

PROTECTION OF THE PRODIGAL

I

IF THE prodigal of the parable in the New Testament¹ were under French or German law, a guardian would have been appointed for him and he would have been spared a good deal of misery; his guardian would have seen to the safe keeping of his funds and he might not have found an opportunity to fraternize and desire to dine with swine. *Pankaprakshalana nyaya*² with its hoary ancestry, is not anything new to the Indian scholars. Parents advise their teenage children, especially girls, not to get into trouble. The popular notion appears to be that when once bitten, the sting or the stigma stays. No less a person than the bard of Avon advised :

You must consider that a prodigal course
Is like the sun's, but not like his, recoverable.³

And it is seldom that man learns from experience. So nearly eighteen centuries after Christ's prodigal went about his business of extravagance and consequent swine-keeping, the French made statutory provision to eliminate similar experiences from their lives. A few centuries before Christ the Romans had also provided for a similar elimination of human misery. The general principle seems to be to provide for the avoidance of all avoidable miseries in life. Law may also play its role in this avoidance.

II

The Twelve Tables (451-450 B.C.) laid down that :

A prodigal shall have no jurisdiction over property and he shall be in charge of his relatives.

The common law lawyers might frown upon this provision of law on the ground that a prodigal, like any other sane, adult person, should be free to ruin himself if he so chooses. What often happens is that when he treads the highway to ruin, he ruins not only himself, but also his dependents. Should not his wife and minor children be protected from the spendthrift ways of the person who is considered to be responsible for their maintenance and general welfare?

1. St. Luke, 15, 11-32.

2. "The rule of washing off the mud (instead of avoiding it, that is, of curing the disease instead of preventing it)" (M. Monier-Williams, *Sanskrit-English Dictionary*, 1330 (Oxford, 1964 ed.); V.S. Apte in his *Sanskrit-English Dictionary* explains : "Just as it is more advisable for one to avoid getting into mud than to get into it and then wash it off, so it is more advisable for one to avoid getting into danger than expose oneself to it and then try to get out of it somehow or other."

3. Shakespeare, *Timon of Athens*, III, iv, 12-13.

The common law lawyer, in spite of his vehement arguemnts in support of the rational strength of the common law, is himself aware that one ignoble frailty of his law is that it is not invariably very strong when it comes to a quest of justice. That is why he invented what he called equity. In the eyes of most civilians, his concept of equity itself is not equitable enough in many instances.

Some civil law countries have considered it prudent and expedient to restrict a prodigal's freedom to waste his substance (as the Gospel puts it) as his whims dictate to him.

Under article 6 of the German Civil Code, a prodigal may be placed under guardianship. The article reads in part:

A person may be interdicted

(2) if he has exposed himself or his family to the risk of poverty by his prodigality.

Interdiction in the civil law connotes a judicial declaration to the effect that the person concerned is not competent to enter into legal transactions. As a consequence he would be placed under guardianship. Under article 114 of the German Civil Code, persons interdicted on any ground other than insanity enjoy a limited capacity to enter into legal transactions.⁴ For instance, they can validly accept a donation, as here they merely gain an advantage.

III

In France the method adopted for the protection of a person afflicted with mental weakness or prodigality is different in details, but the purpose sought to be served is not dissimilar. While a lunatic in France will be placed under interdiction and guardianship, those suffering from mental weakness or noted for prodigality will have a legal adviser (*conseil judiciaire*) appointed for them by the court to look after their property. The legal adviser's powers of protection do not extend to the person of those for whose benefit he is appointed, but only to their property. The prodigal⁵ is not free under French law, to carry out any act of administration of his property, apart from purely ministerial acts, without the consent and cooperation of the legal adviser. The adviser's concurrence is required, for instance, to sell or hypothecate property, to carry on a business, or to institute legal

4. Under article 5 those who may be interdicted fall under three heads, (i) persons who are unable to control their affairs by reason of insanity or moral weakness, (ii) persons who have exposed themselves or their family to the risk of poverty by their prodigality, (iii) persons who are unable to control their affairs or expose themselves or their family to the risk of poverty or endanger the safety of others by habitual drunkenness.

5. A prodigal is defined as a person who, owing to the disorder of his mind, or of his morals, dissipates his fortune by excessive and foolish expenditure. (Aubry and Rau, 1 *Droit Civil Français* 138 (6th ed. Paris, 1931-58) cited by Amos and Walton, *Introduction to French Law* . 47 (3rd ed. 1967). It is incidentally interesting to note that professional litigants (whose number is legion in India) are considered included in the category of prodigals,

proceedings.⁶ In litigation the legal adviser is joined with the prodigal as a party; in administrative acts, his concurrence is necessary to validate the acts. No power to represent the prodigal is, however, attributed to him.

For a better understanding of the French institution, it may be helpful to set out the provisions of the Civil Code relating to the protection of the prodigal.

Article 513 : Prodigals may be prohibited from suing and defending, compromising, borrowing, receiving and giving discharge for capital composed of personal property (*capital mobilier*)⁷ convey or hypothecate their property, without the assistance of an adviser appointed by the Tribunal.

Article 514 : Prohibition to act without the assistance of an adviser may be applied for by those who have the right to ask for a person's interdiction,⁸ their application shall be investigated and determined in the same manner. Such prohibition can be withdrawn only on following the same formalities.

Article 515 : No judgement in matters of interdiction or an appointment of an adviser shall be given either at first instance or on appeal without hearing the opinion of the public prosecutor (*Conclusions du ministere public*)

The proceedings for the appointment of an adviser are required to be brought before the tribunal of first instance. Apart from examining witnesses and perusing documents, the tribunal will order the family council to give its opinion on the condition of the person for whose benefit the appointment of a legal adviser is sought to be made.⁹ The tribunal will also examine the defendant in the judges' chambers. If the defendant cannot appear, he will be examined at his house by one of the judges appointed for that purpose attended by his clerk.¹⁰ The public prosecutor is required to be present at the time of the examination.

The appointment of an adviser shall have effect from the day of the

6. Amos and Walton, citing Planiol and Ripert, *Traite pratique de droit civil* 1 No. 748 pointed out that the courts have interpreted the article in such a manner as to permit the prodigal to do all acts of administration, but no other acts relating to his patrimony. (See, Amos and Walton, at 47).

7. *Capital mobilier* means in effect money to be invested (see, Amos and Walton, *supra* note 6 at 47).

8. Under art. 490, any relative is entitled to apply for the interdiction of his relative and all married persons may apply with regard to each other. In case of madness, the public prosecutor must apply, if it is not applied for by the husband, wife or relatives. In cases of imbecility or insanity also, he can apply when a person has no husband, wife or known relatives.

9. Art. 494.

10. Art. 496.

judgement. All acts performed subsequently by the person without the assistance of the adviser will be void (*nuls de droit*).¹¹

IV

The common law attitude of *laissez-faire* is well known, it may not, therefore, be necessary to deal in detail with the neglect of the prodigal by the common law. As it does not play the role of Providence to the prodigal, he is likely to be left with the swine, and no fatted calf can be killed for him. The common law's indifference does not stop with its total neglect of the prodigal, it goes to the extent of refusing him under the conflicts rules of the English court the protection afforded to him by a French tribunal. The following headnote of a case¹² decided by the Chancery Division of the King's Court in England will illustrate the Anglo-Saxon indifference to the prodigal :

By the Code of Napoleon a French subject of full age, who is of extravagant habits, when adjudged by a French Court of competent jurisdiction to be a "prodigal," is restrained from dealing with, disposing of, alienating, receiving or giving a receipt for his movable property without the consent of a "*conseil judiciaire*" (legal adviser). But, although this judgement modifies and affects the status of the "prodigal," it is a disqualification unknown to English law, and will be disregarded by English Courts.

Where, therefore, a French subject of full age, who had been adjudged a 'prodigal', and placed under the control of a '*conseil judiciaire*' by the judgement of a French Court of competent jurisdiction, became entitled to a fund in a court in England :—

Held, that he was entitled to payment out of the fund to himself on his sole receipt, notwithstanding the opposition of his '*conseil judiciaire*'.

In this case counsel for the petitioner argued that the judgement of the French court did not effect a change of status in the prodigal, but only required that he should act with the assistance of his legal adviser. "But, even if it does effect his status", counsel proceeded to state, "it is a personal disqualification of a *penal nature* unknown to English law, to which the courts of this country will not give effect."¹³

It is hard to see how a protective provision of this kind can be characterised as of a penal nature. The notion of 'penal nature' was perhaps

11. Art. 502.

12. *In re Selot's Trust* (1902) Ch. 488.

12. *In re Salot's Trust* (1902) Ch. 488.

13. *Id.* at 490. (Italics supplied).

introduced into the argument with a view to deriving support from Justice Story's work on the Conflict of Laws.¹⁴

In fairness to the common law, it may be appropriate to refer to protective trusts. It is possible under English law to settle property on protective trusts for those who have shown by their conduct that they need protection. A common law lawyer writes :

In English law the status of the prodigal is unknown. But persons who have shown by their conduct that they need protections can obtain it, if property is settled for them on protective trusts. By the development of the device of discretionary trusts in which the determination of the persons to be benefited and the quantum of this benefit is entrusted to the discretion of a trustee, English law enables a settler to provide in large measure and with a great degree of flexibility against the hazards of mental or moral defection, without the formalism and publicity involved in the procedures of interdiction and appointment of an official adviser.¹⁵

It is clear that if this is all that the common law could do for the unfortunate prodigal, the scope of its activities is very limited. Formalism and publicity may be regarded as more palatable than the prodigal's desire to deprive the swine of their husk.

V

In India, apart from trusts that can be created, there are certain statutory provisions to protect the prodigal from his flair for profligacy. One such provision is reproduced below. Section 5(2) of the Panjab Court of Wards Act, 1903, provides :

When it appears to the State Government that any landholder is

- (n) owing to his having entered upon a course of wasteful extravagance likely to dissipate his property incapable of managing or unfitted to manage his affairs, the State Government may make an order directing that the property of such land-holder be placed under the superintendence of the Court of Wards.

Provided that such an order shall not be made on the ground

14. Justice Story wrote: Personal disqualifications not arising from the law of nature, but from the principles of the customary or positive law of a foreign country, and especially such as are of a penal nature, are not generally regarded in other countries where the like disqualifications do not exist. Hence the disqualifications resulting from heresy, excommunication, Popish recusancy, infamy and other penal disabilities, are not enforced in any other country, except that in which they originate", quoted in *Norms v. De Valdor* 41 (1880) L.T. 791 (Ch.).

15. K.W. Ryan, *An Introduction to the Civil Law* 286 (Sydney, 1962).

stated in . . . clause (d) unless such land-holder belongs to a family of political or social importance and the State Government is satisfied that it is desirable on grounds of public policy or general interest to make such order.

It may be easily seen that, as in the case of trusts, the scope of the section is strictly limited. The provision applies to a land holder and such land-holder should belong to a family of political or social importance. Further, the state government should be satisfied that it is desirable on grounds of public policy and general interest to place his property under the Superintendence of the Court of Wards.

Under the Uttar Pradesh Court of Wards Act, 1912 the Court of Wards may assume or refrain from assuming the superintendence of the person of any proprietor of a *mahal*¹⁶ who is declared by the state government to be incapable to managing or unfitted to manage their own property owing to their having entered upon a course of extravagance or owing to their failure without sufficient reason to discharge the debts and liabilities due by them. No such declaration will be made unless the state government is satisfied that the aggregate annual interest payable at the contractual rate on the debts and liabilities due by the proprietor exceeds one-third of the gross annual profits of the property and that such extravagance or such failure to discharge the debts and liabilities is likely to lead to the dissipation of the property.¹⁷

Again, the limited scope of the provisions of the Act is obvious and calls for no further comment. It is necessary to make adequate provision for all those cases of extravagance which tend to dissipate the property or waste one's substance.

VI

Protection of the prodigal is of immense importance to communities where their personal law imposes an obligation on persons to maintain not only their wife and children, but also their parents and grand parents.¹⁸ If

16. A *mahal* was a fiscal division, a unit of local area, erected by the revenue system for payment of land revenue. A *mahal* may constitute a single village or a portion of a village, or two or more villages or two or more portions of villages, or a revenue-free area or land granted by government under the waste land rules. See, *Thakur Radha Kristnaji v. Sarju*, S.D. 1 of 1952. See also in this connection, the U.P. Zamindari Abolition and Land Reforms Act (Act No. 1 of 1951) by which *mahals*, as fiscal units ceased to exist.

17. Ss. 8 and 12.

18. S. 20 of the Hindu Adoptions & Maintenance Act, 1956 reads :

- (1) Subject to the provision of this section a Hindu is bound, during his or her lifetime, to maintain his or her legitimate or illegitimate children and his or her aged or infirm parents.
- (2) A legitimate or illegitimate child may claim maintenance from his or her father or mother as long as the child is a minor.

they are themselves given to prodigality and addicted to waste their substance, how would it be possible for them to maintain all these relatives in reasonable comfort. When the law imposes certain obligations, it is necessary to see that provision is made to facilitate their implementation. If a prodigal is shown the green light to proceed with his extravagancies, it is unreasonable to expect of him to maintain these relatives in reasonable comfort. Not even half a ladle of rice gruel comes out of an empty pot. Maintenance presupposes capacity to maintain and that capacity may be assumed if the prodigal's hands are restrained, and his path made strait and narrow like the one envisaged for a place pleasanter than the one we are accustomed to.

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- (3) The obligation of a person to maintain his or her aged or infirm parent or a daughter who is unmarried extends in so far as the parent or the unmarried daughter, as the case may be, is unable to maintain himself or herself out of his or her own earnings or other property.

Explanation: In this section "parents" includes a childless stepmother.

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