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should have ordered that, we think that he should also have ordered the execution creditors to pay the plaintiffs' costs. We, therefore, answer the whole question in the affirmative, and order that the judgment be entered for the plaintiffs, as prayed for in the plaint, with costs of suit. The plaintiffs will also have the costs of reversing the question and stating the same for the opinion of this same Court, and otherwise arising thereout or connected therewith, to be taxed by the Taxing Officer of this Court.

Before Mr. Justice Norman.

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Alimony, Permanent.

Principle on which the Court will grant permanent alimony.

THIS was an application for permanent alimony. Mr. Justice Phear had upon an application for alimony *pendente lite*, estimated the respondent's income at rupees 600 per month, and ordered rupees 200 a month as alimony *pendente lite*. The wife had brought the suit against her husband for judicial separation on account of his adultery, and obtained an order for judicial separation. The affidavit put in, in support of the application, showed that the marriage took place in October 1860, the husband at the time being an assistant in the petitioner's late husband's business which he had left to his wife; that from his marriage up to the end of 1868, the profits of the business were estimated at rupees 2000 per month, but after that time, they had decreased to about one-half that amount; that from June 1867 to March 1869, the respondent did not afford the petitioner any adequate means of support; that in March 1869, she accordingly obtained an order from the Police Magistrate that her husband should pay her rupees 50 a month as maintenance; that he failed to pay this sum after the first three months, and had only made payment on her taking out a summons to compel him to do so; and that he was living in adultery at the time of the application. The income of the respondent at the time of application was stated to be rupees 1,000 per month, and an advertisement in one of the daily papers was referred to in which the respondent stated that he wanted a partner in his business, guaranteed him rupees 700 per month.

The respondent filed an affidavit in opposition to the application, in which he stated that the petitioner had left his protection, taking away with her property amounting to about rupees 4,000; that he had incurred liabilities in consequence of a suit by his wife with respect to property she alleged to be her separate property, but which suit had been dismissed by the Appeal Court; that these liabilities, together with others incurred by reason of litigation in respect of his wife, amounted to rupees 13,000, in respect of which he was paying interest at the rate of rupees 125 a month; that he had paid rupees 1,500 into Court to cover his wife's costs in the present suit; and that he had sup-

ported his wife, by monthly payments of rupees 50, from March 1869 to May 1870.

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He also stated that the property brought him by his wife was of the value of about rupees 7,000, and that the petitioner's former husband was insolvent at the time of his death, and the respondent had paid off his creditors.

Mr. Hyde for the petitioner.—For permanent alimony more may be given than for alimony *pendente lite*, for which a sum not exceeding one-fifth of the husband's income is fixed. By section 37 of the Indian Divorce Act, a sum is to be awarded, which may be thought reasonable by the Court, looking to the wife's fortune (if any), to the ability of the husband, and to the conduct of the parties. Here the husband has a good business; his conduct has been exceedingly bad, and the wife is admittedly free from all suspicion of wrong. In addition to this, the business carried on by the respondent was established out of funds originally belonging solely to the petitioner, and acquired by the respondent by virtue of his marital rights on his marriage. The case is therefore one in which the Court will grant the highest amount of alimony which it can award. It only remains to see what that is. Where the separation is on account of the misconduct of the husband, the English cases show that the wife is entitled to a moiety of the husband's income: *Deane v. Deane* (1), *Smith v. Smith* (2), *Cooke v. Cooke* (3). The first English Divorce Act, 20 and 21 Vict., c. 85, makes by section 22 the rules and precedents of the Ecclesiastical Courts applicable to the Divorce Court, and the Indian Divorce Act makes the English rules and precedents applicable. The petitioner is, therefore, entitled to one half of the husband's income.

Mr. Phillips for the respondent.—The money brought by the wife into the business is all spent; by the suits she has brought against her husband, he has incurred expenses to the amount of rupees 13,000, on which he has to pay the monthly sum of rupees 125. If half his income is awarded as alimony, it will send him into the Insolvent Court. In making an order for permanent alimony, the amount should be what the wife would receive if living with her husband; the means of the husband are to be taken into consideration; and his misconduct is no ground for increasing the amount; Pritchard on Divorce, 11. According to the English cases, more than a moiety of the husband's income cannot be given. Where that proportion, the utmost that can be given, is given, it is on account of special circumstances in the case. In the case of *Deane v. Deane* (1), there were eight children living apart from the husband and his income was not gained by his personal exertions. The proportion given is always much smaller when the husband is gaining his income by his personal exertions: see the judgment in *Cooke v. Cooke* (3). That is the case here. In *Cooke v. Cooke* (3), a bad case was made against the husband, yet not more than half was given. The general rule appears to be to give one-third; *Haigh v. Haigh* (4).

(1) 1 S. & T., 90.

(2) 2 Phill., 235.

(3) 2 Phill., 44, 45.

(4) 38 L. J. P. & M., 37.

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Mr. Hyde in reply.—The misconduct of the parties is to be taken into consideration in awarding permanent alimony, as is expressly laid down by section 37 of the Indian Divorce Act. The misconduct of the husband has been of the worst possible kind. He has spent all the money he got with his wife, without affording her any adequate means of support, and he is living in adultery. One-half of his estimated income should be given.

NORMAN, J.—I have ascertained from Mr. Justice Phear that, in making the estimate he did of the amount of the respondent's income, he did it in such a manner as to be well within the mark; and that if I am to make an allowance for any such sum as rupees 125, I should have to take a higher estimate. Evidence has been read before me, and from that it appears that the respondent's average income amount to rupees 1,000 a month. The result is that I think, I shall be justified in taking his income at rupees 600 a month, as found by Mr. Justice Phear. Many excuses have been put forward by Mr. Ord, to which I attribute no weight. His statement that his wife carried away rupees 4,100 would have been brought forward before the Magistrate on her application for maintenance if it could have been.

The statement as to the insolvency of Mrs. Ord's former husband is vague and uncertain. It is no answer whatever to the finding come to after careful examination of the books by Mr. Justice Phear as to the amount of respondent's income, with which I see every reason to concur. I think there is a good deal in what is said in some of the cases as to a distinction being taken where the income is mainly dependent on the husband's exertions. See the cases in 2 Phillimore, 44. In this case the present income appears to depend principally on the husband's own exertions, and I shall therefore not order that the full moiety be awarded as permanent alimony, to which otherwise, I think Mrs. Ord fully entitled. I think I shall do justice between the parties, and treat Mrs. Ord with the liberality to which she is entitled in giving her rupees 250 a month; and looking at the difficulties that have been thrown in her way at every step by Mr. Ord, I think I am justified in directing that this sum be made a first charge on the good-will and stock-in-trade of his business as an undertaker. Under the powers conferred by section 37 of the Indian Divorce Act, I direct that a deed be executed by the respondent charging the good-will and stock-in-trade of his business as an undertaker with the payment of rupees 250 a month to Mrs. Ord, and I direct that he do so pay rupees 250 a month to her as permanent alimony, and the costs on scale No. 2 as between party and party of and incidental to this application. The order for alimony will be included in the decree for judicial separation, and the alimony itself to run from the date of that decree.

Attorneys for the petitioner : Messrs. *Sims* and *Mitter*.

Attorney for the respondent : Mr. *Moses*.