

HIGH COURT. Apia. 1957. 1, 8, August. MARSACK C.J.

Petition for divorce - wilful desertion - agreement to separate - insufficient evidence in support of petition.

A petitioner for divorce must establish the grounds upon which the petition is based; and where the petition alleges wilful desertion on the part of the respondent, it must be established that the respondent had left the marital home with the intention either of deserting the petitioner or of breaking up the marriage.

Petition dismissed.

Metcalf, for petitioner.  
Phillips, for respondent.

Cur. adv. vult.

MARSACK C.J.: This is a petition for divorce based upon the allegation that in December 1953 the respondent without just cause wilfully deserted the petitioner and that such desertion has continued to be effective until the present day; alternatively that the petitioner and the respondent were parties to an agreement for separation made verbally in December 1953, such agreement being still in full force and effect.

The evidence shows that the parties, at the times material to this petition, were residing with the petitioner's parents at Taufusi. The domestic life of the parties was not particularly happy. The petitioner blames the respondent entirely for the unhappiness of the home, ascribing it to his drinking habits and his threats of violence to her when he was under the influence of liquor. The respondent alleges that their domestic infelicities amounted to little more than the lack of harmony which often exists between husband and wife, and that this lack of harmony was very largely brought about by the constant interference in their domestic affairs by the petitioner's father, Pulo'u Tivoli.

The circumstances surrounding the actual separation were clearly described in the evidence of Pulo'u, who was called by the petitioner. Pulo'u after testifying as to an incident concerning a shot-gun goes on to say:

"It was during this same week that I got Ino and Tupe to live apart. I sent respondent Ino off to live with his own family at Mulinu'u. My daughter agreed with this course of action. I thought perhaps relations between them would later improve. Respondent protested against my action as he did not want to go. I sent my daughter (petitioner) to New Zealand a week later."

In my view this represents a substantially accurate account of how the parties became separated. Respondent left the marital home not because he had any intention of deserting his wife or of breaking up the home, but unwillingly, because he was thrown out by his father-in-law.

There is substantial support for this view in the letters of the 20th May and 3rd June 1954 from petitioner, then in New Zealand, to respondent. In both of these letters she pledges her undying affection for the respondent, and in the earlier letter she says:-

"You know very well our family interfered too much with us but we must have patience because I feel that this separation of ours will end up in our having a happy married life in future."

In the result I am unable to find any evidence that the respondent wilfully and without just cause deserted the petitioner.

It was suggested at the hearing, though no legal argument was directed

to the point, that the separation was in fact due to the wrongful conduct of the respondent to the extent that he was guilty of what has been called "constructive desertion". Although I find that the respondent did not at all times behave as a perfect husband the evidence falls far short of establishing such a line of conduct as would satisfy the test laid down by the Courts, namely acts of so serious a character that an intention to disrupt the marriage could reasonably be inferred. I do not accept the evidence, given on behalf of the petitioner, that the respondent threatened violence to the petitioner at the time of the shot-gun incident. The testimony of the witness Passi definitely negatives the suggestion of such threats, and such suggestion is hard to accept in the light of the petitioner's letters written shortly afterwards.

Furthermore I can find no evidence of an agreement to separate. I am satisfied that the respondent at no time wanted a separation from his wife. Emphasis was placed by Mr Metcalfe on the circumstance that after the expulsion of the respondent from the family home he sent a messenger to his wife asking for the wedding ring to be returned to him, and that the petitioner on the advice of her father returned it. I do not accept this as conclusive evidence that the respondent wished to bring their marriage to an end. It is equally consistent in my opinion with an attempt on the part of the respondent to convince the petitioner that the action taken by her father was a very serious one, aimed in fact at breaking up their marriage. It is unfortunate that neither in evidence in chief nor in cross-examination was the respondent asked any questions as to this incident.

It is further alleged by the petitioner that when she returned to Samoa for a very short time in June 1954 she saw her husband only once, in the street; and that they passed without speaking. As her evidence was given by affidavit she was not cross-examined as to why she had not spoken to the respondent; and at the hearing in the High Court the respondent was not questioned as to why he had not spoken to the petitioner. He did, however, give evidence that just before his wife's departure for New Zealand in the first instance he had received a letter from a firm of solicitors - written, according to the respondent, on the instructions of Pulo-tu - warning him to keep away from the petitioner.

In the result I find that the petitioner has failed to establish either of the grounds upon which her petition is based and that accordingly the petition must be dismissed.

Although the respondent has been successful, this is I think a proper case where the husband should make some contribution towards his wife's costs. There will be an order that the respondent pay to the petitioner her disbursements, amounting to £8.10.0.

Petition dismissed.