Present : Bertram C.J. and Porter J. 1923.

ELIYATAMBY *v.* GABRIEL.

260—D. C. Colombo, 5,083.

Evidence—Action for divorce and damages—Confession of misconduct by wife in presence of husband and co-respondent—Subsequent letters by wife to co-respondent—Reference to misconduct in letters—Letters produced in evidence against wife—Admission by plaintiff's counsel that letters were inadmissible against co-respondent—Letters referred to in cross-examination by counsel for co-respondent—Plaintiff's contention in appeal that letters were admissible against co-respondent—Fact in issue—Relevant fact—Hearsay—Evidence Ordinance, ss. 7 and 9—Appeal.

Plaintiff brought an action against his wife for divorce on the ground of adultery with the second defendant. He also claimed damages against the second defendant. Plaintiff found his wife at the house of a neighbour in a state of intoxication. He brought her home, and called the second defendant to assist him to compose his wife. The wife still suffering from the effects of intoxication, charged the second defendant with misconduct with her. The plaintiff treated the remarks then as due to intoxication.

Within two or three days of this incident, the wife began to address a series of secret letters in rapid succession to the second defendant, in which reference was made to the above incident and to other acts of misconduct. The plaintiff intercepted these letters. At the trial the wife did not contest the case. The plaintiff's counsel produced the letters as against the wife. The counsel for the second defendant contended that these letters were not evidence against him. The plaintiff's counsel admitted that this was so. The second defendant's counsel, fearing that the letters might prejudice his client in the mind of the Court and with the public, required all the letters of the series should be produced, but reserved to himself the right to object that the letters were not evidence against his client. The second defendant's counsel referred to the letters freely in his cross-examination of the plaintiff, and went so far as to challenge the whole case even as against the wife.

The plaintiff's counsel in his summing up again admitted that the letters were not evidence against the second defendant.

Held, that 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.

The letters were also relevant evidence against the second defendant by reason of the provisions of the Evidence Ordinance.

" The alleged misconduct of the parties is a fact in issue in this case, but so also is the interview between husband, wife, and second respondent at which the wife made her confession. This interview may also be regarded as a relevant fact. Section 7 declares that facts which are the effect of any relevant fact or fact in issue are

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themselves relevant. A series of letters addressed by one of the parties to the interview to the other party affiected by her confession may be considered as one of the effects of that interview. Section 9 is more specific. The interview above referred to is a fact in issue. Section 9 declares that any facts 'which support or rebut an inference suggested by a fact in issue' are relevant in so far as they are necessary for that purpose."

A party who makes an admission on a point of law at the trial is not bound by that admission in appeal.

THE facts are set out in the judgment.

Elliott, K.C. (with him *Samarawickreme, B. F. de Silva, Amarasekera,* and *Ferdinands*), for plaintiff, appellant.

H. J. C. Pereira, K.C. (with him *Soertsz, H. V. Perera,* and *L. M. de Silva*), for the co-respondent, respondent.

December 19, 1923. BERTRAM C.J.—

This is an action brought by the plaintiff for divorce from his wife, the first respondent, on the ground of her alleged misconduct with the second respondent. The action originated in the following manner: Plaintiff and the second respondent were friends, and the friendship was shared by the first respondent. The second respondent had at one time lived in plaintiff's house, and since that time had been a frequent visitor and an associate of the whole family. On February 10, 1922, plaintiff was distressed to find his wife at the house of a neighbour in a state of violent intoxication. He succeeded in getting her home, and brought his friend, the second respondent, to the house to assist him to compose his wife. At the interview in the house, the wife, still suffering from the effects of intoxication, made a dramatic confession of infidelity to her husband, and charged the second respondent with being a participator in her guilt. The second respondent made no reply to the accusation. The condition of the first respondent was such that the husband was perplexed as to how the remark ought to be regarded. He was reluctant to believe his friend guilty of such treachery, and, for the time being, treated the remark as the result of a halucination due to the condition of intoxication in which his wife was. All three sat down to dinner, and the second respondent shortly afterwards left, the wife begging him to return in the morning.

Within two or three days of this singular incident, the wife began to address a series of secret letters to the second respondent. In the first of these reference was made to the interview above described. These letters followed rapidly one upon the other. They were intercepted by the husband. Their terms at first left him in some doubt as to whether any misconduct had actually been committed, but as time proceeded, their references became unequivocal. Mainly

as the result of these letters, and of a communication from the servant to whom the wife had entrusted them, he instituted these proceedings.

At the trial in the District Court plaintiff necessarily presented his case against the two respondents together. The wife did not appear, and wrote to the Court disclaiming any defence, but the plaintiff, nevertheless, had to prove a case against her. As an essential part of the case against the first respondent, counsel for the plaintiff referred to these letters in the opening.

It was impossible for counsel for the second respondent to object either to the opening or the production of these letters. He contended, both here and in the Court below, that these letters were in no way evidence against his client. Assuming that this is so, his technically correct course would have been to have left these letters severely alone, and to have confined himself in his defence, to the other evidence of the alleged misconduct. This course, however, though technically correct, he felt to be practically impossible. He realized that these letters were of such a character that, if unchallenged, they might prejudice his client unconsciously in the mind of the Court, and that they would certainly prejudice him with the public. At an early stage in the trial he declared that he was anxious for the fullest investigation, and required that all the letters of the series should be produced, and not only those which plaintiffs' counsel had put in, but reserved to himself the right to object that the letters were not evidence against his own client. Counsel for plaintiff freely admitted that the letters were not evidence against the second respondent, and the case was fought upon this singular and artificial footing.

As the case proceeded, however, the contents of the letters became an inseparable part of the trial. Second respondent's counsel, in connection with these letters, set up several pleas, not easily reconcilable with one another. He argued, in the first place, that these letters were the outcome of a mental and sexual disorder known as nymphomania. He contended, in the second place, that the action by the husband was *malâ fide:* that he was inspired not by honest indignation, but by social jealousy; and that his motive was blackmail, and that he himself had taken advantage of the drinking habits of his wife to inspire her to fabricate these letters.

The plaintiff was severely cross-examined from this point of view, and the letters were freely referred to in order to support it and in order to enforce the suggestion of nymphomania. Counsel for the defence wen tfurther. Feeling that his client might suffer in reputation if a verdict were taken against the wife on the ground of her own confession, and if the action against his own client were dismissed because of insufficiency of evidence, he challenged the whole case against the first respondent, and sought to persuade the

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Judge that even as against her, in spite of her explicit confession, judgment ought not to be entered.

In spite of all these developments, counsel for the plaintiff, in pursuance of his original undertaking, formally admitted in his summing up that the letters could not be treated as evidence against the second respondent, and the learned District Judge, in his judgment, so ruled. He further ruled, with perfect correctness, that the confession of the wife to her husband in the presence of the second respondent was not in itself evidence against the second respondent, but was relevant only for the purpose of enabling the Court to judge of the conduct of the second respondent upon that confession.

Apart from the interview and the letters, there was a definite body of other evidence against the second respondent. Two friends of the plaintiff, whose evidence there is no reason to impeach, spoke to finding the second respondent in the company of the wife under circumstances which they considered suspicious. The plaintiff's chauffeur (who had brought him the letters) testified to certain acts of familiarity and intimate behaviour on the part of the two respondents. He and another servant spoke of them being on several occasions together in the plaintiff's bedroom in the absence of the plaintiff. The second respondent denied the alleged acts of familiarity, but admitted that in view of his intimacy with the family and his frequent visits to the house he may well have been in the plaintiff's bedroom with the first respondent. He protested that, if so, his presence there was wholly innocent, and that the inference sought to be drawn by the witnesses for the plaintiff were unjustified. The confession of the wife in her husband's presence he said he had regarded as the utterance of a disordered nature under the influence of intoxication.

The learned District Judge ruled out the letters, and, having decided that the wife's confession could be regarded only in so far as it affected and threw light upon the behaviour of the second respondent, considered that he had to approach the other evidence, as though everything said in connection with the letters were excluded from his mind, and that he was to weigh it and adjudge it as he would have weighed it and adjudged it if this was the only evidence brought before him. He came to the conclusion that the evidence was not of such a character as would have justified him, under such circumstances, in finding misconduct against the second respondent.

As against the wife he considers the case fully proved. In a somewhat difficult passage in his judgment he then separately addressed himself to the plea of defendant's counsel that, notwithstanding first defendant's confession and letters, he should dismiss the case against her also on the ground that both confession and letters were the emanations of a delusion. He examined this plea, and came to the conclusion that the letters were not the emanation

of a delusion, but were genuine and spontaneous letters referring to a state of facts which actually existed. We, therefore, rejected the suggestion of counsel for the second respondent that he should dismiss the case against the wife.

With regard to the conclusions of the learned District Judge, upon the evidence other than the wife's confession and letters, it does not appear to me that it is open to any serious criticism. The task which he had to discharge was an artificial one, but not more artificial than that which judges in similar situations have to discharge. It frequently happens in divorce cases that a decree is given against a wife on her own confession, but that the case against the co-respondent, based on that confession, has to be dismissed because there is no other evidence against him. In this case there was a considerable body of evidence against the second respondent, and this made the learned Judge's task more difficult. Undoubtedly there was adequate evidence to justify him in finding a verdict against the second respondent, but the evidence, in my opinion, was not of such a character that the learned District Judge was bound to give effect to it.

But all this is on the supposition that the evidence of the letters which were the origin and moving factor in the case was entirely to be left out of consideration. As the case developed, it evolved in the minds of those conducting it, the peculiar assumption that the letters could not be used to prejudice the second respondent, but that they might, nevertheless, be used by the second respondent in every possible way to prejudice the plaintiff. I am at a loss to understand how this position can be accepted. I can hardly suppose that the learned Judge would have permitted the case to proceed on this basis if he had not been misled by the agreement of counsel at the bar. 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. They became an essential part of the case, and were bound to be adjudicated upon by the Court. No doubt artificial situations often arise in divorce cases, but the manner in which the letters were dealt with in this case seems to me to carry artificiality beyond all allowable limits.

It is quite true that this peculiar process grew up out of an admission made by plaintiff's counsel in a certain spirit of astute generosity, but in his petition of appeal, and in this Court, plaintiff's counsel abandoned that position. We have ruled in a previous case, *Perera v. Samarakoon* [1] that he is entitled to do so, and Mr. H. J. C. Pereira is not able to contest this authority. We, at any rate, who in this Court, have to adjudicate upon the merits of this case cannot recognize so artificial a position. We must ask ourselves whether in

[1] *(1922) 23 N. L. R. 502.*

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fact the letters were evidence against the second respondent, and, if so, what bearing they have upon the case.

In my own opinion they were evidence against the second respondent, both by reason of the use that was made of them by the defence and also by reason of the principles of the law of Evidence in force in this Colony. I have already explained my view with regard to the first of these heads. That view, if justified, is in itself sufficient to require us to examine the letters, but as the principles of our law of Evidence were, in fact, discussed before us, and as the case is of some general importance, I think it well that we should express ourselves on this aspect of the matter.

Although the Evidence Ordinance has now been in force in this Colony for nearly a generation, counsel and Judges of experience, in arguing and deciding upon questions of evidence, proceed, as a rule, not so much upon a recollection of the precise words of our Code, but rather instinctively upon the unconscious tradition which survives in our Courts from the days before the Evidence Ordinance when our law was identical with the law of England. So also at the English Bar these questions of evidence are, as a rule, decided upon the basis of general principles instinctively realized, but seldom consciously formulated. Perhaps the most rooted of these instinctive principles in the law of England is that which prohibits hearsay evidence. A fact is said to be proved by hearsay evidence when evidence is given either that a statement as to the fact was made by some person not called as a witness, or that a statement as to the fact is contained in some letter, book, or document. There are certain well-known and recognized exceptions to this rule, but where these exceptions cannot be invoked the mind of a lawyer bred on English principles revolts at the idea of a man being prejudiced by the production of a letter written by a person not called as a witness and not subjected to cross-examination. There is another principle connected with that just described. It is recognized that remarks may be made or letters may be written which may have an intimate bearing on a case under trial. If brought to the notice of the party sought to be charged by them, they may have great importance when considered in connection with his conduct with regard to them. In such cases the English lawyer instinctively asks, when it is sought to tender in evidence an utterance or a letter : " Was the defendant present when this was said ? " or " was this letter brought to the notice of the defendant ? " If the answer is in the negative, he objects to the remark or the letter being admitted in evidence.

In the Courts of our Colony, however, we are governed not by the general principles of the law of England, but by the express enactments of the Evidence Ordinance. It is a singular thing, however, that our Evidence Ordinance contains no general prohibition of hearsay, nor does it anywhere specifically prohibit the use of a remark or a letter against a person not responsible for it, where the

remark or the letter was not brought before him in such circumstances as to affect his action. If the history of the Ordinance is read, as it may be read in the *Appendix to Ameer Ali's Treatise*, it fully confirms the effect which the Act itself produces. The principle draftsman of the Code rejected with a certain *animus* the whole of the English law of hearsay. Instead of its negative provisions which exclude this or that type of evidence, he substituted positive enactments enumerating and declaring what should be treated as evidence, and for the English theory of admissibility and inadmissibility he substituted the new doctrine of relevancy, enacting that evidence might be given of all facts declared by the Code to be relevant and of no others (section 5). A trace of the English aversion to hearsay is to be found in section 60, which declares that oral evidence must in all cases whatever be direct, and it is sometimes thought that this provision reimports into our Code the English prohibition of hearsay. But the section is obviously insufficient for the purpose. It is in particular defficient in the present case, where the evidence in question is not oral evidence but consists of letters.

Among the statements declared to be relevant are those enumerated in section 32. This section deals with statements by persons who cannot be called as witnesses, and it embodies many of the recognized exceptions to the English rule excluding hearsay. It might possibly be thought that by implication from this section all other statements by persons not called as witnesses are necessarily irrelevant, and that for the purpose of more precisely defining this principle (which is nowhere expressly laid down in the Ordinance) we must have recourse to section 100 which allows us, in this Colony, to have recourse to the English law of Evidence for the purpose of questions not provided for in our Ordinance. I do not think, however, that this is possible. Statements by persons not called as witnesses are referred to as relevant in several places in chapter 2. It cannot be said that these questions are not provided for. They are provided for in a different way.

We are, therefore, reduced to an examination of chapter 2 of the Evidence Ordinance, in order to satisfy ourselves whether, in the circumstances of the case, these letters are to be considered as "relevant." Two sections, which during the argument were discussed as having a specific bearing on the case, may be at once rejected. The first is section 19, which deals with the use of admissions made by certain persons who are strangers to a suit against a party to a suit. It is hardly necessary to consider the special history of that section or the phraseology which has been used in its enlargement into a general principle. The persons there under consideration are persons who are not parties to a suit at all, and the section has no bearing on the use of an admission by one of two respondents against the other. In any case, the word "liability" means a pecuniary and contractual liability, and the

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word " position " has no reference to such a situation as that which we are now discussing. The other section was section 10, which refers to things said or done by conspirators in reference to their common design. That section, too, has a special history, and is intended to deal with a special class of facts. Quite apart from the inappropriateness of describing a guilty relationship of this sort, as a conspiracy to commit an actionable wrong, it is clear that these letters cannot aptly be described in the words of this section as being written by one of the parties of the relationship " in reference to their common intention."

There are, however, certain sections which have a more immediate bearing upon the case, and these are sections 7 and 9, which I will proceed to consider.

First, as to section 7. The alleged misconduct of the parties is a fact in issue in this case, but so also (see definition in section 3) is the interview between husband, wife, and second respondent at which the wife made her confession. This interview may also be regarded as a relevant fact. Section 7 declares that facts which are the effect of any relevant fact or fact in issue are themselves relevant. A series of letters secretly addressed by one of the parties to this interview to the other party affected by her confession may surely be considered as one of the effects of that interview.

Section 9, however, is more specific. As I have said, the interview above referred to is a fact in issue. Section 9 declares that any facts " which support or rebut an inference suggested by a fact in issue " are relevant in so far as they are necessary for that purpose. Two inferences were in fact suggested by this interview. The first is that suggested by the plaintiff that the silence and inaction of the second respondent on the confession being made were due to the embarrassment caused by a consciousness of guilt. The other was that suggested on behalf of the second respondent, namely, that he was silent because he treated this confession as the ravings of a disordered mind. A series of letters written by the wife, who made the statement, to the second respondent, in whose hearing she made it, following almost immediately upon the making of it, supports the first of these inferences and rebuts the second. They disclose a relationship between the parties which is fatal to the inference suggested by the respondent. Again, section 9 declares that facts " which show the relation of parties by whom any fact in issue was transacted are relevant." It is difficult to see how it can be said that these letters do not show the relation of the parties to this interview. 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.

Two observations may here be made. The first is that in the present case we know the contents of the letters, and we can read them in order to judge of their relevancy. In all ordinary cases, however, the Judge would have to rule on the admissibility of the document without seeing it. He would have to judge from all the circumstances of the case whether it was calculated to be of such a nature as to be admissible, as being the effect of a fact in issue, or as explaining the relation of parties, or as confirming or rebutting a possible inference, as the case may be. The second observation is this. If we consider the question from the point of view of common sense, and not from the point of view of our English prepossessions, I think that everybody would feel that where two persons are suspected of being in a relationship of this sort, any communications passing between them, even though they do not actually reach the person to whom they are addressed, are most material for the purpose of determining whether such relationship in fact existed.

It appears to me, therefore, that both upon the ground of the use made of the letters by counsel for the respondent and upon the ground of the principal of our law of Evidence, these letters constitute evidence which must be considered for the purpose of determining the issues in this action. Are these letters genuine letters ? or, are they, on the other hand, either the result of a malicious fabrication or the emanations of a sexually disordered mind ? The first of these alternatives may be wholly rejected. There is nothing whatever to support it. These documents are obviously not fabrications. When they are read, they make the whole of the action of the plaintiff, taken upon them, perfectly clear. There is no occasion or justification for imputing to him any indirect motive with regard to them. With regard to the other alternative it is suggested that they are symptoms of nymphomania, and it is singular that this contention, so vital to the respondent's case, has been so inadequately presented. No evidence has been given on the subject, except by himself and another member of the profession who, for reasons given by the learned Judge, must be regarded as, to some extent, in the nature of a partisan. A practitioner of the greatest eminence was called into the witness box, but no questions were put to him as to the nature of this supposed disorder. There is a reference to it in one of the cases cited to us, which indicates that it is the result of an affection of the uterus. It appears to be of the nature of hysteria, and to take the form of delusions on the part of the person affected by it that she has taken part in acts of sexual intimacy which, in fact, have never occurred. It appears to be suggested by the second respondent that an early and premonitory symptom of the disorder may be the existence of excessive activity of the sexual instinct, indicated by acts of amorous behaviour. All that can be said on this point, in the absence of any medical evidence, is that neither in the actions of the first respondent nor in the terms

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of her letters is there anything to justify the imputation to her of this mental disorder. The second respondent, himself, says that he was frequently and continuously in her company, but he saw no symptoms of the disorder and never suspected its existence until these letters were written. The letters seem the natural outpourings of a nature involved in a illicit relationship. They make references to facts and circumstances which are shown to be true, and they produce upon the mind the vivid impression of being the mirrors of fact. There is one expression, indeed, which, if it bears the meaning it seems to bear, is of a shocking and revolting character, but I agree with the learned District Judge that it does not displace the impression caused by the letters as a whole.

It appears to me that these letters are decisive of the case. For the reasons I have given, I think they ought not to have been excluded by the learned Judge. When the case against the second respondent is supplemented by these letters, they clinch the evidence given by the other witnesses, and place the general truth of their evidence beyond reasonable doubt. In my opinion, therefore, the appeal of the plaintiff should be allowed, and the cross appeal of the second respondent, the admissibility of which was not seriously pressed, must be dismissed, in both cases with costs in both Courts.

It becomes necessary for us to assess damages against the second respondent. The plaintiff disclaimed any desire to receive any damages at all, and indicated his intention of appropriating any damages he may be awarded to charity. As, however, this is an action for damages, it is necessary that we should assess them. Such an injury cannot adequately be assessed in pecuniary terms. If damages are awarded it is for the purpose of expressing the reprobation of the Court and of society. In the present case, in view of costs already incurred, that reprobation may be definitely, though of course not adequately, vindicated by the assessment of damages at Rs. 5,000. The costs should be taxed on the basis of this amount.

PORTER J.—

I have read the judgment of his Lordship the Chief Justice and agree with his decision in this case, and I agree with his observations as to the admissibility of the documentary evidence, and I consider that the evidence against both the respondent and the co-respondent, apart from the letters, is amply sufficient to justify the finding.

There is, against both respondents, the evidence of the chauffeur regarding what he saw reflected in the windscreen.

The evidence of the maid servant of the visits of the co-respondent in the absence of the plaintiff when the co-respondent spent long periods with the respondent in the plaintiff's bedroom at times when the co-respondent must have known of the plaintiff's absence, for instance, when the plaintiff and the children were away at the races.

The co-respondent admits his being with the respondent on this and on many occasions in the plaintiff's bedroom in the absence of the plaintiff, but says, in view of his intimacy with the family, his presence there was wholly innocent, and that the inferences sought to be drawn by the witnesses for the plaintiff were unjustified.

I think the appeal of the plaintiff should be allowed, and the cross appeal be dismissed in both cases, with costs in both Courts.

It is necessary to assess damages against the second defendant. Counsel for the plaintiff disclaimed any desire to receive damages, and that any damages awarded would be given to charity.

I would therefore award damages of Rs. 5,000 and costs on this scale against the co-respondent not as a measure of their adequacy, which cannot be assessed in pecuniary terms, but as expressing the reprobation of the conduct of the co-respondent.

Appeal allowed.