[HIGH COURT OF AUSTRALIA.]

W. SCOTT, FELL AND COMPANY, LIMITED Appellants; Plaintiffs,

AND

F. H. LLOYD . . . . . Respondent. Defendant,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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Sydney, *Dec.* 10, 11.

Griffith C.J., Barton and Isaacs JJ.

Action on contract—Sale of goods—Equitable plea—Contract induced by concealment of material facts—Fraud.

In an action by a purchaser against a vendor for non-delivery on a contract for the sale of coal which the vendor had previously contracted to buy from a colliery company, the defendant pleaded, as a defence upon equitable grounds, that before the making of the contract sued upon the colliery company with whom he had contracted for the supply of the coal had agreed with other persons not to supply coal for shipment to South Australia except to those persons, and had accordingly refused to supply coal to the plaintiffs for that purpose, and the plaintiffs, by fraudulently concealing from the defendant those facts and the fact that they intended to ship the coal in question to South Australia, induced the defendant to enter into the contract sued upon, and the colliery company refused to deliver the coal, at the defendant's order, to the plaintiffs, which was the non-delivery sued for, and the defendant thereupon repudiated the contract. There being no allegation to the contrary in the plea, it was to be assumed as against the defendant that the agreement by the company not to supply coal was subsequent to the contract of sale between the company and the defendant.

Held, that the facts alleged to have been concealed by the purchasers from the vendor were not such as the purchasers were bound by any duty to disclose, and therefore the mere non-disclosure of them did not, under the circumstances alleged, amount to fraudulent concealment such as would entitle the vendor, either in law or in equity, to be relieved from performance of the contract, and the plea was bad.

Decision of the Supreme Court: *Scott, Fell & Co.* v. *Lloyd*, (1906) 6 S.R. (N.S.W.), 447, reversed.

APPEAL from a decision of the Supreme Court of New South Wales.

The appellants brought an action against the respondent claiming damages for breach of a contract to sell to the appellants a quantity of coal which he had previously contracted to buy from the Abermain Colliery Company Limited. The respondent pleaded, *inter alia*, an equitable plea setting up that before the date of the contract sued upon the Abermain Company had, to the knowledge of the appellants, agreed with certain other persons not to supply coal to anyone but those persons for shipment to South Australia, and that the Abermain Company had accordingly refused to supply coal to the appellants for shipment to that State, that the respondent was unaware of this, and that the appellants, by fraudulently concealing from the respondent these facts as well as the fact that they desired to have the coal for shipment to South Australia, induced the respondent to enter into the contract sued upon, and that the Abermain Company had refused to supply to the appellants the coal they had agreed to sell to the respondent, which was the alleged breach, and that the respondent within a reasonable time of his discovery of the facts alleged to have been concealed from him had repudiated the contract sued upon and given notice of repudiation to the appellants.

The appellants demurred to the plea on the grounds that it did not allege that the contract between the respondent and the Abermain Company was made subsequently to the agreement not to supply coal for shipment to South Australia, or that the contract between the respondent and the Abermain Company disentitled the respondent to have delivered to him for shipment to South Australia the coal that company had agreed to sell to him, or that the Abermain Company had rightfully refused to deliver the coal under their contract with the respondent, and that the facts alleged did not entitle the respondent to repudiate the contract, or disclose any duty upon the appellants to inform the respondent of the facts alleged to have been concealed, or constitute a fraudulent concealment.

The Supreme Court overruled the demurrer, and ordered

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judgment on the demurrer to be entered for the respondent: *Scott, Fell & Co.* v. *Lloyd* (1).

It was from this decision that the present appeal was brought by leave of the High Court.

The material portions of the pleadings are more fully stated in the judgments.

Broomfield (*Chubb* with him), for the appellants. The facts alleged in the plea disclose no obligation on the part of the plaintiffs to inform the respondent of the matters alleged to have been concealed. This was not a contract *uberrimae fidei*. The vendor must look out for himself. There is nothing inequitable in holding the respondent to his bargain. He had his action against the Abermain Company for breach of their contract to supply the coal as agreed, and the appellants were entitled to assume that the Abermain Company would carry out that contract, which was an open one, containing no stipulation against shipment to South Australia. There was no fiduciary relationship between the appellants and the respondent, and, therefore, there was no duty to disclose the facts mentioned in the plea: *Story, Equity Jurisprudence*, 2nd ed., sec. 204, p. 131. Mere omission to disclose is not a fraudulent concealment, if the purchaser does nothing actively to mislead: *Walters* v. *Morgan* (2); *Fox* v. *Mackreth* (3); *Turner* v. *Harvey* (4); *Coaks* v. *Boswell* (5).

Rolin (*Barton* with him), for the respondent. The plea sufficiently discloses a fraudulent concealment. It was material for the respondent to know that the appellants intended to ship the coal to South Australia. Not knowing that, or that the appellants had been refused by the Abermain Company, he was not aware of the risk of the latter company refusing to supply the coal. Even though the Abermain Company were bound in law to fulfil the contract, it might have been necessary for the respondent to bring an action for its enforcement. A duty lay on the appellants to inform the respondent of the facts, because he, being ignorant of them, was also ignorant of the existence of

(1) (1906) 6 S.R. (N.S.W.), 447.
(2) 3 De G., F. & J., 718.
(3) 2 Bro. C.C., 400.
(4) Jac., 169.
(5) 11 App. Cas., 232, at p. 235.

any reason for hesitation, and could not be expected to make inquiries. The appellants knew of the risk, and deliberately led the respondent into it, knowing that he was unaware of it. They were guilty of fraud in not making it known to him, and so not giving him an opportunity of protecting himself. The promisor is not bound to fulfil his promise in a sense in which the promisee knew, at the time the contract was made, that the promise was not intended: *Smith* v. *Hughes* (1).

A non-disclosure, which leads the promisor into making a promise he would not have made if there had been a disclosure, is equivalent to fraudulent concealment.

Counsel for the appellants were not called upon in reply.

Cur. adv. vult.

December 12th.

GRIFFITH C.J. This was an action for non-delivery of coal under a contract, alleged to be for the sale of coal, and which according to the declaration was as follows:—"That the defendant should sell to the plaintiffs and the plaintiffs should buy from the defendant five thousand tons of Abermain best screened coal which had before then been purchased by the defendant from the Abermain Colliery Company Limited under a certain agreement made between the defendant and the said Abermain Colliery Company Limited and dated the 23rd day of January 1906 at the price of seven shillings and sixpence per ton upon certain terms and conditions set out in the said contract between the defendant and the said Abermain Colliery Company Limited." It does not appear distinctly whether the contract was for five thousand tons already ascertained, or for the future delivery of unascertained coal, but it was probably the latter. The defendant pleaded as an equitable plea that "before the date of the alleged agreement between the plaintiffs and the defendant the said Abermain Colliery Company Limited had entered into certain agreements with certain persons other than the plaintiffs and the defendant, whereby they had agreed not to supply coal for shipment to South Australia to anyone but the said persons, and the said Abermain Colliery Company Limited had accordingly refused to supply coal to the plaintiffs

(1) L.R., 6 Q.B., 597.

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for shipment to South Australia, all of which facts the plaintiffs at the date of the said agreement between the plaintiffs and the defendant well knew, but of which the defendant was ignorant, and thereupon the plaintiffs by fraudulently concealing from the defendant the facts that the Abermain Colliery Company Limited had entered into such agreement as aforesaid and that the said Abermain Colliery Company Limited had refused to supply coal to the plaintiffs for shipment to South Australia and that the plaintiffs intended to ship the said coal to South Australia induced the defendant to enter into the said agreement in the declaration mentioned and sued upon, and afterwards the plaintiffs asked the defendant to deliver them the said coal and to direct the said Abermain Colliery Company Limited to deliver to the plaintiffs the said coal for shipment to South Australia and the said Abermain Colliery Company Limited refused to deliver the said coal for such shipment which is the non-delivery and refusal to deliver in the action sued for." It will be observed that the plea does not allege that the agreements not to supply coal were made before the agreement between the defendant and the Abermain Colliery Company. It must therefore be taken against the vendor that those agreements were subsequent to the agreement between the company and the defendant. The learned Judges of the Supreme Court were of opinion that the plea was good.

The substance of the plea is that the plaintiffs induced the defendants to enter into the contract sued upon by the fraudulent concealment of facts known to the plaintiffs and not known to the defendant. The mere use of the epithet fraudulent adds nothing to the case as was pointed out in *Wallingford* v. *Mutual Society* (1). If no fraud is disclosed by the case set up, the mere allegation of fraud without showing facts to support it is not a matter to which the Court will pay serious attention. It is therefore necessary to consider whether the concealment alleged in this case was of such facts that the non-disclosure was improper, to use the mildest term, and that must depend upon whether under the circumstances there was any duty in the plaintiffs to disclose them. Now, the law on that subject has often been stated. I will read two passages from the judgment in the case of *Smith*

(1) 5 App. Cas., 685.

v. *Hughes* (1). There *Cockburn* C.J., citing from *Story on Contracts*, vol. I., sec. 516, stated the rule as follows (2):—"'The general rule, both of law and equity, in respect to concealment, is that mere silence with regard to a material fact, which there is no legal obligation to divulge, will not avoid a contract, although it operate as an injury to the party from whom it is concealed.' 'Thus,' he goes on to say (sec. 517), 'although a vendor is bound to employ no artifice or disguise for the purpose of concealing defects in the article sold, since that would amount to a positive fraud on the vendee; yet under the general rule of *caveat emptor*, he is not, ordinarily, bound to disclose every defect of which he may be cognizant, although his silence may operate virtually to deceive the vendee.'" In the same case *Blackburn* J. said (3):—"In this case I agree that on the sale of a specific article, unless there be a warranty making it part of the bargain that it possesses some particular quality, the purchaser must take the article he has bought though it does not possess that quality. And I agree that even if the vendor was aware that the purchaser thought that the article possessed that quality, and would not have entered into the contract unless he had so thought, still the purchaser is bound, unless the vendor was guilty of some fraud or deceit upon him, and that a mere abstinence from disabusing the purchaser of that impression is not fraud or deceit; for, whatever may be the case in a court of morals, there is no legal obligation on the vendor to inform the purchaser that he is under a mistake, not induced by the act of the vendor." I apprehend that that is the law. It cannot make any difference to the application of the rule whether it is a vendor or a purchaser who does not make disclosure, or whether the sale is or is not of a specific article. The duty is the same in each case. Now, what are the facts alleged to be concealed here? The two last are that the Abermain Colliery Company had refused to supply coal to the plaintiffs for shipment to South Australia, and that the plaintiffs intended to ship the coal to South Australia. I fail to see any obligation to disclose the first of those facts, and the second appears to me to be absolutely irrelevant. The remaining

(1) L.R., 6 Q.B., 597. (2) L.R., 6 Q.B., 597, at p. 604.
(3) L.R., 6 Q.B., 597, at p. 606.

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Griffith C.J.

fact alleged to have been concealed is that the Abermain Colliery Company had entered into agreements with certain persons other than the plaintiffs and defendant not to supply coal for shipment to South Australia to any one but those persons. That is to say, that since making the contract to supply coal to the defendant they had agreed that they would not supply coal to the defendant, or to anybody except certain specified persons, for shipment to South Australia. That contract being as it appears upon the pleadings, what is there to prevent the application of the ordinary presumption that subsequent contracts of that kind are not intended to apply to contracts which are already in existence, and which the person who made them is bound to carry out? If a person has made a binding contract with A. to supply him with coal, and then makes a contract with B. not to supply coal except to certain persons, it must *primâ facie* be supposed that he intended to keep his contract with A. That, I think, is the proper way to regard the facts alleged by the plea. All that could be imputed to the plaintiffs would be this, that they knew that after the Abermain Colliery Company had made a contract with the defendant to supply this coal they had made another contract with other persons not to supply it except to those persons, and that if they performed their contract with the defendant they might be breaking their contracts with the other persons or they might not. The plaintiffs might very reasonably have supposed that under those circumstances the Abermain Colliery Company would not have refused to supply coal to the defendant under their contract. Seeing that this was only a reasonable thing to expect, why should they disclose anything to the defendant? There is no rule of law or equity that I know of compelling them to do so. I think, therefore, that the alleged concealment is not a fraud at all.

There is another aspect of the case which to my mind raises more difficulty, and that is this: In a contract for the sale of specific goods it is always an implied term that the vendor has a title to the goods, and when a contract is made it is assumed to be made on the mutual understanding that the vendor can supply those goods. If the purchaser does not know that the vendor is not the owner of the goods, that, I apprehend would be a mutual

mistake. But if there is not a mutual mistake, if the purchaser knew and the vendor did not, then there is high authority for saying that the purchaser is guilty of fraud. But that is not the case made here. It may be contended that this was a contract for the sale of goods which were assumed to be in the potential possession of the vendor. If the purchaser knew that they were not, was it a case of mutual mistake or a concealment of a material fact? The plea does not raise that point. What I have said is not to be taken as an expression of opinion that that would certainly be a case of fraud. Because, although if the purchaser knew that the vendor had no title to the goods, that might be a fraud, yet another question would arise, whether the right to the possession of the goods should be regarded as a question of fact or a matter of law. That is a matter which would require argument if the case should occur and a plea be properly framed to raise the question. Where a man who is lawfully entitled to the possession of goods is unlawfully deprived of them, and is not aware of the fact himself, though the purchaser knows it, the question whether that amounts to fraud is one which would give rise to a very interesting discussion, but it does not arise now. The plea as framed does not make it necessary for us to consider it.

I think, for the reasons I have given, that the demurrer ought to have been allowed, and that judgment should be for the plaintiffs.

BARTON J. The facts set up in the plea as an equitable defence to the action are that the plaintiffs knew and did not disclose that the Abermain Company had entered into such an agreement as described in the plea, that is to say, an agreement with persons other than the plaintiffs and defendant that they would not sell coal for shipment to South Australia to anyone but those persons, that the Abermain Company had refused to supply coal to the plaintiffs for shipment to South Australia, and that the plaintiffs intended to ship the coal in question to South Australia. Now, these being the facts which were not disclosed, the question arises whether the plaintiffs were under any duty to disclose them to the vendor. On this point I will read an often quoted passage from

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the case of *Fox* v. *Mackreth* (1), where Lord *Thurlow* L.C. said:— "I do not agree with those who say, that wherever such an advantage has been taken in the course of a contract by one party over another, as a man of delicacy would refuse to take, such a contract shall be set aside. Let us put this case. Suppose A., knowing of a mine on the estate of B., and knowing at the same time that B. was ignorant of it, should treat and contract with B. for the purchase of that estate at only half its real value, can a Court of Equity set aside this bargain? No; but why is it impossible? Not because the one party is not aware of the unreasonable advantage taken by the other of this knowledge, but because there is no contract existing between them by which the one party is bound to disclose to the other the circumstances which have come within his knowledge; for if it were otherwise, such a principle must extend to every case, in which the buyer of an estate happened to have a clearer discernment of its real value than the seller. It is therefore not only necessary that great advantage should be taken in such a contract, and that such an advantage should arise from a superiority of skill or information; but it is also necessary to show some obligation binding the party to make such a disclosure." That is just such an obligation as I fail to see in this case. What I see here seems to be no more than a superior smartness in dealing. In the case of *Turner* v. *Harvey* (2) the purchaser knew that the vendors, the assignees of a bankrupt, had been kept in ignorance of a circumstance considerably increasing the value of what was sold, and that the sale by them was at an undervalue, and therefore in violation of their duty to the creditors. Lord *Eldon* L.C. said (3):— "The Court, in many cases, has been in the habit of saying, that where parties deal for an estate, they may put each other at arm's length: the purchaser may use his own knowledge, and is not bound to give the vendor information of the value of his property. As in the case that has been mentioned; if an estate is offered for sale, and I treat for it, knowing that there is a mine under it, and the other party makes no inquiry, I am not bound to give him any information of it; he acts for himself, and exercises his

(1) 2 Cox Ch. Ca., 320, at pp. 320, 321.

(2) Jac., 169.

(3) Jac., 169, at p. 178.

own sense and knowledge. But a very little is sufficient to affect the application of that principle. If a word, if a single word be dropped which tends to mislead the vendor, that principle will not be allowed to operate." (There is no suggestion of any actual misleading in the present case). "There have been cases upon contracts made by trustees to sell, which is the situation of assignees, where the Court has said, not that it will order the contracts to be cancelled, but that if the trustee has been negligent, not taking that care to preserve the interest of *cestui que trusts* which he ought to have done, it will not permit the party dealing with him to take advantage of that negligence: if he was dealing with one whom he knew to have a duty, and if that duty was plainly neglected, the contract will not be enforced." And that is the effect of the judgment of the law Lords in the case in question, because the assignees had a duty to the creditors as the other party well knew, and he also knew that the sale at an undervalue was a violation by the assignees of their duty to the creditors. In the case of *Coaks* v. *Boswell* (1), Lord *Selborne*, speaking of the obligation of a purchaser standing in no special fiduciary relation to his vendor, said that as he is "(generally speaking) under no antecedent obligation to communicate to his vendor facts which may influence his own conduct or judgment when bargaining for his own interest, no deceit can be implied from his mere silence as to such facts, unless he undertakes or professes to communicate them." That is the situation of the parties here. I would like to mention, also, some expressions of Lord *Blackburn* L.J. in *Brownlie* v. *Campbell* (2), where he said:—"I quite agree in this, that whenever a man in order to induce a contract says that which is in his knowledge untrue with the intention to mislead the other side, and induce them to enter into the contract, that is downright fraud; in plain English, and Scotch also, it is a downright lie told to induce the other party to act upon it, and it should of course be treated as such . . . And I go on further still to say, what is perhaps not quite so clear, but certainly it is my opinion, where there is a duty or obligation to speak, and a man in breach of that duty or obligation holds his tongue and does not speak, and does not say the thing he was

(1) 11 App. Cas., 232, at p. 235. (2) 5 App. Cas., 925, at p. 950.

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bound to say, if that was done with the intention of inducing the other party to act upon the belief that the reason why he did not speak was because he had nothing to say, I should be inclined myself to hold that that was fraud also." There, of course, Lord *Blackburn* insists upon the necessity for there being an obligation to speak in order that silence may become fraudulent concealment. That was in 1880, and was an affirmative expression of what he said in 1871 in *Smith* v. *Hughes* (1):— "In this case I agree that on the sale of a specific article, unless there be a warranty making it part of the bargain that it possesses some particular quality, the purchaser must take the article he has bought though it does not possess that quality." I remark here that there can be no difference between the obligations of a vendor to the purchaser and those of a purchaser to the vendor. [His Honor then read the rest of the passage already set out in the judgment of *Griffith* C.J. and continued.] This passage exactly describes the real relations between the parties under this contract. There is no pretence that there is any relation between them such as in equity—and this is a plea upon equitable grounds—would raise a duty of disclosure. There is no pretence that there was anything more than the relation of intending buyer and seller between them, which entitled each party *primâ facie* to refrain from disclosing to the other any fact which he with his superior skill or knowledge had discovered, and which might make the contract more advantageous to him as buyer or as seller. If there is nothing more than that then the mere non-disclosure is within the rights of the plaintiffs; and it does not become anything more than non-disclosure, by the fact that in the plea you have the epithet "fraudulent." And as this arose between parties between whom there did not exist any such relation as raised a legal or equitable duty to make a disclosure, it cannot affect the validity of the contract. This appearing by the plea itself, the result is that it does not disclose a defence to the action.

ISAACS J. The declaration in this case sets up an agreement to sell five thousand tons of Abermain best screened coal which

(1) L.R., 6 Q.B., 597, at pp. 606, 607.

had been purchased by the defendant from the Abermain Colliery Company, at the price of seven shillings and sixpence per ton. The plea which has been demurred to sets up the defence of fraudulent concealment. There is a series of facts relied upon for that purpose. Placing them in inverse order, first there was a colliery company agreement called a colliery contract with the defendant for the supply of coal to them. Next there was a colliery agreement with other persons not to supply coal for shipment to South Australia to anyone but those persons, and thirdly there was the plaintiffs' application to the defendant to be supplied with the coal and the refusal of the Abermain colliery to supply it. Fourthly there is the contract with the defendant that is now sued upon. Reading the plea as it ought to be read, not at all events in favour of the vendor, and I think not unreasonably in any case, the alleged agreement with other persons not to supply coal for shipment to South Australia must mean an agreement not to enter into new agreements of that kind. That is the only honest meaning one can give to it. It cannot mean an agreement to break existing contracts. Unless there is in the plea a distinct allegation of an engagement to break existing agreements it is not to be inferred. The plaintiffs' application to be supplied with coal must be taken to mean an application to enter into a new contract express or implied. Then the plea states that there was fraudulent concealment of certain facts which are three in number, first that the Abermain Colliery Company Limited had entered into certain agreements with certain persons other than the plaintiffs and defendant not to supply coal for shipment to South Australia except to those persons, and, if that is taken as I think it ought to be taken, that they had agreed not to make new agreements for that purpose, I do not see how it affects the case. The next fact that was fraudulently suppressed according to the allegation in the plea was that the plaintiffs had applied to the Abermain Colliery Company to be supplied with coal under a new agreement and the company had declined to supply them. It was further alleged that it was the intention of the plaintiffs to ship whatever coal they got under the contract to South Australia. No prior relationship between the parties is alleged. There was no position of

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trust or confidence making it the duty of the plaintiffs to disclose to the defendant what they knew of the matter or what they intended to do with the coal. No such position had been created between them either by words or conduct. No false impression had been created, and there was no active deception, nothing in short raising an obligation on the plaintiffs' part to disclose those facts which were known to them, and nothing which would allow it to be fairly inferred that the colliery company had ever said or led the plaintiffs to believe that the colliery company was going to break its contract with the defendant, and, that being so, there is nothing in the plea. The utmost that can be alleged is that there was silence in respect of certain matters which if the defendant had known he would not have agreed to supply the coal. But that is not sufficient to invalidate this contract, and the passage quoted from *Story*, read by my learned brother the Chief Justice from *Smith* v. *Hughes* (1), I think, embodies the law on this subject:—"The general rule, both of law and equity, in respect to concealment, is that mere silence with regard to a material fact, which there is no legal obligation to divulge, will not avoid a contract, although it operates as an injury to the party from whom it is concealed." That principle was applied in the case of *Ward* v. *Hobbs* (2), a very strong case where a Statute prohibited persons from sending animals infected with contagious disease to market and inflicted penalties on any person so sending them; it was held that the act of sending them if known to be so infected was a public offence, but did not amount by implication to a representation that they were sound, and did not of itself raise any right on the part of the purchaser to obtain damages from the vendor in respect of injury he may have suffered in consequence of their purchase. It was argued there very strongly that, there being a Statute which made it a penal act to send such cattle to market, any person would be entitled to treat the fact of their being sent to market as a representation that they were sound, but the House of Lords held that mere silence on the part of the vendor of cattle was not a representation, on the authority of the principle stated in *Story* in the passage already quoted.

(1) L.R., 6, Q.B., 597, at p. 604. (2) 4 App. Cas., 13.

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Under these circumstances it seems to me that the case cannot be put higher for the defendant than that he was ignorant of these facts at the time when he entered into the contract. But he does not show any obligation by contract, conduct or otherwise imposed upon the plaintiffs to set him right. Under these circumstances I agree that the demurrer should be allowed.

Appeal allowed. Order appealed from discharged. Judgment to be entered for the plaintiffs on demurrer. Respondent to pay the costs of the appeal. Leave to respondent to amend as advised.

Solicitor, for appellants, *Baxter Bruce & Co.*

Solicitor, for respondent, *J. McLaughlin.*

C. A. W.

[HIGH COURT OF AUSTRALIA.]

RICHARD CHANTLER . . . . . APPELLANT;
DEFENDANT,

AND

ADDELLA CHANTLER . . . . . RESPONDENT.
COMPLAINANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Dec.* 17, 18.

Griffith C.J., Barton and O'Connor JJ.

Husband and wife—Leaving without means of support—Child taken by wife from custody of husband against his will—Refusal by Supreme Court to enforce father's right to custody—Infants' Custody and Settlements Act (N.S.W.) (No. 39 of 1899), secs. 5, 6—Deserted Wives and Children's Act (N.S.W.) (No. 17 of 1901), secs. 4, 7.