[HIGH COURT OF AUSTRALIA.]

KELLWAY . . . . . APPELLANT;
PETITIONER,

AND

KELLWAY . . . . . RESPONDENT.
RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Nov.* 8, 9.

SYDNEY, *Nov.* 29.

Rich, Starke and Evatt JJ.

Husband and Wife—Divorce—Desertion—Departure from home by wife—Agreement to resume cohabitation—Assent by wife—Failure of husband to carry out agreement—Desertion by husband—Marriage Act 1928 (*Vict.*) (*No.* 3726), *sec.* 75 (*a*).

The petitioner and the respondent were married in 1922. During the matrimonial life there were frequent quarrels, and the wife complained of the husband's treatment of her. After one quarrel the wife left the matrimonial home and remained away for about two years. The circumstances of the separation were not such as to constitute desertion on the part of either the husband or the wife. The parties then met and agreed upon a reconciliation, and the wife subsequently asked the husband to visit her solicitor to settle certain details for carrying out the agreement, but the husband declined to do this and refused to continue with the reconciliation.

Held by *Rich* and *Evatt* JJ. (*Starke* J. dissenting) that, as the parties had agreed to resume cohabitation and the inference which should be drawn from the circumstances of the case was that the husband had determined finally to terminate the matrimonial relationship, his refusal to carry out the agreement for reconciliation amounted to desertion on his part without just cause or excuse.

Decision of the Supreme Court of Victoria (*Gavan Duffy* J.) reversed.

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APPEAL from the Supreme Court of Victoria.

The appellant, Dorothy Margaret Mary Kellway, petitioned for dissolution of her marriage with the respondent, John Evelyn Kellway, on the ground of desertion.

The parties were married on 22nd November 1922, the wife being then eighteen and the husband twenty-two years of age. There was one child of the marriage. The petitioner alleged that the respondent did not support her or the child and caused her humiliation by giving her valueless cheques with which to pay the tradespeople. There were various quarrels between them as to this and other matters. Finally, about June 1926, there was a quarrel about the petitioner's going to a dance given for her cousin. She thereupon left the matrimonial home, taking the child with her, and went to stay with her mother. In August 1928 the husband suggested a reconciliation, and there was a discussion between them as to a resumption of cohabitation. An agreement was reached, but the precise method of carrying out the agreement was left to stand in abeyance until the end of 1928. Subsequently, on the wife's suggestion that she and her husband should go to the wife's solicitor to discuss the matter, the husband receded from the agreement. He told her that if she was taking that attitude he could do nothing further, and in his evidence said that that was the final break.

Gavan Duffy J., who tried the case, held that the acts of the husband were not such as to enable the wife to leave the matrimonial home in 1926 and say she had been driven out. His Honour also found that nothing definite was arranged as to a reconciliation in August 1928 and that it was left over to a future occasion to make the actual arrangement, and that there was nothing said at that meeting which would amount to a definite unconditional offer by the wife to return. His Honour accordingly dismissed the petition.

From that decision the petitioner appealed to the High Court.

Wilbur Ham K.C. (with him *P. D. King*), for the appellant. If there was no desertion when the respondent drove the petitioner out, there was when he refused to take her back after the reconciliation in August 1928. *Gavan Duffy* J. thought that, as there was not an unconditional offer to return home, desertion by the husband could

not arise from that date. The offer to return need not be unconditional, for the condition may be justified (*Oldroyd* v. *Oldroyd* (1); *Young* v. *Young* (2); *Gibson* v. *Gibson* (3); *White* v. *White* (4)). In this case, if there were a condition, it was reasonable.

Leo Little, for the respondent. The wife in this case deserted the husband without just cause or excuse and, as she remains the guilty party, her offer to return must be regarded in that light. If a wife has deserted her husband, a refusal of her offer to return does not necessarily constitute desertion by him (*Hutchinson* v. *Hutchinson* (5); *Olsen* v. *Olsen* (6)). If there was any desertion the wife in this case deserted the husband. The judge's finding should not be disturbed.

Wilbur Ham K.C., in reply.

Cur. adv. vult.

The following written judgments were delivered :— Nov. 29.

RICH J. The petitioner in this case prays for a dissolution of the petitioner's marriage on the ground of desertion provided in sec. 75 (*a*) of the *Marriage Act* 1928. The petition was heard by *Gavan Duffy* J., who dismissed it. The petitioner now appeals to this court.

In an appeal from a primary judge it is the duty of a court of appeal to make up its own mind, not disregarding the judgment appealed from and giving special weight to that judgment in cases where the credibility of witnesses comes into question, but with full liberty to draw its own inference from the facts proved or admitted, and to decide accordingly (*Mersey Docks and Harbour Board* v. *Proctor* (7)). I fully endorse the statement in Mr. Justice *Gavan Duffy's* judgment as follows : " I think when she described her life with her husband, that she is giving a substantially true enough picture, that is, to this extent, that she complains that he treated

(1) (1896) P. 175, at pp. 186, 187.
(2) (1903) 3 S.R. (N.S.W.) 258; 20 W.N. (N.S.W.) 80.
(3) (1859) 29 L.J. P. & M. 25.
(4) (1908) 7 C.L.R. 477.
(5) (1908) V.L.R. 411; 30 A.L.T. 23.
(6) (1915) V.L.R. 526; 37 A.L.T. 48.
(7) (1923) A.C. 253, at pp. 258, 259.

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her unkindly, that he was unsympathetic, that he was hard and quarrelsome with her, that he made her life unpleasant by his careless, and in some ways dishonest, method of conducting his finances; and that after they were separated he both by his conduct and his letters showed none of the sympathy or willingness to conciliate that one might expect from a loving husband." The conduct of the husband so described and his subsequent conduct after her departure do throw some light upon his state of mind and attitude in 1928 when the parties met for the purpose of negotiating for a resumption of cohabitation. This conduct and a quarrel about a dance led to a suspension of cohabitation. *Gavan Duffy* J. appears to have considered that at the time the wife left after the party the husband did not by his conduct convey to her that he intended to terminate relations between them if she persisted. Perhaps we ought not to interfere with his Honour's finding on this point, but, accepting it, it by no means follows that her subsequent action, founded as it was on the passage at arms between them, meant that she was terminating relations or consenting to their termination. A suspension of cohabitation was the result, but the matrimonial relationship, although lamentably weakened, was not definitively broken. Thin as it was, it subsisted until his action, which in my opinion was such a refusal to resume cohabitation as manifested an intention no longer to regard her as his wife. If parties have separated by mutual consent or the complaining party has ended the matrimonial relationship by deserting the other, no subsequent conduct of the party to the marriage who is alleged to have deserted can amount to desertion unless in the meantime the matrimonial relationship has been re-established. But the physical separation is quite a different thing from the termination of the matrimonial relationship. Such a relationship depends upon many elements and circumstances, including an intention still to treat conjugal relations as subsisting. Sometimes relationship may be close and manifest, at other times it may be slender. In every case it is a question of fact whether it continues to exist at a given point of time. It is also a question of fact whether at that point of time a respondent against whom desertion is alleged took a step which ended it with the intention of producing a termination. In the present case the question involved is one of inference

of fact, and does not depend on the credibility of witnesses. There is not much dispute as to what actually took place, and as far as overt acts are concerned we have the judge's findings. The chief point is the respondent's intention to end the slender matrimonial relationship which remained between the parties. This intention is to be inferred not merely from his conduct at that point of time but all his previous course of conduct and from what he afterwards did and failed to do. " Desertion is not a specific act, but a course of conduct " (*Thomas* v. *Thomas* (1)). The final break occurred in this way. On a date between 12th August and 17th August 1928 the husband and wife had dinner together, and I infer from the husband's evidence that an agreement was made that there should be a resumption of cohabitation, and that the situation of the home was to be in another State, but the precise method of carrying out the arrangement was to stand in abeyance until the end of 1928. Subsequently, however, merely upon the wife's suggestion that she and her husband should go to the wife's solicitor the husband receded from the agreement. He said:—" I 'phoned her when I returned from the tour then she told me in respect of that matter that she wanted me to go with her to her solicitor, Mr. Corder. I said if she was taking that attitude again I could do nothing further. That was the final break." His alleged objection seems to have been to the particular solicitor, whose name was, he said, " like a red rag to a bull." As in my view of the facts the parties had come to an agreement to resume cohabitation, the question whether the offer was conditional or unconditional does not arise. It is not unreasonable in the circumstances that the appellant should desire that the agreement should be brought formally to the notice of the solicitor who had been advising her as to the maintenance and upbringing of the child. In my opinion the husband intended to recede from their agreement and his conduct amounts to desertion without just cause or excuse.

Even assuming that no final agreement was come to but that the wife's offer was conditional upon provision of a home for herself and child apart from the husband's relatives, that condition was by no means unreasonable and does not detract from the bona fides of her

(1) (1924) P. 194, at p. 199.

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offer to return and resume cohabitation (Cf. *Mather* v. *Mather* (1); *Harris* v. *Harris* (2)). Matrimonial relations are not conducted *in vacuo* and a wife is entitled to have some place in which to shelter. Having regard to her very unhappy experience in the past it was a very proper effort on her part to secure the domestic happiness of the parties free from all interference whether well-meaning or otherwise.

In my opinion the appeal should be allowed.

STARKE J. This is an appeal from a judgment of *Gavan Duffy* J. in the Supreme Court of Victoria dismissing the appellant's petition praying the dissolution of her marriage with the respondent on the ground that he without just cause or excuse wilfully deserted her and without any such cause or excuse left her continuously so deserted during three years and upwards (*Marriage Act* 1928, sec. 75 (*a*)).

Desertion consists in the termination of a matrimonial relationship without the consent of the other party thereto with the intention of forsaking that other and of permanently or indefinitely abandoning such relationship (*Tulk* v. *Tulk*; *Hoffmeyer* v. *Hoffmeyer* (3); *Bain* v. *Bain* (4)). There must be a deliberate purpose of abandoning the conjugal society or relationship (*R.* v. *Leresche* (5)). But, as *Cussen* J. in *Tulk* v. *Tulk* (6) observed, the cessation of marital intercourse is not the only element of the matrimonial relationship. "Marital intercourse, the dwelling under the same roof, society and protection, support, recognition in public and in private, correspondence during separation . . . may be regarded separately as different elements, the presence or absence of which go to show more or less conclusively that the matrimonial relationship does or does not exist" (*Fitzgerald* v. *Fitzgerald* (7); *Bradshaw* v. *Bradshaw* (8); *Kay* v. *Kay* (9); *Hampton* v. *Hampton* (10)). Before referring to the facts of the present case it is desirable also to remember the function

(1) (1904) 21 W.N. (N.S.W.) 196.
(2) (1866) 15 L.T. N.S. 448.
(3) (1907) V.L.R. 64, at p. 65; 28 A.L.T., at p. 165.
(4) (1923) 33 C.L.R. 317.
(5) (1891) 2 Q.B. 418, at p. 420.
(6) (1907) V.L.R., at p. 65; 28 A.L.T., at p. 165.
(7) (1869) L.R. 1 P. & D. 694; (1874) L.R. 3 P. & D. 136.
(8) (1897) P. 24.
(9) (1904) P. 382, at p. 388.
(10) (1912) 12 S.R. (N.S.W.) 246; 29 W.N. (N.S.W.) 65.

and duty of this court with regard to an appeal from a decision of a judge sitting without a jury. There is no doubt that this court in the exercise of its appellate jurisdiction may affirm, reverse or modify a judgment appealed from and give such judgment as ought to have been given in the first instance (*Judiciary Act*, sec. 37). The exercise of this jurisdiction " is a matter of justice and of judicial obligation. None the less," said Lord *Sumner* in *S.S. Hontestroom* v. *S.S. Sagaporack and S.S. Durham Castle* (1), " not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judge, and, unless it can be shown that he has failed to use or has palpably misused his advantage, the higher court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case." " If his estimate of the man forms any substantial part of his reasons for his judgment the trial judge's conclusions of fact should, as I understand the decisions, be let alone " (*Powell and Wife* v. *Streatham Manor Nursing Home* (2)). The position of an appellate court is even more disadvantageous where, as in this case, the intent of the parties, real or assumed, is the vital question for determination.

The parties in this case were married in 1922. The husband was then twenty-two years of age and the wife eighteen. For some months they lived with the wife's mother, but in 1923 purchased a home for themselves, where they resided until about the end of 1925. A child was born in February of 1924. Unfortunately payment of the purchase money for the house and its upkeep was beyond their means, and it was sold early in 1926. The family then went to reside with the husband's mother. In June 1926, however, the appellant left her husband and went to reside with her mother and has never returned to her husband.

The learned trial judge, who saw and heard both the husband and wife, did not accept the evidence of either party as absolutely accurate, though he was more prepared to accept that of the wife where any conflict arose. Further, he regarded the husband as hard and unsympathetic and as having humiliated his wife by giving her cheques for tradesmen which were dishonoured, though ultimately

(1) (1927) A.C. 37, at p. 47 (2) (1935) A.C. 243.

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paid. The wife he regarded as an excitable woman, labouring under a strong sense of grievance, and rather irresponsible as regards her obligations as a wife. The learned judge concluded that the husband's conduct did not compel the appellant to leave him nor was it such as to found an inference in fact of his intention to break off the matrimonial relationship or to cause such an intention to be imputed to him. Indeed, he regarded the act of the appellant in leaving her husband as an impulsive and rather foolish act which neither party thought would, or intended that it should, end the matrimonial relationship. Such a finding cannot in my opinion be disturbed if this court pays due attention to the function and duty of an appellate tribunal as already mentioned.

The parties remained apart until the month of August 1928, when the husband suggested a reconciliation. In the meantime the husband had not behaved well. He had not visited or supported his wife nor made any regular provision for the maintenance and education of the child of the marriage. But the parties met in August 1928 in response to the suggestion of the husband. A discussion took place, and " at the end it was left that " the appellant was " to meet her husband again." According to the appellant she was quite willing to return to her husband if he could offer her some sort of home. Soon afterwards the husband telephoned to the appellant but she asked him to go to her solicitor. But the husband was not on friendly terms with the solicitor, who apparently had unjustly accused him of drunkenness, and he would not go with the appellant to see him. He said if that was the appellant's attitude he could go no further. " That was the final break."

The learned judge said that he was not prepared to find that there was a definite offer on the part of the appellant to return coupled or uncoupled with a condition. In fact it is apparent from the reasons of the learned judge that he was not satisfied that the appellant was willing to return to her husband and equally it is apparent that he did not accept the view that the conduct of the husband founded any inference in fact of his intention to break off the matrimonial relationship or to cause such an intention to be imputed to him.

The appellant, as other evidence suggests, was endeavouring to put her husband in the wrong so that she might divorce him ; whilst the husband, who was a Roman Catholic and opposed to divorce, was equally anxious that he should put the appellant in the wrong and so avoid a dissolution of the matrimonial tie.

Under circumstances such as these the opinion of the learned judge who saw and heard the parties should be conclusive upon any question of intention, upon the question whether the husband by his words or his conduct intended to determine the matrimonial relationship or whether the wife intended to do so. It would be an arbitrary exercise of the appellate power of the court to interfere with the decision of the learned judge in such circumstances and contrary to well-settled principles of practice.

It is difficult, I think, to reconcile the decision of the Supreme Court of New South Wales in *Hampton* v. *Hampton* (1) (*Street*, *Gordon* and *Rich* JJ.) with a reversal of the decision of *Gavan Duffy* J. in the present case, though I think it possible that the learned judges in the former case took somewhat too narrow a view of the meaning of the phrase " an existing state of cohabitation."

The appeal should be dismissed.

EVATT J. I agree with the judgment of my brother *Rich*, but there are several observations which I desire to add. Because of the large extent to which the findings of the learned trial judge accepted the frankness and truthfulness of the wife, this court is placed in an unusually favourable position to make its own independent finding upon the crucial issue as to the intention of the respective spouses.

A very striking feature of the evidence was the husband's retention, " hoarding " is the word he used, of a note written by his wife in November 1923—more than thirteen years before the institution of the present suit. The note ran as follows :—

> " 22nd November, our wedding day. I am going now because you could hardly expect me to do otherwise after the way you spoke to me this morning of all mornings. I can and have stood all your money worries and helped with my sympathy as much as possible but I am sick again and too frightened of what might happen if you work me into this distraught condition any more.

(1) (1912) 12 S.R. (N.S.W.) 246 ; 29 W.N. (N.S.W.) 65.

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> If you really want me to come back, you can come and convince me of it, or if you prefer to make arrangements to close up the house I will go away to the country until my baby arrives and . . ."

As appears, the note was written on the first anniversary of the wedding day, and only some two months before the birth of their child. It contained so moving an appeal not only to the tenderness and devotion that might be expected of a husband who was sensitive to his marriage vows, but to common humanity itself, that, in response, some immediate gesture of kindness and sympathy was to be expected. But, instead of that, the husband did nothing whatever to relieve the situation, although he had himself brought it into existence by capriciously objecting to his wife's being provided with some temporary assistance pending the birth of her only child.

The note is so obviously genuine that it tells heavily against the husband as evincing his real intention to conduct himself as a husband. Normally very few persons would have been unashamed to retain it, still less produce it. Why was it kept ? I am convinced that, even at this stage of the married life, the husband had determined to collect or bring into existence evidence which might subsequently be used by him in the event of litigation with his wife. Accordingly he preserved the note in order to prove the fact that she had left the house, entirely overlooking the significance of the fact that the note also explains why she left it.

From this time onwards, *Duffy* J.'s findings show that his attitude towards his wife was " unkindly," " hard," " quarrelsome," " unsympathetic and inconsiderate." If, as one may assume, he remained affectionate to his own family, that rather stresses a special animus against his wife. He actually intimated that if she attended a dance, she should not expect to be received at home again.

In some cases, such an ultimatum might be regarded as trivial. I think that in this case he meant what he said, and was so understood by his wife. *Duffy* J. found, impliedly at least, that the wife had just cause or excuse for leaving him on this occasion ; and such finding is plainly right. Again, the husband seems to have been saturated with the notion that, so long as it was the wife who left him, his legal position was absolutely secure. His intention to remove his wife from his company, at least temporarily, is evidenced

by the fact that, after she left, he showed little or no interest in the welfare either of his wife or of his child.

I have reached the opinion that his wife's departures were desired and intended by him, that having regard to her somewhat excitable nature, he knew his prior conduct was calculated to cause such departures, and that, because of financial necessities, the nature of which has not clearly emerged from the evidence, he greatly desired to be relieved of the obligation of supporting his wife, while the latter, as the supposed wrongdoer, was to remain legally tied to him. In order to attain these objectives, he adopted the practice of writing to her long-winded and self-righteous, not to say hypocritical, pronunciamentos which were well calculated to quench all love and affection.

Notwithstanding his conduct, his wife decided in 1928 that he might be taken at his word, and that one more attempt should be made to resume cohabitation. I have no doubt that she was largely influenced by a desire to have her child properly brought up. At the same time, I think that her attempt was a genuine one, and that her husband became alarmed at the prospect of having to support her. At first, however, he complied, or pretended to comply, with her desire for the resumption of cohabitation, and an agreement was reached that it would take place at the end of 1928. Soon however he made up his mind to withdraw from the agreement, and so he seized upon the absurd pretext that the solicitor whom she wished to be consulted by both of them, apparently in order to record their final agreement, was distasteful to him. In point of fact, although the solicitor in question had acted for the wife, he was also an old friend of the husband, and fully shared his opinions on marriage. I infer that in 1928, at any rate, the husband's desire and intention was to avoid at all cost any resumption of the relationship of husband and wife, and that he rejected his wife's bona fide desire and intention to have that relationship resumed.

In view of what *Rich* J. has said, it is not necessary to enter upon any elaborate analysis of the cases. In many cases the well-known and much discussed authority of *Fitzgerald* v. *Fitzgerald* (1) was applied. But it is erroneous to regard the judgment of Lord *Pen-*

(1) (1869) L.R. 1 P. & D. 694; (1874) L.R. 3 P. & D. 136.

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zance as laying down an absolute and unqualified rule requiring spouses who are *de facto* living apart to resume a " common life and home " before there can be a commencing point for statutory desertion. It is well stated, in relation to desertion, that the law

> " does not deal with the mere matter of place. What it seeks to enforce is the recognition and discharge of the common obligations of the married state. If one party does not acknowledge them, the party who has so offended cannot be heard to say that he or she is not guilty of desertion on the ground that there has been no desertion by departure from a place " (*Pulford* v. *Pulford* (1)).

The most recent statement of the law is contained in *Papadopoulos* v. *Papadopoulos* (2), where *Merriman* P. said that the passage in Lord *Penzance's* judgment " while completely accurate in the circumstances of that case, cannot be regarded as an exhaustive test of the meaning of desertion in all circumstances."

I therefore agree that the respondent has entirely failed to meet the wife's case based on desertion commencing in 1928, that the appeal should be allowed, and a decree for dissolution pronounced.

Appeal allowed with costs. Order appealed from discharged except as to costs. Decree nisi for dissolution of the marriage. Direct it shall not be made absolute until three months from the pronouncement thereof. Order of Macfarlan J. dated 22nd May 1929 so far as it relates to the custody, maintenance and education of the child of the marriage Robert Evelyn Kellway continued with liberty to the parties to apply to the Supreme Court as they may be advised for any variation in the said order or any further or other order relating to the said child. Petition remitted to the Supreme Court to deal with the question of alimony and any other question arising. Order that the petitioner do lodge an office copy of the order of this court with the Prothonotary of the Supreme Court of Victoria.

Solicitors for the appellant, *Davis, Cooke & Cussen.*

Solicitors for the respondent, *Doyle & Kerr.*

H. D. W.

(1) (1923) P. 18, at pp. 21, 22.

(2) (1936) P. 108, at p. 115.