was charged with raping his wife, who, prior to the act complained of, had obtained a separation order which was still in force. Byrne J. held that under these circumstances the marriage did not constitute any formal bar to the indictment. However, though it is not impossible for a husband to be charged with rape under these circumstances, the jury will regard the fact of the marriage as making more probable, either actual consent by the wife, or a belief on the part[4] of the husband that the wife was a consenting party. In the instant case the accused husband was in fact acquitted.

A. L. T.

4. See *R. v. Burles*, [1947] A.L.R. 460.

DIVORCE: MATRIMONIAL CAUSES ACT 1945.

Tavcar v. Tavcar.[1]

In this case, a petition for dissolution of marriage was presented under Part II. of the Commonwealth *Matrimonial Causes Act* 1945 on the ground of desertion of the petitioner by the respondent for a period of three years or upwards. The petition bore an endorsement in accordance with the Divorce Rules of 1949 stating that relief was sought according to the law of New South Wales.

From the evidence, it appeared that the parties were married on the 14th January 1943. At the time, the respondent was a merchant seaman serving aboard a ship trading on the Australian coast. He was domiciled in Yugo-Slavia and the petitioner was domiciled in Victoria. The only matrimonial home which the parties ever established was in Newcastle, New South Wales.

The respondent left Australia in 1945, apparently to return to Yugo-Slavia. Although the petitioner had written to him at addresses which he gave to her, she had not heard from him. On these facts, the trial judge, Mr. Justice Sholl, found desertion without just cause for three years and upwards.

It was submitted for the petitioner that she fell within Part II. of the Commonwealth Act. Part II. of the Act is headed " Institution of Matrimonial Causes against Members of Overseas Forces, and certain other persons, not domiciled in Australia." By section 4 of this Act it is provided that Part II. " shall apply in relation to marriage celebrated in Australia on or after the 3rd day of September 1939, and before the appointed day[2] where the husband (whether a member of an overseas Naval, Military, or Air Force, or not) was, at the time of the marriage not domiciled in Australia and the wife was immediately before the marriage, domiciled in a State or Territory." His Honour held that the marriage in this case fell within section 4 of the Act. It was further held that the Supreme Court of Victoria here was invested with Federal jurisdiction by section 5 (2) because, as prescribed by section 5 (1), the

1. Unreported. Supreme Court of Victoria. Judgment delivered on 7th March, 1950.
2. Not yet proclaimed.

parties were not domiciled in a State or Territory and the petitioner was resident in Victoria.

The petitioner then asked the Court to exercise jurisdiction, pursuant to section 6 (*a*) " in accordance with the law (other than the law relating to practice and procedure) of the State or Territory in which the last or only matrimonial home of the parties to the marriage was situated." " This," said Sholl J., " according to my findings, must be the law of New South Wales, which was the State of the only matrimonial home of the parties."

The *Matrimonial Causes Act* 1899 of New South Wales by section 16 (*a*) provides : " Any wife who at the time of the institution of the suit has been domiciled in New South Wales for three years and upwards . . . may present a petition " and sets out desertion as a ground for dissolution of marriage. The difficulty confronting the Court was that the petitioner had never at any time been domiciled in New South Wales. Sholl J. held that " The law as to domiciliary qualification to take proceedings in relation to status is not, in my opinion, a law relating to practice and procedure, but is either a condition of the Court's jurisdiction or a condition of the litigant's substantive right or both. Can I then grant the petitioner a divorce consonant with the law of New South Wales when she has not the domiciliary qualification stipulated for by that law ? "

However, His Honour then proceeded to hold that the heading to Part II[3] limited the Part to persons *not* domiciled in Australia. " It has dealt with domicil by requiring only (1) pre-marital Australian domicil of the wife, and (2) a non-Australian domicil of the parties at the institution of the suit (and possibly this may be doubtful, at the hearing of the suit)." The Act had in Part II treated domicil (i.e. of the ' wife ' before marriage) as a condition of the Court's jurisdiction and had then proceeded to dispense with that condition where Part II applied. Further, the Court would be disabled from granting relief according to the law of the matrimonial home[4] if a domicil in Australia were necessary that would frustrate the legislation. Hence the Act must be taken to have dispensed with the requirement of domicil as a condition of the substantive right of the litigant. A decree *nisi* for dissolution of the marriage was therefore granted.

In view of this decision, it is submitted that the Commonwealth Act must be regarded as having exclusively prescribed the foundation of jurisdiction of the Court under Part II. The domiciliary requirements of the law of the State or Territory where the parties set up their last or only matrimonial home, and *semble* any other requirements which may be regarded as a condition either of jurisdiction of the Court or the substantive right of the litigants must be disregarded. The only relevant provisions of the law of such State or Territory are those relating to the ground for dissolution of marriage, *e.g.* in this case, desertion of the petitioner by the respondent for a period of three years and upwards.

R. G. DeB. G.

3. *vide, supra.*
4. See *Matrimonial Causes Act* 1945, section 6.

(NOTE—Since this note was written, *Tavcar v. Tavcar* has been reported. See [1950] A.L.R. 260.—Eds.)