

[HIGH COURT OF AUSTRALIA.]

SMITH APPELLANT ;
PETITIONER,

AND

SMITH RESPONDENT.
RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF
VICTORIA.

*Divorce—Desertion—Petition by wife—Ill-treatment of wife by husband—Animus
deserendi—Agreement made in contemplation of separation—Departure by
husband from matrimonial home—Whether separation by agreement—Marriage
Acts 1928-1943 (Vict.) (No. 3726—No. 4963), s. 75 (a).*

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Oct. 6.

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

A wife, who had been so ill-treated by her husband that she would have been entitled to leave him, entered into a written agreement with him which recited that he had intimated to her that he was prepared to leave her alone on condition that she sold the household furniture and gave him half the proceeds ; the wife declared in the agreement that “ on the execution of this document by you and me I will proceed to sell the furniture . . . and will give you ” the sum stipulated, and the husband acknowledged that “ on receipt . . . of the said sum . . . I will not trouble you further and will not molest you in any way.” Having received the agreed sum, the husband left the wife, and thenceforward they lived apart. After the expiration of three years from the separation, the wife sought a decree dissolving the marriage, under s. 75 (a) of the *Marriage Act* 1928 (Vict.), on the ground of desertion.

Held, by Starke, Dixon and Williams JJ. (Latham C.J. and McTiernan J. dissenting), that the agreement did not express or involve such consent by the wife as would preclude her from establishing that her husband had deserted her ; the proper conclusion was that the husband had deserted the wife, and she was therefore entitled to a decree.

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

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Gladys Vera Smith petitioned the Supreme Court of Victoria for divorce on the ground—under s. 75 (a) of the *Marriage Act* 1928 (Vict.)—that her husband, without just cause or excuse, had deserted her and left her continuously so deserted during three years and upwards. On the hearing of the petition—which the husband did not defend—the following facts appeared from the evidence of the petitioner:—Prior to 9th May 1944, on which date the parties finally separated, she had left her husband for short periods on several occasions because of his ill-treatment. On the morning of 9th May 1944 “the respondent told me that if I gave him half the value of the furniture he would clear out and leave me alone. I spoke to my brother-in-law, Bernard Roden, who was our landlord, and he offered to help me by buying the furniture for £30.” The petitioner then consulted her solicitor, who drew up a document in the following terms:—“To Henry John William Smith.—Whereas you and I have been married for the past eleven years and during that time I claim that you have made my life a perfect misery and whereas on Thursday the fourth day of May 1944 you were convicted at the Fitzroy Court on my complaint of assaulting me and you were sentenced to fourteen days imprisonment such sentence being suspended on your entering into a bond to be of good behaviour for a period of two years And whereas since last Thursday you have not altered your ways in that you have been continually drinking, you have refused to go to work and support me and you have continually used filthy language towards me and have threatened to further assault me And whereas you have now intimated to me that you are prepared to leave me alone on condition that I sell the household furniture and give you the sum of fifteen pounds cash being half the proceeds thereof Now I hereby declare that on the execution of this document by you and by me I will proceed to sell the furniture to my brother-in-law, Bernard Roden, and will give you the sum of fifteen pounds as requested by you.—Dated the ninth day of May, 1944.—And I Henry John William Smith do hereby acknowledge that on the receipt by me from you of the said sum of fifteen pounds as recited above I will not trouble you further and will not molest you in any way.” Both parties signed this document, and Roden, who was present when it was signed, handed the respondent £15. The respondent “then went home, packed his belongings and left.”

Gavan Duffy J. said he was “satisfied that the respondent was a very unsatisfactory husband and that his conduct entitled the

petitioner to leave him. Had she done that, I would have been prepared to grant her a divorce on the ground of desertion. Instead of doing that, she entered into an agreement which I find was, in effect, an agreement to separate. It follows . . . that the separation was not against her will, and the petition must . . . be dismissed."

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From this decision the wife appealed to the High Court.

Gillard, for the petitioner. *Gavan Duffy J.* was wrong in treating the written agreement as making the separation consensual. It is clear that, for some time beforehand, the respondent had the intention of repudiating and terminating the matrimonial relationship, and the separation was the natural outcome of his premeditated and wrongful conduct. An intention to desert must be imputed to him by reason of his conduct. The object of the agreement, so far as the petitioner was concerned, was to secure her personal safety and to save something of her property. The agreement does not express consent by her to the termination of the matrimonial relationship, and it does not justify the inference of such consent. [He referred to *Bain v. Bain* (1).]

The respondent did not appear.

The following judgments were delivered :—

LATHAM C.J. With regret I am of opinion that this appeal should be dismissed. I have the same difficulty as the learned trial judge, namely, that the document signed by the parties amounted to an agreement for separation, an agreement, it is true, brought about by the misbehaviour of the husband which would have justified the wife in leaving him and would have placed him in the position of deserting her, even if she were the spouse who left the matrimonial home. But, though she had every reason for separation, there was no separation in fact until the separation which took place upon the terms recorded in the document. The parties agreed that they would separate upon the wife paying the husband £15. In my opinion, though I have every sympathy with the wife, as the law stands at present, this fact prevents her establishing desertion by her husband.

Accordingly, in my opinion, the appeal should be dismissed.

STARKE J. This appeal should be allowed.

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DIXON J. I agree that the appeal should be allowed. It appears to me that the document was the outcome of the husband's conduct, and that conduct sufficiently exhibits an intention to make the matrimonial relationship impossible. The proper inference from his conduct is that he was prepared to make continued cohabitation an impossibility for his wife, as indeed he had long since done. The wife executed the document in order to secure immunity from molestation, not for the purpose of terminating with her consent a matrimonial relationship. In fact it had already been terminated before the agreement was executed in consequence of his violence.

MCTIERNAN J. I have the same difficulty in this case as that which the learned trial judge encountered. Once it is admitted—as counsel for the appellant admits here—that the document signed by the parties is a voluntary agreement on her part, I can see no escape from the decision which the trial judge has given, namely, that the appellant consented to the separation.

I am of opinion that the appeal should be dismissed.

WILLIAMS J. In my opinion the appeal should be allowed. I agree with the reasons given by my brother *Dixon*.

Appeal allowed and decree nisi for dissolution of marriage granted as of 6th October 1948. Direct that the decree shall not be made absolute until three months from 6th October 1948. Order that the appellant lodge an office copy of the order of this Court with the Prothonotary of the Supreme Court of Victoria. Order that the respondent pay the appellant's costs in the Supreme Court and in this Court.

Solicitor for the appellant : *Aleck Sacks*.

E. F. H.