[HIGH COURT OF AUSTRALIA.]

McILROY . . . . . APPELLANT;
PETITIONER,

AND

McILROY . . . . . RESPONDENT.
RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1946.

MELBOURNE, *Feb.* 27.

SYDNEY, *April* 8.

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

Divorce—Desertion—Petition by wife—Deed of separation—Repudiation by husband—No acceptance by wife of repudiation—Marriage Act 1928 (*No.* 3726) (*Vict.*), *s.* 75 (*a*).

The petitioning wife left the matrimonial home in October 1930 in consequence of her daughter's complaint, the truth of which was admitted by the husband, that he had "tried to be indecent to her." Shortly afterwards husband and wife executed a deed of separation, and they never lived together again. The deed provided for weekly payments by the husband to the wife, the payments in the first instance to be made by a debtor of the husband. The debtor made the payments until he had discharged his indebtedness, but the husband never personally made any such payments. In 1936 the wife sued the husband under the deed and recovered a sum in execution from the executors of a will under which the husband was a beneficiary. Shortly afterwards the husband disappeared. Thereafter the wife received nothing under the deed and made no attempt to enforce payment. In 1943 she applied for and was granted a pension as a deserted wife under the *Widows' Pensions Act* 1942. In 1945 she petitioned for divorce on the ground, under s. 75 (*a*) of the *Marriage Act* 1928 (Vict.), of desertion for three years and upwards. The trial judge was of opinion that the husband intended to desert the wife, but he was not satisfied that the wife had ever accepted the husband's repudiation of the deed of separation and ceased to regard the deed as governing the relationship of the parties; he dismissed the petition.

Held that the circumstances of the case were not such as to entitle the petitioner to a decree; the decision of the trial judge was justified on the evidence and should not be disturbed.

Pardy v. *Pardy*, (1939) P. 288, discussed.

Decision of the Supreme Court of Victoria (*O'Bryan* J.): *McIlroy* v. *McIlroy*, (1946) V.L.R. 8, affirmed.

APPEAL from the Supreme Court of Victoria.

By petition dated 19th April 1945 Agnes Roberta McIlroy sought of the Supreme Court of Victoria a decree that her marriage with the respondent, James McIlroy, be dissolved on the ground (under s. 75 (*a*) of the *Marriage Act* 1928 (Vict.)) that the respondent had without just cause or excuse wilfully deserted her and without any such just cause or excuse left her continuously so deserted during three years and upwards. The petition was heard by *O'Bryan* J., from whose judgment the following passage, showing the facts of the case, is taken :—" The parties were married on 17th November 1909. After a somewhat unsatisfactory matrimonial existence, during long periods of which they lived apart, they settled down in 1920 and lived together as man and wife in a rented house at Mildura until October 1930. There were then two living children of the marriage, a son aged about twenty and a daughter aged about sixteen years. On a certain Sunday in October 1930 the daughter complained to her mother that her father ' had come to her bedroom after she had gone to bed and had tried to be indecent to her.' The petitioner, on the same day, questioned the respondent about the matter, and the respondent confessed to the truth of the daughter's statement. The petitioner thereupon left the house, taking with her her son and daughter, and went to a hotel in Mildura, where they stayed for the next two nights. The respondent in the meanwhile stayed on in the matrimonial home. The petitioner returned to the home on the Monday afternoon and cooked the respondent's meal but did not speak to him. When she came to the house on the Tuesday the respondent had left. I have no doubt that the petitioner was greatly shocked by the occurrence and for some time did not make up her mind what was to be done. It was the first occurrence of the sort, respondent never theretofore having displayed any unnatural appetites or tendencies. I am satisfied that after she had time for reflection she determined, and has since remained of that mind, that she could no longer live with the respondent. She was actuated by two reasons for this decision : (1) the care of her daughter, and (2) her disgust with her husband for his misconduct. The former reason would not have afforded her justification for continuing to live apart from her husband as, within a year after this incident, the daughter married and set up a home of her own at Merbein and later lived with her husband at other places. To return to the events of October 1930. The respondent, having left the matrimonial home on the day after the incident, appears to have left Mildura, but returned in about a fortnight. I think it is extremely probable that the petitioner in her conversations with her husband on the Sunday,

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and by her departure from him with her children, and by her subsequent silence in his presence on the Monday, made it clear to him that she was unwilling to continue matrimonial relations with him and was unlikely to forgive him. At all events on his return to Mildura he appears to have instructed a solicitor . . . to draw up a deed of separation. The deed, which is dated 12th November 1930, was executed by both husband and wife. . . . The deed recites that unhappy differences have arisen between the parties and that they have mutually agreed to live apart, and that the husband has agreed to pay his wife a clear annuity of £104 during her life for her maintenance and support, and to transfer and assign to her all the household furniture and effects belonging to him and then in the matrimonial home, subject to the assumption by her of certain personal debts of his. The deed then goes on to witness mutual covenants by the husband and the wife :—On the husband's part : (*a*) Liberty to the wife to live apart and free from his control and authority. (*b*) Not to annoy, molest or disturb her, nor to attempt to compel her to resume cohabitation, nor to enforce restitution of conjugal rights. (*c*) To pay her an annuity of £104 by weekly payments of £2 for life and while leading a chaste life. (*d*) To transfer and assign to her certain household furniture and effects subject to her payment of his said debts. On the wife's part : (*a*) To pay the said debts. (*b*) Not to molest or disturb her husband &c., nor to endeavour to enforce restitution of conjugal rights nor to compel him to pay maintenance further than the said annuity of £104. (*c*) Right to husband, if compelled thereafter to pay wife's debts, to deduct the amount from the annuity. Mr. James Young was a party to the deed. He, being indebted to the husband in the sum of £275, guaranteed and undertook to pay to the wife the sum of £2 per week in respect of the annuity until the full sum of £275 had been paid. The parties lived apart under that agreement, and James Young duly made his payments of £2 per week until the sum of £275 had been exhausted. Thereafter the husband paid nothing. . . . At the end of 1935 his father died, leaving certain property. . . . Although for about four years the respondent had paid, and the petitioner had received, nothing under the deed, she successfully sued her husband for arrears of payment thereunder and recovered in execution about £400 from his father's executors. That was the last payment made or received under the deed, and the respondent has since disappeared. I have no doubt that the respondent has completely repudiated his obligation to make payments under the deed of separation, but I am not satisfied that the petitioner has ever accepted that repudiation. I am satisfied that in the first instance she wanted

a separation from the respondent, and was content to accept a separation by agreement rather than rely upon what marital rights she had to live apart from him in consequence of his misconduct. It may well be, as Mr. *Voumard* contended, that having the responsibility for the upbringing of her daughter, aged then sixteen years, she not only (apart from any agreement) had just cause and excuse for leaving him, but that, had the separation begun other than under the deed, he would in law have been the deserting party. I was not at all satisfied that when he went to Sea Lake while she was at the Mildura Hotel he intended to leave her permanently. She had left the house and had demonstrated that, at any rate temporarily, she was unwilling to continue matrimonial relations. . . . During the ensuing fortnight, however, I am of opinion that neither party had finally determined what was to happen in the future, and at the end of that period they both decided to separate by agreement. Before there was any default under the deed the more cogent of the petitioner's reasons for withdrawing from marital relations disappeared. Her daughter married and was no longer under her care. Thereafter I am of the opinion that the petitioner would, apart from the deed of separation, have no longer been justified in refusing to resume matrimonial relations with her husband, had he requested her to rejoin him. It is clear that, although a separation may begin by agreement or under a deed of separation, that separation may be changed in character to desertion if one party under the deed repudiates its terms and the other party accepts that repudiation and is willing to return to cohabitation. In this case the respondent's failure to make any payment under the deed, and his conduct in going away without telling her where she could find him if she wished to resume cohabitation, and without first giving her the option to terminate the deed and to offer to resume matrimonial relations with him, indicates an *animus deserendi* on his part. I have then to consider whether she, on her part, has regarded the deed as a dead letter and as no longer regulating their matrimonial relations. She has not reasserted her conjugal rights and has not done any other positive action indicative of an intention to treat the deed as a dead letter. Mr. *Voumard* has contended that her application for a widow's pension indicates that she had treated the deed as a dead letter. . . . True it is that she applies as 'a woman who has been deserted by her husband,' but she dates her husband's desertion from about the year 1930, i.e., the date of the deed. She put her case fairly and fully before the Commissioner of Pensions and was granted a widow's pension . . . 'as a deserted wife,' but I do

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not think it necessarily follows that she is, in terms of the *Marriage Act*, a person who has been left continuously deserted for three years and upwards. . . . In this case the separation originally was consensual. When the husband repudiated the deed the petitioner, as late as 1936, relied upon it and enforced it. At that time the only justification for her continued determination never to return to him was the one act of misconduct, and its importance in regard to the care and upbringing of their daughter had disappeared, as she was then married and in a home of her own. At no time thereafter did the petitioner show any indication of treating the deed as a dead letter, her mere inaction in not trying to enforce its terms as to payment, when she did not know where he was and had no reason to suppose he could pay, does not show that, and even if her conduct in applying for a pension did show such an intention, which is contrary to my judgment, that application was only made on the 25th July 1943, which is less than three years before the presentation of her petition. For these reasons the petition must be dismissed. I regret the decision because in this case separation has continued over a long period, the respondent has undoubtedly had the *animus deserendi* for many years, but the separation began with her consent, and I cannot find any evidence to satisfy me that, before the presentation of her petition, she was not still willing to accept the benefit of the deed which enabled her to live apart from her husband ; in other words, her original consent to the separation has continued throughout."

From the decision of *O'Bryan* J. dismissing the petition the petitioner appealed to the High Court.

Voumard, for the appellant. The trial judge took the view that there was no separation (in any relevant sense) until the deed of separation was executed. This view is not borne out by the evidence. The respondent's conduct gave the petitioner just cause for leaving him and resulted in a separation which, in the first instance, was not consensual ; his conduct was such as to drive her from the matrimonial home and to constitute " constructive " desertion on his part. Moreover, the reasonable inference from the fact that the respondent left the matrimonial home on the day following the incident of the Sunday in October 1930 is that he left with the intention of not living with the petitioner again ; this is evidenced by the fact that he did not seek forgiveness for his conduct but, after consulting the petitioner, gave instructions for the drafting of the deed of separation and then went away. In law, therefore, the respondent was a deserter before the deed was executed. The judge

also took the view that the petitioner was always desirous of insisting (as far as she could) on the provisions of the deed as to payment by the husband and as to non-molestation and that, therefore, her consent to the separation, as expressed in the deed, subsisted at all material times, or, at any rate, that it had not been shown affirmatively that the consent had terminated. This leaves out of account, or does not appropriately evaluate, the fact that the wife was justified in leaving the matrimonial home. In view of that fact the deed in this case should not be read as expressing an unconditional willingness to separate, unrelated to the respondent's prior misbehaviour; it should not be construed as indicating anything more by way of consent on the part of the petitioner than an agreement to treat the separation as consensual so long as the deed was observed, that is to say, for present purposes, so long as the husband fulfilled his obligations under it. It is true that while the deed subsisted the separation was, as the judge described it, consensual, but the proper conclusion here is that it was preceded by a non-consensual separation. In the circumstances of this case, therefore, the deed came to an end when the respondent repudiated it, which he clearly did, as the judge found, much more than three years before the petition, and it was not necessary to prove "acceptance" by the petitioner of the repudiation. The parties then reverted to the position in which they were at the time of the execution of the deed, that is, to a state of separation which was not consensual. It was not necessary that there should have been a resumption of cohabitation after the deed ceased to operate (*Pardy* v. *Pardy* (1)). If, contrary to the petitioner's submission, it was necessary to show affirmatively that the respondent's repudiation was accepted by her, the length of time which elapsed after the repudiation, coupled with her application for a widow's pension, was sufficient to show that she had, before the period of three years, in fact accepted the repudiation. In the circumstances here the petitioner was not required to prove that she was willing to resume cohabitation (*Sifton* v. *Sifton* (2)); on this point the trial judge misdirected himself in law, and the whole of his judgment is coloured by the misdirection. In *Pardy* v. *Pardy* (3) the petitioning wife's willingness to resume cohabitation was one of the facts taken into account as showing, on the particular facts of that case, that she had treated the deed of separation as a dead letter, but the case did not decide that such willingness was essential to her success. Accordingly, the trial judge should have held that the parties were separated, for a longer period than three years, in circumstances which did not

(1) (1939) P. 288.
(2) (1939) P. 221, at pp. 225, 226.
(3) (1939) P. 288: See particularly p. 301.

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involve consent by the wife, and he should have granted the decree. [He referred to *Hoggett* v. *Hoggett* (1).]

The respondent did not appear.

Cur. adv. vult.

April 8.

The following written judgments were delivered :—

LATHAM C.J. This is an appeal from a judgment of the Supreme Court of Victoria (*O'Bryan* J.) dismissing a petition for dissolution of marriage which was based on the ground that the respondent husband without just cause or excuse wilfully deserted the petitioner and without just cause or excuse so deserted her during three years and upwards (*Marriage Act* 1928 (Vict.), s. 75 (*a*)). The case was undefended. The evidence of the petitioner accepted by the learned judge showed that the marriage took place on 17th November 1909 and that the parties lived together until 1930. In October 1930 a daughter, aged sixteen, complained that her father had behaved indecently to her. The mother and daughter went away and within a few days a separation deed was signed by the husband and the wife. This deed provided for a payment to the wife by the husband of £2 a week and for the payment by one James Young, who was indebted to the respondent, of a sum of £275 10s. to the wife by weekly instalments. The deed also contained the ordinary clauses as to living apart and non-molestation. Mr. Young paid the £275, but thereafter the husband paid nothing. In 1936 he became entitled to a legacy under his father's will. The petitioner sued him under the deed and, as a result of the action, recovered a sum of £375. She did not see or hear of the husband thereafter. On 3rd February 1943 she made an application for a widow's pension under the *Widows' Pensions Act* 1942 and described herself as deserted by her husband for a period of not less than six months (see s. 4, definition of " deserted wife "). *O'Bryan* J. dismissed the petition upon the ground that the original separation of the parties was by consent, and that there was nothing to satisfy him that the separation was not still a separation by consent. He found that the husband had repudiated the deed by failing to make any payments under it, but he was unable to find that the wife had accepted that repudiation so as to bring about the result that the consensual separation could be said to have come to an end and desertion to have commenced. On the ground, therefore, that her original consent to the separation had continued throughout, he held that the desertion was not proved. The learned judge pointed out that the application for a pension,

(1) (1926) V.L.R. 505.

even if it could be regarded as an acceptance by the wife of the repudiation of the deed by the husband, was made at a date within three years from the presentation of the petition (19th April 1945).

I am unable to find any ground for objection to this decision. Desertion is a wilful separation by a spouse from the other spouse without either the consent of the other spouse or reasonable cause: See *Tulk* v. *Tulk* (1); *Bradford* v. *Bradford* (2). Desertion may take various forms, but as long as a separation is by consent there is no desertion, even though a husband fails to make covenanted payments under the separation deed (*Roe* v. *Roe* (3); see also *Pape* v. *Pape* (4)).

But, though a subsisting deed of separation is a complete answer to an allegation of desertion, if the deed no longer subsists it is then possible for desertion to take place. Thus, if the parties have agreed to rescind the deed, the deed would not be an effective reply to an allegation of desertion. So also it has been held that if one party repudiates the deed and the other party accepts the repudiation so that the deed is no longer regarded by either as regulating their relations but is treated as a dead letter, then, as the separation is no longer by consent, desertion may be established (*Pardy* v. *Pardy* (5); and see *Hoggett* v. *Hoggett* (6)). Thus, if a husband repudiates a separation deed and the wife accepts the repudiation and treats the deed as a nullity by asking him to live with her again, a refusal on his part may amount to desertion by him. This was what happened in *Pardy* v. *Pardy* (7), where it is said that the wife "made it clear to him" (the husband) "that she wanted him to provide a home for her, but he made no offer whatever." In *Pardy* v. *Pardy* (5) there are statements *obiter* to the effect that the continuance or cessation of consent to a separation is simply a question of fact, so that a mere change of mind, uncommunicated to the other party, will, if established, amount to an acceptance of a repudiation as discharging the contract. Sir *Wilfred Greene* M.R. said that the only thing required on the part of the spouse alleging desertion is that "he or she should not be a consenting party to the continuance of the separation. Whether he or she does remain a consenting party must be a question of fact." But, as I have already stated, in *Pardy* v. *Pardy* (5) there was some communication between the parties. The husband had repudiated the deed by failing to pay any real attention to his obligations thereunder and the wife had said to him that she wished them to live together again. Therefore she regarded the deed as no longer regulating their relations and said

(1) (1907) V.L.R. 64.
(2) (1908) 7 C.L.R. 470.
(3) (1916) P. 163.
(4) (1887) 20 Q.B.D. 76.
(5) (1939) P. 288.
(6) (1926) V.L.R. 505.
(7) (1939) P., at p. 308.

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so to her husband. In the present case there is nothing of this kind, and it is unnecessary in this case to determine whether a mere change of mental attitude by the wife, uncommunicated to the husband, can be treated as an acceptance of repudiation within the principle to which reference has already been made. It has been held in this Court that consent to separation of spouses involves more than a mere state of mind not disclosed to the other party (*Bradford* v. *Bradford* (1)). There is, I think, much to be said for the proposition that acceptance of a repudiation cannot be established by proving a mere change in mental attitude, but it is unnecessary to decide that question in the present case. The learned judge has held that there was no cessation of consent to the separation and that the wife was still willing to accept the benefits of the separation deed in the form of any payment which she could get under it and the freedom from her husband's company to which she was entitled under it. There was no evidence that she, instead of desiring the separation to continue, desired matrimonial cohabitation to be resumed so as to bring the case within the actual decision in *Pardy* v. *Pardy* (2). I can see no reason for interfering with this finding of the learned judge. In my opinion the appeal should be dismissed.

STARKE J. Appeal from a judgment of the Supreme Court of Victoria dismissing a petition on the part of the appellant, the wife, praying the dissolution of her marriage on the ground of desertion during three years and upwards.

The spouses executed a deed of separation in November 1930 in the ordinary form and have ever since lived apart. From the execution of the deed the spouses must be treated as living apart by mutual agreement. Separation by consent whether express or implied is not desertion. But if the spouses rescind the deed or treat it as at an end or if one spouse repudiates the deed and the other establishes that he or she is no longer a consenting party to the continuance of the separation and is asserting his or her conjugal rights then the separation is no longer due to a consensus of the spouses but is attributable to a supervening *animus deserendi* on the part of the repudiating spouse and a refusal or unwillingness to resume matrimonial relations (*Pratt* v. *Pratt* (3) ; *Pardy* v. *Pardy* (2)).

In this particular case the trial judge found that the respondent to the suit (the husband) had undoubtedly the *animus deserendi* for many years. But the petitioner had, by the deed, assented to the original separation but alleged desertion on the part of her husband.

(1) (1908) 7 C.L.R. 470.
(2) (1939) P. 288.
(3) (1939) A.C. 417.

It was necessary in these circumstances that she established that she was no longer a consenting party to the separation continuing.

She relies upon the presentation of her petition and upon obtaining a widow's pension under the *Widows' Pensions Act* 1942 based upon an allegation of desertion. But the trial judge who saw and heard the petitioner found affirmatively that her consent to the separation, given by the separation deed, continued throughout and that she was always willing to act upon and accept the benefits of that deed.

The question is one of fact and the finding of the judge ought not, in my opinion, to be disturbed.

The appeal should be dismissed.

Dixon J. The facts of this case could not amount to desertion if we apply the law as it has been understood and administered in Australia. The principles which have obtained in this country and which have been generally, although not uniformly, adhered to are well expounded by *Cussen* J. in *Tulk* v. *Tulk* (1) and *Bailey* v. *Bailey* (2), though the word " cohabitation," capable of connoting so much less, is employed once or twice in the latter judgment to express the wide and flexible conception of conjugal association which in the former judgment his Honour describes and calls the matrimonial relationship, that is " the state of things " withdrawal from which, rather than from a place, constitutes desertion according to Lord *Merrivale* : *Pulford* v. *Pulford* (3).

But even if we were to go further and, making desertion not only fundamentally (per *Henn Collins* J., *Lynch* v. *Lynch* (4)) but almost exclusively a question of intention, try the right of the petitioner-appellant to a decree for dissolution by tests derived from the decision of the Court of Appeal in *Pardy* v. *Pardy* (5), still the facts would not, in my opinion, support a finding of desertion.

In these circumstances the case cannot raise for our consideration the effect of that decision or of the decision of the Divisional Court in *Thomas* v. *Thomas* (6), which may be considered a natural, if not a logical, consequence of what was said in *Pardy* v. *Pardy* (5). It is a matter upon which I think it is better not to express opinions by the way, but to wait until the occasion arises for giving a binding decision and then, if possible, obtain a full argument on both sides.

In my opinion the appeal should be dismissed.

(1) (1907) V.L.R. 64, at pp. 65, 66 ; 13 A.L.R. 45, at pp. 46, 47.
(2) (1909) V.L.R. 299, at pp. 302, 303 ; 15 A.L.R. 237, at p. 239.
(3) (1923) P. 18, at p. 21.
(4) (1939) P. 355, at p. 358.
(5) (1939) P. 288.
(6) (1945) 62 T.L.R. 166.

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McTIERNAN J. I agree that the appeal should be dismissed. The petition in this case could not possibly succeed without the aid of the principles which are laid down in *Pardy* v. *Pardy* (1). I agree entirely with the learned trial judge that the evidence fails to establish the conditions which under the doctrine of the above-mentioned case are requisite to be fulfilled on the part of the spouse alleging desertion in order to establish desertion by the other spouse.

WILLIAMS J. In *Waghorn* v. *Waghorn* (2) this Court overruled the interpretation which it had placed on one aspect of the law of desertion in *Crown Solicitor (S.A.)* v. *Gilbert* (3), so that the law in this country should be brought into conformity with the law as interpreted by the Court of Appeal in England. This appeal relates to another aspect of the law of desertion with which the Court of Appeal has recently dealt in *Pardy* v. *Pardy* (1). Briefly the material facts are that on 12th November 1930 a deed of separation was entered into between the petitioner, the wife, who is the appellant, and her husband, who is the respondent, by which the respondent agreed that the appellant might at all times thereafter live apart from him as if she were unmarried and to pay her during her life so long as she continued chaste the clear yearly annuity of £104 by weekly instalments of £2 for her separate use and benefit and by which it was agreed that the spouses would not annoy, molest, disturb or otherwise interfere with one another. Since October 1936 the appellant has not received from the respondent any payments of the annuity. In 1942 the Parliament of the Commonwealth passed the *Widows' Pensions Act* 1942, which entitles a wife who has been deserted by her husband for a period of not less than six months to a pension. In July 1942 the appellant applied for and was granted such a pension.

The learned judge below was satisfied that (1) in the first instance the appellant desired a separation from the respondent and was content to accept a separation by agreement rather than to rely upon any marital rights she had, to live apart from him in consequence of his misconduct, and (2) since 1936 the respondent had completely repudiated his obligation to make the payments provided for by the deed; but he was not satisfied that (3) the appellant had ever accepted that repudiation.

Mr. *Voumard* did not challenge the first finding and relied on the second, but he did challenge the third finding, and also contended that, even if it was correct, the appellant was nevertheless entitled to succeed. After reading the evidence carefully I am not satisfied that the third finding was wrong. On the contrary I think that it was

(1) (1939) P. 288.
(2) (1942) 65 C.L.R. 289.
(3) (1937) 59 C.L.R. 322.

right, and that his Honour was fully justified in holding that the appellant would not have been prepared to forego her right to the annuity if she could have enforced payment, or to give up her right to live apart and resume cohabitation. There is for instance her statement in support of her application for a pension that " I have never taken action to have the deed enforced as I could not afford the expense, and I did not want to have anything to do with such a man."

In *Hoggett* v. *Hoggett* (1) *Dixon* A.J. as he then was, after citing a number of decisions, mainly English, pointed out that in many undefended suits in courts of first instance it had been held that when a deed of separation had been repudiated by one of the spouses and he or she persisted in leaving the other as if deserted, the former was from that time guilty of desertion. Since that case there have been further decisions in England to the same effect some of which are discussed in the judgment of *Langton* J. in *Pardy* v. *Pardy* (2). Mr. *Voumard* contended, and his contention is supported by some of these decisions, that it was a condition going to the root of the appellant's agreement to separate that the respondent should continue to pay the annuity and that his repudiation of this obligation was sufficient to put an end to the consensual separation; so that since 1937 the appellant could claim that she had been deserted in the absence of some offer on the part of the respondent to resume cohabitation. But this Court should, in my opinion, follow the views on this point expressed by Sir *Wilfred Greene* M.R. (in whose judgment the other members of the Bench concurred) in *Pardy* v. *Pardy* (2). His Lordship said that, while it was not necessary that cohabitation should be resumed after a separation by agreement before one spouse could desert the other, it was necessary that the spouse claiming to be deserted should by words or conduct show an acceptance of the repudiation of the deed by the other spouse, and thereby waive the contractual right under the deed to live separate and apart before the desertion could be said to be against his or her consent. His Lordship said that in order that a separation which began by being consensual may be changed into desertion *it must lose its consensual element on both sides* (3). (The italics are mine.)

His Honour, in my opinion, correctly applied the law in *Pardy* v. *Pardy* (2) when he held that the third finding disentitled the appellant to a decree.

For these reasons I would dismiss the appeal.

Appeal dismissed.

Solicitor for the appellant, *Roy L. Yelland.*

E. F. H.

(1) (1926) V.L.R. 505, at p. 507.
(2) (1939) P. 288.
(3) (1939) P., at p. 303.