Restitution of Conjugal Rights and the Law Commission's Recommendation for Reform

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THE PROVISION for the matrimonial remedy of conjugal rights is made in section 9 of the Hindu Marriage Act, 1955 and section 22 of the Special Marriage Act, 1954. While under the latter statute there is a single provision of restitution of conjugal rights, in the former statute it is divided into two. The main provision is contained in section 9(1) and the subsidiary provision is contained in section 9(2). Section 9 of the Hindu Marriage Act reads :

> (1) When either the husband or the wife has without reasonable excuse withdrawn from the society of the other, the aggrieved party may apply by petition to the district court, for restitution of conjugal rights and the court, on being satisfied of the truth of the statement made in such petition and that there is no lagal ground why the application should not be granted, may decree restitution of conjugal rights accordingly.
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> (2) Nothing shall be pleaded in answer to a petition for restitution of conjugal right which shall not be a ground for judicial separation or for nullity of marriage or for divorce.

The language of section 22 of the Act of 1954 and of section 9(1) of the Act of 1955 is identical. The Special Marriage Act does not contain anything like section 9(2) of the Hindu Marriage Act. The provision of restitution of conjugal rights under the Hindu Marriage Act has caused some difficulties of interpretation and our courts are divided on the conjugation of section 9(1) and section 9(2) of the Act.

The two questions that arise for the consideration in connection with the remedy of restitution of conjugal rights are :

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(i) Should the remedy of restitution of conjugal rights be retained in the marriage law ?

(ii) Does the provision of restitution of conjugal rights in Hindu Marriage Act need some clarification or modification ?

If the first question is answered in the affirmative the second question does not arise at all. Since neither the Ministry of Law nor the Law Commission has given any consideration to the first question, it is proposed to consider the second question first. On the second question both the Law Ministry and the Law Commission have expressed certain views.

Section 9 of the Hindu Marriage Act has come for consideration in a number of cases. The problem under section 9 is : sub-section (1) of the Act lays down that the aggreived party can petition for restitution of conjugal rights if the respondent has withdrawn from his society 'without reasonable excuse' while sub-section (2) lays down that "nothing shall be pleaded in answer to a petition for restitution of conjugal rights which shall not be a ground for judicial separation, or for nullity or for divorce." Therefore, the questions that arise are : "Is reasonable excuse" in sub-section (1) equivalent to 'a ground' for a matrimonial relief, or is it less than that ? If it is less than a ground, then what is the significance of the provision in sub-section (2) ?

Our courts are divided on this issue.

The Andhra Pradesh High Court[1] is the only court which gives a straight affirmative answer to the first question. The simplified facts of this case are : husband's petition for restitution of conjugal rights was resisted by the wife on the ground that since the husband was suffering from leprosy it amounted to reasonable excuse for her living separate from her husband. Holding that the leprosy was not 'virulent' which is a ground for both judicial separation and divorce, (though in the former case the period of suffering should not be less than one year, while in the latter, not less than 3 years) the husband's petition was granted. Krishna Rao, J., said :

> It is manifest that the 'reasonable excuse' contemplated by sub-section (1) must be one which would afford a ground either for judicial separation or for nullity of marriage or for divorce. What reasonable excuse is envisaged by sub-section (1) is indicated by sub-section (2)....It is not open to either spouse to plead any excuse other than those indicated in sub-section (2).[1a]

1. *Annapurnamma* v. *Appa Rao*; A.I.R. 1963 A.P. 312.
1a. *Id.* at 314.

This obviously renders the expression 'reasonable excuse' in sub-section(1) redundant.

Attempts at reconciliation of sub-sections have been made by Mookerjee and Basu, JJ., of the Calcutta High Court[2] and Gagneshwar Prasad, J., of the Allahabad High Court.[3] Mookerjee, J., said that it is incumbent on the petitioner to prove that the respondent was staying away from him without any reasonable excuse and if he fails to prove that, the petition cannot be granted even if the respondent fails to prove the ground taken by him under sub-section (2). By separating the burden of proof under both the sub-sections, he felt that the provision is made to work. Being of the view that he defences under sub-section (2) are by way of additional proof, Gagneshwar Prasad, J., said that sub-section (2) only lays down that what would be considered to be a legal ground for refusal to grant a decree for restitution of conjugal rights and, therefore, applies only to the last condition of sub-section (1). The learned judge very rightly said that to construe sub-section (2) as a bar to the consideration by the court of any other matter save what is mentioned therein granting or refusing to grant a decree for restitution of conjugal rights-would render the two other conditions of sub-section (1) nugatory.[4] But, if something less than a ground for a matrimonial relief is considered to amount to reasonable excuse, then, it is submitted, there would be no occasion to apply sub-section (2). The fact of matter is that either way (the Calcutta and the Allahabad views), sub-section (2) is rendered useless.

The provision has come for interpretation in several cases before the Punjab High Court. The first reported case in which the matter was considered in some detail is *Gurdev Kaur* v. *Sarwan Singh.*[5] It was the husband's petition for restitution of conjugal rights and the wife's main defence was husband's physical cruelty spreading over a period of fifteen years of married life. It is interesting to note that the trial court framed only one issue : Whether the petitioner has treated the respondent with such cruelty as to cause a reasonable apprehension in the mind of the respondent that it would be harmful and injurious for the respondent to live with him. This issue reproduces the language of section 10(1)(*b*) of the Hindu Marriage Act which makes cruelty a ground of judicial separation and is based on the provisions of section 9(*2*). The trial court placed the burden of proof on the

2. *Rebarani* v. *Ashit Sen*, A.I.R. 1965 Cal. 162.
3. *Jagdish Lal* v. *Smt. Shyama*, A.I.R. 1966 All. 150.
4. *Id.* at 154-155.
5. (1959) P.L.R. 188.

wife, and proceeded in a manner which left no doubt that provision of sub-section (1) was not at all in his mind. Since the wife failed to discharge the burden, the court without any hesitation granted the husband's petition for restitution. On appeal to the High Court, Grover, J., accepted the appeal and said that under sub-section (1), *inter alia*, the petitioner has to show that the respondent has withdrawn from his society without any reasonable excuse. Then the learned judge said (it is submitted rightly) that a petition for restitution of conjugal rights shall fail not because of any defence set up by the wife under section 9 (2) but it cannot succeed on account of the non-fulfilment of one of the essential ingredients of sub-section (1), such as the petitioner's failure to prove that the respondent has withdrawn from his society without any reasonable excuse.

Grover, J., then observed that 'reasonable excuse' in sub-section (1) is not equivalent to a 'ground' for a matrimonial relief. The reasonable excuse or reasonable cause is not necessarily a ground for any matrimonial relief but if the misconduct or misbehaviour of the petitioner is such that the respondent is fully justified in separating from the petitioner, then the petitioner cannot succeed because it would not be possible for the court to say that the respondent has withdrawn herself/himself from the petitioner's society without any reasonable excuse.[6]

It is obvious that in view of this the court fixed the burden of proof on the petitioner. The unfortunate aspect of the judgment is that in the latter portion of his judgment, Grover, J., found it necessary to say that the petitioner's conduct amounted to cruelty within the term of section 10(1)(*b*). It is this observation which led to confusion in later Punjab cases. *Gurcharan Singh* v. *Waryam Kaur*[7] illustrates this amply. In the husband's petition for restitution, Dua, J., displayed the same hesitation and ultimately ended with a finding of cruelty. *Madan Kohli* v. *Sarla Kohli*[8] was also a husband's petition for restitution and the wife's defence was once again husband's cruelty. The trial court very rightly framed only one issue : whether the respondent has withdrawn from the society of the petitioner without any reasonable excuse. The burden of proof was placed on the petitioner. The

6. *Id* at 194; see also *Tirath Kaur* v. *Kirpal Singh*, (1963) P.L.R. 315, *Hardip Singh* v. *Dalip Kaur*, A.I.R 1970 P. & H. 284.

7. (1970) P. L. R. 127.

8. (1966) P. L. R. 177.

trial court and the High Court concurred that the husband was guilty of cruelty, hence the petition was dismissed.

Then came *Santosh Kaur* v. *Mehr Singh*[9] which was also husband's petition and where wife's defence was once again husband's cruelty. In this case the trial court felt that it was for the wife to make out the case of cruelty. On appeal Pandit, J., disapproved this and observed:

> This is not the correct position in Law. Since the husband has filed this petition for restitution of conjugal rights...on the ground that his wife has withdrawn from his company without any sufficient cause, he had to prove that fact before he could be granted any relief. Simply because the wife could not establish that the husband treated her with cruelty, that alone will not entitle the husband to claim relief.

This, it is, submitted, is a correct statement of law. Some other cases also take this position.[10] In *Shanti Devi* v. *Balbir Singh*[11] Hardy and Ansari, JJ., have made a very clear statement of law which is free from any faltering or hesitation which has been displayed by Grover, J., and some other judges of the Punjab & Haryana High Court. Hardy, J., repeated (without quoting) Grover, J'.s observation that a petition for restitution "shall fail not because any defence set up by the opposite party under section 9(2) but it cannot succeed on account of non-fulfilment of one of the essential ingredients of sub-section (1) of section 9."[12] The learned judges of the Delhi High Court have no doubt that the burden of proof to prove that the respondent had withdrawn from the society of the petitioner rests on the petitioner. This case also indicates the difficulties involved in the interpreration of section 9.[13] The trial court and the judges in the Letters Patent appeal took one view, while the single judge of the High Court who heard the appeal took a different view. Unfortunately Hardy, J., towards the end of the judgment said that the wife-respondent has been able to make a case of reasonable excuse to keep away from the society of the petitioner-husband within the meaning of

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9. (1966) P. L. R. 713.

10. *Alopbai* v. *Ramphal*, A.I.R. 1962 M.P. 211; *Shakuntalabai* v. *Baburao*, A.I.R. 1963 M.P. 10; *Mango* v. *Prem*, A.I.R. 1962 All. 477; *Jagdish Lal* v. *Shyama*, A.I.R. 1966 All. 150: *Ramkali* v. *Sewa Singh*, A.I.R. 1969 Delhi L.T. 519; *Sadhu Singh* v. *Jagdish Kaur*, A.I.R. 1969 P. & H. 139; *Shanti Devi* v. *Balbir*, A.I.R. 1971 Delhi 294; *Bejoy* v. *Aloka*, A.I.R. 1969 Cal. 417.

11. A.I.R. 1971 Delhi 294.

12. *Id.* at 296.

13. *Supra* note 11 at 297.

sub-section (1) of section 9. This statement leads to confusion in respect of burden of proof and one may fall in the pit-hole and infer that the learned judge propounded the view that the burden of proving 'reasonable excuse' is on the respondent.

This is also the trend in other cases. *P.S. Ramarao* v. *P.R. Krishnamani*[14] was also a husband's petition for restitution of conjugal rights. Kailasam, J., of the Madras High Court observed that sub-section (1) requires that it is for the aggrieved party (*i.e.*, the petitioner) to prove that the other party had, without reasonable excuse withdrawn from the society of him or her. It is only one of the satisfactions of this condition that the other party enters into his defence. Thus, the learned judge had no doubt that burden of proof was on the petitioner. The same view has been expressed by Kan Singh, J., of the Rajasthhn High Court.[15] He said that under section (9) (1) the petitioner had to satisfy the court that the other spouse without reasonable cause had withdrawn from his or her society.

From the review of the aforesaid decisions of the High Courts two propositions clearly emerge :

(*i*) "Reasonable excuse" in sub-section (1) is not equivalent to a "ground" for a matrimonial relief (the only High Court that takes the contrary view is the Andhra Pradesh High Court).

(*ii*) The burden of proof that the respondent had withdrawn from the society of the petitioner without any reasonable excuse is on the petitioner.

The implication of these proposition is that judiciary by the process of interpretation had repealed sub-section (2) of section 9 of the Hindu Marriage Act. This is a socially desirable solution of the problem and an instance of progressive interpretation of law.

But the question still remains : who is responsible for this muddling up of section 9 ? It may be recalled that there is no sub-section (2) to section 22 of the Special Marriage Act, or to section 36 of the Parsi Marriage and Divorce Act, 1936. It seems that somehow or the other someone in Parliament thought it fit to model the provision of restitution of conjugal rights in Hindu Marriage Act on the Indian Divorce Act, 1869. The pro-

14. A.I.R. 1973 Mad. 279.
15. *Kaushalya* v. *Lal Chand*, A.I.R. 1972 Raj. 253.

vision of restitution of conjugal rights is found in the latter statute in sections 32 and 33. It will be fruitful to reproduce both the sections. Section 32 reads :

> When either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, either wife or husband may apply by petition to the District Court or the High Court for restitution of conjugal rights, and the court on being satisfied of the truth of the statement made in such petition and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly.

Section 33 runs : "Nothing shall be pleaded in answer to a petition for restitution of conjugal rights which would not be a ground for suit for judicial separation or for decree of nullity of marriage."[16]

At the time when the Indian Divorce Act was passed the position in English law, on which the act is based, was not clear. In the ecclesiastical courts and its successor, the divorce division of the High Court, the position was that against a petition for restitution of conjugal rights only a ground for divorce *mensa at toro* (its modern version is judicial separation) could be pleaded. If marriage was void or voidable then also restitution could not be granted. It is in this background that sections 32 and 33 were enacted. The position was abandoned in English law much before the Hindu Marriage and Divorce Bill was drafted. The Matrimonial Causes Act, 1950 does not contain any provision at par with section 33 of the Act of 1869 or section 9(2) of the Hindu Marriage Act. One wonders why the Act of 1869 was thought to be the model and why all the later Indian matrimonial statutes were ignored.

The author has submitted in an article published in 1967 that "Sub-section (2) of section 9 of the Hindu Marriage Act, 1955 should be deleted by Legislative amendment".[17] In his work *Modern Hindu Law, Codified and Uncodified* the present writer has submitted that section 9 (2) of the Hindu Marriage Act was also inconsistent with section 18 (2) of the Hindu Adoption and Maintenance Act, 1956.[18] The Law Commission has

16. Even under the Divorce Act, the provision has not been interpreted very strictly; *Seonamnamma* v. *Vargeese Abraham*, A.I.R. 1957 T.C. 277.

17. The Matrimonial Remedy of Restitution of Conjugal Rights Through the Punjab High Court, (1967) XIX-1 *The Law Review* 1 at 5.

18. Second edition, at 167. This is also the same under s. 488, Cr. P.C. ; see Law Commission's *Fifty-ninth Report* para 4.9.

also recommended that section 9(2) be deleted. The present writer reiterates that it is the most sensible thing to do, if we want to retain the remedy of restitution of conjugal rights.

In respect of restitution of conjugal rights the Law Commission also makes another recommendation that the burden of proof of proving reasonable excuse should be on the respondent. The Law Commission gives the reason thus :

> Since, ordinarily, the presence of 'reasonable excuse' would be more within the knowledge of the respondent than the absence thereof could be within the knowledge of the petitioner, it would not be unfair to provide that the respondent should prove its existence. It may be difficult for the petitioner to prove the negative.[19]

The Law Commission prefaced this conclusion by observing that there is a controversy on this matter between the High Courts. It is submitted that in the cases that have been reviewed earlier in this paper burden of proof in each one of them of reasonable excuse has been placed on the petitioner. The Law Commission says that the Madhya Pradesh High Court in *Anna Sahib* v. *Tarabai*[20] and the High Court of Punjab and Haryana in *Hardip Singh* v. *Dalip Kaur*[21] have said that burden of proof is on the respondent. It is submitted that this is not so. Both the High Courts have said this in respect of the averment made under sub-section (2). In the Madhya Pradesh High Court the husband's petition for restitution of conjugal rights was resisted by the wife on the ground of cruelty of the husband. Shiv Dayal and Raina, JJ., said that burden of proving cruelty and illtreatment is on the respondent.[22]

In the Punjab and Haryana case Suri, J., did make the following observation: "A husband cannot be denied a decree for restitution of conjugal rights unless the wife proves just cause for staying away from the husband."[23] But this fits in the context of what he says further on. The learned judge draws his support from *Annapurnamma* v. *Peddigari*[24] where the Andhra Pradesh High Court had said that what is reasonable excuse under sub-section

19. *Id.* at para 4. 11.
20. A.I.R. 1970 M.P. 36.
21. A.I.R. 1970 P. & H. 284.
22. A.I.R. 1970 M.P. 37.
23. *Supra* note 21 at 286.
24. A.I.R. 1963 A.P. 312.

(1) is indicated in sub-section (2). It is in this light that he made the above observation and added: "It is for the wife to prove and explain her defence that she had been turned out...."[25] If 'reasonable excuse' is denied an independent existence and is considered to be a part of 'ground' for matrimonial relief, then obviously the burden of proof is to be on the respondent.

The fundamental assumption of jurisdiction in a matrimonial cause (and it is not proposed to be changed by the Law Commission or by the law ministry) is that the averment made by the petitioner in his petition (negative or positive) has to be proved by him ; so much so that the burden of proof in respect of the bar to matrimonial relief (such as under section 23, the Hindu Marriage Act, or section 34, the Special Marriage Act) is on the petitioner. For instance, the petitioner has to prove that there has not been any improper or unreasonable delay in filing the petition. It is the negative which the petitioner has been required to prove.[26] Similarly, when a petitioner files a petition under section 13(1)(*i*) or under section 10(1)(*f*) of the Hindu Marriage Act the burden of proving the matrimonial fault (or offence) is on the petitioner but he or she has also to prove (the negative) that he or she has not been accessory to or connived at or condoned the act or acts complained of.[27] Every petitioner has to prove (the negative) that the petition is not presented or prosecuted in collusion.[28]

It is because under the Indian law (both under the Hindu Marriage Act and the Special Marriage Act) the basic theory of divorce, matrimonial offence or guilt requires the petitioner not merely to establish the matrimonial offence or guilt on the part of the respondent beyond reasonable doubt but also to prove that he or she (*i.e.*, the petitioner) is the innocent party. If the petitioner is not able to establish his innocence the petition will not be granted even if he or she is able to establish the respondent's guilt beyond reasonable doubt. Under this theory, the burden of proving both, *i.e.*, the matrimonial misconduct (under every matrimonial cause, including the restitution of conjugal rights) is on the petitioner as it is an established rule of English law and of Indian law that the burden of proof is placed on the petitioner. It is for the petitioner to satisfy alleged averments made by him in his restitution petition,[29] though once the *factum* of sep-

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25. *Supra* note 21 at 286 para 5.
26. S. 23(1) (*d*) of the Hindu Marriage Act.
27. S. 23 (1) (*b*).
28. S. 23 (1) (*c*).
29. *Hewitt* v. *Hewitt*, (1948) All E.R. 242, per Tucker, L.J,

aration is established, the burden of proof shifts to the respondent to establish the justification.[30] There are a series of cases of the various High Courts and the Supreme Court which take the view that the burden of proof for seeking the matrimonial relief rests on the petitioner and he had to prove the ground beyond all reasonable doubts.[31]

The next question is whether we should retain the remedy of restitution of conjugal rights in our law at all. It is obvious that neither the *dharmashastra* recognised it nor did the Muslim law givers made any provision for it. It came to us with the British rule. It is remarkable that this was the only matrimonial remedy which was made available by the British rulers of India to all Indian communities and this continues to be the position. However, the restitution was not made part of the matrimonial law of any community, but the relief was made available under general law.

III

Like any other anachronistic remedies the restitution of conjugal rights dates back to feudal England, where marriage was primarily a property deal, and the wife and the children were part of man's possession as other chattels. Thus, the wife was treated like a cow, who if ran away from the master's shed could be brought back. At that time a degree could be executed by the arrest of the wife. It is remarkable that many other anachronistic common law actions were gradually abolished but they survived in matrimonial law and from English matrimonial law they were exported to the colonies. For instance, the common law action for damages for the tort of criminal conversion was abolished in 1857, but it survived in divorce jurisdiction in the shape of damages for adultery *per se* against the co-respondent in husband's petition for divorce on the ground of wife's adultery. Similarly, the torts of enticement, seduction and harbouring which were virtually primitive remedies survived for much longer time. Actions for breach of marriage was a very fertile field for gold diggers and blackmailers. Some of these actions still survive in India and other countries which have the 'benefit' of British rule. These

30. *Rebarani* v. *Ashit*, A.I.R. 1965 Cal. 162.

31. *Sachindranath* v. *Nilima*, A.I.R. 1970 Cal.38 (adultery); *Lilabati* v. *Kashinath* (1969) 73 C.W.N. 19 (adultery) *Nishit* v. *Anjali*, A.I.R. 1968 Cal. 105 (nullity on the ground of respondent's pregnancy); *Pattayee Ammal* v. *Krishna Manickam*, A.I.R. 1967 Mad. 254 (adultery); *Valliammual* v. *Cheth*, (1966) 2 M.L.J. 425 (adultery); *Maganlal* v. *Bai Devi*, A.I.R. 1971 Guj. 33 (adultery); *Kaushalya* v. *Lal Chand*, A.I.R. 1972 Raj. 253 (restitution of conjugal rights); *Bipinchandra* v. *Prabha*, A.I.R. 1957 S.C. 176 (desertion); *White* v. *White*, A.I.R 1958 S.C. 441; *Lachman* v. *Meena*, A.I.R. 1964 S.C. 40 (desertion); *Mahendra* v. *Sushila*, A I R. 1965 S.C. 364 (nullity on the ground of pregnancy).

have been abolished in England by the Law Reform (Miscellaneous Provisions) Act, 1970.

The remedy of restitution of conjugal rights was retained in the capitalist England, though some of its stings contrary to the concept of equality of sexes were picked out. The decree could not be executed by the arrest of the respondent, but it could be by the attachment of property. Later on this mode of execution of decree was also abolished. Then non-compliance with the decree amounted to constructive desertion on the basis of which divorce could be obtained. The only advantage to the wife of this remedy was that on filing the petition she could immediately claim maintenance. The court otherwise cannot grant specific performance of marriage, but by a decree of restitution of conjugal rights it meant that. To retain this remedy, which is rightly called worse than tyranny and worse than slavery,[32] in the modern world for this little advantage is repelling. English law has fortified the wife's position by making adequate financial provisions for her and has abolished the matrimonial cause of restitution of conjugal rights.[33]

The remedy of restitution of conjugal rights is still retained by Indian divorce laws. When the provision in the Special Marriage Bill and the Hindu Marriage and Divorce Bill was debated in Parliament many members voiced their opposition to it. J. B. Kriplani said : "This provision was physically undesireable, morally unwanted and aesthetically disgusting...."[34] The present writer has also argued for its repeal in an article published in 1955.[35]

It may also be mentioned that under the Indian law a decree for restitution of conjugal rights can still be executed by attachment of the respondent's property.[36]

It is rather curoius to note that the Law Commission has not recommended for the repeal of the provision of execution of restitution of conjugal rights decree by attachment of respondent's property. On account of this obvious attitude it was not expected of it that it would recommend for the abolition of the remedy of restitution of conjugal rights.

It is submitted that remedy of restitution of conjugal rights should be abolished altogether from the Indian law and a provision on the line of

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32. S. 20, the Matrimonial Proceedings and Property Act, 1970.
33. S.S. More, Parliamentary Debates Dec. 10, 1954 (on Special Marriage Bill).
34. See Parliamentary Debates on Special Marriage Bill, Dec. 10, 1954.
35. Hindu Law of Marriage, Divorce and Alimony, *18 Supreme Court Journal* (1955) 261 at 297.
36. O. 21, r. 32 of the Civil Procedure Code, 1898.

section 27 of the Matrimonial Causes Act, 1973 should be enacted in both the Hindu Marriage Act and the Special Marriage Act. Section 27 of the Matrimonial Causes Act provides that a spouse can claim maintenance on the ground of wilful refusal to maintain him on the part of the other spouse.

The non-compliance of the decree of the restitution of conjugal rights for a period of two years under the Hindu Marriage Act[37] and for a period of one year under the Special Marriage Act[38] entitles either party to obtain a decree of divorce. It is submitted that this provision should be substituted by laying down that if parties are living separate from each other (either under a decree of judicial separation or under a separation agreement or otherwise), for a period of two years, then either party should be allowed to seek divorce.

37. S. 13 (*1a*) (*ii*). The Law Commission has recommended that the period should be reduced to one year.

38. S. 27.