

ORIGINAL

IN THE HIGH COURT OF AUSTRALIA

OGDEN

V.

OGDEN

REASONS FOR JUDGMENT

*Judgment delivered at* Sydney

*on* Thursday, 9th June, 1955.

OGDEN

v.

OGDEN

O R D E R

Appeal dismissed. No order as to costs.

OGDEN v. OGDEN

JUDGMENT

DIXON C. J.

With some misgiving I concur in the view that this appeal must be dismissed. It is a wife's appeal from a decree for dissolution of marriage on the ground of desertion. The parties were married in 1922, he being 26 years of age and she 25. There were no children of the marriage. About the year 1935 the wife objected to the husband's frequenting the company of another woman with whom he had become acquainted. She was filled with suspicions about their association and with jealousy. In 1936 he left his wife and they remained apart for more than three years. It is said on her behalf with much justification that there ~~was~~ the requisite period of desertion on his part amounting to a ground of divorce. In fact in the present proceeding/<sup>on</sup> that view of the matter she cross-petitioned for dissolution. After the commencement of the period the course of events gave strong support for the wife's suspicions. Indeed in certain proceedings for maintenance that the wife took the husband seemed to admit in his evidence that he was living with the woman, but he afterwards said that it was a mistake and that the association was innocent. In 1939 the parties reunited for about six weeks. The wife imposed or sought to impose a condition that the husband should see no more of the other woman and that he should allow her to accompany her, if he went out at night. At the end of the six weeks he insisted one evening on going out without his wife; she protested in anger and said that if he persisted she could not stand it and would have gone before he returned. He did persist and she carried out her threat. He did not on that occasion go to see the other woman, and indeed if his testimony is correct, it would appear that she had been out of the country for some time and had not returned.

The departure of the wife began a period of separation that has continued unbroken and on the ground that she then deserted her husband without just cause or excuse and without any

such cause or excuse has left him continuously so deserted during three years and upwards, the decree appealed from was pronounced.

Before the three years had passed the association of the husband with the other woman had in some degree been renewed and of course his wife regarded it as a guilty association.

The whole case seems to me to depend upon the existence of reasonable grounds amounting to just cause or excuse on her part for terminating the relationship re-established in 1939 or upon grounds subsequently appearing which afforded a just cause or excuse for her continuing the separation then commencing. It seems probable that she suspected, although wrongly as it turned out, on the evening she left him that he was going to see the other woman. For the respondent, however, it was maintained that she had her own reasons for wishing to make an occasion for breaking up the re-established matrimonial relationship. Suspicion and jealousy nevertheless seem the more probable cause. There is no evidence that the husband's subsequent association, such as it was, with the other woman was in fact of a guilty kind. But his wife's leaving him on the night he persisted in going out without her and her later belief that he had renewed a guilty relationship with the woman are matters which depended on past facts.

The misgiving which I feel concerns the question whether, construed in the light of the past, the course she took might not have had far more reason and justification than have been ascribed to it. It is not clear that the facts affecting the issue were fully elucidated at the hearing, nor indeed is it clear that the findings of the learned Judge who pronounced the decree were directed to the question. His Honour's attention seems to have been turned rather to the impossibility of treating the condition imposed by the wife that she should be allowed to accompany her husband when he left home at night and the husband's failure to observe it as something amounting to a just

cause or excuse or to a revival of what was regarded as condoned desertion by him.

But there cannot, I think, be spelled out of the evidence, as it is recorded, sufficient to afford the wife a just cause or excuse for her intentionally terminating the matrimonial relationship or continuing the desertion thus begun. For the wife it was contended that in truth there never was a sufficient re-establishment of a matrimonial relationship to put an end to the desertion of the husband which began in 1936 or, at all events, to destroy its sufficiency as a matrimonial wrong upon which she could petition. But upon the facts this contention cannot be made good. The evidence is susceptible only of the inference that a matrimonial relationship was re-established between the parties, although it did not subsist for more than six weeks.

It is for these reasons that I think that the appeal must be dismissed. It is not a case in which the husband should pay the costs of his wife's unsuccessful appeal against the decree he has obtained. On the other hand, I do not think that she should be ordered to pay his costs of the appeal.

OGDEN

v.

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JUDGMENT

WILLIAMS J.  
KITTO J.  
TAYLOR J.

OGDEN

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JUDGMENT

WILLIAMS J.  
KITTO J.  
TAYLOR J.

This is an appeal by the wife from a decree nisi made by Nield J. in the Supreme Court of New South Wales in its matrimonial causes jurisdiction in favour of the husband granting him a divorce on the ground that his wife had without just cause or excuse wilfully deserted him and left him continuously so deserted during three years and upwards. The decree was made in a consolidated suit in which the husband sued his wife for a decree on the ground of desertion and the wife sued her husband for a divorce on the same ground. The wife's case is that the desertion by her husband commenced about August 1936. The husband's case is that the desertion by his wife commenced towards the end of 1939 after the parties had resumed cohabitation and been reconciled for about six weeks, whereby his previous matrimonial offence, if any, had been condoned.

It is unnecessary to say very much about the circumstances in which the husband is alleged to have deserted his wife. He left the matrimonial home after there had been constant bickerings over his association with a woman named Miss McCartney. The husband, who is a motor mechanic, has always been interested in a particular branch of that work connected with the speedway. He first met Miss McCartney on a visit to the speedway and they subsequently became very friendly. This aroused the jealousy of his wife causing her



on one occasion to assault Miss McCartney. The husband has a workshop at 372 Canterbury Road, Canterbury. There is a home at the rear of the shop. After leaving his wife, the husband commenced to live there with Miss McCartney and two of her brothers. She did the housekeeping. The husband appears to have admitted in certain maintenance proceedings in July 1937 that he and Miss McCartney were living together as man and wife, but he denied in his evidence in the present case that he had made this admission and said that she was never more than a housekeeper and that there was never any adulterous association. Whatever the association may have been, and there is certainly not sufficient affirmative proof that it was in fact adulterous, it did not cause the wife to break up the matrimonial home prior to his departure or to take proceedings to obtain a divorce on the ground of adultery after they had separated.

The parties agreed to resume cohabitation about September 1939. The wife said that she made it a condition of this resumption that if the husband went out at night he would either take her with him or tell her where he was going. The husband said that this matter was mentioned during their discussions prior to the resumption, but it was never a condition of the agreement. There is no suggestion in the evidence that the reconciliation which took place was intended to be other than complete or the cohabitation other than permanent. A resumption of cohabitation by mutual agreement puts an end to the desertion. Perry v. Perry (1952 P. 203). The parties went to live at the home of a Mrs. Martin at 3 Canberra Street, Canterbury, where they had a bedroom and shared the rest of the house. Sexual intercourse took place on the first night but not thereafter. The husband went to work daily at 372 Canterbury Road. The wife used to join him there and bring his lunch. One of the McCartney brothers had married and he and his wife were living in the home at the

rear. Miss McCartney was not there. She was in fact in America, although the wife does not appear to have known this. About six weeks after the resumption of cohabitation the wife left the new matrimonial home. She left after a quarrel with her husband about his going out one night to do some work. According to the husband he told his wife where he was going but refused to take her with him and she said if he went out of the house that night she would be gone when he got back. He got back about ten o'clock and found she had gone, taking her belongings with her. She never returned. According to the wife she asked him to take her with him, but he said that where he was going women were not allowed. She said she did not want to come inside and could sit outside in the side-car. He said you can't do that. She said that he was going out to see that woman again, but he denied it. She then said she could not stand it for a moment longer and, if he went out again, she would not be there when he came home. About five months later Miss McCartney returned from America. The husband was then living again at 372 Canterbury Road with her brother and his wife. Miss McCartney joined them there. She lived there for about six months but there is no evidence of any improper association between her and the husband. All that the wife could say was that on one occasion, in January 1940, she went to the workshop at about ten o'clock at night and found Miss McCartney assisting her husband there.

On the evidence, of which this is a bare outline, it would be difficult to say that his Honour was not justified in making the decree under appeal. But it was contended that it was apparent from his Honour's reasons for judgment that he had not properly considered all the issues that it was necessary for him to consider before he could make such a decree. It was contended that he had not properly considered whether the husband had proved that his wife had left the matrimonial home without just cause or excuse and had

thereafter continued to desert him for three years and upwards without just cause or excuse. It/<sup>was</sup> also contended that his Honour had not properly considered whether the husband had established that the wife had condoned his previous desertion. In his reasons his Honour, after saying/<sup>that</sup> the wife was not entitled to impose a condition on her husband that he could not go out at night to do his work without taking her with him, said:

"It is contrary to commonsense. She therefore leaves without just cause or excuse. Nothing which has happened since alters the character, the nature and quality of her act. It is desertion without just cause or excuse. The only possible answer she could have to it is that he first deserted her and she was entitled to impose a condition but that is something which the law does not allow. It is contrary to the authorities in our own Courts".

His Honour then proceeded to discuss what conduct is sufficient to revive a condoned matrimonial offence. He referred to Bridges v. Bridges (45 S.R. N.S.W. 164). In that case it was held that condoned adultery may be revived by subsequent serious matrimonial misconduct of the adulterous spouse, although such misconduct does not of itself amount to a matrimonial offence for which the Court could grant relief. He then said:

"Even if it were desertion by the husband in 1936, what happened in 1939 is not sufficient to entitle the wife to say that she withdraws from being the condoning party, is entitled to withdraw from cohabitation and rely on the earlier misconduct which she condoned. I think that her contention fails because the incident itself is not of such weight or gravity as to justify her in withdrawing from the home".

In these passages his Honour finds in the first instance that in 1939 the wife left the husband without just cause or excuse. Then occurs the sentence: "Nothing which has happened since alters the character, the nature and quality of her act". This is a somewhat elliptical statement, but it can only mean that after the wife had left the husband without just cause or excuse in the first instance, nothing subsequently occurred which gave her a just cause or excuse

for remaining away. His Honour then proceeded to discuss the question whether there was any evidence that the husband had by his conduct revived his previous matrimonial offence which had been condoned when cohabitation was resumed.

His Honour does not say whether he believed the version of the wife or the husband of the conversations which took place between them about the husband going out at night prior to her agreeing to resume cohabitation or on the night the wife left. But, assuming that his Honour accepted the wife's version, the only reasonable findings open in law on the evidence would still be that the husband's matrimonial offence had not been revived and that the wife had no just cause or excuse for leaving him or continuing to stay away. Really the two issues dovetail into one another. In the first place there can be no such thing as conditional condonation. In Henderson v. Henderson (1944 A.C. 49 at p. 54) Viscount Simon L.C. said:

"Condonation is not a contract in which one party may claim to be discharged by the other's repudiation. Condonation is not a contract at all. It is the overlooking of past wrongs accompanied by action on the part of the aggrieved spouse which shows that they are really forgiven, and the circumstance that the guilty party, before or at the time of condonation, makes promises as to future conduct cannot lead to the consequence that previous offences are no longer condoned, if and when the promises are afterwards repudiated".

A condoned offence, as the Supreme Court held in Bridges v. Bridges, supra, may be revived by serious matrimonial misconduct which does not amount to an offence for which the Court could grant relief, but the misconduct must be serious. In Richardson v. Richardson (1950 P. 16 at p. 21) Bucknill L.J. referred with approval to the words of Sir Francis Jeune P. in Houghton v. Houghton (1903 P. 150) where he said:

"When the law speaks of condonation and revival, it means that the offence is condoned on the condition that there shall be in the future a proper compliance with the matrimonial decencies and duties, and a person who goes back to live with his or her guilty spouse goes back on that implied condition alone."

In the second place a spouse may have just cause or excuse for separating from the other spouse where he or she has reasonable grounds for believing, induced by the conduct of the other, that the latter has contracted an adulterous association, even though he or she is unable to prove that adultery has in fact taken place. Baker v. Baker (1954 P. 33).

But there is in the present case no evidence of any serious matrimonial misconduct on the part of the husband and no evidence on which the wife could reasonably believe that adultery was taking place between him and Miss McCartney. The wife left the matrimonial home in a fit of pique after a silly tiff with her husband brought about by her jealous disposition. She had been told that the husband was going out to do some work and did not want her to go with him. She had no reasonable grounds for thinking that he was going to meet Miss McCartney. Nor, having left him, had she any reasonable grounds for continuing to stay away. There is no evidence of any association between her husband and Miss McCartney after 1939 which exceeded the bounds of propriety. Her belief that he was committing adultery with Miss McCartney was based on flimsy surmises, and not on any reasonable basis of fact. Even when he sued her for a divorce, she did not charge him with adultery. The remarks of Davies J. in Forbes v. Forbes (1954 3 A.E.R. 461 at p. 466) seem to be appropriate:

"In my judgment, the fact that a petitioner has not chosen to bring and does not now make a charge of adultery may well be a most relevant matter for consideration when the Court is asked to find that the petitioner on reasonable grounds believes, and has believed for three years preceding the presentation of the petition, that the respondent had committed adultery".

The appeal should be dismissed.

OGDEN v. OGDEN

JUDGMENT.

FULLAGAR J.

JUDGMENT

FULLAGAR J.

In this case a husband petitioned in the Supreme Court of New South Wales for dissolution of marriage on the ground of desertion, and his wife filed a counter-petition which was also based on the ground of desertion. Nield J. dismissed the wife's petition, but granted a decree nisi on the husband's petition. The wife appeals to this Court. It is possible that the result of the case does not accord with what may be regarded as the real merits of the parties, but his Honour's decision was, in my opinion, correct.

It is clear that the husband in 1936 deserted the wife without just cause or excuse, and that he left her so deserted for three years and upwards. But it is also, I think, clear that the evidence established a reconciliation and a resumption of the matrimonial relation in 1939. It is quite likely that the husband, in seeking or agreeing to the reconciliation, was actuated by no worthier motive than a desire to get rid of a maintenance order which had been made against him. In any case, the resumed relationship lasted only for a very short time - some three months at most. But I can see no escape on the evidence from the conclusion that there was a real and complete resumption of the matrimonial relation. What brought that resumed relationship to an end was desertion by the wife, and that desertion had, at the time of the filing of the husband's petition, continued for more than three years.

While one may feel some sympathy for the wife, there was, in my opinion, no evidence of any "just cause or excuse" for the wife's desertion in 1939. There was, I think, clearly evidence on which it could have been found that the husband had committed adultery with a woman named Mavis McCartney both before and after he deserted his wife in 1936. But there is no evidence on which

it could be found that he committed adultery during the period of the resumed matrimonial relation. After the resumption the parties soon ceased to be on friendly terms, and the actual occasion of the wife's departure from the home was that the husband went out one evening after refusing to tell her where he was going and refusing to take her with him. One may, as I have said, sympathise with a woman who was naturally suspicious that her husband's relations with Mavis McCartney might not have ceased. But I do not think it can be seriously contended that the husband's conduct on the final evening or before it provided just cause or excuse for desertion.

There was no evidence of any commission of adultery by the husband after his wife left him in 1939, and the line of cases of which Waghorn v. Waghorn (1942) 65 C.L.R. 289 is a well known example appear to me to have no relevance in this case.

The wife gave evidence that her agreement to resume the matrimonial relation was subject to a condition that, if the husband went out at night, he would "tell her where he was going or else take her with him", and that the husband assented to this condition and was guilty of a breach of it. It was put by counsel for the appellant wife that the resumption amounted to condonation by the wife of the husband's matrimonial offence of desertion for three years and upwards, but that that condonation was subject to a condition on breach of which the matrimonial offence was "revived", with the result that the wife was entitled to a divorce on the ground of the husband's desertion in 1936. I feel some doubt as to whether it is sound to say that the rules relating to condonation are applicable to a case where there has been a resumption of cohabitation after there has been desertion whether for the statutory period or for a shorter period. But, if it be assumed that those rules are applicable where there has been desertion for the statutory period, the argument, in my opinion, nevertheless fails. It is established, I think, that condonation cannot be made subject to such a condition as that which is asserted in this



case. Condonation is always subject to the condition imposed by law that the offence condoned will be revived by serious matrimonial misconduct on the part of the offending spouse, but it cannot be made subject by agreement to any other condition. Condonation, when once established, is effective despite any such condition. I had occasion to consider the authorities on this subject in Hemsworth v. Hemsworth (1947) V.L.R. 292, at pp. 307-9, and it will be sufficient to refer to that case. I ~~did~~ not understand it to be contended, nor do I think that it could have been successfully contended, that (apart from the alleged express condition) there was in this case such "serious matrimonial misconduct" on the part of the husband as would suffice to revive a condoned matrimonial offence.

The appeal should, in my opinion, be dismissed.