Patna High Court
Sita Devi vs Maharaja Kumar Gopal Saran ... on 16 April, 1928
Equivalent citations: 111 Ind Cas 762
Author: Macpherson
Bench: K Sahay, Macpherson
JUDGMENT Macpherson, J.

1. This is an appeal by Sita Devi describing herself as the wife of Maharaja Kumar Gopal Saran Narayan Singh of Tikari in the District of Gaya from the decision of the Subordinate Judge of Gaya, who dismissed her suit against her husband on the basis of two instruments executed by him on 16th April, 1913, and 115th July, 1917, respectively.

2. The instruments which are in English are stamped in accordance with Section 25 of the Indian Stamp Act, 1899, which deals with valuation for annuities, and the executant describes himself as a Bhumihar Brahman by caste, a zemindar by profession and resident of Tikari in the District of Gaya.

3. The first deed sets out as follows:-- "Whereas Sita Devi formerly Elsie Caroline Thompson embraced the Hindu faith and thereupon contracted a legal and binding Hindu marriage with me in the Vedic form and is and has been living with me openly and to the knowledge of my relatives, friends and dependants as my wife since May 2nd, 1909, the date on which the said marriage was solemnised by Arya Samaj at Lucknow and whereas it is incumbent for me to provide for the said Sita Devi during her life so that she may pass her days in ease and comfort. I of my own free will and consent and without any undue pressure or false representation on the part of my said wife or of anybody else settle a life annuity of Rs. 36,000 on the said Sita Devi to be paid to her in twelve equal monthly instalment of Rs. 3,000 to be paid to her or her nominee on the first of every calendar month, the first payment of which shall be made on the May 1st, 1913, and I herewith charge my properties stated and fully set out and described below with the payment of such annuity which properties after paying the Government revenue and road and public work cesses yields me a clear annual income of more than thirty-six thousand rupees. Neither I nor after me my heirs, or executors, or administrators shall have any right to sell, mortgage or in any other way alienate the said properties during lifetime of my wife the said annuity-holder. If I or any of my heirs, executors or administrators do so, it shall be null and void. The said annuity shall cease at the death of my wife, the said annuity-holder."

4. The second document recites-- "I settled a life-annuity of thirty-six thousand rupees on my wife Sita Devi....whereas I am now desirous out of the love and affection which I bear to my said wife the said Sita Devi of granting to her and her heirs in perpetuity for ever an annuity of rupees fifteen thousand per annum...now this indenture witnesseth that for the consideration aforesaid and for the purpose of carrying the said desire into effect, I the said Maharaja Kumar Gopal Saran Narayan Singh hereby grant unto the said Sita Devi, her heirs, executors, administrators and assigns one perpetual annuity or clear yearly rent charge or sum of rupees fifteen thousand to be issuing and payable out of and charged and chargeable upon all and singular, the properties and villages, lands, hereditaments and premises set out, and described in the schedule hereto which said perpetual annuity or rent charge is to be paid by equal monthly instalments on the first day of each and every

month free from all taxes and deductions whatsoever except income tax the first of such payments to be made on the 1st day of August next....to hold the said annuity or annual rent charge unto the said Sita Devi, her heirs, executors, administrators and assigns for ever to the extent that part of the said life-annuity of rupees thirty-six thousand per annum to the extent of rupees fifteen thousand per annum shall merge into and be extinguished in the said perpetual annuity of rupees fifteen thousand and thereby granted provided always that if the grant of the said annuity hereby granted shall for any reason become ineffective or void in law the right of the said Sita Devi to the whole annuity secured by the hereinbefore recited deed shall become valid and effectual capable of being enforced".

5. In both cases thirty seven villages in Aurangabad, a sub-division of the Gaya District, are charged.

6. In her plaint which was filed on the 26th January, 1923, the plaintiff Sita Devi set out that defendant had in spite of repeated requests, failed or neglected to make any payment since August, 1921, and by reason thereof and his conduct towards her she had been reduced to serious difficulty in maintaining herself, which she was doing by pledging jewellery, and she had refused the offer to take a lump sum and relinquish her rights

7. She prayed for a declaration of her title to an annuity of Rs. 3,000 a month, the payment of arrears of Rs. 51,000 from the 1st September, 1921, to the date of suit, the enforcement of the charge by the sale of the properties, the sale, if necessary, of a sufficient portion of them, the appointment of a Receiver to take charge of them, future payment of the annuity and interim payment of the annuity pending final judgment in the suit.

8. In his written statement, which was filed on the 17th December, 1923, the defendant, while admitting the execution of the two instruments on which the plaintiff sued, submitted that they were obtained from him at a time when he "was under the fascination of her charms and was under the erroneous belief which was worked upon his mind by the plaintiff that she was his lawful wife".

9. The instruments, moreover, being executed solely in consideration of the fact that she was his wife and would act up to the ideal of a Hindu wife and at least would live with him always. He pleaded that his marriage with plaintiff was not valid as being between a Bhumihar Brahman and a non-Hindu, to wit a Christian lady of European nationality, and also because at that time she was the wife of one George Still well. He set out that from the time when she came to India in 1904-05 as an actress she attracted him by her charms when he was very young, and since then the plaintiff (an intelligent and resourceful lady) often met the defendant till she pressed the defendant to marry her and he being young and inexperienced and entirely under her fascination yielded to her though he was already married to a Hindu wife. He further set out that the so-called Arya Samaj Vedic rites alleged to have been performed to solemnise the alleged marriage between the plaintiff and himself was a device to ensnare the defendant and was in violation of the Hindu Law and custom and not bona fide. He admitted that he stopped her monthly allowance, but on reports of her gross misbehaviour and misconduct in England, in particular with a Mr. Culliford who lived with her for years in the defendant's flat in London, and he contended that in any case her misbehaviour would, if she were a Hindu wife, forfeit her claim for any maintenance; she had reverted to the stage in

London and her conduct was repugnant to Hindu feeling and since her return to India in 1922 she had, using the name of Maharani of Tikari, appeared in public performances in Calcutta and advertised in the 'Statesman' newspaper that she was open to private and public engagements. He denied that she was in difficulty in maintaining herself and averred that she had received large sums in cash besides jewels from the defendant and had taken the defendant's family and other jewels worth five lakhs of rupees. He submitted that she should return the jewels to him as having been given to her for mere use and he pleaded that this suit was not maintainable until she returned the same.

10. The admissions that the defendant was acquainted with and attracted by the plaintiff in 1904-05 and that it was after ho stopped her allowance that he was advised that the marriage with her performed by the Arya Samaj was not legal are noteworthy.

11. Between the institution of the suit and the filing of the written statement there had been proceedings at the instance of the plaintiff for interim payments and the appointment of a Receiver (both of which eventually failed in appeal) in the course of which certain statements of fact were made by the parties on affidavit. On the 20th December, 1923, it was contended by Mr. Jackson, who appeared on behalf of the plaintiff, that there was practically no defence. The Court, however, framed issues and fixed the case for positive hearing on the 28th January, 1924. The defendant asked for security for costs, but his application was disallowed. The case was adjourned to the 5th March for hearing and on that date Mr. Jackson for the plaintiff put in evidence the two documents founded upon and the decree of divorce passed by the Supreme Court of New South Wales in favour of the plaintiff which had. been filed on 22nd February, while the defendant put in the marriage certificate which, had been filed on 15th February. On the ground that he was unable to bear the heat of Gaya Mr. Jackson then argued the case on behalf of the plaintiff and stated that he would not offer any further evidence. Hardly any evidence and no evidence of importance had then been recorded on behalf of defendant. The result has been that on behalf of the plaintiff no evidence has been adduced except the three documents and the witnesses examined on behalf of the defendant whether in England or in India have not been cross-examined because, it is said, the plaintiff has no funds, and though a Vakil watched the proceedings on her behalf he took no part beyond protesting against adjournments. Neither party to the suit deposed and all the defence witnesses with one exception were examined on commission, the evidence of European and Eurasian witnesses in Calcutta being very indifferently led and recorded. Certified copies of the petition for dissolution of marriage and accompanying affidavit and of the "questions for the Judge," all obtained on 27tb February, 1924, and of a transcript of his notes of the proceedings at the hearing of plaintiff's suit sworn to by the short-hand reporter on 2nd May were filed by defendant on 21st July and at the hearing admitted in evidence subject to the objection of the plaintiff. The suit was eventually taken up for hearing on 20th July, 1924, and argued on behalf of the defendant for seven days. Judgment was delivered on the 26th August following and appears to follow closely the lines of the argument on behalf of the defendant.

12. In his judgment the learned Subordinate Judge begins with an account of the position which unfortunately appears to set out as facts several matters of controversy.

13. The important issues were issues Nos. 3 to 7.

3. Are the ekrarnamas dated the 16th April, 1913, and 18th July, 1917, valid and for consideration? Are they binding on the defendant?

4. Whether the alleged marriage of the plaintiff with the defendant is legal and valid? Is the plaintiff entitled to enforce the said deeds and sue for her allowance? Can the defendant question the marriage with the plaintiff?

5. Is the plaintiff's claim tenable having regard to the fact that she was married to Mr. Stillwell?

6. Whether there has been any misbehaviour or misconduct on the part of the plaintiff? Has the plaintiff by reason thereof forfeited her claim to the allowance from the defendant under the alleged deeds?

7. Whether the plaintiff is in possession of any jewelleries given to her by the defendant? If so, can she maintain the present suit without returning the said jewelleries, if any?

14. To what relief, if any, is the plaintiff entitled?

15. The Subordinate Judge decided all the issues in favour of the defendant and dismissed the suit.

16. It is convenient to set out at this stage certain material facts which are not the subject of controversy.

17. The plaintiff as Elsie Caroline Thompson spinster, aged twenty-one, was married on the 11th June, 1903, by special license to George Edwin Stillwell, bachelor, aged 29 before the acting Resident Magistrate, Gape Town. The plaintiff was born at Sydney in the Colony of New South Wales where her father was a book-seller, and was a variety performer under the stage name of Elsie Forrest. Her mother was present at the marriage, but left for Sydney three days later. Stillwell was a theatrical artist (in fact a conjurer of some reputation) employed in the same theatrical company as Elsie Forrest, and gave out to his wife that he had been born in Kentucky, one of the United States of America. After a year in Africa the Stillwells came to Calcutta with the Sandow Company in October-November 1904, and remained there after that Company had left. There the defendant who is about a year younger than the plaintiff was in 1804 05 "attracted by her charms." In January, 1905, Stillwell left Calcutta and proceeded via Singapore whence he corresponded with his wife to Sydney. For some six weeks he stayed in his father-in-law's house. After a serious illness the plaintiff left Calcutta in November, 1005, for Sydney which she reached in the following month. On 10th January, 1906, she filed in the Supreme Court of New South Wales a petition for dissolution of the marriage and in the absence of Stillwell, who, was personally served, a decree nisi was pronounced in the suit and was made absolute on the 26th June, 1906, the decree reciting, inter alia, that it had been proved to the satisfaction of the Court that the respondent was at the time of the institution of the suit domiciled in New South Wales. The plaintiff returned to Calcutta in 1907 and in the end of 1908 plaintiff and defendant were together at Manolescue's Hotel in Rajpur (near Mussoorie) and

taking steps for their conversion to Sikhism in order to contract a valid marriage ; defendant had then a Hindu wife living. Eventually in 1909 after consultation with eminent lawyers, the plaintiff embraced the Hindu faith and took the name Sita Devi under which she has sued. The marriage of the plaintiff and defendant was solemnised by the Arya Samaj at Lueknow on the 2nd May, 1909.

18. The plaintiff and defendant lived together openly and to the knowledge of the relatives, friends and dependants of defendant as husband and wife. As the defendant is popularly designated Maharaja of Tikari so the plaintiff was similarly known as the Maharani of Tikari. During the war the plaintiff was in London residing in the defendant's flat in North Gate Mansions of which he paid the rent and costs of repair. The defendant appears to have been in London as he took her to Ciros' and Murray's. After his return to India she wrote him affectionate letters in 1916 and 1917 and the sum of Rs. 3,000 a month was paid regularly to her till August, 1921, but ceased thereafter. The second deed was sent on 6th September, 1917, by defendant's Solicitors in Calcutta to plaintiff in England and on 27th September, 1917, defendant executed an indenture of trust of all his property. On Armistice Day 1920 the plaintiff appeared at the Aeolian Hall in London apparently under the direction of her singing-master referred to in the letters mentioned, One H.T. Culliford had been living with the plaintiff in defendant's flat. Plaintiff came to Calcutta towards the end of 1922 and was advertised to appear in concerts at the conservatoire and as willing, like the other professors, to take private and public engagements and as having consented to give away the prizes at the 'distribution of prizes' there. She appears to have stayed on in Calcutta at least till early in 1924 but now to be absent from India. Stillwell was alive in 1914 and had apparently re-married.

19. The findings of the learned Subordinate Judge were briefly as follows: On the fifth issue he held that the plaintiff's claim was not tenable, because her divorce being invalid and a nullity to her knowledge, she was not defendant's wife and she had obtained the grant of the annuity in the false character of wife acquired by the fraud [Giles v. Giles (1836) 1 Keen. 685 : 44 R.R. 134 : 5 L.J. Ch. 46 : 48 E.R. 471] of po3ing as a single woman which had deceived the grantor into believing her to be his wife.

20. On the fourth issue he found that the defendant was not precluded from raising the question of invalidity of his marriage with her even if the divorce was good and that that marriage was not legal and valid, inasmuch as a Brahman (as he found the defendant to be) could not under modern Hindu Law marry even a Hindu of another caste and plaintiff could not even become a Hindu as Hinduism does not contemplate conversion and does not proselytiza. He further found that even if the marriage were valid the annuity is an adattam gift of the sixteenth category, the plaintiff not being a proper object of a gift, and the defendant was entitled to revoke it and had done so.

21. On the third issue he held that it was not a case of gift but of an annuity, something of the nature of a corrody, and that there was no gift except of the money already paid. The deeds were settlements by husband on wife and as the plaintiff knew that her divorce and subsequent marriage were nullities, Section 25(1) of the Contract Act did not apply and these agreements without consideration are void and not binding on the defendant.

22. On the sixth issue he held that the defendant had been able to prove adultery and other misconduct on the part of plaintiff whereby she would have forfeited her claim to the allowance under the deeds, even if they had been operative.

23. Finally, on the seventh issue he held that the plaintiff if she had otherwise established her case could have been successfully met by the plea of defendant that she "could not under any circumstances succeed unless she returns the family jewels, she having traduced the fair name of the Maharani of Tikari and so is unfit to wear them."

24. I am anxious that I should not be understood as accepting any finding of the Court below unless I do so explicitly. He had the disadvantage of one-sided discussion of the evidence and, as already mentioned, at the outset of his judgment, controversial matters are set out as facts.

25. Mr. B.N. Mitter, who mainly argued this appeal on behalf of the plaintiff-appellant, assailed the findings of the trial Court on all points. Mr. Pugh, who summed up for him at his request, put the case of the appellant as follows:

(1) It is a case of charge and nothing else. Therefore consideration is not necessary.

(2) It is a contract valid Under section 25(1) of the Indian Contract Act, 1872. The plaintiff's marriage with the defendant is valid,

(a) because the decree of divorce is good and the Arya Samaj marriage after plaintiff's conversion to Hinduism is good and

(b) because, even if the decree for divorce were invalid, yet the Arya Samaj marriage of the plaintiff and defendant is not proved to be invalid.

(3) The demises are also valid under section 25(2) of the same Act as being promises to compensate the plaintiff for what she had already done for the promisor, such as her conversion to Hinduism and co-habitation with him.

(4) Assuming that the demises are good under Sub-section (1) or Sub-section (2) of that Act,

(a) unchastity or other misconduct is not proved and

(b) even if it is proved, then it does not per se break the contracts which do not relate to maintenance and are not governed by Hindu Law.

(5) In any case the grant under the second deed is clearly not for maintenance.

26. On behalf of the respondent Mr. Hasan Imam confines himself to two points:

(1) Stillwell was still the husband of the plaintiff when she went through a form of marriage with defendant in 1909 and, therefore, the plaintiff is not the wife of defendant and cannot take under the instruments, and (2) assuming that the divorce was good and she was unmarried at the time (sic) the Arya Samaj marriage was perform (sic) and the latter was valid, nevertheless (sic) plaintiff cannot take advantage of the (sic) struments in her favour which (sic) provide for the maintenance of (sic) wife by granting her an annuit (sic) on certain properties of her hus (sic)

(a) by reason of her proved unchastity which involves a forfeiture of the annuity so that she is at best entitled to a maintenance, if in need, which he would put at two rupees per month, and

(b) inasmuch as the Court will not in the circumstances permit her to recover the annuity until she has returned the jewellery, family and other, which he gave to her for her use only.

27.Mr. Hasan Imam has definitely given up the contention that the marriage of the plaintiff and defendant could be invalid for any other reason than that the plaintiff had a husband alive at the time when it was solemnized and he has been well advised in doing so. The views of the learned Subordinate Judge in this regard are, in my judgment, unsound on all points. Defendant has entirely failed to establish that the marriage of defendant and plaintiff is invalid under the Hindu Law by reason of the incapacity of defendant who is dwij to marry a convert to Hinduism. His finding would have offended against the principle that a decision should cause as little disturbance as possible to the established state of things, and the many mixed marriages of Europeans and Hindus which have and are still taking place among the educated classes. But in fact defendant has entirely failed to establish that the marriage of 1909 is invalid under the Hindu Law. The Arya Samaj which performed it with Vedic rites is a well-known reformed sect of Hindus in Northern India of substantial and increasing importance, the validity of whose marriages it would now be preposterous to question. The Samaj goes back to the Vedas for its inspiration, doctrine and many of its practices. It receives adherents from within and without Hinduism though naturally more readily from twice-born or true Hindus. As the Encyclopdia of Religion and Ethics sets out:

There is no special ceremony of (sic) for members of the twice-born castes, (sic) outsiders, such as Christians and (sic) madans, must undergo a ceremony (sic) cation.

28. (sic) conversion of plaintiff to Hindu-(sic) according to the tenets of the (sic) which further does not permit difference of caste to interfere with marriage. The following quotations are from Part II, Ch. II of "The Arya Samaj" by Lajpat Rai, a well-known member:

The Arya Samaj repudiates caste by birth, 'The Arya Samaj believes that in Vedic times there was no caste by birth in India.' 'Character and conduct alone can decide whether a person is twice-born' (Mahabharata). 'One of the greatest services rendered by the Arya Samaj to the cause of social reform among Hindus is its championship of the rights of the depressed and untouchable classes to be admitted into the Arya Samaj on an equal footing with persons of the highest castes.'

29. A member of the Arya Samaj need not break completely with the Hindu social system, but, on the other hand, there is nothing to prevent any twice born Hindu from renouncing his caste or

shedding any part of the marriage laws of his caste. Members of the Arya Samaj may validly intermarry and the embarrassments and inconveniences (e.g., those of caste discipline) entailed by the mixed marriage are as immaterial to the legality of the ' marriage itself as are those entailed by marriage of Christians of different tribes in the Ranchi District. No doubt, many Babhans (I use the more usual term for convenience) and Brahmans have given an opinion that the marriage is invalid, but the opinion of ultra orthodox persons on such a point, if admissible at all, is entirely valueless, as they assume that the only valid marriage is a caste marriage. In passing it may be pointed out that the learned Subordinate Judge was also wrong in finding that defendant is a Brahman. The only entirely safe and unprejudiced evidence on such a point obtainable in India is in the Census Reports. I refer to Gait's Census Report of Bengal 1801, Vol. VI, paras. 595 and 610; O'Malley's Census Report of 1911, Vol. V, para. 833, and Tallent's Census Report of Bihar and Orissa Vol. VII, page 237. The Bhumihar Brahmans are unquestionably dwij and a very important community in Bihar, but it would be incorrect in all respects to class them as Brahmans.

30. It will be convenient to consider first whether the instruments though agreements without consideration are preserved from being void by sub-sections (1) of Section 25 of the Indian Contract Act. They are admittedly valid under that provision if the plaintiff is the wife of the defendant. The plaintiff hag filed a decree absolute dissolving her marriage with Stillwell which was pronounced by the Supreme Court of New-South Wales. As the contrary does not appear on the record, the Court is under section. 14 of the Code of Civil Procedure bound to presume that the decree was pronounced by a Court of competent jurisdiction.

31. This presumption arising from the production of the decree may, however, be rebutted by proving want of jurisdiction. The defendant assailed the decree on that ground and also on the ground that it was obtained by fraud or collusion.

32. On behalf of the appellant it has been urged that a decree in rem even of a foreign Court cannot be contested at all or at least can be contested only by the parties to the suit in which it was pronounced. I am unable to accede to this contention. Apart from Section14 of the Code of Civil Procedure already cited, Section 44 of the Indian Evidence Act, 1872, lays down that any party to a suit may show that any judgment or decree which is relevant Under section 41 Land which has been proved by the adverse party, was not delivered by a competent Court or was obtained by fraud or collusion. Section 41 enacts that a final decree of a competent Court in the exercise of matrimonial jurisdiction which confers upon or takes away from any person any legal character not as against any specified person but absolutely, is relevant when the existence of any such legal character is relevant, and is conclusive proof that any legal character which it takes away from any such person, ceased at the time from which such decree declared that it had ceased or should cease. It is clear that the decree of divorce can be assailed by the defendant on the grounds set out in Section 44.

33. The position under English Law is set out in "The Conflict of Laws" by Dicey and Keith at page 436, Third Edition, as follows:

"If the fraud or collusion of the parties induces the Divorce Court of a foreign country to believe that it has jurisdiction where, according to the doctrine maintained by. English Tribunals, it has no

jurisdiction, then the judgment or sentence of divorce is rendered in England invalid by such fraud or collusion. But if the fraud or collusion does not go to the root of the foreign Court's jurisdiction but merely by the pretence of facts which do not exist, or the suppression of the facts which do exist, induces the foreign Court to grant a divorce which it would is not otherwise have granted, then, as long as such divorce continues in force in the country where it is granted, it cannot be invalidated in England merely on account of such fraud or collusion. In many of the judgments as to the effect of fraud on a judgment or sentence of divorce it has been said that the Courts will not recognise the decree of a foreign tribunal where the judgment has been obtained by collusion or fraud of the parties. But I think, when those cases are examined that the collusion or fraud which was being referred to was to every 'case'....collusion or fraud relating to that which went to the root of the matter, namely, the jurisdiction of the Court. In other words (they were) as an illustration, cases where the parties have gone to the foreign country and were not truly domiciled there and represented that they were domiciled there and so had induced the Court to grant a decree. The collusion or fraud in those cases have gone to the root of the jurisdiction. There is no jurisdiction if there is no domicile, and, therefore, collusion and fraud entered into many of those cases in a way that went to fortify the view that where there is no domicile there is no jurisdiction. But supposing that what was kept back was something that would have made the Court come to a different conclusion than it would otherwise have done, I can see no valid reason in the judgments in cases affecting status for treating the decree as a nullity, unless it is set aside:" Bater v. Bater (1906) P. 209 at p. 218 : 75 L.J.P. 60 : 94 L.T. 835 : 22 T.L.R. 408.

34. I am of opinion that the law in India goes further and definitely allows even a decree in rem which is relevant under Section 41 of the Evidence Act which was passed in 1872, to be contested also on the ground of fraud or collusion which does not go to the jurisdiction of the Court.

35. To establish lack of jurisdiction, fraud and collusion the defence adduced in evidence, (1) a copy of the record of the suit Stillwell v. Stillwell or rather of portions thereof consisting of

(a) certified copies of the petition of the plaintiff for dissolution of her marriage, with accompanying affidavit, dated the 10th January, 1906, filed in the Supreme Court of New South Wales before Simpson, J., Judge of the Matrimonial Causes Court and, also of the "questions for the Judge" signed by the Registrar, and

(b) a copy of the proceedings of the Court at the hearing of the suit which is supported by an affidavit of the Court reporter who took shorthand notes of the proceedings, and (2) oral evidence.

36. Before dealing with this evidence in detail it is necessary to make a few preliminary observations on the domicile of Stillwell, since the most strenuously contested question in this litigation is whether he was domiciled in New South Wales on the 10th January, 1906, on which plaintiff presented her petition for dissolution of her marriage with him. His domicile of origin was not in New South Wales. It is the case of both parties that it was in Kentucky. There is nothing to indicate that he acquired any domicile of choice before 1905 or 1906. The only provision of law under which the Supreme Court of New South Wales could have jurisdiction to dissolve the marriage of the Stillwells was Section 15 of the New South Wales Matrimonial Causes Act, 1899, which runs as

follows:

"Any wife whose husband is at the time of the institution of the suit domiciled in New South Wales may present a petition to the Court praying that her marriage may be dissolved on the ground that since the celebration thereof her husband has been guilty of adultery." Section 18 may also be quoted here. It runs: "Whenever a petition is presented Under section 15 the Court shall dismiss the petition if

(a) it is not satisfied on the evidence that the alleged adultery was committed, or

(b) if it finds that the petitioner has during the marriage been accessory to or conniving at the adultery of the other party to the marriage or has condoned the adultery complained of, or

(c) it finds that the petition is presented or prosecuted in collusion with either of the respondents.

37. The case made out by the plaintiff in the Divorce Court was that Stillwell the only 'respondent' was on the 10th January, 1906, domiciled in New South Wales. The defendant in this litigation sought to prove (1) that Stillwell was not domiciled there on that date and so the Court had no jurisdiction to dissolve the marriage, (2) that the proceedings in that Court were vitiated by fraud or collusion between the Stillwells in respect both of the question of domicile and of other matters, whereby they misled the Court.

38. The proceedings in the Divorce Court being important because the defendant relies upon them in support of his contention and because they also elucidate the position, I detail them at some length.

39. In her petition for dissolution of marriage-addressed to the Judge of the Court of Matrimonial Causes filed on that date the plaintiff set out the facts relating to her marriage, that her own birthplace was Sydney and her husband was born at Paris, Kentucky, and that the latter was [at the time of the institution of the suit domiciled in New South Wales; that there was no issue of the marriage, that he had been guilty of adultery with a woman, whose name was to the petitioner unknown, at the Gresham Hotel, Sydney, at which he was then residing and at other places in the State of New South Wales, and asked for a decree dissolving the marriage and for 'further and other reliefs' In an affidavit to the truth of the statement in the petition she also swore that there had been no collusion or connivance, past or present, direct or indirect, between her and her husband any other person.

40. The 'questions for the Judge' submitted by the Registrar were (1) whether the Stillwells were married on 11th June, 1903, and (2) whether Stillwell had between the 1st November, 1905, and 10th January, 1806, committed adultery at the Gresham Hotel, Sydney, New South Wales, and other places in the said State. In the course of the hearing the Presiding Judge struck out from the second issue the final words " and other places in the said State," presumably because evidence as to adultery at the Gresham Hotel was adequate Under section 18(a), but the words possess some importance in this litigation as indicating that it was contemplated to adduce evidence of adultery

prior to the date when Still well went to the Gresham Hotel.

41. In her deposition at the hearing on 22nd March, 1905, the petitioner first proved the marriage at Cape Town and then gave evidence in support of domicile. She stated that her husband had told her that he was born in Kentucky in the United States of America, that he had been several years away from America, his father and mother were dead and he had no relations and that he had been living in England for four years. In reply to a question from the Court she stated that when they were about to be married Stillwell said he would make his home at Sydney. Her home was in Sydney and her people were living there: about April, 1903, she had gone to Africa to join a company there. She joined first and Stillwell afterwards joined that company as a conjurer and illusionist:

He stated that he intended to go to Sydney and take, engagements and finally to settle down.

42. He said he intended to take up her father's busine83 of bookseller and stationer in Sydney after performing his professional engagements. A year after the marriage the Stillwells went with a company to Calcutta where they afterwards took private engagements. As they became short of money Stillwell arranged to go to Sydney, while she would proceed to London where she was to be instructed in dramatic work and had to fulfil engagements, until her husband could bring her back to Sydney. He left Calcutta in January, 1905, and proceeded to Sydney via Singapore whence the husband and wife corresponded. He asked her to address his letters after he had left Singapore to the care of her father at Sydney. The English engagement fell through and her trip to England was abandoned in March, 1905. She left Calcutta in November, 1905, after a serious illness and arrived at Sydney in the following month. Two weeks later she met him for the first time at her parents' house. Her husband told her that she could come back and live, with him if she liked to support herself and in reply she said that if she had to support herself she would prefer to stay at home with her people. On the following day he asked her to live with him and she refused to do so until he explained soma of his conduct in Manilla. He refused to do so and intimated that he was living with another woman and refused to give any account of his doings at all. He said that he would not give up the woman with whom he was living and whom he said he had brought from Western Australia. At further interviews he refused to give up the woman and did not ask deponent to live with him again.

43. Benjamin Samuels the landlord of the Gresham Hotel deposed that he knew Mr. Stillwell who was employed with Thurston, entertainer, and who was staying at his Hotel. The witness was then retired and Mary Ann Thompson mother of Mrs. Stillwell was produced, obviously to give evidence as to the domicile of Stillwell. She deposed that before the marriage Stillwell had stated that he would bring her daughter home to her in New South Wales, would eventually make that State his home and would assist her husband in his business. She left Africa three days after the wedding and he said his letters were to be addressed to their business, place in New South Wales. Before her daughter returned from Calcutta Stillwell had been staying with witness at witness' house for a period of about six weeks. He was waiting for an engagement with Rickards. He went for a short time to New Zealand and returned to Rickards and then went to Thurston, a variety artist, and she saw him performing at the Palace Theatre.

44. Benjamin Samuels, re-called, identified a photograph as that of Stillwell who had said he was a conjurer and was employed at Thurston's. Stillwell had stayed at his Hotel for about five weeks from December 1905 until the end of January 1905 and had towards the latter end of his stay mentioned that a petition of divorce had been served on him. He had a woman who was not Mrs. Stillwell the petitioner staying with him under the name of Mrs. Stillwell and Stillwell and that woman occupied one room all the time. The petitioner re-called identified the photograph shown to her as that of her husband and proved that there was no issue of the marriage. The Court decided both issues in favour of the plaintiff and granted a decree nisi to the petitioner returnable within three months. The decree absolute (Ex. I) which is dated the 26th June, 1906, sets out that, upon reading the decree nisi, the affidavit of service of a copy thereof on the Crown Solicitor and the request in writing of the petitioner that such decree be made absolute and the certificate of the Registrar of the Court that no matter in opposition to the final decree was pending, "and it having been proved to the satisfaction of this Court that the respondent was at the time of the institution of this suit domiciled in New South Wales" the Court made the decree absolute and the marriage of Elsie Caroline Still-well with George Edwin Stillwell was dissolved.

45. It may be observed that the full record of the trial is not before the Court: the affidavits of service and search mentioned in the proceedings in Court have not been produced and probably something in the nature of an order sheet was kept in which there may well have been orders as to the proof of domicile, but it is not forthcoming. One cannot feel sure, therefore, that the Divorce Court had not materials before it beyond what defendant has made available in this litigation.

46. On these proceedings the learned Subordinate Judge is transparently in error in holding that the Divorce Court did not address itself to the question of domicile and that the evidence fell far short of what was required to prove domicile in New South Wales. The lower Court is also in error in supposing that Stillwell ever meant to enter his father-in-law's business as soon as he came to Sydney. The intention expressed was first to take engagements in the State and after exploiting that side until presumably it was played out, to settle down to the more prosaic but more certain business of book-selling in an established business.

47. The oral evidence consists of the deposition of Joseph Edward Collier "a member of the theatrical profession" as sheet-anchor with an adminicle in certain evidence relating to events in Calcutta in 1904-05 which as Mr. Hasan Imam admitted, is not by itself sufficient to establish want of jurisdiction or fraud or collusion.

48. Collier has deposed that he knew Stillwell in South Africa in 1901 and met Elsie Forrest in 1902 at Dunedin in New Zealand; that in 1905 he was playing at the opera-house at Auckland in that Dominion along with Stillwell and staying at the same Hotel when Stillwell's wife Elsie Forrest came there.

She wanted with Stillwell to go to Sydney to obtain a divorce. Stillwell refused to go. He said he wanted money. This gave rise to a heated discussion and, became known to everybody in the company. Stillwell said he had already agreed not to oppose the divorce and hence it was unnecessary for him to go. He got some money too from his wife Elsie Forrest. This was at the end of

1905 or beginning of 1905. Then I went with another company to the Pnatic (?) Island and we landed in the Fizi Island. I do not know whether Stillwell actually went to Sydney.

49. The learned Subordinate Judge apparently accepted the contention advanced on behalf of the defendant that Collier's evidence could not but be true because it "fits in exactly with the evidence in the Divorce Court" though given long before the defendant obtained copies of the proceedings in that Court. These grounds are not well-founded. In the first place it is not unreasonable to hold in the absence of evidence to the contrary that intimation of the contents of these proceedings could have reached the defendant's advisers along with the copies certified on 27th. February while one of the Calcutta witnesses also possessed a photograph of plaintiff taken at Auckland from which a guess may have been made. In the second place there is no reference in the divorce proceedings to New Zealand except Mrs. Thompson's statement that Stillwell "went to New Zealand for a short time. He got back about December."

50. On behalf of th6 appellant it is strongly contended that Collier's testimony ought not to be believed, und, in my opinion, there is great force in the contention. It is inconsistent with the testimony in the Divorce Court where plaintiff stated that she did not see her husband for two weeks after she arrived in Sydney and that he came to see her at her mother's house and discussed the question of her return to live with him. It is extremely unlikely that even if plaintiff went to Auckland in December, 1905, Collier would be in a position to learn so precisely what passed between plaintiff and Stillwell or be able to detail it nearly twenty years later. A significant point is Collier's statement that he did not know whether Stillwell actually went to Sydney. That implies that when Collier left Auckland, Stillwell was still there. But it is incredible that Mrs. Stillwell would have parted with money, as the witness states she did, until Stillwell started or at least made it clear that he would go. Having regard to the facts that Mr. Stillwell left Calcutta in November, and that Stillwell was at the Gresham Hotel about the middle of December, not only had plaintiff little time to go to Auckland but if she went there at all, the witness, who left Auckland before Stillwell did, must have had very little time there with the Stillwells. It is sought to support Collier by reference to a photograph of plaintiff taken in Auckland, New Zealand, which she is said to have sent to the witness Adelyne D'Souza in Calcutta after her return to Australia. But even according to Collier Elsie Forrest was touring with the Dix Company in New Zealand in the beginning of 1902, her alleged visit to Auckland was, from its alleged purpose, unlikely to be accounted a good time for a photograph, and the Photograph certainly does not appear to have been taken shortly after a serious illness such as she had had in Calcutta, Then there is the strange fact that Collier makes no reference to the woman whom Stillwell himself stated he brought from Western Australia to Sydney and with whom he lived at the Gresham Hotel later.

51. I am confident that Collier is a got-up witness and his testimony should be disbelieved, not only what he states took place between the Stillwells at Auckland but also his statement that plaintiff went to Auckland to Stillwell at the end of 1905 or beginning of 1906.

52. The testimony of the Calcutta witnesses when carefully considered, does not afford any real support to the testimony of Collier on the questions of domicile and collusion. Mr. Hasan Imam admits that Joseph Defries was examined merely to prove that Stillwell was alive (and apparently

married) in 1914. Manolescue speaks of the end of 1901 or January, 1905, when he must have been at most nineteen years of age. His testimony is that P.C. Paul, commonly known as Sonnie Paul, son of Sir Charles Paul, financed Stillwell because he was a great admirer of Mrs. Stillwell and took her to lunch at his house and gave her jewellery and presents.

Paul frequently used to sit in my room and talk to Elsie Forrest to marry her. So it was arranged that Stillwell would receive consideration to allow her to divorce him....Stillwell agreed to the proposal and went away about March, 1905, leaving Elsie Forrest behind with Paul. Stillwell went to Singapore.

53. In the written statement of defendant it is admitted that defendant was attracted by the charms of the plaintiff in 1904-05; but Manolescue who according to his story knew defendant since 1900 has nothing to say on the subject. It is improbable that the parties would be in the room of a person of his position at all and certainly that Paul would speak of marriage to her openly, in the presence of this youth. Then again the words "So it was arranged that Stillwell would receive consideration to allow her to divorce him....Still well agreed to the proposal" do not show how the witness came to know anything about it. It is suggestive of gossip or rough inference rather than knowledge. It is also significant that approximately the same vague terms are used by a subsequent witness. Every sentence of the statement quoted is open to serious criticism. Even if money passed from Paul to Stillwell it may only have been money to finance Stillwell's show in Calcutta. The admitted "fascination of her charms" doubtless secured for plaintiff many admirers including Paul and the defendant, who may have been willing to help her husband. Above all there is nothing whatever to show any collusion between plaintiff and Stillwell, even if Stillwell received consideration from Paul for allowing a divorce. Then the inaccuracy of the witness on points of fact is not unimportant. The utmost caution must be exercised before placing any reliance upon the testimony of this witness.

54. The witness Pickering, who was a pugilist and an instructor in physical culture in Calcutta up to December 1905, and who appears to be of a roving disposition, knew Sonnie Paul as a person who took lessons in physical culture and boxing. He speaks of Sonnie Paul driving out with Elsie Forrest and giving her dinner and lunch at various places, but many persons in Calcutta and probably defendant must have done the same. His story is that Paul was in love with her and intended marrying her; that Stillwell told him that he had received ten to fifteen thousand rupees hush money "by hush money I mean a pried for consenting to a divorce" and that Paul and Stillwell told him that Stillwell was paid a certain sum to allow a divorce. Here again there is no indication that Mrs. Stillwell knew of any arrangement in this regard and the evidence of a subsequent witness might well put a different complexion on this matter.

55. W.H. Williams, a theatrical performer, deposed that Stillwell, whom he met at Singapore about June or July, 1905, told him in casual conversation that the show financed by Paul was a failure and that his wife was in Calcutta; that he started divorce proceedings against her and that in order to avoid scandal as some people in Calcutta would be implicated he was compensated by Paul and was on his way to Manilla leaving his wife behind in Calcutta. Which, if either of the two stories thus put into the mouth of Stillwell is true, there is no means of deciding. But the term "hush money " is more consistent with the story of Williams than the explanation of it given by Pickering. The expression

"started divorce proceedings" need not mean proceedings in Court but it would certainly have been easy for the defendant to show from the registers of the Calcutta High Court that no divorce proceedings had been instituted there. It is also the fact that Pickering like Manolescue may be ruled out as a parson on whose testimony no reliance can safely be placed.

55. Mrs. Waite, the widow of a clerk in the Calcutta High Court who was in 1901 05 the private Secretary of the Chief Justice and much later rose to be a Deputy Registrar of the Court, stated that she was introduced to the Stillwells in 1904-05 by Sonnie Paul who was infatuated with the plaintiff. She further deposed:

Sonnie Paul wanted to marry Elsie Forrest and so it was arranged that Stillwell should receive a handsome amount of money and allow his wife to get a divorce. Stillwell agreed to this...She afterwards went to Australia to get a divorce. She came back to India in 1907. Sonnie Paul did not marry her. He changed his mind, fell into love (sic) with another.

56. It will be observed how closely the wording of the most important statement of this witness resembles that of Mono-lescue and the same criticisms apply to it. In particular there is nothing to show how this witness could know the facts. A person in her position, the wife of a clerk on pay of scarcely half the monthly valuation of Paul's house, was by no means likely to be on intimate terms with the Pauls. I have no doubt at all that she had nothing except Calcutta gup to go upon.

57. Mr. Hasan Imam places more reliance on the evidence of Adelyne D'Souza, the housekeeper of the Pauls. She deposed, that "the Stillwells used to come to Sonnie Paul in 3, Park Street often. Elsie Forrest came oftener and denied and lunched with Paul and often drove together... ... After Stillwell left Calcutta she remained in Calcutta. Elsie was friendly to Mr. Paul and also intimate with him. Elsie was for some months in Calcutta and they met each other as before."

58. Paul went to England after Elsie Forrest went to Australia. The latter gave the witness some gifts with a letter of 30th August, 1905, thanking her for her kindness and also sent her from Australia a gold bangle and the stage photo of herself already mentioned. Sonnie Paul returned from England in 1908 married. The last sentence in the deposition is "Elsie Forrest went to Australia with the intention of taking divorce as she was anxious to marry Sonnie Paul."

59. Mr. Hasan Imam lays stress upon that sentence and upon the statement that Elsie was intimate with Mr. Paul. To my mind it would be altogether unreasonable to infer adultery between Paul and Mrs. Stillwell from this expression of the old Eurasion house-keeper. If the defence wished to make out this case they ought to have obtained a much more explicit statement from the witness. The statement of the plaintiff's intention in going to Australia, so far as can be seen, is nothing more than the inference of the witness and it is hardly consistent with the movements of the plaintiff after she had secured the divorce. One would expect her to join Paul in England or at any rate not to return to Calcutta while he was still in England, even if he was still unmarried in 1907. If Calcutta held an attraction it was not Paul. The solution may be found in para. 10 of the written statement. But whether that is so or not, the defendant has in this suit endeavoured to make much more out of the relations of Paul and plaintiff than the actuality warranted and has adduced in support

testimony both unreliable and inconclusive.

60. I am altogether unable to support on the evidence set out the finding that the divorce decree is vitiated by fraud or by collusion on the part of the Stillwells. I am not prepared to rely upon the evidence of Collier even to the extent of holding that the plaintiff in December, 1905, fetched Stillwell from Auckland to Sydney or even visited Auckland at all, and still less as to the details of the alleged interviews between the Stillwells and the passing of money. Nor would the evidence of the other witnesses, which I also discredit, materially strengthen the evidence of Collier. There were admittedly monetary transactions between Paul and Stillwell but it is not shown that they had anything to do with a divorce at Sydney: on the contrary they are consistent with payments in connection with financing Still well's 'show' or with settlement of divorce proceedings initiated by Stillwell. Even if Paul and Stillwell arranged that Stillwell should not oppose a divorce, it is not shown that plaintiff was cognizant of the arrangement. There is no foundation whatever in the evidence of the witnesses Defries, Manolescue, Pickering and Mrs. Waite enumerated by the learned Subordinate Judge for his remark that plaintiff induced Stillwell by offer of money to agree to a divorce; none of these witnesses say that. The Calcutta evidence certainly fails to establish adultery between Paul and plaintiff, or that, to use the expression of the learned Subordinate Judge "the wife was having intrigue with other men". On the other hand all indications point in the opposite direction. It may be pointed out that the defendant must have been in a position by his own evidence to elucidate many points which are obscure. No doubt, the plaintiff could do so also, but the onus is not upon her, and apart from the view of her Counsel that she must succeed even if the written statement were true, it will be clear hereafter that the point on which she could not face cross-examination is the issue as to adultery. Then Stillwell appears to have corresponded with her when he was at Singapore. It is just possible that plaintiff when she left Calcutta may have heard something as to misbehaviour on the part of Stillwell at Manilla and if she said anything in Calcutta as to divorce she may have had that in her mind. Again the collusion, if there had been any, would be of an unusual character. Notoriously collusion is effected at a Hotel by the husband staying there for a night with a woman of the town. Still well made a prolonged stay with his mistress at the Gresham, describing her as his wife. And he had according to his own account brought her from Western Australia. The statement in the petition for dissolution of marriage that adultery took place not only at the Gresham Hotel (as it did from about the middle of December) but also in other places in New South Wales indicates that these two people may have been in adultery before the plaintiff arrived in Sydney and that there was no collusion as to the ground on which divorce was granted. The fact that Stillwell went to live at the house of his parents-in-law and stayed there for six weeks appears also to contra-indicate any collusion between the Still-wells up to that time or any idea on his part of a divorce. The plaintiff's account of her interviews with her husband tends in the same direction: his terms were that they should live together if she would maintain herself and cost him nothing, It is not an unfair inference that he left the house of his parents-in-law because of the discovery of his liaison with the woman referred to and that the breach between him and his wife was not final until he definitely refused to give up the woman and support his wife.

61. To my mind the defendant has completely failed to establish fraud either actual or constructive or collusion between the Still wells in respect of the proceedings in divorce either with regard to domicile or on any other point.

62. But it is further open to the defendant to show that, fraud and collusion apart, the Court in New South Wales had no jurisdiction to pronounce a decree of divorce because Stillwell was in fact not domiciled there. I am of opinion that the defendant had also failed to establish that contention. Assuming that the domicile of origin of the defendant was in Kentucky, he had no relatives there, he had lived for a long time in Britain and had toured for the most part in the British Empire. There was certainly no inherent improbability that he would adopt his wife's domicile of origin as his domicile of choice. Just before his marriage he stated to his bride and her mother that he would eventually settle down in Now South Wales where a settled occupation would be available in his father-in-law's business and there is no reason to doubt that he was in earnest. He also had his permanent address for his letters at the business place of his father-in-law in New South Wales. His venture in Calcutta having failed his eyes might well turn to New South Wales; there was nothing unusual in his working his way there by giving performances at places en route. His residence with his parents-in-law certainly points towards an intention to settle down there. It has already been pointed out that he had never intended to stop taking engagements on arrival in New South Wales but only eventually to join his father-in-law in business. No doubt, forgathering with another woman en route introduced a complication but the fact that he took up his residence with the Thompsons shows that it was till then only a temporary connection and even when he first met his wife, he contemplated taking her to live with him and giving up the new consort.

63. Now domicile can always be ascertained either by means of a legal presumption or from the known facts of the case. The presence of Still well in New South Wales is presumptive evidence of his domicile and it is evidence of his intention to reside there that he had expressed an intention of doing so and that when he left Calcutta he arranged to go to Sydney and eventually to bring his wife back from London to Sydney. Residence in the house of his parents-in-law is also significant. While there he was on the look out for an engagement with Rickards,--(eventually, he intended to take up work with his father-in-law)--crossed to New Zealand for a short time, returned about December, secured the engagement at Rickards' and then went to Thurston's. It is not unreasonable to assume that he went to New Zealand merely to fill in the time, until the engagement at Rickards should be available I see no reason to doubt that Stillwell went to New South Wales with the intention of establishing his permanent abode there, primarily with an eye to his taking up his father-in-law's business eventually if it should prove a good thing, and even if it should not do so, still to adopt as his permanent home, in so far as the circumstances of a person who from the nature of his occupation wanders about a good deal, permit his wife's city which was the only place in the world to which either of them had any attachment. It may be observed that it is a very common thing for British Officers in India (except in the comparatively few cases where they have a permanent home of their own in the United Kingdom) to settle their families and eventually themselves with or in the neighbourhood of the relatives of their wives. I am unable to hold that the nature of Still-well's residence in New South Wales is inconsistent with or rebuts the animus manendi. It is true that by 22nd March, 1806, he had left the Gresham Hotel, but it has not been shown that he left the State then or at any time before 1914 and in any case it is clear that if on arrival in New South Wales he had made it his domicile of choice, as I consider he had, he had not abandoned it on the 10th January following when the proceedings were instituted. I am clearly of opinion that the defendant has failed to prove that on the 6th January, 1906, Stillwell was not domiciled in New South Wales or to displace the presumption of competent jurisdiction attaching to the divorce decree of the

Supreme Court of that State or to invalidate the judgment and decree of that Court Under section 44 of the Indian Evidence Act. That decree is, as already indicated, relevant and conclusive Under section 41 of the Indian Evidence Act, unless the defendant establishes that it was delivered by a Court not competent to deliver it or was obtained by fraud or collusion and defendant has completely failed to show that. Be it noted that in discussing the question of fraud, collusion and domicle, I have placed the defendant in the most favourable position by accepting all the evidence adduced by him as relevant and admissible, though portions of it are of doubtful admissibility, and yet have been constrained to hold against him.

64. The divorce being valid and the marriage of the plaintiff with the defendant being admittedly vaild she was his wife at the time when the deeds sued upon were executed by him in her favour and Section 25(1) of the Contract Act applies to them.

65. Next, on the question whether the deeds come Under section 25(2) of that Act as a promise to compensate a person who has already voluntarily done something for the promisor, reliance is placed on behalf of the plaintiff upon the recital in the earlier deed. There is certainly discernible therein an insistent note that, whatever anybody may say the marriage is valid, has been consummated and has been accepted by his relatives, friends and dependants, and accordingly it is incumbent on him to provide for Sita Devi. The question whether his design in 1913 was to provide for her, in view of all she had done voluntarily for him so as to make her secure in the event of the marriage being adjudged invalid is, therefore, by no means easy to answer. On the whole, but not without some hesitation, I have come to the conclusion that the deed is really a life-annuity granted by Hindu husband to Hindu wife and charged upon his properties set out in the deed. It was urged at one stage of the case that if the divorce was not valid the consideration for the deed would be not only past adultery but also future adultery and that would, as held in Alice Mary Hill v. William Clarke 27 A. 266 : 1 A.L.J. 632, "make it not merely an immoral but an illegal agreement and the contract would be void."

66. But the fallacy lies in this that adultery per se is not an offence in India. To come under Section497 of the Indian Penal Code the adultery must be without the consent or connivance of the husband and in the present case it is clear that if the divorce was invalid be-cause of fraud or collusion between the Still-wells especially as to the jurisdiction, it could not be said that the adultery was without consent or connivance of Stillwell who moreover had himself married and on this hypothesis had committed adultery in the lifetime of the plaintiff and must be supposed to have assented to similar freedom of action on the part of plaintiff.

67. Issue No. 6(1).--The learned Subordinate Judge has found that the plaintiff had relapsed to her former vocation and was leading an immoral life in England and a questionable life in Calcutta. The learned Subordinate Judge has, naturally, experienced some difficulty in apprehending the position and some of his findings in this regard have not been seriously supported before us and are clearly unsustainable. As early as 1916, as the letter Ex. T (1) indicated, plaintiff told the defendant that she wanted to "commence to learn to operas with an Italian accompanist, Maestro Veroli" and that she had been working hard at Italian. No one can say that an appearance at the Aeolian Hall on Armistice Day, 1920, with Maestro Veroli as accompanist was undignified nor can her array on that

occasion give serious or any ground for strictures. She had been studying for two years before she went to him in July, 1917, and in a previous letter had written: "My voice is doing splendidly these days. I am sure now that I shall try things with it if I only keep my strength."

68. Thus her husband knew her aspirations and did not oppose them. As to her appearances at the Conservatoire in Calcutta, the wives of Judges and other distinguished men had done the same and no stigma could attach to that. There is a world of difference between concerts at the Aeolian Hall and the Conservatoire and her former vocation. But even if she had reverted to the variety stage and earned her livelihood by her profession, the defendant could have no ground to grumble. If such a return should prove inconvenient to him he would have had himself to blame for stopping her allowance and there is certainly nothing to show that by themselves these incidents would in the least irritate the defendant who, so far from being an orthodox or old-fashioned Hindu, is, as the record shows, very 'advanced' and westernized. They would assuredly be no answer to the present suit.

69. On the other hand, I am unable after careful consideration to see that there is any satisfactory answer to the charge that plaintiff misconducted herself with H.T. Culliford. Culliford stayed with her in the flat continuously for at least eighteen months holding himself out as her step-brother. The neighbours considered that they wire living as husband and wife and the agent for the flats, who knew that Culliford had no sister, was of the same opinion. The plaintiff in her affidavit stated that she was never without a chaperon at the flat and Mrs. Culliford states that there was a chaperon there on the few occasions on which she visited. Had there been a chaperon in the house while Culliford resided there, it is safe to say that his residence would not have given arise to scandal in the flats. But there is still stronger evidence against plaintiff. The witness Newman, whose furnished lodgings in Richmond, Surrey, were occupied by the plaintiff in the summer of 1922 for ten to fourteen weeks, has deposed that the plaintiff gave out that her brother would come to the apartments to have his meals and that H.T. Culliford came as that brother, that she tried unsuccessfully to secure a room for him in Newman's house, that she and Culliford addressed one another in endearing terms, she was upset when she heard that a visitor, the only one, had called; on some days Culliford's car used to remain outside the house of the witness for eight or nine hours; Culliford used to go up to her bedroom with the plaintiff about mid-day and stay there with her for half an hour or an hour; after 5 P.M. they always sat in the sitting-room, with the door locked and with the curtain drawn though it was summer, and at night after dinner they went upstairs to the bedroom about 9 P.M. and Culliford stayed there with plaintiff until 10 or 10-30 when he left the room, came downstairs and let himself out, occasionally doing so after the witness had locked up for the night, while the plaintiff never came down at all after she had gone up about 9 P.M. No reason is shown why this evidence should not be believed and from it there can be only one inference. There is further evidence with regard to the De Vere Hotel but it only shows that Culliford appeared to the manageress a very affectionate brother of plaintiff. The only attempt at explanation is found in the affidavit of the plaintiff made after Mr. Jackson had promised that the relationship of Culliford, whom he thought to be her half brother, would be explained by the plaintiff. Therein she stated that he was a friend whom she had nursed during the War. Bat this explanation does not go far enough especially in view of the testimony of the witness Newman, even though, as the letter Ex. T (2) of 31st July, 1917, in which she writes about Bothie Robertson "he is going to try to get to Devenshire

for a couple of weeks. I hope he will succeed--it will be nice to have a big strong brother to look after me. Men are very scarce these days Daddy Dear", shows that defendant by no means required a specially high degree of circumspection from her. But when every allowance has been made for the comparative freedom of manners of the plaintiff's original profession and of post-war days generally, there is no escape from the conclusion that Culliford was the lover and paramour of plaintiff and she lived in adultery with him in defendant's flat and elsewhere. On this point I agree with the learned Subordinate Judge.

70. The learned Subordinate Judge is less clear as to whether plaintiff actually committed adultery in Calcutta, Upon a careful perusal of the evidence of Mrs. Williams, the only witness on that point, I consider that it is not inconsistent with the innocence of the plaintiff in Calcutta of the highest marital offence. The apartments being in a select neighbourhood, Mrs. Williams was grealty concerned for the reputation of her house, which might suffer from the free ways of theatrical people. Her standard of deportment and circumspection for an 'unprotected' woman was, it would seem, higher than is now-a-days required, and she promptly objected to the plaintiff receiving gentlemen callers in her room. The letters Exs. M and N to Ivan, who once took supper with plaintiff and then took her out for the evening, are consistent with innocence and I would not lay any special stress on the visit of the "Moslem dressed in English clothes" to a lady who had been accustomed during her married life to meet Indians of the better classes.

71. Issue No. 7.-- In his written statement defendant set out that plaintiff had taken the defendant's family and other jewels worth five lakhs, and as these had been made over to her for use only, the suit was unsustainable until they were returned by her. The only evidence on the subject of the jewels is found in the affidavits of March, 1923, and in the three letters (Ex T series) addressed by plaintiff to defendant. In his affidavit defendant repeats his allegation, while plaintiff denies having obtained any jewellery by false pretexts, and states that presents which she received from defendant from time to time were given willingly and as a mark of affection. In the earliest of the letters which is dated the 4th May, 1916, occurs the expressions "Zeppelins give us an anxious time these days. Raids almost every night and so I keep the 'family jewholes' safe at hand always."

72. This is so obviously the joke of that period that it is surprising that the learned Subordinate Judge should have drawn any inference from it. The expression is within quotation marks and was one which many thousand people must have used at the time who had no family jewels at all. The ludicrous reference is to underground places of safety and perhaps also to a certain race which, on the one hand, is or was then believed not to be unduly endowed with courage (doubtless, quite erroneously) and on the other, to be not unconnected with the jewel trade. In the second letter written in the following November she wrote:

I know you will send me the money for my new furcoat (I ordered it ages ago) and I shall take it as my Xmas present, so please do not think of sending me anything else, for you know, dearest, that I have heaps and heaps of jewellery, much more than I can ever possibly wear.

73. In the last letter produced which is dated July, 1917, she wrote thanking him for his promise to send her money for her birthday and proceeded:

The money will be much more useful to me than any jewellery of which I already have too much and I shall be able to pay up some pressing bills.

74. On the evidence adduced plaintiff had received jewellery from previous admirers including Paul, while of the jewellery received from the defendant there is nothing to show how much she received after their marriage in 1909 and how much during the five preceding years of their friendship. The defendant could have readily proved that he had made over the family jewels to her for her use. The only admission is that she received presents from time to time and it does not imply that family jewels ware ever made over to her or any jewels merely for her use. In disagreement with the Court below I find that the possession and retention by plaintiff of presents of jewellery made to her by defendant in no way precludes her from maintaining her suit on the two deeds. There is also nothing to show what jewellery remains to her after she has disposed of some of it in order to maintain herself and presumably to pay expenses incidental to this litigation.

75. I find, therefore, that the plaintiff is in fact and was from 1909 onwards the wife of the defendant, that the instruments in suit are valid Under section 25 (1) of the Contract Act, that the plaintiff has committed adultery subsequent to the execution of those instruments and that there is no proof that the plaintiff is in possession of family jewels given by the defendant for her use or of any jewels given by him after marriage except as gifts presented from affection and without any implication that they would be returnable under any circumstances.

76. Certain other questions which have been discussed only call for mention, since in view of the above it is unnecessary to determine them. Among them are (1) the argument based on Armitage v. Attorney-General (1906) P. 135 : 75 L.J.P. 42 : 94 L.T. 614 : 22 T.L.R. 306 that defendant has not shown that even if Still well was not domiciled in New South Wales, the Court of Kentucky in which he must be supposed to have his domicile, would not recognise the decree of divorce passed by the Supreme Court of New South Wales and if it did so, this Court also would uphold it, (2) that defendant has not shown that the Arya Samaj marriage was invalid even if the divorce decree produced was invalid and Stillwell was alive in 1909, and (3) what would be the position if at the time when plaintiff and defendant married (a) the plaintiff alone knew or (b) both plaintiff and defendant were aware that the divorce was invalid or (c) both were under a mistake of fact that the divorce was valid. But it is right to indicate my considered opinion that the defendant was at the time of the marriage fully cognizant of plaintiff's history in Calcutta and the material circumstances attending the divorce and that both bona fide believed the divorce to be valid and also believed after careful enquiry that the only obstacle to a lawful union was the difference in religion and that it had been successfully overcome.

77. Thus all the issues have been found in favour of plaintiff except the first sub-issue in issue No. 6 and there remains only the other sub-issue, to wit, whether by reason of her adultery in 1920-1922, she has forfeited her claims under the deeds or either of them.

78. It has been strenuously urged on her behalf that both deeds are independent of the subsequent immorality of the plaintiff, as they do not contain a dum casta clause.

79. The first instrument, though as already indicated, the recital protests with somewhat suspicious insistence the validity of the marriage from a Hindu point of view, appears to me to grant as maintenance to a Hindu wife a life-annuity of a specified amount charged upon some of the executant's property. Stamp duty was paid Under section 25 of the Indian Stamp Act as upon an annuity. By the general Hindu Law she would be entitled to a maintenance out of her husband's property (the Tikari Raj estate is admittedly defendant's separate property) both in his lifetime and after his decease. The intention is to fix the amount of this maintenance on an appropriate or even a reasonably generous scale.

80. To my mind the absence of a dum casta clause makes no difference. A Hindu wife is entitled to maintenance from her husband so long as she is chaste though perhaps, if having been unchaste she is penitent, she has a right to a bare subsistence. Reliance is placed by Mr. Hasan Imam on the decision in Satyabhama v. Kesvacharya 29 Ind. Cas. 397 : 39 M. 658 : 18 M.L.T. 28 : 29 M.L.J. 87. That was a suit by a Hindu widow against her deceased husband's brother for maintenance at the rate fixed in the deed, it having been found that plaintiff had after the agreement lived an immoral life but had reformed at the date of the suit. It was held that she had lost her right to the rate fixed in the deed but was entitled to a starving allowance. The learned Judges held that the fact that the maintenance was secured by a deed did not differentiate the case from the earlier decisions of the Madras High Court in which it was held that maintenance was forfeited by unchastity. It is indeed urged before us that the deed of 1913 is registered, whereas the report does not indicate whether the written agreement in the case cited was registered. But the object of registration was to make the deed valid Under section 25(1) of the Indian Contract Act, 1872, and to affect immoveable property Under section 17 of the Registration Act, 1908.

81. It is also urged that Under section 92 of the Indian Evidence Act evidence may not be adduced for the purpose of adding to or contradicting the terms of the grant. But even if the fifth proviso should not be adjudged wide enough to admit of evidence of the custom that all grants of maintenance to Hindu wives have the incident of chastity annexed to them, Section92 only bars evidence of an oral agreement or statement. It appears to me that inSection1 of the Indian Contract Act, 1872, is to be found the answer to plaintiff's case. It is there laid down that nothing in the Act shall affect any incident of any contract not inconsistent with the provisions of the Act. Clearly the incident of chastity attaching to an annuity granted by a Hindu husband by deed to his Hindu wife for her maintenance is not inconsistent with any provision of the Contract Act and is, therefore, not affected by that Act: The instrument is, therefore, to be interpreted as if it contained a dum casta clause. Accordingly the plaintiff is in the circumstances unable to recover under this deed. The words "it is incumbent for me to provide for the said Sita Devi during her life so that she may pass her days in ease and comfort" do not indicate any more than that he was making a suitable provision for the wife of a person in his station. In Saunders v. Saunders (1894) 69 L.T. 498 there was a post-nuptial settlement in a deed of separation containing no dum casta clause. The marriage was dissolved upon the wife's adultery and the postnuptial deed was varied by reducing the settlement of 200 to 100 payable only dum sola et casta vixerit. If I were called upon to fix a "starving maintenance" allowance in the present case I would say that Rs. 500 a month dum sola et casta vixerit would be adequate if it be not liberal. But as a result of the decision in the next paragraph the point does not require consideration.

82. It has been confidently urged on behalf of the plaintiff that, whatever may be the case with the first deed, the perpetual annuity granted by the second deed is not a provision for maintenance "so that she may pass her days in ease and comfort," as the first deed is, but a grant of a different character, over and above the requirements of maintenance, made out of the love and affection which he bore to the grantee. I consider that to be the correct interpretation of the deed itself. A part of the maintenance is turned into an absolute grant which is indefeasible even by subsequent misconduct. The provision that if the second deed is ineffective, the first deed shall revive completely, may well have reference to encumbrances created upon the charged properties in the interval between the two deeds. Then the position of the defendant at the date of execution also falls to be considered. He was on the eve of making an indenture of trust (page 114 of Part I of the paper-book) of all his properties. The plaintiff though not then in India was made one of the trustees. A copy of the deed now under examination was forwarded to her in England by Messrs. Leslie and Hindu, defendant's Solicitors in Calcutta, on the 6th September, 1917, so that it probably reached her just before the indenture of trust was executed on the 26th September, 1917. It was natural in the circumstances that he should make special provision for his wife and doubtless the grant of the perpetual annuity was made in anticipation of the indenture. The grant is to her, her heirs, executors, administrators and assigns. There being at that time no issue of the marriage the executant would, in the absence of after-born issue, be her heir and he may well have contemplated that when the annuity in the first deed ceased on her death it would be an advantage to him to receive the reversion of the perpetual annuity of Rs. 15,000 a year granted by the second deed, or that after-born children if any, for whom no other provision may have been made, should inherit it. In my opinion the second deed is not a maintenance grant and is not affected by the subsequent unchastity of the plaintiff. The defendant is not entitled to rescind it or to revoke it.

83. Accordingly I would allow this appeal in part and decree the suit of the plaintiff in part with proportionate costs in both Courts and interest thereon at six per cent, per annum. It is declared that the plaintiff is entitled under the deed of 18th July, 1917, to a payment from the defendant on the first day of each month of the sum of Rs. 1,250 a month free from all taxes and reductions whatsoever, except income-tax, and that the same is a charge upon the properties set out in the said deed and the said charge maybe enforced by the sale of the said properties. The plaintiff is further entitled to a decree for the arrears of the said payment from and including the 1st September, 1921, up to and including 1st January, 1923, being Rs. 21,250 with interest at six per cent. per annum from date of suit till date of realisation, and is entitled to sell a sufficient portion of the said properties for recovering the said arrears.

Kalwant Sahay, J.

84. I have had the advantage of reading the judgment of my learned brother, and as I agree to the decree which he proposes to make in the case and as the facts and the evidence are set out in great detail and with clearness by him, J do not consider it necessary to deal with the facts at any great length.

85. The first point for consideration is the question about the validity of the marriage of the plaintiff with the defendant. Although in the Court below the defendant contended that there could not be a

valid marriage between the defendant, who is a dwij Hindu and the plaintiff, who was a Christian and alleged to be a convert to Hinduism, and succeeded in obtaining a decision in his favour from the Subordinate Judge, Mr. Hasan Imam who appears on behalf of the defendant-respondent did not press this point before us. He challenged the validity of the marriage only on the ground that the divorce obtained by the plaintiff from the Matrimonial Court at Sydney was invalid, and he did not challenge the validity of the marriage on the ground of its being invalid under the Hindu Law. Under the circumstances it is not necessary at all to consider the correctness or otherwise of the reasoning of the learned Subordinate Judge for holding that the marriage was invalid under the Hindu Law. His observations that conversion to or from Hinduism is wholly repugnant to Hindu ideas and feelings, that there can be no valid conversion of a non-Hindu to Hinduism, that a Hindu is born and not made, that the Sudhi ceremony of the Arya Samaj sect is the ceremony of bringing those into the fold of Hinduism who had at some earlier time embraced other religion though they were Hindus by birth that Sudhi is not a ceremony of conversion of a non-Hindu by birth into Hinduism, that a Brahman, Kshatriya or Vaishya cannot accept as wife a woman who is not among the four castes and who is by birth and parentage a Christian, that according to the Hindu Law the plaintiff could not have been converted to Hinduism, that assuming the conversion of the plaintiff was valid her conversion would not give her the status of a dwij or twice-born, that the status of the defendant was that of a Brahman and that as such there could be no valid marriage between him and the plaintiff who could not become a dwij by her conversion, and that at any rate a marriage such as that between the plaintiff and the defendant is not allowable according to Hindu Law as it now obtains in this country, do not call for any examination at all. Many mixed marriages between Indians and Europeans have been performed and are being performed and it would be out of place to enter into a discussion as regards the validity of such marriages when the question doe3 not properly arise in the present case and when the learned Counsel for the respondent expressly gives up the point and confines himself to the question of the invalidity of the marriage only on the ground of the illegality of the divorce.

86. I would, therefore, consider very briefly the question whether there was a proper and legal divorce between the plaintiff and her husband George Edwin Stillwell. The defendant produced the marriage certificate (Ex. A) dated the 11th of June, 1903, granted by the Acting Resident Magistrate, Cape Town, which proved the marriage of the plaintiff with George Edwin Stillwell on the 11th of June, 1803. The plaintiff, on the other hand, produced a decree absolute granted by the Supreme Court of New South Wales (Ex. I) which shows that her marriage with George Edwin Stillwell was dissolved on the 26th of June, 1908. She has also produced copies of the proceedings of the Court in the divorce case. The decree is prima facie evidence in favour of the plaintiff of the divorce being valid and legal. There is a presumption in her favour raised by Section 14 of the Code of Civil Procedure that the judgment in the divorce case was pronounced by a Court of competent jurisdiction. It is, however, open to the defendant to show that there was a want of jurisdiction in the Court which pronounced the divorce decree. He is entitled to do so not only Under section 14 of the Code of Civil Procedure, but also Under section 44 of the Indian Evidence Act. The contention of the learned Advocate for the appellant thatSection44 does not apply to judgments in rem does not appear to be sound. Section 41 of the Evidence Act refers to judgments, orders or decrees by a competent Court in the exercise of Probate, Matrimonial, Admiralty or Insolvency jurisdictions. In the present case we have got a judgment and a decree of a Court in the exercise of its Matrimonial

jurisdiction which is relevant evidence Under section 41 of the Act. Section 44, however, refers to judgments, orders or decrees which are relevant Under section 41 and other sections of the Act, and it expressly provides that any party to a suit may show that a judgment, which is relevant Under section 41 and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion. We have got statutory provision in this respect in India and it is not necessary for us to consider the decisions of the English Courts cited before us on the question whether it is open to the defendant, even in the case of a judgment in rem, to show that such judgment was pronounced by a Court not competent to pronounce it or that it was obtained by fraud or collusion. There is, however, a presumption in favour of the plaintiff that the judgment or decree was pronounced by a Court of competent jurisdiction and the onus lies upon the defendant to show that the Court had no jurisdiction to pronounce it.

87. The validity of the decree of the Divorce Courts challenged by the defendant on two grounds: first, that the Court at Sydney had no jurisdiction to pronounce the decree inasmuch as the domicile of the respondent George Edwin Stillwell, on the date of the presentation of the application for divorce, was not in New South Wales; and secondly, because the decree was obtained by fraud or collusion.

88. On reference to the proceedings in the divorce case it appears that there was a clear allegation in the petition of the wife that her husband was, at the time of the institution of the suit, domiciled in New South Wales. There was an affidavit to this effect filed by the wife along with her petition and, although no specific issue was framed on the point, evidence was given at the trial on the point of domicile and in the final decree it is expressly stated that it had been, proved to the satisfaction of the Court, that the respondent was, at the time of the institution of the suit, domiciled in New South Wales. The question was, therefore, considered by the Court before granting the decree in the divorce case. We have to see whether the defendant has succeeded in showing that, as a matter of fact, George Edwin Stillwell was not domiciled in New South Wales at the time of the institution of the divorce proceedings. The evidence adduced on the side of the defendant goes to show that the domicile of origin of Stillwell was in Kentucky in the United States of America and it is contended that there was nothing to show that he ever changed his domicile and adopted a new domicile of choice. There is, however, evidence on the record to show that at the time of his marriage with the plaintiff, George Edwin Still-well expressed his intention of settling down in New South Wales after he had completed his engagements. We find that after finishing his engagements which brought him to Calcutta and when his attempts to start business on his own account had failed in Calcutta, he went to Sydney and lived with his parents-in-law. The nature of his occupation was such that he could not be expected to live at any one place for any length of time, but there is evidence of his intention to make Sydney his home, and unless there is strong evidence to the contrary we cannot in the face of the finding of the Court of New South Wales come to the conclusion that George Edwin Still well was not domiciled in New South Wales at the time of the institution of the divorce proceedings. It is not for us to review the evidence given in the divorce case and to come to a finding as to whether the decision of the Court of New South Wales on the question of domicile was correct or erroneous. We have to see whether the defendant has by positive evidence proved that, as a matter of fact, George Stillwell was not at the time of the institution of the proceedings in the divorce case domiciled in New South Wales. There is evidence on the side of the plaintiff to show that

George Still well had adopted New South Wales as his domicile of choice. The evidence may be slight, but that evidence must be accepted when there is a total absence of evidence on the side of the defendant to prove otherwise. I agree with my learned brother in holding that it has not been established that the decree in the divorce case was passed by a Court which had no jurisdiction to pass the same on the ground of the respondent in the case not being domiciled in New South Wales.

89. As regards the question whether the decree in the divorce case was vitiated on account of fraud or collusion, there is some evidence on the side of the defendant. That evidence has been considered in detail by my learned brother and I generally agree with him in the conclusion arrived at by him. It is necessary to refer to the evidence of only two of the witnesses examined by the defendant, viz., Joseph Edward Collier and Adelyne DeSouza. Collier who is "a member of the theatrical profession" states that at the end of the year 1905 he was playing at Auckland at the Opera House with George Still well and that he was staying at the same Hotel in Auckland with Still well. He states that his wife Elsie Forrest came there and wanted him to go to Sydney to obtain a divorce. Still well refused to go and he wanted money. This gave rise to a heated discussion and became known to everybody in the company. Stillwell said he had already agreed not to oppose the divorce and hence it was unnecessary for him to go and he said he won't go to Sydney. At last he agreed to go after completing his engagements in the company. He got some money too from his wife Elsie Forrest. Great reliance is placed by Mr. Hasan Imam upon the evidence of this witness, and if this evidence is believed, collusion is established. My learned brother has given reasons for not believing this witness and I agree with, him. It is contended on behalf of the respondent that this witness, like all the other witnesses examined by the defendant, was not cross-examined by the plaintiff, that before the Subordinate Judge no argument was advanced on behalf of the plaintiff challenging the truth of the evidence given by this or by any other witness on behalf of the defendant, that in the memorandum of appeal to this Court also no ground was taken challenging the veracity of this or of any other witness, and that under the circumstances this Court must accept the evidence of this as well as of the other witnesses examined on behalf of the defendant as true, and I must proceed on the assumption that the facts deposed to by these witnesses have been proved and are unchallenged by the plaintiff. It is unfortunate that the plaintiff who had the benefit of the advice of an eminent Counsel did not think it proper to cross-examine any of the witnesses examined on behalf of the defendant, that no arguments were advanced on her behalf at the trial before the learned Subordinate Judge, and that the learned Counsel who appeared for her argued the case before any evidence was adduced and before even the issues were settled. The matter is regrettable, but it does not relieve this Court from the duty of critically examining the evidence adduced on behalf of the defendant upon whom the onus of proof lies. The Court cannot shut its eyes and cannot refuse to consider the probabilities of the case and cannot accept the evidence, of any witness as true without critically examining the evidence and applying its mind to a consideration of the question as to whether the evidence given by the witness is true or not. I find it hard to believe the evidence given by Collier. The evidence of the other witnesses of the defendant goes to show that P.C. Paul, otherwise known as Sonnie Paul, bad already arranged with George Stillwell and had given him money to induce him to agree to a divorce, and Collier's statement is the only evidence to show that the plaintiff also gave some money to her husband to obtain the divorce. Collier, moreover, does not know whether Stillwell actually went to Sydney or not. He had left Auckland while Stillwell was still there, and it is doubtful how far his evidence is admissible as to the conversation that passed

between the husband and the wife. His statement that Stillwell got some money from his wife does not appear to be based on his own knowledge, but appears to be his opinion on hearsay information and is hardly admissible. The evidence of Adelyne DeSouza is of no importance on the question of collusion. She only proves the intimacy between Paul and the plaintiff. In the last sentence of her deposition she states that Elsie Forrest went to Australia with the intention of taking a divorce as she was anxious to marry Sonnie Paul. Accepting this evidence to be true, this does not prove collusion between the husband and the wife. The wife may be anxious to obtain a divorce, but she may have good grounds for it, and the ground upon which the divorce was granted, viz., adultery of the husband, has not in this case been shown to be false. Assuming for the sake of argument that there was some understanding between Sonnie Paul and the plaintiff that she should obtain a divorce in order that the two may be married, the divorce would not be invalid if, as a matter of fact, there was legal ground for the wife obtaining the divorce. Not a scrap of evidence has been given in the present ease to show that, as a matter of fact, George Stillwell was not guilty of adultery as was found by the Court at Sydney. If adultery had been proved, the Court at Sydney was competent to pronounce a decree for divorce, although there might have been an anxiety on the part of the wife to obtain the divorce on a different motive. The evidence of the other witnesses examined at Calcutta do not go far enough to prove collusion between the husband and the wife, and I am of opinion that the decree in the divorce case passed by the Supreme Court at New South Wales has not been proved to be bad on account of want of jurisdiction or of fraud or collusion practised by either party to the divorce.

90. The result is that it must be held that the marriage of the plaintiff with the defendant has been proved to be a valid marriage.

91. I have next to consider whether the two documents relied upon by the plaintiff and upon which her claim is based can be enforced.

92. As regards the first document I am of opinion that it is a document fixing the maintenance allowance by a Hindu husband for his Hindu wife. The plaintiff's case is that before her marriage with the defendant she was converted to Hinduism and became a Hindu and the marriage was under the Vedic rites which are binding between Hindus. Her position, therefore, must be that of a Hindu wife. The deed expressly says that there had been a legal and binding Hindu marriage between Sita Devi, formerly Elsie Caroline Thompson, who had embraced the Hindu faith, and that the marriage was performed in the Vedic form. The status of the plaintiff as the lawful wife of the defendant is repeated about half a dozen times in that short document, The executant of the document gives it as the reason for the execution of the document that it was incumbent upon him to provide for the said Sita Devi during her life. This obligation is attributable only to the fact of the marriage and to the fact of the defendant, the executant of the document, being the husband of Sita Devi. The document must, therefore, be considered as a document fixing the amount of maintenance which the Hindu husband was bound to give to his Hindu wife. The question whether the Hindu wife is entitled to claim the maintenance fixed by this document must be answered on a consideration of the Hindu Law on the question of maintenance. It has not been challenged, and cannot in fact be challenged, that a Hindu wife is not entitled to claim maintenance from her husband or from the estate of her husband if she is guilty of unchastity. Reference may be made to Nagamma v. Virabhadra 17 ML 392 : 6 Ind. Dec. (N.S.) 272, Sathyabhama, v. Keshvacharya 29 Ind.

Cas. 397 : 39 M. 658 : 18 M.L.T. 28 : 29 M.L.J. 87, Rama Nath v. Rajonimoni Dasi 17 C. 674 : 8 Ind. Dec. (N.S.) 990, Valu v. Ganga 7 B. 84 : 7 Ind. Jur 261 : 4 Ind. Dec. (N.S.) 56, Vishnu Shambhog v. Manjamma 9 B. 108 : 9 Ind. Jur. 271 : 5 Ind. Dec. (N.S.) 72 and Bhikubai Yeshwantrao v. Hariba Sawalaram 94 Ind. Cas. 665 : 27 Bom. L.R. 13 : A.I.R. 1925 Bom. 153 : 49 B. 459. The question, therefore, whether the plaintiff's claim under this document can be supported would depend on the answer to the question whether unchastity has been proved.

93. This brings me to a consideration of the evidence adduced by the defendant to prove the unchastity. The evidence consists of two sets of witnesses, one examined in Calcutta and the other in England. As regards the unchastity in England, the allegation is that the plaintiff was guilty of living in adultery with one Culliford. The evidence on this point again has been clearly and in great detail dealt with by my learned brother, and I entirely agree with him in holding that her unchastity with Culliford has been established. In this respect I desire to refer to the observations of Sir William Scott in Loveden v. Loveden (1810) 181 E.R. 618 : 8 Hag. Con. 1 where he lays down the rule of evidence upon subjects of this nature and the principles upon which those rules are constructed. He observed:

It is a fundamental rule, that it is not necessary to prove the direct fact of adultery : because, if it were otherwise, there is not one case in a hundred in which that proof would be attainable: it is very rarely indeed that the parties are surprised in the direct fact of adultery. In every case almost the fact is inferred from circumstances that lead to it by fair inference as a necessary conclusion : and unless this were the case, and unless this were so held, no protection whatever can be given to marital rights. What are the circumstances which lead to such a conclusion cannot be laid universally, though many of them, of a more obvious nature and of more frequent occurrence, are to be found in the ancient books: at the same time it is impossible to indicate them universally; because they may be infinitely diversified by the situation and. character of the parties, by the state of general manners, and by many other incidental circumstances apparently slight and delicate in themselves, but which may have most important bearings in decisions upon the particular case. The only general rule that can be laid down upon the subject is that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion : for it is not to lead a rash and intemperate judgment, moving upon appearances that are equally capable of two interpretations, neither is it to be a matter of artificial reasoning, judging upon such things differently from what would strike the careful and cautious consideration of a discreet man, The facts are not of a technical nature : they are facts determinable upon common grounds of reason : and Courts of Justice would wander very much from their proper office of giving protection td the rights of mankind, if they let them selves loose to subtleties and remote and artificial reasonings upon such subjects. Upon such subjects the rational and the legal interpretation must be the same.

94. Keeping these valuable observations in mind and examining the evidence with reference to the rules and principles laid down therein, I am definitely of opinion that the adultery of the plaintiff with Culliford has been established. As I have said, it is not necessary to consider the evidence in detail as it has been so considered by my learned brother and I entirely agree with him. In this view of the case it is not necessary to consider the evidence of adultery given by the Calcutta witnesses. Although the generality of the evidence given by the Calcutta witnesses does not go far enough to

prove the actual fact of adultery in Calcutta, the evidence leaves no doubt in my mind that her conduct in Calcutta was not such as one would expect from a Hindu wife. There is, however, no reason to disbelieve the evidence of Lilion Williams, the keeper of a flat in Harrington Mansions. Her evidence to my mind goes to establish the fact of adultery in Calcutta also. However, as I have said, it is not necessary to consider in detail this evidence the proof of, unchastity in England is sufficient for the purpose of defeating the claim of the plaintiff under the first document.

95. As regards the plaintiff's right under the second document, the matter stands on a different footing. This document was executed on the 18th of July, 1917. It is contended by Mr. Hasan Imam that this document stands on the same footing as the first document and is also a document fixing maintenance. The terms of this document and the circumstances under which it was executed, however, lead to the conclusion that it was not a maintenance grant. The document states that the executant is desirous out of love and affection which he bears to his wife, Sita Devi, of granting to her and her heirs in perpetuity for ever an annuity of Rs. 15,000 per annum and of charging the payment of the same upon the properties set out in the schedule thereto annexed, and it expressly grants to "the said Sita Devi, her heirs, executors, administrators and assigns one perpetual annuity or clear yearly rent charge or sum of Rs. 15,000 to be issuing and payable out of and charged and chargeable upon all and singular the properties and Villages, lands, hereditaments and premises set out and described in the schedule" attached to the document. It is true that it is stated in the document that the annuity of Rs. 15,000 was in lieu or substitution of Rs. 15,000, part of the life-annuity of Rs.36,000 fixed by the first document; but that does not give to the grant under the second document the same character as that given by the first document. It appears from the record that this document was executed at A time when the defendant was contemplating to create a trust in respect of his entire estate and, as a matter of fact, he did execute a deed of trust which related to the entire estate held by him. The document of the 18th July, 1917, under consideration, appears to have been executed before the execution of the trust deed, and the object evidently was to grant an annuity in perpetuity to the plaintiff, her heirs, executors, administrators and assigns, and it cannot be a grant for maintenance which is usually a grant for life. This document is in no way affected by the subsequent unchastity of the plaintiff, and I am of opinion that the plaintiff is entitled to claim the annuity fixed under this document.

96. It is contended that there was no consideration, for the grant and it is, therefore, illegal. Having regard to the fact that the marriage of the plaintiff with the defendant has been found to be a lawful and valid marriage, Section 25 of the Indian Contract Act comes into operation. The agreement is expressed in writing and is registered under the law for the time being in force for the registration of documents, and it expressly purports to have been made on account of natural love end affection between the parties standing in a near relation to each other, and the want of consideration does not make it void.

97. The plaintiff is, therefore, entitled to a declaration of her right to recover the annuity granted under the second document of the 18th of July, 1917, and she is entitled to the arrears claimed under this document for the period from September 1821 to January 1923 as claimed. This amount comes up to Rs. 21,250. There is no claim for interest for the period from September 1921 to January l923 and the decree will be for Rs. 21,250 being the arrears from September 1921 to January 1923 at the

rate of Rs. 15,000 per annum with interest thereon at 6 percent, per annum from the date of the institution of the suit until realisation.

98. As regards the defendant's allegation contained in para. 23 of the written statement in respect of the jewels, it is sufficient to say that there is no evidence worth the name to substantiate the defendant's allegation. It cannot upon the evidence be held that the plaintiff is in possession of the family jewels or of the nature or value thereof, and I agree with my learned brother that the claim of the plaintiff cannot be defeated on the ground of her alleged possession of the family jewels of the defendant.

99. I would, therefore, set aside the decree of the Subordinate Judge and direct that a decree be made in favour of the plaintiff declaring her rights to the grant of Rs. 15,000 a year under the instrument of the 18th of July, 1917, and a decree for realisation of the sum of Rs. 21,250 being the arrears from September 1921 to January 1923 with interest thereon at 6 per cent, per annum from the date of the institution of the suit until realisation with proportionate costs in this Court as well as in the Court below, with interest thereon at 6 per cent per annum.