MATRIMONIAL JURISDICTION.

Before Mr. Justice Marten.

1920.
March 2.

DAISY AMELIA BORGONHA (PETITIONER) *v.* WILFRED CHURCHILL BORGONHA (RESPONDENT)*.

Divorce—Petition for divorce by wife—Husband and wife not living together but separately from each other at the date of the petition—High Court's jurisdiction to hear the petition—Indian Divorce Act (IV of 1869), section 3 (1)—Practice and procedure of the Bombay High Court.

Under the Indian Divorce Act the High Court has jurisdiction to hear a petition of divorce if both parties are resident within its jurisdiction at the time of the presentation of the petition notwithstanding that the parties were then residing separately and not together.

The word "together" in section 3 (1) of the Indian Divorce Act governs only the words "last resided" and not the word "reside".

Durand v. *Durand*[1], referred to ; *Xavier* v. *Xavier*[2], not followed.

The practice of the Bombay High Court has been to accept as sufficient foundation for the jurisdiction a residence of both parties within the jurisdiction at the time of the filing of the petition.

PETITION for divorce.

The petitioner, Daisy Amelia Borgonha was lawfully married to the respondent, Wilfred Churchill Borgonha at Agra on 31st October 1898.

From and after the said marriage the petitioner lived and cohabited with the respondent at Jhansi, Nowgong, Meerut, Rurki and lastly at Muttra until about the year 1906.

The petitioner and the respondent had an issue living of their marriage, one daughter born about 1906.

* Q. C. J. Matrimonial Jurisdiction No. 2927 of 1919.

[1] (1870) 14 W. R. 416.
[2] (1892) P. J. 153.

The petitioner alleged *inter alia* that the respondent was guilty of cruelty towards her. She further alleged that the respondent had been guilty of desertion of the petitioner and her daughter without reasonable excuse for about twelve years since they last resided together at Muttra and had during that interval committed adultery with various women. On account of her poverty and failure to trace the respondent during his movements from place to place the petitioner could not take proceedings against the respondent for a considerable period.

At the time of the presentation of the petition the petitioner and the respondent were living separately in Bombay, the respondent being employed at a Hospital in Bombay, and subsequently employed in the Royal Indian Marine, Bombay, on board one of their vessels.

The petitioner, *inter alia*, prayed : (*a*) that the Court might decree a dissolution of the marriage between the petitioner and the respondent, (*b*) that the respondent be ordered to pay to the petitioner such sums as the Court might think fit and proper for permanent alimony and for alimony *pendente lite*, (*c*) that custody of her minor daughter be given to her and (*d*) that the respondent be ordered to pay adequate sums to the petitioner for the maintenance and education of the daughter. After the bulk of the evidence had been recorded the the case was adjourned for further argument on the point of jurisdiction.

Campbell, for the petitioner.

The respondent did not appear.

MARTEN, J. :—This is a wife's petition for divorce on the ground of her husband's adultery, cruelty and desertion.

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The case is undefended but raises a question of some importance, viz., whether this Court has jurisdiction to hear a petition where the parties last resided together outside the jurisdiction, but at the date of the petition are residing within the jurisdiction, separately and not together. This depends on the directions given in section 3 (1) of the Indian Divorce Act (IV of 1869) as to which High Court petitions under that Act are to be presented.

The point was not raised until after the bulk of the evidence had been taken. I will accordingly deal with the matter in the same order and state the facts first.

The parties are domiciled Anglo-Indian Christians of the Protestant faith. They were married at Agra on the 31st of October 1898. They resided at various places after their marriage and finally at Muttra, which was the last place where the parties resided together. That place is outside the jurisdiction of this Court under the Indian Divorce Act. There is one child of the marriage—a daughter now aged thirteen—and she is and has for many years past been maintained by the petitioner.

[His Lordship after dealing with the evidence found the charges of adultery, desertion and cruelty proved. He then proceeded as follows :—]

That brings me to the point of jurisdiction which I have referred to. That depends on the true construction of the following words in section 3 (1), viz :—

"In this Act, unless there be something repugnant in the subject or context...In the case of any petition under this Act, "High Court" is that one of the aforesaid Courts within the local limits of whose ordinary appellate jurisdiction, or of whose jurisdiction under this Act, the husband and wife reside or last resided together."

What then is the meaning of the concluding sentence? Does the word "together" govern the word "reside" as well as the words "last resided," or does it only

govern the words "last resided"? If, for instance, the concluding sentence was written out in full, ought it to run "...within...whose jurisdiction...the husband and wife reside together or last resided together" or should it run "...within...whose...jurisdiction...the husband and wife reside, or the husband and wife last resided together."

Now I think, one very cogent reason for not making the word "together" govern the word "reside" is that one can hardly imagine any case in which the husband and wife would be residing together at the date of the presentation of a divorce petition. For one thing, to do so would almost inevitably raise the strongest suspicion of collusion or connivance, and lead to the petition being dismissed. For instance, a wife's petition must depend on adultery *plus* either desertion or cruelty. Obviously in no petition founded on desertion could the parties be living together at the date of the petition. And it is difficult to imagine any case in which a wife who is charging her husband with adultery and cruelty, would still be residing with him. On the other hand, it would be quite natural, I think, for the Legislature to found a jurisdiction on the presence within the jurisdiction of both parties at the date of the presentation of the petition. *Prima facie*, this would be the most convenient forum to try the case.

It is true that an alternative is given. But one can well undestand the Legislature giving a petitioner the alternative of bringing the suit within the jurisdiction of the last matrimonial residence, and that the Legislature should in effect select this as the sole jurisdiction in cases where at the date of the petition both parties were not residing within the same jurisdiction.

Looking at the sentence from a purely grammatical point of view, I think it by no means follows that the

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word "together" governs "reside". If the printer had put a comma after the word "reside", it would, I take it, be clear that "together" would not govern "reside". But whether or no there is a comma in the original Act, I do not propose to let my decision depend on the punctuation which the printer thought fit to adopt.

The authorities on the point seem very meagre. Despite an adjournment, counsel has only been able to produce two cases really in point. These cases differ in their conclusions and are decisions not on section 3 (1), but on similar directions in section 3 (3) with reference to District Courts.

The first is *Durand* v. *Durand*,(1) a decision in 1870 by a Bench of three Judges in Calcutta, confirming a decree of the Recorder of Rangoon, which dissolved a marriage on the husband's petition. As the Act then stood, the Recorder of Rangoon was the "District Judge" in Pegu within the meaning of section 3 (2) and (3). There, at the date of the petition, the husband and wife were both living in Pegu, but in different parts of Pegu. There is nothing whatever in the report to show that the parties last resided together within the jurisdiction of the Rangoon Court. On the contrary, the only matrimonial residence mentioned in the report is Madràs. The judgment states at the outset the separate residences in Pegu at the date of the petition, and next states that the case is a very clear one. Then, after setting out certain other facts the learned Judges say that the jurisdiction is clear from the record, but the Recorder ought to have stated in his judgment the facts on which that jurisdiction was founded. The learned Judges do not specifically mention the point I have to decide, but it is clear that their attention was

(1) (1870) 14 W. R. 416.

expressly drawn to the question of jurisdiction, and that they thought the Court had jurisdiction in that case. This decision must, I think, have been based on the separate residences within the jurisdiction at the date of the petition. Otherwise the learned Judges would have committed the very fault which they attributed to the Recorder, viz., not stating the facts on which the jurisdiction rested. In my opinion, the case is an authority in favour of the present petitioner.

The other case is one in 1892 on the Appellate Side of this Court where by majority of two to one the Court held that the word "together" governs the word "reside" in section 3. They accordingly reversed a decree for dissolution of a marriage which had been passed by a mofussil Court. The case is *Xavier* v. *Xavier*[1]. There Mr. Justice Birdwood and Mr. Justice Telang held that there was no jurisdiction to hear the petition, but Mr. Justice Jardine thought there was. The facts were that at the date of the petition the husband was in jail at Nagpur, and the parties last cohabited at Bhusawal which is outside the jurisdiction of the Nagpur Court. Curiously enough, Mr. Justice Telang is the only Judge who mentions the extreme improbability of the parties residing together at the date of the petition, and even he only refers to the case of desertion. He says :—

"But the living *together* seems to me to be the important matter. I presume the words about 'last residence' were introduced to meet such cases for instance, as where the husband, having deserted the wife, there is no *jurisdiction possible based on a present residence together* ; while, it may be assumed that husband and wife *must* have lived *together* somewhere after marriage, and the jurisdiction would in such a case, therefore, go under the words 'last resided' to the Court of the place where such living took place. I think this is what was intended, and I do not see any such serious *inconvenience resulting from this construction as to lead one to suppose that it cannot have been intended.*"

(1) (1892) P. J. 153.

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If it had been really present to the minds of the learned Judges that the Legislature could never have contemplated the parties living together at the date of the petition, I do not think Mr. Justice Telang and Mr. Justice Birdwood would have arrived at the conclusion they did. It may be that the Court did not have the advantage of any argument from counsel or had only an imperfect argument; and this would seem to be borne out by the fact that *Durand* v. *Durand*[1] was not mentioned by the Court, while on the other hand the case of *Wingrove* v. *Wingrove*[2] on the next page was relied on by Mr. Justice Jardine. *Wingrove* v. *Wingrove*[3] is, however, clearly distinguishable, for, as is pointed out by Mr. Justice Birdwood, one of the the parties there was living outside the jurisdiction at the date of the petition. The only jurisdiction available, therefore, was that of the "last residence together."

As regards the question of inconvenience referred to by Mr. Justice Telang, if the Bombay jurisdiction is not available in the present case, the parties and their witnesses would have to travel over 800 miles from Bombay to get their suit decided.

There are two other cases from Calcutta which have been cited to me. Both of these are decisions of Mr. Justice Fletcher, viz., *Bright* v. *Bright*[3] and *Giordano* v. *Giordano*[4]. Neither case deals expressly with the point before me, and the actual decisions are irrelevant. The latter case would however be relevant, if Shillong in Assam was outside the jurisdiction of the Calcutta High Court at the date of the presentation of the petition in 1912. There the parties last cohabited at Shillong, but at the date of the petition were living in Calcutta in separate residences. The report

(1) (1870) 14 W. R. 416.
(2) (1870) 14 W. R. 416.
(3) (1909) 36 Cal. 964.
(4) (1912) 40 Cal. 215.

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does not show on which particular branch of section 3 the Court was relying for its jurisdiction, and as Shillong appears to be in a Native State, I do not think it would be safe to rely on this case without further enquiry as to the facts and jurisdiction. If, however, Shillong was then outside the jurisdiction, then the case would be an additional authority in favour of the petitioner.

As regards the practice of this Court, I have made enquiries from my brother Kajiji, who was Prothonotary for many years, and also from the present Prothonotary Mr. Malabari. They are both of opinion that the practice of this Court has been to accept as sufficient foundation for the jurisdiction a residence of both parties within the jurisdiction at the time of the filing of the petition. They have further been good enough to assist me by looking up the records of recent matrimonial cases in this Court. These records certainly tend to shew that in some petitions the draftsmen were relying for the jurisdiction on present separate residences within the jurisdiction. But for the moment, no case clearly on all fours with the present one has been found. I may, however, add that the present petition was admitted by the then Acting Prothonotary Mr. Patel, and that an order for alimony under it was made by my brother Pratt on the 14th November 1919, and that the experienced counsel who settled the petition and appeared at the hearing was evidently of opinion that the jurisdiction was clear.

I have considered whether it would not be proper for me either to report the case to my Lord the Chief Justice under rule 63 of our High Court Rules for hearing by a Bench of two or more Judges, or alternatively, to dismiss the petition having regard to *Xavier* v. *Xavier*[1], so that the question of jurisdiction might

[1] (1892) P. J. 153.

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be determined by an appellate Court. But as there is a conflict of authority, I think I am entitled, with very great respect to the learned Judges in *Xavier* v. *Xavier*[1], to act on my opinion of the Act, and none the less so because the parties can hardly be in a financial position to stand the expense of further litigation.

The conclusion, therefore, which I have arrived at is that if both parties are resident within the jurisdiction at the time of the presentation of the petition, this Court has jurisdiction to hear it under the Indian Divorce Act notwithstanding that the parties were then residing separately from each other.

That brings me to the last question of fact, viz., whether the parties were then resident within the jurisdiction.

[His Lordship then dealt with facts and found both parties were so residing.]

Mr. Campbell did submit an alternative argument to me based on certain observations of Sir Basil Scott in *Nusserwanjee Wadia* v. *Eleonara Wadia*[2], which I confess I have some difficulty in understanding. The argument was that the High Court preserved its divorce jurisdiction under section 35 of the Letters Patent, quite irrespective of the Divorce Act, and that, therefore, I was in a position to deal with this matter under the Letters Patent irrespective of the Divorce Act. I, however, pointed out to counsel that this argument appeared to be in flat contradiction of section 4 of the Indian Divorce Act, which provides that:

"The jurisdiction now exercised by the High Courts in respect of divorce *a mensa et toro*, and in all other causes suits and matters matrimonial, shall be exercised by such Courts and by the District Courts subject to the provisions in this Act contained, and not otherwise..."

(1) (1892) P. J. 153. (2) (1913) 15 Bom. L. R. 593.

Further, section 45 of the Indian Divorce Act which embodies the Civil Procedure Code is expressly made "subject to the provisions herein contained." One cannot, therefore, rely on section 20 (formerly section 17) of the Civil Procedure Code as if section 3 of the Divorce Act did not apply here. Under these circumstances, counsel did not pursue this line of argument. Under section 3 the parties here could clearly go to the Court having jurisdiction where the parties last resided together. I have not, therefore, a case to deal with where there never was any matrimonial residence, e.g., if the parties had separated at the Church door and never lived together. I say nothing as to the jurisdiction in any exceptional case such as that.

In the result, I pronounce a decree *nisi* for dissolution of the marriage. I give the custody of the child to the petitioner and direct the respondent to pay the costs of the petitioner. Any application for alimony may be left to be dealt with in Chambers.

I wish to add that I think it would be convenient if all Divorce Petitions contained a definite statement as to the jurisdiction relied on. This is very frequently done already, but it was omitted in the present case.

Solicitors for the petitioner: Messrs. *Smetham, Byrne & Co.*

Decree accordingly.

G. G. N.