

IN THE HIGH COURT OF AUSTRALIA.

MORRIS

V.

MORRIS

REASONS FOR JUDGMENT.

Delivered at SYDNEY

on 8th August, 1945

40358 A. H. PETTIFER, ACTING GOVT. PRINT.

miss J.

IN THE HIGH COURT OF AUSTRALIA)
NEW SOUTH WALES REGISTRY }

MORRIS V. MORRIS

JUDGMENT:

LATHAM C.J.

This is a case of a most unhappy marriage which after an initial three years of apparently satisfactory matrimonial life has turned out to be a complete failure.

The evidence which was accepted by the learned Judge shows that the wife refused sexual intercourse with her husband, that she refused to show him any affection, that she refused to associate with him while deliberately associating with other men, that she refused, in effect, to prepare his meals, to make his bed or to mend his clothes. But none of those facts in itself is a ground for divorce, however serious they may be in the private lives of the individuals concerned.

It is necessary in the present case to establish the ground relied upon by the petitioner, namely, wilful desertion without just cause or excuse for three years prior to the presentation of the petition. The petition was presented on the 16th October 1944. It was therefore necessary to establish desertion by the wife beginning at a date three years prior to the date mentioned and continuing thereafter. The husband did not leave the matrimonial home (he was purchasing the house on terms) until September 1944, when the addition to the other circumstances which

I have mentioned of an assault by a male friend of his wife led him to leave the home and to live with his parents.

The question is - was there desertion by the wife three years prior to the presentation of the petition? There may be desertion though the parties continue to live under the same roof, but, as has been said, very strong facts are required to establish desertion in such a case. If there is not actual physical separation by the spouse alleged to be the offending party, there must be a real living apart, an abandonment of the matrimonial relationship by the party alleged to have been guilty of desertion.

As the law is expressed by Mr. Justice Cussen in Tulk v. Tulk (1907 V.L.R. 64) - "Desertion commences when one of the spouses without the consent of the other terminates an existing matrimonial relationship with the intention of forsaking that other and of permanently or indefinitely abandoning such relationship."

In the present case, however, the matrimonial home was maintained. The wife was apparently, on the evidence, completely inattentive to her duties, but in my opinion it is not possible to say that she had deserted her husband three years before the presentation of the petition. If the evidence had been that more than three years before the presentation of the petition the husband, as a consequence of the conduct of the wife, had left the home and that she accepted the position, that is, regarded it as a termination of the matrimonial relationship, it may be that then there would have been the necessary evidence of desertion, but that is not the evidence in this case.

As matters stand on the evidence, I am of opinion that the decision of the learned Judge was right and - though I admit with regret - I am of opinion that the appeal should be dismissed.

ORDER: Appeal dismissed.

Judgment.Rich, J.

I feel great regret about the matter. The case is a border line one and I do not think the facts shew what is required in cases of constructive desertion.

Desertion connotes both an act and an intention. It is not a specific act, but a course of conduct. The principle laid down in the cases is that the intention of the offending party to break off the matrimonial relations must be shown. Intention being a question of fact or of inference from the facts it does not appear to me that the facts in this case convincingly show an intention on the part of the wife to separate her life from that of her husband, or a determination on her part no longer to be bound by the matrimonial tie.

For these reasons I agree that the appeal should be dismissed.

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JUDGMENT

STARKE J.

I think the judgment of the Court below, on the facts of this case, was plainly right.

ORAL JUDGMENT

DIXON J.

I agree that the appeal should be dismissed.

It is by some extension of the common understanding of desertion that the Courts have made it possible to regard one spouse as deserting the other although the parties are living in the same house and outwardly in apparent association together. It has been found possible in such a case to say that there has been desertion only because, inside the same house, there has been a complete and deliberate separation by one spouse from all real association with the other. In this case I think that there is a complete lack of fulfilment of this condition, that is to say the elements which have been relied upon on do not amount to the complete and deliberate separation which is required.

In the case of Littlewood v Littlewood. 1942 2 A.E.R. 515, Pilcher J. refers to the decision of Sir Boyd Merriman P. in Smith v Smith 1940 P. 49 and ~~says~~ says of it that it is the strongest case in which it has ever been decided that, although the husband and wife continued to live under the same roof, the facts justified the Court in coming to the conclusion that desertion was proved.

Treating it as the strongest case, it appears to me that the facts of this case fall short of what that decision demands. I, therefore, think the appeal should be dismissed.