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necessary party to the appeal, and as he had not been served with notice of the appeal it must be held to have abated. This contention has no force. It was held in the case of *Lok Singh* v. *Balwan Singh* (1), following the case of *Hira Lal* v. *Ramjas* (2), that the vendor, being void of interest, is not a necessary party to a suit for pre-emption. We therefore overruled the preliminary objection.

Appeal decreed and cause remanded.

MATRIMONIAL JURISDICTION.

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April 19.

Before Mr. Justice Blair.

MARGARET ARTHUR (PETITIONER) *v.* HARRY ROBERT ARTHUR (RESPONDENT).*

Act No. IV of 1869 *(Indian Divorce Act), section* 22 *et seqq — Judicial separation—Desertion by petitioner not a bar to a suit for judicial separation—Statute* 20 *and* 21 *Vic., Cap. LXXXV.*

Held that desertion without reasonable excuse constitutes no bar to a suit for judicial separation. *Duplany* v. *Duplany* (3) followed.

THIS was a petition by the wife asking for a decree for judicial separation upon the grounds of adultery with various persons and also that the respondent had on the 9th of August, 1901, gone through a form of marriage with one Sarah Anne Clarke at the Registry Office at Croydon. The respondent admitted the truth of the allegations made in the petition, but alleged that when he contracted the marriage referred to in the petition he believed that his wife was dead, and that the adultery complained of took place at a time when the petitioner had deserted him without lawful excuse. It appeared from the evidence in the case that the parties used to quarrel a good deal, and that some time in 1897 the petitioner, after a quarrel, left the respondent and went to Calcutta, and thence to South Africa, and never returned to him. The material question of law raised in the suit was whether such desertion of the respondent by the petitioner was a bar to her obtaining the

* Original suit No. 2 of 1904.

(1) Weekly Notes, 1903, p. 239. (2) (1883) I. L. R., 6 All., 57.
(3) L. R., 1892, P., 53.

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decree for a judicial separation which she sought. The facts of the case are set forth in considerable detail on the judgment of the Court.

Mr. *H. T. Coleman*, for the petitioner.

Mr. *C. Dillon*, for the respondent.

BLAIR, J.—In this case Margaret Arthur sues Harry Robert Arthur, her husband. The prayer of the suit is for a judicial separation from the respondent. The grounds upon which the relief is sought are these:—That on diverse occasions since April, 1897, the said Harry Robert Arthur committed adultery with various persons, and a letter of his is cited as an admission of the truth of this allegation. It is further alleged that on the 9th of August, 1901, the said Harry Robert Arthur went through a form of marriage with Sarah Anne Clarke at the Registry Office of Croydon. There is the usual allegation that between the petitioner and respondent there is no collusion or connivance with respect to the subject of the present suit. The respondent admits the truth of the allegations made against him in the petition, and avers that when he contracted the marriage referred to in the petition he believed that his wife, the petitioner, was dead, and the adultery complained of took place at a time when the petitioner had deserted the respondent without lawful excuse. Upon this admission by the respondent, which renders unnecessary the proof of the facts alleged in the petition, the respondent's counsel opened his case, and the respondent was examined as a witness. At a later stage the petitioner was also examined, and gave evidence as to the whole of the relations between the parties subsequent to the marriage. The respondent was a soldier-clerk in the Ordnance Department, and at the time when cohabitation ceased was in receipt as wages of about Rs. 240 a month. The parties cohabited at various places in England and India, and at one time the petitioner went over to Europe to undergo in Dublin a training as midwife and nurse. Early in their matrimonial life in 1887, two years after their marriage, there appears no doubt that quarrels arose, and on one occasion the respondent beat his wife severely with a cane. Their quarrel was, however, apparently made up, and cohabitation continued. That may be noted as the one incident

of serious violence used by the husband towards his wife. Upon another occasion it is sworn, and I believe it to be true, that he threw a dish or plate full of food in her face. This also is as far back as 1887. Upon another occasion, at a later period, she alleges that he had pulled her out of the bed and kicked her on her shin, but the injury was slight, as he wore only a slipper. During this time she was allowed to save such money as she could out of that part of his wages which was given to her for house-keeping. She does not allege that he ever stinted her for money, and indeed at a time when beyond doubt she left him intending not to return, her savings amounted to the substantial sum of £215, which she took with her. There are sufficient indications throughout the evidence of both the husband and the wife that they were neither of them good-tempered people—an inference which any observer would have drawn for himself from their demeanour in the witness box. Indeed, he admits having a hasty temper, and in one of his letters describes it as vile temper. She, on the other hand, exposed herself in this respect most completely, for not only does her conduct show her to have been irascible, but also to have been actuated, on at least one occasion, by spiteful malignity. She alleged that in his position as ordnance clerk he obtained bribes from babus for contracts, and to that effect she wrote to his Commanding Officer some four months after she had left him. I see no reason to believe this portion of her statement, and it is manifest that the officer to whom it was made did not believe it either, otherwise his discharge from the service was inevitable. For some time before her departure, in April or May 1897, there appears to have been very little violent quarrelling. But upon a certain day, the exact date of which is immaterial, she alleges, and I think truly, that he threw a slipper at her, and that it hit her in the face: but it is not alleged that it caused her any pain or injury worth mentioning. It was upon this quarrel, and nothing more serious, that the woman departed from her husband's house with intent never to return. She alleges that had he apologized she would have made up the quarrel, but would not have returned to live with him. *A fortiori* if the quarrel had not been made up she would still have lived separately from him. She appears

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to have betaken herself to Calcutta. While there, it is alleged by the respondent and denied by the petitioner that she wrote to him asking for assistance. In my opinion that statement is very improbable. He must have known that she possessed and had taken away with her a sufficient amount of her savings. Indeed, as before their quarrel some arrangements had been made for her departure to Europe *vid* Bombay, it seems highly probable that he was aware that expense could be afforded. However that may be, she did not write to him again for several years. She betook herself for a short time to relatives and friends of his and her own, and after a short stay set off for South Africa, where she arrived, she says, with £180 in her pocket. There she established a boarding-house, and after several years went from thence to Johannesburg. Here she carried on a business, which, it is alleged, and not denied, was sold for £3,000. The net sum that remained to her after all her obligations were met was, she says, about £1,000. Until a period later than the subject of her complaint in the petition the respondent did not communicate, nor even, accepting his own account, did he attempt to communicate with her. He inquired her address of her Indian agents, and afterwards of the same firm in London, but failed to obtain it. It is obvious from one of these letters that the firm knew where a letter would find her. We do not know anything, nor is it needful to enter into the other adulteries upon the ground of which the petitioner seeks relief, with this exception that in 1901, four years after she had left him, he married a woman named Clarke, his own cousin. That is the bigamy and one of the adulteries complained of. It is alleged by the respondent that he believed his wife to be dead. He certainly took no reasonable steps to satisfy himself whether she was dead or not until after the marriage it became necessary for him to make a report to his office showing that his second marriage was a legal marriage in consequence of the death of his first wife. Thus it was not until marriage had taken place, and the woman had been hopelessly compromised, that he began to make a show of inquiry. He found some man who had lived in Kimberley, where, for some reason or another, he imagined, or says he imagined, his wife had been, and showed

him a photograph of her, and the man then said that he thought it was the woman, and that she had kept a public-house or hotel somewhere in Kimberley, and had either died or been killed during the siege. Upon such flimsy materials was the report to his office based, together with his alleged inability to trace her whereabouts through a bank. I think it is needless to read through the correspondence, which, however instructive it may be as to character, can have no substantial bearing upon the decision which I have to pass. The suit is one for judicial separation, which is the modern equivalent for the ecclesiastical divorce *a mensa et toro*. The matrimonial offences charged against the respondent being believed by me, and indeed admitted, furnish ample ground for a decree for judicial separation. The only question therefore is whether the desertion by his wife, for I unhesitatingly find it to be a desertion, can furnish a bar in point of law to her suit for judicial separation, or if not a bar in law, whether in my discretion I can refuse to grant the decree prayed for. The subject is one of some complexity, and has been discussed in the English Courts, which are our guide in the decision of cases of this kind in this country. It appears that prior to the year 1857, when Act 20 and 21 Vic., Cap. LXXXV was passed, these matters were within the jurisdiction of the ecclesiastical courts, and it is beyond doubt that those courts did not look upon desertion as a matrimonial offence for which they would give relief. The Act, however, 20 and 21 Vic., Cap. LXXXV, introduced into the category of matrimonial offences desertion. To adopt the language used by the Judge ordinary in the case of *Duplany* v. *Duplany* (1) : "Cases decided before 1857 have been mentioned to me, some to show clearly that the ecclesiastical courts would have granted a decree of judicial separation although there had been desertion without reasonable excuse on the part of the husband or wife who was petitioning for that relief. The last case cited, *viz.*, that of *Morgan* v. *Morgan* (2) seems to show on very high authority that this was the law. Now, does the Divorce Act (20 and 21 Vic., Cap. LXXXV) make any difference in that respect? In terms it clearly does not, because, although it created the offence of desertion, making it in a certain

(1) L. R., 1892, P., 53. (2) Curt. Ecc., 679.

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sense a matrimonial offence, it did so for a specific purpose, *viz.* (1) for constituting a ground for judicial separation; (2) or for divorce when coupled with adultery on the part of the husband; and (3) or for a discretionary defence in cases of judicial separation." The learned Judge later on follows with the observation: "Where the Act of Parliament has abstained from making the offence, as in the case of desertion, a discretionary bar, I am not able to bring myself to say that it was made a discretionary bar under that Act. I am not blind to the fact that the Act constituted the offence of desertion as a matrimonial offence, but I do not think that it was intended to make that offence a discretionary bar in cases where it would not have been any bar, discretionary or otherwise, before the passing of that Act, and where the Act does not in terms make it a discretionary defence. Leaving the matter to be determined upon the principles which formerly guided the decisions of the ecclesiastical courts, I hold that the desertion by a wife is no bar to her suit for judicial separation. I decide that as a matter of law."

As far as I know there is no other reported case either in the English or Indian Law Reports to the same effect. At the same time as far as I know there is no decided case to the contrary. In my opinion the learned Judge in *Duplany* v. *Duplany* adopted the only possible construction of the Act 20 and 21 Vic., Cap. LXXXV. The alterations made by that Act are imperative, but in my opinion it would be impossible for a Judge, because he considers it reasonable, to extend those specific and definite provisions. It is not for this Bench to say whether another provision ought to have been added to that Act. It is not there, and it is not open to me to enact any such provision because I think it reasonable. The result is that I hold as a matter of law that desertion without reasonable excuse, such a desertion as I find has taken place in this case, constitutes no bar to a suit for judicial separation. That being so, the petitioner's suit is decreed, having regard to the facts which I have reviewed above, and upon which I ground my decision. As to costs, I leave each party to bear his and her own costs. Upon the question of alimony *pendente lite*, I decline to allow anything. The petitioner has been in possession of the family savings, and is in a prosperous condition,