[HIGH COURT OF AUSTRALIA.]

POWELL . . . . . APPELLANT;
PETITIONER,

AND

POWELL . . . . . RESPONDENT.
RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Oct.* 22; *Dec.* 23.

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

Divorce—Desertion—Separation by agreement—Period of separation limited by agreement—Refusal by wife to resume cohabitation after expiration of period limited—Marriage Acts 1928-1941 (*No.* 3726—*No.* 4839) (*Vict.*), *s.* 75 (*a*).

A husband and wife separated pursuant to an agreement which provided that they should live apart for a limited period. The wife refused to resume living with the husband after the expiration of the period, although requested by the husband to do so.

Held that, within the meaning of s. 75 (*a*) of the *Marriage Acts* 1928-1941 (Vict.), the wife had deserted the husband.

Pardy v. *Pardy*, (1939) P. 288 and *Beeken* v. *Beeken*, (1948) P. 302, followed.

Fitzgerald v. *Fitzgerald*, (1868) L.R. 1 P. & D. 694, discussed.

Decision of the Supreme Court of Victoria (*Fullagar* J.), *Powell* v. *Powell*, (1948) V.L.R. 351, reversed.

APPEAL from the Supreme Court of Victoria.

George Leslie Powell and Alice Louisa Powell were married on 1st October 1921. In September 1928 they separated pursuant to an agreement that they live apart until September 1929. In September 1929, while they were still living apart, they executed a deed by which they agreed to live apart for a further period of twelve months, and they lived apart as so agreed. Shortly before the expiration of that period the husband wrote to the wife suggesting that cohabitation be resumed. The wife replied that she had no intention of living with the husband again, and cohabitation was never resumed.

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On 9th July 1947 the husband filed a petition in the Supreme Court of Victoria praying that the marriage be dissolved on the ground, under s. 75 (*a*) of the *Marriage Acts* 1928-1941 (Vict.), that the wife, without just cause or excuse, had wilfully deserted him and left him continuously so deserted during three years and upwards.

Fullagar J., by whom the petition was heard, found that "the wife, in response to a bona fide request, refused to resume cohabitation after the expiration of the second period of twelve months. . . . The allegation of desertion, however, rests entirely on the wife's refusal to resume living with her husband in September 1930 at a time when there was no existing state of cohabitation." He felt bound by Australian authorities to hold that the wife's refusal did not constitute desertion, and he dismissed the petition : *Powell* v. *Powell* (1).

From this decision the petitioner appealed to the High Court.

Frederico, for the appellant. The trial judge was in error in holding that to grant the decree in this case would be inconsistent with the view expressed by Lord *Penzance* in *Fitzgerald* v. *Fitzgerald* (2). Here the agreements merely suspended cohabitation for two successive periods of twelve months ; they did not have the effect of putting an end to cohabitation. Accordingly, there was an existing state of cohabitation on the termination of the second twelve-month's separation, and the wife wrongfully put an end to that state by refusing to rejoin her husband. In any event, this Court should reject Lord *Penzance's* view, as the Court of Appeal has done in England in *Pardy* v. *Pardy* (3) and *Beeken* v. *Beeken* (4). To do so would not be inconsistent with any previous decision of the Court. It is true that Lord *Penzance's* proposition has been cited with approval in several cases in this Court (for example, *Kellway* v. *Kellway* (5)) but none of the decisions in those cases is directly in point here. *Pardy's Case* (6) has been followed in New Zealand (*Sutherland* v. *Sutherland* (7)) and in South Australia (*Morgan* v. *Morgan* (8)). In Victoria it has been accepted by some of the judges of the Supreme Court but not by others : see *Morgan* v. *Morgan* (9) ; *Merry* v. *Merry* (10) ; *Bickerton* v. *Bickerton* (11). The judgment of *Cussen* J. in *Tulk* v. *Tulk* (12) does not express an

(1) (1948) V.L.R. 351.
(2) (1868) L.R. 1 P. & D. 694, at p. 698.
(3) (1939) P. 288.
(4) (1948) P. 302.
(5) (1937) 58 C.L.R. 173.
(6) (1939) P. 288.
(7) (1941) N.Z.L.R. 199.
(8) (1947) S.A.S.R. 51.
(9) (1946) V.L.R. 446.
(10) (1948) V.L.R. 26.
(11) (1947) V.L.R. 91.
(12) (1907) V.L.R. 64 : See pp. 65, 66.

unqualified acceptance of Lord *Penzance's* view; but see *Bailey* v. *Bailey* (1). [He also referred to *Sifton* v. *Sifton* (2); *Shaw* v. *Shaw* (3); *Thomas* v. *Thomas* (4); *Jordan* v. *Jordan* (5); *Timoney* v. *Timoney* (5); *Weatherley* v. *Weatherley* (7); *McIlroy* v. *McIlroy* (8).]

The respondent did not appear.

Cur. adv. vult.

Dec. 23.

The following written judgments were delivered:—

LATHAM C.J. This is an appeal from a decision of the Supreme Court of Victoria (*Fullagar* J.) dismissing a husband's petition for divorce. The petition was founded upon alleged desertion by the wife for three years and upwards. The parties were married in 1921. In the year 1928 they executed a deed of separation which provided that they should live separate for a period of twelve months from 25th September 1928. On 30th September 1929 they executed another deed under which they agreed to live separate for a further period of twelve months. Just before the expiry of that period the husband wrote to his wife asking her to come back to him but she refused to do so and said that she had no intention of ever living with him again. She has since acted in accordance with this statement, although he has asked her to return and is able and willing to provide a suitable home for her.

The learned trial judge was of opinion that this case raised the question whether the courts of Australia should follow *Pardy* v. *Pardy* (9), which has been regarded as profoundly modifying the law as previously understood with respect to the effect of an agreement for separation in a case in which desertion is alleged.

Statutes relating to matrimonial causes do not provide any definition of desertion and the courts have been careful to abstain from attempting to give a definition which would have to be applied in circumstances which vary very greatly and which cannot be foreseen. Desertion involves forsaking or abandonment by one spouse of the other against the will of the other. There cannot be desertion unless there is a refusal to recognize some or all of the obligations arising from the matrimonial relationship. Desertion may assume many forms. It may be easy to determine that desertion has taken place in a particular case as, for example, where one party, against the will of the other, leaves the matrimonial home,

(1) (1909) V.L.R. 299.
(2) (1939) P. 221, at p. 223.
(3) (1939) P. 269, at p. 271.
(4) (1945) 62 T.L.R. 166.
(5) (1939) P. 239.
(6) (1926) N.I.L.R. 75, at p. 78.
(7) (1947) A.C. 628, at pp. 631, 632.
(8) (1946) 73 C.L.R. 270.
(9) (1939) P. 288.

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declaring that he or she will have nothing more to do with the other spouse, and the parties remain apart. But separation is not in itself desertion. Separation may be completely consistent with the full maintenance of the matrimonial relationship, as in the case of a husband whose occupation necessitates frequent absences from his home. There may be desertion though the parties are still living in the same home, if one of them persistently and continuously refuses to recognize the matrimonial tie: see *Powell* v. *Powell* (1). Again, the party who remains in the matrimonial home after the other party has gone away may be held to be guilty of desertion if the departure of the other spouse has been brought about by the creation by him or her of conditions which a self-respecting wife or husband cannot reasonably be expected to tolerate: see *Bain* v. *Bain* (2). Neither a husband nor a wife can repudiate the status of marriage—they remain married whether they like it or not—but one of them may so behave as to destroy some or all of the various elements which constitute married life. *Cussen* J. indicated these elements in *Tulk* v. *Tulk* (3) :—" Marital intercourse, the dwelling under the same roof, society and protection, support, recognition in public and in private, correspondence during separation, making up as a whole the *consortium vitae*, which the old writers distinguish from the *divortium a mensa et thoro*, may be regarded separately as different elements, the presence or absence of which go to show more or less conclusively that the matrimonial relationship does or does not exist. The weight of each of these elements varies with the health, position in life, and all the other circumstances of the parties." There may be desertion even though there is a recognition of some degree of obligation, as where a husband leaves his wife, but still gives her some money to live on: see *Yeatman* v. *Yeatman* (4). The question to be determined in a case of alleged desertion is whether in the circumstances of that case there is a sufficiently substantial degree of repudiation of the matrimonial obligations of married persons to amount to forsaking and abandonment.

But one principle has been maintained at all times, namely that where there is a separation of husband and wife by consent neither can be held to desert the other by reason of such separation. In such a case there is no abandonment against the will of either party. Accordingly, if there is consent to separation, either permanently or during an indefinite period, there can be no desertion unless the parties put an end to their agreement, so that the agreement no

(1) (1922) P. 278.
(2) (1923) 33 C.L.R. 317.
(3) (1907) V.L.R. 64, at p. 65.
(4) (1868) L.R. 1 P. & D. 489.

longer operates by way of consent. A separation agreement may be terminated by agreement to rescind, or by resumption of sexual intercourse or of living together—acts which show a common intention to treat the agreement as at an end. (The true significance of *Pardy* v. *Pardy* (1), I suggest hereafter, is to be found in the recognition of another means of terminating a separation agreement.) Thus desertion cannot take place during separation by consent, and an agreement for separation establishes consent so long as the agreement subsists.

An original separation by agreement is voluntary on both sides. Such a separation cannot be evidence establishing desertion because it is not separation against the will of either party. There may be mere consent not amounting to any binding agreement, as where a husband or wife goes away on business or for a holiday with the consent of the other party. If there is a deed or an agreement for consideration providing for separation which is in operation neither party can be heard to say that the separation does not continue to be voluntary. The agreement, whether by deed or by a binding agreement for consideration, operates by binding each party to the separation as being a separation by consent. A separation agreement which is otherwise binding is not revocable at will by one party to it. In relation to desertion such an agreement is important only as evidencing consent to separation. As long as the consent continues that separation cannot be relied upon as evidence of desertion. But if the agreement has ended and one party communicates a desire and a willingness to resume matrimonial relations there is no consent to the continuance of the separation. The law is accurately stated in my opinion in *Halsbury's Laws of England*, 2nd ed., vol. 10, p. 657—"An agreement or deed of separation is usually conclusive against a charge of desertion where such agreement or deed has been complied with and is subsisting, but desertion may be asserted if the agreement is repudiated or terminated by consent or conduct." (I understand the words "complied with" to refer only to the fact of continued separation, and not to performance of all the obligations, e.g. to pay an allowance, created by the agreement or deed: *Roe* v. *Roe* (2)). Authority for the statement which I have quoted is to be found in *Walter* v. *Walter* (3) —an agreement to live apart and "neither party took any step to set that agreement aside"; held—no desertion: *Henty* v. *Henty* (4) —original departure of husband legitimate—refusal to return to his wife—"his subsequent conduct clearly shows his desire to

(1) (1939) P. 288.
(2) (1916) P. 163.
(3) (1921) P. 302, at p. 304.
(4) (1875) 33 L.T. 263, at p. 264.

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break off all association with his wife "—held desertion: *Huxtable* v. *Huxtable* (1)—consent to a temporary separation—husband refused to return to his wife—held to be desertion. The period of desertion would begin at the time of the refusal.

The termination of a deed of separation does not make the original separation involuntary: *Crabb* v. *Crabb* (2) and see the reasons stated by *Fullagar* J. in *Bickerton* v. *Bickerton* (3). But the termination of a deed of separation does, in my opinion, preclude the contention that the separation, because there was formerly an agreement for separation, continues to be a separation by consent after the agreement has ceased to operate. I venture to repeat what I said in *McIlroy* v. *McIlroy* (4): "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* (5); see also *Pape* v. *Pape* (6)). 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."

In *Fitzgerald* v. *Fitzgerald* (7) Lord *Penzance* said that desertion means abandonment and implies an active withdrawal from a cohabitation which exists and that "no-one can 'desert' who does not actively and wilfully bring to an end an existing state of cohabitation . . . But if the state of cohabitation has already ceased to exist, whether by the adverse act of husband or wife, or even by the mutual consent of both, 'desertion', in my judgment, becomes from that moment impossible to either, at least until their common life and home have been resumed." These words have been relied upon as requiring, after any agreed separation, a resumption of a common life and home before there can be desertion. The result of this view is that if, for example, a wife executes a separation deed and lives apart from her husband by reason of the deed and they do not come together again, she can never at any subsequent time be permitted to allege and attempt to prove that he has deserted her. Thus in *Bailey* v. *Bailey* (8) it was held that a refusal by one spouse to resume cohabitation after it has ceased by consent cannot be desertion. *A'Beckett* A.C.J. made a natural protest against this state of the law when he said in *MacKenzie* v. *MacKenzie* (9):—"The deed should not be a permanent bar to obtaining relief. There must be some means by which

(1) (1899) 68 L.J. (P.) 83.
(2) (1868) 1 P. & D. 601.
(3) (1947) V.L.R. 91, at p. 95.
(4) (1946) 73 C.L.R. 270, at p. 277.
(5) (1916) P. 163.
(6) (1887) 20 Q.B.D. 76.
(7) (1868) L.R. 1 P. & D. 694, at p. 698.
(8) (1909) V.L.R. 299.
(9) (1906) V.L.R. 416, at p. 417.

the wife could effectually revoke the licence to live separate if the husband continued to make default and distinct notice were given to him that the wife no longer consented to his living apart from her and that she required him to maintain her."

An examination of what Lord *Penzance* said in *Fitzgerald* v. *Fitzgerald* (1) itself shows in my opinion that the proposition as to the necessity for the resumption of a common life and home before desertion can be established after there has been a separation by agreement was too widely stated in that case and in other cases such as *Bailey* v. *Bailey* (2). In *Fitzgerald* v. *Fitzgerald* (3) Lord *Penzance* expressly referred to cases in which "actual cohabitation does not exist at all, because the circumstances of the parties do not permit of it." Yet it was held that there could be desertion in such cases. His Lordship continued: "No doubt, again, there are cases in which the parties may have innocently ceased for a time to be actually living together, separated by the calls of everyday life, or the exigencies of public duty, and the husband or wife, taking advantage of the separation, may have purposely rejected all subsequent opportunities of coming together again; and this may constitute desertion. For in truth, in such cases, the state of cohabitation was not, in the first instance, wholly relinquished, but only suspended till a fitting occasion for its resumption, and purposely to reject all such occasions is practically to abandon it. Such were the cases of *Gatehouse* v. *Gatehouse* (4) and *Lawrence* v. *Lawrence* (5)." In such cases there was no desertion at the time of the original separation, but the refusal to re-establish ordinary matrimonial relations after the temporary suspension thereof was held to be desertion. These cases are in my opinion inconsistent with the suggested rule that after an agreed separation there must be an actual resumption of matrimonial relations before there can be desertion. By "actual resumption of matrimonial relations" I mean a change in the relationship of the parties from a matrimonial point of view from the relationship which existed during the period of agreed or otherwise legitimate separation—such as would most commonly, but not exclusively, be shown by return to a common home.

In my opinion the statement last quoted from *Fitzgerald* v. *Fitzgerald* (1) applies to the present case. The matrimonial relationship of the parties was not terminated by the deeds for any permanent or indefinite period but was only suspended for stated

(1) (1868) L.R. 1 P. & D. 694.
(2) (1909) V.L.R. 299.
(3) (1868) L.R. 1 P. & D., at p. 697.
(4) (1867) L.R. 1 P. & D. 331.
(5) (1862) 2 Sw. & Tr. 575 [164 E.R. 1120].

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limited periods. The wife in the present case has "purposely rejected all occasions" for the resumption of matrimonial relations and has therefore abandoned what is called cohabitation and has deserted her husband. The cases already cited show that "resumption of a common life and home" after an agreed temporary separation is not a precondition of the possibility of subsequent desertion. They are in my opinion quite inconsistent with the proposition that there cannot be desertion without something which can be called such a resumption. Thus, in my opinion, the petitioning husband has established desertion in the present case under rules of law which are stated in *Fitzgerald* v. *Fitzgerald* (1).

I come now to consider the development of the law after *Fitzgerald* v. *Fitzgerald* (1). That case has been subjected to repeated criticism in respect of the declaration that after a separation "whether by the adverse act of husband or wife, or even by the mutual consent of both, 'desertion' . . . becomes from that moment impossible to either, at least until their common life and home have been resumed (2)." For recent examples of such criticism in addition to *Pardy* v. *Pardy* (3), see *Jordan* v. *Jordan* (4) and *Thomas* v. *Thomas* (5), where it is pointed out that it is impossible to accept the proposition that if the state of cohabitation has already ceased to exist by the adverse act of husband or wife desertion becomes "from that moment impossible to either." The statement in *Tulk* v. *Tulk* (6) is more guarded. It omits the reference to "either party" and is limited to separation "intended to be permanent or indefinite."

The application of the rule for which *Fitzgerald* v. *Fitzgerald* (1) is commonly cited has been escaped in more than one way. In some cases the rule has been excluded by simply holding that there can be cohabitation though there is no living together and no common home : see *Chudley* v. *Chudley* (7)—a case of a temporary separation of husband and wife for mutual convenience—there was no re-establishment of a common home—no coming together in any sense whatever—the husband refused to return to the wife ; held—desertion. But in order to maintain consistency with *Fitzgerald* v. *Fitzgerald* (1) it was said in that case that it would be "monstrous" to hold that in such a state of facts cohabitation between husband and wife had ceased. So also in *Huxtable* v. *Huxtable* (8) it was baldly stated that "cohabitation may indeed exist together with an agreement to live apart." "Cohabitation"

(1) (1868) L.R. 1 P. & D. 694.
(2) (1868) L.R. 1 P. & D., at p. 698.
(3) (1939) P. 288.
(4) (1939) P. 239, at p. 249.
(5) (1945) 62 T.L.R. 166, at p. 167.
(6) (1907) V.L.R. 64, at p. 66.
(7) (1893) 69 L.T. 617.
(8) (1899) 68 L.J. (P.), at p. 85.

must here be used to refer to a continuing recognition of the obligations incidental to marriage. It plainly does not involve living in a common home as required by Lord *Penzance*. It is unnecessary to refer in detail to what are called the church door cases, where there is a ceremony of marriage and immediate separation so that there has never been any cohabitation between the parties in any intelligible sense, but where desertion can nevertheless take place: *De Laubenque* v. *De Laubenque* (1). See also *Brodie* v. *Brodie* (2), where agreements for future separation were made—one immediately before marriage and the other immediately after the marriage ceremony. The parties separated and never came together again in any sense. It was held that the agreements were void as contrary to public policy because they provided for future separation. But a decree for restitution of conjugal rights was made. Desertion must have been the ground for the decree, but desertion was considered to be so obvious that no reference is made to it in the reasons for judgment. Thus refusal to recognize any matrimonial obligations was held to be desertion, though there had never been any cohabitation of the parties in any respect whatever. Thus the idea of "cohabitation" has become very vague and unsatisfactory. Cessation of cohabitation really means, I suggest, "breaking the marriage" by acts done with that intention, the intention being shown by words, spoken or written, or by reasonable implication from conduct. If the word "cohabitation" must be used in describing desertion, then cohabitation must be regarded as being capable of re-establishment after a period of separation without any return to a common home.

Another means of escaping from the position said to have been created by *Fitzgerald* v. *Fitzgerald* (3) has been made available by *Pardy* v. *Pardy* (4). In *Pardy* v. *Pardy* (4) the statement which I have quoted from *Fitzgerald* v. *Fitzgerald* (3) with respect to the resumption of a common home was expressly disapproved and declared to be no longer the law. In *Pardy* v. *Pardy* (4) there had been a separation agreement which the husband had refused to carry out and had repudiated. The husband repudiated the agreement in circumstances which were held to show, not that he regarded himself as free to resume the cohabitation proscribed by the separation deed, but that he did not propose to resume cohabitation at all. The wife was willing to resume cohabitation, but the husband would not have it. It was held, therefore, that both parties regarded the separation deed as a dead letter, so that the

(1) (1899) P. 42.
(2) (1917) P. 271.
(3) (1868) L.R. 1 P. & D. 694.
(4) (1939) P. 288.

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continuance of the separation was not in any way attributable to the existence of the deed, but, on the other hand, was due to the fact that the husband was determined to maintain the separation against the will of his wife; that is, there was actual separation in fact; that separation was brought about and continued by the husband with the intention of abandoning his wife: therefore it was held that there was both the fact of separation and the intention of desertion on the part of the husband. It was emphasized that if a separation begins by being consensual it cannot be changed into desertion unless it loses its consensual element on both sides (1). If, however, the parties agree to terminate the agreement, there is no longer consent to separation. The agreement for separation is important in relation to the issue of desertion only as evidence of such consent. In the case of a deed or of other binding agreement for separation a party who is bound by the deed cannot allege absence of consent—on any other view the deed or agreement would, as an agreement for separation, be merely foolish. If, however, the agreement (whether by deed or by writing or by word of mouth or inferred from conduct) is terminated, it can no longer operate as evidence of consent.

Pardy v. *Pardy* (2) does not, I suggest, really create a radical revolution in the law with respect to desertion. It concedes that desertion involves a repudiation of matrimonial obligations amounting to abandonment of the party alleging desertion. That is the general principle. But *Pardy* v. *Pardy* (2) denies that, after matrimonial obligations have been suspended by an agreement for separation, they can be re-established (so as to make desertion possible) only by resumption of a common life and home. The decision in that case provides another example of a manner in which an agreement for separation may be determined, namely by both parties treating it as a dead letter so as to bring to an end any consent which otherwise might be inferred from its existence. In other words, *Pardy* v. *Pardy* (2) logically applies the principle that the importance of separation agreements in relation to the subject of desertion depends upon the existence of an agreement subsisting at the time when desertion is alleged and showing that the separation of the parties is not against their will, but is by mutual consent. When the agreement ends the consent ends.

In the present case the consent to separation was a consent to the severance of matrimonial relationship during two limited periods only, the latter of which expired in September 1930. Thereafter such consent in my opinion ceased to operate for any purpose.

(1) (1939) P., at p. 303. (2) (1939) P. 288.

The matrimonial relationship was only suspended. Even if the agreement had been for an indefinite period *Pardy* v. *Pardy* (1) shows that desertion could take place without any conduct amounting to re-establishment of cohabitation within the meaning of *Fitzgerald* v. *Fitzgerald* (2). In my opinion the matrimonial relationship after the expiry of the periods of agreed separation in this case was as real as in the many other cases, to some of which reference has been made, in which it has been held that desertion occurred, although there was no resumption of a common home after a temporary separation. "If absence for a time be agreed to, and that time be exceeded, desertion may afterwards arise" (*Halsbury's Laws of England*, 2nd ed., vol. 10, p. 655.) See *Mahoney* v. *M'Carthy* (3): "In this case a temporary separation only was at first intended, and I agree with the counsel for the plaintiff, that there may be circumstances tending to shew that although there be no intention to desert at the beginning, there may afterwards be desertion without resumption of cohabitation."

I summarize my conclusions in the present case in the following words:—the parties separated by consent for a limited period: after that period expired the wife persisted in absenting herself from her husband without his consent, though, as the learned judge found, he had not been guilty of any misbehaviour towards her and was willing and able to provide her with a proper home: such conduct amounts to desertion under the law as declared before *Pardy* v. *Pardy* (1) as well as under the law as declared in that case. It was deliberate abandonment of the husband by the wife and it can find no justification in the deeds of separation (the period of which had expired) or in any other circumstances.

In my opinion the appeal should be allowed and a decree for dissolution of the marriage should be made.

STARKE J. The Supreme Court of Victoria dismissed a petition praying on behalf of the appellant the dissolution of his marriage with the respondent on the ground that she without just cause or excuse wilfully deserted him and without any such cause or excuse left him continually so deserted during three years and upwards (*Marriage Act* 1928, s. 75).

In 1928 the spouses executed a deed of separation whereby they agreed to live separate and apart for twelve months from 25th September 1928 to 25th September 1929. In 1929 another deed

(1) (1939) P. 288.
(2) (1868) L.R. 1 P. & D. 694.
(3) (1892) P. 21, at pp. 25, 26.

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was executed by the spouses whereby they agreed to live separate and apart for a further period of twelve months.

In September 1930 when the agreement of 1929 was about to expire the appellant sought to restore the matrimonial relationship and suggested that the spouses should live together again, but the respondent refused, and stated that she had no intention of ever living with the appellant again.

The learned trial judge found that the respondent in response to a bona fide request of the appellant refused to resume cohabitation after the expiration of the second period of twelve months.

But he dismissed the petition.

The allegation of desertion, he said, rested entirely upon the respondent's refusal to resume living with the appellant in September 1930 at a time when there was no existing state of cohabitation. And I gather from *Bickerton* v. *Bickerton* (1) that the matrimonial relationship was severed when the spouses agreed to live apart and that there was nothing in what subsequently happened to enable a court to say that desertion had taken place.

The courts, however, have repeatedly declined to attempt any exhaustive definition of desertion (*Pulford* v. *Pulford* (2); *Jordan* v. *Jordan* (3); *Cohen* v. *Cohen* (4); *Weatherley* v. *Weatherley* (5)). "In its essence desertion is the forsaking or abandonment by one of the spouses of the other" (*Rayden* on *Divorce*, 4th ed., p. 101). But whether one spouse deserts another or not depends upon the circumstances of the particular case and is a question of fact.

But the decision under appeal places reliance upon the opinion of Lord *Penzance* in *Fitzgerald* v. *Fitzgerald* (6) that "no one can 'desert' who does not actively and wilfully bring to an end an existing state of cohabitation. . . . But if the state of cohabitation has already ceased to exist, whether by the adverse act of husband or wife, or even by the mutual consent of both, 'desertion', in my judgment, becomes from that moment impossible to either, at least until their common life and home have been resumed."

The Victorian cases of *Belton* v. *Belton* (7); *Tulk* v. *Tulk* (8); *Bailey* v. *Bailey* (9); *Bickerton* v. *Bickerton* (10); *Martin* v. *Martin* (11) also adopt this view and *Bradford* v. *Bradford* (12); *Fremlin* v. *Fremlin* (13) in this Court were cited in support of the same view.

(1) (1947) V.L.R. 91, at p. 96.
(2) (1923) P. 18, at p. 22.
(3) (1939) P. 239, at p. 251.
(4) (1940) A.C. 631, at p. 646.
(5) (1947) A.C. 628, at p. 631.
(6) (1868) L.R. 1 P. & D. 694, at p. 698.
(7) (1899) 24 V.L.R. 683, 977.
(8) (1907) V.L.R. 64.
(9) (1909) V.L.R. 299.
(10) (1947) V.L.R. 91.
(11) (1948) V.L.R. 134.
(12) (1908) 7 C.L.R. 470.
(13) (1913) 16 C.L.R. 212.

But in *Jordan* v. *Jordan* (1) it was said that it had often been explained that the opinion of Lord *Penzance* in *Fitzgerald* v. *Fitzgerald* (2) was not intended to be and could not be taken as an exhaustive exposition of the law relating to desertion. And it was pointed out that the subsequent history of the case reinforced that view: and see *Thomas* v. *Thomas* (3).

In *Pardy* v. *Pardy* (4) the Court of Appeal held that where the original separation was by mutual consent desertion may supervene without the necessity of a resumption of cohabitation. All that is required to establish desertion in such a case is the presence of a supervening *animus deserendi*; a matter to be inferred from the words and conduct of the deserting spouse, a continuance of the *de facto* separation and the absence of consent by the other party.

But, according to this decision, in order that a separation which began by being consensual may be changed into desertion, it must lose its consensual element on both sides (5).

In *Beeken* v. *Beeken* (6) it was said by the Court of Appeal (Lord *Merriman*, P., *Bucknill* L.J. and *Hodson* J.) that the opinion of Lord *Penzance* in *Fitzgerald* v. *Fitzgerald* (2) was no longer law as was clear from the decision of *Pardy* v. *Pardy* (4).

And in the State of Victoria four justices of the Supreme Court (*Lowe*, *Duffy*, *Martin* and *Barry* JJ.) are content to follow *Pardy* v. *Pardy* (4) (see *Morgan* v. *Morgan* (7); *Merry* v. *Merry* (8)) whilst *O'Bryan* and *Fullagar* JJ. consider themselves bound by the Victorian decisions, and *Herring* C.J. observed that the decision causes considerable difficulty: *Martin* v. *Martin* (9); *Bickerton* v. *Bickerton* (10); *Merry* v. *Merry* (11).

There is no real difficulty, I think, in the application of *Pardy* v. *Pardy* (4) if we are not over subtle. What the law seeks to enforce is the recognition and discharge of the common obligation of the married state. You must look at the conduct of the parties in order to ascertain whether one of the spouses has been abandoned and forsaken by the other: cf. *Pulford* v. *Pulford* (12); *Shaw* v. *Shaw* (13).

But in any case *Pardy* v. *Pardy* (4) is the law of England and we have said more than once in this Court that, though not bound by the decisions of the Court of Appeal, still this Court should

(1) (1939) P., at p. 250.
(2) (1868) L.R. 1 P. & D. 694.
(3) (1945) 62 T.L.R. 166, at p. 167.
(4) (1939) P. 288.
(5) (1939) P., at pp. 303, 306.
(6) (1948) P. 302.
(7) (1946) V.L.R. 446.
(8) (1948) V.L.R. 26, at pp. 31, 36.
(9) (1948) V.L.R. 134.
(10) (1947) V.L.R. 91.
(11) (1948) V.L.R., at p. 30.
(12) (1923) P., at pp. 21, 22.
(13) (1939) P. 269.

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defer to and treat those decisions as authoritative upon the construction of statutes governing the law of marriage and divorce until some superior authority has spoken or some manifest error is apparent in its decisions : see *Sexton* v. *Horton* (1) ; *Waghorn* v. *Waghorn* (2) ; *Trimble* v. *Hill* (3).

Applying the principles or rules laid down in *Pardy* v. *Pardy* (4) it is plain, though the spouses separated for a time, yet the wife refused to resume cohabitation and her *animus deserendi* is established by her words and conduct.

But there is another ground upon which this appeal succeeds consistently with what was said by Lord *Penzance* in *Fitzgerald* v. *Fitzgerald* (5). It is stated shortly in *Shaw* v. *Shaw* (6) : "It is clear . . . that if cohabitation has ceased by agreement, only for a limited time or for a particular reason, that spouse is guilty of desertion who, without cause, refuses to resume cohabitation at the expiration of the time or the cessation of the reason for the separation." See *Fitzgerald* v. *Fitzgerald* (7) ; *Bradshaw* v. *Bradshaw* (8). Here the parties agreed to separate for a limited period of two years. The matrimonial relationship was not determined, but suspended. And when the wife refused to renew that relationship and stated her intention never to live with her husband again the matrimonial offence of desertion was complete.

The appeal should be allowed and a decree nisi granted for the dissolution of the marriage between the appellant and the respondent.

DIXON J. The decision which the Court gives in this case appears to me to imply a change in the basal conception of desertion upon which the administration of the divorce laws in Australia has proceeded for more than half a century. It is a change which may have important consequences. I have not been able to discover in the late English cases which the court follows any explanation of the conception of desertion to which the particular conclusions adopted in those cases may be referred and for myself, notwithstanding a strong belief in the advantages of pursuing an interpretation of the law uniform with that adopted in England, I should have preferred to wait, in the hope of further enlightenment, before following those decisions at the expense of the doctrine with which I have been familiar. *Bishop*, an American writer of authority whose work on *Marriage and Divorce* was I think first published in 1852, defined desertion in divorce law as the voluntary separation

(1) (1926) 38 C.L.R. 240.
(2) (1942) 65 C.L.R. 289.
(3) (1879) 5 App. Cas. 342.
(4) (1939) P. 288.
(5) (1868) L.R. 1 P. & D. 694.
(6) (1939) P., at p. 272.
(7) (1868) L.R. 1 P. & D., at p. 697.
(8) (1897) P. 24.

of one of the married parties from the other or the voluntary refusal to renew a suspended cohabitation without justification either in the consent or the wrongful conduct of the other. This definition is open to criticism, but it does bring out the difference between the withdrawal from an existing matrimonial relationship and the refusal, or for that matter the intentional failure, to re-establish a matrimonial relationship that has been suspended. English and Australian law had not included the second alternative in its conception of what is the essential nature of desertion, nor indeed has English law now made any express acknowledgement that it has done so.

The principle upon which Australian law has hitherto proceeded provided a simple and I think flexible conception of desertion which in a jurisdiction always thronged with cases exhibiting a multitudinous variety of human situations has enabled the courts to apply a ready test that has been found not unsatisfactory and, with few exceptions, decisive.

The principle adopted conceived husband and wife as standing in a relation to one another brought about by the marriage. It may be the product of the status of marriage and the rights and obligations flowing from the status. But it is not the legal relation between husband and wife that has afforded the criterion. It is the relation between them in fact and that is the relation which springs up by their mutual recognition of one another as husband and wife.

Ordinarily it means that they dwell together in the closest association, but the continuance of the relation is consistent with physical separation by long distances and for indefinite periods of time and on the other hand it may be terminated although neither of them removes himself or herself from what has been the common dwelling. In other words physical proximity or separation, of whatever value it may be as an evidentiary circumstance in any given case in which the existence or termination of the relationship is in issue, is not a criterion, not an element determining the presence or absence of the relation. The outward manifestations of the matrimonial relation are necessarily governed by the conditions controlling the actions and movements of husband and wife. In the everyday case they are described by the word cohabitation, a word that, both by its misuse and by reason of its ambiguities, has proved almost as mischievous in this branch of law as have the words "survivor" and "issue" in wills, and like those words should accordingly be avoided. But in special cases, of which there has been an almost infinite diversity before the courts, the

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outward manifestations may be few and slight. A secret marriage between employees of an institution or establishment in which they dwell but which will not employ married couples may result in the husband and wife almost avoiding the evidences to which a court would look and yet that in itself might without any paradox be properly regarded as significant of the mutual recognition in fact of one another as husband and wife which is at the centre of the relation. A husband whose duties send him to a remote and inaccessible place may be unable to do more than allot part of his remuneration to his wife and send her an occasional message. But it will be enough to sustain the relationship.

Desertion was held to consist in the intentional termination of this relation against the will of the other party to the marriage. The element of intention must necessarily take an indispensable place in such a conception of desertion. But it is apparent that, in any given case, the more tenuous is the actual relationship, the fewer the outward manifestations, the more decisive must intention become. Indeed the relationship may be so thin, that it is only by ascertaining that an intention to end the relationship existed that you can be sure it was terminated. But under this conception the intention represented a state of mind that was not difficult to define. It consisted in a purpose of bringing to an end the matrimonial relationship that existed however the relationship was outwardly manifested. The flexibility of this conception of desertion can be seen in the fact that it will apply equally well; when the relationship is established at the altar and the husband resolves upon its termination at the church door; when a husband who has been parted unwillingly by circumstances from the wife with whom he has been living, for example by duties taking him abroad, or by service in the armed services or even a period of incarceration, forms an intention no longer to treat her as his wife and in some way makes her aware of his decision; and when a wife still dwelling in the same house as her husband withdraws from his society, refuses to converse with him and behaves as if he were a stranger.

Clear as the principle was in apprehension and useful in application, among the logical consequences that ensue from it there are some that were not welcome. One is that if the matrimonial relationship was terminated by the mutual consent of the parties, nothing that either of them afterwards did could amount to desertion. There being no longer any matrimonial relationship, there was nothing to put an end to and nothing to which to address the required intention. Of course it was open to them to reunite in establishing the relationship again and if they did so the principle

would apply as much to the re-established relation as to the original. The common use of separation agreements as a formal means of ending domestic discord and securing the payment of maintenance to wives necessarily meant that impending desertions were often forestalled by separations by consent. When husbands made default in payment of the covenanted maintenance and thus disregarded the deed, perhaps also disappearing in order to avoid its enforcement, the plight of the wife was thought to be hard. In not a few reported cases of this kind primary judges pronounced decrees for dissolution on the footing that the husband had set the deed at nought and deserted, forgetting or not heeding the inconsistency of this conclusion with the principle established. But in Victoria at all events the looseness of these decisions had been corrected. The rule that after the termination by consent of the matrimonial relation there could be no desertion was however thought to be inconvenient. Two other consequences of the same conception of desertion deserve notice, but they are scarcely open to this objection. The first is the effect of the repentance of a deserting husband or wife. Suppose that a husband deserts his wife and afterwards reconsiders his decision and seeks to come back to her. She rejects his offer to return and re-establish the relationship of husband and wife. His offer ends his desertion. But her refusal cannot under the hitherto accepted principle amount to or involve desertion on her part, because she does not thereby put an end to any existing relationship. The second of the two consequences concerns the cessation of conduct on the part of one party to the marriage which had afforded to the other a justification for the latter's putting an end to the matrimonial relation between them. Suppose that a wife is an inebriate and her husband, with complete justification in her conduct, leaves her. After many years of inebriacy she is cured or reformed and demands that her husband re-establish a matrimonial relationship between them. He refuses. Under the principle that has obtained his refusal does not involve desertion on his part, again because there is no existing matrimonial relationship.

This being the law as it has stood in Australia, the decision of the Court in the present case seems to me necessarily, or perhaps I should say logically, to involve a revision of the root conception of desertion. For you cannot say that a refusal on the part of a wife to resume a matrimonial relationship which had been brought to an end or what is the same thing suspended by a deed of separation, constitutes desertion without implying a change in the established conception of desertion. The change may take one or other of two

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forms, but no third form has occurred to me. One possible change is simply to say, with *Bishop*, that the voluntary refusal to renew a suspended matrimonial relationship (cohabitation is *Bishop's* word) is an additional form of desertion. In other words the established conception stands. But it is no longer exhaustive. There is added to it another category, refusal to re-establish a matrimonial relation. That is intelligible, but it seems a little arbitrary. I suppose, however, it could be justified if the view were accepted that it fell within the common understanding of what amounts to desertion. But I know of nothing to warrant the acceptance of such a view.

The other form of change is to say that the conception of desertion as the intentional termination of an existing matrimonial relationship against the will of the other spouse is erroneous. Intention is necessary and it must be against the will of the other party to the marriage. But according to the suggested view neither the notion of matrimonial relationship, as a conception more extensive than actual marital association or society or consortium, nor the termination of that relation constitutes an element in desertion. That view is less arbitrary but it is, I think, also less intelligible. It is less intelligible because the intention must be directed to something. To say that it is an intention to desert will not help very much, because it turns back the inquiry to the meaning of desertion, that is to say, what is the conduct, the acts and omissions, which the word desertion connotes. For an intention to desert must surely mean an intention to act or to refrain from acting in some definable way. To turn the words into Latin may distract attention from the difficulty but it will not avoid it. It is better I think to face the difficulty and recognize that the establishment by authority of a series of situations as amounting to desertion, infused by no discernible principle and deducible from no general proposition that has so far been formulated, can hardly be considered a satisfactory substitute for the doctrine that has been displaced. But to face the difficulty is one thing and to solve it is another. It is possible to speak only with hesitation and diffidence. There is no danger however in beginning with the assumption that neither an existing state of " cohabitation " nor an existing matrimonial relationship is necessary and that desertion may take place notwithstanding that already all relations between the parties to the marriage have been severed and they have ceased to be anything but complete strangers to one another. We may safely assume also that the state of mind of the deserter is the decisive element in constituting his action or inaction desertion. For we are assured that desertion

is fundamentally a question of intention. To what must the state of mind be directed ?

Ex hypothesi it need no longer be directed to bringing to an end an existing matrimonial relationship. There are I think three other possible states of intention which would explain the result that has been reached.

In the first place it would be possible to take the mutual obligations that flow from the status of marriage and to treat them as a congeries or an aggregate forming the subject of the matrimonial wrong of desertion. To deny or maintain a denial to the party deserted of the substantial benefit which would arise from the recognition and performance of these obligations by the party deserting might be regarded as the essence of the wrong. If the requisite state of mind was an intention to make or maintain such a denial it would seem a not unsatisfactory conception of the mental element in desertion. It would explain why no existing matrimonial relation is necessary ; because it is an intention which is independent of any consideration of the extent to which, if at all, there is or has been any performance or recognition of those obligations.

In the second place it is possible as an alternative to disregard any question of status and legal obligation and to take the relation of the parties to a marriage as a social fact. The outward relation that ought to subsist between them, if the matter were so considered, would depend on how the parties were circumstanced, but it would be the product of their mutual recognition of one another as husband and wife. It would be possible to regard desertion as the negation, as distinguished from the termination, of this relation as it ought or might be expected to exist. If the state of mind demanded were an intention to deny or maintain a denial of all such relationship, that might not be an unsatisfactory criterion. That is to say desertion would consist in an intentional neglect or refusal to maintain or establish any of the forms of association or of relationship which, in the circumstances of the parties, would or might be expected to result from a proper recognition of one another as husband and wife.

In the third place it is possible to say that the intention is not a specific state of mind or even a defined or definable state of mind but is any attitude to which such expressions might be judicially applied as " an intention to abandon the other party to the marriage ", or " an intention to abandon the marriage ", " to repudiate the obligations of the marriage ", " to set them at nought ", " no longer to recognize the marriage ", " to break the marriage "

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and so on. Desertion could then be safely described as a question of fact. In a period when legal thought tends perhaps to be less juridical than sociological this may not appear unsatisfactory, because where there is no criterion but an unformulated question of fact cases may be more readily decided in accordance with what is considered just or convenient. But there are many engaged in the practice of the law and in the administration of justice who instinctively look for definitions and categories as guides or tests for the solution or disposal of cases. To them the substitution of figurative and dyslogistic expressions for a more precise legal standard is unenlightening and unhelpful.

In the practical application of the first and second of the foregoing attempts to state what kind of intention is now required as the mental element in desertion there will probably be very little difference of result. The differences of result however that must ensue from the change in the conception of desertion as a whole may extend much farther than to cases of separation agreements or other separations by consent. In those cases it will only be necessary to show that the consent has been lawfully withdrawn and that the alleged deserter has formed and communicated or manifested some resolve or intention of the requisite description and that the separation has been continued.

To make the withdrawal of the consent legally possible it may be necessary to show that a separation agreement has been terminated by mutual consent or has been discharged by breach.

The decided cases show that at this point the common law of contract, which is necessarily involved, is in danger of receiving new and strained applications. For it cannot always be clear that a covenant to pay maintenance is an essential condition interdependent with the covenant to live separately. One curious result must be the different position of wives and husbands in cases of separation agreements. The positive obligations placed by a separation deed upon a wife are not usually of such a character that it will be easy or even possible to find that she has committed a breach going to the root of the agreement or has "repudiated" it. But outside separation by consent there are familiar situations that may be affected by the change of doctrine. The deserting spouse who repents and makes a sincere offer to the other spouse to resume matrimonial life appears now to be able by doing so to make the deserted spouse a deserter, if the latter refuses the offer.

The case I put in the earlier part of this judgment of the husband or wife who is guilty of conduct justifying the other in abandoning his or her society forms another example of a possible reversal of

the former legal result. If the husband or wife guilty of that conduct reforms and requests the other to resume matrimonial relations and the latter refuses, in logic there seems to be no reason why the refusal should not now amount to desertion. But perhaps this result may not be found just or convenient and logic may not be pursued to its conclusion.

I should have preferred to wait until it was clearer what the principle is that has now been adopted in England in place of that which has been renounced before following the cases which evidence the change. The reasons of *Fullagar* J. in the present case and in *Bickerton* v. *Bickerton* (1) appear to me to be admirable examinations of the existing Australian law and of the difficulties involved in the readjustment that is taking place in England. With him I should prefer for the time being to administer our law as it exists and wait until further and perhaps more authoritative decisions in England had made the new principles clearer. It would then become easier to proceed in conformity with English decisions and there would be less danger of further points of departure developing between the two jurisdictions.

But the question when we should give effect to English decisions at variance with what has been decided here is largely a question of judgment and sound discretion or wisdom, and as the other members of the Court have formed a clear opinion that we should now give effect, at all events, to the two decisions of the Court of Appeal (*Pardy* v. *Pardy* (2) and *Beeken* v. *Beeken* (3)) I do not think that I should persist in my inclination to the contrary to the extent of dissenting.

I agree that the result of these decisions is that the appeal must be allowed.

WILLIAMS J. The appellant as petitioner sued his wife as respondent for a divorce in the Supreme Court of Victoria in its Divorce and Matrimonial Causes jurisdiction on the ground that the respondent had without just cause or excuse wilfully deserted the appellant and without just cause or excuse left the appellant continuously so deserted during three years and upwards. The parties were married on 1st October 1921 and cohabited until September 1928. They then agreed to enter into a deed to live separately and apart and not to molest each other for twelve months. When this period expired a similar deed was entered into for a further period of twelve months. On the expiry of the second

(1) (1947) V.L.R. 91.
(2) (1939) P. 288.
(3) (1948) P. 302; (1948) W.N. 262.

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period the appellant, who had been keeping up the payments on the house in which they had previously cohabited and was living there, wrote to the respondent and suggested that they should resume cohabitation. But he received a note from her in reply in which she said she had no intention of living with him again. Shortly after this the appellant told the person from whom he was buying the house that he would not require it further and that he could sell it again if he wished to do so.

The appellant alleges that the desertion commenced when the respondent refused to return to him in September 1930 and has since continued. The learned trial judge accepted the appellant's evidence that he sincerely wished the respondent to resume cohabitation and that her failure to do so was against his will, but he dismissed the petition on the ground that there cannot be desertion where there has been a refusal to return to a common life which has been ended by mutual consent. His Honour refused to follow the decision of the Court of Appeal in *Pardy* v. *Pardy* (1). This decision has been recently applied by the same court in *Beeken* v. *Beeken* (2). His Honour pointed out that to hold that there could be desertion in such circumstances was inconsistent with a large number of previous decisions including four decisions in this Court: *Bradford* v. *Bradford* (3) (*Griffith* C.J.), (*Isaacs* J.); *Fremlin* v. *Fremlin* (4) (*Barton* J.); *Dearman* v. *Dearman* (5) (joint judgment of *Isaacs*, *Gavan Duffy* and *Rich* JJ.) and *Bain* v. *Bain* (6) (*Starke* J.). If *Pardy* v. *Pardy* (1) and *Beeken* v. *Beeken* (7) had been decisions of the House of Lords or of the Privy Council, his Honour would no doubt have followed them although they were inconsistent with previous decisions of this Court: *Piro* v. *W. Foster & Co. Ltd.* (8). But they are decisions of the Court of Appeal and I can understand his Honour hesitating to depart from these previous decisions in the absence of a clear lead from this Court. In the interests of uniformity this Court should, in my opinion, now give this clear lead and decide that *Pardy* v. *Pardy* (1) should be followed in Australia: *Waghorn* v. *Waghorn* (9); *Piro* v. *W. Foster & Co. Ltd.* (10).

Applying the principles of that case it follows that the dictum of Lord *Penzance* in *Fitzgerald* v. *Fitzgerald* (11) that "no one can

(1) (1939) P. 288.
(2) (1948) P. 302; (1948) W.N. 262.
(3) (1908) 7 C.L.R. 470, *Griffith* C.J. at p. 474; *Isaacs* J. at p. 475.
(4) (1913) 16 C.L.R. 212, at p. 225; *Barton* J. at p. 225.
(5) (1916) 21 C.L.R. 264, at p. 266; *Isaacs*, *Gavan Duffy* and *Rich* JJ. at p. 266.
(6) (1923) 33 C.L.R. 317, at p. 328; *Starke* J. at p. 328.
(7) (1948) P. 302; (1948) W.N. 262.
(8) (1943) 68 C.L.R. 313.
(9) (1942) 65 C.L.R. 289.
(10) (1943) 68 C.L.R. 313.
(11) (1868) L.R. 1 P. & D. 694, at p. 698.

'desert' who does not actively and wilfully bring to an end an existing state of cohabitation" should no longer be regarded as law. The fact that there has been a separation for a period by mutual consent does not therefore prevent one spouse deserting the other if, after the termination of the period, one spouse genuinely desires a resumption of cohabitation and the other spouse refuses to return to a common life. The latter can then desert the former because, as Sir *Wilfrid Greene* M.R. said in *Pardy* v. *Pardy* (1), there is a "de facto separation, *animus deserendi*, and absence of consent on the part of the spouse alleging desertion."

The position that arises under a deed of separation for a definite period which has expired by effluxion of time is similar to that which arises under a deed of separation for an indefinite period which has been discharged by mutual consent, or by any other means by which an agreement may be mutually terminated, as for instance by one spouse repudiating the deed by a breach which goes to the root of the contract and that repudiation being accepted by the other spouse. The period during which the spouses have agreed to live apart has in each case come to an end. I rest on the passage from *Pardy* v. *Pardy* (1) already cited in *McIlroy* v. *McIlroy* (2) "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."

In my opinion the appeal should be allowed and the appellant should be granted a decree nisi.

Appeal allowed. Order of Supreme Court discharged. Order that marriage be dissolved on ground of wilful desertion without just cause or excuse for a period of three years and upwards unless within three months of this order sufficient cause under s. 89 *of the Marriage Act* 1928 *appears why this order nisi should not be made absolute. Office copy of this order to be lodged by petitioner with Prothonotary of Supreme Court. No order as to costs of appeal.*

Solicitors for the appellant: *J. A. C. Coulter & Scouller.*

E. F. H.

(1) (1939) P., at p. 307.

(2) (1946) 73 C.L.R. 270, at p. 281.