

paid first. If there is then any balance remaining, that will go to defray the petitioner's costs *pro tanto*.

*Petition dismissed.*

5

A.E. LYNCH v. J.H.E. LYNCH and COKER

Supreme Court (McRoberts, Deputy J.): August 7th, 1931

10

[1] Family Law — divorce — conduct conducing — husband not guilty of wilful neglect conducing to adultery when refuses to support wife who unjustifiably choses not to cohabit: A husband who ceases to support his wife when she unjustifiably refuses to cohabit with him despite his reasonable attempts to induce her to return, is not guilty of such wilful neglect or misconduct as might conduce to his wife's adultery so as to be a discretionary bar to the granting of a decree to him (page 262, line 39—page 263, line 21).

15

20

[2] Family Law — divorce — costs — court may order co-respondent to pay costs of divorce, if was aware at time of adultery that respondent married woman: Since the Rules of the Supreme Court, O.LVI, r. 1 gives the court discretion in awarding costs of all proceedings, it is open to the court to order a co-respondent to pay the costs of divorce proceedings based upon the wife's adultery if, at the time that adultery was first committed, he knew that she was a married woman (page 263, line 29—page 264, line 18).

25

[3] Family Law — divorce — desertion — consists of separation and intent to end cohabitation without reasonable cause or consent of spouse: Desertion is the separation of one spouse from the other, with an intention on the part of the deserting spouse of bringing cohabitation permanently to an end without reasonable cause and without the consent of the other spouse; if, therefore, the deserted spouse's conduct indicates an unwillingness to resume cohabitation, desertion by the other is negatived (page 260, line 28—page 262, line 14).

30

The petitioner petitioned for a decree of divorce from the respondent, his wife, on the ground of adultery, and claimed damages and costs from the co-respondent.

35

40

The petitioner and respondent married and lived together in Freetown for some years. The petitioner was employed in the Government service and was required to spend much of each year in the Protectorate away from his wife. During one of his long absences he agreed that she should go for a three month holiday to Conakry. However, without consulting her husband she went instead to Lagos and later travelled on to Accra staying away a total of 10 months. Meanwhile the petitioner returned from the Protectorate and ceased to pay his wife her allowance.

When the respondent returned to Freetown she went to live with her mother who supported her from that time.

She made no attempt to contact the petitioner who shortly afterwards returned to the Protectorate. One year later the petitioner began a series of attempts to achieve a reconciliation with his wife but she never responded. The respondent later committed adultery with the co-respondent. 5

The petitioner brought the present proceedings for divorce on the ground of the respondent's adultery. He also claimed damages from the co-respondent but later withdrew the claim. 10

Although the respondent denied the alleged adultery in her answer, she later admitted it but raised two of the discretionary bars, contending first that her husband had deserted her, and secondly, that his failure to pay her an allowance amounted to wilful neglect which conduced to the adultery complained of. 15

The court granted a decree nisi of divorce to the petitioner who claimed that the costs of the proceedings should be borne by the co-respondent who at the time the adultery was first committed was aware that the respondent was a married woman. The court in the exercise of its discretion ordered the co-respondent to pay the costs of the proceedings. 20

Cases referred to:

- (1) *Boddington v. Boddington* (1858), 27 L.J.P. & M. 53. 25
- (2) *Burne v. Burne*, [1920] P.17; (1920), 122 L.T. 224.
- (3) *Codrington v. Codrington* (1865), 4 Sw. & Tr. 63; 164 E.R. 1439.
- (4) *Cufley v. Cufley* (1865), 13 L.T. 610, followed.
- (5) *Darnborough v. Darnborough* (1926), 136 L.T. 384; 96 L.J.P. 24, applied. 30
- (6) *Haswell v. Haswell* (1859), 1 Sw. & Tr. 502; 164 E.R. 832.
- (7) *Keech v. Keech* (1868), L.R. 1 P. & D. 641; 19 L.T. 462, applied.
- (8) *R. v. Cookham Union* (1882), 9 Q.B.D. 522; 47 J.P. 116.
- (9) *Smith v. Smith* (1859), 1 Sw. & Tr. 359; 164 E.R. 765, followed. 35
- (10) *Smith v. Smith*, [1922] P.1; (1921), 126 L.T. 350.
- (11) *Thompson v. Thompson* (1858), 1 Sw. & Tr. 231; 164 E.R. 706, applied.
- (12) *Ward v. Ward* (1858), 1 Sw. & Tr. 185; 164 E.R. 685, followed. 40
- (13) *Wickins v. Wickins*, [1918] P. 265; (1918), 119 L.T. 268.

(14) *Yeatman v. Yeatman* (1870), L.R. 2 P. & D. 187; 23 L.T. 283.

**Legislation construed:**

Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. V, c. 49), s. 178(3):

- 5 "If the court is satisfied on the evidence that the case for the petition has been proved and does not find that the petitioner has in any manner been accessory to or connived at or condoned the adultery or that the petition is presented or prosecuted in collusion with either of the respondents, the court shall pronounce a decree of divorce:
- 10 Provided that the court shall not be bound to pronounce a decree of divorce if it finds that the petitioner has during the marriage been guilty of adultery or if in the opinion of the court he has been guilty —
- ...  
 (c) of having without reasonable excuse deserted, or of having without reasonable excuse wilfully separated himself or herself from, the other party before the adultery complained of; or
- 15 (d) of such wilful neglect or misconduct as has conduced to the adultery."

**McROBERTS, DEPUTY J.:**

20 This is a petition by Arthur Edward Lynch for the dissolution of his marriage with Josephine Honoria Eccuah Lynch on the grounds of her adultery with one Ernest Coker, who is cited as co-respondent, for damages against him and further that he, the said Ernest Coker, may be condemned in costs. The co-respondent has not entered an appearance.

25 The respondent, by her answer denies the adultery alleged and supports her prayer for the dismissal of the petition by alleging the desertion and neglect of her by her husband since June 1928 and refusal by him to live and cohabit with her, and further that he has not supported her since that date. There has also been an informal application by her for maintenance.

30 The allegation of adultery was not disputed at the trial for after evidence of it had been led it was admitted by her counsel and also later on by herself in the witness box.

35 The parties were married on January 21st, 1920 at Holy Trinity Church, Freetown and seem to have lived contentedly for some years thereafter. The petitioner is a surveyor in the Government service and his duties took him, during the dry months from October to June, up into the Protectorate, and during this absence the respondent lived with her mother who had a house in

40 Freetown. The petitioner himself lived, during such time as he spent in Freetown, with his mother-in-law as well, but this he

disliked. He tried to establish a home of his own and secured a house, paid a month's rent for it in advance, but his wife declined to move, giving as her excuse that she thought the place was haunted, and the lorry that had come to move their things was sent away.

Before he left for the Protectorate at the end of 1927 it had been arranged that Mrs. Lynch, who had not been feeling very well, should go away for a change. Her husband says that Conakry was the place selected, but his wife whilst admitting that Conakry was mentioned says that she declined to go there as she knew no one there and that Lagos, where her sister lived, was eventually agreed upon. The petitioner denies this and I believe what he says for the following reasons: If he had ever consented to her going to Lagos he would have provided her with sufficient funds to enable her to get there. He had always treated his wife generously. Out of a month's salary of £12.10s.0d. he had given her £7 whenever he was away, and I feel no doubt at all that if he had meant her to go to Lagos he could and would have found the money for her passage.

[The learned judge concluded that the petitioner had not contemplated or approved his wife's trip to Lagos, and continued:] The belief which I have thus expressed is supported by the petitioner's letter in reply to one by the respondent announcing her arrival in Lagos, and an endeavour has been made to construe it in support of the suggestion that the petitioner knew of and approved his wife's journey thither. If this document is to be read in that way it is indeed, as the respondent herself admits, a strange communication, but if it is meant to convey, as the petitioner says it was, both indignation and surprise then it is perfectly comprehensible. The missive ran:

"I am glad to hear from you once more, although from afar. I am glad to hear you had a pleasant voyage and meet all well. Did you travel first class? Excuse me asking, dear girl, as I am somewhat a stranger to these movements and happenings, still since I am still on the floor I guess I may be put a bit in the know, if not altogether, eh? Just as you think fit anyway, if I might know. I note what you say in reference to extra, good. By the way is your passage for the return secured? Now don't for goodness sake think me interposing into affairs, but only a bit of interest."

There is here of course no robust outburst of indignation, for

different people approach problems of this kind in different ways but that the passage I have quoted is, within the literary limitations of the petitioner, biting sarcasm as it was meant to be, cannot be gainsaid and he expresses the ideas he meant to convey in a manner that allows of no misunderstanding.

I am by no means certain that Mrs. Lynch would have been friendless if she had gone to Conakry. Her husband says that they had been there before and that the friends with whom they had then stayed would have been willing to entertain her. A consideration of all these facts convinced me that her going to Lagos was without the petitioner's knowledge and against his consent.

The trip away from home was to have lasted for three months, and an opportunity for her return was presented at the end of that time by the visit of her sister to Freetown. This chance was neglected by the respondent who had in the meantime gone off, against her husband's wishes, to Accra. Finally, at the end of 10 months she came back, having induced a cousin to pay her fare.

In the meantime in June 1928 the monthly allowances of £7 which had thus far been regularly paid had stopped. When asked why he had not brought this about earlier if he had really disapproved of his wife's conduct, the petitioner said that he wanted to keep the matter private. That had he written in official things would soon have become generally known whilst if he waited until he got back to Freetown, when all his salary would be paid to him direct, he could discontinue the remittances without anyone knowing anything about it. This of course is sound, and his stopping the allowance also appears to me to have been both reasonable and natural. Mrs. Lynch had gone to Lagos against his wishes, she had moved on to Accra without his consent, she had ignored his suggestion that she should return home with her sister, and she had long overstayed the planned duration of her holiday. It is difficult to see what other course he could employ, in the circumstances, to inspire in her a reasonable state of mind. But the stoppage of her supplies did not bring her back, for she continued to live in Accra for a further four months and she came back in October when she knew that her husband would be in the Protectorate or just about to go there.

In point of fact she got back a few days before he left for up-country but she made no attempt to see him or to communicate with him in any way. She stayed with her mother, and even if she did not know where he was living she certainly knew quite well

where he worked and could very easily have got in touch with him after her long absence and unheralded return if she had had the very slightest wish to do so.

The petitioner himself left for the Protectorate early in October 1928 and for a year neither saw nor sought his wife, but in October 1929 he tried to get in touch with her again, sending several messages through Dr. Bright and calling once at the house in his company. This visit was unexpected, and the respondent was not at home, but they saw her mother. This effort by the husband was ignored by the wife who made no attempt to see him or arrange a meeting, and shortly afterwards he went up to the Protectorate on duty once more.

When he came back to Freetown in August 1930 he sent two of his friends, Williams and M'Carthy, to see her. She showed Williams plainly that she did not wish to return and said that she did not think that her husband cared for her any more, and that he would not be able to hold her again. He met her once more on her way to Hastings but she put him off, and her manner was such as to discourage any further attempts on his part, for he said he did not think it would be any good. M'Carthy's efforts were equally futile. She was told that her husband would take her back and wanted to live with her again, but to this she only answered that she would see M'Carthy again. She made no attempt to do this however and on the two occasions that he called, she was out.

The respondent states that her mother sent for Dr. Bright and asked him to try and arrange things between them, implying rather than saying, that the first move in the attempted reconciliation came from her, and that her husband failed to appear at the interview which was arranged between them. It is unfortunate that Dr. Bright is not here to say what transpired, but the question of her support seems to have formed an important part of the discussion, and I am inclined to believe that the question of how to get money out of the husband was the only one that really interested either Mrs. Lynch or her mother, and that the question of coming together again did not interest them at all. Had it done so, or had the respondent ever wished to see her husband, she could have availed herself of the advances he made, or could even have gone to see him, instead of deliberately avoiding him, a thing which in a small place like Freetown must have demanded a certain amount of care. When they did meet by accident in the street, as they once did, she pointedly ignored him.

Of the acts of adultery with Coker which took place at Hastings towards the close of last year I need not speak, for these are admitted. I need only say that it has been shown that the correspondent knew that Mrs. Lynch was a married woman and the wife of the petitioner, and also that her conduct was in no way brought about by her husband's treatment of her. She was living, she says, with her aunt in Hastings, and with her mother in Freetown. Coker made her no allowance though he gave her occasional presents, and though the number and value of these have not been specified they cannot have amounted to very much. She was certainly not driven to this liaison because her husband was no longer supporting her, or was unwilling to do so, for it was while she was at Hastings that Williams conveyed the petitioner's message to her that she should return. She lived on her mother, and Coker in no way contributed to her upkeep. Her lapse from virtue was therefore merely vicious and nothing else.

There is of course in this case no difficulty in finding that adultery has taken place. It has been admitted and none of the absolute defences have been put forward and I am satisfied, for s. 178 of the Supreme Court of Judicature (Consolidation) Act, 1925 casts this duty upon me, that the petitioner has not been accessory to, or connived at, or condoned, this adultery.

But certain discretionary defences are relied upon by the respondent, namely — (a) that the petitioner deserted the respondent and wilfully separated himself from her, and (b) that his wilful neglect conduced to the adultery complained of. I shall now proceed to deal with the defences *seriatim* under the Supreme Court of Judicature (Consolidation) Act, 1925.

The court is not bound to pronounce a decree of divorce if in its opinion the petitioner has been guilty, during the marriage, of having without reasonable excuse deserted or of having without reasonable excuse separated himself from the other party before the adultery complained of, and desertion is defined in 16 *Halsbury's Laws of England*, 1st ed., at 481 (1911) as — "one party to a marriage, without the consent or against the will of the other, wilfully, without cause or reasonable excuse, makes the other live apart for two years or more . . . ." but it is definitely stated that this definition is not exhaustive. In *Thompson v. Thompson* (11) the learned Judge Ordinary, without attempting to lay down a precise definition of "desertion," thinks that it undoubtedly must mean a wilful absenting himself by the

husband, and that such absence and cessation of cohabitation must be in spite of the wish of the wife; she must not be a consenting party. This description was approved by Field, J. in *R. v. Cookham Union* (8) (9 Q.B.D. at 528) when he said: "I feel some difficulty in giving the word desertion here a better interpretation than that given to it by the Judge Ordinary in *Thompson v. Thompson*." [These words do not appear in the report of the case at 47 J.P. 116.] 5

In *Smith v. Smith* (9) the principle above referred to was applied, for the court held that in the case before it there was nothing to satisfy the court that, when the parties separated the husband went against the will of the wife, that there was nothing to show that the wife was desirous of retaining her husband at that time, and that, on the contrary, there appears to have been a desire on her part to separate, for she went to live with her sister and made no enquiries after her husband for a considerable time, and there was no proof that he knew where she was living, and Lord Chelmsford, L.C. goes on to say (1 Sw. & Tr. at 362; 164 E.R. at 767) that — "if the Court were to permit this evidence to be taken as satisfactory proof of desertion, it would lead to great laxity." 10 15 20

Again in *Ward v. Ward* (12) Cockburn, C.J. asks whether even if disagreements and quarrels take place, and both parties are bound over to keep the peace, can you treat a subsequent separation as desertion? and he goes on to answer the question by saying (1 Sw. & Tr. at 185; 164 E.R. at 685) that — 25

"though the husband may have left her, yet if there were a corresponding animus on the part of the wife, if she were a party to his leaving and consented to it, that would not constitute desertion. The act of desertion must be done against the will of the wife." 30

The facts in *Keech v. Keech* (7) are worth noting shortly. A husband and wife lived in Jamaica and the wife was obliged to return to England because of her health. The husband afterwards, in 1851, asked her to return and provided her passage, but her health was not sufficiently restored to enable her to accept his offer. She had no further communication with him, but in 1856 he made her some allowance which he continued to pay until 1860 when it ceased, and suit was brought some eight years later. It is held in this case that as she had never made any offer to return to him after refusing his offer in 1851 he had not deserted her. 35 40



*Cufley v. Cufley* (4) is a case which supports the proposition that where the wife's conduct shows that her separation from her husband has been voluntary then he had not failed in his duty towards her although he had no knowledge of her whereabouts for five years and apparently made no effort to find her.

A consideration of the authorities which I have cited enables me to draw from them, without going so far as to attempt a comprehensive definition of desertion, the principle which ought to be applied in this case, namely, that to enable her to avail herself of the discretionary defence which I am now examining a wife must show quite definitely that her husband withdraws himself from her without her consent and against her will, and that when by her conduct she has shown an unwillingness to return to him, that such conduct negatives desertion.

I think that it must be considered that in the case before me there can be no question of desertion. It is unnecessary for me to recite the facts again, but it is quite clear from them that the husband was at all times willing to receive his wife back and that he made every reasonable effort to induce her to return, but that it was she who refused to come and live with him or to have anything more to do with him.

It is true that for a year after her return the petitioner did not seek out his wife but this of course makes no difference and at the end of that time he invited her to come to him. There is no suggestion that the offers he made were not sincere, and I think they were perfectly genuine.

The portion of the Act which is relied upon by the respondent and which I have set out in an earlier part of this judgment refers not only to desertion but also to a separation without reasonable excuse, and this provision is meant to cover such cases as are illustrated by *Haswell v. Haswell* (6), *Yeatman v. Yeatman* (14) and *Wickins v. Wickins* (13) and the other cases of that group, that is to say, cases in which there has been separation or desertion and the court has had to ascertain whether such conduct has been justified by the circumstances of the case. In the matter before me, this aspect of the question does not arise, for having held that there has been no desertion, there can clearly be no question of justification or excuse.

The next point that I have to consider is whether the petitioner has been guilty of such wilful neglect and misconduct as has conduced to the adultery which has taken place, and the answer to

such a question must be in the negative. The petitioner has at all times treated his wife with marked consideration. He has for years allowed her more than half his pay and has in her own words "always been a good husband to me." He continued to pay her allowance long after most other men would have stopped it, and when she finally returned to Sierra Leone he, within what in all the circumstances was a very reasonable time, tried to get in touch with her and induce her to return. There is surely here no neglect and as for misconduct on his part, this has never been alleged. Mr. Lynch's moral behaviour appears to have been above reproach. This woman's lapse from virtue was in no way due to her restricted means. She lived with her mother who was apparently both willing and able to support her and although she was probably less comfortable, she nevertheless preferred to live in that way than with her husband. Her misconduct with Coker was not induced by straightened circumstances for he did nothing to support her and the presents of which she has vaguely spoken are not shown to have been of any value or to have contributed, or to have been meant to contribute, to her maintenance. Her relations with him were merely vicious and inspired by nothing but her own carnal desires.

On the question of the damages claimed by the petitioner from the co-respondent I will not enter as this claim has been withdrawn.

There has been an application for maintenance by the respondent but such an application cannot be considered at this stage for it cannot be made before the decree nisi, and only then by a separate petition.

Under s. 34 of the Matrimonial Causes Act, 1857 the court was empowered on adultery having being proved to order the co-respondent to pay the whole or any part of the costs of the proceedings and a practice grew up of exercising this discretion when the co-respondent knew that the respondent was a married woman: see *Boddington v. Boddington* (1) and *Smith v. Smith* (10). Conversely it was held in *Burne v. Burne* (2) that there was no absolute rule of practice that a co-respondent cannot be condemned in costs unless at the time of the first misconduct he knew that the respondent was a married woman.

This section I have quoted has now been repealed, and has not been re-enacted but wide powers in regard to costs (though not referring especially to actions of divorce) are given to the Supreme

5 Court of England by s. 50(1) of the Supreme Court of Judicature  
(Consolidation) Act, 1925. It has been difficult to find many cases  
in which this point has arisen since 1925 but in *Darnborough v.*  
*Darnborough* (5) Hill, J., observing that under s. 50 costs were in  
the discretion of the court, gave them against the co-respondent  
and quoted *Codrington v. Codrington* (3) as his authority for so  
doing, although that case was decided under the repealed  
10 enactment. Section 50 of the Supreme Court of Judicature  
(Consolidation) Act, 1925 does not apply in this country but the  
practice of the English courts in matrimonial causes is to be  
followed subject to the Supreme Court Ordinance and the Rules  
of Court. Order LVI, r. 1 makes the costs of and incident to all  
proceedings within the discretion of the courts and I think there-  
fore that I can make an order against the co-respondent. That he  
15 knew full well that Mrs. Lynch was a married woman at the time  
of his adulterous intercourse is to my mind fully established,  
though I cannot think that his conduct contributed very  
materially to the break between the husband and wife.

20 In this case I pronounce a decree nisi for the dissolution of the  
marriage between Arthur Edward Lynch and Josephine Honoria  
Eccuah Lynch unless sufficient cause be shown to the court why  
the decree should not be made absolute within six months of the  
date thereof, and in the exercise of my discretion I condemn the  
co-respondent Ernest Coker in the costs of these proceedings.

25 *Order accordingly.*