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REPORTS OF CASES ARGUED AND DETERMINED IN The House of Lords.

No. 3

Captain Wyndham's Divorce Bill. SESSION 1855.

1855.

Subject_Nature of Divorce Bills. —

Divorce Bills, though in form legislative, are substantially of a judicial character.

Proxies are not used on Divorce Bills.

Subject_Indian Divorces. — Course of Proceeding under 1 Geo. 4. c. 101. —

In general a Legislative Bill drops with the Session of Parliament in which it is introduced, and the measure, if persisted in, must be renewed by a fresh Bill in the ensuing Session; but an Indian Divorce Bill, proceeding on the 1 Geo. 4. c. 101, continues effective from Session to Session, so as to give a reasonable opportunity to make use of the materials returned under the Commission awarded by the House.

Subject_Evidence. —

Question as to how far letters written by the wife to the husband, after the separation and adultery, could be read to prove the terms on which the husband and wife had lived together.

Subject_Adultery. —

Remarkable illustration afforded by this case of the difficulty and tediousness of the only remedy allowed to the injured party.

ON the 12th of March Counsel were called in, and Mr. *Macqueen*, appearing on behalf of the Petitioner, said:

My Lords, I scarcely know what course your Lordships may wish me to pursue, whether your Lordships desire the whole evidence to be gone through, it having been taken in India and reported from the Judges there to your Lordships' House.

The **Lord Chancellor**: We are here to attend to the application of parties.

Mr. *Macqueen*: The application of the parties is that the Bill be read a second time; the petition was presented many months ago for that purpose.

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Lord Brougham: Has notice been given to the wife?

Mr. *Macqueen*: The wife is in India, and this case is in all respects different from that of an ordinary Divorce Bill. If your Lordships will allow me, therefore, I will quickly lay before you materials which will enable your Lordships to see how it is that the wife could not be here. The wife has already been heard in India. An investigation has already taken place before the Judges there, who have reported their satisfaction with the evidence, which evidence has been printed, and has been for some time upon the table of your Lordships' House.

The Lord Chancellor: Since when?

Mr. Macqueen: Nearly a year, my Lord?

Lord Brougham: In February 1854.

Mr. Macqueen: Captain Wyndham was married at Mysore in the East Indies on the 20th September 1838, and he lived with his wife very happily, as will appear from the evidence, till May 1842. In that month his regiment was ordered to China, and he accompanied it thither. A general military order had been issued, interdicting any of the officers from taking their wives with them; the consequence was, that Captain Wyndham was under the necessity of leaving his wife in India. He placed her under the care of her mother and her step-father, a gentleman of the name of Stokes, a medical officer in the Indian service.

Lord Brougham: At Madras?

Mr. Macqueen: At Madras, or some other place on the Madras establishment. It appears that Captain Wyndham returned from China under an order from General Gough in January 1843, and he immediately rejoined his wife, who, with her mother and father-in-law, was then living somewhere up the country. He remained with her till April 1843, when he was ordered

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to rejoin his regiment in China. He did so accordingly, and remained with his regiment till it returned to India in January 1845, when he learned for the first time the calamity which had happened to him; that his wife had eloped with another Indian officer, Captain Annesley Gore. Immediately upon receiving this intelligence, Captain Wyndham put himself in communication with his solicitors at Madras, Messrs. Dale and Boyson, and desired them to take the necessary steps to enable him to get rid of his wife. He was told that it would be a somewhat expensive and tedious process, that he must first bring an action against the adulterer, and that he must next get a sentence of divorce *à mensâ et thoro* from the Ecclesiastical Court.

Accordingly an action was brought against Captain Gore before the Court in India, and the result was that damages were awarded, not by a Jury, for I believe they do not summon a Jury in such cases, but by the Judges; who, upon a full consideration of the case and the evidence, awarded damages to the amount of 15,000 rupees, equivalent to 1,500 *l*. The trial was conducted with great solemnity, in the usual way, and the Judges also gave costs amounting to 2,000 rupees, 200 *l*. But although these sums were so awarded, it was impossible to recover them, because Captain Gore was a man

of very irregular habits, and had placed himself in the Insolvent Court at Madras. Nevertheless it was necessary to take steps against him, and it was considered expedient that Captain Wyndham should resist the attempt which Captain Gore made to get through the Court without paying his debts; the result was, I believe, that a sum came out of his estate sufficient to pay the costs of the action at law; he was kept in prison, however, for a couple of years.

The next step was for Captain Wyndham to proceed against Captain Gore in the Ecclesiastical Court; and

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your Lordships will see at once how expensive and how hard it was upon this unfortunate husband, who was a man of no fortune, almost wholly dependent upon his pay. However, it so happened that he was able to procure the necessary funds to carry his suit to the Ecclesiastical Court, and in due time a sentence of divorce *à mensâ et thoro* was granted.

At Madras, it appears, that one Court possesses ecclesiastical, civil, and criminal jurisdiction, so that the whole of the proceedings were before the same tribunal.

My Lords, this being in 1847, the next step would have been to apply to the Imperial Parliament for a Bill of Divorce; but at that time such a step was far beyond Captain Wyndham's means. Nor was he in a position to repair to your Lordships' House till the Session of 1853, two years ago, when he presented his petition for leave to bring in a Bill to obtain the usual divorce.

My Lords, that Bill was read a first time, and the usual orders were made, that inasmuch as the adultery had taken place in the East Indies, an inquiry should be conducted before the Judges in Madras, under the authority of an Act of Parliament passed in the year 1820 upon Lord *Eldon's* and Lord *Redesdale's* suggestion, for the purpose of enabling persons in India to obtain the remedy of divorce without coming to this country. That Act of Parliament, to which I must now direct your Lordships' attention, is the 1st Geo. IV. chapter 101, passed on the 24th July 1820. It was "to enable the examination of witnesses to be taken in India in support of Bills of Divorce on account of adultery committed in India." The present case was one of this class. The Act directs that in such cases the Speaker of either House (for the proceeding may be commenced in the House of Commons, I

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believe, as well as in this House, but whichever House is applied to by petition) the Speaker shall issue his warrant for the examination of witnesses in India. Then there is a direction that duplicate warrants shall be sent out to India in two *distinct* ships. The Judges are directed upon the receipt of the warrant to give due notice to all the parties interested, and to examine the witnesses.

Lord Brougham: And then does it not direct that duplicates of the proceedings shall be returned?

Mr. *Macqueen*: Yes, my Lord, to this House. The examination is returned under seal from the Court in India, with such comments as the Judges think proper to make upon the conduct of the witnesses; and the result of the proceedings in the case now before your Lordships is that the Court in India have expressed their entire satisfaction with the way in which the witnesses gave their evidence, and the way in which the case was laid before them. By the Act of Parliament to which I am alluding, authority is given to the Judges, if they think proper, to put such further questions with a view of eliciting the truth as may appear to them expedient.

Then comes the 4th section of the Act, to which I must beg leave to request your Lordships' attention. It directs that the proceedings are not to be discontinued by prorogation of the Session, or by dissolution of Parliament; because it would be impossible for the proceedings in India to be returned to this House during the same Session in which they had been commenced; therefore provision is made that the Bill shall continue effective notwithstanding the close of the Session,—in point of fact, till the whole inquiry is completed and brought to a close. I have looked over the evidence with great care, and it appears to me, without troubling your Lordships by referring to particular

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witnesses, that it is extremely satisfactory. There is proof of the marriage, there is proof that the wife was served with notice of the proceedings, and there is proof also of gross, shameless, and scandalous adultery. Indeed, a part of the evidence shows that she not only committed adultery with Captain Gore, but that she has lived with him down to the present time and has had several children by him.

These examinations were returned to this country in the month of March of last year; and Captain Wyndham, through his solicitors at Madras, employed an agent in London to attend to his interests; and remittances were sent to this agent sufficient for the purpose of carrying the Bill through Parliament.

The Lord Chancellor: In the last Session?

Mr. *Macqueen*: In the last Session. There are letters from this agent to Messrs. Dale and Boyson acknowledging the receipt of the money, but he failed to perform the duty which he had undertaken to discharge. He, indeed, delivered in the examinations, which were laid upon the table of your Lordships' House, were ordered to be printed, and have been printed; but he did this through the instrumentality of parliamentary agents, the most respectable house of Richardson, Maclaurin, and Loch, who were not acquainted with Captain Wyndham, but were merely employed by the agent to whom I have alluded. These gentlemen took the necessary steps to carry the measure through, but presently there arose a want of funds, and they of course applied to the agent employing them, but he refused to give any supplies, stating various excuses, though, at the very time, he was in possession of Captain Wyndham's money, which the Madras solicitors had sent to him by bank post bills from India. This he has since acknowledged.

On the 22nd of June 1854, the agent alluded to

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wrote a letter to Captain Wyndham's solicitors at Madras, in which he uses these words:

“The Bill is waiting the third reading; and will, I hope, pass during the present Session.”

My Lords, the Bill had only been read a first time, and read a first time in the preceding Session with a view to the proceedings being sent out to India, but it had not been read a second time; it was his duty to have had it read a second time, but he failed to do so, taking no further steps in the matter; and Messrs. Richardson, Maclaurin, and Loch were quite unable to move, for they had no instructions and no authority; and they had no means of proceeding except as instruments in the hands of their immediate employer. But although this was the real state of the case, the agent took upon himself to write the remarkable letter which I have quoted. On the 8th of August 1854, he wrote another letter to Messrs. Dale and Boyson, in which he intimated, for the first time (of course to their great astonishment), that nothing had been done in the Bill during that Session! Captain Wyndham and his solicitors at Madras received this intelligence in September 1854. Mr. Dale, one of the partners, arranged to come to England, and arrived in this country in January of the present year. The first subject of inquiry was, what had become of the money which the agent had received; but so unsatisfactory was the account given by him and the report which Mr. Dale had from other quarters that he thought it prudent immediately to apply to the Court of Queen's Bench. An affidavit was made by Mr. Dale, in which he stated

the material facts, a rule *nisi* was granted, and a return is to be made to that rule next Easter Term. In the meantime no conclusive order has been made.

Lord Brougham: By whom are you instructed?

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Mr. *Macqueen*: By Messrs. Chilton, Burton, and Johnson, Solicitors, of Chancery Lane. Mr. Dale next presented a petition to your Lordships' House in the name of Captain Wyndham, praying the House to make an Order for the second reading of this Bill; but in case the House should think that a *new* Bill was necessary, then, in the alternative, praying that the House might dispense with service of the notice of second reading upon Mrs. Wyndham, as she had had ample notice to attend to her interests during the inquiry at Madras.

The first part of the prayer, which I have now to support, is that the House may proceed upon the *present* Bill, although it was presented in the preceding Session of 1853; there being a practice which says that Legislative Bills brought in in one Session will have to be renewed in the succeeding Session.

Lord Brougham: The 4th section of the Act prevents a Bill from dropping by a prorogation any more than by a dissolution of Parliament.

Mr. *Macqueen*: There is no Standing Order of this House which says that a Bill must necessarily drop with the Session; but there no doubt is a *practice*, which practice is observed.

Lord Brougham: It must be a very inveterate practice when it is recognized by that very 4th section of Lord *Eldon's* Act. Just read the preamble of the 4th section upon which you rely.

Mr. *Macqueen*: “And whereas by the usage and custom of Parliament no proceedings by Bill in Parliament have continuance from one Session to another.”

Lord Brougham: Clearly the usage and custom of Parliament is just as much the law of Parliament as if there was an Act of Parliament for the purpose.

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Mr. *Macqueen*: Your Lordships will allow me to distinguish between Bills of Divorce and ordinary Bills. Bills of Divorce, although in form legislative, have been considered for more than a hundred and fifty years past as of a judicial character. The fact which shows this, is that proxies, which are used in all legislative measures,

cannot be used in Divorce Bills. Divorce Bills are placed substantially upon the footing of the ordinary judicial business of the House; and, like Appeals and Writs of Error, may go over from Session to Session and from Parliament to Parliament until the consummation of the case. In that respect they resemble Parliamentary impeachments; which, as your Lordships know, were the subject of infinite discussion in the last century as to whether they terminated by dissolution of Parliament; and it was at last resolved that they should continue, notwithstanding the dissolution of Parliament ^(a).

Lord Brougham: It would have been a very different thing as to the question of the cessation of impeachments by dissolution, if there had been a Statute introduced reciting that by the law and usage and custom of Parliament all impeachments abated by dissolution. In that case it would have been out of the question to have contended as Burke did.

Mr. *Macqueen*: The Act is an enabling Statute. The power which the House had before was enlarged, not diminished. Now, if your Lordships will look at the very words of the 4th section, upon which this difficulty turns, you will perceive that they are “no dissolution or prorogation shall effect the discontinuance of a Bill with reference to Indian Divorce cases until the examination therein directed shall have been returned; but that such proceedings may be resumed and proceeded upon in a subsequent Session

Footnote

(a) *See proceedings in Warren Hastings' case.*

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or in a subsequent Parliament in either House of Parliament, in like manner and to all intents and purposes as they might have been in the course of one and the same Session.”

Lord Brougham: That is along with you, no doubt.

Mr. *Macqueen*: My Lords, the only difficulty which arises is from these words, “Until the examination therein directed shall have been returned.” Now, if these words are to be taken strictly, a consequence would arise which certainly the Legislature never intended; because it might happen that the proceedings were returned to this country so as to arrive on the last day of the Session, when it would be utterly impossible for the House to proceed. That inconvenient, not to say absurd, construction never can be attributed to the Legislature. Then if an irrational construction is not to be adopted,

the only sensible one, as I submit to your Lordships, is this; that the Legislature intended that a reasonable time should be allowed to give effect to and to make use of the materials which have been returned from India. This, therefore, throws the whole matter into the discretion of your Lordships to deal with it as the House in its wisdom may think fit.

Then the question will be, Has Captain Wyndham been guilty of laches? I am prepared by evidence to prove to your Lordships' satisfaction that, on the contrary, he has been extremely diligent and active from the first notice that he received of the extraordinary conduct of the London agent.

Lord Brougham: Have you nothing to say to *Hough's case*? (a)

Mr. *Macqueen*: There, it is true, the *Lord Chancellor* is represented as suggesting that, unless the

Footnote

(a) *Macq. House of Lords*, 799.

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Bill were carried through in the Session when the proceedings came back from India, it must fall. But on referring to the Journals, it will be found that there were specialties in *Hough's case*.

Lord Brougham: There was collusion.

The **Lord Chancellor** (having examined the entry in the Journals): *Hough's case* creates no difficulty at all.

Captain Wyndham's Bill allowed to proceed, although presented two years previously, in the Session of 1853. Further consideration as to the Second Reading put off.

On the 12th June, Counsel again called in.

The **Lord Chancellor**: I have read all the evidence sent from India. The House desires to know how those parties lived together before the wife's misconduct.

Mr. *Macqueen*: There are two letters written by her to her husband.

The **Lord Chancellor**: How are they proved?

Mr. *Macqueen*: They were proved in the suit for divorce *à mensâ et thoro*, and in the action for damages, by a witness who died before the Commission arrived in India. Therefore his deposition may be read ^(a).

The **Lord Chancellor**: Supposing you get over that difficulty by so proving the handwriting, how do the letters show the terms on which the parties lived? The husband was then in China; the letters may have been collusive. The more convenient course is, that you read the material parts of the evidence to the House.

Footnote

(a) See *Copley's case, Macq. House of Lords, 576.*

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The printed depositions having been read, satisfied the House except as to the terms on which the parties had lived with each other.

Mr. *Macqueen* then proposed to read a letter written by Mrs. Wyndham to her husband in the beginning of 1844.

The **Lord Chancellor**: That is after they had, in fact, finally separated. That letter can be very little evidence of the terms on which they were living, because they were not living together at all in the beginning of 1844.

Mr. *Macqueen*: It is surely evidence of the terms on which they lived down to the separation, a few weeks before.

The **Lord Chancellor**: Have you got the originals?

Mr. *Macqueen*: They are on the table.

Two letters from Mrs. Wyndham to the Petitioner were then read; but on account of their being subsequent to the separation, they did not quite satisfy the House ^(a).

Mr. *Macqueen*: We can prove *aliunde* that Captain Wyndham and his wife lived happily together.

Footnote

(a) *The ground of the objection to the reception of the letters was not made quite clear. The suggestion of collusion, in cases where the object might be, by concert between the husband and wife, to inflame the*

damages against the adulterer, was considered at Nisi Prius, in Edwards v. Crock, 4 Esp. 39; Trelawney v. Coleman, 1 B. & Ald. 91; and in Wilton v. Webster, 9 Car. & P. 198. These were all cases of crim. con.; and before the wife's letters were received the circumstances were explained. But in Captain Wyndham's application to Parliament for a divorce against his wife, no collusion can be supposed to have existed between him and her after the separation, when he was in China and she in India. Then, are we to suppose that the letters were written under the influence of a concert between Mrs. Wyndham and Captain Gore? This, again, seems an improbable and objectless collusion; for what purpose could Captain Gore serve by joining Mrs. Wyndham in an epistolary plot to praise the conjugal qualities of Captain Wyndham? As observed, however, in the text, the letters were read, although they proved insufficient.

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The Lord Chancellor: You are not precluded from doing so; you can supply defects in the evidence sent from India. What time do you require?

Mr. Macqueen: A week.

The Lord Chancellor: Then we will resume the case this day week, at 3 o'clock.

On the 21st June it was proved orally, at the bar of the House, that Captain and Mrs. Wyndham had lived very happily together in the marriage state; the circumstances of apparent delay in the proceedings were also got over; and the House being thus satisfied that the Petitioner's conduct had been such as clearly to entitle him to the remedy he prayed and had been eleven long years endeavouring to obtain,— the Bill on the motion of the *Lord Chancellor* (Lord Brougham concurring) was read a second time; and having been subsequently passed by the Commons and returned to the Lords, it received ultimately, before the close of the Session,

The Royal Assent.

Solicitors: Chilton, Burton, and Johnson.

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