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LAW COMMISSION OF INDIA

FIFTEENTH REPORT

(LAW RELATING TO MARRIAGE AND DIVORCE AMONGST CHRISTIANS IN INDIA)

GOVERNMENT OF INDIA : MINISTRY OF LAW

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CHAIRMAN
LAW COMMISSION.
New Delhi—3.
August 19, 1960.

Shri Asoke Kumar Sen,
Minister of Law,
New Delhi.

MY DEAR MINISTER,

I have great pleasure in forwarding herewith the Fifteenth Report of the Law Commission on the law relating to Marriage and Divorce among Christians in India.

2. This subject was referred by the Law Ministry to the previous Law Commission, and was taken up by the present Law Commission on a top priority basis. A draft of the proposed legislation was prepared by me, and was revised by the Commission in its meetings held on the 23rd and the 24th April, and the 4th May, 1959. The revised draft was circulated for opinion, and as a number of persons and associations desired to make oral representations on the proposed Bill, we took their oral evidence at Bombay on the 11th, 12th, 14th and 15th September, 1959, at Madras on the 13th, 14th and 15th October, 1959, and at New Delhi on the 2nd, 3rd and 4th November, 1959. The draft was again revised in the light of the evidence given before us and was finalised by the Commission at its meetings held on the 22nd and 23rd April, 1960. The Report has been drawn up in accordance with the decisions taken at that meeting.

3. Shri P. Satyanarayana Rao has signed the Report subject to two separate notes which are appended to the Report. Shri Sachin Chaudhuri has also signed the Report subject to a note appended to the Report.

4. The Commission desires to express its appreciation of the services rendered by Shri D. Basu, Joint Secretary, in the preparation of the Report and by Shri P. M. Bakshi, Deputy Draftsman, in the preparation of the Bill and the Notes.

Yours sincerely,
T. L. VENKATARAMA AIYAR.

REPORT ON THE LAW RELATING TO MARRIAGE AND DIVORCE AMONGST CHRISTIANS IN INDIA

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INTRODUCTION

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सत्यमेव जयते

REPORT ON THE LAW OF CHRISTIAN MARRIAGE AND DIVORCE

1. The law relating to divorce amongst Christians is contained in the Indian Divorce Act, 1869, and that relating to marriage in the Indian Christian Marriage Act, 1872. Both these enactments are based on the law as it then stood in England. Since then considerable changes have taken place in the social conditions both in England and in India. With a view to adjusting the law to those changes, the British Parliament has enacted a number of statutes on the above topics, culminating in the Marriage Acts, 1949, and 1954, and the Matrimonial Causes Act, 1950. In India, however, the law as originally enacted in the statutes of 1869 and 1872 has remained practically unchanged, and the criticism that it has become antiquated and to some extent obsolete is well-founded. The need has thus arisen for enacting a law on the topic of marriage and divorce such as will be suitable to the present conditions. Indeed private Bills on the subject were introduced in Parliament, and the question of revision of the law on the subject has since been referred by the Government to the Commission. **The need for revision.**

We invited suggestions from all persons interested in the matter. The response was large, and written representations were received from dignitaries of the Christian Church, representatives of Christian associations, members of the Christian community, Bar Associations and Judicial Officers. Special mention must be made of two draft Bills which were prepared and sent to us, one by the National Christian Council, Nagpur, and the other by the Catholic Bishops' Conference, India. It may be mentioned that in England, a Royal Commission was appointed in 1951 to "inquire into the law of England, and the Law of Scotland concerning divorce and other matrimonial causes and to consider whether any changes shall be made in the law or its administration". The report[1] of the Commission contains valuable discussion on several problems, which arise for our decision. In the light of the above materials, we prepared a draft of the Law on marriage and matrimonial causes and had it circulated for opinion, and in answer thereto, we received quite a large number of suggestions and comments. Some of the correspondents desired to make oral representations, and in view of the importance of the subject, we acceded to this suggestion and took their evidence at Bombay, Madras and Delhi. The names of witnesses who were so examined are set out in an Appendix[2]. The draft was then finalised by us after

[1]Report of the Royal Commission on Marriage and Divorce, 1955, (Cmd. 9678).

[2]See Appendix IV.

taking their evidence into consideration and the same is annexed to this report.

(*a*) Consolidation.

2. Under the present law, there are two statutes, one dealing with divorce and another with marriage. It would obviously be advantageous to have one comprehensive code dealing with both the branches of the law; and that is the view which has generally found favour with the community. The Parsi Marriage Act, 1936, the Special Marriage Act, 1954, and the Hindu Marriage Act, 1955, deal, all of them, both with marriage and with matrimonial causes in one enactment, and that is the pattern which we have adopted.

(*b*) Title.

The proposed Act accordingly covers the ground traversed by the Indian Divorce Act, 1869, and the Indian Christian Marriage Act, 1872, and it has been termed the Christian Marriage and Matrimonial Causes Act. We have omitted the word "divorce" in the title, because the Act deals not only with divorce, but also with other kinds of actions such as nullity of marriage, restitution of conjugal rights and judicial separation. It will also be more satisfying to sentiment to avoid the word "divorce" in the title to a law on marriage.

Local extent.

3. We shall now discuss in detail the main points on which the law requires revision. The first question that has to be considered is as to the territories to which the proposed law should apply. We have provided that it should extend to the whole of India except Jammu and Kashmir. At present the Indian Christian Marriage Act, 1872, has no application to the areas of the State of Travancore-Cochin, and Kashmir, though, it should be noted, the Indian Divorce Act, 1869, was made applicable to the whole of India except the State of Jammu and Kashmir. A suggestion has been made to us that the proposed legislation should not extend to the erstwhile Travancore-Cochin State, which has now become merged in the State of Kerala, and the main ground that has been urged in support of it is that the Syrian Christians who form a considerable proportion of the population in that State are governed by a customary law of marriage, which is ancient, and differs from that in force among other Christian communities, and that that should not be disturbed. But an examination of that customary law does not reveal any such radical difference as would justify a separate treatment. Under that law, parties who intend to marry give notice thereof to the clergyman, who publishes it in two successive meetings of congregations, and if there is no objection, the marriage is solemnised. If there is any objection, then the matter is enquired into by a Bishop, and his decision is final. No marriage is solemnised if the parties are within prohibited degrees of consanguinity or affinity. That, in brief, is the customary law, and that does not differ in substance from the mode of solemnisation

in Roman Catholic Churches, and there is therefore no sufficient justification to exclude the territories of the erstwhile Travancore-Cochin State from the proposed Act. We should add that though the suggestion for exclusion of Travancore-Cochin from the Act was made in the written representations, no witnesses appeared before us to support the suggestion. The position regarding the State of Manipur is similar. The Indian Christian Marriage Act, 1872, does not apply to it, but the Indian Divorce Act, 1869, does. It is desirable that as far as possible there should be one uniform law for all Christians in India. We have accordingly recommended that the proposed legislation should apply to the erstwhile Travancore-Cochin State as well as Manipur.

Application.

4. One of the questions agitated before us is, whether the provisions of the proposed Act should govern marriages even when only one of the parties belongs to the Christian faith at the time of the marriage. Under section 4 of the Indian Christian Marriage Act, 1872, the marriage has to be solemnised in accordance with the provisions of the Act even when only one of the persons is a Christian. It has been suggested before us that the law in this respect requires modification. Section 5 of the Hindu Marriage Act, 1955, expressly provides that the Act applies to marriages between Hindus. Section 2(6) of the Parsi Marriage Act, 1936, defines a marriage as one between Parsis. Conformably to this, "husband" and "wife" are defined in section 2(5) and section 2(9) respectively as meaning a Parsi husband and a Parsi wife. Thus, the scheme of legislation has, latterly, been that laws governing marriages in a particular religious denomination should have application only when both the parties to the marriage belong to that religious denomination. The witnesses, who pressed for applying the Act to marriages even if one of the parties thereto was a Christian while the other was not, maintained that if the non-Christian party was willing to have the marriage solemnised in a Church in accordance with the rites and ceremonies of that Church, there was no reason why the law should refuse to recognise it. But clearly such a marriage cannot, in any sense, be regarded as sacramental. In this connection, reference should be made to the Special Marriage Act, 1954, which is applicable to marriages between persons belonging to different faiths, and it would be quite logical if marriages between persons both of whom are Christians are alone brought within the purview of the Act, while marriages in which only one of the parties is a Christian are left to be solemnised under the provisions of the Special Marriage Act, 1954. Further, if a marriage between persons belonging to different faiths is allowed to be solemnised under the provisions of the proposed Act, that would lead to various complications. If, for example, a Christian male marries a Hindu female, the succession to their properties would be governed as regards the husband

by the Succession Act, and as regards the wife by the Hindu Law. The result would be anomalous and inequitable. Difficulties might arise as regards the rights of the parents to the custody of children in case of dispute. The normal law awarding to the father the right of guardianship over children after a particular age might work hardship on the mother. We consider that the proposed legislation should apply only when both the parties thereto are Christians. This view has also the support of a considerable body of Christians.

Question of domicile.

5. The next question which falls to be considered is as to the application of the proposed legislation to marriages solemnised in India, when one or both the parties thereto are of foreign domicile, and on that there has been difference of opinion amongst us. It has been strongly urged that the legislation should be limited to marriage between persons of Indian domicile, because, according to rules of private international law, when there is a conflict of laws—and that is bound to be when the parties to the marriage have one or both of them a foreign domicile—, the validity of the marriage will have to be judged so far as the capacity of the parties is concerned by the law of their domicile or *lex domicilii* and that to the extent that the proposed legislation prescribes conditions for the validity of such a marriage it will be opposed to rules of private international law. Therefore, it is said, the present legislation should be limited to marriages between persons of Indian domicile.

(*i*) Pattern followed by other countries.

It may be stated, at the very outset, that in providing that it is to apply to all marriages solemnised in India, the proposed legislation follows the pattern adopted in other countries. The Marriage Act, 1949, applies to all marriages solemnised in England, even though the parties thereto are not British by domicile, and its provisions[1] prescribe not merely the form to be observed but also the conditions of a valid marriage. That is also the scope of the marriage laws in the American states, and in all English speaking countries. Indeed no instance has been brought to our notice where a sovereign state has enacted a marriage law limited to persons domiciled in the state. Conformably to this pattern, the Special Marriage Act, 1954, and the Hindu Marriage Act, 1955, apply to all marriages solemnised in India. And what is the ground on which our Parliament should now retreat from the position taken by it in those enactments and by all sovereign states in the marriage laws and decline to legislate for marriages solemnised within its territories, when one or both the parties thereto, have a foreign domicile? That ground is stated to be the rule of private international law, that the validity of a marriage should, in case of conflict, be decided according to the law of

[1] *Vide* sections 1, 2 and 3.

domicile, and not the law of the country where the marriage was celebrated. The answer to this is first that as a statement of the rule of private international law, the above proposition is too broad, and second that whatever that rule, it operates not to encroach on grounds occupied by municipal law, but to supplement the grounds which should be complied with before the marriage can be held to be valid. Both these statements will now be explained.

(*ii*) Rule of private international law.

The rule of private international law generally accepted, no doubt, is that where there is conflict of personal laws the validity of a marriage should be determined as regards forms and ceremonies according to *lex loci celebrationis* and as regards capacity of the parties according to *lex domicilii*. But this rule, it must be mentioned, has come to be recognised only in quite recent times, and cannot, even now, be said to command unqualified acceptance. The view which originally held the field was, that the validity of a marriage both in respect of capacity of the parties and of the forms to be observed was governed by the law of the country where the marriage was celebrated. That is on the principle that the validity of a contract must be judged by the *lex loci contractus* and that marriage is a contract which is concluded where it is solemnised. On this ground, it was held in *Dalrymple* v. *Dalrymple*[1] that the validity of a marriage solemnised in Scotland between an English domiciled husband, and a Scottish domiciled wife was to be determined in accordance with Scottish law. In 1861, came the decision in *Brook* v. *Brook*[2]. There the question was as to the validity of a marriage solemnised in Denmark, between persons having English domicile. The marriage would be void under English law on account of prohibited relationship, but valid according to Danish law. It was held that the prohibitions imposed by English law rested on nationality, and that English subjects were subject to these prohibitions wherever the marriage might be celebrated. Thus the rule in *Dalrymple* v. *Dalrymple* was departed from. Then came the decision in *Sottomayor* v. *De Barros* (No. 1)[3]. There the question was as to the validity of a marriage solemnised in England between persons, both of whom were assumed to be of Portuguese domicile; and it was held that the marriage was void, as it was prohibited by the law of their domicile, though it would be valid according to the law of England. It is this decision which forms the foundation for the rule that as regards the capacity of the parties to enter into a marriage contract it is *lex domicilii* that is determinative and not the *lex loci celebrationis*. This statement of the law has generally

[1](1811) 2 Hagg. Cons. 54.

[2](1861), 9 H.L. Cas. 193.

[3](1877), 3 P.D. 1.

been accepted as correct[1], though its correctness has been assailed in subsequent decisions[2].

(iii) Doctrine of Matrimonial home.

It should however be mentioned that there is also another view, which has the support of a large body of opinion in England. It is that the validity of a marriage, as regards the capacity of the parties, should be judged not by reference to the domicile of the parties prior to their marriage but by reference to what is called the matrimonial domicile, that is to say, the law of the place where they intend to set up their marriage home. That is the view taken by Cheshire in his 'Private International Law'[3] and that is also the recommendation made by the Royal Commission on Marriage and Divorce[4]. The trend of the recent authorities in England has been in favour of this view[5]. The result of the authorities is thus summed up in Graveson on 'Conflict of Laws'[6]:

"The essentials of a marriage are governed by the law of the domicile of each party at the time of marriage (or just possibly by that of the intended matrimonial residence of the parties), while the formalities are governed exclusively by the law of the place of celebration applicable to the particular type of marriage celebrated."

It will be thus seen that even the rule that the validity of a marriage should be judged as regards capacity of the parties by the law of their domicile is still far from being settled.

(iv) Position where one party domiciled in the country.

But it is sufficient for our purpose that even accepting the law as laid down in *Sottomayor* v. *De Barros* (No. 1)[7], an exception to it has been recognised when one of the parties to the marriage is domiciled in the country, where the marriage is solemnised. In *Sottomayor* v. *De Barros* (No. 2)[8], which represents a later stage of the litigation in 3 P.D.1, the question arose as to the validity of a marriage solemnised in England between two persons, one of whom had the English domicile and the other the Portuguese domicile. The marriage would be bad according to the Portuguese law but valid according to English law. It was held that as one of the parties had the English domicile, it was the law of England where the marriage was solemnised that applied and that, according to that law,

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[1] *Vide* Dicey's 'Conflict of Laws', 7th edn., Rules 31 and 32, pages 249 and 257; Halsbury's Laws of England, Lord Simonds edition, Vol. 7, p. 91.

[2] *Vide Sottomayor* v. *De Barros* (1879), L.R. 5 P.D. 94 and *Ogden* v. *Ogden* (1908), p. 46.

[3] See the discussion at pages 305 to 312, of the 5th edn.

[4] *Vide* Cmd. 9678, p. 395.

[5] *Vide* the observations of Lord Greene M. R. in *De Reneville* v. *De Reneville* (1948), 1 A.E.R. 56 at p. 61; *Casey* v. *Casey* (1949), 2 A.E.R. 110.

[6] 3rd edition, p. 131.

[7] (1877), 3 P.D.1.

[8] (1879) L.R. 5. P.D. 94.

it was valid. It is said that this decision is opposed to principle, but it has stood and has been accepted as good law, and as laying down an exception to the rule in *Sottomayor* v. *De Barros* (No. 1)[1]. On the rule enunciated therein, the proposed legislation can properly lay down the conditions of a valid marriage, even as regards capacity, if any of the parties thereto had the Indian domicile. And even when both the parties thereto have foreign domicile, there is, as already stated, a large body of opinion in favour of the view that if they intend to set up their matrimonial home in the country where the marriage is celebrated it is the law of that country that will govern even in respect of capacity to enter into marriages. Thus according to rules of private international law, the validity of a marriage solemnised in India, will be governed by our law, not merely when both the parties thereto are of Indian domicile, but also when even one of them is of Indian domicile, and, it may be, even when both are of foreign domicile, if they intend to adopt India as their matrimonial home. No question of conflict of laws could arise in the above cases.

(*v*) Competence of a sovereign legislature.

Even as regards the area wherein there might be a conflict of laws, the question is whether the State legislature should withdraw when it comes into conflict with rules of private international law. Now the law is settled beyond doubt that it is competent to the legislature of a sovereign state to enact laws so as to bind all persons within its territories, irrespective of their domicile, and that such a legislation is not liable to be questioned on the ground that it is not in accordance with rules of private international law. In enacting the law, the sovereign legislature may and generally does take into consideration the rules observed by other nations but it is ultimately for the legislature of that State to decide what the law should be, and when it comes to a decision and enacts a law, that is supreme. Dealing with the very question of conflict of laws arising by difference in domiciles, the court observed in *Sottomayor* v. *De Barros*[2]:

"This statute and all the marriage Acts which have since been enacted are general in their terms, and therefore applicable to, and bind, all persons within the kingdom. In the weighty language of Lord Mansfield, 'the law and legislative government of every dominion equally affects all persons and all property within the limits thereof, and is the rule of decision for all questions which arise there:' *Campbell* v. *Hall.*"[3]

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[1]*Vide* exception 1 at p. 264 of Dicey's 'Conflict of Laws' 7th edn ; Halsbury's Laws of England, Vol. 7, p. 91, para. 165.

[2](1879) L.R. 5 P.D. 94, at p. 106 ; See also Schmitthoff, 'The English Conflict of Laws', 1954 edn., pages 6-7.

[3]Cowp. 208.

What, then, is the effect, it may be asked, of the rule that in case of conflict, the validity of a marriage, as regards capacity, should be determined according to the law of domicile? Its effect is, not to give validity to marriages which are void according to *lex loci celebrationis*; for that would be to encroach on the domain of a sovereign legislature, but to render void marriages prohibited by *lex domicilii*, notwithstanding that they may be valid according to *lex loci celebrationis*. In others words, *lex domicilii* operates not in supersession of *lex celebrationis*, but in conjunction with it, with the result that such marriages, in order to be valid, must comply with both the *lex celebrationis*, and *lex domicilii*.

(vi) Dicey's view.

That is the view expressed in the latest edition of Dicey's 'Conflict of Laws'. After setting out in Rule 31 the general principle that the validity of a marriage as regards capacity of parties should be determined in accordance with their respective domicile, the learned Editors state an exception to it in the following terms[1]:—

> "A marriage is, possibly, not valid if either of the parties is, according to the law of the country where the marriage is celebrated, under an incapacity to marry the other."

It is then observed that this is the view taken by Westlake, Dicey and Chesire. Then we have the following observations:—

> "Accordingly, it is conceived that no marriage celebrated in England would be held valid by an English court if the parties were within the prohibited degrees of English law or if either of them was under the age of sixteen, even if the marriage was valid by the law of their domicile."

Then follows a reference to the decisions which support the above view.

(vii) Graveson's view.

Discussing the inter-relation in case of conflict between *lex loci celebrationis* and *lex domicilii*, with reference to a marriage solemnised in England, Graveson states the position thus[2]:

> "The overriding effect of English law in this respect is to maintain minimum, not maximum, English standards of essentials of marriage, so that provided the English standard is satisfied, reference will still be made to the *lex domicilii* to ascertain the existence of capacity, for example, to perform an act in England."

In the same manner, a marriage solemnised in India may be required to satisfy certain conditions which we

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[1] Dicey's 'Conflict of Laws', Seventh Edition, p. 256.

[2] 'The Conflict of Laws' by R. H. Graveson, 3rd edn., p. 131.

consider essential, and then *lex domicilii* may be left to operate on it.

It will be material for the purpose of the present discussion to note that according to rules of private international law, the question whether a marriage is void or voidable is to be determined in accordance with *lex loci celebrationis*;[1] and that as under the proposed legislation the only two grounds on which a marriage will be void are the existence of a spouse by a previous marriage and the parties being within certain prohibited relationship, and as the list of prohibited relations has been framed with due regard to other systems of law and is not stringent, a conflict based on those grounds, though theoretically possible, is practically speaking unlikely.

(viii) Section 88 of the Christian Marriage Act, 1872.

It remains to consider whether there is anything in section 88 of the Indian Christian Marriage Act, 1872, which militates against this view. That section provides that nothing in the Act renders valid a marriage which is forbidden by the personal law of the parties thereto. It is said that this is a recognition of the principle that the validity of a marriage is to be judged not by *lex loci celebrationis*, but by *lex domicilii*. But this is to ignore alike the object and the true scope of section 88. While the course of legislation on marriage in England was to prescribe both the conditions of a valid marriage and the forms to be observed in its solemnisation, the Christian Marriage Act, 1872, deliberately departed from this scheme and restricted itself to the latter, leaving the former to be determined by the personal law of the parties. The reason for this was, as stated by the Select Committee[2] on the Native Converts' Dissolution of Marriage Bill, 1865, that in India a considerable proportion of the Christian population was Roman Catholic by persuasion, and it was not considered desirable to impose on them conditions which had been evolved in the ecclesiastical courts forming part of the Established Church of England. It is to give effect to this that section 88 was enacted. Now that the proposed legislation is to be comprehensive and to deal both with conditions of a valid marriage and modes of solemnisation thereof, we must abandon section 88 and fall back on the pattern of the English statutes, and on the latest of them, the Marriage Act, 1949.

Nor does section 88 on its true construction lend any support to the view that the marriage law of a State should be limited to persons domiciled therein. It has not in mind any question of conflict between *lex loci celebrationis* and *lex domicilii*. It merely leaves the question of validity of marriage to be determined by the personal law of the parties, and that, of course, is something different from the law of domicile. The contrast in section 88 is

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[1] *Vide De Reneville* v. *De Reneville* (1948) 1 A.E.R. 56.

[2] Gazette of India, Jan. 20, 1866, p. 163, para. 7.

not between the *lex loci celebrationis* and the *lex domicilii*, but between one system of personal law and another, applicable to persons having the same domicile.

Moreover, the section only says that nothing in the Act shall render valid a marriage forbidden by the personal law of the parties, which is merely one other application of the doctrine that the conditions as to the validity of a marriage prescribed by *lex loci celebrationis* and by *lex domicilii*, operate both cumulatively and that a marriage which is invalid under the personal law of the parties does not become valid because it complies with the requirements of the Act.

(ix) Conclusion. We, therefore, recommend that the proposed legislation should apply to all marriages solemnised within the territory of India whatever the domicile of the parties thereto, and that it should leave no vacuum therein. And in this we follow not merely the scheme adopted in the Special Marriage Act, 1954, and the Hindu Marriage Act, 1955, but also the pattern of similar legislation in England, which, being general, binds, as observed in *Sottomayor* v. *De Barros* (No. 2)[1], all persons within the kingdom. And in this we are no more disregarding rules of private international law than the very countries where they have been developed.

Modes of solemnisation of marriages. 6. Coming next to the topic of solemnisation of marriages, section 5 of the Indian Christian Marriage Act, 1872, enumerates five different modes in which marriages could be solemnised. It has been pressed before us that the law as laid down in the section is complicated and cumbersome and that it should be simplified by prescribing one mode of solemnisation for all marriages between Christians in India. We agree that the ultimate goal should be to enact one law applicable to all Christians; but, as will presently appear, it is not feasible, in the conditions as they exist, to enact such a law, and it is now possible only to make a near approach to it.

(*i*) Procedure for Indian Christians. 7. Dealing with the five modes of solemnisation mentioned in section 5, sub-sections (1) to (3) thereof contain provisions applicable, in general, to marriages between Christians, while sub-section (5) is limited to marriages between Indian Christians for which a special procedure is laid down. The reason for making this distinction is stated to be that the more formal and elaborate procedure for solemnisation of marriages obtaining in the Established Churches was unsuitable to Indian Christians, many of whom were considered not sufficiently literate. But this reason, even if it was correct in 1872, when the Indian Christian Marriage Act was passed, has long ceased to be so, and we think that there is no need at the present day to retain the special procedure for solemnisation of

[1]L.R. 5 P.D. 94.

marriages between Indian Christians. We have, therefore, omitted the special procedure prescribed in section 5(5).

8. As regards the other four modes of solemnization of marriages mentioned in section 5, they can be divided into two categories—civil and sacramental. Section 5(4) provides for marriages being solemnized by or before the Registrar appointed under the Act. That is, of course, a civil marriage, and that has been retained. There was a suggestion that since all civil marriages could now be performed under the Special Marriage Act, 1954, there was no need to recognise such a category in the proposed enactment, which might be limited to sacramental marriages. But the representatives of the Christian community are strongly opposed to this, as marriages solemnized under the Special Marriage Act could be dissolved by the consent of parties, and that is against their notions and sentiments. (*ii*) Civil marriages.

9. Coming next to sacramental marriages, the scheme of the Indian Christian Marriage Act, 1872, is this. Section 5(1) provides for marriages being solemnised by any person who has received episcopal ordination, and this head will comprehend all marriages performed according to the rites of the Church of Rome and the Church of England. Section 5(2) provides for marriages being solemnised by clergymen of the Church of England. Under Section 5(3), marriages can be solemnized by any minister of religion who is licensed under the Act. Now the question is, whether it is possible to have one category of what may be said to be sacramental marriages as distinguished from civil marriages. (*iii*) Sacramental marriages.

10. The strength of the Christian population in India is stated to be about ten million, and the evidence is that they belong to different Church organisations. Nearly half the number is of the Roman Catholic persuasion, and that forms a distinct unit. Then there are those who were members of the Indian section of the Anglican Church prior to 1927, and, on the constitution of that section as a distinct Church under the Indian Church Act, 1927[1], under the name of the Church of India, Burma and Ceylon, became members of that Church. Then there is the Church of Scotland which seceded from the Roman Catholic Church in 1560, and after throwing off episcopalism became in 1688 a Presbyterian Church. Then there are the Presbyterian Churches of America and of England, the Lutheran Church, and several congregational Churches. The evidence discloses that the Protestant Churches functioning in India number several hundreds, each of them having its own followers. There are substantial differences in the rites and ceremonies relating to solemnisation of marriage in those Churches. The question is, whether it is possible to bring all these Churches under one category. It was suggested that it would be possible to introduce uniformity,

[1]17 and 18 Geo. 5, c. 40.

if the law provided that no minister of religion, whatever the Church to which he might belong, could solemnize a marriage unless he was licensed by the State, and also prescribe the rules for solemnisation to be observed by them.

11. Simple and attractive as this suggestion might seem, there is considerable difficulty, legal and practical, in giving effect to it. Two of these Churches, the Church of Rome, and the Anglican Church and its successor, the Church of India, Burma and Ceylon, have rules for solemnization of marriages which are ancient, definite and well-designed to prevent clandestine or prohibited marriages. These Churches are religious denominations, and have a constitutional right to manage their own affairs in matters of religion. It has been held by the Supreme Court[1] that religion includes not merely matters of doctrine and belief but also practices which are regarded by the community as part of its religion. These Churches cannot, therefore, be compelled to adopt rules for solemnization of a marriage different from those sanctioned by their usage. It follows, that we have to recognise two different modes for solemnization of marriages, one for ministers of established Churches and another for other ministers of religion. The former must be left to be governed by the rules and usages of the Church wherein the marriage is solemnized, and the latter will have to be regulated by statute.

12. Then, as regards the persons who are entitled to solemnize the marriages in the Church of Rome and in the Church of India, Burma and Ceylon, the ministers derive their authority from episcopal ordination. And a provision that they should obtain license from the State might be challenged as constituting the super-imposition of an outside authority on the Church in what is a matter of religion, and therefore repugnant to the Constitution. Moreover, the power to grant a license carries with it the power to revoke it, and it is a question whether such a power can be reconciled with the episcopal character of the Church. And, legal difficulties apart, there is the practical inconvenience in having to license thousands of priests all over the country. And what purpose does licensing serve, if the solemnization is to be in accordance with the practice of the Church? The rules of these Churches are sufficiently stringent to maintain discipline among its clergymen. We therefore recommend that such Churches should be brought under a distinct category, and that the ministers of those Churches should, as heretobefore, have the authority to solemnize marriages in accordance with the rules and usage observed therein.

13. Then there are other Churches, such as the Church of Scotland, the American Presbyterian Church and the

[1]*The Commissioner, Hindu Religious Endowments, Madras* v. *Sri Lakshmindra Thirtha Swamiar*, (1954) S.C.R. 1005, and Sri *Venkataramana Devaru* v. *State of Mysore* (1958), S.C.R. 895.

like which, though not episcopal in their constitution, have well-settled rules as to the appointment of ministers and solemnization of marriages. These Churches also stand, so far as the legal position is concerned, very much on the same footing as the Church of Rome or the Church of India, Burma and Ceylon, and any provision requiring their ministers to follow the rules of solemnisation prescribed in this Act for licensed ministers, or even for obtaining licenses from the State, may be open to attack. In our opinion, these Churches also should be placed in the same category as the Roman Catholic Church or the Church of India, Burma and Ceylon.

14. Besides these Churches, if new Churches are formed, and they frame their own rules for appointment of ministers and for solemnization of marriages, those Churches also will have to be accorded the same status as is enjoyed by the Roman Catholic Church or other existing Churches. The result is, that all these Churches which can be said to form religious denominations will form a category of their own, with the right to follow their own rules as to solemnization of marriages. These Churches have been termed by us as "recognised Churches". Where, however, parties to a marriage do not belong to any recognised Church, we have to provide for solemnisation of their marriages by ministers licensed by the State and to prescribe the procedure to be followed by them in solemnizing marriages. Thus sacramental marriages must necessarily fall under two categories, (i) those solemnized by ministers of recognised Churches, and (ii) those solemnized by ministers licensed by the State.

Recognised Churches.

15. That leads us on to the question as to which of the Churches are to be recognised. There is no difficulty so far as the established Churches, such as the Roman Catholic Church, the Church of India, Burma and Ceylon and similar Churches are concerned. The difficulty arises with reference to other Churches, whose number is said to be legion. It appears from the evidence that there is a movement among several Protestant Churches to merge themselves into a single Church. In 1947, the four southern dioceses of the Church of India, Burma and Ceylon united with the Wesleyan Methodist Church and the Scottish Church of South India to form a new Church called the Church of South India. It is said that there is a similar movement for union among the Protestant Churches of North India. If that fructifies, the task of recognition would, to that extent, be rendered easy. But it is admitted that there are several Churches which are functioning as independent units, and, on the materials before us, it is not possible for us to say which of them deserve recognition.

16. The evidence also discloses that new Churches are in the course of formation and expansion, such as, for example, the Indian National Church. This is said to have been started in 1947 with the object of establishing a

national Church, which will be wholly free from the influence of foreign Churches and missions, which will propagate the Christian faith on lines suited to Indian notions and traditions, and in which the ministers of religion would be Indians. This Association has been registered under the Bombay Public Trusts Act, 1950, and is stated to have a following of about 60,000 persons.

17. Now, what are the criteria which should be taken into consideration before a Church is recognised for the purpose of the proposed Act? They are that the Church must have a sufficient following and strength to justify recognition, that it should have a place of worship, that there should be, in the Church organisation, a proper authority to appoint and control ministers, that the Church must have clear and definite rules as to solemnization of marriages such as will prevent hasty and clandestine marriages, and that it should be registered in accordance with the law relating to registration of societies. These are, in general, the factors that would be relevant in deciding whether a Church should be recognised under the proposed legislation.

18. Then there is the question as to the authority which is to decide whether a Church should be recognised. We have provided that the power of recognition should be vested in the State Governments, and that they should be guided by a committee consisting of Christians not exceeding five in number. It will be the duty of the committee to examine applications for recognition in the light of the considerations set out above, and recommend to the State Government whether the Church should be recognised, and it will be for the State Government to come to a decision on the recommendation of the committee.

19. To summarise the result, marriages can, according to our recommendations, be solemnised in three modes; (i) by or before the Marriage Registrar—and that is a civil marriage; (ii) by ministers of recognised Churches; and (iii) by ministers licensed by the State—the two latter being sacramental marriages; religious denominations having clear and definite rules for solemnisation of marriages by ministers constituted under the rules of the Church should be classed as recognised Churches; a committee of Christians should be constituted to recommend to the Government which Churches should be recognised; and the State Governments should have the power to grant or withhold recognition on such recommendation.

Licenses to Ministers.

20. As regards licenses to ministers of religion, some of the witnesses insisted that the Government should issue licenses only to Indians, as they are likely to understand Indian customs and manners better. But if the parties do not belong to a recognised Church, it is only Indian ministers who would ordinarily solemnise such marriages, and there seems to be no necessity to make it a rigid rule. The

opinion was also expressed that the system of licensing ministers should be totally abolished and that marriages should be allowed to be solemnized, as among the Hindus and Muslims, by priests selected by the parties. This is wholly unworkable. The system of marriage among Hindus and Muslims has evolved on different lines, and cannot be fitted in with the scheme of solemnization among Christians.

Registration of marriages.

21. Though it has not been possible, as already stated, to bring all sacramental marriages under one category, we have provided that all ministers of religion should, after solemnizing a marriage, enter it in a book kept for the purpose and send a copy thereof to the Registrar-General. That would introduce an element of uniformity in all sacramental marriages.

Conditions of a valid marriage.

22. We shall now take up the question of conditions of a valid marriage. The Indian Christian Marriage Act, 1872, deals exclusively with the topic of solemnization of marriage, and leaves the requisites of a valid marriage to be determined in accordance with the 'personal law' of the parties. That has introduced an element of uncertainty in the law, which, it is desirable, should be removed. As the object of the proposed legislation is to codify the law relating to Christian marriages, we consider that it should also prescribe the conditions on which a valid marriage could be contracted.

Prohibited degrees.

23. One of the conditions of a valid marriage under the proposed law is that the parties should not be "within prohibited relationship unless the custom governing each of them permits of a marriage between the two." We have set out[1] (i) the relations who cannot be married by a man and (ii) the relations who cannot be married by a woman. In framing this list, we have examined the lists appended to the (English) Marriage Act, 1949, and the Special Marriage Act, 1954, and the provisions of the Hindu Marriage Act, 1955, and we have further taken into account the sentiments of the Christian community of this country in the matter. There is one aspect of this question which may be elucidated. In the list as originally framed by us and included in the draft which was circulated for opinion, we had included in Part I, "sister's daughter, brother's daughter, mother's sister and father's sister", and in Part II "brother's son, sister's son, mother's brother and father's brother". Objection is taken by the Roman Catholic Church witnesses to the inclusion of the above relations in the prohibited lists, because, it is said, though marriages with those relations are not viewed with favour, and are prohibited, the prohibition is not absolute and is capable of being removed by a Papal dispensation. It was therefore urged that these relations should be taken out of the lists, or, in the alternative, provision should be made for

[1]See Appendix I, Schedule I.

the grant of dispensation by the appropriate authorities of the Catholic Church. We consider that it would be inappropriate in a piece of legislation like this to enact any provision for dispensation by any authority, and much less by an outside authority. But the question still remains, whether these relations should be placed in the list of prohibited relations. Can it be said that marriage with these relations is so repugnant to the prevailing notions as to call for prohibition? In some communities in India, marriages with some of these relations, as for example, sister's daughter, and mother's brother are not unusual, and they are valid. The fact that the Pope can issue dispensation with respect to these marriages shows that they cannot be very obnoxious to Christian sentiment, though they may not be favoured. We have, therefore, omitted these relations altogether from the lists.

24. Another point which was raised with reference to prohibited degrees, may be mentioned. In requiring as a condition of marriage that the parties should not be within prohibited relationship, we have made an exception where the custom governing each of the parties permits of such a marriage. Two points have been raised in connection with this provision. One is that the exception in favour of custom should be omitted in the interests of harmony and purity of the home. But in this country customs as to marriage have varied from region to region, and they have recognised as valid marriages which are not in accordance with strict rules of law. Now to enact a law which will render them void would be to throw the society into great confusion. We are therefore unable to accept this suggestion, though we appreciate the sense behind it.

25. A suggestion different in its tenor is that when the custom of one of the parties permitted the marriage, it should be declared to be valid, even if the custom of the other party did not sanction it. We are unable to accept this suggestion, as marriage is a bilateral affair, and it is only a custom which binds both the parties that could be recognised.

Age.

26. Another condition for a valid marriage under the proposed legislation is, that "the bridegroom has completed the age of eighteen years and the bride the age of fifteen years at the time of the marriage". Under section 60 of the Christian Marriage Act, 1872 as amended in 1952, it is a condition of marriage between Indian Christians that the age of the bridegroom shall not be under eighteen years and the age of the bride shall not be under fifteen years. We have adopted this as a condition of *all* marriages solemnised under the proposed legislation.

Consent of guardian.

We have also provided that where the bride is a minor, the consent of her guardian must have been obtained. That is because marriage, like other contracts, pre-supposes contractual capacity in the parties; and as a minor cannot,

under the law, consent to a contract, her guardian has to act for her. On this, two questions arise for consideration: (i) who are the persons who can act as guardian for this purpose, and (ii) what is to happen if the guardian refuses to consent, without just cause. On the first question, the witnesses are for liberalising the list of guardians, and for including *de facto* guardians also therein. We have, conformably to their evidence, provided for a long category of guardians. As for including *de facto* guardians in the list, we have, on full consideration, come to the conclusion that they can obtain leave of the district court, and need not be specially mentioned. **Guardianship.**

27. Then the question is, what is to happen if the consent of the guardian is withheld without just cause. We have provided that in such cases, the permission of the district court will have to be obtained before the marriage is solemnized. At one stage, we were inclined to the view that this provision might be limited to marriages solemnized by Marriage Registrars (as at present)[1] or by licensed Ministers. But the question has been raised whether such a provision should not apply even to marriages solemnized by Ministers of recognised Churches. It appears that in these cases, when consent is refused, the higher ecclesiastical authorities usually intervene and bring about a settlement. We are of opinion that this is a function which pertains to the domain of civil rights, and more properly confined to the district court. The result is, that the procedure of resort to district court in case of refusal of consent will now be available for all marriages performed under the Act. **Withholding of guardian's consent.**

28. Another point raised in connection with the marriage of a minor bride is that under the Canon Law, if she is over fourteen years of age, her own consent must also be obtained before a marriage could be solemnized and such a provision should be enacted in the present law. Speaking practically, the parents or guardians would be acting wisely in obtaining the consent of the bride or else she might refuse to go through it. But as, in law, she is incapable of giving consent, that cannot be prescribed as a condition of a valid marriage. **Bride's own consent.**

29. We may now refer to certain prohibitions to marriage contained in the Canon law, which the Roman Catholics proposed for inclusion in the proposed law: **Prohibitions under Canon Law.**

(1) Persons who have joined the sacred order cannot marry. But it appears that this is an impediment which is capable of being removed by a dispensation being granted, and our policy is not to recognise such prohibitions as conditions of a valid marriage.

(2) Under the Canon law, abduction, commission of certain crimes, conduct violating public propriety

[1]See section 45, Indian Christian Marriage Act, 1872.

and certain spiritual relationships are also regarded as impediments to a lawful marriage, and it is said that the proposed law should not recognise, as valid, marriages performed in disregard of that law. But these impediments pertain to the domain of moral and not positive law, and they cannot, therefore, be prescribed as conditions the breach of which will render the marriage void. This does not preclude the Church from refusing to solemnize such marriages as are repugnant to Canon law, and that is what has been provided[1].

(3) In general, it is said that incapacity which is a bar to the solemnization of a marriage according to the laws and customs of the Roman Catholic Church should also be recognised as conditions of a valid marriage. For the reasons given above, we are unable to accept this.

Danger of Death.

30. Finally, it was suggested that under the Canon law, when a person is in danger of death, he can validly enter into a contract of marriage in the presence of two witnesses without going through the formalities of solemnisation by the priest, and that a similar provision might be made in the proposed statute. But, in our opinion, to provide that a declaration before two witnesses should suffice to constitute a valid marriage will open a wide door to false claims and perjured evidence. On the other hand, it should not be difficult for a dying man to send for the Registrar and have the marriage solemnized before him under the provisions of this Act. We have, therefore, not accepted this suggestion.

Nullity of marriage.

31. Having dealt with the conditions of a valid marriage, we now proceed to consider the effect of a breach of those conditions on the validity of a marriage. In England, this question is considered on principles applicable to contracts. Under the general law, some contracts are void, as for example when they are illegal or immoral, and some are voidable, as for example when they are brought about by fraud, in which case it is open to the party defrauded to avoid them. This distinction has been maintained in the law of marriages, certain grounds being recognised as grounds for declaring a marriage void, and certain others as grounds for annulling it. A void marriage is, under the law, no marriage at all, whereas a voidable marriage is good and valid until it is annulled by an order of court. In English law, the differences in the legal consequences between the two classes of marriages are well-settled,[2] and section 8 of the Matrimonial Causes Act, 1950, proceeds on a recognition of them.

Existing law under the Divorce Act, 1869.

32. This subject is dealt with in section 19 of the Divorce Act, 1869. Under that section, a marriage would be void if (i) the respondent was impotent at the time of the marriage

[1]See Appendix I, clause 70.

[2]Halsbury's Laws of England, Vol. 12, Paragraphs (420-425); Tolstoy on Divorce, 4th edition, pp. 98-99.

and at the time of the institution of the suit; (ii) the parties are within the prohibited degrees of consanguinity or affinity; (iii) either party was a lunatic or idiot at the time of the marriage; or (iv) 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 then in force. The section saves the jurisdiction of the court to annul marriages on the ground that the consent thereto was obtained by fraud or force. On general principles, those marriages would be voidable. The distinction between void and voidable marriages has been adopted in the Special Marriage Act[1] and in the Hindu Marriage Act[2].

33. Now the question is as to how marriages should be dealt with under the proposed Act, when they are invalid either on account of breach of a condition prescribed or otherwise. The opinion is overwhelmingly in favour of limiting the category of void marriages within the narrowest limits, the reason being that the children of such marriages would be illegitimate. Agreeing with this view, we have provided that marriages shall be void only in two cases: (i) when either party has a spouse living at the time of the marriage, or (ii) when the parties are within prohibited relationship. Reasons of public policy require that these marriages should be prohibited, and that is also in consonance with the sentiment of the members of the community. In all other cases, we have provided that the marriages would be voidable.

34. Conformably to the rules relating to avoidance of contracts, the right to obtain annulment of a voidable marriage will be available only to the party aggrieved, and that is to be exercised subject to the conditions prescribed.

Marriages solemnised under the existing law.

35. It will be seen that the scheme of the proposed Act marks a substantial departure from that adopted in section 19 of the Indian Divorce Act, 1869, and as that Act is to stand repealed by this Act, the question arises as to the legal incidents of marriages solemnized before the commencement of this Act, when they suffer from infirmities which will render them void or voidable under the proposed Act. In dealing with this matter, we have followed two principles; first, that a marriage which was valid, according to the law as it stood at the time of the marriage, should remain unaffected by the provisions of the proposed Act, and second, that even if it was void under the existing law, it might be treated as *voidable* under the proposed legislation, and a right has been given to *avoid* it in those cases. Thus a marriage, when the spouse by a previous marriage is living, or between persons within prohibited relationship, will be void both under section 19 of the Indian Divorce Act

[1].Sections 24, 25 and 26.

[2]Sections 11, 12 and 16.

and under the proposed Act. As, however, the Indian Christian Marriage Act, 1872 did not enumerate who the prohibited relations are, whereas the proposed Act enumerates them, it is conceivable, though highly improbable, that a marriage between two persons, which might be bad on the ground of prohibited relationship under the proposed Act, might be valid if solemnised before its commencement, having regard to the then law of prohibited relationship. But such a marriage will not be open to attack under the provisions of the proposed Act, because we have provided that a marriage solemnised before the commencement of Act, shall not be deemed to be invalid by reason of any provisions of the Act. Under the Indian Divorce Act, 1869, a marriage is null and void if (a) the respondent was impotent at the time of marriage and the date of suit, or (b) either party was an idiot or lunatic at the time of marriage. Under the proposed Act, the marriage would be voidable in either of these cases, and we have provided that the party aggrieved can move for annulment thereof. Thus the retrospective operation of the Act will not prejudicially affect rights previously acquired.

Status of children born of voidable marriages.

36. So far, we have considered the rights of the parties to a marriage, when the marriage is void or voidable. We have now to consider the rights of the children, if any, born of such marriages. Where the marriage is voidable, no difficulty arises. It is valid in law until a court passes a decree annulling it, and the children born of that marriage before a decree of annulment is passed are rightly regarded as legitimate.

Status of children born of void marriages—three views.

37. The problem arises only when the marriage is void. Three views are possible as to the status of children born of such a marriage: (i) they must be regarded as illegitimate, because a void marriage has, in law, no existence, and the children of such a marriage can only be regarded as *filius nullius;* (ii) they should be entitled to succeed to their parents, as if they were legitimate, provided the parents had contracted the marriage *bona fide* and without knowledge of any impediment; (iii) they should, in all cases, be entitled to succeed to their parents as if they were legitimate.

First view : children illegitimate.

38. The first view is the one generally accepted in all English-speaking countries, and that was also the law of England before the enactment quite recently of the Legitimacy Act[1]. In support of this view, it is said that as prohibition of certain marriages rests on grounds of public policy, it would defeat that policy if children of those marriages are regarded as legitimate, because what largely deters persons from contracting prohibited marriages is the fear that the children would be illegitimate. In other words, in a conflict between the interests of the general

[1]Legitimacy Act, 1959 (7&8 Eliz 2, Ch. 73), section 2 (1).

public and those of the innocent offspring of prohibited marriages, it is the latter that must give way to the former.

Second view: children of *bona fide* marriages to inherit as legitimate.

39. The second view recognises the force of the reason in support of the first view, but seeks to limit it to cases where the parties to a marriage deliberately break the law and contract prohibited marriages. Where however they are not aware of the true facts constituting the impediment, and there is no intention on their part to set the prohibitions at naught, then, the demands of public policy are, it is said, sufficiently satisfied by declaring the marriage void, and there is no need to go further and visit the consequences of the mistake of the parents on the children. To illustrate, the wife marries a second time in the honest belief that her husband had been drowned when the ship in which he travelled sank in the high seas. Likewise, two persons who are within prohibited degrees, contract a marriage in ignorance of their relationship. Public policy does not, it is said, require that in addition to declaring the marriage void, the children of the marriage should also be bastardised. This principle has, it should be noticed, been accepted to a limited extent in section 21 of the Divorce Act, which provides that when a person contracts a second marriage in the *bona fide* belief that the spouse by the previous marriage was dead, then the children of such marriage would be entitled to succeed to the estate of their parents as if they were legitimate.

It may be mentioned here that it is this view that commended itself to the Royal Commission on Marriage and Divorce in England. Its report on this point runs as follows[1]:

"In England, if a marriage is void *ab initio*, the children of the marriage are deemed to be illegitimate. It may be noted, however, that before the Reformation, the Canon law held that the child of a void marriage was legitimate where the defect rendering the marriage void was unknown to one of the parties.

"Under the common law of Scotland, where at the time of the marriage one or both of the parties to a putative marriage was or were ignorant of the impediment to the marriage, the children are held to be legitimate, and are entitled to the ordinary rights of succession. The ignorance must be of the existence of the impediment and not merely ignorance of the law.

"One witness suggested that the Scots rule be adopted in England. Others advocated that to avoid hardship to children born of a void marriage they should always be deemed to be legitimate. In our view no distinction can be drawn between children who were illegitimate from

[1]Report of the Royal Commission on Marriage and Divorce, 1955, Cmd. 9678, pp. 305 and 306, paragraphs 1184 to 1186.

birth and children born of parents who had gone through a ceremony of marriage, both knowing at the time of an impediment which rendered the marriage void. The Scots rule, on the other hand, seems to us to be sound and we suggest that in England, as in Scotland, children born of a void marriage should be held to be legitimate where it is shown that one or both of the parents was or were ignorant of the impediment to the marriage."

It was to implement the above recommendation that the British Parliament enacted, as already stated[1], the Legitimacy Act, 1959, providing therein that the child of a void marriage shall be treated as the legitimate child of his parents if at the time of the act of intercourse resulting in the birth (or at the time of the celebration of the marriage if the marriage took place later) both or either of the parents reasonably believed that the marriage was valid.

Third view : children to inherit as legitimate.

40. The third view also agrees that a marriage entered into in disregard of prohibitions enacted on grounds of public policy should be declared to be void, but seeks to relieve the children of the marriage from the consequences of such a declaration on the ground that the children, being innocent, should not suffer for the sins of their parents. It is sufficient, it is said, that the parents are punished for contracting a marriage prohibited by law.

First view not accepted.

41. The first view is, strictly speaking, logical. But the Indian legislature has to some extent, made a departure from it when it enacted section 21 of the Indian Divorce Act, 1869, conferring certain rights of succession on children of void marriages contracted *bona fide;* and that having stood as law for now ninety years, we do not consider it expedient now to go back upon it on grounds of pure logic. As already stated[2], the British Parliament has also relaxed somewhat the strictness of the law on this subject and has recognised by the Legitimacy Act, 1959, certain rights in children of void marriages contracted *bona fide.* We have, therefore, not adopted the first view.

Argument in favour of second view.

42. It is a more difficult question whether we should adopt the second or the third of the views set out above. In support of the second view, apart from the fact that it was adopted as law in section 21 of the Divorce Act, 1869, it may be urged that if the third view is to prevail it would mean that persons can with impunity defy a law based on grounds of public policy, and frustrate the purpose with which the legislature has enacted the prohibition. Sympathy is undoubtedly due to innocent children of prohibited marriages, but they are not without rights under the law. They have a right to be maintained, and that is all that legitimate children are entitled to, during the lifetime of their parents. But to enlarge these rights, and place them on the same footing as legitimate children with right

[1]See para. 38, *supra.*

[2]Paras. 38 and 39, *supra.*

to inherit, would be to abrogate the distinction between marriage and concubinage. So long as society believes in marriage as an institution and prescribes conditions therefor, there must be a point at which breach of the regulations must render the marriage void and the children illegitimate. That is the argument in support of the second view.

Third view accepted.

43. There is undoubtedly great force in this reasoning. But, then, our Parliament had quite recently occasion to go into the question of the status and rights of children born of void marriages, in connection with two pieces of legislation, the Special Marriage Act, 1954, and the Hindu Marriage Act, 1955, and on both these occasions, it has adopted the third view and recognised the rights of children of void marriages to succeed to the properties of their parents as if they were legitimate. Section 26 of the Special Marriage Act provides that where a decree of nullity is granted in respect of a marriage which is either void or voidable, any child begotten before the decree is made who would have been the legitimate child of the parties to the marriage if it had been dissolved instead of being declared null and void shall be deemed to be their legitimate child. Then follows a proviso which limits the rights of succession to the properties of the parents. Section 16 of the Hindu Marriage Act is on the same lines as section 26 of the Special Marriage Act and confers similar rights on the children of void marriages. Now the question is, whether there are sufficient grounds for our departing from a decision taken by the legislature quite recently on a matter which is as much social as it is juristic. We are unable to find any justification for treating children born of marriages prohibited by the proposed legislation differently from those born of marriages prohibited by the Special Marriage Act, 1954, and the Hindu Marriage Act, 1955. We have accordingly provided that they should also be entitled to succeed to the properties of their parents as if they were legitimate.

Judicial separation.

44. Under section 14 of the Matrimonial Causes Act, 1950, a petition for judicial separation can be presented on the same grounds on which a petition for divorce can be presented, and on certain other grounds specified therein. That, in general, is the scheme of the Special Marriage Act, 1954, and it is also provided in section 27(i) of the said Act, that when a decree for judicial separation is made, but the parties do not, within two years thereafter, come together, that itself would be a ground for a petition for divorce. Now it is said that to provide for two remedies on the same facts, one for judicial separation and another for divorce, serves no purpose, and that, further, when a decree for judicial separation is passed, and, two years elapse thereafter without the parties coming together, a provision that a fresh action for divorce could again be filed on the same grounds can only result in needless delay and expense. It has therefore been suggested that an action for judicial separation might be altogether omitted. There is considerable force

in this. But the Roman Catholics do not recognise divorce, and the legal systems based on the Canonical law, generally, provide only for judicial separation. There are considerable sections of the Protestants also who are averse to divorce, and they would prefer a decree for judicial separation to a decree of dissolution of marriage. This is one of the modes of relief recognised in the Indian Divorce Act, 1869, and we do not see sufficient grounds for changing the law. We have, therefore, provided for relief by way of judicial separation being granted on the same grounds as divorce. But we are impressed by the suggestion that, to permit a second action for divorce after a decree for judicial separation has remained in force for two years, on the identical grounds on which that decree is founded, must result in delay and expense. We have accordingly provided that it is open to either party, to apply, in that very suit, after two years, for a decree of dissolution, if the parties do not come together.

45. It was also suggested by a few witnesses that the grounds for judicial separation might be less stringent than those for divorce. Apart from the vagueness of this suggestion, having regard to the fact that a decree for judicial separation would, in the proposed Act, result, without more, in a decree for dissolution[1], the nature and standard of the grounds should be the same for both forms of action. And that in general, is the scheme of the Matrimonial Causes Act, the Special Marriage Act, and the Hindu Marriage Act.

Capacity of wife to acquire property or to enter into contracts after a decree for judicial separation.

46. We should now refer to sections 24 and 25 of the Indian Divorce Act, 1869, which enact, *inter alia*, that after a decree for judicial separation is made a married woman shall have the right to hold and acquire property, dispose of it *inter vivos* or by testamentary disposition, and to enter into contracts. This provision is based upon the common law of England under which the personality of the wife became, on marriage, merged in that of her husband, and they constituted one person in the eye of the law. The result was that marriage operated as an assignment to the husband of the property which the wife owned at the time of the marriage. Properties acquired by her later also vested in him. On her death, they passed to him absolutely. Likewise, any contract entered into by her only operated as one entered into on behalf of her husband. The Court of Chancery made some inroads into this law, and in 1882, the British Parliament enacted the Married Women's Property Act, providing that the properties of a woman would continue to be her own, even after marriage; that she could acquire properties in her own right after marriage; and, that she had absolute dominion over them. When the Divorce Act was enacted in 1869, it was the common law doctrine that held the field, and it is that doctrine that is reflected in sections 24 and

[1]See para. 44, *supra*.

25 of the Divorce Act. The common law of this country, however, was different, and, conformably to it, the statute law of this country allowed married women equal rights with men in respect of property and contracts. Section 4 of the Married Women's Right to Property Act, 1874, which applies to Christians, provides that the earnings of a married woman shall be her separate property, and under section 7 of that Act, she is entitled to maintain legal proceedings with reference thereto. Section 20 of the Indian Succession Act, 1925, makes it clear that a person does not become, by marriage, subject to any disability in respect of his or her property, or acquire any interests in the property of his or her spouse. Under the Contract Act, 1872, there is no bar to married woman entering into a contract in her own name and in her own right. The provisions of sections 24 and 25 of the Indian Divorce Act, 1869, based upon the then current English Law that marriage effaces the separate personality of the wife, and that the effect of judicial separation is to bring about its re-emergence, must, therefore, be regarded as out of tune with the common law of India and with the statutes aforesaid, and as obsolete. There being no need for those provisions, they have been omitted in the proposed enactment.

Succession to the properties of a wife dying intestate after a decree to judicial separation.

47. Section 24 of the Indian Divorce Act, 1869, further provides that when there has been a decree for judicial separation, the properties acquired by or devolving on the wife shall, if she dies intestate, devolve as if her husband had then been dead. This was the law in England when the Indian Divorce Act, 1869, was enacted, and that continues to be the law even now under section 21(1)(a) of the Matrimonial Causes Act, 1950. The question is, whether the law should now be laid down in those terms. On principle, the distinction between judicial separation and divorce is that, while in the latter the marriage tie is dissolved, in the former it still subsists. If persons continue to be related, in the eye of law, as husband and wife, and if one of them dies intestate, the persons who are entitled to succeed to the properties must be his or her heirs on the footing that he or she is a married person. In that view, if a married woman dies after the passing of a decree of judicial separation, her husband will be one of the heirs. Likewise, if the husband dies after a decree for judicial separation is passed, the wife will be one of his heirs. To provide, therefore, that on the death of a married woman, in respect of whom a decree for judicial separation has been passed, her property will devolve as if her husband were dead even though he is in fact alive, is to ignore the very basis of the jural relationship between the parties when the decree passed is one of judicial separation and not of divorce. Such a provision is, therefore, clearly illogical. It is to be further noted that under the law of England, if a husband dies after a decree for judicial separation is passed, the wife is entitled to succeed as one of his heirs. That is on the footing that the marriage still subsists, and

equally the husband must be entitled to succeed to the properties of his wife when she dies intestate after a decree for judicial separation is made, but for the special rule enacted in section 25. We see no reason to adopt different rules as regards the two spouses, and it may be mentioned that in neither the Special Marriage Act, 1954, nor the Hindu Marriage Act 1955, has the law as laid down in section 25 been adopted. We have therefore omitted the special provisions in sections 24 and 25 of the Indian Divorce Act.

Divorce.

48. Coming next to divorce, the Roman Catholics have strongly pressed on us that divorce should not be recognised, as it is opposed to their faith, or, in the alternative, that they should be exempted from the provisions of this Act in so far as they relate to divorce. They say, basing themselves on the passage in the Bible, "what therefore God has joined together, let not man put asunder", that, it is a fundamental article of the Christian faith that marriage is indissoluble; that the Canonical law therefore does not recognise divorce; that the grant of divorce would be repugnant to it; and that therefore the provisions relating to divorce should not apply to them. But it should be noted that the Indian Divorce Act, 1869, applies to all Christians including Roman Catholics, and has been in operation for now ninety years without any protest. It will be too late now to reverse the current and exempt Roman Catholics from the provision for divorce. It should, moreover, be remembered that the provisions of the proposed Act are merely enabling in character. They do not compel any Roman Catholic to go against the Canonical law. He or she can, consistently with it, apply for judicial separation and not divorce. If notwithstanding that the Divorce Act, 1869, has provided for divorce, the Roman Catholic Christians have been in a position, during all these years, to conform to Canonical principles, in not resorting to court for divorce, they are free to do so under the proposed Act as well. The proposed Act introduces no change in the existing law. For these reasons, we have provided that the Act should apply to all Christians, Roman Catholics as well as Protestants.

Grounds of divorce.

49. We may now refer to the grounds on which divorce could be granted. The law on the subject is now contained in section 10 of the Indian Divorce Act, 1869, and that has come in for the following criticisms:

(1) It makes a distinction between the husband and the wife in the matter of grounds on which they could obtain divorce. While adultery, without more, is a ground for divorce in a petition by the husband, in the case of a petition by the wife, there should, in addition, be some other element, such as that it should be incestuous adultery, or bigamy with adultery, or adultery coupled with cruelty or desertion for two years. The criticism is, that there is no justification

for maintaining this distinction between the husband and the wife. We agree with it.

(2) Under section 10 of the Divorce Act, adultery is the only ground on which divorce could be granted, apart from some grounds special to the wife. It is said that this law has now become very much out of date, and that it is necessary to allow divorce on several other grounds, as has been done in all modern legislation. This criticism is also well-founded. Section 10 is thus of little assistance to us in formulating the grounds for divorce.

Provisions in other enactments.

50. We have, however, two enactments of Parliament, the Special Marriage Act, 1954, and the Hindu Marriage Act, 1955, which deal exhaustively with this topic, and, in laying down the grounds for divorce, we have, in general, followed the provisions in those enactments *viz.*, section 27 of the Special Marriage Act, and section 13 of the Hindu Marriage Act. But there are certain matters on which those two enactments differ, and certain matters on which the proposed Act differs from both of them. We shall now refer to them.

Adultery.

51. Under section 10 of the Indian Divorce Act, 1869, it is a ground for divorce that the wife "has been guilty of adultery", and this follows the English law on the subject. That is also the provision under section 27(a) of the Special Marriage Act; but the corresponding provision of the Hindu Marriage Act, section 13(1)(i), requires that the respondent must be *"living* in adultery". That imports a course of conduct, whereas on the language of section 27(a), even a single act of adultery will be sufficient ground for divorce. But the law that has at all times been in operation among the Christians is that even a single act of adultery is a ground for divorce, and as there is no serious opposition to it, we do not propose to depart from it. We have accordingly provided, following the language of section 27(a), that adultery is, in itself, a ground for divorce.

Leprosy.

52. Under section 13(1)(iv) of the Hindu Marriage Act, it is a good ground for divorce that the respondent has been suffering for a period of not less than three years immediately preceding the presentation of the petition from a virulent and incurable form of leprosy. There is a similar provision in section 27(g) of the Special Marriage Act, but it differs from section 13(1)(iv) of the Hindu Marriage Act in two respects. It does not contain the limitation that it should be virulent and incurable. But obviously that must have been the intention. It is further provided in section 27(g) that it is not a ground for divorce if the leprosy has been contracted from the petitioner. We do not think that any such limitation need be imposed, and we have adopted the provisions of the Hindu Marriage Act as more just.

Refusal to consummate marriage.

53. Under section 25(i) of the Special Marriage Act, wilful refusal by the respondent to consummate the marriage is a ground for annulling it. This is in accordance with the law as embodied in section 8 of the Matrimonial Causes Act, 1950, but its correctness is open to question. A decree for annulment could, properly, be made only on grounds which exist at the time of the marriage, whereas when the petition is founded on a ground which arises subsequent thereto, the appropriate relief to be granted is dissolution. On principle, therefore, a refusal to consummate a marriage, as distinguished from impotence at the time of marriage, would be a ground for dissolving the marriage, and not for annulling it. That is also the view taken in the Report of the Royal Commission on Marriage and Divorce, 1955[1]. We have, accordingly, included wilful refusal to consummate a marriage as one of the grounds for divorce.

Desertion.

54. Under section 27(b) of the Special Marriage Act, 1954, it is a ground for divorce that the petitioner had been deserted without cause for a period of at least three years immediately preceding the presentation of the petition. Under the Hindu Marriage Act this is a ground for judicial separation, but not for divorce. In England desertion was made a ground for judicial separation by the Matrimonial Causes Act, 1857, and it was only in the Matrimonial Causes Act, 1937, that it became for the first time a ground for divorce, and that is the law as enacted in section 1(1)(b) of the Matrimonial Causes Act, 1950. In our opinion this should be available as a ground for divorce among Christians.

Cruelty.

55. Under section 27(d) of the Special Marriage Act, cruelty is a ground for divorce. That is also the law in England as embodied in section 1(1)(c) of the Matrimonial Causes Act, 1950. Under the Hindu Marriage Act, 1955, cruelty is a ground for judicial separation under section 10(1)(b), but it is not a ground for divorce under section 13(1). We are of opinion that we should adopt the law as embodied in section 27(d) of the Special Marriage Act.

56. The suggestion has been made that we should define cruelty. What is cruelty for the purpose of divorce has been considered in numerous decisions in England. In *Russell* v. *Russell*[2] it was defined as "conduct of such a character as to have caused danger to life, limb, or health, bodily or mental, or as to give rise to a reasonable apprehension of such danger". It has been observed in Latey on Divorce[3] that "there has been so marked a development in the mutual relations of husband and wife and in the rights of a wife since the Ecclesiastical Courts administered the matrimonial law, and Judges are so bound to exercise their judicial discretion with due regard to the customs and manners of their own time, that a blind

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md. 9678, page 31, paragraphs 88 and 89, and page 83, paragraph 283.
[2](1895) P. 135, affirmed on appeal, (1897) A. C. 395.
[3]14th edition, page 82, para. 158.

adherence to the decisions of over a century, or even a generation ago, is impossible." It would therefore be obviously inexpedient to lay down hard and fast rules as to what would amount to cruelty. That appears to be the reason why the Hindu Marriage Act, 1955, also does not define cruelty, but provides in section 10(1)(b) that cruelty which can be a ground for judicial separation must be such as to cause a reasonable apprehension in the mind of the petitioner that it will be harmful or injurious for the petitioner to live with the other party. Considering this question, the Royal Commission on Marriage and Divorce, observed[1] that it was preferable not to have a detailed definition of that word but to allow the concept of cruelty to remain open to such adjustment as it was desirable to make through the medium of judicial decisions. We also propose to leave it at that.

Imprisonment.

57. Under section 27(c) of the Special Marriage Act, it is a ground for divorce that the respondent is undergoing a sentence of imprisonment for seven years or more for an offence as defined in the Indian Penal Code, and there is a proviso that no divorce shall be granted on this ground unless the respondent has undergone at least three years' imprisonment at the time of the petition. But there is nothing corresponding to this in the Hindu Marriage Act; and following that Act, we have excluded this from the grounds for divorce.

Venereal disease.

58. Under section 27(f) of the Special Marriage Act and section 13(1)(v) of the Hindu Marriage Act, the petitioner can ask for divorce on the ground that the respondent had been suffering from venereal disease for three years prior to the petition. It has been urged before us, that as a result of the advance of medical science venereal disease could not now be regarded as incurable, and that it should therefore be no longer a ground for divorce.

We, however, think that there are not sufficient grounds for laying down the law in terms different from those of the Special Marriage Act and the Hindu Marriage Act. Nor is this view likely to create any great hardship, as no action for divorce could be maintained unless the respondent had been suffering from the disease for three years prior to the petition. It should also be mentioned that while the Special Marriage Act provides that it will be a ground for divorce only if the disease had not been communicated by the petitioner, there is no such limitation in the Hindu Marriage Act. We have preferred to follow the language of the Hindu Marriage Act.

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[1]Royal Commission's Report, 1955, Cmd. 9678, page 42, para. 133.

Judicial separation and non-resumption of cohabitation.

59. Under section 27(i) of the Special Marriage Act, it would be a ground for divorce if the respondent has not resumed cohabitation for a period of two years or upwards after the passing of a decree for judicial separation. We have, as already explained[1], provided that, on these facts it would be open to the petitioner to apply for divorce in the very proceeding in which a decree for judicial separation had been passed. There is therefore no need to make this a distinct ground for a petition for divorce.

Renunciation

60. Section 13(1)(vi) of the Hindu Marriage Act provides that if either party renounces the world by entering a religious order, that would be a ground for dissolution of the marriage. We do not think that there is need for such a ground in the Christian community, and it should be observed that there is nothing corresponding to it in the Special Marriage Act. We have, accordingly, not included it among the grounds for divorce in the proposed Act.

Consent.

61. Section 28 of the Special Marriage Act, 1954, enacts that the marriage might be dissolved if a petition for divorce is presented by both the parties stating that they had been living separately for a period of one year or more, that they are not able to live together, and that their marriage should, by consent, be dissolved. The question is whether such a ground should be incorporated in the proposed Act. The opinion of all sections of the Christian community is strongly against it. The question whether divorce could be granted on the consent of the parties is discussed in the Report of the Royal Commission on Marriage and Divorce, 1955[2]. It states that with one exception, "all agreed that the present law based on the doctrine of the matrimonial offence should be retained." That is to say, before a marriage which is intended to be a lifelong union is dissolved it must be made out that either party is guilty of what has been termed the matrimonial offence. The Hindu Marriage Act, 1955, also does not provide for a marriage being dissolved merely by the consent of the parties. There is no reason for treating sacramental marriages between Christians differently from those between Hindus. We have not, accordingly, provided for divorce being granted on the mere consent of parties.

Artificial insemination.

62. It is necessary to refer to one other ground for divorce about which there has been considerable discussion in England. The Report of the Royal Commission on Marriage and Divorce[3] suggests that artificial insemination by a donor without the husband's consent should be a ground for divorce. This practice does not appear to have

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[1]See para. 44, *supra*.

[2]Cmd. 9678, p. 13, para. 65.

[3]Cmd. 9678, p. 28, para. 73, and p. 31, para. 90.

come into vogue in India to such a degree as to call for legislation. We have accordingly ignored it.

Conversion.

63. One of the grounds on which divorce could be had under the proposed legislation is that the respondent has ceased to be a Christian by conversion. This corresponds to section 13(1) (ii) of the Hindu Marriage Act, 1955, under which it is a ground for divorce that the other party has ceased to be a Hindu by conversion to another religion, and to section 32(j) of the Parsi Marriage and Divorce Act, 1936, which provides for divorce on the ground that the defendant has ceased to be a Parsi.

A connected question which loomed large in the evidence before us is as to the rights of a convert to Christianity to obtain dissolution of a marriage contracted before his or her conversion. (That is the converse of the case for which provision has been made by us). The Converts' Marriage Dissolution Act, 1866, provides that when a husband or wife changes his or her religion to Christianity he or she can move the court for a decree dissolving the marriage, and the court may pass such a decree after complying with the procedure prescribed therein and that thereafter the parties thereto shall have the right to remarry. But this Act applies only if the parties to the marriage are not Muslims, Parsis, or Jews; and the criticism levelled against it, that it is discriminative in character in that (1) it applies only to cases of conversion from Hinduism, and (2) it gives relief only in cases of conversion to Christianity, is well-founded. In view of this, we are considering whether we should not recommend the enactment of a law, which will be generally applicable to all cases of conversion from one religion to another religion. The question of the repeal of the Converts' Marriage Dissolution Act, 1866, can appropriately be taken up then for consideration.

Joinder of adulterer or adulteress in actions founded on adultery.

64. We should now refer to the changes proposed in the law relating to the joinder of adulterer as a co-respondent. Section 11 of the Divorce Act, 1869, enjoins that in a petition for divorce presented by the husband, the alleged adulterer shall be made a co-respondent, and to this there are three exceptions provided. The following questions arise for our decision on this subject:—

(1) The first question is whether the rules relating to the joinder of an adulterer should be enacted in the section itself, as under section 11, or, whether they should be left to be framed by the High Court in the exercise of its rule-making authority. Under section 41(2) (a) of the Special Marriage Act this is one of the matters on which the High Court is authorised to make rules. That, however, is not the practice in England, and, further, to delegate the power to the High Courts would lead to diversity and differences in provisions, on a subject in which uniformity is both possible and

desirable. We have, therefore, enunciated the rules as to joinder of an adulterer in the section itself.

(2) Another question which arises under this section, is, whether the grounds set out in section 11 of the Indian Divorce Act, 1869, for dispensing with the joinder of an adulterer, require to be enlarged. While we think that those grounds must *prima facie,* be taken as exhaustive, the courts should, nevertheless, have a discretion in particular cases to excuse the non-pleading of the adulterer as a party to the proceedings. Such a provision is to be found in section 3 of the Matrimonial Causes Act, 1950, and we have inserted a similar provision in the proposed Act.

(3) A third question which calls for decision is whether the adulteress should be made a party when a petition for divorce is presented by the wife on the ground of adultery. The principle on which this legislation proceeds is that the husband and the wife should, in all matters, be placed on the same footing, and it therefore follows that the adulteress also should be impleaded as a co-respondent, and that is what we have provided.

(4) And, lastly, it has been suggested that when a petition for judicial separation is made on the ground of adultery, the adulterer or the adulteress should also be made a co-respondent as in an action for divorce. We have agreed with this suggestion, and given effect to it.

Damages for adultery.

65. Then there is the question of damages for adultery. Section 34 of the Indian Divorce Act, 1869, provides that the respondent may claim damages from any person who has committed adultery with his wife, and that he can do so either in a petition for divorce or judicial separation, or even merely for damages without any such relief. There is no such provision in the Hindu Marriage Act, 1955. Under the Special Marriage Act, 1954, section 41 (2) (b), this matter is left to be regulated by the rules to be framed by the High Courts. The question is whether the law should countenance such a claim. It is undoubtedly strange to Indian sentiment that adultery should be a matter for compensation. In England, the rule in question has its origin in the common law, and has been consistently followed by the statute law on the subject. In the Report of the Royal Commission on Marriage and Divorce, 1955[1], it is observed that this law has been criticised as out of tune with the accepted law on the question. But the Report considers that there might be circumstances in which it is reasonable that the adulterer should be compelled to make redress to the petitioner, and that therefore the provision should be retained. While the law as enacted in the Hindu Marriage Act, 1955, is more in accord with Indian sentiment, we have

[1]Cmd. 9678, p. 120, para. 432.

retained the provision for damages as that has been the law well-settled in the Christian community for centuries, and no exception has been taken to it by the witnesses who appeared before us. And, on the principle of equality already stated, this provision will be applicable not merely to a husband as against an adulterer, but also to a wife as against an adulteress. This is also the recommendation[1] of the Royal Commission on Marriage and Divorce.

66. While we have thus retained the claim for damages for adultery, we have, departing from the law as laid down in section 34 of the Indian Divorce Act, 1869, provided that such a claim could be made only in a petition for divorce or judicial separation, and not independently of such relief. According to the law of England as it stood prior to the Matrimonial Causes Act, 1857, it was competent to the husband to claim damages against any person who committed adultery in an action for criminal conversation, without asking for divorce or judicial separation. That statute abolished this action and substituted in its place a suit in the divorce court, and that right has been preserved by the statute law right through, the latest provision being section 30 (1) of the Matrimonial Causes Act, 1950. It is this right that is embodied in section 34 of the Divorce Act, 1869, which provides that a husband can present a petition limited to a claim for damages only. We are not in favour of recognising such a claim. While it may be legitimate to permit a claim for damages when it is ancillary to a prayer for divorce or judicial separation, to permit such a claim to be made as the only substantive relief must lead to blackmail actions. We consider that a self-respecting husband who is aggrieved by a person committing adultery with his wife will seek to get the marriage dissolved and not to make a profit out of the wrong. It is true that seducing a man's wife will, under the English law, furnish a cause of action in tort, and damages can be recovered on the ground of loss of consortium or service. But this doctrine has come in for considerable criticism, and it was observed by Talbot J., in *Delvin* v. *Cooper*[2], "it seems quite possible for a husband and wife in financial difficulties to sow the seeds of an action for enticement, and when the result has proved a financial success, to share the proceeds by staging a touching reconciliation." In this report, we are not concerned with the question whether the English law on this subject should be adopted in this country, and if so, within what limits, because it is well-settled[3] that the remedies of an action in tort for enticement and petition for divorce on the ground of adultery are based on different causes of action. It is sufficient for the present purpose that no right should be recognised in the husband to move the divorce court for damages *simpliciter*. We have accordingly limited the claim for damages on the ground of

[1]Cmd. 9678, p. 121, para. 434.
[2]183 L.T. (Jour.) 222.
[3]*Vide Elliott* v. *Albert*, (1934) 1 K.B. 650.

adultery, under the Act, to petitions for divorce or judicial separation.

Settlement of property.

67. The Indian Divorce Act, 1869, enacts certain provisions with reference to settlement of property. Section 40 provides that when a decree for dissolution or nullity of marriage is made, the court may inquire into the existence of any settlement, ante-nuptial or post-nuptial, and direct that the properties so settled be applied for the benefit of the husband or wife or children or both children and parents as it might deem fit. This is a salutary provision, and has been retained. Section 27 of the Hindu Marriage Act enacts that the court might make such provisions in the decree as it deems just and proper with respect to any property presented at or about the time of marriage which might belong jointly to both the husband and the wife. This will comprehend properties other than those which section 39 of the Indian Divorce Act might cover, and we have accordingly inserted a similar provision in the proposed Act.

68. Then there is section 39 of the Divorce Act, which provides that when a court passes a decree for dissolution of marriage or judicial separation on the ground of adultery of the wife, and the wife has properties of her own, the court may order such settlement of those properties to be made as it thinks reasonable, for the benefit of the husband or children of the marriage or of both. Having regard to the other provisions recommended by us, this section should be omitted. The husband has a right to claim compensation for the wife's adultery. He has also been given a right to claim alimony, interim or permanent, in appropriate cases. In view of this, there seems to be no reason why he should claim the properties of the wife should also be settled on him. As for the children, the court has the power to make suitable orders for their maintenance and education. It should be remembered that under the law the children have no right actually to the properties of parents, but only a right to be maintained. That being so, there seems to be no ground for a special provision that the properties of the mother should be settled on them by reason of the adultery of the mother. On principle, therefore, it would seem that all that the law need provide is adequate and reasonable alimony for the parents and adequate maintenance and expenses for the education of the children. To go further and to enact that the wife should be deprived of a portion of her properties and the same settled on the husband and children would appear to be unduly severe and unjust, bordering on vindictiveness. It is true that the Royal Commission has, in its Report[1], considered this question and recommended that there should be a provision for settlement of properties

[1]Report of the Royal Commission on Marriage and Divorce, 1955, Cmd. 9678, p. 141, para. 516 ; p. 142, para. 520 ; and p. 154, para. 570.

whenever there is a decree for divorce or nullity of marriage. For the reasons already given, we are unable to agree with this view. It may be mentioned here that no such provision has been enacted either in the Special Marriage Act, 1954, or in the Hindu Marriage Act, 1955. Our proposal to omit section 39 will bring the law in line with those two statutes.

Jurisdiction.

69. We shall now deal with questions relating to jurisdiction and procedure under the proposed Act. The provisions of the Indian Divorce Act, 1869, relating to jurisdiction fall under two categories: (1) Section 2 prescribes the conditions on which the court could pass decrees under the Act, such as for dissolution of marriage, for nullity and so forth. (2) The Act further specifies in the several sections relating to the different kinds of action, the courts in which they could be instituted. These two categories have reference to two distinct aspects of jurisdiction. The former views the question from the standpoint of private international law, the latter from that of municipal law. Dealing first with the former, a Sovereign State can enact laws providing for the conditions on which its courts could grant relief by way of decree for divorce or nullity of marriage, and the decrees passed by the courts acting within the authority conferred by these provisions will be valid and enforceable within its territories. But when the status of the parties to such a decree becomes the subject-matter of a dispute in a proceeding between them in another State, the question arises whether courts of that State are bound to recognise that decree. That is a matter regulated by rules of private international law, and recognition of decrees passed by one State has not seldom been refused on the ground that it is not in accordance with the accepted rules of private international law, with the result that "a man and woman are held to be man and wife in one country, and strangers in another"[1].

70. Section 2 of the Indian Divorce Act, 1869, as it stood prior to its amendment in 1926, provided that the court could pass a decree of divorce if the parties to the action resided within the jurisdiction of the court at the time of the presentation of the petition. But it is a rule of private international law, well-recognised, that a decree of dissolution of marriage could be passed by the courts of a country only if the parties thereto had the domicile of that country at the time of the application[2]. In enacting that divorce could be granted if the petitioners were residing within jurisdiction at the time of the petition, irrespective of domicile, section 2 went beyond the bounds recognised by private international law, and in *Keyes* v.

[1] *Vide Le Mesurier* v. *Le Mesurier*, (1895) A.C. 517 ; *Vide* also *Mountbatten* v. *Mountbatten*, (1959) 1 A.E.R. 99.

[2] *Vide* Rule No. 31 in Dicey's Conflict of Laws, 6th edition, page 216 and Rule No. 71 at page 368.

Keyes and Gray[1] it was held that a decree of an Indian court dissolving a marriage of persons of British domicile could not be recognised in England. As a result of this decision, the British Parliament had to enact a law validating the decrees of Indian courts, and the Indian legislature passed an amendment Act[2] so as to bring section 2 in accordance with the rules of private international law. Under section 2, as amended, decrees for dissolution of marriages could be made only if the parties are domiciled in India at the time of the petition; decrees for nullity—if the marriage was solemnised in India and the petitioner was residing in India at the time of the petition; and other decrees—if the petitioner was residing in India at the time of the petition.

Forum.

71. When once the conditions provided in section 2 are satisfied and action could be taken in the Indian courts, the question arises as to which of the Indian courts is competent to entertain the action. It is this aspect which is dealt with in the second category of provision. Under the provisions of the Indian Divorce Act, the court where the proceedings could be taken is the High Court or the District Court, and according to the definition of these terms in section 3, that meant the High Court or the District Court within the territory of India within whose jurisdiction the husband and wife reside or last resided together. This is analogous to the provisions of the Civil Procedure Code laying down in which court a suit could be instituted. Thus the Indian Divorce Act deals with jurisdiction of matrimonial courts in both aspects.

Course adopted, as to jurisdiction.

72. Section 31(1) of the Special Marriage Act and section 19 of the Hindu Marriage Act, deal with the second of the two aspects mentioned above. As for the first, there is nothing about it in section 19 of the Hindu Marriage Act, possibly because questions of marriage under that Act with persons of foreign domicile are likely to be of merely academic interest. Section 31(2) of the Special Marriage Act does deal with the first aspect to a limited extent, but it is not exhaustive of the law on the subject. Having regard to the scope of the Indian Divorce Act, 1869, as already stated[3], and to the fact that Christians form an international community, we consider it desirable to lay down the law on the subject from the points of view of both private international law and municipal law. On the former aspect, while generally adopting section 2 of the Indian Divorce Act, we have introduced a new provision under which a decree for dissolution could also be passed in favour of a petitioner, who, being the wife, was domiciled in India before marriage, and has been residing in India for a period of not less than three years preceding the presentation of the petition. The purpose of this

[1](1921) p. 204.
[2]Act 25 of 1926.
[3]Para. 69, *supra*.

enactment is to empower Indian courts to grant relief to Indian women who may marry persons having foreign domicile. As, in law, the wife will acquire on marriage the domicile of the husband, such a provision is necessary to clothe the Indian court with jurisdiction to dissolve such a marriage. There is, it may be mentioned, a similar provision in section 18 of the Matrimonial Causes Act, 1950.

73. Then as regards decrees for nullity of marriage, they can be made under section 2, paragraph 4, of the Indian Divorce Act, 1869, only if the marriage was solemnised in India, and the petitioner is residing in India at the time of the petition. But it is now recognised that the courts of a country have jurisdiction to grant such decrees, even though either of those conditions is absent, if at the time of the petition, both the parties[1], or even the petitioner alone[2], is domiciled in that country. We have accordingly enlarged the scope of section 2 of the Indian Divorce Act, by providing that decrees of nullity could be made if the parties are, or, in certain events, even the petitioner is, domiciled in India.

Course adopted as to forum.

74. On the second aspect, that is municipal jurisdiction, we have provided that a petition in a matrimonial cause may be presented to the district court within whose local limits the respondent is residing at the time of the petition, or the marriage was solemnised, or the husband and wife last resided together; and with a view to minimising delay and expense, we have enlarged the definition of 'district court' in section 3 of the Indian Divorce Act, 1869, so as to include any other court which may be notified by the State Government. We have further provided that the petition might be presented in the District Court within whose jurisdiction the petitioner resides at the time of the presentation of the petition, provided the respondent is, at that time, residing outside India[3].

Matrimonial tribunal.

75. Coming next to matters of procedure, the National Christian Council, Nagpur, has strongly pressed for the constitution of a matrimonial tribunal, consisting of a clergyman and some respectable members of the community to bring about reconciliation between the parties to a matrimonial cause. They suggest that as soon as a dispute under the Act comes before the court, it should be transferred to the tribunal, that the latter should try informally to effect a settlement, and if that fails, then and only then should the matter be taken up by the court for trial under its ordinary procedure. The object behind this suggestion is, without doubt, commendable, but there are considerable difficulties in the way of accepting it in the form suggested. If the tribunal is constituted under

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[1]Dicey's Conflict of Laws, 6th edition, page 244, Rule 35 ; Tolstoy on Divorce, 4th edition, page 18.

[2]*De Reneville* v. *De Reneville* (1948), p. 100.

[3]See also Appendix II, Notes on clauses, under clause 36.

the provisions of the Act, it becomes a statutory body and cannot function informally, as desired. It is true that in holding an enquiry, it is not bound by strict rules of evidence, but it has to observe rules of natural justice, and its findings will be open to attack in the normal way on appropriate grounds, and it is agreed that it is not such a body that is in their contemplation. The lawyer witness, who elaborated this point in his evidence, stated, after some discussion, that the object would be achieved if a duty is cast on the court to bring about, whenever possible, reconciliation, and a power is given to it to refer the matter to a person agreed to by the parties or suggested by the court, for the purpose of effecting settlement. We consider that that could be done, and have accordingly inserted a clause authorising such a reference. The referee under this provision is not a tribunal, not even an arbitrator, as under the Arbitration Act, but a conciliator, and a reference to him will be optional with the court.

Decisions of ecclesiastical courts.

76. We may now refer to the suggestion made by the Roman Catholic witnesses, that decisions of the ecclesiastical authorities functioning under the Church of Rome on matrimonial causes heard by them should be accepted by the courts hearing petitions under the Act as final and conclusive, the function of the latter being limited to merely carrying out those decisions. We are unable to accede to it. It is the courts constituted under the law of this country that can have the exclusive authority to determine disputes relating to civil rights, and there can be no surrender or abdication of that authority. That, of course, does not bar the reception in evidence of those proceedings to the extent they may be admissible under the law.

Decree *nisi* and decree absolute.

77. A question on which there is divergence of opinion is as to the procedure to be followed before a decree for divorce is finally made. Under section 16 of the Indian Divorce Act, a decree *nisi* has first to be passed, and a decree absolute could thereafter be made only after the expiration of such time as the High Court might direct, but not less than six months from the pronouncement of the decree *nisi*. The point for consideration now is, whether the proposed legislation should retain that procedure, or whether, dispensing with the decree *nisi*, it should provide for a decree for divorce being straightway passed. In support of the latter view, it is said that that would simplify the procedure in an action for divorce, save time and reduce expense. It is also pointed out that both the Special Marriage Act, 1954, and the Hindu Marriage Act, 1955, provide for the passing of only a single decree, and it is said that it is desirable that the law relating to divorce among Christians must also fall in line with them, and that therefore the provision for the passing of a decree *nisi* should be abolished. As against this, it is

claimed that the procedure of passing a decree *nisi*, before a decree absolute dissolving the marriage is made, has certain advantages justifying its retention. First, it is said that the provision that there should first be a decree *nisi* and that a specified period should elapse before it could be made absolute, would give the parties a further opportunity of becoming reconciled. Secondly, it is said that the present procedure is better suited to prevent collusive decrees of divorce being obtained. Mere service of summons in a divorce action on the respondent goes generally unnoticed; but the proceedings in court resulting in a decree are bound to attract attention and afford reasonable opportunity to any person to establish that the proceedings are really collusive. It is said that the need for such a provision is all the greater, as it is now proposed to omit[1] section 17A of the Indian Divorce Act, and there would thus be no officer who could intervene in the proceedings and object to a decree being passed on the ground of collusion. In this connection, reference may be made to the sections of the Matrimonial Causes Act, 1950, bearing on this point. Section 12(1) provides for a decree *nisi* being passed, and that can be made absolute only after the expiry of six months from the pronouncement thereof, unless the court fixes a shorter time. Then section 12(2) provides that any person might intervene and show cause why it should not be made absolute, on the ground of collusion or other relevant circumstances. It is said that the proposed legislation should be on the same lines for this reason as well. Thirdly, it is said that the procedure of first passing a decree *nisi* and then absolute obtains in all the English-speaking countries and has practically come to be regarded as part of the law of the Christians. The question whether this procedure should be continued, or whether one decree should be passed dissolving the marriage was considered by the Royal Commission[2], and it expressed the opinion that it was desirable to retain the existing procedure of passing a decree *nisi* which could be made absolute after a specified period, and it has further suggested that that period should be three months. The evidence of the witnesses before us is also in support of this view. There was only one witness who stated that the procedure of passing two decrees might be abolished, but in the course of discussion, it appeared that his objection to its retention was based mainly on the ground of additional expense. The Roman Catholic witnesses, on the other hand, desired that after the passing of a decree *nisi* nine months should elapse before a decree absolute is passed.

78. It will be relevant, for the purpose of deciding which of the two views should be accepted, to refer to section 57 of the Indian Divorce Act, which enacts that when a decree

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[1]See para. 79, *infra*.

[2]Report of the Royal Commission on Marriage and Divorce, 1955, Cmd. 678, pages 250 to 252, paragraphs 952 to 958.

for divorce has been passed, it shall be lawful for the respective parties to marry again after the expiration of six months from the date of the decree and not earlier. The combined effect of sections 16 and 57 of the Divorce Act is that after a decree *nisi* has been passed for dissolution, six months must elapse before a decree absolute can be passed, and another six months must elapse before the parties can re-marry. Section 30 of the Special Marriage Act, 1954, provides that when the marriage has been dissolved by a decree, and that decree has become final, the parties thereto may re-marry after the lapse of one year, but not earlier. A similar provision has been enacted in section 15 of the Hindu Marriage Act, 1955. Now it is for consideration whether it would be expedient to enact a prohibition against re-marriage after a decree for dissolution is finally made. If there is a marriage during the prohibited period, it is in law null and void and the children of that marriage would be illegitimate. Questions have also arisen as to the paternity of children born after the decree for dissolution of the marriage and within the prohibited period. We are disposed to think that the purpose of prohibiting a marriage after a decree for dissolution, namely, to prevent resort to divorce proceedings for getting rid of the wife, so as to be able to marry another woman,—is better served by prescribing an interval between the decree *nisi* and the decree absolute. So far as the parties to the action are concerned, it will make no difference in the result whether there is a single decree dissolving the marriage, followed by a period during which they cannot re-marry, or whether there is a decree *nisi*, followed by a decree for divorce to be after a specified period, with no further prohibition against re-marriage. After careful consideration, we have come to the conclusion that the procedure of decree *nisi* and decree absolute should be retained, and that after the final decree, the parties should be free to re-marry (after the period of appeal has expired).

Confirmation by High Court.

79. Section 17 of the Indian Divorce Act provides for a decree for dissolution passed by a District Judge being confirmed by a special Bench of the High Court. We see no need for such a provision. The decree of divorce passed by the district court would be open to appeal like other decrees of that court, and that, in our opinion, is sufficient.

King's Proctor.

We have also come to the conclusion that section 17A of the Indian Divorce Act, 1869, may be omitted, because that provision does not appear to have been availed of in practice to any appreciable extent. The purpose of that section will be sufficiently served by retaining the procedure for the passing of a decree *nisi*[1].

Minor changes.

80. We have explained the important proposals above. Our recommendations on minor matters relating to the subject are explained in the notes on clauses.

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[1]See para. 77, *supra*.

81. In order to give a concrete shape to our proposals, we have, in Appendix I, put them in the form of a draft Bill.

Appendix II contains the notes on clauses, explaining, with reference to each clause in Appendix I, any points that may need elucidation.

Appendix III contains a comparative table showing the provision in the existing Acts and the corresponding provision, if any, in Appendix I.

Appendix IV contains a list of the witnesses examined by us on the subject.

Appendix V shows our recommendations in respect of other Acts.

1. T. L. VENKATARAMA AIYAR (*Chairman*).
*2. P. SATYANARAYANA RAO
3. L. S. MISRA,
4. G. R. RAJAGOPAUL,
6. N. A. PALKHIVALA,
**5. S. CHAUDHURI.

(*Members*).

D. BASU,
Joint Secretary.

NEW DELHI;
The 19*th August* 1960.

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* Shri Rao has signed the report, subject to the two notes appended.

** Shri Chaudhuri has signed the report, subject to the note appended.

INDEX TO APPENDIX I

Explanation of abbreviations used

Christian Marriage Act . . . The Indian Christian Marriage Act, 1872.

Divorce Act . . . . . The Indian Divorce Act, 1869.

H.M.A. . . . . . The Hindu Marriage Act, 1955.

M.C.A. . . . . . The (English) Matrimonial Causes Act, 1950.

P.M.D.A. . . . . . The Parsi Marriage and Divorce Act, 1936.

S.M.A. . . . . . The Special Marriage Act, 1954.

APPENDIX I

Proposal as shown in the form of a draft Bill.
[This is a tentative draft only.]

[Corresponding sections of the existing Act are noted in the margin.]


सत्यमेव जयते

THE CHRISTIAN MARRIAGE AND MATRIMONIAL CAUSES BILL, 1960

A

BILL

to amend and codify the law relating to marriage and matrimonial causes among Christians.

BE it enacted by Parliament in the Eleventh Year of the Republic of India as follows:—

CHAPTER I

PRELIMINARY

1. (*1*) This Act may be called the Christian Marriage and Matrimonial Causes Act, 1960. Short title, extent and commencement. [S. 1, 1st para., Christian Marriage Act, and s. 1, Divorce Act.]

(2) It extends to the whole of India except the State of Jammu and Kashmir, and applies also to Christians domiciled in the territories to which this Act extends who are outside the said territories. [S. 1, 2nd para. Christian Marriage Act and s. 2, 1st para, Divorce Act.]

(3) Section 7 shall come into force at once, and the remaining provisions of this Act shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint. [New] *Cf.* s. 1 (2), S.M.A. s. 1 (2), H.M.A.

2. In this Act, unless the context otherwise requires,— Definitions.

(*a*) "Christian" means a person professing the Christian religion; [S. 3, part, Christian Marriage Act.]

(*b*) "church building" includes any chapel or other building generally used for public Christian worship; [S. 3, part Christian Marriage Act.]

(*c*) "desertion" means the withdrawal by one spouse, without reasonable cause and without the consent or against the wish of the other spouse, from cohabitation with the other spouse with the intention of bringing cohabitation permanently to an end; and its grammatical variations and cognate expressions shall be construed accordingly; [S. 3 (9), Divorce Act] Contrast S. 10 (1), Expl., H.M.A.

New]
Cf. s. 2 (*d*), S.M.A.

(*d*) "diplomatic officer" means an ambassador, envoy, minister, charge d' affaires, High Commissioner, Commissioner or other diplomatic representative, or a counsellor or secretary of an embassy, legation or High Commission;

New]
Cf. s. 2 (*d*), S.M.A.

(*e*) "district", in relation to a Marriage Registrar, means the area for which he is appointed as such under this Act;

[S. 3 (3), part, Divorce Act]

Cf. s. 3 (*b*), H.M.A. Cont rast s. 2 (*e*), S.M.A.

(*f*) "district court" means, in any area for which there is a city civil court, that court, and, in any other area, the principal civil court of original jurisdiction, and includes any other civil court which may be specified by the State Government, by notification in the Official Gazette, as having jurisdiction in respect of the matters dealt with in this Act;

[S. 3, part, Christian Marriage Act.]

(*g*) "India" means the territories to which this Act extends;

[New]

(*h*) "licensed Minister" means a Minister of Church licensed under section 8 to solemnize marriages under this Act;

[New]

(*i*) "Marriage Registrar" means the Marriage Registrar appointed under section 9 or section 10;

[New]

(*j*) "Minister of a recognised Church" means a Minister of any Church which is a recognized Church within the meaning of this Act;

[S. 3, part, Christian Marriages Act and s. 3 (5), Divorce Act]

(*k*) "minor" means a person who has not completed the age of eighteen years;

[New]

(*l*) "prescribed" means prescribed by rules made under this Act;

[New]
Cf. s. 2 (*b*), S.M.A.

(*m*) "prohibited relationship"—a man and any of the persons mentioned in Part I of the First Schedule, and a woman and any of the persons mentioned in Part II of the said Schedule, are within prohibited relationship;

Explanation 1.—"Relationship" includes,—

(*a*) relationship by half or uterine blood as well as by full blood;

(*b*) illegitimate blood relationship as well as legitimate; and all terms of relationship in this Act shall be construed accordingly;

Explanation 2.—"Full blood" and "half blood"—Two persons are said to be related to each other by full blood when they are descended from a common ancestor by the same wife and by half blood when they are descended from a common ancestor but by different wives;

Explanation 3.—"Uterine blood"—two persons are said to be related to each other by uterine blood when they are descended from a common ancestress but by different husbands;

(*n*) "recognised Church" means a Church declared to be a recognised Church under section 7; [New]

(*o*) "Registrar-General' means— [S. 3, part, Christian Marriage Act.]

(*i*) a Registrar-General of Births, Deaths and Marriages appointed under the Births, Deaths and Marriages Registration Act, 1886, and 6 of 1886

(*ii*) in relation to any territories to which that Act does not extend, an officer performing the functions of a Registrar-General of Births, Deaths and Marriages under any corresponding law in force in those territories;

(*p*) "rule", in any expression denoting rules of any Church, includes a rite, ceremony or custom of that Church. [New]

CHAPTER II

CONDITIONS FOR CHRISTIAN MARRIAGES

Marriage, between Christians to be solemized according to Act.

3. Every marriage between persons both of whom are Christians shall be solemnized in accordance with the provisions of this Act, unless the marriage is solemnized under the provisions of the Special Marriage Act, 1954.

[S. 4, Christian Marriage Act.]

43 of 1954.

Conditions of marriage.

4. A marriage may be solemnised between any two Christians if the following conditions are fulfilled, namely:—

(*i*) neither party has a spouse living at the time of the marriage; [New]

Cf. s. 60(2), Christian Marriage Act. S. 5(*i*), H.M.A., s. 4 (*a*), S.M.A.

(*ii*) the parties are not within prohibited relationship, unless the custom governing each of them permits of a marriage between the two; [S. 88, Christian Marriage Act.]

Cf. s. 5 (*iv*), H.M.A., s. 4 (*d*), S.M.A.

[New] *Cf.* s. 5 (*ii*), H.M.A., s. 4 (*b*), S.M.A.

(*iii*) neither party is an idiot or a lunatic at the time of the marriage;

[New] *Cf.* s. 60 (1), Christian Marriage Act S. 5 (*iii*), H.M.A., s. 4 (*c*), S.M.A.

(*iv*) the bridegroom has completed the age of eighteen years and the bride the age of fifteen years at the time of the marriage;

[New] *Cf.* s. 5 (*vi*), H.M.A.

(*v*) where the bride has not completed the age of eighteen years, the consent in writing of her guardian in marriage or the permission of the district court under sub-section (4) of section 5, has been obtained for the marriage; and

[New] *Cf.* s. 4 (*e*) S.M.A.

(*vi*) where the marriage is solemnized outside India, both parties are domiciled in India.

Consent of guardian in marriage. [S. 19 and s. 44, 1st para., Christian Marriage Act.]

Cf. s. 6, H.M.A.

5. (*1*) Whenever the consent of a guardian in marriage is necessary for a bride under this Act, the persons entitled to give such consent shall be the following in the order specified hereunder, namely:—

(*a*) the father;

(*b*) the mother;

(*c*) the paternal grandfather;

(*d*) the paternal grandmother;

(*e*) the brother by full blood;

as between brothers, the elder being preferred;

(*f*) the brother by half blood;

as between brothers by half blood, the elder being preferred:

Provided that the bride is living with him and is being brought up by him;

(*g*) the paternal uncle by full blood; as between paternal uncles, the elder being preferred;

(*h*) the maternal grandfather;

(*i*) the maternal grandmother;

(*j*) the maternal uncle by full blood; as between maternal uncles, the elder being preferred:

Provided that the bride is living with him and is being brought up by him.

[New] (*2*) No person shall be entitled to act as a guardian in marriage under sub-section (*1*) unless such person has himself completed the age of twenty-one years.

[New] (*3*) Where any person entitled to be the guardian in marriage under sub-section (*1*) refuses, or is for any cause

unable or unfit, to act as such, the person next in order shall be entitled to be the guardian.

(4) Where no such person as is referred to in sub-section (1) is living and willing and able and fit to act as guardian in marriage, or where any guardian in marriage, without just cause, withholds his consent to the marriage, the permission of the district court shall be necessary for the marriage of the bride. [S. 45, part, Christian Marriage Act, extended.]

(5) The permission of the district court for the marriage of the bride under sub-section (4) may be applied for by a petition made by the parties to the intended marriage. [S. 45, part, Christian Marriage Act.]

(6) Where such a petition is made, the district court shall examine the allegations of the petition in a summary manner and shall decide the matter after giving a reasonable opportunity to the parties to be heard. [S. 45, part, Christian Marriage Act.]

(7) The decision of the district court granting or refusing permission under sub-section (4) shall be final. [New]

(8) Notwithstanding anything contained in sub-section (1), where any person has been appointed or declared by a court to be the guardian of the person of the bride, he alone shall be entitled to act as guardian in marriage. [New] See s. 7, Guardians and Wards Act, 1890.

(9) Nothing in this section shall affect the jurisdiction of a court to prohibit by injunction an intended marriage, if in the interests of the bride for whose marriage consent is required the court thinks it necessary to do so. [New]

CHAPTER III

Solemnization of Christian Marriages

A.—*Persons authorised to solemnize marriages*

6. Marriages may be solemnized under this Act— Who may solemnize marriages.

(a) by any Minister of a recognised Church;

(b) by any Minister of Church licensed under section 8 to solemnize marriages; [S. 5, part, Christian Marriage Act.]

(c) by, or in the presence of, a Marriage Registrar appointed under section 9 or section 10.

7. (1) For the purpose of advising the State Government as respects Churches to be declared as recognised Churches, the State Government shall, by notification in the Official Gazette, establish a Committee consisting of such number of Christians, not exceeding five, as the State Government may think fit to appoint, and it shall be the duty of the Committee to examine applications by Churches for being declared to be recognised Churches and to make recommendations to the State Government thereon. Recognised Churches. [New]

(2) In making any recommendation to the State Government under sub-section (1), the Committee shall have regard to the following, among other matters, namely:—

(i) whether the Church is properly organised;

(ii) whether the Church is registered under any law for the time being in force relating to the registration of societies in general or religious societies in particular;

(iii) whether the Church has well-established rules for the solemnization of marriages;

(iv) whether the Church has proper places of worship;

(v) whether, according to the rules of the Church, clergymen are ordinarily ordained to solemnize marriages;

(vi) whether the strength or standing of the Church is such as to justify recognition being accorded thereto.

(3) The State Government, after taking into consideration the recommendations made by the Committee under this section, may by notification in the Official Gazette declare any Church to be a recognised Church for the purposes of this Act, and any such notification may also declare a group of Churches belonging to any organisation or denomination to be recognised Churches.

Grant of licences to Ministers of Church to solemnize marriages. [S. 6, Christian Marriage Act.]

8. The State Government may, by notification in the Official Gazette, grant licences to Ministers of Church to solemnize marriages within the whole or any part of the State.

Marriage Registrars in India. [S. 7, Christian Marriage Act.]

9. (1) The State Government may, by notification in the Official Gazette, appoint any person to be a Marriage Registrar for any district.

Cf. s.3(1) S.M.A.

(2) Where there are more Marriage Registrars than one in any district, the State Government shall appoint one of them to be the Senior Marriage Registrar.

(3) Where there is only one Marriage Registrar in a district, and such Registrar is absent from the district or is ill or his office is temporarily vacant, any person authorised in this behalf by the State Government, by general or special order, shall act as, and be, the Marriage Registrar of the district during such absence, illness or temporary vacancy.

10. For the purposes of this Act in its application to Christians domiciled in India who are outside India, the Central Government may, by notification in the Official Gazette,— Marriage Registrar Outside India. [New]

(*a*) in the case of the State of Jammu and Kashmir, appoint such officers of the Central Government as it may think fit to be the Marriage Registrars for the State or any part thereof; and *Cf.* s. 3 (2) S.M.A.

(*b*) in the case of any other country, place or area, appoint such diplomatic or consular officers as it may think fit to be the Marriage Registrars for the country, place or area.

B.—*Marriages before Ministers of recognised Churches*

11. (*1*) Marriages may be solemnized under this Act by any Minister of a recognized Church according to the rules of the Church of which he is a Minister and in the presence of at least two witnesses. Solemnization of marriages by Ministers of recognised Churches. [S. 5, part, Christian Marriage Act.]

(*2*) No such marriage shall be solemnized—

(*a*) if the Minister has reason to believe that the solemnization of the intended marriage would be contrary to the provisions of section 4; or [New]

(*b*) if any other lawful impediment be shown to the satisfaction of the Minister why such marriage should not be solemnized; or

(*c*) unless a solemn declaration has been made before the Minister in the form specified in the Fourth Schedule—

(*i*) by the bridegroom, and

(*ii*) by the bride, or, if she is a minor for whose marriage the consent of the guardian is required under this Act, by the guardian on behalf of the bride.

C.—*Marriages before licensed Ministers and Marriage Registrars*

12. (*1*) When a marriage is intended to be solemnized by a licensed Minister or by or in the presence of a Marriage Registrar, the parties to the marriage shall give notice thereof in writing in the form specified in the Second Schedule,— Notice of intended marriage to licensed Ministers, etc., and marriage notice book. [S. 12 and s. 38, Christian Marriage Act.]

(*a*) to the licensed Minister whom they desire to solemnize the marriage, or

(*b*) to the Marriage Registrar of the district in which at least one of the parties to the marriage has *Cf.* s. 5, S.M.A.

resided for a period of thirty days immediately preceding the date on which such notice is given.

[New] (2) Where the bride is a minor for whose marriage the consent of the guardian is required under this Act, the notice to be given under sub-section (1) shall be signed on behalf of the bride by the guardian.

[S. 40, part, Christian Marriage Act] *Cf.* s. 6, S.M.A. (3) The licensed Minister or the Marriage Registrar, as the case may be, shall keep all notices given under sub-section (1) with the records of his office and shall also forthwith enter a true copy of every such notice in a book prescribed for that purpose, to be called the Marriage Notice Book.

Procedure to be followed by licensed Minister on receipt of notice. [S. 13, Christian Marriage Act.] **13.** Where a notice under section 12 is given to a licensed Minister, he shall proceed as follows:—

Cf. s. 6 (2), S.M.A. (*a*) if the parties intending marriage desire it to be solemnized in a particular church building, and if the licensed Minister be entitled to officiate therein, he shall cause the notice to be published by affixing a copy thereof to some conspicuous part of such church building;

(*b*) if he is not entitled to officiate as a Minister in such church building, he shall, notwithstanding anything contained in sub-section (3) of section 12, at his option, either return the notice to the person who delivered it to him, or deliver it to some other licensed Minister entitled to officiate therein, who shall thereupon act as if the notice were given by the parties to him under section 12;

[S. 14, Christian Marriage Act.] (*c*) if it is intended that the marriage shall be solemnized in a private building, the licensed Minister, on receiving the notice under section 12, shall forward a copy thereof to the Marriage Registrar of the district, who shall cause it to be published by affixing it to some conspicuous place in his own office;

[S. 15, Christian Marriage Act.] *Cf.* also s. 39. 2nd para., Christian Marriage Act. [S. 16, Christian Marriage Act (*d*) if the bride intending marriage is a minor, the licensed Minister, on receiving the notice under section 12 shall, unless within twenty-four hours after its receipt he returns the same under clause (*b*), send by post or otherwise a copy of such notice to the Marriage Registrar of the district, or, if there be more than one Marriage Registrar of the district, to the Senior Marriage Registrar, and the Marriage Registrar or Senior Marriage Registrar, as the case may be, on receiving any such copy, shall affix it to some conspicuous place in his own office, and the latter shall further cause a copy of the said notice to be sent to each

of the other Marriage Registrars in the same district, who shall likewise publish the same in the manner above directed.

Procedure to be followed by Marriage Registrars on receipt of notice.

14. Where the notice under section 12 is given to a Marriage Registrar, he shall proceed as follows:—

[S. 39, 1st para., Christian Marriage Act.] *Cf.* s. 6 (2), S.M.A.

(*a*) the Marriage Registrar shall cause the notice to be published by affixing a copy thereof to some conspicuous place in his own office;

[S. 39, 2nd para., Christian Marriage Act.] *Cf.* also s. 15, Christian Marriage Act.

(*b*) if the bride is a minor, the Marriage Registrar shall, within twenty-four hours after receiving the notice under section 12, send, by post or otherwise, a copy of the notice to each of the other Marriage Registrars, if any, in the same district, who shall affix the copy to some conspicuous place in his own office;

[New] *Cf.* s. 6 (3), S.M.A.

(*c*) if either of the parties intending marriage is not permanently residing within the local limits of the district of the Marriage Registrar, the Marriage Registrar shall also cause a copy of such notice to be transmitted to the Marriage Registrar of the district within whose limits such party is permanently residing, and that Marriage Registrar shall thereupon cause a copy thereof to be affixed to some conspicuous place in his own office.

Issue of certificate of notice.

15. (*1*) Any licensed Minister or Marriage Registrar consenting or intending to solemnize any marriage under this Act shall, on being required so to do by or on behalf of either of the persons by whom the notice was given, issue under his hand a certificate of notice in the form specified in the Third Schedule.

[S. 17, part, 24, 41, part, and 50, Christian Marriage Act.]

(*2*) No such certificate shall be issued—

[S. 18, and s. 42, part, Christian Marriage Act.]

(*a*) until the expiration of seven days from the date of publication of the notice or, where the bride is a minor, until the expiration of twenty-one days from the said date; and

(*b*) unless a solemn declaration has been made before the licensed Minister or the Marriage Registrar, as the case may be, in the form specified in the Fourth Schedule—

(*i*) by the bridegroom, and

(*ii*) by the bride, or, if she is a minor for whose marriage the consent of the guardian is required under this Act, by the guardian on behalf of the bride.

Objection to certificate. [New] *Cf.* s. 7 (1) and s. 7 (3), S.M.A.

16. (*1*) Any person may, before the expiration of seven days from the date on which any notice has been published under section 13 or section 14, make an objection in writing to the marriage on the ground that it would contravene one or more of the conditions specified in section 4.

Cf. s. 8 (1), earlier part, S.M.A.

(*2*) If an objection is made under sub-section (*1*), the licensed Minister or the Marriage Registrar shall not issue the certificate under section 15 unless he has inquired into the matter of the objection and is satisfied that it ought not to prevent the issue of the certificate or the objection is withdrawn by the person making it.

Cf. s. 8 (1), latter part, S.M.A.

(*3*) The licensed Minister or the Marriage Registrar shall not take more than thirty days from the date of the objection for the purpose of inquiring into the matter of the objecion and arriving at a decision.

Application to district court against decision on objection. [S. 46, Christian Marriage Act, extended.] *Cf.* s. 8 (2), S.M.A.

17. (*1*) If the licensed Minister or the Marriage Registrar upholds an objection to an intended marriage and refuses to issue the certificate of notice of marriage, either party to the intended marriage may, within a period of twenty-one days from the date of such refusal, apply by petition to the district court.

(*2*) The district court may examine the allegations of the petition in a summary manner, and shall decide the matter after giving a reasonable opportunity to the parties to be heard.

(*3*) The decision of the district court on such petition shall be final, and the licensed Minister or the Marriage Registrar shall act in conformity with the decision.

Procedure on receipt of objection by Marriage Registrar abroad. [New] *Cf.* s. 10, S.M.A.

18. Where an objection is made under section 16 to a Marriage Registrar outside India in respect of an intended marriage outside India, and the Marriage Registrar, after making such inquiry into the matter as he thinks fit, entertains a doubt in respect thereof, he shall not solemnize the marriage but shall transmit the record to the Central Government with such statement respecting the matter as he thinks fit to make, and the Central Government, after making such inquiry into the matter and after obtaining such advice as it thinks fit, shall give its decision thereon in writing to the Marriage Registrar, who shall act in conformity with the decision of the Central Government.

Certificate not to be issued and marriage not to be solemnized in certain cases. [S. 17, part, s. 41, part nd s. 42, part, Christian Marriage Act.]

19. No licensed Minister or Marriage Registrar shall issue a certificate of notice in respect of any marriage or solemnize any marriage under this Act—

(*a*) if he has reason to believe that the solemnization of the intended marriage would be contrary to the provisions of section 4; or

(*b*) if any other lawful impediment be shown to his satisfaction why such certificate should not be issued or such marriage should not be solemnized.

20. After the issue of the certificate of notice by the licensed Minister, the marriage may be solemnized between the persons therein described by the licensed Minister according to such form or ceremony as obtains in the Church to which the licensed Minister belongs and in the presence of at least two witnesses.

Solemnization of marriage by licensed Minister.

[S. 25, Christian Marriage Act.]

21. (*1*) After the issue of the certificate of notice by the Marriage Registrar, the marriage may be solemnized between the persons therein described by or in the presence of the Marriage Registrar according to such form or ceremony as the parties think fit to adopt and in the presence of at least two witnesses:

Solemnization of marriage by Marriage Registrar.

[S. 51, Christian Marriage Act.]

Provided that the marriage shall not be complete and binding on the parties unless each party says to the other in the presence of the Marriage Registrar and the witnesses and in any language understood by the parties—

Cf. s. 12 (2), Proviso, S.M.A.

"I, (A.B.) take thee (C.D.) to be my lawful wife (or husband)".

(*2*) The marriage may be solemnized—

(*a*) at the office of the Marriage Registrar; or [New]

(*b*) at such other place in his district and within a reasonable distance from his office, as the parties may desire, and upon such conditions and the payment of such additional fees as may be prescribed. *Cf.* s. 12 (1), S.M.A.

22. If a marriage is not solemnized within three months after the date of the certificate issued by the licensed Minister or the Marriage Registrar under section 15, such certificate and all proceedings, if any, thereon shall be void, and no person shall proceed to solemnize the said marriage until new notice has been given and the certificate thereof issued in the manner provided in this Chapter.

Certificate void if marriage not solemnized within three months.

[Ss. 26 and 52, Christian Marriage Act.]

Cf. s. 14, S.M.A.

D.—*Registration of marriages*

23. (*1*) When the marriage has been solemnized, the Minister of recognized Church or the licensed Minister or the Marriage Registrar, as the case may be, shall enter a certificate thereof in the form specified in the Fifth Schedule in a book to be kept by him for that purpose and to be called the Marriage Certificate Book, and such certificate shall be signed by the parties to the marriage and the witnesses.

Certificate of marriage, and registration.

[Ss. 27 to 36, S. 54, s. 55 and s. 59, Christian Marriage Act.]

Cf. s. 13 (1), S.M.A.

Cf. s. 13 (2), S.M.A.

(*2*) On a certificate being entered in the Marriage Certificate Book by the Minister of a recognized Church or the licensed Minister or the Marriage Registrar, the certificate shall be deemed to be conclusive evidence of the fact that a marriage under this Act has been solemnized.

Cf. s. 48, S.M.A.

(*3*) Every Minister of a recognized Church, licensed Minister or Marriage Registrar in a State shall send to the Registrar-General of that State, at such intervals and in such form as may be prescribed, a true copy of all entries made by him in the Marriage Certificate Book since the last of such intervals.

CHAPTER IV

Restitution of Conjugal Rights

Restitution.

[S. 32, part, Divorce Act.]

Cf. s. 9, H.M.A., s. 22, S.M.A.

24. (*1*) When either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply by petition to the district court, for restitution of conjugal rights.

[S. 33, Divorce Act.]

(*2*) Nothing shall be pleaded in answer to such petition which would not be a ground for judicial separation or for nullity of marriage or for divorce.

[S. 32, part, Divorce Act.]

(*3*) The court, on being satisfied of the truth of the statements made in such petition, and that there is no legal ground why a decree of restitution of conjugal rights should not be granted, may decree restitution of conjugal rights accordingly.

CHAPTER V

Judicial Separation

Judicial separation.

[S. 22, earlier part, Divorce Act.]

Cf. s. 10(1), H.M.A.

Cf. s. 23 (1), S.M.A.

25. Either party to a marriage, whether solemnized before or after the commencement of this Act, may present a petition praying for a decree for judicial separation on any of the grounds specified in section 30.

Effect of judicial separation on duty to cohabit.

[S. 22, latter part, and s 26, Divorce Act.]

26. (*1*) Where a decree for judicial separation has been passed, it shall no longer be obligatory for the petitioner to cohabit with the respondent.

(2) The court may, on the application by petition of either party and on being satisfied of the truth of the statements made in such petition, rescind the decree where the parties have expressed a desire to come together and to resume cohabitation or where for any other reason the court considers it just and reasonable to rescind the decree.

Cf. s. 10 (2) S.M.A.

Cf. s. 3 (2) S.M.A.

Cf. s. 14 (2), 14 (3), M.C.A.

CHAPTER VI

NULLITY OF MARRIAGE

27. Any marriage solemnized, whether before or after the commencement of this Act, shall be null and void and may, on a petition presented for the purpose, be so declared by a decree of nullity, if it contravenes the condition specified in clause (*i*) or (*ii*) of section 4.

Void marriages.

[S. 18, Divorce Act and s. 19(2), and 19(4), Divorce Act.]

Cf. s. 11, opening lines H.M.A.

Cf. s. 24 (1) (*i*), S.M.A.

28. (*1*) Any marriage solemnized, whether before or after the commencement of this Act, shall be voidable and may be annulled by a decree of nullity on any of the following grounds, namely:—

Voidable marriages.

[(*a*) that the marriage is in contravention of the condition specified in clause (*iii*) of section 4; or

[S. 19 (3) Divorce] Act

Cf. s. 12 (1) (*b*), H.M.A. Contrast s. 24 (1)(*i*), S.M.A.

[(*b*) that the respondent was impotent at the time of the marriage and continued to be so till the institution of the proceeding; or

[S. 19 (1), Divorce Act.]

Cf. s. 12 (1) (*a*), H.M.A.

Contrast s. 24 (1) (*ii*), S.M.A.

[(*c*) that the consent of the petitioner, or where the consent of the guardian in marriage of the petitioner is required under clause (*v*) of section 4, the consent of such guardian, was obtained by force or fraud; or

[S. 19, last para., Divorce Act]

Cf. s. 12 (1) (*c*), H.M.A.

Cf. s. 25 (*iii*) S.M.A.

[(*d*) that the respondent was at the time of the marriage pregnant by some person other than the petitioner.

[New]

Cf. s. 12 (1) (*d*), H.M.A.

Cf. s. 25 (*ii*), S.M.A.

[New] (2) Any marriage solemnized after the commencement of this Act shall be voidable and may be annulled by a decree of nullity on any of the following grounds, namely:—

Contrast, s. 24 (1) (*i*), S.M.A.

[(*a*) that the marriage is in contravention of the condition specified in clause (*iv*) of section 4; or

[(*b*) that the marriage of the petitioner, being the wife, is in contravention of the condition specified in clause (*v*) of section 4.

[New] (3) Notwithstanding anything contained in sub-section (1), no petition for annulling a marriage—

Cf. s. 12 (2), H.M.A. [(*a*) on the ground specified in cluse (*c*) of sub-section (1) shall be entertained, if—

Cf. s. 25, 2nd proviso, S.M.A. [(*i*) the petition is presented more than one year after the force had ceased to operate or, as the case may be, the fraud had been discovered; or

[(*ii*) the petitioner has, with his or her full consent, lived with the other party to the marriage as husband or wife after the force had ceased to operate or, as the case may be, the fraud had been discovered;

Cf. s. 12 (2), H.M.A. and s. 25, 1st proviso, S.M.A. [(*b*) on the ground specified in clause (*d*) of sub-section (1) shall be entertained, unless the court is satisfied—

[(*i*) that the petitioner was at the time of the marriage ignorant of the facts alleged;

[(*ii*) that the proceedings have been instituted, in the case of a marriage solemnized before the commencement of this Act, within one year of such commencement and, in the case of a marriage solemnized after such commencement, within one year from the date of the marriage; and

[(*iii*) that marital intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of the grounds for a decree.

[New] (4) Notwithstanding anything contained in sub-section (2), no petition for annulling a marriage under that sub-section shall be entertained if the petition is presented more than one year after the petitioner has completed the age of eighteen years.

Legitimacy of children of certain void marriages and voidable marriages. **29.** (1) Where a marriage is null and void under section 27 by reason of contravention of the condition specified in clause (*i*) or clause (*ii*) of section 4, any child begotten or conceived before the marriage is declared to be null and void, who would have been the legitimate child of the parties to the marriage if the marriage had been valid, shall

be deemed to be their legitimate child notwithstanding that the marriage is null and void. [S. 21, Divorce Act.]

Cf. s. 16, H.M.A.

Cf. s. 26, S.M.A.

(2) Where a marriage is annulled by a decree of nullity under section 28, any child begotten or conceived before the decree is made, who would have been the legitimate child of the parties to the marriage if the marriage had been dissolved instead of having been annulled by a decree of nullity, shall be deemed to be their legitimate child notwithstanding the decree of nullity.

(3) Nothing contained in this section shall be construed as conferring upon any child of a marriage which is void or which is annulled by a decree of nullity any rights in or to the property of any person other than the parents in any case where, but for the passing of this Act, such child would have been incapable of possessing or acquiring any such rights by reason of his not being the legitimate child of his parents. *Cf.* s. 16, proviso, H.M.A., and *Cf.* s. 26, proviso, S.M.A.

CHAPTER VII

DIVORCE

A.—*Grounds of divorce*

30. (1) Any marriage, solemnized whether before or after the commencement of this Act, may, on a petition presented either by the husband or the wife, be dissolved by a decree of divorce on the ground that the respondent— Grounds of divorce. [S. 10, 1st para. part and 2nd para. part, Divorce Act.]

(i) has, since the solemnization of the marriage, committed adultery; or *Cf.* s. 27 (*a*), S.M.A. *Cf.* s. 13 (1) (*i*), H.M.A.

(ii) has ceased to be a Christian by conversion to another religion; or *Cf.* s. 13 (1) (*ii*), H.M.A.

(iii) has been incurably of unsound mind for a continuous period of not less than three years immediately preceding the presentation of the petition; or *Cf.* s. 13 (1) (*iii*), H.M.A. *Cf.* s. 27 (*e*), S.M.A.

(iv) has, for a period of not less than three years immediately preceding the presentation of the petition, been suffering from a virulent and incurable form of leprosy; or *Cf.* s. 13 (1) (*iv*), H.M.A. *Cf.* s. 27 (*g*), S.M.A.

(v) has, for a period of not less than three years immediately preceding the presentation of the petition, been suffering from venereal disease in a communicable form; or *Cf.* s. 13 (1) (*v*), H.M.A. and *Cf.* s. 27 (*f*), S.M.A.

S. 27 (*h*), S.M.A. *Cf.* s. 13 (1), (*viii*), H.M.A.

(*vi*) has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of the respondent if the respondent had been alive; or

Contrast s. 25 (*i*), S.M.A. *Cf.* s. 32 (*a*), P.M.D.A.

(*vii*) has wilfully refused to consummate the marriage, and the marriage has not, therefore, been consummated; or

Cf. s. 27 (*j*), S.M.A. *Cf.* s. 13 (1) (*ix*), H.M.A.

(*viii*) has failed to comply with a decree for restitution of conjugal rights for a period of two years or upwards after the passing of the decree against the respondent; or

Cf. s. 27 (*k*), S.M.A. and see the definition of 'desertion.'

(*ix*) has deserted the petitioner for a period of at least three years immediately preceding the presentation of the petition; or

Cf. s. 27 (*d*), S.M.A. and Contrast s. 10 (1)(*b*)-Judicial Separation, H.M.A.

(*x*) has, since the solemnization of the marriage, treated the petitioner with cruelty.

Cf. s. 13 (2) (*ii*), H.M.A. s. 27, last sentence, S.M.A.

(2) A wife may also present a petition for the dissolution of her marriage by a decree of divorce on the ground that the husband has, since the solemnization of the marriage, been guilty of rape, sodomy or bestiality.

Divorce after decree for judicial separation.

[New]

31. Where in respect of any marriage, solemnized whether before or after the commencement of this Act, a decree for judicial separation has been passed, and there has been no resumption of cohabitation as between the parties to the marriage for a period of two years or upwards after the passing of the decree, either party may, by an application in the proceeding in which the decree was passed, pray for a dissolution of the marriage by a decree of divorce; and the court may, on being satisfied of the truth of the statements made in such application, pass a decree accordingly[1].

No petition for divorce to be presented within three years of marriage.

[New]

Cf. s. 14, H.M.A.

S. 29, S.M.A.

32. (*1*) Notwithstanding anything contained in this Act, it shall not be competent for any court to entertain any petition for dissolution of a marriage by a decree of divorce under section 30, unless at the date of the presentation of the petition three years have elapsed since the date of the marriage:

Provided that the court may grant leave to present a petition before the said three years have elapsed, if the

[1]If it is considered that a fresh proceeding for divorce should be filed, the clause can run as follows :—

"Either the husband or the wife may also present a petition for the dissolution of the marriage by a decree of divorce on the ground that there has been no resumption of cohabitation as between the parties to the marriage for a period of two years or upwards after the passing of a decree for judicial separation in a proceeding to which they were parties".

court thinks fit to do so on the ground that the case is one of exceptional hardship to the petitioner or of exceptional depravity on the part of the respondent; but any such leave may, in the interests of justice, be revoked by the court at any time before a decree *nisi* of divorce is passed; and where the leave is so revoked, the court may dismiss the petition without prejudice to any petition which may be brought after the expiration of the said three years upon the same or substantially the same facts as those alleged in support of the petition so dismissed.

(2) In disposing of any application under this section for leave to present a petition for divorce before the expiration of three years from the date of the marriage, the court shall have regard to the interests of any children of the marriage and to the question whether there is a reasonable probability of a reconciliation between the parties before the expiration of the said three years. *Cf.* s. 14 (2), H.M.A. s. 29 (2), S.M.A.

B.—*Re-marriage after divorce*

33. Where a decree of divorce has been made absolute under section 42 or a decree of divorce has been passed under section 31, and the time for appealing has expired without an appeal having been presented or an appeal has been presented but has been dismissed and the decree of dismissal has become final, but not sooner, either party to the marriage may marry again. Re-marriage of divorced persons. [s. 57, Divorce Act]. *Cf.* s. 13 (1), M.C.A. Contrast s. 15, H.M.A. and s. 30, S.M.A.

CHAPTER VIII

Jurisdiction and Procedure

34. Nothing contained in this Act shall authorise any court to grant any relief under Chapters IV to VII, except where— Relief to be given to Christians only.

(*a*) both the parties to the marriage are Christians at the time of the presentation of the petition; or [S. 2, 2nd para., Divorce Act.]

(*b*) both the parties to the marriage were Christians at the time of the marriage, and at least one of the parties is a Christian at the time of the presentation of the petition; or

(*c*) the marriage was solemnized under any enactment repealed hereby, and at least one of the

parties is a Christian at the time of the presentation of the petition[1].

Jurisdiction of Indian Courts.

35. Nothing contained in this Act shall authorise any court—

[S. 2, 3rd para., Divorce Act.]

(*a*) to make any decree of dissolution of marriage, except where—

(*i*) the parties to the marriage are domiciled in India at the time of the presentation of the petition; or

(*ii*) the petitioner, being the wife, was domiciled in India immediately before the marriage and has been residing in India for a period of not less than three years immediately preceding the presentation of the petition;

[S. 2, 4th para., Divorce Act.]

(*b*) to make any decree of nullity of marriage, except where—

(*i*) the parties to the marriage are domiciled in India at the time of the presentation of the petition; or

(*ii*) the marriage was solemnized under this Act or under any enactment repealed hereby, and the petitioner is either domiciled or residing in India at the time of the presentation of the petition;

[S. 2, 5th para., Divorce Act.]

(*c*) to grant any other relief under Chapters IV to VII, except where the petitioner is residing in India at the time of the presentation of the petition.

Court to which petition to be made.

[New]

36. (*1*) Every petition under sub-section (5) of section 5 shall be presented to the district court within the local limits of whose ordinary original civil jurisdiction the bride resides.

[New]

(*2*) Every petition under section 7 shall be presented to the district court within the local limits of whose ordinary original civil jurisdiction the licensed Minister discharges

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[1]The following alternative draft can also be considered :—

"No court shall grant any relief under Chapters IV to VII except where at least one of the parties was a Christian at the time of the marriage and continued to be so till the institution of the proceeding".

This is wider in some respect than the main draft, because it will cover cases where a Christian and a non-Christian marry outside India (or though this can happen very rarely even within India, where the personal law of the non-Christian allows such marriage) and one of the parties petitions for matrimonial relief. It is, however, narrower in one respect than the main draft, because, it will not apply to cases where for example, two non-Christians marry and then become converts to Christianity.

It is narrower than the existing section, by requiring that one party should have been a Christian at the time of the marriage also

his functions or the office of the Marriage Registrar is situate, as the case may be.

(3) Every petition under Chapters IV to VII shall be presented to the district court within the local limits of whose ordinary original civil jursidiction— [S. 3 (1), part and s. 3 (3) part, Divorce Act, s. 10 first para, part, and second para. part, Divorce Act, and section 23, earlier part, Divorce Act.]

(a) the respondent is residing at the time of the presentation of the petition, or *Cf.* s. 29 (1), P.M.D.A.

(b) the marriage was solemnized, or *Cf.* s. 19, H.M.A.

(c) the husband and wife last resided together, or s. 31 (1), S.M.A.

(d) the petitioner is residing at the time of the presentation of the petition, provided the respondent is, at that time, residing outside India. *Cf.* s. 29 (3), P.M.D.A.

37. (1) Every petition presented under Chapters IV to VII shall state as distinctly as the nature of the case permits the facts on which the claim to relief is founded and shall also state that there is no collusion between the petitioner and the other party to the marriage. Contents and verification of petitions. [s. 47, 1st para. and s. 10, third para., Divorce Act.] *Cf.* s. 20, H.M.A. s. 32, S.M.A.

(2) The statements contained in every petition under Chapters IV to VII shall be verified by the petitioner or some other competent person in the manner required by law for the verification of plaints and may, at the hearing, be referred to as evidence. [s. 47, 2nd para., Divorce Act.]

38. Subject to the other provisions contained in this Act and to such rules as the High Court may make in this behalf, all proceedings under this Act shall be regulated, as far as may be, by the Code of Civil Procedure, 1908. Application of Code of Civil Procedure. [s. 45, Divorce Act.] *Cf.* s. 21, H.M.A. *Cf.* s. 40, S.M.A. 5 of 1908. 5 of 1908.

Decree in proceedings.

[S. 12, part, s. 13, part, s. 14, part, and s. 23, latter part, Divorce Act.]

Cf. s. 24, H.M.A. S. 33, S.M.A.

39. (*1*) In any proceeding under Chapters IV to VII, whether defended or not, if the court is satisfied that—

(*a*) any of the grounds for granting relief exists and the petitioner is not in any way taking advantage of his or her own wrong or disability for the purpose of such relief, and

(*b*) where the ground of the petition is adultery, the petitioner has not in any manner been accessory to or connived at or condoned the adultery, or where the ground of the petition is cruelty, the petitioner has not in any manner condoned the cruelty, and

(*c*) the petition is not presented or prosecuted in collusion with the respondent, and

(*d*) there has not been any unnecessary or improper delay in instituting the proceeding, and

(*e*) there is no other legal ground why relief should not be granted,

then, and in such a case, but not otherwise, the court shall decree such relief accordingly.

[New]

(*2*) Before proceeding to grant any relief under Chapters IV to VII, it shall be the duty of the court in the first instance, in every case where it is possible so to do consistently with the nature and circumstances of the case, to make every endeavour to bring about a reconciliation between the parties.

[New]

(*3*) For the purpose of aiding the court in bringing about such reconciliation, the court may, if the parties so desire or if it thinks it just and proper so to do, adjourn the proceeding and refer the matter to any person named by the parties in this behalf or to any person nominated by the court if the parties fail to name any person, with directions to report to the court as to whether a reconciliation can be, and has been, effected, and shall, in disposing of the proceeding, have due regard to the report.

Adulterer or adulteress to be a co-respondent.

[S. 11, Divorce Act.]

Cf. s. 3, M.C.A. 1950.

Cf. s. 41 (2) (*a*), S.M.A.

40. (*1*) On a petition for divorce or judicial separation presented on the ground of adultery the petitioner shall make the alleged adulterer or adulteress a co-respondent, unless the petitioner is excused by the court from so doing on any of the following grounds, namely:—

(*a*) that the respondent is leading the life of a prostitute, and that the petitioner knows of no person with whom the adultery has been committed;

(*b*) that the name of the alleged adulterer or adulteress is unknown to the petitioner although the petitioner has made due efforts to discover it;

(*c*) that the alleged adulterer or adulteress is dead;

(*d*) any other ground which the court may regard as sufficient in the circumstances of the case. *Cf.* s. 3, M.C.A.

(*2*) The provisions of sub-section (*1*) shall, so far as may be, apply in relation to the answer of a respondent praying for divorce or judicial separation on the ground of adultery, as they apply in relation to a petition for divorce or judicial separation presented on that ground. [New.] *Cf.* s. 3, M.C.A.

41. If, in any proceeding for divorce or judicial separation, the respondent opposes the relief sought on the ground of the petitioner's adultery, cruelty or desertion, the court may give the respondent the same relief to which he or she would have been entitled if he or she had presented a petition seeking such relief. Relief to respondent in case of opposition to petition for divorce on certain grounds. [S. 15, Divorce Act.]

42. (*1*) Every decree for divorce under section 30 shall, in the first instance, be a *decree nisi*, not to be made absolute until after the expiration of six months from the pronouncing thereof, unless the court fixes a shorter time. Decree *nisi* for divorce. [S. 16, Divorce Act.]

(*2*) After the pronouncing of the decree *nisi* and before the decree is made absolute, any person may, by an application made in accordance with such rules as may be made by the High Court in that behalf, show cause why the decree should not be made absolute by reason of the decree having been obtained by collusion or by reason of material facts not having been brought before the court, and in any such case the court may make the decree absolute, reverse the decree *nisi*, require further inquiry or otherwise deal with the case as the court thinks fit. *Cf.* ss. 12 (1), 12 (2), M.C.A.

(*3*) Where a *decree nisi* has been obtained and no application for the decree to be made absolute has been made within six months from the pronouncement of the *decree nisi* by the party who obtained the decree, then, at any time within three months from the expiration of the said six months, the party against whom the decree *nisi* has been granted shall be at liberty to apply to the court and the court, on such application, may make the decree absolute, reverse the *decree nisi*, require further inquiry or otherwise deal with the case as the court thinks fit. *Cf.* s. 12 (3), M.C.A.

43. (*1*) A husband or wife may, on a petition for divorce or for judicial separation, claim damages from any person on the ground of adultery with the wife or husband of the petitioner. Damages from adulterer or adulteress. [S. 34, Divorce Act.]

(*2*) The court may direct in what manner the damages recovered on any such petition are to be paid or applied, and may direct the whole or any part of the damages to be settled for the benefit of the children, if any, of the marriage, or as a provision for the maintenance of the wife, or husband. [S. 39, 3rd para., Divorce Act.] *Cf.* s. 30, M.C.A. S. 41 (2)(*b*), S.M.A.

Maintenance *pendente lite* and expenses of proceedings.

[S. 36, Divorce Act.]

Cf. s. 24, H.M.A.

Cf. s. 36, S.M.A.

44. Where in any proceeding under Chapters IV to VII it appears to the court that either the wife or the husband, as the case may be, has no independent income sufficient for her or his support and the necessary expenses of the proceeding, it may, on the application of the wife or the husband, order the respondent to pay to the petitioner the expenses of the proceeding, and monthly during the proceeding such sum as, having regard to the petitioner's own income and the income of the respondent, may seem to the court to be reasonable.

Permanent alimony and maintenance.

[S. 32, Divorce Act.]

Cf. s. 25, H.M.A.

Cf. s. 37, S.M.A.

45. (*1*) Any court exercising jurisdiction under Chapters IV to VII may, at the time of passing any decree or at any time subsequent thereto, on application made to it for the purpose by either the wife or the husband, as the case may be, order that the respondent shall, while the applicant remains unmarried, pay to the applicant for her or his maintenance and support such gross sum or such monthly or periodical sum for a term not exceeding the life of the applicant as, having regard to the respondent's own income and other property, if any, the income and other property of the applicant and the conduct of the parties, may seem to the court to be just, and any such payment may be secured, if necessary, by a charge on the immovable property of the respondent.

(*2*) If the court is satisfied that there is a change in the circumstances of either party at any time after it has made an order under sub-section (*1*), it may, at the instance of either party, vary, modify or rescind any such order in such manner as the court may deem just.

(*3*) If the court is satisfied that the party in whose favour an order has been made under this section has remarried, or, if such party is the wife, that she has not remained chaste, or, if such party is the husband, that he has had sexual intercourse with any woman outside wedlock, it shall rescind the order.

Disposal of property.

[New]

46. (*1*) In any proceeding under Chapters IV to VII, the court may make such provisions in the decree as it deems just and proper with respect to any property presented, at or about the time of the marriage, which may belong jointly to both the husband and the wife.

S. 40, main para, Divorce Act]

Cf. s. 25, M.C.A.

(*2*) In any case in which the court pronounces a decree for divorce or nullity of marriage, the court may inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders, with reference to the application of the whole or any part of the property so settled (whether the settlement is for the benefit of the children of the marriage or of the parties to the marriage or both), as the court thinks fit.

(3) The court shall not make any order under sub-section (2) for the benefit of the parents or either of them at the expense of the children. [S. 40, proviso, Divorce Act.]

47. In any proceeding under Chapters IV to VII, the court may, from time to time, pass such interim orders and make such provisions in the decree as it may deem just and proper with respect to the custody, maintenance and education of minor children, consistently with their wishes, wherever possible, and may, after the decree, upon application by petition for the purpose, make, from time to time, all such orders and provisions with respect to the custody, maintenance and education of such children as might have been made by such decree or interim orders in case the proceeding for obtaining such decree were still pending, and the court may also from time to time revoke, suspend or vary any such orders and provisions previously made. Custody of Children. [Ss. 41, 42, 43 and 44, Divorce Act.] *Cf.* s. 26, H.M.A. S. 38, S.M.A.

48. A proceeding under this Act shall be conducted *in camera* if either party so desires or if the court so thinks fit to do, and it shall not be lawful for any person to print or publish any matter in relation to such proceeding except with the previous permission of the court. Proceedings may be *in camera* and may not be published. [S. 53, Divorce Act.] *Cf.* s. 22 (1), H.M.A. S. 33, S.M.A.

49. Except as otherwise provided in this Act, all decrees and orders made by the court in any proceeding under this Act shall be appealable as decrees of the court made in the exercise of its original civil jurisdiction, and such appeal shall lie to the court to which appeals ordinarily lie from the decisions of the court given in the exercise of its original civil jurisdiction. Appeals from decree and orders. [S. 55, part, Divorce Act.] Contrast s. 28, H.M.A. S. 39, S.M.A.

Provided that there shall be no appeal on the subject of costs only. *Cf.* s. 96, Code of Civil Procedure.

50. All decrees and orders made by the court in any proceeding under this Act shall be enforced in the like manner as the decrees and orders of the court made in the exercise of its original civil jurisdiction for the time being are enforced. Enforcement of decrees and orders. [S. 55, part, Divorce Act.] *Cf.* s. 28, H.M.A. S. 39, S.M.A.

CHAPTER IX

PENALTIES

51. Every person whose marriage is solemnized under this Act and who, during the lifetime of his or her wife or husband, contracts any other marriage shall be subject to the penalties provided in section 494 and section 495 of the Indian Penal Code for the offence of marrying again during the lifetime of the husband or wife, and the marriage so contracted shall be void. Punishment of bigamy. [New] *Cf.* s. 44, S.M.A. 45 of 1860

Punishment for contravention of certain other conditions for marriage. [New] *Cf.* s. 18, H.M.A.

52. Every person who procures a marriage of himself or herself to be solemnized under this Act in contravention of the conditions specified in clauses (*ii*), (*iv*) and (*v*) of section 4 shall be punishable,—

(*a*) in the case of a contravention of the condition specified in clause (*ii*) of section 4, with simple imprisonment which may extend to one month, or with fine which may extend to one thousand rupees, or with both;

(*b*) in the case of a contravention of the condition specified in clause (*iv*) of section 4, with simple imprisonment which may extend to fifteen days, or with fine which may extend to one thousand rupees, or with both; and

(*c*) in the case of a contravention of the condition specified in clause (*v*) of section 4, with fine which may extend to one thousand rupees.

Penalty for false oath, declaration, notice or certificate for procuring marriage. [S. 66, Christian Marriage Act.] Contrast s. 45, S.M.A.

53. Whoever, for the purpose of procuring a marriage or licence of marriage, intentionally,—

(*a*) where an oath or declaration is required by this Act or by any Church according to the rules of which a marriage is intended to be solemnized, makes a false oath or declaration, or

(*b*) where a notice or certificate is required by this Act, signs a false notice or certificate,

shall be punishable with imprisonment for a term which may extend to three years, and shall also be liable to fine.

False personation by person objecting to marriage. [S. 67, Christian Marriage Act.] 45 of 1860.

54. Whoever makes an objection to the issue, by a licensed Minister or a Marriage Registrar, of a certificate, by falsely representing himself to be a person whose consent to the marriage is required by law, knowing or believing such representation to be false, or not having reason to believe it to be true, shall be deemed to be guilty of the offence described in section 205 of the Indian Penal Code and punishable accordingly.

Solemnizing marriage without due authority. [S. 68, Christian Marriage Act.] *Cf.* s. 75 (1) (*a*), M.C.A.

55. Whoever, not being authorised by section 6 to solemnize a marriage, solemnizes or professes to solemnize under this Act a marriage between persons who are Christians, shall be punishable with imprisonment for a term which may extend to ten years, and shall also be liable to fine which may extend to two thousand rupees.

Penalty for not deciding objections within prescribed period, or refusal to solemnize marriage. [New]

56. (*1*) Whoever, being a licensed Minister or a Marriage Registrar, in contravention of the provisions of sub-section (*3*) of section 16, wilfully or without just cause takes more than thirty days from the date of any objection to an intended marriage for the purpose of inquiring into the matter of the objection and arriving at a decision, shall be punishable with fine which may extend to one hundred rupees.

(2) Whoever, being a licensed Minister or a Marriage Registrar, refuses, without just cause, to solemnize a marriage under this Act, shall be punishable with simple imprisonment for a term which may extend to three months, or with fine which may extend to one hundred rupees, or with both.

Penalty for wrongful action of Marriage Registrar or Minister, etc. [Ss. 69, 70, 71, 72 and 73, Christian Marriage Act.]

57. Whoever, being authorised under this Act to solemnize a marriage, knowingly and wilfully—

(*a*) solemnizes such marriage—

(*i*) without publishing a notice regarding such marriage as required by any provision of this Act, or

(*ii*) in contravention of any other provision contained in this Act, or

(*b*) issues any certificate in contravention of any provision contained in this Act,

Cf. s. 46, S.M.A.

shall be punishable with simple imprisonment for a term which may extend to one year, or with fine which may extend to five hundred rupees, or with both.

Destroying or falsifying Marriage Certificate Books. [S. 75, Christian Marriage Act.]

58. Whoever, by himself or another, wilfully destroys or injures any Marriage Certificate Book, or any part thereof or any authenticated extract therefrom, or falsely makes or counterfeits any part of such book, or wilfully inserts any false entry in any such book or authenticated extract, shall be punishable with imprisonment for a term which may extend to seven years and shall also be liable to fine which may extend to two thousand rupees.

Penalty for publishing proceedings held *in camera*. [New] *Cf.* s. 22 (2), H.M.A.

59. Any person who prints or publishes any matter in contravention of the provisions contained in section 48 shall be punishable with fine which may extend to one thousand rupees.

Limitation for prosecutions. [S. 76, Christian Marriage Act.]

60. No prosecution for any offence punishable under section 52, section 53, section 54, section 55, section 56, section 57, section 58 or section 59 shall be instituted after the expiry of two years from the date on which the offence is committed.

CHAPTER X

MISCELLANEOUS

Liability for frivolous objections. [S. 49 Christian Marriage Act.] *Cf.* s. 9 (2), S.M.A.

61. (*1*) Where any person makes an objection against the issue of any certificate of notice of marriage and the Marriage Registrar under section 16, or the district court under sub-section (*4*) of section 5 or under section 17, declares that the objection is not reasonable and has not been made in good faith, the Marriage Registrar or the district court, as the case may be, may, after giving such person a reasonable opportunity of being heard, award,

by way of compensation, costs, not exceeding one thousand rupees, to the parties to the intended marriage.

(2) Any person aggrieved by an order of the Marriage Registrar or the district court under sub-section (1) may, within a period of thirty days from the date of the order, appeal to the district court or the High Court, as the case may be.

(3) Subject to any order passed on appeal under sub-section (2), the order of the Marriage Registrar or the district court under sub-section (1) shall be final.

(4) Any order of costs made under sub-section (1) may be executed in the same manner as a decree passed by the district court within the local limits of whose jurisdiction the office of the Marriage Registrar is situate.

Savings regarding irregularities. [S. 77, Christian Marriage Act.]

62. Whenever any marriage has been solemnized between two Christians under this Act in accordance with the provisions of section 6, it shall not be void merely on account of any irregularity in respect of any of the following matters, namely:—

(*i*) any statement made in regard to the dwelling place of the persons married;

(*ii*) the notice of the marriage;

(*iii*) the certificate of the notice of the marriage or translation thereof;

(*iv*) the registration of the marriage.

Correction of errors.

[S. 78, Christian Marriage Act.]

Cf. s. 49, S.M.A.

63. (1) Any person authorised to solemnize a marriage under this Act, who discovers any error in the form or substance of any entry in the Marriage Certificate Book may, within one month next after the discovery of such error, in the presence of the persons married, or, in case of their death or absence, in the presence of two other witnesses, correct the error by entry in the margin, without any alteration of the original entry and shall sign the marginal entry and add thereto the date of such correction.

(2) Every correction made under this section shall be attested by the witnesses in whose presence it was made.

(3) Where a copy of any entry has already been sent under sub-section (3) of section 23 to the Registrar-General, such person shall make and send in like manner a separate certificate of the original erroneous entry and of the marginal corrections therein made.

Solemnization of marriage by Ministers of Church in places sanctioned by Custom or usage.

[New]

64. Subject to the other provisions contained in this Act, a marriage under this Act may be solemnized by a Minister of a recognised Church or a licensed Minister—

(*a*) in a church building, or

(*b*) in any other place agreed upon between the parties to the marriage, if solemnization at such place is in accordance with the custom or usage applicable to the community to which the parties to the marriage belong.

65. Every Marriage Registrar shall be deemed to be a public servant within the meaning of section 21 of the Indian Penal Code. Marriage Registrars to be deemed to be public servants. [New] 45 of 1860.

66. The Marriage Notice Book shall be open for inspection at all reasonable times, without fee, by any person desirous of inspecting the same. Inspection of Marriage Notice Book. [S. 40, part, Christian Marriage Act.]

67. (*1*) The Marriage Certificate Book kept under this Act shall at all reasonable times be open for inspection and shall be admissible as evidence of the statements therein contained. Inspection of Marriage Certificate Book. [S. 79 and s. 80, part, Christian Marriage Act.]

(*2*) Certified extracts from the Marriage Certificate Book shall, on application, be given by the person who solemnized the marriage or other person having the custody for the time being of the Marriage Certificate Book, to any person who applies for the same. *Cf.* s. 47, S.M.A. and s. 8 (3), H.M.A.

(*3*) Inspection of the Marriage Certificate Book under sub-section (*1*) and the grant of certified extracts therefrom under sub-section (*2*) shall be—

(*a*) without fee, if applied for by the parties to the marriage at or about the time of the marriage;

(*b*) subject to the payment of the prescribed fee, in other cases.

68. Every certified copy, purporting to be signed by the person entrusted under this Act with the custody of any Marriage Certificate Book, of an entry of a marriage in such Book, shall be received in evidence without production or proof of the original. Certified copy to be evidence. [S. 80, part Christian Marriage Act.]

69. (*1*) Any notice to be given or declaration to be made by any person in respect of an intended marriage under this Act may be given or made in a language commonly in use in the State or the part of State in which the notice is given or declaration made, or in English. Language of notices and declarations. [New]

(*2*) Every person solemnizing a marriage under this Act shall satisfy himself that the parties to the marriage have understood the contents of the notice given and the declaration made by each of them, and (where a certificate of [Ss. 23, 57 and 58, Christian Marriage Act.]

notice of marriage is required to be issued under this Act) of the certificate of notice of marriage issued for the marriage.

Ministers of recognised Churches not compelled to solemnize marriages contrary to the rules of the Church. [s. 58, Divorce Act, extended]

70. No Minister of a recognised Church shall be compelled to solemnize any marriage, the solemnization of which would be contrary to the rules of the Church of which he is a Minister.

Powers of Marriage Registrars in respect of inquiries. 5 of 1908 [s. 53, Christian Marriage Act.] *Cf.* s. 9 (1), S.M.A.

71. For the purpose of any inquiry under this Act, the Marriage Registrar shall have all the powers vested in a civil court under the Code of Civil Procedure, 1908, when trying a suit in respect of the following matters, namely:—

(*a*) summoning and enforcing the attendance of witnesses and examining them on oath;

(*b*) discovery and inspection;

(*c*) compelling the production of documents;

(*d*) reception of evidence on affidavits; and

(*e*) issuing commissions for the examination of witnesses;

and any proceeding before the Marriage Registrar shall be deemed to be a judicial proceeding within the meaning of section 193 of the Indian Penal Code. 45 of 1860.

Explanation.—For the purpose of enforcing the attendance of any person to give evidence, the local limits of the jurisdiction of the Marriage Registrar shall be the local limits of his district.

Power to make rules. [Ss. 82 and 83, Christian Marriage Act.] *Cf.* s. 50, S.M.A.

72. (*1*) The Central Government may, by notification in the Official Gazette, make rules for carrying out the purposes of this Act.

(*2*) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:—

(*a*) the duties and powers of Marriage Registrars and the areas in which they may exercise jurisdiction;

(*b*) the manner in which a Marriage Registrar may hold inquiries under this Act, and the procedure therefor;

(*c*) the form and manner in which any books required by or under this Act shall be maintained;

(*d*) the fees that may be levied for the performance of any duty imposed upon any person under this Act;

(*e*) the conditions under which licenses to solemnize marriages may be issued by the State Government, and the circumstances under which they may be revoked;

(*f*) the surrender of such licences on the expiry thereof by revocation or otherwise;

(*g*) the procedure to be followed by Committees constituted under section 7;

(*h*) the form in which, and the intervals within which, copies of entries in the Marriage Certificate Book shall be sent to the Registrar-General;

(*i*) any other matter which may be or requires to be prescribed.

(*3*) Every rule made under this section shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days, which may be comprised in one session or in two successive sessions, and if, before the expiry of the session in which it is so laid or the session immediately following, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

Rules by the High Court.

73. The High Court may, by notification in the Official Gazette, make such rules consistent with the provisions contained in this Act as it may consider expedient for the purpose of regulating the procedure to be followed in petitions under sub-section (*5*) of section 5 or under section 17, and for the purpose of carrying into effect the provisions of Chapters IV to VII.

[s. 62, Divorce Act.]

Cf. s. 41 (1), S.M.A.

Savings regarding marriages so solemnized before the Act.

74. A marriage solemnized before the commencement of this Act, which is otherwise valid, shall not be deemed to be invalid merely by reason of any provision contained in this Act.[1]

[New]

Cf. the wording of s. 29 (1), H.M.A.

Savings for other marriages.

75. Nothing in this Act shall affect the provisions of the Special Marriage Act, 1954, or apply to any marriage solemnized under that Act.

[New]

43 of 1954.

[1]An alternative draft, based on section 79 (7) of the (English) Marriage Act, 1949, would be as follows :—

"Nothing in this Act shall affect the validity of any marriage solemnized before the commencement of this Act".

Cf. s. 29 (4) H.M.A.

But the words "affect the validity" would extend the protection, it can be argued, to voidable marriages also (which is not the intention). The phraseology used in the English Act has not, therefore, been adopted.

Repeal. 4 of 1869 15 of 1872

76. (*1*) The Indian Divorce Act, 1869, the Indian Christian Marriage Act, 1872, the Indian and Colonial Divorce Jurisdiction Act, 1926, the Indian and Colonial Divorce Jurisdiction Act, 1940, the Indian Divorce Act, 1945, and any enactment corresponding to the Indian Christian Marriage Act, 1872, in force in the territories which, immediately before the first day of November, 1956, were comprised in the States of Travancore-Cochin and Manipur are hereby repealed.

15 of 1872

Cf. s. 51 (2), (*a*), S.M.A.

(*2*) Notwithstanding such repeal,—

15 of 1872

(*a*) all marriages duly solemnized under the Indian Christian Marriage Act, 1872, or any such corresponding enactment, shall be deemed to have been solemnized under this Act;

Contrast s. 29 (3), H.M.A. and s. 51 (2)(*b*), S.M.A.

4 of 1869

15 of 1872

(*b*) all suits and proceedings in causes and matters matrimonial which, when this Act comes into force, are pending in any court under the Indian Divorce Act, 1869, or under the Indian and Colonial Divorce Jurisdiction Act, 1926, or under the Indian and Colonial Divorce Jurisdiction Act, 1940, or under the Indian Christian Marriage Act, 1872, or any such corresponding enactment, shall be dealt with and decided by such court as if this Act had not been passed.

Cf. s. 51 (3), S.M.A.

10 of 1897

(*3*) The provisions of sub-section (*2*) shall be without prejudice to the provisions contained in section 6 of the General Clauses Act, 1897, which shall also apply to the repeal of the Indian and Colonial Divorce Jurisdiction Act, 1926, the Indian and Colonial Divorce Jurisdiction Act, 1940, the Indian Divorce Act, 1945, the Indian Divorce Act, 1945, and such corresponding enactment.

THE FIRST SCHEDULE

[New]

PROHIBITED RELATIONSHIP

[*See* section 2(m)]

PART I

Cf. First Schedule, S.M.A.

1. Mother
2. Father's widow (step-mother)
3. Mother's mother.
4. Mother's father's widow (step-grand-mother)
5. Father's mother
6. Father's father's widow (step-grand-mother)
7. Daughter
8. Son's widow
9. Daughter's daughter

10. Daughter's son's widow
11. Son's daughter
12. Son's son's widow
13. Sister
14. Wife's daughter (step-daughter)
15. Wife's mother
16. Wife's son's daughter (step-son's daughter)
17. Wife's daughter's daughter (step-daughter's daughter)
18. Wife's father's mother
19. Wife's mother's mother.

Explanation.—For the purposes of this Part, the expression "widow" includes a divorced wife.

PART II

20. Father
21. Mother's husband (step-father)
22. Father's father
23. Father's mother's husband (step-grand-father)
24. Mother's father
25. Mother's mother's husband (step-grand-father)
26. Son
27. Daughter's husband
28. Son's son
29. Son's daughter's husband
30. Daughter's son
31. Daughter's daughter's husband
32. Brother
33. Husband's father
34. Husband's son (step-son)
35. Husband's son's son (step-son's son)
36. Huband's daughter's son (step-daughter's son)
37. Husband's father's father
38. Husband's mother's father.

Explanation.—For the purposes of this Part, the expression "husband" includes a divorced husband.

THE SECOND SCHEDULE

[*See* section 12(i)]

[Sch. I, Christian Marriage Act.]

FORM OF NOTICE OF INTENDED MARRIAGE

To

Cf. Second Schedule, S.M.A.

The [licensed Minister][1] [Marriage Registrar][1] for .....

We hereby give you notice that a marriage under the Christian Marriage and Matrimonial Causes Act, ... is intended to be solemnized between us within three calendar months from the date hereof.

Name	Condition	Occupation	Date of birth	Dwelling place	Permanent dwelling place, if present dwelling place not permanent	Length of residence	Church, chapel or place of worship in which marriage is to be solemnized (if the marriage is to be so solemnized)
A. B.	Unmarried / Widower / Divorcee						
C. D.	Unmarried / Widow / Divorcee						

[1]Strike off what is inapplicable.

Witness our hands, this..... day of.....19.....

Sd. A. B.

Sd. C. D.

NOTE.—In the case of a minor bride for whose marriage the consent of her guardian is required, the guardian should sign on her behalf.

THE THIRD SCHEDULE

[*See* section 15(1)]

[Sch. II, Christian Marriage Act.]

FORM OF CERTIFICATE OF NOTICE

I, ... do hereby certify that, on the .....day of ....., notice was duly entered in

my Marriage Notice Book of the marriage intended between the parties therein named and described, delivered under the hand of both the parties, that is to say,—

Name	Condition	Occupation	Date of birth	Dwelling place	Permanent dwelling place, if present dwelling place not permanent	Length of residence	Church, chapel or place of worship in which marriage is to be solemnized (if the marriage is to be so solemnized)
A. B.	Unmarried / Widower / Divorcee						
C.D.	Unmarried / Widow / Divorcee						

and that the declaration.....
required by section*.....
of the Christian Marriage and Matrimonial Causes Act .....*
has been duly made by the said.....

Date of notice entered.....

Date of certificate given.....

Witness my hand this.....day of.....19.....

(Sd.)

This certificate will be void unless the marriage is solemnized on or before the..... day of.....19.....

Licensed Minister[1]
Marriage Registrar[1]

THE FOURTH SCHEDULE

[*See* sections 11(2)(c) and 15(2)(b)]

DECLARATION TO BE MADE BY THE BRIDEGROOM [New]

I, A. B., hereby declare as follows:— *Cf.* Third Schedule, S.M.A.

1. I am at the present time unmarried (or a widower or a divorcee, as the case may be).

2. I have completed .... years of age.

*To be filled up.
[1]Strike off what is inapplicable.

3. I am not related to C. D. (the bride) within the prohibited relationship.

4. I am a Christian.

5. I am aware that, if any statement in this declaration is false, I am liable to imprisonment and also to fine.

(Sd.) A. B. (the Bridegroom).

DECLARATION TO BE MADE BY THE BRIDE

I, C. D., hereby declare as follows:—

1. I am at the present time unmarried (or a widow or a divorcee, as the case may be).

2. I have completed .... years of age.

3. I am not related to A. B. (the bridegroom) within the prohibited relationship.

4. I am a Christian.

5. Consent of my guardian in marriage, Shri .... has been obtained to my proposed marriage with A.B.[1]

6. I am aware that, if any statement in this declaration is false, I am liable to imprisonment and also to fine.

सत्यमेव जयते (Sd.) C. D. (the Bride).

NOTE :—In the case of a minor bride for whose marriage the consent ofan is required, the guardian should sign on her behalf.

Signed in our presence by the above named A.B. and C.D. So far as we are aware there is no lawful impediment to the marriage.

(Sd.) G. H.
(Sd.) I. J. } Two witnesses.

(Countersigned) E. F.
Minister of a recognised Church[2]
Licensed Minister[2]
Marriage Registrar[2]

Dated the .....day of ..... 19 .....

[1]Strike off if not applicable. If in lieu of guardian's consent, permission of the district court has been obtained state so.

[2]Strike off what is inapplicable.

THE FIFTH SCHEDULE

[*See* section 23(1)]

FORM OF CERTIFICATE OF MARRIAGE

I, E. F., hereby certify that on the ..... day of .....19 ..... A.B. and C.D.[1] appeared before me and that the declaration required by section .....*..... of the Christian Marriage and Matrimonial Causes Act, 19..... was duly made, and that a marriage under that Act was solemnized between them in my presence *and in the presence of two witnesses who have signed hereunder.* [Schs. III and IV, Christian Marriage Act.] *Cf.* Fourth Schedule S.M.A.

(Sd.) E. F.
Minister of a recognised Church[2]
Licensed Minister[2]
Marriage Registrar.[2]
(Sd.) A. B. (Bridegroom).
(Sd.) C. D. (Bride).
(Sd.) G. H.
(Sd.) I. J. Two witnesses.

Dated the ..... day of ..... 19.....

*To be entered.

[1]Herein give particulars of the parties.

[2]Strike off what is inapplicable.

APPENDIX II

NOTES ON CLAUSES

Clause 1

Title.—The word "Indian" has been omitted in consonance with recent legislative practice. The words "and Matrimonial Causes" have been used, instead of the word "divorce", since "divorce" is a narrower expression than "matrimonial causes".

Extent.—The reasons for extending the new Act to Manipur and Travancore-Cochin have already been stated.[1]

(i) *Marriage*

Application.—The Act will apply to all marriages solemnized within India. This result has been achieved by the extent clause, which applies the Act to the whole of India except the State of Jammu and Kashmir. As regards the extra-territorial operation of the Act, Indians domiciled in the territories to which the Act extends will, if Christians, be governed by the Act, wherever they are. (It is considered unnecessary to add the requirement that they must be citizens of India).

(ii) *Matrimonial causes*

As regards matrimonial causes, the separate clause dealing with the jurisdiction of Indian courts may be seen.[2]

The application of the Act to any person is, of course, subject to the provisions laying down certain restrictions[3] on the powers of court—a proposition which, it is felt, need not be expressly enacted in this clause.

Commencement.—The provisions relating to recognition of churches should come into force at once, so that the necessary machinery may be set up and recognition granted before the substantive provision comes into force. Though the General Clauses Act may also ensure this, still, to avoid all doubts, a specific provision has been made.

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[1]See the body of the Report, para. 3.
[2]See draft clause 35.
[3]Draft clauses 34 and 35.

Clause 2

"Christian"—the singular "a person" has been preferred to the plural.

The following alternative definitions were considered, but have not been accepted:—

"(i) 'Christian' means a person who has become a member of some Christian Church by an act *customary* in that Church for the admission of members, and continues to be such unless and until the laws of his Church determine otherwise".

"(ii) 'Christian' means a person who has become a member of some Christian Church by an act *recognized* in that Church".

"(iii) 'Christian' means a person who has been baptised".

The emphasis in all these definitions is on certain ceremonies; but, since religion is a matter of persuasion, it is considered unnecessary to insist on overt ceremonies.

The word "profess" is not likely to create any difficulty. Even the dictionary meaning of "Christian" is in harmony with the definition adopted in the draft.

"Church building"

The expression "Church" is used in two senses—

(i) "Church" with the capital C—denoting the organisation;

(ii) "church" with the small c—denoting the place of worship.

To avoid confusion, the expression "church", in the second sense, has been replaced by "church building".

["*Custom*" and *"usage"*—have been defined in the Hindu Marriage Act. But it is considered that it is unnecessary to define either of these expressions].

Clause 2—*"desertion"*—

(a) The existing definition of "desertion" in the Divorce Act says that desertion implies abandonment of one party by the other. This does not appear to indicate, in detail and specifically, the essential ingredients of desertion.

The definition in the Hindu Marriage Act does not purport to analyse the concept of desertion; it merely stresses certain ingredients—*i.e.*,—"without reasonable cause" etc.

The meaning of desertion as established by judicial decisions is this—that there must be a failure of the discharge of matrimonial obligations—what is called the total

forsaking of "consortium". The sub-clause under discussion, therefore, attempts a fresh definition of desertion, bringing out the aspect of withdrawal from cohabitation while also mentioning the other ingredients.

(b) The definition in the Hindu Marriage Act has been discussed in a recent decision of the Bombay High Court.[1] An analysis of that decision would show that desertion requires—

(i) *separation in fact* between the two spouses;

(ii) an *intention,* on the part of the deserting spouse, to *forsake* or abondon the other spouse;

(iii) absence of consent on the part of the deserted spouse; and

(iv) absence of conduct on the part of the deserted spouse giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention.

Intention to forsake or abandon is thus an essential ingredient, and this has been sought to be brought out in the draft clause by the words "with the intention of bringing co-habitation permanently to an end". Factual separation has been brought out by the words "withdrawal" etc.

As regards ingredients No. (iii) and (iv) above, the language of the Hindu Marriage Act has been followed.

(c) The inclusive part of the definition in the Hindu Marriage Act, which says that desertion includes "the wilful neglect" of one party by the other, has been omitted in the sub-clause under discussion, because it will be covered by the words "withdrawal from co-habitation". It may also be pointed out that it has been held[2] that the conduct of the spouse, in order that it may amount to wilful neglect, must be "deliberate and intentional failure" to perform the obligations of married life, indicative of a total repudiation of the obligations of marriage.[2] "The intention to desert is implicit in the concept of desertion and is implict in wilful neglect".[3]

(d) The draft definition will also bring out one essential ingredient of the concept of desertion—intention to desert *permanently.* "In its essence, desertion means the

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[1] *Meena* vs. *Lachman,* (1959) 61 Bombay Law Reporter 1549 (Division Bench).

[2] See the judgment of Shah, J., in *Meena* vs. *Lachman,* (1959) 61 Bombay Law Reporter, 1549, 1552.

[3] Desai, J., in *Meena* vs. *Lachman,* (1959) 61 Bombay Law Reporter, 1549, 1557.

intentional *permanent* forsaking and abandonment of one spouse by the other without the other's consent, and without reasonable cause."[1]

(e) For an elaborate definition, see the Royal Commission's Report.[2]

Clause 2—"diplomatic officer"—

Follows the language of the corresponding provision in the Special Marriage Act.

Clause 2—"district"—

Follows the language of the corresponding provision in the Special Marriage Act.

Clause 2—"High Court" (omitted)—

The definition of the expression "High Court", occurring in existing section 3(1) of the Indian Divorce Act, has been omitted, for the following reasons:—

(i) So far as "States" proper are concerned, the respective High Courts for the States will exercise jurisdiction as at present. So far as "Union Territories" are concerned, the High Court exercising jurisdiction or the Judicial Commissioner concerned, can be regarded as the High Court by virtue of the definition in the General Clauses Act, which applies to all civil cases.

(ii) The Judicial Commissioners now exercise jurisdiction to issue writs etc., and there is no harm if they are regarded as High Courts for this Act also.

(iii) There is no express definition of the expression in the Hindu Marriage Act or in the Special Marriage Act.

(iv) The expression occurs at very few places in the Bill as drafted.[3]

Clause 2—"India"—Needs no comments.

Clause 2—"Licensed Minister"—

This is new, and is intended to avoid the use of the lengthy expression "Minister of Church licensed by the State Government" in the substantive provisions.

Clause 2—"Marriage Registrar"—

This is new. There is no corresponding provision in the Special Marriage Act, but it has been inserted here for the sake of precision.

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[1]See *Bipin Chander Jaisinghbhai Shah* vs. *Prabhawati*, (1956), S.C.R 838, 850.

[2]Report of the Royal Commission on Marriage and Divorce, (1955), Cmd. 9678, para. 155 (*iii*).

[3]It occurs, for example, in the rule-making clause—Clause 73.

Clause 2—"*Minister of recognised Church*"—

This is new, and is intended to distinguish between—

(i) Ministers of recognised Churches;

(ii) Ministers licensed by the State Governments.[1]

The use of the expression under discussion, and the expression "licensed Ministers" etc., will make it clear whether a particular substantive provision applies to all Ministers or only to Ministers of certain classes.

Clause 2—"*minor*"—

The existing provision in the Christian Marriage Act defines a minor as a person who has not completed the age of 21 years and who is not a widower or widow. Two changes have been made in this definition,—

(a) instead of the age of 21 years, the age of 18 years has been substituted, in conformity with the general law as contained in the Indian Majority Act;

(b) the exception for widowers and widows has been omitted, since it is felt that even widowers and widows (if minor), should be subject to the special provisions of the Act applicable to minors.

The existing definition in the Divorce Act makes special provisions for "native" boys and girls. This restriction has been removed. For non-natives, the provision in the Divorce Act treats as "minors" all "*un-married* children who have not completed the age of 18 years". This has been adopted in substance in the draft in so far as the *age* is concerned. But the change made is, that all children below 18, whether married or unmarried, will be "minor" for the purposes of the new Act.

The expression "completed" the age has been adopted here as well as elsewhere in the draft clauses.

[Section 78(1) of the (English) Matrimonial Causes Act, 1950, defines a minor as a "person *under the age* of twenty-one years".

Section 3 of the Indian Majority Act, 1875, uses the word "attained".

Section 4(a) of the Hindu Minority and Guardianship Act uses the word "completed".

Section 4(1) of the Guardians and Wards Act says "attained majority".

Section 4(c), Special Marriage Act and section 5(iii), Hindu Marriage Act say, "completed the age"].

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[1]*Vide* the body of the Report, para. 19.

Clause 2—"prescribed"—

Needs no comments.

Clause 2—"prohibited relationship"—

The definition is new and follows the language of the Special Marriage Act. But one departure has been made. That Act defines "degrees" of prohibited relationship, but since some of the prohibited relationships do not represent any "degrees", the word "degrees", has been omitted.

Clause 2—"recognised Church"—

This is new, and is consequential on the changes made in the provisions regarding Churches having the system of episcopal ordination.[1]

Clause 2—"Registrar-General"—

A provision has been added to cover the cases where the Central Act (the Births, Deaths and Marriages Registration Act, 1886) is not itself in force in the place concerned.

Clause 2—"rule"—

This is new. The lengthy formula "rule, custom, rite or ceremoney" occurs in existing section 5 of the Christian Marriage Act. The definition under discussion will shorten the formula. The definition will be useful for other draft clauses also, where a reference has been made to rules of Church.

Clause 3

The following changes have been made in the existing provision:—

(i) The provision is sought to be changed by limiting its scope to cases where *both* the parties are Christians.[2]

(ii) The existing provision to the effect that a marriage solemnised otherwise than in accordance with the provisions under this Act shall be void, has been omitted as unnecessary.

(iii) Marriages solemnised under the Special Marriage Act have been expressly excluded from the scope of the section. Though there is also a general savings for such marriages,[3] it has been considered necessary, in the interests of clarity, to insert that saving provision here also.

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[1]See clause 7.

[2]For a detailed discussion, please see the body of the Report, para. 4.

[3]See clause 75.

(iv) The expression "persons both of whom are Christians" has been adopted, as more accurate. (The form "persons.....Christians" has been adopted in other clauses also, except in lengthy sentences where it was found to be adding to the length.)

Clause 4

The conditions for marriage have been put here on the lines of the corresponding provision in the Hindu Marriage Act and the Special Marriage Act.[1]

Sub-clause (*i*) has been taken from the corresponding provision in the two Acts referred to above.

Sub-clause (*ii*) has been taken from the corresponding provision in the two Acts referred to above. The exception for custom has been taken from the Hindu Marriage Act. It is considered unnecessary to refer to "usage" here.

Sub-clause (*iii*) has been taken from the corresponding provision in the two Acts referred to above.

Sub-clause (*iv*) has been taken from the corresponding provision in the two Acts referred to above.

Sub-clause (*v*) has been taken from the corresponding provision in the Hindu Marriage Act. As to the powers of the district court, the relevant clause[2] may be seen.

Sub-clause (*vi*).—Since the new Act will apply to persons outside India,[3] this has been inserted on the lines of the corresponding provision in the Special Marriage Act.

Clause 5

General.—It is considered that a comprehensive provision relating to guardian in marriage would be desirable. The clause has been drafted generally on the basis of the corresponding provision in the Hindu Marriage Act. Important departures from that Act are explained below.

Sub-clause (*1*).—The list of guardians given in the sub-clause is much longer than that in the existing Act. A full list has been given, in order to make the position clear. [The list given in the Hindu Marriage Act has been followed, with the omission of the paternal uncle by half blood. He has been omitted in view of the social conditions of Christians.]

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[1]For a detailed discussion, please see the body of the Report, para. 22 *et seq.*

[2]Clause 5 (4).

[3]See clause 1.

Sub-clause (2).—A slight verbal departure from the Hindu Marriage Act is the use of the formula "has..... completed" in relation to the guardian. This is in conformity with the word "completed" used in other clauses.[1]

Sub-clause (3).—Needs no comments.

Sub-clause (4).—This differs from the Hindu Marriage Act, whereunder in such circumstances the guardian's consent is not necessary. In view of the social conditions of Christians, it is considered that such a provision would be useful.

The words "where no such person is living and willing etc. will make it clear that the sub-clause will apply not only where the persons entitled to act as natural guardians are dead, but also where, though living, they are not willing to act or able to act etc. Contrast the Hindu Marriage Act, where the words used are "In the absence of". It is considered that the wording adopted in the sub-clause will be more clear.

Existing section 45 of the Christian Marriage Act deals elaborately with the procedure to be followed in cases where a guardian refuses consent. This has been covered, in substance, in this sub-clause, but briefly. Apart from this change in form, the following changes of substance have been made in the provision regarding the court's permission:—

(*a*) The case where the guardian is insane has been omitted, since an insane guardian will be treated as incompetent to act, and the guardian next in order of preference will automatically take his place.

(*b*) The provision will apply to all marriages whether solemnized by ordained Ministers, licensed Ministers or Marriage Registrars.

(*c*) The provision has been made applicable to the father (as well as to any other guardian), since there is no reason why the case of the father's consent should be left uncovered.

(*d*) The petition will lie in all cases to the "district court" as defined in the definition clause.

(*e*) Unnecessary matter has been omitted.

Sub-clauses (5) *and* (6) need no further comments.

Sub-clause (7).—It is considered that the decision of the district court granting or refusing permission should be final and not subject to any appeal etc. Hence this sub-clause. (There is no such provision in the Hindu Marriage Act).

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[1]See notes to clause 2—"Minor".

Sub-clauses (8) *and* (9) need no further comments.

Clause 6

General.—The various classes of marriages mentioned in section 5 of the existing Act have been dealt with here.

The category of marriage by certificate, applicable to Indian Christians under section 60 of the Indian Christian Marriage Act, has been omitted.[1]

Sub-clause (*a*).—The existing Act specifies certain particular Churches whose Ministers are episcopally ordained. While preserving the separate category of persons so authorised to solemnize marriages, the sub-clause under discussion requires that they should be Ministers of "recognized Churches". The manner in which the recognition will be accorded is dealt with separately.[2]

The manner of solemnization of marriages by such Ministers has been dealt with separately.[3]

Sub-clause (*b*).—Instead of the formula "Minister of Religion" the formula "Minister of Church" has been adopted as more appropriate, everywhere in the draft clauses.

Though the expression "licensed Minister" has been defined, it is felt that in the sub-clause under discussion, the full expression "Minister.....licensed" etc. would be better, in view of the importance of the sub-clause.

Sub-clause (e) need no comments

Clause 7

This deals with recognition of Churches.[4]

The criteria laid down in sub-clause (2) will ensure that recognition is granted to Churches having an organisation and standing.

Clause 8

Only verbal changes have been made in the existing section, as follows:—

(i) It has been made clear that the licence may be granted either for the whole State or for any part thereof.

(ii) The mention of the power to revoke the licence has been omitted, since it is felt that this will be covered by the provisions of section 21 of the General Clauses Act, under which a power to issue an order includes a power to rescind it.

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[1]For a detailed discussion, see the body of the Report, para. 7.

[2] See clause 7.

[3]See clause 11.

[4]For a detailed discussion, see the body of the Report, para. 18.

(iii) The words "so far as regards the territories under its administration etc." have been omitted, as unnecessary.

Clause 9

Sub-clauses (1) *and* (2).—Slight verbal changes have been made. They need no comments.

The requirement that the Marriage Registrars should be Christians has been omitted, since their functions are not sacramental.

Sub-clause (3).—Under the existing section, when there is a temporary vacancy in the office of the Marriage Registrar, the District Magistrate is directed to act as Marriage Registrar during the vacancy. The structure of the administrative and judicial machinery in the various States, however, (and particularly the nomenclature of the officer at the head of the District), may vary from State to State, and hence the sub-clause under discussion leaves the matter elastic, by providing that such person as the State Government may authorise will act as the Marriage Registrar during the vacancy.

Clause 10

Since the new Act will be applicable (to persons domiciled in India) outside the territories to which the Act extends[1], it becomes necessary to provide for the appointment of Marriage Registrars for those territories. Hence this clause, which is modelled on the corresponding section in the Special Marriage Act.

Clause 11

Sub-clause (v).—Existing section 5, of the Christian Marriage Act provides (in substance) that an episcopally ordained Minister may solemnize marriages according to the rules, rites, ceremonies and customs of that Church. This has been adopted here, using the short expression "rules" which has been defined separately.[2]

An additional requirement of the presence of at least two witnesses, has been inserted since it is felt that this should apply to all marriages under the Act.

Sub-clause (2).—The existing Act does not lay down any such obligation; but since the proposed conditions of marriage will now apply to marriages solemnized by any person under the Act,[3] it is felt that there should be a specific obligation on all persons solemnizing marriages under the Act to see that the conditions for marriage are

[1]See clause 1 (2).

[2]See clause 2—"rule".

[3]See clause 4.

fulfilled, that there is no lawful impediment to the marriage and that the parties make a declaration to that effect. Compare sections 17, 18, 41 and 42 of the Christian Marriage Act, which are confined at present to licensed Ministers and Marriage Registrars.

As an example of other "lawful impediments", see section 57 Divorce Act.

Clause 12

Provisions which are common to marriages solemnized by Ministers licensed by the State Government and marriages solemnized by or in the presence of Marriage Registrars have been put in this group, in order to avoid repetition.

Sub-clause (1), *opening paragraph*.—The provision has been simplified on the lines of the corresponding provision in the Special Marriage Act. Following that, it has been provided that the notice must be given by *both* the parties.

Sub-clause (1), *paragraph* (*a*).—Slight verbal changes have been made, which do not need any comments.

Sub-clause (1), *paragraph* (*b*).—The existing provision is to the effect that the notice may be given to the Marriage Registrar of—

(*i*) the district within which the parties have dwelt; or

(*ii*) the districts within which each of the parties has dwelt, the notice in the latter case being given to the Marriage Registrar for each district concerned. This is likely to create confusion, and hence the paragraph under discussion provides that it will suffice if *at least one* party has resided in the district of the Marriage Registrar to whom the notice is given.

The words "as the case may be" have not been inserted (at the end) as unnecessary.

Sub-clause (2).—This is intended to make it clear that in the case of a minor bride, the notice must be signed by the guardian whose consent is required.[1]

Sub-clause (3).—Follows the language of the corresponding provision in the Special Marriage Act.

Clause 13

General.—Since there is some difference between the action to be taken by a licensed Minister and that to be

[1]Compare clauses 11 (2) and 15 (2)(*b*).

taken by a Marriage Registrar on the receipt of a notice, the subject has been dealt with in separate clauses.

Paragraph (*a*).—Small verbal changes have been made, which do not need any comments. The expression "church building", used here, has been defined separately.[1]

Paragraph (*b*) needs no comments. The verbal changes are very minor.

Paragraph (*c*) needs no comments.

Paragraph (*d*).—It is sufficient to say that the notice must be sent "by post"[2]. This paragraph will apply to every minor bride—that is, whether she is marrying with the guardian's consent or otherwise.

Other changes are verbal and minor, and hardly need any comments.

Clause 14

Paragraph (*a*) needs no comments. Small verbal changes have been made which are self-explanatory.

Paragraph (*b*).—The verbal changes made are very minor and need no comments.

Paragraph (*c*).—This is new. The object is to give publicity to the notice of marriage in the district where the parties are permanently residing.

The corresponding provision in the Special Marriage Act may be compared.

Clause 15

This follows, in substance, the existing provisions on the subject in the two Chapters relating to Ministers of Church licensed by the State and Marriage Registrars. The expression "certificate of notice" has been preferred to the lengthy expression "certificate of receipt" etc.

The minimum time limit of 4 days for the issue of the certificate, prescribed at present, is felt to be inadequate and has been increased to 7 days. For the same reason, the time-limit of 14 days (where a party is a minor) has been increased to 21 days.

The time-limit has been expressed in a condensed form in paragraph (*a*), of sub-clause (*2*), while paragraph (*b*) of that sub-clause is intended to focus attention on the necessity of a declaration by the parties.

Section 17, proviso, clause (*3*), of the existing Christian Marriage Act has been omitted. That relates, in substance, to objection by a guardian. The reason for the omission

[1]See clause 2—"church building".

[2]See section 27, General Clauses Act, 1897, as to service by post.

is, that under the draft clauses, the position of a guardian who wants to "forbid" a marriage will not differ from the position of any other person making an objection to the marriage.

It has been made clear that in a case of a minor bride the declaration is to be signed by her guardian whose consent is required under the Act.

Clause 16

Sub-clause (1).—This is modelled on the lines of section 7 of the Special Marriage Act. Differing from section 7(3) of the Special Marriage Act, however, this sub-clause provides that the objection must itself be in writing when submitted to the licensed Minister or the Marriage Registrar.

There is no corresponding provision in the existing Christian Marriage Act, authorising any person to file an objection; there are, of course, provisions relating to objections by guardians, *vide* sections 20 and 44 of the existing Act.

The period of seven days mentioned here harmonises with that given in the earlier clause.[1]

While in the case of minor brides the period mentioned in the preceding clause[1] is 21 days, it is not considered necessary to extend the maximum period for objections in the case of minor brides to 21 days. Whether the bride is a minor or a major, the period which will be allowed to the objector, will be 7 days in all cases. This course has been adopted in view of the over all time-limit of 30 days laid down by sub-clause (3).

Sub-clauses (2) *and* (3) follow the language of section 8(*1*), Special Marriage Act.

Clause 17

General.—Unnecessary matter has been omitted. The application will lie to the "district court", as defined in the definition clause, in all cases. The provision will apply to marriages solemnised by licensed Ministers also, since it seems desirable to extend its scope to such marriages.

Sub-clause (1).—A time-limit of twenty-one days has been imposed for making the petition. (The Special Marriage Act allows thirty days).

Sub-clause (2).—The language of this sub-clause has been taken, in part, from existing section 48, third paragraph, of the Christian Marriage Act. To make matters clear, provision for opportunity being given to the parties has been inserted.

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[1]See clause 15 (2) (*a*).

Sub-clause (3).—Slight changes have been made on the lines of the corresponding provision in the Special Marriage Act.

Clause 18

This is intended to deal with a case where objection is made to a marriage outside India. The corresponding provision in the Special Marriage Act has been followed; but, after the word "such statement as he thinks fit", the words "to make" have been added, as a drafting improvement.

Clause 19

This does not differ, in substance, from the existing provision. Slight verbal changes have however been made which are consequential on the scheme of other clauses.

Clause 20

The following changes have been made in the existing provision:—

(*i*) The existing section provides that the form or ceremony will be such as the Minister thinks fit to adopt. It is considered, however, that instead of leaving the choice to the Minister, he should be required to follow the rules of his Church. The provision has been altered accordingly.

(*ii*) It is not necessary to say expressly that there must be two witnesses 'besides the Minister'. These words have, therefore, been omitted.

(*iii*) Other changes are verbal and consequential.

Clause 21

Sub-clause (1).—The following changes have been made:—

(*i*) Instead of the words "form and ceremony", the words "form *or* ceremony" have been used. Compare existing section 25, Christian Marriage Act.

(*ii*) Unnecessary matter has been omitted.

(*iii*) The existing section requires that the witnesses should be "credible". This has been omitted, as unnecessary. It is not contained in the section relating to licensed Ministers (section 25, Christian Marriage Act).

(*iv*) The words "besides the Marriage Registrar" have been omitted as unnecessary.[1]

(*v*) A proviso has been added to the effect that the marriage will not be complete and binding unless each party says to the other the prescribed formula. This follows the corresponding provision in the Special Marriage Act.

[1]Compare clause 20 and the notes on that clause.

Sub-clause (2).—This is new and follows the corresponding provision in the Special Marriage Act.

It has been made clear that the place where the Marriage Registrar can be called should be situated in his district (that is, within his jurisdiction).

Clause 22

The existing provision allows a period of two months, after which a fresh notice etc. is necessary. This period is regarded as slightly inadequate, and has, therefore, been increased to three months.

Other changes made are very minor and verbal and do not need any comments.

Clause 23

General.—The provisions regarding registration of marriages which occupy thirteen sections in the existing Act, have been put here in a simplified and brief form. A uniform procedure has been applied to all marriages under the Act.

Sub-clause (1) is mainly modelled on the corresponding provision in the Special Marriage Act.

Sub-clause (2).—This follows the earlier part of section 13(2) of the Special Marriage Act. The latter part of that sub-section raising a conclusive presumption regarding signatures of witnesses—is considered unnecessary and has not therefore, been adopted.

Sub-clause (3).—Follows the language of the corresponding provision in the Special Marriage Act.

Clause 24

General.—Where either the husband or the wife withdraws from the society of the other, the other party can sue for restitution. This substantive proposition has been placed in sub-clause (*1*). The defences that are open have been put in sub-clause (*2*). The action to be taken by the court has been dealt with in sub-clause (*3*).

Sub-clause (1).—The wording used in the existing provision is that "either the wife or the husband" may sue for restitution. The wording used in the Hindu Marriage Act and the Special Marriage Act is, that the "aggrieved party" can sue. In the draft, the words "aggrieved party" have been used as more elegant.

Sub-clause (2).—The existing section provides that nothing shall be pleaded in answer to a petition for restitution, which would not be a ground for judicial separation or nullity. To this, the draft makes an addition by providing that a ground for divorce can also be pleaded. On this point, the draft follows the provision in the Hindu Marriage Act.

The negative language used here has been used in the other Acts also, and has therefore been retained.[1]

Sub-clause (3).—The existing section (as well as the corresponding provision in the other Acts) says, that if there is *"no legal ground"* why restitution should not be decreed, the court may decree it. This has been retained, after some consideration. (It was, at first, considered that the words "no valid defence" would be better. But, later, it was felt that the existing words are more precise[2], [3]).

Clause 25

The language of the corresponding provision in the Special Marriage Act has been followed, with necessary modifications.

The reference to divorce a *mensa et toro* has been omitted as not needed now.

Under the Hindu Marriage Act, failure to comply with a decree for restitution entitles the other party to divorce only and not to judicial separation. The Special Marriage Act entitles him to either of the two reliefs, and this has been followed, as more comprehensive, in the draft.

Clause 26

Sub-clause (1).—The provision that it shall not be obligatory for the petitioner to co-habit with the respondent, has been framed on the lines of the Hindu Marriage Act, and the Special Marriage Act. Though a subsequent clause[4] allows either party (after a decree for judicial separation) to apply for divorce, it is considered that the *release* from the obligation to co-habit should not extend to the respondent in the decree for separation.

Existing section 26, proviso, Indian Divorce Act refers to capacity to contract debts. This has been omitted as unnecessary.

Sub-clause (2).—Under the existing Act, the court can rescind the decree on the ground that it was obtained in the absence of the party applying for rescission and that there was reasonable cause for the alleged desertion (where desertion was a ground for decree). There is, however, some amount of confusion in the existing provision, because it mixes up the question of merits (reasonable cause) with the question of procedure (previous decree obtained in absence). Morever, so far as absence is concerned, the normal proceedings for setting aside an

[1]For a discussion of the effect of this provision, see J. D. M. Derrett, "Recent Decisions and some Questions in Hindu Law", (1960) 62 Bom. L.R. (Journal) 18, 20.

[2]As to the meaning of "legal ground", see L.R. (1913), p. 80; (1948) 1 A.E.R. 188; (1950), A.E.R. 832.

[3]*Cf.* Clause 39 (1).

[4]Clause 31.

exparte decree should suffice; and so far as reasonable cause for desertion is concerned, that could have been investigated in the earlier proceedings. The only justification, it is felt, for setting aside a decree of judicial separation, would be a change in the circumstances. Hence the power has been limited to cases where—

(*a*) the parties desire to come together, or

(*b*) for any other reason the court considers it just and reasonable to rescind the decree.

Category (*b*) above will preserve the wide discretion of the court, found in the corresponding provision in the Hindu Marriage and the Special Marriage Act.

Compare and contrast sections 14(2) and 14(3) of the (English) Matrimonial Causes Act, 1950.

Clause 27

This deals with the subject of void marriages.[1]

The form of the clause follows that of the corresponding provision in the Hindu Marriage Act, with this difference that while the Hindu Marriage Act confines the right to apply to the *parties* to the marriage (*vide* the words "on a petition presented by either party thereto"), the draft clause eliminates that requirement.

The reason for the omission is, that there may be occasions when a person who is not a party to the marriage has to sue for a decree of nullity of that marriage,—for example, when, after a marriage between A and B, A again enters into marriage with C and it therefore becomes necessary for B to sue for nullity of the second marriage. It may be noted that the provision in the Special Marriage Act does not require that the petition should be filed by either party.

(Under section 11 of the Hindu Marriage Act, it has been held[2], [3] that the previously married wife cannot apply under that section to have the later marriage declared null and void).

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[1]As to the substance of the clause, please see the discussion in the of the Report, para. 31 *et seq.*

[2]*Amarlal* v. *Vijayabai* (1959), A.I.R. 1959 Madhya Pradesh 400.

[3]*Lakshmi Ammal* v. *Ramswami* (1960), A.I.R. 1960 Madras 6.

The following chart will show the points of difference between void and voidable marriages:—

Void marriages	Voidable marriages
1	2
1. A void marriage does not require a judicial declaration before it can be treated as void.	1. A voidable marriage is valid unless set aside by a court.
2. A void marriage can be repudiated by *either* party.	2. A voidable marriage can be repudiated *only* by the party aggrieved by the flaw in the marriage.
3. A void marriage can be impugned by third parties also.	3. A voidable marriage cannot be impugned by third parties.
4. A void marriage can be annulled after the death of the parties.	4. Certain voidable marriages, for example those voidable for impotence, can be invalidated only during life time.
5. A void marriage does not change the domicile of the wife.	5. A voidable marriage confers a unity of domicile on the husband and the wife.
6. A decree of nullity is always retrospective	6. A decree of nullity in a voidable marriage, is properly speaking, prospective.

Clause 28

General.—This deals with voidable marriage[1].

Sub-clause (1).— In treating the marriage as *voidable* in the circumstances dealt with here, the corresponding provision in the Hindu Marriage Act has been followed.

(It should be noted here that the Special Marriage Act treats a marriage as void in cases of idiocy or impotence).

The *language* of the various paragraphs is also modelled on the Hindu Marriage Act, except that (with respect to impotence) the positive "till" has been preferred to the negative "until" used in the Hindu Marriage Act.

Sub-clause (2).—This is new. It is considered that where parties below age marry or where the guardian's consent in not obtained, the marriage should be voidable, though not void. The Special Marriage Act makes the marriage of a person below the requisite age void, and the sub-clause therefore differs from that. The Hindu Marriage Act is silent on the subject, and the sub-clause differs from that also by making an express provision. The sub-clause will, however, be limited to marriages solemnized after the new Act, since there was no such provision in the old Act. It is, further considered desirable to specify the period within which the parties may set aside the marriage[2].

[1]As to the substance of the provision, please see also the discussion in the body of the Report, para. 31 *et seq.*

[2]See clause 28 (4).

It is considered that in the case of the want of the guardian's consent, only the minor, that is the wife should have the right to avoid.

Sub-clause (3).—This follows the language of the corresponding provision in the Hindu Marriage Act and the Special Marriage Act.

As regards para. (*a*) (*ii*) relating to the petitioner living with the other party to the marriage after the force has ceased etc., the draft uses the words "full consent" as in the Hindu Marriage Act, while the Special Marriage Act uses the words "free consent". In the context in which the words are used, it is presumed that both would carry the same meaning.

Sub-clause (4).—Notes under sub-clause (2) above may be seen. The formula "unless the petition is presented *within* one year", has been avoided, since it would create a slight uncertainty as to whether the petition can be presented *before* attaining majority.

Clause 29

General.—The question of legitimacy of children of void and voidable marriages has been dealt with here. The existing provision, it is felt, is too narrow, because it is confined only to two grounds of nullity, namely:—

(i) where the former spouse was living, and

(ii) insanity.

The clause under discussion seeks to extend it to certain other cases also, as will appear from a discussion below.

As to the substance of the provision, see the discussion in the Report.[1]

Sub-clause (1).—The existing section deals only with the case where a spouse by a previous marriage was living.

The draft makes the following changes:—

(i) The provision has been widened so as to extend to all cases irrespective of good faith and belief of the parties etc. Further, it has been extended to cases of marriages void by reason of prohibited degrees also.

(ii) The provision will apply to any child begotten "or conceived". The corresponding provision in the Hindu Marriage Act may be compared.

It may be noticed that the protection given by this clause will apply irrespective of whether a decree is passed or not. The other two Acts do not expressly deal with the case where a decree is not passed.

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[1] See the body of the Report, para. 36 *et seq.*

Sub-clause (2).—This deals with voidable marriages annulled by the court and follows, in substance, the language of the main paragraph of section 16 of the Hindu Marriage Act, with necessary modifications.

Section 21 of the Divorce Act requires the court to specify the names of the children in the decree. This has been omitted, as unnecessary.

Sub-clause (3).—The existing section confines the right of succession of the children "to the estate of the parent who at the time of the marriage was competent to contract". The sub-clause under discussion gives him the right to inherit to both the parents. The corresponding provision in the Hindu Marriage Act etc., has been followed

As in the other two Acts, this will apply to voidable marriages also.

Clause 30

The reasons for including the various grounds for divorce embodied in this clause, have already been given.[1]

The actual wording of the various paragraphs of sub-clause (*1*) follows the wording of the corresponding provision either in the Special Marriage Act or in the Hindu Marriage Act.

Wilful refusal to consummate the marriage has been treated as a ground for dissolving the marriage here, since it is a case of fault after the marriage and not of a flaw existing at the time of the marriage like impotence etc.[2], [4].

Artificial insemination has not been included, as the practice is not in vogue in India[5], [6].

Clause 31

This is new. A proceeding for judicial separation, it has been suggested in some quarters, is a waste of time, because a decree of separation neither ends the marriage nor encourages the parties to come together. On the other hand there are certain persons and bodies, who hold the opinion that the sanctity of marriage should be preserved at all costs, and that where the parties cannot stay together, they may be allowed to remain separate by a decree of judicial separation without breaking the marriage by divorce.

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[1]See the body of the Report, para. 48 *et seq.*

[2]*Cf.* s. 32 (*d*), Parsi Marriage and Divorce Act, 1936.

[3]See also the discussion in the body of the Report, para. 53.

[4]*Cf.* the Report of the Royal Commission on Marriage and Divorce, (1955), Cmd. 9678, page 31, paragraphs 88-89.

[5]Contrast the recommendation in the Report of the Royal Commission on Marriage and Divorce (1955), Cmd. 9678, page 31, para. 90.

[6]See also the body of the Report, para. 62.

As a compromise between the two shades of opinion, the clause under discussion attempts to provide a procedure which, while mitigating the objection based on waste of time, will ensure that the marriage is not broken up in haste[1]. The difference between the clause under discussion and the provisions in section 13(*1*) (*viii*) of the Hindu Marriage Act and section 27(*i*) of the Special Marriage Act is two-fold:—

(*i*) Under the clause under discussion, it will not be necessary for the parties to file a fresh petition for divorce. Under the other two Acts, a fresh petition is necessary.

(*ii*) Under the clause under discussion, *either party* (that is, whether he is the petitioner or the respondent in the decree for judicial separation) can apply for divorce, while under the other two acts only the petitioner who obtained the decree can so apply. It is felt that where A obtains a decree for judicial separation against B, the initiation of further proceeding for divorce should be open to B also. The reason is, that in the absence of such a provision, B is always kept at the mercy of A and A can, after having obtained the decree for judicial separation, sit quiet and neither end nor mend the marriage[2].

[It may be of interest here to note that in South Australia, a decree of juidicial separation passed by *any* court in the British Commonwealth, is a ground for divorce[3].]

It has been considered unnecessary to have an express provision as to whether divorce can be obtained on the very ground that led to the earlier decree for separation[4].

It is also considered unnecessary to lay down any elaborate procedure as to the passing of the first decree (separation) and the second decree (divorce), and the inter-relation between the two.

Clause 32

General.—This is new and is based generally on the corresponding provision in the Hindu Marriage Act and the Special Marriage Act.

Sub-clause (1).—While the main paragraph of this sub-clause follows the Hindu Marriage Act and the Special Marriage Act, the proviso has been worded in a slightly different manner. Under the other two Acts,

[1]See also the body of the Report, para. 44.

[2]*Cf.* the Hindu Marriage (Amendment) Bill 1958, Bill No. V of 1958, as introduced by Dr. W. S. Barlingay in the Rajya Sabha.

[3]See the U. N. Survey of Legislation on marriage, divorce etc., Publication No. ST/SOA/29, dated 9th March, 1956, U. N. Bureau of Social Affairs, Population Branch.

[4]Contrast Section 7 (English) Matrimonial Causes Act, 1950,

leave can be granted upon application made "in accordance with the rules" etc. This mention of rules etc., has been omitted, as it is considered unnecessary to make such an elaborate provision expressly. Secondly, while under the other two Acts, leave can be revoked only in case of misapprehension or concealment as to the nature of the case, under the clause under discussion, it can be revoked "in the interest of justice". Thirdly, instead of the complicated procedure provided in the other two Acts as to the order to be passed when leave is revoked, a simple provision has been made that the court will dismiss the petition without prejudice to any subsequent petition which may be brought after the expiry of three years.

The clause will not apply to a decree of divorce after judicial separation[1].

Sub-clause (2) follows the corresponding provision in the other two Acts.

Clause 33

The provisions relating to remarriage of divorced persons, as contained in the various Acts, vary in form and substance. For example—

Period for re-marriage.

(*i*) *As regards the period.*—In section 57 of the Divorce Act, the provision is that when *six months* after the dissolution of the marriage have expired, or (when an appeal has been presented to the High Court in its appellate jurisdiction) the appeal has been dismissed or the marriage is dissolved on appeal, the parties may re-marry, provided no further apeal has been presented. If there is any further appeal, the parties can re-marry after the further appeal is disposed of.

Section 15 of the Hindu Marriage Act allows remarriage where the marriage has been dissolved and either there is no right of appeal, or if there is a right of appeal, no appeal has been filed within the time or the appeal has been dismissed. The proviso, however, prescribes a minimum period of one year from the decree "in the court of the first instance".

Section 30 of the Special Marriage Act is to the same effect, but the period of one year has to be calculated, it would appear, from the date of the appellate decree (where there has been an appeal).

Right to re-marry.

(*ii*) *As regards the right.*—The right of the parties to re-marry has been expressed in different terms in the various statutes. Section 57 of the Divorce Act says, "it shall be lawful.....to marry again as if the prior marriage had been dissolved by death".

Section 15 of the Hindu Marriage Act simply provides that "it shall be lawful to marry again".

[1] Under clause 31

Section 30 of the Special Marriage Act provides that "either party to the marriage may marry again".

Consequences of violation.

(*iii*) *As to the consequences of the violation of the prohibition.*—Section 57 of the Divorce Act emphasises the mandatory character of the prohibition by adding the words "but not sooner".

Section 15 of the Hindu Marriage Act does not contain these words, but the words in the proviso—"it shall *not* be lawful" appear to have the same force.

Section 30 of the Special Marriage Act contains the words "but not sooner."

Course adopted.

The clause under discussion takes away any minimum *period* for re-marriage after the final decree. In case of appeal, of course, the party has to wait until the appeal is dismissed. And in any case, the party has to wait until the time for appeal has expired. But once the proceedings finally end, there is no further waiting period.

The words "but not sooner" have been retained, to emphasise the mandatory character of the provision. The phraseology "either party may marry" etc., used in the Special Marriage Act, has been adopted as brief and simple.

Compare also section 13(*1*) of the (English) Matrimonial Causes Act, 1950.

Clause 34

General.—The existing provision in the Divorce Act authorises the court to grant relief under the Act where *either* the petitioner *or* the respondent professes the Christian religion (at the time of the *petition*). It seems, however, more logical to provide that (as a rule) *both* the parties must be Christians at the time of *marriage* (or petition).

The result of this change is, that where a non-Christian is married to a Christian outside India (or—though this can happen very rarely,—even within India, where the personal law of the non-Christian allows that), the parties will not be able to get relief under the new Act. Similarly, where two non-Christians marry and one of them is subsequently converted to Christianity, the parties cannot claim relief under the new Act. In both these respects, the clause is narrower than the existing section.

Sub-clause (a).—This will include cases of two non-Christians marrying as non-Christians and subsequently getting themselves converted to Christianity.

Sub-clause (b).—See discussion under "General" above. The words "at least one of the parties is a Christian" etc., are intended to exclude cases where both the spouses have, after re-marriage, renounced Christianity.

Sub-clause (c).—To protect the rights of persons married under the existing Act, it has been made clear that such a marriage can be made the subject-matter of proceedings under the new Act, if at least one of the parties is a Christian at the time of the petition. This part of the clause follows the existing provision in the Divorce Act.

Placing.—It is considered that the clause under discussion should be placed along with the clause dealing with the local jurisdiction of district courts. Hence it has been placed here.

Clause 35

This clause deals with the jurisdiction of Indian courts.[1]

If, on applying this clause, an Indian court is found to have jurisdiction, then the question—"which Indian court has jurisdiction" will have to be decided under a separate clause.[2]

Placing.—It is considered that the clause under discussion should be placed in the same Chapter as deals with the internal jurisdiction of district courts. Hence it has been placed here.

Clause 36

Sub-clauses (*1*) *and* (*2*) are new and are intended to define which district court will have jurisdiction in certain petitions relating to marriage.

Sub-clause (3)—*General.*—Assuming that Indian courts have jurisdiction to try a particular petition in the nature of matrimonial cause, this sub-clause seeks to lay down which district court shall exercise such jurisdiction.

The provisions of the sub-clause are thus subject to those of the clause relating to jurisdiction of Indian Courts[3] —a proposition which need not be expressly enacted.

(*a*) This head of jurisdiction is new, and is not found either in the existing provision or in the Hindu Marriage Act or the Special Marriage Act. It follows the principle behind section 20 of the Code of Civil Procedure, 1908, under which the defendant's residence confers jurisdiction on the court. Section 29(1) of the Parsi Marriage and Divorce Act, 1936, may also be compared.

See also Supplementary note (*i*) below.

Para (*b*).—This is not found in the existing Act, but has been adopted from section 19 of the Hindu Marriage Act and section 31(1) of the Special Marriage Act.

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[1]For a detailed discussion, please see the body of the Report, paras 69 to 73.

[2]See clause 36.

[3]Clause 35. See also clause 34.

Para. (*c*).—This is found in section 3(*1*) and section 3(*3*) of the existing Divorce Act, and also in section 19 of the Hindu Marriage Act and section 31(*1*) of the Special Marriage Act.

Where the husband and wife are residing together, sub-clause (a) will suffice.

Para. (*d*).—Whenever Indian courts have jurisdiction by virtue of the provisions inserted in the clause[1] relating to jurisdiction of Indian courts, it is necessary to provide *which* district court will exercise jurisdiction. While paragraphs (a) to (c) above will meet normal situations, there may be situations which are not covered by them, though covered by the clause[1] relating to jurisdiction of Indian courts. Hence the paragraph under discussion.

In most of the provisions incorporated in the clause relating to jurisdiction of Indian courts, jurisdiction is related to—

(i) domicile of the parties;
(ii) domicile of the petitioner;
(iii) residence of the petitioner.

In such cases, the question "which district court will exercise the jurisdiction" will be decided (in view of the paragraph under discussion) on the basis of the residence of the petitioner.

[It is considered that the petitioner should have *some* kind of residence and that more physical presence should not suffice. Cases where a petitioner is domiciled in India but has no residence here are, it is considered, not likely to arise].

[It may, of course, be noted that the paragraph under discussion is intended to deal with cases only where the respondent is residing outside India. If he is residing within India, the matter will be decided by draft paragraph (a), and the petitioner's residence or presence within a particular jurisdiction will be irrelevant.]

The paragraph under discussion will, in short, ensure that whenever an Indian court has jurisdiction, the question—"which district court will exercise the jurisdiction" is answered for *all* situations.

[The sub-clause under discussion is, it need not be mentioned, not intended to have the effect of *expanding* the jurisdiction of Indian Courts. As already pointed out, it is subject to the provisions of the restrictions on jurisdiction of Indian courts.]

Supplementary Note—

(*i*) It may be noted that where the marriage was solemnised within the jurisdiction of court 'A' and the

[1]Clause 35.

parties last resided together in the jurisdiction of court 'B', while the husband now resides in the jurisdiction of a court 'C' and the wife now resides in the jurisdiction of court 'D', the case would not be covered by the existing provision in the Indian Divorce Act or by the corresponding provision in the Special Marriage Act[1] or the Hindu Marriage Act. Such a case will be covered by draft para. (a) which authorises the filing of a petition in the court within whose jurisdiction the respondent is residing. In the absence of such a provision, the parties have to go either to court A or to court B—even though neither of them is staying there *now*.

(*ii*) No special provision has been considered necessary in respect of a petition at the instance of a person who is not a party to the marriage.[2]

Clause 37

This follows the language of the Hindu Marriage Act and the Special Marriage Act. An express statement that there is no connivance, though insisted upon by section 47, 1st paragraph of the Indian Divorce Act, is not found in the other two Acts and has been omitted.[3]

Clause 38

The language of the corresponding provisions in the Hindu Marriage Act and the Special Marriage Act has been followed.

Clause 39

General.—This is a new provision.

Sub-clauses (*1*) *and* (*2*).—These follow the corresponding provision in the Hindu Marriage Act and the Special Marriage Act, which seeks to lay down the principles that should guide the courts in matrimonial causes.

Sub-clause (*3*).—Fears have been expressed in certain quarters that if the task of reconciliation is done by the court, the parties may not co-operate with the court, and that it would be desirable if private persons are associated with the court for this purpose. A provision to that effect has accordingly been inserted in the sub-clause under discussion.[4]

[There is no such provision in the other two Acts referred to above].

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[1] Section 31 (2) of the Special Marriage Act need not be considered here.

[2] As to such petitions, see the notes on clause 27.

[3] Clause 39 (1)(*b*), of course, bars relief on the ground of adultery, there has been connivance.

[4] See also body of the Report, para. 75.

Clause 40

Sub-clause (*1*).—This follows the existing provision in Indian Divorce Act, with the addition of the words "or adulteress"; the added words will cover cases where the wife sues the husband for divorce on the ground of adultery. On this point, the clause follows section 3 of the (English) Matrimonial Causes Act, 1950. The court has also been given discretion to excuse non-compliance with the section on any other ground, as in the English Act.

The scope of the provision has been extended to petitions for judicial separation, where the ground is adultery.

Sub-clause (*2*)—is entirely new, and has been modelled on the lines of section 3 of the (English) Matrimonial Causes Act, 1950.

Clause 41

The existing provision has been reproduced in substance, but in a simplified form. The corresponding provision in the Special Marriage Act has been followed, as far as possible.

It appears desirable to extend this clause to petitions for judicial separation.[1] That change has been made accordingly.

Clause 42

As to the substance of this clause the reasons have been already stated.[2]

The language of section 12(*1*) and section 12(*2*) of the (English) Matrimonial Causes Act, 1950 has been followed in place of existing section 16 of the Indian Divorce Act, since the former is more precise and simple.

Sub-clause (*3*) is intended to deal with a case where a party, after having obtained decree *nisi*, does not take steps to get it made absolute. The respondent should not in such cases be allowed to remain at the mercy of the petitioner (decree-holder), and hence the sub-clause confers upon the respondent the right to apply to the court, which can deal with the case in such manner as it thinks fit.

Section 12(*3*) of the (English) Matrimonial Causes Act, 1950, may be compared.

Clause 43

The provisions regarding damages from adulterer or adulteress, at present contained in sections 34 and 39, 3rd para., of the Indian Divorce Act, have been placed here in

[1] Compare clause 40.
[2] See the body of the Report, paras. 77-78.

a simplified form. The language of section 30 of the (English) Matrimonial Causes Act, 1950, has been followed, as more precise and brief.

The changes of substance are:—

(*a*) The right has been given to the wife also.

(*b*) The provision for a mere claim for damages has been omitted as repugnant to modern ideas and likely to lead to black-mail.[1]

Clause 44

The existing complicated provisions regarding interim alimony have been replaced by a simple one, which follows the corresponding provisions in the Hindu Marriage Act and the Special Marriage Act.

The elaborate provisions in section 36, second and third paragraphs, of the Indian Divorce Act appear to be unnecessary and have been omitted.

Clause 45

The corresponding provisions in the Hindu Marriage Act and the Special Marriage Act have been followed.

Clause 46

General.—The provisions of section 39, first para., Divorce Act, authorising the court to order settlement of the wife's property for the benefit of the husband and the children, have been omitted. It is felt that as the power to award maintenance is proposed to be widened, the power of the court to order settlement of the spouse's property or to vary settlements, is not needed.[2]

Sub-clause (*1*).—This is new and has been inserted on the lines of the corresponding provision in the Hindu Marriage Act.

Sub-clause (*2*).—Where there is already in existence a settlement, there is no harm if the power of the court to direct the application of the property, contained in section 40 of the Indian Divorce Act, is retained. It has been embodied here, with slight verbal changes made for clarity.

Sub-clause (*3*) does not need any comments.

Clause 47

This follows the language of the corresponding provisions in the Hindu Marriage Act and the Special Marriage

[1]For a detailed discussion, see the body of the Report, para. 66.

[2]For a detailed discussion, see the body of the Report, paras. 67-68.

Contrast s. 24, M.C.A. and the Royal Commission's Report on Marriage and Divorce, (1955), paragraphs 512 *et-seq.*

Act, which are simpler, briefer and yet more comprehensive than the language in the existing section.

As to the question whether an order under such a provision can be made after the parties have remarried *each other*, see the discussion in a recent English case.[1]

Clause 48

The following changes have been made on the lines of the corresponding provision in the Hindu Marriage Act and Special Marriage Act:—

(i) It has been provided that if either party desires, then the proceedings must be held *in camera.*

(ii) An express provision, that it will not be lawful to publish or print such proceedings without the court's permission, has been added.

As regards the penalty for non-publication, a separate clause[2] has been inserted in another Chapter.

Clause 49

1. This deals with that part of section 54 of the Indian Divorce Act which deals with appeal. The following verbal defects in the existing Act may be noted:—

(*a*) The words "may be appealed from" occur in jarring repetition.

(*b*) The expression "laws and orders" is lengthy and not precise also.

(*c*) The reference to "orders", occurring for the *second* time in the existing section of the Divorce Act is not accurate. Orders of a court are not appealable in all cases (that is, unless mentioned in Order XLIII, rule 1 of the Code of Civil Procedure). Hence it would not be accurate to say that the decrees and orders will be appealable as decrees and *orders* in original civil jurisdiction. The difficulty has been felt under section 28 of the Hindu Marriage Act in a recent case where it was held[3] that an order refusing *interim* maintenance is not appealable, because it is not listed as an appealable order in the Code of Civil Procedure.

(*d*) It is not clear whether the right of appeal should be sought in any other statute. See the discussion on the subject in a case which arose under the Hindu Marriage Act.[4]

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[1] *Grainger* vs. *Grainger and Clark*, (1959) 3 W.L.R. 642, 649, 650 Court of Appeal).

[2] See clause 59.

[3] *Saraswati* v. *Krishnamurthy*, A.I.R. 1960 Andhra Pradesh 30.

[4] *Shobhana Sen's* case, A.I.R. 1959 Cal. 455.

2. To make the matter clear, a short and straight provision giving a right of appeal against all decrees and orders has been made.

3. A provision that the decrees etc. may be appealed from "under the law for the time being in force"—which would cover such points as limitation, form of appeal etc. has been regarded as unnecessary.

Clause 50

Existing section 54 of the Indian Divorce Act deals with two topics—(*i*) appeal; (*ii*) enforcement. For the sake of convenience, it has been broken up into two clauses. The clause under discussion deals with enforcement.

Clause 51

A person married under the Christian Marriage Act may marry again—

(*i*) under the Christian Marriage Act; or

(*ii*) under any other system of law.

So far as the situation at No. (*i*) above is concerned, the second marriage will be void by reason of breach of the condition providing that there should be no "spouse living at the time of the marriage", and will be punishable as bigamy under the Penal Code.

So far, however, as the situation at (*ii*) above is concerned, it is not clear if the Christian Marriage Act will apply, and it is better to make a specific provision for such a situation.

Hence the necessity of the clause under discussion, which follows section 44 of the Special Marriage Act.

[So far as the situation at No. (*i*) above is concerned, the clause under discussion will be a repetition of the clause which provides that such marriages shall be void. Compare section 44 of the Special Marriage Act, which similarly repeats the provision in section 24(*1*)(*i*) read with section 4(*a*) of that Act.]

It is not considered necessary to incorporate any provision similar to section 43 of the Special Marriage Act.

Clause 52

This imposes punishment for contravention of certain conditions of marriage, and follows section 18 of the Hindu Marriage Act.

As to breach of the condition regarding "spouse living", see a separate clause.[1]

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[1]Clause 51.

It is considered unnecessary to punish breach of the condition regarding idiocy or lunacy or regarding domicile of parties where the marriage is solemnised outside India.

Clause 53

The following comments may be made:—

(*i*) The reference to various classes of Churches have been omitted.

(*ii*) The formula "shall be deemed to have committed the offence punishable" has been replaced by the words "punishable with". Existing section 67 of the Christian Marriage Act links up the offence with section 193 I.P.C. (false evidence etc.), while section 45, Special Marriage Act, links it up with section 199 I.P.C. To make the clause self contained, the punishment has been reproduced in the clause.

(*iii*) Section 45 of the Special Marriage Act runs on different lines, in other respects. It has not been considered necessary to follow the language of that section, which punishes every person making, signing or *attesting* any notice, declaration or *certificate*, irrespective of the motive of the offender.

(*iv*) As a definition of "rule" in relation to rules of Church has been inserted[1], consequential changes have been made in the clause under discussion.

Clause 54

The clause has been made wider by including false personation before a licensed Minister also. Instead of reference to "forbidding issue" of certificate, the mention of "making an objection" has been made. This is consequential.

It appears that there is no corresponding provision in the Hindu Marriage Act or the Special Marriage Act.

Clause 55

The following changes have been made in the existing provision:—

(*i*) The condition that the unauthorised solemnization should be "in the absence of a Marriage Registrar of the district in which the ceremony takes place" has been omitted, as unnecessary.

(*ii*) Transportation has been omitted, and the fine has been limited to two thousand rupees.

(*iii*) The words "under this Act" have been added for the sake of clarity.

(*iv*) Other changes are consequential.

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[1]See clause 2—"rule".

Clause 56

Sub-clause (*1*).—This is new and is intended to expedite the disposal of objections to a proposed marriage.

Sub-clause (*2*).—This is also new. Complaints received show that very often the Ministers licensed by the State Government refuse to solemnize a particular marriage without reasonable cause. It seems desirable to make a provision that such refusal shall be punishable. Hence the sub-clause.

The sub-clause has been made applicable to Marriage Registrars also, for the sake of comprehensiveness.

Clause 57

The provisions regarding penalty for wrongful actions of various types taken by a Marriage Registrar or Minister of Church are at present contained in several sections of the Christian Marriage Act. These have all been consolidated in this one clause, which is framed on the lines of the Special Marriage Act.

On a study of sections 69 to 73 of the existing Act, it has been found that all the offences concerned would be covered by the residuary words "in contravention of any other provision contained in this Act" in paragraph (*a*)(*ii*) and the similar words used in paragraph (*b*) in the clause under discussion.

Most of the existing sections provide for imprisonment of three years to five years and unlimited fine. This has been replaced by imprisonment up to one year and fine up to five hundred rupees, as in the Special Marriage Act.

Clause 58

The following changes have been made (in the existing section):—

(*i*) Instead of reference to "register, book or counter-foil certificate" reference to "the marriage certificate book" has been made. This is consequential.

(*ii*) The fine has been limited to two thousand rupees.

Clause 59

This is new and imposes a penalty for publication of proceedings without permission of the court, where proceedings are held *in camera*. The corresponding provision in the Hindu Marriage Act may be compared.

The existing section—section 53 of the Indian Divorce Act—does not impose any penalty in such cases.

Clause 60

The substance of the existing provision has been retained; but the positive form has been changed into a negative one, in order to emphasise the mandatory character of the provision.

The offence of bigamy[1] has been excluded from this clause, as it is a serious one.

Clause 61

Sub-clause (*1*).—It has been made clear that the order awarding cost should be passed after giving the parties an opportunity of hearing.

Following the language of the corresponding provision in the Special Marriage Act, a maximum compensation of one thousand rupees has been imposed.

The Special Marriage Act requires that the objection must not be reasonable and must not have been made in good faith. This wording has been preferred to the existing wording "frivolous and such as not to obstruct" etc., as the former brings out the real ingredients.

Sub-clause (*2*).—It is felt that the order should be appealable, and hence this sub-clause. [The corresponding provision in the Special Marriage Act does not provide for appeal from the decision of the Marriage Officer.]

Sub-clause (*3*).—This will bar any second appeal.

Sub-clause (*4*).—Departing from the existing provision, it has been provided that a separate suit will not be necessary, and the order will be executable as a decree of the district court. Compare the corresponding provision in the Special Marriage Act.

Clause 62

The following changes have been made:—

(*i*) Existing section 77(1) of the Christian Marriage Act saves any irregularity regarding 'any statement in regard to the consent of any person" whose consent is required by law. This has been omitted, because the substantive provision[2] regarding effect of want of guardian's consent makes the marriage voidable, and not void. Therefore, no saving for false statement regarding consent is necessary.

(*ii*) Existing section 77(*4*) saves irregularity as to time and place of marriage. This has been omitted, because the substantive provisions regarding time and place (sections 10 and 11 of the Christian Marriage Act) have been omitted.[3]

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[1]Clause 51.
[2]Clause 28(2)(*b*).
[3]Clauses 21 (2) and 64 are merely enabling provisions.

(*iii*) The words "solemnized in accordance with the provisions of sections 4 and 5" have been replaced by "solemnized between two Christians under this Act in accordance with the provisions of section 6". The reference to existing section 4 is thus replaced by the gist thereof, namely—"between two Christians". It is also made clear that the marriage must be under the Act.

Clause 63

The words "and such person shall make the like marginal entry in the certificate thereof" have been omitted. Under existing section 54 of the Christian Marriage Act, when a marriage is registered, an entry has to be made at two places—

(i) in the marriage register book, and

(ii) also in the counterfoil.

But in the scheme proposed, there is no separate certificate. The only entry is in the marriage register book.[1] Hence this omission in the draft.

Section 49 of the Special Marriage Act does contain the omitted words. But even in that Act the words appear to be out of place, in view of the provisions of section 13 of the Special Marriage Act.

Clause 64

This is new. Since it appears that in practice marriages are solemnised at places other than churches, it seems desirable that such practice should be given statutory recognition, provided, of course, it is sanctioned by custom or usage. The clause under discussion is intended to make this clear.

Such customs or usages should be prevalent in the *community* to which the parties belong. That has been made clear.

Clause 65

This is new. Though there is no such provision in the Hindu Marriage Act or the Special Marriage Act or in the English Act, still it will prove a useful one for the present Act.

Clause 66

Only a slight verbal change has been made. The plural "all persons" has been replaced by the singular "any person".

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[1]See clause 23(1).

Clause 67

It is considered that inspection of the Marriage Certificate Book and the supply of certified extracts therefrom should be free if the inspection or extracts are required by the parties to the marriage (at or about the time of marriage). In other cases, fees should be charged. This principle has been incorporated in the clause under discussion.

In other respects, the corresponding provision in the Special Marriage Act has been followed.

By allowing inspection free in the cases mentioned above, the clause departs from existing section 79 of the Christian Marriage Act. Further, unlike the existing Act, the clause will apply to Ministers of Churches (or other persons having the custody of the Marriage Certificate Book) also.

Clause 68

The changes made are consequential and intended to improve the language.

Clause 69

The existing provisions regarding making the parties understand the substance of notices and declarations have been embodied here, with certain additions and alterations. It has been provided in sub-clause (1) that the notice etc., may be given in the language commonly used in the State or in English.

Clause 70

The clause under discussion is merely intended to protect Ministers of Church in cases where, by the rules of their Church, they are prohibited from solemnizing a particular marriage.

It will take the place of section 58 of the Indian Divorce Act, and widen the scope of that section, by—

(*i*) applying it to Ministers of all recognised Churches, and

(*ii*) allowing the protection not only where the Minister's objection to solemnizing the marriage is based on the parties being divorced (as at present), but also in any case where the rules of his Church do not allow it.

It is considered unnecessary to embody the protection against suits etc. contained in existing section 58, latter part, Divorce Act.

Section 59 of the Divorce Act, which requires that in such cases any other Minister should be allowed to solemnise the marriage in that church building, has been omitted as unnecessary. Parties can, in such cases, go to any other church building.

Clause 71

The language of the corresponding provision in the Special Marriage Act has been followed.

Clause 72

The language of the corresponding provision in the Special Marriage Act has been followed with the addition of certain matters relating to licensing of Ministers and the Advisory Committees for recognition of Churches.

The provision regarding the procedure for laying the rules before the Parliament and modifications etc. by Parliament is in conformity with the latest legislative practice.[1]

Clause 73

1. The language of the corresponding provision in the Special Marriage Act has been followed; but sub-section (2) of section 41 of that Act, which enumerates the matters in respect of which rules may be made, has been omitted as unnecessary.

2. Section 41(*1*) of the Special Marriage Act contains the restriction that the rules should be consistent with the Civil Procedure Code. But the clause applying the Act[2], is itself subject to rules made by the High Court. Hence this restriction is unnecessary.

3. Petitions under the clauses[3] relating to marriage, have also been covered for comprehensiveness.

Clause 74

This is new. Since the grounds which render a marriage void under the new Act are not co-extensive with those given in section 19 of the Indian Divorce Act, it is considered proper to ensure that a marriage performed before the new Act will not be rendered *void* by the new provision. (For example, the existing Indian Divorce Act does not contain a *list* of prohibited degrees, though s. 19 mentions it as a ground of nullity.)

[So far as *voidable* marriages are concerned, the matter has been dealt with in the very clause[4] dealing with voidable marriages].

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[1]The language of the sub-clause will clear such doubts as arise from the observations of the Supreme Court in *re. Kerala Education Bill*, A.I.R. 1959, S.C. 956, 957— (1959)—450, 459. 2 S.C.A. " After the rules are laid before the Legislative Assembly they may be altered or amended and it is then that the rules, as amended, become effective. If no amendments are made, the rules come into operation after the period of 14 days expires ". See also *Express Newspapers (Private) Ltd.* vs. *Union of India*, *A.I.R.* 1958, S.C. 578.

[2]Clause 38.

[3]Clauses 5(5) and 17.

[4]Clause 28.

It may be noted, that the clause under discussion will apply also to marriages solemnized outside India, *i.e.*, marriages solemnized not under the existing Christian Marriage Act but under the law of the foreign country where they are solemnized.

Placing.—It is considered that this savings should appear at the end, and not in the main clause[1] dealing with void marriages. Hence it has been placed here.

Clause 75

This is new. The corresponding provision in Hindu Marriage Act may be compared.

Clause 76

General.—This is a repeal clause.

Sub-clause (1).—Repeal of the Indian and Colonial Divorce Jurisdiction Acts, 1926 and 1940, and the Indian Divorce Act, 1945 (all U.K. Acts have also been provided for. For reasons, see the note below, entitled "Colonial jurisdiction".

Sub-clause (2), *paragraph* (*a*).—This follows the language of section 51(2) of the Special Marriage Act.

So far as *matrimonial relief* under the Act is concerned, the substantive provisions relating to decree of nullity, restitution, judicial separation, divorce etc., themselves make it clear how far the new Act is to apply to marriages solemnized before its commencement. Therefore, the saving provision under discussion may not be of much use in respect of *matrimonial relief.*

But it may be desirable to make it clear that the pre-Act marriages will be deemed to have been solemnized under the new Act, for other purposes. Apart from the general utility of such a provision, there may be *specific* cases where it will come handy—for example, in relation to punishment of bigamy.[2]

The paragraph under discussion will not, have the effect of attracting the nullity provisions of the new Act so as to affect the validity of any pre-Act marriages[3].

Sub-clause (2), *paragraph* (*b*).—It is felt that pending suits and proceedings under the existing Acts regarding marriage and divorce should continue to be dealt with by the respective courts, notwithstanding the repeal of those Acts. A provision has been made accordingly. This is a departure from the course adopted in s. 51(2) (b) S. M. A.

This provision will be "without prejudice to the general provisions of s. 6 of the General Clauses Act, 1897."—See

[1]Clause 27.
[2]See clause 31.
[3]See clause 74.

sub-clause (3). The provisions of section 6 of the General Clauses Act save previously acquired rights, liabilities etc., and it is considered that there would be no conflict between the specific provisions embodied in the sub-paragraph under discussion and those of the General Clauses Act.

Proceedings other than judicial proceedings *e.g.* notices of marriage etc. already given, do not, it is considered, need any savings provision. Parties can give fresh notices in such cases. This course had to be adopted in view of the fact that the continuance of such proceedings would create complications, particularly because the scheme in the proposed Act is, in some respects, different from that in the existing Act—*e.g.* (i) *both* parties must be Christians, (ii) *both* parties must sign the notice, and so on.

Sub-Clause (3).—This follows the language of section 51(3), Special Marriage Act. Though a specific saving provision has been inserted in sub-clause (2), paragraph (*a*), regarding pre-Act marriages (following the Spec al Marriage Act), the words "without prejudice" in the sub-clause under discussion have been used, again following the Special Marriage Act.

The words "without prejudice" etc. are not likely to create any complications when contrasted with sub-clause (2), paragraphs (*a*) and (*b*). The position relating to sub-clause (2), paragraph (*a*) has been discussed above in the Notes thereto. The position relating to sub-clause (2), paragraph (b) has also been discussed above in the Notes thereto, which may be seen.

[As to the Converts' Marriage Dissolution Act, the subject has already been dealt with.[1]]

Colonial jurisdiction

(1) The Indian and Colonial Divorce Jurisdiction Act, 1926[2] (as amended by the Indian and Colonial Divorce Jurisdiction Act, 1940)[3] confers jurisdiction on Indian Courts to make decrees for dissolution of marriages where the parties to the marriage are British subjects domiciled in England or Scotland, in any case where a court in India would have such jurisdiction if the parties to the marriage were domiciled in India.

(2) The 1926 Act was passed in consequence of the decision in *Keyes* v. *Keyes*,[4] holding that Indian courts could not grant a divorce where the parties were not domiciled in India (even though the marriage was celebrated in India, the parties were resident in India and the acts of adultery were committed within the jurisdiction of Indian

[1] See the body of the Report, para. 63.

[2] 16 and 17 Geo. 5. c. 40.

[3] 3 and 4 Geo. 6 c. 35.

[4] *Keyes* v. *Keyes*, (1921) p. 204.

courts). The 1926 Act achieved, through an act of British Parliament, a result which, in view of the political subordination of India, could not be achieved then by Indian legislation.

(3) There are, of course, certain conditions which are applicable to a decree under the 1926 Act. The important conditions, stated briefly are[1].

(a) The grounds on which the decree may be granted should be such as those on which a decree may be granted by the High Court in England, according to the law for the time being in force in England.

(b) Relief will be given on principles and rules as nearly as may be conformable to those on which the High Court in England acts.

(c) The court cannot grant relief under the Act except in cases where the petitioner resided in India at the time of presenting the petition and the place where the parties last resided together was in India. Nor can the court dissolve a marriage on a ground of adultery, cruelty or any crime except where the marriage was solemnised in India or the adultery, cruelty or crime was committed in India.

(d) The court may refuse to entertain the petition unless it is desirable in the interests of justice that the suit should be determined in India.

(4) There are certain other minor provisions which are not material for the present purpose.

(5) The 1926 Act was amended by the 1940 Act, which was enacted to remove certain doubts, and make certain modifications. Section 1 of the 1940 Act made it clear that the substantive amendments made in the English Law on divorce by the Matrimonial Causes Act, 1937 were to be taken into account by the Indian courts also while acting under the 1926 Act. Section 3 of the 1940 Act made it clear that where the wife is deserted by a husband and the pre-desertion domicile of the husband was in England or Scotland, then any change in the domicile of the husband after desertion could be disregarded for the purposes of jurisdiction under the Act. Other amendments are not material.

(6) The 1926 and 1940 Acts have not, in terms, been repealed so far. But it would seem from section 17(1) of the Indian Independence Act, 1947[2] that the jurisdiction under the 1926 Act can now be exercised only in respect of proceedings instituted before the "appointed day" (i.e.,

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[1]Section 1 (1), Proviso, of the 1926 Act.

[2]10 and 11 Geo. 6. c. 30.

before the 15th August, 1947). Sections 17(1) and 17(2) of the Indian Independence Act are as follows:—

"17(1). No court in either of the new Dominions shall, by virtue of the Indian and Colonial Divorce Jurisdiction Acts, 1926 and 1940, have jurisdiction in or in relation to any proceedings for a decree for the dissolution of a marriage, unless those proceedings were instituted before the appointed day, but, save as aforesaid and subject to any provision to the contrary which may hereafter be made by any Act of the Parliament of the United Kingdom or by any law of the Legislature of the new Dominion concerned, all courts in the new Dominions shall have the same jurisdiction under the said Acts as they would have had if this Act had not been passed.

(2) Any rules made on or after the appointed day under sub-section (4) of section one of the Indian and Colonial Divorce Jurisdiction Act, 1926, for a court in either of the new Dominions shall, instead of being made by the Secretary of State with the concurrence of the Lord Chancellor, be made by such authority as may be determined by the law of the Dominion concerned, and so much of the said sub-section and of any rules in force thereunder immediately before the appointed day as require the approval of the Lord Chancellor to the nomination for any purpose of any judges of any such court shall cease to have effect."

[s. 17(3)(4) are not material]

(7) It may be of interest to note here that the 1926 and 1940 Acts were considered by the Law Commission in its Report relating to British Statutes applicable to India. The observations made are as follows:—

"(301) 1926 Indian & Colonial Divorce Jurisdiction Act (16 & 17 Geo. 5, c. 40).

1940 Indian & Colonial Divorce Jurisdiction Act (3 and 4 Geo. 6. c. 35)."

This statute (as amended in 1940) gives jurisdiction to the High Courts in India to try matrimonial causes where parties thereto are British subjects domiciled in England or Scotland.

Apparently, this jurisdiction is still beneficial to those British subjects who are coming to India for business and the like. But it is striking that this jurisdiction of our High Courts is to be governed by rules made by the Secretary of State, with the concurrence of the Lord Chancellor [s. 1(4)].

If this jurisdiction is to be maintained, it should be settled with the Government of the U.K. that the jurisdiction should be governed solely by our laws, and then we

may adopt the provisions of this statute with necessary modifications".[1]

(8) As these two Acts are now applicable only to proceedings pending in August 1947, they can be taken as repealed, for all practical purposes. However, a formal repeal is necessary, and the clause therefore seeks—

(*a*) to incorporate a saving provision in the new Act to the effect that the two Acts mentioned above shall continue to apply to pending proceedings, and

(*b*) to provide for a formal repeal of the two Acts.

For future, the cases of British subjects domiciled in England or Scotland and coming to India will be governed by the provisions of the new Act relevant to any *other* non-Indians. No special provisions will be necessary.

(9) With the proposed repeal of these two Acts, the repeal of a later Act—the Indian Divorce Act, 1945—a British Act,[2] also becomes necessary. The Act was passed to validate certain proceedings for dissolution entertained by the High Court of Bombay (in relation to parties from the State of Hyderabad). It is essentially linked up with the Indian and Colonial Divorce Jurisdiction Act, 1940, and has no independent object of its own.[3]

First Schedule

The list of prohibited relationships has been framed mainly on the basis of (English) Marriage Act, 1949 and the Special Marriage Act. Only items which are common to both the Acts have been retained[4]. And even from the items so common, the following have been omitted:—

Sister's son; sister's daughter; brother's son; brother's daughter; mother's brother; mother's sister; father's brother; father's sister.

These have been omitted in view of the fact that in some communities, it is usual to arrange such marriages.[5]

The items in the list could be reduced in number by adopting some drafting devices. For example, the expressions "any lineal ascendant or descendant", "widow of any lineal ascendant or descendant of the wife" and so on could be used. But that would make the list less concrete and has been avoided.

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[1]Fifth Report of the Law Commission, page 74, item (301).

[2]9 Geo. 6 Ch. 5.

[3]*Cf.* Fifth Report of the Law Commission (British Statutes Applicable to India), page 83, item (393).

[4]See also the discussion in the body of the Report, paras. 23—25.

[5]See also the discussion in the body of the Report, para. 23.

The items have been treated both from the bride's angle and from the bridegroom's angle. Each item in Part I of the Schedule (that is, the item as seen from the angle of the bridegroom), has its converse (that is, the item as seen from the angle of the bride), in Part II, as shown below:—

Item in Part I	Corresponding item in Part II
1	26
2	34
3	30
4	36
5	28
6	35
7	20
8	33
9	24
10	38
11	22
12	37
13	32
14	21
15	27
16	23
17	25
18	29
19	31

Second Schedule

The form of notice contained in the First Schedule to the Christian Marriage Act mentions the period of "three" calendar months. Under the form, parties give notice that the marriage is intended to be solemnised "between us within *three* calendar months from the date hereof". It must be noted, however, that under the provision in the body of the Act[1], as it exists at present, if a marriage is not solemnised within two months of the date of the certificate, a fresh notice is required. The existing Act seems to have given an extra one month on supposition that about a month might be taken up between the notice and the actual issue of the certificate, and the parties would get two months more after the date of the certificate, thus making a total period of three months. It is, however, better to mention in the Schedule the same period as is mentioned in the body of the Act. For this reason, while the period in the body of the draft[2] is increased to *three* months, the period in the Schedule has been retained without any increase.

For verbal changes, see the corresponding provision in the Special Marriage Act.

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[1]See sections 26 and 52 of the Christian Marriage Act.

[2]Clause 22.

As to the note regarding minor bride, the substantive provisions may be seen.[1]

The column regarding "age" has been replaced by "date of birth" which is more convenient.

Third Schedule

The verbal changes made are consequential.

Fourth Schedule

This is new and, follows the corresponding Schedule in the Special Marriage Act.

As to the note regarding minor bride, the substantive provision[2] may be seen.

Fifth Schedule

The form of "certificate of marriage" contained in the existing Act, has been replaced by a simplified form which follows the corresponding provision in the Special Marriage Act.

The declaration to be filed regarding absence of impediment etc.[3] would be much earlier than the actual solemnisation—at least in the case of licensed Ministers and Marriage Registrars[4]—, and hence the witnesses who signed the declaration may not necessarily be the same as those who attend the marriage. In view of this, the reference to those witnesses, though found in the Special Marriage Act, has not been adopted.

Omitted Sections

The reasons for omitting the following sections of the existing Acts have been given below:—

Indian Christian Marriage Act, 1872

Section	
Section 3—Definitions of various Churches, and of "Indian Christian" and "Roman Catholic".	Omitted, as unnecessary.
Sections 9, 10 *and* 11	Omitted, as unnecessary.

[1] See Clause 12(2).

[2] Clause 15(2)(*b*)(*ii*).

[3] See the Fourth Schedule, as proposed.

[4] See clause 15 (2)(*b*), etc.

Sections 20, 21 *and* 22	Omitted, as unnecessary.
Section 37	Omitted, as unnecessary in the present day conditions
Section 43	Omitted, as unnecessary.
Section 44, 2nd and 3rd paragraphs	Omitted, as unnecessary.
Section 48	Omitted, as unnecessary.
Sections 60 *to* 65	Omitted, consequent on the proposed abolition of marriage by certificate.
Section 74	Omitted, as unnecessary.
Section 81	Omitted, as unnecessary.
Section 85	Omitted, as unnecessary.
Section 87	Omitted, as unnecessary.

Indian Divorce Act, 1860

Section 3 (1) part, "High Court" .	Omitted for reasons given already
Section 3 (2)	Omitted, as unnecessary.
Section 3 (4)	Omitted, as unnecessary.
Section 3 (6) *and* 3 (7) . . .	Omitted, as unnecessary.
Section 3 (8)	Omitted, as unnecessary.
Section 3 (10)	Omitted, as unnecessary.
Sections 4 *to* 6	Omitted, as unnecessary.

Section 7.—Section 7 provides that in all suits and proceedings under the Act, relief should be granted as nearly as may be on principles and rules followed by the Court for Divorce and Matrimonial Causes in England. The opinion is generally against the retention of such a provision, and hence it has been omitted. It is true that decisions of English courts might afford valuable assistance, as the branch of law is one with which English courts had to deal with for a considerable length of time. But that is not a ground for laying down that the Indian courts should act in conformity with the rules laid down in the English Divorce Courts. Courts in India might refer to them for guidance as indeed they do in respect of other subjects as well.

Sections 8 *and* 9.—Under the proposed scheme, there will be a regular appeal to the High Court against decisions given by the district court in proceedings under the

[1]See notes to clause 2.

Act, and that will assimilate these proceedings to other civil proceedings. There is no need, therefore, to confer an extraordinary jurisdiction on the High Courts to transfer proceedings duly taken in the mufassil courts.

As regards section 9, it should be noted that under existing section 45, Indian Divorce Act, the provisions of the Civil Procedure Code are generally to apply to the trial of proceedings under the Act. There is, therefore, no need for a special provision such as is contained in section 9.

Section 12, *part* (*re-countercharge*).—Omitted, as unnecessary.

Section 13, *part.*—Section 13 in part states certain grounds on which relief could be refused. All such grounds have already been provided in a single comprehensive clause. There is, however, a *further* provision in section 13 that when a petition is dismissed by a district court, the petitioner may nevertheless present a similar petition to the High Court. This is not necessary. Once a petitioner has moved the district court and a decision has been pronounced, the only remedy which should be open to the petitioner is to take the matter in appeal. This part of the section has, therefore, been omitted.

Section 14, *part* (*condonation*).—Omitted as unnecessary.

Section 17.—There is considerable opposition to the retention of section 17. There are no special reasons why decrees for dissolution should be put on a different footing from decrees passed by civil courts in other civil proceedings. Hence there is no need for a provision requiring that decrees for dissolution of marriage passed by a district court should be confirmed by the High Court. Section 17 has therefore been omitted.

Section 17A.—Section 17A was introduced in the Indian Divorce Act, 1869, by an amendment of 1927 and is based upon a similar provision in England. The section has not in practice been availed of to any extent. No useful purpose will be served by providing for the appointment of a (State) Proctor. It has, therefore, been omitted.

Section 20.—Omitted, as unnecessary.

Sections 24 *and* 25.—Omitted, as unnecessary[1].

Sections 27 *to* 31.—These sections confer certain rights on a wife to whom the Indian Succession Act, 1865, does not apply. The relevant provision is section 4 of the Indian Succession Act, 1865 and that has been repealed by the Indian Succession Act, 1925 and re-enacted as section 20. Under this section, two classes of persons are exempt-

[1]For a detailed discussion, see the body of the Report, para. 46.

ed from its operation: (a) persons married before the 1st January, 1866. This sub-clause would have worked itself out and need not now be repeated. (b) The wife of a marriage where either bride or bridegroom was at the time of the marriage a Hindu, a Mohammadan, a Sikh or a Jain by religion. This might have been necessary in view of the fact that the Indian Divorce Act, 1869 and the Indian Christian Marriage Act, 1872, apply to marriages where one of the parties thereto is not a Christian. But under the scheme as proposed, the Act will apply only when both the parties thereto are Christians. In view of this, sections 27 to 31 are unnecessary and have been omitted.

Section 35.—This deals with costs. It is not necessary to enact any special provision in that behalf. The provisions of the Code of Civil Procedure are ample and confer on the court a discretion in the matter of awarding costs, and that must be sufficient to cover cases arising under this Act also. The section has therefore been omitted.

Section 38.—This provides that payments of alimony (granted to the wife) might be made either to her or to the trustees. There is no need for such a provision.

Section 39, *first paragraph.*—Omitted, for reasons already given.[1]

Section 39, *second paragraph.*—Omitted, as unnecessary.

Section 46.—Section 46 provides for the forms mentioned in the Appendix being used. There is no such provision in the Special Marriage Act or the Hindu Marriage Act. This can be left to be dealt with by the rule-making authority of the High Courts. The section has, therefore, been omitted.

Sections 48, 49 *and* 50.—Provisions of the Code of Civil Procedure relating to the matters mentioned in these sections will be attracted by the force of existing section 45, Indian Divorce Act. Hence the sections are unnecessary.

Sections 51-52.—These sections lay down certain special rules in the matter of taking evidence in proceedings under the Act. Subsequent to this enactment, the Indian Evidence Act was passed in 1872 and it contains general provisions applicable to all proceedings. In view of those provisions, these sections have become unnecessary. They have been omitted and the matter left to be determined in accordance with the provisions of the Evidence Act. [As to competence, see sections 118, 137 and 138 of that Act. As to compellability, see section 118 of that Act and section 179, I.P.C.].

[1]See notes to clause 46.

Section 54.—There is no need for this section as the provisions of the Code of Civil Procedure will be ample for that purpose.

Section 56.—Omitted, as unnecessary.

Section 59.—Omitted for reasons already given.[1]

Sections 60 *and* 61.—Omitted, as unnecessary.

Schedule of forms.—Omitted, as unnecessary (see under section 46, above).

[1]See notes on clause 70.

APPENDIX III

MARRIAGE

Indian Christian Marriage Act, 1872

Table showing the provision in the existing Acts and the corresponding provision, if any, in Appendix I

Existing provision	Corresponding clause, if any, in App. I
1	2
	[Clause]
Section 1, 1st para. . . .	1 (1), part.
2nd para. . . .	1 (2), part.
Section 2 (Repealed) . . .	..
Section 3	..
"Church of England" and "Anglican"	Omitted.
"Church of Scotland" . . .	Omitted.
"Church of Rome" and "Roman Catholic".	Omitted.
"Church"	2, part.
"India"	2, part.
"Minor"	2, part.
"Christian"	2, part.
"Indian Christian" . . .	Omitted.
"Registrar-General" . . .	2, part.
Section 4	3.
Section 5, part	6.
Section 5, part	11 (1).
Section 6	8.
Section 7	9.
Section 8 (Omitted by the Adaptation of Laws Order, 1950).	..
Section 9	Omitted.
Section 10	Omitted.
Section 11	Omitted.

1	2
Section 12	12 (1), part.
Section 13	13 (*a*) and (*b*), part
Section 14	13 (*c*), part
Section 15	13 (*d*), earlier part
Section 16	13 (*d*), latter part
Section 17, part	19, part
Section 17, part	15 (1), part
Section 18	15 (2), part
Section 19	5 (1), part
Section 20	Omitted.
Section 21	Omitted.
Section 22	Omitted.
Section 23	69 (2), part
Section 24	15 (1), part
Section 25	20
Section 26	22, part
Sections 27 to 36	23, part
Section 37	Omitted.
Section 38	12 (1), part.
Section 39, 1st para. . . .	14 (*a*).
2nd para. . . .	14 (*b*).
Section 40, part	12 (3).
Section 40, part	66
Section 41, part	19, part
Section 41, part	15 (1), part
Section 42, part	15 (2), part
Section 42, part	19, part
Section 43	Omitted.
Section 44, 1st para. . . .	5 (1), part
Section 44, 2nd para. . . .	Omitted.
Section 44, 3rd para. . . .	Omitted.

1	2
Section 45, part, extended . .	5 (4)
Section 45, part	5 (5).
Section 45, part	5 (6)
Section 46, extended . . .	1
Section 47 (Omitted by the Adaptation of Laws Order, 1950).	.. .
Section 48	Omitted.
Section 49	61
Section 50	15 (1), part.
Section 51	21 (1)
Section 52	22, part
Section 53	71
Section 54	23, part
Section 55	23, part
Section 56 (Omitted by the Adaptation of Laws Order, 1950).	..
Section 57	69, part.
Section 58	69, part
Section 59	23, part
Section 60 to 65	Omitted.
Section 66	53
Section 67	54
Section 68	55
Section 69	57, part
Section 70	57, part
Section 71	57, part
Section 72	57, part
Section 73	57, part
Section 74	Omitted.
Section 75	58
Section 76	60
Section 77	62

1	2
Section 78	63
Section 79	67, part
Section 80, part	67, part
Section 80, part	68
Section 81	Omitted.
Section 82	72, part
Section 83	72, part
Section 84 (Omitted by the Adaptation of Laws Order, 1950).	..
Section 85	Omitted.
Section 86 (Omitted by the Adaptation of Laws Order, 1950).	..
Section 87	Omitted.
Section 88	4(*ii*)
Schedule I	Second Schedule.
Schedule II	Third Schedule.
Schedule III	Fifth Schedule, part
Schedule IV	Fifth Schedule, part
Schedule V (Repealed)	..

DIVORCE

Indian Divorce Act, 1869

Existing provision	Corresponding provision, if any, in App. I
1	2
	[Clause]
Section 1	1 (1), part
Section 2, 1st para. . . .	1 (2), part
Section 2, 2nd para. . . .	34
Section 2, 3rd para. . . .	35 (*a*).
Section 2, 4th para . . .	35 (*b*)

1	2
Section 2, 5th para. . . .	35 (*c*)
Section 3 (1), part . . .	Omitted
Section 3 (1), part	36 (3), part
Section 3 (2)	Omitted.
Section 3 (3), part	2 , part
Section 3 (3), part . . .	36 (3), part
Section 3 (4)	Omitted.
Section 3 (5)	2, part
Section 3 (6)	Omitted.
Section 3 (7)	Omitted.
Section 3 (8)	Omitted.
Section 3 (9)	2, part
Section 3 (10)	Omitted.
Section 4	Omitted.
Section 5	Omitted.
Section 6	Omitted.
Section 7	Omitted.
Section 8	Omitted.
Section 9	Omitted.
Section 10, 1st para. part. . .	30, part
Section 10, 1st para. part. . .	36 (3), part
Section 10, 2nd para. part . .	30, part
Section 10, 2nd para. part . .	36 (3), part
Section 10, 3rd para. . . .	37 (1), part
Section 11	40 (1)
Section 12, part	39 (1), part
Section 12, part (relating to counter-charge).	Omitted.
Section 13, part	39 (1), part
Section 13, part	Omitted.

1	2
Section 14	39 (1), part
Section 14, part (relating to condonation).	Omitted.
Section 15	41
Section 16	42
Section 17	Omitted.
Section 17A	Omitted.
Section 18	27, part
Section 19 (1)	28, part
Section 19 (2)	27, part
Section 19 (3)	28, part
Section 19 (4)	27, part
Section 19, last para. . . .	28, part.
Section 20	Omitted.
Section 21	29
Section 22, earlier part . . .	25
Section 22, latter part . . .	26, part
Section 23, earlier part . . .	36 (3), part
Section 23, latter part . . .	39 (1), part
Section 24	Omitted.
Section 25	Omitted.
Section 26	26, part
Sections 27 to 31	Omitted.
Section 32, part	24 (1)
Section 32, part	24 (3)
Section 33	24 (2)
Section 34	43
Section 35	Omitted.
Section 36	44
Section 37	45
Section 38	Omitted.
Section 39, 1st para. . . .	Omitted.

1	2
Section 39, 2nd para. . . .	Omitted.
Section 39, 3rd para. . . .	43 (2)
Scetion 40, main para . . .	46(2)
Section 40, Proviso	46(3)
Section 41	47, part
Section 42	47, part
Section 43	47, part
Section 44	47, part
Section 45	38
Section 46	Omitted.
Section 47, lst para	37(1), part
Section 47, 2nd para . . .	37(2)
Section 48	Omitted.
Section 49	Omitted.
Section 50	Omitted.
Section 51	Omitted.
Section 52	Omitted.
Section 53	48
Section 54	Omitted.
Section 55, part	49
Section 55, part	50
Section 56	Omitted.
Section 57	33
Section 58, extended . . .	70
Section 59	Omitted.
Section 60	Omitted.
Section 61	Omitted.
Section 62	73
Schedule of form	Omitted.

APPENDIX IV

LIST OF WITNESSES EXAMINED

Witness No.	Name of witness	Page No. in the record of evidence
1	2	3
	BOMBAY (11th, 12th, 14th and 15th September, 1959)	
1	Dr. J. S. Williams (Indian National Church, Bombay) .	
2	Shri D. Suryawanshi, President, Indian Christian Association	
3	Shri James J. John, General Secretary of the All India Federation of National Churches, Bombay .	
4	Shri David F. Shaw, M.L.A., Bombay . . .	
5	The Catholic Union of India, Bombay (A. Soares—President and Alfred T. O. Pinto, Secretary) . .	
6	Shroff & Co., Bombay Solicitors (Shri S. K. J. Modi) .	
7	The Methodist Church, Bombay (Rev. J. B. Satyarvata and Shri V. Uzagare)	
8	Shri C. S. Kirby, Shri C. S. Deodhar, Shri G. S. Deodhar } Representing the Centenary Christian Association, Hubli, Dharwar District, Mysore State	
9	Shri D. N. Tilak, Representative of the National Christian Council	
	MADRAS (13th to 15th October, 1959)	
10	Shri R. Sadasivan, Chief Presidency Magistrate, Madras	
11	Shri Balasingham Satya Nadar, Advocate, representing the National Christian Council	
12	Shri C. K. Nair	
13	Shri A. Dorairaj	
14	Shri P. T. Mathew	
15	Shri L. V. Mathews, representing the National Christian Council	
16	Shri C. V. Naidu	
17	Shri E. B. Devadason	

1	2
	NEW DELHI (2nd to 4th November, 1959)
18	Rev. John Justin Levi, Chief Priest, Indian National Church, Delhi . . . . .
19	Shri Gyan Chand, Editor, "Masihe Duniya" .
20	Cardinal Gracias, Bishop Raymond, Father Sanders & Father Nazareth. (Representing the Catholic Bishops' Conference of India)
21	Shri E. A. N. Mukerji, representing the National Christian Council . . . . .
22	Prof. Eric H. Banerji, Jullundur . . . .
23	Shri B. S. Darbari, Advocate, Agra . . .
24	Shri A. B. Shinde, Jubbulpur, representing the National Christian Council . . . . .
25	Rev. W. D. Maddan . . . . .
26	Rev. William Glad, representing the Northern Evangelical Lutheran Church of India . . . .

APPENDIX V

RECOMMENDATIONS IN RESPECT OF OTHER ACTS

1. *Converts' Marriage Dissolution Act,* 1866—As the existing Act is limited to cases of conversion from Hinduism to Christianity, the question whether a law generally applicable to all cases of conversion from one religion to another is needed, is under consideration. When such legislation is undertaken, the repeal of the Converts' Marriage Dissolution Act can be taken up.[1]

[1]See the body of the Report. para. 63.

NOTE OF SHRI P. SATYANARAYANA RAO

I am unable to subscribe to the view implicit in the provisions of the proposed Bill that no distinction ought to be made in the matter of capacity and essential validity between persons domiciled in India and persons not so domiciled, in the case of marriages solemnised under the proposed Bill in India. The proposed Bill proceeds on the assumption that the provisions as to capacity and essential validity embodied in clause 4 should apply inexorably even where one or both the parties to the marriage is or are of foreign domicile in all cases in which the marriage is solemnised in India under the Act. Be it noted in this connection that apart from the Special Marriage Act which suffers from a similar defect and which even otherwise is bound to be objectionable to the vast majority of Christians who would prefer a religious form of marriage, this is the only Act under which Christians may marry in India.[1]

The relevant provisions of the Bill are clauses 1(2), 3, 4, 11, and 19.

Clause 1(2) provides that the Act extends to the whole of India except the State of Jammu and Kashmir and also to persons domiciled in India who are outside the said territories. This means that the Act will apply, irrespective of the domicile of the parties, to all marriages solemnised under it in India. This clause purports to follow section 1, first para. of the Indian Christian Marriage Act, 1872, and section 2, first para. of the Indian Divorce Act, 1869. It is so as regards the wording but not as regards the substance. The former, as will be pointed out later, purported to deal only with forms of marriage. The latter dealt with matrimonial causes and in the very section relied on embodied significant qualifications. These are really no precedents. The draft clause proceeds on exaggerated notions of sovereignty and the earlier part of the clause is not in harmony with the latter part of the clause importing the domicile qualifications as to marriages solemnized under the Act outside India.

Clause 3 which provides that marriages between Christians in India shall be solemnised under the proposed Act unless the same is solemnised under the provisions of the Special Marriage Act, has been adverted to earlier.

[1]See clause 3.

Clause 4 deals with capacity and essential validity and it provides that a marriage may be solemnised in India between any two Christians if the conditions laid down by it are fulfilled. Clauses 11 and 19 deal with the duty of different persons entitled to solemnise a marriage under the Act to ensure that the requirements of clause 4 are complied with. Clause 11 applies to marriages before a minister of recognised church and it imposes a duty on the minister to refuse to solemnise a marriage if the minister has reason to believe that the solemnisation of the marriage will, *inter alia,* be contrary to the provisions of clause 4. Clause 19 deals with marriages before a licensed Minister or a Marriage Registrar and imposes on them a duty similar to that imposed on Ministers of recognised church by section 11, with this difference that clause 19 provides expressly for an enquiry into the matter and for an appeal from the decision.

It would be seen from the foregoing survey that the Bill makes *lex loci celebrationis* govern not only the formal validity of the marriage but also its essential validity. Further it excludes altogether the personal laws of the foreign party or parties to the marriage, at any rate, so far as the validity of the marriage in India is concerned. There is no provision in the Bill corresponding to section 88 of the Christian Marriage Act, 1872, saving the application of the personal laws to the parties. The elaborate provisions in the Bill giving effect to rules of private international law as to jurisdiction in matrimonial causes would naturally lend support to the view that the Bill should be construed to be exhaustive on the subject of the applicability of its provisions. The very fact that a qualification is introduced on the basis of domicile in the case of marriages solemnised under the Act outside India may be construed as leading to the inference that no such qualification be introduced in the case of marriages solemnised in India. It has been asserted that the effect of the provisions of the Bill would be to make the *lex domicilii* operate cumulatively with the *lex loci.* Whatever may be the merits of the solution it is obvious that the provisions of the Bill do not give effect even to this solution.

I am of the opinion that this extreme lack of solicitude for foreign laws displayed by the Bill is (i) insular and (ii) not in keeping with the liberal approach in the matter of jurisdiction in matrimonial causes adopted in the Bill (iii) inconsistent with the policy adopted in the case of Christian marriages for nearly a century (iv) inconsistent with the practice followed in England from whose legal system we have drawn considerably, and an injudicious break with which is bound to be out of harmony with settled legislative and judicial approach, though it may satisfy pseudo-notions of sovereignty (v) contrary to the consensus of

juristic opinion as to the proper principles of Private International Law applicable to the subject.

I will consider these objections *seriatim.*

(i) *Insular approach.*—The recognition of the foreign laws by all civilised countries for the purpose of doing justice between the parties has been well-established and all the writers on Private International Law have emphasised the necessity of such recognition. To quote only one authority—Cheshire on Private International Law[1] sums up the position in the following words:—

> "Private International Law owes its existence to the fact that there are in the world a number of separate territorial systems of law that differ greatly from each other in the rules by which they regulate the various legal relations arising in daily life. The occasions are frequent when the courts in one jurisdiction must take account of some rule of law that obtains in another territorial system. A sovereign is supreme within his own territory, and, according to the universal maxim of jurisprudence, he has exclusive jurisdiction over every transaction that is there effected. He can, if he chooses, refuse to consider any law but his own. The adoption, however, of this policy of indifference, though common enough in other ages, is impracticable in the modern civilised world, and nations have long found that they cannot, by sheltering behind the principle of territorial sovereignty, afford to disregard foreign rules of law merely because they happen to be at variance with their own territorial or internal system of law. Moreover, as will be shown later, it is no derogation of sovereignty to take account of foreign law."

In this connection it may be noted that Indian courts[2] and legislation[3] have, by following English precedents, impliedly given preference to the theory so ably expounded by Savigny[4] that the general principle in cases involving a foreign element should be that full effect should be

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[1]4th ed., p. 1.

[2]See in the sphere of marriage, 54 Bom. 288 and 59 Bom. 278. In other spheres see the collection of cases in the article by T. S. Rama Rao on "Private International Law in India" in the Indian Year Book of International Affairs, 1955.

[3]Eg. S. 13 C.P. C.; S. 41 Evidence Act; S. 2 Indian Divorce Act ; S. 5 Indian Succession Act ; S. 88 Indian Christian Marriage Act ; S. 134 to 137 Negotiable Instruments Act, etc.

[4]For an exposition of Savigny's theory and its merits, see Wolff: Private International Law, 2nd ed. pp. 34—38 and p. 39.

given to foreign laws unless there are overriding principles of public policy to the contrary. It is thus clear that in disregarding altogether the personal laws of the foreign parties the Bill is unduly insular in character.

It must also be remembered that the followers of Christian religion in our country are a comparatively small minority; but there is an overwhelming adherence to this religion in the countries abroad. When considering a legislation for such a community it may not be justified to do so merely from the domestic angle. We should also take note of the principles of Private International Law. Domestic consideration in the legislative policy of a country which has one religious concept may be justified but it would be inadequate legislation if such principle is rigorously applied in a country like India.

It is not suggested that our legislature is not competent to legislate for marriages when one or both parties thereto have a foreign domicile. No one can dispute the competency of our legislature to legislate on the subject, nor is it maintained that we should not legislate on the subject. All that is said is that when we legislate we should take into account the peculiar feature of such marriages, namely, a party or parties being of foreign domicile and formulate rules suited to the situation. Private International Law is not super-State Law. It is only part of the law of a State. If foreign laws are allowed to be taken note of in cases involving a foreign element it is because the sovereign permits it. So there is no point in entertaining the fear of 'encroachments' of Private International Law into Municipal Law.

(ii) *Not in keeping with the liberal approach adopted in the matter of jurisdiction*:

In this connection reference may be made to clause 35 of the draft Bill. If in the matter of jurisdiction we are prepared to set a limit to the jurisdiction of our courts it is difficult to understand why we should not be actuated by the same spirit in the matter of capacity and essential validity of marriage. We must be logical.

(iii) *Inconsistent with the policy adopted in the case of Christian Marriages for nearly a century*:

The law relating to solemnisation of Christian marriages was consolidated and amended by the Indian Christian Marriage Act, 1872. An examination of the provisions of the Act of 1872 reveals that the main object of the Act was to provide the machinery for the solemnisation in India of marriages among Christians while leaving the question of essential validity to the personal laws of the parties. Part I of the Act deals with persons by whom marriages may be solemnised; Part II deals with the time and place at which marriages may be solemnised; Part III relates to

marriages solemnised by Ministers of Religion licensed under the Act; Part IV relates to registration of marriages solemnised by Ministry of Religion; Part V relates to marriages solemnised by or in the presence of marriage registrar; Part VI relates to marriages of Native Christians; Part VII deals with penalties and Part VIII deals with miscellaneous matters. This Act changed the law as it stood then under which the Registrar or Minister had to satisfy himself that there was no lawful impediment according to the law of England and by section 88 left the question of capacity and essential validity to the personal laws of the parties.[1] Section 88 of the Indian Christian Marriage Act, 1872, expressly provides "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."

Thus the determination of the capacity of the parties and the essential validity of the marriage was expressly left to the personal law or laws of the parties. Under this scheme, foreigners could take advantage of the provisions of the Act and have their marriages solemnised in one or other of the forms provided by it while being governed by the personal law in the matter of capacity and essential validity. This system ensured the international validity of their marriages without at the same time imposing restrictions alien to their personal laws and minimised in no small measure limping marriages or marriages valid in one country and invalid in another country. This state of law has obtained since 1872 at least. No hardship has been experienced; no objection has been expressed; no qualms of sovereignty were felt. Eminent judges of an age when judicial side-comments on the propriety of the principles underlying a legislative provision were considered both proper and necessary, have had occasion to apply section 88 but none felt the need for criticising the principle. What then is the justification for the radical departure from the liberal principle in the proposed Bill? Why should we now revert to a system similar to that abandoned in 1872. It is hard to understand.

(iv) *Inconsistent with the practice in England*:

Firstly, the statutory provisions may be considered The domestic law of marriage in England was finally consolidated with some amendments by the Marriage Act, 1949. This Act provides for two categories of absolute prohibitions or prohibitions which may be classified as pertaining to capacity and essential validity. These are (i) as to age and (ii) as to prohibited degrees. Section 2 of the Act taken from the Age of Marriage Act, 1929, provides that a marriage between persons either of whom is under the age of 16 shall be void. Section 1 deals with prohibited degrees

[1]For a statement of the law prior to 1872, see Lope *v.* Lopez, 12 Cal. 706 at p. 729.

and provides that marriages within prohibited degrees of consanguinity or affinity as stated in Parts I and II of the First Schedule to the Act shall be void. It may be noted that the Schedule reproduces with some modifications the prohibitions of the Prayer Book as confirmed and modified by statutes commencing from Lord Lyndhurst's Act of 1835 (526 Will. 4. c. 54).

It is significant that the Act is silent on the question whether its provisions on the subject under consideration are confined only to persons domiciled in England or whether they apply to all persons marrying in England. It is this legislative silence that enables Courts to import principles of private international law. It cannot be claimed that our Bill follows the pattern of the English Marriage Act. There is nothing in the Act corresponding to clause 1(2) of our proposed Bill. Nor can an inference be drawn from the provisions of the Act that compliance with sections 1 and 2 is condition precedent to the solemnisation of marriage under it. In contrast to the provisions of our Bill the Act does not empower any of the authorities authorised to solemnise marriages to *suo motu* refuse to register marriages on the ground of any prohibitions falling under section 1 or 2. Thus in the case of marriage by banns, no doubt, publicity is given and it is open to raise objections. In the case of marriage by common license provision is made in section 16 whereby one of the persons to be married should swear before a person granting such licence that he or she believes that there is no impediment of kindred or alliance of any other lawful cause nor any suit commenced in any court, to bar or hinder the solemnisation of marriage in accordance with the licence. That sworn statement is accepted and, if it is false penal consequences will follow. Section 29 provides for the entering of a caveat and that caveat is to be enquired into by the Superintendent and an appeal is provided for to the Registrar-General from the decision of the Superintendent. Thus it is clear that the Act does not insist as does the present Bill, that whatever may be the law of the domicile of the parties they are bound to satisfy the solemnising authority that there are no impediments under sections 1 and 2 of the Act.

Considerable light is thrown on the question as to what is the meaning of the expression "impediments" in relation to the declaration that there are no impediments, by other statutory provisions and judicial decisions and the views of writers of authority. We may consider first Marriage with Foreigners Act, 1906 (6 Edw. 7, c. 40) which is still on the statute book. Section 2 of the Act deals with marriages of foreigners with British subjects in the United Kingdom and deals with issue of certificates that there are no impediments according to the foreign law. Though the Act applies only in the case of subjects of reciprocating territories, it is clear that it proceeds on the assumption that impediments in the case of a foreigner would mean

impediments under the foreign law[1]. Secondly, reference may be made to section 19 of the Foreign Marriages Act, 1892, which provides that the Marriage Officer under the Act should refuse to solemnise a marriage which would be inconsistent with the principles of international law or comity of nations. As will be pointed out later, the principle referred to is the principle that capacity and essential validity are governed by *lex domicilii* of the parties.

It may also be noted that leading authorities like Halsbury and Dicey support the view that the law relating to prohibited degrees of consanguinity and affinity laid down by the English Act affects only persons domiciled in England. See 19 Halsbury's Laws of England (3rd edn.), page 785 and Dicey's Conflict of Laws (7th edn.), page 258. The decisions relied on by these writers in support of the proposition—Re De Wilton, Re Bozzelli's Settlement—Sottomayor v. De Barros (No. 1)—bear it out[2].

In the sphere of English conflict of laws, since the decision of House of Lords in 1861 in *Brook* v. *Brook*[3] it is well established that a distinction has to be made between formalities and essentials of marriage and that the latter which includes capacity is governed by the law of domicile of the parties. In *Brook* v. *Brook*, the marriage was solemnised in Denmark between a man and his deceased wife's sister, both of English domicile. According to the law of Denmark, the marriage was valid. According to the law of England, as it stood then, the parties were within prohibited degrees of relationship and hence the marriage was void. The question in issue was whether the

[1]See Halsbury Laws of England (3rd edn.), Vol. 19, pp. 778, 779 where this Act is referred to.

[2]In Re De Wilton [(1900) 2 Ch. 481] the question arose with reference to the persons professing the Jewish religion who were domiciled British subjects. The marriage was solemnised outside England according to Jewish rites between a niece and a maternal uncle. The marriage was valid according to Jewish Law but was void according to English law. It was held, notwithstanding the fact that the marriage was valid according to Jewish law, as the persons were domiciled in England they were governed by the impediments laid down by the English Law (Lord Lyndhurst's Act) and so the marriage was void.

In *Re Bozzelli*'s *Settlement* [(1902) 1 Ch. 751] the question arose about the validity of the marriage between a naturalised Italian domiciled in Italy who married her deceased husband's brother, an Italian domiciled in Italy. The marriage was solemnised in Italy after the necessary dispensation has been obtained. It was valid according to the Italian law and the question arose whether it is a marriage which should be recognised as valid in the United Kingdom. It was held that notwithstanding Lord Lyndhurst's Act, the marriage was valid in England. Swinfein Eady J., applied the principle of Brook *v.* Brook [(1861) 9 H.L. Cas. 193] which established the principle that the law of domicile of the parties will govern the essential validity of marriage. A passage from the judgement of the Court of Appeal in Sottomayor *v.* De Barros [(1877) 3 P. D. 1] was also quoted with approval. It repeats the well-recognised principle of private international law that a question of personal capacity to enter into a contract is to be decided by the law of domicile of the parties.

[3](1861), 9 H.L. Cas. 193.

lex loci celebrationis would prevail over the doomiciliary prohibition as to capacity. The point was debated before very eminent Law Lords and in an exhaustive judgement it was held that the marriage was void, as under the law of England such a marriage was void. Lord Campbell, L.C. at p. 207 in that case stated: "There can be no doubt of the general rule that a foreign marriage, valid according to the law of a country where it is celebrated, is good everywhere. But, while the forms of entering into the contract of marriage are to be regulated by the *lex loci contractus*, the law of the country in which it is celebrated, the essentials of the contract depend upon the *lex domicilii*, the law of the country in which the parties are domiciled at the time of marriage, and in which the matrimonial residence is contemplated. Although the forms of celebrating the foreign marriage may be different from those required by the law of the country of domicile, the marriage may be good everywhere. But if the contract of marriage is such, in essentials, as to be contrary to the law of the country of domicile, and it is declared void by that law, it is to be regarded as void in the country of domicile, though not contrary to the law of the country in which it was celebrated.", and at p. 212 the Lord Chancellor further observed: "It is quite obvious that no civilised State can allow its domiciled subjects or citizens, by making a temporary visit to a foreign country to enter into a contract, to be performed in the place of domicile, if the contract is forbidden by the law of the place of domicile as contrary to religion, or morality or to any of its fundamental institutions." The other Lords, Lord Cranworth and Lord St. Leonards also enunciated the same principles. Ever since that decision the principle has been applied in England to varying situations.

The application of the principle laid down by the House of Lords in *Brook* v. *Brook* may be considered with reference to the following situations[1].

(1) Both parties domiciled in England and the marriage celebrated abroad.

(2) Both parties domiciled abroad and the marriage celebrated in England.

(3) One party domiciled in England and other party abroad and the marriage celebrated abroad.

(4) One party domiciled in England and the other abroad and the marriage celebrated in England.

The first of the aforementioned situations was the one directly in issue in *Brook* v. *Brook* and does not require further consideration. It is clear that *lex domicilii* of the parties is decisive in such a situation[2]. The second

[1]The situation where both parties are domiciled in England and the marriage is celebrated in England is clearly a problem governed exclusively by municipal law.

[2]See also Re De Wilton (1900) 2 Ch. 481. Facts given earlier, see p. 146, footnote 2.

situation arose in *Sottomayor* v. *De Barros* (No. 1)[1]. In this case the marriage was between two first cousins, both assumed to be of Portuguese domicile. By the law of Portugal the marriage was void as being within prohibited degrees, but by the Law of England the marriage was valid. The court held that the domiciliary prohibition was binding and accordingly declared the marriage void. The third situation—one party domiciled in England, the other abroad and the marriage celebrated abroad—arose in *Mette* v. *Mette*[2], *Re Paine*[3] and more recently in *Pugh* v. *Pugh*[4]. In all these cases the principle of domicile governing capacity was applied and by virtue of the prohibition under one or other of the laws of domicile applicable, the marriages were held void although the marriages in each case was valid by the *lex loci celebrationis* and the *lex domicilii* of one of the parties. It is significant that both in *Re Paine* and *Pugh* v. *Pugh*, the decision in *Brook* v. *Brook* was followed and applied. In *Re Paine*, Bennet J., expressly endorsed the views of Dicey, Westlake and Halsbury *viz.*, that capacity is governed by the law of domicile of each of the parties.

It is only with regard to the fourth situation—that is, where the marriage is celebrated in England and one party is domiciled in England and the other domiciled abroad—that there is confusion and difficulty. The only authorities are *Sottomayor* v. *De Barros* (N. 2)[5], and dicta in *Ogden* v. *Ogden*[6] and *Chetti* v. *Chetti*[7]. The dicta in Ogden's case are of not much weight as the decision proceeded, rightly or wrongly, on the assumption that matters of consent pertain to form. The decision in Chetti's case can be explained with reference to the ultimate reservation in favour of public policy of *lex fori*. It is enough, therefore, to consider *Sottomayor's* (No. 2) case in detail. Strong reliance has been placed on this case in support of the provisions of the proposed bill and it is therefore necessary to consider it in detail and show what criticism it has evoked.

The case originally started before Phillimore J.[8] and the question raised was about the validity of a marriage in England between first cousins one of whom was admittedly of Portuguese domicile. Such a marriage was valid according to the law of England. The marriage itself was celebrated in England. Phillimore J., directed the Queen's Proctor to intervene as the respondent, the husband merely entered appearance and did not file an answer. He disposed of the case without trial holding that as the marriage

[1](1877) 3 P.D. 1.
[2](1859) 1 Sw. & Tr. 416.
[3](1940) Ch. 46.
[4](1951) P. 482.
[5](1879) 5 P.D. 94.
[6](1908) P. 46.
[7](1909) P. 67.
[8]2 P.D. 81.

was contracted in England and being valid under English law, the fact that the parties were incapacitated from entering into a marriage by the law of Portugal did not affect the validity.

The matter was taken in appeal[1]. In the Court of Appeal, the facts not having been tried by the first court, the matter was argued on the assumption that both the parties, the husband and the wife, had Portuguese domicile. On this footing, as the marriage was invalid according to the law of Portugal, the Court of Appeal reversed the decision of Phillimore J., and remanded the case for further disposal on the other questions, particularly questions of fact. Cotton L.J., delivered the judgement of the court consisting of James, Baggalay and Cotton L.JJ. He applied the principle laid down by the House of Lords in *Brook* v. *Brook* viz., that the capacity to enter into marriage must be determined according to the domicile of both the parties.

After it was sent back, the case was disposed of by Sir James Hannen P.[2]. He found as a fact that the husband's domicile was English while that of the wife was Portuguese. The President held the marriage valid. Though the judgement is not a well-reasoned one, it is clear that the learned Judge relied upon the English domicile of one of the parties and the place of celebration of marriage for testing the validity of marriage with reference to English Law and for disregarding the prohibition of the law of foreign domicile.

This decision has created a stir in England and was severely criticised. It is, however, treated by Dicey and others as an exemption to the general rule relating to dual domicile as they could not get over the decision until it was reversed by high authority. The decision, however, is opposed to principle and authority and is not in keeping with all other decisions commencing from *Brook* v. *Brook*. It has been criticised by a number of writers of authority.

Westlake[3], in effect, refused to recognise the decision; for, notwithstanding it, he laid down in section 21 the rule as follows:—

> "It is indispensable to the validity of a marriage that the personal law of each party be satisfied so far as regards his capacity to contract it, whether absolute, in respect of age, or relative, in respect of the prohibited degrees of consanguinity or affinity."

Referring to the case, the learned author observed thus:

> "....but this authority is weakened, (1) by the learned Judge's pronouncement in favour of the *lex loci contractus* as governing competency, (2) by his

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[1] 3 P.D. 1.

[2] (1879) 5 P.D. 94.

[3] Private International Law, 4th ed. p. 59.

taking Creswell's opinion in favour of the *lex loci contractus* from *Simonin* v. *Mallac*[1], without reference to that learned Judge's saying in *Mette* v. *Mette*[2] "there could be no valid contract unless each was competent to contract with other", (3) by his reference to the statutes on the marriage of first cousins, which seems to imply that the rules of private international law are less applicable where the English law is contained in statutes than where it is the common law. In *Re De Wilton*[3].....the dependence of capacity for marriage on domicile was held not to be subject to an exception for the marriages of Jews.

And conversely, a marriage in which the personal law of each party as regards his capacity is satisfied is valid in England so far as regards such capacity, notwithstanding that by English law it would be incestuous: *Re Bozzelli's Settlement*[4].....and the judgements of Lord Campbell and Cranworth in *Brook* v. *Brook* there quoted."

The eminent Canadian authority, Falconbridge discussed six different methods of reconciling *Mette* v. *Mette*[5] and *Re Paine*[6] with *Sottomayor* No. 2 all of which he rejects as untenable[7]. Referring to this Morris[8] observes:

"The decision in the latter is based upon the grounds (1) that capacity to marry is governed by the law of the place of celebration, and (2) that an incapacity imposed by foreign law is less important than a capacity imposed by English law and can therefore be disregarded. The former ground is clearly untenable since *Brook* v. *Brook*. The latter ground is unworthy of a place in a respectable system of conflict of laws' "

Rabel[9], a leading authority of international reputation, examines the decision very critically and states his conclusion as follows:

"On the basis of this latter case, many writers have believed that English courts would always apply domestic law, if the marriage is celebrated in England and one party, or at least the bridegroom, is domiciled there, irrespective of any incapacity by which the other party may have been affected under his own domiciliary law. Thus, whereas a domiciled Englishman marrying abroad would remain subject to the English rules on capacity, the foreign grounds of incapacity, of a person domiciled abroad would be

[1](1860) 2 Sw. & Tr. 67.
[2] 1 S & T 423.
[3](1900) 2 Ch. 481.
[4](1902) 1 Ch. 751.
[5](1859) 1 Sw & Tr. 416.
[6](1940) Ch. 46.
[7]Falconbridge : Essays on Conflict of Laws (1st ed.), pp. 640—643.
[8]Morris : Cases on Private International Law (Third edn.), p. 79.
[9]The Conflict of Laws, A Comparative Study, Vol. I, 1945, p. 260.

disregarded. This alleged rule has acquired world-wide notoriety; it has been labelled a badge of "insular pride and complacency". In fact, apart from the unclear grounds of the court in the second *Sotto-mayor*[1] decision and the entirely discredited case of *Ogden* v. *Ogden*[2] there is no reasonable support for such unilateral English doctrine."

Referring to the decision, Dicey[3] remarks as follows:

"... an anomalous exception to the negative application of the doctrine under consideration was, as we shall see, established by the decision of Sir James Hannel P., on the second hearing of the case of *Sotto-mayor* v. *De Barros*[4]. Although it may have been justified by some remarks of the Court of Appeal on the previous hearing of the case[4], the decision was largely based on the judgment in earlier cases which stressed the predominance of the *lex loci celebrationis* in all matters affecting the validity of marriage. The learned judge appears to have failed to appreciate the significance of the first decision which differentiated questions of capacity from those of formal validity, and his judgment in favour of the validity of the marriage celebrated in England between parties one of whom was domiciled there, and the other of whom was incapable of intermarrying with him by the law of her domicile, gives a *national bias to English Private International Law which is logically indefensible.*

Subject to the above anomalies, the rule that capacity to marry depends upon the law of the ante-nuptial domicile of each of the parties is borne out to the full by the authorities; and it is submitted that it is consistent with sound principle, because a person's status is, as a general rule, determined by the law of his domicile, questions of status cannot be affected by the intention of the parties, and a person's capacity to marry is a matter of public concern to the country of his domicile."

Schmitthoff[5] thinks that the decision, however, could be sustained on other grounds than those on which it was decided and he also points out that the decision of Willmer J. in *Chapelle* v. *Chapelle*[6] indicates clearly that the alleged exception does not exist. In that case, it may be stated, the marriage was celebrated in England while the husband was domiciled in Malta where the wife went after the marriage and where she lived with him for about ten

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[1](1879) 5 P.D. 94.

[2](1908) P. 46.

[3]Dicey on Private International Law, 7th ed. pp. 250-51.

[4](1877) P.D. 1, 6-7.

[5]Clive M. Schmitthoff, The English Conflict of Laws, 3rd ed., p. 352.

[6](1950) P. 134.

years; the marriage was valid by English law but void by the law of Malta. Willmer J. disregarded the domicile of the wife at the date of the marriage—if the alleged exception existed, he would have paid particular attention to this fact and would probably have held that the decree of a foreign court could not annul *ab initio* a marriage valid in English law—and made the recognition of the decree of nullity of the Maltese court dependent on the existence of a common domicile of both parties in Malta at the date of the commencement of the nullity suit.

Even Graveson[1], who has been relied on in support of the approach of the Bill concedes that the doctrine laid down by the case is 'inelegant' though he has something to say in favour of it by way of apology. He observes: "..... it exists to protect domiciled Englishmen and English women on entering into marriages with persons domiciled abroad, the English marriage ceremony and the institution of monogamous marriage itself as the only type which can validly be performed in England and it only applied to marriages celebrated in England." It is unnecessary in the present context to examine how far this explanation is valid. Christians domiciled in India have managed without any such protection and have experienced no hardship. Besides, there is no question of inroads on the institution of Christian marriage as our Bill is applicable to Christians only and as it embodies different types of generally recognised marriage ceremonies. In short, if there is any force in Prof. Graveson's justification that does not hold good in the context of our Bill.

It is needless to multiply other authorities in support of the criticisms levelled against the decision in *Sottomayor* v. *De Barros*. Though text-book writers who have obviously no power to over-rule decisions have to explain it away as an exception so long as it is not overruled by a competent tribunal it is hard to see how it can commend itself to us as a precedent worthy of being followed in the proposed Bill. To follow it would be only to swing back the pendulum to the situation which existed prior to the decision of the House of Lords in *Brook* v. *Brook*[2].

The foregoing survey of English Law represents the position as can be deduced from statutory provisions and judicial decisions. It does not take note of theories of what individual writers regard as ought to be the law. Private International Law is indeed a fertile field for the free play of imagination and a fine arena for the display

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[1] Graveson : Conflict of Laws (Third Edn.) p. 136.

[2] (1861) 9 H.L. Cas. 193.

of fanciful theories. Views of writers are not lacking which are far away from what can legitimately be deduced on the basis of doctrine of precedent and the established canons of interpretation. Judicial dicta swung out of their context can conveniently be made to buttress these theories. In the present context it is enough to consider two theories. Firstly, the so called matrimonial domicile governing capacity and essential validity—a theory propounded by Prof. Cheshire. Prof. Cheshire has found respectable ancestry for this 'pet child' of his in Savigny and has managed to get it 'adopted' in the Royal Commission Report, by virtue of his position as the expert member. It is true, in recent years, a few judges have flirted with the theory though no one has wedded it much less wedded it to English Law! How truly it represents English law may be judged by the learned professor's own confession in the third edition of his book after a heroic struggle with a crusader's zeal to support it. After examining all the English cases excepting the second Sottomayor case he observed:

> "It may be objected with force that one of these decisions is conclusive in favour of the law of matrimonial home....Nevertheless there remains one decision which, *on the facts though not on the reasoning* is a more convincing authority for the view now being advocated. This is *Sottomayor* V. *De Barros* (No. 2)[1] ....."[2]

This is what the learned Doctor had to confess as late as 1947.

While the importance of the theory consists in focussing attention on the seat of the status in issue, it suffers from a serious drawback in that it makes everything hinge on intention and thus introduces confounding uncertainty as to the validity of the marriage. And if this defect is sought to be remedied by presumption such as that the matrimonial domicile will be the husband's domicile, its chief merit is *pro tanto* sacrificed.

In *De Reneville* v. *De Reneville*[3] while dealing with the question of jurisdiction in nullity suits, Lord Greene M.R., observed at p. 61 as follows:

> "In my opinion the question whether the marriage is void or merely voidable is for French law to answer. My reasons are as follows: *The validity of a marriage so far as regards the observance of formalities is a matter for the* lex loci celebrationis. *But this is not a case of forms.* It is a case of essential validity. But what law is that to be decided?

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[1](1879) 5 P.D. 94.

[2]Cheshire : Private International Law, Third edn., 1947 (1949 reprint), p. 284.

[3] (1948) 1 All E.R. 56.

> In my opinion, by the law of France either because that is the law of the husband's domicile on the date of the marriage or (preferably in my view) because at that date it was the law of the matrimonial domicile in reference to which the parties may have been supposed to enter into the bonds of marriage. In *Brook* v. *Brook* the marriage in Denmark (by the law of which country, assuming it applied, it was valid) of two persons domiciled in England was held to be void on the ground that, although the *lex loci* governed the form of marriage, its essential validity depended on the *lex domicilii* of the parties".

Then the learned Lord quoted the passage from Lord Campbell's judgment in *Brook* v. *Brook* which has already been referred to. Let it be noted, and the relevant passage is italicised, that this case does not support the application of *lex loci* to determine essential validity: It lends countenance to the matrimonial domicile theory. But as Morris[1] has pertinently pointed out something more tangible is necessary to hold that a case dealing with jurisdiction has given the go by to the law obtaining for nearly a century, a law stated in crystal clear terms only seven years earlier in *Re Paine*[2]. In fact, *Re Paine* was not considered in *De Reneville's* case.

Assuming that the matrimonial domicile theory represents the true position in English law how does it support the stand taken in the Bill of governing essential validity exclusively by *lex loci*? How can it be assumed that those who marry in India necessarily make India their matrimonial home?

I now pass on to consider the second theory, the theory of what may be termed public policy. Passages from Dicey and Graveson have been quoted that some or all the English requirements apply to marriages solemnised in England. In Dicey[3] there is a frank confession that there is no reported decision in support of the proposition and that the only available case is a Victoria Court decision—Will of Swan which is against his view. It was held in that case that the *invalidity by the* lex loci celebrationis *did not invalidate the marriage.* Besides a suggestion is made that the *lex loci celebrationis* prohibitions may be overcome and the *marriage* saved by applying the Renvoi doctrine. It is clear from this that the statement is made in a half-hearted manner. Graveson observes that the municipal rule as to age would apply in all cases though he cites no authority but he cautions strongly against the

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[1]Morris : Cases on Private International Law, Note G, p. 174 at p. 177.

[2](1940) Ch. 46.

[3]Conflict of Laws (7th ed.) pp. 256-257.

full application of municipal law requirements. He observes:

> "The overriding effect of English law in this respect is *to maintain minimum not maximum* standards of essentials of marriage, so that provided the English standard is satisfied, reference will still be made to *lex domicilii* to ascertain the existence of capacity."

A passage from *Sottomayor* v. *De Barros* (No. 2) has been relied on in support of the application of the *lex loci*. It will indeed be edifying for the editors of Dicey and Graveson who have been floundering for authority for the proposition.

Enough has been said to show that English law howsoever construed would not support the extreme approach adopted in the Bill.

(v) *Contrary to the consensus of authority as to the proper principles of Private International Law applicable to the subject*:

That personal law plays a decisive part in determining the capacity of parties to a marriage is well established in practically all the systems of Private International Law of the world[1], though there is divergence of opinion as to the criterion of personal law. Even in the United States of America with its emphasis on *lex loci*, statutory provisions have been made to ensure compliance with *lex domicilii*[2].

In conclusion, we would like to emphasise that deviations from generally accepted principles of Private International Law in the sphere of capacity and essential validity of marriage will only lead to the increase of the number of limping marriages. The real solution for avoiding this is to follow principles generally accepted so that the requirements would be the same whether the marriage is celebrated in one country or the other and secondly to restrict so far as may be the application of, on grounds of public policy, local requirements. In a composite legal system such as ours under which widely divergent institutions ranging from polyandry to polygamy coexist, it is not justifiable to insist on special requirements on grounds of public policy. If for hundred years no consideration of public policy were felt and capacity and essential validity could be exclusively left to personal laws of

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[1]For a survey of the various systems, see Rabel: Conflict of Laws, A comparative study, Vol. I. See also Wolff : Private International Law (2nd ed.), 326 as to the position in continental laws.

[2]See for eg., Uniform Marriage Evasion Act of 1912. See also Restatements on Conflict of Laws, s. 140.

parties[1] what justification is there now for deviating from that course?

The ideal solution would be to maintain the *status quo* by restricting the provisions of the Bill to persons domiciled in India and little consolation can be derived by claiming that we are creating a sort of *"jus gentium"* paying due regard to the requirements under different municipal laws. If it is intended to engraft an exception recognised in England in *Sottomayor* (No. 2) case, that may also be embodied. If, on the other hand, it is intended to adopt Cheshire's matrimonial domicile theory, that may be stated clearly. As pointed out there are other types of cases, which are not covered by the principle in *Sottomayor* (No. 2) case, and provision has to be made for such cases. If on the other hand it is intended to tighten the provisions still further and to adopt the principle of cumulative impediments, that is, to insist that the conditions laid down in section 4 should be satisfied in addition to the conditions laid down by the law of domicile it may be so stated in the Bill instead of leaving it uncertain. It is, of course, for the sovereign legislature of India which has undoubtedly the power to enact any law as it pleases to decide whether it should or should not take cognizance of the well-accepted principles of private international law which in some respects have been adopted in Indian legislation. The precedents of the Special Marriage Act and the Hindu Marriage Act need not be taken seriously. In the case of the former, the question was not debated fully, possibly because of Law Minister's assurance on an allied subject that the question of conflict of laws would be examined and that a suitable bill would be introduced later. In the case of the Hindu Marriage Act different considerations apply. In any case, two wrongs cannot make a right!

P. SATYANARAYANA RAO,
30-5-60.

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[1]See above discussion as to s. 88 of the Indian Christian Marriage Act, pp. 143, 144.

SUPPLEMENT TO THE MINUTE OF DISSENT

In view of the revision of the original paragraph 5 of the report subsequent to my sending the minute of dissent I feel it necessary to clarify certain points.

Firstly, it is assumed that what was urged was that the proposed legislation should be limited to marriages between persons of Indian domicile[1] and that a *'vacuum'* should be left in the law as to marriages of persons not domiciled in India[2]. I would only emphasise that there is nothing in my minute to justify such an assumption. The following passage in my minute sets in clear terms the stand I have taken:

> "No one can dispute the competency of our legislature to legislate on the subject, nor is it maintained that we should not legislate on the subject. All that is said is that when we legislate we should take into account the peculiar feature of such marriages, namely, a party or parties being of foreign domicile and formulate rules suited to the situation".

It is enough to point out that this liberal plea for giving persons domiciled abroad the elementary facility of having the essential validity of their marriages regulated by their personal laws cannot by any means be construed as a plea for not legislating on the subject of marriages of persons domiciled abroad.

Secondly it has been added that the decision in *Sottomayor* v. *De Barros* (No. 2)[3] "has stood". To one familier with the methods of legislative reform in England it will be no revelation to be told that other anomalies "stood" or have been "standing" for long periods without being slashed by the legislative axe. An instance in point is the law as to the deserted wife's right to petition for dissolution of her marriage. This was reformed partially in 1937 and almost completely in 1949. In short, "standing" of a rule in English law is not necessarily a safe test.

In this connection reference may be made to the passage in the Royal Commission Report on Marriage and Divorce which has been relied upon in support of the 'matrimonial home' or the so called 'matrimonial domicile theory'. The passage reads thus:

> "If the marriage is alleged to be void on a ground other than that of lack of formalities, that issue shall

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[1]See opening para. entitled 'question on domicile' in paragraph 5 as revised.

[2]See concluding para. entitled '(*i*) Conclusion' in paragraph 5 as revised.

[3]1879 L.R. 5 P.D. 94.

be determined in accordance with the personal law or laws of the parties at the time of the marriage (so that the marriage shall be declared null and void if it is invalid by the personal law of one or other or both of the parties); provided that a marriage which was celebrated elsewhere than in England or Scotland shall not be declared void if it is valid according to the law of the country in which the parties intended at the time of the marriage to make their matrimonial home and such intention has in fact been carried out[1]."

It is clear from the first part of this passage that the principle of determining the validity of the marriage according to the dual domicile of the parties applies to the marriages celebrated in England. It would seem that the rule in *Sottomayor* (No. 2) has not found favour.

Thirdly, I shall consider the interpretation placed on section 88 of the Indian Christian Marriage Act. It will perhaps be conceded that statement of objects and reasons, proceedings in the legislature in respect of even the very Act under consideration do not constitute an aid to construction of that Act in courts. It is no doubt true that one of the objects accomplished by section 88 is to save to Roman Catholics their personal law as to capacity. If that had been its only object it is strange that it has not been so stated. It cannot be denied that the section would apply to all persons marrying under the Act.

The next question is as to what is the meaning of the expression 'personal law'. The expression has to be construed in the light of the context in which it is used. In the context in which it occurs it is used to denote the law governing the person marrying under the Act, particularly the status of the person for purpose of marriage. This leads us on to the question as to what is the criterion by which to determine the law governing personal status. The criterion may be with reference to the concept of a territorial system of law or to use the language of Dicey a "Law District" or it may be with reference to membership of a religious or tribal group. Where the criterion is with reference to a territorial system of law it is either Domicile or Nationality. Where on the other hand, it is with reference to membership of a group it may be religion or tribe membership. In India we have side by side the territorial criterion of domicile and also the criterion of religion. The latter concept is used as regards persons domiciled in India. The former criterion is employed as regards cases involving a foreign element. Either would lead to the same result in the case of persons domiciled in India. Thus, for example, if a Hindu and a Christian, both domiciled in India, marry under the Christian Marriage Act and the criterion of personal law is said to be the law of domicile, then it will be Indian law. Now Indian law

[1]Report of the Royal Commission on Marriage and Divorce, Cmd. 9678 p. 395 cited in Cheshire, Private International Law (5th edn.), p. 312.

will say that if the party is a Hindu, Hindu law would apply, etc. In other words, it is an instance of the criterion religion coming into opration through the criterion of domicile[1]. It is for this reason that the expression 'domicile' is used as synonymous with 'personal' law.

It has been observed that the contrast in section 88 is between one system of personal law and another applicable to persons having the same domicile. It is difficult to justify this view. Firstly section 88 does not occur in Part VI but in Part VIII of the Act. Secondly the language of the section is very wide and it clearly has in view 'any marriage' solemnised under the Act. It cannot be denied that persons domiciled abroad, in the same country or in different countries, can marry under the Act. In such cases section 88 of the Act would come into operation to confirm the effect of the prohibitions under the *lex domicilii* of the parties. An authority on the point is the decision of Gentle J., in *William Hudson* v. *Mr. Webster*[2]. At p. 568 the learned judge observed:

> "A bigamous marriage in England is a marriage which is not a valid marriage and section 88 of the Christian Marriage Act clearly to my mind contemplates and prevents a marriage which would be invalid in places elsewhere, including England, not becoming a valid marriage because it is celebrated in this country".

It has been claimed that section 88 is merely "one other application of the doctrine that the conditions as to the validity of a marriage prescribed *lex loci celebrationis* and *lex domicilii* to operate both cumulatively". This cumulative operation is not in the sense that the requirements as to capacity and essential validity under two systems are to be complied with for, as conceded in the Report the Act deals with forms only.

P. SATYANARAYANA RAO,
5-8-1960.

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[1] For a proper appreciation of this point, see the judgment of Beaumont C. J., in *Khambhatta* v. *Khambhatta*, 59 Bom. 278 wherein he pointed out that the *lex domicilii* of a Muslim domiciled in India would be Indian law applicable to Muslims (at pp. 284-285). Delivering his judgment in the appeal from the decision of Beaumont C. J., Broomfield J. observed at p. 308 thus : " It is recognised that the law of the religion is a part of the law of domicile.... "

[2] A.I.R. 1937 Mad. 565.

NOTE BY MEMBER SHRI SACHIN CHAUDHURI

While I generally subscribe to the views on Private International Law as expressed by Shri Satyanarayana Rao in his note, my agreement is not such as to impel me to dissent from the majority view.

S. CHAUDHURI,
19-8-60.

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