

H. C. OF A.
1916.
BROADBENT
v.
DAVIES.

by inserting the word “having” before the words “the internal edge.” Respondent to pay costs of appeal and £10 10s. for costs before Commissioner.

Solicitor for the appellants, *Arthur Muddle*.
Solicitor for the respondent, *Henry Davis*.

B. L.

[HIGH COURT OF AUSTRALIA.]

MELBOURNE NATHAN DEARMAN . . . APPELLANT ;
AND
DAISY GERTRUDE DEARMAN . . . RESPONDENT.

DAISY GERTRUDE DEARMAN . . . APPELLANT ;
AND
MELBOURNE NATHAN DEARMAN . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF
NEW SOUTH WALES.

H. C. OF A.
1915-1916.
SYDNEY,
Nov. 24, 25,
1915 ;
April 10,
1916.
Isaacs,
Gavan Duffy
and Rich JJ.

Husband and Wife—Divorce—Desertion—Constructive desertion—Evidence.

Where a husband leaves his wife in consequence of conduct on her part which justifies him in believing that she has committed adultery, her conduct does not amount to constructive desertion by her unless it is marked by persistence regardless of consequences or is accompanied by refusal to discontinue that conduct, so as to show an intention on her part to break off matrimonial relations or an intention to persevere in intolerable conduct.

Decision of the Supreme Court of New South Wales (*Gordon J.*) affirmed.

APPEALS from the Supreme Court of New South Wales.

H. C. OF A.
1915-1916.

Suits for dissolution of marriage on the ground of desertion for three years and upwards were brought by Melbourne Nathan Dearman against his wife Daisy Gertrude Dearman and by her against her husband, and the two suits were consolidated. The consolidated suit, in which the husband was made the petitioner, was heard by *Gordon J.*, who dismissed both petitions.

DEARMAN
v.
DEARMAN.

From that decision each party appealed to the High Court.

The material facts are stated in the judgment hereunder.

Melbourne Nathan Dearman, in person.

Jaques, for Daisy Gertrude Dearman.

During argument reference was made to *Sickert v. Sickert* (1); *Fitzgerald v. Fitzgerald* (2); *Thompson v. Thompson* (3); *White v. White* (4); *Fremlin v. Fremlin* (5); *Moss v. Moss* (6); *Hampton v. Hampton* (7); *Reidpath's Case* (8); *Tulk v. Tulk* (9).

Cur. adv. vult.

The judgment of the COURT, which was read by ISAACS J., was as follows:— April 10, 1916.

Both parties appeal from the judgment of *Gordon J.* dismissing their respective petitions for divorce on the grounds of adultery and desertion. The question of adultery does not now arise as the findings that it did not occur are not challenged. But each contends that the petition should be supported on the ground of desertion, and, further, that the charge of desertion advanced by the opposite party was properly held to be unsustainable.

The material facts are as follow:—The parties were married in 1900, and with some interruption lived together till 28th July 1907. For some little time prior to that date the husband, believing that his wife was secretly meeting, and was misconducting herself with, a man named Pettit, caused her to be watched. She was discovered in compromising circumstances with Pettit. The husband—who, as

(1) (1899) P., 278.
(2) L.R. 1 P. & M., 694.
(3) 1 Sw. & Tr., 221.
(4) 7 C.L.R., 477.
(5) 16 C.L.R., 212.

(6) 15 C.L.R., 538.
(7) 29 W.N. (N.S.W.), 65.
(8) L.R. 11 Eq., 86.
(9) 28 A.L.T., 165.

H. C. OF A.
1915-1916.

DEARMAN

v.

DEARMAN.

Gordon J. thought, and as we think, reasonably believed his wife had committed adultery—at once left his wife, and so broke up the matrimonial home. He did so, intending to obtain a divorce, and therefore intending never to return. The breach was not merely temporary. He presented his petition on 2nd August 1907, and Sir *George Simpson* dismissed it. The Full Court reversed that decision (1), but this Court restored it (2), and the Privy Council refused leave to appeal in November 1909.

The husband then accepted the situation, and on 21st December 1909 wrote a letter to his wife asking her to return. She denies receiving it, but *Gordon J.* thought she probably received it. The husband in September 1910 wrote again to her practically offering to prepare a home for her. This also she denies receiving, and as to that *Gordon J.* was more doubtful.

The husband claimed that even starting with his requests to her to return, refused by her for more than three years, she deserted him for that period. The wife claimed that he, not having returned to her during a period of over three years from the Privy Council's refusal of leave to appeal, had deserted her for the necessary period. *Gordon J.* observes, after seeing and hearing the parties, that he felt the gravest doubt whether either party since July 1907 ever wished or was willing to resume cohabitation.

As to the wife's petition, we concur on the whole with the judgment of *Gordon J.* that her case has failed on the facts.

As to the husband's petition, a more difficult position arose on the appeal. The learned primary Judge dealt with this petition solely on the basis of whether there had been desertion since 28th July 1907. On the authority of *Hampton v. Hampton* (3), which follows *Fitzgerald v. Fitzgerald* (4), he held, and rightly held, that if cohabitation had ceased under circumstances not amounting to desertion, desertion could not originate until after a subsequent resumption of cohabitation—except under the statutory provision, should restitution of conjugal rights be ordered by the Court and denied by the party. But his Honor did not consider the further question as to whether the act of the husband in quitting the

(1) 8 S.R. (N.S.W.), 457.

(2) 7 C.L.R., 549.

(3) 29 W.N. (N.S.W.), 65.

(4) L.R. 1 P. & M., 694.

matrimonial home was brought about by conduct of the wife, which made the separation in reality her act on the principle laid down in such cases as *Sickert v. Sickert* (1); *Harriman v. Harriman* (2); *Eastbourne Guardians v. Croydon Guardians* (3) and *Moss v. Moss* (4). If desertion by her had constructively arisen prior to the suit of August 1907, then the law is settled (*Fremlin v. Fremlin* (5)) that the divorce proceedings were not an annihilation of the existing wrong, but a mere suspension.

H. C. OF A.
1915-1916.
DEARMAN
v.
DEARMAN.

It comes, then, to a question of fact whether the wife constructively deserted her husband prior to August 1907. It is as to this we have hesitated. In *Charter v. Charter* (6) Sir *Francis Jeune*, speaking for himself and *Gorell Barnes J.* in reference to a husband's alleged constructive desertion, said:—"The principle which underlies the cases is the intention of the husband to break off matrimonial relations."

Applying that to the wife's conduct here, while it is clear that her behaviour entirely justified the husband in believing she had committed adultery, it was not marked by persistence regardless of consequences or accompanied by any refusal to discontinue her conduct, so as to show an intention on her part to break off matrimonial relations, or, what is equivalent, an intention to persevere in behaviour which, independently of actual adultery, would make it intolerable to a self-respecting husband to remain.

We therefore think the appeal from this part of the judgment of *Gordon J.* should also be dismissed.

Appeals dismissed.

Solicitors, for Daisy Gertrude Dearman, *Stephen, Jaques & Stephen.*

B. L.

(1) (1899) P., 278.

(2) (1909) P., 123, at pp. 135, 148.

(3) (1910) 2 K.B., 16, at p. 28.

(4) 15 C.L.R., 538.

(5) 16 C.L.R., 212.

(6) 84 L.T., 272, at p. 273.