

decree. It seems to us that in this respect the Court issuing the certificate is vested with all the powers conferred by the law on a Civil Court to enforce compliance with the certificate by payment or by realization, through distress, of the amount so declared to be due. In this view we are of opinion that the Magistrate has rightly held that the petitioners have committed an offence under s. 206, Penal Code. No doubt sanction to the prosecution should have been given before the Magistrate took cognizance of that offence, but unless the want of such sanction has, in fact, occasioned a failure of justice (s. 537, Code of Criminal Procedure), the conviction is not bad only on that account. There is nothing in the proceedings to show that this is so. We, therefore, find no sufficient reason to interfere in revision.

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[221] MATRIMONIAL JURISDICTION.*

Before Mr. Justice Harington.

YOU D v. YOU D AND OTHERS [10th December, 1900].

Divorce—Condonation—Revival—Co-respondent—Costs—Evidence of misconduct on a date after suit.

Where a husband has condoned adultery committed with one co-respondent which has been revived by adultery committed with another co-respondent a decree *nisi* will be granted against both* co-respondent, but costs will not be given against the co-respondent whose adultery was condoned.

During the hearing of the suit evidence was tendered to show misconduct with one co-respondent on a date after suit.

Held, such evidence was admissible.

Costs as between attorney and client against first co-respondent were disallowed.

THIS was a husband's petition for dissolution of marriage by reason of his wife's adultery with two co-respondents, Meade and Metcalfe. The petitioner in his prayer to the plaint asked for damages, but not costs against both co-respondents.

The respondent filed an answer denying adultery, but did not appear at the hearing.

Mr. *W. H. Knight*, for the petitioner proved his case, but gave up his claim for damages.

He also wished to give evidence of Meade, the co-respondent, on a date after the suit was filed, being found in his shirt outside respondent's open bedroom door at 7 A.M. Phips on Evidence, 2nd edition, 136 referred to; *Boddy v. Boddy* (1) cited. It was contended that the evidence was admissible.

The evidence having been admitted, to explain previous acts of the respondent and co-respondent.

HARINGTON, J.—I find that there has been: (1) Adultery of respondent with Metcalfe in October 1899.

(2) Condonment of that adultery by the Petitioner in December 1899.

(3) Adultery with Meade in January 1900.

[222] Mr. *Knight*—I ask for a decree *nisi* against both co-respondents. [HARINGTON, J.—The adultery of Metcalfe was condoned.] Yes, but revived by subsequent adultery with Meade. [HARINGTON, J.—That

* Suit No. 1 of 1900.

(1) (1861) 30 L. J. P. & M. 95.

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is misconduct with a different person; how can that affect the petitioner's rights against Metcalfe? Any subsequent marital misconduct revives the right. The misconduct need not be *ejusdem generis*, nor *quo ad hunc*. The principle as laid down by Lord Stowell in the case of *D'Aquilar v. D'Aquilar* (1) is perfectly general in terms; "misconduct" not "the misconduct." This was adopted by the Judge ordinary in *Curtis v. Curtis* (2); *Ridgway v. Ridgway* (3); *Newsane v. Newsane* (4); *Bernstein v. Bernstein* (5); *Pomero v. Pomero* (6). In the case of *Norris v. Norris* (7) the Court granted a decree *nisi* on the ground of adultery with each and both of the co-respondents. I ask for costs against both co-respondents. [HARINGTON, J.—The petitioner does not claim costs in the petition.] Nevertheless he is entitled to them—*Finlay v. Finlay* (8); *Goldsmith v. Goldsmith* (9); *West v. West* (10). Apart from the general power of the Court under s. 220 of the Code of Civil Procedure, s. 35 of the Divorce Act is clear. The Act only requires adultery to be established to the satisfaction of the Court. Compare schedule of forms to the Act: "form (1) costs not prayed." S. 35 of Divorce Act is almost in the same words as ss. 20 and 21 Vic. c. 85, s. 43. *Finlay v. Finlay* is a direct authority.

[HARINGTON, J.—I will give you costs as against Meade. I follow *Norris v. Norris* and refuse costs as against Metcalfe, on the ground that adultery with him was condoned.]

[223] Mr. Knight.—I ask for costs as between attorney and client against Meade. *Outhwaite v. Outhwaite and Diaz* (11).

HARINGTON, J.—That was a very gross case. I must look to the conduct of the parties. I refuse the application for attorney and client's costs against Meade.

Attorneys for petitioner: Messrs. Leslie & Hands.

28 C. 223.

APPELLATE CIVIL.

Before Mr. Justice Ameer Ali and Mr. Justice Brett.

MADAN MOHUN SAHA AND OTHERS (*Plaintiffs*) v. RAJAB ALI AND OTHERS (*Defendants*).^{*} [3rd & 6th August, 1900.]

Co-sharers—Suit concerning joint property—Suit for khas possession—Exclusive possession of one co-sharer—Partition—Denial of title in written statement—Cause of action—Improvement by tenant—Meliorating waste.

Where one co-sharer holds possession of certain land and deals with it in a particular way and in the ordinary course, and another co-sharer objects to that dealing or to that course of conduct, his proper remedy is to sue for partition, by which the rights of all the co-sharers may be adjusted and the loss sustained by one may be made good at the expense of another.

When one co-sharer landlord, in exclusive possession of a waste plot of land, although such exclusive possession may be held with the permission of the

^{*} Appeal from Appellate Decree, No. 2463 of 1898, against the decree of Babu Srinath Pal, Subordinate Judge of Tipperah, dated the 2nd of September 1898, affirming the decree of Babu Debendra Nath Banerjee Munsif of Nabinagar, dated the 28th of February 1898.

(1) (1794) 1 Hagg. 773, 796.
(2) (1858) 1 S. & T. 192.
(8) (1881) 29 W. R. 612.
(4) (1871) L. R. 2 P. 306, 311.
(5) (1893) L. R. 1893, 292.
(6) (1884) L. R. 10 P. D. 174.

(7) (1861) 4 S. & T. 287.
(8) (1861) 30 L. J. P. & M. 104.
(9) (1846) 15 L. J. Ch. 264.
(10) (1870) L. R. 2 P. L. D. 196, 198.
(11) (1900) I. L. R. 28 Cal. 84.