[HIGH COURT OF AUSTRALIA.]

TYSON . . . . . APPELLANT ;
PETITIONER,

AND

TYSON . . . . . RESPONDENT.
RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1954.

MELBOURNE, *Sept.* 15, 29.

Dixon C.J., Kitto and Taylor JJ.

Matrimonial causes—Dissolution of marriage—Desertion—Without just cause or excuse—Strained relations due to conduct of departing spouse—State of mind of spouse remaining—Marriage Act 1928 (*Vict.*) (*No.* 3726), *s.* 75 (*a*).

On the hearing of a petition for dissolution of marriage on the ground of desertion without just cause or excuse for the statutory period it appeared that, although the husband had only decided to marry the wife when told by her that she was pregnant to him, the marriage had been normally happy until shortly after the birth of their child, when the wife told him that she had had sexual intercourse with several men in addition to him before their marriage and that he was not the father of the child. The husband gave evidence that on being told this he was greatly shocked, and that, on his suggestion, the parties from that time occupied separate rooms. From then on, although relations were strained and sexual intercourse did not take place between the parties, they appeared to the world as a normal married couple and performed in substantial measure in the home the mutual obligations of husband and wife. About three months after relations had become strained, the wife left the husband.

Held, that the wife did not have just cause or excuse for leaving the husband.

Synge v. *Synge*, per *Jeune* P. (1900) P. 180, at pp. 192-196 ; *Davis* v. *Davis* (1918) P. 85 ; *Dale* v. *Dale*, (1951) 53 W.A.L.R. 42, per *Wolff*, J. at pp. 46-47, distinguished.

Held further, that, in the circumstances, the husband's state of mind did not prevent desertion from arising.

Spence v. *Spence* (1939) 1 All E.R. 52, distinguished. *Bradford* v. *Bradford* (1908) 7 C.L.R. 470 ; *Harriman* v. *Harriman*, per *Buckley* L.J. (1909) P. 123, at p. 148, referred to.

Decision of the Supreme Court of Victoria (*Dean* J.) reversed.

H. C. OF A. 1954.

TYSON v. TYSON.

APPEAL from the Supreme Court of Victoria.

Keith Tyson presented a petition, dated 9th February 1954, to the Supreme Court of Victoria, praying that his marriage with Joan Lilian Tyson might be dissolved on the ground that she had without just cause or excuse wilfully deserted him and without any such cause or excuse had left him continuously so deserted during three years and upwards.

The suit, which was not defended, was heard before *Dean* J. who, on 22nd June 1954, held that the wife had just cause or excuse for leaving the husband and consequently ordered that the petition be dismissed.

From this decision the petitioner appealed to the High Court.

The facts and the argument are sufficiently set forth in the judgment hereunder.

Mrs. J. Rosanove, and *B. F. McNab*, for the appellant.

There was no appearance for the respondent.

Cur. adv. vult.

Sept. 29.

THE COURT delivered the following written judgment:—

This is an appeal against an order dismissing the appellant's petition for the dissolution of his marriage with the respondent upon the ground of desertion for three years and upwards. The respondent was not represented either upon the hearing of the suit or upon this appeal.

The parties were married on 27th February 1950 and the period of desertion is said to have commenced at the beginning of November in the same year when the respondent left the matrimonial home and went to live with her parents. In the meantime, on 3rd June 1950, the respondent had given birth to a male infant. After the birth of the child the respondent resided with her parents for some two months at their home some twenty-three miles away from the petitioner's home and during this time he visited his wife and child on frequent occasions. Upon her return home early in August the respondent told the appellant that he was not the father of the child and from that time on they occupied separate bedrooms during the period they continued to live in the same house. In September the respondent went to her parents' home for what was called a two weeks' holiday. Thereafter she returned home and after some five or six weeks there finally left the matrimonial home with her mother on 1st November 1950.

The petitioner was thirty years of age when the suit was heard and the respondent was twenty-three. In his evidence the petitioner said that sexual intercourse had occurred between them before

H. C. OF A. 1954.

TYSON v. TYSON

Dixon C.J. Kitto J. Taylor J.

marriage and that he decided to marry the respondent only after she informed him that she was pregnant and that he was responsible for her condition. Nevertheless, until August, when the respondent told the petitioner that he was not the father of her child and that she had had sexual relations with several other men just before her marriage, the parties appear to have been living a more or less normal married life. But when this declaration was made to the petitioner he was, he says, greatly shocked. After this, he says, it did not "seem right to occupy the same room" as his wife and he suggested that she should sleep in another room. This she did and from that time sexual intercourse between them ceased. He hinted, he says, that he did not want her as a wife, but he did not tell her or request her to leave the home. Consideration of the evidence led the learned trial judge to say: "The question is whether desertion has been made out. It is a very hard case and one can attribute no blame to the petitioner. He made it quite plain he did not wish to treat her as a wife. They do not seem to have had much discussion about it. He seems to have been somewhat reticent and inarticulate. Under these circumstances I have no doubt she had just cause for leaving. She was living under a strain, and relations must have been unsatisfactory in the home. He made it plain to her that he was shocked and disgusted with her and did not want her as a wife, and in these circumstances I think she was justified in leaving him, and her conduct cannot be described as desertion".

A careful perusal of the somewhat scanty evidence leaves us with the conviction that the finding expressed in the concluding portion of this passage is not justified. No doubt the petitioner was shocked and disgusted by his wife's disclosures and he would have been a strange man indeed if they had not produced, at the very least, somewhat strained relations between them. But they did continue to live for a while under the same roof and, although sexual intercourse ceased, there is no suggestion that his reaction to these disclosures resulted in the complete destruction of cohabitation. In the presence of other people they appeared as a normal married couple and in the home they both performed in some substantial measure the mutual obligations of husband and wife. Whether or not in due course of time the petitioner would have become completely reconciled is a matter of speculation in spite of his frank avowal that he does not think this would have occurred. In actual fact the respondent gave no real opportunity for this. Within a few weeks she went off to stay with her parents for a fortnight and on her return stayed only for some five or six weeks before she finally departed. During this time her husband's conduct

towards her was no worse than her disclosures might reasonably have been expected to produce whether they were made by her in a spirit of hostility and with the object of destroying the marriage or made remorsefully and with a desire to ask forgiveness. There is, it should be said, nothing in the evidence to indicate the circumstances in which the disclosures were made. But whatever their purpose the respondent had little to complain of concerning her husband's conduct during the very brief period she remained under the same roof. If she desired forgiveness she ought to have been prepared, and, indeed, her obligations as a wife, in our opinion, required her, to wait for a substantially longer period for a change in her husband's attitude towards her, whilst if the disclosures were made for the purpose of estranging her husband the accomplishment of that purpose did not constitute any justification for leaving the matrimonial home. In the circumstances we do not think that the findings of the learned trial judge on this point can stand.

It should, perhaps, be added that this case is not governed by such authorities as *Synge* v. *Synge* (1); *Davis* v. *Davis* (2) and *Dale* v. *Dale* (3). These cases do not apply because of the circumstances which prompted the appellant to pursue the course he took and because relatively the time during which he persisted in it was short. The respondent's disclosure made it not unnatural and not unreasonable that he should so act, at all events for some little time afterwards. His conduct was his immediate response to a situation which she had created and it could not be regarded as a reasonable justification for her terminating the matrimonial relationship which, though it had doubtless been weakened by her disclosure and his response, had not been severed.

The only aspect of the case which has troubled us arises from the fact that there is little doubt upon the evidence that the respondent's final departure did not inspire the petitioner with any feelings of regret. In his frame of mind at that time he was probably glad to see her leave and the suggestion emerges that she may have left with his consent. But careful examination of the evidence does not lead to such a conclusion. It is true that he did not try to restrain her or to persuade her to stay but he was not bound to do either. And if he experienced relief or even pleasure at her departure, that circumstance is not, by itself, sufficient to establish that she left with his consent: *Bradford* v. *Bradford* (4). If she did not have her husband's consent, either expressly or tacitly given, then she deserted him when she withdrew from the matri-

(1) (1900) P. 180, at pp. 192-196.
(2) (1918) P. 85.
(3) (1951) 53 W.A.L.R. 42, at pp. 46-47.
(4) (1908) 7 C.L.R. 470.

H. C. OF A. 1954. TYSON v. TYSON. Dixon C.J. Kitto J. Taylor J.

monial home with the intention, which is beyond doubt, of terminating the existing state of cohabitation. As *Buckley* L.J. said in *Harriman* v. *Harriman* (1): "Desertion is evidenced much more by the intention of the absent husband than by the ready acquiescence of the wife in his absence or even the desire of the wife for his absence. The words of *Cockburn* C.J. in *Ward* v. *Ward* (2), 'The act of desertion must be done against the will of the wife', must be read with their context, namely, 'if she were a party to his leaving and consented to it'. In that context I agree with them. But if they are to be understood as meaning that desertion cannot be predicated of a husband when his wife is thankful that he has left her (because, say, she always went in bodily fear of him), then, with great respect, I do not agree. Desertion does not necessarily involve that the wife desires her husband to remain with her. She may be thankful that he has gone, but he may nevertheless have deserted her" (3).

Circumstances such as those which led *Langton* J. to conclude in *Spence* v. *Spence* (4) that the respondent left the matrimonial home with the tacit consent of the petitioner are absent from the present case and, in our view, the facts do not justify a finding on this point adverse to the petitioner. It was not a separation by mutual consent and whatever may have been his feeling about it, her departure was a voluntary termination by her of the matrimonial relationship and was independent of his will.

In considering this case it has occurred to us that in view of the paucity of the evidence the suit should be sent back for a new trial on this issue, but on the whole this course would, we think, work an injustice to the appellant. He appears to have been completely frank before the learned trial judge and the proper inference upon his evidence seems to be that he did not consent to his wife's departure. In these circumstances we are of the opinion that the appeal should be allowed and that there should be a decree for the dissolution of the marriage.

Appeal allowed. Discharge decree of the Supreme Court. In lieu thereof pronounce a decree nisi on the ground of desertion. Order that the petitioner do lodge an office copy of the order of this Court with the Prothonotary of the Supreme Court of Victoria.

Solicitors for the appellant, *F. J. Orames & Downing.*

R. D. B.

(1) (1909) P. 123.
(2) (1858) 1 Sw. & Tr. 185 [164 E.R. 685].
(3) (1909) P., at p. 148.
(4) (1939) 1 All E.R. 52.