[HIGH COURT OF AUSTRALIA.]

HUGH LAWTON BARTLETT . . . . APPELLANT;
PETITIONER,

AND

ADA PEARL BARTLETT . . . . . RESPONDENT.
RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Aug.* 8, 9; *Nov.* 14.

Rich, Dixon, Evatt and McTiernan JJ.

Divorce and Matrimonial Causes—Grounds for dissolution of marriage—Statutory desertion—Restitution of conjugal rights—"Conjugal rights"—"Compliance"—Return for short period of time—Intentions and conduct of parties—Marital intercourse—Matrimonial Causes Act 1899 (*N.S.W.*) (*No.* 14 *of* 1899), *sec.* 11 (1).

Under sec. 11 (1) of the *Matrimonial Causes Act* 1899 (N.S.W.), acts of cruelty upon the part of the spouse, who obtained the decree for restitution of conjugal rights, may afford a justification for the departure of the spouse against whom it has been obtained from the matrimonial home, but such acts will not prevent a decree of dissolution if prior thereto the latter failed actually to comply with the decree for restitution; but, *per McTiernan* J., they would constitute a discretionary bar.

Compliance with a decree for restitution of conjugal rights is the aggregate effect of a great number of acts and consists in a course of behaviour, and the acts and conduct of the spouse bound to obey must not be opposed or repugnant to the maintenance of the matrimonial relationship. Sexual intercourse is not necessary to obedience, but its refusal is a matter material to be considered.

A husband obtained a decree for restitution of conjugal rights, in purported compliance with which his wife returned with her children to his home. She did so in order to prevent his obtaining a decree for dissolution and she bore him no affection. After remaining for almost six weeks, during which she sometimes occupied the same bed as her husband, she left the home with her children, alleging as a ground gross acts upon his part of cruelty of a sexual

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nature. Upon the hearing of his petition for dissolution the Judge in Divorce acquitted him of the cruelty alleged and pronounced a decree, but, on appeal, the Full Court reversed his decision upon the ground that the cruelty was established by independent evidence. Upon appeal to the High Court, *Rich* and *Evatt* JJ. were of opinion that the finding of the primary Judge ought not to have been set aside and that the wife had not acted in compliance with the decree for restitution: *Dixon* and *McTiernan* JJ. were of opinion that the wife had not failed to comply with the decree before her departure from the home and that she was justified in leaving by conduct which the evidence established against her husband. The Court being equally divided, the decision of the Full Court was affirmed.

Per Rich and *Evatt* JJ.:—Wilful refusal of sexual intercourse may in all the circumstances prove, or tend to prove, that one of the spouses is according merely nominal and not real adherence to the decree requiring restitution. It is probable that a spouse who has completely lost all love and affection for the other cannot well comply with such a decree, because resumption of cohabitation would almost inevitably be followed by acts or omissions clearly evidencing a failure to render conjugal rights.

Per Dixon J.:—A decree of restitution requires cohabitation but not sexual intercourse. It does not attempt to control motives, feelings, emotions, sentiment, or states of mind, but only overt acts and conduct. Compliance is not rendered impossible because the motive for attempting it is to avoid dissolution. Dwelling together as husband and wife in outward acceptance of the relationship without attempting to cause a separation is necessary for obedience.

Per McTiernan J.:—In ascertainng whether there has been a failure to comply with the decree, it is not the duty of the Court to measure the affection which one spouse should have for the other and to search the heart of the respondent to find whether or not acts, which might constitute compliance, have been done with that standard of affection; conduct which has the objective quality of compliance does not fail to comply because its motive is to avert a dissolution.

Decision of the Supreme Court of New South Wales (Full Court) affirmed pursuant to the provisions of sec. 23 (2) (*a*) of the *Judiciary Act* 1903-1932.

APPEAL from the Supreme Court of New South Wales.

This was an appeal from the judgment of the Full Court of New South Wales setting aside a decree *nisi* for the dissolution of marriage. The petition in the suit for dissolution of marriage was founded upon the allegation that the wife had failed to obey a decree for restitution of conjugal rights made against her on the application of the husband in a prior suit. After the decree for restitution of conjugal rights was served on the wife she returned on 29th March

1931, within the time limited by the decree, to the house appointed by the husband, and stayed there until 7th May 1931, when she again left. On 11th May the husband filed a petition for the dissolution of the marriage on the ground that she had deserted him without reasonable cause by reason of her failure to comply with the decree for restitution of conjugal rights. In her answer the wife denied the allegation, and said that after she had returned home in obedience to the decree, the husband had been guilty of cruelty which justified her subsequent withdrawal. From the evidence given at the hearing of the petition it appeared that within the time limited by the decree for restitution of conjugal rights, the wife returned home with the three children of the marriage and for six weeks lived under her husband's roof, performed some household duties, dined with her husband and children in the house and occupied his bed. It also appeared that the wife hated her husband, was violent to him in deed and in word, bitterly quarrelled with him, and, in the main, neglected her household duties. She shunned her husband's society and, even before the children, insulted and humiliated him. She denied the allegation of her husband that she refused to wash and mend his clothes. Her motive in returning home and occupying her husband's bed was to comply with the decree and thereby avert the dissolution of the marriage. But fearing pregnancy she provided herself with contraceptives. It appeared, however, that the husband insisted that his wife should submit to him without eliminating the possibility which she so dreaded, his motive being, according to the wife, that she might be forced to live apart from him and so "break" the decree. He resorted to violence to attain this result, and it could be inferred from the wife's evidence that she was injured in these struggles and by certain unnatural sexual habits which he frequently indulged in despite her protests and struggles, but there was some evidence to the effect that, due to her inexperience in their use, the internal injuries complained of could have been caused by the use by the wife of the contraceptives. A doctor who gave evidence as to the wife's condition on three occasions during the six weeks in question, stated that on 7th May "she had bruises on both thighs. The vaginal mucuous membrane was congested, that is, swollen and red. She

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had a swelling in the right mastoid region—the bony prominence behind the ear—and also in the left parietal region—towards the vertix of the skull, and she had swellings due to recent bruisings on the left upper arm and both wrists. . . . From her condition and what I knew of her she was not in a condition to return home." The husband's diary contained a record of the manner in which he admitted he treated his wife, and what occurred between them reinforced the inference that he violently abused and ill-treated her. In the course of his judgment the trial Judge, *Owen* J., said :—" These injuries were in the nature of internal injuries, of bruising, and of a certain amount of swelling which Dr. Grieve referred to. It is possible that those injuries were occasioned by the use of a particular form of contraceptive which has been referred to in the evidence and which the husband says he found amongst his wife's things when she returned, and in this he is supported to some extent by the wife's own admissions that she herself did come back prepared to take precautions to see that she did not become pregnant again. . . . Dr. Gunning, whose evidence has not been impeached . . . says that in the use by her of a contraceptive such as was described, if the wife were a novice, she would be liable to bruise herself. . . . It is quite conceivable that the injuries were caused by a careless use, or by a person inexperienced, of the particular form of contraceptive that is mentioned. When I come to weigh the whole of the evidence I cannot feel satisfied in my mind that the injuries that the doctor found were inflicted by the husband." *Owen* J. found that the wife had disobeyed, or not obeyed the decree for restitution, and, therefore, was guilty of desertion. A decree nisi for the dissolution of the marriage was granted to the husband. Upon the wife's appeal to the Full Court of the Supreme Court this decision was reversed. The judgment of that Court was delivered by *Street* C.J., who said, *inter alia*, " the only inference to be drawn from the facts, quite apart from the credit to be given to her or to him, is that her condition as Dr. Grieve saw it on the 7th May was due to her husband's conduct and to his treatment of her. That being so, it seems to me that the learned Judge's finding, which was in effect that she had not complied with the decree for restitution of conjugal rights made against her because she left home without sufficient

justification cannot be supported. . . . I think that on the evidence the inference to be drawn from the established facts was that she was justified in leaving her home as she did." The Full Court allowed the appeal, set aside the decree nisi for the dissolution of the marriage and dismissed the petition.

From this decision the husband now appealed, *in forma pauperis*, to the High Court.

Further material facts appear in the judgments hereunder.

Richards, for the appellant. The Full Court was wrong in assuming that the respondent's evidence was correct, in view of the fact that the trial Judge, who had the advantage of observing the demeanour of both parties, stated that, in his opinion, the respondent was untruthful, and that her evidence could not be accepted unless corroborated. The trial Judge found that the respondent had not discharged the onus of proving that the injuries complained of by her had been caused by the appellant. Such a finding cannot be disturbed by a Court of Appeal (*Dearman* v. *Dearman* (1)). In view of the evidence of the respondent as to her daughter's personal knowledge of the appellant's ill-treatment of, and general conduct towards her it is significant that that daughter, then aged about sixteen years, was not called to give evidence. A suit for restitution of conjugal rights and a suit for the dissolution of the marriage on the ground of failure to comply with the decree in the former suit, are steps in the same proceedings (*Thomas* v. *Thomas* (2)). In this appeal the Court is entitled to, and should, have regard to the evidence and findings in the suit for restitution of conjugal rights (*Russell* v. *Russell* (3)).

[McTIERNAN J. referred to *Oldroyd* v. *Oldroyd* (4).]

The evidence shows that upon her return in purported compliance with the decree for restitution of conjugal rights the respondent refused to perform domestic duties, e.g., the preparation of meals, washing and mending of clothes, &c., and she also refused marital intercourse to the appellant. Such a return was an illusory return, and was not a compliance with the decree (*Harris* v. *Harris* (5)).

(1) (1916) 21 C.L.R. 264.
(2) (1930) 31 S.R. (N.S.W.) 159, at pp. 168, 169; 48 W.N. (N.S.W.) 21, at p. 23.
(3) (1895) P. 315.
(4) (1896) P. 175.
(5) (1929) 30 S.R. (N.S.W.) 59; 47 W.N. (N.S.W.) 9.

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As to what constitutes failure to comply with a decree for restitution of conjugal rights, see *Gettens* v. *Gettens* (1); *Brown* v. *Brown* (2), and *Rayden and Mortimer* on *Divorce*, 3rd ed. (1932), pp. 69 *et seqq.*, citing *Webster* v. *Webster* (3).

[RICH J. referred to *Davis* v. *Davis* (4).

[McTIERNAN J. referred to *Weldon* v. *Weldon* (5).]

The trial Judge was wrong in finding or assuming that the injuries complained of by the respondent were not caused by the contraceptives used by her. Her conduct, e.g., absence of complaints to neighbours, or to the police station nearby, her visits to a medical practitioner at a suburb many miles distant from the suburb where she resided, indicates that her complaints as to ill-treatment of her by the appellant are without foundation. The letter forwarded on 7th April 1932 by her solicitor to the appellant's solicitor contains no reference to the alleged abnormal sexual habits of the appellant.

A. G. Higgins, for the respondent. A party to whom a decree for restitution of conjugal rights is directed is bound to return to, and cohabit with the other party to the marriage. By "cohabit" is meant not physical cohabitation, but living under the same roof (*Hocking* v. *Hocking* (6)). The question is: Has the respondent established to the satisfaction of the Court the charges of unnatural and abnormal sexual habits on the part of the appellant which she states compelled her to leave the home on the second occasion? If so her leaving home on that occasion was justified and in the circumstances she has, or will be deemed to have, complied with the decree. The respondent's evidence as to the appellant's unnatural and abnormal sexual habits is sufficiently corroborated by the medical evidence which was accepted by the trial Judge as both truthful and accurate. The trial Judge drew an incorrect inference from the established facts. The Full Court was entitled to, and did, draw the correct inference from such facts (*Smith* v. *Chadwick* (7)). An appeal court is not bound by the conclusions of fact arrived at by a trial Judge (*Federal Commissioner of Taxation* v. *Clarke* (8)).

(1) (1928) 45 W.N. (N.S.W.) 149.
(2) (1911) 28 W.N. (N.S.W.) 138.
(3) (1922) 66 Sol. Jo. 486.
(4) (1918) P. 85.
(5) (1883) 9 P.D. 52.
(6) (1913) 30 W.N. (N.S.W.) 78, at p. 79.
(7) (1884) 9 App. Cas. 187, at p. 194.
(8) (1927) 40 C.L.R. 246, at pp. 262 *et seqq.*

The evidence given by the appellant is inconsistent in many respects with entries made by him in a diary which is before the Court. Such entries corroborate, in many instances, the evidence given by the respondent. It is obvious that the diary was "kept" by the appellant for the purposes of litigation. The respondent did not exhibit repugnance to sexual intercourse in the natural way, but only to sexual intercourse in an unnatural way. The petition for the dissolution of the marriage was issued four days after the respondent left home on the second occasion. No preliminary inquiries were made as to her whereabouts or welfare.

Richards, in reply.

Cur. adv. vult.

Nov. 14.

The following written judgments were delivered :—

RICH J. I have had the advantage of reading the judgment of my brother *Evatt* and agree with it, and I desire to make only two observations, one by way of addition and one by way of reservation. I desire to add a reference to the Scotch form of decree in an action of adherence, the material parts of which are as follows :—" Ordains the defender to adhere to the pursuer, his wife, her society, fellowship, and company, and to cohabit, converse with, treat, cherish, and entertain her at bed and board, and otherwise as a married person should do to his wife, and that during their joint lives " (*Murray* v. *M'Lauchlan* (1)). Such a decree was not specifically enforced (*Fraser, Husband and Wife*, 2nd ed. (1878), p. 875). The Scotch lawyers acted on the maxim, *Nemo potest cogi precisum ad factum.*

The form of decree to which I have referred does not mean to make obedience depend upon a party's capacity to control his affections. I do not suggest that compliance with a decree of restitution is dependent upon feelings and states of mind, but the form of decree does show that not one specific act but a continuance or series of acts is required, and obedience or disobedience is to be decided by reference to the aggregate effect of a great number of overt acts the effect of which is to show how the spouse actually conducted himself or herself.

(1) (1838) 1 S.C., 2nd Series (Dunlop) 294.

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By way of reservation or modification I wish to say that I prefer, in lieu of expressing any opinion as to which account of those given by the parties ought to be believed, to accept and rely upon the opinion of the trial Judge. I have found it almost an impossible task to form a confident opinion on this subject by the aid only of the printed page and the documents. In my opinion the appeal should be allowed. If this opinion were to prevail and the order of *Owen* J. restored I would make some provision for alimony which could be enforced when occasion arose.

DIXON J. Sec. 11 (1) of the *Matrimonial Causes Act* 1899 (N.S.W.) is as follows :—" If the respondent fails to comply with a decree of the Court for restitution of conjugal rights such respondent shall thereupon be deemed to have been guilty of desertion without reasonable cause and a suit for dissolution of marriage or for judicial separation may be forthwith instituted and a decree nisi for the dissolution of the marriage or a decree of judicial separation may be pronounced on the ground of desertion although the period of three years may not have elapsed since the failure to comply with the decree for restitution of conjugal rights."

On 19th February 1931 the Supreme Court pronounced a decree of restitution of conjugal rights requiring the respondent, within twenty-one days after service of the decree upon her and a written notice of the home to which she was to return, to return to her husband, the appellant, and to render him conjugal rights. In consequence of the service of this decree the respondent did, on 29th March 1931, return to her husband's home. There she remained until 7th May 1931 when she again left it. On 11th May 1931, her husband filed a petition for dissolution of marriage upon the ground of her failure to comply with the decree for restitution of conjugal rights.

The respondent, who defended the suit, denied that she had failed to comply with the decree and said that, after she had returned home in obedience to it, the appellant had been guilty of cruelty which justified her subsequent withdrawal. The cruelty charged included conduct of an atrocious description. The respondent failed to prove to the satisfaction of the learned primary Judge that the

appellant had been guilty of this conduct and a decree for dissolution was made. Upon the respondent's appeal to the Full Court, this decision was reversed. Their Honors were of opinion that reliable medical evidence describing the physical state of the wife, which had been accepted by the primary Judge, when considered with passages contained in a diary kept by the husband, required the conclusion that he had inflicted upon her the enormities complained of. The husband now appeals *in forma pauperis* against the decision of the Full Court. In setting aside the primary Judge's finding upon a matter so much determined by an estimate of the witnesses whom he saw and heard, the Full Court took an unusual course. Their Honors were, however, fully alive to the principles which should guide an appellate Court in examining such a question of fact and based their conclusion upon the inferences which appeared to them necessarily to arise from circumstances clearly established by the evidence and admissions. A close consideration of the appellant's diary together with the whole of the oral evidence has led me to concur in the opinion of the Full Court that the finding absolving the appellant of the charge of cruelty ought not to be allowed to stand. A detailed discussion of the reasons for this conclusion would serve no useful purpose. It is enough to say that, in my opinion, the true explanation of the condition of the respondent's vagina and the external bruises upon her body is that they were caused by the appellant. If the vaginal injuries were not inflicted by the appellant in the manner described by the respondent, they were caused in the course of his forcibly removing contraceptive appliances from her organs. I think that on at least three occasions the appellant was the cause of injuries of this description and that besides, as a result of altercations, he repeatedly used her with unjustifiable violence. His conduct in these respects would supply reasonable cause for her forsaking the matrimonial home notwithstanding the decree for restitution of conjugal rights. But this conclusion does not end the matter. The difficulty remains of deciding whether on her side there was not, before she left her husband's house, and before any justification arose, a failure to comply with the decree. It is clear enough that the respondent resolved to return to her husband only in order that her disobedience

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to the decree might not enable him to obtain a divorce. Probably her feelings towards her husband were no less embittered than were his to her. No doubt the decree for restitution would not have been made unless the Court was satisfied that the husband then had a sincere desire for a real restitution of conjugal rights and a corresponding willingness to render them to his wife (*Woodlands* v. *Woodlands* (1)). But I think he learnt with no pleasure of her resolve to obey the decree and that her attempt to avoid default proved at first as full of embarrassment to him as of difficulty to her. He was, I feel sure, anxious that she should fail in compliance, but enough had been said by the lawyers about " sincerity " to make him cautious in action. Although the parties were in communication with their respective proctors, it is probable that each was uncertain as to what conduct amounted to compliance and what was sufficient default. Probably they were unaware " that the duty of matrimonial intercourse cannot be compelled by this Court, though matrimonial cohabitation may " (*Forster* v. *Forster* (2)). At any rate, I suspect that, on her part, she thought submission to intercourse was required of her and that, on his part, he hoped to make this or the risk of pregnancy the breaking point of her resolve to obey the decree. Dwell under his roof she did, for nearly six weeks. In that period she shared with him the same room and often the same bed. To his house she brought their three children and there cared for them. What household duties she performed is a matter in dispute, but it seems improbable that she attended to her husband's clothes or any other of his personal needs. It is clear that whatever she did was attributable, not to any desire to re-establish permanent domestic relations with him, but to her purpose of complying with the judicial decree and thus closing his way to a divorce. The learned primary Judge (*Owen* J.) described the issue before him as follows: —" What I have to determine is whether the wife has obeyed the spirit of the decree for restitution or has merely attempted to obey the letter of that decree. A decree for restitution directs the wife not only to return home, but to render conjugal rights to her husband, and when a wife does in fact return but the Court sees that she had

(1) (1924) 35 C.L.R. 446.
(2) (1790) 1 Hagg. Con. 144, at p. 154; 161 E.R. 504, at p. 508.

no intention of really obeying the decree, but is merely there in order to appear to obey it, the Court comes to the conclusion and rightly so, that there has not been a real obedience to the decree. But for one aspect of the case," *scil.*, the charge against the husband —" I should have no hesitation in saying that the wife's return was illusory, that she had no intention in coming back of carrying out the decree in its spirit, that she came back in order to place further difficulties in the way of her husband." His Honor then says that, apart from the charge of sexual misconduct against the husband, he would feel no doubt that the wife had really disobeyed the decree but, " if that were to be believed then it seems to me the husband must fail, because if a husband, notwithstanding that his wife has apparently not intended to obey the decree, by his own conduct prevents her from remaining in the home, he can hardly come to this Court for assistance by way of a decree for dissolution." I am not prepared to agree that, if in the course of a pretended but unreal compliance with the decree by one spouse, the other is guilty of conduct which thenceforward would absolve the first from further rendering conjugal rights, the first is to be considered retrospectively as never having failed to comply. The decree requires a return home to the husband within the specified time after service, and commands from that time the rendering to him of conjugal rights. Once it can be correctly said that a failure to comply has occurred, the statute operates to give to the husband a definite ground of divorce which his subsequent conduct would not destroy, whatever other effect it might have (cp. *Harding* v. *Harding* (1)). In *Thomas* v. *Thomas* (noted in the *Commonwealth Law Reports* (2), but otherwise unreported) this Court, as appears from the papers in the Registry, did not affirm the judgment of the Full Court (3), but restored the decree of *Owen* J. upon the ground that so long as the decree for restitution stood, non-compliance therewith constituted a good statutory ground for dissolution, but that it was competent in proceedings by the Crown Solicitor under sec. 21 for the Court under sub-sec. 4 to set aside the decree for restitution as procured by deception and suppression of material facts.

(1) (1886) 11 P.D. 111.
(2) (1930) 45 C.L.R. 604.
(3) (1930) 31 S.R. (N.S.W.) 159; 48 W.N. (N.S.W.) 21.

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Dixon J.

The difficulty in the present case is to accept his Honor's view that, apart from her husband's misconduct, the respondent should be considered to have failed to comply with the decree. To some extent this difficulty arises from a lack of definition in the nature and extent of the duties imposed by a decree of restitution. The old form of sentence in use in the Ecclesiastical Courts has been much modified. The "Clerks' Instructor of Ecclesiastical Courts" of 1740 gives a form of sentence admonishing a husband "to perform Conjugal Rites with his wife and to demean himself towards her at Bed and Board with such affection as he ought to treat his wife." The *causa restitutionis obsequiorum conjugalium* (*Oughton's Ordo Judiciorum* (1728), p. 283) has long since become a suit for the restitution of conjugal rights, not rites; but, even in *Tomlins' Law Dictionary* (1835), the hesitation remains between the two spellings, neither of which expresses the meaning of "*obsequia.*" But the duty imposed by the decree or sentence appears at all times to have been described in vague general terms which, although perhaps as precise as the nature of the obligation permitted, provided a very inexact measure for a requirement enforceable by process of contempt, as it was from 1813 to 1884. In the unreported case of *Gill* v. *Gill* (1823) (cited in *Orme* v. *Orme* (1)), the Dean of Arches (Sir *John Nicholl*) held that a husband who had been decreed "to take his wife home, and treat her with conjugal affection," had not complied with the decree, because, although she had returned to his home and he had not ejected her, yet he "treated her in a manner, certainly, evincing anything but 'conjugal affection,' under circumstances, the particulars of which were specified by the wife in her petition, and constituted, as there laid, a case of great hardship." It does not appear what were the circumstances relied upon, but it is clear that they amounted to active misconduct towards her. In *Wily* v. *Wily* (2), in making a decree for restitution against a husband who had before suit offered his wife "the shelter and protection of his home" upon terms of mutual immunity from molestation, *Hill* J. referred to a statement which the husband had afterwards made in Court that he was prepared to cohabit with his wife and live under the

(1) (1824) 2 Add. 382, at pp. 383-385; 162 E.R. 335, at pp. 335, 336.
(2) (1918) P. 1.

same roof with her and treat her as a wife, but that he had no affection for her. The learned Judge said (1) :—" If it is so, and if, as no doubt is the case, the law cannot compel sexual intercourse, he will be able to comply with all that the decree of the Court can enforce." After holding that the earlier offer involved a refusal of conjugal rights, he went on to say :—" I do not . . . think that even willingness to live under the same roof is *per se* sufficient, having regard to the decision in *Gill* v. *Gill*." " There must be something more and the wife must be treated as a wife." In *Webster* v. *Webster* (2), *Hill* J. pronounced a decree for restitution of conjugal rights against a husband who after suit returned to his wife, occupied the same bed but refused intercourse, maintained a separate establishment and said that he returned only to avoid public proceedings and did not intend to live with her as a husband. *Hill* J. said that he was prepared to find that there was no genuine attempt or intention on his part to return to his wife. In *Fielding* v. *Fielding* (3) followed in *Tew* v. *Tew* (4) the simple duty enforceable by a decree for restitution was considered to amount to " living together " without any superaddition. *Salmond* J. said (5): " The duty enforced was merely the duty of husband and wife to live together under the same roof in the normal relationship of husband and wife, but without reference to the question of intercourse." In *Harris* v. *Harris* (6) the return of a wife for a period of three months but subject to an unexpressed intention of leaving her husband again if she found that she had no sufficient affection for him was held no compliance. *Ferguson* A.C.J. said (7) the case was not one where the party had been dishonest in a simulated compliance by an illusory return, but had returned not with the intention of resuming permanent cohabitation but with the intention of making up her mind whether she would do so or not.

For the most part these cases illustrate rather than resolve the difficulty of determining what amounts to compliance with a decree of restitution. But so long as that remedy is retained it must be

(1) (1918) P., at p. 3.
(2) (1922) 66 Sol. Jo. 486.
(3) (1921) N.Z.L.R. 1069.
(4) (1924) N.Z.L.R. 113.
(5) (1921) N.Z.L.R., at p. 1071.
(6) (1929) 30 S.R. (N.S.W.) 59; 47 W.N. (N.S.W.) 9.
(7) (1929) 30 S.R. (N.S.W.), at pp. 60, 61; 47 W.N. (N.S.W.) 9.

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treated as an independent process imposing an obligation the performance, or non-performance, of which is ascertainable. On the one hand, it is clear that the obligation requires cohabitation, a physical dwelling together. On the other hand, it is clear that it does not require the resumption of sexual intercourse. It cannot, in fact, and in principle ought not to be understood as attempting to, control motives, feelings, emotions, sentiment or states of mind. Its operation must be limited to overt acts and conduct. The fact that an attempt to comply with the decree is actuated by a desire to avoid a divorce cannot operate to make compliance impossible. But the overt acts and conduct that the decree requires are those which belong to a relationship. The relationship is continuous. The behaviour of those occupying it one to another ought therefore to be always consistent with and not repugnant to it. Perhaps, all that can be said is that the decree of restitution requires the spouse against whom it is directed again to dwell with the other spouse in outward acceptance of the relationship, to act as if they were husband and wife maintaining a matrimonial home and to commence no course of conduct intended to cause a separation.

In the present case the respondent appears not to have worn her wedding ring but this she had long disused. The appellant's evidence and his diary contain much material from which it might be inferred that when she returned it was only for a temporary purpose and a defined period of six weeks. But it is not easy to accept his evidence. Her evidence is positive to the effect that she assumed, however unwillingly, the role of a wife in all respects, including sexual intercourse. In face, however, of the opinion of the learned trial Judge, a Court of Appeal cannot act upon her testimony in so far as it is uncorroborated. Nevertheless it was for the appellant to satisfy the Court of the correctness of his case, and on the whole evidence I think the appellant has not established that, before he was guilty of an act of cruelty, she had failed to comply with the decree.

EVATT J. On July 18th, 1932, the present appellant obtained from the Supreme Court of New South Wales in its Matrimonial Causes jurisdiction a dissolution of his marriage with the present respondent.

The ground for the decree was that the respondent had "deserted the petitioner without reasonable cause by reason of her not having complied with the decree of the Court for restitution of conjugal rights."

The suit was heard by *Owen* J., but upon appeal to the Full Court the decree was set aside and an order made dismissing the husband's petition. From the judgment of the Full Court this appeal is brought.

It appears that on February 19th, 1931, *Owen* J. made a decree for restitution of conjugal rights against the wife in favour of the husband. The decree was made in pursuance of sec. 7 (1) of the *Matrimonial Causes Act*. It ordered the wife (1) to return home to the appellant, and (2) to render to him conjugal rights. The form of the order is taken from that appended to the *Rules and Regulations* made by the Supreme Court pursuant to sec. 91 of the Act.

Sec. 11 (1) of the *Matrimonial Causes Act* provides that upon the failure of a respondent named in a decree for restitution of conjugal rights to comply with the decree ordering such restitution, the respondent

> "shall thereupon be deemed to have been guilty of desertion without reasonable cause and a suit for dissolution of marriage or for judicial separation may be forthwith instituted and a decree nisi for the dissolution of the marriage or a decree of judicial separation may be pronounced on the ground of desertion although the period of three years may not have elapsed since the failure to comply with the decree for restitution of conjugal rights."

Sec. 5 of the *Matrimonial Causes Act* 1899, provides that in all suits and other proceedings other than proceedings to dissolve any marriage, the Court shall proceed and act upon such principles as are conformable to those upon which the Ecclesiastical Courts of England acted before the year 1857. Such principles would therefore determine the preliminary question whether the Supreme Court should make a decree for restitution of conjugal rights. As the terms of sec. 11 indicate, failure of a respondent to comply with such a decree is deemed to constitute "desertion *without reasonable cause*." When a suit for dissolution of marriage is subsequently instituted by virtue of sec. 11 (1), the Court's primary function is to inquire whether the respondent has complied with the restitution

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decree. As the proceeding before the Court is one for dissolution, sec. 5 is not made applicable. It is, however, of great value to take into consideration the practice of the Ecclesiastical Courts when they had to decide whether there had been compliance with a decree for restitution.

The first question in this suit is, what is comprised in the " conjugal rights " which the wife was, by the decree, directed to render to the appellant ?

Much of the present controversy has centred upon the question of sexual intercourse, the wife's alleged refusal of it, and the husband's supposed cruelty in relation to it.

Owing to the lack of definition of what duties are required to be rendered in obedience to a decree for restitution of " conjugal rights " and also to the fact that, in matters of sex, euphemism is preferred to plain language, many persons, the present respondent included, seem to regard " conjugal rights " as a mere synonym for sexual intercourse. The respondent appears to have acted upon such assumption, and to have considered, if not actually been advised, that, apart from the duties of such intercourse, she had no duties towards her husband.

It is precisely the opposite theory which many of the Courts have accepted, that the question of sexual intercourse is quite an irrelevant factor in deciding whether one spouse has refused to render conjugal rights to the other. Thus in *Fielding* v. *Fielding* (1), no less an authority than *Salmond* J. said (2) :—

> " It is true that she has refused and still refuses marital intercourse with the petitioner. Such a refusal, however, is not a ground on which a decree for restitution of conjugal rights can be made. The jurisdiction conferred upon this Court by sec. 7 of the *Divorce and Matrimonial Causes Act*, 1908, is the same jurisdiction as that formerly possessed and exercised by the Ecclesiastical Courts in England, save only that by reason of sec. 2 of the amending Act of 1920 the making of a decree is discretionary, instead of a matter of right as formerly. The Ecclesiastical Courts never professed or attempted by means of decrees for restitution of conjugal rights, and imprisonment for disobedience to such decrees, to enforce any duty of sexual intercourse between husband and wife. The basis of such a decree was the wrongful refusal of matrimonial cohabitation. The duty enforced was merely the duty of husband and wife to live together under the same roof in the normal relationship of husband and wife, but without reference to the question of intercourse."

(1) (1921) N.Z.L.R. 1069.

(2) (1921) N.Z.L.R., at pp. 1070, 1071.

He added later (1) :—

"In *A* v. *B* (2) I expressed the opinion that persistent and unjustifiable refusal of marital intercourse amounted to desertion entitling the injured party after the expiry of the statutory period of three years to relief by way of divorce. This, however, is a very different thing from holding that such a refusal is a ground for a decree of restitution of conjugal rights. The jurisdiction in divorce is the new statutory jurisdiction created by the *Divorce and Matrimonial Causes Act*. The jurisdiction in restitution of conjugal rights is the old ecclesiastical jurisdiction, and is limited by the law that was in force in the Ecclesiastical Courts. Conjugal rights in those Courts meant the right of cohabitation and nothing more, and that is what the term means still."

Another illustration of the same tendency is *Tew* v. *Tew* (3), a decision of *Hosking* J., where the petitioner for restitution was the husband. He and his wife and family were still living under the same roof, but she had refused sexual intercourse, the husband having to occupy a separate bedroom. The husband and wife had not spoken to one another for many months. The husband had his meals by himself. The gravamen of the charge was the refusal of marital intercourse. *Hosking* J. dismissed the petition, relying upon *Fielding* v. *Fielding* (4) and *Orme* v. *Orme* (5).

In *Orme* v. *Orme* (5) the suit for restitution was brought by the wife against the husband. Sir *Christopher Robinson* of the Consistory Court of London pointed out that the parties were admitted to be actually cohabiting. He said (6) :—

"The case of *Gill* v. *Gill*, cited, I presume, as the nearest, is very far from being strictly, in point. The husband had been decreed there, in the usual form, (that suit commencing by a libel in the usual form), to 'take his wife home, and treat her with conjugal affection ;' and, moreover, to 'certify his obedience to the decree, on a given day :' as the usual, and necessary, preliminary step, to his dismissal from the effect of the original citation. On that day, a certificate was tendered by the husband ; in objection to the receipt of which the wife prayed, and was permitted, to be heard 'on her petition :' and it clearly appearing, in the result, namely, on the facts disclosed in that petition, fully sustained by affidavits, that, although the wife had taken herself home (for so it appeared) in the absence of the husband, still, that the husband, on his return, though without actually ejecting her, had treated her in a manner, certainly, evincing anything but 'conjugal affection,' under circumstances, the particulars of which were specified by the wife in her petition, and constituted, as there laid, a case of great hardship, the Court did refuse then

(1) (1921) N.Z.L.R., at p. 1071.
(2) (1920) G.L.R. 311.
(3) (1924) N.Z.L.R. 113.
(4) (1921) N.Z.L.R. 1069.
(5) (1824) 2 Add. 382 ; 162 E.R. 335.
(6) (1824) 2 Add., at pp. 384-385 ; 162 E.R., at pp. 335, 336.

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to dismiss the husband; but directed him to certify over, as above, on a future day; when his certificate not being objected to, he was, *ipso facto*, dismissed. But this is far short of a precedent for the institution, *de novo*, of a suit for restitution of conjugal rights, on grounds, similar to the present, of the wife not being treated by the husband with conjugal affection—the cohabitation of the parties neither being, nor ever having been, suspended, that I am aware of. Matrimonial intercourse may be broken off on considerations, (of health, for instance, and there may be other) with which it is quite incompetent to this Court to interfere."

It will be observed that in *Orme* v. *Orme* (1) it was only decided that an original petition for restitution should not succeed where cohabitation had not been suspended, and where the sole ground relied upon was the respondent's refusal of sexual intercourse (cf. *Swabey* on *Divorce*, p. 46). That is the very distinction made from the decision in *Gill* v. *Gill* (cited in *Orme* v. *Orme* (2)), where, undoubtedly, the Court of Arches in the year 1823 treated the mere resumption of cohabitation as an insufficient compliance with a decree for restitution against a husband.

I do not think that *Orme* v. *Orme* (1) is any authority for the proposition of law that persistent and wilful refusal of sexual intercourse by a spouse who is ordered to render conjugal rights is an irrelevant factor in inquiring whether such decree has been complied with. The case of *Gill* v. *Gill* (cited in *Orme* v. *Orme* (2)), on the contrary, would seem to indicate that, upon such an inquiry, it is necessary to pay due regard to all aspects of the conduct of the spouse who is alleged to have disobeyed the decree (cf. *Woodey* v. *Woodey* (3)).

It was in *Forster* v. *Forster* (4) that Lord *Stowell* gave utterance to the statement so frequently quoted and misquoted:

> "Most certainly, what Dr. Harris has said is true, 'That the duty of matrimonial intercourse cannot be compelled by this Court, though matrimonial cohabitation may.'"

But Lord *Stowell* also added (5):—

> "It is not however to be considered as a matter perfectly light in the behaviour of a complaining husband, that he has withdrawn himself without cause, and without consent, from the discharge of duties that belong to the very institution of marriage; and if he has so done, he ought to feel less surprise, if consequences of human infirmity should ensue."

(1) (1824) 2 Add. 382; 162 E.R. 335.
(2) (1824) 2 Add., at pp. 383-385; 162 E.R., at pp. 335, 336.
(3) (1874) 31 L.T. 647.
(4) (1790) 1 Hagg. Con., at p. 154; 161 E.R., at p. 508.
(5) (1790) 1 Hagg. Con., at pp. 154-155; 161 E.R., at p. 508.

In *Synge* v. *Synge* (1) Lord *St. Helier* expressed a view in close accord with two of the three purposes of marriage as stated in the Book of Common Prayer. He said (2) :—

> "The objects of married life, as expressed in the Marriage Service, are not the less true because they are the utterances of a more plain-spoken age than the present; and while human nature remains what it is, I think a husband has a right to decline to submit to a groundless demand of his wife that he should live with her as a husband only in name. Neither party to a marriage can, I think, insist on cohabitation unless she or he is willing to perform a marital duty inseparable from it."

More recently, *Duke* P. said in *Jackson* v. *Jackson* (3) :—

> "Wanton refusal of one or other of the parties to a marriage to have sexual intercourse is no doubt a wrong thing. It is the intentional breach of one of the ties of marriage, but it does not produce either separation or living apart."

And in the same case (4) *Hill* J. considered that :—

> "the refusal of sexual intercourse would have to be considered in connection with the age of the parties, the state of their health, the number of children they already had, and a number of other circumstances."

And he added (5) :—

> "There may be desertion though the husband continues to live under the same roof with the wife, but in such case the facts must be very strong. They must show that the husband really causes the wife to live apart against her will—not only sleep apart, but to live apart. Refusal to occupy the same bed and refusal to have sexual intercourse may be a fact which, taken with other facts, has weight in considering whether the husband has really caused the wife to live apart."

In *Webster* v. *Webster* (6) it appeared that after a wife had filed a petition for restitution her husband without any warning returned to the home. He said that he did not want the case to get into the newspapers, but that he had no intention of living with her as her husband. He also said that he would take her out to dinner and to a theatre once a week, but that was the most he would do. They occupied the same bed, as the only other bed in the flat was occupied by the wife's aunt. The husband did not give up another flat elsewhere which he had been previously occupying. He showed no affection for her. Eighteen days after returning the husband left, leaving a letter stating :—

> "As I told you then, I did not intend to live with you as a husband and I do not intend to do so again after the experience of the last two weeks."

(1) (1900) P. 180.
(2) (1900) P., at p. 195.
(3) (1924) P. 19, at pp. 23, 24.
(4) (1924) P., at p. 27.
(5) (1924) P., at pp. 26-27.
(6) (1922) 66 Sol. Jo. 486.

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Hill J. treated the case as though the wife had filed a fresh petition after the husband's departure. He made a decree for restitution. He found that there was no genuine attempt or intention on the husband's part to return to the wife, and so disregarded the period of eighteen days, pronouncing a decree based upon the husband's refusal to return prior to the filing of the wife's petition.

In *Wily* v. *Wily* (1) (a wife's petition for restitution of conjugal rights), it appeared that the husband in reply to the usual affectionate letter of the petitioner, said :—

> "In answer to your letter I perceive the time has arrived for plain speaking, and I trust that what I have to say will not cause you pain. Should you desire to give up your work at the hospital and return to me, I will decidedly give you the shelter and protection of my home. But I cannot and will not, under any circumstances, cohabit with you on terms of our early married life. I have lost all affection for you, and when I recall the petty acts of jealousy, espionage and habitual discussion with others concerning me, I realize that it is impossible to make a fresh start. You shall have your room without the slightest molestation from me and I must be immune from every molestation from you."

Hill J. held that the husband's letter sufficiently evidenced his then refusal to render conjugal rights, and rejected the argument that "willingness to live under the same roof is" *per se* performance of the husband's duties. As authority for this he referred to *Gill* v. *Gill* (cited in *Orme* v. *Orme* (2)). He added, *obiter* (3) :—

> "The respondent (husband) now says that he is prepared to cohabit with his wife and live under the same roof with her and treat her as a wife, but that he has no affection for her. If it is so, and if, as no doubt is the case, the law cannot compel sexual intercourse, he will be able to comply with all that the decree of the Court can enforce." He also said : "The husband now says in effect that he is prepared to do that," i.e., treat the wife "as a wife."

This analysis of some of the leading cases shows that it is not correct to assert that a deliberate and continued refusal of sexual intercourse can never be relied upon by the other spouse for the purpose of evidencing failure in the duty to "render conjugal rights." On the contrary, such wilful refusal may in all the circumstances prove or tend to prove that one of the spouses is according merely nominal and not real adherence to the decree requiring restitution. It follows that the persistent and wilful refusal of

(1) (1918) P. 1.
(2) (1824) 2 Add., at pp. 383-385 ; 162 E.R., at pp. 335, 336.
(3) (1918) P., at pp. 3, 4.

sexual intercourse cannot always be treated as an irrelevant part of the inquiry in these cases.

This may be an understatement of the position for *Bishop* says (*Bishop* on *Marriage and Divorce*, 6th ed. (1881), vol. I., par. 778, p. 584) :—

> "Yet it is by no means certain that the Court would discharge a husband . . . until he had received his wife, not only to his habitation, but to the matrimonial bed."

and affixes a footnote as follows (p. 584) :—

> "A writer in the *London Law Magazine*, vol. 50, p. 275, shows, that, by the canon law, whence the suit for restitution of conjugal rights was derived, the court would compel carnal copulation ; but he thinks the English tribunals have altered the rule, for the purpose of relieving somewhat the asperities of a cruel and unjust proceeding, which he considers this suit to be."

However that may be, it is not safe to accept *Hill* J.'s *obiter dictum* in *Wily* v. *Wily* (1) that a husband who openly admitted that he had lost all affection for his wife, and who on that account refused to have any sexual relationship with her, was fully complying with a decree ordering restitution. On the contrary, it is probable that one spouse who has completely lost all love and affection for the other, cannot well comply with a decree directing the rendering of conjugal duties. Resumption of cohabitation by such a person would, almost inevitably, be followed by acts or omissions clearly evidencing a failure to render conjugal rights.

In the marriage service, the woman promises to "obey him, and serve him, love, honour, and keep him in sickness and in health." The man's promise is to "love her, comfort her, honour, and keep her in sickness and in health." Revision or elision of some of the promises has been attempted, and, with or without authority, been made. But the Prayer Book's third stated purpose for which marriage was ordained—"mutual society, help, and comfort," is of the essence of the marriage relationship. And it is difficult to see how, upon the assumption that all love and affection have disappeared, this fundamental purpose can be carried out.

In the present case, *Owen* J. did not accept the evidence of the respondent that the appellant had cruelly ill-treated her in attempting to have sexual intercourse with her. The wife returned to the

(1) (1918) P. 1.

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home armed with contraceptives, and the view of *Owen* J. tends to the conclusion that she brought injury upon herself by their use. It is impossible to say that his view was not permissible, because he entirely disbelieved the wife's evidence. Upon the hearing of the petition for restitution she made most serious charges against her husband, and these were made without foundation.

The wife remained at home for a period of six weeks only. The time and manner of her arrival showed that, from the outset, she did not intend to restore normal matrimonial relations with her husband. She neglected the house, she paid no attention to the husband's comfort, and very little to that of the children; she shunned his society, and, even before the children, insulted and humiliated him.

The reason for her conduct is not in doubt. Whatever love and affection she had ever had for him, had completely vanished. She had been defeated in, and discredited during, the bitterly contested litigation before the Supreme Court. She had come to hate her husband. But she was determined, if possible, to prevent the dissolution of the marriage. She was advised and knew that, unless she complied with the decree for restitution, dissolution might lawfully take place. She returned home, not in order to perform conjugal duties, but to feign such performance so as to win the next bout of the litigation.

If, as I think, the husband is entitled to be acquitted upon the grave charge of deliberately inflicting injuries upon his wife, the case becomes abundantly clear. It is the case of a spouse who is directed to render conjugal rights, and who returns home, but does not render conjugal rights or perform any conjugal duties. Mere residence under the same roof is not a sufficient compliance with the decree. The Ecclesiastical Courts would not have discharged her in such a case, and *Gill* v. *Gill* (cited in *Orme* v. *Orme* (1)), is a convincing illustration of the relevant principle.

In the circumstances, I think that the Full Court should not have interfered with the decree made by *Owen* J., and that the appeal should be allowed.

(1) (1824) 2 Add., at pp. 383-385; 162 E.R., at pp. 335, 336.

McTIERNAN J. This is an appeal from the judgment of the Full Court of New South Wales setting aside a decree nisi for the dissolution of marriage. The petition in the suit for dissolution of marriage was founded upon the allegation that the wife had failed to obey a decree for restitution of conjugal rights made against her on the application of the husband in a prior suit. Sec. 11 of the *Matrimonial Causes Act* 1899 of New South Wales says that if the respondent fails to comply with a decree for restitution of conjugal rights, the respondent shall thereupon be deemed guilty of desertion without reasonable cause and a suit for dissolution of marriage or judicial separation may be forthwith instituted and a decree for the dissolution of the marriage or a decree of judicial separation may be pronounced on the ground of desertion, although the period of three years may not have elapsed since the failure to comply with the decree for restitution of conjugal rights. By sec. 13 it is a ground for dissolution of marriage on the petition of the husband that his wife has without just cause or excuse wilfully deserted him and without any such cause or excuse left him continuously so deserted during three years and upward. It may be noted that the Court may also dissolve a marriage on the petition of the wife on the same ground (sec. 16).

After the decree for restitution of conjugal rights was served on the wife she returned to the house appointed by the husband on 29th March 1931, that is within the time limited by the decree, and stayed there until the 7th May 1931, when she again left. On 11th May the husband filed a petition for the dissolution of the marriage on the ground contained in sec. 13. In her answer the wife denied that she had deserted the petitioner without reasonable cause by reason of her failure to comply with the decree for restitution of conjugal rights. The Full Court of the Supreme Court of New South Wales (*Street* C.J., *James* and *Davidson* JJ.) held that the finding of the learned trial Judge, *Owen* J., which was in effect that the wife had not complied with the decree for restitution of conjugal rights because she left home without sufficient justification, could not be supported. The Full Court held that the inference to be drawn from the established facts was that the wife was justified in leaving the home on 7th May. *Street* C.J. delivering the judgment of the Court said :—" The case is not one in which we are merely

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called upon to decide between the credit to be given to the husband and the wife in respect of matrimonial quarrels and disturbances which occurred before she left her home; in determining whether her husband's conduct was such as to justify her leaving home when she did on 7th May, Dr. Grieve says that when he saw her on that day she was a nervous wreck and that assuming her condition to have been due to her husband's conduct it would not have been safe for her to return home to her husband. In my opinion the only inference to be drawn from the facts quite apart from the credit to be given to her or to him, is that her condition as Dr. Grieve saw it on 7th May was due to her husband's conduct and to his treatment of her. That being so it seems to me that the learned Judge's finding, which was in effect that she had not complied with the decree for restitution of conjugal rights made against her because she left home without sufficient justification, cannot be supported. I do not think on the evidence as a whole that the case for the petitioner that his wife had left her home without justification, was made out. On the contrary I think that on the evidence the inference to be drawn from the established facts was that she was justified in leaving her home as she did." With that finding I agree. A consideration of Dr. Grieve's evidence as to the wife's injuries and bruises, and the regions of her body where they appeared does not, in my opinion, admit of the conclusion that they were all self-inflicted. Dr. Grieve who spoke of her condition on 7th May said :—" She had bruises on both thighs. The vaginal mucuous membrane was congested—that would be swollen and red. She had a swelling in the right mastoid region—the bony prominence behind the ear—and also in the left parietal region—towards the vertix of the skull. And she had swellings due to recent bruisings on the left upper arm and both wrists. There were some loose hairs present in the right mastoid region, hair that had been separated from but was still adhering to the other hair." The husband's diary containing a record of the manner in which he admits he treated his wife and what occurred between them strongly reinforces the inference that he violently abused and ill-treated her.

It appears that within the time limited by the decree for restitution of conjugal rights, the wife returned home with the children of the

marriage and for six weeks lived under the husband's roof, performed some household duties, dined with the husband and children in the home and occupied his bed. It also appears that she hated the appellant, was violent in deed and in word to him, bitterly quarrelled with him and in the main neglected her household duties. Her motive in returning home and occupying her husband's bed was to comply with the decree and thereby avert the dissolution of the marriage. But fearing pregnancy she provided herself with contraceptives. The appellant had no moral objection to this device but when he became aware of it I have no doubt that he insisted that she should submit to him without eliminating the possibility which she dreaded so that she might be forced to live apart from him and break the decree. He resorted to violence to attain this result and I think that it is a correct inference that she was injured in these struggles. It was contended on behalf of the appellant that notwithstanding that the wife returned to his bed and board, she failed to comply with the decree during the six weeks that she was in the house because she had not the proper disposition for its fulfilment, her motive being to wreck the appellant's plan to have the marriage dissolved. But it is not the duty of the Court in ascertaining whether there has been failure to comply with a decree for restitution of conjugal rights to measure the affection which one spouse should have for the other and to search the heart of the respondent to ascertain whether or not acts, which might constitute compliance with the decree, have been done, with that standard measure of affection. I am not aware that the law has invented the "reasonably affectionate spouse." Moreover conduct on the part of the respondent which has the objective quality of compliance with the decree, does not fail to operate as compliance because it was done with the motive of averting what might be the consequence of disobedience, namely dissolution of the marriage. Although bitter strife raged in this home, yet the wife could not, in my opinion, be held to have failed to comply with the decree while the parties lived together, the respondent taking the place of a wife in the matrimonial home, however imperfectly, and occupying the appellant's bed.

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But six weeks after her return to the home she left it. If she were not justified by cruelty on the part of the husband in leaving, her departure after so brief a stay, may have amounted to a failure to comply with the decree. Indeed the husband appears to have acted upon the view that failure to comply occurred when she left the house on 7th May for it was not until 11th May that he filed his petition to have the marriage dissolved. In the view which I have taken on the issue of cruelty the appellant cannot, obviously, rely upon the wife's departure which was justified by his cruelty, as a breach of the decree if she had not already broken it. In view of the finding of the issue of cruelty against the husband it is unnecessary to determine the grave question whether by reason of the wife's conduct in seeking to prevent pregnancy she failed to comply with the decree. I am of opinion, that if this question were answered against the wife or if it were decided on any other ground that she broke the decree before she departed, the husband would still fail because the cruelty found against him should operate as a bar to his petition for the dissolution of the marriage. It would be a startling result if notwithstanding the finding of cruelty the statute should require that the husband's petition for dissolution of marriage be allowed. A husband's suit for dissolution of marriage based on the failure of the wife to comply with the decree for restitution of conjugal rights is in reality under the statute, a suit for dissolution of marriage on the ground of desertion (secs. 11 and 13). Sec. 20 provides, *inter alia*, that sec. 19 (2) shall apply to a petition under sec. 13. Sec. 19 (2) provides that the Court shall not be bound to pronounce a decree for dissolution of marriage if it is of opinion that the petitioner has been guilty of cruelty towards the other party to the marriage. In my opinion the Court should upon the finding that the husband's cruelty justified the wife in leaving the matrimonial home exercise its discretion to refuse to make the decree for dissolution of marriage even if it came to the conclusion that prior to such cruelty the wife failed to comply with the decree for restitution of conjugal rights, that is, technically deserted her husband. Sec. 19 (2) does not expressly say that the cruelty, which the Court is thereby authorized to take

into consideration, should have been committed before the desertion occurred. Desertion without just cause or excuse might conceivably occur although the husband were cruel to the wife before the desertion commenced. The section does not confine the discretion of the Court to cruelty committed before the desertion was complete. The language of the section does not warrant the view that cruelty committed after the desertion should be excluded from the Court's consideration. The cruelty of the husband, which I think is established in this case, cannot be any the less a good ground for refusing his petition because the desertion upon which it is founded, assuming the wife disobeyed the decree, is imputed to her by the statute.

In my opinion, the appeal should be dismissed.

As the Court is equally divided as to whether the appeal should be allowed or dismissed the decision appealed against will stand in accordance with the provisions of sec. 23 (2) (*a*) *of the Judiciary Act* 1903-1932.

Solicitor for the appellant, *A. E. Cupit.*

Solicitor for the respondent, *B. M. Salmon.*

J. B.