

**Fowle Vs. Fowle**

**Fowle Vs. Fowle**

**SooperKanoon Citation :** [sooperkanoon.com/856975](http://sooperkanoon.com/856975)

**Court :** Kolkata

**Decided On :** Sep-14-1878

**Reported in :** (1879)ILR4Cal260

**Judge :** Jackson, Officiating C.J. ;Markby and ;Prinsep, JJ.

**Appellant :** Fowle

**Respondent :** Fowle

**Judgement :**

Jackson, Officiating C.J.

1. This was a petition for is solution of marriage by a wife, Charlotte Rebecca Fowle, on the ground of adultery, cruelty, and desertion, filed under the Indian Divorce Act in the Court of the Recorder at Rangoon in British Burmah.

2. The husband, Edward Fowle, as respondent, admitted the principal act of adultery or rather course of adulterous life charged, but denied the other adulteries, also the cruelty and the desertion. He avowed, however, that the petitioner had connived at the adultery which he admitted.

3. The suit having come on for trial, the Recorder found that cruelty had not been committed, that the petitioner had not been deserted, that the adulteries charged previous to an adulterous connection with a Burmese woman, named Mahkin, had not been proved; but on the ground of the last-mentioned adultery, which had not

been condoned, and as to which he found no connivance or acquiescence, he decreed a judicial separation with alimony, but dismissed the petition for a divorce.

4. The alimony was at first fixed at Rs. 700 per mensem, but, on reconsideration, he thought fit to reduce that sum by Rs. 80 per mensem as the equivalent of an income arising out of the marriage-settlement of Mrs. Fowle, so that the sum finally allowed as alimony was Rs. 620 per mensem, secured by a penal bond which the husband was required to enter into with the Registrar of the Court in the sum of Rs. 10,000.

5. Charlotte Fowle, dissatisfied with this judgment, appealed, on the ground: 1stly.--That cruelty had been sufficiently proved. 2ndly,-That desertion had been proved. Either of which, coupled with the adultery, entitled her to a dissolution of the marriage. 3rdly,--That the alimony allowed was insufficient. 4thly.--That it had not been adequately secured or made payable as long as the petitioner lived.

6. The respondent, on the other hand, preferred an objection, not in the sequel insisted on, that the alimony was excessive.

7. The appellant at the hearing abandoned the charge of cruelty, but we are much pressed to find a case of desertion.

8. The facts admitted are these: Edward Fowle, the respondent, apparently born about 1820, came in early life to Moulmein. His father, a Captain in Her Majesty's 63rd Foot, shortly after dying in India, left a widow and two daughters in very narrow circumstances. Edward Fowle continued in Burmah in various mercantile situations, helping his mother out of his income. In the course of time, he formed a connection of a kind very common in Burmah, with a woman of that country named Mahkin. Having apparently amassed a little money, and having a certain commercial position, he went to England in 1856; things being so arranged between him and Mahkin that both should be free if he had not returned within a year. Edward Fowle having afterwards gone to France, met at Calais the petitioner, whose parents had known him as a boy, being friends of his father. In November 1856 Edward Fowle married the petitioner, and about a year afterwards a daughter, the sole issue of this marriage, was born.

9. It seems that Mr. Fowle's fortune, though prosperous enough when he left Burmah, was precarious. He was reduced to serious difficulties by the misconduct of an agent, and the couple soon found themselves in embarrassment. About this time too subjects of dispute appear to have arisen between husband and wife; she manifesting a somewhat positive temper, and he being, in her opinion, profuse and certainly thoughtless and provoking in his manner and conversation. Those letters of Mrs. Fowle, which are preserved relative to this period of their married life, show a good deal of affection on her part, coupled, however, with a very distinct appreciation of her own rights and of the duties of her husband.

10. One result of their pecuniary troubles was that Mrs. Fowle went over to Calais, where her parents were, for her confinement. Immediately after she had gone, he obtained a temporary appointment, being attached to the Siamese Embassy then in England. In this capacity he took up his abode at Calridge's Hotel, where Mrs. Fowle presently joined him. They did not live very happily then, and out of some incidents of that time arose charges to which I need not at present advert. There were quarrels about a Burmese servant, and jealousies brought about a good deal by Mr. Fowle's jocular mode of expressing himself.

11. At last, in the early part of 1859, his funds having apparently come to an end, Edward Fowle returned to Rangoon accompanied by his wife, the infant being left behind in the care of the wife's mother. Mr. Fowle says that he proposed her remaining in England, but that ways and means for her maintenance then were not forthcoming. The husband's affairs did not at first improve; their life at Rangoon was not entirely happy, nor, according to Mrs. Fowle, even comfortable. After a time, insolvency appeared imminent, and it was arranged that Mrs. Fowle should return to England, and she accordingly left Rangoon in April 1861 and arrived in England about the latter end of June.

12. From that time their conjugal life has never been resumed, and indeed they never met again till Mrs. Fowle returned in 1876 to Rangoon for the purpose of taking the present proceedings. But a remarkable and not very regular correspondence was kept up. To some of the letters on both sides it will be necessary to advert by and by. For the moment it need only be said that, on the

side of the husband, they contain alternate assurances of ardent love and violent reproaches, interspersed with trivial and often indelicate gossip and remarks. On the side of the wife, whose preserved letters are much less numerous, there is little show of love, but a friendly disposition with a tendency to lecturing, a good deal of pressure (reasonable enough it must be said) for an increased allowance, and occasionally a tone decided and even threatening on this subject.

13. Mrs. Fowle's life during all that time is admitted to have been quite irreproachable. She had her child with her, and brought her up till she was nearly adult, when the girl went to her father's relations. But a few months after his wife's return to Europe, Mr. Fowle went on business to Moulmein, where he met with Mahkin, the Burmese woman previously mentioned, and the result was that he resumed cohabitation with her, and continued to live openly with her down to the time of the trial. By this woman he has had, in the interim, several children, whom he has had baptized as his, who bear his name, and have been educated at his expense; as indeed has also been a daughter of Mahkin by another European with whom she had had an intermediate connection.

14. He says, indeed, and emphatically affirms, that, if Mrs. Fowle had returned during this period, Mahkin would have immediately left him, and that it was so understood between him and Mahkin. But no admission of the kind was elicited from Mahkin herself, who was a witness in the cause, and the tenor of her evidence makes this statement somewhat improbable: for, on the one hand, she says, that, she at first was angry, and repelled his advances when they met at Moulmein, and this anger can only be ascribed to resentment at his having given her up for his European wife; and further, it appears that she returned to him out of compassion for his reduced circumstances, and made him considerable advances out of her own funds. In this state of things, it is unlikely that she would have consented to be taken up and put down at Mr. Fowle's convenience.

15. There is consequently here a case of the clearest and most systematic adultery, which is more than a mere act of adultery, for it amounts in fact to a putting by the respondent of Mahkin for many years together, as completely as possible, into the place of his wife. She managed his house, she bought and sold

for him, and was, as the witness Antram says, the 'lady of the house'; she bore him children, she left her money in his hands and 'helped him generally in his business in everything', and this without any disguise whatever. Mr. Fowle says, indeed, that he had quarrels with her, but he had also quarrels, at least as bitter, with his wife, and perhaps these differences may be taken as making the position more completely quasi-conjugal.

16. Upon this arises at once the question whether there was any acquiescence or connivance on Mrs. Fowle's part when she became aware of the state of the case, and what her conduct was when it came to her knowledge. This question may be answered at once.

17. It seems that Mrs. Fowle had few friends, perhaps not one intimate friend in Burmah, and that she kept up no correspondence with any one at Rangoon. She was quite aware of her husband's character, and thought him at least as bad as he actually was. He had led her not to expect marital faithfulness in him, and she undoubtedly did not expect it. She says that she always looked upon the resumption of their conjugal life as probable, and that she had made up her mind not to ask questions, and, unless infidelity on his part was actually brought to her notice, to assume that his conduct had been correct.

18. Now the only thing which tends to affect her with knowledge prior to 1875 of her husband's intercourse with Mahkin is the fact that, in 1871, Captain Brooking, an acquaintance, came from Rangoon, bringing a message from the husband, and, in answer to a question from Mrs. Fowle, said, 'he had heard there was a woman of the name of Mahkin about the place'. It appears to us that this vague statement of Captain Brooking would not necessarily convey to her mind an absolute knowledge that her husband was at that time actually living in adultery with Mahkin, still less can the statement be taken as a foundation for a charge of connivance; on the other hand it is certain that, as soon as Mrs. Fowle obtained a positive knowledge of the state of things in the winter of 1875, she took immediate measures for going out to Burmah with the view of taking proceedings for her divorce if it could be obtained.

19. There can be no question, therefore, as to the respondent having committed adultery at which the petitioner has not connived.

20. As to the earlier adulteries in Rangoon, we quite agree with the Court below in thinking that they are unproved, and as to those charged as having been committed in England, we think it unnecessary to go into them; first, because, if proved, they would not advance the petitioner's case as to a judicial separation; secondly, because, to give the Courts in this country jurisdiction to dissolve a marriage solemnized out of India, the adultery complained of must have occurred in India. But the evidence as to such acts was certainly unsatisfactory.

21. We now come to the far more difficult question, whether the petitioner has further made out the charge of desertion, which, if proved, would, coupled with the adultery, entitle her to a dissolution of the marriage. This is obviously a mixed question of law and of fact, and it will be convenient first to state, with all practicable brevity, how the facts appear to stand.

22. It is pretty clear that, when husband and wife parted in 1861, the idea of a permanent separation was not in the mind of either. Mr. Fowle seems to be a person of buoyant character and impulsive temperament. His impressions are transient, and his moods are changeable. He seems a kind-hearted man without much fixity of principle, and his correspondence plainly shows that he was equally ready to be very fond of his wife, or to be at daggers drawn with her, according to the tone in which the lady chanced to respond to his advances. She, on the other hand, unmistakably displays greater tenacity and firmness. The affectionate pleading even if accompanied by a certain hardness exemplified in the earlier letters of her opening married life has wholly disappeared in the after letters. She would probably say that she was desillusionee. The mingled coarseness and levity with which she had been treated effectually dispelled all romance or fondness from her nature, and left her cold and, relatively to him, concentrated in character. He had an attachment to her chiefly sensual in its nature, and hoped vaguely that something would turn up which would bring them together again. She, fond of the pleasanter parts of life and indifferent now to her husband, had probably no wish to remain in Burmah, but would have returned if she had thought her position there

likely to present greater attractions than her life in England. As time wore on, it may be that stronger inducements would have been required to tempt her to return; but we find no trace at any time of a settled resolution not to do so. He, on the other hand, had constantly affirmed that he would never go back to England, and had announced his intention of removing or concealing himself in case his wife should come in search of him. In his cross-examination he says, on the other hand, that if his wife had come out, as she entered at one door, Mahkin would have gone out of the other. But it is impossible to lay much stress on the declarations of a man like Fowle, who seems to have been in turns cajoling and defying his wife, now trying to soften her with the account of his misery, and then taunting and wounding her by his language. He had indeed taken a step which, unknown to her, greatly altered their relation, and on the one hand indisposed him to leave Burmah, and on the other, made him use measures to deter her from coming out. But a quarrel with Mahkin, a failure of his health, or the possession of assured riches, might at any time have led to a change in his intention and to his going to England; and we cannot doubt that if he had so gone in any of the years between 1863 and 1875, he would have gone at once to his wife and ostensibly amicable relations would have been resumed. That which did happen was brought about by this, that the wife, estranged by long absence, embittered by being kept in narrow circumstances when she knew her husband to be living in abundance, was roused to action by the certainty that she had been not only neglected but displaced.

23. Now, what in the legal sense is 'desertion' which the petitioner alleges, and which the exigencies of her case require her to prove? Desertion, by the Indian Divorce Act, 'implies an abandonment against the wish of the person charging it'. Abandonment is not defined, but the effect of the clause is doubtless to introduce into the Indian Statute the view adopted by the Courts in England in construing the English Act. Now the expression 'against the wish' is capable of two meanings. It may be construed either as contrary to an actively expressed wish of the person charging and notwithstanding the resistance or opposition of such person, or it may mean simply an act done when the wish of the person affected by it is the other way. All the English cases seem to put the stronger and more definite construction upon the words, and as the Indian Legislature has undoubtedly

adopted the language of those decisions, we ought probably to interpret them in the same way. Indeed, regard being had not merely to the high authority of the Probate and Divorce Court on other grounds, but also to the fact that its tribunal is much occupied in considering cases of the kind, we think that its decisions must usually and necessarily be a guide to the Courts in India, except when the facts of any particular case, arising out of the peculiar circumstances of Anglo-Indian life, constitute a situation such as the English Court is not likely to have had in view. Therefore, however hardly the construction there adopted may appear to bear upon the wife in certain cases, we should be compelled to follow it here, unless peculiarities of the kind adverted to should appear to take a given case out of the ordinary rule, or unless the case can be shown to be clearly outside of the rule. Even the case of *Fitzgerald v. Fitzgerald* (L.R., 1 P. & D., 644), harsh as it may seem to be, has been recognized as authority by this Court, and the petitioner in the case of *Wood v. Wood* (I.L.R., 3 Cal., 485), only succeeded (on appeal) by showing that there were circumstances in her case which made the ruling inapplicable.

24. It is unnecessary to discuss the explanation given by Mr. Jackson of the *Fitzgerald* case (L.R., 1 P. & D., 644),--viz., that where intercourse had been only suspended, the omission by a husband to avail himself of the opportunities of renewal might constitute desertion, but that where intercourse had been determined, there must have been a resumption before desertion could take place,--as well because we do not think there had been a real determination of intercourse (considering what the situation of the parties was), as also for other reasons which will appear.

25. In the case before us if there was any desertion, if the wife was abandoned, she certainly was not a consenting party; but it would be less easy to say that she made any active opposition.

26. But was she in truth abandoned? If so, when and how

27. It is clear that the facts relied on to prove desertion must be something beyond mere adultery, for in order to obtain a divorce, a wife, if she cannot prove cruelty, must prove desertion in addition to adultery, and this certainly cannot mean

adultery plus adultery.

28. Now, Mr. and Mrs. Fowle had lived separately by mutual consent for many years, and we do not find, although she might have been willing to resume cohabitation, that she ever actively sought it. The separation indeed, cannot be said to have taken place in a hostile way on account either of conjugal misbehaviour on his part or even of any estrangement between them, although such estrangement had certainly begun on one side, if not on both. They separated purely for reasons of convenience, and during the whole time of her absence the only complaint which Mrs. Fowle ever made was tending the exiguity of her allowance, and that not until she had reason to believe that her husband could well afford to make it larger, and when she did leave England, on hearing news, which made her think differently of her position, it was not with the intention of demanding a renewal of conjugal relations, but with the view of commencing these proceedings.

29. We entirely concur in the decision of this Court in the case of *Wood v. Wood* (I.L.R., 3 Cal. 4.85), and that case shows that there may be desertion supervening on a temporary separation, although such separation had the wife's acquiescence, and although there had been no resumption of 'the common life and home'. But that was when the wife, after continuing to live with the husband for years, notwithstanding his gross misconduct, had done everything in her power 'to prevent an entire separation and to make it practicable for them to live together again'. Certainly Mrs. Fowle had shown no such toleration, and had made no such endeavours.

30. But then it was suggested, in the course of argument, that Mr. Fowle's conduct with Mahkin had amounted to nothing less than installing her in the place of his wife, and consequently an abandonment of the wife; and it was pointed out that it would be dealing hard measure to the wife to make it a condition of giving her the relief which she seeks, that she should first have demanded the resumption of those conjugal relations which the husband's conduct must have made odious if not impossible to her. But even if the conduct in question amounted to desertion, she would be bound, according to the cases, to give evidence of conduct on her

part, showing unmistakably that such desertion was against her will.

31. But was it a desertion? The connection with Mahkin, however immoral, was of a kind extremely common in British Burmah. Mrs. Fowle's family knows, and we cannot doubt that she also knew, her husband to have had a liaison of the kind before she married. She knew what his notions were even after marriage, and she certainly believed him to act fully up to them. Her language on several occasions, and particularly near the close of her cross-examination, shows plainly that she was prepared to hear that he had been unfaithful to her, and indeed thought it probable. Now she not only knew her husband's history and ideas, but, having lived for nearly two years in Rangoon, she had presumably learnt something of the ways of Englishmen there, and consequently the form which Mr. Fowle's infidelity took is precisely that which she would have had reason to expect.

32. Then, was this desertion? During a course of years the wife lives apart quite contented, except as to the amount of her income, and making no attempt, manifesting no wish, to resume closer intercourse. During nearly all that time, unknown to the wife, at least as far as exact information goes, the husband has allowed another woman to enjoy most of the advantages of the wife's position.

33. When did the desertion take place? It is difficult to conceive a desertion of which the person deserted is unconscious. It must then have commenced when she became aware of it; and if so, it then became incumbent on her to show that she was deserted against her wish; in other words, to have taken some steps towards the renewal of that intercourse which had been so long suspended. Instead of that, she appears to have thought only of surprising her husband in flagrante delicto for the purpose of obtaining a dissolution of the marriage.

34. Indeed, other arguments against her may be derived from the correspondence which is on record: for instance, in more than one or two of his letters Mr. Fowle throws out the plainest hints of a disposition to help her to obtain a divorce. Take, for instance, the letter (D 18), undated, but, from internal evidence, written some time after March 1868, about seven years after their separation. He uses there these words: Knowing this, and moreover feeling for you, I shall throw no obstacle in the way of your getting a divorce if you want it, and if I find that you meet me in

a friendly spirit, I can assist you towards it without collusion, but openly and effectively'. The immediate answer to this letter is not before us, but in April 1872 she refers to it in these terms: 'I am perfectly willing to meet you in a friendly spirit, and to consider again your letter of about three years ago, and which you may remember'. She adds, referring to a message delivered to her by Captain Brooking, 'that she has not the slightest desire to see Rangoon again, but that she will do anything, however distasteful, to set her daughter and herself in a recognized and suitable position'.

35. Is this the language of a woman deserted against her wish? We think not. On the contrary, she seems to put aside the occasion afforded to her of expressing a wish to return to the common life and home, for, according to her account, she had then no knowledge of anything which should have disinclined her or made it difficult for her to return. Mr. Bell, indeed, would go further and suggest that the proposition for a divorce came from her; but of this we have seen no proof, nor does it seem probable. We think that, in truth, there was no desertion at any time. Mr. Fowle swears that during that cohabitation with Mahkin, if his wife had made her appearance, Mahkin would at once have disappeared; and in expressing, at an earlier place in this judgment, a doubt whether it would have really been so, it was not our meaning that such an occurrence was in itself improbable. On the contrary, it seems in accordance with the nature of such connections. What we doubted was, that Mr. Fowle would have consented to sacrifice a woman who was useful to him, and to whom he had become used, in favour of another who had never made him happy, and to whom years of separation had made him indifferent.

36. The facts, therefore, which are relied upon as desertion seem to us to amount only to a prolonged systematic adultery. We are consequently of the same opinion as the Court below on this part of the case.

37. The next point raised was the amount of alimony which, on Mrs. Fowel's part, was said to be inadequate. This contention, however, has not been made out to our satisfaction. By the decree which she has obtained, Mrs. Fowle is placed in a situation far better, in a pecuniary point of view, than she had ever enjoyed before,

indeed sufficiently good to enable her to save something. She has no child to support, and no particular expenses to provide for beyond those of ordinary subsistence. Upon our intimating this opinion, the respondent's Counsel abstained from pressing his objection that the alimony was excessive in Mr. Fowle's present circumstances.

38. The last point urged was as to the form of the decree, which it was contended ought to have provided a more effectual and durable guarantee for the wife's receipt of the income allotted to her. But we are clearly of opinion, on the authority of the decision in *Hyde v. Hyde* (4 Section & T., 80) and on the reason of the thing, that the Court ought not, even if it had the power, to tie up the property of the husband, who is a mercantile man, and requires the unfettered use of his capital, or convert alimony into an absolute interest in, and charge upon, his estate.

39. Being, therefore, in accord, on all points of decision, with the learned Recorder, whose judgment is an example of careful and complete analysis of evidence, we dismiss the petitioner's appeal and affirm the decree of the Court below.

40. In regard to the costs of the cause we find that this is an appeal which was not unreasonably preferred. There were, undoubtedly, points of difficulty in it, and although it is true that the question of cruelty was pressed on one side, we must, on the other hand, bear in mind the aggravated and unexpected turn given to the case in the Court below by the charge of misconduct suddenly brought against Mrs. Fowle.

41. We think, therefore, in accordance with the practice which is laid down in *Jones v. Jones* (L.R., 2 P & D., 333), that the wife should have the reasonable costs of her appeal. She has already had allowed, we find by the order of this Court made in February last, the sum of Rs. 1,114 to pay for the costs of translation and printing. This was not a case in which a money value could be readily fixed, and we think that, on the whole, the sum of Rs. 1,600 will be a fair and sufficient sum for what would ordinarily be called vakeel's fees. Of this sum, Rs. 1,000 has already been paid. The balance, Rs. 600, will be debited to the sum which may remain over from the Rs. 1,114 in deposit after deducting the actual

costs of printing, &c.; If that amount is not sufficient, the respondent will have to pay the excess.

**Markby, J.**

42. I have very few words to add to the judgment of the Chief Justice, in the conclusions of which I entirely concur.

43. As regards the desertion, the fundamental consideration, in this case is that the parties had, by mutual agreement, determined to separate, and to live--the one, in England, and the other in Rangoon. The separation was not originally an unqualified one, and though there was never any definite prospect of reunion, I do not think that either party entirely abandoned the notion that the separation might one day be put an end to. Under such circumstances it would be difficult, but it would not, in my opinion, be impossible, to prove desertion. The situation of the parties, though it approaches, is not identical with, the situation of a husband and wife who are formally separated under articles of separation. But the appellant must establish clearly that this separation by consent became, at a subsequent time, a desertion by the husband. To do this she must be able to point to some distinct and definite act of the husband indicative of the intention to desert. No such act has, in my opinion, been proved. The appellant's Counsel laboured to show that Mr. Fowle had, by the connection he formed with Mahkin, placed an insuperable barrier to the resumption of conjugal life with the appellant. I do not myself think that the evidence entitles us to say that this barrier was an insuperable one. But that is really not the question. The question is, whether Mr. Fowle, by his connection with Mahkin, intended to commit an act of desertion towards his wife. I think he did not. The connection with Mahkin had assumed a character which it could never have assumed had Mr. and Mrs. Fowle not been living apart; but for this separation both parties are responsible, and not Mr. Fowle alone. It is to this separation, and not to any change of intention on the part of Mr. Fowle in regard to his wife, that I attribute the position which Mahkin obtained in Mr. Fowle's household.

44. The appellant's Counsel also relied on the letter written by Mr. Fowle to Mrs. Fowle's mother-in-law in August 1862, as showing an express and final intention on his part to abandon his wife. It is highly improbable that, if Mr. Fowle had formed any such intention, he would have announced it in this manner, but we must read this letter with the letter written the very next day to his wife, and it is clear, then, that in the first letter Mr. Fowle was repelling somewhat vehemently any blame which might be cast upon him by his mother-in-law for the unhappiness of her daughter's marriage, and that he was not announcing a final determination to abandon his wife.

45. It seems to me, therefore, that the appellant has failed to prove desertion, and I concur in dismissing the appeal.

**SooperKanoon - India's Premier Online Legal Search - [sooperkanoon.com](http://sooperkanoon.com)**