[HIGH COURT OF AUSTRALIA.]

LOUISA MOSS . . . . . APPELLANT;
PETITIONER,

AND

EDWARD ELIAS MOSS . . . . RESPONDENT.
RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1912.

SYDNEY, *Dec.* 6, 9, 20.

Griffith C.J., Barton and Isaacs JJ.

Husband and Wife — Divorce — Desertion — Constructive desertion — Evidence — Matrimonial Causes Act 1899 (*N.S.W.*) (*No.* 14 *of* 1899), *sec.* 16.

A husband having for some years, without foundation, continually accused his wife of impropriety of conduct and of actual misconduct with other men so as to justify her in leaving him, she threatened to leave him. He then made overtures for a reconciliation which the wife rejected, but for two months afterwards cohabitation between them continued, and during that time the husband continued to make the same charges against the wife. She thereupon left him. After the separation the husband's conduct was such as to render the wife's return to him practically impossible. On a petition by the wife for dissolution of the marriage on the ground of desertion for three years and upwards,

Held, that an intention to drive his wife away from him and to make the separation between them permanent should be imputed to the husband, and, therefore, that the desertion was established.

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

APPEAL from the Supreme Court of New South Wales.

A petition for dissolution of marriage on the ground of desertion for three years and upwards was instituted by Louisa Moss against her husband, Edward Elias Moss. The petition was heard

by *Gordon* J. The case made by the petitioner was that for six months at least before July 1906, when the petitioner left the matrimonial home, she was subjected by her husband to a series of insults and physical outrages of such a character that no self-respecting woman could continue cohabitation, and that this conduct had seriously impaired her health.

The learned Judge found that the physical outrages were not proved, but that for a long period the respondent, without foundation, had continually accused the petitioner of impropriety of conduct and also of actual misconduct with other men, and that he continued to do so up to the time she left him in July 1906; that in March 1906, after the petitioner had threatened to leave the respondent, the respondent desired to be reconciled to her and tried to bring about a reconciliation with her, but that she refused to be reconciled; that from that time until the petitioner left the home cohabitation between them continued; and that the petitioner left the home contrary to the respondent's wish; and he also found that after the separation the respondent continued to make the same charges against his wife, and in a more outrageous manner. He therefore held that the petitioner had not made out a case of constructive desertion, and he refused a dissolution of the marriage, but he made a decree for judicial separation.

From this decision the petitioner now appealed to the High Court.

Rolin K.C. (with him *Morris*), for the appellant. On the facts which the learned Judge found as to the respondent's conduct, he should have held that the respondent intended the natural consequences of his acts, namely, to drive his wife from the house: *White* v. *White* (1); *Koch* v. *Koch* (2); *Sickert* v. *Sickert* (3); *Dickinson* v. *Dickinson* (4). The respondent's conduct was such as to justify his wife in leaving him. The conduct which will justify a wife in leaving her husband is something less than a matrimonial offence: *Russell* v. *Russell* (5). If the

(1) 7 C.L.R., 477.
(2) (1899) P., 221.
(3) (1899) P., 278, at p. 282.
(4) 62 L.T., 330.
(5) (1895) P., 315; (1897) A.C., 395, at p. 445.

H. C. OF A. 1912.

Moss v. Moss.

petitioner was justified in leaving her husband in March, she was justified in doing so in July.

Perry, for the respondent. The intention of the respondent is a question of the fact, and the finding of the learned Judge on that question should not be disturbed. The conduct of the respondent was not such as to justify his wife leaving him. There must be contemplated or actual violence: *Vardy* v. *Vardy* (1). [He also referred to *Beauclerk* v. *Beauclerk* (2); *Nicholson* v. *Nicholson* (3); *Miller* v. *Miller* (4).]

Rolin K.C., in reply, referred to *Walker* v. *Walker* (5); *Jeapes* v. *Jeapes* (6); *Basing* v. *Basing* (7); *Halsbury's Laws of England*, vol. XVI., p. 482; *Synge* v. *Synge* (8).

Cur. adv. vult.

December 20.

GRIFFITH C.J. read the following judgment:—This was a wife's petition for dissolution on the ground of desertion for three years and upwards. The desertion set up is what is called constructive desertion, that is to say, that the cohabitation was brought to an end by conduct on the part of the husband of such a character as practically to compel the wife to leave the matrimonial home. The learned Judge granted a decree of judicial separation on the ground of conduct of the husband subsequent to the cessation of cohabitation. The wife now appeals from the refusal of a decree of dissolution.

The case made for the appellant was that for six months at least before July 1906, when she left the matrimonial home, she was subjected to a series of insults and physical outrages of such a character that no self-respecting woman could continue cohabitation, and that this conduct had seriously impaired her health. It was contended that separation under such circumstances must be imputed to the husband and not to the wife. For this position the case of *Sickert* v. *Sickert* (9) was relied

(1) 16 W.N. (N.S.W.), 78.
(2) (1891) P., 189.
(3) L.R. 3 P. & M., 53.
(4) L.R. 2 P. & M., 13.
(5) 77 L.T., 715.
(6) 89 L.T., 74.
(7) 3 Sw. & Tr., 516.
(8) (1900) P., 180.
(9) (1899) P., 278.

upon, in which *Gorell Barnes* J., referring to the husband's refusal to desist from the misconduct then under consideration, said (1):—"If he refuse to do so, a wife with any self-respect has only one course to take—that is, to withdraw from cohabitation. The husband in such a case must be taken to intend the consequences of his action—that is to say, that his wife shall not live with him. The situation then produced is just the same as if the guilty husband left his wife. Desertion is not to be tested by merely ascertaining which party left the matrimonial home first. It may be committed by a husband acting as I have just said, and if the attitude of the parties remain the same for two years the offence of desertion contemplated by the Statute is complete."

As I understand the learned Judge, his meaning is that an intention to bring the existing state of cohabitation to an end is to be imputed to the husband irrespective of his actual intention, if by his conduct he shows that continued cohabitation is only possible for the wife upon conditions which a self-respecting woman cannot be expected to accept.

The learned Judge was of opinion upon the evidence that the appellant had proved that her husband, the respondent, had "without foundation, without cause, and without any reason, carried away I will assume by absurd jealousy, accused her continually of impropriety of conduct, even of actual misconduct with other men, and that he continued to do so right up to the time she left him; and that such conduct has continued ever since."

With regard to the other charges of personal outrage made by the appellant, he said that, without deciding whether the charges were true or not, he did not think it would be safe for him to act upon the evidence as it stood; that, although it might be true, he did not think it would be safe for the Court to say that the petitioner had proved the case sufficiently clearly for the Court to say that the charges were substantiated. The reasons, however, which he gave for this conclusion are not, to my mind, at all cogent. He thought it strange that, if the charges were true, the appellant had not mentioned the facts to her medical adviser. But, as all evidence of what she told her medical adviser was excluded, I cannot attach any weight to its

(1) (1899) P., 278, at pp. 283, 284.

H. C. OF A. 1912.

Moss v. Moss.

Griffith C.J.

absence. After referring to that gentleman's evidence, which was to the effect that during the period in question the appellant's health failed in such a manner as to occasion him great alarm, but that she recovered almost immediately after separation from her husband, he refrained from expressing any opinion upon its reliability, only contrasting it with the evidence of a nursemaid who did not notice any change in her mistress's health. He also commented on the fact that the nurse did not know anything of the misconduct alleged. To my mind it appears quite natural that the wife should not have disclosed the facts to which she deposed in her evidence either to her medical adviser or to the nurse.

I infer, however, that the learned Judge was of opinion that the other conduct of the respondent in making persistent and unfounded charges of infidelity was such as to justify her in leaving him. But he thought that she in fact went away against his wish and contrary to his attempts for a reconciliation. The suggested attempt for reconciliation occurred in May 1906, two months before the final separation, and was made through Mr. Cook, a solicitor, whom she is said to have told that it was too late. It does not appear, nor is there anything to suggest, that any promise of amendment was made, but it does appear that for two months afterwards appellant and respondent continued to occupy the same bed, and that during all that time the insults were continued as already stated.

Under these circumstances I think that the episode of attempted reconciliation is not material. I think further that the continued intention to drive her away must be imputed to the husband, if his conduct continued to be such as to practically compel her to leave him.

But here I find another difficulty. She alleges as the cause of her going, not only the insults, but the physical outrages, and as to the latter the learned Judge has not found any fact in her favour. On the whole, however, I have come to the conclusion, to which, I understand, the learned Judge also came, that the husband's insults and conduct, whatever it was, which was sufficient to affect, and she says did affect, her health, justified her in leaving him in July.

The husband's conduct subsequent to the separation was of an outrageous character, and such as to render the wife's return to cohabitation practically impossible. Under these circumstances, even if the original separation should be regarded as intended by the husband to be temporary only, I think that a fresh intention to make it permanent must be imputed to him (*White* v. *White* (1)).

I think, therefore, that a case of desertion is established, and that a decree of dissolution should be pronounced.

BARTON J. I have come to the same conclusion, and do not propose to add anything.

ISAACS J. read the following judgment:—The learned primary Judge did not find it necessary to determine finally whether the respondent's conduct drove the petitioner away, because his Honor came to the conclusion that in May 1906, two months before she actually left, she made up her mind to leave the respondent because of his past insults, notwithstanding he desired—and as I must assume the learned Judge found—*bonâ fide* desired to become reconciled by ceasing the imputations. If that were all, I should have great difficulty in differing from the decision; because bad as the conduct was, it was not irremediable. But the evidence is clear that although she most distinctly said she would not be reconciled, yet, in point of fact, she not merely lived in the house, but for a month after her verbal refusal occupied the same room and the same bed with the respondent. Actual marital intercourse is not directly proved, but cohabitation took place, and not only so, it took place in circumstances which need not be detailed, but which leave no doubt in my mind that conjugal relations were during that month resumed. That obliterates the earlier refusal, and leaves to be considered, whether when she left in July, she left in consequence of conduct that practically drove her out. For this purpose I do not think it necessary to consider whether the respondent's behaviour injured her health. The learned Judge felt it difficult to decide, even after hearing the witnesses; and I should not feel safe in

(1) 7 C.L.R., 477.

H. C. OF A. 1912.

Moss v. Moss.

Isaacs J.

determining that question from mere inspection of the written notes of testimony. But this is not a charge of cruelty: it is a question whether the respondent's conduct was such as to be intolerable. What is intolerable is a question not susceptible of reduction to a formula, and each case must be judged of according to its circumstances. But I do not doubt that the respondent's gross and continuous charges, utterly undeserved as the learned Judge found, had, from their character and repetition, become unbearable to a wife desiring to perform her conjugal duty, but refusing to be constantly branded with moral degradation. Notwithstanding the partial reconciliation in June, the charges being renewed justified the petitioner in leaving the house, and as the respondent was the direct cause of this, he must be held to have constructively deserted his wife. His request for her to stay does not remove his responsibility, because it was a request to stay under intolerable conditions.

After that, his behaviour was still worse; so that once the desertion started, it continued for more than the necessary period.

I agree that the petitioner is entitled to succeed, and that the marriage should be dissolved.

Appeal allowed. Decree for judicial separation discharged. Decree nisi for dissolution of marriage with costs.

Solicitors, for the appellants, *Boyce & Magney.*
Solicitor, for the respondent, *E. R. Abigail.*

B. L.