UNIFORMITY OF EMPIRE LAW.

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The decisions of the Court of Appeal in England have now become persuasive authority of the highest order since the High Court of Australia has decided that, where a general proposition of law is involved, the court should be careful of introducing into Australian law a principle inconsistent with that accepted in England.[1] The basis of the matter is that there should be uniformity of law throughout the Empire. As was said by the Privy Council in *Trimble v. Hill*, " in all parts of the Empire where English law prevails, the interpretation of that law by the Courts should be as nearly as possible the same."[2] But the result of Australian courts acting on this principle may be to set aside views which have been accepted as law for many years. Since this may be the case, the opinion may be hazarded that it behoves English appellate tribunals to make themselves acquainted with the jurisprudence of Dominions which accept the principle. In addition, problems which arise in English courts may have been grappled with, and decisions given thereon, which could well be studied for the care and learning bestowed upon the subject, and the assistance which they may well afford.

These remarks are prompted in particular by a consideration of recent decisions in connection with divorce which indicate how sweeping may be the effect of abandoning local decisions for the purpose of securing uniformity of law and how necessary it may be that there should be some limitation on the theory that it is the Dominion decision which should be abandoned. The divorce decisions may now be considered in connection with their subject-matter. The commission by a deserted spouse of adultery during the statutory period of desertion raises for decision the question of whether the deserter thereupon has just cause or excuse for continuing to desert. The deserter may never have known of the adultery or even though he knows of it, it may not have affected his conduct. Can it be said under those circumstances that the desertion has been terminated by the conduct of the deserted spouse ? The earliest reported case on the matter appears to be *Douglas v. Douglas*,[3] where the decision was that the adultery of the deserted spouse constituted just cause or excuse for desertion and, therefore, terminated it, notwithstanding that it was unknown to the deserter. Then the Full Court of Queensland took the opposite view in *Gray v. Gray*.[4] This case was followed in point of time by *Cook v. Cook*,[5] where Murray C.J. accepted the New Zealand decision, and by *Hopkins v. Hopkins*[6] in which Lowe J. preferred the Queensland case. The view put by the New Zealand Court may be stated shortly. Adultery of a husband is just cause for his wife continuing to remain away from him, even though she does not know of it ; the husband might take proceedings against her for restitution of conjugal rights, or once the statutory period of desertion

1. *Waghorn v. Waghorn*, (1942) 65 C.L.R. 289, at p. 297.
2. (1879) 5 App. Cas. 342, at p. 345.
3. (1903) 23 N.Z.L.R. 584.
4. [1925] Q.S.R. 166.
5. [1934] S.A.S.R. 298.
6. [1936] V.L.R. 218.

was complete for divorce; his restitution suit would not succeed since uncondoned adultery on the part of a petitioner is a defence to proceedings for restitution of conjugal rights; it would not matter that the wife did not know of the adultery, because once the husband committed adultery he no longer had the right to compel her to live with him; similarly it was considered that in a suit for divorce based on desertion the husband could have no right to allege that his wife had no just cause or excuse for remaining away after the husband had committed adultery before the termination of the desertion period; he knew she had a sufficient reason for remaining away from him and he could not honestly set up that she did not know of it—see *Cook v. Cook*.[7]

On the other hand the view-point was that in order to constitute "cause" there must be something which actually operates upon the mind of the party who is alleged to have "cause" for certain conduct, and as Lowe J., in *Hopkins v. Hopkins*, said with his usual care and precision, "Once the view expressed above is taken, it is apparent that the adultery of the petitioner, unknown to the respondent, cannot be a cause of his continuing to desert her, and hence cannot afford him just cause or excuse for doing so. Indeed the petitioner's adultery, of which he knows, is not necessarily such cause or excuse, for he may be shown to have overlooked it, and it may be proved that his continued desertion was for reasons apart from the petitioner's conduct."

The matter then came before the High Court in *Crown Solicitor (S.A.) v. Gilbert*,[8] when the majority of the court considered that desertion was no longer possible once the spouse alleging desertion committed adultery. The commission of adultery as a matter of law amounted to justification for remaining away. It terminated the duty to cohabit. Knowledge that there was a right to refuse to cohabit was not a necessary ingredient of the right and motive for refusal to cohabit was immaterial. So far as Australia was concerned this decision would have appeared to settle the matter, but in *Herod v. Herod*,[9] Lord Merriman (then Sir Boyd Merriman), the President of the English Divorce Court, had occasion to consider the problem. In arriving at a conclusion, His Lordship had the earlier Australian decisions before him, but with regard to the High Court decision, he said, "Most unfortunately, the full report of the judgments in the High Court of Australia in *Gilbert v. Gilbert* is not yet available in this country. I have, however, seen a short digest of the judgments in the Australian Law Journal.[10] From this, it appears that the majority of the court founded their judgments upon the principles of the Ecclesiastical Courts, whereas Latham C.J. held that the natural effect of the words of the statute should not be limited by considerations derived from the manner in which the Ecclesiastical Courts exercised a different jurisdiction. As I am deprived by the exigencies of the calendar of the advantage of reading the judgments given in the High Court of Australia, it would be unprofitable to examine in detail the decisions of the several state courts which must necessarily have been reviewed in those judgments." With great respect it may be questioned whether

7. [1934] S.A.S.R., at 302.
8. (1937) 59 C.L.R. 322.
9. [1939] P. 11.
10. Vol. 11, p. 347.

it would not have been more satisfactory for the decision in *Herod v. Herod* to have been delayed until the actual judgments of the High Court had been made available. Lord Merriman took a different view from the High Court. The basis of his decision was that desertion is founded upon intention and that if an intention to desert is established its continuance cannot be affected by conduct which is proved to have had no influence on the intention of the deserter. He supported his conclusion by three decisions where desertion had been held to be established, notwithstanding adultery on the part of the petitioner which took place after the commencement of desertion, and in which it was not suggested that the adultery had terminated the desertion, though the King's Proctor had intervened in two of the cases. The decision of *Herod v. Herod* was accepted by the Court of Appeal in *Earnshaw v. Earnshaw*[11] thus bringing about opposition between the law of England and that of Australia.

In *Waghorn v. Waghorn*, in the Supreme Court of New South Wales, the trial Judge held that so far as he was concerned he was bound by the High Court decision in *Gilbert's Case*, but on the matter going on appeal to the High Court,[12] argument was heard as to whether the court's previous decision should be overruled and, in order to preserve consistency and uniformity in the law as administered in England and Australia, the Court followed the English decisions and overruled its own decision. A protest was, however, voiced by one member of the court, as follows: "In this court some trouble has been taken to preserve consistency of decision, not only with English courts, but also with those of Canada and New Zealand. English courts cannot be expected to receive the decisions of the Dominions with the traditional respect which the courts of the Dominions pay to the decisions of the English courts, but it is disappointing to find that, upon the particular question with which we are concerned, the Court of Appeal did not take an opportunity of considering the judgment delivered by this court in *Crown Solicitor (S.A.) v. Gilbert.*"

Another instance of the extent to which the High Court follows English decisions in order to maintain uniformity of legal principle is illustrated by the acceptance in Australia of the Court of Appeal decision in *Pardy v. Pardy*.[13] *Pardy v. Pardy* held that though a separation is originally by consent, it may nevertheless subsequently become desertion notwithstanding that there is in the meantime no resumption of cohabitation. It departs from the notion of desertion continuously, if not invariably, accepted since *Fitzgerald v. Fitzgerald*[14] that desertion is the wilful termination of an existing matrimonial relationship and that if the matrimonial relationship has previously ceased to exist, without desertion having arisen, desertion is thereafter impossible unless the matrimonial relationship is in the meantime resumed. The result of the decision in *Pardy v. Pardy* was that, although the parties originally separated pursuant to deed, desertion took place if one of them subsequently repudiated the deed and the other accepted that repudiation.

11. [1939] 2 All E.R. 698.
12. (1942) 65 C.L.R. 289.
13. [1939] P. 288.
14. (1868) L.R. 1 P. & D. 694.

The decision was of the first importance as it provided that relief might be given in a class of case which frequently occurred and which cried out loudly for relief to be given. The principle that there must be a breach of an existing matrimonial relationship before desertion can arise had been accepted in Australia as fundamental. Reference may be made to the decision of Cussen J. in *Bailey v. Bailey*[15] and of the Full Court of Victoria in *Belton v. Belton*[16] as well as to four decisions in the High Court: *Bradford v. Bradford*[17]; *Fremlin v. Fremlin*[18]: *Dearman v. Dearman*[19]; and *Bain v. Bain.*[20]

When the High Court came to decide the case of *Powell v. Powell,*[21] some concern was felt in departing from previously accepted principle and difficulty was found in laying down any general principle in substitution. Nevertheless the principle that there should be uniformity of law in the British legal system prevailed and the judgment was unanimous that the principle of *Pardy v. Pardy* should be accepted and the earlier Australian decisions departed from.

But Australian courts will not slavishly adhere to English decisions when they are convinced that they are manifestly wrong. This is shown by the history of the rule relating to the standard of proof of adultery. Prior to the decision of the High Court in *Briginshaw v. Briginshaw,*[22] there was considerable authority in Australia for the view that adultery must be proved beyond reasonable doubt with the same strictness as if it were a criminal offence. The decision of *Briginshaw v. Briginshaw* was based upon a very careful examination of the history of the divorce law, prior decisions and the language of the statutory provisions. It was considered that there was no general rule in the ecclesiastical courts which would indicate that those courts had adopted the criminal standard of proof or indeed that those courts had made any endeavour to lay down with exactitude the standard of proof of adultery. The decision of the matter could not, however, turn upon any principle of ecclesiastical law. Divorce was the subject of a new statutory jurisdiction and the enacting legislation made it clear that proceedings for dissolution of marriage were not governed by the rules of law of ecclesiastical courts. The legislation had not created a criminal jurisdiction and the courts administering the new jurisdiction were civil and not criminal courts; while the highest authority in England had decided that adultery was not a crime. The analogies of the criminal law could not be applied in the divorce court and, in fact, on the whole, English courts did not appear to have applied the criminal burden of proof to cases of adultery. The High Court next turned to a consideration of the relevant provisions of the matrimonial causes statute which enacts that the court should satisfy itself so far as it reasonably can. The proper construction of this provision was held to be not that the court should apply the criminal rule but that it should adopt the civil rule of

15. [1909] V.L.R. 299.
16. [1899] 24 V.L.R. 977.
17. (1908) 7 C.L.R. 470, at pp. 474-5 (Griffith C.J. and Isaacs J.).
18. (1913) 16 C.L.R. 212, at p. 225 (Barton J.).
19. (1916) 21 C.L.R. 264, at p. 266 (Isaacs, Gavan Duffy and Rich JJ.).
20. (1923) 33 C.L.R. 317, at p. 328 (Starke J.).
21. (1948) 77 C.L.R. 521.
22. (1938) 60 C.L.R. 336.

reasonable satisfaction. The same standard of proof was required in respect of all matrimonial offences including adultery, but it could not be said that a matrimonial offence such as desertion necessitated proof beyond reasonable doubt. The civil rule of reasonable satisfaction did not prevent a court from acting with care and caution before finding serious allegations, such as adultery, established. The High Court, accordingly, decided that the civil and not the criminal standard of proof applied in the case of adultery.

Later, however, the Court of Appeal in *Ginesi v. Ginesi*[23] determined that adultery was to be proved beyond reasonable doubt. Thereupon the High Court in *Wright v. Wright* had to determine whether it would adhere to the decision in *Briginshaw's Case* or whether, for the sake of uniformity, it should follow the opinion of the Court of Appeal. The High Court critically considered *Ginesi's Case*. It was pointed out that it was based on ecclesiastical authorities which, in the niew of the High Court, did not support the conclusion arrived at; it was determined without reference to the revelant statutory provisions; it regarded adultery as a crime, which was opposed to the decision of the House of Lords in *Mordaunt v. Moncreiffe*.[24] On the other hand, the Court took the view that *Briginshaw v. Briginshaw* was well considered and was based on a complete examination and survey of the subject and therefore should be followed. It is interesting to note that there has been an indication from the Court of Appeal that *Ginesi v. Ginesi* is likely to be reconsidered. An important matter at present awaits for decision. For many years Australian courts have decreed divorce on the ground of constructive desertion in cases where the parties while still continuing to live under the one roof are in fact living as strangers to one another. The test adopted in Australia has been that there must be an intention to withdraw from the conjugal society and that if a spouse acts upon that intention and withdraws from the conjugal society without sufficient excuse desertion occurs. In England, however, the Court of Appeal has decided in *Hopes v. Hopes*[25] that there can be no desertion in such a case if the spouses continue to live in the common household. Following that decision Lord Merriman expressed the opinion in *Everitt v. Everitt*[26] that, if a deserting spouse returned to the matrimonial home and lived in the common household, the desertion was terminated. But subsequently the Court of Appeal held (*Bartram v. Bartram*[27]) that in such a case, if there was no intention to resume the matrimonial relationship, there was no termination of desertion notwithstanding that the parties had resumed a common household. It is difficult to see, however, how the two Court of Appeal decisions can both be right, if one regards the matter from the standpoint of principle. If living in the common household will prevent desertion arising it should also, as Lord Merriman considered, terminate it, since living under such cirsumstances must be inconsistent with desertion. The truth of the matter is, however, that living together in one household cannot be regarded as the legal test of

23. [1948] P. 179.
24. [1874] L.R. 2 Sc. & Div. 374.
25. [1949] P. 227.
26. [1949] P. 374.
27. [1950] P. 1.

whether there is or is not desertion, but is only a rough practical test which is not sufficiently accurate to be applicable in all circumstances, as the second decision of the Court of Appeal shows.

Under these circumstances it would seem that Australian courts would be justified in continuing to apply to this class of constructive desertion the test which they have applied in the past, and not feel constrained to adopt as an absolute rule of law, the test propounded in *Hopes v. Hopes*. There is no general proposition of law laid down by the *Hopes Case*, but merely a method of applying the law to the facts and accordingly no harm would be done by Australian courts adhering to their own decisions, see *Waghorn v. Waghorn*.[28]

28. (1942) 65 C.L.R., p. 297.