

MATRIMONIAL JURISDICTION.

*Before Mr. Justice Harington.*BOWEN *v.* BOWEN.*1909
June 14.*Divorce—Collusion—Husband's petition—Agreement between the Parties, not acted on, whether constitutes Collusion.*

A petition for divorce was presented by the husband, on the ground of the wife's adultery with the co-respondent. Subsequently an agreement was come to between the petitioner and the respondent, by which, for a pecuniary consideration, the respondent agreed not to defend the suit and to furnish the petitioner with evidence against herself and the co-respondent, should the latter venture to defend the suit. This agreement, however, fell through, and the respondent filed her answer denying adultery, and making a counter-charge of adultery against the petitioner. The co-respondent did not defend the suit. At the trial, the plea taken by the respondent was that the petition should be dismissed on the ground of collusion between the petitioner and herself :—

Held, that inasmuch as the agreement, which contemplated a fraud upon the Court, was not acted on, and in no way affected the decision of the Court, it did not constitute collusion.

Churchward v. Churchward (1) referred to.

ORIGINAL SUIT.

This was a petition by the husband for dissolution of marriage by reason of his wife's adultery with the co-respondent, George Evance. The parties were married in Calcutta in April 1903, the respondent being at the time fifteen years of age and the petitioner thirty-two, and they lived together in various places in the suburbs of Calcutta. There was one child of the marriage, a boy, born in June 1904.

From October 1907, the parties, though residing together, ceased to live as man and wife. In February 1908, the wife left her husband's protection and remained away till October of the same year, when there was a reconciliation, and the wife returned to her husband at No. 9, Dent's Mission Road, Kidderpore, a boarding-house, in which the co-respondent was also a lodger. Subsequently, the petitioner having suspicions as

* Original Civil Suit No. 1 of 1909.

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to his wife's conduct with Evance, moved to Garden Reach taking the respondent with him.

The petitioner and respondent appear to have been unable to get on together. Early in December 1908, they went to Messrs. Ghose and Kar, solicitors, to consult them as to getting a divorce. At this interview, the wife proposed that her husband should go to a house of ill-fame, and that she should have him watched, so as to obtain evidence with a view to divorce proceedings. The husband, however, refused to accede to the proposal.

Later in December, the husband's suspicions were again aroused. He followed his wife on two occasions, on the 16th and 17th December between 8-30 P.M. and 9 P.M., to No. 9, Dent's Mission Road, and discovered that his wife was in the room occupied by Evance. On his return home, on the second occasion, he packed up his things and left the house. On the 19th December, the husband again followed his wife, and saw her in the same room. At a subsequent interview, he informed his wife that he had put the matter in his solicitor's hands.

The petition for divorce was filed on the 7th January 1909, and was followed by a singular correspondence between the petitioner and respondent. On the 19th January the wife wrote as follows: "I believe you have filed your suit for a divorce. What have you done with my summons? I have not received any up to date. You know my address. I hope you will send it to me here and not to Cleavers at Kidderpore. I hope whatever you have against me is nothing but the truth, and not by what you have heard. What you might gain now by lies, you will be punished for hereafter. Well I hope you will gain your desires and be happy." There was another letter from the wife, dated the 26th January, asking for an interview with reference to the child, which was answered by the husband on the 27th January, suggesting that she should call and bring the boy with her. On the 31st January, Mrs. Bowen wrote in the following terms: "I did not send you the letter as promised yesterday as I have since heard Evance is not going to defend; he is going to withdraw his defence, but if I find

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he is going to defend the case, I will send you the letter as promised. I do not see the man any more. I would like to see you about all this, but I think it would be best we don't meet just now. God knows what he is working up. Who knows he might watch us meeting. Whatever I have to say I will write till the road is clear. Don't be afraid of me. I won't play you a double game, if you will only keep to your word. When writing to me, don't do so by the *boodhah* but by post as he might be seen coming here. If Evance withdraws his case, it ought to then come off soon. Let me know how things go on. I will give you something else which will settle the swine properly should he defend. I don't think he will. He hasn't a brass farthing. Ta Ta for the present. Yours, Winnie." There was also an undated letter from Mrs. Bowen, stating that she was trying to get the co-respondent's solicitors not to defend the suit.

On the 9th February 1909, the wife filed her answer. She denied the charge of adultery, and made a counter-charge of adultery against her husband and submitted that he was by reason of this misconduct disentitled to the relief he claimed. The co-respondent Evance did not defend the suit.

At the hearing, the respondent took the further plea that the petition should be dismissed on the ground of collusion between the petitioner and herself. It appeared from the correspondence and the evidence given at the trial that sometime after the 19th January 1909, there was an agreement come to between the petitioner and respondent, by which for a pecuniary consideration the respondent was prepared not only not to defend the suit but to furnish the petitioner with evidence which she believed would be conclusive against herself and the co-respondent, should he venture to defend the suit. This agreement, however, fell through, and was never acted on.

Mr. Pugh (*Mr. Hyam* with him), for the respondent. This petition should be dismissed under section 13 of the Indian Divorce Act. Both previous and subsequent to the petition being presented, there were collusive negotiations between the petitioner and the respondent. It is sufficient that

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at some stage of the proceedings, the petition should have been prosecuted in collusion: *Churchward v. Churchward* (1).

Mr. Stokes, for the petitioner. The true test as to whether there has been collusion between the parties so as to disentitle the petitioner from obtaining relief, is whether the decision of the Court has been affected by the agreement between the parties. There would be collusion, if, by agreement between the parties, material facts were not brought before the Court: the effect would be to commit a fraud on the Court. In the present case, the agreement, inasmuch as it fell through, cannot affect the decision of the Court. The respondent, who has taken this plea, has defended the suit and is in a position to place all the facts before the Court. *Churchward v. Churchward* (1) is distinguishable: there, the petition was presented under an agreement between the parties, the respondent not appearing to defend the suit, and it was on the intervention of the Queen's Proctor, that it was held that the agreement constituted collusion.

Cur. adv. vult.

HARINGTON J. This is a petition by the husband for dissolution of his marriage by reason of his wife's adultery with one George Evance.

The respondent denies the adultery, makes a counter-charge of adultery against her husband and alleges he is by reason of this misconduct disentitled to the relief he claims.

The co-respondent does not defend the suit.

The marriage took place in April 1903, the respondent being at that time fifteen years of age while the petitioner was thirty-two. There was issue of the marriage one child born in June 1904.

According to the petitioner the respondent refused him his marital rights as far back as 1904. The wife denies this and says they lived together until 1907, but the question is of small importance as it is common ground that after the wife's

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return from Mussorie in that year, though residing together, they were not living as man and wife.

Their differences came to ahead in February 1908 : the wife left her husband's protection and remained away until October in that year when there was a reconciliation. At this time the parties were residing at No. 9, Dent's Mission Road—a house kept by a Mrs. Barnes in which the co-respondent was a lodger. The petitioner having, as he says, suspicions as to his wife's conduct with Evance moved to Garden Reach taking the respondent with him. They appear to have been unable to get on together : they went accordingly early in December to Messrs. Ghose and Kar, the attorneys, to consult them as to getting a divorce. At this interview the wife proposed that her husband should go to a house of ill-fame, and that she should have him watched, so that the evidence she considered necessary for a divorce might be obtained. It is common ground that the proposal was made and that the husband refused to accede to the proposition. The wife asserts and the husband denies that it was in consequence of a suggestion of his that she made this proposal.

Later in December the husband became suspicious, and on the 16th of that month at 8-30 or 9 P.M. he followed his wife who went from their house in Garden Reach to 9, Dent's Mission Road. There he discovered that his wife was in the room occupied by Evance. He was afraid to go in ; but retreated to the next house which was occupied by a friend of his, named Jarratt, whence he could see into the room in which his wife was. He followed her again on the following night taking a detective with him again seeing her in the co-respondent's room. He then went home packed up his things and left the house. On the 19th he followed her again, and again saw her in the same room.

The respondent's account is that she went with her husband and a Parsee as far as the gate of No. 9, and that she went into it to see Mrs. Barnes. She says she went three or four times altogether, and she did go into Evance's room. The hall was being white-washed, and she and Mrs. Barnes and Mr. Cleaver

and Mr. Outhwaite who resided in the house were all there, as well as Mr. Evance. She denies that she ever was alone with Evance or was guilty of misconduct with him.

After her husband left the house in Garden Reach the respondent had an interview with him at the Docks, at which he told her he had put the matter in his solicitor's hands.

The petition was filed on January 7th and then follows a correspondence between the petitioner and respondent, which forms a very singular feature in the case. It begins with a letter from Mrs. Bowen, dated 19th January, which contains the phrase: "I hope whatever you have against me is nothing but the truth, and not by what you have heard. What you might gain now by lies, you will be punished for hereafter."

Then follows another letter from her, dated the 26th January, asking for an interview about the child, which is answered by the husband on the 27th suggesting she should call and bring the boy with her.

Next comes a very remarkable letter dated the 31st January from Mrs. Bowen. She begins by saying that she has not sent the letter she promised, because she hears Evance is not going to defend. She expresses a wish to see Mr. Bowen, but fears being watched by Evance. Then she says "don't be afraid of me. I won't play you a double game if you will only keep your word," and the letter ends with a paragraph. "I will give you something else which will settle the swine properly should he defend. I don't think he will as he has not a brass farthing. Ta Ta for the present. Yours, Winnie."

Then there is an undated letter from Mrs. Bowen stating that she is trying to get the co-respondent's solicitors not to defend the suit.

When questioned about these letters and about the promise referred to, Mrs. Bowen says that, in consideration of being allowed the custody of the child and being paid a sum of Rs. 5,000 by her husband, she agreed to write a letter to her husband admitting her guilt and the "something to settle the swine" was an incriminatory letter which she would write, and "put a back date on it" (to use her own expression), and

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arrange for it to fall into her husband's hands to be used against Evance.

She says that suspecting her husband's *bonâ fides* she got her sister to ask him to deposit the money with her until the case should be over. When he refused to make this deposit, she knew he would not keep his promise and the agreement went off.

Mr. Bowen when cross-examined on these letters gives a very halting explanation about the promise being to keep the case out of the papers.

Nothing transpired after January 31st until the 9th of February when Mrs. Bowen filed her answer.

The case has been fought with vigour by the petitioner and with great bitterness by the respondent.

The first question is, has the adultery been proved ?

[His Lordship then dealt with the evidence, and came to the conclusion that the respondent had committed adultery with the co-respondent.]

The next question is, do the facts disclosed at the hearing establish a case of connivance or collusion so as to debar the petitioner from the relief he claims ?

The circumstance that the wife's adultery took place so shortly after her proposal in the attorney's office might raise a suspicion of connivance, but I do not think there was connivance, because if there was, there was no reason why the respondent should not have asserted it. The admission about the letter she was prepared to write makes it impossible to believe she could have been deterred by any regard for her own character.

On the question of collusion I have no doubt there was an agreement made sometime after January 19th, by which, in consideration of a pecuniary payment, the respondent was prepared not only not to defend the suit, but to furnish the petitioner with evidence, which she believed would be conclusive against herself and against the co-respondent.

*But this agreement fell through, probably because the petitioner did not pay.

Had the agreement been acted on, it would have clearly constituted a case of collusion.

But the agreement not acted on, though extremely disgraceful to the petitioner and to the respondent, does not constitute collusion, because it in no way affects the decision of the Court. If parties agree that a matrimonial offence shall be committed, or if they conspire to bring about a state of circumstances from which the Court would infer that a matrimonial offence had been committed, such conduct would be a fraud on the Court and would constitute collusion, or if the parties conspire to lay a false case before the Court or to conceal from the Court facts material for the decision of the case, this would be collusion as it would affect the decision of the case. Further, as is pointed out in *Churchward v. Churchward* (1), there may be a case of collusion where there is an agreement not to defend and where the parties are acting in complete concert in the prosecution of the suit, and the Court is thus deprived of the security for eliciting the whole truth afforded by a contest of opposing interests and is rendered unable to pronounce a decree for dissolution of marriage, with sufficient confidence in its justice. In all these cases the petitioner is disentitled to relief, because he has done something to affect the decision of the case. There has been either *suppressio veri* or *suggestio falsi*, or at the lowest a concert between the parties to bring about a divorce which raises a suspicion that any facts likely to defeat the object of the agreement will not be placed before the Court.

But when parties enter into an agreement to effect a fraud on the Court, and then before anything is done to carry out the agreement, they change their minds, and whether from good or bad motive decline to carry out the fraud they had contemplated, then I do not think their rights are affected. In the present case the agreement in no way affects the decision of the Court, because it was not carried out. The case has been defended and defended with great vigour. No admissions of

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any sort have been made, and there is no reason to suppose from the attitude of the parties that the Court has been deprived of any safeguard.

I hold, therefore, that the petitioner is not disentitled to relief in consequence of the arrangement which he and the respondent were at one time prepared to carry out.

There is no evidence at all in support of the recriminatory charges. The respondent has charged her husband with adultery

The evidence of adultery against the husband consists solely of confessions of misconduct which he is alleged to have made to the wife. Even if the wife could be believed as to this, the confessions would not under the canon law have been sufficient, but the husband contradicts her and, for reasons I have stated, I do not consider her a person whose word is to be relied on.

In the result I hold that the wife has committed adultery, that no act has been done by agreement between the parties which has affected the inception, prosecution or decision of the suit; and the recriminatory charges have wholly failed.

There must be a decree nisi with costs against the co-respondent. I make no order with respect to the wife's costs.

J. c.

Attorneys for the petitioner : *Pugh & Co.*

Attorneys for the respondent : *Morgan & Co.*