

APPEAL FROM ORIGINAL CIVIL.

Before Mr. Justice Woodroffe and Mr. Justice Carnduff.

ARNOLD *v.* ARNOLD.*

1911
Jan. 31.

Divorce—Wife's petition—Admission by respondent—Effect of husband's admission of adultery and cruelty, supported by confirmatory evidence.

In a suit for dissolution of marriage, in the absence of collusion, an admission of guilt by one of the parties, is cogent evidence which the Court will act on, especially if the admission is corroborated by other evidence.

Robinson v. Robinson and Lane (1), followed.

APPEAL by the petitioner, Mrs. Florence Arnold, from the judgment of Harington J.

This appeal arose out of an undefended matrimonial suit in which the wife sought a decree for the dissolution of her marriage, on the grounds of adultery and cruelty of her husband.

The petitioner and her husband, George Villiers Arnold, were married in Sheffield on the 8th March, 1902. A child was born in March, 1904, but survived only a few months. In 1908 the petitioner and the respondent joined the Bandmann Theatrical Company and came out to India in June of the same year. The petitioner charged her husband with having committed adultery between the months of May and August, 1909, with a ballet mistress employed in the same company, but condoned his offence and resumed cohabitation with him.

Thereafter the petitioner and respondent joined the Bandmann Opera Company. The petitioner charged the respondent with having committed adultery on several occasions between the months of December 1909, and February 1910, in Calcutta with one Miss Hebe Kneller who was also a member of the same company. The parties as well as Miss Kneller were

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residing at the time at the Albany Hotel, at 10, Eyd Street, Calcutta.

The petitioner in her evidence mentioned certain acts of familiarity between her husband and Miss Kneller and in particular stated that, one night in January, 1910, at 1-30 A.M. she entered Miss Kneller's bedroom and saw her "husband leaning on Miss Kneller and she was in bed in her night dress." Her husband was dressed in his waistcoat and had not taken off his clothes to go to bed. She called her husband away and accused him and "he admitted every thing."

After this incident in January, 1910, the petitioner ceased to cohabit with the respondent. Evidence of cruelty was also given by the petitioner, who further alleged that there was no collusion or connivance between her and the respondent.

Two other members of the Opera Company were called as witnesses, and although unable to give evidence of any acts of adultery, they spoke to the relations between the respondent and Miss Kneller amounting to a public scandal, so much so, that Miss Kneller was finally dismissed from the company on the 4th June, 1910, while the company was playing at Yokohama. It appears the respondent paid the lady's passage back to England.

On the return of the Opera Company to Calcutta after its tour in the Far East, the wife threatened divorce proceedings, and on the 23rd November, 1910, the husband wrote to his wife in the following terms:—

"Hotel Continental,
 12, Chowringhee Road,
 Calcutta, Nov. 23, 1910.

"My dear wife,

I have heard that you are bringing divorce proceedings against me, and I believe that you are charging me with adultery with a certain lady in the company, and cruelty in Calcutta, both of these charges I am bound to admit to, as you have probably secured substantial proofs as to the cruelty, which has occurred during passion, I sincerely regret.

I shall not defend the case under the circumstances.

Your Husband,
 (Sd.) G. V. Arnold."

A few days after the petition was filed, but before the issue of citation, the husband wrote on the 30th November 1910, a second letter to his wife in the following terms:—

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“Hotel Continental,
 12, Chowringhee Road,
 Calcutta, Nov. 30, 1910.

“Dear Floss,

I can't go away without writing and wishing you good-bye. I would have said good-bye personally, only I suppose my presence would have been distasteful to you. I am sorry we have finished up like this. I know I am losing a good woman, for I believe you to be good, and trust you will always try and be so. I wish you the best of everything and hope that you may meet and marry a good man who will make you happier than I have done. When you go to England don't abuse my poor mother, will you?

Good-bye and best wishes.

Yours,
 George.”

The husband did not file an answer or defend the suit.

On the 3rd January, 1911, Harington J. dismissed the petition, holding that adultery had not been established. His Lordship observed as follows:—

“This is a petition by the wife for dissolution of marriage on the ground of cruelty and adultery of her husband. To enable her to succeed in this Court it is necessary to prove some specific act of adultery committed in India. Now, the lady has given her evidence and she is the only witness who has spoken to facts from which it is said that particular acts of adultery ought to be inferred. It was argued by her learned counsel that the question whether the adultery was established depended on whether she was believed or not. I don't agree with that proposition. Her evidence was given in a frank and straightforward manner, and I have no doubt that each fact to which she spoke was truly stated by her, but the question is, are the facts she has proved sufficient to justify the inference that on any of the occasions, she has spoken to, adultery was committed. In the first instance, she found her husband in the room of a Miss Kneller, who was in bed, but the door of the room was unfastened and the husband was in his ordinary dress and I don't think that the fact that a man in ordinary clothes is in the bed-room of a woman with the door open, without any further evidence that something took place, would justify the inference that he had committed adultery with the lady in whose room he was. A different inference might be drawn if the door had been fastened, and there were evidence of any fact which would justify one in supposing that he had been sharing her bed. Then the other instance is an occasion when she left him in the drawing room, and on going there later

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found he was not there. Afterwards when she saw him she charged him with having been in the lady's room and he told her to mind her own business. That circumstance is not sufficient. There is nothing to show whether he really went to the lady's room on that occasion, or if so, how long he was there, whether he was alone with the lady or whether the door was shut or open. The next fact she proved was an act of familiarity with the lady in the Albany Hotel which took place in her presence, and another witness has spoken to another act of familiarity which took place at the back of the stage. In my view, these are not sufficient to establish a charge of adultery. If, when acts of familiarity have been proved, it had been shown that the husband had been in this lady's bed-room after taking steps to prevent any interruption by a third party, it is possible that an inference might have been drawn that he had committed adultery. This has not been shown and I have no course therefore, but to hold that the petitioner has not established the acts of adultery charged. I must, therefore, dismiss the petition."

From this judgment, the petitioner appealed.

Mr. Eardley Norton (Mr. Pearson with him), for the appellant. Harington J. found the petitioner to be a truthful witness, hence there can be no question of collusion. Collusion being negatived, the respondent's letters, being admissions of guilt, are conclusive evidence against him: *Robinson v. Robinson and Lane* (1), *Williams v. Williams and Padfield* (2). Further, the evidence corroborates the written admission of the respondent. Again, the evidence proves both guilty passion and opportunity and the legal inference of the commission of adultery must follow.

The respondent did not appear.

WOODROFFE J. In this case the petitioner asks for the dissolution of her marriage with the respondent on the grounds of adultery and cruelty. He has been served with a notice by the petitioner. But he has entered no defence on either of the charges and he does not appear in this appeal. Adultery has been sought to be proved in this case both by admissions oral and documentary and other acts from which it is contended adultery should be inferred. In particular in a letter of 23rd April, 1910, which the respondent wrote

(1) (1859) 1 Sw. & Tr. 362.

(2) (1865) L. R. 1 P. & D. 29.

to the petitioner, he writes as follows:—"I believe that you are charging me with adultery with a certain lady in the Company and cruelty in Calcutta, both of these charges I am bound to admit to, as you have probably secured substantial proofs as to the cruelty which has occurred during passion I sincerely regret. I shall not defend the case under the circumstances." I have no doubt that "the lady in the Company" is Miss Kneller. There has been no question of any other.

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Another letter has been proved dated the 30th November 1910 in which with other things he states "I can't go away without writing and wishing you good-bye. I would have said good-bye personally, only I suppose my presence would have been distasteful to you. I am sorry we have finished up like this. I know I am losing a good woman, for I believe you to be good and trust you will always try and be so."

From the evidence of McGarth it appears that the respondent was very fond of Miss Kneller, a member of the Company and on one or two occasions he asked McGarth not to speak to his wife about it.

Mr. Smith, the Manager of the Bandmann Opera Company, states that he himself had charged both the respondent and Miss Kneller with the intimacy alleged to exist between them and that neither denied it. Subsequently both of them left the company. The evidence of Mr. Bury, Manager of the Empire Theatre, is that in consequence of the relationship existing between the parties the petitioner asked him for a separate room. Mr. Justice H rington in his Judgment states that "the petitioner gave her evidence in a frank and straightforward manner and I have no doubt that each fact to which she spoke was truly stated by her." One of such facts was that there was no collusion. Nor is there any ground for suspecting collusion in this case. The learned Judge, however, adds "but the question is, are the facts she has proved sufficient to justify the inference that on any of the occasions she has spoken to adultery was committed?" If the learned Judge was not satisfied as regards the evidence tendered, I think

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that under the circumstances of this case, the petitioner might have been given an opportunity to produce such further evidence as the Court thought was necessary, as I have stated no collusion is proved or suggested. In the present case admissions have been proved. Doubtless, caution is required in cases of Divorce to see that there is no collusion and an admission must be examined from this point of view. But if, as here, there is no reason to suspect collusion an admission may be as cogent evidence in these as in any other cases. In *Robinson v. Robinson* (1), Sir Alexander Cockburn says:—"The Divorce Court is at liberty to act and is bound to act on any evidence legally admissible by which the fact of adultery is established. If, therefore, there is evidence not open to exception of admissions of adultery by the principal respondent, it would be the duty of the Court to act on these admissions although there might be a total absence of all other evidence to support them. The admission of a party charged with a criminal or wrongful act, has at all times and in all systems of jurisprudence been considered as most cogent and conclusive proof; and if all doubt of its genuineness and sincerity be removed, we see no reason why such a confession should not, as against the party making it, have full effect given to it." It is to be observed that the learned Chief Justice says that it is the duty of the Court to act on admissions although there might be a total absence of all other evidence to support them. The present case is stronger. Not only is there no reason to suspect collusion but the evidence which has been given supports and corroborates the written admission of the respondent. Evidence has also been given of acts from which the Court was asked to draw the inference of adultery. It is unnecessary to consider whether these facts, if they stood alone, would be sufficient to prove the alleged adultery. However they may be and guarding myself from being supposed to say that they are insufficient, it is sufficient to say that I have no doubt that the admission contained in the letters of the

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respondent are truthful admission of facts. In my opinion, the acts of adultery and cruelty charged have been proved. I would therefore reverse the judgment of Mr. Justice Harrington and pass a decree *nisi* or dissolution of marriage with costs.

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CARNDUFF J. I agree, and have nothing to add to the judgment which has been delivered by my learned brother.

J. C.

Appeal allowed.

Attorneys for the petitioner: *Morgan & Co.*

APPEAL FROM ORIGINAL CIVIL.

*Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice,
 and Mr. Justice Woodroffe.*

AMLOOK CHAND PARRACK

v.

SARAT CHUNDER MUKERJEE.*

1911
 July 20

Mortgage—Preliminary mortgage decree—Application for sale of mortgaged property—Limitation Act (IX of 1908), Sch. I., Arts. 181, 182 and 183. Transfer of Property Act (IV of 1882), ss. 88 and 89—Civil Procedure Code (Act V of 1908) o. XXXIV. rr. 4 and 5; o. XLI, r. 20—Party, addition of.

A preliminary mortgage decree under s. 88 of the Transfer of Property Act, 1882, does not require, and is not followed by any supplemental decree, but only, if necessary, by an application for an order absolute for sale under s. 89 of the Transfer of Property Act.

Such an application is a petition for realization by the mortgagee of his decree, and is an application "to enforce a judgment or decree," etc., within the provisions of Art. 183 of the Limitation Act, 1908.

Harendra Lal Roy Chowdhri v. Maharani Dasi (1) referred to; *Madhab Mani Dasi v. Lambert* (2) discussed.

It is a question for the Court in its discretion to determine in each case whether or not it will make an order for the addition of a party as contemplated by o. XLI, r. 20 of the Code of Civil Procedure, 1908.

Appeal from Original Civil, No. 62 of 1910.

- (1) (1901) I. L. R. 28 Calc. 557; (2) (1910) I. L. R. 37 Calc. 796;
 L. R. 28 I. A. 89, 97. 15 C. W. N. 337.