

and went on to try the case on the merits. He gave a decree for the plaintiff. The defendant appealed to the Judge who, on the 28th September 1869, passed the following judgment:

“ Before this, on the grounds mentioned in a proceeding of the 9th instant, an order was passed to the effect that the appellant should make up the deficiency of the stamp duties of the petition of appeal in proportion to the amount under claim, rupees 666, up to the 25th idem; and that then the appeal should be tried. But as he has not complied with that order up to this date, the petition of appeal is rejected; and it is, accordingly, ordered that the appeal be dismissed with costs; and that the respondent's costs, with interest up to date of realization, be borne by the appellant.”

The defendant appealed specially to the High Court.

Baboo Bama Charan Banerjee for the Appellant.

Baboo Debender Narayan Bose for the Respondent.

Hobhouse, J. —The Judge is quite wrong in this case. If the plaint was under-valued, objection should have been taken in the first instance, and then the Court could have proceeded on the matter of under-valuation in the mode prescribed by law. But the plaintiff was allowed to put in his suit on a certain valuation, the suit was determined by the first Court on that valuation, and it is not until the defendant comes up in appeal that the Court curiously enough rules that the defendant must suffer for the laches committed by the plaintiff. It is quite clear that the Court was wrong in rejecting the defendant's appeal on the ground of under-valuation, and we direct that his judgment and his decree be set aside, and the case be remanded to be tried on the merits.

The costs to follow the final result of the case.

B. L. R. Vol. V, p. 34.

(Appendix.)

The 6th June 1870.

Before Mr. Justice Norman.

ORD v. ORD.

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 2,000 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 the application was stated to be rupees 1,200 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, and 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 supported his wife, by monthly payments of rupees 50, from March 1869 to May 1870.

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 ex-

penses 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* (2). That is the case here. In *Cooke v. Cooke* (2), 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* (3).

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 amounts 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

(1) 1 S. & T., 90.
(2) 2 Phill., 235.
(3) 2 Phill., 44, 45.

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(2) 2 Phill., 44, 45.
(3) 38 L. J. P. & M., 37.

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.*

B. L. R. Vol. V, p. 39.

(Appendix.)

The 28th May 1870.

Before Mr. Justice Phear and Mr Justice Mitter.

THE QUEEN v. MAHENDRANATH CHATTERJEE and another.

Reference No. 59 of 1870, from the Sessions Judge of 24 Pergunnas, dated the 17th May 1870.

Code of Criminal Procedure (Act XXV of 1861), ss. 407, 426.

A. was charged with the offence of voluntarily causing hurt to C., and B. was charged with the same offence, and also with the offence of abetting A. The Magistrate found A. guilty of the offence, and sentenced him to three months' rigorous imprisonment. The Magistrate also found B. guilty of abetment of the offence of voluntarily causing hurt to C., and sentenced him to one month's rigorous imprisonment and a fine.

On appeal, the Sessions Judge held that there was no evidence to convict A., and he accordingly released the prisoner. The appeal of B., however, was rejected, on the ground that the evidence, though it did not prove him guilty of abetment, proved him guilty of voluntarily causing hurt, and, therefore, under Section 426 of the Code of Criminal Procedure, the sentence could not be reversed. No "error or defect either in the charge or in the proceedings on trial" was alleged.

Held (by *Mitter, J.*) that Section 426 of the Code of Criminal Procedure did not apply.

MAHENDRANATH CHATTERJEE was charged before the Cantonment Magistrate of Barrackpore of voluntarily causing hurt to one Gaurmohan Ghose, and abetting one Jan Bax in causing hurt to the said Gaurmohan; and Jan Bax was charged with the offence of voluntarily causing hurt to the said Gaurmohan.

The Magistrate found Mahendranath Chatterjee guilty of abetment of the offence of voluntarily causing hurt to Gaurmohan, under Sections 109 and 323 of the Indian Penal Code, and Mahendranath was sentenced to one month's rigorous imprisonment, and a fine of rupees 200, or, in default, to one month's rigorous imprisonment.

The Magistrate also found Jan Bax guilty of voluntarily causing hurt to Gaurmohan, and thereby punishable under Section 323 of the Indian Penal Code, and Jan Bax was sentenced to three months' rigorous imprisonment.