

THE
CALCUTTA
LAW REPORTS
OF
CASES
DECIDED BY THE
HIGH COURT, CALCUTTA,
ALSO
JUDGMENTS OF H. M.'S PRIVY COUNCIL.

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1879.



CALCUTTA:

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The Hon. SIR RICHARD GARTH, <i>Knight</i> ,	<i>Chief Justice.</i>	
„ „ LOUIS STEUART JACKSON, C.I.E.,	} <i>Judges.</i>	
„ „ CHARLES PONTIFEX,		
„ „ WILLIAM AINSLIE,		
„ „ ERNEST GEORGE BIRCH,		
„ „ GEORGE GORDON MORRIS,		
„ „ JAMES SEWELL WHITE,		
„ „ ROMESH CHUNDER MITTER,		
„ „ HENRY STEWART CUNNINGHAM,		
„ „ WILLIAM FRASER McDONELL, V.C.,		
„ „ HENRY THOBY PRINSEP,		
„ „ LOFTUS RICHARD TOTTENHAM,		} <i>Officiating as Judges.</i>
„ „ ALEXANDER THOMAS MACLEAN,		
„ „ LEWIS PRICE DELVES BROUGHTON,		

The Hon. SIR RICHARD GARTH, *Knight*, Chief Justice, was absent on leave from 17th August to 17th September, 1878.

The Hon. LOUIS STEUART JACKSON, C.I.E., officiated as Chief Justice from the 19th of August, 1878 to the 17th September, 1878.

The Hon. ERNEST GEORGE BIRCH was absent on leave from the 16th of February, 1878 to the 24th December, 1878.

The Hon. GEORGE GORDON MORRIS was absent on leave from the 8th of April, 1878 to the 12th October, 1878.

The Hon. HENRY STEWART CUNNINGHAM was absent on deputation from the 11th of May, 1878.

The Hon. LOFTUS RICHARD TOTTENHAM officiated as a Judge from the 8th of April, 1878 to the 24th December, 1878.

The Hon. ALEXANDER THOMAS MACLEAN officiated as a Judge
from the 17th of April, 1878 to the 12th October, 1878.

The Hon. LEWIS PRICE DELVES BROUGHTON officiated as a Judge
from the 11th of May, 1878.

The Hon. GREGORY CHARLES PAUL, C.I.E.,... *Advocate-General.*
JOHN D. BELL, Esq. ... *Standing Counsel.*

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called on, and his Counsel had not been instructed and withdrew from the case. The learned Judge held, that the fact that the defendant had answered to the summons and had engaged Counsel did not deprive him of the right to make an application to the Court under section 119 of Act VIII of 1859 to set aside the judgment passed as an *ex-parte* judgment.

We must, therefore, set aside the order of the Judge of the Small Cause Court, and direct him to exercise the jurisdiction vested in him by the first part of section 21 of the Small Cause Court Act, and determine whether the defendant has shown sufficient cause for his non-appearance at the time when the suit was heard.

The petitioner is entitled to his costs.

[CIVIL APPELLATE JURISDICTION.]

Sept. 14th. CHARLOTTE REBECCA FOWLE PLAINTIFF;
AND
No. 138 of EDWARD FOWLE DEFENDANT.
1877.

Divorce—Act IV of 1869—Desertion—Abandonment—Wife, Separation against wish of—Alimony—Costs of Appeal.

Where there has been a voluntary separation between husband and wife, there can be no desertion of the wife by the husband, unless there shall have been a resumption of intercourse, or, the wife shall have taken active steps to make the renewal of such intercourse possible or practicable.

Wood vs. Wood, 1 C. L. Rep., 552, distinguished.

In a suit for divorce, a wife, though unsuccessful, is entitled to the costs of an appeal if it be not unreasonably preferred.

Jones vs. Jones, L. R., 2 P. and D., 333, followed.

REGULAR APPEAL from a decree passed by the Recorder of Rangoon.

This was a suit for divorce, on the grounds of cruelty, adultery and desertion. The respondent, Mr. Edward Fowle, who was born in June 1820, arrived in Moulmein from England in the year 1845. He afterwards carried on business there as a timber merchant, until 1856, when he returned to England. While in

Burmah he had formed a connection (Burmese fashion) with a woman named Mahkin, and on leaving he arranged with Mahkin that, if he did not return within twelve months, she was to be at perfect liberty, and he also.

Shortly after his return home he met, for the first time, the respondent—then Miss Charlotte Rebecca Webster—to whom he was married on the 26th of November 1856. At the time of the marriage, the petitioner's father settled £1,000 and respondent £500, to the separate use of the petitioner. This sum produced an income of £80 a year which, from the time of her marriage, the petitioner has always received and applied to her own use. In September 1857, a child was born, and Mr. Fowle's business in Burmah having become involved through the negligence and dishonesty of the agent whom he had left in charge, the petitioner and the respondent not having sufficient means to live in England, left England for Rangoon, where they arrived in May 1859. They remained in Rangoon till April 1861, when Mrs. Fowle returned to England. When Mrs. Fowle left Rangoon, there was no intention on either her part or on that of the respondent not to resume cohabitation again.

Some months after the petitioner's return to England, Mr. Fowle went on business to Moulmein, and, meeting Mahkin there, resumed his former connection with her. This connection continued without interruption down to the institution of this suit, during which time Mahkin had several children which the respondent brought up, educated, and acknowledged as his. During this time Mrs. Fowle remained in England with her daughter, keeping up a correspondence with the respondent.

From this correspondence it appears that the petitioner and respondent did not live happily together while in Rangoon, she complaining of her husband's bad prospects, his neglect, harshness, idleness and want of steadiness, and he of her stubborn and irascible temper, unfounded jealousy, and general want of appreciation of her husband. Up to 1868, she received a fair allowance, having regard to her husband's income which was small. From 1869, his prospects rapidly improved, and his large income for the three or four years preceding the suit

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was Rs 46,000. During this time he only allowed his wife and daughter £150 a year, which with her separate income, made £250. Mrs. Fowle constantly complained of the smallness of her allowance, and it appeared from her evidence that had she had a fair allowance, she would not have desired to join Mr. Fowle in Rangoon.

Up to 1871 Mrs. Fowle was unaware of the connection which her husband had formed with Mahkin, but she states in her evidence that from her knowledge of his character and opinions, she had had an idea that he would not remain faithful to her. In that year, Captain Brooking, a mutual friend of Mr. and Mrs. Fowle's, left Rangoon for England. Shortly before his departure Mr. Fowle said to him—"Tell Charlotte not to come out." He delivered this message to Mrs. Fowle, and, on her inquiring how Mr. Fowle was living, he said—"Don't ask me. I know nothing about how he was living, but I have only heard there was a woman of the name of Mahkin about the place." Mrs. Fowle afterwards inquired of several persons as to her husband's conduct, who told her that he was living a quiet, steady life. She heard nothing further of Mahkin until the 25th of December 1875, when the whole matter was told her by a Mr. Hannay. She immediately made preparations for leaving England for Rangoon, which she did on the 20th of January 1876. On the 16th of March 1876, the present suit was instituted in the Court of the Recorder of Rangoon.

An application was made by the petitioner for alimony *pendente lite*, and the Court granted Rs. 700 per month. The case having come on for hearing, his Honor, the Recorder, found the charges of cruelty and desertion unproved, but he gave a decree for a judicial separation on the ground of the adultery with Mahkin. It should also be noticed that this was the only charge of adultery which was substantiated against Mr. Fowle and this was admitted by him.

When the case came on for final disposal, the respondent was ordered to enter into a bond with the Registrar of the Court conditioned for the payment of Rs. 700 a month as permanent alimony. The respondent moved for a review of judgment, where this amount was reduced to Rs. 620, on the ground that in

fixing the amount at Rs. 700, the Court had not taken into consideration the fact of Mrs. Fowle having a separate income of £80 a year. The petitioner appealed on the whole case to the High Court of Judicature at Calcutta, but when the appeal came on for hearing she abandoned the charge of cruelty, the questions which remained for the Appellate Court to decide were the fact of desertion, and the amount of alimony.

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 Argument.

Evans, for the Appellant, *Mr. Remfry* with him.

Evans.—The real issue is : Is the petitioner entitled to a divorce, and this depends on whether desertion and adultery for two years has been proved. The adultery is admitted, and the only question is as to the desertion. As to that, it appears uncontradicted, that during Mrs. Fowle's residence in England after her arrival there in 1861, she received letters from her husband warning her not to come out to him, as he would leave the country if he heard she were coming. He sent a message to her by Captain Brooking in 1871, that she was not to come out ; he repeated again and again that he would never leave Burmah, would never live in England ; and during all this time he was living as the husband of Mahkin, whose children he educated and acknowledged as his own—there could be no stronger proof of desertion than that. Besides, he tells her that he will make no change in his habits or opinions which were the prime cause of all the unhappiness of their married life.

The husband's prohibition to follow him is strong evidence of desertion—*Macqueen on Divorce*, pp. 300-3 ; and his refusal to make any change in his habits of life is also strong evidence to the same effect—*Gibson vs. Gibson*, 29 Law Jour., 25 ; *Meara vs. Meara*, 35 Law Jour., 33. It is not a fact that there cannot be desertion unless the wife deplores the separation—*Macqueen on Divorce*, p. 306. *Gatehouse vs. Gatehouse*, L. R., 1 P. & M., 331, shows that desertion dates from the time the husband meant to abandon his wife ; in this case we say the desertion commenced when the respondent formed the permanent connection with Mahkin in 1861, and was complete in two years afterwards. See as to constructive desertion, *Williams vs. Williams*, 3 Sw. and Tr., 547 ; *Lawrence vs. Lawrence*, 2 Sw. and Tr., 580 ; and *Wood*

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vs. *Wood*, 1 C. L. R., 552; the last is a strong authority in my favour.

Once the desertion is complete, the right to divorce cannot be lost unless the wife condones the adultery—*Macqueen on Divorce*, 307; *Cargin vs. Cargin*, 27 Law Jour., 69; *Cudlip vs. Cudlip*, 27 Law Jour., 69. And the fact of giving an allowance to a woman whom he has abandoned is no answer to a suit for divorce—*Macdonald vs. Macdonald*, 4 Sw. and Tr., 242; *Yateman vs. Yateman*, L. R., 1 P. and M., 489.

On the question of alimony, we contend that the amount allowed was too small. In *Orde vs. Orde*, 5 B. L. R., Appendix, 34, one-fourth was given. The review cutting down the amount of alimony was wrong—*Otway vs. Otway*, 3 Phill., 109. The rule is to give as much or more permanently than was given *pendente lite*. Again the alimony should be charged on the immoveable property of the defendant; his own bond is not security within the meaning of section 37 of the Divorce Act of 1869. See for form of Bond, *Macqueen on Divorce*, p. 428, *Appendix*.

J. D. Bell and Jackson, for the Respondent.

In order to constitute desertion there must be abandonment of the wife, against the wish of the wife, and there must be positive proof that it is against the wish of the wife. *Macqueen's* conclusions to the contrary (page 306) are bad law. What he calls "dicta" are clearly good law. It must be proved affirmatively that the wife has objected to the separation—*Smith vs. Smith*, 1 Sw. and Tr., 359; in no case will a divorce be granted unless the Court can put its hand upon some circumstances and say:—"This shows the separation is against the wish of the wife—*Gibson vs. Gibson*, 29 Law Jour., 25; *Thompson vs. Thompson*, 27 Law Jour., 65; *Yateman vs. Yateman*, L. R., 1 P. and M., 490; *Lawrence vs. Lawrence*, 2 Sw. and Tr., 583. Now in the present case, the parties separated voluntarily in 1861, and in the whole correspondence there is no trace of a desire on the part of the wife to resume cohabitation. All her letters show that she had no wish to return to her husband so long as she got a sufficient allowance.

Fitzgerald vs. Fitzgerald, L. R., 1 P. and D., 694, is applicable.

were. Here, as there, the cohabitation was voluntarily determined in 1861, and that case shows that there can be no desertion under such circumstances unless there is a resumption of cohabitation. Where the wife chooses and agrees to remain apart there can be no desertion—*Buckmaster vs. Buckmaster*, L. R., 1 P. and D., 713. *Gatehouse vs. Gatehouse*, L. R., 1 P. and M., 332, is not in point. There the intercourse was merely suspended; here it was voluntarily determined. *Wood vs. Wood*, 1 C. L. R., 552, is also a case of mere suspension; it is a case of a different class from *Fitzgerald vs. Fitzgerald*, L. R., 1 P. and D., 694, and quite consistent with it. When all the letters of the respondent are read together, they show that he never had any intention to abandon his wife.

The Court below is right on the question of alimony. The personal bond of the husband is amply sufficient security—*Hyde vs. Hyde*, 4 Sw. and Tr., 80. [Counsel were stopped on this point.]

Evans, in reply.

Smith vs. Smith is a case from which you cannot draw a principle that will be supported by the other cases. In *Gatehouse vs. Gatehouse* it was held that the desertion was the act of the husband, inasmuch as it appeared quite clear that the wife had no intention of severing the connection, that is also the case here. The absence of any expressed demand on the part of Mrs. Fowle, for the resumption of cohabitation, is accounted for by the fact that it was only in 1875, shortly before she came to Kangoon, when she heard of Mahkin, that she was satisfied of Mr. Fowle's intention to abandon her. There is quite sufficient evidence to show that when Mrs. Fowle heard of the whole circumstances, the separation was against her wish. This is a clear case of a woman being abandoned without her knowing it, and I do not see on what ground it can be contended that a wife cannot be abandoned without knowing it.

The following judgments were delivered by the High Court (1):—

JACKSON, *Offg. C.J.*:—

JACKSON, *C.J.*

This was a petition for dissolution of marriage by a wife,

(1) JACKSON, *Offg. C.J.*, MARKBY and PRINSEP, *J.J.*

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Charlotte Rebecca Fowle, on the ground of adultery, cruelty, and desertion, filed under the Indian Divorce Act, in the Court of the Recorder at Rangoon, in British Burmah. The husband, Edward Fowle, as respondent, admitted the principal act of adultery or rather course of adulterous life charged; but denied the other adulteries, and also the cruelty and the desertion. He avowed, however, that the petitioner had connived at the adultery which he admitted. The suit having come on for trial, the Recorder found that cruelty had not been committed; that the petitioner had not been deserted; and that the adulteries charged, previous to an adulterous connection with a Burmese woman named Mahkin, had not been proved; but on the ground of the last-mentioned adultery, which had not been condoned, and as to which he found no connivance or acquiescence, he decreed a judicial separation with alimony, but dismissed the petition for a divorce. The alimony was, at first, fixed at Rs. 700 per mensem, but, on reconsideration, he thought fit to reduce that sum by Rs. 80 per mensem, as the equivalent of an income arising out of the marriage settlement of Mrs. Fowle; so that the sum finally allowed as alimony was Rs. 620 per mensem, secured by a penal bond which the husband was required to enter into with the Registrar of the Court in the sum of Rs. 10,000.

Charlotte Fowle, dissatisfied with this judgment, appealed on the ground: *first*, that cruelty had been sufficiently proved; *secondly*, that desertion had been proved, either of which, coupled with the adultery, entitled her to a dissolution of the marriage; *thirdly*, that the alimony allowed was insufficient; and, *fourthly*, that it had not been adequately secured or made payable as long as the petitioner lived. The respondent, on the other hand, preferred an objection, not in the sequel insisted on, that the alimony was *excessive*. The appellant, at the hearing, abandoned the charge of cruelty; but we are much pressed to find a case of desertion.

The facts admitted are these:—Edward Fowle, the respondent, apparently born about 1820, came in early life, to Moulmein. His father, a Captain in Her Majesty's 63rd Foot, dying in 1841, shortly after, left a widow and two daughters in very

circumstances. Edward Fowle continued in Burmah in various mercantile situations, helping his mother out of his income. In the course of time, he formed a connection, of a kind very common in Burmah, with a woman of that country named Mahkin. Having, apparently, amassed a little money, and having a certain commercial position, he went to England in 1856; things being arranged between him and Mahkin, that both should be free when he had not returned within a year. Edward Fowle, having afterwards gone to France, met, at Calais, the petitioner, whose parents had known him as a boy, being friends of his father.

In November 1856, Edward Fowle married the petitioner, and about a year afterwards, a daughter—the sole issue of this marriage—was born. It seems that Mr. Fowle's fortune, though prosperous enough when he left Burmah, was precarious. He was reduced to serious difficulties by the misconduct of an agent, and the couple soon found themselves in embarrassment. About this time, too, subjects of dispute appear to have arisen between husband and wife; she manifesting a somewhat positive temper, and he being, in her opinion, profuse, and certainly thoughtless and provoking in his manner and conversation. Those letters of Mrs. Fowle which are preserved, (relative to this period of their married life), show a good deal of affection on her part, coupled, however, with a very distinct appreciation of her own rights and the duties of her husband. One result of their pecuniary troubles was, that Mrs. Fowle went over to Calais, where her parents were, for her confinement. Immediately after she had done so, he obtained a temporary appointment, being attached to the Siamese Embassy then in England. In this capacity, he took up his abode at Claridge's Hotel, where Mrs. Fowle presently joined him. They did not live very happily then, and out of some incidents of that time arose charges to which I need not at present advert. There were quarrels about a Burmese servant, and jealousies brought about a good deal by Mr. Fowle's jocular modes of expressing himself.

At last, in the early part of 1859, his funds having apparently come to an end, Edward Fowle returned to Rangoon accompanied by his wife, the infant being left behind in the care of the wife's mother, Mrs. Webster. Mrs. Fowle says, that he proposed her

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remaining in England, but that ways and means for her maintenance there were not forthcoming. The husband's affairs did not at first improve; their life at Rangoon was not entirely happy, nor, according to Mrs. Fowle, even comfortable. After a time, insolvency appeared imminent; and it was arranged that Mrs. Fowle should return to England; and she accordingly left Rangoon in April 1861, and arrived in England about the latter end of June.

From that time their conjugal life has never been resumed; and, indeed, they never met again till Mrs. Fowle returned in 1876, to Rangoon, for the purpose of taking the present proceedings. But a remarkable and not very regular correspondence was kept up. To some of the letters on both sides it will be necessary to advert by-and-by. For the moment, it need only be said that on the side of the husband, they contain alternate assurances of ardent love and violent reproaches, interspersed with trivial and often indelicate gossip and remarks. On the side of the wife, whose preserved letters are much less numerous, there is little show of love but a friendly disposition with a tendency to lecturing, a good deal of pressure (reasonable enough it must be said) for an increased allowance, and occasionally a tone decided and even threatening on this subject. Mrs. Fowle's life during all that time is admitted to have been quite irreproachable. She had her child with her, and brought her up till she was nearly adult, when the girl went to her father's relations.

But a few months after his wife's return to Europe, Mr. Fowle went on business to Moulmein, where he met with Mahkin, the Burmese woman previously mentioned; and the result was, that he resumed cohabitation with her, and continued to live openly with her down to the time of the trial. By this woman, he had had, in the interim, several children whom he has had baptised in his, who bear his name and have been educated at his expense, and indeed, has also been a daughter of Mahkin by another European with whom she had had an intermediate connection. He has, indeed, and emphatically affirms, that, if Mrs. Fowle had returned during this period, Mahkin would have immediately left him; and that it was so understood between him and Mahkin. But the admission of the kind was elicited from Mahkin herself, who

witness in the cause, and the tenor of her evidence makes this statement somewhat improbable; for she says, that she at first was angry and repelled his advances when they met at Moulmein, and his anger can only be ascribed to resentment at his having given her up for his European wife; and, further, it appears that she turned to him out of compassion for his reduced circumstances, and made him considerable advances out of her own funds. In this state of things, it is unlikely that she would have consented to be taken up and put down at Mr. Fowle's convenience.

There is consequently here a case of the clearest and most systematic adultery, which is more than a mere act of adultery, for it amounts in fact to a putting by the respondent, of Mahkin for many years together, as completely as possible, into the place of his wife. She managed his house, she bought and sold for him, and was, as the witness Antram says, the "lady of the house." He bore him children, she left her money in his hands and helped him generally in his business in every thing; and this without any disguise whatever. Mr. Fowle says, indeed, that he had quarrels with her; but he had also quarrels, at least as bitter, with his wife, and perhaps these differences may be taken as making the position more completely quasi-conjugal.

Upon this arises at once the question, whether there was any connivance or connivance on Mrs. Fowle's part, when she became aware of the state of the case; and what her conduct was when it came to her knowledge. This question may be answered at once. It seems that Mrs. Fowle had few friends, perhaps not one intimate friend, in Burmah; and that she kept up no correspondence with any one in Rangoon. She was quite aware of her husband's character, and thought him at least as bad as he actually was. He had led her not to expect marital faithfulness in him, and she undoubtedly did not expect it. She says that she always looked upon the resumption of their conjugal life as probable; and that she had made up her mind not to ask questions, and that when his infidelity on his part was actually brought to her notice, to suppose that his conduct had been correct. Now, the only thing which tends to affect her with knowledge, prior to 1875, of her husband's intercourse with Mahkin, is the fact that, in 1871, Captain Brooking, an acquaintance, came from Rangoon, bringing a

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message from the husband; and in answer to a question from Mrs. Fowle said, "he had heard there was a woman of the name of Mahkin about the place." It appears to us, that this vague statement of Captain Brooking would not necessarily convey to her mind an absolute knowledge that her husband was at that time actually living in adultery with Mahkin; still less can the statement be taken as foundation for a charge of connivance. On the other hand, it is certain, that as soon as Mrs. Fowle obtained a positive knowledge of the state of things in the winter of 1875, she took immediate measures for going out to Burmah with the view of taking proceedings for her divorce, if it could be obtained.

There can be no question, therefore, as to the respondent having committed adultery at which the petitioner has not connived. As to the earlier adulteries in Rangoon, we quite agree with the Court below in thinking that they are not proved; and, as to those charged as having been committed in England, we think it unnecessary to go into them: *first*, because if proved, they would not advance the petitioner's case as to a judicial separation; and, *secondly*, because to give the Courts in this country jurisdiction to dissolve a marriage solemnized out of India, the adultery complained of must have occurred in India. But the evidence as to such acts was certainly unsatisfactory.

We now come to the far more difficult question, whether the petitioner has further made out the charge of desertion which, if proved, would, coupled with the adultery, entitle her to a dissolution of the marriage. This is obviously a mixed question of law and of fact, and it will be convenient first to state, with all practicable brevity, how the facts appear to stand.

It is pretty clear, that, when husband and wife parted in 1864, the idea of a permanent separation was not in the mind of either. Mr. Fowle seems to be a person of buoyant character and impulsive temperament. His impressions are transient and his moods are changeable. He seems a kind-hearted man without much fixity of principle; and his correspondence plainly shows, that he was equally ready to be very fond of his wife or to be at daggers drawn with her, according to the tone in which the lady chose to respond to his advances. She, on the other hand, unmistakably displays greater tenacity and firmness. The affection

ading, even if accompanied with a certain hardness, exemplified in the earlier letters of her opening married life, has wholly appeared in the after letters. She would probably say that she is *disillusionnee*. The mingled coarseness and levity with which she had been treated effectually dispelled all romance or fondness from her nature, and left her cold and relatively to him concentrated in character.

He had an attachment to her chiefly sensual in its nature, and depended vaguely that something would "turn up" which would bring them together again. She, fond of the pleasanter parts of life, and indifferent now to her husband, had probably no wish to remain in Burmah; but would have returned thither, if she had thought her position there likely to present greater attractions than her life in England. As time wore on, it may be that stronger inducements would have been required to tempt her to remain; but we find no trace at any time of a settled resolution to do so. He, on the other hand, had constantly affirmed that he would never go back to England; and had announced his intention of removing or concealing himself in case his wife should come in search of him. In his cross-examination he says, on the contrary, that if his wife had come out, as she entered at one door, Mahkin would have gone out at the other. It is impossible to lay much stress on the declarations of a man like Fowle, who seems to have been in turns cajoling and defying his wife; now trying to soften her with the amount of his misery, and then taunting and wounding her with his language. He had, indeed, taken a step which, unknown to her, greatly altered their relation; and which, on the other hand, indisposed him to leave Burmah; and on the other, made him use measures to deter her from coming out. But a quarrel with Mahkin, a failure of his health, or the possession of a large sum of money, might, at any time, have led to a change in his position and to his going to England; and we cannot doubt that if he had so gone in any of the years between 1863 and 1865, he would have gone at once to his wife, and ostensibly amicable relations would have been resumed.

That which did happen was brought about by this,—that the estrangement by long absence, embittered by being kept in

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narrow circumstances when she knew her husband to be living in abundance, was roused to action by the certainty that she had been not only neglected but displaced.

Now, what in the legal sense is "desertion" which the petitioner alleges and which the exigencies of her case require her to prove? Desertion, by the Indian Divorce Act, "implies an abandonment against the wish of the person charging it." Abandonment is not defined; but the effect of the clause is doubtless to introduce into the Indian Statute the view adopted by the Courts in England in construing the English Act. Now, the expression "against the wish" is capable of two meanings. It may be construed either as contrary to an actively expressed wish of the person charging, and notwithstanding the resistance or opposition of such person; or it may mean simply an act done when the wish of the person affected by it is the other way. All the English cases seem to put the stronger and more definite construction upon the words, and as the Indian Legislature has undoubtedly adopted the language of those decisions, we ought probably to interpret them in the same way.

Indeed, regard being had not merely to the high authority of the Probate and Divorce Court on other grounds, but also to the fact that it is a tribunal much occupied in considering cases of the kind, we think that its decisions must usually and necessarily be a guide to the Courts in India, except when the facts of any particular case arising out of the peculiar circumstances of Anglo-Indian life constitute a situation such as the English Court is not likely to have had in view. Therefore, however hard the construction there adopted may appear to bear upon the wife in certain cases, we should be compelled to follow it here, unless peculiarities of the kind adverted to should appear to take a given case out of the ordinary rule, or unless the case can be shown to be clearly outside of the rule.

Even the case of *Fitzgerald vs. Fitzgerald*, L. R., 1 and D., 644, harsh as it may seem to be, has been recognized as an authority by this Court; and the petitioner in the case of *Wood vs. Wood*, 1 C. L. R., 532, only succeeded (on appeal) in showing that there were circumstances in her case which rendered the ruling inapplicable. It is unnecessary to discuss the expl-

iven by Mr. Jackson of *Fitzgerald's* case, viz., that where
 urse had been only suspended, the omission by a husband
 il himself of the opportunities of renewal might constitute
 on, but that where intercourse had been determined there
 ave been a resumption before desertion could take place,
 l, because we do not think there had been a real determina-
 f intercourse, (considering what the situation of the parties
 as also for other reasons which will appear.

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he case before us, if there was any desertion, if the wife
 andoned, she certainly was not a consenting party, but it
 be less easy to say that she made any active opposition.
 as she in truth abandoned? If so, when and how? It
 r that the facts relied on to prove desertion must be some-
 beyond mere adultery; for, in order to obtain a divorce,
 , if she cannot prove cruelty, must prove desertion in
 n to adultery, and this certainly cannot mean adultery
 dultery.

r, Mr. and Mrs. Fowle had lived separately by mutual
 it for many years; and we do not find, although she might
 een willing to resume cohabitation, that she ever actively
 : it. The separation, indeed, cannot be said to have taken
 in a hostile way, on account, either of conjugal misbehavi-
 his part, or even of any estrangement between them,
 gh such estrangement had certainly begun on one side,
 on both. They separated purely for reasons of convenience,
 uring the whole time of her absence, the only complaint

Mrs. Fowle ever made was tending the exigency of her
 nce, and that not until she had reason to believe that her
 id could well afford to make it larger; and when she did
 England, on hearing news which made her think differently
 position, it was not with the intention of demanding a
 al of conjugal relations, but with the view of commencing
 proceedings.

entirely concur in the decision of this Court in the case
 od vs. *Wood*, 1. C. L. R., 552, and that case shows that
 may be desertion supervening on a temporary separation,
 gh such separation had the wife's acquiescence, and
 gh there had been no resumption of the common life and

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home. But that was when the wife, after continuing to live with the husband for years notwithstanding his gross misconduct, had done everything in her power to "prevent an entire separation and to make it practicable for them to live together again." Certainly Mrs. Fowle had shown no such toleration and had made no such endeavours. But then, it was suggested in the course of the argument that Mr. Fowle's conduct with Mahkin had amounted to nothing less than installing her in the place of his wife, and consequently an abandonment of the wife; and it was pointed out, that it would be dealing hard measure to the wife, to make it a condition of giving her the relief which she seeks, that she should first have demanded the resumption of those conjugal relations which the husband's conduct must have made odious, if not impossible, to her. But, even if the conduct in question amounted to desertion, she would be bound, according to the cases, to give evidence of conduct on her part showing unmistakably that such desertion was against her will.

But was it a desertion? The connection with Mahkin, however immoral, was of a kind extremely common in British Burma. Mrs. Fowle's family knew, and we cannot doubt that she also knew, her husband to have had a *liaison* of the kind before she married. She knew what his notions were even after marriage, and she certainly believed him to act fully up to them. Her language on several occasions, and particularly near the close of

* "From the conversations I had had with Mr. Fowle as to his opinions on the subject, I had always my suspicions that he was unfaithful and was not likely to be true to me during our separation. I certainly had an idea that he would not remain faithful."

her cross-examination,* shows plainly that she was prepared to hear that he had been unfaithful to her, and indeed thought it probable. Now, she not only knew her husband's history and ideas, but having lived for nearly two years in Rangoon, she had presumably learnt something of the ways of Englishmen there; and, consequently, the form which Mr. Fowle's infidelity took is precisely that which she would have had reason to expect.

Then, was this desertion? During a course of years, the wife lives apart, quite contented, except as to the amount of her income, and making no attempt, manifesting no wish to resume closer

intercourse. During nearly all that time, unknown to the wife, at least as far as exact information goes, the husband has allowed another woman to enjoy most of the advantages of the wife's position.

When did the desertion take place? It is difficult to conceive a desertion of which the person deserted is unconscious. It must then have commenced when she became aware of it, and, if so, it then became incumbent on her to show that she was deserted against her wish; in other words, to have taken some steps towards the renewal of that intercourse which had been so long suspended. Instead of that, she appears to have thought only of surprising her husband in *flagrante delicto*, for the purpose of obtaining dissolution of the marriage.

Indeed, other arguments against her may be derived from the correspondence which is on record; for instance, in more than one or two of his letters Mr. Fowle throws out the plainest hints of a disposition to help her to obtain a divorce. Take, for instance, the letter marked D. 18, which is undated, but which from internal evidence was written some time after March 1868, about seven years after their separation. He uses these words: "Knowing this, and moreover feeling for you, I shall throw no obstacle in the way of your getting a divorce, if you want it and if I find that you meet me in a friendly spirit. I can assist you towards it without collusion, but openly and effectively." The immediate answer to this letter is not before us; but in April 1872 she refers to it in these terms: "I am perfectly willing to meet you in a friendly spirit, and to consider again your letter of about three years ago and which you may remember." She adds referring to a message delivered to her by Captain Brooking, that she has "not the slightest desire to see Rangoon again," but that she "will do anything and brave anything, however distasteful, to set her daughter and herself in a recognized and suitable position."

Is this the language of a woman deserted against her wish? We think not. On the contrary, she seems to put aside the passion afforded to her of expressing a wish to return to the common life and home; for, according to her account, she had no knowledge of anything which should have disinclined her

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or made it difficult for her to return. Mr. Bell, indeed, would go further, and suggest that the proposition for a divorce came from her; but of this we have seen no proof, nor does it seem probable. We think that in truth there was no desertion at any time. Mr. Fowle swears that if, during the cohabitation with Mahkin, his wife had made her appearance, Mahkin would at once have disappeared; and, in expressing, at an earlier place in this judgment, a doubt whether it would have really been so, it was not our meaning that such an occurrence was in itself improbable. On the contrary, it seems in accordance with the nature of such connections. What we doubted was, that Mr. Fowle would have consented to sacrifice a woman who was useful to him and to whom he had become used, in favour of another who had never made him happy, and to whom years of separation had made him indifferent. The facts, therefore, which are relied upon as desertion, seem to us to amount only to a prolonged and systematic adultery. We are consequently of the same opinion as the Court below on this part of the case.

The next point raised, was the amount of alimony which, on Mrs. Fowle's part, was said to be inadequate. This contention, however, has not been made out to our satisfaction. By the decree which she has obtained, Mrs. Fowle is placed in a situation far better in a pecuniary point of view than she had ever enjoyed before; indeed, sufficiently good to enable her to save something. She has no child to support, and no particular expense to provide for beyond those of ordinary subsistence. Upon our intimating this opinion, the respondent's Counsel abstained from pressing his objection that the alimony was excessive in Mr. Fowle's present circumstances.

The last point urged was as to the form of the decree, which, it was contended, ought to have provided a more effectual and durable guarantee for the wife's receipt of the income allotted to her. But we are clearly of opinion, on the authority of the decision in *Hyde vs. Hyde*, 4 Sw. and Tr., 80, and on the reason of the thing, that the Court, even if it had the power, ought not to tie up the property of the husband, who is a mercantile man and requires the unfettered use of his capital, or convert alimony into an absolute interest in and charge upon his estate.



Being, therefore, in accord, in all points of decision, with the learned Recorder, whose judgment is an example of careful and complete analysis of evidence, we dismiss the petitioner's appeal and affirm the decree of the Court below.

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MARKBY, J. :—

MARKBY, J.

I have very few words to add to the judgment of the Chief Justice, in the conclusions of which I entirely concur.

As regards the desertion the fundamental consideration in this case is, that the parties had by mutual agreement determined to separate and to live, the one in England and the other in Rangoon.

The separation was not originally an unqualified one; and, though there was never any definite prospect of re-union, I do not think that either party entirely abandoned the notion that the separation might one day be put an end to. Under such circumstances, it would be difficult—but it would not, in my opinion, be impossible—to prove desertion. The situation of the parties, though it approaches, is not identical with the situation of a husband and wife who are formally separated under articles of separation. But the appellant must establish clearly, that this separation by consent became at a subsequent time a desertion by the husband. To do this, she must be able to point to some distinct and definite act of the husband indicative of the intention to desert. No such act has, in my opinion, been proved. The appellant's Counsel laboured to show that Mr. Fowle had, by the connection he formed with Mahkin, placed an insuperable barrier to the resumption of conjugal life with the appellant. I do not myself think that the evidence entitles us to say, that this barrier was an insuperable one. But that is really not the question. The question is, whether Mr. Fowle, by his connection with Mahkin, intended to commit an act of desertion towards his wife. I think he did not. The connection with Mahkin had assumed a character which it could never have assumed had Mr. and Mrs. Fowle not been living apart; but for this separation both parties are responsible and not Mr. Fowle alone. It is to this separation, and not to any change of intention on the part of Mr. Fowle in regard to his wife, that I

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attribute the position which Mahkin obtained in Mr. Fowle's household.

The appellant's Counsel also relied on the letter written by Mr. Fowle to Mrs. Fowle's mother-in-law in August 1862, as showing an express and final intention on his part to abandon his wife. It is highly improbable that if Mr. Fowle had formed any such intention he would have announced it in this manner. But we must read this letter with the letter written the very next day to his wife; and it is clear then, that in the first letter Mr. Fowle was repelling somewhat vehemently any blame which might be cast upon him by his mother-in-law for the unhappiness of her daughter's marriage, and that he was not announcing a final determination to abandon his wife. It seems to me, therefore, that the appellant has failed to prove desertion; and I concur in dismissing the appeal.

PRINSEP, J. PRINSEP, J. :—

I concur in the judgment which has just been delivered by the Chief Justice.

J. D. Bell.—Under the order of this Court we were compelled to deposit Rs. 1,100 to cover the cost of printing, and a sum of Rs. 1,000 to answer the further costs of the appellant of and incidental to this appeal. That Rs. 1,000 is still in Court, and I would ask your Lordships for an order that it be returned to us.

Evans.—The principle of the English decisions will govern here, and the wife is entitled to her costs even though she be unsuccessful.

JACKSON, C.J. JACKSON, *offg.* C.J. :—

Yes, in the Court below.

Evans.—In *Jones vs. Jones*, L. R., 2. P. & D., 331, it is shown that the same rule holds on appeal. *Brown vs. Ackroyd*, (cited in *Macqueen*, p. 619) shows the foundation of the rule to be that a wife may bind her husband for necessaries, and a suit brought with reasonable and probable cause will be considered necessary. In this case there can be no doubt that the wife was justified in bringing the suit. The proper way would be to order the attorney's costs to be taxed and paid by the respondent.

Bell.—With regard to the scale on which costs would be given, the general rule of the Appellate Court must be followed, *i.e.*, the situation of the suit is to be taken as the basis of costs.

JACKSON, *offg. C.J.* :—

In regard to the costs of the cause, we find that this is an appeal which was not unreasonably preferred. There were, undoubtedly, points of difficulty in it; and although it is true that the question of cruelty was pressed on one side, we must on the other hand, bear in mind the aggravated and unexpected turn given to the case in the Court below by the charge of misconduct suddenly brought against Mrs. Fowle. We think, therefore, in accordance with the practice which is laid down in *Jones v. Jones*, L. R., 2 P. and D., 333, that the wife should have the reasonable costs of her appeal. She has already had allowed, we find by the order of this Court made in February last, the sum of Rs. 1,114 to pay for the costs of translation and printing. This was not a case in which a money value could be readily fixed; and we think that, on the whole, the sum of Rs. 1,600 will be a fair and sufficient sum for what would ordinarily be called *vakeels'* fees. Of this sum, Rs. 1,000 has already been paid. The balance Rs. 600 will be debited to the sum which may remain over, from the Rs. 1,114 in deposit, after deducting the actual costs of printing, &c. If that amount is not sufficient, the respondent will have to pay the excess.

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