[HIGH COURT OF AUSTRALIA.]

REGINALD ALFRED WAGHORN . . . APPELLANT;
PETITIONER,

AND

MIRIAM DOROTHY WAGHORN . . . RESPONDENT.
RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, 1941, *Nov.* 13, 14.

1942, *Feb.* 4.

Rich, Starke, Dixon, McTiernan and Williams JJ.

Divorce—Desertion—Continuance—Adultery of deserted spouse—Effect—Deserting spouse unaware of or uninfluenced by adultery—Precedents—Conflicting decisions of High Court and English courts—Matrimonial Causes Act 1899-1929 (*N.S.W.*) (*No.* 14 *of* 1899—*No.* 5 *of* 1929), *secs.* 13 (*a*), 16 (*a*), 19 (2) (*a*), 20 (3).

If a spouse commits adultery after he or she has been deserted, the desertion is not necessarily terminated as a matter of law, regardless of the question whether the deserting spouse knew of the adultery or whether it had any influence on his or her conduct. If it is left in doubt whether the respondent knew of the adultery or, if known, whether his or her conduct was affected by it, the petitioner would fail to discharge the burden of proof. The question is to be determined according to the circumstances of each case.

So *held* by *Rich, Starke, Dixon* and *Williams* JJ. (*McTiernan* J. dissenting).

Herod v. *Herod*, (1939) P. 11, and *Earnshaw* v. *Earnshaw*, (1939) 2 All E.R. 698, followed, and *Crown Solicitor* (*S.A.*) v. *Gilbert*, (1937) 59 C.L.R. 322, not followed, by *Rich, Dixon* and *Williams* JJ. on the ground that it is desirable to achieve uniformity of decision with the English courts, and by *Starke* J. on the ground that *Crown Solicitor* (*S.A.*) v. *Gilbert*, (1937) 59 C.L.R. 322, was wrongly decided.

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

APPEAL from the Supreme Court of New South Wales.

In a petition filed by Reginald Alfred Waghorn on 20th July 1940, in the matrimonial causes jurisdiction of the Supreme Court of New South Wales, the petitioner sought a decree that his marriage

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with his wife, Miriam Dorothy Waghorn, be dissolved, 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 petitioner also prayed that although during the marriage he had been guilty of adultery the court would exercise the discretion conferred upon it by sec. 19 (2) (*a*) of the *Matrimonial Causes Act* 1899-1929 (N.S.W.).

The respondent did not defend the petition.

It was established by the evidence that the petitioner and the respondent were married on 11th January 1936, and lived together more or less unhappily until September of that year, when without justification the respondent left the petitioner and refused to return. There was not any issue of the marriage.

About twelve months later the petitioner and another woman commenced to live together as husband and wife, and they continued so to live together up to the date of the hearing of the petition. Two children had been born of this association.

The petitioner met his wife in December 1937, and discussed with her the question of the restitution of conjugal relations or, alternatively, of a dissolution of the marriage. Not being able to arrive at a final decision, the parties arranged to meet again the following week, but the appointment was not kept by the wife. That was the only occasion upon which the petitioner and the respondent had met since the latter had left him in September 1936. Nothing was then said about the woman with whom the petitioner was living, nor, so far as the petitioner was aware, had his wife ever seen him with the woman.

The trial judge dismissed the petition on the ground that the matter was concluded by the decision of the High Court in *Crown Solicitor* (*S.A.*) v. *Gilbert* (1), which was binding on the Supreme Court. His Honour said he did so with regret, since the respondent broke up the matrimonial home without just cause or excuse, and it was, he thought, highly improbable that the petitioner's adultery, had it come to the respondent's knowledge, would have had the slightest effect upon her determination to disregard the obligation of the marriage tie, and had he been in a position to do so he certainly would have exercised his discretion in the petitioner's favour in order that he might be free to regularize the relationship between him and the woman in question.

From that decision the petitioner appealed to the High Court.

Throsby, for the appellant. The statutory provisions considered by the court in *Crown Solicitor* (*S.A.*) v. *Gilbert* (1) differ materially

(1) (1937) 59 C.L.R. 322.

from the provisions of secs. 13 (*a*) and 16 (*a*) of the *Matrimonial Causes Act* 1899-1929 (N.S.W.); therefore that decision is not applicable to the case now before the court: See *Norford* v. *Norford* (1). Adultery by a petitioner during the period of desertion does not automatically terminate the desertion; it is a discretionary bar only and is not an absolute bar. To "wilfully desert" as provided in the New-South-Wales Act, the deserting party must have the intention of deserting. That intention continues and is in no way affected if the adultery by the deserted spouse either is unknown to, or, being known to, is disregarded by the deserting spouse (*Herod* v. *Herod* (2); *Earnshaw* v. *Earnshaw* (3)). Adultery by the deserted spouse during the period of desertion is not "just cause or excuse" to the deserting spouse if that spouse did not know of the adultery or was uninfluenced by it. The "state of mind" of a party was considered in *Bradford* v. *Bradford* (4)—See also *Woodlands* v. *Woodlands* (5); *Sexton* v. *Horton* (6).

Cur. adv. vult.

1942, Feb. 4.

The following written judgments were delivered:—

RICH J. In this case the learned trial judge dismissed the petition, which claimed a decree for dissolution of marriage on the ground of desertion. His Honour held that "so far as this court is concerned the matter is concluded by the decision of the High Court in *Crown Solicitor* (*S.A.*) v. *Gilbert* (7)," and considered that he was "bound to follow the High Court in preference to the decisions given in England since *Gilbert's Case* (7) was decided." Before us counsel for the petitioner endeavoured to distinguish the present case from *Crown Solicitor* (*S.A.*) v. *Gilbert* (7), but as this argument found no favour with the Bench he plucked up heart of grace, faced about and asked that the latter case should be overruled and the English decisions followed. It was suggested from the Bench that in one of these decisions (*Herod* v. *Herod* (2)) the judgment of Sir *Boyd Merriman* P. was influenced in some degree by considerations of convenience and social needs, whereas the decision of this court followed the traditional legal reasoning by deduction or induction from antecedent principles, and so was less "sociological." However this may be, the Court of Appeal in *Earnshaw* v. *Earnshaw* (3) approved of the learned President's judgment, but apparently did not consider the conflicting decision of this court in *Crown*

(1) (1941) 58 W.N. (N.S.W.) 156.
(2) (1939) P. 11.
(3) (1939) 2 All E.R. 698.
(4) (1908) 7 C.L.R 470.
(5) (1924) 25 S.R. (N.S.W.) 260; 42 W.N. 67; 35 C.L.R. 446.
(6) (1926) 38 C.L.R. 240, at p. 244.
(7) (1937) 59 C.L.R. 322.

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Solicitor (*S.A.*) v. *Gilbert* (1). The question now to be determined is whether we should reconsider this decision.

"We are bound by decided cases, for the sake of securing as much certainty in the administration of the law as the subject is capable of" (*Baker* v. *Baker* (2)). "Great inconvenience and, therefore, impropriety" follow from "adopting a course which tends to make the law fluctuate according to the opinions of particular judges; but much must depend upon the nature of the question" (*Lozon* v. *Pryse* (3)). And in *Trimble* v. *Hill* (4) the Privy Council stresses the importance "that in all parts of the Empire where English law prevails, the interpretation of that law by the courts should be as nearly as possible the same." In accordance with the opinion expressed in this case the Supreme Courts of the then colonies of Australia yielded to the decisions of the English Court of Appeal in order to secure this uniformity of decision. After Federation the High Court was established as one of the three organs of government by the Constitution of the Commonwealth of Australia. And no appeal lies from its decision "upon any question, howsoever arising, as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any State or States, or as to the limits *inter se* of the constitutional powers of any two or more States, unless the High Court shall certify that the question is one which ought to be determined by Her Majesty in Council" (Constitution, sec. 74). But with regard to appeals to the High Court from State courts an appeal by special leave lies from the High Court to the Privy Council (Constitution, sec. 74). Technically this court is bound by the judgments of the Privy Council, but, as heretofore, we shall pay the highest respect to decisions of the English Appeal Court and to those of the Supreme Courts of the other Dominions and to the judgments of the Supreme Court of the United States of America on points of law common to the respective countries. In quest of uniformity the court may reconsider previous decisions, but with great reluctance in the case of old authorities on the strength of which many transactions may have been adjusted and rights determined (*Concrete Constructions Pty. Ltd.* v. *Barnes* (5); *Westminster City Council* v. *Southern Railway* (6)). The House of Lords alone does not depart from its rulings, and they remain, unless altered by legislation, the reason being that the House of

(1) (1937) 59 C.L.R. 322.
(2) (1858) 6 H.L.C. 616, at p. 630 [10 E.R. 1436, at p. 1442].
(3) (1840) 4 My. & Cr. 600, at p. 617 [41 E.R. 231, at p. 237].
(4) (1879) 5 App. Cas. 342, at p. 345.
(5) (1938) 61 C.L.R. 209, at p. 226.
(6) (1936) A.C. 511, at p. 564.

Lords is a legislative body (*Beamish* v. *Beamish* (1); *London Tramways Co. Ltd.* v. *London County Council* (2)). I have elsewhere stated that "in Australia the six States forming the Commonwealth are governed by common law, modified by statute, which although enacted by six parliaments showed remarkably little divergence. One of the tasks of this court is to preserve uniformity of determination. It may be that in performing the task the court does not achieve the uniformity that was desirable and what uniformity is achieved may be uniformity of error. However in that event it is at least uniformity." As one of the two justices who decided *Crown Solicitor (S.A.)* v. *Gilbert* (3) considers, for the reasons expressed in his judgment, that he is willing to give up his own view, I shall not stand in the way. And in order not to produce divergent rules of construction we shall follow the rule adopted by the Court of Appeal in *Earnshaw* v. *Earnshaw* (4):—"If a spouse commits adultery after he or she has been deserted, the desertion is not necessarily terminated as a matter of law, regardless of the question whether the deserting spouse knew of the adultery or whether it had any influence on his or her conduct. If it is left in doubt whether the respondent knew of the adultery or, if known, whether his or her conduct was affected by it, the petitioner would fail to discharge the burden of proof. The question is to be determined according to the circumstances of each case."

This leaves the question to be determined according to the circumstances of each case, a flexible rule adapted to social conditions of the present day, where no craving is felt for certainty in anything, least of all in a matter appertaining to the lottery of marriage. And it seems that, "applying that principle" as it is called in *Earnshaw* v. *Earnshaw* (4), a petitioner is set the task of proving a negative —that the deserting spouse's intention to keep away and to continue that act of desertion was not affected by the fact that to his or her knowledge the petitioner was at some time during the period of desertion living in adultery (5). The doctrine of *compensatio criminis*, borrowed by the ecclesiastical courts and expressed by them in the phrase that the petitioner must come into court with clean hands, does not apply in proceedings to dissolve any marriage (Act No. 14 of 1899 (N.S.W.), sec. 5).

For the reasons stated the appeal should be allowed, the order of the Supreme Court set aside, and the matter remitted to the Supreme Court for rehearing.

(1) (1861) 9 H.L.C. 274, at pp. 338, 339 [11 E.R. 735, at pp. 760, 761].
(2) (1898) A.C. 375.
(3) (1937) 59 C.L.R. 322.
(4) (1939) 2 All E.R., at p. 699.
(5) (1939) 2 All E.R., at p. 700.

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Before parting with the case I venture to suggest that the legislature, under the express power contained in sub-sec. 22 of sec. 51 of the Constitution, might take into consideration the question of passing a Federal divorce Act. In *Bourne* v. *Keane* (1)—the case which validated bequests for masses for the dead—Lord *Birkenhead* L.C. stresses, as a powerful consideration of policy, the correspondence of the law of England upon the matter there in question "with the law of Ireland, of our great Dominions, and of the United States of America." And it appears to be a matter of some importance that the residents of the six States of the Commonwealth should live under corresponding conditions so far as divorce is concerned. The legislature would not be originating a system of divorce, but merely passing a uniform Act in substitution for the divorce Acts of the States, and thus, "To heavenliest harmony Reduce the seeming chaos."

STARKE J. In my opinion *Crown Solicitor (S.A.)* v. *Gilbert* (2) was an erroneous decision, and it should no longer be followed. It was decided under the *Matrimonial Causes Act* 1929 of South Australia, which provided 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," whereas the present case falls for decision under the *Matrimonial Causes Act* 1899-1929 of New South Wales, which provides that "any husband . . . may present a petition to the court praying that his marriage may be dissolved on one or more of the grounds following:—(*a*) that his wife has without just cause or excuse wilfully deserted the petitioner and without any such cause or excuse left him continuously so deserted during three years and upwards." But the construction of these Acts is essentially the same.

According to *Gilbert's Case* (2) "just cause or excuse" exists if the spouse seeking divorce has in fact been guilty of some breach of the conjugal duty which lies upon him, whether the deserting spouse knew of those facts or not or whether she was influenced in her conduct by those facts or not. It is clear from the explicit words of the New-South-Wales Act that intention is an essential element of the matrimonial offence called desertion: the words of the Act are "wilfully deserted the petitioner and . . . left him continuously so deserted." But if an intention to desert and to leave the petitioner so deserted is proved, then the matrimonial offence of desertion is established. The fact that the spouse seeking

(1) (1919) A.C. 815, at p. 831.

(2) (1937) 59 C.L.R. 322.

divorce has committed some breach of conjugal duty, unknown to the deserting spouse, does not affect her intention any more than it does if the breach of conjugal duty has in fact no influence whatever upon her conduct (*Herod* v. *Herod* (1); *Earnshaw* v. *Earnshaw* (2)).

But it is said that, despite her wilful misconduct, there is "just cause or excuse" if the other spouse is guilty of some breach of conjugal duty. Such a construction is opposed, I think, to the terms of the statute: the "cause or excuse" must operate upon or affect the state of mind of the deserting spouse and afford some excuse for the wilfulness of her conduct. A passage in the speech of Lord *Romer* in *Cohen* v. *Cohen* (3) aids, I think, this view:—"The question whether a deserting spouse has reasonable cause for not trying to bring the desertion to an end, and the corresponding question whether desertion without cause has existed for the necessary period, must always be questions of fact, and the determination must depend upon the circumstances of the particular case. I deprecate attempts to lay down any general principle applicable to them all."

Nothing, of course, that I have said interferes with the discretion of the Supreme Court under secs. 19 (2) and 20 (3) of the Act.

This appeal should be allowed and the cause remitted to the Supreme Court.

Dixon J. To "desert" is an ordinary English verb about the meaning of which there should be no mystery, even in the law. When a sailor is said to desert his ship, a soldier his post, a mother her child, or a statesman his principles, the word is chosen because it connotes a breach of obligation, whether legal or moral. An essential part of its meaning is that the man of whom it is used is doing what he is not entitled to do. It is this which distinguishes it from such expressions as go away, depart, separate from and leave. It would be to "desert" English usage to apply the word to a man who did only what he was entitled to do.

On this simple ground it would appear to me that a wife could not correctly be said to "desert" her husband if her husband had forfeited all claim to her conjugal society. When the law authorizes one spouse to withdraw from the society of another, the law cannot, without abuse of logic and language alike, say that the withdrawal amounts to desertion. Now it is quite plain that to a guilty husband or wife the law gives no claim to the consortium of the other party to the marriage, assuming, of course, no condonation and no connivance. The law authorizes the other spouse to withdraw. The

(1) (1939) P. 11. (2) (1939) 2 All E.R. 698.
(3) (1940) 2 All E.R. 331, at p. 339.

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innocent party is entitled to terminate any subsisting conjugal relationship and, if none subsists, is entitled to a continuance of the separation existing, and it does not matter whether the guilt of the other spouse is concealed or is discovered. This doctrine forms part of the common law. It is the foundation of the rule that a guilty wife is not entitled to her husband's support and cannot pledge his credit, his ignorance of her guilt being of no importance. The ecclesiastical rule was the same. Where the common law says that the obligation of consortium arising out of the marriage no longer exists, there can hardly be desertion. But in cases where the common law or the ecclesiastical law or both say that the conduct of a husband or wife gives the other spouse no right to abandon the former's conjugal society, that is to say, where the right to consortium exists, there may nevertheless be circumstances which afford a sufficient moral justification for or extenuation of the desertion to make it wrong to dissolve the marriage on that ground. There may then be desertion, but with just cause or excuse. It is not of much importance whether in such cases the termination of the matrimonial relationship is regarded as desertion but excusable, or as not amounting to desertion within the meaning of the divorce law. But it is of importance that when, for every purpose of the law of husband and wife, one of the parties is entitled to abandon the other, the abandonment which the law authorizes should not be called desertion. I am therefore unable to agree in the proposition that, when the uncondoned adultery of one spouse has discharged the other from his obligation to maintain or renew the matrimonial relationship, the latter's failure to do so can amount to desertion or the continuance of desertion, simply because the innocent party was unaware of the other's guilt, or, knowing it, had what to him or her was a stronger motive for relinquishing or refraining from the other's society. This reasoning, which will be found stated more fully in *Crown Solicitor* (*S.A.*) v. *Gilbert* (1), forms the ground of that decision.

It is reasoning which attempts to follow legal principles and, as the fashion once was, to put out of consideration social or sociological conceptions or preconceptions. Whether for this defect or because of some want of cogency, it is reasoning which has not won general acceptance. Apparently it has been felt that its consequence is to leave the adulterer in a plight that his " desertion " of the traditional moral code can scarcely merit. He comes of course as a petitioner, and nearly always states his hard case without opposition or answer. It is small wonder, therefore, that the courts have, since the decision in *Crown Solicitor* (*S.A.*) v. *Gilbert* (1), had abundant opportunities

(1) (1937) 59 C.L.R. 322.

of hearing what misfortune, under that decision, can afflict forsaken husbands and wives whose only fault is an adulterous connection which the dictates of truth or more powerful motives forbid them any longer to conceal. In England, strangely enough, the question did not come up for decision until after the decision of this court in *Crown Solicitor (S.A.)* v. *Gilbert* (1), but when it came to be determined the report of that decision was not available to Sir *Boyd Merriman* P., who in a very full judgment rejected its doctrine (*Herod* v. *Herod* (2)). His decision has been approved by the Court of Appeal (*Earnshaw* v. *Earnshaw* (3)). The question submitted for our consideration is whether we should follow the rule so laid down in England or adhere to the decision of this court.

The question how far this court should defer to the decisions of the Court of Appeal is one to which an unqualified answer can hardly be given. But I think that if this court is convinced that a particular view of the law has been taken in England from which there is unlikely to be any departure, wisdom is on the side of the court's applying that view to Australian conditions, notwithstanding that the court has already decided the question in the opposite sense. The fact that we still believe in the correctness of our own decision, as I do in the present case, is not in itself an adequate ground for refusing to follow this course. If the point decided amounts to no more than a particular application of a principle about which there is no difference of opinion, no harm can come from our adhering to our decision. In the application of the law to the facts, divergences between English opinion and Australian opinion may be expected, and it is a matter of little concern. But where a general proposition is involved the court should be careful to avoid introducing into Australian law a principle inconsistent with that which has been accepted in England. The common law is administered in many jurisdictions, and unless each of them guards against needless divergences of decision its uniform development is imperilled. Statutes based upon a common policy and expressed in the same or similar forms ought not to be given different operations. In this court some trouble has been taken to preserve consistency of decision, not only with English courts, but also with those of Canada and New Zealand. English courts cannot be expected to receive the decisions of the Dominions with the traditional respect which the courts of the Dominions pay to the decisions of the English courts, but it is disappointing to find that, upon the particular question with which we are concerned, the Court of Appeal did not take an opportunity

(1) (1937) 59 C.L.R. 322. (2) (1939) P. 11.
(3) (1939) 2 All E.R. 698.

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of considering the judgment delivered by this court in *Crown Solicitor (S.A.)* v. *Gilbert* (1). At the same time the fact that the Court of Appeal made such short work of the question is strong ground for believing that in England it will be treated as closed and the conclusion will be accepted without reconsideration or further examination.

This is not the first time that the court has been faced with the difficulty of adjusting its decisions with those subsequently given in England. In *Brown* v. *Holloway* (2) this court found the reasoning of *Fletcher Moulton* L.J. in *Cuenod* v. *Leslie* (3) so satisfactory that it rejected the decisions in *Seroka* v. *Kattenburg* (4) and *Earle* v. *Kingscote* (5), and decided that a husband was no longer liable for his wife's torts. Unfortunately, however, in *Edwards* v. *Porter* (6) the House of Lords rejected the reasoning of *Fletcher Moulton* L.J. and adhered to the decision in *Seroka* v. *Kattenburg* (4). In *Hall* v. *Wilkins* (7) the Supreme Court of New South Wales considered that it should follow the decision in *Brown* v. *Holloway* (8) rather than that in *Edwards* v. *Porter* (6), and from this decision the High Court refused special leave to appeal (9). It is difficult to understand why the court should have allowed this state of conflict in authority to continue, but a very small amount was involved in the case, and the refusal of special leave to appeal does not mean that the High Court was not prepared to reconsider *Brown* v. *Holloway* (2).

In *Hunt* v. *Korn* (10) the court, following *In re Tringham's Trusts*; *Tringham* v. *Greenhill* (11) and *In re Nutt's Settlement*; *McLaughlin* v. *McLaughlin* (12), held that words of limitation were not indispensable to the creation of an equitable estate in fee simple, but that it might be created by any sufficient indication of intention. In *In re Bostock's Settlement*; *Norrish* v. *Bostock* (13) however, the Court of Appeal overruled *In re Tringham's Trusts* (11) and decided that unless the deed were expressed inartificially, the absence of words of limitation left the court under the necessity of holding that the grantee took an estate for life only. In *Sexton* v. *Horton* (14) the court overruled *Hunt* v. *Korn* (10) and followed *In re Bostock's Settlement* (13). It is not clear, however, that *Clauson* J. in *In re*

(1) (1937) 59 C.L.R. 322.
(2) (1909) 10 C.L.R. 89.
(3) (1909) 1 K.B. 880.
(4) (1886) 17 Q.B.D. 177.
(5) (1900) 2 Ch. 585.
(6) (1925) A.C. 1.
(7) (1933) 33 S.R. (N.S.W.) 220; 50 W.N. 44.
(8) (1909) 10 C.L.R. 89.
(9) (1933) 49 C.L.R. 661, note; 33 S.R. (N.S.W.) 577, note; 50 W.N. 252, note.
(10) (1917) 24 C.L.R. 1.
(11) (1904) 2 Ch. 487.
(12) (1915) 2 Ch. 431.
(13) (1921) 2 Ch. 469.
(14) (1926) 38 C.L.R. 240.

Arden; *Short* v. *Camm* (1) was as strict in his adherence to the decision as was the High Court.

In *Davison* v. *Vickery's Motors Ltd.* (2) *Isaacs* J. discussed at length reasons for refusing to follow the decision of the Court of Appeal in *Bolton Partners* v. *Lambert* (3). A perusal of his observations will show that it is important for this court to consider how far the decision of the Court of Appeal has been accepted and represents what may be termed settled law. In *Skill Ball Pty. Ltd.* v. *Thorburn* (4) we adopted the view that if a course of decisions, even of a Divisional Court, has produced an interpretation of a statute which we felt sure would be adhered to in Great Britain we should follow it, notwithstanding that we ourselves should have placed a different construction on the statute, and this reflects the same view as that expressed by *Isaacs* J. (5).

There is some indication in the judgment of *Swinfen Eady* M.R. in *Wickins* v. *Wickins* (6) that the Court of Appeal regarded adultery on the part of one spouse as terminating desertion on the part of the other. For his Honour was careful to say that the desertion upon which reliance was placed in that case as a discretionary bar took place before the adultery. It is probably true that if the question had arisen in England for direct decision early in the present century the view we took in *Crown Solicitor (S.A.)* v. *Gilbert* (7) might have been taken. But at the present time it is almost certain that the opposite opinion will continue to prevail, and in these circumstances I think it is better that we should give up our own view.

Accordingly, the law should be taken to be that a husband or wife may be guilty of desertion or of continuing to desert notwithstanding that the other party to the marriage commits adultery which is neither condoned nor connived at. Something more is required. As it is expressed in *Earnshaw* v. *Earnshaw* (8) and *Herod* v. *Herod* (9), the conduct of the "deserting" spouse must have been "affected" or "influenced" by it. I assume that this means that the motives actuating the party said to desert must include the adultery of the other party. A not uncommon case is that of a wife who instinctively feels that her husband's attitude to her has changed in a way she can explain either not at all or on the hypothesis that he is interested in some other woman. She has no knowledge and is unwilling to believe in the forebodings that her

(1) (1935) Ch. 326.
(2) (1925) 37 C.L.R. 1, at p. 16.
(3) (1889) 41 Ch. D. 295.
(4) (1936) 55 C.L.R. 292.
(5) (1925) 37 C.L.R., at p. 16.
(6) (1918) P. 265, at p. 270.
(7) (1937) 59 C.L.R. 322.
(8) (1939) 2 All E.R. 698.
(9) (1939) P. 11.

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instincts prompt. But she leaves him because of the change she feels in him. In fact he has established an adulterous connection. It might be thought that in such a case she was really "influenced by" or "affected by" his conduct notwithstanding her want of actual knowledge, and at all events that she ought not to be held guilty of desertion. But that may be stretching the words "influenced or affected by" too far. For in the judgment of Sir *Boyd Merriman* the following passage occurs:—"It may be that, in the case where the alleged deserter's intention has been entirely unaffected even by the suspicion of antecedent adultery, he or she has nevertheless been actuated in withdrawing from cohabitation by conduct or neglect on the part of the other spouse, which is in truth a consequence of that spouse's adulterous association. If so, it is in that conduct or neglect, not in the adultery itself, that the cause or excuse for the alleged desertion must be found" (1). At the same time his Lordship in more than one place lays stress on the necessity of a petitioner who has been guilty of adultery proving affirmatively either that the deserting respondent was ignorant of the adultery or that his or her conduct was not influenced or affected by it. For example: "If nothing more was proved than that the respondent had left the home and that the petitioner shortly afterwards had set up an adulterous association continued down to the time of the presentation of the petition, it might be well-nigh impossible for the petitioner to discharge the burden of proof" (2).

Curiously enough, though the present case has been the occasion for reconsidering the question decided in *Crown Solicitor (S.A.)* v. *Gilbert* (3), the facts proved hardly come up to the standard set by Sir *Boyd Merriman*. No evidence was given to exclude the respondent's knowledge of the petitioner's adultery. The petitioner's counsel discreetly confined his questions on the subject to two, viz., whether on the occasion of an interview with the respondent anything had been said about his mistress, and whether the respondent had seen them together. However, on the hearing of the appeal, we had not the advantage of any argument on behalf of the respondent, who did not appear, and the facts were not examined.

In the Supreme Court the suit was dismissed, not on the ground that the respondent may have been aware of the petitioner's adultery or may have been influenced by it, but because of the authority of *Crown Solicitor (S.A.)* v. *Gilbert* (3).

In these circumstances I think that the appeal should be allowed and the suit should be remitted to the Supreme Court to be dealt with according to law.

(1) (1939) P., at p. 24.
(2) (1939) P., at p. 23.
(3) (1937) 59 C.L.R. 322.

McTIERNAN J. In this case the court has to decide whether it will follow its decision in *Crown Solicitor (S.A.)* v. *Gilbert* (1), or the decision in *Herod* v. *Herod* (2), which was approved by the Court of Appeal in *Earnshaw* v. *Earnshaw* (3). In this court its prior decisions are of binding authority, while those of the courts which decided *Herod* v. *Herod* (2) and *Earnshaw* v. *Earnshaw* (3) are of persuasive authority, and of the highest authority of that kind. This court, however, is not absolutely bound to follow every one of its own prior decisions: See *The Tramways Case* [*No.* 1] (4).

With great respect to the reasoning in *Herod* v. *Herod* (2), I am not convinced that this court's decision in *Crown Solicitor (S.A.)* v. *Gilbert* (1) is erroneous. Error is not available as a ground for departing from our prior decision. The only possible ground is that it is desirable to have uniformity between the law in this country and that in England. If that is a sufficient ground for us to depart from a prior decision, it would constrain us to follow not only a decision of the Court of Appeal conflicting with one of this court, but also a decision of the court of first instance which decided *Herod* v. *Herod* (2) that is in conflict with a prior decision of this court. In any case uniformity with the English law of divorce has not been a characteristic of the law of divorce of New South Wales. As I cannot agree that our prior decision is wrong, I do not think that we should be justified in declining to follow it on the ground that it is desirable to have a measure of uniformity in the interpretation of the *Matrimonial Causes Act* of this State and the English Act. Whether it is desirable to obtain such uniformity is, I think, only a question of expediency. If the doctrines expounded in *Herod* v. *Herod* (2) are to become law in this country, it belongs to the province of the appropriate legislative body to make them law if it thinks fit to adopt them.

The appeal should be dismissed.

WILLIAMS J. On 20th July 1940, the appellant R. A. Waghorn filed a petition in the Supreme Court of New South Wales in its matrimonial causes jurisdiction, praying that his marriage with his wife Miriam Dorothy Waghorn should be dissolved, on the ground that the respondent 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. He also prayed that, although during the marriage he had been guilty of adultery, the court would exercise the discretion conferred upon it by sec.

(1) (1937) 59 C.L.R. 322.
(2) (1939) P. 11.
(3) (1939) 2 All E.R. 698.
(4) (1914) 18 C.L.R. 54, at p. 58.

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19 (2) (*a*) of the *Matrimonial Causes Act* 1899 (N.S.W.). The petition was not defended and came on for hearing before *Owen* J. on 29th July 1941. The evidence proved that the parties were married on 11th January 1936 and lived together until September 1936, when the respondent left the petitioner without justification and refused to return. About the middle of 1937 the petitioner and a Miss Muriel Hastings Jones commenced to live together as man and wife and have ever since continued to do so. Two children aged three years and eight months respectively have been born of this union.

About Christmas 1937 the parties met and discussed the question of the restitution of conjugal relations or, alternatively, of a divorce, but nothing was finally decided. They arranged to have a further talk, but the respondent did not keep the appointment. The evidence shows that this was the only occasion the parties had met since they separated, that nothing was then said about Miss Jones, and that, so far as the petitioner knew, the respondent had never seen him with Miss Jones. His Honour, rightly considering that the decision of this court in *Crown Solicitor* (*S.A.*) v. *Gilbert* (1), by which he was bound, applied, dismissed the petition.

Secs. 13 (*a*) and 16 (*a*) of the above Act provide that one spouse may present a petition praying for a divorce where the other spouse has without just cause or excuse wilfully deserted the petitioner and without any such cause or excuse left the petitioner so deserted during three years and upwards. In *Williams* v. *Williams* (2), Sir *Wilfred Greene* M.R. said: "The act of desertion requires two elements on the side of the deserting spouse—namely, the factum of separation and the *animus deserendi*; and on the side of the deserted spouse one element, namely, the absence of consent"; and in *Pratt* v. *Pratt* (3) Lord *McMillan* said: "The desertion must be persisted in without the consent and against the wishes of the deserted spouse"; so that wilful desertion without just cause or excuse means simply desertion, and the effect of the sub-section is merely to expand the ordinary grammatical meaning of the word and fix the period for which the desertion has to continue in order to provide a ground for divorce.

By virtue of secs. 19 (2) and 20 (3) of the Act the court is not bound to pronounce a decree for a divorce if it finds that the petitioner during the marriage has been guilty of adultery.

The *Matrimonial Causes Act* 1929 (S.A.), sec. 6 (*c*), gives any married person a right to claim a divorce in the case of "desertion for five years." It is therefore, although in an abbreviated form,

(1) (1937) 59 C.L.R. 322.
(2) (1939) P. 365, at p. 368.
(3) (1939) A.C. 417, at p. 422.

to the same effect, apart from the period, as secs. 13 (*a*) and 16 (*a*) of the New-South-Wales Act. In *Gilbert's Case* (1) this court held by a majority that where a husband who has been deserted by his wife commits adultery before the termination of the period of five years the period of desertion is thereby terminated, even though the adultery is unknown to the wife. Previously there had been conflicting decisions in the New-Zealand and in the Supreme Courts of the States, the substance of which is referred to by my brother *Dixon* in the following passage :—" 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 " (2). The majority of the court held that 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 England the *Matrimonial Causes Act* 1937, sec. 2, substituting a new sec. 176 in the *Supreme Court of Judicature* (*Consolidation*) *Act* 1925, introduced as an additional ground for divorce desertion of the petitioner by the other spouse without cause for a period of at least three years immediately preceding the presentation of the petition, and sec. 4, substituting a new sec. 178 in the *Supreme Court of Judicature* (*Consolidation*) *Act*, provided that the court should not be bound to pronounce a decree, and might dismiss the petition if it found the petitioner had during the marriage been guilty of adultery.

In *Herod* v. *Herod* (3) the learned President of the Probate Divorce and Admiralty Division of the High Court of Justice refused to follow *Gilbert's Case* (1) ; and, as stated in the headnote, held that " if a spouse commits adultery after he or she has been deserted, the desertion is not necessarily terminated as a matter of law, regardless of the question whether the deserting spouse knew of the adultery or whether it had any influence on his or her conduct. If it is left in doubt whether the respondent knew of the adultery or, if known,

(1) (1937) 59 C.L.R. 322.
(2) (1937) 59 C.L.R., at p. 335.
(3) (1939) P. 11.

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whether his or her conduct was affected by it, the petitioner would fail to discharge the burden of proof. The question is to be determined according to the circumstances of each case. A spouse cannot be heard to say that adultery at which he or she has connived or to which his or her conduct has conduced is a reasonable cause for desertion." This decision was followed by the Court of Appeal in *Earnshaw* v. *Earnshaw* (1).

In addition to the New-South-Wales and South-Australian Acts, the divorce legislation of the other Australian States contains similar provisions to those discussed by this court in *Crown Solicitor (S.A.)* v. *Gilbert* (2), and by the English courts in the cases mentioned. Attempts have been made by the Supreme Courts of some of the States, other than South Australia, to distinguish *Gilbert's Case* (2) on the different language of the local Acts; but, in my opinion, without any sound basis, as the substance of each is the same, so that at the present time there is a conflict between the English law and the Australian law on the question of what constitutes desertion without cause. The view of the majority of this court appears to me logical. It postulates that a petitioner must practice continence for the requisite period so that, in order to be in a position to complain of the breach by the other spouse of the right of consortium, he or she may be able to show that he or she has not himself or herself committed a fundamental breach of the contract on which that right is founded, and affords reasonable scope for the exercise by the court of its discretion in cases where the adultery was condoned, connived at or conduced by the deserting spouse, or where the adultery occurred after the statutory period had elapsed but before the dissolution of marriage. On either view the petitioner must prove the initiation of the desertion and that it continued without just cause or excuse for the statutory period. When he confesses he has committed adultery he admits that a just cause or excuse does in fact exist, but on the English view he avoids his confession if he can show that the adultery was unknown to his wife and so could not have been the cause of her desertion, or alternatively that although the adultery was or may have been known to his wife it did not influence her conduct. The more clandestine the adultery, the stronger the petitioner's case would be, because he would then only have to prove his wife was unaware of it, whereas once she discovered the infidelity, he would have to prove she did not object. But however logically sound, the majority view in *Gilbert's Case* (2) is possibly somewhat dogmatic when applied to the intimate relations created by the marriage state, and may not sufficiently recognize that, as every marriage raises its

(1) (1939) 2 All E.R. 698.

(2) (1937) 59 C.L.R. 322.

own problems, married couples should try to smooth out their incompatibilities as far as the infinite variety of their individualities will permit; so that, if one spouse deserts the other, the justification must be one which the law recognizes to be a just cause or excuse and one which in fact justifies the conduct of the deserter having regard to the importance he or she in fact attaches to the other's wrongdoing.

From the definitions to which I have referred it appears that the desertion must continue to be against the wish and without the consent of the deserted spouse for the whole statutory period. This must be established as a fact. If the adultery consists of occasional indulgences, especially if it is promiscuous, it would be open to the trial judge to infer that, in spite of such isolated lapses, the deserted one still objected to the other's absence; and such a conclusion might still be possible where the liaison had a degree of permanence arising from the particular circumstances, as, for instance, where the adulterous association was between the petitioner and his housekeeper. But where the petitioner has openly conferred the status of a reputed wife upon his paramour in an association intended to be permanent, and there are issue of the union who are passed off as their legitimate children, it might be very difficult for the court to conclude that the new mistress was only an intruder intended to be jettisoned to make room for the repentant deserter, if only she would consent to return to her unhappy spouse. However, it may be, although I would hardly think it possible, that it is sufficient if the petitioner can show the initial withdrawal from cohabitation was without his consent and that a subsequent change of mind, whatever effect it has on his conduct, is immaterial unless, like his adultery, it is communicated to the deserter. The point was not discussed in *Herod* v. *Herod* (1) or in the subsequent case of *Andrews* v. *Andrews* (2); and so, as it was not adverted to before us, I would not care to express any concluded opinion upon it, but it would be strange if the petitioner could approbate the desertion by entering upon a new cohabitation carrying all the indications of a permanent alliance, and then reprobate it so as to be able to complain of his wife's conduct as being against his wishes, when her absence was essential to the success of his new venture. The English view may, therefore, raise a difficult question which does not appear to have been as yet discussed.

But on the whole, for the reasons given by my brother *Dixon*, it would appear to be advisable to follow *Herod's Case* (1), so as to make the law in this instance consistent in both countries. I have

(1) (1939) P. 11. (2) (1940) P. 184.

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come to this conclusion more readily because it is possible that if *Symons* v. *Symons* (1), *Hunter* v. *Hunter* (2), and *Hale* v. *Hale* (3), discussed in *Herod's Case* (4) (and *King* v. *King* (5) and *Ostick* v. *Ostick* (6), where the relevant circumstances appear to have been similar) had been cited to this court in *Gilbert's Case* (7), the decision may have been different. At any rate they would have affected my mind if I had been a member of the court on that occasion. My mind is also influenced by the fact that in *Lynch* v. *Lynch* (8) it was held the respondent to a petition alleging desertion was not entitled to take advantage as a just cause of the fact of the existence on the file of a nullity petition of which he was wholly ignorant and which therefore did not affect his conduct, and that in *Cohen* v. *Cohen* (9), the House of Lords held the fact that a petition for divorce on the ground of desertion has been left on the file did not prevent the competency of a second petition on this ground and the granting of a decree where there was nothing to show that in the circumstances " the petition while it was on the file deterred the respondent in the very least from taking steps to end his desertion." It is also to be noted that in *Farmer* v. *Farmer* (10) and *Garcia* v. *Garcia* (11), where the husband had been living in adultery for a considerable period, it was held that the wife could complain that she had been deserted constructively, not when he first contracted the adulterous association, but only when she first became aware of it and so entitled to withdraw from his society whilst the association continued. These cases all suggest that the question whether a spouse is justified in withdrawing from cohabitation involves an inquiry into his or her mental condition. If the question under appeal should ever go on appeal to the Privy Council or the House of Lords, and the view taken in *Crown Solicitor* (*S.A.*) v. *Gilbert* (7) should finally triumph, no great harm would be done by its temporary abandonment, as the upsetting of weighty transactions and important titles would not be involved, and this perplexing legal chameleon could change its hues again without irreparable damage being done.

I therefore agree that the appeal should be allowed.

Appeal allowed. Order of the Supreme Court discharged. Case remitted to the Supreme Court to be dealt with in accordance with law.

Solicitor for the appellant, *M. B. Giles.*

J. B.

(1) (1897) P. 167.
(2) (1905) P. 217.
(3) (1915) 32 T.L.R. 53.
(4) (1939) P. 11.
(5) (1915) P. 88.
(6) (1917) P. 20.
(7) (1937) 59 C.L.R. 322.
(8) (1939) P. 355.
(9) (1940) A.C. 631.
(10) (1884) 9 P.D. 245.
(11) (1888) 13 P.D. 216.