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THE
LAW AND PRACTICE OF DIVORCE
IN INDIA,

Being a Commentary on the

INDIAN DIVORCE ACT (IV OF 1869)

(As amended upto date)

AND

THE INDIAN AND COLONIAL DIVORCE JURISDICTION ACT, 1926.

(16 & 17 Geo. V, Ch. 40).

BY

JEHANGIR CURSETJI FORBES, B. A., LL.B.,

ADVOCATE (O. S.) HIGH COURT, BOMBAY.

WITH A FOREWORD

BY THE HONOURABLE

MR. JUSTICE C. P. BLACKWELL

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TO

THE HONOURABLE

SIR JOHN WILLIAM FISHER BEAUMONT, Kt., K. C.

CHIEF JUSTICE

OF

THE HIGH COURT OF JUDICATURE AT BOMBAY

THIS WORK IS

With kind permission

RESPECTFULLY DEDICATED.

FOREWORD

There is undoubtedly room for an up to date text book upon the law relating to divorce of persons professing the Christian religion in India. Mr. J. C. Forbes, who as an Advocate of the Original Side of the Bombay High Court, has had considerable experience in divorce matters, presents such a book in an attractive form which should prove extremely useful to practitioners.

Mr. Forbes has taken Sections of the Indian Divorce Act of 1869, as amended, in turn, and has illustrated their operation where necessary by a reference to leading decisions. He has dealt fully with such matters as domicile, the *lex loci* contractus, admissions and confessions, non access and presumption of legitimacy, alimony, the custody of children, and the right of intervention by a duly appointed officer corresponding with the King's Proctor in England, and questions of procedure are clearly and adequately treated. In addition to setting out in appendices the Rules of the Bombay, Calcutta and Madras High Courts under the Indian Divorce Act of 1869, Mr. Forbes has also set out conveniently in appendices the sections of the Indian and Colonial Divorce Jurisdiction Act, 1926, which confers divorce jurisdiction in certain cases upon Courts in India and other parts of His Majesty's Dominions, where the parties are domiciled in England or Scotland, and the Rules made thereunder, and has referred to some important decisions in connection with this Act.

I congratulate Mr. Forbes upon his treatment of the subject, and I commend this book with confidence to members of the profession.

C. P. BLACKWELL.

November 30th 1937.

PREFACE

The Indian Divorce Act (IV of 1869) was drafted on the model of the Matrimonial Causes Acts of 1857 to 1866 and residence in India was then considered sufficient to give jurisdiction to Courts in India, irrespective of domicil, to decree dissolution of marriage. Under the Matrimonial Causes Act domicil was essential to found jurisdiction, and consequently, decrees passed by the Courts in India dissolved the marriage of parties not domiciled in India, but they remained married in the country of their domicil. To obviate such difficulty the Indian Divorces Validity Act, 1921, was passed by the British Parliament validating in England and Scotland the decrees of dissolution passed by the Courts in India. In 1926 the Indian Divorce Act was amended and domicil was made essential to found jurisdiction of the Courts in India to decree dissolution of marriage. In order also to facilitate the dissolution of marriages of persons domiciled in England or Scotland who could not for poverty or any other cause institute divorce proceedings in the countries of their domicil, the Indian and Colonial Divorce Jurisdiction Act, 1926, conferred jurisdiction on the Courts in India and other parts of His Majesty's Dominions to dissolve marriages of persons domiciled in England or Scotland.

The Matrimonial Causes Act of 1907 vested the Divorce Court in England with power to increase the amount of alimony granted to the wife on the husband's circumstances improving. No such provision is made in the Indian Divorce Act of 1869, but the question is set at rest by the decision of the Privy

Council in *Iswarraya*-v-*Iswarraya* (1931) 58 I. A. 350, holding that the Courts in India have such power. Again, by the Matrimonial Causes Act of 1923 husband and wife in England have been placed on an equal footing in respect of grounds for dissolution of marriage, and since then a wife may file a petition against the husband for the dissolution of her marriage on the ground of his adultery alone without having to wait for the commission by the husband of any other matrimonial offence. It is, indeed, regrettable that the difference in the rights of the sexes with respect to the grounds for divorce is not yet removed in India, and a wife cannot ask for the dissolution of her marriage when the husband is guilty of adultery unless he is also guilty of either cruelty or desertion for two years or upwards. Further, in India, in a suit by a wife for dissolution of marriage on the ground of the husband's adultery with a named woman, the latter has no right to intervene, (as she has in England). This defect ought to be remedied. It is high time that the antiquated Divorce Law which is applicable to Christians in India is amended and brought upto date to meet the requirements and suit the conditions of modern times.

In 1925 the Matrimonial Causes Acts of 1857 to 1923 were substituted by the Supreme Court of Judicature (Consolidation) Act, (15 & 16 Geo. V. C. 49).

In the present work, reference is given under each section of the Indian Act to the corresponding provisions of the Matrimonial Causes Acts, the Supreme Court of Judicature (Consolidation) Act, 1925, and the Matrimonial Causes Rules, 1924. Extracts from important judgments of eminent Divorce Court Judges have been quoted which lay down general princi-

ples or are likely to prove useful to the practitioner. Cases both English and Indian have been brought up to the end of 1937. Rules framed by the several High Courts in India under the Indian Divorce Act, and Rules framed by the Governor General in Council under section 17-A of the Act, together with all Statutes relating to Matrimonial Matters and Rules framed by the Supreme Court for the guidance of the Divorce Court in England, are incorporated in separate Appendices. An exhaustive Index with cross references will facilitate the work of the busy practitioner.

This work contains full annotations to the Indian and Colonial Divorce Jurisdiction Act, 1926 and the Indian (Non-Domiciled Parties) Divorce Rules, 1927 under which the number of suits in the Courts in India is increasing.

I take this opportunity of tendering my sincere thanks to the Honourable Mr. Justice C. P. Blackwell for writing the Foreword, and to G. C. O'Gorman, Esquire, Barrister-at-Law, for his valuable assistance. My thanks are also due to my wife for going through the proofs and for the preparation of the Table of Cases.

J. C. F.

Central Bank Building,
Esplanade Road, Fort,
Bombay.

January, 1938.

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ADDENDA.

To f. n. (*j*) at p. 75 add, "Farnham *v.* Farnham (otherwise Daniels) (1937) P. 49. Burgess (otherwise Leadbitter) *v.* Burgess (1937) P. 60".

To f. n. (r_1) at p. 121 add, "Herd *v.* Herd (1936) P. 205 at p. 213".

To f. n. (*z*) at p. 296 add, "Morton *v.* Morton, Daly & McNaught (1937) P. 151".

To f. n. (*a*) at p. 296 add, "But see Morton *v.* Morton, Daly & McNaught, supra".

At p. 327, after section 1 sub-section 1 (*d*) add,

"*a High Court in India.....shall have jurisdiction to make a decree for the dissolution of marriage*".

"The High Court of Bombay has jurisdiction to hear a petition for dissolution of a marriage entered into at Karachi by parties one of whom is domiciled in Scotland and the other in South Africa and who last resided together at Karachi in Sind. [*H.* v. *H.* (1937) 39 Bom.L.R. 1182".]

CORRIGENDA.

p. 3, line 12, for '1927' read '1926'.

p. 22, f. n. (*l*), after Dicey Conflict of Laws, add "5th edition, p. 298."

p. 56, f. n. (*p*), for (1130) read '(1830)'.

p. 87, f. n. (*p*), for 'Cooks' read 'Cooke'.

p. 103, f. n. (*u*), for (1559) read (1858).

p. 135, f. n. (*t*), read Mason *v.* Mason (1883) 8 P. D. 21.

p. 146, line 6, delete the words 'that of'.

p. 156, f. n. (*l*), for 'Wickings' read 'Wickins'.

p. 179, f. n. (*o*), for 'Maccullum' read 'McCullum'.

ACT No. IV OF 1869.

An Act to amend the law relating to Divorce and Matrimonial Causes in India.

Whereas it is expedient to amend the law relating to the divorce of persons professing the Christian religion, and to confer upon certain Courts jurisdiction in matters matrimonial; It is hereby enacted as follows:—

Preamble.

I. PRELIMINARY.

1. This Act may be called the Indian Divorce Act, and shall come into operation on the first day of April, 1869.

Short title, commencement of Act.

For Statement of Objects and Reasons, see Calcutta Gazette, 1863, p. 173.

Sir Henry (then Mr.) Maine stated in the Legislative Council:—

"This measure is obviously one of great importance... It is substantially a consolidation measure. It puts together the English Statute Law on the subject in a more orderly form and in clearer language, and it incorporates the recent decisions of the Divorce Court. But in the main its principles are those of the Statute regulating the jurisdiction of the English Court of Divorce and Matrimonial Causes" (See Fort St. George Gazette, Supplement, 31st March 1869, p. 4.)

"It is also to give effect to the policy embodied in the High Courts Act passed in 1861, (24 and 25 Vict.

Ch. 104) and to the Letters Patent issued by Her Majesty for constituting the High Courts. The object of the High Courts Act seemed to have been not so much to create new branches of jurisdiction, as to constitute and redistribute the power which already existed. The 9th clause gave power to Her Majesty to confer on the High Courts such matrimonial jurisdiction as she thought fit; but Her Majesty did not attempt to confer on the High Courts such jurisdiction as was exercised by the Divorce Court in England. The Secretary of State, therefore, requested the Governor-General to introduce a measure conferring a jurisdiction on the High Courts in India similar to that exercised by the Divorce Court sitting in London. Hence the Act."

For the Report of the Select Committee, see Gazette of India, 1869, p. 192.

For Proceedings in Council, see Calcutta Gazette, 1862, supplement, p. 463; Calcutta Gazette, 1863, supplement, p. 43; and the Gazette of India, 1869, supplement, p. 291.

This Act extends to India the principal provisions of the Matrimonial Causes Act, 1857 (20 and 21 Vict. Ch. 85) as subsequently amended.

Extent of Act.

2. This Act shall extend to the whole of British India, and (so far only as regards British subjects within the dominions hereinafter mentioned) to the dominions of Princes and States in India in alliance with Her Majesty.

Extent of power to grant relief generally.

Nothing hereinafter contained shall authorise any Court to grant any relief under the Act except where the petitioner or respondent professes the Christian religion;

And to make decrees of dissolution.

or to make decrees of dissolution of marriage except where the parties to the marriage are domi-

ciled in India at the time when the petition is presented;

or to make decrees of nullity of marriage except where the marriage has been solemnized in India and the petitioner is resident in India at the time of presenting the petition; Or of nullity.

or to grant any relief under this Act, other than a decree of dissolution of marriage or of nullity of marriage except where the petitioner resides in India at the time of presenting the petition.

The original section 2 of the Act was substituted by the present section by Act XXV of 1927.

This Act has been declared in force in the following Districts:—

(i) The Santhal Parganas;
(ii) The Arkan Hill Districts;
(iii) The Districts of Hazaribagh, Lohardaga (now called Ranchi District) and Manbhum, Pargana Dhalbhum and the Kolhan in the District of Singbhum. The Schedule Districts in Ganjam and Vizagapatam;
(iv) The N. W. F. P., Tarai;
(v) Upper Burma (except the Shan States);
(vi) British Baluchistan.
(vii) Angul and the Khondmals.

The provisions of the Act apply to suits between Eurpean British subjects resident in Native States in India.

Section 2 of the Act is not *ultra vires* of the Indian Legislature (*a*).

" .....except where the petitioner or respondent (*b*) professes the Christian religion."

(*a*) *Thornton* v. *Thornton and Stransham* (1866) 10 Bom. 422.

(*b*) The words 'or respondent' were inserted by Act XXX of 1927.

Before the amendment by Act XXX of 1927 the Courts in India had no jurisdiction to grant relief in a matrimonial suit if the respondent did not profess the Christian religion (*c*).

A previously contracted non-Christian marriage may be dissolved under this Act (*d*), but this Act is not applicable to a suit filed on the ground of adultery before conversion (*e*), nor does it apply to Budhists (*f*), nor to a marriage solemnised according to Hindu rites between parties subsequently converted to Christianity (*g*).

The marriage must be performed according to the rites of the Christian religion (*h*).

Petitioner or respondent must profess the Christian religion.

In a petition for restitution of conjugal rights under section 32 it is sufficient if one of the parties professes the Christian religion. It is not necessary that both the parties should be Christians. The addition of the word 'or respondent' to section 2 of the Act (by Act XXX of 1927) indicates that either the petitioner or the respondent must profess the Christian religion (*i*).

A Christian does not cease to be a Christian by reason of his ex-communication (*j*).

MARRIAGE.

'Marriage' may be defined either as "the act, ceremony or process, by which the legal relationship of husband and wife is constituted or as the physical, legal and moral union between man and woman in complete community of life for the establishment of a family".

(*c*) *Wadia* v. *Wadia* (1913) 38 Bom. 125; 15 Bom.L.R. 593.
(*d*) *Gobardhan Dass* v. *Jasadamoni Dassi* (1891) 18 Cal. 252.
(*e*) *Perianayakam* v. *Pottukanni* (1891) 14 Mad. 382.
(*f*) *Moung Tso Min* v. *Mah Htah* (1892) 19 Cal. 469.
(*g*) *Thapita Peter* v. *Thapita Lakhshmi* (1894) 17 Mad. 235; *Magaina* v. *Premsingh* (1906) 8 Bom.L.R. 856.
(*h*) *Rathnammal* v. *Manikkam* (1893) 16 Mad. 455.
(*i*) *Nina Dalal* v. *Merwanji P. Dalal* (1930) 32 Bom.L.R. 1046, F.B.
(*j*) *Pakkiam* v. *Chelliah Pillai* (1923) 46 Mad. 839, F.B.

A contract to marry may be defined as a contract between a man and a woman by which they mutually promise to marry one another, the promise of each being the consideration for the promise of the other. It is not necessary that the contract should be evidenced by writing, nor even that the mutual promises should be made by express words. The conduct of the parties and particularly their behaviour towards each other may be such as to justify an inference that they have mutually promised to marry, and in the case of the woman it is sufficient to prove that she acted in such a way as to indicate her consent to and approval of the man's promise, as by receiving his visits in the capacity of a suitor.

General principles of validity—

Marriage as understood in Christendom is the voluntary union for life of one man and one woman, to the exclusion of all others. A marriage contracted in a country where polygamy is lawful, between a man and a woman who profess a faith which allows polygamy, is not a marriage as understood in Christendom and although it is a valid marriage by the *lex loci* and at the time when it was contracted both them an and the woman were single and competent to contract marriage, the English Matrimonial Court will not recognise it as a valid marriage in a suit instituted by one of the parties against the other for the purpose of obtaining relief for a breach of matrimonial obligations (*k*). So, a marriage ceremony performed according to Mahomedan rites between a Christian man and a Mahomedan woman can create no valid marriage between the parties (*l*).

A union formed between a man and a woman in a foreign country although it may there bear the name of a

(*k*) *Hyde* v. *Hyde & Woodmansee* (1866) L.R. 1 P. & D. 130; 14 L.T. 188.
(*l*) *Skinner* v. *Durga Prasad* (1904) 31 All. 239.

marriage and the parties to it may there be designated husband and wife, is not a valid marriage according to the law of England unless it is formed on the same basis as marriages throughout Christendom, and is in its essence the voluntary union for life of one man and one woman to the exclusion of all others (*m*).

MODERN MARRIAGE.

The modern tendency is to regard the relationship as strictly a contract in which each party should have equal duties. There are, however, difficulties in the way of this reasonable and legal method of looking at the matter, and in fact, it had not proceeded in England up to July 1923 so far even as the equalization of divorce, so that while a husband could obtain a divorce for adultery alone, a wife could not. Under the Indian Divorce Act, however, the inequality as regards the respective rights of the husband and the wife still prevails.

The natural incidence of the burden of reproduction is not equal, for while the man's part is small, the woman's part is large. Complete equalisation involves the economic independence of the mother, but the mother cannot at once be an effective childbearer and an effective breadwinner. The matter is adjusted by assuming that the woman bears the child for her husband and that in return he supports her and the child. One is, however, then landed in another inequality for by this arrangement the child belongs to the father, although on a natural basis the child belongs primarily to the mother of whose flesh and blood it is formed. The difficulties of marriage are further increased by the complexity and individualisation involved by civilised life. It has been found that there is a tendency for like to mate with like. In a primitive community

(*m*) *Re*: *Bethell, Bethell* v. *Hildyard* (1888) 38 Ch. D. 220; 58 L.T. 674.

where individualisation has not progressed far, satisfactory mating is comparatively easy. But with an increased complexity of individual demands, successful mating becomes much more difficult, all the more so since its success cannot be determined until the decision is already irrevocably made. Notwithstanding these difficulties, there are no indications to show that marriage will tend to assume forms more complex than that of monogamy. It seems most probable that as one sees to a very marked extent in the United States and to a slighter degree in Europe generally, monogamy will succeed in surviving by adjusting itself to modern conditions with the help of a greater facility of divorce—causes more subtle than adultery—but equally fatal to successful marriage being regarded as an adequate motive for divorce. The reality, honesty and sacredness of marriage are thus preserved at the expense of a stability which in an increasingly large number of cases is compatable with genuine mating in marriage and an incentive to irregular unions the future of the children will always remain an important matter for mutual arrangement, not to be settled by any invariable rule.

MARRIAGE WITH FOREIGNERS.

The utmost caution is to be exercised in the case of marriage with foreigners, especially Frenchmen, as many marriages are invalid abroad, though valid in England, but the Marriage with Foreigners Act, 1906 (6 Edw. 7, Ch. 40) enables reciprocal arrangements to be made with foreign countries for the grant of certificates that no legal impediments exist, without which certificate no such marriages may be celebrated in the United Kingdom.

MARRIAGES AT EMBASSIES, ETC.

By the Foreign Marriage Act, 1892, British Ambassadors or their Chaplains, British Consuls or High Commis-

sioners or the Commanding Officers of British ships at foreign stations may be authorised by warrant to act as marriage officers. Seven days residence and fourteen days publication are required before the marriage can be celebrated. Marriages within the lines of a British Army abroad are valid if celebrated by a Chaplain or an officer deputed to perform them. Marriages on board merchant ships without a clergyman are of doubtful validity.

MARRIAGE ON A BRITISH SHIP.

A marriage between British subjects solemnised on board an English Man-of-War at a foreign station by a clergyman of the Established Church without licence or banns is valid (*n*).

EVIDENCE OF MARRIAGE IN A BRITISH COLONY.

Proof of the solemnization of a marriage in a British Colony by a clergyman of the Church of England, according to the rites of that Church, is sufficient evidence of a marriage for the purposes of a divorce (*o*).

A marriage between British born subjects, natives of Europe, members of the Church of England, celebrated at Surat by a minister of the Gospel and Missionary not in Holy Orders, belonging to a sect called 'Congregationalists' or 'Independents', no person in Holy Orders being present at the marriage, was held valid (*p*).

MARRIAGE IN CHILI.

The proof of a marriage in Chili may be established by the production of a certified extract of the entry of the marriage in the marriage register kept in Chili, in com-

(*n*) *Culling* v. *Culling* (1896) P. 116; 74 L.T. 252.

(*o*) *Limerick* (*Countess of*) v. *Limerick* (*Earl of*) (1863) 4 Sw & Tr. 252; 164 E.R. 1512.

(*p*) *Maclean* v. *Cristall* (1849) 7 Notes of Cases, Sup. xvii.

pliance with the requirements of the law of that country, and admissible in evidence there, upon the Court being satisfied of the identity of the parties named in the certificate, and of the Curate Rector who gave the certificate (*q*).

IN FRANCE.

A marriage celebrated in France can be proved by putting in evidence examined copies of the Register and upon further proof that the Register was kept according to the law of France, and that it would be received as evidence of the marriage in the Courts of that country (*r*)

IN RUSSIA.

Where the parties to a suit for judicial separation in England were married in Moscow according to the acceptance of "marriage" in the local law, their domicile being then Russian, it was held by the English Court that the Union between the parties was of one man and one woman to the exclusion of all others. It constituted a valid marriage according to English Law notwithstanding that it could according to local law be dissolved by mutual consent (*s*).

IN JAPAN.

A monogamous marriage contracted by a Christian with a non-Christian under the law of a non-Christian but a monogamous country, such as Japan, will be recognised as valid in England, the country of the Christian party's domicil (*t*).

This Act is applicable to such marriages as are recognised as marriages by Christians and not to polygamous

(*q*) *Abbott* v. *Abbott and Godoy* (1860) 4 Sw. & Tr. 254; 29 L.J.P. 57.

(*r*) *Nachimson* v. *Nachimson* (1930) P. 217.

(*s*) *Ibid.*

(*t*) *Brinkley* v. *Attorney General* (1890) 15 P.D. 76; 59 L.J.P. & M. 54.

contracts such as the unions known as marriages to the Mahomedan Law (*u*).

Marriage is substantially one and the same thing all the Christian world over; the whole law of marriage assumes this, and it is important to observe that it is regarded as a wholly different thing, a different status from Turkish or other marriages among non-Christian nations (*v*); and the Courts in India have no jurisdiction under the Indian Divorce Act to dissolve the marriages of Hindus who, subsequently to their marriage have become converts to Christianity (*w*). The Calcutta High Court, however, is of the opinion that if the petitioner professes the Christian religion at the time of presenting the petition, he or she is entitled to relief under the Indian Divorce Act, and this whether or not the "marriage" in respect of which relief is prayed, be recognised as such in Christendom. Thus, in a case where the petitioner and respondent were married as Hindus, but subsequently became converts to Christianity, it was held that the petitioner, who applied for dissolution of his marriage, was entitled to relief under the Act, inasmuch as he was a person professing the Christian religion at the time of presenting his petition (*x*).

DOMICIL.

A person's domicil is a place or country where his permanent home is. It is not necessarily the same as his place of residence, for a person may be living in a foreign country temporarily. In such a case although not residing in his own country, he is still domiciled there. But

(*u*) *Hyde* v. *Hyde & Woodmansee* (1866) L.R. 1 P. & D. 130; 35 L.J.P.&M. 57.

(*v*) *Warrender* v. *Warrender* (1835) 2 Cl. & Fin. 532.

(*w*) *Perianayakam* v. *Pottukanni* (1891) 14 Mad. 382. *Thapita Peter* v. *Thapita Lakhshmi* (1894) 17 Mad. 235, F.B.

(*x*) *Gobardhan Dass* v. *Jasadamoni Dassi* (1891) 18 Cal. 252.

if the acts of a person reasonably indicate that he intends to make his home for an indefinite period in a foreign country, the fact that he declares from time to time his intention of ultimately returning to his own country will not prevent his acquiring a domicil abroad. The moment a foreign domicil is abandoned, the native domicil is re-acquired. If after having acquired a domicil of choice a man abandons it and travels in search of another domicil of choice, the domicil or origin comes instantly into action and continues until a second domicil of choice has been acquired. A natural born Englishman may domicil himself in Holland, but if he breaks up his establishment there and quits Holland, declaring that he will never return, it is absurd to suppose that his Dutch domicil clings to him until he has set up his tabernacle elsewhere (*y*).

By the term 'domicil' in its ordinary sense is meant the place where a man or person lives or has his home. In a legal sense, however, the domicil of a person is where he has his true fixed permanent home and establishment to which he intends returning. Two things are essential to constitute domicil—

1. Residence.
2. Intention of making a home.

'Domicil' has been defined as "that place or country in which a person's habitation has been fixed without any present intention of removing thereform" (*z*), or "a place in which a person has voluntarily fixed the habitation of himself and his family, not for a mere special or temporary purpose, but with a present intention of making it his permanent home, unless and until something (which is un-

(*y*) *Udny* v. *Udny* (1869) L.R. 1 H.L. 460; Sc. & Div. 441 (H.L.)
(*z*) *In re Craignish* (1892) 3 Ch. 180.

expected, or uncertain) shall occur to induce him to adopt some other permanent home" (*a*).

There must be a residence freely chosen and not prescribed or dictated by any external necessity, such as the duties of office, the demands of creditors or the relief from illness. No person can at any time be without a domicil, but the domicil of a person is quite distinct from the *patria* or nationality to which he may belong (*b*).

No person can at the same time have more than one domicil (*c*).

For usual guidance on the principles governing the determination of domicil see *Ross v. Ellison* (*or Ross*) (*d*).

Before exercising jurisdiction under the Indian Divorce Act the Court ought to carefully inquire on proper legal principles into the question of the domicil of the parties (*e*). It is also important to consider the question of the domicil of the parties at the outset in order to ascertain whether the Court has jurisdiction under the Indian Divorce Act or the Indian and Colonial Divorce Jurisdiction Act. This goes to the root of the jurisdiction and the position bears no analogy to cases, where it is doubtful under which particular statute or branch of the law an order should be made (*f*); and if a decree is made without jurisdiction for that reason not only will it be of no effect, but in some cases the consequences may be very far reaching and affect questions of succession wholly unanticipated at the time (*g*).

(*a*) *Lord* v. *Colvin* (1859) 28 L.J. Ch. 361.
(*b*) *Udny* v. *Udny* (1889) L.R. 1. H.L. 460; *Bell* v. *Kennedy* (1868) L.R.1 H.L. 307.
(*c*) *Wright* v. *Wright* (1931) 58 Cal. 259.
(*d*) (1930) A.C. 1.
(*e*) *Cresswell* v. *Cresswell* (1932) 60 Cal. 601.
(*f*) *Stroud* v. *Stroud* (1931) 58 Cal. 1332.
(*g*) *Wright* v. *Wright* (1931) 58 Cal. 259.

A person's domicil is that country in which he either has or is deemed by law to have his permanent home. But where a person may have no home or more than one, the law requires him to have one domicil and one only. The question of domicil is a mixed question of law and fact. It is only when the relevant facts have been ascertained that the Court is in a position to determine where a person is domiciled. In the case of a European claiming to be domiciled in India it will be pertinent to inquire where his father lived and died or resided as the case may be, where he and his father were born, the circumstances in which he came to and resided in India, which will assist in ascertaining whether there exists an *animus revertendi* or *animus manendi* his object in residing in India and generally as to the conditions under which he lived and his habits of life (*h*). Although permanent residence abroad without intent to return may not operate as a change of domicil, if believed to be necessary for health's sake, the circumstances that such residence was occasioned by mere preference of climate or by the opinion that the air or the habits of the country may be better suited to the health than those of the country which has been quitted will not be sufficient to prevent such permanent residence from so operating (*i*).

The question whether a man has abandoned his domicil of origin and acquired a new domicil would depend on his residence and intention (*j*) and the onus lies on a person who alleges a change of domicil to prove it (*k*).

(*h*) *Wright* v. *Wright*, *supra*.

(*i*) *Hoskins* v. *Mathews* (1856) 8 De G.M.&G. 13; 25 L.J. Ch. 689; 44 E.R. 294.

(*j*) *Shere* v. *Morgan* (1935) 62 Cal. 869.

(*k*) *Ibid.*

PRESUMPTION IN FAVOUR OF ORIGINAL DOMICIL.

1. A change of domicil must be a residence *sine animo revertendi.* A temporary residence for the purposes of health, travel, or business does not change the domicil.

2. Every presumption is to be made in favour of the original domicil.

3. No change can occur without an actual residence in a new place.

4. No new domicil can be obtained without a clear intention of abandoning the old (*l*).

There is a presumption in favour of the native country when the question lies between that and another domicil and in favour of the place where one lives and has his family rather than in favour of his place of business (*m*).

In *Keyes v. Keyes and Gray* (*n*) the Court declined to recognise an Anglo-Indian domicil as justifying the divorce of parties whose residence in India was temporary only though the marriage was celebrated in India and the acts of adultery relied on were committed within the jurisdiction of the Indian Court. The justice of this decision is assumed in the Indian Divorces (Validity) Act, 1921 (11 & 12 Geo. 5, C. 18). But this decision was not followed by the Calcutta High Court in *Isharani Nirupoma Devi* v. *Victor Nitendra Narain* (*o*) where it was held that the jurisdiction conferred by the Indian Divorce Act on Courts in India to make decrees of dissolution of marriage on the basis of residence is not restricted to the cases of persons domiciled in India and such jurisdiction was not beyond

(*l*) *The Lauderdale Peerage Case* (1885) 10 A.C. 692, H.L.
(*m*) *Aitchison* v. *Dixon* (1870) L.R. 10 Eq. 589.
(*n*) (1921) P. 204; 37 T.L.R. 499.
(*o*) (1926) 53 Cal. 282.

the authority given by the Indian Councils Act of 1861 (24 & 26 Vict. C. 67).

An applicant in divorce proceedings was the proprietor of a Scotch estate, but left Scotland for America in 1895 to earn his living. In 1901 he married respondent, an American lady and in 1902 they went to Quebec where he carried on the business of manufacturing arms. They lived together there till 1917 with occasional visits to England. In 1917 the applicant went to Washington, staying there as an expert adviser on munitions till September 1918, when he stayed a certain time in Great Britain and in 1918 leased a house in London. In 1922 he took a lease of a flat in New York of which he remained tenant when proceedings for divorce began in December 1923. Upto the year 1920 there was no statement by the applicant of his intention to abandon his Scottish domicil and as late as December 1920, he stated in an affidavit that he was a domiciled Scotchman. Between December 1920 and the institution of these proceedings he was trying for the purposes of taxation to become a resident alien in the United States and in April 1923 succeeded. In January 1924 after these proceedings he sought to be naturalised as an American citizen. He spent increasing periods of time at his Scottish estate and referred to it as his home in a letter written to respondent in November 1922. Since 1920, however, he had made statements in documents and verbally that he intended to live permanently in New York, though such statements were never made to his wife, nor with one exception, to any personal friend. It was held by the House of Lords that the evidence of declared intention of change of domicil was not established, as such declaration must be examined by considering the person to whom, the purposes for which, the circumstances in which they were made, and be carried into effect

by conduct and action consistent with the declared intention (*p*).

TO FOUND JURISDICTION.

Every petition under the Indian Divorce Act must contain an allegation that the parties are domciled in British India (*q*).

A person with a foreign domicil of origin may acquire an English domicil for the purpose of founding the jurisdiction of the Matrimonial Court, without acquiring such a domicil for the purpose of succession. A domicil for the purpose of founding the jurisdiction of the Court is not acquired by a person who has made a temporary sojourn in that country but who has never resided there and is out of the territory when the suit is instituted (*r*). An officer in the English Army, who had a foreign domicil of origin, who never permanently resided in England and who was not in England when the suit was instituted but who had received a military education at Woolwich and held a commission in a regiment, the permanent headquarters of which were in England, was held not to have acquired an English domicil (*s*).

The domicil of the wife is that of the husband and she cannot acquire a separate domicil, even when he has been guilty of such misconduct as would furnish her with an answer to a suit for restitution of conjugal rights (*t*), but the domicil of the wife is not the domicil of the husband to such an extent as to compel her to become subject to the jurisdiction of the tribunals of any country in which the husband may choose to acquire a new domicil (*u*).

(*p*) *Ross* v. *Ellison (or Ross)* (1929) L.J.P.C. 163; 141 L.T. 666, (H.L.) (1930) A.C. 1.
(*q*) *Hewson* v. *Hewson* (1924) 26 Bom.L.R. 467. *Rooke* v. *Rooke* (1934) 36 Bom.L.R. 492.
(*r*) *Yelverton* v. *Yelverton* (1859) Sea. & Sm. 49.
(*s*) *Ibid.*
(*t*) *Yelverton* v. *Yelverton* (supra).
(*u*) *Briggs* v. *Briggs* (1880) 5 P.D. 163; 49 L.J.P.&M. 38.

For the purposes of international law the domicil for the time being of the married pair affords the only true test of jurisdiction to dissolve the marriage (*v*). The House of Lords has decided that foreign Courts have jurisdiction to dissolve a marriage solemnised in England between English subjects, provided that the married pair are permanently domiciled within the jurisdiction of such Court at the time of the institution of the suit (*w*). The above decision affirms the principle enunciated by the House of Lords in *Harvey* v. *Farnie* (*x*) that the question of divorce is not imminent of the marriage contract to be governed by the *lex loci contractus*, but is an incident of status to be disposed of by the law of the domicil of the parties, that is of the husband.

Although the marriage and acts of adultery in a suit for dissolution may have taken place abroad, if the domicil of the parties is English, the jurisdiction of the English Court is complete (*y*).

If jurisdiction in suits involving the disruption of the marriage tie is founded on anything short of domicil the relation or status of a married person will be one in the country of the Court making the decree and another in all other countries. That is to say, a man or a woman would be treated as married in one country, and not so in another, or married people might be enjoined to live together in one country and to live apart in another. No Court ought to assume or presume to place people in so deplorable a position, unless forced to do so by the express law of the country whose law it is administering (*z*). An American writer suggests a way out of the difficulty. He observes:

(*v*) *Le Mesurier* v. *Le Mesurier* (1895) A.C. 517; 64 L.J.P.C. 97.
(*w*) *Shaw* v. *Gould* (1868) L.R. 3 H L. 55 at p. 85. See *Dolphin* v. *Robins* (1859) 7 H.L. Cas. 390.
(*x*) (1882) 8 App. Cas. 43; 52 L.J.P.&M. 33.
(*y*) *Ratliff* v. *Ratliff and Anderson* (1859) 1 Sw. & Tr. 467; 29 L.J.P.&M. 171.
(*z*) *Niboyet* v. *Niboyet* (1878) 4 P.D. 1 at p. 13, C.A.

"The Courts of every country, both when they decree divorces and when they sit in judgment on foreign divorces, should do whatever they consistently can to establish rules preventive of a conflict of laws..... The international rule of jurisdiction is a part of our unwritten law. Hence, and because this law binds our Government in all its departments almost like our written constitutions, our status giving jurisdiction should be construed as mingled with and qualified by it; and never, except by such express words as admit of no other result, be permitted a meaning conflicting therewith.....Any word employed in a statute may be modified, limited or expanded in meaning by the connection in which it stands and the subject to which it is applied. Our divorce statutes, giving jurisdiction commonly provide that the applicant shall have resided a given number of years in the state. The principles of international law, and the general principles of our own requiring the residence for divorce to be *animo manendi*, the method of interpretation already pointed out indicates that the residence demanded shall be held to be permanent—the domicil" (*a*).

In order to get over this difficulty the Indian Divorce Act was amended and section 2 of the Act of 1869 was substituted by Act XXV of 1926, 'domicile' having been substituted for 'residence' to found jurisdiction.

PERSONS IN THE INDIAN SERVICE.

The rules established with reference to the domicil of persons in the service of the East India Company were peculiar and are now admitted to have been anomalous. With the death of the former servants of the East India

(*a*) Bishop on Divorce—Vol. II, para 114.

Company their operation has ceased and a domicil in India can only be obtained in the same way as domicil in any other civilised country (*b*).

ALIEN ENEMY.

An alien enemy registered as such and who is domiciled in England has a right to bring a petition for the dissolution of his marriage solemnised in England(*c*).

AS REGARDS CO-RESPONDENT.

Whatever it is that determines the jurisdiction of the Court that jurisdiction does not depend upon the domicil of the co-respondent nor is it to be determined by the question whether the co-respondent is or is not a British subject. "The conclusions at which I have arrived," observed Evans P. "after some perplexity and difficulty are as follows:—(1) the jurisdiction of the Court over the co-respondent both as to damages and costs in a suit properly instituted in a British tribunal, does not depend on domicil, allegiance, or residence; (2) if a foreign co-respondent is served in England, this Court has for that reason jurisdiction over him; (3) he can be served abroad, whatever his nationality and if he is served abroad, the statute authorising such service gives to this Court jurisdiction over him; in proper cases the Court may exercise discretionary powers and dismiss or dispense with a co-respondent domiciled abroad, but he is not entitled to demand as of right that he be dismissed from the suit (*d*)"

A co-respondent in a divorce suit, a domiciled Dane was served in Brussels with copies of petition and citation

(*b*) *Cf. Casdagli* v. *Casdagli* (1919) A.C. 145.
(*c*) *Krauss (otherwise Des Salles D'Espinoix)* v. *Krauss and Orbach* (1919) 35 T.L.R. 637; 63 Sol. Jour. 760.
(*d*) *Rayment* v. *Rayment and Stuart, Chapman* v. *Chapman and Buist* (1910) P. 271; 103 L.T. 430; See also *Rush* v. *Rush, Bailey and Pimenta* (1920) P. 242.

which only alleged adultery at Brussels. He entered an appearance under protest and then applied to be dismissed from the suit on the ground that he was not subject to the jurisdiction of the Court, and the Court acceded to his application (*e*).

DOMICIL DISTINGUISHED FROM RESIDENCE.

A person may be said to have more than one residence. If he has houses in different places, at each of which he keeps an establishment, each may be called his residence, though he may not go there for years; but the meaning of the word 'residence' is different from 'domicil,' for, an infant has the domicil of his parents until he attains full age and does some act to acquire a new one, and thus his domicil may be in a country in which he has never personally been, whereas 'residence' implies personal presence at some time or other (*f*). The difference in the construction arises from a confusion between domicil and residence. Domicil once acquired can only be lost by clear evidence. Domicil is a status and has nothing to do with the question of residence though residence is an element from which demicil can be inferred. Residence cannot exist without residence at all and only when the residence is the main and principal residence (*g*).

'Residence' as contrasted with 'domicil' is certainly unimportant, *e.g.* husband and wife are domiciled in England, but reside in France. Wife commits adultery in

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(*e*) *Fairfax* v. *Fairfax and De La Cruz* (1909) 99 L.T. 892; 25 T.L.R. 213. *Walter* v. *Walter and Bergmann* (1909) 25 T.L.R. 473. *Levy* v, *Levy and De Romance* (1908) P. 256; 99 L. T. 312; 24 T.L.R. 466.

(*f*) *Walcot* v. *Botfield* (1854) Kay. 534; 2 Eq. Rep. 758; 2 W.R.393; 69 E.R. 226.

(*g*) *Ward* v. *Maconochie* (1891) 7 T.L.R. 536.

Paris. Husband though residing abroad, can obtain a divorce from the English Court (*h*).

JURISDICTION OF DISTRICT COURT.

Under section 2 of the Indian Divorce Act 1869 a District Court has jurisdiction to make a decree for dissolution of marriage upon being satisfied that the adultery charged has been committed in India without going into evidence as to the place of the marriage of the parties(*i*).

FOREIGNER RESIDING IN INDIA.

The Courts in India have jurisdiction to grant relief to a foreigner domiciled in his native land and married in India if he resided in India at the time of presenting the petition.

On a petition by a wife for dissolution of marriage it appearing that the husband was a subject of the United States of America and domiciled in that country and that the marriage was celebrated and both parties resided in India up to January 1923, until which time the married life lasted (when the husband had left for America where he since remained), proof was given of adultery and cruelty committed within the jurisdiction of the Court sufficient to entitle the petitioner to a decree *nisi;* it was held that the Court had jurisdiction to pass the decree. The result was that the decree would hold good in India, but that everywhere else the parties remained legally married(*j*).

The difficulty has been obviated by the amendment of the section which makes domicil in India essential to found jurisdiction under this Act.

(*h*) *Goulder* v. *Goulder* (1892) P. 240; 61 L.J.P.&D. 117.

(*i*) *Kyte* v. *Kyte and Cooke* (1896) 20 Bom. 362.

(*j*) *Giordano* v. *Giordano* (1913) 40 Cal. 215. *Millerv. Miller* (1925) 52 Cal. 566.

TO MAKE DECREE OF NULLITY.

Matrimonial residence within the jurisdiction is sufficient to give the Court power to declare a bigamous marriage null and void, even though the domicil of the respondent might be and the *de facto* marriage was celebrated outside British India *(k)*.

The jurisdiction to entertain a suit for the declaration of a nullity of marriage depends not on the domicil of parties but on the place where the marriage is celebrated. Domicil could not be the test of jurisdiction, for the domicil of the woman may depend on the very point demanding decision, namely, the validity of the marriage *(l)*. The Court should find on the question whether the marriage was solmnised in India and the date on which it was solemnised *(m)*. It is obvious that no civilised state can allow its domiciled subjects or citizens by making a temporary visit to a foreign country, to enter into a contract to be performed in the place of domicil if the contract is forbidden by the law of the place of domicil as contrary to religion or morality or to any of its fundamental institution *(n)*.

For the grounds on which marriages may be declared null and void—see notes to section 19.

Interpretation-clause.

3. In this Act, unless there be something repugnant in the subject or context,—

"High Court."

(*l*) "High Court" means,—

in any Regulation Province—the Court there established under the Act of the twenty-fourth and twenty-fifth of Victoria, Chapter one hundred and four;

(*k*) *Roberts (falsely called Brennan)* v. *Brennan* (1902) P. 143.
(*l*) *Dicey—Conflict of Laws.*
(*m*) *Singrai* v. *Puraigi Santhalni* (1920) 31 C.L.J. 340.
(*n*) *Brook* v. *Brook* (1861) 9 H.L. Cas. 193.

in the territories for the time being subject to the government of the Lieutenant-Governor of the Punjab—the High Court of Judicature at Lahore;

in Burma—the High Court of Judicature at Rangoon:

in Oudh—the Chief Court of Oudh:

in Sind—the Chief Court of Sind.

and in any other Non-Regulation Province and in any place in the dominions of the Princes and States of India in alliance with Her Majesty—the High Court or Chief Court to whose original criminal jurisdiction the petitioner is for the time being subject, or would be subject if he or she were an European British subject of Her Majesty:

In the case of any petition under this Act, "High Court" is that one of the aforesaid Courts within the local limits of whose ordinary appellate jurisdiction, or of whose jurisdiction under this Act, the husband and wife reside or last resided together:

"District Judge".

(2) "District Judge" means,—

in the Regulation Provinces and in Oudh—a Judge of a principal Civil Court of original jurisdiction;

in the Non-Regulation provinces other than Oudh, Sind and Burma—a Commissioner of a Division:

in Burma and Sind a Judge of a District Court; and in any place in the dominions of the Princes and States aforesaid—such officer as the Governor General of India in Council

shall from time to time appoint in this behalf by notification in the Gazette of India, and, in the absence of such officer, the High Court in the exercise of its original jurisdiction under this Act:

"District Court."

(3) "District Court" means, in the case of any petition under this Act, the Court of the District Judge within the local limits of whose ordinary jurisdiction, or of whose jurisdiction under this Act, the husband and wife reside or last resided together:

"Court."

(4) "Court" means the High Court or the District Court, as the case may be:

"Minor Children."

(5) "Minor children" means, in the case of sons of Native fathers, boys who have not completed the age of sixteen years, and, in the case of daughters of Native fathers, girls who have not completed the age of thirteen years: In other cases it means unmarried children who have not completed the age of eighteen years:

"Incestuous adultery."

(6) "Incestuous adultery" means adultery committed by a husband with a woman with whom, if his wife were dead, he could not lawfully contract marriage by reason of her being within the prohibited degrees of consanguinity (whether natural or legal) or affinity:

"Bigamy with adultery."

(7) "Bigamy with adultery" means adultery with the same woman with whom the bigamy was committed:

"Marriage with another woman."

(8) "Marriage with another woman" means marriage of any person, being married, to any other person, during the life of

the former wife, whether the second marriage shall have taken place within the dominions of Her Majesty or elsewhere:

(*9*) **"Desertion" implies an abandonment against the wish of the person charging it; and** "Desertion."

(*10*) **"Property" includes in the case of a wife any property to which she is entitled for an estate in remainder or reversion or as a trustee, executrix or administratrix; and the date of the death of the testator or intestate shall be deemed to be the time at which any such wife becomes entitled as executrix or administratrix.** "Property."

'RESIDE'.

The word "reside" in section 3 (1) and (3) has no technical meaning and must be taken to be used in its ordinary sense (*p*). It must in each case be decided with reference to its own circumstances. It conveys the idea, if not of permanence of some degree of continuance. That the residence to which the Indian Divorce Act points must be something more than occupation during occasional and and casual visits within the local limits of the Court, more specially where there is a residence outside those limits marked with a continual measure of continuance (*q*). It also depends upon the intention of the legislature in framing the particular provision in which the word is used (*r*).

'Reside' is to dwell permanently or for a length of time. To have one's dwelling or home. A dwelling is the place where a man lives, and which he considers his home for the time being. It is constituted by actual occupancy

(*p*) *Wilkinson* v. *Wilkinson* (1923) 47 Bom. 843; 25 Bom.L.R. 945.
(*q*) *Banerji* v. *Banerji* (1899) 3 C.W.N. 250.
(*r*) *Mahomed Skuffli* v. *Laldin Abdulla* (1878) 3 Bom. 227. *Ramchandra* v. *Keshav* (1882) 6 Bom. 100.

coupled with an intention to give the character of a certain permanency to such occupancy. If a man has a family dwelling in some place, but occasionally occupies a house and sleeps in another place, his residence will be in the former and not the latter place (*s*). It is not essential for residence that the parties should have a house of their own. It will be sufficient to find the place where the parties both lived together (*t*). If a man has a dwelling place in a certain place, a mere temporary absence, with the fixed intention of returning, will not alter the character of his residence in the former place (*u*), and a man who has a fixed dwelling in the plains does not the less "dwell" there according to the proper and legal construction of the word, because for health or pleasure he passes the hot season on the hills (*v*).

The parties to a suit were married in Ireland in 1847. In 1872 respondent came over to England with the alleged intention of purchasing a medical practice but almost immediately returned to Ireland. The petition and citation were served upon him while lodging in London. It was held that the respondent had not acquired a residence in the country and the jurisdiction of the Court did not attach (*w*). But where parties were resident in England at the beginning of the suit the Court had jurisdiction to grant the wife judicial separation on the ground of her husband's cruelty although the domicil of the parties was foreign and although the acts of cruelty were committed abroad (*x*).

(*s*) *Walsh* v. *Walsh* (1927) 29 Bom.L.R. 308.
(*t*) *Gopal Chunder Sircar* v. *Kurnodar Mooshee* (1867) 7 W.R. 349
(*u*) *Whethorne* v. *Thomas* (1846) 7 M.&G. 1.
(*v*) *Orde* v. *Skinner* (1880) L.R. 7 I.A. 204.
(*w*) *Burton* v. *Burton* (1873) 21 W.R. 648.
(*x*) *Armytage* v. *Armytage* (1898) P. 178; 78 L.T. 680. See *Aughinelli* v. *Aughinelli* (1918) P. 247.

The practice of the Bombay High Court has been to accept as sufficient foundation for the jurisdiction a residence of both parties within the jurisdiction at the time of the filing of the petition notwithstanding that the parties were then residing separately and not together (*y*). A mere temporary sojourn in a place, there being no intention of remaining there, will not amount to 'residence' in that place within the meaning of the section (*z*). The residence must be *bona fide* and not of a mere casual traveller. Nor must it be a mere colourable residence for the purpose of obtaining relief under the Act (*a*). If in a suit for dissolution of marriage where at the time of the presentation of the petition the respondent does not reside within the jurisdiction of the Court, the jurisdiction of the Judge and the right of the petitioner to petition him will depend on where the parties 'last resided together' (*b*); the absence of the respondent from India at such time being immaterial (*c*).

"Last Resided Together"—

The High Court has jurisdiction to hear a petition for divorce where the parties last resided together outside its jurisdiction, but at the date of the presentation of the petition are residing within its jurisdiction separately from each other. The word "together" in section 3(1) of the Indian Divorce Act governs only the words "last resided" and not the word 'reside' (*d*), and if the parties last resided together within its jurisdiction the fact that

(*y*) *Borgonha* v. *Borgonha* (1920) 44 Bom. 924; 22 Bom.L.R. 361.
(*z*) *Flowers* v. *Flowers* (1910) 32 All. 203. See *Wilkinson* v. *Wilkinson* (1923) 47 Bom. 843, S.B. 25 Bom.L.R. 945.
(*a*) *Nusserwanji Wadia* v. *Eleonora Wadia* (1913) 38 Bom. 125. 15 Bom. L.R. 593. See *Lee* v. *Lee* (1924) 5 Lah. 147.
(*b*) *Wingrove* v. *Wingrove* (1870) 14 W.R. 416.
(*c*) *Thorton* v. *Thorton* (1886) 10 Bom. 422.
(*d*) *Bargonha* v. *Bargonha* (1920) 22 Bom. L.R. 361. *Murphy* v. *Murphy* (1920) 22 Bom. L.R. 1077; 45 Bom. 547.

after residing together within the jurisdiction of the Court they resided somewhere else outside the jurisdiction it would not affect the Court's jurisdiction where they last resided together to entertain the suit, *(e)*. In a petition for dissolution of marriage, where the husband and wife had no permanent residence, but last lived together in a Hotel at Bombay for the greater portion of a month, the husband being then on leave from active service in Mesopotamia it was held that there was sufficient residence within the meaning of the Act to give the Court jurisdiction to entertain the suit *(f)*.

DISTRICT JUDGE.

The Political Resident at Aden is neither a District Judge nor the Commissioner of a Division and has no jurisdiction under this act *(g)*. In Burma the Judge of a Divisional Court is a District Judge within the purview of this section *(h)*; and the Judicial Commissioner of Sind, the Receiver of Rangoon or of Akyab and the Judicial Commissioner of Oudh is a District Judge under this Act.

A District Judge cannot under section 16 of the Bombay Civil Courts Act transfer to the Assistant Judge for trial a suit for dissolution of the marriage under the provisions of this Act *(i)*.

PROHIBITED DEGREES.

The prohibited degrees are those contained in the Table published by the Governor-General in Council and set forth in Appendix A. A person is restrained from

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(e) *De Souza* v. *De Souza* (1935) 37 Bom.L.R. 57.
(f) *Bright* v. *Bright* (1909) 36 Cal. 964. *Ritchson* v. *Ritchson* (1934) 38 C.W.N. 347; A.I.R. (1934) Cal. 570.
(g) *Mouna* v. *Mouna* (1913) 37 Bom. 57; 14 Bom.L.R. 872.
(h) *Hardinge* v. *Hardinge*, 19 I.C. 53, F.B.
(i) *French* v. *French* (1915) 39 Bom. 136, F.B. 17 Bom.L.R. 754.

marriage as well with illegitimate as with legitimate relations(*j*). Such marriages are void wherever contracted even when both parties are fully cognizant of the impediment(*k*).

The Indian Statutes relating to the marriage of Christians in India do not relax the general law of marriage with regard to British subjects of European origin. An impediment to marriage within prohibited degrees which is ordinarily imposed upon such British subjects by their personal law is not removed by a customary law of local observance or a dispensation under the authority of the Roman Catholic Church or any other religious community(*l*).

INCESTUOUS ADULTERY.

As to the persons with whom a man is forbidden to marry, see notes to section 19, "prohibited degrees of consanguinity or affinity". Both legitimate and illegitimate relations are included in this definition (*m*).

BIGAMY.

It is the offence of going through a form of marriage, during the existence of a former marriage, and is punishable in Great Britain under section 57 of the Offences Against the Person Act, 1861, and in India under section 494 of the Indian Penal Code. It makes no difference that the second marriage took place abroad, or that it was *ab initio* void provided the offender was a British subject, but it is essential that the first marriage should be good. A person is not guilty of bigamy who remarries when he or

(*j*) See *Reg.* v. *Chadwic* (1847) 11 Q.B. 173. *Reg.* v. *Brighton (Inhabitants)* (1861) B.&S. 447; 5 L.T. 56. *Horner* v. *Horner* (1799) 1 Hag. Con. Cas. 352; *Woods* v. *Woods* (1840) 2 Cur. 521.

(*k*) *Andrews (otherwise Ross)* v. *Ross* (1888) 14 P.D. 15; 59 L.T., 900.

(*l*) *Peal* v. *Peal* (1931) P. 97.

(*m*) *Thompson* v. *Thompson* (1912) 39 Cal. 395.

she has not heard of a first wife or husband for seven years, and does not know her or him to be alive.

A. was baptised in infancy into the Roman Catholic Church, but subsequently relapsed into Hinduism and was married to a Hindu. Her Hindu husband afterwards discarded her and A. was readmitted into the Roman Catholic Church and married by a priest to a Roman Catholic during the lifetime of her Hindu husband. It was held that A.'s marriage with the Hindu was subsisting and valid at the time of her Christian marriage (*n*). In considering the question in India whether a previous marriage of one of the parties is or is not subsisting, the Court must apply the law in India applicable to that marriage at the time (*n* [1]). If a person having a wife living goes through the ceremony of marriage with another woman, who is within the prohibited degrees of affinity so that the second marriage, even if not bigamous, would have been void, he would still be guilty of the offence of bigamy (*o*). And the offence of bigamy would be complete even if the second marriage was celebrated beyond the King's Dominions (*p*). Two English persons married in England, the husband afterwards went to Kansas in the United States and after an interval of a year, presented a petition and obtained a divorce by reason of his wife's desertion. He then married again. The wife had received no notice of the petition. It was held that his domicil at the time of the divorce was English and therefore the divorce was null and void and he had committed bigamy (*q*).

(*n*) *Re Millard* (1887) 10 Mad. 218.

(*n* [1]) *Khambatta* v. *Khambatta* (1934) 36 Bom. L.R. 1021.

(*o*) *R.* v. *Allen* (1872) L.R. 1 C.C.R. 367; 26 L.T. 664.

(*p*) *Russel's (Earl) Case* (1901) A.C. 446; 85 L.T. 253; 20 Cox. C. C. 51 (H. L.).

(*q*) *Briggs* v. *Briggs* (1880) 5 P. D. 163; 42 L. T. 662.

Bigamy with adultery is established by proof of the subsequent marriage and co-habitation, although such subsequent marriage is null and void on the ground of consanguinity (*r*). Proof of the performance of the marriage ceremony and if the bigamy took place abroad or in a Colony, proof of the marriage law of that country is necessary (*s*); the validity of a foreign marriage being proved by the evidence of a professional lawyer or of a person who is to be deemed by reason of his office to be skilled in the law of the country where it was celebrated (*t*).

R. was married to his wife at the British Consular office at Cairo in 1919, and some months afterwards he went through the ceremony of marriage with D., at a registry office in London. R. was indicted for bigamy in marrying D. during the lifetime of his wife. R. contended that the marriage at Cairo was not binding. The certificate stated that the marriage ceremony was performed by the Acting British Consul. The question was whether that ceremony was valid and that depended on the interpretation of the Foreign Marriage Act, 1892. It had not been shown whether the Acting British Consul had a warrant from a Secretary of State under that Act to solemnise marriages nor whether an Acting Consul came within the definition of "Consul" in the Act and the Court held that the marriage in Cairo had not been proved (*u*).

MARRIAGE WHEN GOVERNED BY *LEX LOCI CONTRACTUS*.

The rule that the *lex loci contractus* of a marriage establishes its validity, requires this qualification, namely,

(*r*) *Reg.* v. *Penson* (1833) 5 C.&P. 412. Cf. *Gurbaksh Singh* v. *Shama Singh* (1876) 19 P. R. Cr. Jugt.
(*s*) *Burt* v. *Burt* (1860) 2 Sw. & Tr. 88; 29 L. J. P. & M. 133.
(*t*) *R.* v. *Moscovitch* (1927) 20 Cr. App. Rep. 121; 28 Cox. C.C. 442; 138 L.T. 183. See *Hamilton* v. *Hamilton* (1901) 5 C.W.N. clix.
(*u*) *R.* v. *Raven and Dellow* (1920) 84 J.P. 139.

where the law of a country, forbids marriage under any particular circumstances, the prohibition follows the subjects of that country wherever they may go (*v*). But the *lex loci contractus* as to marriage will not prevail when either of the contracting parties is under a legal incapacity by the law of the domicil; and, therefore, a second marriage performed in Scotland or a Scottish divorce *a vinculo* from an English marriage between parties domiciled in England at the time of such marriage and divorce is null (*w*). Any incapacity of either a man or a woman which though recognised and enforced by the law of the domicil of either is of a kind to which the Courts of England refuse recognition does not render a marriage celebrated in England invalid on account of such incapacity. A foreigner or a British subject domiciled abroad who enters into a contract of marriage with an English woman domiciled in England, a marriage which would be recognised by the law of England as valid if contracted between persons domiciled in that country, does not carry with him any disability of a personal character imposed by the law of his domicil so as to preclude him from contracting a valid marriage with her in England (*x*). Where a marriage of English subjects was celebrated abroad, not according to the *lex loci* the marriage was held to be invalid (*y*), because the validity of a marriage celebrated in a foreign country must be determined in an English Court by the *lex loci* where the marriage is solemnised. On a plea of coverture where the parties who were British subjects, were married in France, and if the marriage would not be valid in that country, it would not be valid

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(*v*) *Frenton* v. *Livingstone* (1859) 33 L.T.O.S. 355; 7 W.R. 671.
(*w*) *Conway* v. *Beasley* (1831) 3 Hag. Ecc. 639; 162 E.R. 1292.
(*x*) *Chetti* v. *Chetti* (1909) P. 67.
(*y*) *Middleton* v. *Janverin* (1802) 2 Hag. Con. 437; 161 E.R. 797.

in Great Britain (*z*). A marriage between a British subject domiciled in England and a female ward of Court was celebrated in the presence of the British Consul and the English Church at Antwerp by a clergyman of the Church of England who had been appointed Chaplain to the Church and was paid by the British Government, still the marriage was held invalid on the ground that certain ceremonies prescribed by the law of Belgium had not been observed (*a*).

BIGAMY WITH ADULTERY.

The adultery committed must be with the same woman with whom the bigamy was committed (*b*). In order to establish the charge of bigamy with adultery, a mere proof of a ceremony of marriage with a certain third person would not suffice. Substantive proof that adultery has also been committed with that person is absolutely necessary. In *Ellam* v. *Ellam* (*c*) all that was proved was that the respondent had gone through a form of marriage with another woman in America but there was no evidence of any subsequent co-habitation between the parties to the bigamous marriage and the Court held that the mere proof of the ceremony of marriage was not sufficient to satisfy the words "bigamy with adultery". Adultery will not be inferred from bigamy alone being charged in the petition(*d*). The bigamy must be proved, the mere proof of a conviction of bigamy not being sufficient (*e*).

(*z*) *Lacon* v. *Higgins* (1822) Dow. & Ry. 38; 3 Stark. 178.
(*a*) *Kent* v. *Burgess* (1840) 11 Sim. 361; 59 E. R. 913.
(*b*) *Horne* v. *Horne* (1858) 27 L. J. P. & M. 50.
(*c*) (1889) 58 L. J. P. & M. 56.
(*d*) *Bonaparte* v. *Bonaparte* (1891) 65 L. T. 795.
(*e*) *March* v. *March* (1858) 28 L. J. P. & M. 30; 1 Sw. & Tr. 550.

II. JURISDICTION.

Matrimonial jurisdiction of High Courts to be exercised subject to Act.

4. The jurisdiction now exercised by the High Courts in respect of divorce *a mensa et toro*, and all other causes, suits and matters matrimonial, shall be exercised by such Courts and by the District Courts subject to the provisions in this Act contained, and not otherwise: except so far as relates to the granting of marriage-licenses, which may be granted as if this Act had not been passed.

xception.

'Jurisdiction' is the power of a Court to hear and determine a cause; to adjudicate and exercise any judicial power in relation to it; in other words, by 'jurisdiction' is meant the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision (*f*).

Numerous attempts have been made to define the term 'jurisdiction' which has been stated to be "the power to hear and determine issues of law and fact"; "the authority by which the judicial officers take cognizance of and decide causes"; "the authority to hear and decide a legal controversy"; "the power to hear and determine the subject matter in controversy between parties to a suit and to adjudicate and exercise any judicial power over them"; "the power to hear, determine and pronounce judgment on the issues before the Court"; "the power or authority which is conferred upon a Court by the Legislature to hear and determine causes between parties and to carry the judgments into effect"; "the power to inquire into the facts, to apply the law, to pronounce the judgment and to carry it into execution"(*g*).

(*f*) *Sukhlal* v. *Tara Chand* (1905) 33 Cal. 68 at p. 71, F.B.
(*g*) *Ashutosh* v. *Behari Lal* (1907) 35 Cal. 61. *Gurdeo* v. *Chandrikah* (1907) 36 Cal. 1931.

The jurisdiction of the Court may be qualified or restricted by a variety of circumstances. Thus, the jurisdiction may have to be considered with reference to place, value and nature of the subject-matter. The power of a tribunal may be exercised within defined territorial limits. Its cognizance may be restricted by a variety of circumstances. It may be competent to deal with controversies of a specified character, for instance, testamentary and matrimonial causes, acquisition of lands for public purposes, record of rights as between landlords and tenants(*h*).

A judgment pronounced by a Court without jurisdiction is void, subject to the well-known reservation that when the jurisdiction of a Court is challenged, the Court is competent to determine the question of jurisdiction, though the result of the inquiry may be that it has no jurisdiction to deal with the matter brought before it (*i*).

Since jurisdiction is the power to hear and determine it does not depend either upon the regularity of the exercise of that power or upon the correctness of the decision pronounced, for the power to decide necessarily carried with it the power to decide wrongly as well as rightly (*j*).

The Court has to exercise such jurisdiction only as is comprised within the provisions of this Act (*k*) and a suit for a declaration regarding the validity or otherwise of a marriage is not maintainable in the exercise of the Court's matrimonial jurisdiction (*l*).

(*h*) *Hriday Nath Roy* v. *Ramchandra* (1921) 48 Cal. 138 at pp. 146-147, F.B.
(*i*) *Rashmoni* v. *Ganada* (1914) 20 Cal. L.J. 213 at p. 217; 19 C. W.N. 84.
(*j*) *Malkurjun* v. *Narjari* (1900) 25 Bom. 337 at p. 347, P.C., L.R. 27 I.A. 216.
(*k*) *Lish* v. *Lish*, A.I.R. (1923) Pat. 301.
(*l*) *Ibid.*

The Courts in India have no jurisdiction to entertain a suit in respect of "jactitation of marriage" *i.e.* a suit to enforce perpetual silence on the person who falsely gives out that he or she is married to the complainant (*m*).

Prior to the passing of this Act the High Courts in India exercised jurisdiction, in matrimonial causes conferred upon them under section 9 of the High Courts Act and Cl. 35 of the amended Letters Patent of the High Court and extended to all subjects of the Crown professing the Christian religion (*n*). But the ecclesiastical jurisdiction of the Supreme Court of Bombay was limited to persons described and distinguised by the appellation of British subjects, residing in the Town and Island of Bombay and the Factories subordinate thereto and all the territories dependent upon the Government of Bombay. This jurisdiction could not, however, be exercised over Parsis (*o*). By Cl. 35 of the Amended Letters Patent of the High Court that decision was given effect to by limiting the jurisdiction within the Presidency to "matters matrimonial between Our subjects professing the Christian religion" (*p*). As regards the jurisdiction of the Calcutta High Court to admit a petition for divorce where the parties reside within 24 Parganas, see *Gasper* v. *Gonsalves*(*q*). The jurisdiction conferred by the Indian Divorce Act on Courts of India to make decrees for dissolution of marriage on the basis of residence was, before the amendment of the section in 1917, not restricted to the cases of persons domiciled in India and such jurisdiction was not beyond the authority given by the Indian Councils Act(*r*).

(*m*) *Matrimonial Causes Act, 1857*, section 6.
(*n*) *Lopez* v. *Lopez* (1886) 12 Cal. 726; *Elleneora Wadia* v. *Nusserwanji Wadia* (1914) 38 Bom. 125.
(*o*) *Ardeseer* v. *Perozboye* (1856) 6 Moo. I.A. 348.
(*p*) *Wadia* v. *Wadia* (1914) 38 Bom. 125 at pp. 145-146.
(*q*) (1874) 13 B.L.R. 109.
(*r*) *Nirupama Debi* v. *Prince Victor Nityendra Narain* (1926) 53 Cal. 282.

OBJECTIONS TO JURISDICTION.

"No objection as to the place of suing shall be allowed by any appellate or revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, and unless there has been a consequent failure of justice" (*s*).

Where the Judge has no inherent jurisdiction over the subject matter of a suit, the parties cannot by their mutual consent, convert it into a proper judicial process although they may constitute the Judge their Arbiter, and be bound by his decision on the merits when these are submitted to him. But when in a case which the Judge is not competent to try, the parties without objection join issue and go to trial upon the merits, the defendant cannot subsequently dispute his jurisdiction upon the grounds that there were irregularities in the intitial procedure which if objected to at the time would have led to the dismissal of the suit (*t*), and if any of the parties to the suit put in an absolute appearance it is too late to plead to the jurisdiction of the Court (*u*). The respondent may in his answer on the merits allege facts raising the question of jurisdiction (*v*). It is not absolutely necessary to raise the question of domicil in the pleadings and the Court can allow such questions to be raised at the hearing if the evidence adduced points to a doubt as to the Court's jurisdiction (*w*). If the jurisdiction of the Court is disputed, a party served may enter an "Appearance under Protest".

(*s*) Code of Civil Procedure, section 21.
(*t*) *Ledgard* v. *Bull* (1887) 9 All. 191 at p. 203, P.C.; 13 I.A. 134.
(*u*) *Zyclinski* v. *Zyclinski* (1862) 2 Sw. & Tr. 420; 3 L.J.P.&M. 37. *Garstin* v. *Garstin* (1865) 4 Sw. & Tr. 73.
(*v*) *Wilson* v. *Wilson and Howell* (No. 1) L.R. 2 P. & D. 341; 41 L.J.P.&M.1.
(*w*) *Parkinson* v. *Parkinson* (1893) 69 L.T. 53.

This must state concisely the grounds of protest and the party must forthwith proceed by summons to obtain directions as to the decisions on the questions raised. A preliminary issue may then be ordered to be tried with or without stay of the proceedings in the cause or an order may be made for the determination of the matters in question at the hearing the of cause (*x*). A respondent husband who appears under protest may be ordered to furnish security for his wife's costs (*y*) and to pay alimony *pendente lite* (*z*).

A District Judge ought in all cases to inquire into, and set out in his judgment, the facts relied on as giving jurisdiction to the Court to pronounce a decree of dissolution of marriage (*zz*).

PERSONS DOMICILED IN ENGLAND OR SCOTLAND.

Prior to 1926 the Indian High Courts had no jurisdiction to dissolve the marriage of persons domiciled in England or Scotland (*zzz*). This difficulty led to the passing by the British Parliament of the Indian and Colonial Divorce Jurisdiction Act, 1926 (16 and 17 Geo. V. C. 40).

(*x*) Rule 16 B of the Matrimonial Causes Rules, 1924. See *Reira* v. *Reira* (1914) 112 L.T. 223. *Lowenfeld* v. *Lowenfeld* (1903) P. 177, C.A.

(*y*) *Smith* v. *Smith* (1923) P. 128. *Johnstone* v. *Johnstone* (1929) P. 165, C.A.

(*z*) *Ronalds* v. *Ronalds* (1875) L.R. 3 P.& D. 259.

(*zz*) *Durand* v. *Durand* (1870) 14 W.R. 416. *Bai Kanku* v. *Shiva Toya* (1893) 17 Bom. 624, F.B.

(*zzz*) *Wilkinson v. Wilkinson* (1923) 47 Bom. 843, F.B; 25 Bom. L.R. 946; (1923) A.I.R. Bom. 321.

5. Any decree or order of the late Supreme Court of Judicature at Calcutta, Madras or Bombay sitting on the ecclesiastical side, or of any of the said High Courts sitting in the exercise of their matrimonial jurisdiction, respectively, in any cause or matter matrimonial, may be enforced and dealt with by the said High Courts, respectively, as hereinafter mentioned, in like manner as if such decree or order had been originally made under this Act by the Court so enforcing or dealing with the same.

Enforcement of decrees or orders made heretofore by Supreme or High Court.

6. All suits and proceedings in causes and matters matrimonial, which when this Act comes into operation are pending in any High Court, shall be dealt with and decided by such Court, so far as may be, as if they had been originally instituted therein under this Act.

Pending suits.

7. Subject to the provisions contained in this Act, the High Courts and District Courts shall, in all suits and proceedings hereunder, act and give relief on principles and rules which, in the opinion of the said Courts, are as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being acts and gives relief:

Court to act on principles of English Divorce Court.

Provided that nothing in this section shall deprive the said Courts of jurisdiction in a case where the parties to a marriage professed the Christian religion at the time of the occurrence of the facts on which the claim to relief is founded.

RELIEF ON PRINCIPLES AND RULES OF THE ENGLISH COURT.

The decisions of the Divorce Court in England must be taken to be a guide by the Courts in India under the

Indian Divorce Act, except when the facts of any particular case arising out of the peculiar circumstances of Anglo-Indian life, constitute a situation such as the English Courts are not likely to have had in view (*a*), and the principles and rules which obtain in the Divorce Court in England are to be applied as nearly as may be in India(*b*). In considering in a divorce suit in India, the question whether a previous marriage of one of the parties is or is not still subsisting, the Court must apply the law in India applicable to that marriage at that time(*c*). As the Courts in India have to grant relief on the principles and rules of the English Divorce Court, a divorce cannot be decreed on the uncorroborated testimony of the petitioner as to adultery and cruelty(*d*). The order which is made by the Courts in India against a husband for giving security for the wife's costs of the suit is based on the English Divorce Rules having regard to this section of the Act, which governs the practice of the Indian Courts(*e*). The principles and rules are not merely rules of procedure such as the rules which regulate appeals but are the rules and principles which determine the cases in which the Court will grant relief to the parties appearing before it, or refuse that relief—rules of *quasi* substantive rather than of mere objective law (*f*).

The expression " rules and principles " points rather to the rules and principles on which the Court deals with these matrimonial cases in requiring a certain degree of evidence and other cognate matters (*g*).

(*a*) *Fowle* v. *Fowle* (1879) 4 Cal. 260.
(*b*) *Hay* v. *Gordon* (1872) 21 W.R. 11. *Joseph* v. *Ramama* (1922) 45 Mad. 982, F.B.
(*c*) *Khambatta* v. *Khambatta* (1934) 36 Bom. L.R. 1021.
(*d*) *Joseph* v. *Ramama*, supra.
(*e*) *Mayhew* v. *Mayhew* (1895) 19 Bom. 293.
(*f*) *A.* v. *B.* (1898) 22 Bom. 612 at p. 615. *Miller* v. *Miller* (1925) 52 Cal. 566.
(*g*) *Wilkinson* v. *Wilkinson* (1923) 47 Bom. 843; 25 Bom. L.R. 945, F.B.

This section is a residuary section intended to provide for any matters which by inadvertance or otherwise are not dealt with in the Act. It is not unusual in statutory drafting to insert provisos of this nature *ex majore cautela.* more especially where an attempt is being made to codify in this country an unfamiliar branch of English law.

Extraordinary jurisdiction of High Court.

8. The High Court may, whenever it thinks fit, remove and try determine as a Court of original jurisdiction any suit or proceeding instituted under this Act in the Court of any District Judge within the limits of its jurisdiction under this Act.

The High Court may also withdraw any such suit or proceeding, and transfer it for trial or disposal to the Court of any other such District Judge.

The provisions of this section are analogous to those of section 24 (1) (a) and (b) of the Civil Procedure Code and apply to Chartered High Courts in the exercise of their ordinary original civil jurisdiction (*h*). It gives a general power of transfer of all suits, appeals and other proceedings. It may be exercised at any stage of the proceedings and even *suo motu* without an application. The Court will consider the balance of convenience (*i*). (See Clause 13 of the Letters Patent of the Bombay, Calcutta and Madras High Courts).

A decree for dissolution was passed by the Divisional Court at Nagpur and was confirmed by the High Court of Bombay. Still the Bombay High Court could not entertain an application for alimony or maintenance in the same suit as the Divisional Court at Nagpur was not subordinate to the Bombay High Court within the meaning of section

(*h*) *Mahindra Chandra* v. *Lal Mohan* (1929) 56 Cal. 940; A.I.R. (1929) Cal. 358.

(*i*) *Brojo Gopal* v. *Lakshimoni* (1927) 54 Cal. 607; A.I.R. (1927) Cal. 791.

24(1) (a) of the Civil Procedure Code, nor could the High Court transfer the petition to the Divisional Court (*j*).

Reference to High Court.

9. When any question of law or usage having the force of law arises at any point in the proceedings previous to the hearing of any suit under this Act by a District Court or at any subsequent stage of such suit, or in the execution of the decree therein or order thereon,

the Court may, either of its own motion or on the application of any of the parties, draw up a statement of the case and refer it, with the Court's own opinion thereon, to the decision of the High Court.

If the question has arisen previous to or in the hearing, the District Court may either stay such proceedings, or proceed in the case pending such reference, and pass a decree contingent upon the opinion of the High Court upon it.

If a decree or order has been made, its execution shall be stayed until the receipt of the order of the High Court upon such reference.

The provisions of this section are analogous to those of Order XLVI Rules 1 and 2 of the Civil Procedure Code.

A reference under this section should only be made when a judge entertains a reasonable doubt on a question of law or usage having the force of law. And a judge cannot ordinarily entertain a reasonable doubt on a point clearly decided by the rulings of the High Court to which he is subordinate, unless the authority of the decision can be questioned by virtue of anything said or decided in the

(*j*) *Wallace* v. *Wallace* (1916) 40 Bom. 109; 17 Bom. L.R. 948.

Privy Council (*k*). If the Court has no reasonable doubt it should not make a reference merely because it is asked to make one(*l*).

III—DISSOLUTION OF MARRIAGE.

When husband may petition for dissolution.

10. Any husband may present a petition to the District Court or to the High Court, praying that his marriage may be dissolved on the ground that his wife has, since the solemnization thereof, been guilty of adultery.

When wife may petition for divorce.

Any wife may present a petition to the District Court or to the High Court, praying that her marriage may be dissolved on the ground that since the solemnization thereof, her husband has exchanged his profession of Christianity for the profession of some other religion, and gone through a form of marriage with another woman;

or has been guilty of incestuous adultery,

or of bigamy with adultery,

or of marriage with another woman with adultery,

or of rape, sodomy or bestiality,

or of adultery coupled with such cruelty as without adultery would have entitled her to a divorce *a mensa et toro*,

or of adultery coupled with desertion, without reasonable excuse, for two years or upwards.

Contents of petition.

Every such petition shall state, as distinctly as the nature of the case permits, the facts on which the claim to have such marriage dissolved is founded.

(*k*) *Bhanaji* v. *De Brito* (1906) 30 Bom. 226.
(*l*) *Dawoodjee* v. *Municipality of Rangoon* (1923) 1 Rang. 220; A.I.R. (1923) Rang. 193.

DISSOLUTION.

Cf: section 27 of the Matrimonial Causes Act, 1857.

Section 176 of the Supreme Court of Judicature (Consolidation) Act, 1925.

The conditions under which a Christian marriage may be dissolved are laid down in this section. It is optional for the petitioner residing within the jurisdiction of a District Court to file the petition either in the District Court or in the High Court, but the High Court has, under section 8 of this Act, power to transfer such a petition to the District Court subordinate to it on the ground of convenience of parties or witnesses or on any other ground.

LIMITATION.

There is no limitation for the dissolution of marriage(*m*), but appeals under the Indian Divorce Act are nevertheless governed by the Limitation Act and Art. 151 would apply to a suit decided by the High Court (*n*). The original jurisdiction of the High Court includes matrimonial jurisdiction (*o*).

"Since the Solemnization of the Marriage—"

As a general rule it is not competent to the husband or the wife to plead illicit intercourse prior to the marriage because the doctrine universally maintained is that marriage operates as an oblivion of all that has passed and as an oblivion of all that can possibly have occurred(*p*). Some of the cases seem to hold that one of the parties is not permitted to prove in the first instance ante-nuptial incontinence in the other either because it would be contrary to

(*m*) See section 29 (3) of the Limitation Act, 1908. *Hay* v. *Gordon* (1872) 18 W.R. 480, P.C. *Williams* v. *Williams* (1878) 3 Cal. 688.

(*n*) *A.* v. *B.* (1898) 22 Bom. 612.

(*o*) *King* v. *King* (1882) 6 Bom. 416. See *Navivahu* v. *Turner* (*Official Assignee*) (1889) 13 Bom. 520, P.C.; 16 I.A. 156.

(*p*) *Weatherley* v. *Weatherley* (1854) 1 Spinks 193; 24 L.T.O.S. 35.

good policy to allow such a course of proof to be pursued or because a person entering marriage is understood to abandon unlawful pleasures(*q*). Yet, in other cases the ante-nuptial and post-nuptial conduct have in the circumstances of those cases been very properly connected together(*r*). And where a woman with whom connection of the husband was pleaded before marriage was continued in the service of the husband after marriage and he was charged to have committed adultery with the very same woman the Court allowed the allegation as it stood in the petition (*s*); for, the existence of a former connection renders a renewal more probable than the commencement of an entirely new connection, but the existence of the former is a totally separate fact and may be true without affording any proof of a subsequent connection(*t*).

ANTE-NUPTIAL INCONTINENCE NOT TO BE PLEADED.

In a petition for divorce on the ground of adultery it is not competent to prove the ante-nuptial incontinence of the respondent even though it and the adultery be charged to have been committed with the same person (*u*).

PROOF OF MARRIAGE.

The necessity of proving the marriage arises, not only from the fact that it is an essential ingredient in the offence alleged, since no violation of matrimonial duty can take place where the matrimonial relation does not exist; but likewise from the consideration, that as divorce is the suspension or dissolution of this relation, if there is no

(*q*) *Graves* v. *Graves* (1842) 3 Cur. Ec. 235; 163 E.R. 714. *Perrin* v. *Perrin* (1822) 1 Add. Ec. 1; 162 E.R. 1.
(*r*) *Weatherley* v. *Weatherley*, supra. *Simmons* v. *Simmons* (1847) 11 Jur. 830.
(*s*) *Weatherley* v. *Weatherley*, supra.
(*t*) *Simmons* v. *Simmons*, supra.
(*u*) *Fitzgerald* v. *Fitzgerald* (1862) 32 L.J.P.&M. 12; 11 W.R. 85

relation subsisting, there is nothing for the divorce to act upon. Marriage is the foundation of the whole proceeding (*v*). In suits for nullity of marriage, as in suits for divorce the marriage sought to be set aside must be proved (*w*). In *Nokes* v. *Milward* (*x*) where the marriage was celebrated in Scotland, and the ground of nullity alleged was that the defendant wife had a former husband living at the time of its celebration, Dr. Swaby after remarking that the direct evidence of the fact of the marriage in respect to which the sentence of nullity was prayed, was not satisfactory, added, "nor is this lack of primary evidence at all compensated for by any secondary proof in the cause as of consummation, cohabitation, mutual acknowledgments, &c. for, even granting such secondary proof to be admissible in the case, which is very doubtful, (it being a case brought *inter vivos* and by the one against the other contracting party) save only in corroboration of other and more direct testimony, namely, that of persons present (there being persons still living vouched to have been present) at the alleged fact of marriage, still, of the little of such secondary proof as appears in the cause, the whole is extra-libellate, and so strictly speaking no proof."

In the case of a marriage solemnised in India the usual mode of proving it for the purpose of a matrimonial suit is for the petitioner to file a certified copy of the marriage certificate with the petition, and at the hearing to testify that he or she was married to the respondent at the time and place mentioned in such certified copy. But the practice though universal, is not necessarily a rule of law, and if the circumstances warrant it, the Court may still

(*v*) *Hammerton* v. *Hammerton* (1828) 2 Hag. Ec 8; 162 E.R. 767.
(*w*) *Aughtie* v. *Aughtie* (1810) 1 Eng. Ec. 72; 1 Phillim. 201; 161 E.R. 961.
(*x*) (1824) 1 Add. Ec. 386; 162 E.R. 336.

hold the marriage proved even in the absence of a certificate (*y*).

A marriage solemnized out of India is ordinarily proved by the production of such documentary evidence as there may be concerning it, and the evidence of the petitioner. Thus, a marriage solemnised in India was allowed by the English Divorce Court to be proved by the production from India Office of a register kept in the custody of of the Secretary of State and by a copy of the entry signed by the Under Secretary of State and sealed with the seal of the Secretary of State, the parties themselves also swearing to the marriage (*z*). Although when the contents of a marriage register are in issue, verbal evidence of these contents is not receivable, yet the fact of the marriage may be proved by the independent evidence of a person who was present at it (*a*). Under section 50 of the Indian Evidence Act an "opinion expressed by conduct" as to the existence of the relationship of one person to another, of any person who as a member of that family or otherwise has special means of knowledge on the subject is a relevant fact; though such opinion is not sufficient to prove marriage in proceedings under the Indian Divorce Act and prosecution under sections 494, 495, 497, or 498 of the Indian Penal Code. In India a marriage is to be proved strictly in the regular way, *i.e.*, that the ceremony of marriage must be proved (*b*). It was, however, pointed out by the Chief Court of the Punjab in *Wadhawa* v.

(*y*) *Carroll* v. *Carroll* (1934) 13 Pat. 129.
(*z*) *Regan* v. *Regan* (1892) 67 L.T. 720. Section 79 of the Indian Evidence Act, 1872.
(*a*) Taylor on Evidence, 11th Edn. Vol. 1, pp. 313 to 314, para 416. See *Jivandas Keshavji* v. *Framji Nanabhai* (1870) 7 Bom.H. C.R. 45 at p. 63.
(*b*) *Empress* v. *Pitamber Singh* (1880) 5 Cal. 566, F.B. *Rathnammal* v. *Manikkam* (1893) 16 Mad. 455, F.B.

Fatteh Muhammad (*c*) that the logical inference from such negative provision is only that in the special proceeding marriage must be proved otherwise than by evidence of opinion only. "It appears to us," observes the learned Judge, "that the English law and the Indian law of evidence are substantially the same (as regards proof of marriage) and that in the former as in the latter the only definite and settled rule is that in certain matrimonial and criminal proceedings marriage must be more strictly proved than in other proceedings, and when marriage is alleged, it must be proved that the parties were actually married and not merely reputed to be married. It must be remembered that marriage is an equivocal expression denoting in our language equally the conjugal relation and the ceremony by which it is commenced, and there are English cases which show that the marriage relation may be proved otherwise, than by opinion or repute in the absence of proof of any ceremony." The Bombay High Court, however, held that in suits for dissolution of marriage strict proof of marriage was not necessary. The mere fact that people apply to a Court for divorce raises a presumption of marriage (*d*), and it is hardly credible that persons should apply for dissolution of marriage which had never taken place (*e*).

GRETNA GREEN MARRIAGE.

In *Patrickson* v. *Patrickson* (*f*) the only evidence of marriage was that the petitioner and respondent had in May 1860 left England together for the purpose of being married at Gretna Green, that they shortly returned and stated that they had been married, and lived together for many years as man and wife; it was held sufficient. But

(*c*) 5 P.R. (1894) Cr. Judgt.
(*d*) *Kyte* v. *Kyte and Cook* (1896) 20 Bom. 362.
(*e*) *Rooker* v. *Rooker and Newton* (1863) 33 L.J.P.&M. 42.
(*f*) (1865) L.R. 1 P. & D. 86; 35 L.J.P. 48; 13 L.T. 567.

the bare assertion of a petitioner is not sufficient proof of marriage to satisfy the requirements of the Act (*g*); the production of a decree of previous matrimonial proceedings between the same parties being considered sufficient evidence of marriage (*h*).

PRESUMPTION OF MARRIAGE.

When a man and woman intend to become husband and wife, and a ceremony of marriage is performed between them by a clergyman competent to perform a valid marriage, presumption in favour of everything necessary to give validity to such a marriage is one of exceptional strength, and unless rebutted by evidence strong, distinct, satisfactory, and conclusive, must prevail (*i*). It is a well-recognised rule of law that when a particular relationship is shown to exist, such as marriage, then its continuance must *prima facie* be presumed (*j*). "The mere co-habitation of a man and woman, of their behaviour in other respects as husband and wife, always affords an inference of greater or less strength that a marriage has been solemnized between them. Their conduct being susceptible of two opposite explanations the Court, giving effect to the presumption of innocence, is bound to assume it to be moral rather than immoral. The law presumes the validity of a marriage ceremoney" (*k*). There is no doubt that general reputation of a marriage may be given *valeat iquantum.* A person living in a particular neighbourhood, say, in New York, may be called to say that the reputation in New York was that A and B were man and wife (*l*). It is not necessary to confine repute and

(*g*) *Rathnammal* v. *Manikkam* (1893) 16 Mad. 455, F.B.
(*h*) *Ledlie* v. *Ledlie* (1895) 22 Cal. 544.
(*i*) *Lopez* v. *Lopez* (1885) 12 Cal. 706, *In re Millard* (1887) 10 Mad. 218. *Piers* v. *Piers* (1849) 3 H.L. Cas. 331.
(*j*) *Bhima* v. *Dhulappa* (1905) 7 Bom. L.R. 95.
(*k*) Woodroffe and Amir Ali's Evidence Act, 9th Edn. p. 830.
(*l*) *Shedden* v. *Patrick*, (1854) 30 L.J.P.&M. 217 at pp. 231–232.

conduct to the family; general reputation among and treatment by, friends and neighbours being receivable as evidence of marriage. It may also be proved by evidence of certain specific facts such as the parties being received into society as man and wife, being visited by respectable families in the neighbourhood, going to churches and public place together and otherwise demeaning themselves in public, and addressing each other, as persons actually married(*m*). If a so-called marriage is no marriage in the place where it is celebrated, it is no marriage at all although the ceremony or proceeding, if conducted in the place of the parties' domicil would be a good marriage(*n*).

IDENTITY OF PARTIES—DECREE OF CONFRONTATION.

It is often important to show what are called the identity and diversity of the parties to an act of sexual intercourse proved; namely, that one of them was the defendant, and the other was not the plaintiff(*o*). To aid this part of the proofs the Ecclesiastical Courts used sometimes to resort to what is termed a 'decree of confrontation', applied for on special grounds. On such a decree it was necessary that the defendant should be produced to a witness who had known her in both characters of wife and adulteress, or to two or more witnesses at the same time who would separately identify her in each character(*p*). Such action by the Court is now obsolete and a respondent must not be sub-

(*m*) *Kay* v. *Duchesse de Vienne* (1811) 3 Camp. 23. *Goodman* v. *Goodman* (1858) 28 L.J.Ch. 745. Re: *Shephard, George* v. *Thyer* (1904) 1 Ch 456; 73 L.J.Ch. 401; 90 L.T. 249.

(*n*) *Berthiaume* v. *Dastous* (1930) A.C. 79; 45 T.L.R. 607, 142 L.T. 54, P.C.

(*o*) *Sullivan* v. *Sullivan* (1824) 2 Add. Ec. 299. *Williams* v. *Williams* (1798) 1 Hag. Con. 299. *Dillon* v. *Dillon* (1842) 3 Curt. Ec. 86. *Hammerton* v. *Hammerton* (1818) 2 Hag. Ec. 8; 162 E.R. 76.

(*p*) *Searl* v. *Price* (1816) 2 Hag. Con. 187.

poenaed merely for purposes of identification(*q*). It is customary now a days to prove identity by photographs where personal identification is not readily available (*r*).

ADULTERY.

Adultery consists in the voluntary sexual intercourse of a married person with a person other than the husband or the wife (*s*).

For adultery to be the foundation for divorce, it must be voluntary. When the party is compelled by force or ravishment; or the wife has carnal knowledge of a man not her husband, through error or mistake, she believing him to be her husband; or when, the wife marries another man through a belief that her former husband is dead and during the continuance of this belief lives in matrimonial intercourse with him; the offence justifying a divorce is not committed. Nor, where the wife is forced against her will to sexual intercourse or is incapable of understanding the nature of the act could she be found guilty of adultery and the husband's petition should be dismissed(*t*). And where the Court was satisfied that the wife had been raped by a man unknown, with the result that she gave birth to a child, there was no adultery and dismissed the husband's petition for divorce(*u*).

PROOF OF ADULTERY.

It is not necessary to prove the direct fact of adultery, nor is it necessary to prove a fact of adultery in time and

(*q*) *Farulli* v. *Farulli and Pederzoli* (1917) P. 28; 116 L.T. 18.
(*r*) *Carter* v. *Carter* (1920) 36 T.L.R. 121. *Hills* v. *Hills and Easton* (1915) 31 T.L.R. 541.
(*s*) *Crawford* v. *Crawford* (1886) 11 P.D. 150. *Long* v. *Long and Johnson* (1890) 15 P.D. 218.
(*t*) *Long* v. *Long and Johnson*, supra. See *Yarrow* v. *Yarrow* (1892) P. 92; 66 L.T. 383.
(*u*) *Clarkson* v. *Clarkson* (1930) 143 L.T. 775; 46 L.T.R. 623.

place: "To lay down any general rule," observes Lopes, L. J., "to attempt to define what circumstances would be sufficient and what insufficient upon which to infer the fact of adultery is impossible. Each case must depend on its own particular circumstances. It would be impracticable to enumerate the infinite evidentiary facts which of necessity are as various as the modifications and combinations of events in actual life. A jury ought to exercise their judgment with caution to apply their knowledge of the world and of human nature to all the circumstances relied on in proof of adultery, and then determine whether those circumstances are capable of any other reasonable solution than that of the guilt of the party sought to be implicated" (*v*)

THE EVIDENCE.

The difficulty most embarrassing in these cases of adultery is generally found to lie in the evidence. A single act of adultery being sufficient to establish a cause, the plaintiff need go no further than show this act by his testimony, and in an aggravated case, though he will not be limited to proving only one act yet will be restrained from going quite uselessly beyond the requirements of the law (*w*).

Adultery is peculiarly a crime of darkness and secrecy; parties are rarely surprised in it and so it not only may, but ordinarily must, be established by circumstantial evidence (*x*), and the testimony must, convince the judicial mind affirmatively that actual adultery was committed; since nothing short of carnal act can lay a foundation for a divorce (*y*). But a fundamental principle never to be lost sight of in these cases is, that the act need not be proved in

(*v*) *Allen* v. *Allen and Bell* (1894) P. 248 at p. 252, C.A. *Gibbs* v. *Gibbs* (1933) 55 All. 597.
(*w*) *Richardson* v. *Richardson* (1827) 1 Hag. Ec. 6; 162 E.R. 487.
(*x*) *Williams* v. *Williams* (1798) 1 Hag. Con. 299; 161 E.R. 559.
(*y*) *Hammerton* v. *Hammerton* (1828) 2 Hag. Ec. 8; 162 E.R. 767.

time and place. "Circumstances," says Lord Stowell, "need not be so specifically proved as to produce the conclusion, that the fact of adultery was committed at that particular hour, or in that particular room; general cohabitation has been deemed enough"(*z*); and it will be sufficient, if the Court can infer that conclusion, as it has often done between persons living in the same house, though not seen in the same bed or in any equivocal situation (*a*).

In a suit for divorce adultery having been committed by the husband with the wife's sister and condoned by the wife; and the sister having afterwards lived in the same house with the husband and the wife; Dr. Lushington observed: "The cohabitation of the husband and the sister of his wife appears to have continued up to the commencement of the cause; for I take it to be clear, that according to the doctrine of this Court, and according to all the principles in similar cases, if it can be once shown that the parties have been cohabiting in an illicit connection, it must be presumed, if they are still living under the same roof, that the criminal intercourse subsists, notwithstanding those who live under the same roof are not prepared to depose to that fact"(*b*). It is generally speaking necessary to prove that the parties were in some place together where the adultery might probably be committed; were it otherwise, it might happen that guilty intention would be mistaken for actual guilt and this would be contrary to all principles of justice as well as to known rules of jurisprudence (*c*). The Court must be satisfied that a criminal attachment subsisted between the parties and that opportunities occur-

(*z*) *Loveden* v. *Loveden* (1810) 2 Hag. Con. 1; 161 E.R. 648. *Caton* v. *Caton* (1849) 13 Jur. 431; 7 Notes of Cases 9. *Bramwell* v. *Bramwell* (1831) 3 Hag. Ec. 618.
(*a*) *Burgess* v. *Burgess* (1817) 2 Hag. Con. 223; 161 E.R. 723.
(*b*) *Turton* v. *Turton* (1830) 3 Hag. Ec. 338; 162 E.R. 1178.
(*c*) *Caton* v. *Caton*, supra.

red when the intercourse in which it is satisfied the parties intended to indulge, might with ordinary facility have taken place(*d*). The Courts have considered the offence established, when unable from the evidence to come to a certain conclusion as to the particular period of time at which it was committed(*e*). Ocular proof is seldom expected, but the proof should be strict, satisfactory and conclusive (*f*). It is physically possible that persons may be in the same bed together without criminal intercourse: Courts of justice, however, cannot proceed on such grounds, finding persons in such a situation as presumes guilt generally they must presume it in all cases attended with these circumstances(*g*).

The rule should be that there must be such proximate circumstances proved, as, by former decisions, or on their own nature and tendency satisfy the legal conviction of the Court that the criminal act has been committed. The Court will look with great satisfaction to the authority of established precedents, but where these fail it must find its way as well as it can, by its own reasoning on the particular circumstances of the case(*h*). It has been found particularly important to show circumstances leading to the adultery, rendering the commission of it probable and the absence of such circumstances in evidence has been considered a strong indication against the party pursuing. It is true that in almost all cases adultery is clandestine, but it is equally true, in the great majority of cases where the parties are cohabiting together, that after the discovery of the fact of adultery, evidence is produced to show that it is

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(*d*) *Davidson* v. *Davidson* (1856) Dea. & Sw. 132 at p. 135; 162 E.R. 526.
(*e*) *Grant* v. *Grant* (1839) 2 Curt. Ec. 16; 163 E.R. 322.
(*f*) *Rix* v. *Rix* (1777) 3 Hag. Ec. 74; 162 E.R. 1085.
(*g*) *Cadogan* (*Lord*) v. *Cadogon* (*Lady*) (1796) Hag. Con. 4, n.; 161 E.R. 649.
(*h*) *Williams* v. *Williams* (1798) 1 Hag. Con. 299; 161 E.R. 559.

probable. This is a species of evidence the Court always looks for; indeed it requires wherever the circumstances allow of its production (*i*). In a case where the wife was charged with adultery, Lord Stowell, observed, "I have certainly felt pressed by the absence of all proof of indecent familiarity, of all proximate acts which might reasonably have been expected during this long intimacy. I have felt too, that such a connection could hardly subsist without connivance, which I am not justified in suspecting. On the other hand there is a long continued intimacy, scarcely to be explained as consistent with innocence. The going into her bed room, the nursing her child in his presence, his attention to the child, the quarrel with her husband on his account, and no attempt at defence, and a child born during this intimacy, looking at all these facts, I think I am judicially warranted in pronouncing the adultery proved" (*j*).

In *Hunt* v. *Hunt* (*k*), the evidence against the wife was quite strong resting, however, on circumstances but she proved to the satisfaction of the Court, by the testimony of surgeons who examined her person that she was *virgo intacta* having never been known by man. The wife had already lived with her husband for eight years and there was evidence of the husband's admission, that he had not himself consummated the marriage.

Every act of adultery implies three things; first, the opportunity, secondly, the disposition in the mind of the adulterer, thirdly, the same in the mind of the *particeps criminis*. And the proposition is substantially true, that wherever these three are found to concur, the criminal act is committed (*l*). Circumstantial evidence usually pro-

(*i*) *Dillon* v. *Dillon*, supra.
(*j*) *Caton* v. *Caton* (1849) 13 Jur. 431 at p. 432.
(*k*) (1856) *Dea. & Sw.* 121; 164 E.R. 522.
(*l*) *Davidson* v. *Davidson* (1856) *Dea. & Sw.* 132; 164 E.R. 526.

ceeds on one or other of the beforementioned propositions, but it may also proceed on quite different ones; as where adultery is proved against the wife by showing the husband's non-access and the birth of a child (*m*).

The proposition by which we test the sufficiency of circumstantial evidence is, that if the facts proved cannot be reasonably reconciled on the assumption of innocence, but are harmonious with the assumption of guilt, the Court will infer guilt. On the other hand, if the facts can be reasonably reconciled on the assumption of innocence, or cannot be so on the assumption of guilt, the Court will not infer guilt (*n*). The stronger the affection and the more perfect the concord between married persons, the less likely is it that adultery will be committed. Therefore, the terms on which the parties cohabited have been considered a material circumstance in this issue. On the other grounds, amicable intercourse between the husband and wife during the pendency of the suit, and while they are not in actual cohabitation, may be shown in defence; for this is sometimes thought to be inconsistent with the belief in the mind of the plaintiff, that the adultery she alleges has really been committed (*o*). Libidinous conduct in the wife is admissible in evidence against her. The husband will, therefore, be permitted to plead, that the conduct of his wife, during his absence, was so indecorous as to induce a lady with whom she resided to recommend her removal to her mother (*p*). In a case wherein the evidence did not amount to judicial proof of the wife's adultery, but her conduct had been so culpable as to raise strong suspicions or criminality and induce the Court to recind the conclusion

(*m*) *Caton* v. *Caton*, (1849) 13 Jur. 431. *Richardson* v. *Richardson* (1827) 1 Hag. Ec. 6 and 11.
(*n*) *Grant* v. *Grant* (1839) 2 Curt. Ec. 16 and 55; 162 E.R. 322.
(*o*) *Dillon* v. *Dillon* (1842) 3 Curt. Ec. 86; 163 E.R. 663.
(*p*) *Croft* v. *Croft* (1130) 3 Hag. Ec. 310; 162 E.R. 1168.

to admit further evidence; proof that during the progress of the suit, the alleged *particeps criminis* had frequently visited her alone, and remained late at night, was received as sufficiently strengthening the former proof to justify the sentence of divorce (*q*).

"LIVING IN ADULTERY"—

Where a single act of adultery is pleaded, unaccompanied with circumstances leading up to the probability of its commission, the Court will view the case with jealousy, and examine the case with great vigilance (*r*). For, a single act of adultery does not necessarily amount to "living in adultery". The words, "living in adultery" refer to a course of conduct and mean something more than a single lapse from virtue (*s*).

ADMISSIONS AND CONFESSIONS.

Admissions are of many degrees. First, there are admissions which are made casually, in the course of an ordinary conversation and without any special importance being attached to the words. Again, there are admissions which are made under circumstances which render them more important and weighty, and thirdly, where there are admissions which are connected with facts and which are the most important (*t*).

There are two requisites to a confession; one that a witness truly states that which purports to be a confession; the other, that the party making the confession speaks the truth (*u*). Where a wife had become pregnant while living away from her husband in the service of the co-respondent and after her confinement has sent to co-respon-

(*q*) *Hammerton* v. *Hammerton* (1829) 3 Hag. Ec.; 162 E.R. 1060.
(*r*) *Dillon* v. *Dillon* (1842) 3 Curt. 86, 96; 163 E.R. 667.
(*s*) *In re Fulchand Maganlal* (1928) 30 Bom.L.R. 79.
(*t*) *Tippet* v. *Tippet and Meredith* (1866) 14 W.R. 410.
(*u*) *Noverre* v. *Noverre* (1846) 1 Rob. Ec. 428; 163 E.R. 1090.

dent for money claiming it from him on the ground that he was the father of the child and he sent the money though denying that he was the father; the admission of the wife coupled with the circumstances in which it was made, was in the absence of explanation or denial sufficient evidence of her having committed adultery with the co-respondent (*v*). An admission by the wife whilst giving evidence in other proceedings that she had been living with co-respondent is more than a mere confession and justified the Court in granting a decree ***nisi*** (*w*), but the conversation of a paramour not made in the presence of the wife (the respondent) is no evidence against her (*x*). Where the wife is charged with adultery, her conduct and declarations on a confession of guilt by the alleged ***particeps criminis*** being communicated to her are admissible evidence on behalf of the husband (*y*). The Calcutta High Court in a suit for dissolution of marriage held that in the absence of collussion, 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 (*z*). So, where the only evidence in support of an allegation of adultery against the wife were confessions made by her to the petitioner and his sister, the Court granted the petitioner a decree ***nisi*** being satisfied that the confessions were true and had not been made for the purpose of bringing about a dissolution of the marriage tie, but solely in order to obtain the husband's forgiveness (*a*).

(*v*) *Tippet* v. *Tippet* supra.

(*w*) *Hartley* v. *Hartley and Fleming* (1919) 35 T.L.R. 298.

(*x*) *Donellan* v. *Donellan* (1795) 2 Hag. Ec. sup. 144; 162 E.R. 1042.

(*y*) *Harris* v. *Harris* (1829) 2 Hag. Ec. 376; 162 E.R. 894. affirmed 2 Hag. Ec. 511.

(*z*) *Arnold* v. *Arnold*, (1911) 38 Cal. 907. See also *Carroll* v. *Carroll* (1934) 13 Pat. 129.

(*a*) *Collins* v. *Collins and Deal* (1915) 115 L.T. 936; 33 T.L.R. 123.

ADMISSION BY RESPONDENT.

The admission or confession of the respondent is not admissible evidence against the co-respondent (*b*) unless the co-respondent has had an opportunity of testing it by cross-examination (*c*). In *Le Marchant* v. *Le Marchant & Radcliff* (*d*) counsel for the co-respondent admitted the adultery of which the only evidence was of the respondent (husband) and the Court acting upon the admision granted a divorce.

PETITION BASED ON RESPONDENT'S LETTERS.

Where a husband seeks divorce on an allegation of of his wife's adultery as evidenced solely by letters written by her, the Court before granting divorce must be satisfied that all reasonable ground for suspicion of collusion is removed (*e*). In a letter from a wife addressed to her husband she wrote, "I think of all your love, your invariable kindness to me and the base, the horrible return that I have made to you, till I am almost mad". This would mean that nothing but the violation of her marriage vow could have induced her to use expressions so extremely derogatory to herself and is a confession which could be acted upon (*f*). Similarly, a husband's confession in his letter to the wife of having committed adultery with a woman (whose name was not disclosed) at a hotel corroborated by the evidence of the hotel waiter and by the

(*b*) *Robinson* v. *Robinson and Lane* (1859) 1 Sw. & Tr. 362; 164 E.R. 707. See *Hay* v. *Gordon* (1872) 18 W.R. 480, P.C.; 10 Beng. L.R. 301.
(*c*) *Allen* v. *Allen and Bell* (1894) P. 248.
(*d*) (1876) 45 L.J.P. 43; 34 L.T 367.
(*e*) *Over* v. *Over* (1924) 49 Bom. 368; 27 Bom.L.R. 251. See *Robinson* v. *Robinson and Lane*, supra. *Williams* v. *Williams and Padfied* (1865) L.R. 1 P. & D. 29. *Owen* v. *Owen* (1831) 4 Hag. Ec. 212; 162 E.R. 1441.
(*f*) *Dean* v. *Dean* (1847) 5 Notes of Cases 626; 12 Jur. 63.

production of the hotel bill was considered sufficient evidence for granting the wife a decree *nisi* (*g*).

A decree for dissolution of marriage cannot be made merely on admissions and without recording any evidence (*h*), nor on the ground that the respondent does not oppose the petitioner. The provisions of section 10 of the Act must be complied with (*i*).

VISITING BROTHEL.

If a married man associates with prostitutes or visits a brothel, without any apparent motive and especially when there he shuts himself up in a room with a common prostitute; it must be inferred in the absence of proof to the contrary that he does this with the intent of committing adultery; and as the opportunity and the undoubted consent of another party concur with his own intent the offence must be presumed to be committed (*j*). The act of going to a house of ill fame is characterised by the saying, that people do not go there to say their paternoster; that it is impossible they can have gone there for any but improper purposes; and that it is universally held a proof of adultery (*k*).

If a married woman is seen going into a house of ill-fame with a man not her husband, or unattended, that is alone sufficient evidence of adultery (*l*), and this species of proof has been considered to be more stringent when produced against the woman than the man.

(*g*) *Booth* v. *Booth* (1929) 73 Sol. Jour. 159.
(*h*) *Bai Kanku* v. *Shiva Toya* (1893) 17 Bom. 624, F.B.
(*i*) *Lehna Mal* v. *Mt. Hakim Bibi* (1919) 51 I.C. 235; F.B. 25 P.R., (1919) F.B.
(*j*) *Astley* v. *Astley*; (1828) 1 Hag. Ec. 714; 162 E.R. 728.
(*k*) *Loveden* v. *Loveden*: (1810) 2 Hag. Con. 1 at p. 24; 161 E.R. 648.
(*l*) *Eliot* v. *Eliot*, cited in *Williams* v. *Williams* (1798) 1 Hag. Con. 299; 161 E.R. 5559.

In order to show an adulterous interest, it is competent to give in evidence, not only the defendant's improper familiarities with the alleged *particeps criminis* at times anterior to the facts charged and at times concurrent with the fact, but also his unsuccessful solicitations of the chastity of other women (*m*).

CONTRACTION OF VENEREAL DISEASE.

Sufficient *prima facie* proof of a husband's adultery can be deduced from the fact that long after marriage, he was infected with venereal disease. But when the disease develops after marriage, this conclusion does not follow; because antenuptial misconduct may have produced it(*n*).

Stains upon the husband's linen, though it seems admissible in proof, are not alone sufficient evidence of his adultery; since they do not necessarily establish even his infection with venereal disease. There may be discharges from other causes, which when dry, would so nearly resemble those of syphilitic origin, as to render it impossible to distinguish the one from the other.

If a person has contracted a venereal disease, it is *prima facie* evidence of adultery(*o*), but where there are cross charges of adultery and of the communication of veneral disease, proof, that the petitioning husband had contracted a venereal disease, is not sufficient to throw upon him the onus of proving that it was communicated to him by his wife, but the onus is still on the wife to prove her husband's adultery(*p*). An infection of the respondent with 'crabs' is in the absence of prior misconduct or infection of the petitioner, *prima facie* evi-

(*m*) *Forster* v. *Forster* (1798) 1 Hag. Con. 144 at p. 152.
(*n*) *Popkin* v. *Popkin* (1794) 1 Hag. Ec. 765, n; 162 E R. 745.
(*o*) *Gleen* v. *Gleen*, (1900) 17 T.L.R. 62. See *Anthony* v. *Anthony* (1919) 35 T.L.R. 559. *Hardless* v. *Hardless* (1933) 55 All. 134.
(*p*) *Gliksten* v. *Gliksten and Deane* (1917) 33 T.L.R. 203; 116 L.T. 543.

dence that the respondent has committed adultery (*q*). A wife's suit for divorce by reason of cruelty and adultery against the husband was defended on the ground of the wife's adultery; the wife's charges against the husband could not be sustained but the husband's charges could be sustained and separation was pronounced for. Where the adultery of the wife is established and the husband is proved to have had venereal disease at the time when the wife's paramour is likewise infected; the presumption of the law against the husband shifts and the wife is bound to show that he contracted the disorder from another person than herself (*r*).

WIFE SUFFERING FROM A VENEREAL DISEASE.

In *Collett* v. *Collett* (*s*) there was an attempt to establish adultery against the husband by showing the wife to be suffering under a recent infection; Dr. Lushington, observed, "It is impossible to lay down any general inflexible rule; for each case must depend upon its own circumstances, and it is scarcely possible to conceive a case without some cirumstance which would assist the Court in coming to a conclusion. It is very important, before I proceed to state the evidence and the impression which it has made on my mind that the principles which ought to prevail, should be clearly understood. The principal evidence is the testimony of a medical gentleman. Now what degree of credit and weight ought to be given to the evidence of medical men under the circumstances? I apprehend that medical evidence may be of two kinds and that it is under such conditions that medical evidence is received in other Courts.

(*q*) *Stead* v. *Stead* (1927) 71 Sol. Jour. 391.
(*r*) *King* v. *King* (1847) 5 Notes of Cases, 244.
(*s*) (1838) 1 Curt. Ec. 678 at pp. 686-687; 163 E.R. 237.

"*First*:—That it is necessary for the satisfaction of the Court that it should be informed of the conclusions drawn by persons of skill and science as to a matter from facts proved in the cause *aliunde*, for instance, it may ask the opinion of medical men if so and so were the case."

"*Secondly*:—Which is a superior kind of evidence, opinions founded upon the observation and inspection of the medical man himself. I find that such evidence is received in all cases of murder, infanticide and poison; the learned Judges who preside in the Courts where such questions arise, rely not merely upon the opinions of medical men who have seen the body; but persons are frequently produced in Court and examined who have not seen the body; and in the well-known case of Lord Gardiner in the House of Lords the evidence of medical men was mainly relied upon. On a consideration of what is done in other Courts, and from the extreme difficulty of the Courts forming a judgment in a matter of this kind, I think if there be medical evidence speaking to the fact of venereal disease and there be sufficient opportunities for the medical witness to form his opinion, I am bound, unless his evidence is discredited, to believe it."

HOTEL EVIDENCE.

Since the Matrimonial Causes (Amendment) Act, 1923, whereby a wife could obtain a dissolution of her marriage on the ground of her husband's adultery alone (and not adultery coupled with any other offence), petitions for divorce considerably increased wherein the wife alleged adultery of the husband with a woman at a hotel without disclosing the name of the woman with whom the adultery was alleged to have been committed. In such cases the only evidence was a hotel bill and the letter of the husband to the wife asking her to divorce him on the ground of his having stayed with a woman, whose name is not disclosed.

one night at a hotel. It was one of the class of cases in which the Court was of the opinion that the practice of resorting to hotels to establish a *prima facie* case for dissolution of marriage should not be sanctioned (*t*).

"I have to consider," says Lord Merrivale P., "evidence of this in a state of things which undoubtedly exists in regard to artificial proceedings for dissolution of marriage by consent of the parties. It is time that this practice of resorting to hotels in order to make a *prima facie* case for dissolution of marriage, as the effect of a conclusion at which the parties have arrived between themselves, should be stopped"(*u*). An inkeeper (or a hotel manager or waiter) may not be the best witness to speak to the identity of a guest whom he sees but once; an innkeeper must be in the habit of seeing a great number of strangers and unless there be some circumstances attracting his attention he is not likely to take very accurate notice of his guests(*v*). No reliance should be placed on the mere sporadic incident of going to a hotel with a woman with a view to furnish evidence to the other spouse to institute divorce proceedings(*w*). But in a recent case the Court of Appeal held (reversing the decision of Lord Merrivale P.) that a decree must be granted on the ground that if evidence were tendered in good faith which under all usual circumstances clearly pointed to adultery, it was the duty of the Court to act upon it, unless the King's Proctor could adduce cogent evidence to rebut the obvious conclusion, and that there were circumstances on which the Court was satisfied in accordance with what had hitherto been the practice that adultery had been established(*x*).

(*t*) *Aylward* v. *Aylward* (1928) 44 T.L.R. 456.
(*u*) *Ibid* p. 457.
(*v*) *Dillon* v. *Dillon* (1842) 3 Curt. 86; 6 Jur. 422; 163 E.R. 667.
(*w*) *Barnard* v. *Barnard*, 115 I.C. 572.
(*x*) *Woolf* v. *Woolf* (1931) P. 134, C.A.

DECREE IN PREVIOUS SUIT.

A decree in a previous suit, finding as a fact the adultery of a party to that suit will, on identity being established, be admissible as evidence of adultery against the same person as a party to a subsequent suit(*y*), and the adultery of a husband respondent in his wife's suit for dissolution of marriage is sufficiently established subject to identification, by the production of a decree in the former suit upon which it appears that damages have been assessed against him as co-respondent in respect of the same adultery and that he has been ordered to pay such damages(*z*). The fact that a husband who petitions for a divorce against his wife was co-respondent in a previous suit not between the same parties, in which a decree for divorce had been granted, containing a statement that he had been guilty of adultery, does not create an estoppel. The production of the decree in such a case is evidence that the hushand had committed adultery, but does not preclude his denying the fact. A decree *nisi* may be made in his favour if he denies the adultery. But in that case the facts may be laid before the King's Proctor in order that, if he sees fit, the evidence in the former action may be brought before the Court(*a*).

On a petition by a wife for dissolution of her marriage on the ground of adultery coupled with desertion the decree in a previous suit in which her husband had been co-respondent was produced. This decree stated that the jury found that respondent had been guilty of adultery with co-respondent and that he had been condemned in costs, but contained no finding by the jury that co-respondent had been guilty of adultery with respondent. It was held

(*y*) *Eskell* v. *Eskell* (1919) 88 L.J.P. 128; 63 Sol. Jour. 77.
(*z*) *Little* v. *Little* (1927) P. 224; 137 L.T. 495; 71 Sol. Jour. 493.
(*a*) *Partington* v. *Partington and Atkinson* (1925) P. 34.

that the decree was not by itself sufficient evidence of adultery against the husband (*b*). A verdict by default against an adulterer is not evidence against the wife, but may be relevent as a circumstance of the case (*c*), and a conviction for perjury committed during a slander action, for falsely swearing that sexual intercourse with a certain woman had not occurred, is equivalent to a finding that there had been such intercourse and the certificate of conviction is admissible as ***prima facie*** evidence of the intercourse in a subsequent suit for dissolution of marriage in which the man convicted is respondent (*d*).

EMPLOYMENT OF PRIVATE DETECTIVES.

The testimony of paid witnesses like private detectives, inquiry agents and women of evil repute should be subjected to special scrutiny.

In support of a petition by a wife for a judicial separation, direct evidence was given of several acts of adultery committed by the husband; but in consequence of the improbability of that evidence, of the discrepancies in the statements of witnesses and of the improper manner in which it had been got up by the private detectives employed by the petitioner, the Court refused to act upon it, and dismissed the petition (*e*). The learned Judge observed:—

" I feel bound here to make one or two observations upon the subject of the employment of men of the class to which Shaw (the detective) belongs. They may be very useful for some purposes. They may be instrumental in detecting malpractices which would otherwise remain

(*b*) *Ruck* v. *Ruck* (1896) P. 152; 65 L.J.P. 87. See *Conradi* v. *Conradi, Worral and Way* (1868) L.R.P.&D. 514; 18 L.T. 659; 16 W.R. 1023.
(*c*) *Best* v. *Best* (1823) 1 Add. 411; 162 E.R. 145.
(*d*) *Toole* v. *Toole* (1926) 134 L.T. 542; 42 T.L.R. 245.
(*e*) *Sopwith* v. *Sopwith* (1859) 4 Sw. & Tr. 243; 164 E.R. 1509. *Worseley* v, *Worseley* (1904) 20 T.L.R. 171.

concealed, but they are most dangerous agents. I say it advisedly; it is my opinion that they are most dangerous agents. Police detectives are most useful; they are employed in a government establishment, they are responsible to an official superior, they have no pecuniary interest in the result of their investigations beyond the wages they receive for the occupation that they follow, and they may be and are constantly employed, not only with safety, but with benefit to the public. But when a man sets up as the hired discoverer of supposed delinquencies, when the amount of his pay depends upon the extent of his employment and the extent of his employment depends upon the discoveries he is able to make, then that man becomes a most dangerous instrument" (*f*).

PRESUMPTION OF ADULTERY.

A presumption sometimes relied upon in these cases is that when an adulterous intercourse is once shown to exist between persons, and they are still living together, or under the same roof, the unlawful connection also is deemed to be continuing (*g*). Where the wife was travelling in a steamer during the whole voyage with the co-respondent in the same cabin and not coming to the witness box to deny the charges of adultery is sufficient proof of adultery of the wife (*h*). But it would not be safe to presume adultery from the mere fact that the respondent and the co-respondent travelled together by a night train; the presumption would, however, arise if after continuing travelllng in a night train the parties spent the night together in a waiting room at a station (*i*).

(*f*) *Sopwith* v. *Sopwith* (1859) 4 Sw. & Tr. 243 at pp. 246–247; 164 E.R. 1509..
(*g*) *Beeby* v. *Beeby* (1799) 1 Hag. Ec. 789; 162 E.R. 755. *Turton* v. *Turton* (1830) 3 Hag. Ec. 388; 162 E.R. 1178.
(*h*) *Hill* v. *Hill* (1923) 47 Bom. 657 at pp. 660, 663.
(*i*) *D'Cruz* v. *D'Cruz*, 98 I.C. 1019.

LOCKED DOORS—

If parties fasten the door of a room and so remain with it fastened and for no assignable reason, such circumstances lead strongly to the conviction of adulterous intercourse between them (*j*). So, where a married woman goes with a stranger to an inn, the blinds are pulled down, the room is in confusion, the door is locked and they are there for a considerable time, it is a case of very strong suspicion, but they do not amount to more than presumption (*k*). The Court is not bound to infer adultery from evidence of opportunity and will only do so if satisfied that adultery has in fact been committed (*l*).

In a recent case the applicant (the husband) ceased to live with respondent as his wife though she joined him sometimes in America, London and Scotland and letters passed between them of an affectionate nature. In 1919 the applicant met D. in New York who was living with her husband and two daughters on good terms. In December 1920, with her husband's consent, she went on a big game shooting expedition to Africa with applicant, applicant's wife consented, though against her desire. Applicant and D. were drawn together through their mutual enthusiasm for sport. An expert photographer was with them on the expedition but fell ill. Applicant and D. were several days and nights together. D. was in 1920 forty.five years of age and there was no direct evidence of familiarity between them and the Court held that there was not sufficient ground for the inference that adultery might reasonably be assumed as the result of an opportunity for its occurrence(*m*).

(*j*) *Faussett* v. *Faussett* (1849) 7 Notes of Cases 72. 13 Jur. 688. See *Timings* v. *Timings* (1792) 3 Hag. Ec. 82, Note. 162 E.R. 1088.
(*k*) *Hunt* v. *Hunt* (1856) Dea. & Sw. 121; 164 E.R. 522.
(*l*) *Farnham* v *Farnham* (1925) 133 L.T. 320; 41 T.L.R. 543.
(*m*) *Ross* v. *Ellison* (or *Ross*) (1930) A.C. 1 at pp. 7-9; 141 L.T. 666, *H.L.*; 96 L.J.P.C. 163.

WIFE'S PETITION FOR DIVORCE.

A—**"The husband has since the soleminisation of the marriage exchanged his profession of Christianity for the profession of some other religion, and gone through a form of marriage with another woman."**

The mere conversion of the husband to another religion would not entitle the wife to sue for dissolution of marriage, unless the husband goes through a form of marriage with another woman, though the proof of the commission of adultery is not essential nor is a mere change of religion coupled with adultery (without proof of second marriage) a sufficient cause for divorce(*n*). This provision appears to have been inserted in consequence of a decision of the Madras High Court in 1866. In that case the husband once a Roman Catholic convert who, during his assumed Christianity had married a woman according to the Christian form, became again a professing Hindu and married according to the Hindu forms a Hindu woman and it was held that the second marriage was valid (*o*).

B.—**"Incestuous adultery"—**

See notes to section 3 (6).

C.—**"Bigamy with adultery"—**

See notes to section 3.

The bigamy and adultery must be with the same woman(*p*).

(*n*) *Maung Mun* v. *Labya Naw* (1924) 2 Rang. 199. See *Skinner* v. *Skinner* (1897) 2 C.W.N. 269, *P.C.*

(*o*) *Anon.* (1866) 3 Mad. H,C.R. App. VII.

(*p*) *Russel's Case* (1901) A.C. 446; *Ellam* v. *Ellam* (1889) 61 L.T. 338.

D.—**"Marriage with another woman with adultery"—**

See notes to section 3.

E(i)—**"Rape"—**

A man is said to commit rape who except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the five following descriptions:—

Firstly—against her will;

Secondly—without her consent;

Thirdly—with her consent, when her consent has been obtained by putting her in fear of death or hurt;

Fourthly—with her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married;

Fifthly—with or without her consent when she is under fourteen years of age.

The offence is punishable under section 376 of the Indian Penal Code.

A wife may obtain a divorce from her husband on the ground of 'rape' though he has only been prosecuted and convicted of an attempt to have unlawful carnal knowledge of a girl under the age of thirteen years (*q*), or even when the husband has been convicted of an indecent assault only (*r*). The order of conviction by the Criminal Court is not conclusive and evidence would be allowed to be adduced

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(*q*) *Coffey* v. *Coffey* (1898) P. 169; 78 L.T. 796.

(*r*) *Bosworthick* v. *Bosworthick* (1901) 86 L.T. 121; 18 T.L.R. 104.

de novo to enable the wife to obtain a divorce(*s*); alternatively a wife will be entitled to a decree of judicial separation on the ground of cruelty if the conduct of the husband has been such as to cause a breakdown of her health by reason of the disgrace and shock arising out of his conviction(*t*).

E (ii)—"Sodomy and bestiality."

A man commits sodomy or bestiality, who voluntarily has carnal intercourse against the order of nature with any man, woman or animal(*u*).

If sodomy is committed by a husband with his wife against her consent he is guilty of a matrimonial offence(*v*); so also, an attempt by him to commit the crime of sodomy or bestiality would be a sufficient ground for his wife to seek separation (*w*), but the crime imputed to the husband is so heinous and so contrary to experience that it would be most unreasonable to find a verdict of guilty where there is simply oath against oath without any further evidence direct or circumstantial, to support the charge(*x*); the same cogent evidence is required to overcome the presumption of guilt as in a criminal case and the same duty rests on a judge in summing up to a jury to to warn them of this and that they ought not to find the offence to be proved on the uncorroborated evidence of an accomplice(*y*).

(*s*) *Virgo* v, *Virgo* (1893) 69 L.T. 460. *March* v. *March* (1858) 28 L.J.P.&M. 30; 164 E.R. 910.

(*t*) *Boworthick* v. *Bosworthick* (1901) 86 L.T. 121; 18 T.L.R. 104.

(*u*) See the Indian Penal Code, section 377.

(*v*) *C.* v. *C.* (1905) 22 T. L. R. 26.

(*w*) *Mogg* v. *Mogg.* (1824) 2 Add. 292; 162 E.R. 301.

(*x*) *N.* v. *N.* (1862) 3 Sw. & Tr. 234; 164 E. R. 1264.

(*y*) *Statham* v. *Statham* (1929) P. 131 *C.A.*, 140 L.T. 292; 45 T.L.R. 147.

NON-ACCESS.

PRESUMPTION OF LEGITIMACY.—

Section 112 of the Indian Evidence Act, 1872, runs:

"The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within 280 days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten." It must, however, be remarked that a child born of a married woman is presumed to be legitimate, and that this presumption is exceedingly strong and can be rebutted only by evidence of the clearest and most satisfactory kind. Indeed, so strong is the presumption that "even if it were proved to demonstration that, at the time when the husband was sleeping with his wife, she was carrying on an adulterous intercourse with some other man, so that it would be possible that the child should be the child of either the husband or the paramour, still the presumption is that it is the child of the husband" (*z*).

In a divorce suit filed by the husband on the ground of the wife's adultery, the miscarriage took place long after the filing of the petition and the evidence of the husband of non-access was admitted against the wife (*a*).

"The average period of gestation is 284 days, the minimum 270 and the maximum 298. The duration of natural gestation appears to be not a fixed period, but one subject to variation within certain limits. In exceptional

(*z*) *Bosvile* v. *Atty. Gen.* (1877) 12 P.D. 177 at p. 179.
(*a*) *Cockman* v. *Cockman* A.I.R. (1934) All. 618, S.B.

cases a longer period than 296 days has been recorded. In one of such cases the duration of gestation as fixed by the sudden death of the husband was 308 days. In two American cases where the duration was 313 and 317 days the Court decided in favour of the Plaintiffs, thus admitting the possibility of prolongation of pregnancy to the period stated. Up to the decision of the matrimonial suit in 1921 the longest period of gestation recorded was 325 or 326 days" (*b*).

Where the proof of adultery depends upon the length of the period between the last possible date for marital intercourse and the birth of a child, the opinion of medical witnesses should be accepted (*c*), and under section 60 of the Indian Evidence Act, 1872, a Court can consider and act upon the opinion of experts contained in treatises as regards the question whether a particular child could or could not have been begotten just before the period of non-access (*d*). In a husband's petition for divorce on the ground of his wife's adultery, the husband alleged that he had left his wife on October 4, 1918, and sailed from England on October 12. He did not return until December 1919. On September 1, 1919 his wife gave birth to a child. There was no evidence against the wife except the lapse of time between coition and the birth of the child (331 days). Evidence was given by three leading medical authorities on the subject that such an interval could not in the present stage of medical knowledge be said to be impossible, and the petition was dismissed (*e*). In a suit for divorce on the ground of the adultery of the wife the Court found that she had committed adultery with an

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(*b*) Lyon's Medical Jurisprudence for India, 8th Edition, pp. 345-347.
(*c*) *Bowden* v. *Bowden* (1917) 62 Sol. Jour. 105.
(*d*) *Howe* v. *Howe* (1913) 38 Mad. 466.
(*e*) *Gaskil* v. *Gaskil* (1921) P. 425; 126 L.T. 115; 38 T.L.R. 1.

unknown man resulting in the birth of a child and the judge pronounced a decree *nisi*. The judgment was based on the evidence of the husband that although he admitted having occupied the same bed with his wife at a date when conception of the child was normally possible he had not in fact on that occasion nor at any time at which in the course of nature the child could have been conceived had marital intercourse with her. The Court of Appeal held that evidence was properly admitted, but the House of Lords by a majority (Earl of Birkenhead, Vicount Findlay and Lord Dunedin; Lord Summer and Lord Carson dissenting) held that a rule of law that neither a husband nor a wife is permitted to give evidence of non-intercourse after marriage to bastardize a child born in wedlock applied to proceedings instituted in consequence of adultery and was not affected by 32 and 33 Vict. C. 68, section 3, which makes the parties to such proceedings and husbands and wives of such parties competent witnesses(*f*). But the fact of non-access can be proved by evidence *aliunde*(*g*), and the rule in *Russel* v. *Russel* does not include the case of a still born child (*h*), nor does it apply to the case of a child which must have been conceived during the existence of a separation order and the husband may obtain a divorce without other evidence than the wife's admission (*i*). The confession of the wife that she has committed adultery is admissible as evidence in a suit for divorce

(*f*) *Russel* v. *Russel* (1924) A.C. 687. See *Brown* v. *Leech* (1924) L.J K.B. 48; 132 L.T. 89.

(*g*) *Farman* v. *Farman* (1924) 40 T.L.R. 823; See *Andrews* v. *Andrews and Chalmers*,(1924)P. 255; 132 L.T. 400; 40 T.L.R. 873. *Boulton* v. *Boulton* (1918) 34 T.L.R. 389; 62 Sol. Jour. 606 (where affidavit evidence was admitted of non-access by the husband to establish adultery, the birth of a child being proved *aliunde*).

(*h*) *Holland* v. *Holland* (1925) P. 101; 41 T.L.R. 431; 133 L.T. 318.

(*i*) *Andrews* v. *Andrews and Chalmers*, supra. *Mart* v. *Mart* (1926) P. 24.

so long as she does not assert that the husband could have had no access at the time of conception (*j*).

Having regard to section 7 of the Indian Divorce Act of 1869 the rule laid down by the House of Lords in *Russel* v. *Russel* [(1924 A. C. 687] to the effect that neither a husband nor a wife is permitted to give evidence of non-intercourse after marriage to bastardize a child born in wedlock applies to divorce suits in India. It follows that if the wife's evidence involves allegations of non-access or non-intercourse by her husband in the course of a confession or an admission made by her the confession or admission becomes inadmissible (*k*).

To rebut the presumption of legitimacy it is not necessary to prove that access was physically impossible, but the evidence must preponderate to convince the Court that access did not take place at a time and under circumstances which would enable the husband to be the father of the child (*l*). A denial of the husband or wife of intercourse before marriage as to a child born after, is admissible (*m*); and the evidence of a verbal statement made by the wife's paramour, previously to the birth of the child is admissible as tending to show that he was the father (*n*). So also, previous statements by the mother that the child is a bastard are admissible as evidence of her conduct but not as evidence of paternity (*o*), and the Court has accepted as evidence of non-access the evidence of the petitioner's father that the petitioner and his wife had separated eighteen months prior to the birth of a child to the wife

(*j*) *Warren* v. *Warren* (1925) P. 107; 41 T.L.R. 599; 133 L T. 352; 69 Sol. Jour. 725.
(*k*) *Premchand Hira* v. *Bai Galal* (1927) 51 Bom. 1026.
(*l*) *Atchley* v. *Sprigg* (1864) 33 L.J.Ch. 343.
(*m*) *The Poulett Peerage* (1903) A.C. 395 at p. 399.
(*n*) *Burnaby* v. *Baillie* (1889) 42 Ch. D. 282; 61 L.T. 634.
(*o*) *The Aylesford Peerage* (1885) 11 A.C. 1.

and that the petitioner had been living with the witness during the material period and had not slept away one night (*p*).

In India under sections 118 and 120 of the Indian Evidence Act, 1872 both the parties to the proceedings for divorce are competent to give evidence as to non-access and the consequent illegitimacy of the child (*q*).

CO-RESPONDENT'S EVIDENCE.

Upon the hearing of an issue which had been directed for the purpose of determining the status of a child born of the respondent during wedlock, the co-respondent in the former proceedings was called as a witness by the petitioner and a question was put to him as to adultery between him and the respondent and the Court told him he was bound to answer the question (*r*). It was, however, held by the Allahabad High Court in a similar case that the Court ought to have explained to the witness (the co-respondent) before he was sworn that it was not compulsory upon, but optional with him to give evidence or not and that the co-respondent had not "offered" to give evidence within the meaning or section 51 of the Indian Divorce Act, and, therefore, his evidence was not admissible (*s*). This view appears to have been supported by a recent decision of the Court of Appeal that no witness in any matrimonial proceedings shall be liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery (*t*).

(*p*) *Hadlow* v. *Hadlow* (1930) 46 T.L.R. 624; 143 L.T. 774; 74 Sol. Jour. 682.
(*q*) *Howe* v. *Howe* (1913) 38 Mad. 466. see *Rozario* v. *Ingles* (1893) 18 Bom. 468.
(*r*) *Evans* v. *Evans & Blyth* (1904) P. 378.
(*s*) *De Bretton* v. *De Berton* (1881) 4 All. 49.
(*t*) *Woolf* v. *Woolf* (1931) P. 134 at p. 139, C.A.

CORROBORATION (GENERALLY).

The rule of practice prevailing in the Divorce Court in England in contested cases is that the entirely uncorroborated evidence of one person is not taken to be sufficient to establish adultery (*u*), but there is no rule of law which prohibits the Court from acting on such evidence if it is satisfied that the story put forward is a true one and that there is no collusion (*v*). Thus, in a husband's suit for divorce on the ground of his wife's adultery the Court acted upon the uncorroborated evidence of the petitioner who testified having found his wife in bed with the co-respondent (*w*); and a decree for judicial separation on the ground of adultery may be granted upon the evidence of a single witness, as to the co-habitation of the wife, after her elopement, if there are corroborating circumstances (*x*). Adultery can be established by the entirely uncorroborated evidence of one witness as to the particular act, provided that there is evidence of a similar character in regard to other offences which can be and are treated as corroboration (*y*).

CORROBORATION OF ADMISSION OR CONFESSION.

The admission of a wife charged with adultery, unsupported by any confirmatory proof, may be acted upon as conclusive evidence upon which to pronounce a divorce, provided the Court is satisfied that the evidence is trust-

(*u*) *Collard* v. *Collard* (1922) 44 All. 254. *Carroll* v. *Carroll* (1934) 13 Pat. 129.
(*v*) *Curtis* v. *Curtis* (1905) 21 T.L.R. 676. See *Warren* v. *Warren* (1925) P. 107.
(*w*) *Riches* v. *Riches & Clinch* (1918) 35 T.L.R. 141; 63 Sol. Jour. 230.
(*x*) *Curtis* v. *Curtis* (1846) 5 Moo. P.C.C. 252; 13 E.R. 487.
(*y*) *Collard* v. *Collard*, supra.

worthy and that it amounts to a clear, distinct and unequivocal admission of adultery (*z*); there being no absolute rule of practice and no rule of law which precludes the Court from acting upon such uncorroborated evidence in any case in which the Court finds the confession to be true (*a*). But such testimony should on all occasions be most accurately weighed (*b*).

ACTS OF ADULTERY SUBSEQUENT TO THE DATE OF THE PETITION.

Evidence of the acts of adultery subsequent to the date of the petition may be admitted for the purpose of showing what inference the Court ought to draw from evidence of previous acts of improper familiarity (*c*).

PETITION BROUGHT FOR A COLLATERAL PURPOSE.

Where the petitioner presents a petition for a collateral purpose only and does not sue for all the reliefs he (or she) is entitled to, the Court has a discretion to refuse a decree, but the discretion is not unlimited discretion and that discretion must be exercised upon some legal ground such as the absolute and dicretionary bars and the ground that the suit was not brought *bonafide* but only for some collateral purpose (*d*).

A wife who was entitled to a dissolution of her marriage on the ground of her husband's adultery, petitioned only for a judicial separation and for permanent

(*z*) *Robinson* v. *Robinson & Lane* (1859) 1 Sw. & Tr. 362; 164 E.R. 767. *Over* v. *Over* (1925) 49 Bom. 368; 27 Bom. L.R. 251.
(*a*) *Getty* v. *Getty* (1907) P. 334; 98 L.T. 60. *Winberg* v. *Winberg* (1910) 27 T.L.R. 9.
(*b*) *Williams* v. *Williams* (1748) 1 Hag. Con. 299; 161 E.R. 559.
(*c*) *Wales* v. *Wales & Cullen* (1900) P. 63. See. *Sternson* v. *Sternson* (1911) P. 191.
(*d*) *Blanchard* v. *Blanchard* (1928) 138 L.T. 176.

maintenance and custody; when asked why she did not pray for dissolution, the petitioner stated that she did not wish her husband to marry the woman who had ruined her home; the Court held that permanent maintenance and custody being at any rate a part of the purpose for which the suit was brought the petitioner was entitled to a judicial separation (*e*).

PLEADINGS.

GENERAL AVERMENT IN PETITION—

In a petition for dissolution of marriage it was alleged th at the co-respondent had lived in the same house with him (the petitioner) for two years, and that the adultery was committed " on diverse occasions " during that period, and the Court held that sufficient information was given by the petitioner to enable the wife to meet the case to be set up against her (*f*).

AMENDMENT OF ANSWER (WRITTEN STATEMENT)

A co-respondent whose answer merely traverses the allegation of adultery will not be allowed to cross-examine the witness called to establish that allegation, for the purpose of eliciting that the petitioner had been guilty of adultery, or of such misconduct as would induce the Court to exercise its discretion by withholding a decree, without an amendment of the answer. An answer is amended similarly to a petition (*g*).

PRACTICE

Subpeona *Duces Tecum*—Discovery tending to show adultery.

(*e*) *Blanchard* v. *Blanchard* (1928) 138 L.T. 176
(*f*) *Smith* v. *Smith & Liddard* (1859) *Sea. & Sm.* 1; 29 L.J.P. & M. 62.
(*g*) See *Firminger* v. *Firminger and Ollard* (1869) 17. W.R. 335.

In a wife's petition for divorce on the ground of adultery the petitioner served the respondent with a subpeona *duces tecum* requiring him to produce his pass book and cheques for a given period, his correspondence with two woman with whom adultery was charged; and his diaries. The only issue in the action was that of adultery. The Court discharged the summons on the ground that an order for discovery could not be made against a party to divorce proceedings when it was sought for no other purpose than to prove that party guilty of adultery (*h*). Similarly, a party charged with adultery may not be called upon by compulsory process to provide evidence in support of the charge (*i*). Nor can a party in a matrimonial suit in which the issue is the issue of adultery be required to answer interrogatories or be required to make discovery (*j*). A party alleging adultery may not provisionally require the opposing party to produce documents in the event that that party should become voluntarily a witness in the cause (*k*). Even the rigorous compulsory process of the Ecclesiastical Courts was not available to enforce an answer to a libel which alleged adultery (*l*).

CRUELTY.

WHAT IS LEGAL CRUELTY—

Bodily injury, reasonable apprehension thereof or injury to health are the tests of legal cruelty (*m*). Sir William Scott (afterwards Lord Stowell) laid down the

(*h*) *Cavendish* v. *Cavendish* (1926) P. 10.
(*i*) *Redfern* v. *Redfern* (1891) P. 139.
(*j*) *Ibid.* See section 198 of the Judicature (Consolidation) Act, 1925.
(*k*) *Ibid.*
(*l*) *King* v. *King* (1850) 2 Rob. 153; 163 E.R. 1275. See E. v. E. (1907) 24 T.L.R. 78.
(*m*) *Tourkins* v. *Tourkins* (1858) 1 Sw. & Tr. 168; 164 E.R. 678.

following principles from which legal cruelty could be inferred and the case decided by him as far back as 1790 is still a leading case on the point:—

> " What merely wounds the mental feelings is in a few cases to be admitted where they are not accompanied with bodily injury, either actual or menaced. Mere austerity of temper, petulence of manners,rudness of language, a want of civil attention and accommodation, even occasional sallies of passion, if they do not threaten bodily harm, do not amount to legal cruelty. They are high moral offences, in the marriage state undoubtedly, not innocent surely in any state of life, but still they are not that cruelty against which the law can relieve.....still less is it cruelty where it wounds not the natural feelings but the acquired feelings arising from particular rank and situation, for the Court has no scale of sensibilities by which it can guage the *quantum* of injury done and felt and, therefore, though the Court will not absolutely exclude considerations of that sort where they are stated merely as matter of aggravation, yet they cannot constitute cruelty where it would not otherwise have existed; of coure the denial of little indulgences and particular accommodations which the delicacy of the world is apt to number amongst its necessaries, is not cruelty. They are negative descriptions of cruelty, they show only what is not cruelty, and are yet perhaps the safest definitions which can be given under the infinite variety of possible cases that may come before the Court. But if it were at all necessary to lay down an affirmative rule, I take it that the rule cited by Dr. Bever from Clarke, and the other books of practice is a good general outline of the canon law, the law of this country, upon this subject. In the older cases of this sort

which I have had an opportunity of looking into, I have observed that the danger to life, limb or health, is usually inserted as the ground upon which the Court has proceded to a separation. This doctrine has been repeatedly applied by the Courts in the cases that have been cited. The Court has never been driven off this ground. It has been always jealous of the inconvenience of departing from it, and I have heard no one case cited in which the Court has granted a divorce without proof given of a reasonable apprehension of bodily hurt. I say apprehension, because assuredly the Court is not to wait till the hurt is actually done, but the apprehension must be reasonable; it must not be an apprehension arising merely from an exquisite and diseased sensibility of mind" (*n*).

This decision was followed with approval by the House of Lords in the famous case of *Russell* v. *Russell*(*o*) where Lord Halsbury, L. C. observed.

"If as I have said the Spiritual Court regarded married life as a whole, it would be absolutely impossible to lay down in the iron framework of a definition that which would constitute such as would necessarily justify separation the questions of fact and degree would qualify almost any proposition that could be formulated; for example, a slight blow under great provocation, and on a single occasion during a long life, could hardly be suggested as a ground for separation, though upon that hypothesis personal violence existed. On the other hand, it is possible to conceive a course or treatment which would make the continuance of a marriage bond, involving the obligation of the con-

(*n*) *Evans* v. *Evans* (1790) 1 Hag. Con. 37; 161 E.R. 466.
(*o*) (1897) A.C. 391 at p. 423.

tinued *consortium* more terrible than the severest bodily suffering".

So for instance, the husband's attempt to debauch his women servants is a strong act of cruelty (*p*). The kind of violence where violence is used, is immaterial. In this respect no difference exists between a blow, a push or any other force (*q*). It is not necessary to prove acts of personal violence to substantiate a charge of cruelty; it is the acknowledged doctrine that danger to the person and health is sufficient. Where the wife is the aggressor and the treatment complained of has been brought about by acts of violence on her part which have provoked her husband to violence, she cannot complain of cruelty which is the consequence of her own misconduct (*r*), but if the return on the part of the husband is out of proportion to the offence given it would be the duty of the Court to interpose its protection (*s*). A wife is, however, not entitled to relief by reason of the cruelty of the husband, unless she is a person of good temper and has always behaved well and dutifully towards him (*t*).

PHYSICAL VIOLENCE.

Where the husband struck the wife in the face, and while drunk cut her hand and cut her fingers by throwing a jug of water at her and frequently threw cold water over her and also spat in her face, the husband was found guilty of cruelty (*u*). Cruelty would also be established by proof of habitually insulting conduct and violent temper

(*p*) *Popkin* v, *Popkin* (1794) 1 Hag. Ec. 765, n; 162 E.R. 745.
(*q*) *Dysart* v. *Dysart* (1847) 1 Rob. Ec. 470; 163 E.R. 1105. *Saunders* v. *Saunders* (1847) 1 Rob. Ec. 549.
(*r*) *Allen* v. *Allen* & *D'arcy* (1859) *Sea.* & *Sm.* 84, 30 L. J. P. & M. 2; *Waring* v. *Waring*, (1813) 2 Hag. Con. 153; 161 E. R. 699.
(*s*) *Dysart* v. *Dysart*, supra.
(*t*) *Taylor* v. *Taylor* (1755) 2 Lee 172; 161 E.R. 303.
(*u*) *Waddell* v. *Waddell* (1862) 2 Sw. & Tr. 584; 6 L.T. 552; 164 E.R. 1124.

connected with an adulterous intercourse carried on by the husband and leading to frequent quarrels and occasionally to slight acts of violence and causing mental and bodily suffering (*v*). A husband who was for six years addicted to intemperence and had suffered from *delerium tremens*, had on occasions inflicted bodily injury on his wife and had by his general course of conduct towards her materially injured her health. The Court found that the wife could not return to cohabitation without incurring great peril of a renewal of the bodily injuries inflicted upon her and that she was entitled to relief (*w*). On the question of cruelty the Court will consider the liability of danger which the wife would incur by returning to cohabitation with a husband subject to uncontrollable fits of drunkenness, such husband having used a certain amount of violence to the wife while under the influence of drink and particular acts of violence will be viewed in connection with the cumulative misconduct of married life (*x*).

Where a husband assaulted his wife in the street in such a manner as to induce a passer-by to believe her to be and to treat her as a prostitute, it was held that although the respondent had inflicted no personal injury upon her yet he was guilty of cruelty (*y*).

SINGLE ACT.

"The law does not require that there should be many acts. The Court has expressed an indispostion to interfere on account of one slight act, particularly between persons who have been under long cohabitation; because if only one such instance of ill-treatment and that of a slight

(*v*) *Knight* v. *Knight* (1865) 4 Sw. & Tr. 103; 13 L.T. 252; 164 E. R. 1455.
(*w*) *Marsh* v. *Marsh* (1858) 1 Sw.&Tr. 312; 164 E.R. 744.
(*x*) *Power* v. *Power* (1865) 4 Sw.&Tr. 173; 12 L.T. 824; 164 E. R. 1483.
(*y*) *Milner* v. *Milner* (1861) 4 Sw.&Tr. 240; 164 E.R. 1508.

kind, occurs in many years it may be hoped and presumed that it will not be repeated. But it is only on this supposition that the Court forbears to interpose its protection even in the case of a single act, because if one act should be of that description which should induce the Court to think that it is likely to occur again and occur with real suffering there is no rule that should restrain it from considering that to be fully sufficient to authorise its interference" (*z*).

It is quite possible that a single act of cruelty on a single occasion, may be so severe and attended with such corresponding circumstances as might under a fair and liberal construction of this section justify a divorce (*a*), and also, where one act of cruelty is of such a nature as to raise a reasonable apprehension of further acts of the same kind (*b*), or where the one act would induce the Court to expect that it would occur again and occur with real suffering (*c*), the Court would grant relief. Again when the only act is of such a nature as would induce the Court to conclude that if the cohabitation continued there would be a course of conduct on the part of the husband which would be injurious to the health of the wife (*d*), or such as to reasonably cause fear on her part so that she could not continue to cohabit with him with any reasonable prospect of maintaining her health and well being (*e*), the wife would be entitled to relief. But a single act of personal violence by the husband towards the wife not

(*z*) *Holden* v. *Holden* (1810) 1 Hag. Con. 453; 161 E.R. 614.
(*a*) *Popkin* v. *Popkin* (1794) 1 Hag.Ec. 765, n; 162 E.R. 745. *Foster* v. *Foster* (1921) P. 438.
(*b*) *Reeves* v. *Reeves* (1862) 3 Sw. & Tr. 139 at p. 141; 164 E.R. 1227.
(*c*) *Dysart* v. *Dysart* (1870) 1 Rob. Ec. 470; 163 E.R. 1105.
(*d*) *Wodehouse* v. *Wodehouse* (1885) 1 T.L.R. 538, C.A. *Konda &c.* v. *Ranga Nayaki Ammal* (1923) 46 Mad. 791.
(*e*) *Westropp's Divorce Bill* (1886) 11 App. Cas. 294; 2 T.L.R. 628, H.L.

producing any considerable injury to her person and not repeated is not, though unwarrantable, sufficient to grant the wife relief (*f*).

Cruelty may consist in the aggregate of the acts alleged in a petition or answer and each paragraph need not allege an independent act of cruelty sufficient in itself to warrant the relief sought (*g*). It is in its nature a cumulative charge which must be sustained and evince a continued want of self-control and must be referable to permanent causes so as to endanger the future safety of the wife's person or health (*h*): and it is not necessary when there is an attempt at violence by an overt act to wait till it is actually put into execution (*i*).

EFFECT ON WIFE'S HEALTH.

It is not necessary to prove acts of personal violence to substantiate a charge of a cruelty; it is the acknowledged doctrine that danger to the person or health is sufficient (*j*). So, where no actual violence is offered and no threat of violence held out the wife may yet be entitled to relief if the husband by such conduct places the wife's life or even only her health in jeopardy and renders it impossible for her safely to consort any longer with him in the marriage state (*k*). Cruelty falling short of physical violence, but such as to jeopardise health or sanity (*l*), or silent indifference to the wife and the acquisition of disgust-

(*f*) *Smallwood* v. *Smallwood* (1861) 2 Sw. & Tr. 397; 5 L.T. 324; 164 E.R. 1050.
(*g*) *Green* v. *Green* (1864) 33 L.J.P. & M. 64.
(*h*) *Plowden* v. *Plowden* (1870) 23 L.T. 266; 18 W.R. 902.
(*i*) *Popkin* v. *Popkin*, supra. See *Oliver* v. *Oliver* (1801) 1 Hag. Con. 351; 161 E R. 581.
(*j*) *Otway* v. *Otway* (1812) 2 Phil. 95; 161 E.R. 1088,
(*k*) *Paterson* v. *Paterson* (1850) 3 H.L. Cas. 308; 10 E.R. 120.
(*l*) *Kelly* v. *Kelly* (1870) L.R. 2 P. & D. 89. See *Tomkins* v. *Tomkins* (1858) 1 Sw. & Tr. 168.

ing habits (*m*), would be sufficient cruelty for the refusal on the part of the wife to live with her husband.

It is cruelty on the part of the husband to withhold medical assistance from the wife while he is able to provide it (*n*).

Wilful and malicious desertion is not alone cruelty, but in conjunction with other acts it frequently is sufficient (*o*). A wife who had remained away for several years owing to the husband's cruelty succeeded in her suit for judicial separation brought principally because of differences about the children on the ground that it was unsafe for her to return (*p*).

Where the husband pursues a course of conduct with the intention of making his wife disgusted with him and it is calculated to have that effect and has the natural effect of seriously affecting the wife's health (*q*), or where force physical or moral is systematically exerted to compel the submission of the wife in such a manner, to such a degree and during such length of time as to break down her health and to render serious malady imminent (*r*), the interference of the law cannot be justly withheld by any Court.

In a petition for divorce the wife alleged adultery, cruelty and desertion. The husband admitted adultery, but subsequently the wife condoned that adultery by cohabitation with her husband. The husband again deserted her on two occasions on one of which she had a boy three months old and on the other when she was about to be confined. On joining the Army in 1916 the husband had stated that he was

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(*m*) *Thompson* v. *Thompson* (1911) 39 Cal. 395.
(*n*) *Evans* v. *Evans* (1790) 1 Hag. Con. 35; 161 E.R. 466.
(*o*) *Ibid. Sullivan* v. *Sullivan* (1824) 2 Add. Ec. 299; 162 E.R. 303.
(*p*) *Cooks* v. *Cooks* (1863) 32 L.J.P. & M. 81; 164 E.R. 1221.
(*q*) *Litton* v. *Litton* (1924) 40 T.L.R. 272.
(*r*) *Cochrane* v. *Cochrane* (1910) 27 T.L.R. 107.

a widower and thereby the wife was caused considerable pain and anxiety and with difficulty obtained an allowance out of his pay as his wife. It was held that the husband's conduct amounted to cruelty, that such cruelty effected a revival of the condoned adultery and that the wife was entitled to a divorce (*s*). It is cruelty for a man to leave his wife and children without any means for their support and to spread false reports about his wife and thereby injure her health (*t*). A Court is not bound to order a wife to return to her husband if there is reasonable ground for apprehending that a return to that husband will imperil her safety (*u*).

Cruelty is to be decided from the cumulative effects of acts, and where the husband's infidelity, the indignities to which he had subjected the wife, the threats in his correspondence and the suggestion that she should go to another man and be unfaithful, all of which had tended to prejudice her health, constituted a case of cruelty entitling the wife to a decree of divorce (*v*). Acts of cruelty towards children in the presence of the mother may be alleged as cruelty towards her (*w*), especially if done for the purpose of giving her pain and where carried to such an extent as to affect the mother's health (*x*). So also, where the husband's conduct has an injurious effect on his wife's health, his conduct may be held to amount to constructive cruelty (*y*), as for instance, a persistent course of harsh irritating conduct unaccompanied by actual violence, but carried to such a point as to endanger petitioner's health and renewed after

(*s*) *Stuart* v. *Stuart* (1926) 53 Cal. 436.
(*t*) *Jeapes* v. *Jeapes* (1903) 89 L.T. 74.
(*u*) *Dular Koer* v. *Dwarkanath Misser* (1905) 34 Cal. 971.
(*v*) *Cochrane* v. *Cochrane* (1910) 27 T.L.R. 107.
(*w*) *Suggate* v. *Suggate* (1859) 1 Sw. & Tr. 489; 164 E.R. 827.
(*x*) *Birch* v. *Birch* (1873) 28 L.T. 540; 21 W.R. 463.
(*y*) *Fenwick* v. *Fenwick* (1922) 38 T.L.R. 603.

the resumption of interrupted cohabitation (*z*). In order to support an allegation of cruelty against the husband where there has been no actual injury to the wife's health she must show such conduct in the past that there is a reasonable probability that it will be continued and if continued will be injurious to her health (*a*). So, where the conduct of the husband to his wife was such as not only to inflict bodily injury upon her upon one occasion, but also to put her in reasonable fear on many occasions, his behaviour to one of her children in her presence, his threats to her on one or two occasions, and his conduct to the children when she was in a delicate state of health, were such as to reasonably cause fear on her part so that she could not continue to cohabit with him with any reasonable proposal of maintaining her health and well-being, the House of Lords granted her petition (*b*). And the husband's conduct is legal cruelty if by cohabitation the wife is exposed to bodily hazard and intolerable hardships (*c*).

VENEREAL DISEASE.

It is cruelty for the husband to communicate venereal disease to the wife though there must be clear evidence that he meant its communication (*d*), but the wilfulness may be presumed from the surrounding circumstances, by the condition of the husband and by the probabilities of the case after such explanation as he may offer. *Prima facie*, the husband's state of health is to be presumed to be within his knowledge; but he may rebut this by his own oath,

(*z*) *Mytton* v. *Mytton* (1886) 11 P.D. 141; 57 L.T. 92; 35 W.R. 368.
(*a*) *Wodehouse* v. *Wodehouse* (1885) 1 T.L.R. 528, *C.A. Moonshee Buzloor Ruheem* v. *Shumsoonnissa Begum* (1867) 11 M.I.A. 551; 8 W.R. 3.
(*b*) *Westropp's Divorce Bill* (1886) 11 App. Cas. 294 at p. 297; *Saunders* v. *Saunders* (1847) 1 Rob. Ec. 549; 163 E.R. 1131.
(*c*) *D'Aguilar* v. *D'Aguilar* (1794) 1 Hag. Ec. 773; 162 E.R. 748.
(*d*) *Collet* v. *Collet* (1838) 1 Curt. Ec. 678; *Birendra* v. *Hemlata* (1921) 48 Cal. 283.

when admissible as a witness, or by other proof (*e*). It would be cruelty if the husband who is suffering from a venereal disease has connection with his wife against her will although the disease is not communicated to her (*f*).

MEDICAL WITNESS COMPELLABLE TO TESTIFY—

A medical man who in the course of treating a patient ascertains that the patient is suffering from such a disease, may be compelled to give evidence to that effect (*g*).

WHAT IS NOT CRUELTY.

A prohibition to the wife of intercourse with the wife's family is not cruelty to a wife, though under circumstances it might tend to illustrate the temper of the husband (*h*), nor a mere violent act which occasions pain and injury to the wife, unaccompained by threat of any intentional blow (*i*), will warrant a sentence of separation because it does not infer future risk. Neglect, silence, shunning the wife's company and declarations by the husband that he will never co-habit with her, do not constitute "cruelty and maltreatment" (*j*), nor is it cruelty on the part of the husband to use blasphemous language; or habits of intoxication which occasion mental suffering and bodily ill-health to the wife, without bodily ill-treatment or threats thereof (*k*). Where the

(*e*) *Brown* v. *Brown* (1865) L. R. 1 P. & D. 46; 13 L. T. 645; 14 W. R. 119. *Browning* v. *Browning* (1911) P. 161. But see *Jones* v. *Jones* (1860) Sea & Sm. 138. (Where the Court refused to treat the communication of the disease as an act of cruelty in the absence of evidence that the husband had done so wilfully or recklessly). See *Morphett* v. *Morphett* (1869) L. R. 1 P. & D. 702; 19 L. T. 801.

(*f*) *Foster* v. *Foster* (1921) P. 438. See *Ciocci* v. *Ciocci* (1854) 1 Spinks 121; 164 E.R. 70.

(*g*) *Garner* v. *Garner* (1920) 36 T.L.R. 196.

(*h*) *Neeld* v. *Neeld* (1831) 4 Hag. Ec. 263; 162 E.R. 1442.

(*i*) *Ibid.*

(*j*) *Paterson* v. *Paterson* (1850) H.L Cas. 308; 10 E.R. 120.

(*k*) *Chesnutt* v. *Chesnutt* (1854) 1 Spinks. 105; 164 E.R. 114.

charges of cruetly are confined to three days alone of a cohabitation of three years the legal offence of cruelty is not committed (*l*). So also, an unfounded charge of unchastity made by the husband against his wife is of itself not sufficient to constitute legal cruelty (*m*), although it has been made wilfully, maliciously and without reasonable or probable cause (*n*).

PETTY DOMESTIC QUARRELS.

Words of mere present irritation however re-proachful, or words of mere insult however galling, or mere inattention to the petty domestic quarrels, or carelessness on the part of the husband though it may accidentally and contrary to his intention, produce mischief—will not warrant the Court's interference. Affection may exist, though accidents may happen in petty quarrels and a husband is not to be deprived of his marital rights because a wife pertinaciously resists them and in the course of that resistance, encounters accidental injuries which were never meant to be inflicted(*o*); as the Court is not in the babit of interferring in ordinary domestic quarrels. There may be much unhappiness from unkind treatment or violent and abusive language in which parties can obtain no relief from a Court, but must be left to correct the intemperance of which they complain by such private means as they can employ for the purpose (*p*). So, where a husband threatened to cut his wife's throat but did not accompany the threat with any act of violence and subsequently after cohabitation ceased, broke into the house in which his wife was living and kicked through her bed room door,

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(*l*) *Plowden* v. *Plowden* (1870) 23 L.T. 266; 18 W.R. 902.
(*m*) *Yamunabai* v. *Narayan* (1876) 1 Bom. 164.
(*n*) *Augustin* v. *Augustin* (1882) 4 All. 374.
(*o*) *Oliver* v. *Oliver* (1801) 1 Hag. Con. 361; 161 E.R. 581.
(*p*) *Harris* v. *Harris* (1813) 2 Hag. Con. 148; 161 E.R. 697.

the acts were held not to amount to legal cruelty (*q*); nor is mere abuse ground for the interference of the Court (*r*), nor drunkness *per se* (*s*), nor mere unhappiness resulting from the destruction of domestic comfort caused by drunkenness (*t*), nor would habitual drunkenness and series of annoyances and extraordinary conduct on the part of the husband (*u*) constitute legal cruelty.

HUSBAND'S REPENTENCE

A husband who had been guilty of a long series of acts of insult and cruelty towards his wife, ultimately expelled her and some of her children from the matrimonial home. On the following day he apparently repented of his act and endeavoured to get his wife to return to him by repeatedly writing penetent letters to her promising to mend his future conduct towards her. She refused to comply and after some months took out a summons against him for desertion. The desertion was found proved. The husband appealed on the ground that the desertion had been terminated by his repentence and desire for his wife's return, but the Court held that the desertion was a continuing offence and could not be obliterated by subsequent offers, as to the genuineness of which his wife might reasonably entertain doubts (*v*).

WIFE'S CRUELTY TOWARDS THE HUSBAND.

Generally speaking the acts of violence or other acts which constitute legal cruelty on the part of the husband

(*q*) *Brown* v. *Brown* (1866) 14 W.R. 318.
(*r*) *D'Aguilar* v. *D'Aguilar* (1794) 1 Hag. Ec. 773; 162 E.R. 748. *Greenway* v. *Greenway* (1848) 6 Notes of Cases, 291.
(*s*) *Chesnutt* v. *Chesnutt* (1854) 1 Spinks 196; 164 E.R. 114.
(*t*) *Hudson* v. *Hudson* (1863) 3 Sw. & Tr. 314; 9 L.T. 579; 164 E.R. 1296. See *Browning* v. *Browning* (1911) P. 161.
(*u*) *Brown* v. *Brown* (1868) L.R. 1 P. & D. 46; 13 L.T. 645; 14 W.R. 149.
(*v*) *Thomas* v. *Thomas* (1924) P. 194, C.A.

would be treated as cruelty on the part of the wife. But some distinction is made on account of the difference between the sexes as the husband is considered strong enough to protect himself from his wife's violence (*w*). The same rules of danger to life or limb would prevail in the case of cruelty on the part of the wife; protection being the foundation for granting relief to the agrrieved spouse. But drunkenness of the wife even when accompanied by acts of considerable violence is not a substantial ground for granting a decree of judicial separation when the Court is convinced that the real object of the petitioner is to get rid of a drunken wife (*x*). The Court would, however, interfere if the moral result of the wife's violence to all the proper relations of married life would be serious, and would not wait and drive the husband to the necessity of meeting force by force (*y*); nor would the Court decline to interfere where the wife's conduct would endanger her own safety by provoking her husband to retaliate (*z*).

It would not be cruelty on the part of the wife to lock the husband out of the house on two or three occasions (*a*), or to bring a false charge of having committed an unnatural offence (*b*).

INSANITY OF THE SPOUSE.

As a general rule cruelty committed by an insane spouse is no ground for separation, for a lunatic is to be restrained rather than the other party be released (*c*), but

(*w*) *Furlonger* v. *Furlonger*, (1847) 5 Notes of Cases, 422.
(*x*) *Scott* v. *Scott* (1860) Sea. & Sm. 133; 29 L.J.P. & M. 64.
(*y*) *Prichard* v. *Prichard* (1864) 3 Sw. & Tr. 523; 10 L.T. 789; 164 E.R. 1378. *White* v. *White* (1851) Sea. & Sm. 77; 1 Sw. & Tr. 591; 1 L.T. 197; 164 E.R. 874.
(*z*) *Forth* v. *Forth* (1867) 16 L.T. 574.
(*a*) *Kirkman* v. *Kirkman* (1807) 1 Hag Con. 409; 161 E.R. 598.
(*b*) *Rusell* v. *Rusell* (1897) A.C. 395; 77 L.T. 249; 13 T.L,R. 516.
(*c*) *Hall* v. *Hall* (1864) 3 Sw. & Tr. 348; 33 L.J.P. & M. 65.

a husband's petition may be allowed by reason of his insane wife's violence towards him (*d*). Similarly, the wife is entitled to the protection of the Court where the husband is proved to be insane and where it appears that his conduct may endanger the safety of the wife (*e*), as for instance, where an insane husband who twice attempted to commit suicide held out threats to the wife so that her health became impaired (*f*). The Court would not entertain the question of sanity or insanity, but would look only to the acts done (*g*).

CORROBORATION.

It is necessary to require corroboration of petitioner's evidence as to cruelty (*h*), and the mere production of a certified copy of a separation order previously made between the husband and wife by a Court of Summary Jurisdiction on the ground of his persistent cruelty is not, as a general rule, to be considered a sufficient corroboration (*i*).

PLEADINGS.

The cruelty (including the communication of a veneral disease) must be specifically pleaded, and, if it is not, the Court will not allow the issue to be raised or evidence given of it (*j*); nor is evidence to prove a species of cruelty not pleaded in the petition admissible (*k*).

(*d*) *White* v. *White* (1862) 1 Sw. & Tr. 592;
(*e*) *Hanbury* v. *Hanbury* (1892) P. 222.
(*f*) *Baron* v. *Baron* (1908) 24 T.L.R. 273; 52 Sol Jour. 282.
(*g*) *Martin* v. *Martin* (1860) 2 L.T. 118; 8 W.R. 367.
(*h*) *Carroll* v. *Carroll* (1934) 13 Pat. 129.
(*i*) *Judd* v. *Judd* (1907) P. 241; 98 L.T. 59; 23 T.L.R. 538; 51 Sol. Jour. 500.
(*j*) *Kelly* v. *Kelly & Saunders* (1870) 3 Beng. L.R. Ap. 6. *Squires* v. *Squires* (1864) 3 Sw.&Tr. 541. *Walker* v. *Walker* (1912) 107 L.T. 655.
(*k*) *Jewell* v. *Jewell* (1862) 2 Sw. & Tr. 573; 164 E.R. 1119.

If a wife who had been treated with cruelty has brought that treatment on herself by her own violent conduct, she cannot set it up as an answer to a petition for dissolution on the ground of her adultery (*l*).

In case of insanity the petition should state the insanity is lasting and abiding and that there is no hope of recovery or amelioration and not that it is a mere recurrent or intermitent insanity (*m*).

DESERTION.

'Desertion' means an abandonment and implies an active withdrawal from a co-habitation that exists (*n*). But this is not an exhaustive definition of desertion. "In order to ascertain whether or not there has been desertion the whole conduct of the parties must be reviewed. Desertion is not a withdrawal from a place, but from a state of things. What the law seeks to enforce is recognition and discharge of the obligations of the conjugal state. If one party renounces this, or, without the consent of the other, renders it impossible of fulfilment, that is desertion". If he or she has not recognised the duty of co-habitation in the married state, desertion has arisen. There must be a complete renunciation of that conjugal duty and an intention to put an end to co-habitation, though there is no matrimonial home and co-habitation as an existing state of things has been suspended by circumstances not under the control of the party (*o*). 'Desertion' may be equivalent to leaving destitute (*p*).

(*l*) *Allen* v. *Allen & D'Arcy* (1859) Sea. & Sm. 84.
(*m*) *Hanbury* v. *Hanbury*, (1892) P. 222.
(*n*) *Fitzgerald* v. *Fitzgerald* (1869) L.R. 1 P.&D. 694 at p. 697. See *Bradshaw* v. *Bradshaw* (1897) P. 24.
(*o*) *Pulford* v. *Pulford*, (1923) P. 18. *Sickert* v. *Sickert*, (1899) P. 278; 81 L.T. 495.
(*p*) *Haswell* v. *Haswell and Sanderson* (1859) 1 Sw. &Tr. 502 at p. 505.

This term has the significance in India as under English law and although the word 'abandonment' in the section is undefined the effect of the clause is to introduce into the Indian Statute the view adopted by the Courts in England in construing the English Act (*q*). In order, therefore, to constitute 'desertion' there must be a cessation of co-habitation and an intention on the part of the guilty party to desert the other(*r*).

So, where a husband brings a concubine into the house where his wife is living and the wife has to leave the house in consequence, the husband is guilty of desertion(*s*).

The expression 'against the wish of' is to be construed as meaning contrary to an actively expressed wish of the person charging abandonment and notwithstanding the resistance or opposition of such person (*t*), or a wilful abstention by the husband against the wish of the wife (*u*). A wife is bound when seeking to prove desertion to give evidence of conduct on her part showing unmistakably that such desertion was against her wish (*v*) and that she was ready to return to co-habitation if required (*w*).

'Co-habitation' does not necessarily imply the daily and nightly residence together of a husband and wife under the same roof. Circumstances of life, such as business duties, domestic service and other things, may separate husband and wife and yet notwithstanding there may be an existing state of co-habitation (*x*).

(*q*) *Fowle* v. *Fowle*, (1879) 4 Cal. 260.
(*r*) *Appibai* v. *Khimji Cooverji* (1936) 38 Bom. L.R. 77 at pp. 88-89.
(*s*) *Roi* v. *Rasinga Naik* (1935) 58 Mad. 684.
(*t*) *Ibid. Ward* v. *Ward* and *Thompson* v. *Thompson* (1858) 1 Sw. & Tr. 231; 164 E.R. 706.
(*u*) *Hill* v. *Hill* (1923) 47 Bom. 657. *Smith* v. *Smith* (1859) 1 Sw. & Tr. 359; 164 E.R. 765.
(*v*) *Fowle* v. *Fowle*, supra.
(*w*) *Keech* v. *Keech* (1868) L.R. 1 P.&D. 641; 19 L.T. 462.
(*x*) *Huxtable* v. *Huxtable* (1899) 68 L.J.P.&M. 83.

A wife who refuses to permit marital intercourse to her husband cannot allege 'desertion' if in consequence he refuses to live with her (*y*), but there may be desertion without previous co-habitation on parties having parted immediately after the marriage ceremony (*z*), and also, when marriage was not consummated (*a*).

If a deed of separation is not acted upon either as to the husband and wife living apart or as to certain stipulations as to money matters contained in it, the husband will still be guilty of desertion if he subsequently leaves the wife against her will (*b*).

If the intention of the husband not to return to the wife could be made out from his letters and from his acts, desertion would be inferred (*c*). Where a husband who had gone abroad on military service ceased to correspond with his wife and contributed nothing to her support (*d*), and where another left his wife on account of her drunkenness without making any provision for her maintenance (*e*), the husbands were held to be guilty of desertion.

WILFUL DESERTION.

The occupation of a separate house is not essential to the matrimonial offence of desertion (*f*), and it would, therefore, amount to desertion if the husband forsakes the wife's bed, avoids her society and secludes himself from her in a separate part of a common residence (*g*), because the wife is entitled to the society and protection

(*y*) *Synge* v. *Synge* (1901) P. 317, C.A.
(*z*) *De Laubenque* v. *De Laubenque* (1899) P. 42; 79 L.T. 708.
(*a*) *Lee Shires* v. *Lee Shires* (1910) 54 Sol. Jour. 874.
(*b*) *Cock* v. *Cock* (1864) 3 Sw. & Tr. 514; 164 E.R. 1375.
(*c*) *Lawrence* v. *Lawrence* (1862) 2 Sw. & Tr. 575; 164 E.R. 1120.
(*d*) *Henty* v. *Henty* (1875) 33 L.T. 263.
(*e*) *X.* v. *X.* (1899) 22 Mad. 328.
(*f*) *Powell* v. *Powell* (1922) P. 278.
(*g*) *Ibid.*

of her husband and the payment of an allowance to her is no answer to a charge of wilful desertion (*h*).

So would it be desertion on the part of the husband who though willing to return to his wife was actually living with another woman (*i*).

The facts which constitute desertion vary with the circumstances and mode of life of the parties (*j*).

WHAT DOES NOT CONSTITUTE DESERTION.

A husband whose absence from home is necessitated by emyloyment abroad is not guilty of desertion (*k*), nor would he be guilty of the offence if the wife's conduct shows that her separation from her husband was voluntary (*l*), nor would the refusal by one of the spouses to resume co-habitation at the request of the other constitute desertion (*m*), nor would the husband be answerable for desertion if he neglects opportunities of consorting with his wife (*n*); even when they continue to reside under the same roof (*o*). Abstention of marital intercourse without reasonable cause or the parties going their own way and having their own friends and interests would not amount to desertion (*p*), and if a husband asks his wife to go her own way and she, thereupon, leaves the house and refuses to return to him at his request, the husband is not guilty of desertion (*q*), nor is he guilty of this matrimonial offence when the wife's refusal to co-habit with the husband

(*h*) *Macdonald* v. *Macdonald* (1859) 4 Sw. & Tr. 242; 164 E.R. 1508.
(*i*) *Garcia* v. *Garcia* (1888) 13 P.D. 216; 59 L.T. 524. See *Davis* v. *Davis* (1921) 124 L.T. 795.
(*j*) *Williams* v. *Williams* (1864) 3 Sw. & Tr. 547; 164 E.R. 1388.
(*k*) *Thompson* v. *Thompson* (1858) 1 Sw. & Tr. 231; 164 E.R. 706.
(*l*) *Cufley* v. *Cufley and Loveck* (1865) 13 L.T. 610.
(*m*) *Fitzgerald* v. *Fitzgerald* (1869) L.R. 1 P. & D. 694. See also (1874) L.R. 3 P. & D. 136.
(*n*) *Williams* v. *Williams* (1864) 3 Sw. & Tr. 547; 164 E.R. 1388.
(*o*) *Jackson* v. *Jackson* (1924) P. 19; 40 T.L.R. 45.
(*p*) *Ste. Croix* v. *Ste. Croix* (1917) 44 Cal. 1091.
(*q*) *Charter* v. *Charter* (1901) 84 L.T. 172; 17 T.L.R. 327.

is a groundless one, *e.g.* when she refuses to live in the same house with her husband's parents (*r*), or in a house next to her mother-in-law's (*s*). Where a husband goes into service leaving his wife as a servant in a family where she contracts an adulterous connection with a man servant, the husband is not guilty of desertion or of wilful separation (*t*).

SEPARATION BY MUTUAL CONSENT.

An agreement or deed of separation is conclusive against a plea of desertion (*u*) unless it is brought about by coercion or fraud (*v*); such an agreement to live apart may be evidenced by conduct (*w*). Where a wife relying on a deed of separation takes steps to enforce payment under the deed she cannot set up desertion whilst the deed is subsisting (*x*). If the state of co-habitation has ceased to exist whether by the adverse act of the husband or of the wife or by mutual consent, desertion becomes impossible to either, at least until their common life and home has been resumed (*y*). So, it would not be desertion on the part of the husband who commits adultery subsequent to the separation for some years by mutual consent (*z*), or who leaves the wife under an agreement between them not to molest the husband on his paying a sum of money to her (*zz*). Where the husband and

(*r*) *Jones* v. *Jones* (1895) 39 Sol. Jour. 397; 11 T.L.R. 317.
(*s*) *Jackson* v. *Jackson* (1932) 48 T.L.R. 206.
(*t*) *Davies* v. *Davies & Hughes* (1863) 3 Sw. & Tr. 221; 164 E.R. 1258.
(*u*) *Piper* v. *Piper* (1902) P. 198. *Looker* v. *Looker* (1918) P. 133.
(*v*) *Adamson* v. *Adamson* (1907) 23 T.L.R. 434. *Smith* v. *Smith* (1915) P. 288. *Holroyd* v. *Holroyd* (1920) 36 T.L.R. 479. *Crabb* v. *Crabb* (1868) L.R 1 P. & D. 601.
(*w*) *Bowen* v. *Bowen* (1908) 73 J P. 87.
(*x*) *Roe* v. *Roe* (1916) P. 163.
(*y*) *Fitzgerald* v. *Fitzgerald* (1869) L.R. 1 P. & D. 694.
(*z*) *Synge* v. *Synge* (1901) P. 317, C. A.
(*zz*) *Buckmaster* v. *Buckmaster* (1869) L.R. 1 P. & D. 713. See *Pape* v. *Pape* (1887) 20 Q.B.D. 76. *Roe* v. *Roe* (1916) P. 163. *King* v. *King* (1882) 6 Bom. 417 at p. 417, note.

the wife separated by consent at the instance of the wife and the husband six years afterwards made an offer to return to co-habitation which the wife refused believing it to be not *bonafide,* and where there was no change in the circumstances which had originally led the wife to desire a separation, it was held that there was no desertion (*a*).

Where the separation on the part of the husband is not voluntary but is due to stress of circumstances the husband cannot be said to be guilty of desertion (*b*). For instance, where a husband in order to avoid arrest for the commission of a crime separated from his wife with her consent, but he was afterwards imprisoned for several offences. Whilst in prison he kept up a correspondence with his wife and made repeated endeavours when out of prison to induce her to return to co-habitation. The wife refused and the co-habitation was not resumed, the husband was not guilty of desertion. Similarly, where a husband having left his wife in full possession of the family home subsequently visited the chiildren with his wife's assent but did not return to co-habitation, nor did he hold any communication with her, the Court held that it was a separation by mutual arrangement (*c*). But when the separation is temporarily for mutul convenience, marital relations are not altered and the husband would be guilty of desertion on his refusal to take his wife back or to maintain her (*d*). The consent of the wife to the separation must be clearly proved. If a wife told her husband to go to the woman with home he was carrying on an adulterous intercourse and to return to her (the wife) when he would be sick of that woman, it will not amount to the

(*a*) *Cooper* v. *Cooper* (1875) 33 L.T. 264.
(*b*) *Townsend* v. *Townsend* (1873) L.R. 3 P. & D. 129. But see *Cudlip* v *Cudlip* (1858) 1 Sw. & Tr. 229; 164 E.R. 705.
(*c*) *Taylor* v. *Taylor* (1881) 44 L.T. 31.
(*d*) *Chudley* v. *Chudley* (1893) 69 L.T. 617; 10 T.L.R. 36.

wife's assent to the separation (*e*). An attempt on the part of the husband to prove the wife's consent by her letters only was found by the Court insufficient to absolve him from the charge of desertion as he himself for many years had not provided her with maintenance or a home (*f*).

A deed of separation does not, however, preclude the wife from petitioning for divorce on the ground of the husband's desertion and adultery (*g*), nor could the husband avail himself of the deed when he had on a former occasion repudiated the deed, or when he has broken any of the covenants (*h*), for instance, when he has ceased to pay the stipulated allowance (*i*).

ANTE-NUPTIAL AGREEMENT TO SEPARATE.

An ante-nuptial agreement between husband and wife for not living together is void as against public policy and is no answer to a charge of desertion (*j*); and where the agreement is contrary to the policy of the British Law, British Courts will not enforce it although the agreement may be entered into in a foreign country, by the law of which it is valid (*k*).

OFFER TO RESUME CO-HABITATION.

An offer to resume co-habitation should be a *bonafide* one and if the wife is suspicious of the husband's *bonafides*

(*e*) *Haviland* v. *Haviland* (1863) 32 L.J.P. & M. 65.
(*f*) *Meara* v. *Meara* (866) 35 L.J.P. & M. 33. See *Harriman* v. *Harriman* (1909) P. 123 at p. 148.
(*g*) *Hussey* v. *Hussey* (1913) 109 L.T. 192; 29 T.L.R. 673. *Smith* v. *Smith* (1915) P. 288.
(*h*) *Smith* v. *Smith* supra. *Looker* v. *Looker* (1918) P. 132.
(*i*) *Walsh* v. *Walsh* (1920) 122 L.T. 463. *Terry* v. *Terry* (1915) 32 T.L.R. 167.
(*j*) *Brodie* v. *Brodie* (1917) P. 271.
(*k*) *Rousillon* v. *Rousillon* (1880) 14 Ch.D. 351. See *Kaufman* v. *Gerson* (1904) 1 K.B. 591, C.A. *Abdul* v. *Hussenbi* (1904) 6 Bom.L.R. 728. See section 23 of the Indian Contract Act, 1872

she is not bound to return to him (*l*). Nor is desertion obliterated by repentence and subsequent offers to resume co-habitation if the wife reasonably entertains doubts as to the genuineness of the offers (*m*). Before resuming co-habitation the wife is entitled to annex reasonable conditions to such resumption (*n*). The refusal of the husband to abandon his bad habits like drinking and gambling would not make his offer of return a *bonofide* one (*o*), and a wife would be justified in refusing to return to a husband who is living in adultery with another woman (*p*), nor would the willingness on the part of the husband to resume co-habitation with his wife absolve him from the charge of desertion if he is, at the time, actually living with another woman (*q*). Whether the husband's offer is a *bonafide* one or not is a question of fact in each case (*r*).

When the husband and wife are living apart under a separation deed, the refusal on the part of the husband to make payments and resume co-habitation on the offer of the wife to do so would not necessarily constitute desertion (*s*). The refusal on the part of the husband to resume co-habitation with a wife who had been removed to a lunatic asylum, but who had recovered, would amount to desertion (*t*).

(*l*) *Cooper* v. *Cooper* (1875) 33 L.T. 264. *Martin* v. *Martin* (1898) 78 L.T. 558. *Harris* v. *Harris* (1866) 15 L.T. 448. *Kershaw* v. *Kershaw* (1887) 3 T.L.R. 507.

(*m*) *Thomas* v. *Thomas* (1924) P. 194.

(*n*) *Gibson* v. *Gibson* (1859) 29 L.J.P. & M. 25.

(*o*) *Ibid.*

(*p*) *Farmer* v. *Farmer* (1884) 9 P.D. 245. *Garcia* v. *Garcia* (1888) 13 P.D. 216. *Graves* v. *Graves* (1864) 3 Sw. & Tr. 350; 164 E.R. 1310. *Koch* v. *Koch* (1899) P. 221.

(*q*) *Edwards* v. *Edwards* (1893) 62 L.J.P. & M. 33. See *Lodge* v. *Lodge* (1890) 15 P.D. 159.

(*r*) *French Brewster* v. *French Brewster* (1889) 62 L.T. 609.

(*s*) *R.* v. *Leresche* (1891) 2 Q.B. 418; 17 Cox C.C. 384, C.A.

(*t*) *Pulford* v. *Pulford* (1923) P. 18.

Where the offence of desertion is once completed the spouse deserted has a right to the relief given by statute although the other party may subsequently have made a *bonafide* offer to return (*u*), nor would the offer of return to co-habitation be a bar to the wife's petition on the ground of adultery and desertion for she is under no obligation to condone the adultery (*v*).

CONSTRUCTIVE DESERTION.

It is not necessary for a husband in order to desert his wife, to actually turn his wife out of doors; it is sufficient if by his conduct he compels her to leave the house (*w*), and the party who intends to bring the co-habitation to an end and whose conduct in reality causes its termination commits the act of desertion (*x*); so also, where the separation is brought about by the husband's misconduct the wife is entitled to relief on the ground of desertion by the husband (*y*). And where the husband makes it impossible for the wife to remain in the matrimonial home on account of his misconduct with another woman (*z*), or when he brings a woman into the house despite his wife's protests and the wife consequently leaves the husband's house, the wife is entitled to relief on the ground of desertion on the part of the husband(*a*).

The law that applies to the case of desertion of the wife by the husband would equally apply to the desertion

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(*u*) *Cargill* v. *Cargill* (1559) 1 Sw. & Tr. 235; 164 E.R. 708.
(*v*) *Basing* v. *Basing* (1864) 3 Sw. & Tr. 516; 164 E.R. 1375.
(*w*) *Charter* v. *Charter* (1901) 84 L.T. 272; 17 T.L.R. 327. See *Baker* v. *Baker* (1863) 3 Sw. & Tr. 213; 164 E.R. 1255.
(*x*) *Sickert* v. *Sickert* (1899) P. 278; See *Bowron* v. *Bowron* (1925) P. 189. *Graves* v. *Graves* (1864) 3 Sw. & Tr. 350;164 E.R. 1310. *Appibai* v. *Khimji Cooverji* (1936) 38 Bom.L.R. 77 at pp. 88-89.
(*y*) *Wood* v. *Wood* (1878) 3 Cal. 485
(*z*) *Pizzala* v. *Pizzala* (1896) 12 T.L.R. 451. *Koch* v. *Koch* (1899) P. 221. *Sic.. ert* v. *Sicker* supra.
(*a*) *Dickinson* v. *Dickinson* (1889) 62 L.T. 330.

of the husband by the wife and the husband would be entitled to judicial separation by reason of the wife's desertion for two years and upwards without reasonable cause (*b*).

'WITHOUT REASONABLE EXCUSE' OR 'REASONABLE CAUSE.'

There is no distinction in meaning between the expressions, "without reasonable excuse" and "without reasonable cause" (*c*). A "reasonable excuse" for leaving a wife must be grave and weighty (*d*).

WHAT IS 'REASONABLE EXCUSE.'

When a husband withdraws from co-habitation and when he discovers at a subsequent period that his wife is living in adultery with another man, the husband is not guilty of having wilfully separated himself from her without reasonable excuse (*e*). A separation due to the exigences of business or professional or public duties is a separation with reasonable cause (*f*), and any matrimonial offence, such as adultery, cruelty &c., which would be an answer to a suit for restitution of conjugal rights is a reasonable excuse (*g*).

The husband is bound to give the wife the security and comfort of his home and society, so far as his position and business will admit and if the Court is satisfied that the husband has failed in this duty it will in the exercise of its discretion, refuse to dissolve the marriage by reason of the wife's adultery (*h*).

(*b*) *Millar* v. *Millar* (1883) 8 P.D. 187.
(*c*) *Wickins* v. *Wickins* (No. 1) (1918) P. 265, C.A.
(*d*) *Yeatman* v. *Yeatman* (1868) L.R. 1 P. & D. 489.
(*e*) *Haswell* v. *Haswell and Sanderson* (1859) 1 Sw. & Tr. 502; 164 E.R. 832.
(*f*) *Exparte Aldrige* (1858) 1 Sw. & Tr. 88; 164 E.R. 641.
(*g*) *Haswell* v. *Haswell and Sanderson*, supra.
(*h*) *Jeffresy* v. *Jeffreys and Smith* (1864) 3 Sw. & Tr. 493; 164 E.R. 1366.

"FOR TWO YEARS OR UPWARDS."

The statutory period of desertion is two years and to enable a party to maintain desertion, there must exist a state of things which keeps it up during the whole period of two years (*i*). Any petition filed before the expiration of two years would be premature (*j*). When, however, the period of two years is not complete at the time when proceedings for divorce are commenced, such charge can only be pleaded and acted upon by being made the subject of a fresh petition when the period is completed (*k*). The period of desertion does not run during the time the suit is pending (*l*) because that practically puts it out of the respondent's power to return (*m*).

The failure of a husband to comply with a decree for restitution of conjugal rights would amount to desertion (*n*) although the period of two years had not elapsed (*o*), but there can be no decree for judicial separation when it is impossible for the husband to comply with the decree, *i. e.*, when he has not the means of doing so, or when he did not know his wife's whereabouts (*p*).

COMMENCEMENT OF DESERTION.

Desertion commences from the time the husband makes up his mind to abandon the wife and not from the time when the husband and wife cease to cohabit (*q*). Where a married couple parted in 1877 and the wife found

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(*i*) *Kay* v. *Kay* (1904) P. 382. *Dodd* v. *Dodd* (1906) P. 189.
(*j*) *Wood* v. *Wood* (1887) 13 P.D. 22; 57 L.J.P &M. 48.
(*k*) *Lapington* v. *Lapington* (1888) 14 P.D. 21; 58 L.J.P.&M. 26.
(*l*) *Kay* v. *Kay*, supra.
(*m*) *Harriman* v. *Harriman* (1909) P. 123, C.A. *Stevenson* v. *Stevenson* (1911) P. 191, C.A.
(*n*) *Bigwood* v. *Bigwood* (1888) 13 P.D. 89; 58 L.T. 642.
(*o*) *Harding* v. *Harding* (1886) 11 P.D. 111; 56 L.T. 919.
(*p*) *Smith* v. *Smith* (1859) 1 Sw. & Tr. 359; 164 E.R. 765.
(*q*) *Gatehouse* v. *Gatehouse* (1867) L.R. 1 P. & D. 331; 16 L.T. 34. *Stickland* v. *Stickland* (1876) 35 L.T. 767.

in 1886 that the husband was living in adultery, having contributed nothing for her maintenance, the desertion was held to commence in and since 1886 (*r*); and where a a wife was *malafide* persuaded to agree to a temporary deed of separation and the husband was found to be living abroad in adultery, relief was granted to the wife notwithstanding that the commencement of the desertion was calculated prior to the date on which the separation should have come to an end (*s*). A husband deserted his wife without reasonable cause on the 4th October 1854 and did not return to her again. On the 16th November 1856 he was arrested and subsequently convicted for felony and sentenced to four years imprisonment. Between the 4th October 1854 and the 17th November 1856 he was twice imprisoned for debt, on the first occasion for seven and on the second occasion for nineteen days. The wife filed the petition before the expiration of the term of imprisonment and the Court held that the husband had been guilty of desertion for two years and upwards(*t*). So, a husband would be guilty of desertion if at the time of separation he was carrying on an adulterous intercourse notwithstanding the fact that he was prevented by subsequent imprisonment from returning to his wife (*u*), nor, would intermittent visits by the husband to the wife, without the intention of resuming marital intercourse prevent the wife from obtaining relief for desertion (*v*). A husband deserted his wife, but within two years from the desertion a deed of separation was agreed to, by which he covenanted to make her an allowance. This deed was duly executed by the husband and wife but no part of the

(*r*) *Drew* v. *Drew* (1891) 64 L.T. 840.
(*s*) *Harrison* v. *Harrison* (1910) 54 Sol. Jour. 619.
(*t*) *Astrope* v. *Asrtope* (1859) 29 L.J.P.&M. 27.
(*u*) *Drew* v. *Drew* (1883) 13 P.D. 97; 58 L.T. 923.
(*v*) *Thurston* v. *Thurston* (1910) 26 T.L.R. 388.

allowance had been paid. It was held that the wife had bargained away her right to relief and could not establish a charge of desertion without cause for two years (*w*).

PLEADINGS.

In a petition for dissolution of marriage the grounds for divorce should be specifically averred and proved and where this is not done the Court will be justified in returning the petition (*x*). Where the petitioner alleges adultery and desertion, but there is no averment that the desertion was an abandonment against the wish of the petitioner the Court cannot decree dissolution of marriage (*y*).

In answer to a petition for judicial separation on the ground of desertion respondent may set out facts showing that there was reasonable cause for the desertion, but such facts should be stated succinctly (*z*).

BAR TO RELIEF.

Desertion by the petitioner without reasonable excuse constitutes a bar to the suit for judicial separation (*zz*).

Adulterer to be co-respondent.

11. Upon any such petition presented by a husband, the petitioner shall make the alleged adulterer a co-respondent to the said petition, unless he is excused from so doing on one of the following grounds, to be allowed by the Court:—

(1) That the respondent is leading the life of a prostitute and that the petitioner knows of no person with whom the adultery has been committed.

(*w*) *Parkinson* v. *Parkinson* (1869) 2 P.&D. 25; 21 L.T. 732. *Piper* v. *Piper* (1902) P. 198.

(*x*) *Ma Maw* v. *Maung Yaw Han* (1933) 11 Rang. 68.

(*y*) *Bai Kanku* v. *Shiva Toya* (1893) 17 Bom. 624 at p. 625, F.B.

(*z*) *Hill* v. *Hill* (1864) 33 L.J.P.&M. 187; 10 Jur. (N.S.) 371.

(*zz*) *Arthur* v. *Arthur* (1904) 26 All. 553.

(2) That the name of the alleged adulterer is unknown to the petitioner, although he has made due efforts to discover it.

(3) That the alleged adulterer is dead.

CO-RESPONDENT.

Cf: Section 28 of the Matrimonial Causes Act, 1857

Section 177 of the Supreme Court of Judicature (Consolidation) Act, 1925.

Rules 4 and 5 of the Matrimonial Causes Rules, 1924.

Rule 916 of the Bombay High Court Rules, 1936.

This section deals with the petition only by the husband. The petitioner must make every person whom he charges in the petition with having committed adultery with his wife a co-respondent unless he is excused from so doing by the Court on special grounds (*a*).

In India under the provisions of this section only three grounds are mentioned for dispensing with the co-respondent, namely,

(*i*) wife leading the life of a prostitute,

(*ii*) the name of the alleged adulterer being unknown, and

(*iii*) the alleged adulterer being dead.

Under the provisions of the English Statute the Court of Divorce has a wider discretion in the matter and can grant leave to dispnse with the co-respondent on any special ground. The Courts in India notwithstanding the provisions of section 11, can act on the principles and rules of the English Court of Divorce. (See section 7 of the Act).

(*a*) *Carryer* v. *Carryer and Watson* (1865) 4 Sw. & Tr. 94; 13 L.T. 250; *Joseph* v. *Ramamma* (1922) 45 Mad. 982, F.B.

A person who has been charged by a husband in his answer to a petition by the wife for divorce with having committed adultery with the wife is entitled to intervene(*b*).

In a suit by the wife for dissolution the alleged adulteress is not made a co-respondent, but the Court may, in its discretion, if it deems fit, make the alleged adulteress a party whenever it has reason to suspect collusion or connivance between the petitioner and her husband (*c*). But in a wife's suit for divorce on the ground of incestuous adultery of the husband the Court has no power to allow the alleged adulteress to intervene (*d*).

"*Alleged adulterer*".—The words 'alleged adulterer' mean the person alleged by the petitioner in the petition to be the adulterer (*e*).

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DISPENSING WITH CO-RESPONDENT.

"Unless the Court otherwise orders". If the petitioner desires to proceed with a divorce suit without citing the co-respondent, he must show that the co-respondent could not be traced or that he does not know or cannot ascertain his whereabouts or that he could not be reached by one or other of the methods by which service or substituted service could be effected (*f*). The discretion given to the Court to allow a petition for divorce to proceed on special grounds without making any co-respondent, is to be exer-

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(*b*) *Stevenson* v. *Stevenson* (1899) 4 C.W.N. 506.

(*c*) *Bell* v. *Bell* (1883) 8 P.D. 217. *Jones* v. *Jones* (1896) P. 165. *Pepper* v. *Pepper and Baker* (1926) 136 L.T. 224. See *Stuart* v. *Stuart*, (1936) 57 All. 884. *Swaine* v. *Swaine*, (1932) 10 Rang. 115. In the Bombay High Court the woman named in the wife's petition as the alleged adulteress is to be served with a certified copy of the petition—See Rule 917.

(*d*) *Ramsay* v. *Boyle* (1903) 30 Cal. 489. *Bailey* v. *Bailey* (1903) 30 Cal. 490, n.

(*e*) *Saunders* v. *Saunders* (1897) P. 89. *Pitt* v. *Pitt* (1868) L.R. 1 P.&D. 464.

(*f*) *Rush* v. *Rush, Bailey and Pimenta* (1920) P. 242.

cised with regard to the principles laid down in or to be gathered from the Act and the Rules and to the circumstances of each particular case and cannot be fettered by any general rules of practice (*g*). But the Court should not lightly excuse a party from making any inquiry which he can reasonably be asked to make as to the adulterer(*h*). The Court of Appeal will not interfere with the exercise of discretion of the trial Court unless it appears that the trial judge had acted upon a wrong principle or under some misapprehension or without consideration (*i*).

LEAVE OF THE COURT TO BE OBTAINED.

In a suit for dissolution of marriage on the ground of adultery with a person unknown the petitioner should obtain leave from the Court to dispense with the naming of a co-respondent (*j*). The direction for such leave must be by application to the Judge on motion founded on affidavit before the hearing of the petition (*k*). The Court may not grant leave on the affidavit of the petitioner alone and may insist on its corrobaration by affidavit of other persons who tried to trace the co-respondent (*l*), and the Court would have no jurisdiction to entertain the petition where such leave has not been obtained (*m*). The respondent has no *locus standi* and is not entitled to be heard in opposition to such an application (*n*), nor to move for vacating the order (*o*).

(*g*) *Saunders* v. *Saunders*, supra. *Edwards* v. *Edwards and Wilson* (1897) P. 316.
(*h*) *Over* v. *Over* (1925) 49 Bom. 368; 27 Bom.L.R. 251; A.I.R. (1925) Bom. 231.
(*i*) *Rush* v. *Rush, Bailey and Pimenta*, supra.
(*j*) *Howard* v. *Howard and Dunnet* (1922) 44 All. 728.
(*k*) *Cox* v. *Cox* (1916) 45 Cal. 525. *Drinkwater* v. *Drinkwater* (1889) 60 L.T. 398.
(*l*) *Pitt* v. *Pitt* (1868) L.R. 1 P.&D. 464. *Jeffreys* v. *Jeffreys* (1912) 2 P.D. 90. *Barber* v. *Barber* (1896) P. 73.
(*m*) *Cox* v. *Cox*, supra.
(*n*) *Dobson* v. *Dobson and Paxton* (1916) P. 110.
(*o*) *Allen* v. *Allen and D'Arcy* (1859) 23. J.P. 360.

"RESPONDENT LEADING THE LIFE OF A PROSTITUTE."

Where the wife, the respondent is alleged to be leading the life of a common prostitute and to have committed adultery with several persons who were necessary witnesses to enable the petitioner to establish the charges of adultery, the petitioner will be allowed to proceed without making a co-respondent (*p*); but where the respondent was not leading a life of promiscuous intercourse with all who sought her, but was living with separate persons in succession and professed to be able to attribute her respective children to a father, she was held not to be leading a life of prostitution within the meaning of the Act (*q*). So, where some of the adulterers are known and some are not known, the known adulterers should be added as co-respondents (*r*).

Where the wife has given birth to a child of which petitioner is not the father the Court may allow him to proceed with the suit without naming a co-respondent (*s*).

"NAME OF THE ALLEGED ADULTERER IS UNKNOWN."

If the name of the adulterer is unknown the Court can dispense with that co-respondent (*t*), but the petitioner must show that he has made due efforts to trace the man with whom respondent is alleged to have committed adultery and that he could not learn his name (*u*). In the

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(*p*) *Peters* v *Peters and Willet* (1861) 3 Sw. & Tr. 264. *Roe* v. *Roe* (1869) 3 Beng. L.R. Ap. 9. *Hook* v. *Hook* (1858) 1 Sw. & Tr. 183; *Quicke* v. *Quicke* (1861) 2 Sw. & Tr. 419; 5 L.T. 690.

(*q*) *Roe* v. *Roe*, supra.

(*r*) *Penty* v. *Penty* (1822) 7 P.D. 19.

(*s*) *Saunders* v. *Saunders* (1897) P. 89, C.A.

(*t*) *Rayment* v. *Rayment & Stuart* (1910) P. 271. *Jeffreys* v. *Jeffreys* (1912) 28 T.L.R. 504.

(*u*) *Evans* v. *Evans* (1859) 28 L.J.P. & M. 20.

event of the petitioner acquiring evidence as to the person with whom his wife committed adultery and who was previously unknown, he ought to bring the matter before the Court (*v*). Where the adultery is admitted by the wife with a person whose initials only could be found in a hotel register the Court ordered the petitioner to charge his wife as having committed adultery with that man and named the co-respondent by his initials only; service to be by advertisement (*w*). And where in a husband's petition for dissolution of marriage he alleges adultery with persons known as well as unknown, leave must be obtained to dispense with making unknown persons co-respondents (*x*), and allegations against unknown persons in the petition may be struck out (*y*).

"ALLEGED ADULTERER IS DEAD."

Where the alleged adulterer is dead the petitioner should apply to the Court for an order to be excused from making him a co-respondent (*z*), and when the co-respondent named in the petition dies after the commencement of the proceedings the petitioner should apply to have his name struck out of the suit (*a*), but the charge of adultery by respondent with the co-respondent (since deceased) could be gone into at the trial (*b*).

(*v*) *Muspratt* v. *Muspratt* (1861) 31 L.J.P. & M. 28.

(*w*) *Nicolas* v. *Nicolas* (1899) 80 L. T. 422.

(*x*) *Penty* v. *Penty, Johnson & Sabingie* (1882) 7 P.D. 19.

(*y*) *Hunter* v. *Hunter & Vernon* (1858) 28 L. J.P. & M. 3. *Peacock* v. *Peacock* (1894) 6 R. 656.

(*z*) *Tollemache* v. *Tollemache* (1858) 28 L.J.P. & M. 2. *Slaytor* v. *Slaytor & Jackson* (1897) P. 85.

(*a*) *Sutton* v. *Sutton & Peacock* (1863) 32 L.J.P. & M. 156. *Walpole* v. *Walpole & Chamberlain* (1901) P. 86.

(*b*) *Wigglesworth* v. *Wigglesworth, Bennett & Smith* (1911) 27 T.L.R. 463.

WANT OF EVIDENCE AGAINST CO-RESPONDENT.

The mere fact of want of evidence against the alleged adulterer, might not in all cases, be a sufficient reason for dispensing with a co-respondent (*c*). If, however, the Court is satisfied that no evidence can be obtained against the co-respondent, it may exercise its discretion and allow the petitioner to proceed without the co-respondent (*d*), and also when the only evidence available against the co-respondent is the wife's confession of adultery (*e*).

Where the address and occupation of the alleged adulterer is known to the petitioner he could not be excused from citing him as co-respondent merely on the ground that there was no evidence against him except respondent's confession (*f*).

The respondent could not be asked to furnish the address of the co-respondent (*g*).

CO-RESPONDENT A FOREIGNER.

A petitioner is relieved from citing an alleged adulterer as co-respondent on the ground that he is a foreigner domiciled and resident out of the jurisdiction of the Court, but notice of the proceedings is to be served upon him (*h*). The jurisdiction of the Court, however, does not depend upon the domicil of the co-respondent, nor is it to be determined by the question whether the co-respondent is or is

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(*c*) *Carryer* v. *Carryer & Watson* (1865) 4 S.W. & Tr. 94; 13 L.T. 250. *Jones* v. *Jones* (1896) P. 165. *Joseph* v. *Ramamma* (1922) 45 Mad. 982, F.B.
(*d*) *Edwards* v. *Edwards & Wilson* (1897) P. 316.
(*e*) *Muspratt* v. *Muspratt* (1861) 31 L.J.P. & M. 28. *Jenkins* v. *Jenkins* (1867) L.R. 1 P. & D. 330. *Gill* v. *Gill* (1889) 37 W.R. 623. *Bagot* v. *Bagot* (1890) 62 L.T. 612.
(*f*) *Carnish* v. *Carnish* (1890) 15 P.D. 131.
(*g*) *Franklin* v. *Franklin* (1921) P. 407.
(*h*) *Boger* v. *Boger* (1908) P. 300; 99 L.T. 881.

not a British subject *(i)*. Even a foreigner can be made a co-respondent *(j)*.

RULING PRINCE AS CO-RESPONDENT.

A foreign Ruling Prince is not capable of being a co-respondent on proof of his status *(k)*. A certificate from the India Office as to the status of a Ruling Prince in India will be accepted in evidence *(l)*.

INTERVENERS.

Section 11 of the Indian Divorce Act makes no provision for the intervener in a wife's petition for dissolution of marriage. Section 197 of the Supreme Court of Judicature (Consolidation) Act, 1925, provides for it. See also Rules 17 to 19 of the Matrimonial Causes Rules 1924, and Rule 917 of the Bombay High Court Rules (Indian Divorce Rules) 1936.

In a suit by a wife for dissolution on the ground of the husband's alleged adultery with a named woman, the latter has no right to intervene *(l_1)*. This defect ought to be remedied by inserting in the Indian Divorce Act, 1869, a provision similar to that in Rule 9 of the Indian (Non-Domiciled Parties) Divorce Rules, 1927. But the Court may upon the application of the woman with whom the husband is alleged to have committed adultery direct that that she be made a co-respondent *(m)*, and she may plead after issue joined by leave of the Court *(n)*, or even after the passing of the decree *nisi* and before it is made

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(i) *Rayment* v. *Rayment & Stuart* (1910) P. 271.
(j) *Hill* v. *Hill* (1923) 47 Bom. 657.
(k) *Statham* v. *Statham and the Gaekwar of Baroda* (1912) P. 92.
(l) *Ibid.*
(l_1) *In the matter of Enid Peychers* (1935) 62 Cal. 82.
(m) *Ball* v. *Ball* (1883) 8 P.D. 217. *Bailey* v. *Bailey* (1903) 30 Cal. 490, note.
(n) *Jones* v. *Williams* (1865) 4 Sw. & Tr. 19; 34 L.J.P. & M. 102.

absolute (*o*), but the Court has no power, where the husband is charged with having committed incestuous adultery, to allow the alleged adulteress to intervene (*p*).

HUSBAND'S ANSWER TO WIFE'S PETITION.

COUNTERCHARGE AGAINST WIFE—

Where the husband in answer to the wife's petition charges his wife with having committed adultery with a specified person, the Court may allow the alleged adulterer to intervene although the husband does not pray for dissolution of the marriage (*q*), but the alleged adulterer in the husband's answer to the wife's petition for judicial separation is not permitted to intervene (*r*). Where the husband's answer contains a claim for cross relief (Counterclaim) then in that case the husband is bound to make the alleged adulterer a co-respondent as he would have done if he had presented a cross petition (*s*). Where, however, the King's Proctor intervenes after a decree *nisi* obtained by the wife and alleges adultery of the wife with a specified person, the Court has no power to allow the alleged adulterer to intervene (*t*).

By the Matrimonial Clauses Act, 1907, (7 Edw. VII. Ch. 12) section 3, the Court was given the power to allow intervention of any person charged with adultery with any party to the suit. The provisions of that section have been reproduced in section 197 of the Supreme Court of Jurisdiction (Consolidation) Act, 1925. So, where the person charged by the King's Proctor with having

(*o*) *French* v. *French* (1914) 30 T.L.R. 584.
(*p*) *Ramsay* v. *Boyle* (1903) 30 Cal. 489.
(*q*) *Wheeler* v. *Wheeler and Rhodes* (1889) 14 P.D. 154. *Kenworthy* v. *Kenworthy*, (1919) P. 65 at pp. 72-74. Rule 22-B of the Matrimonial Causes Rules, 1924.
(*r*) *Farrell* v. *Farrell* (1896) 76 L.T. 167.
(*s*) *Harrop* v. *Harrop* (1899) P. 61. *Lowe* v. *Lowe* (1899) P. 204. *Kenworthy* v. *Kenworthy* (1919) P. 65.
(*t*) *Grieve* v. *Grieve* (1893) P. 288. *Carew* v. *Carew* (1894) P. 31.

committed adultery with the petitioner, intervened and filed an answer to the King's Proctor's plea, such person, as well as the petitioner, may, upon the dismissal of the petition, be condemned in the costs of the King's Proctor(*u*).

REVISION—

The High Court will not interfere in revision with the order of the District Judge refusing to add a party as co-respondent (*u*$_1$)

Court to be satisfied of absence of collusion.

12. Upon any such petition for the dissolution of a marriage, the Court shall satisfy itself, so far as it reasonably can, not only as to the facts alleged, but also whether or not the petitioner has been in any manner accessory to, or conniving at, the going through of the said form of marriage, or the adultery, or has condoned the same, and shall also enquire into any countercharge which may be made against the petitioner.

Cf. section 29 of the Matrimonial Causes Act, 1857. Section 178 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925.

"*Petitioner has been Accessory to*"—

Where a husband leaves his wife in a situation likely to induce her to adulterous co-habitation he is said to be "accessory to" it (*v*); as, where the husband would go to places of amusement with respondent and co-respondent, allowing the respondent (wife) to dance frequently with co-respondent and would leave her in co-respondent's

(*u*) *Davison* v. *Davison* (1909) P. 358.
(*u*$_1$) *Lyall* v. *Lyall* (1927) 54 Cal. 1038 at p. 1040.
(*v*) *Gipps* v. *Gipps & Hume* (1864) 11 H.L.Cas. 1; 10 L.T. 735.

care(*w*), or where the adultery of the wife is brought about by the husband's agent, though without his knowledge (*x*).

A husband domiciled in England acquiesced and entirely assisted his wife to obtain a decree of divorce in South Dakota and where she remarried knowing that the American decree was invalid in England the Court held in the husband's suit for dissolution on the ground of the wife's adultery, that he was guilty of being an accessory to respondent's adultery (*y*). But where the marriage of parties domiciled in England is dissolved by a foreign (U. S. A.) Court, the decree of which is not valid in England, and the woman remarries, both the husband and the wife honestly believing in the validity of the American decree the husband could not be said to be 'an accessory to his wife's adultery' and the Court in England may grant him a decree *nisi* against the wife (*z*).

CONNIVANCE.

"'Connivance," is the currupt consent of a party to the conduct in the other party whereof he afterwards complains. It bars the right of divorce because no injury was received for what a man has consented to he cannot say was an injury. In that case the general rule of law comes in, that *volenti non fit injuria,* no injury has been done and, therefore, there is nothing to redress"' (*a*). "'Connivance" is a thing of the intent resting in the mind. It is a corrupt consenting. Errors or imprudences coming short of this, however fatal in their consequences,

(*w*) *Barnes* v. *Barnes and Grimwade* (1867) L.R. 1 P. & D. 505; 17 L. T. 268.
(*x*) *Picken* v. *Picken & Simmonds* (1864) 34 L.J.P. 22. *Gower* v. *Gower* (1872) L.R. 2 P. & D. 428. *Bell* v. *Bell* (1889) 58 L.J. P. 54.
(*y*) *Lankester* v. *Lankester & Cooper* (1925) P. 114.
(*z*) *Clayton* v. *Clayton & Sharman* (1932) P. 45.
(*a*) *Forster* v. *Forster* (1790) 1 Hag. Con. 144; 161 E.R. 504. *Lehna Mal* v. *Mt. Hakim Bibi* 25 P. R. (1919), F. B.

are not connivance. A Court of justice must look *quo animo* the step is taken. But the connivance may be a passive permitting of the adultery or other misconduct, as well as an active procuring of its commission. If the mind consents, that is connivance. If one should ignorantly place his wife in circumstances of temptation it would be contrary to justice also to hold that the mistake bars him of his remedy on her voluntarily yielding to the temptation"' (*b*).

The honesty of his (the husband's) intentions, not the wisdom of his conduct, is to be considered (*c*). So, a husband who has connived at his wife's adultery with one man, is not entitled to a divorce on the ground of his wife's adultery with another (*d*). But this principle should not be carried to all lengths, because thus a man would be for ever barred of all hope; though he should repent of his wrong and try to win his wife to repentence also (*e*). In order to establish connivance by the husband at his wife's adultery it must be shown that he gave a willing consent to it and that he was an accessory before the fact. Mere negligence, inattention, dullness of apprehension or indifference will not suffice; there must be an intention on the part of the husband that the wife should commit adultery (*f*).

"Coarse and even brutal behaviour towards the wife, obscene and disgusting language or entire disregard of decorum will not alone constitute connivance. Such conduct does not show that the husband acquiesced in the

(*b*) *Moorsom* v. *Moorsom* (1792) 3 Hag. Ecc. 87; 162 E.R. 1090. *Rogers* v. *Rogers* (1830) 3 Hag. Ecc. 57; 162 E.R. 1079.
(*c*) *Hoar* v. *Hoar* (1801) 3 Hag. Ecc. 137; 162 E.R. 1108.
(*d*) *Stone* v. *Stone* (1844) 1 Rob. Ecc. 99; 163 E.R. 978. *Lovering* v. *Lovering* (1792) 3 Hag. Ecc. 85; 162 E.R. 1089.
(*e*) *Ibid. Sec Hodges* v. *Hodges* (1795) 3 Hag. Ecc. 118; 162 E.R. 1100.
(*f*) *Allen* v. *Allen* & *D'Arcy* (1859) Sea & Sm. 84; 30 L.J.P. & M. 2.

wife's misconduct. Even cruelty and desertion, though tending to induce the wife to disregard her own duty are not connivance. Facts, to constitute connivance must have a direct and necessary tendency to cause adultery to be committed or continued" (*g*). No blindness and weakness on the part of the husband short of an actual willing consent beforehand to the wife's adultery, will constitute connivance, so as to bar his right to a dissolution of marriage by reason of her misconduct (*h*).

CONDUCT CONDUCING TO ADULTERY.

Where the husband had left his wife voluntarily on account of her drunkenness, that he had not maintained her or contributed to her support since so leaving her, that he had no reason for believing that his wife had committed adultery during the time he had lived with her, the Court dismissed his petition on the ground that the husband had conduced to the wife's adultery, if any had been committed (*i*). And where the husband separated himself from his wife, who upto the time of his doing so was a virtuous woman, merely because she had run him into debts; he did not write to her, or go to see her, or make her an allowance proportionate to his income; the husband's petition for dissolution on the ground of his wife's adultery during separation was dismissed as the Court held that his conduct towards his wife disqualified him from obtaining the relief sought (*j*). But the mere fact that the husband refused marital intercourse to the wife by itself is not such wilful neglect or misconduct as conduced to the adultery; nor can the fact

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(*g*) *Stone* v. *Stone*, Supra.
(*h*) *Marris* v. *Marris & Burke* (1862) 2 Sw. & Tr. 530; 164 E.R. 1102.
(*i*) *X.* v. *X.* (1899) 22 Mad. 328.
(*j*) *Holloway* v. *Holloway & Campbell* (1882) 5 All. 71.

that the parties went their own way, in the sense that they had their own friends and interests, be said to be conduct conducing to adultery, even when coupled with the abstinence by the husband from marital intercourse (*k*).

In considering to what extent desertion is to be held to be a bar to relief, the Court will have regard to the question whether it has conduced to the misconduct of the other spouse(*l*). And where the husband takes no steps beyond mere verbal remonstrance to terminate a course of conduct on the part of his wife and the co-respondent, which if it did not bring about actual adultery at the time, eventually resulted in it, the petitioner was not entitled to relief(*m*). The Court cannot give relief to a petitioner whose misconduct has conduced to the adultery of the respondent. The Court should endeavour to promote virtue and morality and to discourage vice and immorality (*n*). A husband is expected by the law to pay due attention to the behaviour of his wife and to give her the benefit of some superintendence where she is placed in dangerous situations (*o*), and he is bound to give her the security and comfort of his humane society so far as his position and business will admit (*p*).

BURDEN OF PROOF.

To establish connivance, more grave and conclusive evidence will be required than to establish condonation. The burden of proof is on the party setting up the connivance and the testimony must be strongly inculpatary. admitting of no dispute (*q*). "The notoriously debauched

(*k*) *Ste. Croix* v. *Ste. Croix* (1917) 44 Cal. 1091.
(*l*) *Hodgson & v. Hodgson & Turner* (1955) P. 233.
(*m*) *Robinson* v. *Robinson & Dearden* (1903) P. 155.
(*n*) *Tickner* v. *Tickner* (1924) P. 118.
(*o*) *Forster* v. *Forster* (1790) 1 Hag. Con. 144; 161 E.R. 504. *Synge* v. *Synge* (1900) P. 180.
(*p*) *Jeffreys* v. *Jeffreys & Smith* (1884) 3 Sw. & Tr. 493; 164 E.R. 1366.
(*q*) *Turton* v. *Turton* (1830) 3 Hag. Ecc. 338; 162 E. R. 1178.

character of the paramour, his exclusion from all respectable female society, the introduction of him by the husband to his wife, the encouragement of their intimacy, the allowing her to accept a supply of money from him, expostulations from the family at such intimacy, the refusal of the husband to attend to them and improper familiarities and liberties in his presence and without his remonstrance are material facts in a plea of connivance" (*r*).

"*Petitioner has condoned the adultery*"—

Condonation. See notes to section 14.

"*Court shall inquire into any countercharge*"—

See notes to section 15.

DUTY OF THE COURT—

Under the provisions of this section a duty is cast upon the Court in the investigation of suits for divorce that upon any petition for a dissolution of marriage being presented, the Court shall satisfy itself, so far as it reasonably can, not only as to the facts alleged, but also whether or not petitioner has been in any manner accessary to or conniving at the adultery, or has condoned the same (*r*$_1$).

Dismissal of petition.

13. In case the Court, on the evidence in relation to any such petition, is satisfied that the petitioner's case has not been proved, or is not satisfied that the alleged adultery has been committed,

or finds that the petitioner has, during the marriage, been accessory to, or conniving at, the

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(*r*) *Moorsom* v. *Moorsom* (1792) 3 Hag. Ecc. 87; 162 E.R. 1090.
(*r*$_1$) *Forshaw* v. *Forshaw* (1909) 31 All. 511 at p. 513, S.B. *Allah Rakha* v. *Mt. Barkat Bibi* (1931) 12 Lah. 22. *Lehna Mal* v. *Mt. Hakim Bibi* 25 P.R. (1919), F.B. *X* v. *X* (1899) 22 Mad. 328 at p. 331.

going through of the said form of marriage, or the adultery of the other party to the marriage, or has condoned the adultery complained of,

or that the petition is presented or prosecuted in collusion with either of the respondents,

then and in any of the said cases the Court shall dismiss the petition.

When a petition is dismissed by a District Court under this section, the petitioner may, nevertheless, present a similar petition to the High Court.

Cf: section 30 of the Matrimonial Causes Act, 1857. Section 178 (2) of the Supreme Court of Judicature (Consolidation) Act, 1925.

This section, with the exception of the last paragraph, is superfluous. Its provisions are a repetition of the provisions of section 12 and section 14.

For 'Collusion' see notes to section 14.

For 'Connivance' see notes to section 12.

For evidence of adultery see notes to section 10.

"*When petition is dismissed by the District Court petitioner may present a fresh petition to the High Court.*"

A fresh petition should be based on the same allegations (*s*).

The right to institute fresh proceedings on the same grounds is restricted to a suit for dissolution only and does not extend to suits for nullity, for judicial separation, or for restitution of conjugal rights.

Power of Court to pronounce decree for dissolution.

14. In case the Court is satisfied on the evidence that the case of the petitioner has been proved,

(*s*) *Beanlands* v. *Beanlands* 45 P.R. (1871).

and does not find that the petitioner has been in any manner accessory to, or conniving at, the going through of the said form of marriage, or the adultery of the other party to the marriage, or has condoned the adultery complained of,

or that the petition is presented or prosecuted in collusion with either of the respondents,

the Court shall pronounce a decree declaring such marriage to be dissolved in the manner and subject to all the provisions and limitations in sections sixteen and seventeen made and declared:

Provided that the Court shall not be bound to pronounce such decrees if it finds that the petitioner has, during the marriage, been guilty of adultery,

or if the petitioner has, in the opinion of the Court, been guilty of unreasonable delay in presenting or prosecuting such petition,

or of cruelty towards the other party to the marriage,

or of having deserted or wilfully separated himself or herself from the other party before the adultery complained of, and without reasonable excuse,

or of such wilful neglect or misconduct of or towards the other party as had conduced to the adultery.

No adultery shall be deemed to have been condoned within the meaning of this Act unless where conjugal cohabitation has been resumed or continued. Condonation.

Cf: section 31 of the Matrimonial Causes Act, 1857. Section 178 of the Supreme Court of Judicature (Consolidation) Act, 1925.

"Petitioner's case to be proved"—

The Court has no power to pronounce a decree of dissolution merely on the admissions of the parties and without recording any evidence (*t*).

"Petitioner has been accessory to"—

See notes to section 12.

"Or conniving at the adultery"—

See notes to section 12.

"Or has condoned the adultery"—

CONDONATION.

It means a blotting out of an offence imputed to the respondent, so as to restore the offending party to the same position he or she occupied before the offence was committed. There can be no condonation which is not followed by conjugal cohabitation (*u*). It means the complete forgiveness and blotting out of a conjugal offence followed by cohabitation, the whole being done with full knowledge of all the circumstances of the particular offence forgiven. The forgiveness which is to take away the husband's right to a divorce must not fall short of reconciliation (*v*).

It is a question of fact and not of law (*w*). So, there is no condonation if the offence is condoned without the

(*t*) *Bai Kanku* v. *Shiva Toya* (1893) 17 Bom. 624.
(*u*) *Keats* v. *Keats & Montezuma* (1859) 1 Sw. & Tr. 334; 164 E.R. 754. *Bernstein* v. *Bernstein* (1893) P. 292. *Cramp* v. *Cramp & Freeman* (1920) P. 158. *Crocker* v. *Corcker* (1921) P. 25. *Turnbull* v. *Turnbull & Coats* (1925) 41 T.L.R. 507.
(*v*) *Ste. Croix* v. *Ste. Croix* (1917) 44 Cal. 1091. Cf: the provision of section 14, last paragraph "No adultery shall be deemed to have been condoned.....unless where conjugal cohabitation has been resumed or continued."
(*w*) *Peacock* v. *Peacock* (1858) 1 Sw. & Tr. 183; 164 E.R. 684.

full knowledge of the acts of adultery (*x*) nor, where condonation is alleged to have been brought about by fraudulent representation (*y*). But in such a case it must be clearly proved that the petitioner was induced to resume cohabitation by his belief that the respondent was innocent (*z*).

Where the husband and wife have separate beds and there is no sexual intercourse, condonation is not always to be inferred from their living in the same house together (*a*). "It is not necessary that a husband should instantly close his doors upon an offending, and it may be, repentent wife; recollecting her former innocence he may indulge, at least, in some feelings of pity for her degraded situation and until a fit retirement is provided allow her the protection of his roof, but not the solace of his bed." Yet condonation may possibly be inferred, more particularly against the husband if within a reasonable time the parties do not entirely separate (*b*).

The condonation of adultery with one person does not bar a suit for adultery with another and a decree for dissolution can be pronounced on the ground of the uncondoned adultery (*c*), but both the adulterers are to be made co-respondents. If the husband institutes proceedings against the wife with both adulterers a decree *nisi* will be granted against both the co-respondents, but costs will not be awarded against the one whose adultery was condoned (*d*).

(*x*) *Ellis* v. *Ellis & Smith* (1865) 4 Sw. & Tr. 154; 164 E.R. 1475.
(*y*) *Sneyd* v. *Sneyd & Burgess* (1926) P. 27.
(*z*) *Ibid. Roberts* v. *Roberts & Temple* (1917) 117 L.T. 157.
(*a*) *Dance* v. *Dance* (1799) 1 Hag. Ecc. 794, n.; 162 E.R. 757.
(*b*) *Timmings* v. *Timmings* (1792) 3 Hag. Ecc. 76; 162 E.R. 1086. See *Hall* v. *Hall & Kay* (1891) 64 L.T. 837; 60 L.J.P. 73, C.A.
(*c*) *Alexandre* v. *Alexandre* (1870) L.R. 2 P. & D. 164.
(*d*) *Youd* v. *Youd* (1900) 28 Cal. 221.

REVIVAL.

Condonation is a conditional forgiveness which does not take away the right of complain in case of a continuation of adultery which operates as a reviver of former acts (*e*); it is a conditional reinstatement of the offending spouse (*f*). If a wife forgives earlier adultery upon condition and assurance of future amendment, on the husband again committing adultery, that previous injury revives (*g*) for, the effect of condonation is taken off by repetition of misconduct, and this may be so even though the misconduct would not support an original charge (*h*); and one matrimonial offence committed after condonation is sufficient to revive all the matrimonial offences committed before it (*i*). Where a wife after legal cruelty consents to a reconciliation and to matrimonial cohabitation, former injuries would revive by subsequent misconduct of a slighter nature than would constitute the original offence (*j*). So, cruelty may be revived by a lesser degree of cruelty than is necessary to found a suit in the first instance and condoned adultery may be revived by attempts to have adulterous intercourse with other persons (*k*). And when the husband having received reasonably probable

(*e*) *Ferrers* (*Lady*) v. *Ferrers* (*Lord*) (1791) 1 Hag. Con. 130; 161 E.R. 500. *Moreno* v. *Moreno* (1920) 47 Cal. 1068.
(*f*) *Premchand Hira* v. *Bai Galal* (1927) 51 Bom. 1026; 29 Bom. L.R. 1336.
(*g*) *Blackmore* v. *Blackmore* (1929) 7 Rang. 313. *Durant* v. *Durant* (1825) 1 Hag. Ecc. 733; 162 E.R. 734.
(*h*) *D'Aguilar* v. *D'Aguilar* (1794) 1 Hag. Ecc. 773; 162 E.R. 748. *Palmer* v. *Palmer* (1860) 2 Sw. & Tr. 61; 164 E.R. 914. *Cooke* v. *Cooke* (1863) 8 L.T. 644; 164 E.R. 1221. *Thompson* v. *Thompson* (1912) 39 Cal. 395.
(*i*) *Stuart* v. *Stuart* (1926) 53 Cal. 436. *Blandford* v. *Blandford* (1883) 8 P.D. 19; 48 L.T. 238.
(*j*) *Westmeath* v. *Westmeath* (1827) 2 Hag. Ecc. Sup. 61; 162 E.R. 1012. See (1829) 2 Hag. Ecc. Sup. 134.
(*k*) *Snow* v. *Snow* (1842) 6 Jur. 285. See *Collins* v. *Collins* (1884) 9 App. Cas. 205. *Thomson* v. *Thomson* (1911) 39 Cal. 395. *King* v. *King* (1924) 47 All. 50.

information of his wife's adultery, has, by continuing cohabitation condoned the offence, subsequent misconduct of the wife (improprieties of conduct) tending to, though falling short of adultery would revive the condoned adultery (*l*), or even improper overtures to and attempts to take liberties with a woman would revive a condoned adultery (*m*); and fresh acts of cruelty will revive acts of cruelty and also of adultery (*n*).

Cruelty fully condoned is not revived by subsequent desertion. In order to revive condoned cruelty the acts must be *ejusdem generis* (*o*). It may be revived by subsequent adultery as to form, coupled with that adultery, a ground for a decree of dissolution (*p*).

Condoned desertion is revived by subsequent adultery (*q*), and desertion for not complying with a decree for restitution of conjugal rights may, after condonation, be revived by adultery (*r*).

Desertion for two years without reasonable excuse revives condoned adultery (*s*) whether the petitioner be husband or wife (*t*).

CONDONATION BY DEED.

A husband had been guilty of cruelty and the wife had stipulated in a deed of separation not to take any proceedings against him in respect of that cruelty. He subsequently committed adultery but that act did not revive the

(*l*) *Pereira* v. *Pereira & Bonjour* (1882) 5 Mad. 118 F.B.
(*m*) *Ridgway* v. *Ridgway* (1881) 29 W. R. (Eng.) 612.
(*n*) *Worsley* v. *Worsley* (1730) 2 Lee 572; 161 E.R. 444.
(*o*) *Hart* v. *Hart* (1855) 2 Ecc. & Ad. 193; 164 E.R. 383.
(*p*) *Palmer* v. *Palmer* (1860) 2 Sw. & Tr. 61; 164 E.R. 911.
(*q*) *Blandford* v. *Blandford* (1883) 8 P.D. 19; 48 L.T. 238.
(*r*) *Paine* v. *Paine* (1903) P. 263. *Price* v. *Price & Brown* (1911) P. 201.
(*s*) *Houghton* v. *Houghton* (1903) P. 150.
(*t*) *Copsey* v. *Copsey* (1905) P. 94.

wife's right to complain of cruelty (*u*). The execution of such a deed is not against public policy nor did it constitute any bargain between the parties to prevent the course of justice by withholding material facts from the Court (*v*).

A deed of separation executed prior to the suit of the wife against the husband, contained, ***inter alia***, a clause to the effect:—

> "No proceedings shall be taken by or on behalf of the husband or the wife against the other of them in respect of any misconduct or alleged misconduct previous to the date of these presents and any offence which may have been committed or permitted by either of them against the other. is hereby condoned."

It was held that the wife could not rely upon the husband's acts of cruelty alleged prior to the said deed of separation, though coupled with allegations of adultery committed by him subsequently to the deed (*w*). But where a petition for judicial separation on the ground of adultery had been dropped and a deed entered into, the wife was granted a dissolution of marriage on the husband's fresh act of adultery with the same woman (*x*). Where a husband and wife had separated under a separation deed which provided that the wife should not take proceedings of any sort against the husband in respect of anything done upto that date, and the husband was subsequently guilty of two acts of cruelty towards his wife, the Court held that she was not precluded by the deed from suing for a judicial separation (*y*).

(*u*) *Gandy* v. *Gandy* (1882) 7 P.D. 168. *Rose* v. *Rose* (1883) 8 P.D. 98.
(*v*) *L.* v. *L.* (1931) P. 63.
(*w*) *Monk* v. *Monk* (1932) 60 Cal. 318.
(*x*) *Binney* v. *Binney* (1893) 69 L.T. 498.
(*y*) *Kunski* v. *Kunski* (1907) 23 T.L.R. 615. *Norman* v. *Norman* (1908) P. 6.

CONDONATION BY WIFE.

Condonation is not held so strictly against a wife as against a husband. Conjugal cohabitation after an act of adultery avowed by the husband may be condonation, but it is not a legal consequence that the wife pardons all other acts (*z*). The effect of co-habitation is less stringent on the wife and condonation by implication is not held a strict bar against her, for it is not improper she should for a time show a patient forbearance and entertain hopes of her husband's reform (*a*); it being meritorious in a wife to continue cohabitation as long as there is a possible chance of reclaiming her husband (*b*).

PLEADINGS.

Condonation proved at the hearing will be noticed by the Court although it has not been pleaded (*c*), but unless such condonation was estabilised by the clearest and most conclusive evidence, the Court would not be justified to act upon it; for if it had been expressly pleaded the other party might have produced further evidence to explain and disprove the defence (*d*). Where condonation is not pleaded the Court would take upon itself the responsibility of deciding whether it existed. It is a question for the judge and not the jury, if the issue is not raised on the pleadings (*e*).

COLLUSION.

'Collusion' is an improper act done or an improper refraining from doing any act, for a dishonest purpose, in matrimonial cases (*f*). It is held to exist where the

(*z*) *D'Aguilar* v. *D'Aguilar* (1794) 1 Hag. Ecc. 773; 162 E.R. 748.
(*a*) *Beeby* v. *Beeby* (1799) 1 Hag. Ecc. 789; 162 E.R. 755.
(*b*) *Angle* v. *Angle* (1848) 1 Rob. Ecc. 634; 163 E.R. 1161.
(*c*) *Curtis* v. *Curtis* (1859) 4 Sw. & Tr. 234.
(*d*) *Snow* v. *Snow* (1842) 6 Jr. 285.
(*e*) *Moosbrugger* v. *Moosbrugger* (1913) 109 L.T. 192.
(*f*) *Scott* v. *Scott* (1913) P. 52.

institution of the proceedings for dissolution of marriage is procured and its conduct provided for by agreement or bargain between the spouses or their agents although it does not appear that any specific fact has been falsely dealt with or withheld (*g*). The collusion must have been between plaintiff and defendant in the suit. Collusion between either of them and a third party is insufficient (*h*). An agreement between the husband and the wife, parties to a divorce suit, subsequent to its institution, that they had agreed that the marriage should be dissolved, each party to be at liberty to marry again and each party to bear his or her own costs of the suit would amount to collusion (*i*), but there is no collusion where both parties are desirous of a divorce after the commission of the offence (*j*).

The petitioner is, however, not precluded from instituting proceedings in good faith when the effects of collusion at a previous stage are spent and when he makes a full and frank disclosure of all material facts (*k*). The payment to the petitioner by the respondent or his agent of arrears of maintenance allowance provided for in a deed of separation in consideration of the wife instituting divorce proceedings against the husband is no evidence of collusion (*l*), but where petitioner pays a sum of money to the respondent to offer no opposition to the suit it is collusion (*m*), and also, if he promises to pay the costs of both the respondent and the co-respondent (*n*). The

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(*g*) *Ste. Croix* v. *Ste. Croix* (1917) 44 Cal. 1091 *Gethin* v. *Gethin* (1861) 31 L.J.P. 43. *Churchward* v. *Churchward & Holliday* (1895) P. 7.
(*h*) *Meddowcroft* v. *Huguenin* (1844) 4 Moo. P.C.C. 386; 13 E.R. 352, P.C.
(*i*) *Christian* v. *Christian* (1885) 11 Cal. 651.
(*j*) *Crewe* v. *Crewe* (1800) 3 Hag. Ecc. 123; 162 E.R. 1102.
(*k*) *Watkin* v. *Watkin & Malcolm* (1919) 122 L.T. 225.
(*l*) *Malley* v. *Malley* (1909) 25 T.L.R. 662.
(*m*) *Linton* v. *Guderian* (1929) 56 Cal. 530. *Barnes* v. *Barnes & Grimwade* (1867) L.R. 1 P. & D. 505.
(*n*) *Bacon* v. *Bacon & Ashby* (1877) 25 W.R. 560.

suppression of material facts which might be pleaded in a cross-petition by the respondent would amount to collusion even though the suppressed facts might not have been sufficient to establish the cross-petition (*o*). The attendance of one of the parties in Court to aid in the identification is *per se* no evidence of collusion (*p*). An agreement between husband and wife to furnish the petitioner with the evidence of adultery to enable him (or her) to institute divorced proceedings amounts to collusion (*q*), but a mere request by the petitioner to the respondent for production of evidence, does not amount to collusion (*r*).

KING'S PROCTOR TO GIVE PARTICULARS.

Where the King's Proctor intervenes and pleads collusion between the parties, he has to furnish the parties with the particulars regarding the character of the collusion intended to be charged (*s*).

RESPONSIBILITY OF LEGAL ADVISERS.

Legal advisers must avoid transactions between parties or between themselves as legal advisers during the pendency of divorce proceedings which taints the transaction with suspicion of collusion (*t*). But where the solicitors of the parties conduct the suit in such a way as to give rise to a reasonable suspicion of collusion and the parties themselves are not implicated the petitioner is entitled to relief (*u*).

(*o*) *Hunt* v. *Hunt & Wright* (1877) 39 L.T. 45. *Butler* v. *Butler & Burnham* (1890) 15 P.D. 66. *Rogers* v. *Rogers* (1894) P. 161. *Linton* v. *Guderian* (1929) 56 Cal. 530.

(*p*) *Harris* v. *Harris & Lambert* (1862) 4 Sw. & Tr. 232; 164 E.R. 1505.

(*q*) *Todd* v. *Todd* (1866) 1 P. & D. 121.

(*r*) *Laidler* v. *Laidler* (1920) 123 L.T. 208.

(*s*) *Jessop* v. *Jessop* (1861) 2 Sw. & Tr. 301; 164 E.R. 1011.

(*t*) *Carmichael* v. *Carmichael* (1925) 42 T.L.R. 133.

(*u*) *Cox* v. *Cox* (1861) 2 Sw. & Tr. 306; 164 E.R. 1013.

UNREASONABLE DELAY.

Unreasonable delay in taking proceedings may be a bar to the success of a petition. If there has been undue delay, some reason must be advanced, and the Court will have regard to all the circumstances, and say if the delay has been unreasonable.

Lack of means wherewith to pay for proceedings has always been accepted as an excuse for delay, but in view of the facilities now given to poor persons this reason is now not so widely available as in the past. Unreasonable and unexplained delay between a petitioner's knowledge of the adultery committed by the respondent and the filing of his petition for dissolution of his marriage may induce the Court to dismiss the petition as indicating acquiescence in the injury complained of (*v*). But any presumption arising from apparent delay may always be removed by an explanation of circumstances (*w*). Where a petitioner neglected for fourteen years to take any steps to obtain a separation from his wife whom he knew to be living in adultery, the Court refused to allow the petition to be amended by the addition of a co-respondent (*x*). But the hope or expectation operating in the mind of a husband that he may be released from the matrimonial tie by the death of his wife, who after committing adultery had become insane, was accepted as a valid excuse and explanation of what would otherwise be "unreasonable delay" in taking proceedings for the dissolution of marriage (*y*).

It is legal and meritorious to be patient as long as possible. Forbearance does not weaken the wife's right

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(*v*) *King* v. *King* (1930) 57 Cal. 215.
(*w*) *Williams* v. *Williams* (1873) 3 Cal. 688. *Best* v. *Best* (*Lady*) (1814) 2 Phil. 161; 161 E.R. 1107.
(*x*) *Roe* v. *Roe* (1869) 3 Ben. L.R. Ap. 9.
(*y*) *Johnson* v. *Johnson* (1901) P. 193.

to relief. Mere time is no bar in the case of a woman (*z*), and failure to take action in respect of a separate matrimonial offence is not delay, if the latter is proved and is one which entitles the petitioner to the relief claimed (*a*).

'Unreasonable delay' is the delay from which it would appear that petitioner is insensible to the injury of which he complains (*b*); it means culpable delay, something in the nature of connivance or acquiescence (*c*).

Where the adultery of the wife commenced almost simultaneously with the marriage which took place in 1860, but until 1869 there was no means of obtaining relief and the petitioner believed that after seven years he could contract a second marriage, the Court held that the delay was not unreasonable (*d*); and the court will not dismiss a petition where a sufficient explanation of the delay is given (*e*), but where the trial Court in the exercise of its discretion has refused to grant a divorce on the ground of unreasonable delay, the Court of Appeal will not interfere unless the trial Court has decided the case on some wrong principle of law (*f*).

A delay of two years in presenting a petition with the full knowledge of the facts of the case would be considered unreasonable and the petition would be dismissed unless sufficient reason for the delay is given (*g*). Lapse of time though not an absolute bar, yet taken in connection with other circumstances and where the petition is not filed

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(*z*) *Popkin* v. *Popkin* (1794) 1 Hag. Ecc. 765, n.; 162 E.R. 745.
(*a*) *Rutter* v. *Rutter* (1920) 123 L.T. 588.
(*b*) *Pellew* v. *Pellew & Berkeley* (1859) 1 Sw. & Tr. 553; 164 E.R. 856.
(*c*) *Rickard* v. *Rickard & Bond* (1921) 37 T.L.R. 511, C.A.
(*d*) *Devasagayam* v. *Naiyagam* (1874) 7 Mad. H.C.R. 284.
(*e*) *Wilson* v. *Wilson* (1872) L.R. 2 P. & D. 435.
(*f*) *Pears* v. *Pears* (1912) 107 L.T. 505; 56 Sol. Jour. 720, C.A. *Hughes* v. *Hughes & Williams* (1915) 32 T.L.R. 62, C.A.
(*g*) *Nicholson* v. *Nicholson* (1873) L.R. 3 P. & D. 53; 29 L.T. 108. *Dixon* v. *Dixon* (1892) 67 L.T. 394.

bona fide for the wife's protection, but for some collateral purpose, the petition would be dismissed (*h*).

Where a delay of some years occurs in bringing a suit for nullity on the ground of malformation, the Court will require an explanation of such delay (*i*), and the evidence to support such a suit should be of the clearest and most satisfactory kind (*j*).

Delay is no bar to a suit for nullity of marriage by reason of minority and want of consent of the father (*k*).

The reasons for the delay are to be set out in the petition to satisfy the Court (*l*).

Where a husband commences a suit against his wife for divorce on the ground of adultery, but abandons it for want of funds to carry it on, he is not debarred from seeking relief at a subsequent period (*m*). A lapse of eight years from the discovery of the wife's adultery was sufficiently accounted for by the husband's inability to bear the expenses of the divorce suit (*n*), and a delay of nine years for want of means on the part of the husband was excused by the Court (*o*), but where the petitioner asks the Court to exercise its discretion in his favour for

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(*h*) *Mathews* v. *Mathews* (1860) 3 Sw. & Tr. 161; 164 E.R. 1235. *Besant* v. *Wood* (1879) 12 Ch. D. 655. *Boulting* v. *Boulting* (1864) 3 Sw. & Tr. 329; 164 E.R. 1312.

(*i*) *E.* v. *T.* (Falsely called E.) (1863) 3 Sw. & Tr. 312; 164 E.R. 1295. *G.* v. *M.* (1885) 10 App. Cas. 171. *B.-N.* v. *B.-N.* (1854) 1 Ecc. & Ad. 248; 164 E.R. 144, P.C.

(*j*) *Castleden* v. *Castleden* (1861) 9 H.L. Cas. 186.

(*k*) *Duins* v. *Donovan* (otherwise *Duins*) (1830) 3 Hag. Ecc. 301; 162 E.R. 1165.

(*l*) *Best* v. *Best* (*Lady*) (1814) 2 Phil. 161; 161 E.R. 1107.

(*m*) *Coode* v. *Coode* (1838) 1 Curt. 755; 163 E.R. 262. *Ratcliff* v. *Ratcliff & Anderson* (1859) 1 Sw. & Tr. 467; 164 E.R. 816. *Mason* v. *Mason* (1883) 8 P.D. 21.

(*n*) *Re Brooks' Divorce Bill* (1847) 1 H.L.Cas. 159; 9 E.R. 714, H.L. Re Lardner's Divorce (1839) 6 Cl. & Fin. 569; 7 E.R. 812, H.L.

(*o*) *Faulkes* v. *Faulkes & Stainton* (1891) 64 L.T. 834.

unreasonable delay on the ground of poverty and where the poverty is not proved, the petition is dismissed (*p*).

A delay of twenty years on the part of the wife was excused on the grounds that the wife had no means and the husband (respondent) had led a wandering life without any regular employment (*q*).

Unreasonable delay on the part of the husband may be excused on the ground of his inability to take action in consequence of his affliction on the wife's elopement (*r*), or on the ground of ignorance of law supported by counsel's opinion (*s*), or delay in the hope of the wife's return (*t*). But unreasonable delay on the ground of religious scruples will not be excused (*u*).

"*Petitioner guilty of adultery.*"

Cf. section 31 of the Matrimonial Causes Act, 1857. Section 178 of the Supreme Court of Judicature (Consolidation) Act, 1925.

THE DOCTRINE OF RECRIMINATION.

It is incompetent for one of the parties to a marriage to come into Court and complain of the other's violation of matrimonial duties if (herself or) himself is guilty likewise. When the respondent sets up such violation, in answer to the plaintiff's suit, it is called, "Recrimination."

"The doctrine," observes Lord Stowell, "has its foundation in reason and propriety. It would be

(*p*) *Short* v. *Short & Bolwell* (1874) L.R. 3 P. &. D. 193.
(*q*) *Harrison* v. *Harrison* (1864) 3 Sw. & Tr. 362; 164 E.R. 1315. *Edwards* v. *Edwards & Doncaster* (1900) 17 T.L.R. 38.
(*r*) *Re Heaviside's Divorce Bill* (1845) 12 Cl. & Fin. 333; 8 E.R. 143, H.L.
(*s*) *Tollemache* v. *Tollemache* (1859) 1 Sw. & Tr. 557; 164 E.R. 858. *M.* v. *M.* (otherwise *H.*) (1906) 22 T.L.R. 719.
(*t*) *Mason* v. *Mason* (1838) 3 P.D. 21.
(*u*) *Coppinger* v. *Coppinger & Lutwyche* (1918) 34 T.L.R. 588, C.A.

> hard if a man could complain of the breach of a contract which he has violated, if he could complain of an injury, when he is open to a charge of the same nature. It is not unfit if he who is the guardian of the purity of his house has converted it into a brothel, that he should not be allowed to complain of the pollution which he himself has introduced, if he, who has first violated his marriage vow, should be barred of his sources of mutual forgiveness in the humiliation of mutual guilt" (*v*).

According to this doctrine if both the husband and wife have committed adultery and have separated, neither of the parties can maintain against the other a suit for the restitution of conjugal rights (*w*).

Wherever petitioner and respondent are both guilty of adultery the suit is barred (*x*) even if there had been a single act of adultery on the part of the petitioner, whatever may be the extent of the guilt on the other side (*y*). So, a wife guilty of adultery cannot be a petitioner in the Divorce Court on the ground of any matrimonial offence of the husband (*z*).

Cruelty cannot be pleaded in bar to a charge of adultery (*a*) nor could indifference, ill-behaviour or cruelty of the husband be pleaded by the wife in bar to his suit for divorce on the ground of her adultery, for, his indifference or

(*v*) *Beeby* v. *Beeby* (1799) 1 Hag. Ecc. 789; 162 E.R. 755.
(*w*) *Hope* v. *Hope* (1858) 1 Sw. & Tr. 94; 164 E.R. 644. *Brooking Phillips* v. *Brooking Phillips* (1913) P. 80.
(*x*) *Proctor* v. *Proctor* (1819) 2 Hag. Con. 292; 161 E. R. 747. *Brisco* v. *Brisco* (1824) 2 Eng. Ec. 294.
(*y*) *Astley* v. *Astley* (1823) 1 Hag. Ec. 714; 162 E.R. 728.
(*z*) *Drummond* v. *Drummond* (1861) 2 Sw. & Tr. 269; 164 E.R. 998. *Otway* v. *Otway* (1888) 13 P.D. 141.
(*a*) *Harris* v. *Harris* (1829) 2 Hag. Ec. 376; 162 E.R. 894. *Dillon* v. *Dillon* (1842) 3 Curt 86; 163 E.R. 663.

ill-behaviour or cruelty will not justify her misconduct (*b*), nor is a divorce by reason of adultery committed by the wife barred by the husband's previous wilful desertion (*c*).

As far as public morals and interest of society are concerned, it would be better to act upon the principle that a party guilty of the breach of the marriage vow should not have the assistance of the Court to enforce any marital right (*d*). It is well settled that where adultery is pleaded by way of recrimination merely, it is not necessary to prove such strong facts as would be requisite to convict on a direct proceeding for divorce. The reason assigned is that the party who enters the Court with a criminal imputation on the other, must himself come with clean hands (*e*).

DUTY OF COUNSEL AND SOLICITOR.

Where the petitioner has committed adultery prior to the institution of the suit it is the duty of his counsel and solicitor to disclose the fact to the Court if they are aware of it (*f*), and when the solicitor discovers between the time of the decree *nisi* and the decree absolute that the petitioner has committed adultery but has not disclosed the fact to the Court, he would only fulfil his duty if he communicated the facts to the King's Proctor (*g*). It is also highly desirable that solicitors should inquire of their clients whether they themselves have been guilty of adultery (*h*).

It is apparent that in the divorce jurisdiction Solicitors have a duty of disclosure of facts often adverse to their

(*b*) *Moorsom* v. *Moorsom* (1792) 3 Hag. Ec. 87; 162 E.R. 1090.
(*c*) *Morgan* v. *Morgan* (1841) 2 Curt. Ec. 679 at p. 686; 163 E.R. 548.
(*d*) *Hope* v. *Hope*, supra.
(*e*) *Forster* v. *Forster* (1790) 1 Hag. Con. 144; 161 E.R. 504.
(*f*) *Abraham* v. *Abraham & Harding* (1919) 120 L.T. 672; 63 Sol. Jour. 411.
(*g*) *Cawthra* v. *Cawthra* an unreported case mentioned in (1933) 176 L.T. Jour. 174.
(*h*) *Moyse* v. *Moyse & Crick* (1929) 73 Sol. Jour. 192.

clients' interest which seems to go far beyond their responsibilities in any other jurisdiction(h_1).

DISCRETION OF THE COURT TO GRANT DECREE.

In a proper case the Court may grant divorce to a wife on the ground of cruelty and adultery of the husband although the wife herself is guilty of adultery. But it is essential in matrimonial cases that if a petitioner wishes the Court to exercise its discretion in his or her favour, he or she should make a frank disclosure of all the circumstances of the case(i). In such cases it is the duty of the Court to consider the whole of the circumstances, bearing in mind the interest of public morality, the position and interest of the parties themselves, of the children of the marriage, of the future of the children and of the guilty party (j). But where the adultery of the petitioner has conduced to that of the respondent the Court will refuse to grant the decree (k).

The suppression of his or her own guilt by a petitioner, if deliberate, makes the Court reluctant to exercise its discretion in favour of the petitioner (l).

> "There is no specific limitation to the discretion of the Court," says Sir Francis Jeune, "and the category of cases for the exercise of such discretion is not a fixed one, and the class of cases for its exercise may be extended from time to time. If the petitioner's guilt has in any serious degree contributed to the misconduct of the respondent, the discretion of the Court will not

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(h_1) (1933) 176 L.T.Jour. 174.
(i) *Stuart* v. *Stuart & Holden* (1930) P. 77, at p. 79. *Apted* v. *Apted & Bliss* (1930) P. 246. *Smith* v. *Smith* (1932) 59 Cal. 945. *Carroll* v. *Carroll* (1934) 13 Pat. 129.
(j) *Smith* v. *Smith*, supra. *Swaine* v. *Swaine* (1932) 10 Rang. 299.
(k) *Apted.* v. *Apted & Bliss* (1930) P. 246 at p. 251.
(l) *Main* v. *Main* (1909) 101 L.T. 815; *Hampson* v. *Hampson* (1914) P. 104 at p. 109.

be exercised in favour of the petitioner. And the respondent cannot evade the consequences of the misconduct by alleging that the petitioner has been guilty of misconduct for which the respondent has been responsible in any serious degree. If a wife leaves her husband because she has transferred her affections to another man, and the husband assumes this to be so, she is in a serious degree responsible for the husband's misconduct" (*m*).

It is not enough to urge that the petitioner's misconduct has been natural or excusable, but the Court must find, as a fact, that it is the conduct of the respondent which has caused the petitioner's lapse (*n*).

If a respondent wife is guilty of adultery and the petitioning husband is found guilty of cruelty, the Court has the power to give the petitioner a decree, provided his cruelty did not in any way lead to his wife's adultery (*o*).

The Courts in India in exercising the discretion given by section 14 of the Act in granting or refusing a decree of dissolution of marriage will adopt as a guide the principles laid down in the English decisions with regard to the corresponding section of the English Statute. The discretion to be exercised must be a regulated discretion. The Court cannot grant or withhold a divorce upon the mere footing of the petitioner's adultery being more or less frequent or under the circumstances of each case more or less pardonable or capable of excuse. There must be special features attending the commission of such adultery, placing it in some category capable of distinct statement and recognition,

(*m*) *Constantinidi* v. *Constantinidi* (1903) P. 246.
(*n*) *Wyke* v. *Wyke* (1901) P. 149. *Carroll* v. *Carroll* (1934) 13 Pat. 129.
(*o*) *Pryor* v. *Pryor* (1900) P. 57.

so that the discretion may be fitly exercised in favour of a petitioner (*p*). Though the Court is more lenient now than it was formerly, still it is the rule that the petitioner should come to the Court with clean hands and could not commit adultery with impunity (*q*), and the Court will exercise the discretion not readily but with stringency. The Court will consider the advisability of granting or withholding the decree and whether the granting of the decree might give the petitioner an opportunity of marrying the woman with whom he misconducted himself, or to lead a respectable life (*r*). The exercise of this discretion is based on the requirements of public morality and will not be enfeebled by an unduly sensitive regard to the hardship of particular cases (*s*), and this discretion may under certain circumstances be exercised in spite of the fact that there had been an intervention by the King's Proctor and that the finding of the Court has been adverse to the petitioner (*t*). The conduct of the petitioner is the right criterion upon which to decide whether the Court should exercise the discretion in his (or her) favour (*u*).

In the exercise of this discretion the Courts do not treat the sexes on an equal footing. That which would not be excusable in a man may be excusable in a woman and when her adultery has resulted from her husband's treatment she may retain a decree obtained on the ground of his misconduct even though she has concealed her own

(*p*) *John G.* v. *Mary Anne G.* (1871) 8 Bom.H.C.R.O.C.J. 48. *Rufas* v. *Rufas* (1900) 2 Bom.L R 690.
(*q*) *Dean* v. *Dean & Hargreaves* (1921) 37 T. L.R. 798.
(*r*) *Wilson* v. *Wilson* (1920) P. 20. *Babb* v. *Babb & Ross* (1920) 123 L.T. 93. *Wilkinson* v. *Wilkinson & Seymour* (1921) 126 L.T. 29, n. *Brooke* v. *Brooke* (1912) P. 205.
(*s*) *Hines* v. *Hines & Burdett* (1918) P. 364.
(*t*) *Pretty* v. *Pretty* (1911) P. 83. *Evans* v. *Evans & Elford* (1906) P. 125. *Hampson* v. *Hampson* (1914) P. 104.
(*u*) *Munzer* v. *Munzer & Swain* (1912) 107 L.T. 203.

fault from the Court and has committed perjury in denying it, provided that, the Court is of opinion on the facts that leniency towards the erring petitioner may result in her moral reinstatement (*v*). Circumstances, must, however, be proved which mitigate petitioner's offence and enable the Court to grant relief without offending the established view of the interest of public morality (*w*).

When a wife who was deserted for four years by her husband and who was forced by necessity and circumstances created by her husband to become unchaste, she was granted a divorce by the Court in the exercise of its discretion (*x*); and where the conduct of the husband drove the wife to lead the life of a prostitute to maintain herself and her child, where she had given up the said mode of livelihood before instituting proceedings against her husband for divorce and when she had not concealed anything from the Court, the Court exercised its discretion in her favour (*y*). But where the wife in a suit for divorce (or in the alternative for judicial separation) was found to have herself committed adultery to which the conduct of the respondent had in no way conduced, the Court refused to grant her relief (*z*). Where, however, both the husband and the wife combine to withhold facts from the Court and the husband is guilty not of an isolated act but of a persistent course of adultery, relief to the husband would be refused (*a*). Where the husband was guilty of an isolated act of adultery resulting in the birth of a child the Court granted him a divorce from his wife on the ground of her adultery, exercising its discretion in his

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(*v*) *Pretty* v. *Pretty, supra.*
(*w*) *Pullen* v. *Pullen & Holding* (1920) 123 L.T. 203.
(*x*) *Rebario* v. *Rebario* (1927) 54 Cal. 80. *Hale* v. *Hale* (1915) 32 T.L.R. 53. *Morton* v. *Morton* (1916) 32 T.L.R. 484.
(*y*) *Wilson-De-Rose* v. *Wilson-De-Rose* (1930) 57 Cal. 891.
(*z*) *Rhine* v. *Rhine* (1911) 33 All. 500.
(*a*) *Palmer* v. *Palmer* (1916) 41 Bom. 36; 18 Bom.L.R 818.

favour in the interest of the woman with whom he had committed adultery and in the interest of the child (*b*), but in a later case the Court refused to exercise its discretion in favour of a husband petitioner who admitted that he had committed adultery on two occasions with a woman whom he was willing to marry and who was anxious to marry him (*c*).

Condonation by the respondent of the petitioner's adultery is no ground for excusing the petitioner's misconduct and the suit should be dismissed (*d*), and in such a case the wife will be entitled to her full costs and the co-respondent will not be liable for costs (*e*). Where, however, the wife guilty of adultery presents a petition for divorce, the adultery having been condoned by the husband, the Court may grant her a decree *nisi* (*f*). But the Court should refuse to exercise its discretion in favour of a petitioning husband who had committed adultery and had obtained from his wife her written permission to do so (*g*).

Relief in case of opposition on certain grounds.

15. In any suit instituted for dissolution of marriage, if the respondent opposes the relief sought on the ground, in case of such a suit instituted by a husband, of his adultery, cruelty, or desertion without reasonable excuse, or in case of such a suit instituted by a wife, on the ground of her adultery and cruelty, the Court may in such suit give to the respondent, on his or her application, the same

(*b*) *Schofield* v. *Schofield* (1915) P. 207.
(*c*) *Armistead* v. *Armistead* (1922) 38 T.L.R. 626.
(*d*) *Goode* v. *Goode & Hamson* (1861) 2 Sw. & Tr. 253; 164 E.R. 992. *McCord* v. *McCord* (1875) L.R. 3 P. & D. 237. *Story* v. *Story & O'Connor* (1887) 12 P.D. 196. *Boucher* v. *Boucher & Judd* (1892) 67 L.T. 720. See *Habra* v. *Habra & Habal* (1914) P. 100.
(*e*) *Goode* v. *Goode & Hamson*, supra.
(*f*) *Harden* v. *Harden* (1919) 36 T.L.R. 121. *Owen* v. *Owen* (1919) 35 T.L.R. 284. *Coverdale* v. *Coverdale* (1913) 30. T.L.R. 20.
(*g*) *Wingfield* v. *Wingfield* (1921) 37 T.L.R. 300, C.A.

relief to which he or she would have been entitled in case he or she had presented a petition seeking such relief, and the respondent shall be competent to give evidence of or relating to such cruelty or desertion.

Cf. section 2 of the Matrimonial Causes Act, 1866. Section 180 of the Supreme Court of Judicature (Consolidation) Act, 1925.

The provisions of this section do away with cross-suits and avoid multiplicity of proceedings and unnecessary costs. The section allows a counterclaim which the Code of Civil Procedure does not provide for. The Rules of the Bombay High Court, however, allow a counterclaim. See Rule 122 B.

If no counterclaim is allowed cross suits are filed which are consolidated at the hearing.

Before the passing of the Matrimonial Causes Act, 1866, the practice in the English Courts was to stay one suit until the determination of the other (*h*). The provisions of this section apply only to the proceedings for divorce and not to suits for nullity or for restitution of conjugal rights. So, in a husband's suit for divorce on the ground of the wife's adultery, the wife may in her answer charge the husband with adultery and cruelty and pray for divorce or judicial separation (*i*). And in answer to a petition for dissolution of marriage, respondent may set up a claim for a decree of nullity on the ground of the petitioner's impotence and the issue in the answer will be tried first (*j*), but the respondent wife will not be permit-

(*h*) *Osborne* v. *Osborne, Osborne* v. *Osborne & Martalli,* (1863) 3 Sw. & Tr. 327; 9 L.T. 456.
(*i*) *Eldred* v. *Eldred* (1840) 2 Curt. 376; 163 E.R. 448; *Cocksedge* v. *Cocksedge* (1844) 1 Rob. Ecc. 90; 163 E.R. 975.
(*j*) *S.* v. *S. & R.* (1912) P. 16.

ted to pray for restitution of conjugal rights in her answer to a petition for dissolution of marriage on the ground of her adultery (*k*). A husband may, in his answer to the wife's petition, cross-petition for divorce against the wife on the ground of her adultery. A separate petition is not necessary (*l*). Similarly, a wife may in her answer to her husband's petition for dissolution on the ground of her adultery, plead virginity and charge the husband with adultery. If the wife's virginity is proved and the husband's adultery is established, the wife is entitled to a separation (*m*). But cruelty of the petitioner is not an answer to the wife's suit for judicial separation on the ground of adultery (*n*).

A husband in answer to his wife's petition for judicial separation which he opposes on the ground of her adultery, may claim damages against the alleged adulterer (*o*).

WITHDRAWAL OF PETITION.

Where a husband withdraws his petition for dissolution of marriage, in which the wife opposes and counterclaims judicial separation, the suit is not terminated, but the wife will be entitled to relief on her establishing the allegation against the husband (*p*), and the Court will allow an allegation praying for relief to be added to the prayer of an answer for the purpose of allowing the suit to be continued (*q*).

(*k*) *Drysdale* v. *Drysdale* (1867) L.R. 1 P. & D. 365; 15 L.T. 512.
(*l*) *Hill* v. *Hill* (1923) 47 Bom. 657; 25 Bom.L.R. 289.
(*m*) *Hunt* v. *Hunt* (1856) Dea. & Sw. 121; 164 E.R. 522.
(*n*) *Tuthill* v. *Tuthill* (1862) 31 L.J.P. & M. 214.
(*o*) *N.* v. *N.* (1913) P. 75.
(*p*) *Schira* v. *Schira & Sampajo* (1868) L.R. 1 P. & D. 466. *Blackborne* v. *Blackborne* (1868) L.R. 1 P. & D. 563. *King* v. *King* (1882) 6 Bom. 416 at p. 450. *Forshaw* v. *Forshaw* (1909) 31 All. 511.
(*q*) *Firminger* v. *Firminger & Ollard* (1869) 17 W.R. 335.

Decrees for dissolution to be *nisi*.

16. Every decree for a dissolution of marriage made by a High Court not being a confirmation of a decree of a District Court, shall, in the first instance, be a decree *nisi*, not to be made absolute till after the expiration of such time, not less than six months from the pronouncing thereof, as the High Court, by general or special order from time to time, directs.

Collusion.

During that period any person shall be at liberty, in such manner as the High Court by general or special order from time to time, directs, to show cause why the said decree should not be made absolute by reason of the same having been obtained by collusion or by reason of material facts not being brought before the Court.

On cause being so shown, the Court shall deal with the case by making the decree absolute, or by reversing the decree *nisi* or by requiring further inquiry, or otherwise as justice may demand.

The High Court may order the costs of Counsel and witnesses and otherwise arising from such cause being shown, to be paid by the parties or such one or more of them as it thinks fit, including a wife if she have separate property.

Whenever a decree *nisi* has been made, and the petitioner fails, within a reasonable time, to move to have such decree made absolute, the High Court may dismiss the suit.

"*Decree shall in the first instance be a decree nisi*"—

Cf: section 7 of the Matrimonial Causes Act, 1860.

Section 183 of the Supreme Court of Judicature (Consolidation) Act, 1925.

Rule 56 of the Matrimonial Causes Rules, 1924.

This section mentions only a decree for dissolution.

No reference is made to a decree for nullity. The Madras High Court has, however, held that a decree to be passed in the first instance in a suit for declaration of nullity of marriage is that of a decree *nisi* and not a decree absolute (*r*).

In a suit for dissolution of marriage a decree *nisi* is first pronounced, the husband and wife remaining married (*s*), and a woman continues to be subject to all the disabilities of coverture, until the decree is made absolute (*t*). If either party dies after the passing of the decree *nisi* and before it is made absolute the suit is considered to have abated and none has a right to apply to have the decree *nisi* made absolute (*u*).

A decree *nisi* is not a 'decree' within the purview of the expression in the Civil Procedure Code (*v*).

"Not to be made absolute till after the expiration of not less than six months"—

Cf: The wording of section 183 of the Supreme Court of Judicature (Consolidation) Act, 1925:

> " Not to be made absolute until after the expiration of six months from the pronouncing thereof unless the Court by general or special order from time to time fixes a shorter time ".

(*r*) *Sumathi Ammal* v. *Paul* (1936) 59 Mad. 518, F.B.

(*s*) *Ellis* v. *Ellis* (1883) 8 P.D. 188; 49 L.T. 223.

(*t*) *Norman* v. *Villars* (1877) 2 Ex. D. 359; 36 L. T. 788. *Sinclair* v. *Fall* (1933) 1 Ch. 155.

(*u*) *Grant* v. *Grant & Bowles & Pattison* (1862) 2 Sw. & Tr. 52; 6 L. T. 660. *Stanhope* v. *Stanhope* (1886) 11 P. D. 103. *Butterfield* v. *Butterfield* (1923) 50 Cal. 153.

(*v*) *King* v. *King* (1882) 6 Bom. 416.

The High Courts in India have no power to shorten the time. Still a decree of nullity confirmed by the High Court before the six months period had expired cannot be treated as made by a Court not competent to make it within the meaning of sections 41 and 44 of the Indian Evidence Act and is, therefore, conclusive proof that the marriage was null and void (v_1).

The Courts in England will not, unless there be peculiar circumstances in the case, shorten the time within which the decree *nisi* may be made absolute in suits for nullity (w). But where a decree *nisi* was made after three petitions, the Court made the decree absolute within three months (x). So also, where the first decree *nisi* was dissolved on the intervention of the King's Proctor a fresh decree was obtained by the petitioner and the Court in the special circumstances of the case allowed the time to be reduced for making the decree absolute (y). Where a new trial is ordered six months after the decree *nisi*, the decree *nisi* in the second trial, may be passed, but without waiting for the expiration of six months after the second decree, the first decree *nisi* may be made absolute (z). The time will not, however, be shortened on the ground of the petitioner's ill-health due to excitement of the litigation(a).

"Not less than six months"—

The decree may be made absolute any time after the expiration of six months and the petitioner has no right to have it made absolute immediately after the lapse of six

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(v_1) *Caston* v. *Caston*(1900) 22 All 270, F.B. See *Samuel* v. *Samuel* A.I.R. (1934) Lah. 636, S.B.
(w) *M.* v. *B.* (1874) L.R. 3 P.D. 200. *Brennan* (otherwise *Roberts*) v. *Brennan* (1902) 86 L.T. 599.
(x) *Fitzgerald* v. *Fitzgerald* (1874) L.R. 3 P.D. 136.
(y) *Rogers* v. *Rogers* (1894) 6 R. 589.
(z) *Sheffield* v. *Sheffield & Paice* (1881) 29 W.R. 523.
(a) *Biedermann* v. *Biedermann* (1896) 12 T.L.R. 209.

months (*b*), but within a reasonable time thereafter (*c*), and if no such application is made within a reasonable time the Court has power to dismiss the petition (*d*). What is reasonable time is a question depending on the circumstances of each case (d_1). The petitioner alone has the right to have the decree made absolute (*e*).

Where the petitioner under a mistake of law, made the application for making the decree *nisi* absolute nine years after its pronouncement the Court granted the application as otherwise the petitioner would have been put to unnecessary cost of a fresh suit(*f*). And where alimony proceedings are pending the delay in applying to have the decree *nisi* made absolute is excused (*g*). So also, when arrears of alimony *pendente lite* are not paid the decree *nisi* is not made absolute(g_1).

"*During that period any person shall be at liberty to show cause why the decree nisi should not be made absolute*"—

See Notes to section 17-A.

Any person possessing the necessary proofs may intervene to prevent the decree being made absolute. But the words "any person" do not apply to parties to the suit and the provisions of this section do not give the respondent to a divorce suit the right to object to a decree *nisi* being

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(*b*) *Watton* v. *Watton, Daw* v. *Daw, Davies* v. *Davies* (1866) L.R. 1 P. & D. 227.
(*c*) *Parsons* v. *Parsons* (1907) P. 331. See Rules 925 to 927 of the Bombay High Court Rules, 1936.
(*d*) *Pollock* v. *Pollock, Deane & Macnamara* (1868) 16 W.R. 1130.
(d_1) *Southern* v. *Southern* (1890) 62 L.T. 668.
(*e*) *Ousey* v. *Ousey & Atkinson* (1875) 1 P.D. 56. *Halfen* v. *Boddington* (1881) 6 P. D. 13.
(*f*) *Grant* (falsely called *Giannetti* v. *Giannetti*) (1913) P. 137; 108 L.T. 1037.
(*g*) *Southern* v. *Southern*, supra.
(g_1) *De Bretton* v. *De Bretton* (1882) 4 All. 295. *Latham* v. *Latham* (1861) 2 Sw. & Tr. 299.

made asbolute(*h*). The fact that the intervener is related to the respondent is immaterial (*h* 1)

"*Material facts not being brought before the Court*".—

See Notes to section 17-A.

Confirmation of decree for dissolution by District Judge.

17. Every decree for dissolution of marriage made by a District Judge shall be subject to confirmation by the High Court.

Cases for confirmation of a decree for dissolution of marriage shall be heard (where the number of the Judges of the High Court is three or upwards) by a Court composed of three such Judges, and in case of difference the opinion of the majority shall prevail, or (where the number of the Judges of the High Court is two) by a Court composed of such two Judges, and in case of difference the opinion of the Senior Judge shall prevail.

The High Court, if it thinks further inquiry or additional evidence to be necessary, may direct such inquiry to be made, or such evidence to be taken.

The result of such inquiry and the additional evidence shall be certified to the High Court by the District Judge, and the High Court shall thereupon make an order confirming the decree for dissolution of marriage, or such other order as to the Court seems fit:

Provided that no decree shall be confirmed under this section till after the expiration of such time, not less than six months from the pronouncing thereof, as the High Court by general or special order from time to time directs.

(*h*) *Williams* v. *Williams* (1936) 14 Rang. 322.
(*h* 1) *Swaine* v. *Swaine* (1932) 10 Rang. 115. See Rules 923 and 924 of the Bombay High Court Rules, 1936.

During the progress of the suit in the Court of the District Judge, any person suspecting that any parties to the suit are or have been acting in collusion for the purpose of obtaining a divorce shall be at liberty, in such manner as the High Court by general or special order from time to time directs, to apply to the High Court to remove the suit under section 8, and the High Court shall thereupon, if it thinks fit, remove such suit and try and determine the same as a Court of original jurisdiction, and the provisions contained in section 16 shall apply to every suit so removed: or it may direct the District Judge to take such steps in respect of the alleged collusion as may be necessary to enable him to make a decree in accordance with the justice of the case.

The intention of the legislature as expressed in section 17 for having the decree of the District Court confirmed by the High Court is to enable the High Court to review the whole case and form its own conclusions (*i*), and the High Court can set aside a decree passed by the District Court if the decree was pronounced on insufficient evidence (*j*), or on the uncorroborated testimony of the petitioner (*k*).

No notice to the respondent is necessary in proceedings for the confirmation of the decree, but the High Court will not confirm the decree unless it is satisfied that the respondent was served with a copy of the petition (*l*).

The High Court should not make a decree *nisi* absolute without a motion being made to it for that purpose (l_1).

(*i*) *Garlinge* v. *Gorlinge* (1922) 44 All. 745; A.I.R. (1922) All. 504.
(*j*) *Ibid. Emile* v. *Emile*, A.I.R. (1930) Lah. 360.
(*k*) *Payne* v. *Payne*, A.I.R. (1922) Mad. 350, F.B.; 42 M.L.J. 562.
(*l*) *Ibid. Hunter* v. *Hunter* (1891) 18 Cal. 539.
(l_1) *Culley* v. *Culley* (1888) 10 All. 559 at p. 561. *Forshaw* v. *Forshaw* (1909) 31 All. 511.

The High Court when moved to confirm the decree of the District Court can deal with that part of the decree awarding damages against the co-respondent although he does not appeal against it (*m*).

The relationship of husband and wife subsists after the passing of the decree *nisi* and until it is confirmed by the High Court (*n*).

Where after the passing of the decree *nisi* the parties are reconciled the application for the confirmation of the decree *nisi* is withdrawn and the proceedings are taken as disposed of. It does not leave the petitioner an option of reviving the proceedings and of applying once again for the confirmation of the decree (*o*). According to the Allahabad High Court the proceedings are to be stayed (*p*).

A decree for nullity of marriage made by the District Court cannot be confirmed by the High Court before the expiration of six months from the pronouncing thereof (*q*). The Allahabad High Court has taken a different view and has held that such a decree could be confirmed even before the expiration of six months (*r*). It is submitted that the view taken by the Bombay High Court is the correct one.

The decree may be confirmed even after long delay where the delay is satisfactorily accounted for (*s*).

All applications for alimony and custody of children after the confirmation of the decree by the High Court should be made to the District Court that pronounced the decree *nisi* (*t*).

(*m*) *Kyte* v. *Kyte & Cook* (1896) 20 Bom. 362.
(*n*) *Borthwick* v. *Borthwick* (1914) 41 Cal. 714 at p. 717 *Warter* v. *Warter* (1890) L.R. 1 P. & D. 152.
(*o*) *Binge* v. *Binge* (1932) 13 Lah. 47 at p. 49.
(*p*) *Culley* v. *Culley* (1888) 10 All. 560, S.B.
(*q*) See section 20 of the Act. *A.* v. *B.* (1899) 23 Bom. 460, S.B.
(*r*) *Caston* v. *Caston* (1900) 22 All. 270, F.B.
(*s*) *Grant* (falsely called *Gianetti*) v. *Gianetti* (1913) P. 137.
(*t*) *Wallace* v. *Wallace* (1915) 40 Bom. 109 at p. 111; 17 Bom.L.R. 948.

Appointment of officer to exercise duties of King's Proctor.

17A. The Governor-General in Council may appoint for each High Court of Judicature established by Letters Patent an officer who shall, within the jurisdiction of the High Court for which he is appointed, have the like right of showing cause why a decree for the dissolution of marriage should not be made absolute or should not be confirmed, as the case may be, as is exercisable in England by the King's Proctor, and the Governor-General in Council may make rules regulating the manner in which the right shall be exercised and all matters incidental to, or consequential on, such exercise.

KING'S PROCTOR.

Cf: section 7 of the Matrimonial Causes Act, 1860.

Section 1 of the Matrimonial Causes Act, 1873.

Section 181 (2) and (3) of the Supreme Court of Judicature (Consolidation) Act, 1925.

Rule 51 of the Matrimonial Causes Rules, 1924.

Section 17-A was inserted by Act XV of 1927.

It does not apply to nullity suits.

The following officers are appointed by the Governor-General in Council to exercise the right of showing cause why a decree *nisi* should not be made absolute as is exercisable in England by the King's Proctor:

Officer.	*High Court.*
Crown Prosecutor	.... Madras.
Solicitor to Government	.... Bombay.
Superintendent and Remembrancer of Legal Affairs	.... Calcutta.
Government Advocate	.... Allahabad.
Legal Remembrancer	.... Lahore.

Officer.	*High Court*
Government Advocate	.... Rangoon.
Legal Remembrancer	.... Patna.

The respondent to the suit has no right to challenge the petitioner's right to have the decree *nisi* made absolute. The King's Proctor may, however, consider the respondent's allegations and if he considers the intervention justified it is his duty to intervene (*u*).

The usual grounds of intervention are that there has been collusion or connivance between the parties, or undisclosed adultery by the petitioner, or that some other material facts were withheld from the Court at the hearing. It is not essential that such material facts have been wilfully withheld, an accidental omission may be a good ground for the intervention (*v*). The King's Proctor may intervene to show cause why a decree *nisi* should not be made absolute on the ground that the charge of adultery on which it was granted was not true and he is at liberty to adduce evidence of fresh material facts for that purpose (*w*).

Before the addition of section 17-A to the Indian Divorce Act, 1869, the Courts in India had power to inquire into the truth of the allegation made by a party to the suit against the making a decree *nisi* for dissolution absolute (*x*).

Where the King's Proctor intervenes in a suit for dissolution of marriage before the hearing and pleads collusion and that petitioner has been guilty of adultery, his right to intervene could not be defeated by petitioner asking only for a judicial separation; but he will be allowed to prove his pleas. The Court will not at the hearing in

(*u*) *Williams* v. *Williams* (1936) 14 Rang. 322.
(*v*) *Howarth* v. *Howarth* (1884) 9 P.D. 218.
(*w*) *Crawford* v. *Crawford & Dilke* (1886) 11 P.D. 150; 55 L.T. 305; 2 T.L.R. 768, C.A.
(*x*) *Codd* v. *Codd* (1923) 47 Bom. 664. See *Stoate* v. *Stoate* (1861) 2 Sw. & Tr. 384; 164 E.R. 1045.

such a case, allow the prayer of the petition to be altered into a prayer for judicial separation for the purpose of ousting the King's Proctor (*y*). The King's Proctor can intervene at any stage of the case and he is not preculuded from setting up other defences in addition to that of collusion (*z*), but in the absence of materials establishing collusion there is no statutory authority for the intervention of the King's Proctor before the passing of the decree *nisi* even though the inquiry would be likely to show that the petitioner's case was a false one. The assistance which the King's Proctor can render to the Court before the decree *nisi* is, in the absence of suspected collusion, confined to matters of argument (*a*). It was, however, held in a recent case that his intervention was not limited to cases of suspected collusion (*b*) and that he could intervene where there is suppression of fact or presentment of falsehood by a petitioner (*c*). Where the King's Proctor intervenes charging petitioner with adultery and collusion, the Court is not bound to dismiss the suit on the petitioner's application as the King's Proctor would be entitled to his costs if he established collusion (*d*).

The provisions of section 17-A of the Indian Divorce Act of 1869, limit the powers of the Government Proctor to the right of " showing cause why a decree for the dissolution of marriage should not be made absolute or should not be confirmed as the case may be ". No provision is made for his intervention in suits for nullity or for his intervention during the progress of a suit for dissolution, nor is there any provision for the Court to send the necessary

(*y*) *Drummond* v. *Drummond* (1861) 2 Sw. & Tr. 269; 164 E.R. 998.
(*z*) *Sotto Mayer* v. *De Barros* (1879) 5 P.D 94; 41 L.T. 281.
(*a*) *Jackson* v. *Jackson* (1910) P. 230; 103 L.T. 79.
(*b*) *Sloggett* v *Sloggett* (1928) P. 148; 139 L.T. 239.
(*c*) *Apted* v. *Apted & Bliss* (1930) P. 246; 143. L.T. 353.
(*d*) *Joyce* v. *Joyce* (1864) 33 L.J.P. 200. *Higgins* v. *King's Proctor*, *King's Proctor* v. *Carter* (1910) P. 151.

papers in a suit for dissolution to the Government Proctor to instruct Counsel to argue before the Court any question in relation to the matter which the Court deems to be necessary or expedient to have fully argued (d_1). See section 181 of the Supreme Court of Judicature (Consolidation) Act, 1925. It is submitted that in the absence of statutory provisions the inherent powers of the Indian Courts are not taken away and coupled with the provisions of section 7 of the Indian Divorce Act, 1869, the Courts in India can act on the principles and rules of the English Divorce Court.

At any time before a decree *nisi* for dissolution of marriage is made absolute, it is competent for one of the public to intervene, although three months may have elapsed since the decree was pronounced (e). Even the King's Proctor can appear as one of the public to show cause against a decree *nisi*, but in such a case the Court has no jurisdiction to award him costs (f). The King's Proctor can appear any time before a decree *nisi* is made absolute (g).

The mere suppression of material fact from the Court does not empower the Court to withhold relief when it appears upon all the facts being disclosed to the Court that the petitioner is entitled to a decree(h). On the intervention of the King's Proctor on the ground that the petitioning wife had concealed material facts, the Court rescinded

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(d_1) *See Clayton* v. *Clayton & Sherman* (1931) 48 T.L.R. 191.
(e) *Clements* v. *Clements & Thomas* (1864) 3 Sw. & Tr. 594; 164 E.R. 1327.
(f) *Lautour* v. *Queen's Proctor* (1864) 10 H.L Cas. 685. 10 L.T. 198. *Bowen* v. *Bowen & Evans* (1864) 3 Sw. & Tr. 530. 164 E.R. 1381.
(g) *Poole* v. *Poole & Charlton* (1896) 12 T.L.R. 509.
(h) *Alexandre* v. *Alexandre* (1870) L.R. 2 P. & D. 164; 23 L.T. 268. *Butler* v. *Butler* (1890) 15 P.D. 66. See *Spurgeon* v. *Spurgeon* (1930) 46 T.L.R. 396. *Hunter* v. *Hunter* (1905) P. 217; 93 L.T. 451

the decree *nisi* which although the wife had committed adultery the Court had granted in its discretion (*i*); so also, would a decree *nisi* be rescinded if it be brought to the notice of the Court that the petitioner was guilty of adultery after the passing of the decree *nisi* and before it was made absolute (*j*).

Where in a suit by a husband for nullity of marriage he had pleaded the wife's incapacity to consummate and had obtained an exparte decree on the ground of the wife being *hanc apta viro*—the King's Proctor intervened and proved by the evidence of the wife and by that of doctors that the wife was *apta viro* and the marriage was consummated, the Court rescinded the decree *nisi* (*k*). The suppression of material facts is of great importance and even when innocent may bring about the recission of a decree *nisi*. The circumstances of each particular case may be dealt with as justice as may require regard being had, not merely to the parties themselves and to others who may be interested in, or affected by, the decision of the Court, but to public decency and morality and the welfare and interests of society and state (*l*). The withholding from the Court the fact of petitioner's adultery is a good ground for rescinding a decree *nisi* for dissolution, though had the facts been disclosed the Court in the exercise of its discretion would have granted relief (*m*). If, however, the Court finds that the suppression of the fact of adultery was due to the petitioner's Counsel's advice (*n*), or to an ignorance of law the Court would treat her with leniency

(*i*) *King* v. *King* (1915) 32 T.L.R. 78.
(*j*) *Hulse* v. *Hulse & Tavernor* (1871) L.R. 2 P. & D. 259.
(*k*) *T.* v. *T.* (1908) 24 T.L.R. 580.
(*l*) *Brooke* v. *Brooke* (1912) *Wickings* v. *Wickings,* (1918) P. 265.
(*m*) *Roche* v. *Roche* (1905). P. 142. 9; 2 L.T. 668. *Dawes* v. *Dawes* (1916). 32 T.L.R. 247. *Stuart* v. *Stuart and Holden* (1930) P. 77.
(*n*) *Pretty* v. *Pretty* (1911) P. 83; 154. L.T. 79.

and in spite of the King's Proctor's intervention, the Court would refuse to rescind the decree *nisi* but would mulct the petitioner in the costs of the King's Prooctor (*o*). Where, however, the concealment of the adultery of the petitioner is not wilful the Court may rescind the decree (*p*), and where the Court has been misled by the petitioner into exercising its discretion in his favour, the Court may, not only rescind the decree, but may sanction his prosecution for perjury (*q*).

When the petitioner's adultery which was concealed from the Court was condoned by the respondent, the decree *nisi* was allowed to stand, the petitioner being made to pay the costs of the King's Proctor (*r*).

COSTS OF KING'S PROCTOR—

Costs of an intervention by the King's Proctor or by a member of the public is in the discretion of the Court and the King's Proctor stands in the same position as any other intervener except that the Treasury may recoup him for any costs which he may pay to a successful petitioner under order of the Court (*s*).

The co-respondent may be condemned in the costs of the King's Proctor's successful intervention where the decree *nisi* has been obtained by the collusion of the petitioner and the co-respondent (*t*), or his costs may be paid from the money deposited by the husband for the wife's costs of the suit (*u*). Even a pauper petitioner

(*o*) *Hook* v. *Hook & Brown* (1917) P. 56; 116 L.T. 383.
(*p*) *Holland* v. *Holland* (1918) P. 273; 119 L.T. 266.
(*q*) *Rosenz* v. *Rosenz & Josten* (1909) 26 T.L.R. 14.
(*r*) *Bebb* v. *Bebb & Ross.* (1920) 123 L.T. 93.
(*s*) *Higgins* v. *King's Proctor, King's Proctor* v. *Carter* (1910) P. 151 at p. 164, C.A.
(*t*) *Taplen* v. *Taplen & Cowen* (1891) P. 283; 64 L.T. 870. *Hyman* v. *Hyman* (1904) P. 403.
(*u*) *Butler* v. *Butler, Butler* v. *Butler & Burnham* (1890). 15 P. D. 161; 63 L.T. 260. *Hedderwick* v. *Hedderwick* (1930) 74 Sol. Jour 863.

(*v*), or a wife without separate estate (*v*$_1$) is liable to be condemned in the full costs of the King's Proctor's successful intervention. Where a person charged by the King's Proctor with having committed adultery with the petitioner, intervenes and files an answer to the King's Proctor's plea, such person as well as the petitioner, may upon the dismissal of the petition be condemned in the costs of the King's Proctor (*w*), but where the King's Proctor is successful only on part of the plea no costs are awarded to him (*x*), nor where there is no moral fault on the part of the petitioner (*y*).

The King's Proctor for the time being can sue for costs awarded in any matter before his own appointment to the Office of King's Proctor (*z*).

The Court possesses full powers in the exercise of its judicial discretion to condemn the King's Proctor in the costs of an unsuccessful intervention (*a*), or where his intervention was not justified (*b*). The petitioner, like any other successful litigant is entitled to costs unless his or her own conduct has really brought about the intervention (*c*).

Where, however, the petitioner's conduct has justified the intervention which was unsuccessful, the Crown is not made to pay the costs (*d*), but on the contrary the costs of the King's Proctor are allowed (*e*), nor will he be condemned in costs where the Court exercised its discretion in

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(*v*) *White* v. *White* (1898) P. 124. *Guy* v. *Guy & Foster* (1900) 17 T.L.R 4. *Roberts* v. *Roberts & Lang* (1916). P. 187.
(*v*$_1$) *Kennard* v. *Kennard* (1915) P. 194.
(*w*) *Davison* v. *Davison* (1909) P. 308.
(*x*) *Barnes* v. *Barnee & Grimwade* (1857) L.R. 1 P. & D. 505; 17 L.T. 268.
(*y*) *Rogers* v. *Rogers* (1894) P. 161; 70 L.T. 699.
(*z*) *Re Raynor, Exparte Raynor* (1877) 37 L.T. 38.
(*a*) *Westcott* v. *Westcott* (1908). P. 250. 99 L.T. 310.
(*b*) *Howe* v. *Howe & Howe* (1910) 54 Sol. Jour. 252.
(*c*) *Westcott* v. *Westcott*, supra.
(*d*) *Jessop* v. *Jessop* (1861) 30 L.J.P. 193.
(*e*) *Bebb* v. *Bebb & Ross* (1920) 123 L.T. 93.

favour of a guilty petitioner and did not rescind the decree *nisi* (*f*).

IV—Nullity of Marriage.

Petition for decree of nullity.

18. Any husband or wife may present a petition to the District Court or to the High Court, praying that his or her marriage may be declared null and void.

Under the provisions of section 2 of the Indian Divorce Act a petition for a declaration of the marriage being null and void can only be made when the marriage was solemnized in India.

The difference between a suit for divorce and a suit for nullity is that in the former case the marriage (unless challenged in the answer to the petition) is presumed to have been regular and one of the parties to it stands accused of some matrimonial offence since; whereas a petition for a decree of nullity is based upon the contention that the ceremony gone through between the parties was irregular in some respect and should be declared void or that the marriage had not been consummated.

The requisites of a valid marriage are that there must be the voluntary consent of both parties. There must be compliance with the legal requirements of publication and solemnization so far as the law deems it essential. There must not be incapacity in the parties to marry either as regards age or physical capacity or as respects relationship by blood or marriage. Failure in these respects renders the marriage void or voidable (*g*), and a voidable marriage, continues a marriage, till it is dissolved (*h*), but cannot be rendered void, after the death of either of the parties (*i*).

(*f*) *Symons* v. *Symons* (1897) P. 167.
(*g*) *Moss* v. *Moss* (1897) P. 263. *Crawson* v. *Crawson* (1905) 2 All. L. J. 420.
(*h*) *Bury's Case* (1598) 5 Coke 98; 77 E R. 207.
(*i*) *Elliott* v. *Gurr* (1812) 2 Phil. 16; 161 E.R. 1064.

Before a suit for nullity can be entertained it must be established that a ceremony of marriage had been performed between the parties by a clergyman qualified to marry them (*j*).

AGE-LIMIT—

There is no age limit beyond which a suit for nullity will not be entertained (*j* 1), but the Court may refuse relief when parties are of an advanced age (*j* 2).

In a suit for nullity of marriage a charge of cruelty with a counterclaim for judicial separation cannot be made by the respondent in answer to the petition (*k*), nor can a suit for nullity be instituted after obtaining a decree of separation on the ground of adultery of one of the parties (*k* 1).

Grounds of decree.

19. Such decree may be made on any of the following grounds:

(*1*) **That the respondent was impotent at the time of the marriage and at the time of institution of the suit;**

(*2*) **That the parties are within the prohibited degrees of consanguinity (whether natural or legal) or affinity;**

(*3*) **That either party was a lunatic or idiot at the time of the marriage;**

(*4*) **That the former husband or wife of either party was living at the time of the marriage, and the marriage with such former husband or wife was then in force.**

(*j*) *Lopez* v. *Lopez* (1886) 12 Cal. 706 at p. 733, F.B.
(*j* 1) *W.* v. *H.* (falsely called *W.*) (1861) 2 Sw. & Tr. 240.
(*j* 2) *Briggs* v. *Morgan* (1820) 2 Hag. Con. 324.
(*k*) *Humphreys* v. *Williams* (falsely called *Humphreys*) (1860) 29 L.J.P. & M. 62.
(*k* 1) *Guest* v. *Guest* (1820) 2 Hag. Con. 321.

Nothing in this section shall affect the jurisdiction of the High Court to make decrees of nullity of marriage on the ground that the consent of either party was obtained by force or fraud.

There are six main grounds for petitioning for a decree of nullity—

(i). Impotence.

(ii). Prohibited degrees of consanguinity or affinity.

(iii). Insanity.

(iv). Bigamy.

(v). Fraud, threat or duress.

(vi). Marriage without license or the due publication of banns.

The last ground is not mentioned in section 19 of the Indian Divorce Act, but the Courts in India have the power under section 7 of the Act to entertain a petition on such ground.

(*i*) IMPOTENCE.

There must not be incapacity in the parties to marry as regards physical capacity (*l*). A final decree annulling a marriage on the ground of the incapacity of one of the parties to it to consummate it has retrospective operation, so that the effect of the decree amounts to a declaration that there is no marriage (*m*). Such a decree is a judgment *in rem* altering the status of the parties and can be pronounced only by the Court of their domicile. In substance, it is a decree for the dissolution of the marriage which was voidable only and not void and is thus distinguished from decrees annulling marriages for illegality

(*l*) *Moss* v. *Moss* (1897) P. 263; 77 L.T. 220.
(*m*) *Newbould* v. *Attorney General* (1931) P. 75; 144 L.T. 728.

or informality (*n*). The ground of the interference of the Court in cases of impotence is the practical impossibility of consummation (*o*), but the impotence must exist at the time of the marriage (*p*) and must be permanent and incurable (*q*). Impotence renders the marriage voidable and not void and can only be questioned in the matrimonial Court during the joint lives of the parties. The question can be raised by the non-impotent spouse only (*r*), and a man is not permitted to plead his own natural impotency as a ground for a decree of nullity of marriage (*s*), nor can he (respondent) apply to make a decree *nisi* for nullity absolute (*t*). A discretion is, however, vested in the Court to be exercised very carefully to grant a decree of nullity at the suit of an impotent person (*u*).

IMPOTENCE *QUOAD HANC*.

When a marriage cannot be consummated by the spouses although no impediment to consummation is clear or apparent in either of them and the Court is satisfied that the marriage has not been consummated, the marriage may be annulled (*v*). There may be no structural defect in the spouse but the consummation may be impossible

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(*n*) *Inverclyde* (otherwise *Tripp*) v. *Inverclyde* (1931) P. 29; 144 L.T. 212.
(*o*) *G.* v. *G.* (1871) L.R. 2 P. & D. 287; 25 L.T. 510. *H.* v. *P.* (falsely called *H.*) (1873) L.R. 3 P. & D. 126. *Dickinson* v. *Dickinson* (1913) P. 198.
(*p*) *Greenstreet* (falsely called *Cumyns*) v. *Cumyns* (1812) 2 Phil. 10; 161 E.R. 761. *P.* v. *P.* (1916) 2 I.R. 400.
(*q*) *Birendra* v. *Hemlata* (1920) 48 Cal. 283. *Brown* v. *Brown* (1828) 1 Hag. Ec. 523; 162 E.R. 665.
(*r*) *A.* v. *B.* (1868) L.R. 1 P. & D. 559; 19 L. T. 22. *Salvesan* v. *Austrian Property Administrator* (1927) A C. 641.
(*s*) *Norton* v. *Seton* (falsely called *Norton*) (1819) 3 Phil. 147; 161 E.R. 1283.
(*t*) *Halfen* (otherwise *Boddington*) v. *Boddington* (1881) 6. P.D. 13; 44 L.T. 252. *Lewis* v. *Lewis* (1892) P. 212.
(*u*) *G.* v. *G.* (falsely called *K.*) (1908) 25 T.L.R. 328, *C.A.*
(*v*) *G.* v. *G.* (1912) P. 173; 106 L.T. 647.

owing to the wife's invincible repugnance to the act of consummation resulting in a paralysis of the will (*w*). Where attempts by the husband to have intercourse with the wife produce hysteria on her part and when the marriage was not consummated for three years (*x*), or where the intercourse is imperfect by reason of a natural and incurable malformation of the sexual organs of the female, those organs admitting of a partial connection only with the male (*y*), the marriage is annulled. But the incapacity should be permanent and if there is a possibility that its cause may be cured the Court will not grant a decree of nullity although such cure may be highly improbable (*z*). Where, however, the malformation, might possibly, but at great risk to life and with a doubtful success as to the end desired, be removed, the respondent could not be called upon to submit to an operation and the Court would be justified in granting relief to the petitioner (*a*). When the operation does not involve great risk to life but the wife still refuses to submit to an operation the marriage may be annulled (*b*).

A husband on account of his habit of self-abuse was unable to consummate the marriage and the medical evidence was to the effect that if he discontinued his practice and exercised self-control he would be cured, but he refused to do so, the marriage was declared null and void (*c*). Mere

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(*w*) *G.* v. *G.* (1924) A.C. 349; 131 L.T. 70. *Graham* v. *Reith* (*or Graham*) 68 Sol. Jour. 417, *H.L. S.* v. *B.* (1892) 16 Bom. 639.
(*x*) *H.* v. *P.* (falsely called *H.*) (1873) L.R. 3 P. & D. 126.
(*y*) *D.—E.* v. *A.—G.* (falsely called *D. E.*) (1845) 1 Rob. Ecc. 279; 163 E.R. 1039. *L.* v. *L.* (otherwise *D.*) (1922) 38 T.L.R. 697.
(*z*) *S.* (falsely called *E.*) v. *E.* (1863) 3 Sw. & Tr. 240; 164 E.R. 1266.
(*a*) *W.* v. *H.* (falsely called *W.*) (1861) 2 Sw. & Tr. 240; 164 E.R. 987.
(*b*) *L.* v. *L.* (falsely called *W.*) (1882) 7 P.D. 16; 47 L.T. 132.
(*c*) *J.* (otherwise *K.*) v. *J.* (1908) 24 T.L.R. 622. See *Joseph* (otherwise *King*) v. *Joseph* (1909) P. 217.

incapacity of conception is no ground for a decree of nullity if sexual intercourse is not impossible (*d*). Where a wife refuses either to consummate the marriage or to cohabit with her husband the Court may persume incapacity on her part (*e*) and also, if the wife wilfully and wrongfully refuses to submit to medical inspection (*f*), or if she resists all attempts at sexual intercourse after a lapse of reasonable time and the Court is satisfied of the *bona fides* of the petition a decree for nullity may be pronounced (*g*). But where there is no evidence of incapacity the Court cannot annul the marriage merely on the ground of the wife's unwillingness to consummate the marriage (*h*), or on the ground of her persistent refusal of marital intercourse (*i*).

Both spouses impotent—

Where both the parties to the ceremony of marriage are impotent, each being incapable as regards the other a decree *nisi* may be granted to each of the parties and either may apply in due course for a decree absolute (*j*).

Compromise between the parties—

A suit for nullity can be compromised and the petition dismissed, but the wife is not entitled to file a fresh suit for nullity on the same allegation (*k*).

(*d*) *L.* (otherwise *D.*) v. L. (1922) 38 T.L.R. 697; 66 Sol. Jour. 613.
(*e*) *F.* v. *P.* (otherwise *F.*) (1911) 27 T.L.R. 429; 55 Sol. Jour. 482. *Finegan* v. *Finegan* (otherwise *McHardy*) (1917) 33 T.L.R. 173.
(*f*) *W.* v. *W.* (otherwise *L.*) (1912) P. 78. *S.* v. *S.* (otherwise *M.*) (1908) 24 T.L.R. 253.
(*g*) *S.* v. *A.* (otherwise *S.*) (1878) 3 P.D. 72. *Napier* v. *Napier* (1915) 84 L.J.P. 198. *S.* v. *B.* (1892) 16 Bom. 639. *G.* v. *M.* (1885) 10 App. Cas. 171. *W.* v. *W.* (1912) P. 78.
(*h*) *C.* v. *C.* (otherwise *H.*) (1911) 27 T.L.R. 421.
(*i*) *Hudston* v. *Hudston* (otherwise *Newbigging*) (1922) 39 T.L.R. 108.
(*j*) *H.* v. *H.* (otherwise *N.*) (1929) 98 L.J.P. 155; 45 T.L.R. 618.
(*k*) *H.* v. *H.* (1928) 30 Bom. L.R. 523, F.B.

Non-Consummation after a lapse of reasonable time—

Triennial cohabitation—

The rule of the Ecclesiastical Court of triennial cohabitation has not been recognised by the Divorce Court beyond the point that a presumption of inability to consummate the marriage would arise, in the absence of any other evidence, where husband and wife have lived together for a period of three years in the same house with ordinary opportunities of intercourse and where it is established that there has been no consummation (*l*), and the Court can draw an inference of the existence of some latent incapacity on the part of the respondent where the marriage has not been consummated after a lapse of six months (*m*), or even after a lapse of three months (*n*), or where one of the parties was always willing and anxious to consummate the marriage but the other party persistently refused martial intercourse and has also refused to obey the usual order to attend for medical inspection (*o*). A decree of nullity of marriage was passed where the wife persisted in her refusal for seven years (*p*), and also, where the petition was presented after seventeen years from the date of the marriage (*q*). The Court may presume impotence on the part of the husband where the medical evidence shows that after a cohabitation of many years the wife is *virgo intacta* (*r*).

(*l*) *G.* v. *M.* (1885) 10 App. Cas. 171 at p. 190; 53 L.T. 398.
(*m*) *F.* v. *P.* (falsely called *F.*) (1896) 75 L.T. 192. *E.* v. *E.* (otherwise *T.*) (1902) 87 L.T. 149; 46 Sol. Jour. 586; (1903) P. 88.
(*n*) *G.—S.* (falsely called *T-E.*) v. *T-E.* (1854) 1 Ecc. & Ad. 389; 164 E.R. 224.
(*o*) *B.* (otherwise *H.*) v. *B.* (1901) P. 39; 70 L.J. P. 4.
(*p*) *Vickery* v. *Vickery* (otherwise *Cox*) (1920) 37 T.L.R. 332; 65 Sol. Jour. 343.
(*q*) *S.* v. *B.* (falsely called *S.*) (1905) 21 T.L.R. 219.
(*r*) *Lewis* (falsely called *Hayward*) v. *Hayward* (1866) 35 L.J.P. 105 H.L.

Delay—

The objection of delay in asking relief may be got over when the proof of impotence is complete, but not otherwise (*s*). No definite or absolute bar arises from delay in presenting the petition for nullity (*t*), but lapse of time must be satisfactorily accounted for (*u*), and the evidence to support the suit should be of the most satisfactory kind (*v*). Delay coupled with insincerity of the petitioner will operate as a bar to the suit (*w*). Where a suit was brought by the wife twenty-six years after the marriage on the ground of the husband's impotency, the wife having been proved a virgin, the suit was dismissed as the Court was not satisfied with the explanation for the abnormal delay (*x*).

Medical Inspection—

Medical Inspection of the person of the parties especially of the woman, should not be ordered unless it is absolutely necessary in the interests of justice (*y*), but a decree for nullity on the ground of malformation will not be granted unless the existence of incurable malformation is proved by a medical man who has examined the person of the respondent (*z*).

Notice of medical inspection—

Strict proof is required of service upon respondent of notice to attend before the medical inspector and of the

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(*s*) *Cuno* v. *Cuno* (1873) L.R. 2 Sc. & Div. 300; 29 L.T. 316, H.L.
(*t*) *G.* v. *M.* (1885) 10 App. Cas. 171; 53 L.T. 398.
(*u*) *B-n.* v. *B-n.* (1854) 1 Ecc. & Ad. 248; 23 L.T.O.S. 99; 164 E.R. 144, P.C.
(*v*) *Castleden* v. *Catleden* (1861) 9 H.L. Cas. 186; 5 L.T. 164; See *T.* v. *T.* (1931) 47 T.L.R. 629.
(*w*) *Marriott* v. *Burgess* (1864) 10 Jur. (N.S.). 885.
(*x*) *W.* (falsely called *R.*) v. *R.* (1876) 1 P.D. 405. See *L.* (otherwise *B.*) v. *B.* (1895) P. 274.
(*y*) *Anon.* (1857) Dea. & Sw. 295; 164 E.R. 581.
(*z*) *T.* v. *M.* (falsely called *T.*) (1865) L.R. 1 P. & D. 31. 13 L.T. 644.

appointment itself (*a*); an affidavit of service of the notice upon the respondent will suffice (*b*).

Appointment of Medical Inspector—

The appointment of the Medical Inspector rests with the Court and it may allow the parties to select them and should they not agree each may be allowed to nominate one (*c*), or each party may even nominate two, but it is not necessary that both parties should be examined by the same inspectors (*d*).

Report of Medical Inspector—

The report of the Medical Inspector is not conclusive and the Inspectors themselves and other medical men may be examined (*e*). If the report of Medical Inspectors is not in evidence in the trial Court, it will not be admitted in appeal (*f*).

(ii) PROHIBITED DEGREES.

The prohibited degrees referred to in this section do not necessarily mean the degrees prohibited by the laws of England (*g*). The general rule for the extent of the prohibitions is, that it extends to those that are near of kin and to those that are near to those that are near of kin (*h*). So, a man cannot marry his deceased wife's sister's daughter for she is within the Levitical degrees (*i*),

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(*a*) *B.* (otherwise *W.*) v. *B.* (1909) 25 T.L.R. 713.
(*b*) *P.* v. *P.* (otherwise *A.*) (1909) 25 T.L.R. 530; 53 Sol. Jour. 486.
(*c*) *C.* v. *C.* (1862) 32 L.J.P. & M. 12.
(*d*) *B.* (Falsely called *C.*) v. *C.* (1863) 32 L.J. P.&M. 135.
(*e*) *W.* v. *H.* (falsely called *W.*) (1861) 2 Sw. & T.R. 240; 4 L.T. 89.
(*f*) *Harrison* v. *Harrison* (1842) 4 Moor P.C. Cas. 96; 13 E.R. 238, P.C.
(*g*) *Lopez* v. *Lopez* (1885) 12 Cal. 706. *Hilliard* v. *Mitchell* (1890) 17 Cal. 324.
(*h*) *Hill* v. *Good* (1671) Freem K.B. 167; 89 E.R. 120.
(*i*) *Wortley* v. *Watkinson* (1679) 2 Show. 70; 89 E.R. 800.

and by affinity he is her uncle (*j*). A marriage within the prohibited degrees of consanguinity or affinity is null and void although one of the parties is illegitimate (*k*). A man cannot marry his first wife's mother's sister (*l*).

By the passing of the Deceased Wife's Sister's Marriage Act, 1907, a man may now legally marry his deceased wife's sister. Section 1 of the above statute validates such a marriage for all purposes, whether the marriage is contracted within or without the realm and whether prior or subsequent to the enactment (*m*), and although owing to the death of one of the parties, the assumed relationship of husband and wife had ceased to exist before the date of the passing of the Act (*n*), nor does the Act affect existing interests and a woman who married her deceased sister's husband was not disqualified from receiving the income from her first husband's property which was left to her by will in 1902 upon trust "while she remained his widow" with a gift over on her death or second marriage (*o*).

See Deceased Brother's Widow's Marriage Act, 1921.

(iii) INSANITY.

Before pronouncing a decree of nullity on the ground of insanity the Court must be satisfied that there was mental derangement existing at the time of the marriage (*p*);

(*j*) *Clement* v. *Beard* (1699) 5 Mad. Rep. 448; 87 E.R. 756. See *Ellerton* v. *Gastrell* (1719) 1 Com. 318; 92 E.R. 1090.
(*k*) *R. V. Brighton* (1861) 1 B. & S. 447.
(*l*) *Butler* v. *Gastrell* (1723) Gilb. Ch. 156; 145 E.R. 627.
(*m*) *Thompson* v. *Dibdin* (1912) A.C. 533; 107 L.T. 66.
(*n*) *Re Green, Green* v. *Meinall* (1911) 2 Ch. 275; 105 L.T. 350.
(*o*) *Re Whitfield, Hill* v. *Mathie* (1911) 1 Ch. 310; 103 L.T. 878. See *Re Springfield, Davies* v. *Springfield* (1922) 38 T.L.R. 263; 66 Sol. Jour. 268.
(*p*) *Paulappa* v. *Lea Hangal* (1906) 8 Bom.L.R. 982, S.B. *Hancock* (falsely called *Peaty*) v. *Peaty* (1867) L. R. 1 P. & D. 335. *Jackson* (otherwise *Macfarlane*) v. *Jackson* (1908) P. 308.

any state of mind which falls short of lunacy or idiocy cannot be allowed to be a ground for annulment of a marriage. The doctor's opinion is not conclusive, it is at the most a guide (*q*).

Marriage is a contract as well as a religious vow, and like other contracts, will be invalidated by want of consent of capable persons (*r*), so, when a person is an idiot at the time of marriage, he or she is not capable of being bound by the transaction in any shape or form (*s*), nor can a person suffering from delusion be mentally capable of entering into the contract of marriage (*t*).

Marriage during lucid interval—

The marriage of a lunatic during a lucid interval is valid (*u*), but a person who has been found a lunatic by inquisition or whose person and estate have been committed to the care and custody of trustees, is not capable of marrying unless the commission has been superseded or he (or she) has been declared of sane mind by the Court or by the Committee (*v*).

Burden of Proof—

The burden of showing that the respondent was insane at the time of the marriage lies upon the party asserting it (*w*); and when in a case of this kind a guardian *ad litem* has been assigned to a lunatic, if in the course of the suit it is alleged that the lunatic has since recovered his (or her) faculties and is then in a sound state of mind the Court

(*q*) *Mt. Titli* v. *Jones*, (1934) 56 All. 428.
(*r*) *Turner* v. *Meyers* (1808) 1 Hag. Con. Cas. 414; 161 E.R. 600.
(*s*) *Paulappa* v. *Lea Hangal* (1906) 8 Bom. L.R. 982.
(*t*) *Forster* v. *Forster* (1923) 39 T.L.R. 658.
(*u*) *Cartwright* v. *Cartwright* (1793) 1 Phil. 90.
(*v*) *Turner* v. *Meyers* (falsely called *Turner*), supra.
(*w*) *Durham* v. *Durham* (1885) 10 P.D. 80.

will not make a decree at the instance of the guardian till that question is settled (*x*).

With respect to lucid interval the *onus* of proof attaches on the party alleging such lucid interval who must show sanity and competence on the part of the other party at the period when the act was done, and to which the lucid interval refers (*y*).

Deaf and Dumb person—

Deaf and dumb persons are competent to marry and may show their consent by signs provided they sufficiently understand the nature of the contract and the presumption is in favour of validity of such a marriage, the burden of proof being upon those who would impeach it (*z*).

(iv) BIGAMY.

Where the former husband or wife of either party is living at the time of the marriage and such marriage is legally in force the subsequent marriage is null and void (*a*), and the misconduct of the petitioner however gross, is no bar to a decree of nullity (*b*), as such a marriage is void(*c*) and the Court has no discretion as to withholding relief (*d*). In such a suit the identity of the parties is the most important point (*e*).

(*x*) *Hancock* (falsely called *Peaty*) v. *Peaty*, supra.
(*y*) *Attorney General* v. *Paruther* (1793) 3 Brown C.C. 409; 29 E.R. 962; *Re Lawrence, Lawrence* v. *Lawrence* (1916) W.N. 205.
(*z*) *Harrod* v. *Harrod* (1854) 23 L.T. (O.S.) 243; 69 E.R. 344.
(*a*) *Miles* v. *Chilton* (falsely calling herself *Miles*) (1849) 1 Rob. Ec. 684; 163 E.R. 1178.
(*b*) *Ibid.*
(*c*) *Elliot and Sugden* v. *Gurr* (1812) 2 Phil. 16; 161 E.R. 1064. *Bayard* (falsely called *Morphew*) v. *Morphew* (1815) 2 Phil. 321; 161 E.R. 1158.
(*d*) *Bateman* v. *Bateman* (otherwise *Harrison*) (1893) 78 L.T. 472.
(*e*) *Legge* v. *Dumbbton* (falsely called *Legge*) (1845) 9 Jur. 144.

The Courts in India have no jurisidiction under this Act to grant relief in a suit for nullity except in cases in which it can be proved that the marriage was solemnised in India. See section 2.

The offence of bigamy is punishable in India under section 494 of the Indian Penal Code.

Where after a decree of dissolution of marriage but before the lapse of six months after it is made absolute one of the parties to it gets married again during the lifetime of the other, the latter *de facto* marriage is null and void in law (*f*).

(v) CONSENT OBTAINED BY FORCE OR FRAUD.

If it can be proved that at the time of the ceremony either of the parties was forced to submit or was terrified into such an acquiescence as was apparent only or was by some trick, false or material misrepresentation or deception inveigled into the marriage, that marriage is void. There must be the voluntary consent of both parties (*g*), and the question of consent is one of fact and not of law (*h*). But when a woman of full age and of sound mind has gone through the ceremony of marriage publicly in the presence of witnesses, who discovered nothing in her demeanour to suggest constraint and she has herself complied with the formalities by signing her name in the Register in a clear, firm hand and answering questions without apparent difficulty or confusion, the Court declined to annul the marriage (*i*). A man threatened a woman that he would shoot her unless she married him. In that fear she went through

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(*f*) *Chichester* v. *Mure* (falsely called *Chichester*) (1863) 3 Sw. & Tr. 223; 164 E.R. 1259. *Warter* v. *Warter* (1390) 15 P.D. 152. *Battie* v. *Brown* (falsely called *Battie*) (1915) 38 Mad. 452.
(*g*) *Moss* v. *Moss* (1897) P. 263; 77 L.T. 220.
(*h*) *Mt. Titli* v. *Jones* (1934) 56 All. 428.
(*i*) *Cooper* v. *Crane* (1891) P. 369 at p. 376; 61 L.J.P. 35.

the ceremony, but the marriage was not consummated; the Court granted her the decree of nullity (*j*); and where a man was intoxicated in order to make him go through the ceremony of marriage, the marriage was annulled (*k*). The Court also passed a decree of nullity in a case where the marriage ceremony was gone through at a register office, petitioner not knowing that she was going through a ceremony of marriage, but thinking that they were putting their names down to be married in the future, and the marriage never having been consummated (*l*). Similarly, where an Italian went through a ceremony of marriage with an English girl in England under the belief that the ceremony was one of betrothal and there was neither cohabitation, nor consummation, nor conduct amounting to ratification, the marriage was declared null and void (*m*). So, where the respondent under the pretence of saving a woman from bankruptcy proceedings and exposure in a Court of law induced her to marry him and threatened to shoot her if she showed that she was going through the marriage ceremony not of her free will, the Court granted her a decree of nullity (*n*). Where a ward of tender age was forcibly abducted by her guardian, the marriage was annulled (*o*); and so was a marriage between a trustee's daughter and the *cestui que trust* who was a person of weak and deranged mind pronounced null and void and the pretended wife was condemned in costs (*p*). Where a marriage was procured by the instigation of the parents of the

(*j*) *Bartlett* v. *Rice* (1894) 72 L.T. 122.
(*k*) *Sullivan* v. *Sullivan* (1818) 2 Hag. Con. Cas. 246; 161 E.R. 728.
(*l*) *Hall* v. *Hall* (1908) 24 T.L.R. 756.
(*m*) *Valier* v. *Valier* (otherwise *Davis*) (1925) 133 L.T. 830; 69 Sol. Jour. 746. *Kelly* (otherwise *Hyams*) v. *Kelly* (1932) 148 L.T. 143; 76 Sol. Jour. 832. See *Ford* v. *Stier* (1896) P. 1.
(*n*) *Scott* v. *Sebwright* (1886) 12 P.D. 21; 57 L.T. 421.
(*o*) *Harford* v. *Morris* (1776) 2 Hag. Con. Cas. 423; 161 E.R. 792.
(*p*) *Portsmouth* (*Countess*) v. *Portsmouth* (*Earl*) (1828) 1 Hag. Ecc. 355; 162 E.R. 611. *Wilkinson* v. *Wilkinson* (1845) 4. Notes of Cases 295. *Harrod* v. *Harrod* (1854) 1 K. & J. 4; 18 Jur. 853.

respondent, the woman being only fourteen years of age and under their custody and control, it was annulled(*q*).

The concealment of a loathsome venereal disease is considered a fraud sufficient to warrant a decree of nullity (*r*). But the concealment by a woman from her husband at the time of the marriage of the fact that she is then pregnant by another man does not render the marriage null and void (*s*), nor would the marriage be annulled on the ground that banns were published without the wife's knowledge and they contained the false name and wrong age of the husband (*t*).

The Court has no power to pronounce a decree of nullity of marriage because of fraud in its inducement(*u*).

(vi) UNDUE PUBLICATION OF BANNS.

Marriage is a contract by which the relation of parties to the public is materially altered, it is a contract which is to be entered into by the parties with all public notoriety and which is the contract to be performed in a public place. The high importance of this contract has required by the known law of the country and every Christian country, that there shall be a publication of banns to give validity to a contract *sui generis*. This condition is never relaxed but by dispensation in the way of licence (*v*). The object of publishing banns is to awaken the vigilance of parents and guardians and to give them an opportunity of protecting their rights. It, therefore, requires that the

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(*q*) *Hull* v. *Hull* (falsely called *M'Arthur*) (1851) 17 L.T. (O.S.) 235.
(*r*) *Birendra* v. *Hemlata* (1821) 48 Cal. 283.
(*s*) *Moss* v. *Moss* (1897) P. 263; 77 L.T. 220
(*t*) *Templeton* v. *Tyree* (1872) L.R. 2 P. & D. 420; 27 L.T. 429.
(*u*) *Ibid. Emmanual Singh* v. *Kamal Saraswati* A.I.R. (1934) Pat. 670, *F.B.*
(*v*) *Frankland* v. *Nicholson* (1805) 3 M. & S. 259, n. 105 E.R. 607.

true name should be given to them (*w*). The act of causing the publication of banns of marriage is an act done in the preparations to marry but does not amount to an attempt to marry (*x*). If parties marry knowingly and wilfully without the due publication of banns the marriage may be declared null and void (*y*), but where both the parties are not cognisant of the undue publication of banns the marriage is valid (*z*).

A marriage by banns where by the consent of both parties the name of the man was falsely stated to be "John" his baptismal name being "Bower", was declared null and void (*a*). Where, however, there is a variation in the name, even without a fraudulent intent (*b*), or the banns are published in a false name to the knowledge of both parties (*c*), the marriage is void.

It is doubtful whether the marriage of a minor can be declared null and void by reason of undue publication of banns if there be no parent or guardian whose consent or dissent can be given to such marriage (*d*).

But where parties, being minors, intend to contract a secret marriage, omit one or two of their Christian names, the marriage having held good for a number of years, no offence is committed (*e*).

(*w*) *Wakefield* v. *Mackay* (1807) 1 Hag. Con. Cas. 394; 161 E.R. 593.

(*x*) *R.* v. *Peterson* (1876) 1 All. 376.

(*y*) *Tongue* v. *Allen* (1835) 1 Curt. 38; 163 E.R. 13.

(*z*) *Wright* v. *Elwood* (1837) 1 Curt. 652; 163 E.R. 231.

(*a*) *Midgley* (falsely called *Wood*) v. *Wood* (1859) Sea. & Sm. 70; 164 E.R. 1518.

(*b*) *R.* v. *Tileshelf* (1830) 1 B. & Ald. 190; 109 E.R. 758. *Wormald* v. *Neale & Wormald* (falsely called *Neale*) (1868) 19 L.T. 93.

(*c*) *Small* v. *Small & Furber* (1923) 67 Sol. Jour. 277.

(*d*) *Holmes v. Simmons* (falsely called *Holmes*) (1868) L.R. 1 P. & D. 523; 18 L.T. 770.

(*e*) *Gompertz* v. *Kensit* (1892) L.R. 13 Eq. 369; 26 L.T. 95. *Plummer v. Plummer* (1917) P. 163.

Confirmation of District Judge's decree.

20. Every decree of nullity of marriage made by a District Judge shall be subject to confirmation by the High Court, and the provisions of section seventeen, clauses one, two, three and four, shall *mutatis mutandis* apply to such decrees.

Confirmation by the High Court of the Decree passed by a District Judge—

Under section 17 of the Act a decree of dissolution passed by the District Judge is subject to confirmation by the High Court. Similarly, a decree of nullity is also to be confirmed. The provisions of section 20 of the Act do not contemplate confirmation after a lapse of six months. There is a conflict of decisions on this point. The Allahabad and the Lahore High Courts have held that it is competent to the High Court to confirm the decree before the expiration of six months (*f*), but the Bombay and Madras High Courts have held to the contrary (*g*).

In England a decree of nullity of marriage is in the first instance, a decree *nisi* not to be made absolute until after the expiration of six months from the pronouncing thereof unless a shorter time is by special order fixed by the Court.

See section 1 of the Matrimonial Causes Act, 1873, and section 183 of the Supreme Court of Judicature (Consolidation Act), 1925.

Under the Indian Divorce Act no provision is made for intervention in a suit for nullity except that the decree passed by the District Court is subject to confirmation by the High Court. A decree passed by the High Court in a suit for nullity is final.

(*f*) *Caston* v. *Caston* (1900) 22 All. 270 at p. 279, *F. B. Samuel* v. *Samuel* A.I.R. (1934) Lah. 636, S.B.

(*g*) *A.* v. *B.* (1899) 23 Bom. 460. *Agnes Sumathi Ammal* v. *Paul* (1936) 70 M.L.J. 321, F.B.

Children of annulled marriage.

21. Where a marriage is annulled on the ground that a former husband or wife was living, and it is adjudged that the subsequent marriage was contracted in good faith and with the full belief of the parties that the former husband or wife was dead, or when a marriage is annulled on the ground of insanity, children begotton before the decree is made shall be specified in the decree, and shall be entitled to succeed, in the same manner as legitimate children, to the estate of the parent who at the time of marriage was competent to contract.

Regarding this section, Sir Henry Maine observed in the Legislative Council: "This section which is taken textually from the New York Code, and resembles the provisions of the French Code and the numerous systems descended from Roman Law, permits the children to succeed as legitimate to the property of the parent competent to marry, and then relieves them *protanto* from the stigma of illegitimacy" (*h*). But the children are not declared legitimate.

The provisions regarding children are applicable only in cases where the marriage has been annulled on the ground of either bigamy or insanity and not on any of the other grounds enumerated in section 19 of the Act.

The Court has the power to refuse to make a decree *nisi* for nullity absolute until materials are furnished for deciding what provision ought to be made for the children of the annulled marriage (*i*).

(*h*) See *Fort St. George Gazette, Supplement* dated 31st March 1869 at p. 7.

(*i*) *Langworthy* v. *Langworthy* (1886) 11 P.D. 85; 54 L.T. 776.

V.—JUDICIAL SEPARATION.

Bar to decree for divorce *a mensa et toro* but judicial separation obtainable by husband.

22. No decree shall hereafter be made for a divorce *a mensa et toro*, but the husband or wife may obtain a decree of judicial separation, on the ground of adultery, or cruelty, or desertion without reasonable excuse for two years or upwards, and such decree shall have the effect of a divorce *a mensa et toro* under the existing law, and such other legal effect as hereinafter mentioned.

Cf: sections 7 and 16 of the Matrimonial Causes Act, 1857.

Section 185 of the Supreme Court of Judicature (Consolidation) Act, 1925.

A suit for judicial separation may be instituted either by a husband or a wife on the grounds of:

(*a*) adultery; or

(*b*) cruelty; or

(*c*) desertion without reasonable excuse for two years or upwards; or

(*d*) failure to comply with a decree for restitution of conjugal rights (*j*).

Attempts at sodomy or bestiality are sufficient grounds for a wife's petition (*k*).

"*May obtain a decree for judicial separation*":

The jurisdiction of the Court to grant a decree of judicial seperation depends on residence and *not* on domicil (*l*).

(*j*) Though this ground is not mentioned in sec. 22 of the Indian Divorce Act, 1869, the Courts in India have the power to entertain a suit on such a ground under section 7 of the Act.
(*k*) *Bromley* v. *Bromley* (1794) 1 Hag. Con. 141, n. 161 E R. 504.
(*l*) *Armitage* v. *Armitage* (1898) P. 178. See section 2 of the Act. *De Souza* v. *De Souza* (1935) 37 Bom. L.R. 55.

The Court will at the prayer of the petitioner at the hearings make a decree of judicial separation instead of a decree *nisi* for dissolution although the petitioner prays for dissolution (*m*), and where the proof of facts fall short of the evidence required for a decree of dissolution the Court may pass a decree for judicial separation if one of the offences is clearly proved (*n*).

For notes on "adultery", "cruelty", and "desertion" see notes to section 10.

Application for separation made by petition.

23. Application for judicial separation on any one of the grounds aforesaid, may be made by either husband or wife by petition to the District Court or the High Court; and the Court on being satisfied of the truth of the statements made in such petition, and that there is no legal ground why the application should not be granted, may decree judicial separation accordingly.

Cf: section 17 of the Matrimonial Causes Act, 1857 as amended by sec. 19 of the Act of 1858.

"There is no legal ground why the application should not be granted"—

This provision refers to the bars to a suit, such as condonation, connivance, collusion between the parties to the suit, dealy in the institution of the suit and petitioner being guilty of a matrimonial offence. But as a rule there is neither collusion nor connivance in a suit for judicial separation as parties are entitled in law to live separate by mutual consent.

(*m*) *Dent* v. *Dent* (1865) 4 Sw. & Tr. 105; 13 L.T. 252; 164 E.R. 1455.

(*n*) *Smith* v. *Smith* (1859) 1 Sw. & Tr. 359; 32 L.T. (O.S.) 394; 164 E.R. 765. *Rutherford* v. *Richardson* (1923) A.C. 1 at p. 7, H.L. *Duplany* v. *Duplany* (1892) P. 53. See *Russell* v. *Russell* (1895) P. 315, C.A.

Adultery of Petitioner—

A wife who sues for judicial separation if herself found guilty of adultery is not entitled to relief, notwithstanding that the charges against the husband are proved (*o*), but the Court has discretion to grant relief to the guilty petitioner (*p*).

Existence of a Deed of Separation—

Where by a deed of separation a husband covenanted with his wife to make her an allowance in consideration of her undertaking neither to sue for restitution of conjugal rights, nor for alimony, nor to molest, trouble or disturb the husband, and the wife notwithstanding the due receipt of the allowance by her instituted proceedings for judicial separation, the Court granted perpetual injunction against her restraining her from proceeding in the Divorce Court (*q*), but where there is no covenant in the deed of separation not to sue and no agreement to condone past offences the wife is entitled to a decree of judicial separation (*r*); and no agreement or deed which is obtained by fraud or duress is binding upon the wife (*s*).

Cruelty—

See notes to section 10.

Cruelty of the petitioner is no answer to a suit for judicial separation on the ground of adultery (*t*).

(*o*) *Otway* v. *Otway* (1883) 13 P.D. 141; 59 L.T. 153. *Everett* v. *Everett & Maccullum* (1919) P. 298. *Rhine* v. *Rhine* (1911) 33 All. 500, S.B.
(*p*) *Gooch* v. *Gooch* (1893) P. 99 at p. 105.
(*q*) *Flower* v. *Flower* (1871) 25 L T. 902; 20 W.R. 231.
(*r*) *Moore* v. *Moore, Chadwick* and *Griffiths* (1887) 12 P.D. 193; 57 L.T. 568.
(*s*) *Adamson* v *Adamson* (1907) 23. T.L.R. 434. *Holroyd* v. *Holroyd* (1920) 36 T.L.R. 479 at p. 480.
(*t*) *Tuthill* v. *Tuthill* (1862) 31 L.J.P. & M. 214.

Desertion.—

See notes to section 10.

In a suit for judicial separation on the ground of desertion the petitioner is not entitled to relief if the desertion was the cause of the petitioner's misconduct (*u*).

Undue delay—

Delay in instituting the proceedings in a matrimonial cause is to be accounted for (*v*); but mere delay in the case of a woman is no bar to relief (*w*). Lapse of time, though not an absolute bar, yet taken in connection with other circumstances may show that the suit was not a *bonafide* one and it may be dismissed(*x*). And where a deed of separation has been executed between a husband and wife who had continued to live apart and the wife more than five years afterwards by counterclaim to an action by the husband to enforce the deed, claimed as against him a judicial separation on the ground of the husband's alleged cruelty, the Court held her right to relief barred by lapse of time and by the execution of the deed of separation (*y*).

When there is unreasonable delay in presenting the petition the Court will require to be satisfied of the sincerity of the petitioner (*z*)

Separated wife deemed spinster with respect to after-acquired property.

24. In every case of a judicial separation under this Act, the wife shall, from the date of the sentence, and whilst the separation continues, be considered as unmarried with respect to property of every description which she may acquire, or which may come to or devolve upon her.

(*u*) *Russel* v. *Russel* (1895) P. 315.
(*v*) *Best* v. *Best* (*Lady*) (1814) 2 Phil. 161; 161 E.R. 1107.
(*w*) *Popkin* v. *Popkin* (1794) 1 Hag. Ec. 765, n.; 162 E.R. 745. *Foster* v. *Foster* (1921). P. 438.
(*x*) *Mathews* v. *Mathews* (1860). 3 Sw. & Tr. 161; 2 L.T. 472; 164 E.R. 1235. *Smallwood* v. *Smallwood* (1861) 31 L.J P. 3; 5 L.T. 324. *Boulting* v. *Boulting* (1864) 33 L.J.P. 33; 9 L.T. 779.
(*y*) *Besant* v. *Wood* (1879) 12 Ch. D. 605; 40 L.T. 445,
(*z*) *Boulting* v. *Boulting, supra.*

Such property may be disposed of by her in all respects as an unmarried woman and on her decease the same shall, in case she dies intestate, go as the same would have gone if her husband had been then dead:

Provided that, if any such wife again cohabits with her husband, all such property as she may be entitled to when such cohabitation takes place shall be held to her separate use, subject, however, to any agreement in writing made between herself and her husband whilst separate.

Cf: section 25 of the Matrimonial Causes Act, 1857, and section 8 of the Matrimonial Causes Act, 1858.

Section 194 of the Supreme Court of Judicature (Consolidation) Act, 1925.

See sections 20 and 21 of the Indian Succession Act, 1925, and section 4 of the Married Women's Property Act, 1874. The latter Act applies to persons whose domicile is not British India (*a*).

"*Wife considered unmarried with respect to property of every description*"—

The property with respect to which a married woman who has obtained a decree for judicial separation is to be considered as a *feme sole* is only such property as shall be acquired by or come to, or devolve upon her after the date of the decree and during the continuance of the separation (*b*), so also, money accumulated for the use of the wife between the date of the desertion and the passing of the decree for judicial separation would be paid to the wife to

(*a*) *Allumuddy* v. *Braham* (1879) 4 Cal. 140.
(*b*) *Waite* v. *Morland.* (1888) 38 Ch. D. 135; 59 L. T. 185.

the exclusion altogether of the husband (*c*) and she would be entitled absolutely to all the property subsequently coming into possession (*d*). All the wife's choses in action not reduced into possession at the date of the decree of judicial separation become her absolute property as if she were a *feme sole* (*e*). Similarly, a legacy left to the wife for her separate use and without the power of anticipation should be paid to her absolutely if she was separated from her husband before the date of the will (*f*). Where a married woman, subsequent to the obtaining of a decree of judicial separation became entitled to certain stocks, it was held the stock belonged to her as if she were a *feme sole* and was not included in a covenant to settle all property during the coverture (*g*), but not any reversionary interest to which the wife was entitled at the date of the settlement though it fell into possession during the separation (*h*).

Alimony to wife not "separate estate"—

Alimony received by a wife under a decree for judicial separation from her husband is not "separate estate" chargeable by the wife (*i*).

Separated wife deemed spinster for purposes of contract and suing.

25. In every case of a judicial separation under this Act, the wife shall, whilst so separated, be considered as an unmarried woman for the purposes of contract, and wrongs and injuries, and suing and and being sued in any civil proceeding and her

(*c*) *Re Ford* (1862) 32 Beav. 621; 8 L. T. 625.
(*d*) *Re Insole* (1865) 35 Beav. 92; 13 L. T. 455; L.R. 1 Eq. 470.
(*e*) *Johnson* v. *Lander* (1869) 38 L. J. Ch. 229; 19 L. T. 592.
Re Emery's Trust (1884) 50 L. T. 197.
(*f*) *Munt* v. *Glynes* (1872) 41 L. J. Ch. 639; 27 L. T. 366.
(*g*) *Dawes* v. *Creyke* (1885) 30 Ch. D. 500; 53 L. T. 292.
(*h*) *Davenport* v. *Marshall* (1902) 1 Ch. 82; 85 L. T. 340.
(*i*) *Anderson* v. *Hay* (*Lady*) (1890) 7 T. L. R. 113.

husband shall not be liable in respect of any contract, act or costs entered into, done, omitted or incurred by her during separation:

Provided that where, upon any such judicial separation alimony has been decreed or ordered to be paid to the wife, and the same is not duly paid by the husband, he shall be liable for necessaries supplied for her use: Provided also that nothing shall prevent the wife from joining, at any time during such separation, in the exercise of any joint power given to herself and her husband.

Cf. section 26 of the Matrimonial Causes Act, 1857, Section 194 of the Supreme Court of Judicature (Consolidation) Act, 1925.

"*The wife shall, whilst separated, be considered as an unmarried woman*"—

A married woman who has obtained a decree of judicial separation can sue and be sued by herself in actions of tort as well as in actions of contract (*j*), but she cannot contract so as to affect or bind her separate property acquired before the separation in respect of which she is restrained from anticipation (*k*).

"*Alimony not paid by husband* ..... *he shall be liable for necessaries supplied to the wife*"—

Where a husband turns away his wife, he gives her credit wherever she goes and must pay for necessaries for her (*l*) and while they cohabit together the husband shall answer all contracts of the wife for necessaries for, his assent shall be presumed (*m*); the onus being on him to

(*j*) *Ramsden* v. *Brearley* (1875) L. R. 10 Q. B. 147; 32 L. T. 24.
(*k*) *Hill* v. *Cooper* (1893) 2 Q. B. 85.
(*l*) *Etherington* v. *Parrot* (1703) 90 E. R. 955.
(*m*) *Ibid. Harrison* v. *Grady* (1865) 13 L. T. 369.

show, in case of litigation, that the goods were furnished in such circumstances that he was not liable to pay for them (*n*), or that his wife had neither express nor implied authority to act as his agent (*o*), or that the wife was already adequately provided with necessaries and that there was no necessity for the articles delivered unless the tradesman could show an express or implied assent of the husband to the contract made by the wife (*p*). But where the wife leaves the husband and lives separate and others have notice of the separation, the husband is not liable (*q*); it being incumbent on the tradesman suing the husband to prove that the separation was justified (*r*). Where, however, the wife is living in open adultery her husband is not bound by any contract she may make even for necessaries (*s*). A. was the manager of a limited Company's hotel where his wife acted as Manageress, they cohabited, he made his wife an allowance for clothes, but forbade her to pledge his credit for them. She purchased clothes from a tradesman, the bills were at first made out in her name and were paid by her. She afterwards incurred with the same tradesman, a debt for clothes, payment for which was demanded from the husband with whom previously they had had no communication and the husband was held not liable (*t*). If the husband makes to his wife a fixed allowance which is suitable to the standard of their domestic life, the wife has no right to pledge his credit for the matters covered by the allowance (*u*). But the mere fact that

(*n*) *Clifford* v. *Laton* (1823) 3 C. & P. 15. *Seaton* v. *Benedict* (1828) 5 Bing. 28; 130 E. R. 962.
(*o*) *Girdhari Lal* v. *Crawford* (1886) 9 All. 147. *Reid* v. *Teakle* (1853) 13 C. B. 627; 138 E. R. 1346.
(*p*) *Seaton* v. *Benedict*, supra.
(*q*) *Robison* (*Robinson*) v. *Gosnold* (1704) 87 E. R. 927.
(*r*) *Clifford* v. *Laton*, supra.
(*s*) *Emmett* v. *Norton* (1838) 8 C. & P. 506. *Atkyns* v. *Pearce* (1857) 29 L. T. (O.S.) 212.
(*t*) *Debenham* v. *Mellon* (1880) 6 App. Cas. 24; 50 L.J.Q.B. 155; 43 L.T. 673; *Morel* v. *Westmorland* (1904) A.C. 11.
(*u*) *Miss Gray Ltd.* v. *Cathcart* (*Earl*) (1922) 38 T.L R. 562.

a wife has a separate income does not negative her authority to pledge her husband's credit for necessaries (*v*), nor does it exonerate a husband from the obligation of paying her dress bills (*w*). But where the tradesman gives credit to the wife and not to the husband at all, knowing that she is a married woman, the husband is not liable (*x*).

Money lent to wife—

If a man lends a married woman money to buy 'necessaries' and she does so, he has no remedy against the husband (*y*), but a person who advances to a deserted wife money to enable her to supply herself with necessaries has a remedy in equity against the husband (*z*). There is no authority in a married woman, living apart from her husband to borrow money on his credit (*a*). But where the husband is a lunatic the person lending money to his wife during the period of lunacy is entitled to recover it from the lunatic's estate (*b*).

Wife forbidden to pledge husband's credit—

A husband who is able and willing to supply his wife with necessaries and who has forbidden her to pledge his credit, will not be held responsible for necessaries bought by her (*c*). But the prohibition to the wife not to pledge the husband's credit must be a direct, present, positive and absolute prohibition and not a mere complaint of extravagance or a declaration as to the future (*d*). A husband has

(*v*) *Seymour* v. *Kingscote* (1922) 38 T.L.R. 586.
(*w*) *Callot* v. *Nash* (1923) 39 T.L.R. 292.
(*x*) *Ibid.*
(*y*) *Harris* v. *Lee* (1718) 2 Eq. Cas. 135; 24 E.R. 482. *Re Cook, Exparte Vernall* (1892) 10 Mor. 8.
(*z*) *Jenner* v. *Morris* (1861) 30 L.J.Ch. 361; 45 E.R. 795. *Deare* v. *Soutten* (1869) L.R. 9 Eq. 151; 21 L.T. 523.
(*a*) *Paule* v. *Goding* (1861) 2 F. & F. 585.
(*b*) *Re Wood's Estate, Davidson* v. *Wood* (1863) 32 L.J. Ch. 400; 46 E. R. 185.
(*c*) *Re Cook, Exparte Holmes* (1892) 10 Mor. 12.
(*d*) *Morgan* v. *Chetwynd* (1865) 4 F. & F. 451.

a right to limit the expenditure of his wife, and if it is made out to the satisfaction of the Court that he has actually done so, he will not be liable for the debts contracted by the wife in opposition to his directions (*e*).

Allowance to wife—

Where a husband during temporary absence from home makes an adequate allowance to his wife for the supply of herself and family with necessaries and a tradesman with notice of this, supplies her with goods the husband is not liable for the debt (*f*). But in the absence of notice if goods are delivered by a tradesman in the house in which the wife is living, the onus is upon him to prove that the goods supplied were necessaries, and that the allowance given to the wife was inadequate (*g*). And where a husband living with his wife makes her a sufficient allowance for dress, he is not liable for dresses supplied to her without his knowledge (*h*), nor would he be liable for necessaries which are excessive in extent and such as the husband never would have authorised, (*i*).

In determining the wife's authority to pledge the husband's credit the extravagant nature of the wife's orders is a matter to be taken into consideration, as showing she had no such authority (*j*).

Husband's lunacy—

A husband is liable for necessaries supplied to his wife during the period of his lunacy (*k*) and the wife is entitled

(*e*) *Shoolbred* v. *Baker* (1867) 16 L.T. 359. *Jolly* v. *Rees* (1864) 33 L.J.C.P. 177; 143 E.R. 931. *Remmington* v. *Broadwood* (1902) 18 T.L.R. 270, C.A.
(*f*) *Holt* v. *Brien* (1821) 4 B. & Ald. 252; 106 E.R. 930.
(*g*) *Dennys* v. *Sargeant* (1834) 6 C. & P. 419.
(*h*) *Reneaux* v. *Teakle* (1853) 8 Ex. 680; 155 E.R. 1525.
(*i*) *Freestone* v. *Butcher* (1840) 9 C. & P. 643.
(*j*) *Lane* v. *Ironmonger* (1844) 13 M. & W. 368; 153 E.R. 152.
(*k*) *Richardson* v. *Du Bois* (1869) L.R. 5 Q.B. 512. *Read* v. *Legard* (1851) 6 Ex. 636; 17 L.T.O.S. 145; 155 E.R. 698.

to pledge his credit for necessaries (*l*). But the rule of the Lunacy Court is to subordinate the rights of a lunatic's creditors to his needs so that the creditors will only be allowed to enforce their claims against any of his property which has come within the protection of the Courts if the property is more than sufficient for his support (*m*).

NECESSARIES.

The word "necessaries" cannot be exhaustively defined. It varies with the rank, position, profession and wealth of the parties. That which might be necessary for a peeress would be extravagant and wasteful luxury for the wife of a village headman; that which is necessary to one may not be necessary to another. It is a mixed question of law and fact (*n*), and whilst considering whether the goods supplied were 'necessaries' or not, evidence should be given not only of the style of the husband's living before the separation, but of the amount of his income and the style of living of the wife at the time the goods were supplied (*o*); for the law infers that the wife has implied authority to contract for things that she as the manager of the household considers really necessary and suitable to the style in which the husband chooses to live (*p*).

Provision for children—

Though a husband is not bound to provide for the children of his wife by a former husband, yet if he takes them into his house and they become part of his family he shall be deemed to stand in *loco parentis* and be liable in a contract made by his wife for their education (*q*). And

(*l*) *Re Wood's Estate*; *Davidson* v. *Wood* (1863) 32 L.J. Ch. 400; 8 L.T. 476; 46 E.R. 185.
(*m*) *Re Farnham* (1895) 2 Ch. 799.
(*n*) *Joyonam* v. *Mahadeb Sahay* (1909) 36 Cal. 768.
(*o*) *Harvey* v. *Norton* (1840) 4 Jur. 42.
(*p*) *Phillipson* v. *Hayter* (1870) L.R. 6 C.P. 38; 23 L.T. 556.
(*q*) *Stone* v. *Carr*. (1799) 3 Sp. 1.

when the custody of the child is with the mother who is living separate from the husband, the reasonable expenses of providing for it are part of the reasonable expenses of the wife and are 'necessaries' for which she has authority to pledge her husband's credit (*r*). Expenses for the education of children are 'necessaries' (*s*).

Jewellery and furniture—

Articles of jewellery are not 'necessaries' for which the husband could be held liable (*t*), but the furniture for a house which the wife has taken for her own residence is 'necessary' for a married woman who lives separate (*u*).

Medical attendance—

Medical attendance is one of the most primary 'necessaries' for which the husband is liable (*v*). For a thing to be a 'necessary' it must be necessary under the circumstances in which the wife is placed (*w*). Shampooing though not a 'necessary' in the legal sense and more of a luxury may in certain circumstances be considered a 'necessary' (*x*). So also, are the expenses of the wife's stay at a watering place, if they be reasonably incurred for her health (*y*).

Costs of legal proceedings—

The wife is entitled to pledge her husband's credit for costs of legal proceedings as 'necessaries' supplied to her (*z*). See notes on 'Costs'.

(*r*) *Bazeley* v. *Forder* (1868) L. R. 3 Q. B. 559; 18 L. T. 756.
(*s*) *Collins* v. *Cory* (1901) 17 T. L. R. 242.
(*t*) *Montague* v. *Benedict* (1825) 3 B. & C. 631; 107 E. R. 867.
(*u*) *Hunt* v. *De Blaquiere* (1829) 130 E. R. 1174.
(*v*) *Harrison* v. *Grady* (1865) 13 L. T. 369. *Forristall* v. *Lawson, Connelly & Lawson* (1876) 34 L. T. 903.
(*w*) *Canham* v. *Howard* (1887) 3 T. L. R. 458.
(*x*) *Ibid.*
(*y*) *Thompson* v. *Harvey* (1768) 4 Burr. 2177; 98 E. R. 136.
(*z*) *Payne & Co.* v. *Pirosha* (1911) 13 Bom. L.R. 920. *Ottaway* v. *Hamilton* (1878) 47 L.J.Q.B. 725, C. A. *Re Wingfield* (1904) 2 Ch. 665, C.A. *Abrahams* v. *Buckley* (1924) 1 K.B. 903.

Decree of separation obtained during absence of husband or wife may be reversed.

26. Any husband or wife, upon the application of whose wife or husband, as the case may be, a decree of judicial separation has been pronounced, may at any time thereafter, present a petition to the Court by which the decree was pronounced praying for a reversal of such decree, on the ground that it was obtained in his or her absence, and that there was reasonable excuse for the alleged desertion, where desertion was the ground of such decree.

The Court may, on being satisfied of the truth of the allegations of such petition, reverse the decree accordingly, but such reversal shall not prejudice or affect the rights or remedies which any other person would have had, in case it had not been decreed, in respect of any debts, contracts, or acts, of the wife incurred, entered into, or done between the times of the sentence of separation and of the reversal thereof.

Reversal of decree of separation—

Cf: section 23 of the Matrimonial Causes Act, 1857.

Sections 185 and 195 of the Supreme Court of Judicature (Consolidation) Act, 1925.

Rules 47-50 of the Matrimonial Causes Rules, 1924.

Section 185 of the Judicature Act does not provide for the reversal of the decree of judicial separation probably on the ground that the decree is automatically reversed on the husband and wife resuming cohabitation. But the Court has the power to rescind a decree of judicial separation where the parties have resumed cohabitation (*a*), or

(*a*) *Oram* v. *Oram* (1923) 129 L. T. 159. *Miller* v. *Miller* (1928) 72 Sol. Jour. 205.

where the decree was granted to a wife (petitioner) guilty of adultery the Court being of opinion that she did not require its protection (*b*).

"*Decree obtained in his or her absence*"—

Absence means non-appearance in the suit and not absence without knowledge or notice of the suit (*c*), and a decree having been obtained in the husband's absence is a good ground for its discharge, but it is not sufficient in such a case to allege merely the non-appearance of the respondent but the husband's petition must set out the cause of his non-appearance and must also state circumstances tending to show that the decree was wrong on the merits (*d*).

The decree is, however, not set aside on the parties resuming cohabitation (*e*) though the Court has discretion to do so. (*f*).

See section 60 of the Act.

VI—PROTECTION ORDERS.

Deserted wife may apply to Court for protection.

27. Any wife to whome section 4 of the Indian Succession Act, 1865, does not apply, may, when deserted by her husband, present a petition to the District Court or the High Court, at any time after such desertion, for an order to protect any property which she may have acquired or may acquire, and any property of which she may have become possessed or may become possessed after such desertion, against her husband or his creditors, or any person claiming under him.

(*b*) *Grossi* v. *Grossi* (1873) L. R. 3 P. & D. 118; 28 L. T. 371. *Everett* v. *Everett & McCullum* (1919) P. 298.
(*c*) *Philips* v. *Philips* (1866) L.R. 1 P. & D. 169; 14 L.T. 604.
(*d*) *Ibid*
(*e*) *Mathews* v. *Mathews* (1912) 3 K. B. 91.
(*f*) *Oram* v. *Oram* (1923) 39 T. L. R. 332.

Cf: section 21 of the Matrimonial Causes Act, 1857.

Section 6 of the Matrimonial Causes Act, 1858.

Section 226 of the Supreme Court of Judicature (Consolidation) Act, 1925 and the Sixth Schedule thereto.

"*Any wife to whom section 4 of the Indian Succession Act, 1865, does not apply*"—

See sections 20 and 21 of the Indian Succession Act of 1925 (XXXIX of 1925).

See section 7 of the Married Women's Property Act, 1874 (III of 1874).

Sections 20 and 21 relate to the effect of marriage on the wife's property, but the order of succession to such property is not thereby affected (*g*).

The domicil of the wife is the domicil of the husband. Therefore, if a woman domiciled in British India marries a man domiciled out of British India, the husband will not acquire any right over the wife's property during their joint lives, but if she predeceases the husband he will be entitled to the whole of her property to the exclusion of the children according to English law (*h*).

"*When deserted by her husband*"—

For notes on 'desertion' see notes to section 10.

The wife's petition is to be supported by affidavit and must state facts to satisfy the Court of the fact of the desertion on the part of the husband (*i*). When the husband makes a *bonafide* offer to return to cohabitation the wife is not entitled to any protection order under this section (*j*).

(*g*) *Shapurji* v. *Dossabhoy* (1906) 30 Bom. 359.
(*h*) *Miller* v. *Administrator General of Bengal* (1875) 1 Cal. 412. *Hill* v. *Administrator General of Bengal* (1896)23 Cal. 506.
(*i*) *Exparte Sewell* (1858) 28 L.J.P. 8.
(*j*) *Cargill* v. *Cargill* (1858) 1 Sw. & Tr. 235; 31 L.T. (O.S.) 332; 164 E.R. 708. *Usher* v. *Usher* (1922) 128 L. T. 26.

"*Property which the wife may have acquired or may acquire*"—

Where a married woman who was deserted by her husband was left executrix and residuary legatee under a will after proving which she obtained an order for the protection of her property, she was held entitled to transfer consols standing in the name of the testatrix and to receive dividends thereon as if she was a *feme sole* (*k*). Similarly, the wife would be entitled to the payment of a fund bequeathed for her separate use by her father without power of anticipation (*l*), or to any fund in Court representing a legacy bequeathed to her (*m*).

The protection of an order granted to a wife is confined to the lawful earnings of a lawful industry and does not extend to earnings or property purchased with earnings acquired by her as keeper of a brothel (*n*). The property acquired by a woman's lawful exertions can be willed away by her (*o*). The effect of the protection order is that the wife can sue and be sued by herself in actions of tort and of contract (*p*). Such protection order will protect her reversionary property, though such reversionary property be not mentioned in the order itself (*q*).

The protection order is not retrospective and a married woman is not entitled to commence an action in her own name before obtaining the protection order (*r*); though the

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(*k*) *Bathe* v. *Bank of England* (1858) 27 L.J. Ch. 630; 31 L.T. (O.S.) 230.
(*l*) *Cooke* v. *Fuller* (1858) 26 Beav 99; 53 E.R. 834.
(*m*) *Re Kingsley's Trusts* (1858) 26 Beav 84 at p. 86; 53 E.R. 828. See *Re. Kingsley*; *Ex parte Wooley*; (1858) 32 L.T.O.S. 25.
(*n*) *Mason* v. *Mitchell* (1865) 34 L.J. Ex. 68; 11 L.T. 714.
(*o*) *In the Goods of Elliot* (1871) L.R. 2 P. & D. 274; 25 L.T. 203.
(*p*) *Ramsden* v. *Brearley* (1875) L.R. 10 Q.B. 147; 32 L.T. 24. *Re Rainsdon's Trusts* (1859) 7 W.R. 184.
(*q*) *Re Whittingham's Trust* (1864) 10 L.T. 363; 12 W.R. 775.
(*r*) *Midland Railway Coy.* v. *Pye* (1861) 10 C.B.N.S. 179; 9W.R. 658.

specific mention in the order of all property acquired by a married woman after desertion and before the grant of the order would make the order retrospective in effect and would date back to the commencement of the desertion (*s*), but the wife cannot bind or in any way affect her separate property acquired before the desertion in respect of which she is restrained from anticipation and, therefore, a creditor who has obtained judgment against her upon a contract made after the desertion cannot obtain execution against such property (*t*). Where, however, the wife is before such desertion entitled to any *choses in action* which are not reduced into possession till after the desertion such property will be protected by the order (*u*).

By obtaining a protection order a wife does not deprive herself of her right to alimony *pendente lite* in a suit subsequently instituted by her for dissolution of marriage (*v*), but she has no longer any authority to pledge her husband's credit (*w*).

Court may grant protection order.

28. The Court, if satisfied of the fact of such desertion, and that the same was without reasonable excuse, and that the wife is maintaining herself by her own industry or property, may make and give to the wife an order protecting her earnings and other property from her husband and all creditors and persons claiming under him. Every such order shall state the time at which the desertion commenced, and shall, as regards all persons dealing with the wife in reliance thereon, be conclusive as to such time.

(*s*) *In the Goods of Elliot* (1871) L.R. 2 P. & D. 274; 25 L.T. 203.
(*t*) *Hill* v. *Cooper* (1893) 2 Q.B. 85; 69 L.T. 216.
(*u*) In *Re Coward* (1875) L.R. 20 Eq. 179; 32 L.T. 682. *Nicholson* v. *Drury Buildings Estate Co.* (1877) 7 Ch. D. 48; 37 L.T. 459.
(*v*) *Hakewill* v. *Hakewill* (1860) 30 L.J.P. 254. See section 36 of the Act.
(*w*) *Ibid.*

Cf: section 9 of the Matrimonial Causes Act, 1858.

A protection order should be in general terms, the Court having no power to decide what title the wife may have to specific property (*x*).

Date of commencement of desertion—

The date upon which the desertion is found to have commenced should be inserted in the finding of fact and should appear upon the face of the order (*y*), but the omission to mention the date is not a material objection to the order (*z*).

Discharge or variation of orders.

29. The husband or any creditor of, or person claiming under him, may apply to the Court by which such order was made for the discharge or variation thereof, and the Court, if the desertion has ceased, or if for any other reason it think fit so to do, may discharge or vary the order accordingly.

Discharge or variation of the order—

The order once made remains in force until discharged (*a*).

A protection order will be discharged on the application of the husband if he satisfied the Court that there never was any desertion (*b*). The application is to be made to the Court that granted the order (*c*) and no other judge has the power to discharge it (*d*). An application to discharge the order is not limited to the lifetime of the married woman. A claim to pronounce against the validity

(*x*) *Exparte Mullineux* (1858) 1 Sw. & Tr. 77; 164 E.R. 636.
(*y*) *Fengl* v. *Fengl* (1914) P. 274. *Joseph* v. *Joseph* (1915) P. 122.
(*z*) *Pulford* v. *Pulford* (1923) P. 18.
(*a*) *Mathews* v. *Mathews* (1912) 3 K.B. 91; 107 L.T. 56. *Jones* v. *Jones* (1924) P. 203.
(*b*) *Rudge* v. *Weedon* (1859) 4 De. G. & J. 216; 33 L.T. (O.S.) 214.
(*c*) *R.* v. *Arnold* (1864) 10 L.T. 458; 12 W.R. 756.
(*d*) *Re Sharpe* (1864) 10 L.T. 458; 12 W.R. 756.

of the will of a married woman who had obtained a protection order and a counterclaim to discharge the order may be included in the same action (*e*). An order obtained by a wife by false statements, or by the suppression of material facts from the Court and without notice to the husband is an invalid order and must be set aside on the husband's application (*f*) and even after the wife's death (*g*).

Liability of husband seizing wife's property after notice of order.

30. If the husband, or any creditor of, or person claiming under, the husband seizes or continues to hold any property of the wife after notice of any such order, he shall be liable, at the suit of the wife (which she is hereby empowered to bring), to return or deliver to her the specific property and also to pay her a sum equal to double its value.

Husband's liability after notice of the order—

See section 21 of the Matrimonial Causes Act, 1857.

The protection order operates from the date of desertion (*h*).

Wife's legal position during continuance of order.

31. So long as any such order of protection remains in force, the wife shall be and be deemed to have been, during such desertion of her, in the like position in all respects, with regard to property and contracts and suing and being sued, as she would be under this Act if she obtained a decree of judicial separation.

"So long as such order of protection remains in force"—

The protection order places the wife in the position of a *feme sole* and she can sue and be sued in her own

(*e*) *Mudge* v. *Adams* (1881) 6 P.D. 54; 44 L.T. 185.
(*f*) *Mahoney* v. *M'Carthy* (1892) P. 21.
(*g*) *Hopkins* v. *Bulbeck* (1920) 64 Sol. Jour. 409.
(*h*) *In the Goods of Elliot* (1871) L.R. 2 P. & D. 274.

name (*i*) and can maintain an action in respect of her own earnings (*j*), but cannot pledge her husband's credit (*k*).

Death of wife intestate in husband's lifetime—

On the death of the wife who had obtained a protection order in the lifetime of the husband intestate, letters of administration may be granted to one of her next of kin, limited to such personal property as she had acquired, or become possessed of since the desertion without specifying of what that property consisted (*l*); and where the wife has left a minor son the grant of letters of administration may be made to the guardian elected by the son and without citing the father (*m*).

Effect of the Supreme Court of Judicature (Consolidation) Act, 1925.

This Act has repealed section 21 of the Matrimonial Causes Act of 1857 so far as it relates to the High Court and has repealed section 6 of the Matrimonial Causes Act, 1858, altogether. The jurisdiction of the Courts is abolished in such matters.

VII—Restitution of Conjugal Rights.

Petition for restitution of conjugal rights.

32. When either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, either wife or husband may apply, by petition to the District Court or the High Court, for restitution of conjugal rights, and the Court, on being satisfied of the truth of the statements made in such petition, and that there is no

(*i*) *Ramsden* v. *Brearley* (1875) L.R. 10 Q.B. 147; 32 L.T. 24.
(*j*) *Thomas* v. *Head* (1860) 2 F. & F. 88 at p. 91.
(*k*) *Hakewill* v. *Hakewill* (1860) 30 L.J.P. 254.
(*l*) *In the Goods of Worman* (1859) 1 Sw. & Tr. 513; 29 L.J.P. 164.
(*m*) *In the Goods of Stephenson* (1866) L.R. 1 P. & D. 287; 15 L.T. 296. *In the Goods of Jones* (1904) 74 L.J. P. 27. See *Attorney General for Alberta* v. *Cook* (1926) A.C. 444.

legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly.

Cf: section 17 of the Matrimonial Causes Act, 1857.

Section 5 of the Matrimonial Causes Act, 1858 and section 5 of the Act of 1884.

Section 186 of the Suprme Court of Judicature (Consolidation) Act, 1925.

Rule 20 of the Matrimonial Causes Rules, 1924.

The former doctrine of the Ecclesistical Court, and of the Divorce Court for some years after the Act of 1857, that there was no defence to a suit for restitution, but a matrimonial offence by the petitioner is not now law. The Petitioner must prove that he or she is sincere in desiring a return to cohabitation (*n*), but the mere intention to take proceedings for divorce if the order for restitution is not obeyed is not a proof of insincerity(*n* 1). Where matrimonial cohabitation is suspended it is not competent to the wife to sue the husband, or the husband the wife, for restitution of conjugal rights pending cohabitation (*o*).

Where the husband refuses to live with his wife and only makes her an inadequate allowance the wife is entitled to sue for restitution of conjugal rights (*p*).

If the petitioner is guilty of adultery he or she cannot obtain a decree of restitution (*q*).

(*n*) *Lacey* v. *Lacey* (1931) 47 T.L.R. 577.

(*n* 1) *Harnett* v. *Harnett* (1924) P. 41, affirmed by the Court of Appeal at p. 126.

(*o*) *Orme* v. *Orme* (1824) 2 Add. 382; 162 E.R. 335.

(*p*) *Winkworth* v. *Winkworth* (1908) 25 T.L.R. 54.

(*q*) *Hope* v. *Hope* (1858) 1 Sw. & Tr. 94; 164 E.R. 644.

Written demand for return to cohabitation—

See Rule 3-A of the Matrimonial Causes Rules, 1924.

Before a citation in a suit for restitution of conjugal rights is allowed to issue the Court must be satisfied by affidavit that a written demand for cohabitation and for the restitution of conjugal rights has been made upon the respondent and that after a reasonable opportunity for compliance therewith such cohabitation and restitution of conjugal rights have been withheld (*r*). The demand must be of a conciliatory character (*s*), but it is not to be expected that a letter written under such circumstances should be of an affectionate nature, and provided the request is clear the Court will not inquire too closely into the peremptory character of the precise words which were used (*t*), but would take into consideration the nature of the respondent's reply (*u*).

Service of the letter—

Where the respondent is out of the jurisdiction of the Court and his or her whereabouts are not known, the letter of demand may be served on his or her solicitors(*v*), so also, where the respondent is evading service and is keeping out of the way the Court may allow the written demand to be served on his or her male relation (father), coupled with the requirement that it should be advertised (*w*). Where the letters of demand addressed to the respondent at his last known residence and place of business, respectively,

(*r*) *Re Tucker* (1897) P. 83; 77 L.T. 149.
(*s*) *Field* v. *Field* (1888) 14 P.D. 26; 59 L.T. 880. *Neumann* v. *Neumann* (1913) 29 T.L.R. 213; 108 L.T. 48.
(*t*) *Elliot* v. *Elliot* (1901) 85 L.T. 648.
(*u*) *Naylor* v. *Naylor* (1920) 122 L.T. 801; 64 Sol. Jour. 257.
(*v*) *Waters* v. *Waters* (1875) 34 L.T. 33. *Macarthur* v. *Macarthur* (1889) 58 L.J.P. 70.
(*w*) *Re Sheehy* (1876) 1 P.D. 423.

had been returned through his Solicitors unopened, substituted service was allowed to be made on the husband's Solicitors (*x*). The service of the letter as well as the citation can be effected even out of the jurisdiction of the Court (*y*).

Cruelty—Unfounded charge of bigamy and theft—

The Court would refuse to decree restitution of conjugal rights where the husband beat and expelled his wife from his house, and also charged her falsely with theft and bigamy (*z*). To justify a refusal for the restitution of conjugal rights, the causes must be grave and weighty and such as to show a moral impossibility that the duties of married life can be discharged (*a*).

Husband suffering from a loathsome disease—

When the husband is suffering from any of the loathsome diseases, such as leprosy or syphilis at the time of the institution of a suit for restitution of conjugal rights, the Court should refuse him relief (*b*). The criterion of legal cruelty, justifying the wife's desertion is the same in this country as in England, namely, whether there has been actual violence of such a character as to endanger personal health or safety, or whether there is the reasonable apprehension of it (*c*).

The Court has no discretion to refuse a decree for restitution of conjugal rights for other causes than those which in law justify a wife in refusing to return to cohabitation; and the Court cannot refrain from passing a decree in

(*x*) *Re Tucker* (1897) P. 83; 77 L.T. 140.
(*y*) *Bateman* v. *Bateman* (1901) P. 136. *Perrin* v. *Perrin. Powell* v. *Powell* (1914) P. 135 at pp. 139-140.
(*z*) *Uka Bhagvan* v. *Bai Hetu* (1880) P.J. 322.
(*a*) *Hirabai* v. *Dhanjibhai* (1900) 2 Bom. L.R. 845.
(*b*) *Bai Premkuvar* v. *Bhika Kallianji* (1865) 5 Bom. H.C.R.A.C.J. 209.
(*c*) *Yamunabai* v. *Narayan* (1876) 1 Bom. 164.

favour of the plaintiff because it considers that it would not be for the benefit of either side that the decree should be granted (c_1).

Agreement to separate—

A contract by which a husband has agreed to allow his wife to live separate is a good defence to a subsequent suit by him for restitution of conjugal rights (*d*). It was, however, held by the English Court that such an agreement was no bar to such a suit (*e*).

Limitation—

The refusal of a wife to return to her husband and allow him the exercise of conjugal rights consitutes a continuing wrong giving rise to constantly recurring causes of action on demand and refusal (*f*). A positive refusal on the part of the wife to return to her husband is not essential to give the husband a cause of action (*g*).

In 1885 the plaintiff obtained a decree against his wife for restitution of conjugal rights which was never executed. In 1887 she returned to his house and stayed with him for two months. She afterwards deserted him again. Thereupon, plaintiff filed a second suit and the suit was not barred as the second withdrawal from cohabitation constituted a fresh cause of action (*h*).

Delay—

Where there is unreasonable delay in seeking restitution of conjugal rights the Court should consider the

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(c_1) *Parshotamdas* v. *Bai Mani* (1897) 21 Bom. 610.
(*d*) *Kawasji Edulji Bisni* v. *Sirinbai* (1898) 23 Bom. 279. *Parshotam* v. *Bai Jadi* (1900) 2 Bom. L.R. 72 at p. 75.
(*e*) *Spering* v. *Spering* (1863) 3 Sw. & Tr. 211; 164 E.R. 1255. *Walter* v. *Walter* (1921) P. 302.
(*f*) *Bai Sari* v. *Sankla* (1892) 16 Bom. 714; P.J. 18.
(*g*) *Fakirgauda* v. *Gangi* (1898) 23 Bom. 307.
(*h*) *Keshawal Girdharilal* v. *Bai Parvati* (1893) 17 Bom. 327.

conduct of the parties so as to be able to judge whether the plaintiff deserves the relief he seeks and whether such a relief would not be unreasonable in the particular case against the defendant (*i*). So, where a wife left her husband's house in consequence of an assault on her by her husband and his kept mistress, and the husband deferred his suit for restitution of conjugal rights for four years leaving his wife without maintenance in the meantime, and then resorted to the Civil Court as a counter movement to an application by the wife to the Magistrate for an order for maintenance, the Court held that laches under such circumstances on the part of the husband, coupled with his previous conduct to his wife, disentitled him to the assistance of the Court (*j*).

Decree—

A decree for restitution of conjugal rights implies that the parties are to live together under the same roof. It is not, therefore, sufficient compliance with the decree that the husband has provided the wife with a suitable establishment and sufficient income (*k*). But it is not competent to a Court in passing a decree for restitution of conjugal rights to impose conditions under which restitution can be had (*l*), nor can the Court ask the husband to set up a separate house for the wife and to give her separate maintenance (*m*), nor restrain the parents of the wife by an injunction from keeping her under their roof (*n*). The Court has no power to make the order for the wife's return to her husband on his executing a bond with securities to abstain from all personal violence to her (*o*).

(*i*) *Bai Jivi* v. *Narsingh* (1927) 29 Bom. L.R. 332.
(*j*) *Basapa* v. *Ningi* (1878) P J. 6.
(*k*) *Weldon* v. *Weldon* (1883) 8 P.D. 52. See (1885) 54 L.J.P. 60, C.A.
(*l*) *Motilal* v. *Bai Chanchal* (1902) 4 Bom. L.R. 107.
(*m*) *Chimanlal* v. *Bai Nermada* (1902) 4 Bom. L.R. 820.
(*n*) *Bai Jamna* v. *Dayalji* (1920) 22 Bom. L.R. 214.
(*o*) *Bapalal v. Bai Amrat* (1875) P.J. 247.

The decree for restitution of conjugal rights states the time within which the respondent is to obey the order. In case of failure, the respondent is to be deemed guilty of desertion without reasonable cause, and the petitioner will thereupon be at liberty to file a petition for judicial separation, although two years may not have elapsed since the date of the failure to obey the decree to return or since the date of desertion.

Enforcement of the decree—

A decree for restitution of conjugal rights is enforceable only in the manner provided by Order XXI, Rule 33 of the Civil Procedure Code, 1908, and the penalty therein provided operates not only as a purging of the contempt in not obeying the decree but in full satisfaction of the decree (*p*); and the decree should not be executed by detention of the respondent in civil prison although the Court has power to order the respondent to go to jail. The tendency of modern legislation is against sending women to jail in civil matters. It is a sufficient consequence for the refusal to obey a decree for restitution if the wife has to maintain herself and cannot make any claim against her husband for maintenance (*q*).

The procedure of obtaining a decree for restitution of conjugal rights is frequently adopted where the husband is guilty of adultery in order to obtain another of the necessary grounds, namely, desertion, to couple with the adultery to obtain divorce.

Custody of children—

There is no settled practice that after the respondent's disobedience to a decree for restitution of conjugal rights,

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(*p*) *Ardaser* v. *Avabai* (1872) 9 Bom. H.C.R. 290.
(*q*) *Bai Parwati* v. *Ghanchi Mansukh* (1920) 44 Bom. 992.

the custody of the children should be refused to him or her. The paramount consideration must be the welfare of the children (*r*).

Answer to petition.

33. Nothing shall be pleaded in answer to a petition for restitution of conjugal rights, which would not be ground for a suit for judicial separation or for a decree of nullity of marriage.

Cf: section 22 of the Matrimonial Causes Act, 1857.

The Court has no discretion in refusing a decree for restitution of conjugal rights for other causes than those which in law justify a wife from refusing to return to live with her husband and that the Court cannot abstain from passing a decree in favour of the plaintiff, because it considers that it would not be for the benefit of either side that the decree should be granted (*s*). It may be advisable that the law should not adopt stringent measures to compel the performance of conjugal duties; but as long as the law remains as it is, the Courts cannot, with due regard to consistency and uniformity of practice (except perhaps, under the most special circumstances), recognize any plea of justification other than a marital offence by the complaining party which would be the only ground for refusing relief (*t*).

No facts are sufficient to bar the proceedings except such as would be sufficient to have entitled the party to a divorce *a mensa et toro* (*u*). Married persons are bound to live together and if either withdraws without lawful cause the other may by a suit, compel the party withdrawing to

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(*r*) *W.* v. *W.* (1926) P. 111.

(*s*) *Purshotamdas* v. *Bai Mani* (1897) 21 Bom. 610 at p. 615.

(*t*) *Dadaji* v. *Rukmabai* (1886) 10 Bom. 301 at p. 313. *Scott* v. *Scott* (1865) 4 Sw. & Tr. 113; 12 L.T. 211; 164 E.R. 1458. See *Mackenzie* v. *Mackenzie* (1895) A.C. 384.

(*u*) *Holmes* v. *Holmes* (1757) 2 Lee. 116; 164 E.R. 283.

return to cohabitation. The only lawful cause for withdrawing is the cruelty or adultery of the other party (*v*), or indulging in unnatural practices (*w*), but a plea that respondent had reasonable suspicion that petitioner had committed adultery is bad (*x*). Habits of intemperance, jealousy of the husband and frivolity of conduct of the wife do not constitute reasonable grounds for the husband deserting the wife (*y*), nor is it a ground for dismissing a wife's suit for restitution of conjugal rights that she has been guilty of impropriety of behaviour not amounting to a matrimonial offence, nor that she has previously refused to permit conjugal intercourse (*z*). An offer by the husband to live under the same roof with his wife, each party being free from molestation by the other, is not an offer of matrimonial cohabitation and is no defence to a suit by the wife for restitution of conjugal rights (*a*), nor is it a good defence for the husband to return to cohabitation during pendency of the petition with a view to avoid publicity at the same time keeping on an establishment of his own (*b*).

A reasonable apprehension of bodily injury if the wife returned to her husband (*c*), or a course of conduct which if persisted in would undermine the health of the wife (*d*), is a sufficient justification for dismissing the husband's petition.

A husband has just cause for withdrawing from cohabitation if the wife is addicted to drink and had become

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(*v*) *Barlee* v. *Barlee* (1882) 1 Add. 201; 162 E.R. 105.
(*w*) *Geils* v. *Geils* (1848) 6 Notes of Cases 97. See (1851) 3 H.L. Cas. 280.
(*x*) *Burroughs* v. *Burroughs* (1861) 2 Sw. & Tr. 303; 164 E.R. 1012.
(*y*) *Greene* v. *Greene* (1916) P. 188.
(*z*) *Rippingall* v. *Rippingall & Delacour* (1876) 24 W.R. 907. *Fletcher* v. *Fletcher & Hobson* (1915) 31 T.L R. 306.
(*a*) *Wily* v. *Wily* (1918) P. 1; 117 L.T. 703.
(*b*) *Webster* v. *Webster* (1922) 66 Sol. Jour. 486.
(*c*) *Babu* v. *Musammat Kokla* (1923) 46 All. 210.
(*d*) *Kondal* v. *Ranganayaki Ammal* (1923) 46Mad. 791.

dangerous to herself and others and had been in a condition bordering on *delirium tremens* (*e*). So also, neglect and refusal to discharge domestic duties and endeavours to provoke an assault are good defences to the wife's suit (*f*), but differences between husband and wife due to the wife's inability to agree with her step-children will not disentitle the wife to a decree for restitution of conjugal rights (*g*).

The Court has discretion to refuse relief to a petitioner seeking a decree of restitution of conjugal rights even in the absence of a matrimonial offence on the part of the petitioner. The question for decision is whether respondent had reasonable cause for leaving the petitioner and the test is whether it has become practically impossible for the parties to live together (*h*).

"It is certain that a spouse may without having committed an offence which would justify a decree of seperation, have so acted as to deserve the reprobation of all right-minded members of the community. Take the case of a husband who has heaped insults upon his wife, but has just stopped short of that which the law regards as *saevitia* or cruelty; can he when his own misconduct has led his wife to separate herself from him, but come into Court, and avowing his misdeeds, insist that it is bound to grant him a decree of adherence? Might not the Court refuse its aid to one who had so acted, and regard his conduct as a bar to his claim to relief? It is not a motion strange to our law that a Court should refuse its aid to one who does not come into it with clean hands, and when the question arises for decision I think it may well be considered whether the Court would be bound to entertain an action and grant relief at

(*e*) *Beer* v. *Beer* (1906) 94 L.T. 704. *Fisk* v. *Fisk* (1920) 122 L.T. 803.
(*f*) *Woodey* v. *Woodey* (1874) 31 L.T. 647.
(*g*) *Oldroyd* v. *Oldroyd* (1896) P. 175; 75 L.T. 281.
(*h*) *Greene* v. *Greene* (1916) P. 188.

the suit of one whose misconduct though falling short of a matrimonial offence, has been the primary cause of the difficulty, and has led to the refusal to adhere" (*i*).

Refusal of marital intercourse—

The rights of husband and wife as to marital intercourse are mutual and either party refusing such intercourse without sufficient reason gives just cause to the other for withdrawal from cohabitation and such a refusal is a valid defence to a wife's petition for restitution of conjugal rights (*j*). But a plea by a wife that sexual intercourse with her is impossible owing to her incurable disease or physical malformation is not in itself a good defence to a suit by the husband for restitution of conjugal rights (*k*).

Agreement to separate—

An agreement between husband and wife to live separate is no bar to a suit for restitution of conjugal rights (*l*), but it may be alleged in answer to an allegation in the petition that from the date of the deed the respondent has without just cause refused to cohabit with the petitioner (*m*). It has always been held in the Divorce Court that deeds of separation are utterly inoperative to abrogate the duty of cohabitation involved in the contract of marriage. It is accordingly quite competent to either party the day after they have parted in obedience to their mutual agreement to come to the Court in defiance of such agreement and obtain a decree for restitution of conjugal rights (*n*). But a husband is not debarred from enforcing

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(*i*) *Mackenzie* v. *Mackenzie* (1895) A.C. 384 at p. 390.
(*j*) *Davis* v. *Davis* (1918) P. 85; 118 L.T. 649.
(*k*) *Purshotamdas* v. *Bai Mani* (1896) 21 Bom. 610. See *Parkes* v. *Parkes* (1923) 40 T.L.R. 42
(*l*) *Spering* v. *Spering* (1863) 3 Sw. & Tr. 211; 164 E.R. 1255. *Pugh* v. *Pugh* (1920) 37 T.L.R. 105.
(*m*) *Anquez* v. *Anquez* (1866) L.R 1 P. & D. 176; 14 L.T. 635.
(*n*) *Crabb* v. *Crabb* (1868) L.R. 1 P. & D. 601; 18 L.T. 153.

a deed of separation and from obtaining an order restraining his wife from commencing an action for restitution of conjugal rights by reason of trifling breaches of the covenants on his part (*o*), especially where the agreement is entered into for valuable consideration not to sue (*p*). The breach of the covenant, however, must be clear, serious and deliberate (*q*). A valid agreement between the parties to live apart may exist in the absence of a formal deed of separation and without an express covenant not to sue for restitution of conjugal rights (*r*). The non-fulfilment of a covenant to pay an allowance to the wife is a good ground for instituting the suit and the Court would grant the decree notwithstanding the deed (*s*).

VIII—Damages and Costs.

34. Any husband may, either in a petition for dissolution of marriage or for judicial separation, or in a petition to the District Court or the High Court limited to such object only, claim damages from any person on the ground of his having committed adultery with the wife of such petitioner.

Such petition shall be served on the alleged adulterer and the wife, unless the Court dispenses with such service, or directs some other service to be substituted.

(*o*) *Besant* v. *Wood* (1879) 12 Ch. D. 605; 40 L.T. 445. See *Hyman* v. *Hyman* (1929) A.C. 601.

(*p*) *Hunt* v. *Hunt* (1862) 4 De G. & J. 221; 5 L.T. 778. *Clark* v. *Clark* (1885) 10 P.D. 188; 52 L.T. 234. See *Russell* v. *Russell* (1895) P. 315. *Re Weston, Davies* v. *Tagart* (1900) 2 Ch. 164. *Marshall* v. *Marshall* (1879) 5 P.D. 19; 39 L.T. 690. *Gleig* v. *Gleig* (1906) 22 T.L.R. 716. See *Welch* v. *Welch* (1916) 85 L.J.P. 188.

(*q*) *Kunski* v. *Kunski* (1898) 68 L.J.P. 18.

(*r*) *Walter* v. *Walter* (1921) P. 302; 125 L.T. 575.

(*s*) *Tress* v. *Tress* (1877) 12 P.D. 128; 57 L.T. 501. *Gill* v. *Gill* (1917) 62 Sol. Jour. 37. *Phillips* v. *Phillips* (1917) P. 99 *Kennedy* v. *Kennedy* (1907) P. 49. *Waller* v. *Waller* (1910) 26 T.L.R. 223. *Mc Quiban* v. *Mc Quiban* (1913) P. 208.

The damages to be recovered on any such petition shall be ascertained by the said Court, although the respondents or either of them may not appear.

After the decision has been given, the Court may direct in what manner such damages shall be paid or applied.

Cf: section 33 of the Matrimonial Causes Act, 1857.

Section 189 of the Supreme Court of Judicature (Consolidation) Act, 1925.

See section 61 of the Indian Divorce Act, 1869.

By the Matrimonial Causes Act, 1857, actions for criminal conversation were abolished, but a husband may in a suit for dissolution of marriage or for judicial separation, or in a petition limited to such object, claim damages from any person (the co-respondent) on the ground of adultery with the petitioner's wife. The claim is to be tried on the same principles, and subject to the same rules, as actions for criminal conversation were previously tried, subject to the provision that the other enactments in the Act with reference to the hearing and decision of petitions shall apply.

The damages, if any, have always been compensatory only and not exemplary or punitive. The grounds on which damages are given are, (1) the actual value of the wife lost, (2) compensation to the husband for the injury to his feelings, the blow to his honour and hurt to his matrimonial and family life (*t*). Whether the wife was a good wife and took care of the home and children would be an element of consideration (t_1). The next topic that is generally

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(*t*) *Ellworthy* v. *Ellworthy & Ledgard* (1920) P. 126; 89 L J.P, 151.
(t_1) *Premchand Hira* v. *Bai Galal* (1927) 51 Bom. 1026; 29 Bom. L.R. 1336.

considered is what is the position of the defendant, how came he to be introduced; under what circumstance did he become intimate with the family, was there anything like treachery in his conduct. That is a legitimate consideration, not that the Court has to punish the man, but the conduct of the defendant, the mode in which he proceeds to obtain the affection of the lady is important for the consideration of the Court (*u*). In estimating the amount of damages to be awarded the fact that the wife was earning money of a portion of which the husband had the advantage may properly be taken into account (*v*). If a husband has a virtuous wife taken from him by the contrivance of another man, he is entitled to damages commensurate with the loss of such a wife; but if she has led a loose life before marriage, her value is not the same as that of a virtuous woman (*w*). The Court has also to consider how far the husband interferred to protect his wife from the temptation to which she was exposed (*x*); the means of the co-respondent have nothing to do with the question. The only question is what damage the petitioner has sustained, and the damage that he has sustained is the same whether co-respondent is a rich man or a poor man (*y*), and the fact that the adulterer is a poor man should not debar the Court from giving heavy damages against him if his conduct has entailed a heavy loss on the husband for, "if he cannot pay in purse he must pay in person" (*z*). The poor man cannot by the plea of poverty escape for the actual injury he has caused. A rich man should not merely because he is a

(*u*) *Comyn* v. *Comyn & Humphreys* (1860) 32 L.J.P. 210.
(*v*) *Darbishire v. Darbishire & Baird* (1890) 62 L.T. 664.
(*w*) *Ibid.*
(*x*) *Calcraft* v. *Harborough (Earl of)* (1831) 4 C. & P. 499 at p. 501.
(*y*) *Keyse* v. *Keyse & Maxwell* (1892) 11 P.D. 102. *Bikker* v. *Bikker & Whitewood* (1892) 67 L.T. 141.
(*z*) *Cowing* v. *Cowing & Wollen* (1863) 33 L.J.P. & M. 149, *Thomas* v. *Thomas* (1925) 52 Cal. 379.

rich man be compelled to pay more than a proper compensation to the husband. This follows from the rule that the damages are not punitive but compensatory (*a*). In *Gardener* v. *Gardener* (*b*) the Court on evidence as to the irregular, intemparate and violent habits of the wife before she met the co-respondent found the adultery proved but awarded no damages (*c*). If a man's wife goes and walks the streets the husband is not entitled to come to Court and recover damages against any man who consorts with that woman (*d*), but if the conduct of the co-respondent be marked by treachery, wantonness, cruelty or gross depravity, the damages should be so much the more than if his conduct be free from such circumstances of aggravation. The damages would vary with the impropriety and gravity of the misconduct (*e*). If the co-respondent did not know that the woman was married and she held herself out to commit adultery the damages should be reduced to next to nothing because she was of no value to the husband (*f*), though his ignorance of the fact does not entirely clear him of the possibility of such a penalty (*g*).

Onus on husband—

The onus ought to rest on the co-respondent to prove as a matter of mitigation that he did not know that the woman was married rather than on the petitioner to prove that the co-respondent possessed such knowledge. It is, however, held that the husband if he desires to claim damages on the footing that the adulterer had knowledge must

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(*a*) *Butterworth* v. *Butterworth* (1920) P. 126 at 147.
(*b*) (1901) T.L.R. 331.
(*c*) *Gibson* v. *Gibson & West* (1906) 22 T.L.R. 361.
(d) Darbishire v. Darbishire (1890) 62 L.T. 664.
(e) Butterworth v. Butterworth (1920) P. 126 at p. 141.
(f) *Watson* v. *Watson & Watts* (1905) 20 T.L.R. 320.
(g) *Lord* v. *Lord & Lambert* (1900) P. 297.

prove such knowledge affirmatively (*h*). The general conduct of the co-respondent, therefore, may give a most direc- aid to the ascertainment of the value of the wife, for when a husband claims damages he puts in issue the whole character, conduct and value of the wife (*i*).

Measure of damages—

The petition must specify the amount of damages which the husband claims (*j*). The blow to the husband and the shock to his feelings clearly depend to a large extent on the conduct of the co-respondent. It, therefore, follows that any feature of treachery, any grossness of betrayal, any wantonness of insult and the like circumstances may add deeply to the husband's sense of injury and wrong, and therefore, call for a large measure of compensation. In assessing damages to the husband it seems to be essential that his whole character and conduct and affection should be tested. These matters bear directly not only on the value of the wife, but also upon the question of any shock to his feelings which he may assert to have been caused by the adultery. The character and conduct of the husband is as fully in issue as the character and conduct of the wife (*k*). The Court has also to consider the position of the parties, the terms on which the husband and wife lived together before her adultery broke off their cohabitation, the circumstances under which the adulterer was introduced and the means he has to pay the damages assessed (*l*). In *Forster* v. *Forster & Berridge* (*m*), Sir C. Cresswell pointed out to the jury: "If it required the use of a fortune to seduce a wife, it would

(*h*) *Lord* v. *Lord & Lambert* (1900) P. 297 at p. 300.
(*i*) *Watson* v. *Watson & Watts*, supra.
(*j*) *Spedding* v. *Spedding & Lander* (1862) 32 L.J.P. 31.
(*k*) *Butterworth* v. *Butterworth* (1920) P. 126 at pp. 144, 145.
(*l*) *Bell* v. *Bell & Marquis of Anglesey* (1859) 1 Sw. & Tr. 565.
(*m*) (1864) 33 L.J.P. 150, note.

indicate that she was not lightly to be won and would, therefore, indicate her greater value to a husband as compared with a wife who yielded to the first suggestion of temptation. If the co-respondent does not know that the woman with whom he commits adultery is a married woman then he is not consciously committing wrong to any man and he is not liable in damages and so far is that doctrine carried that the Court never even gives costs against a co-respondent who is proved not to have known that the woman was married because he is only the unconscious instrument with which the wife carries out her wrong against the husband" (*n*). Want of knowledge on the part of the co-respondent that the respondent was a married woman is not a bar to a claim for damages, but it has a bearing on the *quantum* of damages (*o*). Where the co-respondent committed misconduct at first without that knowledge, the petitioner forgave his wife for that misconduct. Thereafter, however, the co-respondent with full knowledge committed adultery again under discreditable circumstances, the Court awarded substantial damages and also costs against the co-espondent (*p*).

Where it was proved on the hearing of a petition, that there had been no issue of the marriage and that at the time of hearing the respondent was living with the co-respondent, the Court made the order for the payment to the petitioner of the damages assessed against the co-respondent as part of the decree *nisi* instead of postponing it until the decree absolute (*q*).

(*n*) *Darbishire* v. *Darbishire* (1890) 62 L.T. 664. *Newby* v. *Newby & White* (1897) 77 L.T. 142. But see *Sweeting* v. *Sweeting & Rowlands* (1919) 36 T.L.R. 15.

(*o*) *Lord* v. *Lord & Lambert* (1900) P. 297 at p. 299.

(*p*) *Burne* v. *Burne & Helvoet* (1902) P. 17.

(*q*) *Evans* v. *Evans & Bird* (1865) L.R. 1 P. & D. 36.

"The Court may direct in what manner such damages shall be paid or applied".

The amount of damages awarded are disposed of by the Court according to the particular circumstances of the case. The whole amount may be paid over to the petitioner, or a part to him and a part settled for the benefit of the children. In some cases the whole amount is applied for the children's benefit, and sometimes provision is even made for a guilty wife (*r*), because the damages are not for the husband's pocket (*s*). But as a general rule the costs of the petitioner over and above the amount he may have recovered from the co-respondent on taxation are paid out of the amount of damages before any other payments are made (*t*).

See notes to section 39.

The High Court on confirming the decree of the District Court dissolving a marriage, has the fullest power to deal with the case as justice may require, including the award of damages by the District Court even though the co-respondent has not appealed against such order (*u*) and also to award damages although the claim may have been disallowed by the lower Court (*v*).

COSTS.

Power to order adulterer to pay costs.

35. Whenever in any petition presented by a husband the alleged adulterer has been made a co-respondent, and the adultery has been established, the Court may order the co-respondent to pay the whole or any part of the costs of the proceedings:

(*r*) *Ashcroft* v. *Ashcroft* (102) P. 270.
(*s*) *Keats* v. *Keats & Montezuma* (1859) 28 L.J.P. 57; 1 Sw. & Tr. 334; 161 E.R. 754.
(*t*) *Forster* v. *Forster & Berridge* (1863) 3 Sw. & Tr. 151; 164 E.R. 1466.
(*u*) *Kyte* v. *Kyte & Cook* (1895) 20 Bom. 362.
(*v*) *Premchand Hira* v. *Bai Galal* (1927) 51 Bom. 1027; 29 Bom. L.R. 1336.

Provided that the co-respondent shall not be ordered to pay the petitioner's costs—

(1) if the respondent was at the time of the adultery living apart from her husband and leading the life of a prostitute, or

(2) if the co-respondent had not, at the time of the adultery, the reason to believe the respondent to be a married woman.

Power to order litigious intervenor to pay costs.

Whenever any application is made under section seventeen, the Court, if it thinks that the applicant had no grounds or no sufficient grounds for intervening, may order him to pay the whole or any part of the costs occasioned by the application.

Cf: sections 34 and 51 of the Matrimonial Causes Act, 1857.

Section 50 of the Supreme Court of Judicature (Consolidation) Act, 1925.

Rules 34 and 91 to 93 of the Matrimonial Causes Rules 1924.

Rule 929 of the Bombay High Court Rules, 1936.

Under section 45 of the Act the procedure between party and party is regulated by the Code of Civil Procedure.

The provisions for costs are made by section 35 of the Civil Procedure Code, and the section is subject to such conditions and limitations as may be prescribed by the Rules made under the Code and also subject to the provisions of any law for the time being in force.

Section 35 of the Indian Divorce Act makes provisions for the payment of the costs of a matrimonial suit.

As a matter of general practice it may be said that a successful party will be awarded costs against an unsuccessful opponent but this statement needs care in its application to proceedings in the Divorce Court.

Costs against co-respondent.

The question of costs against the co-respondent is within the discretion of the Court (*w*), and no appeal lies against the order for costs. (See section 55 of the Act). But the discretion of the Court is a judicial one and the long course of decisions only allows a co-respondent to be condemned in costs if it is either shown that he knew, or circumstances proved which would enable the Court to find that he ought to have known, that respondent was a married woman. But there is no special rule as to the nature of the evidence required to prove such knowledge and it may, like other facts in issue, be inferred from proved facts (*x*). The discretion depends upon the opinion of the Court as to the conduct of all the parties in each case; and even if it is proved that co-respondent knew respondent to be a married woman when the adultery was committed it does not necessarily follow that he will be condemned in the whole of the costs and the Court may order him to pay those costs only which had been incurred in proving respondent's adultery with him (*y*).

Without going fully into the matter it may be obvious that there may be a case in which although the husband may have committed an act of adultery the Court would hold that he is entitled to recover his costs against co-respondent

(*w*) *Robinson* v. *Robinson & Wilson* (1898) 78 L.T. 391; 14 T.L.R. 363.

(*x*) *Gibbs* v. *Gibbs & Heathcote* (1920) 123 L.T. 206; 36 T.L.R. 503. *Natall* v. *Natall* (1885) 9 Mad. 12. *Boyle* v. *Boyle* (1903) 30 Cal. 631.

(*y*) *Codrington* v. *Codrington & Anderson* (1865) 4 Sw. & Tr. 63; 164 E.R. 1439. See *Darnborough* v. *Darnborough & Smith* (1926) 96 L.J.P. 24.

whose adultery has been established; on the other hand there may be cases in which the Court would come to the conclusion that petitioner's conduct was so bad that he ought never to have come to Court, and therefore, the co-respondent ought not to be condemned in costs (*z*).

It is an established rule not to award costs in favour of a husband petitioning for a divorce against a co-respondent who had no knowledge that the respondent was a married woman, but it is too broad a statement of the rule to say that the co-respondent must have such a knowledge at the time he first misconducted himself (*a*); and when the co-respondent admitted that within a fortnight after he first committed adultery with the respondent he became aware that she was a married woman, the Court ordered him to pay the petitioner's costs (*b*). Where there is no evidence to show that the co-respondent when he first formed the connection with the respondent knew that she was a married woman, the Court may refuse to condemn him in costs (*c*), but costs may be awarded against a co-respondent, not proved to have known that respondent was married, if the facts warrant a finding that he ought to have known, but not otherwise (*d*).

Where a husband has condoned adultery committed with a co-respondent which has been revived by adultery committed with another person, costs will not be given against the co-respondent whose adultery was condoned(*e*).

(*z*) *Ravenscroft* v. *Ravenscroft & Smith* (1872) L.R. 2 P. & D. 376; 26 L.T. 265. See *Yowell* v. *Yowell, Sarrash & Burleigh* (1875) 24 W.R. 59. *Barnstein* v. *Barnstein* (1893) P. 292.

(*a*) *Norris* v. *Norris & Smith* (1918) P. 129 at p. 130; 118 L.T. 507.

(*b*) *Bilby* v. *Bilby & Harrop* (1902) P. 8.

(*c*) *Priske* v. *Priske & Goldby* (1860) 4 Sw. & Tr. 238; 164 E.R. 1507.

(*d*) *Taylor* v. *Taylor & Kraft* (1920) 123 L.T. 112; 36 T.L.R. 36.

(*e*) *Norris* v. *Norris, Lawson & Mason* (1861) 4 Sw. & Tr. 237; 164 E.R. 1506. *Youd* v. *Youd* (1901) 28 Cal. 221.

In a case where adultery after knowledge is established the Court is not precluded from awarding costs by the mere fact that the co-respondent has also committed adultery at a date before he had knowledge and where the proof of such prior misconduct depended upon confession only (*f*). Where the co-respondent is without knowledge that the woman is married and where the petitioner has not proved knowledge against the co-respondent no costs should be given against the latter (*g*).

In a question of costs the onus is on the petitioner to prove knowledge on the part of the co-respondent of respondent being a married woman (*h*). Inquiry is made into the circumstances of each case and consideration given to the question as to whether the co-respondent knew that the woman was married or might reasonably be expected to have had such knowledge (*i*). So, where the co-respondent had formed an intimacy with the woman, not knowing that she was married, afterwards learnt that she was a wife and yet continued the intimacy, the adulterer should, as a general rule, be ordered to pay the petitioner's costs (*j*).

When the petitioner does not claim damages against the co-respondent and obtains a decree *nisi* he will be entitled to his costs as between attorney and client (*k*).

Co-respondent to pay costs of the variation of settlement—

When in a suit for dissolution of marriage the co-respondent is condemend in costs, he is also liable for the costs of the petitioner and respondent incurred in obtaining an alteration of a marriage settlement (*k* 1).

(*f*) *Norris* v. *Norris & Smith* (1918) P. 129.
(*g*) *Teagle* v. *Teagle & Nottingham* (1858); Sw. & Tr. 188; 164 E.R. 686.
(*h*) *Lord* v. *Lord & Lambert* (1900) P. 297 at p. 299.
(*i*) *Langrick* v. *Langrick* (1920) P. 90.
(*j*) *Learmouth* v. *Learmouth & Austin* (1889) 62 L.T. 608.
(*k*) *Outwaite* v. *Outwaite* (1901) 28 Cal. 84.
(*k* 1) *Gill* v. *Gill & Hogg* (1863) 3 Sw. & Tr. 359; 164 E.R. 1314.

When co-respondent not liable for costs—

No costs are awarded against the co-respondent where he has found out when too late to repair the wrong done, that the woman with whom he had taken up was a married woman, and because he did not then desert her (*l*). Nor, will the co-respondent be mulcted in costs when the adultery of the wife was condoned by the petitioner or connived at by him (*m*), nor when the wife is living separate from the husband and is leading an immoral life (*n*).

Husband's Liability for Costs.

Costs of the wife pendente lite—

As a rule a wife whether she be the petitioner or the respondent is usually (but not always) entitled to have her costs upto and of and incidental to the hearing taxed *de die in diem* and the husband may be ordered to pay into Court a sum sufficient to cover such costs or to give security for that amount. If the sum be paid into Court, the costs of the wife are taxed and paid out of such sum *de die in diem* to her or to her attorney (*o*). This practice is a survival of the old days when the legal assumption was that a wife was dependent upon her husband for everything and, therefore, it was right and proper that she should be provided at his expense with the means of bringing her case before the Court, whether she be the accuser or the accused. Upon this general assumption there is imposed the exception

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(*l*) *Bilby* v. *Bilby & Harrop* (1902) P. 8.

(*m*) *Youd* v. *Youd* (1901) 28 Cal. 221. *Norris* v. *Norris* (1861) 4 Sw. & Tr. 237; 164 E R. 1506.

(*n*) *Roe* v. *Roe* (1870) 3 Beng. L R. Appx. 9. *Nelson* v. *Nelson* (1868) 1 P.D. 510.

(*o*) Rule 929 of the Bombay High Court Rules, 1936. Rule 91 of the Matrimonial Causes Rules, 1924. *Mayhew* v. *Mayhew* (1895) 19 Bom. 293. *Natall* v. *Natall* (1886) 9 Mad. 12. *Kelly* v. *Kelly & Saunders* (1870) 5 Beng. L.R. 71 at p. 76. *Weber* v. *Weber & Pyne* (1858) 1 Sw. & Tr. 219; 164 E.R. 701. *Georgucopulas* v. *Georgucopulas* (1902) 29 Cal. 619.

where she is possessed of separate estate or means of her own (*p*). This rule applies to suits for nullity of marriage as well as to other matrimonial suits (*q*) on the ground that the costs of a suit justifiably instituted by a married woman against her husband for a divorce or judicial separation or for nullity of marriage are "necessaries" for which she may pledge her husband's credit (*r*), but the presumption of the implied authority for pledging the husband's credit may be rebutted by proof of circumstances inconsistent with the existence of such authority (*s*). The fact that the wife is at the time when the husband presents his petition for divorce living in adultery with the co-respondent or is separated from her husband under such circumstances that she does not pledge his credit, is not a ground for refusing her costs *pendente lite*, though alimony *pendente lite* might be refused under such circumstances (*t*). It is not necessary that the wife should be successful in the proceedings (*u*), and whether she fails or succeeds in the suit the sum deposited by the husband will be appropriated to the payment of her costs, but if she fails and the costs amount to more than the deposit the Court will not order the surplus to be paid by the husband (*v*).

Parties Governed by the Indian Succession Act—

The Indian Succession Act (section 20 of Act XXXIX of 1925) which does not entitle the husband to acquire any interest in his wife's property does not affect the husband's liability to pay the wife's costs (*w*). But in a later case it

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(*p*) *Broadhead* v. *Broadhead* (1870) 5 Beng. L.R. Appx. 9.
(*q*) *Bird* v. *Bird* (1753) 1 Lee. 20*n*.
(*r*) *Stocken* v. *Puttrick* (1873) 29 L.T. 507.
(*s*) *Mahomed Sultan Sahib* v. *Horace Robinson* (1907) 30 Mad. 543.
(*t*) *Gordon* v. *Gordon* (1869) 3 Beng L.R. Appx. 13.
(*u*) *Payne & Co.* v. *Pirsphah* (1911) 13 Bom. L.R. 920.
(*v*) *White* v. *White* (1859) Sea. & Sm. 77.
(*w*) *Broadhead* v. *Broadhead*, **supra.**

was held by the Calcutta High Court that the foundation of the English practice having been displaced with respect to persons subject to the Indian Succession Act, the practice itself ought no longer, as a general rule, be followed; and in suits for judicial separation between persons subject to that Act, the Court will not, except under special circumstances, order the husband to give security for his wife's costs (*x*). Where, however, the wife has no means of her own the Court has a discretion to order the husband to furnish security for her costs (*y*), but unless special circumstances are made out, the husband will not be ordered to pay the wife's costs in a suit by the husband for dissolution of the marriage (*z*). The Allahabad High Court has taken a different view and has laid down that in a petition for dissolution of marriage on the ground of adultery filed by the husband, if the wife enters an appearance and denies the allegations against her, she has an absolute right to require her husband to furnish her with funds sufficient to enable her to make a full and satisfactory defence and to obtain such assistance from Counsel as is reasonable in the circumstances and the Court should take upon itself the duty of seeing that this is done (*a*). Where, however, the respondent wife admits adultery resulting in the birth of a child, but denies adultery with the only named co-respondent, the Court would order the petitioning husband to give security for the wife's costs to the extent that the Registrar might fix as sufficient to provide for any costs that the husband might be ordered to pay by the Judge at the trial (*b*).

(*x*) *Proby* v. *Proby* (1879) 5 Cal. 357.
(*y*) *Bateman* v. *Bateman & Nicachi* (1914) 41 Cal. 963.
(*z*) *Thomas* v. *Thomas* (1896) 23 Cal. 913; *Young* v. *Young* (1896) 23 Cal. 916, Note. But see *Georgucopulas* v. *Georgucopulas* (1902) 29 Cal. 619.
(*a*) *Garlinge* v. *Garlinge* (1922) 44 All. 745.
(*b*) *In A.B.'s Petition* (*or S.* v. *S.*) (1928) P. 25; 44 T.L.R. 52.

Husband suing in formâ pauperis—

The fact that a husband petitioner for divorce has obtained leave to sue as a poor person does not relieve him from the obligation to give security for his wife's costs. The costs for which security is ordered may in a proper case be limited to such costs as the wife would incur if she had obtained leave to defend as a poor person; but each case must be decided on its merits (*c*).

Failure to furnish security for wife's costs—

The English Courts do not strike out a husband's petition or strike out his defence to his wife's petition merely because he had failed to give security. What they do is to stay the husband's petition, and as regards the wife's petition, to proceed against the husband for contempt, if he is proved to be able to pay but contumaciously refuses to do so (*d*).

Successful wife entitled to costs—

A wife in whose favour a decree for dissolution of marriage is made is entitled to costs against her husband as a matter of course (*e*), and even when no order has been made (*f*), and the Court may refuse to postpone the payment of the costs of the wife (in whose favour a decree *nisi* is passed) by the husband until the result of the intervention, if any, of the King's Proctor is known (*g*).

Wife having separate property—

Where the wife has separate property of her own she is liable to pay her own costs (*h*).

(*c*) *Smith* v. *Smith, Rotherford & Ors.* (1920) P. 206.
(*d*) *Codd* v. *Codd* (1923) 47 Bom. 665.
(*e*) *Peacock* v. *Peacock* (1858) 27 L.J.P. & M. 71.
(*f*) *Kaye* v. *Kaye* (1858) 4 Sw. & Tr. 239; 164 E.R. 1507.
(*g*) *Gladstone* v. *Gladstone* (1875) L.R. 3 P. & D. 260; 32 L.T. 404. See *Butler* v. *Butler* (1890) 15 P. D. 126.
(*h*) *Holmes* v. *Holmes* (1755) 2 Lee. 90; 161 E.R. 274.

When wife unsuccessful—

The settled practice of the Courts is that the wife if she fails will not be entitled to taxed costs beyond the sum of money paid into Court by the husband (*i*), but the mere fact that no deposit has been made or security given for the payment of the wife's costs is no obstacle to the making of an order against the husband to pay her costs, although her petition is dismissed (*j*). This, too, is entirely within the discretion of the Court and where the wife's petition is dismissed, the facts that security for the wife's costs have been ordered and that the conduct of the wife's Solicitor is not open to censure, do not deprive the Court of its discretion to give costs or to refuse them to the wife or to give costs against the wife (*k*), and there is no appeal from the refusal of the Court to order the wife's costs to be paid (*l*). But the wife is entitled to such costs only upto the time when her guilt is proved; and after her adultery has once been established she is not as an ordinary rule entitled to costs, though the case may in a sense, be still said to be pending (*m*), and if the Court finds that there is property of the guilty wife upon which an order for costs, if made can operate, the guilty wife, like any other unsuccessful litigant, will be condemned in costs (*n*).

Sucurity for costs of Appeal--

In a suit for divorce brought by a wife against her husband, the wife obtained a decree *nisi* which ordered the

(*i*) *Glennie* v. *Glennie & Bowles* (1863) 3 Sw. & Tr. 109; 7 L.T 696; 161 E.R. 1214. See *Allen* v. *Allen & Bell* (1894) P. 248; *Brown* v. *Brown* (1915) P. 83.
(*j*) *Boyle* v. *Boyle* (1903) 30 Cal. 631.
(*k*) *Baldwin Raper* v. *Baldwin Raper & Metz* (1926) 42 T.L.R. 619.
(*l*) *Butler* v. *Butler* (1890) 15 P.D. 126. See *Palmer* v. *Palmer & Stockley* (1914) P. 116.
(*m*) *Whitmore* v. *Whitmore* (1866) 35 L.J P. & M. 51; L.R. 1 P. & D. 96.
(*n*) *Forrester* v. *Forrester* (1930) 57 Cal. 1350. *Hyde* v. *Hyde & Fellgate* (1888) 59 L.T. 523. See *Capron* v *Capron* (1927) P. 243. M. (otherwise *de B.*) v. *de B.* (1875) 33 L.T. 263.

respondent to pay a monthly sum by way of alimony to the wife, and also ordered him to pay the wife's costs of the suit. Under this decree a sum of Rs. 3,309/- was due to the wife on the 26th May 1882. The wife appealed from an order made in the suit, and the Court under the circumstances, admitted the appeal without requiring from the appellant the usual security for costs(*o*). The husband cannot be justly called upon by her as a matter of right to provide for her costs of the appeal (*p*), nor is there any practice of requiring the Court to make the husband pay costs of an unsuccessful appeal by an unsuccessful wife (*q*).

Compromise of suit—

Where the parties to a matrimonial suit return to cohabitation and the suit is amicably settled the husband is ordered to pay the wife's attorneys their costs of the suit (*r*), and such costs are not limited to the amount deposited in Court even when no security for the wife's costs was applied for (*s*).

A wife on the 2nd June 1896 presented her petition in which she prayed for the dissolution of her marriage with the respondent on the grounds of adultery and cruelty. A commission was issued at her instance to examine witnesses in England on the charges of adultery and cruelty and the result of their evidence was that the petitioner was satisfied that the charges brought by her against her husband were wholly unfounded, and she, on the 2nd September 1897, applied for leave to withdraw her suit and for payment of her costs by the respondent. She contended that her costs

(*o*) *King* v. *King* (1882) 6 Bom. 487.
(*p*) *Ste. Croix* v. *Ste. Croix* (1916) 44 Cal. 35.
(*q*) *Monk* v. *Monk* (1933) 60 Cal. 318.
(*r*) *P.* v. *P.* (1872) 9 Ben. L.R. Appx. 6.
(*s*) *Boyle* v. *Boyle* (1903) 30 Cal. 621.

should be paid by him as between attorney and client. The respondent submitted he ought to pay costs as between party and party. The Court held that the petitioner's costs be taxed as between party and party, it being open for the attorney for the wife to sue the husband for the rest of the costs (*t*).

Continuance of a suit which was compromised—

At the hearing of a petition by a wife for restitution of conjugal rights, petitioner and respondent agreed to a compromise, but the petition was not dismissed. The wife afterwards refused to be bound by the compromise and insisted on proceeding with the suit, and the Court refused to allow the wife's costs to be taxed beyond the date of the compromise (*u*). But where the wife had petitioned against the husband for judicial separation and the proceedings had ended before hearing, by her return to cohabitation, the petition was allowed to be dismissed on the husband's application only on payment of taxed costs (*v*).

Petition for nullity by father of minor—

Where the father of a minor petitions for a decree of nullity of his child's marriage, he must make the other party to the *de facto* marriage a party to the suit. In such a suit the *de facto* wife is not entitled to have her costs taxed against the petitioner as in ordinary cases between husband and wife (*w*).

Abatement of suit—

A suit by the wife against her husband having abated by the wife's death, the Court will not at the petition of the

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(*t*) *Butt* v. *Butt* (1898) 25 Cal. 222; 2 C.W.N. 37.
(*u*) *Hayward* v. *Hayward* (1860) Sea. & Sm. 135.
(*v*) *Cooper* v. *Cooper* (1864) 3 Sw. & Tr. 392; 164 E.R. 1327.
(*w*) *Wells* v. *Cottam* (falsely called *Wells*) (1863) 3 Sw. & Tr. 364; 164 E.R. 1316.

King's Proctor, direct the costs incurred by the wife to be paid by the husband (*x*).

Denial of Jurisdiction—

A husband cannot refuse to pay and give security for his wife's costs of a divorce suit or issue as to the domicil merely on the ground that he disputes the jurisdiction of the Court. He may be ordered to pay his wife's costs of suit upto the setting down of the issue and to give security for her costs attendant on the issue and down to the close of the pleadings (*y*).

Husband guilty of adultery—

In a husband's suit for divorce if the wife is found guilty of adultery with the co-respondent but the husband too is proved to have committed adultery which the wife had condoned, the husband's petition will be dismissed and he will be mulcted in the full costs of the wife, but the husband will be entitled to costs against the co-respondent in respect of the issue found against the latter (*a*).

Death of husband before trial—

Where the husband had paid a sum into Court to meet the wife's costs of the hearing of the petition and had died shortly before the time appointed for the hearing, the Court made an order for the taxation of the costs incurred for the hearing by the wife's solicitors, and the payment to them of such taxed costs out of the fund in Court, with leave to the Solicitors of the husband's executors to attend the taxation (*c*).

(*x*) *Cheale* v. *Cheale* (1828) 1 Hag. Ec. 374; 162 E.R. 617.
(*y*) *Smith* v. *Smith* (1923) P. 128. *Johnstone* v. *Johnstone* (1929) P. 165. *Nina Dalal* v. *Merwanji P. Dalal* (1930) 32 Bom. L.R. 1046, F.B.
(*a*) *Waudby* v. *Waudby & Bowland* (1902) P. 85. *Bremner* v. *Bremner & Brett* (1864) 3 Sw. & Tr. 378; 164 E.R. 1321.
(*c*) *Hall* v. *Hall* (1864) 3 Sw. & Tr. 390: 164 E.R. 1326.

Solicitor's right to costs—

In England a solicitor's common law right to sue the husband as for "necessaries" supplied to the wife is not to be limited to the statutory right and remedies for costs given to the wife under the Divorce Act, and so, a solicitor engaged by a wife in divorce proceedings against her husband may sue the husband for "extra costs," *i.e.* costs reasonably incurred by her beyond the taxed party and party costs (*d*).

Where a solicitor conducts matrimonial proceedings on behalf of a wife against her husband it is not a condition precedent to the solicitor's right to recover his costs thereof from the husband that he shows that the proceedings were necessary or that they had a successful issue. It is sufficient that he acted on reasonable grounds, made adequate inquiries and showed proper diligence and care (*e*).

The solicitors of the wife must make all efforts to secure their costs from their real debtor, the husband, before they can be allowed to apply for a charging order against the wife's property, "recovered or preserved" in the suit through their exertions (*f*).

Moneys deposited by a husband respondent as security for his wife's costs of a petition constituted a fund paid in for the benefit of her attorney who was entitled to have it applied for his benefit whatever the result of the petition, provided that he had been in no way to blame and that that rule applied to moneys deposited by a respondent appealing from the decision of the lower Court as security

(*d*) *Ottaway* v. *Hamilton* (1878) 3 C.P.D. 393; 47 L.J.C.P. 725. *Butt* v. *Butt* (1895) 25 Cal. 222.
(*e*) *Abrahams (Michael) Sons & Co.* v. *Buckley* (1924) 1 K.B. 903; 40 T.L.R. 483; 68 Sol. Jour. 596.
(*f*) *Payne & Co.* v. *Pirosha* (1911) 13 Bom. L.R. 920.

for the costs of the appeal in accordance with the rules of the Bombay High Court (*g*).

Solicitor's lien for costs—

The Court generally asks the Registrar to estimate the probable expenses of the suit from the commencement to the date of the final hearing and such sum is ordered to be paid into Court, the wife's solicitors to have a lien on the sum to the extent of his costs(*h*), but where there is no fund in Court, the wife cannot, by simply giving a notice of change of solicitors, deprive the former solicitor of his right to carry in his bill for taxation so as to compel him to have recourse to an action at common law against the husband for necessaries (*i*).

Taxation on a generous scale—

The taxation in matrimonial causes is as between party and party, but rather more generously as understood in the Ecclesiastical rather than the common law Courts. Thus in *Butt* v. *Butt* (*j*) the Court ordered the costs to be taxed on a "liberal scale"; and in Bombay the practice has always been to allow a more liberal taxation than on the usual party and party scale.

IX—ALIMONY.

Alimony *pendente lite.*

36. In any suit under this Act, whether it be instituted by a husband or a wife, and whether or not she has obtained an order of protection, the wife may present a petition for alimony pending the suit.

(*g*) *Nusserwanji Wadia* v. *Eleonora Wadia* (1913) 38 Bom. 125.
(*h*) *Kelly* v. *Kelly & Saunders* (1869) 3 Ben. L.R. Appx. 5.
(*i*) *Jinks* v. *Jinks* (1911) P. 120.
(*j*) (1898) 25 Cal. 222.

Such petition shall be served on the husband; and the Court, on being satisfied of the truth of the statements therein contained, may make such order on the husband for payment to the wife of alimony pending the suit as it may deem just:

Provided that alimony pending the suit shall in no case exceed one-fifth of the husband's average nett income for the three years next preceding the date of the order, and shall continue, in case of a decree for dissolution of marriage or of nullity of marriage, until the decree is made absolute or is confirmed, as the case may be.

Cf: section 190 (3) of the Supreme Court of Judicature (Consolidation) Act, 1925.

Rules 57 to 64 of the Matrimonial Causes Rules, 1924.

Rule 928 of the Bombay High Court Rules, 1936.

The following are some of the definitions of alimony:—

" 'Alimony', although it properly signified nourishment or maintenance when strictly taken, in the common legal and practical sense, signified that proportion of the husband's estate which the wife sues in the Ecclesiastical Court, to have allowed her for her present subsistence and livelihood according to law, upon any such separation from her husband as is not caused by her own elopement or adultery".

'Alimony' signifies that legal proportion of the husband's estate, which by the sentence of the Ecclesiastical Court is allowed to the wife for her maintenance on account of any separation from him.

'Alimony', in its legal sense, may be defined to be that proportion of the husband's estate, which is judicially allowed and allotted to a wife, for her subsistence and livelihood, during the period of their separation.

'Alimony' is maintenance afforded to the wife, where the husband refuses to give it, or where his improper conduct compels her to separate from him. It is not a portion of his real estate to be assigned to her in fee simple subject to her control or to be sold at her pleasure, but a provision for her support, to continue during their joint lives, or so long as they live separate.

" 'Alimony' as the term is used in divorce law, is the allowance which a husband, by order of Court pays to his wife, living separate from him for her maintenance; or it may be the provision which is made by the Court for the sustenance of a wife divorced from the bond of matrimony, out of her late husband's estate. The allowance may be for her use either during the pendency of a suit, in which case it is called alimony *pendente lite* or after its termination, called permanent alimony. It has no common law existence as a separate independent right, but whatever found, it comes as an incident to a proceeding for some other purpose, as for a divorce; no Court having any jurisdiction to grant it, where it is the only relief sought".

PENDENTE LITE.

"*In any suit under this Act*—"

Under the Indian Divorce Act the wife would be entitled to claim alimony from the husband during the pendency of the suit whether the suit be for dissolution of marriage, or for nullity of marriage, or for judicial separation, or for restitution of conjugal rights. Whether the husband be the petitioner or respondent in the suit he usually has the privilege of providing for the wife's support during the progress of the suit.

(i) Suit for dissolution of marriage—

It is not competent to the Court to allot to the wife any sum for alimony *pendente lite* until the fact of marriage is

either proved against or admitted by the husband (*k*), but the Court can recommend a payment to the wife in the nature of alimony *pendente lite* (*l*). The Court has no power to allot alimony *pendente lite* in a suit in which the husband has not appeared (*m*), not even by consent of parties (*n*).

The power of the Court to allot alimony *pendente lite* is not affected by the husband pleading to the jurisdiction of the Court (*o*).

(ii) Suit for nullity of marriage—

As a rule a marriage *de facto* carries a right to alimony *pendente lite* until it is finally declared to be void (*p*) even though fraud in procuring the marriage is charged against the wife (*q*). But the Court will not grant alimony *pendente lite* should the marriage be plainly null and void on the face of the pleadings (*r*). This view was, however, disapproved in a later case where it was held that an order may be made even if there was no valid marriage (*s*).

(iii) Suit for judicial separation—

The provisions of this section confer on the Court the power to make interim orders in a suit for judicial separation, but the order for alimony *pendente lite* must be made before the passing of the decree (*t*).

(*k*) *Smyth* v. *Smyth* (1824) 2 Add. 254; 162 E.R. 287.
(*l*) *Mitchell* v. *Mitchell* (1853) 1 Ecc. & Ad. 102; 164 E.R. 59.
(*m*) *Deane* v. *Deane* (1858) 28 L.J.P. & M. 23.
(*n*) *Clarke* v. *Clarke* (1862) 31 L.J.P. & M. 165.
(*o*) *Ronalds* v. *Ronalds* (1875) L.R. 3 P. & D. 259. See *Smith* v. *Smith* (1923) P. 128. *Johnstone* v. *Johnstone* (1929) P. 165.
(*p*) *Foden* v. *Foden* (1894) P. 307, C.A.; 71 L.T. 279.
(*q*) *Portsmouth* (*Earl*) v. *Portsmath* (*Countess*) (1926) 2 Ad. 63; 162 E.R. 404.
(*r*) *Blackmore* v. *Mills* (falsely called *Blackmore*) (1868) 18 L.T. 586.
(*s*) *Foden* v. *Foden*, supra. See *Crump* v. *Crump & Abbott* (1869) 3 Beng. L.R.O.C. 101.
(*t*) *Welton* v. *Welton* (1927) P. 162; 136 L.T. 675.

(iv) Suit for Restitution of Conjugal Rights—

In a suit for restitution of conjugal rights the wife is entitled to an order for alimony during the pendency of the suit and subsequent to the decree for restitution and until the husband received her back in his home (*u*) because for the purposes of alimony the cause was pending until the husband obeyed the decree of the Court (*v*); the wife's right to an order for alimony *pendente lite* being not affected by the fact that the order is made after the decree for restitution(*w*), and it extends until the proved disobedience by the husband to the decree (*x*).

Service of Petition on the Husband—

See Rules 6 to 14 and 28 and 29 of the Matrimonial Causes Rules, 1924.

Substituted service of the petition for alimony *pendente lite* on the respondent's agent will be allowed in a case where substituted service of the writ of summons was ordered (*y*). Similarly, substituted service of the orders will be allowed by the Court by leaving them at the last known residence of the husband and at his attorneys' office (*z*).

"Payment to the Wife Pending the Suit"—

Generally the husband is bound to provide alimony *pendente lite* for the wife, but when the wife has separate means sufficient for her defence and subsistence she is not entitled to alimony nor costs during the suit ; she then stands on the common footing of a litigant party and on

(*u*) *Taylor* v. *Taylor* (1842) 6 Jur. 633. See (1843) 2 Notes of Cases 174, P.C.
(*v*) *Ibid.*
(*w*) *Ver Mehr* v. *Ver Mehr* (1921) P. 404.
(*x*) *Ibid.*
(*y*) *Odevaine v. Odevaine* (1888) 58 L.T. 564; 52 J.P. 280.
(*z*) *Nuttall* v. *Nuttall* (1862) 31 L.J.P. & M. 164.

proving her case has a *prima facie* right to costs. It is, however, discretionary with Courts on a consideration of all the circumstances to relax the rule (*a*).

A wife who is undergoing a sentence of imprisonment for a felony is nevertheless entitled to alimony *pendente lite* (*b*), and also, where the wife is charged in her husband's petition with adultery and has filed no answer to it she is still entitled to have alimony *pendente lite* allotted to her (*c*). But when the wife is living with the co-respondent and is supported by him the Court will refuse to allot her alimony *pendente lite* (*d*). If the husband and the wife have been living apart for some years and the wife has been supporting herself during that time and is still able to do so, she will normally not be entitled to alimony *pendente lite* (*e*); so also, where the husband has no means and is very poor the Court might exercise its discretion and refuse an order for alimony (*f*). But when the husband is out of employment at the time of the petition the Court could make an order for alimony based upon an average of his earnings for the past three years (*g*), and also when the husband sues *in formâ pauperis* (*h*). Where, however, the husband is an insolvent debtor and possessed of no property and in no business or profession the Court will refuse to make any order for alimony (*i*), but the

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(*a*) *D'Aguilar* v. *D'Aguilar* (1794) 1 Hag. Ecc. 773; 162 E.R. 748.
(*b*) *Kelly* v. *Kelly* (1863) 4 Sw. & Tr. 227; 164 E.R. 1503.
(*c*) *Smith* v. *Smith & Tremsaux* (1863) 4 Sw. & Tr. 228; 164 E.R. 1503.
(*d*) *Holt* v. *Holt & Davis* (1868) L.R. 1 P. & D. 610; 19 L.T. 662. *Madan* v. *Madan & De Thoren* (1867) 37 L.J.P. & M. 10; 17 L.T. 326
(*e*) *Madan* v. *Madan*, supra. *George* v. *George* (1867) L.R. 1 P. & D. 553.
(*f*) *Gaynor* v. *Gaynor* (1862) 31 L.J.P. 144.
(*g*) *Thompson* v. *Thompson* (1867) L.R. 1 P. & D. 553.
(*h*) *Grinnam* v. *Grinnam* (1916) P. 1; 113 L.T. 1216.
(*i*) *Bruere* v. *Bruere* (1837) 1 Curt. 566; 163 E.R. 198.

Court may suspend the proceedings until something by way of maintenance is given to the wife (*j*).

Where the husband's income consists only of a voluntary allowance from his father the Court may order the husband to make some allowance to the wife and may stay the suit by the husband till he has undertaken to do so (*k*).

An assignment apparently fraudulent and colourable, by the husband of all his property after the commencement of a suit by the wife for divorce, cannot disentitle her to alimony (*l*).

To a guilty wife—

A wife found guilty of adultery in a suit for divorce brought by her husband whose petiton had been dismissed because by his conduct he had conduced to her adultery was nevertheless a competent suitor for dissolution of marriage on the ground of her husband's adultery and if she presented a petition for divorce the Court had jurisdiction, in its discretion, to award her alimony *pendente lite* (*m*).

Deed of Separation—

The existence of a separation agreement would not affect the jurisdiction of the Court to make provision for the maintenance and education of the children (*n*).

Arrears—

The Court may interfere by way of injunction to restrain a husband from dealing with his property so as to defeat an order for costs or alimony *pendente lite* when

(*j*) *Bruere* v. *Bruere* (1837) 1 Curt. 566; 163 E.R. 193.
(*k*) *Moss* v. *Moss & Bush* (1867) 15 W.R. 532. *Martin* v. *Martin* (1919) P. 283.
(*l*) *Brown* v. *Brown* (1828) 2Hag. Ecc. 5; 162 E.R. 766.
(*m*) *Walton* v. *Walton* (1927) P. 162.
(*n*) *Barry* v. *Barry* (1901) P. 87.

the amount of the latter has been fixed and an instalment of it is already due and in arrears, but will not so restrain him in respect of the instalments of alimony to become due at a future date (*o*).

Proportion of the husband's income—

The amount of alimony *pendente lite* is within the discretion of the Court and each application is judged upon its merits but it can be taken that the general rule is to allot one-fifth of the joint incomes of the husband and wife, plus a further allowance for the children of the marriage. The wife's earning and her ability to maintain herself are taken into account especially where the parties are in poor circumstances (*p*). The Court should consider the nature of the suit, the charges made by the petitioner against the respondent and the latter's answer thereto and whether the suit is vexatious or there has been delay. If the proceedings are in order and *prima facie* there is nothing against the wife, she is entitled to be maintained with reference to her former state (*q*); and even though the conduct of the respondent (wife) before and after marriage has been reprehensible the husband is bound to allow her a sum which will enable her to live a respectable life (*r*). In the Ecclesiastical Court one-fifth of the husband's net income was usually allotted as alimony *pendente lite* and was made payable from the date of the return of the citation (*s*).

The husband is liable for necessaries supplied to his wife pending the suit and before the order for alimony, but he is liable only to a reasonable amount and, therefore, if

(*o*) *Fanshawe* v. *Fanshawe* (1927) P. 238.
(*p*) *Nicholls* v. *Nicholls* (1861) 30 L.J.P. 163.
(*q*) *Smith* v. *Smith* (1813) 2 Phil. 152; 161 E.R. 1105.
(*r*) *Leslie* v. *Leslie* (1911) P. 203; 104 L.T. 462.
(*s*) *Sykes* v. *Sykes* (1897) P. 306; 77 L.T. 150

the wife during that period incurred debts to an extravagant amount that circumstance cannot be taken into account as a ground for diminishing the amount of alimony (*t*).

In allotting alimony *pendente lite* the Court will not look minutely into the figures when the income to be dealt with is of large amount (*u*), nor will the Court take into consideration the circumstances that the husband has to maintain children of a former marriage (*v*), but the Court will take into account the wife's income derived from separate property as also the income of which she is in actual enjoyment though earned by herself (*w*).

The institution of vexatious suits by the wife against the husband is a ground for allotting alimony *pendente lite* at less than the usual rate (*x*), but not an averment of adultery in the husband's answer (*y*).

Nett Income—

The phrase "nett income" in the Act has no other meaning than that which it ordinarily bears. The maintenance of children by a husband or instalment of debts that have to be paid have no bearing on the question of what constitutes a man's nett income. Ordinarily, a man drawing a fixed salary and having no other means, that expression would be taken to mean the amount of his salary minus deductions on account of income tax, charges for pension fund and the like (*z*); deductions being also made

(*t*) *Sykes* v. *Sykes* (1897) P. 306; 77 L.T. 150.
(*u*) *Edwards* v. *Edwards* (1868) 17 L.T. 584.
(*v*) *Hill* v. *Hill* (1864) 33 L.J.P. & M. 104.
(*w*) *Goodheim* v. *Goodheim & Frankinson* (1861) 2 Sw. & Tr. 250; 4 L.T. 449; 164 E.R. 991.
(*x*) *Hakewell* v. *Hakewell* (1860) 30 L.J.P. & M. 254.
(*y*) *Crampton* v. *Crampton & Armstrong* (1863) 32 L.J.P. & M. 142.
(*z*) *R.* v. *R.* (1891) 14 Mad. 88 at p. 94.

from the husband's gross income in respect of income tax and super tax chargeable on the income raised during the current year (*a*). But no deduction is allowed for sums paid by way of premium to maintain a policy of insurance on his life unless the policy was under settlement for the benefit of his wife and children after his death (*b*), nor would the Court allow deductions claimed on account of outgoings occasioned by the husband's own extravagance and profligacy (*c*). But the husband is entitled to deduct from income derived from real property the expense of ordinary current repairs; not of extraordinary and permanent improvements which ought to be charged on the fund of the income (*d*).

Duration—

Alimony *pendente lite* is payable from the date of service of the citation and not from the date of its return (*e*).

Where the respondent is living with and is supported by the co-respondent after the filing of the petition and service of the citations, the Court may order that the alimony should run from the date at which respondent ceases to cohabit with co-respondent (*f*). Alimony *pendente lite* ceases when the wife's adultery is conclusively proved, *i e.*, upon a verdict finding her guilty of adultery (*g*), but the Court may in its discretion make an order for alimony to continue (*h*) and will not rescind an order on an

(*a*) *Sherwood* v. *Sherwood* (1929) P. 120.
(*b*) *Forster* v. *Forster & Thomas* (1862) 2 Sw. & Tr. 553; 164 E.R. 1111.
(*c*) *Mytton* v. *Mytton* (1831) 3 Hag. Ecc. 657; 162 E.R. 1298.
(*d*) *Hayward* v. *Hayward* (1858) 1 Sw. & Tr. 85; 164 E.R. 640.
(*e*) *Nicholson* v. *Nicholson & Ratcliffe* (1862) 31 L.J.P. & M. 165. *Kelly* v. *Kelly & Saunders* (1869) 3 Beng. L.R. Appx. 4. *Foden* v. *Foden* (1894) P. 307 at p. 314.
(*f*) *Holt* v. *Holt & Davies* (1868) L.R. 1 P. & D. 610; 19 L.T. 662.
(*g*) *Wells* v. *Wells & Hudson* (1864) 3 Sw. & Tr. 542; 10 L.T. 696; 164 E.R. 1386.
(*h*) *Dunn* v. *Dunn* (1888) 13 P.D. 91; 59 L.T. 385. In *re Hedderwick, Morton* v. *Brinsley* (1933) 1 Ch. 669 at pp. 676-677.

allegation of the husband that she was maintaining herself by prostitution (*i*).

"*..... shall continue ..... until the decree is made absolute, or is confirmed*".—

The order for alimony *pendente lite* is usually made before the trial and it was formerly held that if no order was made before the passing of a decree *nisi*, it could not be made at all (*j*). But this view has been held to be erroneous by the Court of Appeal on the ground that the legal status was not altered until the decree *nisi* was made absolute and the Court had power to grant to the wife alimony *pendente lite* even after the passing of the decree *nisi* (*k*), and the *lis* between the parties is terminated not by the decree absolute, but the lapse of time allowed for questioning the verdict (*l*).

In a suit for judicial separation alimony is payable to a wife on an appeal unless it shall appear to the Court that such an appeal is frivolous or vexatious or that she has been guilty of laches (*m*).

In a suit for nullity of marriage alimony is payable after the decree *nisi* and until the decree is made absolute (*n*); but where it has been proved beyond doubt that the marriage which was sought to be set aside was bigamous, the Court may at once exercise its discretion and relieve the petitioner from the obligation to pay alimony *pendente lite* between the decree *nisi* and decree absolute (*o*).

(*i*) *Patch* v. *Patch* (1869) 38 L.J.P. & M. 27; 19 L.T. 662.
(*j*) *Latham* v. *Latham & Gethin* (1861) 2 Sw. & Tr. 299; 164 E R. 1011.
(*k*) *Ellis* v. *Ellis* (1883) L.R. 8 P.D. 188. *Foden* v. *Foden* (1894) P. 307. *Thomas* v. *Thomas* (1896) 23 Cal. 913. *Bowman* v. *Bowman* (1909) 36 Cal. 1018 at p. 1020.
(*l*) *Madan* v. *Madan & De Thoren* (1868) 19 L.T. 612.
(*m*) *Jones* v. *Jones* (1872) L.R. 2 P. & D. 333; 26 L.T. 106.
(*n*) *S.* (falsely called *B.*) v. *B.* (1884) 9 P.D. 80.
(*o*) *Childers* v. *Childers* (otherwise *Burford*) (1899) 68 L.J.P. 90.

Intervention of King's Proctor—

When the King's Proctor intervenes on the ground of the wife's adultery and the decree ***nisi*** is rescinded, the wife is entitled to payment of arrears upto the date she was found guilty of adultery (*p*). It finally ceases when the time for moving for a new trial has elapsed.

No provision is to be found in the Code of Civil Procedure for asking for a new trial, but the wife may apply for a review of judgment under section 114 and Order 47, Rule 1 of the Code. On such an application being made she may apply for a continuance of alimony *pendente lite* pending the disposal of her application for review, and the Court has discretion, considering the circumstances of the case to continue the payment of alimony (*q*).

After husband's death—

The order for alimony *pendente lite* does not create a legal debt by the husband, but only a liability to pay (*r*) and the payment of arrears due under the order cannot be enforced after the husband's death against his estate (*s*).

Increase or reduction of amount—

Under the Supreme Court of Judicature (Consolidation) Act, 1935, the power conferred on the Court to vary periodical payments is restricted in operation to cases of restitution of conjugal rights and does not apply to orders for alimony *pendente lite*, unless the order was with liberty to apply (*t*). Under section 7 of the Indian Divorce Act, 1869, the English practice will apply to India.

(*p*) *Whitmore* v. *Whitmore* (1866) L.R. 1 P. & D. 96; 14 L.T.171.
(*q*) *Hirabai* v. *Dhunjibhoy* (1893) 17 Bom. 148.
(*r*) *Linton* v. *Linton* (1885) 15 Q.B.D. 239. In *re Hawkins, Exparte Hawkins* (1894) 1 Q.B. 25. See *Robins* v. *Robins* (1907) 2 K.B. 13 at pp. 16-17.
(*s*) *Re Hedderwick, Morton* v. *Brinsley* (1933) 1 Ch. 669 at pp. 674-677.
(*t*) *Abbot* v. *Abbot* (1931) P. 26; 144 L.T. 598. Affirmed in 47 T.L.R. 222, C.A.

37. The High Court may, if it think fit, on any decree absolute declaring a marriage to be dissolved, or on any decree of judicial separation obtained by the wife,

Power to order permanent alimony.

and the District Judge may, if he thinks fit, on the confirmation of any decree of his declaring a marriage to be dissolved, or on any decree of judicial separation obtained by the wife,

order that the husband shall, to the satisfaction of the Court, secure to the wife such gross sum of money or such annual sum of money for any term not exceeding her own life, as, having regard to her fortune (if any), to the ability of the husband, and to the conduct of the parties, it thinks reasonable; and for that purpose may cause a proper instrument to be executed by all necessary parties.

In every such case the Court may make an order on the husband for payment to the wife of such monthly or weekly sums for her maintenance and support as the Court may think reasonable:

Power to order monthly or weekly payments.

Provided that if the husband afterwards from any cause becomes unable to make such payments, it shall be lawful for the Court to discharge or modify the order, or temporarily to suspend the same as to the whole or any part of the money so ordered to be paid, and again to revive the same order wholly or in part, as to the Court seems fit.

PERMANENT ALIMONY.

Cf: section 32 of the Matrimonial Causes Act, 1857. Section 190 of the Supreme Court of Judicature (Consolidation) Act, 1925.

Rules 57 to 64 of the Matrimonial Causes Rules, 1924.

The difference between permanent alimony and permanent maintenance is more technical than substantial; permanent maintenance applying to the allowance after divorce, and alimony after judicial separation.

In a case of judicial separation the award is made for the joint lives of the husband and wife, or until a decree of divorce is pronounced. The means of ascertaining the amount to be awarded is the same as in alimony *pendente lite*, but in this instance the proportion is usually one-third instead of one-fifth of the joint incomes. Sometimes less than a third has been given and as much as a half has been awarded. But the Court is not at liberty to allot more than one moiety of the joint incomes to the wife although she may have brought more than one moiety of the property into settlement (*u*).

There is no fixed rule that the Court will allow to the wife one-third of the husband's disposable income. It is no more than a rough working rule and does not impose an absolute limit. Further, in estimating the amount of the allowance the Court must not focus its attention only on the disposable income of the husband in the year preceding the making of the order, but must have regard to his earnings in previous years and to his probable earnings in the future. In making an order for permanent alimony the Court is given a wide discretion with which the Court of Appeal will not readily interfere unless it is satisfied that the Court below has proceeded on some wrong principle (*v*).

"*On any decree absolute for dissolution*"—

See Rules 65-70 of the Matrimonial Causes Rules, 1924.

The Legislature did not intend that a wife entitled to a dissolution of marriage should purchase it at the price of

(*u*) *Haigh* v. *Haigh* (1869) L.R. 1 P. & D. 709 at p. 710; 20 L.T. 281.
(*v*) *Sherwood* v. *Sherwood* (1929) P. 120.

being left destitute and where the circumstances of the husband permit, the Court will direct a maintenance to be secured to the woman (*w*).

To guilty wife—

There is no rule of practice that a wife against whom a decree *nisi* for dissolution of marriage is pronounced must show special circumstances to entitle her to an order that the decree shall not be made absolute except upon the condition of the husband securing a provision for her support (*x*). The Court has an absolute discretion vested in it by the section to be exercised according to the circumstances of each case. Thus, it will order the husband to secure a provision for his guilty wife, even though his own conduct has been unimpeachable, if the wife is proved to be entirely without means of support and unable through ill health to earn her own living (*y*). But where the misconduct of the wife is very great and no blame is attributable to the husband and where she has independent means the Court may refuse to make an order for her maintenance (*z*). The Court, however, has the power to order the husband to settle the amount of damages awarded to him, for the wife's benefit (*a*).

Compassionate allowance—

After the passing of an exparte decree *nisi* in a suit in which the wife is the respondent and who has not appeared she cannot apply for a compassionate allowance unless she

(*w*) *Fisher* v. *Fisher* (1861) 2 Sw. & Tr. 410 at p. 413; 5 L.T. 364; 164 E.R. 1055 See *Horniman* v. *Horniman* (1933) P. 95.
(*x*) *Robertson* v. *Robertson* (1883) 8 P.D. 94.
(*y*) *Ashcroft* v. *Ashcroft & Roberts* (1902) P. 270; 87 L T. 229. *Scott* v. *Scott* (1921) P. 107. *Kelly* v. *Kelly & Saunders* (1870) 5 Beng. L.R. 71. *McGowan* v. *McGowan* (1916) 38 All. 688.
(*z*) *Turner* v. *Turner & Wedgewood* (1863) New Rep. 405.
(*a*) *Latham* v. *Latham & Gethin* (1861) 30 L.J.P. & M. 43.

asks for the leave of the Court to appear and then by further leave of the Court files her petition for maintenance (b). But the Court will not make any order against the husband if the wife is living with the co-respondent and is supported by him (c).

Deed of Separation—

When in a deed of separation a wife covenants not to take proceedings to compel her husband to allow her maintenance beyond a stipulated amount and thereafter the wife obtains a decree for dissolution of the marriage on the ground of the husband's adultery she no longer remains bound by the covenant but is free to take proceedings for permanent maintenance (*d*). She can, however, be restrained by the order from taking any proceedings to enforce the allowance under the separation deed in addition to permanent maintenance (*e*). But where the marriage is dissolved on the ground of the wife's adultery, the Court has the power of setting aside the deed of separation, and may grant the wife an allowance considerably less than the amount stipulated in the deed (*f*).

An agreement entered into between the parties contained the following passage:—" This allowance to be paid in any event whether they remained married or whether the marriage should hereafter be dissolved." Subsequently the marriage was dissolved on the grounds of the husband's adultery and cruelty and the Court held that the wife was not precluded by the existence of the above agreement from filling her petition for permanent maintenance in the usual

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(*b*) *Ferguson* v. *Ferguson, Jesson & Gardfield* (1931) 48 T.L.R. 86.
(*c*) *McGowan* v. *McGowan* (1916) 38 All. 688.
(*d*) *Hughes* v. *Hughes* (1928) 44 T. L. R. 463. *Hyman* v. *Hyman* (1929) P. 1, *C.A.*; (1929) A.C. 601.
(*e*) *Reid* v. *Reid* (1925) P. 1; 42 T.L.R. 30.
(*f*) *Clifford* v. *Clifford* (1884) 9 P.D. 76. *Saunders* v. *Saunders & Beck* (1893) 69 L.T. 498.

way (*g*), nor is the wife prevented from applying for an increased amount after a divorce notwithstanding the existence of a deed in consideration of abandonment of former proceedings (*h*).

Quantum—

Although the considerations which applied in the Ecclesiastical Courts to awards of alimony must have due weight in determining the proper award of maintenance to a wife after a decree of divorce, the assumption of a fixed arithmetical rule and an indispensable process of applying that rule is erroneous and disregards the duty imposed on the Court by the provisions of the section under which the Court is to award by way of maintenance "such sum as having regard to the wife's fortune, if any, to the ability of the husband and to the conduct of the parties, the Court may deem reasonable". Where the husband's whole income has been expended on the requirements of the matrimonial home, a third of his means may well be required for the wife's maintenance; but where beyond everything called for by such requirements, the husband possesses an ample fortune, the amount of his income affords no definite guidance as to the sum required to supply his sometime wife with the necessaries, comforts and advantages incidental to her station in life (*i*).

In awarding maintenance to the wife the Court has to ascertain what are the joint incomes of the husband and the wife, how they are to be divided in providing for the woman, something which the husband cannot deprive her of and on the other hand not unduly beggaring the husband (*j*). The wife should be put in the same position as

(*g*) *Bishop* v. *Bishop*, *Judkins* v. *Judkins* (1897) P. 138; 76 L.T. 409.
(*h*) *Wilkinson* v. *Wilkinson* (1893) 69 L.T. 459.
(*i*) *Gilby* v. *Gilby* (1927) P. 197. *Stibbs* v. *Stibbs* (1931) P. 15.
(*j*) *Naish* v. *Naish* (1916) 32 T.L.R. 487, *C.A.*

she would have been in had she remained his lawful wife (*k*). So, where the husband's sole property consisted in his life interest in certain houses belonging to the wife, the Court allotted the wife two-thirds of the annual income arising from the houses reserving the wife's right to the property (*l*).

"*On any decree of judicial separation*"—

The Court is bound by the practice of the Ecclesiastical Courts in allotting permanent alimony after a decree of judicial separation, but the Court is not at liberty to allot more than one moiety of the joint incomes to the wife although she may have brought more than one moiety of the property into settlement (*m*).

The right of the wife to be maintained by the husband is founded on her common law right to pledge her husband's credit for necessaries according to his means and does not depend wholly on the statutes (*n*).

Although the Court by a decree of judicial separation gives a legal warranty to a wife and husband to live apart, still they remain husband and wife and that while they remain so, the obligation also remains on the husband of contributing to the support of the wife (*o*).

An order for alimony *pendente lite* in favour of the wife is not a condition precedent to her applying for permanent alimony (*p*).

(*k*) *Hulton* v. *Hulton* (1917) 33 T.L.R. 137.
(*l*) *George* v. *George* (1869) 38 L.J.P. & M. 34; 20 L.T. 262.
(*m*) *Haigh* v. *Haigh* (1869) L.R. 1 P. & D. 709; 20 L.T. 281.
(*n*) *Dean* v. *Dean* (1923) P. 172; 129 L.T. 704.
(*o*) *Forth* v. *Forth* (1867) 36 L.J. P. & M. 122; 16 L.T. 874.
(*p*) *Pastre* v. *Pastre* (1930) P. 80; 142 L. T. 490. *Covell* v. *Covell* (1872) L.R. 2 P. & D. 411; 27 L.T. 324.

"Conduct of the parties"—

The words "conduct of the parties" refer to the conduct both before and after the marriage (*q*).

Guilty wife—

The Ecclessiastical Court had power to grant permanent alimony to a wife who was divorced *a mensâ et toro* on account of her misconduct and that power was not taken away by the Matrimonial Causes Act of 1857. The Court has, therefore, jurisdiction to grant permanent alimony to a wife against whom a decree of judicial separation has been made on account of her misconduct (*r*), especially when she has no means and in order to enable her to live a respectable life (*s*).

What proportion of husband's income—

After a decree for judicial separation when the husband's delinquency is established and when the wife is the injured party separated from the comfort of matrimonial society and from the society of her family, not by the act of Providence but by the misconduct of her husband she must be liberally supported. The law has laid down no exact proportion; it gives sometimes a third, sometimes a moiety, according to circumstances (*t*). The normal rule of fixing the amount of permanent alimony at one-third of the joint incomes of the spouses free of tax is not a hard and fast one. The allocation of alimony is a matter for the discretion of the Court which can take exceptional circumstances into consideration. The fact that the husband's

(*q*) *Restall* v. *Restall* (1930) P. 189, *C.A.* *Mould* v. *Mould* (1933) 49 T.L.R. 242.
(*r*) *Prichard* v. *Prichard* (1864) 3 Sw. & Tr. 523; 10 L.T. 789; 164 E.R. 1378. *Goodden* v. *Goodden* (1892) P. 1; 65 L.T. 542.
(*s*) *Leslie* v. *Leslie* (1911) P. 203; 104 L.T. 462.
(*t*) *Otway* v. *Otway* (1813) 2 Phil. 109; 161 E.R. 1092.

income is a large one and the fact that the wife during part of married life lived apart from the husband and acquiesced in receiving a smaller income than the husband could have afforded, are not grounds for departing from the general rule, but the fact that the husband's income is fluctuating and to some extent precarious is an exceptional circumstance which the Court can take into consideration and is a ground for reducing the proportion (*u*). Similarly, the Court will take into consideration the circumstance that the husband is obliged in order to earn his income, to live in a more expensive place than the wife and when that is the case will not allow her the usual proportion of such income (*v*). When the wife has custody of minor children the Court will allot her an extra allowance for the children's maintenance and education (*w*). Where the only income of the husband is derived from independent property and when the husband is guilty of adultery committed with a woman living with him as his mistress and has turned his wife out of the house the Court would be justified in awarding the wife a moiety of the husband's income (*x*).

In estimating the amount of alimony to be allowed to a wife the husband is entitled to a deduction from the amount payable by him the amount of pension from the Crown granted to the wife, but not legacies left by will since the marriage to the wife for her separate use, nor any salary received by her (*y*).

(*u*) *Dean* v. *Dean* (1923) P. 172; 129 L.T. 704.

(*v*) *Louis* v. *Louis* (1866) L.R. 1 P. & D. 230; 14 L.T. 770.

(*w*) *Whieldon* v. *Whieldon* (1861) 2 Sw. & Tr. 388; 164 E. R. 1046. *Shaftesbury Union* v. *Brockway* (1913) 1 K.B. 159.

(*x*) *Avila* v. *Avila* (1862) 31 L.J.P. 176.

(*y*) *Westmeath* (*Marquis*) v. *Westmeath* (*Marchioness*) (1834) 3 Knapp 42; 12 E.R. 563, H.L.

"The husband shall.....secure to the wife gross sum of money or annual sum of money".

The Court may order the husband to secure to the wife either a gross sum or an annual payment for any term not exceeding her life. So, where a sum of money stands in a Savings Bank in the joint names of the husband and wife, the Court may order the husband to secure it to the wife (*z*). And when the husband is out of the jurisdiction of the Court, the only power which the Court has in case of dissolution of marriage is to order the husband to secure a sum of money to her (*a*). Though the Court has power to order the husband to *secure* for the benefit of the wife a gross or annual sum, it has no power to order him to *pay* the wife a gross or annual sum (*b*) and the power to secure a gross or annual sum for the benefit of the wife could be exercised only once and could not be varied (*c*).

The Court has no power on a decree of dissolution to reserve liberty to apply for security in making an order for maintenance under section 190 (1) and (2) of the Supreme Court of Judicature (Consolidation) Act, 1925. The insertion of such a provision would permit the conversion at a subsequent date of an order to pay maintenance into an order to secure it and that would be *ultra vires* (*d*).

Lump Sum Payment—

The Court has no power to order a lump sum to be paid over to the wife absolutely for her permanent maintenance or to order such lump sum to be secured to her issue by settlement for a longer period than her own life (*e*)

(*z*) *Rowbotham* v. *Rowbotham* (1858) 1 Sw. & Tr. 190; 164 E.R. 687.
(*a*) *Ibid.*
(*b*) *Medley* v. *Medley* (1882) 7 P.D. 122; 47 L.T. 556.
(*c*) *Rawlins* v. *Rawlins* (1865) 1 Sw. & Tr. 158; 164 E.R. 1477.
(*d*) *Shearn* v. *Shearn* (1931) P. 1; 143 L.T. 772.
(*e*) *Twentyman* v. *Twentyman* (1903) P. 82; 88 L.T. 571.

unless both parties consent to the payment of a lump sum agreed upon (*f*); no further proceedings to be taken without the leave of the Court (*g*). The Bombay High Court has, however, held that under section 37 of the Indian Divorce Act the Court has power to make the order for the payment of a lump sum for permanent maintenance of the wife. "The plain meaning of the words is that the gross sum of money should be paid absolutely to the wife and that the annual sum of money should be limited for the period of her life" (*h*).

"*Court may make an order for payment of monthly or weekly sums*"—

The Court may order sums of money to be paid weekly or monthly as permanent maintenance and may from time to time modify the order (*i*), but the Court would not make an order for a weekly or monthly payment except where the husband has no property on which the requisite amount can be secured (*j*). The Bombay High Court has, however, held that the Court has power to order the husband to pay to the wife a weekly or monthly sum for her maintenance and support and this latter order may be either in addition to or in substitution of the order before mentioned. The words "for any term not exceeding her life" qualify the words 'annual' and not 'gross sum' (*k*).

"*Dum Sola et Casta*" *Clause*—

There is no rule that in an order granting permanent maintenance to a divorced wife the *dum sola et casta* clause

(*f*) *Jenkins* v. *Jenkins* (1930) 99 L.J.P. 63; 142 L.T. 656.
(*g*) *Olding* v. *Olding* (1930) 99 L.J.P. 128; 143 L.T. 310.
(*h*) *Taylor* v. *Bleach* (1914) 39 Bom. 182; 17 Bom. L.R. 56.
(*i*) *Jardine* v. *Jardine* (1881) 6 P. D. 213. *Hanbury* v. *Hanbury* (1894) P. 102.
(*j*) *Corbett* v. *Corbett* (1888) 13 P.D. 136; 59 L.T. 183.
(*k*) *Taylor* v. *Bleach*, supra.

ought to be inserted unless there is some reason to the contrary, nor that it ought to be omitted unless there is some reason for inserting it. The Court must in each case determine what is reasonable having regard to the conduct of the parties, their position in life, their ages and their respective means, the amount of the provision made, the existence or non-existence of children and who is to have the custody of them and any other circumstances which may be important in any particular case (*l*). Where the woman is young and was a person of doubtful character before marriage the clause is properly inserted (*m*). The object of the Court in ordering a provision for a guilty wife is that she should be protected from temptation and lead a respectable life, at the same time, a husband should not be called upon to support a wife who is leading an immoral life and on this ground, as well as for the protection of the wife, the provision for her should be limited *dum casta.* The wife should know and should be made to feel that her livelihood depends upon her leading a chaste life in the future. The *dum sola* clause is inserted so as not to call upon the husband to contribute to the support of his divorced wife if she should become the wife of another man (*n*).

Where the husband and the wife had lived apart for many years and the husband ultimately obtained a decree for dissolution on the ground of the wife's adultery, the Court refused to insert the *dum sola et casta* clause into the order for maintenance (*o*). Regard must be had to the wife's past life in determining whether it is right and proper that that clause should be inserted (*p*). The Court has

(*l*) *Wood* v. *Wood* (1891) P. 272; 64 L.T. 586. *Kettlewell* v. *Kettlewell* (1898) P. 138. *Hall* v. *Hall* (1914) 111 L.T. 403.
(*m*) *Medley* v. *Medley* (1882) 7 P.D. 122; 47 L.T. 556.
(*n*) *Squire* v. *Squire & O' Callaghan* (1905) P. 4; 92 L.T. 472. *Woodcock* v. *Woodcock & Codesido* (1914) 111 L.T. 924, C.A.
(*o*) *Lander* v. *Lander* (1891) P. 161; 64 L.T. 120.
(*p*) *Ollier* v. *Ollier* (1914) P. 240; 111 L.T. 697.

an absolute discretion according to the circumstances of each case either to order the payment during the whole of her life or so long as the wife remains unmarried (*q*), and that discretion cannot be fettered by an agreement between husband and wife in that behalf (*r*).

Although there is no provision in the Indian Divorce Act to award alimony in nullity suits, under section 7 the Court has power to do so on the principles and rules of the English Court. The order for permanent maintenance may be made containing a clause *dum sola vixerit* without the addition of *et casta*(*s*), and the amount may be reduced on remarriage (*t*).

Sometimes an order for alimony in a suit for judicial separation contains a provision for the amount to be payable only while the wife leads a chaste life, but if that stipulation is omitted and the husband afterwards alleges that the wife has been guilty of adultery the Court cannot vary the order (*u*). Similarly, the maintenance allowance does not cease on the wife's re-marriage if the clause is not inserted in the order (*v*). It is now usual in orders for permanent alimony to give the parties 'liberty to apply' or to say, "until further order."

Charge on husband's estate—

In granting alimony to the wife, the Court should be very reluctant, even supposing it has the power, to tie up the property of the husband and so convert alimony into an

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(*q*) *Lister* v. *Lister* (1889) 15 P.D. 4; 62 L.T. 90.
(*r*) *Woodcock* v. *Woodcock & Codesido*, (1914) 111 L.T. 924, C.A.
(*s*) *Smith* v. *Smith* (1898) P. 29; 78 L.T. 28. See 79 L.T. 124.
(*t*) *Marigold* (otherwise *Evans*) v. *Marigold* (1911) 55 Sol. Jour. 387. *Sharp* (otherwise *Morgan*) v. *Sharp* (1909) P. 20; 99 L.T. 884.
(*u*) *Collins* v. *Collins* (1910) 103 L.T. 80; 54 Sol. Jour. 682.
(*v*) *Dufty* v. *Dufty* (1932) 147 L.T. 18; 76 Sol. Jour. 397. *Natborny* v. *Natborny* (1932) 147 L.T. 252. 76 Sol. Jour. 416.

absolute interest in and charge upon his eatate (*w*). But where an instrument is executed charging the husband's immoveable property with the payment of a monthly sum for permanent alimony during the wife's life, the wife is entitled on the death of the husband, in addition to the monthly payment, to a distributive share of his estate (*x*).

Alimony neither alienable nor attachable—

Sums of money to be paid by a husband for the maintenance of his divorced wife are a purely personal allowance and so long as the order subsists can neither be alienated nor released (*y*), and although the amount of alimony can be said to be property recovered or preserved by the exertions of the wife's solicitors and liable to a charging order under the Solicitor's Act, the Court would refuse in the exercise of its discretion to make the order on the ground that it could not be presumed that the wife had contracted with her solicitors to bind her separate property for costs (*z*). Nor can alimony be attached by the wife's creditors for non-payment of her debts (*a*).

Husband's Insolvency—

The husband's liability for the payment of alimony to the wife continues during insolvency and even after discharge (*b*).

No order for separate maintenance—

The Court has no power to give a wife separate maintenance. It is always as incidental to some other matter

(*w*) *Fowle* v. *Fowle* (1879) 4 Cal. 260.
(*x*) *Motibai* v. *Motibai* (1900) 16 Bom. 465; 2 Bom. L.R. 602.
(*y*) *Watkins* v. *Watkins* (1896) P. 222; 74 L. T. 636. *Paquine* v. *Paquine* (1909) 1 K.B. 688.
(*z*) *Harrison* v. *Harrison* (1888) 13 P.D. 180; 60 L.T. 39.
(*a*) *Walls* v. *Legge* (1923) 2 K.B. 240.
(*b*) *Kerr* v. *Kerr* (1897) 2 Q.B. 439, *Linton* v. *Linton* (1885) 15 Q.B.D. 239, C.A. In re *Hawkins*, Exparte *Hawkins* (1894) 1 Q.B. 25, C.A.

that she becomes entitled to a separate provision (*c*), nor is it competent to the Court dismissing the husband's petition for dissolution of marriage to award maintenance to the wife though the wife might have filed an application for divorce or judicial separation on the husband's petition under section 15 of the Act, still in the absence of a decree for dissolution or judicial separation, no order for alimony can be made under the Act (*d*).

" The Court may discharge or modify the order or suspend the same "

Variation of the Order—

Before the passing of the Matrimonial Causes Act, 1866, the Court had no power to vary an order for permanent alimony or maintenance (*e*), but it was later conferred on the Court by statute and the Court had discretion to exercise such power (*f*). The settlement referred to in section 32 of the Matrimonial Causes Act, 1857 (section 37 of the Indian Divorce Act, 1869) is final, irrevocable and unalterable though it is made in the exercise of a wide discertion (*g*).

Under section 32 of the Matrimonial Causes Act, 1857, there was power to decree against the husband a pecuniary settlement in favour of the wife to be secured upon his real or personal possessions; under the Matrimonial Causes Act, 1866, power was given for monthly or weekly payments subject to suspension or diminution if the husband became unable to make the payments, and under the

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(*c*) *Ball* v. *Montgommery* (1793) 2 Ves. 191 at p. 195.
(*d*) *Devasrayam* v. *Devamony* (1923) 46 Mad. 133. *Gulbai* v. *Behramsha* (1914) 16 Bom. L.R. 211.
(*e*) *Rawlins* v. *Rawlins* (1866) 4 Sw. & Tr. 158; 164 E.R. 1477. *Motibai* v. *Motibai* (1900) 24 Bom. 465.
(*f*) *Turk* v. *Turk, Dufty* v. *Dufty* (1931) P. 116; 47 T.L.R. 445.
(*g*) *Ibid* at page 123.

Act of 1907 an additional power was introduced to increase the *quantum* if the husband's means should increase.

The Ecclesiastical Courts had and exercised power to order variations in the amount of alimony from time to time either by way of increase or reduction (*h*).

Reduction of Quantum—

In modifying an order for maintenance by reducing the *quantum* the Court ought to have regard to all the circumstances of the case, including both the reduction in the husband's income and the increase in that of the wife (*i*), and the Court has the power to modify the original order although it was made by consent (*j*).

When the marriage is dissolved the future relations of parties as to money matters are then to be finally determined subject to the Court's power to vary the order when the income of the husband is a fluctuating one (*k*). The order which the Court may make on the dissolution of the marriage for the wife's maintenance and the jurisdiction to review that order are matters of discretion conferred on the Court by statute and not standardised by the rules applying in cases of judicial separation. The jurisdiction is embodied in section 190 (1) and (2) of the Supreme Court of Judicature (Consolidation) Act, 1925 (*l*).

The order for reduction of *quantum* cannot be made merely on the re-marriage of the wife, but it must be shown that there is substantial improvement in her fortune and that the husband's income has diminished (*m*).

(*h*) *De Blaquiere* v. *De Blaquiere* (1830) 3 Hag. Ec. 322 at p. 329; 162 E.R. 117.
(*i*) *Hall* v. *Hall* (1915) P. 105.
(*j*) *Ibid.* *Smith* v. *Smith* (1931) 41 T.L.R. 368.
(*k*) *Stephen* v. *Stephen* (1930) P. 269 at p. 271.
(*l*) *Turk* v. *Turk, Dufty* v. *Dufty* (1931) P. 116 at p. 118.
(*m*) *Ibid.*

Increase in Quantum—

Upon the true construction of section 37 of the Act the power of the Court is not confined to the making once and for all one single order for the payment of a weekly or monthly sum by way of permanent alimony to a wife (*n*), and the Court has power to make orders for the payment of larger sums by the husband if the circumstances are such as to justify an increase in the amount of the alimony (*o*).

In a suit for nullity of marriage—

The provisions of this section give power to the Court to make an order for alimony in suits for dissolution of marriage or of judicial separation. The Court has no power to order the husband to provide alimony for the wife in suits for nullity (*p*). The English Divorce Court has the power of making an order (*q*).

Court may direct payment of alimony to wife or to her trustee.

38. In all cases in which the Court makes any decree or order for alimony, it may direct the same to be paid either to the wife herself, or to any trustee on her behalf to be approved by the Court, and may impose any terms or restrictions which to the Court seem expedient, and may from time to time appoint a new trustee, if it appears to the Court expedient so to do.

(*n*) *Iswarayya* v. *Iswarayya* (1931) 33 Bom. L.R. 1402 at pp. 1405-1406, P.C. 58 I.A. 350.

(*o*) *Ibid* at p. 1407 and at p. 1410. See Matrimonial Causes Act, 1907.

(*p*) *Turner* v. *Turner* (1921) 48 Cal. 636 at p. 642.

(*q*) See *K.* v. *K.* (otherwise *R.*) (1910) P. 140. (Respondent a lunatic). *Gallan* v. *Gallan* (otherwise *Goodwin*) (1913) P. 160. (Respondent's incapacity). *Ramsay* v. *Ramsay* (otherwise *Beer*) (1913) 108 L.T. 382 (Marriage void *ab initio*).

"Alimony to be paid either to the wife or to any trustee on her behalf"—

Cf: section 24 of the Matrimonial Causes Act, 1857.

Section 1 of the Matrimonial Causes Act, 1907.

Section 190 (5) of the Supreme Court of Judicature (Consolidation) Act, 1925.

When the alimony is made payable to the wife the husband is not bound to pay it to her attorney (*r*), but the order may be varied by making it payable either to her or to her attorney (*s*). The Court does not make an order for the payment of alimony *pendente lite* to the wife's attorneys without a written application from her (*t*) and when the alimony is paid to the wife's attorneys it is only for the sake of convenience and the attorneys are not entitled either to charge for receiving it (*u*), or to claim any *lien* for costs on the moneys so received (*v*).

On the death of the wife pending the hearing of the suit but after an order for payment of alimony *pendente lite*, the executors of the wife cannot be permitted to be joined as parties to the suit to enable them to enforce the order (*w*).

X—Settlements.

Power to order settlement of wife's property for benefit of husband and children.

39. Whenever the Court pronounces a decree of dissolution of marriage or judicial separation for adultery of the wife, if it is made to appear to the Court that the wife is entitled to any property, the Court may, if it think fit, order such settlement as it thinks reasonable to be made of such property

(*r*) *Parr* v. *Parr & White* (1863) 32 L.J.P. 90; 11 W.R. 257.
(*s*) *Kelly* v. *Kelly* (1863) 4 Sw. & Tr. 227; 164 E.R. 1503.
(*t*) *Brown* v. *Brown* (1865) 4 Sw. & Tr. 144; 164 E.R. 1471.
(*u*) *Margetson* v. *Margetson* (1865) 35 L.J.P. 80.
(*v*) *Leete* v. *Leete* (1879) 48 L.J.P. 61; 40 L.T. 788.
(*w*) *Schenck* v. *Schenck* (1908) 24 T.L.R. 739.

or any part thereof, for the benefit of the husband, or of the children of the marriage, or of both.

Any instrument executed pursuant to any order of the Court at the time of or after the pronouncing of a decree of dissolution of marriage or judicial separation, shall be deemed valid notwithstanding the existence of the disability of coverture at the time of the execution thereof.

Settlement of damages.

The Court may direct that the whole or any part of the damages recovered under section thirty-four shall be settled for the benefit of the children of the marriage, or as a provision for the maintenance of the wife.

Cf: section 45 of the Matrimonial Causes Act, 1857 and section 6 of the Act of 1860.

Sec. 191 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925.

Rules 71 and 72 of the Matrimonial Causes Rules, 1924.

The provisions of this section are applicable only when the wife is found guilty of adultery (*x*).

The application for the settlement of the wife's property is ordinarily to be made by the petitioner after the final decree (*y*), but if the petitioner dies before the decree *nisi* has been made absolute, or confirmed by the High Court as the case may be, the suit abates and the guardian of the children cannot apply to have the decree made absolute or confirmed so as to enable him to subsequently apply for an order under this section (*z*).

(*x*) *Bellingay* v. *Bellingay* (1866) L.R. 1 P. & D. 168.
(*y*) *Ling* v. *Ling & Croker* (1865) 4 Sw. & Tr. 99; 164 E.R. 1453.
(*z*) *Grant* v. *Grant Bowles & Pattison* (1862) 31 L.J.P. & M. 174 at p. 176.

"Wife is entitled to any property"—

Where the wife is entitled to property over which she has absolute power of disposition, the Court will compel her to resettle the property (*a*), but if the wife's interest is one which she is restrained from anticipating the Court has no power to make an order which will interfere with that restraint on anticipation (*b*).

In ordering a settlement the Court should have regard to the pecuniary position which the husband and children of the marriage would have been in if the marriage had not been dissolved through the wife's misconduct and should adjust as far as possible any alteration made in their pecuniary position by reason of the change in circumstances consequent upon the dissolution of the marriage(*c*). So, where on a dissolution of marriage on account of the wife's adultery, the husband petitioned that certain jewellery belonging to her should be sold and a settlement made of the proceeds giving the wife a life interest in the income arising from the investment of the proceeds, with remainder to himself, the Court refused to order the settlement as the husband's income was substantial and the wiefe's income was only £ 72 a year (*d*). The Court should also take into consideration the costs which the wife would have to incur in defending the suit and for which the husband would not be strictly liable (*e*); and may refuse to make the allowance to the husband variable according to the

(*a*) *Swift* v. *Swift* (1891) 15 P.D. 118. See *Public Trustee* v. *Wolf* (1928) A.C. 544.

(*b*) *Michell* v. *Michell* (1891) P. 208, C.A. *Loraine* v. *Loraine & Murphy* (1912) P. 222, C.A. See *Morgan* v. *Morgan & Kirby* (1923) P. 1.

(*c*) *Lorriman* v. *Lorriman & Clair* (1908) P. 282.

(*d*) *Schofield* v. *Schofield & Cowper* (1891) 64 L.T. 838.

(*e*) *Bacon* v. *Bacon & Bacon* (1860) 2 Sw. & Tr. 86; 2 L.T. 438; 164 E.R. 925.

possible fluctuations in the value of the wife's property, or to limit it till such time as he remained unmarried (*f*).

After a decree of judicial separation on the ground of the wife's adultery, the Court ordered the trustees of the wife who was entitled to an interest of £ 4,000 with a power of appointment amongst her children, to pay over a moiety of the income to the trustees named by the husband to be applied by them for the maintenance and education of the children of the marriage (*g*). By an ante-nuptial settlement A. settled certain immoveable property in Calcutta to which he was absolutely entitled upon himself for life and then upon his intended wife for life and then upon the children of the marriage. On the dissolution of the marriage on the ground of the wife's adultery the Court declared the settlement void as regards the wife and directed the trustees to reconvey the property to A. for an absolute estate (*h*). Moneys secured to a wife under a policy of insurance payable to her at the time of her husband's death is "property in reversion" and the Court has power to order the wife to settle her interest thereunder for the benefit of the husband and children of the marriage (*i*). So also, the separate income of the wife payable to her under the trusts of a marriage settlement may be settled as permanent maintenance on the husband if the wife refuses to obey a decree for the restitution of conjugal rights (*j*).

Property of party domiciled in a foreign country—

The Court has no authority over the property of a person domiciled in a foreign country. The jurisdiction

(*f*) *Midwinter* v. *Midwinter* (1893) P. 93.
(*g*) *Seatel* v. *Seatel* (1860) 4 Sw. & Tr. 230; 164 E.R. 1504.
(*h*) *Wood* v. *Wood* (1875) 14 Beng. L.R. Appx. 6.
(*i*) *Stedall* v. *Stedall* (1902) 86 L.T. 124; 18 T.L.R. 254.
(*j*) *Swift* v. *Swift* (1890) 15 P.D. 118; 62 L.T. 669.

to order the settlement of property is *prima facie* the property of a woman domiciled in England. The jurisdiction is only invoked with regard to property when the order will be effective and when it will not infringe the authority of a foreign tribunal (*k*).

"*The whole or any part of damages recovered shall be settled for the benefit of the children of the marriage*"—

Cf: section 34 of the Act.

" ... the Court may direct in what manner such damages shall be paid or applied."

Cf: section 189 (3) of the Supreme Court of Judicature (Consolidation) Act, 1925.

The Court has the power to permit the petitioner to deduct his costs which he is unable to recover from the co-respondent from the amount of damages which the co-respondent is ordered to pay the petitioner and the balance may be settled upon the issue of the marriage (*l*), or even the whole amount of damages may be ordered to be settled upon the wife or children (*m*). But where there is no issue of the marriage and the wife is living with the co-respondent the Court may order the payment to the petitioner of the damages awarded against the co-respondent as part of the decree *nisi* instead of postponing it until the decree absolute (*n*).

(*k*) *Tallack* v. *Tallack & Broekma* (1927) P. 211 at pp. 221-223.
(*l*) *Taylor* v. *Taylor & Wolters* (1870) 39 L.J.P. & M. 23; 22 L.T. 140; *Spedding* v. *Spedding & Lander* (1862) 32 L.J. P. & M. 31.
(*m*) *Bent* v. *Bent & Footman* (1861) 2 Sw. & Tr. 391; 5 L.T. 139; 164 E.R. 1047.
(*n*) *Evans* v. *Evans & Bird* (1865) L.R. 1 P. & D. 36.

The damages are not for the husband's pocket (*o*); the interest of the children of the marriage are to be first considered, nor are those of the respondent wife to be ignored (*p*), and the Court has discretion to direct the investment of the amount for the benefit of the guilty wife where alimony is refused (*q*).

The Court may also direct all the petitioner's interest in the damages to be assigned by him to a trustee for the use of the child of the marriage and in case of the child's death under twenty-one and unmarried for the use of the petitioner (*r*). A sum of £5,000 damages was apportioned by the Court as follows:—£ 1,500 was settled on the youngest child of the marriage aged 5 years; £ 1,500 was given to the petitioner and also his costs of the suit in addition to those which had been taxed against co-respondent; the balance was invested in the purchase of a life-annuity for respondent to be paid to her as long as she lived chastely and did not become the wife of the co-respondent and in the event of her breaking either of those conditions to be paid to petitioner (*s*).

40. The High Court, after a decree absolute for dissolution of marriage, or a decree of nullity of marriage,

and the District Court, after its decree for dissolution of marriage or of nullity of marriage has been confirmed,

may inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose

(*o*) *Keats* v. *Keats & Montezuma* (1859) 28 L.J.P. & M. 57 at p. 61; 164 E.R. 754.
(*p*) *Forster* v. *Forster & Berridge* (1863) 34 L.J.P. & M. 88.
(*q*) *Latham* v. *Latham & Gethin* (1861) L.J.P. & M. 43.
(*r*) *Clark* v. *Clark & Bouck* (1861) 2 Sw. & Tr. 520; 6 L.T. 659; 164 E.R. 1098.
(*s*) *Meyern* v. *Meyern & Myers* (1876) 2 P.D. 254; 35 L.T. 909.

marriage is the subject of the decree, and may make such orders, with reference to the application of the whole or a portion of the property settled, whether for the benefit of the husband or the wife, or of the children (if any) of the marriage, or of both children and parents, as to the Court seems fit:

Provided that the Court shall not make any order for the benefit of the parents or either of them at the expense of the children.

Cf: section 5 of Matrimonial Causes Act, 1857, and section 3 of the Act of 1878.

Section 192 of the Supreme Court of Judicature (Consolidation) Act, 1925.

Rules 71 and 72 of the Matrimonial Causes Rules, 1924.

The petition for dissolution of marriage or of nullity of marriage should contain a prayer respecting such settlement and before the decree is made absolute a separate petition for an order as to the application of the settled property should be filed and served on the respondent (*t*).

Who can apply—

The petition should usually be signed by the petitioner, but if he is abroad the Court will allow his attorney to sign it on his behalf (*u*). In the event of the petitioner's death the petition may be made by the guardian of the children of the marriage (*v*), but not by the executor of the deceased petitioner (*w*). Where, however, the

(*t*) *Gibbings* v. *Gibbings* (1864) 10 Jur. (N.S.) 1087.
(*u*) *Ross v. Ross* (1882) 7 P.D. 20; 51 L.J.P. & M. 22.
(*v*) *Ling* v. *Ling & Crocker* (1865) 4 Sw. & Tr. 99; 164 E.R. 1453.
(*w*) *Smithe* v. *Smithe & Roupell* (1868) L.R. 1 P.&D. 587.

petitioner after obtaining a decree *nisi* in his favour dies before it is made absolute the suit abates and the guardian of the children is not entitled to apply for making the decree *nisi* absolute with a view to petition for the variation of the post-nuptial settlement (*x*). Where the petitioner dies after obtaining a decree absolute for dissolution of the marriage and after presenting a petition for the variation of the marriage settlement and when there are no children of the marriage, the petition for variation of the settlement abates by the death of the petitioner and the proceedings cannot be continued by the personal representatives for the benefit of his estate (*y*).

"*On dissolution of marriage or decree of nullity of marriage*"—

The provisions of this section limit the power of the Court to deal with settlements in suits for divorce or nullity and it does not extend to suits for judicial separation (*z*), nor has the Court jurisdiction to entertain any application for an inquiry into and variation of settlements until after the decree has been made absolute (*a*).

The rights of the guilty party on dissolution of marriage are not *per se* forfeited (*b*). On a dissolution of marriage at the instance of the wife the wife is entitled to apply both for a variation of the settlement and also for permanent maintenance and the Court has power to investigate into the matter(*c*).

(*x*) *Grant* v. *Grant, Bowles & Pattison* (1862) 2 Sw. & Tr. 522; 164 E.R. 1099. *Stanhope* v. *Stanhope* (1886) 11 P.D. 103.

(*y*) *Thomson* v. *Thomson & Rodschinka*(1896) P. 263.

(*z*) *Norris* v. *Norris & Gyles* (1858) 1 Sw. & Tr. 174 at p. 176; 164 E.R. 680.

(*a*) *Gilbert* v. *Gilbert & Boucher* (1928) P. 1.

(*b*) *Fitzgerald* v. *Chapman* (1875) 1 Ch. D. 563.

(*c*) *Snowdon* v. *Snowdon* (1866) 15 W.R. 90.

Where the parties are married in another country, but the decree of dissolution is pronounced by the British Court, the Court has power to vary the marriage settlement though made according to the law of that country(*d*), but the power to vary marriage settlements can only be exercised where the decree upon which the application is founded has been pronounced by that Court. Therefore, where a decree has been pronounced by a Colonial Court (New Zealand) the Court in England would have no jurisdiction to entertain such an application (*e*).

The power given to the Court to inquire into and vary settlements extends to cases where nullity of marriage has been decreed for impotence(*f*) and the power is not limited to any particular class of nullity cases but includes all cases in which a decree of nullity has been pronounced upon whatever ground (*g*).

"*The Court may inquire into the existence of ante-nuptial or post-nuptial settlements*"—

A settlement does not include an assignment to the spouse of any property (*h*).

The power conferred upon the Court by this section is a power to vary ante-nuptial or post-nuptial settlements only, that is, settlements made either before or after the marriage of the husband and wife whose marriage is in question (*i*). So, the Court has no jurisdiction in a case

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(*d*) *Nunneley* v. *Nunneley & Marrian* (1890) 15 P.D. 186; 63 L.T. 113.
(*e*) *Moore* (falsely called *Bull*) v. *Bull* (1891) P. 279; 60 L.J.P. 76.
(*f*) *Nepean* (otherwise *Lee Warner*) v. *Nepean* (1925) P. 97; 133 L.T. 287.
(*g*) *Dormer* (otherwise *Ward*) v. *Ward* (1901) P. 20; 83 L.T. 556. See *Bosworthick* v. *Bosworthick* (1926) 95 L.J.P. 171.
(*h*) *Chalmers* v. *Chalmers* (1892) 68 L.T. 28. See *Hubbard* v. *Hubbard* (1901) P. 157, C.A.
(*i*) *Loraine* v. *Loaraine & Murphy* (1912) P. 222 at p. 228, C. A. 107 L.T. 363.

where the wife has married again, to order a settlement by her of property to which she is entitled under the trust of her father's will for her separate use without power of anticipation (*j*). Nor does it enable the Court to vary the trusts of a will even when the gift by will is to the trustees of a marriage settlement upon the trusts of the settlement (*k*). In *Worsley* v. *Worsley and Wignall* (*l*), Lord Penzance, observed: "The Court would have a great difficulty in saying that any deed which is a settlement of property made after marriage and on the parties to the marriage is not a post-nuptial settlement. It would not be justified in narrowing the reasonable scope of the words used in the section. The substance of the matter is that the legislature by this section has armed the Court with authority to make special arrangements in the case of a woman being found guilty of adultery in reference to property settled upon her in her character as a wife. The substantial feature to bring the case within the clause of the statute is, that a sum of money is paid to a woman in her character as wife, or is settled upon her in that character and whilst she continues a wife."

A provision for life made by a wife for her husband when the marriage was subsisting by a bond giving him an annuity for his life expectant upon her death, is a post-nuptial settlement within the meaning of the section (*m*). So also, a life policy effected after marriage by one of the spouses on the life of the spouse effecting it with a contingent interest of the other spouse in the policy moneys, is a post-nuptial settlement and after the dissolution of marriage

(*j*) *Loraine* v. *Loraine & Murphy* (1912) P. 222 at p. 228, C.A.; 107 L.T. 363.

(*k*) *Garratt* v. *Garratt & Garratt* (1922) P. 230; 127 L.T. 559.

(*l*) (1869) L.R. 1 P. & D. 648 at p. 651.

(*m*) *Bosworthick* v. *Bosworthick* (1927) P. 64 at pp. 70-71.

the Court has power to make orders with reference to the application of the policy moneys (*n*).

The expression "ante-nuptial or post-nuptial settlements" does not, as regards the parties whose marriage is the subject of the decree, include a settlement of the property of either spouse not made in contemplation of any particular marriage but giving the spouse power to appoint an interest to any future wife or husband (*o*).

Settlement pending suit—

A wife subsequent to her husband's petition for dissolution of the marriage with her on the ground of her adultery executed a settlement of interests to which she was entitled under a will and under the marriage settlement of her parents and settled them on herself for life with remainder to all or any of her children or child, reserving a general power of appointment by will in default of any surviving children and further reserving a power of appointment both of capital and income in favour of any surviving husband. After decree absolute she executed a deed poll, declaring that her income under the settlement should be for her separate use without power of anticipation. Shortly after the execution of the deed poll she married the co-respondent in the suit. The Court held that the settlement was a "post-nuptial settlement" with which the Court had power to deal (*p*).

In deciding whether a settlement comes within the meaning of "post-nuptial settlement" the material question is whether the settlement in question is upon the husband in the character of husband or upon the wife in the character of wife or upon both in the character of

(*n*) *Gulbenkian* v. *Gulbenkian* (1927) P. 237.
(*o*) *Hargreaves* v. *Hargreaves* (1926) P. 42.
(*p*) *Melvill* v. *Melvill & Woodward* (1930) P. 159, C.A.

husband and wife. Mere form is immaterial. The settlement may be one in the strictest sense, or it may be for instance, a covenant to pay by one spouse to the other, or by a third party to a spouse. What is material is that the settlement should provide financial benefit for one or both of the spouses as spouses and with reference to their married state (*q*). In dealing with a 'settlement' under the powers conferred by the provisions of section 40 of the Act the Court will not be fettered in its application of the settled funds by remote and contingent interests therein of volunteers (*r*). Nor are the powers of the Court limited to absolute interests. Orders may be made with reference to property so settled as to be applied at the discretion of the trustees (*s*).

Vested interest of deceased child—

By an ante-nuptial settlement, the fortune of the intended wife was vested in trustees upon trust for the wife for life, remainder to the husband, remainder to the children of the marriage. There was only one child, who died at the age of 21 intestate and unmarried after having acquired a vested interest in the fund and his father became entitled to his interest as his sole next of kin. The wife obtained a decree dissolving the marriage. The father's interest as next of kin of his deceased son was held to be 'property settled' within the meaning of the section and the Court had power to extinguish not only the father's life interest, but also his interest as next of kin of his son (*t*).

(*q*) *Prinsep* v. *Prinsep* (1929) P. 225; 141 L.T. 220.
(*r*) *Ibid. Janion* v. *Janion* (1929) P. 237, n. (pp. 237-239).
(*s*) *Vallance* v. *Vallance* (1907) 77 L.J.P. 33.
(*t*) *Blood* v. *Blood* (1902) P. 190 at p. 198; 86 L.T. 641.

Variation of separation deed—

A deed of separation by which a husband and wife agree to live separate and the husband covenants to pay the wife an annuity during their joint lives; is a 'post-nuptial settlement', which the Court has jurisdiction to revise after a decree for dissolution of the marriage by reason of the wife's adultery (*u*). Similarly, the Court has power to direct trustees of an assignment to apply the amount payable to the guilty wife as if she was dead and had died in the lifetime of the petitioner (*v*), and also, could reduce the amount of a weekly allowance, which the husband under a deed of separation had covenanted to pay to the wife (*w*). The Court has discretion to fix the amount of allowance which ought to be paid to the guilty wife having regard to all the circumstances of the case and the conduct of the wife in the suit (*x*).

A deed of separation in which an allowance is provided for the wife without any *dum casta* clause can be varied as a "post-nuptial settlement" (*y*), for, unless the deed contains a *dum casta* clause, or a provision that the deed shall come to an end upon the dissolution of the marriage, the payments must be continued notwithstanding the wife's adultery (*z*) until the allowance is extinguished or varied by the Court (*a*), and the petitioner is not precluded by the deed of separation from asking for an increase in the allowance out of the respondent's settled property than that which was secured to him by the deed (*b*). The Court has

(*u*) *Worsley* v. *Worsley & Wignall* (1869) L.R. 1 P. & D. 648; 20 L.T. 546.
(*v*) *Bullock* v. *Bullock & Strong* (1872) L.R. 2 P. & D. 389; 27 L.T. 247.
(*w*) *Jump* v. *Jump* (1883) 8 P.D. 159.
(*x*) *Clifford* v. *Clifford* (1884) 9 P.D. 76; 50 L.T. 650.
(*y*) *Saunders* v. *Saunders & Beck* (1893) 69 L.T. 498.
(*z*) *Wasteneys* v. *Wasteneys* (1900) A.C. 446.
(*a*) *Clifford* v. *Clifford*, supra.
(*b*) *Benyon* v. *Benyon & O'Callaghan* (1876) 1 P.D. 447.

also the power on a husband's petition for the cancellation of a post-nuptial settlement after the dissolution of the marriage on the ground of the wife's adultery subsequent to the date of the settlement, to reduce the amount payable thereunder and to limit it *dum sola et casta* (*c*). No bargain or a covenant in a deed of separation can bind the Court or limit the scope of its discretion. "Parties may contract themselves out of their rights, but they cannot contract the Court out of its duty. That would be to make a law for themselves" (*d*).

Whilst the inquiry under this section is pending the Court can restrain the respondent by an injunction from selling or incumbering the settled property (*e*).

"*The Court may make such order as to it seems fit*"—

"The main object and intent of the legislature in giving the Divorce Court power to vary marriage settlements is to place parties in the same position, as far as possible, as if the marriage had not been put an end to through the fault of one of them" (*f*), and it is not the function of the Court to punish the guilty party, but to prevent, as far as possible, the innocent party being damaged in a pecuniary sense by the dessolution (*g*). In making a settlement of property belonging to a wife the Court should look not only to the portions of the wife's fortune which the husband may have already received but to all the circumstances

(*c*) *Cooper* v. *Cooper & Ford* (1932) P. 75.
(*d*) *Russell (Countess)* v. *Russell (Earl)* (1935) P. 39 at p. 57; 152 L.T. 283.
(*e*) *Watts* v. *Watts* (1876) 24 W.R. 623, C.A. *Nokes* v. *Nokes & Hill* (1877) 4 P.D. 60; 39 L.T. 47.
(*f*) *Hodgson Roberts* v. *Hodgson Roberts & Whitaker* (1906) P. 142 at p. 144; 94 L.T. 621. *Sykes* v. *Sykes & Smith* (1870) L.R. 2 P. & D. 163. *Hartopp* v. *Hartopp and Akhurst* (1899) P. 65.
(*g*) *Maudslay* v. *Maudslay* (1877) 2 P.D. 256.

of the case, and particularly to the husband's conduct (*h*), having regard not only to the rights and liabilities of the parties *inter se*, but also to the interests of society and public morality and relief will not be given to a person guilty of matrimonial misconduct unless such misconduct can be palliated (*i*).

The Judge has an absolute judicial discretion as to the provisions to be made for the parties respectively out of settled property and the Court of Appeal will not interfere with that discretion unless there has been a clear miscarriage in its exercise (*j*).

Though the power given to the Court of varying settlements is not given for the purpose of punishing the guilty party but of making due provision for the parties, their conduct is to be taken into consideration in determining what provisions ought to be made for them respectively (*k*), and the power of the Court is limited to such alterations as are for the personal benefit of the husband, wife or children of the marriage (*l*). Such settlements ought not to be varied beyond what was necessary for the benefit of the injured spouse and the child of the marriage (*m*). The main question for the consideration of the Court is the nature and extent of the pecuniary prejudice caused to the husband and children of a guilty wife by the breaking away of the wife with her property from the common home; the relative financial positions of the husband and wife after divorce are also material. The object of the

(*h*) *Barrow* v. *Barrow* (1854) 24 L. J. Ch. 267; see 24 L. T. (O.S.) 198, C.A.

(*i*) *Constantinidi* v. *Constantinidi & Lance*, (1905) P. 253 at p. 271.

(*j*) *Wigney* v. *Wigney* (1882) 7 P. D. 177; 46 L. T. 441. See *Ponsonby* v. *Ponsonby* (1884) 9 P.D. 122. *La Terriere* v. *La Terriere & Grey* (1921) 37 T.L.R. 671, C.A.

(*k*) *Wigney* v. *Wigney* (1882) 7 P.D. 177; 46 L.T. 441.

(*l*) *Thomson* v. *Thomson & Rodschinka* (1896) P. 263.

(*m*) *Prinsep* v. *Prinsep* (1930) P. 35.

section is to enable the Court as nearly as may be to restore the pecuniary status of the parties as existing before the termination of the married life (*n*), and the Court will make no order respecting settled property after dissolution of marriage by reason of the wife's adultery to deprive the husband of any benefit derived from the settlement (*o*). So, where a marriage settlement gives an innocent party to it the power, if survivor, of appointing a portion of his or her settled fund in favour of a future spouse and the issue of a future marriage the Court in varying such a settlement will, although issue of the first marriage exists, permit the immediate exercise of such a power in the life time of the guilty party to an extent, in the opinion of the Court, not detrimental to such existing issue (*p*).

Where the husband petitioner had only a small official income and the wife by reason of whose adultery the marriage was dissolved was a lady of considerable fortune in which she took the first life interest, the Court in dealing with the marriage settlement allotted to the husband such a portion of her settled property as would place him somewhat in the status in which he would have been had the union continued (*q*).

Where a marriage was dissolved on the wife's petition and there was a settlement of property which contained a provision giving the wife upon the death of the husband a power of appointment in favour of a second husband and the children of a second marriage, the Court did not, upon the dissolution of the marriage through the misconduct of

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(*n*) *Hartopp* v. *Hartopp & Akhurst* (1899) P. 65. *Matheson* v. *Matheson* (1935) P. 171.

(*o*) *Thompson* v. *Thompson & Barras* (1862) 2 Sw. & Tr. 649; 164 E. R. 1150.

(*p*) *Hodgson Roberts* v. *Hodgson Roberts & Whitekar* (1906) P. 142; 94 L.T. 621.

(*q*) *March* v. *March & Palumbo* (1867) L. R. 1 P. & D. 437; 16 L.T. 366.

the husband, vary the settlement so as to enable the wife to exercise such power of appointment before his death (*r*). On the dissolution of a marriage decreed on the wife's petition, an order was made extinguishing the life interest of the husband in the settled perperty, the whole of which was brought into settlement by him there being one child of the marriage who had not attained a vested interest (*s*). And where under a marriage settlement a wife had power to resettle settled property in the event of surviving her husband and marrying again and having been divorced, had married co-respondent during her husband's lifetime, the Court made an order preventing any resettlement on any husband married, or children born during the first husband's lifetime (*t*). The restraint on anticipation does not affect the power of the Court to vary a marriage settlement even in a case where the delinquent wife has married the co-respondent after the decree absolute and before the petition to vary (*u*), nor is the Court precluded from ordering a reconveyance of the property to the petitioner in the event of a failure of issue (*v*).

"*The Court shall not make any order..... at the expense of the children*"—

The Court will require full information of the husband's means when asked to vary the interest of the wife in her moneys in settlement in favour of the child (*w*).

(*r*) *Pollard* v. *Pollard* (1894) P. 172; 70 L. T. 815. See *Whitton* v. *Whitton* (1901) P. 348.

(*s*) *Kaye* v. *Kaye* (1902) 86 L.T. 638.

(*t*) *Branton Day* v. *Branton Day & Erskine* (1898) 78 L. T. 358. *Williams* v. *Williams & Kilburn* (1920) P. 69; 122 L.T. 748.

(*u*) *Merton* v. *Merton* (1900) 83 L.T. 223. *Morgan* v. *Morgan & Kirby* (1923) P. 1.

(*v*) *Wynne* v. *Wynne* (1898) 78 L.T. 796.

(*w*) *Webster* v. *Webster & Mitford* (1862) 3 Sw. & Tr. 106; 7 L.T. 646; 164 E.R. 1212.

Where under a post-nuptial settlement, two-thirds of the dividends of certain stock to which the wife at the time of the marriage was entitled were settled upon the wife for life for her separate use and the remaining one-third on the husband for life, with benefit of survivorship for life, the *corpus* of the fund after the death of the survivor to go to the issue of the marriage; the Court directed that the husband's portion of the income of the settled property should be paid to the wife and in the event of her death in his lifetime the whole of the income should be applied to the benefit of the child (*x*). So, where the petitioner had entered into a convenant binding his estate with the payment of an annuity to respondent (wife) in the event of her surviving him, the Court directed the annuity, when recovered, to be paid for the benefit of the children of the marriage (*y*). The fact that by reason of dissolution of marriage in consequence of a wife's misconduct an annuity provided by the husband will not be payable to the wife and will be lost to the family is a detriment to the children and a ground for compensating them out of the wife's property brought into settlement (*z*). So, where property was settled upon the husband for life, then upon the wife for life, then upon the childern of the marriage, the Court ordered upon the dissolution of the marriage on the ground of the wife's adultery, that after the death of the petitioner the settled property should in the event of respondent surviving petitioner be applied to the benefit of the children of the marriage as if respondent were dead (*a*).

Where the whole settled property was given by the father of the respondent (wife) for the benefit of his

(*x*) *Boyton* v. *Boyton* (1861) 2 Sw. & Tr. 275; 4 L.T. 258; 164 E.R. 1001.
(*y*) *Callwell* v. *Callwell & Kennedy* (1860) 3 Sw. & Tr. 259; 164 E.R. 1274.
(*z*) *Newall* v. *Newall & Platt* (1898) 78 L.T. 203.
(*a*) *Pearce* v. *Pearce & French* (1861) 30 L.J.P. & M. 182.

daughter for life and then for the benefit of her husband and on the death of the survivor of them for the benefit of their children; the Court ordered the whole income of the settled property to be applied during the joint lives of the petitioner and respondent for the benefit of their children (*b*).

The Court should take care that as far as possible the finances of the family should remain in *status quo ante* and that the innocent party and children should not be adversely affected by the breaking up of the marriage (*c*).

The Court has no power to vary settlements unless it be for the benefit of the children of the marriage or of their parents (*d*).

XI—Custody of Children.

Power to make orders as to custody of children in suit for separation.

41. In any suit for obtaining a judicial separation the Court may from time to time, before making its decree, make such interim orders, and may make such provision in the decree, as it deems proper with respect to the custody, maintenance and education of the minor children, the marriage of whose parents is the subject of such suit, and may, if it think fit, direct proceedings to be taken for placing such children under the protection of the said Court.

Power to make such orders after decree.

42. The Court, after a decree of judicial separation, may upon application (by petition) for this purpose make, from time to time, all such orders and provision, with respect to the custody, maintenance and education of the minor children,

(*b*) *Paul* v. *Paul & Farquhar* (1870) L.R. 2 P. & D. 93.
(*c*) *Beauchamp* v. *Beauchamp & Watt* (1904) 20 T.L.R. 273, C.A.
(*d*) *Sykes* v. *Sykes & Smith* (1870) L.R. 2 P. & D. 163.

the marriage of whose parents is the subject of the decree, or for placing such children under the protection of the said Court, as might have been made by such decree or by interim orders in case the proceedings for obtaining such decree were still pending.

Power to make orders as to custody of children in suits for dissolution or nullity.

43. In any suit for obtaining a dissolution of marriage, or a decree of nullity of marriage instituted in, or removed to, a High Court, the Court may from time to time, before making its decree absolute or its decree (as the case may be), make such interim orders, and may make such provision in the decree absolute or decree,

and in any such suit instituted in a District Court, the Court may from time to time, before its decree is confirmed, make such interim orders, and may make such provision on such confirmation,

as the High Court or District Court (as the case may be) deems proper with respect to the custody, maintenance and education of the minor children, the marriage of whose parents is the subject of the suit;

and may, if it think fit, direct proceedings to be taken for placing such children under the protection of the Court.

Power to make such orders after decree or confirmation.

44. The High Court after a decree absolute for dissolution of marriage or a decree of nullity of marriage,

and the District Court after a decree for dissolution of marriage or of nullity of marriage has been confirmed,

may, upon application by petition for the purpose, make from time to time all such orders and provision, with respect to the custody, maintenance and education of the minor children, the marriage of whose parents was the subject of the decree, or for placing such children under the protection of the said Court, as might have been made by such decree absolute or decree (as the case may be), or by such interim orders as aforesaid.

Cf: sections 4, 6 and 95 of the Matrimonial Causes Act, 1857.

Section 193 of the Supreme Court of Judicature (Consolidation) Act, 1925.

Rule 73 of the Matrimonial Causes Rules, 1924.

Rule 928 of the Bombay High Court Rules, 1936.

See the Guardian and Wards Act, (VIII of 1890).

In any suit for judicial separation or for dissolution or for nullity of marriage or for restitution of conjugal rights (no mention is made in the section regarding this suit) the Court has full discretion as to providing for the custody of the children of the marriage, the paramou n consideration being the welfare of the children (*e*), next, the interest of the innocent party to the suit and thirdly the health of the mother (*f*).

Where the wife respondent in a suit for dissolution of marriage wishes to raise any question as to the paternity of any child or children whose custody is claimed by the husband (petitioner) she must file an answer in the suit specifically raising the question as to the paternity of such child or children and unless she so pleads she will not be

(*e*) *D'Alton* v. *D'Alton* (1878) 4 P.D. 87.
(*f*) *Barnes* v. *Barnes & Beaumont* (1867) L.R. 1 P. & D. 463.

allowed at the hearing to raise any question as to paternity in opposing her husband's application for custody of such child or children (*g*).

For obtaining an order for the custody, maintenance and education of the minor children the application is to be made by a separate petition and a copy of the petition is to be served on the other party to the suit (*h*), and if subsequent to the making of the order the other party desires to obtain an order for access to them he or she should make a fresh petition (*i*).

'"Minor children" is defined by section 3 (5) of the Act and means, "in the case of sons of Native fathers, boys who have not completed the age of sixteen years, and, in the case of daughters of Native fathers, girls who have not completed the age of thirteen years. In other cases it means unmarried children who have not completed the age of eighteen years"'. The Divorce Court in England has power to make orders respecting the custody, maintenance and education of children during the period of their minority, that is till they attain the age of twenty-one. But except under very special circumstances, a child who has attained years of discretion cannot properly be ordered into the custody of either parent against such child's own wishes (*j*) unless the child is a ward of Court (*k*).

Custody or access to guilty wife—

Adultery by the wife which justifies a divorce ought not to be regarded for all time and under all circumstances

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(*g*) *Gordon* v. *Gordon* (1903) P. 92.

(*h*) *Ledlie* v. *Ledlie* (1891) 18 Cal. 473. *Borthwick* v. *Borthwick* (1914) 41 Cal. 714.

(*i*) *Anthony* v. *Anthony* (1861) 30 L.J.P. 208.

(*j*) *Thomasset* v *Thomasset* (1894) P. 295 at pp. 302-303.

(*k*) *Stark* v. *Stark & Hitchins* (1910) P. 190.

as sufficient to disentitle her to access to or even to the custody of the daughter who is under sixteen. The power of the Court is to be exercised with discretion and the benefit and interest of the infant is the paramount consideration and not the punishment of the guilty spouse (*l*).

Under the Indian Divorce Act the Court has no power to pass orders for the custody, maintenance or education of the children in suits for restitution of conjugal rights. Before 1884 the law in England was similar (*m*), but by section 6 of the Matrimonial Causes Act of 1884 the English Divorce Court was given the power to make an interim order as to the custody of the children of the marriage and to save expense will make such an order at the time of the pronouncing of a decree of restitution of conjugal rights (*n*). The Courts in India may still make orders for the custody, maintenance and education of the children under the powers vested in the Court by section 7 of the Act.

Whatever the order may be as to custody, the Court should also give permission to the other party to have reasonable access, unless this should not be in the interest of the child (*o*).

Intervention of persons not parties to the suit—

At the time of hearing of a petition for the custody, maintenance or education of the children persons other than parents and third parties can intervene by a petition at their own risks as to costs to bring before the Court facts for the welfare of the minors or to question the propriety of any order passed by the Court (*p*). So, where the

(*l*) *Stark* v. *Stark & Hitchins*, supra.
(*m*) *Chambers* v. *Chambers* (1870) 39 L.J.P. & M. 56.
(*n*) *Paine* v. *Paine* (1902) 50 W.R. 382.
(*o*) *B.* v. *B.* (1924) P. 176, C.A.
(*p*) *Chetwynd* v. *Chetwynd* (1865) 34 L.J.P. 130; L.R. 1 P. & D. 39. *March* v. *March* (1867) L. R. 1 P. & D. 437. *Goodrich* v. *Goodrich* (1873) L.R. 3 P. & D. 134.

Court is not satisfied with the fitness of either of the parents to have the custody, it may be directed that the children should be placed in the care of other relatives who had intervened for the purpose, but provision should be made for both parents to have reasonable access(*q*). Thus, where a husband who was the petitioner and was successful in a divorce suit, but had been guilty of misconduct himself and had ill treated his wife, was deprived of the custody of the child of the marriage and the custody was given to the respondent's parents (*r*).

Interim Orders—

Until the final decree in the suit the Court has the power to make orders as to the custody, maintenance or education of the children *pendente lite* and the Court may restrain the respondent upon the exparte application of the petitioner from removing the child out of the jurisdiction of the Court (*s*).

On an application for an interim order for the custody of children, the Court should consider all the existing circumstances at the time of the application, but should not follow affidavits as to the truth or falsehood of charges brought by the parties against each other (*t*); and in making the order for access or custody pending the hearing of the suit the Court should be satisfied that the motive of the applicant is natural love and affection for the children and that the applicant has no indirect object in view, as to which, lapse of time in making the application may be material. The Court will also consider the convenience of

(*q*) *Chetwynd* v. *Chetwynd* (1865) L.R. 1 P. & D. 39.
(*r*) *Pryor* v. *Pryor* (1900) P. 157.
(*s*) *Harris* v. *Harris* (1890) 63 L.T. 262. *Carter* v. *Carter* (1861) 29 L.J.P. & M. 167. *Adami* v. *Adami* (1929) 73 Sol. Jour. 557.
(*t*) *Ryder* v. *Ryder* (1861) 2 Sw. & Tr. 225; 3 L. T. 678, 164 E. R. 981.

all parties in the circumstances, and how the children would probably be affected if the order were made (*u*). At common law a father has a right to the custody of the child, irrespective of its sex, until it attains majority and he should not be deprived of his right, even in the case of an infant unless good cause is shown (*v*). So, where it appears that neither mother nor child will suffer by the separation the Court may refuse to make any order in her favour (*w*), but the Court has absolute discretion to adhere to or depart from the common law rule (*x*).

The Court has power to order that the party who has not the custody of the child shall have access to it *pendente lite* (*y*), but when it appears to the Court that the visits of the mother to the child might be detrimental to the child's health, the Court may refuse to make an order for access pending the hearing of the suit although there may be reason to apprehend that the separation from her child would affect the mother's health (*z*).

Applications for interim orders for the custody of a child should be kept distinct from the main question in the suit (*a*).

Maintenance—

Where alimony *pendente lite* is allotted to the wife and the only child of the marriage is left in her custody

(*u*) *Codrington* v. *Codrington & Anderson* (1864) 3 Sw. & Tr. 496 at p. 503; 10 L.T. 387; 164 E.R. 1367.
(*v*) *In re Agar Ellis, Agar-Ellis* v. *Lasceelles* (1883) 24 Ch. D. 317 at p. 329.
(*w*) *Cartlidge* v. *Cartlidge* (1862) 2 Sw. & Tr. 567; 6 L. T. 397; 164 E. R. 1117. *Cooke* v. *Cooke* (1863) 3 Sw. & Tr. 248; 164 E.R. 1269.
(*x*) *Spratt* v. *Spratt* (1858) 1 Sw. & Tr. 215; 164 E. R. 699.
(*y*) *Thompson* v. *Thompson & Sturmfels* (1862) 2 Sw. & Tr. 402; 164 E.R. 1052.
(*z*) *Philip* v. *Philip* (1872) 41 L.J.P. & M. 89; 27 L.T. 592.
(*a*) *Wallace* v. *Wallace* (1862) 32 L. J. P. & M. 34; 8 Jur. (N. S.) 1082.

pending the hearing of the suit, the Court may refuse to order the husband to contribute to the child's maintenance (*b*) even when the child is over sixteen years of age (*c*); and the existence of a deed of separation, or the making of a periodical allowance to the wife does not oust the jurisdiction of the Court to make provision for the maintenance and education of the children (*d*).

Custody etc. on final decree—

An application for the custody of the children after the final decree is to be by petition (*e*) and in making the order the Court will have full discretion to adhere to or depart from the common law rule (*f*), but the Court has no power upon the dismissal of a petition for judicial separation or for dissolution, or for nullity of marriage to make any order for the custody, maintenance or education of the minor children (*g*), nor has the Court any power to make such an order in the event of the death of the petitioner before the decree *nisi* is made absolute (*h*).

If the petition is granted the Court has the widest discretion to weigh the comparative advantages or disadvantages of giving the custody of all or any of the children to the one parent or the other and no general rule for the guidance of the Court can be laid down (*i*); the Court will be mainly guided by the particular circumstances of the case before it (*j*) and the Court of Appeal will not

(*b*) *Cranwell* v. *Cranwell* (1868) 19 L.T. 611.
(*c*) *Thomasset* v. *Thomasset* (1894) P. 295.
(*d*) *Barry* v. *Barry* (1901) P. 87; 84 L.T. 33.
(*e*) *Ledlie* v. *Ledlie* (1891) 18 Cal. 473.
(*f*) *Spratt* v. *Spratt* (1858) 1 Sw. & Tr. 215; 164 E.R. 699.
(*g*) *Seddon* v. *Seddon & Doyle* (1862) 2 Sw. & Tr. 640; 161 E. R. 1146.
(*h*) *Butterfield* v. *Butterfield* (1923) 50 Cal. 153, F.B.
(*i*) *Symington* v. *Symington* (1875) L.R. 2 H.L. (Sc.) 415.
(*j*) *Thomasset* v. *Thomasset* (1894) P. 295.

overrule the discretion of the lower Court except under very special circumstances (*k*).

A husband and wife having been Roman Catholics, the husband afterwards became a Protestant, and placed the children in a Protestant school. The wife filed a petition for judical separation. The parties came together again and the wife withdrew her petition on the husband promising that the children should be educated as Roman Catholics. He broke the promise and the wife subsequently filed a new petition and obtained judicial separation and claimed the custody of the children, intending them to be educated as Roman Catholics. To solve the difficulty the Court gave the custody to the mistress of the school in which the father had placed them, but directed that both parents should have full access to them (*l*).

Prima facie the innocent party has a right to the custody of the children provided the interests of the minors are not likely to be thereby affected (*m*); the children of tender years being usually entrusted to the mother (*n*); and the innocent mother should not be deprived of the comfort and society of her children because of her husband's misconduct (*o*). But when there have been no acts of violence on the part of the father towards the children the Court may give one or more of them to him (*p*). So also, when there appears to be no continuance of immorality and the father is affectionately attached to his children and had always been so and has sufficient income, an order

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(*k*) *Handley* v. *Handley* (1891) P. 124, C.A.
(*l*) *D'Alton* v. *D'Alton* (1878) 4 P. & D. 87 at p. 90. Affirmed on appeal at p. 90.
(*m*) *Martin* v. *Martin* (1860) 29 L.J.P. & M. 106; 2 L.T. 118.
(*n*) *B.* v. *B.* (1861) 30 L.J.P. & M. 156.
(*o*) *Hyde* v. *Hyde* (1859) 29 L.J.P. & M. 150. *Milford* v. *Milford* (1869) L. R. 1 P. & D. 715. *Boynton* v. *Boynton* (1861) 2 Sw. & Tr. 275; 164 E.R. 1001.
(*p*) *Martin* v. *Martin*, supra.

for taking away from him the custody of his sons would not be conducive to their welfare (*q*).

Ordinarily, the Court will refuse to give the custody of the children to the guilty party whether husband or wife (*r*), but the Court has the discretion to give the custody of a minor child even to the guilty spouse where the Court is of opinion that such an order would be for the benefit and in the interests of the infant (*s*). Access may, however, be allowed to a mother who has been proved guilty of adultery (*t*).

Where a father, after a decree dissolving his marriage is shown to be leading a notoriously dissolute life, the Court will hold him disqualified to have the custody of his child (*u*). Similarly, where the wife after obtaining a divorce has the custody of the children and then leads a profligate life the Court may vary the order by giving the father the custody of the children (*v*). A guilty party may lose the custody of the children even on the death of the innocent spouse (*w*).

Where a girl aged sixteen leaves her father in order to live with her guilty mother, the Court may refuse to interfere (*x*).

Insanity of Wife—

Where the wife is found to be a lunatic an application for access to the child should be refused in the interest of the child (*y*). If the application of the wife is opposed on

(*q*) *Symington* v. *Symington* (1875) L.R. 2 H.L. (Sc.) 415.
(*r*) *Bent* v. *Bent & Footman* (1861) 2 Sw. & Tr. 292. 164 E. R. 1047. *Kelly* v. *Kelly & Saunders* (1870) 5 Beng. L. R. 71. *Goad* v. *Goad*, 69 P.R. (1870).
(*s*) *Stark* v. *Stark* (1910) P. 190 at p. 193.
(*t*) *B.* v. *B.* (1924) P. 176.
(*u*) *March* v. *March & Palumbo* (1867) L.R. 1 P. & D. 437.
(*v*) *Witt* v. *Witt* (1891) P. 163.
(*w*) *Skinner* v. *Skinner* (1888) 13 P.D. 90.
(*x*) *Mozley-stark* v. *Mozley-stark* (1910) P. 190.
(*y*) *Philip* v. *Philip* (1872) 41 L.J.P. & M. 89.

the ground that she is not of sound mind and if medical evidence produced by the respective parties is conflicting the Court may direct the wife to be examined by a physician nominated by itself and on his certificate may give her the custody of the child (*z*).

Child born before marriage of parents subsequently divorced—

An order for the custody of a child alleged to be legitimated by the marriage of its natural parents after its birth, but not already declared to be legitimated, cannot be made on a decree *nisi* for the dissolution of that marriage. Nevertheless, the *prima facie* right of the mother to have the care and control of her child born out of wedlock, as recognised in decisions at common law stands on a footing different from the case of a putative father and should be protected in divorce proceedings to which the mother is a party (*a*). A petitioner in divorce proceedings applied for the custody of two children both of whom were born during the marriage. The elder child was begotten before the marriage and petitioner was not the father of it. Respondent contended that the eldest child was illegitimate and petitioner was not entitled to its custody, but the Court gave petitioner the custody of both children (*b*).

XII—Procedure.

Code of Civil Procedure to apply.

45. Subject to the provisions herein contained, all proceedings under this Act between party and party shall be regulated by the Code of Civil Procedure.

(*z*) *Duggan* v. *Duggan* (1859) 29 L.J.P. & M. 159.

(*a*) *Green* v. *Green* (1929) P. 101 at p. 105. See *M.* v. *M.* (1906) 22 T.L.R. 325. *Bednall* v. *Bednall* (1927) P. 225.

(*b*) *M.* v. *M.* (1906) 22 T.L.R. 325.

"Proceedings to be regulated by the Code of Civil procedure"—

By section 7 of the Indian Divorce Act the Court is enabled to act and give relief on the principles and rules of the English Divorce Court in matters which are not expressly dealt with either by the Act or by the Code. The words " all proceedings under this Act between party and party " apply only to proceedings after the parties to the suit have been determined in accordance with the provisions of the Act. Section 7 of the Act does not apply to procedure (*c*).

Stay of proceedings—

When there is a suit by the husband in the Indian High Court against the wife for dissolution on the ground of her adultery and by the wife against the husband in England for restitution of conjugal rights; on an application on her behalf to stay the proceedings in the Indian High Court until the suit in England was determined the High Court may refuse to grant stay of proceedings (*d*).

Court's power to rectify mistakes—

Where a mistake has been made in drawing up an order the Court or a Judge has power to alter it even where it is under appeal and though the request for alteration be made by the party who has given notice of appeal against the order as drawn up (*e*).

Particulars—

Where in a petition by the wife against the husband he was for the purpose of establishing cruelty charged with

(*c*) *Ramsay* v. *Boyle* (1903) 30 Cal. 489.
(*d*) *Thornton* v. *Thornton* (1886) 10 Bom. 422. See Rule 921 of the Bombay High Court (Divorce) Rules, 1936.
(*e*) *E.* v. *E.* (1903) P. 88.

using insulting language to her in the presence of servants and guests with the object of humiliating and degrading her, the petitioner was ordered to give particulars setting out the names of such servants and guests (*f*). so, in a petition asking for relief on the ground of cruelty, acts sufficient to establish legal cruelty should be alleged; all pleadings should be as short as is consistent with alleging a legal ground for the prayer. Respondent may apply for further particulars if necessary (*g*), but a general allegation that during a specified time respondent committed "diverse acts of cruelty" is bad and is a ground for an order that the petition be amended by specifying such acts, but not for an order that particulars of the acts of cruelty be given (*h*), nor is evidence of an act of actual violence admissible where only a general allegation of cruelty has been made in the petition. Where evidence was offered that the husband had struck his wife a blow and no such specific charge had been made in the petition, the Court allowed the hearing to be adjourned in order that particulars might be furnished (*i*). So also, adultery as a ground of a petition should be distinctly alleged. It is not sufficient that the petition alleges information and belief of the petitioner that the respondent has committed adultery (*j*). When leave to amend such a petition is granted and when there has been no appearance it must be re-served (j_1).

Inspection of documents—

The respondent to a matrimonial suit is entitled to have brought into Court letters written to her by the peti-

(*f*) *Bishop* v. *Bishop* (1901) P. 325.
(*g*) *Suggate* v. *Suggate* (1859) 1 Sw. & Tr. 489; 32 L. T. (O. S.) 285.
(*h*) *Goldney* v. *Goldney* (1862) 32 L.J.P. & M. 13.
(*i*) *Brook* v. *Brook* (1886) 2. P.D. 19; 57 L.T. 425.
(*j*) *Spilsbury* v. *Spilsbury* (1863) 3 Sw. & Tr 210; 164 E.R. 1254.
(j_1) *Forman* v. *Forman & Davis* (1863) 32 L.J.P. & M. 80.

tioner while the facts to which they speak were fresh in her memory. If the petitioner has none, he should make an affidavit to that effect (*k*).

Attachment before judgment—

An order for attachment before judgment will not be made in divorce proceedings. Attachment before judgment being a matter of relief and not of procedure is governed by section 7 of the Indian Divorce Act and the principles and rules of the English Court and not by the Civil Procedure Code (*l*).

Persons over 18 years of age—

Under the provisions of the Civil Procedure Code a next friend is not necessary for a suitor over 18 years of age, and can file a suit under this Act in his or her own right (*m*).

Evidence on affidavit.—

Under Order XIX Rule 1 of the Civil Procedure Code the Court may for sufficient reasons order that any particular fact or facts may be proved by affidavit (*n*). See section 51 of the Act.

Forms of petitions and statements.

46. The forms set forth in the schedule to this Act, with such variation as the circumstances of each case require, may be used for the respective purposes mentioned in such schedule.

Forms—

The forms in the schedule are only intended to serve as a guide to draw pleadings and they are not intended to be literally followed (*o*).

(*k*) *Gordon* v. *Gordon* (1869) 3 Ben. L.R. O.C. 100.
(*l*) *Phillips* v. *Phillips* (1910) 37 Cal. 613.
(*m*) *Goodal* v. *Goodal* (1933) 55 All. 243.
(*n*) *Stone* v. *Stone* (1934) 38 C. W. N. 969. But see the remarks of Costello J. in (1935) 62 Cal. 541 at pp. 545-546
(*o*) *Evans* v. *Evans* (1858) 1 Sw. & Tr. 78; 164 E. R. 637.

47. Every petition under this Act for a decree of dissolution of marriage or of nullity of marriage, or of judicial separation shall state that there is not any collusion or connivance between the petitioner and the other party to the marriage ; Petition to state absence of collusion.

the statements contained in every petition under this Act shall be verified by the petitioner or some other competent person in manner required by law for the verification of plaints, and may at the hearing be referred to as evidence. Statements to be verified.

Cf : section 41 of the Matrimonial Causes Act, 1857.

Rule 3 of the Matrimonial Causes Rules, 1924.

Rules 915 and 920 of the Bombay High Court (Divorce) Rules, 1936.

For "collusion" and "connivance", see notes to section 13.

"*Statements shall be verified*"—

See Order VI, Rule 15 of the Code of Civil Procedure.

The omission to verify the plaint is a mere irregularity and it may be verified at a later stage of the suit (*p*).

"*Statements may at the hearing be referred to as evidence*"—

The affidavit of the petitioner will not be taken as evidence at the hearing but the parties must produce sufficient evidence to prove allegations in the petition independently of such affidavit. The Court is bound by the rules of evidence observed at common law (*q*), but in an exparte case the Court may dispense with the evidence of the petitioner (*r*). Under the provisions of this sec-

(*p*) *Shib Deo* v. *Ram Prasad* (1924) 46 All. 637.
(*q*) *Deane* v. *Deane* (1858) 1 Sw. & Tr. 90; 164 E.R. 642.
(*r*) *Nicolson* v. *Nicolson & Fairley* (1892) 68 L. T. 28.

tion statements contained in the petition may be referred to as evidence at the hearing, but the practice followed in the English Divorce Court, namely, that the parties give *viva voce* evidence, should invariably be followed in every case unless there are some very good reasons to the contrary (*s*). The petitioner must come into the witness box, he (or she) must be sworn and he (or she) must prove his (or her) case, because, amongst other things, the judge has to satisfy himself whether there is any collusion between the parties and he has further to satisfy himself as to the complete honesty and truth of the petition (*t*).

Suits on behalf of lunatics.

48. When the husband or wife is a lunatic or idiot, any suit under this Act (other than a suit for restitution of conjugal rights) may be brought on his or her behalf by the committee or other person entitled to his or her custody.

"*Husband or wife is a lunatic or idiot*"—

See Rule 75 of the Matrimonial Causes Rules, 1924.

See O. 32, R. 15 of the Code of Civil Procedure which makes applicable O. 32, Rules 1 to 14 to "persons adjudged to be of unsound mind and to persons who though not so adjudged are found by the Court on inquiry by reason of unsoundness of mind or mental infirmity to be incapable of protecting their interests when suing or being sued".

Section 48 of the Indian Divorce Act only provides for the petitioner being a lunatic or an idiot, but the provisions of O. 32 of the Code of Civil Procedure are for the due representation of either party provided that he or she is adjudged to be of unsound mind.

(*s*) *Premchand* v. *Bai Galal* (1927) 51 Bom. 1026; 29 Bom. L. R. 1336.

(*t*) *Howard* v. *Howard & Dennett* (1922) 44 All. 728.

See Rules 338 to 343 of the Bombay High Court Rules, 1936.

When one of the parties is obviously of unsound mind, but has not been formally adjudged to be so, the Court has the power to allow a self-constituted next friend to sue or appoint a guardian *ad litem* to defend on his or her behalf (*u*), and a decree passed against a lunatic not properly represented in the suit is not binding on him and need not be challenged in execution proceedings as he is not a party to the suit (*v*).

By Rule 75 of the Matrimonial Causes Rules, 1924, "a committee or other person duly appointed under the Lunacy Acts for a person of unsound mind may prosecute, defend or intervene in a suit on behalf of such person or otherwise represent him, but if there be no such committee or other person duly appointed, application shall be made on affidavit to a Registrar who will assign a guardian to the person of unsound mind. If the opposite party is already before the Court the application shall be upon summons"; but an order under the above rule ought not to be made assigning a guardian *ad litem* to a person as regards whose alleged unsoundness of mind there is a substantial and *bona fide* dispute (*w*). Where the respondent is a lunatic in an asylum the Court should adjourn the case in order that petitioner might apply for the appointment of a guardian *ad litem* to such respondent (*x*).

The committee of a lunatic may institute proceedings against the wife of a lunatic for adultery (*y*) and can sue

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(*u*) *Venkataramana* v. *Timappa* (1892) 16 Bom. 132. See *Rasik Lal Datta* v. *Bidhumukhi Dasi* (1906) 33 Cal. 1094 at p. 1100.

(*v*) *Kalipada* v. *Hari* (1917) 44 Cal. 627.

(*w*) *Fry* v. *Fry* (1890) 15 P.D. 50 at pp. 51-52.

(*x*) *Giles* v. *Giles* (1900) P. 17; 81 L.T. 823.

(*y*) *Parnell* v. *Parnell* (1814) 2 Hag. Con. 169; 161 E.R. 704.

either for dissolution of marriage (*z*), or for judicial separation (*a*), or for nullity of marriage (*b*).

The insanity of the respondent and the consequent inability to put in a defence is not a bar to the trial of the suit (*c*), but notice should be given to the Government Solicitor in case he should think fit to appear and take part in the proceedings (*d*).

The attorney instructed on behalf of the inmate of a lunatic asylum is entitled to facilities to visit the patient at the asylum (*e*).

Suits by minors.

49. Where the petitioner is a minor, he or she shall sue by his or her next friend to be approved by the Court; and no petition presented by a minor under this Act shall be filed until the next friend has undertaken in writing to be answerable for costs.

Such undertaking shall be filed in Court and the next friend shall thereupon be liable in the same manner and to the same extent as if he were a plaintiff in an ordinary suit.

Suits by Minors—

See Order XXXII of the Code of Civil Procedure.

See Rule 74 of the Matrimonial Causes Rules, 1924.

See Form No. 14 in the Schedule.

(*z*) *Baker* v. *Baker* (1880) 5 P. D. 142; 42 L. T. 332. *Burell* v. *Burell & Blake* (1900) 17 T.L.R. 41.

(*a*) *Woodgate* v. *Taylor* (1861) 2 Sw. & Tr. 512; 5 L. T. 119; 164 E. R. 1095.

(*b*) *Hancock* v. *Peatty* (1867) L.R. 1 P. & D. 335; 16 L.T. 182.

(*c*) *Mordaunt* v. *Moncrieff* (1874) 43 L. J. P. & M. 49, *H. L.*; 30 L. T. 649.

(*d*) *Burnett* v. *Burnett & Purdy* (1922) 39 T. L. R. 111; 67 Sol. Jour. 147.

(*e*) *In re petition for judicial separation, Exparte Belcham* (1901) P. 65.

Nothing in the Indian Majority Act (IX of 1875) affects the capacity of a person to act in the matters of marriage or divorce. The age of majority would depend upon the personal law of the class to which the party belongs. The minority of English subjects not domiciled in India, continues till the attainment of twenty-one years (*f*).

A girl over 19 years of age and domiciled in India is not a minor within the meaning of section 49 and can file a petition in her own right (*g*).

Undertaking of Next friend as to costs—

There is no similar provision in the Code of Civil Procedure when suits other than matrimonial suits are instituted on behalf of a minor and when the Court is satisfied that there were reasonable grounds for instituting the suit and the next friend had acted *bona fide* the Court will not mulct the next friend in costs and will direct the costs to come out of the property of the minor (*h*). In a recent case it was held by the Bombay High Court that when a suit filed by a minor by his next friend was dismissed there was a clear distinction between the liability of the next friend to pay the costs of the successful defendant as between himself and the latter, and the question as to the position between the next friend and the minor. The next friend is ordinarily liable to pay the costs of the successful defendant and the latter is entitled to get his costs from the former irrespective of the question whether the action was for the benefit of the minor or whether it was proper or not, without prejudice of course to the right of the next friend to be indemnified

(*f*) *Rohilkhand & Kumaon Bank* v. *Row* (1885) 7 All. 490, *F.B.*
(*g*) *Goodal* v. *Goodal* (1933) 55 All. 243.
(*h*) *Devkabai* v. *Jafferson* (1896) 10 Bom. 248.

or to be reimbursed to the extent of the costs paid by him to the successful defendant out of the estate of the minor. But if it appears to the Court either at the hearing of the action or when an application is made by the next friend to that effect, that the action was improper, or was not for the benefit of the minor, or was not properly conducted or that the next friend was guilty of negligence, in all such cases the order should be that the next friend should pay the costs of the successful defendant personally (*i*).

Under Rule 338 of the Bombay High Court Rules, 1936, the next friend of a minor is required to make an affidavit to be presented to the Judge with the plaint in the suit that he has no interest directly or indirectly adverse to that of the minor and that he is otherwise a fit and proper person to act as such next friend. The age of the minor shall also be stated.

Section 49 of the Indian Divorce Act makes no provision for a suit instituted against a minor resopndent or co-respondent but the proceedings in India are governed by the Code of Civil Procedure and the necessary provisions are to be found in Order XXXII, Rule 3. A guardian *ad litem* for an infant defendant should not be made on the application of the plaintiff, exparte, and no such order should be made unless and until the Court is satisfied that the infant has been duly served and there has been an opportunity for making an application on behalf of the infant (*j*), and the Court has no power to make an order by which a minor may in any way be concerned or affected without his being represented by a next friend or guardian for the suit (*k*). Under the English Court

(*i*) *Babu alias Vrajlal* v. *Alibhai* (1934) 36 Bom. L.R. 1201.
(*j*) *Suresh Chander* v. *Jugat Chander* (1887) 14 Cal. 204.
(*k*) *Aminchand* v *Collector of Sholapur* (1889) 13 Bom. 234.

practice where the respondent is a minor it is not necessary for the petitioner to see that a guardian *ad litem* is appointed, similarly, a co-respondent who is a minor can proceed without a guardian (*l*).

It is not decided at what age a boy may be made a co-respondent nor can evidence be given that a boy under the age of 14 years is capable of committing rape etc. (*m*).

Service of petition.

50. Every petition under this Act shall be served on the party to be affected thereby, either within or without British India, in such manner as the High Court by general or special order from time to time directs:

Provided that the Court may dispense with such service altogether in case it seems necessary or expedient so to do.

Service of petition—

Cf: section 42 of the Matrimonial Causes Act, 1857.

Rules 6 to 10 of the Matrimonial Causes Rules, 1924.

See Order V Rules 9 *et seq.* and Order XLVIII of the Code of Civil Procedure.

See Rule 918 of the Bombay High Court (Divorce) Rules, 1936.

The service of the petition is to be effected personally as far as possible, on the parties thereto. Acceptance of service on behalf of a person is not allowed (*n*), but where personal service is not possible, the whereabouts of the respondent and co-respondent not being traceable, it is

(*l*) *Quinn* v. *Quinn* (1920) P. 65.

(*m*) *R.* v. *Phillips* (1839) 8 C. & P. 736. *R.* v. *Jordan & Cowmeadow* (1829) 9 C. & P. 118.

(*n*) *Milne* v. *Milne* (1865) 4 Sw. & Tr. 183; 164 E.R. 1487.

desirable that the proper notice should be put up at the Court house (*o*), nor can filing of pleadings or appearance of the opponents cure this defect (*p*). The stringent provisions prevailing under the old practice are now somewhat relaxed. In India the service of the petition is governed by the provisions of the Code of Civil Procedure relating to the service of a writ of summons. The object of the service of the writ of summons is that the parties affected are duly informed of the institution of the proceedings before the date fixed for the hearing (*q*), and every attempt should be made to serve notice of a divorce suit on the respondent and co-respondent (*r*).

Service out of jurisdiction of the Court may be effected under the general order of the Court and without special leave. The service of a decree (in a suit for restitution of conjugal rights) is to be proved at a place from which the respondent could have obeyed the decree within the specified time (*s*). Where the respondent or co-respondent resides in a foreign country the Court may dispense with personal service and order substituted service to be effected by registered post (*t*).

Service on minors, lunatics and prisoners—

Service on a minor is sufficient (*u*). It is not necessary for the petitioner to see that a guardian *ad litem* has been appointed and the service is good whether in the presence of his natural guardian or not (*v*). Service on the Committee or any other person duly appointed for a lunatic is

(*o*) *Garao Sangma* v. *Rangji Mechik* (1929) 56 Cal. 29.
(*p*) *De Niceville* v. *De Niceville* (1868) 37 L.J.P. 43.
(*q*) *Bhomshetti* v. *Umabai* (1897) 21 Bom. 223.
(*r*) *Garao Sangma* v. *Rangji Mechik*, supra.
(*s*) *Bateman* v. *Bateman* (1901) P. 138.
(*t*) *Wray* v. *Wray & Dr. Almeida* (1907) P. 132.
(*u*) See *Brown* v. *Wildman* (1859) 28 L.J.P. & M. 54.
(*v*) *Quinn* v. *Quinn* (1920) P. 65.

sufficient, but if no such Committee or person has been appointed, the lunatic should be served in the presence of the person in charge of him or her (*w*). If the person to be served is in prison the petition is to be served upon him through some officer in charge of the prison (*x*).

Mode of taking evidence

51. The witnesses in all proceedings before the Court, where their attendance can be had, shall be examined orally, and any party may offer himself or herself as a witness, and shall be examined, and may be cross-examined and re-examined, like any other witness:

Provided that the parties shall be at liberty to verify their respective cases in whole or in part by affidavit, but so that the deponent in every such affidavit shall, on the application of the opposite party, or by direction of the Court, be subject to be cross-examined by or on behalf of the opposite party orally, and after such cross-examination may be re-examined orally as aforesaid by or on behalf of the party by whom such affidavit was filed.

Cf: section 46 of the Matrimonial Causes Act, 1857.

Section 101 of the Supreme Court of Judicature (Consolidation) Act, 1925.

See section 138 of the Indian Evidence Act, 1872.

"*Any party may offer himself or herself as a witness*"—

A party does not "offer" himself or herself as a witness who having been summoned by the opposite party

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(*w*) *Bawden* v. *Bawden* (1861) 2 Sw. & Tr. 417; 164 E. R. 1057. *Giles* v. *Giles* (1900) P. 17.

(*x*) See Order V, Rule 24 of the Code of Civil Procedure, 1908. *Bland* v. *Bland* (1875) L.R. 3 P. & D. 233.

gives evidence not voluntarily, but in obedience to the direction of the Court and without the knowledge that he was not bound to answer questions put to him by the Court(*y*).

A witness cannot be cross-examined as to any act of adultery respecting which he or she has not been examined-in-chief, although such adultery may not be a question in issue in the cause (*z*), but in a later case it was held that a party to a suit who "offers" himself as a witness on his own behalf in his examination-in-chief denies the truth of some of the charges of adultery contained in the pleadings and is asked no questions as to the other charges of adultery, is liable to be asked and is bound to answer questions in cross-examination respecting all the charges contained in the pleadings (*a*).

"*Parties shall be at liberty to verify their cases by affidavit*"—

Cf: Order XIX of the Code of Civil Procedure.

A party to a matrimonial suit is not entitled as of right to give evidence by affidavit and where a petitioner "offers" himself (or herself) as a witness he or she shall be examined orally in Court (*b*). When either party *bona fide* desires the production of a witness for cross-examination and that such witness can be produced an order shall not be made authorising the evidence of such witness to be given by affidavit (*c*). The Divorce Court has a discretion to allow affidavit evidence of adultery in exceptional circumstances, but as a general rule should not allow it (*d*).

(*y*) *De Bretton* v. *De Bretton & Holme* (1882) 4 All. 49.
(*z*) *Babbage* v. *Babbage & Manning* (1870) L.R. 2 P. & D. 222.
(*a*) *Brown* v. *Brown & Paget* (1874) L.R. 3 P. & D. 198 at p. 199; 30 I.T. 767.
(*b*) *Skinner* v. *Skinner*, 13 P.R. (1891).
(*c*) Order XIX Rule 1 of the Code of Civil Procedure.
(*d*) *Gayer* v. *Gayer* (1917) P. 64; 116 L.T. 322. *Stones* v. *Stones* (1935) 62 Cal. 541.

In a wife's petition for divorce on the ground of her husband's desertion and adultery the desertion was proved and also the fact that the respondent had gone through the ceremony of marriage with another woman in America, the Court allowed the proof of adultery to be completed by affidavit in the special circumstances of the case (*e*). If evidence is to be taken of absent persons, evidence given on commission would be preferable to affidavit evidence (*f*). But where the witnesses in a divorce suit were all resident in America and the expenses of a commission would be beyond the wife's means the Court allowed the facts of the bigamous marriage, the subsequent adultery and the identity to be proved by affidavits (*g*). Affidavit evidence cannot without special leave be admitted as sole proof of adultery though leave to use it even for that purpose may be given in very special circumstances (*h*). Such evidence, however, is admissible of non access by the husband to establish adultery, the birth of a child being proved *aliunde* (*i*). Where no answer was filed in a suit for restitution of conjugal rights the Court allowed the petition to be proved by affidavit (*j*), and in a suit for nullity by a woman, the Court, with the consent of the respondent, allowed petitioner's evidence to be given by affidavit (*k*). It is, however, undesirable and contrary to established practice to accept evidence on affidavit (especially evidence of the petitioner) except as regards evidence other than that of the petitioner in some very exceptional cases (*l*).

(*e*) *Ellam* v. *Ellam* (1899) 58 L.J.P. 56.
(*f*) *Gayer* v. *Gayer* (1917) P. 64. *Grant* v. *Grant* A.I.R. (1937) Pat. 82.
(*g*) *Burslem* v. *Burslem* (1892) 67 L.T. 719. *Carter* v. *Carter* (1919) 36 T.L.R. 121.
(*h*) *Goodman* v. *Goodman & Pinfield* (1920) P. 67; 122 L.T. 748.
(*i*) *Boulton* v. *Boulton* (1918) 34 L.T. 389; 87 L.J.P. 112.
(*j*) *Ford* v. *Ford* (1867) 36 L.J. P. & M. 86.
(*k*) *B. (falsely called C.*) v. *C.* (1863) 32 L.J.P. & M. 135.
(*l*) *Stones* v. *Stones* (1935) 62 Cal. 541.

Competence of husband and wife to give evidence as to cruelty or desertion.

52. On any petition presented by a wife, praying that her marriage may be dissolved by reason of her husband having been guilty of adultery coupled with cruelty, or of adultery coupled with desertion without reasonable excuse, the husband and wife respectively shall be competent and compellable to give evidence of or relating to such cruelty or desertion.

Cf: section 6 of the Matrimonial Causes Act, 1857.

Section 198 of the Supreme Court of Judicature (Consolidation) Act, 1925.

"*The husband and wife shall be competent and compellable to give evidence*"—

Section 118 of the Indian Evidence Act, 1872, provides for persons who may testify:—

> "All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them or from giving rational answers to those questions, by tender years, extreme old age, disease whether of body or mind, or any other cause of the same kind."

Section 120 runs thus:—

> "In all civil proceedings the parties to the suit, and the husband or wife of any party to the suit shall be competent witnesses".

The provisions of the above two sections of the Indian Evidence Act, 1872, modify the restrictions put upon the husband and wife under the English common law by the decision of the House of Lords in *Russell* v. *Russell* [(1924) A. C. 687] (*m*).

(*m*) *Howe* v. *Howe* (1915) 38 Mad. 466, *F.B. De Bretton* v. *De Bretton* (1882) 4 All. 49.

Where the husband bases his petition for divorce on the fact of his non-access to his wife, it is not open to him to ask the Court to accept his own evidence on that point. There is a presumption of law that the child of a married woman was begotton by her husband and neither a husband nor a wife is permitted with the object or possible result of proving that a child born to the wife during wedlock is not the child of the husband, to give evidence showing or tending to show that they did not have sexual relations with each other at the time when the child would have been conceived. This rule which is the same in British India as in England is applicable not only to cases in which the legitimacy of the child is directly in issue but also to proceedings instituted in consequence of adultery where the wife's adultery is brought to be established by proof that she has given birth to a child of which the husband is not the father. The rule excludes evidence by the husband on the point of non-access and also of any facts from which non-access might indirectly be presumed. The fact of non-access might, however, be proved *aliunde.*

Section 118 of the Evidence Act does no more than enumerate the English rule with regard to the competence of parties as witnesses without in any way making admissible all the evidence which might be given by them. In this connection the provisions of section 112 must not be overlooked. These sections of the Indian Evidence Act were enacted many years before the decision in *Russell* v. *Russell* and they embody English common law rule of evidence applicable to legitimacy proceedings. The ruling of the Court in *Russell* v. *Russell* merely made it clear that the same kind of principle is equally applicable to cases in which there is a question of proving a wife's adultery for the purpose of obtaining a dissolution of marriage. The wording of section 112 of the Evidence

Act in no way conflicts with the rule of law as laid down in *Russell* v. *Russell* because it neither says in terms, nor even suggests, that it would be open to a husband petitioner himself to give evidence tending to show that he neither had nor could have had access to his wife at the time when the child was conceived. The words in that section namely, "unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten", mean no more than that evidence to that effect may be given but only if such evidence is not otherwise inadmissible (*n*).

The respondent wife in a divorce suit is compellable to give evidence of her adultery if she "offers" herself as a witness (*o*). In a suit by a wife in order to prove desertion she should give evidence of conduct on her part showing that such desertion was against her will (*p*), and when a petitioner and a respondent are examined upon an issue of cruelty or desertion they may be cross-examined upon issues of their own adultery and each other's adultery (*q*), but statements written or verbal made by the wife in the absence of the co-respondent though evidence against herself are not evidence against the co-respondent (*r*).

Power to close doors.

53. The whole or any part of any proceeding under this Act may be heard, if the Court thinks fit, with closed doors.

In Camera—

This term seems to have been originally applied to the Judge's Chambers at Sergeant's Inn as distinguished from

(*n*) *Sweeney* v. *Sweeney* (1935) 62 Cal. 1080.
(*o*) *Kelly* v. *Kelly & Saunders* (1869) 3 Beng. L.R. Appx. 6. *Wadia* v. *Wadia* (1914) 38 Bom. 125. *De Bretton* v. *De Bretton* (1882) 4 All. 49.
(*p*) *Fowle* v. *Fowle* (1879) 4 Cal. 260.
(*q*) *Boardman* v. *Boardman* (1866) L.R. 1 P. & D. 233. See *Rev. M. Bonheim* v. *Ka Trolimon* (1930) 57 Cal. 1159.
(*r*) *Hay* v. *Gordon* (1872) 10 Ben. L.R. 301, *P.C.*; 18 W.R. 480.

their Bench in Westminster Hall. It is now used with reference to legal proceedings held privately, *in Camera* (*i.e.* in chambers) from which the public are excluded.

As a general rule all trials of an issue of facts in England have always been held with open doors. Under the mediæval procedure all suitors of a Court were summoned to attend its sittings and bound under penalty to be there to witness or assist in the proceedings. Trials were *in pais* and differed for this and other historic reasons from trials under the civil and canon law which rested on inquisition and torture and were usually conducted in private; and notwithstanding all changes in procedure, an English Court of Justice is in theory open to as many citizens as can crowd into it without disturbing its proceedings. It is common practice to order women and children out of the Court when certain classes of criminal charges are being heard, but the order as to adult women has neither common law nor statutory authority and is unenforcible by any lawful process.

In civil proceedings on the common law side there seems to have been no precedent until 1889 for the exclusion of the public from a trial with or without a jury, whether the parties consented or not. In *Malan* v. *Young* (*s*) the public including barristers not concerned in the case were excluded by order of the Judge and consent of the parties on a trial for libel held without a jury. The power of the judge was at the time strongly questioned (*t*).

Matrimonial Causes—

Under the Ecclesiastical practice certain classes of matrimonial suits could be heard *in Camera*, but petitions for dissolution of marriage instituted under the provisions

(*s*) (1869) 6 T.L.R. 38.
(*t*) See (1889) 34 Sol. Jour. 41.

of the Matrimonial Causes Act of 1857 must be heard in open Court (*u*). After considerable hesitation it is now held that under section 22 of the Act of 1857 cases of nullity on the ground of incapacity be heard in *Camera* (*v*), and where divorce is sought on the ground of sodomy the evidence is in practice taken in private. In *Cohen* v. *Cohen* (*w*). Sir F. Jeune held that such a case could not be heard in *Camera*, but requested all persons not concerned in the case to leave the body and gallery of the Court, after which the trial proceeded with closed doors. Similarly, when the details of the case are very unpleasant the Judge orders the removal from the Court of women and children (*x*). Where proceedings are directed to be held *in Camera*, it seems to be contempt of Court to publish a report of them, except perhaps of the result (*y*).

Hearing in Camera—

Apart from any statutory enactment the general rule is that the Courts must as between parties, administer justice in public, unless by so doing the parties would reasonably be deterred from seeking the justice which it is the primary function of the Courts to administer (*z*). The Court must be satisfied that the paramount object of securing that justice is done would really be rendered doubtful of attainment if the order for hearing *in Camera* were not made (*a*), or wherever, in the opinion of the Court, justice would be defeated by insisting on a public

(*u*) *Barnett* v. *Barnett* (1859) 2 L.J. P. & M. 28.
(*v*) *H.* v. *C.* (1859) 29 L.J. P. & M. 29. *C.* v. *C.* (1869) L.R. 1 P. & D. 640 *A.* v. *A.* (1875) L.R. 3 P. & D. 230.
(*w*) (1897) 13 T. L. R. 255.
(*x*) *Barnett* v. *Barnett*, supra.
(*y*) *In re Martendale* (1894) 3 Ch. 193.
(*z*) *R.* v. *Local Government Board, Exparte Alridge* (1914) 1 K.B. 160, C.A. (1915) A.C. 120.
(*a*) *Scott* v. *Scott* (1913) A.C. 417.

hearing (*b*). In a recent case in England the trial of an uncontested action was held in the Judges' Library and neither the Judge nor Counsel were robed. The trial was considered not to be in open Court and the decree passed by the Court was held to be voidable but not void (*c*).

54. The Court may from time to time adjourn the hearing of any petition under this Act, and may require further evidence thereon if it sees fit so to do.

Power to adjourn.

"*The Court may adjourn the hearing*"—

Cf: section 44 of the Matrimonial Causes Act, 1857.

See Order XVII of the Code of Civil Procedure.

A discretion is given to the Court to grant time to the parties and to adjourn the hearing of the suit. An adjournment should not be refused if sufficient cause is shown (*d*). When a party satisfies the Court of its inability to produce all his witnesses on the date fixed for hearing, an adjournment should be granted (*e*).

Adjournment for particulars—

Where evidence was offered that the husband had struck his wife a blow and no such specific charge had been made in the petition the Court allowed the hearing to be adjourned in order that particulars might be furnished (*f*), and a suit may be adjourned to enable the co-respondent

(*b*) *Moosbrugger* v. *Moosbrugger* (1913) 29 T.L.R. 658. *Cleland* v. *Cleland* (1913) 30 T.L.R. 169. *Norman* v. *Mathews* (1916) 85 L.J. K.B. 857. *R.* v. *Lewes Prison* (*Governor*) (1917) 2 K.B. 254.

(*c*) *McPherson* v. *McPherson* (1936) A.C. 177, P.C.

(*d*) *Maharaja* v. *Harihar* (1920) 5 Pat. L.J. 390.

(*e*) *Thornton* v. *Thornton* (1886) 10 Bom. 422 at p. 433. *Surjamoni Dasi* v. *Kali Kanta Das* (1901) 28 Cal. 37.

(*f*) *Brook* v. *Brook* (1886) 12 P.D. 19; 57 L.T. 425. *Bancroft* v. *Bancroft & Rumney* (1864) 3 Sw. & Tr. 597.; 164 E.R. 1407.

to amend his answer by the insertion of various counter-charges against the petitioner (*g*), but the Court may not postpone the trial of a suit on the application of one of the parties if no notice of the application has been given to the other party (*h*).

In a wife's suit for dissolution of marriage on the ground of adultery and desertion, respondent's adultery was proved, but it appeared that the desertion of his wife had lasted for less than two years. The hearing was adjourned and on a supplementary petition filed more than a year afterwards the Court heard further evidence as to desertion and granted a decree (*i*). The cause of action had not accrued when the petition was filed and the proper procedure is to withdraw the petition and file a fresh one on the completion of two years (*j*). In a suit for divorce by reason of adultery, promoted by the husband, the proof of the guilt of the wife was conclusive and she had also in terms admitted it. An application on her behalf to stay the proceedings to enable her to examine witnesses abroad to prove condonation on the part of the husband was rejected (*k*).

nforcement f and appeals rom, orders nd decrees.

55. All decrees and orders made by the Court in any suit or proceeding under this Act shall be enforced and may be appealed from, in the like manner as the decrees and orders of the Court made in the exercise of its original civil jurisdiction are enforced and may be appealed from, under the laws, rules and orders for the time being in force:

(*g*) *Plumer* v. *Plumer & Bygrave* (1859) 4 Sw. & Tr. 257; 29 L.J.P. & M. 63 ; 164 E.R. 1514.
(*h*) *Hepworth* v. *Hepworth* (1861) 2 Sw. & Tr. 414; 5 L.T. 120; 164 E.R. 1057.
(*i*) *Wood* v. *Wood* (1887) 13 P.D. 22.
(*j*) *Lapington* v. *Lapington* (1889) 14 P.D. 21.
(*k*) *Campbell* v. *Campbell* (1857) Dea. & Sw. 285; 29 L.T. (O.S.) 150; 164 E.R. 578.

Provided that there shall be no appeal from a decree of a District Judge for dissolution of marriage or of nullity of marriage: nor from the order of the High Court confirming or refusing to confirm such decree:

Provided also that there shall be no appeal on the subject of costs only.

No appeal as to costs.

Cf: section 52 of the Matrimonial Causes Act, 1857.

Decrees and orders under this Act are enforced in the manner provided by the Code of Civil Procedure, 1908, for the execution of decrees. The word 'decrees' in this section include both decree *nisi* and decree absolute (*l*).

Orders—It includes any decision on an interlocutory proceeding which goes to the root of the question whether or not a dissolution or nullity is decreed (*m*).

'*Shall be enforced*'—

Judgments as to status in matters within the jurisdiction of the Court are judgments *in rem* and bind all the world. The Courts in England recognise and enforce such judgments of Indian Courts in matters within their jurisdiction and will also recognise and enforce the orders for damages, such as English Courts pass under similar circumstances (*n*). An order for payment of alimony *pendente lite* is to be enforced in accordance with the provisions of the Code of Civil Procedure relating to execution of decrees and the husband is not to be committed to prison for contempt of Court (*o*).

(*l*) *A.* v. *B.* (1898) 22 Bom. 612 at p. 614.

(*m*) *Pagani* v. *Pagani & Vining* (1866) L.R. 1 P. & D. 223; 14 L.T. 706.

(*n*) *Philip* v. *Batho* (1913) 17 C.W.N. cclxi.

(*o*) *White* v. *White* (1927) 32 C.W.N. 179 at pp. 180–181.

"May be appealed from"—

An appeal would lie from a decree absolute though no appeal was preferred from the decree *nisi* (*p*). It should be filed within 20 days from the date of the decree (*q*). When the period of limitation for filing an appeal has expired during the vacation of the High Court, a party to a suit has the right to have the appeal admitted on the day the Court reopens and the Prothonotary of the High Court has power to receive and file a memorandum of appeal on that day. In such a case in order to save the right of appeal to the appellant the appeal may be admitted without requiring security (*r*). On an appeal against a decree of dissolution on the ground of adultery where the appellant contended that the fact of adultery on her part was not established in the trial Court, the co-respondent was not entitled to be heard in opposition to the appeal (*s*). The Court of Appeal has power to admit additional evidence. Where the appellant produced before the Court of Appeal certain letters written after the appeal was filed by the respondent and one M. to each other which showed the existence of criminal intimacy between them, the Court held that those letters were admissible in evidence and having been brought to the Court's notice by the appellant, the Court was bound in the interest of justice to require their production in order to enable it to decide the appeal on its real merits (*t*). So also, when the evidence on record is not satisfactory and the Court of Appeal requires further information it can direct the parties in the interest of justice to attend Court and answer questions (*u*).

(*p*) *Cleaver* v. *Cleaver* (1884) 9 App. Cas. 631 at p. 634.
(*q*) *A.* v. *B.* (1898) 22 Bom. 612.
(*r*) *King* v. *King* (1882) 6 Bom. 487.
(*s*) *Kelly* v. *Kelly & Saunders* (1870) 5 Ben. L.R. 71.
(*t*) *Morgan* v. *Morgan* (1882) 4 All. 306.
(*u*) *Holloway* v. *Holloway* (1883) 5 All. 71 at p. 72.

The High Court when moved to confirm the decree of the District Court, can deal with that part of the decree awarding damages against the co-respondent although he does not appeal against it (*v*).

An appeal lies against the order of rejection by the District Judge under section 14 of a husband's petition for dissolution of marriage (*w*), and also against an order ruling that certain evidence is inadmissible (*x*).

"*Provided there shall be no appeal from a decree of the District Judge nor from the order of the High Court*"

The provisions of this section do not deprive parties of the right to appeal to His Majesty in Council from an order of a High Court confirming or refusing to confirm the decree of a District Judge and an order of a High Court confirming the decree of a District Judge for dissolution of marriage was reversed as it affected the co-respondent (*y*).

"*No appeal on the subject of costs only*"—

Sections 16 and 35 of this Act provide for orders for costs, but the Court is not deprived of its discretion of ordering parties to pay costs under section 35 of the Code of Civil Procedure.

The right of parties to appeal against an order for costs only is taken away by the specific provision to that effect. The Bombay High Court has held that an appeal would lie for costs only whether the order as to costs involved a question of principle or not, but the Appellate Court would not interfere with the exercise of discretion

(*v*) *Kyte* v. *Kyte & Cooke* (1886) 20 Bom. 362.
(*w*) *Palmer* v. *Palmer* (1917) 41 Bom. 36.
(*x*) *Chamarette* v. *Chamarette*, A.I.R. (1937) Lah. 176.
(*y*) *Hay* v. *Gordon* (1872) 10 Ben. L.R. 301, P.C.

of the lower Court unless a principle was involved and the principle was violated (*z*).

Appeal to Queen in Council.

56. Any person may appeal to Her Majesty in Council from any decree (other than a decree *nisi*) or order under this Act of a High Court made on appeal or otherwise,

and from any decree (other than a decree *nisi*) or order made in the exercise of original jurisdiction by Judges of a High Court or of any Division Court from which an appeal shall not lie to the High Court,

when the High Court declares that the case is a fit one for appeal to Her Majesty in Council.

Appeal to His Majesty in Council—

See sections 109 to 112 and Order XLV of the Code of Civil Procedure, 1908.

By section 45 of the Act all proceedings under this Act are regulated by the Code of Civil Procedure but they are subject to the other provisions of this Act.

Section 56 limits the scope of the general provisions for appeals to the Privy Council but such limitation does not affect the prerogative of the Crown to admit an appeal. Special leave may be granted by the Privy Council to appeal where leave has been refused by the High Court (*a*), or when leave has been wrongfully granted by the High Court (*b*). No appeal lies to the Privy Council on an interlocutory order (*c*), nor does an appeal lie as a matter

(*z*) *Ranchordas* v. *Bai Kasi* (1892) 16 Bom. 676. *Khushal* v. *Punamchand* (1898) 22 Bom. 164.
(*a*) *Rahimbhoy* v. *Turner* (1891) 15 Bom. 155.
(*b*) *Sorabjee* v. *Dwarkadas* (1932) 59 I.A. 366; 34 Bom.L.R. 1310, P.C.
(*c*) *Radha Kishan* v. *Collector of Jaunpore* (1901) 23 All. 220, *P.C.*; 28 I.A. 28.

of right in suits for restitution of conjugal rights as the valuation is put arbitrarily (*d*).

XIII—Re-Marriage.

Liberty to parties to marry again.

57. When six months after the date of an order of a High Court confirming the decree for a dissolution of marriage made by a District Judge have expired,

or when six months after the date of any decree of a High Court dissolving a marriage have expired, and no appeal has been presented against such decree to the High Court in its appellate jurisdiction,

or when any such appeal has been dismissed,

or when in the result of any such appeal any marriage is declared to be dissolved,

but not sooner, it shall be lawful for the respective parties to the marriage to marry again, as if the prior marriage had been dissolved by death:

Provided that no appeal to Her Majesty in Council has been presented against any such order or decree.

When such appeal has been dismissed, or when in the result thereof the marriage is declared to be dissolved, but not sooner, it shall be lawful for the respective parties to the marriage to marry again as if the prior marriage had been dissolved by death.

"*It shall be lawful for the parties to marry again*"—

Cf: section 57 of the Matrimonial Causes Act, 1857.

Section 184 of the Supreme Court of Judicature (Consolidation) Act, 1925.

(*d*) *Mowla Newaz* v. *Sajidunnissa* (1891) 18 Cal. 378. *Motichand* v. *Ganga Prasad* (1902) 24 All. 174.

Section 57 of the Act expressly prohibits re-marriage within six months of the making of the decree absolute. The tie of marriage is not finally dissolved until the lapse of a specified time after a decree for dissolution and the marriage is still in force within the meaning of section 19 (1) so as to give jurisdiction to the Court to pronounce a decree of nullity regarding a prohibited marriage (d_1). Where after a decree of dissolution of marriage, one of the parties to such marriage was married in fact within the time limited by the Matrimonial Causes Act, 1857, and during the lifetime of the other party to the marriage, the Court held the latter *de facto* marriage to be null and void in law (e).

The decree of the High Court referred to in the section is the decree absolute and not the decree *nisi* (f). The prohibition contained in this section against the marriage of either party within such period is an integral part of the proceedings and a condition which must be fulfilled before the parties can contract a fresh marriage, nor can the parties evade the prohibition by obtaining a domicile in another country (g).

The parties to the divorce proceedings are entitled to intermarry again (h), but the children born of such re-marriage are not entitled to the benefit of a settlement made on the former marriage upon the children of the parties (i).

(d_1) *Battie* v. *Brown* (1913) 38 Mad. 452. *Turner* v. *Turner* (1921) 48 Cal. 636. *Jackson* v. *Jackson* (1912) 34 All. 203.

(e) *Chichester* v. *Mure* (falsely called *Chichester*) (1863) 3 Sw. & Tr. 223; 32 L.J.P. 146; 8 L.T. 676; 164 E.R. 1259. *Rogers* (otherwise *Briscoe* falsely called *Halmshaw*) v. *Halmshaw* (1864) 3 Sw. & Tr. 509; 33 L.J. P. & M. 141; 164 E.R. 1373.

(f) *Jackson* v. *Jackson* (1932) 34 All. 203 at pp. 204–205. *Warter* v. *Warter* (1890) 15 P.D. 152.

(g) *Warter* v. *Warter*, supra at p. 155.

(h) *Fendall* (otherwise *Goldsmid*) v. *Goldsmid* (1877) 2 P.D. 263.

(i) *Bond* v. *Tylor*, (1862) 31 L.J.P. & M. 784.

Wife's right to husband's name after divorce—

Marriage confers a name upon a woman. The name so conferred becomes her actual name and continues to be so even after a decree of divorce until she has acquired by repute some other name which, so to speak, obliterates it (*j*); and an injunction will not be granted to restrain the former wife whose marriage with the former husband has been dissolved and who has subsequently married from using her former name or title (*k*).

English clergyman not compelled to solemnize marriages of persons divorced for adultery.

58. No clergyman in Holy Orders of the Church of England shall be compelled to solemnize the marriage of any person whose former marriage has been dissolved on the ground of his or her adultery, or shall be liable to any suit, penalty or censure for solemnizing or refusing to solemnize the marriage of any such person.

This section was amended by Act XII of 1873 whereby 'United Church' was substituted by "Church" and in the words England and Ireland in the second line, the words "and Ireland" were repealed.

Where a clergyman licensed to solemnize marriage is made aware of the dissolution of a previous marriage of either of the parties before him he should call for the production of the decree absolute to ascertain whether the period of six months prescribed by section 57 of the Act has expired (*l*).

English minister refusing to perform ceremony to permit use of his church.

59. When any Minister of any Church or Chapel of the said Church refuses to perform such marriage-service between any persons who but for

(*j*) *Fendall* (otherwise *Goldsmid*) v. *Goldsmid*, supra.
(*k*) *Cowley* (Earl) v. *Cowley* (Countess) (1901) A.C. 450; 85 L.T. 254; 17 T.L.R. 725, H.L.
(*l*) *Turner* v. *Turner* (1921) 48 Cal. 636 at p. 642. *Battie* v. *Brown* (1915) 38 Mad. 452 at p. 454.

such refusal would be entitled to have the same service performed in such Church or Chapel, such Minister shall permit any other Minister in Holy Orders of the said Church, entitled to officiate within the diocese in which such Church or Chapel is stiuate, to perform such marriage-service in such Church or Chapel.

Cf: Section 58 of the Matrimonial Causes Act, 1857.

XIV—MISCELLANEOUS.

Decree for separation or protection order valid as to persons dealing with wife before reversal.

60. Every decree for judicial separation or order to protect property, obtained by a wife under this Act shall, until reversed or discharged, be deemed valid, so far as necessary, for the protection of any person dealing with the wife.

No reversal, discharge or variation of such decree or order shall affect any rights or remedies which any person would otherwise have had in respect of any contracts or acts of the wife entered into or done between the dates of such decree or order, and of the reversal, discharge or variation thereof.

All persons who in reliance on any such decree or order make any payment to, or permit any transfer or act to be made or done by, the wife who has obtained the same shall, notwithstanding such decree or order may then have been reversed, discharged or varied, or the separation of the wife from her husband may have ceased, or at some time since the making of the decree or order been discontinued, be protected and indemnified as if, at the time of such payment, transfer or other act, such decree or order were valid and still subsisting

without variation, and the separation had not ceased or been discontinued,

unless at the time of the payment, transfer or other act, such persons had notice of the reversal, discharge or variation of the decree or order or of the cessation or discontinuance of the separation.

See section 26 of the Act,

Cf: section 23 of the Matrimonial Causes Act, 1857.

Bar of suit for criminal conversation.

61. After this Act comes into operation, no person competent to present a petition under sections two and ten shall maintain a suit for criminal conversation with his wife.

Cf: section 59 of the Matrimonial Causes Act, 1857.

Criminal Conversation—

At common law condonation by the husband of an act of adultery was no bar to an action for criminal conversation against the adulterer but only went in mitigation of damages. Under the Matrimonial Causes Act, 1857 and under the Indian Divorce Act, 1869, where on a petition for divorce and for damages against the co-respondent, a divorce is refused on the ground that the adultery complained of had been condoned, the petitioner is not entitled to a judgment even for nominal damages against the co-respondent, but the petition will be dimissed and the petitioner may be ordered to pay co-respondent's costs (*m*).

In India adultery by a man with a woman whom he knows or has reason to believe to be the wife of another man without the consent or connivance of the man is an offence punishable under section 497 of the Indian Penal

(*m*) *Bernstein* v. *Bernstein* (1893) P. 292; 69 L.T. 513.

Code with imprisonment for a term which may extend to five years or with fine or both. The wife is not punishable as an abettor. A prosecution under section 497 of the Indian Penal Code can be launched only by the husband or by the person having the care of the wife on his behalf.

Power to make rules.

62. The High Court shall make such rules under this Act as it may from time to time consider expedient, and may from time to time alter and add to the same:

Provided that such rules, alterations and additions are consistent with the provisions of this Act and the Code of Civil Procedure.

All such rules, alterations and additions shall be published in the local official Gazette.

Power of the High Court to make Rules—

The provisions of sections 53 and 54 of the Matrimonial Causes Act, 1857 had given powers to the Court to make rules and regulations concerning the practice and procedure and for the fees payable upon all proceedings under the Act.

For Rules of the Bombay High Court—
(see Appendix C).

For Rules of the Calcutta High Court—
(see Appendix D).

For Rules of the Madras High Court—
(see Appendix E).

For Matrimonial Causes Rules, 1924—
(see Appendix F).

SCHEDULE OF FORMS.

No. 1.—PETITION *by husband for a dissolution of marriage with damages against co-respondent, by reason of adultery.*

(*See sections 10 and 34.*)

In the (High) Court of

To the Hon'ble Mr. Justice [*or* To the Judge of]

The day of 19 .

The petition of *A. B.* of

SHEWETH,

1. That your petitioner was on the day of , one thousand nine hundred and , lawfully married to *C.B.*, then *C. D.*, spinster at . (*a*)

2. That from his said marriage, your petitioner lived and cohabited with his said wife at and at , in , and lastly at , in , and that your petitioner and his said wife have had issue of their said marriage, *five* children, of whom *two* sons only survive, aged respectively *twelve* and *fourteen* years.

3. That during the *three* years immediately preceding the day of one thousand nine hundred and , *X. Y.* was constantly, with a few exceptions, residing in the house of your petitioner at aforesaid, and that on divers occasions during the said period, the dates of which are unknown to your petitioner, the said *C.B.* in your petitioner's said house committed adultery with the said *X. Y.*

4. That no collusion or connivance exists between me and my said wife for the purpose of obtaining a dissolution of our said marriage or for any other purpose.

Your petitioner, therefore, prays that this (Hon'ble) Court will decree a dissolution of the said marriage, and that the said *X. Y.* do pay the sum of rupees 5,000 as damages by reason of his having committed adultery with your petitioner's said wife, such damages to be paid to your petitioner, or otherwise paid or applied as to this (Hon'ble) Court seems fit.

(Signed *A. B.* (*b*).

Form of Verification.

I, *A. B.*, the petitioner named in the above petition, do declare that what is stated therein is true to the best of my information and belief.

(*a*) If the marriage was solemnized out of India, the adultery must be shown to have been committed in India.

(*b*) The petition must be signed by the petitioner.

No. 2.—Respondent's statement in answer to No. 1.

In the Court of the day of
Between *A.B.*, petitioner,
C. B., respondent, and
X.Y., co-respondent.

C. B., the respondent, by *D.E.* her attorney [*or* vakil] in answer to the petition of *A. B.* says that she denies that she has on divers or any occasions committed adultery with *X. Y.*, as alleged in third paragraph of the said petition.

Wherefore the respondent prays that this (Hon'ble) Court will reject the said petition.

(Signed) *C. B.*

No. 3.—Co-respondent's statement in answer to No. 1.

In the (High) Court of
The day of
Between *A. B.*, petitioner,
C. B., respondent, and
X. Y., co-respondent.

X. Y., the co-respondent, in answer to the petition filed in this cause, saith that he denies that he committed adultery with the said *C. B.*, as alleged in the said petition.

Wherefore the said *X. Y.* prays that this (Hon'ble) Court will reject the prayer of the said petitioner and order him to pay the costs of and incident to the said petition.

(Signed) *X. Y.*

No. 4.—PETITION *for Decree of Nullity of Marriage.*
(*See section 18.*)

In the (High) Court of
To the Hon'ble Mr. Justice
Judge of] [*or* To the
The day of , 19

The petion of *A. B.* falsely called
A. D.,

SHEWETH,

1. That on the day of , one thousand nine hundred and , your petitioner, then a spinster, eighteen years of age, was married in fact, though not in law, to *C. D.*, then a bachelor of about thirty years of age, at [*some place in India.*]

2. That from the said day of , one thousand nine hundred and , until the month of one thousand nine hundred and , your petitioner lived and cohabited with the said *C. D.*, at divers places, and particularly at aforesaid.

3. That the said *C. D.* has never consummated the said pretended marriage by carnal copulation.

4. That at the time of the celebration of your petitioner's said pretended marriage, the said *C. D.* was, by reason of his impotency or malformation, legally incompetent to enter into the contract of marriage.

5. That there is no collusion or connivance between her and the said *C. D.* with respect to the subject of this suit.

Your petitioner therefore prays that this (Hon'ble) Court will declare that the said marriage is null and void.

(Signed) *A. B.*

Form of Verification: *See No. 1.*

No. 5.—PETITION *by wife for judicial separation on the ground of her husband's adultery.*

(*See section 22.*)

In the (High) Court of

To the Hon'ble Mr. Justice [*or*

To the Judge of]

The day of 19 .

The petition of *C. B.*, of the wife of *A. B.*

SHEWETH,

1. That on the day of , one thousand nine hundred and your petitioner, then *C. D.*, was lawfully married to *A. B.*, at the Church of , in the

2. That after her said marriage, your petitioner cohabited with the said *A. B.* at and at , and that your petitioner and her said husband have issue living of their said marriage, *three* children, to wit, etc., etc. (*a*).

3. That on divers occasions in or about the months of *August*, *September* and *October*, one thousand nine hundred and , the said *A.B.*, at , aforesaid, committed adultery with *E.F.*, who was then living in the service of the said *A. B.* and your petitioner at their said residence aforesaid.

4. That on divers occasions in the months of *October*, *November* and *December*, one thousand nine hundred and , the said *A. B.* at aforesaid, committed adultery with *G. H.*, who was then living in the service of the said *A. B.* and your petitioner at their said residence aforesaid.

5. That no collusion or connivance exists between your petitioner and the said *A. B.* with respect to the subject of the present suit.

Your petitioner therefore prays that this (Hon'ble) Court will decree a judicial separation to your petitioner from her said husband by reason of his aforesaid adultery.

(Signed) *C. B.* (*b*).

Form of Verification: *See No. 1.*

(*a*) State the respective ages of the children.

(*b*) The petition must be signed by the petitioner.

No. 6—Statement in answer to No. 5.

In the (High) Court of

B. against *B.*

The day of

The respondent, *A.B.*, by *W. Y.*, his attorney [*or* vakil] saith,—

1. That he denies that he committed adultery with *E. F.*, as in the third paragraph of the petition alleged.

2. That the petitioner condoned the said adultery with *E. F.*, if any.

3. That he denies that he committed adultery with *G. H.*, as in the fourth paragraph of the petition alleged.

4. That the petitioner condoned the said adultery with *G. H.*, if any.

Wherefore this respondent prays that this (Hon'ble) Court will reject the prayer of the said petition.

(Signed) *A. B.*

No. 7.—Statement in reply to No. 6.

In the (High) Court of

B. against *B.*

The day of

The petitioner, *C.B.*, by her attorney [*or* vakil], says—

1. That she denies that she condoned the said adultery of the respondent with *E. F.*, as in the second paragraph of the statement in answer alleged.

2. That even if she had condoned the said adultery, the same has been revived by the subsequent adultery of the respondent with *G.H.*, as set forth in the fourth paragraph of the petition.

(Signed) *C. B.*

No. 8.—PETITION *for a judicial separation by reason of cruelty.*

[*See section 22.*]

In the (High) Court of

To the Hon'ble Mr. Justice [*or* To the Judge of]

The day of 19 .

The petition of *A.B.* (wife of *C.B.*) of

SHEWETH,

1. That on the day of , one thousand nine hundred and , your petitioner, then *A.D.*, spinster, was lawfully married to *C. B.*, at

2. That from her said marriage, your petitioner lived and cohabited with her said husband at until the day of , one thousand nine hundred and , when your petitioner separated from her said husband as hereinafter more particularly mentioned, and that your petitioner and her said husband have had no issue of their said marriage.

3. That from and shortly after your petitioner's said marriage the said *C.B.*, habitually conducted himself towards your petitioner with great harshness and cruelty, frequently abusing her in the coarsest and most insulting language, and beating her with his fists, with a cane, or with some other weapon.

4. That on an evening in or about the month of one thousand nine hundred and , the said *C. B.* in the highway and opposite to the house in which your petitioner and the said *C.B.* were then residing at aforesaid, endeavoured to knock your petitioner down, and was only prevented from so doing by the interference of *F.D.*, your petitioner's brother.

5. That subsequently on the same evening, the said *C. B.* in his said house at aforesaid, struck your petitioner with his clenched fists a violent blow on her face.

6. That on one Friday night on the month of one thousand nine hundred and , the said *C.B.*, in , without provocation, threw a knife at your petitioner, thereby inflicting a severe wound on her right hand.

7. That on the afternoon of the day of , one thousand nine hundred and , your petitioner by reason of the great and continued cruelty practised towards her by her said husband, with assistance withdrew from the house of her said husband to the house of her father at : that from and after the said day of , one thousand nine hundred and , your petitioner hath lived separate and apart from her said husband, and hath never returned to his house or to cohabitation with him.

8. That there is no collusion or connivance between your petitioner and her said husband with respect to the subject of the present suit.

Your petitioner, therefore, prays that this (Hon'ble) Court will decree a judicial separation between your petitioner and the said *C. B.*, and also order that the said *C. B.*, do pay the costs of and incident to these proceedings.

(Signed) *A. B.*

Form of Verification: *See No. 1.*

No. 9.—Statement in answer to No. 8.

In the (High) Court of

The day of

Between *A. B.*, petitioner, and

C. B., respondent.

C. B., the respondent, in answer to the petition filed in this cause by *W. J.* his attorney [*or* vakil] saith that he denies that he has been guilty of cruelty towards the said *A. B.*, as alleged in the said petition.

(Signed) *C. B.*

No. 10.—PETITION *for reversal of decree of separation.*

(*See section 24.*)

In the (High) Court of

To the Hon'ble Mr. Justice [*or* To the Judge of]

The day of 19 .

The petition of *A. B.*, of

SHEWETH,

1. That your petitioner was on the day of lawfully married to .

2. That on the day of , this (Hon'ble) Court at the petition of , pronounced a decree affecting the petitioner to the effect following, to wit,—

[*Here set out the decree.*]

3. That such decree was obtained in the absence of your petitioner, who was then residing at

[*State facts tending to show that the petitioner did not know of the proceedings; and, further, that had he known he might have offered a sufficient defence.*]

or

That there was reasonable ground for your petitioner leaving his said wife, for that his said wife

[*Here state any legal grounds justifying the petitioner's separation from his wife.*]

Your petitioner, therefore, prays that this (Hon'ble) Court will reverse the said decree.

(Signed) *A. B.*

Form of Verification: *See No. 1.*

No. 11.—PETITION *for Protection-order.*

(*See section 27.*)

In the (High) Court of

To the Hon'ble Mr. Justice [*or* To the Judge of]

The day of 19

The petition of *C. B.*, of

the wife of *A. B.*

SHEWETH,

That on the day of she was lawfully married to *A. B.*, a

That she lived and cohabited with the said *A. B.* for years at , and also at , and hath had children, issue of her said marriage, of whom are now living with the applicant, and wholly dependent upon her earnings.

That on or about , the said *A. B.*, without any reasonable cause, deserted the applicant, and hath ever since remained separate and apart from her.

That since the desertion of her said husband, the applicant hath maintained herself by her own industry [*or* on her own property, *as the case may be*], and hath thereby and otherwise acquired certain property consisting of [*here state generally the nature of the property*].

Wherefore she prays an order for the protection of her earnings and property acquired since the said day of , from the said *A. B.*, and from all creditors and persons claiming under him.

(Signed) *C. B.*

No. 12.—PETITION *for alimony pending the suit.*

(*See section 36.*)

In the (High) Court of

B. against *B.*

To the Hon'ble Mr. Justice [*or* To the Judge of]

The day of 19 .

The petition of *C. B.*, the lawful wife of *A. B.*

SHEWETH,

1. That the said *A. B.* has for some years carried on the business of , at , and from such business derives the nett annual income of from Rs. 4,000 to 5,000.

2. That the said *A. B.* is possessed of plate, furniture, linen and other effects at his said house, aforesaid, all of which he acquired in right of your petitioner as his wife, or purchased with money he acquired through her, of the value of Rs. 10.000.

3. That the said *A. B.* is entitled, under the will of his father subject to the life interest of his mother therein, to property of the value of Rs. 5,000 or some other considerable amount. (*a*).

Your petitioner, therefore, prays that this (Hon'ble) Court will decree such sum or sums of money by way of alimony, pending the suit, as to this (Hon'ble) Court may seem meet.

(Signed) *C. B.*

Form of Verification: *See No. 1.*

(*a*) The petitioner should state her husband's income as accurately as possible.

No. 13.—Statement in answer to No. 12.

In the (High) Court of

B. against *B.*

A. B. of , the above-named respondent, in answer to the petition for alimony, pending the suit, of *C. B.*, says—

1. In answer to the first paragraph of the said petition, I say that I have for the last *three* years carried on the business of , at , and that, from such business, I have. derived a nett annual income of Rs. 900, but less than Rs. 1,000.

2. In answer to the second paragraph of the said petition, I say that I am possessed of plate, furniture, linen and other chattels and effects at my said house. aforesaid, of the value of Rs. 7,000, but as I verily believe of no larger value. And I say that a portion of the said plate, furniture, and other chattels and effects of the value of Rs. 1,500, belonged to my said wife before our marriage, but the remaining portions thereof I have since purchased with my own monies. And I say that, save as hereinbefote set forth, I am not possessed of the plate and other effects as alleged in the said paragraph in the said petition, and that I did not acquire the same as in the said petition also mentioned.

3. I admit that I am entitled under the will of my father, subject to the life-interest of my mother therein, to property of the value of Rs. 5,000, that is to say, I shall be entitled under my said father's will, upon the death of my mother, to a legacy of Rs. 7,000, out of which I shall have to pay to my farther's executors the sum of Rs. 2,000 the amount of a debt owing by me to his estate, and upon which debt I am now paying interest at the rate of five per cent. per annum.

4. And, in further answer to the said petition, I say that I have no income whatever except that derived from my aforesaid business, that such income, since my said wife left me, which she did on the day of last, has been considerably diminished, and that such diminution is likely to continue. And I say that out of my said income, I have to pay the annual sum of Rs. 100 for such interest as aforesaid to my late father's executors, and also to support myself and my two eldest children.

5. And. in further answer to the said petition, I say that, when my wife left my dwelling-house on the day of last, she took with her, and has ever since withheld and still withholds from me, plate, watches and other effects in the second paragraph of this my answer mentioned, of the value of, as I verily believe, Rs. 800 at the least · and I also say that, within five days of her departure from my house as aforesaid, my said wife received bills due to me from certain lodgers of mine, amounting in the aggregate to Rs. , and that she has ever since withheld and still withholds from me the same sum.

(Signed) *A. B.*

No. 14.—UNDERTAKING *by minor's next friend to be answerable for respondent's costs.*

(*See section 49.*)

In the High Court of

I, the undersigned *A. B.*, of being the next friend of *C. D.* who is a minor, and who is desirous of filing a petition in this Court, under the Indian Divorce Act, against *D. D.* of , hereby undertake to be responsible for the costs of the said *D. D.* in such suit, and that, if the said *C. D.* fail to pay to the said *D. D.* when and in such manner as the Court shall order all such costs of such suit as the Court shall direct him [*or* her] to pay to the said *D.D.*, I will forthwith pay the same to the proper officer of this Court

Dated this day of 19 .

(Signed) *A. B.*

APPENDIX A.

TABLE OF PROHIBITED DEGREES OF CONSANGUINITY AND AFFINITY.

A man shall not marry his—

1. Paternal grand-father's mother.
2. Paternal grand-mother's mother.
3. Maternal grand-father's mother.
4. Maternal grand-mother's mother.
5. Paternal grand-mother.
6. Paternal grand-father's wife.
7. Maternal grand-mother.
8. Maternal grand-father's wife.
9. Mother or step-mother.
10. Father's sister or step-sister.
11. Mother's sister or step-sister.
12. Sister or step-sister.
13. Brother's daughter or step-brother's daughter, or any direct lineal descendant of a brother or step-brother.
14. Sister's daughter or step-sister's daughter, or any direct lineal descendant of a sister or step-sister.
15. Daughter or step-daughter, or any direct lineal descendant of either.
16. Son's daughter or step-son's daughter, or any direct lineal descendant of a son or step-son.
17. Wife of son or step-son, or of any direct lineal descendant of a son or step-son.
18. Wife of daughter's son or of step-daughter's son, or of any direct lineal descendant of a daughter or step-daughter.
19. Mother of daughter's husband.
20. Mother of son's wife.
21. Mother of wife's paternal grand-father.
22. Mother of wife's paternal grand-mother.
23. Mother of wife's maternal grand-father.
24. Mother of wife's maternal grand-mother.
25. Wife's paternal grand-mother.
26. Wife's maternal grand-mother.
27. Wife's mother or step-mother.
28. Wife's father's sister.
29. Wife's mother's sister.
30. Father's brother's wife.
31. Mother's brother's wife.
32. Brother's son's wife.
33. Sister's son's wife.

A woman shall not marry her—

1. Paternal grand-father's father.
2. Paternal grand-mother's father.
3. Maternal grand-father's father.
4. Maternal grand-mother's father.
5. Paternal grand-father.
6. Paternal grand-mother's husband.
7. Maternal grand-father.
8. Maternal grand-mother's husband.
9. Father or step-father.
10. Father's brother or step-brother.
11. Mother's brother or step-brother.
12. Brother or step-brother.
13. Brother's son or step-brother's son, or any direct lineal descendant of a brother or step-brother.
14. Sister's son or step-sister's son, or any direct lineal descendant of a sister or step-sister.
15. Son or step-son, or any direct lineal descendant of either.
16. Daughter's son or step-daughter's son, or any direct lineal descendant of a daughter or step-daughter.
17. Husband of daughter or of step-daughter, or of any direct lineal descendant of a daughter or step-daughter.
18. Husband of son's daughter or of step-son's daughter, or of any direct lineal descendant of a son or step-son.
19. Father of daughter's husband.
20. Father of son's wife.
21. Father of husband's paternal grand-father.
22. Father of husband's paternal grand-mother.
23. Father of husband's maternal grand-father.
24. Father of husband's maternal grand-mother.
25. Husband's paternal grand-father.
26. Husband's maternal grand-father.
27. Husband's father or step-father.
28. Brother of husband's father.
29. Brother of husband's mother.
30. Husband's brother's son, or his direct lineal descendant.
31. Husband's sister's son, or his direct lineal descendant.
32. Brother's daughter's husband.
33. Sister's daughter's husband.

NOTE.—In the above table the words "brother" and "sister" denote brother and sister of the whole as well as half blood. Relationship by step means relationship by marriage.

APPENDIX B.

THE INDIAN AND COLONIAL DIVORCE JURISDICTION ACT, 1926.

(16 AND 17 GEO. V, CAP. XL.)

An Act to confer on Courts in India and other parts of His Majesty's Dominions jurisdiction in certain cases with respect to the dissolution of marriages, the parties whereto are domiciled in England or Scotland, and to validate certain decrees granted for the dissolution of the marriage of persons so domiciled.

[15th December 1926].

Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Divorce jurisdiction of High Courts in India where parties are domiciled in England or Scotland.

1.—(1) Subject to the provisions of this Act, a High Court in India to which Part IX of the Government of India Act applies shall have jurisdiction to make a decree for the dissolution of a marriage, and as incidental thereto to make an order as to damages, alimony or maintenance, custody of children, and costs, where the parties to the marriage are British subjects domiciled in England or in Scotland, in any case where a court in India would have such jurisdiction if the parties to the marriage were domiciled in India:

Provided that—

(*a*) the grounds on which a decree for the dissolution of such a marriage may be granted by any such court shall be those on which such a decree might be granted by the High Court in England according to the law for the time being in force in England; and

(*b*) any such court in exercising such jurisdiction shall act and give relief on principles and rules as nearly as may be conformable to those on which the High Court in England for the time being acts and gives relief; and

(*c*) no such court shall grant any relief under this Act except in cases where the petitioner resides in India at the time of presenting the petition and

the place where the parties to the marriage last resided together was in India, or make any decree of dissolution of marriage except where either the marriage was solemnized in India or the adultery or crime complained of was committed in India; and

(*d*) any such court may refuse to entertain a petition in such a case if the petitioner is unable to show that by reason of official duty, poverty or any other sufficient cause, he or she is prevented from taking proceedings in the court of the country in which he or she is domiciled, and the court shall so refuse if it is not satisfied that in the interests of justice it is desirable that the suit should be determined in India.

Proviso (*a*)—

The words in proviso (*a*) to section 1, sub-section (*1*) are intended to mean that the grounds on which a decree for the dissolution of the marriage of British subjects domiciled in England may be granted by a High Court in India shall be those on which such a decree migh be granted by the Divorce Court in England according to the law for the time being in force in England, *i.e.*, according to the provisions of section 176 of the Supreme Court of Judicature (Consolidation) Act of 1925 (*1*). And the adulteryal one of a husband respondent committed after the 17th day of July, 1923, is a sufficient groundfor granting a divorce to the wife (*2*).

Any Matrimonial offence committed subsequent to the condonation of a prior matrimonial offence so as to enable the aggrieved party to rely upon it as a ground for seeking divorce. The revival of prior adultery by subsequent desertion is of itself sufficient in law to found a petition for dissolution under this Act (*3*).

Proviso (*d*)—

The Courts in India before they entertain a petition of parties not domiciled in India must be clearly of opinion upon facts before it that because of the reasons referred to in scetion 1, subsection (1) (*d*) the petitioner cannot effectively prosecute his suit for divorce in the Court of his domicile. The Court must also be satisfied that the interests of justice imperatively demand that the suit should be decided in India (*4*). So, where the petitioner satisfiesthe Court that she is prevented from taking proceedings in the Courts in England for want of sufficient means and the witnesses to the charge of adultery in India the Court in India may entertain the petition (*5*).

(*1*) *Barnard* v. *Barnard* (1929) 56 Cal. 89.
(*2*) *Ibid.*
(*3*) *Stones* v. *Stones* (1935) 62 Cal. 541.
(*4*) *Dunbar* v. *Dunbar*, A.I.R. (1935) All. 763.
(*5*) *Barnard* v. *Barnard*, supra.

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(2) Any such order for alimony or maintenance or for custody of children shall have effect in India on the making thereof, but save as aforesaid no such decree or order shall have any force or effect either in India or elsewhere unless and until registered in manner hereinafter provided.

"No decree or order shall have force or effect until registered"—

No decree for dissolution of marriage made by virtue of the jurisdiction conferred on a High Court in India under this Act has any force or effect, either in India or elsewhere, unless and until it has been registered in the High Court in England. The absence of such registration means that the marriage between the parties is—at any rate to a limited extent—still in force, and a second marriage contracted by either of the parties, in such circumstances, will be null and void (*6*). "It is obviously desirable that the matter should be clarified by further legislative enactment. The only satisfactory method would be to make it incumbent upon the Court pronouncing the decree to direct that steps be taken by the Registrar of the Court to have the decree registered in England or Scotland as soon as convenient after the decree was pronounced" (*7*).

A decree might be registered on the application of any person with a real interest in the cause and not merely an intermeddler (*8*).

(3) On production of a certificate purporting to be signed by the proper officer of the High Court in India by which the decree or order is made, the decree or order shall—

(*a*) if the parties to the marriage are domiciled in England, be registered in the High Court in England;

(*b*) if the parties to the marriage are domiciled in Scotland, be registered in the books of council and session;

and upon such registration shall, as from the date of registration, have the same force and effect, and proceedings may be taken thereunder as if it had been a decree or order made on the date on which it was made by the High Court in India, by the High Court in England or the Court of Session in Scotland, as the case may be, and, in the case of an order, proceedings may be taken for the modification

(*6*) *Taylor* v. *Wenkenbach*, I.L.R. (1937) 1 Cal. 417.
(*7*) *Ibid* at pp. 431-432.
(*8*) *Wilkins* v. *Wilkins* (1932) W.N. 118.

or discharge thereof as if it had been such an order as aforesaid:

Provided that—

(i) the High Court in England or the Court of Session in Scotland shall not, unless the Court for special reasons sees fit so to do, entertain any application for the modification or discharge of any such order if and so long as the person on whose petition the decree for the dissolution of the marriage was pronounced is resident in India; and

(ii) where an order for the payment of alimony has been so registered in the books of council and session, the Court of Session shall in addition to any other power have power in the event of any material change of circumstances to discharge or modify such order.

(4) Proceedings before a High Court in India in exercise of the jurisdiction conferred by this Act shall be conducted in accordance with rules made by the Secretary of State in Council of India with the concurrence of the Lord Chancellor, and those rules shall provide—

(*a*) for petitions being heard before a judge or one of two or more judges of the court nominated for the purpose by the chief justice of the court with the approval of the Lord Chancellor;

(*b*) for the decree or order made by such a judge being subject to appeal to two judges of the court similarly nominated without prejudice however to any right of ultimate appeal to His Majesty in Council;

(*c*) for prohibiting or restricting the exercise of the jurisdiction where proceedings for the dissolution of the marriage have also been instituted in England or Scotland;

(*d*) for preventing, in the case of a decree dissolving a marriage between parties domiciled in Scotland, the making of an order for the securing of a gross or annual sum of money;

(*e*) for limiting cases in which applications for the modification or discharge of an order may be

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entertained by the court to cases where at the time the application is made the person on whose petition the decree for the dissolution of the marriage was pronounced is resident in India;

(*f*) for prescribing the officer of the Court empowered to give certificates under this Act, and the form of any such certificates;

(*g*) for conferring on such official as may be appointed for the purpose within the jurisdiction of each High Court the like right of showing cause why a decree should not be made absolute as is exercisable in England by the King's Proctor.

(5) The decision of a High Court in India, or on an appeal therefrom, as to the domicile of the parties to a marriage shall for the purposes of this Act be binding on all courts in England, Scotland and India.

Power to extend Act to other British possessions.

2.—(1) His Majesty may, by Order in Council provide for applying the foregoing provisions of this Act, subject to the necessary modifications, to any part of His Majesty's Dominions other than a self-governing dominion, in like manner as they apply to India, and, in particular, any such Order in Council may determine the court by which the jurisdiction conferred by those provisions is to be exercised (*9*).

(2) For the purposes of this section "self-governing dominion" means the Dominion of Canada, the Commonwealth of Australia (which for this purpose shall be deemed to include Papua and Norfolk Island), the Dominion of New Zealand, the Union of South Africa, the Irish Free State, Newfoundland, and the Colony of Southern Rhodesia.

Validity of certain decrees.

3. Any decree granted under the Act of the Indian Legislature known as the Indian Divorce Act, 1869, and confirmed or made absolute under the provisions of that Act, for the dissolution of a marriage the parties to which were at the time of the commencement of the proceedings domiciled in England or in Scotland, and any order made by the court in relation to any such decree shall, if the

(*9*) This Act has been made applicable to Kenya from 1st October, 1928; to the Straits Settlements from 1st December, 1931 and to Jamaica from 1st August, 1932.

proceedings were commenced before the passing of this Act, be as valid and be deemed always to have been as valid in all respects as though the parties to the marriage had been domiciled in India.

"Confirmed or made absolute"—

According to a dicision of the Lahore High Court if a decree *nisi* was passed before the Act came into force, but was confirmed or made absolute subsequently, the decree would not be validated by the provisions of this Act. (*10*). See the Indian Divorce (Validity) Act (11 & 12 Geo. V, C. 18). The Calcutta High Court has, however, held that even if the proceedings were commenced before the passing of this Act, the decree of the Indian High Court would be valid (*11*).

4. This Act may be cited as the Indian and Colonial Divorce Jurisdiction Act, 1926. Short title.

(*10*) *Waller* v. *Waller*, A.I.R. (1928) Lah. 557.
(*11*) *Barnard* v. *Barnard* (1929) 56 Cal. 89.

RULES UNDER SECTION 1 (4) OF THE INDIAN AND COLONIAL DIVORCE JURISDICTION ACT, 1926.

(16 AND 17 GEO. V, CAP. XL.)

[THE INDIAN (NON-DOMICILED PARTIES) DIVORCE RULES, 1927.]

HOME DEPARTMENT.

NOTIFICATION.

JUDICIAL.

Simla, the 16th August, 1927.

No. F.—922/25.—The following rules made by the Secretary of State in Council of India, with the concurrence of the Lord Chancellor, under the Indian and Colonial Divorce Jurisdiction Act, 1926, (16 and 17 Geo. 5) are puplished for general information:—

RULES UNDER SECTION 1 (4), INDIAN AND COLONIAL DIVORCE JURISDICTION ACT, 1926.

Short Title and Commencement.

1.—(1) These Rules may be called the Indian (Non-Domiciled Parties) Divorce Rules, 1927.

(2) They shall come into force on the 27th day of July 1927.

Appointment of Judges.

2.—(1) As soon as may be after the coming into force of these Rules the Chief Justice of each of the High Courts referred to in sub-section (1) of section 1 of the Indian and Colonial Divorce Jurisdiction Act, 1926 (hereinafter called "the Act") shall submit to the Lord Chancellor through the Secretary of State for India the names of such number of judges of the Court (including, if he thinks fit, the name of the Chief Justice himself) not exceeding six, as he may consider necessary for the purpose of exercising jurisdiction under the Act and these Rules.

(2) Upon the approval of the Lord Chancellor to any nomination so submitted being signified to the Chief Justice by the Secretary of State for India, the Chief Justice shall cause the names so approved to be notified in the local official Gazette (or, in the case of the High Court of Judicature at Calcutta, in the *Gazette of India)* as judges appointed to exercise jurisdiction under the Act, and the judges whose names shall have been so notified shall thereupon have power to exercise jurisdiction accordingly.

(3) At any time after the first nominations under these Rules have been approved, the Chief Justice may propose the names of a further judge or judges to take the place of, or to exercise jurisdiction in addition to, the judge or judges for the time being having powers under the Act; and when such further nominations are approved they shall be notified as aforesaid.

3. Every petition under the Act shall be heard by a single judge nominated and approved as hereinbefore provided, sitting without a jury, and, subject to the provisions of the Indian Limitation Act, an appeal shall lie to a bench of two other judges who have been similarly nominated and approved against any decree or order which would be appealable if it had been passed in proceedings under the Indian Divorce Act, 1869, and shall be disposed of accordingly. Each such bench shall be constituted by the Chief Justice as occasion may arise.

4. Nothing in these Rules shall be deemed to prevent the exercise of any ultimate right of appeal to His Majesty in Council.

Petition.

5. All proceedings under the Act shall be commenced by filing a petition to which shall be attached a certified copy of the certificate of the marriage.

6.—(1) In the body of a petition praying for the dissolution of a marriage shall be stated—

(*i*) the place and date of the marriage and the name, status and domicile of the wife before the marriage;

(*ii*) the status of the husband and his domicile at the time of the marriage and at the time when the

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petition is presented, and his occupation and the place or places of residence of the parties at the time of institution of the suit;

(*iii*) the principal permanent addresses where the parties have cohabited, including the address where they last resided together in India;

(*iv*) whether there is living issue of the marriage, and if so the names and dates of birth or ages of such issue;

(*v*) whether there have been in the Divorce Division of the High Court of Justice in England or in the Court of Session in Scotland or in any Court in India any, and if so what, previous proceedings with reference to the marriage by or on behalf of either of the parties to the marriage, and the result of such proceedings;

(*vi*) the matrimonial offences charged set out in separate paragraphs with the times and places of their alleged commission;

(*vii*) the claim for damages, if any;

(*viii*) the grounds on which the petitioner claims that in the interests of justice it is desirable that the suit should be determined in India.

(2) The petition shall conclude with a prayer setting out particulars of the relief claimed, including the amount of any claim for damages and any order for custody of children which is sought, and shall be signed by the petitioner.

Verification of Petition.

7. The statements contained in every petition under these Rules shall be verified by the petitioner or some other competent person in manner required by the Code of Civil Procedure for the time being in force for the verification of plaints, and in cases where the petitioner is seeking a decree of dissolution of marriage the verification shall include a declaration authenticated in like manner that no collusion or connivance exists between the petitioner and the other party to the marriage, and that neither the petitioner nor, within the knowledge of the petitioner, the other party to the marriage, has instituted proceedings which are still pending for the dissolution of the marriage in England or Scotland.

Co-respondents and Interveners.

8. In every petition presented by a husband for the dissolution of his marriage the petitioner shall make the alleged adulterers co-respondents in the suit, unless the Court shall otherwise direct.

Where the husband, respondent, in his answer charges the petitioner with adultery and asks for damages against the alleged adulterer, the respondent's attorneys should serve the alleged adulterer with a copy of the answer and notice of the suit. The alleged adulterer should be made a party to the suit without any application for leave to intervene (*12*).

9. Where a husband is charged with adultery with a named person, a certified copy of the pleading containing such charge shall, unless the Court for good cause shown otherwise directs, be served upon the person with whom adultery is alleged to have been committed accompanied by a notice that such person is entitled, within the time therein specified, to apply for leave to intervene in the cause.

An application for leave to intervene under the provisions of rule 9 should be made by summons supported by affidavit returnable before a judge in Chambers, and when the order is made giving leave, it should contain or be accompanied with such directions as to appearance and procedure as the Court may think fit in the circumstances of the case (*13*).

Service of Petitions and Notices.

10. Every petition or notice referred to in these Rules shall be served on the party to be affected thereby, either within or without British India, in the manner prescribed by the Code of Civil Procedure for the time being in force for the service of summonses:

Provided that unless the Court for good cause shown otherwise directs, service of all such petitions and notices shall be effected by delivery of the same to the party to be affected thereby, and the Court shall record that it is satisfied that service has been so effected.

Answer and subsequent Pleadings.

11. A respondent or co-respondent, or a woman to whom leave to intervene has been granted under Rule 9, may file in the Court an answer to the petition.

(*12*) *Banyard* v. *Banyard* (1931) 58 Cal. 1384.

(*13*) *In the matter of Enid Peychers*, A.I.R. (1935) Cal. 456; 39 C.W.N. 95. *Sadler* v. *Sadler* (1935) 62 Cal. 82.

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12.—(1) Any answer which contains matter other than a simple denial of the facts stated in the petition shall be verified in respect of such matter by the respondent or co-respondent as the case may be in the manner required by these Rules for the verification of petitions, and when the respondent is husband or wife of the petitioner the answer shall contain a declaration that there is not any collusion or connivance between the parties.

(2) Where the answer of a husband alleges adultery and prays relief, a certified copy thereof shall be served upon the alleged adulterer, together with a notice to appear in like manner as a petition. When in such case no relief is claimed the alleged adulterer shall not be made a co-respondent, but a certified copy of the answer shall be served upon him together with a notice as under Rule 9 that he is entitled within the time therein specified to apply for leave to intervene in the suit, and upon such application he may be allowed to intervene, subject to such direction as shall then be given by the Court.

13.—(1) If it appears to the Court that proceedings for the dissolution of the marriage have been instituted in England or Scotland before the date on which the petition was filed in India, the Court shall either dismiss the petition or stay further proceedings thereon until the proceedings in England or Scotland have terminated, or until the Court shall otherwise direct.

(2) If it appears that such proceedings were instituted after the filing of the petition in India, the Court may proceed, subject to the provisions of the Act, with the trial of the suit.

Showing Cause against a Decree Nisi.

14. The Governor-General in Council in the case of the High Court of Judicature at Calcutta and the Local Government in other cases shall appoint a person to exercise within the jurisdiction of each of the High Courts referred to in section 1 of the Act the duties assigned to His Majesty's Proctor by sections 181 and 182 of the Supreme Court of Judicature (Consolidation) Act, 1925, and the name of the person so appointed shall be notified in the *Gazette of India* or in the local official Gazette, as the case may be, by the designation of Proctor. Every Proctor so appointed shall in the exercise of his functions

act under the instructions of the Advocate-General or other Chief Law Officer of the Province. Appendix B.

15.—(1) If any person during the progress of the proceedings or before the decree *nisi* is made absolute gives information to the Proctor of any matter material to the due decision of the case, the Proctor may take such steps as he considers necessary or expedient.

(2) If in consequence of any such information or otherwise the Proctor suspects that any parties to the petition are or have been in collusion for the purpose of obtaining a decree contrary to the justice of the case, he may after obtaining the leave of the Court intervene and produce evidence to prove the alleged collusion.

16.—(1) When the Proctor desires to show cause against making absolute a decree *nisi* he shall enter an appearance in the suit in which such decree *nisi* has been pronounced and shall within a time to be fixed by the Court file his plea setting forth the grounds upon which he desires to show cause as aforesaid, and a certified copy of his plea shall be served upon the petitioner or person in whose favour such decree has been pronounced or his advocate. On entering an appearance the Proctor shall be made a party to the proceedings, and shall be entitled to appear in person or by advocate.

(2) Where such plea alleges a petitioner's adultery with any named person a certified copy of the plea shall be served upon each such person omitting such part thereof as contains any allegation in which the person so served is not named.

(3) All subsequent pleadings and proceedings in respect of such plea shall be filed and carried on in the same manner as is hereinbefore directed in respect of an original petition, except as hereinafter provided.

(4) If the charges contained in the plea of the Proctor are not denied or if no answer to the plea of the Proctor is filed within the time limited or if an answer is filed and withdrawn or not proceeded with the Proctor may apply forthwith for the rescission of the decree *nisi* and dismissal of the petition.

17. Where the Proctor intervenes or shows cause against a decree *nisi* in any proceedings for divorce, the Court may make such order as to the payment by other

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parties to the proceedings of the costs incurred by him in so doing, or as to the payment by him of any costs incurred by any of the said parties by reason of his so doing, as may seem just.

18. Any person other than the Proctor wishing to show cause against making absolute a decree *nisi* shall, if the Court so permits, enter an appearance in the suit in which such decree *nisi* has been pronounced, and at the same time file affidavits setting forth the facts upon which he relies. Certified copies of the affidavits shall be served upon the party or the advocate of the party in whose favour the decree *nisi* has been pronounced.

19. The party in the suit in whose favour the decree *nisi* has been pronounced may within a time to be fixed by the Court file affidavits in answer, and the person showing cause against the decree *nisi* being made absolute may within a further time to be so fixed file affidavits in reply.

Decree Absolute.

20. No decree *nisi* for the dissolution of a marriage under the Act shall be made absolute till after the expiration of six months from the pronouncing thereof, if no appeal has been filed within that period, or if any appeal (including an appeal to his Majesty in Council) has been filed, until after the decision thereof.

21.—(1) Application to make absolute a decre *nisi* shall be made to the Court by filing a petition setting forth that application is made for such decree absolute, which will thereupon be pronounced in open Court at a time appointed for that purpose. In support of such application it must be shown by affidavit filed with the said petition that no proceedings for the dissolution of the marriage have been instituted and are pending in England or Scotland, and that search has been made in the proper books at the Court up to within six days of the time appointed, and that at such time no person had intervened or obtained leave to intervene in the suit, and that no appearance has been entered nor any affidavits filed on behalf of any person wishing to show cause against the decree *nisi* being made absolute; and in case leave to intervene had been obtained, or appearance entered or affidavits filed on behalf of such person, it must be shown by affidavits what proceedings, if any, have been taken thereon.

(2) If more than twelve calendar months has elapsed since the date of the decree *nisi*, an affidavit by the petitioner, giving reasons for the delay, shall be filed.

Alimony, Maintenance and Custody of Children.

22. Proceedings relating to alimony, maintenance, custody of children, and to the payment, application or settlement of damages assessed by the Court shall be conducted in accordance with the provisions of the Indian Divorce Act, 1869, and of the rules made thereunder:

Provided that when a decree is made for the dissolution of a marriage the parties to which are domiciled in Scotland, the Court shall not make an order for the securing of a gross or annual sum of money:

Provided further that no Court in India shall entertain an application for the modification or discharge of an order for alimony, maintenance or the custody of children, unless the person on whose petition the decree for the dissolution of the marriage was pronounced is at the time the application is made resident in India.

Certifying Officer.

23. A certificate referred to in sub-section (3) of section 1 of the Act shall be in the form set out in the Schedule and shall be signed by a Registrar or Prothonotary of the High Courts to which the Act applies, and sealed with the seal of the Court.

Procedure Generally.

24. Subject to the provisions of these Rules all proceedings under the Act between party and party shall be regulated by the Indian Divorce Act and the rules made thereunder.

Under this Rule, the Court may for sufficient reasons allow the petitioner and also the petitioner's witnesses to give evidence by affidavit subject to their being present for cross-examination if so directed by the Court (*14*).

25. The forms set forth in the Schedule to the Indian Divorce Act, with such variation as the circumstances of each case and these Rules may require, may be used for the respective purposes mentioned in the Schedule.

(*14*) *Stones* v. *Stones* (1935) 62 Cal. 541; (1934) 38 Cal. W.N. 969.

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SCHEDULE.

(See Rule 23.)

I, A. B. Registrar / Prothonotary of the High Court of Judicature at hereby certify that the foregoing is a true copy of a decree / order made by the aforesaid High Court acting in exercise of the matrimonial jurisdiction conferred by the Indian and Colonial Divorce Jurisdiction Act, 1926, in Suit No. of / Appeal No. of

in

from judgement and decree in Suit No. of which the above-named C. D. was petitioner and the above-named E. F. was respondent and the above-named G. H. was co-respondent / intervener.

Signed_____

Registrar.
Prothonotary.

J. A. SHILLIDY,

Officiating Joint Secretary to the Govt. of India.

APPENDIX C.

RULES OF THE BOMBAY HIGH COURT.

(*Vide Bombay Government Gazette* dated 20th June 1929, Part I, page 1388).

BY HIS MAJESTY'S HIGH COURT OF JUDICATURE AT BOMBAY.

ORIGINAL SIDE.

Chapter XL.

Rules under the Indian Divorce Act IV of 1869.

Short title and commencement.

912. (1) These rules may be called High Court Divorce Rules, 1929.

(2) They come into force on the 30th day of June 1929.

Petition.

Marriage certificate to be annexed to petition.

913. All petitions under sections 10, 18, 23, 27, 32 and 34 of the Indian Divorce Act, 1869, (hereinafter called "the Act") shall be accompanied by a certified copy of the certificate of marriage, if such a certificate is available to the petitioner.

Contents of petition and prayer.

914. (1) In the body of the petition under sections 10, 18, 23, 27, 32, or 34 of the Act shall be staten (*a*) whether the petitioner professes the Christian religion; (*b*) the place and date of the marriage and the name, status and domicile of the wife before marriage; (*c*) the status of the husband and his domicile at the time of the marriage and at the time when the petition is presented, and his occupation and the place or places of residence of the parties at the time of the institution of the suit; (*d*) the principal permanent addresses where the parties have cohabited, including the address where they last resided together in India; (*e*) whether there is living issue of the marriage, and if so the names and dates of birth or ages of such issue; (*f*) whether there have been in the Divorce Division of the High Court of Justice in England or in the Court of Sessions in Scotland or in any Court in India any, and if so what, previous proceedings with reference to the marriage by or on behalf of either of the parties to the

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marriage, and the result of such proceedings; (*g*) the matrimonial offences charged set out in separate paragraphs with the times and places of their alleged commission; (*h*) the claim for damages, if any; (*i*) the grounds on which the petitioner claims that the High Court has jurisdiction to determine the petition, and if the petition is one for decree of dissolution of marriage or of nullity of marriage, or of judicial separation, it shall further state that there is no collusion or connivance between the petitioner and the other party to the marriage.

(2) The petition shall conclude with a prayer setting out particulars of the relief claimed, including the amount of any claim for damages and any order for custody of children which is sought, and shall be signed by the petitioner: Provided that where the Petitioner is, by reason of absence or for other good cause, unable to sign the petition, it may be signed by any person duly authorised by him or her to sign the same or to sue on his or her behalf.

Verification of petition.

Verification of petition.

915. The statements contained in every petition shall be verified by the petitioner or some other competent person in manner required by the Code of Civil Procedure, for the time being in force for the verification of plaints.

Co-respondents and interveners.

Co-respondents in husband's petition.

916. In every petition presented by a husband for the dissolution of his marriage the petitioner shall make the alleged adulterers co-respondents in the suit, unles the Court shall otherwise direct under section 11 of the Act.

Interveners in wife's petition.

917. Where a husband is charged with adultery with a named person, a certified copy of the pleading containing such charge shall, unless the Court for good cause shown otherwise directs, be served upon the person with whom adultery is alleged to have been committed, accompanied by a notice that such person is entitled, within the time therein specified, to apply for leave to intervene in the cause.

Service of petitions and notices.

Service of petitions and notices.

918. Every petition or notice under the Act shall be served on the party to be affected thereby, either within or without British India, by serving him, in the manner prescribed by the Code of Civil Procedure for the time being

in force for the service of summonses, with a certified copy of the petition with the notice endorsed thereon, or of the notice, as the case may be: Appendix C.

Provided that, unless the Court for good cause shown otherwise directs, service of all such petitions and notices shall be effected by delivery of the same to the party to be affected thereby, and the Court shall record that it is satisfied that the service has been so effected:

Provided also that the Court may dispense with such service altogether in case it seems necessary or expedient to do so:

Provided further that no service shall be necessary of any petition (or notice) to make a decree absolute.

Answer and subsequent pleadings.

919. A respondent or co-respondent, or a woman to whom leave to intervene has been granted under Rule 917 may file in the Court an answer to the petition. Answer.

920. (1) Any answer which contains matter other than a simple denial of the facts stated in the petition shall be verified in respect of such matter by the respondent or co-respondent as the case may be in the manner required by these rules for the verification of petitions, and when the respondent is husband or wife of the petitioner the answer shall contain a declaration that there is not any collusion or connivance between the parties. Verification of answer.

(2) Where the answer of a husband alleges adultery and prays relief, a certified copy thereof shall be served upon the alleged adulterer, together with a notice to appear in like manner as a petition. When in such case no relief is claimed the alleged adulterer shall not be made a co-respondent, but a certified copy of the answer shall be served upon him together with a notice as under Rule 917 endorsed thereon that he is entitled within the time therein specified to apply for leave to intervene in the suit, and upon such application he may be allowed to intervene, subject to such direction as shall then be given by the Court.

921. (1) If it appears to the Court that proceedings for the dissolution of the marriage have been instituted in England or Scotland before the date on which the petition was filed in India, the Court shall either dismiss the peti- When proceedings to be dismissed or stayed.

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tion or stay further proceedings thereon until the proceedings in England or Scotland have terminated, or until the Court shall otherwise direct.

(2) If it appears that such proceedings were instituted after the filing of the petition in India, the Court may proceed, subject to the provisions of the Act, with the trial of the suit.

Service of the decree nisi.

Service of decree *nisi.*

922. Where a decree *nisi* for dissolution of marriage or a decree of nullity of marriage contains collateral matter, *e.g.*, an order for the custody of children, paying damages into Court, etc., it shall be served on the respondent and co-respondent in the manner provided by the Code of Civil Procedure for the service of summonses, but it shall not otherwise be necessary to serve such decree on the opposite party. Proceedings subsequent to such decree shall not be rendered invalid by reason only of the fact that the decree is not proved to have been served.

Any order to enforce collateral matter in such decree shall be made on a Judge's summons supported by affidavit containing an excerpt from the decree relating to such matter.

Decrees for Judicial separation and restitution of conjugal rights shall be served on the Respondent in the manner provided by the Code of Civil Procedure for service of summonses.

Showing cause against a decree nisi.

How cause shown after decree *nisi.*

923. Any person, other than the "Officer" appointed by the Governor-General in Council, wishing to show cause against making absolute a decree *nisi* shall, if the Court so permits, enter an appearance in the suit in which such decree *nisi* has been pronounced, and at the same time file affidavits setting forth the facts upon which he relies. Certified copies of the affidavits shall be served upon the party or the Attorney of the party in whose favour the decree *nisi* has been pronounced.

Affidavits in answer.

924. The party in the suit in whose favour the decree *nisi* has been pronounced may within a time to be fixed by the Court file affidavits in answer, and the person showing cause against the decree *nisi* being made absolute may within a further time to be so fixed file affidavits in reply.

Decree absolute.

Decree absolute when to be made.

925. No decree *nisi* for the dissolution of a marriage shall be made absolute till after the expiration of six months from the pronouncing thereof, if no appeal has been filed within that period, or if any appeal, (including an appeal to His Majesty in Council) has been filed, until after the dicision thereof.

Application for decree absolute how made.

926. Application to make absolute a decree *nisi* shall be made to the Court by filing a notice setting forth that application is made for such decree absolute which will thereupon be pronounced in open Court at a time appointed for that purpose. Such notice shall be accompanied by the Prothonotary and Senior Master's certificate and an affidavit that no proceedings for the dissolution of the marriage have been instituted and are pending in England or Scotland, and that search has been made in the proper books at the Court up to within six days of the time appointed, and that at such time no person had intervened or obtained leave to intervene in the suit, and that no appearance has been entered nor any affidavits filed on behalf of any person wishing to show cause against the decree *nisi* being made absolute; and in case leave to intervene had been obtained, or appearance entered or affidavits filed on behalf of such person, it must be shown by affidavit what proceedings, if any, have been taken thereon.

(2) If more than twelve calendar months have elapsed since the date of the decree *nisi*, an affidavit by the petitioner giving reasons for the delay shall be filed.

Decree absolute, appearance not necessary.

927. On the date mentioned in the notice the suit should be placed on board for decree absolute, and on the suit being called on, the decree *nisi* shall be made absolute without any application being made to the Court either by the party in person or by Counsel.

Alimony, maintenance and custody of children.

When order may be modified.

928. The High Court shall not entertain an application for the modification or discharge of an order for alimony, maintenance or the custody of children, unless the person on whose petition the decree was pronounced is at the time the application is made resident in India.

No application for alimony *pendente lite* shall be entertained after the decree absolute.

Appendix C.

Where there is a controversy as to alimony or the custody and maintenance of children such matter shall be disposed of by a separate application to the Judge taking matrimonial causes in Chambers.

Removal of child outside jurisdiction.

Any order relating to the custody of children shall direct that the child do remain in the custody of the party to whom such custody is given until further order of the Court and be not removed out of the jurisdiction of the Court without its sanction.

Costs.

Costs.

929. A wife whether she be the petitioner or the respondent may have her costs up to and of an incidental to the hearing taxed *de die in diem*, and the husband may be ordered to pay into Court a sum sufficient to cover such costs or to give security for the same. If the sum be paid into Court, the wife may have her costs taxed and paid out of such sum *de die in diem* to her or to her Attorney. The Court may, however, where the wife is possessed of sufficient means of her own, refuse to pass any order under this rule.

Nothing in this rule shall disentitle a wife in whose favour a decree *nisi* for dissolution of marriage or a decree of nullity of marriage is pronounced to the full costs of the suit against the respondent.

Forms.

Forms.

930. The Forms for notices under these rules shall so far as possible be in accordance with forms Nos. 138 and 139.

FORM No. 138.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY.

Matrimonial Jurisdiction.

Suit No. of 193 .

In the matter of the Indian Divorce Act of

----------Petitioner.

----------Respondent.

----------Co-respondent.

To

TAKE NOTICE that you are entitled within days after delivery hereof to you inclusive of the day of such delivery to apply upon Summons for leave to enter an appearance either in

person or by your Attorney in the High Court of Judicature at Bombay, India, to intervene in this cause should you think fit so to do and thereafter to make answer to the charges in this Petition and that in default of your so doing the Court will proceed to hear the said charges proved and pronounce Judgment, your absence notwithstanding. The Petition is filed and this Notice is issued by Messrs. whose address for service is Bombay.

Dated at Bombay. day of 19 .

By the Court,
Prothonotary and Senior Master.

FORM No. 139.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY.

Matrimonial Jurisdiction.

Suit No. of 193 .

In the matter of the Indian Divorce Act of

----------Petitioner.

----------Respondent.

----------Co-respondent.

To

Respondent abovenamed.

and

Co-respondent abovenamed.

TAKE NOTICE that you are required within days after the service hereof upon you inclusive of the day of such service to enter an appearance either in person or by your Attorney in the High Court of Judicature at Bombay should you think fit so to do and to make answer to the charges in this Petition within days after entering your appearance and take further notice that the hearing and final disposal of this suit is fixed for the day of 19 when you are required either to appear in person or by an Advocate (O.S.) properly instructed by an Attorney of this Court and that in default of your so doing the Court will proceed to hear the said charges proved, and pronounce Judgment, your absence notwithstanding.

This Notice to appear is issued by Messrs.

whose address for service is Bombay.

Witness Chief Justice at

Bombay, aforesaid this day of 19 .

By the Court,
Prothonotary and Senior Master.

APPENDIX D.

RULES OF THE CALCUTTA HIGH COURT.

CHAPTER XXXV—A.

MATRIMONIAL SUITS RULES UNDER THE INDIAN DIVORCE ACT (ACT IV OF 1869) AND AMENDING ACTS.

Ch. XXXV-A. Divorce.

These rules were prescribed for the exercise of the Matrimonial Jurisdiction of the Original Side of this Court by virtue of the powers vested in the Court by the Indian Divorce Act (IV of 1869) and all other powers thereto enabling, with effect from the 18th November, 1929.

Petition and Notice to Appear.

How proceedings to be originated. Cf. Eng. r. 1.

1. Proceedings under the Act shall be originated by filling a petition to which shall be attached a certified copy of the certificate of the marriage.

A. All such proceedings shall be entitled as follows:—

IN THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

Original Side (Matrimonial Jurisdiction).

In re the Indian Divorce Act (Act IV of 1869).

Between A. B. Petitioner,
C. D. Respondent, and
X. Y. Co-respondent.

Contents of petition. Cf. Eng. r. 1A.

B. In the body of the petition shall be stated:—

(1) The place and date of the marriage and the name, status and domicile of the wife before the marriage;

(2) whether the petitioner or respondent professes the Christian religion at the time when the petition is presented;

(3) the domicile of the husband at the time when the petition is presented, and his occupation and the place or places of residence of the parties respectively at the time of institution of the suit;

(4) the principal permanent addresses where the petitioner and respondent have cohabited within the jurisdiction, and in particular the place where they last resided together;

(5) whether there is living issue of the marriage, and if so, the names, and dates of birth or ages, of such issue;

(6) whether there have been in any, Court any, and if so, what previous proceedings with reference to the marriage by or on behalf of either of the parties to the marriage, and the result of such proceedings;

(7) the matrimonial offences charged, set out in separate paragraphs including particulars of the times and places of their alleged commission.

C. In cases where the petitioner is seeking a decree of nullity of marriage or of dissolution of marriage or of judicial separation, the petition shall further state that no collusion or connivance exists between the petitioner and the other party to the marriage, or alleged marriage. Collusion or connivance.

D. The petition shall conclude with a prayer setting out particulars of the relief claimed, including the amount of any claim for damages and any order for custody of children which is sought. Prayer of petition. Cf. Eng. r. 1B.

E. Every petition shall be signed by the petitioner. In the case of a minor it shall be signed both by the minor and by his or her next friend and shall be accompanied by the undertaking mentioned in section 49 of the Act and by a petition for approval of the next friend by the Court. In the case of a petition brought under section 48 of the Act it shall be signed by the person bringing the suit. Signature of petition.

F. Pursuant to section 47 of the Act every petition shall be verified in manner provided by Order VI, rule 15, Civil Procedure Code, and rule 12 of Chapter VII of these Rules. Verification of petition.

Co-respondents.

2. In every husband's petition for dissolution of marriage on the ground of adultery the alleged adulterers shall be made co-respondents in the suit unless the Judge shall otherwise direct by order on summons supported by affidavit. Alleged adulterers to be co-respondents. Cf. Eng. r. 4.

Appendix D.

Respondent includes co-respondent. Eng. r. 5.

3. The term "respondent" in these rules shall include a co-respondent so far as the same is applicable.

Service of Petition.

Copy petition to accompany writ.

4. Each writ of summons for service on each respondent shall have annexed thereto a certified copy of the petition.

How served. Cf. Eng. r. 7.

5. The writ of summons shall be served on each respondent personally by delivery of a copy thereof together with a certified copy of the petition. The service shall be through the Sheriff. The writ of summons may not be served by the petitioner.

Application for substituted service. Cf. Eng. r. 9.

6. Where personal service cannot be effected leave to substitute some other mode of service may be granted upon an application under rule 23 of Chapter VIII of these Rules.

Service by advertisement. Cf. Eng. r. 12.

7. When it is ordered that writ of summons shall be advertised the form of advertisement shall be settled by the Registrar and the newspaper containing the advertisements shall be filed.

Order dispensing with service of petition.

8. No order dispensing with service of a petition upon a party to be affected thereby shall be made by the Registrar.

No trial unless appearance or service. Cf. Eng. r. 13.

9. In the absence of any such order a petitioner shall not proceed to trial unless an appearance has been entered by or on behalf of the respondent or it has been shown by affidavit filed with the Registrar that they have been duly served with the petition in accordance with rules 4 to 7 hereof. Rule 22 of Chapter VIII of these rules shall apply under this rule.

[Rule 22 of Chapter VIII—Where the summons has been served through another Court, the service may be proved by the deposition or affidavit of the serving officer made before the Court through which the service was effected.]

Appearance.

Appearance to be entered and notified.

10. Appearance shall be entered and notified in accordance with rules 15–20, and 24 of Chapter VIII of these Rules.

Appearance may be limited or under protest. Cf. Eng. r. 16B.

11. The appearance may be under protest or limited to any proceeding in the suit in respect of which the party shall have received notice to appear: Provided that (*a*) any appearance under protest shall state concisely the

grounds of protest, and (*b*) the party appearing under protest shall forthwith proceed by summon to obtain directions as to the determination of the question or questions arising by reason of such limited appearance and in default of so proceeding shall be deemed to have entered an unconditional appearance. Directions to be given upon an appearance under protest may provide for the trial of preliminary issue with or without stay of proceedings in the suit or for determination of the matters in questions at the hearing of the suit.

Staying Proceedings for Restitution.

Application to stay restitution proceedings. Cf. Eng. r. 20.

12. At any time after the commencement of proceedings for restitution of conjugal rights the respondent may apply to the Judge by summons for an order to stay the proceedings by reason that he or she is willing to resume or to return to cohabitation with the petitioner.

Answer and Subsequent Pleadings.

Answer to petition. Cf. Eng. r. 21.

13. A respondent who has entered an appearance may within time limited by the writ of summons file with the Registrar an answer to the petition. Such answer shall be signed and verified in manner required by law for the verification of pleadings.

Reply to answer. Cf. Eng. r. 23.

14. Where in any suit for the dissolution of marriage it appears from the answer that the respondent will apply for relief under section 15 of the Act, the petitioner shall file a reply thereto within fourteen days from the filing of the answer. Save as aforesaid no pleading subsequent to the answer shall be delivered except by leave.

No answer necessary if question of costs or custody of children.

15. After entering an appearance a respondent in a suit may without filing an answer be heard in respect of any question as to costs and a respondent who is husband or wife of the petitioner may be heard also as to custody of or access to children.

Addition of Parties.

Application to add parties.

16. Save as otherwise provided by rule 26 hereof or by the rules applicable to the officer appointed under section 17A of the Act, any person claiming to be added as a party to the suit or matter shall apply to the Court by notice of motion.

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Evidence taken by Affidavit.

Evidence by affidavit. Cf. Eng. rr. 36, 37.

17. Where any party proposes under section 51 of the Act to verify his case by affidavit such affidavit or affidavits must be filed within fourteen days after the party has received notice that the case has been entered in the Prospective List and the party shall forthwith apply on summons to the other parties to the Registrar for directions as to the deponents being produced for cross-examination at the hearing.

Examination of Witnesses before Hearings.

Security for costs of commission or *de bene esse*. Cf. Eng. r. 39 (B).

18. When an order is made for the examination of a witness on commission or *de bene esse*, a wife may apply for security for her costs of the examination at the time of the order or subsequently by summons.

Trial of Issues.

Separate trial of issues. Cf. Eng. r. 40.

19. A Judge may direct, and any petitioner and any party to a cause who has entered an appearance may apply on summons to a Judge for a direction for, the separate trial of any issue or issues of fact, or any question as to the jurisdiction of the Court.

Proceedings in Chambers.

To whom to be made. Cf. Eng. r. 41.

20. All applications under these Rules which are not hereby directed to be made to the Court or to a Judge may be made to the Registrar.

Appeal from Registrar. Cf. Eng. r. 45.

21. An appeal from an order or decision of the Registrar may be made to a Judge in Chambers under Rule 15 of Chapter VI of these Rules.

Petition for reversal of decree of Judicial Separation.

Petition to reverse decree. Cf. Eng. r. 47.

22. A petition to the Court for reversal of a decree of judicial separation must set out the grounds on which the petitioner relies.

Appearance of party praying reversal. Cf. Eng. r. 48.

23. Before such a petition can be filed an appearance on behalf of the party praying for a reversal of the decree of judicial separation must be entered in the suit in which the decree has been pronounced. Leave to enter such appearance shall be granted by the Registrar exparte.

Appendix D.

Copy of petition to be served. Filing answer thereto. Cf. Eng. r. 49.

24. A certified copy of such petition, under seal of the Court, together with a notice of motion (Form No. 1, Appendix M.M.) returnable before the Judge in Court shall be served personally upon the party in the suit in whose favour the decree has been made unless leave to substitute some other form of service has been obtained under Rule 23 of Chapter VIII of these Rules. Such party may within fourteen days file with the Registrar an answer thereto.

Subsequent pleadings and proceedings. Eng. r. 50.

25. All subsequent pleadings and proceedings arising from such petition and answer shall be filed and carried on in the same manner as before directed in respect of an original petition and answer thereto so far as such directions are applicable.

Showing Cause against a Decree Nisi.

Application to show cause. Cf. Eng. r. 52.

26. Any person other than the Officer appointed under section 17A of the Act wishing to show cause under section 16 of the Act against making absolute a decree *nisi* shall apply exparte by petition to the Court for leave to show cause. If the leave be granted such person shall within seven days from the date of the order enter an appearance in the cause in which such decree *nisi* has been pronounced and file affidavits setting forth the facts upon which he relies, and shall within seven days from appearance serve certified copies of such affidavits on the party or the solicitor of the party in whose favour the decree *nisi* has been pronounced.

Affidavits in answer. Eng. r. 53.

27. The party in the suit in whose favour the decree *nisi* has been pronounced may within fourteen days after delivery of the affidavits in answer, and the person showing cause against the decree *nisi* being made absolute may within fourteen days file affidavits in reply.

No affidavit in rejoinder without leave. Cf. Eng. r. 54.

28. No affidavits shall be filed in rejoinder to the affidavits in reply without leave of the Registrar or Judge and subject to any direction by the Judge the matter shall be heard and decided in the same manner as provided in the case of an original petition.

Decree Absolute.

Six months between decrees *nisi* and absolute. Cf. Eng. r. 56.

29. The time within which a decree *nisi* may not under section 16 of the Act be made absolute shall be six months from the pronouncing thereof.

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Application for decree absolute. Cf. Eng. r. 56.

30. Application to make absolute a decree *nisi* shall be made to the Court by filing with the Registrar a petition in writing setting forth that application is made for such decree absolute, which will thereupon be pronounced in open Court at a time appointed for that purpose. In support of such application there shall be exhibited a certificate of the Registrar that the requisite time has elapsed since the date of the decree *nisi*, and that up to within six days of the date appointed for the hearing of the application no person had intervened or obtained leave to intervene in the cause, and that no appearance has been entered nor any affidavits filed on behalf of any person wishing to show cause against the decree *nisi* being made absolute, and in case leave to intervene has been obtained, or appearance entered or affidavits filed on behalf of such person, the certificate shall show what proceedings, if any, have been taken thereon. Forms of certificate are given in appendix M. M. Nos. 2 and 3. If more than twelve calendar months have elapsed since the date of the decree *nisi* an affidavit by the petitioner giving reasons for the delay must be filed.

Alimony.

Petition for alimony.

31. A wife who is petitioner in a suit after service of the writ of summons and a wife who is a respondent may after entering appearance file a petition for alimony pending suit under section 36 of the Act.

Service of petition. Cf. Eng. r. 57.

Such petition shall be verified as required by law for a plaint and a copy thereof together with a summons (Form No. 4 in Appendix M.M.) shall be served personally on the husband, except leave shall have been obtained from the Judge to substitute some other form of service.

Answer thereto. Cf. Eng. r. 58.

32. The husband may within fourteen days or such further time as may be allowed file an answer thereto duly verified as required by law for a pleading.

Hearing of summons.

33. Such summons shall be returnable before the Judge in Chambers who may make an order on the said petition or give such directions as to further evidence as he may think fit or refer the matter to an officer of the Court for a report or adjourn the same into Court for hearing.

Applications under sections 37 and 38 of Divorce Act.

34. All applications under section 37 of the Act shall be made to the Court by notice of motion supported by affidavit. Such applications must be brought within one

month of the completion of the decree absolute declaring a marriage to be dissolved or decree for judicial separation as the case may be, provided that an extension of time may be obtained from the Judge on summons. Applications for the appointment of a new trustee under section 38 of the Act shall be made on summons returnable before the Judge in Chambers.

Date payments under section 37 to commence.

35. Monthly or weekly sums ordered to be paid to a wife for her maintenance and support under section 37 of the Act shall unless otherwise ordered commence from the date of the decree absolute or decree for judicial separation as the case may be.

Interim order.

36. Pending the final determination of an application under section 37 of the Act an interim order may be made upon such terms as shall appear to the Court to be just and without prejudice to the effect of the order to be ultimately made.

Variation of Settlements.

Applications under sections 39 and 40 of Act.

37. All applications under sections 39 and 40 of the Act shall be made on notice of motion to the Court. The Court may make such reference for enquiry or report and to such officer as it may think fit but no order for the settlement of a wife's property or for the settlement of damages or for variation of settlements shall be made except by the Court.

Custody and Maintenance of Children and Access.

Applications under sections 41 and 43 of Act.

38. Applications for interim orders under sections 41 and 43 of the Act shall be made on summons to the Judge in Chambers supported by affidavit.

Applications under sections 42 and 44 of Act.

39. Applications under sections 42 and 44 of the Act shall be made by petition, which shall be verified as required by law for a plaint and which together with a summons (Form No. 5 in Appendix M. M.) returnable before the Judge in Chambers shall be served personally upon the party or parties to be affected thereby except leave shall have been obtained from the Judge to dispense with such service or to substitute some other form of service.

Showing cause.

40. Any such party may show cause against the petition by filing affidavits or by filing an answer verified as required by law in the case of a pleading. Rule 33 of this Chapter shall apply to the proceedings on such petition.

Appendix D.

Taxing Bills of Costs.

Taxation. Cf. Eng. r. 84.

41. All bills of costs shall be referred to the Taxing Officer for taxation and may be taxed by him without any special order for that purpose.

Wife's Costs.

Procedure to obtain order for wife's costs. Cf. Eng. r. 91.

42. When the pleadings are complete or at an earlier stage of a suit by order of the Judge or of the Registrar to be obtained on summons, a wife who is petitioner or has filed an answer may file her bill or bills of costs for taxation as against her husband and the Registrar shall ascertain what is a sufficient sum of money to be paid into Court or what is a sufficient security to be given by the husband to cover the costs of the wife of and incidental to the hearing of the cause, and may thereupon, unless the husband shall prove to the satisfaction of the Registrar that the wife has sufficient separate estate or show other good cause, issue an order upon the husband to pay her costs up to the setting down of the cause and to pay into Court or secure the costs of the hearing within a time to be fixed by the Registrar. The Registrar may in his discretion order the costs up to setting down to be paid into Court.

Payment of costs into Court. Eng. r. 93.

43. The order for payment of costs in which a respondent or co-respondent has been condemned by a decree *nisi* if drawn up before the decree *nisi* is made absolute, shall direct payment into Court, and such costs shall not be paid out of Court to the party entitled to receive them under the decree *nisi* until the decree absolute has been obtained, but a wife who is unsuccessful in a cause, and who at the hearing of the cause has obtained an order for costs may nevertheless proceed at once to obtain payment of such costs after allowance thereof on taxation.

Removal of Suits, etc.

Application under section 8 of Act.

44. An application to the High Court to remove a suit or proceeding under section 8 of the Act shall be made by an *ex parte* application to the Judge on the Original Side in open Court for a Rule upon the party or parties concerned to show cause against such removal.

Times fixed by these Rules.

Varying of times fixed. Cf. Eng. r. 82 (A).

45. The time fixed by these Rules for the performance of any act may be varied by Order of a Judge or the Registrar subject to such qualifications and restriction and on such terms as he may think fit.

Practice and procedure. Cf. Eng. r. 96.

46. In any matter of practice or procedure which is not governed by statute or dealt with by these Rules the Rules of the Original Side in respect of like matters shall be deemed to apply.

No. 1.

FORM OF NOTICE UNDER RULE 24.

In the High Court of Judicature at Fort William in Bengal.

In Matrimonial Jurisdiction.

In Re: The Indian Divorce Act (Act IV of 1869).

BETWEEN

A. B.....Petitioner,

C. D.....Respondent,

&

X. Y.....Co-respondent.

To

A. B. the petitioner

and

To.....

his or her Attorney.

Take notice that on day the day of at the hour of 11 o'clock in the forenoon or so soon thereafter as Counsel can be heard an application will be made on behalf of before the Hon'ble Mr. Justice for an order that the Decree of judicial separation passed on the day of be set aside and also for such other order as to the Court may seem fit.

Dated this day of 19 .

Yours faithfully,

Grounds:
Petition of the applicant.

Attorney for the applicant.

No 2.

FORM OF CERTIFICATE UNDER RULE 30.

In the High Court of Judicature at Fort William in Bengal.

Matrimonial Jurisdiction.

In Re: The Indian Divorce Act. (Act IV of 1869).

BETWEEN

A. B.....the Petitioner,

C. D.....the Respondent,

&

X. Y.....the Co-Respondent,

At the request of Attorney for the petitioner I do hereby certify that six months have elapsed since the date of the decree *nisi* dated the day of ; that

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up to the day of being within six days of the date appointed for the hearing of the application to make absolute the decree *nisi*, no person has intervened, or obtained leave to intervene in the above cause; and that no appearance has been entered nor any affidavits filed on behalf of any person wishing to show cause against the decree *nisi* being made absolute.

Dated this day of 19 .

Registrar.

No. 3.

ALTERNATIVE CERTIFICATE UNDER RULE 30.

At the request of Attorney for the petitioner I do hereby certify that in respect of the decree *nisi*, dated the day of 19 , (Name) intervened (or obtained leave to intervene) in the cause on the day of that an appearance was entered on the day of and affidavits have been filed on behalf of , with a view to show cause against the decree *nisi* being made absolute (state if any other proceedings have been taken).

Dated this day of 19

Registrar.

No. 4.

FORM OF SUMMONS UNDER RULE 31.

In the High Court of Judicature at Fort William in Bengal.

Matrimonial Jurisdiction.

In Re: The Indian Divorce Act.
(Act IV of 1869).

BETWEEN

A. B.----------Petitioner,
C. D.----------Respondent,
&
X. Y.----------Co-Respondent.

Let the Respondent/Petitioner abovenamed attend before the Judge in Chambers on day of at the hour of 11 o'clock in the forenoon on the hearing of an application on behalf of the Petitioner/Respondent for an order that the Respondent/Petitioner do pay to the Petitioner/Respondent the sum of Rs. per month for alimony *pendente lite* and Rs. for interim costs and for such further or other sums

as may seem just and the said Respondent/Petitioner do pay to the Petitioner/Respondent her costs of and incidental to this application to be taxed by the Taxing Officer of this Court. Appendix D.

Dated this day of 19 .

Registrar.

Applicant's Attorneys.

This summons was taken out by the Attorney for the Petitioner/Respondent.

To

The Respondent/Petitioner,

To

his Attorneys

Grounds:

Petition of the applicant verified by affidavit.

No. 5.

FORM OF SUMMONS UNDER RULE 39.

In the High Court of Judicature at Fort William in Bengal.

Matrimonial Jurisdiction.

In Re: The Indian Divorce Act. (Act IV of 1869).

BETWEEN

A. B.----------Petitioner,

C. D.----------Respondent,

&

X. Y.----------Co-Respndent.

Let the parties concerned attend before the Judge in Chambers on the day of at the hour of 11 o'clock in the forenoon on the hearing of an application on the part of the Petitioner/Respondent for an order that the custody of the children of the marriage of the parties in the suit may be given to the applicant (and that the Respondent/Petitioner do pay to the applicant Rs. a month for the maintenance of herself and for the maintenance and education of her minor children) and that the Respondent/Petitioner do pay to the applicant her costs of and incidental to this application to be taxed by the Taxing Officer of this Court.

Dated this day of 19 ,

Registrar.

Applicant's Attorney.

This summons was taken out by the Attorney for the Petitioner/Respondent.

To

The Respondent/Petitioner,

To

his Attorneys

Grounds:

Petition of the applicant verified by affidavit sworn.

APPENDIX E.

RULES OF THE MADRAS HIGH COURT.

Matrimonial Suits.

1. Every proceeding under the Indian Divorce Act, which is thereby required to be made by petition than a proceeding in a pending petition, shall be by an original petition entitled in the matter of the said Act.

2. An original petition shall state whether the parties are domiciled in India at the commencement of the proceedings and shall be presented to the Registrar, who shall if the same is admitted, endorse thereon a day certain for the first hearing.

3. The summons to the respondent shall be in Form No. 13 c, and shall require the respondent to file in Court a written statement, not less than three days before the day so appointed. The summons shall be accompanied by a copy of the petition; and the provisions of the Code and of these rules relating to issue of summons and service thereof, and of a copy of the plaint on a defendant, shall apply thereto.

4. Unless otherwise ordered, an original petition shall be served not less than fourteen clear days before the day appointed for the case in the defended board for hearing.

Inerlocutory Applications.

5. An application in a pending original petition, which is required by the said Act to be by petition, shall be entitled in the said original petition and shall state the section of the Act under which it is presented. The petition and a copy thereof for service shall be presented to the Registrar, who shall if the same is admitted, endorse the date appointed for the hearing on the petition and copy. Service shall be effected by serving the copy so endorsed, in manner prescribed for service of a summons in chambers not less than five clear days before the day appointed for the hearing.

6. The Registrar shall, unless the application is one that may be made to the Master, post the case before the Judge in Chambers, on the day so appointed, or if there is no Judge then sitting, on the next Chamber day thereafter.

7. The following applications shall be made by notice of motion and unless the Court otherwise orders, notice thereof, and of any affidavits to be used in support thereof, shall be served not less than five clear days before the return-day :—

(1) for leave to show cause why a decre *nisi* should not be made absolute;

(2) to discharge or vary a protection-order made under section 28 of the said Act;

(3) to discharge or modify an order for permanent alimony;

(4) to appoint a new trustee in respect of permanent alimony;

(5) for the settlement of any property or damages if made at the hearing of the suit.

8. Except as provided by the said Act, or by these rules, an application in any pending proceeding, under the said Act, may be made by summons in Chambers.

9. Unless the Court otherwise orders, any facts required to be proved upon an interlocutory application shall be proved by affidavit.

Decree Nisi.

10. Unless otherwise ordered, a decree *nisi* shall direct that the further hearing of the suit be adjourned to a day certain, not less than six nor more than nine months from the date thereof. On the adjourned day, the case shall be posted for hearing, and if the petitioner does not appear and move for the decree to be made absolute, the Court may dismiss the suit, or make such order as it thinks fit.

11. Subject to the foregoing rules, and so far as the same are consistent with the Code, the provisions of these rules with respect to civil suits and matters shall apply to all proceedings under the said Act.

APPENDIX F.

MATRIMONIAL CAUSES RULES, 1924.

STATUTORY RULES AND ORDERS.

SUPREME COURT, ENGLAND.

Procedure:—Matrimonial Causes Rules.

THE MATRIMONIAL CAUSES RULES, 1924, DATED FEBRUARY 14, 1924, FOR THE PROBATE, DIVORCE AND ADMIRALTY DIVISION OF HIS MAJESTY'S HIGH COURT OF JUSTICE IN DIVORCE AND MATRIMONIAL CAUSES, TO TAKE EFFECT ON AND AFTER 1ST MARCH, 1924, MADE UNDER THE PROVISIONS OF THE MATRIMONIAL CAUSES ACTS, 1857 TO 1907, THE LEGITIMACY DECLARATION ACT, 1858 (21 & 22 VICT. C. 93), AND THE GREEK MARRIAGES ACT, 1884 (47 & 48 VICT. C. 20).

Whereas by the Statute 20 & 21 Vict. c. 85 (Matrimonial Causes Act, 1857) it is provided that there shall be a Court of Record to be called "The Court for Divorce and Matrimonial Causes": and whereas by Section 53 of the said Act it is further provided that the said Court shall make such Rules and Regulations concerning the practice and procedure under the said Act as it may from time to time consider expedient and shall have full power from time to time to revoke or alter the same: and whereas by the Statute 38 & 39 Vict. c. 77 (*a*) it is enacted that the President for the time being of the Probate and Divorce Division of the High Court of Justice shall have the powers as to the making of Rules and Regulations conferred by the 53rd Section of the 20th and 21st Vict. c. 85: and whereas these Rules have been duly published in accordance with the Rules Publication Act, 1893, as Provisional Rules:

Now I, the Right Honourable Sir Henry Edward Duke, President of the Probate, Divorce and Admiralty Division of the High Court of Justice, do make the following Rules and Regulations concerning the practice and procedure in Divorce and Matrimonial Causes, to take effect on and after the 1st day of March 1924, in place of the said Provisional Rules.

Henry Edward Duke,
President.

14th February, 1924.

(*a*) *i.e.* "The Supreme Court of Judicature Act, 1875."

Petition and Notice to Appear. Appendix F.

1. Proceedings under the Matrimonial Causes Acts or any of them shall be commenced by filing a Petition.

(A) In the body of the Petition shall be stated:—

(1) The place and date of the marriage and the name and status of the wife before the marrage;

(2) The principal permanent addresses where the parties have cohabited within the jurisdiction (*a*);

(3) Whether there is living issue of the marriage, and, if so, the names, and dates of birth or ages, of such issue;

(4) The occupation of the husband and the place or places of residence and of domicile of the parties to the marriage at the date of the institution of the suit;

(5) Whether there have been in the Divorce Division of the High Court any, and if so what, previous proceedings with reference to the marriage by or on behalf of either of the parties to the marriage, and the result of such proceedings;

(6) The matrimonial offences charged, set out in separate paragraphs;

(7) The claim for damages, if any.

(B) The Petition shall conclude with a prayer setting out particulars of the relief claimed, including the amount of any claim for damages and any order for custody of children which is sought, and shall be signed by the Petitioner, and in the case of a minor or other person who is not *sui juris* by his or her guardian (*b*).

2. The Petition and every copy to be served shall be indorsed in conspicuous characters with a Notice to Appear in the form set out in Appendix I.

(*a*) If there is no address within the jurisdiction it must be so stated. No address out of jurisdiction need be given.

(*b*) Where it is intended to ask at the hearing that the discretion of the Court be exercised in favour of the petitioner, the petition must contain a prayer to this effect.

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3. (A) Every Petition shall be accompanied by an affidavit made by the Petitioner, verifying the facts of which he or she has personal cognizance, and deposing as to belief in the truth of the other facts alleged in the petition, and such affidavit shall be filed with the Petition. A Petition for Restitution of Conjugal Rights shall further state sufficient facts to satisfy one of the Registrars that a written demand for cohabitation and restitution of conjugal rights has been made by the Petitioner upon the party to be served, and that, after a reasonable opportunity for compliance therewith, such cohabitation and restitution of conjugal rights have been withheld.

(B) In cases where the Petitioner is seeking a decree of Nullity of Marriage or of Dissolution of Marriage, or of Judicial Separation, or a decree in a suit of Jactitation of Marriage, the affidavit of the Petitioner, filed with his or her Petition, shall further state that no collusion or connivance exists between the Petitioner and the other party to the marriage or alleged marriage.

Co-respondents.

4. In every Petition for dissolution of marriage on the ground of adultery the alleged adulterers, if male, shall be made Co-respondents in the cause and served with a sealed copy of the petition, unless a Registrar shall otherwise direct by order on summons supported by affidavits.

5. The term "Respondent" in these rules shall include a Co-respondent so far as the same is applicable.

Service.

6. Every Petitioner who has filed a Petition shall forthwith obtain in the Registry a sealed copy or copies of the Petition indorsed with Notice to Appear for service upon the Respondent or Respondents respectively.

7. A Petition shall be served personally by delivery of such sealed copy as aforesaid. It may not be served by the Petitioner.

8. Service of any document on a party who has not entered an appearance must be personal service unless otherwise ordered.

9. Where personal service cannot be effected leave to substitute some other mode of service may be granted

upon an application to the Registrar supported by affidavit or affidavits to include an affidavit of the person having conduct of the proceedings. Appendix F.

10. Any Petition or Decree may be served within or without His Majesty's Dominions.

11. Where an affidavit of service of a petition is not required by these Rules a certificate of service in the form given in Appendix No. II shall be filed in the Registry. *

12. When it is ordered that Notice to Appear to a Petition shall be advertised the form of advertisement shall be settled in the Registry and the newspapers containing the advertisements shall be filed with the sealed copy of the Petition.

13. A Petitioner cannot proceed to trial unless an appearance has been entered by or on behalf of the Respondents or it has been shown by affidavit filed in the Registry that they have been duly served with the Petition and by certificate issued by and filed in the Registry that they have not appeared.

14. An affidavit of service of a Petition must be substantially in the form given in Appendix No. III and in addition shall show the means of knowledge of the Deponent as to the identity of the person served.

Appearance.

15. All Appearances are to be entered in the Registry in a book provided for that purpose, and shall be accompanied by an address for service within three miles of the General Post Office. Notice of such Appearance must be given to the opposite party. A form of Entry of Appearance is given in Appendix No. IV.

16. (A) An Appearance may be entered at any time before a proceeding has been taken in default, or afterwards by leave obtained on summons.

(B) The Appearance may be under protest or limited to any proceeding in the cause in respect of which the party shall have received Notice to Appear: Provided that (*a*) any Appearance under Protest shall state concisely the grounds of protest, and (*b*) the party appearing

*Substituted by the Matrimonial Causes (Amendment) Rules dated 28th June, 1933.

Appendix F. under protest shall forthwith proceed by summons to obtain directions as to the determination of the question or questions arising by reason of such limited appearance and in default of so proceeding shall be deemed to have entered an unconditional appearance. Directions to be given upon an Appearance under Protest may provide for the trial of a preliminary issue with or without stay of proceedings in the cause or for determination of the matters in question at the hearing of the cause.

Interveners.

17. Where a husband is charged with adultery with a named person a sealed copy of the pleading containing such charge shall be delivered to the person with whom adultery is alleged to have been committed, indorsed in lieu of Notice to Appear with notice that such person is entitled within eight days after delivery thereof to apply for leave to intervene in the cause. Such delivery and notice may only be dispensed with by order upon summons for cause shown. A form of notice is contained in Appendix No. V.

18. Application for leave to intervene in any cause shall be made by summons supported by affidavit, and leave may be given with such directions as to appearance and procedure as the Registrar shall think fit.

19. Parties intervening must join in the proceedings at the stage at which they find them unless otherwise ordered by a Registrar.

Staying Proceedings for Restitution.

20. At any time after the commencement of proceedings for Restitution of Conjugal Rights the Respondent may apply by summons for an Order to stay the proceedings by reason that he or she is willing to resume or to return to cohabitation with the Petitioner.

Answer and Subsequent Pleadings.

21. A Respondent who has entered an Appearance may within fourteen days from the expiration of the time allowed for the entry of such Appearance file in the Registry an Answer to the Petition—A form of Answer is given in Appendix No. VI.

22. (A) Every answer which contains matter other than a simple denial of the facts stated in the Petition shall be accompanied by an affidavit made by the Respondent, verifying such other or additional matter so far as he or she has personal cognizance thereof and deposing to his or her belief in the truth of the rest of such other or additional matter, and where the Respondent is husband or wife of the Petitioner shall further state, except where the claim in question is for Restitution of Conjugal Rights, that there is not any collusion or connivance between the parties; and such affidavit shall be filed with the Answer.

(B) Where the Answer of a husband alleges adultery and prays relief the alleged adulterer must be served personally with a sealed copy thereof bearing a Notice to Appear in like manner as a Petition. Where in such a case no relief is claimed the alleged adulterer shall not be made a Co-respondent but a sealed copy of the Answer shall be delivered to him indorsed with Notice as under Rule 17 that such person is entitled within eight days to apply for leave to intervene in the cause and upon such application he may be allowed to intervene subject to such directions as shall then be given.

23. Within fourteen days from the filing and delivery of the Answer the Petitioner may file a Reply thereto except where such Answer is a simple denial, and no subsequent pleadings shall be delivered except by leave.

24. A copy of every Answer and subsequent pleading shall within twenty-four hours after the same is filed be delivered to the opposite parties or their solicitors.

25. A pleading may be amended by leave to be obtained upon summons subject to any directions which may then be given as to re-service of the amended pleading and any consequential amendments of pleadings already filed.

26. No pleading shall be amended out of time without leave nor shall any pleading be filed out of time after a step in default has been taken without leave, such leave to be obtained upon summons.

27. Application for further particulars of matters pleaded may be made by summons, but before applying by summons, a party may apply for them by letter. The

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costs of such letter and of any particulars delivered pursuant thereto shall be allowable on taxation and in dealing with the costs of any application for particulars by summons the provisions of this Rule shall be taken into consideration.

All particulars, whether given under order or otherwise, shall be filed together with a verifying affidavit and within twenty-four hours a copy thereof shall be delivered to the party who has applied for such particulars.

Service of Pleadings, etc.

28. Notices and copies of pleadings and other instruments which are required by these rules to be delivered but of which personal service is not expressly required may be delivered by leaving the same at the respective addresses furnished by or on behalf of the parties.

Every notice shall be in writing and indorsed by the party or his solicitor.

29. When it is necessary to serve personally any order or decree of the Court an office copy thereof under seal of the Court must be produced to the party served and a copy annexed to the affidavit of service and marked as an exhibit by the commissioner or other person before whom the affidavit is sworn.

Service out of the Jurisdiction.

29A. The provisions of Order XI Rules 8, 8A, 11 and 12 of the Rules of the Supreme Court (which relate to the service of documents in certain foreign countries) shall apply so as to enable documents in Divorce and Matrimonial Causes to be served in accordance with those provisions:

Provided that

(*a*) The document may be served out of the jurisdiction without leave; and

(*b*) In the case of a petition or other document of which personal service is expressly required by these Rules, the official certificate shall show the server's means of knowledge as to the identity of the person served.*

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* Added by the Matrimonial Causes (Amendment) Rules, dated 19th February, 1932.

Trial or Hearing.

30. (A) Before a cause is set down for trial or hearing the pleadings and proceedings in the cause shall be referred by the Petitioner or any party who is defending the suit to one of the Registrars who shall certify that the same are correct and in order and the Registrar to whom the same are referred shall cause any irregularity in such pleadings or proceedings to be corrected or refer any question arising thereon to the Judge for his direction.

(B) Unless a Registrar shall otherwise order on summons, all causes in which damages are claimed shall be tried by a Common Jury and all other causes shall be heard by the Court itself without a Jury.

Discretion.

(C)—(1) (i) In every case in which a party prays that the Court will exercise its discretion under the proviso to Section 178 of the Supreme Court of Judicature (Consolidation) Act, 1925, to grant a decree *nisi* notwithstanding his or her adultery, the Petition (or Answer) shall contain a prayer to this effect;

(ii) The application for the Registrar's certificate under paragraph (A) of this Rule shall state whether or not the Court will be asked to exercise its discretion on behalf of the applicant notwithstanding his or her adultery;

(iii) Where the discretion of the Court is being sought by reason of the adultery of the applicant for the cirtificate, there shall be lodged, with the application, a statement signed by the party or his or her solicitor setting forth the acts of adultery committed by him or her and all the facts which it is material for the Court to know for the purpose of the exercise of its discretion;

(iv) Where the discretion of the Court is sought by a party other than the applicant for the certificate such party shall lodge in the Registry a corresponding statement within ten days after the receipt of notice of setting down.

(2) No such statement as is mentioned in the preceding paragraph shall, except by the direction of the Judge, be open to inspection by any other party to the suit.

This paragraph shall not apply to the King's Proctor, whether he is or is not a party to the suit.

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(3) Where such statement contains any allegation of adultery or other matrimonial offence on the part of the other spouse which is not referable to any specific allegation in the pleadings, notice of such allegation shall be given to the said spouse, provided that if the Court at the hearing is satisfied that the failure to give such notice is justified the same may be dispensed with.

(4) Neither the said statement nor the said notice shall be admissible in evidence against the party lodging or giving the same respectively except where the party has referred to the said statement or the said notice in evidence given in open court. *

31. The Petitioner after obtaining the Registrar's certificate shall set the cause down for trial or hearing and within twenty-four hours file and give to each party in the cause for whom an appearance has been entered notice of his having done so.

If the Petitioner fail so to set down within fourteen days after the granting of such certificate, any party defending the suit may proceed as the Petitioner might have done.

32. No cause shall be placed in the list for trial or hearing until after the expiration of ten days from the date of setting down save with the consent of all parties to the suit or by order of a Judge.

33. The Registrar shall draw and sign the decree of the Court and the same shall be issued under the seal of the Court.

34. After entering an Appearance a Respondent in a cause may without filing an Answer be heard in respect of any question as to costs and a Respondent who is husband or wife of the Petitioner may be heard also as to custody of or access to children.

(A) Where a party at whose instance a cause has been tried or heard is represented by a solicitor, and any part of the court fee payable in respect of the decree (Fee No. 29) is not paid, the Judge may, on the application of the official solicitor by summons, and upon a report signed

* Added by the Matrimonial Causes (Amendment) Rules, 1934, dated the 11th December 1934.

by the Registrar stating the amount of the unpaid fee, order that party's solicitor personally to pay the said amount and the official solicitor's costs of the application.*

Discovery.

35. (A) In any cause or matter a party may deliver interrogatories for the examination of an opposite party or parties by leave to be obtained upon summons.

(B) A copy of the interrogatories proposed to be delivered shall be delivered with the summons.

(C) Interrogatories shall be answered within ten days or such other time as may be appointed.

(D) A party may without affidavit apply for discovery of documents by an opposite party or parties and such opposite party or parties may be ordered to make such general or limited discovery as in the discretion of the Judge or Registrar shall seem fit.

Evidence taken by Affidavit.

36. When a Judge has directed that all or any of the facts set forth in a pleading may be proved by affidavit all affidavits sworn in pursuance of such direction shall be filed in the Registry and copies thereof delivered to the other parties to the suit within such time as the Judge or a Registrar shall direct.

37. Application for an order for the attendance of a Deponent for the purpose of being cross-examined in open Court shall be made to a Judge on summons.

Examination of Witnesses before Trial or Hearing.

38. (A) Any necessary application for an order for examination of one of the parties or of a witness who is within the jurisdiction of the Court shall be made to a Registrar by summons.

(B) Such examination shall be *viva voce,* unless otherwise directed, before a person to be nominated by a Registrar.

(C) The other parties in the suit shall have four clear days' notice of the time and place appointed for the examination, unless the Registrar shall otherwise direct.

* Added by the Matrimonial Causes (Amendment) Rules, dated 2nd February 1931.

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39. (A) Application for a Commission or for Letters of Request, or for the appointment of a Special Examiner to examine a party or a witness who is outside the jurisdiction of the Court, may be made by summons and the procedure with regard thereto shall coform as nearly as may be to the Rules of the Supreme Court in like cases. (For Form of Commission *see* Appendix VII: for Forms of Letters of Request, Commission Rogatoire, and order for Special Examiner in France *see* Rules of Supreme Court, 1883, Appendix K 35 BB 37 B 37 ccc).

(B) A wife may apply to a Registrar for security for her costs of such examination at the hearing of the summons or subsequently by summons.

Trial of Issues.

40. A Judge may direct and any Petitioner and any party to a cause who has entered an appearance may apply on summons to a Judge for a direction for the separate trial of any issue or issues of fact, or any question as to the jurisdiction of the Court.

Proceedings in Chambers.

41. All applications under these Rules which are not hereby directed to be made to a Judge may be made upon summons to a Registrar.

42. A summons may be taken out by a party or at the discretion of a Registrar by any other person having or claiming right to be heard in the cause or matter.

43. The name of the cause or matter and of the agent taking out a summons is to be indorsed thereon and a true copy of the summons is to be served on the party summoned or his solicitor one clear day at least before the summons is returnable and before 6 p.m. and on Saturdays before 1 p.m.

44. On the day and at the hour named in the summons the party taking out the same shall attend with the original summons at the place appointed for hearing the same. If any party to the summons do not appear after the lapse of half an hour from the time named in the summons the other party or parties may proceed in his absence.

45. Appeal from any order or decision of a Registrar may be made to a Judge in Chambers by summons issued within five days of the order or decision complained of and returnable on the first day on which summonses are heard after this period has elapsed, but such appeal shall not act as a stay unless so ordered by the Registrar or a Judge.

Re-Hearing.

46. An application for the re-hearing of a cause heard by a Judge alone where no error of the Court at the hearing is alleged shall be made to a Divisional Court of the Probate Divorce and Admiralty Division, and shall be by notice of motion, stating the grounds of the application, filed in the Registry and served within six weeks after Judgment, and such notice shall be a 14 days' notice, and may be amended at any time by leave of the Judge. Application for re-hearing in any case not hereinbefore provided for must be made by appeal to the Court of Appeal.

Petition for Reversal of Decree of Judicial Separation.

47. A Petition to the Court for the reversal of a decree of Judicial Separation must set out the grounds on which the Petitioner relies. A form of such Petition is given in Appendix No. VIII.

48. Before such a Petition can be filed an Appearance on behalf of the party praying for a reversal of the decree of Judicial Separation must be entered in the cause in which the decree has been pronounced, leave to enter such Appearance being first obtained upon summons.

49. A certified copy of such Petition, under seal of the Court, shall be served personally upon the party in the cause in whose favour the decree has been made, who may within fourteen days file in the Registry an Answer thereto and shall on the day on which the Answer is filed deliver a copy thereof to the other party in the cause or to his or her solicitor.

50. All subsequent pleadings and proceedings arising from such petition and Answer shall be filed and carried on in the same manner as before directed in respect of an original Petition and Answer thereto so far as such directions are applicable.

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Showing Cause against a Decree Nisi.

51. (A)—

(*a*) When the King's Proctor desires to show cause against making absolute a Decree *Nisi* he shall enter an appearance in the cause in which such Decree *Nisi* has been pronounced and shall within fourteen days after entering appearance file his Plea in the Registry setting forth the grounds upon which he desires to show cause as aforesaid and within twenty-four hours of filing his Plea shall deliver a copy thereof to the person in whose favour such decree has been pronounced, or to his solicitors;

(*b*) Where such Plea alleges a Petitioner's adultery with any named woman the King's Proctor shall deliver to each such woman personally a plain copy of his Plea omitting such part thereof as contains any allegation in which the woman so served is not named, and such copy shall be indorsed with the notice contained in Appendix 5, so far as applicable; such delivery and notice may only be dispensed with by Order on Summons for cause shown; proof of such delivery must, unless the Court shall otherwise direct, be by affidavit to which a copy of Plea, as delivered, marked as an exhibit, must be annexed; the means of knowledge of the deponent as to the identity of the person must be shown;

(*c*) All subsequent pleadings and proceedings in respect of such Plea shall be filed and carried on in the same manner as is hereinbefore directed in respect of an original Petition, except as hereinafter provided.*

(B) If no Answer to the Plea of King's Proctor is filed within the time limited or if an Answer is filed and withdrawn or not proceeded with the King's Proctor may apply forthwith by motion to rescind the Decree *Nisi* and dismiss the Petition.

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* Amended by the Matrimonial Causes (Amendment) Rules dated 1st February 1925.

(C) If the charges contained in the Plea of the King's Proctor are not denied in the Answer thereto the party in whose favour the Decree *Nisi* has been pronounced shall within fourteen days from the date of the Registrar's certificate that the pleadings are correct and in order set down the cause for trial or hearing and within twenty-four hours afterwards shall file and give to the King's Proctor notice of his having so done.

In default of such setting down and notice the King's Proctor may apply forthwith by Motion to rescind the Decree *Nisi* and dismiss the Petition.

52. Any person other than the King's Proctor wishing to show cause against making absolute a Decree *Nisi* shall enter an appearance in the cause in which such Decree *Nisi* has been pronounced, and within four days thereafter file affidavits setting forth the facts upon which he relies and within twenty-four hours deliver copies thereof to the party or the Solicitor of the party in whose favour the Decree *Nisi* has been pronounced.

53. The Party in the cause in whose favour the Decree *Nisi* has been pronounced may within fourteen days after delivery of the affidavits file affidavits in answer, and the person showing cause against the Decree *Nisi* being made absolute may within fourteen days file affidavits in reply.

54. No affidavits are to be filed in rejoinder to the affidavits in reply without leave of a Registrar.

55. The questions raised on such affidavits shall be argued in such manner and at such times as a Judge may on application upon summons direct.

Decree Absolute.

56. Application to make absolute a decree *Nisi* shall be made to the Court by filing in the Registry a notice in writing setting forth that application is made for such Decree Absolute, which will thereupon be pronounced in open Court at a time appointed for that purpose. In support of such application it must be shown by affidavit filed with the said notice that search has been made in the proper books at the Registry upto within six days of the time appointed, and that at such time no person had intervened or obtained leave to intervene in the cause, and that

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no Appearance has been entered nor any affidavits filed on behalf of any person wishing to show cause against the Decree *Nisi* being made absolute; and in case leave to intervene had been obtained, or appearance entered or affidavits filed on behalf of such person, it must be shown by affidavits what proceedings, if any, have been taken thereon. A Form of affidavit is given in Appendix No. IX.

If more than twelve calendar months has elapsed since the date of the Decree *Nisi* an affidavit by the Petitioner giving reasons for the delay must be filed.

Alimony.

57. A wife who is Petitioner in a cause after filing her Petition may file, and after serving the same may serve, a Petition for alimony pending suit, and a wife after entering Appearance to a Petition may file and serve a Petition for alimony pending suit.

58. The husband shall within fourteen days after service of a Petition for alimony file his Answer thereto upon oath setting out his property and income and if Respondent shall before so doing enter an Appearance in the cause. Such Appearance may be limited to the alimony proceedings.

59. The wife if the husband's Answer is insufficient may apply on summons for a further and better answer or for discovery of documents or for an order for the husband's attendance for cross examination, and such order shall thereupon be made as in the circumstances of the case may appear to the Registrar to be required.

60. If the Answer of the husband alleges that the wife has property or income she may within fourteen days file a reply on oath to that allegation; but the husband may not file a Rejoinder to such Reply without leave of a Registrar.

61. A Registrar shall investigate the averments in the Petition for Alimony, Answer, and Reply, in the presence of the parties or their Solicitors, and shall be at liberty to require the attendance of either party for the purpose of being examined or cross-examined, and to take the oral evidence of witnesses, and to require the production of any document, and to call for affidavits, and shall direct

such order to issue as he shall think fit or refer the application or any question arising therefrom to the Judge for his decision.

62. A wife who has obtained a decree of Judicial Separation may apply for an allotment of permanent alimony. She may proceed with such application upon the pleadings already filed on her application for alimony pending suit on giving eight days' notice to her husband or his solicitor of her intention so to do. Otherwise the rules governing an application for alimony pending suit shall govern an application for permanent alinony.

63. A wife may at any time after alimony has been allotted to her, whether alimony pending suit or permanent alimony, file her Petition supported by affidavit for an increase of the alimony allotted, by reason of the increased means of the husband or the reduction of her own means or the husband may file a Petition supported by affidavit for a reduction of the alimony allotted, by reason of his reduced means or the wife's increased means, and the course of proceeding in such cases shall be the same as required by these Rules and Regulations in respect of the original Petition for alimony and the allotment thereof.

64. Permanent alimony shall unless otherwise ordered commence from the date of the final decree.

Maintenance and Periodical Payments.

65. (A) Application for maintenance or periodical payments on a decree for dissolution or nullity of marriage shall be made in a separate Petition which may be filed at any time after Decree *Nisi* but not later than one calendar month after Decree Absolute except by leave to be applied for by summons to a Judge.

(B) Application for periodical payments may be made in like manner at any time after non-compliance with a Decree of Restitution of Conjugal Rights.

66. A certified copy of such Petition under the seal of the Court shall be served on the husband or wife (as the case may be) or his or her solicitor upon the record.

67. A party served with such Petition may within fourteen days after service, after entering an appearance thereto, file an Answer on oath and thereupon on the same

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day shall deliver a copy of such Answer to the opposite party or his solicitor.

68. If the Answer of the husband alleges that the wife has property of her own, she may within fourteen days file a Reply on oath to that allegation; but the husband may not file a Rejoinder to such Reply without leave of a Registrar.

69. (A) Upon an application for maintenance or periodical payments the pleadings when completed shall be referred to one of the Registrars, who shall investigate the averments therein contained, in the presence of the parties or their solicitors, and who for that purpose shall be at liberty to require any affidavits, the production of any document, and the attendance of the husband or wife for the purpose of being examined or cross-examined, and to take the oral evidence of any witnesses, and shall direct such order to issue as to the maintenance of either party to the marriage or the children of the marriage as he shall think fit, or refer the application or any question arising therefrom to the Judge for his decision.

(B) Pending the final determination of an application for maintenance or periodical payments an interim order may be made upon such terms as shall appear to the Registrar to be just and without prejudice to the effect of the order to be ultimately made.

70. The provisions of Rule 63 shall be observed in cases of application for increase or reduction of payments for maintenance and of periodical payments.

Variation of Settlements.

71. (A) Application to vary marriage settlements shall be made by petition filed after but within one calendar month of Decree Absolute unless such time is extended by a Judge on summons personally served on the husband or wife as the case may be, the trustees of the settlemenst, and such other persons as the Registrar shall direct. Subsequent pleadings shall be as in proceedings for Maintenance. Appearance must be entered in the prinicipal cause before an Answer is filed. The Registrar shall conduct his investigation as in Maintenance proceedings, and shall report in writing to the Court the result of his investigations. The parties respectively upon enquiry by

them in the Registry shall be informed of the making of the Report.

(B) The Report of the Registrar shall within five days be filed in the Registry by the party on whose behalf the Petition has been filed, who shall give notice thereof to the other parties heard by the Registrar; and any party, after such notice has been given, may apply to the Judge by motion to confirm or vary the Report.

Settlement of Wife's Property.

72. Application for a settlement of property of a wife by virtue of the Matrimonial Causes Act, 1857, Section 45, shall be made and proceeded with in the manner prescribed in Rule 71 with regard to application for variation of settlements.

Custody and Maintenance of Children and Access.

73. (A) When custody of children is claimed in any Petition the father, mother, or guardian, or any person who has intervened in the suit for the purpose of applying to be appointed guardian of such children, or who has the custody or control of such children under an order of the Court, may apply at any time either before or after final Decree to a Judge on summons for any order relating to the custody, maintenance or education of such children or for directions that proper proceedings be taken for placing such children under the protection of the Chancery Division of the High Court of Justice.

(B) When custody of children is claimed in any Petition and a Petition for alimony *pendente lite*, permanent alimony, periodical payments, maintenance, settlement, or variation of settlement has been filed and is pending in such suit, applications for maintenance for children may be made from time to time to a Registrar.

(C) Applications as to access to children may be made to a Registrar on summons.

Guardians ad litem.

74. (A) A minor who has attained the age of seven years may elect a guardian *ad litem* for the purpose of any proceeding on his or her behalf.

(B) A guardian for an infant under the age of seven years may be assigned by a Registrar upon an application supported by affidavits.

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(C) The election, the consent of the guardian to act, and an affidavit showing fitness and no contrary interest, must be filed in the Registry before an elected guardian can be permitted to file a Petition or enter an appearance on behalf of the minor.

75. A Committee or other person duly appointed under the Lunacy Acts for a person of unsound mind may prosecute, defend or intervene in a suit on behalf of such person or otherwise represent him; but if there be no such Committee or other person duly appointed application shall be made on affidavit to a Registrar, who will assign a guardian to the person of unsound mind. If the opposite party is already before the Court, the application shall be upon summons.

Subpœnas.

76. Subpœnas in causes and matters to which these Rules and Regulations apply shall issue out of the Divorce Registry unless a Judge shall direct otherwise.

Attachment and Committal.

77. Application for attachment or committal shall b made to a Judge by motion.

78. Any person attached or committed may apply for his or her discharge by motion to the Judge, or if the Court be not sitting to a Registrar.

Enforcement of Orders.

79. (A) In default of payment to any person of any sum of money at the time appointed by any order of the Court for the payment thereof, a writ of *fieri facias*, sequestration, or elegit shall be sealed and issued as of course in the Registry upon an affidavit of service of the order and of non payment.

(B) A decree or order requiring a person to do an act thereby ordered shall state the time within which the act is to be done, and the copy to be served upon the person required to obey the same shall be endorsed with a memorandum in the words or to the effect following, *viz*:—If you the within named (A.B.) neglect to obey this order by the time therein limited you will be liable to process of

execution for the purpose of compelling you to obey the same. Appendix F.

Office Copies, Extracts, &c.

80. The Registrars of the Principal Registry are to have the custody subject to direction by the President of the Probate Divorce and Admiralty Division of all pleadings and other documents brought in or filed and of orders and decrees made in any matter or suit.

81. Copies or extracts of documents originals of which are retained in the Registry will, if required, be examined with the originals from which the same are copied. Every copy so required to be examined shall be certified under the hand of a Registrar to be an examined copy, and the seal of the Court will not be affixed to any copy which is not so certified.

Time Fixed by these Rules.

82. (A) The time fixed by these Rules for the performance of any act may be varied by Order of a Judge or Registrar subject to such qualifications and restrictions and on such terms as upon the application for variation may be deemed fit.

(B) The time fixed by these Rules for the performance of any act, or for any proceeding in a cause, shall in all cases be exclusive of Sundays, Christmas Day and Good Friday.

Motions.

83. When it is necessary to give notice of any motion to be made to the Court such notice shall be served on all parties who may be affected by the proposed order and who shall have entered an appearance four clear days previously to the hearing of such motion, and a copy of the notice so served shall be filed in the Registry, and the affidavits to be used in support of the motion and original documents referred to therein or intended to be used at the hearing of the motion shall at the same time be left in the Registry. Copies of such affidavits or documents shall be delivered upon request to the parties who are entitled to be heard upon the motion.

Appendix F.

Taxing Bills of Costs.

84. All bills of costs shall be referred to the Registrars for taxation and may be taxed by them without any special order for that purpose. Such bills shall be filed in the Registry. Notice of the time appointed for taxation will be forwarded to the party filing the bill at the address furnished by such party, who shall give the other party or parties to be heard on the taxation thereof at least one clear day's notice of such appointment and shall at the same time or previously deliver to him or them a copy or copies of the bill to be taxed.

85. When an appointment has been made by a Registrar for taxing any bill of costs and any party to be heard on the taxation does not attend at the time appointed the Registrar may nevertheless proceed to tax the bill after the expiration of a quarter of an hour upon being satisfied by affidavit or otherwise that the parties not in attendance had due notice of the time appointed.

86. The bill of costs of any solicitor will be taxed on his application as against his client after sufficient notice given to the person or persons liable for the payment thereof, or on the application of such person or persons after sufficient notice given to the solicitor.

87. In divorce and matrimonial causes costs allowed to solicitors and the taxation of such costs shall be in accordance with the provisions of Order LXV of the Rules of the Supreme Court, as far as the same are applicable thereto, and subject to any provision contained in these Rules.*

88. *The provisions of Order 65, Rule 10 (b), of the Rules of the Supreme Court of Judicature, made and dated the 4th day of February 1920, shall be applied on taxation of costs in Divorce and Matrimonial Causes so long as such Rule shall remain in force.*†

89. The fees payable on the taxation of any bill of costs shall be paid by the party on whose application the bill is taxed and shall be allowed as part of such bill. If more than one-sixth of the amount of any bill of costs taxed as between solicitor and client is disallowed on taxation thereof no costs incurred in such taxation shall

*Substituted by the Matrimonial Causes (Amendment) Rules, dated 23rd April 1932.

†Repealed by the Matrimonial Causes (Solicitor's Costs) Rules, 1932.

be allowed and the party on whose application the bill is taxed shall be at liberty to deduct the costs incurred by him in the taxation from the amount of the bill as taxed, if so much remains due; otherwise the same shall be paid by the solicitor to the person on whose application the bill is taxed.

90. Upon the Registrar's certificate as to costs being signed an order of the Court for payment of the amount within seven days or such other time as the Registrar shall direct may issue.

Wife's Costs.

91. After the Registrar's certificate that the pleadings are in order has been given, or at an earlier stage of a cause by order of the Judge or of a Registrar to be obtained on summons, a wife who is Petitioner or has filed an Answer may file her bill or bills of costs for taxation as against her husband, and the Registrar to whom such bills of costs are referred for taxation shall ascertain what is a sufficient sum of money to be paid into Court or what is a sufficient security to be given by the husband to cover the costs of the wife of and incidental to the hearing of the cause, and may thereupon unless the husband shall prove to the satisfaction of the Registrar that the wife has sufficient separate estate or show other good cause issue an order upon the husband to pay her costs up to the setting down of the cause and to pay into Court or secure the costs of the hearing within a time to be fixed by the Registrar. The Registrar may in his discretion order the costs up to setting down to be paid into Court.

92. The bond taken to secure the costs of a wife of and incidental to the hearing of a cause shall be filed in the Registry, and shall not be delivered out or be sued upon without the order of a Registrar.

93. The order for payment of costs in which a Respondent or Co-respondent has been condemned by a Decree *Nisi* if drawn up before the Decree Nisi is made absolute, shall direct payment into Court, and such costs shall not be paid out of Court to the party entitled to receive them under the Decree *Nisi* until the decree absolute has been obtained; but a wife who is unsuccessful in a cause, and who at the hearing of the cause has obtained an order of the Judge for costs may nevertheless proceed

Appendix F. at once to obtain payment of such costs after allowance thereof on taxation.

Payment of Money out of Court.

94. Persons entitled to payment of money out of Court on applying for the same, shall bring into the Registry duplicate forms in writing setting forth the date on which the money applied for was paid into Court, the amount applied for, and the name and address of the person to receive the same.

Registry and Officers.

95. The Registry of the Court and the Clerks employed therein shall be subject to and under the control of the Registrars of the Principal Probate Registry.

Proceedings under the Legitimacy Declaration Act, 1858 and the Greek Marriages Act, 1884.

96. The above Rules and Regulations, so far as the same may be applicable, shall extend to applications and proceedings under the Legitimacy Declaration Act, 1858 and the Greek Marriages Act, 1884.

Rules of the Supreme Court.

97. In any matter of practice or procedure which is not governed by statute or dealt with by these Rules the Rules of the Supreme Court in respect of like matters shall be deemed to apply.

Operation of these Rules.

98. These Rules and Regulations shall come into operation on the 1st day of March 1924, and may be cited as the Matrimonial Causes Rules 1924, and shall supersede the Provisional Rules and Regulations 1923, which came into operation on the 30th day of November 1923; but in any cause or matter in which proceedings were begun before the 1st day of January 1924, the Rules and Regulation in force prior to the 30th day of November 1923 may, subject to any express direction of a Registrar, be acted upon as though these Rules and Regulations had not been made.

APPENDIX I.

Appendix F.

In the High Court of Justice,
Probate, Divorce and Admiralty Division. (*Divorce.*)

To of

TAKE NOTICE that you are required, within eight days (1) after service hereof upon you, inclusive of the day of such service, to enter an appearance either in person or by your solicitor at the Divorce Registry of the High Court of Justice at Somerset House, Strand, in the County of London, should you think fit so to do, and thereafter to make answer to the charges in this Petition, (2) and that, in default of your so doing, the Court will proceed to hear the said charges proved and pronounce judgment, your absence notwithstanding.

(1) Or as the case may be.

(2) Or Answer.

The Petition (3) is filed and this notice to appear is issued by (4 of

Dated at London the day of 19

Registrar.

(3) (Or Answer as the case may be.)
(4) Stating name and address of petitioner or solicitor.

Note.—Any person entering an appearance must at the same time furnish an address for service within three miles of the General Post Office, London.

APPENDIX II.

CERTIFICATE OF SERVICE.

In the High Court of Justice,
Probate, Divorce and Admiralty Division. (*Divorce.*)

A.B. v. C.B. & R.S.

A sealed copy of the (supplemental) Petition dated the day of 19 and extracted from the Registry was (as amended pursuant to order dated the day of 19) duly served by the undersigned G.H. on C.B. the Respondent (*or* R.S. the Co-respondent) at on the day of ."*

APPENDIX III.

AFFIDAVIT OF SERVICE.

In the High Court of Justice,
Probate, Divorce and Admiralty Division. (*Divorce.*)

* Substituted by the Matrimonial Causes (Amendment) Rules, dated 28th June 1933.

Appendix F.

A.B. against C.B. and R.S.

I C.D. of etc. make oath and say, that the Petition bearing date the day of 19 filed in this Court against C.B. the Respondent (or R.S. the Co-respondent), was duly served by me on the said C.B. (or R.S.) at on the day of 19 by delivering to the said C.B. (or R. S.) personally a sealed copy thereof.

(Means of knowledge of identity to be inserted here.)

SWORN at etc. on the day of 19 .

Before me

A Commissioner for Oaths or as the case may be.

APPENDIX IV.

ENTRY OF AN APPEARANCE.

In the High Court of Justice,
Probate, Divorce and Admiralty Division. (*Divorce.*)

A.B. Petitioner against C.B. Respondent and R.S. Co-Respondent.	The Respondent C.B. (or the Co-Respondent R.S.) appears in person (or C.D. the Solicitor for C.B. the Respondent) (or R.S. the Co-Respondent) appears for the said Respondent or Co-Respondent.

(Here insert the address required within three miles of the General Post Office, London.)

Entered this day of 19

APPENDIX V.

In the High Court of Justice,
Probate, Divorce and Admiralty Division. (*Divorce.*)

To of

(1) Or as the case may be.

TAKE NOTICE that you are entitled within eight days (1) after delivery hereof to you, inclusive of the day of such delivery to apply upon summons for leave to enter an appearance either in person or by your Solicitor at the Divorce Registry of the High Court of Justice at Somerset House, Strand, in the County of London, for leave to intervene in this cause, should you think fit so to do, and thereafter to make answer to the charges in this Petition, (2) and that, in default of your so doing, the Court will proceed to hear the said charges proved and pronounce judgment, your absence notwithstanding.

(2) Or Answer

Appendix F.

The Petition (3) is filed and this notice is issued by (4) of

Dated at London the day of 19 .

Registrar.

(3) (Or Answer as the case may be.)
(4) Stating name and address of petitioner or solicitor

Note.—Any person entering an appearance must at the same time furnish an address for service within three miles of the General Post Office, London.

APPENDIX VI.

ANSWER.

In the High Court of Justice,

Probate, Divorce and Admiralty Division. (*Divorce.*)

The day of 19 .

A.B. *v.* C.B.

The Respondent C.B. by C.D. her Solicitor (or in person), in answer to the Petition filed in this cause, saith:

1. That she is not guilty of adultery as alleged in the said Petition.

2. That on the day of 19 , and on other days between that day and , the said A.B. at in the County of committed adultery with K.L.

(In like manner Respondent is to state connivance, condonation, or other matters relied on as a ground for dismissing the Petition.)

Wherefore this Respondent humbly prays:

That your Lordship will be pleased to reject the prayer of the said Petition, and decree, etc.

APPENDIX VII.

COMMISSION FOR EXAMINATION OF WITNESSES.

In the High Court of Justice,

Probate, Divorce and Admiralty Division. (*Divorce.*)

GEORGE V., by the grace of God, of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas. King, Defender of the Faith, to (here set forth the name and proper description of the Commissioner), Greeting. Whereas a certain cause is now depending in the Probate, Divorce and Admiralty Division of Our High Court of Justice between A.B.. Petitioner, and C.B., Respondent, and R. S., Co-Respondent, wherein the said A.B.

Appendix F.

has filed his Petition praying for a dissolution of his marriage with the said C.B. (or otherwise as in the prayer of the Petition). And whereas by an Order made in the said cause on the day of 19 on the application of the said A.B. it was ordered that a Commission should issue under the Seal of Our said Court for the examination of (here insert name and address of one of the persons to be examined) and others as witnesses to be produced on the part of the said A.B. the Petitioner, in support of his Petition (saving all just Exceptions). Now know ye that We do by virtue of this Commission to you directed, authorise you within thirty days after the receipt of this Commission at a certain time and place to be by you appointed for that purpose with power of adjournment to such other time and place as to you shall seem convenient to cause the said witnesses to come before you and to administer to the said witnesses respectively an oath truly to answer such questions as shall be put to them touching the matters set fourth in the said Petition, (a true and authentic copy whereof sealed with the seal of Our said Court is hereunto annexed), and such oath being administered We do hereby authorize and empower you to take the examination of the said witnesses touching the matters set fourth in the said Petition, and to reduce the said examination or cause the same to be reduced into writing. And that for the purpose aforesaid you do assume for yourself some notary public or other lawful scribe as and for your actuary in that behalf if to you it should seem meet and convenient so to do. And the said examination being so taken and reduced into writing as aforesaid, and subscribed by you We do require you forthwith to transmit the said examination, closely sealed up, to the Divorce Registry of Our said Court at Somerset House, Strand, in the County of Middlesex, England, together with these presents. And we do hereby give you full power and authority to do all such acts, matters and things as may be necessary, lawful and expedient for the due execution of this Our Commission.

Dated at London the day of in the year of our Lord one thousand nine hundred and and in the year of Our Reign.

(Signed) X.Y.
Registrar.

APPENDIX VIII.

PETITION FOR REVERSAL OF DECREE OF JUDICIAL SEPARATION.

In the High Court of Justice,
Probate, Divorce and Admiralty Division. (*Divorce.*)

To the Right Honourable the President of the said Division.

The day of 19 .

The Petition of A.B. of , showeth:

1. That your Petitioner was on the day of 19 lawfully married to C.B. then C.D. Spinster (or Widow) at

(Here state where the marriage took place.)

2. That on the day of your Lordship by your final decree, pronounced in a cause then depending in this Court, entitled C.B. against A.B., decreed as follows: to wit: Appendix F.

(Here set out the decree.)

3. That the aforesaid decree was obtained in the absence of your Petitioner, who was then residing at

(State facts tending to show that the Petitioner did not know of the proceedings: and further, that had he known of them he might have offered a sufficient defence.)

and that there was reasonable ground for your Petitioner leaving his said wife, for that his said wife

(Here state any legal grounds justifying the Petitioner's separation from his wife.)

Your Petitioner therefore humbly prays:

That your Lordship will be pleased to reverse the said decree.

*(Signed)

*To be signed by the petitioner.

APPENDIX IX.

AFFIDAVIT IN SUPPORT OF APPLICATION FOR DECREE ABSOLUTE.

In the High Court of Justice,
Probate, Divorce and Admiralty Division. (*Divorce.*)
A.B. against C.B. and R.S.

I, C.D. of etc. Solicitor for A.B. the Petitioner in this cause make oath and say, that on the day of 19 , I carefully searched the books kept in the Divorce Registry of this Court for the purpose of entering appearances, from and including the day of 19 , the day of the date of the decree *nisi* made in this case, to the day of 19 , and that during such period no appearance has been entered in the said books by the King's Proctor, or by or on behalf of any other person or persons whomsoever. And I further make oath and say, that I also carefully searched the books kept in the said Registry for entering the minutes of proceedings had in this cause from and including the said day of 19 , to the day of 19 , and that no leave has been obtained by the King's Proctor, or by any other person or persons whomsoever, to intervene in this cause, and that no affidavit, instrument or other document whatsoever, had been filed in this cause by the King's Proctor or any other person whomsoever during such period, or at any other period during the dependence of this cause, in opposition to the said decree *nisi* being made absolute.

SWORN at etc. on the day of 19 .
Before me,

A Commissioner for Oaths (or as the case may be).

Appendix G.

APPENDIX G.

SUPREME COURT OF JUDICATURE (CONSOLIDATION) ACT, 1925.

(15 & 16 Geo. V, Ch. 49.)

A.D. 1925.

PART VIII.

MATRIMONIAL CAUSES AND MATTERS.

Divorce and Nullity of Marriage.

Grounds for petition for divorce.

176. A petition for divorce may be presented to the High Court (in this Part of this Act referred to as "the court")—

(*a*) by a husband on the ground that his wife has since the celebration of the marriage been guilty of adultery; and

(*b*) by a wife on the ground that her husband has since the celebration of the marriage been guilty of rape, or of sodomy or bestiality, or that he has since the celebration of the marriage and since the seventeenth day of July, nineteen hundred and twenty-three, been guilty of adultery :

Provided that nothing in this Act shall affect the right of a wife to present a petition for divorce on any ground on which she might, if the Matrimonial Causes Act, 1923, had not passed, have presented such a petition, and on any petition presented by a wife for divorce on the ground of the adultery and cruelty, or adultery and desertion, of her husband, the husband and wife shall be competent and compellable to give evidence with respect to the cruelty or desertion.

13 & 14 Geo. 5 c. 19.

Provision as to making adulterer co-respondent.

177.—(1) On a petition for divorce presented by the husband or in the answer of a husband praying for divorce the petitioner or respondent, as the case may be, shall make the alleged adulterer a co-respondent unless he is excused by the court on special grounds from so doing.

(2) On a petition for divorce presented by the wife the court may, if it thinks fit, direct that the person with whom the husband is alleged to have committed adultery be made a respondent.

Duty of Court on presentation of petition.

178.—(1) On a petition for divorce it shall be the duty of the court to satisfy itself so far as it reasonably can both as to the facts alleged and also as to whether the petitioner has been accessory to or has connived at or condoned the adultery or not, and also to enquire into any countercharge which is made against the petitioner.

(2) If on the evidence the court is not satisfied that the alleged adultery has been committed or find that the petitioner has during the marriage been accessory to or has connived at or condoned the adultery complained of, or that the petition is presented or prosecuted in collusion with either of the respondents, the court shall dismiss the petition.

(3) If the court is satisfied on the evidence that the case for the petition has been proved and does not find that the petitioner has in any manner been accessory to or connived at or condoned the adultery or that the petition is presented or prosecuted in collusion with either of the respondents, the court shall pronounce a decree of divorce:

Provided that the court shall not be bound to pronounce a decree of divorce if it finds that the petitioner has during the marriage been guilty of adultery, or if in the opinion of the court he has been guilty—

(*a*) of unreasonable delay in presenting or prosecuting the petition; or

(*b*) of cruelty towards the other party to the marriage; or

(*c*) of having without reasonable excuse deserted, or of having without reasonable excuse wilfully separated himself or herself from, the other party before the adultery complained of; or

(*d*) of such wilful neglect or misconduct as has conduced to the adultery.

Dismissal of respondent or co-respondent from proceedings.

179. In any case in which, on the petition of a husband for divorce, the alleged adulterer is made a co-respondent or in which, on the petition of a wife for divorce, the person with whom the husband is alleged to have committed adultery is made a respondent, the court may, after the close of the evidence on the part of the petitioner, direct the co-respondent or the respondent, as the case may be, to be dismissed from the proceedings if the court is of opinion that there is not sufficient evidence against him or her.

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Relief to respondent on petition for divorce.

180. If in any proceedings for divorce the respondent opposes the relief sought, in the case of proceedings instituted by the husband, on the ground of his adultery, cruelty or desertion, or, in the case of proceedings instituted by the wife, on the ground of her adultery, cruelty or desertion, the court may give to the respondent the same relief to which he or she would have been entitled if he or she had presented a petition seeking such relief.

Duties of King's Proctor.

181. In the case of any petition for divorce or for nullity of marriage—

(1) The court may, if it thinks fit, direct all necessary papers in the matter to be sent to His Majesty's Proctor, who shall under the directions of the Attorney-General instruct counsel to argue before the court any question in relation to the matter which the court deems to be necessary or expedient to have fully argued, and His Majesty's Proctor shall be entitled to charge the costs of the proceedings as part of the expenses of his office:

(2) Any person may at any time during the progress of the proceedings or before the decree *nisi* is made absolute give information to His Majesty's Proctor of any matter material to the due decision of the case, and His Majesty's Proctor may thereupon take such steps as the Attorney-General considers necessary or expedient:

(3) If in consequence of any such information or otherwise His Majesty's Proctor suspects that any parties to the petition are or have been acting in collusion for the purpose of obtaining a decree contrary to the justice of the case, he may, under the direction of the Attorney-General, after obtaining the leave of the court, intervene and retain counsel and subpœna witnesses to prove the alleged collusion.

Provisions as to costs where King's Proctor intervenes or shows cause.

182.—(1) Where His Majesty's Proctor intervenes or shows cause against a decree *nisi* in any proceedings for divorce or for nullity of marriage, the court may make such order as to the payment by other parties to the proceedings of the costs incurred by him in so doing or as to the payment by him of any costs incurred by any of the said parties by reason of his so doing, as may seem just.

(2) So far as the reasonable costs incurred by His Majesty's Proctor in so intervening or showing cause are not fully satisfied by any order made under this section for the payment of his costs, he shall be entitled to charge the difference as part of the expenses of his office, and the Treasury may, if they think fit, order that any costs which under any order made by the court under this section His Majesty's Proctor pays to any parties shall be deemed to be part of the expenses of his office.

Decree *nisi* for divorce or nullity of marriage.

183.—(1) Every decree for a divorce or for nullity of marriage shall in the first instance, be a decree ***nisi*** not to be made absolute until after the expiration of six months from the pronouncing thereof, unless the court by general or special order from time to time fixes a shorter time.

(2) After the pronouncing of the decree *nisi* and before the decree is made absolute, any person may, in the prescribed manner, show cause why the decree should not be made absolute by reason of the decree having been obtained by collusion or by reason of material facts not having been brought before the court, and in any such case the court may make the decree absolute, reverse the decree *nisi*, require further inquiry or otherwise deal with the case as the court thinks fit.

Re-marriage of divorced persons.

184.—(1) As soon as any decree for divorce is made absolute, either of the parties to the marriage may, if there is no right of appeal against the decree absolute, marry again as if the prior marriage had been dissolved by death or, if there is such a right of appeal, may so marry again, if no appeal is presented against the decree, as soon as the time for appealing has expired, or, if an appeal is so presented, as soon as the appeal has been dismissed:

Provided that it shall not be lawful for a man to marry the sister or half-sister of his divorced wife or of his wife by whom he has been divorced during the lifetime of the wife, or the divorced wife of his brother or half-brother or the wife of his brother or half-brother who has divorced his brother during the lifetime of the brother or half-brother.

(2) No clergyman of the Church of England shall be compelled to solemnise the marrige of any person whose former marriage has been dissolved on the ground of his or

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her adultery, or shall be liable to any proceedings, penalty or censure for solemnising or refusing to solemnise the marriage of any such person.

(3) If any minister of any church or chapel of the Church of England refuses to perform the marrriage service between any persons who but for his refusal would be entitled to have the service performed in that church or chapel, he shall permit any other minister of the Church of England entitled to officiate within the diocese in which the church or chapel is situate to perform the marriage service in that church or chapel.

Judicial Separation and Restitution of Conjugal Rights.

Decree for judicial separation.

185.—(1) A petition for judicial separation may be presented to the court either by the husband or the wife on the ground of adultery or cruelty, desertion without cause for not less than two years, failure to comply with a decree for restitution of conjugal rights, or on any ground on which a dercee for divorce *â mensâ et thoro* might have been pronounced immediately before the commencement of the Matrimonial Causes Act, 1857.

20 & 21 Vict. c. 85.

(2) The court may, on being satisfied that the allegations contained in the petition are true and that there is no legal ground why the petition should not be granted, make a decree for judicial separation, and any such decree shall have the same force and effect as a decree for divorce *â mensâ et thoro* had immediately before the commencement of the Matrimonial Causes Act, 1857.

(3) The court may, on the application by petition of the husband or wife against whom a decree for judicial separation has been made, and on being satisfied that the allegations contained in the petition are true, reverse the decree at any time after the making thereof, on the ground that it was obtained in the absence of the person making the application, or, if desertion was the ground of the decree, that there was reasonable cause for the alleged desertion.

(4) The reversal of a decree for judicial separation shall not affect the rights or remedies which any other person would have had if the decree had not been reversed in respect of any debts, contracts or acts of the wife incurred, entered into or done between the date of the decree and of the reversal thereof.

Decree for restitution of conjugal rights.

186. A petition for restitution of conjugal rights may be presented to the court either by the husband or the wife, and the court, on being satisfied that the allegations contained in the petition are true, and that there is no legal ground why a decree for restitution of conjugal rights should not be granted, may make the decree accordingly.

Periodical payments in lieu of attachment.

187.—(1) A decree for restitution of conjugal rights shall not be enforced by attachment, but where the application is by the wife the court, at the time of making the decree or at any time afterwards, may, in the event of the decree not being complied with within any time in that behalf limited by the court, order the respondent to make to the petitioner such periodical payments as may be just, and the order may be enforced in the same manner as an order for alimony in proceedings for judicial separation.

(2) The court may, if it thinks fit, order that the husband shall, to the satisfaction of the court, secure to the wife the periodical payments, and for that purpose may direct that it shall be referred to one of the conveyancing counsel of the court to settle and approve a proper deed or instrument to be executed by all necessary parties.

Legitimacy Declarations.

Declaration of legitimacy, &c.

188.—(1) Any person who is a natural-born subject of His Majesty, or whose right to be deemed a natural-born subject of His Majesty depends wholly or in part on his legitimacy or on the validity of any marriage, may, if he is domiciled in England or Northern Ireland or claims any real or personal estate situate in England, apply by petition to the court for a decree declaring that the petitioner is the legitimate child of his parents, and that the marriage of his father and mother or of his grandfather and grandmother was a valid marriage or that his own marriage was a valid marriage.

(2) Any person who is so domiciled or claims as aforesaid, may apply to the court for a decree declaring his right to be deemed a natural-born subject of His Majesty.

(3) Applications under subsections (1) and (2) of this section may be included in the same petition and on any such application the court shall make such decree as the court thinks just, and the decree shall be binding on His Majesty and all other persons whatsoever:

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Provided that the decree of the court shall not prejudice any person—

(i) if it is subsequently proved to have been obtained by fraud or collusion; or

(ii) unless that person has been cited or made a party to the proceedings or is the heir-at-law, next of kin, or other real or personal representative of, or derives title under or through, a person so cited or made a party.

(4) A copy of every petition under this section and of any affidavit accompanying the petition shall be delivered to the Attorney-General at least one month before the petition is presented or filed, and the Attorney-General shall be a respondent on the hearing of the petition and on any subsequent proceedings relating thereto.

(5) In any application under this section such persons shall, subject to rules of court, be cited to see proceedings or otherwise summoned as the court shall think fit, and any such persons may be permitted to become parties to the proceedings and to oppose the application.

(6) The provisions of this Act relating to matrimonial causes shall, so far as applicable, extend to any proceedings under this section.

(7) No proceedings under this section shall affect any final judgment or decree already pronounced or made by any court of competent jurisdiction.

Miscellaneous.

Damages.

189.—(1) A husband may on a petition for divorce or for judicial separation or for damages only, claim damages from any person on the ground of adultery with the wife of the petitioner.

(2) A claim for damages on the ground of adultery shall, subject to the provisions of any enactment relating to trial by jury in the court, be tried on the same principles and in the same manner as actions for criminal conversation were tried immediately before the commencement of the Matrimonial Causes Act, 1857, and the provisions of this Act with reference to the hearing and decision of petitions shall so far as may be necessary apply to the hearing and decision of petitions on which damages are claimed.

(3) The court may direct in what manner the damages recovered on any such petition are to be paid or applied, and may direct the whole or any part of the damages to be settled for the benefit of the children, if any, of the marriage, or as a provision for the maintenance of the wife.

Alimony.

190.—(1) The court may, if it thinks fit, on any decree for divorce or nullity of marriage, order that the husband shall, to the satisfaction of the court, secure to the wife such gross sum of money or annual sum of money for any term, not exceeding her life, as having regard to her fortune, if any, to the ability of her husband and to the conduct of the parties, the court may deem to be reasonable, and the court may for that purpose order that it shall be referred to one of the conveyancing counsel of the court to settle and approve a proper deed or instrument, to be executed by all the necessary parties, and may, if it thinks fit, suspend the pronouncing of the decree until the deed or instrument has been duly executed.

(2) In any such case as aforesaid the court may, if it thinks fit, by order, either in addition to or instead of an order under sub-section (1) of this section, direct the husband to pay to the wife during the joint lives of the husband and wife such monthly or weekly sum for her maintenance and support as the court may think reasonable:

Provided that—

(*a*) if the husband, after any such order has been made, becomes from any cause unable to make the payments, the court may discharge or modify the order, or temporarily suspend the order as to the whole or any part of the money ordered to be paid, and subsequently revive it wholly or in part as the court thinks fit; and

(*b*) where the court has made any such order as is mentioned in this subsection and the court is satisfied that the means of the husband have increased, the court may, if it thinks fit, increase the amount payable under the order.

(3) On any petition for divorce or nullity of marriage the court shall have the same power to make interim orders for the payment of money by way of alimony or otherwise to the wife as the court has in proceedings for judicial separation.

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(4) Where any decree for restitution of conjugal rights or judicial separation is made on the application of the wife, the court may make such order for alimony as the court thinks just.

(5) In all cases where the court makes an order for alimony, the court may direct the alimony to be paid either to the wife or to a trustee approved by the court on her behalf, and may impose such terms or restrictions as the court thinks expedient, and may from time to time appoint a new trustee if for any reason it appears to the court expedient so to do.

Power of court to order settlement of wife's property.

191.—(1) If it appears to the court in any case in which the court pronounces a decree for divorce or for judicial separation by reason of the adultery of the wife that the wife is entitled to any property either in possession or reversion, the court may, if it thinks fit, order such settlement as it thinks reasonable to be made of the property, or any part thereof, for the benefit of the innocent party, and of the children of the marriage or any or either of them.

Any instrument made under any order of the court made under this section shall be valid and effectual, notwithstanding the existence of coverture at the time of the execution thereof.

(2) Where the application for restitution of conjugal rights is by the husband, and it appears to the court that the wife is entitled to any property, either in possession or reversion, or is in receipt of any profits of trade or earnings, the court may, if it thinks fit, order a settlement to be made to the satisfaction of the court of the property or any part thereof for the benefit of the petitioner and of the children of the marriage or either or any of them or may order such part of the profits of trade or earnings, as the court thinks reasonable, to be periodically paid by the respondent to the petitioner for his own benefit, or to the petitioner or any other person for the benefit of the children of the marriage, or either or any of them.

Power of court to make orders as to application of settled property.

192. The court may after pronouncing a decree for divorce or for nullity of marriage enquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application

of the whole or any part of the property settled either for the benefit of the children of the marriage or of the parties to the marriage, as the court thinks fit, and the court may exercise the powers conferred by this subsection notwithstanding that there are no children of the marriage.

Custody of children.

193.—(1) In any proceedings for divorce or nullity of marriage or judicial separation, the court may from time to time, either before or by or after the final decree, make such provision as appears just with respect to the custody, maintenance and education of the children, the marriage of whose parents is the subject of the proceedings, or, if it thinks fit, direct proper proceedings to be taken for placing the children under the protection of the court.

(2) On an application made in that behalf the court may, at any time before final decree, in any proceedings for restitution of conjugal rights, or, if the respondent fails to comply therewith, after final decree, make from time to time all such orders and provisions with respect to the custody, maintenance and education of the children of the petitioner and respondent as might have been made by interim orders if proceedings for judicial separation had been pending between the same parties.

Wife's property in case of judicial separation.

194.—(1) In every case of judicial separation—

(*a*) the wife shall, as from the date of the decree and so long as the separation continues, be considered as a feme sole with respect to any property which she may acquire or which may devolve upon her, and any such property may be disposed of by her in all respects as a feme sole and if she dies intestate shall devolve as if her husband had been then dead; and

the wife shall, during the separation, be considered as a feme sole for the purpose of contract and wrongs and injuries, and of suing and being sued, and the husband shall not be liable in respect of her contracts or for any wrongful act or omission by her or for any costs she incurs as plaintiff or defendant:

Provided that—

(i) where on any judicial separation alimony has been ordered to be paid and has

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not been duly paid by the husband, he shall be liable for necessaries supplied for the use of the wife:

(ii) if the wife returns to cohabitation with her husband, any property to which she is entitled at the date of her return shall, subject to any agreement in writing made between herself and her husband while separate, be her separate property:

(iii) nothing in this section shall prevent the wife from joining at any time during the separation in the exercise of any joint power given to herself and her husband.

(2) In any case where the decree for judicial separation is obtained by the wife, any property to which she is entitled for an estate in remainder or reversion at the date of the decree, and any property to which she becomes entitled as executrix, administratrix or trustee after the date of the decree, shall be deemed to be property to which this section applies, and for the purpose aforesaid the death of the testator or intestate shall be deemed to be the date when the wife became entitled as executrix or administratrix.

Protection of third parties.

195.—(1) Where a wife obtains a decree for judicial separation, the decree shall, so far as may be necessary for the protection of any person dealing with the wife, be valid and effectual until discharged, and the discharge or variation of the decree shall not affect any rights or remedies which any person would have had, if the decree had not been discharged or varied, in respect of any debts, contracts or acts of the wife incurred, entered into or done during the period between the date of the decree and the discharge or variation thereof.

(2) Any person who, in reliance on any such decree as aforesaid, makes any payment to or permits any transfer or act to be made or done by the wife, shall, notwithstanding the subsequent discharge or variation of the decree, or the fact that the separation has ceased or has been discontinued, be protected and indemnified in the same way in all respects as if at the time of the payment, transfer or other act the decree were valid and still subsisting without variation in full force and effect, or the separation had not ceased or been discontinued, as the case may be, unless at

that time that person had notice of the discharge or variation of the decree or that the separation had ceased or been discontinued.

Power to vary orders.

196. The court may from time to time vary or modify any order for the periodical payment of money made under the provisions of this Act relating to matrimonial causes and matters either by altering the times of payment or by increasing or diminishing the amount, or may temporarily suspend the order as to the whole or any part of the money ordered to be paid, and subsequently revive it wholly or in part, as the court thinks just.

Power to allow intervention on terms.

197. In every case in which any person is charged with adultery with any party to a suit or in which the Court may consider, in the interest of any person not already a party to the suit, that that person should be made a party to the suit, the court may, if it thinks fit, allow that person to intervene upon such terms, if any, as the court thinks just.

Evidence.

198. The parties to any proceedings instituted in consequence of adultery and the husbands and wives of the parties shall be competent to give evidence in the proceedings, but no witness in any such proceedings, whether a party thereto or not, shall be liable to be asked or be bound to answer any question tending to show that he or she has been guilty of adultery unless he or she has already given evidence in the same proceedings in disproof of the alleged adultery.

Power of Secretary of State to order records to be transmitted from ecclesiastical courts.

199.—(1) A Secretary of State may order any judge, registrar or other officer of any ecclesiastical court in England or the Isle of Man, or any other person having the public custody or control of any records, books, documents or other instruments relating to matrimonial causes and matters, to transmit the same at such times, and in such manner, and to such places in London or Westminster, and subject to such regulations, as the Secretary of State may appoint.

(2) If any person wilfully disobeys an order made under this section he shall for the first offence forfeit the sum of one hundred pounds to be recoverable as a debt in the court by any registrar of the principal probate registry,

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and for a second or any subsequent offence the court may, by a warrant of committal countersigned by a Secretary of State, commit the person so offending to prison for any period not exceeding three months.

Seal of court for use in matrimonial causes.

200.—(1) The seal of the court to be used in respect of its jurisdiction in matrimonial causes and matters shall be such as the Lord Chancellor may from time to time direct.

(2) All decrees and orders of the court, or copies thereof, made in pursuance of the said jurisdiction shall, if purporting to be sealed with the said seal, be received in evidence in all parts of the United Kingdom without further proof.

APPENDIX H.

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MAINTENANCE ORDERS (FACILITIES FOR ENFORCEMENT) ACT, 1920.

(10 & 11 Geo. V. Ch. 33.)

CHAPTER 33.

An Act to facilitate the enforcement in England and Ireland of Maintenance Orders made in other parts of His Majesty's Dominions and Protectorates and *vice versâ*.

[16th August 1920.]

BE it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Enforcement in England and Ireland of maintenance orders made in His Majesty's dominions outside the United Kingdom.

1.—(1) Where a maintenance order has, whether before or after the passing of this Act, been made against any person by any court in any part of His Majesty's dominions outside the United Kingdom to which this Act extends, and a certified copy of the order has been transmitted by the governor of that part of His Majesty's dominions to the Secretary of State, the Secretary of State shall send a copy of the order to the prescribed officer of a court in England or Ireland for registration; and on receipt thereof the order shall be registered in the prescribed manner, and shall, from the date of such registration, be of the same force and effect, and, subject to the provisions of this Act, all proceedings may be taken on such order as if it had been an order originally obtained in the court in which it is so registered, and that court shall have power to enforce the order accordingly.

(2) The court in which an order is to be so registered as aforesaid shall, if the court by which the order was made was a court of superior jurisdiction, be the Probate, Divorce and Admiralty Division of the High Court, or in Ireland the King's Bench Division (Matrimonial) of the High Court of Justice in Ireland, and if the court was not a court of superior jurisdiction, be a court of summary jurisdiction.

Transmission of maintenance orders made in England or Ireland.

2. Where a court in England or Ireland has, whether before or after the commencement of this Act, made a maintenance order against any person, and it is proved to that court that the person against whom the order was made is resident in some part of His Majesty's dominions outside the United Kingdom to which this Act extends, the court shall send to the Secretary of State for transmission to the governor of that part of His Majesty's dominions a certified copy of the order.

Power to make provisional orders of maintenance against persons resident in His Majesty's dominions outside the United Kingdom.

3.—(1) Where an application is made to a court of summary jurisdiction in England or Ireland for a maintenance order against any person, and it is proved that that person is resident in a part of His Majesty's dominions outside the United Kingdom to which this Act extends, the court may, in the absence of that person, if after hearing the evidence it is satisfied of the justice of the application, make any such order as it might have made if a summons had been duly served on that person and he had failed to appear at the hearing, but in such case the order shall be provisional only, and shall have no effect unless and until confirmed by a competent court in such part of His Majesty's dominions as aforesaid.

(2) The evidence of any witness who is examined on any such application shall be put into writing, and such deposition shall be read over to and signed by him.

(3) Where such an order is made, the court shall send to the Secretary of State for transmission to the governor of the part of His Majesty's dominions in which the person against whom the order is made is alleged to reside the depositions so taken and a certified copy of the order, together with a statement of the grounds on which the making of the order might have been opposed if the person against whom the order is made had been duly served with a summons and had appeared at the hearing, and such information as the court possesses for facilitating the identification of that person, and ascertaining his whereabouts.

(4) Where any such provisional order has come before a court in a part of His Majesty's dominions outside the United Kingdom to which this Act extends for confirmation, and the order has by that court been remitted to the court of summary jurisdiction which made the order for the purpose of taking further evidence, that

court or any other court of summary jurisdiction sitting and acting for the same place shall, after giving the prescribed notice, proceed to take the evidence in like manner and subject to the like conditions as the evidence in support of the original application.

If upon the hearing of such evidence it appears to the court that the order ought not to have been made, the court may rescind the order, but in any other case the depositions shall be sent to the Secretary of State and dealt with in like manner as the original depositions.

(5) The confirmation of an order made under this section shall not affect any power of a court of summary jurisdiction to vary or rescind that order: Provided that on the making of a varying or rescinding order the court shall send a certified copy thereof to the Secretary of State for transmission to the governor of the part of His Majesty's dominions in which the original order was confirmed, and that in the case of an order varying the original order the order shall not have any effect unless and until confirmed in like manner as the original order.

(6) The applicant shall have the same right of appeal, if any, against a refusal to make a provisional order as he would have had against a refusal to make the order had a summons been duly served on the person against whom the order is sought to be made.

Power of Court of summary jurisdiction to confirm maintenance order made out of the United Kingdom.

4.—(1) Where a maintenance order has been made by a court in a part of His Majesty's dominions outside the United Kingdom to which this Act extends, and the order is provisional only and has no effect unless and until confirmed by a court of summary jurisdiction in England or Ireland, and a certified copy of the order, together with the depositions of witnesses and a statement of the grounds on which the order might have been opposed has been transmitted to the Secretary of State, and it appears to the Secretary of State that the person against whom the order was made is resident in England or Ireland, the Secretary of State may send the said documents to the prescribed officer of a court of summary jurisdiction, with a requisition that a summons be issued calling upon the person to show cause why that order should not be confirmed, and upon receipt of such documents and requisition the court shall issue such a summons and cause it to be served upon such person.

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(2) A summons so issued may be served in England or Ireland in the same manner as if it had been originally issued or subsequently endorsed by a court of summary jurisdiction having jurisdiction in the place where the person happens to be.

(3) At the hearing it shall be open to the person on whom the summons was served to raise any defence which he might have raised in the original proceedings had he been a party thereto, but no other defence, and the certificate from the court which made the provisional order stating the grounds on which the making of the order might have been opposed if the person against whom the order was made had been a party to the proceedings shall be conclusive evidence that those grounds are grounds on which objection may be taken.

(4) If at the hearing the person served with the summons does not appear or, on appearing, fails to satisfy the court that the order ought not to be confirmed, the court may confirm the order either without modification or with such modifications as to the court after hearing the evidence may seem just.

(5) If the person against whom the summons was issued appears at the hearing and satisfies the court that for the purpose of any defence it is necessary to remit the case to the court which made the provisional order for the taking of any further evidence, the court may so remit the case and adjourn the proceedings for the purpose.

(6) Where a provisional order has been confirmed under this section, it may be varied or rescinded in like manner as if it had originally been made by the confirming court, and where on an application for rescission or variation the court is satisfied that it is necessary to remit the case to the court which made the order for the purpose of taking any further evidence, the court may so remit the case and adjourn the proceedings for the purpose.

(7) Where an order has been so confirmed, the person bound thereby shall have the same right of appeal, if any, against the confirmation of the order as he would have had against the making of the order had the order been an order made by the court confirming the order.

Power of Secretary of State to make regulations for facilitating communications between courts.

5.—The Secretary of State may make regulations as to the manner in which a case can be remitted by a court authorised to confirm a provisional order to the court which made the provisional order, and generally for facilitating communications between such courts.

Mode of enforcing orders.

6.—(1) A court of summary jurisdiction in which an order has been registered under this Act or by which an order has been confirmed under this Act, and the officers of such court, shall take all such steps for enforcing the order as may be prescribed.

(2) Every such order shall be enforceable in like manner as if the order were for the payment of a civil debt recoverable summarily:

Provided that, if the order is of such a nature that if made by the court in which it is so registered, or by which it is so confirmed, it would be enforceable in like manner as an order of affiliation, the order shall be so enforceable.

(3) A warrant of distress or commitment issued by a court of summary jurisdiction for the purpose of enforcing any order so registered or confirmed may be executed in any part of the United Kingdom in the same manner as if the warrant had been originally issued or subsequently endorsed by a court of summary jurisdiction having jurisdiction in the place where the warrant is executed.

Application of summary Jurisdiction Acts. 42 & 43 Vict. c. 49.

7.—The Summary Jurisdiction Acts shall apply to proceedings before courts of summary jurisdiction under this Act in like manner as they apply to proceedings under those Acts, and the power of the Lord Chancellor to make rules under section twenty-nine of the Summary Jurisdiction Act, 1879, shall include power to make rules regulating the procedure of courts of summary jurisdiction under this Act.

Proof of documents signed by officers of court.

8. Any document purporting to be signed by a judge or officer of a court outside the United Kingdom shall, until the contrary is proved, be deemed to have been so signed without proof of the signature or judicial or official character of the person appearing to have signed it, and the officer of a court by whom a document is signed shall, until the contrary is proved, be deemed to have been the proper officer of the court to sign the document.

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Depositions to be evidence.

9. Depositions taken in a court in a part of His Majesty's dominions outside the United Kingdom to which this Act extends for the purposes of this Act, may be received in evidence in proceedings before courts of summary jurisdiction under this Act.

Interpretation.

10. For the purposes of this Act, the expression "maintenance order" means an order other than an order of affiliation for the periodical payment of sums of money towards the maintenance of the wife or other dependents of the person against whom the order is made, and the expression "dependents" means such persons as that person is, according to the law in force in the part of His Majesty's dominions in which the maintenance order was made, liable to maintain; the expression "certified copy" in relation to an order of a court means a copy of the order certified by the proper officer of the Court to be a true copy, and the expression "prescribed" means prescribed by rules of court.

pplication Ireland.

11. In the application of this Act to Ireland the following modifications shall be made:—

(*a*) The Lord Chancellor of Ireland may make rules regulating the procedure of court of summary jurisdiction under this Act, and other matters incidental thereto:

(*b*) Orders intended to be registered or confirmed in Ireland shall be transmitted by the Sscretary of State to the prescribed officer of a court in Ireland through the Lord Chancellor of Ireland:

(*c*) The expression "maintenance order" includes an order or decree for the recovery or repayment of the cost of relief or maintenance made by virtue of the provisions of the Poor Relief (Ireland) Acts, 1839 to 1914.

12.—(1) Where His Majesty is satisfied that reciprocal provisions have been made by the legislature of any part of His Majesty's dominions outside the United Kingdom for the enforcement within that part of maintenance orders made by courts within England and Ireland, His

Majesty may by Order in Council extend this Act to that part, and thereupon that part shall become a part of His Majesty's dominions to which this Act extends.

(2) His Majesty may by Order in Council extend this Act to any British protectorate, and where so extended this Act shall apply as if any such protectorate was a part of His Majesty's dominions to which this Act extends.

13. This Act may be cited as the Maintenance Orders (Facilities for Enforcement) Act, 1920. Short title.

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APPENDIX I.

INDIAN DIVORCES (VALIDITY) ACT, 1921.

(11 & 12 Geo. V. Ch. 18.)

CHAPTER 18.

An Act to make provision with respect to the validity of certain decrees granted in India for the dissolution of the marriage of persons domiciled in the United Kingdom.

[1st July 1921.]

BE it enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Validity of decrees. [Act No. 4 of 1869.]

1. Any decree granted under the Act of the Indian Legislature known as the Indian Divorce Act, 1869, and confirmed or made absolute under the provisions of that Act, for the dissolution of a marriage the parties to which were at the time of the commencement of the proceedings domiciled in the United Kingdom, and any order made by the court in relation to any such decree, shall, if the proceedings were commenced before the passing of this Act, be as valid, and be deemed always to have been as valid, in all respects, as though the parties to the marriage had been domiciled in India.

Short title.

2. This Act may be cited as the Indian Divorces (Validity) Act, 1921.

APPENDIX J.

MATRIMONIAL CAUSES ACTS, 1857—1923.

20 & 21 VICT. c. 85 (MATRIMONIAL CAUSES ACT, 1857) (*a*).

An Act to amend the Law relating to Divorce and Matrimonial Causes in England. [28th August, 1857.]

1. [Commencement of Act.] Repealed 55 & 56 Vict. c. 19 (*b*).

2. *As soon as this Act shall come into operation*, all jurisdiction now exerciseable by any ecclesiastical court in England in respect of divorces *á mensâ et thoro*, suits of nullity of marriage, suits of jactitation of marriage, suits for restitution of conjugal rights, and in all causes, suits, and matters matrimonial, shall cease to be so exerciseable, except so far as relates to the granting of marriage licences, which may be granted as if this Act had not been passed. *Ibid*, as far as the word "operation".

3. [The Court may enforce decrees or orders made before this Act comes into operation.] Repealed by 55 & 56 Vict. c. 19.

4. [As to suits pending when this Act comes into operation.] Repealed by 38 & 39 Vict. c. 66.

5. Provided, that if at the time when this Act comes into operation, any cause or matter which would be transferred to the said Court for Divorce and Matrimonial Causes under the enactment hereinbefore contained shall have been heard before any judge having jurisdiction in relation to such cause or matter, and be then standing for judgment, such judge may at any time within six weeks after the time when this Act comes into operation give in to one of the registrars attending the Court for Divorce and Matrimonial Causes a written judgment thereon signed by him and a decree or order, as the case may require, shall be drawn up in pursuance of such judgment, and every such decree or order shall have the same force and effect as if it had been drawn up in pursuance of a judgment of the Court for Divorce and Matrimonial Causes on the day on which the same was delivered to the registrar, and shall be subject to appeal under this Act. Power to judges whose jurisdiction is determined to deliver written judgments. Repealed by 38 & 39 Vict. c. 66.

(*a*) Short Title, "Matrimonial Causes Act, 1857"; collective title, "Matrimonial Causes Acts, 1857 to 1919" (9 & 10 Geo. c. 28).

(*b*) Short Title, "Statute Law Revision Act, 1892."

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Repealed as far as the word "operation" by 55 & 56 Vict. c. 19.

Repealed; Jud. Act 1925. See ss. 21, 56 and 225.

6. *As soon as this Act shall come into operation*, all jurisdiction now vested in or exerciseable by any ecclesiastical court or person in England in respect of divorces *á mensâ et thoro*, suits of nullity of marriage, suits for restitution of conjugal rights, or jactitation of marriage, and in all causes, suits, and matters matrimonial, except in respect of marriage licences, shall belong to and be vested in Her Majesty; and such jurisdiction, together with the jurisdiction conferred by this Act, shall be exercised in the name of Her Majesty, in a court of record to be called "The Court for Divorce and Matrimonial Causes."

No decree for divorce *a mensa et thoro* to be made hereafter, but a judicial separation.

Repealed; Jud. Act 1925. See sec. 185.

7. No decree shall hereafter be made for a divorce *á mensâ et thoro*; but in all cases in which a decree for a divorce *á mensâ et thoro* might now be pronounced, the court may pronounce a decree for a judicial separation, which shall have the same force and the same consequences as a divorce *á mensâ et thoro* now has.

Repealed by 55 & 56 Vict. c. 19.

8. [Judges of the Court.]

Ibid.

9. [Judge of the Court of Probate to be the judge ordinary.]

Ibid.

10. [Petitions for dissolution of marriage, &c. to be heard by three judges.]

Ibid.

11. [Acting judge during absence of the judge ordinary.]

Altered by 23 & 24 Vict. c. 145, s. 4.

12. The Court for Divorce and Matrimonial Causes shall hold its sittings at such place or places in London or Middlesex or elsewhere as Her Majesty in Council shall from time to time appoint.

Seal of the Court.

13. The Lord Chancellor shall direct a seal to be made for the said Court, and may direct the same to be broken, altered, and renewed, at his discretion; and all decrees and orders, or copies of decrees or orders, of the said Court, sealed with the said seal, shall be received in evidence.

Repealed by 42 & 43 Vict. c. 78 (*c*).

14. [Officers of the Court.]

Repealed by 55 & 56 Vict. c. 19.

15. [Power to advocates, barristers, &c. to practise in the Court.]

(*c*) Supreme Court of Judicature (Officers) Act, 1879.

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Sentence of judicial separation may be obtained by husband or wife for adultery, &c.

16. A sentence of judicial separation, (which shall have the effect of a divorce *á mensâ et thoro* under the existing law, and such other legal effect as herein mentioned), may be obtained, either by the husband or the wife, on the ground of adultery, or cruelty, or desertion without cause for two years and upwards.

Repealed See Jud. Act 1925, s. 185 (1).

Application for restitution of conjugal rights or judicial separation may be made by husband or wife by petition to Court or to judges of assize.

17. Application for restitution of conjugal rights or for judicial separation on any one of the grounds aforesaid may be made by either husband or wife, by petition to the Court, [*repealed, as to the judges of assize, by Matrimonial Causes Act*, 1858, *s.* 19], and the Court *or judge to which such petition is addressed*, on being satisfied of the truth of the allegations therein contained, and that there is no legal ground why the same should not be granted, may decree such restitution of conjugal rights or judicial separation accordingly, and where the application is by the wife may make any order for alimony which shall be deemed just.

Repealed M. C. Act, 1858. Jud. Act 1925, see Ss. 185, 186, 190 (4).

18. } [*Provisions as to proceedings before judges of*
19. } *assize repealed by Mat. Causes Act*, 1858,
20. } *s.* 19].

Wife deserted by her husband may apply to police magistrate or justices in petty sessions for protection.

21 A wife deserted by her husband may at any time after such desertion, if resident within the metropolitan district, apply to a police magistrate, or, if resident in the country, to justices in petty sessions, *or in either case to the Court*, for an order to protect any money or property she may acquire by her own lawful industry, and property which she may become possessed of, after such desertion, against her husband or his creditors, or any person claiming under him; and such magistrates or justices *or Court*, if satisfied of the fact of such desertion, and that the same was without reasonable cause, and that the wife is maintaining herself by her own industry or property, may make and give to the wife an order protecting her earnings and property acquired since the commencement of such desertion, from her husband and all creditors and persons claiming under him; and such earnings and property shall belong to the wife as if she were a *feme sole*: Provided always, that every such order, if made by a police magistrate, or justices at petty sessions, shall, within ten days after the making thereof, be entered with the registrar of the county court within whose jurisdiction the wife is resident; and that it shall be lawful for the husband, and

Repealed by Jud. Act, 1925 so far as High Court jurisdiction is concerned.

Words italicised are repealed see M. C. Act 1858, Ss. 7, 8, 9, 10.

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any creditor or other person claiming under him, to apply to *the Court, or to* the magistrate or justices by whom such order was made, for the discharge thereof: Provided also, that if the husband or any creditor or other person claiming under the husband shall seize or continue to hold any property of the wife after notice of any such order, he shall be liable, at the suit of the wife (which she is hereby empowered to bring), to restore the specific property, and also for a sum equal to double the value of the property so seized or held after such notice as aforesaid: If any such order of protection be made, the wife shall during the continuance thereof be and be deemed to have been, during such desertion of her, in the like position in all respects, with regard to property and contracts, and suing and being sued, as she would be under this Act if she obtained a decree of judicial separation.

See Mat. C. Act, 1858, ss. 7, 8, 9, 0; 28 Vict. c. 44.

Court to act on principles of the ecclesiastical Court.

22. In all suits and proceedings, other than proceedings to dissolve any marriage, the said Court shall proceed and act and give relief on principles and rules which, in the opinion of the said Court, shall be as nearly as may be conformable to the principles and rules on which the ecclesiastical courts have heretofore acted and given relief, but subject to the provisions herein contained, and to the rules and orders under this Act.

Repealed Jud. Act, 1925, see Ss. 32, 104.

Decree of separation obtained during the absence of husband or wife may be reversed.

23. Any husband or wife upon the application of whose wife or husband, as the case may be, a decree of judicial separation has been pronounced, may, at any time thereafter, present a petition to the Court, praying for a reversal of such decree on the ground that it was obtained in his or her absence, and that there was reasonable ground for the alleged desertion, where desertion was the ground of such decree; and the Court may, on being satisfied of the truth of the allegations of such petition, reverse the decree accordingly; but the reversal thereof shall not prejudice or affect the rights or remedies which any other person would have had in case such reversal had not been decreed in respect of any debts, contracts, or acts of the wife incurred, entered into, or done between the times of the sentence of separation and of the reversal thereof.

Repealed: Jud. Act, 1925, see s. 185.

See also Mat. C. Act, 1858, s. 8.

Court may direct payment of alimony to wife or to her trustee.

24. In all cases in which the Court shall make any decree or order for alimony, it may direct the same to be paid either to the wife herself or to any trustee on her behalf, to be approved by the Court and may impose any

terms or restrictions which to the Court may seem expedient, and may from time to time appoint a new trustee, if for any reason it shall appear to the Court expedient so to do.

Repealed: Jud. Act, 1925 See s. 190 (5)

25. In every case of a judicial separation the wife shall, from the date of the sentence and whilst the separation shall continue, be considered as a *feme sole* with respect to property of every description which she may acquire, or which may come to or devolve upon her; and such property may be disposed of by her in all respects as a *feme sole*, and on her decease the same shall, in case she shall die intestate, go as the same would have gone if her husband had been then dead: Provided, that if any such wife should again cohabit with her husband, all such property as she may be entitled to when such cohabitation shall take place shall be held to her separate use, subject, however, to any agreement in writing made between herself and her husband whilst separate.

In case of judicial separation the wife to be considered a *feme sole* with respect to property she may acquire, &c. by Mat. C. Act, 1858, s. 7.

Repealed: Jud. Act. 1925, See s. 194.

26. In every case of a judicial separation the wife shall, whilst so separated, be considered as a *feme sole* for the purposes of contract, and wrongs and injuries, and suing and being sued in any civil proceeding; and her husband shall not be liable in respect of any engagement or contract she may have entered into, or for any wrongful act or omission by her, or for any costs she may incur as plaintiff or defendant: Provided, that where upon any such judicial separation alimony has been decreed or ordered to be paid to the wife, and the same shall not be duly paid by the husband, he shall be liable for necessaries supplied for her use: Provided also, that nothing shall prevent the wife from joining, at any time during such separation, in exercise of any joint power given to herself and her husband.

Also for purposes of contract and suing.

Repealed Jud. Act, 1925, See s. 194.

27. It shall be lawful for any husband to present a petition to the said Court, praying that his marriage may be dissolved, on the ground that his wife has since the celebration thereof been guilty of adultery; and it shall be lawful for any wife to present a petition to the said Court praying that her marriage may be dissolved, on the ground that since the celebration thereof her husband has been guilty of incestuous adultery, or of bigamy with adultery, or of rape, or of sodomy or bestiality, or of adultery coupled with such cruelty as without adultery would have

On adultery of wife or incest, &c., of husband petition for dissolution of marriage may be presented.

Repealed: M. C. Act 1923 and Jud. Act, 1925. See s. 176.

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entitled her to a divorce *á mensâ et thoro*, or of adultery coupled with desertion, without reasonable excuse, for two years or upwards; and every such petition shall state, as distinctly as the nature of the case permits, the facts on which the claim to have such marriage dissolved is founded: Provided that, for the purposes of this Act, incestuous adultery shall be taken to mean adultery committed by a husband with a woman with whom, if his wife were dead, he could not lawfully contract marriage by reason of her being within the prohibited degrees of consanguinity or affinity; and bigamy shall be taken to mean marriage of any person, being married, to any other person during the life of the former husband or wife, whether the second marriage shall have taken place within the dominions of Her Majesty or elsewhere.

As to "incestuous adultery."

Adulterer to be a co-respondent.

May be dismissed from suit, Mat. C. Act, 1858, s. 11.

Cause may be tried by a jury if insisted on.

Repealed: Jud. Act, 1925. See s. 99 (1h), 177

28. Upon any such petition presented by a husband, the petitioner shall make the alleged adulterer a co-respondent to the petition, unless on special grounds, to be allowed by the Court, he shall be excused from so doing; and on every petition presented by a wife for dissolution of marriage, the Court, if it see fit, may direct that the person with whom the husband is alleged to have committed adultery be made a respondent; and the parties, or either of them, may insist on having the contested matters of fact tried by a jury, as hereinafter mentioned.

Court to be satisfied of absence of collusion, &c.

Repealed: Jud. Act, 1925, See s. 178.

29. Upon any such petition for the dissolution of a marriage, it shall be the duty of the Court to satisfy itself, so far as it reasonably can, not only as to the facts alleged, but also whether or not the petitioner has been in any manner accessory to or conniving at the adultery, or has condoned the same, and shall also inquire into any counter-charge which may be made against the petitioner.

Dismissal of petition in certain cases.

Repealed: Jud. Act, 1925 See s. 178.

30. In case the Court, on the evidence in relation to any such petition, shall not be satisfied that the alleged adultery has been committed, or shall find that the petitioner has during the marriage been accessory to or conniving at the adultery of the other party to the marriage, or has condoned the adultery complained of, or that the petition is pesented or prosecuted in collusion with either of the respondents, then and in any of the said cases the Court shall dismiss the said petition.

Power to Court to pronounce decree for dissolving marriage.

Now only a decree *nisi* in the first instance.

See Mat. C. Act, 1860, s. 7.

31. In case the Court shall be satisfied on the evidence that the case of the petitioner has been proved, and shall not find that the petitioner has been in any manner accessory to or conniving at the adultery of the other party to the marriage, or has condoned the adultery complained of, or that the petition is presented or prosecuted in collusion with either of the respondents, then the Court shall pronounce a decree declaring such marriage to be dissolved: Provided always, that the Court shall not be bound to pronounce such decree if it shall find that the petitioner has during the marriage been guilty of adultery, or if the petitioner shall in the opinion of the Court, have been guilty of unreasonable delay in presenting or prosecuting such petition, or of cruelty towards the other party to the marriage or of having deserted or wilfully separated himself or herself from the other party before the adultery complained of, and without reasonable excuse or of such wilful neglect or misconduct as has conduced to the adultery.

Repealed: Jud. Act, 1925. See s. 178.

Repealed by 7 Edw. 7, c. 12.

32. [Maintenance.]

See Jud. Act, 1925, s. 190.

Husband may claim damages from adulterer.

Crim. Con. repealed: Jud. Act, 1925. See s. 189.

33. Any husband may, either in a petition for dissolution of marriage, or for judicial separation, or in a petition limited to such object only, claim damages from any person on the ground of his having committed adultery with the wife of such petitioner; and such petition shall be served on the alleged adulterer and the wife, unless the Court shall dispense with such service or direct some other service to be substituted: and the claim made by every such petition shall be heard and tried on the same principles, in the same manner, and subject to the same or the like rules and regulations, as actions for criminal conversation are now tried and decided in Courts of Common Law; and all the enactments herein contained with reference to the hearing and decision of petitions to the Court shall, so far as may be necessary, be deemed applicable, to the hearing and decision of petitions presented under this enactment; and the damages to be recovered on any such petition shall in all cases be ascertained by the verdict of a jury, although the respondents or either of them may not appear; and after the verdict has been given the Court shall have power to direct in what manner such damages shall be paid or applied, and to direct that the whole or any part thereof shall be settled for the benefit of the children (if any) of the marriage, or as a provision for the maintenance of the wife.

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Power to Court to order adulterer to pay costs.

Repealed: Jud. Act, 1925. See s. 50.

34. Whenever in any petition presented by a husband the alleged adulterer shall have been made a co-respondent, and the adultery shall have been established, it shall be lawful for the Court to order the adulterer to pay the whole or any part of the costs of the proceedings.

Power to Court to make orders as to custody of children. See also Mat. C. Act, 1859, s. 4.

Repealed: Jud. Act, 1925. See s. 193.

35. In any suit or other proceeding for obtaining a judicial separation or a decree of nullity of marriage, and on any petition for dissolving a marriage, the Court may from time to time, before making its final decree, make such interim orders, and may make such provision in the final decree, as it may deem just and proper with respect to the custody, maintenance, and education of the children, the marriage of whose parents is the subject of such suit or other proceeding, and may, if it shall think fit, direct proper proceedings to be taken for placing such children under the protection of the Court of Chancery.

Questions of fact may be tried before the Court by a jury.

36. In questions of fact arising in proceedings under this Act it shall be lawful for, but, except as hereinbefore provided, not obligatory upon, the Court to direct the truth thereof to be determined before itself or before any one or more of the judges of the said Court, by the verdict of a special or common jury.

Where a question is ordered to be tried a jury may be summoned as in the common Law Courts.

37. The Court, or any judge thereof, may make all such rules and orders upon the sheriff or any other person for procuring the attendance of a special or common jury for the trial of such question as may now be made by any of the Superior Courts of Common Law at Westminster, and may also make any other orders which to such Court or judge may seem requisite; and every such jury shall consist of persons possessing the like qualifications, and shall be struck, summoned, balloted for, and called in like manner as if such jury were a jury for the trial of any cause in any of the said Superior Courts; and every juryman so summoned shall be entitled to the same rights, and subject to the same duties and liabilities, as if he had been duly summoned for the trial of any such cause in any of the said Superior Courts; and every party to any such proceeding shall be entitled to the same rights as to challenge and otherwise as if he were a party to any such cause.

Rights to challenge.

Such question to be reduced into writing, and a jury to be sworn to try it.

38. When any such question shall be so ordered to be tried, such question shall be reduced into writing in such form as the Court shall direct, and at the trial the jury shall be sworn to try the said question, and a true

verdict to give thereon according to the evidence; and upon every such trial the Court or judge shall have the same powers, jurisdiction, and authority, as any judge of any of the said Superior Courts sitting at *Nisi Prius*.

(Sections 36 to 38 have been repealed by the Administration of Justice Act, 1925).

Judge to have same powers as at *nisi Prius*.

Bill of exceptions, special verdict, and special case.

39. Upon the trial of any such question or of any issue under this Act a bill of exceptions may be tendered, and a general or special verdict or vedicts, subject to a special case, may be returned, in like manner as in any cause tried in any of the said Superior Courts; and every such bill of exceptions, special verdict, and special case respectively shall be stated settled, and sealed in like manner as in any cause tried in any of the said Superior Courts, and where the trial shall not have been had in the Court for Divorce and Matrimonial Causes, shall be returned into such Court without any writ or error or other writ; and the matter of law in every such bill of exceptions, special verdict, and special case shall be heard and determined by the full Courts, subject to such right of appeal as is hereinafter given in other cases.

Court may direct issues to try any fact.

See Jud. Act, 1925, s. 70 (5).

40. It shall be lawful for the Court to direct one or more issue or issues to be tried in any Court of Common Law, and either before a judge of assize in any county or at the sittings for the trial of causes in London or Midddlesex, and either by a special or common jury, in like manner as is now done by the Court of Chancery.

(Repealed by the Administration of Justice Act, 1925).

Affidavit in support of a petition.

41. Every person seeking a decree of nullity of marriage, or a decree of judicial separation, or a dissolution of marriage, or decree in a suit of jactitation of marriage, shall, together with the petition or other application for the same, file an affidavit verifying the same so far as he or she is able to do so, and stating that there is not any collusion or connivance between the deponent and the other party to the marriage.

Service of petition.

42. Every such petition shall be served on the party to be affected thereby, either within or without Her Majesty's dominions, in such manner as the Court shall by any general or special order from time to time direct; and for

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that purpose the Court shall have all the powers conferred by any statute on the Court of Chancery: Provided always, that the said Court may dispense with such service altogether in case it shall seem necessary or expedient so to do.

Examination of petitioner. Parties are now made witnesses for all purposes by evidence Amendment Act, 1869 (32 & 33 Vict. c. 68.)

43. The Court may, if it shall think fit, order the attendance of the petitioner, and may examine him or her, or permit him or her to be examined or cross-examined on oath on the hearing of any petition; but no such petitioner shall be bound to answer any question tending to show that he or she has been guilty of adultery.

(Repealed: now Sec. 198 of Jud. Act, 1925).

Adjournment.

44. The Court may from time to time adjourn the hearing of any such petition, and may require further evidence thereon, if it shall see fit so to do.

Court may order settlement of property for benefit of innocent party and children of marriage.

Repealed: Jud. Act, 1925, s. 191.

45. In any case in which the Court shall pronounce a sentence of divorce or judicial separation for adultery of the wife, if it shall be to made appear to the Court that the wife is entitled to any property either in possession or reversion, it shall be lawful for the Court, if it shall think proper, to order such settlement as it shall think reasonable to be made of such property or any part thereof, for the benefit of the innocent party, and of the children of the marriage, or either or any of them.

See Mat. C. Act, 1859, s. 5, and Mat. C. Act, 1860, s. 6.

Mode of taking evidence.

See Jud. Act, 1925, s. 101.

46. Subject to such rules and regulations as may be established as herein provided, the witnesses in all proceedings before the Court where their attendance can be had, shall be sworn and examined orally in open Court: provided that parties, except as hereinbefore provided, shall be at liberty to verify their respective cases in whole or in part by affidavit, but so that the deponent in every such affidavit shall, on the application of the opposite party or by direction of the Court, be subject to be cross-examined by or on behalf of the opposite party orally in open Court, and after such cross-examination may be re-examined orally in open Court as aforesaid by or on behalf of the party by whom such affidavit was filed.

Repealed by 55 & 56 Vict. c. 19.

47. [Court may issue commissions or give orders for examination of witnesses who are abroad or unable to attend.]

Ibid.

48. [Rules of evidence in Common Law Courts to be observed.]

Attendance of witnesses on the Court.

49. The Court may, under its seal, issue writs of subpœna or subpœna duces tecum, commanding the attendance of witnesses at such time and place as shall be therein expressed: and such writs may be served in any part of Great Britain or Ireland; and every person served with such writ shall be bound to attend and to be sworn and give evidence in obedience thereto, in the same manner as if it had been a writ of subpœna or subpœna duces tecum issued from any of the said Superior Courts of Common Law in a cause pending therein, and served in Great Britain or Ireland, as the case may be: [Provion as to witnesses affirming or declaring under Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125).]

Repealed by 55 & 56 Vict. c. 19.

Penalties for false evidence.

50. All persons wilfully deposing or affirming falsely in any proceeding before the Court shall be deemed to be guilty of perjury, and shall be liable to all the pains and penalties attached thereto.

Repealed by 55 & 56 Vict. c. 19.

51. [costs.] (See Jud. Act, 1925, Sec. 50).

Ibid.

52. [Enforcement of orders and decrees.]

Power to make rules, &c. for procedure and to alter them from time to time.

53. The Court shall make such rules and regulations concerning the practice and procedure under this Act, as it may from time to time consider expedient, and shall have full power from time to time to revoke or alter the same.

Repealed by 55 & 56 Vict. c. 19.

54. [Fees to be regulated.] The said Court may make such rules and regulations as it may deem necessary and expendient for enabling persons to sue in the said Court in formâ pauperis.

Suing in forma pauperis.

The words "whose decision shall be final." repealed by 55 & 56 Vict, c. 19.

55. Either party dissatisfied with any decision of the Court in any matter which, according to the provisions aforesaid, may be made by the Judge Ordinary alone, may, within three calendar months after the pronouncing thereof, appeal therefrom to the full Court, *whose decision shall be final.*

Repealed by 31 & 32 Vict. c. 77, s. 2.

56. [Appeal to the House of Lords in case of petition for dissolution of marriage.]

Liberty to parties to marry again.

See Mat. C. Act, 1868, s. 4.

57. When the time hereby limited for appealing against any decree dissolving a marriage shall have expired, and no appeal shall have been presented against such decree, or when any such appeal shall have been dismissed, or when in the result of any appeal any marriage shall be

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No clergyman compelled to solemnize certain marriages.

Jud. Act, 1925, See s. 184.

declared to be dissolved, but not sooner, it shall be lawful for the respective parties thereto to marry again, as if the prior marriage had been dissolved by death: Provided always, that no clergyman, in holy orders of the United Church of England and Ireland, shall be compelled to solemnize the marriage of any person whose former marriage may have been dissolved on the ground of his or her adultery, or shall be liable to any suit, penalty, or censure for solemnizing or refusing to solemnize the marriage of any such person.

If minister of any church, &c., refuses to perform marriage ceremony, any other minister may perform such service.

58. Provided always, that when any minister of any church or chapel of the United Church of England and Ireland shall refuse to perform such marriage service between any persons who but for such refusal would be entitled to have the same service performed in such church or chapel, such minister shall permit any other minister in holy orders of the said united church, entitled to officiate within the diocese in which such church or chapel is situate, to perform such marriage service in such church or chapel.

Repealed by 55 & 56 Vict. c. 19.

59. [No action in England for criminal conversation.]

Ibid.

60. [All fees, except as herein provided, to be collected by stamps, &c.]

Ibid.

61. Provisions of 20 & 21 Vict. c. 77, concerning stamps for the Court of Probate, to be applicable to the purposes of this Act.]

Repealed by 55 & 56 Vict. c. 19; also by 42 & 43 Vict. c. 78.

62. [Expenses of the Court to be paid out of monies to be provided by Parliament.]

Repealed by 55 & 56 Vict. c. 19.

63. [Annual certificates of proctors, &c.]

Ibid.

64. [Compensation to proctors.]

Ibid.

65. [Salary of judge of Court of Probate.]

Repealed: See Jud. Officers Act, 1879, s. 29; and S. L. R. Act, 1894.

66. [Power to Secretary of State to order all letters patent, records, &c., to be transmitted from all Ecclesiastical Courts. Penalty on disobeying such order.]

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67. All rules and regulations concerning practice or procedure, *or fixing or regulating fees*, which may be made by the Court under this Act, shall be laid before both Houses of Parliament within one month after the making thereof, if Parliament be then sitting, or if Parliament be not then sitting, within one month after the commencement of the then next session of Parliament.

Rules, &c., to be laid before Parliament. Words "or fixing or regulating fees," repealed by 55 & 56 Vict. c. 19.

68. [Yearly account of fees, &c., to be laid before Parliament.]

Repealed by 42 & 43 Vict. c. 78.

21 & 22 VICT. c. 108 (MATRIMONIAL CAUSES ACT, 1858)(*c*).

An Act to amend the Act of the Twentieth and Twenty-first Victoria, chapter Eighty-five. [2nd August, 1858.]

1. [Judge Ordinary of the Divorce Court may sit in chambers].

Repealed 55 & 56 Vict c. 19.

2. [Treasury to cause chambers to be provided.]

Ibid.

3. [Powers of judge when sitting in chambers.]

Ibid.

4. The registrars of the principal registry of the Court of Probate shall be invested with and shall and may exercise with reference to proceedings in the Court for Divorce and Matrimonial Causes the same power and authority which surrogates of the official principal of the Court of Arches could or might, before the passing of the twentieth and twenty-first Victoria, chapter seventy-seven, have exercised in chambers with reference to proceedings in that Court.

The Registrars to do all acts heretofore done by surrogates. Repealed: Adm. of Jus. Act, 1925, s. 27.

5. In every cause in which a sentence of divorce and separation from bed, board, and mutual cohabitation has been given by a competent Ecclesiastical Court before the Act of the twentieth and twenty-first Victoria, chapter

This section is now of little practical value, unless possibly in a petition under the Legitimacy Declaration Act, 1858. Repealed: Adm. of Jus. Act. 1925, s. 27.

(*c*) Short title, "Matrimonial Causes Act, 1858"; collective title, 'Matrimonial Causes Acts, 1857 to 1919" (9 & 10 Geo. 5, c. 28).

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Repealed; Adm. of Justice Act, 1925, s 27,

eighty-five, came into operation, the evidence in the case in which such sentence was pronounced in such Ecclesiastical Court may, whenever from the death of a witness or from any other cause it may appear to the Court reasonable and proper, be received on the hearing of any petition which may be presented to the said Court for Divorce and Matrimonial Causes.

Wives deserted by their husbands may apply to the judge for an order to protect property, &c., acquired by them.

Repealed: Jud. Act, 1925.

6. Every wife deserted by her husband, wheresoever resident in England, may, at any time after such desertion, apply to the said Judge Ordinary for an order to protect any money or property in England she may have acquired or may acquire by her own lawful industry, and any property she may have become possessed of, or may become possessed of after such desertion, against her husband and his creditors, and any person claiming under him; and the Judge Ordinary shall exercise in respect of every such application all the powers conferred upon the Court for Divorce and Matrimonial Causes under the twentieth and twenty-first Victoria, chapter eighty-five, section twenty-one.

Provisions respecting property of wife to extend to property vested in her as executrix, &c.

Repealed: See sec. 194, Jud. Act, 1925.

7. The provisoins contained in this Act, and in the said Act of the twentieth and twenty-first Victoria, chapter eighty-five, respecting the property of a wife who has obtained a decree for judical separation or an order for protection, shall be deemed to extend to property to which such wife has become, or shall become entitled as executrix, administratrix, or trustee, since the sentence of separation or the commencement of the desertion (as the case may be); and the death of the testator or intestate shall be deemed to be the time when such wife became entitled as executrix or administratrix.

Order for protection of earnings, &c. of wife to be deemed valid, until reversed, &c.

Repealed: Jud. Act, 1925.

8. In every case in which a wife shall under this Act, or under the said Act of the twentieth and twenty-first Victoria, chapter eighty-five, have obtained an order to protect her earnings or property, or a decree for judicial separation, such order or decree shall, until reversed or discharged, so far as necessary for the protection of any person or corporation who shall deal with the wife, be deemed valid and effectual; and no discharge, variation, or reversal of such order or decree shall prejudice or affect any rights or remedies which any person would have had

in case the same had not been so reversed, varied, or discharged, in respect of any debts, contracts, or acts of the wife incurred, entered into, or done between the times of the making such order or decree, and of the discharge, variation, or reversal thereof; and property of or to which the wife is possessed or entitled for an estate in remainder or reversion at the date of the desertion or decree (as the case may be) shall be deemed to be included in the protection given by the order or decree.

Order to state the time at which the desertion commenced.

Repealed: Jud. Act, 1925.

9. Every order which shall be obtained by a wife under the said Act of the twentieth and twenty-first Victoria, chapter eighty-five, or under this Act, for the protection of her earnings or property, shall state the time at which the desertion in consequence whereof the order is made commenced; and the order shall, as regards all persons dealing with such wife in reliance thereon, be conclusive as to the time when such desertion commenced.

Indemnity to persons, &c., making payments under orders afterwards reversed.

Repealed: Jud. Act, 1925.

10. All persons and corporations who shall, in reliance on any such order or decree as aforesaid, make any payment to, or permit any transfer or act to be made or done by, the wife who has obtained the same, shall, notwithstanding such order or decree may then have been discharged, reversed, or varied, or the separation of the wife from her husband may have ceased, or at some time since the making of the order or decree been discontinued, be protected and indemnified in the same way in all respects as if, at the time of such payment, transfer, or other act, such order or decree were valid and still subsisting without variation in full force and effect, and the separation of the wife from her husband had not ceased or been discontinued, unless at the time of such payment, transfer, or other act, such persons or corporations had notice of the discharge, reversal or variation of such order or decree, or the cessation or discontinuance of such separation.

Where alleged adulterer a co-respondent, Court may order him to be dismissed from the suit.

Repealed: Jud. Act, 1925. See sec. 179.

11. In all cases now pending, or hereafter to be commenced, in which, on the petition of a husband for a divorce, the alleged adulterer is made a co-respondent, or in which, on the petition of a wife, the person with whom the husband is alleged to have committed adultery is made a respondent, it shall be lawful for the Court, after the close of the evidence on the part of the petitioner, to

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direct such co-respondent or respondent to be dismissed from the suit, if it shall think there is not sufficient evidence against him or her.

Repealed by 55 & 56 Vict. c. 19.

12. [Persons who administer oaths under 20 & 21 Vict. c. 77, to administer under 20 & 21 Vict. c. 85.].

Bills of proctors, attornies, &c., to be subject to taxation.

13. The bill of any proctor, attorney, or solicitor, for any fees, charges, or disbursements in respect of any business transacted in the Court for Divorce and Matrimonial Causes, and whether the same was transacted before the full Court or before the Judge Ordinary, shall, as well between proctor or attorney, or solicitor and client, as between party and party, be subject to taxation by any one of the registrars belonging to the principal registry of the Court of Probate; and the mode in which any such bill shall be referred for taxation, and by whom the costs of the taxation shall be paid, shall be regulated by the rules and orders to be made under the Act of the twentieth and twenty-first of Victoria, chapter eighty-five; and the certificate of the registrar of the amount at which such bill is taxed shall be subjeet to appeal to the judge of the said Court.

Power to enforce decree as to costs.

Repealed: Adm. of Jus. Act, 1925, s. 27.

14. The Judge Ordinary of the Court for Divorce and Matrimonial Causes, and the registrars of the principal registry of the Court of Probate, shall respectively, in any case where an Ecclesiastical Court having matrimonial jurisdiction had, previously to the commencement of the Act of the twentieth and twenty-first Victoria, chapter eighty-five, made any order or decree in respect of costs, have the same power of taxing such costs, and enforcing payment thereof, or of otherwise carrying such order or decree into effect, as if the cause wherein such decree was made had been originally commenced and prosecuted in the said Court for Divorce and Matrimonial Causes: Provided, that in taxing any such costs, or any other costs incurred in causes depending in any Ecclesiastical Court previously to the commencement of the said recited Act, all fees, charges, and expenses shall be allowed which might have been legally made, charged and enforced according to the practice of the Court of Arches.

Judge to have authority over proctors, &c.

15. The Judge Ordinary of the Court for Divorce and Matrimonial Causes shall have and exercise, over proctors, solicitors, and attorneys practising in the said

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Court, the like authority and control as is now exercised by the judges of any Court of equity or of common law over persons practising therein as proctors, solicitors, or attorneys. Repealed: Adm. of Jus. Act, 1925, s. 27.

16. [Commissioners may be appointed in the Isle of Man, &c., to administer oaths.] Repealed by 55 & 56 Vict. c. 19.

17. [*Repealed by Matrimonial Causes Act, 1868, s. 2.*]

18. [Judge Ordinary may grant rule *nisi* for new trial, &c.] *Ibid.*

19. So much of the Act of the twentieth and twenty-first Victoria, chapter eighty-five, as authorizes application to be made for restitution of conjugal rights, or for judicial separation by petition to any judge of assize, and as relates to the proceedings on such petition, shall be and the same is hereby repealed. So much of Mat. C. Act, 1857, as to applications to judges of assize repealed.

20. [Affidavits before whom to be sworn when parties making them reside in foreign parts.] Repealed by 52 Vict. c. 10

21. [Affidavits before whom to be sworn in Her Majesty's dominions out of England.] *Ibid.*

22. [Persons forging seals or signature, &c., guilty of felony.] *Ibid.*

23. [Persons taking a false oath before a surrogate, &c., guilty of perjury.] *Ibid.*

22 & 23 VICT. c. 61 (MATRIMONIAL CAUSES ACT, 1859.) (*d*).

An Act to make further provision concerning the Court for Divorce and Matrimonial Causes. [13th August, 1859.]

1. [Judges of the Queen's Bench, &c., to be judges of the Court.] Repealed by 55 & 56 Vict. c. 19.

2. [*Repealed by 23 & 24 Vict. c. 144, s. 4, nad 55 and 56 Vict. c. 19.*]

3. [Precedence of the Judge Ordinary.] *Ibid.*

(*d*) Short title, "The Matrimonial Causes Act, 1859"; collective title, "The Matrimonial Causes Acts, 1857 to 1919" (9 & 10 Geo. 5, c. 28).

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The Court may make orders as to custody, &c. of children after a final decree of separation, &c.

Mat. C. Act, 1857, s. 35. Repealed: Jud. Act, 1925, see s. 193.

4. The Court, after a final decree of judical separation, nullity of marriage, or dissolution of marriage, may upon application (by petition) for this purpose make, from time to time, all such orders and provision with respect to the custody, maintenance, and education of the children, the marriage of whose parents was the subject of the decree, or for placing such children under the protection of the Court of Chancery, as might have been made by such final decree or by interim orders in case the proceedings for obtaining such decree were still pending; and all orders under this enactment may be made by the Judge Ordinary alone or with one or more of the other judges of the Court.

As to marriage settlements of parties after final decree of nullity of marriage. See now Mat. C. Act, 1878. Repealed: Jud. Act, 1925, see s. 192.

5. The Court, after a final decree of nullity of marriage or dissolution of marriage, may inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or a portion of the property settled either for the benefit of the children of the marriage or of their respective parents as to the Court shall seem fit.

See Evidence Amendment Act, 1869 (32 & 33 Vict. c. 68). Repealed: Jud. Act, 1925, see ss. 176, 198.

6. On any petition presented by a wife praying that her marriage may be dissolved by reason of her husband having been guilty of adultery coupled with cruelty, or of adultery coupled with desertion, the husband and wife respectively shall be competent and compellable to give evidence of or relating to such cruelty or desertion.

Repealed by 55 & 56 Vict. c. 19.

7. [Extension of right to appeal to House of Lords.]

23 & 24 VICT. C. 144 (MATRIMONIAL CAUSES ACT, 1860) (*e*).

An Act to amend the Procedure and Powers of the Court for Divorce and Matrimonial Causes.

[28th August, 1860.]

Repealed by 55 & 56 Vict. c. 19.

1. [Judge Ordinary may exercise powers now vested in the full Court, and may call in the assistance of one other judge.]

Ibid.

2. [Judge Ordinary may direct any matter to be heard by the full Court. Appeal to full Court.]

See s. 27 Jud. Act, 1925.

3. [*Repealed by the Matrimonial Causes Act, 1868, s.* 2.]

(*e*) Short title, "The Matrimonial Causes Act, 1860"; collective title, "The Matrimonial Causes Acts, 1857 to 1919" (9 & 10 Geo. 5, c. 28).

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Ibid.

4. [Sittings of the full Court.]

Court may, where one party only appears, require counsel to be appointed to argue on the other side.
Repealed: Jud. Act, 1925, see s. 181.

5. In every case of a petition for a dissolution of marriage it shall be lawful for the Court, if it shall see fit, to direct all necessary papers in the matter to be sent to Her Majesty's Proctor, who shall, under the directions of the Attorney-General, instruct counsel to argue before the Court any question in relation to such matter, and which the Court may deem it necessary or expedient to have fully argued; and Her Majesty's proctor shall be entitled to charge and be reimbursed the costs of such proceeding as part of the expense of his office.

Repealed as far as the words "further enacted that," 55 & 56 Vict. c. 19.
Repealed: Jud. Act, 1925, see s. 191.

6. *And whereas by section forty-five of the Act of the session holden in the twentieth and twenty-first years of her Majesty, chapter eighty-five, it was enacted that "In any case in which the Court should pronounce a sentence of divorce or judicial separation for adultery of the wife, if it should be made appear to the Court that the wife was entitled to any property, either in possession or reversion, it should be lawful for the Court, if it should think proper, to order such settlement as it should think reasonable to be made of such property or any part thereof, for the benefit of the innocent party and of the children of the marrige, or either of them": Be it further enacted,* that any instrument executed pursuant to any order of the Court made under the said enactment before or after the passing of the Act, at the time of or after the pronouncing of a final decree of divorce or judicial separation, shall be deemed valid and effectual in the law, notwithstanding the existence of the disability of coverture at the time of the execution thereof.

Instruments executed pursuant to orders under recited enactment to be valid notwithstanding coverture.

Decrees.
Repealed: see ss. 181 to 83, Jud. Act, 1925.

7. Every decree for a divorce shall in the first instance be a decree *nisi*, not to be made absolute till after the expiration of such time, not less than *three months* (*f*) from the pronoucing thereof, as the Court shall by general or special order from time to time direct; and during that period any person shall be at liberty, in such manner as the Court shall by general or special order in that behalf from time to time direct, to show cause why the said decree should not be made absolute by reason of the same having been obtained by collusion or by reason of material facts not brought before the Court; and, on cause being so shown, the Court shall deal with the case by making the

(*f*) Now six months; see Matrimonial Causes Act, 1866, s. 3.

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decree absolute, or by reversing the decree *nisi* or by requiring further inquiry, or otherwise as justice may require; and at any time during the progress of the cause or before the decree is made absolute any person may give information to Her Majesty's Proctor of any matter material to the due decision of the case, who may thereupon take such steps as the Attorney-General may deem necessary or expedient; and if from any such information or otherwise the said Proctor shall suspect that any parties to the suit are or have been acting in collusion for the purpose of obtaining a divorce contrary to the justice of the case, he may, under the direction of the Attorney-General, and by leave of the Court, intervene in the suit, alleging such case of collusion, and retain counsel and subpœna witnesses to prove it; and it shall be lawful for the Court to order the costs of such counsel and witnesses, and otherwise, arising from such intervention, to be paid by the parties or such of them as it shall see fit, including a wife if she have separate property; and in case the said Proctor shall not thereby be fully satisfied with his reasonable costs, he shall be entitled to charge and be reimbursed the difference as part of the expense of his office.

Collusion.

Extended to suits for nullity by Mat. C. Act, 1873, s. 1.

Continuance of Act.

Repealed: Jud. Act, 1925.

8. This Act shall continue in force until the thirty-first day of July, one thousand eight hundred and sixty-two, and no longer. [This section is repealed, and the above statute made perpetual by 25 & 26 Vict. c. 81; a statute passed solely for that purpose, and consisting of a single section].

27 & 28 VICT. c. 44 (MATRIMONIAL CAUSES ACT, 1864).

An Act to amend the Act relating to Divorce and Matrimonial Causes in England, Twentieth and Twenty-first Victoria, Chapter Eighty-Five (*g*). [14th July, 1864.]

Amending provisions of Mat. C. Act, 1857, s. 21, as to discharge of orders for protection of property of wives deserted by their husbands.

1. Where under the provisions of section twenty-one of the said Act a wife deserted by her husband shall have obtained or shall hereafter obtain an order protecting her earnings and property, from a police magistrate, or justices in petty sessions, or the Court for Divorce and Matrimonial Causes, as the case may be, the husband, and any creditor or other person claiming under him, may apply to the Court,

(*g*) Short title, "The Matrimonial Causes Act, 1864"; collective title, "The Matrimonial Causes Acts, 1857 to 1919" (9 & 10 Geo. 5, c. 28).

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Repealed: As to High Court, Jud. Act, 1925.

or to the magistrate or justices by whom such order was made for the discharge thereof, as by the said Act authorized; and in case the said order shall have been made by a police magistrate, and the said magistrate shall have died or been removed, or have become incapable of acting, then in every such case the husband or creditor, or such other person as aforesaid, may apply to the magistrate for the time being acting as the successor or in the place of the magistrate who made the order of protection, for the discharge of it, who shall have authority to make an order discharging the same; and an order for discharge of an order for protection may be applied for to and be granted by the Court, although the order for protection was not made by the Court, and an order for protection made at one petty sessions may be discharged by the justices of any later petty sessions, or by the Court.

29 & 30 VICT. c. 32 (MATRIMONIAL CAUSES ACT, 1866) (*h*).

An Act further to amend the Procedure and Powers of the Court for Divorce and Matrimonial Causes.

[11th June, 1866.]

WHEREAS by the Act passed in the session of Parliament holden in the twentieth and twenty-first years of the reign of Her present Majesty, intituled "An Act to amend the Laws relating to Divorce and Matrimonial Causes in England," it is by the thirty-second section enacted, that "the Court may, on pronouncing any decree for a dissolution of marriage, order that the husband shall to the satisfaction of the Court secure to the wife such gross or annual sum of money as to the Court may seem reasonable, and for that purpose may refer it to one of the conveyancing counsel of the Court of Chancery to settle and approve of a proper deed to be executed by all necessary parties".

Mat. C. Act. 1857, s. 32.
Repealed: Jud. Act, 1925.

And whereas it sometimes happens that a decree for a dissolution of marriage is obtained against a husband who has no property on which the payment of any such gross or annual sum can be secured, but nevertheless he would be able to make a monthly or weekly payment to the wife during their joint lives:

(*h*) Short title, "The Matrimonial Causes Act, 1866"; collective title, "The Matrimonial Causes Acts, 1857 to 1919" (9 & 10 Geo. 5, c. 28).

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Be it therefore enacted, etc.:

Repealed by 7 Edw. 7, c. 12. See s. 190, Jud. Act, 1925.

1. [Power to order monthly or weekly payments to wife from husband on dissolution of marriage.]

Relief to respondent. Repealed: Jud. Act, 1925, see s. 180.

2. In any suit instituted for dissolution of marriage, if the respondent shall oppose the relief sought on the ground, in case of such a suit instituted by a husband, of his adultery, cruelty, or desertion, or, in case of such a suit instituted by a wife, on the ground of her adultery or cruelty, the Court may in such suit give to the respondent, on his or her application, the same relief to which he or she would have been entitled in case he or she had filed a petition seeking such relief.

Decree *nisi* not absolute till after six months. Extended to decrees for nullity by Mat. C. Act, 1873, s. 1. Repealed: Jud. Act, 1925, s. 183.

3. No decree *nisi* for a divorce shall be made absolute until after the expiration of six calendar months from the pronouncing thereof, unless the Court shall under the power now vested in it fix a shorter time.

31 & 32 VICT. c. 77 (MATRIMONIAL CAUSES ACT, 1868) (*i*)

An Act to amend the Law relating to Appeals from the Court for Divorce and Matrimonial Causes in England

[31st July, 1868.]

WHEREAS it is expedient to amend the law relating to appeals from the Court for Divorce and Matrimonial Causes with a view to prevent unnecessary delay in the final determination of suits for dissolution or nullity of marriage:

Be it therefore enacted, etc.:

Interpretation.

1. Throughout this Act the expression "the Court" shall mean the Court for Divorce and Matrimonial Causes.

Sect. 56 of Mat. C. Act, 1857, sect. 17 of Mat. C. Act, 1859 and sect. 3 of Mat. C. Act, 1860, repealed.

2. Section fifty-six of the Act of twentieth and twenty-first Victoria, chapter eighty-five, section seventeen of the Act of twenty-first and twenty-second Victoria, chapter one hundred and eight, and section three of the Act of twenty-third and twenty-fourth Victoria, chapter one hundred and forty-four, are hereby repealed.

(*i*) Short title, "The Divorce Amendment Act, 1868"; collective title, "The Matrimonial Causes Acts, 1857 to 1919" (9 & 10 Geo. 5, c. 28).

Appeals to House of Lords to be within one month.

No appeal in undefended suits for dissolution unless by leave of Court.

Repealed: Jud. Act, 1925, ss, 27 & 31.

3. Either party dissatisfied with the final decision of the Court on any petition for dissolution or nullity of marriage may, within one calendar month after the pronouncing thereof, appeal therefrom to the House of Lords, and on the hearing of any such appeal the House of Lords may either dismiss the appeal or reverse the decree or remit the case to be dealt with in all respects as the House of Lords shall direct: Provided always, that in suits for dissolution of marriage no respondent or co-respondent, not appearing and defending the suit on the occasion of the decree *nisi* being made, shall have any right of appeal to the House of Lords against the decree when made absolute, unless the Court, upon application made at the time of the pronouncing of the decree absolute, shall see fit to permit an appeal.

Liberty to parties to marry again. Mat. C. Act, 1857, s. 57.

Repealed: Jud. Act, 1925, ss. 27, 31 and 184.

4. Section fifty-seven of the said Act of twenty-first Victoria, chapter eighty-five, shall be read and construed with reference to the time for appealing as varied by this Act; and in cases where under this Act there shall be no right of appeal, the parties respectively shall be at liberty to marry at any time after the pronouncing of the decree absolute.

Short title.

5, This Act may be cited as "The Divorce Amendment Act, 1868."

Qualified retrospective operation.

Repealed: S. L. R. Act, 1893.

6. This Act shall extend to all suits pending at the time when the same shall come into operation, notwithstanding that a decree may have been pronounced therein: Provided, nevertheless, that this Act shall not affect any pending appeal, nor shall the same prejudice any subsisting right of appeal against a decree already pronounced, provided such appeal be lodged within one calendar month after this Act shall come into operation.

36 & 37 VICT. c. 31 (MATRIMONIAL CAUSES ACT, 1873) (*k*)

An Act to extend to suits for Nullity of Marriage the Law with respect to the Intervention of Her Majesty's Proctor and others in Suits in England for dissolving Marriages. [16th June, 1873.]

Repealed by 56 & 57 Vict. c. 54.

[Preamble.]

(*k*) Short title, "The Matrimonial Causes Act, 1873"; Collective title, "The Matrimonial Causes Acts, 1857 to 1919" (9 & 10 Geo. 5, c. 28).

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Extension of sect. 7 of Mat C. Act, 1860, and sect. 3 of Mat. C. Act, 1866, to suits for nullity of marriage.

1. The above-mentioned sections of the said Act shall extend to decrees and suits for nullity of marriage in like manner as they apply to decrees and suits for divorce, and shall be construed as if they were herein enacted, with the substitution of the words "a decree for nullity of marriage" for the words "decree for a divorce" or "divorce," as the case may require.

Repealed: Jud. Act, 1925, see ss. 181-183.

Short title.

The words "together with" to "and each Act" repealed by 56 & 57 Vict. c. 54.

2. This Act, *together with the Acts specified in the schedule to this Act may be cited as "The Matrimonial Causes Acts, 1857 to 1873," and each Act* may be cited as the Matrimonial Causes Act, of the year in which it was passed.

SCHEDULE.

MATRIMONIAL CAUSES ACTS.

Repealed by 56 & 57 Vict. c. 54.

41 & 42 VICT. c. 19 (MATRIMONIAL CAUSES ACT, 1878) (*l*)

An Act to amend the Matrimonial Causes Acts.
[27th May, 1878.]

BE it enacted, etc.:

Short title.

1. This Act may be cited as the Matrimonial Causes Act, 1878.

Costs of intervention.

Repealed: Jud. Act, 1925, see s. 182.

2. Where the Queen's proctor or any other person shall intervene or show cause against a decree *nisi* in any suit or proceeding for divorce or for nullity of marriage, the Court may make such order as to the costs of the Queen's proctor, or of any other person who shall intervene or show cause as aforesaid, or of all and every party or parties thereto, occasioned by such intervention or showing cause as aforesaid, as may seem just; and the Queen's proctor, any other person as aforesaid, and such party or parties shall be entitled to recover such costs in like manner as in other cases: Provided that the Treasury may, if it shall think fit, order any costs which the Queen's proctor shall, by any order of the Court made under this section, pay to the said party or parties, to be deemed to be part of the expenses of his office.

(*l*) Short title, "The Matrimonial Causes Act, 1878"; collective title, "The Matrimonial Causes Acts, 1857 to 1919" (9 & 10 Geo. 5, c. 28).

3. The Court may exercise the powers vested in it by the provisions of section five of the Act of the twenty-second and twenty-third years of Victoria, chapter sixty-one, notwithstanding that there are no children of the marriage.

Extension of power given by Mat. C. Act, 1859.

Repealed: Jud. Act, 1925, see s. 192.

4. [If husband convicted of aggravated assault, the Court may order that wife be not bound to cohabit, &c.]

Repealed by 58 & 59 Vict. c. 39.

47 & 48 VICT. c. 68 (MATRIMONIAL CAUSES ACT, 1884).

An Act to amend the Matrimonial Causes Acts.

[14th August, 1884.]

1. [Title: M. C. Act, 1884.]

2. [Periodical payments in lieu of attachment.]

Repealed: Jud. Act, 1925, see s. 187.

3. [Settlements of wife's property.]

Repealed: Jud. Act, 1925, see s. 191 (2).

4. [Power to vary orders.]

Repealed: Jud. Act, 1925, see s. 196.

5. [Non-compliance with decree deemed to be desertion.]

Repealed: Jud. Act, 1925, see ss. 176, 185.

6. [Custody, etc. of children.]

Repealed: Jud. Act, 1925, see s. 193 (2).

7. [Act to apply to England only.]

7 EDW. 7, c. 12 (MATRIMONIAL CAUSES ACT, 1907).

An Act to amend the Matrimonial Causes Acts, 1857 and 1866, by extending the Powers of the Court in relation to Maintenance and Alimony, and leave to intervene.

[9th August, 1907.]

BE it enacted, etc:

1. (1) The Court may, if it thinks fit, on any decree for dissolution or nullity of marriage, order that the husband shall, to the satisfaction of the Court, secure to his wife such gross sum of money or such annual sum of

Power to grant maintenance and alimony.

Appendix J.

Repealed: Jud. Act, 1925, see s. 190.

money for any term not exceeding her life as, having regard to her fortune (if any), to the ability of the husband, and to the conduct of the parties, it may deem reasonable, and for that purpose may refer the matter to any one of the conveyancing counsel of the court to settle and approve of a proper deed or instument to be executed by all necessary parties, and the court may, if it thinks fit, suspend the pronouncing of its decree until such deed shall have been duly executed.

(2) In any such case the court may, if it thinks fit, make an order on the husband for payment to the wife during their joint lives of such monthly or weekly sum for her maintenance and support as the court may think reasonable, and any such order may be made either in addition to or instead of an order under the last preceding sub-section:

Provided that—

(*a*) If the husband afterwards from any cause becomes unable to make such payments it shall be lawful for the court to discharge or modify the order or temporarily suspend the same as to the whole or any part of the money so ordered to be paid, and again to revive the order wholly or in part as the court may think fit; and

(*b*) Where the court has made any such order as is mentioned in this sub-section, and the court is satisfied that the means of the husband have increased, the court may, if it thinks fit, increase the amount payable under the order.

(3) Upon any petition for dissolution or nullity of marriage, the court shall have the same power to make interim orders for payment of money, by way of alimony or otherwise, to the wife, as it has in a suit instituted for judicial separation.

Repeal of sect. 32 of 20 & 21 Vict. c. 85, and sect. 1 of 29 & 30 Vict. c. 32.

2. Section thirty-two of the Matrimonial Causes Act, 1857, and section one of the Matrimonial Causes Act, 1866, are hereby repealed.

Power to allow intervention on terms.

3. In every case, not already provided for by law, in which any person is charged with adultery with any party to a suit, or in which the court may consider, in the interest of any person not already a party to the suit, that such

person should be made a party to the suit, the court may, if it thinks fit, allow that person to intervene upon such terms (if any) as the court may think just.

Repealed: Jud. Act, 1925, s. 197.

4. This Act may be cited as the Matrimonial Causes Act, 1907, and may be cited with the Matrimonial Causes Acts, 1857 to 1878.

Short title.

9 & 10 GEO. 5, c. 28 (MATRIMONIAL CAUSES ACT, 1919).

An Act to enable the competent courts in the United Kingdom to entertain matrimonial proceedings in respect of certain marriages contracted during the war by members of His Majesty's Forces domiciled outside the United Kingdom. [22nd July, 1919.]

BE it enacted, etc.:

1. Where a marriage has been contracted in the United Kingdom during the present war by a member of His Majesty's Forces domiciled in any of His Majesty's possessions or protectorates to which this Act applies, the competent court in that part of the United Kingdom where the marriage took place shall, any question of domicile or residence notwithstanding, have full jurisdiction and power to entertain, hear and determine any of the matrimonial proceedings specified in the Schedule to this Act, where such proceedings are instituted by either party to the marriage, and to make decrees and orders in relation to such proceedings, as though the parties to the marriage were domiciled or (where the jurisdiction of the court depends upon residence) resident in that part of the United Kingdom:

Power to entertain proceedings.

Provided that this Act shall not apply in any case where the parties to the marriage have at any time since the marriage resided together in the country of the husband's domicile.

For the purposes of this section, "the competent court" means as respects England and Ireland the High Court, and as respects Scotland the Court of Session.

2. This Act applies—

Application of Act.

(*a*) to any self-governing dominion, as from such date as may be prescribed by the legislature of

Appendix J.

that dominion in any declaration or enactment which may be passed applying this Act to such dominion;

(*b*) to any of His Majesty's possessions, not being a self-governing dominion, and to any territory under His Majesty's protection, as from such date as may be prescribed by Order in Council applying this Act to that possession or territory.

The expression "self-governing dominion" means the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, and Newfoundland.

Short title, construction, saving, and duration.

3. (1) This Act shall, in its application to England, be construed as one with the Matrimonial Causes Acts, 1857 to 1907, and those Acts and this Act may be cited together as the Matrimonial Causes Acts, 1857 to 1919, and this Act shall, in its application to Ireland, be construed as one with the Matrimonial Causes and Marriage Laws (Ireland) Amendment Acts, 1870 and 1871, and those Acts and this Act may be cited together as the Matrimonial Causes and Marriage Laws (Ireland) Amendment Acts, 1870 to 1919; and this Act may be cited separately as the Matrimonial Causes (Dominions Troops) Act, 1919.

33 & 34 Vict. c. 110.
34 & 35 Vict. c. 49.

(2) Nothing in this Act shall prejudice or affect the jurisdiction of any court with respect to matrimonial proceedings, other than that conferred by this Act.

(3) This Act shall not apply to proceedings commenced after the expiration of one year from the passing thereof.

SCHEDULE.

Section 1.

MATRIMONIAL CAUSES.

In England, proceedings for divorce, judicial separation, and restitution of conjugal rights.

In Scotland, proceedings for divorce, separation *á mensâ et thoro*, and adherence.

In Ireland, proceedings for divorce *á mensâ et thoro*, restitution of conjugal rights, and criminal conversation.

13 & 14 GEO. 5, c. 19 (MATRIMONIAL CAUSES ACT, 1923). Appendix J.

An Act to amend the Matrimonial Causes Act, 1857.

[18th July, 1923.]

BE it enacted, etc.:

Right of wife to divorce husband for adultery.

1. It shall be lawful for any wife to present a petition to the Court praying that her marriage may be dissolved on the ground that her husband has, since the celebration thereof and since the passing of this Act, been guilty of adultery: Provided that nothing contained herein shall affect or take away any right of any wife existing immediately before the passing of this Act.

See Jud. Act, 1925, s. 176.

Amendment of 20 & 21 Vict. c. 85, s. 27.

2. The provisions of the Matrimonial Causes Act, 1857, set out in the Schedule to this Act are hereby repealed.

Short title.

3. This Act may be cited as the Matrimonial Causes Act, 1923, and shall be construed as one with, and may be cited with, the Matrimonial Causes Acts, 1857 to 1919.

SCHEDULE.

Section 27.

Section twenty-seven, the words "incestuous adultery or of bigamy with"; and the words "or of adultery coupled with such cruelty as, without adultery, would have entitled her to a divorce *à mensâ et thoro*, or of adultery coupled with desertion, without reasonable excuse, for two years or upwards"; and all the words in the proviso.

APPENDIX K.

APPOINTMENT OF GOVERNMENT PROCTORS AND RULES MADE BY THE GOVERNOR GENERAL IN COUNCIL UNDER SECTION 17-A OF THE INDIAN DIVORCE ACT, 1869.

(*See Gazette of India, 1928, Part I, pp. 692-693*).

No. F. 928/27.—In persuance of section 17-A of the Indian Divorce Act (IV of 1869) the Governor General in Council is pleased to appoint each of the officers specified in the first column of the annexed Schedule to exercise, within the jurisdiction of the High Court specified in the corresponding entry of the second column thereof, the like right of showing cause why a decree for the dissolution of marriage should not be made absolute or should not be confirmed, as the case may be, as is exercisable in England by the King's Proctor.

SCHEDULE.

Name of Officer.	Name of High Court.
(1) Crown Prosecutor, Madras.	Madras High Court.
(2) Solicitor to the Government of Bombay.	Bombay High Court.
(3) Superintendent and Remembrancer of Legal Affairs, Bengal.	Calcutta High Court.
(4) Government Advocate, United Provinces.	Allahabad High Court.
(5) Legal Remembrancer, Punjab.	Lahore High Court.
(6) Government Advocate, Burma.	Rangoon High Court.
(7) Legal Remembrancer, Bihar and Orissa.	Patna High Court.

Appendix K.

No. F. 928/27-I.—*In exercise of the powers conferred by section 17-A of the Indian Divorce Act (IV of 1869), the Governor General in Council is pleased to make the* following rules:—

1. These rules may be called the Indian Divorce (Domiciled Parties) Intervention Proceedings Rules, 1928.

2. In these rules unless there is anything repugnant in the subject or context—

"Act" means the Indian Divorce Act, (IV of 1869);

"Officer" means an officer appointed under section 17-A of the Act to exercise the like right of showing cause that a decree for the dissolution of marriage should not be made absolute or should not be confirmed, as the case may be, as is exercisable in England by the King's Proctor;

"Pleader" means any person entitled to appear and plead for another in Court, and includes an advocate, vakil and an attorney of a High Court; and "proceedings" means a suit or proceedings under the Act.

3. (1) If any person during the progress of a proceeding or before the decree *nisi* is made absolute gives information to the officer on any matter material to the due decision of the case, the officer may take such steps as he considers necessary or expedient.

(2) If, in consequence of any such information or otherwise, the officer suspects that any parties to the petition are or have been in collusion for the purpose of obtaining a decree contrary to the justice of the case, he may, after obtaining the leave of the Court, intervene and produce evidence to prove the alleged collusion.

4. (1) When the officer desires to show cause against making absolute a decree *nisi*, he shall enter an appearance in the proceeding in which such decree *nisi* has been pronounced and shall, within a time to be fixed by the Court, file his plea setting forth the grounds upon which he desires to show cause as aforesaid, and a certified copy of his plea shall be served upon the petitioner or person in whose favour such decree has been pronounced or his pleader. On entering an appearance the officer shall be made a party to the proceedings and shall be entitled to appear in person or by pleader.

(2) Where such plea alleges the petitioner's adultery with any named person, a certified copy of the plea shall be served upon each such person omitting such part thereof as contains an allegation in which the person so served is not named.

(3) All subsequent pleadings and proceedings in respect of such plea shall be filed and carried on in the same manner as in respect of an original petition under the Act, except as hereinafter provided.

(4) If the charges contained in the plea of the officer are not denied or if no answer to the plea of the officer is filed within the time allowed or if an answer is filed and withdrawn or not proceeded with, the officer may apply forthwith for the rescission of the decree *nisi* and dismissal of the petition.

5. Where the officer intervenes and shows cause against a decree *nisi* in any proceedings for divorce, the Court may make such orders as to the payment by other parties to the proceedings of the costs incurred by him in so doing or as to the payment by him of any costs incurred by any of the said parties by reason of his so doing, as may seem just.

(Sd.) J. A. SHILLIDY,
Offg. Joint Secy. to the Govt. of India.

APPENDIX L.

RULES MADE BY THE MADRAS HIGH COURT UNDER SECTION 16 (2) OF THE INDIAN DIVORCE ACT, 1869.

(*See Fort St. George Gazette, 1930, Part II, p. 458.*)

In exercise of the powers conferred by section 16 (2) of the Indian Divorce Act, IV of 1869, the High Court hereby makes the following Rules. The Rules shall supplement the Indian Divorce (Domiciled Parties) Intervention Proceedings Rules, 1928, framed by the Governor General in Council:—

1. Any person other than the officer appointed under section 17-A of the Act, wishing to show cause against making absolute a decree *nisi* shall, if the Court so permits, apply in the petition in which such decree *nisi* has been pronounced, and at the same time file affidavits setting forth the facts upon which he relies. Such applications shall be moved in open Court.

2. Unless the Court otherwise orders, notice of the application and certified copies of the affidavits shall be served upon the officer and the party or the pleader of the party in whose favour the decree *nisi* has been pronounced not less than five clear days before the return-day.

3. The party in the petition in whose favour the decree *nisi* has been pronounced may, unless the Court otherwise orders, within three clear days from the date of service of the notice and affidavits, file affidavits in answer.

4. The person showing cause against the decree *nisi* being made absolute shall then be served with certified copies of the affidavits in answer and he may thereupon, unless the Court otherwise orders, file within three clear days from the date of service, affidavits in reply.

5. Certified copies of the affidavits in answer and affidavits in reply shall also be served on the office.

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