PRIVY COUNCIL.

J. C.* 1931 November, 19.

RASHID AHMAD AND ANOTHER (PLAINTIFFS) *v.* ANISA KHATUN AND OTHERS (DEFENDANTS).

[On appeal from the High Court at Allahabad.]

Muhammadan law—Divorce—Pronouncement in wife's absence—Subsequent cohabitation—Acknowledgment of status—Irrevocable divorce.

A Sunni Muhammadan of the Hanafi school thrice pronounced before witnesses the formula of divorce, naming his wife who was not present; a few days later he executed a deed of divorce which stated that the three divorces had been given in the "abominable" form. Cohabitation continued, however, until fifteen years later when he died, five children having been born to them after the divorce. During that period he treated the woman as his wife, and the children as legitimate.

Held that the words of divorce being clear and addressed to the wife were effectual although she had not been present and the divorce being in the *bidaat*, not the *ahsan*, form was irrevocable irrespective of the *iddat*, or period of abstinence from intercourse. It was not material whether the husband had, as was alleged, a mental intention that the divorce should not be effective. Subsequent acknowledgments of the status of the woman and of her children were ineffective in the absence of evidence of facts which might have made a remarriage lawful.

Ma Mi v. *Kallander Ammal* (1), followed. *Furzund Hossein* v. *Janu Bibee* (2), distinguished.

APPEAL (No. 86 of 1929) from a decree of the High Court (February 1, 1927) reversing a decree of the Subordinate Judge of Bijnor at Moradabad (December 15, 1923).

The appeal related to the right to inherit the property of Ghiyas-ud-din, a Sunni Muhammadan of the Hanafi school, who died in 1920.

The suit was brought by the appellants, the brother and sister of the deceased, the principal defendants being

* *Present*: Lord THANKERTON, Lord SALVESEN, and Sir GEORGE LOWNDES.

(1) (1926) I.L.R., 5 Rang., 18; L.R., 54 I.A., 61.
(2) (1878) I.L.R., 4 Cal., 588.

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respondent No. 1, who claimed to be the wife of the deceased, and respondents Nos. 2 to 6, her children by the deceased. The appellants contended that the marriage, alleged to have taken place in August, 1905, was invalid in that the respondent No. 1 had a husband then living, and that in any case it had been validly dissolved by the deceased in September, 1905. The trial Judge made a decree for the appellants, but upon appeal to the High Court (DALAL and PULLAN, JJ.) it was reversed and the suit dismissed. The material facts and the grounds of the above decisions appear from the judgment of the Judicial Committee.

Early in the opening of the present appeal counsel were directed to confine their arguments in the first instance to the question whether the deceased had effectively divorced respondent No. 1.

1931, October, 20, 22, 23. *Hyam* for the appellants: Both courts found that the Muhammadan formula of divorce was thrice repeated by the deceased before witnesses, and that the deed of divorce was a genuine document. The absence of the wife when the pronouncement was made was not fatal to the validity of the *talak*: *Ma Mi* v. *Kallander Ammal* (1), *Ful Chand* v. *Nazab Ali Chowdhry* (2), *Asha Bibi* v. *Kadir Ibrahim Rowther* (3). The view that the deceased did not really intend to divorce respondent No. 1 rests upon conjecture; in any case the *talak* being pronounced in clear terms was effective without proof of the intention of the deceased: *Ma Mi's* case (1). A *talak* between Sunnis is effective even if given under compulsion: *Ibrahim Moollah* v. *Enayut-oor-Ruhman* (4). The triple divorce was of the kind known as a *talak bain*, that is one irrevocable from the moment when pronounced. The subsequent cohabitation was unlawful but did not make the divorce inoperative. As the form adopted was the *bidaat*, not the *ahsan*, form, abstinence

(1) (1926) I.L.R., 5 Ran., 18; L.R., 54 I.A., 61.
(2) (1908) I.L.R., 36 Cal., 184. (3) (1909) I.L.R., 33 Mad., 22.
(4) (1869) 12 W.R., 460.

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from intercourse during the *iddat* period was not essential to its validity. [Reference was made to Wilson's Anglo-Muhammadan Law, 5th edition, paragraph 61, page 136, and notes thereto.]

Abdul Majid for respondents Nos. 1 to 6: The divorce proceedings were unreal and fictitious, and consequently inoperative. That the deceased did not intend that the divorce should be effective is shown by the admitted fact that cohabitation continued afterwards for fifteen years, during which period he treated respondent No. 1 as his wife and respondents Nos. 2 to 6 as his legitimate children. Although the Board held in *Ma Mi's* case (1) that if the intention was clearly expressed it need not be proved, it has never been held that a *talak* is operative if it is proved that the intention was that it should not be effective, the whole proceeding being fictitious. The *talak* was a mere declaration not addressed to anybody; it was inoperative also for that reason: *Furzund Hossein* v. *Janu Bibee* (2). But even if there was a valid divorce in 1905, the subsequent acknowledgments of the status of the respondents gave rise to a presumption that there had been a remarriage: *Habibur Rahman Chowdhury* v. *Altaf Ali Chowdhury* (3).

The appellants were not called upon to reply.

November, 19. The judgment of their Lordships was delivered by Lord THANKERTON:—

This is an appeal from a decree of the High Court at Allahabad, dated the 1st of February, 1927, which reversed a decree of the court of the Subordinate Judge of Bijnor at Moradabad, dated the 15th of December, 1923.

The dispute relates to the succession to the estate of Ghiyas-ud-din, a Muhammadan, who died on the 4th of April, 1920, leaving considerable movable and immovable property.

(1) (1926) I.L.R., 5 Ran., 18; L.R., 54 I.A., 61.
(2) (1878) I.L.R., 4 Cal., 582.
(3) (1921) I.L.R., 48 Cal., 856; L.R., 48 I.A., 114.

The appellants are plaintiffs in the suit, which was instituted on the 28th of June, 1922, and are a brother and sister of Ghiyas-ud-din, and, along with respondents Nos. 10 to 12, who were impleaded as *pro forma* defendants, would be heirs to Ghiyas-ud-din according to Muhammadan law, if the respondents Nos. 1 to 6 (who were defendants Nos. 1 to 6), are unable to establish their claim to be the widow and legitimate children of Ghiyas-ud-din.

The main controversy turns on four stages in the matrimonial history of Anis Fatima, respondent No. 1, viz.: (1) her marriage to Manzur Husain in 1901, (2) her divorce by Manzur Husain early in 1905; (3) her marriage to Ghiyas-ud-din on the 28th of August, 1905; and (4) her divorce by Ghiyas-ud-din on or about 13th of September, 1905.

It is admitted that Anis Fatima was married to Manzur Husain in 1901, but the respondents maintain that the marriage was invalid on the ground that both parties were minors at the time. The Subordinate Judge held the marriage to be valid on the ground that Anis Fatima was then adult and Manzur's marriage was contracted through his mother as his guardian, and this conclusion appears to have been accepted by the High Court.

The alleged divorce by Manzur Husain early in 1905 was challenged by the appellants on the grounds that it was not proved, and that, even if proved, it was invalid in respect that Manzur had not then attained the age of discretion. Manzur himself was the only witness as to the fact of divorce, and his evidence was rejected by the Subordinate Judge, but was accepted by the High Court as proving the fact. On consideration of the conflicting evidence as to Manzur's age, the Subordinate Judge held that he had not then reached the age of discretion, but the High Court reached the opposite conclusion.

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The Subordinate Judge held that the marriage of Ghiyas-ud-din to Anis Fatima was not proved, but this finding was reversed by the High Court, and the appellants acquiesced in the decision of the High Court, and merely maintained the invalidity of this marriage in the event of it being held that Anis Fatima was then the undivorced wife of Manzur.

The fourth stage was the alleged divorce by Ghiyas-ud-din in September, 1905. The appellants' case was that on the 13th of September, 1905, Ghiyas-ud-din pronounced the triple *talak* of divorce in the presence of witnesses, though in the absence of the wife, and that the latter received Rs. 1,000 in payment of her dower on the same day, for which a registered receipt is produced; there was also produced a *talaqnamah*, or deed of divorce, dated the 17th of September, 1905, which narrates the divorce, and which is alleged to have been given to Anis Fatima. The respondents denied the fact of the divorce, and, in any event, they challenged its validity and effect for reasons which will be referred to later. They maintained that the payment of Rs. 1,000 was a payment of prompt dower, and that the deed of divorce was not genuine, in that it was not written or signed by Ghiyas-ud-din.

There are concurrent findings by the courts below that Ghiyas-ud-din did pronounce the triple *talak* of divorce, and that the deed of divorce is genuine, and their Lordships have seen no reason to depart in this case from their usual practice of not disturbing such findings.

The Subordinate Judge held that Ghiyas-ud-din irrevocably divorced Anis Fatima, and that she was, therefore, not his wife at the date of his death in 1920, and also that respondents Nos. 2 to 6, who were admittedly their offspring, but all born after the date of divorce, were not legitimate. The High Court came to the contrary conclusion on the ground that the divorce was fictitious and inoperative, because it was a mock

ceremony performed by Ghiyas-ud-din to satisfy his father, but without any intention on his part that it should be real or effective.

As it was obvious that, in the event of their Lordships agreeing with the conclusion of the Subordinate Judge on this stage of the case, consideration of the earlier stages of the case would be rendered unnecessary, counsel were requested to confine their arguments to this stage in the first instance, and, after full consideration of these arguments, their Lordships are of opinion that the decision of the Subordinate Judge was right, and, therefore, it will be sufficient to deal with this stage alone.

There is nothing in the case to suggest that the parties are not Sunni Muhammadans governed by the ordinary Hanafi law, and, in the opinion of their Lordships, the law of divorce applicable in such a case is correctly stated by Sir R. K. Wilson, in his Digest of Anglo-Muhammadan Law (5th edition) at p. 136, as follows:—"The divorce called *talak* may be either irrevocable (*bain*) or revocable (*raja*). A *talak bain*, while it always operates as an immediate and complete dissolution of the marriage bond, differs as to one of its ulterior effects according to the form in which it is pronounced. A *talak bain* may be effected by words addressed to the wife clearly indicating an intention to dissolve the marriage, either:—(*a*) Once, followed by abstinence from sexual intercourse for the period called the *iddat;* or (*b*) Three times during successive intervals of purity, *i.e.*, between successive menstruations, no intercourse taking place during any of the three intervals; or, (*c*) Three times at shorter intervals, or even in immediate succession; or, (*d*) Once, by words showing a clear intention that the divorce shall immediately become irrevocable. The first-named of the above methods is called *ahsan* (best), the second *hasan* (good), the third and fourth are said to be *bidaat* (sinful), but

are, nevertheless, regarded by Sunni lawyers as legally valid."

In the present case the words of divorce addressed to the wife, though she was not present, were repeated three times by Ghiyas-ud-din as follows:—"I divorce Anisa Khatun for ever and render her *haram* for me," which clearly showed an intention to dissolve the marriage. There can be no doubt that the method adopted was the third above described, and this is confirmed by the deed of divorce, which states that the three divorces were given "in the abominable form," *i.e.*, *bidaat*. The learned Judges of the High Court have erred in treating the divorce as in the *ahsan* form, instead of the *bidaat* form.

The *talak* was addressed to the wife by name, and the case is not affected by the decision of the High Court of Calcutta in *Furzund Hossein* v. *Janu Bibee* (1), where the words of divorce were alone pronounced. In the *bidaat* form the divorce at once becomes irrevocable irrespective of the *iddat* (Baillie's Digest, 2nd edition, p. 206). It is not necessary that the wife should be present when the *talak* is pronounced: *Ma Mi* v. *Kallander Ammal*, (2), *Ful Chand* v. *Nazab Ali Chowdhry* (3), *Asha Bibi* v. *Kadir Ibrahim Rowther* (4), though her right to alimony may continue until she is informed of the divorce.

Their Lordships are of opinion that the pronouncement of the triple *talak* by Ghiyas-ud-din constituted an immediately effective divorce, and, while they are satisfied that the High Court were not justified in such a conclusion on the evidence in the present case, they are of opinion that the validity and effectiveness of the divorce would not be affected by Ghiyas-ud-din's mental intention that it should not be a genuine divorce, as such a view is contrary to all authority. A *talak* actually

(1) (1878) I.L.R., 4 Cal., 588.
(2) (1926) I.L.R., 5 Rang., 18(23); L.R., 54 I.A., 61 (65).
(3) (1908) I.L.R., 36 Cal., 134.
(4) (1909) I.L.R., 33 Mad., 22.

pronounced under compulsion or in jest is valid and effective (Baillie's Digest, 2nd edition p. 208; Ameer Ali's Muhammadan Law, 3rd edition vol. 2, p. 518 Hamilton's Hedaya, vol. 1, p. 211).

The respondents sought to found on the admitted fact that for about fifteen years after the divorce Ghiyas-ud-din treated Anis Fatima as his wife and his children as legitimate, and on certain admissions of their status said to have been made by appellant No. 1 and respondent *pro forma* No. 10, who are brothers of Ghiyas-ud-din, but once the divorce is held proved such facts could not undo its effect or confer such a status on the respondents.

While admitting that, upon divorce by the triple *talak*, Ghiyas-ud-din could not lawfully remarry Anis Fatima until she had married another and the latter had divorced her or died, the respondents maintained that the acknowledgment of their legitimacy by Ghiyas-ud-din, subsequent to the divorce, raised the presumption that Anisa Fatima had in the interval married another, who had died or divorced her, and that Ghiyas-ud-din had married her again, and that it was for the appellants to displace that presumption. In support of this contention they founded on certain dicta in the judgment of this Board in *Habibur Rahman Chowdhury* v. *Altaf Ali Chowdhury* (1). Their Lordships find it difficult to regard this contention as a serious one, for these dicta directly negative it. The passage relied on, which related to indirect proof of a Muhammadan marriage by acknowledgment of a son as a legitimate son, is as follows :—"It must not be impossible upon the face of it, *i.e.*, it must not be made when the ages are such that it is impossible in nature for the acknowledgor to be the father of the acknowledgee, or when the mother spoken to in an acknowledgment, being the wife of another, or within prohibited degrees of the acknowledgor, it would be apparent that

(1) (1921) I.L.R., 48 Cal., 856 (864); L.R., 48 I.A., 114 (120—1).

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the issue would be the issue of adultery or incest. The acknowledgment may be repudiated by the acknowledgee. But if none of these objections occur, then the acknowledgment has more than evidential value. It raises a presumption of marriage—a presumption which may be taken advantage of either by a wife-claimant or a son-claimant. Being, however, a presumption of fact, and not *juris et de jure*, it is, like every other presumption of fact, capable of being set aside by contrary proof."

The legal bar to remarriage created by the divorce in the present case would equally prevent the raising of the presumption. If the respondents had proved the removal of that bar by proving the marriage of Anis Fatima to another after the divorce and the death of the latter or his divorce of her prior to the birth of the children and their acknowledgment as legitimate, the respondents might then have had the benefit of the presumption, but not otherwise.

Their Lordships are therefore of opinion that the appeal should be allowed, that the decree of the High Court should be reversed, and that the decree of the Subordinate Judge should be restored, the appellants to have the costs of this appeal and their costs in the High Court. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellants: *Barrow, Rogers* and *Nevill*.

Solicitors for respondents Nos. 1—6: *Francis* and *Harker*.