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SEPARATE PAGING IS GIVEN TO THIS PART, IN ORDER THAT IT MAY BE FILED AS A SEPARATE COMPILATION

PART VI

Bills introduced into the Council of the Governor General of India and
Bills published before introduction in that Council

GOVERNMENT OF INDIA

LEGISLATIVE ASSEMBLY DEPARTMENT

The following Bills were introduced in the Legislative Assembly on the 12th April 1945 :—

L. A. BILL No. 12 OF 1945

A Bill to amend the law relating to the divorce of persons professing the Christian religion

Whereas it is expedient to amend the law relating to the divorce of persons professing the Christian religion, and to confer upon certain Courts jurisdiction in matters matrimonial ;

It is hereby enacted as follows :—

1. Short title, Extent and Commencement—(1) This Act may be called the Indian Divorce Act, 19

(2) It extends to the whole of British India, and so far only as regards British subjects within the territories herein-after mentioned to the Indian States.

(3) It shall come into force at once.

2. Extent of power to grant relief generally, and to make decrees of dissolution or of nullity—Nothing hereinafter contained shall authorise any Court to grant any relief under this Act, except where the petitioner or respondent professes the Christian religion, or to make decrees of dissolution of marriage except where the parties to the marriage are domiciled in India at the time when the petition is presented, or to make decrees of nullity of marriage except where the marriage has been solemnised in India and the petitioner is resident in India at the time of presenting the petition, or to grant any relief under this Act, other than a decree of dissolution of marriage or of nullity of marriage, except where the petitioner resides in India at the time of presenting the petition.

3. Definitions—In this Act, unless there be something repugnant in the subject or context—

(1) "High Court" means with reference to any area—

(a) in Bengal, Assam and the Andaman and Nicobar Islands, the High Court at Calcutta ;

(b) in the Provinces of Madras and Coorg, the High Court at Madras ;

(c) in the Province of Bombay and in Panth Piploda, the High Court at Bombay ;

(d) in Agra and Ajmer-Merwara, the High Court at Allahabad ;

(e) in Oudh, the Chief Court of Oudh ;

(f) in the Punjab, the North-West Frontier Province, British Baluchistan and Delhi, the High Court at Lahore ;

(g) in Bihar and Orissa, the High Court at Patna ;

(h) in the Central Provinces and Berar, the High Court at Nagpur ;

(i) in Sind, the Court of the Judicial Commissioner in Sind ; and

(j) in any Indian State, the Court which is a High Court for the purposes of the Government of India Act, 1935, and exercises original criminal jurisdiction in respect of European British subjects in that area.

In the case of any petition under this Act, "High Court" means the High Court for the area where the husband and wife reside or last resided together,

(2) "District Judge" means—

(a) in a province, a Judge of a Principal Civil Court of original jurisdiction, however designated ; and

(b) in any area in an Indian State, such officer as the Central Government shall from time to time appoint in this behalf by notification in the Official Gazette, and in the absence of such an officer, the High Court for the area.

(3) "District Court" means, in the case of any petition under this Act, the Court of the District Judge within the

local limits of whose ordinary jurisdiction, or of whose jurisdiction under this Act, the husband and wife reside or last resided together ;

(4) "Court" means the High Court or the District Court, as the case may be.

(5) "Property" includes, in the case of a wife, any property to which she is entitled for an estate in remainder or reversion, or as a trustee, executrix or administratrix ; and the date of the death of the testator or intestate shall be deemed to be the time at which any such wife becomes entitled as executrix or administratrix.

4. Matrimonial jurisdiction of High Courts to be exercised subject to Act. Exception—The jurisdiction now exercised by the High Courts in respect of divorce *a mensa et toro*, and in all other causes, suits and matters matrimonial shall be exercised by such Courts and by the District Courts subject to the provisions in this Act contained, and not otherwise : except so far as relates to the granting of marriage-licences, which may be granted as if this Act had not been passed.

5. Enforcement of decrees or orders made heretofore by Supreme or High Court—Any decree or order of the late Supreme Court of Judicature at Calcutta, Madras or Bombay sitting on the ecclesiastical side, or of any of the said High Courts sitting in the exercise of their matrimonial jurisdiction, respectively, in any cause or matter matrimonial, may be enforced and dealt with by the said High Courts, respectively, as hereinafter mentioned, in like manner as if such decree or order had been originally made under this Act by the Court so enforcing or dealing with the same.

6. Pending suits—All suits and proceedings in causes and matters matrimonial, which when this Act comes into operation are pending in any High Court, shall be dealt with and decided by such Court, so far as may be, as if they had been originally instituted therein under this Act.

7. Court to act on principles of English Divorce Court—Subject to the provisions contained in this Act, the High Courts and District Courts shall, in all suits and proceedings hereunder, act and give relief on principles and rules which, in the opinion of the said Courts, are as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being acts and gives relief :

Provided that nothing in this section shall deprive the said Courts of jurisdiction in a case where the parties to a marriage professed the Christian religion at the time of the occurrence of the facts on which the claim to relief is founded.

8. Extraordinary jurisdiction of High Court—The Court may, whenever it thinks fit, remove and try and determine as a Court of original jurisdiction any suit or proceedings instituted under this Act in the Court of any District Judge within the limits of its jurisdiction under this Act.

Power to transfer suits—The High Court may also withdraw any such suit or proceeding, and transfer it for trial or disposal to the Court of any other such District Judge.

9. Reference to High Court—When any question of law or usage having the force of law arises at any point in the proceedings previous to the hearing of any suit under this Act by a District Court or at any subsequent stage of such suit, or in the execution of the decree therein or order thereon,

the Court may, either of its own motion or on the application of any of the parties draw up a statement of the case and refer it, with the Court's own opinion thereon, to the decision of the High Court.

If the question has arisen previous to or in the hearing, the District Court may either stay such proceedings, or

proceed in the case pending such reference and pass a decree contingent upon the opinion of the High Court upon it.

If a decree or order has been made, its execution shall be stayed until the receipt of the order of the High Court upon such reference.

10. Restrictions on petitions for divorce during first three years after marriage—(1) No petition for divorce shall be presented to a Court unless at the date of the presentation of the petition, three years have passed since the date of the marriage :

Provided that a Court may, upon application being made to it in accordance with the rules of the High Court allow a petition to be presented before three years have passed on the ground that the case is one of exceptional hardship suffered by the petitioner or of exceptional depravity on the part of the respondent ; but if it appears to the court at the hearing of the petition, that the petitioner obtained leave to present the petition by any misrepresentation or concealment of the nature of the case, the court may, if it pronounces a *decree nisi*, do so subject to the condition that no application to make the decree absolute shall be made until after the expiration of three years from the date of the marriage, or may dismiss the petition, without prejudice to any petition which may be brought after the expiration of the said three years upon the same, or substantially the same, facts as those proved in support of the petition so dismissed.

(2) In determining any application under this section for leave to present a petition before the expiration of three years from the date of the marriage, the judge shall have regard to the interest of any children of the marriage and to the question whether there is reasonable probability of a reconciliation between the parties before the expiration of the said three years.

(3) Nothing in this section shall be deemed to prohibit the presentation of a petition based upon matters which have occurred before the expiration of three years from the date of the marriage.

11. Grounds of petition for divorce—A petition for divorce may be presented to a Court either by the husband or the wife on the ground that the respondent—

(a) has since the celebration of the marriage committed adultery ; or

(b) has deserted the petitioner without cause for a period of at least three years immediately preceding the presentation of the petition ; or

(c) has since the celebration of the marriage treated the petitioner with cruelty ; or

(d) is incurably of unsound mind and has been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition ; and by the wife on the ground that her husband has, since the celebration of the marriage, been guilty of rape, sodomy or bestiality.

12. Definition of "care and treatment" in relation to insanity—For the purposes of section 11, a person of unsound mind shall be deemed to be under care and treatment while he is detained in pursuance of any order or inquisition under the Indian Lunacy Act, 1912, and not otherwise.

13. Provision as to making adulterer co-respondent—

(1) On a petition for divorce presented by the husband or in the answer of a husband praying for divorce the petitioner or respondent, as the case may be, shall make the alleged adulterer a co-respondent unless he is excused by the court on special grounds from so doing.

(2) On a petition for divorce presented by the wife the Court may, if it thinks fit, direct that the person with whom the husband is alleged to have committed adultery be made a respondent.

14. Duty of Court on presentation of petition for divorce—

(1) On a petition for divorce it shall be the duty of the court to inquire, so far as it reasonably can, into the facts alleged and whether there has been any connivance or condonation on the part of the petitioner and whether any collusion exists between the parties and also to inquire into any countercharge which is made against the petitioner.

(2) If the court is satisfied on the evidence that—

(i) the case for the petition has been proved ; and

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

(iii) the petition is not presented or prosecuted in collusion with the respondent or either of the respondents ; the court shall pronounce a decree of divorce, but if

the court is not satisfied with respect to any of the aforesaid matters, it shall dismiss the petition.

Provided that the court shall not be bound to pronounce a decree of divorce and may dismiss the petition if it finds that the petitioner has during the marriage been guilty of adultery or if, in the opinion of the court, the petitioner has been guilty—

(a) of unreasonable delay in presenting or prosecuting the petition ; or

(b) of cruelty towards the other party to the marriage ; or

(c) where the ground of the petition is adultery or cruelty, of having without reasonable excuse deserted, or having without reasonable excuse wilfully separated himself or herself from, the other party before the adultery or cruelty complained of ; or

(d) where the ground of the petition is adultery or unsoundness of mind or desertion, of such wilful neglect or misconduct as has conduced to the adultery or unsoundness of mind or desertion.

15. Dismissal of respondent or co-respondent from proceedings—In any case in which, on the petition of a husband for divorce, the alleged adulterer is made a co-respondent or in which, on the petition of a wife for divorce, the person with whom the husband is alleged to have committed adultery is made a respondent, the court may, after the close of the evidence on the part of the petitioner, direct the co-respondent or the respondent, as the case may be, to be dismissed from the proceedings if the court is of opinion that there is not sufficient evidence against him or her.

16. Relief to respondent on petition for divorce—If in any proceedings for divorce the respondent opposes the relief sought, in the case of proceedings instituted by the husband, on the ground of his adultery, cruelty or desertion or, in the case of proceedings instituted by the wife, on the ground of her adultery, cruelty or desertion, the court may give to the respondent the same relief to which he or she would have been entitled if he or she had presented a petition seeking such relief.

17. Decree nisi for divorce or nullity of marriage—

(1) Every decree for divorce or for nullity of marriage shall, in the first instance, be a *decree nisi* not to be made absolute until after the expiration of six months from the pronouncing thereof, unless the Court by general or special order from time to time fixes a shorter time.

(2) After the pronouncing of the *decree nisi* and before the decree is made absolute, any person may, in the prescribed manner, show cause why the decree should not be made absolute by reason of the decree having been obtained by collusion or by reason of material facts not having been brought before the court, and in any such case the court may make the decree absolute, reverse the *decree nisi*, require further inquiry or otherwise deal with the case as the Court thinks fit.

(3) *Prevention of delay in application for decree absolute*—Where a *decree nisi* has been obtained, whether before or after the passing of this Act, and no application for the decree to be made absolute has been made by the party who obtained the decree, then at any time after the expiration of three months from the earliest date on which that party could have made such an application, the party against whom the *decree nisi* has been granted shall be at liberty to apply to the Court and the Court shall, on such application, have power to make the decree absolute, reverse the *decree nisi*, require further inquiry or otherwise deal with the case as the Court thinks fit.

18. Confirmation of decree for dissolution by District Judge—Every decree for a dissolution of marriage made by a District Judge shall be subject to confirmation by the High Court :

Provided that no decree shall be confirmed under this section till after the expiration of such time, not less than six months from the pronouncing thereof, as the High Court by general or special order from time to time directs.

During the progress of the suit in the Court of the District Judge, any persons, suspecting that any parties to the suit are or have been acting in collusion for the purpose of obtaining a divorce, shall be at liberty, in such manner as the High Court by general or special order from time to time directs, to apply to the High Court to remove the suit under section 8, and the High Court shall thereupon, if it thinks fit, remove such suit and try and determine the same as a Court of original jurisdiction, and the provisions contained in section 17 shall apply to every suit so removed ; or it may direct the District Judge to take such steps in respect of the alleged collusion as may be necessary to enable him to make a decree in accordance with the justice of the case.

19. Appointment of officer to exercise duties of King's Proctor—The Provincial Government of any province within which any High Court established by Letters Patent exercises jurisdiction, may appoint an officer who shall, within the jurisdiction of the High Court in that Province, have the like right of showing cause why a decree for the dissolution of a marriage should be not made absolute or should not be confirmed, as the case may be, as is exercisable in England by the King's Proctor; and the said Government may make rules regulating the manner in which the right shall be exercised and all matters incidental to or consequential on any exercise of the right.

In relation to the jurisdiction of any such High Court as aforesaid in an Indian State this section shall have effect as if the reference to the Provincial Government was a reference to the Central Government.

20. Grounds for decree of nullity—(1) In addition to any other grounds on which a marriage is by law void or voidable, a marriage shall be voidable on the ground—

(a) that the marriage has not been consummated owing to the wilful refusal of the respondent to consummate the marriage; or

(b) that either party to the marriage was at the time of the marriage of unsound mind or a mental defective or subject to recurrent fits of insanity or epilepsy; or

(c) that the respondent was at the time of marriage suffering from venereal disease in a communicable form; or

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

Provided that, in the case specified in paragraphs (b), (c) and (d) of this sub-section, the Court shall not grant a decree unless it is satisfied—

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

(ii) that proceedings were instituted within a year from the date of the marriage; and

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

(2) Any child born of a marriage avoided pursuant to paragraphs (b) or (c) of the last foregoing sub-section shall be a legitimate child of the parties thereto notwithstanding that the marriage is so avoided.

(3) Nothing in this section shall be construed as validating any marriage which is by law void, but with respect to which a decree of nullity has not been granted.

21. Confirmation of District Judge's Decree—Every decree of nullity of marriage made by a District Judge shall be subject to confirmation by the High Court, and the provisions of section 18, shall, *mutatis mutandis*, apply in such decrees.

22. Proceedings for decree of presumption of death and dissolution of marriage—(1) Any married person who alleges that reasonable grounds exist for supposing that the other party to the marriage is dead may present a petition to the Court to have it presumed that the other party is dead and to have the marriage dissolved, and the Court, if satisfied that such reasonable grounds exist, may make a decree of presumption of death and of dissolution of the marriage.

(2) In any such proceedings the fact that for a period of seven years or upwards the other party to the marriage has been continually absent from the petitioner, and the petitioner has no reason to believe that the other party has been living within that time, shall be evidence that he or she is dead until the contrary is proved.

(3) Section 17, 19 and 43 shall apply to a petition and a decree under this section as they apply to a petition for divorce and a decree of divorce respectively.

23. Decree of judicial separation—(1) A petition for judicial separation may be presented to the Court either by husband or the wife on any grounds on which a petition for divorce might have been presented, or on the ground of failure to comply with a decree for restitution of conjugal rights or on any ground on which a decree for divorce *a mensa et toro* might have been pronounced and the foregoing provisions of this part of this Act relating to the duty of the Court on the presentation of a petition for divorce and the circumstances in which such a petition shall or may be granted or dismissed, shall apply in like manner to a petition for judicial separation.

(2) Where the Court in accordance with the said provisions grants a decree of judicial separation, it shall no longer be obligatory for the petitioner to cohabit with the respondent.

(3) The Court may, on the application by petition of the husband or wife against whom a decree for judicial separation has been made, and on being satisfied that the allegations contained in the petition are true, ~~reverse~~ the decree at any time after the making thereof, on the ground that it was obtained in the absence of the person making the application, or, if desertion was the ground of the decree, that there was reasonable cause for the alleged desertion.

(4) The reversal of a decree for judicial separation shall not affect the rights or remedies which any other person would have had if the decree had not been reversed in respect of any debts, contracts or acts of the wife incurred, entered into or done between the date of the decree and of the reversal thereof.

24. Separated wife deemed spinster with respect to after-acquired property—In every case of a judicial separation under this Act, the wife shall, from the date of the decree and whilst the separation continues, be considered as unmarried with respect to property of every description which she may acquire, or which may come to or devolve upon her.

Such property may be disposed of by her in all respects as an unmarried woman, and on her decease the same shall, in case she dies intestate, go as the same would have gone if her husband had been then dead:

Provided that, if any such wife, again cohabits with her husband, all such property as she may be entitled to when such cohabitation takes place shall be held to her separate use, subject, however, to any agreement in writing made between herself and her husband whilst separate.

25. Separated wife deemed spinster for purposes of contract and suing—In every case of a judicial separation under this Act, the wife shall whilst so separated, be considered as an unmarried woman for the purposes of contract, and wrongs and injuries, and suing and being sued in any civil proceeding; and her husband shall not be liable in respect of any contract, act or costs entered into, done, omitted or incurred by her during the separation:

Provided that where, upon any such judicial separation, alimony has been decreed or ordered to be paid to the wife, and the same is not duly paid by the husband, he shall be liable for necessaries supplied for her use:

Provided also that nothing shall prevent the wife from joining at any time during such separation, in the exercise of any joint power given to herself and her husband.

26. Protection of third parties—(1) Where a wife obtains a decree for judicial separation, the decree shall, so far as may be necessary for the protection of any person dealing with the wife, be valid and effectual until discharged, and the discharge or variation of the decree shall not affect any rights or remedies which any person would have had, if the decree had not been discharged or varied, in respect of any debts, contracts or acts of the wife incurred, entered into or done during the period between the date of the decree and the discharge or variation thereof.

(2) Any person who, in reliance on any such decree as aforesaid, makes any payment to or permits any transfer or act to be made or done by the wife, shall, notwithstanding the subsequent discharge or variation of the decree, or the fact that the separation has ceased or has been discontinued, be protected and indemnified in the same way in all respects as if at the time of the payment, transfer or other act the decree were valid and still subsisting without variation in full force and effect, or the separation had not ceased or been discontinued, as the case may be, unless at that time that person had notice of the discharge or variation of the decree or that the separation had ceased or been discontinued.

27. Power to vary orders—The Court may from time to time vary or modify any order for the periodical payment of money made under the provisions of this Act relating to matrimonial causes and matters either by altering the times of payment or by increasing or diminishing the amount or may temporarily suspend the order as to the whole or any part of the money ordered to be paid and subsequently revive it wholly or in part, as the Court thinks just.

28. Liability of husband seizing wife's property after notice or order—If the husband, or any creditor of, or person claiming under, the husband, seizes or continues to hold any property of the wife after notice of any such order, he shall be liable, at the suit of the wife (which she is hereby empowered to bring) to return or deliver to her the specific property, and also to pay her a sum equal to double its value.

29. Wife's legal position during continuance of order—

So long as any such order of protection remains in force, the wife shall be and be deemed to have been, during such desertion of her, in the like position in all respects, with regard to property and contracts and suing and being sued, as she would be under this Act if she obtained a decree of judicial separation.

30. Decree for restitution of conjugal rights—A petition for restitution of conjugal rights may be presented to the Court either by the husband or the wife, and the Court, on being satisfied that the allegations contained in the petition are true, and that there is no legal ground why a decree for restitution of conjugal rights should not be granted, may make the decree accordingly.

31. Periodical payments in lieu of attachment—(1) A decree for restitution of conjugal rights shall not be enforced by attachment, but where the application is by the wife, the Court, at the time of making the decree or at any time afterwards, may, in the event of the decree not being complied with within any time in that behalf limited by the Court, order the respondent to make to the petitioner such periodical payments as may be just, and the order may be enforced in the same manner as an order for alimony in proceedings for judicial separation.

(2) The Court may, if it thinks fit, order that the husband shall, to the satisfaction of the Court, secure to the wife the periodical payments, and for that purpose may direct that it shall be referred to one of the conveyancing counsel of the Court to settle and approve a proper deed or instrument to be executed by all necessary parties.

32. Husband may claim damages from adulterer—Any husband may, either in a petition for dissolution of marriage or for judicial separation, or in a petition to the District Court or the High Court limited to such object only, claim damages from any person on the ground of his having committed adultery with the wife of such petitioner.

Such petition shall be served on the alleged adulterer and the wife unless the Court dispenses with such service, or directs some other service to be substituted.

The damages to be recovered on any such petition shall be ascertained by the said Court, although the respondents or either of them may not appear.

After the decision has been given, the Court may direct in what manner such damages shall be paid or applied.

33. Power to order adulterer to pay costs—Whenever in any petition presented by a husband, the alleged adulterer has been made a co-respondent, and the adultery has been established, the Court may order the co-respondent to pay the whole or any part of the cost of the proceedings.

Provided that the co-respondent shall not be ordered to pay the petitioner's costs—

(1) if the respondent was, at the time of the adultery, living apart from her husband and leading the life of a prostitute, or

(2) if the co-respondent had not, at the time of the adultery, reason to believe the respondent to be a married woman.

Power to order litigious intervenor to pay costs—Whenever any application is made under section 18, the Court, if it thinks that the applicant had no grounds or no sufficient grounds for intervening, may order him to pay the whole or any part of the costs occasioned by the application.

34. Alimony—(1) The Court may, if it thinks fit, on any decree for divorce or nullity of marriage, order that the husband shall, to the satisfaction of the Court, secure to the wife such gross sum of money or annual sum of money for any term, not exceeding her life, as having regard to her fortune, if any, to the ability of her husband and to the conduct of parties, the Court may deem to be reasonable, and the Court may for that purpose order the preparation of a proper deed or instrument, to be executed by all the necessary parties, and may, if it thinks fit, suspend the pronouncing of the decree until the deed or instrument has been duly executed.

(2) In any such case as aforesaid the Court may, if it thinks fit, by order, either in addition to or instead of an order under sub-section (1) of this section, direct the husband to pay to the wife during the joint lives of the husband and the wife such monthly or weekly sum for her maintenance and support as the Court may think reasonable:

Provided that—

(a) if the husband, after any such order has been made, becomes from any cause unable to make the payments, the Court may discharge or modify the order, or temporarily suspend the order as to the whole or any part of the money

ordered to be paid, and subsequently revive it wholly or in part as the Court thinks fit; and

(b) where the Court has made any such order as is mentioned in this sub-section and the Court is satisfied that the means of the husband have increased, the Court may, if it thinks fit, increase the amount payable under the order.

(3) On any petition for divorce or nullity of marriage the Court shall have the same power to make interim orders for the payment of money by way of alimony or otherwise to the wife as the Court has in proceedings for judicial separation.

(4) Where any decree for restitution of conjugal rights or judicial separation is made on the application of the wife, the Court may make such order for alimony as the Court thinks just.

(5) In all cases where the Court makes an order for alimony, the Court may direct the alimony to be paid either to the wife or to a trustee approved by the Court on her behalf, and may impose such terms or restrictions as the Court thinks expedient, and may from time to time appoint a new trustee if for any reasons it appears to the Court expedient so to do.

35. Power of Court to order settlement of wife's property—

(1) If it appears to the Court in any case in which the Court pronounces a decree for divorce or for judicial separation by reason of the adultery, desertion or cruelty of the wife that the wife is entitled to any property either in possession or reversion the Court may, if it thinks fit, order such settlement as it thinks reasonable to be made of the property, or any part thereof for the benefit of the innocent party, and of the children of the marriage or any or either of them.

Any instrument made under any order of the Court made under this section shall be valid and effectual, notwithstanding the existence of coverture at the time of the execution thereof.

(2) Where the application for restitution of conjugal rights is by the husband, and it appears to the Court that the wife is entitled to any property, either in possession or reversion, or is in receipt of any profits of trade or earnings, the Court may, if it thinks fit, order a settlement to be made to the satisfaction of the Court of the property or any part thereof for the benefit of the petitioner and of the children marriage or either or any of them or may order such part of the profits of trade or earnings, as the Court thinks reasonable, to be periodically paid by the respondent to the petitioner for his own benefit, or to the petitioner or any other person for the benefit of the children of the marriage, or either or any of them.

36. Divorce proceedings after grant of judicial separation or other relief—

(1) A person shall not be prevented from presenting a petition for divorce, or the Court from pronouncing a decree of divorce, by reason only that the petitioner has at any time been granted a judicial separation upon the same or substantially the same facts as those proved in support of the petition for divorce.

(2) On any such petition for divorce, the Court may treat the decree of judicial separation or the said order as sufficient proof of the adultery, desertion, or other ground on which it was granted but the Court shall not pronounce a decree of divorce without receiving evidence from the petitioner.

(3) For the purposes of any such petition for divorce, a period of desertion immediately preceding the institution of proceedings for a decree of judicial separation, if the parties have not resumed cohabitation and the decree or order has been continuously in force since the granting thereof, be deemed immediately to precede the presentation of the petition for divorce.

37. Inquiry into existence of ante-nuptial or post-nuptial settlements—

The High Court, after a decree absolute for dissolution of marriage, or a decree of nullity of marriage, and the District Court, after its decree for dissolution of marriage or of nullity of marriage has been confirmed,

may inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders, with reference to the application of the whole or a portion of the property settled, whether for the benefit of the husband or the wife, or of the children (if any) of the marriage, or of both children and parents, as to the Court seems fit:

Provided that the Court shall not make any order for the benefit of the parents or either of them at the expense of the children.

38. Custody of children—(1) In any proceedings for divorce or nullity of marriage or judicial separation, the Court may from time to time, either before or by or after

the final decree, make such provision as appears just with respect to the custody, maintenance and education of the children, the marriage of whose parents is the subject of the proceedings, or, if it thinks fit, direct proper proceedings to be taken for placing the children under the protection of the Court.

(2) On an application made in that behalf the Court may, at any time before final decree, in any proceedings for restitution of conjugal rights, or, if the respondent fails to comply therewith, after final decree, make from time to time all such orders and provisions with respect to the custody, maintenance and education of the children of the petitioner, and respondent as might have been made by interim orders if proceedings for judicial separation had been pending between the same parties.

(3) The Court may, if it thinks fit, on any decree of divorce or nullity of marriage, order the husband, or (in the case of a petition for divorce by a wife on the ground of her husband's insanity) order the wife, to secure, for the benefit of the children such gross sum of money or annual sum of money as the Court may deem reasonable, and the Court may for that purpose order that it shall be referred to one of the conveying counsel of the Court to settle and approve a proper deed or instrument to be executed by all necessary parties :

Provided that the term for which any sum of money is secured for the benefit of a child shall not extend beyond the date when the child will attain eighteen years of age.

39. Power to make orders as to custody of children after decree or confirmation—The High Court, after a decree absolute for dissolution of marriage or a decree of nullity of marriage, and the District Court, after a decree for dissolution of marriage or of a nullity of marriage, has been confirmed, may, upon application by petition for the purpose, make from time to time all such orders and provision, with respect to the custody, maintenance and education of the minor children, the marriage of whose parents was the subject, of the decree, or for placing such children under the protection of the said Court, as might have been made by such decree absolute or decree (as the case may be), or by such interim orders as aforesaid.

40. Amendments as to maintenance, settlement of property, etc.—(1) When a petition for divorce or nullity of marriage has been presented, proceedings under section 30, 31, 38 or sub-section (3) of section 34 (which respectively confer power on the Court to order the provision of alimony, the settlement of the wife's property, the application of property which is the subject of marriage settlements, and the securing of money for the benefit of the children) may, subject to and in accordance with rules of Court, be commenced at any time after the presentation of the petition :

Provided that no order under any of the said sections or under the said sub-section (other than an interim order or the payment of alimony under section 30) shall be made unless and until a *decree nisi* has been pronounced, and no such order, save in so far as it relates to the preparation, execution, or approval of a deed or instrument and no settlement made in pursuance of any such order, shall take effect unless and until the decree is made absolute.

(2) The said section 30 shall apply in any case where a petition for divorce or judicial separation is presented by the wife on the ground of her husband's insanity as if for the reference to the husband there were substituted references to the wife, and for the references to the wife there were substituted references to the husband, and in any such case and in any case where a petition for divorce, nullity or judicial separation, is presented by the husband on the ground of his wife's insanity or mental deficiency, the Court may order the payments of alimony or maintenance under the said section to be made to such persons having charge of the respondent as the Court may direct.

41. Wife's property in case of judicial separation—

(a) In every case of judicial separation (a) the wife shall, from the date of the decree and so long as the separation continues, be considered as a feme sole with respect to any property which she may acquire or which may devolve upon her; and any such property may be disposed of by her in all respects as a feme sole and if she dies intestate shall devolve as if her husband had been then dead; and

(b) the wife shall, during the separation, be considered as a feme sole for the purpose of contract and wrongs and injuries, and of suing and being sued, and the husband shall not be liable in respect of her contracts or for any wrongful act or omission by her or for any costs she incurs as plaintiff or defendant :

Provided that—

(i) where on any judicial separation alimony has been ordered to be paid and has not been duly paid by the husband, he shall be liable for necessities supplied for the use of the wife ;

(ii) if the wife returns to cohabitation with her husband, any property to which she is entitled at the date of her return shall, subject to any agreement in writing made between herself and her husband while separate, be her separate property ;

(iii) nothing in this section shall prevent the wife from joining at any time during the separation in the exercise of any joint power given to herself and her husband.

(2) In any case where the decree for judicial separation is obtained by the wife, any property to which she is entitled for an estate in remainder or reversion at the date of the decree, and any property to which she becomes entitled as executrix, administratrix or trustee after the date of the decree shall be deemed to be property to which this section applies, and for the purpose aforesaid the death of the testator or intestate shall be deemed to be the date when the wife became entitled as executrix or administratrix.

42. Power to allow intervention on terms—In every case in which any person is charged with adultery with any party to a suit or in which the Court may consider, in the interest of any person not already a party to the suit, that that person should be made a party to the suit, the Court may, if it thinks fit, allow that person to intervene upon such terms, if any, as the Court thinks just.

43. Evidence—The parties to any proceedings instituted in consequence of adultery and the husbands and wives of the parties shall be competent to give evidence in the proceedings but no witness in any such proceedings, whether a party thereto or not, shall be liable to be asked or be bound to answer any question tending to show that he or she has been guilty of adultery unless he or she has already given evidence in the same proceedings in disproof of the alleged adultery.

44. Remarriage of divorced persons—As soon as any decree for divorce is made absolute, either of the parties to the marriage, if there is no right of appeal against the decree absolute, may marry again as if the prior marriage had been dissolved by death or, if there is such a right of appeal, may so marry again, if no appeal is presented against the decree, as soon as the time for appealing has expired, or, if an appeal is so presented, as soon as the appeal has been dismissed :

Provided that it shall not be lawful for a man to marry the sister or half-sister of his divorced wife or of his wife by whom he has been divorced during the life-time of the wife, or the divorced wife of his brother or half-brother or the wife of his brother or half-brother who has divorced his brother during the life-time of the brother or half-brother.

45. English clergyman not compelled to solemnize marriages of persons divorced for adultery—No clergyman in Holy Orders of the Church of England shall be compelled to solemnize the marriage of any person whose former marriage has been dissolved on the ground of his or her adultery, or shall be liable to any suit, penalty or censure for solemnizing or refusing to solemnize the marriage of any such person.

46. English minister refusing to perform ceremony to permit use of his church—When any minister of any church or chapel of the said Church refuses to perform such marriage service between any persons who, but for such refusal would be entitled to have the same service performed in such church or chapel, such minister shall permit any other minister in Holy Orders of the said Church entitled to officiate within the diocese in which such church or chapel is situate, to perform such marriage service in such church or chapel.

47. Code of Civil Procedure to apply—Subject to the provisions hereinafter contained, all proceedings under this Act between party and party shall be regulated by the Code of Civil Procedure.

48. Petition to state absence of collusion. Statements to be verified—Every petition under this Act for a decree of dissolution of marriage or of nullity of marriage or of judicial separation shall state that there is no collusion or connivance between the petitioner and the other party to the marriage :

The statements contained in every petition under this Act shall be verified by the petitioner or some other competent person in matter required by law for the verification of plaints, and may at the hearing be referred to as evidence.

49. Suits on behalf of lunatics—When the husband or wife is a lunatic or idiot, any suit under this Act (other than a suit for restitution of conjugal rights) may be brought on his or her behalf by the committee or other person entitled to his or her custody.

50. Suits by minors—When the petitioner is a minor, he or she shall sue by his or her next friend to be approved by the Court; and no petition presented by a minor under this Act shall be filed until the next friend has undertaken in writing to be answerable for costs.

Such undertaking shall be filed in Court, and the next friend shall thereupon be liable in the same manner and to the same extent as if he were a plaintiff in an ordinary suit.

51. Service of petition—Every petition under this Act shall be served on the party to be affected thereby, either within or without British India, in such manner as the High Court by general or special order from time to time directs:

Provided that the Court may dispense with such service altogether in case it seems necessary or expedient so to do.

52. Power to close doors—The whole or any part of any proceeding under this Act may be heard, if the Court thinks fit, with closed doors.

53. Power to adjourn—The Court may from time to time adjourn the hearing of any petition under this Act, and may require further evidence thereon if it sees fit so to do.

54. Enforcement of an appeal from orders and decrees—All decrees and orders made by the Court in any suit or proceeding under this Act shall be enforced and may be appealed from, in the like manner as the decrees and orders of the Court made in the exercise of its original civil jurisdiction are enforced and may be appealed from under the laws, rules and orders for the time being in force:

Provided that there shall be no appeal from a decree of a District Judge for dissolution of marriage or of nullity of marriage; nor from the order of the High Court confirming or refusing to confirm such decree:

Provided also that there shall be no appeal on the subject of costs only.

55. Appeal to King in Council—Any person may appeal to His Majesty in Council from any decree (other than a decree nisi) or order under this Act of a High Court made on appeal or otherwise, and from any decree (other than a decree nisi) or order made in the exercise of original jurisdiction by Judges of a High Court or of any Division Court from which an appeal shall not lie to the High Court,

when the High Court declares that the case is a fit one for appeal to His Majesty in Council.

56. Decree for separation or protection order valid as to persons dealing with wife before reversal—Every decree for judicial separation or order to protect property obtained by a wife under this Act shall, until reversed or discharged, be deemed valid, so far as necessary, for the protection of any person dealing with the wife.

No reversal, discharge or variation of such decree or order shall affect any rights or remedies which any person would otherwise have had in respect of any contracts or acts of the wife entered into or done between the dates of such decree or order and of the reversal, discharge or variation thereof.

Indemnity of persons making payment to wife without notice of reversal of decree or protection order—All persons who in reliance on any such decree or order make any payment to, or permit any transfer or act to be made or done by, the wife who has obtained the same shall, notwithstanding such decree or order may then have been reversed, discharged or varied, or the separation of the wife from her husband may have ceased, or at some time since the making of the decree or order been discontinued, be protected and indemnified as if, at the time of such payment, transfer or other act, such decree or order were valid and still subsisting without variation, and the separation had not ceased or been discontinued,

unless, at the time of the payment, transfer or other act, such persons had notice of the reversal, discharge or variation of the decree or order or of the cessation or discontinuance of the separation.

57. Bar of suit for criminal conversation—After this Act comes into operation, no person competent to present a petition under sections 2 and 11 shall maintain a suit for criminal conversation with his wife.

58. Power to make rules—The High Court shall make such rules and prescribe such forms under this Act as it may from time to time consider expedient, and may from time to time alter and add to the same:

Provided that such rules, forms alterations and additions are consistent with the provisions of this Act and the Code of Civil Procedure.

All such rules, forms alterations and additions shall be published in the Official Gazette.

59. Repeal of Act IV of 1869—The Indian Divorce Act, 1869, is hereby repealed.

STATEMENT OF OBJECTS AND REASONS

The object of this Bill is to bring the Indian law relating to the divorce of persons professing the Christian religion into greater conformity with the English law as stated in the Matrimonial Causes Act of 1937.

The grounds of petition for divorce specified in the Bill are:—

- (a) adultery,
- (b) desertion without cause for three years,
- (c) cruelty,
- (d) incurable insanity,
- (e) rape, sodomy, or bestiality on the part of a husband.

No petition for divorce can be presented earlier than three years from the date of the marriage. There are certain other provisions relating to decrees of judicial separation and nullity, which are intended to provide relief from hardship.

In the picturesque language of the preamble to the Matrimonial Causes Act of 1937, this Bill is promoted in the interests of "the true support of marriage, the protection of children, the removal of hardship, the reduction of ill-conducted unions and unseemly litigation and the restoration of respect for the law".

The 31st January 1945

F. E. JAMES

L. A. BILL No. 15 of 1945

A Bill further to amend the Code of Civil Procedure, 1908

Whereas it is expedient further to amend the Code of Civil Procedure, 1908 (Act V of 1908), for the purposes hereinafter appearing;

It is hereby enacted as follows:—

1. Short title, extent and commencement—(1) This Act may be called the Code of Civil Procedure (Amendment) Act, 19

(2) It shall come into force from the date it receives the assent of the Governor-General of India in Council.

(3) It extends to the whole of British India.

2. Amendment of section 54, Act V of 1908—At the end of section 54 of the Code of Civil Procedure, 1908 (Act V of 1908), the following shall be added:

"and the Collector or any Gazetted subordinate, deputed shall comply with the requirements within a period not more than 12 months from the receipt of the proceedings for partition."

3. Amendment of rule 1 of the Third Schedule, Act V of 1908—At the end of rule 1 of the third schedule to the Code of Civil Procedure, 1908 (Act V of 1908), the following proviso shall be added:

"Provided that subject to all the rules and provisions of this schedule or any other law in force in British India for the time being, every sale required to be made by the Collector or his subordinate, in execution of the decree transferred to the Collector under section 68 of this Code shall be made within a period not exceeding 12 months from the date of the receipt of the decree for execution."

STATEMENT OF OBJECTS AND REASONS

At present making of partition and executing the decree by the Collector and his subordinates are delayed indefinitely and in various cases they are delayed for years.

This is an abuse of process and is most detrimental to the interests of the parties. After transferring the duty of directing partition courts feels themselves obliged to have the partition done or decree executed expeditiously since there is no statutory time limit within which the Collector should perform the needful executions. Therefore they remain pending for years, frustrating the very object of them.

The 16th December 1944

LALCHAND NAVAL

L. A. BILL No. 17 of 1945

A Bill to provide for the protection of technical personnel in industries

Whereas it is expedient to provide for the protection of technical personnel in industries;

It is hereby enacted as follows:—

1. Short title and Extent—(1) This Act may be called the Technical Personnel Protection Act, 1945.

(2) It extends to the whole of British India.

2. Definition—For the purpose of this Act—

“Technical personnel in industries” shall mean persons employed in all industrial concerns by virtue of their technical training or scientific education or both, such as, chemists, physicists, metallurgists, engineers and others of similar education and training.

3. Power to make rules and regulations and to prescribe punishment for infringement thereof—The Government of India shall provide for the protection of the technical personnel in industries by making rules and regulations in all matters affecting the interests of such personnel, including, cadres of pay with bonuses, etc., and other conditions of service including security and fixity of its tenure as well as recognition, appreciation and encouragement of invention, originality and initiative; and by enforcing such rules and regulations by making their infringement legally punishable.

STATEMENT OF OBJECTS AND REASONS

This measure is intended to put our industrial progress on a stable basis and to make such progress not only steady and continuous but more indigenous and popular. The technical personnel in industries, which consists of chemists, physicists, metallurgists, engineers and such others, is not less in importance than capital and raw materials. It is moreover different from ordinary skilled or unskilled labour. In the majority of our industrial concerns in India this technical personnel is uncared for, if not unfairly treated. Indian industries thrive in protection. The comparative inefficiency of our Indian industries is mainly due to the lack of initiative on the part of our technical men and experts for proper endeavour and research for improvements and inventions. If the genius skill and knowledge of technical and scientific men are not carefully nursed and properly utilised by providing for them requisite scope and conditions of service, it is rightly apprehended that our industries will never be able to stand on their own legs in open competition in the world and look for protection even after the war and that for an indefinite period.

NILAKANTHA DAS

L. A. BILL NO. 18 OF 1945

A Bill further to amend the Indian Penal Code, 1860

Whereas it is expedient further to amend the Indian Penal Code (XLV of 1860) for the purpose hereinafter appearing;

It is hereby enacted as follows:—

1. Short title—This Act may be called the Indian Penal Code (Amendment) Act, 1944.

2. Amendment of section 302, Act XLV of 1860—In section 302 of the Indian Penal Code (XLV of 1860) and wherever else the words ‘transportation for life’ occur in the said Code, substitute the following words:—

“imprisonment of either description for a term which may extend to fourteen years”.

STATEMENT OF OBJECTS AND REASONS

The punishment to which offenders are liable under the provisions of the Indian Penal Code are given in section 53 of the said Code and are as follows:—

First—Death,

Secondly—Transportation,

Thirdly—Penal Servitude,

Fourthly—Imprisonment which is of two descriptions, namely:—

1. Rigorous, that is with hard labour and

2. Simple.

Fifthly—Forfeiture of property and

Sixthly—Fine.

Transportation can be for any period and may even extend for life. It was intended to be a separate and distinct punishment. The original object of transportation was two-fold. Firstly it was intended to be a deterrent punishment as the idea of transportation to Black Water was generally abhorred by the Indians and secondly to colonise the places which were expected to develop considerably by the import of labourer. The author of the original conception of an Indian Penal Settlement was Sir Stamford Raffles who about the year 1787, first introduced convicts into Sumatra to develop that island. After the cession of Sumatra to the Dutch in 1825, the Indian prisoners were transported to the Straits Settlement to supplement the supply of free labour there. This continued for about 25 years and when the needs of that Colony for this form of assistance had outgrown, the choice fell finally on the

Andamans in 1858 and the present settlement was opened at Port Blair.

In 1919 the Government of India appointed a Committee to enquire into the conditions of jails in India and also to make recommendations in respect of the Penal Settlement in the Andamans. This Committee is known as the Indian Jails Committee. That Committee was very much dissatisfied with the conditions of prisoners in the Andamans. They found “the moral atmosphere of the Settlement thoroughly unhealthy” (paragraph 548). They observed that “We therefore decided that if any fresh attempt at colonisation was to be made, it must be in an entirely new locality” (paragraph 553). They examined the possibility of improvement in the Andamans or the selection of some other settlement for the purpose. After a close examination of the question they found themselves against any recommendation of a fresh settlement even.

In this connection they observed:—

“There can moreover be no reasonable doubt that it must always be more expensive to transport a prisoner to the Andamans and to guard, feed, clothe and otherwise maintain him there than it would be to keep him in his own Province in India If a proper establishment is in future maintained, the cost per head, which has always normally much exceeded that of a prisoner in an Indian jail will generally increase” (paragraph 559).

Dealing with the necessity of transportation on moral grounds they observed “We are not convinced that any sufficient reason exists to justify the undertaking of such large expenditure. The great majority of persons who are deported to the Andamans do not belong to the worst or most dangerous class of Indian criminal. Out of the total population of 12,000 about 2/3rd or 8,000 are persons who have been convicted of murder. The crime of murder in the absence of extenuating circumstances usually results in capital punishment and when this sentence is not imposed, it is often the case that the offence is what is frequently referred to in penological literature as ‘Crime Passionel’. The men who commit these crimes are often some of the least corrupted members of the prison population, and there is therefore no special reason why they should be selected for deportation to Andamans. They might quite as well be retained to undergo their sentences in an Indian prison and a circumstance which bears materially upon this point is the fact that under the present conditions out of every hundred prisoners who are sentenced to transportation not more than fifty are actually deported to the Andamans owing to the stringent rules which have been laid down in consequence of the labour requirements and health conditions of the settlement. It seems to us therefore that if half of the prisoners who are now sentenced to transportation already remain in India, other half who at present are deported, should not with some exceptions, the nature of which is noticed below, also remain in India”. The exceptions pointed out by the Committee are the frontier fanatics and desperate dacoits who are a source of danger to the security of life and property in the locality to which they belong and to whose retention in Indian jails they attributed some of the misuse of fetters and other means of restraints which they had noticed in some of the provinces.

As to the deterrent effect of the sentence of transportation the Committee observed “. Experience has however, proved that the deterrent effect, if it ever existed, has long since ceased to operate. It is a well known fact which is borne out by the evidence by many witnesses that prisoners under life sentences commonly request as a favour from the Inspecting Officers that they shall be sent away to the Andamans”. Summarising their views the Committee says:—“As deportation to Andamans has lost its deterrent effect, as it involves increased cost, as it exposes the prisoners to depressing climatic conditions, and in the case of average prisoners it is not needed from the administrative point of view, we fail to see what necessity there is for its continuance in respect of the great majority of prisoners who are now sent there”.

The Committee recommended the abolition of the punishment of transportation and in pursuance thereof a Bill was introduced in the Legislative Assembly by Sir William Vincent in September 1922. In this Bill an attempt was made to deal with each offence separately and varying terms of imprisonment were proposed as equivalent to the varying periods of transportation according to the nature

and gravity of the offence. Sir William Vincent in the Statement of Objects and Reasons stated:—

"As a result of the report of the Indian Jails Committee the Governor-General in Council proposes to abolish transportation as a form of judicial punishment and the Bill is designed to give effect to this decision. Sentences of transportation under the various laws concerned are usually admissible as alternatives to some other form of punishment. These alternatives are so various that it has been decided that the only practicable method of proceeding is to fix in the case of each offence the sentence of imprisonment which shall be substituted for a sentence of transportation for life or for a less period, if such less period is specified."

The Bill was circulated for eliciting opinion thereon and then referred to a Select Committee of which Sir Malcolm Haily was also a member. The Select Committee took the view that a simple provision prescribing a sentence of imprisonment as equivalent to a sentence of transportation would cause great hardship to the prisoners as the sentence of transportation for a term of years was in practice a lighter sentence than rigorous imprisonment for the same number of years. Provisions of facilities to the prisoners sentenced for long term years would involve great costs to the Provincial Governments and before proceeding further their consultation was necessary. They observed "that the existing law, providing as it does for long term of imprisonment, is itself unsatisfactory, and to amend that law in such as to extend term of imprisonment of this kind, would be an undesirable step".

Sir Henry Stanyon, one of the members of the Committee, wrote an elaborate note on the subject which had the approval of the members of the Committee. In his note he said:—As regards rigorous imprisonment, I agree in the view put forward, chiefly by the Honourable Judges of the Madras High Court that long continued imprisonment with hard labour is to be deprecated. The Hon'ble Mr. Justice Coutts Trotter has written "you require altogether different conditions for a short and a long sentence. The short sentence aims at a sharp and uncomfortable punishment, and so long as it is short, it may properly be made rigorous that is to say extremely—uncomfortable to the actual delinquent—in the hope of reforming him. The long sentence is passed either on account of the great gravity of the offence requiring a deterrent sentence in its length for the warning of the community at large—or on account of the proved recidivist tendencies of the prisoner, which render it necessary to remove him out of mischief conditions which would be salutary as a sharp lesson, say for two years, would be more savagery if imposed for 20 where the real object was to remove the offender, I think this is sound penology. It has been long recognised in England, where hard labour cannot be imposed on a convict for more than two years. For any longer term of imprisonment he is subjected to much less arduous conditions of penal servitude".

The scheme of Sir Henry Stanyon was to sub-divide rigorous and simple imprisonment into two further classes, thus—

Rigorous :

- Class I, i.e., with the hard labour
- Class II, i.e., with moderate labour

Simple—

- Class I, i.e., with light work and degradation
- Class II, i.e., mere confinement without degradation or compulsory work.

For transportation for life he kept a period of 20 years of imprisonment and for other periods of transportation the same period of imprisonment.

In each case however, R. I. class I was to be given for three years, the next four years were to be rigorous class II and the rest of simple imprisonment class I.

As to simple imprisonment class II Sir Henry observed, "I would reserve simple imprisonment class II for offenders whom it may be necessary to deprive of their liberty for political and other crimes not involving moral depravity, and whose position, caste, antecedents or the like may render it proper to exempt them from the ordinary degradation of incarceration in jail. But this is a detail which may be left to the discretion of the courts".

Sir Henry Stanyon wondered as to why the courts in India never looked to the provisions of section 60 of the Penal Code according to which they could award varying terms of rigorous and simple imprisonment in each case and observed "the probable reason for this omission being

the wide gulf which divides the judicial and general estimation of the punitive values and appropriate use of the two forms of imprisonment to which section 60 refers".

However, it was for these reasons that the Committee recommended that the Bill "be not proceeded with pending the consultation with local Governments we have advised and that as soon as possible thereafter the Bill should be revised and presented before the Legislatures". The revised Bill however never came up before the Assembly.

Thus we find the attempt of the Select Committee in reducing the rigour of the hard labour of the prisoners resulted in the postponement of the whole Bill.

It is thus clear that as early as 1922 the Government of India had decided to abolish the punishment for transportation but had given up the task as they thought that by adopting a simple formula of commutation as contained in section 55 of the Indian Penal Code, they were likely to increase the severity of the sentence passed on the prisoner. Section 55 provides that the Government can "without the consent of the offenders" commute the sentence of transportation for life to imprisonment of either description for a term not exceeding 14 years. In practice, however, even at that time more than 50 per cent of the prisoners under the sentence of transportation were kept in jails and now that the transportation has, due to the present conditions, become out of question, all the prisoners of that class are kept in jails.

The deletion of the word 'transportation' from the Penal Code would thus result in no practical change so far as the administration of prisons is concerned, I hope a time will come when the scheme of Sir Henry Stanyon or some other such scheme will be worked out for the reform of the prisons.

The object of the present Bill, is, however, a limited one. It will cause no change whatever so far as administration is concerned, but will give relief to the prisoners concerned as well as relieve the Government of the higher costs of transportation even if transportation become feasible in near future. It had been shown at the outset that transportation is a distinct punishment and the courts have no power to commute transportation into a term of imprisonment. In some cases great hardship is involved to persons found guilty under section 302 due to transportation for life being the only alternative to the death sentence provided by that section. Many cases of riots occurred in which the parties fight with each other resulting in, say, death to one member of one of the parties. Say there are ten persons in the opposite party. Under section 302 read with section 149 all the ten are liable at least for transportation for life. This causes sometimes great hardship to the accused and lays a burden on the public purse and the courts are powerless to intervene. Even the High Court cannot reduce the sentence in appeal as has been pointed out above because transportation for life is a punishment different in nature from imprisonment and imprisonment is not provided in section 302. A study of parts one of section 304 would make this point still more clear. It provides for transportation for life or imprisonment of either description for a term which may extend to ten years. The court has no power to award imprisonment of 11 or 12 years. There is no intermediate between transportation for life and imprisonment for ten years. By the substitution of imprisonment for a term of years for transportation for life will leave it in the power of the courts and specially the High Court to reduce the sentence to proper limits within their discretion. I have kept a period of 14 years as equivalent to 'transportation for life' as provided by section 302 of the Indian Penal Code. Any change in this term for good reasons would be acceptable to me.

MUHAMMAD AHMAD KAZI

L. A. BILL No. 19 of 1945

A Bill further to amend the Land Acquisition Act, 1894
Whereas it is expedient further to amend the Land Acquisition Act, 1894 (I of 1894), for the purpose hereinafter appearing; It is hereby enacted as follows:—

1. **Short title**—This Act may be called the Land Acquisition (Amendment) Act, 1945.

2. **Amendment of section 3, Act I of 1894**—In section 3 of the Land Acquisition Act, 1894 (I of 1894) (hereinafter referred to as the said Act),—

(i) the colon at the end of sub-section (b) shall be deleted and the following shall be added to the sub-section namely:—

"or has a right to offer prayer:" and

(ii) the following shall be inserted as sub-sections (h) and (i), namely:—

"(h) the expression 'Place of worship' means a place or building where prayer is held according to the principles of religion of a class of persons and includes all premises attached to that place or building:

(i) 'Burial place' means a place where a dead body is buried and includes graveyard, cemetery, maqbara, durgah, takia, khanquah, conotaph or samadhi."

3. **Insertion of a new section 56 in Act I of 1894**—After section 55 of the said Act, the following shall be inserted as section 56, namely:—

"56. *Act not to apply to a place of worship or burial place*—The provisions of this Act shall not apply to a place of worship or burial place."

STATEMENT OF OBJECTS AND REASONS

The provisions of the Land Acquisition Act of 1894, have hardly been applied to places of worship or burial places but owing to their being on the statute sometimes troubles have arisen in some places due to misunderstanding on the part of the government officials. It is, therefore, desirable that a section should be added in the end of this Act to the effect that its provisions are not intended to be applied to places of worship or burial places as defined in this amending Bill in its application to the Province of Delhi and Ajmer-Merwara.

M. A. GHANI

L. A. BILL No. 20 OF 1945

A Bill further to amend the Code of Criminal Procedure, 1898

Whereas it is expedient further to amend the Code of Criminal Procedure, 1898 (Act V of 1898), for the purpose hereinafter appearing;

It is hereby enacted as follows:—

1. **Short title, extent and commencement**—(1) This Act may be called the Code of Criminal Procedure (Amendment) Act, 1945.

(2) It extends to the whole of British India.

(3) It shall come into force at once.

2. **Amendment of section 14, Act V of 1898**—(1) In section 14 of the Code of Criminal Procedure, 1898 (Act V of 1898), in sub-section (1) after the word "may", the words "with the previous consent of the High Court" shall be inserted; and

(2) After sub-section (4) the following sub-section shall be added, namely:—

"(5) No person shall be appointed by any Provincial Government an Honorary or Special Magistrate of any class or shall remain in office against whom there has been a final finding of a Judicial Court of his having been corrupt or of his having the reputation of being corrupt or in the habit of deciding cases dishonestly."

STATEMENT OF OBJECTS AND REASONS

Section 14 of the Criminal Procedure Code was enacted at a time when there were no autonomous Provincial Governments and the Government of India Act of 1935 was not passed. Magisterial powers are Judicial Powers under the general supervision of the Honourable High Court in a province and this Court is primarily responsible to give Kings justice to the people. In a recent case, Criminal Revision No. 1678 of 1943, the Honourable the High Court, Punjab, Lahore, declared an Honorary Sub-Judge (Rai Bahadur Pandit Shridutt) to be corrupt and having the reputation of being a corrupt Honorary Sub-Judge and deciding the cases of his own relations and friends with dishonesty. Consequently upon this judgement of the High Court the said Honorary Sub-Judge had to vacate his office as Honorary Sub-Judge. In utter defiance and disrespect of the findings of the High Court of the Punjab the Provincial Government of the Punjab conferred upon the said Rai Bahadur Pandit Shridutt powers of an Honorary Magistrate of the second class thereby giving him greater scope to extend his corrupt practices.

In view of the above instance and other considerations the amendment of section 14 of the Criminal Procedure Code as pointed out in the Bill is necessitated.

SHAM LAL

L. A. BILL No. 21 OF 1945

A Bill further to amend the Code of Civil Procedure, 1908

Whereas it is expedient further to amend the Code of Civil Procedure, 1908 (V of 1908), for the purposes hereinafter appearing;

It is hereby enacted as follows:—

1. **Short title**—This Act may be called the Code of Civil Procedure (Amendment) Act, 1944.

2. **Amendment of section 103, Act V of 1908**—To section 103 of the Code of Civil Procedure, 1908 (V of 1908), the following shall be added, namely:—

"or of which the determination by such courts though not vitiated by such illegality, omission, error or defect, has in the opinion of the High Court, been plainly erroneous, perverse or unjust".

STATEMENT OF OBJECTS AND REASONS

Section 100 of the Code of Civil Procedure deals with the grounds of Second Appeal in civil suits. The grounds given there are follows:—

(a) The decision being contrary to law or to some usage having the force of law;

(b) the decision having failed to determine some material issue of law or usage having the force of law;

(c) a substantial error or defect in the procedure provided by this code or by any other law for the time being in force which may possibly have produced error or defect in the decision of the case on merits.

Section 103 defines the powers of the High Court in Second Appeals. According to this section the High Court may in the Second Appeal determine any issue of fact—"which has been wrongly determined by such (lower appellate) court by reason of any illegality, omission, or error or defect such as is referred to in sub-section (1) of section 100". Thus by reading the two sections together we find that the restrictions imposed by section 100 of the Criminal Procedure Code are binding not on a party to the appeal but they restrict the power of the High Court as well. This restriction has been clearly appreciated by Their Lordships of the Privy Council. They in 1929 A.L.R., P.C. page 1521 approved of the observation made by the Judges of the Calcutta High Court reported in 18 Calcutta L.R., page 25.

"It is enough in the present case to say that an erroneous finding of the fact is a different thing from an error or defect in proceeding and there is no jurisdiction to entertain a Second Appeal on the ground of erroneous finding of fact however gross or inexcusable the error may seem to be". The Learned Judges of the Calcutta High Court used the words "however gross or inexcusable the error may seem to be", but if we were to use the word "however gross or inexcusable the error may really be", the jurisdiction of the High Court would not be extended. This is an anomaly. The High Court of Justice unable to put right a palpable wrong committed by courts subordinate to itself, is a position which cannot be justified on any principle. This is so even if the trial court has decided the matter correctly and it is the lower appellate court who has committed the mistake. In case of the First Appeals which are heard by the High Court, if the judgement of the trial court is upset, an appeal lies to the Privy Council on a question of fact also, and even in cases in which the High Court confirms the decision of the trial court, the powers of the Privy Council are not so restricted and section 112, C. P. C., gives them sufficient power to deal with the matter at their discretion. But so far as section 100 is concerned, it does not make any difference even on that basis. There is an evident difference between a finding of fact arrived at concurrently by two courts and a finding in which the lower appellate court has differed from the first court. One must attach great sanctity to the decision of the trial court on facts, because it had the

advantage of recording the evidence and watching the demeanour of the witnesses, but the same sanctity cannot be attached to the judgment of the First Appellate Court when it chooses to set aside the finding of the trial court. There is little difference between the first and second appellate court on this count, and if there can be difference it is that generally the Second Appellate Court is more efficient and experienced than the first one. As pointed out this principle is recognised in appeals to the Privy Council. On a smaller scale this principle has been recognised even by the U. P. Land Revenue Act, section 210 of which allows Second Appeals on the ground that "the original order has in appeal been varied, cancelled or reversed".

In 1939 I introduced a Bill in the Assembly in which I sought an amendment of section 100, C. P. C., by the addition of the following to sub-section (1)—

"(d) the original decree of the trial court having in appeal been varied, cancelled or reversed:

Provided that a High Court while hearing a second appeal on any of the grounds (a), (b) or (c), may in its discretion determine the correctness or otherwise of the decision on points of fact also, if it thinks that the decision of the court below is erroneous or unjust."

In the Statement of Objects and Reasons of that Bill I traced the whole history of the Second Appeals, and the reasons for restrictions and the way in which the rigour of the law had been softened by the High Courts in actual practice. But this depends upon the temperament of the individual judges and is a factor that cannot be relied upon. That Bill was circulated for eliciting opinion. The public opinion was overwhelmingly in favour of the Bill but the majority of the High Court Judges and the Government were against the Bill mainly on the ground that the amendment sought for would increase the work in the High Court. So I did not proceed further with the Bill, and want to introduce this as a measure of compromise, by which I mean to give no additional rights to the parties to an appeal but only remove an undue restriction on the powers of the High Court. This it is expected would help the administration of justice to some extent without increasing the amount of work.

MUHAMMAD AHMAD KAZMI