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JUDGMENT NO.84

IN THE SUPREME COURT) OF THE TERRITORY OF PAPUA AND NEW GUINEA)

CORAM: CHIEF JUSTICE, PHILLIPS

8th May, 1956.

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IN THE MATTER of the Matrimonial Causes Act 1945-1955 of the Commonwealth of Australia.

B E T W E E N

ALFRED JAMES WILLIAM HAWKINS

Plaintiff

- and -

MURIEL EMILY HAWKINS

Defendant

JUDGMENT

ACTION FOR DIVORCE.

The plaintiff in this matrimonial action, Alfred James William Hawkins, seeks a divorce from his wife, Muriel Emily Hawkins, on the ground of her alleged desertion. The action is undefended, although due service of the Writ and Statement of Claim on the defendant wife has been proved.

It is stated in the Statement of Claim, which was filed on the 22nd of November, 1955, that these proceedings have been instituted "under Part III of the Matrimonial Causes Act 1945 (Commonwealth of Australia)." That Act 1945-1955 because of the amending Commonwealth Act No.29 some months before this suit was instituted. A slip of that kind is not always avoidable in this Territory: it takes some time for printed copies of Commonwealth legislation to get here. In the circumstances, I think I should, and I do, grant leave to amend the Writ and the Statement of Claim so that the Commonwealth Act is correctly described in them: and I order that further service of the Writ and Statement of Claim, as so amended, be dispensed with.

A supplemental Statement of Claim was filed herein on the 2nd of May, 1956, because the plaintiff, in his original Statement of Claim, had omitted to state that he had not resorted to this jurisdiction for the purpose of instituting this action, - an omission that was a non-compliance with Rule 9 of the Rules of Court - Matrimonial Causes Jurisdiction, Papua. However, I have power under Rule 76 of those Rules to waive that non-compliance and I waive it. The supplemental Statement of Claim, in which the plaintiff has stated that he had not resorted to this jurisdiction for the purpose of instituting this action, need not be served on the defendant: (Rule 19A of those Rules).

Incidentally it may be mentioned that the High Court of Australia, in the early part of last year and before the amending Act No. 29 of 1955 was passed, held that Part III of the Matrimonial Causes Act 1945 of the Commonwealth was a valid law of the Commonwealth: (Hooper v. Hooper, 1955, 29 A.L.J., p.33). Its validity had earlier been questioned by a New South Wales Judge.

The immediately relevant sections of Part III of the Commonwealth Matrimonial Causes Act 1945-1955 are Sections 10 and 11.

Section 10 is as follows:-

"10.-(1) Where any person domiciled in a State or Territory is resident in some other State or Territory and has resided there for not less than one year immediately prior to the institution of proceedings under this Part, that person may institute proceedings in any matrimonial cause in the Supreme Court of that other State or Territory notwithstanding that that person is not, or has not been for any period required by law of that other State or Territory, domiciled in that other State or Territory.

(2) The Supreme Court of each State is hereby invested with Federal jurisdiction, and jurisdiction is hereby conferred on the Supreme Court of each Territory to hear and determine matrimonial causes instituted under the last preceding sub-section."

Section 11 provides:-

"Subject to this Part, the Supreme Court of a State shall exercise any jurisdiction with which it is invested, and the Supreme Court of a Territory shall exercise any jurisdiction conferred on it, by the last preceding section in accordance with the law (other than the law relating to practice and procedure) of the State or Territory in which the person instituting the proceedings is domiciled."

The word "Territory", as used in Sections 10 and 11, is defined in Section 3 (1) of the Act as meaning "Territory of the Commonwealth;" and it is common knowledge that the Territory of Papua has, for all but a few years of this century, been a Territory of the Commonwealth.

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It will be noted that, to be qualified to institute proceedings under Part III of that Act, a person must be domiciled in a State or Territory, and must also be resident in some other State or Territory for not less than one year immediately prior to the institution of proceedings under Part III. In this case, the evidence clearly shows that the plaintiff has resided in the Territory of Papua for more than one year immediately prior to the institution of these proceedings: and he has given evidence that his domicile at birth was in the State of New South Wales and that he still has a New South Wales domicile, never at any time having acquired another domicile as a domicile of choice. He gave evidence of a number of absences from New South Wales from about 1938 or 1939 onwards: but these were all due to postings in the course of his employment with the Department of Civil Aviation or Qantas and he has always returned to New South Wales on his leaves or between such postings and he has never set up a permanent home outside that State at any time. I am satisfied, on the evidence, that he has at no time lost the New South Wales domicile which he acquired at birth. On these facts I find that the plaintiff is a person qualified to institute matrimonial proceedings under Part III of the Commonwealth Act.

Because of the express wording of Section II of that Act, the substantive law that this Court has to apply, in determining whether the plaintiff's action should succeed or not, is the law of his domicile, that is, the law of the State of New South Wales. Obviously, therefore, it is necessary that this Court should be informed as to what the relevant law of New South Wales is. That law, so far as the Territory or Papua is concerned, is "foreign law", and knowledge of it may not be imputed to a Judge of the Territory: the general rule is, that "foreign law" is a matter of fact to be "proved by the evidence of experts in that law." In his opening address Mr. Clay, learned counsel for the plaintiff, referred to the great practical difficulty of securing such experts in this Territory: but he submitted that Section 3 of the <u>State and Territorial Laws and Records Recognition Act 1901-1950</u> of the Commonwealth of Australia pointed a way around that difficulty. That Section enacted that "all Courts," - (and Section 2 of that Act defined "Court" as including Courts of the Territories of the Commonwealth), - "shall take judicial notice of all Acts of the Parliament of any State and of all Ordinances of any Territory." Mr. Clay said that he proposed to produce a copy of the New South Wales <u>Matrimonial Causes Act 1899</u> and he

argued that since the Court had to take judicial notice of that Act, that was all he need do: in other words, he submitted that there was no need to call expert evidence at all. Mr. Clay, at that stage, was unable to tell the Court whether the New South Wales Act of 1899 and the date of the institution of these proceedings. I found myself unable to agree with Mr. Clay's argument. It seemed to me to ask particular New South Wales matrimonial statute as constituting the whole law of New South Wales on the subject. It did not appear to me to follow that the statutory provisions he proposed to put before the Court constituted the whole of the relevant New South Wales law in regard to a suit for divorce for desertion. Without doubt this Court was bound to take judicial notice of such statutory provisions (and any amendments of them up to the date of the institution of this action): but that was not enough. The Court also had to be informed about the way those statutory provisions had been judicially interpreted by the Courts of New South Wales or by the High Court of Australia and had to be informed of any other relevant New South Wales law there might be, relating to suits for divorce for desertion. As is pointed out, in this connection, in Halsbury's "Laws of England", Second Edition, Volume XIII, at p. 615:-

> "If the foreign law is contained in a code or written form, the question is not as to the language of the written law, but what the law is as shown by its exposition, interpretation, and adjudication."

Mr. Clay then called Mr. Lynch, a Deputy Crown Law Officer of this Territory, to give evidence concerning the relevant New South Wales law. It appeared that Mr. Lynch had then worked with the Laws Revision Section of the Territories Department in Sydney until he came to this Territory. Although he had not practised as a barrister in the New South Wales Courts, he had been concerned in the preparation and briefing of a good number of matrimonial causes and had closely studied New South Wales matrimonial law for that purpose. Admittedly Mr. Lynch had not had the amount of practical experience that expert witnesses in foreign law in large civilised communities usually have: but, in view of the difficult circumstances in this Territory, I allowed him to give evidence in regard to New South Wales law, and I may say that I found it helpful.

From Mr. Lynch's evidence, which he supported with statutory and other authority, it appears that in New South Wales "any husband who at the time of the institution of the suit has been domiciled

in New South Wales for three years and upwards (provided that he did not resort to New South Wales for the purpose of such institution) may present a petition to the Court praying that his marriage may be dissolved" on various specified grounds, one of which is - "that his wife has without just cause or excuse wilfully deserted the petitioner and without any such cause or excuse left him continuously so deserted during three years and upwards." This had been provided by Section 13 of the Matrimonial Causes Act 1899 of New South Wales, which was, he said, still in force. Mr. Lynch said that the judicial interpretation that that statutory provision had received in New South Wales did not diverge from the judicial interpretation that has been given in this Territory and in England to similar statutory provisions. Mr. Lynch also told us that, in New South Wales, the Court had power to dismiss a petition if, in its opinion, the petitioner's conduct had induced the wrong complained of: (Section 20 (1), ibid.); and that the Court was bound to dismiss a petition if the petitioner had been accessory to or connived at or condoned adultery of the other party to the marriage or if it found that the petition had been presented or prosecuted in collusion with a respondent; (Section 18(b), (c); ibid.). He said that Section 60 of the same Act empowered the Court to make orders as to the custody and maintenance of the children of a marriage, including orders for access to them.

Applying that New South Wales law to the present case, it follows that the plaintiff has to establish his wife's desertion by proving that she deserted him wilfully, that she deserted him without just cause or excuse, and that she remained away from him without just cause or excuse and continuously during a period of three years and upwards. The question then is, whether the plaintiff has established such a desertion on the part of his wife.

It appears from the evidence that the parties were married according to the rites of the Church of England at St.Paul's Church in Sydney by the Reverend F.H. Hordern on the 4th of April, 1942. At that time the plaintiff was twenty-six years of age and his bride twenty years of age. The copy Marriage Certificate put before the Court showed that the consents of the bride's parents to her marriage had been given in writing,as was required (the Court has been told) by the law of New South Wales. I therefore find that that marriage was validly celebrated.

This being an undefended action, the evidence concerning the history of the marriage has come almost entirely from the plaintiff. He has told the Court that at the time of the marriage

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he was a coxswain employed by the Department of Civil Aviation in Sydney and that his earnings after taxes were deducted, were about £8 per week. His wife, prior to the marriage, had been working and earning money. After the marriage the parties first resided in a flat at Edgecliff in Sydney and lived happily there. Five or six months later, the Department of Civil Aviation transferred him to Groote Island in the Gulf of Carpentaria, - a flying base that had no married accommodation. He went there alone and his wife went to live with her mother. On the 17th May, 1943, while the plaintiff was still away at Groote Island, his wife bore a son, Rodney James Hawkins, who is the only child of the marriage. In August or September of 1943 the plaintiff came back to Sydney and he and his wife got a flat at Bondi and set up house there. He says they got on fairly well there for a while but then his wife began to complain that she was not going out very much and did not have enough to spend on herself; she seemed to feel that she was missing something by being married. Early in 1944 the Department of Civil Aviation sent him to Townsville. He went there alone but his wife had agreed to follow him later. There were no Departmental married quarters available at Townsville when he arrived there but he subsequently got the offer of private accommodation and wrote to his wife asking her to join him. He says that she refused to come, saying that she was "through with married life." In August, 1944, he got special leave to go to Sydney to persuade her to join him. She was still living in the flat at Bondi and he went there and asked her to come to Townsville: she refused, saying that she did not like married life and would rather be free. He says that, at about 8 or 9 o'clock that evening, an American sailor knocked at the door and "some words" passed between him and the plaintiff, with the result that the sailor left. A scene with his wife ensued and she said she did not want to be married to him and ordered him out of the place. He did not leave, however, and stayed at Bondi during the two weeks that he was in Sydney on that occasion. During that fortnight he and his wife had no sexual relations, but he continued to urge her to come to Townsville with him and he even got her mother to help in those persuasions. Finally, the wife agreed to come to Townsville with him: and she did return with him, bringing their child. By this time the accommodation that the plaintiff had previously negotiated for had been taken by someone else, but he and his family managed to find house-room in the D.C.A. Barracks. He says that at this period marital relations between him and his wife were resumed but that they used to have tiffs and she was discontented. After three or

four months he got an offer of accommodation elsewhere, namely, a share of a house; but his wife by then did not want to move and they stayed on in the D.C.A. quarters. About February, 1945, he says, his wife said that she wanted to go back to Sydney: he threatened that "if she was going to Sydney to have a good time" he would not let her take the baby with her: but that threat did not deter her and she packed up and went back to Sydney alone. He looked after the baby with the assistance of the wife of one of his work-mates. After a "couple of months" the baby became sick and he wrote and told his wife's mother of this. His wife then returned to Townsville and to their quarters in the D.C.A. Barracks. This time there were no marital relations, and it would appear that the situation between them became somewhat strained, because he went to live in the part-house that he had been offered earlier, while she stayed on in the D.C.A. quarters with their child. She at that time was employed in the D.C.A. Mess. He says that their relations deteriorated and that, although she would at first let him visit the child, she presently used to prevent him from seeing the child, - a situation he did not feel that he could overcome without making a scene in the presence of other people living around them. The plaintiff has told the Court that, on the night of "V.J. Day", (14th August, 1945) he expected the celebrations to be rowdy, so went over to the D.C.A. quarters to see his child; he found the quarters empty except for his baby and he took the child back to the house he was living in and looked after the child there, with the assistance of the lady who owned the house. Some weeks later he resigned from D.C.A. and came, with his child, to his mother's place at Botany in Sydney: he says that he asked his wife to come with him but that she refused to do so and remained in Townsville. For several months he and his child lived at his mother's place at Botany and then Qantas offered him a job in the Far East at Sourabaya, to be followed by a posting to Singapore. As he did not feel that he could take the child with him to the Far East, he talked the matter over with his mother and they arranged that the child should be left with his wife's mother so that the child's mother might freely have access to the child if she wished. When, in pursuance of that plan, he took the child to his wife's mother's place, he found his wife there. He says he had not expected to see her there, as he did not know she was back. He also says that he then "asked her would she consider having another go at married life but she said she would not consider it." A few days later he left for Sourabaya, where he was for four months before going on to the Flying Boat Base at Singapore. While he was in the Far East,

and apparently ever since, he has been sending £3 a week for the maintenance of his child. His wife was working and earning her living independently. He used to write to his wife from the Far East, addressing the letters "care of" her mother, and she used to write to him from time to time, saying how their boy was. He says that towards the end of September, possibly in October 1947, she wrote to him in Singapore and said - as he put it - that "she would like to give married life another go." He replied saying that he was quite willing and he arranged her passage to Singapore. She came, bringing the child. For about a month they had to share a house but after that they had a place to themselves. They resumed marital relations, and he says that for the first couple of months they were happy. But early in 1948 his wife said that she wanted to return to Australia, giving as her reason that she did not want to remain married. In spite of his objections she persisted in her wish to return and the ensuing friction between them became intolerable and there were frequent scenes. So he arranged for her passage to Australia and she went, taking the child with her. He continued to send money for the child's upkeep and a more or less formal correspondence between him and his wife continued. Early in 1949, about February or March, he went home to Sydney on leave and he visited his wife's mother's place, which by this time was at Balmain. While he was there his wife, who did not live there, happened to call in and, he says, her immediate remark was - "Don't ask me to come back:" he says that at that time he would have been willing for her to come back. He did not see his wife again before leaving for Singapore, alone, two months later. Again he kept sending money for the child and the desultory correspondence continued. He next came to Sydney in December, 1949, the Qantas Flying Boat Service to Singapore having been discontinued. He says he next saw his wife at her mother's place shortly after Christmas of that year and asked her to come back to him, telling her that there was plenty of room at his mother's place until he could find her a home of their own: but she refused, saying - "No, I don't want married life again." After he had been about six weeks in Sydney, Qantas sent him to Port Moresby, where he arrived either late in January or early in February, 1950. He came alone and he continued to send money for his son's maintenance and continued to write formal letters to his wife, as before. In June, 1950, he transferred to the Department of Civil Aviation, Port Moresby. Some time in 1952, he says, his wife wrote a letter to him that was friendly in tone. This led to a friendlier correspondence between them, and she eventually wrote, asking him to have her back again. He said he would, and he arranged

a passage for his wife and child through the Department. She and their child arrived in Port Moresby about the end of July, 1952, and he met her on her arrival. He says her first words were - "Can I go back if I don't like it?": she also told him that she did not wish to have sexual relations with him, though after about a week or ten days she relented in that respect. She liked the house but they did not get on very well; they had arguments, and, he says, she seemed discontented with almost everything. Although he went out of his way to be pleasant to her, she did not respond. She was a good mother to the child, who seemed to like the place. She did not specify anything in particular as annoying her but just seemed generally discontented. However, she finally said that she wanted to go back to Australia because she did not like the place and did not like being married. He says that he tried to persuade her not to go but she was definitely set about going; and, as he could only have stopped her by force, he let her go. She returned to Australia, with their child, after having spent only six weeks in the Territory. The plaintiff has sworn that he cannot think of any conduct of his that should have caused her to leave him. Once again he continued to send money for the child and he continued to write to his wife letters that were neutral in tone, neither friendly nor recriminatory. However, some months after she left, he says, he did write asking her to come back; but she replied that she never intended to come back and he thought it was no use asking her to do so after that. In November, 1953 the plaintiff was transferred by D.C.A. to Cocos Island in the Indian Ocean: but he did not get there because, after spending a couple of days in Sydney en route, he contracted pneumonia and was two months getting over it. About the end of that time (which would be either in December, 1953 or in early January, 1954) he saw his wife at her mother's place one day when his wife came home from work. They had a talk. His version of that conversation is as follows:- "During it I said to her - 'What do you intend to do about us?' She said - 'Everything is finished. I do not intend to take up married life again.' I then said - 'It's no use carrying on this way. I intend to get a divorce.' She then said - 'I wish you luck', and that was the end of the conversation." The plaintiff also said in evidence that he had indicated to his wife, he thought, during that talk, that he wanted to get married again: and, in answer to the Court, he said - "I had a particular person in mind but there was nothing definite between us: I did not mention any particular person to my wife: I just said I would like to marry again." The plaintiff has told

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the Court that he meant what he said to his wife at that interview, and that he did not, after that, again ask her to return to him because he thought it would be useless to ask her to do so. That, he says, was the last occasion on which he has seen his wife: he also says that the last time he cohabited with her was when she visited Port Moresby in 1952.

After that the plaintiff returned to the Territory, apparently getting back to Port Moresby in early January, 1954. He says that he saw a local solicitor, just after his return, about getting a divorce. He continued to send money for the child's upkeep and he and his wife corresponded as before.

He has produced a letter she wrote to him on the 18th of April, 1954. The first half of it is devoted to telling him how their son was getting on, but she then said:- "In regards to us, Jim, you know as well as I that I have no intentions of going back and the sooner it's all finalised the better for you. I am sick of being neither one thing or the other. You can go right ahead with the proceedings. I might as well tell you now, Jim, I do sincerely hope you and Joan will be very happy when you are married. I hope things go much better for you than they have for me, this past few years. So long for now. Muriel." As it was obvious from that letter that his wife knew, when she wrote it, that he wished to marry a particular person, the plaintiff was asked about this. He said that he thought he had mentioned the other person to his wife in letters he had written to her after their last interview at her mother's home in Balmain (in late December, 1953, or early January, 1954). When asked whether his wife's statement in that letter, that he knew as well as she that she had no intentions of going back, was written in reply to any suggestion of his that she should come back to him, he replied - "No. I'm positive about that."

The only other letter from his wife that the plaintiff has produced at this trial was one that was dated the 16th of February, 1955, and that was received by him in Port Moresby. The first half of it gives an account of their young son and his doings. Then came the following passages:- "Rod seems to like your girl friend, Jim. How about our divorce don't you agree that something should be done. It's stupid hanging on all the time like this I am sure we would both feel a lot easier in ourselves if it were settled. It's nearly three years Jim. At least we would be able to do something definite on both our sides. Apparently you intend marrying "(sic)" Joan - which I think is good you are not getting any younger nor she nor I, as we are now

we are wasting our lives - so how about starting it now. Let's get it over and done with. Bye-the-way many happy returns for the 13th. It's damned awful weather - rain - rain - and more rain. Real tropical - hot and humid. I guess that's the lot for now. But think over what I've said. Bye for now. Muriel."

Whether those two letters, written by his wife and produced by the plaintiff at this trial, go to show collusion, is a question that this Court will presently have to consider.

It would appear that the plaintiff has not, since receiving that letter, left the Territory. In November, 1955, he instituted these proceedings on the ground of his wife's alleged desertion "in or about September 1952" and, as the statutorily prescribed period for desertion is three years and upwards, it cannot truly be said that he showed undue delay in commencing this action.

The first question I have to determine, and to determine according to the relevant substantive law of New South Wales, is whether his wife's alleged desertion has been established. I think there can be no doubt that, when she finally left him in Port Moresby in September or at any rate not later than early October, 1952, she did so wilfully and despite his persuasions and protestations. But did she have just cause or excuse for leaving? He says he knows of no conduct of his that should have caused her to leave him. The history of the marriage, as disclosed at this trial, was a very chequered one. The wife at the time of her marriage was only twenty years of age and had, before her marriage, tasted the independence that working and earning money for oneself can give. The parties lived happily together for the first five or six months and then the plaintiff was posted to Groote Island. That was the first of a series of postings to tropical places, most of which would lack the amenities of a city like Sydney. While he was away at Groote Island their only child was born. In latter 1943 the parties had four months together at Bondi, and then he was posted to Townsville. During that four months at Bondi she had begun, he says, to complain against married life. Only with difficulty and as a result of a special trip to Sydney in August, 1944, did he get her to join him in Townsville. About six months later she left him and their infant son at Townsville and returned, against her husband's will, to Sydney. A couple of months later, when the child became ill, she came back to Townsville: but relations between the parties deteriorated and, when the plaintiff returned to Sydney with their child in latter 1945, she stayed on in Townville. They did not live together again until she came to Singapore at her own

suggestion and with his approval, in September or October, 1947. She again left him in early 1948. She did not join him again until 1952, when she wrote to him at Port Moresby asking him to have her back and he agreed to do so. She arrived at Port Moresby in July, 1952. But she again left him, and finally left him, after only six weeks. Every time she left him and on occasional meetings in between, she apparently reiterated that she disliked married life. As this action is undefended, the Court had not had the opportunity of hearing her give her side of the matter: the oral evidence about the marriage has all come from the plaintiff. He seemed to me to be a witness who was honestly endeavouring, though in a somewhat halting and inarticulate way, to tell the truth about their married life. My general impression is that this is a case where the wife's desire for "freedom" and independence made the continuous daily round of married life intolerable to her. The plaintiff seems to have been remarkably patient and forbearing and to have made genuine efforts over a long period of time to hold the marriage together. He repeatedly had her back but, in the end, to no avail. On a rough calculation, the parties have only been together for periods totalling three years out of the fourteen years that have passed since their marriage. The attitude she has taken up and her conduct and her statements since she last left him in 1952 show that that departure was deliverate and final: since then she has evinced no intention whatever of returning to him. On the evidence, I find that she left him in or about September and not later than in early October, 1952, wilfully and without just cause and excuse, and that she has continuously remained away from him without just cause and excuse ever since, - (that is, for a period that had exceeded three years at the time of the institution of these proceedings). In short, I find that, under the law of New South Wales, she deserted him.

But another question remains to be determined and it is this:- Is there any reason why this Court should withhold from the plaintiff the relief he seeks in this action? There is no evidence that he induced his wife's desertion or that he connived at it or that his conduct contributed to it. But, as I have already hinted, the Court has to consider whether the evidence, and in particular the evidence of the two letters written by the defendant to the plaintiff on the 18th April, 1954 and the 16th February, 1955, respectively, show collusion between the parties. Mr. Lynch, in his evidence, referred to Cohen v. Cohen (43 S.R. (N.S.W.), page 37) as a leading New South Wales

case on the subject of collusion: in that case Jordan, C.J. expressed the view (which was concurred in by Halse Rogers, J.) that "an agreement between the parties for the institution or prosecution of a suit for dissolution does not necessarily constitute collusion in every case, and that the test to be applied for determining whether such an agreement does amount to collusion in any particular case is to see whether its nature and terms, when considered in the light of all the relevant surrounding circumstances, are such that its existence is likely to lead to the suppression or falsification of material facts." In that case the High Court case of Hanson v. Hanson (1937) 58 C.L.R. p. 259, was cited. In Hanson v. Hanson Latham, C.J. said:- "The law still frowns, in a growingly indefinite manner, upon any agreement that a divorce should be obtained. A mere concurrence of desire for divorce is not fatal, but I am constrained by the law to hold that an agreement that a divorce should be obtained by one party, with the consent of the other, however honest and creditable to both parties the agreement may be, is a bar to either of them obtaining matrimonial relief:" and Dixon J. (as he then was) said:- "No doubt Courts have in recent times taken a much less strict view than formerly was adopted and many arrangements and agreements between the parties to a suit for dissolution are now considered permissible which, at one time, would probably have been condemned as collusion;" and he instanced possible cases of arrangements in regard to alimony, costs and the like. Collusion, of course, must be affirmatively established: mere suspicion of it is not enough. Does the evidence in this case, then, show that the parties had come to a collusive agreement in regard to the institution or prosecution of this action? According to the plaintiff, he asked his wife point blank at their last interview at Balmain at the end of 1953 or the beginning of 1954, - "What do you intend to do about us?". He says that she replied - "Everything is finished. I do not intend to take up married life again.": he then told her that it was useless to continue as they were and that he intended to get a divorce and marry again, to which she retorted - "I wish you luck." In my view, no collusive agreement may rightly be spelled out of that conversation. On his part, he had announced his intention to seek a divorce; her colloquial rejoinder, "I wish you luck," seems to me to have been an expression of her indifference, not the clinching of any bargain or agreement with him. Very soon after that final interview between them, he was back in Port Moresby. There he at once consulted a solicitor about getting a divorce. There is no evidence to show that the taking of that step was other than his own independent act. From Port Moresby he continued to

write more or less formally to his wife and to send money for the child's maintenance; and in the course of that correspondence he mentioned the name of the woman he hoped to marry when free. That that intimation must have been in a context that showed that he was still resolved to seek a divorce, seems borne out by the language used by his wife in her letter to him of the 18th April, 1954. I refer to the portion of that letter which reads, - "In regards to us, Jim, you know as well as I that I have no intention of going back and the sooner its all finalised the better for you. I am sick of being neither one thing or the other. You can go right ahead with the proceedings. I might as well tell you now Jim, I do sincerely hope you and Joan will be very happy when you are married." These words no doubt indicated that divorce would be a relief to her, and even that she desired it. But they fell far short of constituting part of some collusive agreement between them for a divorce and I do not think she considered them to be such. If she had, she would hardly have used the words she did use in the letter she wrote to the plaintiff in the following year, on 16th February, 1955. I particularly refer to the following passage of that letter:- "How about our divorce, don't you agree that something should be done. It's stupid hanging on all the time like this and I am sure we will both feel a lot easier in ourselves if it were settled." She then said, - "It's nearly three years Jim" - which suggests that she knew he intended to seek a divorce on the ground of three years' desertion and that she realised that the duration of her desertion was approaching that period. In that letter she also states:- "as we are now wasting our lives - so how about starting it now. Let's get it over and done with." Do those words amount to evidence of a collusive agreement between them or are they to be read as an expression of her own strong desire for a divorce and of her curiosity to know what he was doing? The latter interpretation seems to be the correct one: I do not consider that she could have thought when she wrote that letter, that there was any hard and fast agreement or bargain between them, otherwise she would not have phrased the letter as she did; nor would she have ended that letter with the words - "Think over what I've said." There is no evidence before the Court to show that that letter had any effect on the plaintiff's intention to get a divorce, - an intention that he had announced to her as far back as their last interview at the end of 1953 or the beginning of 1954, an intention which he had begun to carry out by seeing a solicitor in Port Moresby early in 1954, and an intention which he finally carried out, when it became practicable to do so, by

instituting this action in November, 1955. Nor is there any evidence before the Court of any concerted action between the parties or of any actual agreement between them to suppress or supply or falsify evidence or to divert the course of justice. For these reasons I consider that collusion has not been affirmatively proved.

I therefore think that the plaintiff should have his Decree Nisi on the ground of his wife's desertion in or about the month of September but not later than the month of October, 1952. I pronounce a decree nisi accordingly.

Learned counsel for the plaintiff has asked the Court to order that the plaintiff should have reasonable access to the only child of the marriage. In proceedings such as these, the Commonwealth Matrimonial Causes Act 1945-1955 empowers the Court to make orders in regard to the custody of any child of the marriage; (and the power to make orders for such custody obviously includes the power to make orders in regard to access to any child of the marriage). Section 10(2) of that Act invests the Court with jurisdiction "to hear and determine matrimonial causes instituted under" Section 10(1) of that Act; and Section 3 of the Act defines "matrimonial causes" as including "suits for the dissolution of marriage, nullity of marriage, restitution of conjugal rights and judicial separation, and also .... as incidental to any such suit, matters in relation to damages, alimony, maintenance, custody, maintenance and education of children, settlements, re-marriage, cross or counter-proceedings and costs, together with all other matters incidental to any such suit." Mr. Clay's application for an order that the plaintiff should have reasonable access to the child of the marriage came extremely belatedly - in fact, it was made in the closing sentences of his closing address. It was therefore somewhat unexpected, - especially as no specific claim for access appeared in the plaintiff's Statement of Claim that had been served on the defendant and as nothing whatever was said by the plaintiff in his oral evidence that foreshadowed such an application. Indeed, the impression that I formed from the plaintiff's evidence and from the two letters from his wife that he produced was that, after the parental tug-of-war over the child at Townsville in 1945, the parties had taken as rational and sensible a view as seems practicable, in the circumstances, concerning the custody and bringing-up of the child and about the plaintiff's access to the child: for example, I understood that the boy had spent the last two Christmas holidays here in Port Moresby with the plaintiff.

The difficulty I feel about this belated application for access is, that I have insufficient material before me on which to base a decision. Nothing whatever was said by the plaintiff when he was giving evidence about a desire to have an order for access to the child or about what arrangements might afford "reasonable access" to the child. And what his wife's views on the matter might be, I cannot even guess. For that matter, it was most unlikely that the Court would have had the opportunity at this trial of hearing her views on the subject, for this reason:- there was nothing in the plaintiff's Statement of Claim that would expressly inform