The Law College Magazine



1964-'65

ERNAKULAM



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THE LAW COLLEGE MAGAZINE

Vol. No. XXXII

April 1965

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TO OUR ESTEEMED READERS

We are happy indeed to present to our esteemed readers THE ERNAKULAM LAW COLLEGE MAGAZINE for the year 1964-'65. We do hope that the publication will meet with a generous welcome at the hands of the enlightened public of jurists, lawyers and students in the country. As in the past, this year also, the magazine contains the usual fare of learned articles on legal topics, autobiographical and biographical sketches of legal luminaries, reports of our academic activities etc. etc.,

Two important events, so far as we are concerned, deserve mention here. Shri Philip K. Thayil, our former Professor and Editor-in-charge of the Magazine was promoted and appointed as Principal of Trivandrum Law College, with effect from 18th of January 1965. We offer our congratulations and best wishes to him. Another happy event is the nomination of Our Principal Shri. R. Sankaradasan Thampi as the Dean of the Faculty of Law, Kerala University. We congratulate the Principal on the rare distinction conferred on him and wish him greater glories in future.

The events that somewhat marred the calm serenity of our life this year were the agitations in connection with the food scarcity and the opposition to Hindi. We students had perforce to enter into these fields, not to further any political interests, but because in one case the situation affected our daily bread and, in the other, our future career, which means the same. Although the storms have blown over, we do not feel secure as yet. We can only hope that the unhappy incidents of the past will not recur hereafter.

This is a time when our University is actively contemplating reforms in the field of legal education. A distinguished and authoritative Commission appointed to go into the matter has already submitted its report and the same is now engaging the attention of the authorities. It is needless to say that, any reorganization of legal education in this State, or for the matter of that, anywhere

should be attempted with the object of creating a class of efficient and fearless lawyers committed to eternal vigil to protect Freedom and Rule of Law, the twin pillars of Democratic State. Deterioration in the standard of legal education would mean an inefficient Bar and a weak Judiciary poisoning the stream of administration of justice and, leading to political degeneracy and Dictatorship. Legal education is, therefore, not a subject to be neglected, as is the case today, but one which should be given top priority as it is of vital importance to our society. It is not for us to discuss the possible or desirable course of such reform here, especially in view of the learned report already prepared by the Commission mentioned above. We only record our fervent hope that the authorities concerned would bestow deep thought and attention on the recommendations of the Commission and speedily implement them.

The Government have sanctioned the construction of a new two-storied building for our College within the present campus. It is our hope that the process of construction will be speeded up and the new edifice will come up without delay.

Finally, in bringing out this publication we are indebted to the co-operative efforts of many lovers of forensic literature, both within and without our College, lawyers as well as students and, to acknowledge them all here individually would be embarassing to our friends and may sound like indulging in personal compliments. Hence we respectfully forbear from doing so. The following pages, we hope and trust, will afford them all ample reward for their labours.

Law College,
Ernakulam, 2nd April, '65.

A. S. Joseph Franklin (Sd.)
M. Mohammed Moopen (Sd.)
(Student Editors)

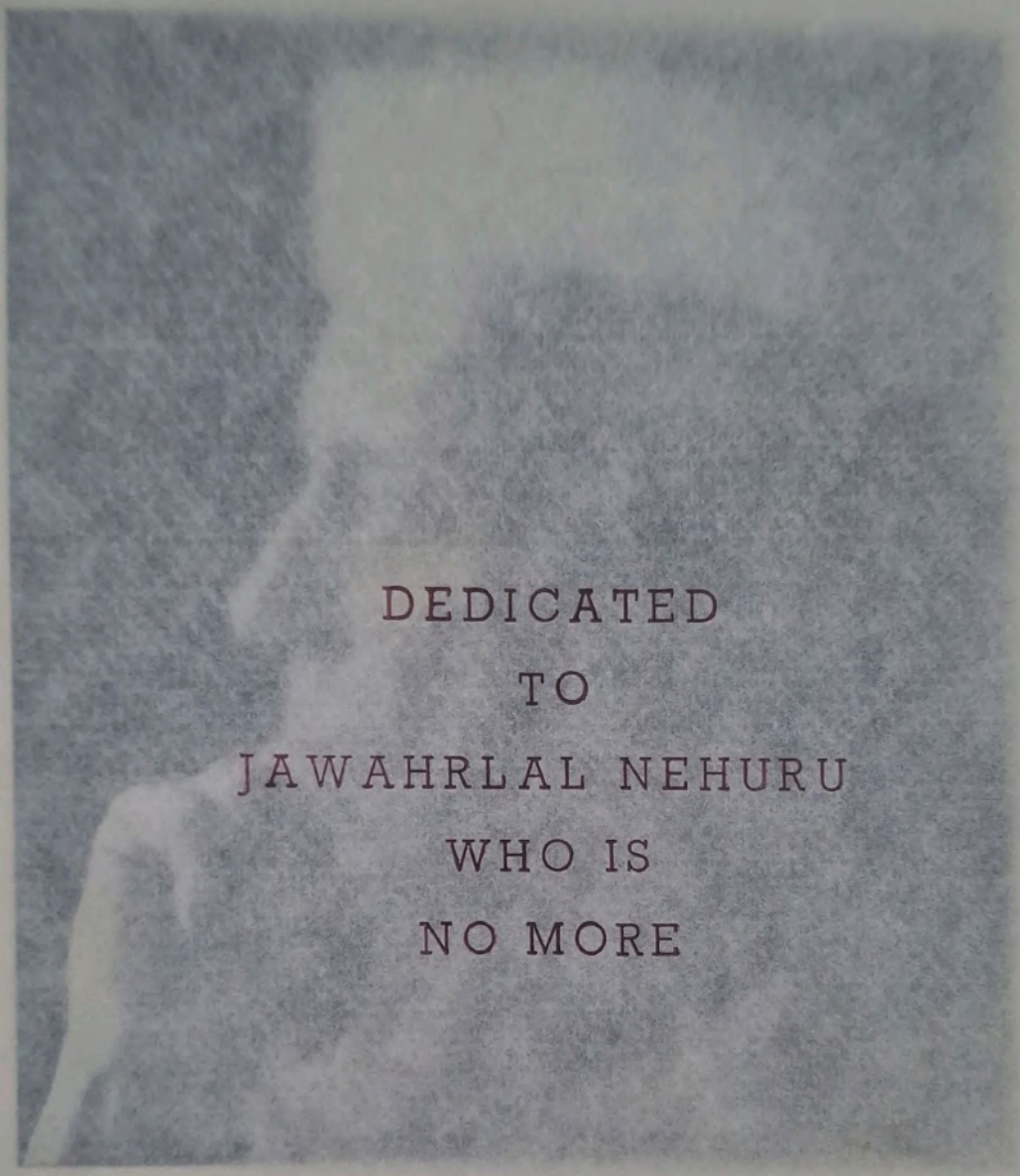
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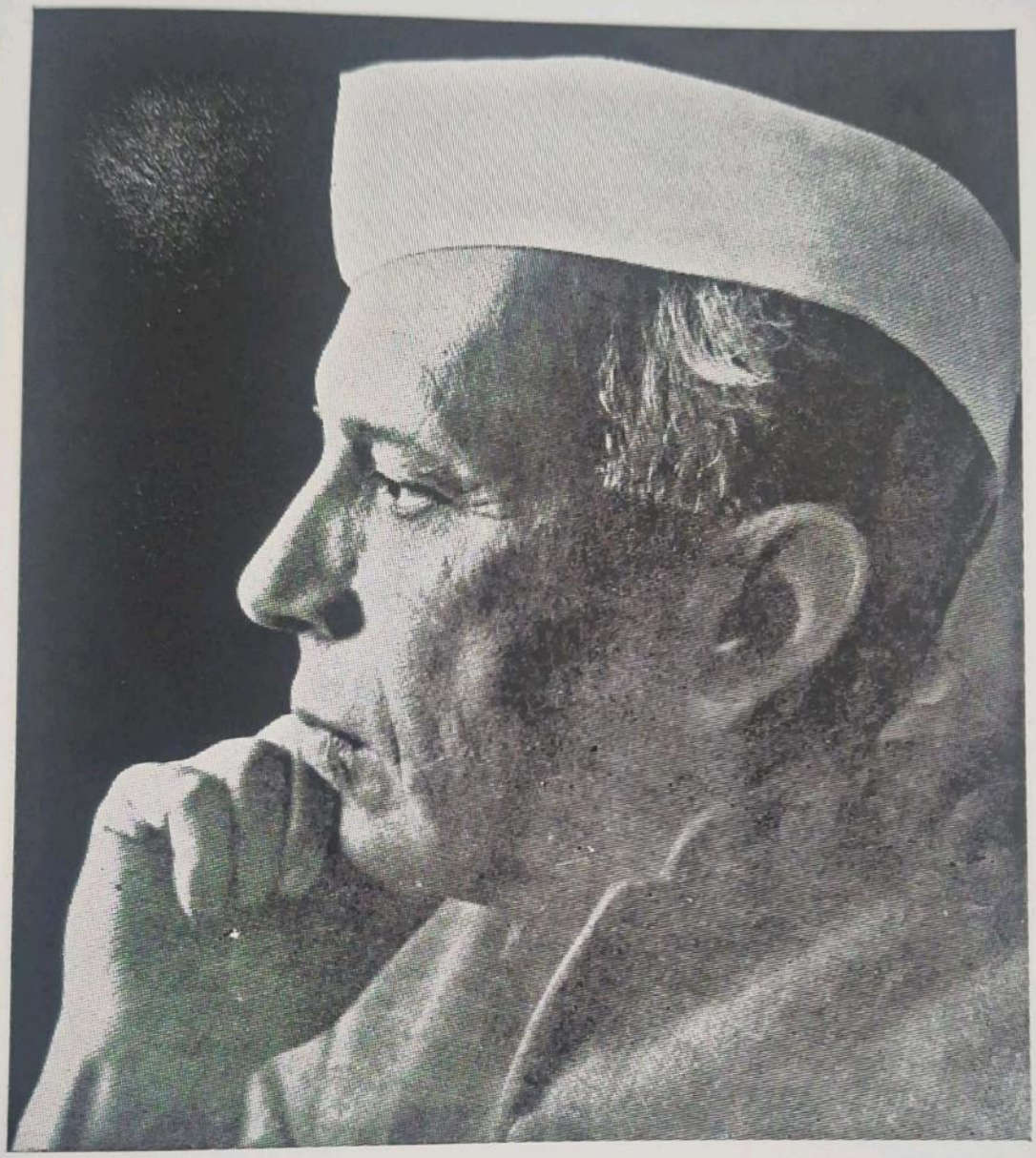
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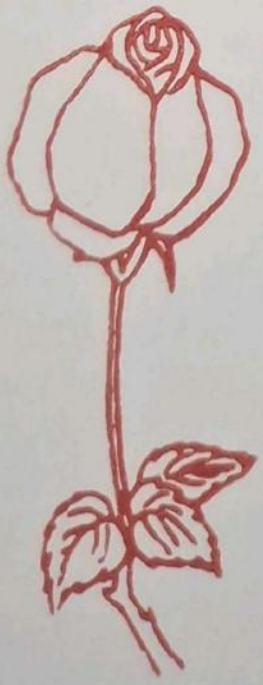
A. S. Joseph Franklin (Sd.)
M. Mohammed Moopen (Sd.)
(Student Editors)



DEDICATED
TO
JAWAHRLAL NEHURU
WHO IS
NO MORE







The woods are lovely, dark and deep,
But I have promises to keep,
And miles to go before I sleep,
And miles to go before I sleep.

— Jawaharlal Nehru.

TESTAMENT

I have received so much love and affection from the Indian people that nothing that I can do can repay even a small fraction of it, and indeed there can be no repayment of so precious a thing as affection. Many have been admired, some have been revered, but the affection of all classes of the Indian people has come to me in such abundant measure that I have been overwhelmed by it. I can only express the hope that in the remaining years I may live, I shall not be unworthy of my people and their affection.

To my innumerable comrades and colleagues, I owe an even deeper debt of gratitude. We have been joint partners in great undertakings and have shared the triumphs and sorrows which inevitably accompany them.

I wish to declare with all earnestness that I do not want any religious ceremonies performed for me after my death. I do not believe in any such ceremonies and to submit to them, even as a matter of form, would be hypocrisy and an attempt to delude ourselves and others.

When I die, I should like my body to be cremated. If I die in a foreign country, my body should be cremated there and my ashes sent to Allahabad. A small handful of these ashes should be thrown into the Ganga and the major portion of them disposed of in the manner indicated below. No part of these ashes should be retained or preserved.

My desire to have a handful of my ashes thrown into the Ganga at Allahabad has no religious significance, so far as I am concerned. I have no religious sentiment in the matter. I have been attached to the Ganga and the Jumna rivers in Allahabad ever since my childhood and, as I have grown older, this attachment has also grown. I have watched their varying moods as the seasons changed, and have often thought of the history and myth and tradition and song and story that have become attached to them through the long ages and become part of their flowing waters.

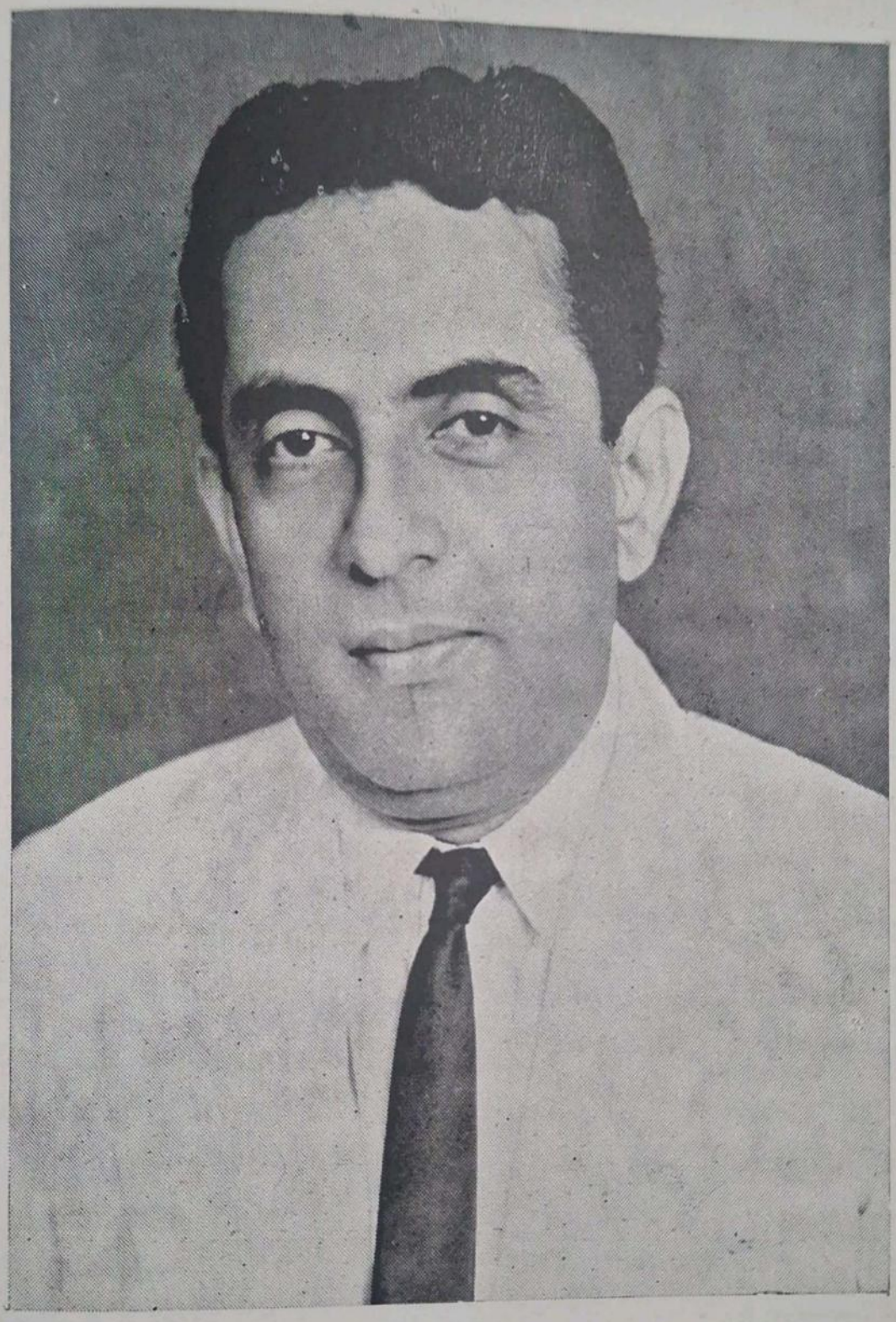
The Ganga, especially, is the river of India, beloved of her people, round which are intertwined her racial memories,

her hopes and fears, her songs of triumph, her victories and her defeats. She has been a symbol of India's age-long culture and civilisation, ever-changing, ever-flowing, and yet ever the same Ganga. She reminds me of the snow-covered peaks and the deep valleys of the Himalayas, which I have loved so much, and of the rich and vast plains below, where my life and work have been cast. Smiling and dancing in the morning sunlight, and dark and gloomy and full of mystery as the evening shadows fall, a narrow, slow and graceful stream in winter, and a vast roaring thing during the monsoon, broad-bosomed almost as the sea, and with something of the sea's power to destroy, the Ganga has been to me a symbol and a memory of the past of India, running into the present, and flowing on to the great ocean of the future. And though I have discarded much of past tradition and custom, and am anxious that India should rid herself of all shackles that bind and constrain her and divide her people, and suppress vast numbers of them, and prevent the free development of the body and the spirit; though I seek all this, yet I do not wish to cut myself off from the past completely. I am proud of that great inheritance that has been, and is, ours, and I am conscious that I too, like all of us, am a link in that unbroken chain which goes back to the dawn of history in the immemorial past of India. That chain I would not break, for I treasure it and seek inspiration from it. And as witness of this desire of mine and as my last homage to India's cultural inheritance, I am making this request that a handful of my ashes be thrown into the Ganga at Allahabad to be carried to the great ocean that washes India's shore.

The major portion of my ashes should, however, be disposed of otherwise. I want these to be carried high up into the air in an aeroplane and scattered from that height over the fields where the peasants of India toil, so that they might mingle with the dust and soil of India and become an indistinguishable part of India.

Jawaharlal Nehru

21st June, 1954



Sri. R. SANKARADASAN THAMPI

Principal, Law College, Ernakulam
and Dean, Faculty of Law, University of Kerala

Federalism in India

By

K. V. Kuriakose, B. A., M. L.,

Part-time Lecturer, Law College, Ernakulam.

Dicey has defined 'Federal State' as a political contrivance intended to reconcile national unity and power with the maintenance of "state rights".(a)

Federal State defined.

The modus operandi by which federalism attempts to reconcile the apparently inconsistent claims of *national sovereignty and of State sovereignty* is the formation of a Constitution under which the powers of sovereignty are elaborately apportioned between the common or national Government and, the State Governments. This division of sovereignty between the centre and the units, called 'federal principle' by Prof. K. C. Wheare,(b) has been accepted as the fundament of federalism, although the details of the scheme may vary with different Constitutions. Generally, the distribution of powers takes place according to the principle that, whatever concerns the nation as a whole should be placed under the control of the national Government, and matters of local interest alone should be left to the units.

Dicey further points out that federation should result from what he calls a 'federal sentiment' among the federating units. That is to say, they should desire 'union' and must not desire 'unity', for, the latter will end up with a complete merger and losing of individual identities creating a unitary State. It should, in other words, be a combination of 'union' and 'separation' or a compromise between the centripetal and centrifugal forces operating against each other. This denouement is brought about by a process of bargaining, at the time of federation – making, among the various participants, in the shape of a 'federal compact' embodied in the

(a) Law of the Constitution (9th Ed.) P. 143. (b) Federal Government (3rd Ed.) p. 11.

Prof. C. H. Alexandrowicz, on the other hand, rejects these views and asserts, after analysing the Constitutional provisions and examining the post-constitutional practice in India that, India is undoubtedly a federation 'with vertically divided sovereignty'.(e)

Supreme Court's views.

In a recent decision reported in A. I. R. 1963 S. C. 1241 (State of West Bengal Vs. Union of India), the highest Court in this country has, however' held (with one Judge, Viz., Subba Rao, J. alone dissenting) that the Constitution of India is not federal but unitary in its true character. Normally the said decision should finally resolve the above controversy. But, considering the fect that, the questions involved in the decision are not of a legal nature alone and are mixed up with politics, as they relate to the political and Constitutional status of various States in India and their relationship with the Central Government, it would appear that the controversy is likely to continue. The strong dissenting judgment of Subba Rao, J. lends support to this view.

It is needless to say that the above decision is one of far-reaching importance in the field of Constitutional law. No apology is, therefore, needed to examine it here in some detail.

State of West Bengal Vs. Union of India.

The Supreme Court gave the above decision in a suit filed by the State of West Bengal against the Union of India for a declaration that Parliament was not competent to make a law authorising the Union Government to acquire land and rights in or over land, which are vested in a State, and that the Coal Bearing Areas (Acquisition and Development) Act (XX of 1957) enacted by the Parliament, and particularly Ss 4 and 7 thereof, were ultra vires of its legislative powers. The plaintiff — State also prayed for an injunction restraining the defendant from proceeding under the provisions of the said sections of the Act, in respect of the coal bearing lands vested in the State Government.

Facts of the case.

The circumstances in which the the impugned Act was passed were the following:—

Under the industrial policy adopted by the Government of India in 1956 the target for additional coal production for the Second Five Year Plan was fixed at 22 million tons per annum. Out

(e) Constitutional Development, in India, p. 169.

traints thereon. In other words, Article 31(2) imposes restrictions on the exercise of legislative power under entry 42 of List III. Property vested in the State may not therefore be acquired under a statute enacted in exercise of legislative power under entry 42 unless the statute complies with the requirements of the relevant clauses of Article 31."

On the second issue noted above the Court held that the impugned legislation was intra vires the powers of Parliament, in view of the absence of any express provision in Constitution limiting those powers. Neither the relevant entries in the Lists, namely, entry 54, List I or entry 42 List III, nor any provisions of the Constitution, barring Article 31, impose any limitation on the power of Parliament. Under entry 54, List I Parliament is given exclusive power to legislate, regulating mines and mineral development. An unqualified power to acquire property is made avilable to it under entry 42, List III. The superiority of Central Legislation in the concurrent field is undeniable. Hence it follows that, to regulate mines and mineral development, if found necessary, property could be acquired by the Union including that vested in a State, subject to Article 31. When there is no express limitation on a power granted by the Constitution, such limitation could not be implied. On the other hand, "in interpreting a Constitutional document provisions conferring legislative power must normally be interpreted liberally and in their widest amplitude."

The second issue.

Doctrines of immunity of instrumentalities and 'prerogative of perfection' of the Crown held inapplicable.

The Court rejected the doctrine of immunity of instrumentalities in relation to our Constitution, especially having regard to the fact that, even in America it has become out-dated. In the United States, under the 'commerce clause', the Federal Government is held to enjoy ample 'police power' to 'condemn' property of a State for Union purposes and, the present tendency there is in favour of its expansion and not diminution The Court also held that the maxim: 'no statute bound the Crown unless the Crown was expressly named therein' (Roy nest lie per ascum statute si il ne soit expressment nosme) could not be applied in the present case, as the statute challenged was clear in its meaning and application. In the result, the Court found both the issues in favour of the Union.

If the Court had been content with disposing of the case as indicated above, without going into other questions, strictly not necessary, no critical comments would have been called for although the findings entered afford room for dissent. However, in the course of the judgment, as already pointed out, the learned Chief Justice embarked upon a detailed consideration of the nature of our Constitution itself and held that, the States in India are not sovereign even in the legislative sphere alloted to them, that they could not be regarded as co-ordinate with the Union which alone enjoys legal sovereignty and that, therefore, the Indian Constitution could not be described as federal in character. The grounds given for this finding are partly historical and partly Constitutional.

Was it necessary to go into other question?

Nature of the Constitution considered and, held not federal.

Historically, it is pointed out that, our tradition is one of unitarianism and not of federalism. Ever since the assumption of authority by the British Crown in 1858 the administration of British India was unitary and highly centralised. The Governor-General was invested with autocratic powers, under the control of the Secretary of State, to administer the entire territory. The Provinces were no more than mere administrative units and, they never had any semblance or pretension of sovereignty. Under the later Constitutional Acts there took place a process of administrative decentralization but, the Government of the country remained unitary. The Government of India Act, 1935 was enacted for the purpose of unifying the country in a federation. However, the proposed federation was still-born and never became effective. The Central Government, therefore, continued as it was before the Act, although some administrative changes were brought about in the Provinces. Under the Indian Independence Act, 1947 a separate Dominion of India was carved out and by section 6 thereof a Dominion legislature was constituted for the first time, with sovereign legislative powers. The authority of the British Crown in India ceased and, its suzeranity over the Indian States came to an end leaving them 'sovereign' at least in theory. Then came the present Constitution which was largely modelled on the Government of India Act, 1935. The principle of distribution of powers was adopted in the Constitution in the same way as under

Historical grounds.

the Act of 1935, with a view to facilitating a decentralized administration in the country which, by its vastness and diversity, could not be conveniently ruled otherwise. Because of the political dominance of the Union Government it absorbed the Indian States by a process of administrative integration. A further re-organisation of territories was effected in 1956 by the States Reorganization Act passed by the Indian Parliament. The facts being as stated above, can we say that the units under our Constitution at any time enjoyed or claimed any sovereign rights or powers? Was there any 'federal sentiment' at play or any 'federation-making' in action at any stage resulting in a 'federal compact', in this historical process?

Characteristics of a true federation-Constitutional grounds-

The learned Chief Justice referred to the following well-known features of a truly federal State: a compact or agreement between sovereign and independent States to form the federation; supremacy of the Constitution barring unilateral amendment thereof; distribution of powers between the Union and the units and, supremacy of the Courts as interpreters of the Constitution. His Lordship then pointed out that, the first two characteristics are not found in our Constitution. So far as the 3rd is concerned, under Articles 246 and 248 predominance is given to the Centre. Furthermore, additional powers are granted to the Centre under the Emergency provisions contained in Part XVIII whereby any State Government can be superseded. Even in normal times Central legislation on State subjects is permitted under Articles 249 and 252. The States are also financially dependent upon the Centre. There are no separate Constitutions for the States as in the U. S. A, nor separate State citizenship and judiciary. According to the learned Chief Justice, the 4th element mentioned above alone is present in our Constitution. The conclusion, according to His Lordship, is therefore, irresistible, namely, that the Indian Constitution is not federal; nor are the States thereunder federal units with sovereign powers.

Duel federalism and Co-operative federalism.

It is clear that in reaching the above conclusion the Court has been led by the theory of 'dual federalism' and that it has attempted to gauge the Constitution by the measure of the traditional pattern, as orginated in America. But it should be

noted that, the orthodox notions of federalism have undergone radical changes even in the United States and been replaced by what is called 'co-operative federalism' in which, as explained by Professor Corwin, the National Government and the State Governments are mutually complementary parts of a single Governmental mechanism, intended for the uplift of the society as a whole. It should further be pointed out that federalism is not a fixed formula or an institution of invariable features and immutable parts. It constitutes a response to the needs of the society. As observed by Livingston, "the elements of federal principle are to be gathered not from the description of the instrumentalities and the powers thereof in the Constitution, *but from their actual operation and the effect* they produce upon the society."(g) It is regrettable that this approach and perspective had completely lost to the Supreme Court in the above decision.

So far as the reasoning of the Court based on the past history is concerned, suffice it to point out that, it has no relevance in assessing the nature of the present Constitution. Even if this country had no federal Constitution in the past that is no bar to have one for the present and future. The true nature and character of the Constitution should be found from its provisions and working, and not from the history.

Past history not relevant

As for the other characteristics pointed out, firstly, a federal compact by independent States is no longer held to be an essential precondition of federalism. Even in America that notion has been discarded and replaced by the idea of 'permanent union'.(h) Secondly, supremacy of the Constitution has been secured under our Constitution by the special mode of amendment prescribed in Article 368. It is well-known that Article 3 which permits unilateral amendment of certain provisions was inserted only to bring about the subsequent re-organization of States on linguistic basis, contemplated at the time of passing the Constitution and, not for destroying federalism. Articles 249 and 252 are designed to meet certain special situations where common legislations on some State subjects may become desirable. In connection with Article 249 it must also be remembered that, the Council of States

Provisions of the Constitution also do not justify the view

(g) Federalism and Constitutional Change, (1956) p. 9,
(h) See Texas Vs. White, 7 Wallace 700 (1869)

is a body representative of the States, excluding the handful of members nominated by the President.

The Emergency provisions also could not be regarded as seriously affecting the federal set-up for, they are meant only to cope with 'emergencies'. The real nature of the Constitution is to be ascertained not with reference to provisions dealing with emergencies and extraordinary situations, but by looking at the provisions providing for its normal day-to-day functioning. Moreover, such provisions, although in different forms, are found in other federal Constitutions as well.

Dual citizenship and dual system of Courts are also no longer essential for federalism. These are matters relating to details and may be varied or modified in order to suit the convenience and conditions in different countries and times. In the context of resurgent Indian Nationalism, quite rightly, double citizenship was thought to be unnecessary. The unified judiciary was accepted "to eliminate all diversities in a remedial procedure."(i) The same system is seen adopted under the Canadian Constiution also.

The decisive character of federalism.

The quintessence or decisive character of federalism may be said to consist in the division of external and internal sovereignty between a National Government and States, as a basis for their co-operation on an equal footing in order to build up and preserve a strong Nation, in the interests of all concerned. This basic feature is to be ascertained from the provisions of the Constitution as well as from the conventions built up around it. In other words, the actual working of the system, no less than the contents of the Instrument providing for it, should be observed. As is said, the proof of the pudding lies in the eating.

Indian Constitution is federal and not unitary.

Viewed in the above light, it could easily be seen that, our Constitution embodies the broad features of a federal scheme. Article 1 of the Constitution declares that India "shall be a union of States". The sovereign powers are elaborately divided between the Centre and the units by means of the Union, State and Concurrent Lists. Provision is made for State Executives headed by Governors, State Legislatures and State High Courts. The States are sovereign and independent in the sphere alloted to

(i) See Constituent Assembly Debates, Vol. VII, p. 36.

them, subject to the provisions of the Constitution, just as the Union is sovereign and independent in its own sphere. In the same way as the Union Government is responsible to the Union Parliament, the State Governments are made responsible to the State Legislatures. We have adopted, under the Constitution, the parliamentary system of Government in which sovereignty manifests itself by the responsibility of the Cabinet to the Legislature. This is found both at the Centre and in the States. Dr. Ambedkar also said the same thing in the Constituent Assembly: "The Provinces (States) are as sovereign in their field which is left to them by the Constitution as the Centre in the field which is assigned to it."(j)

It can be seen from the provisions of the Constitution that in financial matters, by an equitable allocation of resources, the States are made self-supporting or viable with, of course, sufficient federal support.

The post-Constitutional practice in India, furnishing any number of occasions when the 'local will' had asserted itself and prevailed upon the Centre, on various questions, also proves the existence and functioning of federalism in our country. Prof. Alexandrovicz, after making a careful study of all these aspects in his book,(k) therefore, rightly concludes that, "India is undoubtedly a federation in which the attributes of Statehood are shared between Centre and local States."

Unlike the prior Constitutional Acts including the Government of India Act, 1935, the Indian Constitution was made by the Constituent Assembly of India representing the diverse elements that constitute our polity. The Constituent Assembly made a complete break with the past, assumed sovereign powers and framed the present Constitution. The 'federal bargaining, if it is wanted, in fact took place in the said Assembly among the constituent elements and, the 'federal compact' also was effected there. The Constitution is thus the outcome of the negotiative and deliberative processes carried on in the Constituent Assembly.

It is regrettable that, in considering a subject of such 'great public importance' as the Court itself has said, it has neither turned to the Constituent Assembly Debates, nor adverted to the actual working of the Constitution, for enlightenment.

(j) Constituent Assembly Debates. Vol. IX, p. 133.
(k) Constitutional Developments in India, p. 169.

Conclusion.

To conclude, it may be pointed out that, to regard India as anything but a federation would tend to undermine the very foundation of our National Unity. Even within this short period of the life of our Constitution, acute regional jealousies have come to the surface and, open secession has been preached in certain parts as a result thereof. At a time when a single political party rules both at the Centre and in the States the consequences of a disavowal of federalism may not become apparent or serious. But, if different political parties come to power in the various States and at the Centre, with different, and even conflicting, political, social and economic programmes, as is bound to happen sooner or later, a spirit of true federalism alone could keep them together. As observed by Subba Rao, J. in the dissenting judgment, "The future stability of our vast country with its unity in diversity depends upon the strict adherence of the federal principle, which the fathers of our Constitution have so wisely and farsightedly incorporated therein".

SIDE-LIGHTS ON THE PROFESSION

By

Taikad N. Subramonia Iyer.

I. It is very difficult to look back through the curtain of time. The picture is clouded by half-forgotten memories. Any lawyer can answer quicker a point of law or procedure than a query as to what event in the practice of law gave him the greatest pleasure or its equivalent. The picture is bound to be coloured, erratic or at least tainted with ego. Anecdotage is a stage immediately preceding dotage. One does not then pause to consider matters from an external focus. With this background I want to sketch a few impressions neither important nor illuminating and which may not carry a moral or adorn a tale

II. When I started the practice of the law in Travancore with its hierarchy and grade of judicial officers, the ultimate authority was the High Court of that Princely State. We had a galaxy of brilliant men of authentic eminence at the top – E. J. John, K. G. Sesha Iyer, Kochukrishna Marar, V. S. Subramonia Iyer, E. Subramonia Iyer, to mention but a few. Some others remain happily with us whose epitaphs have yet to be written. Each of them had outstanding excellance whose pattern alone differed; E. J. John whose advocacy was equalled by none, Sesha Iyer scholar and savant steeped in traditions of a Vedic age, Marar an artist with a passion for the causes he pleaded, V. S. Subramonia Iyer, poised, exact, persuasive, E. Subramonia Iyer the well beloved of his colleagues and the public, with a heart as large as himself, whose knowledge transcended many climes and many systems of law.

III. There was no Supreme Court to sit in judgment over us or a Privy Council to act as a monitor on legal issues. But I felt – and many others of that generation agree – that the administration of justice from the point of view of the common man, did not lag behind. The satisfaction that was derived by counsel was by and large not less profound than that in these hectic days. The horizon has spread, but has not helped to

round off the corners of injustice or reduce error to a lesser degree. This is not a defeatist attitude or old-worldly axiom. I have had the good fortune of appearing both in the old courts and the new, making adjustments to the changing pattern of our society. I feel, however, that in the rush of events humanity is now left behind. This is not to say that the administration of justice has receded; the emphasis has shifted to out-turn; there is more haste and less speed. Probably this is due to causes such as the break-down of the barriers of time and space reducing the individual to a mere cog in the wheel. As Tagore said "We are merely the victims of the monster car of organisation which goes on growling and howling along life's highway".

IV. I have during these two score years and five in the profession gathered a lot of moss. Much of it may be of fleeting interest, some hazardous to express. I have appeared before many judges in my time, some learned and some seemingly so. Some others, if not most, had inhibitions of a sort. Impatience was the common denominator of many whose docility in the home-front was without par. One can well excuse such peccadilloes probably brought on by chaotic conditions elsewhere or a half-cooked breakfast. These manifest themselves in a variety of ways.

V. Lawyer-Judges usually make up for their slackness at the bar by continuous orations from the Bench. It was Bacon who said "A much-talking Judge is like an ill-tuned Cymbal". I have had to deal with a few Judges of this description in my time. The only incident I remember in which a senior counsel pulled up a talking Judge by stating "Your Honour might interrupt me after I complete my sentence". If questions are asked and answers elicited for clearing a point, everybody will be happy. Such a course would help better in the evaluation of a matter in dispute. But if, on the other hand, the Judge takes the role of an advocate and the position is reversed, as it should not be, the results are often disastrous The Constitution guarantees, no doubt, freedom of speech. Even this freedom is controlled by reasonable restrictions and they apply as much to a Judge as to the lawyer. It is not possible for a junior counsel to hold his own against the torrential eloquence of a Judge. No Judge can convince a lawyer for one party that his case is bad, however cogent may be the points put to him. In such Courts the percentage of failure of justice is colossal.

VI. It is the function of the lawyer often to stoop to conquer. There have been Judges whose knowledge of the law was profound. There were others who felt that a reference to a book was an affront to their common sense. Others had preferences. I am one of those who has been often a victim of such preferences. But this is not to say that any Judge is out ever to decide a case wrongly. I have in my time heard stories of departed Judges who felt and acted as though the argument of a particular counsel carried with it an unshakable momentum. Luckily for me, such worthies belonged to an earlier generation.

VII. More elusive than erudition and familiarity with obsucre legal maxims is the vanity of varying tempo you come across during the passage of time. Life is a "dome of many coloured glass". If it is possible for the lawyer to focus attention on a particular taint he is lucky. I had the honour of appearing before a learned Judge on the original side years ago, who used to take a seista on the bench at varying intervals. His temper too was not always of the best. During his rest the examination of the plaintiff was concluded by me and the chief examination of an important witness for the defence was also over. I was cross-examining this witness when the daily miracle happened and the Judge woke up and he faced me with a question, how I can cross-examine my party after so many years at the bar. I had to remind him gently that he was a witness for the other side and to cover up the confusion the learned Judge remarked that he looked exactly like the plaintiff. I nodded like Homer and everything thereafter went smoothly.

VIII. Another Judge was blessed with a colourless mien. He was one who never opened his mouth on the bench. It will be obvious that to argue a case before him was like addressing the Deity bereft of understanding. I was lucky enough on one occasion to draw two words from him, "I understand". Knowing full well the workings of his mind, I realised that it was best to restate the whole case from the beginning. There was yet another distinguished judicial officer who had a definite hostility to any counsel quoting case law. Knowing his pet aversion I had stacked my books in the verandah of the court room. The opposing counsel who was new to that court quoted galore from an array of books. The only reaction of the Judge I could see was mounting impatience. When it came to my turn to reply, he

asked me one question, "Haven't you also got any books?". The reply came from me that, knowing his Honour as I did, there was no need to quote any authority. The argument ended. No astrologer had to be consulted for forecasting the result.

IX. One of the most interesting things in the profession is a bit of humour. A joke in taste dispels the tedium of the courts and restores the equilibrium. He who is able to laugh at himself is a sport. I have come across numerous instances when mounting tempers and barbed words were reduced to normalism by rocking laughter. This calls for a "touch of nature which makes the whole world kin,' an ability to "look at ourselves as others see us". A recent instance in which a distinguished Judge sent the whole Court into peals of laughter is worthy of mention. The question was one of nucleus of ancestral property to base a claim for partition of large properties. I emphasised that the family had a number of cows and a milk trade. He said that it would be more correct if I said that the cows and the family well constituted a nucleus for acquisition of properties

X. I have always been of the view that unless it is possible for one who enters life to view the whole world from an objective point of view, existence is a drag and an anathema. The lawyer in common with the rest of humanity must learn to take the good with the bad and readjust his vision. It is impossible to mould the world as one would like it to be The only approach to the profession is a psychological one. Knowledge of the law and untiring industry are not half so important as an awareness of the human element in different situations, some helpful, some tiring yet others in conflict with your inner ideals and impulses. After all, "The best is yet to be" and if only the future lawyer can hold his head erect, not swayed or stilled by opposition, he can cross "The Slough of Despond" and tread the path of glory leading to ultimate success.



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Reminiscence of My Life at the Bar

By

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The subject of this article is 'Reminiscences of my life at the Bar'. It is a vast space to look back over fifty-one years of labour as a member of the Bar holding responsible positons as counsel for the Court of Wards, as Government pleader and as Advocate-General the official head of the profession and also as the elected head of the profession having been the President of the Madras Advocates Association, one of the premier Associations of Advocates in India. Incidents come rushing to my mind and it is not easy to choose from them. I shall however begin from the beginning of my connection with the Bar.

I had the singular fortune and unique privilege of serving my period of apprenticeship in 1912-13 under Mr. J. L. Rosario who was then acting as Advocate-General at Madras and who commanded the utmost respect from the Bench and the Bar of the Madras High Court. In the words of Dr. C. P. Ramaswami Iyer he was 'an unapproachable model of rectitude and of the highest professional integrity'.

The high standard of professional etiquette that he maintained throughout his career at the Bar is illustrated by an incident in his life which occurred just before I started my period of apprenticeship under him. The post of Government Pleader and Public Prosecutor in Madras had fallen vacant and the Judges of the Madras High Court were considering the question as to who should be chosen for the post and the two Indian Judges were pressing the claims of their respective nominees when one of them in order to make the choice fall on his nominee advanced the argument that his nominee should be preferred on the ground of seniority. When that argument was put forward, Sir Arnold White, The Chief Justice said that if one went 'by seniority Mr. Rosario should be

appointed and wanted to ascertain whether Mr. Rosario would accept the job. Mr. Rosario was sent for by The Chief Justice and was asked whether he would care to have the job. On Mr. Rosario replying in the affirmative The Chief Justice put the further question why he did not intimate his willingness to the High Court and his reply was that he considered the Government as a big client having a number of cases and that his doing so would amount to soliciting work which would be beneath the dignity of the profession. The Chief Justice said that Mr. Rosario was perfectly right and recommended him for the post and he was appointed.

Mr. Rosario had during the year of my apprenticeship two other apprentices, who were both anxious to remain at Madras while I had no such ambition. My intention was to set up practice at Calicut where I had my education from the fourth standard till I passed my F. A. in the Kerala Vydyasala later named Zamorin College and now known as Guruvayurappan college. As my luck would have it, Mr. Rosario took a liking for me and when I was about to finish my term of apprenticeship, he asked me one morning what my intentions were and said that both his juniors had been separated from him — one by the cruel hand of death and the other by the attractions and glamour of Government service - and that if I decided to settle down at Madras he would see that I am kept above want. As I had no ambition at that time beyond earning enough for my livelihood, I embraced the opportunity thus afforded to me with alacrity and settled down at Madras in the latter part of 1913.

I had not to suffer the usual period of weary waiting at the Bar and even before I was enrolled, my master Mr. Rosario asked an old client of his and a very much respected Muslim landlord of North Malabar – Chowwakkaran Keloth Makki Keyi to send me a vakalath and Rs. 25 towards my fee and thus I started my career at the bar more than fiftyone years back.

In writing about my life at the Bar the remotest reminiscence of which I have a vivid and distinct recollection is my first appearance in court. It was a few days after my enrolment which took place on the 26th of November 1913. It was in the central court of the Madras High Court buildings where Sessions trial used to be held by a Judge of the High Court and the Judge was Mr. C (later Sir

C) Sankaran Nair. Incidently, I may state here that the Madras High Court Buildings look more stately and majestic than the other High Court buildings in India and the Judge Mr. Sankaran Nair had a more towering personality and commanding appearance than any other Judge I have seen. The case was a petition to revise an order passed under S.250 Crl. Procedure Code by which the accused was awarded compensation against the complainant for bringing a false complaint. I had prepared my case thoroughly and thought that the Judge would admit it without any hesitation. But to my surprise the Judge had not the slightest compunction in dismissing it. Even after the pronouncement of the order 'rejected' by the Judge I continued my argument for a few minutes when the Judge directed the Bench clerk to call the next case. By that time Mr. (Now Rt. Hon'ble Sir) C. Madhavan Nair who was sitting by my side pulled my gown and asked me to sit down whispering into my ear that he had not said so much during his first appearance in court. Though I sat down immediately, I had a feeling that the Judge was wrong. I now know that the Judge was right, but in the heyday of youthful ardour I thought otherwise. I then thought and even now feel that the Judge could have been more kind and considerate. This is in striking contrast to another experience I had a few years later when I appeared before Mr Justice K. Srinivasa Iyengar who was very quick in the disposal of cases. I had a case posted for admission hearing before him at the end of a long list. When my case was reached, I rose up and began to state the facts of the case when the Judge observed; "Do you think there is anything in the case – If you think there is, I shall admit it". I was taken aback a little and was hesitant to give an answer in the affirmative, as I felt that the trust reposed in me should not be misused. As there was something in the case to be argued on behalf of the appellant, I gave an affirmative answer and the case was admitted.

As I look back over that long stretch of years, almost in the evening of my life when my race is nearly run, I feel that Providence has been kind to me and that in spite of my master Mr. Rosario being removed by the cruel hand of death within four years of my enrolment I achieved a measure of success at the Bar far more perhaps than I deserved. Within a year after Mr. Rosario's death I was selected for the post of a Munsiff but after some trepidation I decided not to accept it. The

decision was to a certain extent due to my getting an opportunity to visit England for the purpose of instructing counsel there in a Privy Council case which is reported in I. L. R 44 Madras, 883 — a leading case on adverse possession regarding forest lands where Their Lordships of the Privy Council held that adverse possession must have all the qualities of adequacy, continuity and exclusiveness and the onus of establishing these things is on the adverse possessor and that when the holder of title proves that he too has been exercising various acts of possession that would be sufficient to destroy the adequacy, and to interrupt the exclusiveness and continuity of adverse possession. The case was argued for three days before the Privy Council and I was struck by the courtecy and consideration shown by the Judges to the counsel who appeared in the case. Even to the Junior counsel His Lordship Viscount Cave who was one of the Judges said: Well Mr .. .. we do not want to interrupt you in the course of your argument but we want to know just one thing before you proceed further," and the point on which the Judge wanted clarification was put to the counsel.

The Judges of the Supreme Court at least in our country would do well to emulate Their Lordships of the Privy Council in the patience they show and the decorum they observe throughout the hearing of a case. I have watched the proceedings in the Supreme Court in 1950-51 and also in later years and I am sorry to say that the counsel were very often interrupted and heckled by the Judges and what is more an observation made by one Judge is immediately met by his collegue on the Bench with an observation quite to the contrary. I felt so disgusted with the manner in which those observations were made that I expressed my disapproval of the conduct of the Judges to Mr. Justice Chandrasekhara Iyer who was then in the Supreme Court. I understand that the Judges of the Supreme Court at the present day are conducting themselves with more decency and decorum and their behaviour is beyond cavil and criticism, though they might not have attained the serene solemnity and dignity of the Judges of the Privy Council.

Mr. Rosario's example stood me in good stead several times in my long career at the Bar. Two incidents come vividly to my recollection. The first incident happened early in my career, within two or three years of my setting up practice. I was appearing in a batch of appeals, the decision in which

is reported in I. L. R 42 Madras, 761, where it was held that the Karanavan of a Malabar tarwad is not entitled to carry on a trade on behalf of the tarwad and saddle the tarwad with liabilities arising in the course of that business. The appeals against my client were dismissed with costs. The regulation fees came to about Rs. 4000 and my client would have been able to realise the amount from the opposite party, if I had filed a fee certificate for that sum. The client had paid me only Rs. 150/- But he made a sporting offer to pay me Rs. 2000/- more, if I agreed to certify for the amount of Rs. 4000/- Having been trained in the high principles of professional ettiquette and integrity of Mr. Rosario, I had not the slightest hesitation in rejecting the offer. The other incident occurred late in my life when I was Advocate-General of Madras. Some clients from Hyderabad with their advocate came to me for getting an opinion in a matter involving properties of considerable value, about 40 or 50 lakhs of rupees. They told me the nature of the opinion they wanted and they offered me a fee of Rs. 25,000/. I told them that I could give that opinion only if on a scrutiny of the papers I myself came to that view and that I was not prepared to sell my opinion for a price, however large and tempting the price might be. They were not satisfied with my reply and they went away, as apparently, they themselves knew full well that I could not have honestly given the opinion they wanted on a study of the papers. The example of Mr. Rosario has stood me in good stead in steering clear of the many pitfalls that beset a lawyer and to keep me on to the straight and narrow path of rectitude and professional integrity.

I have appeared before several Judges — those of the Supreme Court, High Courts of Madras, Andhra and Kerala — as also before the Subordinate Judiciary in the States of Madras and Kerala. Some of the Judges were pompous, arrogant, vain, conceited, overbearing and impatient. Some were the pink of courtesy, always kind-hearted, gentle, considerate and patient, especially in their manner towards Juniors. The kindness and consideration shown by the Judges is well illustrated by an incident which took place in the Madras High Court regarding a raw junior at the Bar who afterwards came to occupy the highest post in the judiciary open to an Indian. A case of his was dismissed for default by Mr. Justice Davis of the Madras High Court who was a terror to the advocates who practiced before him and especially to

the Junior section. The Junior advocate had prepared a petition for restoration of the appeal and was waiting in the court presided over by the Chief Justice Sir Arnold White from 11 a. m. to 2 p. m. Before the court rose for lunch The Chief Justice who had noticed the advocate sitting in the court, asked him whether he had anything to represent. The advocate said that he wanted to present a petition. The Chief Justice directed the Bench Clerk to take the petition and when the Judge, on looking into the petition, found that it was one for restoration of an appeal dismissed for default by Davis J., the Chief Justice directed the Bench Clerk to return the petition to the advocate. But before the petition was handed over back to the advocate, the Chief Justice realised that the young advocate must have been afraid to go before Davis J; and that must have been the reason which induced him to approach The Chief Justice's court and therefore took back the petition from the Bench Clerk. The Chief Justice made the endorsement on the petition that the case was a fit one for restoration and directed the advocate to take the petition to Davis J. Accordingly, the advocate took the petition to Davis J. and the case was restored to file.

After the death of my master Mr. Rosario I was working as Junior to Mr. C. (later Rt. Hon'ble Sir C) Madhavan Nair till he became a Judge. He is happily with us and I do not therefore want to say anything about his abilities as an Advocate or as a Judge. But one thing I would like to mention and that is about a criminal case in which a senior member belonging to the well-known Vengayil family of North Malabar was an accused. The case had ended in acquittal in the Sessions Court and the Government had filed an appeal. The appeal came up for hearing before two European Judges who had the reputation of being 'convicting Judges'. All the leading criminal lawyers were appearing in the case and Mr. Madhavan Nair had studied the case very well and wanted to put forth his best efforts to get an acquittal for his client. The argument he addressed on the occasion was considered by those who heard it as having reached the high water mark of forensic eloquence the like of which was seldom heard in the High Court.

After having been at the Bar for more than half a century I have painfully come to the conclusion that litigation very often is a gamble. The decision does not depend on the real merits of the case but often on the peculiar idiosyncracies of the Judge and his

mood for the time being. There was a very intelligent civilian judge in the Madras High Court who was always anxious to show off his cleverness by countering any argument that the advocate put forward. If the advocate put forward his best point in the case, the Judge would at once come down on him with an observation to the contrary and the advocate would lose the case. But if the advocate went beating about the bush without coming to the real argument and made the Judge himself mention the clinching point in the case, the case was won. While I was working in the Chambers of Mr. Rosario we used to discuss every morning the cases set down for hearing that day and when I observed one morning that an appeal would certainly be allowed, the old man said "my dear fellow, you have not been sufficiently long in the profession to know that you cannot say that of any case". This statement of his speaks volumes about the uncertiainty of litigation.

My practice was mainly civil and that on the appellate side but I have dabbled in criminal cases also especially at the beginning of my career at the Bar. I began to handle cases of the Court of Wards in the early twenties which brought me into intimate contact with certain senior European Officers belonging to the I. C. S. cadre and mainly through their support I was appointed Government Pleader in the Madras High Court in the year 1941. As Government Pleader I had personally or through my deputies to appear in all civil cases of the Government in the High Court and in important civil cases in the moffussil courts except on very rare occasions when the Government specially engaged the Advocate - General. As Government Pleader I had appeared in cases involving properties of substantial value amounting to several lakhs of rupees like disputes regarding the 'lanks' formed in the Godavari and the irrigation rights of the Government and Zamindars. I had to appear also in certain sensational cases. One such case comes uppermost to my mind at the present moment and that was the case of Rani of Nabha who claimed one lakh of rupees as damages from the Government for her being prevented from leaving Kodaikanal Road station by train. Her husband the Raja had been detained in Kodaikanal for certain political reasons and on getting information that he was about to leave Kodaikanal the police were instructed not to allow him to leave the place. The telephone message to the police was

misunderstood as applying to the Rani instead of the Raja and that resulted in a long drawn-out litigation between the Rani and Government which the Rani eventually lost. As Advocate-General, I had to defend the Government in some important cases. One case fresh in my memory is the case of Sri A. K. Gopalan who had been detained by the Government under the Preventive Detention Act. The case was over without anything untoward happening. Soon after, on my attaining the age of sixty years, I had to retire from my office of Advocate-General. But regardfng the conduct of the case certain aspersions were cast on me and the High officers of the Madras Government by Satyanarayana Rao J. of the Madras High Court behind my back. When I came to know of the observations made by the Judge, I went to the court presided over by Satyanarayana J and told His Lordship that it was not proper on his part to make such statements in my absence and that he ought to withdraw them. There was a wordy duel between us for some time into the details of which I do not propose to enter. The incident created quite a sensation even in high circles at Delhi and was widely reported in the papers in March 1951. This was the only occasion when I had to quarrel with a Judge and I felt then and I feel now that I was perfectly justified in the stand I took for vindicating the honour and independence of the profession. After I ceased to be the Advocate-General I was engaged in what is known as Ramalingam Will Case, the actual hearing of which in the Original Side of the Madras High Court dragged on from day to day for more than a month and a half before Ramaswami J. The decision went against my clients and an appeal was taken before a Bench of Two Judges constituted by Balakrishna Iyer and Ramaswami Gounder J. where the hearing went on for about twenty five days continuously and the appeal was successful to the extent of properties worth about ten lakhs and was lost regarding properties valued about half that sum. Both sides appealed to the Supreme Court and the decision of the High Court was confirmed. This case affords a study in human psychology and how a loving couple having about a dozen children became estranged from each other on account of a Swamiyar whom the wife believed to be only next to God and whom the husband thought was a crook. Another appeal which took about 25 days for actual hearing was that of a Muslim of Tirur who accumulated property worth a few

lakhs starting from almost nothing. After his death his son had no difficulty in dissipating it in a few years.

I have got down certain random thoughts that have come uppermost to my mind and I think it is time to stop; but one observation regarding the profession in general I wish to make before I close. I am afraid that the profession has fallen on evil days and that it is practised with the sole motive of making money and getting victory for the client irrespective of ends and means. This is a deplorable state of things. I do hope that the senior members of the bar will do well to take all steps necessary to raise the standard of the profession and by precept and example show that the goal of life is not merely the acquisition of wealth for one's own self at any cost and thus set an example for youngsters at the bar to emulate and follow.

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BRANCHES AND AGENCIES THROUGHOUT
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SCOPE OF CIVIL SERVANTS' RIGHTS

— Under Art. 311 of the Constitution of India

By

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1. The decision of the Supreme Court in *Moti Ram Deka Vs North Eeast Frontier Railway* (A I. R. 1964 S. C. 600) throws fresh light on the ambit and scope of Art. 311(2) of the Constitution of India, as judicially interpreted.

2. Art. 311 appears in Chapter I of Part XIV of the Constitution entitled "Services under the Union and the States". Art. 309 authorise the Legislature to enact laws regulating the recruitment and conditions of service of persons appointed to public service and posts in connection with the affairs of the Union or the States Art. 310 lays down that Government servants hold office "during the pleasure" of the President or the Governor, as the case may be. Then comes Art. 311(1) which provides that a Government servant shall not be dismissed or removed by an authority subordinate to that by which he was appointed Art. 311(2) further stipulates that a Govt. servant shall not be dismissed or removed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him.

3. The Constitution (Fifteenth Amendment) Act 1963 makes some amendments to Art. 311(2). We are concerned here with the Article as it stood prior to its amendment in October, 1963.

4. Obviously, Art. 310 confers wide powers on the President and the Governors *i.e* on the executive. Under the said Article, a Govt. servant holds his post "during the pleasure" of the President or the Governor. That is, he could be sent out of his post at the sweet will and pleasure of the President or the Governor. Therefore, if Art. 310 had stood alone, the position would be that persons

employed under the Government enjoyed no security of service at all. But Art. 311 engrafted an exception to this general rule and gave certain limited guarantees to civil servants. One of the guarantees was that he could not be dismissed or removed by an authority subordinate to the one which appointed him. The other and the more important was that he should be given a reasonable opportunity to show cause against the action proposed to be taken against him in all cases of dismissal, removal or reduction in rank. Art. 311(2) was always understood as an exception to the blanket power conferred on the executive under Art. 310.

5. Questions always arose as to the circumstances under which a civil servant could invoke the protection afforded to him under Article 311(2). Prior to its amendment, Art. 311(2) read as follows:

> "No such person as aforesaid shall be dismissed or removed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him".

As regards dismissal, there was absolutely no difficulty; the word dismissal implied a specific kind of penal action for mis-conduct. In all cases, where a Government servant is dismissed from service for acts of omission or commission, Art. 311(2) imposed a duty on the State to give him a reasonable opportunity of defending himself. But then, what about removal from service? What exactly is the scope of the word "removal"? Dismissal itself is one form of removal from service. Retirement on attaining the age of superannuation is also removal from service. Termination of service after notice, say for one month, is also another form of removal. The question was, what all kinds or forms of removal could attract the provisions of Art 311(2)?

6. Prior to Moti Ram's case, judicial interpretation tended to take the view that removal by way of penalty alone attracted the constitutional inhibition. Thus, where the age of superannuation was prescribed under the service rules and a Govt. servant was sent out of service by way of retirement after attaining that age, it was universally understood that this was a case outside the purview of Art. 311(2). Removal from service on superannuation was not imposition of any penalty. It did not therefore require giving of a reasonable opportunity to the Government servant to show cause against such removal.

7. Similarly, compulsory retirement from service where the service rules provided for a minimum period of service before such retirement, was also held to be not in contravention of Art. 311(2).

8. What about a case where the service rules prescribed that a person's service could be terminated on giving one month's notice? The service rule in such a case is a contract of employment to which the employees concerned should be deemed to have agreed. Can such an employee turn round and say, when his services are terminated, that he has been removed from service in violation of Art. 311(2)? The answer prior to Moti Ram's case was that he could not. Termination in exercise of contractual power was not considered as a measure of punishment and was therefore not treated as removal within the meaning of Article 311(2). In *Purshotham Lal Dhingra Vs. Union of India* (A.I.R 1958 S. C. 36) it was observed:

> "..... where a person is appointed substantively to a permanent post in government service, he normally acquires a right to hold the post until under the rules, he attains the age of superannuation or is compulsorily retired and in the absence of a contract, express or implied, or a service rule, he cannot be turned out of his post unless the post itself is abolished or unless he is guilty of mis-conduct, negligence, inefficiency or other dis-qualifications and appropriate proceedings are taken under the service rules read with Art. 311 (2)".

This observation was understood to mean that a permanent government servant could be turned out of his post when the post itself was abolished or when the contract of employment provided for termination of his service, after notice. In other words, where a government servant's service is terminated under the service rules which provide for termination after due notice, such termination was not considered as one falling within the meaning of the word removal in Art. 311 (2).

9. But in Moti Ram's case, the constitutional validity of Rules 148(3) and 149(3) of the Indian Railway Establishment Code Vol. I was questioned before a Bench of the Supreme Court consisting of seven judges. In substance, the above said rules provided that the Railway authorities could terminate the service of any permanent employee under them after giving the prescribed notice. After an

elaborate discussion of the entire law on the subject, and after reviewing all the earlier rulings dealing with the scope of Art. 311 (2), the majority of the judges held that the termination of a Railway servant's employment under the aforementioned rules is "removal" within the meaning of Art. 311(2). The majority held that the above said rules were violative of the protection guaranteed to civil servants under Art. 311(2) for the reason that, they did not give the persons concerned an opportunity of showing cause against the action proposed to be taken against them. The Court unequivocally declared that the rules were constitutionally invalid. The following observations in the judgment may be noted:

"..... in a modern democratic state, the efficiency and incorruptibility of public administration is of such importance that it is essential to afford to civil servants adequate protection against capricious action from their superior authority. If a permanent civil servant is guilty of mis-conduct, he should no doubt be proceded against promptly under the relevant disciplinary rules, subject, of course, to the safeguard prescribed by Art. 311(2); but in regard to honest, straight-forward and efficient permanent civil servants, it is of utmost importance even from the point of view of the State that they should enjoy a sense of security which alone can make them independent and truly efficient. In our opinion, the sword of Damocles hanging over the heads of permanent Railway servants in the form of Rule 148(3) or R 149(3) would inevitably create a sense of insecurity in the minds of such servants and would invest appropriate authorities with very wide powers which may conceivably be abused."

"It has however, been urged that the Railway servants who entered service with the full knowledge of these Rules cannot be allowed to complain that Rules contravene Art 311 and are, therefore, invalid. It appears that under R. 144 (which was originally R 143) it was obligatory on railway servants to execute a contract in terms of the relevant Railway Rules. That is how the argument based on the contract and its binding character arises. If a person while entering service executes a contract containing the relevant Rule in that behalf with

open eyes, how can he be heard to challenge the validity of the said Rule, or the said contract? In our opinion, this approach may be relevant in dealing with purely commercial cases governed by rules of contract; but it is wholly inappropriate in dealing with a case where the contract or the Rule is alleged to violate a Constitutional guarantee afforded by Art. 311 (2) and even as to commercial transactions, it is well known that if the contract is void, as for instance, under S 23 of the Indian Contract Act, the plea that it was executed by the party would be of no avail. In any case, we do not think that the argument of contract and its binding character can have validity in dealing with the question about the constitutionality of the impugned Rules."

" ..... There is no doubt that on a fair construction the impugned Rules authorise the Railway Administration to terminate the services of all the permanent servants to whom the Rules apply merely on giving notice for the specified period, or on payment of salary in lieu thereof, and that clearly amounts to the removal of the servant in question. Therefore we are satisfied that the impugned Rules are invalid in as much as they are inconsistent with the provisions contained in Art. 311 (2). The termination of the permanent servants' tenure which is authorised by the said Rules is no more and no less than their removal from service, and so, Art. 311 (2) must come into play in respect of such cases. That being so, the Rule which does not require compliance with the procedure prescribed by Art. 311 (2) must be struck down as invalid."

10. Thus the decision of the Supreme Court in Moti Ram's case makes the position of employees in Government service more secure. The security is available only to permanent servants who alone have a right to the post. The most important consideration that seems to have weighed with the judges was the need for protecting permanent civil servants from capricious action on the part of the executive. If on the other hand, the Court had held that the impugned Railway Rules were constitutionally valid, it would

have been easy for the executive to frame service rules in all departments providing for termination of service on notice. And this would have rendered the protection under Art 311 (2) illusory.

11. At the same time it must also be pointed out that the decision creates some difficulty for the executive. This could easily be seen from a decision of the Full Bench of the High Court of Jammu and Kashmir, reported in AIR 1965 J & K 15. The case arose on the abolition of a Special Police Squad which the State Government had created. The squad itself was abolished and the services of all the permanent employees under the squad were terminated. The question arose whether such termination amounted to a violation of the provisions of Act 311 (2). The Court held that it did. In very clear terms, the Full Bench held that termination of service even on the abolition of the post amounted to "removal" within the meaning of Art. 311 (2), corresponding to Sec. 126(2) of the Constitution of Jammu & Kashmir. The Chief Justice noted that if it where held otherwise, it would be possible, in a democratic form of Government, for those in power to abolish posts held by civil servants and thereby deprive such servants of the protection afforded under the Constitution. The Court also indicated that the proper course for government even in cases where they were compelled to abolish certain posts was to absorb the employees in other departments on equally good emoluments, terms and conditions.

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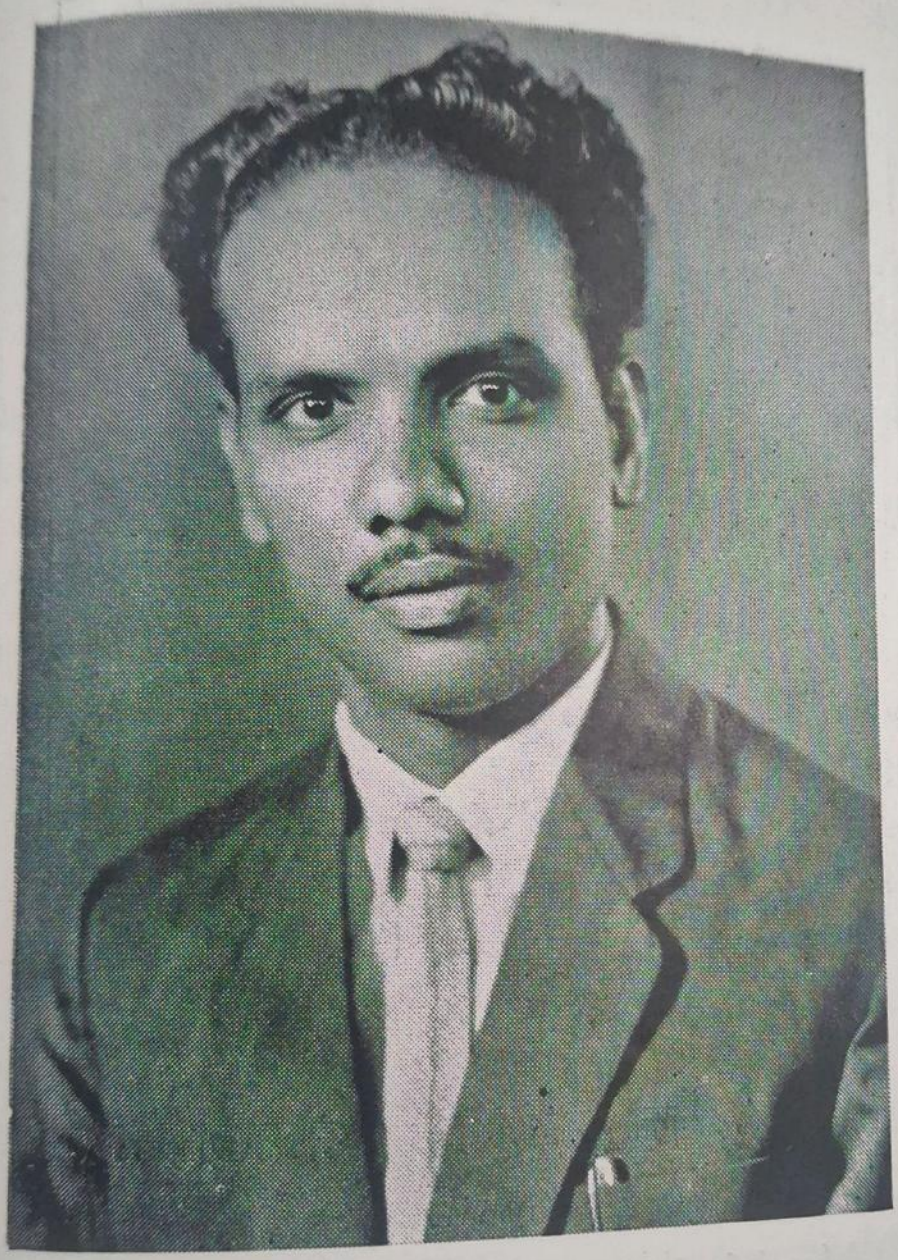
PERSPECTIVES OF LEGAL EDUCATION IN INDIA WITH SPECIAL REFERENCE TO THE CONTENT OF LEGAL EDUCATION FOR THE FIRST DEGREE IN LAW

By

R. Sankaradasan Thampi,
Principal, Law College, Ernakulam and
Dean, Faculty of Law, University of Kerala.

Reorganisation of legal education is a problem engaging the thoughtful attention of the Jurists, Lawyers, Judges and Educationists alike in India. With the formation of the All India Bar Council, which has been charged with the responsibility of maintaining and regularising the standard of legal education in the various Universities in India, the question has assumed considerable significance in recent times. I shall try to indicate very briefly the perspectives of legal studies and also attempt to present a scheme to be followed for the First Degree in Law.

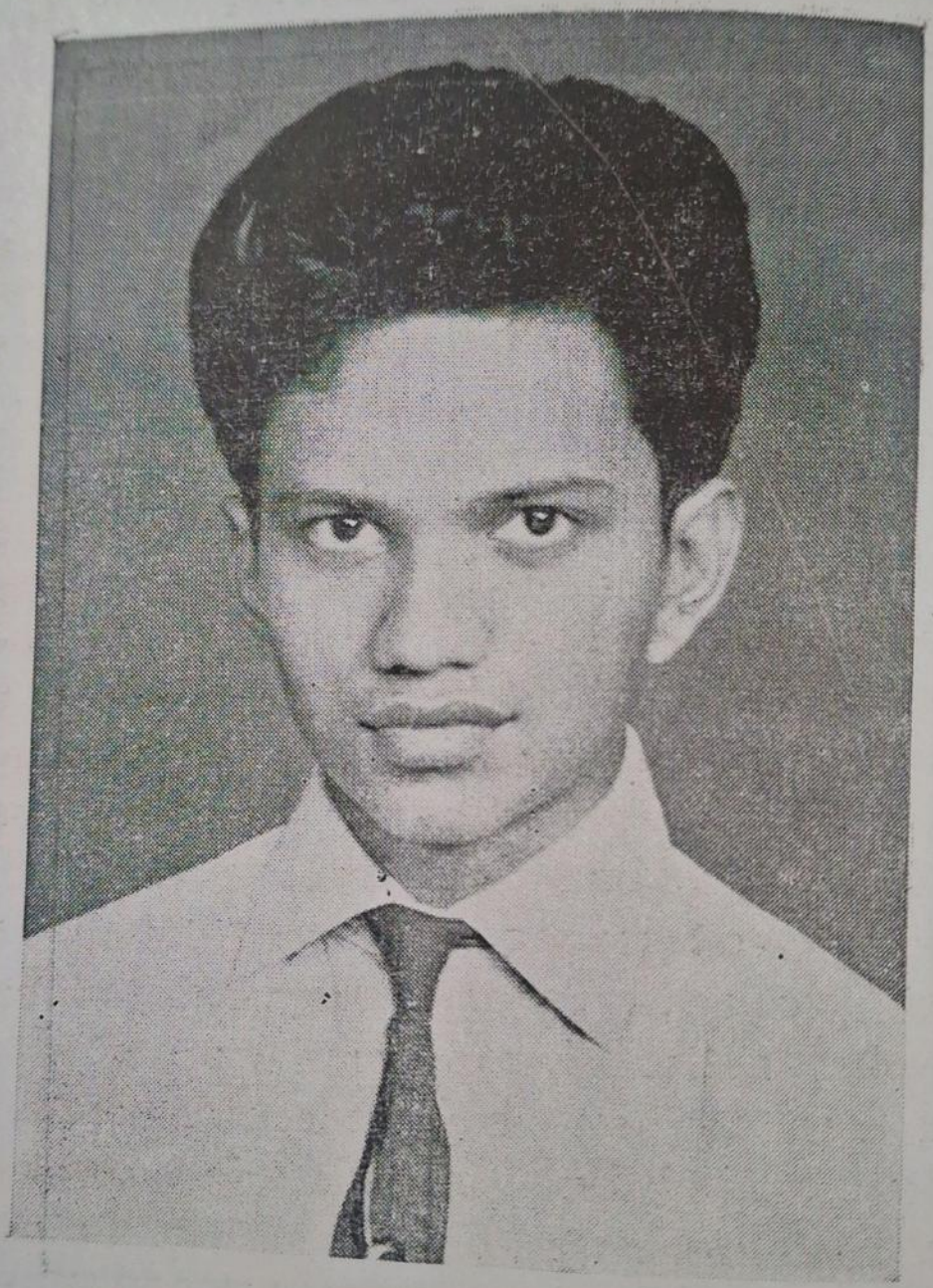
The scope and the significance of legal education have undergone considerable reorientation in modern times. After the attainment of Independence by our country and the formulation of a Republican Constitution for India, the necessity of evolving a scientific basis for legal studies has been admitted on all sides. The 'Rule of Law' is the guiding principle underlying our Constitution. Various constitutional conventions had to be developed in the initial stages of the working of the Constitution. Delicate problems usually arise, which have to be tackled at the constitutional level. The Directive Principles of State Policy visualise certain cherished principles to be acted upon by the State in the governance of the country. Under Part III of Constitution, certain fundamental rights have been guaranteed to citizens and non-citizens alike. The Supreme Court has to function as the watch-dog of the Constitution and has also to hold the scales even as between the competing claims of the citizens and the State on one side and as between the Union and the



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States on the other. Naturally, therefore, the Supreme Court has to play the role of "The Sentinel on the Qui-Vive."

India has accepted democratic socialism and planned economy for the development of the country. The original notions of the functions of a State have undergone radical changes. At one time it was thought that war and administration of justice were the only two essential functions of a State. Legislation and taxation were deemed to be the secondary functions of a State. But the then idea was the formation of Police, negative or repressive State. This idea has given place to the organisation of a Welfare or Social Service State. Consequential changes have taken place regarding the functions of a State also. The concept of a Welfare State implies a radical and Kaleidoscopic realignment of the responsibilities of a State. Far from merely maintaining law and order and effectively administering justice, the State practically interferes in every conceivable field of activity of the citizen in these days, with the result that every citizen has to be on his guard to see that his rights are not tampered with by the State.

The very heavy spell of taxation that the country is being subjected to nowadays also necessitates the citizens to have at least a working knowledge of law and the relevant legal provisions. The agriculturist has to pay agricultural income tax to the State. Any citizen doing business will have to maintain proper accounts for the assessment of sales-tax. It is thus evident that the interference of the State, visible or invisible, is experienced in any sphere of activity undertaken by a citizen, and he has therefore to be conscious of his rights and responsibilities.

We are living in a dynamic society and in a world of clashing views. The one time concept of law as a command issued by the Sovereign to his subjects has basically changed. At present law is regarded as a social phenomenon and it has necessarily to keep pace with the onward march of social events in order that it may serve the cause of developing society in an adequate manner. Law has hence to be dynamic and not static. Society is advancing by leaps and bounds and to divorce law from the impacts of society is to attempt the impossible.

In olden days the legal profession enjoyed covetable reputation and perhaps all the leading personalities in our country at that time were members of the noble

Courts Act, High Court Act, Suit Valuation Act, Court Fee Act, Stamp Act etc. The choice of subjects shall be from among the following:

1. Conflict of Laws.
2. United nations and its Specialised Agencies.
3. Legal Remedies.
4. Trade Marks, Patents and Copyrights.
5. Military Law.
6. Administrative Law.
7. Labour Law.
8. Taxation Laws.
9. Law of Co-operative Socities.
10. Industrial Disputes Act, and connected laws.
11. Banking Law.
12. Law of Insuarance.
13. Company Law.
14. Theory and Practice of Legislation and Interpretation of Statutes.
15. Comparative Constitutional Law.

At the end of the first and second years of study the student shall sit for the University Examination and get a pass. Only if he gets a pass in the Examination at the end of the first year will he be permitted to join the second year of the course and likewise only if he gets through in the examination at the end of the second year will he be permitted to continue his studies in the final year. At the end of the final year also, the student appear for and get a pass in a University Examination in the three subjects that he chooses. But he will be permitted to sit for the examination only if he produces a certificate from his Senior that he has satisfactorily completed the apprentice period of six months.

The above scheme is intended for full-time students. Personally I should think that the same syllabi should apply to in-service students also who join the Law Colleges. But some slight alterations may be made in their case. The provision regarding apprenticeship is not to be made applicable to them. Also purely procedural laws may be excluded from the curriculum of their studies. The duration of the course leading up to the first degree in law may be extended in the case of part-time students to four years. A provision shall also be inserted in the rules that only regular employees will be permitted to be part-time students. The subjects, as far as in-service candidates are concerned, are to be re-distributed as follows:-

First Year

1. Jurisprudence with special reference to the distinctive

contribution by India in the field.

2. Legal History of India.
3. Law of Contracts — Two papers (Details given above).

Second Year

1. Law of Torts.
2. Law of Crimes.
3. Personal Laws — two papers (Details as shown above).

Third Year

1. Transfer of Property Act — two papers (Details as shown above).
2. Trust, Easement and Equity.
3. Public International Law.

Final Year

1. Indian Constitutional Law (Compulsory). The student shall also choose any three subjects from the list indicated above.

A doubt may naturally arise whether the same degree is to be awarded to both full-time and part-time students, since the latter have to study only a lesser number of subjects. I should think there is no inconsistency or incongruity in awarding the same degree to both. It is sufficient if it is indicated in the diplomas of the part-time students that the conferment of the same will not entitle them to practise in a court of law. In case such degree holders desire to commence practice, the concerned Bar Council will have to make necessary regulations in the matter.

I have not discussed the question of the techniques of law teaching in this paper since it is to be treated separately. It is hoped that the above scheme will enable students to acquire an adequate informational framework in law and will also produce better Law Graduates imbued with a greater awareness and realisation of the role of law in everyday life, so that they may face the manifold problems in the society with courage of conviction and enlightened scholarship.

Governor of Jail to the (new comer): Now, nay man, I believe in doing the best I can for my fellow creatures. Though your sentence seven years, I do not want it to be a period of torture. I should suggest, first of all, that you follow your trade, what ever it is while you are here. By the by what is it?

New comer: A deep sea fisherman, Sir.

PARLIAMENTARY PRIVILEGE*

By

Sardar Hukum Singh,

Speaker of Lok Sabha.

An event of great constitutional importance and farreaching implications as regards the powers and privileges of Parliament and State Legislatures is the Opinion recently given by the Supreme Court on the Reference made by the President under Article 143 of the Constitution following the case in the Uttar Pradesh Vidhan Sabha. I need not recapitulate the facts of that case as they are well-known.

The Opinion of the Supreme Court on the President's Reference, as you are all aware, is not unanimous. The majority of the Judges, who constituted the Bench has, in effect, held that the powers and privileges confered on Parliament and State Legislatures by Articles 105(3) and 194(3) of the Constitution respectively are subject to the fundamental rights and that even if the British House of Commons had, at the commencement of the Constitution of India, the privilege or power to commit for its contempt by a general warrant, the Houses of Parliament and Legislatures in India do not have the privilege or power that their general warrants must be held to be conclusive. Mr. Justice A. K. Sarkar, in his minority Opinion, on the other hand, has held that "the right to commit for contempt by a general warrant with the consequent deprivation of jurisdiction of the courts of law to enquire into that committal is a privilege of the House of Commons" and that in view of the plain language of clause (3) of Article 194 of the Constitution "that privilege is possessed" by the Legislatures in India and "when a House commits a person for contempt by a general warrant that person would have no right to

* Excerpts from his address at the Conference of Presiding Officers held at Bombay on the 11th January, 1965.

approach the Courts nor can the Courts sit in judgment over such order of committal." Mr. Justice Sarkar also held that "when there is a conflict between a privilege conferred on a House by the second part of Article 194(3) and a fundamental right, that conflict has to be resolved by harmonising the two provisions. It would be wrong to say that the fundamental right must have precedence over the privilege simply because it is a fundamental right or for any other reason."

Be that as it may, for all practical purposes, the majority opinion is the Opinion of the Court and represents the interpretation of the Supreme Court on the relevant provisions of the Constitution.

Before the present Opinion of the Supreme Court, the position had seemed to be clearly established by the judgments of the Supreme Court in the *Searchlight Case* (AIR 1959 S. C. 395), of the Assam High Court in the *Natun Assamiya's Case* (AIR 1958 Assam 160), and of the Bombay High Court in the case of *Homi Mistry* vs. *Nafisul Hasan* (IIR 1957 Bom. 218), that the privileges of the Legislatures were not subject to the fundamental rights. I may here re-call only the following passage from the judgment of the Supreme Court in the *Searchlight Case:*

> "……It is said that the conditions that prevailed in the dark days of British history, which led to the Houses of Parliament to claim their powers, privileges and immunities, do not now prevail either in the United Kingdom or in our country and that there is, therefore, no reason why we should adopt them in these democratic days. Our Constitution clearly provides that until Parliament or the State Legislature as the case may be, makes a law defining the powers, privileges and immunities of the House, its members and Committees, they shall have all the powers, privileges and immunities of the House of Commons as at the date of the commencement of our Constitution and yet to deny them those powers, privileges and immunities, after finding that the House of Commons had them at the relevant time, will be not to interpret the Constitution but to remake it……
>
> In the second place, the fact that clause (1) has been expressly made subject to the

provisions of the Constitution but clauses (2) to (4) have not been stated to be so subject indicates that the Constitution makers did not intend clauses (2) to (4) to be subject to the provisions of the Constitution .. It does not, however, follow that if the powers, privileges or immunities conferred by the latter part of those Articles are repugnant to the fundamental rights, they must also be void to the extent of such repugnancy. It must not be overlooked that the provisions of Art. 105 (3) and Art. 194 (3) are constitutional laws and not ordinary laws made by Parliament or the State Legislatures and that, therefore, they, are as supreme as the provisons of Part III."

If you go to the history of the provisions contained in Articles 105 and 194 of the Constitution, you will find that the intention has all along been that the Legislatures in India should have the same powers and privileges as are enjoyed by the British House of Commons, more particularly the privilege of committing for contempt by a general warrant without the scrutiny of the Courts.

Soon after the first Central Assembly came into existence in 1921, the First Speakers' Conference presided over by Sir Frederick Whyte, a former member of the House of Commons, was held in the same year. At that time, Sir Frederick Whyte stated:

> "The whole question of 'privilege' in respect of the Legislatures in India was one of great importance..... .. the point being whether legal powers should be asked for to enable the Legislatures to punish contempts."

He further observed that since no privileges resembling those of the House of Commons had been statutorily conferred on Legislatures in India, they possessed no powers to punish contempts.

The matter was considered from time to time at the Conference of Speakers and ultimately in 1933, when the discussions on the Govenment of India Bill were taking place in the Parliament of the U. K., the Secretary of the Central Legislative Assembly was authorised by the Speakers' Conference to address a memorandum to the Clerk to the Joint Select Committee, House of Lords, London Paragraph 4 of the memorandum stated as follows:

> "The unanimous opinion of the Conference of Speakers

was that the future Legislatures, both Central and Provincial in India must be given the privileges, immunities and powers enjoyed by the House of Commons... The Conference felt that in order to achieve this object, it was essential that a section on the lines of Section 18 of the British North America Act, 1867 as subsequently amended by the Parliament of Canada Act, 1875, should be incorporated in the Constitution of India .. ... For the purpose of the exercise and safeguarding these privileges and immunities, the Legislatures, both Central and Provincial, should be made a Court of Record to enquire into and punish contraventions of the Act."

The British Parliament, however, did not accept the proposals as will be apparent by a reference to Sections 28 and 71 of the Govenment of India Act, 1935.

The question was again taken up at the Speakers' Conference in 1938 and Sir Abdur Rahim, President of the Legislative Assembly, addressed a memorandum on the subject to the Government of India to be forwarded to the authorities concerned. Paragraph 5 of this memorandum stated as follows:

> "The Conference were unanimously and emphatically of opinion that the Government of India should be requested to take immediate steps to get Sections 28 and 71 of the Government of India Act, 1935, amended so as to secure for the Central and Provincial Legislatures and the officers and members thereof all the powers and privileges which are held and enjoyed by the Speaker and members of the British House of Commons."

The question was again considered at the Speakers' Conference in January 1947, but further action was postponed in view of the declaration of the British Government on 20th February, 1947 to grant independence to India.

Subsequently, at the instance of Shri G. V. Mavalankar, President of the Constituent Assembly (Legislative), as far as the Centre was concerned, Section 28 of the Government of India Act was amended by an Adaptation Order dated 31st March, 1948. As adapted, S. 28(2) read as follows:—

> "In other respects, the privileges of members of the

Dominion Legislature shall be such as may from time to time be defined by Act of the Dominion Legislature and, until so defined, shall be such as were immediately before the establishment of the Dominion enjoyed by the Members of the House of Commons of the Parliament of the United Kingdom "

When the Speakers' Conference again met in 1950, Shri G. V. Mavalankar, as Chairman of the Conference, pointed out that a material change in the situation had been brought about by the enactment of the provisions of Articles 105 and 194 of the Constitution of India. These provisions placed the powers of Parliament and the State Legislatures on a completely equal footing with those of the House of Commons in the United Kingdom.

In his speech on these provisions in the Constituent Assembly, Dr. Ambedkar, who sponsored the constitutional provisions, stated as follows:

"Under the House of Commons Rules and Privileges, it is open to Parliament to convict any citizen for contempt of Parliament and when such privilege is exercised, the jurisdiction of the court is ousted. That is an important privilege... There is not the slightest doubt in my mind and I am sure also in the mind of the Drafting Committee that Parliament ... must have certain privileges, when that Parliament would be so much exposed to calumny, to unjustified criticism that the parliamentary institution in this country might be brought down to utter contempt and may lose all the respect which parliamentary institutions should have from the citizens for whose benefit they operate."

Now we might have a look into the Opinion of the Supreme Court. But before doing that we do need to have some introspection. A lot of patience and forbearance is needed to work the democratic institutions. All this unfortunate episode could have been avoided if the U. P. Legislature had exercised some restraint even when it believed, and quite rightly, that the High Court Bench at Lucknow had not exercised proper discretion in releasing Keshav Singh on bail. A chain of actions and reactions was set in, and what followed subsequently, has not brought credit to any side. I am glad Justice Sarkar put this whole affair in proper perspective. I cannot do better than quote his reference to

this aspect, which he has done with beautiful clarity and balanced objectivity:

"Before I conclude, I must say that I feel extremely unhappy that the circumstances should have taken the turn that they did and that the reference to this Court by the President should have been rendered necessary. With a little more tact, restraint and consideration for others, the situation that has arisen could have been avoided. I feel no doubt that Beg and Sahgal, JJ, would have dismissed the petition of March 19, 1964 after they had possession of the full facts. I regret that instead of showing that restraint which the occasion called for, particularly as the order of imprisonment challenged was expressly stated to have been passed by a body of the stature of the Assembly for contempt shown to it, a precipitate action was taken. No doubt there was not much time for waiting but Keshav Singh could not force the hands of the Court by coming at the last moment. The result of the order of the Hon'ble Judges was to interfere with a perfectly legitimate action of the Assembly in a case where interference was not justifiable and was certainly avoidable. On the other hand, the Assembly could have also avoided the crisis by practising restraint and not starting proceedings against the Judges at once. It might have kept in mind that the Judges had difficult duties to perform, that often they had to act on imperfect materials, and errors were, therefore, possible. It could have realised that when it placed the facts before the Judges, its point of view would have been appreciated and appropriate orders made to undo what had been done in the absence of full materials. Such an action of the Assembly would have enhanced its stature and prestige and helped a harmonious working of the different organs of the State."

Circumstances conspired themselves in such a manner that the opinion of the Supreme Court regarding Reference by the President under Art. 143 of the Constitution on certain issues arising out of conflict between the High Court and Legislature of U. P. could be announced only three days before the Parliament had to adjourn on

3rd October, 1964. There was no time to have any discussion on the Opinion But the inter-session period of about two months had been fully availed of by the parties interested and persons concerned with the result that the issues have been obscured and there is confusion. Symposia have been held, meetings convened and all this has created an impression that the Legislatures wanted to encroach upon the citizens' fundamental rights under the Constitution, and the Supreme Court, as special protector of these rights, had come to the rescue of the citizens Further warnings have been sounded that if the Parliament amends the Constitution then it would be flouting the judiciary, which is supreme, and eroding the Fundamental Rights, which are inviolable except to the extent provided in the Constitution. The Press has played its own part, and its attitude can be understood and appreciated.

It is only the Legislatures that have not expressed any opinions so far. I congratulate the Legislatures on exercising this restraint. Whenever there has been any reference to this Opinion inside any Legislature, be it a House of Parliament or a State, and whether the reference was during the Question Hour or during other debates, the indications have been clear that legislators are not united, but have emphasized different aspects. This gives me satisfaction that real democracy is working successfully in our country. Constitute a Legislature of 28 members, and let it discuss any resolution or motion. Various aspects would be considered and all opinions would be expressed. In judiciary it has been possible for 28 Judges to converge from different parts of a State, and declare unanimous decision on a question that concerned themselves.

Almost three years have elapsed, and only two remain in the life of the present Parliament and State legislatures, and that too if any legislature is not dissolved earlier. There cannot be any certainty about any of us being elected a member and then again chosen as a Presiding Officer. We have no inherited claims or vested interests. But, being in office, at the present time, when these issues have arisen, we do owe to ourselves, as well as to democracy and to our country some responsibilities to express ourselves how we feel about this opinion. We do believe that the dignity and independence of the judiciary must be maintained. Its right to interpret the Constitution is unquestionable.

We never claim that the legislatures are infallible. We do not

pretend that we are less fallible than the judiciary. We even yield to the claim that the Judges are less fallible than the politicians. But nothing is solved by these attitudes. The politicians have been known to make similar claims. The highest authority may err, but its decision is to be accepted because there is no remedy. Even in judiciary, when an appeal, review or revision is provided against a judgment, pleas have been taken, and in some cases decisions also recorded, holding that the judgment of a judge or a bench of judges, be they any number, is manifestly wrong or even absurd. The opinion of the Supreme body is correct, because it is necessarily right. This correctness flows from finality, the finality is not the result of its correctness. If an appeal lay against this Opinion to higher authority, it could be argued by lawyers, and even could be held by that authority that it was manifestly wrong in more than one respect. Honestly I believe that the opinion is wrong in some respects and many arguments harnessed to support it are untenable and irrelevant.

It has been argued that in England, Parliament is sovereign; in India the Constitution is supreme. Nobody denies that. The same is the case as regards Supreme Court. It is the Constitution that is supreme and not the Supreme Court. It has to interpret the Constitution, and not to make it or rewrite it. If the words used in Art. 194(3) are clear and unambiguous then the ordinary meaning is to be given to the language used, and nothing extraneous can be imported into the Article according to the whims and fancies of the interpreter. The language in Art. 194(3) is very clear, and leaves no doubt for any speculation. To the Supreme Court Judges in *Sharma's* case (1 SCB 806) also the meaning was plain. This judgment contains, "In dealing with the effect of the provisions contained in Cl. (3) of Article 194, wherever it appears that there is a conflict between the said provision and the provisions pertaining to fundamental rights, an attempt will have to be made to resolve the said conflict by the adoption of the rule of harmonious construction". This is unexceptionable. Similiar attempts were made by the Supreme Court earlier, and even in the present Reference one has been made by Justice Sarkar, and the result has been harmony between the two wings, but the elaborate research by the majority now has created a conflict and disturbed harmony. In embarking upon this journey of making an attempt the Judges were at least conscious, that their destination was conflict for they entered a

caveat "what would be the result of the adoption of such a rule (of harmonious construction) we need not stop to consider at this stage."

Now by their construction the majority Judges have come to the conclusion that an ordinary citizen (not a member) has a right to seek redress from any High Court or the Supreme Court against any punishment for a contempt of legislature committed outside the House. This means that a citizen has a fundamental right which can be protected by the Judiciary. Would he lose that right of recourse to courts for protection as soon as he is elected a member of a Legislature! How amusing would that be! The privilege had so far been understood to mean, and is even now understood to imply some special right that a person or group of persons enjoy over and above those enjoyed by all others. But if a legislator is not given the protection that any citizen enjoys, privilege would mean an inhibition, a restriction or a deprivation of some right that every citizen possesses. The Supreme Court has not given its Opinion about a member of the Legislature. But would it be possible to conceive that a member does not enjoy the same rights as an ordinary citizen? When this question is considered the result is inescapable.

Keshav Singh, in the present conflict, was to be administered a reprimand only for the contempt committed outside the House. He was ordered to be imprisoned for the contempt committed by him by his letter to the Speaker and by his behaviour 'in view of the House'. Justice Sarkar has given the facts thus :

> "He (Keshav Singh) was thereupon brought under the custody of the Marshal of the Assembly in execution of a warrant issued by the Speaker in that behalf and produced at the Bar of the House on March 14, 1964. He was asked his name by the Speaker repeatedly but he would not answer any question at all. He stood there with his back to the Speaker showing great disrespect to the House and would not turn round to face the Speaker though asked to do so. The reprimand having been administered, the Speaker brought to the notice of the Assembly a letter dated March 11, 1964, written by Keshav Singh to him .. The Assembly thereupon passed a resolution that 'Keshav Singh be sentenced to imprisonment for seven days for having written a letter worded in language

which constitutes contempt of the House and his misbehaviour in view of the House' .. "

From the facts it is manifestly clear that the sentence of imprisonment was awarded by the House for the objectionable letter by Keshav Singh to the Speaker and his contempt of the House inside the Chamber. As against this, the facts stated in the majority opinion do not disclose how Keshav Singh behaved inside the House. "The contempt and breach of privileges in question arose because of a pamphlet which was printed and published and which bore the signature of Keshav Singh along with the signature of other persons". The Opinion records "In pursuance of the decision taken by the House later on the same day, the Speaker directed that the said Keshav Singh be committed to prison for committing another contempt of the House by his conduct in the House when he was summoned to receive the aforesaid reprimand and for writing a disrespectful letter to the Speaker of the House itself." The actual behaviour of Keshav Singh turning his back towards the Speaker, and refusing to answer anything was not considered worth mention. But even from these facts it becomes clear that imprisonment was given for 'his conduct in the House' and the 'disrespectful letter to the Speaker'. This imprisonment was not awarded only for the contempt committed outside the Chamber. Yet the High Court interfered in this order, and released Keshav Singh on bail.

This is no argument that there was only one day left, and the petition would have become infructuous if Keshav Singh had served the last day also. If that had happened he was himself to blame for not having come earlier. What is the effect of this interim order by the High Court? The balance of sentence of imprisonment of one day has in effect been remitted, for on prorogation of a House, the balance of the period of imprisonment lapses automatically. The Supreme Court has not evidently considered this aspect when it has held that Courts can pass interim orders and even release persons committed for contempt on bail.

The Supreme Court jealously guards its own right to punish for its own contempt. In its own case there is no infringement of the Fundamental Rights and the citizen has no remedy. He has to suffer silently even though he might feel that the order of punishment is not justified.

In Article 194(3) the same rights have been conferred on the Legislature, no less, no more. The Supreme Court has argued very laboriously that it is the right of the Superior courts alone to punish for their contempt, and the person punished has no remedy. This can imply that the Supreme Court is of the view that the Parliament and other legislatures must be reduced to the status of inferior courts. This Opinion concedes that legislatures have powers of courts to punish for contempt. If the Supreme Court had held that legislatures could not punish for their own contempts even, it could be understood. But to grant that they can punish for contempt, and thus can exercise the powers of courts, but only such restricted powers as are exercised by inferior courts, whose decisions on contempt are subject to review by higher courts, is to reduce by means of a laboured judgment the legislatures and the Parliament to the status of an inferior court subject to the jurisdiction of the Higher Courts and particularly the Supreme Court.

It would be interesting to note what Justice Sarkar has to say in this connection:

> "Our job is not to start an innovation as to privileges by our own researches. It would be unsafe to base these novel ideas on odd observations in the judgments in the English cases, torn out of their context and in disregard of the purpose for which they were made... ... To base our conclusion as to the privileges on researches into antiquities, will further more be an erroneous procedure for the question is what the privileges of the House of Commons were recognized to be in 1950. Researches into the period when these privileges were taking shape can afford no answer to their contents and nature in 1950. The question can be answered only by ascertaining whether the right under discussion was treated as a privilege of the House of Commons by authoritative opinion in England in the years preceding 1950."

The authoritative opinion as to the privileges and powers of the House of Commons in England and Commonwealth Parliaments whose such privileges are identical is summed up by Lord Cairns, who delivered the judgment of the Privy Council in the case of the *Speaker of the Legislative Assem-*

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4 " *T. P. Kelu Nambiar, B. A., M. L.* "
5 " *K. V. Kuriakose, B. A., M. L.* "
6 " *P. O. Abdulkhader, B. A., B. L.* "

bly of Victoria vs. *Hugh Glass*, as under:

"beyond all doubt, one of the privileges of the House of Commons – is the privilege of committing for contempt, and incidental to that privilege, it has been well-established in England that the House of Commons have the right to be the judges themselves of what is contempt, and to commit for that contempt by a warrant, stating that the commitment is for contempt of the House generally, without specifying what the character of the contempt is ..... Their Lordships consider that there is an essential difference between a privilege of committing for contempt such as would be enjoyed by an inferior Court, namely, privilege of first determining for itself what is contempt, then of stating the character of the contempt upon a warrant, and then of having that warrant subjected to review by some superior tribunal, and running the chance whether that superior tribunal will agree or disagree with the determination of the inferior Court, and the privilege of a body which determines for itself, without review, what is contempt, and acting upon the determination, commits for that contempt without specifying upon the warrant the character or the nature of the contempt ..... The ingredients of judging the contempt, and committing by a general warrant, are perhaps the most important ingredients in the privileges which the House of Commons in this Country possesses; and it would be strange indeed if, under a power to transfer the whole of the privileges and powers of the House of Commons, that which would only be a part, and a comparatively insignificant part, of this privilege and power were transferred."

Mr. Seervai, while addressing the Maharashtra Assembly remarked "The majority opinion speaks of an objective approach, but does not show it. The minority opinion does not speak of it, but shows it." I entirely agree with this observation.

The language of Art. 194(3) was very plain to Sarkar J, and to all other Judges of the Supreme Court who had considered this Article earlier, but it was not clear to the

present majority delivering the opinion. On this point Sarkar J observed: "I cannot imagine more plain language than this. The language can only have one meaning and that is that it was intended to confer on the State Legislatures the powers, privileges, and immunities which the 'House of Commons' in England had There is no occasion here for astuteness in denying words their plain meaning by professing allegiance to a supposed theory of division of powers".

This clinches the whole issue. There was no need to discuss in detail how and why the House of Commons got invested with these powers; how conflicts arose, how they were resolved in England; how the House of Commons fought these battles against the Stuarts; and how such enormous powers could be given to our legislatures or why should they be given at all when American Congress could do without them? These are all irrelevant discussions, and have only created confusion. Sarkar J has well said in this connection: "It will not be profitable at all, and indeed I think it will be 'mischievous' to enter upon a discussion of that dispute for it will only serve to make turbid, by raking up impurities which have settled down, a stream which has run clear now for years".

The majority opinion entered upon that discussion, and so the apprehensions of Sarkar J have been confirmed.

Supposing indeed the language of Art. 194(3) was not so plain to the majority, as it was to Sarkar J, or to other Judges of the Supreme Court earlier, then the search for the intention of the Constitution-makers was bound to be undertaken. In this search the majority opinion has explored all possibilities of what the intention could have been, and even undertaken upon itself the responsibility to say what it should have been, but only omitted to quote what the framers of the Constitution themselves said their intention actually was. It is strange that the majority of Judges did not consider it worthwhile to mention in their opinion what was intended by Dr. Ambedkar and Sir Alladi Krishnaswamy Iyer when they transplanted Art. 194 (3) from the Australian Constitution. The intention of the Constituent Assembly was to oust the jurisdiction of Courts in contempt cases.

This Opinion has raised so many controversial issues and at certain places the arguments are so involved that one wonders what to say keeping in view the respect we must show to our Courts. The

arguments could go on endlessly but no useful purpose would be served by such futile exercise.

I am happy to say that the minority judgment has recognised that "during the fourteen years that the Constitution has been in operation, the Legislatures have not done anything to justify the view that they do not deserve to be trusted with power." The minority view further says that "though Art. 221 is not enforceable, the Legislatures have shown an admirable spirit of restraint and have not even once in these years discussed the conduct of Judges We must not lose faith in our people, we must not think that the Legislatures would misuse the powers given to them by the Constitution or that safety lay only in judicial correction". I have no reason to believe that the Legislatures in this country will hereafter depart from this high tradition and the standards that have been achieved so far. If we have faith in democracy, we must entrust the chosen representatives of the people with the power necessary for them to conduct their affairs smoothly and in the best interest of the people and in accordance with the Constitution.

I think I may also say a few words about the procedure that we have adopted in Lok Sabha in dealing with privilege cases. I believe this it also the procedure followed in all State Legislatures. No privilege matter can come before the House unless the Speaker gives his consent. This rules out the possibility of a matter being brought before the House in a state of excitement and under the impact of passions. The Speaker reviews the whole thing coolly when he gives his consent that the matter can be brought before the House. Privilege matters are, as a rule, referred to the Committee of Privileges on which are represented all parties and shades of opinions and in which the Minister of Law and the rich legal talent available in the House are represented. The Committee go into the facts and the law bearing on the matter thoroughly and frame a list of points that tell against the person who is alleged to be guilty of contempt or breach of privilege. The Committee ensures that they have before them the answer of the person concerned to all the points that are likely to be made against him. There is, therefore, in our conventions and procedure full opportunity for the person concerned to present his case before the Committee.

The report of the Committee is

then presented to the House and where it is proposed to take any action on the Report, the whole matter is debated in the House. As Lord Kilmuir, who was Lord High Chancellor of Great Britain pointed out "that in these debates it is as anything can be that some member will raise any criticisms that can be made of the Committee's finding and that these will be present to the minds of the House before it comes to a final conclusion". I may emphasize that final decision in all privilege and contempt matters is taken by the House, and not by the Speaker or a Committee, after full investigation and after giving all opportunities to the person against whom action is proposed to be taken to present his case. There are thus adequate safeguards and the rules of natural justice in the established procedure and no citizen need have any fear that his case will go unheard or that any action will be taken against him arbitrarily.

The crux of the whole thing is that we must express what we really want now, when this Opinion of the highest tribunal of the land is there. It may be an Opinion only. It may not be binding even. But then too we must show the utmost respect we can to our Judiciary. This Opinion has already corroded the privileges of the legislatures. Since that Opinion was announced there have been indications in the country that some people have felt encouraged to bring into contempt our Legislatures. We should never do anything which might in any way damage or impair the high esteem in which our Judiciary is held. We must try to enhance their prestige.

Now on the one hand there is the intention of the Constituent Assembly expressed, in unambiguous terms, by Dr. Ambedkar and Sir Alladi Krishnaswamy Iyer, and on the other hand, there is, this Opinion, whereby the construction put by the Supreme Court has compelled us to concede that the original intention is not warranted by the words of Art. 194 (3). The utmost respect we can show to the Judiciary would be by bowing to the superior wisdom of the Judges, however much we might differ from them, and accept that interpretation When that is done, then we have a right to declare that we wish that the original intention may be given effect to by suitable expression in Art 194 (3). We do not ask for anything more, anything new

It must be borne in mind that the Constitution is a composite one whole and well-balanced structure.

There are checks and balances prescribed in the Constitution itself. If any particular wing is impaired or damaged, the whole balance would be upset. There was purpose and well - considered design in assigning particular powers to each wing. The framers of the Constitution had studied and knew very well the privileges, powers and immunities of the members of the Congress in U S. A and of the House of Commons in the United Kingdom. Knowingly and deliberately these framers conferred the privileges of U. K. as the whole structure was conceived and based on Parliamentary democracy of British pattern. To suggest that American Congress privileges might be enough for our Legislatures is, to say the least, simply fantastic. We are not asking for any favours from any one. No one can arrogate to himself the role of the King of England, the repository of all powers, who should consider what powers he is prepared to part with at a particular moment. We only desire that what was intended to be given by the Constitution-makers may be conceded as ours. If the language used in Art. 194(3) is inadequate to convey that intention, then that deficiency might be made up.

Law, Democracy and Discipline

"Law is and should be a great force and a great power in any organised society. Sometimes there are criticisms of the process of law and its slow working A civilised society must be governed by the principles of law. If the laws are not good, they must be changed because the basic function of law is to ensure cohesion in society. Therefore, despite criticisms of the manner of working of the law in a democratic society the function of law is of the highest importance. Law in a democratic society is supposed to keep the balance between freedom and licence. A democratic society is a free society. But it must be remembered that even the fullest freedom does not mean lack of discipline or something approaching licence. The dividing line between freedom and licence is very narrow If freedom forgets discipline it might be suppressed. In a democratic society it is not the law alone that ensures freedom. It cannot be maintained unless the quality of the people themselves is high enough to realise the conception of freedom. In a democracy the people had to maintain some national standards."

— *Jawaharlal Nehru.*

No Admirer of Ladies, Please! *

'K' went to bed on a wintry night
In a somewhat unusual and unhappy plight
For the absence from home of his loving mate.

'K' pondered over the 'files' unfinished,
And meandered in to dreams long vanished;
Images of Cleopatra, Ruth and Lucrece
Danced through the echoes of Shakespeare and Keats,
The impish sleep still eluding in nightly woods
'K' found himself in restless moods
Until at last he fell asleep.

But lo! ere long the 'phone started ringing
Like some rythmic distant singing;
With disgust and anxiety 'K' took up the 'Phone
And a soft and whispering voice
Poured honey in to his ears:
'Sir, you wanted to be waked up at four';
'Nonsense!' muttered 'K' with eyes bloody and sore,
'Wrong number, please' the Exchange Girl giggled.

'K' felt terribly angry
And 'K' felt a little bit hungry
But 'K' could do no better than curse
The fair-sex and their woeful efficiency saying
'The Eves are always at their old job
Of disturbing Adams' sleep!'

POETASTER.

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* With respectful and affectionate apologies to 'K'.

SOCIAL JUSTICE AND LABOUR LEGISLATION

By

A. S. Joseph Franklin,
Student Editor; B. L. Class.

The right of the master to dismiss or discharge a worker employed under him has been restricted by various legislations and judical pronouncements. This legal control over the master's arbitrary power was established as a result of relentless struggle waged by the working class for justice over many centuries. The arbitrary power of the master to dispense with the services of the servant at his will and pleasure is now subject to review by statutory authorities. If the decision of termination is vindictive or capracious it is liable to be set aside. So also the decision should be based on the findings of an enquiry properly and bona fide conducted observing the well accepted cannons of natural justice. The conclusion should be founded on facts gathered in the enquiry. The right of an employer to hire and fire as he pleased no longer holds good as murder of the bygone ena of the 'laissez faire'.

It is not necessary for us to recount the struggle between labour and capital in the different parts of the world. It will suffice to mention that the outcome of that long and continued struggle was that the industrial workers acquired two fundamental rights, namely:– (1) the right to organize themselves to protect their interests without molestation or victimisation by the employers and (2) the right to resort to strike as a means for enforcing their demands. Accordingly, the common law right of an employer to discharge or dismiss an employee, or what is popularly known in some countries as "the right to hire and fire" has been subjected to statutory restrictions. In India the right to form unions of workmen, the procedure for its registration and the right to compel the employers to recognise those unions are covered by statutes. The general right to resort to strike has also been recognised by defining the circumstances under which a strike is to be regarded as illegal and in

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the case of public utility concerns that right has been further regulated by providing for previous notice of strike for a period being given and also by giving Government power to prohibit its continuance, with proper safeguards in the interest of labour by providing for an almost obligatory reference by Government for the purpose of compulsory arbitration of the dispute raised in the strike notice.

There are three other accepted fundamental principles, namely, (1) that an industrial worker must be placed in such a position that the security of his service may not depend upon caprice or arbitrary will of the employer, (2) that industrial peace should be maintained and (3) that industry should be efficiently managed. These principles underlie the Industrial Employment (standing orders) Act, 1940, the Industrial Disputes Act, 1947, and other similar statutes of a like nature. The former Act makes it obligatory on employers of large establihments employing 100 workers or more to have standing orders following a model pattern certified by the appropriate authority. They are to be regarded as conditions of service by which both employers and employees are to be governed. When the services of an industrial worker are terminated, an industrial dispute can be raised under the Industrial Disputes Act for it would be a question of "employment and nonemployment" and it would be competent for the Industrial Tribunal to determine whether the termination of service is justified". (a)

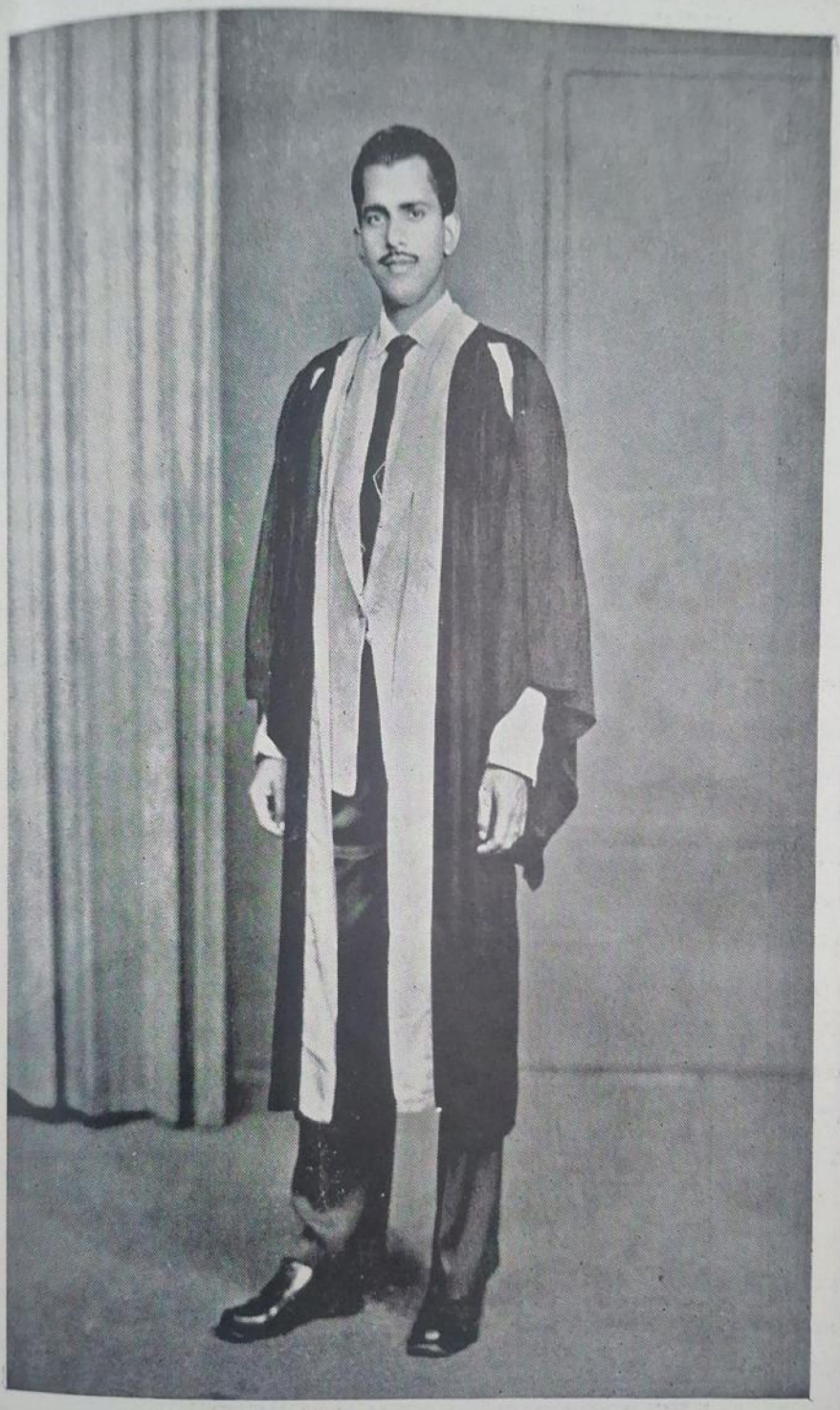
In the case of 'Western India Automobile Association Vs. Industrial Tribunal, Bombay' (b) the Federal Court has held that in an appropriate case the tribunal has the power to order reinstatement. The important distinction to be noted here is the deviation from the jurisdiction of civil courts, which can award damages only, whereas the Industrial Tribunal can create binding contracts relating to future employment even.

There have been no fixed rules to guide the Tribunals in deciding industrial disputes relating to dismissals and the awards of different Tribunals expressed diverse views based on their individual conception of social justice. Social justice differs according to social systems prevalent in societies. As stated by Mr. Justice S. T. Desai, "It is true that it may be difficult to

(a) 1952 LAC 490 = 1951 (2) LLJ. 314.
(b) 1949(1) LLJ. P. 245 = II F C. R. 321.

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MR. JOSE, K. J.



M. L. CLASS

define social justice. In the opinion of Mr. Justice Holmes it is an inarticulate major promise which is personal and individual to every Court and every Judge How a Court or a Judge approaches a particular problem is influenced and coloured by his outlook on life and society. But however a Judge or a Court may approach a particular problem, it cannot ignore the fact that all our legislation is aimed at bringing about social justice and therefore, it would indeed be startling to anyone to suggest that the Court should shut its eyes to social justice and consider and interpret a law as if our country had not pledged itself to bring about social justice Therefore it is a truism to say that the present tendency of our labour and industrial legislation is to impose more burdens upon the employers These burdens are imposed in the interests of the employees because they have been underdogs for decades and centuries and the legislature wants to raise their status". (c) The Full Bench decision of the labour Appellate Tribunal in B. & C Mills Case (d) is a landmark in the history of Industrial Law in India, and the Supreme Court has substantially approved the principles laid down in that case, namely:-

"In cases of dismissal on misconduct the tribunal does not, however, act as a court of appeal and substitute its own judgement for that of the management. It will interfere:- (i) where there is want of good faith, (ii) when there is victimisation or unfair labour practice (iii) when the management has been guilty of a basic error or violation of a principle of natural justice, and (iv) when on the materials, the finding is completely baseless or perverse". (e)

The Supreme Court "has consistently refrained from interfering with the conclusions reached by the Enquiry Officer who conducts domestic enquiries against industrial employees, unless one of the four tests laid down in the case of the Indian Iron and Steel Co., Ltd., is satisfied". Mr. Gajendragadkar C.J. continued to say that the Supreme Court "has accepted the view that if the enquiry is fairly held and leads to the conclusion that the charge framed against the employee is proved, the Industrial Tribunal should not sit in appeal over the finding recorded at the

(c) (A. I. R. 1963 Bombay 146, at P. 150-151).
(d) 1952 LAC 490 = 1951 (2) LLJ 314.
(e) The Indian Iron & Steel Co. Ltd , another Vs. their workmen 1953 S. C. 130 = 1958(I) LLJ. 260.

said enquiry and should not interfere with the management's right to dismiss a workman who is found guilty of misconduct". (f)

The question whether the dismissal of an employee is after a 'bona fide' and proper enquiry is a decisive factor in all adjudications under the Industrial Disputes Act. "In this connection it is necessary to point out that unlike in departmental enquiries against public servants to which Article 311 of the Constitution applies, in domestic enquiries, the question of the *'bona fides'* or *'malafides'* of the employer is often at issue. If it is shown that the employer was actuated by a desire to victimise a workman for his trade union activities, that itself may, in some cases, introduce an infirmity in the order of dismissal passed against such a workman. The question of motive is hardly relevant in enquiries hold against public servants *(Union Territory of Tripura and another V. Gopal Chandra Dutta Choudhuri)* (g). That is another reason why domestic enquiries in industrial matters should be held with scrupulous regard for the requirements of natural justice. Care must always be taken to see that these enquiries are not reduced to an empty formality". (h)

Ordinarily the first attempt of every employer would be to break the collective bargaining strength which is the basic need of the workers. In order to weaken the pulse of the organisation the leading or active members of the union will be denied employment, transferred to distant places or even dismissed under false protexts. It is rather difficult to prove the ulterior motive of the management in cases where a sham enquiry has been conducted by them in keeping with legal forms. In certain cases the punishment meted out may be quite out of proportion compared with the gravity of the offence. In such cases the tribunal cannot impute victimisation and interfere on that ground alone. When active workers of the Union are put to unnecessary trials and tribulations sometimes they may have to bow down before the management.

'Unfair labour practice' is also a term which is incapable of precise definition. Practically there is no difference between victimisation and unfair labour practice. But

(f) M/s. Khardah & Co. Ltd., Vs. The Workmen (1965) 1 S. C. J. 97.

(g) A. I-R. 19 8 S. C. 601.

(h) (1965) 1 S. C. J. 100.

whereas an employer obstructs the freedom of choice and association, it is unfair labour practice and where some punitive action is taken against the worker for his trade union activities, which has necessarily to be against the interest of the employer, then it is called victimisation.

The concept of victimisation has been given a wide meaning by Tribunals and it means all actions taken to the prejudice of the organisation of workers when the real cause and the apparent cause are different.

In bringing home to the workman the charge framed against him the principles of natural justice must be observed. This only implies that the conduct of judicial and quasi-judicial authorities should be in accordance with the following rules:–

(1) No man shall be judge in his own cause "*Nemo debet esse judex in propria cause*". The Judge should be free from bias. "A *real likelihood* of bias' appears to mean a substantial possibility of bias. The court, it has been said, will judge the matter "as a resonable man would judge of any matter in the conduct of his own business". The test of 'real likelihood of bias', which has been applied in a number of leading cases in magisterial and liquor licensing law, is based on the reasonable apprehensions of a reasonable man apprised of the facts". (i) If the enquiry is conducted with a closed mind the whole purpose fails.

"But the person dealing with the enquiry at any stage is in the position of a Judge and the rules of natural justice demand that he should not himself be personally intersted in the case." (j) The Supreme Court has emphatically laid down this proposition in various subsequent decisions as well.

The other essential principle of natural justice is notice and an orderly hearing without any external pressure or influence. This is expressed in the maxim 'No man shall be condemned unheard'.

"So far as the principles of natural justice are concerned, the authority dealing with the workmen should not be guilty of adopting unfair means and must not only act in good faith but also fairly and reasonably and without violating the principle of "*audi alteram partem*". (Hear both parties)

"The authority in question must

(i) A I. R. 1558 S. C. 601.
(j) Judicial Review of Administrative Action by S. A. de Smith P. 149.

only the community of wage earners have proper security of employment. In many cases it is practically infructuous. The social and political climate of the country needs to be given pride of place. The genesis of the present dispute lies in the consciousness which the working class of the country has naturally developed since the age of India's freedom began Of their human rights and of their legitimate place in the economy of the nation the working class of the country has become fully conscious. Their clamour for a fair deal must be appreciated and considered in the background of the social and political climate that prevails in the country today. The constitution which the country gave to itself on the 26th January, 1950 has promised to all the citizens Equality, Social political and economic, and Article 43 of the constitution has laid down as one of the directives of State policy that the State shall endeavour to secure, by suitable legislation or economic organisation or in any other way, to all workers agricultural industrial or otherwise - work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment, of leisure and social and cultural opportunities." (l)

In Prakash Cotton Mills Ltd. Vs. The State of Bombay Mr. Justice Chagla, the then Chief Justice of the Bombay High Court observed: "In our opinion no labour legislation, no social legislation, no economic legislation can be considered by a Court without applying the principles of social justice in interpreting the provisions of these laws. Social justice is an objective which is embodied and enshrined in our Constitution". (m)

Even after 18 years of independence the aim of the Constitution has not yet been materialised. The freedom and prosperity of industrial workers still continue to be a long cherished dream. The proceedings before an Industrial Tribunal are protracted, prolonged to an embarrasing length and therefore torturous. Industrial Disputes which are pending before the Tribunals for years together cuts at the very root of the legislative policy and it impairs justice being properly done even in the most deserving cases. One of the main reasons for the stagnant conditions of service of the industrial worker in India is the want of struggle for betterment of life. The

(l) Report of the Bank Award Commission July 1955
(m) 1957 (2) LLJ. 494.

inordinate delay in deciding dismissal cases is to be noted with regret. Tribunals will have to consider the long strain, anxiety and dejection of the worker who has been dismissed on false or flimsy grounds.

The Tribunals are created to safeguard the interests of the workers. From this point of view the present tendency of the Tribunals is rather retrograde. We now stand only where we were in the Western India Automobile Case in 1949. Shortly stated, a management under the present system of judicial interference in domestic enquiries can some how or other injure an industrial worker, however deligent he may be, and the directive principles of State Policy remain a pious vision as they were when declared.

Your Selections

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"THE POLEMIS POLEMIC"

By

C. M. Saraswathi,
F. L Class.

"Theoretically the consequences of any conduct may be endless", says the learned author Winfield, but no defendant is responsible ad infinitum for all the consequences of his wrongful conduct, however remote in time and however indirect the process of causation, for otherwise human activity will be unreasonably hampered. Bacon's rendering of the maxim, 'in jure non remota causa, sed proxima spectatur' has often been cited".

It is indeed very curious and even embarrassing to note that even in the 18th century, the law regarding 'remoteness of damage' presented a hotch-potch of judicial dicta which sowed only humiliating discontent, and so courts of the 18th century took refuge in scraps of scholastic logic about 'causa causans' and such mistiest generalities.

In 1850 were laid the seeds of a controversy, which was supposed to have been settled in 1921, but which, as Winfield says, cannot be regarded as disposed of even now. Two theories prevailed during these two dates: the 'test of reasonable foresight' and that of 'direct consequences'.

The former emerged in 1850, in the two famous decisions by Chief Baron Pollock of the court of Exchequer: Rigby Vs. Hewit (1850, 5 Ex. 240-243) and Greenland Vs. Chaplin (1889, 5 Ex. 243-248), followed in Lynch Vs. Knight (1861, 9 H. L. C. 577-600) by Lord Wensleydale, again followed by Vaughan Williams L J. in 1920 in Cory Vs. France. Until 1920, there was

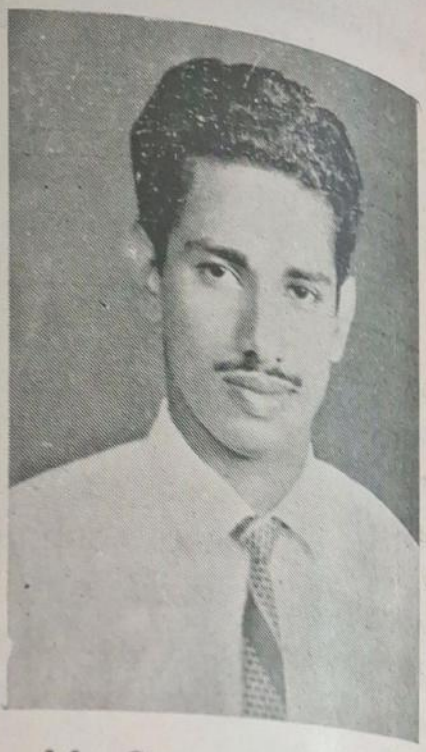
...A LA BENIGN MOTHER



PHOTO: S. GOKULA NAIDU



Miss Charlotte V. L.
who secured the only First Class for the B. L. Examination in the University held in April 1964



Mr. George Varghese
General Secretary



Executive Committee of the College Association with Mr. Justice Raghavan

no authoritative decision that took a view contrary to this – that is, consequences were held too remote, if a reasonable man could not have foreseen them.

The latter view, mentioned above, was laid down in 1870, by the court of Exchequer Chamber in Smith Vs. London and South Western Rly. (L. R. 1870-6 C. P. 14) by Baron Channell and Justice Blackburn, which for the first time established the test of direct consequences.

In 1921, the theory regarding "reasonable foresight", attracted the attention of the Court of Appeal in the celebrated case of Re Polemis and Furness, Withy and Co., Ltd. (1921, 3 KB 560), decided by Bankes, Warrington and Scrutton L. JJ. Thrasyvoules, the Greek Steamship was chartered by Furness, Withy and Co, from Polemis for the duration of the war, in February 1921. Due to sheer negligence on the part of the Arab Stevedores, employed by the defendants, a plank fell into the hold of the ship, which was filled with petrol vapour as a result of leakage from the containers. The gas was ignited and an explosion and a conflagration ensued, which burned the ship to ashes. Arbitrators, appointed in pursuance of Clause 22 of the charter-party directed Furness Withy and Co., to pay £200,000 as damages. Sankey J gave a verdict, based on the principle of "direct consequence" – that is, if a reasonable man could have foreseen any damage, he is liable for all direct consequences, ensuing therefrom.

On an appeal by the defendants, the curious plea raised by the plaintiffs based on clause 21 (the fire exemption clause) of the charter-party that it did not cover negligence on the part of the defendants, was accepted and upheld by their Lordships of the Court of Appeal. In spite of the force and vigour with which Mr. Wright (as he then was – who later became Lord Wright), who appeared with his junior Counsel Mr. Porter (who later became Lord Porter), argued for the defendants, they lost the case. The fact that renowned lawyers like Mr. Dumas took part in the discussions, enhances its significance.

It was further laid down that since the defendants could anticipate some damage, they were liable for all direct consequences flowing from their initial act. This decision can claim the support of the dicta of some of the most eminent judge: from De Grey C. J. in 1773, through Baron Channell and Blackburn J. in 1871, down to Lord

Sumnar (Weld-Blundell Vs. Stephens-1920, A C. 968), there is clear authority to support this view. At the same time, it has not escaped virulent criticisms.

Again, some light was thrown on this, in 1932 by the House of Lords in Liesbosch Dredger Vs. S. S. Edison (1933, AC 449) where it was 'cabined, cribbed and confined' by the imposition of strict limitations on the scope of its application. It has been suggested that this decision is an authority for the proposition that Re Polemis is limited to the direct consequence to the particular interest of the plaintiff, which has been invaded (but this has not been generally accepted). Viscount Buckmaster, Lord Warrington of Cliffe, Lord Tomlin, Lord Russell of Killowen and Lord Wright were the learned Law Lords, who considered this. But this, in no way, exhausts the difficulties connected with Re Polemis; to be more accurate, it was no better than confusion worse confounded".

Writers of legal literature attched great significance to this-many were dissatisfied, nay even disagreed with it, but none denied it, though, in their heart of hearts they even detested it. All seemed to be ignoring it, and until 1933, there is scarcely any mention of it in the reports. Dr. Stally brass, the leanred editor of Salmond, Mr. Beven, noted for his Book on Negligence, Wilson and Slade, and Hart and Honore agreed with it, while, Salmond, Winfiled, Pollock, Glanville Williams, Holdsworth and Prof. Goodhart strongly opposed it.

In 1951, the matter came up for consideration before the court of Appeal, in Thurogood Vs. Van Den Berghs and Jurgens Ltd (1951, 2 KB, 537). Much against the confident expectation of many, leaving them to 'hug a deeam', the Court of Appeal categorically re-established the principle laid down in Re Polemis. Making use of the hypothetical neck-tie incident, the trial Judge, Devlin J. held the defendants liable.

Prof. Goodhart was enraged, for his steadfast faith, though formed when his 'wisdom was consumed in confidence', was shaken, and his final hope became flat despair". Emerging with a very skathing, in fact vitriolic criticism,- "The Imaginary Neck-tie and the Rule in Re Polemis," (1953, LQR, 575), he pointed out that afrer thirty years of innocuous desuetude, the Court of Appeal followed it here and so it is specifically applied only once in thirty years and is therefore not of any practical importance.

The matter was brought to the notice of the Privy Council in the leading case of Overseas Tankship U. K. Ltd. Vs. Mort's Dock and Engineering Co. Ltd (1961, 2WLR, 126), shortly and popularly known as the "Wagon Mound Case", an appeal from New South Wales. The Case was tried by Kinsella J. A full Court of the Supreme Court of New South Wales consisting of Manning, Owen and Manguire JJ. affirmed the decision of Kinsella J., based on "Re Polemis". But Manning J. made bold to express the hope that a time may come when this will be overruled, and in fact, he was looking forward for the arrival of that opportune moment. The matter was taken in appeal to the Privy Council. Viscount Simonds Lords Reid, Radcliffe, Tucker and Morris unanimously repudiated the rule laid down in Re Polemis

Prof. Goodhart and others were immensely pleased and Goodhart wrote an article, "Obituary: Re Polemis" (1961 (77) LQR, 175), stating that for all practical purposes, Re Polemis is now dead. According to him, "Re Polemis is of doubtful ancestry and its sterility during recent years has been of benefit to the law".

Another opportunity for the House of Lords to retrieve its past error, presented itself in Hughes Vs Lord Advocate (1963, 2 W. L. R. 779), a Scottish appeal before Lord Reid, Jenkines Morris, Guest and pearce. But they kept quiet, in fact, deliberately ignored it. There is no reference, however, to the Wagon Mound at all. Yet, it has been suggested by Prof. Glanville Williams that the "Wagon Mound, one hopes, has put an end to the Polemis Polemic." But neither in the judgement, nor in the arguments, is there any reference to Re-Polemis.

A catena of articles followed and flourished in the Law Journals, about Repolemis. In 1931, Prof. Mcnair's "This Polemis Business" appeared in the Cambridge Law Journal (1931) 4CLJ, 125), where he analysed the effect of the decision in the law of contracts S. L. Porter also has contributed an article, entitled "The Measure of Damages in Contract and Tort" (1934,5 CLJ, 176). It was in 1951, that Law Wright came out with an enlightening treatise on this topic (1951, 14 MLR, 393), supporting Re-Polemis. In 1952, there appeared in the Law Quarterly Review, Prof. Goodhart's "The Imaginary Neck tie and the Rule in Re-Polemis (1952, (68) LQR, 514). He stated that the law was in a deplorable condition even in 1951. In 1960 also he expressed his views regarding Re-Polemis in

"Liability and Compensation" (1960,76 LQR, 567) Wagon Mound had not been decided then by the Privy Council, and after the ultimate decision of the Wagon Mound by the Privy Council in 1961, there flashed in the Cambridge Law Journal, another article by Proof. Goodhart, "obituary; Re-Polemis", of which reference has been made earlier. It was in the same year that "The Risk Principle" by Prof. Glanville Williams found its way to the Law Quarterly Review (1961 (77) LQR, 179). Again, the year witnessed another article, emanating from the same author. — "Causation in the Law". Douglas Payne in 1962, came out with an article, "Foresight and Remotnes of Damage in Negligence" (1962, MLR. 1). In 1964, after the decision in Hughes Vs. Lord Advocate in 1963, Prof. Goodhart wrote "a Note on Hughes Vs. Lord Advocate."

It is to be specifically noted at this juncture that the Principle, laid down in 'Re-Polemis' is so deep-rooted in the English system of jurisprudence that no side-wind of any subsequent decision can question its validity. In spite of the fact that many a heavy blows have befallen it, it still holds water' gives its comenting force, added and added strength; or to use the literary expression, 'it is writ in ink, that glows darker with the age' A concrete evidence for this can be derived from the following observation of the Court of Appeal in Thurogood's case. "Re-Polemis had not been overruled, or its binding character so far as this court is concerned, in any degree shaken." Ascribing a Miltonic phraseology to show its unbending and masterful, though not unperturbed authority, will only be quite apt – that is to say, "it is unshakable, undiminished and unterrified" if not "immutable, immortal or infinite." But, when we speak of its irrefagability, irrepealability and irreducibility, of course it is devoid of exaggeration to assert that "fiction lays after truth, invention is unfruitful and imagination, cold and barren".

Administrative Justice – A New Tyranny?

By

A. J. Ephrem, B. Sc., B. L.,
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(Old boy and Malloor Govinda Pillai Memorial Gold Medalist for 1964).

If the history of development of Law and Justice is classified on the basis of the dominating influence of various instruments of power such as the executive, legislature judiciary etc., the present epoch may well be classified as that of "Tribunals" and, the next, probably as the period of "pure administrative orders". The reason for the above view is to be found in the ubiquitous growth and ineluctable tyranny of the innumerable tribunals created by law in the modern Welfare State. The worst caricature of this state of affairs has come from India's elder statesman Mr. C. Rajagopalachari when he termed it as the 'Permit-License-Raj'. With the proliferating growth of State's activities in modern times in almost every field of human life, rule by tribunals is perhaps a necessary evil which could not be avoided. But the problem in a democratic society is how to keep these agencies exercising power within proper bounds so that, the rule of law and the maintenance of citizens' liberties are not imperilled and, the proper balance is kept between the demands of socialism on the one hand and individualism on the other. An attempt is made, in this article, to approach this problem from an objective point of view.

As will be admitted by all, the general tendency in modern legislations is to leave more and more powers in the hands of the executive. This is understandable, for the executive alone possesses the expertise in administration. But, should this experto credite on the part of the legislature lead us to the arbitrary rule of the executive, then the result would be a new threat and a new tyranny.

Often one is tempted to ask whether we are developing a new type of democracy – what in some totalitarian countries is called

'socialist democracy' or 'peoples' democracy' – totally unknown to the Greeks and the Romans and even to the modern Western democracies and, characterised by an all-pervasive, all-embracing executive rule? Are our legislatures progressively becoming mere social gatherings meeting only to applaud the executive policies and, our courts uncared old parents, once powerful and guardians of all human rights, but now toothless and skinny, saying with tears "we cannot help"?

Let us examine the rapid growth of administrative justice in the place of conventional justice we used to get from our courts, when they functioned in the days of their prestine glory.

The Donoughmore Committee Report on Ministerial powers draws a distinction between judicial and quasi-judicial functions. According to the Committee a true judicial decision has got four attributes apart from the fact that it presupposes a dispute between two parties. They are:–

1) the presentation of the case by the parties;
2) decisions on questions of fact;
3) decisions on questions of law; and
4) the final decision which disposes of the whole matter by a finding upon the facts in dispute, and by the application of the relevant laws, and if necessary, promulgating new principles of law where there is none. A quasi-judicial decision equally presupposes an existing dispute between two or more parties and involves among the above-mentioned attributes (1) and (2) but does not necessarily involve (3), and never involves (4). The place of (4) is taken by administrative action, the character of which is determined by the Ministers' free choice.

These definitions are not free from criticisms. But, for practical purposes they are useful. Mr. Basu in his Commentary on the Constitution of India (Vol. I page 278) points out the differences between quasi-judicial and administrative acts. In his opinion," a purely administrative act or order simply disposes of a particular case (eg., the granting of a licence to carry arms or a pass-port), or merely enunciates a policy to be persued by the administrative authority or the government. with out immediately affecting the rights of any individual or makes inquiries or investigates as a preliminary to judicial or legislative proceedings or, appoints a particular person to an office, or refers a matter to a

statutory tribunal for adjudiciation, or transfers such case from one area to another". A quasi-judicial act is explained as follows: "an administrative act (which) immediately affects individuals legal rights and the law requires that in coming to its decision in the matter the administrative authority must follow a procedure simulating the judicial process (when) the administrative act becomes quasi-judicial". "In short (it is) the additional requirement to follow a particular procedure to ensure a a minimum of fairness or (procedural) justice that distinguishes a quasi-judical act from an administrative act". Essentially, what distinguishes a regular judicial process from quasi-judicial and administrative processes is that, judicial decisions are arrived at by "applying fixed objective standards and the merits of the particular case, uninfluenced by any consideration of policy", whereas a quasi-judicial or administrative act is, to a large extent, guided by policy and expediency.

It is noteworthy that even if an administrative act directly affects the rights of citizens, but the law does not require it to follow a particular procedure, it is still administrative and not quasi-judicial in character.

Natural justice and Administrative Orders.

It is relevant at this point to consider the canons of natural justice and how far they are applicable to pure administrative orders.

It appears that a consensus of opinion prevails among the courts that the rules of natural justice are applicable only to judicial or quasi-judicial proceedings and not applicable to pure administrative acts or orders.

Before going into this aspect of the matter, the main principles of natural justice have to be ascertained.

The first of the principles of natural justice requires that no man shall be a judge in his own cause and the second, that both parties must be heard before a decision is given in a case. The Donoughmore Committee on Ministerial Powers have added two more principles to the above. They are:–

1) A party has a right to know the reasons for a decision affecting him, be it judicial, quasi-judicial or administrative.

2) When a decision is arrived at after conducting an enquiry by some Officer, the report of such

Officer must be made available to the parties concerned.

Of these the two principles stated first are universally recognised as part of the essentials of natural justice applicable to all judicial and quasi-judicial acts But the next two stand on a different footing as they have not obtained judicial recognition in the field of pure administrative acts.

The difficulty, however, is to draw a line of clear distinction between quasi-judicial and administrative acts. According to the decision in Kushaldas' case (1950 S. C. R. 621) a decision is quasi-judicial only if the statute requires the authority to act judicially, no matter if rights of individuals are thereby curtailed or not. So, it comes to this: natural justice has nothing to do with administrative actions even if the rights of citizens are seriously affected by such actions. But this definition being very narrow and, as it omits a mass of administrative decisions from the purview of judicial scrutiny, and the protection given by natural justice, Da. J. (as he then was) in Radheshyam V. State of Madhya Pradesh (1959 S. C. 107), sought to make two exceptions to the above dictum, namely: (1) the quasi-judicial duty shall be implied if there is a 'lis' (dispute between two parties pending before the authority) and if the statute conferring the power to determine the same is silent about the procedure to be followed therein. (2) If the dispute is not between two parties, but between a party and the authority itself, then also a quasi-judicial duty will be implied, if (a) it will prejudicially affect the subject and (b) the authority is required by the statute to act judicially. But it may be pointed out that, even if the rights of parties are not involved, if a statute expressly requires the authority to act judicially, he must act accordingly.

The Conclusion that follows is this: whenever the rights of citizens are at stake in a proceeding, a quasi-judicial duty will be implied unless the contrary expressly or by necessary intendment follows from the statute. Such will be the case if the provisions of the statute are made for meeting an emergency.

However, if the statute empowers the authority to reach a decision based purely on its subjective satisfaction, then the courts would not question it even if the circumstances are not those under an emergency. But, if the decision affects the rights of the citizen, the court may strike down such a provision itself if it is found to be

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unreasonable. Even though the view was repeatedly pressed before our Supreme Court, that whenever the rights of citizens are prejudicially affected by an administrative act, it must be presumed to be quasi-judicial irrespective of the statute, the Supreme Court has not accepted it so far.

Subjective satisfaction and its conclusiveness.

As is already stated, whenever a statute provides for subjective satisfaction of the authority concerned as the decisive factor, the same cannot be questioned in any court of law unless it is vitiated by fraud, or mala fides. The result is that, the 'subjective-satisfaction - clause' completely eliminates the requirements of natural justice in purely administrative orders.

Another peculiarity in the case of such an order is that, the authority making the order need not assign any reason whatsoever for its findings; the only requirement is that it should act according to the general policy laid down by the statute. "The jurisdictional fact here is whether the Reserve Bank does entertain the opinion mentioned, not whether the situation envisaged therein actually obtains. That opinion it is for the Reserve Bank to form on the basis of its own subjective satisfaction, and, it is again for the Reserve Bank to say, whether it entertains the opinion or not, not for the Court to determine whether or not adequate, or *in fact any grounds* exist for entertaining such an opinion. In such circumstances a refusal by the authority concerned to place before the Court the material on which it formed the opinion, would be proper" (Raman Nair J., in Reserve Bank V. Palai Central Bank, 1961 K. L T. 65).

The third principle enunciated by the Donoughmore Committee on Natural Justice, as noted already, is that whenever an administrative authority takes any action, which affects the rights of citizens it must assign the reasons for the same, even though subjectively determined and may therefore escape judicial scrutiny. This is because in a democracy no act of the Administration s h o u l d be shrouded in mystery and placed beyond the pale of public understanding. The opinion of the Law Commission (Reform of Judicial Administration, Vol. II) expressed on the subject is also the same. "In the case of administrative decisions provision should be made that they should be accompanied by reasons". Anyhow, the position remains that this requirement as to expressing of reasons is not

insisted upon by our Courts. On the contrary, a tendency to justify non-assignment of reasons in administrative decisions is manifesting itself in our judicial pronouncements. This can only be due to the gratuitous bias of our courts in favour of the Administration as against the citizen which is deplorable.

In the above mentioned case of the Palai Central Bank, the non-assignment of reasons may be, to a certain extent, justified in public interest, considering the emergency involved in the action taken by the Reserve Bank. Further, the relevant provisions of the Reserve Bank Act and the Banking Company's Act do contain certain principles for the guidance of the Reserve Bank in forming its opinion in the matter. But, in a later case (Ephrem Ambooken V. Assistant Chief Officer. Reserve Bank of India, 1964 K. L. T. 829) our High Court has reiterated the view in favour of non-assignment of reasons by the executive authority even in a case where no guidance was given to the authority in the relevant section (Banking Company's Act, section 35 B 1 (b) as to how it was to form its subjective satisfaction in a matter. The court in its judgment elaborately discusses the object and circumstances which necessitated the passing of the statute and states that, the section in question is "only a small wheel in a great machinery" which functions well and, comes to the final conclusion that even though the relevant section is without any guidance (that is, a wheel which can turn in any direction it chooses as it is without any control), looking at the statute as a whole, it cannot be called as an unreasonable restriction under Article 19 (6) of the Constitution. And so the provision was upheld.

It appears that, even where the relevant section did not furnish any guidance as in the above case, to the executive, as to the manner in which it was to act, the court is reluctant to call for reasons for its (the executive authority's) opinion, although it readily assumed (at least for the sake of argument) that the party's rights were affected by the executive act challenged.

The consequence of this attitude is a curious situation of which the citizen ought to be forewarned. That is to say, the phrase 'subjective satisfaction' keeps the courts away from all possible judicial inquiries in relation to administrative acts. Hence they need not be supported by any reasons whatever, resulting in the total exclusion of even public

knowledge of arbitrary executive action where it does happen.

The last mentioned aspect which is non-judicial is of grave public concern for, the scape for public understanding and public censure of Administration is the palladium of a sound democratic State. Non-disclosure of reasons for executive decisions, affecting citizens' rights defeats the objects and undermines the true values of Democracy. Executive action then would be like a leopard in the grass, catching its victim by stealth with absolutely no means of escape for the latter. Unbridled executive action of this kind, though sporadic, is nonetheless a serious peril to the citizens and may demoralise public faith in democratic institutions.

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The Vanishing Point of Jurisprudence

By

M. Mohammad Moopan,
Student Editor; F. L. Class.

Blackstone's definition of law in the widest sense results in the classification of Law under several heads. Of them, the most disputed and perhaps the most controversial section is that of International Law. Some Jurists are prepared to give it only the status of convention and they depict it as 'International convention.' Their reasoning is that 'Agreement' is the essential screw that helps the smooth functioning of the so called International Law. Apart from these Jurists Austin has got his own individualistic view. To him International Law is a contradiction in terms. He says that there must be a superstate authority to enforce International Law, if it is to come under the category of law. But once such authority arises, it ceases to be international and those laws become the laws of that newly arisen power.

But it is left for Holland to proclaim a new theory on International Law, which, though it may appear to be convincing on a first look, will be surely be discarded after a mature thinking. He says "International Law is the vanishing point of Jurisprudence." Literally it means that International Law is the spot where Jurisprudence disappears. Holland discribes his theory in such a characterestic style that a layman may jump into the conclusion that the theory is right. But after having a detailed review of the theory from a strictly juristic point of view, a jurist will not be at loss, even if he rejects the theory at the very outset.

First of all we will see, how Holland comes to the conclusion that International Law is the vanishing point of Jurisprudence and then we will have a perusal into its defects.

Holland brings forth many facts and connects them to form a chain, in order to arrive at his conclusion. He begins by saying that Jurisprudence is the science of law. Then he asks us what is meant by the term 'Science'. Science must be able to give rational explanation to all the phenomena which may arise under its branch of knowledge. Science shall not stop or admit defeat. For example when we say that Physics is a branch of science it means that it must be able to give reasonable answers to all the peculiarities that may come

under its category of knowledge. If the meaning of the term "science" is so, Jurisprudence, which we call as science of law must be able to give correct answers to all the questions that may spring up under it. After stating so much, Holland asks what is meant by law. He declares that law is given by the sovereign to his subordinates or it is given by a superior to an inferior. Moreover sanction is the concomitant element, with which law comes out. If the meaning of law is such, International Law, which is a branch of that law, also must consist of rules applied by sovereign to its subordinates. Now we must examine the definition of International Law. International Law is a body of customary or conventional rules, which are considered to be legally binding by civilised states in their intercourse with each other. From the definition of International Law, we can see that it does not consist of a body of rules imposed by a super authority on the subordinates. Being a matter of pure agreement, on which the smooth functioning International Law depends the element of sanction also is missing. So here we can see that Jurisprudence, the so called science of law is inapt to give a rational explanation to the phenomenon of International Law and the views expressed to give a fitting explanation are quite divergent also. So Holland concludes that International Law is the vanishing point of Jurisprudence.

Now we will have a look into the correctness of this decision. A jurist can straightaway say that Holland is wrong to a large extent. Holland describes law as something imposed by a soverign to his subordinates. When he says so he includes only one type of law, viz, civil law. It is true that to a certain extent, International Law is civil law; but essentially International Law is not civil law. Holland gives the definition of civil law and comes to the conclusion that International Law does not consist of such rules which make a law; and so it is the vanishing point of Jurisprudence. Holland has applied the definition of civil law to test the quality of Jurisprudence with regard to International Law. But the means employed by Holland to the test, are of course not right ones. As one of the essential links of the chain, by which Holland forms his theory is a loose one, the whole chain itself is shattered into pieces. The loose part is the definition of law; upon which Holland constructs the edifice of his theory.

However Holland is right in pointing out the weak spot of sanction in the realm of International Law. At least to that extent we must be prepared to give him his due.

Constitutional Freedom and Democracy

By

A. Jacob Oommen,

B. L. Class.

I

In his book 'Man versus the State', Herbert Spencer observed:- "The great political superstition of the past was the divine right of Kings. The great political superstition of the present is the divine right of Parliament. "The divine right of Parliament may be a superstition but, it is not, if it means only the Sovereignty of Parliament and the Rule of Law. The very basis of democracy is the Rule of Law while in autocracy the basis is the subordination of law to the tyranny of the king.

British democracy is one of the most ideal democracies in the world today. Rule of law forms the foundation of British Constitution. Sir Edward Coke was the exponent of the doctrine of Rule of Law. All the early kings in England believed in their divine rights. They always wanted the judiciary to act according to their will. Since Sir Coke was a believer in the Rule of Law, he wanted to establish the supremacy of law over the king's powers. The enthronement of William and Mary by The Act of Settlement established supremacy of Parliament in England. According to Dicey as he has stated in the Law of the Constitution, "The Magna Charta, the Petition of Rights and the Bill of Rights are the English political trinity of fundamental law". And these have made the law of the land supreme over arbitrary power of the king.

In England the fight for freedom against arbitrary power stopped with the establishment of supremacy of law leading to parliamentary supremacy. The paramount consideration in England was the idea of a welfare state. The courts have power to protect individual rights against executive action but not against legislative encroachments. The position in England as accepted by the courts is this:- "Acts of Parliament are the laws of the land and we do not sit as a court of appeal from

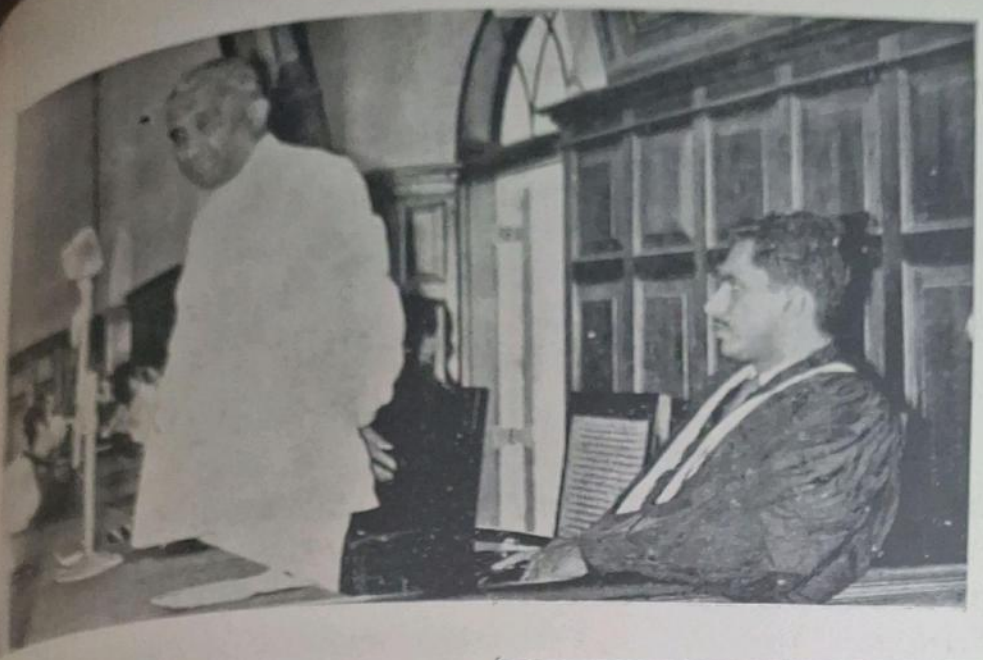
Parliament". Individual rights have, hence, to give way smoothly to the interests of the nation. This was held in an English case *Liversidge V. Anderson*. Sir Coke's dream of the supremacy of the judiciary over the legislature and the executive as is evident from his decision in *Bonham's case* was destined to be realised in the spacious domains of American Constitutional law.

In the United States of America it is not merely the rule of law that prevails but, as is said, the Absolute Reign of Law inasmuch as the American Supreme Court has under The Due Process Clause of the U. S. Constitution almost unlimited powers to strike down any legislative enactment on the ground that it is opposed to the concept of due process which means whatever is held by the court to be just and reasonable in the circumstances. The democratic rights under the American system are not secured by law paramount to prerogative but by constitution paramount to laws. This was made clear by Chief Justice Marshall in *Marbury V Madison* and *Darmouth College Case*. He was a staunch upholder of the maxim "Fiat Justitia Ruat Coelum" (Let justice be done though the heavens should fall). In his instructive book 'Legal Pillars of Democracy', Prof: G. C. V. Subbarao has stated; "In the ultimate analysis the final aim of democracy is to confer upon the citizen freedom in ample measure to develop his faculties and rise to his full stature. The Rule of Law and Absolute Reign of law are only means to that end. American judiciary has by common consent assumed for itself the onerous task of protecting the citizen's fundamental rights by means of their power of judicial review. The Bill of Rights in America was designed not only for protection against executive onslaught but against legislative tyranny as well. The Congress of the United States is not free to make any law as it pleases but only laws intra vires of the Constitution. The judiciary being supreme the legislative enactments are subject to judicial review. But even in America the fundamental rights, though they appear to be absolute from the wording of the Bill of Rights, can be restricted by the State for maintenance of public order, morality, security of the State and the like. This is by virtue of the implied "police powers" made available to the State by judicial interpretation. However, there is no abolition of the fundamental rights in the name of the welfare of the state. Only thing is that fundamental rights and the collective welfare of the

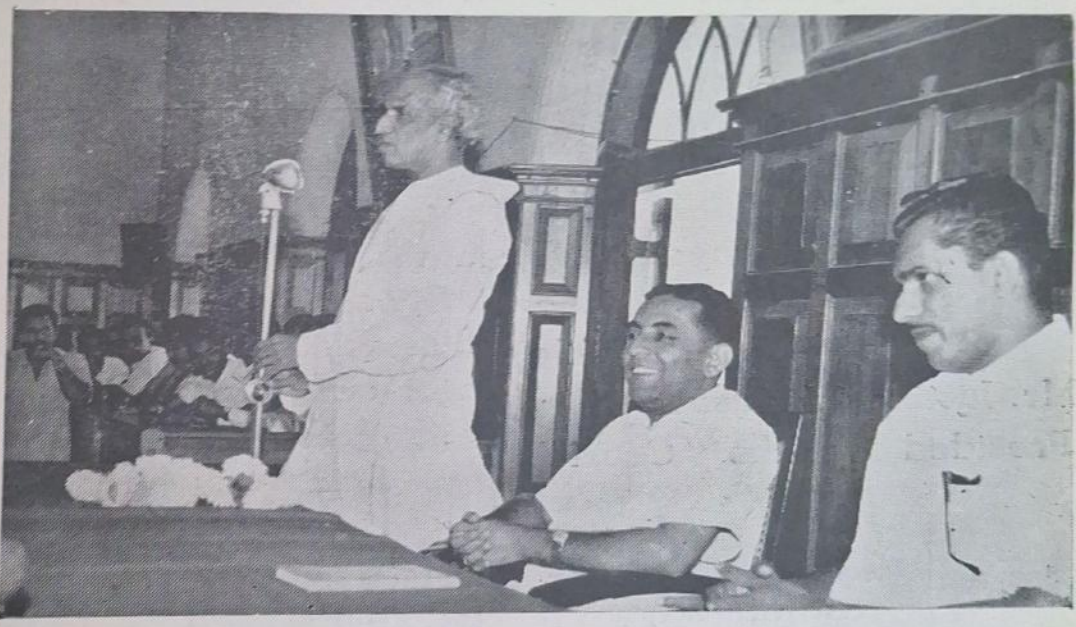
nation should be kept in proper balance. The above position in the American system is clear from the decisions in the civil rights cases such as *Smith V. Allwright* and *Schnell V. Davis*.

In almost every written democratic constitution we find the judiciary assuming the role of the protector of the fundamental rights of the citizens. Under the Indian Constitution the judiciary is expressly entrusted with the responsibility of safeguarding the fundamental rights enumerated in Part III of our Constitution against state-action. The sanction for enforcement of such protection by judicial review is also made effective by articles 32 and 226 which empower the supreme court and the high courts respectively to issue appropriate writs and orders for the purpose. The experience of the framers of our Constitution was similar to that of the American Colonists and therefore they were quite aware of the value and need of fundamental rights for the successful working of a free democracy. That is why they have elaborately dealt with in twenty four articles the fundamental rights and the remedial rights for the enforcement thereof.

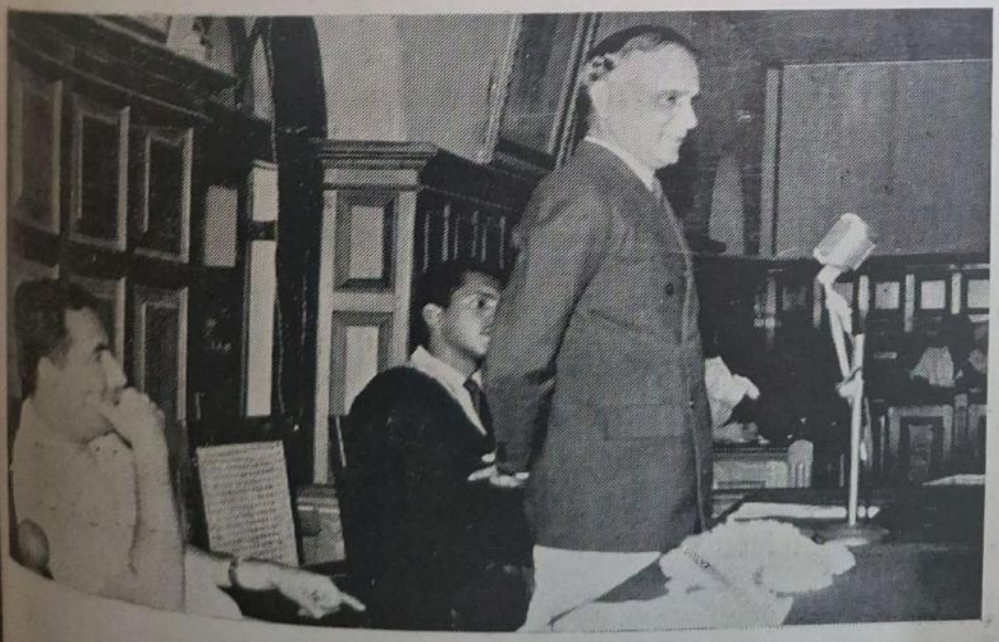
It is true that like all other democratic countries India is also a Welfare State and not a Police State. But we go a step further. As remarked by our late Prime Minister Mr. Nehru "One aim of the Government of India is to achieve the socialistic-pattern of society". In such a State there should be a balance maintained between the individual rights and welfare and, need for advancement of the nation. Consistent with maximum security for individual liberty the paramount consideration in a socialist state is and would be collective interests of the people. Hence with the disappearance of laissez-faire policy and the emergence of welfare state, it follows that, absolute and unrestricted individual rights cannot exist in a free and progressive society. In order to keep in check the fundamental rights granted to the citizen the American judiciary had perforce to invent the "police power" of the state as mentioned above. In our Constitution the restrictions are mentioned in Part III of the Constitution itself. This shows that fundamental rights cannot be restricted by ordinary legislation unless it is enacted in conformity with the constitutional provisions authorising so to do The final say in this matter therefore rests with the courts, under article 19 clauses 2 to 6, in a different form In doing this our Supreme Court has been assigned, to adopt the picturesque



Inauguration of the College Association
By Hon'ble Minister
Sri. S. K. Patel



Sri. V. K. Krishna Menon,
former
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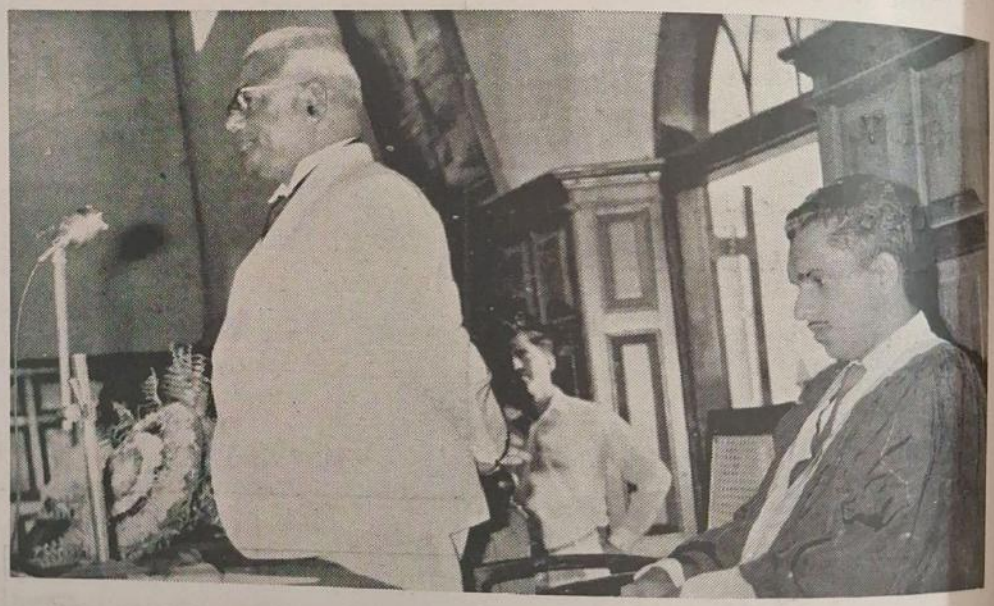


College Day
Hon'ble Mr. Justice Raghavan
Delivering the veledictory
Address

THE MOOT COURT IN SESSION



Advocate Mr. T. S. Krishna Moorthy Iyer (Counsel for the legislature)



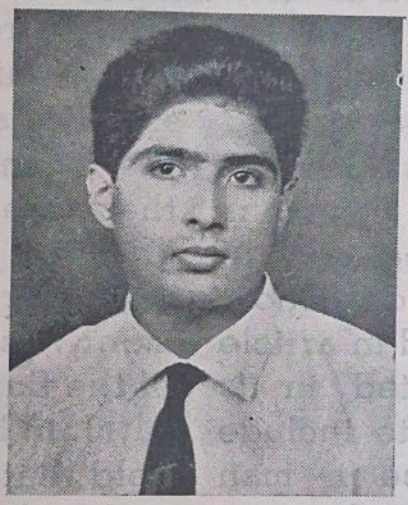
Hon'ble Mr. Justice Madhavan Nair, Presided over the "Court".



Advocate
Mr. K. Chandrasekharan
(Counsel for the High Court)

phraseology of Patanjali Sastri J., in *State of Madras V. V. G Rao*, "the role of the sentinel on the qui vive". So the Rule of Law, Absolute Reign of Law and the Fundamental Rights have all been embodied in our Constitution and this trilogy of doctrines supports the edifice of our democracy.

Another essential requirement is the independence of the judiciary. This is well provided for in India as seen from Part V Chapter IV and Part VI Chapter V of our Constitution. As has been observed by Dr. Banerji, a noted writer on the Constitution, "Arrangements have been made for as much independence and impartiality of the judiciary as human ingenuity can provide for" The opinion given by the Supreme Court in the dispute between U. P. Vidhan Sabha and the Allahabad High Court amply proves this fact.



II

As stated by Dr Johnson "Lawyers know life practically". In a changing society law is made an instrument of social and economic policy and, as society is dynamic so should be the law. In order to bring about changes in society there should be ample freedom of thought and action for the members thereof. It is keeping this in view that, the preamble of our Constitution assures justice social, economic and political to all the citizens of this country. Hence the question often arises as to how the claims of social change and reform should be balanced with those of individual liberty. It is here that the judiciary has to play a positive and constructive role. In interpreting and applying the Constitution the court should not function in a vacum but should act according to the spirit of the times. It follows that success and reputation of the judiciary in India depends on how far the individual freedoms are being safeguarded and protected by it consistent with public interest and, on how far it maintains its independence and impartiality in the discharge of its functions. The Hon'ble Mr. P. B. Gajendra Gadkar, Chief Justice of India, in a recent lecture delivered by him, has rightly urged that the judiciary should always take an objective and fearless view of things and that, in the interpretation of Part III of the Constitution the Grammar school of interpretation should be avoided

and constructive and creative school of interpretation should be followed. For, ultimately it is from the temple of justice that, social economic and political justice should emerge. After all, success of the judiciary in the final analysis depends upon the confidence it creates in the minds of the masses.

Now let us examine some of the decisions of the Supreme Court in the constitutional field Article 21 of our Constitution proclaims that no person shall be deprived of his life and personal liberty except according to *procedure established by law*. Article 22 guarantees certain safeguards to persons detained under a law dealing with punitive and preventive detention. The word "liberty" used in article 21 should be interpreted in its widest amplitude so as to include "freedom" also because a man deprived of "freedom has no "liberty" and a man without "liberty" has no "freedom." That is why Article 19 is held to be subject to articles 21 and 22, for, the seven freedoms under article 19 are only available to persons otherwise free. Under the Vth and XIVth Amendments of the American Constitution no person shall be deprived of his life, liberty or property without *due process of law*. The question whether the due process clause is included in article 21 of the Constitution arose in A. K Gopalan *V. State of Madras* (1950. S. C. J. 174). It was argued on behalf of the petitioner that "Procedure established by law" means "Procedural due process" of the U. S Constitution. Under the Preventive detention Act, 1950 a person's liberty could be taken away and he could be detained if the Central or State Government was satisfied of the necessity of such action in the interests of defence of India, foreign relations, the security of India, maintenance of public order, supplies and services essential to the community etc. It was therefore contented that sufficiency of grounds was justiciable under article 21. But this argument was rejected by the majority of the Supreme Court. But Fazil Ali J. in his dissenting judgement held that 'law' in article 21 means and includes universal principles of natural justice and not merely enacted law. Kania. C J. on the other hand, in the majority judgement held that, deliberate omission of the word 'due' to qualify the word procedure in Article 21 as under the U. S. Constitution, tended to strengthen the view that the word 'law' there signified only positive law and nothing more than that. If the above view of the Supreme Court is to be taken as conclusive, one is inclined to ask

whether fundamental rights guaranteed to the citizens of India are really fundamental, for, they are in the above view at the mercy of the legislature. This result has followed because of the Grammatic interpretation of the word 'law' adopted by the Court. The framers of the Constitution, no doubt, wanted the rights enshrined in Part III of the Constitution to be fundamental. But they appear to have considerably eroded by judicial interpretation. However, it is gratifying to note that later decisions like *Vaidya's case and Moopil Nayar's case* have struck a fresh note and that, a new tendency is becoming evident to safeguard the fundamental rights in their prestine purity and perfection. Let us hope that there will be no set back to this process in the right direction.

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PORTRAIT OF A LORD CHANCELLOR*

By

Miss: Lilly George
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In the golden afternoon of Victorian England, in the House of Lords, there sat on the Woolsack a grand old man, past the Biblical age of four-score-years-and ten. Short of stature, "his feet scarcely touched the floor and his short legs dangled down uncomfortably beneath his black silk gown. He bore a powerful broad body on a pair of exiguous legs, crowned by a large head and an extraordinarily plain and unprepossessing face, without any eye-lashes and with an ugly uptilted nose". Yet there was no mistaking the force of the personality which radiated from him. He was the venerable Lord Halsbury, Lord High Chancellor of Great Britain, the highest judicial Officer of the British Crown. Lord Halsbury was politically a conservative and, thrice he occupied the Woolsack, in all for a period of seventeen years and two months.

It may be noted here that, for a lawyer of distinction and fame, there is no higher or more coveted judicial post in England than that of the Lord Chancellor. The Lord High Chancellor of Great Britain, as he is officially described, occupies a position of great antiquity, dignity and importance. He is said to be the 'keeper of the King's conscience' signifying thereby that, he is the primary legal adviser to the monarch on matters affecting the latter's constitutional position and the royal family. Besides, he is the law adviser of the Ministry, Custodian of the Great Seal, presiding officer in the Chancery Division of Supreme Court and in the House of Lords (the highest judicial authority as well in England) and also fulfils a number of other important offices and functions. Traditionally the office is filled by a political appointment by the political party

* *Acknowledgment:* This article is based on the biography of Lord Halsbury contained in 'Lives of The Lord Chancellors' – By R. F. V. Heuston published by Clarendon Press · Oxford, 1964

as power but, always it is the prize offered to the most distinguished of the profession.

Hardinge Stanley Giffard, as he was before being titled as Lord Halsbury, was born on 3rd September 1823 at Pentonville in London in a family of ancient lineage but of impoverished condition. His father, Stanley Lees Giffard, was an L. L. D., but had achieved no success in life. Lees had married twice and become the father of ten children Hardinge was the fifth of them by his father's first wife. Lees recklessly ran into heavy debts and had been even to jail for some time. However, he somehow managed to educate his children and, Hardinge had to struggle hard to complete his education.

The educational career of Hardinge was by no means brilliant. He was only an ordinary student, below average, having been placed in the fourth class in his final examination at school.

He was called to the Bar in January 1850 and, he entered the profession of law in order that he may earn a living out of it, in circumstances of serious hardship. How this youngman of twenty-seven years, with no influence or high patronage and with only average ability, travelled the long and arduous distance upward to reach the summit of his professional career at the age of sixty-two (for his first appointment as Lord Chancellor came only on 24th June 1885) is, indeed, an interesting saga, alike instructive and inspiring, to the young aspirants of the profession.

It is said that some are born great; that some others have greatness thrust upon them. This may, be true of those who are more fortunate but, in the case of Hardinge Giffard, he had to 'achieve' greatness by dint of hard work and, inspite of difficulties and many handicaps.

Hardinge was not handsome in appearance. As recorded by a writer in the Solicitor's Journal, "he had the disadvantage of an insignificant personal appearance .. .. a man of such appearance has always a hard battle to fight". And what is more, he was blind in one eye as a result of a blow in early life, a defect which Giffard was able to conceal from many people.

On the credit side, however, Giffard possessed "a tremendous force of character, solidity of judgment and practical common sense". Besides, he had a prodigious memory and capacity to do

sustained hardwork even in the old age. These, therefore, were his stock-in-trade when, with faith in Providence and keeping his powder dry, Giffard entered the perilous and uncertain battles of life.

The first case in which he appeared was in the High Court, before Lord Cambell, then Chief Justice, and no sooner than he rose on his legs he was the victim of an attack of extreme nervousness, hesitation and stammering. After a few minutes, the Chief Justice, who was never the most patient of Judges, leaned down from the Bench and remakred, "For, God's sake get on young man." This so stimulated Giffard that never again was he nervous in Court.

One of the earliest cases in which Giffard made a mark as a lawyer was Feret v. Hill (1854) 17 C. B. 207. A lease of premises had been obtained by a fraudulent misrepresentation that they would be used for lawful purposes In fact the lessee used them for a brothel whereupon the lessor forcibly ejected him. In an action for wrongful ejectment Giffard conceded that the lease might have been set aside for fraud, but argued that this not mean that the lessee was automatically a trespasser. His argument was accepted and, in the decision that followed in favour of his client, all the Judges were exceedingly complimentary about his advocacy. This was a distinct achievement for Giffard.

He appeared frequently on circuit, in the Chancery Court and at the Old Bailey. By the middle sixties his practice both on circuit and at Westminister had grown considerably.

One incident which took place at the Old Bailey in 1854 may be mentioned here An insane clergyman, labouring under some grievance from a recent trial fired a gun at Giffard in open court. Luckily the bullet missed its target.

In 1865 Giffard was "given the silk". He was then in his forty-second year. It is said that in his first year in silk his income was doubled. It is also recorded that on the last occasion of his going on circuit in 1874 he had three hundred retainers when he left Paddington Station.

In 1867 Giffard was engaged for the defence of Governor Eyre who was alleged to have put down a rebellion in Jamaica with excessive severity and, in doing so, sentenced to death by Court martial, a local coloured politician by name Gordon. The Jamaican Legislature

had passed an Act of Indemnity, but as Eyre himself had signed the royal assent to this measure, his opponents were full of ire towards him and would not rest contented. On his return to England, therefore, a private prosecution for murder was launched against him. It was a cause-celebre of the Victorian England and created considerable sensation. All the great men of the day - Mill, Tennyson, Dickens, Carlyle - took one side or the other in the case. It is said of Giffard's speech in that case that, it was so effective and moving that he reduced everyone, including the Court, to tears. Eventually Eyre was exonerated and, this added another feather to Giffard's cap.

Giffard now felt confident to enter politics and he joined the Conservative Party. He contested the General Election of 1868 but was narrowly beaten.

In 1873 another misfortune happened to him. When he was holidaying with his wife in Switzerland a coach accident took place on the edge of a narrow mountain road. Caroline Giffard was overcome by shock and died instantly in front of her husband. They had no children.

Giffard was then aged 50 and, in the tragic condition in which he found himself, he had thought that, in his melancholy loneliness at home his life had almost come to an end. Yet, in a few years his career was to be entirely changed. The most important and interesting period of his life – now only half spent – still lay ahead.

A few months later, while on a trip in connection with a case, quite accidentally Giffard met two ladies at Windsor railway station. There he had occasion to help them to get over some trouble they had regarding their tickets. The chance acquaintance, however, luxuriantly prospered subsequently, as sometimes happens in life and, on 14th October 1874 he married the younger of the two ladies, Wilhemina Woodfall, aged 26. It was a happy, fruitful marriage and, she gave him his only son and four daughters and ensured his domestic happiness for forty-two years until his death.

Having thus repaired the gap in his private life Giffard once again girded up his loins for winning fresh battles and laurels new.

In 1875 he was appointed as Solicitor-General with the customary Knighthood conferred on him. In February 1877 he was elected to Parliament.

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the course of a strike. As is well-known, the victorious liberal majority of 1906 reversed the decision in the above case by enacting the Trade Disputes Act of that year.

Another well-known case in which he took part was the trial for bigamy of Earl Russel. After an unhappy married life in England Lord Rassel had obtained a divorce in the State of Nevada and then remarried This divorce, and hence the remarriage, were not recognised in English Law, as he was still domiciled in England. The consequence was that, on his return Russel was prosecuted for bigamy and, as a Peer of the realm he was entitled to be and was tried by his Peers. In the indictment, however, the point was not taken that Russel was a British subject for, there were Peers who were not, and it was thought that this technical flaw would prove fatal for the prosecution. But Lord Russel was sentenced, to the surprise of many, to three months' imprisonment.

In the Legislative field Halsbury had to his credit two major reforms – the Land Transfer Act, 1897 and the Criminal Evidence Act, 1898. He had also lent his support to well-sponsored reforms such as the Criminal Appeal Act, 1907.

To crown all these achievements, on his retirement from Office Halsbury accepted an invitation from Messrs. Butterworth, the legal publishers, to edit the great encyclopaedia of English Law which is known in the legal world as 'Halsbury'. It represents a monumental publishing achievement and constitutes a permanent memorial to Halsbury.

In all his personal habits Halsbury was a man of "extreme simplicity and lack of ostentation". Until very late in old age he was never addicted to alcohol Power and position never corrupted him, nor made him arrogant or tyrannical. Alike in manners and morals he was orthodox.

It is said that Halsbury was lucky in both his marriages: from the first, he acquired a large volume of practice as his father-in-law happended to be the senior partner in a Solicitors' firm; from the second, he and his children acquired considerable wealth Indeed, who can say that he was not lucky?

Halsbury passed away, after a short illness, full of years and honours, at the age of ninety-eight, on 11th December 1921; no breath of scandal, moral or financial, ever touched him.

Is there a Constitution in England?

By

K. S. Sivaramakrishnan B. A.
B. L. Class

England's unwritten Constitution has a flexibility which has withstood the shock of the two world wars and has proved capable of meeting every demand of modern times. Yet, underlying all changes and progress, are traditions and customs handed down through centuries and respected and revered by members of all parties and classes. This state of a majestic institution links the present with the past and is a symbol of the continuity of the traditions of the Mother of parliaments. No doubt, in spite of the need for its mobility, the British Constitution remains rooted in the external and inimitable principles of sanity, sobriety, basic morality of enlightened humanity and natural justice.

The argument that no constitution exists in England is as much true as the opinion that no stars are in the sky, for, the following features which govern the constitutional institutions in England bear ample testimony to the fact that she is having a well-developed and refined constitution.

(1) The English Constitution is unwritten and uncodified. It does not take the form of a book; it is spread and scattered. We cannot point out to something and say with complacency "This is the British Constitution". It goes back to the Magna Carta, covers the petitions of Rights, Habeas Corpus Act etc. and comes down to the Crown proceedings Act of 1947. Conventions and customs have an equal share in the Constitutional development of England.

(2) It is flexible There is no separate machinery and procedure to amend it. It can be amended as a common law.

(3) It is unitary. The power is concentrated in the triple cord – The King, the House of Commons and the House of Lords – which is collectively called the Parliament. Unlike in the U. S. A., the powers

are not scattered among various institutions, there is no distribution of powers among co-ordinate bodies.

(4) England has a limited monarchy. The King is the fountain head of justice. He has personal and political powers and prerogatives. But, he cannot impose his will. He assents to every-thing. But he is not like the President of France, who is only a Titular head. Parliament – that is, the representatives of the people – is sovereign.

(5) There is parliamentary democracy. That is why it is generally said that the British Constitution is monarchical in form and democratic in practice. There is election. Ministers are members of Parliament and Cabinet. There is ministerial responsibility. When the ruling party ceases to command majority in the House of Commons, it should quit. It is characterised by the existence of different parties.

(6) In U. S. A. separation of powers between the legislative, the executive and the judiciary is rigid. In India also it is more or less rigid; but in England the separation is not so clear-cut. This in no way affects the independence and impartiality of each of these departments.

(7) It is conventional. The most important aspects of the Constitution are based on practices and not so much on laws. Cabinet government is a reward of conventions.

Each of the foregoing individually, some of them exclusively and all of them collectively adds lustre to the much adored constitution of England.

"Think daily of the nobility and dignity of your profession. Remember the greatmen that have adorned it and established the pillars of its glory. They were gentlemen, men of learning, of breeding, of honor as delicate as a woman's blush. Be you such, or leave the profession.

Keep in mind the lords of the bar. Resolve each morning when you awake that to the utmost of your effort, you will strive to be one of them—in learning full and thorough, in courtesy delicate, in courage fearless, in character spotless, in all things and at all seasons the true knight of Justice."

Beveridge.

Agreement in Restraint of Marriage

By

Chakkappan Kalliath, B. A., M. L.,
Part-time Lecturer, Law College, Ernakulam.

Agreements in restraint of the marriage of any person other than a minor are void. Matrimony, according to the Court being one of the commands given by God to mankind after the creation, repeated again after the deluge and ever since echoed by the voice of of nature to all mankind. In the interests of the society contracts for marriage are scrutinized with a close and vigilant suspicion of undue influence, fraud or imposition. The law prevents improvident, illadvised and often fraudulent matches. It also avoids all such contracts as tend to the deceit and injury or encourage artifices and improper attempts to control the exercise of free judgment. Law further discountenances secret contracts made with parents and guardians whereby on a marriage they are to receive a benefit. Law also renders invalid certain agreements in restraint of marriage.

Marriage ought to be free. An agreement which restrains a person from marrying anybody or from marrying anybody except a partcular person is void as being contrary to the social welfare of of the State. So it is also in the interests of society that reckless and unsuitable marriages should be prevented by restraining third parties from reaping financial profit by bringing about matrimonial unions.

Considerations of public policy apply both to contracts made prior to marriage and those made after marriage. Every agreement which tends to encourage unfidelity in one or both of the spouses or provides an inducement for immoral conduct is void. The case of Brodie Vs Brodie (1917) P.271, is illustrative of this principle. The wife made a petition for restitution of conjugal rights. The husband pleaded an agreement that parties might live apart. The agreement produced was signed before the marriage ceremony and provided that the parties might at all times

after the marriage live separate and apart. This purported to be confirmed by an endorsed agreement signed by both parties immediately after the ceremony. The second agreement was endorsed upon the first agreement before the marriage and the parties had at the same time agreed to execute it after the marriage. It was held that the two documents formed only one agreement and their object being against public policy, the agreement was void and afforded no defence to the wife's petition.

Marriage is so essential both to individual happiness and to social order that law should allow no obstacles whether by way of penalty or inducement to be placed in its path. So bargains by which the promisor agrees not to marry have been held to be void. Similarly a bargain to hinder or prevent the marriage of another has been held to be illegal. But if the restraint on marriage is incidental to another lawful purpose of the bargain and is reasonable then such bargains are legal and enforceable. Thus an employment contract may provide that during its operative period, the employee must remain single. Contracts restraining a second marriage are generally upheld since children by the first marriage may receive better care, if the parent does not marry.

Agreement to procure marriages for reward are undoubtedly illegal as being contrary to the true spirit of the marriage relation and likely to lead to unhappiness. Thus a marriage brokerage contract, that is an agreement to arrange a marriage for compensation is unenforceable.

Where a person already married promises to marry another, the promisee may recover on the contract if he believed the promisor to be single. For the law protects an innocent promisee misled into believing himself betrothed. In Fenders Vs. Mildmay 1938 A. C T. The respondent's wife petitioned for a divorce on the ground of the respondent's adultery with the appellant and a decree nisi was duly pronounced. Before the decree nisi was made absolute, the respondent promised to marry the appellant immediately after the decree had been made absolute. The decree was made absolute in due course. The respondent refused to marry the appellant. The House of Lords after review of all the authorities on the subject, held the promise not to be void on the ground that after the decree nisi, nothing but the shell of marriage was left and the further period of

waiting until the decree is made absolute is imposed in the public interest in order to secure a full disclosure before the court.

Restrictions on marriage are against public policy and agreements operating in general restraint of marriage are illegal and void. But particular and partial restraints on marriage, if reasonable in extent, are not illegal. For eg., until a particular reasonable age or until consent of parents or guardian.

It will be of interest to know the views taken by American Courts. In Lowe Vs. Doremns a suit was brought to recover the sum due on a promisory note made by Henry Van Riper during his life time of which the following is a copy.

Peterson N. J. August 28, 1909, Thirty days after death, I promise or authorise my executor or administrator to pay to the order of Maywood the sum of three thousand (3000) dollars at the National Bank of Peterson, value received.

Henry Van Riper.

"Witness: James F. Carroll.

"Indorsements:

May Wood"

May Lowe.

May Lawe is the married name of the plaintiff.

In answer to the interrogatories presented to the plaintiff she stated that the consideration for the making and delivery of the note was "continuing and staying in the employ of and not marrying until after the death of the makers, Henry Van Riper and attending to and caring for the wants of said Henry Van Riper until his death" The defendants counsel argued inter alia that the contract sued on was in general restraint of marriage and void as against public policy. The trial court denied the motion and directed a verdict for the plaintiff. On appeal it was held that the contract sued on was in general restraint of marriage and consequently void Garrison said "It was error to direct a verdict for the plaintiff and it was like error to refuse to direct a verdict for the defendant."

But in the subsequent case of Barnes Vs. Hobson, the promise of sixteen years old girl made to her uncle to refrain from marrying until she became 22 was upheld. The validity of a contract where the restraint it imposes is only against marrying a particular person, or person of a particular class or within a specified time should be determined with reference to and the reasonableness of the particular case.

Agreement in Restraint of Marriage

In India it has been doubted whether a partial or indirect restraint on marriage is within the scope of S. 26 of the Indian Contract Act. A contract affecting a major person and restricting her right of marrying according to her choice is a void contract. The section however seems to contemplate a direct restraint on marriage. In Rao Rani Vs. Gulab Rani I.L.R. (1942) a compromise was arrived at between two co-widows in mutation proceedings whereby it was agreed that if either of them remarried she would forfeit her share. It was held that the compromise was not in restraint of marriage as no direct prohibition to remarry was imposed by it. Again it has been held a provision by which a Mohomaden husband authorises his wife to divorce herself from him in the event of his marrying a second wife is not void.

It has been recently held by the Bombay High Court that in dealing with questions as to the validity of bequests under a will, the only statute to be resorted is the Succession Act and it is not open to the court to import into the matter considerations based upon say S. 26 of the Contract Act. Thus it has been held that a defeasance clause in the will of a Parsi to the effect that in the event of marrying a non Parsi, the interest going to that person, shall be deemed to have lapsed, is perfectly valid.

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Judge Wilkin.

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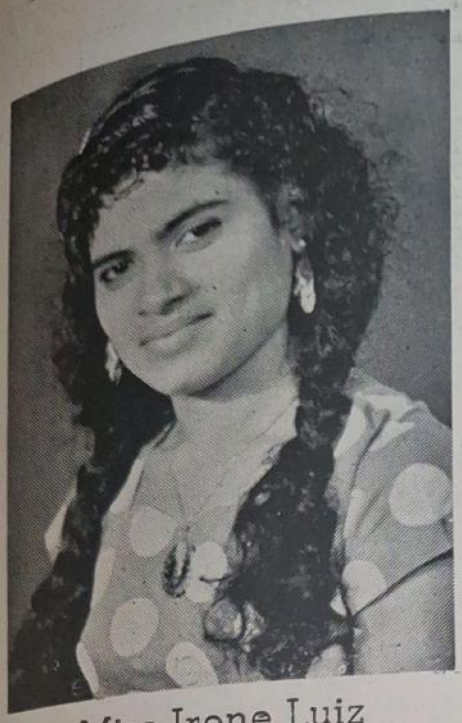
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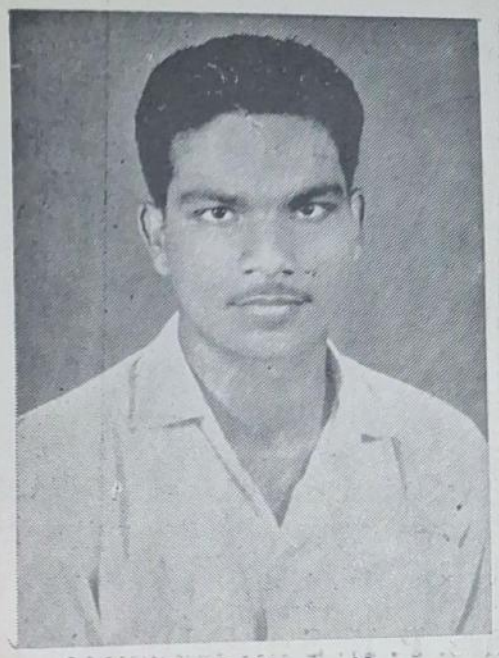
PROPRIETOR:

JOONAS HAJEE OOMER SAIT



Miss Irene Luiz

who won First Prize in Tableau, for the Law College in inter collegiate cultural meet at S. H. College, Thevara



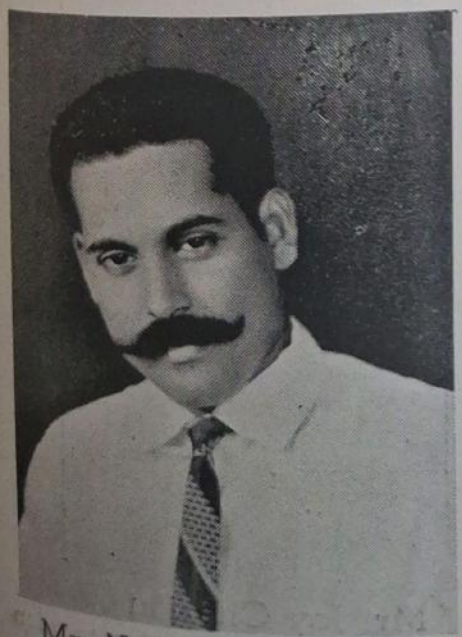
Mr. C. K. Sreedharan

First Prize in Malayalam elocution competition under the auspices of the National Small Savings Scheme

Inauguration



Arts Club



Mr. N. Balarama Pillai

Arts Club Secretary



Miss Subaida K. K.

Ladies Champian Athlete

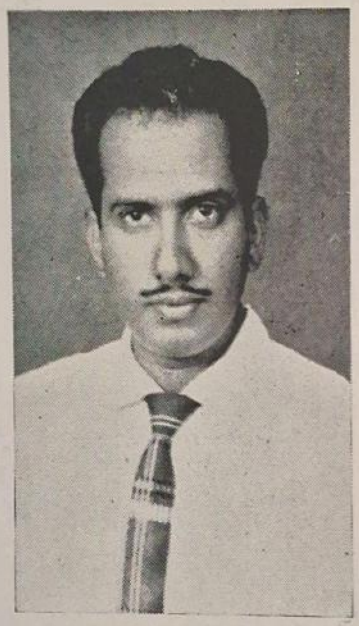
SECURED SECOND CLASS FOR THE FIRST EXAMINATION IN LAW



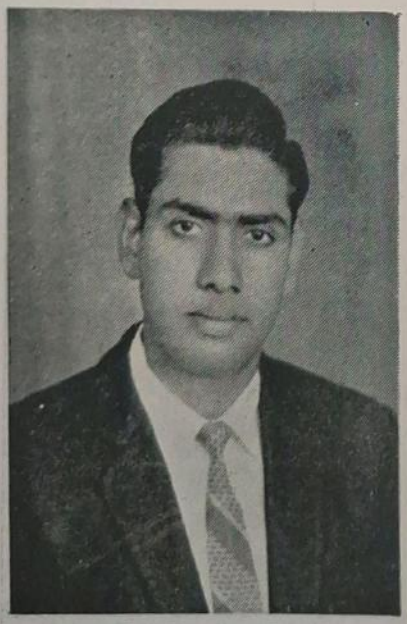
Miss. P. N. Santhakumari



Mrs. Elizabeth George



Mr. Ashok Kumar



Mr. A. Gouri Sankar
Secretary, Moot Club



Mr. Joy Cherian
First Prize winner in Speech Competition
at Gandhi Vichara Parishath

Report of the College Association

I have great pleasure in presenting before you the various activities of the Association. In spite of the fact that the present Committee of the Association came into existance only in November after a long conflict between the students Groups I can proudly say that the activities of the Association have been remarkable

Before presenting the high lights of the activities it will be pertinent on my part to mention something about the college election result. The elections were conducted on Nov. 6th and the following students were elected as the office bearers. Mr Jose K. J. as the President, George Varghese as the Secretary, Gouri Sankar A. as the moot club Secretary, Balaraman Pillai as the Arts Club Secretary, Miss. Brindha as M. L. Class repr: M/s. P. C. Joseph and C. K. Radhakrishnan as the representatives of the B. L Class, M/s Sankaran and Suresh as the F. L. Class representatives and M/s. Joseph Franklin and Mohammad Moopan as the editors from B. L. and F. L. Classes respectively.

The Association had its inauguration on Dec. 5th and Sri S. K. Patil, Union Railway Minister was the distinguished guest of the day who inaugurated the Association

Next the association had its general body meeting to examine the possibilities of getting exemption from the Bar Council examination as far as the present B. L. & F. L. students are concerned and sent it to the concerned authorities for necessary action.

We had the opportunity of listening to Mr. William Weathersby, Counsellor for Public Affairs of the American Embassy and the Director of the United States Information Service in India who talked on 'Current Development in American politics'.

The Same day a grand send-off party was given to Prof. Philip K. Thayil in connection with his promotion as the Principal of the Law College, Trivandrum. The same day along with the send off party the College Social also was held.

The Republic Day was celebrated on 26th Jan. 1965 under the

auspices of the Association. The Principal hoisted the flag and many students spoke on the occasion.

The Association was graced with the presence of Shri. V. K. Krishna Menon. He talked on "Development of International Law and the various aspects of it".

We are sorry that we had to meet thrice to express our heart felt sorrow at the sudden demise of leaders like Shri. P. T. Chacko, H. H. Rama Varma Parikshit Thamburan and Sri Vinston Churchil. Earlier, before the formal inauguration of the Association, Shri. Kamaraj Nadar, the Indian National Congress President visited the College and addressed the Students.

Regarding the activities of the other branches of the College Assocation the Moot Club was inaugurated by Hon'ble Mr. Justice M. Madhavan Nair of the Kerala High Court. M/s. T. S. Krishna Moorthy Iyer and K. Chandrasekharan Advocates of the Kerala High Court argued on the privilege question between the judiciary and the legislature.

The second session of the Club was held when Sri K. V. Kuriakose, Lecturer presided. Shri Gouri Sankar and C. P Ahamed of the B. L. Class argued on the question of validity of the 17th Amendment of the constitution and Kerala Land Reforms Act.

The third session which was purely of the students was presided over by Shri Rama Prabhu of the M L Class and M/s Mohammad Rafi and Sankara Narayana Rao of the B. L. Class argued on the validity of the Preventive Detention Act.

The Arts Day of the College Assocation was conducted in the T. D. M Hall. Shri Madhu, the famous Malayalam film star was the guest who addressed the students on the occassion. I congradulate Mr. Balaraman Piliai for the conduct of the Arts Day in a fine and remarkable manner.

The Association unanimously passed a resolution against the imposition of Hindi. The Association also sent telegrams to the University for the postponement of the University Examination.

On the whole the Association could take pride that within the short time of its disposal, it could do all that was possible. I am thankful to our Principal and other staff members for the timely instructions and help rendered and also to my friend who cooperated in all the activities of the Association and made its working a grand success.

Thank you.

T. George Varghese,
Secretary.

THE ARTS CLUB

The 'Arts Day' of the College Association was held in the T.D.M. Hall on 25th January 1965. Sri. Madhu, the famous Malayalam Film Star addressed the students. He was of the opinion that Malayalam films were not progressing much due to lack of finance with the producers, and he called upon the Government to come forward to uplift the deteriorating Malayalam films by giving proper encouragement.

Our beloved Principal, Sri. R. Sankaradasan Thampi presided over the meeting. He opined, while addressing the students that the encouragement given by the Sahitya Academy etc. is not sufficient. In that respect he referred to the patronage that was used to be given by the erstwhile Maharajas.

Entering into the entertainment part, the programme began with the College orchestra. M/s. E. R. Venkiteswaran, P. Gopinathan, Ramachandra Menon, and Mordecai Moses took part in it. Our thanks are particularly due to Mr. Krishnan of St. Alberts College who was the guest violinist and to Jamuna Theatres for playing the musical instruments.

The next item in the Programme was Dance by Baby Thasinim Chida. She thrilled the entire audience by her "enchanting" dances.

The next item was Ottam Thullal by Mr. A. R Narayanan of the F. L. Class. He impressed on the audience that he was the incarnation of Kunjan Nambiar by showing his masterly talents in 'Tullal Kala'. He recited the entire history of this academic year in a humourous way by mocking at every notable figure of the college. Mr. V. O. Sankaranarayan took the role of "Pinpattukaran" and Mr Balaraman Pillai, as the Mridanganist helped him.

Mr. Chakyat Sudhakaran of the B. L. Class proved himself as a good playwriter and director by presenting a drama called "Vivaham Somnombulisathil Nadakkunnu". M/s. George Varghese (F. L.), V. V. Premachandran (F. L.), A. D. Balachandran (F. L.), and Sheik Mohammadkhan (F. L.) took the role of actors while V. K. Radhakrishnan (F L.) of the leading lady of the play.

The next drama staged was "Kalyanachitty" by P. J. Antony.

Kuttara Radhakrihnan (M. L.) A. Sankaran (F. L.) and C. K. Radhakrishnan (B. L.) took the role of actors while M/s. M. Mohamad Moopan (F. L.), Bashir Ahamed Syeed (B.L.) and V.K. Radhakrishan (F. L.) took the role of actresses.

The last drama was "Night Trains" by K. T. Mahamad which was directed by K. P. Manomohana Menon (B. L.). M/s. Ravindranath K. K. (B L), Sridharan C K (F L.) and Joy. N T. (F.L.) took the role of actors, while M Mohamad Moopan (F. L.) of the heroine.

The last item of the programme was Tableau by Miss Irine Luiz (B. L).

Besides these scheduled items, there was a 'Sabdha Natakam' by M/s. K. K. Ravindranath and Party

In this connection, I take the opportunity of thanking M/s K P. Manomohana Menon, Mundiyath Gopi, Gouri Sankar, Krishnan Nair, George Varghese and Gouthaman for the kind services rendered. The volunteers headed by Mr. Vijyalakshmanan deserve congratulations for their excellant service.

Before the present executive committee of the college Association was formed, a drama troupe was sent to Calicut to take part in the Radio Play Competition organised by the All India Radio Another troupe took part in the Inter collegiate Youth Festival also which was held at Trichur.

I am greately indebted to our Principal, Mr. Sreekantan, Lecturer and other members of the staff for their kind advice and assistance whenever required.

I will also be failing in my duty if I do not mention the name of Sri. Philip K. Thayil, our former Professor who has always been a source of guidance in all my activities.

Thanking you,

N. Balarama Pillai,
Secretary.

THE MOOT CLUB

The inauguration of the Moot Club was held on 11-12-1964. Hon'ble Mr. Justice M. Madhavan Nair of the Kerala High Court delivered the inaugural address and also presided over the moot court and delivered judgment. M/s. R. Chandrasekharan and T. S. Krishna Moorthy Iyer, advocates of the Kerala High Court appeared for the High Court and the Vidhan Sabha respectively in the following privilege issue case. "X was imprisoned persuant to orders passed by the U P. Legislature for contempt of the House He moved a Habeas Corpus petition before the Allahabad High Court and obtained an interim order in his favour and got a release. Thereupon the legislature issued notice against the two judges who entertained the petition and also the advocates who appeared for X for contempt of the House. In that situation the conflict between the High Court and the Legislature over the question was referred to for the opinion of the Court." The Judge preferred a compromise between the two limbs of the State.

The second session of the Moot Court was held when Shri K. V. Kuriakose, lecturer presided. M/s. Gouri Sankar and C. P. Ahamad of the B. L Class argued on the topic of validity of Constitution (17th Amendment Act) 1964 and the Kerala land Reforms Act of 1964. Judgment was reserved.

The third session of the Court which was purely students' session was presided over by Mr. Rama Prabhu of the M L. Class. M/s. Mohammad Rafi and Sankara Narayana Rao argued on the question of the validity of Preventive Detention Act. The Judge negatived the petitioner's contention and dismissed the writ.

Unfortunately the valedictory session which was arranged twice could not be held for reasons beyond our control. But I am only happy to say that we could have three sessions of the Moot Court in spite of fact that the Moot Club began its functioning only in the third term.

One unique feature you find in this year's sessions is that all the cases that were mooted involved the issue of prerogative writs.

I am greately indebted to our Principal and other lecturers for their timely instructions and guidance and to M s. Jose Kuttiyani, Balaraman Pillai, A. Sankaran, V. O Sankara Narayanan, E. Subramonian and Mohamed Moopan in arranging the Moot Courts. I also congradulate my friends who came forward to argue in the Moot Court

A. Gouri Sankar,
Moot Club Secretary.

Law College, Ernakulam
11-3-'65.

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A Brief Survey of the Hindu Succession Act

By

S. EASWARA IYER, Advocate, Ernakulam

The Hindu Succession Act of 1956, as can be gathered from the Pre-amble to the Act, purports to amend and codify the law relating to intestate succession among Hindus. Therefore it is clear that the Act is not one declaring the law upon some particular aspect; but declares in the form of a code the whole law upon the subject of succession and inheritance It is noteworthy that the Act by Section 4 overrules any test, rule or interpretation of Hindu Law existing before the commencement of the Act with respect to matters for which provision is made in the enactment. It is also clearly stated under Section 4 that any other law in force immediately before the commencement of the Act will cease to apply to Hindus to the extent extent of its inconsistency with any of the provision contained in the Act.

When the Hindu Succession Act of 1956 was passed, to come into force as on 17th June 1956, I had occasion to comment on the enactment in a general way (see my article in 1956 KLT Journal page 36).

More than eight years has elapsed since the passing of the enactment and even now many of the difficulties felt in respect of many of the provisions of the enactment are not finally settled by decisions of the Supreme Court of India

In this article of mine I propose to survey briefly the impact of the provisions of the Hindu Succession Act in relation to the intestate succession of Hindus, keeping in view, the decisions rendered by the High Court of India and also the Supreme Court in respect of some of the provisions of the enactment.

The main object of the Act seems to be, to raise the rights of women to an equal level with men and it has been called by some Text-writers as Magna Carta of the

his own sons. A perusal of Section 6 of the Act reveals that the undivided coparcenary in the Mithakshara system is preserved to the extent of a coparcencer dying without leaving female heirs as provided in the proviso. Section 4 of the enactment dealing with overriding effect of the Act annihilates only rules, texts or interpretations of Hindu law for which provisions are made by the enactment. Since the enactment has not abrogated the system of survivorship available in a Hindu Mithakshara coparcenary it is clear that the Mithakshara undivided family is preserved (subject to the succession provided under the proviso). The undivided interest of a coparcener, which enlarges by deaths in the family and diminishes by birth in the family are not in any way affected by the provisions of the enactment. Quite apart from this a Hindu Mithakshara coparcenary can spring into existence by acquisition of property by all the members of a coparcenary forming the natural group jointly by their joint endeavour. If 4 or 5 brothers forming a natural group acquire property jointly by their joint endavour, the existing Hindu Law impresses the property with all the characteristics of coparcenary property. Self acquired property of a male inherited by his son, is also ancestral in his hands in order to afford a right by birth to his own sons. If so it cannot be postulated without difficulty that inheritance under the Act by the son or grand-son to the property of a male dying intestate will not be ancestral in his hands.

Sri N. R. Raghavachariar in his book on Hindu Law (1960 Edition) appears to have assumed that property inherited by a son as per the provisions of the enactment will not be ancestral in his hands. There is no express provision in the enactment regarding the nature of property inherited by a son. A perusal of Section 14 in the enactment will reveal that the Legislature has made express provision regarding the annihilation of what is known as limited estate or women's estate under the Hindu system of inheritance; all properties possessed by a Hindu female whether acquired before or after the commencement of the Act have been declared to be absolute property in her hands. Therefore it cannot be postulated without difficulty that in the absence of a provision contained in the enactment, property inherited by a son is his absolute property not available to a right by birth by his own sons.

Probably it can be argued that when a son or a grand-son or a great grand-son succeeds to the estate (self acquired) of the deceased male governed by the Hindu Law, there is no question of inheritance but is only the principle of survivorship governing the succession. A distinction between succession by survivorship and succession by inheritance on the basis of Aprathibandadaya or saprathibandadaya maintained by the Hindu text writers cannot be called into play for the purpose of putting forward the contention that the Act has provided for absolute interest in favour of the son. In the absence of clear provision abrogating the principle of ancestral property created by succession to the father's estate, it must be presumed that the Act has left untouched the old Hindu Law relating to inheritance by son. Therefore we are faced with the anomaly that where a daughter succeeds to estate of the deceased male she gets it absolutely whereas a son inherits only subject to the right of his own sons whether born before or after the succession opening, claiming a right of partition against him. This question has not so far come up for any decision before the High Courts and I believe still remains to be settled by authoritative pronouncements.

Another difficulty confronted by the provision of Section 8 is with respect to its operation. The Patna High Court construing the Section came to the conclusion that Section 8 is retrospective in operation. Reliance was placed on the decision of the Privy Council in Dunichand V Mt: Anarkali(1) (a case under the Hindu Law is inheritance (Amendment) Act of 1929) by the Patna High Court in the case Lateshwar Jha V Msh Uma Ojhain(2) to hold that the expression 'dying intestate' occurring in Section 8 has no relation to the time of death of a Hindu male and that it merely means "in the case of intestacy of a Hindu male". According to the Patna High Court the only essential requisite for the application of Section 8 is that the male Hindu should have died intestate leaving behind his property; irrespective of the time of his death intestate succession to his property will be governed by Section 8 of the Act. This view of the Patna High Court regarding the retrospective operation of Sec-

(1) AIR 1946 PC 173 (2) AIR 1958 Patna 502

tion 8 based on the expression "dying intestate" occurring in Section 8 has however been dissented from in another ruling of the same High Court (See Renuka Bala Chatterji V Aswini Kumar Gupta(3). The Madhya Pradesh High Court also has held in Sheoraj Singh V Mst Munia(4) that Section 8 is not retrospective in operation relying on the ruling of the Mysore High Court reported in A.I R 1960 Mysore 79. It is held that to give that Section a retrospective effect would prejudice vested right and unsettle estates which had long vested in others. Such a retorspective operation cannot be placed upon that Section unless it appears clearly from the terms therein used or arises by clear and distinct implication. It may be pertinent here to note the observation of the Patna High Court in Renuka Bala Chetterjicar, while dealing with the decision of Privy Council in Dunichand V Mt Anarkali. Their Lordships observed that the Hindu Succession Act of 1956 is entirely of a different character from the Hindu Inheritance Amendment Act of 19 9. According to Lordships the Act replaces the general rules of succession of the Hindu dying intestate in respect of matters of which provisions have been made in the Act. Those matters of which there is no provision in the Act are still to be governed by the old Hindu Law. The contention that the principle enunciated in 1946 Privy Council 173 applies to the interpretation of Section 8 assumes that the Hindu Succession Act of 1956 and the Act of 1929 are enactments of the same nature and introduced alterations of the same kind in matters of succession among the Hindus. But the Hindu Succession Act is entirely of a different character and reading Section 8, 14, 15 and 16 together their Lordships came to the conclusion that succession of property of a male or a female Hindu on his or her actual death has been reoriented by the Act and therefore the devolution of the property spoken of in Section 8 refers to the 1st devolution on account of actual death and to such devolution that would occur after the commencement of the Act. The other kind of devolution of the property of a male Hindu which happens on succession being again opened on the death of a limited owner who inherited the property immediately on the actual death of the limited owner, is not envisaded by the Section.

(3) AIR 1961 Patna Page 498 (4) AIR 1963 M. P. 360.

The problem presented is not without difficulty. If a male Hindu dies before the commencement of the Act and his property is taken by his widow as a limited owner and if at the time of the commencement of the Hindu Succession Act the widow has parted with the possession of the property to a stranger without legal necessity and consideration, then she shall not by the operation of Section 14 Sub Section (1) acquire absolute right over the property in order to confer on her alienee a valid title. The alienations will be open to challenge by the reversioners. If so when the widow dies the question will be who are reversioners. Are they the heirs of the deceased male as per the old Hindu Law or as per the provisions of the Hindu Succession Act. Indeed accepting the ratio in the decision 1961 Patna 498 Succession must be deemed to have been opened out by the actual death of the deceased and therefore the reversioners must be located with reference to the old Hindu Law. If however succession is deemed to have opened out only on the death of the limited owner, who has invalidly alienated the property, the reversioners may be gathered with reference to the provisions of the enactment. Logically two systems of of inheritance will be found existing in such a contingency; but the Patna High Court answers the apparently unreasonable position by pointing out the survival of the restricted estate under Sub Clause (2) of Section 14. Therefore the Patna High Court is of the view that these two orders of succession for the properties in the hands of a female Hindu according as she is a full or limited owner are not ruled out by the enacting provisions of the Act.

A reference to Section 14 of the Act also brings in many difficulties although to a great extent it has been settled by two decisions of the Supreme Court, AIR Kotturu Swami V Verrayya(5) and Munnalal V Raj Kumar(6).

Section 14(1) enacts that property possessed by a female Hindu whether acquired before or after the commencement of the Act shall be held by her as full owner thereof and not as a limited owner. By Sub Section 2 it is provided that certain class of properties acquired by a female Hindu prescribing a restricted estate in such property will be unaffected by the

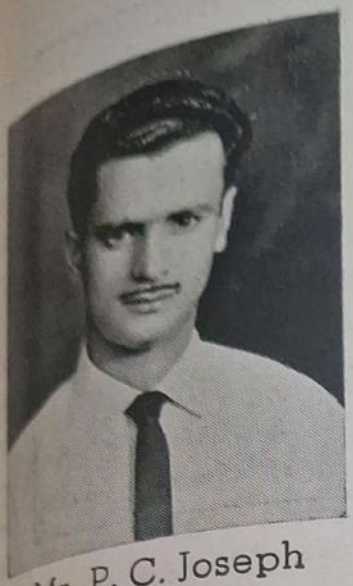
(5) AIR 1959 SC 577 (6) AIR 1962 SC 1493

provision of Sub Section 1. The controvery centered round the question whether the possession referred to in Sub Section 14 is qualified by the words "before or after the commencement of the Act." In other words it was thought that irrespective of the question whether the female Hindu possessed the property before the commencement of the Act or after the commencement of the Act, still she will be the full owner of the property. However the ratio in the decision of the Supreme Court in 1959 Supreme Court 577 indicates the words before or after the commencement of the Act qualifies the words acquire and therefore even granting a wider connotation and interpretation, to the word "possessed" occurring in Section 14 so as to include all forms of possession, the female Hindu will become full owner only if on the date of the commencement of the Act she is possessed either physically, actually or constructively of the property. In other words if at the time of commencement of the Act she has lost possession of the property acquired by her prior to the commencement of the Act and therefore cannot be held to be in actual or constructive possession no question of acquisition of full ownership by virtue of operation of Section 14 still arises. Therefore if a Hindu female governed by the old Hindu Law transfers her limited estate to a stranger invalidly and loses possession thereof, the alienee cannot contend that by the operation of Section 14 Sub Section 1 he is entitled to take advantage of full ownership of the Hindu female. She will continue to have only a limited estate and the alienation is opened to challenge by the reversioners. But the intelligent reader can pose the question as to what will be the legal consequence if such voluntarily cansels alienee the transfer and surrenders back the possession to the female owner. Naturally she becomes full owner by operation of Section 14(1) and she can retransfer the property without any difficulty.

It is thought that the limited estate known to Hindu Law is given to go by Section 14 (1). However Clause 2 of Section 14 enables the preservation of the restricted estate known to Hindu Law and if such restricted estate (limited estate) is so created prior to the commencement of the Act falling within the ambit of Section 14 Sub Section 2, the question arises again as to who are the reversioners entitled to succeed to

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B. L. CLASS



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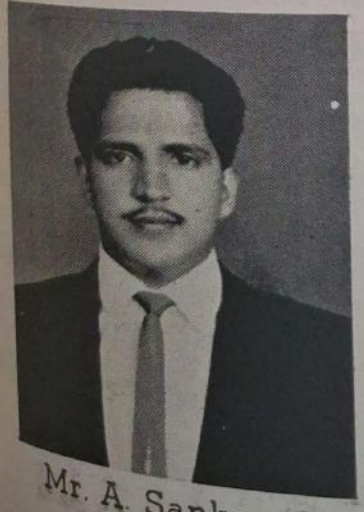


Mr. C. K. Radhakrishnan

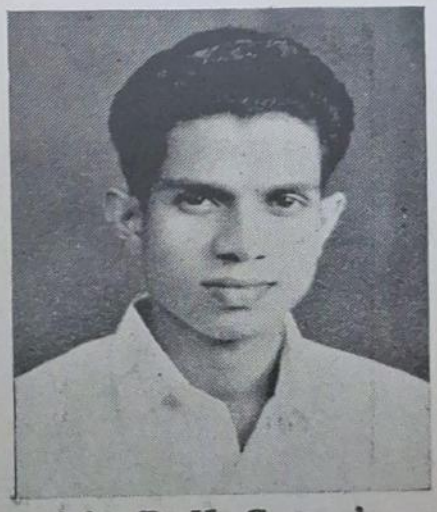


Miss. S. Brinda, M. L. Class

F. L. CLASS



Mr. A. Sankaran



Mr. P. K. Suresh

ACTIVITIES OF THE ARTS CLUB









ANNUAL SOCIAL GATHERING





the estate upon the death of the Hindu female. Naturally the Succession must be traced to the heirs of the deceased full owner and if the time of death of the deceased full owner is to be taken into consideration for ascertaining his heirs, then the old Hindu Law of succession must prevail in respect of such succession.

In relation to the succession of females as provided under Section 15, the anxiety of the Legislature to prefer closer relation can be seen. The rules of succession in the case of intestacy of a female Hindu will reveal that in the case of properties inherited by a female Hindu from her father or mother devolution in the absence of son or daugater of the deceased is sought to be confined to the heirs of her father. The anxiety seems to be that the property should not go by inheritance to strangers of the family (heirs of husbands). The exceptions to the general rule are motivated by a clear and traditional desire that property shall not pass from family to family when a female dies intestate. Whether property is inherited by her from her parent or parents it shall not pass to her husbands or to her husbands whether she dies without children of predeceased children. J. Duncan M Derrett in his introduction to Modern Hindu Law observes at page 95 as follows:

"The intelligent reader will at once exclaim what will happen if the property was inherited by her from her mother and her father survives her? Since the Section provides it shall pass to the heirs of a person, who turns out to be alive (and so has no heirs) should it go to the Government under the Hindu Succession Act Section 29? The answer must be that here we have an example of the very rare phenomenon, the legislative provision which is absurd unless words are added. We are justified in reading "upon the heirs of the father" as "upon the father and default of the father upon the heirs of the father" under the maxims of construing *ut res magis valeat quarn pereat*". The author further expresses the difficulty experienced when the proposita inherited from her husband or from her father in law in similar circumstances. According to him "the difficulty appears to be greater in that the husband is expressly excluded but we must apply the last resort in attempting to construe a badly drafted statutory provision and read as if it were "in the absence of any son or daughter.....upon the husband and default of the husband upon the heirs of the husband".

It is however doubtful as to whether to solve the absurdity arising out of the provisions of an enactment the court will be justified in adding words to the provisions of statute in order to give effect to the provisions as it appears to the court to be reasonable. Hardships that may result will not justify the courts of law importing into the provisions of the statute words not contained in the provisions of the enactment. The problem is for the legislatnre to solve and therefore an immediate amendment of the provisions of this Section may be desirable in order to avoid difficulty in the application of the provision of this Section.

A similar difficulty can be experienced when one peruses Section 23 of the Act. This Section intends to provide for the wholesome rule that a dwelling house wholly occupied by members of the family of the intestate shall not be partitioned unless the male heirs choose to divide their respective shares therein. In other words the female heirs can claim partition of the dwelling house only when the male heirs choose to divide their respective shares therein. The proviso to Section 23 provides that where such female heir is a daughter the right of residence in the dwelling house occurs to her only if she is unmarried or has been deserted by or separated from her husband or when she is widow. It is seen from Section 23 that all female heirs are entitled to right of residence in the dwelling house and the proviso restricts the right of daughter alone. This restriction is not imposed on the other female heirs. Sri. N. R. Raghavachariar in his text-book on Hindu Law commenting upon the provision of Section 23 states at page 855 as follows: "It would be seen that there is no specific provision in this section for the right ofresidence not being available to a daughter of a pre-deceased son, daughter of a pre-deceased daughter, widow of a pre-deceased son, daughter of a pre-deceased son of a pre-deceased son, widow of a pre-deceased son of a predeceased son when any of them marry subsequently. There are so many anomalies in this Section that there is little doubt that the author of the Section must have been fallen asleep several times during the course of his draftmenship hereof.'

Without being as cynical as Sri. N R. Raghavachariar in the quotation extracted above one must express a sort of bewilderment when such provisions are introduced in an enactment stated to have been passed after due deliberation and considerable discus-

sion. An immediate amendment of this provision contained in Section 23 and Section 15 is not only necessary but expedient.

Another controversy is raised taking into consideration the provisions of Section 30 of the Act. Some authors are of the view that Section 30 is controlled by Section 6 of the Act and therefore the power to dispose of the undivided interest of a coparcenary by testamentary disposition is circumscribed by the limitation contained in Section 6 of the Act. Section 6 of the Act provides that in the absence of the existence of relatives mentioned in the proviso interest of a coparcener in a Mithakshara coparcenary property shall devolve by survivorship upon the surviving members of a coparcenary and *not in accordance with this Act*. But Section 30 says that any Hindu may dispose of by will any property, which is capable of being so disposed of by him. The explanation to Section 30 makes it clear that the interest of a male Hindu in a Mithakshara coparcenery property shall *notwithstanding anything contained in this Act*, be deemed to be property capable of being disposed of by him. It is argued by some text writers that in the absence of relatives specified in the proviso to Section 6 survivorship is the rule and therefore Section 30 must be deemed to be controlled by Section 6. However the expression 'notwithstanding anything contained in this Act' occurring in explanation to Section 30 seems to be solving such difficulty. Section 6 of the Act cannot therefore control Section 30 and the interest of a coparcener is capable of being disposed of by way of will or other testamentary disposition irrespective of the question of whether the relatives specified in the proviso to Section 6 exist or not.

There are certain defects in the Act which needs rectification if the intention to provide for near relations to succeed to the property of a deceased must be carried out. If a Hindu male dies before the commencement of the Act leaving as his heirs two daughters, then as per the old Hindu Law of Inheritance, the daughters take jointly with the incidence of survivorship. If one of the daughters dies prior to the commencement of the Act, then the other daughter will take the whole estate as per the old system as a limited estate. If the Act has not come into force during the life time of the surviving daughter then upon her death the sons of both the daughters will inherit the property. But if the surviving daughter dies after the commencement of the Act then there will be difficulty. By the operation of Section 14 Sub Sec-

tion 1 of the Act the surviving daughter will become the full owner of the estate. Then upon her death Section 15 will operate to confer the estate on her children alone. The effect will be that the sons of the daughter who died prior to the commencement of the Act will be denied a right of inheritance although the old Hindu Law would have conferred the right of inheritance as aforesaid. This anomaly needs rectification by appropriate amendments if the intention to prefer closer relation is to be given effect to

Another difficulty that could be experienced is when a male dies leaving daughters by different wives. This is best illustrated by the facts of the case in Rangamma V. Anma Purnamma(7). In that case a Hindu had two daughters B and C from his first wife and a daughter D from his second wife. When the question as to succession to B arose, the court held that C was the sole heir of B who was her full sister and D cannot claim to be her heir being related to her by half blood. Although it was contended that succession to B was regulated by Section 15 Sub Section 2 of the Act, her heirs being the heirs of her father A, the Mysore High Court held that Section 18 of the Hindu Succession Act is as much a rule of succession as the rule of Section 15(2) (a) incorporates and therefore Section 15 (2) (a) must be read along with the rule enshrined in Section 18. Commenting on the incongruity in accepting such an interpretation the Mysore High Court held such incongruity will not constitute any justification for departing from the interpretation which should ordinarily be placed upon a statutory provision which its plain language fully justifies. Incongruities (such as those referred to during the course of the argument the High Court observed have to be removed by Parliament by appropriate legislative process and it is not for the courts to do anything about it.

I have endeavoured in this short analysis of some of the provisions of the Hindu Succession Act to focus the difficulties experienced in the application of the provisions of the enactment. After all the life of law is not logic but must be modelled and shaped in the light of experience gathered. Eight and half years of the working of the enactment has brought to light certain anomalies and difficulties and without wasting one's time in offering distructive criticisms, which will serve no useful purpose, it will be necessary to draw the

(7) AIR 1963 Mys. Page 168

attention of our legislators to bring in suitable amendments in the light of the experience gathered.

I must however reiterate my view that legislation in relation to intestate succession of a Hindu governed previously by a system of Law adopted to the social and economic needs of the time must have been carefully done taking into consideration the needs of society without any particular bias for Westernised modern system of inheritance. The Mithakshara joint family system is closely linked with the rules of inheritance which was available in that system and to separate the one from the other for the purpose of legislation will certainly create needless anomalies. The pious obligation of the son to discharge the personal debt of the father from out of his ancestral estate engrafted in the Mithakshara school of Hindu Law is counter balanced by the provision enabling a right by birth on the property inherited by his father from the paternal grand father. The obligation of ancestral estate to answer to the personal debt of the father will attach itself to a property inherited by the son Such obligation by the rules of inheritance provided in the Hindu Succession Act will certainly not accurue to the daughter's daughter or the daughter's son. The need therefore for sweeping away the right by birth and succession by survivorship in the Mithakshara system will arise, when new rules of succession applicable to all systems of Hindu Law are introduced, to prevent discriminatory treatment. The introduction of many female heirs though justified on the grounds of equality of sex must be counterbalanced by equality to the fullest extent in respect of male heirs also and not by continuing any restrictions upon his power of disposal contained in the old Hindu system of Law. These are matters which require earnest and anxious consideration on the part of the Legislatures.

In this article of mine I cannot enter into a minute and detailed examination of the provision of the Hindu Succession Act. The task must of course be left to the text writers on Hindu Law, having the benefit of making a detailed study. It will be too much for me to endeavour to do so. The students are however referred to the succinct and clear exposition of Intestate Succession in the Introduction to Modern Hindu Law by J. Duncan M. Derrett and the lucid and critical study in the principles and Precedents of Hindu Law by

Sri N. R. Raghavachariar (1960 Edition).

I may also refer the reader to an article by Gunther Dietz Sontheimer (Recent Developments in Hindu law) in "Some Aspect of Indian Law Today" published under the auspices of The British Institute of International and comparative Law.

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IMPORTANCE AND BRIEF HISTORY OF THE LAW OF CONTRACTS

By

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For every human being irrespective of caste, creed, colour or nationality contract is very frequently necessary. The Prince and the peasant, the rich and the poor, the literate and the illeterate – all enter into contracts several times in their lives. In the normal circumstances one human being is born into the world as a result of a contract of marriage between his or her parents. Contracts may have to be entered into for the child in its mother's womb. At the the time of its birth contracts may have to be entered into by its parents, with doctors, nurses and midwives. After the child is born innumerable contracts have to be entered into by the parents for clothes, food, medicines, toys, boks vehicles education etc. The child in his turn gets married, gets employed, gets his life insured, gets his house constructed by a series of contracts. Thus contract is one of the most frequent and important activities of human beings.

We know from the scriptures that even God held himself bound by a Promise and that the Devil and the Prince were bound by the Promises also. The founders of the American Constitutional Democracy held that it derived its just powers from fhe consent of the governed. "Today the marxian economic interpretation, the rise of the service state and the humanitarian theory of legal liability in different ways and varying degrees are leading to a radically different view of the significance of a promise."[1] Christian morals from the pronouncement of the council of carthage incorporated in the corpus of the Canon Law and taken on therefrom by the civil law, the arguments of Demosthanese that citizen should obey law as common agreements and Cicero's praise of

(1) Roscoe Pound's Introduction to the Philosophy of Law P. 163

Prisca Fides in a treatise on duties – all these bear eloquent testimony to the paramount significance of promises. Further as Dr. Friedman observes "the normal commercial contract is still predominantly an insurance against economic risk[2]" Earlier Soviet Jurists, who under the leadership of Pashukanis, relegated all law and contract in particular to the scrap - heap as an instrument of bourgeois society, have been castigated as "wreckers" But the restitution of contract to a place of honour serves mainly the purpose of administrative decentralizations and of the accountancy of state enterprise to the political planners".[3]

In a commercial and industrial society, a claim or want or demand of society that promises be kept and that undertakings be carried out in goodfaith, a social interest in the stability of promises as a social and economic institution becomes of the first importance. From a commercial point of view it is easily seen that contract does play a role of paramount importance. The legal machinery by which transfers of property and performace of services are carried out is broadly speaking the law of contract. "The emergence of a complex credit economy means that in the process of transferring property and performing service people have per force to rely to a far greater extent than before on promises and agreements. A moment's reflection is enough to show to what extent this is true, not only in the commercial matters but in all walks of life. A person's bank account, his right to occupy his house if rented or mortgaged, his employment, his insurance, his shareholdings and many other matters of of vital importance to him, all depend for their their value on the fact that, in the last analysis, the law of contract will enable him to realize his rights".(a)

The striking observation of Roscoe Pound that wealth in acommercial age is made up largely of promises(b) is worth remembering in this connection An important part of everyone's wealth consists of advantages promised, which he may assert not against the world at large but against particular individual. For an ordinary citizen the law of contracts is much more important than the Constitional Law. An ordinary citizen thinks less about his fundamental rights than he does about the need to purchase food, clothing, goods and provis-

(2) Law in a changing society P. 123
(3) Friedmann, Law in changing society P. 110
(a) Introduction to the Law of contract, P. S. Atiyah P 2
(b) Introduction to the Philosophy of Law P. 236

OUR VOLLEY BALL TEAM, 1964-'65

Runners-up in the Mannadiar inter-collegiate Tournaments



Sitting L. to R.

M/s P. N. Nambiar, K. N. Ravindran, R. Sankaradasan Thampi (Principal) K. Sreekantan (Lecturer) & George Mathews (Captain).

Standing L. to R.

M/s K. Abdulla, P. N. Prabhakaran, Gopinath, C. K. Pocker, P. P. Ahammed & P. Madhavan Nair.

ATHELETIC ASSOCIATION — CAPTAINS



Sitting L. to R.

Kumari Sarojini C. A. (Ladies Captain) M/s. K. N. Ravindran (General Captain) R Sankaradasan Thampi (Principal) K. Sreekantan (Lecturer) & George Mathews (Volley Ball).

Standing L. to R.

M/s. O. Divakaran (Tennis) R. S. Prabhu (Foot-ball) V. Ramachandra Menon (Badminton) P. N. Nambiar (Atheletic Captain) P. D. Thomas (Hockey) Ramachandran (Cricket) & Abdulla K. (Basket Ball).

tions, to sell his produce and go about his occasions as a cog in the economic machine.(c)

To know what the Common Law was before the making of any statute is the very lock and key to set open the windows of the Statute.

"Law did not concern itself at first with agreements or breaches of agreements. Its function was to keep the peace by regulating or preventing private war and this only required it to deal with personal violence and with disputes over possession of property".(d) The proposition of Hipyodamus in the fifteenth century B.C. that there were but three subjects of law suits, namely, insult injury and homicide is note worthy in this connection. Glanvill writing late in the reign of Henry II, makes the general statement that the royal judges did not normally concern themselves with private agreements. To Bracton and to Glanvill private agreements were scarcely consonant with the dignity of the Common Law. The duty to keep promise was a matter for religion. This is found in full vigour in Hindu law. To the Hindu Lawyer a debt an obligation merely. It is a sin for which the debtor suffers in the other world. Brihaspathi says: "He who, having received a sum lent or the like does not return it to the owner will be born hereafter in his creditors house a slave, a servant, a woman or a quadraped". Hindus carried the idea of religious obligations so far that a descendant is bound to pay the debt of his ancestor in many cases whether he received the assets of the ancestor or not.

In the course of the thirteenth century, in England a number of writs were developed, governing transactions which modern lawyers would classify as contractural or quasi-contractual. Of these writs the most important were Debt, Covenant and Account. Debt was known as a part of a composite writ which may be termed Debt-Detinual. This composite writ availed both for claims of money and for recovery of specific chattel or its value. By the reign of Edward III this composite writ had been separated into its component parts.(e)

Thereafter Detinue lay to recover specific chattel or its value and Debt to recover precise sum of money. The duty in Debt arises upon receipt of a res. If in the place of the receipt of res we sub-

(c) Some Aspects of Indian Law Today, International and comparative Law qurrterly Publication No. 8 (1964) P. 51

(d) Introduction to the Philosophy of Law by Roscoe Pound P. 136

(e) See Fifoot P. 217

stitute the receipt of any service, we have the conception which underlies the innominate contract. Thus Debt lay not only for res received but also for benefit like services obtained. In debt, the plaintiff alleged, as a general rule, that the defendant both owned and detained - debet et detinet. In a debt action the defendant was liable, not because he had promised, but because he had received a benefit, which in turn cast upon him a duty to pay. Debt was a popular writ throughout the Middle Ages and it was used to enforce mainly three varieties of claims: Debt on Record, Debt on an obligation and Debt on a Contract. The typical example of Debt on Record was an action on a judgement. Actions to recover penalities imposed by statutes or bye-laws also came under Debt on Record. The modern contract of Record (Recognizance and judgements) is a legacy bequeathed by Debt as to Record. In Debt on an obligation the defendant was liable according to the term of a written instrument to which his seal was attached. The modern contract under seal has its parentage in Debt on an obligation. In a Debt on a Contract the plaintiff might claim the returns of money lent, the price of good sold and delivered or of services rendered (innominate contracts) or the payment of rent reserved on a lease. However, a conspicuous feature was common to all these three debt actions. That is the plaintiff must have conferred upon the defendant a benefit in return for which the money was due. The phrase *'Quid pro quo'* was used to indicate this necessary correspondence between benefit and duty. Debt action could lie only if the plaintiff could show the receipt of material benefit *quid pro quod* by the defendant. To this requirement of Quid Pro Quod one exception was admitted in the fifteenth century i. e. the seller of goods might sue in Debt to recover the agreed price even before the goods had been delivered to the buyer, and the buyer, for his part could bring Detinue for the goods even before he had paid the price. Readiness to fulfil their reciprocal promises was sufficient. "With this solitary, if important exception the general rule remained that Debt lay to enforce not promises but duties generated by the receipt of benefit. The contracts within its scope, to use the language of the Roman Law were not consensual. But real and the binding character of mutual promises was not, as a principle accepted.(f)

(f) Cheshire & Fifoot, Law of Contract sixth Edition P. 5

Writ of Debt was subject to a series of technical limitations. Thus, when the plaintiff sued in Debt on Contract, the defendant could avoid an examination of the merits by recourse to the archaic method of trial known as Wager of Law and the action would then be determined not upon its merits but by an archaic process known as compurgation in which the defendant came into court and declared upon oath that he did not owe the debt and twelve respectable neighbours his compurgators or oath helpers declared also upon oath that they believed that his oath was good (g)

Unless the plaintiff produced a sealed document or other formality either in evidence of a contract or as the obligation upon which he sued he might expect to be met by wager of law. "It was ruled as a corollary in the reign of Edward III, that whenever a living debtor could have waged his law, no action would lie against his representative since they could scarcely be received to wage for him".(h) Over and above these two limitations there was the more important limitation that Debt lay only where the plaintiff could depend upon a formality or could prove a substantial benefit (Quid Pro Quo) conferred normally upon the defendant himself, but possibly as a third party at the defendant's request. Further there was the technical limitaton that the duty upon which it rested must not be indeterminate, it could not be used save to recover a fixed and certain sum. The mediaeval law knew no quartum meruit. "It was a corollary of this rule that the plaintiff must recover the precise sum claimed or fail in toto". The Writ of Covenant was almost exclusively used to protect interests in land and especially that of the lessee for years. Seal was essential for covenants. Covenant lay to recover what would now be described as "liquidated damages" for failure to perform some act. Even if the plaintiff could produce a document under seal (which was compulsory as per the rule established by the reign of Edward III) he must use Debt, not covenant, when the defendant's undertaking was to pay him a definite sum of money. Account was of great importance throughout the Middle ages and actions were numerous. The defendant could be sued in any one of three capacities: as guardian in socage, as bailiff or as receiver.

(g) For Wager of Law see Maitland Form of Action PP. 15-6

(h) Fifoot History & saivces of the Common Law P. 231
Fifoot op cit P. 230

The mediaeval Common Law relating to contracts was very inadquate. The royal judges did not recognise an agreement to convey land, whether or not the purchase price had been paid unless it was under seal. They did not allow a claim to reasonable remuneration for goods delivered or services rendered in the absence of fixed and pre-determined sum. In general they offered no means of obtaining damages when neither party had as yet performed his part of the bargain. They did not enforce executory contracts not under seal and until this very serious omission was supplied it was a impossible to say that a general conception of contract had been received into the law. Because of this serious omission litigants looked for redress outside the Common Law courts.

"The litigants (not being merchants to whom local Courts catered) who found the common law too restricted for their need invoked the assistances of the Chancellor. He was adjured for God's love and in the way of charity" to "do what truth, good faith and conscience require", and both as an ecclesiastic familiar with the Common Law and imbued with the Church's condemnation of loesio fidei, and as a statesman mindful of the secular intests of the realm he was not loath to comply."(i) He enforced executory agreements and awarded reasonable remuneration where no price had been fixed. He accepted the presumption that an agreement as such should be enforced, provided only that it was seriously intended and that some good "cause" for the defendant's promise could be shown. He derived the conception of cause from the canon Law which embraced not merely the promotion of financial interests but the moral obligation engendered by the mere fact of pleadings one' faith.

Evolution of Assumpsit:

Assumpsit is defined in 'Terms de la lcy' thus: "Assumpsit is a voluntary promise made by word, by which a man assumes and takes upon him to perform or pay anything to another. This word contains in it any verbal promise made upon consideration". In the sixteenth century the Common Law Judges spurred to emulation by the liberality of the Chancellor evolved a general remedy for breach of contract. The writs of covenant and Debts had been stunted by technical rules. The inventiveness of the Chancellors and judges in the matter of making now writs had come to an end in

(i) Cheshere & Ffoot, Law of contract 6th ed. P. 7

the latter half of the thirteenth century. There were, hence complaints in Parliament of suitors being turned away empty handed because there was not any writ to suit their cases. Accordingly the great Statute of West Minister the Second of 1285 sought to provide remedy by enacting that "whenever from hence forth it shall happen in chancery that in one case a writ is found and in like case falling under the like law, and requiring like remedy, is found none, the clerks of the chancery shall agree in making a writ". Empowered by the statute the clerks of the chancery framed new writs on the analogy of the older writs. These new writs were known by the term 'case' apparently from the word used in the Statute of West Minister II viz, in consimile casu.

One of the earliest writs made use of for satisfying the disappointed litigants was the famous writ of Trespass. Trespass lay for a direct physical injury to the person or to property, but by some ingenious process the details of which are contentiously obscure there had developed out of it a modified form of action, which would be for injuries which were not direct or physical and this came to be known as Trespass on the Case or simply Case.(i)

As an example of an injury which is not direct or physical, Humber Ferry Man's case may be cited. Here a ferry man undertook to carry a mare in his boat across a river, but so overloaded the boat that it sank and the mare was drawned The plaintiff here could not bring a Trespass action as there was no direct or physical injury. There was no interference with possession and there was no deliberate malfeasance or active wrong doing. The plaintiff here had voluntarily parted with the possession of the mare when he put her in the defendant's boat. Similarly when a smith lamed a horse entrusted to him to be shoed or a dentist so negligently extracted the tooth that the jow bone was fractured or a physician negligently administered the wrong medicine or a barber who undertook to shave the beard of the plaintiff with a clean razor but performed his work regligently and unskillfully to the great injury of the plaintiff's face - in all these cases though there was no Trespass or malfesance or active wrong doing there was misfeas-

(i) For a different view of the origin of case see Milsom, 1954 cam L. J. 105

ance or negligent wrong doing in respect of a physical object by the defendant from which the plaintiff suffered loss or damage and so the analogous action of case or Trespass on the case was allowed. Fault in performance or negligent doing of one's duty and causing loss to another is the gist of action here; in other words the action is for the misperformance of that which a man has 'assumed' to do.

In the above example of mifeasance the form of action was tortious but the substance of the claim was contractual. The defendants in those cases argued that the plaintiff was trying to sue on a promise and that his appropriate remedy had there been a deed was covenant. As there was no deed there was no remedy. But the Court gave judgement for the plaintiff because the defendant by his negligent conduct had caused the plaintiff damage Here the distinction between tort and contract is blurred. A tort connotes a misfeasance. A contracting party who had undertaken to do something and who had injured the other contracting party by doing it badly was liable because of this misfeasance to an action of case.

Deceit too, was at first a very narrow and technical form of action. Action ot Deceit on the case, seems to have developed out of this form of action. The boundaries between these two types of action namely Trespass on the case and Deceit on the case are wavering and blurred. But both appear to have been instrumental in the future development of case in relation to the enforcement of mutual promises.

Although there was action for misfesance as given above there was no action for nonfeasance i. e. for not doing at all apart from doing badly and causing loss. The Judges felt an ineffable repugnance to pass from mis-feasance to non-feasance – from doing badly to not doing at all They refused to allow case to be used to remedy pure non-feasance. Even in 1503 it was declared that "where a carpenter makes a bargain to make me a house and does nothing, no action on the case lies, for it sounds in covenant. But if he makes the house improperly, the action on the case well lies".

The repugnance of the judges to pass from misfeasance to nonfeasance was due to two reasons. First, the case was essentially tortious in character and that it was improper to describe a more failure to perform as tort. Secondly, the judges felt that to award damages for non-feasance was to give a general remedy for an informal agreement or covenant.

But the distinction between misfeasance and non-feasance was abandoned in 1505 and the liability for non-feasance was admitted and Forwyk C. J. of the Common Pleas announced the new principle thus. "If I sell you my land and covenant to enfeof you and do not, you shall have a good action on the case and this is adjudged.(k) In 1506 a similar declaration is made by Fineuz, C. I. of the King's Bench.(l) In each of these citations the "covenant" is used simply in the sense of agreement. So if the defendant undertook to convey land or to build a house and he did not nothing to implement his promise he was hence forth liable to an action on the case as if he had begun his task but had failed to complete it with due care and skill. It is important to note here that in all these cases the plaintiff relied upon the defendant's "undertaking" or in the language of the writ the plaintiff declared that the defendant had taken upon himself – assumpsit per se - to do something; and the form of action, thus came to be known as Assumpsit. Thus the history Assumpsit was, as Fifoot observes the perversion of a delictual into a contractual remedy.

Assumpsit later became a general action for breach of contract and it lay whenever the defendant had given an undertaking and had either fulfilled it, improperly or failed to fulfil at all. The way was thus clear for the promulgation of a comprehensive contractual remedy. The liability is based, by this action, not on a duty invoked by the receipt of a benefit but on the breach of a promise. In other words unlike the old writ of Debt it was not a "real", but a "consensual" action. The Assumpsit action, unlike Debt action, is free from the fetters of technicalities. Thus by the middle of the sixteenth century the modern conception of contract had in essence been formulated. The action of Assumpsit through which it was expressed was recognized as a distinct specis of case resting upon the idea of promise.

Now the question arose as to whether the Common Law would recognize all promises as binding whether they were given for value or were purely gratuitous. The judges were impelled by their traditions to decide against the validity of gratutous promises. Gratuitous promises were enforced if they were covenants with seal.

(k) See Anons (1505) Y. B. 20. HY, vii, Mich. No. 18. see Holdsworth H. E. L. vol. iii. pQ. 439 and 440.

(l) Nota Y. B. 21 Hon. VII. Mich. F. 41. pl. 66.

The writ of Debt had familiarised the common lawyer with the idea of bargain-the reciprocity of benefit and duty. This type of transaction deserved legal sanction. By the middle of the sixteenth century in commercial contracts, it was necessary that the plaintiff must prove defendant's promise to have been part of a bargain struck between the partie(m). This requirement was expressed by saying that the plaintiff must have given consideration for the defendant's promise (n)

"The Plaintiff can satisfy this requirement by showing that he had bought the defendant's promise either by conferring a benefit upon him or by furnishing a counter promise of his own. The first of these alternatives was substantially the old *Quid Pro Quo* of Debt, the second was the new idea that reciprocal promises were mutually binding"(o) About this second idea Street says thus: "The conception of contractual obligation embodied in the bilateral contract, is to our mind the most beautiful notion that ever appeared in Contract law."(p)

Subsequent Development of Assumpsit

1 *Indebitatua Assumpsit:—*

It is already seen that the action of Assumpsit is free from the archaism which disfigured the Debt and Detinue. The plaintiff could avoid irrational wager of law and could sue as well the personal representative. Therefore the litigants sought to use Assumpsit instead of Debt. Thus Assumpsit had became general contractual remedy. Every Contract executory is an assumpsit in itself'. The advantages of Assumpsit were so patent that it was bound to be popular with litigants. Lawyers were intially prejudiced against a development, which cofused their categories namely Debt and Assumpsit. An objection which, as Fifoot Says, might have been confined to the scholar in his study was reinforce- by the instinct of cupidity. The King's Bench whose jurisdiction included Assumpsit and excluded Debt naturally encouraged this development of Assumpsit even at the sacrifice of Debt action. The court of Common Please whch enjoyed a monopoly of Debt opposed

(m) See Pecke V Redman (1555)2 Duer 113a

(n) For a discussion of the early history of consideration see Fifoot, History and Sources of Common Law Chapter 16

(o) Cheshire and Fifoot p. 11. Sixth Edn.

(p) The foundations of Legal Liability Vol. II. P. 60



F. L. CLASS



B. L. CLASS

this substitution of Assumpsit for Debt. Owing to the superior efficacy of the action of Assumpsit, business (and with it revenue), began to flow out of Common Pleas into King's Bench, to the satisfaction of latter and the chagrin of the former. Thus as Cheshire and Fifoot observed the last years of the sixteenth century witnessed therefore, the spectable of a house divided in itself, the King's Bench promoting and the Common Pleas and Exchequer resisting the substitution of Assumpsit for Debt. Such an incongruous and undignified position could not long be substained and the crisis was resolved in 1602 in SLADE'S case. Before the case is dealt with it may be noted that a plaintiff in either court (who sued in case Assumpsit) must declare not only that the defendant had incurred a Debt but also that he undertaken to discharge it. (This undertaking was very often a fiction introduced merely to give colour to the suggestions of Assumpsit). The Common Pleas insisted on the fact, the Queen's Bench, on the fiction. The facts of Slade's case are as follows: John Slade brought an action upon the case in the Queen's Bench against Humtrey Morely. He declared that he had bargained and sold standend crops to Morely and that Morely had 'assumed and promised' to pay a fixed price for them and and that he had failed to do so. The jury in a special verdict found that the crops had been sold but that there had never been any express assumpsit to pay the price. The judges felt that they must make up their minds once and for all whether an implied assumpsit would suffice and the case was twice argued before the members of all three courts in a special session of the Exchequer chamber. The King's Bench won and the Assumpsit was accepted as a general alternative to Debt. Save, where the plaintiff had to rely upon a deed and when so used the assumpsit might be a pure fiction. "It may be said that this is the most important case in the whole history of contractual obligations in English law, for the action of Assumpsit was now able to emerge as a general contractual action, freed from the inhibiting forms and limitations of the mediaeval writs".(q) This general fiction is the distinctive mark of the English law of contract.

The Common Law was committed to two species of Assumpsit: special Assumpsit, where the undertaking was express and Indebitatus Assumpsit where it might be im-

(q) Anson on Contracts 21 ed. p. 17

plied from the mere existence of a previous debt.

Subsequent Development of Assumpsit:-

(2) *Quantum Meruit*

For services rendered or goods delivered, the common law before the 17th century afforded no remedy. Thus where a tailor made a suit or an innkeeper supplied food and no stipulation was made as to the remuneration or price Debt would not lie because no defenite amount was to be recovered, special Assumpsit also would not lie because there was no express undertaking. But not long after Slade's case the courts began to allow assumpsit to be brought when services had been rendered or goods supplied in circumstances which made it clear that they were to be paid for even though the amount of the payment had not been expressly fixed.(r) The plaintiff was allowed an action for 'Quantum meruit' for the amount which his services deserved, or for Quantum valebant, for the amount which the goods were worth.

(3) *Quasi-Contract:-*

Later still the courts went further and implied contracts not only from the conduct of the parties but also where there was no agreement at all. This development is found in Quasi contracts. Thus Assumpsit was extended to cases where there was no contract at all. The final development of assumpsit introduced a distracting element into the categories of the law. Debt was available in a number of cases which modern lawyers would place outside the realm of contract. It was an appropriate remedy for the recovery of judgement debts and of statutary customary dues. Even in a case where the plaintiff might have paid money to the defendant under the erroneous impression that it was lawfully due to him, Debt was the orthodox remedy. It is obvious that even in this case a plaintiff would permit it. There were several instances where assumpsits were persistently brought even though there was no contract at all. These cases fall into two groups.

The first consisted of action to recover judgment debts and sums of money imposed by statutes, or due by custom. The Courts significantly described the action as Quasi excontractu, Indebitatus Assumpsit had been identified with the idea of contract and it was illogical to allow its use where there was no agreement at all express or tacit and where the obligation was imposed upon the

(r) See Hall V Walland (1621) Cro. Jac 618

defendant by extrinsic circumstances. How can there be any privity of assent implied when a fine is imposed on a man against his will?

The second consisted a variety of actions whereby the plaintiff claimed a sum of money as had and received by the defendant to his use. This would include the action for the recovery of money paid by mistake, as where an underwriter had paid on a policy of marine insurance under the erroneous assumption that the ship had been lost, or for the recovery of money received by the defendant on a consideration which had wholly failed. In this second group the conspicuous feature is that the defendant had obtained an unfair advantage or an unearned increment at the plaintiff's expense and it was proper that he should be made to indemnify the plaintiff. As in the first, here also, the liability was independent of consent. An action of tortious origin namely Assumpsit was extended to cover even Quasi-contracts. As Cheshire and Fifoot observe, it produced almost as a by-product in the process of litigation a general principle into which the infinite variety of agreements might be resolved without strain or difficulty. Assumpsit was thus a very comprehensive remedy and so the English law unlike the Roman law has been able to think in terms of contract rather than of contracts.

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1	Place of Publication	...	Ernakulam.
2	Periodicity of Publication	...	Annual.
3	Printer's Name	...	The Law College, Ernakulam, (Sri K. Sreekantan, Full-time Lecturer, Law College, Ernakulam, for Law College)
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	Address	...	Full-time Lecturer, Law College, Ernakulam.
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	Nationality	...	Indian
	Address	...	(Full-time Lecturer, Law College, Ernakulam).
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	Nationality	...	Indian.
6	Names and Addresses of Individuals who own the Newspaper	...	Law College, Ernakulam.

I, K. Sreekantan, do hereby declare that the particulars given above are true to the best of my knowledge and belief.

Ernakulam,
March '65.

(Sd.) K. Sreekantan,
For Law College, Ernakulam.

Printed at I. S. Press, Ernakulam-8.

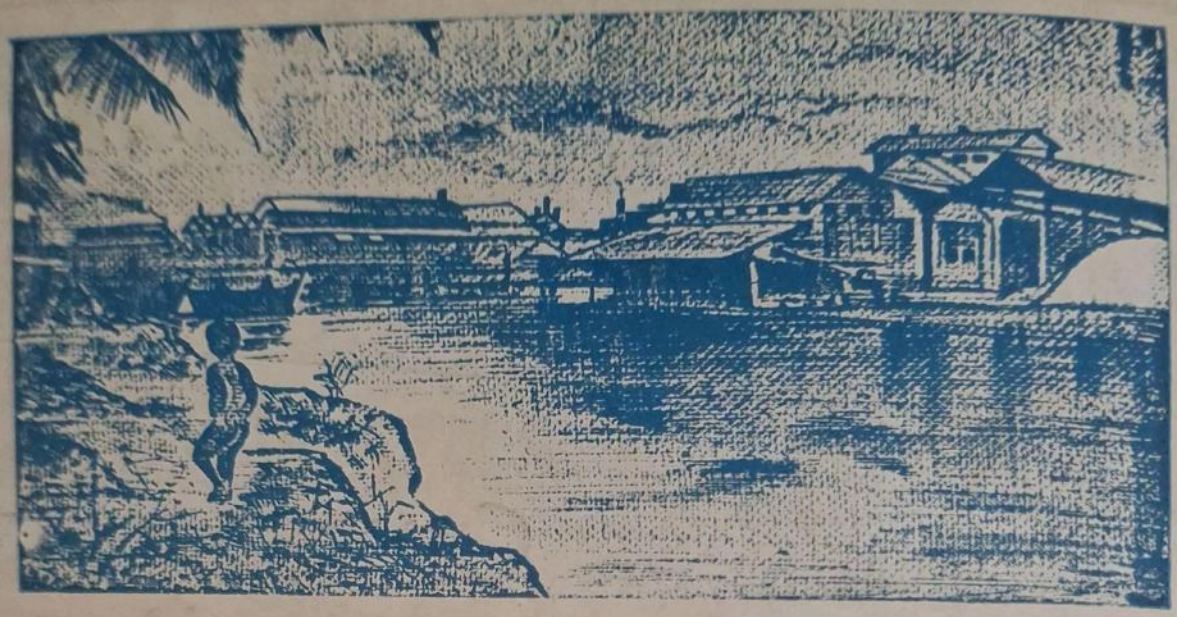
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on the banks of the Periyar

The banks of the River Periyar have, over the years, witnessed a wide range of developments. From Advaita to ammonium sulphate!

Kaladi, Adi Sankara's hallowed birthplace, is on the Periyar's margin. And in the old days, Phoenician and other foreign traders rowed down its course... and took home a rich cargo of ivory and spices and sandalwood.

The Udyogamandal Industrial Complex: To-day, on the banks of this historic river, a new kind of development is taking place—thanks largely to the presence of FACT—a company which has a host of "firsts" to its credit, like the large-scale manufacture of ammonium sulphate, the manufacture of ammonium phosphate and installation of an oil gasification plant, employing the "Texaco" process of partial oxidation.

To-day, along with other units like the Travancore-Cochin Chemicals Ltd., Indian Rare Earths Ltd., Hindustan Insecticides Ltd., the old village of Eloor (now renamed Udyogamandal) presents such a rewarding picture of an industrial complex that it is difficult to imagine that hardly ten or twelve years ago, this village was no different from a hundred other villages.

And newer plants are fast springing up.

Expansion Programme: And FACT itself is currently engaged in putting through its Rs. 12- crore, third-stage, expansion programme, at the end of which the company would have mounted capacities of 70,000 tonnes of nitrogen and 33,500 tonnes of phosphoric acid per annum.

federal Constitution. The chief characteristics of such an instrument are: (i) supremacy of the Constitution which should naturally be reduced to writing and rendered 'rigid' by making it impossible of unilateral amendment; (ii) distribution of different powers among bodies with limited and co-ordinate authority and (iii) authority of courts to act as the interpreters of the Constitution.

Unitarianism.

The very opposite of federalism is Unitarianism which means the concentration of the strength of the State and of all its powers in the hands of one visible Sovereign, be it Parliament, Presidium or Czar.

Quasifederalism.

The U. S. Constitution is held out as the model of federalism as it fulfills all the above mentioned requisites. Other examples are the Constitutions of Switzerland, Canada, Australia, etc. But it may be pointed out that none of them exemplifies federalism in the same measure as the American Constitution. As a result, a tendency has grown among Constitutional Lawyers to adjudge federalism by the yardstick of the American system and this, in turn, has led them to attempt a further classification of such Constitutions on that basis. Prof. K C. Wheare[b] for instance, classifies some of the above-mentioned constitutions as 'quasi-federal' on the ground that, they do not possess the federal characteristics in the same degree as their American counterpart. He has qualified the Indian Constitution also as quasi-federal for the same reason.

Indian Constitution – nature of –

The question whether the Indian Constitution is truly federal or not has been a subject of controversy in recent years. Some writers have called it an 'administrative federation' in the sense that it is a federation imposed from above for purposes of administrative convenience or expediency with little or no federalism in it. Others have treated it as a Constitution belonging to a class by itself, "……neither purely federal nor purely unitary but a combination of both. It is a union or composite State of novel type".[c] According to Jennings, our Constituiion enshrines the principle that "in spite of federalism, the national interest ought to be paramount."[d]

(b) Federal Government (3rd Ed.) p. 11.
(c) Commentary on the Constitution of India, Vol. I, p. 20.
(d) Some Characteristics of the Indian Constitution, p. 55.