ORIGINAL CIVIL.

Before Mr. Justice Batchelor.

SARABAI, PLAINTIFF, *v.* RABIABAI, DEFENDANT.*

1905.
December 9.

Mahomedan Law—Hanafi Sunnis—Divorce—Talak-ul-bain *by one pronouncement in the absence of the wife—Execution of* talaknama *in the presence of the Kazi—Communication of the divorce to the wife*—Marz-ul-maut—*Death of the husband before expiration of the period of* iddat.

A, a Mahomedan belonging to the Hanafi Sunni sect, took with him two witnesses and went to the Kazi and there pronounced but once the divorce of his wife (plaintiff) in her absence. He had a *talaknama* written out by the Kazi, which was signed by him and attested by the witnesses. A then took steps to communicate the divorce and make over the *iddat* money to the plaintiff, but she evaded both. A died soon after this. The plaintiff thereupon filed a suit alleging that she was still the wife of A and claimed maintenance and residence.

Held, overruling the contention that the divorce should have been pronounced three times, that the *talak-ul-bidaat* (*i.e.*, irregular divorce) is good in law, though bad in theology.

Held further, in answer to the contention that the divorce was not final as it was never communicated to the plaintiff, that a *bain-talak*, such as the present, reduced to manifest and customary writing, took effect immediately on the mere writing. The divorce being absolute, it is effected as soon as the words are written "even without the wife receiving the writing."

In order to establish *Marz-ul-maut* there must be present at least three conditions:—

(1) Proximate danger of death, so that there is, as it is phrased, a preponderance (*ghaliba*) of *khauf* or apprehension, that is, that at the given time death must be more probable than life:

(2) there must be some degree of subjective apprehension of death in the mind of the sick person:

(3) there must be some external indicia, chief among which would be the inability to attend to ordinary avocations.

Where an irrevocable divorce has been pronounced by a Mahomedan husband in health, and the husband dies during the period of the discarded wife's *iddat*, she has no claim to inherit to the husband.

ONE Haji Adam Sidick, a Cutchi Memon of the Hunafi sect, died on the 11th day of February 1904 at Bandora, leaving him

* O. C. J. Suit No. 425 of 1904.

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surviving his widow Rabiabai (defendant 1) and a daughter Bai Aishabai (defendant 2).

Sarabai, the plaintiff, was the second wife of Haji Adam Sidick. It was alleged by the defendants and denied by the plaintiff, that she was validly divorced on the 19th November 1903 by her husband.

On the day in question Haji Adam Sidick took with him some witnesses and went to the Kazi of Bombay, there to pronounce the divorce of his wife Sarabai. She was not present there at the time. It appeared that Haji Adam Sidick pronounced the divorce but once and asked the Kazi to prepare the customary *talaknama* (deed of divorce). The Kazi did so: and it was signed by Haji Adam Sidick and was attested by witnesses.

Steps were then taken to communicate the divorce, and to pay the *iddat* money, to the plaintiff, but she evaded both.

Eventually on the 25th June 1904, Sarabai filed the present suit whereby she prayed that " it may be declared that the plaintiff is entitled to a suitable provision for maintenance and residence being made for her out of the estate of " Haji Adam Sidick.

The defendants contended *inter alia* that the plaintiff was validly divorced by Haji Adam Sidick on the 19th November 1903 by an irrevocable divorce and that she had no claim to the estate of Haji Adam Sidick.

The issues raised at the trial were as follows:

1. Whether the plaintiff was validly divorced by the deceased.

2. If so, whether she is entitled to maintenance $\frac{\text{and}}{\text{or}}$ residence $\frac{\text{and}}{\text{or}}$ any right under the will.

3. If she is entitled to maintenance $\frac{\text{and}}{\text{or}}$ residence, what provision should be made therefor?

4. To what relief, if any, is plaintiff entitled?

Davar, with *Raikes*, for the plaintiff:—It is admitted that the parties being Sunnis and Cutchi Memons are governed by Hanafi Law. In Mahomedan Law there are three forms of divorce: *Talak ahsan*, *Talak hasan* and *Talak-ul-bidaat*. In this case, the

form of the divorce would be *talak-ul-bidaat*. Our submission is that divorce is not complete because there is no valid pronouncement. Simply the words "*talak dia*" are not enough in themselves to constitute a valid divorce. See Hamilton's Hedaya, pp. 76, 77 and 80; *Furzund Hossein* v. *Janu Bibee*[1]. There must be formal pronouncement. If the word *talak* is used by itself and without the addition of the word *bâin*, it would only be a reversible divorce, or *talak rajai*.

Moreover, divorce must be addressed by the husband to the wife; a mere statement in her absence is not enough. But supposing it is enough, then we submit that under the formality prescribed by the Mahomedan Law, there must be triple repetition, though the form may be repeated all at the same time. *In re Kasam Pirbhai and his wife Hirbai*[2] and *In re Abdul Ali Ishmailji*[3] show that there must be three pronouncements to effect a valid *talak bidaat*. The same point had arisen in *Ibrahim* v. *Syed Bibi*[4]. We submit that the doctrine of pronouncement must not be extended further. At first the rule was that these three pronouncements should be made separately during three successive *tahr*s, but subsequently the Mahomedan lawyers extended it in favour of the husband by allowing these three pronouncements to be made at one and the same time. The rule is thus sufficiently extended in favour of the husband, and no English Court should extend it further against the wife.

But if divorce of this sort, *i. e.* with one pronouncement of "*talak dia*," can acquire validity, it can do so only by communication. There was no communication in this case. There is no decided case in which the Court has held that *talak* was good unless there was communication to the wife or to some one on her behalf. Except the visit of the Kazi to the plaintiff's house, there is no evidence of communication.

Supposing divorce is proved, then we submit that the testator having died before the completion of the *iddat* plaintiff is entitled to a widow's share. Even if the period of *iddat* has expired we contend that divorce does not bar her right of inheritance, because it was pronounced during a *marz-ul-maut*: Fatwa

(1) (1878) 4 Cal. 588.
(2) (1871) 8 Bom. H. C. R. 95 (CR. CA.)
(3) (1883) 7 Bom. 180.
(4) (1888) 12 Mad. 63.

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Alamgiri; Hamilton's Hedaya, p. 99—Divorce of the sick; Baillie's Moohummudan Law, p. 277; Wilson's Digest of Anglo-Muhammadan Law, sections 31 and 78. On these authorities, even though there was a valid divorce, she would succeed. As to *marz-ul-maut*, we submit that if a man were sick of one kind of sickness, and he died of another, the first sickness would still be a *marz-ul-maut*, Hamilton's Hedaya, p. 99.

In the document of divorce, the Kazi uses the words "one *bain talak*." If this document is held admissible, then our submission is that such a *talak* must be given during a *tahr*, otherwise it is a revocable *talak*: Baillie's Moohummudan Law, p. 207. This fact must be proved by the person relying on the validity of the divorce. But no evidence was given by the defendants on this point.

As to the codicil, we submit that the testator simply states therein the consequences of Mahomedan Law. It is not the expression of his intention, but his view of Mahomedan Law. The testator could not bar his wife's right to the inheritance, but he could exclude her from his bounty. On the death of the testator she stood in the position of a Hindu widow.

Lowndes and *Jardine* (with them *Scott*, Advocate General) for the defendants:—The first question is as to factum of the divorce. There cannot be any doubt there was a divorce. As to the pronouncement we rely on the statement of the Kazi. One of his important official duties is to pronounce divorces; the Court should, under section 114 of the Evidence Act 1872, presume that the Kazi must have done all that is required by the law.

We rely on the document of divorce which is a written record solemnly prepared. Such a solemn deed is, we submit, sufficient in itself to make a divorce valid. *Khajah Gouhur Ali Khan* v. *Khajah Ahmed Khan*[1] points out that some written record of the divorce would be kept. The use of the word *bain* in the *talaknama* is enough.

But even if this document is put out of the case, then we have the words "*talak dia*" used by the deceased before the Kazi. In this case, we submit, the words sufficiently show the intention of

(1) (1873) 20 W. R. 214 (Civ.).

the deceased. Under Mahomedan law, intention is most essential in cases of divorce, and not the actual forms of the words.

In Mahomedan law, there are two forms of divorce: Hedaya pp. 77-78. If divorce could be pronounced by ambiguous words, then the words "*talak dia*" would be enough, for intention only is the most important.

It is argued by the other side that one *talak* is bad *in toto*, but the authorities cited are mere dicta and not binding on this Court. Moreover, the most laudable form of divorce is *Ahsan*, which has to be pronounced in one sentence; surely, there cannot be three pronouncements in one sentence: Hedaya p. 72 and Fatwa Alamgiri which give forms of each kind of divorce. In this case, the Kazi has used the very form in the document of divorce: see also Hedaya on divorce by comparison, pp. 81-83. If mere *talak* is used, it may be revocable, but if used with vehemence it is irreversible, *e. g.* you are divorced like a mountain, this is *bain*, and three pronouncements are not necessary. Supposing the word *bain* was not used, then we have the writing which by itself would be an effective divorce. But it is argued that it must be communicated. We submit that it was communicated. But if this is held against us, then our submission is that no communication is necessary at all, for, if it were necessary, the effect of a valid divorce would be from the date of communication, whilst in law it is from the date of pronouncement. Hamilton's Hedaya, p. 131; Baillie's Moohummudan Law, p. 355; Bahr on Divorce, Part IV, p. 157; Kazi Khan, p. 552. Otherwise, there would be an extraordinary result: for then the period of *iddat* following upon a divorce would expire, yet the divorce would not be effective.

We admit that if a divorce is pronounced in a *marz-ul-maut*, and the man does not recover, his widow inherits. The onus of proving death-illness is on the plaintiff, and it is not discharged. Fatwa Alamgiri, p. 277, note to the heading death-sickness; Hamilton's Hedaya, p. 99; Baillie's Moohummudan Law, pp. 277, 355; Wilson's Digest of Anglo-Muhammadan Law, p. 178; Bahr on Divorce, p. 46; Kazi Khan, p. 555.

The actual cause of death in this case was paralytic stroke, but supposing the divorce was pronounced during

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death-bed sickness, then we submit that *Muhammad Gulshere Khan* v. *Mariam Begam* (1) and *Fatima Bibee* v. *Ahmad Baksh* (2) would apply. These cases relate to gifts during death-bed sickness, but the same conditions would apply to divorces during death-bed sickness.

As to the argument that the *bain talak* must be during a *tahr*, we submit that proof of *tahr* is a fact peculiarly within the knowledge of the plaintiff, and she has not given any evidence on the point.

As to the construction of the will and codicil, the testator treated the plaintiff in the will as one of his heirs, but in the codicil, he mentions the fact of divorce and his intention, and says in effect "But I have divorced her and therefore I intend her to take nothing."

Raikes in reply.—Section 114 of the Evidence Act does not apply. One cannot prove divorce by simply proving that the man went before the Kazi for that purpose, who must have done all necessary acts. It is the Court which has to see that what was necessary to make a divorce valid, was or was not actually done by the Kazi, otherwise the Kazi would be the judge.

BATCHELOR, J:—The plaintiff, who is a Mahomedan lady named Sarabai, was formerly the wife of the deceased Haji Adam Haji Sidick, a Cutchi Memon Mussulman, and now brings this suit against the estate for maintenance and residence as his widow. By an amendment of the plaint she has also put forward an alternative claim based upon the will of the deceased Adam. The defendants are a widow and daughter of Adam and the executors appointed by this will. They resist the claim on the ground that the plaintiff was validly divorced by Adam according to Mahomedan Law. Upon this point the plaintiff's case is that she has no knowledge of any such divorce and that if in fact she was divorced, then the divorce is invalid under Mahomedan Law.

The following are the issues on which the parties went to trial:—

(1) (1881) 3 All. 731. (2) (1903) 31 Cal. 319.

1. Whether the plaintiff was validly divorced by the deceased.

2. If so, whether she is entitled to maintenance $\frac{\text{and}}{\text{or}}$ residence $\frac{\text{and}}{\text{or}}$ any right under the will.

3. If she is entitled to maintenance $\frac{\text{and}}{\text{or}}$ residence, what provision should be made therefor?

4. To what relief if any is plaintiff entitled?

It is common ground that the parties are Hanafi Sunnis and are therefore governed by the law applicable to that division of Mahomedans.

The following appears to me to be the most orderly way of considering the various questions which arise:—

1. Did the deceased validly divorce the plaintiff?

2. If he did, was the divorce pronounced when the deceased was in his death illness (*marz-ul-maut*) or not?

3. If it was pronounced when deceased was not in his death illness what is the effect of the divorce on the present claims?

As to the first question the principal evidence is that of the Kazi Mahmad Ali Murghay and of the *talaknama*. It is proved that Adam taking with him two attesting witnesses went to Mahmed Ali Murghay who is the Kazi of Bombay and there pronounced the divorce of the plaintiff and had a *talaknama* written out by the Kazi which *talaknama* Adam and his witnesses signed. Assuming, as for the purposes of this issue I must assume, that all else was regular, I apprehend that a Court ought not to be astute to set aside that which Adam sought to effect in open conformity with the Mahomedan Law and with the usual formalities; and these considerations are especially weighty under a legal system which permits great facility of divorce. "Every divorce is lawful," the prophet has said, "excepting that of a boy or lunatic."

Now the first objection taken is that Adam's pronouncement, "*talak diya*," was not made actually to his wife, but in her absence to the Kazi and the two witnesses. As authority for the objection reference is made to *Furzund Hossein* v. *Jaun*

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Bibee (1), but that case does not formally decide the actual point now before me, and if it did so then with great respect I should not be able to follow it. For, as I read the books, the Moslem lawyers nowhere require that the pronouncement should be made directly to the wife. No such requirement can be discovered, and there are many passages which negative any such theory. For instance, if a person says to a man "Have you not repudiated your wife?" and he says "True," she is repudiated: Baillie, page 214. And there is a separate section of the law dealing solely with repudiation by writing, where we read that where the writing is customary and manifest—as it was here—the repudiation takes immediate effect: see Baillie, page 233. And the same point is brought out more clearly in para. 2058 at page 95 of Vol. III of Mahomed Yusoof Khan Bahadur's work on Sunni Mahomedan Law. I read this paragraph which leaves no doubt that in such a case as this, where the divorce is unconditional, it takes effect at once, and the wife is bound to observe the *iddat* from the time of the writing. See too para. 1802 at page 5 of the same volume, where we read: "A man says in respect to his wife 'divorced' (meaning 'she is divorced'), without naming the woman, and he has one well known wife; his wife shall become divorced by way of analogy (*Istihsan*)."

Then it is said that since this was a final divorce the pronouncement should have been made three times, whereas the Kazi speaks of only one single pronouncement. Upon this point *Ibrahim* v. *Syed Bibi* (2) and *In re Abdul Ali Ishmailji* (3) are cited, but neither case is a clear authority upon the point in issue. There can be no doubt that a *talak-ul-bidaat* (or irregular divorce) is good in law, though bad in theology: and *Ibrahim's case* decides nothing more than that no special expressions are necessary to constitute a valid divorce.

It must be admitted that the three separate pronouncements alleged to be necessary may be made one after the other in as many seconds, and, the law having advanced thus far, it is difficult to see why everything should be held to depend upon

(1) (1878) 4 Cal. 588. (2) (1888) 12 Mad. 63.
(3) (1883) 7 Bom 180.

the mere punctilio of repetition. *Cessante ratione cessat et lex*, and it is tolerably clear that the only reason for the separate repetitions was exclusively applicable to the more approved forms of divorce, when there was a repetition in each of three succeeding *tahrs* (periods between menstruation), thus affording the husband an opportunity of reconsidering his decision. Admittedly this precaution has disappeared out of the law, and, unless I am forced to do so, I shall be very reluctant to let important questions of right depend upon whether a formula was said once or repeated three times. And I find that the authorities are not against me upon this point. I read the passage at page 204 of Vol. I of Hamilton's Hedaya, which appears plainly to support the view here taken. It is also relevant to know that we are dealing with a system where divorce under compulsion or in a state of inebriety is valid and where divorce though only once pronounced may be effected by many kinds of far fetched implication, of which the books abound in illustrations. So where the divorce is prescribed in words implying vehemence or amplification (*e.g.*, "an enormous divorce", "a divorce like a mountain") an irreversible divorce is effected (Hamilton, Vol. I, pp. 228 *et seq.*): and here I find as a fact that Adam pronounced the *talak-ul-bain* vehemently. This appears from the proof (Exhibit No. 6) of which the Kazi admits the general correctness, and is most consistent with the acts and intentions and conduct of the parties. So far as I can gather from the authorities, the triple repetition is merely one of the many forms by which a *talak-ul-bain* or irrevocable divorce can be effected, as the same result can be attained by any other words apt for the purpose and so understood. That the Mahomedan Law attaches no magic to the mere repetition of a formula is evident from the circumstance that even in the *ahsan* or most laudable form of divorce a single pronouncement is sufficient. On the facts of this case, looking to all circumstances, words and writing and intention and conduct, I cannot doubt that there was a valid *bain* divorce in the *bidaat* form.

Then there is a third objection, namely that this divorce cannot be considered final because it was never communicated to plaintiff. The evidence is quite clear that every practicable step

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was taken to communicate the divorce and make over the *iddat* money to the plaintiff, and that these measures, if they were frustrated, were frustrated solely by her own obstinate refusal to accept the paper or the moneys. In these circumstances it would be a strange result if plaintiff were allowed to take advantage of her own inaccessibility. But I find nothing in Mahomedan Law to countenance such a conclusion. On the contrary, the authorities show that a *bain talak*, such as this, reduced to manifest and customary writing, takes effect immediately on the mere writing: see, *e. g.*, Baillie, page 233: Moulvi Mahomed Yusoof, Vol. III, page, 95. The divorce being absolute, it is effected as soon as the words are written "even without the wife receiving the writing."

Mr. Raikes indeed has contended that it is not competent to the defendants now to rely on the *talaknama* because this writing was not put forward as the basis of their case in the written statement. But I think that the oral pronouncement and the *talaknama* are all part of one single transaction, whose effect has to be ascertained, and I cannot conceive that reliance upon the *talaknama* is in any sense a new case. To my mind this *talaknama* is decisive: it describes the divorce as *talak-ul-bain* and emphatically declares that all rights and liabilities between Adam and plaintiff as husband and wife have ceased and determined. There is ample authority in the books for the view that such a writing, even though not communicated to the wife, effects an irrevocable (that is merely the English rendering of *bain*) divorce as from the date of the document.

It was suggested that there is no evidence that this divorce was pronounced during the plaintiff's *tahr*. But nothing was heard of this point until Mr. Raikes's closing address, and seeing that the matter is one specially within plaintiff's knowledge, and that plaintiff has not come into the witness box, I must disallow this objection. It will be remembered also that the divorce was pronounced over two years ago.

Finally with regard to all these three objections I consider it important to notice that we are not in mediæval Arabia, but in modern India. Let us look at the case a little broadly. We have a Moslem husband who is by law entitled, if he

chooses, to divorce his wife irrevocably, and who is resolved to do so. How does he set about it? Not by any hole and corner device, but by adopting the most open and elaborate procedure possible to him. Taking his two witnesses, he resorts to the head Kazi—a gentleman of position, a Justice of the Peace and Honorary Magistrate—and there goes through all the formalities which are, in the understanding of the members and the heads of Islam *hic-et-nunc*, requisite and sufficient to give validity to his act. Without constituting the Kazi the judge of this suit, I am decidedly of opinion that solemn acts of this kind ought not lightly to be set aside, but rather invite the favourable application of the maxim that *omnia præsumuntur rité esse acta*. And this position seems to me all the stronger under Mahomedan Law, which treats with special respect all orders authenticated by the Kazi. This particular Kazi and his fathers have made hundreds of divorces, and the divorce in question was made with all formalities understood here to be required in order to render it irrevocable. To induce me now to set it aside, I should require more weighty reasons than the formal and technical objections which I have considered. The Mahomedan law looks to the intention, when accompanied by a reasonably plain expression of it: and I conceive that under neither of these heads is any serious dispute possible upon the evidence before me.

The fact of a valid divorce being thus established, it becomes material to consider whether it was pronounced during Adam's death-illness or not. For the sake of brevity I shall use the word 'sickness' as referring only to death sickness and the word 'health' will serve to denote the absence of death-sickness, this usage being also in conformity with the language of the books. First, then, what is meant in Mahomedan law by this sickness or *marz-ul-maut*? Baillie, in discussing the subject under the head of divorce, says:—"It is correct to say that, when a man is unable to go out of his home for his necessary avocations, he is sick, whether he can stand up in the house or not." This is developed in later passages, but since they depend upon an underlying legal principle, I must pause to explain what that principle is, so far as I can collect it from the approved

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authorities. For in such a matter as this it appears to me that my only course is to abide by the accepted authorities, adhering to whatever clear principles may be discernible. In this particular instance both the principle and the reason upon which it is grounded seem to be unmistakeable. They will be found generally in discussions upon the opinions of Shafei, the Imam-ul-Motlebi, of whom Hamilton writes that "His decisions in civil and criminal jurisprudence are seldom quoted by the doctors of Persia or India but with a view to be refuted or rejected." (Hamilton, Vol. I, p. xxviii (Discourse). The references are all throughout to the four Volume edition of 1791.) Shafai, who maintain what may be called the common law position in these matters, held that whether a man's death took place before or after the expiration of the *iddat*, his divorced wife was left without any right of inheritance, because the conjugal relation was cancelled by the supervening divorce. But this view was rejected on what approximates to the equitable principle that the cause of the wife's right to inherit is in the death illness, and as the husband designs to defeat it, his device ought to return to himself by postponing the effect of his act till the expiration of the *iddat*, to prevent the injury which would otherwise fall upon her. (Baillie, page 278). So repudiation by a man in his last illness is always referred to as repudiation by a *faar* or evader, and the principle appears to be the perfectly intelligible doctrine that a wife's slowly accrued rights shall not be suddenly defeated by the caprice of the husband while labouring under such mental infirmity as usually accompanies the approach of death. These observations must be applied when I come to deal with the question of the effect of this divorce upon the plaintiff's rights. But I am obliged to notice them here since they are germane also to the question of the meaning of death-illness. Thus we read in Hamilton's Hedaya, Vol. I, page 283:—"If a husband, being in a besieged town or in an army, repudiate his wife by three divorces, she does not inherit of him, in the event of his death, although that should happen within her *Edit*: but if a man engaged in fight, or a criminal carrying (? being carried) to execution, were in such situation to pronounce three divorces upon his wife, she inherits where he

dies in that way, or is slain: for it is a rule that the wife of a *faar* (or evader) inherits of him, upon a favourable construction of the law: and his evasion cannot be established but where her right is inseparably connected with his property, which is not the case, unless he be [at the time of pronouncing divorce] sick of a *dangerous* illness (appearing from his being *confined to his bed,* and other symptoms) or in such other situation as affords room to apprehend his death: but it is not established where he pronounces divorce in a situation in which his *safety* is more probable than his *destruction.*" Baillie (pages. 280-81) has very much the same description. "Evasion," he says, "may also be established by other causes which come within the meaning of disease, if death be imminent; but if the chances are in favour of escape, the person is to be accounted as one in health. So that one is not an evader though he were surrounded by the enemy, or in the line of battle, or in a place abounding with beasts of prey, or on board ship, or in prison under sentence of retaliation or stoning; because in all these cases a way of escape may be found by some means or other." I pause here to remark, first, that these are strong cases and, secondly, that if the principle is to be applied loyally, it must count for something whether the divorcer himself is conscious of the likelihood of death or is not so conscious. The same subject occurs again in Baillie's Chapter on Gifts, where I see no reason to suppose that the death-illness discussed differs from the death-illness in case of repudiation. And here we read that "the most valid definition of death-illness is, that it is one which it is highly probable will issue fatally, whether, in the case of a man, it disables him from getting up for necessary avocations, out of his house or not, such as, for instance.....when he is a merchant, from going to his shop." This appears to be the definition in the Fatawa-i-Alamgiri, and I may say briefly that other relevant authorities appear to follow the same lines. It would follow that what is meant by death-illness in Mahomedan law is an illness which does in fact cause death, which disables the sufferer at the given time from pursuing his ordinary avocations, and which raises in his mind some apprehension of the probability of death. So where the illness is of long dura-

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tion, but there is no immediate probability or apprehension of death, it is laid down that that is not a death-illness but is to be regarded rather as an indication merely of altered constitution or physical habit. Indeed upon examining the books I seem to find that the only certain test of death-illness laid down is that a man shall not be able to stand praying—no doubt rather a rough test adopted in days when medical diagnosis was itself rough, but indicating pretty clearly the rigorous meaning which Mahomedan jurists attached to the phrase *marz-ul-maut*.

The Hedaya contains what is called a rule for ascertaining a death-illness, and this will be found in Book LII, Chapter II of Hamilton, Volume IV, page 506. Whatever may be the case in the original Arabic, it must be confessed that in the translation the passage is encumbered with much confusion, the particular being confounded with the general, and the sentence being further darkened by parentheses. But, so far as any plain meaning is to be wrung from the words, it would seem that the test is "immediate danger of death" or "apprehension of death"; and this conforms to the principle which has already been deduced. The same test is to be gathered from the treatise of Maulvi Mahomed Yusoof, the passage being at pages 392-3 of the third volume, paragraphs 2920 to 2924. Here again it is laid down by the Fatawa-i-Kazikhan that he only is to be deemed sick who is bed-ridden and incapable of managing his affairs "because the probability from his condition is dissolution," so that if he divorces his wife, he is a *faar*, *i. e.*, a runner away, an evader. "But", we read, "a person who is decrepit or suffering from paralysis, whose complaint does not go on increasing every day, is like one in health. So also one who is wounded or is suffering from pain, but who is not by such wound or pain rendered bed-ridden, is like one in health." And then we find the instances of the man arrayed in rank against an enemy in battle or imprisoned under sentence of death, to which I have already referred.

I admit that this question is not to be decided merely upon medical principles as now ascertained among Western peoples: but my examination of the authorities leads me to the conclusion

that in order to establish *marz-ul-maut* there must be present at least these conditions:—

(*a*) proximate danger of death, so that there is, as it is phrased, a preponderance (*ghaliba*) of *khauf* or apprehension, that is, that at the given time death must be more probable than life:

(*b*) there must be some degree of subjective apprehension of death in the mind of the sick person:

(*c*) there must be some external indicia, chief among which I would place the inability to attend to ordinary avocations.

These, then, are the incidents of death-illness which as it seems to me are to be gathered from the authorities; and that they have commended themselves also to our British Court may, I think, be seen on reference to *Fatima Bibee* v. *Ahmad Baksh*[1] and the cases there cited.

Adopting these principles I pass to consider the evidence of fact in this case. That evidence, as was perhaps to be expected, is conflicting, but I cannot say that I have felt any serious difficulty in reaching a conclusion. In the first place one must bear in mind that Adam was an old man—he was 63—and there is no doubt that he looked his age. Then, again, one must not overlook the obvious: Adam was an elderly Asiatic of the trading community, with whom physical activity is the exception and physical indolence the rule. If an instance be desired, I need not travel outside the case but may point to witness Rahimtoola Meheralli, a strong young man of 24 who conceives himself unable to walk a couple of miles after a day's office work. Then it must be remembered that Adam had no living son and was anxious to have a son; that he had the habit or mania (as one witness describes it) of physicking himself; and that upon the evidence there can be no reasonable doubt but that his medicines were, in general, aphrodisiacs. This, I say, is proved by the evidence, and it is all of a piece with the other circumstances which have been forced on my attention. This, then, is the kind of man who is the subject of this inquiry, and

(1) (1903) 31 Cal. 319.

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of whose death the immediate cause was unquestionably paralysis.

Passing to the witnesses, we have first the hakims Akbarsha and Gulam Mohidin. I have not had the advantage of seeing these persons, as they were examined on commission, but a study of their depositions does not impress me favourably. Even if they were perfectly truthful, their elementary ignorance of medicine and the confused vagueness of their descriptions would render their statements of no real assistance to me. Though they endeavour to conceal it, I cannot doubt that the drugs which they prescribed were simply aphrodisiacs. But the stress and meaning of their evidence is that Adam was suffering from heart disease, and in my opinion there is overwhelming evidence that that is not so. Upon this point it should suffice to refer to the two experienced doctors who attended Adam during his last illness after he had been attacked by paralysis on the 29th January. Dr. Childe is a Major in the Medical service, M. B., London, and Senior Physician of the Jamsetji Hospital. Dr. Rao holds the distinguished degree of Doctor of Medicine, London. Both these gentlemen examined Adam on several occasions in his last illness, and both depose that there was no indication of any malady of the heart, nor was anything of the sort suggested to them. It was a plain case of hemiplegia following the bursting of a blood vessel on the brain due to the weakening of the vessels consequent upon old age. Of the other symptoms which, as explained by Major Childe, accompany heart disease, we hear nothing from the plaintiff's witnesses; and though Mr. Raikes has ingeniously sought to make a point of the fact that Adam wore socks, I cannot bring myself to think that there is any substance in the point. The witnesses say that old men always do feel anything approaching cold, and this statement has not been challenged. But that every elderly native who wears socks does so because he suffers from cold in the extremities due to heart disease, is a chain of reasoning in which I see many weak links and none strong. There are many other indicia which conflict with the hakim's story of heart disease, but these will be noticed as I deal with other witnesses. Here I may advert to another matter which seems to me to be closely

related to the incident of the wearing of socks. There is evidence that Adam was not fond of walking up flights of stairs—I do not think it amounts to more than that. One may well ask, what then? Native gentlemen advanced in years do commonly avoid climbing stairs if it can be avoided, and the circumstance seems to me really to throw no light at all on any question of heart disease. There is abundant other evidence that, when need arose, Adam was quite able to go up and downstairs. Cumulative evidence is one thing; it is quite another thing to attempt to make out a positive case by means of disconnected fragments of evidence, each one of which is of no real significance: zero multiplied is still zero.

The remaining witnesses examined for the plaintiff are Saboo Sidick, Haroon Tyab and Mahomed Bachoo, to whom may be added the Kazi on this point. As to Saboo Sidick, I have no wish to say more than this, that he does not assist the plaintiff. He is an interested party, admitting that he was enraged by Adam's making the codicil to his will. He makes no allusion to heart disease in examination-in-chief, and though he supplies the deficiency when the point is prominently brought to his notice in cross-examination, he explains his previous silence by saying that Adam only some times complained about his heart. He admits that Adam went frequently, it may be daily, to his solicitor's office, and as to his complaints of pain in the head and stomach I am of opinion that this testimony, when fairly assessed, must count for very little. The witness is certainly biassed in plaintiff's favour, and I prefer the evidence that Adam absented himself from the marriage of witness's son, Mahomed Bachoo; and if that is so, witness and Adam were certainly on unfriendly terms. Allowing, then, for some exaggeration, I find no special significance in the fact that an old man, who was dosing himself with aphrodisiacs occasionally suffered from headache or stomachache: but this in my judgment, has nothing to do with *marz-ul-maut*. The unsatisfactory character of this witness's evidence is further indicated by his story that Adam was visited at the Kambeker street house before the stroke of paralysis by two European doctors: the description can only apply to Drs. Childe and Rao and they saw Adam only at

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Bandra after the stroke of paralysis. Haji Haroon Tyeb also makes no mention in examination-in-chief of any complaint by Adam of heart disease. It is very possible that Adam occasionally complained of trifling indisposition, which is likely to be magnified in the retrospect which takes account of the subsequent paralysis and death; but the witness admits that Adam went frequently to the Fort on his usual business. As to the allegation that he took to having his meals on his ground-floor office instead of going upstairs for them, it must be remembered that no single witness is in a position to affirm that Adam *always* did so; and that Adam was both a busy man and an old man, so that the fact observed may be attributed either to press of business or to the indolence of old age, and does not necessarily suggest any specific malady. There is ample evidence that Adam, at least frequently, went upstairs for his lunch, and that evidence I can discover no reason to distrust. The next witness, Abdulla Haji Abu Bucker, admits that Adam sometimes came downstairs for his meals, and in other respects this witness's testimony is almost colourless. The lad Mahomed Bachoo carries the case no further. Then comes the Kazi Sahib, whose evidence at first sight does seem to supply the plaintiff with some groundwork for her case. But even if that evidence stood subject to no deduction, I do not think it would suffice for plaintiff's purposes. Adam's reluctance to go upstairs to the Kazi may have been due to such neutral causes as I have already noticed, or it may have arisen for some affectation of dignity. Of this we find an indication in the circumstance that before this date Adam had tried to get the Kazi to go to him instead of himself going to the Kazi. For the rest, what does the Kazi say? After hesitating whether to describe Adam as well or ill, he says only this that "he seemed to be rather unwell, but was walking all right. I did not speak to him about his state of health. He said I must write the deed quickly, as he was uneasy and must go home soon". This was on the 19th November, and for Adam's liability to passing indisposition I have already ascribed sufficient causes without calling in aid any theory of established illness. Even if we suppose, then, that every word of this description is

true, there is nothing to connect it with any further indisposition, and the stroke of paralysis of the 29th January, which is otherwise accounted for, is none the less a sudden attack due only to old age and disconnected from any preceding ailment. It is plain from the Kazi's own statement that he never supposed that Adam was in mortal sickness, for in that case he would have made a note of the fact. Then we have it that, a few days earlier, the witness signed and approved the proof, Exhibit No. 6, after reading it over carefully and satisfying himself that it was correct. But in this document Adam is described as being in a "sound state of health." I have no desire to disparage the Kazi's explanation of his inconsistency, but the result is that the force of his testimony is perceptibly weakened, for one cannot place implicit confidence in the accuracy of his memory or his observation in respect of details occurring over two years ago.

On the side of the defendants we have an array of witnesses, who depose that up to the first stroke of paralysis Adam was in his normal good health; who are in a position to know the facts; and many of whom inspire me with confidence. If it be remembered what is the upshot of their testimony, it will not be necessary for me to analyse their depositions in detail. The first witness is Karmali Pirbhai. Unfortunately, for the purposes of this case, he is the managing clerk of the defendants' attorneys; but when I have said that, I have said all that can be suggested against him, and though I do not ground my finding on his evidence, I conceive it to be my duty to place on record my opinion that he is a truthful witness. Among other details he mentions that Adam frequently took his lunch upstairs; that he visited the witness at his rooms on the fourth floor of a house about a week before the attack of paralysis; and that he came "pretty well daily" to the attorneys' office mounting two flights of steps to interview the witness. As to the autumn visit to Lanavli, this and other witnesses establish that that was in the ordinary course, and I may take judicial notice of the custom of Bombay people to leave the city between September and November if they can do so. It is shown that Adam went, as usual, to Lanavli to his own house with his family. Abdool

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Sakoor Esmail is the husband of the defendant Ayeshabai, and, that being so, I will not wholly rely upon his evidence, though I will not neglect it, because I am aware of no valid reason why I should disbelieve it. I regard it as affording corroboration of the defendants' case. Then come witnesses Haji Jan Mahomed, Mirza Mahomed Shirazi, Haji Sidick Ismail and Aboo Bucker. These men are strangers to the suit, and no reason is assignable why they should give false or exaggerated evidence. I noted their demeanour while under examination and cross-examination, and the result is that I cannot refuse them credence. They saw Adam constantly up to the date of the stroke (29th January), and they agree that he was throughout in his usual good health, not complaining of any illness, but going about his business in his customary way. Further support is given by Rahimtulla Meherally.

Now this is a large body of evidence, and evidence of a very impressive kind. It is difficult to prove that an old man was in consistently good health over such a period as three months, but upon this evidence I am satisfied that up to the stroke of paralysis on the 29th January, Adam was in normally good health and went about his business as he always had gone about it. I find that the stroke of paralysis was, speaking subject to the limitations of human knowledge in these matters, a sudden, isolated attack, independent of any preceding malady or indisposition. I have shown what in my opinion the plaintiff must prove to establish *marz-ul-maut*, and this examination of the evidence as to facts results in my finding that there is no such proof as the law requires.

The result of the inquiry so far has been to establish that this divorce was pronounced by Haji Adam when in health. And the divorce was the *bain talak* or irrevocable divorce. Now the question is whether, an irrevocable divorce having been pronounced in health, and the husband dying during the period of the discarded wife's *iddat*, she has any claim to inherit. There can, I think, be no doubt—and I understand that Mr. Lowndes does not dispute—that if the divorce had been pronounced in death-illness, the wife's claim to inherit would survive throughout the period of her *iddat*. But this survival is based upon the

theory already noticed that a death-bed divorce is to be regarded as an evasion. Clearly that principle fails where the divorcing husband is in health and is under no greater expectation of death than is normally incident to humanity. In that case, then, what reason is there why the wife's claim should subsist throughout her *iddat* even though she has been irrevocably divorced? I can see none on the principle of the thing. Indeed the principle appears to point the other way. For take the case where a man in perfectly good health to-day irrevocably divorces his wife, and is killed in a Railway accident a month hence. Why should she inherit? There has been no attempt at evasion; the repudiation has been complete and definitive; and I can discern no reason why the husband's estate should be damnified owing to an unforeseen accident. So far as the principle is a guide, it seems clear that such a wife would have no claim; and the plaintiff stands legally in precisely the same case.

Then, is there anything in the authorities to assist the plaintiff? In the first place, the passages which I have already cited from Hamilton's Hedaya and Baillie's Digest are decidedly against her, and I would point particularly to the decision in the case of the husband "being in a besieged town or in an army." There the wife does not inherit even though the husband dies within her *iddat*, and the reason is—because there has been no evasion. The law is also so stated at page 391 of Vol. III of the treatise by Maulvi Mahomed Yusoof Khan Bahadur (Tagore Law Lectures, 1891-92). I can discover no authority in a contrary sense, and I therefore find that both principle and authority compel the conclusion that the plaintiff does not inherit to Adam.

That being so, the suit fails. Plaintiff was entitled to her *iddat* money, and that is at her disposal whenever she demands it. Her *iddat* has expired, and she has no claim to maintenance or lodging (Hamilton, Vol. I, 404). It is clear also that she has no claim under the will, for she is disinherited by the codicil. If the words in the codicil are to be read merely as Adam's opinion of the legal effect of the divorce, then upon my finding the plaintiff is out of Court. But in fact these words must I think be read as expressive also of Adam's wish that the plaintiff should take

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nothing under his will, and—the parties being Cutchi Memons—the disinheriting clause is valid.

No other point is mentioned, and the result is that the suit must be dismissed with costs. The defendant's costs, if not recovered from the plaintiff, may be recovered from the estate.

Suit dismissed.

Attorneys for the plaintiff:—*Messrs. Captain & Vaidya.*

Attorneys for the defendants:—*Messrs. Thakurdas & Co.*

R. R.

CRIMINAL REFERENCE.

Before Mr. Justice Russell and Mr. Justice Batty.

1906. *April* 21.

THE MUNICIPAL COMMISSIONER FOR THE CITY OF BOMBAY *v.* MATHURABAI.*

The City of Bombay Municipal Act (Bom. Act III of 1888), section 3, clauses (w), (x) and (y),† section 461—Building Bye-laws Nos. 40, 42‡—Street—Construction.

The owner of a large plot of ground abutting on a highway divided the plot into 19 small plots and sold them to different purchasers. These plots were

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* Criminal Reference No. 7 of 1906.

† The City of Bombay Municipal Act (Bombay Act III of 1888), section 3, clauses (*w*), (*x*) and (*y*) run as follows:—

(*w*) "Street" includes any highway and any causeway, bridge, viaduct, arch, road, lane, footway, square, court, alley or passage, whether a thoroughfare or not, over which the public have a right of passage or access or have passed and had access uninterruptedly for a period of twenty years; and, when there is a footway as well as a carriageway in any street, the said term includes both;

(*x*) "public street" means any street heretofore levelled, paved, metalled, channelled, sewered or repaired by the Corporation and any street which becomes a public street under any of the provisions of this Act.

(*y*) "private street" means a street which is not a public street.

‡ *Building Bye-laws Nos. 40 and 42* are as follows:—

40. In every case—

Where a person who shall erect a building, shall at any reasonable time during the progress or after the completion of the erection of such building, receive from the Engineer notice in writing specifying any matters in respect of which the erection of such building may be in contravention of any bye-law relating to new