[HIGH COURT OF AUSTRALIA.]

WALKER . . . . . APPELLANT;
APPLICANT,

AND

WALKER AND ANOTHER . . . . RESPONDENTS.
RESPONDENTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1937.

SYDNEY, *Aug.* 20.

Latham C.J., Rich, Starke, Dixon, Evatt and McTiernan JJ.

Husband and wife—Maintenance—"Leave without support"—Wife in New South Wales—Husband in, and resident of, Territory of New Guinea—Jurisdiction of State court of summary jurisdiction—Deserted Wives and Children Act 1901-1931 (*N.S.W.*) (*No.* 17 *of* 1901—*No.* 33 *of* 1931), *secs.* 4, 7.

Evidence—Letter called for and produced—Admissibility in evidence—Probative value.

A wife, who resided with her husband in the Territory of New Guinea, proceeded, in 1932, with his consent, to New South Wales. Whilst on leave in 1933, the husband spent a few weeks with his wife in New South Wales, but, having quarrelled with her, he returned to New Guinea and she thereafter resided in New South Wales. The wife did not again live with her husband, and saw him again on one occasion only, in 1935, when he was hostile to her. Although he continued to reside in New Guinea, the husband forwarded to the wife an allowance for herself and the two children of the marriage. Deeming the allowance insufficient, the wife applied for and obtained an order under sec. 4 of the *Deserted Wives and Children Act* 1901-1931 (N.S.W.) on the ground that at Wollongong, New South Wales, the husband had "left her without means of support, that is, with insufficient means of support."

Held that it was open to the magistrate to find that the husband left his wife without means of support in New South Wales, so as to be liable under sec. 4 of the *Deserted Wives and Children Act* 1901-1931 (N.S.W.).

Renton v. *Renton*, (1918) 25 C.L.R. 291, followed.

While giving evidence the wife stated that her husband was an accountant and received a certain salary. This statement was objected to by the husband's solicitor on the ground that "she does not know," whereupon the wife stated that she "got that information by letter." The solicitor called for the letter and it was produced. After reading it the solicitor said that he objected to the letter, but on the application of counsel for the wife, it was admitted in evidence. The letter had been written to the wife's father by a person in New Guinea and contained the results of inquiries relating to the husband made by him.

Held, by *Latham* C.J., *Starke*, *Dixon*, *Evatt* and *McTiernan* JJ., that the husband's solicitor was bound to put the letter in evidence, and, by *Latham* C.J., *Dixon*, *Evatt* and *McTiernan* JJ. (*Starke* J. dissenting), that the magistrate was entitled to treat it as having probative value upon the question of the husband's means.

Calvert v. *Flower*, (1836) 7 C. & P. 386; 173 E.R. 172, and *Wilson* v. *Bowie*, (1823) 1 C. & P. 8; 171 E.R. 1079, referred to.

Decision of the Supreme Court of New South Wales (Full Court), affirmed.

APPEAL from the Supreme Court of New South Wales.

For some time prior to September 1932 Alan Keith Walker and his wife, Grace Courtenay Walker, had resided together in the Mandated Territory of New Guinea, where he was employed in the Public Service of the Territory. During that month the wife, with Walker's consent, proceeded to Sydney, New South Wales. Walker subsequently obtained leave and in January 1933 joined his wife at Sydney, where they lived together for a few weeks. At the end of that period they quarrelled and then each resided at a different address and saw each other only occasionally. In September 1933, the wife received a letter from Walker and learned that he had just returned to New Guinea. Correspondence ensued between Walker and his wife, and he sent her money at the rate of £4 per week, which in September 1935 he reduced to £3 per week. In that month Walker returned to Sydney, and some days after his arrival, by appointment, met his wife at a hotel in Sydney. According to the wife Walker was then definitely hostile towards her and told her that he did not want to see the two children of the marriage. Walker remained in Sydney for about a month, but his wife, who, with the children, had for some time past resided with her parents at Wollongong, New South Wales, did not again see him. He then returned to New Guinea, but continued to pay the sum of £3 per week to the wife for the maintenance of herself and the two children. In a

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complaint taken out under sec. 4 of the *Deserted Wives and Children Act* 1901-1931 (N.S.W.), and in which reference was made to the *Child Welfare Act* 1923 (N.S.W.) and the *Service and Execution of Process Act* 1901-1934, the wife alleged that on and since 1st October 1935 at Wollongong, New South Wales, Walker "left her . . . without means of support, that is, with insufficient means of support," and she asked for an order for an allowance for herself, and also for the legal custody of the two children of the marriage, and an allowance for their support. At the hearing before the magistrate, which took place in October 1936, it was shown that Walker had been appointed in March 1935 to another position in the public service of the Territory of New Guinea at a salary of £480 per annum. In the course of her evidence the wife stated that Walker was an accountant in New Guinea, and was in receipt of a salary of £700 to £750 per annum. Walker's solicitor objected to that statement on the ground that "she does not know," whereupon the wife stated that she "got that information by letter." The solicitor then said: "I call for that letter." Counsel for the wife had the letter in his possession and, having warned Walker's solicitor of the possible consequences of his calling for it, produced it. The solicitor, after looking at it, said: "I object to that letter," but, upon the application of counsel for the wife, the letter was admitted in evidence. The letter bore date 5th August 1936, and had been written to the wife's father by a solicitor practising in New Guinea, who stated in the letter that he had made inquiries and had found that Walker was employed in New Guinea as an accountant by a named mining company, and that he received a salary of not less than £700 ranging to about £750 per annum. The wife stated that she had last written a letter to Walker in August 1933, and had not since then asked him to provide a home for her. She further stated that she "would not go home to him now if he asks me." Walker, who was not present at the hearing, was ordered to pay the sum of £5 per week for the support of the wife, and 15s. per week for the support of each of the two children to the age of sixteen years, and he was also ordered to pay certain arrears by specified instalments.

A rule absolute for prohibition against the magistrate's order, obtained by Walker from a judge of the Supreme Court of New

South Wales, was set aside by the Full Court of the Supreme Court and the rule nisi discharged.

From that decision Walker appealed to the High Court.

Wallace (with him *Macfarlan*), for the appellant. The permanent home of the appellant is within the Territory of New Guinea, and he was residing at that home at the date of the offence, if any, alleged by the respondent. Therefore, if the offence of desertion was committed by the appellant, it was committed in New Guinea and the magistrate had no jurisdiction to deal with the matter. The *Deserted Wives and Children Act* 1901-1931 (N.S.W.) does not operate exterritorially.

[DIXON J. referred to *Renton* v. *Renton* (1).]

The facts in that case differ from the facts in this case. Whether it involves an act of desertion or not, the leaving without support takes place where the husband resides, not where, either by agreement or otherwise, the wife may happen to be. The letter written to the respondent's father was not admissible in evidence. What took place at the hearing before the magistrate in regard to this letter was analogous to an examination on the *voir dire*. Although it was admitted in evidence the letter had no probative value, and there was no sufficient and satisfactory evidence *aliunde* to support the magistrate's order (*Peck* v. *Adelaide Steamship Co. Ltd.* (2); *Munday* v. *Gill* (3)). In accepting the contents of the letter as evidence the magistrate erred. The respondent did not discharge the onus of proof as to the appellant's income and means. The order made was not reasonable within the meaning of sec. 7 of the *Deserted Wives and Children Act*. "Reasonable" means not only as regards the wife but also as regards the husband. There was no evidence that the appellant left the respondent without means of support: on the contrary, he had supported her throughout. Nor is there any evidence of desertion, either actual or constructive, by the appellant. The respondent refuses to return to the appellant (*Ex parte Pullen* (4), approved in *Chantler* v. *Chantler* (5)).

(1) (1918) 25 C.L.R. 291.
(2) (1914) 18 C.L.R. 167, at p. 174.
(3) (1930) 44 C.L.R. 38, at pp. 48 et seq.
(4) (1899) 15 W.N. (N.S.W.) 269.
(5) (1906) 4 C.L.R. 585, at p. 592.

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Spender K.C. and *Curlewis*, for the respondent wife, were not called upon.

The following judgments were delivered :—

LATHAM C.J. This is an appeal from an order of the Full Court of the Supreme Court of New South Wales setting aside a rule absolute and discharging a rule nisi for prohibition against a magistrate's order for maintenance of appellant's wife and children. In order to succeed upon these proceedings, which are by way of statutory prohibition, it is necessary for the appellant to show that the order of the magistrate cannot be supported upon the evidence. In my opinion, there is evidence upon which the order can be supported. In the first place the order was attacked because, it was said, the wife had not been left without means of support and a question was raised as to the reasonableness of the amount ordered. A case cited in argument was *Munday* v. *Gill* (1) dealing with the procedure by way of statutory prohibition. A consideration of the judgments in that case shows that, as the jurisdiction of the magistrate to make the maintenance order cannot be challenged, the appellant in this case must show that "the evidence does not in reason support the decision." In my opinion, although it is true that the magistrate might have come to another conclusion, it is impossible to say that the evidence does not in reason support his decision. Whether the wife has means of support was a question of fact for the magistrate and his conclusion cannot be set aside unless it was beyond reason. The order cannot be said to be beyond reason.

It was next complained that inadmissible evidence was considered by the magistrate in the process whereby he reached that conclusion. That evidence consisted of a letter written between persons who are not parties to the proceedings. It was mentioned in evidence as the ground of the belief of the wife as to her husband's means. Counsel for the husband called for the letter and the letter was put in evidence. The law on this matter can be found in *Taylor* on *Evidence*, 12th ed. (1931), vol. 2, pars. 1817, 1818. I think there is no doubt that as counsel called for the letter it was rightly admitted as evidence. Once the letter was in, it was for the magistrate to

(1) (1930) 44 C.L.R. 38.

give such weight to it as he might think proper, subject to the limitation that he must not act beyond reason, but he was entitled to attach some importance to the letter as some evidence of the husband's means.

It was further contended that, if there were a leaving without means of support, it took place in New Guinea, where the husband lived, and not at Wollongong, where it was alleged to have taken place. The arguments relied upon to support this proposition are, in my opinion, met by the decision in *Renton* v. *Renton* (1) where the facts are very similar and where it was held that, the husband, being in one State, and the wife being in another State with her husband's consent, and the husband omitting to support his wife, he had left her without means of support in the State in which she was.

RICH J. This case, so far as the jurisdiction point is concerned, is concluded by *Renton* v. *Renton* (2), decided on similar facts. If the circumstances justify it an application to vary, suspend or discharge the order can be made under sec. 21 of the *Deserted Wives and Children Act* 1901-1931 (N.S.W.).

STARKE J. I agree that the appeal should be dismissed, but I do not agree that the letter which has been referred to was admissible in evidence of the husband's means. It is, of course, an old rule that if a party calls for a document in the course of the trial he is bound to put it in if so required, but it does not follow that every statement in such a document, hearsay and otherwise, is evidence. It is for the court to consider the matter in each case, and in this particular case all that happened was that the letter was put in to confirm the wife's statement that her knowledge of her husband's means was based on hearsay and nothing else. I should not have thought that the letter could in these circumstances be used affirmatively, or that it had any probative value whatever. However, I think there was other evidence which was given of the husband's position in life and positions that he had occupied which were sufficient to support the decision of the magistrate.

(1) (1918) 25 C.L.R. 291.

(2) (1918) 25 C.L.R., at p. 299.

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DIXON J. I agree. In *Wharam* v. *Routledge* (1) Lord *Ellenborough* said :—" You cannot ask for a book of the opposite party, and be determined upon the inspection of it, whether you will use it or not. If you call for it, you make it evidence for the other side, if they think fit to use it."

In *Calvert* v. *Flower* (2) before Lord *Denman* C.J. a book was called for by the defendant's counsel, Mr. *Fitzroy Kelly*. The report goes on as follows :—" The book was produced, and *Kelly* turned over several pages of it, so as to look at the contents of them. Lord *Denman* C.J. : I ought now to say, that if Mr. *Kelly* looks at the book he will be bound to put it in as his evidence. *Kelly* : Certainly, I am fully aware that I must do so. Lord *Denman* C.J. : I have mentioned this because it has been supposed by some, that an opposite counsel may look at papers or books called for under a notice to produce, and then not use them."

The important part of the rule which Lord *Denman* states is that the party calling for a document and inspecting it must, if required, put it in as part of his case ; it is evidence tendered by him. When it is in evidence as part of the proof adduced by him, its probative value must be dealt with as a matter of fact. If the matters which are contained in the document are completely irrelevant to the issues then, of course, they must be thrown out of consideration. But if it contains statements of fact in relation to relevant matters, then it becomes a medium of proof to which such weight may be attached as circumstances warrant. Whether in the end it tells in favour of the party who insisted that it should be put in or in favour of the party calling for it will, of course, depend on the facts of the case, but the purpose of the rule is to enable the party producing the document to have it put in evidence so that he may rely upon it.

In the present case it appears to me that the magistrate was entitled to take into account the contents of this letter. So taking them into account, supported as they were by other evidence, he was justified in fixing the sum which he did. It would not be right for this court, as a third tribunal of fact, to review his determination on such a matter.

(1) (1805) 5 Esp. 235 ; 170 E.R. 797.
(2) (1836) 7 C. & P. 386 ; 173 E.R. 172.

I agree that it was open to the magistrate to find that the appellant left his wife without means of support in New South Wales so as to be liable under sec. 4 of the *Deserted Wives and Children Act* 1901-1931. The authority of *Renton* v. *Renton* (1) is probably a sufficient answer to the contention that his breach of duty arose outside the jurisdiction. Indeed the expression "leave without support" implies that the condition of the wife is to be regarded. When it is once settled that it is the omission of the husband to supply her with means of support and not his physical departure that is meant by "leave," it appears to follow that the locality where through his omission she is without means must be considered. In the present case the husband did leave his wife in New South Wales physically. Having left her physically, he omitted to supply her with what was considered to be an amount sufficient for her support.

In my opinion the appeal should be dismissed.

EVATT J. I agree that the appeal should be dismissed. I should add a word or two upon the question whether the magistrate was entitled to consider or place any reliance upon the document purporting to be a letter, dated August 5th, 1936, to the wife's father, from a solicitor carrying on his practice at Wau, New Guinea. I agree with the observations of the Chief Justice and my brother *Dixon* that it is erroneous to hold that, in the circumstances, the magistrate was not entitled to rely upon the document in question. The point is important in general practice. Clearly the document was not admissible in evidence. But, so soon as counsel for the husband called for it, and it was produced, counsel for the wife became entitled to have the document read as part of the evidence in the case. He exercised this right.

Street J. referred to the ruling of *Park* J. in *Wilson* v. *Bowie* (2), but held that the particular document to which I have referred was not "material" because "material means material evidence on a relevant point and this was not evidence at all." In the case cited by his Honour, *Park* J. said: "If the plaintiff's counsel called

(1) (1918) 25 C.L.R. 291.
(2) (1823) 1 C. & P. 8, at p. 10; 171 E.R. 1079, at p. 1080.

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for a paper, and looked at it, they must read it in evidence, if it is at all material to the case; but if it does not bear on the case, he need not read it."

Why was not this document "material" to the case? In my opinion it was most "material," although, but for its being called for, it was "inadmissible." The document purported to narrate the solicitor's personal inquiry into the affairs of the husband, and reported that the husband was working in the district as accountant to a named mining company and was in receipt of a salary ranging between £700 and £750 per annum. A most relevant and material portion of the magistrate's inquiry concerned the husband's means. Therefore the document was "material." Whether such a document has "probative value" is dependent on the circumstances and of these the tribunal of fact must take account. I deny the proposition that, merely because the document was "hearsay" and therefore inadmissible, it is necessarily deprived of probative value. It may have considerable probative value, and I think that, here, the magistrate attached importance to the document. Why should he not? The document might have been a forgery, or the solicitor in question might not have been telling the truth in his report, or the substance of his report might have been wrong. All these are possibilities, but they are all very highly improbable, and, in the ordinary affairs of life, no one would hesitate to come to the conclusion that the report as to the husband's income was probably accurate, especially as no evidence whatever to the contrary effect was called on the husband's behalf.

In my opinion the magistrate was well entitled to attach weight to the document, and I have no doubt he did attach weight to it.

McTIERNAN J. I agree with the judgment of the Chief Justice and concur in the additional observations of my brothers *Dixon* and *Evatt*.

Appeal dismissed with costs.

Solicitors for the appellant, *Baker & Baker*.

Solicitors for the respondent wife, *Boyce & Boyce*.

J. B.