

5 OF 1951 No 6

IN THE HIGH COURT OF AUSTRALIA.

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*M. v. v.*

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v.

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**REASONS FOR JUDGMENT.**

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Judgment delivered at *Adelaide*

on *27* *9* *51*

MUIR v. MUIR

JUDGMENT (ORAL)

DIXON J.  
WILLIAMS J.  
FULLAGAR J.

JUDGMENT (ORAL)

DIXON J.  
WILLIAMS J.  
FULLAGAR J.

This is an appeal from an order of Mr. Acting Justice Paine by which he dismissed an appeal from an order of the Court of Summary Jurisdiction made under the Maintenance Act. The order was made under sec. 66(1)(a) of the Maintenance Act 1926 as amended. It was, of course, made upon the application of the wife. The Magistrate granted to the wife the legal custody of her children, two in number, and he directed the husband to pay to the Children's Welfare and Public Relief Board the sum of £4:10:0 a week. He reserved the question of access and made an order as to costs. The appeal is brought as of right and no objection has been made to the competence of the appeal. Possibly in view of our decision <sup>to</sup> as the competence of the appeal in Cocks v. Juncken, (1947) 74 C.L.R. 277, no objection could properly be made, but we must not be taken to carry that decision any further by entertaining this appeal, in view of the fact that no objection was made.

The Magistrate appears to have acted under paragraph(v) of sec. 66(1)(a) of the Maintenance Act 1926-1950. That paragraph provides that any married woman whose husband in any period during the preceding six months has been guilty of wilful neglect to provide reasonable maintenance for her or any of her children may apply for summary protection under that division and the same may be ordered accordingly.

The Magistrate had before him a long story of matrimonial disputes and bickering and the evidence which the wife gave upon the hearing, if accepted, disclosed a course of conduct on the part of the husband which included a certain number of acts of violence and included other conduct of a description to which a married woman might quite well take very strong exception. The case was essentially one in which it was for the Magistrate to say,

upon his estimate of the credibility of the parties, what were the facts of the case.

Mr. Acting Justice Paine upheld his decision upon the ground that he had applied the correct standard of liability and that there was ample evidence before him. The learned judge's reasons for that conclusion are stated on pp. 104 and 105 of the transcript.

It has been accepted as the law in this State that where the cause of an actual physical separation between husband and wife is the voluntary departure of a wife from her husband the court must consider whether she was justified in leaving him. In the language of Sir George Murray C.J. in Matthews v. Matthews, 1924 S.R. (S.A.) at p. 285, "If she were not [justified] - if, in other words, she deserted him without reasonable cause - no order for either maintenance or custody of children, or relief from cohabitation ought to be made. On the other hand, if she were justified in leaving him, then all or any of these forms of relief which she might ask for might properly be granted."

The Magistrate in his judgment referred to a number of other authorities which are in conformity with that passage and what he says upon the subject will be found at p. 92 of the transcript, where, amongst other authorities, he quotes the statement to the like effect of Sir Frederick Jordan C.J. in the Supreme Court of New South Wales in the case of Heard v. Heard, 43 S.R. (N.S.W.) 82.

It appears to us that in both courts below the correct standard or test of responsibility of the respondent was laid down and the correct test of the right of the wife to depart physically from cohabitation with him. In cases of this description a rehearsal of the facts is generally unwise and seldom serves a useful purpose. We think the less said about the facts of this very unfortunate case the better. We are of opinion that upon the facts found by the learned Magistrate in detail there was material

on which he might properly arrive at his conclusion that the wife was justified in her final departure on 8th January from the society of her husband.

The conclusion which the learned judge drew was in effect that the husband's conduct had been such as to make the wife's position intolerable. The husband's behaviour when, after the attempt again to live together, she left him finally, gave her good ground for apprehension that the former course of conduct would be repeated and for a belief that a continuance of a matrimonial life together remained intolerable. It was unreasonable to expect her to put up with what was an unbearable situation and she was justified in leaving him. That she was justified by his conduct in leaving him is enough. Under sec. 72 on proof of omission to supply reasonable maintenance wilful neglect is presumed against the husband until he proves the contrary. There is, in the circumstances of this case, no ground for supposing that he discharged the burden of proof which is thus thrown upon him. The orders made below are therefore in our opinion correct.

ORDER.

Appeal dismissed with costs.

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