

Legislative (1895) Department.

ORDINARY PRINTED.

G.O., No 92

Dated 24th Sept. 1895

36137

[Despatch Abstract.]

BILL TO CONFER UPON PERSONS FOLLOWING THE MARUMAKKATAYAM AND
ALIYASANTANA LAWS OF INHERITANCE TESTAMENTARY POWER OVER THEIR SEPARATE
AND SELF-ACQUIRED PROPERTY.

Requesting the Honourable the Judges of the High Court to
favour this Government with their opinion as to the advisability
of recasting the -- on the lines recommended by the Advocate-General,
and accepting Mr. Justice Parker's suggestion that the -- should be
declaratory in form.

BACK PAPERS.

G.O.	No.	Department.	Date.	G.O.	No.	Department.	Date.

FURTHER PAPERS.

G.O.	No.	Department.	Date.	G.O.	No.	Department.	Date.

Re Bill to Confer upon persons following the Marumakkattayam and Aliyasantana Laws of Inheritance Testamentary power over their separate and self acquired property

Opinion

1. When I sent in the above draft Bill, I understood that its operation was to be confined to Hindus following the Marumakkattayam and Aliyasantana Laws of Inheritance and to be contingent on the passing of the Honble Mr. C. Sankaran Nayar's Malabar Marriage Bill which contained provisions relating to Wills.

2. Unless and until that Marriage Bill is passed, the Hindu Wills Act cannot, I think, be extended at all, because it is inapplicable to such family relations as exist under the Marumakkattayam and Aliyasantana systems of law. It contemplates a family consisting of husband and wife and their children either begotten or adopted. To such a family the sections of the Indian Succession Act mentioned in Section 2 are applicable when extended. Those sections could not be applied to a Malabar family without modification, e.g.

Explanation

explanation of Section 46 is inapplicable. Take two other examples to illustrate the necessity for modification not only of the Sections themselves, but even of the Illustrations to many of them. Illustration (a) to Section 48 assumes that the child therein referred to would inherit his father's property but for the Will fraudulently obtained. Section 62 refers to the testator's "family," and Illustration (a) shows that the "family" contemplated is of a kind unknown to, or unrecognised by the peculiar systems of law above mentioned.

3. If the Bill to confer testamentary power is to be dealt with as entirely independent of the Malabar Marriage Bill, I think that a mere extension of the Hindu Wills Act will not suffice, but that it will be necessary to frame a Bill on the lines of those Sections of the Indian Succession Act which were extended by Section 2 of the Hindu Wills Act, but with such modifications as the necessities of the case demand. If Government agree with me upon this point, I will prepare a draft of such Bill and submit it in substitution for the Bill now under consideration.

4. I am inclined to think that such
a

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a Bill is necessary, because, even if the Malabar Marriage Bill be passed into Law, it will not affect all persons at present governed by the Mammakkhatayam and Aiyasantana rules of inheritance, whereas the power of disposing of separate and self-acquired property by will is to be conferred on all such persons.

(Sd.) J. H. Spring Branson
Advocate General

Madras
18th March 1895

(True Copy)

Ernest Barker
Government Solicitor

72
Leg (1895) Department
From Ernest Parclay
Government Solicitor
Madras

To The Chief Secretary to
Government
Madras

152
Dated 20 March 1895
Recd 20
Recd 21

Forwarded with reference
to the Order of Government
dated 25 February 1895
U^o 15 Legislative
Ernest Parclay
Government Solicitor

21st March 1895. No. 625

Returned to the Honble
the Secretary General as requested
personally.

A. Muttiah
Under Secy to Govt

To The Govt Secretary.

Preamble
Hindu Wills
Act XXI of
1870.

CURRENT NO. 97 38
Re - Bill to confer upon persons following the
Marumakkattayam and Aliyasautana Laws of
Inheritance testamentary power over their separate
and self acquired property

Opinion

1. With reference to my opinion dated the 18th
March last which was returned to me at my
request for further consideration, it appears to me
that the sections of the Indian Succession Act
extended to Hindu Wills by Act XXI of 1870 may
be extended to Wills made under the powers con-
ferred by this Bill. The enquiries provided for by
Section 62 of the Indian Succession Act ought
to clear up any difficulties which may arise
by the use, in the Wills of those whose marriages
are not registered, of words and phrases apparently
inapplicable to such family relations as exist
under the Marumakkattayam and Aliyasau-
tana systems of law.

2. There is so much in the Hindu Wills Act, 1870,
that it is unnecessary or inexpedient to extend to
the class of Wills now under consideration that
Section 3 of the Bill should be omitted and the
whole Bill should be amended in the manner
hereinafter provided.

3. Preamble - Strike out the words "it is hereby
enacted as follows" substitute the word "and", and
add the following. "Whereas it is expedient to provide
rules for the execution, attestation, revocation, revival
interpretation, and probate of the Wills of such person
"it is hereby enacted as follows".

Th

This appears to be necessary for two reasons, because
(1) the Bill does more than merely confer a testamen-
tary power, it provides for certain formalities which
are intended to secure cogent evidence of execu-
tion of Wills and of the intention and capacity
to execute them:

(2) no reference is made to the Hindu Wills Act.
The present Bill will be complete in itself if my
suggested amendment of the present section 3
be adopted.

4. Section 3. Omit this section and substitute the
following:-

(3) The following portions of the Indian Succes-
sion Act, 1865, namely-

Sections 46, 48, 49, 50, 51, 55, and 57 to 77 (both inclusive)

Sections 82, 83, 85, 88 to 103 (both inclusive)

Sections 106 to 177 (both inclusive) and
Section 187

shall, notwithstanding anything contained in
Section 331 of the said Act, apply to all Wills
and Codicils made by any person under the
powers conferred by this Act. Provided that
the Registration of a marriage under the provisions
of any Act for the time being in force rela-
ting to the marriage of persons following the
Marumakkayam and Elliasantana Laws
shall not revoke any such Will or Codicil, and
that nothing herein contained shall authorise
a testator to bequeath property which he could
not have alienated inter vivos; and that

Section 2.
Hindu Wills
Act XXI of
1870

Section 3.
Hindu Wills
Act XXI of
1870

Section 5. Hindu
Wills Act XXI
of 1870

Section 6. Hindu
Wills Act, XXI
of 1870

nothing herein contained shall affect any law of
adoption."

(4) Nothing contained in this Act shall affect the
rights, duties and privileges of the Administrator
General of Madras."

(5) In this Act and in the said sections and Parts
of the Indian Succession Act, all words defined in
Section 3 of the same Act shall, unless there be
something repugnant in the subject or context, be
deemed to have the same meaning as the said
Section 3 has attached to such words respectively."

"And in applying Sections 62, 63, 92, 96, 98, 99,
100, 101, 102 and 103 of the said Succession Act
to Wills and Codicils made under this Act, the
words 'son' 'sons', 'child' and 'children' shall be
deemed to include an adopted child, and the
word 'grand children' shall be deemed to include
the children, whether adopted or natural born,
of a child, whether adopted or natural born,
and the expression 'daughter-in-law' shall be
deemed to include the wife of an adopted son.

5. This arrangement will prevent the setting up
of non-cupative Wills, secure the due and formal
execution of all Wills made under this Act, and
confine the testamentary power to devise by Will of
such property only as the testator could transfer
by gift inter vivos.

6. The provisos about "maintenance" and intestate
succession" contained in Section 3 of the Hindu Will
Act are omitted as inapplicable or undesirable.

With regard to intestacy there seems to be considerable difference of opinion as to what rights, if any, should be conceded to the widow and children. Moreover, it is not quite clear whether any difference is to be made between persons whose marriages are registered under the proposed marriage Bill and those who are not registered as husband and wife. Probably it is wiser to leave this subject open, to be disposed of hereafter, if necessary in a manner somewhat similar to the Parsi Succession Act, 1865.

J. H. Spring Branson
Advocate General

Madras
17th April
1895.

(True copy)

Ernest Baulg

Government Solicitor

CURRENT NO. 97.
Legislative (1895) Department

From
Ernest Barclay
Government Solicitor
Madras

To
The Chief Secretary to
Government
Colonial and
Amund

CHIEF SECRETARY
GOVERNMENT OF MADRAS
19. APR. 1895

No 239.

Dated 18 April 1895
Recd 19th } do.
Repd. 20th }

Enclos ~~X~~ C No 72 in dispute
3. 13 Books. to be ret'd.

Forwarded with enclosure
with reference to the En.
Government of Government
dated 21st March 1895
No 625.

Ernest Barclay
Government Solicitor

No. 1324.

High Court of Judicature,
Madras, 2nd May 1895.

From

D. W. G. Bowie Esquire, 5th
Acting Registrar of the High Court
of Judicature, Appellate Side,
Madras.

To

The Honorable J. F. Price, C. I. J.,
Chief Secretary to Government,
Fort Saint George.

Honorable Sir,

With reference to Government
Order dated 25th February 1895, No. 15, Legislative,
forwarding, for the opinion of the Honorable the
Judges, a Bill to confer upon persons in the
Presidency of Madras who are governed by the
Marumakkattayam or the Aliyasantana Law
of Inheritance, testamentary power over their
separate and self-acquired property, I am direct-
ed to forward the minutes recorded by the
Honorable Justices Parker, Shephard, Best
and Subrahmaniga Aiyar.

I have the honor to be,
Honorable Sir,
your most obedient servant,

D. W. G. Bowie

Acting Registrar.

Minutes

Mr. Justice Parker:— The language of the Bill in professing "to confer" upon persons governed by the Marumakkattayam or Alyasantana law of Inheritance testamentary powers appears to me inaccurate. It is by no means certain that the limited testamentary power which it is proposed "to confer" does not exist already. It has never been decided that it does not exist and in *Alami. V. Homu* (Indian Law Reports XII. Madras, 126) it was pointed out that since 1826, wills have been made in Malabar in regard to self-acquired property regulating its future management and sometimes giving it to one class of heirs in preference to another. I observe from Mr. Lyall's letter of 31st January 1894, No. 112, that the proposal of Government was that the right to testation in respect of self-acquired property should be "declared" and the Statement of Objects and Reasons appears to contemplate a declaratory Bill only. I would therefore recommend that the title and preamble of the Bill be altered accordingly. This is not a question of mere verbal amendment but is one of substantial importance since if the Bill purports to confer rights which were not in existence before, it might be construed so as to invalidate documents executed before the passing of the Act, and this certainly cannot have been intended. The Act should therefore

therefore be a declaratory one and it should come into effect from the date of the passing thereof. This latter provision has been overlooked in the draft Bill.

I doubt whether it is expedient to use the phrase "separate and self-acquired" property. I do not understand what distinction is intended. Apparently the object of the Bill is to declare that a testator shall have the same power to devise by will self-acquired property as he has to alienate it *inter vivos*. I think it will be sufficient to use the term "self-acquired" property.

It appears to me open to considerable doubt whether the Hindu Wills Act (XXI of 1870) can be conveniently applied to such wills. It must be remembered that the Hindu Wills Act, as also the Indian Succession Act (many of the provisions of which are imported by Section 2) was framed entirely for application to communities among which there is a legal form of marriage. This is not existent in Malabar; and there might be difficulty in applying sections 46, 62, 63, 96 and other sections of the Indian Succession Act to a community in which there are no married women, and in which a man has (in law) no lineal descendants. I observe that the Government of India is not prepared to extend Act XXI of 1870 to the whole of the Madras Presidency and

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and only approves of the suggestion to extend it to Malabar on the ground that where there have hitherto been no wills at all, the Legislature may "in conceding the privilege of testation" impose all conditions essential to due formality. The records of our Courts show that the premise of this argument is historically inaccurate, and that the execution of wills can be traced back as far as 1826. I can see no reason to extend to the classes governed by Marumakkattayam and Mhyasantanam Law, the provisions of an Act which the Government hesitates to extend to the rest of the Presidency and the fact that that Act is obviously framed for communities having a legal form of marriage renders the proposal still more unsuitable. It might of course be possible to introduce a modified form of the provisions of the Indian Succession Act, but I should hesitate to take such a step without further experience of the effect produced by passing a simple declaratory Bill.

Mr. Justice Shephard:— The words 'in the Presidency of Madras' seem to me superfluous as the Act is expressly declared to apply to the Presidency only. If it is necessary to use the word 'separate' at all, I would say 'separate or self-acquired'. Either word, it seems to me, would serve by itself. But the phrase 'separate and self-acquired' may mislead. Instead of the

the reference to 'sound mind and minors' in section 2, I would suggest in substitution for the 3rd section "The provisions of the Hindu Wills Act shall apply to all dispositions made under this Act and shall be read herewith". That would make it clear that the whole Act is to apply, which perhaps is not beyond doubt in the 3rd section as it is drafted. Otherwise I see no objection to the Bill and think it will be a most salutary piece of legislation.

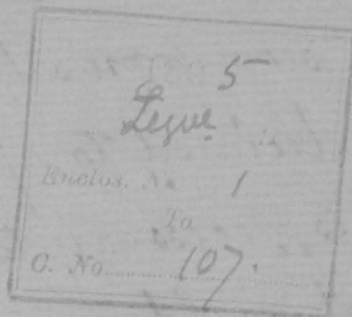
Mr. Justice Best:— The Bill, as drafted, appears to be sufficient for the purpose in view. It seems to me that Act XXI of 1870 can be applied in its entirety.

Mr. Justice Subramania Aiyar:— I see no objection to the Bill. I would apply the provisions of the Hindu Wills Act without modifications.

(True copy)

D. W. E. Comie

Acting Registrar.



Every letter, whether printed or in manuscript, should be docketed and abstracted on the back ; and the abstract should state clearly the purport of the letter and not merely its title subject.

Enclosures and statements also, whether sent with letters, or merely under cover, should be numbered, docketed and abstracted. The headings of statements should be written in full to prevent mistakes, (G. O., 8th April 1893, No. 239, Public.)

CURRENT NO. 107
Legislative
Judicial {1895.} Department.

No.

FROM

The Registrar of the High Court
of Judicature, Appellate Side,
Madras.

Dated 2^d May 1895.
Received
CHIEF SECRETARY
-4 MAY 1895
GOVERNMENT OF MADRAS

No. 1325.

Enc. —

Forwarding minutes
recorded by the Honorable
Justices Parker, Shephard,
Best and Subrahmanya Aiyar
on the Bill to confer upon
persons in the Presidency
of Madras who are governed
by Marumakkattayam or
the Aliyasantana Law
of Inheritance and self-
acquired property.

CURRENT

UNDER SECRETARY
4 JUL 95
PUBLIC & DEPT.

Dear Sir,

I have received
letter of the 28th June enclosing a
Copy of the Bill drafted by the
Advocate General.

The only objection that has been
raised to Sec. (2) is the one I find
in a book recently published in
London - You will find the objection
stated in p. 473. appendix - This
was sent to me by Sir Philip
Hutchins of the Secretary of
State's Council through the Hon.
Mr. Price, who I believe circu-
-lated it among the Council

the

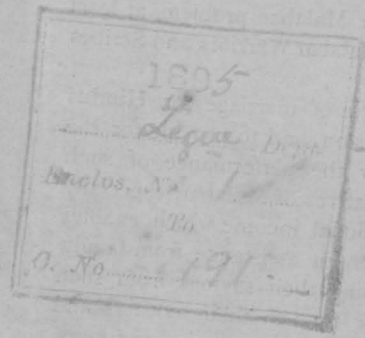
APPENDIX

He Long
N-15

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criticism is uncalled for also, because, whatever the
lasso may have had in excluding from his mind all the
breed's education, all the above traditions represent what
gleaned "from the mothers" of his friends, and his own relation
mother's side, as the invention of the Spaniards would take a
different direction.

Appendix G
by Mrs. Sincor
on the Report of the
Malabar Marriage Commission



See within
for 10

APPENDIX G.

Vol. i., p. 553.

REPORT OF THE MALABAR MARRIAGE COMMISSION.

WHEN first examining into the eccentricities of Egyptian marriage settlements, the writer had no thought of a possible practical bearing for the historical speculation; and it may appear somewhat incongruous to append to the preceding summary of ancient law and history the discussion of anything so modern as a Bill, to be called The Malabar Marriage Act, two proposals for which have been laid before the Madras Government in the last ten years. But, though the shade of Mencius forbids us to study history for the sake of "profit," it is not necessary to close our eyes to the light which, on rare occasions, disinterested historical inquiries may cast on questions of practical politics. We have taught gentlemen who sign themselves Nair and Menon to quote Bentham and John Stuart Mill as well as Parasu Rama in their legislative proposals; and, as the countrymen of the two first-named authors have taken upon themselves the responsibility of legislating for a people, to whom the latter name is naturally the more sacred of the three, it is clearly desirable that the European lawgiver should understand the history and ethics of the Malabar problem, at least not more imperfectly than the descendants of Malabar Warriors and Scribes understand English Utilitarianism.

The demand for an Act "to provide a form of marriage for Hindus following the Marumakkatayam law of succession, and to provide for the maintenance of the wives and children after the performance of such marriages," has arisen because there are now natives of Malabar, especially in the Government service, who earn a professional income which enables them to maintain their wives and children without assistance from family property; and who are desirous of bequeathing their savings from such earnings to their own wife or children, rather than to their mothers and sisters and sisters' children, who are now by local custom their legal heirs. In 1884 a draft Act for this purpose was prepared by Mr. Logan, whose standard work is quoted from in the text (vol. i. p. 553) upon this very subject. As no action was taken upon his proposal, its details need not be discussed. In recognition, however, of the demand for some action in this direction, a Commission was appointed in May, 1891, to take evidence—

"(a) As to the customs connected with Hindu marriages in Malabar ;

hers before born
to me.

As however we pro
legalize Malabar marriages
objection it appears to me to be
a great deal of its force - 2d
however the Marriage Bill is not
passed into law, then we may
have to consider whether any
weight is to be attached to this
objection.

Yours sincerely
C. Sankaran Nair

Lionel Davidson Esq C.S.

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- (b) As to whether the proposed changes are desired by the major classes subject to the Marumakkathayam law,
- (c) Or are essential for the protection of the minority ;
- (d) Whether legislation is expedient,
- (e) And if so what form it should take ;
- (f) Whether the measure would affect the religion, or the religious rites and usages of the Marumakkathayam classes ;
- (g) What would be its effect upon the people of the neighbouring States of Cochin and Travancore,
- (h) And upon the people governed by the Aliyasantana law."

Witnesses selected from the Marumakkatayam classes (*i.e.* those following sister-sons' inheritance) were examined to the number of 322, including representatives of the Kovilagams, or princely families of the country. The written answers of 64 witnesses and the *viva voce* evidence of 121 witnesses are printed at length in the report published by the Commission, which may be recommended as a mine of information for the social anthropologist. The Commission consisted of a Judge of the High Court, Mr. Muttusami Aiyar, Mr. H. M. Winterbotham, Collector of Malabar, the Hon. Sankaran Nair, the author of the Bill discussed, and three other native gentlemen, two holding the office of District Munsiff, and the other a member of the Parapanad Kovilagam.

The Bill drafted by Mr. Sankaran Nair (on the same lines as that of Mr. Logan) proposes to legalize marriages between followers of the Marumakkatayam law of succession upon the following conditions:—

- (1) Neither party must, at the time of the marriage, have a wife or husband living.
- (2) The man must have completed the age of 18 years, and the woman the age of 14 years.
- (3) Each party must, if under 21, have obtained the consent of his or her legal guardian to the marriage.
- (4) The relation of the parties must not be such in respect of consanguinity or affinity that, according to any recognised custom, a marriage between them would be improper. (This is neutralised by the two following provisos, which will be referred to later.)

Then follow a variety of formalities for giving notice of a proposed marriage to the registrar, and for the "solemnization" of the marriage in his presence and that of three witnesses, with any forms desired, provided each party "says to the other in the presence and hearing of the registrar and the witnesses, 'I (A.) take thee (B.) to be my lawful wife (or husband).'" A large part of the remainder of the Draft deals with "Matrimonial Suits" under four heads—Decree of Nullity, Of Dissolution in case of absence, For Divorce or Judicial separation, For Restitution of conjugal rights—all more or less of the European, not to say British pattern. The last material portion confers the following civil rights on parties married under the Act. The husband becomes *ipso facto* the guardian of his wife and children; the latter are entitled to claim mainten-

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the husband, while retaining their rights as members of their
wad. The wife becomes legal guardian of the children after the father's
death; the self-acquired property of either husband or wife, if they die
intestate, shall devolve on the survivor and the children of the marriage,
and failing them on the tarwad. Both husband and wife, if of full age
and sound mind, may dispose of their separate and self-acquired property
by will, with the proviso that the wife and children are entitled first to a
sufficient share of the husband's property to provide them with suitable
maintenance.

In justice to the author of this Bill, which is not acceptable to any section
of his countrymen, it should be explained that it was drafted under the belief
"that in the present state of English public opinion, a proposal to recog-
nise caste as an obstacle to marriage, and to permit free divorce, is not
within the field of practical politics." So that the Bill represents, not the
spontaneous wish either of the whole people or of the "English educated"
minority, but an approximate guess, by a member of that minority, how
much of what they want their rulers will allow them to have.

On the suggestion of the President, the following were accepted as the
chief points for notice in connection with the reference:—

- (a) Conditions of a valid marriage.
- (b) The form that ought to be recognised.
- (c) Registration as evidence of an agreement to be governed by the act.
- (d) Divorce; grounds of divorce; tribunal.
- (e) Rights and obligations to be attached to the legal form of marriage.

Memoranda were prepared by each member of the Commission and
read at their second meeting, from which it appeared that they were
unanimous in replying to the second question of the reference in the nega-
tive, *i.e.* that in their opinion no change in their marriage customs is
desired by the majority of persons following Marumakkatayam. With
regard to question 4, four out of five of the Commissioners agree that
legislation is desirable to meet the needs of the educated and progressive
minority, and the dissenting member considers such legislation necessary
"in case the Courts refuse to recognise the existing social marriages as
legal and binding marriages, creating the rights and obligations described
by him in his Memorandum."

This remark illustrates the initial difficulty of the problem. The late
Sir Fitz-James Stephen is quoted as saying: "Most people regard marriage
as a contract and something more; but I never yet heard of any one who
denied that it is at all events a contract, and by far the most important of
all contracts." The Majority report of the Commission proceeds: "A
contract is an agreement enforceable by law (Contract Act ix. of 1872, § 2),
and if we can discover such an agreement in the form of nuptial union
sanctioned by Marumakkathayam custom, we shall have ascertained that
there is a Marumakkathayam marriage, and not otherwise."

Now if this proposition were of world-wide application, it would be
extremely doubtful whether the ancient Egyptians were married to their

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wives; and it is not even certain that the millennial marriage customs of the Chinese would satisfy the terms of Contract Act ix. 1872. The marriage *Contracts* of later Egypt were all in effect marriage *Settlements*; and the Syrian distinction between "marriages with writings" and those without seems to point to a similar difference. But not even the Roman Prator went the length of saying that persons married without writings were not married at all. An ancient Egyptian might have a wife without entering into "an agreement enforced by law," but if he wished to arrange for the *transmission of his property* to his own and his wife's children, he had to execute a marriage settlement for that purpose.

If the educated minority in Malabar had had an "Egyptian" instead of an English education, they might have met the difficulties of their case by executing marriage settlements, which the Courts would have been obliged to recognise as Contracts. But even if this remedy had occurred to them, it is doubtful whether it would be effectual now, in the face of a strong and well-meant desire on the part of the Courts to uphold another portion of the customary law of the country. The English have been accused in some parts of India of breaking up the "joint, undivided families" of the Hindus, by an excessive readiness to recognise the rights of individuals, apart from the groups of ancient tradition. And by way of avoiding this reproach, they have, in Malabar, to some extent laid themselves open to another; viz., that of arresting a tendency to substitute the *tavazhi*, or natural maternal family, for the tarwad or larger group with a common ancestress. All family property, unless formally divided by deed, is now held to be tarwad property; and marriage settlements of self-acquired property might be set aside by the Courts as an infringement of the rights of tarwads.

The natives of Malabar are thus, through no fault or failing of their own, dependent on the goodwill and intelligence of English legislation to enable them to transmit their property to the children born to them in monogamous unions, contracted in accordance with all the social and religious proprieties recognised in their country. And the discussion of their demands is, after all, scarcely a digression from the subject of the present work, as much of the information embodied in the Report of the Commission throws fresh and valuable light on the significance and origin of various archaic traits already met with.

The marriage customs of the natives of Malabar are in some respects less advanced than those of Egypt, owing to historical circumstances, which are to some extent assignable. The natural evolution of the family continued undisturbed in Egypt, and the combined influence of family affection and proprietary interests made marriage and liberal marriage settlements the rule, in a country with a primitively lax standard of sexual morality.¹ There is practically no doubt that the ancient native custom of Malabar approached to that of the Nabateans and of the modern

¹ Unlike the Chinese classics, a considerable proportion of Egyptian texts are described as untranslatable.

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, while the earliest records of Egypt give no hint at such a stage having been passed through, except in the recognition of real or imaginary marriages with sisters, evidently due to some notion of the special fitness of a sister to be installed as "Lady of the House."

Without a circumstantial description of modern Malayali custom, we should find it difficult to realize what the so-called "sister's son's inheritance" really means. We will suppose Khrishna and Lakshmi (the *baron* and *feme* of India) to be members respectively of a large tarwad, descended from Lakshmi's great-great-great-grandmother, and of a small *tavochi* or branch family, either separated from an overgrown tarwad, or some representative of one which has died out. Khrishna therefore has been brought up in a household consisting of his mother, one or two of his mother's brothers, and his own brothers and sisters; if he is a native of Northern Malabar, the family will also have included his brothers' children, while, if he lives in Southern Malabar, it will have included his sisters' children only. Whether the family group be large or small, the members of either sex within it take their meals together; and, whether the children of a marriage are brought up in their father's or their mother's family, it is usual for long visits to be paid to the other household, and it is therefore desirable, in choosing a consort, to choose one who can, in accordance with caste rules, eat with the persons of the same sex in the family of the other spouse.

Lakshmi's father only visits his wife and children occasionally, and the master of the household, and her legal guardian, the Karnavan, is probably a great-uncle or distant cousin, who takes no personal interest in her, beyond reckoning her as one of those for whom rice must be provided at the women's table, and a husband found in due season. The girls and women of a large tarwad are kept apart from the males, with whom, however remote the relationship, marriage is absolutely forbidden; consequently the only man, before her marriage, with whom she can have any natural intercourse, is a brother of her own. If Khrishna's father also lives in his own tarwad, apart from his wife, Khrishna's sisters will grow up in the habit of regarding him as "the man of the house;" and, as his mother looks to his uncles to do her business outside the family, and look after the family property, from which the undivided household lives, so Khrishna grows up in the habit of considering himself responsible for the material support of his mother and sisters when his uncle dies. And while the uncle lives, it is probably to Khrishna that they would have to apply, if the uncle showed signs of postponing their interests in any way to those of his own children.

The archaic preference of the brother to the husband, the special regard for the mother's brother, and the separation of the sexes at meals (known as a Carian, Basque, and Cretan custom), all originate in a system of domestic organization akin to that of modern Malabar, and we see how the "companionship of the cupboard" gives a natural vitality to an apparently artificial system of inheritance; so that, at the present moment,

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while men wish to be *allowed* to leave property to their children, they would be content to be *compelled* to leave it away from their mothers and sisters. If Khrishna is poor and Lakshmi rich, they would both think it right for their children to be brought up in her tarwad, and for him to give what little he might earn, for the maintenance of his mother and sisters, even though the latter were married and had children. And, under the circumstances, we cannot say that there is anything unnatural or absurd in the feeling. The mother's property maintains the son, and the son's earnings go to the support of the mother and her other descendants.

The hard case, for which relief is sought, is that of a wealthy Khrishna, —probably with an English education and a salary from Government, which passes for wealth,—who has married, perhaps before obtaining a salary, some poor Lakshmi, whose family, if she is left a widow with children, can barely supply her and them with food. If Khrishna is an affectionate and thoughtful husband, he will probably buy some small property in the name of his wife or her brother, and so enable her to provide for their children; but if he dies prematurely, or, like the English professional man who puts off insuring his life, does not take his precautions in time, his wife may be either left destitute or endowed with the *damnosa hereditas* of a lawsuit with his tarwad.

When a new Marriage Law is spoken of, the uneducated classes, we are told, at once assume that it is proposed to compel them to give up Marumakkatayam and become Makkatayam¹ men, to which they object unanimously. "But," says one witness, "do not stop your inquiry here. Ask him (the uneducated man), 'Have you no wife? Are you not married to her?' 'Yes; I have a wife and I am married to her.' 'Is it proper or good that you or she should discard each other, as either of you wish?' 'Of course not; that is not our *marlada* (custom).' 'Are you not bound to maintain your wife and children?' 'Yes; and we do it!' 'Don't you give a portion of your self-acquisitions to them?' 'Yes.' 'Have you any objection to have these customs declared as your law in an Act of the Government?' 'If this is all, it is very good.'"

In the comparatively rare case of family property being left without an heir to claim it, the lawful course under Marumakkatayam is to *adopt a sister*, whose child will be heir, which seems absurd to European ideas. But it is extremely likely that the Egyptian wife, who is called a sister without being one by birth, was primitively adopted in that character, so that her children might receive their father's inheritance, before the custom of writing marriage settlements was formed. And there is thus nothing on the face of it to explain why native Malabar custom has failed to establish monogamy as a national institution in the way that was done in Egypt.

The fact seems to be that two alien influences, Hindu and European, have interfered with the natural development of the Malabar family on either Basque or Egyptian lines. The Nambutiri or Malabar Brahmins,

¹ Son's inheritance.

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probably belong, like the Nairs, to the pre-Aryan population,¹ and actually practised polyandry of the Nabataean type, the eldest son alone being entitled to lawful marriage. Other Brahmins, called *Pattis*, are looked down upon in Malabar, and are only regarded as acceptable husbands when nothing better is to be had. Such a feeling is inconsistent with a real community of origin between the Brahmins of Malabar and the rest of India, in contradistinction to the other inhabitants of the former district. And it seems probable that a polyandrous, priestly caste of Mallas has borrowed the Brahminical pretensions of the Hindu priestly caste, and imposed upon the Nairs,—who, as the warriors of the country, should by analogy be called *Kshatriyas* rather than *Sudras*—a curious revelation ascribed to Parasu Rama, which has had the effect of perpetuating the laxity of Malabar marriage custom.

The learned Zamorin, Maharajah Bahadur, of Calicut, quotes the following passage from a discourse between Garga and Yudhistira in Kerala Mahatmiam: "In this Kerala, only one member of a Brahmin Tarawad shall marry. The eldest son shall marry in preference to the others. It is not necessary that the females of Samanthams, Sudras, and others should observe the rule of chastity. But the rule of chastity should be observed by the Brahmin females only. I truly say that the above rule need not be observed by the females of non-Brahmin castes." This passage, which reminds unbelievers of the less admirable revelations of Mahomet, is put forward by a number of Conservative witnesses, who are at the same time opposed to legislation, indignant at the suggestion that they are not married to their own wives, and certainly prepared to take mortal offence at the barest hint at the possibility of its being supposed that the ladies of their own families are intended to avail themselves of the dispensation accorded by Parasu Rama.

What happened when the Nairs were not, as now, practically monogamous is as if the Basques had found an aboriginal race in Spain, which was taught to reverence them as the Indians did the Incas, and as if then the Basque householders, instead of condemning their cadets to celibacy, had allowed them to marry the aborigines, but not to bequeath any property to the children of such marriages. "Custom," it is further observed by the Zamorin, "is regarded to be the foremost among the Agamas (revelations). The origin of all the virtues is custom, and the eternal God is the Lord of all the virtues." So mighty a god is custom, especially when allied with religion, that vice and virtue may be confounded at his bidding. Custom in China prescribes lawful marriages, and lawful marriages are universal. Custom in ancient Egypt bade a man love his wife unmixedly, and the walls of the eternal dwelling-places record his delight in the affection of the lady of his house. In Malabar—as has so often happened in Europe—the dictates of natural morality and the precepts of what is taken for religion now pull opposite ways. Among respectable

¹ Not, of course, to the dark-skinned, low castes of ancient India, but to some branch of a pre-Aryan white race, with whom civilization seems to have begun.

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people men and women do not practise polygamy. Life-long marriages are common, and it is the exception for the absolute liberty of divorce to be possessed on both sides to be abused by repeated and motiveless separations; and it is probable that if the natives of Malabar were left to their own devices, these new customs would rank as an Agama, and Panchayats and Tarwads would find means to punish their violators.

But at this point the second disturbing element appears. European influence has to some extent accelerated the natural process of development by causing the whole "English educated" class to feel uncomfortable under the imputation of living under a laxer marriage law than other civilized communities; and it might have been supposed that the alien professors of monogamy would welcome and hasten to record the social progress of the subject race under their protection. But the Indian Government has contracted a fixed habit of respecting the religious Agamas of its subjects, however eccentric; and there is therefore some excuse for its hesitating to legislate before ascertaining by direct inquiry whether the domestic usages of modern Malabar are such as are sanctioned by Kerala Mahatmiam or not—whether, in fact, Malabar is governed by what Europe regards as an immoral religious law, or by spontaneously moral custom, unsupported by the sanctions of the civil power.

But for this uncertainty, for which English rule is not to blame, it would be rather startling, and indeed shocking, to find the English Government, while desiring to raise the standard of social propriety, giving offence to the social prejudices of respectable citizens, who have married wives according to the most proper customs of their country, by asking questions which imply that they are perhaps not married at all. Some of the native witnesses even object, as to a slightly coarse, vulgar, or jocose expression, to the words used by the Commissioners¹ as the nearest equivalent available for husband and marriage. And others resent the mere putting of the question on the most important issue of fact before the Commission.

That issue is raised by the interrogatories 23, 24, 27, 28: Can a woman have Sambandham with as many men as she pleases at the same time? Is this permitted or prohibited, and in either case where can such a permission or prohibition be found? Can a man have Sambandham in more than one house at the same time? If he chooses, is there anything to prevent it? Some of the witnesses resent the mere putting of the questions, and some who refrain from answering them, probably do so on the ground of their indecorum. An analysis of over 50 answers probably gives a faithful reflection of the present state of fact and feeling.

To the questions relating to women three answer with a plain Yes, there is nothing to prevent her. Eleven answer with a plain No, she cannot. Five say it is not unlawful, but it is not respectable; it is thought unbecoming. Eight distinguish, and say it is unknown in Northern

¹ Sambandhakaran and Sambandham. Sambandham=connexion, especially the connexion of husband and wife.

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though heard of formerly in Southern Malabar (where a legend of the woman with 28 sambandhakaras at a time is talked of). Fifteen others speak of the practice as very rare, dying out, a thing formerly known, but now unheard of, though not prohibited. Six speak of it as restricted to the lower orders in Southern Malabar, and not approved of even among them. And five answer:

Certainly not.

Of course not.

No; the facility of divorce has given rise to the erroneous idea.

I am surprised that the question should have been asked.

No. This question is not at all warranted by anything connected with the Nayar marriage custom.

The answers to the companion questions are as follows: three give a plain Yes. One adds: "The general Hindu law is in his favour;" and these answers all seem, like the affirmatives in the first case, to apply to the strict letter of the interrogatory. There is nothing in the civil or religious law of Malabar to prevent it; and in Northern Malabar especially, there appears to be a section of the people who would rather alter the local custom in the direction of ordinary Hinduism and polygamy than towards European monogamy. These witnesses can be recognised by their desire to minimize the right of women to divorce, which is certainly an essential part of the old national custom. Twelve answer that it is not illegal, but it is not respectable, no respectable man wishes to do it; it is theoretically lawful but practically unknown; it can be done subject to social odium, or to the difficulty of finding a family that will consent to let one of its women marry a man who has a wife living and undivorced. Some say: it is done against all propriety, or that, if done, the second wife is regarded as a mistress. One says that it is prohibited by custom for men as much as for women; and this witness adds: It is commoner in Northern Malabar, where the women are less educated, less refined and independent than in the south; and, as the taking a second wife is generally recognised (as it was in ancient Egypt) as giving the first wife a sufficient reason for divorcing, it is clear that the customary independence of women must have worked in favour of the rule of one wife—or husband—at a time.

The Commissioners did not take the evidence of any women, though it would not be impossible to do so, as the elder women of a family are allowed to speak to strangers, and the senior ladies of the Kovilagams, in which traditions of gynæcocracy linger, are regarded as authorities on point of social decorum. But even without their evidence, the practice of the Minicoy islanders and the nature of things make it practically certain that the well-born women of Malabar would oppose, with all the irresistible resources of their conservative sex, any proposal to legalize Hindu polygamy, though indeed no such is seriously made by Malabar gentlemen.

When we consider that the list of witnesses includes many entirely opposed to the suggested legislation or to any interference with native custom, and that native theologians are bound by the dictum ascribed to

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Parasu Rama, it is evident that the practice of polyandry is extinct in Northern Malabar and among the upper classes of Southern Malabar, and that it is dying out and discountenanced everywhere. It is believed even by the opponents of European legislation that if a new Marriage Law is passed, even those who do not like it will marry under it, rather than lie under the stigma of not wishing to be as much married as possible; it is also prophesied that any legislation effected in this direction in Malabar will be copied in the adjoining native States of Cochin and Travancore and in Canara, where a transitional law called Aliyasantana is in force. It is therefore plain that a serious responsibility attaches to the English Government, which has the power to accelerate and secure a natural step of social progress and give the *coup de grace* to an unseemly anachronism.

But, if native opinion among men and women alike is in favour of a law legitimating monogamous marriage, it is difficult to see how or why the attempts to give effect to this laudible purpose have been hung up for ten years. What is the difficulty in the way of legitimating the *de facto* monogamous unions now existing in the country, and those contracted day by day, with customary rites and a full intention of permanence?

Before attempting to answer this question, we must analyse the answers given to another interrogatory: "Is it the custom to change 'Sambandham' frequently, or is it the rule for one man and woman to cleave together for life?" Ten of the witnesses answer simply that it is the rule for the parties to cleave together for life; six say that this is the rule, but there are exceptions; one that it is the rule in 999 cases out of 1,000; ten say that it is not customary to change frequently; one that the power to change prevents the wish arising; others that the custom of changing frequently is declining, that it is rare in Northern Malabar, rare in respectable families, rare now, that unprincipled men change and honourable ones do not; that "the majority of the present generation cleave together for life in perfect harmony;" while others speak of permanence as the rule, failing good cause for divorce; "it is not proper to divorce without cause." Four say; "A man can do as he likes;" "It is at the will and pleasure of each individual;" "There is nothing to prevent either party divorcing if bent on it," or "if enmity takes the place of love."

The question as to what are considered reasonable grounds of divorce is discussed at length in the answers to other questions, bearing on the provisions for divorce in the proposed Bill; and there is a general consensus of opinion among the natives that infidelity on either side, failure of the man to give reasonable maintenance or of the woman to obey reasonable commands, incurable and repulsive disease, conviction for crime, barrenness in the wife and intemperance or similar bad habits in the husband, complete incompatibility of temper and, perhaps, a serious feud between the families, are regarded as valid grounds; while separation for frivolous reasons is prevented by the custom which makes the consent of the elders of the families usual in both cases and practically indispensable in the case of women. Some witnesses attribute the generally high standard of matri-

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happiness to the liberty of divorce, which causes both parties to continue on their best behaviour, and there is some agreement as to the exceptional attractiveness of the women of South Malabar, which makes the husband more anxious to retain the affections of his own wife than to be at liberty to take another. The whole picture is perhaps a little overlaid with *coulour de rose*, but we gather that a majority of the whole population in Northern Malabar and of the upper classes in Southern Malabar enter into what is virtually a contract of marriage during life or good behaviour, and that the great majority of such married couples remain faithful to each other, in spite of their legal right to separate at the wish of either one. We gather also that the virtuous majority are prepared to accept legislation, restricting divorce in cases where there is no assignable cause, except that one of the spouses has got tired of the other; and of course it is obvious that the obligation to provide for the wife or the children of a former marriage, dissolved by the husband's default, would operate still further in restraint of change.

Now whether the witnesses exaggerate or not the extent to which the archaic laxity of South Indian custom has become a thing of the past, they agree in wishing to have the marriages that they do in fact enter into recognised as binding legal contracts; and under these circumstances, it cannot be the duty of the English Government to thrust them back upon the uncovenanted mercies of Parasu Rama. To the legal European mind, there are two things wanting to Malabar marriages, that the law should recognise the terms of the contracts so as to be able to enforce its fulfilment, and that this power should not be rendered nugatory by including in the contract itself a provision making it revocable at will. On the other hand, it is highly important, in the interest of morals and the institution of marriage, that the new legal contract should be made as easy, attractive, and popular as possible, so that the obligations it imposes may be generally and willingly incurred.

The Bill of Mr. Sankaran Nair, which we may criticise without scruple, as the clauses in it which are objectionable to his countrymen were doubtless only inserted to facilitate its adoption by the English Government, is opposed on the following grounds: It proposes to create a form of marriage for the population of Malabar; a proposal which is a gratuitous offence to every respectable married couple in the country, and is needless, as there are six or seven well-known forms of marriage in use in various classes and localities, one or other of which would be acceptable to every native desirous of marrying under the Act. The form proposed is also objected to in itself. Both men and women, it is said, would think the formula in the draft improper, not to say immodest, and there is an universal objection to the appearance of the bride in public, before an official of uncertain caste. One gentleman whose command of English idiom leaves nothing to be desired says: "I do not see the fun of constituting the Sub-Registrar our marriage High Priest," and this sentiment may be taken as universal.

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With regard to the age of marriage and the consent of guardians there is no serious difficulty. Child marriage is not usual, and the financial responsibilities associated with a legal marriage would not tend to lower the customary age. Practically at present it is impossible for a marriage to take place without the consent of the elders on both sides, because the husband cannot obtain access to the wife without the consent of *her* Karnavan, nor can she and her children receive their food in their husband's Tarwad, as is usual in North Malabar, without the consent of *his* Karnavan. The consent of the elders can only be dispensed with if the husband is in a position to maintain his wife apart from the families of both; and it would probably be acceptable if some form answering to the French *sommations respectueuses* were provided, by which a young couple, whose union was opposed by their elders, should have to wait for a moderate term, after giving notice of their wish to register the marriage, before the form could be completed.

One point appears to be very important; that, at least for a certain term,—preferably not less than twenty-five years,—it shall be open to any person married according to ancient social custom, to register their past marriage as legal. If they are in a position to do so, the date of the ceremony, the form used, and the signatures of surviving witnesses might be filled in, upon the ordinary registration form; while for the poor or illiterate, who could not give such details, it should suffice to register the marriage as previously effected. It would clearly be unjust and invidious to draw a line between the parties to a monogamous union of thirty or forty years' standing and a young couple who merely hoped to enjoy the same permanent relationship. And it would be unwise to fix any narrow limit of time for such retrospective registrations, because after a few years it is certain that the legally married will look down on the others; and it is not desirable to create a hard and fast line of demarcation between those who claim the benefit of the Act at once, and those who delay doing so, from doubts or scruples, legal or religious, not affecting the correctness of their domestic morals, which experience of the working of the Act would remove. By such retrospective registration the persons who now consider themselves married would be put at once in the same position as if the Act had been passed before their social marriage contract was formed; and of course such registration would "establish" the children as well as the wife in their full legal rights.

The criticisms of the witnesses before the Commission naturally concentrates itself on the points offensive to their religious and social susceptibilities, but there are other difficulties from which a study of comparative jurisprudence might save the Malabar draftsman.

It is proposed, rather light-heartedly, as in accordance with Hindu and English precedent, to make the husband legal guardian of his wife; to reserve the rights already possessed by the wife and children in her own Tarwad, and to allow the wife to dispose by will of all her self-acquired property,—which is to include that which she may receive from her husband.

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An alternative, which would satisfy English misgivings and native susceptibilities, may be proposed: that a few discreet and learned representatives of all classes should be invited to draw up a report describing the various forms of marriage in use, which it is desirable for the Government to recognise as legal. As they vary in cheapness as well as solemnity, it is important that at least one very simple, informal rite should be legalized. It should then be made the business of some person, officiating at each form of marriage, to forward a notification of it to the registrar, specifying the form used, and forwarding the signature of witnesses on a Government form. Application for the form would be a notice of the proposed marriage, and any falsification of such documents would be an offence under the Penal Code. No change would be necessary in the marriage rites of the people, but those who wished to make the marriage agreement a legal contract, "enforceable by law," would do so by the mere fact of having their marriage registered. There can be no motive for the registration of imaginary marriages, and the recommendation of the Chairman of the Commission, repeated by all the more intelligent witnesses, seems absolutely unobjectionable: "The new Act should purport to legalize the existing forms of social marriage, and not to provide a new form of civil marriage."

The next objection is to a proviso that no bar to marriage save consanguinity and affinity shall be recognised, and these only between parties related "through some common ancestor, who stands to each of them in a nearer relationship than that of great-great-grandfather or great-great-grandmother, or unless one of the parties is the lineal ancestor or the brother or sister of some lineal ancestor, of the other." The restrictions on marriage are very numerous and stringent in Malabar, but it is not in accordance with English precedent to attack established custom in such matters as caste observances, and it is clearly unnecessary to weight a Bill for legalizing existing marriages with provisions sanctioning unions now thought wrong or improper. It is as if, in a country like Spain or Russia, it were proposed for the first time to legalize the marriage of Anglo-Catholics, and the law giving that measure of relief went on to legalize marriage with a deceased wife's sister. In Malabar it is not lawful to marry *any* relative of a deceased wife—*i.e.* any member of her Tarwad. And there are real reasons of social expediency at the bottom of all such customary prohibitions, in communities where the group lying in close domestic association is not limited to the natural family. Supposing—*par l'impossible*—that China were included in the British Empire, should we refuse to recognise the legality of Chinese marriages, because it is unlawful, throughout the length and breadth of the Flowery Land, for a Chinese Smith to marry a Smith or a Brown a Brown?

In all parts of India there are restrictions on marriage which appear needless and useless to Europeans, and it would be quite reasonable and logical to declare that any native of the country who had adopted European ideas on the matter should be free to contract a valid civil marriage, "with

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Now the Malayali are said to be a litigious people, and the only serious opposition to a reasonable marriage law is that prompted by the fear that any marriage law, carrying proprietary rights, will result in breaking up the Tarwad properties. The Dewan of the native Cochin State remarks: "The one principal advantage of Marumakattayam Law is the continuity of wealth in Tarwads;" and this claim is perfectly well founded, the Tarwad having the same permanence as the Basque family estate; and any destitute descendant of the ancestress has an absolute right to receive the necessities of life out of it.

It is not the intention of the English Government to disendow Tarwads by a side-wind. But it is impossible to work two totally different legal systems together. In the Tarwad system, the family property vests in the woman, not to use, but to transmit. If she has a guardian at all, in regard to proprietary interests, it is legally the Karnavan of her Tarwad and naturally her mother's son. Hitherto, if the Karnavan chose to insist on Lakshmi divorcing her husband, Khrishna had no remedy, because the marriage was not an agreement enforceable by law. But after a legal registered marriage, Khrishna would have a right to his wife's society, unless she herself were entitled to a legal divorce; and he would therefore not, as a husband, be at the mercy of his wife's great-uncle. The Act also makes him the legal guardian of his children, so that his personal status as husband and father is secured. The clause making him the legal guardian of his wife can only have the effect of raising a conflict of interests and perhaps of rights between the husband and the wife's Karnavan, and should be dropped as a mere matter of legal logic.

Whatever the social position of women may be in modern Malabar, the conception of their legal tutelage is absolutely inconsistent with the national system of inheritance. Theoretically, in Malabar, as in Egypt (and even in China), there are no limits to the civil competence of a woman; her share in the hereditary property of the family is limited as that of a man is limited, and she has the same power of dealing at discretion during life with self-acquired property, and she is at present under the same disability in bequeathing it away from the Tarwad when she dies. To give a woman full testamentary powers over self-acquisitions, to place her under her husband's guardianship, and to make gifts or bequests from him count as self-acquisitions, would be to place every woman between two fires, as the affectionate husband and brother complains of being now. The husband might insist on her bequeathing to his Tarwad gifts from her own brothers, and her Karnavan would certainly claim that she should bequeath to her Tarwad the gifts received from her husband, in view of the obligation which the Tarwad would still be under to maintain her and her children during widowhood. The consequent dissatisfaction of the "belongings" on both sides would go far to neutralize the gain from the essential reforms contained in the Act.

One of the practical injustices of the present law is that, if a man has tried to provide for his wife and children by a gift *inter vivos*, and they die

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Registrar for his high priest." The Hindu, who does not believe in the laws of caste, has as much right to enter upon marriage as a civil contract, as the English agnostic or secularist, who does not wish to be married in church or chapel; and it is one of the drolleries of Anglo-Indian legislation that,—as I am informed,—an Indian rationalist cannot be married at an English registry office unless he declares himself a convert to Christianity! But in this respect Malabar will be no worse off than the rest of India, and there is at present no demand for the legalization of any marriages except those which social and religious custom now regard as lawful.

The objections to the institution of a Divorce Court and public suits for divorce, or for the restitution of conjugal rights, are, if possible, stronger than those raised against the proposed form of marriage; and the reader who is fresh from the domestic atmosphere of Egypt and China will feel the incongruity of setting up by law in a modern Lycia the machinery of this kind which is treated as a necessary evil in Europe. The native witnesses are ready in their references to English scandals, from the Jackson case onwards; and the standard of morality, reached under the existing marriage system, is to some extent vindicated by the fact that many of the witnesses are in favour of retaining the existing equality of the sexes in the matter of divorce. They propose to recognise other grounds of divorce than infidelity, so as not to put a premium on the commission of that offence, but they do not wish to deprive the women of their right to claim release on that ground alone. In this no doubt they are wise, because it is certain that women of wealth and position, whose example would have most weight in the country, would decline to enter into marriages, which they could not dissolve upon the ground hitherto considered sufficient. One cannot make Griseldas by Act of Parliament, but the institution of marriage is perfectly compatible with that of a simple and equal law of divorce. And, even if divorce by mutual consent on the ground of incompatibility of temper were recognised, there is no reason to fear that the license would be abused. The respective Karnavans who have arranged a marriage discourage its dissolution; a person who advertised himself as "gey ill to live with" by more than one divorce for "incompatibility" would find himself unable to obtain a partner for a third attempt; and, besides, as in Egypt, the rights of the first wife and children to maintenance would operate powerfully to discourage second marriages of any kind. If, as is probable, registered marriages came to be regarded as more dignified and sacred than unregistered ones, and if, as is certain, they were only entered into by the more respectable classes, divorce would any way become less frequent than at present. And it is obviously absurd to make the recognition of Malabar marriages conditional on the adoption in the country of a divorce law of English rather than German or American pattern.

The consent of the Karnavans, a year's notice, and a formal registration of the motivated application for divorce are the checks suggested by general consent.

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before him, what he has given them passes to their Tarwad, i.e. to a grandmother, aunts, or cousins, instead of reverting to his own family. The exceptional number of deeds of gift registered in the Marumakattayam districts explains the copious provisions against such transactions in the Gortyn, Syrian, and other semi-archaic codes, and the only way to avoid burdening the statute law with a number of prohibitions, which people spend their ingenuity in evading, is to make the provisions of the common law as equitable or rather as equal as possible. To avoid setting up new injustices in the place of the old ones, the best way would be to make the proprietary responsibilities of husband and wife absolutely equal, so that every Tarwad shall have the same gains and losses, when, as is usually the case now, they arrange two marriages at the same time, each family giving a wife to the other, so as to balance the expense or advantage incurred.

There is a general agreement among the witnesses that not more than half the parent's self-acquisitions should go, on intestacy, to the consort and children, but opinions are divided as to whether the remainder should go to the Tavazhi or to the Tarwad. Some propose that one-third should go to each of the three claimants, but the equitable course would seem to be that it should go according to the "companionship of the cupboard;" i.e. that if the family had eaten rice with the Tavazhi, paid for with Tavazhi funds, the Tavazhi should inherit, and if the Tarwad had found maintenance, then the Tarwad should inherit.

The evidence as to the respective contributions of the family and the husband to the support of the wife and children supplies a most eloquent commentary on Egyptian marriage contracts. The common table supplies food, but "oil and clothes"—it is universally agreed—should be supplied by the husband. Even without the formality of written marriage settlements "he must give it," as the Egyptian documents say, or he may be regarded as dissolving the marriage contract itself by his neglect.

An opponent of marriage legislation proposes, as an alternative, a Bill to the effect that "every person whose personal law is the Marumakattayam law, and who is of sound mind and not a minor, shall be competent to dispose of his self-acquired separate property by will." But this is unnecessarily revolutionary. It is desirable to enable fathers to provide for their children, even though their doing so reduces the amount of the Tarwad's inheritance; but it is not desirable that men should be empowered to disinherit their Tarwad for the sake of women to whom they are not respectably married: such an innovation would be like the Ptolemaic legislation in Egypt, a way of combining the disadvantages of two separate systems of jurisprudence.

Space forbids the enumeration of all points of interest contained in the Report, but the following may claim a moment's notice. The distinction between betrothal and marriage, met with elsewhere, seems to linger in one peculiar marriage custom, in which the bridegroom asks the permission of the mother of the bride to visit her for six months, and does in fact

3. July 95
Madras

Dear Sir,

I have received your letter of the 28th June enclosing a copy of the bill drafted by the advocate General.

The only objection that I can have been raised to sec(2) is the one I find in a book recently published in London. You will find the objection stated in p. 473. appendix. This was sent to me by Sir Philip Hatcher of the Secretary of State's Council through the Hon. Mr. Price, who I believe circulated it among the Council members before forwarding it to me.

As however we propose to

legalise m

marriages

legalize malabar marriages
the objection it appears to me loses
a great deal of its force. If however
the marriage Bill is not passed into
law then ^{we may have to consider} ~~it appears to me~~ ^{whether any weight is to be attached to}
~~this objection is of some weight.~~

Yours sincerely
C. Sankaran Nair

Leonel David on 23/1/19

APPENDICES.

spend the wedding night in the mother-in-law's house, returning (now) the next day to fetch the wife home. There is an inexpensive form of marriage with the peculiarity of not entitling the bride to be brought to her husband's house, as if the "taking" had not been followed by the "establishing" as wife. An institution discussed at great length, the Tali kettu kalyanam, the tying of the tali on a girl before she attains maturity, as a token of marriageableness, may possibly be a reminiscence of an original religious betrothal ceremony; but interested Brahministic suggestions have deprived it of this character; and it is now a useless, expensive, and meaningless ceremony, to the performance of which the conservatism of the country is accordingly profoundly attached. One advantage of a popular and dignified marriage rite is, that it might gradually supersede the tali tying, or perhaps let that resume its place as a real betrothal.

We are reminded of the foundation of Marseilles by the dictum of the Zamorin: "The gift of daughters in marriage by the sacerdotal classes is most approved when they have previously poured water into the hands of the bridegroom."¹ And we are reminded of the Nabatean and Syrian formulas of succession by the sentence quoted from the Jimuthapahatha by the same authority as applying even to those who follow the system of sons' inheritance: "The properties of those who have no son, daughter's son, or daughter's grandson shall descend to the sisters' children."

And we may fairly ask in return for so much curious information, that anthropologists, who might be disposed to form a Society for the Protection of Ancient Institutions, should show sufficient interest in the grievances of Malayali parents to move the Madras Government to proceed with a discreet and sympathetic Malabar Marriage Act.

One point should not be neglected—the selection of a dignified and auspicious name for the new legal contract. It is said that nearly the only words that would be understood throughout Keralam as meaning "to marry" are *Sambandham Tudanguga*—"To begin Sambandham;" but they clearly do not satisfy the requirements of the case. Another term in use is "Guna Dosham"—Good-bad-doing,—which is illustrated by reference to the English "For better for worse" in the Marriage Service. What seems wanted is a term including the ideas of auspicious life-long union between the mother and father of children.² A significant and alluring name would go half-way towards popularizing the reform.

¹ For this, however, there is a parallel in Maun.

² The term *karaina Sambandham* has been suggested, *karaina* being already used to denote a perpetual lease, and the selection of a further honorific adjective might be left to the experts charged with the duty of reporting on the marriage rites to be recognized as binding.

Current No. 191
Legislative DEPARTMENT.

From The Hon'ble C. Sankaran Nair

Madras

No.

Dated 3rd

Received 4th July 1895
Regd 5th

Enclosures 1. (Pamphlet - 4 pp. & 8.)

SUBJECT.

Stating that if the Malabar Marriage Bill is not passed into Law, the question whether any weight is to be attached to the objection on page 473, appended by Miss Sincore on the 7th of the Malabar Marriage Commis-
-sion, will have to be considered

Proof submitted to
U.S. for approval as to the form

CRV
22/7

Books put up with the
file and returned

16/7/95

Pro

G. D. Sankaran Nair
26/9

Read - again the long paper
G. D. Sankaran Nair
abstract -

24th July 1895, No. 92, LEGISLATIVE.

Two copies of the
Proof submitted to
U.S. for approval
with the original paper

CRV
22/7

Here sent
read again
order

GOVERNMENT OF MADRAS. LEGISLATIVE DEPARTMENT.

READ - the following papers :-

From the Government Solicitor, dated 20th March 1895, No. 152.

ABSTRACT. - Forwarding the following opinion of the Advocate-General, dated 18th March 1895 :-

[Re Bill to confer upon persons following the Marumakkatayam and Aliyasantana Laws of Inheritance testamentary power over their separate and self-acquired property.]

OPINION.

1. When I sent in the above draft Bill, I understood that its operation was to be confined to Hindus following the Marumakkatayam and Aliyasantana Laws of Inheritance and to be contingent on the passing of the Hon'ble Mr. C. Sankaran Nayar's Malabar Marriage Bill which contained provisions relating to wills.

2. Unless and until that Marriage Bill is passed, the Hindu Wills Act cannot, I think, be extended at all, because it is inapplicable to such family relations as exist under the Marumakkatayam and Aliyasantana systems of law. It contemplates a family consisting of husband and wife and their children either begotten or adopted. To such a family the sections of the Indian Succession Act mentioned in section 2 are applicable when extended. Those sections could not be applied to a Malabar family without modification, e.g., explanation 1 to section 46 is inapplicable. Take two other examples to illustrate the necessity for modification not only of the sections themselves, but even of the illustrations to many of them. Illustration (a) to section 48 assumes that the child therein referred to would inherit his father's property but for the will fraudulently obtained. Section 62 refers to the testator's "family," and illustration (a) shows that the "family" contemplated is of a kind unknown to, or unrecognized by, the peculiar systems of law above mentioned.

3. If the Bill to confer testamentary power is to be dealt with as entirely independent of the Malabar Marriage Bill, I think that a mere extension of the Hindu Wills Act will not suffice, but that it will be necessary to frame a Bill on the lines of those sections of the Indian Succession Act which were extended by section 2 of the Hindu Wills Act, but with such modifications as the necessities of the case demand. If Government agree with me upon this point, I will prepare a draft of such Bill and submit it in substitution for the Bill now under consideration.

4. I am inclined to think that such a Bill is necessary, because, even if the Malabar Marriage Bill be passed into law, it will not affect all persons at present governed by the Marumakkatayam and Aliyasantana rules of inheritance, whereas the power of disposing of separate and self-acquired property by will is to be conferred on all such persons.

MADRAS,
18th March 1895.

(Signed) J. H. SPRING BRANSON,
Advocate-General.

No. 265.

Returned to the Hon'ble the Advocate-General as requested personally.

21st March 1895.

To the Government Solicitor.

(Signed) A. BUTTERWORTH,
Under Secretary to Government.

[Re Bill to confer upon persons following the Marumakkatayam and Aliyasantana Laws of Inheritance testamentary power over their separate and self-acquired property.]

OPINION.

1. With reference to my opinion, dated the 18th March last, which was returned to me at my request for further consideration, it appears to me that the sections of the Indian Succession Act extended to Hindu wills by Act XXI of 1870 may be extended to wills made under the powers conferred by this Bill. The enquiries provided for by section 62 of the Indian Succession Act ought to clear up any difficulties which may arise by the use, in the wills of those whose marriages are not registered, of words and phrases apparently inapplicable to such family relations as exist under the Marumakkatayam and Aliyasantana systems of law.

2. There is so much in the Hindu Wills Act, 1870, that it is unnecessary or inexpedient to extend to the class of wills now under consideration that section 3 of the Bill should be omitted and the whole Bill should be amended in the manner hereinafter provided.

3. *Preamble*.—Strike out the words "it is hereby enacted as follows," substitute the word "and," and add the following: "Whereas it is expedient to provide rules for the execution, attestation, revocation, revival, interpretation, and probate of the wills of such persons, it is hereby enacted as follows":—

This appears to be necessary for two reasons, because—

(1) The Bill does more than merely confer a testamentary power, it provides for certain formalities which are intended to secure cogent evidence of execution of wills and of the intention and capacity to execute them.

(2) No reference is made to the Hindu Wills Act. The present Bill will be complete in itself if my suggested amendment of the present section 3 be adopted.

4. *Section 3*.—Omit this section and substitute the following:—

Section 2, Hindu Wills Act, XXI of 1870.

(3) "The following portions of the Indian Succession Act, 1865, namely:—

Sections 46, 48, 49, 50, 51, 55 and 57 to 77 (both inclusive);
Sections 82, 83, 85, 88 to 103 (both inclusive);
Sections 106 to 177 (both inclusive); and
Section 187

shall, notwithstanding anything contained in section 331 of the said Act, apply to all wills and codicils made by any person under the powers conferred by this Act. Provided that the registration of a marriage under the provisions of any Act for katayam and Aliyasantana Laws shall not revoke any such will or codicil, and that nothing herein contained shall authorise a testator to bequeath property which he could not have alienated *inter vivos*; and that nothing herein contained shall affect any law of adoption."

(4) "Nothing contained in this Act shall affect the rights, duties and privileges of the Administrator-General of Madras."

Section 5, Hindu Wills Act, XXI of 1870.

(5) In this Act and in the said sections and parts of the Indian Succession Act, all words defined in section 3 of the same Act shall, unless there be something repugnant in the subject or context, be deemed to have the same meaning as the said section 3 has attached to such words respectively.

Section 6, Hindu Wills Act, XXI of 1870.

And in applying sections 62, 63, 92, 96, 98, 99, 100, 101, 102 and 103 of the said Succession Act to wills and codicils made under this Act, the words "son," "sons," "child" and "children" shall be deemed to include an adopted child, and

the word "grand children" shall be deemed to include the children, whether adopted or natural born, of a child, whether adopted or natural born; and the expression "daughter-in-law" shall be deemed to include the wife of an adopted son.

5. This arrangement will prevent the setting up of nun-cupative wills, secure the due and formal execution of all wills made under this Act, and confine the testamentary power to devise by will of such property only as the testator could transfer by gift *inter vivos*.

6. The provisos about "maintenance" and "intestate succession" contained in section 3 of the Hindu Wills Act are omitted as inapplicable or undesirable.

With regard to intestacy there seems to be considerable difference of opinion as to what rights, if any, should be conceded to the widow and children. Moreover, it is not quite clear whether any difference is to be made between persons whose marriages are registered under the proposed Marriage Bill and those who are not registered as husband and wife. Probably it is wiser to leave this subject open, to be disposed of hereafter, if necessary, in a manner somewhat similar to the Parsi Succession Act, 1865.

MADRAS,
17th April 1895.

(Signed) J. H. SPRING BRANSON,
Advocate-General.

From D. W. G. COWIE, Esq., Acting Registrar of the High Court of Judicature, Appellate Side, to the Chief Secretary to Government, dated Madras, 2nd May 1895, No. 1324.

With reference to G.O., dated 25th February 1895, No. 15, Legislative, forwarding, for the opinion of the Honourable the Judges, a Bill to confer upon persons in the Presidency of Madras who are governed by the Marumakkatayam or the Aliyasantana Law of Inheritance testamentary power over their separate and self-acquired property, I am directed to forward minutes recorded by the Honourable Justices Parker, Shephard, Best and Subramania Aiyar.

Minutes.

Mr. Justice Parker.—The language of the Bill in professing to confer upon persons governed by the Marumakkatayam or Aliyasantana Law of Inheritance testamentary powers appears to me inaccurate. It is by no means certain that the limited testamentary power which it is proposed to confer does not exist already. It has never been decided that it does not exist and in *Alami v. Komu* (Indian Law Reports XII, Madras, 126) it was pointed out that, since 1826, wills have been made in Malabar in regard to self-acquired property regulating its future management and sometimes giving it to one class of heirs in preference to another. I observe from Mr. Lyall's letter of 31st January 1894, No. 112, that the proposal of Government was that the right to testation in respect of self-acquired property should be declared and the Statement of Objects and Reasons appears to contemplate a declaratory bill only. I would therefore recommend that the title and preamble of the Bill be altered accordingly. This is not a question of mere verbal amendment but is one of substantial importance since, if the Bill purports to confer rights which were not in existence before, it might be construed so as to invalidate documents executed before the passing of the Act, and this certainly cannot have been intended. The Act should therefore be a declaratory one and it should come into effect from the date of the passing thereof. This latter provision has been overlooked in the draft Bill.

I doubt whether it is expedient to use the phrase "separate and self-acquired" property. I do not understand what distinction is intended. Apparently the object of the Bill is to declare that a testator shall have the same power to devise by will self-acquired property as he has to alienate it *inter vivos*. I think it will be sufficient to use the term "self-acquired" property.

It appears to me open to considerable doubt whether the Hindu Wills Act (XXI of 1870) can be conveniently applied to such wills. It must be remembered that the Hindu Wills Act as also the Indian Succession Act (many of the provisions of which are imported by section 2) v framed entirely for application to communities among which there is a legal form of marriage. This is not existent in Malabar; and there might be difficulty in applying sections 46, 62, 63, 96 and other sections of the Indian Succession Act to a community in which there are no married women and in which a man has (in law) no lineal descendants. I observe that the Government of India is not prepared to extend Act XXI of 1870 to the whole of the Madras Presidency and

167-177 Election

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8/2

only approves of the suggestion to extend it to Malabar on the ground that where there have hitherto been no wills at all, the Legislature may in conceding the privilege of *testation* impose all conditions essential to due formality. The records of our Courts show that the premise of this argument is historically inaccurate, and that the execution of wills can be traced back as far as 1826. I can see no reason to extend to the classes governed by Marumakkatayam and Aliyasantanam Laws the provisions of an Act which the Government hesitates to extend to the rest of the Presidency and the fact that that Act is obviously framed for communities having a legal form of marriage renders the proposal still more unsuitable. It might of course be possible to introduce a modified form of the provisions of the Indian Succession Act, but I should hesitate to take such a step without further experience of the effect produced by passing a simple declaratory Bill.

Mr. Justice Shephard.—The words "in the Presidency of Madras" seem to me superfluous as the Act is expressly declared to apply to the Presidency only. If it is necessary to use the word "separate" at all, I would say "separate or self-acquired." Either word, it seems to me, would serve by itself. But the phrase "separate and self-acquired" may mislead. Instead of the reference to "sound mind and minors" in section 2, I would suggest in substitution for the third section: "The provisions of the Hindu Wills Act shall apply to all dispositions made under this Act and shall be read herewith." That would make it clear that the whole Act is to apply, which perhaps is not beyond doubt in the third section as it is drafted. Otherwise I see no objection to the Bill and think it will be a most salutary piece of legislation.

Mr. Justice Best.—The Bill, as drafted, appears to be sufficient for the purpose in view. It seems to me that Act XXI of 1870 can be applied in its entirety.

Mr. Justice Subramania Aiyar.—I see no objection to the Bill. I would apply the provisions of the Hindu Wills Act without modifications.

Demi-official from the Honourable C. SANKARAN NAYAR, to the Under Secretary to Government, Public Department, dated Madras, 3rd July 1895.

I have received your letter of the 28th June enclosing a copy of the Bill drafted by the Advocate-General.

The only objection that has been raised to section (2) is the one I find in a book recently published in London. You will find the objection stated in page 473, Appendix. This was sent to me by Sir Philip Hutchins of the Secretary of State's Council, through the Honourable Mr. Price, who I believe circulated it among the Council Members before forwarding it to me.

As however we propose to legalize Malabar marriages, the objection it appears to me loses a great deal of its force. If however the Marriage Bill is not passed into law, then we may have to consider whether any weight is to be attached to this objection.

ENCLOSURE.

Objection.

An opponent of marriage legislation proposes, as an alternative, a Bill to the effect that "every person whose personal law is the Marumakkatayam law, and who is of sound mind and not a minor, shall be competent to dispose of his self-acquired separate property by will." But this is unnecessarily revolutionary. It is desirable to enable fathers to provide for their children, even though their doing so reduces the amount of the Tarwad's inheritance; but it is not desirable that men should be empowered to disinherit their Tarwad for the sake of women to whom they are not respectably married: such an innovation would be like the Ptolemaic legislation in Egypt, a way of combining the disadvantages of two separate systems of jurisprudence.

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C. No.

FOR ORDERS.

The currents are the replies received to G.O. of 25.2.95 No. 15 Leg. 6c which contains a draft bill to confer upon persons following the Marumakkathayam or Aliasantana law testamentary power over their separate and self acquired property, and invites the opinions of the High Court, the Advocate-General to Hon C. Saakaraa Nayar regarding the bill.

2. The only specific question put was as to whether Act XXI of 1840 (the Hindu wills Act) can be applied without modifications as provided in sec. 3 of the Bill which runs as follows:-

"The provisions of the Hindu Wills Act 1840 shall apply to all wills & codicils made under the Act"

In putting the question, the Govt. invited attention to the remarks contained in para 4 of Mr. Lyall's letter read

on page 3 of G.O. 81-3-94 No. 42 Leg.

3. The question has received a variety of answers. Mr. Justice Best and Mr. Justice Subramania Aiyar approve the Bill, & consider that the provisions of the Hindu Wills Act can be applied without modification. Mr. Justice Sheppard merely suggests ^{three} minor alterations but is otherwise of the same opinion.

The Advocate General thinks it unnecessary or inexpedient to extend the whole of the Hindu Wills Act to the class of will under consideration, & accordingly submits a revised draft bill. The Hon. C. Sankaran Nair appears to consider it undesirable to empower men to disinherit their wives "for the sake of women to whom they are not respectably married".

Lastly Mr. Justice Parker is opposed to the Bill, firstly on the ground that it proposes to confer testamentary power which probably exist already, secondly that it is doubtful whether the Hindu Wills Act can be conveniently applied in a community in which there are no married women and in which a man has (in law) no lineal descendants. He therefore recommends "simple declaratory Bill" without

FOR ORDERS.

[G.
25.]
600-7-5-95.

DEPARTMENT.

C. No.

FOR ORDERS.

any application of the Hindu Wills Act.

4. The objections taken by Mr. Justice Parker are the most serious. - The use of the word "confer" in the preamble implies that the testamentary powers mentioned did not exist before the passing of the bill; & this bill if passed into law might be construed so as to invalidate documents executed before it was passed; but, as Mr. Parker points out, in *Alami v. Romu* (I.L.R. XII Madras 126) it was remarked that wills have been made in Malabar since 1826.

This ^{next} consideration urged is the difficulty of applying the Hindu Wills Act. This Act, & the Indian Succession Act the provisions of which are applied by it, were framed entirely for application to communities among which there was a legal form of marriage, & the terms used would be inapplicable among persons following the Maramakkattayam or Aligantana law; e.g. sec. 4 "married women" in sec. 46 of the Indian Succession Act, "lineal descendant" in sec. 96.

The Advocate General had similar objections.

Vide his opinion 9.18 March - but on reconsideration came to the conclusion that "the enquiries provided for by section 22 of the Act ought to clear up any difficulties which may arise by the use in the wills of those whose marriages are not registered, of words and phrases apparently inapplicable to such family relations as exist under the Marumakkattayam & Chieftainship systems of law"

Before definitely accepting this view, perhaps it would be as well specially to consult the Judges of the High Court on the point.

Mr Parker next points out that the Govt of India has only consented to the application of the Hindu Wills Act in Malabar "on the ground that, where there have hitherto been no wills at all, the Legislature may in conceding the privilege of testation impose all conditions essential to due formality." The case quoted above (I.L.R. XII, 126) goes to show that wills have existed in Malabar since 1826; but the Govt of India has ^{expressly informed} ~~been~~ of this, it ^{might} ~~has~~ ^{refused} ~~refused~~ its consent to the application of the Hindu Wills Act to that district.

It is to be observed, however, that all that Govt asked for was "a declaration of the right of Hindus in respect of self-acquired property." The Govt of India (para 7 of Mr. Dwyer's letter - 9.10.71. March 1892) however, assumed that it was proposed to confer the privilege of testation upon a class of people previously devoid of the right. - When the letter was written the Govt had before it Report of the Malabar Marriage

FOR ORDERS.

* para 14 of letter 54
26.7.92

[G.]
25.
690-7-5-95.

DEPARTMENT.

C. No.

FOR ORDERS.

* para 87 of the report.

* published in 1889 or 1890 only.

Commission, a perusal of which would have shown that it was regarded as doubtful whether the privilege existed or not. - It is true that the majority of the Commissioners recommended that it should be "conferred" but Sir Muthusami Aiyar in para 20 of his Memorandum (p. 17) expressly refers to the very case (I.L.R. XII Madras 126) upon which Mr Justice Parker bases his contention that the privilege of testation already exists in Malabar. - Several of the witnesses examined express doubts on the subject e.g. M.R.R. P.V. Ananthan Nayar Esq. Dist. Magistrate of Calicut in para 8 of his letter writes:-

"In the Hindu law, wills were recognized by judicial decision, after a long struggle for existence but, under Malabar law, which is a more inflexible law than the Hindu law, that recognition has not yet been given by the Courts though the tenacity of a recent decision of the High Court is in favour of it"

See also para 4 (page 13) of the reply of M.R.R. & Kashi Raman Nayar Esq.

was: contains the remark

by other Hindus
" thought to be inherent also in the
" followers of the Marumakkatharam
" under the customary law of the
" Country but some rulings of the Madras
" High Court have tended to shake
" this belief though the tendency of the
" latest rulings is to recognize the
" testamentary power in certain
" Cases "

make wills. -
These doubts and difficulties may or
may not have been overlooked by the
Govt of India when the proposal to
extend the Hindu wills Act was approved
The expression "where there have hitherto
been no wills at all" seems to lead
to the conclusion that they were entirely
overlooked. At the same time, as wills
appear to be so rare in Malabar as to
be practically unknown, the reason assigned
by the Govt of India for consenting to
apply the Hindu wills Act^{ix} does not
lose very much force. - On this account
it is presumably unnecessary to refer to
that Govt. again ~~for another introduction~~
~~the proposed Bill~~ upon the subject.
It seems clear, however, that the
Bill should be "declaratory" as Mr.
Parker contends. It was a

40. 41-5-94 No. 42 Leg^{re}.

I think we can go ahead. The Constitutional power in Malabar is so shadowy as virtually to be non-existent for every day purposes. And it is another on which it is the duty of Govt to prevent the existence of any doubt.

Certainly
wms JG

C. No.

FOR ORDERS.

"Declaratory" Bill which the Advocate
 General was asked to prepare in para
 17 of L.O. of 30 October 1894 No. 117
 The only alteration required to effect the
 change - would be to substitute
 "declare that" for "confer upon" & to
 insert "possess" before "testamentary"
 in the title & preamble of the Bill.

8. The other criticisms made regarding
the Bill are:

†: Shephard J.

The words are clearly
superfluous *OK*

+ Parker &
Shepherd J.L.

(i)⁺ The words "in the Presidency of Madison" are superfluous by reason of clause (1); this is a mere verbal criticism which the Select Committee might settle. It does not much matter whether the words are retained or not; they are not essential but they do make things a shade more clear.

(ii)⁺ ~~Either~~ It is better to say "self-acquired" instead of "separate and self-acquired". This alteration may be accepted at once. Govt had doubts as to the correctness of the wording, & Mr. Ratterworth noted in P.O. of 25-2-95 No 15 ~~as follows~~ as follows

"I believe that property acquired by partition and also stridhanam are classed as self-acquired property but it seems more correct to term them separate property. If

terms are incorrect, the High Court will doubtless point it out."
Messrs. Parker & Shepherd evidently do consider the terms incorrect.

(iii) *The Bill should contain a ^{provision} section stating that it should come into effect from the date of passing thereof.

This criticism is just; the alteration required can take the form of the addition of "and shall come into effect from the date of passing thereof" to clause (v)

(iv) The Hon. C. Sankaran Nayanar's objection does not appear to call for comment.

9. Orders are solicited as to whether the proposal to make the bill ~~part of~~ a declaratory one is approved

~~the subject of the verbal alteration~~
~~only addition~~

II. as to whether the Hindu wills Act in retrospect should be applied to Malabar as contemplated by the original Bill, or,

III. The Advocate General's revised Bill (no. 20 of the proof) should be communicated to the High Court for opinion as to whether it is preferable to the original Bill, as to the possibility of employing s. 62 of the Indian Succession Act to clear up doubts as to the meaning of terms such as "married women" "lineal descendant" &c. in connection with the wills of persons following the ~~Malabar~~ Hindu law.

IV. If II is approved, which of the verbal & other alterations dealt with supra in para 8 of the note should be given effect to

D
30.4.85

Bill to confer testamentary powers in Malabar

* Parker J.

This is not necessary as by Sec 5 of the Mad. Gen. Clauses Act I of 1891 the Act comes into force, if no time mentioned, from the date of the G.O.

FOR ORDERS.

the assent of the G.O.

G.P. 16/5

H. S. & Co.

1. Hon. Mr. Sankaran Nayanar
2. Hon. Mr. Sankaran Nayanar

I think it sh^d clearly be declaratory so as to save past devolutions by will G.P.

See note

see above

G.P.
16/5
D.C. 15/9

H.E.

The safe course undoubtedly is to ask the H. Ct. to favor us with its opinion as to the recasting of the bill on the lines recommended by the Adv. Genl.

At the same time we can tell them that we accept the suggestion ^{of Parker J.} that the Act be declaratory; & ask if this will be sufficiently provided by making the first part of the preamble run -

"Whereas it is expedient to
" declare that persons in the
" P. of Madras who are governed
" by the Marumattam or Alaya law
" of inheritance possess
" testamentary power over
" their self-acquired property
" &c.

G.P. 16/5

I think that this course is the best now.

W
17.5.85

G.P.
18/9/95

G.P.
18/9

terms are incorrect
 "point it out."
 Messrs. Park
 consider the
 (iii) * the
 stating
 from
 I

Sep 1911
 Bill to confer testamentary
 powers in Malabar
 H.E. the Governor
 Hon. Mr. Belli C. J. S.
 Hon. Mr. Gore

17/12/11
 17/12/11

[G.]
 24.
 990-8395

DEPARTMENT.
 Papers to be read in proceedings:—

Again G.O., dated 189 , No.
 P. Again G.O., dated 25 Feb 1895, No. 10. 15
 Current No. of 189 , dated from

Current No. of 189 , dated from

Printed file
 A 1

ORDER. 824. September 1895, No. 92.

The Hon. the Judges of the High Court
 will be requested to favour Govt.
 with their opinion as to the advisability
 of recasting the Bill on the lines re-
 -commended by the Advocate General.
 2. The Govt. accepts Mr Justice Parker's
 suggestion that the Bill should be
 declaratory in form and preambles that
 this object will be sufficiently provided
 for by making the first part of the
 preamble run as follows:—

"Whereas it is expedient to declare
 "that persons in the Presidency of Madras
 who are governed by the Marumakkathayam
 or the Bhayasantana law of
 inheritance possess testamentary
 power over their self-acquired pro-
 -perty"

(from order)
 22.5.95

The Hon. the C.J. with C.L.
 The Hon. the Advocate Genl.
 The Hon. C. Sankaran Nayar
 8/12/11 for

Recd. again the former paper.
 40 & 25-2-95 No. 1524
 Abstract.

Malabar Testamentary
Bill

Mr. V. S. Forbes Esq.

B.P. (from order)

One

18/3/95

24TH SEPTEMBER 1895, No. 92, LEGISLATIVE.

GOVERNMENT OF MADRAS.

LEGISLATIVE DEPARTMENT.

READ—again the following paper :—

G.O., No. 15, Legislative, dated 25th February 1895.

ABSTRACT.—Forwarding, for remarks, to the Honourable the Judges of the High Court, the Advocate-General and the Hon'ble C. Sankaran Nayar the draft of a Bill to confer upon persons following the Marumakkatayam and Aliyasantana Laws of Inheritance testamentary power over their separate and self-acquired property.

READ—also the following papers :—

From the Government Solicitor, dated 20th March 1895, No. 152.

ABSTRACT.—Forwarding the following opinion of the Advocate-General, dated 18th March 1895 :—

[Re Bill to confer upon persons following the Marumakkatayam and Aliyasantana Laws of Inheritance testamentary power over their separate and self-acquired property.]

OPINION.

1. When I sent in the above draft Bill, I understood that its operation was to be confined to Hindus following the Marumakkatayam and Aliyasantana Laws of Inheritance and to be contingent on the passing of the Hon'ble Mr. C. Sankaran Nayar's Malabar Marriage Bill which contained provisions relating to wills.

2. Unless and until that Marriage Bill is passed, the Hindu Wills Act cannot, I think, be extended at all, because it is inapplicable to such family relations as exist under the Marumakkatayam and Aliyasantana systems of law. It contemplates a family consisting of husband and wife and their children either begotten or adopted. To such a family the sections of the Indian Succession Act mentioned in section 2 are applicable when extended. Those sections could not be applied to a Malabar family without modification, e.g., explanation 1 to section 46 is inapplicable. Take two other examples to illustrate the necessity for modification not only of the sections themselves, but even of the illustrations to many of them. Illustration (a) to section 48 assumes that the child therein referred to would inherit his father's property but for the will fraudulently obtained. Section 62 refers to the testator's "family," and illustration (a) shows that the "family" contemplated is of a kind unknown to, or unrecognized by, the peculiar systems of law above mentioned.

3. If the Bill to confer testamentary power is to be dealt with as entirely independent of the Malabar Marriage Bill, I think that a mere extension of the Hindu Wills Act will not suffice, but that it will be necessary to frame a Bill on the lines of those sections of the Indian Succession Act which were extended by section 2 of the Hindu Wills Act, but with such modifications as the necessities of the case demand. If Government agree with me upon this point, I will prepare a draft of such Bill and submit it in substitution for the Bill now under consideration.

4. I am inclined to think that such a Bill is necessary, because, even if the Malabar Marriage Bill be passed into law, it will not affect all persons at present governed by the Marumakkatayam and Aliyasantana rules of inheritance, whereas the power of disposing of separate and self-acquired property by will is to be conferred on all such persons.

MADRAS,
18th March 1895.

(Signed) J. H. SPRING BRANSON,
Advocate-General.

Endorsement

No. 265.

Returned to the Hon'ble the Advocate-General as requested personally.

21st March 1895. skt

(Signed) A. BUTTERWORTH,
Under Secretary to Government.

To the Government Solicitor.

From the Government Solicitor dated 18th April 1895 No. 239

[Re Bill to confer upon persons following the Marumakkatayam and Aliyasantana Laws of Inheritance testamentary power over their separate and self-acquired property.]

OPINION.

1. With reference to my opinion, dated the 18th March last, which was returned to me at my request for further consideration, it appears to me that the sections of the Indian Succession Act extended to Hindu wills by Act XXI of 1870 may be extended to wills made under the powers conferred by this Bill. The enquiries provided for by section 62 of the Indian Succession Act ought to clear up any difficulties which may arise by the use, in the wills of those whose marriages are not registered, of words and phrases apparently inapplicable to such family relations as exist under the Marumakkatayam and Aliyasantana systems of law.

2. There is so much in the Hindu Wills Act, 1870, that it is unnecessary or inexpedient to extend to the class of wills now under consideration that section 3 of the Bill should be omitted and the whole Bill should be amended in the manner hereinafter provided.

3. *Preamble*.—Strike out the words "it is hereby enacted as follows," substitute the word "and," and add the following: "Whereas it is expedient to provide rules for the execution, attestation, revocation, revival, interpretation, and probate of the wills of such persons, it is hereby enacted as follows":—

This appears to be necessary for two reasons, because—

(1) The Bill does more than merely confer a testamentary power, it provides for certain formalities which are intended to secure cogent evidence of execution of wills and of the intention and capacity to execute them.

(2) No reference is made to the Hindu Wills Act. The present Bill will be complete in itself if my suggested amendment of the present section 3 be adopted.

4. *Section 3*.—Omit this section and substitute the following:—

Section 2, Hindu Wills Act, XXI of 1870.

(3) "The following portions of the Indian Succession Act, 1865, namely:—
Sections 46, 48, 49, 50, 51, 55 and 57 to 77 (both inclusive);
Sections 82, 83, 85, 88 to 103 (both inclusive);
Sections 106 to 177 (both inclusive); and
Section 187

shall, notwithstanding anything contained in section 331 of the said Act, apply to

Section 3, Hindu Wills Act, XXI of 1870.

Provided that the registration of a marriage under the powers conferred by this Act. the time being in force relating to the marriage of persons following the Marumakkatayam and Aliyasantana Laws shall not revoke any such will or codicil, and that nothing herein contained shall authorise a testator to bequeath property which he could not have alienated *inter vivos*; and that nothing herein contained shall affect any law of adoption."

(4) "Nothing contained in this Act shall affect the rights, duties and privileges of the Administrator-General of Madras."

(5) In this Act and in the said sections and parts of the Indian Succession Act, all words defined in section 3 of the same Act shall, unless there be something repugnant in the subject or context, be deemed to have the same meaning as the said section 3 has attached to such words respectively.

And in applying sections 62, 63, 92, 96, 98, 99, 100, 101, 102 and 103 of the said Succession Act to wills and codicils made under this Act, the words "son," "sons," "child" and "children" shall be deemed to include an adopted child, and the word "grand children" shall be deemed to include the children, whether adopted or natural born, of a child, whether adopted or natural born; and the expression "daughter-in-law" shall be deemed to include the wife of an adopted son.

5. This arrangement will prevent the setting up of non-cupative wills, secure the due and formal execution of all wills made under this Act, and confine the testamentary power to devise by will of such property only as the testator could transfer by gift *inter vivos*.

6. The provisos about "maintenance" and "intestate succession" contained in section 3 of the Hindu Wills Act are omitted as inapplicable or undesirable.

With regard to intestacy there seems to be considerable difference of opinion as to what rights, if any, should be conceded to the widow and children. Moreover, it is not quite clear whether any difference is to be made between persons whose marriages are registered under the proposed Marriage Bill and those who are not registered as husband and wife. Probably it is wiser to leave this subject open, to be disposed of hereafter, if necessary, in a manner somewhat similar to the Parsi Succession Act, 1865.

(Signed) J. H. SPRING BRANSON,
Advocate-General.
MADRAS,
17th April 1895.

From D. W. G. COWIE, Esq., Acting Registrar of the High Court of Judicature, Appellate Side, to the Chief Secretary to Government, dated Madras, 2nd May 1895, No. 1324.

With reference to G.O., No. 15, Legislative, dated 25th February 1895, forwarding, for the opinion of the Honourable the Judges, a Bill to confer upon persons in the Presidency of Madras who are governed by the Marumakkatayam or the Aliyasantana Law of Inheritance testamentary power over their separate and self-acquired property, I am directed to forward minutes recorded by the Honourable Justices Parker, Shephard, Best and Subramania Aiyar.

Minutes.

Mr. Justice Parker.—The language of the Bill in professing to confer upon persons governed by the Marumakkatayam or Aliyasantana Law of Inheritance testamentary powers appears to me inaccurate. It is by no means certain that the limited testamentary power which it is proposed to confer does not exist already. It has never been decided that it does not exist and in *Alami v. Komu* (Indian Law Reports XII, Madras, 126) it was pointed out that, since 1826, wills have been made in Malabar in regard to self-acquired property regulating its future management and sometimes giving it to one class of heirs in preference to another. I observe from Mr. Lyall's letter of 31st January 1894, No. 112, that the proposal of Government was that the right to testation in respect of self-acquired property should be declared and the Statement of Objects and Reasons appears to contemplate a declaratory bill only. I would therefore recommend that the title and preamble of the Bill be altered accordingly. This is not a question of mere verbal amendment but is one of substantial importance since, if the Bill purports to confer rights which were not in existence before, it might be construed so as to invalidate documents executed before the passing of the Act, and this certainly cannot have been intended. The Act should therefore be a declaratory one and it should come into effect from the date of the passing thereof. This latter provision has been overlooked in the draft Bill.

I doubt whether it is expedient to use the phrase "separate and self-acquired" property. I do not understand what distinction is intended. Apparently the object of the Bill is to declare that a testator shall have the same power to devise by will self-acquired property as he has to alienate it *inter vivos*. I think it will be sufficient to use the term "self-acquired" property.

It appears to me open to considerable doubt whether the Hindu Wills Act (XXI of 1873) can be conveniently applied to such wills. It must be remembered that the Hindu Wills Act as also the Indian Succession Act (many of the provisions of which are imported by section 2) was framed entirely for application to communities among which there is a legal form of marriage. This is not existent in Malabar; and there might be difficulty in applying sections 46, 62, 63, 96 and other sections of the Indian Succession Act to a community in which there are no married women and in which a man has (in law) no lineal descendants. I observe that the Government of India is not prepared to extend Act XXI of 1870 to the whole of the Madras Presidency and only approves of the suggestion to extend it to Malabar on the ground that where there have hitherto been no wills at all, the Legislature may in conceding the privilege of *testation* impose all conditions essential to due formality. The records of our Courts show that the premise of this argument is historically inaccurate, and that the execution of wills can be traced back as far as 1826. I can see no reason to extend to the classes governed by Marumakkatayam and Aliyasantanam Laws the provisions of an Act which the Government hesitates to extend to the rest of the Presidency and the fact that that Act is obviously framed for communities having a legal form of marriage renders the proposal still more unsuitable. It might of course be possible to introduce a modified form of the provisions of the Indian Succession Act, but I should hesitate to take such a step without further experience of the effect produced by passing a simple declaratory Bill.

Mr. Justice Shephard.—The words "in the Presidency of Madras" seem to me superfluous as the Act is expressly declared to apply to the Presidency only. If it is necessary to use the word "separate" at all, I would say "separate or self-acquired." Either word, it seems to me, would serve by itself. But the phrase "separate and self-acquired" may mislead. Instead of the reference to "sound mind and minors" in section 2, I would suggest in substitution for the third section: "The provisions of the Hindu Wills Act shall apply to all dispositions made under this Act and shall be read herewith." That would make it clear that the whole Act is to apply, which perhaps is not beyond doubt in the third section as it is drafted. Otherwise I see no objection to the Bill and think it will be a most salutary piece of legislation.

Mr. Justice Best.—The Bill, as drafted, appears to be sufficient for the purpose in view. It seems to me that Act XXI of 1870 can be applied in its entirety.

Mr. Justice Subramania Aiyar.—I see no objection to the Bill. I would apply the provisions of the Hindu Wills Act without modifications.

Demi-official from the Honourable C. SANKARAN NAYAR, to the Under Secretary to Government, Public Department, dated Madras, 3rd July 1895.

I have received your letter of the 28th June enclosing a copy of the Bill drafted by the Advocate-General.

The only objection that has been raised to section (2) is the one I find in a book recently published in London. You will find the objection stated in page 473, Appendix. This was sent to me by Sir Philip Hutchins of the Secretary of State's Council, through the Honourable Mr. Price, who I believe circulated it among the Council Members before forwarding it to me.

As however we propose to legalize Malabar marriages, the objection it appears to me loses a great deal of its force. If however the Marriage Bill is not passed into law, then we may have to consider whether any weight is to be attached to this objection.

ENCLOSURE.

Objection.

An opponent of marriage legislation proposes, as an alternative, a Bill to the effect that "every person whose personal law is the Marumakkatayam law, and who is of sound mind and not a minor, shall be competent to dispose of his self-acquired separate property by will." But this is unnecessarily revolutionary. It is desirable to enable fathers to provide for their children, even though their doing so reduces the amount of the Tarwad's inheritance; but it is not desirable that men should be empowered to disinherit their Tarwad for the sake of women to whom they are not respectably married: such an innovation would be like the Ptolemaic legislation in Egypt, a way of combining the disadvantages of two separate systems of jurisprudence.

ORDER—dated 24th September 1895, No. 92, Legislative.

The Hon'ble the Judges of the High Court will be requested to favour Government with their opinion as to the advisability of recasting the Bill on the lines recommended by the Advocate-General.

2. The Government accepts Mr. Justice Parker's suggestion that the Bill should be declaratory in form and presumes that this object will be sufficiently provided for by making the first part of the preamble run as follows:—

"Whereas it is expedient to declare that persons in the Presidency of Madras who are governed by the Marumakkatayam or Aliyasantanam Law of Inheritance possess testamentary power over their self-acquired property."

(True Extract.)

Ag. Under Secy. to Govt.

To the Hon'ble the Chief Justice with C.L.
" Hon'ble the Advocate-General.
" Hon'ble C. Sankaran Nayar.

Exd. S. J. Pereira.

Gobt. of {1895} Madras.

LEGISLATIVE.

Issued

Recd.

Encl.

G.O., 24th September 1895, No. 92.

SEPTEMBER.

Bill to confer upon persons following the Marumakkatayam and Aliyasantana Laws of Inheritance testamentary power over their separate and self-acquired property.

Requesting the Hon'ble the Judges of the High Court to favour this Government with their opinion as to the advisability of recasting the — on the lines recommended by the Advocate-General, and accepting Mr. Justice Parker's suggestion that the — should be declaratory in form.

No. 92, LEGISLATIVE, 24TH SEPTEMBER 1895.

GOVERNMENT OF MADRAS.

LEGISLATIVE DEPARTMENT.

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2. Unless and until that Marriage Bill is passed, the Hindu Wills Act cannot, I think, be extended at all, because it is inapplicable to such family relations as exist under the Marumakkatayam and Aliyasantana systems of law. It contemplates a family consisting of husband and wife and their children either begotten or adopted. To such a family the sections of the Indian Succession Act mentioned in section 2 are applicable when extended. Those sections could not be applied to a Malabar family without modification, *e.g.*, explanation 1 to section 46 is inapplicable. Take two other examples to illustrate the necessity for modification not only of the sections themselves, but even of the illustrations to many of them. Illustration (a) to section 48 assumes that the child therein referred to would inherit his father's property but for the will fraudulently obtained. Section 62 refers to the testator's "family," and illustration (a) shows that the "family" contemplated is of a kind unknown to, or unrecognized by, the peculiar systems of law above mentioned.

3. If the Bill to confer testamentary power is to be dealt with as entirely independent of the Malabar Marriage Bill, I think that a mere extension of the Hindu Wills Act will not suffice, but that it will be necessary to frame a Bill on the lines of those sections of the Indian Succession Act which were extended by section 2 of the Hindu Wills Act, but with such modifications as the necessities of the case demand. If Government agree with me upon this point, I will prepare a draft of such Bill and submit it in substitution for the Bill now under consideration.

4. I am inclined to think that such a Bill is necessary, because, even if the Malabar Marriage Bill be passed into law, it will not affect all persons at present governed by the Marumakkatayam and Aliyasantana rules of inheritance, whereas the power of disposing of separate and self-acquired property by will is to be conferred on all such persons.

MADRAS,
18th March 1895.

(Signed) J. H. SPRING BRANSON,
Advocate-General.

Endorsement No. 265.

Returned to the Hon'ble the Advocate-General as requested personally.

21st March 1895.

To the Government Solicitor.

(Signed) A. BUTTERWORTH,
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2. There is so much in the Hindu Wills Act, 1870, that it is unnecessary or inexpedient to extend to the class of wills now under consideration that section 3 of the Bill should be omitted and the whole Bill should be amended in the manner hereinafter provided.

3. *Preamble*.—Strike out the words "it is hereby enacted as follows," substitute the word "and," and add the following: "Whereas it is expedient to provide rules for the execution, attestation, revocation, revival, interpretation, and probate of the wills of such persons, it is hereby enacted as follows":—

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(4) "Nothing contained in this Act shall affect the rights, duties and privileges of the Administrator-General of Madras."

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And in applying sections 62, 63, 92, 96, 98, 99, 100, 101, 102 and 103 of the said Succession Act to wills and codicils made under this Act, the words "son," "sons," "child" and "children" shall be deemed to include an adopted child, and the word "grand children" shall be deemed to include the children, whether adopted or natural born, of a child, whether adopted or natural born; and the expression "daughter-in-law" shall be deemed to include the wife of an adopted son.

5. This arrangement will prevent the setting up of non-cupative wills, secure the due and formal execution of all wills made under this Act, and confine the testamentary power to devise by will of such property only as the testator could transfer by gift *inter vivos*.

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(True Extract.)

L. DAVIDSON,
Ag. Under Secy. to Govt.

To the Hon'ble the Chief Justice with C.L.
" Hon'ble the Advocate-General.
" Hon'ble C. Sankaran Nayar.

Exd. S. J. Pereira.

Govt. of {1895} Madras.
LEGISLATIVE.

Issued

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G.O., No. 92, 24th September 1895.

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Bill to confer upon persons following the Marumakkatayam and Aliyasantana Laws of Inheritance testamentary power over their separate and self-acquired property.

Requesting the Hon'ble the Judges of the High Court to favour this Government with their opinion as to the advisability of recasting the — on the lines recommended by the Advocate-General, and accepting Mr. Justice Parker's suggestion that the — should be declaratory in form.

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[Despatch Abstract]

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