[ORIGINAL CIVIL].

Before Sir Barnes Peacock, Kt., Chief Justice, and Mr. Justice Macpherson.

KELLY *v.* KELLY AND SAUNDERS

1870
Jan. 4.

Co-respondent's Right to be heard in Appeal—Adultery—Alimony—Divorce Act (IV of 1869), s. 37—Access to Children—Costs.

A husband brought a suit for divorce against his wife on the ground of her adultery; the co-respondent appeared in that suit. The respondent appealed on the ground (*inter alia*) that, on the evidence, the Court ought to have held that the adultery was not proved. *Held*, that in that appeal the co-respondent was not entitled to be heard in opposition to the appeal.

The Court has power, under section 37 of Act IV of 1869, to order permanent alimony to the wife, when a husband obtains a divorce on the ground of her adultery. When the marriage is dissolved on account of the adultery of the wife, she is not entitled to have access to the children of the marriage.

THIS was an appeal from a decision of Mr, Justice Phear in a suit under the Indian Divorce Act, IV of 1869. The suit was brought by the husband for a divorce, on the ground of his wife's adultery, and the petitioner had, by order of the Court, deposited in Court a sum to cover the expenses of the wife's costs and alimony *pendente lite*. Mr. Justice Phear, on the evidence before him, gave a decree *nisi* for a divorce, and decreed damages against the co-respondent (1). From this decree the respondent appealed, principally on the ground that the evidence did not show that adultery had been committed.

Mr. *Creagh* and Mr. *Hyde* were heard for the appellant.

Mr. *Marindin* and Mr. *Cowell* for the respondent were not called on.

Mr. *Piffard* applied to be heard on behalf of the co-respondent.

PEACOCK, C. J.—I think it clear that the co-respondent has no right to be heard in this appeal in opposition to the appeal of

(1) 3 B. L. R., O. C., 67.

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Mrs. Kelly. The appeal is on the ground, first, that, upon the evidence, the learned Judge ought to have found that the adultery was not proved. If the co-respondent can appear and oppose on that ground, and say that the Judge was right in finding that adultery was committed, it would be contrary to the prayer contained in his written statement, in which he prayed that the Judge would reject the prayer of the petitioner. The same reasoning applies to the other two grounds of the appeal. It is said by Mr. Piffard, that possibly Mr, Saunders may have an interest in setting aside the decree, on the ground that if the divorce is granted, Mr. Saunders will be obliged to marry Mrs. Kelly ; but I know of no legal obligation on the part of the co-respondent to marry her, and under these circumstances it appears to me that there is no ground for hearing the co-respondent.

It appears to me that there are no grounds for reversing the decision of Mr. Justice Phear, upon the question of fact as to whether adultery was committed by Mr. Saunders and Mrs. Kelly, or upon the ground that that adultery was condoned.

The rules upon which the Courts act in cases of this kind were very clearly laid down by Lord Stowell in the case of *Loveden* v. *Loveden* (1). He there said : "It is not necessary "for me to state much at large the rules of evidence which "this Court holds upon subjects of this nature, or the principles "upon which those rules are constructed : they are principles "so consonant to reason, and to the exigencies of justice, and "so often called for by the cases which occur in these Courts, "that it is on all accounts sufficient to advert to them briefly. It "is a fundamental rule that it is not necessary to prove the "direct fact of adultery ; because, if it were otherwise, there is "not one case in a hundred in which that proof would be attain-"able : it is very rarely indeed that the parties are surprised in "the direct fact of adultery. In every case almost, the fact is "inferred from circumstances that lead to it by fair inference as "a necessary conclusion ; and unless this were the case, and "unless this were so held, no protection whatever could be given "to marital rights. What are the circumstances which lead to such

(1) 2 Hagg. Con. Rep., 2.

"a conclusion cannot be laid down universally, though many of "them, of a more obvious nature, and of more frequent occurrence "are to be found in the ancient books. At the same time it is im- "possible to indicate them universally, because they may be infi- "nitely diversified by the situation and character of the parties, by "the state of general manners, and by many other incidental cir- "cumstances apparently slight and delicate in themselves, but "which may have most important bearings in decisions upon the "particular case. The only general rule that can be laid down upon "the subject is, that the circumstances must be such as would "lead the guarded discretion of a reasonable and just man to the "conclusion; fro it is not to lead a rash and intemperate judg- "ment, upon appearances that are equally capable of two inter- "pretations; neither is it to be a matter of artificial reasoning "judging upon such things differently from what would strike the "careful and cautions consideration of a discreet man. The facts "are not of a technical nature; they are facts determinable upon "common grounds of reason, and Courts of Justice would wander "very much from their proper office of giving protection to the "rights of mankind, if they let themselves loose to subtilties and "remote and artificial reasonings upon such subjects. Upon such "subjects the rational and the legal interpretation must be the "same. It is the consequence of this rule that it is not necessary "to prove a fact of adultery in time and place; circumstances "need not to be so specially proved, as to produce the conclusion "that the fact of adultery was committed at that particular hour "or in that particular room; general cohabitation has been "deemed enough."

The appeal was dismissed with costs, and the decree *nisi* was made absolute.

Mr. *Creagh* applied for permanent alimony, citing *Keats* v. *Keats and Montezuma* (1), and that the wife might have access to her child.

Mr. *Marindin*, contra, cited *Winstone* v. *Winstone and Dyne* (2), *Ratcliff* v. *Ratcliff and Anderson* (3), and *Thompson* v. *Thompson and Sturmfells* (4), as to access.

(1) 1 S. & T., 334.
(2) 2 S. & T., 246.
(3) 1 S. & T., 467.
(4) 2 S. & T., 402.

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Mr. *Creagh* in reply.

PEACOCK, C. J,—The cases which have been cited establish that, under the English Divorce Act, the Court has power to award permanent alimony to the wife, even when a husband obtains a divorce on account of adultery committed by her; and I have no doubt that, under section 37 of Act IV of 1869, this Court may order permanent alimony to the wife under similar circumstances. The first clause of section 37 enacts that "the "High Court may, if it think fit, on any decree absolute. declaring "a marriage to be disolved, or on any decree of judicial separa- "tion obtained by the wife, order that the husband shall, to the "satisfaction of the Court, secure to the wife such gross sum of "money or such annual sum of mony, for any term not exceed- "ing her own life, as, having regard to her fortune (if any), to "the ability of the husband, and to the conduct of the parties, "it thinks reasonable;" and clause 4 says that, "in every such "case, the Court may make an order on the husband, for payment "to the wife, of such monthly or weekly sums for her mainte- "nance and support as the Court may think reasonable."

It was contended in the course of argument that the words "obtained by the wife" at the end of the 1st clause of section 37, overrode the whole of that clause; and that, consequently, the power given to the Court to order alimoney was only when a decree absolute declaring a marriage to be dissolved should be obtained by the wife. But that is clearly not the grammatical construction of the clause, for two different kinds of decrees are evidently referred to,—the first is on any decree absolute declaring a marriage to be dissolved; the second, following the word "or," on any decree of judicial separation obtained by the wife.

I have no doubt that the intention of the Legislature by this section was to give the High Court the same power as the Courts have in England, and that the grammatical construction is the correct one; and consequently that the Court may if it think fit, on any decree absolute, declaring a marriage to be disolved on account of the adultery of the wife, make an order on the husband for payment to the wife of such monthly or weekly sums for her maintenance and support as the Court may think reasonable.

The evidence in this case did not satisfy me that the husband was conniving at the adultery of his wife, or that he had been guilty of such wilful neglect or misconduct of or towards her as would justify the Court in refusing to pronounce a decree of divorce, under the 4th clause of section 14; but I do think that, in this case, the husband did not take that care of his wife which he ought to have done; for it appears from the evidence that he allowed her to go out to parties alone without accompanying her: and that he allowed her, on those occasions, to remain out until late hours of the night. The co-respondent has absconded, and there appears to be no hope that he will make any provision for Mrs Kelly. Under these circumstances, the question is whether a small sum should be allowed to her for maintenance and support, or whether she should be left in a state of destitution.

From the affiadavit of Mr. Kelly, it appears that his pay amounts to rupees 519-8 a month, and that his marriage expenses are rupees 443-12. He has two daughters, one by the respandent, Mrs. Kelly, and one by his former wife; and he swears in his affidavit that he fully expects that he will be obliged to retire on his pension at the end of the present year, and that then his income will be reduced from rupees 519-8 to rupees 220-12. The petitioner has offered to settle on Mrs. Kelly the damages which he may recover in the suit, but there appears to be very little prospect that those damages will be ever realized.

Under these circumstances, it appears to the Court to be reasonable that the Court should make an order on the husband, under clause 4, section 27 of Act IV of 1869, for the payment to Mr. Kelly, the respondent, for her maintenance and support, of the sum of rupees 50 a month, so long as she continues to lead a chaste and proper life, and continues unmarried.

In addition to that we think that Mr. Kelly ought to setttle upon Mrs Kelly any amount which may be realized of the damages awarded, for her benefit, so long as she continues chaste and un[redacted] and after her death, or on forfeiture of that amount of account of any misconduct, the amount will be for the benefit of the child by her.

The cases seem to establish that the wife is not entitled to

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have access to the children of the marriage, when the marriage has been dissolved on accout of her adultery. We cannot, therefore, order that Mrs. Kelly should be allowed to see the child.

We think that Mrs. Kelly ought to be allowed the costs of this motion for alimony out of, and not exceeding, the amount of the balance in Court. These costs will be taxed on the same scale as that on which her costs were taxed in the original suit. The costs of the settlement of the damages recovered will be paid out of the amount, if any, recovered.

Attorney for appellant : Baboo *D. C. Dutt.*

Attorneys for respondent: Messrs. *Robertson and Co.* and Mr. *Leslie.*

1870
Jan. 11.

Before Sir Barnes Peacock, Kt Chief Justice, and Mr. Justice Macpherson.

GOBARDHAN BARMONO *v.* SRIMATI MANI BIBI.

Appeal to Privy Council, Petition of—Delay in Transmission—Power of High Court to strike it off the File.

Until a petition of appeal to the Privy Council presented to the High Court has been admitted and allowed, a party has no right of appeal to the Privy Council. If the petition is allowed to remain on the file of the Court, and is not presented within a reasonable time, the Court has power to order its removal from the file.

THIS was an appeal from the decision of Mr. Justice Phear, refusing an application to strike a petition of appeal to the Privy Council off the file for delay in prosecuting it.

The case on the original hearing is reported in Volume 3, B. L. R., O. C., 126.

Mr. *Jackson* for the appellant contended that there was no rule that a petition of appeal must be filed within twelve months, after leave to file has been granted, that the application of the respondent should have been made before the Privy Council, and that this Court had no power entertain it; and furiher that this appeal ought to be allowed, as it came within the provisions of the 30th section of the Charter of the