MATRIMONIAL JURISDICTION.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Chandavarkar.

NUSSERWANJEE PESTONJEE ARDESIR WADIA, APPELLANT AND RESPONDENT, *v.* ELEONORA NUSSERWANJEE PESTONJEE ARDESIR WADIA, RESPONDENT AND PETITIONER.*

1913. *March* 28.

Indian Divorce Act (IV of 1869) sections 2, 4, 7 and 45—High Courts Act 24 and 25 Vict., cl. 104, section 9—Amended Letters Patent of the Bombay High Court, clause 35—Restitution of conjugal rights—Jurisdiction of the Bombay High Court to entertain a suit for the restitution of conjugal rights as against (a) a non-Christian respondent and (b) a respondent not residing within the Presidency—Principles and Rules of English Court for Divorce and Matrimonial Causes acted on in India—Refusal of Court to grant relief by restitution of conjugal rights when the respondent is absent from the jurisdiction when the suit is instituted and remains absent—Civil Procedure Code (Act V of 1908), section 20 (corresponding to Act XIV of 1882, section 17), applicability of to matrimonial suits—Residence, what amounts to in order to give the Bombay High Court jurisdiction to pronounce a decree for the restitution of conjugal rights—Costs of unsuccessful petition by wife, rights of the petitioner's solicitors over monies deposited in Court by the respondent as security for the petitioner's costs and over monies deposited by a respondent-appellant as security for the costs of the appeal.

The respondent, a Parsi, married the petitioner, a Christian, in London. Subsequently the parties lived together for some time in London and then came out to Bombay where they also lived together for some time. Afterwards the parties returned to England but, apparently owing to differences which had arisen between them, immediately on their arrival in London, at Victoria Railway Station, the respondent deserted the petitioner and never thereafter lived together again, the respondent having made up his mind about that time that he could not live with the petitioner. The respondent remained in England but the petitioner returned to Bombay with the intention of taking legal proceedings against the respondent there and did sue the respondent in the Bombay High Court claiming restitution of her conjugal rights.

Held, that under section 9 of the High Courts Act and clause 35 of the Amended Letters Patent of the Bombay High Court the jurisdiction exercised by the High Court in matrimonial matters previous to the coming into force of the Indian Divorce Act had been confined to matters between British subjects professing the Christian religion.

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Held, further, that as regards the jurisdiction confirmed to the Bombay High Court by section 4 of the Indian Divorce Act (which included jurisdiction to entertain suits for the restitution of conjugal rights) the powers of the Bombay High Court were still limited to Christian subjects within the Presidency so that the High Court had no jurisdiction to grant a decree of restitution either against a Parsi respondent or against any respondent not within the Presidency.

Held, further, that following the principles on which the Courts for Divorce and Matrimonial Causes in England have acted and given relief, which principles are made applicable in India under section 7 of the Indian Divorce Act, the Bombay High Court could not give relief by way of restitution of conjugal rights if the respondent named in the petition were absent from the jurisdiction at the time the suit was instituted and remained absent, although residence at the date of the suit of both spouses, whatever their domicil might be, would be sufficient to give jurisdiction in suits of this nature.

Firebrace v. *Firebrace*[(1)], *Chichester* v. *Chichester*[(2)] and *Armytage* v. *Armytage*[(3)], followed.

Semble, in the case of matrimonial offences including those other than adultery the application of the Civil Procedure Code, section 20 (corresponding to section 17 of Act XIV of 1882) under section 45 of the Indian Divorce Act involves the necessity of either residence on the part of the defendant or the accrual of the cause of action within the jurisdiction in order to enable the Court to entertain the suit.

Thornton v. *Thornton*[(4)], referred to.

Semble, also, that mere residence in India at the time of the institution of a suit is not residence within the meaning of section 2 of the Indian Divorce Act and that the residence of the petitioner should be *bonâ fide* and not casual or as a traveller.

Held, however, that monies deposited by a husband respondent as security for his wife's costs of a petition constituted a fund paid in for the benefit of her attorney who was entitled to have it applied for his benefit whatever the result of the petition, provided that he had been in no way to blame and that that rule applied to monies deposited by a respondent appealing from the decision of the lower Court as security for the costs of the appeal in accordance with the Rules of the Bombay High Court.

ON the 4th of August 1911 the respondent, a Parsi, married the petitioner, who professed the Christian religion, by license at the Marriage Register Office in the

(1) (1878) 4 P. D. 63.
(2) (1885) 10 P. D. 186.
(3) [1898] P. 178.
(4) (1886) 10 Bom. 422.

District of Kensington in the County of London before the Registrar and Deputy Superintendent Registrar of Marriages of the said district.

After the marriage they lived together at the Albany Hotel and at the Grosvenor Hotel in London until early in October 1911, when they sailed for India reaching Bombay *viâ* Colombo and Madras. On arriving at Bombay the petitioner and the respondent stayed at the Majestic Hotel and afterwards at the Taj Mahal Hotel at both which hotels the petitioner was unwell and they also visited Poona where they stayed at a house of the respondent's father, a brother of the respondent, Cursetji by name, being also present, after which the petitioner and respondent returned to the Majestic Hotel at Bombay. During their stay in Bombay it became clear to the petitioner that the marriage of the respondent to the petitioner was the cause of serious disagreement between the respondent and his family and whether for this or other reasons some coldness seems to have arisen between the petitioner and the respondent. Eventually the petitioner and the respondent, together with the respondent's brother Cursetji, returned to England and arrived at Victoria Station on the evening of the 19th of February 1912, and while at Victoria Station the petitioner and respondent became separated under circumstances as to which contradictory versions were given in the pleadings and never lived together again.

Correspondence then ensued between the parties which however failed to effect a reconciliation and finally the petitioner, in the apparent belief that the respondent would shortly be returning to Bombay, herself came to Bombay, where she landed on the 10th of May 1912, her intention being to renew her request that she should rejoin the respondent, or failing in this to institute such proceedings as she might be advised.

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After her arrival in Bombay the petitioner filed a petition in the High Court at Bombay in which she accused the respondent *inter alia* of having deserted her at Victoria Station and prayed that it should be decreed that the respondent should take the petitioner home and receive her as his wife and render her conjugal rights and that he should be ordered to pay to the petitioner such alimony pending suit as might be deemed just. The respondent filed a written statement to the petition in which he accused the petitioner of cruelty and other offences and denied that he had deserted her at Victoria Station. The respondent however admitted that by the 23rd of February 1912, he had finally made up his mind that he could not live with the petitioner. The respondent further submitted that the Bombay High Court had no jurisdiction to try the petition or that the petitioner was *bonâ fide* residing within the jurisdiction of the Court.

The petition was tried in the first instance before Mr. Justice Macleod who gave the following judgment.

MACLEOD, J. :—This is a petition for restitution of conjugal rights. The petitioner alleges that on the 4th August 1911 she was married to the respondent by license at the Marriage Register Office in the District of Kensington in the county of London. That she professes and at the date of marriage professed the Christian religion. That the respondent was and is still a Parsi. That the petitioner and respondent lived together after the marriage and early in October 1911 sailed for India. They arrived in Bombay about the end of October and except for a short visit to Poona stayed in Bombay until the 3rd February 1912 when they again sailed for Europe. On their arrival at Victoria Station the petitioner alleges that she went with the respondent's consent to despatch a message to her mother and that on her return to where she had left the respondent on the

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platform he had disappeared. On the 23rd February 1912 the petitioner got a notice from the respondent's solicitor to the effect that he did not intend to return to her but wished to provide her with such maintenance as he might be able to afford. Thereafter correspondence took place but no satisfactory settlement could be arrived at and eventually the petitioner left for India on the 19th April.

The petition was filed on the 27th June. The respondent has filed a very lengthy written statement. He contends that this Court has no jurisdiction and without prejudice to that contention he goes on to make various allegations in paragraps 2 and 8 which appear to be of little importance considering that in paragraph 9 he admits that by the 23rd February 1912 he had finally made up his mind that he would not live with the petitioner.

In the subsequent paragraphs 10 and 17 he gives the reasons which he alleges justified his refusal to live with the petitioner. On the 19th October the respondent obtained a summons for the issue of a commission to examine certain witnesses including himself in England. On the 11th November an order was made in Chambers on the summons that it should stand over till the hearing and petitioner's solicitor undertook that in the event of the summons being refused he would consent to an adjournment of the hearing for a week from the date of such refusal.

The suit came on for hearing before me on the 30th December and the following issues were raised by Mr. Setalwad, respondent's counsel :—

1. Whether the Court has jurisdiction to try this suit.

2. Whether the respondent has refused to live with the petitioner as alleged in paragraph 9 of the petition.

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3. Whether respondent is not justified in refusing to live with the petitioner by reason of—

(*a*) Antenuptial incontinence not known to the respondent.

(*b*) Cruelty on the part of the petitioner.

Mr. Weldon for the petitioner objected to issue 3 (*a*) on the ground that antenuptial incontinence could not be pleaded in answer to a suit for restitution of conjugal rights, and referred to section 33 of the Indian Divorce Act :—

"Nothing shall be pleaded in answer to a petition for restitution of conjugal rights which would not be a ground for a suit for judicial separation or for a decree of nullity of marriage."

The grounds for a suit for judicial separation are (1) adultery or (2) cruelty or (3) desertion without reasonable excuse for two years or upwards.

The grounds on which a decree for nullity may be made are set forth in section 19 of the Act. Antenuptial incontinence is not mentioned in that section. It seems obvious, therefore, that the defendant under section 33 cannot plead antenuptial incontinence in answer to this petition and that the portion of paragraph 17 of the written statement under heading A and also paragraph 10 contain allegations clearly barred by section 33.

Mr. Setalwad argued that under section 32 the petitioner must prove that the respondent had withdrawn from her society without reasonable excuse and that he was entitled to cross-examine the petitioner with the object of showing that the respondent had reasonable excuse for leaving her apart from having grounds for doing so within the meaning of section 33.

The answer to this argument is that the onus of proving reasonable excuse for withdrawing from his

wife's society lies on the respondent and it is not for the petitioner to prove that he had no reasonable excuse for his conduct. The law enacted by the Indian Divorce Act does not differ materially from divorce law in England.

In *Yeatman* v. *Yeatman*[1] there was a petition for judicial separation on the ground of desertion without reasonable cause for two years and upwards. At page 491, Lord Penzence, the Judge Ordinary said : "Now, it must be borne in mind that, according to the matrimonial law of this country, which the Divorce Acts have not affected to touch on this head, nothing will justify a man in refusing to receive his wife, except the commission of some distinct matrimonial offence such as adultery or cruelty, upon which the Court could found a decree of judicial separation. And that in all other cases, no matter what her conduct, she can always claim a decree enforcing co-habitation."

It had been repeatedly enunciated in the Ecclesiastical Courts that nothing could be pleaded as a bar to a suit for restitution of conjugal rights which could not be a ground for a divorce *a mensâ et toro* in *Burroughs* v. *Burroughs*[2]. No doubt if the petitioner had been suing for a judicial separation on the ground of desertion without reasonable excuse for over two years, the respondent could have pleaded on the authority of the English cases cited in note (*m*) at page 481 of Volume 16 of Halsbury's Laws of England that he was justified in deserting the petitioner on grounds other than those of adultery or cruelty, but in India it is a different matter when the petitioner is suing to enforce co-habitation and it was so in England until the passing of the Matrimonial Causes Act of 1884. By section 5 of that Act a party who has obtained a decree for restitution of conjugal

(1) (1868) 1 P. & D. 489. (2) (1861) 30 L. J. Mat. 186.

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rights can if the other party refuses to comply with the decree, at once sue for a judicial separation on the grounds of desertion without reasonable cause.

In *Russell* v. *Russell*(1) it was held by the Court of Appeal that the section gave the Court in a suit for restitution of conjugal rights a power to refuse a decree which it had not before and that, therefore, the Court could allow a respondent greater latitude in justifying his or her conduct in refusing co-habitation. The reason given was that otherwise a petitioner who had obtained a decree for restitution of conjugal rights could, if it was not complied with, get a judicial separation without the respondent being able to rely on grounds which would have been a sufficient answer if a petition for judicial separation had been originally filed under section 16 of the Matrimonial Causes Act of 1857. The *ratio decidendi* makes it clear that the decision in *Russell* v. *Russell*(1) which was relied on by Mr. Setalwad does not apply to a petition for restitution of conjugal rights under the Indian Divorce Act.

If section 32 had stood alone, it would have been open to the respondent to justify his conduct by proving any reasonable excuse, such as would have been an answer to a suit for judicial separation on the ground of desertion. But section 33 makes it quite clear that there was no intention on the part of the Indian Legislature to make such a complete departure from the matrimonial law of England as it existed in 1868. The onus being on the respondent he cannot plead anything which would not be a ground for a suit for judicial separation, that is to say, adultery or cruelty on the part of the petitioner or desertion of him by her without reasonable excuse. If his pleading is limited to those grounds anything outside them is irrelevant. Mr. Setalwad

(1) [1895] P. 315.

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relied on a passage in Rattigan on the Indian Divorce Act in which the learned author suggests that though a respondent is limited as to his pleading still he can put the petitioner to the proof that his withdrawal was without reasonable excuse and that the petitioner can be cross-examined as to matters which led to the withdrawal but the learned author appears to have omitted to realise that the onus of proving reasonable excuse is on the respondent, that section 33 defines what excuse he can plead and outside those there can be no questions at issue on which cross-examination of the petitioner could be relevant. In *Mason* v. *Mason*[1] in a petition for restitution of conjugal rights it was held by Butt, J., that evidence of prenuptial incontinence was inadmissible as irrelevant to the question of issue, though it might now be relevant in England under the decision in *Russell* v. *Russell*.

Assuming for a moment that the petitioner admitted in cross-examination all that the respondent has alleged in his written statement, that would in no way affect her rights to a decree. But there is no reason why the Courts should allow cross-examination which can in no way affect the merits of the case. In my opinion sections 32 and 33 must be read together and section 33 must be taken to define the limits of what is a reasonable excuse in section 32.

I, therefore, struck out issue 3 (*a*).

The issues having been settled I dealt first with the first issue regarding jurisdiction. Section 2 of the Indian Divorce Act gives the Court jurisdiction only in cases when the petitioner professes the Christian religion and resides in India at the time of presenting the petition. It is not disputed that the petitioner professes the Christian religion and was living in Bombay at the time

(1) (1889) 61 L. T. 304.

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the petition was presented. Mr. Setalwad did not suggest that the petitioner had any permanent residence out of India but argued that she could not be held to reside in Bombay as she only came to Bombay for the purpose of filing the petition.

He relied on a passage in Rattigan's Law of Divorce in India at page 6: "But, although for the purposes of Indian Municipal Law, mere 'residence' in India is sufficient, it is submitted that such residence must be at least *bonâ fide* and not that of a mere casual traveller. Nor must it be a merely colourable residence for the purpose of obtaining relief under the Act." The Act does not define the word "reside". To "dwell" is to "reside". There is no distinction between residing and dwelling used in its ordinary signification. The decision which has been arrived at in affixing a meaning to the one word would be a safe guide in determining the meaning to be attached to the other. See per Farran, J., *Shri Gosvami* v. *Shri Govardhanlalji*[1].

In *Fernandez* v. *Wray*[2] the defendant arrived in Bombay from Kolapur on his way to England on the 7th March. The plaint was lodged on the 8th March and the defendant sailed on the 10th. The plaint was rejected by Russell, J., for want of jurisdiction under clause XII of the Letters Patent, but this decision was reversed on appeal. Jenkins, C. J., said "Ordinarily no doubt it would not be said that a man remaining here for so short a time was dwelling here but that is because he would ordinarily have a permanent dwelling or residence elsewhere. The cases show that *primâ facie* a man may be said to dwell where he is now staying at any particular time, but it is open to him to show that he is not dwelling there but at some other place."

(1) (1890) 14 Bom. 541 at p. 547. (2) (1900) 25 Bom. 176.

Tyabji, J., said "I think that the words 'reside' and 'dwell' have a narrow or more extended meaning according to the intention of the Legislature in the various Acts in which they occur. For the purpose of jurisdiction I think the authorities establish that, if a person has no permanent residence he may be said to dwell wherever he may be found." No doubt that was a case of a defendant seeking to avoid the jurisdiction of this Court while the petitioner here is claiming that the Court has jurisdiction to give her relief, but there cannot be one meaning attached to the words "reside" or "dwell" for a defendant who says he does not reside or dwell within the jurisdiction and another for a plaintiff who claims relief because he does reside or dwell within the jurisdiction, so that as far as I can see the dicta above-quoted must apply to this case. There have been decisions under the Indian Insolvent Act to the effect that a petitioner who came within the jurisdiction of a Court for the relief of insolvent debtors merely for the purpose of filing his petition could not be said to reside within the jurisdiction within the meaning of the Act but in all those cases the petitioner was proved to have a permanent residence outside the jurisdiction.

All that the Divorce Act requires is that the petitioner should reside in India at the time of presenting the petition. If she had a permanent residence out of India it might be argued that she resided there and not in India but as I have already stated there has been no attempt even to suggest that she has such a residence.

Therefore she is either debarred from residing anywhere which is absurd or as laid down by Jenkins, C. J., she resides where she is staying at any particular time. Ordinarily she would reside with her husband but as he admittedly refused to allow her to live with him, she is cast adrift to reside where she can. With all respect for the learned author quoted by Mr. Setalwad it is not

a question of *bonâ fide* or colourable residence whatever those words may mean but whether there is residence within the meaning attached to that word by the authorities.

I do not think it can be disputed that the petitioner came to Bombay in order to file her petition, but that could only be material if she had a permanent residence out of India. Under the circumstances Bombay would be the best place for her to seek relief. *Primâ facie* the respondent is domiciled in India, according to him the visit to Europe in 1912 was made owing to the importunity of the petitioner but without any prospect of his getting employment or settling down in England. I don't say that the domicile of the respondent affects the question of residence, but if the petitioner had stopped in England and filed a petition there it is not unreasonable to suppose that the respondent would have returned to India. A petition for restitution of conjugal rights is not filed for the purpose of obtaining that relief but merely as a step towards obtaining permanent alimony. In *Marshall* v. *Marshall*[1] Sir James Hannen said: "And I must further observe that so far are suits for restitution of conjugal rights from being in truth and in fact what theoretically they purport to be, proceedings for the purpose of insisting on the fulfilment of the obligation of married persons to live together, I have never known an instance in which it has appeared that the suit was instituted for any other purpose than to enforce a money demand."

The petitioner might think not unreasonably that she had a greater chance of ultimate success by proceeding in India rather than in England. Mr. Setalwad relied on a letter written by the petitioner to her English

(1) (1879) 5 P. D. 19 at p. 23.

solicitor on the 8th March 1912. That was a private letter which strange to say petitioner's solicitor sent on to the respondent's solicitor in clear breach of his duty to his client. Petitioner wrote "should I endeavour to help myself in England from all I know of the people I have to deal with they would use their usual method of 'slipping of'. Therefore I am utterly determined to go to India as soon as the necessary arrangements for my going and remaining there the necessary time, etc., are completed." But whether she intends to leave Bombay or stop in Bombay after the proceedings have terminated seems to me quite immaterial. I read the Act as it stands: if the petitioner is not residing in Bombay she is not residing anywhere, and to hold that would be a denial of justice. I, therefore, held that the Court had jurisdiction to try the case. The marriage was admitted and as the respondent in his written statement admitted that he refused to live with his wife there was no necessity to deal with the second issue. The only issue, therefore, which remained to be tried was issue 3 (*b*) whether the petitioner had been guilty of cruelty which would entitle the respondent to obtain a judicial separation. It then became necessary to deal with the respondent's summons for a commission.

The witnesses whom the respondent wished examined are set forth in the affidavit of Mr. Batliwalla, managing clerk of respondent's solicitors, sworn on the 19th October.

They were to give evidence on matters which I have held to be irrelevant and therefore no commission could issue for the examination. I then considered whether a commission should issue for the examination of the respondent.

I declined to make such an order in the case of a respondent who alleged cruelty by his wife to himself,

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especially when the application was supported only by an affidavit of a managing clerk. In such a case it was very desirable that the respondent should be before the Court unless very good grounds were shown for his inability to attend. That had not been done.

I then offered to adjourn the hearing so as to give the respondent an opportunity of giving evidence before me and Mr. Setalwad said that the respondent would not attend. It would then have been possible to pass a decree in favour of the petitioner but Mr. Setalwad asked for a week to consider his position and referred to the undertaking given by Mr. Crawford to the Judge in Chambers at the argument of the summons. I therefore adjourned the suit for a week. When the suit came on again for hearing on the 7th December Mr. Inverarity appeared for the respondent with Mr. Setalwad. Apparently advantage was taken by respondent's solicitors of the fact that Mr. Inverarity had only arrived from England the day before to instruct him that nothing had been decided on the 30th of November except the discharge of the summons for a commission since Mr. Inverarity contended that he was entitled to argue afresh all the issues which I had decided on the 30th of November, on the grounds as far as I could gather that if anything had been decided it was only for the purpose of determining whether or not a commission should issue on the summons of the 19th October. A perusal of my notes of what occurred on the 30th November would have made it clear what had been done. Whether I was right or wrong was quite a different question. The suit was called on for hearing and issues were raised according to the provisions of the Civil Procedure Code. The question of jurisdiction had to be decided in the suit and not on the summons, since it was obvious that if the Court had no jurisdiction there was an end to the proceedings, and the summons

was adjourned to the hearing in order that the question of jurisdiction might be decided first. The suggestion that I had decided that question only on the summons was not founded on fact. My notes show that the pleadings were read and issues were then raised by respondent's counsel. I was not asked to limit the issues for the purpose of deciding the summons and if I had been I should have declined to do so as contrary to correct procedure and opening the way to the absurd possibility of the Court granting the summons because it had jurisdiction; then rejecting the petition because it had no jurisdiction. Orders in interlocutory proceedings may be made before the hearing on the assumption that the Court has jurisdiction to try the suit, but the object of adjourning this summons to the hearing was to enable the Court first to decide the question of jurisdiction in the suit. An application for a Commission to examine a witness is merely an application that the evidence of a witness should be taken in a particular way. It is made before the hearing as a rule, in order to save time: when the application is adjourned to the hearing the Court is in a better position to decide whether it should be granted when the time comes for examination of the witness supposing he were present in Court. If Mr. Setalwad had continued to conduct the case, it would have been quite impossible for him to have adopted the course taken by Mr. Inverarity. Mr. Setalwad must have known perfectly well what was being done at the first hearing, he raised no objection and gave me no notice whatever that an attempt would be made, when the suit came on for hearing again, to re-open the discussion on the issues which had been decided, on the ground that they had been decided for a limited purpose. He accepted my findings and merely asked for time to consider his position before the Court passed a decree. The respondent admitted the marriage, admitted the

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petitioner was residing in Bombay (though he contended she was not residing *bonâ fide*), admitted that he had refused to live with the petitioner and informed the Court through his counsel that he had no intention of appearing in Court to give evidence to support his plea of cruelty. The Court was therefore perfectly competent to pass a decree in favour of the petitioner, but Mr. Weldon put his client in the box *pro formâ* to deny the allegations of cruelty contained in paragraph 17B of the written statement and I directed that though the marriage was admitted, the marriage certificate should be put in.

Mr. Inverarity then cross-examined the petitioner at considerable length, about the last voyage to Marseilles and London, and the correspondence that took place between the parties and their respective solicitors in London. The greater part of this evidence was irrelevant but I allowed counsel the greatest latitude so that he might have on the record what he wanted.

Petitioner was cross-examined about the letter she wrote to her solicitors on the 8th March although I have already pointed out that, that letter ought never to have come into the respondent's hands. Petitioner admitted that the last paragraph was correct. She was in Bombay remaining until the proceedings terminated. The passage did not mean that she was going back afterwards.

Mr. Inverarity then contended he was entitled to cross-examine petitioner on the allegations in paragraph 17A of the written statement in spite of issue 3 (*a*) having been struck out. It seemed clear that if the respondent was not entitled to plead the allegations in paragraph 17A, they must be struck out, and it followed that any questions based on those allegations were irrelevant.

Mr. Inverarity wished to re-open the argument as to whether the allegations in paragraph 17A were relevant or not, but I declined to review my decision arrived at on the 30th of November. Mr. Inverarity next wished to cross-examine the petitioner about alleged misrepresentations made by her before the marriage and other allegations contained in paragraph 10 of the written statement. Counsel contended that under section 32, he was entitled to cross-examine the petitioner in order to obtain admissions that the respondent had reasonable excuse for leaving her oblivious to the fact that the only excuse relied upon by Mr. Setalwad except cruelty was prenuptial incontinence, but I refused to allow any question to be put with regard to paragraph 10 and struck it out as contrary to the provisions of section 33.

In re-examination Mr. Weldon put in the message written by the petitioner to her mother from the District Messenger Office at Victoria to refute the allegations raised at one time by the respondent, that he had been deserted by the petitioner. In view of respondent's letter of the 23rd February 1912, this was hardly necessary.

This closed the case for the petitioner. Mr. Inverarity complained that he was precluded from calling evidence to support his case. It was not alleged that there was any evidence to support the plea of cruelty except that of the respondent and I had given him an opportunity of giving evidence.

Counsel's complaint was, therefore, not founded on fact. Counsel further complained that he had not been allowed to argue the question of jurisdiction and contended a question of jurisdiction could not be decided without evidence. As to this it is permissible to point out that I decided that question on facts admitted on the pleadings, and that Mr. Setalwad, when the issue was

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being tried, did not raise this point nor did he apply for leave to cross-examine the petitioner.

However now that the petitioner's evidence is on the record it is clear that it would not have assisted the respondent. Petitioner could not be compelled to make any plans, as to what she would do when the proceedings terminated. That would depend entirely on how they terminated. I passed a decree in favour of the plaintiff for restitution of conjugal rights with costs throughout.

Against this decision the respondent appealed.

Strangman with *Inverarity* and *Setalvad* for the appellant and respondent :—

The petitioner did not reside in India ; she came to file this suit and nothing else.

It is unnecessary to consider section 3 of the Indian Divorce Act in view of section 2 : refers to *In the matter of Tietkins*[1] ; *In the matter of Ram Paul Singh*[2].

In the matter of De Momet[3] ; Dicey on the Conflict of Laws, page 801, note ; Indian Divorce Act, section 3 ; *Jogendra Nath Banerjee* v. *Elizabeth Banerjee*[4] ; *Queen-Empress* v. *Sarya*[5].

The learned judge was wrong in considering domicil at all.

Refers to *Massey* v. *Burton*[6].

(Per Curiam : *Thornton* v. *Thornton*[7], referred to.)

As to the right to cross-examine as to reasonable excuse relies on *Russell* v. *Russell*[8] ; and to Rattigan on Law of Divorce, page 177.

(1) (1868) 1 Ben. L. R. (O. C.) 84.
(2) (1881) 8 Cal. L. R. 14.
(3) (1894) 21 Cal. 634 at p. 638.
(4) (1898) 3 Cal. W. N. 250.
(5) (1890) 15 Bom. 505.
(6) (1857) 27 L. J. Ex. 101.
(7) (1886) 10 Bom. 422.
(8) [1895] P. 315.

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The facts constitute a reasonable excuse: see as to antenuptial misconduct, *Perrin* v. *Perrin*(1); *Green* v. *Green*(2), distinguished it is admitted that it cannot be pleaded: Halsbury, Volume 16, page 473, referred to.

Under section 7 of the Indian Divorce Act subject to the provisions of the Act the English rules apply.

Refers to *Yeatman* v. *Yeatman*(3).

No provision exists in India as is provided by section 5 of the Matrimonial Causes Act.

Also refers to *In re Norton's Settlement*(4); *Norton* v. *Norton*(4); and *Arthur Flowers* v. *Minnie Flowers*(5).

Kemp, for the respondent and petitioner:—

The petitioner and the respondent last resided together in India. There could be no residence on the ship.

In the matter of Ram Paul Singh(6) not to be followed as there is no residence outside and cases on the Insolvency Act have no application. The last lines in that case speak as if only one creditor opposed but the others did not oppose.

Mahomed Shuffli v. *Laldin Abdula*(7); *Massey* v. *Burton*(8); *Fernandez* v. *Wray*(9); *Bater* v. *Bater*(10); *Holmes* v. *Holmes*(11); and *Rippingall* v. *Rippingall*(12), also relied on.

Strangman replies.

C. A. V.

SCOTT, C. J.:—The first question that arises is whether the Court has jurisdiction to entertain this suit which is for restitution of conjugal rights.

(1) (1822) 1 Add. 1.
(2) (1869) 21 L. T. 401.
(3) (1868) I. P. & D. 489.
(4) [1908] 1 Ch. 471.
(5) (1910) 32 All. 203 at p. 205.
(6) (1881) 8 Cal. L. R. 14.
(7) (1878) 3 Bom. 227.
(8) (1857) 27 L. J Ex. 101.
(9) (1900) 25 Bom. 176.
(10) [1906] P. 209.
(11) (1755) 2 Lee 116.
(12) (1876) 24 W. R. (Eng.) 967.

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NUSSERWANJEE WADIA v. ELEONORA WADIA.

The petitioner is an English woman professing the Christian religion.

The respondent is a Parsi whose parents reside in Bombay.

The parties were married in London on the 4th of August 1911.

On the 11th of October in that year they started for India and arrived in Bombay about the end of that month.

On the 3rd of February 1912, they left Bombay again for London travelling *vià* Marseilles. They arrived at Victoria Station in London, on the 19th of February 1912, where the respondent left the petitioner. He has since refused to live with her though offering her a certain maintenance. It is alleged on affidavit that subsequent to February 1911 he has obtained employment as a commercial traveller on £200 per annum in England.

On the 8th of March 1912, the petitioner announced her intention of going to India to bring her case before an English Judge "as soon as the necessary arrangements for her going and remaining there the necessary time, etc., were completed."

She started for Bombay to carry out her resolution on the 19th of April, and arrived on the 10th of May 1912. She filed her petition for restitution in this Court on the 27th of June.

The learned Judge finds as a fact, and it is not disputed, that she came to Bombay in order to file her petition. He was of opinion that this Court had jurisdiction to try the suit, under section 2 of the Indian Divorce Act, if it found that the petitioner professed the Christian religion and resided in Bombay at the time of presenting the petition; and being of opinion

that she had no permanent residence anywhere else decided the issue of jurisdiction in her favour.

The provisions of section 2 of the Act relating to or affecting jurisdiction are of a negative and exclusive character except the first clause which relates to its local extent: clause 2 prevents the Court from granting any relief except where the petitioner professes the Christian religion and resides in India at the time of presenting the petition.

Clause 3 prevents the Court from dissolving marriages except in the case of Indian marriages—or where certain specified matrimonial offences have been committed in India or where the husband has abjured the Christian for some other form of religion.

Clause 4 prevents the Court from making decrees of nullity except in the case of Indian marriages.

Section 4 confers upon the High Courts and District Courts subject to the provision of the Act "the jurisdiction now exercised by the High Courts in respect of divorce *a mensâ et toro*, and in all other causes, suits and matters matrimonial."

By section 9 of the High Courts Act such matrimonial jurisdiction was conferred on the High Courts as Her Majesty might by Letters Patent grant and direct and it was provided that save as by such Letters Patent might be otherwise directed and without prejudice to the legislative powers of the Governor-General the High Court in each Presidency should have and exercise all jurisdiction and every power and authority whatsoever in any manner vested in any of the Supreme Courts.

The ecclesiastical jurisdiction of the Supreme Courts was limited to persons described and distinguished by the appellation of British subjects, residing in the Town and Island of Bombay and the factories subordi-

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nate thereto and all the territories dependent upon the Government of Bombay. It was held in *Ardaseer Cursetjee* v. *Perozeboye*(1) that this jurisdiction could not be exercised over Parsis.

By clause 35 of the Amended Letters Patent of the High Court that decision was given effect to by limiting the jurisdiction within the Presidency to "matters matrimonial between Our subjects professing the Christian religion."

In clause 33 of his Despatch of the 14th May 1862, which accompanied the original Letters Patent, the Secretary of State wrote: "Her Majesty's Government are desirous of placing the Christian subjects of the Crown within the Presidency in the same position under the High Court as to 'matters matrimonial' in general, as they now are under the Supreme Court, and this they believe to be effected by clause 35 of the Charter. But they consider it expedient that the High Court should possess, in addition, the power of decreeing divorce, which the Supreme Court does not possess, in other words, that the High Court should have the same jurisdiction as the Court for Divorce and Matrimonial Causes in England, established in virtue of 20 and 21 Vic. c. 85......I request that you will immediately take the subject into your consideration, and introduce into your Council a bill for conferring upon the High Court the jurisdiction and powers of the Divorce Court in England."

The Indian Divorce Act of 1869 was apparently enacted as a consequence of this request. That Act by sections 10—17 conferred on the Indian Courts jurisdiction to grant decrees for divorce, that is dissolution, subject however to the limitations stated in section 2. It would not apparently be necessary that both parties

(1) (1856) 6 Moo. I. A. 348.

to a divorce petition should profess the Christian religion. Nor is this a necessity in the case of petitions for nullity provided for by sections 18—21. But as regards the jurisdiction conferred to the High Court by section 4 (which includes suits for restitution) the powers of the Courts are still limited to Christian subjects within the Presidency.

For this reason I am of opinion that the Court has no jurisdiction to grant a decree for restitution either against a Parsi respondent or a respondent not within the Presidency.

The same result may be arrived at by another train of reasoning. Section 7 enacts that subject to the provisions contained in the Act the High Courts and District Courts shall in all suits and proceedings hereunder act and give relief on principles and rules which in the opinion of the said Courts are as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being acts and gives relief.

It is established by the following cases that the Court will not give relief by way of restitution if the respondent named in the petition was absent from the jurisdiction at the time the suit was instituted and remains absent, although residence at date of suit of both spouses, whatever the domicile, is sufficient to give jurisdiction in suits of this nature: see *Firebrace* v. *Firebrace*[1]; *Chichester* v. *Chichester*[2]; and *Armytage* v. *Armytage*[3].

In *Firebrace* v. *Firebrace*[1] the respondent who was absent from England at the date of the suit was an Australian. Sir James Hannen said (p. 68): "In a suit for restitution of conjugal rights the primary object is

(1) (1878) 4 P. D. 63. (2) (1885) 10 P. D. 186.

(3) [1898] P. 178.

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to control the husband. She asks that her husband shall in the future be compelled by the process of the Court to take her back to live with him in a common home. In other words, she prays that the English law shall be put in force against him, but as the obligation of a foreigner to obey the laws of this country lasts no longer than the time during which he is within its jurisdiction, the tribunals of this country cannot call upon him to obey those laws after the obligation has ceased. The difficulty, amounting in most cases to an impossibility, of enforcing the decree of the Court in the circumstances of the present case lends additional force to the arguments against the existence of the jurisdiction." These remarks appear to me to be applicable to the present case although Bombay may be the respondent's domicile of origin: for the matrimonial jurisdiction of the Indian Courts is in no way based upon domicile.

Another aspect of the question of jurisdiction may be based upon an argument suggested by the case of *Thornton* v. *Thornton*[1] in which counsel suggested that the jurisdiction of the Bombay High Court in a suit for divorce was based on section 45 of the Divorce Act which imported section 17 of the Civil Procedure Code and thus gave jurisdiction where the cause of action arose. Cotton, L. J., seems to have accepted this as the basis of the jurisdiction claimed.

The jurisdiction was really, I think, based on the alleged residence of the petitioner in India coupled with commission of the act of adultery whilst the parties last resided together in India: see *Thornton* v. *Thornton*[1]; and this would be by virtue of section 10 of the Divorce Act read with section 2. The argument, however, suggests that in the case of other matrimonial

[1] (1886) 10 Bom. 422 at p. 431.

offences the application of the Civil Procedure Code will involve the necessity either of residence on the part of the defendant or the accrual of the cause of action within the jurisdiction in order to enable the Court to entertain the suit.

I may add that I am by no means satisfied that the petitioner was residing in India within the meaning of section 2 at the time of the petition. In *Manning* v. *Manning*[1] it was held that mere residence in England at the time of the institution of a suit for judicial separation is not sufficient to found the jurisdiction of the Court. The residence of the petitioner must be *bonâ fide* and not casual or as a traveller.

I think the Court has no jurisdiction and the petition must be dismissed.

CHANDAVARKAR, J. :—I concur.

The attorney for the petitioner applied to the Court for an order directing the Prothonotary to retain the monies paid by the respondent as security for the petitioner's costs pending taxation of his costs and to pay him his taxed costs out of those monies. On the 12th of April 1913 the question was argued before Scott, C. J., when his Lordship delivered the following judgment.

SCOTT, C. J. :—The proceedings in which this application is made were initiated by a petition for restitution of conjugal rights by Mrs. Wadia, a Christian, against Mr. Wadia, a Parsi.

Mr. Crawford of the firm of Crawford Brown & Co. was appointed attorney for Mrs. Wadia, and upon his application an order was made by the Chamber Judge, on the 19th of October 1912, for the deposit by the

(1) (1871) 2 P. & D. 223.

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respondent of Rs. 600 as security for the petitioner's costs. That sum was deposited on the 11th of November 1912. According to the terms of the order it was to cover the petitioner's costs already incurred and to be incurred. The order was made under the settled practice of this Court to follow, in matters relating to costs under the Indian Divorce Act, the practice of the Divorce Courts in England.

The petitioner obtained an order for restitution from Mr. Justice Macleod. An appeal was preferred against his decision upon which the appellant in accordance with the rule of the Court deposited Rs. 500 as security for the respondent's costs. The appeal was successful in that the Court held that it had no jurisdiction to award the relief prayed for to the petitioner, and it declined to make any order for the payment of the respondent's costs by the petitioner having regard to the ground of the decision in the appeal.

Mr. Crawford, the petitioner's attorney, now applies that the Prothonotary be directed to retain the monies in Court pending taxation of his costs and to pay to him the costs when so ascertained out of the monies so deposited on the ground that those sums must be applied in the first instance in satisfaction of his taxed costs as it is the established rule of the Divorce Court not to deprive the wife's solicitor of his costs out of the fund intended for his payment unless he has himself done something to justify so strong a measure. See *Flower* v. *Flower*[1] and *Robertson* v. *Robertson*[2].

On behalf of the respondent it is contended that the solicitor has no *locus standi* in the matter. That position appears to me not to be tenable having regard to the more recent decisions of the Divorce Court in England and Ireland showing that application by

(1) (1873) 3 P. & D. 132. (2) (1881) 6 P. D. 119.

solicitors with reference to their costs have repeatedly been entertained. See *Joseph* v. *Joseph and Burnhill*[1], *Nairne* v. *Nairne*[2], *Ballance* v. *Ballance*[3], and *Jinks* v. *Jinks*[4].

The next question is whether the attorney is right in contending that the money deposited must be treated, whatever the result of the petition, as a fund for his security. In *Hall* v. *Hall*[5], Lindley, L. J., said :—

"The £45 ordered to be paid into Court in this case was intended to enable Mrs. Hall to obtain legal assistance in the divorce proceedings instituted against her, and her solicitor naturally looked to this fund for his remuneration in conducting her defence. In the ordinary course of events he would have had his costs taxed and paid before the motion for a new trial came on for hearing, but the husband who paid the money into Court has caused the payment out to be delayed, and the money is still in Court. The motion for a new trial was dismissed with costs, and the husband has applied for payment of his costs of the appeal out of this £45. The money being still in Court, the High Court, and, on appeal, this Court, clearly has jurisdiction over the fund ; but considering the purpose for which it was paid into Court, and the established rule that the Court will not deprive the wife's solicitor of his costs out of the fund intended for his payment unless he has himself done something to justify so strong a measure...we do not think it right upon the present occasion to accede to the application of the husband."

In *Hurley* v. *Hurley*[6], Mr. Justice Collins made the following observations with regard to the practice in the Divorce Court :—

"The rule is that, whether the wife is successful or not, the husband is bound to furnish her with the means of carrying on the litigation, and the practice has been for the Registrar to estimate a reasonable amount for her costs, which is either paid in or security is given for it. If he has made an accurate estimate, so much the better for the wife ; but if his estimate is found insufficient when the trial comes on the practice is to enlarge the amount paid in by the husband, so that the wife may continue to be in funds, and to that she is entitled although the result may be that she is divorced. The practice, therefore, seems to me to be that the husband is bound to furnish

(1) (1897) 76 L. T. 236.
(2) (1901) 85 L. T. 649.
(3) [1899] 2 I. R. 128.
(4) [1911] P. 120.
(5) [1891] P. 302.
(6) [1891] P. 367.

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the estimated amount for the wife's costs entirely independent of the result There has been an exception engrafted on that rule that, if the result of the litigation turns out to be unsuccessful for the wife—if she is found guilty—the Court refuses to enlarge the amount which has been deposited. Where that practice comes from I do not know, but it only comes into consideration when the wife has been found guilty, which is not the fact here."

Upon these authorities, I think the attorney of the petitioner is justified in his contention that the fund paid in is for the benefit of her attorney and she is entitled to have it so applied whatever the result of the petition, provided of course that the attorney is in no way to blame. The case of *Walker* v. *Walker and Lawson*(1) shows that the solicitor or attorney who takes up a hopeless case must not assume that his costs will be provided for. But having regard to the fact that the petitioner secured an order on her petition in the lower Court and that the point of jurisdiction, upon which the petition was decided in appeal, does not appear to have occurred to the Counsel on either side, I cannot say that in this case the attorney was to blame for taking up the case.

Then, it is contended that, if the attorney is entitled to have the first sum deposited applied in payment of his taxed costs, he has not the same right in relation to the second sum of Rs. 500 as that would have been deposited in the case of any appeal. I think, however, that it may be safely assumed that if there had been no rule providing for a deposit of Rs. 500 by the appellant, the attorney would have made a further application for the deposit and that application would have been granted by the lower Court or the Chamber Judge.

My order is that the sums of Rs. 600 and Rs. 500 be retained in Court and be paid out so far as may be necessary in satisfaction of the taxed costs of the petitioner's attorney, and that the balance, if any, after

(1) (1897) 76 L. T. 234.

these costs shall have been satisfied, be paid out on the application of the respondent's attorneys.

I make no order as to costs of this notice, because I think that the attorney should have been more prompt in getting his costs taxed and in applying that the fund in Court should be paid out in satisfaction of those costs.

Attorneys for the appellant: *Messrs. Wadia, Gandhi & Co.*

Attorneys for the respondent: *Messrs. Crawford, Brown & Co.*

Order accordingly.

H. S. C.

APPELLATE CIVIL.

Before Mr. Justice Heaton and Mr. Justice Shah.

1913. *August* 20.

BAI UJAM (ORIGINAL PLAINTIFF, DECREE-HOLDER), APPELLANT, v. BAI RUXMANI (ORIGINAL DEFENDANT, JUDGMENT-DEBTOR), RESPONDENT.*

Limitation Act (IX of 1908), section 15—Decree—Execution of decree—Application to execute the decree—Exclusion of time—Period during which execution of decree is stayed to be excluded in computing period of limitation.

On the 8th August 1908, an application to execute a decree was made. The Court having directed the execution to proceed as to a part of the decree, the judgment-debtor appealed against the order and pending the appeal, the execution of the decree was stayed from the 9th January to the 18th February 1909. On the 12th August 1911, the decree-holder applied again to execute the decree. The lower Courts held that the second application was barred by limitation, it having been made more than three years after the date of the first application. On second appeal:—

Held, that the second application was filed within time, for the applicant was entitled to exclude the period during which the execution of the decree was stayed, in computing the period of limitation for the second application.

* Second Appeal No. 859 of 1912.