1907.
February 11.

Present: Mr. Justice Wendt and Mr. Justice Middleton

SULE AMMA *v.* MOHAMMADO LEBBE PADILY.

P. C., Kandy, 7,128.

Mohammedan Law—Divorce—" Tollok "—" Letters of Divorce "—Mohammedan Code of 1806, *ss.* 87, 88, 89.

Held, that the expressions " tollok " and " letters of divorce " used in section 87 of the Mohammedan Code of 1806 are not synonymous, but that the latter is merely explanatory of the former.

Held, also, that " the tollok " may be given orally.

Kadijah Umma v. Mohamado Mawlana (1) approved.

Where a Mohammedan wishing to divorce his wife pronounced the tollok three times in his wife's absence and afterwards informed the priest by writing that he had divorced his wife, and the priest communicated that fact to the wife,—

Held, that there was a valid divorce.

THIS was an application under section 3 of Ordinance No. 19 of 1889 for maintenance by a Mohammedan woman for herself and her child against the defendant, who, she alleged, was her lawful husband. The defendant pleaded that he had divorced the applicant according to the Mohammedan Law. The defendant in his evidence stated that he pronounced the tollok three times one after the other in the presence of certain witnesses, but not in the presence of his wife, and that on that very day he wrote the following letter to the priest:—

" 22—12—1903.

" I seek protection from the almighty God, to save me from all disturbance and evil acts of Satan, who was sent away from Paradise.

" I commence to write this document in the name of the most merciful, helping, almighty, and living God, and I expect the help and salvation from the Saviour and our Prophet and our Lord Mohammed.

" All the praises are due to the only one living God.

" Now I, the poor Seyado Mohamado, son of Ismail Lebbe, write this instrument of divorcement for the information, giving my best salam (compliment) and greetings to the officiating priests of Akkurana Mosque, and to the high priests and headmen and the other Muselmen, and state that my wife Zuliha Umma, the daughter of Wappoo Marikar Rasie Lebbe Marikar, is not submissive to me, disobey me, and act contrary to my order and words, and her temper and

(1) (1902) 3 *Browne* 9.

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character are not agreeable to me. I therefore repeated the three 'thalaks' (the first, second, and third divorcements), and the 'magar' money payable by me to her I do hereby give over unto her all the articles which are now in her possession and the goods and chattels which are lying in the house, and I do now separate from my wife and my marriage contract according to our religious books.

"Given on the 2nd day of the month of Sawwal in the year Hijjara 1321.

"SEYADO MOHAMADO
"(son of Ismail Lebbe of Ceylon).

"*Witnesses:*—

(1) Mohamado Lebbe Alim Saibo.
(2) Moona Habeebo Lebbe.
(3) Seyyado Lebbe."

"This true copy of the divorcement has been issued by me, Noor Mohamado Lebbe Alim Saibo, the officiating priest of Akkurana Mosque to Seyado Mohamado Lebbe Alim Saibo, affixing a stamp to the value of 50 cents and set my hand thereon and granted on the 25th day of September, 1906."

[Signature illegible.]

The Police Magistrate (T. B. Russell, Esq.) held that there was a valid divorce according to Mohammedan Law.

The complainant appealed.

Allan Drieberg, for complainant, appellant.

Bawa (*H. Jayewardene* with him), for defendant, respondent.

Cur. adv. vult.

11th February, 1907. WENDT J.—

The question reserved for our consideration by my brother Grenier is whether the defendant had validly divorced his wife, the complainant, who now seeks maintenance, and that question is narrowed down to this: Does the law require, as an essential to a Mohammedan divorce, that the husband shall give to his wife written letters of divorce? It is not contested that if no writing was necessary there had been a valid divorce.

The original Mohammedan Law did not require any writing, but it is contended that in the case of Ceylon Mohammedans the Code of Special Laws of 1806 renders a writing essential. The sections bearing upon the matter are the 87th and the following sections. The 87th section says the husband "shall be obliged to give her the tollok or letters of divorce" at intervals which are specified. Section 88 and the opening words of section 89 speak of "the third tollok" without the addition of the words "or letters of divorce," but the latter part of section 89 empowers the husband "to issue

three tolloks or letters of divorce at once," subject to his obligation to furnish his wife with a dwelling-place for the space of three months. Nell (*Mohammedan Laws of Ceylon, p.* 44) suggests that " letters of divorce " was inserted as the equivalent of " tollok," and that it is a mistranslation. " Tollok " is obviously a local corruption by the Ceylon Moormen (whose language is Tamil) of the Arabic term " tolok," which (says Hamilton's translation of the *Hedaya*) " in its primitive sense means dismission; in law it signifies the dissolution of a marriage, or the annulment of its legality, by certain words." The " tollok " in fact means the words of divorce, and I incline to the view that the alternative expression " letters of divorce " was added merely as an explanation or equivalent. Compare " Maskawien or magger " in sections 72, 77, &c. The use of the term " tollok " by itself in two out of the four passages supports that view. If it was intended to enact that the necessary words of repudiation should be embodied in a written instrument, why require three such instruments to be issued simultaneously when the thrice-repeated formula might have been embodied in one ?

The cases which are relied upon as having decided that a writing is necessary are not satisfactory. In *Pitche Umma v. Modely Atchy* (1) it is not clear whether there had or had not been a writing. It is said the District Court held there was no sufficient proof of divorce, the letters of divorce required by the 87th clause and the record or registry required by the 90th clause not having been produced or their absence accounted for. The Supreme Court was of opinion that there were only private memoranda made by the parties and not secured in any repository for the same established by law, the law nowhere providing " that these tolloks or records shall be sole evidence of the fact of divorce," and this Court in fact held that they were merely evidence of the fact of divorce, and put them on the same footing as registers of births, marriages, and baptisms. Looking to a certain admission of the defendant, the evidence of the witnesses, and to the fact of the parties having lived separate from the time of the alleged divorce, the Supreme Court held the divorce established. In C. R., Batticaloa, 9,352 (2), the Court of Requests held that " letters of divorce must be given, and that the mere utterance of certain words will not dissolve the marriage." It was also of opinion, on the authority of MacNaghten, that the repetition of the words of divorce, when divorce can be verbal, must be made on several occasions. The Court therefore held the divorce not established, and the Supreme Court merely affirmed the dismissal of the action without giving any reasons.

What the facts proved were does not appear. In re *Rama Kandu* (3) Clarence J., in reversing the decision of the District Judge of

(1) (1859) 3 *Lor.* 261.

(2) (1870) *Vanderstraaten* 51.

(3) (1876) *Ram.* 316.

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Kandy, held that the 89th clause " requires three written letters of divorce or tolloks to be given, and the evidence is that there was no writing whatever..... We are not satisfied by the evidence adduced in this case that the writing of divorcement described in clause 89 of the Code has been dispensed with by a custom having the force of law."

The last two of these reported cases are decisions of a single Judge, and they proceed on a bare construction of the clauses of the Code, which are by no means unequivocal. In *Kadijah Umma v. Mohamado Mawlana* (1) Moncreiff J. reviewed the earlier decisions and held that the tollok need not be in writing.

I agree with my brother Middleton in upholding that view.

I am further of opinion that if a written record was necessary the document A dated 22nd December, 1903, which has been produced in this case, satisfies that requirement. It calls itself " this instrument of divorcement," is addressed to the officiating priests of the Akkurana Mosque, and states that the defendant's wife having been disobedient to him he repeated the three tolloks and gave over to her her magar, and that he now separated from his wife and the marriage contract, according to their religious books. The Magistrate held that the priest received this instrument, and that he informed the complainant of its contents, and I think that is sufficient.

The appeal should be dismissed.

MIDDLETON J.—

This was an appeal referred by my brother Grenier before two Judges of this Court and involved the validity of Moslem divorce.

The facts were that the appellant, alleging she was his wife, instituted proceedings for maintenance against the respondent, who pleaded that he had divorced her.

The evidence showed, and the Magistrate found, that three " talaks " were pronounced by the respondent at the same time, and that a writing was drawn up embodying the fact and sent to the priest, who communicated it to the appellant. It was argued that the so-called Mohammedan Code in force in Ceylon rendered it obligatory that the " talaks " should be in writing and should be communicated directly to the wife.

The cases quoted in order of date were first *Pitche Umma v. Modely Atchy* (2) decided in 1859. In that case the Supreme Court found on the evidence of an admission made by the defendant and other evidence which did not appear to include formal acts as laid down in the Mohammedan Code that the fact of divorce had been established.

In the case C.R., Batticaloa, 9,352 (3), Lawson J., sitting alone, in 1870, held that the mere utterance of certain words would not dissolve a Moslem marriage.

(1) (1902) 3 *Browne* 9. (2) (1859) 3 *Lor.* 261.
(3) (1870) *Vanderstraaten* 51.

In the matter of the goods and chattels of *Ramen Kandu*, deceased (1), Clarence J., in 1876, delivered the judgment of the Supreme Court holding that the Court was not satisfied by the evidence adduced in the case that the writing of divorcement described in clause 89 of the Mohammedan Code had been dispensed with by a custom having the force of law to divorce orally. It seems to me that the learned Judge did not sufficiently appreciate the meaning of the Arabic word " talak," improperly spelt " tollok " in the Ceylon Code, as the report makes him say that clause 89 requires three written letters of divorce or " tollocks " (again spelt differently) to be given.

I take leave to think that the word " talak " means, in its literal sense, dismissal or repudiation (Hamilton's *Hedaya, p.* 72; *Van Den Berg's Manual de Jurisprudence Musulmane Selon Le Rite, de Châfi'i i., Not. ii., p.* 425), and that when it is used as disjunctively with the words " letters of divorce " the proper signification to be attached to it is an oral repudiation as distinguished from a written one. The word is not defined in the Ceylon Code, and its meaning may well be sought for from its use and application under the general Mussulman Law in force in India.

The chapter on " Talak " in *Ameer Ali* (*vol. II., pp.* 408-435) makes it clear to my mind that the sense of " talak " is an oral repudiation, and shows that the Shiah sect (p. 420) did not allow " a talak " to be given in writing unless the person giving it was dumb.

I think the view taken by Moncreiff J. in *Kadijah Umma v. Mohamado Mawlana* (2) is the correct one, and that the husband may pronounce the " talak " or give it in writing under the Ceylon Code.

In the case reported in volume 6 of the Madras High Court Reports, p. 432, the Court would appear to have held a divorce valid, notice of which, though three times pronounced before the Kazi and embodied in a letter to the wife, never was proved to have reached the wife. I presume it was held to have taken effect only from the date when pleaded as a defence to the plaintiff's claim for maintenance.

Neither the Ceylon Code nor apparently general Mussalman Law requires the " talak " to be pronounced in the presence of the wife, but it would seem the Hanafi sect (*Ameer Ali, vol. II., p.* 421) hold it is necessary it should come to her knowledge.

My view then is that the facts found by the Magistrate are sufficient to establish that the respondent lawfully divorced his wife, inasmuch as it is proved that he pronounced the "talak" three times orally, at the same time, which is what Ameer Ali calls the *bidaat* form of " talak " recognized as valid by the Shafeis, though in its commission the man incurs a sin (vol. II., p. 412). The husband would, however, be bound to find her a dwelling-place for three months according to section 89 of the Code.

(1) (1876) *Ram.* 316. (2) (1902) 3 *Browne* 9.

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The effect of bringing it to the wife's notice in my opinion is merely to fix the date from which it is to take effect.

The petitioner here had notice of the divorce before the application for maintenance was made, but even if she had not, its effect would, I think, date from the receipt of notice during the maintenance proceedings, and she would still be barred from its recovery.

In my opinion the judgment of the Magistrate should be affirmed and the appeal dismissed.

Appeal dismissed.