Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Haji Saboo Sidick and others v. *Ayeshabai and another, from the High Court of Judicature at Bombay; delivered the* 30*th April* 1903.

Present at the Hearing:

LORD DAVEY.
LORD ROBERTSON.
SIR ANDREW SCOBLE.
SIR ARTHUR WILSON.

[*Delivered by Lord Robertson.*]

The Respondents were the Plaintiffs in a suit brought to assert their rights as one of the widows and a daughter respectively of one Hajee Haroon Sidick, a merchant of Bombay, who died on 20th December 1898. The plaint was filed on 30th September 1899. It originally raised, *inter alia*, the question whether Hajee Haroon Sidick died intestate, but it is not now disputed that he left a Will, under which the Appellants, other than Fatmabai, are the executors. Fatmabai is admittedly a widow of the deceased. The Appellants, on 24th November 1899, filed a joint written statement; and issues were settled on 18th June 1900.

The main question raised by the plaint was whether the deceased had entered into a Nika marriage with the Respondent Ayeshabai. This was keenly disputed, the case of the Appellants being that at the alleged marriage ceremony the deceased had been personated. On this pure question of fact there are concurrent

25266. 125.—5/1903. [24]

judgments in favour of the Respondents; and accordingly their Lordships have not been invited to reconsider its merits. The Appellants confined their argument to four matters, the first of which is, in truth, inseparable from the merits.

1. At the trial it was proved that the deceased had executed a Will, after the alleged marriage, and in it there was no mention made of either of the Respondents. So far as it goes, this is an item of evidence against the marriage having taken place; but, at best, it is only an item, more or less cogent, and its cogency must depend on whether the circumstances of the marriage made it natural that the wife should be an object of the husband's testamentary bounty and improbable that he should have left her to depend on her legal right to maintenance. In the present instance, the Courts below have thought that the circumstances of this marriage made it not unlikely that the testator should take the latter course. It is obvious not only that this is a very tenable view of the question, taken by itself, but also that the point raised by the Appellants could only be made anything of by weighing it in relation to the whole evidence, on which the Courts below have concurrently preferred the Respondents' contention.

2. A draft of the Will, also containing no mention of the Respondents, was tendered in evidence, apparently as of itself furnishing similar evidence to that afforded by the Will. This draft, however, was written not by the testator but by another person, and in their Lordships' judgment it was rightly rejected. This was not a written statement made by the deceased.

3. At the trial questions were put and disallowed, which went to show that Ayeshabai

had been unchaste after the death of her husband and had thus (as the Appellants contended) disentitled herself to maintenance. On the record, as it stood, the Appellants had neither averment nor issue of such unchastity, and all that they could point to was their denial that "the Plaintiffs" were entitled to maintenance, and the 5th issue, whether "the Plaintiffs are entitled in any event to maintenance or marriage expenses." It is manifest that those general words, equally applicable to mother and child, are entirely unsuitable for the statement of the specific fact of incontinence on the part of the mother, and the words of the 5th issue are in fact an echo of the Plaintiffs' own pleading.

The Appellants sought to better their position by applying for leave formally to raise the issue, whether in the event of the Plaintiff Ayeshabai being entitled to maintenance from the date of the deceased's death, she has not forfeited such right by unchastity; and, on this application being refused, the Appellants applied for leave to file a supplemental written statement raising the question of unchastity. Both applications were refused. Both were made after the Plaintiffs' case was closed. It appears to their Lordships that it was out of the question that, after the Plaintiffs' case was closed, this new averment should be made, necessitating, as it did, the opening up of the whole case, without any suggestion that the facts relied on had newly come to the knowledge of the Appellants, and had before been excusably unknown to them.

The proposal that this matter should now be re-opened is the more unreasonable as the Decree appealed against contains a *dum casta* clause.

4. The only other point was as to the amount of aliment. No cause whatever has been shown

for interfering with the careful decision immediately under review, which modified the Decree of the Judge of First Instance.

Their Lordships will humbly advise His Majesty that the Appeal ought to be dismissed. The Appellants must pay the costs of the Appeal.