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extinguished, unless he declares, by express words or necessary implication, that it shall continue to subsist, or such continuance would be for his benefit."

PINHEY, J.—I am of the same opinion. I also was a party to the decision in *Icharam Dayaram* v. *Raiji Jaga* (1), but at the time I was not aware that the soundness of *Toulmin* v. *Steere* had been questioned. I have known it often questioned since. The rule of law enunciated in that case, though highly technical, was very clear, and had been often acted on as "authoritative". As its application completely disposed of the case before us, I preferred to rest my opinion on it in disposing of *Icharam Dayaram* v. *Raiji Jaga*, rather than discuss the other point which my brother Melvill discussed, as I had at the time been but a short time in the High Court, and my short experience in Gujarat did not qualify me to give an opinion thereon off-hand.

(1) 11 Bom. H. C. Rep. 41.

MATRIMONIAL JURISDICTION.

Before Mr. Justice Bayley.

February 23.

HARRIETTE A. KING, PETITIONER, *v.* JAMES S. KING, RESPONDENNT.
ALLAN F. TURNER, INTERVENOR.*

Divorce—Intervenor—Right of third person to intervene—Procedure in case of intervening after decree nisi—Right to move for new trial—Practice—Procedure—Review—Motion to make absolute a decree nisi—Discretion of Court to refuse motion—Further inquiry ordered by Court—Indian Divorce Act IV of 1869.

A wife sued for dissolution of marriage on the grounds of her husband's adultery and cruelty. The respondent entered an appearance through a solicitor, but did not file any written statement, and did not appear at the hearing, and a decree was made for the petitioner on the 26th July, 1881. On the 3rd October, T, who had acted as solicitor for the respondent, appeared as intervenor, and under section 16 of the Indian Divorce Act (IV of 1869) obtained a rule *nisi* calling on the petitioner to show cause why a new trial should not be had and all further proceedings under the decree *nisi* should not be stayed. The rule was obtained upon an affidavit of T, in which he stated that since the date of the decree *nisi* he had been informed by the respondent that the petitioner had been, prior to that date, guilty of adultery with a person whose name he mentioned; that he was informed by the respondent that the reason why he (the respondent) had not defended the suit was that he wished so avoid making public the

* Suit No. 195 of 1881.

fact of his wife's adultery, and thus injuring the prospects of his children; that application had been made both to the Advocate General of Bombay and to the Government Solicitor that they should intervene as representing the Queen's Proctor in India, but that both had declined. The respondent also filed an affidavit corroborating the statements made in T's affidavit. In showing cause against the rule it was contended on behalf of the petitioner that, under the Indian Divorce Act (IV of 1869), the proper course for a third person wishing to intervene was to file an appearance, and then to show cause on the motion to make absolute the decree *nisi*, and that the rule for a new trial was wrong in form.

Held that a new trial could not be granted, there being no provision in the Civil Procedure Code (Act X of 1877) for the granting of a new trial. The respondent himself could only have applied for a review of judgment under section 623, and, even if otherwise entitled to a review, the motion of the 23rd October, 1881, regarded as an application for a review, was too late under clause 162, Schedule II of the Limitation Act XV of 1877. Assuming that a third person had the right to apply for a review of judgment, T's application of 3rd October, 1881, was also barred.

Held, also, that, under the Indian Divorce Act (IV of 1869), a third person may show cause against a decree *nisi* being made absolute, but is not at liberty to institute proceedings, *e.g.*, by obtaining a rule, as was done in this case.

Held, also, that T, who had been the solicitor to the respondent and who was, in fact, acting at the instance of the respondent, was not entitled to intervene or to show cause against the decree being made absolute. A respondent has no right to show cause, and he cannot do indirectly through another what he is not permitted to do himself.

Counsel on behalf of the petitioner subsequently moved to make the decree *nisi* absolute, and contended that the Court having held that T had no right to intervene or to show cause, the affidavits filed by him should be disregarded and taken off the file, and that, no cause having been shown by any other person, the petitioner was entitled, under the provisions of section 16 of the Indian Divorce Act (IV of 1869), to have the decree made absolute. The Court, however, refused the motion, and adjourned the case, directing that the petitioner should attend personally on a day specified, in order that the matters alleged in the affidavits might be investigated.

ON the 23rd April, 1881, the petitioner presented a petition, praying for a decree for the dissolution of her marriage with the respondent, on the grounds of the respondent's adultery and cruelty towards the petitioner. The respondent entered an appearance through Mr. Allan F. Turner, a solicitor of the High Court; but, though ordered to do so, did not file any written statement.

The suit came on for hearing on the 26th July, 1881. The respondent did not appear; and, after hearing the petitioner's evidence the Court made a decree *nisi* for the petitioner, with

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costs against the respondent; and it was ordered that the respondent should pay to the petitioner, as alimony for the maintenance of herself and for the maintenance and education of her two minor children, a monthly sum of Rs. 300 from 26th July, 1811, until the decree *nisi* should be made absolute, or until further order, and that the petitioner should have the custody of the said two children until the said decree should be made absolute, or until further order.

On the 3rd October, Mr. A. F. Turner, who had acted as solicitor for the respondent, appeared as intervenor; and on his behalf a rule was obtained, under section 16 of the Indian Divorce Act IV of 1869, calling on the petitioner to show cause why the decree of the 26th July, 1881, should not be set aside and a new trial had. The rule was granted on an affidavit by Mr. Turner, in which he stated that he was informed and believed it to be true that, prior to the date of the decree *nisi* (26th July, 1881,) the petitioner had committed adultery with one Captain B. The affidavit set forth the facts upon which this statement was founded. In this affidavit Mr. Turner also referred to various allegations made by the petitioner in her evidence at the hearing of the suit, and stated that he was informed by the respondent that they were wholly untrue. The concluding paragraphs of the affidavit were as follows :—

"I am informed by the respondent that the reason why he did not defend this suit was that he wished to avoid making public the fact of his wife's adultery, and thus injuring the prospects of his children.

"The respondent came to Bombay from Savantvadi on the 30th of August last, and it was from him after his arrival here that I heard, for the first time, of the petitioner's adultery. I consulted the Advocate General, and suggested that he should intervene as representing the Queen's Proctor in this country; but he was of opinion that he could not do so, as the duties of the Queen's Proctor did not belong to his office, and proposed an application to Mr. Hearn, the Government Solicitor and Public Prosecutor. I, therefore, applied to Mr. Hearn; but he stated that he could not assume the position and duties of Queen's Proctor, because they do not belong to the offices which he holds under Government,

and because they would involve expense for which no provision exists.

"Under the circumstances hereinbefore stated I submit to this Honourable Court that the decree *nisi*, made in this suit on the 26th day of July last, ought to be reversed, or a new trial ordered, on the ground that the petitioner's adultery and the other material facts hereinbefore set forth were not brought before the Court."

It was agreed that, before the rule *nisi* was argued on the merits, the question as to whether Mr. Turner could intervene in the suit should first be decided.

The case now came on for argument on that preliminary point.

Inverarity for the petitioner.—There are two questions to be decided: 1st, whether Mr. Turner, who was the respondent's solicitor, or any person acting at the instance of the respondent, can intervene. 2nd, whether supposing he can intervene, he can do so in the way in which Mr. Turner has intervened in this case. As to the second point, I contend that in India the only thing a person can do after a decree *nisi* has been granted, is to show cause against the decree being made absolute. There is no power given by the Indian Divorce Act (IV of 1869) to any person to intervene by applying for a separate rule or for a new trial as has been done here. The proper course for a person wishing to intervene is for him to file an appearance, and then to show cause when the petitioner moves to make the decree absolute.

No rules have been made under the Indian Divorce Act, and there is no procedure laid down for a person wishing to intervene.

[BAYLEY, J., referred to section 7 of the Indian Divorce Act.] That section does not apply to questions of procedure : *Abbott* v. *Abbott* (1).

In England the procedure is to ask for a new trial, and not for review. See Stat. 21 and 22 Vict., c. 108, sec. 18 ; Pritchard's Divorce Digest, page 230 ; *Stoate* v. *Stoate* (2). This case is cited erroneously in Macrae on Divorce, p. 58. There is, however, no provision in the Indian Divorce Act enabling a party to move for a new trial. The proper course in India is to apply for a review

(1) 4 Beng . L. R., O. J., p. 51. (2) 30 L. J. P. & M., 173; S. C. 2 Sw. & Tr., 384.

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under section 623 of the Civil Procedure Code (Act X of 1877). The respondent might have done this either within twenty days of the date of decree under clause 162 of Schedule II of the Limitation Act XV of 1877, or within ninety days under clause 173.

Mr. Turner here asks for a new trial. It is clear that in England a new trial would not be granted on the affidavit made by Mr. Turner, and, if so, I submit no order for review should be made here. The affidavit alleges (1) that in the petition only general charges of cruelty were made which the respondent could not be expected to meet, and while at the hearing the petitioner made allegations of specific instances of cruelty which he was not prepared for, and which he says are false; (2) the affidavit alleges the petitioner's adultery; but as this, if true, was known to the respondent before the suit was filed, this allegation affords no ground for review.

As to the charges of cruelty, the charges in the petition are sufficiently precise. See froms annexed to Indian Divorce Act, No. 7. The petitioner was entitled to give evidence of specific instances, although the petition only alleged cruelty generally: Pritchard's Digest, p. 272; *Waddell* v. *Waddell* (1). The respondent might have asked for particulars: *Hill* v. *Hill* (2). It is clear that in this case the respondent himself would not be entitled to a new trial. Here, by inducing his solicitor to apply to the Court, he attempts to get indirectly what he could not get directly. Neither the Indian Divorce Act nor the Civil Procedure Code enables a stranger to the proceedings to apply for a new trial or review.

I contend, therefore, that the rule for a new trial should be discharged, and that we should be allowed to move to make our decree absolute.

Then the question arises whether Mr. Turner can be permitted to show cause against the decree being made absolute. There appears to be no express decision on the point. There is no Queen's Proctor in India. In England any person can intervene as well as the Queen's Proctor. It is clear that neither in India nor in England could the respondent or co-respondent show cause: section 16 of Act IV of 1869 and section 7 of Stat. 23 and 24 Vict.,

(1) 2 Sw. & Tr. 584. (2) 31 L. J. P. & M., 193.

c. 144; *Stoate* v. *Stoate*.(1) The question, then, is whether they can do so indirectly merely by putting their solicitors in motion: *Clements* v. *Clements*(2). Mr. Turner is really the respondent under another name. The person intervening must be an independent third person: Brown on Divorce, p. 301; *Forster* v. *Forster*(3); see *Latour* v. *Latour*(4).

Hon. *F.L. Latham* (Acting Advocate General) for Mr. Turner.—In India unfortunately there is no Queen's Proctor. Mr. Turner applied both to the Advocate General and to the Government Solicitor; but both of them declined to intervene, on the ground that it was no part of their duty. There are two questions here: (1) whether the rule is in the right form; (2) whether Mr. Turner has a right to intervene and obtain the rule.

As to the first question, there are no rules under the Divorce Act yet published in India. In England there are rules; see Brown on Divorce, p. 571. The reason for permitting an intervenor at all, is merely to prevent the Court from acting on insufficient information. In England the Queen's Proctor can only intervene on the ground of collusion: *Latour* v. *Latour*(5). After decree *nisi* he acts merely as one of the public, and may be put in motion by any one, including the parties themselves. Counsel referred to English rules 70, 71, 72, 73, and 74, showing English practice. Under section 16 of Act IV of 1869 the intervenor may intervene at any time before the decree is made absolute. In *Pollack* v. *Pollack*(6) the Court did what we ask here, viz., to stay further proceedings until the parties appear. I submit the rule is in the right form.

(2) Then, can Mr. Turner intervene. He does not appear now as the respondent's solicitor. There being no Queen's Proctor in India there can be no more proper person to intervene than a solicitor who is an officer of the Court. No private person would be so meddlesome as to intervene. *Stoate* v. *Stoate*(7) goes no further than that a respondent may not intervene. In *Boulton* v. *Boulton*(8) the respondent and co-respondent put the Queen's Proctor in

(1) 30 L. J. P. & M. 173.
(2) 3 Sw. & Tr. 394.
(3) 3 Sw. & Tr. 151.
(4) 2 Sw. & Tr. 524.
(5) 2 Sw. & Tr. 524.
(6) 32 L. J. P. & M. 28; S. C. 2 Sw. & Tr. 310.
(7) 30 L. J. P. & M. 173.
(8) 2 Sw. & Tr. 405.

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motion. In that case Sir Cresswell Cresswell, although he had before him only the affidavits of the parties themselves, said: "I shall certainly not proceed until this matter has been cleared up." *Forster* v. *Forster*(1) is in our favour. *Dearing* v. *Dearing*(2) shows that the nearest relationship to a respondent does not disqualify a person from intervening. Counsel referred to *Bowen* v. *Bowen*(3); *Lautour* v. *HerMajesty's Proctor*(4).

BAYLEY, J.—In this suit the petitioner, Harriette Achesina King, by a petition declared on the 27th and filed on the 29th April, 1881, prayed that the Court would decree the dissolution of her marriage with the respondent, James Stewart King, a captain in the Bombay Staff Corps, then Acting Assistant Political Superintendent at Savantvadi, on the grounds of his adultery and cruelty towards the petitioner, and for an order that he should pay the costs of and incidental to such proceedings.

By a summons which was dated and sealed on the 5th May, 1881, the respondent was summoned to appear in the High Court of Bombay on the 27th June then following, and by it he was required to file a written statement of his defence, and serve a copy on the petitioner within four weeks from the service of the summons upon him, in default whereof it was stated that he was liable to have a decree or order passed against him *ex parte*.

The summons was duly served upon the respondent at Savantvadi on the 14th May, 1881, and by an endorsement thereon, bearing that date and signed by him, he thereby acknowledged to have received service of the summons.

By a warrant dated the 23rd May, 1881, signed by the respondent at Savantvadi he appointed Mr. Allan F. Turner, a solicitor of the High Court, his attorney to defend the suit, and that gentleman by a præcipe dated the 25th June, 1881, requested the Prothonotary to enter an appearance for the respondent in his name, but without prejudice to the respondent's right to plead to the jurisdiction. The warrant was filed in the office of the Prothonotary on the 25th June, 1881.

(1) 2 Sw. & Tr. 524.
(2) 2 L. R. 1 P. & D. 531.
(3) Sw. & Tr. 530 at p. 536.
(4) 10 H. L. C. 685 at p. 702.

By a præcipe dated the 25th June, 1881, consented to and signed by Messrs. Crawford and Boevey, attorneys for the petitioner, the respondent's attorney requested the Prothonotary to postpone the hearing of the suit from the 27th June then instant to the 11th July, 1881.

By a letter dated the 4th July, 1881, from the respondent's attorney to the attorneys for the petitioner he stated, in reply to their letter of that day, that he had not filed his client's written statement, and that he did not think the respondent intended to put in one; and he suggested, in order to save expense, that the attorneys for the petitioner should apply for a decree on motion for want of a written statement, adding that such a course would render two counsel unnecessary. On the 14th July, 1881, the sitting Judge in chambers, by an order of that date made upon reading the writ of summons and upon hearing the attorneys for the petitioner, ordered the Prothonotary to set down the suit, subject to any part-heard case on the board of causes, for Monday, the 25th July, 1881, which was accordingly done.

The suit was called on before myself for hearing and final disposal on the 26th July, 1881, when Mr. Inverarity and Mr. Jardine appearing as counsel for the petitioner, and the respondent being called, and not appearing either in person or by counsel, and upon reading the warrant to defendant filed on behalf of the respondent on the 25th June, 1881, and upon framing an issue and after hearing the evidence of the petitioner and other witnesses called on her behalf, the Court recorded its finding upon the issue in favour of the petitioner, and passed judgment for the petitioner, and ordered and decreed that, unless sufficient cause be shown why the decree should not be made absolute on or before the 26th January, 1882, the marriage had and solemnized on the 5th October, 1871, at St. George's Church at Dublin between the petitioner and the respondent be dissolved by reason of the respondent having, since the celebration thereof, been guilty of adultery coupled with such cruelty as without adultery would have entitled the petitioner to a divorce *a mensa et thoro*; and the Court further ordered and decreed that the respondent should pay to the petitioner her costs of and incidental to the

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suit and of and incidental to a petition for alimony filed on the 6th May, 1881, such costs to be taxed as between attorney and client.

The decree further states that, upon the motion of Mr. Jardine, counsel for the petitioner, who moved for an order upon the said petition for alimony, and Mr. Russell, counsel for the respondent consenting to the same, the Court, by and with such consent ordered that the respondent do pay to the petitioner or her attorneys, Messrs. Crawford and Boevey, as alimony for herself and her two minor children, Isabel Maud and Mabel Caroline, the monthly sum of Rs. 300 from the 26th July, 1881, and to continue to make such monthly payment on or before the 26th day of each succeeding month until that decree *nisi* be made absolute, or until the further order of the Court. And the Court further ordered that the petitioner do have the custody of the said two minor children until such decree be made absolute, or until the further order of the Court. The decree *nisi*, which was dated the 26th July, 1881, was sealed on the 11th August, 1881.

By a certificate of the Prothonotary, dated the 18th August, 1881, at the foot of the decree *nisi* it was certified that the sum of Rs. 1,042-4-6 had been allowed by the Taxing Master for the costs in the decree *nisi* mentioned payable by the respondent.

On the 1st October, 1881, Mr. Allan F. Turner, the respondent's solicitor, by warrant of that date appointed Messrs. Chalk and Walker, attorneys, to act for him as intervenor in this suit, and by præcipe dated the 3rd October, 1881, those gentlemen requested the Prothonotary to enter an appearance in their name on behalf of Mr. Allan F. Turner as intervenor. The warrant was filed on the last-mentioned day.

On the same day, the 3rd October, 1881, the Advocate General (the Hon. Mr. Marriott) moved before me on behalf of Mr. Allan F. Turner, as an intervenor under section 16 of the Indian Divorce Act (Act IV of 1869), for a rule calling on the petitioner to show cause why a new trial should not be had, and all further proceedings under the decree *nisi* dated the 26th July, 1881, should not be stayed.

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The application was made upon an affidavit of Mr. Turner, sworn and filed on the 3rd October, 1881, and upon an affidavit of the respondent sworn at Bombay and filed on that day, in which he stated that he had carefully read over Mr. Turner's affidavit, that the statements therein made were entirely true, and that exhibit A to Mr. Turner's affidavit was a true copy of the copy extracts which he made from an original letter mentioned in Mr. Turner's affidavit.

The most material facts alleged in Mr. Turner's affidavit are the following :—

That since the 26th July, 1881, he had been informed, and believed it to be true, that the petitioner had, prior to that date, committed adultery with a certain officer, whom he names, now holding a staff appointment in the Bombay Presidency, and whom, for brevity sake, I will hereafter designate as A.B., who was an intimate friend of the petitioner and respondent, and with whom the petitioner travelled on her return to India in February, 1881.

That the petitioner and A. B. arrived in Bombay from England in the P. & O. S. S. "Malwa" on the 1st March, 1881. He was informed that it had been previously arranged between the petitioner and the respondent that the former should leave Bombay for Vingorla on her way to Savantvadi by the B.I. S. N. Company's steamer which left on the following night, but instead of doing so she remained in Bombay, and stayed at the Esplanade Hotel until the 10th March, when she left for Vingorla by the S. S. "Rajputana". That he was informed that it was A. B.'s intention to leave Bombay for Mhow immediately on his arrival at Bombay; but, being required to give evidence at a certain court-martial, he found orders awaiting him to remain here, and that he as well as the petitioner resided at the Esplanade Hotel.

That he was informed by the respondent that, shortly after the petitioner's arrival at Savantvadi, he had reason to believe that she had a miscarriage; and, suspecting then for the first time that she had misconducted herself with A. B., he on the 26th March, 1881, intercepted a letter which she had written to A.B.,

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and had given to be posted, and after copying the relevant portions of the letter he posted the original to A. B. He annexed to his affidavit a copy of such portions of the letter, which is dated Savantvadi, 25th March, 1881. [His Lordship read extracts from a letter of the petitioner to A. B., and continued.] Such a letter, if genuine, would, I need scarcely say, be very material in an investigation whether the petitioner has misconducted herself with A. B. The letter needs no further comment from me at the present stage of the proceedings.

Mr. Turner's affidavit then proceeds to state *seriatim* the allegations in the petition and what the respondent has informed him by way of denial or by way of explanation in respect thereto; and, if what the respondent has told him be true, it is to be regretted that he did not put in a written statement, as he was ordered to do by the summons, and appear at the hearing and defend the suit.

In para. 24 of his affidavit Mr. Turner states that he was informed by the respondent that on the 10th April, 1881, the day the petitioner left the respondent's house at Savantvadi, and while the ayah was packing up the petitioner's things, the petitioner and respondent conversed together, and it was during that conversation and after he had shown her a copy of the extracts from the letter to A. B. that she confessed to having committed adultery with him between his arrival in England and her departure from Bombay to Savantvadi on the 10th March, 1881.

Mr. Turner in para. 10 of his affidavit says that on or about the 14th May, 1881, the respondent received through the post office a letter dated 17th October, 1880, written by the petitioner while in London to A. B., and addressed to him at Kandahar. The letter reached Kandahar after A. B. had left for England, and was sent back to the petitioner to her address in London, but as she had then left for India it was sent out to the respondent. A copy of the relevant portions of the letter was annexed to his affidavit.

The letter is written in warm and affectionate language. [His Lordship read the letter.] Mr. Turner says, in para. 25 of

his affidavit, that he was informed by the respondent that, when the petitioner told him, just before leaving him on the 10th April, 1881, that she was going to sue for a divorce, he did his best to induce her to accept a deed of separation, and that he renewed his efforts by letters two or three times after she had arrived in Bombay.

In para. 31 he states that he is informed by the respondent that the reason why he did not defend the suit was that he wished to avoid making public the fact of his wife's adultery, and thus injuring the prospects of his children.

In para. 32 he says that the respondent came to Bombay from Savantvadi on the 30th August last, (*i. e.*, more than a month after the date of the decree *nisi*), and it was from him after his arrival here that he heard for the first time of the petitioner's adultery. That he (Mr. Turner) consulted the Advocate General, and suggested that he should intervene as representing the Queen's Proctor in this country; but he was of opinion that he could not do so, as the duties of the Queen's Proctor did not belong to his office, and proposed an application to Mr. Hearn, the Government Solicitor and Public Prosecutor. Mr. Turner thereupon applied to Mr. Hearn; but he stated that he could not assume the position and duties of Queen's Proctor, because they do not belong to the offices which he holds under Government, and becausethey would involve expense for which no provision exists, and he annexed a copy of Mr. Hearn's letter to him, dated the 22nd September, 1881.

In the concluding para. (the 33rd) of his affidavit Mr. Turner submitted that, under the circumstances thereinbefore stated, the decree *nisi* made on the 26th July, 1881, ought to be reversed, or a new trial ordered, on the ground that the petitioner's adultery and the other material facts therein set forth were not brought before the Court.

The learned Advocate General while addressing the Court on the 3rd October 1881, in support of the rule *nisi* which he sought to obtain for the intervenor, Mr. Turner, stated that the respondent had been to him and to Mr. Hearn, but that each had declined to be considered as or in the light of the Queen's Proctor. He cited

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several cases decided in the Court in England for divorce and matrimonial causes, and also a short report of a case before Mr. Justice Phear in Calcutta in 1870—*Willis* v. *Willis* (1)—in which that learned Judge is reported to have said that he was inclined to think that the parties, against whom a decree *nisi* under the Indian Divorce Act was made, could not come in to show cause against it, and that it was only intended that any party other than the parties to the suit should do so.

Upon the above facts being thus brought to the notice of the Court I then granted a rule calling on the petitioner to appear and show cause, if any she had, on the 10th January, 1882, why the decree *nisi* made on the 26th July, 1881, should not be set aside and a new trial had, or why the Court should not make such order in the premises as the nature and justice of the case might require, and it was ordered that copies of the affidavits of Mr. Turner and the respondent filed on the 3rd day of October, 1881, be served with the rule upon the petitioner.

On the 10th January, 1882, the Acting Advocate General (the Hon. Mr. Latham) on behalf of Mr. A. F. Turner, the intervenor, moved absolute the rule *nisi* granted on the 3rd October, 1881.

The gentleman whom I have designated as A. B. appeared in Court in obedience to a *subpœna duces tecum* directing him to appear on that day and produce the original letter written to him by the petitioner, and dated the 25th and 26th March, 1881.

He was sworn and examined by the Acting Advocate General, and gave the following evidence:—

"I received a *subpœna* directing me to produce a letter from Mrs. King, dated the 25th and 26th March, 1881.

"I do not produce such letter.

"I have received letters from Mrs. King, but I cannot say whether I received one of that date or dates.

"I received letters from her after her arrival in India last year.

"I destroyed every one of them.

"I have not got one now in my possession."

Mr. Jardine then addressed the Court; but whether under instructions from Messrs. Crawford and Boevey, the solicitors for

(1) 4 Beng. L.R., O. C. J., 52.

the petitioner, or as *amicus curiæ*, I did not quite collect, and suggested that the petitioner, who had admittedly left India for Europe several months previously, had not received actual notice of the rule *nisi* of the 3rd October, 1881, or of the affidavits of Mr. Turner and the respondent filed on that day.

Messrs. Crawford and Boevey were and still are the attorneys on the record for the petitioner. Section 45 of the Indian Divorce Act enacts that, subject to the provisions therein contained, all proceedings under that Act between party and party should be regulated by the Code of Civil Procedure. That Code (Act X of 1877) by section 39 enacts that the appointment of a pleader (which word by the interpretation clause, section 2, includes an attorney of a High Court) to make or do any appearance, application or act should be in writing and be filed in Court, and when so filed should be considered to be in force until revoked with the leave of the Court by a writing signed by the client and filed in Court; and, by section 40, processes served on the pleader of any party or left at his office or ordinary residence relative to a suit, and whether the same be for the personal appearance of the party or not, shall be presumed to be duly communicated and made known to the party whom the pleader represents, and, unless the Court otherwise directs, shall be as effectual for all purposes in relation to the suit as if the same had been given to or served on the party in person.

The Court, however, having regard to the language of the rule *nisi* of the 3rd October, 1881, and feeling a doubt whether the petitioner had received in Europe actual notice of the same, and bearing in mind the novel character of the proceedings taken by Mr. Turner as intervenor, declined to make the rule absolute, and ordered that the time for showing cause against the rule *nisi* of the 3rd October, 1881, be extended to the 10th April, 1882. That copies of such rule *nisi* and of the affidavits therein referred to be served forthwith upon Messrs. Crawford and Boevey, solicitors for the petitioner, and that such service be deemed good service upon her, and it ordered that no application should be made to make absolute the decree *nisi* dated the 26th July, 1881, until after the disposal of that rule. The Court reserved all the costs of and incidental to such motion of the 10th January, 1882.

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On the 23rd February, 1882, Mr. Inverarity, by arrangement with the learned counsel for the intervenor, showed cause on behalf of the petitioner on a preliminary point against the rule *nisi* of the 3rd October, 1881, and incidentally against so much of the order made on the 10th January, 1882, as prohibits the petitioner from moving absolute the decree *nisi* dated the 26th July, 1881, until after the disposal of the rule *nisi* of the 3rd October, 1881, after which the Acting Advocate General (Mr. Latham) was heard on behalf of the intervenor.

Mr. Inverarity stated that, so far as he was aware, this was the first case of the kind, and that the questions were—1st, whether a person acting at the instance of the respondent can intervene at all? and, 2ndly, if he can intervene, whether he can do so as Mr. Turner had intervened in this case?

He contended that a third person has no power, under the Indian Divorce Act, to intervene by applying for a new trial, or by calling on the petitioner to show cause why a decree *nisi* should not be set aside; that, by section 16 of the Indian Divorce Act, a person not a party to the suit may show cause, but cannot initiate proceedings, and that the proper course for the person who intervenes to take is to file an appearance, and an affidavit in support of what he alleges, and then to appear and show cause when the petitioner moves the decree absolute.

He also contended that, under the Indian Divorce Act, a party—petitioner, respondent or co-respondent—cannot move for a new trial; that although under the English Matrimonial Causes Act of 1858, 21 and 22 Vict., c. 108, s. 18, the Judge Ordinary may grant a rule *nisi* for a new trial to be made absolute only by the full Court, in India such person can only apply for a review of judgment under section 623 of the Civil Procedure Code, which he must do within twenty or ninety days as provided by the Indian Limitation Act, 1877, 2nd Schedule, cl. 162 or 173; that here the respondent put in no written statement, and made no defence, and that had the case been tried in England there would have been no new trial granted on the application of the respondent himself; and Mr. Inverarity asked whether his solicitor could now make such application for him. He contended that

there is no provision in the Indian Divorce Act by which a person can apply for a review of judgment or a new trial through the instance of a third person; that the English decisions showed that an independent third person only could come forward and show cause against a decree *nisi* being made absolute; that, although there was no express decision on the point, Mr. Turner, as intervenor, was not entitled to show cause against the decree *nisi* being made absolute, and that it was clear, both in England and in India, that a respondent cannot show cause against such decree being made absolute, citing for such proposition *Stoate* v. *Stoate*(1) (decided in April, 1861,) where the Judge Ordinary, Sir Cresswell Cresswell, upon Dr. Swabey moving that the respondent might be allowed under section 7 of the 23rd and 24th Vict., c. 144, (from which section 16 of the Indian Divorce Act is taken) to show cause against the decree *nisi* for the dissolution of marriage, rejected the motion, saying "The respondent has no right, under that section, to show cause against the decree *nisi* being made absolute. She should have applied for a new trial."

Mr. Inverarity lastly contended that it was intolerable that the respondent, who had filed no written statement (which would have justified the Court in making, under section 113 of the Civil Procedure Code, a decree against him for want of a written statement), and who made no defence while his wife was in India, could now set up his attorney, and, through him, make a defence which he had never made himself when he had the opportunity of doing so; that the Court ought to hold that it was improper for Mr. Turner, as intervenor, to have taken out the rule *nisi* of the 3rd October, 1881; that no new trial could be moved for by any one, that the petitioner ought to be at liberty to move absolute the decree *nisi* of the 26th July, 1881, and that Mr. Turner ought not to be allowed to show cause against such decree *nisi* when the same is moved.

After considering the arguments used and the authorities cited by Mr. Inverarity, as well as the arguments used and the cases cited by the learned acting Advocate General, I will now proceed to state the conclusion at which I have arrived and the reasons therefor.

(1) 2 Sw. & Tr. 384.

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The points at issue turn principally upon section 16 of the Indian Divorce Act (Act IV of 1869), which is as follows:—[His Lordship read the section.] That section is in part copied, in part adapted or modified from section 7 of the English Matrimonial Act, 23 and 24 Vict., c. 144, which received the Royal assent on the 28th August, 1860. Section 7 of that Statute contains the following provision for the intervention of the Queen's Proctor:—[His Lordship read the section(1).]

These provisions for the intervention of the Queen's Proctor are not, it will be seen, introduced into the Indian Divorce Act. Mr. Macrae in his "Law of Divorce in India", published at Calcutta in 1871, says (p. 55) that the omission is one of considerable importance, as it gives no opportunity to intervene in cases in the High Court until after the decree *nisi*. It is true, says Mr. Macrae, that, before passing the decree, the Court may call any witnesses it pleases to enquire whether relief should be refused on any of the grounds specified in sections 13 and 14, and in certain cases it will always be expedient for the Court to examine at least the woman with whom adultery is said to be committed, but that it is evident that this power is not sufficient to meet numerous cases where the Court alone without a suggestion will not be able to raise the facts from which collusion may be proved. The omission, he says, is the more marked as the next section (sec. 17) contains ample provisions to enable persons to intervene during the progress of the suit where originally brought in a District Court, although it, on its side, is wanting in provisions to enable persons to intervene between the decree of the District Court, which is equivalent to a decree *nisi*, and the confirmatory decree

(1) "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 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."

of the High Court. Mr. Macrae states that, as this section stood in the original draft of the Bill, it gave full power to any person to intervene through the Advocate General at any time during the progress of the suit, but a difficulty as to who might be the proper person to represent the Advocate General or Queen's Proctor under the English Act in the various districts to which the Indian Act was to be made applicable, caused the section in question to be struck out by the Select Committee.

It is, I think, to be regretted that such provision was not retained in the section when the Indian Divorce Act received the assent of the Governor General on the 26th February, 1869. I held the office of Advocate General of this Presidency, but I have no recollection of having been consulted by Government during the progress of the Bill through the Legislative Council upon the subject of the Bill or of any of its intended provisions. I do not think that I should then have seen, nor indeed can I now see any reason why the provision as to the Advocate General intervening should not be applied, at least, to matrimonial causes brought, as was the present one, on the Original Side of the High Court. Had such provision been allowed to remain in the Bill, the difficulty which is felt in the present case would probably not have arisen, as I can scarcely doubt that, if the allegations made in Mr. Turner's affidavit and the extracts from the petitioner's letters had been duly brought to the Advocate-General's notice he would have thought it his duty to intervene for the purpose of bringing material facts before the Court, and relieve it from being misled by the petitioner, and from making a decree absolute under circumstances where the petitioner was not entitled to such a decree. Such was the course adopted by the Queen's Proctor in the case of *Latour* v. *Latour* (1), where that officer, two months after the decree *nisi*, filed a plea, and six months after the decree *nisi*, filed affidavits alleging that when the petitioner, General Lautour, presented his petition for the dissolution of his marriage, on the ground of his wife's adultery, he was and had been for many years cohabiting with a female other than the respondent, and habitually committing adultery with

(1) 2 Sw. & Tr. 524; S. C. 10 H. L. C. 625.

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her, to which affidavits none were filed in answer; whereupon the Judge Ordinary, Sir Cresswell Cresswell, upon motion by the Attorney General on behalf of the Queen's Proctor for a decree, reversing the decree *nisi* and after argument on behalf of the petitioner, rescinded the decree *nisi*, and dismissed the petitioner, and the House of Lords held he was right in so doing. As against so much of the rule *nisi* obtained on the 3rd October, 1881, by Mr. Turner as intervenor as calls upon the petitioner to show cause why the decree *nisi* should not be set aside and a new trial had, the cause shown must, in my opinion, clearly be allowed. The respondent himself could not have moved for a new trial, there being no provision for such a motion in the Civil Procedure Code (X of 1877). He could only have applied for a review of judgment under section 623 of that Code; but such application might possibly have been unsuccessful, as it is only to be granted to a person who from the discovery of new and important matter or evidence which after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason. Here the respondent admits his knowledge of his wife's adultery as early as the 10th April, 1881, before she left Savantvadi for Bombay and before she instituted the present suit.

The motion of the 3rd October, 1881, if it could be regarded in the light of an application for a review of judgment by or on behalf of the respondent, would be too late, not having been made within twenty days, the time fixed by the Indian Limitation Act, XV of 1877, Sch. 2, cl. 162, for an application by any person considering himself aggrieved by a decree for a review of judgment by a High Court in the exercise of its original jurisdiction.

Then, neither the Indian Divorce Act nor the Civil Procedure Code gives any power to a petitioner, respondent or co-respondent to apply for a review of judgment or new trial through the instrumentality of a third person. And, assuming that Mr. Turner had the power of applying for a review of judgment, his application on the 3rd October, 1881, was not made within the period prescribed by the Limitation Act. By section 12 of that Act, where a decree is sought to be reviewed, the time requisite for obtaining a copy of the

decree sought to be reviewed shall be excluded. The decree *nisi* dated the 26th July, 1881, was, as already stated, sealed on the 11th August, 1881, and from endorsements on the draft decree I see that notice of the decree was sent to Mr. Turner, and a copy of it was taken by him on the 1st August, 1881, from which day the twenty days within which an application for a review of judgment must have been made by are to run, and expired on the 21st August. The application, therefore, made by him on the 3rd October following was too late.

The rule *nisi* of the 3rd October also called on the petitioner to show cause why the Court should not make such order in the premises as the nature and justice of the case may require.

By section 16 of the Indian Divorce Act any person during the interval between the decree *nisi* and the making of it absolute (which is not to be less than six months from the pronouncing thereof) 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 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, and 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 require.

The High Court of Bombay has not as yet made any rules or orders under the above section, or under the provisions of section 62 of the Act, which gives authority to the High Court to make such rules under the Act as it may from time to time consider expedient, with power to alter and add to the same, provided such rules, alterations and additions are consistent with the provisions of the Act and the Code of Civil Procedure.

The powers given by the Indian Act and the procedure therein indicated must be strictly followed.

"Any person" may show cause, but, in my opinion, is not at liberty to initiate proceedings, as has been done by Mr. Turner in the present case.

I think, therefore, that this Court has not the power to make any order in the premises as asked in the rule *nisi* of the 3rd

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October last, and that such rule must on these preliminary points be discharged.

I will now consider the question, which was fully argued on the 23rd February last, whether Mr. Turner will be entitled to show cause against the decree *nisi* being made absolute.

That appears to depend upon whether Mr. Turner can be considered as being "any person" within the meaning of section 16 of the Indian Act, and, as such, entitled to show cause why the decree should not be made absolute by reason of a material fact not having been brought before the Court, viz, that the petitioner has during her marriage been guilty of adultery, in which case section 14 provides that the Court shall not be bound to pronounce a decree declaring such marriage to be dissolved if it finds that the petitioner has during the marriage been guilty of adultery.

The portion of section 16 which contains the provision as to any person being at liberty to show cause, and what the Court can do on cause being so shown, is copied almost *verbatim* from section 7 of the 23rd and 24th Vict., c. 144.

The decisions in England upon the corresponding portion of section 7 may, therefore, well be looked at to aid in the construction of section 16 of the Indian Act; and I find that, although there is no direct decision upon the point, there are expressions in some of the English authorities which seem to be in favour of treating the words "any person" as applying to some independent third party.

In *Clements* v. *Clements* (1) the head-note states—though the language which the Judge Ordinary is reported to have used scarcely goes to that extent—"*Semble*, that the Court will not act upon an intervention when satisfied that it is made at the instance of the respondent or co-respondent."

The Judge Ordinary said: "I am satisfied that, if James did intervene, he was virtually intervening for the respondent and co-respondent. *Stoate* v. *Stoate*(2) is an authority that they have no right to show cause against the decree being made absolute. Can they put forward a third person for that purpose? It is not

(1) 3 Sw. & Tr. 394. (2) 2 Sw. & Tr. 384.

necessary to decide that question, because I am satisfied, upon the affidavits, that James never interfered, and never intended to intervene. The decree, therefore, will be made absolute."

In *Forster* v. *Forster and Berridge* (1) during the course of the argument of Mr. Coleridge, Q. C., (now Lord Chief Justice of England) for the intervenor, upon his saying that he thought it right to inform the Court that the Queen's Proctor had been asked to intervene and had declined, and that Mr. Graham, the intervenor, was a personal friend of the co-respondent Mr. Berridge, the Judge Ordinary (Sir Cresswell Cresswell) asked: "Does he intervene at the instance of Mr. Berridge?" Mr. Coleridge said: "No." Upon which the Judge Ordinary said: "Does he swear that? I am rather curious to know how the fact is, although it is immaterial."

That passage was strongly relied upon by the Acting Advocate General on behalf of Mr. Turner.

Mr. Coleridge proceeded to say that the fact that Mr. Graham's motive for intervening was his personal friendship for Mr. Berridge, could not affect the decision of the Court upon the question whether there were good grounds for his intervention. Some motive must be acting upon the mind of every person not the public officer who intervened under the Statute, and Mr. Graham's motive was not a discreditable one. The Judge Ordinary said (p. 154): "It was the intention of the Legislature to allow an independent third person to intervene for the purpose of giving information to the Court which the parties themselves had wilfully withheld."

In *Lautour* v. *Her Majesty's Proctor* (2) the Lord Chancellor (Lord Westbury) in moving the judgment of the House said (p. 699):

"The question which arises is, whether the learned Judge in the Court below" (Sir Cresswell Cresswell) "had power, under the words of the Statute" (23 and 24 Vict., c. 144, s. 7), "to direct costs to be paid by the petitioner to the Queen's Proctor. The Queen's Proctor is not regularly a party to the suit. The Queen's Proctor becomes a party to the suit under the circumstances and in the manner defined by the Statute of the 23 and

(1) 3 Sw. & Tr. 151. (2) 10 H. L. C. 685.

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24 Vict., c. 144. Now that Statute has two objects: one to give to the whole of the public the power to give information to the Court in the interval between the decree *nisi* and the decree absolute, which should relieve the Court from being misled by the petitioner and from pronouncing a decree under circumstances where the petitioner is not entitled to such a decree. Another and a special power is contained in the section that where the Queen's Proctor has the power to intervene in a case of collusion, he may intervene and become a party to the suit to prove that case of collusion, and then, it says, that the Queen's Proctor shall be entitled to his costs.

"In the present case he intervened, and alleged not only a case of collusion, but alleged also the existence of material facts under circumstances contemplated in the first part of the clause, which circumstances had not been brought before the Court, and the Court made an order that he should give the particulars of those material facts. Those particulars were embodied in affidavits filed by the Queen's Proctor. But there was no attempt on his part to make out that case of collusion which was the subject of his first allegation. The Queen's Proctor, therefore, I submit to your Lordships, must be treated here as one of the public, coming in to bring before the Court material facts for the Court's information which had not been presented to it either by the petitioner or by the respondent.

"I must, therefore, submit to your Lordships that, in affirming this decree upon the merits, you will pronounce that that part of it which gave the costs" (to the Queen's Proctor) "was pronounced as in the exercise of a power with which the Court was not invested by the Statute, and that that part of the decree must be reversed."

Lord Chelmsford agreed both with regard to the merits of the case and also upon the question of costs.

A short extract from his judgment will suffice. It has an important bearing upon the position of the petitioner in the present case.

He said: "As to the decree itself, there can be no doubt that the fact of the adultery of the husband" (who was the petitioner) "after the divorce *a mensa et thoro* was a material fact of which the

Court ought to have been informed. It was properly admitted by Sir Hugh Cairns that the Queen's Proctor has the same right as any other of Her Majesty's subjects to inform the Court of any facts which upon the original hearing may have been withheld from it. Accordingly the Queen's Proctor intervening, affidavits were presented to the Court by which the adultery of the petitioner was clearly proved. Under these circumstances the learned Judge of the Divorce Court unquestionably, as it appears to me under the 31st section of the 20 and 21 Vict., c. 85, had a discretion to refuse a decree for a divorce, because the words are 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.' Now, adultery was proved during the marriage, and it appears to me to be a very wholesome exercise, by the learned Judge, of the discretion which he is invested with by the Act of Parliament to say that if a person who has obtained a divorce *a mensa et thoro* and who is contemplating a complete divorce cannot abstain in the interval, but will be guilty of adultery, he ought not to be permitted to obtain that which he is seeking for, and which undoubtedly he might have been entitled to, but for that intervening misconduct."

In *Boulton* v. *Boulton* (1), where, on application to make absolute a decree *nisi* for dissolution at the suit of the husband, it appeared that affidavits had been filed by the respondent which alleged the husband's bigamy and conviction thereof, the Judge Ordinary refused to make the decree absolute, and directed the Registrar to inform the Queen's Proctor that such affidavits had been filed, and permitted the petitioner to file affidavits in answer.

From the report of the case in the same volume at p. 638 it appears that the Queen's Proctor obtained leave to intervene and show cause against the decree *nisi* being made absolute, and filed pleas alleging the petitioner's bigamy and adultery. The petitioner filed a replication in which he admitted the bigamy and adultery charged by the Queen's Proctor.

Upon motion being made by counsel that, as sufficient of the facts pleaded by the Queen's Proctor were admitted by the

(1) 2 Sw. & Tr. 405.

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petitioner, the Court should reverse the decree *nisi* and dismiss the petition, the Judge Ordinary said: "A man guilty of bigamy who sues for a divorce must take the risk of the Queen's Proctor intervening. I have nothing to do with the conduct of the wife; it is the conduct of the husband that I have to deal with. The decree must be reversed, the petition dismissed, and the petitioner condemned in the costs of the intervention."

In *Bowen* v. *Bowen* (1) it was held that any person and the Queen's Proctor as one of the public may enter an appearance and file affidavits in opposition to a decree *nisi* being made absolute at any time before it is made absolute.

The Judge Ordinary said that the obvious intention of the Legislature was that, up to the last moment, an opportunity should be given to evrey person, and especially to the Queen's Proctor, of preventing a decree *nisi* for dissolution of marriage being made absolute if there were grounds for rescinding it.

On a subsequent day the Attorney General moved that the petition might be dismissed, the affidavits establishing that the petitioner had been living in adultery with one Sarah Hughes, and had had a child by her since the decree *nisi* was passed. Counsel for the petitioner said he could not resist the motion, and the Judge Ordinary rescinded the decree *nisi*, and dismissed the petition.

In *Drummond* v. *Drummond*, where the wife petitioned for dissolution by reason of the husband's cruelty and adultery, the husband did not appear; but the Queen's Proctor obtained the leave of the Court to intervene and pleaded collusion and adultery of the petitioner. At the hearing, evidence was given of the cruelty of the respondent and of the adultery of the petitioner subsequently to the filing of the petition. The Judge Ordinary dismissed the petition, saying that he thought that a wife guilty of adultery was not entitled to petition in that Court on the ground of any matrimonial offence committed by the husband.

Lastly, there is the opinion of Mr. Justice Phear in *Willis* v. *Willis* (3), in which case he said that he was inclined to think that

(1) 3 Sw. & Tr. 550. (2) 2 Sw. & Tr. 269.
(3) 4 Beng. L. R., O. C. J., 52.,

the parties, against whom a decree *nisi* was obtained, could not, under section 16 of the Indian Act, come in to show cause against it. That it was only intended that any party, other than the parties to the suit, should do so.

The above are the principal authorities upon the point now under consideration.

Mr. Macrae in his work on the "Law of Divorce in India" says, at p. 59, that the application to make the decree *nisi* absolute should be made on affidavits showing that there has been a recent search for an appearance by any person, and that there has been no appearance, or, if there has been an appearance, that no affidavits have been filed in opposition to the decree. Where the search had not been recent, the case of *Stone* v. *Stone* (1) shows that the Court in England refused to make the decree absolute, but directed a later search to be made, and the affidavit to be resworn.

In the present case an appearance was entered for Mr. Turner on the 3rd October, 1881, and the affidavits of that gentleman and of the respondent were sworn and filed on that day.

Boulton v. *Boulton* (2) shows that, upon an affidavit filed by the respondent, the Court refused to make the decree absolute until the matter was satisfactorily explained.

Section 16 of the Indian Act says that, "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"; and section 14 provides that the Court shall not be bound to pronounce a decree declaring a marriage to be dissolved if it finds that the petitioner has during the marriage been guilty of adultery.

The object of this Court is, of course, to do justice between the parties according to the provisions of the Indian Divorce Act; and by section 7 of that Act it is provided that, subject to the provisions contained in such Act, the High Courts shall in all suits and proceedings thereunder 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

(1) 3 Sw. & Tr. 113. (2) 2 Sw. & Tr. 405.

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for divorce and matrimonial causes in England for the time being acts and gives relief.

It would, of course, be of great assistance to the Court, in the further inquiry which must take place in this suit, if Mr. Turner were permitted to act as intervenor and to instruct counsel and *subpœna* witnesses for the purpose of enabling it to arrive at a conclusion as to whether or not the petitioner has during her marriage been guilty of adultery.

But, even if the Court felt that it would not be authorized by the existing law in allowing Mr. Turner to actively intervene and to show cause against the decree *nisi* being made absolute, it, is to my mind, clear that, with the affidavits filed by him in October last and now among the records of this Court, and which, according to *Boulton* v. *Boulton* (1), even the respondent had authority to file, and having regard to the extracts of the two letters said to have been written by the petitioner mentioned in and annexed to the affidavit of Mr. Turner, the Court would be bound to make further inquiry as to the alleged adultery of the petitioner as best it could,—the law officers of the Crown in this Presidency having declined to interfere in the matter, believing that they had no power to do so.

By the Indian Evidence Act, 1872, sec. 165, the Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties, about any fact relevant or irrelevant, and may order the production of any document or thing, subject to the provisions mentioned in that section. And by section 171 of the Civil Procedure Code the Court may of its own accord summon, as witnesses, strangers to the suit, and cause such persons to produce any documents in their possession. The new Code of Civil Procedure (Act XIV of 1882)—which contains the same number of sections (652) as the existing Code (Act X of 1877), and which received the assent of the Governor General on the 17th March, 1882, and which by section 1 is to come into force on the 1st June next, but by section 3 is not to affect any proceedings prior to decree in any suit instituted before the 1st June, 1882—contains in section 171 provisions similar to those in section 171 of the existing Code.

(1) 2 Sw. & Tr. 405.

Looking at the definition of "decree" in section 1 of that Act, it would not, I think, include a decree *nisi* under the Indian Divorce Act, as such decree *nisi* does not "decide the suit".

It will be a futile task for the petitioner or her legal advisers to endeavour to obtain from this Court an order making the decree *nisi* of the 26th June, 1881, absolute as long as the allegation that she has since her marriage committed adultery remains undetermined. Justice demands that further inquiry should take place, and, if she does not admit it, that the issue aye or no whether such adultery did take place, should be decided one way or other.

Mr. Inverarity spoke of the hardship which would be practised on the petitioner if the respondent, who filed no written statement and made no defence while she was in India, were allowed now to set up his attorney, and make a defence which he never made himself when he had an opportunity of doing so.

Mr. Turner in para. 31 of his affidavit states that he was informed by the respondent that the reason why he did not defend the suit was that he wished to avoid making public the fact of his wife's adultery, and thus injuring the prospects of his children, and (para. 32) that it was after the respondent's arrival in Bombay from Savantvadi on the 30th August last that he heard from him, for the first time, of the petitioner's adultery, whereupon he consulted the Advocate General and the Government Solicitor, with the result already noticed.

If the petitioner really did commit adultery as alleged, that most material fact was concealed from the Court, which made the decree *nisi* in her favour in the belief that she was a virtuous wife; and, to quote again the words of Sir Cresswell Cresswell in *Drummond* v. *Drummond* (1), "I think that a wife guilty of adultery cannot be a petitioner in this Court on the ground of any matrimonial offence of the husband." Notwithstanding the broad and unqualified language of section 16 of the Indian Act, the decision of the Judge Ordinary in *Bowen* v. *Bowen* (2) that any person and the Queen's Proctor as one of the public may enter an appearance and file affidavits in opposition to a decree *nisi* being

(1) 2 Sw. & Tr. 269. (2) 3 Sw. & Tr. 530.

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made absolute and so prevent a decree *nisi* for dissolution of marriage being made absolute if there were grounds for rescinding it; notwithstanding the refusal of the Judge Ordinary in *Clements* v. *Clements* (1) to decide whether a respondent can put forward a third person to show cause against a decree for dissolution of marriage being made absolute; and bearing in mind the language, already quoted, of Lord Chancellor Westbury and Lord Chelmsford in *Lautor* v. *Her Majesty's Proctor*(2) and the opinion expressed by Sir Cresswell Cresswell in *Forster* v. *Forster*(3) who, when he asked Mr. Coleridge whether Graham intervened at the instance of Berridge, the co-respondent, said he was rather curious to know how the fact was, although it was immaterial; and his subsequent statement, reported in the same page, that "it was the intention of the Legislature to allow an independent third person to intervene for the purpose of giving information to the Court which the parties themselves had wilfully withheld"—I am of opinion that Mr. Turner has not been able, either under the provisions of the Indian Act, or according to the principles and rules on which the Court for divorce and matrimonial causes in England has been in the habit of acting and giving relief, to discharge the burden which his action in this suit cast upon him, viz., of proving clearly to the satisfaction of this Court that it will be bound to allow him to show cause against the decree *nisi* being made absolute.

Upon the best consideration that I have been able to give to the matter I think the point, to say the least, is far too doubtful to justify me in allowing him to show cause when the proper time for doing so arrives. What little expression of opinion there is in the English cases appears to be against the right or the power of a respondent to put forward a friend to intervene on his behalf. *Clements* v. *Clements*(4) and *Stoate* v. *Stoate*(5) are a direct authority that a respondent himself has no right to show cause against a decree being made absolute. *Qui facit per alium facit per se* is an old maxim which has a very general application in legal and mercantile matters; or, to borrow the words of Tindal,

(1) 3 Sw. & Tr. 394.
(2) 10 H. L. C. 685.
(3) 3 Sw. & Tr. 154.
(4) 3 Sw. & Tr. 394.
(5) 2 Sw. & Tr. 384.

C. J., in *Cuming, Appellant; Toms, Respondent* (1)," I can see no reason why the maxim which is of almost universal application *qui facit per alium fact per se*, should not accommodate itself to this case."

In the present case I am of opinion that that which the respondent clearly cannot now do himself he cannot indirectly get his solicitor to do for him, such person being still his solicitor on the record. Serious inconveniences might follow and much injustice be done in this country to a petitioner if a respondent were to be allowed, several months after a decree *nisi* had been passed against him, to instruct his solicitor to make allegations against a petitioner which he himself with ample time and opportunity had abstained from bringing forward before the decree *nisi* was passed.

For the above reasons I shall feel compelled, when application is made to me to make the decree *nisi* absolute, to refuse to allow Mr. Turner, as intervenor, to show cause against it. But, as already stated, I shall decline to make that decree absolute until the point as to the alleged adultery of the petitioner since her marriage is cleared up.

The costs of Mr. Turner's intervention and the costs of and incidental to the rule *nisi* of the 3rd October, 1881, to the motion and order made on the 10th January, 1882, the costs of and incidental to the argument on the 23rd February, 1882, and of this day must be reserved.

Rule discharged.

23*rd April*, 1882. *Inverarity* for the petitioner moved to make absolute the decree *nisi* in this case made on the 26th July, 1881.

Lang appeared for the respondent to watch the case.

The following affidavit had been filed by Mr. Crawley-Boevey, partner in the firm of Messrs. Crawford and Boevey, the attorneys for the petitioner:—

"1. I did on Saturday, the 22nd day of April instant, carefully search the records in this suit.

"2. That, on making such search, I find that no appearance has been entered or any affidavits filed by any person to show cause

(1) 8 Scott's N. R. 830.

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against the decree *nisi* made therein being made absolute, save that an appearance was entered by Messrs. Chalk and Walker, attorneys for Allan F. Turner, as intervenor in this suit, on the 3rd day of October last, and that two affidavits were filed on his behalf.

"3. That on the 10th day of April instant this Honourable Court by an order of that date decided that the said Allan F. Turner cannot intervene in this suit, or show cause against the said decree *nisi* being made absolute, and I, therefore, submit that the said two affidavits are not properly on the file of this Honourable Court, and that they should be directed to be taken off the file.

"4. I say that no cause has been shown by 'any person', within the meaning of section 16 of the Indian Divorce Act IV of 1869, why the decree *nisi* which was passed in this suit on the 26th day of July last should not be made absolute, and I, therefore, submit, on behalf of the above-named petitioner, that the said decree *nisi* should be made absolute with costs."

Inverarity for the petitioner.—I contend that the petitioner is entitled to have the decree made absolute. No doubt there have been affidavits filed in which certain allegations have been made by Mr. Turner. But the Court has decided that Mr. Turner is not entitled to intervene: so the affidavits are no longer before the Court, and the Court must consider itself as ignorant of the matters therein stated. The Court cannot consistently decide, as it has done, that Mr. Turner had no right to intervene, and yet give effect to what he says. That would be practically to allow him to intervene while deciding that he had no right to do so. In order to justify the Court in refusing to make the decree absolute, cause must be shown in a certain prescribed manner. No cause has been thus shown, and, consequently, the petitioner is entitled to have the decree made absolute. The Court cannot take judicial notice of information given to it by a person not authorized to give it. It could not refuse to make absolute the decree upon information contained in a private letter addressed to the Judge or conveyed in a private conversation. Such communications would not be regarded as before the Court. Similarly, the affidavits in this case made by a person who has been declared by the Court incapable of intervening are *coram non judice*, and the

Court is judicially ignorant of what they contain. The case of *Pavey* v. *Pavey*(1), heard only three weeks ago in England, is a strong authority in favour of my contention. There the husband was the petitioner, and the respondent had not filed an appearance in the suit. She was, however, present when the case came on for hearing, and accused the petitioner of having committed adultery, and produced a letter which she said would prove it, but the Court refused to look at the letter. The petitioner's counsel was so ill-advised as to call the respondent as a witness, which gave an opportunity of proving the letters; but, if this had not been done, they could not have been used.

By the decree *nisi* the petitioner has been declared entitled to a divorce, unless cause be shown under section 16 of the Indian Divorce Act.

These affidavits must be disregarded. No cause has been shown, and the petitioner is entitled, under this section, to have the decree *nisi* made absolute. If this is refused, the decree *nisi* must remain on the record for ever. The Court cannot reverse the decree, nor can it order further inquiry; for by section 16, clause 3, that can only be done "on cause being shown", and that has not been done here. The Court cannot itself act as Queen's Proctor. There is no one in India to act in that

(1) The report of the case cited by counsel was contained in the *Times* Newspaper of the 26th March, 1882. The following is the report:—

PAVEY *v.* PAVEY AND SBAHN.

In this case evidence was given of the adultery of the wife, and there was no appearance for either her or the co-respondent; but the learned Judge said he had been informed that she was in Court, and asked whether that was so. The respondent having come forward, the President asked her whether she would like to be examined. She replied in the negative, and added: "I have no objection to a divorce. The sooner he gets it the better. He has been a rogue all through the piece. What I say is that he was cohabiting with other women before he left me, and here is a letter showing how he left me." The President, on this, observed that the respondent had not entered an appearance, and was not a witness, and he could not read the letter, which was not in evidence before him. But the learned counsel for the petitioner put the woman in the witness box, and asked her whether there was any collusion between her and her husband in respect of these proceedings. She replied that there was not, but added that her husband had deserted her, and she then handed in a letter written by him on the occasion of his leaving her. In his evidence he had stated

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capacity. In *Boulton* v. *Boulton*(1) the Court directed the information to be given to the Queen's Proctor, who thereupon might intervene if he pleased. That cannot be done here.

4th May, 1882. BAYLEY, J.—On the 24th April counsel for the petitioner in this case moved to make absolute the decree *nisi* for the dissolution of the petitioner's marriage with the respondent. In support of that application he read the affidavit of Mr. Crawley-Boevey, one of the firm of Messrs. Crawford and Boevey, who were the attorneys for the petitioner. [His Lordship read the above affidavit.] Counsel contended the affidavits which had been made by Mr. Turner should be taken off the file; that the Court could not look at them, or pay any attention to the statements contained in them; that there was, therefore, nothing before the Court which could be regarded as cause shown under section 16 of the Indian Divorce Act why the decree *nisi* should not be made absolute.

that he had left her in consequence of her misconduct, but allowed her through his mother 10*s.* a week for two years, when he heard of the adultery with which he now charged her. The letter handed in by the wife was, however, addressed to her as "Dear Tilly", and in it the petitioner announced affectionately that he was going in search of work, and would return in a few weeks.

The President said he did not doubt that the respondent's adultery was proved, and if he had to act only upon the evidence in respect of that, the petitioner would be entitled to a decree *nisi*; but by a witness whom counsel for the petitioner thought fit to call—namely, the respondet—it was now stated on oath, that the husband left her, as he confessed in a letter which she had handed in. That letter, which was his last communication to her, instead of bearing out his statement that he had left her in consequence of her misconduct, was written in affectionate terms, and stated that he was going in search of work and would be back in a few weeks. Instead of that, he never came back at all, and his wife did not hear of him for two years. That established desertion on the part of the petitioner. It was a misapprehension to suppose that the payment of money by way of allowance to a wife covered desertion. It was the duty of the husband, not merely to pay money to keep the wife alive, but also to give her the protection which his society alone afforded; and it was extremely likely that the woman, as she herself stated, had been thrown on her own resources in consequence of his desertion, and had by reason of that desertion thrown herself into the arms of another man. The facts as to this matter had been proved in a somewhat peculiar manner, no doubt; but they satisfied him that the petitioner was not entitled to a verdict, and the Court must, therefore, reject the petition.

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The case of *Pavey* v. *Pavey*, a report of which is contained in a recent copy of the *Times* Newspaper, was relied upon in support of the contention that the Court could not look at the affidavits to which I have referred. In that case it appears that the President of the Matrimonial Court in England refused to look at a letter produced by the respondent in Court, because she had not formally appeared at the hearing. I do not think, however, that that case is an authority for the contention here. In the present case both parties are formally before the Court. The petitioner has duly entered an appearance, and has given her evidence at the trial, and upon that evidence she has obtained a decree *nisi* which she now seeks to have made absolute. These circumstances, I think, distinguish this case from *Pavey* v. *Pavey*, and justify me in refusing to regard it as an authority applicable to the question now before me.

It was also contended that this Court is empowered to "require further inquiry" into matters which have been brought to its notice only where cause has been shown under the provisions of section 16 of the Indian Divorce Act. [His Lordship read the section.] That section is almost word for word the same as section 7 of the English Matrimonial Causes Act (Stat. 23 and 24 Vict., c. 144); and in *Boulton* v. *Boulton* (1), which was a case tried under that Statute, Cresswell, J., although he held that a respondent was not entitled to show cause against a decree *nisi* being made absolute, said: "Does it require any act of the Court to make a decree *nisi* absolute? If you ask me to make the decree absolute, I refuse to do so till this matter is satisfactorily explained."

Now, it is to be observed that the learned Judge in that case did not undertake to decide on the matters disclosed in the affidavits of the respondent, but he acted upon them to this extent. He said: "I will not make the decree absolute until these matters are explained." Accordig to Mr. Inverarity's argument, he ought to have ordered the affidavits to be taken off the file. He did not, however, do this, but he ordered the registrar to inform the Queen's Proctor that the affidavits had been filed in order that he

(1) 2 Sw. & Tr. 405.

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might inquire into the truth of the matters alleged. In doing this, and in refusing to make the decree absolute until the Queen's Proctor was communicated with, he was surely acting upon the affidavits, inasmuch as it was by reason of the allegations contained in these affidavits that he felt bound to refuse the motion then before the Court.

In the case of *Gray* v. *Gray* (1) an application was made by a petitioner to be allowed to take a petition off the file. In that case a wife had sued for a dissolution of marriage and had obtained a decree *nisi*. Subsequently, however, the Queen's Proctor intervened, and delivered pleas charging the petitioner with adultery. She then sought to have her petition taken off the file, and it was urged that it would not be for the interests of public morality that the details of such a case should be published. The Judge, however, refused the application, and said that he considered that public morality was concerned that a sham case founded on collusion should be exposed. The petitioner appealed, but the Court of Appeal (2) confirmed the order of the Court below; and Wightman, J., said :" It is apparently wholly in the discretion of the Court to permit such a step or not."

Now, this Court is bound, in cases like the present, to act upon the principles, and to be guided by the decisions of the Courts in England; and I find that in *Drummond* v. *Drummond* (3) the Judge said : " A wife guilty of adultery cannot be a petitioner in this Court, on the ground of any matrimonial offence of the husband." Keeping in view that statement of the law, we have to ascertain whether the petitioner in this case is entitled to the assistance of the Court. I am clearly of opinion—and I think *Boulton* v. *Boulton* (4) is an authority for the course which I am adopting—that I should not be justified in making this decree absolute until the very grave and serious charges which are made in these affidavits against the petitioner are cleared up.

Suppose a husband had obtained a decree *nisi* in a suit against his wife, and that he had been subsequently tried and convicted in this Court, under the Penal Code, of adultery committed

(1) 2 Sw. & Tr. 263.
(2) 2 Sw. & Tr. 266.
(3) 2 Sw. & Tr. 269.
(4) 2 Sw. & Tr. 405.

after his marriage. It is not unreasonable to presume that this Court would come to know, perhaps informally and indirectly, of the fact of his trial and conviction. If Mr. Inverarity's argument be correct, this Court would be bound to ignore the fact of such conviction, however notorious it might be; would be incapable of itself ordering inquiry into the matter; and would be bound at the end of the period prescribed by the Act, if no cause were formally shown under section 16, to make the decree *nisi* absolute. That, I think, can hardly be seriously contended. There is a case alluded to in Taylor on Evidence(1) in which a Judge acted upon information given to him in Court by a grand juror. "At York a grand juror, hearing a witness swear in Court contrary to the evidence which he had given before the grand jury, told the Judge, and the witness was committed for perjury to be tried upon the testimony of the gentlemen of the grand jury." The grand jury, I may remark, are sworn to secrecy(2). In this case, then, it appears that the Court acted upon information informally conveyed, and upon that information directed a criminal prosecution. That case is, in my opinion, an authority, if authority were needed, to justify me in requiring some investigation into the serious charges which have been made in these affidavits against a person who comes as a petitioner before this Court, and upon the merits of whose case I have to decide.

And I think further that, having regard to the fact that the Courts in India are without the assistance of a Queen's Proctor, they are bound to exercise, in cases like the present, more than ordinary caution. I consider that, in view of the allegations contained in these affidavits, the Court would be disregarding its plain and obvious duty if it now blindly made absolute the decree *nisi* which has been obtained in this case. I, therefore, am unable to do so at present. I am of opinion that further inquiry is necessary as to whether the petitioner has been guilty of adultery. That inquiry cannot be effectually made merely by requiring affidavits to be filed by the petitioner or on her behalf. Her simple denial would be of little value, and I think, therefore, that

(1) Vol. I. (ed. 1868), p. 833, note 1.

(2) 'The king's counsel, your fellows' and your own you shall keep secret.' See the oath in 4 Chitty's Criminal Law 183 (ed. of 1816).

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for the proper investigation of this case as it now presents itself, it is indispensably necessary that the petitioner should in person be present in Court for examination, and I accordingly make an order to that effect, and adjourn the case to the 4th August next.

Motion adjourned to 4th August next.

Attorneys for the petitioner.—Messrs. *Crawford and Boevey.*

Attorney for the respondent.—Mr. *A. F. Turner.*

TESTAMENTARY.

Before Sir M. R. Westropp, Kt., Chief Justice, and Sir C. Sargent, Justice.

1880
September 10.

IN THE MATTER OF THE LAST WILL AND TESTAMENT OF HAJI ISMAIL HAJI ABDULA, CUTCHI MEMON MAHOMEDAN, DECEASED.

Probate in cases not governed by the Indian Succession Act—Power of High Court to grant probate in such cases—Probate to take effect throughout India—Limited probate—Probate duty—Cutchi Memon Mahomedan—Succession Act X *of* 1865, *Section* 331—*Act* XIII *of* 1875—*Hindu Wills Act, Section* 2—*Act* XX *of* 1841—*Act* XXVII *of* 1860, *Section* 18—*Court Fees Act* VII *of* 1870, *Schedule I, Article II.*

In cases not governed by the Indian Succession Act (X of 1865), probates and letters of administration granted by the High Court of Bombay in respect of Hindus, Mahomedans and other persons not usually designated as British subjects take effect only, and can only be granted, for the purpose of recovering debts and securing debtors paying the same, except so far as is otherwise provided in Act XXVII of 1860; and probate duty is only payable on the amount of such debts.

Cutchi Memons are not Hindus within the meaning of section 2 of the Hindu Wills Act (XXI of 1870), and, therefore, probate to take effect throughout India cannot be granted in the case of a will of a Cutchi Memon testator.

Cutchi Memons are Mahomedans to whom Mahomedan law is to be applied, except when an ancient and invariable special custom to the contrary is established.

THIS was an application for probate. The applicants were Haji Ahmed Haji Abdula and Haji Hussan Haji Abdula, brothers of the deceased, who in his will had nominated them together with a third brother (who had predeceased the testator) as his "trustees and executors".

The testator, who was a Cutchi Memon, died on the 16th June, 1878, leaving a widow, two sons, two daughters, and three grandsons him surviving. His will was dated the 19th February, 1878, and by it he disposed of all his property, which amounted to