NOTES ON BUDDHIST LAW

BY THE JUDICIAL COMMISSIONER, BRITISH BURMA.

VIII.—MARRIAGE AND DIVORCE. Jardine, Sir

PREFACE.

Translation by Mr. S. Minus of the Law of Marriage and Divorce according to the Mohavicchedani Dhammathat from a Burmese manuscript on palm-leaves. Edited by Dr. E. Forchhammer, Professor of Pali.

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NOTES ON BUDDHIST LAW.

VIII.—MARRIAGE AND DIVORCE.

By John Jardine, Esq., Bo. C. S., Judicial Commissioner of British Burma.

PREFACE.

In "VI Notes on Buddhist law," the rules of inheritance as understood in the Burman province of Pegu in A.D. 1832 by Rājabala Kyawdin were given to the world under the editing of Dr. Forchhammer, whose appended remarks show the close connection with the law of the Hindus. In the present production we now supply a translation of the statement of the law on marriage and divorce from the same bundle of palm-leaves. Dr. Forchhammer's prefatory note to "VI Notes on Buddhist law" states the peculiar importance of the *Mohavicchedanī* and requires no excuse for my repeating it here :—

Note.—The *Mohavicchedanī*, or 'Dispeller of Ignorance,' was written in the year 1193 (A.D. 1832), during the reign of Pagyeedau, by Rājabala Kyawdin; it is probably the most recent of Burmese Dhammathats and of sufficient importance to claim the notice of the student of Burmese law as it stood immediately after the British occupation of Arakan and Tenasserim. It differs in one important point from all other Burmese law-books: Manu, the Rishi, has entirely disappeared. Rājabala Kyawdin, aware probably of the incongruity of placing Manu in the Buddhist pantheon, as had been done by the jurists of the Alompraic period, and not finding any reference to Manu in the Buddhist scriptures that could support Manu in the dignity of a lawgiver to a Buddhist community, broke with the past traditional history of the law-books of his country; he says in the introduction that, obedient to the request of his king, he proceeds to unfold the law as it was preached by the allwise Buddha in his great compassion for the ignorance of men and recorded originally in the Magadha language, the first of all languages, the mother of all other tongues (mūlabhāsā).

He converts the 'Manu' into Buddha'a 'Dispeller of Ignorance' by the simple way of omitting all mention of Manu and Mahāsamata and by allowing Buddha to decide and legislate in their stead.

The text of the *Mohavicchedanī* is the somewhat re-arranged but otherwise identical law-material of the Manu Dhammathats. On the historical and literary impropriety of converting the dicta of Manu into those of Buddha it is not necessary to expatiate.

2. The reader can at his pleasure compare the rules about the relations of the sexes found in the *Mohavicchedanī* with those in Dr. Richardson's edition of the *Manu Kyay* and those in the *Wonnana*, *Wini Tsaya Paka Thanī*, *Wagaru*, and *Manu Reng* Dhammathats, of which translations and annotations are given in "III and IV Notes on Buddhist law." It were well that the manuscript of the *Mohavicchedanī* should issue in print in the Burmese and Pali of the original. This is a work however which any Burman of decent education can undertake; and

I avoid issuing so recent a codex in the original language as part of the present series from a fear that some of the Burman Judges and Advocates might assume that the *Mohavicchedanī* so issued was an authoritative statement of the existing law. Some parts of it would, I am convinced, be regarded by intelligent Burmans as curiosities belonging to an antique time : there have been many and great changes of sentiment and habit since the conquest of Pegu and the introduction of new ideas with British rule.

3. Without express qualification and great caution it is now unsafe to infer the law of British Burma from the present customs of the Mandalay people. The divergence is of course increased by new legislation, bringing in its train changes that pervade all the life and sentiment of the British subjects. Slavery exists no longer, adultery is punished with fine and imprisonment, kidnapping and enticing are also made penal, minors and the guardians of minors enjoy new and special protections. It therefore behoves me, in issuing a Burmese law-book of A.D. 1832, to commence with a caution about its value as existing law ; and as I have not had time among my other duties and pursuits to annotate on these rules, I must leave the student to Dr. Forchhammer's remarks and to such guides as we have been able to give in our earlier notes on Buddhist law. Dr. Forchhammer and myself came to the opinion that the ultimate explanation of the Dhammathats would be found in the Hindu law, and in dealing with the law of marriage we set forth the parallel passages of the Hindu books. I have not yet received the proceedings of the Congress of Orientalists at Leyden, but from a letter just arrived from Mr. G. M. Tagore, of South Kensington, whose study of Hindu law is profound, I find that our explanation is that accepted by at least one competent scholar after independent research. Mr. Tagore writes to me :—"In the course "of my analysis I found that the Burmese law was originally "founded on the Hindu law of the ancient type : it however gra- "dually diverged more and more from its source through "the operation of the following principles. Through the "influence of Buddhism the doctrine of sacraments was given "up; marriage was reduced to a contract. The offering of the "funeral cakes was given up through the doctrine of Neiban "(Nirvana), and necessarily equality of sexes was introduced "in the law of inheritance." Another confirmation of our opinion is that of Dr. Führer, who from a study of the Pali *Manu Sara* Dhammathat announced, about a year ago at a meeting of

the Royal Asiatic Society in Bombay, that the law there contained was to be explained through *Yajnyawalkya* and the *Mitakshara*. I think now that there was no hyperbole in my remark that the Courts of British Burma have for 50 years administered Hindu law without knowing it. The technical terms used in the *Mohavicchedanī* would be understood without difficulty by a Native Judge at Poona or Benares, but, as they belong to an Aryan language, the Burmans are often at a loss to find proper equivalents.*

4. While I have thought it important to point out that the British rule and law have made the *corpus juris* of British Burma vary in many respects from that of Mandalay, I am far from meaning that the *Mohavicchedanī* is not a book deserving a good deal of study. What a Burman jurist of Pegu thought about the law of the sexes in A.D. 1832, when the country was under the Burman King, must be useful to the Judges of today; and I have never understood why they have been contented to ignore the *Mohavicchedanī* and assume that the Dhammathats of A.D. 1758 to 1774 were of more practical value. For many purposes the system of Civil Courts with jurisdiction to pass decrees without mutual consent has superseded the Burman system of arbitrations. But the people still cling to settlement by arbitration and family contracts (both of these modes being based on mutual consent) in questions of inheritance and partition. At several inspections of Courts up-country the Native Judges have told me that only one in a hundred cases decided by their decrees has related to such questions. It is otherwise with matrimonial cases: the people are rather inclining to sue each other in the Civil Courts about such matters as conjugal rights and divorce; and this being everywhere a difficult jurisdiction for ordinary

* From Dr. Forchhammer's *Notes on the Early History and Geography of British Burma* it appears that there are reasons for believing in the existence of a Hindu colony in Burma towards the close of the third century B.C., and that Golanagara, the present Ayet-thim near Thatôn, was so named because it was the town of the Gaudas, or people from the district of Gour in Bengal. Although it has at all times been customary with the Buddhist kings and priests of Burma to give to towns, monasteries, rivers and tanks classical Pali names, other names of towns occur in the ancient geography which are originally not Pali but Sanskrit and suggestive more of ethnical and historical relations with Hinduic India than with Buddhism, *e.g.*, Utkaladesa and Trikumbhanagara. The old Sanskrit name of Prome means "Glory of the Kshatriya." "The Burmans have a tradition that the Pitakat was originally written in Sanskrit; the Burmans also possessed an alphabet prior to the adoption of the Talaing letters, and this alphabet was Sanskrit." To most Burmans all such indications of a Hindu period are like characters of an unknown language. Dr. Forchhammer mentions two instances of their shortlived historical memory. They confound the celebrated jurist of the 15th century A.D., the Buddhaghosa who translated the Talain Manu Dhammathat into Burmese, with his more renowned namesake, the greatest divine

Judges to exercise, the doctrines as well as the procedure applied differ in many matters of high importance. Some have assumed that because Burmans have submitted to divorce by mutual consent or after consenting to abide by the opinion of arbitrators, the Civil Courts ought, in the absence of mutual consent, to force the defendant into Court and to pass compulsory decrees of divorce where the other circumstances are similar. One Native Judge decreed a divorce without personal notice to the husband-defendant who did not come to Court. The Recorder of Rangoon, Mr. Wilkinson, in his powers as District Judge, has by a course of decisions given great freedom to divorce and the law afforded no means of appeal. The existence even of the *Mohavicchedanī* was ignored: the texts quoted are from the compilations of 1758. But the Acting Recorder, Mr. Allen, has lately doubted whether his Court has any jurisdiction to divorce Buddhists, and has referred the question for the opinion of the High Court of Bengal. If it should be held by that tribunal that no such jurisdiction exists and that the decrees are invalid, the result would cause inconvenience in Rangoon. There is also a difference of opinion among the people themselves, a good many married women acting as if a wife could divorce herself while their husbands are of a contrary opinion. Occasionally this state of things leads to murder, followed by the execution of the criminal as in a case lately before me.* The judgment was as follows:—

* "Queen Empress *v.* Nga Chyo," Crim. Ref. 25, decided the 9th November 1883.

"The parties were man and wife and had separated and for some time had lived in different houses. The prisoner, it seems, sometimes went to see her. The woman contended that the separation was a divorce: the man asserted that she was still his wife. She refused to obey him; he got angry, followed her, and killed her. The offence of murder often arises out of similar circumstances, the law being apparently differently understood. The women insist that they can terminate the marriage status; the men insist on the doctrine of section 171 of the *Wonnana* that this most important institution of social life cannot be dissolved by mere angry words. The contention often ends in

of the Buddhist Church, the commentator who lived in the 4th century after Christ. "In the latter half of the 17th century a Burmese nobleman received from his Sovereign the honorary title of *Manu*: he wrote the *Maharajadhammasattham*, his wise decisions and some episodes of his life have been recorded. A century later the jurists of Ava and Amarapura had apparently forgotten him and ascribed the celebrated seven decisions given by the Burmese Manu, and which are now mentioned at the beginning of every Burmese Dhammathat, to the Hindu Manu." The questions to what school or schools of Hindu law do the Dhammathats belong and whence and how introduced into Burma cannot be answered in the present state of our knowledge, but I am convinced that Dr. Forchhammer's discoveries will be important aids to the solution of these great problems.

quarrelling and murder. After considering the circumstances of the present case I see no sufficient reason for interfering with the sentence of death which the learned Judge has thought fit to pass and I therefore confirm it."

5. The inconveniences of the present unsettled marriage law are great, and I have considered whether, before translating more authorities, I ought not to declare my opinion of it in some authoritative form for the guidance of the Courts. Every Civil Judge of the lowest grade assumes the jurisdiction and passes decrees according to his own notions, so that one Judge gives a divorce where another would refuse it. I have deemed it however better to wait till some case comes before me sitting as a High Court in appeal, when the subject could be argued and a judicial precedent made. No such opportunity has yet occurred, but in the meantime we have got translations made of authorities never before noticed. Amid such uncertainties we continue the same work, and I am in hopes that a careful perusal of the opinions given by a learned Burman so lately as A.D. 1832 may be useful to the Judges and ultimately lead to a proper construction of the texts of last century on which the Courts have hitherto based their judgments and which the people still quote as authorities for the opinions they entertain.

RANGOON:
The 21st November 1883.

JOHN JARDINE,
Judicial Commissioner.

NOTES ON BUDDHIST LAW.

Translation by Mr. S. Minus of the Law of Marriage and Divorce according to the Mohāvicchedani Dhammathat from a Burmese manuscript on palm-leaves. Edited by Dr. E. Forchhammer, Professor of Pali.

S. 1. If (a man) who has already been suspected (to be in familiarity) with another man's wife be found to be sitting in a secret place (with her), or to have pulled that (woman's) person, or spoken words of love (literally conversation carried on by persons who are familiar with one another), let (him) pay as damage a sum in accordance with his deed (crime).

S. 2. If the (man) be one who has not been suspected, even if he should be found in a secret place (with the woman) and pulling her person and carrying on conversation (with her), there is no fault. If doctors and such persons as they be found in the same manner to be with and pulling the person and carrying on conversation (with the wife), there is no fault. If there has been previous suspicion, let (the man) pay as damage six *mats* of pure gold.

Remarks.—The text says "hemachapādakam (ရွှေဝဇ်ခြောက်မတ်), *i.e.*, six mats of pure gold: a gold mat has the value of five tickels: the damage to be paid would therefore be 30 tickels.

S. 3. If a person is found sleeping with another man's wife, even if he be a prince, if the husband (of that woman) should thus see him, he (the husband) has a right to kill the man (thus found lying). If the man has already arrived at the door or steps, there is not a right to kill him but there is a right to strike, slap, and beat with fists and with elbows. If the person be killed, let the damage for fault with the wife be rejected and let the husband pay a compensation according to the rank (or class) of the man killed. If a woman comes to a man who has not a wife, even if she be a princess, the person who takes advantage of the opportunity (goes beyond the limit) is not the least in fault.

S. 4. If a man commits adultery for the first time, let him pay as damage 30 tickels of silver only. If he repeats it a second time, let him pay half of 30 tickels: if for the third time, let him pay half of 15 tickels; and if for the fourth time and upwards, he is no longer in fault for the woman has reached the condition of a prostitute.

S. 5. If three men have sexual connection with one woman, the first two men only shall have to pay damage; the third shall pay no damage.

S. 6. If (a man) has sexual connection (ကျူးလွန်) with a man's least valued concubine (အငယ်ဆုံးအဆင့်အဖြောင်း), and if he be one of inferior class, there is the right to make him a slave. If the man who had the sexual connection be one of a high class, let him pay as damage only half of the amount awarded in case of sexual connection being had with (a man's real) wife (adultery). Thus it should be decided.

S. 7. If a man has sexual connection (လွန်ကျူး) with a runaway wife of another man, not knowing her to be a married woman, he is not the least in fault. If he knows the woman to be the wife of another man, he should be made to pay damage equivalent to his deed.

S. 8. Because (a woman) says that she will not tell her husband (the man) gives her some wearing ornaments (and such like) and has sexual connection (လွန်ကျူး) with her. If she afterwards tells her husband about the sexual connection, the man who committed the deed is not the least in fault, and the wearing ornaments, &c., already given should be asked back till they are returned. If the husband finds it out without his wife telling him, the gifts (wearing ornaments, &c.), though asked to be returned, cannot be obtained but are to be forfeited.

S. 9. The husband not being handsome and not of good complexion, the (wife) goes wrong with another man: let the damage be similar to that laid down in case of adultery. Thus should the decision be.

S. 10. If it be not clearly known whether or not the fault has been committed, let the man or the woman who is higher in rank and more respectable be made to take the oath. If no harm befalls him or her as the case may be within seven days, let the person who lodged the charge be made to pay damages. If he has not sufficient money to pay, let him serve as a servant. If both the man and woman be of the same rank, let them both enter the precincts of a pagoda for the purpose of making a vow or undergo the water ordeal.

Remarks.—A vow made or oath taken at a place *which is not consecrated ground* is not binding according to a Buddhist's belief.

S. 11. If sexual connection be had with another man's wife who (wife) is kept in custody for debt, let the debt be first paid and then the matter be brought forward in accordance with law.

S. 12. If the master has sexual connection with his woman slave, who is the wife of another man, damage should be paid. If (the master) has sexual connection with the wife of his man slave (the woman not being his slave), there is no damage whatever.

S. 13. If the man wishes to be divorced (shinkwa), let him leave behind all animate and inanimate property: if the woman wishes to be divorced, let her hair be shaved, and there is a right to sell the woman. Thus it should be decided.

Remarks.—The Pāli texts of the Dhammathats generally do not, like the Burmese texts, distinguish between "animate" and "inanimate" property: *dhānam* is used for both. Yet the distinction is expressed by separate terms in the Buddhist sacred text and in the commentaries. Buddhaghosha uses in his cholium to the Dhammapada the term *saviññanako* for animate property and livestock and *aviññanako* for real estate or inanimate property. These terms appear however not to have found their way into the Dhammathats of Burma.

S. 14. If a man has a monkey-wife, (he) the husband, who alone is the lord of the wife, has the right to raise her to equality. The relatives have not the right to ask for this elevation but have only the right to complain about what happens. If the monkey-wife

(ဖြောက်မ) die, the man gets off the fault of keeping a monkey-wife (ဖြောက်မ).

Remarks.—Most Europeans, and even some of the younger Burman Magistrates, are ignorant of the meaning of the terms "monkey-wife" and "monkey-husband" (myaukma and myaukhti). They relate to the habits of monkeys, who usually live in distinct groups, in which a male is often united to one or more particular females, but if gone abroad or strayed away to another group, finds there sufficient consideration for his wants to have a female allotted him, especially if he be a powerful monkey; or he will appropriate a temporary partner and take the consequences of being compelled to remain in the new tribe or of recognizing his newly acquired partner as consort or of being driven out of the community. The lower and formerly oppressed races of Burma sometimes allowed their guests to cohabit with unmarried females of the household: such females became the myaukmas during the guests' stay: and what was originally an act of hospitality was afterwards claimed as a privilege by Burman lords when absent from their families and residing temporarily in other places. In the same way a married merchant coming from a distant place for trade may keep a woman as if she were his wife, she attending to his business and cohabiting with him only: their temporary relationship is that of myaukma and myaukhti: the woman may thus support herself as the temporary wife of several men in succession without sinking to the level of a courtesan. A married woman, if she cohabits in this way with a guest or visitor, also becomes a myaukma and he a myaukhti, his status being similar to that of "len-ngay" or lesser husband. It is by inquiry into the customs of the Karens and Chins that fuller acquaintance will be made with these subjects.

Note.—As to the effect of conquest on the women of the conquered race, see IV Notes on Buddhist Law, paragraphs 29 to 31. The distinctions between the continuous concubine, slave wife, and woman merely kept for pleasure are also well known to the Hindu law.—J.J.

S. 15. If an inferior man has sexual connection with the wife of a man of high rank (သူဖြတ်), let him forfeit himself (turn a slave). If a man high in rank has sexual connection (သွန်တျူ) with the wife of a man of the inferior sort, let damages similar to that laid down for the inferior sort be given.

S. 16. If a woman steals another person's husband, the ears and hairknot of that husband-stealer (thief) should be pulled, and there are no damages (for so doing).

S. 17. If the son of a trader has sexual connection with a Brahman woman, he should pay as damages to the value of 90 tickels of copper. If he be a rich nobleman, let him pay 600 tickels of silver instead of copper. If he be a relative of the ruler (ဖဲ့) [the Pali text has "if he be a Kshatriya"], let him pay 1,000 tickels of copper. If he be an inferior (low) person, let his hair be totally shaved, urine be thrown on him, his person wrapped with straw, and fire (ought to be) set to it, but this should be done after consideration.

S. 18. The following are the six faults for which a husband may admonish his wife but not abandon (ma zun taik) her: Being fond of liquor; being in the habit of making false statements; contradicting the sayings of her husband; being in the habit of going and living in some other person's house; mixing in bad company; and being lazy in doing business.

S. 19. Let a woman who bears no children be approached (by her husband) for eight years; if she brings forth only girls, for ten

years. A man should care for and support well until death a woman (wife) of virtuous and proper conduct.

S. 20. If a man goes away in order to trade without leaving any maintenance for his wife, the expiration of eight years should be awaited; if he goes in search of learning (ဿတပဋ္ဌ), the expiration of six years should be awaited.

S. 21. If the wife who remained behind hears that her husband has taken another wife in the place whither he went, the expiration of three years should be awaited: after the expiration of that time she is freed from being his wife.

S. 22. If (a man) living in the same quarter (as his wife) does not go (to her) for a long while, and does not even send her a vegetable-leaf, the woman is freed from being his wife any longer.

S. 23. If the husband goes to trade and during his absence the creditor (whom the woman owes) takes her for wife, he (the creditor) is not the least in fault. Let the husband, who is the lord of the wife, take her after paying the debt.

S. 24. If the husband be mad, lame, blind, or ill, the wife should take proper care of and support him. If she (the wife) does not work and support him, all the property belonging to that woman should be taken (by the husband).

S. 25. If the wife goes wrong (with another man) (the husband) is entitled to take the price of the body and turn her out and abandon her. If a man forcibly commits a wrong act with the woman already divorced from her husband, he should be criminally dealt with (receive punishment).

S. 26. If a man who, through the able pleading of his wife, has been exempted, and enjoyed security from a criminal punishment, abandons this wife, and after taking and living with another woman, a criminal charge being again brought against him he returns to his former wife, that wicked man should be disgraced and then be given in charge of the former consort.

S. 27. If the master of a slave-woman mortgaged for half her value has sexual connection (ဒွိဓနဒါသီသဟဓမ္မိကံ) with her, he shall only have to forfeit the whole value (of the woman). Wise men should thus decide.

S. 28. If an outsider takes and lives with a slave-woman of another man and serves in her stead, even if that slave-woman die, he (the man) should not be freed from being a slave.

S. 29. If (a man) has sexual connection with a woman under the care of her parents and relatives without obtaining their consent he should be criminally punished. Thus wise men should decide.

S. 30. If a man has sexual connection (ဒွိဒန္ဓနဝိကဿဒွဒွံ) with a young woman who had never before been handled by a man, and if he be one of inferior rank, let all the property be collected and taken, and let him also be punished and furthermore be made to pay damages. If he be of the same rank, let him pay as damages (one) viss of pure white silver.

S. 31. If (a man) sportively amuses himself with a woman at a place of (public) amusement (*lit.* at a place of sports or plays), and if

she thereby becomes pregnant, if they be of the same rank, let him take her for wife; if the man be superior in rank and if he does not wish to take her for wife, let him pay as damage the price of her body.

S. 32. If (a man) has sexual connection with a blind woman, he shall pay the price of milk (*i.e.*, he shall provide for a nurse to rear the infant) to her parents. Wise men should thus decide.

S. 33. If (a man) has sexual connection with the daughter of a Brahman, and if he be of an inferior class, let his property be taken after leaving enough for him. If he belongs to the trading class, let his property be taken after his remaining a whole year in the house. If he be a relative of the ruler (ဖဧ) [the Pali text says "if he be a Kshatriya"], let him pay as damage 600 tickels of copper. If he also be of the Brahman class but of inferior caste, let his hair be shaved, after paying the damage, and let him be turned out of the country. If they both wish to live together, let them do so.

S. 34. If the mother and father, after receiving presents from several men, give their daughter in marriage to one whom they like, the man shall not receive back the bridal presents already given. If the bridal presents be plenty, double should be received (returned to the giver).

S. 35. When at the giving of the bridal presents, such as pressed-tea, betel, and tobacco, (the parents) point out the daughter whom the man loves, and at the time of the giving another daughter is given, that man has a right to both those daughters.

S. 36. If at the time of the arrangement with the go-between the parents tell not that their daughter is a leper or has any bodily deficiency, and the daughter is accordingly given in marriage, criminal punishment shall be inflicted.

S. 37. If a man forcibly has sexual connection with another man's daughter against her will, let his left hand forefinger be cut short and let him pay as damage 600 tickels of copper. If the daughter be a consenting party, let 200 tickels be the damage.

S. 38. If there be two girl friends of the same age and if the one seduces the other (to go astray), she shall be made to pay two hundred tickels of copper. If a woman of mature age seduces, her head shall be totally shaved and she should be beaten and sent away to a distant place.

S. 39. If the young girl aimed at and pointed out to be given away in marriage die, let the younger sister be given in marriage. If, on the other hand, the young man die, let the girl be given in marriage to the younger brother (of the deceased).

S. 40. If a man, before marriage, gives a gift (or presents) which he has borrowed from another man, the parents shall have no right, though the presents be returned to the owner, to separate their daughter from the man to whom they have given her.

S. 41. If after the bridal presents have been received (given) the (man) has sexual connection with another woman on the very day appointed for marriage, he shall not get the girl he first wanted, and shall furthermore forfeit all the bridal presents.

S. 42. If a daughter is stolen away by a man, the parents have a right to take her back, even if she be the mother of 10 children. If the man who stole the girl away wishes to be divorced, let him pay as damage the price of the body.

S. 43. If the parents knowing that a certain man pays his addresses to their daughter prevent him not from doing so, they should not prevent them from living together (marrying): the reason is because they (parents) were at first the consenting parties.

S. 44. If after receiving bridal presents the parents break their promise and give their young daughter away to another person, and sexual connection takes place, let them give another daughter to that young man. If sexual connection has not yet taken place, let them return double the bridal presents.

S. 45. If the parents give away their daughter, loved by a certain man, to another person, the lover has not the right to say that the girl was in love with him, as no sexual connection had taken place (with him).

S. 46. If (a man) pulls another man's daughter, embraces her, or kisses (*literally* to sniff up the scent, kissing being with Burmans an olofactory process), let him pay as damage 15 tickels of silver. Thus it should be decided.

Here end the 15 laws to be observed with regard to the conduct of man and woman.