APPEAL FROM ORIGINAL CIVIL.

Before Rankin C. J. and C. C. Ghose J.

COLLINS

v.

COLLINS.*

1928

May 1.

Dissolution of marriage—Previous decree of judicial separation—Whether decree for dissolution of marriage can be obtained upon precisely the same grounds on which judicial separation was obtained.

A petitioner, in the absence of any fresh matrimonial offence, is not entitled to a decree for dissolution of marriage upon precisely the same grounds as those on which she obtained previously judicial separation.

Evans v. *Evans* (1), *Green* v. *Green* (2), *Mason* v. *Mason* (3), *Bland* v. *Bland* (4) and *Fullerton* v. *Fullerton* (5), distinguished.

Ciocci v. *Ciocci* (6), referred to.

APPEAL from a judgment of Pearson J.

The material facts were that the petitioner, Enid Ivy Collins, had originally sued for judicial separation against her husband, Walter George Collins, on the grounds of adultery and cruelty and had obtained a decree on the 17th August, 1926. Thereafter she filed this suit for dissolution of marriage on the 18th July, 1927, on exactly the same grounds as those on which the suit for judicial separation had been based. The later suit was heard by Pearson J., who dismissed it, on the ground that it was not open to the Court to give the petitioner relief on identically the same grounds as in the previous suit for judicial separation.

The petitioner thereupon appealed.

Mr. E. C. Ormond, for the appellant. The statement of the law in Halsbury's Laws of England, Vol. 16, Art. 1015 is correct. Compare also the statement

*Appeal from Original Decree, No. 9 of 1928, in Matrimonial Suit No. 19 of 1927.

(1) (1858) 27 L. J. Rep. (N. S.) Pro. & M. 57.
(2) (1873) L. R. 3 P. & D. 121.
(3) (1883) L. R. 8 P. D. 21
(4) (1866) L. R. 1 P. & D. 237.
(5) (1922) 39 T. L. R. 46.
(6) (1860) 29 L. J. (N. S.) Pro. & M. 60.

of the law in Royden on Divorce, Ed. 1926, p. 133 and Halsbury, Vol. 16, Art. 1016. See also *Green* v. *Green* (1), *Mason* v. *Mason* (2), *Fullerton* v. *Fullerton* (3). It is true that in each of these reported cases there was in fact an allegation in the pleadings of, and proof at the hearing of, a fresh matrimonial offence in the second suit. But the principle was none the less clearly established that where a petitioner had obtained an order for judicial separation on certain grounds, it was open to that petitioner to bring a new suit and succeed in obtaining an order for dissolution of marriage on the same grounds.

The matter being one of status in the case of dissolution of marriage, and not so in the case of a mere judicial separation, and the matter being one concerning only the matrimonial jurisdiction of the Court, there is no question arising of *res judicata* or of major v. minor relief under Order II of the Code of Civil Procedure. See also the Divorce Act, Act IV of 1869, ss. 4 to 7, as to the applicability of the Code and of the English Divorce Practice. The English Divorce practice applies to the present case rather than the Civil Procedure Code. But, in any event, the reliefs being different, Order II, rule 2, is not applicable to the present case. See the corresponding English Rule of the Supreme Court, which is exactly word for word, the same as Order II, rule 2, of the Code. This English Rule of Procedure was not applied in the English cases cited, for the reasons indicated. Compare the case of *Hall* v. *Hall* (4), where, after a suit for dissolution of marriage had been dismissed by consent, a new suit was allowed to be brought between the same parties on precisely the same grounds. If the ordinary rules of procedure in ordinary non-matrimonial civil cases had been applied in that case, the decision given could never have been given.

On grounds of public policy also and on the principle referred to in the cases cited above, patience in

(1) (1873) L. R. 3 P. & D. 121.
(2) (1883) L. R. 8 P. D. 21.
(3) (1922) 39 T. L. R. 46.
(4) (1879) 48 L. J. Pr. & D. 57.

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a wife in delaying to take proceedings for divorce against her husband may be a virtue, but a wife should not be barred from bringing a suit for dissolution of marriage against her husband merely because she has chosen previously only to take proceedings for judicial separation, particularly where, on the merits, the husband has refused to abide by the order for judicial separation and has refused, as in the present case, to pay any alimony whatever.

No one appeared for the respondent.

Cur. adv. vult.

RANKIN C. J. This is a wife's petition for dissolution of marriage brought on the 18th July, 1927. The learned Judge has dismissed the petition on the ground that on the 1st June, 1926, there was a previous petition by the wife against the husband, whereby she sought and obtained a decree for judicial separation upon grounds of cruelty and adultery. That decree was granted to her on the 17th August, 1926. The present petition is founded upon the same acts of cruelty and adultery as founded the previous petition. The petitioner explains that she did not wish for a dissolution of marriage partly because she was a Roman Catholic and had scruples against divorce and partly because she desired to see whether her husband would take her back and also because she was able to get better maintenance. She asked for a decree for judicial separation on the previous occasion though she was entitled by law to a decree for dissolution of marriage. It appears that these reasons no longer actuate the lady to the same extent. It appears further that she has been unable to obtain, by process of execution, maintenance or alimony from her husband. Accordingly, she brings another petition on the same facts, without alleging any new matrimonial offence committed subsequent to the decree for judicial separation and asks now for a decree for dissolution of the marriage. The learned Judge has ruled that without new matrimonial offences a petition cannot be entertained in these circumstances.

Mr. Ormond for the appellant has brought to our notice that in Royden on Divorce, second edition, page 133, it is said that "After a successful suit for judicial "separation, irrespective of whether further offences "were committed either before or since, a suit for "dissolution of marriage may be brought"; and it appears that in Halsbury's Law of England, Vol. 16, page 498, a similar statement is made in an article of which the same learned author is one of the writers.

The authorities given for the proposition so laid down are three: *Green* v. *Green* (1), *Mason* v. *Mason* (2) and *Fullerton* v. *Fullerton* (3); and reference has been made in this connection to the case of *Hall* v. *Hall* (4). The learned Judge on going through these authorities has come to the conclusion that they do not support the proposition laid down; and upon going through these authorities and certain others I am forced to the same conclusion.

The case law upon this subject may be said to begin early. Before the Matrimonial Causes Act of 1856, the Ecclesiastical Courts had no jurisdiction to grant divorce. That relief could only be obtained from the House of Lords. Accordingly, one of the first questions raised on the new Act was whether a person who had brought a suit for the relief which was then possible before an Ecclesiastical Court could after the passing of the new Act, come to the Divorce Court and get relief under the new statute. That matter was dealt with in the case of *Evans* v. *Evans* (5), and the case there was that a suit had been brought by a husband for divorce *a mensa et thoro*, in other words, for judicial separation, on the ground of certain acts of adultery. That petition had been dismissed, but an appeal was pending. In the meantime, after the new Act, he brought a suit for divorce and the question was whether the Court could entertain that suit. Lord Campbell and the Court over which he presided was of opinion that there was no

(1) (1873) I. R. 3 P. & D. 121.
(2) (1883) L. R. 8 P. D. 21.
(3) (1922) 39 T. L. R. 46.
(4) (1879) 48 L. J. Pr. &. D. 57.
(5) (1858) 27 L. J. Rep. (N. S.) Pro. & M. 57.

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estoppel, that the former suit was for a different object, but that here the suit was for a dissolution of the marriage before a tribunal armed with much larger powers and governed by different rules. The same class of case was dealt with in the case of *Ciocci* v. *Ciocci* (1). There a decree for divorce *a mensa et thoro* had been obtained in the Ecclesiastical Court and the same party, namely, the wife, brought a suit under the new Act for a judicial separation on the same ground. The Judge Ordinary was of opinion that such a suit would not lie and he pointed out that a great violation of principle would be involved in putting a party twice on his trial on account of the same acts. He also pointed out that it could not be said in this case that the object of the suit was entirely different from that of the suit before the Ecclesiastical Court. Those two cases are governed by the circumstance that under the Matrimonial Courts Act there was a new jurisdiction and a new remedy available to the petitioner.

Until that Act was passed, adultery coupled with cruelty or desertion was not a cause of action for a decree of divorce, but gave a much more limited right in an Ecclesiastical Court. I now come to the case of *Green* v. *Green* (2), which is one of the cases upon which the petitioner relies. That was a case in which the Judge Ordinary had to deal with the petition of a wife who had obtained a decree for judicial separation upon the ground of her husband's adultery. The wife afterwards instituted a suit for dissolution of marriage on the ground of adultery committed by the husband subsequently to the decree for judicial separation coupled with his cruelty to her during the cohabitation. Even in spite of the fact that the cause of action there included a new matrimonial offence, subsequent to the decree, the Judge Ordinary dealt with the matter as one of some difficulty. He came to the conclusion that the principle that a person cannot be vexed twice on the same facts was not applicable to

(1) (1860) 29 L. J. (N. S.) Pr. & M. 60.

(2) (1873) L. R. 3 P. & D. 121.

such a case. He says "the maxim that no one shall "be twice vexed for the same cause is not in point for "the subject-matter of the two suits, as well as the "remedies sought in them, are different. The hus- "band by his adultery subsequent to the former decree "has committed a fresh matrimonial offence (for the "decree of judicial separation is not to be treated as a 'license to commit adultery for the future); and for this 'offence, aggravated by the previous cruelty, the wife 'has had no redress". He points out that cruelty condoned is revived by subsequent adultery. He also points out "if she had obtained a judicial separa- 'tion on the ground of cruelty, she might afterwards 'have obtained a decree for subsequent adultery "coupled with cruelty already proved; and the fact "that the respondent had previously been guilty of "adultery would not have affected her position". It appears to me that the basis of that decision is the fact that there was a new matrimonial offence.

The same question came before the Court of Appeal in 1883 in the case of *Mason* v. *Mason* (1) and Lindley L. J. there says that the difficulty he had was removed by the authority of *Green* v. *Green* (2). That was a case where a husband had obtained a judicial separation. The wife continued to cohabit with the co-respondent. Then the husband petitioned for a dissolution of his marriage. In these circumstances it was thought that *Green* v. *Green* (2) was applicable and that the only question was the question of delay.

In 1866 the case of *Bland* v. *Bland* (3) came before the Judge Ordinary "where a wife had obtained a "decree of judicial separation on the ground of the "husband's cruelty, and continued to live separate "from him, and the husband subsequently committed "adultery, upon proof of such adultery, and of the "decree for judicial separation, the Court made a "decree *nisi* for the dissolution of marriage", Again in *Fullerton* v. *Fullerton* (4), the learned President,

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acted upon the decision in *Green* v. *Green* (1) in a case where a woman obtained a decree for judicial separation on the ground of adultery and afterwards applied for a dissolution of marriage on the ground of desertion prior to the petition for judicial separation and of adultery subsequent to the decree.

In these circumstances it appears to me that there is no authority for the proposition that upon the same facts before the same Court armed with the same jurisdiction the petitioner can present a new petition asking for a dissolution of the marriage. It appears to me that it would be not only contrary to principle, but inconvenient and in some possible cases highly unjust to permit a party to have two suits about the same matter. One can imagine a case of a husband electing not to ask for a dissolution of marriage and then afterwards keeping *in terrorem* his right to ask for a dissolution of marriage. One can imagine a case in India or elsewhere where a matrimonial case might be presented to the Court in the form of a petition for judicial separation in order that the parties might have a preliminary hearing of the evidence and then afterwards at a later stage present evidence on the same matter over and over again. In my judgment any such ruling as is asked for in this case would be opening the flood gates to practice which might be most inconvenient and objectionable.

In my opinion this appeal must be dismissed. No order is made as to costs as the respondent does not appear.

GHOSE J. I agree.

Attorneys for the appellant: *Messrs. Leslie and Hinds.*

Attorney for the respondent: *No one.*

S. M.

Appeal dismissed.

(1) (1873) L. R. 3 P. & D. 121.