

1890
 QUEEN-
 EMPRESS
 ?
 HARRIDAS
 SAN.

In our opinion it is unnecessary to express any opinion as to which of these decisions is correct. The facts proved in this case do not establish a sale by the accused. The master was present in the shop at the time the order was given by the purchaser, and directed the accused to give the article ordered to the purchaser. The mere mechanical act of handing the liquor to the purchaser cannot, under the circumstances, be regarded as a *sale* by the accused.

U. T. H.

Order reversed.

MATRIMONIAL JURISDICTION.

Before Mr. Justice Wilson.

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 May 1 & 5.

STEPHIEN (PETITIONER) v. STEPHIEN (RESPONDENT).*

Divorce Act (IV of 1869), s. 16, cl. (c)—Divorce—Intervenor—Procedure after decree nisi on application by respondent for liberty to intervene.

A wife sued for dissolution of her marriage on the grounds of her husband's adultery and cruelty. The respondent did not appear or file an answer, and the case was heard *ex parte* and resulted in a decree *nisi* being passed. Subsequently and before the decree was made absolute, the respondent applied for liberty to intervene under the provisions of clause (c), section 16, of the Divorce Act, the application being based on affidavits alleging *inter alia* collusion on the part of the petitioner.

Held, following *King v. King* (1), that the respondent could not be allowed to intervene or be heard when the decree came on to be made absolute, but that the affidavits should be filed, and that notice should be given to the petitioner that the decree would not be made absolute until the matters set out in the affidavits as regarded the collusion had been cleared up.

On the 12th December 1889, the petitioner presented a petition praying for a decree for the dissolution of her marriage with the respondent on the ground of the respondent's adultery and cruelty towards the petitioner. The respondent did not appear or file any answer, and the case came on to be heard *ex parte* on the 23rd January 1890 before Mr. Justice Wilson. At the hearing evidence was given to prove numerous acts of cruelty on the part of the respondent, and also his adultery, and on the 23rd January 1890 the usual decree *nisi* was passed, dissolving the marriage unless sufficient cause

* Suit No. 6 of 1889.

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should be shown to the contrary within six months from the date thereof.

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This decree was filed on the 15th February 1890. On the 1st May 1890, Mr. Pugh, on behalf of the respondent, moved the Court, under section 16, clause (c) of Act IV of 1869, on certain affidavits for a rule calling on the petitioner to show cause why the decree *nisi* should not be set aside and a fresh hearing granted, or for such other order as under the circumstances the Court might think fit and proper to pass. The grounds upon which the application was based were contained in certain affidavits alleging amongst other things that there had been collusion between the petitioner and the respondent, and that had it not been for the suppression of these facts, the Court would not have passed the decree it did, but have dismissed the petition.

Mr. Pugh in moving the Court stated that he was instructed on behalf of the respondent, and moved under the provisions of clause (c) of section 16 of the Divorce Act (IV of 1869).

[WILSON, J.—Is it open to a party to the suit to apply under that section?]

Mr. Pugh.—The question has been very fully discussed in the case of *King v. King* (1), and Mr. Justice Bayley there went very fully into the matter and delivered an exhaustive judgment. My contention is, however, that the learned Judge put too narrow a construction on the section when he held that the words “any person” did not include the respondent. It is perfectly true that this portion of section 16 is taken almost *verbatim* from the English Act, but the great difference is that the latter Act provides for the appointment of the Queen’s Proctor, whereas here we have no official of that description. Neither the Advocate-General nor any Government official has any duty cast on him to intervene, and therefore the only person at all likely to intervene is the respondent or a person moved by him, which is the same thing. No independent person who has no interest in the proceedings is very likely to intervene at the risk of having to pay the costs occasioned by his intervention, though of course it is possible that one might come forward and do so. The reasons, therefore, for preventing a respondent from intervening in England do not apply here, and

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under these circumstances the Court should put a wider construction on the meaning of the term "any person" than is put on the corresponding portion of the English Statute.

Counsel then referred to the case of *King v. King* (1) at length, and to the cases of *Latour v. Latour* (2), *Stoate v. Stoate* (3), *Boulton v. Boulton* (4), and *Clements v. Clements* (5), and after referring to the affidavits contended that there was ample material contained in them which if true would lead the Court to set aside the decree. He then continued—'The question arises as to what course under the circumstances the Court should adopt. In *King v. King* the affidavits, which were filed at the instance of the attorney for the respondent, were ordered to be placed on the record, and the petitioner was directed to attend in Court to be examined on the matters disclosed by them before the decree be made absolute. What happened after that order does not appear.

[WILSON, J.—Supposing the petitioner does appear, who is to cross-examine her? Upon the English authorities the respondent cannot be heard, and the Court of its own motion could not be in a position to do so.]

Mr. Pugh.—That is the difficulty, and that is why in the absence of a Queen's Proctor the Court should put a wider construction on sec. 16, and hold that a respondent is entitled to intervene in this country.

[WILSON, J.—The difficulty in the matter is that by doing so the Court would be putting a construction on the section, which is substantially the same as the English Act, wholly different from the construction put on similar words in the English Act.]

Mr. Pugh.—In that case the only course is to adopt that followed by Mr. Justice Bayley, and allow the affidavits to remain on the file, but, as I have already stated, I contend that a liberal construction should be placed on section 16 and that *any one* should be allowed to intervene and that therefore the respondent should be allowed to be heard.

Section 7 of the Act provides that, subject to the provisions contained in the Act, the Courts in this country shall act and give

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(3) 2 Sw. & Tr. 384.

(2) 2 Sw. & Tr. 524.

(4) 2 Sw. & Tr. 405.

(5) 3 Sw. & Tr. 394.

relief on principles and rules as nearly as may be conformable to the principles and rules of the English Court. Section 16 says *any person* may intervene, and if the English practice be followed and that be taken to be any person other than the respondent or some one moving at his instance, as there is no person whose duty it is to intervene on facts being brought to his notice, it would, in a case like this, result in the dissolution of a marriage under circumstances under which the Legislature intended it should not be dissolved. Though in England any person other than the respondent, or some one at his instance, may intervene, yet in practice the Queen's Proctor alone does so.

[WILSON, J.—In England there have been cases of private intervention.]

Mr. Pugh.—The Act, however, contemplates that in the great majority of cases the Queen's Proctor should be the person to intervene, and as a matter of fact it is the Queen's Proctor who generally does intervene. If, however, the Court holds that the respondent is precluded from intervening, then the affidavits, as in the Bombay case, can be put on the file with the record, and possibly between now and the time when an application is made to have the decree made absolute some person may, on the facts becoming known, come forward and intervene.

The judgment of the Court was delivered on May 5th.

WILSON, J.—In this case I shall follow the view of the law taken in the Bombay High Court in *King v. King* (1). The result will be that the affidavits filed by the respondent and others in this matter will be put up with the record of the suit. Following the Bombay case, I shall not, when the matter comes on for the decree to be made absolute, allow the respondent to be heard; but, as in the Bombay case, information will be given to the attorney for the petitioner that the decree will not be made absolute till the matters set out in the affidavits alleging collusion have been cleared up. She may take what course she may be advised for the purpose of clearing up the matters alleged in the affidavits on that subject.

Attorney for the respondent : Mr. H. C. Chick.

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