NOTES OF CASES

Whitely v. Whitely.[1]

There is no doubt but that *Whitely v. Whitely* is a hard case but good law.

This was a petition by a wife praying for the dissolution of her marriage on the ground that she and her husband had lived separately and apart for a period of not less than five years immediately prior to the presentation of the petition, and that it was unlikely that cohabitation would be resumed—this having been made a ground for divorce by section 2 of the Supreme Court Act Amendment Act 1945. The petition was undefended.

The evidence given for the petition revealed that in 1938 she had obtained at Narrogin, Western Australia, an order against the respondent (under the Married Women's Protection Act 1922) for separation, maintenance, and custody of the two children of the marriage on the grounds of his desertion in 1937 and his wilful neglect to provide reasonable maintenance. At some time after the order for separation the respondent became domiciled in the State of Victoria and was domiciled there at the date of the presentation of the petition. The petitioner contended that she had retained her Western Australian domicil by the operation of section 71 of the Supreme Court Act 1935, which enacts:—"A domiciled person, shall, for the purposes of this Act, include a deserted wife who was domiciled in Western Australia at the time of desertion, and such wife shall be deemed to have retained her Western Australian domicil notwithstanding that her husband may have since the desertion acquired any foreign domicil, and for the purposes of this Act a deserted wife's husband, who was domiciled in Western Australia at the time of the desertion, shall be deemed to have retained his Western Australian domicil notwithstanding that such husband may have acquired a foreign domicil since the desertion."

It will be noticed that the section is extremely wide in its application and is not restricted to the case of a deserted wife who is petitioning on the grounds of desertion. As pointed out by Wolff, J., the section gives to a deserted wife what may be called an artificial domicil "for the purposes of this Act." Such domicil can be set up by the wife as the basis of the jurisdiction of the Supreme Court of Western Australia in divorce and matrimonial causes to

[1] (1947) 49 W.A.L.R. 50.

hear a petition for divorce founded on any of the grounds set out in section 69 of the Supreme Court Act. It thus follows that a deserted wife who was domiciled in the State at the time of desertion may proceed for divorce in the Western Australian Courts on the ground that her husband has committed adultery in New South Wales, even if at the time at which the adultery was committed and at the time of the presentation of the petition the husband was domiciled in the latter State.

It was held, however, in the case under review that the wife could not avail herself of section 71 for the very simple reason that she was not a deserted wife, having lost this status—if it can be so called—by obtaining an order for separation under the Married Women's Protection Act. There is no reason to doubt the correctness of this decision; indeed it appears to be self-evident. The report, however, contains certain *obiter dicta* which do not appear to be in conformity with authority.

At page 52 Wolff, J., says, "No doubt such a decree would be invalid if called into question in the courts of a foreign domicil, and in particular in the courts of the true domicil of the marriage at the time that the petition is lodged." This may well be so in some instances; but it must be remembered that the United Kingdom, New Zealand, and every State in Australia have passed legislation similar to, although not identical with, section 71 of the Supreme Court Act. It is therefore possible that all courts which claim to exercise a jurisdiction similar to that exercised by the Supreme Court of Western Australia under section 71 would recognise the decree of a court elsewhere which is based on the exercise of a like jurisdiction.[2] Furthermore, if the respondent husband was domiciled in a country whose courts would recognise the jurisdiction of the Western Australian court, such recognition will have the effect of causing the decree to be recognised everywhere.[3]

A further point in connection with section 71 may perhaps be touched upon although it is not in any way relevant to the case under discussion. The marginal note to the section reads, "Domicil of a deserted wife." The section, however, is not restricted to the wife, but also provides that the deserted wife's husband shall be deemed to have retained his Western Australian domicil. This provision would enable a husband who has deserted his wife while domiciled in the State to counter-petition and himself ask for relief although at the time of the lodging of his counter-petition he has acquired a domicil elsewhere.[4] It would also enable a deserted wife's husband who had acquired a foreign domicil to initiate proceedings in Western Australia, a privilege which may or may not be valuable—depending upon the law of the husband's new domicil.

[2] Dicey, *Conflict of Laws*, 4th edn., 886, 896 (note t); 5th edn., 936, 943
[3] Armitage v. Attorney-General, (1906) p. 135.
[4] Contrast Bailey v. Bailey, (1909) V.L.R. 299, a decision on the Victorian Act.

McColl v. McLernon.[5]

Counsel for the appellant in McColl v. McLernon should be commended for his courage.

The appellant McColl was convicted in the Court of Petty Sessions, Kalgoorlie, of an offence under section 36 of the Gold Buyers Act 1921, and was sentenced to twelve months' imprisonment. He brought an appeal against his conviction and sentence to the Full Court of the Supreme Court by way of an *order to review* under section 197 of the Justices Act 1902-1942 which provides that "When any person who feels aggrieved as complainant, defendant, or otherwise by the decision of any justice shows by affidavit to a Judge of the Supreme Court sitting in court or chambers a *prima facie* case of error or mistake in law or fact on the part of such justice . . . . the Judge may . . . . grant the applicant an order to review." The appellant sought to show that although the maximum sentence for his offence was two years' imprisonment with hard labour *and* a fine of £300, a practice had grown up in Kalgoorlie of inflicting a much smaller punishment—which generally consisted of a fine only. It was contended on his behalf that this practice had set a "standard" sentence for an offence of this type which should not be departed from.

The Full Court, in discharging the order nisi to review, pointed out that the magistrate had inflicted a punishment within the scope of the penalty which the legislature had authorised him to impose, and that non-compliance with a "custom," even if such custom were established, would not constitute a mistake in law or in fact. In the opinion of Wolff, J., the Supreme Court on the hearing of an order nisi to review has no jurisdiction to interfere with a sentence imposed by a magistrate if that sentence is one which the legislature has authorised the magistrate to impose; the reason being that in such case no mistake in law or fact can be shown, and the basis of the jurisdiction of the Supreme Court cannot be established. It is submitted, however, that it is not impossible for a sentence imposed by a magistrate to reveal a mistake in law even if the sentence is one which it is within his power to impose, with the result that the Supreme Court would on the hearing of an order nisi to review have jurisdiction to interfere. In *Brennan v. Loxton* [6] Dwyer, C.J., gave four instances of such an error occurring, namely, that it is shown:—

(a) that the magistrate took into account some entirely irrelevant material;[7]

(b) that there has been some real misunderstanding of the case;

(c) that some wrong principle has been applied in the consideration of the penalty to be inflicted;

[5] (1947) 49 W.A.L.R. 53.
[6] (1947) 49 W.A.L.R. 95.
[7] Payne v. Wyatt, (1936) 39 W.A.L.R. 13.

(d) that the sentence imposed was so palpably excessive by reason of the triviality of the offence as to shock the conscience.

Having given those instances the learned Judge goes on to say,[8] "If none of these matters is present and *if in fact the sentence imposed is not the maximum,* I find it difficult to appreciate the argument that there has been an error of law."

The significance of the words in italics is somewhat difficult to appreciate. If in fact the sentence imposed is in excess of the maximum, then quite obviously the magistrate has made a mistake in law and the Supreme Court would on the hearing of an order to review have jurisdiction and power to review the sentence. The fact, however, that the sentence imposed is precisely the maximum does not appear by itself to have any significance. It certainly does not reveal a mistake in law or fact; with such a sentence, in the absence of other objectionable features, the appellate court will not interfere.[9]

Many years ago it was held that the Supreme Court can interfere with a sentence imposed by a magistrate on the hearing of an appeal which is an *ordinary appeal* under section 183 of the Justices Act 1902-1942: *Dunleavy v. Dempsey.*[10] This decision, however, has since been doubted by Wolff, J., in *McKenzie v. Griffiths,* [11] in which case the learned judge said, "The sentence was within the powers of the Court to impose, and I may add that I do not think it is within my power to reduce such a sentence." [12] It is submitted with respect that this dictum, which would deny to the Supreme Court on the hearing of an ordinary appeal under section 183 the power or jurisdiction to interfere with a sentence imposed by a magistrate, is unsound.

It is to be observed that the position of the appellate court on the hearing of an order nisi to review is very different indeed from its position on the hearing of an ordinary appeal. In the former case, the basis of the appellate court's jurisdiction is "error or mistake in law or fact," and this being so, the court cannot as a rule interfere with a sentence because its *jurisdiction* to do so cannot be established. An ordinary appeal, however, can be brought whenever (a) a person is summarily convicted, *and* (b) imprisonment is adjudged without the option of a fine, *and* (c) such person did not plead guilty or admit the truth of the complaint.[13] When these matters have been established, the appellate court has jurisdiction upon which no further fetters have been placed; it has power "to confirm, revise, or modify the decision appealed from," and "to make such other order in the matter as the Court may think just." [14]

[8] (1947) 49 W.A.L.R. 95, at 96.
[9] Sinclair v. McKenzie, 47 Journal of Criminal Law, 295.
[10] (1916) 18 W.A.L.R. 90.
[11] (1946) 48 W.A.L.R. 79.
[12] (1946) 48 W.A.L.R. 79, at 80.
[13] Justices Act 1902-1942, sec. 183.
[14] Justices Act 1902-1942, sec. 190.

It is submitted that a power to modify would include a power to increase a sentence as well as to reduce it.[15] The power would operate both ways.

Gibb-Maitland v. The Perpetual Executors, Trustees and Agency Company (W.A.) Limited and Flintoff.[16]

This will interpretation case, reported in 74 C.L.R. 579 on appeal from the Supreme Court of Western Australia, was disposed of by Rich, J., in a judgment of a dozen lines in which he said, "In cases concerning the interpretation of wills one generally finds oneself overwhelmed by a sea of authorities not quite reconcilable with each other. Unless the cases lay down some principle or canon of construction they serve no good purpose." These words would have been sufficient to discourage mention of this case were it not for the fact that Latham, C.J., and Dixon, J., in judgments containing as many pages as that of Rich, J., did words, re-affirmed some important principles.

The testator devised and bequeathed the residue of his estate upon trust out of the income thereof to pay certain annuities to his wife, his two daughters K. and J., and his three named sisters. He then provided that "after the death of my wife and during the lifetime of either of them . . . . (*the three sisters, naming them*) I direct that all surplus income after payment of any annuities then payable shall be divided equally between my two daughters K. and J. and after the death of my said wife and the last survivor of my sisters abovementioned I direct that my trustees shall hold both the capital and income of my residuary estate upon trust for my two daughters K. and J. in equal shares as tenants in common." The will also contained a clause substituting issue for a deceased child of the testator dying before him or before the period of distribution and a clause providing for maintenance of the issue.

The testator was survived by his widow, the two daughters K. and J., and his three named sisters. One of the daughters, K., was then married, and the other, J., subsequently married. The testator's widow died in 1943, and one of the daughters, J., died in 1944 without issue. The respondent Flintoff was the executor of the estate of his wife, the daughter J. The three sisters of the testator were still alive.

The Supreme Court of Western Australia was asked, *inter alia,* on originating summons, "What is the interest of the estate of J. in the estate of the deceased; in what manner should the surplus income after payment of the annuities mentioned in the will of the deceased be distributed?" These questions, were, in effect, "Is there an intestacy regarding the half share in *corpus* given to J., or does it go to her personal representatives; is there an intestacy regarding the half share in the intermediate income given to the daughter J.?"

[15] *Souter v. Souter* (1921) N.Z.L.R. 716, at 724, 725.
[16] In the original action the first respondent was the plaintiff, the appellant and the second respondent the defendants.

Dwyer, C.J., held that the interest in *corpus* vested at the date of death of the testator, and therefore that the share passed to her personal representative. As to the income, he held that is was undisposed of and that there was an intestacy. The appellant K., the other daughter, appealed against the first part of the decision. If she could have established intestacy then she would, as one of the next-of-kin, have been one of the persons entitled in distribution to the other half share of *corpus*. The respondent F. cross-appealed, maintaining that the half share in surplus income given to J. did not devolve as upon intestacy but upon him as J.'s personal representative.

On the appeal before the High Court, counsel for the appellant was faced with an almost insuperable task since he had to establish that the *corpus* did not vest at the date of the death of the testator. In spite of considerable ingenuity he was not able to take the case outside the rules finally approved in *Browne v. Moody*,[17] where Lord Macmillan said, "The date of division of the capital of the fund is a *dies certus*, the death of the son of the testatrix, which in the course of nature must occur sooner or later. In the next place, the direction to divide the capital among the named beneficiaries on the arrival of that *dies certus* is not accompanied by any condition personal to the beneficiaries such as their attainment of majority or the like. The object of the postponement of the division is obviously only in order that the son may during his lifetime enjoy the income. The mere postponement of distribution to enable an interposed life-rent to be enjoyed has never by itself been held to exclude vesting of the capital." It will be seen that these principles applied to the subject case.

Latham, C.J., expressly approved the words quoted. Dixon, J., expressly approved the principle that where the subject of the gift is residue, then in all cases where it is possible the Court shows an inclination to regard the gift as vested in order to avoid an intestacy. Rich, J., agreed with Dixon, J.; in the result, the appeal was dismissed. The cross-appeal, however, called for further argument. As to the devolution of the half share in the intermediate income bequeathed to the daughter J., there are six possibilities any one of which can be supported by previous decisions, namely:—

(a) The half share is undisposed of, and there is an intestacy.

(b) The half share is caught up by the residuary gift and falls into residue.

(c) The half share being given, not for the life of J. but for the lives of others (i.e., the three sisters of the deceased), devolves on the personal representative of J. in a manner analogous to the devolution of an estate *pur auter vie*.

(d) The half share of income being bequeathed to the same person as takes a vested half share in *corpus* follows the

[17] (1936) A.C. 635.

corpus and devolves therewith, namely, on the personal representative of J.

(e) The words "divided equally between" do not import a tenancy in common as is usual, but merely indicate the quantity of the interest given; therefore K. takes by survivorship.

(f) Although a tenancy in common is imported, an implication of cross-remainder in favour of K. should be drawn.

No counsel seriously supported the trial judge's decision that there was an intestacy; Latham, C.J., disposed of this point when he said (at page 586) that if the share of income was not otherwise disposed of then it fell into the final gift of residue. Contentions (c) and (d) were urged on behalf of F., and (e) and (f) on behalf of the appellant. The cases which might support these latter contentions were reviewed by Dixon, J.; many of them will be found conveniently collated in *Re Foster; Coomber v. Hospital for the Maintenance of Exposed and Deserted Children.*[18] His Honour distinguished these cases, saying (at page 594), "The characteristic feature of the limitations (in these cases) is that the interest of each of the donees taking under the preceding gift does not extend beyond his or her life . . . . and that the subsequent gift is a disposition of the fund or property as an entirety or mass." In all the cases put forward to support K.'s contentions one or the other of these characteristics was present. Dixon, J., also pointed out that implied joint tenancy or implication of cross-remainder was in most cases only invoked to avoid an intestacy or a hiatus in the devolution; it will be seen that these factors were not present in the subject case. Dixon, J., said (at page 597), "The limitations to be interpreted in the case before us are of a very different kind from those dealt with in the foregoing authorities or from any to which the construction they adopt has been applied. In the first place, the gift of income and the ultimate gift are to the same named persons in the same shares. Intermediate surplus income is made the subject of a separate precedent gift only because the gift of *corpus* is postponed until the cesser of the annuities charged on income . . . . The necessity of making any implication is lessened by the fact that the residuary gift would catch a half share of income otherwise undisposed of . . . . finally, there is the consideration, which is perhaps the most important of all, that the duration of the gift of income is expressly measured by other lives, namely, the lives of the testator's sisters." He also pointed out that the implication of a cross-remainder in favour of K. would not remove the possibility of a gap in the devolution because if K. died before the last of the three sisters there would be another hiatus.

The contention submitted by the cross-appellant F. was supported in the main by the very apposite decision of the High Court

[18] (1946) 1 Ch. 135.

in *Epple v. Stone*,[19] where the trial judge had stated an example with notional facts exactly the same as in the case under review, and expressed the opinion that on those facts there could be no contention that any sort of survivorship could operate. In the result the cross-appellant succeeded; it was held that the half share in intermediate income bequeathed to J. devolved on her personal representative for the remainder of the lives of the three sisters and the survivor of them.

The principles to be deduced from this decision and from "the sea of authorities not quite reconcilable" are as follows:—

(1) Survivorship may be implied even though there are words importing a tenancy in common in the event of

(i) it being necessary to do so in order to fill a gap or hiatus in the devolution or to avoid an intestacy, or

(ii) the interest of the deceased donee not extending beyond his own life, or

(iii) the gift over on the death of the survivor being a disposition of the fund as an entirety or mass as distinct from the case where a part of the fund may, without abusing the words of the testator, devolve as such on the beneficiaries, or

(iv) there being a combination of two or more of the above characteristics.

(2) Where the words of the will indicate a tenancy in common, survivorship will not be implied unless there are one or more of the factors mentioned in (1) and supported by intention appearing in other parts of the will.

Gore v. Gore [20]

Gore v.Gore, an undefended petition, illustrates the wide discretion conferred upon the Court in Divorce and Matrimonial Causes where the petitioner is seeking relief under section 69 (6) of the Supreme Court Act 1935,[21] which reads as follows:—

> Any married person domiciled in Western Australia may present a petition to the Court praying that his or her marriage may be dissolved, and it shall be competent subject to the next succeeding section for the Court to decree a dissolution thereof, in the case where the husband and wife have lived separately and apart for a period of not less than five years immediately prior to the presentation of the petition and it is unlikely that cohabitation will be resumed.

[19] (1906) 3 C.L.R. 412.
[20] (1947) 49 W.A.L.R. 60.
[21] As amended by the Supreme Court Act Amendment Act, No. 35 of 1945.

In computing the period of separation for the purpose of this subsection separation before the enactment hereof may be taken into account.

Provided that the Court in its absolute discretion may refuse to decree a dissolution of the marriage and shall refuse a decree unless and until provision is made for such maintenance, as in the circumstances the Court thinks proper, of the respondent and any children and the custody and care of any such children.

Provided further that if the petitioner at the time of the presentation of the petition is in default in respect of maintenance payable under any antecedent Court order or under any agreement for the payment of maintenance to the respondent for herself or any child of the marriage, a decree for dissolution of the marriage shall not be granted.

The petitioner gave evidence to the effect that the parties had been married on 15th November, 1933, and in 1936 mutually agreed that thereafter they should live separately and apart, and that the husband should not be responsible for the maintenance of the wife. This arrangement was in fact observed. At the conclusion of his evidence the petitioner, in reply to questions put to him by the trial Judge, stated that he had previously been married in 1926 and that in 1929 he had been divorced by his first wife for desertion.

There appears no reason to doubt that the trial Judge was satisfied that the petitioner's case was within the terms of the Act; but he had to consider whether he should exercise, in favour of or against the petitioner, the discretion conferred upon him by the first proviso to section 69 (6). He expressed the view that the Court should not be ready in cases of this kind to grant a decree to a petitioner already in fault in another matrimonial cause, and accordingly dismissed the petition. The petitioner appealed to the Full Court of the Supreme Court on the ground that the Judge had acted on a wrong principle in taking into consideration the fact that the petitioner had been guilty of desertion in respect of a previous marriage, and for that reason in refusing to grant a decree.

The judgment of the Full Court was delivered by the Chief Justice, who said that the first proviso to section 69 (6) gave the trial judge an absolute discretion; once that conclusion was reached there were no grounds on which the appeal could be allowed. The Chief Justice went even further than the trial Judge in drawing attention to the fact that no maintenance had been paid to the respondent since 1936. He stated that a condition precedent to the exercise of the discretion granted by the section was that if the petitioner were the husband, proper financial provision must have been made for the wife in the past as well as in the future, and intimated that in the circumstances of this case he would have been

disposed on that ground to refuse a decree if the matter had come before him in the first instance.

With all respect to the learned Chief Justice it is submitted that the subsection is not capable of the construction which he appears to have put upon it in the penultimate paragraph of his judgment, where he says, "if there is one thing that the Legislature has demanded *as a condition precedent to every exercise of discretion* given by this new amendment, it is that *proper financial provision shall be made, and shall have been made in the past, in certain cases,*[22] for the maintenance of the wife and family of the petitioner if he is a husband." The first proviso starts by giving the Court an absolute discretion to refuse a decree of dissolution; it then immediately whittles down that absolute discretion by *requiring* the Court to refuse a decree unless and until provision is made for such maintenance *as in the circumstances the Court thinks proper.*[23] The second proviso makes a further inroad upon the absolute discretion of the Court by making mandatory refusal of a decree to a petitioner who is in default in payment of maintenance due under either an order of a competent court or an agreement between the parties.

In the instant case the second proviso had no application. The wife had never sought an order for maintenance; moreover, when the parties separated, it was agreed between them that each should be responsible for his or her own maintenance. The first proviso, despite the remarks of the learned Chief Justice, does not contain, expressly or impliedly, a condition precedent that proper maintenance shall be provided de futuro for a respondent wife. It merely requires such maintenance as, in the particular circumstances, the Court thinks proper; and it may well be that circumstances might arise in which the Court would think it proper not to require any maintenance to be provided for the respondent wife. In the instant case the wife had sought no maintenance at the time of separation; she did not defend the action, nor was she represented at the hearing of the appeal. Her failure to ask for maintenance, both at the time of separation and at the hearing of the petition, might have persuaded the trial judge that in the circumstances of the case it was not necessary or equitable to make any provision for maintenance. But he was absolved from considering those circumstances by his decision to exercise his absolute discretion against the petitioner on the ground that the latter had been the guilty party in a previous matrimonial cause at the suit of his first wife. Even so, his exercise of discretion on that ground might easily have a curious sequel if the respondent wife should hereafter petition under section 69 (6) and disclaim maintenance; would the judicial discretion be exercised against her because she preferred to be completely independent of the husband-respondent?

[22] Author's italics.
[23] Author's italics.

Castle v. Castle.[24]

Among the grounds of dissolution of marriage set out in the Supreme Court Act 1935 is the husband's habitual drunkenness for at least four years coupled with (a) habitual cruelty towards his wife or (b) habitual failure to maintain her.[25] The instant case deals with the question whether a wife can successfully petition on this ground when, during the whole of the four-year period, there was in existence an order of a competent court for the separation of the spouses.

Wolff, J., decided against the petitioner because in his opinion the composite matrimonial offence of habitual drunkenness and failure to maintain is a species of statutory constructive desertion and is restricted to cases where the spouses are under a legal obligation to cohabit. The respondent husband's drunkenness and failure to maintain having been established, it was argued for the petitioner, (1) that each of the grounds of dissolution set out in sec. 69 (3) is separate and distinct, and (2) that the Court should not be concerned to inquire into the particular circumstances under which the parties lived or to find out whether the respondent's misconduct took place at a time when his wife was legally obliged to and did in fact cohabit with him.

The facts were that in 1926 the petitioning wife had obtained a separation order under the (South Australian) *Married Women's Protection Act 1896* which contains a provision to the effect that if the wife voluntarily resumes cohabitation the husband is entitled to have the order discharged. Although the husband did return and live with his wife at odd times and for short periods during the material four years, it appears from the evidence that there was no intention on either side to resume cohabitation; at all events the husband took no steps to have the order discharged. The learned Judge held that at all times the wife had been legally separated from her husband in the sense that as long as the separation order stood she was free from any obligation to cohabit, and that the mere resumption of cohabitation (whether temporary or permanent) did not affect the legal situation.

It would appear from the judgment that a wife must show not merely habitual drunkenness and neglect during the statutory period, but also that during the whole of that period she was under a legal duty of cohabitation, and—in his Honour's opinion—that she did in fact so cohabit. If there is a valid and presently operative separation order, but nevertheless the parties actually live together during the statutory period, neither can rely upon sec. 69 (3) (b).

His Honour's description of the composite matrimonial offence as a species of statutory constructive desertion . . . . "intended to cover a case where one spouse has to suffer the drunkenness and

[24] (1947) 49 W.A.L.R. 105.
[25] Supreme Court Act 1935, sec. 69 (3) (b).

neglect of the other *while they are cohabiting*" [26] seems to suggest that a spouse who proposes to rely on this ground must cohabit with the other and suffer his (or her) misconduct for the whole of the statutory period. He (or she) cannot treat the habitual drunkenness and neglect (of household duties by the wife) as a constructive desertion *simpliciter* unless there is an intention on the part of the offending spouse to bring the cohabitation to an end: see *Boyd v. Boyd*,[27] to which the Court of Appeal referred in terms of approval in *Buchler v. Buchler*. [28] As this particular ground appears virtually unchanged in the Matromonial Casuses and Personal Status Code 1948, sec. 15 (g)—a Code which was drafted by the learned Judge himself—it may be assumed that he is satisfied that his interpretation will work no hardship. But it is respectfully submitted that this is open to considerable doubt.

[26] Author's italics.
[27] (1938) 159 L.T. 522.
[28] (1947) 1 All E.R. 319.