

[HIGH COURT OF AUSTRALIA.]

WHITE APPELLANT;
 PETITIONER,

AND

WHITE RESPONDENT.
 RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF
 NEW SOUTH WALES.

Husband and wife—Divorce—Desertion by husband—Wife leaving home by reason of husband's conduct—Temporary separation—Intention to desert formed by husband after separation begun. H. C. OF A.
 1908.

—
 SYDNEY,
 Dec. 2.

Griffith C.J.,
 Barton and
 Isaacs JJ.

A separation between husband and wife brought about by the act of the husband does not constitute desertion unless accompanied by an intention on his part to permanently put an end to cohabitation.

Whether the husband's conduct does indicate such an intention is a question of fact.

Where the separation is begun by the wife withdrawing from the matrimonial home, owing to conduct on the part of the husband which justifies her in leaving him, it is in effect the act of the husband and not of the wife.

A separation, begun by the husband under circumstances which show that at the time he intended it to be only temporary, may become desertion if continued by the husband with the intention of making it permanent.

Where a separation was begun by a wife leaving her home owing to conduct on the part of her husband which justified her in withdrawing herself temporarily from his society, and the husband afterwards, when the wife desired to return to him, absconded and held no further communication with her :

Held, that the husband was guilty of desertion.

Decision of *Street J.* (24th June 1908) reversed, but on a different ground.

H. C. OF A. APPEAL from a decision of *Street J.* in the Supreme Court of New South Wales, Matrimonial Causes Jurisdiction.

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This was a suit by the appellant Evelyn Veronica White for dissolution of marriage on the ground of desertion. The parties were married on 8th March 1904 and lived together until 9th December 1904, when the appellant left her husband. During the period when they were living together the husband drank to excess very frequently and behaved with great cruelty towards the appellant. On 9th December 1904 the respondent came home drunk, assaulted the appellant with great violence, threatened to kill both her and himself, and told her to "clear out." She thereupon left the house, fearing further violence. Next day she returned to the house for her clothing, when she saw her husband for the last time. She then instituted legal proceedings against him, but they came to nothing as he disappeared from the locality, and nothing was seen or heard of him afterwards.

At the end of 1907, more than three years afterwards, the appellant instituted this suit. At the hearing *Street J.* who presided dismissed the petition on the ground that the evidence did not satisfy him that at the date of the separation there was any design on the part of the respondent to drive the wife from her home, and to put an end to cohabitation. No question was raised as to whether any such intention was afterwards formed.

From this decision the petitioner now appealed *in formâ pauperis*.

P. K. White, for the appellant. Even if the circumstances surrounding the beginning of the separation did not constitute desertion, there was overwhelming evidence of a subsequent intention to desert.

[GRIFFITH C.J.—The case does not seem to have been put to his Honor in that way. His attention seems to have been directed only to the state of mind of the respondent at the time when the separation took place regardless of his subsequent conduct.]

The respondent's subsequent conduct clearly amounts to desertion. There is no necessity for the intention to desert to have existed at the beginning of the separation. At that time the husband, possibly if he intended anything, intended that it

should be only temporary, but he evidently formed the intention subsequently to make it permanent.

He referred to *Fahey v. Fahey* (1); *Pearce v. Pearce* (2); *Glynn v. Glynn* (3).

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There was no appearance for the respondent.

· GRIFFITH C.J. In this case the marriage took place on 8th March 1904. The parties lived together until 9th December 1904, when the petitioner left her husband under circumstances justifying her leaving the house in which they were living together. He was drunken and violent towards her and told her to go away, and she went.

· The learned Judge who presided quoted the following passage from the judgment of *Gorell Barnes J.* in *Sickert v. Sickert* (4):—
“In order to constitute desertion there must be a cessation of cohabitation and an intention on the part of the accused party to desert the other. In most cases of desertion the guilty party actually leaves the other, but it is not always or necessarily the guilty party who leaves the matrimonial home. In my opinion, the party who intends bringing the cohabitation to an end, and whose conduct in reality causes its termination, commits the act of desertion. There is no substantial difference between the case of a husband who intends to put an end to a state of cohabitation, and does so by leaving his wife, and that of a husband who with the like intent obliges his wife to separate from him.”

The learned Judge, applying that statement of the law to the facts of the case, came to the conclusion that the husband, when he told his wife to go under circumstances which justified her in leaving the house, did not really intend to withdraw altogether from cohabitation, and that that disposed of the case. So far as the learned Judge went I entirely agree with him that upon that evidence it was not proper to find that the husband intended at that time to permanently withdraw from the society of his wife. It appears that that was the only view of the case presented to the learned Judge. But there were other facts in evidence which

(1) 21 N.S.W. L.R. (Div.), 25.

(2) 21 N.S.W. L.R. (Div.), 32.

(3) 21 N.S.W. L.R. (Div.), 35.

(4) (1899) P., 278, at p. 282.

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are very material. On the following day the wife, accompanied by a policeman, went back to the house where they had lived to get her clothes. She then took certain proceedings against her husband by summons in the Police Court, though it does not appear whether the summons was served. The husband, thereupon, disappeared, and since then he has never communicated with her, and she has never been able to discover his whereabouts. He has wholly disappeared from her life. That is sufficient evidence of actual desertion. When the separation begins by reason of such conduct of the husband that the wife is justified in withdrawing from the matrimonial home, it is in effect the act of the husband and not of the wife. Whether the conduct indicates an intention to withdraw himself permanently from her society is a question of fact. If the husband has not then formed an intention to bring the state of cohabitation to an end, he cannot be said to have then deserted his wife. Such an intention to desert may nevertheless be formed afterwards, and may be inferred from subsequent conduct. If he continues absent, holds no communication with his wife, and absconds, the inference of intention to bring the cohabitation to an end becomes almost irresistible, and that is this case.

Upon that ground, upon which I am quite certain the learned Judge would have acted if that aspect of the case had been presented to him, I think that the wife is entitled to a decree.

BARTON and ISAACS JJ. concurred.

Appeal allowed. Order appealed from discharged. Decree nisi for dissolution of marriage, returnable in six months.

Solicitor, for the appellant, *J. W. Abigail.*

C. A. W.