Farid-ud-din, having made the mortgage, took a lease of the mortgaged property in favour of the minor. If we were to enforce this lease, we should be practically enforcing the mortgage, for this reason that the lease stands or falls with the mortgage. The property belongs to the minor. If the minor were bringing a suit to set aside the mortgage or to set aside the lease, we could, no doubt, in such a suit decline to grant him relief until he had made compensation to the mortgagee to the extent to which the minor or his property had benefited by the money advanced on the security of the mortgage. The position is altered when the minor is a defendant and not a plaintiff.

We need not decide whether or not the plaintiff could succeed in another suit in obtaining restitution or compensation. We cannot give the plaintiff a decree here to be executed in case the minor does not make compensation. We allow this appeal with costs, and set aside the decrees in the Courts below, and dismiss the suit with costs as against Nizam-ud-din Shah. The other parties are not before us, so this decree will not affect the decrees against them.

Appeal decreed.

MATRIMONIAL JURISDICTION.

1896
May 16.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Aikman and Mr. Justice Blennerhassett.

F. H. PERCY (PETITIONER) *v.* J. PERCY (RESPONDENT).

Act No. IV of 1869 (*Indian Divorce Act*) *sections* 3, *sub-section* (2), 8, 9, 13, 17, 55—*Notification No.* 1203, *dated the* 23*rd September* 1874—*Statute* 28 *Vict. Cap. XXV, section* 3—*Act No. XIII of* 1879 (*Civil Courts Act, Oudh*) *section* 27—*Act No. XX of* 1890 (*North-Western Provinces and Oudh Act*), *section* 42—*Act No. XIV of* 1891 (*Oudh Courts Act*) *section* 8—*Divorce—Appeal—Jurisdiction.*

The High Court of Judicature for the North-Western Provinces has no jurisdiction to entertain an appeal from the decree of a District Judge in Oudh dismissing a suit for dissolution of marriage. *Morgan* v. *Morgan* (1) overruled.

(1) I. L. R., 4 All., 306.

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THE facts of this case so far as they are necessary for the purposes of this report sufficiently appear from the judgment of the Court.

Howard, for the appellants.

The judgment of the Court (EDGE, C. J., AIKMAN and BLENNERHASSETT, J.J.), was delivered by Edge, C. J.—

Mrs. Florence Helen Percy on the 7th of October 1893 presented her petition for divorce in the Court of the District Judge of Lucknow. Her husband was the respondent. The petition alleged matters which, if true, entitled Mrs. Percy to a decree for the dissolution of her marriage. The case came on to be tried by the Additional Judge of Lucknow, to whose file we presume the petition had been transferred for hearing. He dismissed the petition. Mrs. Percy presented her memorandum of appeal to this Court, and it was admitted. When the appeal came on for argument, the question arose as to whether this Court had jurisdiction to entertain and determine the appeal; in other words, whether an appeal from the District Judge of Lucknow, dismissing a petition for dissolution of marriage, lay to this Court.

The question of jurisdiction is one of the first importance. If this Court not having jurisdiction in appeal were to grant the relief asked for in this appeal and to decree dissolution of marriage, and either of these parties, believing himself or herself free, were to contract marriage with another person and have children, those children would be illegitimate and subject to all the disabilities of illegitimate children.

There is no doubt that for some purposes this is the Court having jurisdiction in matrimonial cases instituted in the Courts of the District Judges in Oudh. By section 3 of Act No. IV of 1869, the High Court mentioned in the Act is, so far as the non-regulation provinces are concerned, the High Court or Chief Court to whose original criminal jurisdiction the petitioner is for the time being subject, or would be subject if he or she were a European British subject of Her Majesty. By Notification No. 1203, dated the 23rd of September 1874, the original and appellate

Criminal jurisdiction to be thereafter exercised over European British subjects of Her Majesty in Oudh is to be exercised by the High Court of these Provinces. That notification was issued under section 3 of the Statute 28 Vict. Cap. XXV. By sub-section 2 of section 3 of Act No. IV of 1869, the District Judge for the purposes of the Divorce Act meant, in the non-regulation provinces, the Commissioner of a Division. By section 27 of Act No. XIII of 1879 it was enacted that "for the purposes of the Indian Divorce Act the Judicial Commissioner (of Oudh) shall, throughout the territories to which this Act applies, be deemed to be the Commissioner of a Division." By section 42 of Act No. XX of 1890, the words "District Judge" were substituted for "Judicial Commissioner" in section 27 of Act No. XIII of 1879. We have now traced out the jurisdiction under which the petition for dissolution of marriage was presented to and received in the Court of the District Judge of Lucknow. There is no doubt that, under section 8 of Act No. IV of 1869, this Court had power to remove and try and determine as a Court of original jurisdiction this suit for divorce while it was pending in the Court of the District Judge of Lucknow. If any question of law had arisen and a reference had to be made under section 9 of Act No. IV of 1869 by the Court of the District Judge of Lucknow, that reference could only have been made to this Court. The petitioner could, under section 13, instead of appealing from the decree of the District Judge of Lucknow, have instituted her suit in this Court, notwithstanding that her suit had been heard and determined by the District Judge of Lucknow. Further, if the District Judge had made a decree for dissolution of marriage, it was this Court, and this Court alone, which could, under section 17, have confirmed that decree. All these powers to which we have been referring were given to this High Court in cases under the Divorce Act which might be decided in the Courts having jurisdiction as Courts of first instance in Oudh. One would naturally assume that in those cases in which an appeal is given by Act No. IV of 1869 from a decree or order in a matrimonial suit by a District Judge, the appeal would lie to

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the Court which had the power to withdraw the suit before decision from the Court of the District Judge, to advise on a reference the District Judge upon questions of law arising in the suit and to confirm the decree for dissolution of marriage when passed by the District Judge. One would naturally have expected that the Court to which such jurisdiction was given by the Legislature would be the Court to which jurisdiction in appeal from orders in such suits made by a District Judge would be given. A right of appeal, as has been frequently decided, is not a natural and inherent right attaching to litigation; it is a right which is given, and can only be given, by statute; and it is only the Court to which the jurisdiction is given to entertain an appeal in a particular matter which can hear and determine such an appeal. In order to see whether any right of appeal is given under Act No. IV of 1869 from the decree or order of the District Judge, we have to turn to section 55 of that Act. So far as is material, that section enacts as follows:—"All decrees and orders made by the Court in any suit or proceeding under this Act shall be enforced and may be appealed from in the like manner as the decrees and orders of the Court made in the exercise of its original civil jurisdiction are enforced and may be appealed from under the laws, rules and orders for the time being in force." Mr. *Howard*, who appeared for the petitioner appellant before us, contended, on the authority of the decision of this Court in *Morgan* v. *Morgan* (1), that the appeal in this case lay to this Court.

We regret to say that we are unable to follow that decision. It appears to us that it is based upon the assumption that, because this Court is for certain purposes the High Court for Oudh under Act No. IV of 1869, appeals from the District Judges of Oudh lie, under section 55 of that Act, to this Court. It was not noticed that in framing section 55 the jurisdiction in appeal was made to depend on the original civil jurisdiction, and not, as in cases of confirmation under the Act, on the original criminal jurisdiction in cases of European British subjects of Her Majesty.

(1) I. L. R., 4 All., 306.

At no time had this Court any jurisdiction to hear appeals from decrees of Courts in Oudh passed in the exercise of their original civil jurisdiction. There is under certain circumstances a power in the Judicial Commissioner's Court to make a reference under section 9 of Act No. XIV of 1891 to the High Court. All we have to decide is that the appeal does not lie to us. It is no part of our duty to decide where the appeal does lie, but we think it right to suggest that if it does not lie to the Court of the Judicial Commissioner of Oudh in this case, section 55 of Act No. IV of 1869 is a dead letter so far as rights of appeal under that section from decisions in Oudh are concerned.

We should also like to point out a difficulty which may arise, assuming that the Court of the Judicial Commissioner of Oudh accepts and entertains the appeal in this case from the District Judge of Lucknow, and makes a decree dissolving the marriage between Mr. and Mrs. Percy. The difficulty in that case may be as to whether a decree *nisi* made on appeal can be confirmed by the Court of the Judicial Commissioner, that Court not being a High Court for the purposes of Act No. IV of 1869. It might be that the decree of the Judicial Commissioner could never be confirmed. Their Lordships of the Privy Council are not a High Court for the purposes of Act No. IV of 1869, and the decree of the Judicial Commissioner's Court, if one is made on appeal in this case, would not be a decree of a District Judge, and consequently would not be capable of confirmation by this Court under section 17. It appears to us that speedy legislation is necessary to remove the difficulties which we have pointed out, which in our opinion are obviously caused by an oversight on the part of the gentlemen who drafted Act No. IV of 1869.

We much regret that we have been compelled to come to the conclusion that we have no jurisdiction to grant the petitioner the relief which she sought in vain in the Court of the District Judge of Lucknow. We direct that the memorandum of appeal filed in this Court be returned to the petitioner so that she may present it to the Court having jurisdiction to entertain it, or may, if so

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advised, present an original petition for dissolution of marriage in this Court under section 13 of Act No. IV of 1869.

Memorandum of appeal returned.

1896. *May* 18.

REVISIONAL CRIMINAL.

Before Mr. Justice Knox and Mr. Justice Blair.

IN THE MATTER OF THE PETITION OF RUDRA SINGH AND OTHERS.

Criminal Procedure Code, section 212—*Sessions case—Defence reserved—Examination by Magistrate of witnesses named for the defence.*

The fact that an accused person, against whom a charge has been framed by a Magistrate under the provisions of section 210 of the Code of Criminal Procedure, has reserved his defence does not preclude the Magistrate from acting under section 212 of the Code of Criminal Procedure.

THE facts of this case so far as they are necessary for the purposes of this report sufficiently appear from the judgment of the Court.

Kúnwár Parmanand, for the applicants.

The Public Prosecutor (Mr. *E. Chamier*) for the Crown.

KNOX and BLAIR JJ.—This is an application praying that this Court will set aside an order passed by the Joint Magistrate of Etah, and grant an order directing that Magistrate not to examine certain witnesses whom the accused has named in a list as witnesses whom he wishes to be summoned to give evidence on his trial. The order complained of is an order passed by the Joint Magistrate acting under and within the provisions of section 212 of the Code of Criminal Procedure. We are called upon to set aside that order and to hold that where an accused person says that "he reserves his defence," committing Magistrates have no longer any discretion to act in the terms of section 212 of the Code. This is the broad proposition contended for with great earnestness by the learned vakil who appears on behalf of the petitioner. In the argument which he addressed to us he maintained that when an accused person reserved his defence he was entitled to keep back the defence and withhold from the witness-box all the witnesses who might have had anything to say about it, and who had not