1947 *Present:* **Canekeratne and Dias JJ.**

NOORUL NALEEFA, Appellant, *and* MARIKAR HADJIAR, Respondent.

S. C. 170—D. C. Kalutara, 26,076.

Divorce—Action by Muslim wife—Fasah Divorce—Dissolution on ground of leprosy—Jurisdiction of District Court—Grounds of divorce—Powers of Kathi Court—Chapter 99, Legislative Enactments.

The provisions of Chapter 99 of the Legislative Enactments do not preclude a Muslim wife from bringing an action in the District Court for a dissolution of marriage on the ground of leprosy of the husband.

The principle of the Muslim law that leprosy is a ground of repudiating the contract of marriage is still part of the law of Ceylon.

Per DIAS J.: The combined effect of sections 50 and 51 (2) of the Muslim Marriage and Divorce Ordinance (*Cap. 99*) is to revest in the District Courts the jurisdiction to try actions for divorce which are instituted by Muslim wives against their husbands and which do not fall within the ambit of the definition of "*Fasah Divorcce*" in section 51 (1). In such an action no decree *nisi* can be pronounced, no order for alimony or the custody of the children can be made, and it is doubtful whether the wife will be entitled to demand that her costs should be provided by the husband.

APPEAL from a judgment of the District Judge, Kalutara.

H. V. Perera, K.C. (with him *M. I. M. Haniffa, U. A. Jayasundera, G. T. Samarawickreme* and *M. S. Abdulla*), for the plaintiff, appellant.—The question that arises for consideration on this appeal is whether the District Court has in certain circumstances jurisdiction to entertain an action for dissolution of marriage between Muslims. It is clear that prior to 1929 the District Court had such jurisdiction (see *The King v. Miskin Umma*[1]). Then the Muslim Marriage and Divorce Ordinance, No. 27 of 1929, was enacted. Section 15 provides that where a wife wishes to effect a Fasah divorce the procedure laid down in a schedule to the Ordinance should be followed. The Ordinance defines what is meant by the term, "Fasah divorce" (*vide* section 51). It was one sought by a wife, "on the ground of ill-treatment or for an act or omission on his part amounting to a 'fault' under the Muslim law". It is conceded that where a wife desires to obtain a divorce which falls within the class of Fasah divorces as defined in the Ordinance, the procedure laid down in the Ordinance and that procedure alone must be followed. It is submitted however that the effect of the Ordinance is not to restrict the wife to the kind of divorce defined there. Under the law existing at the time of the enactment of the Ordinance a wife could have sought divorce on other grounds not included in the definition of Fasah divorce. An affirmative statute will not be presumed to repeal the existing law, whether statutory or custom, unless it cannot stand together with it (*vide* Beale's *Cardinal Rules of Legal Interpretation*, p. 527). Again as

[1] *(1925) 26 N. L. R. at 343.*

the District Court had jurisdiction in these matters, that jurisdiction would not be taken away except by express words or necessary implication (*vide* 31 Hailsham 508 ; Beale p. 384).

[DIAS J.—What is the effect of the introductory words stating that the Ordinance is one to amend and consolidate the law ?] That statement did not appear in the original Ordinance. It has been put in by the Commissioner entrusted with the task of bringing out the Revised Edition of the Legislative Enactments. He had no power to change or add to the introductory words in order to alter the scope of the Ordinance.

[CANEKERATNE J.—The Commissioner has merely put together the two Ordinances dealing with the subject. When he says to amend and consolidate the law, he means the statute law.]

That must be so specially in view of section 50 which preserves the Muslim law of marriage and divorce and the rights of Muslims thereunder.

Under the general provisions of Muslim law, especially of Shafei law, a wife was entitled to dissolution of marriage on the ground of the impotence of the husband at the time of marriage or on the ground of his suffering from leprosy. Neither leprosy nor impotence could be said to be "an act or omission" on the part of the husband and, therefore, could not fall within the grounds of a Fasah divorce as defined in the Ordinance. It could not have been intended to deprive a wife of her right to divorce on these grounds in the absence of clear and express words directed to that end. In this case the appellant alleges that the husband is suffering from leprosy and that she is on that ground entitled to a divorce. Leprosy whether contracted before or after the marriage is a ground for dissolution (*vide* the Mohammedan Code of 1806, section 92, *Minhaj et Talabin* p. 299, *Fitzgerald* p. 80). The appellant also asks for a Khula divorce stating that she is willing to pay any reasonable sum for release from the marriage tie. This form of divorce is recognized among Muslims (vide *26 N. L. R. at 280, 281*) and is stated to have been first granted by the Prophet himself (vide *Tyabji* p. 235; *Ameer Ali,* Vol. II. p. 506).

N. E. Weerasooria, K.C. (with him *E. F. N. Gratiaen, K.C., H. W. Jayewardene* and *M. Rafeek*), for the defendant, respondent.—The introductory words to the Ordinance, namely, "to amend and consolidate the law relating to the marriage and divorce of His Majesty's subjects in Ceylon professing the Muslim faith", correctly set forth the effect of the enactment. It was passed in order to relieve the lay Courts of the task of dealing with Muslim divorces and of placing the matter in the hands of Kathis who are conversant with Muslim customs. There were various forms of divorce (1) tollok, (2) Khula, (3) Mubarat. Khula is divorce at the instance of the wife. Mubarat is divorce by mutual consent. The difference between these various forms lay in the different consequences as to property. But in all cases the divorce had to be given by the husband. For instance, in the case of Khula the husband's consent to the divorce may be obtained in consideration of a payment, but he himself gives the divorce and there is no intervention of Court (vide *Ameer Ali,* Vol. II., p. 474, 5). It is the husband's consent that matters (see Wilson's *Anglo-Muhamadan Law,* p. 154). In the case of

Khula there is divorce by the husband to which section 14 applies. That section requires the procedure set out in the second schedule to the Ordinance to be followed. There was also judicial divorce for which a wife sought the intervention of Court. All the grounds for such divorce are available under the Ordinance except possibly impotence and leprosy. Impotence had to be such as existed at the time of marriage. A wife can on such ground obtain a decree for nullity under the general law. A wife therefore still has her remedy. In the case of leprosy there seems to have been some controversy as to whether subsequent leprosy would be a ground for divorce. Wilson says that Minhaj alone gives it as his personal opinion that it would be a ground. It will be seen therefore that apart from the question of leprosy in regard to which there is some doubt, a wife has under the Ordinance all the remedies which she had before the enactment.

There can be no doubt that the intention of the Legislature was that the Kathi should deal with these matters and the Court should cease to be concerned with them. An important consideration appears to be that the Kathis could explore more fully the possibility of reconciliation on which Muslims set much importance. Again, there is provision for registration of divorces effected under the Ordinance but none for divorces granted by Court. It could not have been intended to have an incomplete system of registration. If it is held that the District Court has also jurisdiction there will be two forums competent to grant Fasah divorces but on different grounds ; and the whole scheme and purpose of the statute law will be frustrated.

H. V. Perera, K.C., in reply.—Minhaj states very definitely that subsequent leprosy is a ground for divorce. This is supported by Fitzgerald (*vide* Fitzgerald's *Digest*, p. 80) and there is no statement anywhere that it is not a ground. There is a recent Indian Act No. 8 of 1939, the Muslim Marriage Dissolution Act, which was passed to consolidate the law of divorce in India, and in it subsequent leprosy is explictly stated to be a ground for divorce (*vide* section 6).

One must distinguish between the grounds for divorce and the procedure laid down for obtaining it. Even if no procedure is laid down but the substantial right or remedy exists the Court will adapt its own general procedure to suit the particular matter. The Ordinance really lays down the procedure to be followed in certain kinds of divorces. It does not purport to lay down the grounds. The grounds are those which existed under the general Muslim law. Since the Ordinance deals with procedure and not with grounds for divorce it cannot be said by implication to affect or restrict the latter.

Cur. adv. vult.

October 2, 1947. CANEKERATNE J.—

This is an appeal from a decision of the District Judge of Kalutara, dismissing a wife's action for divorce on the ground of the leprosy of the defendant. The parties are Muslims of the Shafi sect and were married on December 28, 1938, the wife being then about 20 years old ; there has been consummation of the marriage.

The plaintiff, it appears, discovered that the defendant was suffering from leprosy and about the end of the year 1945 she started living separately from him.

On the date of trial 33 issues were framed and on the suggestion of the defendant's Counsel, the trial Judge decided to hear issues 12, 13, 19, and 20, as preliminary issues on the ground that they go to the root of the case. Issue No. 19 refers to the proceedings and orders in Kathi case No. 375 ; it was decided against the defendant and no attempt was made at the argument in appeal to show that the decision was erroneous. The other three issues deal with the right of the plaintiff to institute this action and was decided against her. There was an alternative claim to relief put forward by the plaintiff that she was entitled to a Khula divorce.

The question for our decision is, whether a Muslim wife can have recourse to the civil courts for the purpose of obtaining a dissolution of her marriage. It is contended that the provisions of Chapter 99 C. L. E. preclude her from doing so. Prior to January, 1937, the date when Ordinance No. 27 of 1929 came into operation, the civil courts of the Island were as much open to a Muslim married woman as to her sister subject to what is known as the common law of the Island to obtain relief in matrimonial disputes ; thus she could sue him for recovery of dower or maggar [1], for maintenance and for divorce. In the latter case the application would be made to a District Court ; these Courts have exclusive jurisdiction in matrimonial matters (section 62 of the Courts Ordinance, Ch. 6 C. L. E.) ; "the sitting Magistrate" or "Competent Judge" of the Mohammedan Code of 1806 corresponds to the District Judge. The general rules of Civil Procedure, not those in Chapter XLII of the Code (Ch. 86 C. L. E.) would be applicable in an action instituted by her [2].

Marriage is, in Mahommedan law, simply a contract, it is likened to a contract of sale, or exchange. A purchaser of goods had a right to rescind the contract on discovery of some hidden fault, or on breach of a condition relating to certain defects, these were called options of defect—redhibitory defects. Redhibitory defects are those which either destroy or impair the usefulness of the thing sold for the purpose for which things of that kind are ordinarily intended to be used. The purchaser can bring an action for the rescission of the contract and recovery of the purchase money. The parties to a contract of marriage may agree on the terms of the contract, and if the terms are of a reasonable nature and are not opposed to the policy of the law, they will be binding. Thus an agreement entered into before marriage by which it is provided that the wife should be at liberty to divorce herself from her husband under certain specified contingencies would be valid if the conditions are reasonable [3].

It may be useful to start with the law that was in force in the adjoining country, Palestine. The right of divorce rested entirely with the man, and the grounds of it in Deuteronomy are very vaguely expressed. "If she find no favour in his eyes because he hath found some unseemly

[1] *For an instance, see Beebe v. Pitche (1924) 26 N. L. R. 277.*
[2] *Ayesha Umma v. Abdul Carim (1880) 4 S. C. C. 13, p. 14.*
The King v. Miskin Umma (1925) 26 N. L. R. 330.
[3] *Hamidoola v. Feizunnissa (1882) 8 Cal. 327.*

thing in her, he shall write her a bill of divorcement"[1]. This expression gave grounds for much difference of interpretation. In later times there was considerable divergence of opinion among the rabbis themselves. The school founded by Shammai (first century B.C.) pressing the words "unseemly thing" (the most literal rendering of the word being "nakedness") understood it of unchastity; the school of Hillel pressing the word "thing" and the clause "if she found no favour in his eyes" supposed the most trivial causes to be included, declaring for instance, that a wife might be divorced, even if she burnt her husband's food. It may be doubted, however, how far the latter opinion was literally acted upon. It is most natural to understand the word ("nakedness") of immodest or indecent behaviour. The grounds mentioned in the Misnah as justifying divorce are violation of the law of Moses, or of the Jewish customs. The Hillelite doctrines were, according to Ameer Ali[2], chiefly in force among the Jewish tribes at the time of the Prophet's appearance and repudiations of wives by husbands were as common among the pagan Arabs. Mohammed set himself to ameliorate the position of women. "Ye men" he said "ye have rights over your wives, and your wives have rights over you". Free divorce the Prophet was compelled to tolerate. "The thing which is lawful but is disliked by God is divorce". There are certain cases in which divorce appears to be compulsory but even apart from them the husband may divorce his wife without assigning any cause. The wife, however, is protected by the dower, or more strictly, the bride price, of which a portion is deferred, and which may be claimed by the wife if she is divorced without cause.

The husband may divorce his wife at his mere will and pleasure, without assigning any reason. The contract of marriage may be dissolved by him in three ways:—

I. By the husband at his will. A divorce proceeding simply from the husband or from another in pursuance of authority given by the husband, the person may be the wife or a third party, is called talak[3]. Divorce by talak may be effected in the following ways[4]:—

(1) by a single declaration of talak, followed by abstinence from sexual intercourse for the period called iddat,

(2) by a declaration of talak repeated three times, during successive intervals of purity,

(3) by a declaration of talak, repeated at shorter intervals or even in immediate succession,

(4) by a declaration of talak pronounced once, provided it shows a clear intention that the divorce shall immediately become irrevocable.

II. A divorce by mutual agreement of the parties. When there is dissension between married persons ("when married parties

[1] *Deut. 24-1.*
[2] *2 Ameer Ali (4th Ed.), 522.*
[3] *Hamidoola v. Feizunnissa (1882) 8 Cal. 327.*
Ayatunnessa Beebe v. Karam Ali (1908) 36 Cal. 23.
[4] *Wilson—Anglo-Mohammadan law, 4th Ed., 143, 144.*

disagree") the woman can release herself from the marriage tie by giving up some property in consideration of which the husband is to give her a khula[1]. She takes the initiative in asking to be repudiated. The divorce is the sole act of the husband though granted at the instance of the wife and purchased by her[2]. Some valuable consideration passes from the wife as the party seeking the divorce to the husband. The wife offering, and the husband accepting, compensation out of her property for the release of his marital rights. It is called a divorce by Khula[3].

III. A divorce by mutual consent. No consideration passes from the wife to the husband. It is called a Mubarat divorce.

There is no mention in the law (Jewish law) of divorce by the wife. A wife could not legally separate herself from her husband but in later times her condition evidently improved. Among the later Jews she could claim a divorce under certain circumstances, namely, if her husband were a leper or afflicted by a polypus or engaged in a repulsive trade[4]; if he refuses to perform his conjugal duty, if he continues to lead a disorderly life after marriage, if he proves impotence during ten years, if he suffers from an insupportable disease, or if he leaves the country for ever[5].

The wife can never divorce herself from her husband without his consent; but she may under certain circumstances, obtain a dissolution or cancellation of the marriage[6] (1) when the husband is guilty of conduct which makes the matrimonial life intolerable to her, *e.g.*, as ill-treatment, neglect to perform the duties which the law imposes on him as obligations resulting from marriage, (2) on the ground of her husband's impotence, proved to have existed at the time of the marriage, provided that she then did not know of it and that it has not since been removed; but not if she knew of its existence at the time of the marriage, nor if it commenced only after the marriage had both been contracted and consummated[7].

The Shafeite law permits dissolution also in the following cases: (1) Where the husband is unable to afford her maintenance on even the lowest degree of the three recognised scales[8]. (2) Where the husband is afflicted with madness or leprosy[9].

The proceedings for obtaining a divorce on the ground of impotence of the husband, or of his insanity, or leprosy, or inability to afford maintenance are not classed with divorce in the law books but are

[1] *Minhaj (Howard's translation) 322.*
[2] *M. Buzul-ul-Raheem v. Lateefutoon Nissa, 8 M.I.A., 378, p. 396.*
[3] *Wilson op. cit. p. 151.*
[4] *Driver; Deuteronomy, 270, 271.*
[5] *Glasson; Le Marriage Civil, 149, quoting the Talmud.*
[6] *Ameer Ali op. cit. 581.*
[7] *Wilson op. cit. 153, 154.*
[8] *Wilson op. cit. 432.*
[9] *Wilson op. cit. 432.*

assimilated to the "option of defect" (*actio redhibitoria*) allowed to the purchaser of goods on the discovery of some hidden defect [1]. In the Minhaj they are referred to as grounds for repudiating a marriage [2].

Anyone who becomes aware that he has married a person afflicted with madness, elephantiasis or leprosy has a right to renounce the marriage. A wife may renounce her husband on discovering him to be impotent or castrated. A wife's right to renounce her marriage is not limited to defects existing at the time of the marriage contract, but extends to such as he may have acquired subsequently; with the exception of impotence, for a husband who becomes impotent after cohabiting with his wife can no longer be renounced by her [3].

The right of dower is affected by the exercise of the option. If the renunciation of marriage on account of redhibitory defects takes place previous to all carnal intercourse, the woman loses her right to dower. If renunciation takes place after consummation, proportional dower is due whether the defects existed at the time of the contract, or whether they became manifest between the time of the contract and the first coition; fixed dower is due only where renunciation is based upon defects ascertained after the first coition [4]. The sum of money or other property that the wife is entitled to claim from the husband by way of consideration for the surrender of her person is called dower, or maggar or mahr in Ceylon.

The Code of Mahommedan law observed by the Moors in the province of Colombo obtained statutory recognition by the decision of the Council on August 5, 1806. It was later extended to Mahommedans residing in other parts of Ceylon by Ordinance No. 5 of 1852, section 10. The provisions contained in the Code were binding on Mahommedans for a long time. Articles 74-79 and 92 deal with the question of a divorce by a wife. Articles 87-90 with the question of a divorce by a husband. Article 79, with the question of a divorce by mutual consent. Dissension between married persons is referred to in Articles 80, 81-85. The wife was entitled to obtain a divorce on the ground of the leprosy of the husband whether it was discovered before the consummation of the marriage (Art. 74), or after cohabitation had taken place (Art. 77); in the former case the woman had to restore the marriage gift (maggar), if she received no maggar she cannot claim it (Arts. 76, 78); in the latter case the wife was entitled to keep it (Arts. 77, 78).

Ordinance No. 8 of 1886 made provision for the registration of the marriages of persons professing the Mahommedan faith.

When the Code of Mahommedan law was passed leprosy was a ground of relief according to Mahommedan law and the legislature must be presumed to have left matters as they were not intending to restrict the rights of a wife.

In 1925 it was held that the marriage of a Muslim woman could be dissolved only by a divorce effected by her husband or by a divorce granted by a District Court. (*The King v. Miskin Umma* [5].) Some time

[1] *Wilson op. cit. 432.*
Minhaj 299.
[2] *Wilson op. cit. 432.*
[3] *Minhaj 299.*
[4] *Minhaj 300 (right of option).*
[5] *The King v. Miskin Umma (1925) 26 N. L. R. 330.*

after the decision in this case, the legislature after consideration of the question, passed in December, 1929, Ordinance No. 27 of 1929. The Ordinance did not come into operation till long after an amending Ordinance had been passed. It is an Ordinance to provide for the registration of Muslim marriages and divorces contracted and effected in the Island. It made provision for the appointment of Kathis. It repealed sections 64 to 102 (first paragraph) of the Mahommedan Code of 1806 and the whole of the Mahommedan Marriage Registration Ordinance (section 48). Section 14 (with the rules in the Second Schedule) deals with a divorce by a husband and section 15 (with the rules in the Third Schedule) with a divorce by a wife. A Kathi was given power to adjudicate upon—(*a*) claims for payment of mahr, not over Rs. 1,000, for maintenance, (*b*) actions for I. restitution of conjugal rights, II. for jactitation of marriage, a declaration that a person is not married to a certain man or woman. The provisions contained in "*b*" were repealed by Ordinance No. 9 of 1934. The Ordinance contained procedure for registration of Fasah divorces effected before a Muslim priest prior to April 1, 1925. It contained no definition of the words Fasah divorce, this defect was remedied by Ordinance No. 9 of 1934 entitled "An Ordinance to amend the Muslim Marriage and Divorce Registration Ordinance, 1929" which was passed in July, 1934.

The Statute law is now contained in Chapter 99 of the C. L. E. It is entitled An Ordinance to amend and consolidate the law relating to the marriage and divorce of His Majesty's subjects in Ceylon professing the Muslim faith—the words—Ordinances Nos. 27 of 1929, and 9 of 1934—appear in the margin. Mr. Weerasooria contended that the principle enunciated by Lord Hershell (in *Bank of England v. Vagliano*[1]) applied to this statute. Consolidation is the reduction into a systematic form of the whole of the statute law relating to a given statute, as illustrated and explained by judicial decisions. The consolidation merely places together in a later volume of the statute book enactments previously scattered together over many volumes: Chitty J. said, "I am here to deal not with an Act of Parliament codifying the law, but with an Act to amend and consolidate the law and therefore it is, I say, these observations" (*i.e.*, the observations of Lord Herschell in Vagliano case) "do not apply; and I think it is legitimate in the interpretation of the sections in this amending and consolidating Act to refer to the previous state of the law for the purpose of ascertaining the intention of the legislature"[2]. The Courts will lean against any presumption that such an act was intended to alter what would be the common or general law. Section 14 refers to a divorce by a husband and section 15 to a Fasah divorce by a wife. Mr. Weerasooria's contention at the start was that the whole law affecting Mahommedan spouses was to be found in Chapter 99 and that one could not resort to the general principles of the Mahommedan law in elucidating the rights of parties. Mahommedans, he said, attach such great importance to attempts at reconciliation of disputes between spouses that a special Court composed of members of their faith who were conversant with the customs of the community was appointed

[1] *(1891) A.C. 107, p. 144.*
[2] *Re Budgett (1894) 2 Ch. 557.*

to which all matrimonial disputes were relegated. The civil courts, he argued, had power of inquiry only where the jurisdiction of the Court was specially left unaffected and as no such power was reserved by the Ordinance no application for relief could be made.

The husband may divorce his wife at his mere will and pleasure, without assigning any reason: this rule of the Mahommedan law is recognised by the Ordinance and section 14 prescribes the procedure to be followed by the husband. What has to be done is laid down by the rules in the Second Schedule—declaration of talak must be made on three occasions. If he obtains a permit from the Kathi he must register it. There is a material difference in the language used in the next section, which is the one dealing with a wife's application. The section provides what the wife is to do if she desires to effect a Fasah divorce from her husband. She has to appear before the Kathi. It is the duty of the Kathi, to try to settle the matter by all lawful means (r. 3 of the third schedule). She has a limited right of relief—she can obtain a Fasah divorce. This is defined in section 57 (1), a divorce originating in an application made by a wife without the consent of her husband for divorce on the ground of ill-treatment or on account of an act or omission on his part amounting to a "fault" under the Mahommedan law. If the ground for a divorce is ill-treatment by the husband or an act or ommission on his part amounting to a fault under the Muslim law, then she must make an application to the Kathi; in these cases this is the only relief available to a complaining wife. It is not possible to apply the provisions of the section (section 15) to cases, if any, in which a Muslim woman had a right to obtain a divorce or dissolution of her marriage from her husband on other grounds. Limited jurisdiction is conferred on the Kathi. It was contended that the Ordinance impliedly took away the right, if any, to apply for a divorce or dissolution on any other ground; sections 20, 43, were referred to in this connection: also that the object of the Ordinance was to have a complete register and that this object will become impossible of attainment if divorces could be obtained otherwise. Section 43 has hardly any application to this question; the latter part of section 20 contains wide language; its effect is to penalise a Muslim who aids or abets another Muslim to do certain acts. It was contended further that section 49 expressly provides for an action being brought in a civil court in certain cases and that resort cannot be had to civil courts in other cases. Much stronger language than that contained in section 20 or section 49 would be required to deprive a person of a right, if any, which she had before the promulgation of the Ordinance.

Section 50 has to be considered—the language of the section is as follows:—The repeal of sections 64 to 102 . . . . shall not affect the Muslim law of marriage and divorce, and the rights of Muslims thereunder. Mr. Weerasooria would restrict the applicability of the general principles of the Mahommedan law to an action for nullity of marriage only. Leprosy was, he argued, a redhibitory defect and a married woman's right to get relief on this ground was analogous to the right of a purchaser of goods complaining of a hidden defect. The defect

should be in existence at the time when the contract was made. Reference was made in this connection to the passage in Wilson p. 432 (4th Edition).

A woman who had entered into a contract of marriage could seek relief in certain cases: an option of defect, or an option of repudiation was available to her, she could take steps to rescind the contract. It is possible to arrange the grounds under the following heads:—

(1) Circumstances negativing reality of consent, such as coercion, fraud, option of puberty—the fact that a minor has not attained puberty,

(2) Certain defects of the body, even though these only became manifest after the marriage. The importance of the husband may be classed under this. These are really redhibitory defects and the general rules attaching to redhibitory defects in the contract of sale would probably apply—the defects should have been in existence at the time when the contract was made or the defect though originating after taking possession should be the consequence of some previous defect.

(3) Madness or leprosy of the husband. The cases where relief can be obtained on the ground of leprosy have already been discussed. It is only as a convenient form of expression that the term "redhibitory defects" seems to be applied to the grounds on which the option of defect could be exercised.

The principle of the Mahommedan law relating to leprosy as a ground for repudiating the contract of marriage is still part of the law of Ceylon.

Cogent reasons were adduced by Mr. Weerasooria to show that the proceeding known as a divorce of Khula amounts to nothing more than an offer by the wife to the husband to divorce her; the offer does not result in legal rights unless and until it is accepted by the husband and no steps can be taken by her in a Court of law if the husband refuses to accept the offer. A Khula divorce though it is in form a divorce of the husband by the wife operates in law as a divorce of the wife by the husband.

The question whether the plaintiff is entitled to relief is a question of fact to be determined on the evidence. The order on issues 12, 13, 19, and 20 is set aside and the case is sent back for trial. The appellant is entitled to the costs of appeal and of the contest in the lower Court.

DIAS J.—

I agree with my brother Canekeratne that the judgment of the District Court which has been appealed against should be set aside and the case sent back for trial and that the respondent should pay to the appellant the costs of appeal and of the contest in the lower Court.

In view, however, of the importance of the questions raised I would like to make a few observations of my own.

Under the Mohammedan law there are four forms of divorce which are recognized :——

(1) By the husband pronouncing "Tollok" without assigning any cause. In such a case it is the husband who divorces the wife—See *Beebee v. Pitchie* [2].

(2) The "Mubarat" divorce where the spouses agree and consent to being divorced. In this case also it is the husband who gives the divorce by pronouncing Tollok"—*See Beebee v. Pitchie* [2].

(3) The "Kulah" divorce which is a dissolution of the marriage at the instance of the wife who on compensating her husband he pronounces the "Tollok"—See *Beebee v. Pitchie* [1] and *R. v. Miskin Umma* [3].

(4) There was a fourth form of divorce granted at the suit of the wife by the Kazi or Judge for which there is no special name but which is called by the commentators "a judicial divorce"—See *R. v. Miskin Umma* [3].

It is to be noted that the first three forms of divorce, *i.e.*, by the husband, do not come before any judicial tribunal. It is also to be noted that if the husband refused to give his wife either a "Mubarat" or "Kulah" divorce, the only right the wife had of obtaining a divorce was by the fourth method.

Then came the unsatisfactory and incomplete Mohammedan Code of 1806. Sections 64 to 102 of that Code dealt in an incomplete manner with Mohammedan marriage and divorce. There was no special tribunal appointed which could grant to a Mohammedan wife the fourth form of divorce. This was pointed out in the case of *Rex v. Miskin Umma* [3] by Bertram C.J.—"When on the assumption of British rule in India and Ceylon the Mohammedan 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 Mohammedan divorces *in so far as these require a judicial decree*".

In the year 1871 in *D. C. Colombo, 54,376* [3] and in the Full Court decision of *Ageska Umma v. Abdul Careem* [4] Muslim wives sued for divorces from their Mohammedan husbands in the District Court. Referring to these cases A. St. V. Jayawardene J. said in *R. v. Miskin Umma* [3]: "The matrimonial jurisdiction conferred on the sitting Magistrate by the Mohammedan Code is now vested in the District Courts of Ceylon (*Ageska Umma v. Abdul Careem*) which have exclusive jurisdiction in matrimonial matters. The fact that the application of Ch. XLII of the Civil Procedure Code dealing with matrimonial cases is expressly excluded in the case of Mohammedan marriages is of

[1] *(1924) 26 N. L. R. at p. 280.*
[2] *(1925) 26 N. L. R. at pp. 338–339 and see generally Rabiya Umma v. Saibo (1914) 17 N. L. R. at pp. 339 and 341 and R. v. Miskin Umma (1925) 26 N. L. R. at pp. 335, 340 and 343.*
[3] *(1871) Vanderstraaten p. 196.*
[4] *(1880) 4 S.C.C. page 13.*

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".

In the year 1886 was enacted the Mohammedan Marriages Registration Ordinance, No. 8 of 1886, but this enactment was not concerned with the law of divorce.

In the year 1914 in the case of *Rabiya Umma v. Saibu*[1] the Supreme Court held that the Shafei law, which is applicable to the Mohammedans of Ceylon, recognized the right of the wife in certain cases to divorce her husband on the ground of desertion, and the case was sent back to ascertain how far, if at all, and subject to what conditions, that right has been admitted as a matter of custom in Ceylon. Obviously, this refers to the fourth form of divorce and the law at that date in regard to this form of action was uncertain.

This uncertainty came to a head in 1925 when the matter was fully considered in *Rex v. Miskin Umma* (*supra*). A "practice" had been intruding itself into the life of the Mohammedan community in Ceylon under which certain persons purported to grant or certify divorces between husband and wife *at the instance of the wife.* A Muslim wife having been divorced by such a person remarried. She was then charged with bigamy and convicted. In appeal, therefore, the whole legal question came up for decision. It was held that in regard to the fourth form of divorce it could only be granted by the decree of a Court, and that that Court was the District Court acting under its general matrimonial jurisdiction. It was also held that the Code of 1806 was incomplete and had to be read in the light of the general principles of Mohammedan jurisprudence. Pausing at that point, it is quite clear that up to the year 1925 it was the District Court and the District Court only which had the requisite jurisdiction to grant the fourth form of Mohammedan divorce, *i.e.,* an action by the wife against her husband without his consent.

This led to the enactment of Ordinance No. 27 of 1929 as amended by Ordinance No. 9 of 1934 and which now appears as Ch. 99 in the revised edition of the Legislative Enactments.

It is to be noted, however, that the editor of the revised edition has called Ch. 99 : "An Ordinance to amend and consolidate the law relating to the marriage and divorce of His Majesty's subjects in Ceylon professing the Muslim faith". There is no warrant for this description either in Ordinance No. 27 of 1929, or Ordinance No. 9 of 1934 both of which became law on January 1, 1937—vide *Government Gazette* No. 8,256 of November 13, 1936. On the contrary, the provisions of section 50 of Ch. 99 clearly show that the Ordinance is not exhaustive because that section definitely says that the Muslim Law of Marriage and Divorce and the rights of Muslims thereunder are not affected by the repeal of sections 64 to 102 of the old code of 1806.

[1] *(1914) 17 N. L. R. 338.*

So far as the law of Mohammedan Divorces was concerned, this statute made two important changes :—

(1) In regard to divorce by the husband, *i.e.*, the first three forms of divorce, section 14 of Ch. 99 made it obligatory that the procedure in Schedule II. of the Ordinance was to be adopted. No decree of a judicial tribunal was necessary.

(2) In regard to the fourth class of divorce, *i.e.*, by the wife against her husband without his consent, these were to be dealt with by the newly created Kathi Court following the procedure laid down in Schedule III. of the Ordinance. An appeal lies from the decision of the Kathi to the Board of Kathis and therefrom to the Supreme Court.

It is to be specially noted that the draftsman of Ordinance No. 27 of 1929 did not attempt to define the expression "Fasah Divorce" used in section 15 which gave a Muslim wife the right to institute divorce proceedings in the Kathi Court. It was wrongly assumed at the argument that the definition of "Fasah Divorce" now appearing in section 51 of Ch. 99 was introduced by Ordinance No. 27 of 1929. That is not correct. This definition was brought in to the Ordinance by Ordinance No. 9 of 1934 which added to the interpretation clause the definition of what the draftsman of that Ordinance thought was a Fasah divorce. I have called for and perused the statement of objects and reasons of Ordinance No. 9 of 1934. This states: "The definition of Fasah Divorce is new, and is inserted on the recommendation of the Committee and in accordance with their views regarding the implications of the term[1]". It seems that if this definition had not been inserted in the main Ordinance the difficulties which arise in the present case would never have occurred.

Two sections of Ch. 99 create the difficulty. Section 51 (1) defines a Fasah Divorce *to mean*:—"A divorce of spouses subject to Muslim law effected in accordance with the procedure prescribed in the 3rd Schedule in a case where proceedings originate in an application made by a wife without the consent of her husband for a divorce on the ground of ill-treatment or on account of an act or omission on his part amounting to a 'fault' under the Muslim law". What such a "fault" is under the Mohammedan law the legislature did not attempt to define. Furthermore, the "fault" to afford a cause of action in favour of the wife must be due to an act or omission on the part of the husband. Obviously, a husband who contracts leprosy or insanity cannot very well be said to be guilty of a fault due to an act or omission on his part. The draftsman also forgot to notice the provisions of section 50 (which originally was the proviso to section 48 of the original Ordinance). Section 50 says:—"The repeal of sections 64 to 102 (1st paragraph) inclusive of the Mohammedan Code of 1806 which is effected by this Ordinance shall not affect the Muslim Law of Marriage and Divorce and the rights of Muslims

[1] I have examined the reason given by the Committee in its *irterim* report of December 21, 1933. It is "that it is desirable that the meaning of the expression should be made clear by a special definition"—see Sessional Paper IV. of March, 1934. This Committee consisted of Messrs. P. E. Pieris, Chairman, M. C. Abdul Cador, S. M. Aboobucker, Mohammed Macan Markar, A. H. M. Ismail, M. I. M. Haniffa, T. B. Jayah and P. D. Ratnatunge.

thereunder". The effect of section 50 appears to be that notwithstanding the repeal of sections 64 to 102 of the old Mohammedan Code, the common law of the Muslims in Ceylon and their rights thereunder in regard to the Mohammedan law of marriage and divorce are preserved intact. The effect of Ch. 99 is to oust the jurisdiction of the District Courts (which was recognized in all judicial decisions up to *R. v. Miskin Umma* (*supra*) to entertain actions for divorce by Muslim women in regard to the fourth class of divorce and to vest exclusive jurisdiction in the Kathi Court to try Fasah Divorces brought by a wife against her husband (section 15). But when Ordinance No. 27 of 1929 defined what was meant by a Fasah Divorce the combined effect of that definition read with section 50 of Ch. 99 was to revest in the District Courts the matrimonial jurisdiction to try actions for divorce by wives against their husbands in cases which do not fall within the ambit of the definition of Fasah Divorce. For example, if it is a valid cause of action for a woman to sue her husband for leprosy contracted after the consummation of the marriage, and such leprosy was not due to an act or omission on his part amounting to a fault under the Muslim law, obviously, the Kathi Court has no jurisdiction and the case must be tried by the District Court under its ordinary matrimonial jurisdiction and not under Ch. 99. No decree *nisi* can be pronounced, no order for alimony can be made, no order regarding the custody of the children can be made and it is doubtful whether the wife will be entitled to ask that the husband should provide her costs of action.

The resulting position is unsatisfactory and was, I think, never intended by the Legislature. Today a Muslim wife who wants to obtain a divorce from her husband without his consent has to decide whether she has to go before the Kathi Court or whether she could file her action in the District Court. These are matters for the Legislature.

I am, therefore, of opinion that the order appealed against cannot stand.

Appeal allowed.