[HIGH COURT OF AUSTRALIA.]

BRADFORD . . . . . APPELLANT;
PETITIONER,

AND

BRADFORD . . . . . RESPONDENT.
RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Dec.* 8, 9, 10.

Griffith C.J., Barton, Isaacs and Higgins JJ.

Husband and wife—Divorce—Desertion by husband—Just cause or excuse—Acquiescence by wife—Wife's state of mind not disclosed to husband—Consent—Matrimonial Causes Act 1899 (*N.S.W.*) (*No.* 14 *of* 1899), *sec.* 16 (*a*).

Desertion of a wife by a husband involves an actual and wilful bringing to an end of an existing state of cohabitation by the husband without the consent of the wife, and consent involves more than mere acquiescence in an existing separation or non-resistance to proposed abandonment; it involves a communication of the acquiescence or non-resistance to the other, either by express words or by conduct. A mere state of mind not disclosed to the other is not sufficient to constitute consent.

Held, therefore, in a suit by a wife for dissolution of marriage on the ground of desertion, that the mere existence in the mind of the wife of a feeling of relief at being freed from her husband, owing to his conduct prior to his abandonment of her, does not amount to a consent to the abandonment.

Decision of *Simpson* J. (15th June 1908) reversed.

APPEAL from a decision of *G. B. Simpson* J. in the Supreme Court of New South Wales, Matrimonial Causes Jurisdiction.

This was a suit by the appellant for dissolution of her marriage with the respondent on the ground that the respondent had wilfully without just cause or excuse deserted her and left her

continuously so deserted without such cause or excuse for a period of three years and upwards. The petitioner and respondent were married at Echuca on 18th July 1904 and after marriage went for a trip to Kyneton, in Victoria. A few days after the marriage the respondent left his wife for Moama, New South Wales, where he had been in business prior to the marriage, telling his wife that he was summoned as a witness in a case that was to be tried there, and that he would return as soon as possible. It appeared subsequently that the respondent had really gone to Moama to meet a charge of embezzlement, on which he was afterwards tried and acquitted. The charge arose out of the rsspondent's dealings with certain moneys of his employer, Mr. J. M. Chanter, the petitioner's father. After the trial which took place at Deniliquin on 17th October, the relations between the respondent and his wife's family seem, notwithstanding his acquittal, to have remained unfriendly, partly owing to other alleged breaches of duty on his part, and, whether at their suggestion or not, he decided to leave the country. Before the trial he had written once or twice to his wife expressing regret at the trouble he had caused, and his letters had been answered. On 29th November, before leaving Moama finally, he sent a telegram to his wife in the following terms:—"Very hard. Will write fully tomorrow. God bless you." Shortly before this the petitioner had written to him asking him to see her and make arrangements for the future. No letter from the husband followed the telegram, nor at any time up to the date of the suit had he made any attempt to communicate with his wife or contribute to her support. Proceedings for divorce were then instituted by the wife on the ground of desertion. At the hearing the Judge in Divorce came to the conclusion from the evidence of the circumstances surrounding the separation that the petitioner and her family were, as his Honor put it during the course of the case, "only too glad to get rid of the respondent." His Honor, in the course of his judgment, made the following remarks:—"It is impossible for me to believe that the respondent who behaved in the way disclosed by the evidence has been away from his wife against her will for three years. The petitioner has failed to make me believe that she

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wished the man who behaved in this way to her, to her father, and the whole family, to be with her. I think she was only too glad to get rid of him; any affection she may have had for him was completely lost owing to his conduct." He then dealt with the evidence, and dismissed the petition on the ground that he was not satisfied that the respondent was away from the petitioner against her will and without her consent, but was of opinion that "she was only too glad to get rid of him."

From this decision the petitioner now appealed.

As all efforts to effect personal service of the notice of appeal on the respondent were unsuccessful, and it appeared that the respondent was somewhere in Queensland without any fixed abode, an order was made in Chambers, 4th August 1908, granting leave to advertise the notice of appeal in lieu of service.

Whitfield, for the appellant. *Primâ facie* there is clear evidence of desertion. The respondent left the appellant wholly without consent on her part. If there was just cause or excuse for his going or remaining away the onus is on him to establish it. The mental attitude of the wife is immaterial as regards the quality of the husband's act unless she communicates it to him. Mere acquiescence or even a feeling of relief at the absence of the husband does not amount to consent. A woman may from motives of duty be prepared to sacrifice her feelings and live with her husband notwithstanding his misconduct, and yet may feel relieved when, without any assistance, arrangement or consent on her part, he leaves her and remains away. If that were a bar to relief a wife whose husband was so bad that no decent woman would care to live with him could never obtain a divorce on the ground of desertion because no Judge would believe that she was not glad to get rid of him. But the evidence in this case shows positively that the petitioner was ready to meet her husband and arrange for the future. He led the petitioner to believe when he went away that the separation was only temporary. Even if the petitioner's family connived at the departure of the respondent, that does not prejudice the petitioner unless she was in some way a party to what was done, and there is no evidence of that. A wife may, and often does

believe in her husband notwithstanding the opposition of her relatives. If the respondent had merely left his wife to escape legal proceedings, and no more appeared, that might not establish desertion, but he made no effort afterwards to see his wife or to get her to come to him or even to provide for her in his absence. [He referred to *Meara* v. *Meara* (1); *Nott* v. *Nott* (2); *Failes* v. *Failes* (3); *Langlands* v. *Langlands* (4).] Since the decision of the Supreme Court in *Bycroft* v. *Bycroft* (5), the Judge in Divorce has assumed that the principle which he followed in that case was settled. But the decision of the Full Court in that case was based on the ground that there was evidence that the wife actually assisted her husband to go away, not on the ground that she had tacitly acquiesced in the separation. The case has been since explained in *Smith* v. *Smith* (6), which recognizes the principle now contended for, that the wife's conduct and feelings are immaterial on the issue of desertion except so far as they amount to a cause or excuse for the separation or remaining away, and obviously that can only be when the wife has done something expressing her assent. [He referred to the *Matrimonial Causes Act* No. 14 of 1899, sec. 16 (*a*).]

No appearance for the respondent.

GRIFFITH C.J. In this case the petition was brought by the wife for dissolution of marriage upon the ground of desertion for a period of three years and upwards, without just cause or excuse. The learned Judge was of opinion that under the circumstances the petitioner was really rather glad than otherwise that the respondent had left her, and he thought that under those circumstances she was not entitled to relief. In taking that view he followed a decision of his own in *Bycroft* v. *Bycroft* (5) which had been affirmed by the Full Court of New South Wales, but on a different ground, and we are told that the learned Judge has since that decision acted on the doctrine that it is sufficient answer to a wife's petition for dissolution on the ground of

(1) 35 L.J. P. & M., 33.
(2) L.R. 1 P. & M., 251.
(3) (1906) P., 326.
(4) 16 A.L.T., 44.
(5) (1902) 2 S.R. (N.S.W.) Div., 16.
(6) (1908) 8 S.R. (N.S.W.), 602; 25 N.S.W. W.N., 155.

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desertion that she was glad to be deserted. In the present case there is nothing at all in the nature of just cause or excuse, or at least there is no evidence of anything that amounts to just cause or excuse, for the respondent's leaving the petitioner, and there is no question about his having left her. The last communication she received from him was in November 1904, and she had not seen him for several months previously. In fact he left her about 48 hours after the marriage, intending no doubt at that time to return to her later, but owing to various circumstances he never returned. The question, therefore, is not one of just cause or excuse, but purely one of whether there was in fact desertion or not.

Desertion involves an actual and wilful bringing to an end of an existing state of cohabitation by one party without the consent of the other. If the cohabitation is brought to an end by mutual consent it is not desertion. A temporary separation by mutual consent may become desertion afterwards. Consent involves more than mere mutual acquiescence in an existing state of things or non-resistance to proposed action. It involves a communication of the acquiescence or non-resistance to the other party. This may be made by express words or acts or by behaviour. If a person with respect to whom another proposes to act in a particular way behaves in such a manner that a reasonable man would be induced to believe that he has no objection to the proposed action, he may be taken to consent to it. But some communication must be made. A mere subjective state of mind not disclosed by any act is not sufficient. For instance, if a man has sustained a number of annoyances from a neighbour none of which is actionable, he may mentally regard a further annoyance which transgresses the limits of the law with equanimity or even satisfaction because it entitles him to redress from his adversary, but the adversary cannot set up that state of mind as amounting to leave and licence.

In my opinion a consent which will prevent the total abandonment by a husband of his wife from being desertion must be consent by the wife communicated to the husband by her words or behaviour.

In the present case there is nothing more than a highly

probable conjecture that the petitioner was on the whole not sorry that the respondent had deserted her. This was never communicated to him, and does not alter the quality of his act when done. Nor was anything done by the wife after the abandonment which could alter the quality of the act of the husband.

I have not referred to cases where there has been some matrimonial offence, or conduct of such a kind that the separation is at the time justifiable, that is to say, when the party leaving the other is justified by the conduct of the other in making a temporary separation. That question, I believe, will come before us in another appeal that is down on the list for hearing.

For these reasons I am of opinion that the petitioner is entitled to a decree and that a decree *nisi* should be granted.

BARTON J. I am of the same opinion. The learned Chief Justice of this State in the case of *Smith* v. *Smith* (1), quoted the following very concise definition of desertion given in *Kay* v. *Kay* (2):—"Desertion really means a wilful separation by the respondent from the petitioner without reasonable cause and without the consent of the petitioner."

This case seems to me to come exactly within that definition as expanded by the judgment just delivered, in which I thoroughly concur.

ISAACS J. I agree in the decision, and only say this, that desertion involves an active and wilful bringing to an end of an existing state of cohabitation. If that is done without consent and without reasonable excuse, it falls within the Act. It may be justified either by consent or reasonable excuse. If consent is relied upon, then, I think that the conditions stated by my learned brother the Chief Justice must exist. The question of reasonable excuse depends entirely upon the facts of the case, and I will say this, that, according to my view, it must be reasonable cause or excuse upon the part of the husband or the other party, and no such case can be suggested from the facts of this case. I, therefore, agree that this appeal should be allowed.

(1) (1908) 8 S.R. (N.S.W.), 602, at p. 606; 25 N.S.W. W.N., 155.

(2) (1904) P., 382, at p. 395.

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Higgins J.

HIGGINS J. I agree with the principle laid down by my learned brothers, but I would like to add this, that the telegram from the respondent dated 9th November is the only thing which has caused me to feel any doubt as to the facts. That telegram was in these words: "Very hard. Will write fully to-morrow. God bless you."

The last communication he had received from the wife was, so far as we can ascertain, a letter written in September, and in that she said that she would see him and make arrangements for the future. The last conversation with any of the Chanter family appears to have been on 12th November at the hotel in Moama, and we have no details of that conversation. By that time the Chanter family had learnt that the respondent had been appropriating moneys of the firm, and that circumstance led me to suspect that possibly and probably young Mr. Chanter had said to him "we will prosecute you unless you get out of the Colony and give my sister the opportunity of obtaining a divorce on the ground of desertion." This is after all mere conjecture, and there is no sufficient evidence to establish such a case. And in the next place, as Mr. *Whitfield* pointed out, even if these facts did exist, they have not been connected with the petitioner. Even if it is true that he was frightened away he was not frightened away by the petitioner, and in the words of the Act, he has deserted her clearly without just cause or excuse, inasmuch as she says that she did not induce him to go or consent to his going, and there is no evidence to rebut her statement. Upon the evidence as it appears before the Court I have come to the same conclusion as my learned brothers, that the appeal should be allowed.

Appeal allowed. Order appealed from discharged. Decree nisi for dissolution returnable in six months. Respondent to pay costs of suit and of the appeal.

Solicitor for the appellant: *T. Rose.*

C. A. W.