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But, in my opinion, the rule only means that the travelling allowance bill must be delivered if travelling allowance is being claimed. There is nothing in the rules which compels the Administrative Officer to claim travelling allowance if he does not desire to do so. Therefore the delivery of his travelling allowance bill was not a duty imposed upon him by the Act. In the second place it seems to me clear that the charge of cheating by suppression of the fact that the accused owned a motor car involves an act outside the accused's official duties. He was not under any statutory duty to refrain from stating to the board that he possessed and used his own car. The charge is more analogous to a charge under s. 409, than to a charge under s. 477A, because a part of the ingredients of the charge is not in any way concerned with the official duties of the officer.

In our opinion the judgment of the learned Sessions Judge refusing to stop the prosecution was right, and the application must be dismissed.

SEN J. I agree.

Rule discharged.

J. C. R.

ORIGINAL CIVIL.

Before Sir John Beaumont, Chief Justice.

RAYMOND THORNTON, PETITIONER *v.* MARGUERITE ELAINE
THORNTON, RESPONDENT.*

1939
August 18

Divorce—Indian and Colonial Divorce Jurisdiction Act, 1926 (16 & 17 Geo. V, ch. 40)
—Matrimonial Causes Act, 1937 (1 Edw. VIII & 1 Geo. VI, ch. 57)—Desertion
—Refusal of wife to join husband in India—Refusal to resume marital relations
—Whether desertion at an end if parties live under the same roof.

Where a wife refuses for no adequate reason to live in the country in which his business compels her husband to live and refuses to have any sexual intercourse with him during the periods in which they may be in the same country she ceases to be his

* O. C. J. Matrimonial Suit No. 616 of 1939.

wife in any proper sense and her conduct amounts to desertion. The desertion is not broken merely by the spouses having for a short time lived in the same house.

HUSBAND'S petition for divorce.

The facts are fully set out in the Judgment.

G. C. O'Gorman, for the petitioner.

Respondent did not appear.

BEAUMONT C. J. This is a husband's petition for divorce under the Indian and Colonial Divorce Jurisdiction Act, 1926, the ground of divorce being desertion by the wife without cause for, three years, which is made a ground for divorce under the English Divorce Act of 1937. The facts appearing from the evidence of the husband, which I accept, and the letters from his wife, which he puts in admit of no doubt.

The parties were married in 1922, and the husband and wife came to India in July, 1926, the husband being employed in the Indian Radio and Cable Communications Co., Ltd., which is an Indian Company, and the parties lived together in Bombay until March, 1929, when the wife went to England, taking with her the only child of the marriage a son who had been born in October, 1926. The husband says that in the normal course of events he will remain in India in his present employment until he is fifty-five years of age, which will be sixteen years hence. But he is domiciled in England, and intends to return to England when his employment in India ceases. In 1930 the husband went to England on leave and lived with his wife in the normal manner. He asked his wife in 1930 to return with him to India, but she refused. In 1934 the husband again went to England on leave and he again lived with the respondent as his wife, and pressed her to return with him to India. She refused verbally and she also wrote him letters of October 26, 1934, and August 12, 1935, in which she said that she would not return to the East. She alleges that her health is injured by living in the tropics, but there is no

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medical evidence of that, and the husband says that she was quite well in India, though, like other people, she felt the heat.

Now down to the time when the husband returned to India in 1934 there had been no desertion because during the period of his leave the spouses lived together as husband and wife. In 1938 the husband again went on leave and he lived in the same house as his wife, but they kept separate rooms, and marital relations did not take place between them. The husband returned to India in November 1938, and the wife refused to accompany him. On December 20, 1938, the wife wrote him a letter in which she says that she hoped he understood that she meant what she said and that she would not go out East again. She says that their interests had grown apart, that there had been so many breaks, and that she had built her life independently. She further says that she could not leave her son who is at school, and then she says—

“Another thing I thought you would have realised is that I made your operation an excuse for our living as husband and wife in name only, that part of our married life can quite well be cut out altogether as you come home on leave only for a few months every 3½ years. No doubt it is my fault, but I think I make a better mother than wife.”

And then she says at the end of the letter :—

“I’m sorry to have to write so plainly, but do take this as final and don’t mention the subject again.”

So that it comes to this, the husband is in India as far as can be foreseen for another sixteen years, and the wife definitely refuses to come out and join him there, though she gives no reason which can be considered satisfactory. Marital relations have not existed since 1934, i.e., more than three years before the petition, and the wife definitely refuses to resume such relations. On the other hand the parties did live admittedly under the same roof in 1938, and I should gather from the wife’s letters that she would have no objection to the husband, whenever he is in England, living in the

same house with her, though she would not be willing to share the same room.

The question is whether in these circumstances the wife can be said to have deserted the husband for more than three years without cause. It was held by Lord Buckmaster in *Powell v. Powell*,⁽¹⁾ that the mere fact that a husband and wife were living under the same roof was not enough to prevent desertion. The husband in that case was living in an entirely separate part of the house and refused any sexual intercourse with his wife. Lord Buckmaster said (p. 279) :—

“Except that these two persons were sheltered by one and the same roof, there was desertion of this wife by her husband in every meaning of the word.”

On the other hand, in *Jackson v. Jackson*,⁽²⁾ a division bench of the Probate, Divorce and Admiralty Division held that the mere refusal of sexual intercourse by one of the spouses was not enough to constitute desertion. All cases of desertion must turn on the particular facts proved. It seems to me that where a wife refuses for no adequate reason to live in the country in which his business compels her husband to live, and refuses to have any sexual intercourse with him during the periods in which they may be in the same country, she ceases to be his wife in any proper sense, and that her conduct amounts to desertion, which was not broken merely by the spouses having lived in the same house for a few months in 1938. I therefore feel justified in granting the husband a decree nisi for divorce. He does not ask for the custody of the son. Probably that question will be settled amicably by the parties. But the husband will have liberty to apply for the custody of his son.

Attorneys for petitioner : Messrs. *Perreira, Fazalbhoy & Co.*

Decree nisi.

N. K. A.

⁽¹⁾ [1922] P. 278.

⁽²⁾ [1924] P. 19.

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