

## CRIMINAL REVISION

Before Imam and Chapman JJ.

BORTHWICK

v.

BORTHWICK.\*

1913

Dec. 16.

*Kidnapping—Removal by the mother of her child from the custody of the father after decree nisi delivering custody to him—Absence of prayer in divorce petition for custody, and of subsequent application therefor—Ex parte decree—Submission of decree to High Court for confirmation—Order of custody part of the decree—Time of operation of order of custody—Divorce Act (IV of 1869) ss. 17, 43, 57.—Penal Code (Act XLV of 1860) s. 363.*

Where the plaint in a divorce suit did not contain a prayer for custody of the child and there was no subsequent application therefor by the husband, but the District Judge passed an *ex parte* decree nisi and included in it, as one of its terms, a direction, without notice to the wife, to deliver her child to the father, and submitted the decree to the High Court for confirmation; and where the father subsequently obtained custody of the child but she took it away from his house, and was charged with kidnapping :—

*Held*, that the Judge's direction as to the custody of the child was not intended to be an *ad interim* order under s. 43 of the Divorce Act, which was to take effect immediately, but formed an integral part of the decree and did not operate till confirmation by the High Court, and that she had, therefore, committed no offence punishable under the Penal Code.

*Ledlie v. Ledlie*(1) referred to.

The petitioner, Anne Elizabeth Borthwick, was married to one Herbert Charles Borthwick in November 1905, and had an issue by him, a boy aged about 4 years. In 1913 the husband instituted a divorce

\* Criminal Miscellaneous, No. 165 of 1913, against the order of F. Roe, District Judge of Patna, dated Aug. 18, 1913.

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suit against the petitioner in the Court of the District Judge of Patna, and obtained an *ex parte* decree on the 18th August 1913, in the terms set out in the judgment of the High Court. The Judge ordered the decree to be forwarded to the High Court for confirmation under s. 17 of the Divorce Act (IV of 1869). It appeared that the plaint did not contain a prayer for custody of the child, nor was any application therefor made either at the time of the hearing of the divorce suit or subsequently. Shortly after the decree, the father secured custody of the boy. On the 10th October the petitioner took away the child from her husband's house. He thereupon lodged an information before the police charging the petitioner with kidnapping under s. 363 of the Penal Code. After an investigation, a police report was sent up to the Sub-divisional Officer of Dinapore who issued a warrant against the petitioner. She was arrested on the 18th instant but released on bail. She then moved the High Court and obtained the present Rule. The decree had not been confirmed by the High Court, nor had the minimum period under s. 17 of the Divorce Act expired, at the time of the hearing of the Rule.

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*Babu Satindra Nath Mookerjee*, for the petitioner. The decree *nisi* was subject to confirmation as a whole. The order of the Judge as to the custody of the child is a part of the decree which was forwarded to this Court for confirmation and has no immediate effect, and hence the charge of kidnapping cannot lie. As the husband did not pray for custody of the child in his petition of divorce, notice should have been given to the petitioner and an opportunity afforded of being heard in the matter.

*Babu Mohini Mohan Chatterjee*, for the opposite party. The order relating to the custody of the boy

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*Cur. adv. vult.*

IMAM AND CHAPMAN JJ. The petitioner, Mrs. Anne Elizabeth Borthwick, was arrested on the 18th October, 1913, in execution of a warrant issued by the Sub-divisional Magistrate of Dinapore, the charge against her being that she had kidnapped her child from the lawful guardianship of the father, Mr. Herbert Charles Borthwick. It appears that the parties were married in 1905. Eight years later Mr. Borthwick filed a petition for divorce in the Court of the District Judge, Patna, on the ground of adultery and obtained a decree *nisi* on the 18th August, 1913. In that decree it was directed that Mrs. Borthwick do deliver up to Mr. Borthwick the son born of the marriage. Subsequently to the decree Mr. Borthwick, without the assistance of the Court, obtained custody of the boy. On the 10th October, 1913, the present petitioner Mrs. Borthwick, removed the child from Mr. Borthwick's house. Mr. Borthwick informed the police, and after enquiry the present case was instituted upon a police report charging the petitioner, Mrs. Borthwick, under section 363 of the Indian Penal Code, with the offence of kidnapping the child from the lawful guardianship of Mr. Borthwick.

The decree *nisi* for divorce, dated the 18th August, 1913, was sent by the District Judge to the High Court for confirmation. The decree has not yet been confirmed by the High Court, and in fact the minimum period prescribed by section 17 of the Indian Divorce

Act has not yet expired. The parties are, therefore, still man and wife: *Warter v. Warter* (1).

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The case against the petitioner, however, is that her act of removing the child from Mr. Borthwick's custody in October amounted to an offence by reason of the order of the District Judge in August to the effect that Mr. Borthwick should have the custody of the child. The question for decision is whether the order by the District Judge was of immediate effect or whether it was merely an order *nisi* subject to confirmation by the High Court and is, therefore, not yet in force. The material portion of the District Judge's judgment is as follows: "The following decree is accordingly made (a) that the marriage be dissolved, (b) that the respondent Anne Borthwick do deliver up to the petitioner the son born of the marriage, . . . . . (c) that the co-respondent do pay to the petitioner Rs. 300 as the costs of this suit. . . . . It is ordered that the above decree be forwarded, under section 17 of Act IV of 1869, to the High Court for confirmation." The order for custody of the child formed part of the decree, and we interpret the decree to mean that the order was not to be of effect until confirmed by the High Court. There has been no such confirmation.

We observe that Mr. Borthwick's petition for divorce contained no prayer for the custody of the child, or any notice that application for custody would be made. The divorce proceedings were *ex parte*. It does not even appear that the custody of the child was asked for at the hearing. Now, according to the practice in England if the custody of the child is not prayed for in the petition, it is necessary to file a separate petition for that purpose, which must be filed and served in the same way as an ordinary

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 BORTHWICK v. BORTHWICK, petition. A similar practice prevails in this Court: *Ledlie v. Ledlie* (1). Mrs. Borthwick was never served with any notice to inform her that application for custody of the child would be made, and she had no opportunity of showing cause why such an order should not be made. We cannot think that the District Judge can have intended to make such an order absolute without notice to her. This confirms us in our view that the order for custody of the child was not intended to be an order absolute.

Where the custody of the children is asked for at the hearing of a petition for divorce, the order for such custody forms part of the decree *nisi* (Browne and Powles on Divorce, 7th Edn., p. 413), and is not absolute until confirmed. No doubt it is open to a District Judge to make an *ad interim* order for custody at any time while a case is pending, but no application for *ad interim* order was made in the present case, and we are satisfied that the order that was made was not intended to be an *ad interim* order. It was an order *nisi* without legal effect until confirmed by the High Court. It has not been so confirmed.

This being so, Mrs. Borthwick committed no offence punishable under the Penal Code when she removed the boy from Mr. Borthwick's custody. The Rule is made absolute. We direct that the proceedings against the petitioner be stayed.

E.H.M.

*Rule absolute.*

(1) (1891) I.L.R., 18 Calc. 473.