

BODDINGTON-MARTIN v. BODDINGTON-MARTINJ U D G M E N T

delivered by Phillips C.J. on
13th July, 1954.

In this action the plaintiff seeks the dissolution of his marriage on the ground of his wife's desertion.

He claims to be domiciled in the Territory of Papua and has brought his action under Section 11 of the Matrimonial Causes Ordinance 1941-1951 of that Territory. The relevant portion of that Section is as follows:- "Any married person domiciled in the Territory may claim an order for divorce upon any of the following grounds existing or occurring after the marriage:- (c) Desertion for three years and upwards immediately preceding the commencement of the action without reasonable excuse;" Despite its position at the end of that sentence, I think the phrase "without reasonable excuse" was obviously intended to relate to "desertion" and I therefore adopt that interpretation.

As to what "desertion" is, Lord Merriman, P., said in the case of Mummery v. Mummery, (1942) P. 107; - "Lord Merrivale said more than once that no Judge had ever attempted to give a comprehensive definition of desertion and that probably no Judge would ever succeed in doing so, but among the descriptions of desertion which he gave was one that has always appealed to me. He said that desertion was not withdrawal from a place, but from a state of things : Pulford v. Pulford, (1923) P. 18." In the Victorian case of Tulk v. Tulk, (1907) V.L.R. P. 45, 46, Cussen J., observed:- "Desertion commences when one of the spouses, without the consent of the other, terminates an existing matrimonial relationship with the intention of forsaking that other, and of permanently or indefinitely abandoning such relationship. Desertion once commenced continues until either the matrimonial relationship is re-established, or until the deserting spouse, by a sincere and bona fide offer to re-establish it has manifested a change in his intention, or until the deserted spouse consents to the separation or otherwise indicates that he or she is not desirous of re-establishing the matrimonial relationship."

As to what constitutes a "matrimonial relationship," - learned counsel for the plaintiff referred to, and stressed, another passage in Mr. Justice Cussen's judgment in Tulk v. Tulk, in which that learned Judge said that "marital intercourse, the

dwelling under the same roof, society and protection, support, recognition in public and in private, correspondence during separation, making up as a whole the consortium vitae, which the old writers distinguish from the divortium a mensa et thora, may be regarded separately as different elements, the presence or absence of which goes to show more or less conclusively that the matrimonial relationship does or does not exist."

As I read that passage, Cussen J. was not there attempting to set out an exhaustive list of all the elements of a matrimonial relationship and was not saying that, in the absence of one or some of the elements he had mentioned, a matrimonial relationship would not exist : he was instancing things that should be taken into account or, as he said, "regarded," and weighed in a consideration of the question whether a matrimonial relationship existed or not. In his judgment, Cussen J. went on to say:- "The weight of each of these elements varies with the health, position in life, and all the other circumstances of the parties" : and later still he said that, "in determining whether there has been an abandonment, it must be remembered that the fact that parties are living under one roof at the specific date is not necessarily conclusive." He pointed out that in his discussion he had not used the word "cohabitation" because that term, "though often convenient" had, he thought, "led to some confusion, owing to its various meanings. Sometimes it (had) been used to mean marital intercourse, sometimes to mean dwelling under one roof, and sometimes in the wider sense of matrimonial relationship." Marital intercourse is commonly an element of matrimonial relationship, yet there may be a matrimonial relationship without it : in the High Court case of Maud v. Maud, (1919) 26 C.L.R., 1; it was held by Isaacs J. and Gavan Duffy J. that "there can be no desertion while cohabitation continues and there may be a continuance of cohabitation notwithstanding refusal by either spouse of sexual intercourse" : and Higgins J. said that "the persistent refusal of sexual intercourse does not per se constitute desertion" : See also Jackson v. Jackson, (1924) P., p. 19, approved by the House of Lords in Weatherley v. Weatherley, (1947), A.C. 628. On the other hand, a state of desertion is not necessarily ended or interrupted by acts of sexual intercourse between a deserted and a deserting spouse : such acts, unaccompanied by the "setting up of a matrimonial home together or by any intention on the part of the deserting spouse to do so - and mutual intention is of the essence of the matter - do not terminate or interrupt the state of desertion" : Perry v. Perry (1952) 1 T.L.R., 1633, applying Mummery v. Mummery (1942) P. 107 and Bartram v. Bartram (1950) P. 1.

The plaintiff, having alleged that his wife deserted him, therefore has to prove that she withdrew from an existing matrimonial relationship between them (the "factum") and that she did so, without his consent and without reasonable excuse, intending to end that matrimonial relationship (the "animus") : he further has to prove that such a withdrawal on her part continued, with the same intent and without his consent and without reasonable excuse throughout the period prescribed in the Ordinance, namely :- "three years and upwards immediately preceding the commencement of (this) action," that is to say, preceding the 5th of February, 1954. Once the commencement of a desertion has been proved, there is a presumption that that desertion continues; but that presumption may be rebutted by other facts that may appear. Learned counsel for the plaintiff has contended that desertion, once commenced, is presumed to continue until it is shown that a resumption of cohabitation has occurred, and that there is no onus upon the plaintiff to prove that resumption of cohabitation did not take place. But that contention is opposed to the principle laid down by the authorities, which is, that the onus is always on the plaintiff to prove the continuance of the desertion throughout the whole of the requisite statutory period. That principle was reaffirmed only last year by the High Court of Australia in Thomson v. Thomson, (1953) 87 C.L.R. 488, at 498, citing Lord Macmillan's observation in Pratt v. Pratt, (1939) A.C. 417, 420, - "What is required of a petitioner for divorce on the ground of desertion is proof that throughout the whole course of the three years the respondent has without just cause been in desertion."

The only oral evidence given at this trial has been that of the plaintiff. As the action was not defended, the Court has not had the advantage of seeing the defendant in the witness-box or hearing what she might say.

It appears that the parties were both born in India and that they married on 8th February, 1941, at Holy Trinity Garrison Church, Bangalore, Southern India. He had been a tea-planter but, at the time of the marriage, was a Cadet Officer in the Indian Army. Before marriage she was a schoolteacher, and, as events turned out, she seems to have been teaching most of the time since her marriage. On 16th November, 1941, she bore a daughter, Caroline Ann, who is the only child of the marriage.

The marriage was hardly three months old when the plaintiff's battalion was ordered to Irak and he went with it. In May, 1942, he came to India for a very brief visit and a "school" - during which visit he met and cohabited with his wife. He then re-

turned to his battalion, serving with it in the Middle East and in Italy. He returned to India, a Captain, in May, 1945, and was posted to a military camp known as Dehra Dun, which was forty miles from the town of the same name. During his absence on active service overseas, relations between himself and his wife were cordial, he says, and she corresponded with him regularly. At Dehra Dun camp, 2,000 troops were stationed : married quarters were available for the officers and about a dozen wives lived there with their children : the bungalow allotted to the plaintiff had brick walls, a thatched roof, a lounge-dining room, two bedrooms, bathroom, kitchen, etc. : there were facilities for recreation and two daily services by military vehicle to the town of Dehra Dun.

His wife was at Darjeeling and he wrote asking that she and the child join him. They arrived at Dehra Dun town in November, 1945 - on a Monday, he thought - and he met them at the railway station and "booked them in" at a boarding-house, intending to come back on the following Saturday and take them to the camp : meanwhile they would have a chance to rest after their journey and see something of the town. He says that he and his wife had marital relations at Dehra Dun on the occasion of their reunion.

He returned on the Saturday to take his wife and daughter to the camp : but his wife said she would like to see it first before coming to live there. He returned to camp next day "to organise things" and get more stores for the house and he returned to Dehra Dun in the following week and brought his wife and daughter with their light gear, to the camp. But at a party at his bungalow, arranged to enable her to meet people, she seemed to him to become more interested in a Lieutenant Hepworth, who was present, than in other guests or himself. He has said, in evidence:- "(Hepworth) was monopolising her so much that I had to ask him to behave himself as a gentleman should do and mix with the others."

After that party ended, he says, he asked his wife whether she was going to stay at the camp and she said "no," she "didn't like the locality," and would "rather stay in Dehra Dun township" : but she did not, he says, say anything about objecting to him personally.

So she and the daughter returned to the town and the boarding-house, where their accommodation was a single room with a bathroom off it. When he came to town for weekends, he also occupied that room with his wife and daughter. He tried to persuade her to come to live at the camp, as this would save £7 to £10 a week. At this time, he says, :- "Her attitude became 'very far away from me,' a sort of 'couldn't care less' attitude" : he also

says that after her return to the town from the camp there was no further marital intercourse, and that she was "just aloof and rejected any approaches (he) tried to make" and "became more and more frigid as the weeks went on." He began to suspect that she was seeing Lieutenant Hepworth, though he had nothing definite to go on.

Between Christmas, 1945 and New Year, 1946 he came to town, arriving at the boarding-house at about four o'clock in the afternoon, just as his wife and child were going out. He asked his wife to wait while he changed but she did not wait for him. After changing he went to the Dehra Dun Club, where, over some drinks in the bar, he discussed his domestic problem with a friend, Major Macgregor. Then Lieutenant Hepworth came along and the plaintiff said to Major Macgregor, - "I think I'll confront him," which he then did by saying to Hepworth:- "I believe you have been seeing my wife quite a lot?" Plaintiff says that Hepworth immediately replied:- "Well, I have committed adultery with her." Thereupon plaintiff asked Hepworth whether he would "write a statement to that effect," which Hepworth "duly did, then and there, at the bar," and signed in the present of plaintiff and the Major, saying - "You might find your wife has left," just before he left the bar. Plaintiff has told the Court that, as soon as Lieutenant Hepworth had made his oral admission of adultery, it flashed through his mind that he would make Hepworth "sit up," and get him court-martialled and then proceed for a divorce : he said that his object in asking Hepworth to sign that statement was to use it against him in a court-martial and in later divorce proceedings.

After Hepworth had left the bar, plaintiff was, he says, "very upset," and he had a "few more drinks" with Major Macgregor. He then headed for the boarding-house because, he said in evidence, he "wanted to get (his) wife also to sign the statement that Hepworth had signed admitting adultery." He explained to the Court that he wanted her to sign it because he wanted "to get proof" : he was "after a divorce against her" : he also said that although, up till then, he had "no evidence whatsoever" against her, he "accepted (Hepworth's) statement that he had committed adultery with her as proof that she had committed adultery with (Hepworth)." In short, he adjudged her guilty unheard. Nor did he, he says, believe the denials she made, later that afternoon.

When he got to the boarding-house he found his wife and was not there and her light luggage had gone.

He traced her to Dehra Dun's only Hotel, Green's Hotel, and went to her room and knocked. She opened the door, and seeing

him there, ran out past him. He entered the room and was sitting on the side of a bed, talking to his daughter, when his wife returned, accompanied by Lieutenant Hepworth. As to what happened then, plaintiff has said in evidence:- "Hepworth then requested her to sign the written admission of adultery that he had signed earlier that afternoon. She did not seem annoyed. She said - 'Oh no. I have not done anything like this'." At the Court's instance he amplified that account and gave the following evidence:-

"To the Court:-

"Q: Where was the statement at that time?

A: I had put it on the table with my fountain pen.

Q: Had you said anything when you did that? Tell us all that happened.

A: When my wife and Hepworth came into the room, I took the statement that Hepworth had signed out of my pocket and placed it on the table with my fountain pen. I then took the statement and the pen from the table and handed them to Lieutenant Hepworth. I think I said - 'She must sign as well.' He took the statement and pen and read the statement out to her and he said to her - 'You must sign this : you know we have committed adultery.' She said, - 'Oh, no, we haven't, Heppy!' She refused to sign it. I couldn't make any headway. I was very upset and said several times to her, - 'It must be a fact : you'd better sign it' : but she refused. So I just left them and went out of the room taking with me the statement which my wife had put back on the table unsigned."

"To Mr. Sturgess:-

"Q: What was her attitude towards Hepworth in the room at that time?

A: She was more cordial to him than she was towards me. She called him 'Heppy.' She was not hysterical or worked up."

Plaintiff noticed, very soon after leaving that room, that he had left his pen behind so went back to get it. He knocked on the door. He says he heard a bolt being withdrawn before the door opened : but he did not suggest that the child was no longer in the room. He asked for the pen, he says, and "the next thing (he) knew was that Lieutenant Hepworth had punched (him)" near his left eye and a fight between them ensued. People in the

Hotel came and stopped the fight : and presently the military police arrived.

The plaintiff returned to camp and "reported the whole thing" to his Commanding Officer who counselled a week's reflection before action. After thinking things over for a week, the plaintiff decided to go ahead and put in a report that led to Lieutenant Hepworth's being court-martialled on a number of charges and being cashiered. Plaintiff thinks there were five charges and that one was of scandalous behaviour and another of striking a superior officer - but cannot remember the details of the other charges : he also says that he and his wife were witnesses at the court-martial.

So, on the plaintiff's evidence, the position seems to have been that as soon as Lieutenant Hepworth said in the Hotel bar that he had been committing adultery with the plaintiff's wife, the plaintiff at once accepted that as being true as against his wife although he had not then asked her about it : further, that he at once resolved to get Hepworth court-martialled and to seek a divorce, and in pursuance of that resolution, asked for and got a written admission from Hepworth which he later that afternoon tried to get his wife also to sign : but that he met with her refusal and her denials of adultery which he refused to believe and which did not alter his resolve to seek a divorce. Indeed, after the court-martial he did take steps towards seeking a divorce but finally did not go on with the matter because, he says, his witnesses were dispersed, Hepworth's signed admission was with the court-martial papers, and his lawyer advised him not to proceed because of technical difficulties. Hepworth's alleged admission would not, of course, bind the plaintiff's wife and, unless there was some evidence that the plaintiff has not told us about, it is difficult to see how he could have proved adultery against his wife. It should perhaps be mentioned that, if it were found that his wife was in desertion as from the end of 1945, divorce proceedings instituted by the plaintiff would have had the effect of suspending but not of terminating such a desertion : however, any proceedings he may have instituted in 1946 were dropped long before the period relevant in this case, which is the three years immediately preceding the commencement of this action.

Adultery is not in issue here, but Mr. Sturgess has submitted that the plaintiff's suspicions that his wife had committed adultery were "reasonable" and that the husband could rightly take up the position that he need make no approach to his wife until she had "given him an explanation," - an explanation, presumably, of her suspected conduct which she had already denied, though without

convincing the plaintiff. Her side of the matter has not been heard, as she has not appeared : but it is conceivable, in view of her denials at the Hotel, that she may have felt that the plaintiff's obvious acceptance of Hepworth's statement, before questioning her, called for an explanation from the plaintiff.

The fact appears to be that no explanations were made by either side, for the plaintiff has testified that, after the Hotel incident, he did not speak to his wife again or communicate with her or she with him, before he left India in late October, 1947, to come to Australia. He did, however, whilst in India, entirely voluntarily pay 150 rupees a month to his wife's father for her : but he has told the Court that when he came to Australia he stopped maintaining her and the child "because she had left her father's place in India and gone to England, taking her daughter, without any reference to (the plaintiff) whatever."

The plaintiff arrived in Australia in November, 1947 and left there in August, 1948 to come to Papua, where, except for a holiday, he has resided ever since. He is the Manager at Hagita Plantation at Milne Bay, where rubber and copra are produced. He says he has adopted Papua as his country : that he likes the Tropics that he would not go back to India now; and that Papua is his permanent home. I accept his evidence that the Territory of Papua has become his domicil of choice and that he is domiciled in that Territory.

After coming to Papua, the plaintiff did not hear of his wife until 1952, when his mother sent him a letter, dated 18th February, 1952, that she had received from his wife. That letter has been produced and in it the plaintiff's wife said:-

"I would like to know what Terence's plans are for the future, & I would like him to contribute something towards Caroline's schooling. My Father has been paying for that & if they are going to retire this year, it will be far too much for him to carry on with. She is now 10 years of age & is going to an Independent School for which we pay about £25 per term. I teach at the same school, but with the high cost of living here, I can't even live on my salary, leave along clothe and feed us.

Caroline is now at an age when she could write to her Father, so if he does want that, she would be pleased to have his address. This can all be done through you if he would rather have it that way.

I hope this is not going to cause you any trouble :

You need not send him this letter but do just as you think best. I think it is time we reviewed the situation with an open mind."

The plaintiff's reaction to that letter was described in his evidence as follows:- "I replied to that letter ... after getting legal advice and I followed the wording that I had been advised to use by my solicitor. I did not keep a copy of my reply but it was to the effect that as she had more or less just left me and I had been maintaining her for a while, it looked to me that as her father was retiring, she wanted money. I did not offer her any maintenance."

He received no reply to that letter.

About June, 1952, he sent a "cable" to his wife : he did not keep a copy of it but says that it said:- "Will you Caroline join me here" : that was all. He says that when he sent that message he "wanted them back" and "wanted to take up (his) married life again with (his) wife."

He says that he received a reply to that cable, about July, 1952, and that in her reply his wife said that she "was agreeable to come out with Caroline but that there would be a time-lag before she could come out as she was working in a school and had to complete her contract" : she asked him to book passages for herself and Caroline.

That reply from his wife, the first letter she had addressed to him after a separation of over six years and one written in reply to his cable suggesting a reunion after that long separation, was not produced at this trial. When asked where it was, the plaintiff told the Court:- "It was just an ordinary letter between husband and wife and I just tore it up after reading it."

He arranged for his wife's and daughter's passages from England to Samarai, at which port they arrived on the 15th, or "about the middle," of December, 1953.

On the way out, his wife had sent air-letters to him, and two were produced at this hearing:- one, written when her ship was nearing Gibraltar; the other, written when the ship was nearing Fremantle. The first of these was a "newsy" letter, telling him of the farewell parties in England, life on shipboard, and the discomfort both she and Caroline felt in crossing the Bay of Biscay and their dislike of sea travel : it began "Dear Terence" and ended "Our love, Caroline and Cynthia" : there was nothing in it that hinted of past trouble or trouble to come. The second air-letter,

written on 16th November, "Caroline's birthday," when the ship was nearing Fremantle, was also a cheery, "newsy" letter, telling him of the birthday presents Caroline had received, incidents of ship-life, etc.; but it also contained the following passage which, strangely enough, was not, I think, even mentioned in Mr. Sturgess's closing address for the plaintiff:- "I hope everything works out right for us. We shall have to start afresh and forget the past. And I hope I like the country & the people."

As I have mentioned, the defendant and her daughter arrived at Samarai on or about 15th December, 1953. They came by the vessel "Malekula." The plaintiff has described the meeting:-

"I was at Samarai to meet my wife. That was the first time I had seen her since the incident at Green's Hotel in Dehra Dun. I was on the wharf when the vessel came in. The boat duly pulled in. My daughter was on deck; my wife hadn't appeared. After the Customs had allowed us to go on board, she was still in her cabin. She eventually came into the saloon about five minutes after I got on board and greeted me with just an ordinary greeting - a 'how do you do' - and kissed me : just an ordinary greeting. She did not seem outwardly excited. I had expected that she would at least put her arms round me. We were in Samarai approximately four hours and then went to Hagita" (the plantation at Milne Bay) by a friend's launch. (At Samarai) she wasn't over-excited : she didn't ask questions and did not appear at all interested in any of her surroundings."

One unfortunate circumstance, that day, was that none of her heavy baggage arrived on the "Malekula;" for some reason or other it had missed transshipment at Sydney and she consequently arrived at Hagita Plantation with light luggage only and with no prospect of the arrival of the heavy baggage for some weeks.

The plaintiff's house at the plantation appears to have been a good one. It was of fibro-cement and of two storeys and had a fibro roof. On the ground floor were a lounge with a bar, a dining room, an office, a kitchen and laundry and a small room converted into a sewing-room : on the upper floor were another lounge, three bedrooms, bathroom, etc. The house had the amenities of electric light, hot and cold water, modern sanitation and two radios. He had bought a sewing-machine for his wife and erected a swing for his daughter. He had increased the normal native house-staff of two by getting another male servant and a female servant just before his wife arrived. He says she did not like the house and did not think the servants were "up to standard."

He says that his daughter, then thirteen, occupied one of the bedrooms and that he and his wife occupied a larger bedroom in which there were twin beds. On the second day after his wife's arrival, presumably about the 17th December, he sought to have sexual relations with his wife but she said that she was feeling too homesick : he says that on a second occasion (the date of which he did not specify) she declined, and that no marital intercourse at all occurred between them while she was at Milne Bay. Yet apparently they continued to occupy the same bedroom, or, if she or he moved into the third bedroom, he did not mention this.

She cooked or superintended the cooking of the meals and apparently she looked after the house, and the three of them "lived together" as a family, - nothing was said of eating meals apart, for instance. Of a morning she would practise typing on a typewriter she had brought with her and she appeared to be teaching herself shorthand from a book : when he asked her why she was doing this, she used to say "it doesn't matter." Of an afternoon she would sew things for her daughter, but he says that she did not do some mending that he asked her to do. He has complained that she used to go for a swim at four in the afternoon but only invited him to join her once : he did not say whether he had ever invited her to come for a swim. He has complained that, although he thought she might be interested in copra and rubber production, she declined several invitations to come and have a look. He has complained that when he came back from work on the plantation, she was never there to pour out a cup of tea for him or ask him how he had got on at his day's work, though he admitted that his times for getting back from work were very irregular. He has complained that she used not to call him by his Christian name but would begin a remark by saying "By the way," or "Excuse me." As to her general attitude, - he has said in evidence:- "In her attitude towards me there was some warmth missing somewhere ... In public she completely ignored me ... I felt that she was cold, aloof, and as though there was a barrier between us which I just could not seem to penetrate. I felt there was no companionship at all."

About a week after his wife had arrived at the plantation (i.e., on or about 22nd December) ~~he and his wife had a discussion~~ the plaintiff gave a small party at their house so that she would meet some of her neighbours before Christmas. Also, on or about 22nd December, he and his wife had a discussion about Caroline's education.

He says that at that party, "she behaved in a manner as if (he) didn't exist at all" : on the other hand, he says that when she wanted drinks served to the guests, she would address him as

"You."

As for the discussion about Caroline's education, he says that they had already agreed that Caroline should go to St. Gabriel's School at Charters Towers, (Queensland). But his wife said she wanted to travel as far as Port Moresby with their daughter. He pointed out that Caroline would travel on the "children's special plane" and that it would be needless expense for his wife to go to Port Moresby as the children's plane would go right through and she would see nothing of Caroline there : but his wife "still wanted to go to Port Moresby."

Two days later, on the 24th December, his wife typed a letter to a Mrs. Frank of Port Moresby and gave it to her husband. Mrs. Frank was the lady the plaintiff had asked to meet his wife as she passed through Port Moresby on the way up from Australia. The plaintiff opened that letter : he says he did so because his wife had told him she would write to Qantas herself for a passage to Port Moresby and would try and get a job in Port Moresby. That letter was produced at this hearing, and in it she had written:-

"..... Things are not working out too well here at the moment, but I was wondering what the form would be as regards Caroline's help from the Government if I tried to get a job in Moresby for some time? I am a teacher but if you know of any other kind of job that is going I would try to make a success of it. I can do a little typing but no shorthand. Do you know of anything that is suitable?"

I have written to Pat about the dates of departure and I hope they will fit in with the service from here. My idea is to come at the same time as Caroline. Of course this may not fit in as I understand the service is for the children for Charters Towers.

This may sound double dutch to you but I did not explain the family situation before - I had better leave it until a further opportunity."

The plaintiff told his wife that he had read her letter to Mrs. Frank and asked her what she would do if she had a job in Port Moresby and Caroline were at school in Australia. He says she replied that on school holidays she would have Caroline with her and keep her in Port Moresby, and that, when he asked - "And where do I come in?" - she did not reply.

For Christmas (next day) he gave his wife a nylon night-gown saying - "Please put this on tonight for me" : he says that

she replied - "You are the last man that will see me in it."

Some days before this, there had been a reference to her heavy baggage and she had said that "it didn't matter" and that it could be left at Samarai. After the heavy baggage had arrived at Samarai, about 28th December, he said that he would get it brought out to the plantation by the weekly boat, but she said there was "no point in bringing it out : it can stay in Samarai". He then asked why. She said - "I'd rather it stay in Samarai and I'll collect it later." However, he wrote to Samarai to get that luggage sent out.

On 31st December, 1953, he had another party and he says he "felt that she behaved, not as a wife should have done at a party, in that, on one occasion, (he) was standing at the bar and she called out to (him), right across the room, - 'That man behind the bar. Serve the drinks and don't stand there.'" : further she used not to join with him in conversation with his friends but go to another part of the room.

On the 6th of January last, the heavy luggage arrived "on the round tour of one of Burns Philp's boats," the "Osiri." He told her of this and he says that she said:- "It can stay there. I will be going back on the same boat." She did, in fact, leave by that vessel next day, the 7th January, and took Caroline with her. That morning the plaintiff had found a letter from her on his office desk, the letter dated "6th January, 1954" which has been produced. It reads as follows:-

"Dear Terence,

I intend leaving this letter behind on my departure as I have come to the conclusion that we will never ever get on together again. After our quarrel in India in 1945 we were separated for eight years and I accepted your offer to come out to you from England solely on Caroline Ann's behalf. After living with you for approximately twenty-two days, I find I cannot possibly go on. I have no love for you, in fact all my interests in you are dead. Further I will never permit you to have your conjugal rights and I detest plantation life. In view of this neither you nor I are happy and therefore I do not have the slightest intention of ever returning to you again. I will go my way together with Caroline and you will have no further responsibilities whatsoever.

Yours sincerely,

C. Boddington. Martin."

The plaintiff says that her departure was against his wish and that that was the last he has seen of her or his daughter: but, he says, he wrote to her in Samarai asking her "to reconsider the whole thing." Her reply, which has been produced, was as follows:-

"C/o Steamships,
Samarai.
17/154" (presumably meant to be 17/1/54)

"Dear Terence,

The above is my address. I have written to the Headmistress of St. Gabriels, the Director of Education, and Qantas Airways to say that Caroline will not be going to school at the end of the month.

Thank you for your letter and the oddments. I have nothing further to say on the subject, and you can go ahead with your plans.

Cynthia."

The plaintiff says he does not know what her final reference to his "plans" meant at all : and he denies any collusion.

He says that he did not pay the return fares of his wife and daughter to England, whither they have gone; but he believes that his wife cabled to her people for money.

Service on the defendant of the writ and the statement of claim have been proved; and it appears that she wrote to the plaintiff's solicitor, after such service, advising that she did not wish to dispute any issue in this action.

Learned counsel for the plaintiff has contended that the evidence establishes that the defendant-wife deserted the plaintiff without reasonable excuse at the end of 1945, that that desertion continued until the commencement of this action, and that that desertion was not terminated by her coming to Papua at the plaintiff's request and staying with him from the middle of December last until the 7th of January last. Mr. Sturgess submitted that that visit and short sojourn at Hagita Plantation did not amount to a resumption of cohabitation that would end the desertion because, he said, there was no sincere or bona fide intention to resume cohabitation on her part, - she had only come to Papua with the intention of seeing whether she could form an intention to resume cohabitation.

Obviously, if her coming to Papua and living at the

plaintiff's house at Hagita Plantation for that recent, approximately three weeks', period did amount to a resumption of the matrimonial relationship, or as it is sometimes put, to a resumption of cohabitation, that would be fatal to the plaintiff's case. So the first question that should be determined is;- Was there a resumption of the matrimonial relationship or not? Or, to put the question another way;- Assuming for the moment, as against the defendant, that she did desert the plaintiff without reasonable excuse at the end of 1945, did her coming to Papua at his request and the circumstances of her stay with him at Hagita Plantation from the middle of December last until the 7th of January last amount to a resumption of their matrimonial relationship or a resumption of cohabitation or not?

I have already quoted observations made by Cussen J. in Tulk v. Tulk as to matters which should be regarded as of more or less weight in determining whether a "matrimonial relationship" exists or not, and I suggested that he was not, in that case, attempting an exhaustive list. In the case of Mummery v. Mummery, already cited, Lord Merriman, P., said:- "I doubt whether any Judge could give a completely exhaustive definition of cohabitation, and certainly I am not going to attempt to do so, but at least a resumption of cohabitation must mean resuming a state of things, that is to say, setting up a matrimonial home together, and that involves a bilateral intention on the part of both spouses to do so". In Bartram v. Bartram, above cited, Bucknill, L.J. said that the wife's desertion in that case could "only be brought to an end if the facts (showed) an intention on the part of the wife to set up a matrimonial home with the husband;" and Asquith, L.J. said that resumption of cohabitation involves "a bilateral intention on the part of both spouses to set up a matrimonial home together." the passages I have quoted from Mummery v. Mummery and Bartram v. Bartram were cited with approval by the Court of Appeal in Perry v. Perry, (1952) 1 T.L.R. 1633.

But Mr. Sturgess submitted that there could be no true resumption of the matrimonial relationship or cohabitation without a reconciliation between the spouses, and he relied on an observation made by Denning, L.J. in relation to condonation in Mackrell v. Mackrell, namely, - that the forgiveness in condonation must not fall short of reconciliation, which "does not take place unless and until mutual trust and confidence are replaced." Mr. Sturgess also relied on the same Lord Justice's observation in Bartram v. Bartram: "Indeed, I would say in such a case the period of desertion does not cease to run unless and until a true reconciliation has been effected" : but with the greatest respect, it can be shown that this observation goes too far. In Perry v. Perry, for instance,

Hodson, L.J. observed:- "The choice whether to forgive or not is not open during a current period of desertion to the deserted spouse who is asked to receive back his erring partner. Whether he forgives her or not he must take her back and thereafter her desertion is at an end." Further, the High Court of Australia, in Thomson v. Thomson, (1953) 87 C.L.R. 488, has commented on the very observation of Lord Justice Denning in Bartram v. Bartram on which Mr. Sturgess has relied: it said, at p. 494, "But the basis of the decision in Bartram v. Bartram was that there had never been any resumption of cohabitation and, indeed, no intention on the part of the deserting wife to resume cohabitation. If there had been a resumption of cohabitation it would have been impossible to conclude that desertion on the part of the wife continued, even if the resumption did not result, ultimately, in a 'true reconciliation'": (the italics are mine). The facts in Bartram v. Bartram were "entirely different" from those in Thomson v. Thomson, and from the facts in this case. In Bartram's case a deserting wife returned to live under the same roof as her husband, only because there (was) no other accommodation within reach of her work, which was that of a school teacher," but she refused to sleep with her husband or mend his clothes or cook for him or go out with him : it was held that these facts negatived any intention on the part of the wife to set up a matrimonial home with her husband, and that she had acted "not as a free agent," but "under the spur of necessity." In Thomson's case "it was proved that the wife had deserted the husband but that, after a period of fifteen months, at his request, she had returned to the matrimonial home, where, for the following three years, she performed in varying degree her normal domestic duties in a situation between her and her husband which became increasingly bitter. Sexual intercourse did not take place between the parties after the return of the wife. The trial Judge found that at the time of her return the wife was prepared to, and intended to, resume her place as mistress of the house and to care for her husband and children as such, but he was unable to find either that the wife positively then intended to resume sexual intercourse or that she positively then intended never to do so." It was held, affirming the decision of the trial Judge, that "in the circumstances, desertion for the statutory period had not been established."

Of course, each case must depend on its own facts. As Hodson, L.J. said in Perry v. Perry:- "the facts in each case must be carefully considered, because if it be found that there has been a genuine mutual coming together for however short a time, it is clear that, in such a case, desertion has been terminated." And in this case, the question is - Was there a genuine mutual coming

together, even for however short a time?

That it was the plaintiff's wish and intention that there should be a resumption of a marital relationship seems clear. He cabled to his wife:- "Will you Caroline join me here;" and he has given evidence that when he sent that brief message he wanted to take up his married life again with his wife. That short cable went into no details, and did not say on what terms (if any) the suggested reunion should be, although the plaintiff has given evidence that, for some weeks before he and his wife broke in India there had been no sexual relations between them. However, no evidence has been given of his having sent any communication to his wife that attached conditions to his invitation to her to join him, and on the material before me I am satisfied that he wished their matrimonial relationship to be resumed.

But what was her intention in the matter? The Court has to ascertain her intention, if it can, from some letters of hers that have been produced and from the oral evidence given by the plaintiff. His evidence of what she may have done or said seemed to me to be subjective, rather than objective, - it was coloured by his own interpretation of events : further, after seeing and hearing him give evidence, I formed the impression that, in general, he could have told the Court more than he did.

The first of her letters produced was the one she wrote to his mother on 18th February, 1952, which has already been quoted and in which she said she would like her husband "to contribute something towards" their child's schooling as her salary as a teacher was inadequate. After the rupture of 1945, the defendant had taken the child with her. There is no evidence that the plaintiff tried to get possession of the child from her mother at any time, although, according to him, he thought the mother was an adulterous woman. He has told the Court that he voluntarily sent 150 rupees a month to his wife's father, after the rupture of 1945, but that when he came to Australia he ceased to pay that modest monthly sum because he had heard that his wife had taken the child to England and she had not sought his permission first. So far as the child's welfare was concerned, that seems a somewhat inadequate reason for ceasing to contribute to her maintenance and education. The defendant's letter of the 18th February was a sensible, temperate and rational letter and the request made in it seemed a reasonable one. But, as the plaintiff has told us, he rejected that request in a letter drafted for him by his solicitors.

Later, he changed his mind and sent the cable asking his wife would she and Caroline join him here. He says she replied by

letter, agreeing to come after she had finished the term of her contract as a teacher. But that letter has not been produced at this trial because, the plaintiff says, it was "just an ordinary letter between husband and wife" so he "tore it up after reading it." It is unfortunate that that letter is not before the Court and that the Court has thus been deprived of the opportunity of reading the wife's very words and forming its own opinion whether that reply was "just an ordinary letter between husband and wife" or not. Apart from the reservation that she had first to complete her teaching contract, the plaintiff mentioned no other conditions (if any) that she may have attached to her agreement to join him and he did not suggest that in that letter she agreed to come out only as an experiment : so it is assumed that, in that reply, her acceptance of his invitation was unconditional.

At any rate, she and Caroline sailed from England in the "Orontes." The air-letter she wrote, when nearing Gibraltar, has been produced and, as I have already indicated, it was a normal wifely letter : had it been read by a stranger he would never have guessed that she was about to join her husband after eight years apart.

But the air-letter written by her when nearing Fremantle "included these sentences:- "I hope everything works out right for us. We shall have to start afresh and forget the past. And I hope I like the country and the people." What do those words mean? As she had apparently unconditionally accepted his invitation to join him, and as she and her daughter had embarked on the long sea-voyage from England to Samarai, I consider that those words show, prima facie at least, that she realised that there might be difficulties ahead but that it was her genuine intention "to start afresh and forget the past" and to resume a matrimonial relationship with her husband. But she was at that time still enroute to Papua and it is necessary to examine the evidence about what happened afterwards in order to determine whether, in fact, she carried out such an intention.

As already seen, she and her daughter arrived at Samarai by the "Malekula" on or about 15th December last and he was at Samarai to meet them. To understand what followed, it is essential to appreciate their situation at that moment. Although the plaintiff and the defendant had married in 1941 (when he was twenty-six and she was twenty-four) they had only had three brief periods together; - one of not quite three months immediately after the marriage, another of one month when he came back from Irak to India on a brief visit in 1942, and another of not quite two months in 1945; - a total of a little less than six months. That space of

~~time, broken into three as it was, gave the~~

time, broken into three as it was, gave them little chance of arriving at any deep connubial understanding of each other. They had last seen each other in 1945 in a hotel at Dehra Dun, when he was accusing her of adultery and she was denying it and where the turmoil and scandal of a fight between the husband and Hepworth ensued, - a fight stopped by other people at the Hotel and followed by the arrival of the military police. For eight years after that they had been apart, she bringing up the child, Caroline, - as she had done from the beginning, but for the last four years without any monetary assistance from him. For eight years he had gone his road, she hers. And now they were about to meet again. In these circumstances, it would seem reasonable to suppose that, if their reunion was to be a success, it would call for the exercise of the greatest tact, restraint, and understanding by both sides.

The evidence about how they met this delicate situation comes almost entirely from him. He seems to have been disappointed because, when he boarded the "Malekula," his daughter was on deck to meet him but his wife was still in her cabin. He did not go down to her cabin but waited in the saloon where, within a very few minutes, his wife met him. He seems to have expected a more effusive greeting than she gave him : although she kissed him he thought she would at least have thrown her arms round him. The possibility that his wife may have been delayed in the cabin for some simple reason or that she may have expected their first meeting to take place in the privacy of a cabin and the possibility that she may not have been of the type that is demonstrative in public, occur to one, but do not seem to have occurred to him. He seems to have been further disappointed because she was not openly excited and enthusiastic about her new surroundings, the plantation home and the servants, - all of which, of course, must have been very different from what she had known in India and England. His suspicion was aroused by the fact that she had brought a typewriter with her on which she used to practice, and a text-book on shorthand that she used to study, and particularly by the fact that, he says, she did not explain to him why she had brought these things. However, it does appear from the plaintiff's evidence that his wife did wifely duties such as cooking and supervising the preparation of meals, and looking after the house and sewing for their daughter; and that she slept in the same bedroom as he did, though they occupied twin beds. In view of what plaintiff has said of their relations during their last month or so at Dehra Dun, - (that no sexual intercourse then occurred between them), - and in view of the alleged cause of the stormy interview and the subsequent fight at the Hotel at Dehra Dun on the day of their rupture eight years previously, it can be imagined that the subject of sexual relations

between them might prove a particularly delicate one. Yet it appears that he suggested sexual intercourse two days after she arrived. This was too precipitate, apparently, for although he did not say that she declaimed against such relations, he says she put him off on that occasion on the ground that she was too homesick. On a later occasion, he says, she declined his request for intercourse, saying "I am not interested" : but how much later that occasion was, he did not say. He does say that no sexual relations occurred between them while she was at the plantation. Whether or not the plaintiff and his wife had a heart-to-heart talk over things at any time after she rejoined him last December or whether or not they had any discussion at all about a modus vivendi for their living together from then on, the plaintiff did not say, when giving his evidence. But about 22nd December, about a week after she had arrived, they had the difference of opinion about her wish to accompany Caroline as far as Port Moresby, when Caroline was to go to school in Australia, about a month or so later, by air and via Port Moresby. He stressed that this would be a needless and ineffective expense, but she was not convinced. Whether this difference occurred before or after the pre-Christmas party which apparently took place on or about the same day, the plaintiff did not happen to mention : if it occurred before the party, it may have accounted, to some extent, for her alleged brusqueness at that party. But evidently the difference went deep, and she determined to try and go to Port Moresby, because, as has been seen, she wrote to Mrs. Frank in Port Moresby on 24th December to that effect : she went further, she inquired about the prospects of her employment in Port Moresby and said, - "Things are not working out too well here at the moment," and she explained that this was a reference to her "family situation." The significance of that letter, if it was not written wholly in pique, was that it showed that she had come to the conclusion that her return to her husband had not been, or at any rate was unlikely to be, a success, and that she was at least thinking of leaving. Her husband opened that letter, read it and told her he had done so; and he again argued against her going to Port Moresby. He has not told the Court what her reaction was to his having opened and read that letter : many people dislike to have their letters opened and read while in transmission and it would seem unlikely that this incident would promote harmony between them. When, next day, he gave her a nylon nightgown for Christmas with the request that she wear it that night for him, her response, indicating that that was improbable to a degree, should not, perhaps, have wholly surprised him.

Other shortcomings that he has alleged on her part were things such as her habit of not addressing him by his Christian name when speaking to him; her failure to display interest in his

work and in copra and rubber production; her failure to pour cups of tea for him when he got home, irregular though his returns were; her failure to do some mending he put aside for her to do; and her brusqueness or indifference to him at the two parties he gave. The suggestion appeared to be that these alleged shortcomings, trivial though some of them seem to be, were all part of a studied course of behaviour : some may have been, but I do not think that that has been established in regard to all of them. For instance, it is possible that many wives would not be genuinely enchanted by an inspection of the bowels of a copra-drier, though some of them might have the wit to pretend that they were.

The plaintiff stated, in general terms, that from the time his wife got to Milne Bay her attitude was aloof, that there was "some warmth missing somewhere," and that he felt there was a barrier between them which he could not penetrate. But, if he ever tried to overcome what he felt to be her attitude or the barrier he felt to exist by having a discussion with her, he has told this Court nothing of it. The concrete instances he gave of the aloofness and of the barrier he felt to exist have already been recapitulated by me.

Towards the end of December, her heavy luggage arrived at Samarai by the "Bulolo" : and although she said she did not want it brought to the plantation, he arranged for it to be brought out to the plantation and it arrived by the "Osiri" on 6th January last. He told her of its arrival but she announced that it could stay on the "Osiri" as she intended to leave on that vessel next day. She and her daughter did leave on that vessel on the 7th January - and they have since gone to England. That morning he had found on his desk the letter which she had written to him on the 6th and which has already been quoted. In that letter she said:- "After living with you for approximately twenty-two days, I find that I cannot possibly go on" ; and she made it clear that all was over between them as far as she was concerned and that she did "not have the slightest intention of ever returning to him again." In that letter she also said that she had "accepted (his) offer to come to (him) from England solely on Caroline Ann's behalf" : that may well have been true, but it does not, of course, necessarily exclude an intention to resume a matrimonial relationship, for many such relationships are resumed for the sake of the children.

Whether her oral announcement, on the 6th January, that she was leaving next day, gave rise to any discussion or argument or persuasions or recriminations or not, the plaintiff has not told us. But he says he wrote to her at Samarai, asking her to "reconsider the whole thing." She replied that she had "nothing further

to say on the subject" and that he could "go ahead with (his) plans." What she meant by "his plans," he says he does not know.

After carefully considering the evidence that has been given, the inferences that may legitimately be drawn from it, and the arguments of learned counsel, I have arrived at the following conclusions:- I find that when the plaintiff invited his wife to join him, his intention was that their matrimonial relationship should be resumed. I find that when she accepted that invitation and made the journey from England to Papua to join him, she had the welfare of their child in mind but nevertheless genuinely intended to resume a matrimonial relationship with her husband, though as to whether she intended to permit him to have sexual relations with her or not, I am not able, on the material before me, to make a positive finding one way or the other. I also find that there was a "genuine mutual coming together" of the parties and that they did, in fact, resume their matrimonial relationship when she came out and joined him last December, even though their resumed relationship lasted only so short a while : the circumstance that a matrimonial relationship, once resumed, does not last for long or does not result in a "true reconciliation" does not alter the fact of the resumption, as Perry v. Perry, and Thomson v. Thomson respectively show. It follows, from my finding that the matrimonial relationship was resumed, that its resumption would terminate any current desertion on the part of the wife (a desertion that I have so far been assuming): and it further follows, from that, that the plaintiff had not established something he has the onus of proving, namely, a continuous desertion by his wife without reasonable excuse for a period of three years immediately preceding the commencement of this action. His action, therefore, must be dismissed.

I do not wish it to be thought that I am attributing blame to one party or the other for the breakdown of the married life they had resumed so shortly before. I believe that they both wanted their reunion to be a success but I also believe that, in view of the history of this marriage, only an exceptional couple would have made a success of the reunion. The plaintiff and the defendant did not manage to achieve that success, but it should be remembered that the dice were rather loaded against them : they had married comparatively young and had married in war-time and, because of the War, they had only been able to be together, during the first five years of their marriage, for three brief periods that totalled less than six months.