MATRIMONIAL JURISDICTION.

Before Mr. Justice Scott.

1886. *July* 28 & 29.

A. P. THORNTON, PETITIONER, *v.* EDITH S. THORNTON, RESPONDENT, AND L. A. STRANSHAM, CO-RESPONDENT.*

Jurisdiction—Divorce—European British subjects—Jurisdiction of the High Court of Bombay to hear a suit for divorce arising in a Native State between European British subjects—Legislative power of Governor General—Indian Divorce Act IV of 1869*—Practice—Stay of proceedings—Petition against wife in India—Suit in England by wife against husband for restitution of conjugal rights.*

The petitioner, an European British subject resident at Secunderábád in the Deccan, sued for a divorce, alleging against the respondent various acts of adultery committed at Secunderábád.

Held, that the High Court of Bombay had jurisdiction to try the suit under the provisions of the Indian Divorce Act IV of 1869.

Held, also, that the provisions of the Indian Divorce Act IV of 1869 apply to suits between European British subjects resident in Native States in India; and that section 2 of that Act, which extends those provisions to such persons, was not *ultra vires* of the Indian Legislature.

Statute 28 and 29 Vic., c. 15, section 3 transferred to the Governor General in Council the power, previously vested in Her Majesty by section 18 of the High Courts Act (Stat. 24 and 25 Vic., c. 104) to alter and determine the territorial limits of the jurisdiction of the High Courts of India. The power thus transferred was a power "by Order" to authorise the exercise of jurisdiction. But the power, so conferred upon the Governor General in Council, did not affect the general legislative powers as to matters of jurisdiction previously possessed by him under Stat. 24 and 25 Vic., c. 67, s. 22. Those powers were (section 6 of Stat. 28 and 29 Vic., c. 15) expressly reserved; and the special power given by section 3 of Stat. 28 and 29 Vic., c. 15, of altering the limits of the jurisdiction by executive order does not exclude by implication the general legislative powers. To effect an alteration of such jurisdiction by Act instead of by Order is still within the general scope of the legislative powers of the Governor General in Council, although the more convenient course of an executive Government notification is usually followed.

Previously to the institution of the present suit the respondent had left India and gone to England without any intention of returning to India. It was contended that Act IV of 1869, passed by the Indian Legislature in exercise of its power to make laws for persons resident in Native territories, could not affect her.

Held, that the petition satisfied the Act by alleging residence of the petitioner in India and the commission of the act of adultery whilst the parties last resided together in India. It was not necessary to show the residence of the respondent.

* Suit No. 65 of 1886.

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The petitioner having (as he believed) on the 12th December, 1885, discovered that the respondent had been guilty of adultery, brought her from Secunderábád to Bombay, and sent her to England on the 25th December, 1886. On the 26th February, 1886, he filed his petition in the High Court of Bombay. On the 26th March, 1886, the respondent filed a suit against the petitioner in the High Court of Justice in England for restitution of conjugal rights. On motion made on respondent's behalf to stay proceedings in the present suit until the suit in England should be determined,

Held, in the circumstances of the case, that a stay of proceedings ought not to be granted.

SUIT for divorce. The petitioner sued for a dissolution of his marriage with the respondent, on the ground of her adultery with the co-respondent. He also prayed for damages Rs. 10,000 against the co-respondent. The petition was filed on the 26th February, 1886.

The petitioner was a captain in the Bengal Staff Corps, and held the appointment of Political Assistant and Cantonment Magistrate at Secunderábád in the Deccan at the time the suit was filed.

On the 27th March, 1879, he married the respondent at Montgomery, in the Punjáb. Subsequently to the marriage the petitioner and respondent lived and cohabited at Morár in the State of Gwalior, Central India, and at Nasirábád, at Mount Abu and, lastly, at Secunderábád.

The petitioner alleged that on divers occasions between the 28th August and the 7th December, 1885, the respondent had committed adultery at Secunderábád with the co-respondent. On the 25th December, 1885, the respondent was sent to England by her husband, and was residing there at the time this suit was filed. The petitioner subsequently went to England on short leave, and while he was there (on the 26th March, 1886,) the respondent filed a suit in the High Court of Justice in England against him for restitution of conjugal rights.

On the 19th May, 1886, the respondent filed her written statement in this suit, in which she denied the alleged adultery, and contended that the High Court of Bombay had no jurisdiction It was not denied that both parties were domiciled in England.

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The co-respondent also filed a written statement, denying the alleged adultery.

On the 9th June, 1886, notice was given on behalf of the respondent that (without prejudice to her contention that the High Court of Bombay had no jurisdiction) a motion would be made that the hearing of the petition should be adjourned until after the disposal of the suit for restitution of conjugal rights which the respondent had filed in England.

By an order in chambers of the 17th June it was ordered that the question of jurisdiction should be argued when the motion for adjournment was made. The motion now came on for hearing. The question of jurisdiction was argued first.

Latham (Advocate General) and *Lang* for the respondent.

Macpherson for the petitioner.

Inverarity for the co-respondent.

Latham :—The circumstances out of which this suit has arisen, took place in a Native State, and the parties are European British subjects not domiciled in India but in England. We submit that this Court has no jurisdiction to try this suit. The petitioner has assumed that section 2 of the Indian Divorce Act (IV of 1869) gives jurisdiction[1]. We contend that this section is *ultra vires* and inoperative, and that the Indian Legislature had no power *by legislation* to extend the matrimonial jurisdiction of the High Court to British subjects at Secunderábád. The jurisdiction might have been effectually extended by the Governor General in Council under the provisions of sections 3 and 4 of Stat. 28 and 29 Vic., c. 15, but that has not been done.

The powers of the Indian Legislature depend originally on the provisions of the Indian Councils Act, Stat. 24 and 25 Vic., c. 67, s. 22. That section only gave power to legislate for Government

(1) "2. This Act shall extend to the whole of British India, and (so far only as regards British subjects within the dominions hereinafter mentioned) to the dominions of Princes and States in India in alliance with Her Majesty.

"Nothing hereinafter contained shall authorize any Court to grant any relief under this Act, except in cases where the petitioner professes the Christian religion, and resides in India at the time of presenting the petition."

servants in Native territories. The petitioner no doubt may be a Government servant, but the respondent is not, and this legislation cannot affect her.

That Statute specifically prohibits the Governor General in Council from affecting the provisions of any Act passed in the same session of Parliament. The High Courts Act (Stat. 24 and 25 Vic., c. 104) was passed in that session. Section 9 of that Act gave the High Court such matrimonial jurisdiction in the Presidency as was directed by the Letters Patent. The Letters Patent (see clause 35) did not extend that jurisdiction beyond the Presidency. The Governor General in Council may remove any place or territory from the jurisdiction of the High Court—*The Queen* v. *Burah*[1], but he cannot extend the jurisdiction of the Court *by legislation*. Section 18 of Stat. 24 and 25 Vic., c. 104, expressly limits the power of altering the jurisdiction of the Court to Her Majesty.

Two subsequent Statutes, both passed in 1865, enlarged the powers of the Governor General in Council. The first was Stat. 28 and 29 Vic., c. 15, s. 3, which gives him power *by Order* to enable the High Court to exercise jurisdiction beyond its previous territorial limits. It is clear, therefore, that he could not have done this previously to this Statute. This section does not enlarge his powers of legislation as given by Stat. 24 and 25 Vic., c. 67. It only gives him power to extend the jurisdiction *by Order in Council, i.e.*, in his executive, and not in his legislative, capacity. The second Statute passed in 1865 (Stat. 28 and 29 Vic., c. 17,) enables the Indian Legislature to make laws for British subjects in Native States, whether or not they are Government servants. By this Statute (section 1) the words "British subjects" are substituted for the words "servants of the Government of India," which are the words in section 22 of Stat. 24 and 25 Vic., c. 67. The powers of the Indian Legislature are by this Statute enlarged so far as regards the *persons* whom they may affect by this legislation.

From these Statutes, then, the Indian Legislature derives its powers. We contend that in giving the High Court original

(1) 5 Ind. Ap. 178 : see p. 192.

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matrimonial jurisdiction over British subjects in Native territories by Act IV of 1869 it has exceeded its powers. There was no power to do this by Act. The only method of doing it was by Order in Council under section 3 of Stat. 28 and 29 Vic., c. 15. Act IV of 1869 is, therefore, *ultra vires*, so far as it purports to extend the matrimonial jurisdiction of the High Court. No doubt the Governor General in Council might extend this jurisdiction by Order in Council to-morrow; but if he did, it would not affect the respondent, as she is in England, and is not domiciled in India. The Governor General has also power to make laws for persons resident in Native territories, but the respondent is not resident in Secunderábád. She has left India without any intention to return.

Macpherson, contra:—By the Indian Councils Act, Stat. 24 and 25 Vic., c. 67, s. 22, the Governor General has power to make laws for all Courts of Justice whatever, and for all Government servants in Native States. By Stat. 24 and 25 Vic., c. 104 (High Courts Act), secs. 9—11, the legislative powers of the Governor General are preserved. Stat. 28 and 29 Vic., c. 17, which is to be read with Stat. 24 and 25 Vic., c. 67, enlarges his powers (see recital) to make laws for all British subjects in Native States. I submit that under these Statutes the Governor General had full power to pass Act IV of 1869, and that power was not taken away by section 3 of Stat. 28 and 29 Vic., c. 15: see section 6 of that Act.

Latham in reply:—Statutes conferring jurisdiction must be strictly construed. Stat. 28 and 29, Vic., c. 15, is not a restrictive Statute. It only confers a power which is to be exercised in a certain way.

At the conclusion of the argument with reference to the jurisdiction of the High Court, the question raised by the notice of motion of the 9th June was argued, *viz.*, whether this suit should be stayed until after the decision of the suit filed in England by the respondent against the petitioner for restitution of conjugal rights.

Latham (Advocate General) for the respondent in support of the motion:—The proceedings here should be stayed until the English suit is decided. The petitioner himself is responsible for the difficulty. He sent the respondent to England. He did not tell her he was going to file a suit for divorce. It will be a hardship on her to bring her out again to India to give evidence, and she wishes to give her evidence orally. The petitioner can raise the question of adultery in the English suit, and so the whole matter will be decided. The Court in England has full jurisdiction, and can give a more ample remedy than a Court in India. A divorce granted by this Court cannot be of greater effect than a divorce granted in Scotland, and yet a man divorced in Scotland has been subsequently convicted in England for bigamy. It would seem, therefore, that although the parties might be divorced here, yet they would still be regarded in England as married. The parties will be involved in difficulty if this Court should grant the petitioner a divorce, and the Court in England should in the suit filed by the respondent grant her restitution of conjugal rights. Counsel referred to *The Delta* [1]; Dicey on Domicile, pp. 16, 225, 240; Story's Conflict of Laws (8th ed.), 229 (*a*).

Macpherson, contra:—The petitioner has a right to have his suit heard. He consents to an adjournment sufficient to prevent inconvenience to the respondent.

July 1. SCOTT, J.:—There are three questions in this case: (*a*) whether this Court has jurisdiction; (*b*) whether, if it has jurisdiction, the Court ought not to stay proceedings until the suit brought by the respondent in England is heard; and (*c*) whether, even if the stay cannot be granted, the suit should not be adjourned to a date which would allow the respondent to appear personally at the hearing.

The question of jurisdiction is an important one, and was argued with much ability by the Advocate General. The result of his argument was that the Governor General in Council had exceeded his legislative powers in the Indian Divorce Act (IV of 1869) in so far as he had, by that Act, instead of by executive Order, extended the jurisdiction of the Indian Courts so as to include British subjects resident in the territories

[1] 1 Prob. Div., 393.

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of Native Princes. This power of altering the local limits of the jurisdiction, the learned Advocate General contended, could only be exercised in a certain defined manner,—to wit, by Order in Council, in accordance with 28 and 29 Vic., c. 15, s. 3. He showed that, originally, the Governor General had no inherent legislative power, and that such power as had been granted in later years was strictly limited and defined by Imperial Statutes.

I will now examine the question—what are the existing legislative powers of the Governor General in respect of British subjects in Native territories? The Indian Councils Act, 24 and 25 Vic., c. 67, s. 22, empowers the Governor General in Council to make laws and regulations for all persons and for all Courts of Justice within Her Majesty's Indian territories . . . . and for all servants of the Government of India within the dominions of Princes and States in alliance with Her Majesty. And this legislative power was subsequently extended by 28 and 29 Vic., c. 17, s. 1, to all Christian subjects in Native territories, whether Government servants or not. But a most important restrictive proviso is added to section 22 of the Indian Councils Act above quoted, which says: "Such laws and regulations shall not repeal or, in any way, affect any provisions of any Act *passed in the present session of Parliament, or hereafter to be passed,* in any wise affecting Her Majesty's Indian territories or the inhabitants thereof." Now, in the same session, the jurisdiction of the High Courts in India was established by Imperial Statute (24 and 25 Vic., c. 104.) The question, therefore, is whether an exercise of the above-named legislative power of the Governor General in Council, purporting to extend the jurisdiction of the High Court to Christian subjects in Native States, is inconsistent with any of the provisions of 24 and 25 Vic., c. 104.

The material provisions as to jurisdiction are contained in the 9th section. By the 9th section the High Court is given such jurisdiction as Her Majesty may, by her Letters Patent, grant. So far, then, it would seem that any legislative action under the Indian Councils Act I have cited would affect the provisions of this Act passed in the same session, and would, therefore, be *ultra vires.* But that is not so, as further on in the same High

Courts Act (Stat. 24 and 25 Vic., c. 104) the legislative powers by the Governor General in Council "in the aforesaid matters" (*i.e.*, of jurisdiction) are expressly recognised. Again, in the Letters Patent themselves (clause 44) there is also an express saving of those legislative powers. The Governor General in Council, therefore, is able to legislate generally in matters of jurisdiction. But can he legislate as regards the altering and determining the territorial limits of the several Courts? On this point there has been special Imperial legislation. Section 18 of 24 and 25 Vic., c. 104, (a section now repealed), formerly empowered Her Majesty by Order in Council generally to alter and determine the territorial limits; and when this section was repealed by 28 and 29 Vic., c. 15, this same power was, by section 3, conferred expressly on the Governor General in his executive capacity. By that section it is declared lawful for the Governor General in Council *by Order* "to authorise and empower any High Court to exercise the jurisdiction . . . . . conferred on it by H. M.'s Letters Patent . . . . in respect of Christian subjects by Her Majesty, resident within the dominions of the Princes and States of India in alliance, &c. . . . as the said Governor General may, in manner aforesaid, (*i.e.* by Order in Council) determine."

The question, therefore, is whether, as this Imperial Statute confers on the Governor General the power *by Order*, it further excludes by implication the power to alter the limits of the jurisdiction *by legislation*. In other words, is the power thus conferred the *only* method by which the Governor General can alter the local limits? In the first place, it must be remarked that the same Act which confers this power also (section 6) reserves the legislative powers of the Governor General; and I think it would be a strong proposition to assert that these general powers were repealed because another and simpler mode of proceeding was provided. The more natural inference, where the laws can co-exist, is that the new law is auxiliary to the old one. This view, I think, is supported by the Privy Council in the *Queen* v. *Burah*[1], where it is said, on a consideration

(1) 5 Ind. Ap., p. 178.

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of all these Acts, "the exercise of jurisdiction by the High Courts is subject to, and not exclusive of, the *general legislative power* of the Governor General in Council, as to 'all Courts of Justice whatever'." Their Lordships, also, (page 193) lay down the extent of those legislative powers in the following words:—"The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers. But, when acting within those limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation, as large, and of the same nature, as those of Parliament itself. The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they are restricted. If what has been done is legislation within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited, it is not for any Court of Justice to inquire further, or to enlarge constructively those conditions and restrictions."

Now, in the present case, we have a general power of legislation created by the Councils Act and enlarged by the subsequent Imperial Act, 28 and 29 Vic., c. 17. That general power is recognised and expressly reserved in all the Imperial Statutes which lay down the jurisdiction and the limits of the jurisdiction of the High Courts. But a special power of altering the limits of the jurisdiction by executive order is conferred by 28 and 29 Vic., c. 15, s. 3. Does this exclude the general legislative power? It certainly does not expressly exclude it. I think it does not exclude it by implication. A more convenient mode of altering the limits is provided. It is held to be an administrative or executive Act not requiring special legislation, and it must, I think, be held to be supplementary or ancillary to legislation, and not in any way excluding it. I think to effect an alteration by Act instead of by

Order is still within the general scope of the legislative powers conferred on the Governor General in Council, although the more convenient course of an Executive Government notification is usually followed.

Now let us consider what was done in the present case. The Governor General in Council promulgated the present Indian Law of Divorce in Act IV of 1869. All Christian British subjects resident in Native States were not *simpliciter* included within its application. The Act (section 2) gives jurisdiction to the particular High Court in question over resident European subjects in any place in the dominions of the Princes and States of India in alliance with Her Majesty where Original *Criminal* Jurisdiction has been or may be given to any High Court. So far the legislative power I have already mentioned is not exceeded, inasmuch as Christian subjects in Native States are expressly made the proper objects of legislation by the Acts I have cited. It must also be noticed that the Divorce Act *per se* makes no alteration in the territorial limits of jurisdiction. It only declares that whatever territorial limits are fixed for *criminal* jurisdiction they shall be the same for *matrimonial* jurisdiction. It lays down a principle, and leaves the details to be settled in accordance with the executive orders that may be made as regards criminal matters. Can that be considered an excess of the powers—the general legislative powers—given to the Governor General in Council, and described by the Privy Council in the case I have cited? I think not. It seems to me the Imperial Legislature, when it granted the right of legislating for British subjects in Native States, by implication gave the subsidiary right to alter by enactment the jurisdiction of the High Courts, so as to provide for the administration of the laws so made. That it subsequently provided a more convenient and speedy way of doing so, does not convince me that it intended to withhold the power to legislate. I am, therefore, of opinion that this Court has jurisdiction.

As regards the minor objection to the jurisdiction on the point of residence, I think the petition sufficiently satisfies the Act in alleging residence of the petitioner in India and the commission of the act of adultery whilst the parties resided last together in

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India. It is not necessary to show the residence of the wife. The Act does not require it, and to insist upon it would be to deprive the husband of his right of suit in every case where the wife deserts him and leaves the country.

I now come to the second half of this application, which concerns the stay of proceedings or adjournment. I do not think a case has been made out for a stay of proceedings until the suit in England is heard. The principle laid down by the learned Judges in the English Appeal Court[1] when the present petitioner applied for a stay of his wife's proceedings in England is fully applicable here. There is nothing oppressive or vexatious in this petition. The petitioner has a full right to sue here. He is resident here. It would be very inconvenient for him and his witnesses to go to England on account of his public duties. He first instituted proceedings. Indeed, the wife's proceedings are, in my opinion, a complete after-thought. She went home of her own free will with the offer of a separation if she would part with the children. She refused the condition, and then the husband sued for a divorce, as he had threatened. It was only then she brought her suit. It was urged before me that the petitioner should abide by the result of the English suit, because the relief afforded there is more complete. The learned Advocate General in a closely reasoned argument maintained that an Indian divorce was only valid in India if the parties, though resident in India, were domiciled in England. But I am not obliged to decide that question. The petitioner can claim the Indian remedy if he likes. That is a matter for his election. I cannot refuse him his right if he insists on it. Consequently I cannot grant a formal stay of proceedings. He has a legal right to go on with this suit irrespective of the English suit, and I fail to see any equitable ground for any discretionary interference.

But the question of an adjournment is a different one. I think, under the circumstances, the wife should have an opportunity of giving her evidence orally here as to the alleged adultery. No denial on paper would have the same effect as an oral denial subjected to cross-examination. The petitioner when he sent

(1) See *Thornton* v. *Thornton*, 34 Weekly Reporter, 509.

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her home had the possibility of this suit in his mind, and yet he did not give her the option of staying for it. I think he is, under the circumstances, bound to offer to bring her back, in order that she may make her defence in the best way. The case in England cannot come on till November, but it may then be heard. I cannot postpone the Indian suit till after that date, as that would virtually be granting the stay which I say ought not to be granted. But I do not think the petitioner will be very much aggrieved if I fix a date which will enable the lady to come out here, and to escape the violence of the monsoon for herself and her child. The suit will be set down peremptorily on the 15th September, first on the list. I think the petitioner should pay the expenses of the lady's voyage.

Attorneys for petitioner :—Messrs. *Craigie, Lynch and Owen.*
Attorneys for respondent :—Messrs. *Hore, Conroy and Brown.*
Attorney for co-respondent :—Mr. *A. F. Turner.*

APPELLATE CIVIL.

Before Mr. Justice Birdwood and Mr. Justice Jardine.

NINGA'PPA', APPLICANT, *v.* GANGA'WA', OPPONENT.*

1885. *November* 26.

Civil Procedure Code (Act XIV of 1882), *Secs.* 102, 103, 588, 647—*Appeal from an order refusing to set aside an order under section* 102 *dismissing an application under section* 311.

Section 647 of the Code of Civil Procedure (Act XIV of 1882), when read with clause (8) of section 588, does not give a right of appeal to a judgment-debtor whose application to set aside a sale of his property has been dismissed under section 102, and whose application to set the dismissal aside has been refused under section 103.

Section 647 is not intended to confer any rights of appeal not expressly given elsewhere by the Code.

THIS was an application, under the extraordinary jurisdiction of the High Court, against the order of J. L. Johnston, Acting Judge of Dhárwár, in Appeal No. 26 of 1884.

The applicant purchased certain property belonging to the opponent Gangáwá at a Court sale held in execution of a decree

* Application under Extraordinary Jurisdiction, No. 97 of 1885.