1925.

Present: Bertram C.J. and Jayewardene A.J.

THE KING *v.* MISKIN UMMA *et al.*

4—D. C. (Crim.) Kegalla, 2,354.

Muslim law—Divorce by wife—Judicial decree—Civil Procedure Code, Chapter XLII.

Under the Muslim law a wife is only entitled to a divorce if her husband effects the divorce himself, or the divorce is granted by a decree of Court. In Ceylon a District Court is the competent authority for granting such a divorce.

As Chapter XLII. of the Civil Procedure Code does not apply to Muslims, such an action for divorce must be governed by the general rules of civil procedure.

Per BERTRAM C.J.—The Code of 1806 is not exhaustive of the Muslim law applicable to Ceylon. It has to be read in the light to the general principles of that jurisprudence.

THIS case was reserved by the District Judge of Kegalle for the consideration of the Supreme Court under section 353 of the Criminal Procedure Code upon a question of law arising from a charge under 362 (*b*) of the Penal Code. The accused were Muslims, and the first accused, who is the daughter of the second accused, was charged with marrying a second time during the lifetime of her husband, and the second accused was charged with abetment of

the offence. They were convicted, and sentenced to undergo simple imprisonment till the rising of the Court. The facts of the case and his finding were stated by the District Judge as follows:—

"At the hearing of the said charges it was proved that the first accused did contract a second marriage during the lifetime of the first husband, and that the second accused, her father, solemnized the marriage on each occasion according to Muhammadan customs. But it was contended on the part of the accused that the first marriage was validly dissolved by means of a document called the *Passauhu kadutham*, executed by a Mowlana before the second marriage was contracted, and that therefore, the second marriage was not void, and that the accused could not be held to be guilty of the offence under section 362 (*b*) of the Ceylon Penal Code.

"But I being of opinion that the document pleaded was of no force or avail in law, and that the practice in question was not one recognized either by the general Muhammadan law or our local Code on Muhammadan law for the reasons stated in my judgment, held the first marriage was not validly and legally dissolved, and that the only way in which a Muhammadan wife could obtain a valid divorce without the consent of her husband was through the machinery of the District Court, and found the accused guilty of the charges laid against them."

Akbar, S.G. (with him *J. E. M. Obeysekere, C.C.*), for the Crown.—The law laid down in the Code may be supplemented by text-books recognized as authorities. Under the Muslim law, the husband has the right of divorce, without going before a tribunal, subject to certain safeguards. As, for example, he has to pay the wife the *maggar* as soon as he divorces her. He has to explain his action to friends who may attempt a reconciliation. He has to issue three letters of *talak*, and before the third *talak* a reconsiliation is possible. Now that elders are no longer recognized, the husband has the right of divorce straight away. The second method of divorce is by *khula*, where the wife wants the divorce with the consent of the husband, the consideration being the waiver of the *maggar*. The third kind is *mubarât*, divorce by mutual consent. The fourth method recognized is by a judicial decree.

The Shafei law extends to the whole of the Colony. In the matter of judicial divorce *Wilson on Muhammadan Law, ch. 3, page 143*, shows the difference between the Shafei and the Hanafi laws. A wife cannot divorce herself without her husband's consent except through means of a judicial decree.

When the husband is unable to maintain he must divorce her, if he does not, the *Kâzi* does it on his behalf.

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In *Rabia Umma v. Saibu* [1] Sir Alexander Wood Renton says that on a question of law the proper course to adopt is to refer to text-books. The passage cited by De Sampayo J. from *Tyabji* is not borne out by the original authority, *Hedaya 1.4.2.* Now Wilson deals in a separate chapter with judicial divorce, paragraph 72. page 153. When we turn to Shafei law at end of page 431, he says that the wife may obtain judicial divorce on the ground of non-maintenance. He cites the same authority from *Hedaya.*

In *Ageska Umma v. Abdul Carim* [2] it was held that the Judge who corresponds to the sitting Magistrate is the District Judge.

A Muhammadan husband is entitled to bring an action for divorce on the ground of adultery, *Cassim v. Bibi.*[3]

Samarawickreme (with *M. B. A. Cader*), for the accused.—The Muhammadan Code is a summary of the law, as it was applied in Ceylon at the time of its introduction. It provides for a divorce at the instance of the wife in the case of continued dissensions.

BERTRAM C.J.—There is nothing in the Code which contemplates a wife obtaining a divorce without the intervention of the Court.

Samarawickreme.—The jurisdiction of the Magistrate contemplated by section 85 is only confied to the payment of *maggar* and its computation. But the grounds of divorce need not be so decided. What comes before the Magistrate is the fixing of the amount. Where there are continued dissensions, divorce may be mutual, or if that is not possible, at the instance of the wife.

Under section 92 a wife may obtain a divorce when the husband is decaying into poverty. It need not be presumed that a judicial Court corresponds to a *Kâzi.* The exclusion of Muhammadans from the sections of the Civil Procedure Code dealing with matrimonial causes is significant, and shows that our Courts cannot take cognizance of them. No Muhammadan husband is obliged to come into Court. Section 64 of the Courts Ordinance does not create a new jurisdiction. Even if it does, that does not affect the rights given to the Muhammadans under the Code.

Akbar, S.-G. in reply, cited *Amir Ali, vol. II., p. 470; Wilson's Anglo-Muhammadan Law, p. 150.*

February 17, 1925. BERTRAM C.J.—

This reference raises very important questions with regard to the Muhammadan law of divorce, the principles of which have been very clearly expounded to us by the Solicitor-General. It appears that for some time past a "practice" has been intruding itself into the life of the Muhammadan community in Ceylon, under which

[1] *(1914) 17 N. L. R. 338.* [2] *(1880) 4 S. C. C. 13.*
[3] *(1900) 4 N. L. R. 316.*

certain persons have purported to grant or certify divorces between husband and wife at the instance of the wife, or of the wife's father without the intervention of any judicial tribunal. I am not aware to what extent this " practice " may have proceeded. What has been done clearly cannot constitute a custom, and in the absence of any evidence as to the extent to which such proceedings have taken place, I desire to use even the word " practice " in a most restricted sense. There can be no doubt whatever that these proceedings have no foundation either in the general principles of Muhammadan law or in any special developments of that law, which might be suggested to have taken place by virtue of local customs.

The " practice " (is practice it be) is of itself unjustifiable, and in this particular instance particularly scandalous. The wife in the present case was a child, daughter of a Muhammadan Registrar of Marriages, who was married by her father at the age of ten, and divorced and remarried at the age of thirteen in the absence of her husband. The instrument chosen for this purpose was a strolling mendicant calling himself a Mowlana, and purporting to be a descendant of the Prophet, who at the instance of the father issued a certificate, which was said to constitute a valid divorce. This mendicant is an ignorant person, who speaks of the *Kâzi* (or *Kadi*) as the " *Kali,*" and under cross-examination disclaimed the honour of being a " *Kali,*" or of having any power to grant divorces. The father of the girl, so he explained, is a *Kali,* being Registrar of Marriages. He kindly assisted the father in effecting the divorce in this capacity by writing the certificate for him, the father's hand being paralyzed. With all that has been said by the learned District Judge about this person, I entirely associate myself.

The learned District Judge, who has initiated this reference, has dealt with all the questions concerned in so thorough and careful a manner, that it is hardly necessary for us to do anything more than endorse the principles he has laid down in his judgment. As, however, the questions involved are of great importance, I will add certain further observations.

The brief Code of Muhammadan law promulgated in this Colony in 1806 is no doubt a very rough condification of certain portions of a very great system of jurisprudence. It is not exhaustive, and has to be read in the light of the general principles of that jurisprudence. But I am unable to see that enactments so promulgated, in so far as they relate to the matters under consideration, make any substantial departure from those principles. It is a recognized principle of Muhammadan law that a husband is free to divorce his wife without assigning a cause. In the original purity of the law, this right was carefully safeguarded and subjected to repeated opportunities for reconciliation. With the development of civilization these safeguards have been discarded, and the only check upon the husband's rights is the necessity of restoring his wife's *maggar,*

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if he thinks fit to divorce her. The wife's position is very different, as explained by Sir Roland Wilson in his *Digest of Anglo-Muhammadan Law, 4th ed., p. 143*:—

> " The wife can never divorce herself from her husband without his consent, but she may under some circumstances obtain a divorce by judicial decree."

Under the Hanafi law those circumstances are extremely restricted. Under the Shafei law (the parties in this case belong to the Shafei community) they are slightly more extensive. One of the grounds there recognized for separation is the incapacity of the husband to provide his wife with proper maintenance. See the *Hedaya, bk. IV., ch. 15*. It is the alleged failure of the husband to provide maintenance, which is the ground for the supposed divorce in the present case.

The wife is at all times entitled to secure a divorce by agreement with her husband, and there are two forms in which this may be done. But it should be observed that in both cases it is the husband, who himself grants the divorce at the instance of his wife, and that in those rare cases in which a wife is entitled to obtain a divorce by judicial decree, the *Kâzi* is considered as acting as the substitute for the husband. See the *Hedaya* in the passage just cited " Shafei says that they must be separated, because whenever the husband becomes incapable of providing his wife's maintenance, he cannot *retain her within humanity*, as is required in the sacred writings; such being the case, it behoves him to divorce her; and if he declines to do so, the *Kâzi* is then to effect separation as his substitute, in the same manner as in cases of emasculation or impotence."

Our own rough Code is entirely in accordance with these principles. The right of a wife to obtain a divorce for insufficiency of maintenance is prescribed by section 92. " She may obtain a divorce, should she wish it, under the same provisions as stated in the 76th Article." The 76th Article must be read in connection with the final words of Article 75, where it is said that if the parties are unwilling to abide by the decision of the priest, "they shall be at liberty according to custom to lay their case before the competent Judge." Article 76 proceeds: " The bride is in such a case obliged to restore to the bridegroom the *maskawien* or *maggar*." It is clear, therefore, that where a woman seeks a divorce on the ground of incapacity of maintenance, she can only do so through a judicial decree, in which the Judge acts as substitute for, and in the absence of consent by, her husband.

The question arises, who is the competent Judge ? Under our own legal system there can be no doubt whatever that he is the District Judge. The idea that the *Kâzi* (or *Kadi*) under Muhammadan law is a sort of special religious functionary with spiritual qualifications only distinct from the ordinary judiciary, and that

his place in non-Muslim countries may be taken by some appropriate person of ecclesiastical rank or piety is a pure figment of the imagination. In Islam all law was sacred, and the only person who judicially administered it (apart from the Head of the State itself) was the *Kâzi* (or *Kadi*) who was a Judge in the fullest sense of the term, and the only Judge whom the law recognized. In the Court of the *Kâzi* the law of sale was as sacred as the law of divorce, and he adjudicated upon both in the same capacity. Western jurisprudence developed a distinction between what we sometimes describe as " personal law " and other law. And in various regions, where the original Muhammadan rulers have been displaced, it has been found convenient by the new Government to assign this special law, the *Statut personel*, to special religious Judges. No such course was adopted in India or Ceylon. A similar development took place in Turkey in modern times. The Sultan by virtue of his Imperial prerogatives established special statutory tribunals known as the Nizam Courts, presided over by judicial officers of a different character from the old-fashioned *Kadi*. But the *Kadi's* Court continued to function with regard to a group of questions (not necessarily identical with the group comprised in the *Statut personel*), which came to be considered to have a special religious flavour.

These arrangements are purely political and administrative arrangements. When on the assumption of British rule in India and Ceylon, the Muhammadan community retained their own system of law, that law was to be administered by the regular tribunals.

In Ceylon the District Judge, therefore, as the competent authority for a divorce under section 64 of the Courts Ordinance is the competent judge for Muhammadan divorces in so far as these require a judicial decree. This has been long ago determined by the judgment of the Full Court in *Ageska Umma v. Abdul Carim (supra)*. The fact that there are no special rules of procedure under our Civil Procedure Code, which are appropriate for the purpose of Muhammadan divorces, does not affect the situation. Chapter XLII. no doubt does not apply in such cases, but in the circumstances they must be governed by the rules of procedure applicable to ordinary actions.

The law is so clear that Mr. Samarawickreme, who appeared for the convicted persons, necessarily had the greatest difficulty in sustaining the task which he had been called upon to perform. He was, however, able to make one ingenious verbal suggestion, namely, that where section 92 says that the wife who cannot be maintained by her husband " may obtain a divorce," all that the section means is that she may herself put through a divorce by means of any appropriate certificate or formal document. He contends that the reference to the 76th Article must be strictly construed, and that the only condition of such a divorce is that under Article 76 the wife must restore the *maggar* to the husband,

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if she has already obtained it. There being no reference to the "competent judge" in Article 76 itself, the words immediately preceding in Article 75 are, according to Mr. Samarawickreme, to be disregarded. It is hardly necessary to discuss this verbal subtlety. Is seems to me a sufficient answer to point out that the words "obtain a divorce" imply a divorce that cannot issue from the wife herself, but must be secured from some authority competent to bestow it. And the only authority competent to bestow it recognized in the context is the "competent Court." It is a further sufficient answer to the contention that if this were our local law, it would involve a complete departure from the accepted principles of Muhammadan jurisprudence—a revolutionary proceeding which there is occasion to impute to the authors of our Code.

The only difficulty, which arises in the case is to be found in a series of passages in the work of an Indian lawyer, himself a Judge of the Madras High Court, Mr. Justice Tyabji's *Principles of Muhammadan Law, s. 205, p. 168.* He there states that "under Shiah and Shafei law a marriage may be annulled by the wife without the intervention of the Court on any of the following grounds," and among the grounds referred to, he states: "The husband's inability to provide maintenance for his wife." This opinion has been accepted in a considered *obiter dictum* of De Sampayo J. in *Rabia Umma v. Saibu* (*supra*). Weight is no doubt to be attached to that dictum, but it is purely incidental, and for the purpose of the decision De Sampayo J. had no occasion to compare this utterance of Mr. Justice Tyabji's with the recognized authorities on Muhammadan Law. If he had had occasion to do so, he would have found that this utterance stands alone, and is in direct conflict with the accepted authorities. The only authority which Mr. Justice Tyabji gives for his statement is a reference to *Bailie's Digest of Muhammadan Law.* This after all is only another text-book, and it is hardly sufficient for one text-book writer to cite the work of another. The passage in *Neil Bailie* referred to in *Tyabji* is *Book III. "Of Divorce" on p. 203 of the Edition of 1865.* There is nothing in the section of the work cited, either in the words of the text or in the notes at the foot thereof, which in any way justifies the statement. Neil Bailie says: "There are thirteen different kinds of *Firkut* (or separation of married parties), of which seven require judicial decree and six do not." The six forms which do not require a judicial decree do not include a divorce for incapacity of maintenance. It is difficult to understand the statement of the learned author that in this form of divorce a judicial decree may be dispensed with, particularly as it is in effect twice repeated. But it must be taken to be due to an oversight.

In the course of the argument there was a certain discussion of the principles applicable to the two forms of divorce by consent, *khula* and *mubarat*, and as to the functions of the Court in the

former. It is not necessary to give any decision on the points discussed, because it is not suggested that this was a divorce by consent. I may, however, observe that it appears to me that the function of the " sitting Magistrate " under section 85 in the case of the *khula* divorce must be confined to the assessment of compensation, where a *khula* divorce has already been agreed upon by the parties. See section 80. The point will be found fully discussed by Sir Roland Wilson in his *Digest of Anglo-Muhammadan Law, 5th ed., p. 432.*

The second accused, who is responsible for this scandalous proceeding, may think himself fortunate that the learned Judge has attributed so much weight to the " practice " which is said to have prevailed, and that he has under the circumstances awarded him only a nominal punishment. The question of enhancing this punishment was not considered by the Court, and there is no occasion for us to vary the decision of the learned District Judge. Any person, however, who in future acts similarly should not rely upon being similarly dealt with. On the matter referred to us, I would confirm the verdict and sentence of the learned District Judge.

JAYEWARDENE A.J.—

This is a case reserved by the learned District Judge of Kegalla for the consideration of this Court under section 353 of the Criminal Procedure Code. The question of law stated for our opinion arises in this way:—The accused are Muslims. The first accused, who is the daughter of the second accused, was charged under section 362 (*b*) of the Penal Code with marrying a second time during the lifetime of her husband, and the second accused was charged with abetment of the offence. They were both convicted, and sentenced to undergo simple imprisonment till the rising of the Court. The salient facts of the case and his opinion are stated by the District Judge in the reference as follows:—

> " At the hearing of the said charges it was proved that the first accused did contract a second marriage during the lifetime of her first husband, and that the second accused, her father, solemnized the marriage on each occasion according to Muhammadan customs. But it was contended on the part of the accused that the first marriage was validly dissolved by means of a document called the *Passauhu kadutham*, executed by a Mowlana before the second marriage was contracted, and that, therefore, the second marriage was not void, and that the accused could not be held to be guilty of the offence under section 362 (*b*) of the Ceylon Penal Code.

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"But I being of opinion that the document pleaded was of no force or avail in law, and that the practice in question was not one recognized either by the general Muhammadan law or our local Code on Muhammadan law for the reasons stated in my judgment, held that the first marriage was not validly and legally dissolved, and that the only way in which a Muhammadan wife could obtain a valid divorce without the consent of her husband was through the machinery of the District Court, and found the accused persons guilty of the charges laid against them."

He invites this Court to consider whether his determination is correct in law. It may be mentioned here that according to the Mowlana the ground on which he granted the divorce was the failure of the husband to maintain his wife, the first accused. There is also a suggestion in the evidence that the first accused had been deserted by her husband.

The reference raises the question of a wife's rights with regard to divorce under the Muhammadan law, that is, whether she can divorce her husband without the intervention of a Court of Law. It is contended for the accused that according to the laws and customs prevailing amongst the Muslims in Ceylon a wife can divorce her husband before a priest, and that such a divorce is permitted when, as in this case, the husband is unable to maintain his wife. Whatever the general Muhammadan law may be, it is argued that such a divorce is permitted by section 92 of the Muhammadan Code of 1806. To answer the question propounded by the District Judge, it is necessary, in the first place, to ascertain the general Muhammadan law on the point. In my opinion the general principle is that stated by Sir Roland Wilson in his work entitled *Digest of Anglo-Muhammadan Law* in the following passage:—

"The husband may divorce his wife at his mere will and pleasure, without assigning any reason; but the transaction is called by a different name, and requires different formalities, according as it takes place against her will or by mutual consent. The wife can never divorce herself from her husband without his consent; but she may, under some circumstances, obtain a divorce by judicial decree"—(p. 143).

The general rule of law as stated by Syed Amir Ali in his work on *Muhammadan Law* (*vol. 2. pp. 532, 582, 4th ed.*) appears to be the same.

In Muhammadan law there are three forms of divorce which have specific technical names. They are *talâk* or *tolloh*, where the dissolution of the marriage proceeds from the husband. Sections 87 to 90 of our Muhammadan Code provide for such divorces.

Mubarat, where the dissolution is by mutual consent, see section 79 of the Muhammadan Code, and *khula*, in which although the proceedings for the dissolution are commenced at the instance of the wife, the final separation is founded on the consent of the husband who releases his wife on being compensated. This form of divorce is, in my opinion, provided for by sections 80-86 of the Code of 1806. See *Bee Bee v. Assen Pitche.*[1] There is a fourth form of divorce—that granted by the *Kâzi* or Judge, for which there is no special name, but is called by the commentators " judicial divorce."

A " judicial divorce " or a dissolution of the marriage tie by a Judge can be granted by the Court on the application of either husband or wife. According to the law of the Shafei sect to which the Muslims of Ceylon belong, a wife can obtain a divorce from the *Kazi* or Judge on the ground of her husband's inability to maintain her. See *Wilson's Digest of Anglo-Muhammadan Law, pp. 152 and 432,* and *Amir Ali's Muhammadan Law, vol 2. p. 582.*

Mr. Justice Tyabji in his book on *The Principles of Muhammadan Law* gives four grounds on which under the Shafei law marriage may be annulled by the wife without the intervention of a Court, and among them are impotency and inability of the husband to provide maintenance for the wife. Section 205, p. 168 (1st ed.). In section 206 he refers to the grounds on which a husband can obtain a divorce without the intervention of the Court, and in section 207 the learned author says: " According to Shiah and Shafei law either party may annul the marriage on any of the grounds stated in sections 205 or 206, and the marriage is then dissolved without any order of the Court," and lays down the conditions necessary to make such a divorce valid. Then in section 208, he adds: " In Shiah and Shafei law the annulment of a marriage under sections 205, 206, and 207 does not amount to a divorce for purposes of establishing prohibition by divorce between the parties remarrying each other."

But Wilson mentions impotency as one of the three main grounds for which a marriage may be dissolved by judicial decree (page 153, section 72 and with regard to the Shafei law on the point he says: " The wife may obtain a judicial divorce not merely on the ground of the impotence of the husband, but also if he is afflicted with madness or leprosy." Page 432, section 401 (1).

Amir Ali says that the wife is entitled to claim a divorce on the ground of her husband's impotency if she was unaware of the infirmity prior to his marriage, and states the general rule thus:—

> " A claim for the dissolution of the marriage on the ground of impotency is to be preferred always before the *Kâzi* or Judge having jurisdiction in the matter (*Kâzi* of the city or place)." Page 597.

[1] *(1924) 26 N. L. R. 277.*

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Then at page 600 he points out that under the Shafei law, if the husband is suffering from leprosy or other dire disease, the wife can obtain a cancellation of the marriage from the *Kâzi*. With regard to a divorce on the ground of the husband's inability to maintain his wife, Wilson (page 432) says that "a judicial divorce can be obtained by the wife on the ground that the husband is unable to afford her maintenance on even the lowest of the three recognized scales," and Amir Ali says that "under the Shafei and Hanafi system inability on the part of the husband to maintain the wife, absence without any provision for her maintenance, desertion, cruelty, and like causes, entitle a woman to apply for and obtain a separation from the *Kâzi*" (page 469), and at page 470 he cites the *Fatawai Kâzi Khan*, which states the law thus: "Inability (viz.: to provide for maintenance) does not create a right of separation; but *Shafei*, on whom be peace, says that the woman is entitled in such a case to demand from the *Kâzi* that he should effect a separation between them, and the separation (so) effected by the *Kâzi* shall be a cancellation (*faskh*) of the marriage. . . ."

There is, therefore, between Tyabji on the one side and Wilon and Amir Ali on the other, a direct conflict as to the proceeding by which a dissolution of a marriage can be effected on the grounds of impotence, affliction with a dire disease such as insanity or leprosy, and inability to maintain a wife. Tyabji, however, gives no authority for the statement that on these grounds a marriage can be dissolved without the intervention of a Court.

According to the *Hedaya* (*bk. IV., ch. XI., p. 354*), the *Kâzi* can, on the application of the wife, decree an annulment of the marriage on the ground of importance, the *Kâzi* acting in such cases as the substitute of the husband. As regards the wife's right to a dissolution of the marriage owing to the husband's inability to maintain her, the *Hedaya* (*bk. IV., ch. 15, p. 397*) thus states the Shafei law on the point: "Shafei says that they must be separated, because whenever the husband becomes incapable of providing his wife's maintenance, he cannot *retain her with humanity* (as is required in the sacred writings); and such being the case, it behoves him to divorce her; and if he decline so to do, the *Kâzi* is then to effect the separation as his substitute in the same manner as in cases of emasculation or importence. . . ."

Thus the law as laid down by Wilson and Amir Ali is supported by the *Hedaya*, and the latter lends no support whatever to Tyabji's view that for importance and inability to provide maintenance the wife can dissolve the marriage without the intervention of the Court. In my judgment the law as laid down by Wilson and Amir Ali, supported as it is by the *Hedaya*, ought to be followed in preference to that laid down by Tyabji. As regards the case of *Rabia Umma v. Saibu* (*supra*) in which the law as stated by Tyabji was referred to with approval, it cannot be regarded as a binding authority for the

reasons given by my Lord the Chief Justice. Further, the qualification which Tyabji has added in section 208 (*supra*) shows that the dissolution of marriage referred to by him in sections 205 and 207 does not involve the prohibition of marriage with each other, and points to such dissolutions as being not of the same character as ordinary divorces under the Muhammadan law which prevents remarriage except under certain drastic conditions. It may be that Tyabji is not referring to the complete divorces with prohibition of remarriage referred to by Wilson and Amir Ali.

Under the Shafei law, therefore, a wife cannot obtain a dissolution of the marriage without the intervention of a Court of law. That being the Shafei doctrine on the point, we have to consider whether that law has been altered by our Muhammadan Code. As I have stated above, the Code provides for divorce by *talak*, *mubarat*, and *khula*. It also provides for the nullification or dissolution of marriage on the wife discovering that the husband is suffering from such disorders as leprosy or insanity, &c. (sections 74-78), and owing to the husband's inability to maintain his wife through poverty (section 92).

In the former case, the matter is, on the complaint of the wife, inquired into by the priest with the assistance of the commandants on both sides and the native commissioners, and a divorce is "conceded." If the parties are not satisfied with the result, they can claim a decision by a competent Judge according to custom. It is of course open to the husband to consent to such a divorce or to refuse to do so. If the husband consents, the divorce would in law be one at the instance of the husband who can divorce his wife without stating any grounds at his free will and pleasure. It is only where the husband withholds his consent that the matter would have to come before the Judge. The section dealing with the right to a divorce on the husband's failure or inability to maintain his wife runs thus:—

> "A married man decaying into poverty, so as to be unable to maintain his wife, such wife, if she should be possessed of any wealth which she is unwilling to share with her husband, may obtain a divorce, should she wish it, under the same provision as stated in the 76th Article" (section 92).

Mr. Samarawickreme contends that under this section it is not required that the divorce, which the wife seeks, should be granted by a competent Court or a sitting Magistrate, and that the reference to Article 76 does not incorporate the provisions of Article 75, but merely requires that the wife should in such a case restore to the husband the *maggar*. I think the second part of his contention is sound. But although section 92 does not expressly require the intervention of a Judge or the consent of the husband, the use of

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the word *obtain* implies that she cannot cancel the marriage according to her own will and pleasure, but that it should be granted to her by another who is legally competent to grant it. She might induce her husband to divorce her and thus *obtain* a divorce from him, or if he declines to do so, then she must *obtain* a divorce from the only other authority empowered to grant it, and who can act as a subsitute for the husband, the *Kâzi*, or the officer corresponding to him under our law—a competent Judge. She is, in my opinion, nowhere permitted to annul or dissolve her marriage without the consent of her husband or without a judicial decree. To give to the wife the rights she claims in this case is to make a fundamental alteration in her rights with regard to the marriage contract. In the absence of clear and explicit language, it cannot be presumed that the framers of the Code of 1806 made such a radical departure from a well-recognized principle of the Muhammadan law and of the rules of the Shafei sect.

Then it is contended that the dissolution of a marriage at the request of a wife without any notice to the husband by Mowlanas or men claiming to be descendants of the Prophet and learned in the law has the sanction of custom in Ceylon. Such a custom has not been proved to be generally prevalent in the Island, and it is, in my opinion, repugnant to the principle of law existing among the Shafeis. It cannot be recognized by a Court of law. Speaking of the right of divorce for importance which the *Kâzi* alone can grant, Amir Ali says: "A divorce granted by the *fatwa* (decision) of the *mullahs* (doctors of law or learned priests) is absolutely illegal and invalid. The *Jam'a-ush-shittat* says that no proceeding for divorce on the ground of physical incapacity is valid without recourse to the *muraf'a* (Court) of the *Hâkim-ush-shar'a*. (Judge)." (Page 597.)

The same rule, in my opinion, applies to divorces which Mowlanas purport to grant on the ground of the husband's failure to maintain his wife, for, according to the *Hedaya* (*bk. IV., ch. XV., p. 397*) for non-maintenance, the *Kâzi* can effect a divorce "in the same manner as in cases of emasculation and impotence."

Mowlanas are not referred to in the text-books on Muhammadan law to which I have referred in the course of this judgment, but I have no doubt they occupy a position analogous to that of the *mullahs* of India. It is, however, suggested that at the present day these Mowlanas have the same status and exercise the same powers in matrimonial matters as the *Kâzi*. I do not think so. The *Kâzi* was an official appointed by the State and was the Judge who decided all civil and matrimonial disputes between Mussulmen parties. If such an official existed in Ceylon, when the Code of 1806 was formulated, he has been superseded by the Judges of the Courts—the sitting Magistrates. There are references in the Code to the "competent Court" and "the sitting Magistrate," and they

appear to be entrusted with the duties which the *Kâzi* ordinarily performed under the Muhammadan law. *Kâzis* existed and do exist in India, but according to Amir Ali their duties are now merged in the Civil Courts (page 600), and their acts possesses no legal authority or official sanction. The matrimonial jurisdiction conferred on the sitting Magistrate by the Muhammadan Code is now vested in the District Courts of the Island (*Ageska Umma v. Abdul Carim* (*supra*)) which have exclusive jurisdiction in matrimonial matters. The fact that the application of Chapter XLII. of the Civil Procedure Code dealing with matrimonial causes is expressly excluded in the case of Muhammadan marriages is of no consequence. The provisions of that chapter are such that they cannot be applied to cases between Muslim spouses. But in view of the definition of the term " action " in section 6 of the Code, an action by a Muslim wife to obtain a divorce can be prosecuted under the general rules of civil procedure.

For these reasons I hold that the conclusion arrived at by the learned District Judge in his clear and well reasoned judgment is right, and I agree that the verdict and sentence should be confirmed.

Conviction affirmed.