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LAW APPLICABLE TO CHRISTIANS

BY

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THE CHRISTIAN LITERATURE SOCIETY FOR INDIA

MADRAS ALLAHABAD RANGOON COLOMBO

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PREFACE

THIS handbook has been prepared at the request of the National Christian Council. Primarily it is intended for the use of missionaries; but it is hoped that it may also be found helpful, by members of the Indian Christian community, as well as by the general reader in search of the rules of law relating to Christians.

So far as the author is aware, there is no book in existence, dealing with the personal law applicable to Christians in India. Busy missionaries, especially those stationed in remote rural areas, at a distance from lawyers and courts, have often complained to him of the want of a single book, which deals with the problems that they are often called upon to handle. Questions connected with conversion, marriage, and guardianship, and the management of property of Churches, have been put to him from time to time; and it is with a view to provide a compendious commentary on the law relating to them, that this little handbook has been prepared. The author has also had the advantage of having before him lists of questions, prepared by a few senior missionaries, which indicated the ground, that he was expected to cover.

The form and contents of the book have to be viewed in the light of the purpose mentioned above. A complete treatise on Christian Law would be expected to embody a full exposition of all the rules relating to inheritance and administration; but the Indian Succession Act alone is a considerable volume by itself, and a satisfactory commentary on it would have greatly exceeded the limits of space imposed upon the author. Similar treatment of other acts, in which Christians are interested, viz., the Divorce Act, and the Guardianship and Wards Act, would have taken up even more room. Some of these Acts have therefore been boiled down to the smallest possible dimensions, and only those decisions, that seemed likely to be of use, have been noted. On the other hand, a good deal of matter, which has no direct bearing on the

personal law applicable to Christians, has been introduced. For purposes of reference, short, if somewhat bald, summaries of the law relating to transfers, registration arbitration, and crimes have been embodied in the third part of the book. The first book is meant to introduce the missionary to the subject of law in general, the sources of law in British India, and the main branches of law, together with their relationship one to another. An appendix containing simple forms of Wills, Transfers, and Powers of Attorney, is also provided at the end with the object of helping missionaries. Occasional repetition that may be found to occur, here and there, in the book, is explained by the desire to state clearly a summary of the law on each point, and thus obviate the necessity for numerous cross references. The author is the last person who would like to play the part of mentor to missionaries, many of whom are probably older and wiser than himself; but, here and there, he has had to take up the role of an advisor, especially where he feared, that they were likely to take hasty or indefensible action, based purely on religious motives.

The reader must not expect to find an easy or immediate answer to every question he may like to ask. In our modern civilisation, and perhaps especially in India, where old and new form a complex and not yet fully harmonised unity, the affairs of life are complicated, and the law relating to them must also be complicated and uncertain. In some cases, a careful study or collation of the information given in this book will be necessary; in others, while it is hoped that the book will be of assistance, it will be safe or wise to seek the aid of a professional lawyer, either to explain how the law stands with reference to a particular case, or to put through, properly, a given piece of work. On many occasions, however, a layman with judgment and a sense of right, who understands the general principles, and knows the leading provisions of the law on a certain matter, can act safely without the advice of professional men, and can put legal transactions through, himself. Moreover such general knowledge may often save him from doing things which might prove

harmful, materially or morally, to himself, or those who depend on him or his mission.

The author was unwilling to take up this task, as the demands of an exacting office, in a busy city, left him but scanty strength and leisure for it. Eventually he had to undertake it, but only on the terms, that he should be allowed to dictate the book to a stenographer. The National Christian Council not only readily agreed to this, but has provided him with monetary assistance for getting the book typed, and with criticisms from responsible missionaries, after parts of it were completed. To the gentlemen who have very kindly looked through the typed script and offered their criticisms and suggestions and to the National Council I here tender my grateful thanks.

NOTE. Chapters on the general principles of contract and torts and special types of contract like sale, agency, partnership and negotiable instruments, have had to be omitted, on account of the dimensions which the book had already attained and the time taken up in printing it.

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BOOK I

INTRODUCTORY

CHAPTER I

Sources of Indian Law

THE law enforced by the Courts in British India is a picturesque mosaic composed of law in every stage of development, commencing with the most primitive rule of customary law prevalent among aboriginal tribes, and finishing up with the most subtle and elaborate judicial pronouncements of the twentieth century. One of the numerous civil tribunals administering justice in this country may be found at this moment enforcing a rule which is applicable only to a small community numbering five hundred members; at another, it may be dealing with a principle of law which holds good over the whole of the British Empire. Now it may be concerned with a rite or custom which is so absurd as to raise a smile in the Court. At the next moment it may be hearing decisions pronounced by the Court of Chancery in England or the Supreme Court of the United States, in support of a new principle of law which is just emerging into prominence.

As may be imagined, the law administered in British Courts in India is not to be found in one book, or in a single enactment. There are four different sources to which a person might have to refer in order to gather information about any particular rule of law, viz.,

(1) Legislative enactments,
(2) Treatises on English, Hindu, Muhammadan law, etc.,
(3) Judicial decisions which operate as precedents, and
(4) Custom.

(i) Legislative Enactments

The enactments applicable to British India may be those passed by the British Parliament, by the Imperial Legislature or by the Provincial Legislatures.

The Parliament of Great Britain and Ireland is the supreme legislature for the whole of the British Empire. In theory therefore it can still directly promulgate laws applicable to British India though, in practice, it has relegated most of its functions to the legislative bodies in this country. At one time it was very active with reference to India and passed numerous statutes which were meant to be enforced here; some of them still remain on the statute book, though many of them have since been superseded. A well-known book like Jacob's *Index to the Enactments relating to India* gives a list, which covers eight pages, of British Statutes applicable to India; but a good many of them have been repealed in part or whole. There are however two topics in respect of which the British Parliament still continues to pass statutes, viz., first, constitutional matters, for example, the Government of India Act of 1919, and secondly, matters affecting the whole of the British Empire, e.g., the Extradition Act, the Naturalisation Act, Foreign Jurisdiction Act, Army Discipline and Regulation Act, and the Judicial Committee Act.

The Imperial Legislature formerly at Calcutta, now at Delhi, has likewise enacted numerous laws which are applicable to the whole of British India. Under the different Councils Acts, promulgated from time to time, a limited power is reserved to Provincial Councils to pass enactments with reference to local or provincial matters relating, for example, to Revenue, to Religious Endowments, and to Village Officers; but for the rest, laws of all-India importance are dealt with solely by the Imperial Legislature. It is impossible to give a list of all the enactments passed by the said legislature, as in a single year twenty or twenty-five such statutes might be promulgated. As examples of Acts passed by the Imperial Legislature may be mentioned the Indian Penal Code, the Criminal Procedure Code, the Indian Evidence Act, the Civil Procedure Code, the Contract Act, the Companies Act, the Negotiable Instruments Act, the Limitation Act, the Registration Act, and the Police Act.

The Provincial Legislatures in Madras, Bombay and Calcutta have also been legislating at the same time with reference to matters of local importance. Formerly these enactments were known as Regulations. Now they are known as Acts. The Regulations passed under the old regime have mostly been repealed in part or whole, but some are still in force, for example those which relate to the Board of Revenue, Village Munsifs, Karnams, Cantonments and hereditary offices.

Since 1861 regular legislative bodies have been instituted in Madras, Bombay and Bengal and more recently in other provinces, and they have passed numerous enactments some of which are of great practical importance, for example the Acts dealing with estates or zemindaris and those relating to recovery of rent, to Municipalities, to Jails, to Forests, and to local customs.

(ii) Text Books

In respect of certain matters we have still to refer to English Law, and to the text books or treatises published in England. In the first place, there are some branches of law in respect of which no legislative enactments or codes have been passed in India, for example, the law of Torts, Maritime or Admiralty law, and certain branches of mercantile law, like that relating to Trade Marks and names.

Even as regards other matters reference is constantly made to English law because many important enactments passed by the Imperial Legislature, e.g. the Contract Act, are based on the principles of English law. Wherever a rule of law enacted in India is obscure or a given situation is not specifically provided for, we fall back upon the English law. English precedents are therefore freely referred to in all Indian Courts.

Text books on Hindu Law are consulted with reference to certain classes of cases which arise between Hindus; what those classes of cases are will be specified in the next chapter but one. It may be said generally that Hindu law is applicable to Hindus,

Muhammadan law to the adherents of Mahomet and Buddhist law to the followers of Buddha.

The sources or fountain heads of Hindu law are the ancient treatises of law-givers like Manu, Naradha and Apasthamba. There are also numerous commentaries of later date which are constantly referred to as authorities, some in certain provinces, others in all. The commentators under the guise of explaining or glossing over the old rules very often made new law, with the result, that at the present day, different schools of law are followed in different provinces, the Dayabaga in Bengal, the Mithila in Western India and the Mitakshara in Benares and Southern India.

Muhammadan law likewise is derived from the Koran, from numerous treatises like the Hedaya, and the Futwa Alamgiri issued by learned doctors subsequent to the times of Mahomet, from the traditional sayings of the prophet and from the pronouncements or decisions of the companions of Mahomet and his disciples.

(iii) **Judicial Decisions**

The third source of law in British India is judicial decisions. On the Continent and in countries following Roman Law, a decision given by a Court, however superior it may be, is not necessarily binding on tribunals or applicable even to similar facts of a subsequent case; but under the English system each considered judicial pronouncement operates as a precedent. A good portion of English law thus consists of judge-made law. Likewise in India, the different High Courts are continuously engaged in construing, applying and modifying the rules of law contained in enactments and discovering exceptions to them. There are numerous law reports published by Government as well as by private bodies which take care to report all precedents which are likely to be of value and these are constantly searched for and applied to particular cases.

The highest Court of Appeal for British India is the Judicial Committee of the Privy Council. The pronouncements made by this tribunal are binding on all

High Courts and on inferior courts all over India. The decisions of the various High Courts in India and Burma are, strictly speaking, binding only in the provinces over which these Courts exercise jurisdiction; but in the absence of its own precedents, one High Court might consult or refer to a decision passed in any other High Court in India or Burma.

(iv) Custom

'Proof of continued usage may outweigh the written text of the law.' On this general principle, applicable to Hindu law, customs prevalent in small tribes or communities have often to be discovered and enforced in British Courts in preference to the general Hindu law. The people in Malabar, for instance, have special rules of inheritance for themselves, property being descendible through females. Likewise there are special rules governing the devolution of the property of dancing girls. Peculiar marriage customs obtaining among the hundreds of different communities living in British India have come up before British Courts for enforcement. There are no text books relating to these customs. Reference is usually made to District Gazetteers, to Wajib-ul-urs and to books relating to individual castes and tribes. The evidence of old men and of leaders of communities is taken where written proof of custom is not available.

Custom is also responsible for new forms of land tenure and for variations of the ordinary incidents of ownership. There are customary tenures, like Ghatwali tenure, or Shrotriem tenure and novel types of mortgage like those prevalent in Malabar, or of lease like those obtaining in South Canara. Incidents of land tenure vary not only in different provinces but also in different parts of the same province, sometimes even in adjacent Zemindaris or Estates.

Modes of citation of Law Reports

20 I. A. 27; Indian Appeals (Privy Council decisions) 20th vol. 27th page

I. L. R. 20 Madras 27 or more briefly 20 Madras 27 } Indian Law reports (authorised by Government) 20th volume of Madras Series 27th page. There are similar Series for Calcutta, Bombay, Allahabad and more recently for Patna, Burma and Lahore.

B. L. R ; Bengal Law Reports ; issued prior to I. L. R. Calcutta Series.

M. H. C. R ; Madras High Court Reports issued prior to I. L. R. Calcutta Series.

B. H. C. R ; Bombay High Court Reports issued prior to I. L. R. Calcutta Series.

W. R. ; Weir's Selected Rulings.

M. L. J. ; Madras Law Journal.

M. L. T. ; Madras Law Times.

B. L. J. ; Bombay Law Journal.

C. L. J. ; Calcutta Law Journal.

CHAPTER II

Law and its main Divisions

IT is proposed in this chapter to indicate briefly the meaning and scope of the term 'Law' and its principal branches or divisions. For an exhaustive analysis of the term and a full discussion of its leading concepts, the reader must be referred to well-known treatises like Austin's or Salmond's Jurisprudence.

Definition of Law

According to Blackstone 'Law in its most general and comprehensive sense signifies a rule of action and is applied indiscriminately to all kinds of action whether animate or inanimate, rational or irrational. "Thus" he says, we "speak of the laws of motion, of gravitation, of optics or of mechanics as well as of the laws of nature and of nations."'

This use of the term 'law' is too wide for practical purposes. It includes 'natural law' and 'moral law' as well as those rules which are usually administered in and enforced by judicial tribunals. In the same way as society is governed by rules made by a Sovereign Legislature, it is argued that nature is governed by laws similarly imposed upon it by the Creator, and man in all his actions is likewise controlled by rules imposed on him by God. It is in this sense that Hooker says that 'of Law there can be no less acknowledged than that her seat is the bosom of God, her voice the harmony of the world, all things in Heaven and Earth do her homage, the very least as feeling her care and the greatest as not exempt from her power.'

Erskine, another great Jurist, defines law thus: 'Law is the command of a Sovereign, containing a common rule of life for his subjects and obliging them to obedience.' This definition is too narrow. International law does not come within its scope as it is neither promulgated nor

enforced by any single human authority. Customary law likewise falls outside its scope because it is not brought into existence by any sovereign or non-sovereign legislature.

Law has been defined by Salmond as the body of principles recognized and applied by the State in the administration of justice.

A fuller definition of law is that given in Holland's Jurisprudence: 'A law in the proper sense of the term is a general rule of human action taking cognisance only of external acts and enforced by a determinate authority.'

'A law' says Austin, a well-known authority on Jurisprudence, 'is a command which obliges a person or persons to a course of conduct.'

Rights and Obligations

The subject matter of law is rights and obligations. It deals with the various classes of rights vested in individuals or in the State, and the various types of obligations that may be brought into existence either by implication of law or by agreement between the parties.

Right and obligation are correlative terms. Wherever there is a right there should be a corresponding obligation. Wherever on the other hand there is an obligation or duty cast upon a person there is a corresponding right on the part of another person to enforce the right which it creates. Law describes different kinds of rights, defines their extent and limitations, and explains how they are acquired or lost or can be enforced in courts.

'A right' is defined by Holland as 'a capacity residing in one man of controlling with the assent and assistance of the State the actions of others.' 'An obligation' in the language of Savigny 'is the control over another person, yet not in all respects over this person (in which case his personality would be destroyed) but over single acts of his which must be conceived of as subtracted from his free will and subjected to our will.' A right usually involves four elements. (i) 'A person of inherence' or a person in whom the right resides,

(ii) 'a person of incidence' against whom the right is available, (iii) an 'object' over which the right is capable of being exercised (sometimes this element is absent) and (iv) 'acts of forbearance,' which the person in whom the right resides is entitled to exact. This analysis is of great importance because the classification of law springs from the permutations and combinations of these four elements.

Substantive and Adjective Law

Law is divisible, in the first instance, into substantive and adjective law. Roughly speaking, substantive law deals with rights, and adjective law deals with remedies, that is to say, it deals with the Courts to which a person whose right has been infringed should resort, the steps that he should take for the purpose of enforcing those rights, the various stages through which an enquiry in a court passes and the instruments through which he attains his ends. The law of procedure, the law of evidence and the law of limitation are the leading branches of adjective law. Rules of procedure do not lay down any commands which have to be obeyed, nor do they deal with rights which can be enforced. They are concerned mainly with affairs inside courts of justice, while substantive law or law which deals with rights, relates to matters in the world outside.

In India the law of procedure is governed by two great Acts passed by the Imperial Legislature known as the *Civil Procedure Code* (1908) which is applicable to all civil tribunals established by authority of Government, and the *Criminal Procedure Code* (1923) which is followed by Magistrates and Sessions Judges exercising criminal jurisdiction. There will be little further occasion in this book for referring to these two branches of the subject though of course they are most important from the point of view of the person who has to institute actions civil or criminal in the courts. *The Law of Evidence* lays down the kinds of evidence that are relevant or admissible and the ways in which various facts may be proved. Every practising lawyer is expected to have this

branch of the law at his fingers' ends because he may be called upon at any moment to apply his knowledge of the subject. But fortunately this part of the law is not very different from the general principles of proof on which human beings act in the ordinary affairs of life, for instance in deciding about the purchase of a horse or in consenting to believe a story told to them. The *Law of Limitation* is another very important branch of procedural law. It fixes the period of time within which an action should be brought. It is the theory of the civil law that a matter in dispute should not be capable of being agitated indefinitely or over and over again and that rights which have been continually exercised without dispute for a long series of years should not be permitted to be called in question after the lapse of certain time by any body who has money to spend. Generally speaking, however, there is no rule of limitation applicable to criminal cases. A case of murder for instance can be tried and can end in conviction thirty or forty years after the offence is committed as in the well-known case of Eugene Aram.

Public and Private Law

The next great division of law is between public and private law. Where the person in whom the right resides usually called the person of inherence or when the person against whom the right is available is the State, the law dealing with the right is known as public law. Where both the persons concerned in a right, the person of inherence and the person of incidence, the person exercising the right and the person against whom the right is exercised, are private persons, the law applicable is called private law.

Public law contains two main branches, viz., Constitutional law and Administrative law. *Constitutional Law* describes the structure and functions of the State and the various rights which the State has as against the individual, and likewise the individual has against the State. This subject is of very little moment in absolute monarchies where the Sovereign can make, modify or rescind any law just as he pleases, but it is of great mportance in democratic forms of Government which are

usually regulated by carefully drawn up constitutions. There is a certain though very limited amount of constitutional law in India. The Government of India Act passed in 1919 is a fundamental document in this connexion.

Administrative Law is not of very serious importance in British India or in the dominions under the British Sovereign but on the continent, in France and Germany, it assumes formidable dimensions and is administered in special courts set up for the purpose, in France for instance in a Court known as the Court of Cassation. When the State figures as a party in a suit it is not supposed to be governed in continental countries by the same rules by which a private person is governed. There is a special *droit administratif* regulating such cases. Except the Salt Act, a few revenue laws like the Income Tax Act, Forest Act, and Enactments like the Judicial Officers' Protection Act, there is very little *droit administratif* properly so-called in India.

International Law also falls within the definition of public law, because it describes the relations which exist or ought to exist between one State and another. As already indicated, International Law does not fall within the scope of law, strictly so called, because it is not promulgated by any particular sovereign authority nor is it enforced by any sanction except the arbitrament of war.

Civil and Criminal Law

The next great classification is the well-known division into *Civil* and *Criminal law*. Civil law is that which is concerned with the enforcement of rights while criminal law is concerned with the punishment of wrongs. There is a good deal in common between the two branches of law. The conception of ownership and possession, for instance, is exactly the same in both branches of the law but they look at wrongs committed or injuries inflicted from two different points of view. The civil law regards the injury from the point of view of the individual who has been injured. The criminal law regards certain classes of injuries as so serious that apart from the

individual inconvenience the State feels bound to take notice of them and, in the interests of the general public, to interfere with the wrong doer and prevent the repetition of similar offences in the future.

Law of Status

Civil law is divided into the law relating to status, the law relating to property and the law relating to obligations. In the *law relating to status* the person of inherence is the person who is principally kept in mind. Rights that persons may claim may vary where the person who claims the right is an ordinary human being or a juristic person like an idol or a Corporation, may vary again according as to whether a person is a major or a minor, as to whether he has obtained a domicile in this country or not, as to whether he is a person in his full senses or an adjudged lunatic, and finally as to whether the person is a married man or a married woman. Thus, under the law relating to status we study such subjects as marriage, parentage, minority, guardianship, domicile aliens, convicts, lunatics, and idols.

Law of Property and Law of Obligations

The distinction between the law of property and the law of obligations depends upon the person of incidence or the person against whom the right is enforced. A person may have a right against one particular individual obliging that person to do an act; for instance, if I have lent a book to a particular person I have the right against that person to the return of my book; or the right may be one which is available against all persons whatsoever or against the whole world; if I have a book or a piece of property I have a right as against the whole world that no one should interfere with my property or touch or deal with my book without my consent. Where the right is thus available against the whole world it is called a right of property. Where the right is available against a particular individual it is an obligation imposed on that person.

Law of Property

The law of property is, of course, one of the most important branches of civil law. The law relating to immoveable property is usually very different from the law relating to moveable property. There is in addition property of an immaterial character like the right to a patent or a trade mark. There are also rights of a limited nature which one can exercise over the property of another, say by way of easements or trusts. The law relating to succession and inheritance of each of these kinds of property may be slightly different. Property may thus be either moveable or immoveable property, immaterial property or bare rights over the property of others. Under the heading of property, the manner in which property rights may be acquired as by inheritance, or succession or transferred as by sale, mortgage, lease or trust or determined as by bankruptcy or insolvency is dealt with.

Law of Obligations

Likewise obligations fall into several big divisions, the principal distinction being that between contracts and torts. Where two persons enter into a contract, each person obtains rights against the other person and has corresponding obligations to that person. When for instance, I agree to buy a land for Rs. 1000, I have a right to get the land within a reasonable time and I am under an obligation to pay the price. The *law of contracts* is one of the most fundamental branches of law and so far as India is concerned it is codified in an Act known as the Indian Contract Act IX of 1872. But there are various ancillary branches of the law of contracts which are dealt with by other enactments. The Specific Relief Act enunciates certain special remedies which are available in respect of contracts other than mere actions for compensation for breach of contract. The Negotiable Instruments Act relates to contracts for the payment of money under promissory notes, Cheques, and Bills of Exchange. The Indian Companies Act deals with

contracts entered into by a large number of persons for the purpose of carrying on business.

The law of torts on the other hand postulates an injury and a right arising out of an injury. If a person's rights are infringed he has a right to get compensation for that injury. When for instance a person's land is trespassed upon or his property is taken away from him the law might convict the offender and put him into jail, but the person who has lost his property or suffers from the trespass does not benefit thereby. The law of torts provides him with a private remedy by which though the offender has been convicted, or independent of such conviction, he may get separate compensation for the injury done to him personally.

The following is a conspectus showing the leading divisions of Law.

- Adjective Law
  - Procedure, Civil and Criminal
  - Evidence
  - Limitation
- Substantive Law
  - Public Law
    - Constitutional Law
    - Administrative Law
    - Revenue Law
    - International Law
  - Criminal Law
    - Penal Code
    - Other Criminal Enactments
  - Private Law
    - Civil Law
      - Law of Status
        - Domicile
        - Marriage
        - Parentage
        - Minority
        - Guardianship
        - Lunatics
        - Aliens
        - Convicts
        - Idols
        - Corporations
      - Law of Property
        - Corporeal Property
          - Moveable Property
          - Immoveable Property
        - Immaterial Property
          - Patents
          - Trade Mark
          - Copyright
        - Rights in another's Property
          - Easements
          - Leases
          - Trusts
      - Law of Obligations
        - Law of Torts
        - Law of Contracts
          - Contracts
          - Sale
          - Agency
          - Partnership
          - Companies
          - Shipping
          - Promissory Notes etc.
          - Bailments
          - Guarantees

CHAPTER III

Personal and Territorial Law

IT was the glory of ancient Rome that it imposed a single uniform system of law, based on what was known as 'the law of nature' or 'the law of nations,' on all the numerous races which became subject to its rule.

It is the peculiar distinction, on the other hand, of the *Pax Britannica* in India that it applies to each one of the different peoples, who come under its aegis, the particular system of law which has been developed by its forefathers.

When the British first established their ascendancy in India, they promised to preserve to each person the religion, the laws, the customs and the usages in which he had been brought up; and in pursuance of this undertaking, Hindu Law is made applicable to Hindus and Muhammadan Law to Muhammadans all over India. Likewise smaller communities like Buddhists, Parsees, Jews and Jains have their own systems of law administered to them, in cases relating to personal rights. In litigation between members of primitive tribes which have no regular systems of law applicable to them, the general rule is that the customary rules which have grown up among them should be enforced. It is the duty of British Courts to find out, for instance, what the special marriage customs of the Khonds or of the Todas are and apply the same to disputed cases of Khond or Toda marriages. Even where well-recognized systems of law are in existence, there are fringes or areas of life for which they make no special provision; and particular sections of the peoples to whom they apply do not adopt them in their entirety. In such cases the usage or customary law which is prevalent regarding these areas or among that section of people is sought to be discovered and enforced. The special or customary law which is appli-

cable to a person by reason of his birth or religion or domicile is known as personal law, as distinguished from territorial law which is applied to all persons living within a given country, irrespective of creed, nationality or domicile.

Personal Law, as above described, is not applied or enforced with respect to all subjects or all kinds of cases arising among particular communities. Hindu Law, for instance, is not applied even in a case relating to Hindus, when questions relating to contract or transfer of property or trust arise between them or when the criminal law has to be put in motion. Though the Hindu and Muhammadan systems of jurisprudence were complete in themselves, large portions of them are unsuited to modern conditions. Each of them had rules of procedure and evidence which no enlightened Sovereign would think of enforcing at the present day. Even in the Native States presided over by Hindu Rulers, the Hindu Law of ancient days is not applied in its entirety.

Territorial Law

The personal Law of Hindus, Muhammadans and followers of other faiths is only applied to intimate or private matters like minority, guardianship, marriage, divorce and succession.

As regards all other matters which do not concern purely personal relationships, the territorial law of British India is administered to all persons irrespective of caste, creed or nationality.

Law is in the first instance territorial. It applies to every citizen of the country in which the law is enacted. Criminal Law, for instance, is not different for Indians or Englishmen or for Indians and foreigners. The major portion of the Civil Law, for example that relating to Contracts, Trusts, Property, Insolvency and Torts, is the same for all persons resident in British India irrespective of their origin, nationality or domicile. If a contract is entered into in British India, even though the contracting parties may both be Frenchmen, the formation and

validity of the contract would depend on Indian, not on French Law. If immoveable property is purchased in India by a Frenchman he has to acquire and hold it and may transfer or bequeath it only according to rules laid down by the Indian Legislatures. It is a well recognized principle of International Law, that each independent Sovereign Legislature is master within its own limits and the law promulgated by it, known as the Law of the Land or Lex Loci, applies to and binds all persons living within its limits, whether they are subjects or foreigners.

The different systems of Personal Law in force in British India must therefore be deemed to be merely exceptions to the rule that Territorial Law or the Lex Loci is of universal binding force in the territory. To give an example, the Indian Succession Act is the Lex Loci which governs succession and inheritance among all people in British India. But Englishmen and Scotchmen who have not yet acquired an Indian domicile can have English and Scotch law, i.e., the law of their domicile of origin, applied to them, because they cannot be deemed to be aware of the law of British India and having entered into relations and undertaken civil responsibilities before they arrive in India they cannot be suddenly asked to divest themselves of all previously acquired rights and responsibilities. Likewise Hindus, Muhammadans and followers of other faiths in India have all along followed what they believed to be the rules promulgated for them by their ancestors and they are allowed to follow their own law in preference to the general law of the land. Territorial Law is the rule; personal laws are exceptions. As regards a very large number of topics the Lex Loci prevalent in India applies to all persons living in India, whether they are Indians or foreigners. As regards a few topics of an intimate personal nature, e.g., Marriage, Minority, Succession, the personal law applicable to each community is ascertained and enforced.

The principal systems of personal law in force in British India are these:

1. Hindu Law.
2. Muhammadan Law.
3. Christian Law.
4. Buddhist Law.
5. Parsee Law.
6. Jewish Law.
7. Jain Law.
8. Sikh Law.
9. Brahmo Law.

(7, 8, 9: Substantially the same as Hindu Law.)

10. Marumakkathayam Law.
11. Aliyasantana Law.
12. English Law, for persons of English domicile.

Hindu Law: To whom applied

Hindu Law is administered to all persons who fall within the category of Hindus and who have not renounced their religion. In order that the personal law of Hindus may apply, a person must be Hindu both by birth and by religion. It is also applied to illegitimate children of Hindu parents, and to Jains and Sikhs, except in so far as such law is varied by the customary law peculiar to them. A Hindu by birth, who, having renounced Hinduism, has reverted to it after performing expiatory ceremonies, will also have Hindu Law applied to him. A practice has recently sprung up of admitting Muhammadans or even persons of other nationalities into Hinduism after performance of shuddi ceremonies, but this is a departure from the strict rule of Hinduism.

Hindu Law is not applicable or operative as regards its entire extent even to Hindus. It is made to govern certain topics by virtue of certain express enactments varying from province to province, and certain other subjects on the principle of justice, equity and good conscience. In both these kinds of matters, the Hindu Law to be applied is not, as has been already stated, the original Hindu Law but that which is now regarded as applicable to Hindus, namely, Hindu Law as modified

by legal precedents and legislative enactments. With reference to all other topics the general or territorial law is applicable to Hindus.

What branches applicable

The legislative enactments which render Hindu Law applicable to certain topics are unfortunately not uniform throughout India. Generally speaking, by legislative sanction all questions relating to succession inheritance, marriage and religious usages are decided according to the principles of Hindu Law except in so far as they have been modified by custom, judicial decisions, or legislative interference.

There are other rules which are applied to Hindus merely on the principle of justice, equity and good conscience. These have reference to matters like adoption, guardianship, family relations, partition, wills and gifts. In the Punjab and in the Central Provinces, even these rules have been made applicable to Hindus by legislative enactments but in the other provinces they are merely enforced on grounds of justice, equity and good conscience.

As I shall have no further occasion to return to the subject of Hindu Law, it is proposed to mention here some of the special or out-standing features of that system, which may be found useful by missionaries.

Marriage

The original Hindu Law recognized eight forms of marriage. Only three of these, however, are now in vogue. According to Hindu Law, marriage is a sacrament; not a mere contract. Therefore among the higher castes it can never be dissolved, and there is no method of divorcing a conjux. As it is a sacrament, it has to be performed, in order to be valid, with religious ceremonies prevalent in the caste and sub-caste to which both parties belong.

There can be no proper marriage between members of different castes or sub-castes. Expenses of marriage, though usually incurred on a lavish scale, are regarded as items of necessity, and property belonging to the joint family is allowed to be mortgaged or sold for the purpose of celebrating the marriage of one of its members which is a Samskara according to Hindu Law.

Hindu Law recognizes both polygamy and concubinage. The illegitimate son of a Sudra born of a permanently kept concubine is entitled to half the share that the son born of a lawful marriage obtains.

Adoption

A Hindu considers it absolutely essential to have a son for performing his funeral obsequies as soon as he dies and his annual ceremonies ever afterwards. Failing a natural born son, a Hindu father can adopt a son who

will in all matters be treated just like a son. Even if a husband fails to adopt during his life time, his widow may under certain conditions make the adoption to him after his decease. The son so adopted will succeed to the property of his adoptive father, even though it might have passed into the hands of others in the meanwhile.

Joint family

The most characteristic feature of Hindu Law is the arrangement known as the joint family system. As soon as a son is born, he obtains a share in the family property equal to that of his father. A father and his sons, in possession of joint family property, are co-owners or co-parceners, the father (or in his absence the elder brother) being only the manager of the property with power to deal with it for the benefit of all the members of the family but not to their detriment. It follows that, if a father is wasting the property, his son, even if he is a minor, can sue him for partition and obtain his share of the property. If the father alienates family property improperly, the son is not bound by the transaction. If he contracts a debt for immoral purposes, the son's estate is not liable to repay the debt even though it might have been expressly charged therewith. Finally, when the father dies, his son does not inherit to the father as in a Muhammadan or Christian family. He obtains the father's share as the surviving co-parcener, his existing share being merely augmented by his father's. He therefore need not take out letters of administration to the devolving estate.

Self acquisition

It is open, however, to a father or any other member of a joint family, if he acquires property by his own exertions, to keep it separate from the joint family property Except in Bengal, he can dispose of such self-acquired wealth by will while he cannot do so with joint family property. He can give it away to his daughters or for the matter of fact to any one he pleases, and his sons will have no right to call his alienations in question. If he does not dispose of it in his lifetime it is inherited by his sons or other heirs

Women

Women occupy a subordinate position under Hindu Law. A widow can only claim rights of maintenance and residence in the joint family property. If she has no sons, she gets a limited or life estate in her husband's property, which passes after her decease to her husband's collaterals, to the exclusion of her own heirs.

A daughter is not one of the heirs to joint family property, and even in self-acquired property, she can get a portion only if it is given to her. She can inherit the property of her mother but not of her father when he has sons. She is entitled to be maintained by her father, to be given in marriage by him or by the joint family, and to have reasonable gifts given to her at the time of her marriage. If she gets more by her father's favour she considers herself lucky.

Inheritance

The rules of inheritance are regulated by consanguinity and funeral oblations; the different classes of persons who are bound to perform funeral ceremonies, the son, the son's son, the brother's son, etc., obtain shares in the property of a deceased member according to their customary precedence in offering funeral oblations. The daughter and the daughter's children and generally collaterals claiming through females are postponed to collaterals claiming through males.

Endowments

Finally an idol is a juristic person capable of holding property; and if any property is bestowed upon it, it becomes a perpetual endowment which cannot be alienated by trustees, without specific permission from Courts.

Muhammadan Law

Muhammadan Law is applicable to all Muhammadans, whether born in the Muhammadan faith or subsequently converted to that religion. There are, however, certain striking and well-known exceptions to this rule. Various sections of the Muhammadan community, either by reason of their recent conversion, or of their continuing to live among Hindus or of their preference for the Hindu system of jurisprudence, are governed, in matters of succession and inheritance, not by Muhammadan but by the Hindu system of law. Certain important communities on the West Coast known as Khojas and Kutchi Memons, the Sunniborah Muhammadans of Guzaret and Molesalam Gerasias of Broach are governed by Hindu Law in respect of succession and inheritance, on the ground of custom.

With regard to the personal law applicable to Muhammadans, the rule is exactly the same as that relating to Hindus. There are certain branches of Muhammadan Law which have been expressly directed by the legislature to be applied to Muhammadans, e.g., the law relating to succession, inheritance, marriage, or religious institutions. In respect of these matters no other law can be enforced except the Muhammadan Law, subject, of course, to the proviso already mentioned that the said Law could be modified by custom having the force of law, by judicial decisions or by legislative enactment. With reference to other topics, the rule is that a principle of Muhammadan Law may be applied in so far as it is not opposed to justice, equity and good conscience. Under this head comes the law relating to dower, guardianship, minority, bastardy, family relations, wills, legacies, gifts, partitions and the like. If the courts decide that any rule is not in consonance with the principles of justice, equity and good conscience, they may decline to apply that rule. Certain provinces, for instance, have, under this exception,

refused to apply the rules relating to pre-emption, while other provinces have applied it on the ground that it is consistent with justice and equity.

In line with the very short summary of Hindu Law given above, it is proposed to give a similar resume of Muhammadan Law.

Among Muhammadans, a marriage is a contract though it may be performed with religious ceremonies (by a semi-religious official) It can, therefore, be always dissolved. But the only party who can dissolve it is the husband, not the wife. The husband can always divorce his wife by pronouncing the formula 'Talak' three times. But it is also open to him to recall the Talak within four months of its pronouncement. A wife thus divorced has to wait for four months for her Iddat period to expire and then she may marry again In order, however, that the husband may act with a sense of responsibility in pronouncing a divorce, he is rendered liable to pay at once the whole of the Mahr or Dower agreed on by the parties at the time of their marriage and the Dower is usually made so expensive with reference to a man's station in life that he would hesitate a good deal before pronouncing Talak.

A Muhammadan has absolute control over his property during his lifetime and his sons cannot question his disposition of it. Only he must not give away the whole of it by will. After payment of his debts and funeral expenses he can only dispose by will of a third of his estate. Bequests in excess of the legal third do not have effect unless his heirs consent to them after the testator's demise He can make gifts of his property without his sons' consent or subsequent challenge. Such gifts take effect from the moment possession is handed over to the donee. A Muhammadan can also transfer his property by way of Wakf or perpetual endowment for religious or charitable objects in which case the Mukthavallee or manager can only expend the income from the property but cannot touch the corpus.

The rules of inheritance in Muhammadan Law are fair and reasonable. They are so clearly and carefully laid down that there is usually very little room for controversy or litigation about them.

The widow always gets a definite share of the husband's property; she will get a bigger share in the absence of sons. The daughter is a sharer, and there are other kindred who are also sharers and after their shares are paid off, the sons divide the balance among themselves. As the estate becomes divisible after death, administration becomes necessary.

BOOK II

Law applicable to Christians

CHAPTER I

Christians in British India

THE story of Christianity in India is a long one. The Syrian Christians on the West Coast claim to be the descendants of the converts of Saint Thomas, one of the apostles of our Lord, but though this claim has not been substantiated, it is certain that there were Christians on the West Coast early in the 3rd century, converts baptized probably by missionaries who came from ancient Syria and Chaldea. Though the majority of Syrian Christians are living in the native states of Travancore and Cochin, many of them have taken full advantage of the opportunities of education now open to them and are to be found all over India. Those of them who have not become Roman Catholics or members of the Church of England are still under their own Bishops, who in their turn look to the Patriarchs at Antioch and Constantinople as their ecclesiastical authorities.

The Church of Rome began to send out its first missionaries to India in the wake of the Portuguese explorers and adventurers who followed Vasco de Gama. Their earliest converts, drawn principally from the fishermen caste, are to be found all along the Malabar and Coromandal Coasts; but large numbers have since been recruited from other castes and sects and are scattered all over the country. At the present day Roman Catholics form the strongest Christian community in India.

Protestant missionaries began their labours in 1704. Zieganbaug and Plutchau were the earliest missionaries and they belonged like many of their successors in the eighteenth century to the Lutheran Church. Missionaries of other denominations followed from 1785 onwards and now it is said that there are more than a hundred protestant Christian sects represented in India, the strongest being the Baptists and the Church of England.

From the point of view of law, however, these denominational differences are of little value except for ecclesiastical purposes. Christian converts in India have come out from every faith prevalent in the country and from every sect or caste or class to be found in it. These differences in point of origin are also of little moment from the point of view of the law.

The only distinctions that have to be borne in mind are those between British subjects and foreigners or aliens and those between persons having a domicile in British India and those who have not.

The sons of the soil constitute the majority of the Christians resident in India. But there are also Christians, e.g., Government servants, missionaries, and soldiers who have come from other parts of the British Empire. Politically, these enjoy the same status as British Indian subjects who are Christians. But Christians belonging to many nationalities in Europe and from the United States of America have also come either as merchants or as missionaries and settled for long or short periods in India. These latter are 'aliens'; though in normal times there are no restrictions in the way of their acquiring or holding property (except British ships) or entering into contracts, they are liable to be placed under strict surveillance and subjected to stringent rules and restrictions in times of war.

The distinction between persons of British Indian domicile and persons enjoying a foreign domicile is of immense importance for civil law. Christians of Indian domicile of origin, i.e. Christians who were born in India and have lived here throughout their lives, are governed as regards civil law, both territorial and personal, by the law in force in British India. The majority of Christians living in India come under this class. But there are numerous Christian residents in British India who, as regards personal matters, are not governed by the law in force in India. All Christians who are subjects of foreign states, e.g., Frenchmen, Germans, citizens of the United States of America or of the Swiss Confederacy are governed unless they become naturalised or domiciled

in British India by the laws of the respective countries from which they come. The same principle applies not merely to aliens or foreigners properly so called but even to subjects of the British Empire who have their domicile in other parts of the Empire which are governed by separate systems of personal law. An Englishman who has not acquired a domicile in British India is as regards personal law relating to minority, marriage, succession, inheritance, and administration governed by the English Law; a Scotchman is likewise governed by Scotch Law and a South African Uitlander by the Roman Dutch Law.

The rules as to when a person is said to have a domicile in England and how a person can give up his domicile of origin and acquire a new domicile in a country in which he has settled for life with a view to take up his permanent residence therein are laid down in the Indian Succession Act (vide Book iii. ch. 1 *infra*). We need only say here that aliens or citizens of a foreign country and even citizens of portions of the British Empire other than India are governed as regards all questions of personal law (like minority, guardianship, marriage and succession) by the respective laws of the countries or provinces of the British Empire in which they claim their domicile.

To sum up, in matters ecclesiastical, Christians resident in India are governed by the laws and usages of the particular Church to which they belong. Roman Catholics are governed by the rules of Canon law. Christians belonging to the Church of England are governed by Ecclesiastical law as understood and applied in England. Members of other denominations are bound by the rules of those denominations and in the absence of definite rules by the customs and usages prevalent therein.

As regards civil law the distinction just mentioned between personal and territorial law has to be borne in mind. The major portion of law in force in British India, e.g., that relating to Contracts, Trusts, Property, and Torts is territorial, i.e., to say it applies to all persons

resident temporarily or permanently in British India irrespective of their nationality or domicile. But as regards personal law, the distinction between British Indian subjects and persons having a foreign domicile whether British or alien has to be borne in mind. Persons with a domicile other than British Indian are governed as regards minority, guardianship, marriage, succession, inheritance by the laws of the countries of their domicile.

As regards criminal law, there is no distinction between a Christian and a non-Christian, (except as regards the law of bigamy) or between a Christian of British Indian domicile and a Christian who has come from abroad to reside in India for long or short periods. Under the laws of extradition, if an alien has come from abroad to India after having committed an offence elsewhere, the British Government is bound to hand him over, on being requested to do so by his State. There is no such rule however as regards political exiles who have come to take shelter in India on account of persecution in their own country or on account of unpleasant restrictions put on their personal liberty.

Who are Christians

The main divisions into which Christians fall for political and ecclesiastical purposes and for purposes of civil law have been indicated but the question who is a Christian or when a person can be deemed to be a follower of the Christian faith has not yet been answered. Though on the face of it, it appears a simple question, there are numerous difficulties in the interpretation of the term Christian which have come up before the Courts for discussion. Some of these difficulties have arisen in connexion with the children of mixed marriages; others in connexion with conversion and the right of the individual to change his faith; and yet others owing to the principles of the Law of Guardianship.

The Indian Christian Marriage Act XV of 1872 provides that the expression 'Christians' means 'persons professing the Christian religion' and that the expression

'Native Christians' includes 'the Christian descendants of natives of India converted to Christianity, as well as such converts.' Officially the term Native Christian has become superseded by the term Indian Christian and when the above Act is next amended it is to be hoped that the latter expression will be substituted wherever the term Native Christian occurs. The Act, however, is applicable not merely to Indian Christians but is a piece of territorial legislation applicable to all Christians in India.

For purpose of succession there is a separate definition of the term Indian Christian. According to the Succession Act XXXIX of 25 'Indian Christian means a native of India who is or in good faith claims to be of unmixed Asiatic descent and who professes any form of the Christian religion.' This definition apparently supersedes the definition of the term Native Christian given in the Administration of Estates of Native Christians' Act VII of 1901 wherein the expression 'Native Christian' means a native of India who is or in good faith claims to be of unmixed Asiatic descent and who professes any form of the Christian religion.

A child born of Christian parents is *prima facie* a Christian and will continue to be so till, in some overt or public manner, he renounces the Christian religion. So long as he is a child or a minor he is entitled to be brought up in the tenets of the Christian religion.

A person born a Hindu or a Muhammadan may subsequently come to profess the Christian religion by becoming a convert.

Christians are thus either Christians by birth or Christians by conversion.

Those who are born of Christian parents are deemed to be Christians. The entries made in the registers of the Church in which a child is baptized are ordinarily sufficient evidence of Christian parentage. It might, of course, happen that one or other parent who was a Christian at the time the child was born might subsequently have renounced Christianity and adopted some other form of religion, but normally children born of Christian parents are Christians. There are also birth registers

now maintained in most Municipalities and villages, and the information given by parents on the occasion of the birth of a child and embodied in these registers will usually be even a more valuable piece of evidence than an entry in a Church register, as the occurrence is reported immediately after the birth of the child before there is any chance of making up a story about it. But errors might sometimes creep into such registers if the intimation of birth is communicated to the official who preserves the register not by the parents themselves but by third persons who are not sufficiently well informed of the facts.

Where the father of a child is a Christian and the mother is a Hindu, the *prima facie* presumption is that the child is a Christian and has been brought up as one. But it is a matter of evidence in each case. It may happen that the Christian father neglected his responsibilities and allowed the Hindu mother to bring up his child in the Hindu faith. If there is sufficient proof to substantiate this fact, the Court may decide that the child should be brought up as a Hindu, and if the father subsequently files a petition or brings a suit to enforce his rights of guardianship over the child, the Court may not give the child back to him if it is convinced that the main or sole object of the suit is merely to convert the child to Christianity. Similarly where the father is a Hindu and the mother a Christian, the child would be *prima facie* deemed to be a Hindu unless there is evidence that it has been brought up in the Christian faith. The child follows the faith of his father, unless in fact it is proved to have been brought up for many years in some other faith.

The question as to who is a Christian has come up before the Courts for consideration more than once.

In Queen Empress *versus* Veeradu, Indian Law Reports, 18 Madras, page 230, the question arose whether a child three years of age was a Christian within the meaning of the Indian Christian Marriage Act. Though she was born of Christian parents, the District Judge decided that she was not a Christian and the person who

married her in Hindu form was not criminally liable, as the Act requires that a Christian should 'profess the Christian religion' and a child of three cannot be said to have the intelligence or discretion to 'profess' any religion.' Reversing this judgment, the High Court held that the child must be presumed to follow her father's religion and was therefore a Christian. The person who performed the ceremony of marriage was consequently declared liable to be prosecuted.

In Emperor *versus* Maharam, 40 Allahabad, page 393, however, one of the contracting parties to a marriage was the son of Christian parents. His father was an elder in the church; he himself had been educated in a Christian school and till within a few days before the marriage was apparently a Christian. But just before his wedding he declared his preference for a Hindu form of marriage and was married according to Hindu rites. He had become a major and was entitled to change his faith but there was nothing to suggest that he went through any ceremony which rendered him a Hindu. He and those who performed the ceremony of marriage between him and a Hindu girl in the Hindu form prevalent in the Bhangi caste were convicted by the trying Judge of an offence under the Indian Christian Marriage Act. The High Court reversed the judgment and held that he had ceased to be a Christian. This extreme view has however not been followed in Madras where the course of decisions is different. (See Book II chapter iv).

The general principle applicable to such cases is better illustrated by the leading case on the subject, Skinner *versus* Orde XIV Moore's Indian Appeals, page 309. A girl, the daughter of Christian parents, lost her father early in life. Her mother continued to be a Christian after she attained widowhood, but subsequently married a Muhammadan and became a Muhammadan herself. The girl too was sought to be converted to the same religion. The Privy Council decided that she was a Christian and must be brought up as a Christian, and took her away from her mother and sent her to a Christian home.

If a Hindu or a Muhammadan becomes a convert to

Christianity, he does not lose his right to continue to act as the guardian of his children born before his conversion ; but they do not become Christians merely by reason of his change of faith. On the other hand, he will be removed from his guardianship if his only object in applying to be their guardian is to get them converted. *Mookoond Lal Singh versus Nobodip Chunder Singh, 25 Calcutta 881.*

It may be noted that the Acts distinguish between a Christian and an Indian Christian (or native Christian.)

Christians are all persons professing the Christian religion. The term should include, (for application of personal law i.e., the Indian Succession Act and the Indian Christian Marriage Act)

(1) Converts to Christianity.
(2) Christian descendants of such converts.
(3) Christian British subjects who have acquired a domicile in India.
(4) Christian Aliens who have acquired a domicile in India.
(5) Such Aliens as have become naturalized here.
(6) Anglo-Indians.
(7) British Indian subjects residing in Native States.
(8) Christian subjects of Native states domiciled in British India.

The first two of these alone are Native Christians within the meaning of the Indian Christian Marriage Act.

Under the Succession Act an Indian Christian is 'a native of India, of unmixed Asiatic descent who professes the Christian religion,' This peculiar definition is of little importance, as it is only introduced to give the community special treatment in the matter of taking out administration to the estate of a deceased person.

Children of Christian parents must be deemed to be Christians until they profess some other form of faith.

CHAPTER II

Conversion

Legal actions that may have to be faced

As every one knows, there is a definite ceremony in existence in Christianity, which usually serves the purpose of proving in a Court of Law the entrance of a person into the Christian fold. Baptism is the Sacrament by which a person is admitted into the Church of Christ; and except in the case of Baptists, proof of Baptism is sufficient for the purpose of proving such admission.

There are two kinds of Baptism, Infant Baptism, which is administered as soon as the child is in a fit condition to be taken to the Church, and adult Baptism, which is given to grown up persons, who have of their own accord given up their ancestral faith and decided to become members of the Church of Christ.

Infant Baptism does not as a rule give rise to serious legal difficulties. When a child is baptized in infancy both its parents are usually Christians and the child is also entitled to be regarded as a Christian, (*Empress* v. *Veeradu*, 3 Madras 36) and to be brought up in the tenets of that faith. Such a baptized child has, of course when he grows up, the right to exercise his free choice and renounce the Christian religion in favour of some other form of faith. (*Emperor* v. *Maharam*, 40 Allahabad 37 *supra*.) But he cannot be compelled by any body, not even by one of his own parents, to change his faith as it suits their fancy. Difficulties have arisen in cases where both the parents and the child were Christians at one time and the parents have changed their faith afterwards. Strictly speaking the child does not necessarily change its faith merely because the parents do so but the parent retains his right of guardianship over his child and continues in a position to dominate his mind.

He or she cannot help influencing the child towards the same change of faith as he himself has undergone and the child accordingly ceases to be a Christian without ever having been in a position to exercise his own option in the matter. Missionaries have not usually cared to assert the right of the child in such a case to be regarded as a Christian, except where he has been definitely handed over to them for being brought up as a Christian and the parent or parents have, or the surviving parent has, abdicated their rights or his or her rights over the child.

Adult baptism gives rise to a great many more problems. It involves with the renunciation of the old faith, the giving up of a legal status which the convert held in the family of his birth and the adoption in its place of a new set of rules which are henceforth to be applied to him. I need not here dwell on the ceremony of baptism which is dealt with in detail in the chapter on 'Christianity and the Courts,' or with the right of a person, even after he has become a Christian by adult baptism to return to the faith of his forefathers and renounce Christianity.

In connexion with adult baptism and particularly with reference to the separation of a young boy or girl from the family in which he or she has been brought up, for the purpose of teaching him or her Christianity and baptising him or her subsequently as a member of a Church, difficult questions have arisen from time to time and Missionaries are often sorely perplexed over these problems.

It is an undoubted fact that Hindu parents of the higher castes fiercely resent all attempts on the part of Christian Missionaries to take a child away from its ancestral home and subject it to steady influence on the part of Christian teachers. They regard them as a breach or abuse of the confidence that they have reposed in Christian Missionaries. They moreover believe that it is impossible for a boy or girl of tender years to make up his or her mind about the fundamental truths of religion when he could neither have sufficient maturity of mind nor adequate information

about the faith of his forefathers or the faith to which he proposes to transfer himself. They consider it an aggravated wrong if, in particular, any secrecy or concealment is practised either in the taking away of a boy or girl from his or her parental home or in disposing of him or her afterwards. Unfortunately in these modern days, the strong feeling that exists in these matters is nearly always fanned into a flame by those who make it their profession to create bad blood on such occasions and go about circulating all kinds of clever falsehoods for the purpose of making the action of the Christian Missionary or teacher look even more reprehensible than it actually is. Militant sects, like the Arya Samaj, deem it to be part of their duty to interfere at such times and join issue with the Missionaries.

Missionaries, on the other hand, are constantly comparing in their minds the actual surroundings in which the Hindu child is being brought up with the very different atmosphere which he can breathe in a Christian home, and they argue that it cannot be morally wrong but entirely right to remove a child from an environment in which crude superstitions and rites are practised to another place in which he has greater chances of seeking after truth and discussing it with a free and open mind. They are particularly impressed by the circumstance that it is only during the stage of adolescence that a boy has the idealism and the sense of truth necessary for enquiry into the fundamentals of religion. When he grows up and is settled in life, he is so overborne by the responsibilities of domestic or official life that he has neither the time nor the inclination to pursue religious inquiry. According to leading author's like Starbuck, Coe and William James who have written on the psychology of religion, the years between fourteen and twenty are specially the years in which a child begins to think for itself and develope a religious sense of its own, begins to find fault with whatever is false in the beliefs in which it has been brought up and to condemn whatever is morally wrong in the practices to which it has been accustomed. At that age, it is less willing to

put up with things that do not appeal to its sense of right and wrong than afterwards. It is also more influenced by feelings of respect and admiration for high or heroic characters and elevated ideals of thought and feeling. The period of adolescence is specially the period during which even born Christians undergo the great change which is usually described as conversion. It is therefore also the period during which a child not brought up as a Christian is most apt to change his faith. For these reasons, the Christian teacher or Missionary is anxious to force the pace, and to separate the child from what he considers noxious influences, so as to enable him to continue his religious enquiries in peace of mind and the best environments available.

According to the strict theory of the law, there is nothing to prevent a minor or major from changing his faith by renouncing the creed of his forefathers and adopting a new form of religion. The law now in force provides that a child brought up for instance, in a Hindu home, does not forfeit his or her rights of inheritance or succession by reason of its embracing some other form of faith. There are two Acts which deal with these matters, viz., the Native Converts' dissolution of Marriage Act and the Caste Disabilities Act which will be dealt with later (in the next chapter). No action can be taken against a young man or woman for renouncing his or her ancestral faith or against any person for baptizing him or her or inducing him or her to join another faith.

But there is another class of actions which prevents a child from being carried or kept away from its ancestral home, and to which a Missionary might expose himself by taking a Hindu or Muhammadan child under his charge. A boy, even though educated in a Christian school, does not embrace Christianity all at once. Even if he is willing to do so, a wise Christian teacher would keep him under observation for many months before being satisfied that his desire to change his faith is genuine and is not merely the influence of a temporary wave of feeling which may pass away. For the purpose of observing him more carefully and at the same time to enable him to

continue his enquiries in peace and quietness, the Missionary often finds it necessary to separate him from his usual surroundings and place him under Christian influence. But this procedure might expose him both to civil and criminal liability.

The civil law protects all minors. The age of majority in India for most puposes is now attained on the completion of eighteen years. If a boy or girl under eighteen years is taken away from the custody of his or her rightful guardian, an action can be brought in the civil courts for damages against the person who so took him or her. The guardian from whose charge the minor is taken away need not necessarily be the father or the mother of the child. If the parents are dead, or if, of their own free will, they have entrusted the child to another guardian, or if, in the natural course of events, the child is brought up under any other guardianship, such other guardian is entitled to institute a civil action in the same way as a parent would. An action lies in the case of a a boy as well as a girl, though of course, where a girl is removed from the possession of her lawful guardian, the feeling of hostility engendered is much more serious than in the case of a boy. This action cannot be brought in cases in which the person into whose custody or control the boy or girl has passed is not himself responsible for taking him or her away from his or her ancestral home. If, for instance, a boy or a girl left the house of his or her own accord and this circumstance is satisfactorily established in a Court of law, no one can be mulcted in damages for abducting him or her, if he or she has subsequently passed into the custody or control of a third party.

There is, however, another civil action which can be instituted, namely, one for keeping a minor away from his lawful guardianship. Taking one away is one kind of wrong and keeping him away from lawful guardianship is another, and this also might be the subject of an action for damages. It can be brought by the same class of persons who can launch proceedings for taking the

child away from lawful custody or guardianship; and if there is proof of his having been detained against his will or, even with his consent but against the will of his guardians and also if 'loss of Service' so called is established the person so keeping him would be liable. Usually the person who intends to bring an action gives a lawyer's notice calling upon the person into whose custody or control the young person has passed to hand over control. But such a notice is not absolutely essential. Even an oral demand would be enough. The major number of reported cases dealing with this kind of civil wrong are cases in which a minor has been taken away for improper purposes, say for prostitution or for being trained as a circus performer. Vide *Pollard* v. *Rouse* 33 Madras 288, but even where the minor is taken away from his lawful guardianship for purposes of conversion or some other purpose which may appear praiseworthy, the courts are so far anxious to consult the feelings of his parents and guardians that, where the avowed object of such removal is to change his faith and convert him to a new religion they would usually restore him to his natural guardianship unless they are satisfied that his natural guardians are thoroughly incompetent to perform their duties as guardians.

Reference must also be made at this point to the writ of Habeas Corpus which the High Court can issue under its Letters Patent. The aid of this writ is frequently, and sometimes successfully, invoked by parents (or guardians) whose children (or wards) are kept away from them. The High Court orders, on complaint or petition made to it, that any person who happens to keep a minor, (or for that matter, even a major) in concealment should forthwith produce him before it and explain how he came to have control of the minor (or major). After enquiry, it may also order that the minor in question (or the major) should be restored to his home or allowed to go free. This process was applied for in ReSaithri, *Indian Law Reports*, 16 Bombay, page 307.

Under Hindu Law, the father and in his absence the mother is the natural guardian of their minor children;

and if they are taken away from their guardianship they are entitled to sue for their return. The Courts will have in mind the best interests of the minors in acceding to their request.

Several interesting cases on this subject have come up before the Courts for decision.

In *Reade* v. *Krishna*, I. L. R., 9 Madras, page 391, a Brahmin boy 16 years of age became a convert to Christianity and said that he preferred to reside in the home of a Christian Missionary. His father brought a suit to recover custody of his person. It was held that the boy was entitled to change his faith as he was *sui juris* at the age of 16 according to Hindu Law; but his father was entitled to continue to act as his guardian till he attained majority (18). He was restored to his father.

In *Sarat Chandra Chakarbati* v. *Forman*, 12 Allahabad, page 213, a Hindu boy, 16 years of age, became a convert to Christianity. His elder brother who had supported and educated him asked for the restoration of the boy to his guardianship. The boy wished to stay with his Missionary friends and it was found that his interests would be best served by his being with them. The brother's suit was dismissed.

In the matter of Saithri XVI, Bombay, page 307, a woman had entrusted her daughter to the Superintendent of a Zenana Mission school who had her brought up for eight years and then baptized her. The mother sued to recover custody of her daughter but here again the Courts considered that the welfare of the minor would be best served by not acceding to the wishes of the mother and the suit was accordingly dismissed.

In *Mokoond Lal Singh* v. *Nobodib Chunder Singh*, 25 Cal. 881, the father of a minor had become a Christian and had abandoned his family residence; the child continued to be brought up by his uncles as a Hindu Held that the father was not entitled to recover control of his son, as it would not be for the welfare of the child.

In *Besant* v. *Narayaniah*, I.L.R. 38, Madras 807, the father of two minor boys had entrusted them to Mrs. Besant under a written document. He wanted the

document to be cancelled and the children to be returned to him as their surroundings were undesirable. It was held that, in such circumstances the father was entitled to get back his sons but as the latter were, under the arrangements made by Mrs. Besant, receiving an excellent education at Oxford and were in the expectation of further benefits from her, the welfare of the minors required that they should not be disturbed.

Besides the civil actions mentioned above, there are also criminal actions to which a person might expose himself. There is an action for kidnapping and another for abduction. Vide Section 361 I.P.C., 'Whoever takes, or entices, any minor under fourteen years of age if a male, or under sixteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.' Section 362, I.P.C., runs as follows : 'Whoever by force compels, or by any deceitful means induces, any person to go from any place, is said to abduct that person.' The person who kidnaps another from lawful guardianship shall be punished with imprisonment for seven years and shall be also liable to fine. 'Whoever, knowing that any person has been kidnapped or has been abducted, wrongfully conceals or keeps such person in confinement, shall be punished in the same manner as if he had kidnapped or abducted such person, with the same intention or knowledge, or for the same purpose as that with or for which he conceals or detains such person in confinement.' (Section 368, I.P.C.) The punishment for these offences is enhanced where the kidnapping or abduction takes place in order that the child may be murdered or compelled to marry or subjected to grievous hurt or slavery or to be used for purposes of prostitution. But even in a case where no such improper object is established, the mere taking away and keeping away of a minor from his lawful guardianship would expose the person so removing or detaining it to punishment under the Penal Code. The offence of kidnapping can take

place in the case of a minor, if a male, under fourteen years of age, if a female, under sixteen years of age. But the offence of abduction can take place in respect of a person of any age. Even though a person may not himself kidnap or abduct, he may be jointly accused along with a person who effected the actual kidnapping or abduction as a person who abetted the offence. An attempt to commit these offences is also punishable under the Indian Penal Code. It is therefore a most unsafe proceeding either to take away or to keep away, from his or her lawful guardianship, a boy under fourteen years of age or a girl under sixteen years of age. Where the minor in question leaves his guardian of his own accord, no offence would be committed but if there is any inducement offered to him or any force or sign of force accompanying the removal, the person guilty of such abduction or detention will not be allowed to escape.

Both civil and criminal actions of the above description are not uncommon in the Courts. Usually in such cases, there is strenuous contest between the parties as to the age of the child; the defendant or accused may be satisfied that the boy or girl is over eighteen years of age, but the parents will often try to prove that he or she is only fourteen or fifteen; and if feeling in connexion with such a case has been wrought up to a high pitch; doctors are brought in who are prepared to give it as their opinion that a boy or girl usually considered to be nineteen or twenty is really only fifteen or sixteen. It is safe, in such a case, for the person who assumes control over a boy or girl to obtain a certificate from a Medical practitioner of repute so that his bona fides may not afterwards be called in question. It is not necessary at this stage to deal with the signs or indicia which are usually supposed to denote majority as distinguished from minority. That is a question of medical jurisprudence on which any well-known treatise on the subject may be consulted. But the person who ventures to assume control or retain posession of a person must satisfy himself at his peril that he is dealing with a major. It follows from all that has been said above that, though

there is nothing to prevent a boy or girl of seventeen or fifteen or even thirteen from being baptized, there is always a risk in such cases of a criminal or civil action of one or other of the above kinds. For this reason and also to satisfy the feelings of Hindu parents and finally to make sure that the minor himself is becoming a convert from conviction and after proper enquiry, carried on for a reasonable time, it is always wise to postpone baptism till after he has completed eighteen years of age.

It may generally be said that Hindus of the lower castes do not usually raise strenuous objections to a number of their community becoming a convert to Christianity. They are prepared to deal with him as if he is still one of themselves and to take him back if necessary without making much ado about it. They recognize that a member of their community who becomes a Christian frees himself from the trammels of caste regulations and the brand of inferiority from which he suffers as a Hindu, and they realize that, in nearly all cases, he has more prospects of improving himself in material circumstances than if he remained in Hindu society. It is chiefly the higher castes that fiercely resent all attempts to take away a member of their caste and make a convert of him. They regard such an act with the same feeling of abhorrence with which for instance an American might regard a co-national marrying a negro or an Englishman might regard a fellow Englishman similarly entering into relationship with one of the backward races. Feeling sometimes runs to such a high pitch that they would much prefer that a relation of theirs who became a convert died rather than that he should continue to live as a Christian. Cases are not unknown where if a convert fell into the hands of his people he is kept in confinement for months, sometimes for years in the hope that he may revert to his original faith. Sometimes such a person disappears altogether. It will be wise therefore to arrange for an enquirer being baptized quietly and away from his immediate neighborhood; after the conversion he should resume friendly relations with his people without committing himself to their tender mercies.

CHAPTER III

Effects of Conversion

If a child is admitted into the Christian Church, while he is still an infant, along with his parents or with their full and free consent, no legal difficulties arise from the fact of his admission. He continues in his father's family and can claim rights of protection, maintenance and inheritance from his parents.

When however a person is baptized after he attains ten or twelve years of age, certain legal changes take place in his status. The principles of Hindu Law cease to be applicable to him, and he will henceforth be governed by the rules of Law enforced in the case of Christians. He will lose the position that he enjoyed as a member of a Hindu or Muhammadan family and acquire a new status which differs in some respects from his original position. Some of the responsibilities or liabilities to which he was subject as a Hindu or Muhammadan survive even after he becomes a Christian, while others cease to exist; and his liberty to take action is curtailed in certain new directions.

The Law now in force does not impose any penalties upon any person who changes his faith. According to the original Hindu Law and usage, if a Hindu gave up his religion, such renunciation entailed forfeiture of all his rights to property and deprived him of his privileges of inheritance. He ceased to be a member of his old family and could not have claimed rights of residence, maintenance or protection from it. Apostacy from Muhammadanism was also followed by loss of rights of inheritance and maintenance; a heavier tax could be imposed on non-Muslims than upon Muslims; and it was not considered illegal to deprive an apostate of his property.

These rules are now abolished by the Caste Disabilities Removal Act XXI. of 1860 which is so short that it may be quoted in full; 'So much of any law or usage, now

in force, within the territories subject to the Government of the East India Company, as inflicts on any person, forfeiture of property or rights, or may be held in any way to impair or affect any right of inheritance, by reason of his or her renouncing, or having been excluded from the communion of any religion, or being deprived of caste, shall cease to be enforced as law in the Courts of the East India Company, and in the Courts established by Royal Charter within the said territories.' All disabilities imposed by the Hindu Law on outcaste and converted Hindus are thus effectually removed. A person does not by conversion forfeit his right of guardianship over his children, if otherwise qualified, or lose his right to a share in the family property. He may lose his rights as a member of a caste, and as a worshipper in one or other of the Hindu Temples which he patronized as a Hindu: but he acquires corresponding rights as a member of a Christian Church.

1. Marriage

The effects of conversion on marriage, i. e., on the subsistence or continuance of a married relationship which came into existence before the person's conversion, have to be carefully noted. The principles of Hindu and Muhammadan Law differed diametrically as regards the effect on a pre-existing marriage of apostacy from the two faiths respectively.

According to Hindu Law, marriage being a Sacrament can never be dissolved and the wife or husband continues to be the conjux (partner) even after her husband or his wife becomes a convert to Christianity. Under Muhammadan Law a marriage is a contract, and apostacy from the faith at once dissolved that contract and set both parties free to marry again.

As apostacy from Muhammadanism operated as a complete dissolution of the marriage, it follows that no dissolution of the marriage can or need be applied for either under the Native Converts' Dissolution of Marriage Act or under any other Act. Where the wife of Muhammadan became a convert to Christianity and her

husband sued for restitution of conjugal rights, it was held that the action was not maintainable as under Moslem Law her marriage had become dissolved. (*Amin Beg* v. *Sarnar*, 33 Allahabad, page 90).

Usually, where there is a dissolution of a Muhammadan marriage, by the pronouncement of Talak or divorce, the husband and wife have to wait for four months for the wife's Iddat period to expire before he or she could marry again. Apparently even this rule is not in force when either a Muhammadan wife or husband becomes a Christian. In a case in which immediately after her husband was baptized, his former Muhammadan wife got married to some one else without waiting for her period of Iddat to expire, it was held that the marriage may be sinful but not bigamous. (*Abdul Gani* v. *Azeezul-Huk*, 39 Calcutta, 409).

There are two other difficulties of a serious nature which have to be dealt with in connexion with Muhammadan marriages.

Where a Muhammadan husband or wife becomes a Christian and the other party to the marriage contract is not willing to follow him or her in the change of faith, no trouble arises as there is an immediate dissolution of the former marriage (vide *supra*). But where both of them decide to change their faith great care has to be taken that they are both baptized at exactly the same identical moment of time. If e. g., the husband was baptized even a minute or a few seconds earlier it is open to interested persons to contend that from that moment his marriage has become dissolved under Muhammadan Law. Even if she was baptized a few moments afterwards it did not make any difference; the marriage remained dissolved and any issue that might be born thereafter would be illegitimate and not entitled to inherit to the father. This serious consequence which flows from the decision that a Muhammadan marriage is dissolved as from the moment of apostacy, can be finally and effectually dealt with only by the legislature. But the difficulty may be surmounted by the husband and wife baptized at different points of time being re-married in the Christian form immediately

after conversion. It might also be urged that the Freedom of Religion Act which removes all disabilities imposed on a person by reason of his or her having become a convert could be invoked and applied. The Courts may well hold that, at least in the case, where both parties become converts and intended to do so, the man or woman should not have deemed to have lost the conjux by reason of his or her being baptized a few minutes earlier.

The second difficulty arises where a Muhammadan having many wives or concubines becomes a Christian. He will undoubtedly have to give up his concubines but if he is asked to renounce all his wives but one, it will result in serious hardship not only to the wives concerned but to their children as well. The difficulty will not arise in a case where the women elect to remain Muhammadans and not to follow their husband into Christianity. But where they also are willing to change their faith, a serious problem arises. He has to select one of them to be his Christian wife and to give up the others. Even if he gave up the others, the rights of the wives so given up to maintenance from him and of the children born of them before his conversion to inherit to him will be upheld by the law. If he has subsequent children, by the wife who has ceased to be a wife after his conversion they will be illegitimate and cannot inherit to him. The only reasonable advice consistent with ethics that could be given in a contingency like that mentioned is, that the superfluous wives should regard themselves after they become Christians as widows and not keep up their married relationship with their husband. They and their children would in that case be entitled to rights of maintenance and the children born before the husband's conversion would also be entitled to inheritance.

Where a Hindu becomes a Christian, the problem is entirely different. Where he has a single wife and she also elects to become a Christian, she can be baptized at once and there is no necessity for the ceremony of a re-marriage. Where the Hindu has several wives or wives and concubines, the same principles apply as have been just

mentioned. The concubines would have to be given up. He can elect one of his former wives to be his wife; if the others are unwilling to come and live with him, he can obtain a dissolution of his marriage with them under the Native Converts' Dissolution of Marriage Act 21 of 1866. If they are willing to come and live with him they can only be treated as widows not entitled to marital rights though they will remain entitled to rights of maintenance and residence and their children to rights of inheritance.

Where a Hindu has a single wife and she is unwilling to become a Christian or change her faith and also unwilling to come and live with him as his wife, he can obtain a dissolution of the marriage with her by the Native Converts' Dissolution of Marriage Act 21 of 1866. This Act applies to any 'native' husband over sixteen years of age or wife over thirteen years of age who has become a convert to Christianity. If a husband or wife has become a Christian, and if six months after the conversion, the husband finds that the wife refuses to cohabit with him, or likewise the wife finds that the husband refuses to cohabit with her, and the reason for doing so is the conversion to Christianity, then the party suffering by such refusal can file a suit in the High Court or the District Court. Summons goes to the refusing party and on the day fixed for hearing, the plaintiff has to prove the identity of the parties, the marriage that has taken place between them, and the desertion by the other party for six months immediately preceding the suit and he has also to establish that such desertion or repudiation was in consequence of the change of religion. After this evidence the Court asks the other party if he or she will live with the plaintiff. If he or she answers in the affirmative the suit comes to an end and it is dismissed at once. If he (or she) refuses, he (or she) is given a year of locus penitentiae in which to consider the matter and the suit is adjourned for a year. If at the end of the year, the defendant still refuses to live with the petitioner or plaintiff, then a final decree dissolving the marriage between the parties is passed. After such a

decree either of the parties can marry again. The suit is dismissed if, during the year, the wife comes back to the husband and lives with him, or the husband goes back to the wife and lives with her. But after living a short time, if the parties separate again, the original suit can be revived or a new suit filed. If the person who brings the suit is guilty of cruelty or adultery, the action is liable to be dismissed. If he had more than one wife (as a Hindu or Muhammadan) and one of those wives is willing to live with him, the suit against the others would be dismissed. In a casewhere the marriage is thus dissolved the Court may order a proper sum to be paid by the husband to the wife by way of maintenance. If the wife has not sufficient property to conduct the suit, the husband has to find funds for the purpose. If there are children before the dissolution, those children are deemed to be legitimate. These are the principal provisions of the Act. There are also various ancillary rules of a procedural character which need not be set out here.

The legal position is defined above but some church men hold the view that a marriage ceremony gone through before conversion to Christianity continues to hold in the sight of God, even though under Civil Law, e. g., the Muhammadan Law of divorce or the Dissolution of Marriage Act, the marriage bond is deemed broken. Such persons do not permit the party who has become a Christian to remarry at any rate till such a period (5 or 6 years) has elapsed as to make it impossible to hope that the other party may also become a Christian and renew the broken off marriage.

2. Maintenance

The conversion of a husband to Christianity does not deprive his wife of her rights to claim maintenance and residence from him, even if she continues to be a Hindu. (*Mansha* v. *Livanmal*, 6 Allahabad, 619.)

If however she is permanently unwilling to come and live with him as his wife, he can apply for the dissolution of his marriage with her under the Native Converts'

Dissolution of Marriage Act 21 of 1866. If at the time the dissolution is effected, she asks the Court for alimony to be decreed in her favour, in a proper case, the Court may order such alimony to be paid to her as seems reasonable in view of the position and income of the husband. Apart from such an order the wife whose marriage has been dissolved cannot claim maintenance.

The converted Hindu will be liable to maintain not only his wife, but other widows belonging to the joint family, if he has received any joint family property after his conversion. He is not allowed to enjoy his right of inheritance over the joint property without at the same time being subject to its liabilities.

3. Guardianship

The fact that a father has renounced the religion of his ancestors and become a Christian will not deprive him of the custody of his children. (*Muchoo* v. *Arzoon Sahoo*, 5 Weekly Reporter, page 235; *Sham Singh* v. *Santabai*, 25 Bombay, 551-555.) If however, he had ceased to have control of his child for a long time before conversion, or if after conversion he voluntarily abandons his parental rights and entrusts his child to another, the child will not be asked to go back to him. (*Mokoond* v. *Nobadip*, 25 Calcutta 881.) This is especially so if the object of the father in asking for the restoration of his child to his guardianship was merely to get the child admitted into the Christian fold. In other cases the welfare of the child will be the paramount consideration.

Where a Hindu or Muhammadan mother changes her religion, the Court may however, in the best interests of the minor, remove her child from her custody and place it under a Hindu or Muhammadan guardian. Vide *Skinner* v. *Orde*, 14 Moore's Indian Appeals, page 309 at page 323, in which a Christian mother who subsequently married a Muhammadan and became a Muhammadan herself was deprived of the custody of her growing children.

4. Inheritance

The conversion of a member of a Hindu Joint Family would have operated as forfeiture of all his rights over the joint family property under the Hindu Law as it originally stood. The Caste Disabilities Removal Act has however effectually removed this penalty of forfeiture. Even after conversion the converted Hindu is entitled to ask for his share of the joint family property to be given to him. The only effect of conversion is that it causes an immediate dissolution of the joint family and the converted member becomes at once entitled to his share. See for instances of the application of the rule, *Kulada* v. *Haripada*, 40 Calcutta, 407, *Kannia Lal* v. *Gobind*, 33 Allahabad, 356, and *Gobind* v. *Abdul*, 25 Allahabad, 546.

The right of a Hindu convert to obtain a share in the joint family property cannot be claimed by the convert's sons. The descendants of a Hindu convert have no interest in the property of their unconverted relations. (*Vythilinga* v. *Iyadurai*, 40 Madras, page 118.)

If a Muhammadan becomes a convert he cannot at once claim a share in his father's property, but only when the inheritance opens by the death of his father. When a Muhammadan father is alive his children have no interest in his property. It has been held (*Rupa* v. *Sardar*, Punjab Law Reports 376) that Act XXI of 1860 (Caste Disabilities Removal Act) has the effect of abrogating the ancient rule of Muhammadan Law by which a non-Moslem is excluded from succession to a Moslem. In that case A. B. C. three brothers (Muhammadans) sold their property to a first cousin who was a Christian; Muhammadans who had occupancy rights over that property claimed to have a right of preemption as against the Christian cousin. This was found against.

5. Law applicable to the Convert

There has been a change of view as regards this point and also considerable difference of opinion as to the manner in which the rule now accepted has to be applied.

In *Abraham* v. *Abraham*, 9 M. I. A. 199, which was the leading case for a long time on this subject it was held by the Privy Council that 'the profession of Christianity releases the convert from the trammels of Hindu Law' but 'it does not necessarily change the law of property applicable to him.' 'The convert may either retain the old law or adopt that of the class to which he attaches himself or establish a customary law.'

Under this principle which was laid down in 1863 before the Indian Succession Act was enacted, a convert or a converted family may have elected either to adopt the Christian law or preserve the old Hindu law. This principle was applied in a few early cases.

The Indian Succession Act however has now laid down definite rules of inheritance and succession applicable to all Christians and having been enacted as a branch of territorial law it necessarily applies to all Christians living in India.

The original view had accordingly to be changed and the Privy Council has now definitely laid down *Degjibai* v. *Karmavati*, 43 Act 525 that there is no election now possible and all Christians whether they are converted or otherwise must be governed by the Succession Act.

The way for this decision was prepared by a series of cases which however have now become unimportant.

(See in re *Vathiar*, 7 Madras H.C.R. page 121: *Administrator General* v. *Anandachari*, 9 Madras, 466, Degree and Pacotti, 19 Bombay, 783.)

There is, however, a difference of opinion between the different High Courts as to whether the principle of survivorship is applicable to Native Christians who remain joint after conversion. Under the Hindu Law, if there were two brothers living jointly and one of them dies, the whole jointly family property devolves on the surviving brother. Sir Lawrence Jenkins appears to think that the same consequence will happen if after they become Christians they remain joint: when the deceased brother left a widow, he held that the property will go in its entirety to the survivor. (*Ghosāl* v. *Ghosāl*, 31 Bombay, 25.) The Succession Act

which is the Act applicable to Christians according to Jenkins J. is not a complete Act, but deals only with inheritance and does not touch the question of survivorship. According to the Madras High Court on the other hand, on exactly similar facts, a widow of the deceased brother was entitled to his half share, as the Indian Succession Act was the only statute applicable to all Christians. (*Tellis* v. *Saldanha*, 10 Madras, 69. See *Kulada* v. *Haripada*, 40 Calcutta, 407.) In *Nepen Bala* v. *Sita Kanta*, 15 C. W. N. Page 158, one of two brothers became a Christian and died leaving a widow and a brother and a sister. It was contended that the Hindu Law (Bengal school) applied and that the widow took the whole as the estate had become divided at the time of partition. Held that unless it was proved that the deceased had resumed his belief in the Puranic religion, the Indian Succession Act applied, the widow was entitled to half of her husband's property and the brother and sister to the other half.

6. Caste

A curious result, not perhaps contemplated by the Caste Disabilities Removal Act and not due to its influence is that a member of a low caste who was prohibited by caste rules from using a thoroughfare so long as he was a Hindu, is allowed free access to it when he becomes a Christian.

The Act is known as the Caste *Disabilities* Removal Act. Occasionally questions have arisen as to whether by reason of conversion persons have lost the privileges of Caste as distinguished from its disabilities. They cannot claim precedence among Hindus who have disowned them but they have put forward such claims among Christians.

Even after their conversion to Christianity, converts retain a good many customs to which they have become used, provided such customs are not inconsistent with the principles of their new faith. Weddings for instance are celebrated on a scale of expenditure and with ceremonies which are prevalent in the caste from which the converts

have come. Missionaries have sometimes refused to attend or perform marriages in which Hindu customs were followed. On one occasion, a Missionary refused to attend a wedding because the bridal procession towards the church was headed by an elephant from the nearest Hindu Temple wearing Vaishnava Caste marks. In the early days some of them even objected to a Thali or necklace being used in place of the wedding ring as the latter alone is mentioned in the marriage service ; but the Thali is now freely consecrated and used.

A question has sometimes come before the Courts as to whether a section of Christians (purporting to come of a higher caste than others) can claim the right to exclusive use of the whole or portion of a Church on account of their Caste precedence, or separate service in the Church for themselves, or precedence in the Church, in the matter of seats or the distribution of communion or the taking of gifts or offertory. Where a certain section of Roman Catholic Christians, claiming to be superior to others on the ground of caste sued to enforce exclusive rights to sit in and worship from a particular part of the Church during service and to take part in certain duties connected with the Church service, it was held that such a claim was legally unsustainable, however long such privileges may have been enjoyed whether by reason of custom or under an agreement with the Bishop. (*Michael Pillai* v. *Rev. Bartle*, 39 Madras, 1056.)

CHAPTER IV

Marriage

In Hindu Law, marriage is a Samskara or sacrament and is always celebrated with elaborate religious ceremonies. Under Muhammadan Law, the relationship is reduced to its ultimate elements and is conceived as a legal contract between a man and a woman (which can be dissolved at will by the man.)

In Christian Law, marriage partakes of both these characteristics. The Church of Rome has always regarded it as one of the seven sacraments and sets its face rigorously against any conception that robs it of its religious significance. The Church of England, and other churches generally treat it as an institution approved and sanctified by God, and therefore as the permanent union of one man and one woman for all time consecrated by the offices of religion. But in the eye of the Civil Law, it is a contract like any other contract, followed by a status and peculiar consequences attaching to it and capable of being dissolved only in special ways prescribed by the legislatures. It differs from other contracts in the fact that the rights, obligations and duties arising from it are not left entirely to be regulated by agreement of parties, but are, to a certain extent, matters of state regulation over which parties have no control. It confers the status of legitimacy on children born in wedlock and endows them with rights of inheritance which other off-spring do not enjoy [1] ; it gives rise to the relations of consanguinity and affinity: it brings into existence certain direct and indirect rights in favour of either conjux : it cannot in general be dissolved merely by mutual consent, as other contracts are. The married relationship is a status not a mere contract, though the agreement which initiates and so brings it into existence is

[1] A statute has been recently passed in England legitimising children born before marriage.

subject to control by the wills of the contracting parties. It has been defined as 'the voluntary social union of one man and one woman for an unlimited time, entailing certain mutual rights and duties and evidenced by some legal form or ceremony-religious or secular-expressive of the consent of the parties to enter such union.'

The requisites of a valid marriage are these: (Halsbury *Laws of England*, Vol. XVI, page 278.)

1. Each of the parties should, as regard age, and capacity, mental and physical, be capable of contracting a marriage.
2. They should not, by reason of kindred or affinity, be prohibited from marrying one another.
3. There should not be a valid subsisting marriage of either of the parties with another person.
4. The parties, understanding the nature of the contract, should freely consent to marry one another and
5. Certain forms should be observed.

'Engagement'

The marriage contract is usually preceded by a pre-contract known by many names, all of which however have the same legal effect. Among English people this pre-contract is known as an engagement: it takes place between the parties contracting alone and usually in private, though it is announced at the earliest possible opportunity to their relatives and friends. Indians generally like to give the ceremony a more formal and in many instances a more religious character and call it a betrothal. The parties who are intending to marry are then usually brought together for the first time; and the pre-contract is sealed by themselves, if they are grown up; or by their parents or guardians by the exchange of appropriate presents. If this pre-contract is broken, there will be a cause of action in favour of the person suffering by the breach against the bride or bridegroom and any person who contracted to give either of them in marriage. Under the Indian Contract Act a person guilty of breach of such a contract will be liable for damages, the same being assessed 'according to the affections of the

plaintiff, the prejudice to his or her future life and prospects of marriage, the rank and condition of the parties and especially the means of the defendant.' Before there can be an action for breach, there must be proof of consent, and a declaration of willingness on the part of each party being communicated to the other, corroborative evidence of the consent being also available. If one of the contracting parties was already married to the knowledge of the other, the contract is void; but if the subsisting marriage is unknown to the other the contract can be enforced but only by an action for damages for breach thereof. If one of the parties discovers after the contract that the other party is of bad character, or has developed mental infirmity or if the consent has been obtained by fraud or misrepresentation or wilful suppression of material facts, there will be a good defence to the action. (*See Halsbury*, Vol. XVI, page 272.)

Under the general law of contract, an agreement in restraint of marriage is invalid and cannot be enforced. It is the general policy of the law to favour or encourage marriages: accordingly if a party contracts to remain a celibate, the agreement or condition is void. An agreement not to marry a particular person or a member of a particular class is however not repugnant to the law.

On grounds of public welfare and in order that marriage may be free and unfettered, the Courts will refuse to enforce marriage brokerage contracts, for example, agreements by intermediate third persons to promote or bring about a marriage for a pecuniary recompense, or an agreement, for a similar consideration, to prevent a marriage from happening.

By way of clearing the ground for the treatment of the subject of marriage proper, it may also be premised that an agreement in consideration of future co-habitation, i.e. a gift or promise made in expectation of the continuance of improper relationship between a man and a woman is void and unenforceable: but a like gift or promise in consideration of past intercourse is not void.

Indian Christian Marriage Act

All the rules regulating a marriage between Christians in India are now to be found in a single enactment known at the Indian Christian Marriage Act of 1872. It supersedes five different Acts which were in force before the date of its publication, but at the same time provides that marriages solemnized under such previous enactments are not invalidated by the new Act; and appointments made, licenses granted, consents given, certificates issued and other things duly done under the previous laws still hold good. The Act however has to be read in connexion with another small Act known as the Foreign Marriage Act XIV of 1903 which applies to Christians, not being British subjects, who require a certificate of a notice given prior to marriage by the parties. It must be confessed that the main Act is a very clumsy piece of legislation which has frequently been amended and still requires amendment or wholesale redrafting. It combines in a single measure, rules for Indians and foreigners, for marriages in which one party is a Christian or both are Christians, and for marriages solemnized by different classes of persons in five different ways and for registration of each of such marriages.

Who are the persons governed by the Act

The Act states that it applies to the whole of British India and to all Christians resident therein, whether European or Indian, and to all Christian subjects of His Majesty residing in the Native States. 'Christian' is defined in the interpretation clause as 'a person professing the Christian religion.' In a case in which a person was indicted for performing a ceremony of marriage between a Christian and a Hindu, the Sessions Judge who tried the case held that the bride, a girl three years of age was not a person 'professing the Christian religion' within the meaning of the Act and therefore there could be no conviction. On revision, it was held by the High Court of Madras that the term 'person who professes the

Christian religion' includes not only adults who follow that faith but also their children, who, in law, are presumed to follow their father's religion. (*Empress* v. *Veeradu*, 3 Madras, 36.)

Section 87 of the Act states that nothing in this Act applies to any marriage (even between Christians) performed by any Minister, Consul or Consular Agent, between the subjects of the State which he represents, according to the laws of such State. The Act will therefore not apply to foreigners who are just passing through India or who have not acquired a domicile in this country by staying here for the requisite period of time, viz., five years. In such cases, for instance, if a Frenchman in India desires to be joined in marriage with a Frenchwoman and neither of them has been domiciled in India or become British subjects, the law applicable will be that of France, and if the marriage has not been celebrated according to the rules of French law it may be held to be invalid even by British Courts though the formalities laid down in the Indian Christian Marriage Act may have been fulfilled. Subjects of foreign countries have usually consuls representing their countries stationed in the principal cities in India; and when persons who have not yet acquired an Indian domicile are desirous of marrying, they can always be married in the Consulate of the country to which they belong, according to the rites recognized as valid in those countries; but the consular rules are usually very irksome and frequently involve long delay. In such cases, if foreigners residing in India for the time being obtained recognition (under the Naturalisation Acts of 1852 and 1913) as British subjects and thus acquired a domicile in India, they can be married (without the elaborate formalities insisted on by consular departments) under the Indian Christian Marriage Act IX of 1892. If however foreigners passing through India or not naturalized or domiciled here, go through one of the forms of marriage prescribed by the Indian Christian Marriage Act, the marraige will generally be considered valid in India, though it may not be valid in the country of the domiciie

of one or other of the contracting parties. (See *Halsbury*, Vol. XVI, page 281.)

The most noteworthy feature of the Act is that it applies not merely to cases where both the parties to a marriage are Christians but also to cases where only one of the contracting parties is a Christian. Such a marriage can only be celebrated according to the rules laid down for Christian marriages by one of the five classes of persons mentioned in the Act. This provision has been enacted *inter alia* for the purpose of preventing a Christian wife losing her favoured position and status by reason of the privilege of polygamy allowed under Hindu, Muhammadan, and Buddhist Law. If, for instance, a Christian girl was given in marriage to a Hindu or Muhammadan according to non-Christian forms and rites, in the absence of the restrictions laid down by the Act, the Hindu or Muhammadan bridegroom may thereafter have taken, in spite of her protests, a second or third wife and would not have been liable to be convicted of the offence of bigamy. The wife and her children would also stand to lose the benefit of the specially favourable rules of inheritance and succession laid down in their favour in the Indian Succession Act.

Many of the cases that have come up before the Courts are cases in which one of the contracting parties was a Hindu and the other a Christian and a Hindu priest has ventured to celebrate the marriage in contravention of the provisions of this Act. The priest in such cases would be liable to a conviction which may extend to imprisonment for ten years. (See *Empress* v. *Yohan*, 17 Madras, page 391. In re *Kolandaivelu*, 40 Madras, page 103.)

The following persons, come within the purview of the Act:

(i) Persons in British India who are born of Christian parentage, whether Catholics, Syrians or Protestants;

(ii) Persons who have subsequently adopted the Christian religion;

(iii) Foreigners who have settled in India and acquired an Indian domicile;

(iv) Subjects of other portions of the British Empire who have come to or settled in India, e. g., Englishmen, Australians;

(v) British subjects who reside in the Native States (but not Christian subjects under one of the Native Rulers who have come temporarily to live in the British area).

Who can be married?

The Act itself does not lay down any rules of prohibition as to age, religion or relationship. A Christian can under this Act apparently enter into a lawful marriage with a Hindu or a Muhammadan or a Buddhist. An Englishman or foreigner can marry an Indian, but the following rules have to be remembered.

Age

Where persons are being married by a Minister of religion or Christian layman licensed under this Act or before a Marriage Registrar, the question of age becomes important. Where one or other of the parties being married by a licensed layman or minister is a minor, a special notice is insisted on (Section 19) and the consent of the father or the guardian has to be obtained. If the consent of such parent or guardian has not been asked for or obtained, he has the right to protest, within a reasonable time, against the Marriage being proceeded with and to prohibit the issue of the certificate provided for by the Act. (Section 20.) A similar rule applies to a marriage celebrated before a Marriage Registrar. In the case of Native Christians who require a certificate, there is the further rule that the bridegroom should be over sixteen and the bride over thirteen and the modified rule that in case either of them is below eighteen, the consent of the guardian must be obtained. These rules, it will be noted, do not apply under the Act to a case where the bride or the bridegroom is being married by an episcopally ordained

Clergyman of the Church of England or of the Church of Rome or a Minister of the Church of Scotland. It must also be noted that the age of majority for Indian Christians is 18, and for other Christians, following English rules is 21.

Consanguinity

The Act itself does not prohibit close relations from marrying. Ministers of the Church of England or of the Church of Rome will observe the special rules of those Churches by which a man standing in certain relationships to a woman is declared disentitled to marry her. (See Halsbury *Laws of England*, Vol. XVI, page 283.) As regards members of other Churches, a wide discretion is apparently given to the Ministers and the marriage will be valid provided the relationship does not fall within one of the prohibited degrees mentioned in the Divorce Act. This Act does not however specify what the prohibited degrees of consanguinity or affinity are and apparently it is left to the Courts to decide in the case of non-conformists what persons are so closely related according to the customary rules applicable to them or the Common Law that the marriage will be deemed incestuous. The table of prohibited degrees given in the Book of Common Prayer and reported in Halsbury is apparently not confined in its application to members of the Church of England alone. Together with the modifications effected by statute in England it is or ought to be applicable to members of non-confirmist Churches as well, as it is part of the Common Law of England. It is a moot question whether Indian Christians belonging to one or another of the American Churches are governed by the Table, under Sec. 88 of the Act; it might well be contended that they are not.

American Missionaries are sometimes concerned about a man belonging to their mission marrying his uncle's daughter or his sister's daughter, or his deceased wife's sister. There is nothing in Indian law prohibiting such marriages, as English Common Law cannot be deemed to apply to them.

As regards marriage with a deceased wife's sister it is now permitted by law in England. The Marriage with Deceased Wife's Sister Act of 1907 has not been made applicable to British India, so that a Clergyman of the Church of England or the Church of Rome must refuse to perform such a marriage and may legally refuse to recognize such marriages when performed. In *Hillyard* v. *Mitchell* 17, Calcutta 324 an Englishman who was a member of the Church of England married a lady in 1871 and then in 1887 married her half sister. It was held that the law applicable to him was that obtaining in the Church of England (whether in England or in India) and that the second marriage was void altogether. The contract of marriage was cancelled. In *Bomwech* v. *Bomwech*, 35 Calcutta, 381 the issue of such a marriage was held to be illegitimate. In *Lucas* v. *Lucas*, 32 Calcutta, 187 it was held that a Roman Catholic of Indian domicile could marry his deceased wife's sister provided he had obtained a dispensation from the Pope or a person authorized by him. Such a union is not forbidden by law; and the case ought to be governed by the rules of justice, equity and good consience. In *Lopez* v. *Lopez*, 12 Calcuta, 706 the subject is elaborately discussed. An East Indian member of the Roman Catholic Church domiciled in British India first married a certain lady (in 1871) who died soon after and then contracted a second marriage with her sister (in 1887). The first Court held that the second marriage was invalid. On appeal it was held that the rules applicable were not those of the Church of England but of the Church of Rome. The Catholic Church allowed such a marriage provided a special dispensation was obtained. In this case no such dispensation had been asked for or received but as the parties intended to marry and the wedding was celebrated by a Clergyman competent to perform a valid marriage, with the usual ceremonies, the Courts were prepared to presume that the necessary dispensation had been obtained. The doctrine of *factum valet* was applied. When parties have lived together as man and wife the Courts are loth to cancel the marriage tie unless the law is directly infringed. It

is a maxim of the law that all things are presumed to have been rightly and properly done; and especially in matrimonial cases *semper praesumitur pro matrimonio;* there is always a presumption in favour of a lawful marriage.

Contractual Capacity

Marriage being a contract, the parties to the marriage should have contractual capacity at the time of the wedding, and should give their consent, of their own free will, without coercion, duress or undue influence. That is to say, they must not be lunatics or idiots, in which case a decree of nullity of marriage can be obtained, and they must both have consented to the same thing in the same sense. A lunatic, so found on inquisition, cannot marry till the finding is reversed. But if a person is feeble or dull of intellect he can marry, provided he understands the nature of the contract and its responsibilities, has no insane delusions about the subject and has not been deceived in any way by undue influence taking advantage of his mental weakness. The express consent of a guardian is necessary in a case where one or other of the contracting parties is a minor, if the marriage is celebrated by or in the presence of a Marriage Registrar or a Minister of religion licensed to celebrate marriages.

Monogamy

As Christian law strictly enforces monogamy, there can be no marriage where the former husband or wife of either party is living at the time of the wedding, and the marriage with such former husband or wife is still in force and has not been dissolved. A Hindu, for instance, who has a Hindu wife living and has not divorced her cannot merely by becoming a convert to Christianity marry a Christian woman. He will, in that case, make himself liable to a conviction for the offence of bigamy. Under the Indian Evidence Act however, if a conjux has disappeared and has not been heard of for

seven years by those who were in a position to hear from him or her if he or she had been alive, his wife or her husband can marry again; and under the Indian Penal Code it is provided that such a marriage is not bigamy i.e. the second marriage is not void.

Time

Marriage must be solemnized under the Act (Section 10) between 6 a.m. and 7 p.m. Exceptions are provided in the case of a clergyman of the Church of England (when he has obtained a special license), of the Church of Rome and of the Church of Scotland.

Who can celebrate marriages?

There are five classes of persons mentioned in the Act as those who alone can solemnize marriages.

(i) Any person who has received episcopal ordination, (provided he solemnizes a marriage according to the rules, ceremonies and customs of the Church of which he is a Minister). A priest or a deacon may celebrate a marriage. The stringent rules which are laid down in the Act in the case of non-conformist ministers are not applicable to them, because the Church of Rome, the Church of England and the Syrian Church, all of which have bishops, have elaborate rules or rubrics which serve the very purposes which are meant to be served by the provisions of Part 3 and Part 5 of the Act. In the leading case of *Caussavel* v. *Saurez* reported in 19 Madras, page 273, a Roman Catholic priest filed a criminal complaint against a Syrian priest, first for performing a marriage according to Roman rites and secondly without giving the notice that is provided for by part 3 of the Act. The Syrian priest proved that he had received episcopal ordination and authority to celebrate marriages from the titular heads of his Church and that according to the rules of his Church a marriage could be celebrated either in the Roman form or in the Syrian form. The High Court held that being an episcopally ordained person he was not bound to give the

notice which a Minister of religion is compelled to give under part 3 of the Act and that consequently he was not guilty of any offence.

(ii) Any Clergyman of the Church of Scotland, provided the marriage is solemnized according to the rules, rites and customs of that Church.

(iii) Any Minister of religion licensed under the Act to solemnize marriages. All licensed non-conformist Ministers will come under this head, and various special rules are laid down in the case of such Ministers. First, they must have a license to celebrate marriages. (Section 5.) Secondly, the parties intending to marry should give a notice containing certain particulars found in schedule 1 of the Act (Section 12), and the licensed Minister of religion has to publish such notice, in his Church or elsewhere (Sections 13 and 14), and where the wedding is intended to be solemnized in a private dwelling, to send a copy thereof to the Marriage Registrar. (Section 14.) He has to receive a declaration by the parties that they are free to marry and that there is no impediment of kindred or affinity or other hindrance. (Section 15.) If called upon to do so, he then issues a certificate as in Schedule 2 that due notice of the marriage has been given to him and declaration made before him. (Section 17.) He has to get the consent of the guardian where one of the contracting parties to the marriage is a minor, i.e., under 21 if a European, under 18 if an Indian. (Section 19.) If the guardian, instead of giving his consent, protests against the marriage, he is bound to examine the grounds of protest or prohibition and decide whether they are justified or frivolous. (Sections 20 and 21.) A marriage must be celebrated within two months of the certificate. (Section 25.) Immediately after celebrating the wedding he has to send a counterfoil of the entry in his marriage register, (vide Schedule 4), signed by the contracting parties, to the Marriage Registrar of the District in which the wedding has been celebrated. These provisions are contained in part 3 and part 4 of the Act which must be studied carefully, for more exact particulars.

(iv) A Marriage Registrar, (or a private person in the presence of a Marriage Registrar appointed under this Act), may also celebrate marriages. A wedding of this sort is provided for in detail by part 5 of the Act. Substantially the same conditions are imposed on the Marriage Registrar as upon a Minister of religion having a license to perform marriages. There should be notice of the intended marriage, and there should be consent by the guardian if one party is a minor. There should be an oath or declaration by the parties that there is no impediment to their marriage before issue of certificate of the preliminary notice. There should then be a certificate that a notice has been duly issued and the marriage should be performed within two months of the issue of the certificate, and it should be performed by a Marriage Registrar or in his presence. The rules as to minors and place of marriage found in part 3 are repeated in part 5. He also takes the signatures of the contracting parties in duplicate and sends the counterfoil to the Registrar General of Births, Deaths and Marriages. This part of the Act also provides (under Sections 43, 46 and 48) that the Marriage Registrar himself can refer any difficulty which arises before him to the High Court or the District Court and that the parties can likewise apply to the High Court to order the Registrar to issue a certificate when he unlawfully refuses to do so. In 14 Madras, 342, Fischer, a Barrister-at-law practising at Madura, not licensed under this Act, was convicted of an offence under this Act for performing a marriage. The Marriage Registrar attended the ceremony but only in a private and un-official capacity, and merely for the purpose of giving away the bride whose uncle he was. This decision makes it imperative that the Marriage Registrar must therefore either celebrate the wedding himself or must be present in his capacity as a Marriage Registrar to witness the ceremony.

(v) A marriage can also be celebrated by any person (usually a Christian layman) licensed under this Act to grant certificates of marriage between Native Christians.

Such a person has to observe the rules relating to minors —the boy must be over 16, the girl over 13, that relating to monogamy—there should be no husband or wife living and that relating to declaration. (Section 60). He can grant a certificate and must keep a register, extracts from which he must furnish when called on to do so.

Where can a marriage be celebrated?

No Clergyman of the Church of England is allowed to solemnize a marriage in any place other than a Church, unless there is no Church within five miles distance by the shortest route to his place and a special license authorizing him to solemnize the marriage elsewhere is given by the Bishop. As regards other persons, apparently they can solemnize the wedding anywhere; Marriage Registrars and persons specially licensed can celebrate the marriage anywhere, under the Act.

Formalities required in the case of marriages

The Act does not lay down any special formalities in the case of marriages solemnized by a Clergyman of the Church of Rome or the Church of England or by persons episcopally ordained, because these Churches have numerous rules or rubrics which have to be conformed to by the padre before a wedding could be celebrated. But part 3 of the Act provides for the preservation of a register of marriages by such persons, and the submission of quarterly returns of such registers to the Registrar General of Births, Deaths and Marriages, either directly, or in the case of Clergyman of the Church of England through the Archdeacon or the Registrar of the Diocese. If the celebrant is a Clergyman who has received episcopal ordination but is not a member of the Church of England or of the Church of Rome or a Minister of religion licensed under the Act, he is bound to make a record of the marriage in duplicate and send a copy thereof to the Marriage Registrar. In the case of a Minister of religion licensed under the Act or a Marriage Registrar the numer-

ous formalities already referred to and mentioned in part 3 and part 5 of the Act apply.

Penalties

The Act provides very stringent penalties for cases in which a person makes a false oath or declaration or issues a false notice or certificate, or in which one person personates another for the purpose of prohibiting a marriage, or in which a person solemnizes a marriage without authority (in which case he is liable to a conviction for ten years), or out of proper time or without witnesses (in which case he may be imprisoned for a period of three years). Failure to give notices and issue certificates is also made punishable by the Act. Likewise celebration of a marriage more than two months after the certificate is issued, the issue of false certificates, and the maintenance of false registers and books are made punishable.

Under Section 18 of the Act a person intending to get married by a Minister of Religion has to make certain declarations; and under Section 66, a person intentionally making a false declaration before him is liable to be imprisoned for three years. The accused in *Empress* v. *Robinson*, I.L.R. XVI, Allahabad, 212, was an Englishman and a member of the Church of England and could not, as the law then stood, have married his deceased wife's sister. He nevertheless made a declaration that he was free to marry a lady who was no other than his deceased wife's sister and got himself married. It turned out however that he had taken legal opinion and been advised that he could so marry in India; it was held that he had not made an 'intentional' false declaration and was not therefore liable to be convicted.

Under Section 68 of the Act, if a person, not being authorized thereto by Section 5 of the Act, solemnizes a marriage, he is liable to be imprisoned for ten years. In I.L.R. XX, Madras, page 12, *Queen Empress* v. *Paul* any person who conducts, celebrates or performs a marriage was held to be a person who solemnizes it. If he did any act supposed to be material for constituting a marriage or

merely took part in the ceremony he will be liable; and the persons who are being married by him will be liable for abetment of the offence. In this case, a Christian was united in marriage to a Hindu by two persons neither of whom came within the five classes of persons who can solemnize marriages under the Christian Marriage Act; the Sessions Judge acquitted those two persons and the bridegroom who was accused of abetting their offence on the ground that only a person holding an ecclesiastical character can be said to 'solemnize' a marriage. This narrow interpretation of the term was held to be unwarranted and as persons who had conducted or performed the ceremony they were held liable to be indicted.

The scope and meaning of the term 'solemnization' came up for discussion in another form in two interesting cases: In re *Kolandaivelu*, I.L.R. 40 Madras, page 1030 and *Emperor* v. *Maharam*, I.L.R. 40 All. page 393.

In the former a Hindu Valluva and a Christian girl were united in marriage by a Hindu priest of the Valluva caste (to which both of them belonged). The earlier decisions of the Madras High Court were uniform in holding that such a marriage constituted a breach of the rules and exposed the persons who conducted it to the penalty provided for in Section 68 of the Christian Marriage Act. Napier J. however felt a doubt as to whether the earlier decisions were right and whether the Act should not be taken as dealing with Christian marriages only, a marriage according to caste rites by a Hindu priest (between a Christian and a Hindu) being excluded from its scope. The Full Bench however held that the conviction was right and that it made no difference that the marriage purported to be performed by a Hindu priest with caste rites.

In the Allahabad case (*Emperor* v. *Maharam*, 40 All. 393) an able argument was addressed to the court from the point of view taken by Napier, J in the 40 Madras case. One Maharam alleged to be a Christian was married by Bhangi priests according to Bhangi rites to a Hindu girl. The priests were convicted under Section 68 of

Act IX of 1872 and the bridegroom was also convicted for abetment. On appeal both Judges held that Maharam was not a Christian, though he was born of Christian parents and had read in a Christian school. Strictly speaking the question whether the ceremony performed with Hindu rites came within the ambit of Section 68 did not arise. Knox, C. J., therefore avoided discussion of the question, since any decision of his would have been an *obiter dictum*, but Walsh J. thought that the question was one of public importance and that prosecutions under the Act should be discouraged; and went on to hold that if performed by a Hindu priest with Hindu rites, such a marriage could not be held to be illegal. Since the above pronouncement, which stands by itself, it has become risky, at least in the United Provinces, to undertake prosecutions against Hindu priests or Cazis for celebrating marriages when one of the parties is a Christian. Such actions have always been unpopular in this country and have tended to inflame feeling against the persons who promote the prosecution.

In Hindu Law, a valid marriage could not possibly take place between a Hindu and a Christian, who by his conversion has forfeited all his caste rites; but under Muhammadan Law, there is nothing to prevent a Moslem marrying a Kitabia, i. e., a Jew or a Christian. Under the Act however a Cazi who celebrates such a marriage is liable to be convicted. It is clear when we look at the whole scheme of the Act that this consequence was contemplated and intended. The Act applies both to a case in which both parties are Christians and to one in which one alone is a Christian. In the latter case, the marriage can be celebrated only in one of the five ways mentioned in the Act. This was intended to prevent a Christian wife from suffering by the Hindu or Muhammadan husband exercising his privilege of taking other wives superseding his Christian wife and depriving her and her children of their rights of inheritance under the Indian Succession Act. The provisions contained in the Act however do not entirely conserve the purposes intended by them.

Personal Law

Section 88 of the Act has given rise to a great deal of controversy. It runs thus: 'Nothing in this Act shall be deemed to validate any marriage which the personal law applicable to either of the parties forbids him or her to enter into. The marginal summary affixed to this section is phrased 'Non-validation of marriages within prohibited degrees.'

Read along with this marginal note, the section seems clear enough and does not suggest possibilities of diverse constructions. But in fact learned lawyers have interpreted the section in a sense which cuts through the whole scheme of the Act.

Obviously the section has been added, by way of supplement, merely because all churches do not publish schedules of prohibited degrees, and the table put forward by one church or denomination is not always the same as that of another church.

It is in view of these differences that the section provides that if the personal law applicable to a member of a particular denomination prohibits him from marrying a person who stands in a certain relation to him, the marriage is invalid altogether. It does not become legal merely because some other denomination permits it or at least does not prohibit it. Each member of a church must observe the rules of his own church as to prohibited degrees; and must not get married according to the looser standard set up in some other church. If two members of the church of England standing within prohibited degrees went to a Wesleyan church and got married there, the marriage is invalid, if this section is strictly followed.

But as observed in Book II, Chapter III, the term 'personal Law' would include personal law applicable to non-Christians as well as Christians. The law applicable to a person by reason of his birth or domicile or religion is usually known as personal law. Hindu Law is the personal law applicable to Hindus. Now the Hindu system of jurisprudence considers a marriage valid

only when a Hindu marries another Hindu of the same caste and sub-caste. A marriage of a Hindu with a Christian who stands outside the caste system is altogether invalid according to Hindu Law. This section has been construed to imply that a marriage which is invalid according to the personal law of the parties marrying cannot be rendered valid by this Act.

But earlier in the Act it is specifically laid down that a Christian can marry a Hindu or Muhammadan; only the marriage must be celebrated according to the provisions of this Act. The entire Act proceeds on the footing that such a mixed marriage can legally take place. Penalties will be imposed only on those who celebrated the marriage in any form not authorized by this Act, but this section however seems at one stroke, if the construction contended for is correct, to cancel the entire effect of the previous eighty-seven sections.

This effect is certainly not what the legislature intended. It is clear to any one who studies the Act that it had in mind only the differences between the churches in their rules as regards prohibited degrees. The term personal law in the section was therefore intended to apply only to the personal law applicable to Christians of different denominations.

Even otherwise a supplementary section like Section 88 which is in the nature of a proviso cannot be read as cancelling the whole scheme of the Act which allows mixed marriages, where one of the contracting parties alone is a Christian and the other party is not and makes specific provision as to the manner in which such marriages are to be celebrated.

Even in a case where a Hindu girl marries a Christian husband, it is not easy to see why the personal law of the Hindu bride should be applied rather that of the bridegroom. Likewise where a Christian girl marries a Hindu husband it is difficult to see why the marriage should be judged according to Hindu standards when the Act expressly provides that it should be governed by the Christian Law or the rules applicable to civil marriages. It is not possible to find any legal basis for the

contention put forward; it would, it is conceived, be held against if it ever came before the Courts.

Further the *maxim semper praesumitur pro matrimonis* will come to operation as an application of the factum valet doctrine. If two parties have been married, according to the form which they regarded as applicable to themselves and have lived together as man and wife for some time, the courts would hesitate a great deal before holding the marriage invalid on the basis of such flimsy contentions.

The cases of *Chetty* v. *Chetty*, L9 1909.L.R. Probate Division page 67, and *Mir Anwarrudin*, L.R. K. B. D. 1917, Vol. I, page 634 may here be considered.

In the former a British Indian subject who purported to be a Hindu went over to England for study and during his sojourn there married an Englishwoman and later returned to this country deserting her. She prayed for judicial separation and alimony; and he resisted the suit on the ground that there was no valid or subsisting marriage between him and the plaintiff. He was a caste Hindu and there could be no valid marriage under Hindu Law between him and an Englishwoman who was beyond the pale of caste. Sir V. Bhashyam Iyengar gave an opinion in the same sense. It was held however that there was nothing to prevent his giving up his caste, and that it is not open to him to set up such an incapacity, imposed by his personal law but not recognized by English Law, when he had voluntarily gone through the English form of marriage, as if he had no such incapacity. He was not allowed to repudiate the marriage on the ground of such personal incapacity imposed by his own law but unknown to English Law.

In the second case, a Muhammadan British Indian subject went similarly through an English form of marriage before a Registrar with an Englishwoman and then deserted her. He purported to dissolve the marriage by pronouncing talak or divorce, and claimed that the law applicable to him was the Law of his domicile and under that law he could always pronounce talak without giving reasons. In fact he wanted to marry

another Englishwoman and himself started the action, as the Registrar treated the former marriage as subsisting and refused to issue a fresh license enabling him to marry again. It was held that talak might be an appropriate method of dissolving a Muhammadan union, according to Muhammadan Law; but a marriage solemnized in England between him and a Christian woman, which gave rise to the status which women enjoyed in Christian countries, could not be dissolved at the will of one of the parties or enable him to take unto himself other wives as he would be entitled under Moslem Law.

Muthusami v. *Massilamony*, XXXIII Madras. 342 is a very instructive decision; a Christian woman became a Hindu for the purpose of marrying a Hindu and went through the Hindu rites. It was held that it was a valid marriage and she was not an out-caste if members of her husband's family and his caste people generally were willing to accept her as one of themselves. The decision covers a great deal of ground as to people going out of caste and being taken back into it.

CHAPTER V

Effects of Marriage

In ancient Rome a woman on marriage passed into the 'Manus' of her husband and became subject like his slaves and children to his *Patria Potestas*' which gave him absolute authority over her life, limb and property.

Even in modern England, till a series of recent enactments known as the Married Women's Property Acts were promulgated, the personality of a woman was said to have become merged in that of her husband; and the two together were said to constitute but a single person in the eye of the Law. The legal consequence of this doctrine was that a married woman was classed along with infants and lunatics as a person of defective status: could not have entered into contracts by herself; or sue or be sued except along with her husband. All the property that she acquired after her marriage passed at once into the control of the husband. Fortunately most of these obsolete restrictions have been removed by recent legislation, though some still disfigure the English Statute Book.

The law applicable to Christians in British India is more merciful to married women than either the Law of Rome or that of England or the Hindu or Muhammadan Law. It does not classify them along with idiots and infants as persons of defective status, but renders them capable of entering into contracts, holding property and suing and being sued in their own name. A wife does not lose the rights she possessed previous to her marriage but she acquires her husband's domicile and various other rights in addition, as a consequence of her change of status.

Domicile

It is a settled rule of International Law that a woman, on being married, loses her own domicile whether it is her domicile of origin or by acquisition and acquires that

of her husband. She will be governed thereafter, (as regards personal property for instance), by the domicile of her husband, till if she is a foreigner, she is naturalized in British India along with her husband. Section 15 of the Indian Succession Act provides that 'by marriage, a woman acquires the same domicile as her husband, if she had not the same domicile before. Sec. 16: a wife's domicile during her marriage follows the domicile of her husband. Exception. The wife's domicile no longer follows that of her husband, if they are separated by the sentence of a competent court, or if the husband is undergoing a sentence of transportation.

Guardianship

If a married woman is a major she does not stand in need of any guardian, to look after herself or her property. If she is a minor and goes to live with her husband in his house, she passes at once into his guardianship. If she still remains with her parents, and has never moved into the husband's home, her parents will continue to be her *de facto* guardians. If she has separate property, the person who actually acts as her guardian, either the husband, if she has gone to live with him, or the parent with whom she continues to live, will continue to be in management of the same. The above is the general law of British India; but it is expressly provided with reference to British female minors that they pass into the guardianship of their husbands from and after the date of their marriage. (Act XIII of 1874, Section 25.) The guardian can bring the criminal actions like kidnapping, abduction, and civil suits like the action for taking or keeping away a minor from his custody, to which reference has already been made *supra*.

Maintenance

From the date of her marriage and on her proceeding to live with her husband, the wife is entitled to maintenance at the hands of her husband, or if the husband is himself a dependant upon his father, from the husband's family.

The Criminal Procedure Code (Section 488) provides that if any person having sufficient means, neglects or refuses to maintain his wife, (or his legitimate or illegitimate child, unable to maintain itself), a District Magistrate, a Presidency Magistrate, a Sub Divisional Magistrate, or a Magistrate of the First Class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, at such monthly rate not exceeding Rs 50 in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate from time to time directs. Such an allowance shall be payable from the date of the order. The order can be enforced either by attachment of property or by imprisonment of the person refusing to pay it. The allowance is forfeited if the wife lives in adultery. The Magistrate may make it a condition that the wife should live with the husband, in cases where the husband offers to maintain her. If she refuses to live with him, or if, by mutual consent, they live separately, the order will be cancelled.

Similarly, a Civil action for maintenance can be instituted by any married woman whose husband deserts her or refuses to maintain her, without reasonable cause. In the Civil suit, the married woman may not only sue to enforce the payment of such future maintenance, as seems suitable and necessary in view of the position in life and fortune of her husband, but she may also recover arrears of maintenance. The Court may order, as part of its decree, that such past or future maintenance should be a charge on the immoveable property of the husband. The effect of the charge is that, if, after a decree is passed, the husband fails to maintain the wife or pay the arrears decreed, the wife can, without filing a separate suit, bring her husband's property to sale in execution of the decree and get her maintenance paid out of the sale proceeds.

Consortium

Another of the wife's legal rights has reference to the intercourse involved in conjugal relationship. If her

husband refuses to consummate or continue sexual relationship, she can institute a suit for restitution of conjugal rights. The husband likewise is entitled to consortium but is not entitled, if she declines to come to him, to restrain her by force or keep her in confinement; he must also resort to the court for relief.

If a third person, without just cause persuades or entices a wife to live apart from her husband, or receives or harbours her while she is living apart, that person commits an actionable wrong for which he is liable in damages. A husband has also an action, for loss of the services or the society (consortium) of his wife, against a third person by whose wrongful act he is deprived of the society or services of his wife.

The right of consortium is a mutual right which each party has against the other. It is the policy of the Law that the husband and the wife should not be separated without their consent. If however a wife leaves her husband in consequence of continued ill treatment, no action lies against a person for going to her rescue or even for advising her to go away from him, provided he gives his advice in good faith.

Funeral expenses

A husband is also liable to meet the expenses connected with his wife's burial when she dies, but a widow is not, in the converse case, bound to pay for her husband's funeral out of her own pocket.

Contractual Capacity

In former times a married woman had no separate contractual capacity and could only contract along with and through her husband. This rule is now cancelled by an important piece of legislation known as the Married Women's Property Act III of 1874 which is applicable to Christians in India among others. A married woman can now enter into any contract on her own account or take up any employment; and any wages that she might earn by such service or employment becomes her own property.

Section 4 of the Act runs thus: 'The wages and earnings of any married woman, acquired after the passing of this Act in any employment, occupation or trade carried on by her and not by her husband, and also any money or other property so acquired by her, through the exercise of any literary or artistic or scientific skill, and all savings from and investments of such wages, earnings, and property shall be deemed to be her separate property: and her receipts alone shall be good discharge for such wages, earning or property.' 'A married woman may effect a policy of insurance on her own behalf and independently of her husband: and the same and all benefits thereof shall be her separate property' (Section 5). If the husband takes out a policy of insurance on his own life, expressly for the benefit of the wife (or wife and children), it shall be deemed to be a trust for the benefit of his wife (or wife and children), and shall not be subject to the control of the husband, or of his creditors, or form part of his estate. When the policy becomes payable, the money will pass to the official trustee of the Presidency, and it will be received and held by him in trust for the wife (or the wife and children) unless separate trustees are expressly appointed.

Rights of property

The wife does not get any right over her husband's property except the right of maintenance already referred to, and the right to pledge his credit for necessaries. The husband too has no right against the wife's property, unless there is a joint settlement in favour of himself and his wife. The Indian Succession Act 1925 provides, Section 20 (1), that no person shall, by marriage, acquire any interest in the property of the person whom he or she marries, (nor become incapable of any act in respect of his or her own property, which he or she could have done if unmarried).

If the wife saves money out of an allowance given to her for house keeping or from the proceeds of his business, the savings belong to the husband, though they may be

invested in the name of the wife, unless he intended such savings to be treated as gifts to her from him.

English people grant their wives an allowance known as pin money for the purchase of dresses and ornaments suitable to their position in life. Sometimes these are secured by a regular settlement. The representatives of a deceased wife have no action for arrears of pin money; and the wife herself cannot claim it, if the husband has paid more than that amount to her tradesman, or if she has continued to be maintained by him without claiming it. The wife is under an obligation to apply her pin money towards her dress and decoration and cannot assign it to others. She has no claim to her husband's 'paraphernalia,' 'family jewels' or 'heirlooms,' even though he may have allowed her to use them on special occasions.

Capacity to sue and liability to be sued in Courts

Formerly the wife could not sue or be sued in her own name, but only along with her husband. The law on this subject has been permanently modified by the Married Women's Property Act III of 1874, which provides that she can sue and be sued in her own name with reference to any separate property which she has. The following provisions are contained in this enactment. Section 7: A married woman may maintain a suit in her own name for the recovery of property which, by force of the Indian Succession Act or of this Act, is her separate property. She shall have, in her own name the same remedies both Civil and Criminal, against all persons for the protection and security of such property, as if she were unmarried. She shall be liable to such suits, processes and orders in respect of such property as she would be liable to if she were unmarried. Section 8: If a married woman has separate property and enters into a contract with another person with reference to such property, or on the faith that her obligation arising out of such contract will be satisfied out of her separate property, such third person shall be

entitled to sue her and to recover against her whatever he might have recovered in such suit had she remained unmarried.

This last section has come up before the Courts more than once for consideration and has given rise to a conflict of decisions. The difficulty in each case has really arisen owing to the Transfer of Property Act containing a provision (Section 10) that while no person can acquire property with a restraint on his alienating it, a married woman constitutes an exception to the rule, and she can be restrained from disposing of property, given to her as gift or by way of settlement.

In *Hippolite* v. *Stuart*, 12 Cal. 522, a creditor sought to proceed against her separate property, which was subject to a covenant restraining her from anticipating it. The Calcutta High Court held, following English decisions, that such property was liable to the attached and sold and that the Transfer of Property Act which was passed eight years after the Married Woman Act did not alter the Law.

In *Tarachand* v. *Doozabai*, 11 Bom. 348, a Parsee lady who had a life estate given to her with a restraint on anticipation had created a charge over it in favour of a creditor from whom she had borrowed money. Farran J. doubted the validity of the reasoning in *Hippolite* v. *Stuart* but sitting as a single judge he did not like to differ from it. He therefore followed it, as it was an express judicial decision of a Bench of Judges interpreting the section.

The Madras High Court, however, in re Mantel, 18 I.L.R. Madras, 19, refused to follow the lead of Calcutta and held that the Transfer of Property Act allowed an alienation in favour of a married woman with a covenant restraining her from anticipating it, and this beneficent provision would be defeated if any creditor obtaining a decree against such a woman can seize her property or if she herself can charge it or sell it.

It does not appear that the Madras view has since been called in question.

Capacity to contract as husband's agent

Another important question is the capacity of the wife to bind the husband by her contracts. There will be no difficulty in cases in which the husband, in view of protracted absence or for special purposes, gives the wife an express power of attorney to act for him. But in the absence of such a power, the wife has the capacity to bind her husband for all necessaries purchased by her for the benefit of the household, unless the husband has, by express notice, stated or declared to the tradesmen that the wife should have no capacity to bind him, even in respect of such necessaries. If a firm has been habitually supplying goods to the family and the wife continues to purchase goods from the same firm, the husband would have to pay the bills sent in by the firm, though he did not authorize the particular purchase. If he intends that his credit should not be pledged any longer by his wife, he should, in order to be on the safe side, notify the firm that she is no longer his agent for the purpose of purchasing articles, and that he will not be bound by her bargains. If he expressly terminated her authority by prohibiting her from pledging his credit that would ordinarily be enough, unless his subsequent conduct has been such that such prohibition is not evident to others. The person who orders the goods need not be a legally married wife; if she lives with him and has the reputation of being his wife, she can bind her husband so called. It is not necessary that the husband should, in the first instance, tell the tradesmen that she has his authority to buy on his behalf. It is enough that he has behaved as if he has given her an authority to buy on his behalf. She need not say that she purchases as his agent. If there is such a course of conduct, as to entitle the tradesmen dealing with the family to infer that that she has authority from her husband, it is enough. There is however no implied authority to supply goods which are extravagant or in excessive quantities or far beyond the family's usual style of living. The style of living is not what an outsider may consider proper for a man with the husband's income, but the actual scale which the husband has

authorized the wife to adopt, even though it may be imprudent or too expensive for him.

If the husband and wife are living separately, the former's liability depends on the circumstances which brought about the separation. If they are such that the husband would be compelled to give the wife alimony, then he is liable to those who supplied her with necessaries. But if the separation was caused by her misconduct or adultery or if a sufficient allowance has been actually paid to her by the husband, then the husband is not liable to those who have given her credit.

Costs of Suit

If a wife brings a suit against her husband for divorce or dissolution of marriage or judicial separation or grant of alimony, or if under the Native Converts Dissolution of Marriage Act, the wife institutes a suit for a declaration that the marriage has become void and if she has no money of her own, the law provides that she should be entitled to have all the costs of her suit paid by the husband, even though the suit itself is against the husband.

Execution of decrees

Where a woman married or otherwise is sued and a decree is obtained against her for the payment of money the Civil Procedure Code exempts her from arrest or imprisonment in execution of such a decree. (Section 56.) The judgment creditor can only proceed against her property, if any. In execution of a decree against her, her own separate property alone can be attached and not even that, if she is restrained from alienating it: *Gaudoin* v. *Venkatesa Mudaly*, 30 Madras, 378: Also in Re *Mantel*, 18 Madras, 19.

Under the Criminal law, a woman can be arrested or sentenced to undergo imprisonment or pay a fine if she is found guilty of any offence, but in the exceptional case in which she takes part in the commission of an offence merely as the result of her husband's pressure or influence,

and not by her own separate voluntary act, she may be absolved from liability.

Miscellaneous

There are certain miscellaneous provisions which have to be kept in mind as regards married women.

The marriage of a female apprentice discharges a contract of apprenticeship, if any, which she has entered into as a single woman.

Section 20 (1) of the Succession Act 1925 provides that no person (husband or wife) shall, by marriage, acquire any interest in the property of the person whom he or she marries, or become incapable of doing any act in respect of his or her own property, which he or she could have done if unmarried. In this respect the law applicable to Christians differs from that applicable to Hindus and Muhammadans. A Muhammadan wife, on marriage, acquires a lien on her husband's property for dower and is entitled also to maintenance. The Hindu wife likewise is entitled to maintenance chargeable against her husband's property, self-acquired or ancestral. Under Christian law the wife does not get any right in the property of her husband, nor conversely does a husband get any right in the property of his wife merely by reason of marriage, unless of course there is an express ante-nuptial settlement of property in the name of the wife in consideration of the marriage. The rule laid down in Section 20 (1) of the Indian Succession Act, 1925 has, by subsection (2) (*b*) of the same Section, been expressly made inapplicable to any marriage, one or both of the parties to which, professed at the time of the marriage the Hindu, Muhammadan, Buddhist, Sikh or Jaina religion.

If a person makes a will before he marries, it is deemed to be revoked by his marriage, because the effect of the will may be to defeat the wife's claim to succeed to one-third of her husband's property (or one half of it if there are no children), which she is entitled to under the Indian Succession Act. This provision does not apply to a will made by a trustee in respect of

some other person's property in exercise of a power of appointment conferred by the latter.

Under the Trust Act II of 1882, a married woman for whose benefit property has been transferred or bequeathed, without power of alienation, is not entitled to ask for the transfer of the trust property to herself or to another on her behalf. (Section 58 and explanation thereto.) She is also disqualified from acting as a trustee, if the personal law applicable to her does not allow her to act as trustee. (Section 60, Explanation 1).

Under the Indian Succession Act 1925, Probate and Letters of Administration cannot be granted to a married woman without the previous consent of her husband, unless the deceased was a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person. (Sections 223 and 236.)

A condition restraining alienation on transfer of property to a married woman is declared not void. (Transfer of Property Act IV of 1882 Section 10.)

Children born of a valid marriage are deemed to be legitimate and can inherit under the Indian Succession Act to both parents. If a child is born to a woman during the continuance of her marriage, it is presumed to be a child born to her husband, unless it is proved that the husband had no access to her at the time of conception. (Indian Evidence Act Section 112.)

When there has been a valid marriage, the husband and wife have certain criminal and civil actions in respect of his or her conjux. The civil actions have already been referred to, viz., the suit for restitution of conjugal rights, the action for taking away one's wife, the action for keeping a wife away from her husband or concealing her, and the suit for damages for adultery committed with her. The following criminal actions also are available.

1. Section 496 of the Indian Penal Code: 'Whoever, dishonestly or with a fraudulent intention, goes through the ceremony of being married, knowing that he is not thereby lawfully married, shall be punished with

imprisonment of either description for a term which may extend to seven years, and shall be liable to fine.

2. Section 497 of the Indian Penal Code: 'Whoever has sexual intercourse with a person, who is, and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such a case the wife shall not be punishable as an abettor.

3. Section 498 of the Indian Penal Code: 'Whoever takes or entices away any woman who is, and whom he knows, or has reason to believe, to be the wife of any other man, from that man, or from any person having the care of her on behalf of that man, with intent that she may have illicit intercourse with any person, or conceals, or detains with that intent, any such woman, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.'

Law of Bigamy

4. Section 494 of the Indian Penal Code: Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Exception; this section does not extend to any person whose marriage with such husband or wife has been declared void by a Court of competent jurisdiction, not to any person who contracts a marriage during the life of a former husband or wife, if such husband or wife, at the time of the subsequent marriage, shall have been continually absent from such person for the space of seven years, and shall not have been heard of by such person as being alive within that time, provided the person con-

tracting such subsequent marriage shall, before such marriage takes place, inform the person with whom such marriage is contracted, of the real state of facts, so far as the same are within his or her knowledge.

Section 495 : whosoever commits the offence defined in the last preceding section, having concealed from the person with whom the subsequent marriage is contracted the fact of the former marriage, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

In order that there may be a conviction for bigamy, there must be two marriage ceremonies gone through by the same person.

The first marriage should have been a valid marriage; that is to say it should not have been within prohibited degrees or be invalid by reason of its being bigamous. The first marriage must also be subsisting, i.e., it should not have been dissolved by a court of law. Muhammadan Law allows a minor girl to repudiate a marriage on attaining puberty. If a girl has so repudiated her marriage, it is not subsisting and she does not commit bigamy by marrying again. The law of bigamy does not apply to Hindu males or Muhammadan males, who are permitted, by the personal law applicable to them, to marry more than one wife. But it does apply to Hindu and Muhammadan females.

The second marriage, if gone through for the purpose of enabling the two persons to live together, is bigamous even though it took place outside the British Empire or was also invalid for some reason other than that it was bigamous.

A Hindu husband, who having a Hindu wife living marries a second time, after his conversion to Christianity will commit bigamy; not so a Muhammadan husband, as his first marriage is dissolved by his conversion.

There seems to be a difference of opinion as to whether a person who has married a Christian girl when he was a Christian can afterwards become a Hindu or Muhammadan and marry a second wife while his first wife is alive. The better opinion seems to be that he

cannot. *Skinner* v. *Orde*, 14 Moore's Indian Appeals 309. Musammath Ruri, Punjab Reporter No. 5 of 1919. Lazar, 30 Madras 515. But these rulings were dissented from in Michael's case 3 Madras High Court Reports Appeal 7 and Anthony's case 33 Madras, page 371.

If the husband or wife was absent for a continuous period of seven years and the conjux has not heard of his or her having been alive during that period, the conjux can marry again provided he informs the person with whom he or she contracts the marriage as to the real state of facts. In England it is necessary that the party marrying should have a bona-fide belief that the first husband or wife was dead. This is not necessary in India. There do not appear to have been any decided cases in India in connexion with this exception, in which Christians or Indian Christians figured as parties.

CHAPTER VI

Divorce and other reliefs

The leading reliefs and remedies in connexion with the severance of the marriage tie, are now provided for by the Indian Divorce Act of 1869. This enactment is based on the law relating to matrimonial affairs, as it has been worked out through centuries by the Ecclesiastical Courts of England, and as it is now administered by the Probate, Matrimonial and Admiralty Division of the High Court of England. The Act expressly provides that, with regard to such matters, the Courts in India shall, subject to the provisions of this enactment, act and give relief on principles and rules, which, in the opinion of the Courts, are, as nearly as may be, conformable to the principles and rules on which the Court for Divorce and Matrimonial causes in England acts and gives relief. (Section 7.) Whenever therefore there is a lacuna found in the Act or a rule is ambiguous or incomplete, reference is made to English Law to supply the defect.

The rules of procedure prescribed by the Divorce Act are, in many respects, different from those laid down by the Code of Civil Procedure for other classes of cases. Though in cases under this Act, the Code of Civil Procedure ordinarily regulates the proceedings between the parties, it has to give way, where it comes into conflict with the special rules laid down in this Act. (See Section 45.) It has been held for instance that a petitioner cannot ask for attachment before judgment of the respondent's property. *Philips* v. *Philips*, 37 Calcutta 313; and that a petition for dissolution of marriage cannot be decided on admissions made by the parties: *Bai Kanku* v. *Shiva*, 17 Bombay 624.

The peculiar features of proceedings under the Divorce Act are as follows.

(1) There is a special party known as a co-respondent in Divorce Actions, who is entitled to plead and let in

evidence, within certain limits and at certain stages of the proceedings. Also there is room for a third person to intervene either in protection of his or her own interests or to prosecute a case which the parties are unwilling to press. (*Bailey* v. *Bailey*, 30 Calcutta 490 ; *Stevenson* v. *Stevenson*, 4 C.W.N. 506; *King* v. *King*, 6 Bombay 416.)

(2) A final decree for dissolution is not passed immediately after an enquiry. First, a decree *nisi* is promulgated and then the same comes on for confirmation on the Petitioner's motion, not less than six months later. Until six months after the confirmation of the decree *nisi*, the parties are still deemed to be man and wife and neither of them can marry or cohabit with other people. They can cohabit with one another but such an act makes the decree *nisi* a nullity.

(3) The rule as to costs is very peculiar. The husband has nearly always to pay not only his own costs but also the costs of the wife. Even when the wife sues him for dissolution of marriage or restitution of conjugal rights, he has to pay her costs. This provision is enacted, as otherwise a wife may be debarred from procuring the reliefs that she desires or from putting up her defence merely from want of money.

(4) During the pendency of the suit brought by a husband or wife, a Court may order alimony to be paid to the wife ; and even after the suit is decreed the husband may be asked to secure to the wife such gross sum of money, or such annual sum for any term not exceeding her own life, as the Court thinks reasonable.

(5) Proceedings can be held in camera.

(6) Any attempt at connivance between the parties is discouraged, as otherwise parties will bring about collusive divorces, in order to enjoy the liberty of marrying again.

(7) Where the husband or wife has condoned the offence committed by the other party, the suit fails.

(8) The Act is very strict with reference to jurisdiction. The ordinary rules as to jurisdiction have to give way to the special rules contained in the Act.

(9) The District Court in the Moffussil and the

High Courts in the cities are the proper fora for bringing an action; but the District Court cannot pass a final decree. Its decree becomes valid only when it is confirmed by a Bench of three judges of the High Court.

(10) The rules as to who are minors and what should be done with minor children are also peculiar. In the case of Indian fathers, boys who have not completed sixteen years and girls who have not completed the age of thirteen are deemed to be minors and their guardianship is entrusted to the person who is least guilty of offence against the marriage laws.

I. To whom does the Divorce Act Apply?

Relief is given under this Act only to a person who professes the Christian religion and who resides in India at the time of presenting the petition. There are further limitations to the effect that a decree of dissolution of marriage should be passed only (*a*) when a marriage has been solemnized in India[1] (*b*) or where the adultery, rape or unnatural crime complained of has been committed in India or (*c*) when the husband has since his marriage exchanged his profession of Christianity for some other form of religion, and that it shall not pass a decree for nullity of marriage except in cases where the marriage itself has been solemnized in India. The Act also is strictly confined to the reliefs specifically mentioned in it. If for instance a person sues for breach of contract to marry, or for damages for fraud in going through a form of marriage, or even where a decree for nullity is claimed on the ground of fraud perpetrated upon one of the parties, the case, though of a matrimonial nature, not having been expressly provided for by the Act, does not come within the purview of this Act. (See *Gasper* v. *Gonselvez*, 13 Bengal Law Reports, page 109.)

Where certain persons were married as Hindus and then became converts and divorce was sought on the ground of adultery committed before conversion, it was

[1] This has been recently modified so far as people of British blood are concerned. Divorces can be granted in India when the marriage took place in Britain.

held that the suit did not lie. (*Perinayagam* v. *Pothukanni*, 14 Madras 382). Where on the other hand two persons had both been married as Hindus and had subsequently both become converted to Christianity and divorce was sought on the ground of adultery committed after conversion it was held that it was governed by this Act. The Act has been held not to apply to polygamous marriage connexions like those celebrated between Muhammadans (2 N. W. P. 270) or to a case in which a Christian lady who had been married to a Parsee was impleaded as a respondent. In I.L.R., 17 Madras, 235 *Thapita Peter* v. *Thapita Lakshmi* where petitioner and his wife were married as Hindus, and the wife lived an openly adulterous life and then both became converts but the wife continued her adulterous connexion, the Madras High Court held that it had no jurisdiction under this Act as the marriages contemplated by the Act are those found on the principle of a union of one man and one woman. The Calcutta High Court took a different view in *Gobardhan Dass* v. *Jasadamoni Dassi*, 18 Calcutta, page 252.

The rules as to residence have also been considered by the Courts; where, for instance, the respondent was in England or where though the parties were in India, they were not residing within the jurisdiction of the Court in which the petition had been lodged, the relief sought was denied to the petitioners. Latterly however the term 'residence' has been allowed to be interpreted to mean more or less continuous stay instead of being confined to cases where the two parties are all the time in residence either together or separately within the jurisdiction of the Court which tries the suit. In *Jagendra Bannerjee* v. *Elizabeth* (3 C.W.N. 250), petitioner was not continuously resident in India though he made occasional visits; in *Nusservanjee Wadia* v. *Eleonora*, 38 Bombay, 125, the respondent was in England though he often came to India: in both cases relief was refused. The place where the parties were married is not taken into consideration in a suit for dissolution of marriage though it is an important factor in suits for nullity. (*Ryte* v. *Ryte*, 20 Bombay, 362.)

II. Suit for Restitution of Conjugal rights

This is the simplest of the proceedings dealt with under the Act. A suit for restitution of conjugal rights as between Hindus and Muhammadans can be brought in any Civil Court, but as between Christians it has to be instituted only in the District Court or High Court. Where the husband or wife is, without reasonable cause, living away from the society of the other, the conjux in each case may sue for restitution of conjugal rights. Section 32. The only defences available to a respondent are those which are mentioned in the Act as grounds justifying a suit for judicial separation or for nullity of marriage. (See *Lopez* v. *Lopez*, 12 Calcutta, 706.) This relief brings together parties who are inclined to go apart.

The remaining reliefs provide for the partial or total severance of the marriage tie in cases in which one or other of the parties is desirous of such a remedy. There are three kinds of severance provided for in the Act. The first is a decree of nullity of marriage. The second is a decree dissolving the marriage. The third is judicial separation, which takes the place of the English divorce *a mensa et toro*! There is nothing corresponding to the English divorce *a vinculo* in India.

III. Nullity of marriage

A man or woman may apply for a decree of nullity of marriage under this Act, on the following four grounds alone:

(*a*) That the respondent was impotent at the time of the marriage and also at the time of the institution of the suit. The impotency may not be general; if owing to hysteria or impediments in the organs or other special causes one party is unable to deal with the other party, though he or she may be generally not deficient, he or she is liable to have a decree passed against him or her. The impotency may be either congenital or one brought about by syphilis as in some of the reported cases. (See *Birendra Biswas* v. *Hemlata*, 24 C.W.N. 914, 25 C.W.N. 706, 48 Calcutta 283.)

(*b*) That the parties are within prohibited degrees of

consanguinity, whether natural or legal, or of affinity. It is rather unfortunate that the Act does not define what consanguinity and affinity are. These have to be discovered in each case from the family law or customary law governing the parties, (*Lopez* v. *Lopez*, 12 Calcutta, page 706) and they are not necessarily those degrees which are prohibited by the law of England, unless the parties are members of the Church of England. When the Act was promulgated a person was prohibited from marrying his deceased wife's sister, but now under the Marriage with Deceased Wife's Sister Act of 1907, such a marriage is allowed in England. Though this Act has not been made applicable to India, the Courts will not declare such a marriage as being within prohibited degrees and therefore null and void, but clergymen may do still decline to celebrate such a marriage.

(*c*) That either party was a lunatic or an idiot at the time of the marriage.

(*d*) That the former husband or wife of either party was living at the time of the marriage, and the marriage with such former husband or wife was still in force. The Act is strictly confined to persons following a monogamous system of marriage. Section 21 provides, that if children are born of the issue of a subsequent marriage, contracted in the belief that the former husband or wife was dead, they are deemed to be legitimate and shall be entitled to succeed to the estate of the parent, who at the time of the marriage was competent to contract. Likewise in the case of a decree of nullity being passed on the ground of insanity, the children are deemed to be legitimate and entitled to succeed to the competent parent.

As already remarked, this Act only applies where a decree of nullity of marriage is sought on one of the four grounds mentioned therein. If a suit to have a marriage declared null and void is launched on any other ground, for example on the ground that it was brought about by duress, coercion, undue influence or fraud, or that one person personated another, the suit can apparently be brought in any of the Civil Courts in which it may be instituted in the case of Hindus or Muhammadans.

IV. Dissolution of Marriage

There is a big difference made between a husband's petition for dissolution of marriage and a wife's. Thus, while the husband can seek to have his marriage dissolved on the ground of adultery alone, the wife can do so only if she proves (1) adultery coupled with cruelty or (2) adultery coupled with desertion or (3) incestuous adultery or (4) marriage with another woman with adultery, or (5) bigamy with adultery or (6) rape, sodomy or bestiality. (7) She can also petition for dissolution when her husband has exchanged his profession of Christianity for the profession of some other religion and gone through a form of marriage with another woman, when for instance, a Christian husband has married a Christian woman and then become a Hindu or Muhammadan and, under the protection of those systems of law, married other women. Where a complaint of adultery is made by a husband, he has to disclose the name of the adulterer or co-respondent, and bring him on record, unless he is excused by the Court from doing so by reason of the fact, that the respondent is leading the life of a prostitute, or the petitioner knows of no person with whom adultery has been committed, or that in spite of due inquiry the name of the alleged adulterer is unknown, or that the alleged adulterer is dead. When cruelty is alleged, there must be express averments or particulars of the cruelty, so as to enable the respondent to meet them in his pleas. Cruelty includes not only the infliction of physical force or duress: a course of conduct that caused the wife's health to suffer may be cruelty. (*Thomson* v. *Thomson*, 39 Calcutta, 395. *Biswas* v. *Biswas*, 48 Calcutta, 283.) Desertion implies an abandonment against the wish of the person charging it. In *Fowle* v. *Fowle*, 4 Calcutta, 260, desertion is defined as conduct showing unmistakeably that the husband meant to give up his wife in spite of an actively expressed wish to the contrary. See also *Wood* v. *Wood*, 3 Calcutta 485. The terms incestuous adultery, bigamy with adultery and marriage with another woman are carefully defined in the Act. (Vide Section 3.)

The following are valid defences to an action for dissolution of marriage: (Section 14.)

(1) Petitioner has condoned the offence of adultery on the part of the respondent. Condonation involves not merely willingness to overlook the offence, but continuing to cohabit after knowledge of it. Condonation is discussed and explained in *Croix* v. *Croix*, 44 Calcutta 1091. If the party whose wrong doing is condoned commits adultery again, after the condonation, the original offence revives and can be made the subject of a charge. (*Pereira* v. *Pereira*, 5 Madras, 118. *Moreno* v. *Moreno*, 47 Calcutta, 1068.)

(2) Petitioner has connived at the offence, or been accessory to it. In *Holloway* v. *Holloway*, 5 Allahabad, 71, a husband separated himself from his wife merely because she ran into debt, and she then committed adultery; it was held that the husband was not entitled to dissolution. *X* versus *X*, 22 Madras, 328 was a similar case in which a wife given to drink was deserted unreasonably by her husband. She was then guilty of adultery. He was held not entitled to ask for dissolution.

(3) The petitioner has been guilty of a collusive or private arrangement with the respondent for procuring the divorce. The Law discountenances collusive proceedings instituted for the purpose of enabling both parties to marry again. In *Christian* v. *Christian*, 11 Calcutta, 651, the petition for dissolution was dismissed because both parties filed petitions that they had agreed that the marriage should be dissolved. In *Bowen* v. *Bowen*, 36 Calcutta, 874, after a petition was filed, the parties came to an arrangement by which respondent agreed, for a consideration, not to contest the petition. This agreement subsequently fell through; she did contest the petition and charged her husband with adultery and collusion; held that, as the agreement had fallen through, there was no collusion.

(4) Petitioner has been guilty of laches or unreasonable delay in filing his petition. *Palmer* v. *Palmer*, 41 Bombay, 36. *Devasagayam* v. *Pichamuthu* (12 years held not too long, as for 9 years there was no Divorce

Act in India). *Roe* v. *Roe*, 3 B. L. R. 14 years too long. *Williams* v. *Williams*, 3 Calcutta, 668.

(5) Petitioner has himself been guilty of adultery or cruelty or desertion without reasonable cause. *Arthur* v. *Arthur*, 26 Allahabad, 553. *Rhine* v. *Rhine*, 33 Allahabad, 500.

(6) Petitioner has been guilty of misconduct which led to adultery on the part of the other party. *Holloway* v. *Holloway*, 5 Allahabad, 71. *X.* v. *X*, 22 Madras, 328.

(7) The parties have subsequently agreed to live together. *Dare* v. *Dare*, 34 Madras, 339. *Culley* v. *Culley*, 10 Allahabad, 559.

The decree in the first instance is passed as a decree *nisi* or preliminary decree, and becomes absolute only when confirmed not less than six months afterwards. Notice or service of summons after a decree *nisi* and before confirmation is not insisted on in cases where the respondent's whereabouts are not discoverable. Even after a decree *nisi* is passed, parties who did not contest the matter in the first instance for good reasons, are allowed to enter upon their defence and produce evidence; but a co-respondent alone cannot do so. The decree *nisi* will not be so confirmed, if, in the meanwhile, it is discovered that the proceedings have been brought about by collusion between the parties. Where the decree has been passed by a District Judge, it becomes final only when it is confirmed by the High Court.

V. Judicial Separation

While a decree for dissolution of marriage permits either of the parties to contract a fresh marriage after the expiry of six months from the date of the final decree, a decree for judicial separation does not have that effect, so that the parties continue to be man and wife. The husband or wife may obtain a decree for judicial separation (1) on the ground of adultery, or (2) cruelty, (3) or desertion without reasonable cause for two years or upwards. Such a decree when passed may be reversed on the petition of the affected party, on the ground that it was obtained in his or her absence and that there was

reasonable excuse for the alleged desertion, when desertion was the ground of such decree. Similar defences to those which were mentioned in connection with the petition for dissolution of marriage can be pleaded, *mutatis mutandis*. The Act provides for the wife who is judicially separated earning or acquiring or holding her own property, and being able to contract and sue and be sued in a Court of law. But these provisions have become obsolete and unnecessary since the passing of the Married Women's Property Act III of 1874. Alimony is nearly always decreed in favour of the wife when judicial separation is allowed, and if the said alimony is not paid by the husband, he will be liable for all necessaries supplied by tradesmen to the wife.

These are the main remedies provided by the Act. There are in addition to certain ancillary reliefs for which also express provision is made. One of these provisions has become obsolete, because as the law stands at present, a husband has no right to take the property of his wife and she has therefore no reason to ask for protection as against him. But that privilege was conferred on her only by the Married Women's Property Act of 1874, five years after the Divorce Act became Law.

VI. Protection Order

Any wife, to whom Section 20 of the Indian Succession Act 1925 does not apply, may present a petition, if the husband deserts her, for an order to protect her property from interference by the husband and all his creditors and persons claiming under him. If the husband or his creditor or person claiming under the husband seizes, or continues to hold any of her property after notice of any such order, he is liable to restore to her the specific property, and also pay her a sum equal to double its value.

VII. Alimony

The Court may under Section 36 order alimony to be paid to the wife, for her maintenance, during the pendency of any proceedings under this Act, the alimony not to

exceed one-fifth of the husband's average nett income for the three years next preceding the date of the order. After the final decree is passed, declaring a marriage to be dissolved or permitting a judicial separation, alimony may be permanently decreed in favour of the wife, either in the shape of a lump sum, or a sum of money payable periodically during her life time. The alimony is fixed with reference to the position in life and conduct of the parties. No maintenance is decreed when the wife is living with the co-respondent. (*Gordon* v. *Gordon*, 3 re B. L. R., 3.) Alimony once paid cannot be recovered. In *Morgan*, 18 Allahabad, 238, maintenance may be decreed at any time, either after institution of proceedings under the Act or after a decree *nisi*, *Thomas* v. *Thomas*, 23 Calcutta, 913 or even a reasonable time after a final decree, *Lloyd* v. *Lloyd*, 44 Madras, 989. If alimony ordered is not paid, the recalcitrant party's property can be attached: *George* v. *George*, 11 B. L. R., 2 and if he is interested in getting a decree *nisi*, the same may be refused. If he denies that he has means, the matter could be enquired into and settled by the Court itself or by an officer of Court. *Johans* v. *Johans*, 6 C. W. N., 414, *Stevenson* v. *Stevenson*, 26 Calcutta, 764. If permanent alimony is decreed, it cannot be made a charge or absolute interest on the husband's property, *Fowle* v. *Fowle*, 4 Calcutta, 260.

VIII. Settlements

In connection with a decree of dissolution of marriage or for judicial separation for adultery of the wife, a Court may also make such a settlement of her property for the benefit of the husband or children or both, as may be deemed reasonable, and it may, for the purpose of making such a settlement alter or modify, after a decree absolute, any arrangements contained in any ante-nuptial or post-nuptial settlement made between the parties.

IX. Custody of children

During the pendency of judicial proceedings a Court may make all reasonable arrangements for the mainten-

ance and education of the minor children of the marriage sought to be dissolved or affected. Like-wise after the decree it may make permanent arrangements for the custody, maintenance and education of the minor children having regard to the circumstances of each case. The person guilty of adultery will not be entitled to such custody.

X. Re-marriage

Six months after a decree absolute dissolving a marriage, it is open to the respective parties to marry again. If the marriage takes place within the period limited it is void altogether. (*Jackson* v. *Jackson*, 34 Allahabad, 203. *Battie* v. *Brown*, 38 Madras, 452.)

There are special provisions as to procedure, for instance, that the whole or any part of any proceeding may be heard with close doors (Section 53) and that, on any petition presented by a wife, praying that her marriage may be dissolved by reason of her husband having been guilty of adultery coupled with cruelty, or of adultery coupled with desertion without reasonable cause, the husband and wife are competent and compellable to give evidence relating to such cruelty or desertion (552). These are to be found in Sections 45 to 56 of the Act.

CHAPTER VII

Parentage, Minority, and Guardianship

Under Hindu Law, the sovereign is deemed to be the guardian of all children and minors. There is a similar theory in English Law: and the Courts exercise the function of the Sovereign in this regard by watching over the interests of 'Infants' and shielding them and their property from different forms of injury to which they may be exposed. To quote an old author, 'The Law protects these persons, preserves their rights and estates, excuseth their laches and assists them in their pleadings; the judges are their counsellors, the jury are their servants and the Law is their guardian.'

Again under Hindu Law, the child acquires rights in the family property when he is still in *Ventre Sa Mere*; and in English Law, which is followed by the Indian Succession Act, a child in the same position is deemed to be an heir to his parents, the rights of a posthumous child being exactly the same as those of a child born before his father's death.

Hindu Law recognizes the right, under certain limitations, of a childless person to adopt a son to himself, and, within still stricter restrictions, of a widow to adopt such a son to her deceased husband so as to inherit his estate. Muhammadan Law has a doctrine of acknowledgment, by which a person could acknowledge a child, whose paternity is doubtful, so as to give him rights of inheritance. But Christian Law has nothing corresponding either to adoption, fosterage or acknowledgment.

Under Hindu Law again, a son as soon as he is born becomes entitled to a share in the joint family property, and acting through a properly constituted guardian, could ask for a division of the property even when he is a minor. Though Muhammadan Law does not

recognize any rights on birth, still a person possessing property is not entitled to give away the whole of it by will. He must leave at least one-third of his estate to his sons. Under the law applicable to Christians, on the other hand, a child, even if a male, has no rights whatever in his father's property in the absence of an express settlement till the death of the father, and it is open to the parent to dispose of the whole of his property by will, without leaving anything to his own natural-born sons.

As both Hindu and Muhammadan Law recognize concubinage, they have special rules dealing with the inheritance of illegitimate sons. There are no such rules applicable to Christians. A bastard would inherit to his mother but would not to his putative father, unless express provision is made in his favour by the father in a settlement or will.

In order that a child may inherit to its parents, it must be proved to have been born of them.

There is a provision in the Indian Evidence Act that a child born to a married woman, after her marriage, is deemed or presumed to be the child of her husband but the presumption can be rebutted by proof that the husband could have had no access to her at or about the time that the child was conceived. This rule of Evidence is expressed in this way: Section 112. 'The fact that any person was born during the continuance of a valid marriage between his mother and any man or within 280 days after its dissolution, the mother remaining unmarried, shall be (conclusive) proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time that he could have been begotten.'

Age of Majority

The leading enactment which deals with the subject of majority is an Act known as the Indian Majority Act, Act IX of 1875. Till this Act was passed, there were great variations in the age of majority, it being 15, sometimes 16 for Hindus, 16 or puberty for Muhammadans and 21 for Christians. But the Majority Act has made a

simple rule that the age of majority should be 18 for every person of British Indian domicile. Such a person, therefore, whether male or female, attains his or her majority on the completion of 18 years from the date of his or her birth. There are two important exceptions to this rule laid down in the Indian Majority Act itself. The age of majority is 21 in the case of any person whose estate has been taken charge of by the Court of Wards, under the Court of Wards Act. It is also 21 for any one to whose person or property or both a guardian had been appointed by order of any Court in British India. The age of majority is extended from 18 to 21, the moment an order of Court is made appointing or declaring a guardian, although the guardian may subsequently die, or be removed or cease to function as a guardian.

The Act applies only to persons having a British Indian domicile. A minor is deemed, if legitimate, to follow the domicile of his father; if illegitimate, of his mother: if his father or mother has a British domicile, then the minor will attain majority, as under the English Law, when he completes 21 years of age.

Effects of Minority

I. Criminal Liability

Under the Criminal Law a person of extremely tender years cannot be indicted for any criminal offence or convicted thereof. Section 82 of the Penal Code enacts that nothing is an offence which is done by a child under seven years of age. Section 83 provides that nothing is an offence which is done by a child above seven years of age and under 12, who has not attained sufficient maturity of understanding to judge of the nature and the consequence of his conduct on that occasion. In the case of a minor over 12 years of age, therefore, the law allows a conclusive presumption that he has a full sense of responsibility and knows the nature of any offence that he may commit; but in the case of a child under 12 years of age and above 7, there has to be proof that he has sufficient maturity of understanding to judge of the nature

and consequences of his conduct, and if such understanding is not proved to have existed, he is entitled to an acquittal. Though the minor may thus be held free from liability, one who aided and abetted him in his offence cannot escape; thus for example, a person who received property stolen by a minor is liable to be convicted of that offence, though the minor may be eligible to an acquittal. Under the Whipping Act a minor found guilty of an offence may be whipped instead of being sent to jail; or may be sent to one of the Reformatory schools now established under Act III of 1897 Madras Act. Vide also Borstal Schools Act 1925.

II. Capacity to Give Evidence

Under the Indian Evidence Act I of 1872 a similar test is used for the purpose of ascertaining whether a minor is competent to give evidence before a Court of Law. Under Section 118 all persons shall be competent to testify, unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by reason of tender years, extreme old age, disease whether of body or mind, or any other cause of the same kind. Instead of fixing an age limit on the attainment of which a boy or girl can be said to be competent to testify, it is left open to the Judge, in his discretion, to decide, in each case, as to whether a minor witness has attained such maturity of understanding that his evidence can be taken to be of any value. For the purpose of satisfying himself as to his understanding, the Judge may put any questions to the infant or minor and if he is satisfied that the child could understand questions put to him and answer them intelligently, he can be examined as a witness.

III. Capacity to Sue and Be Sued

Under the Civil Procedure Code a minor can sue or be sued, but he must have always a guardian to conduct the suit for him. If there is a regularly constituted guardian appointed by a Court or by the will of one or other of his parents, such guardian will be appointed to

conduct the suit on his behalf; but if no such guardian is forthcoming, the Court may give notice to his natural guardian and either appoint him, if he is willing, or appoint any other near relation who may be willing to litigate the suit on the minor's behalf. The Court however in its discretion will not appoint the natural guardian or a near relation, if his interests are opposed to those of the minor in that particular suit. In the absence of natural guardians or near relations, a judge may appoint an officer of Court or any vakil as a guardian-ad-litem for the purpose of conducting the suit, in which case the guardian so appointed would be entitled to some remuneration. For the provisions of the Civil Procedure Code 1908 relating to the appointment of a guardian for the purpose of a suit or preceeding, vide Order 32 of the Code.

If a decree is passed against a minor, it can be enforced in execution only against the minor's property and not against the minor himself personally.

IV. Capacity to Contract

Formerly there used to be very elaborate rules as to a minor's capacity to contract. But they have been greatly simplified by the Indian Contract Act IX of 1872 which provides that a minor cannot enter into any contract. 'Every person is competent to contract who is of the age of majority according to the law to which he is subject and who is of sound mind and not disqualified from contracting by any law to which he is subject.' (Section 11.) A minor's contract is absolutely void: *Mohori Bibi* v. *Dharmodas Ghose*, 30 Calcutta, 539. Such a contract cannot be confirmed or ratified by him when he comes of age, even though it might be for his benefit. The contract is void, even where the person contracting with the minor is not aware of his minority. No action can be brought against a minor to whom money has been lent or property sold. Where, however, a minor has made a false representation that he is a major, and taking advantage of the fraud thus played by him upon another person, obtains any advantage, he may be compelled to restore the advantage that he has received

from the transaction. He is not allowed to profit by his own fraud. Though a minor is not himself bound by his contract, a person who contracted jointly along with him is not released from liability and a person who stood surety for him has been held to be liable. (*Kashibai* v. *Shripat*, 19 Bombay, 697.) A minor cannot appoint an agent or authorise an agent to do what he cannot do himself. He can repudiate the statements or acts or admissions of a person purporting to act as his agent; A minor can, however, be appointed an agent and when he acts on behalf of his principal, the latter will be bound by such acts: a father will be bound for instance to pay for goods bought on his behalf by his minor son acting as his agent; but the minor is not himself liable to his principal or to third persons.

Under the sections of the Contract Act relating to partnership, a minor can be a partner in a firm, and can sue and can be sued as such partner. Section 247 : A person who is under the age of majority according to the law to which he is subject may be admitted to the benefits of partnership, but cannot be made personally liable for any obligation of the firm but the share of such minor in the property of the firm is liable for the obligations of the firm. Section 248 : A person who has been admitted to the benefits of a partnership under the age of majority, becomes, on attaining that age, liable for all obligations incurred by the partnership as soon as he was admitted, unless he gives public notice within a reasonable time of his repudiation of the partnership. Though a minor may be incapable of undertaking any personal liability, by reason of his incompetency to contract, he is not precluded from accepting benefits. A gift therefore may be made to a minor: and property may be settled on him while he is still a minor: and similarly he may be admitted to the benefits of a partnership. When the partnership imposes onerous liability upon him, an option is given to him. He may, within a reasonable time after attaining majority, give notice repudiating the partnership, or he may confirm it, in which case, he will be treated as if he was competent to contract from the beginning.

Though a minor is not personally liable to return the money lent to him or to pay for all goods supplied to him, Section 68 of the Indian Contract Act lays down that if a person incapable of entering into a contract, for example a minor (or any one whom he is legally bound to support), is supplied by another person with necessaries suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such minor or incapable person. The question what are necessaries is a question of fact in each case. Things necessary are those without which an individual cannot reasonably exist such as food, raiment, lodging and the like, money spent on necessary education, medicine during illness and service where such service is absolutely essential. Articles of luxury are excluded except in the case where the minor in question comes of a rich family and is entitled to treatment according to the rank in which he was born. The principle applies only when goods are supplied to the minor himself and not where they are supplied to a third person even though on his behalf, for example, to a guardian.

A minor whether a Hindu, Muhammadan or Christian can enter into a contract of marriage. In the case of Indian Christians the husband must be at least sixteen years of age and the wife thirteen: till they complete eighteen, the consent of their guardian is necessary: if the consent is wrongfully withheld, the Court can sanction the marriage. For other particulars see the Indian Christian Marriage Act XV of 1872.

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A minor can enter into a contract of service and can sue to recover wages due to him or money paid by him or money 'had and received for his use.' Under the Madras Labour Act of 1903, a minor who is over sixteen years of age can enter into a Labour contract but if she is a girl, the contract cannot be enforced if her husband or guardian objects to it. Act XIX of 1850 lays down in detail the conditions under which a guardian can enter into a contract of apprenticeship on behalf of a minor. The form and contents of such a contract, the manner in which they can be amended or modified, the persons who

can thus bind the minor, and the rights and liabilities of the master and apprentice respectively are defined in the Act. There are strict rules as to the employment of minors in factories. Act XI of 1891 lays down that no child under nine can be employed, and that children cannot be employed in dangerous work or made to work more than 7 hours a day.

If a minor enters into an unconscionable bargain soon after he attains majority, and it is found that astute persons have taken advantage of his youth and immaturity of intellect or his expectations of coming into property, the Courts will relieve the minors embroiled in such bargains.

Guardianship

If a minor has property which requires to be carefully managed or if there is any dispute as to the control or custody of a minor, the question of a guardian for his person or property will arise. The leading provisions as to the appointment of guardians are now gathered together in an Act known as the Guardian and Wards Act VIII of 1890. This Act applies to Hindus and Muhammadans as well as Christians, in fact to all persons having their domicile in British India. It does not interfere with the classes of persons who according to Hindu or Muhammadan Law are entitled to act as guardians, or with the general powers conferred by different systems of personal law upon the natural guardians of the person or property of minors. Nor does it touch the powers of guardians appointed by will. The Act expressly provides that it does not affect any arrangements by which the person of a minor or his estate passes into the custody of the Court of Wards. The result is that the following kinds of guardians can exist:

(1) The natural guardian of a minor under (Hindu, Muhammadan or) Christian law, usually the father and failing the father, the mother. Who are entitled to act as guardian and in what order, what their powers and responsibilities are, are laid down in each system.

(2) Any guardian that may be appointed by such

natural guardian by will, or orally, where, as in the case of Hindus a will is unnecessary. The powers of these guardians will be limited by the provisions of the will or other arrangements made by the natural father or guardian.

(3) The De facto guardian, i.e., any near relation or interested person who takes charge of a minor, or looks after his person or property.

(4) The guardian appointed for the purpose of contesting a suit on behalf of the minor, usually known as a guardian-ad-litem.

(5) The Court of Wards, in cases where a minor's estate has, under the provisions of the Court of Wards Act, passed into the custody of that Court.

(6) Failing Nos. 1 and 2, the Court can appoint a guardian under the Guardian and Wards Act. Such a guardian will necessarily supersede the *de facto* guardian and may be preferred to the natural or testamentary guardian, for adequate cause shown. If the natural or testamentary guardian is, on the other hand, not proved to be unfit, the Court may declare him to be the guardian under the Act.

The District Court is the Court which, in the moffussil, has control over all guardianship matters and the Court to which, therefore, a petition must be presented either for the appointment or for the removal of guardians. Where there is an Original Side to the High Court, as in the Cities of Madras, Bombay and Calcutta, the High Court takes the place of the District Court.

A 'Minor' for the purpose of any case in which a guardian has been appointed under the Guardian and Wards Act is a person under twenty-one years of age. A 'Guardian' means a person having the care of the person of a minor or of his property, or both. A 'Ward' means a minor for whose person or property or both there is a guardian.

There is a regular form prescribed for the application which has to be presented to the District Court for the appointment of a guardian. This form is set out under Section 10 of the Guardian and Wards Act. The

particulars to be given are: the name, sex, religion, date of birth and ordinary residence of the minor, the nature, situation and approximate value of his property, his near relations, the person who has custody or possession of his person or property, where there is a guardian the name of that guardian, the qualifications of the guardian proposed, the causes which led to the application and, if the minor is a female, whether she is married and the name and age of her husband. When an application is made in the above form, either by a relative or a friend of the minor or any person desirous of being the guardian of the minor or by the Collector of the District, the Court gives notice to all the persons interested in the minor (specified in Section 11 of the Act) and may make interlocutory orders as to what is to be done with the person or the property of the minor pending the disposal of the petition.

The principal Section in the Act is section 17. In appointing a guardian or declaring a person who is already acting as the guardian as a Court guardian, the Court shall be guided by what appears in the circumstances to be for the welfare of the minor. In considering what will be for the welfare of the minor the Court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian, his nearness of kin to the minor, the wishes of a deceased parent or other existing relations and of the minor himself if he is old enough to form an intelligent preference. The Court cannot appoint or declare a guardian—(i) when the minor is a married female and her husband is not unfit to be her guardian; or (ii) when the minor has a father and he is not in the opinion of the Court unfit; (iii) when the Court of Wards is in charge of the Minor's estate and can appoint a guardian.

The guardian stands in a fiduciary relation to his ward. He must not make any profit out of his office and must not buy from or sell to his ward. A guardian must not set up any title adverse to a minor's interest or aid any one to do so: he must keep clear and accurate accounts and give full information about them to all

persons interested in the minor's welfare. He must bring suits and defend them when the ward's interests require it, and pay debts which might otherwise accumulate and deplete the estate. The guardian of the person of a ward must look to his support or maintenance, health, and education and such other matters as the law to which the ward is subject requires, such as Upanayan marriage, circumcision, etc. If the ward runs away from the guardian, the guardian can take proceedings for the ward to be returned to him, to be arrested for the purpose, or searched for under the sections of the Criminal Procedure Code relating to search. A guardian of the property of a ward is bound to deal as carefully with it as a man of ordinary prudence would, if it were his own property; but for making mortgages, sales, leases, exchanges, he has to take the special permission of the Court. Under Section 34 of the Act, the guardian may be called upon to give a bond, with or without sureties, for the due performance of his duties, to give a statement of the movable or immovable property of the ward, and to exhibit his accounts in Court from time to time.

Section 39 provides that a guardian who is appointed or declared by Court or by a Will or other instrument may be removed:

(*a*) for abuse of his trust;

(*b*) for incapacity or continued failure to perform the duties of his trust;

(*c*) for illtreatment or neglect to take proper care of his ward;

(*d*) for contumacious disregard of any provision of the Act or of any order of Court;

(*e*) for conviction of an offence rendering him unfit to act as guardian;

(*f*) for having an interest adverse to the faithful performance of his duties, unless it is proved that the adverse interest accrued after the death of the person who appointed him, or that that person made and maintained the appointment in ignorance of the existence of such adverse interest;

(*g*) for ceasing to reside within the local limits of the jurisdiction of the Court, if it is found that it is impracticable for him, by reason of the change of residence, to discharge his functions as guardian;

(*h*) in the case of a guardian of property, for bankruptcy or insolvency;

(*i*) by reason of the guardianship ceasing or being liable to cease, under the Law to which the minor is subject.

A guardian may ask the Court to be discharged from his function: his office may come to an end, if he is a guardian of the person, by his death, discharge or removal, by the ward's marriage (if a female), or by the termination of his minority, or by the father or natural guardian ceasing to be fit to act as a guardian. If he is a guardian of the property, his function will cease by his death, removal or discharge, by the termination of the minority of the ward, or by the Court of Wards taking up the property.

The Act also provides various penalties for unfaithful or contumacious conduct on the part of guardians. The judge may give a guardian directions as to how he is to act, and lay down rules for his guidance. The guardian too may apply to the Court for directions when he feels that he is in need of them.

A person does not lose his right to become a guardian by reason of his conversion. (*Muchoo* v. *Arzan*, 5 W. R., 235, *Shamsing* v. *Santabai*, 25 Bom., 551.) But if after he becomes a convert to Christianity or Muhammadanism, he relinquishes his natural rights to the custody and support of his children and other persons have been for continuous periods looking after the children, the Court will not restore such children to the convert. (*Mookoond* v. *Nobodip*, 25 Calcutta, 881, also *Joshy Assam*, 23 Cal., 290.) Generally speaking, any natural guardian may abdicate his functions, and if he does so for any length of time and if, more particularly, he handed over charge of his children to some one else, he cannot ask for their return. (22 M.L.J., 247.) In re Saitri, an

Ayah whose daughter had for eight years been handed over by her to a Mission and was brought up by that Mission was held not entitled to get back the custody of her daughter, even though it appeared that in the meanwhile the said daughter has been baptized as a Christian. (16 Bombay, p. 307. See also 1912 Madras Weekly Notes, page 53.) Where the minor has attained a certain age, though not the age of majority as laid down in the Indian Majority Act, and has sufficient discretion to look after his own affairs and does not want to go back to the custody of his father or other natural guardian, he will not be compelled to do so. (*Chukkerbutty* v. *Forman*, 12 Allahabad, 213.) A parent whose son has become converted to Christianity or Muhammadanism does not thereby lose his rights to continue as the guardian of his child, (*Reade* v. *Krishna*, 9 Madras, 391), but the Court will not assist parents to exercise their legal rights of custody in cases where there has been voluntary abandonment of parental rights. (3 Calcutta, 290; 1 Madras Law Times, page 347.) The re-marriage of a father or mother is no reason for depriving them of the custody of their children (unless it seems clear to the Court that the best interests of the minors would be served by their continuing with the parents or other relations). See 23 Calcutta, 290, where the law is discussed at great length. See also 22 M. L. J., 247; 1912 M. W. N., page 53; also 20 C. W. N., 608. The various actions which a guardian, natural or testamentary, can bring in order to enforce his rights of guardianship have been mentioned in another connexion (vide Chapter on Conversion). He can institute criminal actions for kidnapping and abduction of his ward; he can pray for a writ of habeas corpus; he can sue for damages for taking away a child from his guardianship or for keeping it away from his guardianship, and for the restoration of his rights as guardian.

This is not the place for enumerating who are the natural guardians of a minor under the different systems of personal law prevalent in India. Generally speaking under Hindu law it may be said that a father has the

first right to such guardianship and after him comes the mother. Paternal kindred are entitled to preference over maternal kindred. But a guardian cannot be appointed to the property of a minor who is a member of a joint Hindu family governed by the Mitakshara Law as such property must be under the control of the manager of the joint family. (19 Calcutta, page 301 ; 25 Bombay, page 353.) The minor has no separate interest in the same. Under Muhammadan Law also, the father is as a general rule preferred to the mother, but if the child is under seven years of age the mother is preferential guardian and, if it is a girl, the mother is preferred, till the girl attains puberty and the father afterwards, is the preferential guardian. The mother as guardian cannot touch or deal with her ward's property, as such a transaction is void altogether and need not even be set aside by the minor when he or she attains majority.

Ordinarily, a minor cannot enter into contracts. If any contracts have been brought into existence for his benefit, they must be effected through his guardian. If he is a Court guardian, his rights as to sale, mortgage, lease, etc., are strictly governed by the provisions of the Guardians and Wards Act: he has to get the permission of the Court before he enters on such transactions. If otherwise, the question arises in each case as to whether the contract is for the benefit of his ward. He can mortgage or even sell property for the purpose of maintaining the minor or celebrating his marriage or conducting necessary litigation or paying Government revenue or paying debts contracted by his father. Generally speaking, the powers of a natural guardian are wider than those of one appointed under the Guardian and Wards Act, while the powers of a testamentary guardian are strictly limited by the terms of the instrument under which he is appointed.

A minor is not personally liable for acts effected by his guardian, though his estate will be. But if the guardian has incurred legitimate expenses on the minor's behalf, and if they are proved to be for the minor's benefit, he is entitled to recover them in an action against the

minor. A compromise made on behalf of a minor must be proved to have been for his benefit, if it is to be enforced against him. All the acts of a guardian, strictly within his powers and done in good faith, bind the ward and his estate: but an unwarranted or unauthorised transfer is void as against the minor and can be set aside by him. The guardian is liable to his ward for breach of trust, waste, or maladministration and even for negligence in management. Under the Law of Limitation if the minor wants to set aside any transaction made on his behalf by his guardian, or indeed bring any action which he was incapable of bringing on account of his minority, he must do so within three years of his attaining majority; that is, if he falls within the ordinary limit prescribed by the Indian Majority Act, before he completes 21 years; and if he comes under the Guardian and Wards Act before he completes 24 years. Section 6 of the Limitation Act provides, that if a person entitled to institute a suit or make an application for the execution of a decree be, at the time from which the period of limitation is to be reckoned, a minor, he may institute the suit or make the application within the same period, after the disability has ceased as would otherwise have been allowed from the time from which by that Act the period begins to run in the case of an adult, provided that the time so allowed shall not be extended beyond three years from the cessation of the disability.

CHAPTER VIII

Inheritance or Intestate Succession

The Law relating to inheritance was codified, for Christians among others, by the Indian Succession Act X of 1865. It was a careful and, on the whole, a highly successful piece of legislation, as it has helped to avoid a great deal of unnecessary litigation. During the last sixty years however, the Act has been frequently amended; and valuable decisions have been passed, both in India and in England, with reference to the subject matter of the Act, which required incorporation. A new Act, called the Indian Succession Act XXXIX of 1925, has accordingly taken the place of the old; and advantage has been taken of the opportunity to incorporate not merely the amendments and decisions above referred to; but also the Law relating to administration which formerly lay scattered in different enactments like the SuccessionCertificate Act, and Probate and Administration Act. It applies to all Christians, Indian and Anglo-Indian: the expression 'Indian Christian' means, under the Act, 'a native of India who is, or, in good faith, claims to be, of unmixed Asiatic descent and who professes any form of the Christian religion.' This definition is new.

Some of the leading principles regulating succession under the Act may be here summarised.

(1) In the case of all persons to whom the Act applies, no distinction is made between inheritance to movable and that to immovable property. The law relating to succession to personal estate in England has been made applicable both to moveable and immoveable property in India, while the law relating to real estate with all its anomalies and complications has been left out.

(2) It is provided, however, that inheritance to immoveable property in British India must always be governed by this Act, while the Law relating to inheritance of movable property follows the law of the domicile of the person to whom inheritance is sought to be traced. This is a general and well-understood principle of International Law, and the Act merely gives effect to it. In practice, the Indian Succession Act governs most cases of disputed inheritance to property, movable or immovable, in British India, except in just a few instances, where an alien or a British subject has not acquired an Indian domicile, in which case the inheritance to his movables will depend on his domicile at the time of his death.

(3) No child obtains any interest in the property of his father merely by reason of his birth; and no married woman gets any interest in her husband's property merely by reason of her marriage. Section 20 (1) of the Indian Succession Act 1925 runs thus: 'No person shall by marriage acquire any interest in the property of the person whom he or she marries or become incapable of doing any act in respect of his or her own property which he or she could have done if unmarried.' This proviso is subject to the right of maintenance, the right to bind the husband by contracts for necessaries, the right to costs in certain cases and funeral expenses, mentioned *supra*.

(4) The widow is given a much more favoured position under the Act than under Hindu or Muhammadan Law. She is entitled to one-third of her husband's property if she has children or other lineal descendants by that husband, half the property if there are no children or lineal descendants but only kindred, and the whole, if there are neither lineal descendants nor kindred.

(5) The English doctrine that in the absence of all heirs half the property of the husband goes to the widow and the other half escheats to the Crown, is thus modified in India, the widow excluding the Crown altogether.

(6) As regards children no distinction is made

between the shares of the male children and those of female children of the person dying intestate. No distinction is also made between those who were born during the life time of the intestate and those who were conceived before his death, but subsequently born alive. If there is a widow, she gets one-third and the remaining two-third is divided among the sons and daughters equally. It is of course always open to any parent to give a larger share to his sons or daughters by will.

(7) If there are only children (sons or daughters) or only grandchildren (male or female) or only great grandchildren (male or female); that is to say, if all the heirs left by an intestate are in the same degree, the inheritance is distributed per Capita; each child gets exactly the same share as any other child; likewise each grandchild and each great grandchild. If, on the other hand, the heirs of a person consist of near and remote lineal descendants mixed up, that is to say, some of the heirs are children who have survived their father or mother, some are grandchildren by a deceased child (or children) and some are great grandchildren, the principle of per Capita inheritance cannot be applied, and inheritance is calculated per Stirpes (root or stock). If, for instance, a man dies leaving two sons and two granddaughters being the daughters of a pre-deceased son, then each of the sons will get one-third share, after deducting the share of the widow, and the two granddaughters will together get one-third, being the share which their pre-deceased father would have obtained if he was alive at the time of the intestate's death.

(8) No distinction is made in reckoning kindred between those who are related to the intestate through his father and those related through his mother, or between those who are related by full blood and those who are related by the half blood.

(9) As regards kindred, other than lineal descendants, the father excludes the mother for purposes of inheritance, and those in a degree nearer the propositus exclude those who are more remote in degree. The exception to this

rule is that when brothers and sisters of intestate and issue of pre-deceased brothers and sisters of the intestate are his heirs, the issue get the share which the brother or sister would have received.

(10) The Act contemplates only legitimate relationships and the issue of lawful wedlock in regulating succession. (*Smith* v. *Massey*, 30 Bombay, 500.)

Persons to Whom the Act is Applicable

Only portions of the Act have been extended to Hindus or Muhammadans to whom their own systems of law are made applicable by other enactments. The Act applies to (1) Europeans by birth or descent, domiciled in British India; (2) Anglo-Indians or persons of mixed European and Indian blood. (3) Native Christians, or Indian Christians, and their descendants, (4) Jews, (5) Armenians, (6) Parsees (in regard to testamentary succession alone). Special Rules for Parsi Intestates have been provided for in Chapter III of the Act. (7) Natives of India not exempted under Section 3 of the Act. (8) Europeans in India who have not acquired an Indian domicile; these are governed by the Indian Succession Act as regards immovable property in India but as regards movable property they are governed by the law of their domicile.

Domicile

The details relating to the Law of domicile will be set out in another place in this hand-book under the heading 'Status', but here a summary is given of the rules relating to domicile as found in the Indian Succession Act 1925. These rules are important because, under Section 5 of the Act, succession to immovable property in British India is regulated by the law of British India, wherever the deceased might have had his domicile at the time of his death, but succession to movable property is governed by the law of the country in which he had his domicile

at the time of his death. The rules as to domicile are applicable to Christians, but they do not apply to cases where the deceased was a Hindu, Muhammadan, Buddhist, Sikh or Jain. (Section 4.)

A person can have only one domicile for the purpose of calculating succession to all his movable property, wherever it may be found. Such a domicile is either a domicile of origin, or a domicile by acquisition. The domicile of origin holds good until a new domicile is acquired.

The domicile of origin of a person is the country in which his father was domiciled. In the case of a child of illegitimate birth, his domicile of origin follows the mother's domicile.

A person acquires a new domicile by taking up his fixed or permanent habitation in a new country, which is not the country of his domicile of origin. A member of His Majesty's civil or military service, or a professional man is not considered to have obtained a new domicile by acquisition, merely by going to reside there in exercise of his profession. A member of the Consulate or Ambassadorial Staff of another country does not acquire a domicile in the country in which he goes to reside as an ambassador, consul, member of consular staff, or servant of such persons. If a person comes to India for a temporary purpose, with the intention of returning to his native country as soon as the purpose is finished, he does not acquire a domicile in British India. If a person was resident in British India, in the absence of proof that he had a domicile elsewhere, the succession to his immovable as well as his movable property is regulated by the law of British India.

A person may acquire a new domicile in British India after residing in India for a year, by making a declaration in writing that he desires to acquire such a domicile and depositing the same in an office appointed for the purpose by the local government; but a person who has acquired a new domicile by residence or declaration can always resume his original domicile. A minor's domicile

generally follows that of the parent, from whom he derived his domicile of origin, a wife's domicile that of her husband. To each of these rules appropriate exceptions are provided. The minor's domicile does not change with that of the parent when (*a*) she is married (*b*) or he holds an employment in His Majesty's Service (*c*) or sets up a new business with the consent of his parent. The wife's domicile may differ from that of the husband when (*a*) she is judicially separated from him or (*b*) he is undergoing a sentence of transportation. An insane person cannot by himself acquire a new domicile.

The following are the cases decided in India on the subject of domicile :

In re *Eliott*, 4 Calcutta, 106, a Scotchman who had entered the service of the East India Company, and continued under the Crown after 1858 till his death in 1878, left a holograph will, which was not attested as required by the Indian Succession Act. Under Scotch Law the will was good. Held nevertheless that the Indian Succession Act applied ; and the will could not be admitted to probate.

In *Santos* v. *Pinto*, 41 Bombay, 687f, a Goanese subject, whose domicile of origin was at Goa, settled down at Bombay for the rest of his life. Though he married a second wife at Goa, and had an intention of returning to Goa, he never carried out his intention, and died at Bombay, leaving considerable property. Under Goanese Law his widow would have been entitled to half the property ; but it was held that his domicile was British India, that the Indian Succession Act applied, and that the will by which he gave his business and factory to a grandson held good.

In *Bonnaud* v. *Emile Charriol*, 32 Calcutta, 631, it was held that as regards movable property in India belonging to a foreigner settled in India, the burden lay on the person who contends that foreign Law applies, to prove the foreign domicile ; and if that is once established, the burden shifts to those who suggest that the domicile of

origin had changed; as regards immovable property in British India, the Succession Act must be applied.

In *Kashiba* v. *Shripat*, 19 Bombay, 697, a widow executed a bond in Kolhapur, a Native State, where also she stayed at the time of suit. But she was married to a British Indian subject; her domicile, though she was a widow, was therefore British Indian; and her capacity to contract must depend on British Indian Law.

In *Mailathi* v. *Subbaroya*, 24 Madras, a widow, an Indian subject of the French Government at Pondichery, had come into some property at Pondichery on her husband's death. She subsequently emigrated to Madras. Held that the property had not changed its character and the French Law applied.

In 1 Calcutta, 412, *Miller* v. *Administrator General*, a British subject having an English domicile married a widow who at the time of marriage had an English domicile. The widow became entitled under the Succession Act to shares in the movable property of her sons by her first marriage. She died leaving no lineal descendants. Her husband became insolvent. Under Indian Law, the Official Assignee on behalf of the insolvent could have got only half the share in the property; it was held that her domicile had become English, and that English Law applied, the Official Assignee got the whole of the movable property.

In 23 Calcutta, 506, *Hill* v. *Administrator General of Bengal*, a person with an English domicile married a wife with an Indian domicile. She left movable property, and the competition was between her husband and her next of kin. It was held that by marriage she had acquired an English domicile, and that under English Law the husband succeeded to the entire property. The Indian Succession Act did not apply.

Succession

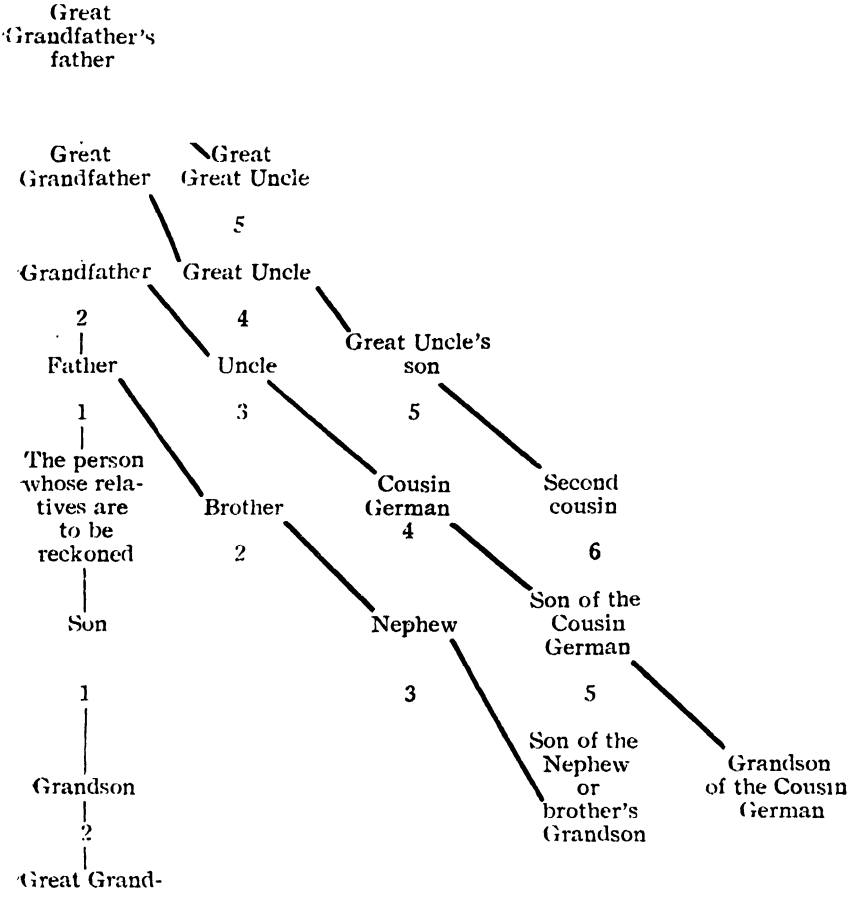
The rules relating to Succession only apply where the person who dies and to whose property inheritance has to

be traced, (known as the propositus), has not left a valid will which is capable of taking effect. The Indian Succession Act draws up a table of consanguinity showing how a man's heirs could be traced to the sixth degree. Lineal consanguinity occurs where one person is derived in direct line from the other: for example a man's son, grandson, father, grandfather. Collateral consanguinity exists between two persons of whom neither is descended from the other, but both are descended from the same common stock or ancestor. For tracing the degrees. nearer or remote, we have to calculate, first the stages from the person dying intestate to the common ancestor and then from the common ancestor down to the person who claims to be his heir. A father is an heir removed one degree from the propositus. A brother is two degrees removed; his son being a nephew will be three degrees removed, the nephew's son will be four degrees. Likewise the grandfather is two degrees removed, the son of a grandfather (who will be an uncle of the person dying) will be three degrees removed, his son (a cousin german) is four degrees removed and so forth.

Husband and Wife

Where a man has left a widow, and lineal descendants, (sons or daughters or grandchildren or great grandchildren) the widow will be entitled to one-third of his property. If he has left no lineal descendants, but kindred only, the widow gets a half share and the kindred get the remainder. If he has left no kindred whatever, as in the case of a bastard, the whole goes to the widow. She will not get a share, as above, if by a valid antenuptial contract she has been excluded from such a share. Whatever share the widow will get in the estate of her pre-deceased husband, the husband or widower likewise gets in the estate of a pre-deceased wife.

Table of Consanguinity



Lineal Descendants

Where a man has left a widow and lineal descendants, only two-third will be available for distribution among the lineal descendants, as the widow gets one-third. But if there is no widow, the whole of the property becomes divisible among the lineal descendants. If a man has left only sons and daughters, that is to say, if there is no grandchild by a deceased child, or a great grandchild by a deceased child also claiming as heir, then the property left by him is divided equally among the surviving children, no distinction being made between a son and a

daughter. Likewise in a case where a man leaves only grandchildren, they are all persons in the same degree and they inherit equally; so also, where he has left only great grandchildren they are all in the same degree and they inherit equally. These are three cases where inheritance is traced per Capita. The principle of per-Capita-distribution is applied among lineal descendants only when all the heirs of an intestate are of the same degree: also, when a man's heirs are his brothers and sisters, or kindred of the same degree.

When however a man leaves children and grandchildren, by a deceased child, or children, grandchildren and great grandchildren by a deceased grandchild, the inheritance is traced per Stirpes. Each of his deceased children who had issue is allocated a share as if he or she was alive at his death, and that share goes to his children or grandchildren. This is thus expressed in Section 40 of the Act:

(1) 'If the intestate has left lineal descendants who do not all stand in the same degree of kindred to him, and persons through whom the more remote are descended from him are dead, the property shall be divided into such a number of equal shares as may correspond with the number of the lineal descendants of the intestate who either stood in the nearest degree of kindred to him at his decease, or, having been of the like degree of kindred to him, died before him, leaving lineal descendants who survived him.'

(2) 'One of such shares shall be allotted to each of the lineal descendants who stood in the nearest degree of kindred to the intestate at his decease; and one of such shares shall be allotted in respect of each of such deceased lineal descendants, and the share allotted in respect of each of such deceased lineal descendants shall belong to his surviving child or children or more remote lineal descendants, as the case may be; such surviving child or children or more remote lineal descendants always taking the share which his or their parent or parents would have been entitled to respectively if such parent or parents had survived the intestate.'

Kindred

Where the intestate has left no lineal descendants, his widow gets half, and the father, if he is alive, gets half. (If the widow is dead he will get the whole.) If the father too is dead, and the intestate's mother and brothers or sisters are living, they divide the property equally. If some of the brothers and sisters are dead leaving issue, a share is set apart for the dead brother or sister as if he or she was still alive, and such share goes to their respective children. If the mother alone is alive and the intestate has left no brothers or sisters or issue by them, the mother gets the whole. When the mother is dead and brothers and sisters are alive, they divide the property equally. If any brother or sister is dead leaving issue, his issue gets the share which he would have got if he was alive. If a man has died without parents, brothers or sisters, it is divided equally among those who are nearest of kindred to him, according to the table given above. Among kindred, therefore, the general principle is that the father excludes the mother, and the nearer exclude the more remote. If there are neither widow, lineal descendants, nor ascendants nor consanguine heirs, the property of the intestate escheats to the Crown.

There is an important point where Indian law differs from the English law. If a child, grandchild, or other lineal heir has any money given to him or settled on him for his 'advancement', the same is not deducted from the distributive share to which he will be entitled under the Act. (Section 49.)

Decided Cases

Time and again it has been contended that the rules found in the Indian Succession Act are not applicable to Christians who have elected to keep to or follow the Hindu Law.

In *Abraham* v. *Abraham*, 9 Moore's Indian Appeals page 239, an Indian had married an English woman but he and his family had observed the Hindu Law. The Indian Succession Act had not then been passed. It

was held by the Privy Council that, by family custom, Hindu Law was applicable to the parties.

In *Ponnusamy* v. *Doraisamy*, 2 Madras 209, parties had become converts before the Succession Act had become Law, and not knowing the English rules they had followed Hindu Law in their family arrangements. The Courts would not disturb such arrangements.

In *Joseph* v. *Vathiar of Nazareth*, 7 M. H. C. R., page 121, no family custom was alleged or proved. It was held that the Indian Succession Act would apply.

In *Dagree* v. *Pacoti*, 19 Bombay, 783, evidence was sought to be let in that members of the Koli (fishermen) caste who had become Christians were still keeping up Hindu customs. It was held that such evidence was inadmissible.

In *Administrator General* v. *Anandachari*, 9 Madras 466, it was held that the Indian Succession Act governed the inheritance to the estate of a convert to Christianity: his Hindu wife would have been entitled to inherit but for the fact that after he became a convert she had renounced all her rights: his father was therefore his heir.

The course of decisions on this point would have been uniform but for a decision passed by the High Court of Bombay in *Ghosal* v. *Ghosal*, 31 Bombay, 25. In that case two brothers had become converts and one of them had died. His brother claimed his property by right of Survivorship under the Hindu Law; his widow claimed it as his heir under the Indian Succession Act. Sir Lawrence Jenkins thought that the Act was not exhaustive, and that the principle of Survivorship was not dealt with under the Act, and held that the brother succeeded as Survivor. Quaere, whether this is good law. In *Tellis* v. *Saldhana*, 10 Madras, page 69, on exactly similar facts, the Madras High Court held that the Succession Act would apply, and the widow succeeded as heir.

The point however is now set at rest once for all by the decision of the Privy Council in *Kamawati* v. *Digjibai*, 43 Allahabad, page 525. One Randi Singh, a convert to Christianity, died leaving, inter alia, a sister's daughter

who claimed one-twelveth share in his property under the Indian Succession Act and a Hindu brother who claimed the whole of it by survivorship. Their Lordships decided in favour of the sister's daughter as 'nothing but confusion could be produced' if the Indian Succession Act was not made applicable. 'The plain Law of the Succession Act would be eviscerated and in each case an enquiry might have to be entered upon as to whether a deceased subject of the Crown wished or by his acts compelled that the Law of the land should not be applied to his case.

Rulada v. *Haripada*, 40 Calcutta, page 407, is a very instructive case. One Panday left six sons, two of whom became converts to Christianity at different times; after such conversion, Panday alienated his property to strangers. It was held that each converted son had become entitled to a share in the family estate as it stood on the date of his conversion, and could recover the same from the alienee.

(See also *Nepen Bala Debi* v. *Sibikanta Bannerjea*, 15 C. W. N., 158 for an exhaustive discussion of the same rule.)

CHAPTER IX

Wills

The idea of a will was unknown to ancient Hindu Law. When one comes to think of it, the authority conferred upon a person of controlling the devolution of his property after his decease is an extraordinary power, which could only have come into existence after legal conceptions had attained a considerable measure of development. As it is such an extraordinary extension of a living person's rights, the Law prescribes very strict limits within which alone testamentary dispositions could be effected, and enacts careful and elaborate rules for the interpretation or construction of such documents. At the present day all Hindus of mature age and sound understanding can make wills but they can only dispose of property which they may alienate during their life-time, e.g., self-acquired property in the provinces to which the Mitakshara applies, and coparcenary property under the Dayabhaga Law. The provisions of the Indian Succession Act, chapter vi, which relates to wills apply only to those Hindus, Buddhists, Jains and Sikhs who live in the cities of Madras and Bombay and the Province of Bengal. They are considered too elaborate for Hindus of other provinces and cities.

The Act does not apply to Muhammadans who have their own rules as regards testamentary arrangements. A Muhammadan cannot, by will, dispose of more than a third of the surplus of his estate after payment of funeral expenses and debts.

The rules in the Indian Succession Act, Part vi, sections 57 to 190 are substantially the same as those applicable to personality in England and apply to all Christians in India having a British Indian domicile.

Explanation of Terms

A *will* means a legal declaration of the intentions of a testator with respect to his property, which he desires to be carried into effect after his death. (Section 2.)

There are two kinds of wills: privileged and un privileged.

A *Privileged* will is one that a soldier could execute when on an expedition or on actual warfare, or a mariner, when he is at sea. In the case of such persons, a simple kind of will without elaborate or complicated formalities is considered enough. (Vide sections 65 and 66 of the Indian Succession Act.)

All other wills are called *unprivileged* wills and are governed by the rules and formalities hereafter to be mentioned.

A *holograph* will is one, the entire body of which is written by the testator in his own hand writing.

A *codicil* means an instrument made in relation to a will, and explaining, altering or adding to its dispositions, and is deemed to form part of the will.

Who can make a Will

Every person who is not a minor and who is not of unsound mind may dispose of his property by will. (Section 59.) Vide illustrations to the section.

A person who is generally out of mind may make a will during a lucid interval. A person who is deaf or blind can make a will if he knows what he is doing. If owing to illness or intoxication or other temporary cause, a person does not know what he is doing, he cannot make a will. A married woman can dispose by will of any property which she could have given away during her life-time. If a will is made as the result of fraud or co-ercion or such importunity as takes away the free agency of the testator, it is void. (See illustrations to section 61.)

The burden of proving testamentary capacity rests, when it is challenged, on the person who propounds the will and applies for probate; *Sukh Dei* v. *Kedar Nath*, 3 Calcutta, 405, but if that onus is discharged, it shifts to the side attacking the will of proving circumstances which invalidate it. Proof of mere weakness of understanding is not sufficient ground for refusing probate; nor is the

existence of strange delusions or wrong motives or a bad disposition, nor physical weakness nor paralytic attacks nor proof of natural intelligence impaired by old age, illness or influence. A testator need not have a perfectly balanced mind; it is enough if he understood what he was doing. He need not actually write or dictate the will; if he gave instructions as to the disposal of his effects, it is enough.

If the will is brought into existence while the testator is under the influence of a person who was in a position to dominate his mind or occupied a fiduciary position with reference to him, the burden is thrown on such person of showing that no undue influence was exerted by him. In the case of a will made by a purdanashin lady, a special onus rests on those who support the will to prove that she thoroughly understood what she was doing. When the party who wrote or prepared a will gets some benefit under it, he must show that the testator knew and approved of all the terms of the will. (*Lacho Bibi* v. *Gopi Narain*, 23 Allahabad, 472.)

Formalities to be fulfilled in Wills

1. The testator must sign; or affix his mark to the will, if he cannot sign. Where he affixes his mark, his name has to be written by some other person for him, but in his presence and by his direction.

The testator may sign in his own name or by a name usually assumed. He need not sign on every page. Initials have been held to be enough; or a seal or stamp when he is in the habit of using one. A thumb impression is sufficient or a mark guided by the hand of another. When another person writes the testator's name, he must be a person other than the attesting witnesses. When a person touches the pen, without making a mark and then hands it to another to write his name, it has been held to be sufficient.

2. The signature of the testator, or his mark and the signature made on his behalf must be so placed at the foot of the will or at the bottom of the page, that it should

appear that it was intended to give effect to the writing as a will.

3. A will must be attested by two or more witnesses, each of whom has seen the testator sign, or has received from the testator a personal acknowledgement that he has signed it. If the testator cannot sign, the attesting witnesses must either be present when he makes the will and some one signs it for him, or receive an acknowledgement of the mark of the testator.

Want of attestation is fatal; but attestation need not be made at the time the testator executes. If a registering officer hears an acknowledgement of the will by the testator, his signature counts as an attestation; any other person who is present at the time to identify and sign will also count as an attestor. Attestors must not be marksmen. If there are two genuine attestations, and forged attestations are subsequently added, that circumstance does not invalidate the will. The attestor must sign after the testator.

Formerly it was thought that if a legacy or benefit was given to an attesting witness or his wife under the will the attestation was void; but the Act provides that the attestation is good, but the attesting witness loses the benefit of the legacy. This result happens even where there are more than two attesting witnesses. The reason given for the rule is 'the suspicion or chance of possible collusion which is favoured by the prospect of benefit.' (3 Madras, page 244.)

Limitations on the Making of Wills

1. A person can only dispose of what belongs to him. No higher right therefore will be passed to the grantee than what the grantor had at the time of his death. *Nemo dat quid non habet.*

2. A testator cannot direct the accumulation of the income arising from his property for any particular period, at the end of which the property with the accumulation or the accumulation alone is to go to some person mentioned. Such property will be disposed of as if no

accumulation had been directed; as otherwise a man's heirs may for an indefinite period be kept out of all enjoyment of his property, with a view to benefit some remote person who may never come into existence. When the property is immovable, or when accumulation is directed to be made from the death of the testator, the direction shall be valid in respect only of the income arising within one year next following the testator's death, and at the end of the year, such property and income will be disposed of respectively as if the period during which the accumulation has been directed to be made had elapsed.

3. No man, having a nephew or niece or nearer relative, has power to bequeath any property for any charitable uses except by a will executed at least twelve months before his death, and deposited within six months since its execution in some place provided by law for the safe custody of wills. When a testator died bequeathing his property to charitable uses, without leaving adequate provision for his wife, it was held that a wife did not come within the term 'nearer relative', though a son would, as 'kindred' only were contemplated by the Act and not relationship by marriage. (*Administrator* v. *Simpson*, 26 Madras, 232.) A man's illegitimate child does not come within the term 'nearer relative.' (*Smith* v. *Massey*, 30 Bombay, 500.)

4. Where a bequest is made to a person, not in existence at the testator's death, subject to a prior bequest, the later bequest is void unless it comprises the whole of the remaining interest of the testator in the thing bequeathed.

5. No bequest is valid whereby the vesting of the thing bequeathed may be delayed beyond the life time of one or more persons living at the testator's death and the minority of some person who shall be in existence at the expiration of that period and to whom if he attains full age the thing bequeathed is to belong.

If a bequest is made to a class of persons with regard to some of whom it is inoperative by reason of the above two rules, such bequest is wholly void.

If a bequest is to take effect after a bequest which has become void by the above three rules, that bequest is also void.

These rules are known as the rules against perpetuities. A bequest for masses for the souls of the dead has been held void as infringing the rule; *Colgan* v. *Administrator General*, 15 Madras, 424, but a valid dedication of premises for religious purpose is not void; *Bhuggobutty* v. *Gooroo Prosanno*, 25 Calcutta, 112; when however there is no real dedication but under colour of one, property is really left in perpetuity for the benefit of the descendants of the testator it is void. (14 B.L.R., 175.) The rule applies to moveables as well as immoveables, 20 Bombay, 511.

Revocation, Alteration and Revival of Wills

A will can always be revoked, or altered by the testator at any time when he is competent. (Section 62.)

A later will, which is valid in all particulars, *ipso facto* cancels all earlier wills.

Every will is revoked by the valid marriage of the maker of the will. This important provision of law has been enacted so that a person's wife and children may not be disinherited altogether by a will made when the testator was not thinking of marriage. This provision does not apply to wills of Hindus or Muhammadans except in the cities of Madras, Bombay and the province of Bengal. It does not also apply where a will is made in exercise of a power of appointment, i.e., when a man is invested with power to determine the disposition of property of which he is not the owner.

A will may be revoked not merely by an express writing declaring an intention to revoke the same and executed in the way in which wills ought to be executed, but also by burning, tearing or otherwise destroying of the same by the testator or some one in his presence and by his direction, with the intention of revoking it. The revocation of a will does not revoke a codicil attached to it. The act of cutting or tearing must destroy the

entire will, and it must be clear that the testator intended to revoke or had an animus revocandi. The power of revocation cannot be delegated to another, nor can an unauthorized destruction be ratified subsequently by the testator.

Construction of Wills

The chapter dealing with this topic is one of the longest in the Act, but as it consists of rules drawn up for the guidance of Courts in interpreting the language contained in wills, it deals with adjective rather than with substantive law. The rules embodied in the Act are based in the first instance on judicial decisions pronounced by English Judges during the course of several centuries; and ultimately on common sense. It is not proposed here to repeat these minute rules here, as they can be ascertained by reference to the Act itself. (Sections 74 to 112.) But a short summary of the principles on which they are based may be of interest.

1. A will speaks from the death of the testator. Any arrangements or settlements made or death-bed gifts granted before the actual decease of the testator are not affected by the will. The language used in the will has to be construed with reference to the state of circumstances which existed at the time of the testator's death. (Section 90.)

2. The main principle of construction is that the Court should try to give effect to the real intentions of the testator. These intentions have to be gathered not by emphasizing individual phrases or sentences in a will, but by reading and construing the will as a whole. If a will or bequest does not express any definite intention, it is void. (Section 89.) If two clauses in it are totally inconsistent, the last one prevails. (Section 88.) That interpretation is preferred which gives effect to the will or has a sensible meaning, to one which is senseless or absurd. (Section 84 and 85.)

3. When a will is ambiguous or defective on the face of it, outside evidence as to the intentions of the testator is inadmissible, (Section 81), but where the words

used are unambiguous but doubts arise when we try to apply them to surrounding facts, extrinsic evidence can be received. (Section 80.) The Court may in all cases enquire into material facts about the testator, his family, disposition, circumstances etc., for the purpose of ascertaining the right application to be given to his words. (Section 75.)

4. Where property is bequeathed to a person, that person gets the whole of the dead person's interest in the property. (Section 95 and 97.) All property not disposed of by specific legacies, goes to the residuary legatee. (Section 103.)

5. If a legatee dies before the testator the legacy lapses and falls into the residue, unless it appears that the testator intended it to go to another person. (Section 105.) But if he is alive at the death of the testator, it becomes vested in him; if he happens to die before he receives it, it goes to his representatives. The rule as to the lapse of a legacy does not apply where a bequest is made to a child or lineal descendant of the testator; if such a legatee dies during the life time of the testator, his heirs or legal representatives will get it.

6. If a bequest is made to a class, the class has to be ascertained with reference to the time of the testator's death.

7. Where a bequest is made to a person, described in a particular way and no person exists who corresponds to that description, it is void. (Section 112.) The words sons, daughters, children, in a will, mean legitimate issue.

Legacies

Sections 110 to 119 of the Act deal with different kinds of legacies. It is not possible to go into detail about legacies, but the leading terms used in the Act require explanation. A legacy may be made payable on the death of a testator, no time being mentioned for its taking effect. It may also be payable after the death of the testator on the happening of an event which is sure to happen. In each case it is a *vested legacy.* Even if

the legatee dies before he receives the legacy it will pass to his legal representatives.

If the legacy is made payable on the happening of an event which may or may not happen or in case a specified uncertain event does not happen, it is known as a *Contingent legacy* and it will become vested when the uncertain event happens or has become impossible in the latter case.

Where a bequest imposed an obligation on the legatee, it is called an *onerous* bequest, and the legatee can enjoy the benefit of it only if he accepts the burden as well.

A *conditional* bequest is some thing which is intended to take effect on the fulfilment of a certain condition. There are various rules made about conditional legacies. A testator, for instance, cannot make a bequest directing that the subject of the bequest should be enjoyed in a particular manner by the legatee, or so enjoyed that it secures him a specified benefit.

A bequest to an executor does not take effect, unless the executor proves the will or manifests an intention to act as an executor.

There is a distinction made between a specific legacy and a demonstrative legacy. Where a testator bequeaths a specified part of the property which is distinguishable from all other parts of the estate, the legacy is specific. The rules relating to such a legacy are to be found in Sections 143 to 149.

Where a testator bequeaths a sum of money or other commodity, and refers to a particular fund or stock from which the money or commodity is to be taken and paid out, the legacy is *demonstrative.* (Sections 150 and 151.)

A legacy is said to be *adeemed* when it ceases to exist as the property of the testator at the time of his death or has been converted in to some other form of property. Detailed rules relating to ademption are laid down in sections 152 to 156.

When an article, the subject of a legacy, is subject to a pledge, lien or encumbrance created by the testator, the legatee takes the article or property subject to the lien, pledge or encumbrance. But this rule does not apply where arrears of rent or revenue are due by the testator

or where a call was due in respect of shares owned by him or where money has to be expended to complete the title of the testator. In these cases the legatee can take the property without having to pay the rent, the revenue, the call or the money spent in making a good title.

Where a fund is bequeathed, the legatee is entitled to the interest that has accrued on it.

Where an annuity is bequeathed, it is deemed to be an annuity for life only, unless otherwise specified. Where a legacy is bequeathed to a creditor, he takes the legacy and can also recover the debt.

In certain cases the legatee is put to an election as to whether he would accept or reject a benefit or accept or reject one or more of several alternative courses, proposed in the will. The rules relating to this are laid down in Sections 180 to 190.

A gift made in contemplation of death is not governed by the forms or rules relating to a will. It takes effect from the moment when possession is handed over to the donee. But it can be resumed by the giver. It does not take effect if the donor recovers from an illness during which it was made or if the donor survives the donee. Section 91.

Gifts made in contemplation of death have to be carefully distinguished from ordinary gifts made during a person's life time or *inter vivos*, which are dealt with by the Transfer of Property Act Sections 123 to 130.

A simple form for making a will is given in the appendix.

CHAPTER X

Administration of the Estate of a Deceased Person

In this Chapter, it is proposed to deal with the various classes of persons, curators, executors, administrators and the like, who are allowed to handle the property of a deceased person, and their powers and responsibilities; also with the order in which the property, if any, left by a deceased person, has to be distributed among his neirs, legatees, and creditors; incidentally, reference will be made to the formalities that have to be fulfilled at different stages in the administration of an estate, the payments that have to be made, and the applications that have to be filed.

Formerly, the provisions relating to this portion of the law were found scattered in many different enactments which it was not always easy to reconcile with one another. Fortunately, the new Indian Succession Act (Act XXXIX of 1925) has gathered together, in a single measure, at least as regards Christians, the various rules governing the administration of a daceased person's property. Occasional references may have to be made to other Acts like The Administrator General's Act and the Registration Act, but in the main, the Indian Succession Act is the great storehouse from which the rules relating to administration have to be gathered.

I. Curators

When a person dies, leaving property moveable or immoveable, and another who has no right to it, has either actually taken hold of the property of the deceased or threatens to take forcible possession of such property, an application may be made to the District Judge of the District in which the property is situated, for the protection of such property. (Sections 192 to 210 of the Indian

Succession Act.) Such an application has to be presented within six months of the death of the person whose estate has been seized or is in danger. It may be presented by a relative of the deceased or by his friend or by an agent, or by the Court of Wards in cases which fall within their cognizance. On receipt of the application, the District Judge, if he is satisfied that it is well founded, issues notice to the party complained of, and after hearing him, he may adopt one of four courses : he may either order the said person to hand over possession to the petitioner or applicant ; and for this purpose, he may determine the right to possession in a summary manner directing the party defeated to institute a regular suit if so advised : or he may allow the person in possession to continue, on giving security, subject to such orders as he may issue regarding inventories of the property in his possession, for the securing of title deeds, and so forth : or he may appoint a curator conferring upon him such powers as are necessary for dealing with the situation that has arisen : or, finally, he may delegate to the Collector or an Officer subordinate to the Collector the powers of a Curator.

II. Executors

The District Court, or in the Cities of Madras, Calcutta, and Bombay, where there are Original Sides to the High Courts, the High Court sitting as a Court of Original Jurisdiction, has power to grant probate and appoint executors. In order that an executor may be appointed, there must first be a valid will, and secondly, a valid appointment of an executor in the will. The provisions relating to wills have already been set out in detail in Chapter ix.

If the will is in private custody, it can be presented for registration before the Officer entitled to register such documents. A small payment has to be made before such Officer will register the will. In many cases, however, the will has already been deposited by the testator in the Office of the Registrar, and where that has been done, the will is merely taken out of his office and registered there.

The Indian Succession Act provides that in the case where a person bequeaths his property or any considerable portion of it, to charitable purposes, to the detriment of his lineal descendants or kindred down to the grade of nephews and nieces, the will has to be executed at least 12 months before the testator's death and should have been deposited in a Registration Office at least 6 months before the death. Generally speaking, it is always safe, even if no provision is made for charitable purposes, to have the will deposited in a Public Office like the Registrar's ; otherwise, the will is apt to disappear, or be defaced, altered, or modified. Where a Registration Officer feels any doubt as to the genuineness of the will, it is open to him to hold an enquiry for the purpose of satisfying himself as to its genuineness and record evidence for the purpose ; and as a result of his enquiry, either register the will or if he is dissatisfied refuse to register it ; in either case, there is an appeal provided against his order to the Registration Officer for the District, to whom that officer is subordinate. The registration of a will, however, is not a formality that must be fulfilled. The parties interested in it may carry it directly to the District Court, and apply for Probate in respect of it. But registration proceedings have the effect of bringing into the open any person who has an interest in opposing it, and laying base the grounds of his opposition ; and for that purpose, if there is any the slightest doubt about the will, it is safe to have it registered.

After registration, an application is made to the High Court, or the District Court, as the case may be, for probate. The Court gives notice to the persons interested in the property, and if there is no opposition, it at once issues a Probate with the will annexed. If, on the other hand, a person to whom notice has been issued, raises any objection (which is known as a *caveat*) the same is enquired into and the issue of probate postponed till after the matter is settled as between the parties. When once probate is issued, the decision is said to be a judgment *in rem*, that is to say, the

probate is good as against all persons whatsoever, and not merely against the parties who contested the issue of the probate in the Court. All creditors and debtors of the estate, and all persons claiming from the deceased as heir or legatee, are bound by the terms of the probate.

A question has sometimes been raised as to whether it is always necessary to apply for a probate or Letters of Administration. For certain purpose it is essential. Section 212 of the Indian Succession Act provides: 'No right to any part of the property of a person can be established in any Court of Justice, unless probate or Letters of Administration, have been granted by a Court of competent jurisdiction.' Section 214 provides: 'No Court shall pass a decree against a debtor of a deceased person for payment of his debt to a person claiming on succession to be entitled to the effects of the deceased person or to any part thereof or (*b*) proceed upon an application of a person claiming to be so entitled, to execute against such a debtor a decree or order for the payment of his debt, unless a probate or letters of administration are produced or a certificate from the Administrator General under Sections 31, 32 of the Administrator General's Act, or a succession certificate under the Indian Succession Act or the Succession Certificate Act, 1889.' So if a debt due to the deceased has to be collected, a probate or letters of administration or succession certificate is absolutely essential; also in cases where the deceased had a decree or order in his favour, and the said decree or order has to be executed. In other cases, it is not absolutely essential; if, for instance, the beneficiaries under a person's will are his own wife and children and no dispute is likely to arise in respect of the administration of the estate by one of them, and no debt has to be collected or rights to property established probate is not necessary; but where there are outsiders mentioned as legatees under the will, or where legacies are given to public or private bodies for charitable purposes, or if there is any chance or likelihood of a dispute being raised immediately or on a future date as to the administration of the estate of the deceased, it is always the safe and proper course to take out probate,

although it is apt to prove an expensive proceeding, as a fee of three per cent has to be paid on the value of the estate.

Probate is only granted to an executor appointed by the will; but such appointment may be either express or by necessary implication. Probate cannot be granted to any person who is a minor or a person of unsound mind; nor can it be granted to a married woman without the previous consent of her husband. When several executors are appointed, probate may be granted to all of them simultaneously or at different times; if one of such executors dies, the survivor or survivors can carry out the representative functions. If a codicil appoints separate executors, those executors have to be appointed in preference to the persons mentioned in the will, and may supersede such persons if they have already been appointed. Any executor may decline the responsibility, but if he once declines, he cannot afterwards apply to be appointed. If there are no executors mentioned in the will, or if the executors decline the appointment, or have died one by one, administrators may be appointed.

A Probate or Letters of Administration can be granted for a limited purpose. (See *infra.*) A probate of a will establishes the will from the death of the testator and renders valid all intermediate acts of the executor as such. The issue of probate supersedes any Certificate issued under the Succession Certificate Act, and if any suit brought by a person who has obtained a succession certificate is pending, such person is superseded by the executor; and after the grant of probate, no person other than the executor appointed under it shall have power to issue or prosecute any suit or act as a representative of the deceased.

III—Administrators

If a deceased person has left property, but has not left behind him any testamentary instrument, or if any will left by him is, for any reason, found to be invalid, or if executors appointed under the will decline or renounce

their office, or die or become incapable of acting, or die before the whole estate has been administered, an administrator may be appointed. The application has to be made to the High Court, or the District Court, notices are issued as before, and if there is a will, proof has to be furnished by the person supporting the will, while persons who object to the will may file their caveats (objections). If there is no will, an administrator is appointed after notice to the parties interested. Under Section 218, if the deceased has died intestate and is a Hindu, Muhammadan, Buddhist, Sikh or Jain, administration is granted to any person or persons who according to the personal law of the parties, would be entitled to all, or any portion of, his estate. When there are several such persons, any one of them may be appointed; but, if the deceased does not fall within any of the five classes just mentioned, if, for instance, he is an Englishman or an Indian Christian, special rules are made as to the order in which administrators are appointed. The widow is entitled to preference, unless on account of some personal disqualification, she is excluded by the Court. When the widow is appointed, any person or persons may be associated with her, who would be entitled if there was no widow. If there is no widow, the administration is committed to the person or persons who would be beneficially entitled to the estate, provided that where the mother is alive, she is entitled to be sole administrator. Those who stand in equal degree of kindred are equally entitled to administration. The husband who survives his wife has the same right in respect of administration of his wife's property as the widow has in her husband's estate. A residuary legatee is also entitled to ask for letters of administration in place of a creditor, under Sections 232, 233 of the Act. The next person mentioned in the Indian Succession Act as the person entitled to Letters of Administration, is a creditor: but under the Administrator General's Act, the Administrator General is entitled to preference to a creditor.

Letters of Administration entitle the Administrator to all the rights belonging to the intestate as if administra-

tion had been granted at the moment after his death ; but there is one important point of difference between an executor and an administrator. Whereas all acts of an executor, even though those performed by him before his appointment are valid, Letters of Administration do not render valid any intermediate acts of the administrator tending to the diminution or damage of the intestates' estate.

Limited Grants

Both probate and Letters of Administration can be granted for a limited time, or for a limited purpose, or until a certain event happens, or until a certain event does not happen. These rules are laid down in Sections 237 to 260 of the Act. As the need for such limited grants does not ordinarily arise, it is not necessary in this hand book to deal with them in detail. Where a will has been lost, for instance, or is being withheld by somebody, Probate or Letters of Administration may be granted till it is discovered. Where an executor is absent in another country or is a minor or lunatic, Letters of Administration may be granted till he returns, attains majority, or becomes of sound mind. Some administrators may be appointed to carry out some only of the purposes mentioned in a will ; while others may be asked to take charge of other functions. An administrator may be appointed only for the purpose of filing suits, or only for the purpose of collecting and preserving property, or only for the purpose of bringing a suit against an administrator who has been guilty of malversation.

Alteration and Revocation of Grants

If, after grant, of letters of administration, a will is discovered or a codicil is found out, the grant may be altered. Errors in names and descriptions or in setting out the purpose or purposes of limited grants may always be amended. It is provided under Section 263 that the grant of Probate or Letters of Administration, may be revoked for the following reasons :

1. That the proceedings taken to obtain the grant were defective;
2. That the grant was obtained fraudulently, by false suggestions, or by concealment of material particulars;
3. That the grant was obtained by means of untrue allegations which affected the law applicable to the case;
4. Where the grant has become useless or inoperative;
5. Where the person to whom the grant was made has neglected or omitted to perform his functions.

Procedure

Many rules of procedure in relation to the grant of probate are laid down in Chapter IV, Sections 264 to 302. The form of an application is laid down under Section 276. Section 268 provides that the Civil Procedure Code regulates proceedings relating to the grant of Probate as far as may be. Sections 264, 266, 267, 270 describe the powers of a District Judge. Section 273 provides that probate or Letters of Administration shall have effect over all the property and estate of the deceased throughout the province in which it is granted, and shall be conclusive against all debtors, all persons holding property which belong to the deceased, and all persons delivering property to the executor or administrator. In certain places, a District Delegate may take the place of a District Judge, making the orders provided by this Act. No probate can be granted until after 7 days from the death of the testator, and no Letters of Administration till after 14 clear days. The Chapter also deals with the penalties that may be imposed on executors or administrators, and with the orders or directions that may be given to such persons. Where a person who has not been appointed executor becomes an executor of his own wrong (executor *de son tort*), that is to say, intermeddles with the estate of the deceased without having any right to do so, he is made answerable to the adminis-

trator or to a creditor or legatee of the deceased for his wrong to the extent of any assets that might have come into his hands.

The powers of an Executor or Administrator

The executor or administrator has the same power to sue and be sued as the deceased had when living. All actions that had been taken by the deceased survive to and against his legal representatives except in cases where the suit abates by reason of its having been brought for personal injuries, like defamation, and assault. An executor or administrator generally can do all such acts as may be necessary for the management of the estate administered by him, but he needs the sanction of the High Court, for expenditure of money on religious or charitable objects or improvements. In the case, however, of executors and administrators appointed to the estates of Hindus, Muhammadans, and Buddhists, larger restrictions are imposed; for instance, an administrator may not mortgage, charge, or transfer the property entrusted to him, or lease any property for a term exceeding 5 years without the permission of the Court; he is placed infact in the same position as a guardian under the Guardian and Wards Act of 1890.

Duties of an Executor or Administrator

The Administrator must provide funds for the performance of the funeral ceremonies of the deceased in a manner suitable to his former station in life. Within six months, he must exhibit an inventory containing a list of all the assets and liabilities of the deceased; within a year, or such further time as the Court may appoint, he must exhibit an account showing the assets which have come to his hands and the manner in which they have been applied or disposed of. The funeral expenses of the deceased and death bed charges which include fees for medical attendance and board and lodging for a month previous to it, are the first charge on the deceased's property. The next item chargeable

on the property are expenses of obtaining Probate or Letters of Administration, and the costs incurred in respect of any judicial proceedings that may be necessary for administering the estate. Then, the third head of charges includes wages due for services rendered to the deceased within three months next preceding his death by any labourer, artisan, or domestic servant. Fourthly, the debts of the deceased must be paid according to their respective priorities. No creditor has any preferential right over another, except mortgagees and other secured creditors. Debts of every description must be paid before any legacy is paid. If the assets after payment of debts, legal expenses, and specific legacies are insufficient to pay general legacies in full, the latter should abate or be diminished in equal proportions. Where there is a specific legacy and assets are sufficient for the payment of debts and necessary expenses, the specific legacy must first be paid; then demonstrative legacies are distributed out of funds which have been specially earmarked for the purpose. If, however, the assets are insufficient to pay the debts and specific legacies, the latter should be diminished rateably in order to allow of debts being paid

A legatee's title to a legacy becomes complete only when the executor expressly or impliedly assents to the legacy. Circumstances in which he is said so to assent are laid out in Sections 332–337. If the testator has left any annuity, it becomes payable as from the testator's death, the first payment to be made at the expiration of a year after that event, unless the will expressly directs that the payment should be made quarterly or monthly. Chapter X lays down the manner in which funds from which annuities or other legacies may become payable should be invested. (Sections 341–348). Sections 349–355 deal with the question as to when and how far legatees are entitled to interest on legacies not paid to them at once. Sections 356–367 describe the circumstances in which legatees who have received legacies may be called upon to refund the legacies for the purpose of discharging debts or for equalising other legacies. Sections 368 and 369 provide that where an executor or administrator is guilty of mal-

administration, he is liable to make good the loss or damage so occasioned from his personal property. He is not entitled to make any benefit for himself; if he does so, he is liable to make good the amount.

Succession Certificate

Formerly, the rules relating to succession certificates were embodied in a separate Act, called the Indian Succession Certificate Act; but now they have been included in the Indian Succession Act, Sections 370-390. Where there are debts due to a deceased person, or any bonds, debentures, annuities, or stock in his name, and it is desired to recover the money due under these without going to the expense of obtaining general Letters of Administration, a simpler procedure is provided by this Chapter. An application may be made to the District Judge by the person interested in the property for permission to recover such debts. He has to specify, according to Section 372, the time and place of the death of the deceased, his heirs, the right in which the petitioner claims and the debts and securities which it is sought to collect. The District Judge sends notices to all the persons interested in the property and after hearing in a summary manner their objections, if any, he grants the certificate which entitles him to receive the debts themselves and securities, any money or interest or dividends due thereon, and also the power to negotiate or transfer them. Before issuing such a certificate, the District Judge has power to insist on a bond being executed with one or more sureties for the due discharge of his duties by the petitioner. A certificate of this sort has effect throughout the whole of British India. It can be altered or amended on cause being shown or revoked if it was obtained fraudulently or on the basis of untrue allegations of fact or for other reasons set out in Section 383. Such a certificate is invalid if probate or letters of administration have already been granted in respect of the same estate. No decision given under this Chapter debars

any one from having the question of his rights as against the petitioner settled by a regular suit. Any payments made to a person holding a certificate are valid, and even if the certificate has been subsequently superseded, the payments may be validated by an order under this Chapter.

CHAPTER XI

Christianity and the Courts

The position that Christianity, as a form of faith, occupies in India is very different from that which it enjoys in England. In Britain, the vast majority of the inhabitants profess the Christian religion; and that form of it which is known as the Church of England is also the State religion of the country. The result is that the entire system of legislation promulgated in England takes for granted that the citizens are Christians of one or other of the Protestant Denominations; it is also to a substantial extent coloured or influenced by Christian ideas. A great deal of property, most of which belonged to the monasteries at one time, has been set apart for the maintenance of Anglican Churches, Priests and Bishops. The clergy have a well recognized place in the social and public life of the country, while Bishops have seats in the House of Lords. The whole system of education, and particularly those great nurseries of learning the Universities of Oxford and Cambridge, wear a distinctly Christian character.

When we come to India, we find an entirely different state of things. India has been the birth-place and home of many forms of faith, and intellectually if not in actual warfare, it has always been a battleground between contending creeds. Christians in India numbering as they do something less than 5 millions out of a total population of 321 millions, and divided among themselves by numerous kinds of cleavage, racial, tribal and denominational, cannot be said to occupy any position of advantage; on the other hand, they had to go through a good deal of struggle before they could establish their right to separate existence and tolerant treatment at the hands of their neighbours.

Christian converts were formerly subject to a good many disabilities. Under the Hindu Law, as it originally

stood, the convert not merely lost all the privileges of caste membership but also his rights to succession or inheritance. Muhammadan Law was even harder upon apostates. A convert to Christianity from Muhammadanism at once lost his wife and children, as apostacy was deemed, *ipso facto*, to result in a dissolution of a Muhammadan marriage. The convert lost all his rights of inheritance and succession, and under the strict Muhammadan Law, it was not wrong for a faithful Muslim to take away the property of a *Kaffir*.

The duty of attending and supporting processions and festivals formerly imposed on officials, whether Christian or Hindu, has now been removed by the Religious Endowments Acts and by administrative action on the part of the Secretary of State for India. The freedom of Religion Act, or Caste Disabilities Removal Act as it is generally known (Act XXI of 1850) has put an end to the disabilities from which the Christian convert formerly suffered. The native Converts' Dissolution of Marriage Act also enables a convert that had a wife previous to conversion, who refused to live with him after that event, to apply for and obtain a dissolution of the marriage tie so as to enable him to marry again. The law as it now stands, therefore, enables a person who becomes a Christian to take his wife along with him, if she is willing to live with him, to continue to be the guardian of his minor children and to retain his rights of inheritance.

In view of the fact that Christianity is the religion professed by all British soldiers in India and by British officials who have come out to help in the governance and administration of this country, a certain though very inconsiderable portion of the State revenue is devoted to the payment of Government Chaplains who are appointed to minister to the wants of these two classes of people, and of the Bishops who hold authority over them. This no doubt involves some measure of special treatment for the Christian religion; but Christianity is not the State religion of British India and much the largest proportion of ecclesiastical or pastoral work carried out in India in connection with Christianity is maintained not

with public but with private funds collected in India and foreign countries.

Protection for Christianity

Christianity having thus become a recognized form of religion prevalent in India, it is now entitled to the same protection as the other creeds flourishing side by side with it in the country. The various provisions contained in the Indian Penal Code for the protection of religion apply to Christianity as well as to other forms of faith.

Section 296 of Penal Code enacts that whoever voluntarily causes disturbance to any assembly, lawfully engaged in the performance of religious worship or ceremonies shall be punished. In *Queen Empress* v. *Ramzan*, 7 All., page 461, a certain person was convicted for saying Amen in a loud voice in a mosque belonging to the sect of Hanafis, among whom Amen had to be pronounced in a subdued voice. The conviction was quashed on appeal on the ground that the accused belonged to a sect which always said Amen aloud and that moreover, just at that moment there were no prayers going on. It has been held to be an offence under Section 296 to pass a mosque with music so as to cause disturbance to religious worship carried on during hours notified therefor. (*Public Prosecutor* v. *Sankara Seethiah*, 34 Madras, 92.)

Section 295: Whoever destroys, damages, or defiles any place of worship or any object held sacred by any class of persons with the intention of thereby insulting the religion of any class of persons or with the knowledge that any class of persons is likely to consider such destruction, damage or defilement as an insult to their religion shall be punished. It has been held however that a cow is not an object within the meaning of Section 295 and killing it in a public place is no offence against Hindus. (*Queen Empress* v. *Imam Ali*, 10 All., 150.) When a bull dedicated and set at large on the Shradda of a Hindu was seized and secretly killed at dead of night 'for the sake of the meat and the value of the skin,'

no offence was committed under this Section. (*Romesh Chunder* v. *Hira Mondal*, 17 Calcutta, 852.)

Section 297 : Whoever with the intention of wounding the feelings of any person or of insulting the religion of any person or with the knowledge that the feelings of any person are likely to be wounded or that the religion of any person is likely to be insulted thereby, commits trespass in any place of worship or any place of sepulture . . . shall be punished. If any person enters a Church for the purpose of disturbing the worship therein, the Church Warden or Trustee or other Church official can remove him and put him outside the Church ; and a constable who is on duty outside may come into the Church for the purpose of removing a trespasser. Persons who entered into a place of burial and ploughed up the graves there were convicted under this Section though they had entered on the land with the consent of the owner thereof. (*Queen Empress* v. *Subhan*, 18 All. 395.) In *Emperor* v. *Ram Prasad*, 33 All. 773, a person entered upon a graveyard for the purpose of demarcating the land which fell to his share and in doing so exposed the bones of persons buried there, in spite of remonstrances from the relations of the buried persons. It was held he was rightly convicted.

Section 298 Provides: Whoever with the deliberate intention of wounding the religious feeling of any person utters any word or makes any sign in the hearing of that person or places any object in the sight of that person shall be punished with imprisonment. The interpolation of a forbidden chant in an authorized ritual has been held to be an offence under the Section : 2 Madras Jurist, 236.

These are the main provisions of a penal character in existence for the protection of religious feelings generally, including Christian religious worship. In the case of all other offences e.g. theft or trespass, perpetrated against religious persons or in respect of property belonging to Churches, the usual remedies available to private individuals can be obtained under the provisions of the Indian Penal Code and other criminal enactments.

Doctrine

It is not proposed to discuss here the fundamental doctrines of the Christian religion, *varying as they do,* according to the denomination or sect to *which a* person belongs. It is no doubt true that from the point of view of spiritual religion, the most vital thing in Christianity is the system of belief in God and a future life, which every follower of the faith entertains; and the next most important feature of the religion is its insistence on a high standard of character and conduct sublimated by that faith; but these not being public or overt matters, do not come within the purview of the Courts. The law in British India does not take official cognizance of the doctrines of Church of England or indeed of any other form of faith prevalent in India.

There are, however, certain classes of suits in which the Courts may feel compelled to make inquiries into the tenets or doctrines of a particular Church or Denomination, e.g. for the purpose of making an adjudication as to the administration of trusts belonging to the Church, or for making arrangements for the management of property belonging to it or for arriving at a decision about the rights and duties of individuals or officials in connection with that Church.

Under Section 9 of the Civil Procedure Code, 'the Courts have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred. The explanation to the Section goes further and provides that a suit in which the right to property or an office is contested is always a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to *religious rights or ceremonies.* The Civil Courts do not undertake to settle purely religious or doctrinal disputes; but if any right to property or right to an office or rights of worship is dependent on the determination of a point of doctrine, it will make enquiries of an ancillary character for the purpose of settling the question at issue before it. Any decision it arrives at on such ancillary matters does

not operate as a final judgment or as *res judicata*, though its finding on the right in dispute will have that effect. (*Vanamamalai* v. *Bhashyakar*, 16 Madras, 150.) Under this head, Courts of Law in India have not infrequently been called upon to investigate points of doctrine held by different Churches or forms of faith.

In some cases, property has been settled on trust or has been held for a long time on trust for the benefit of followers of a particular form of faith. When some of such followers have seceded from the main body of the sect and adopted doctrines which differed in certain particulars from those held by the main body, two classes of suits have been brought. If the seceders have carried away the property belonging to the sect with them, then the followers of the original form of faith can sue to recover such property. (*Free Church of Scotland* v. *Lord Overtoun.*) In the event of a schism, the fact that the seceders form a majority of the trustees or congregation does not of itself entitle the majority to claim possession of the premises. The nature of the original constitution or trust will have to be looked into and those who adhere to it will obtain the property ; if there is no such constitution or deed of trust, continuous usage for twenty-five years before the dispute arose will be looked into. (*Craigdallie* v. *Aikman ; Free Church of Scotland* v. *Lord Overtoun.* See also *Marian Pillay* v. *Bishop of Mylapore*, xvii Madras, 447.)

The seceders likewise can bring an action claiming that they are entitled to share in the benefits of Church worship and property on the ground that their doctrine is not so substantially different as to exclude them from rights formerly exercised by them. *In Advocate General* v. *Muhammed Husen*, 12 Bom., 123, certain members of the Khoja sect sued to have the Treasurer and Accountant, who were in charge of certain property dedicated to the use of Khojas, removed from office and the property in their hands to be handed over to plaintiffs who claimed to be the only true Khojas. It was held that the Courts had jurisdiction to settle the rights of the litigants, with reference to the religious tenets held by the community

in its origin and even a minority holding the original tenets will prevail against a majority who had seceded from them. The history of the Khoja sect was studied and the tenets of the community were ascertained and settled in that case.

Questions of doctrine have been raised in another form, e.g., when the priest or official of a Church has been put out of his office for preaching any new doctrine or for holding different opinions from those of the majority of the followers of the sect to which he formerly belonged, and he wants to be retained in his office or to be restored to it and to have the salary or perquisites or offerings relating to the office to be paid to him as before. The Court in such a case would have to enquire whether the doctrine that he holds is substantially different from that which the suitors profess. (See *Amlalam Pakkiyav Bartle*, 36 Madras, 418.)

There have also been suits in which worshippers in a particular Church or some among the worshippers suing in a representative capacity on behalf of others under Order 1 Rule eight of the Civil Procedure Code, have sued to have their rights declared to worship in that Church, and the officials of the Church contested their right to do so on the ground that they had departed from the faith of their fathers.

Worship

Worship. The essence of Christianity is that its followers have certain beliefs, in one God, and a future life, and in redemption from sin and have to live a life of purity, righteousness and love in consonance with the principles they profess. The form and nature of the worship, public or private, that each Christian offers may be of comparatively small moment from a spiritual point of view, but from the standpoint of law, it is the most important part of his conduct, constituting as it does the outward and visible expression of his inward and spiritual life. Law can only deal with overt or public acts, not with the beliefs or private acts of individuals.

Worship may be public or private. In order that a man may worship God, it is not necessary for him to go to a public place; if however he went to a public place of worship he is entitled to continue his devotions unmolested by others and protected by the Law. Again the individual Christian may meet others in a house or hall or place of assembly and there carry on his devotions with others. Such meetings, not being organized forms of service, are governed rather by the Law applicable to public meetings than by the rules relating to Divine Service in a Church.

Christians are enjoined to assemble with others in public worship; and the form of such worship in practice constitutes the essential point of difference between Christians and others. A Christian is entitled to attend the place of worship of which he is a member and to join in the service. He cannot be turned out of the Church, if there is room for him, and if he is not misbehaving or has not been excommunicated. He has to take the seat that is pointed out to him or to stand, if there is not sitting room. He is also interested in seeing that the worship is carried on according to the form which is prescribed by competent authority or in its absence according to custom. He can complain, if, while there are funds for maintaining worship, the church is closed altogether or the worship is stopped: he can also complain if any novel features inconsistent with the belief of the sect to which the Church belongs is introduced: or an important or vital part of the service is left out. The rites or ceremonies which constitute the service must be performed in due order and pomp.

Rites and ceremonies. There is said to be a legal distinction between a rite and a ceremony. A rite consists in services expressed in words but a ceremony in gestures, or acts preceding, accompanying, or following the utterance of those words. (Vide *Martin* v. *Mackonochie*, L. R. 2 P. C. 365.) As stated already in connection with the doctrines and tenets of Churches, the Courts are not in the first instance authorized to take cognizance of the rites or ceremonies prevalent in any

particular Church, but for the purpose of adjudicating upon one or other of the rights to property, office, or worship already mentioned, they may enquire into the proper rites and ceremonies to be used in that Church, or the course of worship that has been carried on there prior to the suit. No action can be instituted merely for the purpose of ascertaining the ritual of a particular sect or for enforcing it. In *Vasudev* v. *Vannaji*, 5 Bom., 80. it was laid down that 'the regulation of religious ritual is not within the province of the Civil Courts in India. It is for those who profess any form of religion to adopt such ritual as they think fit and make and enforce such rules as may be necessary to secure their observance.' If, however, a decision on questions of ritual is necessary for the decision of any relief awardable by the Courts, the latter are bound to enquire into and determine such questions: (*Anandrao* v. *Shankar*, 7 Bom., 323; *Koont Meera* v. *Mahomed*, 30 Madras, 15). A suit, however, can be instituted for the purpose of compelling the authority in charge of a religious establishment to continue to perform a ceremony, festival or procession which has all along been celebrated in connection with that establishment.

Before passing on to detail, it may be mentioned that the doctrine of 'superstitious uses' prevalent in English Law is not applicable in India. If, for instance, a gift is given for the purpose of reciting Masses for the dead or lighting candles before an altar during day time, the gift will be void under English Law, and a contract entered into for a like purpose will likewise be void. In India, however, where there are so many strange rituals and ceremonies in vogue in connection with different forms of religion prevalent here, it is impossible for the legislature or the Courts to determine what is or what is not a superstitious use, and therefore, the doctrine has been dropped altogether.

Generally speaking, a much larger latitude exists in India as regards the introduction and practice of new or unusual ritual. No action, for instance, has been brought in India to prevent a Church or Chapel from being built in a particular manner or with particular ornaments,

though the Bishop or other competent authority may refuse to consecrate it when it is erected. In England, if a Church intended to belong to the Church of England has been erected with images or stained glass windows or figures or pictures in them meant to be worshipped by the Congregation or with an ornamental *reredos* serving a similar purpose, these decorations may be disallowed: (*Clifton* v. *Redesdale*). Here, such matters are left entirely and exclusively to the discretion and authority of the Bishop who can either sanction them or prohibit them altogether. His discretion will, of course, be governed in general by the rules and practice of the English Churches; but once it is exercised, it operates as an absolute veto. Ultimately, the Act of uniformity must be deemed to apply, though it was not enacted with inferences to colonial conditions. The Bishops have it would appear been granted power to modify its provisions, according to Indian requirements, without interfering with the frame-work of the Act.

The fact that a Bishop consecrates a Church containing certain ornaments or certain structural arrangements does not necessarily imply that he has approved of all those arrangements or ornaments or that he has consecrated them. If, on the other hand, he has separately consecrated the ornaments or parts of a structure, then there would be satisfactory proof that he has approved of them.

The general principle of law is that the persons who have authority over a Church have the right to prescribe the rites and ceremonies that should be practised in that Church and the details of worship that should be carried on there. (*Vanamamalai* v. *Krishnaswami*, 16 Madras, 150.) In a Hindu Temple, the Dharmakartas or the Trustees of the Temple have control over such matters. In a mosque, the Khateeb who has charge of it is in control. On the same principle the Trustees of a Church or the persons who stand in a proprietary relation to it have the right to say what is the form of worship that should be carried on there; when it should be performed, in what order, and with what ceremonial. In the Church of

England and in the Church of Rome the Incumbent of a Church has control over all details of worship subject of course to the authority of the Bishop and their vows on being licensed to act as Ministers. In other denominations the Missionary Societies which own or have built the Churches must in place of the Bishop be deemed to be the final authority. The Incumbent of a Church is given a certain amount of latitude as to departure from existing rules. If it is nothing more than a trivial violation of the Rubric, he is deemed to have applied for and obtained the permission of the Bishop before he embarks upon the change.

Reference is constantly made in this book to the rules and practices of the Church of England as there are no well known treatises dealing with the practice obtaining in other denominations. The decisions given in connection with the Church of England illustrate the way in which courts will deal with any ecclesiastical question brought before them. The Arcana of Roman or Canon Law are both too large and too sacred or secret for an uninitiated outsider to venture within.

Enforcement of Trusts

Under Section 92 of the Civil Procedure Code, provision has been made for civil suits being instituted for the purpose of enforcement of trusts in relation to places of worship. If the income from a Church is not properly administered or not administered for the purposes for which it was intended or is frittered away in introducing new forms of worship while customary rites and ceremonies are neglected, a suit can be brought under this Section for the proper administration of the trust. Such a suit must be instituted in the principal Civil Court of Original Jurisdiction, namely, the District Court in the Mofussil, and the High Court in the City of Madras. It must be instituted either by the Advocate General himself or by the Collector in mofussil districts or by two or more persons having an interest in the trust who have obtained the consent in writing of the Advocate

General (or Collector) for instituting the suit. A suit can be instituted for the retention of marks, ornaments or structures which once formed part of a structure; for the continuance of a chant, rite, or ceremony which has all along been performed; or for the performance of a festival, procession or other religious function that has become associated with a place of worship. Likewise an injunction can be asked for restraining persons, clerical or lay from introducing new marks or ornaments, novel rites or ceremonies, or strange feasts inconsistent with the general character of the worship hitherto carried on.

Suits have been brought in the Civil Courts for the removal of marks, ornaments and structures which are not in consonance with the beliefs of the majority of the worshippers therein. In a case in which Vaishnavas were concerned a suit was brought for the removal of namams used by one class of Vaishnavas, namely, Vadagalais in a temple which was in the main patronized by worshippers of the Thengalai sect. (*Krishnasami* v. *Samaram*, 30 Madras, 160.)

Festivals

The Church of Rome likes to celebrate its leading feasts with pageantry and pomp comparable in some measure with the ceremony attending Hindu festivals; but the Protestant Churches have no festivals in the strict or proper sense of the word. The principal feasts of Christians known as Christmas, Easter and Whitsuntide are mostly enjoyed in private by members of the Church; nothing spectacular is performed in places of worship except special services. The Harvest Festival, so called, has usually nothing to do with the harvest and is scarcely entitled to be called a festival, being merely a means of collecting money for the support of the Church. When the Christian religion has been accepted by the masses generally and become acclamatized in this country it will probably, in the natural course of events build up its own feasts and festivals, suited to the genius of the people.

With reference to existing festivals, the rules that have been evolved in connection with Hindu and Muhammadan ceremonies will be applicable to Christian festivals as well. Members of a Church have the right to see that no important festival is left unperformed, if there are funds for the celebration of such festivals. They can also ask that ceremonies that usually accompany those festivals should not either be altered or left out or changed in character.

The Police Department exercised a general supervision over public processions, in the interests of peace and order. It grants, on application being made to it, licenses to persons who are in the habit of taking out processions but withholds permission when any breach of the peace is likely. The question as to the extent of their power and whether they can permanently withhold permission for procession, private or public, has assumed considerable prominence in recent times but is not likely to be of any importance as regards Christians.

Processions

The Protestant Church does not consider it necessary to arrange public processions through the streets in connection with any of its special services or festivals. There have, however, been occasions on which parties of preachers have gone forth into crowded public streets with music and flags and used thoroughfares for the purpose of conducting Bhajana performances or street preaching. The Salvation Army, in particular, has come before the Courts more than once in connection with such processions. It has been held in such cases that they have only the same rights over a public thoroughfare that other wayfarers have, that they are not entitled to block the street or road or to draw such concourse of people that public traffic is interfered with. They cannot act in such a manner as to insult the public or to draw forth the angry or violent feelings of persons who may be passing by.

The Roman Catholic Church has a place for processions in connection with big feasts like the Feast of

the Assumption or the Feast of the Sodality. The rules applicable to Hindu and Muhammadan processions are also applicable to such gatherings. Processions have been held to be an integral part of public worship and no outsider can interfere with them or disturb them, if the usual licenses have been applied for and obtained from the Police. A rival procession cannot be started merely for the purpose of obstructing a long continued or well established piece of pageantry. The worshippers of a church have the right to ask that the procession should be allowed to pass the streets through which it has always gone, stopping for special ceremony in front of places held sacred by them. They have also an action if the procession is left out altogether or if accustomed ceremonial which formed part of it has been omitted.

Sacraments and other offices

The Church of Rome recognizes Seven Sacraments: Baptism, Confirmation, Marriage, Penance, Mass, Extreme Unction and Ordination. The Church of England and other Protestant Churches recognize only two, namely, Baptism and Holy Communion. These are Sacraments to which every member of the Church is entitled and he has a right to have them without payment of a fee if he is too poor to make a payment.

Baptism

Baptism is the Sacrament or ceremony by which a person is admitted into the Church of Christ. If any member of a church applies for the Baptism of his child, the clergyman in charge is not entitled to refuse it on any ground. He is bound if proper God-parents are forthcoming to baptize even the children of excommunicated persons, illegitimate children, and children of people who live improper lives or are irregular in attendance at church, or fail to pay their offerings to the church or are recalcitrant to ecclesiastical authority. In the Church of England, it is usually administered in a church by a priest or deacon but baptism with water by a Dissenting

Minister or even by a layman or woman, in the name of the Holy Trinity, is good and effectual in cases of special urgency. In such a case, the baptismal ceremony cannot be repeated again as if it was ineffective, but a reception service may be held. Baptism is usually administered in a Church and on a Sunday or Holy day, but it may take place on any other day and in cases of urgent necessity, it may even be held elsewhere than in a Church. It may be performed by immersion in rivers or baptisteries, according to the practice of the Early Church or by Baptists at the present day, or by aspersion or by pouring water on the infant and making the mark of the Cross upon him. The name given to a child at the time of baptism could formerly have been changed at the time of Confirmation and even now in the Civil Law there is no rule against such a change. An entry relating to the baptism must be made in the Church Register and a copy of it should be granted to any one who asks for it.

The Holy Communion

This is also a Sacrament to which every member of the Church who has been confirmed is entitled and it is not open to the clergyman to withhold the Communion from any Church member for private reasons of his own. 'The minister shall not without lawful cause deny the same to any person that will devoutly and humbly desire it, any law or custom to the contrary notwithstanding.' The lawful causes for which Communion may be denied are according to the Rubric:

(1) that the applicant is a notorious evil liver;
(2) " " has done wrong to his neighbours;
(3) " " refuses to kneel; or
(4) " " is a notorious depraver of the Book of Common Prayer.

Communion is refused in practice only to those who are excommunicated. It is open to the Bishop to ex-

communicate a person for living an openly immoral life or for improper conduct, in which case, the priest cannot administer Communion till he is satisfied that the person applying for it has genuinely repented of his offences and resolved to turn over a new leaf. Excommunication is said to be of two kinds: major and minor. Where a person is prevented from coming to Communion alone, it is minor excommunication. Where he is not allowed any privileges of the Church or even to keep company with Christians, it is supposed to be a major excommunication. The priest has power to repel wrong doers who come for Communion and to warn them not to present themselves again but it is open to the Bishop alone to excommunicate or repel permanently.

The Lord's Supper is a sign of the love that Christians ought to have to one another and of the redemption of mankind by the death of Christ. It is usually celebrated by partaking of a small piece of bread and drinking a little wine. In the Church of England, Communion of one kind alone is illegal. The wafer has been held to be illegal in England (unless it has become customary in a church): *Redesdale* v. *Clifton*, L.K. 2 P.D. 349: 'the bread must be such as is usual to be eaten.' (Rubric). A priest only can administer Communion, which must be received kneeling, though no adoration is intended. There must be at least three persons to receive it, if the Communion is administered in a Church, and two in a private house in cases of urgency or sickness. The cup and paten may not be elevated above the head of the Minister. (*Martin* v. *Mackonochie*, 1868 L.R. P.C., 365.) Reservation of Sacrament is also illegal. The Prayer Book has ordained the proper method of celebration and various departures from that method have from time to time been declared illegal by the English Courts. (See Phillemore, *Ecclesiastical Law*.)

Marriage

A member of a parish or Church is also entitled to have his wedding celebrated in that Church. The general rules applicable to marriage in India have already

been set out in detail in the Chapter on Marriage. A member of a Church is entitled to ask that he should be married there; marriage cannot be refused for non-payment of fees, though the clergyman can afterwards recover it if he can. Though there is usually a fee charged for declaring banns in church, refusing to proclaim banns, if fees are not paid, appears to be illegal. The fees paid at the declaration of banns and also at the time of the actual marriage in church are treated in England as part of the perquisites due to the priest. In India, they are usually treated as part of the income of the church. The priest has to see that the parties are not within prohibited degrees, that they are of the required age, namely 18 if they are domiciled British Indian subjects, and 16 and 13 respectively if they are Indian Christians. He is also required to ascertain whether there has been a prior marriage. If a person has been divorced, the clergyman may refuse to perform the marriage service, but he cannot prevent the wedding from being celebrated by some other clergyman willing to do so. To avoid these complications divorced persons are usually married outside church by Registrars and the like. He must, if the marriage is by banns, satisfy himself that the banns have been duly published; the marriage has to be solemnized within two and a half months of the proclamation of banns. If it is by license, he should see the license before he performs the marriage. He is bound to give the notice and issue the certificate or certificates for which provision is made in the Indian Christian Marriage Act. After the marriage has been celebrated, he is also bound to give a copy of the entry in the Marriage Register on payment of the proper fees therefor.

Burial

A member of a parish or church is entitled to the right of being buried in the churchyard belonging to the church. Burial cannot be refused for non-payment of a fee. No person has the right to be buried in a vault belonging to him privately or in any part of a churchyard which he

has chosen. He can, however, direct that his remains should be cremated. A convicted murderer should not be buried in a churchyard nor a person who has committed suicide; but persons who have been murdered or corpses that have been picked up from a well or river or the sea or elsewhere, are entitled to burial. No buried remains can be removed without a license. It is a moot question in law whether the son or other legal representative of a deceased person has the right to his bones and to bring an action if they have been stolen or removed from the churchyard; he would, however, have a right to any jewels or ornaments buried with the corpse. If there are monuments or tombstones erected with permission after payment of the usual fees, they should in no circumstances be removed; and even if the graveyard falls into disuse the Church authority has to see to the preservation of such monuments. The burial should be during day time and should take place with the usual church service; but if the deceased has left any direction that the religious service should not be read over him, it may be omitted, but in that case, the clergyman in charge may refuse to bury him.

CHAPTER XII

Ecclesiastical Personnel

Christian India cannot boast of an ordered hierarchy like countries which once came under the sway of Rome and which adopted a careful gradation of Ecclesiastical rank, in imitation of the gradations of secular rank in the Empire. Nor are there Ecclesiastical Courts in India, with their numerous offices reaching up to the Privy Council for taking cognizance of breaches of Church discipline. Christians stand on the same footing in the eye of the Law as followers of other creeds; and their religious rights and privileges are recognized and enforced by the ordinary Civil Courts, only if they also amount to civil rights. If Christians possess any distinctive rights of their own they possess them as members or worshippers in churches: Lay Trustees, Church Wardens, Lay Readers, Organists and Sextons are the only lay persons concerned in the work of Churches. Ministers alone in non-conformist churches, and Bishops, Priests and Deacons in the Church of England constitute the spiritual hierarchy in existence in Protestant churches in India.

Rights and Privileges of Members of a Church or Worshippers

There are several important questions which arise under this heading. What are the individual and public rights of the members of a Church in the Church itself and in property which appertains to it. How far can they direct the worship, ceremonial or ritual practised in the Church. How far can they control the officials of the Church, the trustees for instance the Padres and the subordinate officials. In all these respects, there has been no special legislation in India for Christians as such, and the rules and principles of

English Law, though useful for purposes of guidance, may not be applicable in detail to Indian conditions. The principles laid down by the Indian High Courts in connection with Hindu, Muhammadan and other forms of faith must *prima facie* be deemed to be applicable to Christians as well.

Individual Rights

The rights of a member of a Church may be classified under two heads, individual rights and rights which he enjoys as one of the general body of worshippers in the Church.

In order that he may claim these rights, he must be able to satisfy the Courts that he is a member of or regular worshipper in, a Church. A communicant member is one who receives communion at least three times a year, one of which must be at Easter. Other members should be regular worshippers, not merely occasional or casual visitors. For the purpose of exercising franchise, or power of voting, a pecuniary qualification e.g., payment of an annual or monthly subscription has often been laid down; and payment of such dues has been held a necessary qualification for exercising franchise both in England and India. He must not have been excommunicated or removed from the list by competent authority for improper conduct or breach of discipline: and he must satisfy other conditions as to age, and residence which are laid down under the rules.

Excommunication is of two kinds, the minor and the major. The minor is an Ecclesiastical censure excluding the person affected from participation in the sacraments and in Divine worship. Major excommunication deprives a man of the benefit of all divine offices and of the society and conversation of the faithful. The Bishop pronounces both these kinds of excommunications after careful and elaborate enquiry made through the priest and others; but he can always restore a person to communion if he returns to a penitent frame of mind and turns over a new leaf. Under the Civil Law a person can be put out of a club or society of which he is a member only

after he has received notice of the charges against him and has had an opportunity of explaining the said charges. The person (or body) excluding him will also have to show that he acted bona fide and in the best interests of the society to which he belonged. Quaere whether a person has a right of action for wrongful excommunication on the ground that he has had no notice of the charges against him. When the head of a caste put a man out of caste such formalities have not been insisted on. (*Queen* v. *Sankara.*) Usually Civil Courts do not interfere with or set aside proceedings taken in accordance with settled arrangements which exist within a Church, if those arrangements are not repugnant to the rules of natural justice, and if the details laid down have been complied with.

His individual rights could shortly be described. As long as he is a member of the Church and not excommunicated, he has the right to enter the Church, take his seat along with the others and join in the worship. If he has no pew to which he is entitled, he must take the seat which is pointed out to him by the Church Warden. If there is no room for him, he cannot be asked to go away if there is standing room and he elects to stand. He can, however, be turned out if he does anything inconsistent with the worship, for instance, if he reads a newspaper or novel or sings aloud by himself or carries on a conversation in an audible manner. If there is reason to apprehend that he is intending to commit disturbance in the Church then too he can be removed by the Church Warden. The latter can ask persons to remove their hats or slippers and if they are not obeyed, he can remove them himself. He can also inflict reasonable punishment on boys playing in Church if such violent action is called for.

An individual member of a Church has also the right to benefit by the ministrations of the Church, that is to say, he is entitled to ask for the rite of baptism for his children and those under his care and of marriage and burial for himself and his children: he has also the right to receive the Sacrament; in each case, if he has not

disqualified himself in any way by past improper conduct and has not been excommunicated.

Finally, an individual member duly qualified under the rules has the right to attend and vote at any meeting of the Church congregation, as such, summoned for disciplinary proceedings or for the discussion of affairs touching the welfare of that establishment. At such a meeting not merely the qualified members of the Church but its officials and any hierarchy to which they are subject can be present in the absence of express rules to the contrary. The rest of his rights are those which he enjoys in common with the other members of the Church.

Under the Indian Law, all the worshippers in a Church or temple are deemed to be interested in the application of the building itself, and of the property, moveable and immoveable, dedicated along with it, to the purposes for which they were intended. They have also the right to see that the worship carried on in the Church is the same as that which has been sanctioned by competent authority or which has always been carried on there, and that no substantial deviation takes place in the rituals, ceremonial or details of worship. They can take exception and institute a regular civil action if, while there are funds available for the purpose, the accustomed worship and ceremonial are left out altogether or curtailed; they can also sue if either novel elements are introduced or vital parts of a service or important festivals are left out. They can insist that the offerings made to the Church and funds belonging to it are not diverted or misapplied to wrong purposes. They have the right to insist that properly qualified persons are inducted into offices and can sue for the removal of any priest insufficiently ordained or guilty of breach of church rules or of trustees who are guilty of breach of trust and prove inefficient. (*Marian Pillay* v. *Bishop of Mylapore*, XVII Madras, p. 447.) The incumbent of the Church, subject to ecclesiastical authority, has the right to determine in what form or language services should be held, what weddings should be performed or meetings held in the church or vestry.

The Civil Procedure Code enables worshippers to file suits for the purposes mentioned in Section 92, where there is a trust created for public purposes of a charitable or religious character. They may either move the Advocate General (or in the mofussil, the Collector of a District) to institute a suit on their behalf for the proper administration of the trust; or two or more persons interested in the trust may obtain the consent in writing of the Advocate General (or the Collector) and then institute a suit for the purposes of seeing that Church affairs are properly administered. In particular, it is provided that they are entitled to sue for the removal of any trustee, or for the appointment of a new trustee, for the vesting of any property in a trustee or trustees, for directing accounts and enquiries, for declaring what proportion of the trust property should be allocated to particular object of the trust, for authorising the whole or any part of the trust property being let, sold, mortgaged or exchanged, for settling a scheme of management and finally for the grant of such further or other relief as the nature of the case may require.

The Advocate General (or the Collector) fulfils, in India, the functions which the Attorney General formerly performed in England. He is supposed to have a general interest in and oversight of all property dedicated to public or charitable trusts, and when he finds that any maladministration is going on, he could either move in the matter *suo motu* or at the instance of parties interested. The section provides that the Advocate General himself may sue or persons who have obtained the consent of the Advocate General may sue, in order that a multiplicity of suits may be avoided and the trustees of churches and charitable institutions may not be molested over and over again by suits instituted by persons who have some axe of their own to grind. The rule that the Advocate General should be taken into confidence ensures that parties going before a Court under Section 92 have a *prima facie* case, and that the suit is necessary in the interests of the proper administration of the trust which is in dispute.

Some decisions under this head are very instructive.

Any worshipper in a Church or Temple is deemed to be a person interested in the trust so as to enable him to sue. (*Sajedur* v. *Gour Mohan*, 24 Calcutta, 418.)

Suits to enforce private as distinguished from public rights are not within the section. (*Manijan* v. *Khader*, 32 Calcutta, 273.)

Suits against persons other than trustees, e.g., against trespassers, aliences from trustees. and strangers, are excluded by the section. (*Srinivasa* v. *Srinivasa*, 10 Madras, 31.)

Suits by all the persons interested in a trust are outside the section but permissible in Law.

A Suit for a declaration that certain property is trust property does not fall within the section. (*Jamal* v. *Mujtiba*, 25 Allahabad, 631.)

In order that the section may apply there must be (1) an express or constructive trust created for a public purpose of a charitable or religious nature. (2) A breach of trust or the need for direction of Court as to its proper administration. (3) The reliefs claimed must be one or more of those mentioned in the Section. If other reliefs not mentioned in the section are added, the suit is not thereby invalidated.

Lay Trustees

In England, title to ecclesiastical property vests in various persons; in some instances, in the Bishop or Ordinary, in some instances, in the Archdeacon or the Chapter of a Cathedral, and as regards Parish Churches, sometimes in the incumbent himself and sometimes in Lay Trustees or Church Wardens. Many of the Churches in India are owned either by Government or by one or other of the Christian Missionary Societies working in India. It is not necessary to discuss the position of these churches in detail; but there are cases in which ownership of Church property is vested in trustees variously described, sometimes as Church Wardens, sometimes as Lay Trustees, now as Elders of the Church, and now as a Synod or other Associate Body.

In these modern days, when powers of self government or self management are bestowed upon members of Churches, there are also in existence bodies like Pastorate Committees or Parish Councils or Church Councils with their various office bearers. Usually the powers of these Pastorate Committees, and Church Councils are defined and settled by the Constitution under which they have come into existence; and they cannot go beyond such powers; but if there are no such rules, they would be in the same position as trustees under the Indian Trusts Act II of 1882. The following provisions of law have to be remembered with reference to such trustees.

A trustee can always renounce his trust; but if he continues in management, he is personally liable, and if there are several trustees, each of them is personally liable for any mismanagement, negligence or breach of trust. There is no period of limitation for suits against trustees.

Each trustee must, on entering office, acquaint himself with the terms of the trust and the details of the property (Section 12) and deal with the trust property with the same intelligence and care that a person of ordinary prudence would show with reference to his own property (Section 15). He should in particular implicitly obey and carry out all the directions of the trust without negligence or delay and file suits if necessary for the purpose (Section 13). The trustee must keep careful and accurate accounts and allow any beneficiary interested in the trust to examine them (Section 19). He must prevent his co-trustees from acting fraudulently or negligently. He is liable for all loss caused by his own negligence or fraud (Section 23).

Officials

There are two classes of officers in connection with Churches. There are the strictly ecclesiastical officials, like bishops, priests, and deacons; and there are the lay ministerial staff or subordinate officers like sextons,

peons and so forth. The Church of England recognizes four lay offices, that of a parish clerk, a sexton, an organist and a lay reader. The parish clerk was originally a cleric, appointed to assist the priest in the celebration of divine offices; but he was elected or appointed by the parishioners or vestry. The Sexton or Sacristan was the keeper of the things appertaining to worship and was appointed by the incumbent; the Sexton may be a woman (*Olive* v. *Ingram*). The organ is vested in the Church Warden and the organist may be appointed by him or by the priest or both but he cannot play as he likes or to the tune of the Church Warden but is under the control of the incumbent, as regards his music (*Wyndham* v. *Cole*). The lay reader's office has come into prominence in recent times; he can, on receiving a license entitling him to do so, read the Scriptures or the Service or with the permission of the priest, preach in Church or in a school room or mission hall or even in private houses or to private persons. He is usually not paid. Not infrequently a layman is ordained a deacon instead of merely receiving license as a lay reader. The corresponding offices in India, viz., organists, sextons, church clerks, and peons have not yet acquired for themselves any special status like that occupied by the Archakas or Poojaries of Hindu temples. They are engaged by the priest, paid monthly salaries and are removeable at the discretion of the authority which appointed them, after the usual month's notice. The ordinary principles of the law of contract relating to the appointment and dismissal of employees apply to them. They are also under the orders and discipline of the incumbent.

Church Wardens

There is also another class of official known as Church Wardens whose history goes back to most ancient times. They are usually the guardians or keepers of the Church, as representatives of the body of the Church. The moveable property of a Church like bells, communion vessels, and church furniture like communion tables, lectern,

reading desks, pulpits, organs, books and pews, vest in them and are liable to be repaired by them. They show people to their seats and are in charge of the seating accommodation. They can remove any person who is misbehaving or about to misbehave in Church. A church Warden can levy and collect pew rents and receive and dispose of alms and offerings, though he cannot sell or give away church property without the consent of the Ordinary or Incumbent.

Ecclesiastical Officials

Ecclesiastical officials, however, (Bishops, priests, deacons,) stand on an entirely different footing. In the Church of England these officials are not appointed and cannot be removed by the worshippers in a church; nor are they paid directly by them. Except in Congregational places of worship, the actual membership of the Church has little or nothing to do with the selection of a minister for that Church. The right to appoint, discipline, and remove such officials rests with a different body altogether; and there is no system of election or private appointment as regards these officials.

The Church of England recognizes three orders, deacons, priests and bishops.

Deacons

A Bishop has to ordain a deacon for service in a church. Before he ordains, he has to examine him as to his knowledge of Scripture and his other intellectual qualifications. He has also to satisfy himself that his moral character is above reproach and of such a kind that he could safely be placed in charge of a Church. He usually insists on a 'title' being given before a deacon is ordained. A Missionary Society or other Church organization has to satisfy the Bishop that if he is ordained as a deacon, they will be prepared to pay him. On these conditions being fulfilled, a person who has passed the requisite examinations, and otherwise proved satisfactory is ordained a deacon. Before ordination he must take the

oath of obedience and sign and subscribe a declaration of assent to the 39 *Articles* and the *Book of Common Prayer*, of his belief that the doctrine of the Church is agreeable to the word of God, and of his intention to use the prescribed forms for Services and the Sacraments.

His function is to assist the priest in divine service; but in practice, he is now often placed in independent charge of churches. He can baptize children and celebrate marriages, and bury people who are deceased, but he is not allowed to consecrate or administer the Sacrament of the Lord's Supper although he can help the priest to distribute it to the communicants and read portions of the service. In the Church of England, at the present day, a person is a deacon only for a short period (not less than a year) as an indispensable preliminary to his becoming a priest. It very rarely happens that a deacon is not raised to the office of priest within a year or two of his ordination. In non-conformist churches the diaconate is merely a lay office corresponding to that of a Church Warden.

Priests

A Priest is placed in independent charge of a church and can perform all the offices except those specially reserved for the Bishop. He, too, is ordained by the Bishop after examination, and he is also subject to the authority of the Bishop. He cannot under English Law be arrested in a Civil suit when he is going to Divine Service or returning from it nor can he be compelled to serve on a jury. English Law disqualifes him from holding or from being elected to certain offices; but no such provisions exist in India. He will lose his rights to his office and the property appurtenant to it on his licence being withdrawn.

The clergyman cannot, of his own accord, make any alterations in the service without the permission of the Bishop, and he should generally obey the orders of the Bishop, except such orders as the Bishop himself is not authorized to impose. He cannot officiate without a

license or in another clergyman's church, without the permission of that clergyman. A clergyman is not liable for refusing to celebrate Divine Service; but he cannot refuse baptism, marriage or burial to the members of his Church. He cannot decline to perform the offices of the Church for non-payment of a fee; he must perform his duties and collect his fee afterwards.

Bishops

Under the existing constitution, there are three classes of Bishops: (1) Bishops of the major dioceses who are directly appointed by Government; (2) Bishops who are also appointed by Government at the instance of Bishops in class one to preside over portions of their dioceses and (3) Missionary Bishops consecrated for the purpose of taking charge of areas in which a particular missionary society is working. The emoluments of a missionary Bishop are not usually provided by the ecclesiastical department of Government but by the missionary society itself, or out of special funds raised for his support. The selection, appointment and consecration of Bishops are governed by so many and such complicated rules that it is not proposed to deal with them here as the average Christian is not likely to be affected by them in any way and no action is likely to be brought in Indian Courts with reference to the appointment of Bishops. Further, if the new constitution recently drawn up for the Indian branch of the Church of England is approved or adopted, the existing rules will soon become a dead letter. (See however *Phillimore's Ecclesiastical Law*, Vol. II, pages 1794 to 1801.)

In the Church of Rome a Bishop and priest belong to the same order, though a Bishop is invested with larger powers. In the Church of England he is the chief Ecclesiastic of his diocese and the head of the Ecclesiastical administration. The chief powers of a Bishop are :— Ordination, confirmation, consecration of Bishops and churches, visitation and correction of clergy, institution or appointment to churches, licensing of deacons and priests

appointing honorary canons, acting as Ecclesiastical Judge and granting marriage licenses. No clergyman can officiate in a Church without the license of the Bishop who can also suspend or withdraw the license. A Bishop is said to be wedded to his see; he impales the arm of his see, his own arms taking the place which would be ordinarily his wife's. He also drops his own surnames and adopts that of his diocese for purposes of signing. A Bishop is usually a corporation sole, with perpetual succession and a seal of office. He has power to approve of special forms of service, though not to alter the established forms.

General Liability

Though clergy are entitled to protection while engaged in the performance of their office, they have no privilege in respect of any defamatory statement that they may make from the pulpit. They cannot for instance make an example of a member of their flock. (*Kelly* v. *Sherlock*.)

Clergy must not take advantage of their intimacy with or personal influence over members of their flock to receive gifts of property from them. When they obtain gifts under a will or a deed of settlement or receive the benefit of a contract, the burden is thrown on them of showing that they exercised no undue influence over their parishioners and that the latter acted in the free exercise of their unfettered judgment. (*Allcard* v. *Skinner*.) The rules of English Law under this head are embodied both in the Indian Contract Act and Indian Evidence Act (Section III.)

CHAPTER XIII

Ecclesiastical Property

In Britain, the term Ecclesiastical property is usually confined to land, buildings and moveables belonging to the Church of England and the body of rules of law which deal with them is known as Ecclesiastical Law. Even there, however, these two terms are being used, at present, in a more extended sense, so as to include non-conformist churches and property set apart for their use. In this hand book the term Ecclesiastical property is used in this wider sense and relates to all property set apart for the use of one or other of the Christian Churches in India, Catholic or Protestant, Syrian or non-conformist. 'Where property is appropriated for use only in connection with or for the benefit of a Church, or is appropriated for use only by or for the benefit of officers or members of a Church as such, or is held for a spiritual purpose in connection with a Church, or is owned by any person in the capacity of representative of a Church, such property is called Ecclesiastical property.' (Halsbury). The principal varieties of such property are: Churches, Parsonages, Churchyards, moveable property inside Churches and property moveable or immoveable dedicated as endowments for Churches or Missions.

Churches

There were severe restrictions at one time in England in the way of land being acquired or granted out for Ecclesiastical purposes, e g., for the erection of a Church. These prohibitory rules which were contained in statutes generally known as Laws of Mortmain were devised because it was feared that the Church of Pre Reformation times would be able to obtain all or nearly all the land in England from pious donors, depriving the nobles in England of all their feudal rights in it in perpetuity.

These restrictions, however, have been mostly removed by the legislature in England. In India there were no restrictions at any time, prohibiting the acquisition or grant of land for religious purposes.

The fabric of a Church can be erected in India by any one. In England before a church is erected, the Bishop of the Diocese has, in the first instance, to satisfy himself that there is sufficient property for endowing the Church, e.g., a Parsonage, glebe lands, rent charges and so forth. He has also to approve of the site, the plan of the building and other details before the erection of the Church is sanctioned. Apparently there are no such rules in India. A building intended for use as a Church may be erected by any one, and with the consent or license of the Bishop may even be used for Divine Service and the administration of Sacraments. But it does not become a Church properly so called till it is consecrated by the Bishop (or other competent authority) and so dedicated to Sacros Usus. The right of a Bishop to consecrate or refuse to consecrate a building erected for use as a Church is absolute. In England, consecration is effected by the decree of a competent Ecclesiastical Court. The Act or sentence of Consecration signed by the Bishop setting aside land and buildings to Sacros Usus is what constitutes the legal act of consecration. The effect of the Act (in India, of the ceremony which takes its place) is that the property consecrated is separated for ever from the common uses of mankind and is set apart solely for sacred purposes till the decree (of consecration) has been set aside by the like authority. From the moment of consecration the property becomes vested in the Bishop or the Trustee. When the fabric of a Church has thus become devoted to Sacros Usus, it cannot ever be employed as a habitation for man, nor has even a Judge or Court of Law the power to sanction the use of it for secular purposes. No alteration or addition can be made in it without a faculty, i.e., permission from the Bishop. From the moment of consecration, it ceases to be the property of the donor who is taken to have dedicated it to sacred objects; it becomes vested in Church

Wardens or Trustees, or the Elders or the Synod. (*Michael Pillai* v. *Bartle*, 39 Madras, 1056.) It can be repaired by the donor or by the trustees. In England the incumbent has to repair the chancel while the trustees have to repair the rest of the Church. No such distinction exists in India. The Hindu Sacred Books contain numerous rules, as to the proportions of sacred buildings, and as to the arrangements that are permissible therein. In England there is no single book or treatise describing what an ecclesiastical building may or may not contain but there are numerous decisions, prohibiting particular structures or decorations. The general principle underlying them all appears to be that a Church should not contain any structures, detail, images or stained glass which are likely to be worshipped for themselves. No occasion has arisen in India so far, calling in question the propriety of any structural or decorative ornament. When the Bishop has consecrated a Church he does not necessarily consecrate or approve of all the ornaments and fittings of the Church. It is open to him, therefore, to order the removal of any ornament which is not in accordance with the usages of the Church, even after the edifice is consecrated. The Trustees are the persons who have to give permission for erection of permanent monuments inside the Church. (See Phillimore on *Ecclesiastical Law*.) They have the right to say what charges should be levied, where the monuments are to be located and what conditions they should fulfil.

Moveable Property inside a Church

In England there is a distinction of great practical importance made between moveable and immoveable property appertaining to a Church. The Church itself, the Churchyard and the rents or glebe lands set apart for the support of the Church are deemed to be vested in the incumbent, while the moveable property in the Church appertains to the Church Wardens or Lay Trustees and any civil or criminal action in respect of them has to be instituted by them. They cannot themselves remove or

dispose of them but they are entitled to be consulted before they are altered or sold. No distinction is made between moveable or immoveable Church property in India. They are both vested in Trustees who can deal with them under the terms of the Trust. The Trustees are in charge of the Communion Table, reading desk, pulpit, lantern, credence table and Communion vessels. They have to provide these and have also the burden of repairing or replacing them when necessary. Likewise the seating accommodation is in their charge. They provide the seats and can levy a pew rent. Other moveable property belonging to a Church like the organ, vases, bells, clocks, registers, books, alms chest and alms bags are in their charge. They have to find these articles of furniture and repair them and bring actions when they are stolen or misappropriated. They collect all alms and subscriptions and any special gifts or offerings that may be made, in money or in kind; and they have the right to control them. They purchase property for the Church including Communion vessels and bread and wine, candles and oil, and the dress and accoutrements of the choir. The members who form the choir are not under their control; and the music is arranged as part of the worship, by the minister or clergyman. Likewise, though the bells are vested in the trustees, the ringing of them is under the control of the incumbent, lest the bells should be rung at all hours or during service.

Churchyards

Nearly all Parish Churches in England have churchyards attached to the sacred building which are governed, however, by slightly different rules. In India also, many especially of the older Churches are provided with churchyards: and the ownership of these 'God's acres' is usually vested in the same authorities as the Churches themselves. The Churchyard is often consecrated by the Bishop or other competent authority in the same way as the Church itself. After it is once consecrated, it cannot be sold for a secular purpose or built over even for the

purpose of yielding rent or profit to the Church. It can however be used for making extensions or alterations to the Church itself. Pathways can be made across churchyards for the purpose of creating order and symmetry among the tombs in it, or for providing easy means of access to the Church, but no roads, avenues or playgrounds can be planned out of it, for the enjoyment of the general public. The Church authority has to give permission before any one can be buried in it, but such permission cannot be refused to a member of the Church. A similar permission has to be obtained for the erection of monuments on payment of the usual fee. The trustees cannot remove such monuments without the consent of the Bishop nor remove the soil nor break down the churchyard wall nor turn cattle into it so as to be a nuisance to the members of the Church. Where a deceased person has directed that his body should be cremated instead of being buried, the same may be allowed by the Church authority, and the urn containing the ashes can be placed either in the graveyard or with permission in the Church itself. The bones and other remains of people buried in the churchyard vest not in the relatives of the deceased but in the Church Wardens who have to bring actions if they are improperly removed or dealt with. The body or bones cannot be removed therefrom without their permission for which a license fee is payable in England. In India an eloborate procedure is prescribed for public cemeteries and the removal has to be effected with the concurrence of the Bishop, the Assistant Surgeon and the Magistrate (or military authority, in military cemeteries).

There are also cemeteries not attached to churches but opened and maintained by government out of public funds. Usually express rules are drawn up for their control and management and an officer is put in charge in addition to a caretaker. *Prima facie* all Christians who are willing to pay the necessary fees are entitled to burial in the particular places allotted to the communities to which they belong, but if it has been confined from its foundation or by long use to any particular community others may have no claim to it.

Parsonages

Many Churches in India have Parsonages attached to them for the occupation of the clergymen ministering in the Church. In England such parsonages or manses form part of the Church endowment and are deemed to be vested in the incumbent like the immoveable property belonging to the Church. In India there is no such rule, but generally it may be said that the persons who own the Church are also entitled to the parsonage unless there is evidence forthcoming that funds for the erection of the parsonage were found from a different source from that out of which the church was built. The ordinary law relating to religious and charitable trusts applies to the parsonage, unless it is vested in private ownership. The Trustees are entrusted with the obligation of maintaining it and keeping it in repair. Unlike Churches, there is nothing to prevent parsonages, if under a trust, from being sold, but the proceeds must be used to provide similar parsonages.

Enforcement of Trusts

There are two classes of cases in which difficulties have arisen with reference to all these kinds of Church property. Where the Government has provided all the funds for the erection of the Church or where a Missionary Society has done so, there is very little room for dispute about the ownership of the Church or about the persons entitled to look after it and control it. But a very large number of the Churches in existence in India have not been erected exclusively with funds from either of the above two sources. Private persons have sometimes given a portion of the money required for the erection of a Church. In a few instances they have found the whole of the money, though the Church has been handed over after erection and consecration to a Missionary Society or to the Government. In many instances, funds have been collected from numerous individuals for the specific purpose of putting up a place of worship and the edifice has been erected with the

proceeds of such fund, supplemented perhaps from the resources of the State or of some Missionary Society. In such cases, the people who contribute the money have the right to see that the funds, and consequently the building or buildings erected with them, are used for the purposes for which the fund was originally collected. If, for instance, a Church so erected is about to be closed, or sold for a consideration, or handed over to some other Missionary Society or body, or put to uses for which it was not intended, persons interested in the Church might well sue for an injunction restraining the Church authority from dealing with it as they liked. It is the special and peculiar province of Courts to ascertain the extent and purposes of any dedication to the public and to protect trusts, i.e., to see that trust property is not mismanaged, misused or alienated. (*Chinnasamy Mudaly* v. *Advocate General*, XVII Madras, 406.)

Even where no money has been found for the erection of the Church by public subscription or by private munificence, a Church is deemed to be property dedicated to the use of the Christian public. Whether a private person or body of persons has given the money for erecting a Church, or whether a Missionary Society or Government has found the funds, once it is erected and dedicated to public use, it ceases to be the exclusive property of the person who so dedicated it or raised funds for it, but has become trust property; and the public has the right to see that the Church itself and all property that goes along with the Church are not sold, misused or mismanaged but utilized in a prudent and business like manner for the purposes for which it was dedicated or intended. Anybody who is benefited by the trust, any member of the Church or regular worshipper in it, can sue to enforce the trust.

Where the Church alone has been erected but no funds have been provided for the maintenance or upkeep of the Church or of the worship to be carried on therein or for the payment of the priests, sextons, and other lay and clerical staff to be employed with the Church, it is open to the defendant in the above classes of suits to say

that they are not bound to keep the edifice in use as a Church because they have to find money from their own resources and are unable to do so.

Endowments for Churches

In England, the majority of Churches belonging to the Church of England are richly endowed with property from the income of which the priests and the other dignitaries of the Church are maintained. A great deal of the property thus appurtenant to Churches was given in Pre-Reformation times, as specific endowments for those Churches. More often it was property originally dedicated to the use of monasteries, convents and other religious houses, but it has long since been appropriated to particular Churches and cathedrals. Provision is now made for the collection of funds for improving or augmenting these endowments and placing them on such a footing that Church officials can receive an adequate income from them. In India also numerous Hindu temples and Muhammadan mosques are maintained out of property specifically dedicated to them and managed by the trustees or mutawallis of such institutions. The Christian cathedrals, Churches and other places of worship in India stand, however, on a different footing. Very few of them have any endowments to boast of; there are still fewer which are provided with sufficient income for the payment of all the persons who are employed about the Church. Ecclesiastical property, in the strict sense of the word, e.g., tithe, rent charge, and glebe lands are non-existent in India. Bishops, chaplains, missionaries and priests or ministers are provided with emoluments, but usually not out of the income of any property specially endowed or dedicated for the purpose. The subject of ecclesiastical endowment therefore, is not of serious importance in British India.

Pious donors have, however, in some instances, provided funds or immoveable property for the maintenance of a Church, after erecting the same. There are also numerous cases in which gifts of lands, and buildings

yielding income, or of stocks and shares have been made to Churches to be held in trust for the maintenance of worship in them or to constitute a fund out of which the Church officials could be paid. In a few instances, agricultural land itself has been bestowed upon the Church, or a building which yields rent; in others a person has bequeathed by will only a definite share or ascertainable quota out of the income of his property (which continues to remain in private ownership) thus constituting an annuity for the benefit of the Church. In other instances, money in some shape or other has been given.

The persons who receive the property so dedicated are deemed to be trustees and under the Indian Trusts Act are bound to see that the income from it is applied to the purpose for which it is dedicated. In some, perhaps in many cases, there is no formal deed of trust or settlement embodying the dedication; in others the trust is merely what is known as an implied or constructive trust. In these latter cases, the trustees have to continue to apply the trust property in their hands to the purpose or purposes for which it has been applied during at least the previous twenty-five years. They have no right to divert funds which are specifically allotted for a given purpose or which have always been used for such purpose to some other object however desirable such other object might appear to be. Where, however, the original beneficiary under the trust has ceased to exist, where for instance an endowment was created for a particular Church or parish and the Church has fallen down and not been rebuilt or the parish has become moribund, it is open to the trustees to apply the funds in their hands for purposes similar to those which the donors intended, in exercise of what is known as the *Cypres* doctrine. The Indian Trust Act provides that in such a case, the trustees could protect themselves from unnecessary litigation by applying to the Court formally for the diversion of funds in their hands from one purpose which had now fallen into disuse to another purpose.

Secular Property

In addition to Churches and ecclesiastical property strictly so called, there are many varieties of property usually held by Missionary Societies or by trustees in charge of Churches. There are institutions like schools, colleges and theological seminaries, hospitals, nursing homes, rest houses, and orphanages, homes for the blind, the deaf and dumb, the incurable, and lepers, reading rooms, libraries and industrial institutions. All these varieties of establishments may have been opened in the first instance or may have been subsequently maintained in any of the ways above mentioned with reference to Churches. The funds for their erection might have entirely come from Missionary Societies; and even in such a case, persons interested in them might urge that the building should continue to be used for the original purposes for which they were intended. In cases in which funds have been given by individual donors or collected from the general public for the erection of such schools, hospitals, etc., the individuals benefiting by those institutions have a stronger footing and have a right to ask that the purpose for which these buildings were originally dedicated should not be defeated. Of course, Missionary Societies will not be bound to maintain these institutions when money is needed for their upkeep and they have not been endowed with any funds earmarked for the purpose. Where, however, such funds are available, they will be liable if, either, they closed such institutions or sold and disposed of them or utilized them for different purposes from those for which they were originally intended.

Dedication

Reference has constantly been made in this Chapter to the subject of dedication for charitable and religious purposes. As the question often arises in Courts as to when property might be said to be dedicated, it is necessary to say a few words about it. There is usually no difficulty if the dedication is express, that is to say,

if there is any document evidencing the dedication. The document may take the form of a will under which a testator devises a piece of property or a share of the income arising from it, for religious purposes: or it may take the form of a deed of gift, duly registered under the Transfer of Property Act to any person who is expected to use it for charitable purposes; or it may take the form of a settlement or trust under which a trustee or body of trustees are expressly instructed to hold the property given under the trust for the charity specified. In these cases, there is usually no difficulty either about the factum of dedication or about the purposes or objects for which it is dedicated or as to the extent of the property which is the subject of dedication. But even in such cases, two or three simple rules must be remembered. In the first place, a dedication to charity will be void if its real object is to defeat the creditors of the person dedicating. Under Section 53 of the Transfer of Property Act, 'Where the effect of any transfer of immoveable property is to defraud, defeat or delay the creditors of the transferor, or prior or subsequent transferees for consideration, or co-owners or other persons having an interest in such property, and the transfer is made gratuitously or for a grossly inadequate consideration, the transfer may be presumed to have been made with intent to defeat or delay such persons.' (See *Ramachandra Mukerjea* v. *Ranjit Singh*, 27 Calcutta, 242.) The second condition is that if the dedication is to take effect in future, it must not have been revoked by subsequent conduct before it took effect. If, for instance, a will devises certain property to charity, but during the life time of the testator, the said property has been sold to some one else, and the proceeds have been used for another purpose, the dedication becomes revoked. The third and most important rule is that in order that there may be dedication, there must be an *animus dedicandi*, that is to say, there must be proof of the intention of the donor to set it apart for religious and charitable purposes. If such intention is not clearly proved, the heirs of the

dedicator may claim to recover the property for themselves. As to this, more later.

These rules apply even to express trusts or gifts, but a large number of the trusts are not really express. They are implied trusts or trusts brought into existence by operation of law. They are referred to under Sections 78–90 of the Indian Trusts Act. There are also trusts known as precatory trusts. Where a piece of property is given by a testator to a relation and he is asked to maintain a catechist out of it, it is called a precatory trust. Then again there may be trusts merely inferred from conduct and user. If, for instance, a building has been erected and consecrated for public use, and has been all along so used by the general public, the mere consecration will imply a dedication, and even if there has been no ceremony like consecration, if the property has been continuously used for a series of years for public purposes, dedication will be inferred. Dedication may, therefore, take place either by express or implied trust or under a constructive or precatory trust or may be inferred merely from consecration or the conduct of the parties.

The principles above mentioned, namely, that the intention must not be to defeat creditors, that the gift should not have been subsequently revoked, and that it must be accompanied by an *animus dedicandi* also apply to these classes of trusts.

It is where there is no express deed of trust that difficulties arise as to whether there has been a dedication, and if one can be inferred or implied what was the extent of the dedication. The following simple rules may be remembered in connection with such dedications.

Where an intention to set apart property for religious uses is clear from the terms or language employed by the donor, and there is a transfer of property for such uses, then there is dedication; but the mere fact that a person spends a portion of the income derived from a property regularly for a particular charitable purpose is insufficient to establish a dedication.

The genuineness or otherwise of a dedication would also depend upon whether the dedication exhausts the whole property, or whether on the other hand, it is sufficient to fulfil the entire objects of the trust. Where, for instance, only a sum of Rs 100 per mensem is required for carrying out a particular charity, and a man gives property yielding Rs 1,000 per mensem for it, the Courts would infer that his real object was not to benefit the charity but to defeat the claims of a possible heir who may claim the property or of a creditor that may attach it. Likewise, if a charity is likely to cost Rs 1,000 a month, and the fund or property set apart for it will yield an income, only of Rs 50 per mensem, the Courts will infer again that the money set apart is totally inadequate for the purpose in view, and that the so called dedication is merely a blind for defeating the claims of possible heirs and creditors.

Another important test is the subsequent conduct of the parties after the so-called dedication. If, for instance, the property has been apparently dedicated, but really the dedicator and after him, the members of his family have all along been appropriating to themselves the income from the dedicated property and using it for their own personal enjoyment, such property will cease to be public property, and can be attached by creditors or taken by his heirs. The way in which the income from the property has been expended from year to year may be taken into account for the purpose of deciding whether the real intention was to benefit the charity or defeat other relations. (*Radha Mohun* v. *Jadomonee*, 23 W. R. (P.C.) 379.) On the other hand, if there was a definite intention to benefit the charity but the trustees put in charge with the property have been misapplying the property or committing breach of trust in respect of it, and appropriating the income to themselves, such conduct even if it was continued for a long time would not cancel the originally expressed trust. There is no law of limitation or adverse possession in favour of trustees and the Courts may interfere at any time to restore trust property to its proper purposes.

If the language of a trust is vague and indefinite or if the object of the trust is not clearly defined, then the trust would be defeated. If a testator for instance says that his property is to be devoted to charity generally, or for any pious uses, his heirs can take the property because the nature of the charity is not sufficiently defined.

A trust is not void and will not fail merely because possession of the property has not been handed over to the trustee or has not been accepted by him. Nor will it fail because the trustee nominated by the donor disclaims the responsibility or retires from his office. If however the trust property has not been defined and cannot be ascertained with precision the trust will be defeated. In order that there may be a trust three things are said to be indispensable: (1) a definite subject, i.e., property, (2) a definite object or purpose, (3) sufficient words to raise a trust. The motive of the grantor or donor is immaterial.

If however there is evidence that advantage was taken of the age, infirmity of mind or body or temperamental or other weakness of a grantor by some person capable of exerting an undue influence upon him, e.g. by a priest on his parishoner, a doctor on his patient, or a guru on his disciple, or a guardian on a ward who is in a position to be influenced by him, and property has thus been obtained or granted out the gift will be invalid.

For detailed information on the subject of dedication see Ganapathy Iyer on Religious Endowments.

CHAPTER XIV

Modes of holding property dedicated for religious and charitable purposes

Missionary societies, both in England and India, and other religious and charitable organizations are constantly acquiring property in India for religious uses. Less frequently grants of property are made to such societies for specified philanthropic purposes. Such societies will naturally be anxious to know what are the best ways of acquiring or holding such property and who are the persons in whose names the grants or acquisition could be made.

There are certain characteristics or conditions which all such grants or acquisitions have to fulfil and if these are kept steadily in view it will not be difficult to decide in each case what is the best course of action to pursue.

(1) In the first place such religious and charitable property have to be held in perpetuity and must therefore be given or granted to persons likely to have a permanent existence. If for instance a testator wants to bequeath property for the use of a church, it is not worthwhile drawing up a deed of grant in favour of a clergyman as, in the natural course of affairs, he is likely to retire or die or be transferred and there is a danger of the property being claimed by his heirs as if it was part of his personal estate. The better course would undoubtedly be to vest the property in a corporation sole or in a body of trustees, for whose appointment and renewal from time to time expressed provision exists or is then and there made. Dedication to Ecclesiastical purposes, once effected, becomes permanent and unalterable and therefore the grantor has to take particular care with a view to the grantee being a permanent person.

(2) Such property must be rendered inalienable. It should be so conveyed as to render it impossible for it to

be mixed up with private property of the person or company to whom it is granted, rendering it liable to be sold for his debts. The grantee's rights to sell or mortgage it must be restricted.

(3) The property must be so held that it can be easily handled and controlled and the income from it received and disposed of conveniently, avoiding the risk at the same time of the gift being misappropriated or mismanaged.

The usual ways in which property intended for public or philanthropic purposes is acquired are these:

1. A person can bequeath such property, moveable or immoveable, lands, houses, shares or money, by will. The charitable organization benefitting by the will would do well to see that the will is registered and probated and secure a copy thereof with the probate attached. It should also see that, within a reasonable time, the executor or administrator separates it from the rest of the estate and invests it in a permanent fashion. If it is landed property patta or registration of title must be applied for and obtained.

2. Property may be acquired by gift or settlement made during the life time of a donor. Such gifts are governed by Sections 122 to 129 of the Transfer of Property Act. If it relates to immoveable property of any value, the gift must be made by means of a registered instrument signed by or on behalf of the donor and attested by at least two witnesses. A gift of moveable property like money or offerings can be made either by a registered instrument or by actual delivery of possession. A gift made in fraud of creditors is void.

3. Property may be given under a deed of trust, which is really the safest and most efficient way when the object is to render it permanently available for religious or charitable purposes. Particulars as to the way in which a trust deed could be brought into existence or a trust can be created are to be found in the Indian Trust Act II of 1882. Some more details are given in a later portion of this chapter.

4. Property can also be acquired by purchase for a religious or charitable purpose. Under the Transfer of Property Act, a transfer of tangible immoveable property of the value of Rs 100 and upwards and of a reversion or other intangible thing can be made only by a registered instrument. If the tangible immoveable property is less than Rs 100 in value, the Transfer may be effected either by a registered instrument or by actual delivery of possession. (Vide Book III, ch. iv.)

In the rest of this chapter it is proposed to deal with the various classes of persons who may acquire or receive a grant of property or hold and control property dedicated to religious or charitable uses, their powers and obligations and the characteristics of tenure by each of them. The following persons can hold such property:

i. Individuals.

ii. Two or more persons acting jointly, e.g. brothers in a family or members of a group.

iii. Persons who have entered into partnership for a specific purpose or purposes, e.g., Gordon Woodroffe & Co.

iv. A society incorporated in England, e.g., the Church Missionary Society.

v. Trustees elected under the Religious Societies Act 1 of 1880.

vi. A society incorporated in India under the Religious and Charitable Societies Act XXI of 1860.

vii. A society incorporated under the Companies Act of 1913.

viii. A body of Trustees brought into existence under the Trust Act. The trust may be express, implied, or constructive.

ix. A corporation sole, e.g., the Bishop of Bombay.

x. Government.

I. Individual Ownership

Property may be acquired by a person for his own exclusive use in which case it is his private estate. It may also be acquired by him with the intention of using it for the benefit of the public, but if he keeps it

in his control, giving as much or as little of it as he likes or giving or withholding at his discretion, it is still his property. If however, on acquisition, he dedicates it to the use of the public or creates a trust in respect of it, he may continue to be the nominal holder of the property but he is really a trustee for public uses.

Likewise property may be granted to a private person or transferred in his name, for his exclusive use, or in order that he may spend as much or as little as he likes out of it for public use : or it may be granted or transferred to him, not for his own beneficial enjoyment but for the use of others.

Property set apart for religious purposes need not necessarily be handed over by the donor to other persons, in order that it may be used for such purposes. A person may for instance erect a private chapel within his own property and get the Bishop or other religious authority to consecrate it for use as a church. The Bishop has absolute discretion to decide whether he will consecrate it or not ; but once it is consecrated it may continue to be the property of the person who erected it, and after him, of his heirs. There appears to be a rule in the Church of England that a person who has a private chapel of his own must worship at least once a year in a parish church or other place of worship in order that he may declare and retain his membership in the general body of the church of England. No such rule is in force in India. An individual might likewise build or establish a mission hall, a reading room, a school, a hospital or a graveyard with his own money and continue to be the proprietor of the same though he has provided them or is utilizing them for public or charitable purposes. If he has not collected money from others for the purpose of establishing any one of the above kinds of institutions or for the purpose of conducting or maintaining the same, it is undoubtedly his own exclusive property, and will descend to his heirs on his death.

If however he has executed a document or created a settlement or trust dedicating it to the use of the public or if there is an implied or constructive trust, he will be in

the position of a trustee merely and cannot be called an absolute owner. But if there is no such document or arrangement he can do what he likes with the property either during his life time or by will. Even if he has collected money from others, if the money has been given to him absolutely to be disposed of or spent by him as he likes, it will still be his property. Very clear and convincing evidence that the property bestowed upon him or acquired by him was not intended for his absolute or exclusive enjoyment but in trust for a specific public purpose, will be necessary before it can be enforced as a trust in his hands.

When property is acquired by a donor for a public or charitable purpose, or given to a private person for such a purpose there is thus always a risk of himself (or his heirs) claiming the property as his private estate, exclusively his own to deal with as he likes, and of its descending to numerous persons who forget or ignore the benevolent intentions of the original donor. The only method of avoiding this risk is for the purchaser to constitute himself a trustee for the public, or the grantor to make the grantee a trustee for the public.

It sometimes happens that a Missionary society or other well-established organization allows property to be purchased on its behalf by a Missionary or Pastor or Catechist on its staff. There is always the risk in such cases of the person in whose name the property is purchased or transferred, or his heirs and legal representatives after his death, claiming it as his or their own. If he has all along held and enjoyed the property in his own name, paid all the rents and charges due in respect of it, effected all repairs and improvements and dealt with the property as if it was his own, mortgaging it, leasing it and the like, he might well claim to be the absolute owner of the property. If he has thus enjoyed it exclusively for himself, and adversely to the true owners, for more than twelve years, he might become entitled to the property under the statute of Limitation which prevents an action being brought in respect of it after that period. Even if he has not made a title for himself by such

adverse enjoyment, he might still claim the right to recover from the true owners, the value of any improvements that he might have effected in the premises and any money spent by him on repairs or taxes if he had acted in the bona fide belief that he was the true owner. In order to avoid these risks, the safe course is to have the property purchased in the name of the body which advances the money and for whose benefit it is acquired. Even if it is purchased in the name of an individual, there should be express recitals in the document that he has acquired it on behalf of the society and with its funds and that he holds it also for the benefit of the society. The title-deed should be preserved in the archives of the society, which must also see that an account is rendered by the holder of the property from time to time as to his stewardship of the same.

II. Two or More Persons Acting Jointly

Property meant to be used for religious and charitable purposes may also be acquired by, or granted to, and therefore held by two or more persons acting jointly. In such cases, all of them would have joint rights over the property and their responsibility or liability in respect of it will also be joint and several ; i.e., each of them can be held separately liable for any expense incurred in respect of it and two or more of them or all of them can also be held jointly liable.

If for instance two or more persons join together to erect a hospital or school and purchase materials or borrow money therefor they will be jointly and severally liable.

In the language of the Contract Act all such persons during their lives and after the death of one of them, his representatives jointly with the survivor or survivors and after the death of the last survivor, the representatives of all jointly will be held liable. (Section 42.)

When two or more persons undertake a joint liability, in their capacity as joint owners, the person in whose favour the liability arises may compel any one of them to perform the whole of the promise. But when one of them

so performs, he is entitled to contribution from the other persons jointly liable along with him. (Section 43.)

The rights existing in favour of a set of persons acting jointly, will likewise enure to the benefit of all of them and if one of them dies, to the benefit of his representatives and other survivors entitled to the money. (Section 45.)

These and other rules relating to joint ownership are set out in detail in Sections 42 to 45 of the Indian Contract Act 9 of 1872.

It is always a risky and cumbersome proceeding for several persons jointly to acquire or receive or hold property in their joint names. In the first place, there is the risk of one or other of them quarrelling with the rest of the joint owners and making enjoyment of the property impossible or refusing to co-operate with others in the enforcement of joint rights. There is the further danger that after the death of each of the joint owners or holders, his heirs or legal representatives may have to be substituted in his place; the area of the persons jointly entitled or liable may thus become indefinitely extended. The persons undertaking joint liability would have also to remember that their liability will not be limited to the property acquired jointly but will be held to extend and can be enforced even against their other property. If for instance joint owners incur debts the same can be recovered not merely from the joint property in connection with which the debt was incurred but also against any separate property that each of them may possess.

If a suit has to be instituted by such joint owners or against them, all of them have to be joined and if some of them are dead their legal representatives have to be joined.

For these and other reasons it is generally a risky and unsafe proceeding to purchase or grant property intended for secular uses in the names of a number of persons jointly: in the case of church property or estate meant for charitable purposes where security of title, and ease and convenience of enjoyment are imperative, it will be highly

unwise to invest property in a number of names or grant it or transfer it to a number of persons jointly : e.g., in all the members of a parish.

III. Partnership

Two or more persons can enter into a contract of partnership and in their capacity as partners acquire or receive and hold property dedicated to charitable or religious uses. 'A partnership is a relation which subsists between persons who have agreed to combine their property, labour or skill in some business and to share the profits thereof if any between them.' (Section 239, Indian Contract Act.)

It is not necessary to deal in detail with this kind of ownership because in the first instance it is not a matter of common occurrence that property dedicated to religious and charitable uses is purchased by a partnership concern though it sometimes happens that a firm conducts a school or a hospital or a reading room for the benefit of its employees. Another reason for not entering into a detail about the rights and liabilities of partners owning charitable or religious property is that in law they are treated exactly like joint owners; their rights and liabilities are exactly the same as regards outsiders as those mentioned above as pertaining to joint contractors or owners.

This statement does not mean that partnership is synonymous with joint ownership. Partners have mutual rights and liabilities which joint owners have not: each of them can act as an agent of the firm and bind the rest by a contract arranged by him. Where two persons jointly own a house they are not a partnership firm : even if they let the house for rent and share it between them they are not a firm. But if they agree to run a hotel in the building and share the profits accruing from the hotel business they are partners.

The Indian Law makes the sharing of profits of the business an essential element of partnership. Where as in running a religious or charitable institution, there is

no expectation or likelihood of profit, it is risky to invest such an institution in a partnership firm. Such a firm is liable to dissolution at any moment for any of the reasons set out in sections 254 and 255 of the Indian Contract Act and the ownership of the charitable institution will then be in the air. Further if the general business of the firm which owns a religious or charitable institution ends in a loss, the said institution is liable on dissolution to be divided among the creditors of the firm, like other assets belonging to the firm.

Though a partnership firm can thus be asked to hold a church or institution for charitable purposes, it is not a safe or wise proceeding to invest it in such ownership.

IV. Persons Incorporated under the Religious and Charitable Societies Act 21 of 1860

The risks attendant on churches and church property being vested in numerous persons not formally incorporated under any statute have already been referred to. Serious difficulties arise not merely when suits have to be filed by or against them but also in the course of the ordinary management or enjoyment of such property, especially when as must happen after efflux of time, the original owners die and numerous legal representatives take their place.

In order to avoid these inconveniences a body of persons intending to hold, or meant to hold, or actually holding property may constitute themselves into a corporation either under Act 21 of 1860 or under the Companies' Act of 1913.

Act 21 of 1860 is known as the Registration of Societies Act and is a piece of legislation singularly free from risks of litigation. The only conditions that a society has to fulfil under the Act are these:

1. There should be seven or more persons.
2. They should have some literary, scientific or charitable purpose or purposes in view.
3. They should enter into a covenant with one another as regards their objects and obligations

and embody the terms of their agreement in a Memorandum of Association.

4. The Memorandum of Association together with a copy of the rules and regulations made by the society should be produced before a Registrar of Joint Stock Companies and registered by him.
5. A fee of Rs 50 should be paid.
6. Annually a list of the members of the society should also be filed before the same Registrar.

There should be more than seven persons but there is no limit to the number of persons who can constitute themselves into a society provided they fulfil the conditions of membership by the rules laid down.

The purpose for which a society may be formed under this Act are specified in Section 20; Charitable societies, societies for the promotion of science, literature, art, useful knowledge, maintenance of libraries, museums, etc. As charitable purposes are mostly connected with some form of faith, the term charitable would presumably include religious societies, which have frequently been registered under the Act.

Charity in its legal sense comprises four leading divisions; settlements of trusts (1) for the relief of poverty, (2) for the advancement of education, (3) for the advancement or maintenance of religion, (4) trusts for purposes generally beneficial to the community. (Per Lord Macnaghten in *Commissioners for Special Purposes* v. *Pemsil*, 1891, Appeal Cases p. 580.)

The Act provides that the Memorandum of Association should contain the name of the society, objects and the names, addresses and occupations of the governing body by whom the affairs of the society are to be managed.

The rules which are drawn up should regulate the constitution of the general body and the conditions of membership in it, the meetings of that assembly and of the governing body or board of management, the powers and responsibilities of such governing body and of the Secretary, Treasurer and other office bearers of the society and the financial arrangements as to audit, accounting, etc.

The Act provides that all property acquired or held by or granted to the society should vest in its governing body. Suits by and against the society can be instituted, without impleading all the members, in the name of the president, secretary or other person appointed for the purpose under the rules, and if a decree is passed the judgment is enforced against the property of the society only and not against the private property of its members.

The governing body of the society is allowed to alter, extend or abridge the purposes of the society or amalgamate the society with another similar society, if the members after receiving notice of the proposed alteration of amalgamation approve of the change at a special meeting by a three-fifths majority, and confirm the same at another special meeting held one month later by a similar three-fifths majority.

A society registered under this Act may be dissolved also by special meeting if three-fifths of the members duly served with notice of the proposed dissolution approve of the resolution. The property if any belonging to the society will not be distributed on dissolution among its members but must be handed over, in application of the cypres doctrine applicable to charities, to any other body established for a similar purpose.

Many Missionary societies, and associations formed for the purpose of collecting funds, acquiring property and using them for a public charitable purposes have been registered under this Act.

V. Trustees under the Religious Societies Act I of 1880

The earlier Act of 1860 does not make specific provision for societies formed for religious purposes. This Act is meant to meet this deficiency and lay down the manner in which bodies of persons associated together for carrying on religious worship may hold property acquired for such purposes.

Section 2 is the important section in the Act and provides that ' when any body of persons associated for

the purpose of maintaining religious worship has acquired or hereafter shall acquire any property and such property has been or hereafter shall be vested in trustees in trust for such body, and it becomes necessary to appoint a new trustee, and no manner of appointing such new trustee is prescribed or such new trustee cannot be appointed in the manner prescribed, a new trustee may be appointed either in such manner as may be agreed upon by such body by a two-thirds majority of the persons associated together actually being present at the meeting at which appointment is made.' The said appointment must be contained in a memorandum subscribed by the chairman and attested by two witnesses. It should be registered under the Indian Registration Act, Section 17.

The Act apparently requires that in the case of new associations a document or deed creating the new trust should be brought into existence under which property could be made to vest in trustees. In the case of existing trusts which may be either implied or constructive as well as express trusts recorded in any permanent document, the property belonging to the society has already vested in trustees appointed in the ordinary way and such trustees can sue and be sued as trustees.

Such a society can be dissolved like a society formed under Act 21 of 1860 by a three-fifth majority of the members of the society; but the property of the society shall not be distributed among its individual members but shall be handed over under the cypres doctrine to another body carrying out similar purposes. The schedule gives a form of the memorandum for appointing new trustees under the Act.

VI. Companies formed under the Indian Companies Act of 1913

The Companies Act has been enacted mainly for the purpose of providing for the incorporation of persons joining together for carrying on any business for gain and is not therefore specially suited for a society which is established with a religious or charitable purpose in

view. In section 26 however of the new act special provision is made for persons registering themselves who have no business ends in view but who associate themselves for a public or a charitable purpose: and Missionary and other bodies have accordingly registered themselves under this Act.

The principal disadvantages of registration under this Act, are that numerous rules contained in it for the purpose of regulating the proper control of funds and for management of the same, by companies contracting for gain will become applicable to religious and charitable societies which have no profit in view; and the somewhat severe penalties imposed by the Act for breach of the rules set out in the Act also become applicable.

On the other hand, there can be no doubt, that if the secretary of a society is a man of business and one who has thoroughly acquainted himself with the provisions of the Act, and carries out all the directions contained in it, it will conduce to the efficient management of the society and serve to create public confidence in it.

Any seven or more persons may subscribe their names to a Memorandum of Association and register themselves into an incorporated company with or without limited liability. The particulars that the Memorandum of Association should contain are set out in sections 8, 9 and 10 of the Act. The other rules contained in the Act are far too numerous and detailed to be set out in a handbook like this; reference must be made to the Act itself, which is a most elaborate piece of legislation based on the English Companies Acts.

VII. Society Incorporated in England Under English Acts

Property may also be acquired by or granted to a Missionary society or organization incorporated in England, America or France. There is no need to register such a society or branch of it in India, if an agent with a power of attorney is stationed in this country to take action on behalf of it, but such a society is usually asked

to name a head office in India. The agent in India must either have a general power of attorney (which has to be registered in India) enabling him to do all the acts which the missionary society itself can do; or he may be granted a special power of attorney for carrying out some particular purpose, for example, the sale of a piece of a property which the society has in view. In either case such a power is strictly construed and the agent will not be able to perform any act which is not expressly provided for in his power and if he inadvertently does so his action will be *ultra-vires* and not binding on the society.

Missionary societies are usually adverse to giving a general power of attorney to their agents such as will enable them to perform all kinds of acts which the society itself could perform and so bind the society. If they invested their local agents with such powers the latter might sell and dispose of all their property or undertake heavy financial responsibility rendering the organization at home unable to get rid of the effects of his action. But such an agent should at least have powers to lease out property and collect rents, to draw money and invest it, and deal with subordinate officials. He may be expressly restricted from selling, mortgaging or giving away property and undertaking financial liability except for limited purposes or for strictly limited sums of money.

The more usual procedure appears to be for Missionary societies to send out special powers of attorney enabling their agent in India to take action specifically mentioned in such powers. While this proceeding guards the society in England from hasty or improvident conduct on the part of its local secretary, it causes delay and involves a great deal of correspondence and waste of money. Even when a small piece of property, say five cents in extent, has to be sold or exchanged, a special power has, weeks previously, to be applied for from home and sent out to India containing, an exact and accurate description of the property intended to be sold. Each such power has to be separately registered in England and the Notarial charges for attestation and registration are usually very heavy compared with the value of the contract

to be put through here on behalf of the society. The difficulty may be met by the agent here being invested with power to sell or mortgage up to a certain limit but on each occasion he may be directed to write for and obtain specific permission from home before he binds himself by a sale or agreement to sell.

VIII. Trustees created by a Deed of Trust

The Indian Trusts' Act is in many respects much the most useful piece of legislation from the point of view of property set apart for a religious or charitable purpose. The law of Trusts in England grew up in the main in connection with gifts and bequests made by pious donors for religious and charitable purposes and most of the churches and church property in England are still held by corporations sole or by bodies of trustees known as lay trustees or Elders of the church or Boards of management. In India also, all or nearly all the property dedicated for religious purposes connected with Hinduism, Muhammadanism and other forms of faith are held in trust, either by single individuals, or by bodies like trustees of temples. Much the largest proportion of the property set apart for religious and charitable purposes connected with the Christian faith is also held by trustees, express, implied or constructive.

Creation of a Trust

The rules as to the creation or construction of a trust are to be found in the Indian Trusts' Act 2 of 1882. When one person agrees to hold property for the benefit of another, there is a trust. Section 3 defines a trust as an obligation annexed to the ownership of the property and arising out of a confidence reposed in or accepted by the owner or declared and accepted by him for the benefit of another or for the benefit of another and the owner. In order that there may be a trust there must be (1) a subject of the trust, i.e., property moveable or immoveable, (2) an object of the trust, i.e., the charitable or religious purpose for which the trust is created, (3) a

trustee who is to hold the property, (4) a beneficiary for whose use or advantage it is to be held and (5) finally terms and conditions under which the trust is to be held. The trust may relate to moveable or immoveable property and may be created by a will or settlement by any person competent to contract. The beneficiary need not be competent to contract. Usually trusts are created by express documents but in certain cases the law is prepared to infer or deduce a trust. Such trusts are known as implied or constructive or precatory trusts and are dealt with in sections 80 to 95 of the Trust Act. Where for instance property is given to a trustee for a certain purpose but that purpose has become illegal or fails or does not exhaust all property, the trustee holds the property in Trust for the benefit of the donor. Other instances, too numerous to mention, are set out in the Act, which also specifies in detail the powers of trustees and their rights and obligations.

The Civil Procedure Code, Section 92 enables Courts freely to interfere for the purpose of enforcing all trusts for religious and charitable purposes, to remove trustees, to appoint a new trustee, to vest property in any trustee, to direct accounts and enquiries, to declare what proportion of trust property or of any interest therein should be earmarked for a particular purpose, to authorise the sale, mortgage or lease of trust property, to settle a scheme and grant such further or other relief as the case may require.

IX. Corporation Sole

Religious property may also be held in the Church of England by the Bishop or Archdeacon acting as a corporation sole, as these offices are of a permanent and enduring character, though the individuals occupying the office may change from time to time. They are able and therefore allowed to hold property in perpetuity as if they were persons existing for all time. In India a great many pieces of property meant to be used in connection with churches, schools, orphanages and

religious and charitable institutions have been handed over to the Bishop and he holds them in trust for the purposes mentioned in the trust deed handed over to him. The Society for the Propagation of the Gospel treats the Bishop of each diocese as its local representative and acquires all its property in his name. As he is a permanent juridical person and has an office or establishment for the purpose of helping him in the management of such property and as donors have the most implicit confidence in the holders of the office, gifts of property are frequently made direct to the Bishop or Archdeacon.

Note.—Only seven of the Government Bishops in India are Corporations sole now, and if the proposed Church Measure becomes Law, they will cease to be so.

X. Government

The Cathedrals in the presidency towns and the more important churches in other towns in the moffussil have either been built by Government or with the aid of private munificence supplemented by public funds; and some of the churches erected by former rulers or pious donors have been taken over by Government. They are all under the control of the Ecclesiastical Department of Government, which is responsible for maintaining them and keeping them in repair. The Department carries out its responsibilities through Bishops and Chaplains and sometimes through Church Wardens or Lay trustees appointed for the purpose. It is not likely that any one will venture to call in question the acts of the Ecclesiastical Department; but strictly speaking the position of Government is only that of a superior trustee who has delegated its authority to other trustees, from necessity.

CHAPTER XV

Citizenship

By the Proclamation made by Queen Victoria when she assumed direct control over the territories which now constitute the Indian Empire, all persons in India irrespective of caste, creed or nationality are entitled to equal treatment under the laws.

We declare it to be our royal will and pleasure that none be in anywise favoured, none molested or disquieted, by reason of their religious faith or observances; but that all shall alike enjoy the equal and impartial protection of the law; and we do strictly charge and enjoin all those who may be in authority under us, that they abstain from all interference with the religious belief or worship of any of our subjects on pain of our highest displeasure. And it is further our will, that so far as may be, our subjects, of whatever race or creed, be freely and impartially admitted to offices in our service, the duties of which they may be qualified by their education, ability and integrity duly to discharge.

This principle of equal treatment and measure of protection for Christians as well as other subjects of Her Majesty was not arrived at till after a great deal of conflict and a considerable measure of agitation. When territories were first acquired by the East India Company in India they proclaimed the principle of toleration for all faiths prevalent in the country and professed their willingness to carry on the Government exactly on the principles on which it was previously carried on by Hindu Rulers. This principle however led to a specially favourable treatment for Hindus and Muhammadans such as they would have enjoyed under rulers of their respective faiths and somewhat of an unfavourable treatment for Christians. 'Up to the year 1831, Native Christians had been placed under stringent civil disabilities by our own Regulations which formally adopted and regularly enforced the loose and intermittent usages of intolerance which they found in vogue. Native Christians were excluded from practising as pleaders, and from the subordinate official departments, although no such rule of exclusion had ever been set up amongst them by Hindus or Muhammadans;

while converts to Christianity were liable to be deprived by reason of their conversion not only of property but of their wives and children.' (Lyall's *Asiatic Studies*, Vol. I, page 272.) 'Up to 1830, Native Christians had been excluded in the Madras Presidency, where they were most numerous, by law, from the Bar, from judicial offices and from Army Commissions. They were left amenable in the interior provinces to Mussalman Law, and their civil rights were defined by no particular Code at all throughout India.' (Lyall's *Asiatic Studies*, Vol. I, page 283).

'Christian officials, whether British or otherwise, had as part of their official duty to conduct festivals and processions in connection with temples, the money for the purpose being found from Government treasuries. A system which allowed Native Christians to be punished publicly by canes for refusing to drag the car of Hindu Idols, which taxed them for the support of those idols and visited them with civil disabilities, was, to say the least, an excessive deference to the opinion of majorities.' (Ibid.) A series of protests were made by individual civil servants who felt conscientious scruples against taking part in festivals and processions held in connection with Hindu temples. Missionary Societies presented strongly worded memoranda to Government praying that the principle of neutrality in religious matters did not include oppressive or unfair treatment to one class of Her Majesty's subjects at the expense of others, while numerous questions were asked in Parliament relating to instances of such treatment; evidence was received and Parliamentary papers were compiled reviewing the whole question of the attitude which the Government should adopt with reference to the question of equal treatment for all subjects. As a consequence of these discussions, the Religious Endowments Act of 1863 was enacted which relieved Government from the obligation to maintain Hindu or Muhammadan places of worship together with the festivals and processions conducted therein. Government set apart in connection with each temple or mosque moveable and immoveable property more than sufficient for the conduct of the religious worship therein

and placed them under special bodies of trustees who in turn were subject to the control of Committees appointed for the purpose. Disabilities imposed on Christians like loss of property and of wife and children were removed as far as possible by the Caste Disabilities Removal Act of 1850, and the General Proclamation of 1857 assured equal treatment in the eye of the law for followers of all faiths. The Bar is now open to Christians who pass the requisite examinations and obtain the necessary certificates. Christians could be appointed to all offices though in practice their getting appointments or promotions is rendered difficult in places where Hindus of special sects or castes predominate, while on the other hand, their dismissal from such offices is rendered only too easy when other persons in the same establishment enter into a conspiracy for effecting such an object.

The only instances in which hardships may still be said to exist in the case of Christians are these:

(1) Where Christians are recruited from the so called lower castes, it is not always easy for them, in country places, to be allowed free passage for themselves or for their processions through streets which are occupied by higher castes. Wedding processions have been stopped for this reason, and on one occasion a funeral procession was suspended on its way to the burial ground because the only street through which the procession could go was a caste street, and the person who had died was a Christian from one of the lower classes. The body was eventually removed late in the day after the intervention of persons in authority and invocation of Police aid.

As public citizens paying taxes in the same manner as other fellow citizens, Christians are entitled to go in procession and to obtain licenses, for the asking, from the Police who are bound to protect them if danger is apprehended from persons intent on breaking the law. But it is a fact that the wrong doer often gets the ear of authority and prevents innocent or lawful processions from being held, in one case at least for thirty years in succession.

(2) A similar prohibition is enforced in the case of public wells and sometimes of river ghats and tanks maintained out of public funds. Where a well is strictly private property or where a tank or ghat is part of the property of a temple, Christians have never claimed the right to approach such wells or tanks or take water from them, but where the well, tank or river ghat is maintained out of local or public funds, they have frequently had occasion to contend that having contributed the funds for such structures along with followers of other faiths, they are entitled to equal treatment. It may be said in favour of the higher castes that they have always shown very much more latitude to Christians drawn, say, from the panchama caste than to the same panchama while he still remains a Hindu, because a Christian panchama is supposed to have stepped out of the caste structure and does not therefore come under the primitive rigour of caste rules. But any one who has studied the question knows of numerous wells that have been dug by public subscriptions in the southern districts for the exclusive use of lower castes, simply because other wells built or maintained out of public funds have become appropriated to the use of the higher castes. Even where the well or tank is maintained out of public funds, evidence is let in under Section 144 or 145 of the Criminal Procedure Code that it has continuously been used only by members of the higher castes and has therefore become appropriated to them and that in fact the lower castes have never used them. And where evidence of such continued user or possession has become established, the Magistracy feels powerless to interfere for the purpose of enabling a non-caste man to obtain his water supply from such a well. (*Indian Cases* p. 343.)

(3) Though schools and colleges maintained or aided out of public funds are in theory open to children of all faiths, in practice, this equal treatment is not always available, especially in outlying portions of the country. There are many instances in which children belonging to the lower castes are not admitted into schools which are mainly attended by children of the higher castes, parti-

cularly in cases where the management is in the hands of committees of the higher castes. There are also stray cases where even if in deference to the orders issued by District Collectors or other officers in high position, panchama boys are admitted, they are asked to sit in the verandah or under a tree in the neighbourhood while caste children are provided with seats inside the school room.

(4) Though there is no statute now compelling Christians to draw chariots or cars in connection with temples and no fines can be imposed or penalty inflicted upon any Christian who refuses to take part in the drawing of such cars or chariots, cases are still not unknown where village munsifs who are entrusted with the duty of impressing people to draw cars on festival occasions do not discriminate between Hindus and Christians. All people who hold land in the locality or who are passing that way are commandeered for the purpose of drawing cars, and unless they protest to the point of appealing to the higher authorities, they are made to take part in the drawing of such cars.

Apart from these considerations, every Christian who pays taxes, obeys constituted authority and carries out the laws to which he is subject is entitled to protection, equal justice in the courts and public benefits (like education, etc.) which are open to all classes of the people. The taxes that have to be paid are either direct or indirect taxes. Indirect taxes are paid not by the consumer or beneficiary in person, but at the point or source where property can most conveniently be taxed; e.g. customs duty is collected when they are first brought into the country, salt duties before they are removed from the factories, licenses for cutting timber before they are carried out of forests, and so forth. The most important direct tax is the income tax which persons obtaining an annual income of Rs 2,000 and over are bound to pay. The tax payable is graded according to the income, people with a smaller income being assessed at a lower percentage than officers drawing larger salaries or persons deriving a larger

income. Persons who own property have to pay taxes regulated according to the nature of the property. In Bengal, the land tax payable by land-owners or zemindars has been settled once for all by a system propounded in the time of Lord Cornwallis and known as the Permanent Settlement system under which the benefit of the unearned increment in the value of the land accrues to the proprietor of the estate, but in other parts of India, except in the case of zemindaries or settled estates and Inames, land revenue is liable to be revised once in every thirty years according to the rise in the value of the outturn and of the labour employed in bringing about that outturn.

As regards all these taxes, the simple principle that has to be remembered is that even where the tax is objected to, the person assessed has to pay the tax and then to urge his protest or appeal against the unfair assessment. Usually a strictly limited period of time, fifteen days or a month, is given for presenting such appeals and unless the person who objects to the assessment is prompt and vigilant, his appeal is liable to be thrown out. On failure to pay these demands any portion of his property whether moveable or immoveable, can be seized and sold and the tax may be realised out of the sale proceeds. The taxes imposed by Government directly are not perhaps felt as a hardship so much as those imposed by local bodies and municipalities which are given varied powers of making separate assessments on different kinds of property and which are usually not slow to exercise the powers so conferred upon them. Even in these cases any person who has lived continuously within the municipality or local board has in the first instance to pay the tax and then to prosecute his appeal, if any, against the improper assessment levied upon him.

The Christian citizen like other subjects is expected to obey constituted authority. If he is served with a summons or a warrant to appear either as a party or as a witness in a proceeding or to act as a juryman in a case, he cannot allow his private comfort to override the demands of the public. He must present himself at the appointed time and place, under penalty of being fined or

committed for contempt, or being proceeded against under the sections in the Indian Penal Code dealing with disobedience to constituted authority. Likewise, where a person is asked to produce his documents or papers or to hand over anything in his custody or to produce any person whom he is concealing, he may be ordered to pay the sum of money or produce the document or other article and a heavy penalty may be imposed for his failing to carry out such orders. The mere writing of a letter that he is unable to go or produce the article in question is not sufficient compliance with the order or notice served on him. If he is unable personally to appear as in the case where he is ill or where he is a person of large estate and therefore incapable of attending to all such summonses, he must send some other person in his employment with authority to make all reasonable explanations on his behalf. There are certain cases in which a man's assistance can be commandeered in the interests of the public service. Section 42 of the Criminal Procedure Code provides that 'Every person is bound to assist a Magistrate or police officer reasonably demanding his aid whether within or without the Presidency towns, (*a*) in the taking or preventing the escape of any other person whom such magistrate or police officer is authorized to arrest; (*b*) in the prevention or suppression of a breach of the peace or in the prevention of any injury, attempted to be committed to any railway, canal, telegraph or public property.' When a riot or other unlawful assembly is taking place, a person should not take part in the assembly on pain of his being included and charged as an abettor or as a member of the assembly. He must either play an active part for the purpose of bringing about peace and restoring order or he must keep out of it altogether.

Likewise, every citizen is presumed to know the law, that is to say, he is expected to know the law applicable to a person in his situation or entering into the particular set of contracts or responsibilities which he undertakes. No person is exempted from responsibility merely on the

ground that he has not cared to ascertain the law or acquaint himself with it. He is of course exempted in cases where he is either defective in intelligence or acts in exercise of an authority conferred upon him, or where for one reason or another, he possesses a special status in the eye of the law, and is therefore entitled to exceptional treatment. Both the civil and criminal law recognize numerous exemptions from liability on public grounds and on the ground of the incapacity of the persons concerned in an offence or wrong, but subject to these grounds of exception, every person is presumed to know the law. (See Chapter on Status, Book III, ch. 1).

It is a well known principle of law that the courts will help a wakeful, not a sleeping person: '*vigilantibus non dormientibus lex adjuvat.*' This maxim has many applications; where for instance a wrong has been done to some one, he cannot sleep over the matter; he must immediately prosecute his remedy. Though there is no limitation in the case of crimes, the courts are apt to infer that a person who delays his complaint about a crime has had time to make up a story about it. If it was a genuine grievance, he would have resorted to the proper authorities at once. The civil law has numerous rules of limitation. Any person whose rights are infringed has to take prompt action within the time allowed to him by the law or lose his remedy for ever. A person who allows an injury to his rights of property to continue for some time may be said either to have acquiesced in the wrong and therefore to have put it out of his power to enforce the remedy for that reason or to have waived the remedy itself.

Though a person might have rights and may be entitled to assert such rights or act in exercise of them he is not allowed to go so far in such assertion as to interfere with or infringe a similar right of others. A person, for instance, has every right to walk or drive his vehicle along a public road but he cannot exercise this right in such a fashion that he interferes with the similar right of others. He cannot, for instance, block a public road with his vehicle or vehicles or by collecting a large number of persons in front of his house to prevent the

street from being used as a thoroughfare. If a person owns property, he must look after the property at his peril so that it does not interfere with the persons or property of another. If, for instance, a man is possessed of a dog or accumulates electric power inside his compound or a large body of water on his land, he cannot allow these to escape to his neighbour's land so as to inflict some injury therein either to persons or to property.

Subject to these three obligations, the payment of taxes, obedience to constituted authority and carrying out of the commands of the civil and criminal law, a person is entitled to protection and equal treatment. A Christian as such is not entitled to any special rights or privileges over and above those accorded to followers of other faiths. The rights that he enjoys as a citizen, being therefore exactly the same as those of other people, it does not seem necessary here to enumerate those rights.

Franchise

The question of the franchise that he enjoys as a citizen is however of some importance and has to be specially dealt with. For service on local and municipal bodies, no special franchise is thrown open to Christians as such, though in practice, if there are numerous Christians in a particular municipality or within the limits of a local board and no Christian has been elected by the general body of voters, the Collector or Local Government usually nominates a Christian so that the community to which he belongs may not go without representation. It must be said in favour of these local electoral bodies generally that a Christian candidate stands at least as good a chance of his being elected as a non-Christian, even where the voters are preponderantly non-Christian, because it is considered that a Christian stands out of caste or village factions and therefore can be expected to hold the balance even between parties, when any communal question arises. It cannot be claimed however that the same tolerance is shown to a Christian candidate in election to legislative assemblies or councils. The electors

or voters to these assemblies are so numerous that unless a Christian candidate is a very considerable person with large means and extensive influence, he has little or no chance of being known to the majority of the electorate, much less of being elected. A certain number of seats have therefore been reserved for Christians in certain provinces. Madras Presidency is the most conspicuous illustration of this principle. Under the rules drawn up in pursuance of the Government of India Act 1919, Christians possessing the necessary qualification, namely the payment of Rs 5 either as Government tax or as municipal tax are constituted into separate electorates and they elect five members to the Legislative Council. To redress any inequality that may still exist, two more Christians are usually nominated in this Presidency by Government in exercise of the power of nomination conferred upon them by rule. Burma is the only other province which has an elected Indian Christian representative in the Legislative Council. There has never been an Indian Christian elected as a member of the Council of State, and one member of the community only has been nominated to the Imperial Assembly sitting at Delhi. Except in the Governorships of Madras and Burma, there is no provision for an Indian Christian constituency as such, anywhere else, though here and there, representatives of the community have been nominated, e.g., in the Panjab, Bombay, and Behar and Orissa.

There are two questions of importance in connection with this franchise. One is whether Indian Christians should be allowed to constitute themselves into a separate electorate and enjoy what is known as communal representation. Another relates to the arrangement that should be made as between different bodies which together constitute the Indian Christian community, for example, the Catholics and the Protestants. As regards the first question, there are those who contend that Indian Christians as such should not be given any special representation because so long as the British connection continues there will be a large number of English people who are always members of these assemblies in their

capacity as public servants, and being Christians, are likely to watch over the interests of the entire Christian community and promote their best interests. This argument admits of a simple answer. A Government official as such is deemed to hold himself neutral in matters of religion. If he is a Christian, he is not permitted to allow his Christian preoccupations to influence his public declarations or actions in any way. For this reason, he cannot be expected to voice the special grievances or views of Christians as a community, though he can speak on their behalf in so far as they suffer along with others. There is also another reason why the British Christian official is unable to voice the feelings of the Indian Christian public. He is usually not in touch with the community; he does not even know what its special requirements or grievances are; and even if he is acquainted with them, he finds himself in the Legislative Assemblies and Councils not as a person bound to represent their interests but as a person who knows the Government view of public questions and the actual way in which public business is carried on and he is put there to enlighten the Assembly with the reasons for the decisions arrived at by Government or for the purpose of defending any action that Government might have taken. His position of being always on the defensive is sufficiently annoying by itself; he is not anxious to draw further arrows of criticism upon himself by venturing to speak on behalf of an uninfluential minority.

There are others who say that Indian Christians are after all Indians, and that under the general law, they are in the same position as the rest of their countrymen. They cannot in fairness ask for anything more by way of right or privilege than what their co-nationals enjoy. They do not therefore need a separate electorate or separate representation in the legislative councils. It is further stated in support of the same argument that so many Indian Christians have taken advantage of the opportunities for education laid open to them and occupy positions of influence in their respective districts, that if they appeal to

the general electorate, they have just as good chance of being elected to the legislative assembly or councils as any Hindu. It may be true that in proportion to their numbers, a larger percentage have benefited by education, but it does not follow that a general electorate, consisting of several thousands of electors (now-a-days varying from 5,000 to 65,000,) knows of these educational qualifications. *Prima facie*, without there being any sense of unfairness or injustice about it, Hindu voters are much more likely to know Hindu candidates, and are much more likely to be influenced by their appeals for support than by those coming from a Christian. Though the Christian does not want any special privilege or birthright for himself in his capacity as a Christian, he may still labour under grievances or disabilities which others do not suffer from, or have requirements separate and distinct from theirs. It is unlikely that a Hindu or a non-Christian generally will feel the weight of these grievances or requirements, nor would he be induced to take vigorous action in respect of them in the same way as an elected Christian would. Cases of unjust treatment meted out to Christians in the services do occur now and then, and though most of the disabilities, from which they suffered as a community, have now fortunately been removed by legislation, there are still places in which the shoe pinches, and the most appropriate person to voice these grievances is a Christian candidate who himself suffers from these grievances. To give an illustration, the Indian Succession Act was a piece of territorial legislation applicable to Christians. Certain provisions of the Act which made it compulsory for the legal representatives of a deceased person's estate to obtain probate or letters of administration in the District Court or the High Court, or from the Administrator General before they could deal with the estate, or even to bury the deceased person concerned, acted as a serious hardship on the majority of Christians who usually have very limited estates and very little ready money wherewith to pay the heavy charges levied for the grant of probate or letters of administration. These grievances were brought to light in a public meeting held in the City of

Madras in 1899, and the result of the agitation which culminated in that meeting was that that particular obnoxious provision was abolished as being inequitable and hard upon Christians. More recently, a member of the Viceroy's Council was about to introduce an amendment to the Indian Succession Act in the Legislative Assembly at Delhi which would have operated injuriously upon the majority of the Indian Christians in this country. The principle of that Bill was generally approved and it was remitted to the Select Committee for discussion of details. At this stage, a nominated Indian Christian member of the Legislative Assembly at Delhi heard about the contents of the Bill and at once represented to the member in charge of the Bill the hardships that would be inflicted by it on the Christian community. The proposed amendment was at once withdrawn. Though the Indian Christian community does not want any special privileges for itself, it needs its own representatives at least for the purpose of giving expression to any grievances or disabilities from which individual members of the community or the community itself or institutions in which the community is interested suffer. After all, modern legislation is legislation by consent. Those rules are enacted as laws which are agreed to by the people on whom they are to be declared to be binding. Before they are declared binding, on any set of persons, it is only fair and just that they should be able to say yes or no to the proposed legislation through their accredited representatives. If Christians are sought to be bound by any legislation which is likely to affect their community it should not be imposed upon them, without the Government or legislatures having any means of knowing what the views of Christians are towards such a proposal and how it would affect them. For this purpose a representative, preferably an elected representative of the Christian community, is always needed.

BOOK III

Territorial or General Law

CHAPTER I

The Law of Status

The ancient Romans divided law into two main branches, namely, the law relating to Persons, and the law relating to Things. The Law of Persons was an important and fundamental branch of law in those days, as the rights and responsibilities of individuals were fixed for all time by the country and family in which they were born, adopted or married. In Modern Law, persons are not usually separately treated, but only in connection with the different branches of the law of obligations and of rights in rem; but for purposes of convenient reference, it is proposed to bring into a single Chapter the discussion of all rules relating to persons.

The following are the special classes of persons whose status deserves attention: namely, Alien enemies, aliens who are friends, persons of foreign domicile, minors, married women, lunatics, drunken persons, diseased persons, convicts, insolvents, agents, trustees, guardians, executors, administrators, idols, cattle, dead men, unborn children, corporations sole, corporations aggregate, the State, and Foreign States.

Rules of Law are generally framed with reference to normal persons capable of exercising full rights and responsibilities. *Ignorantia juris haud excusat.* Ignorance of law excuses no one. Every man is presumed to know the law. No one is absolved from responsibility for his conduct merely on the ground that he has not taken the trouble to ascertain the law. Likewise every person is deemed to know the natural and probable consequences of his acts; no person is excused on the ground that he did not think of the particular effects of his conduct which actually happened. These maxims can only apply to the full grown citizen, who is capable of rights and obligations and with whom therefore the law primarily deals: but

individuals who are not so capable are regarded as exceptions and special rules are made for them.

The term person is not therefore co-terminous with the term human being. There are human beings, who on account of some defect, such as minority, lunacy, or foreign citizenship, are not deemed to be legal persons in the full sense of the term. On the other hand, there are various entities which are not human beings but which for one reason or another are given the same legal status as persons, e.g., idols, corporations.

Alien Enemy

An alien is the citizen of a foreign country. An alien enemy is the citizen of a foreign country actually at war with the country whose law is in question. Such an alien enemy is not allowed to enter into contracts with a British subject during the continuance of the war, or sue in British Courts in respect of them. He cannot, until the war is over, sue in British Courts for a cause of action which accrued before the war. As all contracts entered into before the war between an alien enemy and a British subject are *ipso facto* dissolved by the war, he cannot sue for breach of such a contract even after the war is over; but if he can be served with a writ, he can be sued even during the pendency of the war on a cause of action which accrued before the war.

Aliens

An alien is, as has already been stated, a citizen of a foreign State. He stands on a different footing from the foreign State itself. A foreign State or its sovereign can enter into contracts and can sue in respect of them in British Courts; but it cannot be sued in our Courts, because they have no jurisdiction over them, and no means of enforcing any decrees that might be passed against them. (*Mighell* v. *Sultan of Johore.*)

The citizen of a foreign State can always sue and be sued in British Courts. He can sue in Indian Courts in respect of a contract entered into with him by a

British subject, exactly in the same way as a citizen can. If he can be served with a writ, he could also be sued here, but any judgment that is passed in such a suit could naturally not be enforced against him by the British Courts, unless he is arrested when he is actually in India, or he has moveable property with him that can be attached. A separate suit can however be filed in the country of which he is a citizen, and in that suit the judgment already given against him in this country may be confirmed by a competent tribunal of that country. There are many foreign corporations which are doing business in India. They can also be sued through any local agent that they may have in India, and any property belonging to such foreign firm and found in British India may be attached and sold in execution of a decree obtained against such foreign firm.

If a foreigner committed criminal offences while he is in India, he can be punished by British Courts exactly in the same way as a British subject. Likewise as regards the major portion of the topics dealt with in Civil Law, it is binding on an alien in the same way as it is binding on a citizen. This is because British Law is, in the main, territorial; that is to say, it applies to all persons living for the time being within the territory of British India. But to this rule as to territoriality there are two exceptions. In certain cases, British Courts will punish offences committed outside British India, on the sea within three miles of the Coast or even on the high seas in any British ship. Also as regards personal law, that is to say, the law relating to marriage, inheritance, succession, minority and so forth, the law applicable to the foreigner, though he is actually on Indian soil, is the law of the country of his domicile.

Domicile

It is not merely with reference to an alien who is a citizen of a foreign State that this rule of domicile applies. The Personal law applicable to British citizens is not the same throughout the British Dominions.

English people are governed by the English law, Scotchmen by Scotch law and South Africans by Roman Dutch law.

The leading principles of the law of Domicile are gathered together in the Indian Succession Act (Sections 4–19). There are two kinds of domicile, domicile of origin and domicile of acquisition. Domicile of origin means the country in which a person is born. *Prima facie*, the law of that country would apply to him till he happens to change his domicile. (Vide chapter on Inheritance for further particulars.)

But a person can change his domicile in the course of his life by going to live in another country and adopting that country as his permanent habitation. He obtains a new domicile by acquisition, by thus settling down in a foreign country with the intention of permanently residing there. If he only goes there temporarily for some business, intending to return at once to his home, he will preserve or retain his domicile of origin; but if he permanently resides in the foreign country, with intent to continue there, he becomes a citizen of that country and the law of that state will apply.

Generally speaking, the personal law applicable to an alien or a British subject who does not possess an Indian domicile, is the law of the territory from which he comes, whether it is his domicile of origin or domicile of acquisition. But there is an important exception to this principle. Immoveable property in British India is always governed by the law of British India. According to British law, a person should have resided at least five years in a country other than his country of his origin and continue there with intent to prolong his stay indefinitely before he loses his domicile of origin and acquires a new domicile of acquisition. This process however may be hastened by the Naturalization Act under which a person who has stayed only a year can on application to the proper authority, the Home Secretary in England or the Chief Secretary to Government in India, become a naturalized subject amenable to all the laws of Britain or India as the case may be.

Minors

The law relating to minors has already been dealt with in detail under the heading of Parentage Minority and Guardianship in Chapter VII. The ordinary age of majority in India is 18, but if a guardian is appointed to a minor under the Guardians and Wards Act or if his estate is taken charge of by the Court of Wards, his age of majority is 21. As regards minors of foreign domicile, their age of majority would depend upon the law of their domicile. The age of majority is 21 for Europeans and Anglo-Indians under the Indian Christian Marriage Act.

Minors cannot enter into contracts. A contract entered into by a minor is absolutely void. But if a minor has made a false representation to another person that he is a major, and has received some advantage by it, he is bound to restore or make good that advantage. (For further particulars see chapter on Minority and Guardianship.)

Married Women

Formerly, a married woman could not enter into a contract or hold property on her own account, as she was deemed to have lost her separate personality by being married, her separate existence having become merged in that of her husband. This state of things which existed till 1874 in India has now been altered by the Married Women's Property Act III of 1874, which provides that a married woman can earn money by her separate efforts, or by any trade or employment carried on by her and keep the money for her separate use, that she can enter into contracts on her own account and sue and be sued in respect of them, and that an insurance policy can be taken out for her benefit and it shall enure as her separate property. (For fuller particulars, vide chapter on Effects of Marriage.)

Lunatics

Nearly all the Statutes passed in British India expressly exclude lunatics. A person who is of insane

mind cannot enter into a contract, cannot become a trustee or guardian or executor or administrator and cannot be convicted of a criminal offence. If the lunacy is not permanent, if, for instance, there were lucid intervals in a lunatic's life and he entered into a contract during such lucid interval, with full understanding of what he was doing, he is bound by the contract.

Drunken Persons

Drunkenness is so to speak a temporary form of lunacy. A person, therefore, who enters into a contract when he is in a state of drunkenness can either sue to have the contract cancelled, or if he is sued in respect of it, put forward the plea that the contract was entered into by him at a time when he did not know what he was doing. But if a drunken person entered into a contract and ratified the same after he recovered from his drunkenness he is bound by that contract, and cannot rely upon the fact that the agreement was originally entered into when he was drunk.

A person cannot absolve himself from liability altogether for a criminal offence by proving that he was drunk when he committed the wrongful act. If he got himself drunk he is held liable, but if another made him drunk he is free.

Diseased Men

Under Hindu Law, a leper, and a person suffering from an incurable disease are declared disentitled to inherit; but there is no such restriction in the law applicable to Christians. If, however, a contract has been entered into by a man when he was in a diseased state of body or mind, and the other contracting party has taken advantage of his illness or infirmity, to obtain some undue benefit for himself, the contract could be avoided on the ground of undue influence.

Convicts

Under the old Hindu Law and also under the English Law, a convict or felon was deemed incapable of doing

various civil acts, but no such restrictions exist under the modern British Law. For the purpose of exercising particular kinds of municipal or legislative franchise or of being elected to Municipal or legislative councils or holding office, a conviction has been declared to be a bar, but otherwise a convict can enter into contracts or hold property or inherit it in the same way as other people.

Insolvents

A person who is in possession of his full bodily and mental powers may, however, lose control over his property, and over the benefit of any contracts entered into by him, by reason of his having become an insolvent. If he is not in possession of assets sufficient to meet all his liabilities and is being hard pressed by creditors, he can always apply to the Courts exercising insolvency jurisdiction to be declared an insolvent or if he is unwilling to apply, any creditor of his who wants immediate payment out of his effects can apply that he should be declared an insolvent. As soon as an adjudication order is made, all the property which belonged to the insolvent becomes vested in the Official Assignee, and he is the only person who could thereafter sell it, mortgage it, or enter into contracts in respect of it. The Official Assignee is also the person entitled to the benefit of all contracts entered into by the insolvent before his insolvency and also after insolvency but before his discharge. If, for instance, he is entitled to wages for work done, the Official Assignee can ask the Court to place the wages at his disposal, after giving the insolvent means sufficient for his livelihood. The rules relating to insolvency are an important and very considerable branch of law. (For further details, reference must be made to the Insolvency Act.)

So far, Human beings who are not entitled to exercise the full rights and privileges of the normal citizen have been dealt with. There are certain cases in which a person is allowed to have a double personality in the eye of the law. A person may own property and enter into contracts on his own behalf: he may also doso as agent

for another, or as trustee or guardian for another or as an executor or administrator of another's estate.

Agency

The principles of the law of agency are set out in detail in the chapter on Agency in the Indian Contract Act. Here it may be said that the principal is bound only if the agent has contracted on his behalf within the limits of the authority conferred upon him. Where the agent has so acted, only the principal would be bound, and the agent himself would not be bound, as he merely exists for the purpose of bringing his principal into relation with the other contracting party. To this rule that an agent is not personally liable for contracts entered into by him on behalf of his principal, there are three exceptions: (1) where the agent is a local agent for a merchant resident abroad; (2) where the agent does not disclose the name of his principal; (3) where the principal though disclosed, cannot be sued. As an agent has no personal liability, he can be even a minor or a person of defective status. A principal is responsible to his agent and an agent might likewise be responsible to his principal if he has full contractual capacity. A person purporting to act as an agent of another when he has no real authority to act from that other will be held liable at the instance of the third person deceived by him. The law of agency does not help a person when he comes within the reach of the law of crimes or of torts. An agent is liable in the same way as a principal for all wrongs committed by him on behalf of the principal. If, for instance, a person committed a murder at the request or instigation of another person who keeps himself behind the scenes, both the actual murderer and the person instigating would be liable. A similar rule applies in the case of civil wrongs.

The Law relating to guardians has been set out in chapter vii that relating to curators, executors and administrators in chapter x, and that relating to trustees in chapter xiv.

Till now, I have been dealing with human beings who are in one way or another wanting in full legal personality as understood by the law. There are also certain entities which are not human beings but which are still allowed within certain limits prescribed by law, to do what human beings could do and to that extent, they are invested with human personality.

Idols

In this country, an idol is a juristic person; property can be bestowed upon it and could be held by it in perpetuity. In fact, an idol is in a better position than an ordinary human being because property once given to it vests in it for all future time, and the person who looks after the property is merely a trustee or manager for the idol and cannot himself sell or dispose of the property.

Cattle

Even in English Law, property can be set apart for the maintenance of cattle. Provision for the establishment and maintenance of a home for strayed dogs or broken down horses has been held to be good. (*In Re Dean* 41 Ch. D. 552.) In India many Sections of the community recognize cattle as entitled to maintenance and provision in their old age, same as human beings. Jains, for instance, are constantly setting apart considerable property for the maintenance of old cattle, dogs, cats, horses and so forth. Under the criminal law, also a certain amount of protection is afforded to cattle by the provisions which prevent cruelty to animals. In archaic times, an animal was treated in the same way as a human being, if it was guilty of an offence. 'If an ox gore a man or a woman that they die, then the ox shall be surely stoned and his flesh shall not be eaten;' (Exodus v. 21–28). There were similar provisions in the old Hindu law, but these are now abolished. Under old English law, even a stick or a sword with which a murder was committed was *deodand*, and was forfeited to the family of the murdered.

Dead Men

Though deceased men have no personality in the eye of the law, they are allowed to control the future to a certain limited extent. Every dead man has a right to Christian burial. (*R.* v. *Stuart.*) He can also give directions as to whether he should be buried or cremated, and as to whether and in what manner his remains should be disposed of. A provision made for the maintenance of his tomb would be enforceable. He can likewise say that his body should be protected from the indignity of anatomical uses, but it has been held that a corpse is the property of no one, that it cannot be disposed of by will and removal of it does not amount to theft. Quaere whether these English decisions are applicable to Indian conditions.

The reputation of the dead receives the same degree of protection both under the criminal and civil law. A libel upon a dead man is punishable, when its publication is an attack upon the feelings or interests of living persons. (*Gladstone* v. *Wright.*) In India it has been held that where a deceased person is insulted or ibelled so as to bring odium upon and wound the feelings of his heirs and survivors, an action for defamation can be brought. A deceased person is, of course, allowed by will to control and regulate the disposition and enjoyment of his property subject to the rules of perpetuity, accumulation, and other similar limitations.

Unborn Persons

Though an unborn child cannot be said to be a full person in the eye of the law, the maxim *Nascitures pro jam nato abetur* applies. Under the Indian Succession Act, a posthumous child is entitled to share equally along with the children born before the intestate's death. It has been held that posthumous offsprings are entitled to compensation under Lord Campbell's Act for losses sustained by the death of their father. Wilful or negligent injury inflicted on a child before he is born amounts to murder or manslaughter. A

pregnant woman is respited, as of right, until she has been delivered of her child. In a case, however, in which a female infant claimed damages against a Railway Company for injuries inflicted upon her while she was still in her mother's womb through a collision caused by the defendant's negligence, it was held by an Irish Court that no cause of action was disclosed, as the Company owed no duty of care towards a person whose existence was unknown to them.

Corporations

Corporations sole. The law confers full rights of independent personality on an aggregate of persons, when they are collected together and incorporated under particular Acts, and in some instances also, to an individual holding office, apart from his own person. Corporations are of two sorts, viz., Corporations aggregate and Corporations sole. A Corporation aggregate is an incorporated group of co-existing persons; a corporation sole is an incorporated series of successive persons. A corporation sole exists when the successive holders of a public office are incorporated so as to constitute a single permanent and legal person. In English law, the Sovereign, the Postmaster General, the Solicitor to the Treasury, and Bishops and Archdeacons are such Corporations. In British Indian Law, Bishops and Archdeacons may be Corporations sole. Property given to them vests in perpetuity in the successive holders of the office, who, however, hold it not for their own personal benefit but for the use of the office which they hold or as trustees for any special institution for which the property has been set apart.

Corporations aggregate are, in practice, the more important kinds of corporations. There are a series of legal difficulties in the case of a number of persons joining together as the owners of property. How is such a multitude to manage its own interests and affairs; how shall it dispose of property or enter into contracts; what if some are infants, or insane or absent; what if some of them become bankrupt or die; how shall

legal proceedings be taken by or against so great number; how shall one of them sell or otherwise alienate his share; how shall the joint and separate duties and liabilities be satisfied out of their property? Each of these questions gives rise to a series to difficulties. These complications connected with a partnership are not all solved by a firm being constituted between one or more persons under the English Partnership Acts or under the Indian Partnership law. A firm is in no wise different from the partners of whom it is constituted. Each of them is jointly and severally liable and on the death or bankruptcy or insanity or minority of one of the members of a firm, the same difficulties arise as when a number of persons loosely join together. The law, therefore, allows a certain aggregate of persons to join together as a corporation which becomes a separate entity capable of holding property, entering into contracts, and doing all such acts within certain limitations as a single person could do. A corporation can become bankrupt when the members constituting it are rich; a corporation can be dissolved at any time though the members constituting it are not affected thereby. Two principles have to be remembered in connection with corporations. Corporations are only liable in respect of acts which are within their powers. There are certain matters which a corporation cannot, from the nature of it, do. A corporation cannot, for instance, marry or commit murder. But it has been held that a corporation can be liable for libel or malicious prosecution or deceit under the civil law. (*Conford* v. *Colton Bank*.) Secondly, corporations are strictly bound by the terms of their incorporation. They are, therefore, not bound by contracts entered into for any purposes not within the terms of their incorporation or any acts which they are allowed to do under their terms.

Usually a corporation takes action through its agent or secretary or manager. In respect of contracts entered into through an agent, the settled rule of law which governs all agents is also applicable. An agent can

bind the corporation only in so far as he acts within the express limits of the authority conferred upon him as an agent. If he goes beyond those limits, neither he nor the corporation will be bound.

State

The State is, in fact, a corporation consisting of all the persons who constitute the citizens or subjects of that state. The State, therefore, can hold property, enter into contracts and take up responsibilities and liabilities. In English law, the difficulties connected with such a conglomerate body as the State owning property are got rid of by the doctrine that the head of the State is the holder of all the property belonging to the State; whatever is done by the State is done by the King. The laws are the King's laws, and the Judges are his servants. Public property is the King's property. Public liability, for instance, the liability for National Debt, is on the part of the King. There is a maxim of law that the King can do no wrong. This does not mean that the King cannot personally do any wrong, but it means that the King in his capacity as the holder of his exalted office cannot be prosecuted in a Criminal Court or be sued in a Civil Court as for a wrong. If a wrong is committed, the officers who committed it can be indicted or sued and they are not free from liability, unless Acts of Indemnity are passed in their favour. In India, the State is represented by the Secretary of State for India. All suits on behalf of the Government are brought by him and all suits against Government are also instituted against him. The Civil Procedure Code provides that before instituting a suit, the representative of the Secretary of State in each District, viz., the Collector is entitled to two months' notice. The Secretary of State can thus be sued in British Courts in respect of contracts entered into by Government, in respect of wrongs or encroachments of which it is guilty and in respect of any property that belongs to a private person which it has appropriated wrongfully or by mistake.

He can be sued by the subjects of the State or even by its officials.

Foreign State

A Foreign State is on a different footing from the State of which a citizen is a subject. The Foreign State itself or the Ruler of a Foreign State can enter into a contract with a British subject, and if the contract is entered into in British India, it will be governed by the Lex Loci, by the law of contract in force in British India. Such a foreign ruler can sue to enforce such contracts in British India, and if he obtained decrees, he can execute such decrees. But he has this privilege that he cannot be reached by British Courts, being beyond their jurisdiction, and therefore suits cannot be instituted against him for breach of contract or for torts.

CHAPTER II

Transfer of Property

One of the most important branches of Civil law is that which deals with transfers of immoveable property from one person to another. The rules of law relating to this subject are contained in three Acts, the most important of which is known as the Transfer of Property Act X of 1882. As it is an advanced piece of legislation, based to a large extent on the principles of equity developed in the course of centuries in the Court of Lord Chancellor of England, it has not yet been made applicable to many provinces in British India. It is not yet applicable to the Bombay Presidency or to the Punjab or Burma.

The principal kinds of transfers dealt with in the Act are sales, mortgages, leases and gifts. Trusts are separately dealt with in an Act known as the Indian Trusts Act and easements and licenses are treated in the Indian Easements Act.

Before proceeding to deal with the different kinds of transfers individually, certain general principles applicable to all transfers have first to be enunciated.

A transfer of immoveable property is a type or variety of contract. Therefore all the general principles of the law of contract are taken for granted and applied to all cases of transfers. The parties to a transfer must be capable of entering into contracts. Except in the case of gifts there must be a consideration for each contract. The transfer must not be for an illegal purpose or object. The transferor and the transferee must have consented to the same thing in the same sense; the transaction must not be vitiated by fraud, coercion, misrepresentation or duress.

There are numerous restrictions of an elaborate character, based upon the rules of equity propounded by the Courts of Chancery in England, which are set out in

the Transfer of Property Act (vide Section 6, Sections 10–21, etc.). They are omitted as they seem out of place in a handbook like the present.

A transfer of property is an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself and one or more other living persons. When a person transfers property, the transferee obtains all the rights and interest which the transferor had in the property, which he was capable of transferring or passing. It includes rents and profits that had already accrued, all easements attached to the property, all other things attached to or imbedded in the earth, where property is machinery attached to the earth, all the moveable parts thereof, where the property is a house, the easements attached to the house, the rent thereof accruing after the transfer, the locks, keys, doors, windows and all other things provided for permanent use therein, where the property is a debt or actionable claim, all the securities and documents connected with it, and where the property is money or other property yielding income, the interest or income thereof accruing after the transfer takes effect. A transfer of property may be made orally in every case in which writing is not required by law. Conditional and contingent transfers are dealt with in sections 21–35; and various highly technical rules connected with transfers of property by persons with limited or defective titles, or by bona fide holders of property who believed they had title but really had none, are dealt with in sections 38–50.

Sales of immoveable property

The formalities required in connexion with a sale or conveyance in India are very few. In the case of intangible property, like the right to an annuity or reversion or easement, the sale must be effected by a registered instrument. Where the property to be conveyed is tangible, for example a house, a piece of land or a tank, it may be conveyed, if it is less than Rs 100 in value either by a registered instrument or by delivery of actual possession to the purchaser. Where it is worth a

hundred rupees or more, the law insists on registration. That is to say, the vendor has to execute a deed of conveyance in favour of the purchaser, and take it to the registration office belonging to the Registration Sub-District in which the property is situated and have it registered in the presence of the officer. There is a small charge made for registration. (Vide chapter on Registration as to the scale of charges.) A conveyance in order to be valid must also bear *advalorem* stamp according to the value of the property conveyed. This is dealt with in the Stamp Act. In England conveyances are usually drawn up by solicitors. As the law relating to immoveable property in India is comparatively simple and free from mysteries and anamolies, any ordinary person can draw up a deed of conveyance and no settled forms are observed. Where of course the property is of considerable value, it will be safe to have the title deeds examined and the conveyance itself drawn up by a properly qualified lawyer. (Vide Appendix for a form of sale.)

Before an actual sale is effected or a conveyance is executed, when the parties have settled to buy and sell respectively, it is usual to record their agreement on paper. Such an agreement is called an agreement to sell. It does not give any rights over the property which is the subject of sale, but it does create a personal right and imposes a corresponding personal obligation upon the contracting parties which could be enforced in a Court of Law by suit. That is to say, if the person who has agreed to sell afterwards resiles from his contract, he may be compelled to receive the purchase money and execute the conveyance. Likewise if the person who has agreed to purchase goes back upon his agreement, he could be specifically compelled to purchase according to the terms of the contract, subject to the provisions of the Specific Relief Act already referred to. Such an agreement to sell or contract for sale does not require registration, though it does require a stamp.

The rights of the purchaser and seller respectively are dealt with in Section 55 of the Transfer of Property

Act. The following are among the liabilities of a vendor or seller.

(*a*) He must be prepared to produce all documents of title relating to the property in his possession or power, for the inspection of the purchaser and investigation by his lawyer, if any. If the vendor does not produce his title deed, it either means that he has no title at all or that the title deeds have been pledged or subjected to an encumbrance; and therefore however respectable the vendor may be, it is always safe to have the title deeds taken and examined by competent lawyers.

(*b*) The vendor is bound to disclose any material defect in the properties to be sold of which he is aware and the buyer is not, and could not discover with ordinary care. If he fails to disclose such material defects, the vendor is deemed to be guilty of fraud, and he will be liable to pay damages to the purchaser.

(*c*) He is bound also to answer all reasonable and relevant questions put to him by the purchaser in relation to the property or the title thereto. This duty is imposed upon him not merely at or before the time of the contract to sell or convey but even subsequently.

(*d*) On the purchaser paying or tendering the amount due as price, he is bound to execute a proper conveyance tendered to him by the purchaser. It is the purchaser's business to have the conveyance drawn up. Unless there is an agreement to the contrary, the expenses relating to the stamp, registration, etc., have under the Act to be borne by the purchaser. But in practice such expenses are divided equally between the vendor and purchaser by agreement. The provision that the purchaser must tender the conveyance is made in order to protect his interests and compel the vendor to execute such a deed in the purchaser's favour that the latter cannot afterwards be heard to complain about it.

(*e*) Between the date of conveyance and the date when the property is actually delivered to the purchaser, the vendor is bound to take as much care of the property and of the documents of title relating thereto, as an

owner of ordinary prudence would take of such property and documents. He must not himself waste the property or allow it to be wasted by others.

(*f*) He must, on being asked to do so, deliver such possession of the property as the nature of the property admits, as by handing over the key if the property sold is a house.

(*g*) The vendor is also bound to pay all rents, taxes and other public charges incurred in respect of the property up to the date of sale, all interest on encumbrances up to that date, and except where the property is sold subject to encumbrances, he is also bound to discharge all encumbrances existing on the property. The vendor is also bound to deliver to the purchaser all documents of title relating to the property which are in his possession. The vendor is deemed to covenant that he has a good title to the property and that he is in a position to convey the same to the purchaser. These conditions, or modifications of these conditions, are usually inserted in sale deeds, but where such conditions do not find a place, the courts will read these conditions into every sale deed and compel vendors to abide thereby.

There are similarly certain liabilities on the part of the purchaser. The purchaser is bound to pay or tender the purchase money agreed upon between the parties. It is not necessary that the whole of the purchase money should be paid before a conveyance is completed. The parties may agree that a portion must be paid before the execution of a conveyance and the balance afterwards. When the vendor is called upon to execute a conveyance, it is no answer for him to say that he has not received the full price, as he has always an action for recovering the price settled between the parties. Where the property sold is subject to encumbrances, the purchaser may retain out of the purchase money a sufficient portion to pay off those encumbrances.

From and after the date of the conveyance, the purchaser has to bear all risks attaching to the property and any loss that may arise from injury to it or from decrease in the value of the property which is not

caused by the seller. He is also bound as from the date of the conveyance to pay all rents and charges, and all interest on encumbrances subject to which the property has been sold. He is bound to allow the vendor to take rents and profits that accrued from the property before the date of the purchase or conveyance. If he has not paid the whole of the price, the vendor is also entitled to a charge upon the property in the hands of the purchaser for the balance of purchase money, if any, remaining unpaid by the purchaser and for interest thereon.

Mortgages

Where immoveable property is transferred by the owner thereof to another as security for a sum of money borrowed by such owner, the transfer is called a mortgage. It is somewhat difficult to give a comprehensive definition of the term 'mortgage' because the Transfer of Property Act itself specifies four different kinds of mortgages and provides in section 98 for anomalous mortgages which do not fall within any of the four classes and also for charges in section 100 which do not amount to mortgages properly so called. In this country moreover, there are many kinds of mortgage which do not fall under one or other of the four main types described in the Transfer of Property Act. Each of such mortgages has its own peculiar incidents and remedies. But generally speaking, a mortgage is a transfer of an interest in immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, or for the performance of an engagement which may give rise to pecuniary liability.

The formalities in respect of a mortgage are very much like those regarding a sale. Where the principal money secured is Rs 100 or upwards, the mortgagor must execute a registered instrument in favour of the mortgagee and the document must be attested by at least two witnesses. The requirement as to two witnesses is not insisted on in the case of a sale but is an essential condition in a mortgage, and in its absence the transaction will cease to be a mortgage and will become enforceable,

if at all, only as a personal covenant to pay money. Where the mortgage money secured is less than Rs 100 the mortgage can be effected either by a registered instrument or by delivery of the property. A special kind of mortgage is also allowed in the cities of Calcutta, Madras, Bombay, Karachi, Rangoon, Akyab, etc. by which a person can borrow money by pledging the title deeds of his immoveable property in those cities or elsewhere with the person from whom he borrows money. This kind of mortgage is known as an equitable mortgage. If it is evidenced by a document it must be registered. But where money is borrowed by merely depositing the title deeds, registration is unnecessary.

The mortgagor has always a right to redeem the property, that is to say, to repay the money borrowed by himself and get back his property free from the encumbrance to which it has been subjected by himself. If he repays the money or tenders it at the proper time and place, he can call upon the mortgagor to return or deliver the mortgage deed, and where the mortgagee is in possession of the property to deliver up possession of the property also. Where there is an actual conveyance in favour of the mortgagee he can also ask that the mortgagee should retransfer the property to the mortgagor, or acknowledge that his right over the mortgage property has ceased to exist. Where there are several items of properties separately mortgaged, the mortgagor can redeem any one of them at any time without redeeming the others. But where a person owns only a share of the property which is the subject of mortgage he cannot redeem his share only on payment of a proportionate amount of the mortgage money. Where the property has been subjected to several mortgages one after another, the second, third or the fourth mortgagee can offer to redeem the earlier mortgages and call upon the earlier mortgagee to give up his interest in the property on receipt of the money due to himself. Where the mortgage is a usufructuary mortgage, and the usufructuary mortgagee has paid himself all the money due to himself from and out of the rents and profits that he has

reaped from the property, the mortgagor can without any payment of money ask for the redemption of the mortgage. But where the rents and profits have not been sufficient to repay the whole of the mortgage money due to the mortgagee, the mortgagor cannot sue to redeem without paying the balance of the money not met out of the rents and profits. The mortgagee on the other hand can sue to recover the mortgage money due to himself, or for the foreclosure of the mortgagor's right to redeem, or for sale of the mortgagor's interest in the property, or, finally, he may himself sell the mortgagor's interest in the property without going to a court of law. Each of these rights is hedged in by special restrictions.

It is not unusual, in cases of simple mortgage, to add a provision that the mortgagee should have the power without going to Court of bringing the mortgaged property to sale and taking the money due to himself out of the sale proceeds. As this is an extraordinary power it is hedged in with special restrictions. It is confined to cases (*a*) where the mortgage is an English mortgage and neither the mortgagor nor the mortgagee is a Hindu, Muhammadan or Buddhist, (*b*) where the mortgagee is the Secretary of State for India, (*c*) where the mortgaged property is situated within the towns of Calcutta, Bombay, Karachi and Rangoon. Even in these three cases, either notice must have been given to the mortgagor and default made in payment of the mortgage money for three months from the date of service of such notice; or interest amounting to more than Rs 500 on the mortgage money must be in arrear.

Rights of Mortgagor

A mortgagor is entitled to all accessions to the property made during the time when the mortgaged property is in the possession of the mortgagee. But where the accession is made at the expense of the mortgagee and is capable of being kept separate from the rest of the mortgaged property, the mortgagor cannot take the accession without paying the mortgagee the expenses of acquiring it. Where the mortgaged property is a

lease and the mortgagee obtains renewal of the lease, the mortgagor will have the benefit of the new lease.

The mortgagor is bound by a covenant that he has an interest in the property which is the subject of mortgage and that he has got power to transfer the same by way of mortgage. The mortgagor will have to defend all suits brought in respect of the property, or if the mortgagee is actually in possession of the property, help and enable the mortgagee to defend the suit. The mortgagor is bound to pay all rents and taxes and public charges in respect of the property so long as it is in his possession. He is also bound to pay all rents and fulfil all contracts binding upon him till the date of the mortgage.

Rights and liabilities of mortgagee

If after the date of a mortgage, any accession is made to the mortgaged property, the mortgagee is entitled to treat it as an accession to his security. Where the mortgaged property is a lease and the mortgagor obtains a renewal of the lease, the mortgagee is entitled to the benefit of the new lease. When he is in possession, a mortgagee may spend money after notice to the mortgagor for the management of the property, for the collection of rents and profits thereof, for supporting and defending the mortgagor's title to the property, for preservation of the property itself from destruction or forfeiture, or for the renewal of the lease where the property is a renewable leasehold. When he spends money for the above purposes, he is entitled to add the same to the mortgage money and claim interest thereon at 9 per cent. On the other hand he is bound to manage the mortgaged property while it is in his hands as a person of ordinary prudence would if the property was his own. He must use his best endeavours to collect the rents and profits thereof. He must out of the income pay all government charges and rents and assessments. He must make necessary repairs such as can be made out of the rents and profits. He must not commit any waste or any act which is destructive or injurious. He must keep full and clear accounts of

all sums received and spent by him as mortgagee and when the mortgagor tenders or deposits the mortgage money or any balance that may be due to the mortgagee, he must account for the gross receipts from the mortgaged property to the mortgagor.

There is also a summary remedy provided in Section 83 for the mortgagor. Where the mortgagee is refusing to receive the mortgage money due to himself, the mortgagor may calculate the exact sum of money due to the mortgagee and deposit it in Court to the account of the mortgagee, and call upon him through Court to take the money in full discharge of the amount due to himself. From and after that date the mortgagor will cease to be liable for interest on the mortgage money. The other provisions contained in the Transfer of Property Act are so detailed that it is unnecessary to go into them. Section 100 deals with charges. Where immoveable property belonging to one person is made, by act of parties or operation of law, a security for the payment of money to another and the transaction does not amount to a mortgage, the latter is said to have a charge on the property which may be discharged in the same manner as a mortgage may be.

Leases

The chapter on leases is of very great practical importance, because a great many of the ordinary business relationships in life are governed by the provisions relating to leases. Where a person for instance engages a house for his occupation, or takes a shop or other business premises on rent, or leases a cocoanut garden or sporting, mining, fishing rights, or enters into an agricultural lease, the relationship between the parties is governed in the first instance by this chapter. The entire law relating to landlord and tenant, where the property which is the subject of tenancy is a house or agricultural land or sporting or fishing rights, is dealt with under this head. A lease of immoveable property is the transfer of a right to enjoy such property, either for a limited time or in perpetuity, in consideration of a price or rent paid or

promised, or a share of produce or service yielded periodically by the transferee to the transferor. The owner of the property who allows another person to enjoy his land or other property for a premium or rent is called a lessor. If there is a capital sum fixed as consideration for the enjoyment it is called a premium. If a periodical sum is agreed to be paid, or a share of produce or service is agreed to be given, it is called a rent. A lease of immoveable property for agricultural or manufacturing purposes is always deemed to be a lease from year to year, and is terminable only by a six months notice expiring with the end of the year of the tenancy, whether the notice in question is given by the lessor or lessee. A lease of immoveable property for any other purpose is deemed to be a lease from month to month, in the absence of a contract to the contrary, terminable by fifteen days notice expiring with the end of a month of the tenancy. The notice which terminates the tenancy must be in writing, must be signed by the person giving it or his agent, and either delivered personally to the other party or to his agent, or tendered to him, or affixed to a conspicuous portion of the property. A lease of immoveable property from year to year, or for any term exceeding one year, or reserving a yearly rent, must be made by a registered instrument. An agreement to lease, if it is in the shape of a document, must also be made by a registered instrument. All other leases of immoveable property or agreements to lease may either be made by registered instruments or by an oral agreement accompanied by delivery of possession.

Rights and liabilities of the lessor

The lessor is bound to put the lessee in possession of the property when called upon to do so. He contracts with the lessee for peaceful possession of the property, if the lessee pays the rent reserved by the lease and performs other covenants binding upon himself.

Rights and liabilities of the lessee

If during the continuance of the lease any accession is made to the property, the accession is included in the

property leased and can be enjoyed by the lessee. If on the other hand, owing to fire, tempest flood or other irresistible force, any material part of the property be destroyed or rendered substantially and permanently unfit for the purpose for which it was let, the lease is voidable at the option of the lessee. If the lessee himself has had any share in bringing about the above loss, he is not entitled to terminate the lease. If the premises leased need repair, and the lessor fails to make repairs after being called upon to do so, the lessee may make the same himself and deduct the expenses of such repair with interest from rent, or otherwise recover it from the lessor. If the lessor fails to pay rents and taxes, or to make any payment which he is bound to make, the lessee may make the payment himself and deduct the same from the rent, or otherwise recover it from the lessor. The lessee may remove all fixtures and other things that he has introduced during the continuance of the lease, provided that he is bound to leave the property in the condition in which he received it. The lessee is entitled to reap all crops planted or sown by himself and growing upon the property when the lease is determined. He is also entitled to free right of access for the purpose of gathering and carrying away the crops. The lessee may transfer his interest in whole or in part by way of sale, mortgage or sub-lease to any one; but by reason of his transfer he will not cease to be subject to the liability to the lessor. He is bound to preserve the property entrusted to him and restore the same to the lessor, at the expiry of the lease, in as good condition as when he received it. He is also bound to allow the lessor and his agent, at all reasonable times, to enter upon the premises to inspect the condition of the property, and if any defect has been caused by the lessee, he is bound to make it good within three months after notice has been given to him calling upon him to rectify it. If the lessee becomes aware of any proceeding to recover the property or part thereof, or any other encroachment upon the property, or any interference upon the lessor's rights, he is bound to give the lessor due notice thereof. He must use the

property and its products as a person of ordinary prudence will use them if they were his own. He must not waste the property or use it for purposes other than that for which it was leased, fell timber or pull down buildings or erect mines or dig quarries or commit any other act which are permanently destructive or injurious. He must not without the lessor's consent, erect any permanent structure except for agricultural purposes. On the termination of the lease he must put the lessor in possession of the property. In the same manner as a lessee can transfer his interest, the lessor can likewise sell or transfer his property, but the lessor shall not cease to be subject to the liabilities undertaken by him unless the lessee consents to release him from such liabilities. If the lessee so elects, he can also substitute the transferee for his lessor and hold him liable in the same manner as he would have held the lessor liable.

Termination of lease

A lease of immoveable property comes to an end either by efflux of the time limited in the agreement, or when the lease is limited conditionally on the happening of some event, by the happening of such event, or where the lessor's interest is itself limited up to a certain point or event, on the happening of that point or event, or by the interests of the lessor and the lessee merging in the same person, or by surrender, by the lessee giving up his interest under the lease to the lessor, or by forfeiture, that is, where the agreement provides that if certain conditions are not fulfilled the lessor should have the right to re-enter and the conditions have been broken or the lessee renounces his character as lessee and sets up title in himself or in a third person, or finally by a notice to quit given by one person to another. But where there has been a forfeiture it will be treated as waived by acceptance of rent which fell due after the forfeiture, or by distress for such rent or by any conduct or act on the part of the lessor showing conclusively that he intended to treat the lease as subsisting. Where the forfeiture has happened merely for non-payment of rent, if the lessee also pays or tenders to the

landlord the rent in arrear together with interest thereon and full costs of any suit that may be brought against him, the lessee will be relieved from forfeiture.

Gifts

The chapter on gifts is subject to the proviso contained in Section 129 that it does not relate to any gifts made in contemplation of death, or change or affect any rule of Muhammadan law as regards gift (hiba) or any rule of Hindu or Buddhist law as regards gifts. The scope of this chapter therefore is very limited; it is not applicable to gifts made either under Hindu, Muhammadan or Buddhist law or even under Christian law where it is a gift made in contemplation of death. A gift is a transfer of ascertained existing moveable or immoveable property by one person to another voluntarily and without consideration. Such gifts must be made by the donor and accepted by the donee while the donor is still alive and capable of making the gift. If the donee dies before the acceptance of the gift it is void. In all cases, the gift of immoveable property must be effected by a registered instrument signed by or on behalf of the donor and attested by at least two witnesses. The acceptance need not be in the shape of any document. A gift of moveable property need not be effected by any registered instrument. Mere delivery of possession is sufficient to transfer property in the same. Where a gift is made subject to a burden, a donee cannot take the benefit at the same time refusing the burden. A gift can only be made of existing property. If it is made of property hereafter to come into existence it is void. If it is made in respect of property partly in existence and partly to come into existence in future, it is void as to the latter. A gift has to be accepted during the life of the donor. If a gift is made to two or more donees of whom one does not accept the gift, it is void in so far as it relates to the interest which would have passed to the donee if he had accepted it. A gift can be made conditional that is to say it could be made to take effect on the fulfilment of a condition.

But it must not be made revocable merely by the will of the donor. Where a gift is made by a donor of his entire property, the donee may take the property, but he will in that case become liable also to pay the debts, if any, of the donor, at the time that the gift was made.

CHAPTER III

The Law of Registration

With a view to avoid uncertainty in titles to immoveable property and property generally, and consequent litigation between parties laying claim to it, two excellent and salutary arrangements exist in India, which do not obtain elsewhere.

The Revenue offices of each district and taluq preserve an exact inventory of the several pieces of land lying within its limits, and of the owners thereof. The land in each village and township is measured and surveyed; separate numbers are given to each parcel of land, and its measurements and boundaries are noted: and there is a register kept of the owner of such parcel. When the ownership changes, by inheritance or transfer, patta is transferred and the new title is registered.

There is further a separate office for each district and sub-district, known as the Registration office. Every important document evidencing transfer of property, be it sale, mortgage, lease or gift, has to be taken to this office: the executant of the document has to admit, in the presence of the registering officer, the fact that he executed it, sign a second time in his presence, and place his thumb impression by way of proof. The Registrar has to satisfy himself as to the identity of the parties and their competency to transfer, and the identity of the property conveyed and the genuineness of the transfer, before he registers the document.

The chief objects of registration are:

(1) To provide a true and authentic record of transactions.

(2) To secure publicity.

(3) To furnish security against fraud.

(4) To obtain a record of information as to title.

The Act provides that any document required by law to be registered shall not, unless it has been so registered,

affect any immoveable property comprised therein, or be received as evidence of any transaction affecting such property. It is further provided that registered documents shall, as regards the property they comprise, take effect as against unregistered documents relating to the same property.

Compulsorily registrable documents

The following documents must be registered i.e., are compulsorily registerable.

1. Instruments of gift of immoveable property.
2. Non-testamentary instruments which acknowledge the receipt of payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of such right, title or interest.
3. Other non-testamentary instruments like sales, and mortgages, which purport or operate to create, declare, assign, limit or extinguish, at once or in future, any right, title or interest, of the value of Rs 100 and upwards to or in immoveable property.
4. Leases of immoveable property from year to year or for a term exceeding one year, or reserving a yearly rent.

Documents which need not be Registered

It is to be noted that clauses 2 and 3 above, do not apply to the following documents:

(*a*) Any composition deed, i.e., 'any instrument executed by a debtor whereby he conveys his property for the benefit of his creditors, or whereby payment of a composition or dividend on their debts is secured to the creditors'.

(*b*) Any instrument relating to shares in a joint-stock company.

(*c*) Any debenture issued by any such company, and not creating, declaring, assigning, limiting or extinguishing any right, title or interest in immoveable property.

(*d*) Any endorsement upon, or transfer of, any debenture issued by any such company.

(*e*) Any document merely creating a right to obtain another document, which will, when executed, create,

declare, assign, limit or extinguish any right, title or interest.

(*f*) Any decree or order of a Court, and any award.

(*g*) Any grant of immoveable property by Government.

(*h*) Any instrument of partition, made by a Revenue Officer.

(*i*) Any endorsement on a mortgage deed acknowledging payment of the whole or portion of the purchase money.

(*j*) Any certificate of sale granted to the purchaser of any property sold by public auction by a civil or Revenue Officer.

(*k*) Any order granting a loan or instrument of collateral security granted under the Land Improvement Act or the Land Improvement Loans Act.

(*l*) Any order granting a loan under the Agriculturists' Loan Act or instrument securing payment of such loan.

Optionally Registerable Documents

Among documents of which registration is optional are these:

(*a*) Instruments, other than wills and gift deeds, which purport to create, declare, assign, limit or extinguish any right, title or interest to or in immoveable property, of value less than one hundred rupees.

(*b*) Instruments acknowledging receipt of payment of any consideration in respect of the above-mentioned transactions.

(*c*) Leases for a period not exceeding one year.

(*d*) Instruments other than wills which create or assign, limit or extinguish any right to or in moveable property.

(*e*) Wills.

(*f*) All other documents not required by Section 17 of the Act to be registered.

Limitation for Registration

It is provided that no document, other than a will, shall be accepted for registration, unless presented to the

proper officer within *four months* of the date of execution; where the document sought to be registered is a decree or order, it is provided that a copy of it may be presented within four months of its date, or the date when, on appeal, it became final. In counting the period, the day on which the document is executed should be excluded. If the documents is presented after the period provided for, and is somehow registered, the registration is void and of no effect. Where a document requiring registration comes from a person not duly empowered to present the same, any person claiming under such document may, within four months of knowledge that the registration was invalid, present it, or cause it to be presented, for re-registration.

If several executants of a document execute it at different times, the document may be presented for registration, or re-registration, within four months from the date of each execution.

Where the delay in presentation is unavoidable, the Registrar may, in cases where the delay is not more than four months after the expiration of the time prescribed, i.e., where it is not more than eight months after the original execution, direct registration on payment of a fine, not exceeding ten times the registration fees.

Documents executed out of British India, though not presented within the period prescribed, may be accepted for registration, if they are presented within four months of their arrival in British India.

Place for Registration

As a general rule, a document must be presented for registration in the office of a Sub-Registrar within whose sub-district, the whole or any portion of the property to which the document relates is situated. If no part of the property is situated in the sub-district where it is registered, the registration is void.

Presentation for Registration

Every document to be registered, must be presented at the proper registration office by (*a*) some person

executing or claiming under the document, (*b*) by the representative or assign of such person or (*c*) by the agent of such person or assign, duly authorized by power of attorney. These provisions are important, as registration becomes invalid if the presentation is unauthorized. The object of these provisions is to prevent forgeries, and the procurement of conveyances by fraud, and duress. To illustrate the importance of presentation, take this case. A executes a mortgage to B. The deed is presented for registration by C. C has a power of attorney from B, but it does not authorize him to present documents for registration. Suppose A is present, when C presents it. Even then, as A is there only with the object of admitting execution, the registration is invalid. The case will be different, however, if A himself desires and purports to present the mortgage deed before the Registrar.

Effect

A document properly registered according to the provisions of the law, takes effect from the date of its execution. In the language of the law, the registration relates back to the date of its execution.

When a registering officer may refuse to Register

The registering office may refuse to register a document under certain conditions. Thus, if the document is in a language which the registering officer does not understand, and which is not commonly used in the district, he will refuse to register it, unless it is accompanied by a true translation into the language common in the district, and also by a true copy.

Again, where, in any document, any interlineation, blank, erasure or alteration appears, the Registrar may refuse to register it, unless the persons executing the document attest such interlineation or blank with their signatures or initials.

Further, where a document other than a will, relates to immoveable property, there must be a description of it, adequate enough to identify it. Thus, houses in cities must be described as they are situated with reference to the road; house numbers, if any, must be given; the existing and previous occupancies may be described. Other houses and lands must be described by their name, if any, and the territorial division in which they are situated; the roads and other properties adjacent must be mentioned, with reference, if possible, to a Government map or survey.

Where any person by whom any document purports to be executed, denies having executed it, or if any such person appears to the officer registering, to be a minor or lunatic or again, if any person by whom the document purports to be executed is dead, and his representative denies its execution, the officer will refuse to register the document.

If the property mentioned in a document sought to be registered is not situated within his sub-district the sub-registrar may refuse registration on that ground. If a sub-registrar refuses registration on any ground other than denial of execution, there is an appeal provided to the Registrar. But such appeal must be presented within thirty days from the date of the order.

Appeal

Provision has also been made where the Registrar, refuses to order a document to be registered, that any person claiming under such document or his representative or assign, may, within thirty days of the order of refusal, institute a suit in a civil court for a decree directing registration of the document.

REGISTRATION FEES

Under Sections 78 and 79 of the Indian Registration Act XVI of 1908

1. (*a*) Registration of documents :

	RS	A	P
1. On value not exceeding Rs 10	0	4	0
2. „ exceeding Rs 10, not exceeding Rs 25	0	6	0
3. On value exceeding Rs 25, not exceeding Rs 50	0	8	0
4. On value exceeding Rs 50, not exceeding Rs 75	0	12	0
5. On value exceeding Rs 75, not exceeding Rs 100	1	0	0
6. On value exceeding Rs 100, not exceeding Rs 250	1	8	0
7. On value exceeding Rs 250 not exceeding Rs 500	2	0	0
8. On value exceeding Rs 500, not exceeding Rs 1000	3	0	0
9. When the value exceeds Rs 1,000 but does not exceed Rs 3,000, for the first Rs 1,000, as under sub-clause (8) and for every Rs 500 or part thereof in excess of Rs 1,000	1	0	0
10. When the value exceeds Rs 5,000, but does not exceed Rs 50,000, for the first Rs 5,000, as under sub-clause (9) and for every Rs 1,000, or part thereof in excess of Rs 5,000	1	0	0
11. When the value exceeds Rs 50,000, for the first Rs 50,000, as under sub-clause (10) and for every Rs 1,000, or part thereof in excess of Rs 50,000	0	8	0
12. For the registration of powers of attorney	2	8	0

CHAPTER IV

Criminal Law

The Law of Crimes makes a larger and more direct appeal to the popular imagination than any other branch of law, partly on account of the dramatic manner in which the trial of a criminal case is conducted, and partly because of the intimate character of the issues inquired into in cases like cheating, fraud and defamation, or the magnitude of the stakes involved, for example, the life and death of an individual or his entire property. The State takes special interest in criminal cases; it proceeds on the footing that an injury inflicted on an individual has also a larger bearing on the general public, inasmuch as it endangers the tranquility of the body politic. It is the interest of the State that all offenders should be brought to justice after careful and painstaking enquiry, protected while they are being tried, and given every opportunity of defending themselves, so that the innocent may not be punished along with the guilty. The fact, therefore, that the State takes charge of criminal cases and manages the prosecution, the public manner in which criminal trials are conducted, and humane maxims such as that every person is presumed to be innocent till he is proved to be guilty, and every accused person is entitled to be defended at public expense and to the benefit of the doubt if the case is not brought home to him, should inspire confidence in the administration of justice. Unfortunately, there is so little respect for, and so little willingness to co-operate with, the Police and such a large admixture of falsehood along with the truth in criminal trials, that it is impossible for any one to claim that the fountains of justice flow smoothly or in crystalline purity. However, the wise man has to take things as he finds them, and when an offence is committed, or an injury is inflicted on an individual, it is much better and safer

for him to resort to the Courts for justice, than to take the law into his own hands, or depend upon self-help.

The Indian Penal Code contains a substantial part of the criminal law of this country. It was drafted by Lord Macaulay when he was a member of the Council of the Governor-General of India, and is one of the most satisfactory and enduring pieces of legislation on the Statute book. It has been found so useful that it is applied not merely in British India proper, but also in the majority of Native States and far beyond the confines of the Indian Empire in such distant places as Aden, Zanzibar and Hongkong. There has been no necessity for reenactment of this code, but it has been amended and added to from time to time according to the requirements of modern times. The Indian Penal Code however does not give an exhaustive list of all the crimes dealt with by the Courts. There are numerous other criminal enactments like the Cattle Trespass Act, the Contagious Diseases Act, and the Indian Arms Act, and there are also penal provisions scattered in enactments of a civil or revenue nature such as the Forest Act, the Indian Companies Act, etc.

The Criminal Procedure Code embodies a large majority of the rules relating to the measures that should be taken to bring offenders to justice. This act has also to be supplemented by ancillary legislation such as the Whipping Act, Reformatory Schools Act, etc.

Penal Code

The Indian Penal Code applies to all offences committed within British India, or within a three-mile radius, on the High Seas, outside that territory, whether by British Indian Subjects or foreigners. It also applies to crimes committed by Indian subjects of His Majesty, resident in the Native States, or in any place beyond British India. In the case of European British subjects, however, certain special regulations have been made regarding the manner of trial, and the kind and degree of punishment that could be inflicted on them.

Offences

An 'offence' means any act or omission made punishable by any law for the time being in force. In order that an offence may be constituted, there must usually be two elements, first an overt or public act, secondly *mens rea* (guilty mind) or wrongful intention.

The aim of the prosecution in criminal cases is in the first place to prove the overt act, that is to say, to establish that an offence has been committed,—not an easy thing in itself when, as in cases of murder, all traces of the offence have been effectively removed, or the offence itself is one that is committed in the strictest secrecy, and secondly, to bring the offence home to the particular individual who stands charged with the crime and prove beyond doubt that he was the person who was guilty of the wrong.

In addition to this, the prosecution has also to establish *mens rea*. When a person inflicts injury on an individual merely by accident, or without any desire to cause pain, or possibly with a view actually to benefit the person injured (as in the case of a surgeon performing an operation), or merely in defence of his own rights, it is not reasonable that such a person should be punished. The law therefore lays down that there is no wrong, even when there is suffering caused, if the wrong doer was not actuated by the special kind of wrongful intention provided in the Penal Code with reference to each offence, or at least had the kind of special knowledge that takes the place of such intention.

Any one who studies the Indian Penal Code will rise with the feeling that it has thrown its net very wide indeed, and that it has not only swept within the scope of the criminal law every kind of offence that could possibly be committed by one being against another, but also various acts, concealments or omissions which are merely ancillary to it.

Under Section 511 of the Indian Penal Code, an *attempt* to commit an offence is itself an offence, provided it is established, though the punishment for it is usually

half what would be inflicted if the attempt actually resulted in a crime.

Under Sections 107 to 120, any person who *abets* an offence is also liable, the punishment for abetment being only slightly milder than that for the principal offence. A person is said to abet the doing of a wrong when (*a*) he instigates any person to commit the wrong, or (*b*) engages in a conspiracy to do the wrong (if an offence is subsequently committed as the result of the conspiracy), or (*c*) intentionally aids by act or omission in the commission of the offence. Even a person who conceals the existence of a design to commit an offence, knowing that he will thereby facilitate the commission of a wrong, or being a public servant, provides facilities for the commission of an offence by mere concealment or illegal omission of a duty that he was bound to perform, may be guilty of abetment.

There are many offences in which the gist of the wrong is not the doing or infliction of an injury, but mere *omission* to do one's duty. The omission to give information in certain cases, the omission to produce a document, and the omission to assist a public servant when bound by law to give assistance to him, have been made punishable.

When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act, in the same manner as if it was done by himself alone. This useful provision contained in Section 34 has been given its largest and most sweeping application in cases of criminal *conspiracy*, in respect of which an amendment has been recently introduced under Section 120 of the Indian Penal Code.

Exemptions from Liability

In some respects the most important chapter in the Indian Penal Code is that which deals with general exceptions, i.e., with cases, in which though an injury has been caused, the person concerned in causing it could not be punished as for an offence.

There are, in the first instance, cases where a person is incapable of committing a wrong. An infant under the age of seven years is deemed to be incapable of committing a wrong. An infant above 7 and below 12 is deemed to be incapable of committing the wrong, if he had not attained sufficient understanding to judge of the nature and the consequences of his act. A lunatic is not liable for the wrong that he has committed, if by reason of unsoundness of mind, he is incapable of knowing the nature of the act that he does, or is incapable of knowing that he was doing what was either wrong or contrary to law. Likewise a person who commits a wrong when drunk is not liable, if the drink has been administered to him without his knowledge or against his will. The State may not be indicted as for a wrong, nor can a foreign sovereign.

Where a person e.g., a judge, who does what turns out to be a wrong, is acting in performance of a duty imposed upon him by law, he is not liable for acts done by him. No officer of a Court is liable merely for giving effect to a judgment or executing it. Where a person believes, even by reason of a mistake of fact, that he is bound to do a certain act, and commits a wrong in consequence, he is not liable. The same principle applies where he believes himself not bound, but merely justified by law. (Section 79). Where a person inflicts an injury when he is doing a lawful act, but by accident or misfortune, without any criminal intention or knowledge on the part of the doer, there is no offence.

Where again the person on whom the wrong has been inflicted has expressly or impliedly consented to the act, where for instance a football player receives an injury, or a patient suffers by an operation, or a guardian acts for the benefit of a minor or lunatic or other incapable person, there is no offence.

Where a person does not commit an offence of his own accord, but merely because he is compelled to do so by threats he is not liable to punishment, e.g., when a wife is coerced by her husband to participate in his wrong, say by administering poison.

Finally when a person acts in exercise of his rights of person and property or the person or property of any one in whom he is allowed by law to be interested, he is not liable. This right is very carefully guarded. (Vide Sections 96 to 106.)

Classification of Offences

It is impossible to take the reader through all the numerous offences mentioned in the Indian Penal Code but it might be useful to mention the main principles on which they are classified. In the first place, they are classified according to the person or body affected. The longest chapter is that which deals with injuries to the body of a person. These include, murder, miscarriage, exposure of infants, concealment of birth, hurt simple or grievous, wrongful restraint and wrongful confinement, assault, kidnapping, abduction, slavery, forced labour, rape and unnatural offences. Each of these is carefully defined by the Indian Penal Code and special exceptions are provided under each important section, the punishment varying according to the magnitude of the offence. Another large class consists of offences against property, including theft, extortion, robbery, dacoity, criminal breach of trust, cheating, mischief, criminal trespass. There are also offences relating to documents such as forgery, falsification of accounts, infringement of trade-marks; offences relating to marriage, like adultery, and bigamy, and offences against the reputation of an individual, like defamation, criminal intimidation and insult. The remaining chapters deal with offences against the State, like waging war against the King, and sedition; against the Army and Navy, like mutiny and desertion; against public tranquility, like unlawful assembly, rioting, and affray; and those relating to public servants like bribery, and personation of a public servant. There are offences relating to elections, to coins, and Government Stamps, and those relating to weights and measures, to public health, safety, convenience and morals, like adulteration of drugs, and public nuisances. Other important heads are offences related to contempts of the lawful authority of

public servants and offences against public justice, like giving or fabricating false evidence, perjury, filing a false complaint, and resistance to public servants in the execution of their duties.

There are other modes of classifying offences which are also valuable. They are classified for example, under Section 345 of the Criminal Procedure Code as compoundable and non-compoundable offences. Compoundable offences are those in respect of which the offender can come to terms with the person injured, the latter withdrawing the complaint as the result of a private agreement between the parties. Persons who have suffered from serious wrongs are not usually allowed to compound their injuries with the offenders. But there are certain offences like insult, intimidation, defamation, and adultery which are allowed to be compounded at the instance of the parties themselves, and certain others which are allowed to be compounded with the permission of the Court.

Offences are also classified as bailable and non-bailable. A bailable offence is one in respect of which a person is entitled to be released during trial, after giving security if called upon to do so by the Magistrate. A Non-bailable offence is one in respect of which he is not entitled to be so released; but even in such a case, the Court will release a person accused of an offence, if he is under sixteen years of age, or is a woman, or sick person, or where the Magistrate feels doubt as to whether there is a charge likely to be proved against the accused.

Again, a cognizable offence means one in which a Police officer may arrest an accused person without warrant. In cases of a serious character, the Police need not arm themselves with warrants before they arrest the offender. They are entitled to effect an arrest if they see the offence committed, or see persons concealing themselves after such offences are known to have been committed. A non-cognizable offence is one in which a police officer cannot arrest without a warrant.

The Criminal Procedure Code also classifies offences according to the Court which is competent to try them.

The most serious offences are tried before the High Court or Court of Session, which are empowered to inflict a fine of any dimensions or the penalty of death, on an offender. Those which are less serious are tried by *Magistrates of the first class, and those which are still less serious by Magistrates of the second and third class* respectively. In trying these latter cases, instead of the stipendiary magistrate sitting by himself, he may sit as a member of a Bench, or there may be a Bench of Magistrates without the stipendiary officer, which is empowered to deal with offences of a like description.

There is yet another classification of offences, namely, those in which only a summons could be issued in the first instance, and those more serious, which are known as warrant cases, because in respect of them a warrant of arrest would be forthwith issued. The method of trial provided in the Act for the latter class is much more elaborate than that prescribed for the former. A warrant case is one relating to an offence punishable with death, transportation or imprisonment for a term exceeding six months.

In respect of certain offences like those against public justice, the person interested or injured is not allowed to pursue the remedy himself but must induce a public officer to take the initiative and lay the complaint. If for instance, a person gives a false complaint against an individual, the person injured cannot himself take action, but the officer before whom the false evidence or information was given can commence proceedings by lodging a written complaint. The cases in which such action could be taken are specified in Section 195 Cr. P. C. In cases of serious magnitude against the State, or against high-placed public officials, the Governor-General in Council or the Local Government or other competent authority has to sanction the prosecution.

Criminal Procedure Code

The Criminal Procedure Code deals with a great variety of subjects. But the common factor with reference to them all is that they describe the machinery

laid down by law for bringing offenders to justice and the steps or processes that ought to be taken for effecting that purpose. The Code is therefore mainly concerned with the trial of offenders.

Complaints

A person who has been injured should lay a complaint before the Magistrate, who is competent to try the offence in question, within whose jurisdiction the offence has been committed. The complaint is usually made in writing, and stamped; but it may be addressed, or made orally to the Police Officer in charge of the nearest Police station, or if there is no station in the neighbourhood, to a Village Munsif or *patel*, who will at once forward the same to the nearest Police station. Under Section 190 of the Criminal Procedure Code, a Magistrate can take cognizance of an offence either when he receives a complaint of facts, or upon a report in writing of such facts made by a Police officer, or upon information received from any person other than a Police officer, or upon his own knowledge or suspicion that such an offence has been committed.

A 'complaint' has been defined as an allegation, made orally or in writing, to a Magistrate, with a view to his taking action under the Criminal Procedure Code, that some person, whether known or unknown, has committed an offence. Such a document has to be carefully drafted if it is presented by a private individual, as it will be analysed and dissected with the greatest possible minuteness in the course of the trial, and the evidence subsequently given will be scrutinized and tested in the light of the complaint originally lodged. It is therefore not safe to make a long or prolix recital of facts; the complainant must confine himself to the wrong committed, the date and hour when it was inflicted and the person on whom it was inflicted, the place where the occurrence happened and such general particulars as would give the Court an idea of the species of wrong or wrongs from which the injured party suffered. A long history of the

antecedent relationship between the parties, minute particulars about the occurrence, and careful analysis of the motives which led to it should be avoided.

When a complaint is lodged, the Magistrate can at once, after hearing the complainant if necessary, dismiss it, if in his judgment there is no sufficient ground to proceed with the enquiry. If he does not think it serious, he may also direct a Magistrate or Police officer or even a private person to enquire into the complaint and submit a report to him, or he might himself hold a preliminary enquiry to satisfy himself that there is sufficient ground for proceeding with the case. Except in cases when a complaint has been made by a Court, the Magistrate examines the complainant before dismissing the complaint, or proceeding further with it. But if he regards the complaint as disclosing a *prima facie* case, he issues a summons or warrant, according to the nature and magnitude of the injury from which the complainant suffered. There are elaborate rules as to how a summons or warrant of arrest can be served, and what is to be done when an offender either refuses to come, or absconds or disappears altogether. When in obedience to the warrant, the accused appears he may ask that he may be released on bail. If he is in custody, he may be released, on giving sureties for his appearance or otherwise. He may also ask in appropriate cases for leave to absent himself during the trial, and be represented by a pleader in his place. But this permission is not given in cases of importance.

Modes of Trial

There are four methods of trial described in the Criminal Procedure Code.

The most detailed and careful is that which is prescribed for serious crimes like murder, dacoity, etc., In the first place there is a preliminary enquiry held by a Magistrate for the purpose of deciding whether there is a *prima facie* case against the accused. If he is satisfied that there is, he commits the accused for trial. The High

Court or Court of Sessions then tries such offences, usually with the assistance of jurymen or assessors. Assessors merely sit along with the Judge and give their opinion after the trial is over, but the presiding judge is not bound to accept their opinion or abide by their verdict. But when a set of jurymen bring in a unanimous verdict one way or the other the Judge has to accept the verdict, unless he considers it perverse, in which case he writes a judgment, exhibiting the reason which led him to differ from their considered verdict.

A trial of a warrant case is dealt with in Chapter 21 of the Code. This is the chapter followed in the majority of cases that come before criminal Courts. The Magistrate hears the complainant and his witnesses, who are examined *seratim* by the prosecution and then cross-examined by the accused. If at any stage of the hearing, he feels satisfied that there is no case against the accused, he can stop the trial and discharge the accused. He can likewise discharge the accused, if, after hearing the whole of the complainant's evidence, he considers that no case has been made out. But if he believes that there is a case which would warrant a conviction, he proceeds to frame a charge or charges against the accused, and thus gives public information to him that he will be convicted of those offences, if he does not satisfactorily explain how he came to commit the offence or make out any ground that would exculpate him from liability. If a charge is framed, the accused is entitled for a second time to cross-examine the prosecution witnesses and then enter upon his defence, that is to say, to examine the witnesses on whose evidence he proposes to rely for his acquittal. Each witness summoned for the prosecution or for the defence is first examined in chief by the party calling him, then cross-examined by the opposite party and finally re-examined as regards any matters which may have been left doubtful or uncertain in cross-examination. After the entire evidence has been taken, the accused is entitled to be heard, the argument on his behalf being usually addressed to the Court by his vakil, after which the Magistrate pronounces his judgement, taking time to do

so if necessary. If it is a judgment of acquittal he is released at once. If it is a conviction he is given a right of appeal, where the sentence exceeds a certain amount which is fixed in the Criminal Procedure Code as regards each class of Magistrate. Against an order of acquittal there is no appeal, but the Appellate Court can on an application by the complainant send for the records of the case to see whether the accused has been improperly acquitted. If it is satisfied that there has been a failure of justice it may move for a re-trial.

Chapter 20 deals with the procedure adopted in summons cases. The accused in such a case is asked on appearance whether he has committed the offence with which he stands charged. If he pleads 'guilty' he can be convicted at once. If he pleads 'not guilty' the Magistrate records a memorandum of the evidence given by the prosecution witnesses and of the evidence examined for the defence, and convicts or acquits him according as he considers him guilty or otherwise. The Magistrate in a summons case can always allow a complainant to withdraw his complaint for sufficient ground shown to him, or dismiss the complaint, if the injured party does not appear in Court.

There is also a fourth method of trial which is provided for in Chapter 22 of the Cr. P. C. where the proceedings are still more summary. This procedure is arranged principally for Magistrates sitting as a Bench but it may also be exercised by a District Magistrate or a first class Magistrate specially empowered to do so. The cases tried under this chapter are usually offences of the slighter order. Magistrates need not record the evidence of the witnesses or frame a formal charge, unless an appeal lies. They need only to note the offence complained of and certain other specified particulars and give their finding with reasons therefor. In appealable cases the Magistrate (or Bench of Magistrates) has to write a full judgment as in ordinary summons or warrant cases so as to enable the Appellate Court to ascertain the grounds on which he or they acted. If the Bench is not unanimous, the dissenting member may write a separate judgment.

In addition to these four methods of trial which are provided for offences of different classes, there are other proceedings of an ancillary nature which can be taken under the Criminal Procedure Code.

Maintenance Cases

Where a husband deserts or refuse to maintain his wife, she can proceed against him under Section 488 and claim maintenance either for herself or for herself and her children. These provisions have been already referred to in Chapter V, Book II.

Nuisances

Chapter 10 of the Criminal Procedure Code deals with public nuisances and how to regulate or remove them. Where there is a nuisance in a river or channel, or one inflicted by any trade or occupation, or one caused by a dangerous building or excavation, the Magistrate may under this Chapter make an order requiring, the person causing the nuisance to remove or stop it, or take other action which seemed appropriate for the purpose. He will also, at the same time, ask the person responsible to appear before him, hear what he has to say and confirm his order or revoke it. If the person in question demands a jury to give a layman's verdict on the matter, provision is made for the appointment of such a jury.

Urgent Orders in cases of apprehended Danger

Chapter 11, Section 144, is important. It deals with emergent orders which can be made by a Magistrate in cases of nuisance or apprehended danger. Such an order has effect only for two months from the date of its promulgation. An order may be made against the offenders in the first instance, but if the person responsible for the nuisance or danger appears and shows cause why it should be cancelled, it can be rescinded subsequently; or the order itself may be made in the first instance after hearing such person. He can be asked either to abstain

from doing an act (or class of acts) which is likely to prove injurious, or take such order with reference to property in his possession, or under his management, as is likely to prevent obstruction, annoyance or injury to human life, health or safety or public tranquility. This section is often resorted to when there is immediate danger of a riot, say, owing to an unusual or illegal procession, or the carrying on of an illegal trade or occupation, or some sudden action like bombing or burning which is likely to inflict injury on the general public.

Possession Cases

Chapter 12 relates to summary proceedings for the purpose of finding out who is in actual enjoyment of a piece of property, of which two or more persons claim to be in possession. If the Magistrate is satisfied, from a Police report or other information, that a dispute likely to cause a breach of the peace exists concerning any property, he issues an order calling upon the persons concerned to appear before him and state their respective cases. Without reference to the merits, or title of individuals, he ascertains the person who was actually in possession, and passes an order in his favour. If a person who was actually in possession has been ousted within the previous two months, he might treat the party so dispossessed as the person in possession. This section is constantly resorted to as a preliminary to a regular civil case, as the person found to be in possession has a stronger position in the eye of the civil law than a person who is out of possession, who will be bound to show that though he was out of possession he is still entitled to recover possession.

Security Cases

Chapter 8 provides for taking security from a person for keeping the peace for or good behaviour. When an accused is convicted of an offence the Magistrate can take such security. (Section 106.) Even when a person has not been convicted, if the Magistrate has reason to believe that he is likely to commit a breach of the peace

or disturb the public tranquility, he may take security from him for keeping the peace. If a person is found disseminating seditious matter or taking precautions to conceal himself, or is shown to be a habitual robber, thief, receiver of stolen property or a habitual harbourer of thieves or a person who kidnaps or abducts persons or commits offences involving a breach of the peace, the Magistrate may take a bond from him, with sureties for his good behaviour, after examining him and his witnesses for the purpose.

Habeas Corpus

Where a person is kept concealed, or illegally or improperly detained in public or private custody, the High Court may order a writ known as the writ of *Habeas Corpus* to issue for his production. This writ was one which proceeded in England from the King's Bench Division; in India it can be issued only by one of the High Courts.

Unlawful Assemblies

Chapter 15 deals with unlawful assemblies and the manner in which they can be dispersed. A Magistrate or officer in charge of a Police station may command such assembly to be dispersed, and may, if necessary, use civil or military force for the purpose of effecting the dispersal, not using more force, or inflicting more injury to person or property, than is necessary for effecting his object.

Miscellaneous

The first portion of the Criminal Procedure Code deals with different classes of Criminal Courts, and their respective powers, which are strictly defined by statute. The next portion deals with the powers of the Police, and the processes which can be taken to compel the appearance of an accused, or a witness, or the production of a document, or for searching a house either with a view to finding stolen property or persons who are wrongfully confined or hidden, or other property which it is to the

interest of the Criminal Court to recover. The powers of the Police and the manner in which they should set about their business of investigation are set out in Chapter 5. An investigation includes all proceedings connected with the collection of evidence conducted either by a Police officer or by any person authorized by a Magistrate, and every enquiry other than that conducted by a Magistrate or Court. When a person is accused of an offence and arrested, he should be produced within 24 hours before a Magistrate, and can be kept on remand, for a reasonable time, only on the basis of orders made by a properly constituted Magistrates from time to time. He cannot be kept in custody after he has been discharged or acquitted, nor can a person be tried twice over for the same offence. A person who is accused of an offence may, in certain cases, be given pardon and taken as an approver for the purpose of bringing to justice others who collaborated with him in the wrong. Special provisions relating to European British subjects are dealt with in Section 528 A to D and 529 A. If an offence is committed before a Court, it can itself complain about the occurrence and the case will then be tried in the ordinary way by a Magistrate. The Court can also proceed in cases, where a person before it is guilty of contempt of Court. (Section 480). If a Criminal Court is guilty of trivial irregularities in the performance of its duty the same do not vitiate its proceedings but where the irregularities are of a serious character the whole proceeding is void. There are special provisions in the Code as regards lunatics, as regards the taking and disposal of the property of an accused, as regards giving and withdrawing of bail, and as regards affidavits and other matters which need not be dealt with in detail here. The Provisions of the Criminal Procedure Code have to be read along with Acts like the Whipping Act, The Borstal Act, The Reformatory Schools Act, and the Repeal of Transportation Act which was recently passed.

CHAPTER V

Arbitration

The law of arbitration has its origin in the desire to avoid the delay, uncertainty, and expense attendant on the administration of justice in regularly constituted tribunals. It takes place when disputes are referred to one or more persons, chosen by consent of the parties interested in the controversy. The word 'arbitration' which had its origin in Roman jurisprudence has its counterpart in the Panchayat of India, an ancient institution which has survived the test of centuries, and is still a living force in the social economy of the rural parts of this country.

The agreement between the parties under which arbitrators obtain jurisdiction to decide the matters in issue is technically called a submission or muchilika. The person to whom the reference is made is called the umpire or arbitrator. The decision of the arbitrator is termed an award. It is an invariable rule that all arbitrators whether appointed by private persons or by Courts of law are bound by the principles of natural justice and equity, though not by strict technical rules of law or evidence.

In India numerous enactments have been passed with respect to this branch of the law. (Vide Bannerjee on Arbitrators.) At present, the Civil Procedure Code Schedule II governs the matter, so far as it relates to disputes which the parties then and there agree to refer to arbitration. The Indian Arbitration Act provides for cases in which parties have previously contracted that future disputes should be decided by arbitration, and lays down the rules governing such arbitration without the intervention of Courts of justice. It may be remarked in passing that in the Presidency of Madras there is a Madras Village Courts Act II of 1920 which regulates

the trial of civil and criminal cases of a trivial nature by the village Headman or village Panchayat. The Village Panchayat Act (XV of 1920) provides for the management of various matters affecting villages like drainage, markets, lighting, etc., by bodies of Panchayatdars elected by the villagers themselves.

Different kinds of Arbitration

The Civil Procedure Code (second Schedule) provides for *four* different species of arbitration.

(1) When a suit has actually been filed before a Court, the parties may agree that the entire dispute (or any matter in difference) between them should be decided by an arbitrator or arbitrators. The second Schedule lays down the rules (Section 1 to 16) to be observed in such cases. The Court appoints arbitrators, who relieve it of its jurisdiction, and give an award which is final and binding as between the parties, unless there is fraud or mistake.

(2) Sections 17 to 19. Where no suit has been filed, but parties have come to an agreement that their differences should be settled by arbitration, one of them can ask for the agreement to arbitrate to be filed in Court and thus enforced. Notice is given to the other party and the agreement is enforced, arbitrators are appointed, and the dispute is remitted to them. If a suit has been filed, the same will be stayed till the arbitration is completed. The rules relating to the first kind of arbitration are enforced, *mutatis mutandis*.

(3) When before a suit is filed, parties have privately gone to arbitration and an award has been made, any person interested may ask a Court to recognize and give effect to the award, by filing it and pronouncing judgment upon it. (Sections 20–22.)

(4) Persons concerned in a dispute may also agree to state a case for the opinion of a Court; the Court will then try and determine the dispute in the manner prescribed.

What may be referred to Arbitration

With a few exceptions, all matters which can form the subject of a suit may be referred to arbitration. Arbitrators are competent in such cases to grant most of the remedies which a Civil Court can give.

Exceptions to the general rule may here be briefly referred to. A suit for divorce cannot be referred to arbitration so as to enable an arbitrator to annul a marriage; but the question whether sufficient cause exists for separation or maintenance may be. So too in probate matters, the existence or proof of a valid testament cannot be made the subject matter of arbitration; the grant and revocation of probate are within the exclusive competence of the Courts alone. A claim for the custody of a wife or the appointment of a guardian for a minor cannot be referred. Insolvency proceedings furnish another instance of matters beyond the orbit of arbitration. Proceedings under Section 145 Criminal Procedure Code cannot be referred to arbitration. In short 'matters the decision whereof does not depend on the personal volition of the parties, but in which Courts have to exercise a judicial discretion within prescribed rules, are generally matters which cannot be referred to arbitration.'

Who can refer?

All parties interested in the subject matter of a suit may, at any time before judgment is pronounced, apply for an order of reference. The assent or dissent of persons who are merely *pro forma* parties is immaterial. But if an interested party does not join, the reference is bad in law.

Persons competent to contract can make a submission. According to the Indian Contract Law, a minor's contract is void; a submission by a minor is therefore void. But the certified guardian of a minor may refer a dispute in which he is interested to arbitration, without leave of the Court, provided he acts in good faith and in the interests of the minor. So too can the natural guardian of a minor.

How Reference is made?

The application should be in writing, and should state the matter sought to be referred, but where any matter is referred without the Court's intervention, the agreement need not be in writing. The application for an order of reference by Court must bear the Court fee provided by the Court Fees Act. The order of reference under Schedule 2 should state all the points which are referred to arbitration, and fix a time for the making of the award. When once a matter is thus referred to arbitration, the Court practically loses its seisin over the matter, until or unless the reference falls through.

Appointment of Arbitrators

The Court may appoint an arbitrator or arbitrators in such manner as the parties may agree upon. Where the reference is to two or more arbitrators, provision must be made for differences of opinion by the appointment of an umpire; or the arbitrators themselves may be given power to appoint an umpire; or there may be a provision that the view of the majority shall prevail.

Paragraph 5 of the schedule provides that where parties do not agree, or the person appointed arbitrator declines the office, or where he dies, or refuses, or neglects to act, or leaves British India, or where the arbitrators empowered by the reference to appoint an umpire do not do so, any party to the reference may call upon the other party by notice to appoint an arbitrator, and if, within a week, no action is taken, the Court can, on application, appoint an arbitrator, or supersede the reference and try the suit itself.

As to the question who may be arbitrators, it can be broadly said that any person who has no interest in the subject matter of the dispute can be an arbitrator. There is nothing to prevent the judge himself from being the arbitrator if the parties agree.

Proceedings before Arbitrators

Proceedings before arbitrators are in the nature of quasi judicial proceedings, though the formalities and

strict technical rules of judicial procedure and evidence are not observed. The proceedings have to conform in all essential respects to the principles of natural justice.

The arbitrator must give notice to the parties fixing the place of hearing. Paragraph 7 provides that the arbitrator can move the Court to issue process for attendance of witnesses. He should not examine one party in the absence of the other or proceed with a hearing *ex parte*, without serving due notice on the parties concerned Nor can he make an award without hearing both sides Nor can an arbitrator import his personal knowledge into the matter.

When an umpire has been appointed, he may enter on the reference, in the place of the arbitrators, if the time fixed has expired or if they have given notice to the Court of their inability to agree.

As regards costs of the reference and arbitration proceedings, if the Court so authorizes, the arbitrator can award costs. But it is competent for the Court to make any order in this matter where the award does not provide for it.

Where, for sufficient cause, it is not possible to complete the award within the period fixed, the Court can enlarge the time. Arbitrators should apply in writing to the Court for extension of time. The Court's order extending time must be expressed in definite terms.

The Award

When arbitrators have heard both sides, the award must be made. This being a judicial and not a ministerial act, the arbitrators must make the award in the presence of one another. The award is so to speak their joint judgment. In making the award, the arbitrators must sign it, and cause the award to be filed in Court, together with any documents and depositions filed or made before them. Notice of the filing should be given to the parties.

Power is given to the Court to modify or correct an award:

(*a*) when a part of the award is on a matter not covered by the reference, and the excess portion is severable from the rest,

(*b*) where the award is imperfect in form,

(*c*) where it contains clerical mistakes or accidental slips.

Where the award has left undetermined any of the matters referred, the Court may remit the award for completing the deficiency. So too, where the award is indefinite or *prima facie* objectionable in law, the award may be remitted for reconsideration.

When once an award is made and handed over, the arbitrator's jurisdiction ceases, and they cannot interfere with it, even to the extent of correcting slips and errors.

An award remitted becomes void when the arbitrator or umpire fails to reconsider it.

Setting aside an Award

It is open to the parties to apply to set aside an award on the following grounds:

(*a*) corruption or mis-conduct of the arbitrator;

(*b*) either party having been guilty of fraudulent concealment of material facts or wilfully deceiving the arbitrator;

(*c*) the award having been made after an order of supersession by the Court or after the period fixed. An award cannot be set aside without full inquiry by the Court. The Court cannot act on mere surmise or suspicion but must do so on legal testimony.

Judgment according to Award

After submission of the award, if the Court has no cause for remitting it and no application is made to set it aside, within the period of days fixed by the law, the Court will give judgment according to the award. On the judgment so pronounced a decree will be made. The award thus becomes a rule of Court and enforceable as an ordinary decree of a Civil Court.

Paragraph 2 contains a clause that a decree so passed shall be final and unappealable.

Awards made upon Private References

Where any persons agree in writing that any future differences that may arise between them shall be referred to arbitration, the parties may apply to the competent Court that the agreement should be filed in Court. The application will then be numbered and registered as a suit. The Court will give notice to the other parties, to show cause why the agreement should not be filed. Then the Court will proceed to order that the agreement should be filed, and make an order of reference to the arbitrator or arbitrators, as the case may be. The rest of the procedure is the same as on a reference by Court in a pending suit.

By paragraph 18 of the second schedule it is provided, that where any party to an agreement to refer to arbitration sues the other party in respect of any matter covered by the agreement, it will be open to such party to apply for stay of such suit. The Court may, if satisfied, order accordingly.

Arbitration without Intervention of Court

Where any matter has been referred to arbitration without the intervention of the Court, and an award is made, any person interested in the award may apply that the award should be filed in Court. Such application must be in writing, and will be registered as a suit. The award which is sought to be made a rule of Court must be filed along with the application. The Court will thereupon give notice to the parties to the arbitration, to show cause against the filing of the award. When the Court is satisfied as to the validity of the award, it shall order the award to be filed, and proceed to pronounce judgment, and pass a decree.

It may be noted that in this case, the Court has no power to amend or remit an award of this kind. The limitation for an application to file the award is six months from the date of the award.

A party to an award without intervention of Court may sue to set it aside within three years from the date when the facts entitling him to have it set aside become known to him.

Effect of an Award

A valid award merges and extinguishes all claims comprised in the submission. It is like a final and conclusive judgment.

An award contravening statutory provisions is void. A voidable award can be validated subsequently.

A stranger to a submission cannot avail himself of the award.

A decree based on the award made in a pending suit, or in arbitration without Court intervention, operates as *res judicata* on all the questions referred and decided.

The award is operative though neither party has enforced it.

Where an award is set aside, the *status quo ante* is restored *inter parties*.

A suit to enforce the terms of an award must be brought within six years from the accrual of the cause of action. Where the suit is to recover immoveable property the period is 12 years.

The Indian Arbitration Act

This Act proceeds on the same lines as the second schedule of the Civil Procedure Code.

A submission is irrevocable except by leave of the Court. The parties to a submission may agree that the reference shall be to an arbitrator or arbitrators to be appointed by a person designated therein.

The arbitrator can state a special case for the opinion of the Court on any question of law involved.

When the arbitrators or umpire have made their award, they must sign it and give notice to the parties of the making and signing thereof, and of the amount of fees and charges payable to them. The arbitrators must

cause the award to be filed in Court and give notice of the filing to the parties.

Where an arbitrator has misconducted himself, the Court may set aside the award and remove the arbitrator.

APPENDIX

A few common forms are given, to be used, with modifications, as circumstances require

Power of Attorney

KNOW ALL MEN BY THESE PRESENTS, that I, A.B., of etc., being about to leave Madras and to reside abroad for some time do this day of 192 , hereby appoint C. D., of etc., and E. F., of etc., and each of them, to be my attorneys and attorney for the purposes hereinafter mentioned (that is to say):

1. To receive the rents and profits of and manage all the farms, lands, and house, of whatever tenure, and of any share or interest therein of or to which I now am, or at any time or times hereafter, shall or may become possessed, or entitled, for any estate or interest whatsoever, with liberty in the course of such management to let or demise the said premises, or any part thereof, either from year to year, or for any term or number of years, or for any less period than a year, at such rents, and either with or without any fine or premium, and subject to such covenants and conditions as my said Attorneys or Attorney shall think fit; and with liberty also to accept surrenders of leases or tenancies, to make allowances to and arrangements with lessees, tenants, and others, to cut timber and other trees, whether for repairs, sale, or otherwise, to repair and rebuild houses or other buildings, and to insure the same against damage by fire, tempest or otherwise, to repair fences, to drain or otherwise improve the premises, or any part thereof, to appoint and employ bailiffs, agents, servants, and others to assist in the management of the premises, and to remove them and appoint others in their place and to pay and allow to the persons to be so employed as aforesaid such salaries, wages, or other remuneration as my said Attorneys or Attorney shall think fit; And with power also to give effectual receipts and discharges for the rents and profits of the premises, and on non-payment of any rent or the breach of any covenant, agreement or condition which ought to be observed or performed by any lessee or tenant, to take such proceedings by distress, action or otherwise for recovering such rent or in respect of such breach as my said Attorneys or Attorney shall think fit; and generally to do all such acts or things, in or about the management of the premises, as my said Attorneys or Attorney might do if they or he were or was the absolute owners or owner thereof; Also to use and take all lawful ways and means for recovering any lands, or hereditaments belonging or supposed to belong to me.

2. To ask, demand, sue for, recover and receive all sums of money, goods, effects, and things (whether real or personal) now or hereafter owing, or payable, or belonging to me, by virtue of any security, or upon any balance of accounts or otherwise, howsoever, and to give, sign, and execute receipts, releases and other discharges for any property or thing in action whatsoever.

3. To settle, adjust, compound, submit to arbitration, and compromise all proceedings, accounts, claims, and demands whatsoever, which now are, or hereafter shall be, depending between me and any person or persons whomsoever, in such manner as my said Attorneys or Attorney shall think fit.

4. To appear for me in any Court in any action, or other proceeding, which may be instituted against me, and to defend the same or suffer judgment to go against me, and to commence and prosecute any action or proceeding on my behalf in any Court, in any matter, as my said Attorneys or Attorney shall be advised or think proper.

5. To apply any money which may come to the hands of my said Attorneys or Attorney under these presents, in payment of all costs and expenses incurred by them or him, in or about the execution of the powers herein contained, or to raise the same by way of mortgage or otherwise.

6. To deposit any money not required for costs and expenses as aforesaid at any bank, either in the names or name of my said Attorneys or Attorney or in my name, and to withdraw the same from time to time, and to open or close any current account, and to draw and sign cheques.

7. To invest any money either in the names or name or under the control of my said Attorneys or Attorney, or in my name in any investments (whether being investments authorized by law for the investment of trust money or not) or in the purchase or on the security of any property real or personal, or any interest therein which they or he may think proper, and to vary the investments from time to time.

8. To execute and do in my name or otherwise all such deeds, covenants, agreements and things as my said Attorneys or Attorney may think proper for the purpose of giving effect to the powers hereby conferred.

9. GENERALLY to manage all my concerns and affairs of every description at their absolute discretion, and as fully and effectually as I could do if I were present and acting in my proper person and without being liable to account for any act or default done or committed in good faith.

10. I DECLARE that each of my said Attorneys may act in the several powers and authorities hereby conferred separately and apart from the other of them. And I authorize my Attorneys, and each of them, from time to time to appoint one or more substitute or substitutes to do, execute, and perform all or any such matters and things as aforesaid; and the same substitute or substitutes at pleasure to remove, and to appoint another or others, in his or their place or places.

11. ALL and whatsoever my Attorneys, or either of them or their or his substitute or substitutes, shall do or cause to be done in or about the premises, I hereby covenant with my said Attorneys, and with each of them, to allow, ratify, and confirm.

12. I DECLARE that this power shall be irrevocable for one year from the date hereof.

IN WITNESS, etc.

H. M. COTTON. *Signature.*

Will

I, A.B., son of etc., residing in , do hereby revoke all testamentary dispositions heretofore made by me, and declare this to be my last Will, which I make this day of 19 , and solemnly execute while I am in a sound condition of body and mind.

The following are my heirs : (here sons, daughters and wife, if any.) I leave the following items of immoveable and moveable property : house, . . . nanjah land . . . . garden, cash, shares in company, money in bank.

The following are my debts, which shall be paid out of my cash assets, or the proceeds of the sale of my shares.

I hereby bequeath the following legacies.

SUBJECT to the payment of my funeral and testamentary expenses legacies and debts, which with all duties shall be paid primarily out of my moveable assets specified above, I devise and bequeath all my estate (including any property in respect of which I have a general testamentary power of appointment to which I am not required expressly to refer) to my wife or my wife and children in equal shares. I appoint . . . to be the executors of this my Will.

In WITNESS whereof I have hereunto set my hand the day and year first above written.

Signed and declared by the above-named A.B. as his last Will in the presence of us both present at the same time, who in his presence and the presence of each other have hereunto set our names as witnesses. } (*Testator's Signature.*)

(*Signature of two witnesses with their addresses and descriptions.*)

Assignment of Moveables

THIS INDENTURE, made the day of 192 BETWEEN A.B., of (residence) &c. (hereinafter called the Vendor), of the one part, and C.D., of, (residence) &c., (hereinafter called the Purchaser), of the other part :

WHEREAS the Vendor is the owner of the furniture and effects in and about the premises mentioned in the Schedule hereto :

AND WHEREAS the Purchaser has agreed to purchase the said furniture and effects from the Vendor for the sum of Rs , to be paid at once.

NOW THIS INDENTURE WITNESSETH that in consideration of the sum of Rs now paid by the Purchaser to the Vendor (the receipt whereof the Vendor hereby acknowledges), the Vendor hereby assigns unto the said C.D.

ALL the furniture and effects mentioned in the Schedule hereto,

TO HOLD unto the Purchaser but so that the same shall remain in the possession of the Vendor until the day of next :

AND the Vendor hereby covenants with the Purchaser that the said A.B., will deliver possession of the said furniture and effects to the Purchaser on the day of next, and will in the meantime keep the same in good repair and condition (reasonable wear and tear only excepted).

IN WITNESS, &c.

Here *Signature.*

THE SCHEDULE ABOVE REFERRED TO

Signed, sealed and delivered by the above named A.B., in the presence of me L.M. of, &c. a solicitor of the High Court of Judicature, the effect of the above-written indenture having been explained by me to the said A.B.

Here *Signature.*

Sale

THIS INDENTURE, made the day of 192 , BETWEEN A.B., of (residence), hereinafter called the Vendor), of the one part, and C.D., of (residence) (hereinafter called the Purchaser), of the other part:

WHEREAS the Vendor is now full owner of premises No , situated in, and more particularly described in the schedule hereunder written, and is in possession *free from incumbrances* of the said land or house or holding hereinafter described, (subject to and with the benefit of the lease mentioned in the Schedule hereto), and has agreed to sell the same to the Purchaser for the like estate in possession, free from incumbrances at the price of Rs .

NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement and in consideration of the sum of Rs (on or before the execution of these presents) paid by the Purchaser to the Vendor (the receipt of which sum the Vendor hereby acknowledges), the Vendor, As Beneficial Owner, hereby, conveys unto the Purchaser.

ALL THAT piece of land known as situated in the village of in the Taluk of in the District of containing or thereabouts and bounded on the north by the land of , on the west on the east on the south, measuring feet north to south feet east to west.

TO HOLD UNTO and TO the Use of the Purchaser in full ownership, (subject to and with the benefit of the Lease mentioned in the first schedule hereto.)

And the Purchaser for himself, his heirs and assigns, hereby covenants with the Vendor, that the Purchaser and the persons deriving title under him will observe and perform the stipulations and conditions following (or contained in the Schedule hereto).

(Add the particular restrictions either here or in a Schedule).

And the Vendor hereby acknowledges the right of the Purchaser to production of (the recited Indenture of) (the documents mentioned in the Schedule hereto) and to delivery of copies thereof, and hereby undertakes for the safe custody thereof.

IN WITNESS whereof the parties hereto have hereunto set their hands and seals the day and year first above written.

Signed sealed and delivered by the above named A.B. (and C.D.) in the presence of

Signature.

Schedule.

Mortgage

THIS INDENTURE made the day of 192 , BETWEEN A.B. of etc. (hereinafter called the Mortgagor) of the one part and

C.D. of etc. and E. F., of etc. (hereinafter called the Mortgagees) of the other part.

WHEREAS the Mortgagor is full owner in possession, *free from incumbrances* of the premises hereinafter described.

AND WHEREAS the Mortgagees have agreed to advance to the Mortgagor the sum of Rs (out of money belonging to them on a joint account), upon having the payment thereof, with interest as hereinafter mentioned secured in manner hereinafter appearing.

NOW THIS INDENTURE WITNESSETH, and it is hereby agreed as follows :

1. IN pursuance of the said agreement, and in consideration of the sum of Rs now paid by the Mortgagees to the Mortgagor (the receipt of which sum the Borrower hereby acknowledges), the Mortgagor hereby covenants with the Mortgagees, and with each of them to pay to them on the day of next (generally a year or two years from date of deed) the sum of Rs , with interest thereon from the date hereof at the rate of Rs per cent per annum.

AND ALSO so long as any principal money remains due under these presents, after the said day of next, to pay to the Mortgagees interest thereon at the rate aforesaid, by equal half-yearly payments on the day of and the day of in every year.

2. For the consideration aforesaid the Borrower As Beneficial Owner, hereby conveys unto the Mortgagees.

ALL THAT piece of land known as , situated in the District of in the Taluk of containing or thereabouts and bounded on the north by land of etc.

TO HOLD UNTO and TO THE USE of the Mortgagees, subject to the proviso for redemption hereinafter contained (that is to say) :

3. IT is hereby provided that on payment on the day of next by the Borrower or the persons deriving title under him to the Mortgagees or the persons deriving title under them of the sum of Rs , with interest thereon from the date hereof at the rate of Rs per cent per annum, the premises hereinbefore conveyed shall at the request and cost of the Borrower or the persons deriving title under him, be duly reconveyed to him or them.

IN WITNESS etc.

Lease

AN AGREEMENT, made the day of 192 . Between A.B. of (residence here) etc. (hereinafter called the Landlord, which expression, where the context so admits, includes his heirs and assigns), of the one part, and C.D., of, (residence) etc. (hereinafter called the Tenant, which expression, where the context so admits, includes his executors, administrators, and assigns), of the other part :

WHEREBY it is agreed as follows :

1. The Landlord agrees to let, and the Tenant agrees to take, ALL THAT house or land or premises, etc. known as situated in containing or thereabouts bounded on the north by land of, etc.

The tenancy to be from year to year, or from month to month or for years commencing on the day of 192 at the yearly (or monthly) rent of Rs on payable by equal quarterly payments on etc. (days of payment or monthly, as every month), the last quarterly (monthly) payment to be made in advance on the day of preceding the end of the tenancy, together with the quarter's (month's) rent due on that day.

2. The Tenant agrees to keep all the glass in the windows, and all shutters, locks, fastenings, bells and other internal fixtures in, upon, and belonging to the premises in good and sufficient repair during the tenancy, and the same in good and sufficient repair to deliver up at the end thereof (reasonable wear and tear and damage by fire excepted):

(AND the Tenant also agrees not to assign or underlet the premises, or any part thereof, without the consent in writing of the Landlord.)

3. If any rent shall be in arrear for twenty-eight days whether legally demanded or not, or there shall be any breach by the Tenant of the conditions herein contained, the Landlord may re-enter on the premises without giving any notice to quit and expel the Tenant therefrom.

4. The Landlord agrees that the Tenant, paying the said rent and observing the conditions herein contained, shall quietly hold and enjoy the premises without any lawful interruption by the Landlord or any person claiming under him.

As WITNESS the hands of the parties hereto the day and year first above written.

Signature.

GENERAL INDEX

* The numbers given at the end denote pages.

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