[HIGH COURT OF AUSTRALIA.]

THE CROWN SOLICITOR FOR THE STATE OF SOUTH AUSTRALIA . . . . Intervener, } Appellant;

AND

GILBERT AND ANOTHER . . . . Plaintiff and Defendant, Respondents.

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

H. C. of A. 1937.

Adelaide, *Oct.* 14, 15.

Sydney, *Dec.* 16.

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

Divorce—Desertion—Husband deserted by wife—Subsequent adultery by husband within five years—Unknown to wife—Whether wife's desertion had continued for five years—Matrimonial Causes Act 1929 (*S.A.*) (*No.* 1946), *secs.* 5, 6 (*c*), 9, 12, 13.

Where a husband who has been deserted by his wife commits adultery before the expiration of the period of five years mentioned in sec. 6 (*c*) of the *Matrimonial Causes Act* 1929 (S.A.), the period of desertion is thereby terminated even though the adultery is unknown to the wife.

So *held* by *Dixon*, *Evatt* and *McTiernan* JJ. (*Latham* C.J. dissenting).

Douglas v. *Douglas*, (1903) 23 N.Z.L.R. 584, applied.

Cook v. *Cook*, (1934) S.A.S.R. 298, approved.

Gray v. *Gray*, (1925) Q.S.R. 166, and *Hopkins* v. *Hopkins*, (1936) V.L.R. 218, disapproved.

Decision of the Supreme Court of South Australia (Full Court): *Gilbert* v. *Gilbert*, (1937) S.A.S.R. 79, reversed.

Appeal from the Supreme Court of South Australia.

Mark Holder William Gilbert brought an action in the Supreme Court of South Australia against his wife, Pearle Hazel May Gilbert. He claimed a divorce on the ground that his wife had deserted him

on or about 14th July 1931, and had lived apart from him since that date and had refused to return to him. The writ was issued on 23rd July 1936, and, in the statement of claim, the husband confessed that between about the month of December 1932 and the month of January 1936 he had committed adultery with three different women. The action was heard by *Reed* A.J., who found that the wife had deserted the husband without just cause on or about 20th July 1931 and remained apart from him continuously ever since, against the husband's will. His Honour intimated that, if free to do so, he would make an order nisi in favour of the husband, exercising the court's discretion in his favour, notwithstanding the adultery to which the husband had confessed. The action was referred to the Full Court to pronounce such judgment as that court might think fit.

The Crown Solicitor of South Australia objected to an order nisi for divorce being made and, at the request of the court and with the approval of the Attorney-General, intervened in the action. He objected that, by reason of the husband's adultery, there had not been desertion for five years within the meaning of sec. 6 of the *Matrimonial Causes Act* 1929, and that the husband was not entitled to the relief claimed. The Full Court held that the trial judge had power to make an order nisi, that judgment should be pronounced in accordance with the discretion which he desired to exercise, and that an order nisi for divorce should be made: *Gilbert* v. *Gilbert* (1).

From this decision the Crown Solicitor appealed to the High Court.

Hannan K.C. (with him *Chamberlain*), for the appellant. *Cook* v. *Cook* (2) was rightly decided and should not have been overruled by the Full Court in this case. The test of the existence of desertion is whether the Supreme Court would make an order for restitution of conjugal rights after adultery. If it would not, there is no desertion in law. " Desertion " means the same as " desertion without just cause or excuse " (*Cook* v. *Cook* (2); *Frowd* v. *Frowd* (3)). If there was a legal cause or excuse existing, even though

(1) (1937) S.A.S.R. 79.
(2) (1934) S.A.S.R. 298.
(3) (1904) P. 177.

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that was unknown to the wife, her separation was not desertion. The fair inference from the husband's adultery is that he was not willing to resume cohabitation (*Cargill* v. *Cargill* (1)). The husband's adultery having occurred within the five-years' period, he cannot establish his case. The wife's separation then ceases to be without just cause or excuse (*Brooking-Phillips* v. *Brooking-Phillips* (2)). The knowledge, or absence of knowledge, of the wife is immaterial. [Counsel also referred to *Fremlin* v. *Fremlin* (3); *Hopkins* v. *Hopkins* (4); *Gray* v. *Gray* (5); *Bain* v. *Bain* (6); *Jackson* v. *Jackson* (7).]

[DIXON J. referred to *Cosham* v. *Cosham* (8).]

McEntee, for the plaintiff respondent. The word "desertion" must be construed *simpliciter* (*Jackson* v. *Jackson* (9); *Bain* v. *Bain* (10)). Adultery is a cause or excuse only if known to the wife, and desertion, having begun, is presumed to continue (*Bowron* v. *Bowron* (11): *Drummond* v. *Drummond* (12)). A mere state of mind uncommunicated to the other party is not consent or repudiation of the relationship (*Bradford* v. *Bradford* (13)). It should be possible to examine the circumstances at all times during the five years to ascertain what is the effective cause of the separation. Desertion is entirely a statutory offence and was unknown to the ecclesiastical courts (*Gwynne Hall* on *Divorce* (1905), p. 480). [Counsel also referred to *Langlands* v. *Langlands* (14); *Quinn* v. *Quinn* (15); *Duckworth* v. *Duckworth* (16).]

Chamberlain, in reply. If a construction of the Act is subversive of the principles of common law or ecclesiastical law, that construction will not be adopted (*Craies* on *Statute Law*, 4th ed. (1936), p. 135). As to the proposition that consent must be communicated, it is not

(1) (1858) 1 Sw. & Tr. 235, at p. 237; 164 E.R. 708.
(2) (1913) P. 80, at pp. 89, 90.
(3) (1913) 16 C.L.R. 212, at pp. 216, 228.
(4) (1936) V.L.R. 218.
(5) (1925) Q.S.R. 166.
(6) (1923) 33 C.L.R. 317.
(7) (1924) P. 19, at p. 23.
(8) (1899) 25 V.L.R. 418.
(9) (1924) P. 19.
(10) (1923) 33 C.L.R. 317, at p. 327.
(11) (1925) P. 187.
(12) (1876) 2 V.L.R. (I. P. & M.) 78, at p. 81.
(13) (1908) 7 C.L.R. 470.
(14) (1894) 16 A.L.T. 44.
(15) (1931) Q.W.N. 51.
(16) (1929) Q.W.N. 35.

contended that the husband's adultery amounted to consent. When the husband committed adultery he put an end to the desertion.

Cur. adv. vult.

Dec. 16.

The following written judgments were delivered :—

LATHAM C.J. This is an appeal from a judgment of the Full Court of the Supreme Court of South Australia given in an action for divorce referred to the Full Court by *Reed* A.J. The respondent instituted an action against his wife for divorce upon the ground of desertion for five years (*Matrimonial Causes Act* 1929, sec. 6 (*c*)). The wife did not appear. It was proved that the wife left her husband on or about 20th July 1931 against his will and without any justification, and remained away from him continuously for five years. After the lapse of five years the husband took proceedings for divorce. During the five years the husband committed a number of acts of adultery, but this fact was unknown to his wife. The learned trial judge was prepared, if he had any discretion in the matter, to exercise his discretion in favour of the plaintiff and grant him a divorce, but he referred the action to the Full Court for the purpose of obtaining a decision upon the question whether the acts of adultery, although unknown to the wife, terminated the desertion by the wife by affording just cause or excuse for her separation from her husband.

This question has been considered in New Zealand, where *Williams* J., in *Douglas* v. *Douglas* (1), held that such adultery put an end to the desertion so that the petitioner could not succeed. *Murray* C.J., in *Cook* v. *Cook* (2), took the same view. The Full Court of Queensland took the contrary view in *Gray* v. *Gray* (3), and *Lowe* J. agreed with the latter decision in *Hopkins* v. *Hopkins* (4).

The courts have been careful to abstain from attempting to give any exhaustive definition of desertion. Desertion involves a severance of conjugal relationship. Such a severance may be brought about by one party leaving the other without justification. It may also be brought about by such conduct of one party as forces the

(1) (1903) 23 N.Z.L.R. 584.
(2) (1934) S.A.S.R. 298.
(3) (1925) Q.S.R. 166.
(4) (1936) V.L.R. 218.

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other party, acting reasonably, to live apart, as where a husband is guilty of such conduct as to make it impossible for a wife, consistently with self-respect or personal safety, to continue to live with him. The party who intends to bring the cohabitation to an end and whose conduct in reality causes its termination is the one who commits the act of desertion (*Sickert* v. *Sickert* (1); *White* v. *White* (2)).

Thus, desertion is not constituted by the mere act of separation of husband and wife—otherwise in all cases of separation each party would have deserted the other. In order to constitute desertion there must be an intentional severance of the matrimonial relationship, and the person who on the facts is held to be responsible for that severance is the person who has deserted the other. If there is a justification for the severance of the relationship, there is no desertion. Accordingly it is argued that desertion *simpliciter* always means desertion without just cause or excuse, even in the absence of the words "without just cause or excuse," and that continued desertion must be desertion without the existence of any justification at any time during the relevant period. But the context in which the word appears must always be considered. "The word 'desertion' may not in all places mean the same thing" (*Cargill* v. *Cargill* (3)). Where the word "desertion" appears in a statute, its meaning must be determined by a consideration of the context as well as by such *a priori* considerations as those which have been mentioned.

In the present case the court is required to interpret a statute which provides in very simple language that "any married person . . . may claim an order for divorce upon any of the following grounds existing or occurring after the marriage . . . (*c*) desertion for five years." (*Matrimonial Causes Act* 1929, sec. 6). In the *Matrimonial Causes Act* 1928, which was repealed by the first-mentioned Act, the following words were used to describe desertion as a ground for divorce: "That the respondent has without just cause or excuse deserted the petitioner and without just cause or excuse left him or her continuously so deserted during five years or more."

(1) (1899) P. 278.
(2) (1908) 7 C.L.R. 477.
(3) (1858) 1 Sw. & Tr. 235; 164 E.R. 708.

Does the short phrase of the 1929 Act—" desertion for five years " —mean the same thing as the much longer phrase of the 1928 Act and preceding legislation ?

Mere separation of the parties, as I have already said, does not establish desertion. It is necessary to consider whether the party against whom desertion is alleged was or was not justified in severing the relationship. " Desertion means the cessation of cohabitation brought about by the fault or act of one of the parties. Therefore, the conduct of the parties must be considered. If there is good cause or reasonable excuse, it seems to me there is no desertion at all in law " (*Frowd* v. *Frowd* (1), per *Jeune* P.). If there was no justification for the severance of relations, the act of terminating the *consortium* of the spouses was wrongful, and the party acting wrongfully was " guilty " of desertion—to use the phrase of sec. 12 of the 1929 Act. In this sense, therefore, there is always a wrongful element in the initiation of desertion. Thus, the question of the presence of what is called " just cause or excuse " is always relevant for the purpose of identifying the deserter. Does it follow, however, that the absence of " just cause or excuse " must continue throughout the whole period of desertion required by the statute in order to constitute desertion for that period ?

It cannot always be said that the mere existence of relevant facts unknown to one of the parties brings about a change in their matrimonial relationship from the point of view of desertion. Thus, if a wife justifiably left her husband by reason of his cruelty to her, and he then reformed and bona fide wished her to come back again to him and provided a suitable home but told her nothing about it, there is no doubt that these facts would not affect her position. She would still be a deserted wife. He would be held to have deserted her by reason of his original cruelty. She had just cause for leaving him. The fact that that cause no longer existed could not itself bring about the result that he was no longer guilty of desertion. If, on the other hand, he informed his wife of the facts mentioned and offered her a proper home, she might be held to have deserted him if she refused the offer. Thus, in such a case, the original desertion of the wife by the husband would not be terminated by an act done

(1) (1904) P., at p. 179.

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by him and not brought to the knowledge of his wife. But the knowledge of these facts by the wife might be held to bring about the result that the continued separation of the parties was desertion by the wife and not desertion by the husband.

There is no doubt that the adultery which took place in this case after the wife had left the husband did not in any way contribute to her departure from him. It was not an operative cause or an actuating cause, in any sense, in bringing about the desertion.

But, I agree, there may be just cause for desertion if there is sufficient justification for the separation, even if the facts constituting that justification were not the actuating cause of the separation. It is therefore contended for the Attorney-General that the fact that adultery had happened afforded a cause or reason which, though unknown to the wife, justified her in the eyes of the law in separating herself from her husband. It is urged in support of this view that the wife, under sec. 7 of the Act, was in a position to claim an order for judicial separation on the ground of the adultery of the husband, and that is undoubtedly true. The next step in the argument is the proposition that, if the wife was entitled to obtain from a court an order for judicial separation, it could not possibly be held that she was guilty of any wrongdoing in remaining away from her husband. Therefore, the argument concludes, the wife became justified in remaining away from her husband at the moment when the first act of adultery took place, and therefore, as from that moment she could not be said to have deserted him. In my opinion this reasoning fails to take into account the precise provisions of the statute. It depends upon the proposition that, on account of the adultery of the husband, the wife was entitled to obtain as of course an order for judicial separation which would justify her in remaining apart from her husband. But sec. 7 only provides that she may *claim* an order for judicial separation on the ground of adultery, and sec. 12 provides that the court may refuse to make an order if the plaintiff has been guilty of desertion before the commencement or happening of the ground relied upon. In this case the wife had undoubtedly deserted the husband before the happening of the adultery upon which her hypothetical claim for judicial separation would have been founded. Thus, it is clear

that she was not *entitled* to an order for judicial separation, even though her husband admitted that he had committed adultery. Therefore it cannot be said as of course that for this reason she was entitled to remain away from him after the adultery took place. Thus, in my opinion, this reasoning does not establish that the desertion by the wife ended when the husband committed adultery.

It is further suggested that the husband, by reason of his adultery, could not obtain an order for restitution of conjugal rights, and, this being so, that the wife cannot be said to have been guilty of desertion without just cause or excuse as from the time when the adultery was committed. The Act does not specify any ground for an order for restitution of conjugal rights but simply provides in sec. 9 that proceedings for restitution shall be brought by action under the Act, the jurisdiction to make the order being conferred by sec. 5. Sec. 9 is followed by sec. 12, which provides that the court may refuse to make an order if the plaintiff has been guilty of adultery not condoned. Adultery not condoned is therefore a discretionary and not an absolute bar under the South Australian statute. Accordingly, it cannot be said that the husband would necessarily fail to obtain an order for restitution of conjugal rights because he had been guilty of adultery which his wife had not condoned.

But it has been strongly argued that the statutory provisions should be read in the light of, or subject to, the law as laid down in many English decisions which define the position of a petitioner who does not come into court with clean hands. These decisions show that, in England, a husband who has been guilty of adultery cannot obtain an order for restitution of conjugal rights, and also that a wife can always obtain a decree of judicial separation against a husband who has committed adultery. In my opinion these rules are not applicable to a court bound by the South Australian statute. I base this opinion upon, first, the absence from that statute of the provision which requires the English courts to apply, in proceedings for judicial separation or for restitution of conjugal rights, the principles previously applied in the ecclesiastical courts of England; and, secondly, upon the presence in the statute of the definite provisions to which I have already referred. I proceed to state these grounds in more detail.

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The ecclesiastical courts in England had not power to grant a divorce *a vinculo*. The decree which they had power to grant was a decree for divorce *a mensa et thoro*, corresponding to the modern decree for judicial separation. In English courts the principles relating to divorce *a mensa et thoro* have been carried over to a considerable extent into the exercise of the jurisdiction to grant matrimonial relief by way of judicial separation or restitution of conjugal rights. This is due to the fact that sec. 22 of the *Divorce and Matrimonial Causes Act* 1857 expressly required the High Court in proceedings other than for the dissolution of marriage to " act and give relief on principles and rules which in the opinion of the court shall be as nearly as may be conformable to the principles and rules upon which the ecclesiastical courts have heretofore acted and given relief," but subject to the Act. Thus, in *Otway* v. *Otway* (1) there were cross-petitions for divorce by husband and wife, both of whom had committed adultery. The learned trial judge granted to the wife a decree for judicial separation. In the Court of Appeal reference was made to the authorities in the ecclesiastical courts, and all the learned judges acted upon the long-established principle that a husband guilty of adultery could not maintain any proceedings against his wife in the old ecclesiastical courts for a divorce *a mensa et thoro* (per *Cotton* L.J. (2), per *Fry* L.J. (3) and per *Lopes* L.J. (4). It was because of the statutory provision to which I have referred that the rules and principles of the ecclesiastical courts applying to what is now called judicial separation and to restitution of conjugal rights were applied to limit the jurisdiction given by the Act of 1857 in respect of such relief. See also *Everett* v. *Everett* (5), following *Otway* v. *Otway* (1) and *Russell* v. *Russell* (6) and *Palmer* v. *Palmer* (7). But the rule as to refusing relief to a guilty party necessarily applied in the ecclesiastical courts only to proceedings for judicial separation or restitution of conjugal rights, as those courts had no jurisdiction to grant a divorce *a vinculo*. Further, the English statutory provision contained in sec. 22 of the Act of 1857 and the modern provisions (*Supreme Court of Judicature*

(1) (1888) 13 P.D. 141.
(2) (1888) 13 P.D., at p. 147.
(3) (1888) 13 P.D., at p. 151.
(4) (1888) 13 P.D., at p. 152.
(5) (1919) P. 298.
(6) (1895) P. 315, at p. 332.
(7) (1923) P. 180.

(*Consolidation*) *Act* 1925, secs. 32 and 103) which still keep in being the effect of sec. 22 (*Laws of England*, 2nd ed., vol. 10, p. 637) do not affect proceedings for divorce, which are expressly excepted from sec. 22 by the terms of the section. A petitioner for divorce in England who has been guilty of adultery is not necessarily put out of court by his misconduct. Adultery by a petitioner is a discretionary, not an absolute, bar to relief by way of divorce (*Supreme Court of Judicature* (*Consolidation*) *Act* 1925, sec. 178 (3)). Thus, the rule that no matrimonial relief will be given to a guilty party does not in England apply to proceedings for divorce. The provision which makes it apply to proceedings for judicial separation and restitution of conjugal rights was enacted in South Australia in the *Matrimonial Causes Act* 1867, sec. 14. But this section has been repealed, and nothing corresponding to it is contained in the present Act. Thus, the Supreme Court of South Australia is not now limited by the rules and principles of the ecclesiastical courts.

But, further, the South Australian statute contains provisions which, I think, prevent the rule as to refusing relief to a guilty party from being applied in South Australia even to proceedings for judicial separation or restitution. The statute deals first with the grounds for a claim for divorce or judicial separation and then prescribes absolute and discretionary bars to relief. These bars apply in the case of any order which might otherwise have been made under the preceding section, whether for divorce under sec. 6, judicial separation under sec. 9, or restitution of conjugal rights under sec. 9. (I assume that they are irrelevant in the case of proceedings for nullity of marriage, though such proceedings are also mentioned in sec. 9 ; but it is not necessary to examine this question.) The absolute bars are prescribed by sec. 11, and consist of the plaintiff having condoned, been accessory to, or connived at, the grounds proved, and of collusion. It is not, in my opinion, within the province of the court to create further absolute bars either in the case of divorce, the grounds for which are set out in sec. 6, or in the case of judicial separation, the grounds for which are set out in sec. 7, or in the case of restitution. Sec. 12 deals with discretionary bars which also are applicable in the cases mentioned. They include (*a*) adultery not condoned (which is relevant to the

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plaintiff's claim in the present case), and also (*b*) desertion before the commencement or happening of the said ground (which is relevant to the consideration of the question whether the defendant wife in the present case would be entitled to obtain an order for judicial separation, and of the question whether the plaintiff would be entitled to an order for restitution, if he were to seek it).

Sec. 13 of the Act is, in my opinion, very important in the present case. It is as follows: "Subject to the two preceding sections the court, upon being satisfied as to the existence of any ground, shall make the order or the order nisi claimed as the case may be." This section imposes a duty upon the court to make an order if satisfied as to the existence of any ground, subject to the provisions of secs. 11 and 12 as to absolute and discretionary bars. This section, in my opinion, has the effect of preventing the court from regarding the matters referred to in sec. 12 as constituting other than discretionary bars.

The argument advanced for the Attorney-General appears to me to depend upon the doctrines derived from the ecclesiastical courts, which are not in harmony with the specific provisions to be found in the South Australian statute. On the other hand, there is no difficulty in applying all those provisions to the present case upon the basis of the argument for the plaintiff. That argument is that he has proved desertion by his wife for a period of five years, that that desertion took place without any just cause or excuse, that it is true that he has been guilty of adultery which his wife has not condoned, that this fact entitles the court in its discretion to refuse to make an order for divorce, but that, unless the court exercises its discretion against him, he is entitled to an order. It is argued for the Attorney-General that the adultery of the plaintiff is not merely a discretionary bar in the present case, but that it operates to prevent the continuance of the desertion of the plaintiff by his wife. The actual consequence of accepting this proposition would be that adultery by a deserted spouse during the statutory five years would operate in the same way as if the statute provided that adultery not condoned were an absolute and not a discretionary bar. The statute provides that adultery is a breach of matrimonial duty and that desertion is a breach of matrimonial duty. But it does not

follow earlier rules by refusing any relief to a guilty party. It is constructed upon a scheme which regards adultery which happens after desertion has taken place as a discretionary and not an absolute bar. A court should give the fullest operation to such a remedial provision. I base my decision upon the fact that the words of the statute make specific provision for the effect of adultery by a plaintiff, and that effect is that, when once desertion has commenced, the adultery by a plaintiff is a discretionary bar. In my opinion the natural effect of the words of the statute should not be limited by considerations derived from the manner in which the ecclesiastical courts exercised a different jurisdiction. I agree with what *Angas Parsons* J. said in his judgment :—" Sec. 12 in effect provides for the case of a plaintiff coming into court with unclean hands. It confers a discretion upon the court to refuse or grant relief if the plaintiff has been guilty of ' adultery not condoned,' ' cruelty,' ' habits or conduct inducing or contributing to the existence of the ground relied upon ' and ' wilful neglect or misconduct conducing to the existence of the said ground.' It is not a question of a plaintiff who has been guilty of misconduct being estopped by reason of his misconduct. The legislation has proceeded away from the sanctuary of ecclesiasticism into the realities of human life and conduct considered apart from ecclesiastical standards, and, recognizing the fact of human frailty in married life, Parliament has entrusted the court with the discretion either to refuse or grant relief. That discretion is vested in the trial judge, and the learned acting judge has declared that, if he had the power to do so, he would excuse the plaintiff with respect to his self-confessed adultery. In my judgment he had that power, and this court should pronounce judgment in accordance with the discretion he desired to exercise, and order the divorce which the plaintiff seeks " (1).

In my opinion the appeal should be dismissed.

DIXON J. The question upon which this appeal depends arises under sec. 6 (*c*) of the *Matrimonial Causes Act* 1929 (S.A.), by which the law relating to divorce and matrimonial causes in South Australia was consolidated and amended. The paragraph, with studied brevity, states as a ground of divorce " desertion for five years."

(1) (1937) S.A.S.R., at p. 87.

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A husband seeking a divorce has shown that more than five years before the institution of the proceedings his wife, without lawful justification, terminated a then subsisting matrimonial relationship, and that afterwards she neither re-established nor offered to re-establish the relationship. On his side, however, during the period of five years upon which he relies, he committed adultery on six several occasions. His wife was unaware of his commission of this matrimonial offence.

The question is whether in these circumstances his wife was guilty of " desertion for five years." It is evident that the answer must depend upon the manner in which the very compressed description of the ground of divorce is expanded and upon the meaning it is thus found to contain. It is possible to regard the word " desertion " as connoting nothing but the intentional destruction of an existing conjugal relationship and as containing no implication as to the wrongful character of the act. If it were so interpreted, then, no matter how bad the behaviour of one spouse might be, his or her abandonment by the other spouse would amount to desertion, and at the end of five years the latter could not rely on the conduct of the former as constituting more than a discretionary bar under sec. 12 to proceedings for a divorce. I do not think such an interpretation should be adopted. In ordinary legal understanding " desertion " connotes a quality of wrongfulness as well as intention and overt action. This is well expressed in *Bishop* on *Divorce* (1873) in a passage which follows a discussion of the varying methods adopted in the different American States of describing desertion as a matrimonial offence or wrong, nearly all of which refer to the absence of reasonable cause or the like. The learned author says : " Probably the single word ' desertion ' or the words ' wilful absence ' with no qualification except that of time would alone convey the full legal meaning contained in most of the foregoing statutory provisions " (par. 775). He then defines " desertion " as follows : " Desertion, in divorce law, is the voluntary separation of one of the married parties from the other, or the voluntary refusal to renew a suspended cohabitation without justification either in the consent or the wrongful conduct of the other " (par. 776). But the application to the South Australian provision of the doctrine embodied in the

passage extracted leaves unsolved a further question. That question is whether to constitute "desertion" the termination of the subsisting relationship must be wrongful in the sense that on the actual facts a conjugal duty to continue the relationship lies on the party who brings it to an end, a duty of the breach of which the other party is entitled to complain. That is to say, must it be true that, apart altogether from the knowledge or the motive of the party who brings the matrimonial relationship to an end, no facts exist which in point of law relieve him or her of the legal duty to maintain the relationship? The alternative is to regard every termination of a matrimonial relationship as desertion, if it is not actuated by a knowledge of or belief in some sufficient ground of justification. If the latter be the true view, a wife who leaves her husband "deserts" him unless her reason for doing so consists in circumstances affording an excuse or justification. This means that it is not enough that her husband should be actually guilty of adultery or other matrimonial offence. She must know of or at least suspect his guilt, and that must be the cause of her leaving him. In my opinion, to constitute desertion, the termination of the matrimonial relationship must, on the part of the party bringing it to an end, amount to a breach of conjugal duty which, on the true facts, lies upon him. If that duty does not in truth subsist, his or her action will not become desertion because it was inspired by some reason or motive other than the occurrence or existence of the matters absolving that party from the duty. I base this opinion on the following considerations.

Both at common law and under the doctrine of the ecclesiastical courts the commission of adultery by a wife afforded an absolute justification for a husband's refusal to perform what otherwise would be his conjugal duties. In other words, failure to maintain her or afford her the *consortium vitæ* of the married state was no breach of matrimonial duty after she committed adultery. Accordingly, although a wife whom her husband leaves without means of support may obtain necessaries upon his credit, her adultery at once puts an end to the authority which the law otherwise implies in her as a means of effectuating her husband's obligation to provide for her support. The husband's ignorance of her adultery does not matter

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(*Durnford* v. *Baker* (1)). A single act of adultery is enough, because " the question is whether a wife who has committed a fundamental breach of the marriage contract can insist upon the right of support which is given by the marriage contract " (per *Greer* L.J. in *H. S. Wright & Webb* v. *Annandale* (2)). A wife was under no obligation to maintain her husband, but his adultery put an end to his right to *consortium vitæ*. A suit for restitution of conjugal rights against a deserting husband or wife never could succeed in an ecclesiastical court if the complainant had after the desertion committed adultery, and, moreover, even malicious desertion was no answer to a charge of adultery as a ground for divorce *a mensa et thoro* (*Beeby* v. *Beeby* (3) ; cf. *Hope* v. *Hope* (4) and the citation there of *Govier* v. *Hancock* (5)). Relief by way of restitution of conjugal rights is administered in South Australia, and upon the same principles (secs. 5 and 9). Thus, to abandon a spouse who has committed uncondoned adultery is no breach of matrimonial duty on the part of the other spouse, and the adultery of a deserted spouse absolves the deserting spouse of all duty to return to cohabitation, or, if he be a husband, to support his wife. Further, in place of the right to a divorce *a mensa et thoro* on the ground of adultery, the South Australian statute gives, subject to the discretionary bars set out in sec. 12, a right to a judicial separation.

In the present case, on her husband's adultery, the wife obtained a right to a decree of judicial separation and her previous desertion amounted only to a ground upon which the court might, if it thought fit, refuse to give effect to that right, a discretionary bar under sec. 12 (1) (*e*). It is clear, therefore, that after his adultery, notwithstanding her ignorance of the fact, she became entitled to continue her separation from him, and also, subject to the court's discretion, to enforce her right to live apart from him.

In my opinion the expression " desertion for five years " in sec. 6 ought not to be interpreted as including any period of time in which the adultery of the complaining spouse has placed the other spouse

(1) (1924) 2 K.B. 587.
(2) (1930) 2 K.B. 8, at p. 14.
(3) (1799) 1 Hag. Ecc. 789 ; 162 E.R. 755 ; 1 Hag. Con. 142, n. ; 161 E.R. 504.
(4) (1858) 1 Sw. & Tr. 94, at p. 107 ; 164 E.R. 644, at p. 650.
(5) (1796) 6 T.R. 603 ; 101 E.R. 726.

in such a position. It should be understood as referring to a continuous period throughout which the conduct of the spouse who terminated the matrimonial relationship remains wrongful. As soon as his or her failure or unwillingness to resume or to offer to resume the relationship becomes in contemplation of law justifiable or excusable, the state of "desertion" ceases. There are matters of justification or excuse consisting in circumstances affecting the conduct or actions of the husband or wife relying upon them. In such matters knowledge on his or her part may be indispensable. But the adultery of the complaining spouse goes to the root of the matrimonial relation and discharges the other spouse from some of the obligations otherwise arising from the status. Among those obligations is the duty to cohabit or afford *consortium*, the refusal to perform which is desertion. Knowledge that the party is entitled to refuse is not a necessary ingredient of the right. Still less is it necessary that the party so refusing should be actuated by the adultery of the opposite party as a motive for his or her refusal.

In the present case we are concerned with a statute cast in a new mould. The expression "without just cause or excuse" does not occur. In substance the view I have adopted was applied to those words by *Williams* J. in *Douglas* v. *Douglas* (1). But his Honour referred to the well-known common-law rule that a refusal to perform a contract might be justified upon any ground absolving the party from his obligation to perform, notwithstanding that he was unaware of it and did not act upon it. The rule affords no more than an illustration or analogy. It has no actual application to the obligations arising from the status of husband and wife.

In *Hopkins* v. *Hopkins* (2) *Lowe* J. criticized the use of the analogy of contract in *Douglas* v. *Douglas* (1) and refused to follow that decision, preferring the view of the majority of the Full Court of Queensland (*Gray* v. *Gray* (3)). On the other hand, in *Cook* v. *Cook* (4) *Murray* C.J. applied the decision of *Williams* J. to the present South Australian statute. In strictness, the question whether the adultery of the deserted spouse, if unknown to the deserting spouse, forms or is capable of forming a "just cause or excuse" for the

(1) (1903) 23 N.Z.L.R. 584.
(2) (1936) V.L.R. 218.
(3) (1925) Q.S.R. 166.
(4) (1934) S.A.S.R. 298.

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continuance of the desertion does not arise in the present case. But I think it desirable to state that, in my opinion, it may do so, because the expression " just cause or excuse " relates, not to the motive or reason actuating the conduct otherwise amounting to desertion, but to its lawful justification or rightfulness.

In my opinion the appeal should be allowed. The order of the Supreme Court should be discharged and the suit dismissed. I do not think the husband should pay the costs of the intervention or of the appeal.

EVATT J. Sec. 6 (*c*) of the South Australian *Matrimonial Causes Act* 1929 tersely expresses " desertion for five years " as a ground for divorce. A preliminary question argued is whether such ground does more than summarize the ground fully stated in sec. 24A (1) (*a*) of the *Matrimonial Causes Act* 1867, as inserted by the amending Act of 1928, viz., " that the respondent has without just cause or excuse deserted the petitioner, and without just cause or excuse left him or her continuously so deserted during five years or more."

In my opinion it is clear from the framework and the general method of draftsmanship adopted in the 1929 Act that the ground stated in sec. 6 (*c*) of that Act is identical with the ground stated in the 1928 Act as quoted above. The Act of 1929 was to consolidate as well as to amend. Sec. 12 (1) (*b*) of the 1929 Act speaks of a plaintiff who has been " guilty " of desertion, showing clearly that the conduct of a " deserting " spouse is regarded as wrongful. If so, its wrongfulness must be measurable by some standard, and no other standard is, or can be, suggested than that expressed in the previous Act, which follows in substance the definition adopted both in England and Australia. It was suggested in *Frowd* v. *Frowd* (1) by Lord *St. Helier* that the addition to the word " desertion " of such phrases as " without reasonable excuse," " without just cause " and " without good cause " was an instance " of loose and inaccurate language " because the word " desertion " itself implies the absence of lawful cause or excuse, because, " if there is good cause or reasonable excuse, it seems to me there is no desertion at all in law." Upon this footing, the draftsman of the 1929 Act of South Australia

(1) (1904) P., at p. 179.

was supremely wise in refusing to add unnecessary tags to the word "desertion." It is also clear that the phrase "*for* five years" in sec. 6 (*c*) implies that the absence of lawful cause or excuse must continue throughout the period mentioned.

The more difficult question in the appeal arises thus. The wife deserted her husband, i.e., left him without lawful cause or reasonable excuse. But, subsequently, before a period of five years had elapsed, the husband was guilty of adultery on a number of occasions. The fact of the adultery did not influence the wife to remain absent, because it was unknown to her. The question is whether the state of desertion admittedly existing up to the time of the husband's adultery continued to exist thereafter, or whether his adultery rendered justifiable in law the wife's subsequent absence from her husband. The latter view was adopted by *Murray* C.J. in *Cook* v. *Cook* (1), following the judgment of *Williams* J. in *Douglas* v. *Douglas* (2). It is of value to quote the opinion of *Murray* C.J. :—

> "The effect of Mr. Justice *Williams*' judgment is that the adultery of a husband is just cause of excuse for a wife remaining away from him, although she is not aware of it, until he instituted proceedings against her. The husband's action might have been either for restitution of conjugal rights, or, after his wife had been absent without just cause or excuse for five years, for divorce. In the former case he would have failed, for uncondoned adultery by the petitioner is an answer to a suit for restitution of conjugal rights. See *Rayden* on *Divorce*, 2nd ed., at pp. 65 and 119 ; *Brooking-Phillips* v. *Brooking-Phillips* (3). That the wife did not know of the adultery until the husband admitted it at the hearing would make no difference, for from the moment he committed adultery he would have no right to compel his wife to live with him. Similarly, as it seems to me, in an action for divorce on the ground of desertion continued without just cause or excuse for five years, the husband would have no right to allege that his wife had no just cause or excuse for remaining away from him after he had committed adultery within the five years. He knew that she had a sufficient reason for not consorting with him, and the fact that she did not know could not honestly be set up by him. On these grounds I agree with the decision in *Douglas* v. *Douglas* (2), and desertion without just cause or excuse for five years not having been proved against the defendant, the action must be dismissed" (4).

In my opinion, the judgment of *Murray* C.J. should be adopted. Whilst the precise point is not directly covered by authority, I think

(1) (1934) S.A.S.R. 298.
(2) (1903) 23 N.Z.L.R. 584.
(3) (1913) P. 80.
(4) (1934) S.A.S.R., at p. 302.

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that from several cases to which I will refer shortly there emerges a principle which is of general application and which is decisive.

In *Knapp* v. *Knapp* (1) *Hannen* P. said of a wife's petition based on adultery and desertion for two years:

> "There never was a time at which the petitioner was bound to go back and live with him, because she was always justified in refusing to do so as long as he continued to live with the woman for whose company he had abandoned her: and therefore as it was in the beginning desertion on his part, and the circumstances have never been changed, that state of things, which was a desertion in the first instance, has continued such for now more than two years, and consequently the petitioner is entitled to succeed."

The case implies (1) that it is *possible* for a state of desertion to cease to exist during the statutory period, and (2) that one spouse is under no obligation to cohabit when the other spouse is living in the state of adultery.

In *Kay* v. *Kay* (2) *Gorell Barnes* J. referred to *Knapp* v. *Knapp* (1) and said: "It seems to me, in order to maintain a desertion throughout that time there must be, in fact, a state of things which keeps up the desertion throughout the whole of that period" (He is referring to the statutory period).

He added:—

> "It seems to me that if nothing has happened during the two years to entitle the wife to refuse to return to the husband, if he desires to put an end to the desertion, the petitioner, by filing a petition for divorce in the interval, and making and maintaining throughout charges which are in fact unfounded—and by that I mean charges which it is shown give her on the real facts of the case no right to say to him, 'I will not have you back if you offer to return'; and then, as an incident in those proceedings, obtains an order for alimony and enforces it—that, I think, puts it out of the power of the respondent to do anything, and it seems to me it is a position in which, by her own act, the petitioner is showing that she is no longer—no matter what his attitude is—ready to receive him back, and can, I think, no longer be held entitled to treat him as continuing to desert her. It is an absolutely inconsistent position. He, it is true, remains away, and his attitude of mind is precisely the same. By her action she has put it out of his power practically to return; she is no longer willing to receive him, and she maintains those charges throughout the whole period that covers the time after."

In *Kay* v. *Kay* (2) the wife's petition for divorce was based on charges of cruelty and adultery which were held to be without foundation. It was held that, by her conduct, she plainly showed that she was not ready to receive her husband back during portion

(1) (1880) 6 P.D. 10, at p. 11. (2) (1904) P. 382, at p. 395.

of the period throughout the whole of which she contended that a state of desertion was continuing. The case illustrates the principle that a spouse who has been deserted may by his own subsequent conduct, irrespective of the effect it had on the conduct of the "deserter," prevent the state of desertion from continuing.

In *Harriman* v. *Harriman* (1) it was held that a deserted wife who, before the statutory period of desertion had expired, obtained from a magistrate a separation order against her husband, thereby lost her right to treat her husband's subsequent non-cohabitation as desertion. The case again illustrates the principle that the state of things called "desertion" may be terminated by unequivocal conduct on the part of the deserted spouse, whether or not such conduct operates upon the mind or motives of the deserter. As *Fletcher Moulton* L.J. said, "it is impossible to hold that a husband is committing a marital offence by non-cohabitation when he has not the right to cohabit" (2). In my opinion, the same proposition holds good if we substitute the words "when he has the right not to cohabit" for "when he has not the right to cohabit." If the adultery of one spouse confers upon the other the right not to, or no longer to, cohabit, the principle enunciated should conclude the present appeal.

In *Harriman* v. *Harriman* (3) *Farwell* L.J. said: "The wife who has rejected her husband cannot call herself deserted by him." In my opinion, this statement of principle applies *a fortiori* where the deserted spouse has unequivocally demonstrated her entire rejection of the deserter by committing the act of adultery. When *Kennedy* L.J. asked: "How can he be bound to cohabit, if she is not?" (4), he was merely applying the principle that the fact of desertion is not always governed by the motives, knowledge, purpose or intention of either spouse, but is sometimes determinable by rules of law as to what is "just cause."

In *Stevenson* v. *Stevenson* (5), the Court of Appeal held that the filing and prosecution of a suit for judicial separation prevented a petitioner from pleading that the period of desertion was running during the time of the maintenance of the suit. *Bargreave Deane* J.

(1) (1909) P. 123.
(2) (1909) P., at p. 137.
(3) (1909) P., at p. 146.
(4) (1909) P., at p. 154.
(5) (1911) P. 191.

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said of the wife's petition : " That is the strongest piece of evidence you can have that she herself wished the state of cohabitation to be put an end to ; and from that moment, as long as that prayer was on the record there would be no desertion, because it was with her consent that the husband was away, and she was asking and praying the court to insist on his keeping away " (1).

I would suggest that there is an even stronger piece of evidence which conclusively proves both a desire to terminate all matrimonial relationships and a consent that an absent spouse should continue not to cohabit, and that piece of evidence is the commission of adultery by the deserted spouse. *Cozens-Hardy* M.R. put the position in the following sentence : " The presentation of the petition and its continuance on the files of the court prevented the subsequent desertion from being without excuse. She was praying the court to require her husband to keep away " (2). Equally, in my opinion, the commission of adultery by a spouse who has been deserted prevents subsequent non-cohabitation of the other spouse from being either " desertion," or, at any rate, desertion " without just cause." In other words, I am of opinion, that, irrespective of all questions of knowledge or purpose, adultery on the part of either spouse constitutes good legal cause or excuse for non-cohabitation on the part of the other spouse. In the absence of a statutory provision to the contrary, this general principle is part of the law of South Australia. It was enunciated in popular language by Lord *Thurlow* in the famous case of Mrs. *Addison*, when he said :—" Why do you grant to the husband a divorce for the adultery of the wife ? Because he ought not to forgive her, and separation is inevitable. Where the wife cannot forgive and separation is inevitable by reason of the crime of the husband, the wife is entitled to the like remedy."

The same principle finds application in a variety of ways. Thus, the adultery of a spouse precludes him from obtaining a decree for restitution of conjugal rights. This is not a mere rule of practice but also an application of the principle that in such cases the innocent spouse has just cause or excuse for not cohabitating. For the same reason, the fact of adultery gives the innocent spouse a right to the remedy of judicial separation where, although the status of husband

(1) (1911) P., at p. 192.

(2) (1911) P., at p. 194.

and wife still subsists, the law recognizes " cause " for not cohabitating. A similar principle is illustrated by common-law cases. Thus, in *Govier* v. *Hanock* (1) an action of assumpsit for the board and lodging of the defendant's wife failed upon the ground that the wife's right of support had been terminated by her commission of adultery. And in *R.* v. *Flintan* (2) the conviction of a husband for refusing to maintain an adulterous wife was set aside on the ground that the husband was under no liability to maintain because he could not be successfully sued either for maintenance or for restitution of conjugal rights.

I do not see how the fact that, under the South Australian *Matrimonial Causes Act*, the adultery of a plaintiff may be regarded as disentitling him to relief, affords sufficient warrant for inferring that proof of a plaintiff's adultery can have no other effect. Incidentally, the power to refuse the plaintiff a remedy may be necessary in cases where the statutory period of desertion has expired before the adultery of the plaintiff.

In my opinion, the law of South Australia confers upon either party to a marriage a legal right not to cohabit with the other spouse after that other spouse has committed adultery. In the present case, the wife's " failure " to cohabit after the husband had committed adultery was in strict accordance with her legal rights ; and it is nothing to the point that she was unaware of the fact of adultery.

Similarly, the husband's " adultery " provided conclusive evidence that he regarded the matrimonial relationship as entirely severed, and had no longer any intention of resuming cohabitation. In my opinion, after the husband's adultery, the wife's " failure " or refusal to cohabit was not " desertion " by her within the meaning of the statute.

For the reasons given, the appeal should be allowed.

McTIERNAN J. In my opinion the appeal should be allowed.

Sec. 6 of the *Matrimonial Causes Act* 1929 of South Australia provides that any married person domiciled in the State may claim an order for divorce on a number of grounds therein specified, which include " desertion for five years." The question of law arising for

(1) (1796) 6 T.R. 603 ; 101 E.R. 726. (2) (1830) 1 B. & Ad. 227 ; 109 E.R. 771.

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decision is whether a wife was guilty of "desertion for five years." The facts upon which this question arises are not in dispute. The wife left her husband in July 1931 with the intention of breaking off matrimonial relations, and in August 1936 the husband commenced proceedings for an order for divorce on the above-mentioned ground. The statutory period had elapsed, but the amended writ served on the wife contained admissions that the husband had committed adultery with three women between December 1932 and January 1936. The wife was ignorant of the adultery until these disclosures were made by the amended writ. She did not defend the action. The Crown Solicitor, with the approval of the Attorney-General, intervened and objected to an order nisi for a divorce being made, on the ground that by reason of the plaintiff's adultery there had not been desertion for five years within the meaning of sec. 6 of the *Matrimonial Causes Act* 1929 and the husband was not entitled to an order for divorce. The intervention was made at the request of the Full Court, to which the action had been referred by the learned trial judge (*Reed* A.J.) after he had heard the evidence of the husband and his witnesses. The action was referred to the Full Court to pronounce such judgment as it might think fit. His Honour was of opinion that but for the adultery he would have held that the husband had made out his claim for relief, but he said that because of the adultery he did not feel free to say that the husband had proved that his wife had been guilty of desertion for five years without just cause. But his Honour said that, if he were free to hold that the wife was guilty of desertion for five years, he would exercise the discretion of the court to order a divorce notwithstanding the husband's adultery. The case of *Cook* v. *Cook* (1) stood in the way of an order nisi being made without the case being referred to the Full Court. In that case *Murray* C.J. held that a husband who commits adultery after his wife has left him with the intention of deserting him cannot honestly say that thereafter she deserted him, even if she were unaware of the adultery, and in that case the learned Chief Justice dismissed the husband's claim for relief which was made on the ground of alleged desertion. Upon the reference of the present action the Full Court overruled *Cook* v. *Cook* (1). They reached the

(1) (1934) S.A.S.R. 298.

conclusion that the state of desertion which was commenced by the wife's conduct in leaving her husband continued notwithstanding his adultery, and, acting on the view of *Reed* A.J. that, if he could have held that the statutory ground of relief had been made out, the court should exercise its discretion to order a divorce notwithstanding the adultery, the Full Court made an order nisi for divorce.

Before any question arises as to the manner in which the court should exercise its discretion there must first be determined the fundamental question whether the husband made out any case at all for relief. Prior to the husband's adultery the wife had not been guilty of desertion for five years. But she was ignorant of the adultery, and after it was committed there is no question that in fact she wilfully lived apart and separate from him. As she was ignorant of the adultery, it did not in fact have any influence on her conduct. The words " desertion for five years " refer, not to a specific act, but to a state of affairs which has been kept up for that period. The husband's right to relief therefore turns on the question whether a state of affairs which can justly be described as the matrimonial offence of desertion continuously existed during the period of five years which began in July 1931, when the wife left her husband. In legislation on divorce and matrimonial causes it is often made more explicit that the matrimonial offence intended to be described as desertion is " desertion without just cause or excuse," or other words with a like effect are used (See *Oldroyd* v. *Oldroyd* (1); *Synge* v. *Synge* (2)). No definition of desertion has been framed which will fit all cases. The addition of a phrase of like import to that just quoted marks the wrongful character of the conduct which amounts to desertion and limits the offence to desertion for which the law can find no justification. The word " desertion " in sec. 6 of the present statute was clearly intended to refer to the matrimonial offence of desertion as thus understood. The omission of any qualifying phrase such as " without cause " should not lead to the conclusion that the legislature intended to make as a ground for divorce desertion for which there is a lawful justification (*Frowd* v. *Frowd* (3)). It is implicit in the Act that, if lawful justification

(1) (1896) P. 175. (2) (1900) P. 180.
(3) (1904) P. 177.

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could be found for the commencement or continuation of the conduct charged as desertion, it was not intended that any claim for relief based on that conduct should arise. The court is not here confronted with the delicate problem whether the conduct of the spouse alleged to be deserted was of a character that it could lawfully justify the other spouse in leaving him or in continuing the separation. But it is said that the wife did not know of the adultery, and, as her conduct in continuing to live apart from him was not induced by the adultery, no lawful justification can be found for the continuance of the alleged desertion after the adultery was committed. When the husband committed adultery a right arose in the wife, subject to any discretionary bars, to claim a divorce or a judicial separation. By committing the offence he renounced his marital relationship with his wife, and, while the marriage subsisted, its effects could be repaired only by condonation. Where one spouse has in the first place wilfully and without just cause separated from the other, it is difficult to see why, in principle, lawful justification for the separation should arise, if that spouse becomes aware that since the separation the other has committed adultery, but not if there is ignorance of the adultery. If these two cases are to have a different result, it must be because adultery cannot be a lawful justification for the deserting spouse's refusing to return to cohabitation unless the refusal was influenced by the adultery. The difficulty to which the assumption that there should be a different result may lead, appears if the case be considered of a wife who finding her husband in adultery leaves him, giving out, without any simulation, as her real motive for going, something which the court would not accept as a lawful justification for the departure. In such a case it is clear that the conduct of the wife in leaving her husband was not wrongful, although she happened to be actuated by a motive which would not lawfully justify her. The question whether one spouse has wrongfully continued to keep up a state of affairs amounting to desertion is one for the determination of the court upon the matters brought to its knowledge at the hearing. Where the evidence discloses that the spouse complaining of desertion has committed adultery after the alleged desertion commenced, the question whether the alleged deserting spouse thereafter wrongfully deserted the

adulterous spouse does not depend upon the reaction of the alleged deserter to the knowledge of the adultery. The solution of that question must be governed by judicial standards, and not by any peculiar view which one or both of the parties might take of misconduct to which the statute attaches serious consequences and for which the law has its own judgment. Applying that principle to the present case, it cannot be said that upon the knowledge which the court has of the husband's adultery the desertion of the wife was a state of affairs which was wrongfully kept up by her for a period of five years, although she did not know of her husband's guilt. In my opinion the husband failed to prove that his wife was guilty of desertion for five years.

The conclusion at which I have arrived is in accord with the result in *Douglas* v. *Douglas* (1) and *Cook* v. *Cook* (2), but in disagreement with that in *Gray* v. *Gray* (3) and *Hopkins* v. *Hopkins* (4).

Appeal allowed. Order of Supreme Court set aside and action dismissed. No order as to costs.

Solicitor for the appellant, *A. J. Hannan*, Crown Solicitor for South Australia.

Solicitors for the plaintiff respondent, *McCarthy & McEntee.*

C. C. B.

(1) (1903) 23 N.Z.L.R. 584.
(2) (1934) S.A.S.R. 298.
(3) (1925) Q.S.R. 166.
(4) (1936) V.L.R. 218.