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February 14.

MATRIMONIAL JURISDICTION.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

MORGAN (APPELLANT) *v.* MORGAN (RESPONDENT)

Judicial Commissioner of Oudh—Appellate jurisdiction of High Court in matrimonial suits—Act IV of 1869 *(Divorce Act), ss.* 3 (2), 55—*Act XIII of* 1879 *(Oudh Civil Courts' Act) s.* 27—*Production of additional evidence in Appellate Court.*

A decree dismissing a suit for dissolution of marriage made by the Judicial Commissioner of Oudh, exercising the powers of a District Judge under Act XIII of 1879, and the Divorce Act, 1869, is appealable to the High Court for the North Western Provinces.

At the hearing of an appeal from a decree dismissing a suit by a wife for dissolution of marriage, on the ground of her husband's incestuous adultery with her sister *M* and cruelty, the appellant produced certain letters written by the respondent and *M* to each other which showed that a criminal intimacy existed between them. These letters were not written until after the appellant had filed the appeal. *Held* that such letters were admissible and should be admitted, and that, having been brought to the Court's notice by the appellant's counsel, the Court was bound in the interests of justice to require their production in order to enable it to decide the appeal on its real merits.

THIS was an appeal from a decree of Mr. W. C. Capper, Judicial Commissioner of Oudh, dismissing a suit by Sarah Maria Morgan for the dissolution of her marriage with Edward Morgan on the ground of incestuous adultery with her sister Mary Muller and cruelty. While the appeal was pending the appellant filed three letters, one in the handwriting of Edward Morgan and two in that of Mary Muller, which had been sent to her anonymously after the appeal had been filed. These letters were not in existence at the time when the appellant filed her petition for dissolution of marriage or when she preferred the present appeal. They showed that a criminal intercourse existed between the respondent and Mary Muller.

Messrs. *Hill* and *Conlan*, for the appellant.

Messrs. *Thomas* and *Howard*, for the respondent.

Mr. *Thomas* contended, *in limine*, that an appeal did not lie to the High Court from the decree of the Judicial Commissioner of Oudh dismissing a suit for dissolution of marriage under Act IV of 1869.

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This objection having been overruled, Mr. *Hill* proposed to prove the letters above mentioned. Mr. *Thomas* contended that the letters should not be admitted in evidence in the stage of appeal.

The Court (STRAIGHT, J., and TYRRELL, J.,) delivered the following judgment :—

STRAIGHT, J.—This is an appeal from a decision of the late Judicial Commissioner of Oudh, exercising the powers of a District Judge under Act XIII of 1879, and the Indian Divorce Act of 1869, by Sarah Maria Morgan, an European British subject, petitioner, for a dissolution of her marriage with Edward Morgan, respondent, on the ground of his incestuous adultery with Mary Muller, a sister of the petitioner. The Judicial Commissioner dismissed the petition. Upon the case being called on for hearing before us, a preliminary objection was taken by the learned counsel for the respondent to our entertaining it on the ground that we had no jurisdiction to hear the appeal. We, however, were of opinion, first, that, as s. 27 of the Oudh Civil Courts' Act of 1879 declares that, for the purposes of the Indian Divorce Act of 1869, the Judicial Commissioner of Oudh is to be deemed "the Commissioner of the Division," and by the interpretation-clause of the Indian Divorce Act "District Judge" means in the non-regulation provinces a Commissioner of a Division, the Judicial Commissioner of Oudh was for the purposes of the Indian Divorce Act on the same footing and possessed the same powers as a District Judge; secondly, that this Court, being the High Court to whose original criminal jurisdiction the petitioner as a European British subject would be amenable, was the High Court for Oudh in reference to divorce and matrimonial matters under Act IV of 1869; thirdly, that the procedure of Act X of 1877 being specifically adopted and made applicable to proceedings under such last mentioned Act, and s. 55 thereof distinctly declaring a right of appeal, the dismissal of the petitioner's petition by the Judicial Commissioner of Oudh was just as much appealable as if the decision had been passed by one of the District Judges within the North-Western Provinces. To have adopted the contention urged on the part of the respondent would have been to hold that out of all the tribunals in India exercising jurisdiction under the Divorce Act of 1869, the Judi-

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cial Commissioner of Oudh sitting singly, and, as declared by law, in the subordinate character of a District Judge, was alone unappealable. The position was so obviously untenable and absurd that we did not hesitate to overrule the respondent's objection, and accordingly directed that the appeal should proceed. Thereupon Mr. Hill, counsel for the appellant, opened the case for his client, and after stating to us that the main act of adultery relied on in the Court below was alleged to have taken place on the morning of the 27th November, 1880, at Lucknow, on which occasion Mrs. Morgan asserted she had seen her husband leaving the bed of her sister, went on to inform us that since the decision of the Judicial Commissioner, certain letters marked B and C, written by Mrs. Muller, and D by the respondent, had come into the possession of the petitioner, through an anonymous agency, which if admitted by us as evidence could leave no room for doubt as to the existence of a criminal intimacy between these persons. The handwriting was vouched and verified by an affidavit of the appellant. The counsel for the respondent objected that the matter of these letters, even assuming them to be authentic, was entirely new and could not be produced for the first time in an appellate Court. Either it was of a kind that would have justified an application to the Court of the Judicial Commissioner for review of judgment, or afforded material for a new case in respect of which a fresh petition might have been presented. On the other side it was contended that the letters in question were not in existence at the time the decree dismissing the suit was passed, and indeed had only been written subsequent to the filing of the appeal to this Court, therefore no review of judgment could have been applied for under s. 623 of the Civil Procedure Code. For they were not evidence, which, after the exercise of due diligence, could have been within the knowledge of the petitioner, or produced by her in the Judicial Commissioner's Court. Moreover, their contents went directly to the main point to be decided in the appeal, namely, the credibility of the appellant's story. We were of opinion that these letters were admissible and should be admitted, and that having been brought to our knowledge by the appellant's counsel, we were in the interests of justice bound to require their production, in order to enable us to decide the appeal upon its real merits. It seemed at once inequitable and

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inconvenient for us as a primary appellate Court, having power to determine questions of fact as well as law, to refuse to look at evidence almost if not entirely conclusive of the substantial issue before us, as being strongly corroborative of the story told by the appellant, and to relegate her to a fresh suit, which would involve the respondent himself in further expense. Upon our intimating this view, the counsel for the respondent admitted that the letters in question were in the handwriting of his client and Mrs. Muller respectively, and that having regard to their contents, it would be only stultifying himself and wasting the time of the Court to contest the appeal further. We have thought it right to look into the evidence given before the Judicial Commissioner as also to peruse the letters B, C, and D, and having satisfied ourselves that there has been no collusion or connivance between the parties, and that it has been clearly established that the respondent was guilty of incestuous adultery with Mary Muller his sister-in-law, we have no hesitation in allowing the appeal, reversing the decision of the lower Court, and granting the petitioner a decree *nisi* for dissolution of her marriage with the respondent, who will pay all the costs of the proceedings. (The judgment then proceeded to deal with the question of alimony and the custody of the children of the marriage).

APPELLATE CIVIL.

1882
March 7.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

PHUL CHAND AND ANOTHER (DEFENDANTS) *v.* MAN SINGH (PLAINTIFF).*

Joint Hindu Family—Adult Son—Mortgage of family property by father—Decree against father—Right of Son.

The father in a joint undivided Hindu family governed by the law of the Mitakshara mortgaged the ancestral property of the family as security for a debt incurred by him. His son was of age at the time of the mortgage, but the mortgagee did not make the son join in the mortgage. When the mortgagee brought a suit to enforce the mortgage, he brought it against the father alone; and he obtained a decree against the father alone for the sale of the property. On the property being attached in execution of the decree, the son objected to the sale of the property, so far as his own share according to Hindu law was concerned. This objec-

* Second Appeal, No. 603 of 1881, from a decree of S. M. Meens, Esq., Judge of Aligarh, dated the 27th May, 1881, modifying a decree of Sayyid Farid-ud-din Ahmad, Subordinate Judge of Aligarh, dated the 31st March, 1881.