A

ALKA BEN

v.

KISHORE KANJI JOGIA

[SUPREME COURT—Cullinan J.—21 April 1987]

B

Appellate Jurisdiction

Matrimonial Causes—Petition for desertion—initial desertion established—thereafter evidence of attempt at reconciliation—refusal by deserted party to return may constitute him the deserter—habitual cruelty unlikely to be established by three assaults over several days.

C

S. R. Shankar for Appellant
N. S. Arjun for Respondent

Appeal by Alka Ben (wife) against a decree nisi of divorce granted by the Magistrate's Court to Kishore Kanji (husband). Upon the ground of desertion more fully set out in s. 14(*b*) D of the Matrimonial Causes Act (Cap. 51) (the Act). The wife entered an answer or cross petition alleging desertion and cruelty. The grounds of these were the subject of particulars as follows:

> "(*a*) That after the marriage at Crown Law Office in Lautoka it was agreed that there be a religious ceremony. This did not take place until about a year E later. That I stayed with the Petitioner for approximately three months during which period the Petitioner physically assaulted me on numerous occasions.
> (*b*) The Petitioner directed me that I should leave matrimonial home and spend few days with my parents in or about May 1982 and that he would come and take me away.
> (*c*) The Petitioner did not come to take me. Instead the Petitioner informed me F and my parents and other relatives that he did not want me any more.
> (*d*) That I went to Suva to my relatives place and tried to contact the Petitioner to take me home. The Petitioner did come and see me but refused to take me and live with him."

The Court noted that "cruelty" also is not a sufficient term to describe the ground available G in the Act.

A short summary of the facts referred to in more detail by the learned Judge of Appeal will suffice. The parties were married at the Crown Law Office, Lautoka on 26 January 1981. At that stage the petitioner husband was aged 27 and the wife was 16 H years 10 months. The parties did not live together until a religious ceremony of marriage was undergone on 13 January 1982. The marriage was an arranged marriage.

Following the religious ceremony the parties commenced cohabitation first living at the home of the husband's parents. There were different versions as to the state of affairs between the parties at this stage. The husband said she was not happy from the start. The wife said she was happy with her husband on the first two weeks of their cohabitation. She gave evidence of "abuse" by the husband in the third and fourth week. Further, she claimed to have been assaulted on the day before and the day she left the husband. Her departure was on the 25 April 1982. She left the home of the petitioner's parents to live with her own parents in Nadi. The parties met thereafter by arrangement e.g. in May 1982 at Nadi Airport when the husband was on his way to Papua New Guinea. On his return there were various attempts of reconciliation by relatives and friends of both parties without success. Meanwhile the wife continued her studies at the University of the South Pacific (1982) (1983) and also in New Zealand (1984). The husband continued to see her and take her to various entertainments and to ask her to come back. There was evidence from the husband and she told him she did not love him. Eventually according to the wife she did agree to return to the husband but he "did not come back to me".

The wife also testified that in June 1982 she told the husband she was willing to forget all the injuries she had received from him and return to him.

The husband in August 1982 found three letters written by the wife but not posted. Two of this were written some two days before the wife left the husband on the 25 of April 1982; the third to a male acquiantance in 1981 (before cohabitation) whom she addressed in terms of affection. The husband draw these letters to her attention at some stage. According to him she said she loved this other man who was more romantic than the husband. The learned trial Judge stated that the letters revealed her complete unhappiness at the time, her utter determination to leave the husband to enrol in Medical School and to secure a divorce and her antipathy or aversion to the husband. The husband did not approach her after finding the letters.

In her evidence, the wife had claimed that she had been physically assaulted on a number of occasions referred to earlier.

However the Magistrate on the issue of credibility accepted the evidence of the husband and his witnesses. He rejected the evidence wife and her witnesses. He dismissed the wife's cross petition and claim for the maintenance.

Held: The Magistrate was able to make the finding which he announced, and it was supported by the record. The respondent's letters referred as found in August 1982 made a "mockery" of her claim that the petitioner had deserted her on 25 April 1982. There could not be any doubt that it was she who deserted the husband on that date.

The learned Trial Magistrate was justifiably satisfied that the wife had deserted the husband initially. However he did not give full consideration to the impartial evidence of attempts to reconcile the parties. It must be assumed that he accepted it. Therefore the evidence was that both parties and in particular the wife were willing to reconcile. Although there had been desertion, in view of that evidence there must have been some doubt that the animus deserendi continued, desertion being a continuing offence.

If a deserting spouse genuinely desires to return, the refusal of such offer may constitute
A her the deserted party i.e. becoming in turn the one who was deserted and vice versa. (See Lord Merriman P. in *Thomas v. Thomas* at p. 172). However even if such propositions could be said to apply to the husband the wife could not succeed in her ground of desertion, as her petition was filed on the 29th June 1984 that is, less than two years preceding the formation of an animus deserendi if any, on the part of the husband that is, on the evidence, in August 1982.

B

The learned Trial Magistrate did not correctly direct himself with regard to the wife's willingness at one stage to reconcile. Had he done so he may not inevitably have granted a decree nisi to the husband. In view of finding of credibility which he made, however, supported by the record, there was no basis on which he could have granted the wife's petition.

C The wife's counsel submitted the ground of cruelty was not pursued as such, but rather as being in the support of desertion

Even if the assaults in this case were proved they could not support grounds for constructive desertion by the husband.

D The learned Magistrate held that the wife would not be entitled to maintenance from the husband either from May 1982 or any future maintenance, presumably because of conduct. That is a clear misdirection in view of the fact that the Act was introduced in 1969. Any notion of the "guilty party" would have long since vanished. See Section 84(3); there was no current evidence of the parties' financial situation before the Court, if the application for maintenance is to pursue then affidavits of means would have to be filed by both parties.

E

The application for maintenance was adjourned before Registrar in Chambers.

F Cases referred to:

King v. King (1953) A.C. 124
Thomas v. Thomas (1924) P. 194
Thomas v. Thomas (1946) 1 All E.R. 170
Jones v. Newton and Llanidloes Guardians (1920) 3 K.B. 381

G CULLINAN, J.:

Judgment

This is an appeal against a decree nisi of divorce granted by the Magistrates' Court at Suva to the respondent husband (whom I shall call "the petitioner") on the ground of desertion by his wife the appellant (whom I shall call "the respondent").
H There are no children of the marriage.

The parties were married on 26th January 1981 at the Crown Law Office, Lautoka. The petitioner was then aged 27 years, the respondent 16 years and 10 months. It was an arranged marriage. The respondent was then a student at the

Sangam College, Nadi, preparing for a New Zealand University Entrance Examination, which she subsequently passed. The parties did not therefore undergo a religious ceremony of marriage until over a year later on 13th February 1982 after which they commenced cohabitation as man and wife.

After a brief honeymoon they joined the petitioner's parents, his sister and brother-in-law at his parents' home in Suva. Apparently all went well for the first three weeks, that is according to the respondent: according to the petitioner the respondent was never happy from the start. After but ten weeks of cohabitation the respondent left the home of the petitioner's parents to reside with her parents in Nadi.

By arrangement the parties met again in May 1982 at Nadi Airport when the petitioner was on his way to Papua New Guinea. In June 1982 the respodent returned with some relatives to the petitioner's home but reconciliation was not effected and she departed to the home of a relative in Suva where she stayed for about two months. During those months the petitioner visited her many times and took her to the cinema and other entertainment. Efforts were made by relatives and friends to effect reconciliation without success.

In 1982 the respondent enrolled in and completed a foundation course at the University of the South Pacific ("U.S.P") in Suva. In 1984 she departed for New Zealand where she successfully completed the first year studies in a three year course in Pharmacy at the Central Institute of Technology. Meanwhile on 7th May 1984 the petitioner filed a petition for divorce "on the grounds of desertion". The fact relied upon as constituting that ground was—

> "That the Respondent without just cause or excuse had wilfully deserted the Petitioner on or about the 25th day of April 1982 and such desertion continues to this date, despite several attempts made by the Petitioner to reconcile."

The respondent thereafter filed an answer and cross petition "on the grounds of cruelty and desertion". The facts relied upon as constituting those grounds are as follows:

> "*(a)* That after the marriage at Crown Law Office in Lautoka it was agreed that there be a religious ceremony. This did not take place until about a year later. That I stayed with the Petitioner for approximately three months during which period the Petitioner physically assaulted me on numerous occasions.
>
> *(b)* The Petitioner directed me that I should leave matrimonial home and spend few days with my parents in or about May 1982 and that he would come and take me away.
>
> *(c)* The Petitioner did not come to take me. Instead the Petitioner informed me and my parents and other relatives that he did not want me any more.
>
> *(d)* That I went to Suva to my relatives place and tried to contact the Petitioner to take me home. The Petitioner did come and see me but refused to take me and live with him."

The respondent also prayed for maintenance continuing from May 1982, costs and in particular that "all the expenses of my study be met by the petitioner". The ground in both petition and answer is misdescribed as being simply "desertion". In my view the petition and answer should have pleaded that the decree of dissolution was sought on the ground that "since the marriage the (respondent) (petitioner) has without just cause or excuse wilfully deserted the (petitioner) (respondent) for a

period of not less than two years", the specific facts and dates etc. being pleaded in the body of the petition or answer. The phraseology "on the ground(s) of...." contained in the opening paragraph of Form 1 in the Schedule to the Matrimonial Causes (Magistrates' Courts) Rules or Form 5 in the equivalent Supreme Court Rules indicates that the ground be stated as "wilful desertion without cause or excuse for a period of not less than two years", but the difference with the actual wording of section 14*(b)* of the Act is one of semantics. It seems to me to be obligatory however to plead the full terms of section 14*(b)* of the Act at some place in the petition. This the petitioner has done, but not the respondent. The petitioner however took no objection to that aspect.

As to the ground of "cruelty", either "habitual cruelty" must be pleaded or the fact that "since the marriage the (respondent) (petitioner) had habitually been guilty of cruelty to the (petitioner) (respondent.)" Again, it seems to me to be incumbent upon a respondent who denies any ground or fact in a petition, to plead such denial in his answer—see rule 76(1) of the Matrimonial Causes (Supreme Court) Rules and rules 3A & 17 of the Matrimonial Causes (Magistrate's Courts) Rules. In this respect, I consider that Form 3 scheduled to the latter Rules is defective, that is, when compared with Forms 13 and 14 scheduled to the former Rules. In the present case however the facts pleaded in the answer and cross-petition in effect deny the pleading in the petition.

So much for procedural matters. The learned trial magistrate on the issue of credibility accepted the evidence of the petitioner and his witnesses, and rejected that of the respondent and her witnesses. He found the allegation of desertion made by the petitioner to be proved and granted a decree nisi: he dismissed the respondent's answer and cross-petition, dismissing also the application for maintenance, costs and expenses.

The grounds of the appeal are as follows:

"1. That the learned trial magistrate erred in and holding that the Petitioner had proved desertion and granting decree nisi.
2. That the learned trial magistrate erred in law and in fact in dismissing the Respondent's Cross Petition and further erred in not granting the Respondent a reasonable maintenance."

It was the petitioner's evidence that the respondent was never happy after the respondent and the petition commenced cohabitation. He and his sister pressed her for the reasons for her unhappiness but she resisted their efforts, until eventually, on 24th April, 1982, when pressed by the petitioner's sister in his presence, the respondent said that the petitioner was "a perfect gentleman" and his parents were "very nice people" but that she did not love the petitioner and wished to divorce him: she wished to return to Nadi and continue her studies. The petitioner said she could study while married, but the respondent said that she could study while married, but the respondent said that she could not be a wife and a student at the same time; she said that she had made a mistake in marrying the petitioner and did not wish to make another mistake in becoming pregnant. The petitioner persisted in his efforts without avail. At one stage she said that her parents had forced her to get married. His parents then took the respondent to the home of her uncle in Suva seeking his intervention. He meanwhile telephoned his brother in Perth to appraise him of the problem. When his parents returned with the respondent, she was still adamant. His parents spoke to her, but she repeated that she did not love the petitioner and wished to return to Nadi.

The petitioner and respondent slept in separate bedrooms that night. The following day his mother again attempted to change the respondent's mind, but she said that she wished for divorce and even suggested that she could "find another girl" for the petitioner. At midday the respondent's parents and her uncle arrived. The petitioner also telephoned the respondent's brother in Nadi and asked him to come to Suva. The latter arrived at 3.30 p.m. Despite intercession by all, the respondent departed for Nadi that evening between 5.30 and 6.00 p.m.

The respondent's attitude was confirmed by the petitioner's sister-in-law in Perth who tried to dissuade the respondent on the telephone on 24th and 25th April without success. On 9th May, 1982 a friend of the petitioner and the respondent, resident in Suva, met the respondent at a wedding in Lautoka, attended also by the petitioner's parents. She and her husband attempted reconciliation, but the respondent said that she did not love the petitioner. On a subsequent occasion at her parents home in Nadi the respondent stated that she did not love the petitioner and would not return to him.

In June 1982 the respondent's parents apparently brought the respondent from Nadi in another attempt at reconciliation. They came to the petitioner's home with some five to six uncles. The petitioner and the respondent spoke to one another in privacy of a bedroom, as the respondent had remained silent in company, whereupon the respondent said that, "Those clowns are forcing me to come back". The petitioner then spoke to the relatives, repeating the assertion made by the respondent. The respondent's relatives were visibly thereupon annoyed with the respondent, and all departed in silence. Thus another attempt at reconciliation failed.

Thereafter, as I said earlier, the respondent resided with her uncle in Suva. The petitioner testified that he visited her almost daily, taking her out for drives in his car and to the cinema and elsewhere. During that time some friends and relatives made attempts at reconciliaion. At one stage apprarently she said that she would return to the petitioner, but never did so.

In August 1982, the petitioner discovered three letters in his home, written by the respondent but not delivered. The respondent acknowledged that she had written all three, two to her brother, one on 23rd April, 1982, and the other around the same time; the third letter was written in 1981, before the parties had commenced cohabitation, in affectionate terms to a male acquaintance. When taxed by the petitioner with the latter letter, she admited that she loved this other man, who was "more romantic" than the petitioner, and that in particular she did not love the petitioner.

The contents of the other two letters written to her brother, one of them but two days before her departure on 25th April 1982, whether or not they were posted, clearly indicate her state of mind and intention as to the marriage. They reveal her complete unhappiness, her utter determination to leave the petitioner, to enrol in medical school and in particular to secure a divorce, and indeed what can only be described as her antipathy or aversion to the petitioner.

Apart from such letters, the evidence given by the respondent and her witnesses is to the contrary. The respondent testified that she was happy with the petitioner in the first two weeks of their cohabitation. Then in the third week the petitioner started abusing her verbally saying she was not fit to be a wife but only a dancer. This continued in the fourth week, when he said he had full right to abuse his wife. The

telephone was locked, so that she could not telephone her parents in Nadi. The day before she left the petitioner's home the petitioner threw a glass flower vase at her, striking her and cutting her over the right eye, the vase breaking in the process. The following day he struck her with his hand on the cut over her eye, causing a "black eye" to develop; on the same day his mother struck her with her hand on the back of her head.

In the morning of that day the petitioner telephoned her brother's house at Nadi. Her father and uncle arrived at 12.30 p.m. from Nadi. They found her crying in her bedroom. Her brother arrived at 2 p.m. The petitioner informed her father that she was not fit to be a wife but a dancer, that he did not want her as a wife and asked her father to take her away. Despite remonstrations from her relatives he remained adamant and she left the house at 5.30 p.m., but only on the understanding that she was to return to her parents' home at Nadi for one week from whence her parents-in-law would collect her, after they had attended a forthcoming wedding at Lautoka. Although she spoke to them at the wedding on 9th May 1982, they did not collect her thereafter as promised. She acknowledged the conversation with the married couple from Suva at the wedding, but to the extent only that she denied the wife's query as to why the petitioner "wanted to send me home for good", saying that her parents-in-law were due to collect her the following day. She failed to contact the petitioner by telephone as his family and staff informed her he was not there.

She testified that when the petitioner left for Papua New Guinea sometime before June 1982, he had requested that she meet him at the airport at Nadi. She complied with the request going to the Airport with her mother. As to the incident at the petitioner's home in June 1982, she denied the derogatory reference to her relatives forcing her to reconcile, testifying that she told the petitioner that she was "prepared to forget all the injuries (she) had received before from him" and that she was willing to return to him. The petitioner informed her, and subsequently her relatives outside, that he did not want her. The petitioner incidentally informed her that "he had two letters", but he did not show such letters to her or anyone else present. She denied further that the petitioner had shown her "some letters on one occasion when he took me out in his car".

Thereafter the respondent testified that she stayed with her uncle at Suva for two months intending to "contact the petitioner and return to him". The petitioner used to come and visit her at her uncle's residence and take her out to the cinema and for a drive in his car. The petitioner's mother was in Australia at the time. She asked him when he was going to take her back and he replied that he would do so when his mother returned from Australia. She believed him in the matter, as "the petitioner appeared to still love me and I also loved him", she said. The petitioner's mother returned from Australia about the end of July but the petitioner "did not come back to me". In 1983 she enrolled in the U.S.P. to do a foundation course staying at her uncle's home in Suva. She passed the latter course. In 1984 she successfully completed the first year of a three-year course in Pharmacy at the Central Institute of Technology, Heretaunga, New Zealand. The petitioner testified in particular that she thought her marriage would have succeeded "if the petitioner and I were left alone. The petitioner was responsible for the break up because he told me that I was not fit to be his wife."

The respondent called some witnesses in support of her case. In particular her brother, a Pharmacist, testified that the petitioner 'phoned him at Nadi on the 25th April 1982, as a result of which he drove to Suva. On entering a bedroom in the petitioner's family home he observed his sister "a bit hysterical and crying" and with "a swollen eyelid with a cut on top of it". Another uncle corroborated that evidence, saying that the respondent "appeared to be beaten up, hysterical and crying and there were injuries on her face which consisted of a black eye". Under cross-examination the latter testified however that the respondent had "told us she was beaten up by the members of the petitioner's family". A B

Another uncle, at whose home the respondent stayed in Suva for some months, testified that the petitioner "used to visit my house practically every night" and that the "petitioner used to regularly take the respondent out in the evening and bring her back". He testified in particular that—

> "The Petitioner told me as the relationship improved and that everything was alright from his side that his father approved and he was waiting for his mother's approval." C

There was then evidence from a friend of the family who had spoken to the couple on a number of occasions in an effort to effect reconciliation. He testified that he got the impression that both parties were willing to reconcile and that the respondent was "prepared to go back to the petitioner". He testified in particular, D

> "I got the impression that the Petitioner on his own was prepared to take the Respondent back."

On the issue of credibility the learned trial magistrate, as I have said, accepted the petitioner's evidence. I consider that he was justified in doing so. As to the issue of cruelty, there is the evidence of the respondent's uncle that she complained that she had been beaten up by the petitioner's family, which of course conflicts with her evidence. E

As to her brother's evidence, it was only at the very end of his cross-examination that he testified that he had learnt from his sister that she had been abused and physcially assaulted. He never volunteered such evidence in chief; one would have expected that the immediate reaction of a brother would have been to ask his sister how she came to bear signs of having been assaulted, but that was not the impression he conveyed in giving his evidence in chief. Again, in cross-examination he testified that when the petitioner 'phoned him at Nadi that the petitioner "broke down on the 'phone and was sobbing and he asked me to come over saying there was a personal problem between him and my sister". That is hardly the reaction of one who would subject an 18 year old bride of but 2½ months to physical assault. F

The learned Counsel for the petitioner Mr Arjun submits, that the letters which the petitioner produced in August 1982 give no indication whatsoever that the respondent was at any time ill treated by the petitioner, one of those letters having been written only two days before she left the matrimonial home, that is, on the 23rd April 1989. I respectfully agree. Indeed, the evidence indicates that the petitioner was so upset by the proposed departure of the respondent, that on the 24th April he 'phoned even his sister-in-law in Perth in an effort to get her to dissuade the respondent from leaving him. G H

In any event, as Mr Arjun submits, the alleged assault on the 24th and 25th April
A could hardly amount to habitual cruelty, and might be regarded as forming no more than the wear and tear of some marriages: see e.g. the case of *King v. King* (1) at pp. 127/128 per Lord Normad. The learned Counsel for the respondent Mr Shankar however submits that cruelty is not pleaded as a separate ground as such, but rather as being in support of the ground of desertion. For my part I observe that even if the assaults in this case were proved, I cannot see that they would constitute grounds for
B constructive desertion by the petitioner.

On the issue of desertion, the magistrate accepted the evidence of the petitioner. His finding in the matter is supported by the record. Mr Arjun submits that the respondent's letters make a mockery of her claim that the petitioner deserted her on 25th April 1982. I respectfully agree. The letters in my view completely undermine that allegation. In this respect, under cross-examination she testified that the letters
C "clearly indicated that I wanted to divorce my husband and I deny that". That statement indicates how contradictory her case is. I do not see that there could be any doubt that it was she who deserted the petitioner on the 25th April 1982.

There is then the petitioner's evidence on the finding of the letters. He testified—

> "I do not love the respondent now and I do not want her any more. I reached this
D decision after I saw those three letters M.F.I.2-4 in August 1982. Till then I loved her and wanted her."

Subsequently however in cross-examination the petitioner testified that—

> "I could not base my decision to leave the respondent on the contents of those letters because they had never been posted."

E That aspect of posting of course is irrelevant, but the contrast in the above passages serves to indicate the uncertainty in the petitioner's mind in the matter.

As I said earlier, this was an arranged marriage, and the evidence which I have related surely indicates the degree of participation by all the relatives concerned in the affairs of the couple. Perhaps this is understandable in view of the relatively tender age of the young bride. Clearly the respondent deserted the petitioner initially. It
F must be remembered however that she had just passed 18 years of age at the time. Thereafter it seems from the evidence that the amount of persuasion by all concerned had an effect upon her. There is in particular the obviously impartial evidence of a family friend. It is significant that the petitioner visited the respondent almost daily during that period, that is, from June to August 1982. During that period, the petitioner testified, his mother was in Australia. The petitioner's evidence as to the date when he found the particular letters is vague. The only satis-
G factory evidence in the matter is that he produced them in August 1982 the month of his mother's return from Australia. Thereafter he did not approach the respondent again.

The learned trial magistrate was justifiably satisfied that the respondent had deserted the petitioner initially. He did not however give full consideration to the impartial evidence of attempts to reconcile the parties. He did not discount such
H evidence in his judgment, and I must assume therefore he accepted it. Such evidence is supported by the very frequency of the meetings of the parties during June to August 1982. That being the case, the evidence before the Court is that both the par-

ties, and in particular the respondent, was willing to reconcile. The factum of separation was there, but in view of the evidence there must have been some doubt that the animus deserendi continued in the respondent, desertion being of course a continuing offence: see e.g. case of *Thomas v. Thomas* (2) at p. 199 per Pollock M.R.

If a deserting spouse genuinely desires to return, the refusal of such offer may constitute the deserted party the deserting spouse in turn: see the case of *Thomas v. Thomas* (3) at pp. 172/175 where Lord Merriman P. referred in particular at p. 174 to the dicta of the Earl of Reading L.C.J. in the case of *Jones v. Newton and Llanidloes Guardians* (4) at p.384. In the present case the question of whether or not the petitioner would have had "just cause or excuse" arises. But in any event, even if such propositions could be said to apply to the petitioner, the respondent's answer was filed on the 29th June 1984 that is less than two years preceding the formation of an animus deserendi, if any, on the part of the respondent that is, on the evidence, in August 1982.

In all the circumstances therefore I am not satisfied that had the learned trial magistrate correctly directed himself with regard to the respondent's willingness at one stage to reconcile, he would have inevitably granted a decree nisi to the petitioner. On the other hand, in view of the findings of credibility which he made, which are supported by the record, there was no basis on which he could have granted the respondent's petition in the matter.

With regard to maintenance, I would agree with Mr Arjun's submission that a husband is under no duty to educate his wife. Section 85 of the Matrimonial Causes Act speaks of the education of the children of the marriage, but section 84 speaks merely of "the maintenance of a party to a marriage". I cannot see that higher education would be regarded as part of reasonable maintenance for a spouse. A letter dated the 20th March 1980 written by the petitioner to the respondent contains a promise to educate the respondent "either in Fiji or Australia. After our marriage, you can study whatever you like". But the respondent brings her application under section 84 of the Act, in the course of a matrimonial cause. If the letter is regarded by her as a contract in anticipation of marriage, then she is free to act upon as she is best advised, but no such contract is before this Court.

The learned trial magistrate observed that—

> "the respondent had been at fault in wilfully deserting the petitioner without just cause or excuse. I do not think that the respondent would be entitled to maintenance from the petitioner either from May 1982 or any future maintenance."

That is a clear misdirection: in view of the fact that the Act was introduced in 1969 I would have thought that any notion of the "guilty party" would have long since vanished. Section 84(3) of the Act provides that:

> "The court may make an order for the maintenance of a party notwithstanding that a decree is or has been made against that party in the proceedings to which the proceedings with respect to maintenance are related."

Maintenance is a matter which is subject to variation, and indeed orders in respect thereof are constantly varied according to the changing circumstances of the parties. There is no current evidence of the parties' financial situations before the Court. If the application for maintenance is to be pursued then affidavits of means will have to be filed by both parties. Meanwhile the application for maintenance is adjourned before the Registrar in Chambers.

I observe that within but a few days the parties to the marriage may come within the terms of section 14*(m)* of the Act, that is, based on five years separation. It may be that there is a possibility of reconciliation, even at this stage. On the other hand it may be that there is "no reasonable likelihood of cohabitation being resumed".

If that is the case, then either party or both are free to file a petition under section 14*(m)*. Meanwhile the appeal is allowed to the extent that the decree nisi is set aside.

Appeal allowed.