Court comprised of the Chief Justice and four puisne Judges. That question runs as follows :—

"Where a partner as partner lends money beyond the initial capital to the partnership at an agreed rate of interest and the money is used for capital expenditure, should the interest paid by the partnership to him in the year of assessment be deducted in computing the profits or gains of the partnership within the meaning of Section 10 (2) (*iii*) of the Income-Tax Act?"

In view of the above decision of the Madras High Court, we are of opinion that the question involved in this case is a question of law, and we require the Income-Tax Commissioner to state the case and refer it to this Court for decision.

APPELLATE CIVIL.

Before Tek Chand and Agha Haidar JJ.

ADA JOSE, Petitioner-Appellant

versus

JOSE, Respondent.

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March 31.

Civil Appeal No. 2655 of 1929.

Indian Divorce Act, IV of 1869, section 10—Adultery—proof of—respondent suffering from venereal disease—petitioner free from it—absence of proof of innocent origin—cruelty—forcible intercourse—even though disease not communicated to petitioner.

Held, that if a husband or wife be proved to have contracted a venereal disease (not from the wife or husband) during the marriage, that is sufficient evidence of adultery, and it lies on the opposite party to show that the disease had an innocent origin.

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Gleen v. *Gleen* (1), *Mills* v. *Mills* (2), and *Stead* v. *Stead* (3), followed.

Rayden's *Practice and Law in the Divorce Division*, 2nd Edition, page 82, para. 106, referred to.

Anthony v. *Anthony* (4), and *Gliksten* v. *Gliksten* and *Deane* (5), distinguished.

Held also, that where the respondent, knowing that he was suffering from such a disease, compelled the petitioner to sexual intercourse with him against her will, cruelty must be held to be proved, even though the forcible intercourse did not result in communicating the disease to the petitioner.

Foster v. *Foster* (6), overruling *Ciocci* v. *Ciocci* (7), followed.

First appeal from the decree of J. K. M. Tapp, Esquire, District Judge, Lahore, dated the 26th August 1929, refusing to grant a decree nisi *for dissolution of appellant's marriage with the respondent, but granting a decree for judicial separation.*

B. B. PETMAN, for Appellant.

Respondent in person.

TEK CHAND J.

TEK CHAND J.—This is an appeal under section 55 of the Indian Divorce Act by Mrs. Ada Jose from a judgment of the District Judge, Lahore, refusing to grant a decree *nisi* for dissolution of her marriage with the respondent Charles Leonard Jose, but granting a decree for judicial separation. The parties profess the Christian religion and are domiciled in India. They were married at St. Andrew's Church,

(1) (1900) 17 T. L. R. 62.
(2) (1920) 36 T. L. R. 772.
(3) (1927) Solicitor's Journal, Vol. LXXI, 391.
(4) (1919) 35 T. L. R. 559.
(5) (1917) 33 T. L. R. 203.
(6) 1921 L. R. Probate Division 438.
(7) (1853) 1 Spinks Ecc. and Ad. 121.

Lahore, on the 15th July, 1912, and have five children: three girls born in 1913, 1915, and 1923 and two boys in 1920 and 1926. On the 16th of February 1929, the appellant presented a petition to the District Judge, Lahore, praying that her marriage with the respondent be dissolved on the ground that he had been guilty of cruelty towards her, as well as of adultery with some person or persons unknown. A few days later, on the 15th of February 1929, the husband also lodged a petition in the same Court alleging that the wife had been guilty of adultery with two named co-respondents and praying for dissolution of the marriage. The two suits were consolidated and after a lengthy enquiry were decided in one judgment. The learned Judge dismissed the husband's petition holding that the alleged adultery by the wife was not proved. In the other case, in which the wife was the petitioner, he found that the husband had been guilty of cruelty towards her but that adultery by him had not been established. He accordingly refused the prayer for dissolution of marriage but granted a decree for judicial separation with half costs against the husband. No appeal has been preferred by the husband against the decree dismissing his suit. The wife has, however, lodged this appeal in the suit in which she was the plaintiff, praying that the decree of the Lower Court be modified by granting a decree *nisi* for dissolution of marriage.

As stated already the appellant had alleged that the respondent had been guilty of cruelty towards her as well as of adultery. After a careful review of the evidence the learned District Judge has found—

(1) that the respondent was suffering from gonorrhœa at least in and from February 1928;

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(2) that it is conclusively proved that the appellant was free from this disease and that she could not possibly have communicated it to him; and

(3) that knowing that he was suffering from this loathsome disease he compelled her to sexual intercourse with him against her will in June 1928.

On finding No. (3) the learned Judge has held that cruelty must be held to be proved, even though the forcible intercourse did not result in communicating the disease to the appellant. There can be no question that this conclusion is correct. [See *Foster* vs. *Foster* (1), overruling *Ciocci* vs. *Ciocci* (2)]. The sole point for determination in this appeal, therefore, is whether the charge of adultery against the respondent has been established.

After going through the record I have no doubt that the findings of fact arrived at in (1) and (2) are amply supported by the evidence and must be accepted as correct. I think, however, that the conclusion which the learned Judge has drawn therefrom is erroneous. There is no doubt that the trend of authority in England is that if a husband or wife be proved to have contracted a venereal disease (not from the wife or husband) during the marriage, that is sufficient evidence of adultery (Rayden's Practice and Law in the Divorce Division, 2nd Edition, page 82, para. 106). In *Gleen* v. *Gleen* (3), the only evidence produced was that the medical history-sheet of the husband, who was a soldier in the army, indicated that he had suffered from a venereal disease and on this evidence alone the Lord President held

(1) (1921) L.R. Probate Division 438. (2) (1853) 1 Spinks Ecc. and Ad. 121.
(3) (1900) 17 T. L. R. 62.

that adultery was sufficiently proved and granted a decree *nisi*, the charge of cruelty being established *aliunde*. Similarly in *Mills* v. *Mills* (1), the charge of adultery was based on the fact that the husband had contracted gonorrhœa, and it was found as a fact that the wife-petitioner was free from that disease and that the respondent could not have contracted it from her. On these facts adultery was held proved and a decree *nisi* was pronounced. The same view has been taken by Bateson J. in the recent case of *Stead* v. *Stead* (2), where it was held that an infection of the respondent with a disease called 'crabs' was, in the absence of prior misconduct or infection of the petitioner, *prima facie* evidence that the respondent had committed adultery. At first sight the cases of *Anthony* v. *Anthony* (3), and *Gliksten* v. *Gliksten* and *Deane* (4), appear to take the contrary view, but an examination of the reports will show that the facts in both cases were entirely different. It is no doubt true that it is not impossible for a person to contract gonorrhœa otherwise than by sexual intercourse. As pointed out by the learned District Judge it may, for example, be communicated from infected towels, hands, baths, instruments etc. But in the present case there was no such suggestion that the respondent contracted the disease by any such means. His only defence was that during the period in question he was not suffering from gonorrhœa and that the treatment which he was having at the time was for hydrocele, which had been caused as a result of injuries received in a fall from his bicycle. This allegation and the evidence led in support of it have been

(1) (1920) 36 T. L. R. 772. (2) 1927 Solicitors' Journal Vol. LXXI 391.
(3) (1919) 35 T. L. R. 559. (4) (1917) 33 T. L. R. 203.

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carefully scrutinized by the learned Judge and rejected, and as I am in complete agreement with his conclusion on this point, I do not consider it necessary to discuss it again.

After a careful consideration of the case I am of opinion that the respondent has failed to show that the disease of gonorrhœa from which he has been proved to be suffering had an innocent origin, and that this is coupled with the established fact, that the appellant was free from this disease and could not possibly have communicated it to him, is, in the circumstances of the case, sufficient to prove the charge of adultery.

The respondent having thus been proved to be guilty both of cruelty towards the appellant and of adultery and there being nothing on the record to indicate that the petition has been presented in collusion with the respondent, I am of opinion that a decree *nisi* for dissolution of marriage should have been passed in this case.

I would accordingly accept the appeal and in lieu of the decree for judicial separation passed by the District Judge would pass a decree *nisi* for dissolution of marriage. The appellant shall get her costs in this Court.

AGHA HAIDAR J.

AGHA HAIDAR J.—I agree.

N. F. E.

Appeal accepted.