[HIGH COURT OF AUSTRALIA.]

HALL . . . . . APPELLANT;
PETITIONER,

AND

HALL . . . . . RESPONDENT.
RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1938.

SYDNEY, *Aug.* 9, 31.

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

Divorce—Desertion—Continuance for statutory period—Intervening suit—Matrimonial Causes Act 1899 (*N.S.W.*) (*No.* 14 *of* 1899), *sec.* 13 (*a*).

A married person cannot by filing a petition for divorce terminate or suspend a period of desertion already commenced by that person, and the mere pendency of such a petition does not preclude the innocent spouse from presenting and maintaining a petition for divorce based on that desertion.

Gidley v. *Gidley*, (1926) 43 W.N. (N.S.W.) 191, and *Oxenham* v. *Oxenham*, (1931) 48 W.N. (N.S.W.) 168, overruled.

Fremlin v. *Fremlin*, (1913) 16 C.L.R. 212, at pp. 238, 239, discussed and explained.

Decision of the Supreme Court of New South Wales (*Edwards* A.J.) reversed.

APPEAL from the Supreme Court of New South Wales.

A petition was filed on 1st December 1937, in the Supreme Court of New South Wales, by Weaver George Blythe Hall for the dissolution of his marriage with Muriel Joyce Hall on the ground that she had without just cause or excuse wilfully deserted him and without any such cause or excuse left him continuously so deserted during three years and upwards. The wife did not defend the suit.

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The parties were married on 26th October 1925. According to evidence given by and on behalf of the husband he and his wife lived together until February 1931, when he, at her request, following upon a period of unhappy domestic relations, left the home and took up residence at a nearby residential hotel with a view, as he alleged, of returning later if he were able to effect a reconciliation. The parties never again lived together.

On 20th March 1931 the wife filed a petition in which she prayed for a dissolution of the marriage on the grounds, firstly, that her husband had during three years and upwards been an habitual drunkard and had habitually been guilty of cruelty towards her, and, secondly, that during the same period he had been an habitual drunkard and had habitually left her without means of support. In that suit the husband duly entered an appearance, and, on 20th April 1931, filed an answer denying the charges. The issues were settled, and on 22nd August 1931 the suit was set down for hearing at the then sittings of the matrimonial causes court. On 11th June 1931 a notice of motion was taken out by the solicitors acting for the wife for an order that the husband should provide certain moneys on account of the costs of suit of the wife. This motion was opposed by the husband. It appeared from the affidavit filed by the husband in opposition to the motion that the wife was a wealthy woman, whilst he was almost penniless. The motion came on for hearing before the registrar on 22nd June 1931, when it was stood over till 26th June 1931. On this latter date it was dismissed and no costs of the motion were allowed to the applicant. Thereafter, no steps were taken by the wife to bring the suit on for hearing, and, with other suits that were lying dormant, it was listed for 17th October 1932. An order was made on that date that it should stand over for a month and, on 18th November 1932, it was again placed in the list and on that date it was struck out. No application had been made by the wife to restore it to the list or bring it on for trial, nor did the husband at any time move to have the suit dismissed for want of prosecution.

Some time after the separation in February 1931, the wife went to Queensland and remained out of New South Wales for three or four years. The husband stated that he wrote to his wife whilst

she was in Queensland but did not receive any reply to his letter. Subsequently, in April 1935, his wife got into touch with him and they had lunch together. The husband further stated that during the conversation that ensued he suggested that they should try and come together again for the sake of the child of the marriage. He said his wife replied to this suggestion in these terms : " I have no feelings whatever towards you, and it would be an impossibility for us ever to live together again." He stated also that during this conversation he asked his wife why she had taken out the petition against him and that she answered that she had never intended to take it out and did not know about it at the time. When he stated that he could not understand that and that she must have signed certain papers and known what she was signing at the time she answered that she had been wrongly advised by friends and had practically left everything to them and did not know what she was signing. Thereafter he saw his wife from time to time until about June 1935, and since that date he had not seen her. The husband stated further that he had only learnt quite recently that his wife's suit had been struck out.

The trial judge referred to *Gidley* v. *Gidley* (1), *Oxenham* v. *Oxenham* (2), and *Fremlin* v. *Fremlin* (3), and said that, in his opinion, the husband's failure to apply on 18th November 1932 for his wife's suit to be dismissed for want of prosecution amounted to acquiescence on his part to a suspension of their marriage relations and, that being so, there had been a suspension of the desertion ever since 20th March 1931, consequently the statutory period of three years and upwards which would have entitled the husband to a dissolution of the marriage had not elapsed. The petition was dismissed on this ground.

From that decision the husband appealed to the High Court.

Sugerman, for the appellant. The doctrine said to have been enunciated in *Fremlin* v. *Fremlin* (4) does not apply to enable a suit instituted by the respondent to suspend desertion. That doctrine was applied in *Gidley* v. *Gidley* (1) and *Oxenham* v. *Oxenham* (2). The decisions in those cases are wrong in principle, and although

(1) (1926) 43 W.N. (N.S.W.) 191.
(2) (1931) 48 W.N. (N.S.W.) 168.
(3) (1913) 16 C.L.R. 212, at p. 238.
(4) (1913) 16 C.L.R., at pp. 238, 239.

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they were distinguished in *Harrold* v. *Harrold* (1), *Davies* v. *Davies* (2) and *Coulson* v. *Coulson* (3) such distinctions were unnecessary. If there be a principle that the institution of a previous suit by either spouse suspends the matrimonial relationship so as to disentitle either party to base a subsequent suit on the ground of desertion, that principle is applicable only where the previous suit was bona fide. That position was left open in *Oxenham* v. *Oxenham* (4). The previous suit in this case was not bona fide. The mere fact that a suit is on the file and undisposed of is not in itself sufficient to prevent the period of desertion running. On this aspect *Fremlin* v. *Fremlin* (5) merely establishes that while a previous suit is pending cohabitation is not terminated but merely suspended and is resumed again immediately upon the termination of the previous suit; in that case there had not been in fact any desertion before the previous suit.

[DIXON J. referred to *Lapington* v. *Lapington* (6).]

In addition to that case this matter has been before the courts in England in *Kay* v. *Kay* (7), *Craxton* v. *Craxton* (8), *Harriman* v. *Harriman* (9), *Stevenson* v. *Stevenson* (10), and *Chapman* v. *Chapman* (11). In those cases the matter is put upon the basis shown in *Halsbury's Laws of England*, 2nd ed. vol. 10, p. 658, par. 968.

[RICH J. referred to *Knapp* v. *Knapp* (12) and *Wood* v. *Wood* (13).]

Those cases were discussed in *Kay* v. *Kay* (7).

[DIXON J. referred to *Fullerton* v. *Fullerton* (14).]

The petitioner in *Fremlin* v. *Fremlin* (5) was also the petitioner in the previous suit between the parties; the remarks of *Isaacs* J. (15) were not intended to have an interpretation wider than the decisions made by the English courts; they were not intended to bear the broad significance placed upon them by the courts of New South Wales. Other cases in which the question has been considered by the courts are *Walsh* v. *Walsh* (16), *Heymann* v. *Heymann* (17),

(1) (1937) 54 W.N. (N.S.W.) 160.
(2) (1937) 54 W.N. (N.S.W.) 169.
(3) (1938) 55 W.N. (N.S.W.) 104.
(4) (1931) 48 W.N. (N.S.W.) 168.
(5) (1913) 16 C.L.R. 212.
(6) (1888) 14 P.D. 21.
(7) (1904) P. 382.
(8) (1907) 23 T.L.R. 527.
(9) (1909) P. 123.
(10) (1911) P. 191.
(11) (1938) 54 T.L.R. 462.
(12) (1880) 6 P.D. 10.
(13) (1887) 13 P.D. 22.
(14) (1922) 39 T.L.R. 46.
(15) (1913) 16 C.L.R., at pp. 238, 239.
(16) (1922) 25 W.A.L.R. 131.
(17) (1926) Q.S.R. 148.

Adey v. *Adey* (1) and *Bell* v. *Bell* (2). See also *Dearman* v. *Dearman* (3). A previous petition by the respondent to the second petition cannot have the effect of barring the rights of the petitioner in that second petition. If such an effect did result, a guilty spouse, by bringing a suit or a series of suits, would be able indefinitely to postpone the right of the innocent spouse to relief.

There was no appearance on behalf of the respondent.

Cur. adv. vult.

Aug. 31.

The following written judgments were delivered :—

LATHAM C.J. This is an appeal from a judgment of *Edwards* A.J. dismissing a petition by a husband for dissolution of marriage.

The petition was filed on 1st December 1937. The petitioner alleged that his wife had without just cause or excuse wilfully deserted him and without just cause or excuse left him continuously so deserted during three years and upwards (*Matrimonial Causes Act* 1899 (N.S.W.), sec. 13 (*a*)). The suit was undefended. Evidence was given which, if accepted, showed that the wife had deserted the husband in February 1931 without just cause or excuse and (subject to what immediately appears) had left him so deserted from that date up to the date of the filing of the petition in 1937. But in March 1931 the wife filed a petition for divorce from her husband on the grounds (*a*) that her husband had during three years and upwards been an habitual drunkard and had habitually been guilty of cruelty towards her, and (*b*) that during that period he had been an habitual drunkard and had habitually left her without the means of support.

The husband duly entered an appearance in this earlier suit and, in April 1931, filed an answer denying the charges. An application by the wife's solicitors that the husband should provide moneys for his wife's costs was dismissed. Nothing further was done by either party. The petition was put in the list in October 1932, when neither party appeared, and it was struck out on 18th November 1932.

(1) (1928) Q.S.R. 303.
(2) (1933) S.A.S.R. 67.
(3) (1916) 21 C.L.R. 264.

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That petition has not been dismissed and no decree of any kind has been made upon the prayer in the petition. The appeal has been argued upon the basis that, upon application by either party, the petition could be restored to the list and dealt with. The learned judge, upon the present petition, held that the husband had established only a period of one month's desertion by his wife, namely, desertion during the period February-March 1931. This conclusion followed from the view that the effect of the institution in March 1931 of proceedings by the wife for divorce was to suspend the matrimonial relationship, with the result that neither party could be in the position of deserting the other party during the pendency of the proceedings. Accordingly, as the only desertion established was for a period of one month, the petition was dismissed.

The judgment of the learned judge was based upon decisions of the Supreme Court of New South Wales in *Gidley* v. *Gidley* (1) and *Oxenham* v. *Oxenham* (2). These decisions were based upon statements contained in the judgment of *Isaacs* J. in *Fremlin* v. *Fremlin* (3).

I propose, in the first instance, to consider the matter apart from the authorities mentioned and simply in relation to the terms of the statute. The question is whether the wife, upon the basis that the evidence to which I have referred is accepted, has deserted the husband without just cause or excuse and, without any such cause or excuse, has left him continuously so deserted during three years and upwards prior to the 1st December 1937. If the evidence mentioned is accepted it is established that the wife wilfully severed the matrimonial relationship without just cause in February 1931. The evidence also establishes the continuance of this severance so caused for the statutory period. Does the fact that the deserting wife instituted proceedings for divorce within that period, and the further fact that those proceedings have not been finally disposed of, provide her with just cause for persisting in the continued severance of matrimonial relations with her husband ? She could have returned to him at any time. She could have abandoned the proceedings, either by applying for and obtaining leave to withdraw

(1) (1926) 43 W.N. (N.S.W.) 191. (2) (1931) 48 W.N. (N.S.W.) 168.
(3) (1913) 16 C.L.R. 212.

the petition, or by consenting to it being dismissed, or she could simply have resumed relations with her husband. There was nothing in law or in fact to prevent her from doing so. There accordingly appears to be no ground in reason for holding that the wife's previous suit should prevent the husband from obtaining the matrimonial relief which he now seeks.

The position might well be different if the present petitioner (the husband) were the party who had previously taken proceedings for divorce and those proceedings were still pending. As long as such proceedings were on foot he could be regarded as saying to his wife : " I do not want you to resume matrimonial relations. I want to have nothing to do with you." In such circumstances the wife might be held to have just cause during that time for remaining away from the husband, this cause being that he was saying in the most formal and effective manner that he did not want her. The wife, being repelled by the husband, could not be held at that time to be deserting him. The existence of the petition by the husband would therefore afford to the wife a reply to any contention on his part that, at that time, she was deserting him. But these circumstances do not exist when the previous petition was the petition of the respondent. The only effect of such a petition in relation to desertion would be that the wife (the respondent in the present petition) could not be heard to say that the present petitioner (the husband) was deserting her during the period of the previous petition. It would be an inversion of the facts to hold that insistence by the wife on separation from her husband (evidenced by her former petition) prevented desertion from continuing on her part.

It is a mistake to regard desertion as a kind of extra-matrimonial state in which both parties are in the same position, that is, the position of spouses each deserting the other. Desertion must be desertion either by the wife or by the husband. A pending petition for divorce by one may provide the other with just cause for separation, and therefore bring about the result that the respondent to that petition is not then a deserting party. But the existence of such a petition has no relation to the question whether the petitioner is then guilty of desertion or not. A married person cannot by the simple process of filing a petition for divorce terminate or suspend

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a period of desertion already commenced by that person. This conclusion appears to me to follow naturally and inevitably from the relevant provisions of the statute.

This view is in accordance with the decisions in English courts in *Kay* v. *Kay* (1), *Stevenson* v. *Stevenson* (2) and *Chapman* v. *Chapman* (3), and the earlier decisions in *Lapington* v. *Lapington* (4) and *Knapp* v. *Knapp* (5) (and see *Halsbury's Laws of England*, 2nd ed., vol. 10, p. 658); but, as already indicated, it is not in accordance with the views adopted in the New South Wales cases mentioned.

These latter decisions are founded upon the following statements by *Isaacs* J. in *Fremlin* v. *Fremlin* (6):—"The question, then, for the court in such a suit is whether in consequence of the respondent's acts anterior to the suit, the marriage tie should be dissolved, and for the purpose of that suit, and until it is closed, there is a just cause for the respondent to remain apart from the petitioner, without being guilty of desertion. In other words, there is a practical suspension of the marriage relations during the continuance of the suit, and for the statutory purpose of the suit. During that period the mutual ordinary rights of the parties are dormant. But the moment the purpose is served, the moment the suit is out of the way, then, if it is dismissed, both parties are in the position in which they stood immediately before its commencement. If desertion had been already commenced, its continuance resumes from the termination of the suit—the intermediate time being necessarily regarded as a just interruption. The opposite view is not only inconsistent with *Knapp* v. *Knapp* (5); *Wood* v. *Wood* (7); *Lapington* v. *Lapington* (4); *Stevenson* v. *Stevenson* (2); but it is contrary to principle. A petitioner, though he so far fails to establish sufficient wrong to him in order to obtain relief, does not by his suit obliterate the wrong actually done. That remains, and if it be still persevered in by the wrongdoer, the sound reason of the matter is that the entirety, excluding the period covered by the continuance of the suit, may yet reach the statutory standard, and be so adjudged in a later suit."

(1) (1904) P. 382.
(2) (1911) P. 191.
(3) (1938) 54 T.L.R. 462.
(4) (1888) 14 P.D. 21.
(5) (1880) 6 P.D. 10.
(6) (1913) 16 C.L.R., at pp. 238, 239.
(7) (1887) 13 P.D. 22.

It will be observed that his Honour was dealing with a case where the prior petition had been dismissed and that he, in effect, said that the time of pendency of the suit was a period during which the mutual ordinary rights of the parties were dormant so that there could be no desertion (which can exist only as a breach of those rights) during that period. Further, at the end of the passage quoted his Honour refers to the exclusion of " the period covered by the continuance of the suit." This observation has been regarded as involving the proposition that there can be no desertion by either party during such a period.

In my opinion the statement quoted should be limited to the case of a previous petition by a petitioner who is also the petitioner in the subsequent suit with which a court is dealing. But it cannot be denied, I think, that, although the actual decision in *Fremlin* v. *Fremlin* (1) may be limited in this way, the reasoning of the learned judge is based upon the view that there can be no breach of matrimonial rights (at least by way of desertion) during the continuance of a suit in which one party claims a severance of cohabitation, as in suits for divorce or for judicial separation. It could hardly be contended that adultery by either party during the continuance of a suit was not a breach of a matrimonial obligation. Therefore the proposition that during the continuance of a suit " the mutual ordinary rights of the parties are dormant " cannot be accepted in its full generality. But even in relation to desertion the proposition should, in my opinion, be limited to the case of a petitioner or cross-petitioner for divorce or judicial separation who is a petitioner or a cross-petitioner in the subsequent suit. In such cases the party who is claiming such matrimonial relief is insisting throughout the suit that the respondent should not then or thereafter have the right of matrimonial cohabitation. Accordingly, the claimant party cannot be heard to say that the respondent is, during the suit, guilty of a breach of the matrimonial duty of maintaining such cohabitation. But, for reasons which I have already stated, such a contention is inadmissible where the earlier petition has been presented by the respondent in the later suit. In *Fremlin* v. *Fremlin* (1) the court was dealing with an appeal in a suit for divorce

(1) (1913) 16 C.L.R. 212.

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by a husband on the ground of desertion for three years and upwards. The suit was initiated in 1911. In 1906 he had instituted a suit on the same ground. The earlier suit was dismissed on the ground that there had then been no desertion. It was contended for the respondent that the bringing of the suit in 1906 put an end to cohabitation and that desertion could not begin after the suit had been dismissed unless there had been a resumption of cohabitation or a decree for restitution of conjugal rights. In either of the latter events, it was argued, there would have been a possibility for desertion to begin again; but otherwise desertion could never start again. The observations of *Isaacs* J. (1) in the passage quoted were made in relation to this argument. They were directed to the establishment of the proposition that the prior existence of a petition for divorce, which had been dismissed, does not operate to relieve the parties from matrimonial obligations after the suit—the "practical suspension of the marriage relations" remains only "during the continuance of the suit." But the statement of the learned judge was not in terms limited to this proposition, and in *Gidley* v. *Gidley* (2) the statement of *Isaacs* J. was interpreted and applied in the widest sense and it was held that a petitioner for divorce, who had been respondent in prior proceedings in which his wife had been petitioner, could not count as a period of desertion by his wife the time elapsing between the filing of the petition by her and its termination. The decision in this case was followed in *Oxenham* v. *Oxenham* (3). In *Davies* v. *Davies* (4) the same principle was recognized, but a distinction was drawn where the parties had become reconciled and lived together before the earlier suit had been determined. It was held that the husband had voluntarily re-established the matrimonial relationship and therefore was capable of deserting his wife by withdrawing from an existing state of cohabitation so established. So also in *Coulson* v. *Coulson* (5) the principle was again recognized but its application was excluded. There a respondent husband's suit was held not to constitute an interruption of current desertion because, in the circumstances of that case, when the husband instituted his suit for divorce "he was not merely a

(1) (1913) 16 C.L.R., at pp. 238, 239.
(2) (1926) 43 W.N. (N.S.W.) 191.
(3) (1931) 48 W.N. (N.S.W.) 168.
(4) (1937) 54 W.N. (N.S.W.) 169
(5) (1938) 55 W.N. (N.S.W.) 104.

deserting party, as were the corresponding parties in *Gidley* v. *Gidley* (1) and *Oxenham* v. *Oxenham* (2), but he was a deserting party who had forfeited the right to put an end to his desertion." He had so forfeited his right because it had been found that he had been guilty of cruelty towards his wife which justified her in leaving him. He had also made against the wife a false charge of adultery.

The result of consideration of the statute and of the relevant authorities is that, in my opinion, the New South Wales cases of *Gidley* v. *Gidley* (1) and *Oxenham* v. *Oxenham* (2) were wrongly decided and that the statements of *Isaacs* J. in *Fremlin* v. *Fremlin* (3) should be limited to the case of a prior petition for divorce or judicial separation by a person who is petitioning for similar relief in a subsequent suit upon the ground of desertion. In such a case desertion by the respondent cannot be regarded as existing during the pendency of the earlier petition. This proposition does not necessarily involve the conclusion that no period of desertion prior to the first petition can ever be counted for the purposes of the second petition as part of a period of desertion continuous with desertion after the termination of the first suit. That question can be decided when it arises. When it does arise it may be an important consideration that the presentation of a petition is a right conferred by law and that the exercise of that right cannot be regarded as in itself a breach of matrimonial obligation. Therefore possibly the period of the pendency of the first petition should be regarded as, in the words of *Isaacs* J. in *Fremlin* v. *Fremlin* (4), "a just interruption" which does not interfere with the continuity of desertion which is otherwise without just cause or excuse, though it may diminish its period. But this question does not arise in the present case.

If in this case the learned judge accepts the evidence tendered on behalf of the husband, the desertion by the wife began in February 1931 and continued without interruption up to the filing of the present petition in December 1937. Upon the basis of these facts the husband would be entitled to a decree for dissolution of marriage.

(1) (1926) 43 W.N. (N.S.W.) 191.
(2) (1931) 48 W.N. (N.S.W.) 168.
(3) (1913) 16 C.L.R., at pp. 238, 239.
(4) (1913) 16 C.L.R., at p. 238.

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The learned judge, however, has not found any facts and accordingly there should be an order for a new trial.

RICH J. In this case the learned primary judge, *Edwards* A.J., was constrained to follow a line of decisions of single judges sitting in the New South Wales divorce jurisdiction. We in this court are under no such compulsion. I can state my opinion very shortly. Desertion is a question of fact and the period continues unless it is suspended or put an end to by some overt act or conduct on the part of the injured spouse or by the conjoint action of both spouses. In this case the husband filed a petition for relief based upon his wife's desertion. She had previously filed a petition for divorce founded on other and different grounds. The husband filed an answer denying the charges alleged in her petition but as neither party took any further steps the petition was struck out of the list. So far from this undetermined petition holding up or interfering in any way with her desertion it seems to me to be the strongest evidence of her intention to continue such desertion and to support her husband's charge. It would, indeed, be strange if in divorce proceedings a respondent spouse alleged to have committed a matrimonial offence could, so to speak, take advantage of his or her own wrong and frustrate the operation of the injured party's remedy by merely filing a counter-petition founded on different grounds from those alleged in the original petition.

The appeal should be allowed.

STARKE J. This was a petition filed in December 1937 by a husband in the Supreme Court of New South Wales praying the dissolution of his marriage on the ground that his wife had without just cause or excuse wilfully deserted him and without any such cause or excuse left him continuously so deserted during three years and upwards (*Matrimonial Causes Act* 1899 (N.S.W.), sec. 13 (*a*)). It appears that the wife filed a petition in the Supreme Court on 20th March 1931 praying the dissolution of her marriage with the present petitioner on various grounds. The husband appeared and denied the charges. The wife's petition was never brought to hearing and was struck out of the list of causes for hearing but never

dismissed. The husband's petition was dismissed upon these grounds: "It has been held . . . that while (the petition of the wife filed in 1931) was pending the party charged with desertion . . . cannot be said to have remained away from the other spouse without just cause or excuse." The failure on the part of the husband to have the petition of the wife dismissed "amounted to acquiescence on his part in a suspension of their marriage relations. That being so . . . there has been a suspension of the desertion ever since 20th March 1931 and consequently the statutory period of three years and upwards . . . has not elapsed."

It is settled that the filing and prosecution of a suit for dissolution of marriage or judicial separation "precludes a petitioner from successfully pleading that the period of desertion was running during the time the suit was being maintained." "The presentation of the petition and its continuance in the files of the court" prevent "the subsequent desertion from being without excuse." And this is so because it practically prevents the other spouse from resuming matrimonial relations (*Stevenson* v. *Stevenson* (1); *Harriman* v. *Harriman* (2); cf. *Kay* v. *Kay* (3)). But there are decisions of the Supreme Court of New South Wales founded upon some observations of *Isaacs* J. in *Fremlin* v. *Fremlin* (4) which support the decision in this case (*Gidley* v. *Gidley* (5); *Oxenham* v. *Oxenham* (6)). According to the decisions in these cases the institution of a suit for a judicial separation by a spouse who had deserted the other precluded the spouse who had been deserted from successfully pleading that the period of desertion was running during the time the suit was being maintained. The observations of *Isaacs* J. have, I think, been misunderstood. They were directed to the argument that the institution by a petitioner of a former suit, which had been dismissed, constituted such a break in cohabitation that subsequent desertion became impossible until cohabitation was resumed, and the learned judge denied the proposition (7). The institution of a suit for dissolution of marriage or judicial separation does not, as a matter of fact, bring to an end an existing

(1) (1911) P. 191.
(2) (1909) P. 123.
(3) (1904) P. 382.
(4) (1913) 16 C.L.R., at p. 238.
(5) (1926) 43 W.N. (N.S.W.) 191.
(6) (1931) 48 W.N. (N.S.W.) 168.
(7) (1913) 16 C.L.R., at pp. 215, 238.

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state of desertion: it rather accentuates that state. And it is contrary to all principle and to authority that a deserting spouse can by the mere institution of a suit excuse his conduct or suspend his marital obligations. The observations of *Isaacs* J. in *Fremlin* v. *Fremlin* (1) really support this view. *Chapman* v. *Chapman* (2) and *Adey* v. *Adey* (3) are decisions to that effect. And the opinion of *Roper* J. of the Supreme Court of New South Wales is, I think, to the same effect (*Davies* v. *Davies* (4); *Coulson* v. *Coulson* (5)). The cases of *Gidley* v. *Gidley* (6) and *Oxenham* v. *Oxenham* (7) were, I think, wrongly decided and should not be followed.

The appeal should be allowed.

DIXON J. For the purpose of our decision we must assume that more than three years before the filing of the husband's petition for dissolution the wife wilfully deserted him without just cause or excuse and that for three years and upwards she has left him continuously so deserted except in so far as her own suit operated to suspend the desertion or to afford a cause or excuse. Her suit against her husband was instituted shortly after the withdrawal from cohabitation, which we assume to amount to desertion on her part. The prayer of her petition was for dissolution. The suit was never brought to a hearing and we may proceed upon the assumption that it has never been disposed of. The husband's subsequent suit for dissolution on the ground of desertion has been dismissed because the institution and pendency of the wife's suit has been considered to make her no longer a deserting spouse. This means that, although the wife actually deserted the husband, no period of time between the commencement of her suit and its final determination could be included as part of the three years of continuous desertion without cause or excuse which must elapse before the statutory ground of divorce is completed.

The effect produced upon what may be called an existing state of desertion by the institution by one or other of the spouses of a suit for dissolution or for judicial separation is a matter upon which

(1) (1913) 16 C.L.R., at p. 238.
(2) (1938) 54 T.L.R. 462.
(3) (1928) Q.S.R. 303.
(4) (1937) 54 W.N. (N.S.W.) 169.
(5) (1938) 55 W.N. (N.S.W.) 104.
(6) (1926) 43 W.N. (N.S.W.) 191.
(7) (1931) 48 C.L.R. 168.

much difficulty appears to have been felt. It is evident that different considerations may apply when the suit which is said to suspend desertion is brought by the deserting spouse and when it is brought by the spouse who has been deserted. In the former case, the suspension can arise only from the general effect upon marital duties and relations which should be ascribed to the pendency of a suit in the matrimonial causes jurisdiction. In the latter case, the claim of the petitioner that the marriage or the obligation of *consortium* arising from the marriage should be ended judicially forms an independent consideration. For it may be regarded both as indicating a desire on his or her part that there should be no resumption of cohabitation and also as imposing an obstacle to the return of the respondent. The question could not have arisen before desertion became a distinct ground for dissolution and judicial separation, or a constituent element in a ground for that relief. In the ecclesiastical courts desertion was not a ground for relief other than restitution of conjugal rights (*Brookes* v. *Brookes* (1)). From the nature and occasion of that remedy it is plain that, for the purpose of administering it, the pendency of a prior suit could not matter. But for other purposes the obligation of *consortium* or cohabitation came under the cognizance of the ecclesiastical courts. It appears to have been recognized that, while a suit was pending, there was a suspension of the obligation of cohabitation upon which those courts generally insisted. Thus, during proceedings for the annulment of a marriage, cohabitation was considered neither incumbent nor allowable (*Sullivan* v. *Sullivan* (2) ; *Clowes* v. *Clowes* (3)). As cohabitation spelt condonation, a divorce *a mensa et thoro* could not be obtained unless at some prior time cohabitation had been relinquished and it would scarcely have been possible to treat either party to such a proceeding as guilty of a breach of matrimonial duty in failing to resume it before the suit terminated. According to the practice of the ecclesiastical courts the institution of a suit had the substantial effect of placing the parties to the marriage under the authority of the court, which dealt with them as, upon the facts appearing, the law of the court required. Pending the sentence in

(1) (1858) 1 Sw. & Tr. 326 ; 164 E.R. 750.
(2) (1824) 2 Add. 299, at p. 302 ; 162 E.R. 303, at p. 305.
(3) (1845) 9 Jur. 356, at p. 357.

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the suit, it was natural to regard the marital obligations of the spouses as subject to the direction of the court and otherwise as, perhaps, in abeyance. But to treat the institution of a suit as putting the matrimonial relationship under the control of the court and as suspending the direct claims of the parties upon one another for the fulfilment of their conjugal duties seems to me to fall far short of giving to the pendency of a suit the effect of a justification for an existing matrimonial wrong. For the effect which in this case has been ascribed to the institution of a suit is to transmute what up till that point has been a condition of wrongful desertion into a condition implying either no desertion or else a just cause and excuse for desertion. The suspension of the party's direct claim upon the other party that the full matrimonial relationship should be restored is a consequence of the invocation of the court's jurisdiction and forms part of the law of remedies. While the court is ascertaining and enforcing the rights of the parties, neither can be required or authorized to call upon the other, independently of the court, to perform duties imposed by the substantive law so far as they affect the matters put in suit. But the necessity of leaving the enforcement of those duties or the administration of the corresponding rights to the exclusive authority of the court ought not to mean that the duties or rights are themselves abrogated. In principle I find it hard to see why the institution of a suit even by a deserted spouse should operate in itself to suspend the desertion or to give the deserting spouse just cause or excuse. The substantive law would seem still to say that he ought not to desert or to continue the desertion. Consistently with the substantive law so saying, the law adjective may well say that while the suit is pending the court alone has authority to deal with the desertion and that full performance of the obligations of cohabitation, maintenance and so forth is subject to its decree final or interlocutory. Further, actual cohabitation may be considered to be the duty from the fulfilment of which the institution of the suit relieves the parties; whilst desertion involves more than the mere cessation of actual cohabitation. But, although I should have thought that even a suit by the deserted spouse would not suspend as a matter of law the wrongful desertion of the other, it is clear enough that the institution

of a suit by either spouse may sometimes be an evidentiary fact evidencing an intention to set the marriage at nought or to refuse fulfilment of marital obligations. In some circumstances it may be that the existence and communication of such an intention on the side of the deserted spouse will supply to the deserting spouse an excuse or just cause for his continuing the separation which began in his desertion. But in such a case to attribute the result to the institution of the suit, and not to the intention of the deserted party, is to confuse the fact to be proved with the evidence, or part of the evidence, by which it is proved.

Upon the views I have expressed an existing state of desertion without just cause or excuse would not be brought to an end or suspended merely because one of the spouses instituted proceedings for dissolution and this would be so whether the deserting spouse or the deserted spouse petitioned. But unfortunately for these views a decision of the Court of Appeal has gone much beyond them in the case of a petition for judicial separation by the deserted spouse. In *Stevenson* v. *Stevenson* (1) a deserted wife filed a petition for judicial separation before two years had elapsed from the desertion. Afterwards, when that period had elapsed, she filed a supplemental petition for dissolution on the ground of adultery and desertion for two years. *Cozens-Hardy* M.R., with whom *Farwell* and *Kennedy* L.JJ. agreed, said :—" The presentation of the petition and its continuance on the files of the court prevented the subsequent desertion " (*scil.*, period of desertion) " from being without excuse. She was praying the court to require her husband to keep away. When the supplemental petition was filed there had not been desertion for two years without excuse " (2). The court cited with approval both *Kay* v. *Kay* (3) and *Lapington* v. *Lapington* (4). In the latter case *Butt* J. had refused to countenance a supplemental petition in similar circumstances, but upon the ground that it could not succeed upon a period of desertion incomplete at the time when the original suit was instituted (See *Chapman* v. *Chapman* (5)). In *Kay* v. *Kay* (6) *Gorrell Barnes* J. adopted a principle of less generality than that which the statement

(1) (1911) P. 191.
(2) (1911) P., at p. 194.
(3) (1904) P. 382.
(4) (1888) 14 P.D. 21.
(5) (1938) 54 T.L.R. 462.
(6) (1904) P., at pp. 391-396.

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of *Cozens-Hardy* M.R. might be taken to express. It is, in effect, that where the deserting spouse has not so behaved, and is not so behaving, that the deserted spouse would be justified in declining to resume cohabitation upon the offer of the other spouse to do so, without more, then the institution of a suit by the deserted spouse suspends the desertion or affords an excuse. In this court there is an *obiter dictum* of *Isaacs* J. in *Fremlin* v. *Fremlin* (1), that when a deserted spouse institutes a suit for dissolution there is just cause for the deserting spouse to remain apart from the petitioner without being guilty of a continuance of the desertion. " If desertion had been already commenced, its continuance resumes from the termination of the suit—the intermediate time being necessarily regarded as a just interruption." The dictum does not, as a careful reading will, I think, show, mean to touch the case of an intermediate suit by the deserting spouse. There is also an *obiter dictum* to the same effect by the court in *Dearman* v. *Dearman* (2). I should have thought that in all these cases, even when a judicial separation was the relief sought, the deserted spouse might well have been considered as complaining of desertion, that is of a desertion still persisted in, as a wrong and a continuing wrong, and as seeking relief from the court exclusively. Even in the case of judicial separation, the petition submits the whole question to the court, which alone can give relief. The petition does not demand anything of the respondent or require him to do or abstain from doing anything in relation to the marriage. Why should the petitioner who has been deserted be regarded as giving an excuse for the very conduct of which he or she complains simply because the prayer is for the only relief the law provides and because that relief, if granted by the court but only if granted by the court, destroys the status, or the obligation of cohabitation which arises from the status ? After all, the question depends upon the meaning of the statute when it speaks of continuously leaving the petitioner deserted without just cause or excuse. It is not easy to believe that, among the causes or excuses for what is made otherwise a matrimonial wrong, the statute meant to include the premature invoking of the jurisdiction of the court to redress it by the remedies provided.

(1) (1913) 16 C.L.R., at p. 238. (2) (1916) 21 C.L.R., at p. 267.

It may be too late to apply the views I have expressed to an intermediate suit by a deserted spouse. But that is because the authorities which I have mentioned attribute to the petition a renunciation of the deserted spouse's right to a resumption of cohabitation. Whether it be too late or not, the reasoning upon which those authorities depend has no application to the institution of a suit by a deserting spouse. If a husband or wife first abandons the other party to the marriage without just cause or excuse and then petitions against him or her on unfounded grounds, the petition does not negative, it confirms, the intention to desert.

For the reasons I gave earlier, its mere pendency cannot abrogate or suspend the substantive duty of the deserting spouse. The contrary view taken by *Davidson* J. in *Gidley* v. *Gidley* (1) and by *Langer Owen* J. in *Oxenham* v. *Oxenham* (2) arose, I think, from a too literal interpretation of the language of *Isaacs* J. (3). Although *Roper* J. felt bound to adhere to these cases in deciding *Davies* v. *Davies* (4) and *Coulson* v. *Coulson* (5), he recognized that they did not accord with principle and suggested that they were at variance with *Chapman* v. *Chapman* (6), as in fact they are.

In my opinion the appeal should be allowed and the cause remitted to the Supreme Court for rehearing.

McTIERNAN J. In my opinion the appeal should be allowed. *Edwards* A.J., in dismissing the appellant's petition, felt himself bound to follow the rule established by *Gidley* v. *Gidley* (1) and *Oxenham* v. *Oxenham* (2). That rule is that the commission of the offence of desertion is suspended during the pendency of a suit brought by the deserting spouse. The rule is assumed to have for its support a statement by *Isaacs* J. in *Fremlin* v. *Fremlin* (7). It is founded on the view that those remarks describe the effect of a prior suit brought by a spouse, who is either the petitioner or respondent in a subsequent suit, on the petitioner's right in the latter suit to relief on the ground of desertion.

Kay v. *Kay* (8) is a case in which the fact that a wife had previously petitioned was held to be an answer to a charge of desertion which she made in a subsequent petition and the period contemporaneous with the continuation of the first petition could not be taken

(1) (1926) 43 W.N. (N.S.W.) 191.
(2) (1931) 48 W.N. (N.S.W.) 168.
(3) (1913) 16 C.L.R., at p. 238.
(4) (1937) 54 W.N. (N.S.W.) 169.
(5) (1938) 55 W.N. (N.S.W.) 104.
(6) (1938) 54 T.L.R. 462.
(7) (1913) 16 C.L.R., at pp. 238, 239.
(8) (1904) P. 382.

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into account to make up the statutory period for which the desertion was required to continue. The reasons for attributing that effect to the prior petition are stated by *Gorell Barnes* J. (1) in these terms: "Desertion really means a wilful separation by the respondent from the petitioner without reasonable cause and without the consent of the petitioner: of course I am stating it quite broadly. That is the real position; and 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 so far as it is necessary to deal with the matters in this court, having regard to the two years' time, either for judicial separation or as forming one of the matters which give ground for a divorce. 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." But it does not appear that *Gorell Barnes* J. thought that a previous suit by the petitioner would always be an answer to a charge that during the period from the beginning to the end of the previous suit the respondent deserted the petitioner. For he states: "Now I think that is a different position to the case dealt with by Sir *James Hannen*, where a petition for divorce is presented within the two years under circumstances which entitle the wife to say that the husband has, in fact, deserted her at the commencement, and that his conduct has been such as to warrant her in refusing to receive

(1) (1904) P., at pp. 395, 396.

him back. Then there is no valid reason why the desertion should not be treated as continuing to run on, so as to entitle her to say that there has been desertion to begin with—that his conduct has been such as to show that she is not bound to have him back, and that therefore she is entitled to treat it as desertion right through from beginning to end " (1).

However, in *Stevenson* v. *Stevenson* (2) the situation referred to in this latter passage is not specially noticed and the effect of a prior petition is generally stated to be as follows :—" At the date of the petition there had not been desertion for two years, such as is required by the statute. The desertion had lasted eighteen months only. 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. When the supplemental petition was filed there had not been desertion for two years without excuse " (3). These general observations can have no application to the question of the effect of a previous petition presented by the deserting spouse after the desertion had begun, on the deserted spouse's right to relief on the ground of desertion. As was said by *Hodson* J. in *Chapman* v. *Chapman* (4), " it cannot . . . be contended that the husband " (who was the deserting spouse) " could in that way by his own act prevent desertion running against him, but the wife by her original answer, filed within the three-year period, by which she prayed for dissolution, may be said to have put it out of her husband's power to return to her, and thus to have prevented desertion running against him." There a clear distinction is drawn between the two cases : it has not been recognized in the present case. In my opinion it is incorrect to say that the previous suit of the wife, who was the deserting spouse, interrupted the continuance of the desertion which the appellant, the husband, alleged had begun before the presentation of his petition.

Appeal allowed. Judgment of the Supreme Court discharged. Case remitted to the Supreme Court for rehearing.

Solicitor for the appellant, *S. D. Ratner.*

J. B.

(1) (1904) P., at p. 396.
(2) (1911) P. 191.
(3) (1911) P., at p. 194.
(4) (1938) 54 T.L.R., at p. 464.