

solus agreement merely designated as a mortgage which accordingly could be tested for reasonableness and found wanting.

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## FAMILY LAW

### THE PROBLEM IN RUFF'S CASE

Skerman J. in his judgement in *Ruff v. Ruff*<sup>1</sup> has considered, for the first time in Queensland, the application of the doctrine of condonation to the ground for dissolution of marriage commonly known as constructive desertion. In this context, the issue before the Supreme Court of Queensland in that case was relatively clear: in a petition for dissolution founded on both section 28(b) and section 29 of the *Matrimonial Causes Act 1959-1965*, assuming that the necessary expulsive conduct on the part of the respondent had been made out (on which point the Court was satisfied), could cohabitation of the parties, after the petitioner had become aware of the conduct of the respondent, amount to condonation of the ground relied on by the petitioner?

The learned judge, following both *Manning v. Manning*<sup>2</sup> and *Bullen v. Bullen*,<sup>3</sup> held that the petitioner had reasonable grounds in November 1960 for believing that his wife had committed adultery; and that the petitioner, therefore, was entitled to live separately and apart from his wife. The husband in fact had told his wife to leave the matrimonial home. But she remained until July 1961. As a one-half share in the matrimonial home belonged to her, she declined to leave until the house was sold and her share of the proceeds of sale was made available. This did not happen until July 1961. Skerman J. was, however, satisfied that "the petitioner held and reasonably held a belief in his wife's adultery *throughout the period November 1960 to July 1961* and that it was this state of mind on his part which occasioned him to live separately and apart from her in July 1961 and that such belief persisted *throughout the statutory period of two years thereafter*."<sup>4</sup> The plea of desertion covered a period of not less than two years from July 1961. The learned judge was satisfied that the ground was *prima facie* established in 1960 and continued until at least 1961; the question was, therefore, whether the period of cohabitation from November 1960 to July 1961 amounted to condonation by the husband of the respondent's conduct.

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1. (1964) 7 F.L.R. 133.

2. (1961) 2 F.L.R. 257.

3. [1956] St.R.Qd. 526.

4. (1964) 7 F.L.R. 133 at 135: italics added

## CONDONATION OF DESERTION

The first question is one of principle: can desertion be condoned? It has been accepted in theory by the English Courts that the notion of condonation is inconsistent with a continuing period of desertion—at least, desertion *simpliciter*. As Lord Evershed M.R. pointed out in *Perry v. Perry*:<sup>5</sup> “It is therefore clear that desertion as a ground for divorce differs from the statutory grounds of adultery and cruelty in one important respect. The offence founding the cause of action is not complete, is (as it were) inchoate, until the action is constituted. If one spouse has committed adultery or has treated the other with cruelty, the latter has an accrued right to petition for divorce. He or she may at once repudiate the marriage and is no longer bound to affirm it and reinstate the offending spouse. The deserted spouse has no such right, no such election.” He concludes this line of argument:<sup>6</sup> “. . . . the concept of condonation has, in my judgement, no application, either in strictness or by analogy . . . . to a current period of desertion.” To establish the ground in England, a continuous period of desertion for the appropriate period until the presentation of the petition is essential.<sup>7</sup> At that stage, the petitioner has acquired an accrued right to divorce. The incompatibility of condonation and desertion, then, is based, at least to some extent, upon the absence firstly of a completed matrimonial offence, and then secondly of an accrued right to dissolution.

The Australian courts have not adopted this approach. In Australia the period of desertion commences at the date of separation and must continue thereafter for the appropriate period.<sup>8</sup> The implication here is clearly that once the required period of desertion has elapsed, the matrimonial offence is complete. This is the reasoning behind the conclusion of Dean J. in the Victorian case of *Ivey v. Ivey*<sup>9</sup> where he states: “In Victoria, therefore, but not in England, once the statutory period of desertion is established, the ground is complete, and the only defence which is available is that there has been condonation.” The approach in each jurisdiction to the notion of the completion of the offence, therefore, depends to some extent on the different statutory provisions.

It is interesting to consider whether the ground of desertion can constitute a completed offence in England and whether such

5. [1952] P.203 at 211.

6. [1952] P.203 at 213.

7. Section 1(1) (a) (ii) of the *Matrimonial Causes Act 1965* (England) states: “. . . . “that the respondent has deserted the petitioner without cause for a period of at least three years immediately preceding the presentation of the petition . . . .”

8. Section 28(b) of the *Matrimonial Causes Act 1959-1965* (Australia) states: “. . . that, since the marriage, the other party to the marriage has, without just cause or excuse, wilfully deserted the petitioner for a period of not less than two years.”

9. [1952] V.L.R. 529 at 531. See also *Mitchell v. Mitchell* [1959] V.R. 184.

completed offence of desertion can be condoned. This must, of course, concern the legal effect of renewed cohabitation of the parties after the petition has been presented. In *Perry v. Perry*<sup>10</sup> the Master of the Rolls adverted to this possibility, but expressed no opinion; he did, however, draw attention to *Maslin v. Maslin*,<sup>11</sup> which he suggested covered this point. The matter is not free from doubt; firstly as the decision is one of a first-instance judge only, and secondly as the relevant portion of the judgement of Havers J.<sup>12</sup> is reported in indirect rather than direct speech. The case is thus of lesser authority. In this case, however, the respondent left her husband in July 1947 and never returned. He called to see his wife several times to ask her to return, but without success. The report continues: "*After the husband had filed his petition*, on several occasions the wife asked him to go and see her, and, when he did so, she asked him to stop the night, which he refused to do. On Apr. 3, 1951, however, which was his wife's birthday, at her request he took her out. He saw her home and she asked him to stay the night. He did so." The parties had sexual intercourse. The trial judge found proved circumstances amounting to condonation, and dismissed the petition. Assuming that the events are reported in chronological order, then the decision would be authority, albeit somewhat doubtful, for the proposition that the completed offence of desertion can be condoned as such.

The consequences of the conclusion that the completed offence of desertion can be condoned are interesting. If the ground has been condoned, does subsequent desertion revive the previous offence? One problem, of course, is what is meant in this context by "desertion". It may refer either to the completed offence after two years' physical separation coupled with the necessary subjective attitudes or to the initial separation which if continued for two years would amount to desertion. In the first instance, there can be no doubt that an accrued right to divorce has been acquired, even independently of the condoned desertion. To have any real effect in the context of revival, it must obviously refer to the second alternative. In *Asquith v. Asquith*<sup>13</sup> Lowe J. stated *obiter* that the doctrine of the revival of the condoned offence may apply to desertion. As it is now clearly established<sup>14</sup> that in general the subsequent conduct which revives the previous offence need not amount to an offence *per se*, then *a fortiori* this supports the second alternative. Further, it is probable that the High

10. [1952] P.203 at 213.

11. [1952] 1 All E.R. 477. The case of *Maslin v. Maslin* has recently been approved in this context and followed by Cairns J. in *Ives v. Ives*. *The Times* June 19, 1967.

12. [1952] 1 All E.R. 477 at p. 478: italics added.

13. [1941] V.L.R. 213 at 214.

14. e.g. *Bridges v. Bridges* (1944) 45 S.R. (N.S.W.) 164 and *Schuman v. Schuman* (1961) 106 C.L.R. 566.

Court of Australia would consider that an initial separation in circumstances amounting to desertion, but without the lapse of two years, would amount to a breach of the conditions attached to condonation. In *Schuman's* case<sup>15</sup> the learned judges made the following remark: "But desertion without just cause or excuse *for a significant period* is a completely unequivocal repudiation of the obligations of marriage." (Italics added). This attitude has been previously adopted by the English Court of Appeal in *Beard v. Beard*<sup>16</sup> where condoned adultery was revived by a period of desertion which did not continue for the necessary three years. Accordingly, it is not surprising that the Supreme Courts both of New South Wales and of Queensland have accepted almost without question the second alternative,<sup>17</sup> and have held that once desertion has been established and then condoned, it is revived as soon as the original deserting party again deserts. There is no need to wait for a further two years.

Apart altogether from questions of condonation, resumption of cohabitation during the currency of a period of desertion has, of course, substantial legal effects. Cohabitation is, as it were, the antithesis of desertion. To quote again from Lord Evershed M.R. in *Perry v. Perry*:<sup>18</sup> "There is no doubt . . . . that resumption of the marital relationship or resumption of cohabitation (for this purpose I treat the two formulae as synonymous) puts an end to desertion . . . . Approaching the matter as *res integra* and without regard to authority, I should have thought that the question whether cohabitation or marital relationship has or has not been resumed is a question of fact and degree to be determined according to common-sense principles."<sup>19</sup> The criteria for determining the questions of condonation and of termination of a current period of desertion are thus different. For condonation, the test is "that the husband, with knowledge of the wife's offence should forgive her and should confirm his forgiveness by reinstating her as his wife."<sup>20</sup> Jenkins L.J. in *Perry v. Perry*<sup>21</sup> stated it thus: ". . . condonation properly so called does at all events, involve . . . an election by the injured spouse to affirm the

15. (1961) 106 C.L.R. at p. 576, per Kitto, Taylor and Menzies JJ.
16. [1946] P.8. This has been approved and applied to different circumstances in *Benton v. Benton* [1958] P.12 and *Dunn v. Dunn* [1962] 1 W.L.R. 1480.
17. *Clifton-Steele v. Clifton-Steele* (1962) 3 F.L.R. 457 and *McFinish v. McFinish* [1961] Q.W.N. 15.
18. [1952] P.203 at p. 215.
19. For application of common sense principles, see *Struthers v. Struthers* [1943] S.A.S.R. 89 and *Bartram v. Bartram* [1950] P.1. Also see *infra* at note (37) how this general proposition is affected by s.41A of the *Matrimonial Causes Act 1959-1965*.
20. per Viscount Simon L.C. in *Henderson v. Henderson* [1944] A.C. 49 at 52. Although that decision has been changed by statute, that general proposition holds good.
21. [1952] P.203 at pp. 227 and 228.

marriage notwithstanding the condoned offence." The tests, therefore, of condonation and of termination of a current period of desertion are similar but not identical. Equally, their respective effect is different: condonation is conditional; resumption of cohabitation in terminating desertion is absolute. Once a current period of desertion is terminated by resumption of cohabitation, the parties return, as it were, to square one. It is, accordingly, vitally significant which concept at each stage is applicable to desertion.

#### CONDONATION OF CONSTRUCTIVE DESERTION

The second problem is the relevance of the doctrines of condonation and termination by resumption of cohabitation to constructive desertion. In a sense, constructive desertion is an anomalous concept; the notion of desertion *simpliciter* is probably adequate to deal with circumstances treated under the head of constructive desertion.<sup>22</sup> However, certain provisions relate only to constructive desertion in the Australian legislation.<sup>23</sup> Apart from the Australian statute, however, recent decisions of the English courts, followed by Skerman J. in *Ruff v. Ruff*,<sup>24</sup> have treated constructive desertion differently from desertion *simpliciter*, at least in the context of condonation. The learned judge accepted the reasoning of the English courts, without stating *in extenso* the details of that reasoning.

The argument begins with a consideration of the nature of constructive desertion. Desertion *simpliciter* does not depend, in the first instance, on conduct or behaviour for its existence; it is rather a state of affairs coupled with certain subjective attitudes. Adultery and cruelty, on the other hand, are intrinsically associated with conduct. It seems clear that constructive desertion falls into the second category; it is analogous to cruelty rather than to desertion *simpliciter*. Such was the attitude adopted by Lord Merriman P. in *W. v. W. (No. 2)*:<sup>25</sup> ". . . supposing one is dealing with a cruelty case which is also a case of constructive desertion, identical in every respect on the facts with the charge of cruelty, it does seem to me . . . that it cannot be right to say that one can condone the cruelty but not at the same time condone the desertion." These remarks were not part of the *ratio decidendi* of the case, but nonetheless they have a very strong logical basis.

Such conclusion, that where conduct amounts to constructive desertion as well as to cruelty then such conduct can be condoned, has been clearly accepted by Sir Jocelyn Simon P. in *Howard v.*

22. e.g. The majority view of the *Report of the Royal Commission on Marriage and Divorce* 1956: Cmd. 9678. Para 155 (iii).

23. s.29 of the *Matrimonial Causes Act* 1959-1965.

24. (1964) 7 F.L.R. 133.

25. [1962] P.49 at p. 53.

Howard.<sup>26</sup> The question now is whether conduct amounting to constructive desertion but *not* at the same time equivalent to cruelty<sup>27</sup> can be condoned. Sir Jocelyn Simon takes the argument based on the behavioural distinctions between the two concepts of desertion one stage further. He suggests that the doctrine of *Perry v. Perry*<sup>28</sup> is relevant where "the expulsive conduct is such that the guilty spouse has a *locus poenitentiae* and by suitable contrition and promise of amendment can make a genuine request for resumption of cohabitation with which the injured spouse is bound to comply."<sup>29</sup> By implication, expulsive conduct in such a situation is not really "expulsive" at all in the sense that the departing spouse has been given no just cause and excuse for non-cohabitation, and that a refusal of a *bona fide* request to resume marital cohabitation will *per se* place the other party in a state of desertion. Clearly, rules relating to behavioural offences are scarcely consistent with those relating to the presence of static conditions. But constructive desertion has elements from both. "The conduct has *ex hypothesi* ceased to be such that the injured spouse can rely on it as constituting good cause for separation or founding a subsisting state of desertion."<sup>30</sup> Now, in the circumstances of constructive desertion, this *locus poenitentiae* or power to make an acceptable *bona fide* offer to resume marital cohabitation could not logically exist. Such is the conduct of the guilty spouse that the other party to the marriage is under no obligation to resume marital life. This is, of course, the major step in the argument, and separates the two concepts of desertion from the point of view of condonation. The learned President quotes no authority for such a step, simply because there can be none. It is, at this stage, a matter of principle.

To support this general conclusion, two further methods of argument are used: certain instances of injustice which would result from a refusal to allow constructive desertion to be condoned are quoted;<sup>31</sup> and reference is made to the notion of approbate and reprobate. This last concept lends great weight indeed to Sir Jocelyn Simon's conclusion. "In the present case the husband could only lawfully have sexual intercourse with the wife on the basis that she was his wife: to hold that he could have intercourse with her while continuing to assert that her conduct entitled him to live apart from her would be to allow him to treat her as a mistress, a mere instrument for sexual gratification. The husband would be approbating the marriage by

26. [1965] P.65 at p. 71.

27. This is clearly established: e.g. *Magaard v. Magaard* (1958) 99 C.L.R.1.

28. [1952] P.203.

29. [1965] P.65 at p. 71.

30. [1965] P.65 at p. 72

31. See the references to the homosexual husband, the domineering husband and the husband who reasonably believes his wife has committed adultery at [1965] P.65 at p. 72 per Sir Jocelyn Simon.

sexual intercourse and reprobating it by declaring that the wife's conduct entitled him to bring cohabitation to an end."<sup>32</sup> This approach is, of course, fundamental; and it assumes that the basis of the charge against the respondent is essentially behavioural. The Court concluded that the basic element of condonation is "forgiveness of *conduct* which constitutes a matter of complaint,"<sup>33</sup> and that in principle *conduct* amounting to constructive desertion can be condoned.

#### APPLICATION TO RUFF'S CASE

To return now to *Ruff's case*: the learned judge had to consider whether the circumstances of the case amounted to condonation of the respondent's conduct in giving to the petitioner just cause and excuse to terminate the cohabitation. During the period in question, from November 1960 to July 1961, the petitioner, the respondent and their sons all lived in the matrimonial home. *Ex facie* it was a normal life: the respondent cooked meals; the whole family ate together; the respondent attended to the petitioner's washing. For a period of time, since there was allegedly a shortage of beds, the petitioner and respondent slept in the same bed; but the parties did not have sexual intercourse. Nor did they appear together socially. Under these circumstances, Skerman J. held that the petitioner and respondent had not resumed marital cohabitation, as the respondent merely performed the duties of a housekeeper; albeit the housekeeper did sleep with the householder for a short period of time. Such conduct did not, therefore, amount to condonation; and decree was granted.<sup>34</sup>

#### THE STATUTE OF 1965

It remains now to consider the implications of the amendments made to the Australian legislation of 1959 by the *Matrimonial Causes Act* 1965. Section 39<sup>35</sup> contains the principal reference both to condonation of the ground and revival of the ground, if the condition attached to condonation is broken. As desertion is made a ground for dissolution by section 28(b), it is by implication included in the condonation provisions of section 39. As the specific provisions relating to constructive desertion, on the other hand, are contained in section 29, section 39 is *prima facie* not relevant. The Court has not yet considered the matter, but it is probable firstly that section 39 refers only to the completed offence, thus involving no alteration in the previous position in

32. [1965] P.65 per the President at p. 73. italics added.

33. (1964) 7 F.L.R. 133.

34. (1964) 7 F.L.R. 133 at p. 136.

35. "A decree of dissolution of marriage shall not be made upon a ground specified in any of the paragraphs (a) to (k), inclusive, of section twenty-eight of this Act, if the petitioner has condoned the ground and the ground has not been revived."

Australia;<sup>36</sup> and secondly that section 29 creates no new ground, but merely treats the circumstances stated there to fall within the terms of section 28(b). Unless and until the Court decides that condonation is relevant to a current period of desertion, then section 39 will be treated restrictively as applying to the completed offence only.

Other "continuing" offences, for example cruelty and failure to pay maintenance, are also caught by section 39: one is clearly behavioural in character, while the other relates to a state of affairs rather than to conduct. No general conclusion can, therefore, be drawn from these statutory provisions.

More, however, may possibly be read into the reconciliation provisions in section 41A. This section introduces into Australia concepts similar to those provided for in England by section 1(2) in respect of desertion and section 42(2) in respect of adultery and cruelty, both of the *Matrimonial Causes Act 1965* (England).<sup>37</sup> If the resumption of marital cohabitation was intended to effect a reconciliation, then for the purposes of desertion, such resumption of cohabitation shall not interrupt a current period of desertion; and for purposes of the other grounds (apart from separation), the resumed cohabitation shall not, in similar fashion, be treated as condonation. The terminology of the sections, therefore, suggests that Parliament has intended that condonation applies to the behavioural offences, while a resumption of cohabitation in circumstances of desertion operates to terminate the continuity of such desertion. Constructive desertion has not been dealt with separately by statute; it will fall within the concept of desertion *simpliciter* in this context. There has thus been no change in the basic principles. Statute may indeed be said to have reinforced the previous law on the matter.

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## INDUSTRIAL LAW.

### *Compulsory unionism.*

Comment on the decision of Hanger J. as President of the Queensland Industrial Court in *Re Miscellaneous Workers Award*<sup>1</sup> must be somewhat brief in view of the fact that the decision is the subject of challenge by means of the prerogative writ procedure in the Supreme Court. However, it is thought that something should be said as to the basis of the learned

36. *Supra*: see notes (8) and (9).

37. The corresponding parts of the Australian statute are section 41A(2) in respect of desertion and section 41A(1) in respect of the other grounds, apart from separation, which is dealt with separately.

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1. Reported (1966) 62 Q'land Industrial Gazette 703.