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Isaacs J.

Under these circumstances it seems to me that the case cannot be put higher for the defendant than that he was ignorant of these facts at the time when he entered into the contract. But he does not show any obligation by contract, conduct or otherwise imposed upon the plaintiffs to set him right. Under these circumstances I agree that the demurrer should be allowed.

Appeal allowed. Order appealed from discharged. Judgment to be entered for the plaintiffs on demurrer. Respondent to pay the costs of the appeal. Leave to respondent to amend as advised.

Solicitor, for appellants, *Baxter Bruce & Co.*

Solicitor, for respondent, *J. McLaughlin.*

C. A. W.

[HIGH COURT OF AUSTRALIA.]

RICHARD CHANTLER . . . . . APPELLANT;
DEFENDANT,

AND

ADDELLA CHANTLER . . . . . RESPONDENT.
COMPLAINANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Dec.* 17, 18.

Griffith C.J., Barton and O'Connor JJ.

Husband and wife—Leaving without means of support—Child taken by wife from custody of husband against his will—Refusal by Supreme Court to enforce father's right to custody—Infants' Custody and Settlements Act (N.S.W.) (No. 39 of 1899), secs. 5, 6—Deserted Wives and Children's Act (N.S.W.) (No. 17 of 1901), secs. 4, 7.

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Under secs. 4 and 7 of the *Deserted Wives and Children's Act* 1901 any justice may, in a proper proceeding for that purpose, if satisfied that a wife or child is in fact left without means of support by a husband, and that the husband is able to contribute to their support, make an order against the husband for the payment of a certain sum periodically towards the support of the wife or child.

Sec. 6 of the *Infants' Custody and Settlements Act* provides that where any parent of a child applies to the Supreme Court for a writ or order for the production of the child, the Court may decline to make the order if it is of opinion that the parent has disentitled himself to have the custody, or that the child is of such an age or in such a state of health as to render any change in its custody inexpedient.

A wife, who had deserted her husband, took and kept away from his custody and against his will a child of the marriage, and the Supreme Court, without giving reasons, refused an application by the husband for an order directing the wife to deliver the child to his custody. The wife and child had no means of support, and the husband, though willing and able to support the child if returned to his custody, refused to contribute to its support while it remained away from him in the custody of his wife.

Held, that the husband was not guilty of leaving the child without means of support within the meaning of secs. 4 and 7 of the *Deserted Wives and Children's Act* 1901.

The effect of the refusal by the Supreme Court to grant the application of the husband was not to give the wife the legal custody of the child, but merely to relegate the parties to their legal rights apart from the *Infants' Custody and Settlements Act*.

Decision of the Supreme Court, (1906) 6 S.R. (N.S.W.), 412, reversed.

APPEAL from a decision of the Supreme Court of New South Wales on a special case stated under the *Justices Act*.

The respondent proceeded against her husband, the appellant, under secs. 4 and 7 of the *Deserted Wives and Children's Act* 1901, for leaving a child of the marriage without means of support. The magistrate declined to make any order against the husband, and, on the application of the complainant, stated a special case for the opinion of the Supreme Court.

It appeared from the special case that certain admissions were made upon the hearing of the case in the Police Court. These are set out in the judgment of *Griffith* C.J.

Pring J., before whom the special case came on for hearing, referred the matter to the Full Court. They held that the deci-

sion of the magistrate was erroneous in point of law and remitted the case to him for determination: *Chantler* v. *Chantler* (1).

From that decision the present appeal was brought by special leave.

McManamey and *Bignold*, for the appellant. There was no evidence of leaving without means of support within the meaning of secs. 4 and 7 of the *Deserted Wives and Children's Act* 1901. The only obligation resting on the appellant was that which the common law imposed upon him, as modified by the provisions of that Statute. At common law there is in this State no obligation on a parent to maintain his child, and the English Poor Law is not in force. The only duty in that respect is a moral one. [They referred to *Ex parte Noble* (2).] The Statute only applies to cases where the father leaves his child without means of support. The appellant's wife had deserted him and taken the child away against his will. He certainly had not *left* the child in the ordinary acceptation of the term, any more than he had left his wife: *MacQueen, Husband and Wife*, 4th ed., p. 437. He was able and willing to support the child in his own home. The mere omission to contribute is not sufficient to render him liable; there must be an actual leaving under the Statute, or a contract at common law. [They referred to *Seaborne* v. *Maddy* (3); *Mortimore* v. *Wright* (4).] In this case the wife was responsible for the unfortunate position that had arisen.

The failure of the appellant to obtain an order for the delivery of the child to himself did not alter the legal relationship of the parents and child. The legal custody of the child was not affected. The Court may have refused to make an order for any of the reasons stated in sec. 6 of the *Infants' Custody and Settlements Act* 1899. The parties were left in *statu quo* as far as their legal rights were concerned.

James (*Breckenridge* with him), for the respondent. The *Deserted Wives and Children's Act* 1901 in effect imposes an absolute obligation on a father to maintain his child if he is able to

(1) (1906) 6 S.R. (N.S.W.), 412.
(2) 3 N.S.W.L.R., 52.
(3) 9 C. & P., 497.
(4) 6 M. & W., 482.

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do so. If *Ex parte Noble* (1) is to the contrary, it was wrongly decided. The Statute was passed for the benefit of the child, and the father should not escape the responsibility for the maintenance of the child because the parents cannot agree as to its custody. The Statute provides that the father is liable if the child is "in fact" left without means of support. The words "in fact" make it immaterial where the child happens to be. They were not in the earlier Act, 4 Vict. No. 5, sec. 7.

They were inserted to meet the difficulty raised by *Ex parte Noble* (1). If the appellant was not in the wrong he would have been able to recover under the *Infants' Custody and Settlements Act* 1899. The order of the Supreme Court has in effect made the wife's custody the legal custody, and imposed upon the husband the same obligation towards the child whilst it is in her custody as would have existed without the order, if the child had remained in the custody of the father. [He referred to *Smart* v. *Smart* (2).] He would be in contempt if he attempted now to take the child from the mother. The respondent may have disentitled herself to claim maintenance from the appellant, but the duty of the appellant to the child is not affected thereby. The child cannot help itself. "Leave" does not mean to actively abandon by going away: *Kinnear* v. *Kinnear* (3). It is not desertion that is intended, but failure to support. A wife is in a different position; she need not go away unless she pleases, and, if she goes away, then, unless she comes within sec. 16, as a wife constructively deserted, she loses her rights, although she is in fact left by her husband without means of support. [He referred to *Ex parte Pullen* (4).]

This is not a penal Statute; the payment is enforceable, not by imprisonment, but by recognizance, the penalty for breach of that being imprisonment at the discretion of the magistrate: *Ex parte Hore* (5); *Houghton* v. *Oakley* (6).

This is not a case in which special leave to appeal should have been granted. No question of general importance is involved.

[GRIFFITH C.J. Surely the question whether the Statute has

(1) 3 N.S.W.L.R., 52.
(2) (1892) A.C., 425.
(3) (1904) 4 S.R. (N.S.W.), 512.
(4) 15 N.S.W. W.N., 269.
(5) (1903) 3 S.R. (N.S.W.), 462.
(6) 21 N.S.W. L.R., 26.

made a radical change in the liability of a husband with regard to the children of the marriage is one of general importance.]

If the appellant's contention is right, a mere question of fact is involved.

[O'CONNOR J.—Surely it must be a question of law in either view.]

McManamey, in reply, referred to sec. 10 of the *Infants' Custody and Settlements Act* 1899.

December 18.

GRIFFITH C.J. In this case the Court is asked to construe the provisions of the *Deserted Wives and Children Act* (No. 17 of 1901). The case arises upon the complaint by a wife against her husband before a Justice under sec. 4 of that Act, complaining that her husband, the appellant, has left his infant child, of the age of four years, without means of support. The facts admitted before the magistrate were as follows:—First, that the wife removed the child from the possession of the husband against his will, and then summoned him in the Police Court for maintenance of herself, alleging constructive desertion under sec. 16 of the Act, which provides that:—"A wife compelled to leave her husband's residence under reasonable apprehension of danger to her person, or under other circumstances which may reasonably justify her withdrawal from such residence shall, for the purpose of this Act, be deemed to have been deserted without reasonable cause." That summons was dismissed. Next, it was admitted, that, though the husband refused to pay for the support of the child in the wife's custody, he had offered to provide for the wife and this child and his other children, or any of them, in his own home. It was also admitted that he was able to support the child, and that it was against his wish that the child was taken from him. Upon these facts, and one other fact which I will mention directly, the magistrate dismissed the complaint, being of opinion that the husband had not left his child without means of support within the meaning of the Act.

Now, the existing Act, passed in 1901, was a recapitulation or consolidation of two earlier Acts, the first of which was passed in 1840 (4 Vict. No. 5). That Act was entitled "An Act to

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Provide for the Maintenance of Deserted Wives and Children." It began with a preamble in these words:—"Whereas several instances have occurred in the Colony of New South Wales and its Dependencies of persons deserting either their wives or their children (and in some cases both) and leaving them without adequate means of support and it is expedient to provide a remedy in future for such cases." That Act was afterwards amended by an Act of 1858 (22 Vict. No. 6), but it appears that the only purpose of the latter Act when it was passed was the amendment of the earlier one by the addition of certain provisions which have no bearing on the question to be decided in the present case. The Act now in force is entitled "An Act to Consolidate the Enactments relating to Deserted Wives and Children." It is suggested for the respondent that the result of the consolidation was to revolutionize the law of New South Wales as to the liability of a father to maintain his children. The original Act contained provisions that are substantially the same as those of the present Act, though they are arranged somewhat differently. It began by providing that, if it is made to appear to a Justice that any married woman has been "unlawfully deserted by her husband or hath been left by him without means of support it shall be lawful for such Justice upon complaint on oath by her or any reputable person on her behalf" to take action. It provided, by sec. 2, that when the case came on for hearing, if the Justice or Justices were satisfied that the wife was in fact without means of support and that her husband was able to maintain her or to contribute to her maintenance, they might make an order compelling him to contribute to her support in such manner as they might think fit. Then it was provided by sec. 7 :—"That complaint may be made as aforesaid (either by the mother or any reputable person) in case of the desertion by any father of his child or children or where any child shall have been left by the father without adequate means of support and the like proceedings may thereupon in every such case be taken against the father and such inquiry be had touching his ability to maintain such child or children and the like order or orders be made in respect thereof as are hereinbefore directed or authorized respectively with regard to the desertion or maintenance of a

wife." In the present Act the law is put a little more briefly. Sec. 4 begins: "In any case where—(*a*) Any husband or father has deserted his wife or child, or has left such wife or child without means of support" then the Justices may take action. Sec. 7 provides:—"Upon the hearing the Justices shall inquire into the matter of the complaint, and if they are satisfied that the wife or child is in fact left without means of support and that the defendant is able to contribute to the support of such wife or child" the Justices may make an order directing the husband to pay such sum as they think fit towards the maintenance of the wife or child as the case may be. It is suggested that the words "in fact" make a difference. I have already pointed out that those words were in the earlier Act with respect to the wife, and the provisions as to the child are the same as in the case of the wife, so that they do not really make any difference. The contention for the respondent is substantially this, that in reading sec. 4 it must be read as if it were "in any case where a father has failed to contribute towards the support of his wife or child." In 1882 it was decided by the Supreme Court of New South Wales in *Ex parte Noble* (1) that when a wife leaves her husband of her own accord he cannot be found guilty of having deserted her. That was a case in which a mother had removed her children from the house of a drunken violent father, and the charge was that the father had left them without means of support. The Court based their decision upon the ground that, though possibly there had been a constructive desertion of the wife, there was no such offence as constructive desertion of the children, and that, when a father is able and willing to receive the children back into his home and support them there, he cannot be guilty of leaving them without means of support. In 1899 the Supreme Court of New South Wales in *Ex parte Pullen* (2) held that if a wife leaves her husband of her own accord she cannot afterwards summon him under the old Act (4 Vict. No. 5), for leaving her without means of support. Those decisions recognized the meaning of the terms used in the Statutes of 1840 and 1858. In the consolidation Act of 1901 the same terms are used, and, according to the ordinary canons of construction, it must be

(1) 3 N.S.W. L.R., 52. (2) 15 N.S.W. W.N., 269.

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taken that the legislature were aware of the construction that had been put upon the law by the Courts, and intended that in the consolidating Act the same words should bear the same construction as had been put upon them. Whether the Act is to be regarded as a penal Act or not, it imposes penal consequences for failure to comply with an order made under it, that is, the payment of a heavy fine, which may under the law of the State be enforced by imprisonment. When an Act is so framed it is ordinarily to be inferred that a man is only to be held responsible under it for some positive act. The words are, if he "has left" his wife or child "without means of support." That may be by actual desertion, going away from them and leaving them, or it may be, without committing any act of desertion in the ordinary sense, by leaving his wife and children in his house and making no provision for their maintenance. But where somebody, without his consent, takes the child away from his home where he was willing to provide for its support, and he refuses to maintain it elsewhere, it is an extraordinary thing to say that that is leaving the child without means of support in any sense which should make him punishable.

In my opinion, leaving a child without means of support means something more than failing to contribute to its support, and the cases of *Ex parte Noble* (1) and *Ex parte Pullen* (2) were rightly decided.

There is one other fact which I should mention. It appears that after the wife took the child away from her husband he made an application to the Supreme Court for a writ of *habeas corpus*. A rule *nisi* was granted, but on the return of the rule the Court refused to grant the husband the custody of the child and discharged the rule. Now, it appears that under the Statute No. 39 of 1899 the Supreme Court may refuse to make an order for the handing over of a child to the father in either of three cases, sec. 6, where (*a*) "the parent has abandoned or deserted or neglected the child"; or (*b*) has "otherwise so conducted himself that the Court should refuse to enforce his right to the custody of the child"; or (*c*) "that the tender age of the child or its state of health render it expedient that it should

(1) 3 N.S.W. L.R., 52.

(2) 15 N.S.W. W.N., 269.

remain with its mother or some other person." In these cases the Court may decline to issue the writ or make the order. All that we know from the special case is that the Court refused to interfere between the parties. When the Court refuses to interfere, the rights of the parties remain as they were before the application to the Court. The mere refusal to make an order cannot have the effect of making unlawful what was not unlawful before the order was asked for, or of rendering the husband liable, as for an offence, for an act that was lawful when he did it. Apart from that, it appears from the special case that the Court could not have refused to make an order on the ground that the parent had deserted the child. Whether or not there were other grounds for the refusal does not appear. Nothing appears except that the order was refused, but, for the reasons I have stated, that is quite immaterial. It is suggested that the real reason for the refusal was that the Court was of opinion that the child was of too tender an age, and that was mentioned before the Supreme Court in the present case. If that was really the basis of the decision of the Supreme Court in this case it might have been a reason for rescinding the order granting special leave, if the point were material. But it seems to me absolutely immaterial on what ground the Supreme Court made the order refusing to hand over the child to the custody of the father. If they made it on the ground that the child was better off with the mother, that does not make the father guilty of the offence of leaving it without means of support, if he objects to maintaining it in the custody of its mother, nor does it make it unlawful for him to object to having his home broken up by the separation of his children from him. The learned Judges of the Supreme Court seem to have thought the refusal of the order for custody of the child equivalent to making an order taking away the legal custody from the father and giving it to the mother. I do not think it was. But, even if it had been, I do not see how under the circumstances of this case that would make it unlawful for the father to insist upon having some say in the custody and maintenance of his own family. The legislature has made full provision for the settlement of matrimonial disputes in the *Matrimonial Causes Act*, and I do not think it would tend to the beneficial settlement of such disputes

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or to the happiness of families if they were to provide that a wife who tired of her husband might go away from him and take away his children, though he was quite willing and able to make provision for them in his own home. Very often children are the links which serve to bind together parents who, but for them, would have separated or become estranged. It would be most unfortunate if there were a law which would tend to make children the cause of separation rather than a means of keeping the home together. For the reasons I have given I am satisfied that there is no such law.

I am, therefore, of opinion that in this case the magistrate was right in coming to the conclusion that the husband had not, within the meaning of the *Deserted Wives and Children Act*, left his child without adequate means of support, in that he failed to contribute to its support and maintenance in the custody of its mother and away from his own home. The decision of the magistrate was therefore right and should be restored.

BARTON J. I am entirely of the same opinion, and have nothing to add.

O'CONNOR J. I concur.

Appeal allowed. Order appealed from discharged. Appeal from Justices dismissed.

Solicitor for the appellant, *L. B. Bertram.*

Solicitor for the respondent, *H. R. Clark.*

C. A. W.