

MATRIMONIAL JURISDICTION.

1911
February, 28.

*Before Sir John Stanley, Knight, Chief Justice, Mr. Justice Griffin and
Mr. Justice Tubball.*

JOHN HENRY RHINE (RESPONDENT) v. MABEL RHINE (PETITIONER) AND
JOHN HENRY RHINE (PETITIONER) v MABEL RHINE (RESPONDENT).^{*}
(Two petitions consolidated.)

*Act No. IV of 1869 (Indian Divorce Act), section 23—Discretion of court—
Petitioner's adultery a ground for refusing a decree for judicial separation.*

Where the petitioner (the wife) in a suit for divorce or in the alternative for a judicial separation was found to have herself committed adultery, to which the conduct of the respondent had in no way conduced, it was *held* that this was a good ground for the refusal of a decree for judicial separation. *Otway v. Otway* (1) followed. *Constantinidi v Constantinidi* (2) distinguished.

These were two appeals arising out of cross petitions under the Indian Divorce Act, 1869. The facts out of which they arose were as follows:—

The appellant, John Henry Rhine, an engine driver on the North-Western Railway, was married to the respondent, Mabel Rhine, in the Central Provinces, in the year 1897. The last residence of the parties was at Saharanpur. There has been no issue of the marriage. Mrs. Rhine left her husband in April, 1909, and went to her brother in the Punjab. She, on the 28th of May, 1909, instituted a suit in Lahore against her husband for dissolution of their marriage, or in the alternative for judicial separation. The plaint in this suit was returned to her to be filed in the proper court, the court at Lahore not having jurisdiction in the matter, and accordingly the plaint was filed in the court of the District Judge of Saharanpur, on the 30th of July, 1909. Meantime, Rhine filed a petition for divorce on the 22nd of July, 1909, on the ground of his wife's adultery with the co-respondent, Leonard A. Green, also an engine driver on the North-Western Railway.

By the agreement of the parties the two suits were heard together and one judgement was delivered in both suits. Mrs. Rhine alleged in her petition various acts of cruelty on the part of her husband and charged him with having committed at

^{*}First Appeals Nos. 206 and 207 of 1910 from decrees of R.O.E. Leggat, District Judge of Saharanpur, dated the 4th of May, 1910.

(1) (1883) L. R., 13 L. D., 141. (2) [1903] P. D., 248.

1911

RHINE
v.
RHINE.

various places carnal intercourse with her against the order of nature, forcibly and against her consent. The adultery of Mrs. Rhine with the co-respondent Green was established to the satisfaction of the learned District Judge, and his finding is not now in controversy. He also found that the misconduct of Rhine, alleged by his wife, was established by the evidence and dismissed Rhine's petition for dissolution of marriage, as also Mrs. Rhine's petition for dissolution of marriage, but he granted Mrs. Rhine's prayer for judicial separation.

The husband appealed.

Mr. C. Ross Alston, for the appellant.

No one appeared for the respondent.

STANLEY, C. J.—These appeals arise out of cross petitions for divorce under the Indian Divorce Act. The appellant, John Henry Rhine, who is an engine driver on the North-Western Railway, was married to the respondent, Mabel Rhine, in the Central Provinces, in the year 1897. The last residence of the parties was at Saharanpur. There has been no issue of the marriage. Mrs. Rhine left her husband in April, 1909, and went to her brother in the Punjab. She, on the 28th of May, 1909, instituted a suit in Lahore against her husband for dissolution of their marriage, or in the alternative for judicial separation. The plaint in this suit was returned to her to be filed in the proper court, the court at Lahore not having jurisdiction in the matter, and accordingly the plaint was filed in the court of the District Judge of Saharanpur, on the 30th of July, 1909. Meantime, Rhine filed a petition for divorce on the 22nd of July, 1909, on the ground of his wife's adultery with the co-respondent, Leonard A. Green, also an engine driver on the North-Western Railway.

By the agreement of the parties the two suits were heard together and one judgement was delivered in both suits. Mrs. Rhine alleged in her petition various acts of cruelty on the part of her husband and charged him with having committed at various places carnal intercourse with her against the order of nature, forcibly and against her consent. The adultery of Mrs. Rhine with the co-respondent Green was established to the satisfaction of the learned District Judge, and his finding is not

1911

RHINE
v.
RHINE.*Stanley, C. J.*

now in controversy. He also found that the misconduct of Rhine alleged by his wife was established by the evidence and dismissed Rhine's petition for dissolution of marriage as also Mrs. Rhine's petition for dissolution of marriage, but he granted Mrs. Rhine's prayer for judicial separation. In his judgement he remarks :—

"I have found that Rhine has been guilty of conduct which is not only criminal but which constitutes a high degree of cruelty of a most abominable kind, and I do not think that the idea can be tolerated that the wife should be obliged to live with her husband under such circumstances."

The present appeals were then preferred by the husband, and the grounds of appeal are that the evidence on the record did not justify the finding that the respondent was guilty of the criminal offence charged against him; and that a decree for judicial separation ought not to have been passed having regard to the fact that Mrs. Rhine was proved to have been guilty of adultery, and further that a decree for dissolution of the marriage on the ground of his wife's adultery ought to have been passed in his favour. Mrs. Rhine does not resist the appeal and no one appears for her.

As to the observation of the learned District Judge that he did not think that the idea could be tolerated that the wife should be obliged to live with her husband under the circumstances of this case, I may observe that it does not necessarily follow if a decree for judicial separation be refused that she will be obliged to live with her husband. If he seeks restitution of conjugal rights it will be for the court before which the case comes to say whether under the circumstances a decree should be passed in his favour.

The first question then for determination is whether or not the evidence satisfactorily establishes that the appellant Rhine was guilty of the misconduct charged against him. Mrs. Rhine gave evidence in support of her case and this evidence was corroborated by the evidence of Mrs. Tilbury, who is a diplomaed midwife and also by a Mrs. Burrowes. The former was called in on one occasion by Mrs. Burrowes to treat Mrs. Rhine, after she had been subjected, as she alleged, to the cruel treatment complained of. Mrs. Tilbury stated that she found Mrs. Rhine in

a condition indicating that the offence complained of had been committed, and that she had been treating her for the injuries sustained by her which she detailed. She further stated that for the same reason she was called in once or twice after this. Mrs. Burrowes, who was next door neighbour to Mrs. Rhine, stated that Mrs. Rhine often told her that her husband treated her unnaturally, and beat her because she would not submit to his ill-treatment. The learned District Judge believed these witnesses. He observes:—" I feel sure that these two ladies have not invented the incident which they relate. Their evidence was given in a simple, straightforward way and with the air of persons relating what they had actually seen." The learned Judge had better means of estimating the credit to be attached to the evidence than we possess. He came to the conclusion that the evidence of Mrs. Rhine and her witnesses was reliable. Against it there was the denial of Rhine himself. But there is on the record a most compromising letter which was addressed by him on the 11th of May, 1909, to a Mrs. Miller whom he addresses as his " dearest sister, " and who, it is stated, lived with his brother-in-law, but was not married to him. In this letter he complains of his wife, and we find in it these statements: " whenever Mrs. Rhine has left home, or had any words with me, she always flies back to an old story of telling people that I committed the sin of sodomy. This originated through some friends of her at Sukkur, about 8 years ago. If I was guilty of such an action, why was not immediate action taken against me. I say to you, dear sister, under the circumstances of this accusation I am innocent. Anyhow she tries to tell this story of 8 years old to excite people's sympathy for her and hatred for me. Admitting for argument's sake this to be true, I'm a man after all, but for any woman to tell such a story year after year and disclose some of the bedroom secrets of our home, and when disclosed and known by the male people what would you think of such a woman. " There is this further passage in the letter:—" I give you the assurance, my dear sister, that I am a reformed man and unblamable in every way." This does not appear to me to be the letter of an innocent man. Such a charge as was made against him would ordinarily be met by an indig-

1911

 RHINE
 v.
 RHINE.

Stanley, C. J.

1911

RHINE

v.

RHINE.

Stanley, C. J.

nant denial, but in this case there is at most a qualified denial. He says:—"Under the circumstances of this accusation I am innocent." Then admitting for argument's sake the charge to be true he observes:—"I'm a man after all." This suggests that he excused himself on the ground that passion and lust got the better of him. He admits that there were 'bedroom secrets' which ought not to have been disclosed and that his wife had made the charge of misconduct against him long anterior to the divorce proceedings. Whatever be the full weight to be attached to this letter, it appears to me that it furnishes corroboration of the evidence of Mrs. Rhine and her witnesses. I am wholly unable under the circumstances to come to the conclusion that the court below was wrong in regarding the charge made by Mrs. Rhine as proved. I also agree in the view taken by the court below that as neither of the parties came into court with clean hands, neither of them was entitled to a decree for dissolution of marriage.

It only remains to consider whether under the circumstances the court below ought to have granted a judicial separation. It is only under exceptional circumstances that the court will grant a decree for judicial separation to a petitioner who has been guilty of adultery. Section 23 of the Indian Divorce Act prescribes that in an application for judicial separation the court on being satisfied of the truth of the statements made in the petition and *that there is no legal ground why the application should not be granted* may decree judicial separation. This section closely corresponds with section 17 of the Matrimonial Causes Act, 20 and 21 Victoria, Chapter 85, as amended by 21 and 22 Victoria, Chapter 108, section 19. The Act does not define the legal grounds which justify the court in refusing to grant a decree to a petitioner for judicial separation. In the case of *Otway v. Otway* (1) it was held by the Court of Appeal in England that a judicial separation can only be granted where the petitioner comes to court with a pure character and is free from all matrimonial misconduct. In that case a husband and wife had both been found guilty of adultery, and the husband had also been found guilty of aggravated cruelty. It was held by the Court of

(1) (1893) L. R., 13 P.D., 141.

Appeal reversing the decision of BUTT, J., that the court had no jurisdiction to make a decree for judicial separation on the ground of such cruelty, however aggravated its character might be. COTTON, L. J., laid down the following as the true principle which should guide a court in a case of the kind. He observed:—

“In my opinion the true principle is this, that a wife having been guilty of adultery has put herself in such a position that she cannot be considered as an innocent party in any proceedings which might have been taken in the old Ecclesiastical Courts, or which might now be taken in the Court of Divorce, and therefore on that ground she is not in a position to come to that court to give her any relief as to any matrimonial offence which the husband may have committed, or, to put it on the ground of compensation, for a crime of the same nature.” FRAY, L. J., in the course of his judgement remarked:—“The case is one which it appears to me ought to be considered with great care, because it is impossible not to feel a strong sense of repulsion at continuing the marriage tie between an adulterous man and an adulterous woman, where the man has been guilty of cruelty of the description of which the respondent in this case has been guilty.” He states his conclusion as follows:—“The conclusion I have arrived at is that the principles which formerly governed the old Ecclesiastical Courts ought to prevail now, one of which is not to pronounce a decree for a divorce *a mensâ et thoro* in favour of an adulteress.” LOPES, L. J., in his judgement observes:—“Now the authorities seem to me clearly to lay down that if a wife sued her husband for adultery and had herself been guilty of adultery, she was not entitled to any relief. That doctrine applies in this case unless it can be maintained that the fact of the husband having been found guilty of cruelty as well as adultery, entitles the wife to relief, when but for the cruelty she would have had no *locus standi*. I can find no authority for this proposition, and it is opposed to what I believe to be the principles on which the Ecclesiastical Courts have acted in granting decrees for a divorce *a mensâ et thoro* viz., that a wife or husband seeking such relief must come to the court with a pure character and must be free from any matrimonial misconduct.”

1911

 REINE
 v.
 REINE.

Stanley, C. J.

911

RHINE
 v.
 RHINE.
 Stanley, C. J.

To this ruling great weight necessarily attaches. It is no doubt true that in the later case of *Constantinidi v. Constantinidi* (1), JEUNE, P., granted a decree for dissolution of marriage in a case in which both the petitioner and respondent had been guilty of adultery. In that case it was held that, although the discretion conferred by section 31 of Act 20 and 21 Victoria, Chapter 85, is a judicial and not an arbitrary discretion, the causes for and circumstances under which the court may exercise its discretion in favour of a guilty petitioner are to be taken in combination and according to their several degrees of force and also that the list of such causes is not a closed book and may be extended as occasion arises. The learned President in the course of his judgement, in treating of the principles which should guide the court in a matter of the kind, observes :—“ I think, therefore, one can find guidance only by reference to the general principles of justice, and no principles of justice in regard to this matter seem to me clearer than these: first, that the petitioner who has been convicted of adultery should not be allowed to obtain a divorce, if such adultery, in any serious degree, contributed to the misconduct of the respondent; and, secondly, that a respondent should not be allowed to avoid the consequences of proved misconduct by putting forward an act or acts of misconduct on the part of the petitioner for which the respondent was himself or herself in any serious degree responsible. To hold otherwise would be to allow a wrong-doer to profit by wrong doing. I have no doubt that the Legislature intended that the court should act on these principles whether or no it intended that the court should act on any other principles.” Finding in that case that the respondent's conduct conduced to the adultery committed by the petitioner, the learned President granted a decree *nisi*. This was a very different case from the one now before us. In this case Mrs. Rhine has been found guilty of deliberate adultery. It cannot rightly be said that her husband conduced to the adultery. The principle laid down in *Otway v. Otway* should, therefore, I think, be applied to this case, and accordingly applying it I would hold that, coming into court as she does with unclean hands, Mrs. Rhine is not entitled to any relief. I would, therefore, in

(1) [1903] P. D., 246.

the circumstances of this case, set aside the decree of the court below for a judicial separation and in other respects affirm the decree of that court.

GRIFFIN, J.—I concur.

TUDBALL, J.—I concur.

BY THE COURT.—The order of the Court is that the decree of the court below in so far as it granted the petition of Mrs. Rhine for judicial separation be set aside, and that her petition be dismissed *in toto*. In other respects the decree will stand affirmed, but without costs as no one appears on the part of the respondent.

Petition dismissed.

APPELLATE CIVIL.

1911
February
24.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

KURMA SINGH AND ANOTHER (PLAINTIFFS) v. OHLALLU (DEFENDANT) *
Act (Local) No. II of 1901 (Agra Tenancy Act), sections 10, 202—Exchange of lands on partition—Expropriatory tenant—Suit for possession in Civil Court—Res judicata—Procedure.

By section 10 of the Agra Tenancy Act, 1901, where there is a transfer by private alienation, no rights of expropriatory tenants accrue if the alienation is by gift or by exchange between co-sharers.

Where circumstances exist to which section 202 of the same Act applies, the court has no option, but is bound to adopt the procedure laid down in that section.

The facts of this case were as follows:—

One Duli Chand, now represented by the appellants, brought a suit for possession of certain agricultural lands. It appears that the parties were co-sharers in certain zamindari, and under an arbitration award the zamindari was partitioned. The lands in question fell to the share of Duli Chand. He brought a suit in the Civil Court for proprietary possession of those lands and for ejectment of the defendant. The Subordinate Judge, in whose court the suit was instituted, by his decree, dated the 10th of

* Second Appeal No. 947 of 1910 from a decree of L. Johnston, additional Judge of Meerut, dated the 22nd of April, 1910, reversing a decree of Muhammad Husain, additional Subordinate Judge of Meerut, dated the 30th of July, 1909.