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amount", (*i.e.*, the amount to be realized "principal and interest") and then the proviso that payments shall be applied first in reduction of interest, and entered on the back of the document. The strictest construction of the words is in accordance with the usual intentions of the parties to a simple mortgage. Why they should be wrested from that construction in favour of an unusual and most improbable intention is not explained.

Their Lordships hold that the plaintiffs are entitled to recover their principal debt with interest at the rate mentioned in the mortgage-deed, up to the date of the Subordinate Judge's decree, and thereafter at the rate of 6 per cent. per annum. The decree of the High Court should be discharged.

The respondents ought to pay the whole costs of suit in both the Courts below. The case should be remitted to the Subordinate Judge to take the proper accounts, and give further directions.

Their Lordships will humbly advise Her Majesty to this effect.

The respondents must pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellants:
Messrs. *Ranken, Ford, Ford and Chester.*
Solicitors for the respondents:
Messrs. *Pyke and Parrott.*

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August 14.

REVISIONAL CRIMINAL.

Before Mr. Justice Knox, Mr. Justice Aikman and Mr. Justice Blennerhassett.

SHAH ABU ILYAS (APPLICANT), *v.* ULFAT BIBI (OPPOSITE PARTY).*

Criminal Procedure Code, sections 488, 489, 490 *-Maintenance—Plea of divorce in answer to an application for enforcement of an order for maintenance of a wife.*

Where in answer to an application for enforcement of an order under section 488 of the Code of Criminal Procedure for the maintenance of a wife, the party against whom such order is subsisting pleads that he has lawfully

*Criminal Revision No. 184 of 1896.

divorced his wife and therefore the order can no longer be enforced, it is the duty of the Court hearing the application to entertain and consider such plea, and, if it find the plea established, to decline to enforce the order for any period subsequent to the date when the marriage ceased to subsist between the parties.

In such case, where the parties are Muhammadans, the marriage will be deemed to subsist until the expiration of the *iddat*.

In section 489 of the Code the "change in circumstances" referred to is a change in the pecuniary or other circumstances of the party paying or receiving the allowance which would justify an increase or decrease of the amount of the monthly payment originally fixed, and not a change in the status of the parties which would entail a stoppage of the allowance.

So *held* by Aikman and Blennerhassett, J.J., *dissentiente* Knox. J.

In the matter of the petition of Din Muhammad (1); *Abdur Rohoman* v. *Sakhina* (2); *Zeb-un-nissa* v. *Mendu Khan* (3); *In re Kasam Pirkhai* (4); *In re Abdul Ali Ishmailji*; (5) *Mahomed Abid Ali Kumar Kadar* v. *Ludden Sahiba* (6) and *Mussammat Baji* v. *Nawab Khan* (7) referred to. *Nepoor Aurut* v. *Jurai* (8) disssented from. *Mahbuban* v. *Fakir Bakhsh* (9) overruled.

THE facts of this case sufficiently appear from the judgment of Aikman J.

Mr. *C. Dillon* for the applicant.

KNOX, J.—Musammat Ulfat Bibi presented an application before a Deputy Magistrate of the first class at Basti, praying for an order of maintenance to be granted in her favour under section 488 of the Code of Criminal Procedure.

Shah Abu Ilyas, the husband, appeared to answer this application and objected that Musammat Ulfat Bibi was no longer his wife, as he had divorced her on the 11th of September 1895. There is nothing to show whether the divorce which he sets up was a revocable or irrevocable divorce. If it was the latter, the relationship of wife was no longer in existence in October 1895, the time at which these proceedings took place.

The learned Deputy Magistrate considered the objection raised by Shah Abu Ilyas, considered the fact of divorce proved, but held

(1) I. L. R., 5 All., 226.
(2) I. L. R., 5 Calc., 558.
(3) Weekly Notes, 1885, p. 29.
(4) 8 Bom. H. C. Rep. 95.
(5) I. L. R., 7 Bom., 180.
(6) I. L. R., 14 Calc., 276.
(7) 29 Panj. Rec. 69.
(8) 10 B. L. R., App. 33.
(9) I. L. R., 15 All., 143.

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that Shah Abu Ilyas was liable for the maintenance of his wife for the term of her *iddat*.

He gave an unconditional order, however, for the payment by Shah Abu Ilyas of Rs. 15 per mensem not terminable with the period of *iddat*. No attempt was made by Shah Abu Ilyas to get this order revised.

On the 9th of December Shah Abu Ilyas, instead of getting the order revised, went to a Magistrate and objected that, as the period of *iddat* would expire on the 11th of December, he should not be liable for maintenance after that date. He made the application under section 489. It was refused, and in my opinion rightly refused, as section 489 has no application to such a case.

On the 6th of January 1896, Ulfat Bibi applied for enforcement of the order of maintenance. Her application was under section 490. The Magistrate before whom it was laid satisfied himself as to the identity of the parties and the non-payment of the allowance due, and granted the application.

It is contended that he should have, in a proceeding instituted under section 490 of the Code of Criminal Procedure, inquired into the fact whether Musammat Ulfat Bibi was still the wife of Shah Abu Ilyas. I have already considered this contention in *Mahbuban* v. *Fakir Bakhsh* (1) and I see no reason to alter the view I then formed. The law appears to me in section 490 to be laid down in clear and definite terms, and I should be in my opinion framing new law if I were to add to section 490 the words—"On the Magistrate being satisfied that the applicant is no longer the wife of the person against whom the order was originally made." If the person against whom the order was made wishes to contest the order, he should in my opinion do so when the order is passed, and not wait until it is about to be enforced. Otherwise we might have the unseemly case of a wife obtaining an order of maintenance from the Magistrate of the District one day, taking it the next day for enforcement to a subordinate Magistrate, who could apparently then hold that she was not a wife and refuse to enforce it. It may

(1) I. L. R., 15 All., 143.

be that the law is defective, or it may be that the Legislature intended such cases to be dealt with by superior Courts in revision. I incline to the latter view. In any case, I hold that the words of section 490 are clear, precise and imperative, and that the Legislature did not intend the Magistrate to whom an order like the present, unconditional and undetermined, was taken to consider any point other than the identity of the parties and the non-payment of the allowance due. I do not think it necessary to refer further to the rulings cited. They have been virtually considered by me in *Mahbubán* v. *Fakir Bakhsh*. I would decline to interfere and would reject the application.

AIKMAN, J.—This is an application for revision presented by one Shah Abu Ilyas under the following circumstances:—

The applicant was married to Musammat Ulfat Bibi.

Ulfat Bibi, on the 19th of September 1895, applied to a Magistrate of the first class for an order under section 488 of the Code of Criminal Procedure directing her husband to make her a monthly allowance for her maintenance.

When Shah Abu Ilyas was called on to show cause why such an order should not be passed, he alleged that Musammat Ulfat Bibi was no longer his wife, as he had divorced her on the 11th of September 1895.

When such a plea is put forward in answer to an application for an order for maintenance under section 488, the Magistrate dealing with the application is not only competent, but it is his imperative duty, to inquire into the plea, and determine on such evidence as may be adduced before him whether the plea is a valid one; that is, whether the relation of husband and wife subsists between the person against whom an order is asked for and the person making the application, for, unless such conjugal relation subsists, a Magistrate has no authority to pass an order for maintenance as between husband and wife. In this case the Deputy Magistrate recorded evidence as to the alleged divorce, but he did not determine upon that evidence whether Shah Abu Ilyas had divorced his wife as he alleged. He contented himself with saying

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that, even if a divorce had taken place, the husband was liable to support his wife during the period of *iddat*, which period had not expired on the 15th of October 1895, when the case was disposed of. He directed Shah Abu Ilyas to pay Rs. 15 per mensem for the support of Musammat Ulfat Bibi, but in his order he fixed no period during which this monthly allowance was to continue.

The next stage of the case was that on the 9th of December 1895, Shah Abu Ilyas deposited in court Rs. 15, being the monthly allowance from the date of the order up to the 15th of November 1895, along with a petition expressing his willingness to pay the allowance up to the 11th of December 1895, on which date, he contended, the period of *iddat* expired, but objecting to pay it after that date.

On the 6th of January 1896, Musammat Ulfat Bibi presented a petition in Court asking for the enforcement of the maintenance order, and stating that, although three months had elapsed, she had only received one month's allowance. (This statement was not quite accurate, as three months did not expire until the 15th of January 1896.) Mr. Munna Lal, the Deputy Magistrate who had passed the order for maintenance, having gone on leave, both these petitions came on for disposal before Mr. D. L. Johnston, Joint Magistrate. Before him Musammat Ulfat Bibi asserted her right to a monthly allowance irrespective of the period of *iddat*.

Shah Abu Ilyas, on the other hand, relying on his allegation of divorce, and on the decision of Mahmood, J. in *In the matter of the petition of Din Muhammad* (1), contended that the order of maintenance had become *functus officio* and incapable of enforcement.

After considering the ruling referred to above, and the ruling of my brother Knox in *Mahbuban* v. *Fakir Bakhsh* (2), the Joint Magistrate suggested to Shah Abu Ilyas that he should put in an application under section 489 of the Code of Criminal Procedure. Shah Abu Ilyas adopted this suggestion, and on the 25th of January 1896 put in an application purporting to be under

(1) I. L. R., 5 All., 226. (2) I. L. R., 15 All., 143.

section 489, and asking that the allowance should be stopped. The case was disposed of by the Joint Magistrate by an order dated the 28th of January 1896. In that order he came to the conclusion that section 489 would not cover the present case. That section runs as follows:—"On proof of a change in the circumstances of any person receiving under section 488 a monthly allowance or ordered under the same section to pay a monthly allowance to his wife or child, the Magistrate may make such alteration in the allowance as he thinks fit, provided the monthly rate of fifty rupees be not exceeded."

In the case *Nepoor Aurut* v *Jurai* (1) the Calcutta High Court (Phear and Glover, JJ.) expressed an opinion that the corresponding section (537) of Act No. X of 1872, which does not differ materially from section 489 of the present Code, would probably apply to a case like the present. Phear, J., observes:—"Section 537 provides a mode in which the person, against whom the order is made, can, upon a change of circumstances, get that order altered. And it seems to me probable that, upon the facts stated by the Deputy Magistrate, when the husband in his presence divorced his wife, such an alteration in circumstances did occur which would justify the Deputy Magistrate upon the application of the husband in altering the order of maintenance in favour of the wife."

Notwithstanding this opinion of the learned Judges of the Calcutta High Court, it appears to me that the view taken by the Joint Magistrate is correct. I entertain no doubt that the "change in circumstances" referred to in section 489 is a change in the pecuniary or other circumstances of the party paying or receiving the allowance which would justify an increase or decrease of the amount of the monthly payment originally fixed, and not a change in the status of the parties which would entail the stoppage of the allowance. I concur with the following observations of Mahmood, J., in the case of *Din Muhammad* (2):—"The words 'The Magistrate may make such alteration in the allowance ordered as he deems fit,' preceded as they are by the word 'wife' and followed

(1) 10 B. L. R., App. 33. (2) I. L. R., 5 All., 226.

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as they are by a limitation as to the amount of the monthly allowance, clearly indicate that 'the alteration in the allowance' contemplated by that section only refers to a power to alter that amount and not to a total discontinuance thereof." The same view was taken in *Abdur Rohoman* v. *Sakhina* (1).

In disposing of the petitions before him, the Joint Magistrate rightly held that a plea of divorce, if made out, would not justify him in cancelling the order of maintenance under the penultimate paragraph of section 488. The paragraph sets forth three grounds upon proof of which a Magistrate is authorized to cancel an order of maintenance passed in favour of a wife, and divorce is not one of these.

In considering whether he could give effect to the plea of Shah Abu Ilyas, the Joint Magistrate referred to two rulings of this Court, *viz.*, the ruling of Mahmood, J., *In the matter of the petition of Din Muhammad* (2) and the ruling of my brother Knox in *Mahbuban* v. *Fakir Bakhsh* (3), in which he dissented from a previous decision of this Court by Oldfield, J., *viz.*, *Zeb-un-nissa* v. *Mendu Khan* (4). It is with regard to these discordant rulings that the present case has been referred to this bench.

I find myself unable to agree with the view taken by my brother Knox. That view appears to me to be opposed not only to decisions of this Court, but to decisions of the Calcutta, Bombay and Madras High Courts and the Chief Court of the Panjáb, and, so far as I can ascertain, it has not been adopted by any authority save my brother Knox. It has been repeatedly held that the Legislature in enacting section 488 of the Code of Criminal Procedure did not intend to interfere with the right of divorce.

It cannot in my opinion be disputed that it is only on proof of the existence of conjugal relations between a man and a woman that the man can under section 488 be ordered to provide for the woman's support, and I hold that it is only on the supposition of the continued existence of that relationship that the allowance can

(1) I. L. R., 5 Calc., 558.
(2) I. L. R., 5 All., 226.
(3) I. L. R. 15 All., 143.
(4) Weekly Notes, 1885, p. 29.

continue. Dealing with the corresponding section of the Presidency Magistrates' Act (No. IV of 1877), Ainslie and McDonell, J.J., observed:—"In our opinion it is, under the terms of section 234, *as essential to the continued operation* as to the original making of an order of maintenance that the recipient of the allowance should be *a wife* at the time for which maintenance is claimed, and consequently, for the purposes of Chapter XVIII of the Presidency Magistrates' Act of 1877, a Magistrate must, when a question of divorce arises, determine on such evidence as may be before him whether there has or has not been a legally valid divorce. If he finds that there has been a valid dissolution of the marriage tie, he should refrain from taking any steps to enforce the order of maintenance from the date of dissolution." *Abdur Rohoman* v. *Sakhina* (1).

In the case *In re Kasam Pirbhai and his wife Hirbai* (2) it was held by Westropp, C. J., and Bailey, J., that a husband against whom a maintenance order had been passed and who had subsequently divorced his wife was no longer liable under the maintenance order. The learned Judges observe in regard to the maintenance order:—"That was a proper order at the time it was made, but we think the groundwork of that order has now been removed, and we cannot consider it any longer a continuing binding order upon the applicant. On the question that is before us, we say that we do not think that the Magistrate ought to issue an attachment upon, or otherwise to execute the order, it being in fact *functus officio*." That case was followed by Sarjent, C. J., and Melvill, J., in *In re Abdul Ali Ishmailji and his wife Husenbi* (3), where it was held that after a divorce a Magistrate should no longer enforce an order for maintenance.

In the case *Mahomed Abid Ali Kumar Kadar* v. *Ludden Sahiba* (4) the learned Judges (Prinsep and Beverley, J.J.) held that a man who had been ordered by a Magistrate to pay maintenance to a woman on the ground that she was his wife, and who

(1) I. L. R., 5 Calc., 558 at p. 562.
(2) 8 Bom., H. C. Rep. 95.
(3) I. L. R., 7 Bom., 180.
(4) I. L. R., 14 Calc., 276.

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had succeeded in procuring from a court of competent jurisdiction a declaration that no relationship existed between him and the woman, might ask the magistrate on the authority of *Abdul Rohoman* v. *Sakhina* (1) and *Abdul Ali Ishmailji* v. *Husenbi* (2) to abstain from giving any further effect to his order for maintenance.

It appears from a note in Prinsep's Code of Criminal Procedure, 11th edition, p. 318, that the Madras High Court has held that a Muhammadan wife divorced after an order for maintenance had been passed in her favour is entitled to maintenance during her *iddat*, but that the order cannot be enforced for a time subsequent to the expiry of the *iddat*.

In the case *Musammat Baji* v. *Nawab Khan* (3) the Chief Court of the Panjáb, after considering the ruling of my brother Knox and other rulings referred to above, held that it *is* open to a Magistrate to entertain and inquire into a plea of divorce, and, if he finds it established, to refuse to enforce his order, at least after such date as the divorce operates under the law and custom governing the parties to disentitle the woman to further maintenance.

My brother Knox in the case *Mahbuban* v. *Fakir Bakhsh* (4) held that "when a person in whose favour an order of maintenance has been given takes it before a Magistrate and the Magistrate finds that he has jurisdiction owing to the residence of the person affected by the order, and is satisfied as to the identity of the parties and the non-payment of the allowance due, it is his duty to enforce the order for maintenance."

Acting upon this decision the Joint Magistrate in this case directed that the order for maintenance should be enforced, and the Sessions Judge, before whom the case was taken in revision, declined to interfere with the order. I regret that I cannot concur with the decision of my brother Knox, which, as shown above, is opposed to the decisions of all the other Judges who have had to consider the point.

(1) I. L. R., 5 Calc., 558.
(2) I. L. R., 7 Bom., 180.
(3) 29 Panj. 5Rec. 69
(4) I. L. R., All., 143.

It appears to me to be a mistake to say that the only questions which a Magistrate before whom an order for maintenance is produced under section 490 has to consider are whether he has jurisdiction over the person affected by the order, and whether he is satisfied as to the identity of the parties.

A most material question which in my opinion it is incumbent on him to consider is whether the order to which it is sought to give effect is still in force, or whether, to use the expression of Westropp, C. J., it has become "*functus officio.*"

Take the case of a man who under section 488 had been ordered to pay a monthly sum for the support of his illegitimate child until it should attain the age of twelve years. If such an order were produced before a Magistrate under s. 490, I do not think it could seriously be contended that all the Magistrate has to do is to satisfy himself that he has jurisdiction, that the parties are the same, and that the allowance is unpaid. He has further to consider the question of the age of the child, so as to ascertain whether the allowance claimed is or is not due under the order. So in the case of a woman producing under section 490 an order for her maintenance, the Magistrate has to satisfy himself whether the allowance asked for is or is not due under the order. The order can only have been passed for an allowance to the woman as a wife, and, if she no longer occupies that position, the allowance is no longer due under the order, save for the period before she ceased to be the wife of the person ordered to pay the allowance.

This period, I hold, includes in the case of Muhammadans the period of the *iddat*. It is true that Oldfield, J., in the case from which my brother Knox dissented, held that no allowance was payable after the actual date of divorce, but he gives no reasons for his opinion, which is opposed to the judgment of Mahmood, J., in the case of *Din Muhammad* (1) and of the Madras High Court in the case referred to above. The passage quoted from the Hedaya by Mahmood, J. ("A marriage is accounted still to subsist during the *iddat* with respect to various of its effects, such as the obliga-

(1) I. L. R., 5 All., 226.

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tion of alimony, residence and so forth") is sufficient authority for the continuance of the allowance during the *iddat*.

For the above reasons I would set aside the order of the Joint Magistrate, and direct him to come to a finding on such evidence as may be adduced before him, as to whether Shah Abu Ilyas divorced his wife, and, if so, on what date. If he finds that Shah Abu Ilyas did divorce his wife, he should determine what is the period of the *iddat* and enforce the maintenance order for that period and to no later date.

BLENNERHASSETT, J.—The authorities collected by my brother Aikman show a strong consensus of opinion among the High Courts of Calcutta, Bombay, Madras, and the North-Western Provinces, and the Chief Court of the Panjáb in support of the view expressed by him. Following those authorities, I concur in the judgment of my brother Aikman and in the order proposed by him.

BY THE COURT.

The order of the Court will be that the order of the Joint Magistrate be set aside, and the Joint Magistrate inquire into and determine whether Shah Abu Ilyas has divorced his wife, and if he has, that he should determine what is the period of the *iddat* and enforce the maintenance order until the expiry of that period and to no later date.

APPELLATE CIVIL.

1896
August 14.

Before Mr. Justice Banerji and Mr. Justice Aikman.

THAKURI AND OTHERS (PLAINTIFFS) *v.* BRAMHA NARAIN AND OTHERS (DEFENDANTS.)*

Court-fee—Act No. VII of 1870 *(Court-Fees Act) Sch. ii, art.* 17, *cl. vi—Civil Procedure Code, section* 539*—Prayer for appointment of plaintiffs as trustees—Declaratory relief.*

A prayer in a plaint purporting to be a plaint under section 539 of the Code of Civil Procedure, that the plaintiffs themselves may be appointed trustees is not a prayer for possession requiring to be stamped at the value of the trust pro-

* First Appeal No. 266 of 1896 from an order of H. Bateman, Esq., District Judge of Saháranpur, dated the 1st October 1894.