Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Mussumat Mulleka v. *Mussumat Jumeela and others, from the High Court of Judicature at Fort William in Bengal; delivered 21st December,* 1872.

Present:

Sir James W. Colvile.
Sir Barnes Peacock.
Sir Montague Smith.
Sir Robert P. Collier.

Sir Lawrence Peel.

THE Appellant was one of the Defendants in the Court below. The suit was brought to recover a very large sum of money—viz., 16.25,000 rupees, upwards of 160,000*l.*, as the balance due on account of Dain Mohur, or dower alleged to have been settled upon the Plaintiff Jumeela by her late husband Syud Mahomed.

The suit was instituted by Jumeela and two other persons, viz., Mr. H. O. King, a Mooktear, and Mussumut Summunt Koonwaree, Mr. H. O. King being a purchaser for the sum of 5,000 Rs. of one-fourth part of the amount alleged to be due to the Plaintiff Jumeela, and also of one-fourth of her share in the landed estate of her deceased husband, and the Plaintiff, Mussumat Summunt Koonwarree, being also a purchaser of another fourth part of Jumeela's Dain Mohur, and of her share of her deceased husband's estate for a like sum of 5,000 Rs. (Bill of Sale, Record, page 82).

The dower was described in the plaint as "Dain Mohur, Moûjjul," or dower payable at a future period on divorce or death of the husband.

The Defendants pleaded limitation, upon the ground that the Plaintiff had been divorced by her husband more than twelve years before the commencement of the suit.

Three issues were laid down :—

1. Whether Syud Mahomed actually divorced the Plaintiff Mussumut Jumeela, his wife.

2. How much of the Dain Mohur was payable immediately, and how much deferred.

3. Whether, with reference to the determination of the first and second issues, the suit was barred by limitation.

With reference to the last issue, it should be stated that the suit was commenced on the 3rd of September, 1860, and that the period of limitation was that fixed by Regulation 3 of 1793, section 14, viz., twelve years. The marriage took place more than twelve years before the commencement of the suit. Syud Mahomed died on the 21st February, 1854—more than six years, and less than twelve years before the commencement of the suit.

The case was tried by the Principal Sudder Ameen of Bhangulpore upon the second issue in the first instance. He found that the Dain-Moher was prompt and with advertence to that finding, he held that the twelve years ought to be calculated from the date of the marriage, and that consequently, the suit was barred by lapse of time. He did not consider it necessary to try the first issue, whether the Plaintiff had been divorced or not, but dismissed the suit with costs, on the ground of limitation.

The case was appealed to the High Court for a 12-anna share of the sum claimed on account of Dain-Moher, exclusive of the one-fourth share of Mr. H. O. King, who did not join in the Appeal. (Record 177). The Petitioners in the Appeal were Jumeela and Summunt Koonwarree, and also one Loknath Messer, who, pending the suit, viz., on the 31st March, 1862, purchased from Jumeela, for the sum of 400 rupees, a 2-anna share of her Dain-Moher.

The Appeal was heard, by a Division Court. They found that the divorce was not proved, and held that the suit was not barred by limitation. They reversed the decision of the Principal Sudder

Ameen, and remanded the case to him to try what was the amount of the dower. That was on the 31st of May, 1864.

The Defendants, on the 23rd June, 1864, appealed to Her Majesty in Council against that decision.

The case having gone back upon remand under the decision of the High Court, the then Principal Sudder Ameen, a Mahomedan, proceeded to try what was the amount of the dower. Many witnesses were examined on both sides, and he found that the Dain-Moher was settled at one lac and eighty thousand, one moiety rupees, and the other gold mohurs, and he gave a decree for the Plaintiffs for the amount claimed, viz., 16.25,000 rupees, with costs and interest. He came to that conclusion not only upon the evidence of witnesses who spoke to what actually took place, but upon the evidence of other witnesses, to whom he gave credit, that the custom prevailing in the Plaintiff's family and also in most of the other respectable families in Bhangulpore, was in accordance with the amount which the other witnesses proved to have been actually settled in their presence.

On the 13th February, 1865, an Appeal was preferred by the Defendants to the High Court against that decision. The case was heard before a Division Bench of the High Court, and the Appeal was dismissed, with costs.

The Defendant Mussamat Mulleka alone, on the 5th July, 1866, appealed to Her Majesty in Council against the last-mentioned decree of the High Court, the other Defendant having compromised the claim against him.

We have therefore, under the two Appeals before us, to consider whether the Judgment of the High Court over-ruling the plea of limitation, and remanding the case, and the decision as to amount of dower are correct or not. Their Lordships are of opinion that a divorce was not proved. In this respect they concur in the finding of the High Court upon a question of fact. They intimated that opinion in the course of the argument.

It is now to be considered whether the suit was barred by limitation. In the first place we will consider whether it was barred if the dower was prompt.

The Principal Sudder Ameen on the first trial held that as the dower was settled without any specification as to the time at which it was to be payable, it must according to the Mahomedan law be considered to be Dain Moher Mooujjul, to be paid, to use his own words, "on demand or immediately on demand by the wife." The High Court upon the first appeal considered the Mahomedan law to be precise, that if nothing is said at the time, the dower is to be considered exigible; but they held upon the authority of Ameeronissa's case, 6 Moore's Indian Appeals, 211, that although the dower was exigible, the Plaintiff Jumeela was not bound to sue for it during the life of her husband.

Their Lordships are of opinion that the Principal Sudder Ameen, who first tried the case and who considered that the dower was payable on demand, was not correct in holding that the cause of action accrued to the wife before dissolution of the marriage without demand. There are no doubt conflicting decisions as to the period at which a cause of action accrues to a wife in respect of prompt dower. Prompt dower is said to be exigible immediately. Macnaghten in his principles of Mahomedan law, page 59, says, "where it has not been expressed whether the payment of the dower is to be prompt or deferred, it must be held that the whole is due on demand." The word "exigible" implies that it may, not that it must be exacted, and therefore it would seem that a cause of action in respect of it does not accrue so long as the marriage exists, until the wife does something to show that she requires it to be paid. According to the Mahomedan law a woman may refuse herself to her husband as a means of obtaining so much of her dower as is prompt. Baillie, Dig. of Mahomedan law, page 125. That is a mode of exacting it. But she is not obliged to adopt it. It is optional with her either to insist upon the payment of her prompt dower during her husband's lifetime, or to wait until the dissolution of the marriage.

In Meer Nujib Ollah *v.* Mussumat Doordana Khaloon, Macnaghten's Select Cases, vol. i, page 103, it was held that the right to prompt dower was barred by limitation in consequence of the period which had elapsed since the date of the settlement, although at the time of the commencement of the

suit, twelve years had not elapsed since the husband's death. That decision was followed in Noorunissa Begum *v.* Nawab Syud Mohsin Alli Khan, 7 Macnaghten's Select Reports, page 40. In the case of Nawab Jung Bahadoor Khan *v.* Mussamut Uzeez Begum Suder, Decisions N. W. P. for 1845, page 180, the Court pointed out the distinction between a contract to pay on a stipulated date, and a contract to pay on demand, and said that, in the former case, should the obligor fail to pay on the stipulated day, a cause of action would then accrue for the recovery of the sum due, but that in the case of an obligation to pay on demand (which they considered an obligation to pay exigible dower to be) there was no infraction of the obligation, and, consequently, no legal cause of action before demand. From the case of Ameeroonissa *v.* Moraadoonissa, 6 Moore's Indian Appeals page 229, it would seem that the Lords of the Judicial Committee were of opinion that limitation in respect of prompt dower did not run from the time of the marriage but from the death of the husband. In that case there was a settlement by which the husband agreed to pay dower when demanded by his wife. The wife was not suing for her dower, but was in possession of her deceased husband's property, and set up her right of dower in answer to the husband's heir, who sued to recover possession of the estate. In that case the Lord Justice, Knight Bruce, expressed the opinion of the Judicial Committee, that a wife was not obliged to sue her husband immediately or in his lifetime; and that limitation did not apply as a bar to her claim for dower.

If the principle of that decision be followed in the present case, the Plaintiff is not barred by limitation.

In the case of Simpson and Routh, 2 Barn. and Cress. Reports, 682, which was referred to in the last-mentioned case, Lord Tenterden said, "In this as in other cases where a demand is necessary to give a right of action, the commencement of the action is not of itself a demand.

In McNaghten's "Precedents of Mahomedan Law," page 275, it is said, "The dower becomes due on the consummation of the marriage, or the death of either of the parties, or on divorce. Should the wife not claim the payment of it during the lifetime

of her husband, it must be paid to her out of the property left by him on his decease."

Their Lordships are of opinion that the case of Nawab Jung Bahadoor Khan *v.* Mussumat Uzeez Begum, above cited, was rightly decided, and that, in respect of prompt dower payable under the Mahomedan law, limitation does not begin to run before the dower is demanded, or the marriage is dissolved by death or otherwise.

In the present case, as a divorce was not proved, it is unnecessary to consider whether, even in the case of a divorce, a cause of action accrues in respect of deferred dower before the repudiation has become irrevocable, or the dower has been demanded.

Their Lordships having determined that there was no divorce, and that the suit was not barred by limitation if the dower was prompt, it becomes unnecessary to determine whether it was prompt or deferred; for the suit having been commenced within twelve years from the time of the death of Syud Mahomed it was clearly not barred if the dower was deferred.

The question as to the amount of dower was one of fact, as to which their Lordships see no reason to interfere with the decision of the Principal Sudder Ameen, which was affirmed on appeal by the High Court. Their Lordships concur in the remark of the High Court: "It may be true that the sum claimed and deposed to as agreed upon and customary is a very large sum; but the Mahomedan law-books, the decided cases, and the experience of the country, show that it is a fact that sums so apparently beyond the means of the parties are fixed as dower amongst Mahomedans from the highest to the lowest."

There is nothing in the Mahomedan law to limit the amount fixable for dower. See 1 McNaghten's "Select Cases," 275, and *id.* 48, in which the amount fixed was 300,000 gold Mohurs. See also the same Vol. p. 266. The above cases, it should be remarked, were decided upon the authority of futwas obtained from the Mahomedan law officers. In McNaghten's "Precedents of Mahomedan Law," page 131, there is the opinion of Mahomedan law officers that a dower exceeding 150,000 gold Mohurs, which absorbed the whole estate of the husband, took precedence of claims by inheritance.

No defence was set up in the Court of Original Jurisdiction, upon the ground that the amount fixed was a mere sham, and that neither of the parties intended that it was to be acted upon, and it is not for a Court of Appeal to suggest or give effect to such a defence when it was never raised in the Court of Original Jurisdiction, which, if the question had been there raised, might have laid down a distinct issue, and taken evidence upon the subject. In McNaghten's "Principles of Mahomedan Law," case 35, page 288, a very large amount of dower was upheld on a question put to ascertain whether the deed of dower was a mere device to prevent divorce.

The Judgment of the Principal Sudder Ameen upon the trial after the remand was, "That a Decree should pass in favour of all the Plaintiffs, viz., 'Mussamat Jumeela, Summunt Koonwarree, and Mr. King,' to this effect, that they the Plaintiffs do recover *the amount in suit* with interest and costs from the Defendants in possession of the property left by Syud Mohummud, *in proportion* to their appropriations, as well as from the property left by the said deceased." No decree appears to have been drawn up upon that Judgment, as it ought to have been. The High Court dismissed the appeal from that decision with costs. The Judgment accordingly stands.

It appears to their Lordships that the Judgment was not correct. Mr. King not having appealed from the first decision, viz., that of the Principal Sudder Ameen of the 8th March, 1862, was not entitled to the benefit of the reversal of that Judgment (11 Moore's Indian Appeals, 207), and the Judgment under the remand ought not to have been in his favour, but ought to have been limited to the 12-anna share, to which alone the appeal related. Further, their Lordships are of opinion that the Decree is erroneous in awarding the demand against the Defendants in proportion to their appropriations, and in rendering them personally liable to that extent in addition to the charge upon the assets. The Defendants were not liable except as representatives of the deceased. As representatives they were liable for the whole debt to the extent of the assets received, and not duly administered by them respectively. It is not because an executor or heir has only three-fourths of the assets that he

is liable only to three-fourths of the debt. He is liable to pay the whole debt so far as the assets in his hands will go.

Whatever the amount of assets, the proper form of Decree against the two Defendants, sued jointly as representatives, is that the Plaintiff do recover the whole amount against the Defendants as representatives of the deceased to be paid out of the property of of the deceased. Each of the Defendants would then be liable for the whole debt to the extent of the assets received by him, and the Decree would be executed by the attachment and sale of as much as necessary of the property of the deceased in the hands of both or either of the Defendants; and if no such property could be found, and the Defendants should fail to satisfy the Court that they had duly applied such property of the deceased, as should be proved to have come into their several possessions, the Decree might be executed against the Defendants respectively to the extent of the property not duly applied by them in the same manner as if the Decree had been obtained against them personally, or, in other words, by the attachment and sale of their own private properties. (Act 8 of 1859, s. 203.) If, however, the Decree were against one of the Defendants for three-fourths of the debt and against the other Defendant for one-fourth, and the Defendant against whom the Decree for one-fourth was given should prove, under the execution, that he had duly applied the whole of the one-fourth of the assets which had come to his hands in payment of other just debts due from the deceased, the decree holders could not levy more than three-fourths of the debt upon the other Defendant, notwithstanding the assets in his hands might be sufficient to pay the whole debt, and thus they would be deprived of one-fourth of their demand, notwithstanding the rule of Mohamedan Law that all the assets must be applied in payment of debts in preference to claims by inheritance.

If matters had remained as they were when the Principal Sudder Ameen gave judgment upon the trial after the remand, the decree might be set right by declaring that the Plaintiffs, Jumula and Summunt Koonwaree, do recover three-fourths of the amount of dower from the Defendants as representatives of the deceased, to be paid out of the assets

of the deceased. But it appears that one of the Defendants, viz., Syud Mohamed Hossein, after the Decree of the Principal Sudder Ameen under the remand and before the Decree of the High Court upon the appeal against that Decree, compromised the claim against him.

The Solenamah or Deed of Compromise was made between the Plaintiff, Jumeela and Kassim Ally Khan, described as purchaser of the share of Beebee Jumeela, the Plaintiff Summunt Koonwarree, Loknath Misser, and the Defendant Syud Mahomed Hossein. After reciting that certain suits were depending between them, each of the parties renounced and relinquished every sort of claim, and declared that there remained no claim one against another. By paragraph 1 it was declared that out of the 16 annas of the property of the late Syud Mahomed, 12 annas had come into the possession of the Defendant Syud Mohummud Hossein, and of purchasers from him, of which 5 annas and 9 pie came to the Defendant Mohommed Hossein as his share, and the remainder, 6 annas and 3 pie, came to the Plaintiff Mussumut Jumeela and others as their share (meaning that, by the terms of the compromise, they were to have a 6 anna 3 pie share.) By paragraph 2 it was declared that out of the 6 anna share (meaning, no doubt, the 6 anna 3 pie share), the Plaintiff Jumeela, and at the then present moment Kassim Ally Khan, who was stated to be the purchaser of her share, had accepted 2 annas; the Plaintiff Mussumut Summunth Koonwaree, in lieu of the entire properties (that is, the shares of Jumeela's dower purchased by her), accepted a 3 anna and 6 pie share; and Loknnath Misser, in lieu of his purchase, accepted a 9 pie share. These shares constituted the whole of the 6 anna 3 pie share of the estate of the deceased, which was given by the Defendant Mohummud Hossein in satisfaction of the claim against him.

By the 9th paragraph it was declared that all differences existing between the parties to the compromise having been cleared up, thereafter no manner of claim whatever remained to be instituted one against another either regarding the payment of Dain-Mohur or the expenses of the suits therein mentioned, or for the recovery of Wassilat (mesne profits) and each of the declarants renounced and

relinquished the total expenses of all suits from the beginning up to the then present moment.

By paragraph 10 the parties agreed to file petitions of agreement in the cases of appeal to England and to the High Court, and the Zillah Courts and Mohummud Hossein relinquished the security bond in the case in appeal to the Privy Council.

Paragraph 11 was as follows :—

> Since the conditions of this Salehnamah are in accordance with the aforementioned detail regarding the 12 annas share, and the 4 annas share of the property left by Syud Mohummud has come into the possession of Mussamut Mulleka, the same has no concern with Hajee Mohummud Hossein and others. It has therefore been settled between Mussamut Jumeela, Kassim Ally Khan, Summunth Kooeree, and Loknath Misser, that the whole or any portion of the 4 annas which may be acquired by the compromise, or in execution of the Decree for the "Dain-Moher," or by means of the institution of a suit for Mussamut Mulleka shall be partitioned into sixteen shares out of which Mussamut Summunth Kooeree, shall take ten shares, and five shares Mussamut Jumeela and Kassim Ally Khan, and one share Loknath Misser.

In pursuance of the agreement in paragraph 10, the Solenamah was sent up to the High Court and was recorded and forms part of the record before us. It is set out at page 187 of the Record.

The suit ought, according to the provisions of Section 98, Act 8 of 1859, to have been disposed of in accordance with the terms of the compromise. The Decree of the High Court, after referring in express terms to the compromise, dismissed the Appeal, and thereby in substance upheld the decision of the Principal Sudder Ameen of the 28th September, 1864. It was certainly not in accordance with the compromise for the Decree of the Principal Sudder Ameen, ordered the Defendant Muhummud Hossain to pay a proportion of the debt and costs ; and the Decree of the High Court ordered him to pay the costs of the Appeal though the Plaintiffs had expressly renounced all costs.

It is important to remark that the 6-anna 3-pie share of the estate which was given by the Defendant Mohummud Hossein in satisfaction of the claim against him, consisted of immoveable estate. Their Lordships know nothing as regards the value of the whole of the estate or of the 6-anna and 3-pie share accepted by the Plaintiffs in satisfaction of their claim against the last-named Defendant.

It appears to their Lordships that the effect of the compromise was to release the Defendant, Mahomed Hossein, and the 12-anna share, or three-fourths of the assets which came to his hands, and consequently to release the other heirs and the remaining one-fourth of the assets from that portion of the debt which, as between the several heirs, ought to be borne by the three-fourths of the assets released, or, in other words, from three-fourths of the amount claimed. That is the construction which the High Court, by their Decree, appear to have put upon the compromise. If the whole debt should be decreed to be levied out of the remaining one-fourth of the assets, the Plaintiffs having received a 6-anna 3-pie share of the whole estate, might still levy the whole debt, and thus obtain more than they are entitled to; and if the debt should be levied out of the remaining one-fourth of the assets, the Defendant, Mahomed Hossein, would, as between him and the other heirs, be liable to contribute three-fourths of the amount so levied, notwithstanding the compromise by which he gave a 6-anna 3-pie share of the estate in discharge of the liability of the 12-anna share of the assets which came into his possession, and to enable him to retain, as against the Plaintiffs, the other 5-anna 9-pie share of the assets. Their Lordships therefore think that, in consequence of the compromise, the remaining one-fourth of the assets is liable for only one-fourth of the debt.

The shares of heirs cannot be ascertained until all debts have been satisfied. It is only the balance after paying all debts that, according to the Mahomedan law, is divisible amongst them. A compromise operates for the benefit of all those amongst whom the estate is divisible, and the balance is divisible amongst them. (See Baillie on the Mahomedan Law of Inheritance, 108). If the compromise made by Mahomed Hossein by giving up to the Plaintiff a 6 anna 3 pie share of the estate operated for his benefit alone, and to release the three-quarter share of the assets which he took by inheritance, the result would be that he might retain a 5 anna 3 pie share of the estate out of the 12 anna share which came to his hands, whilst the other fourth of the estate in the hands of Mulleeka might be seized and sold for payment of the

remainder of the debt, and thus be wholly absorbed. By these means Mahomed Hossein, as one of the heirs, would obtain a 5 anna 9 pie share of the estate whilst the other heirs would get nothing, which would be contrary to the principles of the Mahomedan law of inheritance.

It may be, and probably is, the fact, that even one-fourth of the debt will absorb the whole of the remaining one-fourth of the assets, and, if that be the case, the heirs of Mahomed Hossein may be called upon by the other heirs for contribution out of the 5 anna 9 pie share, which he retained under the compromise. If such should be the effect of the decree against Mulleeka for one-fourth of the debt, it will be because the compromise did not intend to release more than three-fourths of the assets. This is clear from the 11th paragraph of the compromise.

The Defendant Mahomed Hossein jointly with Defendant Mulleka appealed to the High Court, but having compromised the claim against him he has not joined in the Appeal to Her Majesty in Council. The consequence is that the Decree of the High Court will stand against him, and he must avail himself of the compromise in such manner as he may be advised, should the Plaintiffs endeavour to execute the Decree against him. If he had appealed he would have been entitled to have the suit disposed of in accordance with the compromise according to the provisions of section 98 of Act 8 of 1859. In that case the decree must have been modified as against the Defendant, Mulleka, and she cannot be deprived of the benefit of the compromise in consequence of Mahomed Hossein's not having appealed.

The Decree of the Principal Sudder Ameen, of the 28th September, 1864, upon the trial after the remand, and the Decree of the High Court, of the 10th January, 1866, by which that Decree was upheld, ought to be reversed. Mr. King's share of the amount claimed has already been disposed of in consequence of his not having appealed against the first decision of the Principal Sudder Ameen, of the 8th day of March, 1862. Their Lordships are of opinion that the Plaintiffs, Jumeela and Summunt Koonwaree, are not entitled to recover from the Defendant, Mulleka, more than three-fourths of the

one-fourth of the demand which has not been satisfied by the compromise, or, in other words, three-sixteenths of the whole amount claimed, but that they are entitled to a Decree against her as representative of the said Syud Mahomed, deceased, for three-sixteenths of the amount sued for, and three-sixteenths of the costs incurred in the Lower Courts prior to the appeal to the High Court, of the 13th February, 1865, to be paid out of the property of the said Syud Mahomed, deceased, other than the 12-anna share, or three-fourths thereof, to which the said compromise related, and that the Decree of the High Court, of the 31st day of May, 1864, ought to be affirmed, but that, in consequence of the compromise, it should be modified as to the costs.

Considering also the mode in which so large an amount of dower was settled by the deceased without any writing, and the uncertainty which existed as to whether payment of it would amount to a due administration of assets, we think that the Defendant Mulleka was justified in resisting the suit and taking the opinion of the Court, and that she ought to be at liberty to retain her costs incurred in the several proceedings in this suit, and in the appeals to Her Majesty in Council, out of any assets of the said Syud Mahomed in her hands after satisfaction of the sums awarded against her in this suit; and that such costs take priority of all claims by inheritance to any portion of such assets.

Upon the whole their Lordships will humbly advise Her Majesty that the Decree of the High Court of the 31st of May, 1864, be affirmed, except so far as the Defendant, Mulleka, is thereby ordered to pay costs and interest thereon, and that the Plaintiffs, Jumeela and Summunt Koonwarree, do recover against the Defendant, Mulleka, as representative of the late Syud Mahomed, deceased, three-sixteenths of the costs and interest awarded by the said last-mentioned Decree, to be paid out of the assets of the late said Syud Mahomed, deceased, other than that portion thereof to which the said compromise relates; that the Judgment of the Principal Sudder Ameen, of the 28th day of September 1864, and the Judgment and Decree of the High Court, of the 10th of January, 1866, so far as they relate to the Defendant Mulleka, be reversed, with costs of the Appeal to the High Court of the 13th of

February, 1865, and that it be decreed that the Plaintiffs, Jumeela and Summunt Koonwarree, do recover against the Defendant, Mulleka, as representative of the late Syud Mahomed, deceased, three-sixteenths of the whole amount claimed in the suit, and three-sixteenths of the costs incurred by the Plaintiffs in the lower Court prior to the Appeal to the High Court of the 13th of February, 1865, the said portions of the amount claimed, and of the said costs, to be paid out of the property of the late Syud Mahomed, deceased, other than that portion thereof to which the said compromise relates, and that such Decree be without prejudice to the rights, if any, which the Defendant, Mulleka, or any of the heirs of the late Syud Mahomed may have against the said Defendant, Mahomed Hossein, in consequence of the execution or satisfaction of the said Decree, and that the Defendant, Mulleka, be at liberty to retain her costs of all the proceedings in this suit, and also of the Appeals to Her Majesty in Council, out of any assets of the said Syud Mahomed, deceased, in her hands, after satisfaction of the sums awarded against her in this suit in preference to all claims by inheritance to such assets.

And their Lordships order that each of the Plaintiffs, Jumeela and Summunt Koonwarree, and the Defendant, Mulleka, do bear her own costs of the above-mentioned appeals to Her Majesty in Council.

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