[HIGH COURT OF AUSTRALIA.]

REGINALD WILLIAM FREMLIN . . . APPELLANT;
PETITIONER,

AND

MARIE LOUISE FREMLIN . . . . RESPONDENT.
RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1913.

SYDNEY, *April* 2, 3, 4, 15.

Barton, Isaacs and Gavan Duffy JJ.

Husband and wife — Divorce — Domicil — Domicil of origin — Acquisition of new domicil — Burden of proof — Evidence — Desertion — Constructive desertion by wife — Cohabitation — Effect of prior suit for desertion — Suspension of cohabitation — Matrimonial Causes Act 1899 (*N.S.W.*) (*No.* 14 *of* 1899), *sec.* 13.

Practice — Costs — Divorce — Costs of unsuccessful wife — Matrimonial Causes Act 1899 (*N.S.W.*) (*No.* 14 *of* 1899), *sec.* 47.

In a suit for divorce brought in New South Wales by a husband, he having given sufficient evidence to prove his domicil of origin to be in that State, the burden is on the respondent to establish that he has lost that domicil.

A husband, whose domicil of origin was in New South Wales, married there, and in 1896 went, with his wife's consent, to Western Australia where he worked at different occupations, and where he remained until 1906, with the exception of a short visit to New South Wales in 1898. In 1906 he instituted a suit for divorce in New South Wales on the ground of desertion for three years and upwards, based on the refusal of his wife to go and live with him in Western Australia. This suit was dismissed on the ground that there had been no desertion. The husband in 1906 returned to Western Australia, and in 1908 became manager of a station there, and he retained that position and remained in Western Australia until 1911, when he instituted in New South Wales a second suit for divorce on the ground of desertion for three years and upwards, based on the continued refusal of his wife to go and live with him in

Western Australia. At the hearing the husband denied that he intended to leave New South Wales permanently and to make his home in Western Australia.

Held, on the evidence, that the wife had not discharged the onus of proving that the husband had lost his domicil of origin.

Held, also, on the evidence, that the refusal of the wife to go and live with her husband in Western Australia was "desertion" within the meaning of sec. 13 of the *Matrimonial Causes Act* 1899.

The bringing of a suit for divorce does not put an end to cohabitation, but merely suspends it, and, therefore, that suit having been dismissed, a subsequent suit for divorce on the ground of desertion may be instituted without a resumption of cohabitation or a decree for restitution of conjugal rights.

Fitzgerald v. *Fitzgerald*, L.R. 1 P. & M., 694, explained.

In a suit for divorce by a husband in which he is successful, his wife is entitled to her costs which have been reasonably incurred, unless it is proved that she has sufficient means to pay them after providing for her reasonable maintenance, and the burden of proving that costs have been unreasonably incurred by her, and that she has sufficient means, is upon the husband.

Decision of the Supreme Court of New South Wales (*Gordon* J.): *Fremlin* v. *Fremlin*, 29 W.N. (N.S.W.), 109, reversed.

APPEAL from the Supreme Court of New South Wales.

By a petition dated 21st March 1911 Reginald William Fremlin instituted a suit for divorce from his wife, Marie Louise Fremlin, on the ground that she had without just cause or excuse wilfully deserted him and without any such cause or excuse left him continuously so deserted for three years and upwards.

The suit was heard by *Gordon* J., who held that the petitioner was domiciled in Western Australia, and also that there had been no desertion, and therefore dismissed the suit with costs: *Fremlin* v. *Fremlin* (1).

It appeared that in 1906 the petitioner had instituted a prior suit for divorce, also on the ground of desertion for three years and upwards, which was heard by *Pring* J. and was dismissed. In delivering his judgment in the present suit, *Gordon* J. stated that he had been informed by *Pring* J. that the ground on which the prior suit was dismissed was that "the facts did not show desertion, although they showed that the parties had been living separate from one another for over three years."

(1) 29 W.N. (N.S.W.), 109.

H. C. OF A. 1913.

FREMLIN v. FREMLIN.

The other facts sufficiently appear in the judgments hereunder.

Windeyer (with him *E. A. Barton*), for the appellant. The learned Judge attached too little importance to the appellant's domicil of origin, and too much to his residence in Western Australia. The fact that a man having his domicil in one of the States of the Commonwealth takes up his residence in another State has not such an effect as a change of residence from one country to an altogether foreign country. On the evidence the appellant never changed his domicil. An indefinite change of residence is not sufficient to show a change of domicil. There must be shown to have been a definite intention to change his domicil: *Hodgson* v. *De Beauchesne* (1); *Davies and Jones* v. *State of Western Australia* (2); *Udny* v. *Udny* (3); *Bell v. Kennedy* (4); *Winans* v. *Attorney-General* (5); *Huntly* (*Marchioness*) v. *Gaskell* (6). The character of the appellant's residence in Western Australia was not such as to indicate an intention to make that State his permanent home: *In re Patience*; *Patience* v. *Main* (7). As to the question of desertion, the learned Judge has drawn a wrong inference from the statement of *Pring* J. that the parties had been living "separate" from one another. He interpreted that expression as meaning that the parties had intentionally put an end to their cohabitation, and he then applied the decision in *Fitzgerald* v. *Fitzgerald* (8). But the expression does not bear that meaning, but only means that the parties were not living together; consequently, that case has no application. Although the institution of the first suit for divorce suspended the cohabitation until the suit was concluded, so that during the pendency of the suit one of the parties could not be said to have deserted the other—*Stevenson* v. *Stevenson* (9); *Kay* v. *Kay* (10),—yet the cohabitation was not put an end to. Therefore it was not necessary, before the respondent could be said to have subsequently deserted the appellant, that they should have actually resumed cohabitation, or that the appellant should

(1) 12 Moo. P.C.C., 285, at p. 323.
(2) 2 C.L.R., 29, at p. 40.
(3) L.R. 1 H.L. (Sc.), 441, at p. 455.
(4) L.R. 1 H.L. (Sc.), 307.
(5) (1904) A.C., 287.
(6) (1906) A.C., 56, at pp. 62, 67.
(7) 29 Ch. D., 976, at p. 982.
(8) L.R. 1 P. & M., 694.
(9) (1911) P., 191.
(10) (1904) P., 382.

have obtained a decree for restitution of conjugal rights: *Fitzgerald* v. *Fitzgerald* (1); *Gatehouse* v. *Gatehouse* (2); *Bradshaw* v. *Bradshaw* (3); *Mahony* v. *M'Carthy* (4); *Huxtable* v. *Huxtable* (5); *Stickland* v. *Stickland* (6); *Farmer* v. *Farmer* (7).

Boyce (with him *A. W. Ralston*), for the respondent. Domicil is a question of fact. The passage in *Udny* v. *Udny* (8), cited by *Griffith* C.J. in *Davies and Jones* v. *State of Western Australia* (9), exactly covers the appellant's position. A change of domicil from one State of the Commonwealth to another does not require such strong evidence to support it, as where the effect of the change is *exuere patriam*: *Whicker* v. *Hume* (10); *Taylor on Evidence*, 10th ed., p. 203; *Westlake's Private International Law*, 4th ed., p. 331. The statements of the appellant at the hearing as to his intention not to change his domicil should not be given much weight: *In re Craignish*; *Craignish* v. *Hewitt* (11); *Bell* v. *Kennedy* (12); *Doucet* v. *Geoghegan* (13). All the acts and letters of the appellant show an intention to make his home in Western Australia. The onus was on the appellant of establishing that he was domiciled in New South Wales, and he did not discharge that onus merely by showing a domicil of origin. The institution of the first suit for divorce, which was an application to the Court to compel his wife to keep away from him, constitutes such a break in cohabitation that subsequent desertion became impossible until cohabitation was resumed: *Fitzgerald* v. *Fitzgerald* (1). It was an adverse act of the appellant putting an end to the cohabitation: *R.* v. *Leresche* (14); *Kay* v. *Kay* (15); *Harriman* v. *Harriman* (16); *Stevenson* v. *Stevenson* (17); *Hampton* v. *Hampton* (18).

[GAVAN DUFFY J. referred to *Wood* v. *Wood* (19).

BARTON J. referred to *Knapp* v. *Knapp* (20).]

Those two cases depend on the fact that the conduct of the

(1) L.R. 1 P. & M., 694.
(2) L.R. 1 P. & M., 331.
(3) (1897) P., 24.
(4) (1892) P., 21.
(5) 68 L.J., P., 83.
(6) 35 L.T.N.S., 767.
(7) 9 P.D., 245.
(8) L.R. 1 H.L. (Sc.), 441, at p. 458.
(9) 2 C.L.R., 29, at p. 41.
(10) 7 H.L.C., 124.
(11) (1892) 3 Ch., 180, at p. 190.
(12) L.R. 1 H.L. (Sc.), 307.
(13) 9 Ch. D., 441, at p. 455.
(14) (1891) 2 Q.B., 418, at p. 420.
(15) (1904) P., 382.
(16) (1909) P., 123, at p. 149.
(17) (1911) P., 191.
(18) 12 S.R. (N.S.W.), 246.
(19) 13 P.D., 22.
(20) 6 P.D., 10.

H. C. OF A. 1913.

FREMLIN v. FREMLIN.

husband was such as to justify the wife in refusing to cohabit with him. *Bolster* v. *Bolster* (1) is not good law. Desertion must be wilful, and without reasonable cause. The evidence shows that the appellant did not want his wife, and that the state of cohabitation had ceased. It was reasonable for her, under the circumstances, to refuse to go to Western Australia.

The respondent is entitled to her costs of the appeal in any event, and there should be no variation of the order already made as to costs: *Allen* v. *Allen* (2); *Erskine* v. *Erskine* (3); *Te Kloot* v. *Te Kloot* (4); *Tauro* v. *Tauro* (5); *Otway* v. *Otway* (6); *Matrimonial Causes Act* 1899, sec. 47; *Divorce Rules* 1902, r. 161.

[ISAACS J. referred to *Ash* v. *Ash* (7).]

Windeyer, in reply, was called on only as to costs. The rules as to costs between husband and wife are the same as in ordinary cases, except that, if the wife cannot properly protect herself, either by instituting proceedings against her husband or defending herself against proceedings instituted by him, without provision being made for her by her husband, he will be ordered to pay her costs. The respondent should have made a substantive application to the Supreme Court when the relative financial positions of the parties could have been inquired into. [He referred to *Brown and Powles on Divorce*, 7th ed., p. 158; *Divorce Rules* 1902, r. 143.]

Cur. adv. vult.

April 15.

BARTON J. This is an appeal by a husband, petitioner for a dissolution of marriage, from the decree of *Gordon* J., who dismissed the petition with costs.

The petition was under the *Matrimonial Causes Act* 1899, sec. 13, which provides that "Any husband who at the time of the institution of the suit has been domiciled in New South Wales for three years and upwards" may petition for dissolution of

(1) 15 N.S.W.L.R. (Div.), 8.
(2) (1894) P., 134.
(3) 19 N.S.W.L.R. (Div.), 21, at pp. 23, 24.
(4) 15 N.S.W.L.R. (Div.), 1.
(5) 19 N.S.W.L.R. (Div.), 6, at p. 10.
(6) 13 P.D., 141.
(7) (1893) P., 222.

marriage on the ground (*inter alia*) "(*a*) that his wife has without just cause or excuse wilfully deserted the petitioner and without any such cause or excuse left him continuously so deserted during three years and upwards."

There are thus two questions, domicil and desertion.

The main facts are these:—The marriage took place on 24th July 1894, the petitioner, who was born in New South Wales and who, so far as we know, had never lived out of that State, being then 20 years of age. The respondent, who was 24 years older, was at that time a widow, and she had six children, ranging in age from 8 to 20 years. She, also, was born in New South Wales. There has not been any issue of the respondent's marriage with the petitioner. The parties, and the respondent's family with them, lived together on an orchard in the Windsor district, rented by the respondent. As they did not make a success of fruit growing, they went to live at Kogarah, near Sydney, where the petitioner tried, but failed, to make a living as a licensed fisherman. The respondent had then, as her own, an income of £10 to £12 a month. In 1896 the petitioner discussed with the respondent the expediency of his going to Western Australia to better himself. He asked her during the discussion whether she would join him in Western Australia in the event of his doing well in that State, but she gave him no decided answer, and it does not appear that she was then, or at any time, prepared to live with him there. There is nothing to show that the petitioner had any motive for leaving New South Wales other than his desire to earn a living, and the better prospect, as it appeared to him, of succeeding in that aim in Western Australia. While the respondent did not evince any desire to accompany him, it appears that she approved of his going, and that they were on friendly terms with one another. He went there in 1896, and about January 1898 he returned to Sydney, where he remained till the following June. Between those months he stayed with his own people, at the respondent's request, as her house was fully occupied. He saw her once or twice a week, and they had the ordinary intercourse of man and wife, unwillingly on her part. She was then supporting her four younger children out of her own means. Before again going to Western Australia, as he did

H. C. OF A. 1913.

FREMLIN v. FREMLIN.

Barton J.

in June, he asked her whether she would join him there if he succeeded in making a comfortable home for her. She would not give him any decided answer.

During his first absence in Western Australia there was correspondence between them, and during his second absence from her he wrote again. He received a letter from her after the middle of 1898, and that, he says, was the last time he heard from her. He answered in a letter dated 23rd October 1898, and written at Nannine. The terms of this letter are affectionate. The respondent does not think she answered it. It was much discussed at the bar, but it seems to me that it does not afford any inference that it was the petitioner's intention to remain in Western Australia.

The petitioner, in giving evidence in this suit, summarized his account of what he did in Western Australia in these terms:—

"I went away to Western Australia in 1896—I cannot remember the date; I got work there on telegraph construction under the Government; I remained in that employment until I came back here in January 1898. I gave up my employment when I came over here; I remained here till June 1898; then I went back to Western Australia to the same employment again, telegraph construction. I remained in that employment from August 1898 until October 1898. Then I went droving; I was in the employment of a man named Gastro; I was in his employment until January or February 1899. Then I was working on a Government dam at a place called Mullewa; then I went to work on the mines at Yuin Reef; I continued at that up till about 1902. Then I went as overseer, on the station where I am now, at a salary of £120 a year and everything found; I remained there as overseer nearly twelve months. Then I started business on the goldfield at Yuin Reef; that is a mining centre. I started business there as storekeeper and butcher; I had what is called a business area; I took that up under the Mining Act; there was a small place on it, and I kept on adding to it; I put up altogether a store, and a place to reside for myself, and a small office. I continued that until about 1906; I still had the business when I came over here in March 1906; I left a manager to look after the business. I started the suit here in May 1906; as soon as I came over here I saw my

solicitor with reference to taking divorce proceedings, and, under his advice, I did not go to see the respondent at all. The suit was dismissed in October 1906; I was kept waiting here for five months; then I took a flying visit over there to see how things were, and came back here again in time for the hearing of the case. Three days after the hearing of the case I returned to Western Australia. I continued my business there for about six months after I returned; it might not have been six months. At the time I got back things took a turn very much for the better, and I was able to have some of my cheques lifted; I was holding about £800 worth of dishonoured cheques when I got back. The manager lifted some of the cheques and showed me at the time he left the place that he had made a profit on the business. The mine closed down, and everybody had to give up business then, and I ceased to carry on the business. My business depended entirely on the mine. That was six months after I returned. The manager of the station had told me I could have my old position as soon as I applied for it; when the business failed I applied for it and became overseer in April 1908; I continued for a certain time as overseer; I became manager in October 1908; I have been manager ever since; I am still manager. I am going straight back there. I have no property or business of any description over here.

"I was in Sydney when I signed the present petition in March 1911; I stayed in Sydney about ten days only; I went straight back to Western Australia. I left Fremantle on the 9th March 1912; I came over here specially for this suit."

On the question of domicil this may all be considered. On the question of desertion I will presently consider the weight of the evidence relating to the time which followed the dismissal in October 1906 of the suit which he brought in that year for divorce on the ground of desertion. That suit was heard by *Pring* J., who dismissed it, and, as we are told, found that there was "no desertion."

The question for us on that part of the case is whether, assuming that there was no desertion proved up to 1906, there has been desertion since. There is some further evidence given by the petitioner which is as follows:—"Respondent has been in

H. C. OF A. 1913.

FREMLIN v. FREMLIN.

Barton J.

the same cottage all the while, as far as I know. When I went out to see her after the termination of the last suit, I did not know if she was in the same cottage; I went to the same cottage, I was told she was not in. I went straight back next day to Yuin, Western Australia. I drafted the letter (Exhibit F), on the road; I think it was posted in Yalgoo. . . . I had been back about a week or so when I posted that letter; . . . things seemed as if they were going to improve at that time; I found out I had to take over charge as soon as I got back, the thing had been run badly as far as my business was concerned, but the mine was looking up. . . . Some time after, I went bankrupt; I think it was in 1910 I went bankrupt. . . . On the 20th March 1911 I wrote that the mismanagement of my business during my absence had compelled me to go bankrupt, and that I found out things had been badly mismanaged, directly I got back. I was honest when I wrote and told respondent on my return that I found things were likely to improve in the next three months and I would have a suitable home for her. I meant this woman of 56 was to come and live in Yuin; I saw no reason why she should not come."

The letter referred to, Exhibit F, is dated 21st November 1906, and is practically a copy of a draft which he made on 7th October on the steamer in which he returned to Western Australia. Before he left Sydney, after the conclusion of the suit, he had sent a telegram to his wife in these words:—"Will call at two thirty, make an effort to see me." On the telegram appears the office stamp of the suburb in which the respondent was then living, and we nowhere find anything to rebut the inference that she received that telegram. The letter was as follows:—

"I was disappointed at not seeing you on the 6th Oct., as I hoped you would have made an effort to see me especially after me wiring to say I was coming. I wished to try and enter into some arrangements with you *re* coming to the West which might have proved beneficial to us both, but as I had not the opportunity of explaining to you personally the only course now open to me is to offer my suggestions in writing.

"There seems to be no chance of undoing what we have already done and which I am sorry to say has turned out so unfortunately

for us both." (I suppose he was there referring to the marriage which, as petitioner, he had failed to undo.) "I thought I was quite justified in taking the measures I did to rectify my miserable position as you must admit that I gave you every opportunity of getting into correspondence with me also every inducement so that we could have entered into some arrangements for your settling in the West and keeping a home. But there it's no use harping on the old business so I will now endeavour to explain clearly what I want you to do. On my return here I find that things are likely to improve greatly within the next three months. I will in that time have a suitable home ready for you and what members of the family care to come with you. I will only ask you to remain at Yuin for a few months and then we can rent a place in Geraldton and as soon as I get things in connection with my business properly going I would have no difficulty in leaving my business and live permanently in Sydney or some" (the word "part" is omitted, but it appears in the draft) "of N.S.W. Of course, I would like you to understand that I make this offer with no bodily desires because I know some twelve years ago that cohabitation was always distasteful to you as I could hardly expect you to entertain any thoughts in that direction now. But it must appear clearly to you that my position is very hard (in this way) that in all sincerity I ask you to come to me and you simply ignore my asking. And just take into consideration that I am according to your way of looking at things to go through life without a place to call a home. Why, I am ashamed to partake of anyone's hospitality because I know I am not in a position to return it. And again I appeal to you as a wife's duty to her husband and surely the better part of your nature must point out clearly the course you should follow and come and keep a home together for me. . . . If you decide to come I will arrange with Mr. Parry to secure your passage to Perth and allow you £5 for travelling expenses and I will meet you in Perth. Let me have your answer as early as possible so I will have a little time to have all in readiness for you. . . ."

The respondent received that letter, but disregarded it. It contains distinct proposals for a resumption of the cohabitation

H. C. OF A. 1913.

FREMLIN v. FREMLIN.

Barton J.

which had been interrupted by the suit before *Pring* J. In her own evidence she says in respect of her husband's statements as to their earlier married life :—"I saw the petitioner off on one trip to Western Australia; I do not know which trip it was; we parted on friendly terms." She says she wrote to him after he went back to Western Australia in 1898, and she does not say that she wrote again. When asked why she did not answer the letter of 21st November 1906, she said :—"I did not consider it *bonâ fide*; I did not think he was in a position to keep me over there; it seemed such a wilderness of a place I did not care to venture." Then, speaking of the time when she had received a previous letter from him, she said :—"I had made up my mind he did not want me; . . . we had drifted hopelessly apart." Then, later, she said :—"I have refused to consider going out there because, in my opinion, it was too far from civilization. That was my opinion when I got his letter a month after the last divorce suit." (That is the letter above set forth.) "I do not profess to have any affection for petitioner now . . ."

The letter of 21st November 1906 was written after the failure of the first proceedings for divorce on the ground of desertion, and, if the cohabitation is to be taken to have been merely suspended by those proceedings, and not entirely at an end so that it could not be resumed, that letter is very important, for it is full of the proposal that the respondent should return to the petitioner. It is true that he admits that certain incidents of married life were so distasteful to her that cohabitation between them might be lacking in that respect when they came together again. That, however, was apparently not his fault, and he made that offer to her. She received the letter, and made no answer to it; and it may be taken that she refused the proposal for the reasons which she gave in her evidence, which are, shortly, that she would not go to what she considered a wilderness, and that she had ceased to have any affection for him.

These being the main facts, we have two questions to decide. First, at the inception of this suit had the petitioner been domiciled in New South Wales for three years and upwards? Secondly, had there been desertion as described in the section?

Taking the first question—that of domicil—I premise that the

petitioner, having been born in New South Wales and having lived there up to the time of his marriage, has shown a domicil of origin which requires distinct and cogent evidence to establish its abandonment in favour of another domicil.

In *Winans* v. *Attorney-General* (1), Lord *Halsbury* L.C. said:—"Now the law is plain, that where a domicil of origin is proved it lies upon the person who asserts a change of domicil to establish it, and it is necessary to prove that the person who is alleged to have changed his domicil had a fixed and determined purpose to make the place of his new domicil his permanent home." In the much older case of *Udny* v. *Udny* (2) Lord *Westbury* said:—"Domicil of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with an intention of continuing to reside there for an unlimited time. This is a description of the circumstances which create or constitute a domicil, and not a definition of the term. There must be a residence freely chosen, and not prescribed or dictated by any external necessity, such as the duties of office, the demands of creditors, or the relief from illness; and it must be residence fixed not for a limited period or particular purpose, but general and indefinite in its future contemplation. It is true that residence originally temporary, or intended for a limited period, may afterwards become general and unlimited, and in such a case so soon as the change of purpose, or *animus manendi*, can be inferred the fact of domicil is established." Lord *Curriehill* in the case of *Donaldson* v. *M'Clure* (3) says:—"To abandon one domicil for another means something far more than a mere change of residence. It imports an intention not only to relinquish those peculiar rights, privileges and immunities which the law and constitution of the domicil confer on the denizens of the country in their domestic relations, in their business transactions, in their political and municipal status, and in the daily affairs of common life, but also the laws by which the succession to property is regulated after death. The abandonment or change of a domicil is therefore a proceeding of a very serious

(1) (1904) A.C., 287, at p. 288. (2) L.R. 1 H.L. (Sc.), 441, at p. 458.
(3) 20 D., 307.

H. C. OF A. 1913.

FREMLIN v. FREMLIN.

Barton J.

nature, and an intention to make such an abandonment requires to be proved by satisfactory evidence." Lord *Halsbury*, in *Marchioness of Huntly* v. *Gaskell* (1), expressed strong approval of Lord *Curriehill's* judgment, quoting this passage.

In *In re Patience*; *Patience* v. *Main* (2), *Chitty* J. said:— "In *Doucet* v. *Geoghegan* (3) the late Master of the Rolls, sitting in the Court of Appeal, quoted with approval a passage from Dr. *Lushington's* judgment in the case of *Hodgson* v. *De Beauchesne* (4). The passage is this: 'We think that length of residence, according to its time and circumstances, raises the presumption of intention to acquire domicil. The residence may be such, so long and so continuous, as to raise a presumption nearly, if not quite, amounting to a *præsumptio juris et de jure*; a presumption not to be rebutted by declarations of intention, or otherwise than by actual removal.' I observe in that passage Dr. *Lushington* does not speak merely of the length and continuity of the residence, but he speaks of the character of the residence, saying that the residence may be such, so long and so continuous, as to raise the presumption to which he refers."

Chitty J. there strongly adverted to the fact that the person whose intention was in question had shifted about from place to place, as showing that he had a fluctuating and unsettled mind; and he held that under such circumstances even long residence afforded but little, if any, presumption of an intention to make a new domicil. That, I think, is the case here. This is not a question of conflicting evidence in which the decision of the Court of first instance depends very largely upon the credence to be placed on the testimony of the various witnesses, but it is a question of the weight to be given to the evidence, as a whole, in coming to a conclusion on the question of domicil. I think the weight of the evidence is entirely insufficient to establish that distinct and definite intention of change, which is absolutely necessary in order to prove the abandonment of the domicil of origin. I will not go further into the details of the evidence of the petitioner on the question of domicil, nor do I weigh his declarations as to his intentions. We have to rely to a great extent on his evidence,

(1) (1906) A.C, 56, at p. 66.
(2) 29 Ch. D., 976, at p. 982.
(3) 9 Ch. D., 441, at p. 456.
(4) 12 Moo. P.C.C., 285, at p. 329.

but it does not appear that there was any fact established which showed that it was his intention to abandon his domicil of origin and take up his settled abode in Western Australia. It is enough to say, therefore, that the case may, as to this issue, be decided on the ground relied on by Lord *Halsbury* in *Winans* v. *Attorney-General* (1), namely, that after proof of a domicil of origin there rested upon the respondent an onus which has not been discharged.

Passing from the question of domicil, we come to that of desertion. The leading case upon that appears to be *Fitzgerald* v. *Fitzgerald* (2). There Lord *Penzance* said (3):—"I come, then, to the following conclusions as applicable to cases of this kind. No one can 'desert' who does not actively and wilfully bring to an end an existing state of cohabitation. Cohabitation may be put an end to by other acts besides that of actually quitting the common home. Advantage may be taken of temporary absence or separation to hold aloof from a renewal of intercourse. This done wilfully, against the wish of the other party, and in execution of a design to cease cohabitation, would constitute 'desertion.'" (That, I think, is established by the evidence in this case.) "But if the state of cohabitation has already ceased to exist, whether by the adverse act of husband or wife, or even by the mutual consent of both, 'desertion,' in my judgment, becomes from that moment impossible to either, at least until their common life and home have been resumed. In the meantime either party may have the right to call upon the other to resume their conjugal relations, and, if refused, to enforce their resumption; but such refusal cannot constitute the offence intended by the Statute under the name of 'desertion without cause.'"

In *Bradshaw* v. *Bradshaw* (4) it was held that, in order to give jurisdiction, it is necessary that there should be a cohabitation which is broken by the act of the respondent; but such cohabitation does not necessarily imply that the parties are living together physically under one roof.

In this case, in the first instance we have a right to go back

(1) (1904) A.C., 287.
(2) L.R. 1 P. & M., 694.
(3) L.R. 1 P. & M., 694, at p. 698.
(4) (1897) P., 24.

H. C. OF A. 1913.

FREMLIN v. FREMLIN.

Barton J.

to the beginning to find out the terms on which the petitioner and the respondent parted. The petitioner originally went to Western Australia with the approval of the respondent. There was not then, on the evidence, any intention on either side to put an end to the marital relation so far as that could be done without a judicial separation or a divorce. The petitioner went away because he had not found his efforts to make a livelihood in New South Wales successful, and because he thought, and probably the respondent thought, that he would have a better chance of making a livelihood in Western Australia—and, so far as he was concerned, that meant a living for both of them,—and that he could there find a place which she could make a home for him. There was no separation in the technical and legal sense, for there was not even an estrangement, and the living apart—the absence one from another—of these persons was not a cessation of cohabitation in the legal sense.

Passing over, so far as they may have reference to the question of desertion, the intervening facts before May 1906, but recollecting that sexual relations between husband and wife were, from an early period of their marriage, distasteful to the respondent, we come to the suit for dissolution of marriage which the petitioner brought in that year. It is contended for the respondent that, assuming that there was a cohabitation which had not been broken by prior events, it was broken by the bringing of that suit on the ground of desertion. In a sense it was broken, but the real question is whether it was broken for good and all, or was merely suspended.

We have not had cited to us any very direct authority on that question, but there are two cases at least in which, although they were undefended, the inference to be drawn from the judgments of the learned Judge is clearly that he did not consider that anything more than a suspension of cohabitation occurred during the proceedings.

One of those cases is *Wood* v. *Wood* (1). In that case the evidence of desertion under the original petition fell short of the statutory period by several months. Sir *James Hannen* P. adjourned the hearing for further evidence, and thirteen months

(1) 13 P.D., 22.

or so afterwards the petitioner filed a supplemental petition charging desertion, and, it being proved that the respondent had not returned to cohabitation, the desertion was held to be established, and a decree *nisi* of dissolution was pronounced. His Lordship could not have given that decision had he held the opinion that the original institution of the proceedings had definitely put an end to cohabitation.

The other case is *Knapp* v. *Knapp* (1). That was a case in which a wife's petition for dissolution of marriage by reason of cruelty and adultery was, by leave of the Court, withdrawn. She afterwards filed a petition for dissolution of marriage by reason of the same adultery, and also by reason of desertion for two years, which had not accrued at the date of the first petition. On those facts Sir *James Hannen* P. said (2):—"It is clear that at the time when the respondent left his wife, eloping with another woman, he deserted his wife, and if that state of affairs continued for two years, the petitioner would have been entitled to institute a suit for dissolution of marriage. It is true that she did institute a suit for dissolution of marriage upon the grounds of cruelty and adultery, and for some time before two years had elapsed was seeking to have her marriage dissolved; but that is not inconsistent with her afterwards abandoning that suit, and after having waited the requisite time, instituting another suit on the ground of her husband's adultery and desertion. There never was a time at which the petitioner was bound to go back and live with him, because she was always justified in refusing to do so as long as he continued to live with the woman for whose company he had abandoned her; and therefore as it was in the beginning desertion on his part, and the circumstances have never been changed, that state of things, which was a desertion in the first instance, has continued such for now more than two years, and consequently the petitioner is entitled to succeed." There, again, unless Sir *James Hannen* P. had been of the opinion that cohabitation, though suspended, had not been determined, he could not very well have granted the petition.

That being the position in law, as I think it is, the question is whether the evidence in this case establishes that there was up

(1) 6 P.D., 10.

(2) 6 P.D., 10, at p. 11.

H. C. OF A. 1913.

FREMLIN v. FREMLIN.

Barton J.

to the beginning of the alleged desertion a cohabitation which was broken by the respondent. As Lord *Penzance* said in *Fitzgerald* v. *Fitzgerald* (1), in the passage I have already quoted: "Advantage may be taken of temporary absence or separation to hold aloof from a renewal of intercourse. This done wilfully, against the wish of the other party, and in execution of a design to cease cohabitation, would constitute 'desertion.'" Accepting that as the law, as of course we do, it seems to me that such a state of things at least has existed in this case. There was a physical separation between the parties which lasted for a long time, but which was in no wise inconsistent with their coming together again and cohabiting in the full sense of the term. That goes on, the petitioner from time to time endeavouring to bring about a resumption of conjugal life. The respondent's unwillingness, which probably existed at an early stage, culminated in a refusal when, his entreaties notwithstanding, she did not answer his letters requesting her to join him in Western Australia. Apparently, she denied herself to him at her house, and she admitted afterwards that she could not face the prospect of a life in Western Australia, and that her affection for him had ceased. If the petitioner showed, as he has done, his willingness to resume the state which was the only one consistent with the relation of the parties, and if the respondent chose, as she did, to do that which is equivalent to a refusal to resume that state, then it seems to me that she is guilty of desertion. Desertion means the same thing, whether the word is used alone or coupled with the words "wilful" and "without just cause or excuse," and when I speak of desertion I speak in terms of sec. 13 of the Act. If the cohabitation is brought to an end by the wife without the consent of the husband and without the intention of renewing it, the matrimonial offence of "desertion" is complete.

I am of opinion, therefore, that the petitioner has established the origin and retention of a domicil of origin entitling him to bring this suit in New South Wales, and also that he has established desertion for three years and upwards within the meaning of the Act; and therefore, that a decree *nisi* should now be made in his favour.

(1) L.R. 1 P. & M., 694, at p. 698.

Then arises the question of costs.

It has been strenuously contended that the respondent is not entitled to her costs. Normally she is. What has occurred to take this case out of the rule? It is said that if an adjournment were granted so that the respondent might file an affidavit, an opportunity would be given to inquire into her means with the object of establishing the petitioner's right to demand from her some contribution to her costs. If he wished to show that she had means out of which she could pay some or all of her costs, he has had an opportunity to do so, and has not taken advantage of it. Why should he be allowed to gather fresh material now, if any exists? It is true that the respondent admitted that in 1896, and again in 1906, her means amounted to £10 or £12 a month. What means she now has, or what claims upon her there now are, we are not told. I think the case is not taken out of the ordinary rule, and it was for the petitioner to take it out of that rule; and therefore it is proper that he should pay the costs of the respondent.

ISAACS J. read the following judgment:—Some questions of great importance present themselves in this case.

The first is as to domicil, which may be broadly stated to be the foundation of all jurisdiction in divorce.

In New South Wales, by sec. 13 of the *Matrimonial Causes Act* 1899, the petitioner must be domiciled for three years and upwards before the suit.

The learned primary Judge came to the conclusion that the petitioner's domicil is not New South Wales but Western Australia. His Honor reviewed the facts, the major portion of which, and the most weighty against the petitioner on this branch, occurred before 1906. In that year *Pring* J., in the prior suit, necessarily found that the petitioner was still domiciled here, because he entertained the suit and decided it on the merits. It does not follow as a matter of course that the two decisions are conflicting, because later facts may alter the entire aspect; but in the view I take of the facts since 1906, they lessen the probability of a change of domicil. I refer to this phase of the matter for the purpose of making an observation.

H. C. OF A. 1913.

FREMLIN v. FREMLIN.

Isaacs J.

Since domicil is, as a general principle, essential to jurisdiction, at all events to jurisdiction that will be recognized elsewhere, and as that depends so largely on the view that any particular tribunal takes of the facts, it is in the highest degree desirable that the danger of a mistake should be obviated so far as possible. And further, provided a real and substantial cause for divorce exists, it will be conceded that preliminary, though vital, obstacles to redress, and the risk of multiplicity of litigation, ought to be lessened or removed so far as law will permit. Uncertainty in matrimonial relations is altogether to be deprecated, and it is a scandal, as Lord *Penzance* said (1) in a passage approved by the Privy Council in *Le Mesurier* v. *Le Mesurier* (2), "when a man and woman are held to be man and wife in one country, and strangers in another." For the purposes of divorce jurisdiction the Australian States are still different countries. The difficulty must be faced where, as the learned Lord said in the same passage, different communities have different views and laws respecting matrimonial obligations, and a different estimate of the causes which should justify divorce. But sec. 51 sub-sec. (xxii.) of the federal Constitution gives the Commonwealth Parliament power to make laws with respect to "divorce and matrimonial causes," and I would wish to draw the attention of the Commonwealth Parliament to the question in order that consideration may be given to the desirability of allowing the present state of things to continue in the Australian community.

The present is only one case, though perhaps an illustrative case, which typifies the uncertainty as to the effect of an Australian, originally domiciled in one State, seeking a livelihood in another and induced by various reasons to prolong his stay. Has he or has he not in the circumstances changed his domicil? If he travels on to a third State, and obtains employment there, which of the three States is then his State of domicil? This is a conclusion on which each of three Supreme Courts may, upon the facts, differ from the other two. I have therefore thought it right to refer to the matter first in a general way so that it may receive such consideration as Parliament in its wisdom may deem proper.

(1) L.R. 2 P. & M., 435, at p. 442. (2) (1895) A.C., 517, at p. 540.

I pass now to the questions at issue as immediately affecting the parties.

1. *Domicil.*—The learned primary Judge stated as the first question to be considered: "Has the petitioner proved, as he is bound to prove, that he is domiciled in New South Wales?" After an examination of the facts his Honor determined that the petitioner had not proved that fact, and that there had been an actual change of domicil.

In thus stating the petitioner's obligation to prove his domicil in New South Wales, either of two positions may be meant. Undoubtedly, the petitioner must adduce sufficient evidence of the fact; that is one position. But after a given state of things has been proved by him, the question of which party has then the burden of adducing additional evidence to support or to destroy, as the case may be, the effect of the evidence already given, is quite another position. If, on evidence already given, the party having the affirmative of the issue ought in law to succeed, the burden of displacing his right is the burden of proof in the latter sense.

That brings me to the other point, which is this: Upon the petitioner proving that New South Wales was his domicil of origin, on whom then rested the burden of proof, that is, the burden of displacing the effect of that established fact? I find no trace of that question being considered in the judgment appealed from; and, reading that judgment, I conclude that no special force was given to the domicil of origin, but it simply took its place as one of a number of facts, the potency of each depending equally on the circumstances. I devote no attention to what is called the *factum* required to affect the domicil of origin, because the actual residence and occupation of the petitioner in Western Australia is uncontroverted. The contest is with regard to the *animus*, or intention, accompanying that residence. No doubt, as laid down in *Hodgson* v. *De Beauchesne* (1), it is impossible to lay down any positive rule with respect to the necessary evidence, and Courts of Justice must necessarily draw their conclusions from all the circumstances of the case: in one case a fact

(1) 12 Moo. P.C.C., 285, at p. 330.

H. C. OF A. 1913.

FREMLIN v. FREMLIN.

Isaacs J.

may be of the greatest importance; in another the same fact may be so qualified as to be of little weight.

But a man's domicil of origin stands in an exceptional position. It is affixed to him *by law* at the moment of his birth, and is therefore involuntary; and, although he is free to relinquish it by acquiring a substituted domicil, provided both act and intention combine for that purpose, it never completely disappears. While he retains the substitute, that prevails; but, as no man can ever be without a domicil, the moment the substituted domicil ceases, then the original domicil reasserts itself, as the true domicil, unless by the united force of a new act and a new intention another substitute be adopted. The domicil of origin, consequently, has a force which no other domicil can have. Lord *Westbury* emphasizes this position in *Udny* v. *Udny* (1).

By virtue of that great effect which the law attributes to the domicil of origin, it has been laid down again and again, that once it is proved, the onus lies upon those who assert another domicil to establish it. For instance, in the *Lauderdale Peerage Case* (2) Lord *Selborne* says :—" The onus of proving a change of domicil, *animo et facto*, lies upon those who assert it." In *Winans* v. *Attorney-General* (3) Lord *Halsbury* L.C. held that it was on the Crown, and added, " as I cannot bring myself to a conclusion, either way, whether Mr. Winans did or did not intend to change his domicil, his domicil of origin must remain." In the same case Lord *Macnaghten* says (4) :—" The onus of proving that a domicil has been chosen in substitution for the domicil of origin lies upon those who assert that the domicil of origin has been lost."

In other words, a Court once satisfied with regard to the domicil of origin requires to be convinced by preponderating evidence that it has been relinquished,

Then arises the further inquiry: What evidence is necessary to establish the intention of such relinquishment and the substitution of a domicil of choice? Lord *Westbury's* words are (5)—"an intention of continuing to reside there for an unlimited time." That is sometimes described as the *animus manendi*. But the argument

(1) L.R. 1 H.L. (Sc.), 441, at pp. 457, 458.
(2) 10 App. Cas., 692, at p. 739.
(3) (1904) A.C., 287, at p. 289.
(4) (1904) A.C., 287, at p. 290.
(5) L.R. 1 H.L. (Sc.), 441, at p. 458.

here has shown how easily words are mistaken. It has been contended that to intend to remain until the accomplishment of an object which may occupy an indeterminate period, satisfies Lord *Westbury's* expression "unlimited time." That, however, is an error. In such a case the duration of residence is limited by the time required for the attainment of the desired object, which it is assumed will at some definite point of time be accomplished. The words of Lord *Selborne* in *Lauderdale Peerage Case* (1) are again unmistakably clear. He speaks of "an intention to settle there permanently, *sine animo revertendi*" (2). He then enumerates circumstances which, he says (3), "appear to me to be altogether opposed to the notion that he had any idea of settling permanently in the province of New York, or of relinquishing his domicil of origin." And, further on, he observes:—"It is not because a critical state of health may oblige a man to go, or to remain with the prospect of dying, abroad, that he can be held to have abandoned, either *animo* or *facto*, his domicil of origin." It is manifest that a severe disease may be as unlimited in point of time as the making of a fortune; but if a man said he would return when completely cured, that could scarcely establish an intention to forsake his domicil of origin. In *Doucet* v. *Geoghegan* (4) *Jessel* M.R. treats an intention to return when a fortune has been acquired as opposed to an intention of permanent residence. In *Winans* v. *Attorney-General* (5) Lord *Macnaghten* indicates the tenacity of a domicil of origin as compared with any other. He says:—"Its character is more enduring, its hold stronger, and less easily shaken off." The intention requisite to shake it off must be "a fixed and settled purpose," "a determination," "a final and deliberate intention"—to do what? Why, to "abandon" the domicil of origin and to "settle" in the other. The term *animus manendi* may fail to receive its full connotation unless we bear in mind Lord *Selborne's* words, that the settlement must be *sine animo revertendi*.

That change is said to be serious. The voluntary abandonment of one civil community for another is never a light step,

(1) 10 App. Cas., 692.
(2) 10 App. Cas., 692, at p. 739.
(3) 10 App. Cas., 692, at p. 740.
(4) 9 Ch. D., 441, at p. 456.
(5) (1904) A.C., 287, at pp. 290 *et seq.*

H. C. OF A. 1913.

FREMLIN v. FREMLIN.

Isaacs J.

but it is a question of degree. It would be most serious for an Australian to exchange his domicil of birth for that of a domicil in China, but less serious in the United States, still less in England, and least of all in a neighbouring State of the Commonwealth, where not merely conditions of life, currents of thought and laws are similar, but in many cases are identical. The strength of the individual facts would, therefore, vary in each case. But while there would be less serious consequences arising from the change, the necessity and inducements of change, and, consequently, the likelihood of intended change, are diminished. The intention is to be judged of upon all available testimony. Of this, conduct is the most important, because the most reliable. A man's own declarations are, of course, admissible in evidence, but, as laid down by the Privy Council in *McMullen* v. *Wadsworth* (1), the doctrine of the Roman law still holds good, that "It is not by naked assertion, but by deeds and acts, that a domicil is established." Naked assertion without deeds and acts would be useless, and assertion inconsistent with deeds and acts is equally useless to control them. In *Potter* v. *Minahan* (2) I emphasized this point. Lord *Lindley* lays stress upon it in *Winans* v. *Attorney-General* (3). In *Anderson* v. *Laneuville* (4) the Privy Council said that declarations, though undoubtedly admissible, are not entitled to the first degree of consideration. Nevertheless, they are to be tested and appraised, and are not to be ignored. If the declarant is not found to be untrustworthy, and if his declarations be not opposed to the clear inference otherwise to be drawn from his conduct, it is impossible to deny deny them weight. For instance, in *Wilson* v. *Wilson* (5) Lord *Penzance* says:—"It seems to me that the question which the Court has to ask itself is this: assuming that the mere circumstances attending the residence in England, if the man were dead, and we knew nothing of his intentions, except what we could gather from that residence, would not be sufficient to enable the Court to arrive at the conclusion that he had adopted an English domicil, still when we have the man here, and when he swears

(1) 14 App. Cas., 631, at p. 636.
(2) 7 C.L.R., 277, at p. 314.
(3) (1904) A.C., 287, at pp. 299, 300.
(4) 9 Moo. P.C.C., 325, at p. 335.
(5) L.R. 2 P. & M., 435, at p. 444.

that was his intention, why should not the Court believe him? The Court must not take his word as conclusive proof of the fact, and if there are circumstances in the case which tend to show that what he says is not true or likely to be true, they may influence the conclusion at which the Court would arrive. Therefore the question is here, not so much whether the circumstances of his English residence tend to prove English domicil, as whether, the man swearing to his intention to create an English domicil, there are such circumstances on the other side as warrant the Court in throwing over his oath and disbelieving him."

In the present case, the learned primary Judge has cast no reflection on the *bona fides* of the petitioner in any respect, but has found that his testimony as to his never having definitely made up his mind to leave New South Wales is not sufficient to counterbalance the conclusion drawn from the facts and conduct of the petitioner. A man, without wilfully swearing to what is false, may erroneously term an intention indefinite, when it was really definite, or *vice versâ*. But, where the quality of the conduct is not *per se* unequivocal, where it is reasonably capable of either construction—as, in my opinion, it is here—then honest evidence of actual intention cannot be cast aside and treated as non-existent, and some sound reason must be found for disbelieving it.

In my opinion, the residence and occupation of the petitioner in Western Australia were not of such a character as to outweigh the *primâ facie* effect of the domicil of origin, and certainly not, when added to that there is the sworn testimony of the petitioner, who, however interested, is not found to be a wilfully misleading witness.

I have said that the events since 1906 are weaker to show a change of domicil than those that went before. A powerful consideration in that respect is, that in 1906 the petitioner knew from the first suit the importance of retaining his New South Wales domicil; and it is most improbable that he, nevertheless, deliberately elected to forsake it. So far as *intention* goes, it is inconceivable that, at one and the same time, the petitioner persevered in his determination to renew his suit when the necessary period of desertion had expired, a period commencing

H. C. OF A. 1913.

FREMLIN v. FREMLIN.

Isaacs J.

with his request to come to him in November 1906, and also resolved to take a step fatal to his success.

In all the circumstances, I am of opinion that the petitioner discharged his onus of establishing his domicil in New South Wales.

2. *Desertion.*—Then we come to the question of desertion. As to this, we are utterly unconcerned with the events prior to 1906. The desertion relied on is said to have commenced then. In November of that year, and directly after the termination of the earlier suit, the petitioner requested his wife to come to him in Western Australia. She treated his request then, and ever since, with silence, and determined, though passive, refusal. She now says she looked upon Western Australia, or, at all events, the portion where her husband lived, as a wilderness. White women do live there ; and I agree with the learned primary Judge that the respondent had no valid reason whatever for not complying with her husband's wish. To say that a wife in health and strength could justifiably refuse to accompany her husband to a populated locality in Australia, where such characteristic occupations as gold-mining and grazing are carried on with the usual accompaniments of storekeeping and butchering and similar vocations, would be a serious blow to the development of the country, and is contrary to its history.

There is no solid foundation for the suggestion of learned counsel, Mr. *Boyce*, who certainly argued his client's case with both fairness and force, that the petitioner's act in going to Western Australia, and staying there apart from his wife, was really a breaking off of their cohabitation, and amounted practically to a desertion by him.

Desertion is a comparatively new offence in our legal history. As a matrimonial offence it was unknown to the ecclesiastical or common law. See *Brookes* v. *Brookes* (1). Its import has been ascertained and developed by various decisions since 1857. In one of these, *Williams* v. *Williams* (2), Sir *James Wilde* made some observations that have bearing on the present case. He says :—" To desert is to forsake or abandon." Then he proceeds to distinguish between the withdrawal by a husband from his

(1) 1 Sw. & Tr., 326. (2) 3 Sw. & Tr., 547.

wife's society which does, and that which does not, constitute a forsaking or abandonment of her. The passage is too lengthy to quote, but it indicates that it depends upon circumstances, that as matrimony is made for all, so must matrimonial intercourse accommodate itself to the weightier considerations of material life, and to call mere absence desertion would render the duties of matrimony impossible to persons of certain occupations. This, in substance, is repeated by *Gorell Barnes* J. in *Kay* v. *Kay* (1).

So that no blame can be attached to the petitioner, and apart from the doctrine of *Fitzgerald* v. *Fitzgerald* (2), his case of desertion is established.

Now, the learned primary Judge considered that the observations of Lord *Penzance* (3) conclusively settled that there could be no desertion in the present case, and that for two reasons which are really distinct. One is based on the finding of *Pring* J. that "the facts did not show desertion, although they showed that the parties had been living separate from one another for over three years." What *Pring* J. calls "living separate," *Gordon* J. calls "separation," and treats as if it meant necessarily the total relinquishment of cohabitation prior to the suit of 1906. But the phrase does not necessarily mean that: it may mean mere corporeal absence without any intention on the petitioner's part to sever marital relations, and the result of what Sir *James Wilde* calls "the weightier considerations of material life." If the finding of *Pring* J. as to "living separate" can be relied on at all as an estoppel—a position I am by no means sure of, because I am not clear that it was either one of the issues or involved in the issues raised by the parties before him,—still the respondent must satisfy the Court that the term was used by the learned Judge in the strict sense of cesser of cohabitation. In itself it is not definite, and the only means we have of gathering its import is by the light of the facts as proved prior to 1906. On those facts it is clear to demonstration that, up to the earlier suit the petitioner had no intention whatever to relinquish cohabitation, and the respondent's own case was that she did not relinquish it; and so, apart from the second ground relied on by the learned

(1) (1904) P., 382, at p. 389. (2) L.R. 1 P. & M., 694.
(3) L.R. 1 P. &. M., 694, at p. 698.

H. C. OF A. 1913.

FREMLIN v. FREMLIN.

Isaacs J.

primary Judge, there existed no legal reason why desertion should not take place after the termination of the first suit.

On a subsequent day the learned primary Judge took up a very distinct ground, reasoning thus:—Cohabitation, at all events, ceased by the petitioner's adverse act of suing for divorce; cohabitation has never been resumed, nor has there been a decree for restitution of conjugal rights; consequently, on the authority of *Fitzgerald* v. *Fitzgerald* (1), there cannot be desertion, for it had no starting point. The answer is that the bringing of the suit does not destroy cohabitation. It is not desertion: it is not, in itself, a severance of conjugal relations. On the other hand, in the sense required for entitling the other spouse to sever conjugal relations, it is not matrimonial misconduct or in any way an unjustifiable act. It is instituted as a legal right under the express provisions of an Act of Parliament, passed as a part of public policy; and however mistaken a petitioner may be as to his substantive rights, his invocation of a duly constituted tribunal to decide them is not within the meaning of *Fitzgerald* v. *Fitzgerald* (1) "an adverse act" by which the state of cohabitation *ipso facto* definitely ceases to exist. The question, then, for the Court in such a suit is whether in consequence of the respondent's acts anterior to the suit, the marriage tie should be dissolved, and for the purpose of that suit, and until it is closed, there is a just cause for the respondent to remain apart from the petitioner, without being guilty of desertion. In other words, there is a practical suspension of the marriage relations during the continuance of the suit, and for the statutory purpose of the suit. During that period the mutual ordinary rights of the parties are dormant. But the moment the purpose is served, the moment the suit is out of the way, then, if it is dismissed, both parties are in the position in which they stood immediately before its commencement. If desertion had been already commenced, its continuance resumes from the termination of the suit—the intermediate time being necessarily regarded as a just interruption. The opposite view is not only inconsistent with *Knapp* v. *Knapp* (2); *Wood* v. *Wood* (3); *Lapington* v. *Laping-*

(1) L.R. 1 P. & M., 694.
(2) 6 P.D., 10.
(3) 13 P.D., 22.

ton (1); *Stevenson* v. *Stevenson* (2); but it is contrary to principle. A petitioner, though he so far fails to establish sufficient wrong to him in order to obtain relief, does not by his suit obliterate the wrong actually done. That remains, and if it be still persevered in by the wrong-doer, the sound reason of the matter is that the entirety, excluding the period covered by the continuance of the suit, may yet reach the statutory standard, and be so adjudged in a later suit.

Moreover, if the view presented for the respondent be correct, a position would arise which I put to her learned counsel. Suppose a wife's petition for adultery and desertion fails, only because the desertion fell short of two years by a month: is the law so inconsequential as, notwithstanding the adultery, and notwithstanding the husband's persistence in desertion, to require her to resume cohabitation, or hypocritically sue for a restitution of conjugal rights which is abhorrent to her, and then wait until the adultery is repeated, and a new full period of desertion for two years is established? In the absence of overwhelming authority I cannot think so.

And when *Fitzgerald* v. *Fitzgerald* (3) is carefully looked at, and the facts observed, it is plain the learned primary Judge there, Lord *Penzance*, did not think so either.

The facts are all important to understand his judgment. The petition he had to deal with was by the wife for adultery and desertion. The adultery was proved, but the desertion had to be considered.

Now, it is a striking fact which must not be lost sight of, that there had been in that case a previous suit by the same petitioner, charging her husband with adultery and cruelty. That suit was not finally decided until 1864. As pointed out in the judgment, the termination of those proceedings worked no alteration in the relations of the parties. Neither made any overtures to the other, and both held aloof. So that there was neither resumption of cohabitation, nor decree for restitution of conjugal rights. The learned Judge said (4):—"Adultery since the conclusion of the former suit has been proved. The question which the Court

(1) 14 P.D., 21.
(2) (1911) P., 191.
(3) L.R. 1 P. & M., 694.
(4) L.R. 1 P. & M., 694, at p. 695.

H. C. OF A. 1913.

FREMLIN v. FREMLIN.

Isaacs J.

has reserved for consideration is, whether the desertion is established ?"

The desertion relied on in the second suit was, as it appears (1), based on the husband's never having since the first suit sought his wife, or asked her society, but kept aloof from her in continuance of the breach in 1861—three years before the first terminated. That breach was caused by the wife leaving him in consequence of his supposed misconduct negatived by the first decree.

Now, it is plain that if the learned primary Judge considered that the mere bringing of the first suit was a termination of cohabitation in the sense here contended for, and if it required a new start for desertion, it would have been simple for him to have said so, and to have based his judgment on that. So far from doing so, he took into his consideration for the purposes of the desertion, the original breach in 1861, and its continuance down to the first suit; then—ignoring the period of interruption —he said this (2):—"It is one thing to make a breach, it is another to refrain from attempts to heal it. Desertion means abandonment, and implies an active withdrawal from a cohabitation that exists; the word carries with it an idea of forsaking or leaving, and it is hardly satisfied by the negative position of standing apart."

Then he refers to cases like *Williams* v. *Williams* (3), and he calls them not a total relinquishment, but a suspension of the state of cohabitation, till a fitting occasion for its resumption. In the case before him, he said the wife had—and his observations had reference only to 1861—not merely suspended but determined the cohabitation. Subsequently she instituted the earlier suit, but the learned Judge uttered no syllable indicating that he attached any importance to that, as finally terminating the cohabitation. In one sense that was unnecessary, because the cohabitation had already been terminated. But, so plain and simple an answer, if tenable at all, could not have escaped the most eminent counsel who argued, and the learned Judge who heard, the cause.

(1) L.R. 1 P. & M., 694, at p. 696. (2) L.R. 1 P. & M., 694, at p. 697.
(3) 3 Sw. & Tr., 547.

I therefore decline the invitation of attributing to that learned Judge's words a meaning which he had the opportunity of applying to them, and conspicuously avoided. It is also notable that at a later date, on the intervention of the Queen's Proctor, a re-hearing took place; most eminent counsel—including the present Lord *Halsbury*, and the then Attorney-General, Sir *R. G. Collier*—appeared; and again, in determining whether the necessary desertion had been proved, the whole conduct of the respondent from August 1861, after the actual separation but years before the termination of the first suit, down to 1867, when the second petition was filed, was taken into account and adjudged upon.

None of the learned Judges who determined the later cases cited, appear to have entertained the smallest notion that the words relied on have the extension sought to be attributed to them. In my opinion that extension was never intended, and ought not to be included. There is, then, no reason for denying to the conduct of the respondent its ordinary effect; and starting with 1906, there is no doubt in my mind she must be held to have deserted her husband for over three years. The exact *terminus a quo* is not essential to be determined so long as it is clear that the necessary period is covered before the institution of the present suit, and that is the case here.

3. *Costs.*—The last question is as to the proper rule respecting costs. The respondent wife succeeded below, but has now failed. What is the primary rule in such a case?

First, as to the costs of the appeal: In *Medway* v. *Medway* (1) it was said by *Jeune* P., for himself and *Gorell Barnes* J.:—"Where a wife has obtained a decision in her favour and comes here to support it, she ought to have her costs." That was not a case in the divorce jurisdiction, but was analogous. It was one where justices made in summary jurisdiction a separation order and a weekly allowance, which was on appeal set aside and a re-hearing ordered. The Act directs that such an appeal is to be heard by the Probate, Divorce and Admiralty Division of the High Court. *Medway's Case* (2) was followed by the same learned Judges in *Charter* v. *Charter* (3).

(1) (1900) P., 141, at p. 144. (2) (1900) P., 141. (3) 84 L.T., 272.

H. C. OF A. 1913.

FREMLIN v. FREMLIN.

Isaacs J.

That is different from the case where she is an unsuccessful appellant: See *Otway* v. *Otway* (1).

As to the original trial, Mr. *Windeyer* said that the Divorce Rules enabled interim security or payment to be made, and, if that were done, the husband would have an opportunity of cross-examining the wife as to her separate means, and that, if that course were not taken, she lost her right to costs in the end if unsuccessful. That, no doubt, was a rule for a very long time, as in 1859 in *Keats* v. *Keats* (2); *Glennie* v. *Glennie* (3). But in 1881 this rule was held by a powerful Court of Appeal in *Robertson* v. *Robertson* (4) to be erroneous, and as improperly fettering the discretion which the Act of Parliament requires the Court to exercise. It not only conflicts with the doctrine that neglect to avail oneself of a special right does not prevent one from exercising a general right, but it was based on an erroneous foundation. *Jessel* M.R. said that the liability of the husband for the wife's costs originated in the rule of law which gave the wife's personal property to the husband as well as the income of her real estate. But he also referred to what he called "the nobler view," held in the House of Lords, that no man of right feeling would wish that his wife should not have the means of fairly investigating and fairly defending herself against so odious a charge as that of adultery. And he added that—apart from the pecuniary reason—the nobler reason ought to be sufficient. *Brett* L.J. said (5):—"It is not unjust" (for a husband to have to pay the costs of his unsuccessful wife), "but, on the contrary, it is a question of high policy and high propriety." And so the Court overruled the former practice. And see *per Cotton* L.J. in *Otway* v. *Otway* (6).

Without travelling over the line of decisions by which, notwithstanding the existence of the Married Women's Property Acts, the primary rule established in *Robertson* v. *Robertson* (4) is confirmed, I refer to the case of *Kemp-Welch* v. *Kemp-Welch* (7), where it was expressly approved by the Court of Appeal. In *Sheppard* v. *Sheppard* (8) the matter was thoroughly examined

(1) 13 P.D., 141.
(2) 1 Sw. & Tr., 334, at p. 358.
(3) 3 Sw. & Tr., 109.
(4) 6 P.D., 119.
(5) 6 P.D., 119, at p. 124.
(6) 13 P.D., 141, at p. 155.
(7) (1910) P., 233.
(8) (1905) P., 185.

by Sir *Gorell Barnes* P. That learned Judge says (1):—"It is true that the discretion and the way in which it is exercised originates in the fact that a wife has, at common law, a right to pledge her husband's credit for necessaries; but that is only in part the foundation for the way in which this Court exercises its discretion in cases such as this, the real point being that it is impossible to do justice if a woman who is attacked cannot put the Court in possession of all the facts, and fight her case and deal with it properly, unless she has funds to do it. And this is equally true in a case where the wife wishes to have relief on the ground of her husband's misconduct." As the learned President further observes (2), it is a question affecting not merely the two contending parties; others may be affected: "children may be, and the public are concerned in these questions of status. In divorce cases, justice could hardly be done if the wife without any means is not provided by the husband with means to contest the case."

But *cessante ratione cessat lex.* If the wife has sufficient means to contest the matter—that is to say, sufficient left after providing for reasonable maintenance—*Allen* v. *Allen* (3),—then the *primâ facie* liability of the husband is displaced. In *Heal* v. *Heal* (4) it was held that as it appeared the wife had more property than her husband, she, being unsuccessful, had to pay her own costs. In *Milne v. Milne* (5) Lord *Penzance*, finding that the unsuccessful wife had a large separate income, and the husband but moderate means, made her pay the costs, like any other suitor. So in *Miller* v. *Miller* (6), the wife's separate income appearing to be £760 a year, she was ordered to pay the costs.

In this case the husband's means are greater than the wife's, who had in 1906 a separate income of either £2 or £2 10s. a week for the maintenance of herself and her children by a former marriage. No further means have been proved.

In these circumstances she should have her costs so far as they have been reasonably incurred.

(1) (1905) P., 185, at p. 190.
(2) (1905) P., 185, at p. 191.
(3) (1894) P., 134.
(4) L.R. 1 P. & M., 300.
(5) L.R. 2 P. & M., 202, at pp. 204, 205.
(6) L.R. 2 P. & M., 13, at p. 15.

H. C. OF A. 1913.

FREMLIN v. FREMLIN.

Isaacs J.

In my opinion the burden of showing unreasonableness rests upon the husband. That may appear on the surface. If, however, so far as appears, the wife's solicitor is acting in the ordinary course of protecting his client's interests, the general rule should apply unless the contrary is shown by the husband. If that is shown, then, in order to protect husbands who have been wronged, from undue burdens, which might deter them from seeking the remedy which the law has provided, the solicitor must look to his own client alone. It is her protection that is primarily provided for, and that requires only reasonable conduct on the part of her solicitor: See *per Barnes* J. in *Walker* v. *Walker* (1).

In this case no question can arise as to the reasonableness of her proctor in defending her. The view taken by *Gordon* J. after a complete exposure of the facts is sufficient to establish that.

In my opinion also, the appeal should be allowed.

GAVAN DUFFY J. I have read and concur in the judgment of my brother *Isaacs*.

Appeal allowed. Decree nisi for dissolution of marriage. Petitioner to pay the respondent's costs of the hearing and of the appeal.

Solicitor, for the appellant, *W. A Windeyer*.
Solicitors, for the respondent, *Dalrymple & Blain*.

B. L.

(1) 76 L.T., 234.