M.R.O. 1—32,000—16-10-29.

MADRAS RECORD OFFICE.

Government of Madras.

Judicial DEPARTMENT.

G.O. No.	1317	Press ~~Mis.~~
77-80		
Dated		No. 1860

11/12

Not to be folded or roughly handled

Proceedings of the Madras Government, Judicial Department,
11th October 1860.

No. 77. Read the following letter from CLEMENT DALE, Esq., Government Pleader, Sadr Adalat, to T. PYCROFT, Esq., Chief Secretary to Government, dated Madras, 18th August 1860, No. 121.

Para. 1. I do myself the honor of acknowledging the receipt of the Order of Government noted in the margin, whereby I am requested to report upon the extent to which Converts in the Madras Presidency are affected by the existing state of the Law respecting marriages.

Order of Government, 31st March 1860, *No.* 395, *Judicial Department, on letter from the Government of India, 10th March* 1860, *No.* 524.

2. By the term "Converts," is I presume meant Converts to Christianity from Mahomedanism and Hinduism; and that the question is confined to those who have been married according to Mahomedan and Hindu Law previously to their conversion.

3. I may premise that (so far as I know) no decision has been passed by any of the Courts in this Presidency bearing on the subject, with the exception of an Order made some years back in the Supreme Court by Sir William Burton, in the case of Philip Streenevassa. That Order was made on the Crown side, on the return to a Habeas Corpus issued on the application of Philip Streenevassa for the delivery to him of his wife, who was forcibly detained by his or her parents. The husband and wife at the time of their marriage were Hindus, and had since cohabited together: The husband subsequently became a Convert to Christianity, whereupon the relatives of husband and wife treated him as dead, and her as a widow. The Order of the Supreme Court was, that the wife should be delivered over to her husband.

4. In the absence of all authoritative decision on the point, it is a matter of great difficulty to answer the question propounded.

5. I however am of opinion, that in the event of the question being raised, while the Law is in its present state, the Courts would decide that a marriage before conversion was binding on both the parties.

6. And (as regards Hindus) that such marriage was binding, whether only the "first marriage" or "betrothment" had been performed; and notwithstanding that at the time of such betrothment, the parties (or the female) were mere infants; and whether cohabitation had or had not ensued.

7. It follows that a Convert who has been married before his or her conversion, cannot marry again during the life of his or her wife or husband, without the risk of being indicted for Bigamy, unless for sufficient cause a divorce a vinculo matrimonii were obtained.

8. And such divorce can only (as I believe) be obtained, by persons resident in India, by an Act of the Imperial Parliament.

9. In paragraph 6 I have alluded to marriages by Hindus while mere children, and have confined that allusion to Hindus, because in the marriage of Mahomedans, discretion and puberty with proposal and consent are essential to a contract of marriage. And Mahomedan girls at puberty may repudiate a contract of marriage entered into on their behalf before arriving at the age of puberty.

10. Moreover as between a Mahomedan husband and wife, one of whom became a Convert to Christianity, the Convert need not necessarily be affected by the existing Law, because as the marriage of a Mahomedan with a Christian, Jew, or person of other religion believing in one God is legal; there can be nothing repugnant to Mahomedan Law, in the husband and wife, after conversion of one, continuing to cohabit.

11. As regards Hindus the Law is different, for by Hindu Law the Convert is considered as civilly dead; the party therefore who continued to profess the Hindu religion, could not cohabit with the Convert without losing caste, and becoming an out-caste.

12. Probably on the strength of Philip Streenevassa's case, the Supreme Court might order a Hindu wife to be delivered over to her Christian husband, but I think it scarcely admits of a doubt, that the Mofussil Courts and the Sudder Court would look upon the Convert as an out-caste; and that in those Courts a Convert would not be able to obtain any assistance, or restoration of conjugal rights.

13. If my opinion be well founded, it follows that as regards Converts from Hinduism, who were married previously to conversion, the extent to which they are affected by the existing state of the Law respecting marriages is, that the obligation of their marriage contracted when Heathen, and perhaps mere infants, is still binding on them, although they are precluded from obtaining any of the rights or advantages of a conjugal state.

14. In paragraph 6, I have alluded to the custom of marriages or betrothment of Hindus when mere infants, generally, as regards females, from 2 to 8 years of age. It is laid down in 1st Strange, page 37, that the betrothment once effected, the contract is perfected; and may be enforced by the husband "on completion of the time. As between Parsees it is held indis-"soluble." And in the 2nd volume, page 32, a remark by Mr. Ellis is quoted in much stronger terms as follows: "If what is here called betrothment, be the first, or real marriage (for the "fetching home of the bride at the age of puberty, commonly called the second marriage, is "merely the solemnization, not the celebration of the rite) the woman cannot be married again "(except in some castes, where custom supersedes the Law) and, as I know of no distinction "made by the Hindu priests between consummation and non-consummation, she is, in my "opinion, entitled to be considered in every respect as a wife." Reverting however to the doctrine quoted from the 1st volume where the learned author pointedly states that "as between "Parsees it (the betrothment) is held indissoluble" the fair inference is, that among other classes, although the betrothment may be enforced (how is not stated) it is not indissoluble; indeed in the 2nd volume of Sir Thomas Strange's work, page 34, an opinion of the Bombay Pundits is quoted, in which (after stating that the custom of the caste had been ascertained) they proceeded to say, "it appears that where the first betrothment has been accompanied with presents, it is con-"clusive," and after noticing that from the particular circumstances of that case, they were of opinion that the first betrothal ought to be established, they conclude as follows: "It being "ordained in the Mitacshara that a girl shall only be betrothed once, *unless the betrothment* that "has taken place, be *liable* to be revoked for sufficient reasons, such as disease, *bad conduct* "*in the man*, and the like." It is perhaps superfluous to remark, that amongst Hindus, conversion to the Christian faith would be looked upon as conduct of the very worst description. Then again in page 35, the Bombay Pundits say "the father having betrothed his daughter in consi-"deration of a sum of money stipulated, the betrothment is Asaor Viva; and on payment of the "money it cannot be set aside; *otherwise it may*." In support of the opinions of the Pundits first quoted, reference is made to the following verses in the 4th Book of Jagannatha, viz., verse 180, "if a damsel is betrothed to 2 or more persons, and the first bridegroom arrive "before the second nuptials are completed, then, of all the persons to whom she is promised, he "to whom the first promise was made shall obtain her; and the other shall recover what he had "given to the bride: but if the first bridegroom arrive when the second nuptials have been con-"summated, he shall receive back what he had given." Also to verse 176, "once is a damsel "given in marriage, he who detains her shall incur the punishment of a thief: *but if a worthier* "*bridegroom offer, he may take the damsel though given away*, provided the first were undeserv-"ing." Again to the 177th verse "the gift requires excellent qualities in the bridegroom *for its* "*irrevocable* validity." And in verse 178, it is stated that from a man of contemptible birth, &c., "a parent may take back a damsel though given away."

15. I believe that if a case were brought before the Courts of this Presidency, it would be held, agreeably to the opinions expressed by Sir Thomas Strange and Mr. Ellis which I have quoted, that the betrothment is indissoluble. I have entered somewhat fully into the subject, as it appears from the texts quoted that the subject is not free from doubt, which may probably induce the Legislature to add a declaratory Section, that in cases in which betrothments have been made on behalf of parties of tender age, from which legal consent by such party cannot be inferred, and in which before the 2nd marriage and consummation have taken place, either party becomes a convert from the Hindu religion, then such betrothment shall not have the effect of a marriage, so far as such convert is concerned, and he or she shall be at liberty to contract marriage without being liable to the penalties attached to Bigamy.

16. I would observe that such Convert is considered by Hindu Law as civilly dead, and therefore under that Law the ceremony of the second marriage could not be enforced; so far

Proceedings of the Madras Government Judicial Department,
11th October 1860.

therefore as the party who retains their original faith is concerned, no hardship would ensue, nor would any violence to the feelings of Hindus, generally, be offered by such an enactment (if the Convert were a male) inasmuch as Polygamy is allowed by their Law.

17. It may be worthy of remark, that if the conversion be to the Christian faith, the Law of that Church requires that at the time of a marriage being contracted, the parties should be, 1st, willing to contract; 2ndly, able to contract; and lastly, did actually contract. Moreover under the Civil Law, a marriage by a boy under 14, or a girl under 12, is only inchoate and imperfect, and the marriage is rendered void by either of the parties disagreeing on arriving at the age of consent, without any sentence of the Spiritual Court, and the parties may marry any other person; although if at the age of consent they agree to continue together, a second marriage is not necessary. I also understand that an opinion is prevalent amongst Christian bodies of various denominations, that betrothment entered into on behalf of children of Hindu parents, while of tender age, are "mere idle ceremonies entailing no duties on Converts to Christianity, and conveying to "them no rights;" and Missionaries of the Church of England, I believe, in such cases require, that from children of Christian Converts placed under their instruction the badges of marriage should be removed. Moreover some Clergymen of the English Church, hold the opinion that if a Priest of that Church, were to refuse to celebrate the marriage of a Christian Convert, who when of immature age had been betrothed by Hindu relatives, but had not celebrated the second marriage, such Priest would render himself amenable to the Civil Law. How far such position is well founded, I am not called upon by the present reference to offer an opinion; but I refer to it, as shewing not only the doubt that exists regarding the legality and conclusive character of the betrothment of a child of tender years by Hindu relatives, but also the difficulty in which Clergymen of the Church of England, carrying on their duties in India, feel themselves involved.

18. On receipt of the Order of Government noted above, I did not observe that my report was to be restricted to the one point quoted in paragraph 1; and under a misapprehension that I was required to offer an opinion "upon the expediency of altering the Law" in the terms of Mr. Secretary Grey's letter of the 10th of March 1860, No. 524, I instituted some enquiries, with the view of eliciting information and opinions on the subject, and from information received I subsequently placed myself in communication with Mr. Dealtry, through whom the Bishop of Madras kindly promised to furnish me with copies of papers he had obtained on the subject; considerable delay ensued, and I have only lately received a portion of the papers, the remainder having been (as I am now informed) forwarded by His Lordship to the Metropolitan; I regret the delay which has been caused in forwarding this letter from my endeavour to obtain information, the more so, as I now observe the point to which my report was to be limited.

No. 78. MINUTE BY THE HONORABLE EDWARD MALTBY.

In the case of Mohamedans no alteration of the law seems necessary, as their laws sanction marriages with Christians.

2. But in the case of Hindoos, the peculiarity of their institutions renders it very essential, in my opinion, that the subject treated of in these papers should be set at rest by the Legislature.

3. Under the Hindoo law, the contract of marriage only holds good while both the parties retain their caste, and religion. On a Hindoo losing caste, he is treated as virtually dead. His relations perform funeral obsequies for him, and break off all domestic ties for ever. The marriage contract thus comes to an end by Hindoo law and usage, on the husband or the wife becoming an out-caste; and it seems to me highly desirable that the general law of the Empire should provide for this contingency, so as to put a stop to all doubt and difficulty about the position of the Christian convert, and give due protection to the party who remains in caste.

4. The evil resulting from the want of a clear law on the subject was strikingly shown, in my opinion, in the case of Phillip Streenevassa to which Mr. Dale alludes in para. 3 of his letter.

5. I have not the record of the case at hand to refer to, but believe that the main facts were as follows:

Phillip Streenevassa, a Hindoo became a convert to Christianity, and applied to the Supreme Court for the restoration of his wife (an adult) who had gone on his conversion to her own family. The wife was produced in Court under a writ of Habeas Corpus, and though she claimed to remain with her own family, declaring that the applicant was no longer her husband, she was delivered to him by force and against her will.

6. The Judge who decided the case, Sir W. Burton, quoted Act 21 of 1850, in support of his decision (unless my memory is incorrect) but it appears to me that that Act applies to *property* only, and that the Legislature never intended the rights and conscience of a Hindoo wife to be so interfered with. Sir W. Burton ordered, indeed, that this woman was to have her food dressed by a person of her caste, but when she was forced to live with an out-casted husband, this precaution was not of the least avail, and she was virtually deprived of her rights of conscience and her relations by this decision.

7. It is most highly desirable, in my opinion, that the Legislature should prevent the possibility of such a case occurring again. I concur in the principle of the Bill that on a Hindoo husband becoming a convert to Christianity and his wife refusing to continue to live with him, the marriage should be formally dissolved, on these points being established before a Judicial authority. But especially where both parties are adults, I think that the dissolution of the marriage should take place after an interval of six months. This would give ample time for reflection to all the parties interested, and I should anticipate unfavorable consequences from the longer delay of 2 and 4 years which is proposed by Sir C. Jackson.

8. The case of a Hindoo wife converted to Christianity has a somewhat different aspect. By her conversion she has virtually given up her husband and relations. The law could not force them to associate with her, nor would it I presume make any such attempt, or oblige the husband to support a wife who had made herself dead to him. In this case the Hindoo husband is now perfectly free to re-marry, and the question in regard to the converted wife would be whether under the Christian laws she was in a position to contract a new marriage. Into the religious part of this question I shall not enter, nor is it necessary to do so. Under the English laws a wife who has been abandoned by her husband may marry another man, after a fixed interval, without exposing herself to a charge of bigamy. I would follow this principle, but in a more decided and complete form, with regard to the convert wife, who has been repudiated by her husband. For the sake of humanity and morality, she should, I think, be declared free to marry again.

9. By general law, as well as by the law of England, the father has the right to children born in marriage. A change of religion either on the part of the father or the mother should not in my opinion deprive a father of this right, where the children are infants, and where the father is not shown to be an improper guardian on other grounds than that of religious opinions.

(Signed) E. MALTBY.

24th September 1860.

No. 79. MINUTE BY THE HONORABLE THE GOVERNOR.

I believe that, according to Hindoo law, there is but one marriage ceremony, the betrothal, and that the fact of the husband or wife becoming a convert to another faith, renders the marriage practically void, as observed by Sir C. Jackson. All that appears to me necessary in such a case, is to leave it to the party remaining in caste to declare, whether he or she will relinquish caste and join the convert. In case of such consent, the marriage should hold good. If consent to join be refused, the marriage should be declared at an end, and the convert allowed to re-marry. A law to this effect should therefore in my opinion be passed. The Magistrate should be the authority empowered to administer the law. The process might be simple. On an application from the convert, a notice might be served on the party remaining in caste, to appear, and state what he or she meant to do. On refusal to join the convert, a formal award should be passed, declaring the marriage void. The age of the girl does not appear to me to affect the question. She acts under the control of her guardians, and to wait until she became

of age would answer no good purpose, and would only tend to embarrass the whole proceeding, which should be as simple and expeditious as possible.

2. This form of procedure would in no respect invade or disturb the Hindoo system of law, and would afford the convert all the assistance he or she can require.

3. As regards Mahomedans, the conversion of one of the two would not, under their law, operate, or produce the necessity for a divorce.

4. The difficulty as to which of the parties is to have the children, is to my mind a far greater one than that connected with their marriages. I would, I am inclined to think, allow the law under which the children are born to govern the matter. That this may operate painfully upon the convert's feelings, there can be no doubt. But I can hit upon no legitimate remedy, to obviate this, and certainly the feelings of the other party are in this instance equally entitled to consideration.

(Signed) W. A. MOREHEAD.

25th September 1860.

No. 80. To the Secretary to the Government of India, Home Department, dated Fort Saint George, 11th October 1860, No. 1,317.

I am directed by the Honorable the Governor in Council to acknowledge the receipt of your letter under date the 10th March last, Home Department, Judicial, No. 524, transmitting copy of a correspondence relative to a Bill introduced by Sir Charles Jackson, for the dissolution of marriages of Christian Converts, and requesting that with the permission of His Excellency the Governor in Council, a report may be furnished upon the extent to which such Converts in the Madras Presidency are actually affected by the existing state of the law and upon the expediency of altering the law.

2. In reply I am directed to forward, for submission to the Supreme Government, the accompanying report of the Government Pleader upon the extent to which Converts in the Madras Presidency are affected by the existing state of the law respecting marriages.

3. I am likewise desired to forward the enclosed Minutes which have been recorded by the Honorable the Governor and by the Honorable E. Maltby, conveying their views as to the expediency of altering the present law.

(Signed) T. PYCROFT,
Chief Secretary.

Exd. F. Cartledge.

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death by Lt C Jackson, de
that apprehend the necessary
in such a case - it to leave it
to the party delinquent in case
to declare whether he or
she will relinquish the case

join the consent — In case of
such consent the marriage
should hold good — If con-
sent to join be refused
the marriage should be
declared at an end — & the
consent allowed to be mar-
-ry — Also to this effect should
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The age of the girl does not
appear to me to affect the
question — The acts under
the contract

of her own desires & to avail
until the happiness of a
husband whom we pray
Justice & humanity
to embrace the whole
Jewish community which shou
be as sensible & Patriotic
as possible —
This form of Prosecution
would in no respect in
vade or disturb the
Freedom & Systems of Law
& would afford the
Govt

Govt to decide the question
to be required —
As regards Mahomedans
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the difficulty as to
which of the parties is
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is to my mind a far
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marriage - I am
disinclined to think
that the law under which
the Children are born

govern the matter - Such
ties may dissolve peaceably
when the torments failing
there can be no doubt -
But I can see no
legitimate remedy, to
decide this - and as
long as the feeling of the
two parties are in
this unhappy
condition equally
entitled to the =
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8

Before offering remarks on
the subject I would like to
see the Bill - Perhaps it is in
the Office among the proceedings
of the Legislative Council

Ede

Minute

The questions referred by the Govt of India are—

The extent to which Christian Converts in the Madras Presidency are actually affected by the existing state of the Law regarding marriage—

and secondly—

On the competency of a Native to act as Pleader—

The report from the Govt Pleader shows what in his opinion is the present state of the Law—

It will be for the consideration of the Members of Govt whether it be

Expedient to alter it.

22-8-60

Dispd 12th Oct.

Judicial Department

No 1317. 10

Govt of India

Home Dept.

I am to acknowledge the receipt of your letter under date the 10 Inst. Home Dept. Legl No 524 transmitting copy of a correspondence relative to a Bill introduced by Sir Charles Jackson, for the dissolution of marriages of Christian Converts, & I am desired to request that with the permission of His Excy the Govr in Council, a report may be furnished upon the extent to which such Converts in the Madras Presy are actually affected by the existing state of the law & upon the Expediency of alter-ing the Law -

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Pendency an Act to
by the existing state of
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Marriages —
3. Save Licenses
directed to persons and
Churches hereafter
which have been issued.
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Solicitor General
Provincial Secretary
24 pedicing & altering
the present Law.

Fort St George,
11 October, 1860.

JP

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