ved of the right of appeal, except by express words or implication. Looking at all the sections together, their ips are of opinion that the words "who has not appeared" used in s. 119, mean "who has not appeared at all," and do not pply to the case of a defendant who has once appeared, but who ails to appear on a day to which the cause has been adjourned.

There are several cases to that effect decided by the High Court in Calcutta: Marshall's Reports, page 32; 3rd Bengal Law Reports, Appendix, 121, and 6th Weekly Reporter, page 86.

Two cases were refered to by the learned Judges who decided this case,—a case in 6th Bengal Law Reports, 688, and one from the North-Western Provinces Reports of 1869, decided the 21st May of that year. Their Lordships have referred to those decisions. It appears to them that the case cited from the 6th Bengal Law Reports, 688, so far from being an authority in support of the decision of the High Court, is rather an authority against it. The case which is cited from the North-Western Provinces Reports of 1869, decided the 21st May of that year, is certainly in conflict with the several decisions in the High Court at Calcutta to which reference has been made, and which in the opinion of their Lordships were correctly decided.

Under these circumstances their Lordships will humbly advise Her Majesty that the decision of the High Court was erroneous, and that the case be remanded to the High Court to hear and determine the appeal. The respondents must pay the costs of this appeal.

Agent for the appellant: Mr. *T. L. Wilson.*

APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Turner.

HAMID ALI (PLAINTIFF) *v* IMTIAZAN AND OTHERS (DEFENDANTS).*

Muhammadan Law—Husband and Wife—Divorce—Repudiation by Ambiguous Expression—Custody of Minor Children.

Where a Muhammadan said to his wife, when she insisted against his wish on leaving his house and going to that of her father, that if she went she was his

* Second Appeal, No. 1211 of 1877, from a decree of Maulvi Hamid Hasan Khan, Subordinate Judge of Mainpuri, dated the 15th August, 1877, affirming a decree of Maulvi Nasar-ul-la Khan, Munsif of Mainpuri, dated the 31st March, 1877.

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paternal uncle's daughter, meaning thereby that he would not regard her relationship and would not receive her back as his wife, *held* that the used by the husband to the wife, being used with intention, constitute Muhammadan law, a divorce which became absolute if not revoked within the allowed by that law.

Held also, the divorce having become absolute, the parties being *Sunnis*, tha the husband was not entitled to the custody of his infant daughter until she has attained the age of puberty (1).

THIS was a suit in which the plaintiff, a Muhammadan of the sect of *Sunnis*, claimed, amongst other things, to recover his wife and his infant daughter. His wife set up as a defence to this claim that the plaintiff was not entitled to recover her as he had divorced her before the suit. It appeared from the evidence of the plaintiff that his wife's father and her brothers had come to his house with the object of taking his wife away to her father's house. His wife was willing to go, but the plaintiff objected to her going, and addressed her as follows: "Thou art my cousin, the daughter of my uncle, if thou goest" (2). His wife did not take any notice of these words, but left his house. On the issue whether the expression used by the plaintiff to his wife constituted a divorce, the Court of first instance held, relying on a passage in the Durul-Mukhtar, that it did so, being an "ambiguous expression" used by the plaintiff, while in an angry state, with an intention to repudiate his wife. It also held that, as the repudiation had not been revoked with one year, the divorce had become final, and the plaintiff could not therefore recover his wife. It also held that the plaintiff could not recover his infant daughter till she attained puberty. The lower appellate Court, on appeal by the plaintiff, concurred in the view of the Court of first instance that the plaintiff had divorced his wife. It did not determine whether or not the plaintiff had revoked the divorce within the time allowed by Muhammadan law, or whether he was entitled to the custody of his infant daughter.

The plaintiff appealed to the High Court, contending that the expression used by the plaintiff to his wife did not constitute a divorce, under Muhammadan law, such expression having been used by him in anger only, and without the intention of divorcing

(1) See also *Mohomuddy Begam* v. *Oomdutoonissa*, 13 W. R. 454; and *Beekhun Bibee* v. *Fuzuloollah*, 20 W. R. 411, where the parties presumably were *Sunnis*

(2) "*Ki tu mere chacha ki larki lahin hai, agar tu jaegi.*"

her; that, assuming such expression constituted a divorce, the plaintiff was entitled to revoke the divorce, which he had done by asking his wife to return to him; and that the lower appellate Court had failed to determine whether or not the plaintiff was entitled to the custody of his minor daughter.

Mr. *Mahmood* and Pandit *Ajudhia Nath*, for the appellant.

Lala *Lalta Prasad*, for the respondent.

The High Court remanded the case for the trial of the issue set out in the order of remand, which was as follows:

TURNER, J.—The words used by the appellant to his wife appear to fall within the class of ambiguous expressions. By saying, if you go to your father's house you are my paternal uncle's daughter, the appellant intended to declare that he would regard her in no other relationship, and not receive her back as his wife. This, if spoken with intention (as it doubtless was), constituted a divorce, which became final if it was not revoked within the time allowed by law (1). The appellant alleges it was so revoked. The Court of first instance found that the appellant did not recall his wife for a year, a finding which appears possibly inaccurate. The whole of the questions on the merits were raised by the very general expressions used in the memorandum of appeal, but the issue as to revocation was not determined. The lower appellate Court must try the following issue: Was the divorce revoked within the period allowed by law? On the return of the finding ten days will be allowed for objections. Regarding the custody of the daughter, if it be found that the divorce was not revoked, the daughter must remain with her mother until she has attained the age of puberty.

The lower appellate Court found on this issue that the plaintiff had not revoked the divorce.

The High Court (PEARSON, J., and TURNER, J.) delivered the following judgment:

TURNER, J.—No objection having been taken to the finding on the issue remitted we accept it. The appeal fails and is dismissed with costs.

Appeal dismissed.

(1) See Baillie's Digest of Muhammadan Law, p. 228.