

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Lord William Hay v. Gordon, from the Chief Court of the Punjaub; delivered 31st July 1872.*

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Present:

SIR JAMES W. COLVILLE.  
SIR BARNES PEACOCK.  
SIR MONTAGUE E. SMITH.  
SIR ROBERT P. COLLIER.

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SIR LAWRENCE PEEL.

This is an appeal brought by Lord William Hay, the co-respondent, against a judgment of the Chief Court of the Punjaub, confirming a judgment of the Additional Commissioner at Umballa, whereby Colonel Gordon obtained a dissolution of his marriage with his wife on the ground of her adultery with Lord William Hay, and Lord William Hay was ordered to pay the costs of the suit.

Before the year 1869 the Indian Courts had only power to decree divorces *a mensa et thoro*. The power of the Court of Divorce in this country of granting divorces *a vinculo* was first introduced into India by Act IV. of 1869, which enacts that subject to its provisions "the High  
" 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." There is a power to make rules and regulations not inconsistent with the Act and the Code of Civil Procedure in India. But it would appear that no rules have been made, and therefore the principles and rules which obtain in the Divorce

Court in this country are as nearly as may be to be applied in India. Power is given to district judges in the first instance to hear divorce causes, but their decrees are not final, or indeed operative at all, until confirmed by the decree of the High Court, which is empowered to direct further enquiry to be made or additional evidence to be taken.

In this case the High Court was the Chief Court of the Punjaub.

The first question which has been raised is whether or not the Statute of Limitations is a bar to this suit? It is argued that the cause of action arose in 1859 or 1860 when the acts of adultery are said to have been committed, or at all events in the year 1862, when Colonel Gordon says that the misconduct of his wife came to his knowledge. Act XIV. of 1859, after prescribing particular terms of limitation for certain actions, enacts that with respect to all suits and actions not before specifically provided for the term of six years shall apply, that is six years from the time when the cause of action accrued. Their Lordships are of opinion that the provisions of that Act do not apply to suits for divorce *a vinculo*, which at the time when it passed were unknown in India. They are confirmed in the view which they have taken of the intention of the legislature by the Limitation Act which was passed last year (Act IX. of 1871), which expressly enacts that its provisions shall not apply to suits under the Indian Divorce Act.

The Appellant further relied upon substantially two grounds, the first was that justice had not been done him in this suit inasmuch as he ought to have had an opportunity of being examined in this country by a commission, and secondly that upon the general merits of the case the decree was wrong.

With respect to the first question, the material facts appear to be these. The alleged adultery was in the years 1859 and 1860. The Petitioner does not aver with any particularity at what

time in those years the acts of adultery were committed. Lord William Hay left India in 1862 and has resided in England ever since. In 1862 Colonel Gordon says he became aware of his wife's adultery by what he regarded as a confession by her in a certain letter which will be subsequently referred to, and that at that time he endeavoured to establish a case by the examination of witnesses in India; but it would appear that those very witnesses, who have been now called for him, at that time either could not or would not give evidence sufficient to establish his case. This suit was instituted in June 1869. Lord William Hay for the first time heard of it on receiving the summons in the beginning of August in that year. Upon that he immediately took what undoubtedly was the proper proceeding of applying to an able counsel for his opinion, and that counsel advised in substance that application should be made to the Court in India for further particulars, and upon these particulars being obtained for a commission for the examination of Lord William Hay.

Lord William Hay upon the 13th of August wrote to Mr. Chisholm at Simla, who held a power of attorney from him, enclosing a copy of his counsel's opinion, and requesting that an advocate might be retained for him to act upon the instructions therein contained. It appears that Mr. Cunningham was so retained, but it does not appear that this gentleman acted in conformity with those instructions, the reasons for his not so acting do not appear.

The cause was heard before the Commissioner of Umballa on the 18th and 19th November 1869. The Commissioner pronounced against Lord William Hay, decreeing a dissolution of the marriage on the ground of adultery with him and condemning him in costs. Lord William Hay states in his affidavit that he was not aware of this decision until January of the next year, 1870, when he received a short report of the case



in the Mofussilite newspaper; that he then sent out an affidavit (which appears in the record) denying his guilt, stating a variety of circumstances, and among other things setting out the opinion of counsel above referred to. In pursuance of that affidavit, and a petition which he also sent to India, it appears that his counsel before the Chief Court of the Punjaub, Mr. Plowden, upon the 19th of May, presented a petition to that Court containing various grounds of defence, and stating this among other things: "The co-respondent is and always has been willing to tender himself as a witness in the case, and prays that, if the petition be not otherwise dismissed as against him, his evidence may be taken by Commission." Upon the hearing of the cause before the Chief Court of the Punjaub in July 1870, the Court declined to comply with this request on these grounds; they say—"We see no likelihood of any sort of advantageous result from the issue of a commission. We have Lord William Hay's positive denial on oath on the record, and though we should be anxious to offer a litigant so circumstanced every possible facility and indulgence in the hearing of the case, it is not, we think, necessary, and would not therefore be expedient now, at the last moment, to re-open the proceedings by the grant of a commission which could scarcely bring any new fact before us, would place Lord William Hay's disavowal in no stronger a light, and would postpone the relief prayed for," and the Court subsequently make this observation: "With regard to the co-respondent, we have further to remark that his explanation of his proceedings is not, in our opinion, satisfactory, and that we cannot regard the course which he has pursued as in any degree adequate to the gravity of the occasion, or as indicating a serious intention to resist the present proceedings."

Their Lordships are not able to agree with the Chief Court that Lord William Hay's general denial in the affidavit is at all equivalent to what would or might have been a circumstantial denial by him of the facts stated by the witnesses, or an explanation of these facts, upon an examination by a commission; and they are also unable to agree with the Chief Court in the remark that they cannot regard the course pursued by him as adequate to the gravity of the occasion, or as indicating a serious intention to resist the proceedings. Their Lordships see no reason to doubt that Lord William Hay has all along seriously and earnestly desired to resist these proceedings to the best of his ability.

Upon this part of the case their Lordships have come to the conclusion that it would have been desirable and proper, under all the circumstances, to accede to Lord William Hay's application for a commission to examine him.

But their Lordships do not rest their decision upon this ground. After giving the whole case their best consideration, they have come to the conclusion that there is no sufficient evidence upon which this decree against Lord William Hay can be supported.

In their Lordships' opinion, the evidence against Lord William Hay is entirely that of the native witnesses. Before coming to this, however, it is well to make an observation upon other evidence which was admitted in the case, and which undoubtedly was admissible as against the respondent Mrs. Gordon, viz., her own confessions, or what are contended to have been her own confessions. As far as the correspondence is concerned, the only passage which in any way bears upon her relations with Lord William Hay, is the following in letter H, which must have been written somewhere about April 1862 from England to her husband then in India: "I have your letters as to what occurred at Simla.

“ Herbert always told me that *you knew of it, and did not care.* Lord William Hay told me the same thing. Herbert always told me that Emily knew of it, and I firmly *believe* that both *you and she did.*” What she is writing about here is clearly misconduct of her own, and it may be assumed to be adultery with a gentleman at Simla, referred to by the name of Herbert. It appears that the person here designated as “Herbert,” told her that her husband knew of this adultery and did not care. She also says “Lord William Hay told me the same thing.” It appears to their Lordships that the view taken of this expression in her letter by the Court above is more correct than that taken by the Court below, viz., that it does not amount to a confession on her part of any adulterous intercourse with Lord William Hay, but merely to a statement of a conversation with him on the subject of her misconduct with another person, and her husband’s supposed sentiments regarding it.

On this part of the case—the lady’s confessions—a Mrs. Byrne is called, who lives at Simla, and whose house Mrs. Gordon rented. This lady is the grandmother of a Mr. Johnson who was retained in this case to get up the evidence on the part of Colonel Gordon, and she does speak to a communication from Mrs. Gordon which would undoubtedly lead to the inference that she had committed adultery with Lord William Hay. It is certainly somewhat remarkable, as has been forcibly remarked by Dr. Deane, that this lady should, if the statement be correct, not have communicated it in 1862 to Colonel Gordon, who was then attempting to procure sufficient evidence to obtain a divorce, as Mrs. Byrne must probably have well known.

Their Lordships have thought it necessary to say a word upon this part of the case, although no statements of Mrs. Gordon, written or verbal, are, according to well-known principles of law,

admissible against Lord William Hay; and they now refer to the only evidence against him, which is that of the native witnesses. Without going through that evidence in detail, it may be enough to say that part of it is simply hearsay, and of an extremely unsatisfactory and loose character, to say the least of it, such as that of "Boonah," who speaks of having seen a horse tied up near Mrs. Gordon's house at 12 o'clock at night, which she heard from some grooms was the horse of Lord William Hay, those grooms not being called. There is evidence of Lord William Hay coming to the house on a good many occasions and dining there very frequently, but that is not evidence which, if taken alone, would at all lead to the inference of adultery. There is the evidence of a jampan bearer to the effect that on three occasions he, together with other bearers (it appears there would be four bearers of the jampan), took Mrs. Gordon to Lord William Hay's house about 8 or 9 o'clock at night, it does not appear at what time in the year. According to his account the jampan bearers and the jampan remained outside, visible to all persons who might be passing, which would not point to the conclusion that the visits were of an adulterous or even of a clandestine character. Further there is the evidence of a man of the name of Torab, who had been in the service of Colonel Gordon from the year 1856 down to the present time, and this is the only witness who speaks of any familiarities between Lord William and Mrs. Gordon. His statement is to the effect that Lord William Hay frequently came to Mrs. Gordon's when her husband was absent (indeed her husband does not seem to have been much at Simla), that Lord William came to dinner two or three times a week, sometimes in company, sometimes alone, and the witness goes on to say that when he would take away the coffee, Mrs. Gordon and Lord William Hay would be sitting



on a sofa together, he with his arm round her waist. This witness appeals in confirmation of his statements to the evidence of an ayah of the name of Peerun, who, if not supposed to have witnessed the same familiarity, still was constantly in the house, and would, of course perfectly well know whether Lord William Hay was there frequently or not. Torab says, that the ayah was aware of the frequency of Lord William Hay's visits, and of the familiarity between Lord William Hay and Mrs. Gordon, and that he and the ayah were in the habit of discussing it together, and both of them discussing it with Mrs. Byrne. He also states that in the year 1862, when he was in Colonel Gordon's service, upon Colonel Gordon questioning him concerning the facts to which he was then deposing, he denied all knowledge of them; he adds, "last year Colonel Gordon gave me great encouragement" (*dilasa* is the native word) "to speak the truth, and promised to forgive me every thing if I would; then I told the sahib."

The ayah Peerun, upon being called, contradicts the evidence of Torab; and is, in fact, a witness in favour of Lord William Hay. She, instead of confirming the account which Torab had given as to Lord William Hay's frequent visits and his intimacy with Mrs. Gordon, says this: "I was in Mrs. Gordon's service about nine years ago. Know of nothing between her and Lord William Hay. He only called on her twice to my knowledge;" this entirely agrees with Lord William Hay's own account in his affidavit, where he says that he only called twice upon Mrs. Gordon; one of his visits being to a certain extent on a matter of business, and that he dined once in the house of Colonel Gordon. She does speak, and so does one other witness, to an occurrence, certainly somewhat extraordinary, viz., Mrs. Gordon going to Lord William Hay's house at night, or late in the evening, breaking some of his windows and cutting some creepers outside the house. Pursoo,



the other witness who speaks to this transaction, represents that Lord William Hay declined to have anything to say to her. He says, "I told the sahib; he said, if she won't go send for the guard, as she was drunk and might strike me with the knife. I persuaded her to go home." That is all we know of that transaction, which certainly appears to their Lordships to be no evidence of adultery.

It has been already said that their Lordships are of opinion that the only evidence against Lord William Hay was that of the native witnesses. It is true that the Chief Court does speak of that evidence as being corroborated in one highly important particular by Mr. Johnson, the gentleman who was employed to get up the case. But their Lordships do not take the same view of the evidence of Mr. Johnson. The passage to which the Chief Court refers would appear to be this: "One morning I was taking my early ride about 7 or 7.30. I saw Mrs. Gordon coming down the steps which lead out of Littlewood; the ayah was with her. I passed close to her but did not speak; her hair was hanging down." It does not appear to their Lordships that the fact of Mr. Johnson meeting this lady between 7 and 8 o'clock in the morning in company with a maid walking down steps, which would seem to be public ones, leading, it is true, to Lord William Hay's house, but also to other places, does afford any corroborative evidence which can be relied on of the statements of the native witnesses.

The case, therefore, in their Lordships' view, as far as Lord William Hay is concerned, resolves itself into this: the only part of the evidence of any importance is that of a native servant who in 1862 denied all knowledge of what he asserted in 1869, and this servant is contradicted by a fellow servant whom he vouches.

Lord William Hay must be taken, as the Chief Court of the Punjaub properly assumes, to have given a general denial of the truth of

this evidence; if that denial has not been specific, and has not been tested by cross-examination, the fault, having regard to his desire to be examined on commission, cannot be regarded as his.

Under these circumstances, their Lordships have come to the conclusion that this decree cannot be maintained.

Their Lordships are not unmindful that they have on more than one occasion, laid it down as a general rule, subject to possible exceptions, that they would not reverse the concurrent findings of two Courts on a question of fact. But they consider that the circumstances of this case are of so peculiar a character as to take it out of the scope of that general rule. They are dealing with a jurisdiction of an important and delicate character, new to the Courts of India. This is certainly the first case which has come before their Lordships, and probably not many suits of this description have been tried in India. It is to be observed that in this case it can scarcely be said that there have been two separate judgments, inasmuch as the legislature has not thought it safe to entrust the Court below with the power of pronouncing decisions which would be binding if not appealed against, but have made these decisions operative only on confirmation by the High Court, whose confirmatory judgment is practically the judgment in the suit. It is further to be observed that the Court below was clearly wrong in accepting as evidence against Lord William Hay the statements of Mrs. Gordon, and regarding those statements as confirming the credibility of the evidence of the native witnesses against him. It is true that the Chief Court distinguishes between the evidence which was admissible as against the respondent and that which was admissible as against the co-respondent. At the same time they attach a good deal of importance to the finding of the judge below upon the credibility of the native witnesses, based as that finding was in a great measure upon evidence not admissible.

For these reasons their Lordships have come to the conclusion that it is not one of the cases to which the ordinary rule above mentioned should be applied.

Their Lordships will therefore humbly advise Her Majesty to allow this appeal and to reverse so much of the decree of the Chief Court of the Punjab as is appealed against, and that in lieu thereof the suit be dismissed as against Lord William Hay, with the costs in the Courts below and the costs of this appeal.



