1878.

SHRIMAN GOSWA'MI v. GOSWA'MI SHRI GIRDHAR-LA'LJI.

looking at it as analogous to a foreign judgment, because I consider that in any case the plaintiff is not entitled to have this rule made absolute. If it was an act of State, no authority has been cited to show that such an act can be the ground of an action in a Court of law or equity. In all the cases in which an act of State has been before the Court in India it has been the defendant who has set it up. The deposition cannot, in my opinion, be regarded as at all analogous to a foreign judgment. No Court has given any decision in the matter. We have only the decision of the Darbár, and as the dispute was one between the Darbár and the defendant, the Darbár assumed to be a judge in its own cause. Its decision, therefore, could not be regarded as analogous to a judgment. The case of *Godard* v. *Gray* (1) sets forth the principles to be regarded by a Court in enforcing a foreign judgment.

The plaintiff having brought his suit in Bombay must take the law as he finds it, and he must show that by the law as administered in this Court he has a better title to the property which he claims than the defendant who is in possession. He has shown no equity to have the rule made absolute, and I cannot find from the affidavits or exhibits annexed to them that he has any right to the property in Bombay, which he can enforce against the defendant. The rule must be discharged with costs.

Rule discharged.

The plaintiff appealed against the above decision, but on the 2nd August, 1879, the appeal was dismissed with costs by Westropp, C. J., and Sargent, J., and the order of Bayley, J., confirmed.

Attorney for plaintiff:—Mr. *Bháishanker Nánábhai.*

Attorneys for defendant:—Messrs *Rimington, Hore and Conroy.*

(1) L. R., 6 Q. B., 139.

FULL BENCH.

Before Mr. Justice Bayley, Chief Justice (Acting), Mr. Justice Jardine and Mr. Justice Candy.

BA'I KANKU, PETITIONER, *v.* SHIVA TOYA, RESPONDENT.*

1892.
July 21.

Divorce—Husband and wife—Decree based merely on admissions and without recording evidence—Adultery—Collusion—Practice—Procedure—Indian Divorce Act (IV of 1869), Secs. 3, *Cl.* 3, 14 *and* 17.

A decree for dissolution of marriage cannot be made merely on admissions and without recording any evidence.

THIS was a reference made by G. McCorkell, District Judge of Ahmedabad, under section 17 of the Indian Divorce Act (IV of 1869).

The plaintiff, Bái Kanku, a Christian resident of Sháhvádá in the Ahmedabad District, filed a suit against her husband, Shiva

* Reference, No. 17 of 1891.

1892.

BA'I KANKU v. SHIVA TOYA.

Toya, under the provisions of the Indian Divorce Act (IV of 1869), to obtain a decree for dissolution of marriage on the ground of his adultery and desertion. The plaintiff alleged that she was legally married to the defendant on the 14th January, 1875, that they had lived together as husband and wife for about ten years after the marriage, and that subsequently in 1886-87 the defendant eloped with a widow, and lived in adultery with her in a different village. The suit was filed in the year 1891.

The defendant, Shiva Toya, appeared and admitted the correctness of the allegations made against him in the plaint.

The plaintiff consequently did not produce any evidence on her behalf.

The District Judge pronounced a decree for dissolution of marriage, and forwarded it to the High Court for confirmation under section 17 of the Indian Divorce Act (IV of 1869).

JARDINE, J.:—It is impossible to confirm this decree without violating the principles applied by the Courts to protect the bond of marriage. The decree is based entirely on admissions, no evidence having been recorded. To give the District Court jurisdiction there should have been some proof of the fact of the marriage—*Patrickson* v. *Patrickson*[1] and also that the petitioner is a Christian, and as to the residence under section 3, clause 3, of Act IV of 1869. The petition alleges adultery and desertion; but there is not even an averment that the desertion was an abandonment against the wish of the petitioner (see section 3, clause 9). It was, therefore, wrong of the District Court to decree dissolution of the marriage, especially as the essential facts have under section 14 to be shown to the satisfaction of the Court by evidence. To hold the adultery of the husband proved on his mere admission would, under the circumstances of the case, be imprudent and contrary to practice—*Williams* v. *Williams and Padfield*[2]. The danger of collusion between the parties must always be borne in mind, and especially when, as in the present case, there has been a delay of several years in applying to the Court for relief—*Williams* v. *Williams*[3].

(1) L. R. 1 P., 86. (2) L. R. 1 P., 29.
(3) I. L. R., 3 Calc., 688.

1892.

BA'I KANKU v. SHIVA TOYA.

The case must be sent back to the District Court for further inquiry and evidence, as it lies on the petitioner to prove the marriage, the residence, and both the adultery and the desertion, and with reference to section 17 to explain the delay in bringing the suit. The result should be certified to the High Court within four months.

Order accordingly.

CRIMINAL REFERENCE.

Before Mr. Justice Jardine and Mr. Justice Telang.

1892. *August* 18.

QUEEN-EMPRESS *v.* BOSTAN VALAD FUTTEKHA'N.*

Indian Penal Code (Act XLV of 1860), Sec. 81—Act likely to cause harm, done without a criminal intent and to prevent other harm.

The accused was a sepoy in a native infantry regiment. On the occasion of a fire in the city of Ahmednagar, he and the rest of his company turned out to assist in extinguishing it. He with other sepoys was stationed by their officer with orders to keep clear a space in front of the burning house, and not to allow any one not in uniform to intrude on that space. The police under the city chief constable were also engaged at the fire, and on some of them coming round from the rear they were warned off by the sentries. A fracas between the soldiers and the police took place, and the chief constable was kicked by the accused. For this he was charged before the Magistrate, and fined for voluntarily causing hurt under section 323 of the Penal Code. In evidence it appeared that the police attempted to force the military guard, which had been posted as above stated, and it was further proved that the chief constable was not in uniform and that the accused did not know who he was. It was not alleged that the kick was unnecessarily violent.

Held, that the conviction was bad. The Magistrate having found that the chief constable was not in uniform, and that the accused did not know who he was, the kick was justifiable as given in good faith for the purpose of preventing much greater harm under section 81 of the Indian Penal Code, and as a means of acting up to the military order,

THIS was a reference under section 438 of the Code of Criminal Procedure (Act X of 1882) by the District Magistrate of Ahmednagar.

The reference was in the following terms :—

"The accused are sepoys of the 8th Regiment Bombay Infantry. On the night of the 1st April, 1892, a fire occurred in the city of Ahmednagar, and a company of the regiment turned out to assist in extinguishing it. The accused with other sepoys were

* Criminal Reference, No. 82 of 1892.