posed. In other cases her evidence is admissible if she offers herself as a witness.

1869

KELLY v. KELLY AND SAUNDERS.

The respondent had not pleaded the cruelty of her husband in her defence

Mr. *Hyde*, in the examination in chief proposed to ask the respondsnt questions tending to show cruelty on the part of the husband.

Mr. *Marindin* objected that cruelty must be pleaded specifically. *Allen* v. *Allen & D'Arcy* (15.) It cannot now be made out by examination.

Mr. *Hyde* submitted that he might put the questions with respect to cruelty The Court has power to raise the defence now. *Plumer* v. *Plumer & Bygrave* (16). By the English practice, and by section 14 of the Indian Act, the court has power to raise the issue.

PHEAR, J.—It is one of the rules of English evidence that evidence cannot be given to contradict irrelevant matter, and I think I ought not to treat cruelty or no cruelty as an issue between the petitioner and respondent unless it is pleaded by the latter. It is obvious that if this were not so specific charges need never be brought forward, and the petitioner would not know what case he had to meet. It appears to me that these charges of cruelty cannot be set up by the respondent now. Whether the co-respondent might go into them in reduction of damages is another question.

Before Mr. Justice Phear.

EWING & Co. *v.* GOSAIDAS GHOSE AND TWO OTHERS.

1869
June 17.

Irregular Service of Summons—Effect on Decree—Act VIII. of 1859. *s.* 119.

IN this case the plaintiff had sued the defendants, under Act V. of 1866, upon a joint promissory note of which they were the makers. The summons was served upon the first defendant, and a summons for each of two other defendants was left with him. The first defendant did not apply for leave to defend the suit, and the plaintiff then obtained a decree against all the defendants under Act V. of 1866 and arrested the first defendant in execution thereof, and he was imprisoned accordingly.

A rule was obtained by the prisoner to show cause why he should not be released.

Mr. *Jackson* now moved to make the rule absolute, and, in support of his motion, contended that the summonses had been improperly served. As the note was joint, not joint and several, service on one of the parties only was not sufficient. Even if it were sufficient, the prisoner ought to have had notice under the 37th Rule of the High Court, Original Criminal Jurisdiction.

(1) 28 L. J., Pro. & Mat., 81. (2) 29 L. J , Pro. & Mat., 63.

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EWING & Co. v. GOSAIDAS GHOSE.

Mr. *Ingram* for the plaintiff.—More irregularity is not a sufficient ground for setting aside these proceedings. The prisoner is not damnified by the want of service on his co-defendants. He is in the same position as a defendant at home, who does not plead in abatement for want of parties. He cited *Bower v. Kemp* (1). There it was held, that in order to set aside a regular judgment, on payment of costs, the affidavit must state that the defendant has a good defence upon the merits. *Emerson v. Brown* (2). The application should have been made within a reasonable time, as in England four or at most seven days. See *Reg. Gen. Hil. Term. 3 and 4 Wm. IV.* The rule is so strict that it applies even in the case of prisoners. *Primrose v. Baddely* (3); *Fownes v. Stokes* (4).

Mr. *Jackson* in reply.—Section 119 of Act VIII. regulates this case, and there has been no delay. The decree has been obtained upon a petition, under Act V. of 1866, stating that the defendants have been duly served. Rule 30 of this Court applies.

[PHEAR, J.—You do not bring yourself within section 119, and your client by not appearing, admits that he has no defence.]

Under section 53 of Act V. of 1866, he could not appear, unless he had received service of summons and had a good defence.

PHEAR, J.—There is one point, I think I must reserve for consideration. But it appears to me that Mr. Jackson has not brought his case within the provisions of section 119 of Act VIII. of 1859. I think when that section speaks of the summons not being duly served, it refers to service on that defendant only who complains and does not refer to service on his co-defendants. And the other alternative, provided for by that section, namely, that he had been prevented by any sufficient cause from appearing, is not made out, because he was in truth prevented from appearing by the Act of the Legislature, unless he got the leave of the Court to appear, and that leave he never asked for. As I have already pointed out, the defendant might procure the decree to be set aside by appealing to the equitable discretion of the Court, if he made out a sufficient case for the exercise of that discretion.

For this purpose he must shew that it is inequitable or improper, as between him and the plaintiff, that the decree should be allowed to stand. Now by the circumstances of the case the defendant can plead no merits as regards the plaintiffs' cause of action. It must be assumed he has no defence to offer to it, because he has not availed himself of the provision of Act V. of 1866, by applying for leave to defend. There remains, however, the question, whether as a matter of procedure a decree should be allowed to stand, which has been passed in a suit against one defendant only on a joint cause of action, while the other persons liable on that cause of action have not

(1) 1 Dowl., 282.
(2) 8 Scott's N. C., 219.
(3) 2 Dowl., 350.
(4) 4 Dowl., 125.

1869

EWING & CO. v. GOSIDAS GHOSE.

been served, and the Court has not given leave for the maintenance of such a suit, and also where the defendant against whom the decree is passed without any fault of his own, has had no opportunity to object to the want of regularity. I am not prepared to give any decision upon this question without further consideration.

On the following day PHEAR, J., said, the question is whether I ought to let the decree stand. I think on the whole I ought not to interfere; the other defendants might object to the decree as they were not duly served, but not the first defendant. He has the same remedies over against the co-makers of the note as if the decree were valid against him and them jointly, and I cannot discover that as between himself and the plaintiff he has any equity entitling him to have the decree set aside. I think the rule must be discharged with costs.

Before Mr Justice Phear.

ROE *v.* ROE.

Suit for Divorce—Prostitute—Connivance.

1869
June 17.

THIS was a suit by the husband for a divorce, on the ground of his wife's adultery. Mr. Justice Phear adjourned the case to consider whether the addition of a co-respondent was necessary. He decided that it was unnecessary to make any alteration in the proceedings, and gave the following Judgment.

PHEAR, J.—In this case the plaintiff seeks to be divorced from his wife on the ground of adultery. It is undoubtedly the policy of the law that divorces should not be lightly granted, and the Legislature has, with this object, fenced about the right to a divorce with certain restrictions.

Under the New Indian Act, this Court has the duty imposed upon it of being specially careful that no decree for divorce should be obtained by collusion, or be given in cases where the husband's conduct has been such as to lead up to his own dishonor, or to exhibit any connivance at his wife's misconduct; with this view Act. IV. of 1869 has strictly enjoined that the adulterer should be made a co-respondent except in three cases.

(1) When the wife is leading the life of a prostitute, and the petitioner knows of no person with whom the adultery has been committed.

(2) When the name of the alleged adulterer is unknown to the petitioner although he has made due efforts to discover it.

(3) When the alleged adulterer is dead.

Now this provision is very much more stringent than the English Act (Sec 28 of the Act of 1857). There the Legislature did not specify what cases should be exceptions, it left it to the discretion of the Court to determine; and the English Court perscribed to itself the rule, that when the adultery relied upon was committed in the course of a life of prositition, then the adulterer need not be made a co-respondent even though known (*Peters* v. *Peters*).