

**DHIRAJ LAL**

v.

**SAVITRI BEN**

[SUPREME COURT, 1966 (Mills-Owens C.J.), 16th November 1965,  
28th January 1966]

In Divorce

*Husband and wife—divorce—desertion—animus deserendi—distinction between intention and desire—meaning of desertion “without cause”—cruelty and expulsive conduct—provision of proper matrimonial home in relation to just cause—custom of parties—conduct conducing to desertion—court’s discretion—Divorce (Summary Jurisdiction) Ordinance (Cap. 29)—Matrimonial Causes Ordinance (Cap. 28) ss.2,4(2)—Matrimonial Causes Act 1950 (14 Geo. 6, c.25) (Imperial) s.4(2).*

In a petition for divorce under the provisions of the Divorce (Summary Jurisdiction) Ordinance in the Magistrate’s Court, it was found that the marriage between the petitioner and the respondent was the second half of a Gujarati exchange marriage. The other marriage was between the respondent’s brother and the petitioner’s sister; this marriage broke up and the parties did not live together. The respondent was living with the petitioner at his family home. Aggrieved by the failure of the respondent’s brother to take the petitioner’s sister to live with him, the parents of the petitioner did everything they could to make life unpleasant for the respondent; the petitioner did nothing to alleviate this unpleasantness. The respondent’s family members then removed her from the petitioner’s home.

The magistrate further found that the respondent’s assertion that she had been beaten every day was a much exaggerated account of what had taken place and that there was no evidence of ill-treatment sufficient to drive her from co-habitation. The magistrate expressed the opinion that on an objective view of the facts of the relationships of the parties, neither of whom formed views of his or her own, the factual withdrawal of the wife from co-habitation appeared to entitle the petitioner to a decree nisi on the grounds of her desertion. But, considering the family background as a whole, the only way in which the couple could have lived together would have been for the petitioner to have provided a separate family home.

On the matter being referred to the Supreme Court under the provisions of the Divorce (Summary Jurisdiction) Ordinance—

*Held*: 1. It was plain that the respondent identified herself with the wishes of her family and intended to leave her husband, whatever her own desire may have been.

2. Section 2 of the Matrimonial Causes Ordinance requires that desertion, as a ground for divorce, must be "without cause". Just cause, as a defence to a charge of desertion, need not amount to an allegation of a matrimonial offence.

3. It was clear in the present case that the petitioner was not proved to have been guilty of either cruelty or of such expulsive conduct as would give rise to a case of constructive desertion.

4. If, therefore, the respondent had just cause to leave the matrimonial home it could only be on the basis that the petitioner had failed to provide her with a proper home. The case for the respondent was not presented on the basis that an alternative house should have been provided, and there being no evidence as to the customary position of the respondent as daughter-in-law, it was not open to the court to speculate on the customs of the parties relating to the choice of a matrimonial home. It was therefore not possible for the court to say there was just cause for desertion consisting of failure of the petitioner to provide a separate home.

5. Under proviso (iv) of section 4(2) of the Matrimonial Causes Ordinance the court may dismiss the petition if, in its opinion, a petitioner has been guilty of "such wilful neglect or misconduct as has conduced to the... desertion." *Semble*: This refers to conduct which is not sufficiently bad to constitute just cause but is something worse than the ordinary wear and tear of married life.

6. If the magistrate was of the view that the petitioner was aware that the respondent was being placed in circumstances which she could not reasonably be expected to endure and did nothing to alleviate them, the magistrate could properly make a recommendation to the Supreme Court that discretion should be exercised to dismiss the petition; the suit would be remitted to the magistrate to express his views, in the form of a recommendation, on this aspect of the case.

Cases referred to :

*Lang v. Lang* [1955] A.C. 402; [1954] 3 All E.R. 571; *Hadden v. Hadden* (1919) *The Times* December 5th (unreported); *Williams v. Williams* [1943] 2 All E.R. 746; 169 L.T. 375; *Glenister v. Glenister* [1945] P.30; [1945] 1 All E.R. 513; *Young v. Young* [1964] P.152; [1962] 3 All E.R. 120; *Gollins v. Gollins* [1964] A.C. 644; [1963] 2 All E.R. 966; *Hall v. Hall* [1962] 3 All E.R. 518; [1962] 1 W.L.R. 1246; *McGowan v. McGowan* [1948] 2 All E.R. 1032; 64 T.L.R. 634; *Walter v. Walter* [1949] W.N. 407; 65 T.L.R. 680; *Postlethwaite v. Postlethwaite* [1957] P.193; [1957] 1 All E.R. 909.

Petition for divorce referred by a magistrate to the Supreme Court under section 12 of the Divorce (Summary Jurisdiction) Ordinance. The facts as found by the magistrate are set out in the decision of the learned Chief Justice.

D. S. Sharma for the petitioner.

J. R. Reddy for the respondent.

MILLS-OWENS C.J. : [28th January 1966]—

This is a case arising under the Divorce (Summary Jurisdiction) Ordinance (Cap. 29). It is desirable that the conclusions of the learned Magistrate should be set out at length; they are expressed as follows—

A "This is a husband's petition on the grounds of his wife's desertion.

This case graphically illustrates the difficulties of applying the English marriage laws to a customary Gujarati marriage.

This Court is satisfied with its jurisdiction.

B It is common ground that this was the second half of a Gujarati exchange marriage.

The parties were married two or three days after the marriage of your petitioner's sister to your respondent's brother.

C According to custom each bride returned home after a week with their new husbands.

Because of a row in the first marriage your respondent's brother did not go to fetch back his wife. As a direct consequence of this your petitioner did not go to fetch back your respondent.

D Despite efforts by the Gujarati Society to effect a settlement this state of affairs remained for three years.

During this period there can be little doubt but that both husbands were in desertion. Matters were brought to a head in July 1961 when petitioner brought petition for divorce on grounds of your respondent's desertion.

E A double reconciliation was affected and your petitioner's father fetched your respondent and these people began, for the first time, to live together. The petition for divorce was discontinued.

However when a few days later your respondent's brother came to fetch your petitioner's sister a row developed — and he abandoned the attempt.

F These parties never lived together and the husband's recent petition for divorce on the grounds of his wife's desertion has been refused this year by the Supreme Court.

Directly that first petition was filed by your respondent's brother this present petition followed.

G The further facts are in dispute but in the opinion of this Court the following facts are proved.

Your petitioner and his family were aggrieved at the failure of your respondent's brother to fetch his wife and your petitioner's family did everything they could to make life unpleasant for your respondent. Your petitioner did nothing to alleviate this unpleasantness.

H Your respondent's claim that she was beaten every day is a much exaggerated account of what took place.

In July 1962 your respondent's mother and brother came and after taking your respondent to the Police Station removed her from your petitioner's home.

No independent evidence was called as to what took place at the Police Station but this Court does not believe your petitioner's assertion that your respondent told him that she did not want to go back to him. A

Since then no attempt has been made to reconcile the parties at all.

This Court has seen the parties give evidence and is quite convinced that both have acted throughout not according to their own wishes but solely according to the dictates of their families. B

It seems impossible to make a finding as to which party wished to withdraw from an association which was at no time one of their own choosing. C

In the opinion of this Court there are two possible ways of looking at the facts of this case.

On an objective view of the bare facts of the personal relationships of this married couple neither of whom formed views of their own the factual withdrawal of the wife from cohabitation appears to entitle your petitioner to a decree nisi on the grounds of her desertion. There is no evidence of possible ill-treatment sufficient to drive her from cohabitation. D

On the wider facts of the family background as a whole the only way that this couple could have lived together was for the husband to provide a separate home for his wife outside the family. The relationship was never going to be allowed to go on as it was. E

Looked at in this way his complete failure to provide a possible home for his wife negatives any subjective intention to desert by his wife. Even though she wilfully separated she never had any intention of her own to bring cohabitation permanently to an end. F

If such be the proper approach he is no more entitled to a decree nisi of divorce than was the petitioner in the earlier divorce proceedings between the other half of the family.

A judgment by the Supreme Court setting out the principles to be followed in the many less extreme examples of this difficulty would be of the greatest assistance. G

There are no children of the marriage.

Whatever is the decision of the Supreme Court this Court does not recommend an order for costs."

There was no cross-petition by the wife respondent. It appears clear that no offer to re-establish the matrimonial home had been forthcoming from either party during the period of separation. The H



wife did not file a formal answer to the husband's petition, but it is recognised in practice in proceedings under the Ordinance that the Magistrates' Courts are to deal with the issues which arise on the evidence. In this case the learned Magistrate has raised the question whether the wife may properly be said to be guilty of desertion having regard to the circumstances of the separation, including her state of mind in leaving her husband.

Desertion, it is trite to remark, requires the *factum* of physical separation, and the *animus deserendi* or intention to desert. Here there is no question that the wife walked out from the home to rejoin her own family and has remained with them ever since. In fact she acceded to the wishes of her family that she should leave her husband. Unless she had just cause to leave her husband — which is a matter I deal with below — the position is that in effect she put the wishes of her family above her duties as a wife. It may well have been contrary to her own wish or desire that the marriage should break up, but to say that she had no intention to desert would be, in my view, to confuse intention with desire. It is plain that she identified herself with the wishes of her family and intended to leave her husband whatever her secret hopes or fears for the future of the marriage. The opinion of their Lordships of the Privy Council in *Lang v. Lang* [1954] 3 All E.R. 571, on appeal from the High Court of Australia, appears to be in point, although the subject there under discussion was that of intention in relation to cruelty. At pp.579-80 the following was said—

"The fact that the question at issue involves a consideration of the effect of the actions of one person on another adds to the complexities of the case. But, apart from this, the distinction between intention and desire has to be borne in mind. A man may wish one thing and intend another... Their Lordships... venture to question whether, as a matter of strict terminology, a man can be said to entertain conflicting 'intentions'. A man may well have incompatible desires. He may have an intention which conflicts with a desire, i.e., he may will one thing, and wish another, as when he renounces some cherished article of diet in the interest of health. But 'intention' necessarily connotes an element of volition: desire does not. Desires and wishes can exist without any element contributed by the will. What, then, is the legal result where an intention to bring about a particular result (be it proved directly or by inference from conduct) co-exists with a desire that that result should not ensue? That is the substantial point raised by this appeal. ... Where a man's own actions are concerned and not their effect on another, the answer is easy. If he desires to resist temptation but yields to it his intention is evidenced by his acts. His better self is, it may be, overborne, yet, in the end, his intention is to yield. ... If the husband knows the probable result of his acts and persists in them, in spite of warning that the wife will be compelled to leave the home, and indeed, as in the present case, has expressed an intention of continuing his conduct and never indicated any intention of amendment, that is enough, however passionately

he may desire or request that she should remain. His intention is to act as he did, whatever the consequences, though he may hope and desire that they will not produce their probable effect."

To paraphrase the oft-quoted words used in 1919 by Shearman J. in *Hadden v. Hadden* "The Times" Dec. 5, 1919 — also in relation to cruelty — and to apply them to the facts of this case: I do not question that the respondent wife had no wish to desert, but her intentional acts amounted to wilful desertion. Much as she may have wished not to terminate the cohabitation, in fact she chose to break her obligations in that respect.

Section 2 of the Matrimonial Causes Ordinance (Cap. 28), however, requires that the desertion should be "without cause". It is clear, according to the authorities, that just cause need not amount to a matrimonial offence. In *Williams v. Williams* [1943] 2 All E.R. 746 at p.752 Du Parcq L.J., said—

"Counsel... suggested, however, that as a general rule there could not be reasonable cause or excuse for desertion unless some matrimonial offence on the part of the deserted spouse were proved. This suggestion is wholly erroneous. Conduct which falls short of adultery may excuse desertion, and so in some circumstances may the honest though mistaken belief of one spouse that he or she has been wronged by the other. This seems to me to be plain as a matter of construction and good sense, and the courts have always so held:..."

Lord Merriman in *Glenister v. Glenister* [1945] 1 All E.R. 513 at p.518 said—

"That... misconduct, short of proof of a matrimonial offence, can be a justification for withdrawal from cohabitation, has been recognised ever since the well-known decision in *Russell v. Russell* [1895] P.315; on appeal [1897] A.C. 395, and it is, I think, clear, both from that case and from *Thomas v. Thomas* [1924] P.194, that conduct which, though not in itself a matrimonial offence, would afford an answer to a petition for restitution of conjugal rights, would itself be sufficient to absolve a husband from a charge of desertion."

Where the cause alleged is in the nature of a case of cruelty the case of *Young v. Young* [1962] 3 All E.R. 120 comes under consideration. The learned President, Sir Jocelyn Simon, with whom Karminski J. agreed, said at pp. 122-4—

"I turn to the second point of counsel for the wife, that even if the parting was not consensual, the wife was still not a deserter. The husband may have been acquitted of persistent cruelty, he says, but that is not conclusive as to the wife's right to live apart. He relies on *Timmins v. Timmins* [1953] 2 All E.R. 187. There an overbearing, domineering, dictatorial husband had acted in such a way that his conduct had adversely affected his wife's health. After they had separated he requested her to return to cohabitation; she refused. The trial judge held that he had not treated her with cruelty, and with misgiving, that she was, therefore, bound to return to cohabitation at her

husband's request. The Court of Appeal upheld the finding on cruelty. They held that she had, nevertheless, good cause for refusing to return to cohabitation. It is important to see how the court distinguished *Pike v. Pike* [1953] 1 All E.R. 232. Denning L.J., said ([1953] 2 All E.R. at p.191)—

'In considering whether one party has good cause for leaving the other, much depends on whether the conduct complained of is of a 'grave and weighty' character or not. Conduct which is of a grave and weighty character may sometimes fall short of cruelty because it lacks the element of injury to health; as in *Russell v. Russell* [1895] P.315 and *Edwards v. Edwards* [1949] 2 All E.R. 145; or because it lacks the element of intent to injure (as in the case of drunkenness or association with other women); but, nevertheless, it may give good cause for leaving, as the cases which I have cited earlier amply show. On the other hand, conduct which is not 'of a grave and weighty character', and is for that reason not cruelty, does not give good cause for leaving: see *Yeatman v. Yeatman* (1868) L.R. 1 P. & D. 489. It is conduct of that kind to which I referred in *Pike v. Pike* [1953] 1 All E.R. 232; when I said [at p.235] that conduct 'less than cruelty' does not justify a spouse in leaving. In the present case, the conduct of the husband was, I think, of a grave and weighty character, and the only reason why it was not cruelty was because there was no intent to injure.'

Hodson L.J., said ([1953] 2 All E.R. at p.194)—

'The just cause, which on the authorities must be proved, must be 'grave and weighty': *Yeatman v. Yeatman*, per Lord Penzance (1868), L.R. 1 P. & D. at p.494; 'grave and convincing': *Buchler v. Buchler*, per Lord Greene, M.R. [1947] 1 All E.R. at p.321. It may, as Lord Penzance said, be distinct from a matrimonial offence. For example, such conduct may be distinct from cruelty in that it lacks the element of causing injury to health or reasonable apprehension of the same. To that extent such conduct falls short of or is less than cruelty, to use the language that is to be found in many of the authorities, but it none the less must be grave and weighty ...'

*Pike v. Pike* and *Timmins v. Timmins* are thus perfectly reconcilable. In *Timmins v. Timmins* the husband's overbearing and dictatorial conduct was not assumed in any desire to injure or distress his wife, and, for that reason and that reason alone, it was not cruelty. In *Russell v. Russell* the wife who persisted in charges of homosexual conduct against her husband after she had ceased to believe that they were true, had not thereby injured his health, and, for that reason and that reason alone, it was not cruelty. But where the gravity of the conduct itself is in question, irrespective of its motive or its effect, the standard is the same both for good cause for separation and for cruelty: in both cases it must amount to such a grave and weighty

matter as renders the continuance of the matrimonial cohabitation virtually impossible. It, therefore, follows that if the conduct is not of sufficient gravity to justify a charge of cruelty, it is not of sufficient gravity to excuse withdrawal from cohabitation.”

(It will be observed that the above is now to be read subject to the decision of the House of Lords in *Gollins v. Gollins* [1963] 2 All E.R. 966, to the effect that it is not essential to proof of cruelty that the conduct in question should be ‘aimed at’ or intended to injure the other spouse). It is, I suppose, logical — so long as constructive desertion remains a legal concept — that conduct in the nature of a case of cruelty should be tested by the same standard whether it is put forward as a substantive case of cruelty or as a substantive case of expulsive conduct amounting to constructive desertion. It has been laid down that a case of cruelty should be pleaded as such and not ‘dressed up’ or framed as a case of constructive desertion. But since the decision in *Gollins v. Gollins* (*supra*) the passage cited above from *Young v. Young* appears to lose much of its force. Moreover, it is difficult to see why cruelty as a ‘just cause’ should necessarily have to be of the same high standard as is required in respect of cruelty put forward as a substantive ground for divorce. Just cause is no more than a defence to a charge of desertion, not in itself a substantive ground for a petition. In *Hall v. Hall* [1962] 3 All E.R. 518, Ormerod L.J., at p.522 referred to the following passage from the judgment of Lord Denning M.R., in *Timmins v. Timmins* (*supra*) —

“...it has been repeatedly held, by some of the most eminent judges exercising this jurisdiction, that conduct which for one reason or another falls short of cruelty may, nevertheless, afford good cause for leaving and be a defence to a suit for restitution.”

Ormerod L.J., referred to this passage with apparent approval, and without, it will be noted, the qualification introduced in *Young v. Young* as to applying the same standard to cruelty put forward as just cause as to cruelty put forward as a substantive ground for divorce. Be the legal position as it may with respect to cruelty as just cause, it is clear that it was not proved in the present case that the husband was guilty of either cruelty or of such expulsive conduct as would give rise to a case of constructive desertion. The learned Magistrate rejected the wife’s obviously very doubtful, evidence of physical ill-treatment, and there was no reliable evidence of injury to her health. The position appears to be that life was made thoroughly uncomfortable for her by her ‘in-laws’ not by physical ill-treatment but by words and actions in the domestic sphere, and that the husband did nothing to alleviate it. I assume that the learned Magistrate accepted that the husband was aware of what was going on. There was no evidence as to the extent to which, if at all, a wife such as the respondent is customarily expected to subordinate herself to her mother-in-law.

If, therefore, it is to be said that the wife had just cause to leave the matrimonial home it can only be, in my view, on the basis that the husband failed to provide her, in the circumstances, with a

proper home. In the case of *McGowan v. McGowan* [1948] 2 All E.R. 1032, Hodson J., said, at p.1034—

A “Various authorities were referred to before the justices and before this court. In the first of these, *Millichamp v. Millichamp* (1931) 146 L.T. 96, a decision of the Divisional Court, an order of the justices for maintenance on the ground of wilful neglect to maintain was upheld. There the justices, in a case where the wife had left the husband who was living in his mother’s house, held that the husband had brought about the separation by putting his mother first instead of his wife, so that it was B unreasonable for him to expect his wife to continue to live in that house under the conditions involved. This was tantamount to a finding that the husband had not maintained, or, indeed, offered to maintain, his wife in a reasonable home in the circumstances and the finding was upheld. In *Jackson v. Jackson* (1932) 146 L.T. 406 the husband had taken a house next door to his mother’s house, and the wife had left him there. Lord Merrivale C P., put the question thus :

‘Is it right to say that the conditions imposed on the wife were unbearable for her or any other wife, conditions which it was not competent for a reasonable husband to set up? Were they such conditions that a reasonable wife, being so treated by an unreasonable husband, could not be expected to proceed with the conjugal life?’ D

“This question he answered in the negative, and the order of the justices based on wilful neglect to maintain was discharged.

E It seems to me that the justices in this case have rightly approached the problem in the same way as Lord Merrivale, and have answered the question similarly in so far as they have found that the wife had no reasonable ground for leaving her mother-in-law’s house in 1946. The other cases referred to, namely, *Mansey v. Mansey* [1940] 2 All E.R. 424 and *King v. King* [1941] 2 All E.R. 103, deal with the right of the husband to choose the matrimonial home, but in each case it is clearly F recognised that the husband must act reasonably. Lord Merri- man P., in the latter case, made it clear that the husband’s right to choose the home is not to be erected into a proposition of law so as to shift the burden of proof to the wife in a case where the husband alleges desertion without cause. Each case must be determined on its own facts, having regard to the circumstances in which the parties find themselves, paying due G regard, for example, to any agreement on the subject which they may have made.

Since the hearing of this appeal the same topic has been discussed in the Court of Appeal in *Dunn v. Dunn* [1948] 2 All E.R. 822. Denning L.J., is reported to have enunciated the same proposition, adding the words (at 823) :

H “The decision where the home should be is a decision which affects both the parties and their children. It is their duty to decide it by agreement, by give and take, and not by the



imposition of the will of one over the other. Each is entitled to an equal voice in the ordering of the affairs which are their common concern. Neither has a casting vote, though, to be sure, they should try so to arrange their affairs that they spend their time together as a family and not apart. If such an arrangement is frustrated by the unreasonableness of one or the other, and this leads to a separation between them, then the party who has produced the separation by reason of his or her unreasonable behaviour is guilty of desertion.'

"It is true that the Lord Justice said that, in his opinion, neither spouse had a casting vote in the choice of the home, but that is but another way of expressing the proposition that neither has, as a matter of law, the right to choose the matrimonial home."

In *Walter v. Walter* (1949) W.N. 107, Willmer J., said—

"A word as to what I conceive to be the law in the matter. The view which commonly used to be expressed was that it was the husband's right to say where the matrimonial home ought to be and that it was the wife's duty to follow the husband wherever he went. Recent decisions, particularly in the Court of Appeal, show that that is not in law the correct view. The case of *Dunn v. Dunn* shows that there is no absolute rule whereby either party is entitled to dictate where the matrimonial home shall be. On the contrary it is held that the matter is one to be settled by agreement between the parties by a process of give and take and by reasonable accommodation. ... After pointing out that as a matter of fact in most cases the location of the husband's work was a most important consideration to be borne in mind in selecting where the matrimonial home should be, he continued ..."

(Then follows the passage quoted above.)

The learned Judge continued :

"It must be pointed out that both in that case and in *McGowan v. McGowan*, the court was only concerned with the prayer of one party."

It is clear, in the present case, that the case for the wife was not presented on the basis of a claim that the husband, in the circumstances, should have provided an alternative home, and no evidence was directed to establishing that this was reasonably feasible. Both parties appeared to accept that if they were to live together it must be at the home of the husband's parents. That may well be what is commonly done by such parties and what they both expected to have to do. There was no evidence of any request by the wife for a separate home or of threats to leave if a separate home was not provided; the matter of provision of a separate home did not apparently, arise when the *panchayat* dealt with the matter. And, as I have indicated above, there was no evidence as to the customary position of the wife as a daughter-in-law. It is not open to the Court to speculate as to the customs of the parties; or as to the extent to which they intended when entering upon the marriage to regard

A themselves as bound by custom in the matter of choice of the matrimonial home. In a case such as this where the wife is represented by counsel and no evidence is led on the point, it is not possible in my view for the Court to say that there was just cause for the desertion consisting of a failure on the part of the husband to provide a separate home.

B It remains to consider the discretionary bar of 'conduct conducing' which arises under section 4(2) of the Matrimonial Causes Ordinance; proviso (iv) provides that the Court may dismiss the petition if, in its opinion, the petitioner has been guilty of "such wilful neglect or misconduct as has conduced to the... desertion". In *Postlethwaite v. Postlethwaite* [1957] 1 All E.R. 909, Willmer J. considered the corresponding provision in the English legislation and said, at p.911—

C "Accordingly desertion for the necessary period having been found, I must next consider whether or not it is right to say that it was conduced to by wilful neglect or misconduct on the part of the husband, so as to call for the exercise of the discretion of the court. I am bound to say that I have not found this aspect of the case at all easy. So far as I know, and apparently so far as the knowledge and researches of the experienced counsel who have appeared before me go, this is the first case in which a plea of wilful neglect and misconduct conducing has been raised in answer to an allegation of desertion. At first sight it struck me as being difficult to see exactly what the Matrimonial Causes Act, 1950, s.4(2), proviso (iv) means by that phrase in relation to a charge of desertion. If there were misconduct on the part of one spouse which in fact conduced to, that is to say, was a cause of, the other spouse leaving, it seemed to me that, *prima facie*, that amounted to saying that there was just cause; and if that were so, there would be no offence of desertion.

F In other words, *prima facie* it seemed to me difficult to envisage anything which could amount to misconduct conducing to desertion which would not automatically put an end to the charge of desertion. However, it has been submitted on behalf of the wife, and counsel for the husband did not dissent from the proposition, that some meaning must be attributed to this phrase as incorporated in the statute. The proposition was put forward by counsel for the wife, and I think that it is not disputed by counsel for the husband, that there is an area, which he described as 'a no man's land', between that which is a grave and weighty matter, such as would amount to just cause, on the one hand, and that which, on the other hand falls within the well-known phrase 'the ordinary wear and tear of married life'. Small and trivial matters, if they fall within the ordinary wear and tear of married life, have on the authorities no legal significance. On the other hand matters such as are of a sufficiently grave and weighty character as to amount to just cause, would make it impossible to allege desertion at all. It is said, however, that there are degrees of conduct open to criticism between those two extremes, and that the court is required by the statute to



examine the conduct of the deserted spouse to see whether it is of such a nature. Counsel for the wife submitted that the phrase 'conjugal unkindness', much used in connexion with the doctrine of revival after condonation, might be a fair way of expressing the sort of misconduct at which the statute is aiming when it talks of misconduct conducing to desertion. A

Having given the matter some consideration, I have come to the conclusion that counsel's submission is broadly right. One must attribute some meaning to the statute. The only meaning which I can attribute to it is that it refers to conduct which is not sufficiently bad to constitute just cause, but which is something worse than the ordinary wear and tear of married life, such as either spouse must be prepared to accept when he or she takes the other for better, for worse. In other words, as counsel for the wife put it, one must see if there has been conduct which falls short of justifying the separation, but which may, in part at least, excuse it. That seems to me very much a question of fact and of degree in the particular circumstances of any particular case, or if I may so express it, very much a jury question." B C

If therefore, having seen and heard the parties and their witnesses, the learned Magistrate is of the view that the husband petitioner was aware that the wife was being placed in circumstances which she could not reasonably be expected to endure and did nothing to alleviate I think that he (the Magistrate) could properly make a recommendation to this Court that discretion should be exercised to dismiss the petition. I therefore remit the suit to the learned Magistrate in order that he may express his views, in the form of a recommendation, on this aspect of the case, after hearing the parties or their counsel if they desire to be heard. I see no objection to copies of this decision being made available to the parties or their counsel. I should add that it is not a case in which further evidence should be heard. D E

*Petition referred back to magistrate.*