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I congratulate Mr. Forbes upon his treatment of the subject, and I commend this book with confidence to members of the profession."

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THE
MUSLIM DIVORCE LAW

Being a Commentary on

THE DISSOLUTION OF MUSLIM MARRIAGES ACT, (VIII OF 1939).

BY

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PREFACE

Among all the nations of antiquity the power of divorce was regarded as a natural corollary to the marital right. Originally, this power was exclusively vested in the husband and the wife was under no circumstance entitled to claim a divorce. The progress of civilisation and the advancement of ideas led to a partial amelioration in the condition of Muslim women. They too acquired a qualified right of divorce. In modern times legislation has been passed to place women of other communities on a footing of equality with men with regard to marital rights and obligations, and facilities have been accorded to them to obtain a dissolution of marriage. In response to considerable agitation of the Muslims for the amelioration of the condition of married Mahomedan women the present Act has been enacted to give relief to Mahomedan wives by way of divorce. The grounds hitherto existing in Mahomedan law entitling a wife to divorce her husband were inadequate and unsatisfactory and placed a Mussalman wife at the mercy of the husband who more often than not treated her as a chattel and would divorce her at will on the most flimsy pretext. To remedy the great anomaly that so far existed the Central Legislature has come to the rescue of the Muslim wife. The Act is not exhaustive and though it to a great extent enlarges the grounds for divorce it is still an incomplete and defective piece of legislation.

In order to make this book useful to the practitioner references have been given to the detailed commentaries in my book on "The Law and Practice of Divorce in India" on points which are common to the Christian and Muslim laws.

A chapter on divorce by husband has been added to complete the Muslim law of divorce.

J. C. F.

CENTRAL BANK BUILDING,
ESPLANADE ROAD, FORT,
BOMBAY.
June. 1939.

TABLE OF CASES

ACT NO. VIII OF 1939.

[PASSED BY THE INDIAN LEGISLATURE.]

(*Received the assent of the Governor General on the 17th March, 1939*).

An Act to consolidate and clarify the provisions of Muslim law relating to suits for dissolution of marriage by women married under Muslim law and to remove doubts as to the effect of the renunciation of Islam by a married Muslim woman on her marriage tie.

WHEREAS it is expedient to consolidate and clarify the provisions of Muslim law relating to suits for dissolution of marriage by women married under Muslim law and to remove doubts as to the effect of the renunciation of Islam by a married Muslim woman on her marriage tie, it is hereby enacted as follows:

For the Statement of Objects and Reasons, see Appendix A.

Short title and extent.

1. (1) This Act may be called the Dissolution of Muslim Marriages Act, 1939.

(2) It extends to the whole of British India.

The provisions of the Act do not extend to His Majesty's subjects in Indian States.

Jurisdiction—It is nowhere stated in the Act as to which Courts in British India would have jurisdiction to try suits under the Act. It is not provided in the Act whether the residence of the defendant, or the last place of residence of the husband and wife, or the place of solemnisation of the marriage, or the place of commission of the matrimonial offence would give jurisdiction to the Court in British India. It is doubtful whether a Subordinate Judge even of the First Class could have jurisdiction to entertain a suit under this Act.

In the absence of express provision the Code of Civil Procedure will govern suits under the Act.

DIVORCE BY WIFE.

Grounds for decree for dissolution of marriage.

2. A woman married under Muslim law shall be entitled to obtain a decree for the dissolution of her marriage on any one or more of the following grounds, namely:—

(i) that the whereabouts of the husband have not been known for a period of four years;

(ii) that the husband has neglected or has failed to provide for her maintenance for a period of two years;

(iii) that the husband has been sentenced to imprisonment for a period of seven years or upwards;

(iv) that the husband has failed to perform, without reasonable cause, his marital obligations for a period of three years;

(v) that the husband was impotent at the time of the marriage and continues to be so;

(vi) that the husband has been insane for a period of two years or is suffering from leprosy or a virulent venereal disease;

(vii) that she, having been given in marriage by her father or other guardian before she attained the age of fifteen years, repudiated the marriage before attaining the age of eighteen years:

Provided that the marriage has not been consummated;

(viii) that the husband treats her with cruelty, that is to say,—

(a) habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill-treatment, or

(b) associates with women of evil repute or leads an infamous life, or

(c) attempts to force her to lead an immoral life, or

(d) disposes of her property or prevents her exercising her legal rights over it, or

(e) obstructs her in the observance of her religious profession or practice, or

(f) if he has more wives than one, does not treat her equitably in accordance with the injunctions of the Qoran;

(ix) on any other ground which is recognised as valid for the dissolution of marriages under Muslim law:

Provided that—

(a) no decree shall be passed on ground (iii) until the sentence has become final;

(b) a decree passed on ground (i) shall not take effect for a period of six months from the date of such decree, and if the husband appears either in person or through an authorised agent within that period and satisfies the Court that he is prepared to perform his conjugal duties, the Court shall set aside the decree; and

(c) before passing a decree on ground (v) the Court shall, on application by the husband, make an order requiring the husband to satisfy the Court within a period of one year from the date of such order that he has ceased

to be impotent, and if the husband so satisfies the Court within such period, no decree shall be passed on the said ground.

"A woman married under Muslim law"—

For detailed notes on 'Marriage', see the author's, "Law and Practice of Divorce in India", pp. 4 to 6.

Marriage under Muslim law.

'Marriage' is a contract which has for its design or object the right of enjoyment and the procreation of children. It was instituted for the solace of life, and is one of the prime or original necessities of man. It is, therefore, lawful in extreme old age after hope of offspring has ceased, and even in the last or death illness(*a*).

The pillars of marriage as of other contracts, are *Eejab o Kubool*, or declaration and acceptance. The first speech from whichever side it may proceed, is the declaration, and the other the acceptance.

The requisites of a contract of marriage amongst Mahomedans are:—

1. Understanding; (Persons of unsound mind may be validly contracted in marriage by their guardians);
2. Puberty; (The lowest age of puberty according to its natural signs, is 12 years in males and 9 years in females: when the signs do not appear, both sexes are held to be adult

(*a*) *Baillie, Part I*, p. 4.

when they have completed their fifteenth year). Persons who have not attained puberty may be validly contracted in marriage by their guardians.

3. Freedom in the contracting parties, that is, free consent when parties have attained puberty;
4. The woman must be lawfully contracted to the man, that is, she must not be within the prohibited degrees of consanguinity, or affinity or fosterage, or must not be so related to the man's other wives so that she could not inter-marry if one of them had been a male;
5. The offer and acceptance of the offer of marriage must be at the same meeting;
6. The contracting parties must hear each other;
7. There must be the presence of two male or one male and two female witnesses, who must be adult, sane Mahomedans;
8. The woman must not be the wife of any other man;
9. The period of *iddut* must have expired in the case of a widow or a divorced woman.

Marriages which do not conform to the requirements of clause 4 above are *ab initio* void. A void marriage is unlawful in itself, the prohibition against the marriage being perpetual and absolute.

An invalid marriage is not unlawful in itself but it is wanting in some of the conditions of validity, as for instance, the presence of witnesses.

The following are invalid marriages:—

(1) a marriage contracted without witnesses;

(2) a marriage with a fifth wife;

(3) a marriage with a woman who is the wife of another man;

(4) a marriage with a woman undergoing *iddut*;

(5) a marriage between parties prohibited by reason of difference of religion;

(6) a marriage with a woman so related to the wife that if one of them had been a male they could not have lawfully intermarried.

In all the aforesaid invalid marriages the cause of invalidity could be removed by the parties subsequently rectifying the errors.

Shiah law—The presence of witnesses is not necessary in any matter regarding marriage.

A marriage brought about by a person other than a father or grandfather is ineffective until it is ratified by the minor on attaining puberty (*b*).

The Shiah law does not recognise the distinction between void and invalid marriages. A marriage is either valid or void, and marriages which are invalid under Sunni law are void under Shiah law.

(*b*) *Mulka Jehan* v. *Mahomed* (1873) 26 W.R. 26; I.A. Sup. 192.

Legal effect of a Mahomedan marriage—Marriage legalises children, subjects the wife to the power of restraint, it imposes upon the husband the obligation of paying dower to the wife and of maintaining and clothing her. It establishes on both sides the prohibitions of affinity and rights of inheritance. It obliges the husband to be just between his wives and to have a due regard to their respective rights; while it imposes on them the duty of obedience when called to his bed and confers on him the power of correction when they are disobedient or rebellious. It enjoins on him the propriety of associating familiarly with them with courtesy and kindness. It forbids him to associate together either as wives or concubines two women who are sisters or so related to each other as to render their association unlawful (*c*). An invalid marriage has no legal effect before consummation, but after consummation it is joined to valid marriages as to its effects, one of which is the establishment of the child's paternity (*nusub*) (*d*).

Dispute as to validity of marriage:—When a husband or wife disputes the validity of the marriage after the birth of a child, the husband insisting for its being invalid and the wife claiming its validity and both adduce evidence, the evidence of the person alleging the invalidity if accepted, the maintenance during *iddut* is not to be paid, but the paternity of the offspring is established (*e*).

(*c*) *Baillie*, Part I, p. 13.
(*d*) *Baillie*, Part I, p. 157.
(*e*) *Baillie*, Part I, p. 758.

Dissolution of marriage—The contract of marriage under Mahomedan law may be dissolved in three ways:—

(1) by the husband at *his will without the intervention* of a Court of law;

(2) by mutual consent of the husband and wife, also without the intervention of the Court;

(3) by a decree of a Court of law at the suit of the husband or wife.

A wife cannot divorce herself from her husband except by obtaining a judicial decree in that behalf.

The Act makes provisions for the dissolution of the marriage by the wife only under clause (3) above.

GROUNDS FOR DIVORCE.

The following grounds for divorce by a wife are provided by the Act:

(i) that the whereabouts of the husband have not been known for a period of four years.

Provided that the decree shall not take effect for a period of six months from the date of such decree, and if the husband appears either in person or through an authorised agent within that period and satisfies the Court that he is prepared to perform his conjugal duties, the Court shall set aside the said decree.

Analogous law—

Section 31 of the Parsi Marriage and Divorce Act, 1936:

> "If a husband or wife shall have been continually absent from his or her wife or husband for the space of seven years, and shall not have been heard of as being alive within that time by those persons who would have naturally heard of him or her, had he or she been alive, the marriage of such husband or wife may, at the instance of either party thereto, be dissolved."

Section 8 of the Matrimonial Causes Act, 1937:

> "(1) Any married person who alleges that reasonable grounds exist for supposing that the other party to the marriage is dead may present a petition to the Court to have it presumed that the other party is dead and to have the marriage dissolved, and the Court, if satisfied that such reasonable grounds exist, may make a decree of presumption of death and of dissolution of the marriage.
>
> "(2) In any such proceedings the fact that for a period of seven years or upwards the other party to the marriage has been continually absent from the petitioner, and the petitioner has no reason to believe that the other party has been living within that time, shall be evidence that he or she is dead until the contrary is proved".

In those Acts a period of seven years, instead of four years, is fixed.

These provisions are analogous to those of section 108 of the Indian Evidence Act, 1872.

The provisions of the section are also analogous to the principle which exists in the law of Scotland which permits a divorce for a wilful desertion continued for four years.

In the Parsi Marriage and Divorce Act, 1936, section 32 (g), and in the Matrimonial Causes Act, 1937, section 2, (b), desertion without cause for three years or upwards is a ground for divorce.

For commentaries on 'Desertion,' see the author's "Law and Practice of Divorce in India," pp. 95-107.

This section brings the divorce law into line with the criminal law of bigamy in which seven years continual absence is a defence (e_1).

Two conditions must exist for the grant of a divorce, namely:

(i) that the plaintiff has been absent from the defendant spouse for at least four years immediately preceding the presentation of the plaint and the plaintiff has no reason to believe that the defendant spouse has been living within that time; and

(ii) that the Court shall be satisfied that reasonable grounds exist to suppose the other party to the marriage is dead.

(e_1) *See the Indian Penal Code, section* 494.

As the presumption arises whether the period of disappearance is exactly four years or exceeds it, the language of the section would be more accurate if, instead of the words, 'four years' it read 'not less than four years'(*f*).

The presumption acted upon in Courts that death may ordinarily be presumed after the prescribed period if no news has been received by persons who would be expected to hear are relevant to this consideration (*g*). The presumption of the duration of life, with respect to persons of whom no account can be given, ends at the expiration of the prescribed period from the time when they were last known to be living (*h*), but there is no presumption in law that a person was alive for the prescribed period from the time when he was last heard of (*i*); nor is there any presumption as to the time of his death (*j*), he must be taken to have lived upto the end of the said period (*k*), but the earliest date on which the death can be presumed can only be the date when the suit

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(*f*) *Lalchand Marwari* v. *Ramrup Gir* (1926) 53 I. A. 24; 28 Bom. L.R. 855, P. C.; 42 T. L. R. P. C. 159.

(*g*) *Wills* v. *Palmer* (1904) 53 W. R. 169. *Williams.* v. *Scottish Widows' Fund Life Assce. Society* (1888) 52 J. P. 471. *In the Goods of Bowden* (1904) 21 T. L. R. 13

(*h*) *Doe d. George* v. *Jesson* (1805) 6 East 80; 102 E. R. 1217.

(*i*) *Veeramma* v. *Chenna Reddi* (1914) 37 Mad. 440.

(*j*) *Napean d. Knight* v. *Doe* (1837) 2 M. & W. 894; 7 L. J. Ex. 335; 150 E. R. 1021. *R.* v. *St. James Clerkenwell* (1852) 16 J. P. 373. *See Re Beasney's Trusts* (1869) L. R. 7 Eq. 498. *Re Rhodes, Rhodes* v. *Rhodes* (1887) 36 Ch. D. 586; 57 L. T. 652.

(*k*) *Dunn* v. *Snowden* (1862) 2 Drew. & Sm. 201; 7 L. T. 558; 62 E. R. 598. *Re Westbrook's Trusts* (1873) W. N. 167.

was filed, it cannot have further retrospective effect (*l*). It is a preliminary presumption of law that a party living at a given time is alive at a subsequent time within a reasonable limit (*m*).

In all questions upon the existence of life at a particular time, the presumption in favour of life must be governed and the weight that is to be attached to it, regulated by the circumstances of each particular case (*n*). So, a person ought not to be presumed to be dead from the fact of his not having been heard of for four years (or seven years as the case may be) if the other circumstances of the case render it probable that he would not be heard of though alive (*o*), nor does the presumption of death after seven years' absence arise where the probability of intelligence is rebutted by circumstances (*p*), but the Court will presume the death of a person after seven years, although there be strong evidence to show that the person has reason to keep his identity concealed (*q*). A. left his country on the 9th November 1829. On the 16th June 1831 his brother-in-law received a letter from America on behalf of A.

(*l*) *Jeshanker* v. *Bai Divali* (1920) 22 Bom. L. R. 771.

(*m*) *Lambe* v. *Orton* (1859) 29 L. J. Ch. 286; 1 L. T. 290. *Thomas* v. *Thomas* (1864) 2 Drew. & Sm. 298.

(*n*) *R.* v. *Harborne* (*Inhabitants*) (1835) 2 Ad. & El. 540; 111 E. R. 209. *Dharup Nath* v. *Gobind Saran* (1886) 8 All. 614.

(*o*) *Watson* v. *England* (1844) 14 Sim. 28; 2 L. T. O. S. 455; 60 E. R. 266. See 4 L. T. 210.

(*p*) *Bowden* v. *Henderson* (1854) 2 Sm. & G. 360; 65 E. R. 436. *R.* v. *St. James Clerkenwell, supra.*

(*q*) *Wills* v. *Palmer* (1904) 53 W.R. 169; 49 Sol. Jour. 165.

describing him as having changed his name to B. Three months after this A.'s wife sent a letter to him, addressed to him as B. by the hand of a friend who could not find him. He was not heard of any more and it did not appear that any inquiries were made by his family. On this state of facts the Court held that there was not sufficient evidence to ground presumption of death, still less of the particular period of death (*r*). Courts have gone further and have presumed death from the lapse of shorter period than seven years or even within a few months in special cases in which proof of the fact was considered sufficient (*s*); for instance, death was presumed at the end of five or six years in the case of a man who was in bad health and was to have returned to his relations in six months and not having returned (*t*), or where a ship is proved to have sailed and has not been heard of for two or three years, it is to be presumed that she is lost and a particular individual who sailed on board of such ship perished (*u*), or a person was in poor health when last heard of and inquiries were made by his family (*v*), or where a person who depended for his maintenance on the dividends on stock payable half yearly did not apply for payment more than six months after the receipt by him of the

(*r*) *Re Creed* (1852) 1 Drew. 235; 61 E.R. 441.
(*s*) *Re Walker* (1909) P. 115.
(*t*) *Webster* v. *Birchmore* (1807) 13 Ves. 362; 33 E.R. 329.
(*u*) *Watson* v. *King* (1815) 4 Camp. 272; 1 Stark 121; *In the Goods of Dodd* (1897) 77 L.T. 137.
(*v*) *Grisall* v. *Stelfor* (1845) 4 B. & Ald. 433; 106 E.R. 995.

previous dividend, the presumption must be that he had died after the last payment was received by him (*w*). Where better evidence than that adduced in Court regarding the absence or death of a person can be obtained, the Court will not draw an inference in law that the person is dead (*x*). A person departed from his house and on the same day a hat bearing his name was discovered in the neighbouring canal. A letter was also received from him by his manager intimating that before such letter arrived he would be out of his trouble. The evidence showed, however, that at the time of his going away the person was in very embarrassed circumstances, and that, on the day before, he had collected about £25 from persons who owed him money, which sum he took with him. He also took his best clothes, clean linen, and such jewellery as he possessed. The canal was thoroughly dragged by the police, but nothing was found. In those circumstances the Court was not bound to presume that the debtor was dead (*y*).

Burden of proof—As the presumption is in favour of the continuance of life the onus of proving the death lies on the party who asserts it (*z*).

It is impossible to distinguish a case of presumption of life from one of presumption of death, for who-

(*w*) *Re Beasney's Trusts* (1869) L. R. 7 Eq. 498; 38 L. J. Ch. 159; 19 L. T. 630. *Re Henderson's Trusts* cited in (1868) L. R. 7 Eq. 498 at p. 500.

(*x*) *Re Rhodes, Fraser* v. *Renton* (1873) 28 L. T. 392.

(*y*) *Re Lewis, Exparte Becker* (1893) 9 T. L. R. 406.

(*z*) *Throgmorton* v. *Walton* (1624) 81 E. R. 917; 2 Roll. Rep. 461. *Re Benjamin* (1902) 1 Ch. 723.

ever has to make out a case in order to establish a title which depends upon the fact of either the death or the life of any person must prove that fact (*a*).

Section 108 of the Indian Evidence Act, 1872, lays down that when the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it. The question for which provision is made is whether a man is alive or dead at the time the question is raised and not whether he was alive or dead at some antecedent date (*b*).

The provisions of the Evidence Act do not require a Court to hold that a person is dead at the expiration of the seven years, but merely provide that the burden of proving that he is alive at the time of the suit is shifted to the person who affirms it (*c*).

Pleading—The plaint must state the last place of co-habitation of the parties, the circumstances in which the parties ceased to cohabit and the date when and the place where the respondent was last seen or

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(*a*) *Hickman* v. *Upsall* (1875) L. R. 20 Eq. 136. See (1876) 4 Ch. D. 144, C. A.; *Wilson* v. *Hodges* (1802) 2 East, 312; 102 E. R. 388. *Lambe* v. *Orton* (1859) 29 L. J. Ch. 286; 1 L. T. 290. *Thomas* v. *Thomas* (1864) 2 Drew. & Sm. 298. See *Re Phene's Trusts* (1870) 5 Ch. App. 139.

(*b*) *Dharup Nath* v. *Gobind Saran* (1884) 8 All. 614. *Rango Balaji* v. *Mudiyeppa* (1899) 23 Bom. 296. *Fani Bhusan Banerji* v. *Surjya Kanta Roychowdhry* (1908) 35 Cal. 25. *Narki* v. *Lal Sahu* (1909) 37 Cal. 103. *Mairaj Fatima* v. *Abdul Wahid* (1921) 43 All. 673.

(*c*) *Narayan* v. *Srinivas* (1906) 8 Bom. L.R. 226.

heard of. An affidavit in support of the plaint must state the steps which have been taken to trace the respondent.

Procedure—In suits on this ground the provisions laid down in section 3 of the Act, are to be complied with, namely,

(*a*) the names and addresses of the heirs of the husband on the date of the filing of the plaint shall be stated in the plaint,

(*b*) notice of the suit shall be served upon such persons who would be entitled to be heard in the suit,

(*c*) the paternal uncle and brother of the husband, if any, shall be cited as party even if he or they are not heirs.

Service—As the presumption of death does not arise until after the passing of the decree, an order for substituted service of the Writ of Summons must be obtained and notice of the proceedings must be given by advertisement.

Effect of the decree—The decree that may be passed under the provisions of this Act shall be only in the nature of a *decree nisi* under the English law and within a period of six months the husband will be at liberty to have the decree set aside on the ground that he was prepared to resume cohabitation with the wife. The Court will have carefully to scrutinise the bona-fides of the husband's application before setting aside the decree. In suits under other Acts once the decree

is pronounced the decree would be effective though the person presumed dead were subsequently found to be living and even though there had been fraud in obtaining the decree (*d*). Parties are, however, at liberty to marry again.

(ii) that the husband has neglected or has failed to provide for her maintenance for a period of two years.

It is incumbent on a husband to maintain his wife whether she be a Muslim or a non-Muslim, poor or rich, enjoyed or unenjoyed, young or old, if not too young for matrimonial intercourse. When a wife is too young for matrimonial intercourse she has no right to maintenance from her husband whether she be living in his house or with her father. When an adult woman who has not yet removed to her husband's house asks for maintenance she is entitled to it unless he has called upon her to remove. If when called upon to remove to his house she refuses to do so of right, that is, to obtain payment of her dower, she is entitled to maintenance; but if she refuses to do so without right, as when her dower is paid, or deferred, she has no claim to maintenance (*e*). If the wife does not wilfully obstruct the husband in the exercise of his marital rights she is entitled to maintenance. She as the adult wife is entitled to maintenance from her minor husband, and also when he is incapable of consummation or has gone on a pilgrimage. But when both parties

(*d*) *Chalmers* v. *Chalmers* (1930) P. 154.
(*e*) *Baillie*, pp. 441-442.

are minors and unfit for matrimonial converse she has no right to maintenance; the husband in such circumstances being like a *mujboob* or an impotent person.

If after the wife's removal to the husband's house she takes ill, she is entitled to maintenance (*f*).

The provisions of this sub-section would give rise to cases which may be filed by discontented wives owing to the husband's poverty. The husband may be unable in spite of honest endeavours, or through physical incapacity to earn a living. In order to entitle the wife to relief on the above ground the neglect or failure to maintain must be wilful.

Mere neglect or want of affection has never been a ground for divorce or even for judicial separation (*g*), nor silence on the part of the husband, or shunning the wife's company, or a declaration by him that he will never cohabit with her, have been held to be grounds for judicial separation (*h*). Nor would the Court grant a decree to protect the wife from mere unhappiness resulting from an ill-assorted marriage, nor from the destruction of domestic comfort (*i*).

Hitherto neglect by the husband or his failure to maintain the wife could only entitle her to an allowance on an order of a Magistrate under section 488 of the Criminal Procedure Code.

(*f*) *Baillie*, p. 443.

(*g*) *Neeld* v. *Neeld* (1831) 4 Hag. Ecc. 263; 162 E.R. 1442.

(*h*) *Paterson* v. *Paterson* (1850) 3 H. L. Cas. 308;10 E. R. 120. See 15 L. T. O. S. 537.

(*i*) *Hudson* v. *Hudson* (1863) 3 Sw. & Tr. 314; 164 E.R. 1296; 9 L. T. 579.

(iii) that the husband has been sentenced to imprisonment for a period of seven years, or upwards.

Provided that no decree shall be passed until the sentence has become final.

Analogous Law—

Section 32(f) of the Parsi Marriage and Divorce Act, 1936:

> "That the defendant is undergoing a sentence of imprisonment for seven years or more for an offence as defined in the Indian Penal Code.
>
> Provided that divorce shall not be granted on this ground unless the defendant has prior to the filing of the suit undergone at least one year's imprisonment out of the said period."

The language of sub-section (iii) is wide enough to include a sentence of imprisonment for any offence punishable under any law of any country. It would include imprisonment of the husband for a political or other offence not involving moral turpitude, or as a prisoner of war in an alien country. It would, in short, entitle a wife to institute proceedings for divorce on hearing of the passing of the sentence upon the husband for seven years or more.

(iv) that the husband has failed to perform, without reasonable cause, his marital obligations for a period of three years.

Analogous Law—

Section 32 (a) of the Parsi Marriage and Divorce Act, 1936, reads:

> "that the marriage has not been consummated within one year after its solemnization owing to the wilful refusal of the defendant to consummate it".

Section 1 (1) (a) of the Matrimonial Causes Act, 1937, provides:

> " that the marriage has not been consummated owing to the wilful refusal of the respondent to consummate the marriage".

It is not clear from the language of sub-section (iv) whether the period of three years is to be computed immediately from the date of the marriage or even after a lapse of considerable time thereafter, the marriage having been consummated. The language of the section would entitle a wife to sue her husband for divorce on the ground of the non-exercise by the husband without cause of his marital rights later in married life owing to disagreement with or want of affection for the wife. Such a provision does not exist either in the Parsi Marriage and Divorce Act or in the Matrimonial Causes Act.

If non-consummation is meant it should have been a ground for cancellation or nullity of the marriage rather than for divorce, as it places a marriage contract on the same footing as any ordinary contract (*j*).

Wilful refusal by the defendant calls for an averment of readiness and willingness by the plaintiff to perform her own part of the contract. It would debar a plaintiff from seeking relief if the defendant had attempted intercourse or if the plaintiff had been unwilling to allow intercourse. Parties living under the same roof, each party being free from molestation by the other is not matrimonial cohabitation and is held as refusal of conjugal rights (*k*). If the Court is satisfied that a marriage has not been and that it cannot be consummated by the spouses though no impediment to consummation is clear or apparent in either of them the Court is justified in granting relief (*l*). The ground of the interference of the Court in such cases is the practical impossibility of consummation (*m*).

(v) that the husband was impotent at the time of the marriage and continues to be so.

(*j*) *Cf. Cart* v. *Ambergate Rly. Co.* (1851) 17 Q. B. 127.

(*k*) *Wily* v. *Wily* (1918) P. 1; 87 L. J. P. 31; 117 L. T. 703; 34 T.L.R. 33. See *Jackson* v. *Jackson* (1924) P. 19.

(*l*) *G.* v. *G.* (1912) P. 173; 81 L.J.P. 90;106 L.T. 647;28 T.L.R. 481.

(*m*) *G.* v. *G.* (1871) L.R. 2 P. & D. 287;40 L.J.P. 83;25 L.T 510.

Provided that before passing a decree on this ground the Court shall, on application by the husband, make an order requiring the husband to satisfy the Court within a period of one year from the date of such order that he has ceased to be impotent, and if the husband so satisfies the Court within such period, no decree shall be passed on the said ground.

Analogous law—

Section 30 of the Parsi Marriage and Divorce Act, 1936—

> "In any case in which consummation of the marriage is from natural causes impossible such marriage may, at the instance of either party thereto, be declared to be null and void."

Section 19 (1) of the Indian Divorce Act 1869, provides for granting a decree of nullity of marriage on the ground

> "that the respondent was impotent at the time of the marriage and at the time of the institution of the suit."

For commentaries on "Impotence", see the author's "Law and Practice of Divorce in India," pp. 161-167.

The proviso allowing the husband a year's time to get himself cured of impotency is taken from the Hanafi law.

An impotent person is one who is unable to have intercourse with a woman, though he has the natural organs, and a person who is able to have intercourse with an enjoyed woman, but not with a virgin, or with some women but not with others; whether the disability be by reason of disease, or weakness of original constitution or advanced age or enchantment is still to be accounted impotent with respect to her with whom he cannot have intercourse; (relative impotency) (*n*)

Proviso:—

When a woman brings her husband before the Court and sues him demanding a separation on the ground of impotency, the judge is to ask him if he has had intercourse with her or not; and if he should admit that he has not had intercourse with her, *the case is to be adjourned for a year*, whether the wife be an enjoyed woman or a virgin. If the husband should deny the charge, alleging that he has had intercourse with his wife and she is an enjoyed woman, his word is to be taken accompanied by his oath that he has had intercourse with her; and if he should swear to that effect her right is void, but if he refuses to swear, *the case is to be adjourned for a year.* If she would allege that she is still a *virgo intacta*, (*virgin*) an inspection by women (women medical inspectors) is to be ordered; for though one woman is sufficient yet an inspection by two is more cautious and more to be relied on. If they should declare her to be an enjoyed woman, the word of the husband is to be

(*n*) *Baillie*, P. 347.

taken with his oath; and if he should swear, her right is void. If they (medical inspectors) should declare her to be a virgin, her word as to non-intercourse is to be received without oath. When the fact is ascertained that there has not been any intercourse between the parties, *the court is to adjourn the case for a year* whether the man requires it or not (*o*).

How the year is to be computed.

While computing the period of one year, the days of the wife's courses and the month of Ramzan, are all to be taken as falling within the year; but not so any days in which he or she may be sick. If then the husband should be sick during the year, the period of adjournment is to be enlarged by the number of days of his illness. But if he should perform the *hujj* (pilgrimage to Mecca) or should be absent, no allowance is to be made for the time so occupied. It is different, however, when the wife goes on a pilgrimage, or is otherwise absent; for the time so occupied by her is not to be reckoned against him. When a woman finds that her husband is ill and unable for intercourse, the case is to be adjourned until he is well, however much the disease may be prolonged and if he should be in prison, and his wife prevented from access to him in the prison, the time is not to be reckoned against him; but if she is not prevented from access and an opportunity is offered for retirement; the time is to be reckoned, but not so, when there is no such opportunity. And it makes no difference though the imprisonment should be on account of her dower.

(*o*) *Baillie*, p. 347.

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delay.

If the woman be imprisoned on any account, and the husband is allowed access to her with free opportunity for retirement, the time is to be reckoned, but otherwise not (*p*).

If the prescribed period (that is, one year) has expired and the woman delays for a time to bring the matter again before the Court, her right is not cancelled, even though they should have mutually agreed to have intercourse during the interval. But if the man should ask the Court to extend the time for another year, or a month or more, the Court ought not to do so without the consent of the woman, and though she should consent, she may retract, whereupon the fresh period is to be cancelled and the choice again given to the wife(*q*).

If intercourse should once have taken place between married parties, though the husband should subsequently become weak, the wife has no choice; and if she knew at the time of the marriage that the man was impotent and unfit for a woman, she has no right to raise the question afterwards. But if she did not know it at the time, and only afterwards becomes aware of it, she is entitled to raise the question, and her right to dispute it is not cancelled, however long the time may be till she is dissatisfied with her condition(*r*). This condition is not mentioned in the Act.

(*p*) *Baillie*, pp. 348-349.
(*q*) *Baillie*, p. 349.
(*r*) *Ibid*, p. 350.

Right to be exercised immediately.

The option of cancellation must in all cases be exercised immediately, for if a blemish be known to a man or woman, and they do not hasten to cancel the contract, it becomes binding upon them(*s*).

(vi) that the husband has been insane for a period of two years.

Analogous law—

Section 19 (3) of the Indian Divorce Act, 1869:—

> "That either party was a lunatic or idiot at the time of the marriage."

Section 32 (b) of the Parsi Marriage and Divorce Act, 1936:

> "That the defendant at the time of the marriage was of unsound mind and has been habitually so upto the date of the suit.
>
> Provided that divorce shall not be granted on this ground, unless the plaintiff (1) was ignorant of the fact at the time of the marriage, and (2) has filed the suit within three years from the date of the marriage."

Section 7 (1) (b) of the Matrimonial Causes Act, 1937:—

> "That either party to the marriage was at the time of the marriage of unsound mind or a mental defective within the meaning of the Mental Deficiency Acts, 1913 to

(*s*) *Baillie* part II, p. 61. See the author's "Law and Practice of Divorce in India," p. 166.

1927, or subject to recurrent fits of insanity or epilepsy."

"2 (d)—that the respondent is incurably of unsound mind and has been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition".

For commentaries on "Insanity", see the author's "Law and Practice of Divorce in India," pp. 168-170.

Under Mahomedan law the insanity of a husband entitles the wife to cancel their marriage, whether the insanity be continued or occasional, and so also, when it is supervenient or occurs after the contract, and whether before or subsequent to connubial intercourse (*t*).

Unlike the provisions of the Divorce Acts for Parsis, and Christians in India and England where insanity should exist at the time of the marriage, the provisions of the Muslim law permit a wife to divorce her husband on the ground of his insanity which may be subsequent to the marriage.

The period of two years prescribed by this subsection is rather short. It ought to have been at least five years with a condition that the insanity was incurable.

(vi) that the husband is suffering from leprosy.

When a husband is suffering from any of the loathsome diseases such as leprosy or syphilis the

(*t*) *Baillie*, Part II, p. 59.

Court refuses him a decree for restitution of conjugal rights(*u*). Similarly, the Act has given the Mahomedan wife option to sue a diseased husband for divorce as his disease practically makes the discharging of the duties of married life impossible.

(vi) that the husband is suffering from a virulent venereal disease.

Analogous law—

Section 32 (e) of the Parsi Marriage and Divorce Act, 1936:—

> "that the defendant has infected the plaintiff with venereal disease";

Section 7 (1)(c) of the Matrimonial Causes Act, 1937:—

> "that the respondent was at the time of the marriage suffering from a venereal disease in a communicable form."

The words, "virulent venereal disease" would not, it is submitted, disentitle the wife to relief if the disease was in the primary stage as the wife is not expected to wait till the husband's complaint aggravates.

The venereal diseases are gonorrhoea, syphilis and soft chancre. Venereal itch has also been considered a disease entitling the wife to relief (*v*).

(*u*) *Bai Premkuvar* v. *Bhika Kallianji* (1865) 5 Bom. H. C. A. C. J. 209.

(*v*) *Browning* v. *Browning* (1911) P. 161.

For commentaries on "Venereal Disease", see the author's "Law and Practice of Divorce in India," pp. 61-62 and 89-90.

(vii) that she, having been given in marriage by her father or other guardian before she attained the age of fifteen years, repudiated the marriage before attaining the age of eighteen years.

Provided that the marriage has not been consummated.

Option on attaining the age of 17 years—

The provisions of this section enable a minor girl before attaining the age of eighteen years to repudiate the marriage *even* when she was contracted in marriage during her minority *by her father.*

Prior to the passing of the Act a minor who was contracted in marriage by her guardian, *other than her father* could alone repudiate the marriage on arriving at *puberty*.

How option is extinguished—When a girl is aware of the contract at the time of attaining the prescribed age, but is ignorant that she has an option, and does not repudiate the marriage her option is annulled : but when she is not aware of the contract, she has an option of repudiating it within a reasonable time after she comes to know of its existence (*w*).

(*w*) *Bismillah Begam* v. *Nur Muhammad* (1922) 44 All. 61; A.I.R. (1922) All. 155.

Effect of repudiation—When the option is exercised by the girl and the marriage is dissolved, she is not entitled to the dower, but until dissolution by a Court the marriage is subsisting and in the event of the death of the husband prior thereto the wife is entitled to all rights of inheritance (*x*).

(viii) that the husband treats her with cruelty, that is to say,—

(a) habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill-treatment,

Analogous law—

Section 10 of the Indian Divorce Act, 1869 :

> "Any wife may present a petition to the District Court or to the High Court praying that her marriage may be dissolved on the ground that since the solemnization thereof her husband has been guilty of adultery coupled with such cruelty as without adultery would have entitled her to a divorce â *mensa et toro.*

Section 34 of the Parsi Marriage and Divorce Act, 1936 :—

> "Any married person may sue for judicial separation on the ground that the defendant

(*x*) *Baillie* Part I. D. 51

> has been guilty of such cruelty to him or her or their children, or has used such personal violence, or has behaved in such a way as to render it in the judgment of the Court improper to compel him or her to live with the defendant."

Section 2 (c) of the Matrimonial Causes Act, 1937 :—

> "A petition for divorce may be presented to the High Court either by the husband or the wife on the ground that the respondent has since the celebration of the marriage treated the petitioner with cruelty."

For detailed commentaries on "Cruelty", see the author's, "Law and Practice of Divorce in India," pp. 80-94.

(viii) (b) that the husband associates with women of evil repute or leads an infamous life,

The association of a husband with prostitutes may be a just and good ground for entitling the wife to relief, but it would be difficult to draw the line when a man associates with professional singers, dancers, actresses, and low class working women, many of whom are women of easy virtue, and who would not be classed or fall within the purview of the expression "women of evil repute," though in reality the husband may be leading a very immoral life.

The husband's habitual association with undesirable women may be brought within the meaning of the expression, "leading an infamous life."

(viii) (c) that the husband attempts to force her to lead an immoral life,

A similar provision exists in section 32 (e) of the Parsi Marriage and Divorce Act, 1936 :

> "That the defendant (husband) has compelled the wife to submit herself to prostitution."

For economic reasons husbands have been known to force their wives to prostitution. Some husbands do it as a matter of business, marrying women with that object only. It is, indeed very derogatory and very humiliating for a respectable woman, however poor, to yield to such compulsion, and such a disgraceful conduct on the part of the husband should, no doubt, entitle her to a divorce. Strict legal proof would, however, be difficult to adduce in a Court of law of the husband's intentions or force; the onus of proof being entirely on the wife.

(viii) (d) that the husband disposes of her property or prevents her exercising her legal rights over it,

The contract of marriage gives the man no power over the woman's person beyond what the law defines and none whatever upon her goods and property (*y*).

(*y*) *A.* v. *B.* (1896) 21 Bom. 77 at p. 84.

A Musalman wife retains in her husband's households all the rights which the law vests in her as a responsible member of society. She can be sued as a *femme sole*, she can receive property without the intervention of trustees, her earnings acquired by her individual exertions cannot be wasted by a prodigal husband nor can she be ill-treated with impunity by one who is brutal (*z*).

(viii) (e) that the husband obstructs her in the observance of her religious profession or practice,

Equality is a condition in marriage, that is, in respect of Islam, or the general profession of the Mussalman religion.

Apostasy by itself does not cancel the marriage (see section 4) and the wife is entitled to profess her own religion unmolested by the husband.

(viii) (f) that if the husband has more wives than one, does not treat her equitably in accordance with the injunctions of the Qoran.

A Mahomedan wife is entitled to maintenance by her husband. The amount of maintenance or the degree of comfort is to be determined by the woman's requirements in respect of food, clothing, residence and service, a due regard being also had to the custom of her equals among her own people in the same city. Each wife is

(*z*) *Amir Ali's Mahomedan Law*, 5th Edition, p. 16.

entitled to a separate apartment for herself free from any intrusion (*a*).

When a man has two wives or more he must be just and equal in dividing his attention among them (*b*). What is required of him in this respect is justice and equity in matters that are within his power such as living with them for society and acquaintanceship. With regard to wives, equality must be observed between the old and the new, the virgin and the *suyyib*, the healthy and the sick—even the paralytic and the insane if not dangerous,—the woman in her courses, and one who is purified from them, the pregnant woman, and one in an interval of pregnancy, the young girl unfit for matrimonial converse, the pilgrim and the wife under *eela* or *zihar* (*c*).

A man going on a journey may lawfully take some of his wives with him without the others, though it would be better to cast lots between them, to prevent jealousy; and when he returns, the others have no right to require that he shall remain for a similar period with them. It is also right and becoming to distribute all his attentions equally between his wives, even to matrimonial intercourse, though he is under no positive obligation to do so (*d*).

The inequitable treatment of the wife would practically amount to neglect and would also fall within the purview of the provisions of section 2 (ii) of the Act.

(*a*) *Baillie*, Part II. pp. 99-100.
(*b*) *Hidayah*, Vol. II. p. 122.
(*c*) *Baillie*, pp. 189-190.
(*d*) *Baillie*, p. 191.

(ix) on any other ground which is recognised as valid for the dissolution of marriages under Muslim law:

In addition to the grounds enumerated in section 2 (i) to (viii) above the following grounds are recognised as valid for the dissolution of a Mahomedan marriage:

(*a*) *by mutual consent of husband and wife without the intervention of a Court.*

(*b*) *stipulation by wife for right of divorce.*

An agreement made either before or after marriage by which it is provided that the wife may be at liberty to divorce herself. The delegation may be contingent or be subject to conditions which should be of a reasonable nature and are not opposed to the policy of the Mahomedan law. In such cases the contingency must have happened and the conditions must have been fulfilled before the delegated authority could be exercised by the wife and a divorce will then take effect. The power so delegated to the wife is irrevocable and she may exercise it even after the institution of a suit against her for restitution of conjugal rights (*e*).

(*c*) *Apostasy from Islam*—

The doctrine of the Muslim faith is that a Mahomedan must believe in one God and must consider Mahomet his Prophet. That being so, apostasy from

(*e*) *Sainuddin* v. *Latifannessa Bibi* (1919) 46 Cal. 141 at p. 148.

Islam of either party to a marriage operates as an immediate dissolution of the marriage (*f*).

See section 4 of the Act. This ground of automatic dissolution of the marriage is abrogated by the provisions of section 4 of the Act which now gives an option to the wife to sue her husband for divorce on any one of the grounds enumerated in section 2 of the Act.

(*d*) *Agreement for future separation*—

An ante-nuptial agreement entered into between the prospective wife on the one side and the prospective husband and his father on the other with the object of securing the wife against ill-treatment and of ensuring her a suitable amount of maintenance in case such treatment was meted out to her is not void as being against public policy (*g*).

The following grounds of divorce have statutory recognition under section 2 of the Muslim Personal Law (*Shariat*) Application Act, 1937 :—

(*e*) *Eela*—A husband's abstinence from marital intercourse for a period of not less than four months, being confirmed by a vow, as by fasting, pilgrimage or the like.

(*f*) *Zihār* (derived from *zuhr* back)—

When the husband compares his wife to her mother saying, "Thou art to me as the back of my mother," that is, comparing her to a person within the

(*f*) *Amin Beg* v. *Saman* (1911) 33 All. 90.

(*g*) *Muhammad Muin-ud-din* v. *Jamal Fatima* (1921) 43 All. 650.

prohibited degrees. The effect of such an expression is to render matrimonial intercourse illegal and the husband must refrain from sexual intercourse till expiation. In default of expiation the wife is entitled to sue her husband for divorce.

(*g*) *Lian* (False charge of adultery against wife)—

If a husband brings a false charge of adultery against the wife or denies the paternity of a child of his wife conceived or born in wedlock, the wife may sue him for divorce (*h*).

If the allegation is proved to be false such conduct on the part of the husband is considered legal cruelty (*i*). If, however, the allegation is true the wife cannot succeed (*j*).

If the charge against the wife is of an unnatural offence the wife is not entitled to sue for divorce (*k*).

To entitle the wife to sue her husband for divorce on the above ground the following conditions must be complied with, namely,

(a) the parties must be husband and wife;

(b) their marriage must be a valid one, whether consummated or not, so that if he were to slander her, and then repudiate

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(*h*) *Baillie*, p. 336.

(*i*) *Jeaps* v. *Jeaps* (1903) 89 L. T. 74.

(*j*) *Zafar Husain* v. *Ummat-ur-Rahman* (1919) 41 All. 278. *Khatijabi* v. *Umarsahab* (1928) 52 Bom. 295; A.I.R. (1928) Bom. 285.

(*k*) *Baillie*, p. 336.

her three times, or irrevocably, there would be no *lian*; nor would there be any *lian* if he were first to repudiate her irrevocably and then slander her.

If the marriage is invalid there is no *lian* for the man is not her husband.

The husband may retract the words and declare that the charge was false or unfounded (*l*).

(h) *by agreement between husband and wife*—

(*i*) *Khoola* (to put off)—

the laying down by a husband of his rights and authority over his wife for consideration. That is, the wife buys her freedom or release from the marriage tie. It is an offer to compensate the husband if he releases her from his marital rights. Once the husband accepts the offer, it operates as a complete and irrevocable divorce and failure on the part of the wife to pay the consideration does not invalidate such divorce (*m*), but the husband would be at liberty to sue the wife for it.

(*ii*) *Mubaraat* (mutual release)—

The dissolution of marriage by agreement when both husband and wife desire a divorce. The offer of separation may proceed from either husband or wife. Once it is accepted the dissolution is complete. The wife gives up her claim to dower.

(*l*) *Baillie*, p. 337.
(*m*) *Baillie*, p. *305*.

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3. In a suit to which clause (i) of section 2 applies—

(a) the names and addresses of the persons who would have been the heirs of the husband under Muslim law if he had died on the date of the filing of the plaint shall be stated in the plaint,

(b) notice of the suit shall be served on such persons, and

(c) such persons shall have the right to be heard in the suit :

Provided that paternal uncle and brother of the husband, if any, shall be cited as party even if he or they are not heirs.

For notes see section 2 (i) at p. 17.

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4. The renunciation of Islam by a married Muslim woman or her conversion to a faith other than Islam shall not by itself operate to dissolve her marriage:

Provided that after such renunciation, or conversion, the woman shall be entitled to obtain a decree for the dissolution of her marriage on any of the grounds mentioned in section 2:

Provided further that the provisions of this section shall not apply to a woman converted to Islam from some other faith who re-embraces her former faith.

This section creates a radical change in the fundamentals of Islamic religion.

If one of the two spouses should apostize from the Mussalman faith before connubial intercourse has taken place, their marriage is cancelled on the instant, and the wife has no right to dower if the apostasy be on her side; but if it is on the side of the husband she is entitled to half the dower. If the apostasy does not take place till after connubial intercourse, the cancellation of the marriage is suspended till the expiration of the *iddut*, whether the husband or the wife be the apostate, and no part of the dower abates, because the right to it has been fully established by consummation. There is an exception, however, if the husband were born in the faith, for in that case the marriage is cancelled immeditately, though it should have followed by connubial intercourse, because a return to the faith is not allowed (*n*).

Before the passing of this Act there being no adequate provision for obtaining relief by a married Muslim woman in cases where the husband would neglect her, refuse to maintain her, desert her, or treat her with cruelty, etc., a married Muslim woman had recourse only to one device, that is, apostasy. She need not now have recourse to abjuration of the Muslim faith. The provisions of the section protect a Mahomedan wife who in spite of a genuine conversion does not desire her marriage to be automatically dissolved,

(*n*) *Baillie, part II*, pp. 29-30.

and entitles her to sue for divorce on any of the grounds mentioned in section 2, even after apostasy.

Proviso—

The provisions of this section do not apply to a convert to Mahomedanism who re-embraces her former faith, which means that although a Mahomedan woman's marriage on apostasy shall not by itself be a ground for dissolution of marriage, the reconversion of a wife to her former faith, shall by itself operate as an automatic dissolution of marriage.

It is doubtful whether a Mahomedan husband could file a suit for restitution of conjugal rights against a wife who has abjured Islam and is living separate from her husband (*o*).

Rights to dower not to be affected.

5. Nothing contained in this Act shall affect any right which a married woman may have under Muslim law to her dower or any part thereof on the dissolution of her marriage.

Dower (muhr)—

It is the property which is incumbent on a husband, either by reason of its being named in the contract of marriage, or by virtue of the contract itself, as opposed to the usufruct of the wife's person. Dower is not the exchange or consideration as understood in the technical sense of the Contract Act given by the man to the woman for entering into the contract, but an effect of the contract imposed by the law on the

(*o*) *See Amin Beg* v. *Samon* (1911) 33 All. 90.

husband as a token of respect for its subject, the woman (*p*). If dower were the bride price a post nuptial agreement to pay dower would be void for want of consideration, but such an agreement is valid and enforceable, (*q*) and an addition may be made to the dower at any time during the continuance of a marriage and the husband's promise to add to the dower if accepted by the wife becomes incorproated with the marriage contract and is binding upon him (*r*). Dower is made binding on the husband by consummation of marriage or by death, which by terminating the marriage, puts an end to all contingencies to which it is exposed; on the other hand the woman becomes entitled to it as soon as she has surrendered her person (*s*).

Dower is divided into 'prompt' (*mooujjul*) which is immediately payable and 'deferred' (*moowujjul*) which is not payable till the dissolution of the marriage. Though a woman's dower should be payable on demand she is not obliged to sue for it immediately, nor in the lifetime of her husband and consequently the period of limitation does not begin to run until the dissolution of the marriage by death or divorce (*t*).

Dower which is not paid at once may for that reason be described as deferred dower, but if it is

(*p*) *Baillie*, Part I, p. 91. *Abdul Kadir* v. *Salima* (1886) 8 All. 149, *F. B. Mt. Fatima Bibi* v. *Lall Din*, A.I.R. (1937) Lah. 345
(*q*) *Abdul Kadir* v *Salima, supra.*
(*r*) *Jahuran Bibi* v. *Soleman Khan* (1933) 58 Cal. L. J. 251 at pp. 257-258; A. I. R. (1934) Cal. 210.
(*s*) *Baillie*. Part I. pp. 91-92.
(*t*) *Ibid* p. 92. See Limitation Act, 1908. Sch. I. Arts. 103-104.

postponed until demanded by the wife it is in law prompt dower (*u*).

When a marriage has been consummated before delivery of the dower, the right to it is by no means cancelled by the consummation, but remains a debt payable by the husband, for which he is responsible, however long or short may be the delay in its payment, and whether it be demanded or not.

Under the provisions of this Act the wife is entitled to sue the husband for the dower even if the marriage is not consummated.

6. Section 5 of the Muslim Personal Law *(Shariat)* Application Act, 1937, is hereby repealed.

Section 5 of the Shariat Act was :

> "The District Judge may, on petition made by a Muslim married woman, dissolve a marriage on any ground recognised by Muslim Personal Law (Shariat)."

WIFE'S COSTS.

Under English Common Law the husband is liable for the wife's costs of a Matrimonial suit irrespective of the result thereof, except when she is possessed of a sufficient separate property. The same rule applies

(*u*) *Mahadeo Lal* v. *Mt. Bibi Maniran* (1933) 12 Pat. 297 at p. 302; A.I.R. (1933) Pat. 281.

to the Parsis (*v*), but it does not apply to the Mahomedans as the husband does not acquire any interest in the wife's property (*w*).

In the case of the Parsis and also in the case of English people the husband acquires no interest in the property of the wife, still the same old English law is made applicable in recent cases and there is no reason why it should not apply to Mahomedan wives.

For detailed commentaries on "Costs," *see the* author's "Law and Practice of Divorce *in India*," pp. 213-227.

DIVORCE BY HUSBAND.

When the dissolution of the marriage tie proceeds from the husband, it is called *tulak* or *talak*, that is, the taking off of any tie or restraint; or the taking off of the marriage tie by appropriate words.

Technically the power of the husband is absolute, but virtually and in practice, it is restrained within definite bounds by special conditions which are attached to its exercise.

The Hanifis, the Malikis, the Shafeis and the bulk of the Shiahs hold *talak* to be permitted (*mubah*) though they regard the exercise of the power without any cause to be morally or religiously abominable (*x*).

Conditions necessary for the exercise of the power.—Even among the Schools which recognise the validity of a divorce without the intervention of any judicial authority there are several conditions

(*v*) *Payne & Co.* v. *Piroshah* (1911) 13 Bom. L. R. 920.
(*w*) *A.* v. *B.* (1896) 21 Bom. 77.
(*x*) *Amir Ali*, 5th Edn. Vol. II, p. 472.

imposed on the exercise of the power of the husband with the object of protecting the wife as much as possible from being thrown on the world at the mere caprice of the man. They also give to the wife the right of obtaining a dissolution of the contract under certain circumstances.

Talak how effected.—Any Mahomedan of sound mind who has attained puberty may divorce his wife without assigning any cause and without a writing (*talaknama*). No particular form of talak is necessary, provided that the words used are understood as implying talak, nor is it necessary to pronounce the declaration of talak in the presence of the wife (*y*).

A repudiation by a dumb man by signs is effective, when the dumbness has been long continued and his signs have become long understood; and it makes no difference whether he can write or not.

Forms of talak.—Two forms of talak are recognised by the Hanafis, namely:—

(1) Talak-ul-Sunnat; and

(2) Talak-ul-Bidat or Talak-ul-Badai.

Talak-ul-Sunnat is the divorce which is effected in accordance with the rules laid down in the traditions (*the Sonnah or Sunnat*) handed down from the Prophet or his principal disciples. It is, in fact, the mode or procedure which seems to have been approved of by him.

(*y*) *Sarabai* v. *Rabiabai* (1905) 30 Bom. 537.

Ahsan form.

The talak-ul-sunnat is either Ahsan (very proper or best) or Hasan (proper or good). In the talak-ul-sunnat pronounced in the *ashan* form, the husband is required to submit to the following conditions, namely:

(a) he must pronounce the formula of divorce once, in a single sentence;

(b) he must do so when the woman is in a state of purity (*tahr*, between two occurrences of the courses) and there is no bar to conubial intercourse; and

(c) he must abstain from the exercise of conjugal rights, after pronouncing the formula, for the space of three *tahrs*.

The last clause is intended to demonstrate that the resolve on the husband's part, to separate from the wife, is not a passing whim, but is the result of settled determination. On the lapse of the term of three *tahrs*, unless revoked in the meantime, the separation takes effect as an irrevocable divorce.

Hasan form.

In the Hasan form the husband is required to pronounce the formula three times during three successive *tahrs*, namely three periods of purity of the wife. When the last formula is pronounced the talak or divorce becomes irrevocable (*z*).

Talak-ul-bidat as its name signifies is the new or irregular mode of repudiation. It is effected by declaration of talak repeated three times in immediate succession or at intervals within one *tahr*. It

(*z*) *Amir Ali*, 5th Edn. Vol. II, p. 475.

is also valid even if pronounced by a single declaration, provided it clearly indicates an irrevocable intention to dissolve the marriage (*a*).

The Shiah and the Malikis do not recognise the validity of a *talak-ul-bidat*, whilst amongst the Hanafis and the Shafeis a divorce is effective if pronounced in the *bidat* form.

A talak under Shiah law is to be pronounced in the presence of two witnesses.

When the marriage is not consummated the divorce may be effected by a single declaration of talak.

Talak by writing—In the absence of words showing a different intention, a talak by writing operates as an irrevocable divorce (*talak-i-bain*) and takes effect immediately on the execution of the document (*b*).

Talak by drunken persons and lunatics—A talak pronounced under compulsion is valid. Similarly, a talak pronounced by a husband in a state of intoxication is valid, unless the thing which intoxicated him was administered to him without his knowledge or against his will, or for a necessary purpose. So also, a talak pronounced by a lunatic during a lucid interval is valid.

(*a*) *Sarabai* v. *Rabiabai* (1905) 30 Bom. 537.
(*b*) *Ibid, at* p. 544.

APPENDIX A.

STATEMENT OF OBJECTS AND REASONS.

(Gazette of India, 1938, Part V, p. 36.)

There is no provision in the Hanafi Code of Muslim law enabling a married Muslim woman to obtain a decree from the Court dissolving her marriage, in case the husband neglects to maintain her, makes her life miserable by deserting or persistently maltreating her, or absconds leaving her unprovided for, and under certain other circumstances. The absence of such provision has entailed unspeakable misery to innumerable married Muslim women in British India. But the Hanafi jurists have clearly laid down that in cases in which the application of Hanafi law would cause hardship, it is permissible to apply the provision of the Maliki, Shafi'i or Hambali law. Acting on this principle, the *Ulema* have issued *fatwas* to the effect that in cases enumerated in clause 3, part A, of this Bill, a married Hanafi Muslim woman may obtain from a Court a decree dissolving her marriage. As the Courts are sure to hesitate to apply the Maliki law to the case of a Hanafi Muslim woman, legislation recognising and enforcing the principle referred to is called for in order to relieve the sufferings of countless Muslim women. As to cases covered by clause 3, part B, Hanafi law makes the necessary provision for granting the appropriate relief. Thus clauses 3 and 4 are meant to consolidate the provisions of Muslim law relating to dissolution of marriage by judicial decree.

Again, the Courts in British India have held in a number of cases that the apostasy of a married Muslim woman *ipso facto* dissolves her marriage. This view was repeatedly challenged at the bar, but the Courts stuck to precedents created by rulings based in an erroneous view of the Muslim law. The *Ulema* have issued *fatwas* supporting non-dissolution of marriage by reason of the wife's apostasy. The Muslim community has again and again given expression to its supreme dissatisfaction with the view held by the Courts. Any number of articles have been appearing in the press, demanding legislation to rectify the mistake committed by the Courts.

Hence this Bill.

HOSSAIN IMAM.

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