[HIGH COURT OF AUSTRALIA.]

POTTER . . . . . APPELLANT;
PETITIONER,

AND

POTTER . . . . . RESPONDENT.
RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1954.

MELBOURNE, *May* 28, 31; *Oct.* 13.

Webb, Fullagar and Kitto JJ.

Matrimonial Causes—Dissolution of marriage—Desertion—Parties living in same house—Conduct of respondent—Whether terminating matrimonial relationship—Marriage Act 1928 (*Vict.*) (*No.* 3726), *s.* 75 (a).

In a suit by a husband for dissolution of marriage on the ground of desertion for the statutory period of three years it appeared that the parties had resided in the same house until about one month before presentation of the petition. The evidence showed that, due to the conduct of the wife, for at least three years prior to that time the parties had not occupied the same bedroom, or had sexual intercourse, or dined together, each party giving orders, separately, to the housekeeper for any meal required. The parties never went out socially together, nor, with one exception, did they ever entertain outsiders in common, although the wife entertained, and went out with, male friends without reference to, or consultation with, the husband. If they found themselves in the sitting-room of an evening, the wife would abuse the husband until he went elsewhere. The wife did not attend in any way to the husband's personal wants, although she had done so at an earlier stage, nor did she ever directly inform her husband of her movements, even on an occasion on which she took a trip abroad. The husband maintained the household and supplied the wife with money. She, however, never approached him for money except through the agency of her bank manager or solicitors. At various times the wife told the housekeeper with reference to the husband that she " couldn't bear him," " detested him " and " wouldn't be there if he couldn't give her so much ".

Held by *Fullagar* and *Kitto* JJ. (*Webb* J. dissenting), that, in the circumstances, the wife had deserted the husband for the requisite period.

Watkins v. *Watkins* (1952) 86 C.L.R. 161 and *Walker* v. *Walker* (1952) 2 All E.R. 138, referred to.

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

H. C. OF A. 1954.

POTTER v. POTTER.

APPEAL from the Supreme Court of Victoria.

William Ian Potter presented a petition, dated 23rd November 1953, to the Supreme Court of Victoria, praying that his marriage with Gwenyth Winifred Potter be dissolved on the ground that she had without just cause or excuse wilfully deserted him and had without any such cause or excuse left him continuously so deserted during three years and upwards.

The suit, which was not defended, was heard before *Barry* J., who, in a written judgment delivered on 30th March 1954, held that, although the parties had been estranged from August 1950, the relationship between them had, until the end of 1953, retained sufficient of the elements of marital association to preclude the application of the principle in *Watkins* v. *Watkins* (1). Consequently his Honour ordered that the petition be dismissed.

From this decision the petitioner appealed to the High Court of Australia.

P. E. Joske Q.C. (with him *E. H. E. Barber*), for the appellant. In *Watkins* v. *Watkins* (1) the High Court indicated its view of the law applicable in the type of desertion where the parties continue to live under the one roof and also demonstrated the proper mode of approach to the facts. There the Court affirmed *Drake* v. *Drake* (2); *Simons* v. *Simons* (3); *Power* v. *Power* (4) and *Campbell* v. *Campbell* (5). The test laid down in *Drake* v. *Drake* (2) and acted on in *Power* v. *Power* (4) was whether the party charged had abandoned the conjugal society, and wrongfully brought an existing state of cohabitation to an end. The same test should be applied here. In applying this test to the facts in *Watkins* v. *Watkins* (1) the High Court considered that desertion was established notwithstanding that the respondent was making use of the marriage and taking advantage of it for his own purposes. He not only lived under the same roof as the petitioner but for a substantial part of the statutory period of desertion actually occupied the same bedroom as she did. He took meals in her company in the house. He gave her money out of which she provided food for him and took advantage of her domestic services, including cooking. But the manner in which he took meals and gave her money was held to indicate an intention to end and not maintain the consortium and the other acts mentioned, by which he made use of the marriage, were not regarded as preventing a

(1) (1952) 86 C.L.R. 161.
(2) (1896) 22 V.L.R. 391.
(3) (1898) 24 V.L.R. 348.
(4) (1944) V.L.R. 247.
(5) (1951) 51 S.R. (N.S.W.) 158; 68 W.N. 174.

termination of the conjugal relation. The High Court considered the facts as especially comparable with *Power* v. *Power* (1), and that case also shows that although there is not a complete disclaimer of the marriage, nevertheless the conjugal relationship may be abandoned. In other words abandonment of the conjugal relationship and not disclaimer of the marriage is the test. No satisfactory definition of desertion has ever been evolved, the reason being that the matrimonial offence of desertion has so many different facets. It has, therefore, been insisted that desertion is essentially a question of fact. *Matthews* v. *Matthews* (2) represents a valuable examination of the constituents of the offence. It is clear on the authorities that the type of desertion which occurs where one party is driven from the home differs greatly from that which occurs where the parties have remained under the one roof. In *Baily* v. *Baily* (3) the High Court was dealing with constructive desertion based on an alleged driving out of the home. This case was decided before *Watkins* v. *Watkins* (4) which was a case of desertion whilst remaining under the one roof. It is significant that the High Court in *Watkins* v. *Watkins* (4) does not refer to *Baily* v. *Baily* (3) but approves a line of authorities none of which is a case of driving out of the home. In *Lang* v. *Lang* (5) and *Deery* v. *Deery* (6) both cases of driving from the home, *Watkins* v. *Watkins* (4) is not referred to. *Dixon* C.J. was a member of the Court in all four of those High Court decisions. In reviewing in *Deery* v. *Deery* (6) the cases relating to desertion which consist of driving the petitioner from the home, *Dixon* C.J. refers to the passage in *Baily* v. *Baily* (7) "The cases seem to show that what must be proved is either an actual intention to bring about a rupture of the matrimonial relation, or an intention to persist in a course of conduct which any reasonable person would regard as calculated to bring about such a rupture" (8). In some degree this passage is expanded in *Deery v. Deery* (6) by reference to the judgment of *Irvine* C.J. in *Bain* v. *Bain* (9), a passage wherefrom (10) being quoted, and it apparently being considered by *Dixon* C.J. that it is sufficient if there is "an intention to persist in a course of conduct with knowledge that it is completely inconsistent with the maintenance of the matrimonial relation" (8). Now the question of fact in *Deery* v. *Deery* (6) was whether the evidence showed an intention to

(1) (1944) V.L.R. 247.
(2) (1948) V.L.R. 326.
(3) (1952) 86 C.L.R. 424.
(4) (1952) 86 C.L.R. 161.
(5) (1953) 86 C.L.R. 432.
(6) (1954) 90 C.L.R. 211.
(7) (1952) 86 C.L.R. 424, at pp. 426-427.
(8) (1954) 90 C.L.R., at p. 222.
(9) (1923) V.L.R. 421.
(10) (1923) V.L.R., at p. 428.

H. C. OF A. 1954. POTTER v. POTTER.

drive the petitioner from the home. The greater part of the petitioner's case, in the view of *Dixon* C.J., was based on outbursts of temper due to her excitable disposition and not occurring as a result of any sudden or definable change in her character and he accordingly was unable to find any purpose or design on her part to drive her husband away. Even if the tests in *Deery* v. *Deery* (1) were to be applied in the *Watkins* v. *Watkins* (2) line of cases, it is submitted that the evidence in the present case is such as to satisfy not merely one test, but each of the three tests referred to above. In other words, the evidence establishes: (1) an actual intention by respondent to bring about a rupture of the matrimonial relation; (2) an intention to persist in a course of conduct which any reasonable person would regard as calculated to bring about such a rupture; (3) an intention to persist in a course of conduct with knowledge that it is completely inconsistent with the maintenance of the matrimonial relation. [He then addressed the Court on the evidence.]

There was no appearance for the respondent.

Cur. adv. vult.

Oct. 13.

The following written judgments were delivered:—

WEBB J. This is an appeal from a judgment of the Supreme Court of Victoria (*Barry* J.) dismissing a petition for divorce by the appellant husband on the ground of desertion by the respondent wife. The desertion proved was constructive. The petition as originally presented included adultery as the first ground; but the petitioner obtained leave to strike out that ground before the hearing began, as he could not secure the necessary evidence to support it.

Barry J. found the necessary animus but not the factum. With respect I think his Honour properly found the animus, as the wife's intention to drive her husband from the matrimonial home was not negatived by considerations of her ill-health, which was "a vitally important factor" in *Baily* v. *Baily* (3); or by considerations of a naturally excitable temperament and a reasonable view of the other spouse's questionable behaviour, as in *Deery* v. *Deery* (1). The evidence in this case does not indicate that Mrs. Potter's health or mental state or her husband's conduct was in any way responsible for her attitude towards him in the home.

(1) (1954) 90 C.L.R. 211.
(2) (1952) 86 C.L.R. 161.
(3) (1952) 86 C.L.R. 424, at p. 427.

She appears to have been at all times in sound mental and physical condition and to have received no provocation from him. Both parties are highly intelligent and of superior education. Mr. Potter appears to have provided generously for his wife at all times and to have been faithful to her. He had been divorced by his first wife for desertion, but there is no evidence that suggests he displayed a partiality for women other than his wife. His Honour had no doubt that there were faults on both sides; but I see no evidence that suggests that Mr. Potter was at fault in any way.

However his Honour found that the factum was not established because it was only on the departure of Mr. Potter from the matrimonial home in November 1953 that the desertion began; and that was only very shortly before the petition was presented. As pointed out in *Baily's Case* (1) "the departure of one spouse from a place, *while it marks the commencing point of the period of desertion*, may be an act for which the other spouse is really responsible, so that it is that other spouse who must be held to have departed from a state of affairs and therefore to be the deserting party" (2). My italics. Here, however, the petitioning husband relied on *Watkins* v. *Watkins* (3) as an authority that the factum can be found, although the parties continue to live under the same roof. But as stated (4) the facts of that case were "very special" and the evidence "unusually cogent"; the deserting husband had by his attitude towards his wife brought their matrimonial relationship to an end more than the statutory period of three years before the presentation of the petition, although the parties continued to live under the same roof throughout. *Barry* J. did not find that to have been the position here, and I see no reason to take a different view. The very special facts of *Watkins' Case* (3) prevent it from being applied readily or at all. Because the long unbroken and unwarranted silence maintained by the husband in *Watkins' Case* (3) brought the common life and the matrimonial relationship to a close while the parties were still living under the same roof, it does not follow that the frequent but not continuous abuse of her husband in which Mrs. Potter indulged necessarily had the same effect: she and her husband still had some kind of a common life together and a matrimonial relationship existed, although it was what is sometimes called "a cat and dog existence". Moreover they were living that kind of existence long before sexual intercourse between them ceased in August 1950. There is no evidence that Mrs. Potter actually refused intercourse after that

(1) (1952) 86 C.L.R. 424.
(2) (1952) 86 C.L.R., at p. 426.
(3) (1952) 86 C.L.R. 161.
(4) (1952) 86 C.L.R., at p. 167.

H. C. OF A. 1954.

POTTER v. POTTER.

Webb J.

date, and if it was possible up to that stage it could have been possible thereafter for all that the evidence plainly discloses, although Mr. Potter said that was no "opportunity or occasion" to raise the question of intercourse. This did not amount to a denial that it was in fact possible. It did not take place, as Mrs. Potter agreed, but that was not to say it was impossible. Further there was a suggestion of implacable hatred in the husband's frigid and sustained silence in *Watkins' Case* (1) but that cannot be said of Mrs. Potter's conduct, objectionable and inexcusable though it was.

Contrary to Mr. *Joske's* written submissions to *Barry* J., his Honour treated the desertion alleged as constructive. His Honour did not use the term "constructive desertion"; but I think it follows, from his finding that the desertion began when Mr. Potter finally left the matrimonial home, that he regarded the desertion as being constructive. As already appears, I do likewise. But if I am wrong in so doing, still, for the reasons already given, I am not prepared to find that the appellant has discharged the onus of proof that the matrimonial relationship had ceased for the statutory period before the presentation of the petition—that for the statutory period "the common home had been put to an end", to employ the language of *Birkett* L.J. in *Walker* v. *Walker* (2). In that case, as in *Watkins' Case* (1) the parties did not speak to each other throughout the statutory period; the matrimonial relationship was at an end. But in the former case the wife's practice of shutting herself up in a separate bedroom and locking the doors, and in rebuffing her husband's attempt at reconciliation, was more strongly indicative of the termination of the matrimonial relationship than was the respondent's conduct in this case, or, if possible, than the respondent's conduct in *Watkins' Case* (1). Apparently there was in this case no attempt at reconciliation to be rebuffed; although Mr. Potter said he endeavoured to "placate" his wife. If he made any attempt at reconciliation in the true sense of the term he did not say so in as many words. This feature of his attitude towards his wife might seem to have significance, having regard to the fact that there was a child of the marriage to be considered and to whom the reconciliation of her parents was of vital importance. However, Mr. Potter might well have thought that any attempt at reconciliation would have been futile.

In the result I find myself unable to differ from the view of *Barry* J. that, although there was constructive desertion by the

(1) (1952) 86 C.L.R. 161.

(2) (1952) 2 All E.R. 138, at p. 139.

respondent, still the petition for divorce was presented too soon. That view is not shared by a majority of the Court who take the view submitted by Mr. *Joske* that the desertion began while the parties were still living in the same house because, as he submitted, they were even then leading separate lives. But if the contrary view prevailed it would not save this marriage; it would merely postpone its dissolution on a fresh petition, that is to say it would lead to nothing more than delay and expense, as a consideration of Mrs. Potter's attitude before *Barry* J. suggests that she would not be likely to make any genuine effort to terminate her desertion of her husband.

With reluctance I would dismiss the appeal.

FULLAGAR AND KITTO JJ. This is an appeal from a judgment of the Supreme Court of Victoria (*Barry* J.) refusing a husband's petition for dissolution of marriage. The ground of the petition was that the wife had "without just cause or excuse deserted him and without any such cause or excuse left him continuously so deserted during three years and upwards" (*Marriage Act* 1928 (Vict.), s. 75 (a)). The case is one of considerable difficulty.

The parties were married on 2nd July 1942. There is one child of the marriage, a daughter, who was born on 3rd May 1944. The husband, the wife, and the child, resided in a "maisonette" at 44 Murphy Street, South Yarra, until the husband left that dwelling immediately before the presentation of the petition. The case is, therefore, one of that class in which one spouse is alleged to have deserted the other although both continue to live in the same house or dwelling. Recent examples of cases in which desertion has been held to have taken place in such circumstances are *Walker* v. *Walker* (1) and *Watkins* v. *Watkins* (2).

Such cases do not, of course, constitute a "class" in a logical sense. The ultimate question of fact which arises is the same as that which arises in any other case in which desertion is alleged. In this particular type of case, however, the difficulty of determining that question is increased by the absence of the most reliable *indicium* of a broken matrimonial relation. The position can hardly be more clearly put than in the words of *Hood* J. in *Drake* v. *Drake* (3). Referring to a case in which the husband was the alleged deserter, his Honour said:—"The important point is not whither he has gone, but has he abandoned the conjugal society, and wrongfully brought an existing state of cohabitation to an

(1) (1952) 2 All E.R. 138.
(2) (1952) 86 C.L.R. 161.
(3) (1896) 22 V.L.R. 391.

H. C. OF A. 1954. POTTER v. POTTER. Fullagar J. Kitto J.

end ? This being so, if there be in reality an abandonment of the wife, there is none the less a destruction of the matrimonial tie simply because the husband remains under the same roof with her. Such a fact would call for greater vigilance in dealing with the evidence of abandonment, but that is all. The real question would still be—had the husband terminated the conjugal relation ? " (1). In Victoria the cessation of the matrimonial relation must be shown to have continued for three years before commencement of suit.

Such cases may, as a matter of strict analysis, be either cases of actual desertion or cases of " constructive " desertion. The respondent spouse may have voluntarily withdrawn into practical isolation, or he or she may, by a course of cruel, violent, or otherwise intolerable, conduct, have forced the other to withdraw into practical isolation. The distinction, however, will seldom be important in a particular case. If the proper conclusion is that the respondent spouse has brought to an end, against the will of the other, a pre-existing matrimonial relation or *consortium vitae*, the other is entitled to a decree of dissolution. Often there will be little difficulty in saying that the respondent spouse is responsible for a situation existing in fact, but much more difficulty in saying whether that existing situation involves a true cessation of the matrimonial relation. That is indeed the position in the present case. For the evidence clearly discloses, and *Barry* J. found, a long course of conduct on the part of the wife of a more or less intolerable character and such as might well have justified her husband in leaving her. *Barry* J. indeed thought—rightly, one would think—that he was " perfectly justified " in leaving what had been the common dwelling when he did, and that he did so " because her behaviour had made it plain that there was no hope of a tolerable married life ". But he did not leave the common dwelling until just before the presentation of the petition. And the question in this case is not whether her conduct was at any time such that, three years after leaving her, he could maintain a suit for constructive desertion. It is whether there was in fact for a period of three years before the commencement of the suit a cessation of the matrimonial relation.

The petition was presented on 23rd November 1953, and the desertion was alleged to have taken place in August 1950. The marriage seems to have been reasonably happy until a year or so after the birth of the child, when the wife appears to have become interested in acting on the stage, and her whole attitude towards marriage and her husband changed. By the end of 1947, he says,

(1) (1896) 22 V.L.R., at p. 394.

it had become apparent that she desired to " break off our relationship ". There were scenes of violence, indicative of an unbalanced mentality. In the course of one of them she blackened both his eyes, and she afterwards boasted to his friends of having done so. The husband's business necessitates his travelling frequently in Australia and abroad. After he and his wife returned from England in 1949, she told him that she had a " divine mission ". From this time onwards she repeatedly attacked him verbally both in private and in public. The " divine mission " seems to have been specially pressing in the mornings, and he ceased to breakfast with her because she constantly abused him at that meal in the presence of the child. In June 1950 the two visited America, returning to Australia in August. They travelled independently, but spent some time together in New York, where she appears to have endeavoured to embarrass him in a variety of ways. Immediately after their return they spent a short and unhappy holiday at Palm Beach, the climax of which was a violent physical attack by her upon him. The purpose of the " holiday " in the husband's mind had been that they might " relax ", and recover from nervous strains and tensions which had been set up between them. Something like an opposite result seems to have followed. It is from the close of this visit to Palm Beach that desertion is said to date. After this time (August 1950) sexual intercourse did not take place. The parties had occupied separate bedrooms since early in 1946.

Before examining the position which subsisted between August 1950 and the date of the presentation of the petition, it should be mentioned that, although the suit was undefended, *Barry* J. exercised the power given by s. 118 of the *Marriage Act* 1928, and required the attendance of the respondent wife before the court. She attended accordingly. She was represented by counsel and was examined and cross-examined. The learned judge found her an unreliable witness, and the transcript shows that many of her answers to questions were evasive and argumentative. But her evidence is important for two reasons. In the first place, she made no attempt to justify her conduct, apart from a general suggestion that the nature of her husband's business, and his absorption in it, made a breakdown of the marriage inevitable. And, in the second place, while she denied suggestions (which are not, we think, of much importance in this case) that she had not properly looked after her home or her child, she admitted assaults on her husband, and other incidents described by him, and her evidence generally corroborated his. Indeed, if one could accept without reservation one passage in her evidence, it would be practically decisive of

H. C. OF A. 1954. POTTER v. POTTER. Fullagar J. Kitto J.

the case. Mr. *Joske*, who appeared for the petitioner, said to her :— " Your husband says you repudiated your matrimonial obligations in August 1950, and without just cause or excuse you have persisted in that repudiation since. Now, do you agree that that is a fair interpretation of your conduct since August 1950 ? " Her answer was : " Oh, I suppose it is, yes ". Her answer to that question, however, could not relieve the court from the necessity of a critical examination of the whole of the evidence, and significance could attach to an answer which she gave a little later to a question put by his Honour. His Honour said :—" What I want to know by way of assisting me in this inquiry is whether you agree that as from August 1950 there was not any reality left to your marriage and that that was a result of a decision arrived at by you ? " Her answer was :—" Well, in all honesty, I would say there was as much reality as there ever had been, and that life went on just as it always had ". On the other hand, there are three things to be said as to this. The first is that, when she used the word " life " she was most probably thinking of her own individual life, in which she had become completely absorbed before 1950. The second is that she said immediately afterwards that " the marriage " had been " more unpleasant " after their return from America in August 1950. And the third is that there is a strong body of evidence to show that (whether or not it amounted to an actual destruction of the matrimonial relation) a radical change did take place in the relationship of the parties after the well-intentioned but ill-omened " holiday " at Palm Beach.

Before going to the evidence in detail, there is one other matter which must be mentioned. There is an inestimable number of domestic services and attentions, of greater or less moment, which a wife normally renders or pays to her husband. If she does not perform these functions herself, she sees that they are performed. Examples are the cooking and serving of meals, the washing and mending of clothes, the cleanliness and order of the house. In many—probably in most—cases of this type, where the husband is the petitioner, considerable significance attaches to an omission to attend to such matters as these, though such an omission is, of course, never decisive. In the present case the husband was a man of ample means, and was able to employ domestic assistance for his wife, which, as *Barry* J. said, relieved her of " the more obvious housewifely duties ". Again, the husband was engaged in a large business, which demanded constant personal attention and necessitated much travelling. The wife, on the other hand, had personal interests of her own outside the home, and was able to

indulge these. *Barry* J. observed that, regard being had to these matters, " the respondent would not necessarily be expected to perform the more obvious housewifely duties that economic necessity requires of married women in less affluent circumstances ". We would agree with this, but, with respect, it does not follow, as *Barry* J. seems to have thought, that no importance attaches in this case to an omission by the wife to attend to the domestic necessities of her husband. For the position in the relevant years must be compared with the position which had obtained in earlier years. In earlier years the wife had been assiduous and efficient in the maintenance of the home as a common home and in what counsel called " those countless little acts and tasks which a wife does for her husband ". One other remark should be made with regard to this feature of a normal married life. The greater the extent to which the circumstances of the parties in any particular case make its presence or absence an unreliable indication of the existence or non-existence of the matrimonial relation, the greater the significance that is likely to be attributable to the outside social life of the parties. In the present case it may be truly said that a common social life completely ceased in 1950.

It is not necessary to refer in detail to those aspects of the wife's behaviour which had, by 1950, made association with her positively intolerable to her husband. *Barry* J., as we have said, felt no difficulty about this aspect of the case. It is sufficient to say that her conduct seems to have been both deliberate and indefensible. After August 1950 her opportunities for expressing her attitude to her husband became infrequent, for they met but rarely, but she does not seem to have neglected any opportunity that did occur. Her whole attitude seems both malicious and mean. She was supported by her husband, and she had been at all times very generously treated in money matters. At the same time, she constantly and violently abused him, often in vulgar terms. She took many opportunities of hurting and humiliating him. She often called him a " bastard " in the presence of the child. She felt and expressed hatred of him. She told the housekeeper (Mrs. Fallon) that she " couldn't bear him ", that she " detested him ", and that she " wouldn't be there if he couldn't give her so much ". In a letter to Mrs. Fallon in September 1953, when she was abroad, she referred to him as " the horror ". On at least one occasion she expressed indifference, if not pleasure, at the thought of his death. She suggested divorce on various occasions and many times invited him to leave the home. She appears indeed to have set out to make his life miserable in the extreme, and to have succeeded. But

H. C. OF A. 1954.

POTTER v. POTTER.

Fullagar J. Kitto J.

habitual cruelty alone is not a ground for divorce under Victorian law, and these things do not of themselves establish desertion. The matrimonial relation may continue to subsist under conditions of the greatest unhappiness. If it ceased to subsist in this case, the evidence makes it plain that the cause lay in a deliberate course of conduct on the wife's part. The question is whether it did cease to subsist. That question can only be answered after a close examination of the evidence.

One difficulty which commonly faces a petitioner in this type of case is absent in the present case. The evidence in such cases must inevitably be viewed by a court with great caution, and often he or she will fail to prove to the satisfaction of the court the existence of a state of affairs as to which there can, in the nature of things, be little evidence other than that of the petitioning spouse himself or herself. But here, apart from the respondent wife's evidence, there was a very considerable degree of corroboration both from within the home and from outside it. *Barry* J. accepted without reservation the evidence given by and for the husband, and, to one who merely reads it, it seems to bear the marks of sincerity.

That there was no real sharing of a common life from the latter part of 1950 onwards seems plainly established. They occupied separate bedrooms, and sexual intercourse had ceased. They had meals together in the home only on very rare occasions, and then only because there was an accidental overlapping between his breakfast and hers, which were taken at different times. On those occasions there was invariably vituperation on her part, to which he remained silent, or complete silence on both sides. They never dined together in the home. He would inquire in the morning of the housekeeper whether his wife would be having dinner at home, and if he were informed that she intended to do so, he would make arrangements to have his dinner elsewhere. If he dined at home, it was a solitary dinner. With one exception they never ate a meal together outside the home, and the exception tends rather to emphasize the rule. A Mrs. Leckie called at the home one Sunday morning in October 1951 to consult the husband on financial matters. When lunch time approached, she suggested that he and she should continue their conference at lunch at Menzies' Hotel. The wife suggested that she should go also, and she did go. During luncheon a "scene" occurred, in the course of which she struck her husband across the face. With one exception they never entertained guests in common in the home. The exception again tends rather to emphasize the rule, for on that occasion the wife, without

the knowledge or consent of the husband, invited members of the University Council and others to the home. The invitation had purported to come from them both, and, for the sake of keeping up appearances and to prevent greater embarrassment, he attended and helped to entertain them. Invitations to functions of a social nature arrived, addressed to them both. She received them, told him nothing about them, and attended the function alone. If he and she ever found themselves alone in the home of an evening, and he sat in the sitting room, she would commence to abuse him, with the result that he fled either to his own room upstairs or to his office in the city. She did not attend in any way to his personal wants or needs, although she had done so at an earlier stage. When he was ill or indisposed, she was completely indifferent and did nothing whatever to attend to his needs or to comfort or assist him.

It has been said that in earlier years the wife had attended personally to household duties and household affairs. She planned and prepared meals, and she attended to her husband's laundry and the domestic laundry. She looked after his clothes. When they had no domestic assistance, she planned and prepared meals herself. When they had such assistance, she personally supervised their planning and preparation. By August 1950 all such activities on her part had ceased. After that time perhaps nothing better reveals the degree of separation attained than the fact that each gave orders separately to the housekeeper for any meal intended to be eaten in the home. The husband conveyed any wishes he had for breakfast directly to the housekeeper, and, if he were intending to dine at home, he would give instructions directly to the housekeeper. It should be added that any mending or repair to any article of his clothing was always entrusted directly to the housekeeper. In this connection, a somewhat quaint remark, which was possibly not fully appreciated by the learned judge of first instance, was made by an immigrant named Katarina Dameta, who was employed in the house from 1950 to 1953, and who gave evidence through an interpreter. She said in effect that she was "serving two mistresses", which conveys unmistakably to our minds that she felt herself to be ministering to two persons who were living independently of each other.

We have said that, if it be indeed true that less importance than usual should attach in the circumstances of this case to attention to personal duties such as are commonly performed by a wife, more importance than usual must attach to their outside social life. As to this the evidence is very clear. The petition originally alleged

H. C. OF A. 1954. POTTER v. POTTER. Fullagar J. Kitto J.

adultery, but this allegation was withdrawn by leave, and there is no evidence whatever of adultery, or even (apart from a man named Patkin, to whom passing reference will be made later) of any impropriety. But, in the period in question, the wife had her own male friends, whom she entertained without reference to her husband, and with whom she went out without consulting him. He and she never went out together or visited mutual friends together, although she frequently went out alone. There is quite a large body of evidence to this effect. A number of persons, whom they had visited together before August 1950, gave evidence that after that time such visits ceased. They had formerly attended frequently together at functions at the University and at the National Gallery, but after that time, while each on occasions attended such functions separately, they never did so together. Miss Roper, the Principal of the Women's College at the University, said that the wife, about the end of 1951 or beginning of 1952, spoke of herself and her husband as "leading separate lives." The husband owned a boat, which he kept at Williamstown. Before August 1950 he and his wife had spent a good deal of time on this boat. After that period he continued to use his boat a good deal, but his wife never accompanied him. The only occasion on which she was on the boat was when she brought a party of her friends there against his will.

Financial matters are, to our minds, of very considerable importance in this case. The husband was in fact maintaining the "household", so far as there can be said to have been a household, during the relevant period. The wife had no means of her own. He made her a generous allowance by payments into her bank account. She was supposed to pay, and did generally pay, such accounts as the grocer's and greengrocer's, but he had sometimes to pay accounts that she neglected to pay, and on a number of occasions he put her bank account in funds when it was overdrawn. So large a sum as £1,000 was sometimes required for this purpose. Major domestic expenses he paid himself. In 1951, while he was away in Sydney, she purchased, without consulting him, a mink coat for £3,000 and diamond jewellery to the value of £4,000. On his return, he took these articles and returned them to the sellers. Little importance attaches to these matters from the point of view of the real question in the case. Indeed, it might be said that they tend to indicate, rather than contra-indicate, the continuance of the matrimonial relation. But the really significant thing, in our opinion, is that she never approached him personally on any matter of finance. When it was a matter of putting her bank account

in order, it was her bank manager who approached him. On three occasions he received letters from solicitors, writing on her behalf and requesting him to make available to her a substantial lump sum of unspecified amount. With a view to obtaining money, she interviewed Mr. H. A. Pitt, a partner in the firm of stockbrokers to which her husband belonged, asserting that she was a partner in the firm. In May 1953 she interviewed Mr. R. A. Rowe, chairman of the Stock Exchange of Melbourne, and made the same assertion that she was a partner in the firm. These assertions were entirely without foundation. In January 1953 she wrote a letter to Mr. G. D. Brown, another partner of her husband's, enclosing a letter from her bank manager, and saying that he had asked that " the Firm put the account in order immediately ". She said that she was writing to Mr. Brown because her husband was " out of Melbourne ". The statement that her husband was out of Melbourne at the time was either entirely untrue or grossly misleading. He said that he believed that he was in Melbourne on the day on which the letter was written, but that, if he was not, he was merely in Sydney on a two-days' visit which he made regularly to that city every month. In May 1953 she made a trip abroad, returning in November a day or two before the petition was filed. The first knowledge that the husband had of her intention to make this trip was when his own solicitor telephoned him, telling him that she desired to go abroad and asking that he should make the necessary money available. He ultimately agreed to do so—mainly, he says, because he thought it would be a good thing for himself and the child that she should be away from them.

The evidence briefly summarized above was accepted by *Barry* J., but his Honour said that the impression conveyed to his mind by it all was that of a marriage from which all happiness and all hope of happiness had vanished, but which " nevertheless retained sufficient of the elements of the *consortium vitae*, or marital association, to preclude " the finding of desertion which was held justified in *Watkins* v. *Watkins* (1). But, one is driven to ask, what elements really did remain ?

An immediate and, as we think, correct, answer may be made to this question by saying : " So far as the evidence affirmatively establishes, none ". But this is nothing to the point. The burden of proof is on the petitioner, who must establish the absence of all elements. It is because of this that we have regarded the case as one of difficulty. The petitioner's case may have suffered to some extent from an initial concentration on the intolerable behaviour

(1) (1952) 86 C.L.R. 161.

H. C. OF A. 1954.

POTTER v. POTTER.

Fullagar J. Kitto J.

of the respondent, and a consequential inattention to the vital question in the case. But, be this as it may, there are matters as to which one would certainly have wished for more evidence, and there are two episodes which might be regarded as suggesting at least a vestigial survival of the *consortium vitae*.

One would have expected a clear account of how the parties spent their week-ends when both were in Melbourne. Again, the husband was abroad at times during the relevant years, and was away for substantial periods. One would have expected to be told whether he and his wife corresponded during those periods, and, if so, on what terms. If letters had been destroyed, secondary evidence could have been given. Obvious importance attaches to this matter, but it was conspicuously neglected, although his Honour called pointed attention to it. Paragraph 23 of the husband's affidavit shows that she was aware of the date of his return from a trip made in 1951, and one might infer from that paragraph that he had written to her and expected her to meet him, though she did not do so. One would have expected also to be told more about any correspondence that took place during the wife's absence from Australia for six months in 1953. As to this period the husband did say that she wrote him very rarely, and that such letters as she did write were abusive in character. Also it was during this period that she wrote two letters to Mrs. Fallon, referring to him as " the horror ".

On the whole, we do not think that these omissions should be held to detract from the general picture presented by the evidence. Perhaps of more importance is the position of the parties *vis à vis* the child. One would not, we think, have expected the child to be called as a witness. But she was an important factor in the situation, and one would have expected clearer evidence as to the relationship of the parents to her and in respect of her. We do not think, however, that there is anything to warrant the conclusion that her presence on the scene or anything in the relationship between her and her parents operated to keep alive a *consortium vitae* which should otherwise be held to have ceased. There is indeed evidence connected with the child which supports the conclusion that it had ceased. She would appear to have been generally under the care and management of her mother except during her mother's absence from Australia, though her father drove her to school each day. Each Christmas her mother took her away for a holiday at a seaside resort or some such place, and her father would go there for two or three days, for the sole purpose, as he says, of seeing her. At one period, on the advice of a doctor,

the mother sent the child to board for some time at Bentleigh. The father was never consulted about this, and knew nothing about it until after the child had left the home. The child suffered from some ailment, but her health was never discussed between the parents. Before August 1950 the father used to attend the child's school functions. After that time he was never told when they were to take place, and he attended none.

Of the two incidents to which we have referred, one took place in December 1950 at the Hotel Manyung on Port Phillip Bay, and the other in August 1952 at the maisonette in South Yarra. In the former case the father had gone down to be with the child at Christmas. The wife went to a " New Year party " and did not return to the hotel until 5.30 a.m. on the following morning. He says : " She was evasive when I asked her where she had been ". In the latter case he had been abroad, and the wife had been staying at the Hotel Australia in Sydney. A man named Patkin is said to have been staying at that hotel at the same time. On the evening after the husband's arrival at the maisonette in South Yarra, Patkin called to take the wife out. The husband says that Patkin " acted as if I would accept the position ". He protested, and there was a violent scene, after which the wife went out to Patkin, who was waiting in his car, and the two embraced. These incidents do suggest that there was something of the matrimonial relation left. On the other hand, it may be fairly said that they were on any view still legally husband and wife. Even if they had been living far apart, improper or indiscreet conduct on her part could affect him, and to protest against such conduct may be said to be not necessarily inconsistent with a state of affairs in which the matrimonial relation had really ceased.

There is yet another matter which tells at first sight against the husband's case. He said in the course of his evidence : " I think I realised it was completely hopeless when I came back from abroad at the end of 1952, and found my wife was so completely irresponsible about it as to invite men to call and take her out in the evening. When I first noticed the marriage was in danger was after returning from America in 1950 ". His whole case is, of course, that the marriage in effect came to an end on his return from America in 1950, not that it was merely " in danger ". But the meaning which it seems fair to attribute to the passage we have quoted, read in the context of the whole of the husband's evidence, is that he perceived in 1950 that the break which had developed out of the Palm Beach holiday was so serious that the marriage was at an end unless it were mended, and that, when he

H. C. OF A. 1954.

POTTER v. POTTER.

Fullagar J. Kitto J.

returned from abroad in 1952, he realized that there was no hope of its ever being mended.

In *Powell* v. *Powell* (1), *Dixon* J. spoke of " the mutual recognition in fact of one another as husband and wife " as being at the centre of the matrimonial relation. It is that mutual recognition which was held to have been absent in *Watkins* v. *Watkins* (2). The present case is, in some respects, more like *Walker* v. *Walker* (3) than *Watkins* v. *Watkins* (2), but it is a more doubtful case than either of those cases. There are matters which are capable of being regarded as indicative of a degree of mutual recognition, and there are matters which are not satisfactorily cleared up by the evidence. It is always necessary, however, to look in such a case at the whole picture presented, and it is material to remember that isolated incidents have often been held not to bring to an end a period of desertion which has once commenced. Looking at the evidence as a whole, and at the picture presented as a whole, we think the proper conclusion is that by August 1950 the wife had completely repudiated the matrimonial relation, with the result that it ceased to exist and was not thereafter resumed. It is not that, as *Barry* J. put it, " so far from repudiating the matrimonial relation, she was asserting it and abusing it ". It seems to us to be rather that she was denying it in every substantial respect, its only reality for her being represented by the payment of money into her bank account. She was quite frank about this to Mrs. Fallon. The case is near the border-line, but we think that desertion for three years was established, and that the appeal should be allowed.

Appeal allowed. Discharge order of Supreme Court of Victoria. In lieu thereof decree nisi for dissolution of marriage on ground of desertion. Order that appellant do cause an office copy of order of this Court to be lodged with the Prothonotary of the Supreme Court of Victoria.

Solicitors for the appellant, *Gillott, Moir & Ahern.*

R. D. B.

(1) (1948) 77 C.L.R. 521, at p. 536.
(2) (1952) 86 C.L.R. 161.
(3) (1952) 2 All E.R. 138.