REPORTS OF CASES

DETERMINED IN THE

HIGH COURT OF AUSTRALIA

1918-1919.

[HIGH COURT OF AUSTRALIA.]

FREDERICK MAUD . . . . . APPELLANT;
PETITIONER,

AND

ALICE MAUD . . . . . RESPONDENT.
RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1919.

MELBOURNE, *March* 12.

Isaacs, Higgins and Gavan Duffy JJ.

Husband and Wife—Divorce—Desertion—Refusal of sexual intercourse—Marriage Act 1915 (*Vict.*) (*No.* 2691), *sec.* 122.

The persistent refusal of sexual intercourse is not by itself desertion within the meaning of sec. 122 (*a*) of the *Marriage Act* 1915 (Vict.), which entitles a married person to a divorce on the ground of wilful desertion without just cause or excuse for three years and upwards.

Decision of the Supreme Court of Victoria (*Hood* J.) affirmed.

APPEAL from the Supreme Court of Victoria.

By petition in the Supreme Court Frederick Maud sought a dissolution of his marriage with Alice Maud on the ground that without just cause or excuse she had wilfully deserted him and without any such cause or excuse had left him continuously so deserted during three years and upwards.

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It appeared that the parties, who were married on 12th June 1901, lived together in the same house from that time until a fortnight after the service of the petition. During the whole of that time the respondent persistently refused to allow the petitioner to have sexual intercourse with her, although until about four years before the petition they occupied the same bed, after which time the respondent slept in the kitchen. The respondent always performed the ordinary household duties and did some work in the garden. Until about six months before the petition the parties had their meals together, and after that time the petitioner prepared his own meals. They spoke to one another until about a fortnight after the petition was served. The petition was heard by *Hood* J., and there was no appearance for the respondent. The learned Judge held that the mere fact that the respondent persistently refused to allow the petitioner to have sexual intercourse with her was not desertion, and that there was no evidence which showed that by that conduct the respondent intended to break off matrimonial relations with the petitioner. He therefore dismissed the petition.

From that decision the petitioner now appealed to the High Court.

Schutt, for the appellant. The persistent refusal of sexual intercourse is desertion within the meaning of sec. 122 (*a*) of the *Marriage Act* 1915. The principal object of marriage is the begetting of children, and there is no other object which could not be achieved by friendship. Apart from that principal object the duties of a wife could as well be performed by a housekeeper. Those duties are ancillary to the principal object. That object is so important that a decree of nullity will be granted if one of the parties is impotent. A refusal of sexual intercourse is an abandonment of the main object of marriage, and is therefore desertion. (See *Bishop on Marriage and Divorce*, 5th ed., vol. I., secs. 777-782.) A physical separation of the parties is not necessary (*Simons* v. *Simons* (1)). When it is said that desertion means the putting an end to cohabitation, the word "cohabitation" implies as an essential the opportunity of sexual intercourse.

[ISAACS J. referred to *B————n* v. *B————n* (2); *Charter* v. *Charter* (3); *Graves* v. *Graves* (4).]

(1) 24 V.L.R., 348; 20 A.L.T., 90.
(2) 1 Sp. Eccl. & Adm., 248, at p. 260.
(3) 84 L.T., 272.
(4) 3 Sw. & Tr., 350, at p. 353.

In England, where desertion is not a substantive ground of divorce but only for a judicial separation (see *Divorce and Matrimonial Causes Act* 1857, secs. 7, 16, 27, and *Matrimonial Causes Act* 1884, sec. 5), the decisions support the view that to constitute desertion it is sufficient to prove a refusal of sexual intercourse (*Synge* v. *Synge* (1); *Bradshaw* v. *Bradshaw* (2); *Yeatman* v. *Yeatman* (3); *De Laubenque* v. *De Laubenque* (4); *Davis* v. *Davis* (5)).

[ISAACS J. referred to *Mackenzie* v. *Mackenzie* (6).]

Even if the refusal of sexual intercourse is not by itself sufficient to constitute desertion, the facts of this case show that in reality during the last three years the respondent never cohabited with the appellant in the proper sense of the term, and that any of the duties ordinarily performed by a wife were performed by the respondent not as a wife but as a housekeeper. This is borne out by the respondent not defending the suit, and thereby expressing her desire that the marriage should be put an end to. The facts are almost identical with those in *Simons* v. *Simons* (7), where a divorce was granted although the parties continued to reside in the same house. [Counsel also referred to *Drake* v. *Drake* (8); *Southwick* v. *Southwick* (9); *Orme* v. *Orme* (10); *Forster* v. *Forster* (11); *Fraser on Husband and Wife*, 2nd ed., pp. 1207, 1209; *Fitzgerald* v. *Fitzgerald* (12).]

The judgment of ISAACS J. and GAVAN DUFFY J., which was delivered by ISAACS J., was as follows :—

This case turns on the meaning of desertion as a matrimonial offence. Does the persistent wrongful refusal of matrimonial intercourse of itself constitute desertion ? The answer is that there can be no desertion while cohabitation continues, and there may be a continuance of cohabitation notwithstanding refusal by either spouse of sexual intercourse.

In every case the question as to whether cohabitation as husband and wife has ceased must be determined as a fact upon consideration

(1) (1900) P., 180, at pp., 195, 196.
(2) (1897) P., 24.
(3) 1 P. & M., 489.
(4) (1899) P., 42.
(5) (1918) P., 85.
(6) (1895) A.C., 384, at p. 411.
(7) 24 V.L.R., 348; 20 A.L.T., 90.
(8) 22 V.L.R., 391; 18 A.L.T., 149.
(9) 97 Mass., 327.
(10) 2 Add., 382.
(11) 1 Hag. Con., 144, at p. 154.
(12) 1 P. & M., 694, at p. 698.

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of all the circumstances. In the present case the wife, up to a few months before the presentation of the petition, continued to perform in and about the marital home substantially all the duties of a wife, except that of admitting her husband to intercourse.

In those circumstances there was no desertion, and in our opinion the judgment appealed from was right, and should be affirmed.

HIGGINS J. It may well be that the persistent refusal of sexual intercourse ought to be a substantive ground of divorce, but such conduct does not *per se* constitute desertion. Desertion implies an abandonment—abandonment of the person deserted—abandonment of the society. It is not sufficient to show failure to carry out one of the duties of the position. A sailor who refuses to go aloft does not desert his ship. In the army desertion is a very different thing from refusal to perform one or more of one's duties: it is not desertion to refuse to do fatigue duty. Here there was no refusal of cohabitation in the proper sense of the term. In *Webster's Dictionary* the word "cohabitation" is defined as "the act or state of dwelling together, or in the same place with another," and in law as "the living together of a man and woman in supposed sexual relationship." So that the word involves that there need not be actual sexual relationship.

In this case the parties resided together under the same roof, received visitors there, took their meals together at the same table, and spoke together, and the wife performed the household duties, without wages of course, and certain gardening duties. Mr. *Schutt* has not shown us that the word "desertion" has a different meaning from its usual meaning, and I think that the decision of *Hood* J. was right.

Appeal dismissed.

Solicitor for the appellant, *Gavan Duffy, King & Co.*, for *M. F. Bourke*, Mansfield.

B. L.