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suit the heirs had obtained a decree for possession on payment of a proportionate part of the dower debt within 6 months; the decree provided that upon failure to pay, their suit should be dismissed. A second suit to recover possession was held to be maintainable. Had the widow's claim on the estate been (which it was not) similar to that of a mortgagee, the case would be an authority against the appellants. In any view, however, it does not assist their contention.

There being no authority constraining them to adopt a different view, their Lordships think that the right to redeem has never been extinguished in the present case, and that the present suit for redemption was maintainable.

This appeal accordingly fails and should be dismissed. Their Lordships will humbly advise His Majesty accordingly. If the respondents have properly incurred any costs in relation to the appeal, these must be paid by the appellants.

Solicitors for appellants: *Barrow, Rogers and Neville.*

## MATRIMONIAL JURISDICTION

*Before Mr. Justice Young, Mr. Justice King and Mr. Justice Bennet*

1933
*November*, 13

COCKMAN (PETITIONER) *v.* COCKMAN (RESPONDENT) AND BAKER (CO-RESPONDENT)*

*Divorce—Evidence of adultery—Miscarriage after separate living—Non-access—Whether husband can give evidence of non-access—Admissibility of evidence—Evidence Act (I of 1872), sections 112, 120.*

Where, in a suit for divorce on the ground of the wife's adultery, it was proved that eight months after the filing of the petition of divorce the wife had a miscarriage and produced a foetus six weeks old, it was *held* that the husband could give evidence of non-access to his wife at the material date.

It is a question whether the rule in *Russell* v. *Russell* (1), that evidence of non-access may not be tendered by a spouse and

*Matrimonial Reference No. 3 of 1933.

(1) [1924] A.C., 687.

received by a court with the object or possible result of bastardizing a child of the marriage, applies to India or not, having regard to sections 112 and 120 of the Evidence Act. It has, however, been held in England that the rule does not apply in the case of a miscarriage or a still-born child, the reason being that in neither of these cases is there any danger of bastardizing the living issue of the married pair.

Mr. *G. S. Pathak*, for the petitioner.

No one appeared for the opposite party.

YOUNG, KING and BENNET, JJ.:—This is an application to confirm a decree passed by the District Judge of Jhansi dissolving the marriage between G. T. Cockman and Olga Myrtle, his wife, the co-respondent on the record being one Lance-Corporal C. G. Baker of the Air Force.

The petitioner alleged adultery with soldiers unknown and with Lance-Corporal Baker. Evidence was called on the first issue as to adultery with soldiers unknown; but the learned Judge has found that there was not sufficient evidence on this point. We agree with him.

As to the adultery with Lance-Corporal Baker, there is on the record a letter from him to the petitioner in which he admits adultery with the respondent. That letter, owing to section 32, clause (3) of the Evidence Act, is admissible as evidence in the case, as Baker is in England and his admission of adultery would have exposed him to a criminal prosecution. There are also several letters from the wife to the petitioner, in which she clearly confesses a guilty affection for the co-respondent. She, however, does not admit adultery. There is further evidence of guilty familiarity between the respondent and the co-respondent, which the learned Judge believes, and, finally, there is evidence that since the petition has been filed the respondent had a miscarriage and that she produced on that occasion a foetus six weeks old. That miscarriage took place on the 24th of October, 1932; the petition was filed on the 16th of February, 1932. The petitioner gave evidence

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of non-access to his wife at the material date. This was corroborated by his mother. On the question of adultery we think there is enough evidence to satisfy the court that adultery had been committed by the respondent. There was clear evidence of guilty affection, an admissible admission by the co-respondent of adultery and also evidence of guilty familiarity between the respondent and the co-respondent. In addition to this there was ample opportunity for this couple to have satisfied their guilty affection. On this ground alone we may confirm the decree of the lower court.

The learned Judge, however, bases his decision particularly upon the fact of the miscarriage taking place so long after the filing of the petition, and the evidence of non-access given by the husband. It was thought that the well known case of *Russell* v. *Russell* (1), decided by the House of Lords, might apply to this case. The rule in *Russell* v. *Russell* is authority for the proposition that evidence of non-access may not be tendered by a spouse and received by a court with the object or possible result of bastardizing a child of the marriage. The rule in *Russell* v. *Russell* only applies, however, where there is the danger of bastardizing the living issue of the married couple. It has been held in England in *Fosdike* v. *Fosdike and Hillier* (2) and in *Holland* v. *Holland* (3) that the rule in *Russell* v. *Russell* does not apply in the case of a miscarriage or a still-born child, the reason being that in neither of these cases is there any danger of bastardizing the living issue of the married pair. We do not need, therefore, to consider in this case whether the rule in *Russell* v. *Russell* applies to India or not. This would necessitate a consideration of the effect of sections 112 and 120 of the Indian Evidence Act. It is to be noted that section 3 of the English Act of 1869 allowing parties

(1) [1924] A.C., 687. (2) (1925) 41 T L.R., 432, *note*.
(3) [1925] P., 101.

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in divorce proceedings to give evidence, which is somewhat similar to section 120 of the Indian Evidence Act, was considered in *Russell* v. *Russell* and it was held that evidence of non-access, on a proper construction of the section, was not admissible.

The evidence of the husband of non-access being admissible against his wife, corroborated as it is by the evidence of the mother, and of the miscarriage in October, 1932, amply proves adultery by the respondent in this case. We, therefore, confirm the decree passed by the lower court.

## MISCELLANEOUS CIVIL.

*Before Mr. Justice Bennet*

MUHAMMAD MUSTAFA ALI KHAN (PLAINTIFF) *v.* DISTRICT BOARD, BAREILLY AND ANOTHER (DEFENDANTS)*

1933 *November*, 15

*Specific Relief Act (I of 1877), sections 21(b), 56(f)—Injunction —Master and servant——Dismissed servant cannot get injunction against master—Statutory servant—Secretary, District Board.*

Under section 56(*f*) of the Specific Relief Act an injunction cannot be granted to prevent the breach of a contract, the performance of which would not be specifically enforced; and as, according to section 21(*b*) of the Act, contracts of personal service between a master and a servant cannot be specifically enforced by either party, a dismissed servant's only remedy for a wrongful dismissal would be by an action for damages and he can not obtain an injunction against his dismissal or against the appointment of another person in his place. The rule is not affected by the fact that the service is one governed by a statute, as the post of Secretary of a District Board under the U. P. District Boards Act.

So, where the Secretary of a District Board was dismissed by a resolution of the Board, and he filed a suit on the allegation that the resolution was illegal and contrary to the District Boards Act, and the suit having been dismissed by the lower courts he filed a second appeal in the High Court and applied for a temporary injunction restraining the District Board from enforcing the resolution of dismissal and insisting on his handing over charge, it was *held* that he could not get the injunction.

*Application in Second Appeal No. 1396 of 1933.