Now in this case I have no evidence beyond that the objectionable substance is a preparation of opium and since every penal statute must be construed strictly and so far as possible in favour of the accused, in the absence of evidence that Exhibit A is a preparation susceptible of being smoked, I feel bound to hold that the exhibit is not a preparation on which there is an absolute ban as regards importation.

There now arises the further point, was the accused the actual importer of the exhibit? I have carefully considered all relevant assistance which I can find and albeit with some hesitation I come to the conclusion that in the absence of any definition of the term "importer" in local legislation I should adopt the perfectly logical definition in s. 284 of 39 and 40, Vict., c. 36.[1] Reading that section carefully I cannot consider that the words "possessed of" can mean an innocent carrier of a parcel and accordingly I come to the conclusion that Wong Chow was not the importer of this parcel of opium. Any other conclusion, it seems to me, might lead to very curious results. I can conceive a case in which the shipping company might be held responsible for the importation of a packet innocently received for carriage; the agents of the post office might even be held similarly liable, and so, the more especially in a criminal charge, I feel constrained to hold that the importer is the receiver or addressee of the parcel, who is beneficially interested therein or, of course, one who might land the parcel knowing its contents and attempt to smuggle it through the Customs.

No such state of mind or action may be attributed to the accused and accordingly I hold that both in fact and in law the charge against him cannot be sustained.

There will accordingly be a verdict of "not guilty."

I only desire to add that I have come to this conclusion with a certain degree of hesitation—if I had been sitting as a High Court judge in England I should, I think, have convicted and given leave to appeal, but I cannot put a person in the position of accused to the expense of an appeal, and so, since I have a doubt, it is better that a guilty man should escape rather than that an innocent man should suffer.

R. *v.* SURAJPAL.

[Criminal Jurisdiction (Maxwell Anderson, C.J.) June 14, 1934.]

Bigamy—Marriage by Indian Custom—First marriage prior to Marriage (Amendment) Ordinance 1928 *and without certificates—Second marriage complying with all legal requirements—whether first marriage valid.*

Accused was arraigned on a charge of bigamy contrary to s. 57 of the Offences against the Person Act, 1861. It was proved that in 1927 he went through a marriage ceremony according to Indian custom with one Rampiari. The marriage was performed by two priests, one registered and one unregistered under the Marriage Ordinance 1918. No certificates for marriage were produced to the priests and the marriage was not registered. The priests deposed that the marriage was binding

[1] *Customs Consolidation Act,* 1876.

according to the religion and personal law of the parties but that the parties were informed that the ceremony was not in accordance with the law of Fiji. The parties eventually separated and in 1932 accused commenced proceedings in the Supreme Court (reported *sub nomine In re Sudamma*[1]) to obtain the custody of the child of the marriage. In those proceedings it was argued on his behalf that the marriage was valid and it was proved in evidence that in 1927 Indian marriage officers were not provided with forms of certificates. Without deciding on the validity of the marriage the learned Acting Chief Jutice (*C. G. Howell*) stated *obiter* : " I think it should be made known that in my judgment failure to obtain a certificate does not *ipso facto* void a marriage."

It was proved that in 1933 accused, Rampiari being still alive, went through a marriage ceremony with one Piyari. The second marriage was also performed according to the religion and personal law of the parties and in accordance with every requirement of the law of Fiji.

The evidence of the two Indian priests (confirmed by reference to the work of *Chinna Durai,* Barrister-at-Law, on *Hindu Law*) was that according to Hindu religion and law (*a*) the marriage was binding, (*b*) the issue of the marriage was legitimate, (*c*) a husband having a wife living may marry again if his wife unlawfully deserts him, (*d*) a woman having a husband married cannot re-marry, (*e*) Hindu religion prohibits divorce but among certain classes custom permits of divorce and re-marriage.

The evidence of Rampiari was that she knew her marriage was not in accordance with the law of Fiji, that she had wished it to be so and that at the time of the marriage it was her intention to live with the accused " happily all my life."

The accused did not give evidence nor call any witnesses.

HELD.—(1) That a marriage by Indian custom prior to 1st April, 1929 was a lawful marriage at the time it was contracted and remained so after the enactment of the Marriage Ordinance 1928.

(2) At the present time certificates for marriage and the registration thereof are necessary for a legal marriage.

[**EDITORIAL NOTE.**—This decision turns on the effect of the proviso to s. 63 of the Marriage Ordinance 1918 (now s. 58 of the Marriage Ordinance Cap. 118, Revised Edition Vol. II page 1193). The proviso, which was as follows, was repealed by the amending Ordinance No. 7 of 1928 :—

> " Provided that nothing contained in this section or in s. 18, 26, and 27 of this Ordinance " shall apply to the marriage of Indians according to Indian custom ".

The ss. 18, 26, and 27 referred to are identical with the same sections of Cap. 118.

The amending Ordinance of 1928 which repealed this proviso came into effect on 1st April, 1929. The effect of the decision is that, the repeal of the proviso not being retrospective, although marriages solemnised since 1st April, 1929 must comply with the statutory formalities to be valid, marriages solemnised according to Indian custom prior to 1st April, 1929 remain valid.

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[1] (1932) 3 *Fiji L.R.*

The decision was followed in :—
R. v. Sarjudei [1937] 3 Fiji L.R.
In re Dukhan [1939] 3 Fiji L.R.
but in the first mentioned case it was observed that the amendment enacted in 1928 applied to marriages before 1st September (not 1st April). See however *R. v. Rama* [1946] 3 Fiji L.R. in which case an opposite view is taken as to the effect of a " customary marriage " in a bigamy case.]

Cases referred to :—
(1) *Brierly v. A.G.* [1890] 15 P.D. 76.
(2) *Brook v. Brook* [1861] 9 H.L. Cas. 193 ; 4 L.T. 93 ; 11 E.R. 703 ; 27 Dig. 63.
(3) *R. v. Millis* [1844] 10 Cl. Fin. 534 ; 8 E.R. 844 ; 15 Dig. 739.
(4) *Smith v. Huson* [1811] I Phil. 287 ; 161 E.R. 987 ; 15 Dig. 737.
(5) *R. v. Savage* [1876] 13 Cox, C.C. 178 ; 15 Dig. 736.
(6) *Rex v. Inhabitants of Wroxton* [1833] 4 B. and Ad. 640 ; 110 E.R. 595 ; 27 Dig. 48.
(7) *L— v. L—* Times 14th May 1934.
(8) *James v. James & Smyth* [1881] 51 L.J. (P) 24 ; 27 Dig. 63.
(9) *Papworth v. Battersby Borough Council* [1915] 84 L.J.K.B. 1881 ; on appeal [1916] 1 K.B. 583 ; 30 Dig. 198.

G. F. Grahame, for accused, outlined the history of marriage legislation in the Colony and submitted that at the foundation of the Colony the law governing marriage was the Common Law of England and that any alteration therefrom is invalid save where it has been made by statutory enactment, except in the case of the Fijian inhabitants in whose case their own custom and usage governed marriage until statutory provision was made therefor, that a Common Law marriage, i.e., the voluntary union for life of one man with one woman to the exclusion of all others, required solemnization by an episcopally ordained clergyman, provided that in cases where it was impossible to procure the presence of such a clergyman, any form or ceremony showing the intention by the parties to marry one another is sufficient to constitute a valid marriage. *James v. James* [1882] 51 L.J. (p) 24. He went on to point out that at the time of the cession of the Colony there was no Indian population in the Colony and that after the arrival of Indian immigrants the marriage requirements for marriage contracted by them in the Colony was the Common Law of England until the passing of Ordinance 1 of 1892.[1] The Marriage Ordinance No. 2 of 1918[2] with amendments constituted a code. He submitted that between January 1st, 1920, and September 1st, 1929, a marriage by Indian custom was only legal and valid if s. 43 (1) of Ordinance No. 2 of 1918 be fully complied with, that a marriage must be by a priest registered as a marriage officer, in accordance with the personal law of the parties and subject otherwise to the provision of the Ordinance.

S. 12 requires notice of intention to marry.

S. 15 which applies to all marriages solemnized within the Colony prescribed a certificate for marriage being issued and s. 15 (2) provides that if any persons knowingly and wilfully intermarry without that certificate for marriage the marriage shall be null and void.

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1 1924 *Edition. Immigration Ordinance (Repealed as to marriages).*
2 *Now Marriage Ordinance Cap.* 118 *(Revised Edition Vol.* II *page* 1176).

In this case both parties had been informed by the priest that no certificate existed and they knowingly and wilfully intermarried without it. Therefore the marriage was null and void.

Further, s. 44 of the Ordinance prescribed that the Indian priest shall observe and fulfil all the formalities prescribed in Part I of the Ordinance. Any marriage by Indian custom which was not in accordance with those formalities was not a valid marriage unless it was subsequently registered under the provisions of Ordinance 27 of 1928.[1] It is only under s. 63[2] of the 1918 Ordinance that a marriage by Indian custom was referred to. That section is a penalty section only and by proviso exempted persons who married according to Indian custom and the priest who married them from penalties for non-compliance with the provisions of the Marriage Ordinance, and also from penalties under ss. 18, 26 and 27. It did not make a marriage by Indian custom legal and valid.

Therefore the marriage in 1927 between accused and Rampiari was not a valid marriage. It is for the prosecution strictly to establish its validity. In an indictment for bigamy everything must be proved most strictly and the law will not presume the validity of the marriage in the case of bigamy as it will in civil cases.

He quoted *Brierly v. A.G.*, [1890] 15 P.D. 76 ; *Brook v. Brook*, 9 H.L. Case 193 at page 209 ; *R. v. Millis* [1844] 10 Cl. and F., 534 H.L.; *Smith v. Huson*, I Phil. 287 ; and *R. v. Savage*, 13 Cox 178.

The Attorney-General, *R. S. Thacker.*—I rely on ss. 15 (2), 56[3] and 63[4] of the Marriage Ordinance 1918. Under s. 15 (2)[5] to make the marriage null and void both parties must have knowingly and wilfully intermarried without a certificate for marriage. There is no evidence that both knew, but only that the wife did so know. The section is therefore not satisfied. The accused cannot be permitted to come to this Court and say that the marriage is invalid when in 1932 he argued that it was valid. To allow this would be to make proceedings in this Court a farce. (He referred to *Trevelyan on Hindu Law*, p. 92). Where it has been proved a marriage has been celebrated there is a presumption that it is valid in law and that all necessary ceremonies have been performed. The first marriage was within the reasoning of the proviso to s. 19 of the Ordinance and if one party was ignorant of any invalidity, the marriage was good. (He quoted *Rex v. Inhabitants of Wroxton*, 4 B. & Ad. 640, and *L— v. L—*, Times (daily edition), 14th May, 1934).

MAXWELL ANDERSON, C.J.—On the facts of this case the assessors are of opinion and I agree with them that the accused is guilty of bigamy in that he went through a form of marriage with Rampiari which at the time, and also in 1932, he believed to constitute a valid and binding marriage and subsequently in 1933 he during the lifetime of Rampiari married another woman Piyari, according to the same forms and ceremonies and in accordance with the law of Fiji as existing at

[1] *Such subsequent registration to be effected before a date fixed in the Ordinance. The Ordinance is now spent except as referred to in s. 42 of the Marriage Ordinance Cap. 118 (Revised Edition page 1189).*
[2] *Now s. 53 of Cap. 118.*
[3] *Now s. 58 of Cap. 118.*
[4] *Now s. 53 of Cap. 118.*
[5] *Repealed. The sub-section defined the offence of bigamy.*

that date. I find that the first marriage was a legal marriage binding on the parties and not contrary to the law of Fiji. I should have been sorry if I had felt constrained to hold otherwise for I realise that my decision in this case must be not only of the greatest importance to the Indian community but affects many hundreds if not thousands of married couples in the Colony.

I had at first thought that this case would involve a very difficult point of law but the arguments of learned counsel have shown that the solution of the issue lies in a nutshell.

The marriage of the accused with Rampiari is subject to the provisions of the Marriage Ordinance 1918. Learned counsel for the accused has ably set out the general provisions of that Ordinance and traced out the historical inception and progress of the law. I need not therefore recapitulate and it suffices to commence from the proviso to s. 63 (now repealed) of that Ordinance. S. 63 enacts a penalty for wrongfully procuring a marriage (observe that it does not make such a marriage null and void) and the proviso reads " Provided that nothing contained in this section or in ss. 18, 26, and 27 of this Ordinance shall apply to the marriage of Indians according to Indian custom." Now s. 18 enacts a penalty on any person solemnizing a marriage without production to him of the certificates required by s. 15 and the said s. 15 further enacts that if any persons knowingly and wilfully intermarry without the said certificates for marriage their marriage shall be null and void.

S. 26 enacts a penalty on the solemnization of a marriage by an unregistered person but expressly states that the validity of the marriage shall not be affected in such case. S. 27 enacts a penalty on a priest or marriage officer who fails to transmit certificates to the Registrar-General. The exemption from these sections of an Indian priest performing a marriage ceremony according to Indian custom provides in fact that the provisions of the Ordinance as regards certificates do not apply to such marriages as he may perform and that provided the parties to the ceremony really believe that a marriage is being solemnized between them the marriage is legal for all purposes. It has been argued by learned counsel for the accused that the Marriage Ordinance 1928 shows that marriages by Indian custom solemnized before April 1st, 1930, are only legal if they have been registered under that Ordinance.[1] I dissent from that view ; the Ordinance says " it shall be lawful ", and is in fact a declaratory or enabling Ordinance and in no way renders illegal or void anything done prior to its enactment.

The Marriage Ordinance 1928 repeals the proviso to s. 63 of the Marriage Ordinance 1918 which I have discussed *supra* and therefore at the present time the certificates for marriage and registration thereof are necessary for a legal marriage, but I am satisfied that in 1927 this was not so and accordingly I hold that marriage solemnized by Indian priests prior to 1st April, 1929, according to the personal law and religion of the parties and whether such priest was registered or not are legal and valid provided always that the parties so intended.

It follows that the marriage of the accused with Rampiari in 1927 was a valid marriage as he contended in 1932 and in marrying Piyari in 1933

[1] *Vide R. v. Sarjudei* [1937] 1 *Fiji L.R. for comment on this passage.*

he committed the offence with which he stands charged. But there are degrees of guilt. I take into consideration that for nearly fifty years the point which I have now decided has been the subject of much conflict of opinion, the law is not very clearly stated and in addition there is the conduct of Rampiari as set forth in the civil proceedings in 1932, and I am of opinion that a sentence of three days' imprisonment will meet the justice of this case. The accused may therefore be released forthwith.

TARA SINGH *v.* DALEL SINGH.

[Civil Jurisdiction (Maxwell Anderson, C.J.) March 15, 1935.]

Action for malicious prosecution—nolle prosequi entered to the prosecution—whether proceedings in prosecution terminated in favour of plaintiff.

In December 1933 Dalel Singh laid a charge to the effect that Tara Singh had robbed him of two one pound notes as a result of which a preliminary enquiry was held and Tara Singh committed for trial. The Attorney-General entered a *nolle prosequi* to the information and thereupon Tara Singh brought the present action claiming damages for malicious prosecution.

HELD.—A *nolle prosequi* does not have the same effect as an acquittal and does not amount to a termination of proceedings in favour of the accused so as to enable him to bring an action for malicious prosecution.

[**EDITORIAL NOTE.**—This was a reserved judgment but there is no record of a written judgment ; the report is compiled entirely from the Judge's Notes. The Criminal Procedure Code s. 73 specifically provides that a *nolle prosequi* is not a bar to subsequent proceedings. At the date of the decision the relevant section (Criminal Procedure Ordinance, 1875 s. 7) contained no such provision.]

Cases referred to :—

(1) *Gilchrist v. Gardner* [1891] 12 N.S.W.L.R. 184; 8 N.S.W.W.N. 21 ; 33 Dig. 481 N. (AUS).

(2) *Goddard v. Smith* [1704] 87 E.R. 1107 ; 33 Dig. 481 ; 14 Dig. 243.

(3) *Rich v. Forman* [1927] 29 W.A.L.R. 13. (AUS).

(4) *R. v. Allen* [1862] 1 B. & S. 850 ; 31 L.J.M.C. 129 ; 5 L.T. 636 ; 26 J.P. 341 ; 9 Cox. C.C. 120 ; 121 E.R. 929 ; 14 Dig. 243.

(5) *Cotterell v. Jones* [1851] 138 E.R. 655 ; 21 L.J.C.P. 2 ; 33 Dig. 507.

(6) *Brook v. Carpenter* [1825] 3 Bing. 303 ; 130 E.R. 530 ; 33 Dig. 482.

(7) *Metropolitan Bank v. Pooley* [1885] 10 Ap. Cas. 210 ; 54 L.J.Q.B. 449 ; 53 L.J. 163 ; 49 J.P. 756 ; 1 Dig. 67.

(8) *Quartz Hill Gold Mining v. Eyre* [1883] 11 Q.B.D. 674 ; 52 L.J.Q.B. 488 ; 49 L.J. 249 ; 33 Dig. 469.

(9) *Elworthy v. Bird* [1824] 2 Bing. 258 ; 9 Moo. P.C. 430 ; 130 E.R. 305 ; 14 Dig. 244.