ORIGINAL CIVIL.

Before Mr. Justice Sharpe.

VIOLA DUNCAN *v.* GEORGE DUNCAN.*

1938
Nov. 7.

Divorce—Fresh ground for divorce arising subsequent to filing of petition—Reliance on such ground for divorce—Court's power to act on new ground—English practice—Supplementary petition and other requisites—Condonation of prior matrimonial offence—Subsequent offence, ejusdem generis *or otherwise—Revival of prior offence—Divorce Act, s. 7.*

It is open to Courts in Burma, following the practice of the English Courts, to pronounce a decree for divorce based on adultery (coupled with previous cruelty) committed by the respondent after the presentation of a petition for dissolution of marriage. But in order to enable the Court to do so, it is essential that the petitioner should file a duly verified supplemental petition supported by an affidavit which should set out the facts, testify to non-collusion and no connivance, and copies of the supplemental petition should be duly served on the respondent and on all persons affected by it.

Smith v. *Heptonstall*, [1938] Ran. 6, distinguished.

Upon the commission of a subsequent matrimonial offence the forgiveness of a prior offence is cancelled and the old cause of complaint is revived; furthermore the subsequent offence need not necessarily be *ejusdem generis* as the original offence.

Blackmore v. *Blackmore*, I.L.R. 7 Ran. 313; *Dent* v. *Dent*, 4 Sw. & Tr. (P. & D.) 105; *Hindle* v. *Hindle*, 7 B.L.T. 294, referred to.

Austin Moore for the petitioner.

No appearance for the respondent.

SHARPE, J.—This undefended case came before me on the last day of the last sittings (Aug. 26, 1938). Although I wished to take time to write my judgment, I had no doubt that the Petitioner was entitled to a decree *nisi* and I wanted the six months' period to commence running in her favour before the Long Vacation. So I then merely directed a decree *nisi* to be drawn up that day and intimated that I would give my full reasons after the Long Vacation. This I will now do.

* Civil Regular No. 214 of 1938.

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The Petitioner is a Christian and, at the date of the presentation of her petition, which was one for obtaining a dissolution of her marriage to the Respondent, both she and the Respondent were domiciled in Burma. The matter therefore fell to be decided under the Divorce Act. Her case was based upon allegations of adultery coupled with such cruelty as without adultery would have entitled her to a divorce *a mensa et toro*. The parties were married on the 10th July 1933 and there is issue of the marriage two children, a boy, Peter Maitland, born on the 27th November 1934, and a girl, Ursula Celene, born on the 1st December 1936.

The cruelty alleged was of two kinds : first, that for the previous four years the Respondent had on numerous occasions assaulted the Petitioner and that, in consequence, her health had been seriously affected ; second, that on five occasions since about October 1937 the Respondent had attempted to have intercourse with the Petitioner against the law of nature, and that he had assaulted her when she resisted his attempts. I do not propose to go into the details of the evidence in regard to the charges of cruelty. I will merely say that, in regard to the first charge, I was doubtful whether the acts of the Respondent amounted to cruelty, within the meaning of the Divorce Act. In regard to the second charge, however, I was abundantly satisfied that the Respondent's acts amounted to such cruelty as without adultery would have entitled the petitioner to a divorce *a mensa et toro*.

The adultery relied upon was, in the first place, an act of adultery committed by the Respondent in September 1937 with a Burmese servant girl. The Petitioner proved that act of adultery to my satisfaction, but she quite frankly admitted that she had condoned that matrimonial offence, and had taken the Respondent

back, at his request, in order, as she said, "to avoid disgrace." That was the only act of adultery alleged against the Respondent in the petition, but about four weeks after presenting her petition, namely, on the 17th August, the Petitioner presented a supplemental petition alleging a further act of adultery by the Respondent with a Burmese woman, whose name is unknown, on a date subsequent to the presentation of the original petition. The original petition had in the meantime, namely, on the 25th July, been served upon the Respondent. I was abundantly satisfied, upon the evidence, that that further act of adultery was committed by the Respondent. But it fell to be considered whether such act of adultery, having occurred after the date of the presentation of the original petition, could be properly considered in the present proceedings as a ground for the dissolution of this marriage, and whether it might not have been necessary for the present petition to be dismissed and for the Petitioner to file a fresh petition so that the adultery relied upon would be prior in date to the institution of the proceedings.

Section 7 of the Divorce Act provides that, subject to the provisions of that Act, this Court (and also, for that matter, the District Courts) shall act and give relief on principles and rules which, in the opinion of the Court, are as nearly as may be conformable to the principles and rules on which the High Court in England for the time being acts and gives relief.

As I understand it, the present practice in England is this : When it is desired, after a petition has been filed, to add further charges, if the acts or any of them have occurred after the date of the petition, and if the petition has already been served—and that is the position in the present case—the original petition cannot be amended, and a supplemental petition must be filed. As a matter of fact supplemental petitions are not

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referred to in the English Divorce Rules, although they have been known to English practitioners for over fifty years ; they are entirely governed by practice and by case law. But there can be no doubt that they are used in such cases as those which I have just indicated. The object of them is to enable the Court to pronounce a decree based, for example, on adultery committed by the respondent after the presentation of a petition for dissolution of marriage. In that respect, therefore, a suit for relief under the Divorce Act is an exception to the general rule governing civil suits, which I stated in *Smith* v. *Heptonstall* (1), namely, that

> "nothing arising after action brought can either create a new, or complete a then incomplete, cause of action entitling the plaintiff to any relief in that same then existing suit."

In my opinion the High Court in England would have allowed the adultery charged in the supplemental petition in the present case to afford a ground for dissolving the marriage, and accordingly, by reason of section 7 of the Divorce Act, this Court was similarly entitled to allow the adultery committed by the Respondent on the 13th August last to be considered as providing a basis for a decree in this case. But unfortunately certain essential steps had not been taken in regard to the supplemental petition. All that happened was this: The original petition was, as I have said, served upon the Respondent on the 25th July. When, on the day finally fixed for the filing of the written statement, namely, the 17th August, the advocates for both parties appeared before the learned Deputy Registrar, Mr. Austin Moore, for the petitioner, filed the supplemental petition to which I have referred, at the same time stating that he had already supplied

(1) [1938] Ran. 6, 18.

the other side with a copy of it. Thereupon Mr. Jordan, for the Respondent, said that he would not contest the suit. No written statement has been filed. Now the English practice requires that a sealed copy of a supplemental petition must be personally served in all cases except in cases where there was an order of substituted service of the original petition; and no supplemental petition can be filed without leave, the application for which must be supported by an affidavit made by the petitioner. Such affidavit should set out the facts, testify to non-collusion and no connivance, and verify the paragraphs of the supplemental petition. A sealed copy of the supplemental petition must be served not only on the respondent but also on all persons affected by it. Such are the main features of the English practice which, in my opinion, apply equally in Burma. In the present case, apart altogether from the fact that no formal application for leave to file this supplemental petition was made, as, in my judgment, it ought to have been, there was no affidavit by the Petitioner, and the supplemental petition has never been personally served upon the Respondent. In the result, therefore, the position in regard to the supplemental petition in the present case was this: the adultery therein charged could, when established by evidence, as in fact it was, and taken in conjunction with the cruelty which had been proved, have formed a basis for granting the Petitioner a decree *nisi*; but, as the proceedings in connection with this supplemental petition were irregular in the respects which I have indicated, I could not take such adultery into consideration.

How, then, did the matter stand, apart from such further adultery? The Petitioner established to my satisfaction (*a*) the Respondent's adultery in September 1937, which, however, she condoned, and (*b*) cruelty

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from and after October 1937. The condonation was before the cruelty in October. Upon the commission of a subsequent matrimonial offence the forgiveness of the prior offence is cancelled and the old cause of complaint is revived; furthermore, the subsequent offence need not necessarily be *ejusdem generis* as the original offence. In *Hindle* v. *Hindle* (1), following a number of English decisions on the point, adultery was held to have revived a prior act of assault, which had been condoned, while in *Blackmore* v. *Blackmore* (2), a Full Bench of this Court held, following a Calcutta decision, which, in its turn, was based on English decisions, that desertion revived previously condoned adultery. In *Dent* v. *Dent* (3) a decision which is entirely in point in the present case, it was held that cruelty revives adultery. Consequently I held in the present case that the Respondent's cruelty from October 1937 onwards revived his adultery in the previous September, and, as I did not find either that the Petitioner had been in any manner accessory to, or conniving at, the Respondent's adultery in September 1937, or that the Petition was presented or prosecuted in collusion with the Respondent, I was able to pronounce a decree *nisi* for the dissolution of the marriage in this case without reference to the matters set out in the supplemental petition.

The question of the custody of the children remains. Mr. Austin Moore asked me to give the Petitioner the custody of both the children for an indefinite period of time. He said that that was the usual practice of this Court. Be that as it may, I must consider whether the Court has power to make such an order. I will certainly follow that practice if I think it is allowed, but, if I come to the conclusion that it

(1) 7 B.L.T. 294. (2) (1929) I.L.R. 7 Ran. 313.
(3) 4 Sw. & Tr. (P. & D.) 105.

is not a practice which is legal, I cannot follow it. I would add that I do not know of any reported decision as to this practice ; I think that the practice has merely grown up in the office and has never been the subject of consideration by a Judge of this Court. I wished to take time to consider the matter and therefore I made an interim order for the Petitioner to have the custody of both her children until further order. I have now considered the matter carefully and my conclusions are these :

The power both of this Court and also of the District Courts to make orders, in a suit for obtaining a dissolution of marriage, for the custody of a children, issue of that marriage, rests upon sections 41 to 43 of the Divorce Act. The only children concerning whom order with respect to custody, maintenance or education may be made are minor children, the marriage of whose parents is the subject of the suit. By section 3 (5) of the Divorce Act the word "minor children" are given a particular and carefully defined meaning, and, in my judgment, it follows that the Court's power to make any order for the custody of a minor child, the marriage of whose parents is the subject of a suit for obtaining a dissolution of that marriage, is limited to making an order in respect of such child only so long as that child remains a minor child within the meaning of the Divorce Act. I think that I am right in saying that, according to the English divorce practice, an order for the custody of a child is, in England, always expressly stated to be limited in point of time until the child shall attain an age specified in the order, which is usually sixteen (because of the practice which has there grown up at common law in respect of *habeas corpus* proceedings concerning minors over that age), and which never exceeds twenty-one (which is the age of majority in

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England). To my mind the proper practice to be followed in Burma is to limit the order for custody to the age which is fixed by section 3 (5) of the Divorce Act as that at which any particular child ceases to be a "minor child" as defined in that section.

It is also the invariable practice in England to direct that the person to whom is given the custody of a child of a marriage which has been dissolved, shall not remove such child outside the jurisdiction of the Court.

[His Lordship, following the above principles, then made an order in favour of the Petitioner for the custody of the children of the marriage during their respective minorities, such children not to be removed out of Burma without the sanction of the Court.]