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[PRIVY COUNCIL.]

Present: Viscount Haldane, Lord Blanesburgh, and Lord Darling.

ELIATAMBY *v.* ELIATAMBY *et al.*

260—D. C. Colombo, 5,083.

Divorce—Evidence of adultery—Undelivered letters from wife—Evidence against co-respondent—Evidence Ordinance, No. 14 of 1895 s. 9,

In an action by a husband for divorce, letters written by the wife to the co-respondent but not delivered to him, are not admissible against the co-respondent.

The fact that the co-respondent's Counsel has based questions in cross-examination upon the contents of the letters, which had been properly admitted against the wife, does not make the letters evidence against the co-respondent.

APPEAL from a judgment of the Supreme Court. The action was brought by the plaintiff for divorce from his wife the first defendant on the ground of her misconduct with the second defendant. The first defendant filed answer denying adultery. This answer she later withdrew. The second defendant also denied adultery. The District Judge found that there was evidence of adultery against the first defendant, but not against the second defendant. He entered a decree dissolving the marriage but dismissed the action as against the second defendant. In appeal the Supreme Court reversed the decision of the District Judge, so far as it related to the second defendant, and found that he had committed adultery with the first defendant.

The facts appear from the judgment of the Judicial Committee.

July 7, 1925. Delivered by LORD DARLING :—

This is an appeal from a decree of the Supreme Court of the Island of Ceylon dated December 19, 1923, setting aside a decree of the District Judge of Colombo, dated May 28, 1923, so far as it related to the appellant, and further decreeing that the appellant do pay to the first respondent the sum of Rs. 5,000 as damages.

The questions for determination in this appeal are whether the evidence prove that the appellant has committed adultery with the second respondent and whether certain matters admitted as evidence were rightly so admitted.

On May 31, 1922, the first respondent instituted a suit in the District Court of Colombo praying that his marriage with the second respondent might be dissolved on the ground of her alleged adultery with the appellant and that the appellant be ordered to pay the sum of Rs. 50,000 as damages to the first respondent in respect of the alleged adultery.

The second respondent filed an answer dated August 2, 1922, *inter alia* denying the allegation of adultery. This answer she withdrew on October 11, 1922. The appellant had filed an answer dated July 26, 1922, denying the allegation of adultery.

The following issues were framed at the trial by the District Judge :—

(1) Did the second defendant (appellant) commit adultery with first defendant (second respondent) on various occasions between July 29, 1920, and February 11, 1922 ?

(2) If so, what damages (if any) is plaintiff (first respondent) entitled to ?

The second respondent was not called as a witness and the District Judge having heard all the evidence, was of opinion that there was no evidence of adultery against the appellant or evidence from which adultery could be inferred even if he accepted as true the evidence of the witnesses called on behalf of the first respondent.

The District Judge found that there was evidence of adultery against the second respondent consisting of—

(1) A verbal admission made by her to the first respondent on February 10, 1922 ;

(2) Letters in her handwriting and addressed to the appellant but not delivered to him.

And he pronounced a decree dissolving the marriage, dismissed the action as against the appellant, and ordered the first respondent to pay the appellant's costs.

The wife's admission was made on February 10, 1922, in the presence of the appellant at a time when she was drunk and violent, and the appellant both as a doctor and a friend had been sent for

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to attend her. The first respondent did not then separate from the second respondent and continued to live with her till the institution of the suit.

The letters are exhibits "P 2" to "P 11," and "D 13" and "D 14." They are all subsequent in date to the interview at which the admission was made, and to the adultery alleged, and were never received by the appellant. They are alleged to have been given to the first respondent's motor car driver for transmission to the appellant, but they were in fact given by the motor driver to the first respondent. There is in exhibit "D 13" internal evidence that the second respondent knew that these letters were not reaching the appellant.

The appellant is a medical practitioner and a married man and had visited the house of the first respondent, not professionally but as a friend, over the period during which adultery is alleged to have been committed.

Both the first respondent and the appellant appealed to the Supreme Court and that Court dismissed the appeal of the appellant and on the appeal of the first respondent reversed the decision of the District Judge so far as it related to the appellant and found that he had committed adultery with the second respondent.

The Chief Justice of the Supreme Court held that :—

(1) The evidence, apart from the confession and letters, was not of such a character that the District Judge was bound to find adultery ; and

(2) That the confession was not in itself evidence against the appellant but relevant only to judge of the conduct of the appellant upon that confession ; but

(3) That the letters were evidence against the appellant either—

(*a*) As having been "put in" by his Counsel at the trial; or

(*b*) By virtue of the Evidence Ordinance of Ceylon.

The learned Puisne Justice of the Supreme Court agreed with the Chief Justice as to the admissibility of the letters, but he held also that the evidence against the appellant, even apart from the letters, was amply sufficient to justify a finding against him.

The Supreme Court further ordered the appellant to pay to the first respondent the sum of Rs. 5,000 in respect of the alleged adultery, and said the damages were awarded for the purpose of expressing the reprobation of the Court and society.

From the decree of the Supreme Court the appellant has appealed to His Majesty in Council, and submits that it should be set aside and the decree of the District Judge restored with costs.

The decree against the second defendant, Celia Eliatamby, is based upon the evidence of her own admission of adultery, and upon the above letters written by her which contain admissions to the same effect. Whether that admission or these letters

constitute sufficient proof of adultery even on the part of the second defendant is a question which their Lordships need not further pursue, for against this decree there is no appeal.

As to the appellant, their Lordships, after carefully considering all the evidence in the case, agree with the District Judge and the Chief Justice, that apart from the admission of Mrs. Eliatamby and the letters addressed by her to the appellant, but never delivered to him, there is not sufficient evidence to prove him guilty of adultery with her.

With regard to the verbal admission of adultery made by Celia Eliatamby, when drunk, in the presence of the appellant, their Lordships are of opinion that it is not evidence against the appellant for any purpose whatever.

It now remains to consider the question whether the woman's letters are for what they are worth legal evidence against the appellant. As to this their Lordships are of opinion that none of the sections of the Evidence Ordinance in force in Ceylon apply in such a way as to affect the ordinary rules of evidence by which this particular matter must be decided. These letters were put forward as an essential part of the case against the appellant, were, as a series, opened by Counsel for the plaintiff, and he actually read all but two of them to the Court. To this course, as the Chief Justice observes, it was impossible for the appellant's Counsel then to object, for they were evidence against their writer the second respondent. But that Counsel in the trial Court and in the Supreme Court contended that they were not admissible as evidence against his client, and this was in the trial Court admitted by Counsel for the plaintiff to be so.

The letters having being read as part of plaintiff's case and being clearly admissible against the defendant, Celia Eliatamby as against whom they were tendered, it is contended that notwithstanding plaintiff's Counsel's admission to the contrary on the basis of which the trial proceeded, they became evidence against the present appellant by reason of his Counsel having in cross-examination founded questions upon them, and this contention the Supreme Court has held to be well founded. In the words of the Chief Justice: "As soon as these letters were used by the defence for the purpose of challenging the plaintiff's honour and *bona fides* they became part of the case between these two parties for all purposes. They were 'in' as between these two parties." In this view their Lordships cannot concur. Before the defendant's Counsel asked a single question regarding them they were "in" as part of the plaintiff's own case, and therefore, questions and arguments might properly be founded upon them without in any way adopting them as part of the evidence produced on behalf of this appellant—for appellant's Counsel had a right to rebut that case, and to destroy it, by means of its own component material.

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There is no identity or analogy, as suggested in argument, between this case and one in which a defendant's Counsel makes evidence against his client of a document not already put in, by asking questions on its assumed contents—which questions then lead to its necessary production. There he brings in a fresh document, but these letters although all not read were all treated as put in by the plaintiff's Counsel. A man does not draw his sword upon another who being manacled, snatches the weapon from an assailant's hand, and strikes him with it.

The Chief Justice relied on the Evidence Ordinance section 9, as making these letters evidence, because it declares that facts "which show the relation of parties by whom any fact in issue was transacted are relevant." And he observed that: "It is difficult to see how it can be said that these letters do not show the relation of the parties to this interview." But it is precisely because the *ex parte* statement of one person made in the absence of the other whom it concerns does not show the relation of the parties, especially in regard to a third party (but merely amounts to a version by one of them possibly false), that the law of England excludes such statements as hearsay—as not being evidence.

The Chief Justice gave his view as to the effect of the Evidence Ordinance, and in this their Lordships regret to be entirely unable to concur. He came to the conclusion that the Evidence Ordinance which is merely the application to Ceylon of the Indian Evidence Act—had practically swept away all the English law relating to hearsay. Were this so the consequences must long ago have been manifest in the decisions in the Courts of India, and in those of the Judicial Committee of the Privy Council, yet in 1872, the very year of the passing of the Indian Evidence Act, it was laid down in *Hay v. Gordon*,[1] that "No statements of Mrs. Gordon (the respondent in divorce), written or verbal, are according to well-known principles of law admissible against Lord William Hay" (the respondent). Their Lordships have been unable to find any authority for the contention that since that case was decided any other rule has prevailed in the Indian Courts.

The Chief Justice himself had no doubt as to the revolutionary consequences of his decision, for he used these words :—

> "I am conscious that by bringing the letters under this head I am in fact laying down that any intercepted correspondence between the respondents in divorce cases may be considered as evidence against the person to whom it is addressed, and I appreciate the danger of this latitude, but our duty is to interpret the words of the section."

[1] *Bengal L. R. 10, p. 301.*

In their Lordships' opinion no words of the section compel to such a conclusion. The words of the Ordinance in this regard are precisely those of the Indian Evidence Act, and, therefore, were they to be construed as the Supreme Court has now held that they should, the same reversal of the well understood principles of English law as are applicable in such cases as this would have been accomplished in India as well as in Ceylon. The principle is one so reasonable in itself, fundamental and so long established, that their Lordships cannot conceive of its being overthrown and discarded except designedly, and by words so plain that their meaning would be open to no manner of doubt.

Their Lordships will, therefore, humbly advise His Majesty that this appeal should be allowed, the judgment of the District Judge of Colombo in favour of the appellant restored, and that the appellant should have the costs of this appeal and in the Courts below.

Appeal allowed.