1870. *November* 14. *C. R. A. No.* 175 *of* 1870.

in the Lower Court. We may however state that, as at present advised, we agree with the remarks of Bruce, V. C. in the case of *Shields* v. *Boucher*, I *De Gex* and *Smale*, 40, cited at the bar. And we may add that, even if the legitimate descent had been proved to our satisfaction, we should have been compelled to hold that the evidence as to nationality was incomplete. All that the evidence, if admissible, amounts to is that John Turnbull was a European, and there is nothing to show that he was a British born subject. The Judge before whom a plea of this kind is set up may, as the High Court has recently laid down, be satisfied by the appearance of the prisoner and the circumstances brought forward at the time that the plea is true ; but if not so satisfied, the plea, if persisted in, must be substantiated by sufficient evidence. The result is that the conviction of the Session Court must be affirmed, no objection having been taken to the findings upon the facts. As regards the punishment we are disposed to reduce it, and we shall send for the record for that purpose.

The sentence of the High Court was that the prisoner be rigorously imprisoned for a period of five years and pay a fine of Rupees 10,000 and in default be rigorously imprisoned for a further period of one year.

APPELLATE JURISDICTION (*a*)

Special Appeal No. 202 *of* 1870.

TADIYA.....*Special Appellant.*

HASANEBIYARI.....*Special Respondent.*

According to Mahomedan Law dower is presumed to be prompt in the absence of express contract and may be enforced at any time.

1870. *November* 30. *S. A. No.* 202 *of* 1870.

THIS was a Special Appeal against the revised decision of Srinivasa Rao, the Principal Sadr Amin of Mangalore, in Regular Appeal No. 350 of 1867, modifying the decree of the Court of the District Munsif of Mangalore, in Original Suit No. 199 of 1863.

The plaintiff brought the suit setting forth that her husband, the defendant, not having maintained herself and the minor daughter (born of her by the defendant) for the year

(*a*) Present : Holloway and Innes, JJ.

1870. November 30. S. A. No. 202 of 1870.

prior to 17th February 1863, on which the defendant divorced her, Rupees 44, being the amount of expenses incurred on account of the maintenance for that year, should be recovered to her from the defendant, together with her dowry, Rupees 20.

The defendant stated that he maintained the plaintiff and had not divorced her ; that she was to obtain her dowry either at the time when she was divorced or at the time of his death.

The District Munsiff gave judgment as follows :—No evidence was adduced as to the plaintiff having been maintained under Mahomedan Law. The dowry is payable after marriage. As no conditions have been entered into as to the plaintiff's dowry being paid either at the time of divorcing her, or at the defendant's death, the same is payable on demand. The Court, considering it not necessary to ascertain in this suit the question whether the defendant has divorced the plaintiff, decides that the defendant should pay to the plaintiff the amount of maintenance and dowry claimed by her, together with costs.

Upon appeal the Principal Sadr Amin upheld the decision of the Munsiff ; but upon review pronounced the following judgment :—

Owing to Petition No. 56 of 1869 presented by the defendant for review of the judgment passed in the suit, the Principal Sadr Amin has placed the suit again on the file for re-consideration of the same for the following reasons :—

" The plaintiff claims in this suit dowry, &c., from the defendant, and the defendant states that he has not divorced her, and that the dowry is payable either at the time of divorce or at his death. On a reference to the decree in page 119 of the Appendix to Macnaughten's Mahomedan Law and also to the decree passed in Suit No. 13 of 1855 by the Mahomedan Sadr Amin, the Principal Sadr Amin comes to see that the Mahomedan Law divides the dowry into two sorts as " Moyozilla and Muvayzilla," and declares that of these the first is payable at the time of Nikka marriage, and the other at the time of divorce by the husband or after his death.

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It is declared in Section 183 of the Manual of Mahomedan Law, by Sadagopacharyar, that should there be no clear understanding (between the parties) as to the time for the payment of dowry, it is payable on demand. The defendant pleads in the present suit that he has not divorced (his wife); that the dowry is payable either at the time when he will divorce her or at his death. Consequently, the suit has been placed again on the file in order to ascertain whether the defendant had divorced (the plaintiff) and how the dowry is usually paid.

The Court perused the depositions, &c., given by the witnesses for the parties, and which were sent for from the Lower Court.

The Principal Sadr Amin concurs with the Court below in the opinion arrived at to the effect that the evidence given by the witnesses for the plaintiff to the effect that the defendant wrote a letter divorcing thereby the plaintiff, was not credible, and that the said circumstance was not proved. With reference to the divorce alleged to have taken place at Bolara, attached to the town of Mangalore, it is to be observed that while the people and Mokhtears of the parties' own caste, as well as the neighbours, such as Khazi Katiba, Mukri, &c., were available, there was no reason for the people of the Sajip village situate at a distance of more than 4 kosses, and wherein the plaintiff lived, meeting together at that time to the exclusion of any one of the abovementioned persons, and also prove Ammarivayava man being procured for writing the said letter. Moreover, the Cazi of Mangalore town has, in the decree passed by him, and which was produced by the defendant, held that the defendant has not divorced (the plaintiff), and that the letter was got up in the name of the defendant. Under these circumstances, the Court concludes that the defendant has not divorced (the plaintiff), and that the letter produced by the plaintiff was not actually written by the defendant.

The point that remains still for consideration is whether the plaintiff is entitled to obtain the dowry at once. The witnesses that gave their evidence in favour of the defendant in the above respect deposed that the dowry is given among the parties of the suit who are of Saffe Majab class either at

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the time when husband and wife join together, or after the death (of the husband); and their evidence is consistent with the meaning of the decrees referred to above. As it has been concluded that the defendant did not divorce (the plaintiff), it does not appear proper that dowry should be awarded (to the plaintiff.)

Hence, the Principal Sadr Amin reverses such portion of the decree appealed against as awarded the amount of dowry, and amends his previous judgment by deciding that no costs will be directed to be paid by the defendant to the plaintiff, inasmuch as she carried on false proceedings to the effect that she was divorced, &c., by the defendant; and that the parties should bear their respective costs.

The plaintiff presented a Special Appeal to the High Court.

Parthasarathy Aiyangar, for the Special Appellant, the plaintiff.

The Court delivered the following

JUDGMENT :—This is an appeal against the disallowance of dower because there had been no divorce.

The authorities seem to be in accord upon the point that dower is of two sorts; I, Prompt, exigible at any time ; II, Deferred, exigible at divorce. They further agree that it is a presumption of Mahomedan law that in the absence of express contract dower is presumed to be prompt. We, therefore, reverse the revised decree of the Principal Sadr Amin, except as to the matter of costs.

The Lower Court having determined that the appellant appeared before the Court with a false allegation, we do not alter the decree of the Principal Sadr Amin as to costs. There will be no costs of this Special Appeal.

Special Appeal allowed.