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IN THE HIGH COURT OF AUSTRALIA.

COOKE

v.

COOKE

ORIGINAL

REASONS FOR JUDGMENT.

High Court of Australia.
Principal Registry.

26 OCT 1943

Oral Judgment delivered at Melbourne

on Tuesday, 26th October, 1943

REASONS FOR JUDGMENT.

LATHAM C.J.

This is an appeal from a decision of Mr. Justice Lowe refusing to grant a decree for divorce in a case in which a wife petitions on the ground of desertion by her husband. If I consulted my personal inclinations, I should be very glad indeed to allow the appeal. But I am unable to satisfy myself that the facts proved amount to desertion by the husband. I need not recite all the facts. To my mind they bear the complexion which the learned judge considered them to bear and they support the inference which he drew. Here we have a case of a very unhappy home with a husband persistently and consistently ill-treating his wife, not with, except possibly on one occasion, any physical cruelty, but in such a way as to make her life nearly unbearable for her; treating her with indignity and affront when they were together; in the presence of the children, and in the presence of strangers. There is sufficient ground for the wife having strong objection to the conduct of her husband. But he remained in the matrimonial home. Sexual intercourse ceased in 1938, but he remained in the home. He supported his wife and the children. He had some of his meals with the family and, although he had said that he no longer regarded her as his wife, still, as Mr. Justice Lowe has held, there were the elements of the matrimonial relationship to which I have referred still existing. It was not until June 1943 that he left his wife. He then did in fact desert her. In my opinion the facts of this case do not establish desertion at an earlier date, though they do show that there was a very unhappy home and that the wife had abundant cause for complaint. I agree, as I have said, with regret, with the judgment of the learned judge, and therefore am of opinion that the appeal should be dismissed. If the appeal were allowed on these facts, the Court would be very nearly allowing ill-treatment, short, possibly, of cruelty, arising from definite incompatibility of temperament to be erected into desertion in intention and in fact. I decide the case simply on the ground that on the particular facts of the case it does not appear to me that the evidence establishes that abandonment of the matrimonial relationship which is required to constitute desertion and I would therefore dismiss the appeal.

This appeal has been dismissed and a question arises as to costs. There is a discretionary power in the Court to give costs to a wife who is an unsuccessful appellant in a matrimonial case:

Moses v. Moses, 27 C.L.R. 490. This is a power which should not be exercised as of course, but only in special circumstances. The Court is of opinion that there are special circumstances in this case. It was a borderline case. The importance of the matter to the wife is of course obvious - that goes without saying. It was a reasonable appeal, not brought for purposes of embarrassing or harassing the husband. It was a very arguable case and the Court is equally divided. In all those very special circumstances the Court will make an order that the wife should have the costs of the appeal.

JUDGMENT.

RICH J.

I do not share the apprehensions of the Chief Justice that if we decide the case in favour of the appellant mere incompatibility of temperament may in future be relied upon as a ground for divorce. It is, as His Honour said, a question of fact in each case. It is true that until 1943 the parties lived under the same roof but that fact does not preclude the appellant from alleging and proving desertion. The respondent did not defend the suit or appear on the hearing of the appeal. The evidence is that the respondent insisted on occupying a separate room and withdrawing himself from the society of the appellant. There was no common house. His departure from the home was the culmination of a series of events which showed an intention on his part to separate his life from that of his wife and a determination no longer to be bound by the matrimonial tie. The facts are similar to those in the local cases of Simons v. Simons, 24 V.L.R. 348; Small v. Small, 1922 V.L.R. 725, and to the English cases such as Smith v. Smith, 1940 P. 49; Wilkes v. Wilkes, 1943 P. 41. I think the appellant made a case of desertion and that the appeal should be allowed.

COOKE

v.

COOKE

JUDGMENT.

McTIERNAN J.

I agree in substance with what the Chief Justice has said and
I concur in the comment which has been made on the conduct of this
respondent. I am not satisfied that the separation from which desertion
could^{be}/inferred took place until the respondent left the home.

COOKE v. COOKE.

JUDGMENT.

WILLIAMS J.

I agree with my brother Rich that the appeal should be allowed. Desertion is of course an abandonment of a state of consortium both in intention and in fact. For this purpose it is sufficient where, as here, the husband and wife continue to live under the same roof, as Hodson J. put it shortly in Wilkes v. Wilkes, 1943 P. 41 at p. 42, if the facts show that the husband has actually caused the wife not only to sleep apart from him, but also to live apart from him against her will.

The facts in the present case show that from March 1938, although they continued until this year to reside in the same house, the husband refused to have any further sexual intercourse with his wife, that he ignored her and refused to treat her as his wife. From that date onwards he forced her, in every real and substantial sense, to use His Lordship's words, "to live apart from him against her will."
