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unless we were forced to do so by the Legislature or by any clear conclusions of authority. The English authorities cited are authorities referring to other statutes, and the only authority approaching it, which is a decision of Mr. Justice Markby (1), is one against it.

That being so, we think that no appeal lies in this case, and we dismiss the appeal with costs.

Appeal dismissed.

A. F. M. A. R.

ORIGINAL CIVIL.

Before Mr. Justice Wilson.

LEDLIE *v.* LEDLIE.*

1891 *April* 23.

Divorce—Practice—Custody of child, application for—Notice of application—Act IV of 1869, *s.* 42.

A petition for judicial separation by a wife contained a statement in the body thereof to the effect that the petitioner was desirous of having the custody of a child born of the marriage, but contained no prayer to that effect. The respondent appeared and filed an answer to the petition, in which he expressly noticed that portion of the petition. Pending the hearing of the petition, an application was made by the petitioner for the custody of the child *pendente lite*, which was opposed by the respondent and refused. After decree made for judicial separation, the respondent not appearing at the hearing, an application was made by the petitioner, under the provisions of section 42 of the Act, for the custody of the child. No notice of such application was given to the respondent.

Held, that it was the more correct procedure, having regard to the provisions of section 42, not to include a prayer for the custody in the original petition, and that following the decision in *Horne* v. *Horne* (2) and *Wilkinson* v. *Wilkinson* (3), it was unnecessary under the circumstances to give further notice of the application to the respondent.

Held further on the merits that the petitioner was entitled to the order asked for.

THIS was an application under section 42 of the Indian Divorce Act (IV of 1869) by Alicia Ellen Ledlie, praying for the custody

* Motion in original civil suit No. 4 of 1890.

(1) *Jogessur Sahai* v. *Maracho Kooer*, 1 C. L. R., 354.

(2) 30 L. J. P. & M., 200.

(3) 30 L. J. P. & M., 200, note.

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of her son Arthur Ledlie, a boy of the age of nine years. The petitioner had on the 14th April obtained a decree for judicial separation from her husband, Henry St. Clair Ledlie.

The petitioner and the respondent were married on the 12th July 1880 at Agra, and the sole surviving issue of the marriage was a son, Arthur Ledlie, who was born on the 16th July 1881. The parties lived together till 1883, when, the respondent being unable to support the petitioner, she with his consent went with their child to live with her mother. Subsequently she obtained employment and supported herself and her child till March 1890, when she returned to live with the respondent, whose protection she left on the 1st July 1890 in consequence of his gross cruelty towards her. On the 28th August 1890 the petitioner filed her petition for a judicial separation, and on the 9th September 1890 she filed a further petition praying for an order that the child might be delivered into her custody or placed under the protection of the Court *pendente lite*, and for access.

Upon the hearing of the *interim* application, both parties having appeared and filed affidavits, it was rejected upon it appearing that the child had been placed with the respondent's parents at Allahabad, and that they were maintaining and educating him.

At the hearing of the suit the respondent did not appear, and the alleged gross cruelty having been found to be fully proved, the Court (Mr. Justice Wilson), on the 14th April 1891, gave a decree for judicial separation with costs, in accordance with the prayer of the petition.

The petitioner now applied under section 42 of the Divorce Act for the custody of the child, setting out the above facts, and alleging that she had repeatedly been refused access to the child; that the respondent was unfit to have the custody, and that his parents were not possessed of sufficient means to educate the child properly; and further alleging that she was desirous of maintaining and educating him, and was well able to do so from her own earnings, and had in fact done so from 1886 to 1890 without any assistance from the respondent. She further stated that it would not be just to leave the custody of the child with his father, judicial separation having been decreed by reason of his gross cruelty and misconduct, and that unless she obtained the

custody of the child she would virtually be deprived, being the innocent party, of the solace and comfort of her child's society.

No notice of this application was served upon the respondent. A prayer for the custody of the child was not included in the original petition for judicial separation, though the fact that the petitioner desired to have the custody appeared from the body of the petition itself.

Mr. *Caspersz* for the petitioner.—In this case the wife, being the innocent party, is entitled to the custody as of right upon the principles laid down in *Macleod* v. *Macleod* (1), in which the English cases of *Chetwynd* v. *Chetwynd* (2), *Hyde* v. *Hyde* (3), *Duggan* v. *Duggan* (4), *Suggate* v. *Suggate* (5), *Boynton* v. *Boynton* (6), and *Marsh* v. *Marsh* (7), are cited and followed by Mr. Justice Phear. In that case an order for custody was made at the time the decree was passed; but section 42 of the Divorce Act expressly directs that such an order is to be made upon a separate petition. Section 50 provides that notice is to be given to the opposite party unless dispensed with by the Court. It has been held in *Horne* v. *Horne* (8) and *Wilkinson* v. *Wilkinson* (9) that where the original petition contains a prayer for the custody, an order may be made without further notice. Here the respondent has already had sufficient notice of this application, the original petition for judicial separation setting out clearly that the petitioner desired to have the custody, and that portion of the petition is referred to in paragraph 26 of the respondent's answer. It was unnecessary to insert a prayer for the custody in that petition, as no order could be passed except upon a separate petition under section 42. Reading the original petition in the light of the subsequent interlocutory application, in which the respondent appeared, it is clear that he has had sufficient notice. Should the Court, however, think notice is necessary, I would ask for a rule and for an order for substituted service

(1) 6 B. L. R., 318.
(2) L. R. 1 P. & D., 39.
(3) 29 L. J. P. & M., 150.
(4) 29 L. J. P. & M., 159.
(5) 1 S. & T., 492.
(6) 2 S. & T., 275.
(7) 1 S. & T., 312.
(8) 30 L. J. P. & M., 200.
(9) 30 L. J. P. & M., 200, note.

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thereof as we have endeavoured unsuccessfully to give the respondent notice of this application.

The judgment of the Court (WILSON, J.) was as follows:—

Where the petitioner in a suit for judicial separation desires an order as to the custody of the children of the marriage, it is clear, I think, that section 42 of the Indian Divorce Act contemplates that, after the decree has been made, the intervention of the Court shall be sought by petition. Generally speaking, the Court will not act *ex parte*, but the petition must be served, or in some sufficient form notice must be given in order to show the respondent what the Court is to be asked to do. On the other hand, it has been held in England that, if that notice has been given in an earlier stage of the case, then notice of the petition itself need not be given. In the case of *Horne* v. *Horne* (1) a decree *nisi* for dissolution of marriage had been made, and, at the time of applying to have the decree *nisi* made absolute, counsel for the petitioner asked the Court whether notice ought to be given to the respondent of an intended application to the Court with respect to settled property, and added that a copy of the petition for dissolution of the marriage, which prayed for such an order, had been served on the respondent, but he had not entered an appearance. On that the Judge ordinary said, "as a copy of the petition praying for an order as to the settled property was served on the respondent, and he has not entered an appearance, I think no notice of the application need be given. If the petition had not contained such a prayer, notice to the respondent would have been necessary." In a note to the same case is cited the case of *Wilkinson* v. *Wilkinson*, which is to this effect:—"Where the respondent was served with a petition for dissolution of marriage containing a prayer for the custody of children, but did not appear on making the decree absolute, the Court gave the custody of the children to the petitioner, though no notice of the application had been given to the respondent."

In the present case the original petition for judicial separation did not actually contain a formal prayer for the custody of the child; but it did what I think was more correct as being in accordance

(1) 30 L. J. P. & M., 200.

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with section 42. The petition warned the respondent that this application would be made; for what it says in paragraph 28 is this:—"That your petitioner is desirous by reason of the matters hereinbefore stated to be enabled to live apart from her husband and to have the custody of her child." This is, I think, a sufficient warning that she intended to apply at the proper time for the custody of the child. And that being so, I think, under the authority of the English cases, notice is not necessary of this application. This is strengthened by the fact that the respondent in his answer deals with paragraph 28, and is also strengthened by the application for *ad interim* custody of the child, in which she said:—"Your petitioner, therefore, humbly prays your Lordship for an order that the respondent do deliver the said child into her custody, or for an order that the said child be placed under the protection of this Honourable Court *pendente lite* in the custody of a guardian to be appointed by this Honourable Court, and that your petitioner be allowed full and free access to the said child." The result is that I think the petitioner need not give any further notice. On the merits she is clearly entitled to the custody of the child. The costs of this application will be costs in the cause.

H. T. H. *Application granted.*

Attorneys for the Petitioner: Messrs. *Orr & Robertson.*

APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Banerjee.

1891
May 8.

HURI DASS KUNDU (DEFENDANT) *v.* J. C. MACGREGOR, RECEIVER, HIGH COURT, AND RECEIVER TO THE ESTATE OF RAJ CHANDER DAS (PLAINTIFF).*

Receiver, powers of—Right to sue without permission of Court—Suit for ejectment—Monthly tenant holding over after expiry of notice to quit.

The order appointing a receiver gave him power "to let and set the immoveable property or any part thereof as he shall think fit, and to take and use all such lawful and equitable means and remedies for recovering

* Appeal from Appellate Decree No. 724 of 1890, against the decree of H. Beveridge, Esq., Judge of 24-Pergunnahs, dated the 15th of May 1890, reversing the decree of Baboo Girindra Mohun Chuckerbutty, Munsif of Alipore, dated the 15th of January 1890.