

HIGH COURT. Apia. 1959. 27, August; 3, September. MARSACK C.J.

Divorce - lengthy period of desertion by husband - subsequent re-association of parties for few weeks - whether this terminated or interrupted desertion - whether there was condonation on wife's part.

A temporary re-association between a wife and husband does not terminate or interrupt a previous desertion on the part of the husband, in the absence of a re-establishment of the matrimonial home or the intention on the part of both spouses to do so.

Mummery v. Mummery [1942] 1 All E.R. 553; Perry v. Perry [1952] 1 All E.R. 1076, followed:

The act of the husband in again abandoning the wife following their short re-association, revived to the wife her rights under the original desertion; any condonation on the part of the wife in temporarily living with the husband being conditional upon the husband fulfilling the obligations of marriage.

Trotter v. Trotter [1957] N.Z.L.R. 579; and Perry v. Perry (supra), referred to.

Jackson, for petitioner.

Cur. adv. vult.

MARSACK C.J.: This is a petition for divorce on the ground of desertion for a period of three years and upwards. The suit is not contested.

The parties were married on the 24th June 1950 in Western Samoa and a child was born to them on the 21st November 1950. Within a fortnight of the marriage, namely on the 6th July 1950, the respondent went to New Zealand, ostensibly for a visit. He did not return to Samoa and on no occasion communicated with the petitioner. He made no contribution whatever towards the maintenance of the child of the marriage. I am satisfied that the respondent abandoned the petitioner and by his act caused her to live separate and apart from him. Accordingly the allegation of desertion is well founded and the statutory period of three years entitling the petitioner to sue for divorce had expired by July 1953.

About the beginning of 1958 the petitioner in her turn went to New Zealand. The respondent was then normally resident in Auckland, but the petitioner and respondent met in Wellington in May 1958. They then lived together for a period of three weeks. The evidence as to this resumption of cohabitation is very scanty, and no attempt has been made to satisfy the Court as to whether or not it was a genuine attempt at reconciliation.

The question for determination is thus whether the petitioner is entitled to rely on the original period of desertion for a dissolution of her marriage to the respondent, or whether the association during a period of three weeks in 1958 amounted to such a resumption of the marital relationship as to bring the original desertion to an end.

Although as I have said the evidence as to the terms upon which the parties temporarily resumed cohabitation is meagre it is possible to draw some conclusions as to the intentions of the respondent from his subsequent conduct. At the end of this period he left the petitioner again, stating that he was going back to Auckland. The petitioner followed him at a later date and found that he was living again with a woman with whom he had set up a household several years previously and by whom he had had four children. I accept the evidence of the petitioner that the respondent informed her he intended to continue living with this woman in Auckland and did not propose to return to his wife. From these acts I deduce that at least from the respondent's point of view his temporary re-association with his wife was not a genuine attempt at reconciliation but was little more than a sexual adventure.

Although sexual intercourse is beyond doubt a most important incident in the marital relationship the Courts have over the years tended more and more to take the view that isolated incidents of sexual relations do not necessarily constitute in themselves a resumption of the marital association to the extent of bringing to an end a period of separation or of desertion. In order that the temporary coming together of the spouses should be effective to terminate a previous period of separation or desertion there should be present, as Merriman P. said in Mummery v. Mummery /1942/ 1 All E.R. 553, a bilateral intention on the part of both spouses to set up a matrimonial home together. Whatever may have been the intention of the petitioner in living with her husband for a time in Wellington I am satisfied that the respondent had no intention of giving up the Auckland home which he had founded some years before, and abandoning his children and their mother who formed the other members of that household. The principle applicable is well expressed in the Australian case of Timms v. Timms quoted with approval by the Master of the Rolls in Perry v. Perry /1952/ 1 All E.R. 1076 at p. 1084:

"Desertion is not terminated or interrupted by casual acts of intercourse or casual visits, without any return to the routine of common life, or anything resembling the re-establishment of the matrimonial relationship."

Applying this reasoning to the facts which I have found in the present case I am satisfied that the three weeks' association as man and wife between petitioner and respondent in May 1958 did not possess the character necessary to operate as a termination of the previous period of desertion. On this ground therefore I think the petitioner is entitled to succeed. In this connection it is important to note that no effort was made by the respondent either during that period of association or subsequently to it to make any provision for the maintenance of the child of the marriage.

Independently of my finding that the temporary resumption of cohabitation was insufficient to put an end to the period of desertion, I think that even if it could be held that the petitioner had condoned the previous desertion by electing to come back to live even temporarily with the respondent in Wellington such condonation must be considered as clearly conditional, that is to say conditional upon the subsequent fulfilment in all respects of the obligations of marriage on the part of the deserting spouse. If he should fail to fulfil these obligations then the conditional condonation would cease to have any effect and the rights of the deserted spouse arising from the original matrimonial offence would be revived. There is ample authority for this proposition in the English and New Zealand cases; reference need only be made to Perry v. Perry (supra) and Trotter v. Trotter /1957/ N.Z.L.R. 579. In the present case I find that respondent abandoned his wife again at the termination of their short re-association, thereby reviving the rights of the petitioner under the original desertion commencing in July 1950 if she had ever lost them.

For these reasons there will be a decree dissolving the marriage. Petitioner will have custody of the child of the marriage. There will be an order (by consent) for a maintenance of the child of the marriage at the rate of one pound (£1) per week payable as from the 1st September 1959. Petitioner does not ask for an order for costs.