but is to be entitled to the amount of his own payments into the fund and accrued interest;

(17) By art. 21 that if he fails to make the payments for six months the board may cancel his membership and he is then to be entitled only to amounts paid in by him and accrued interest; but in a special case the board on the proposal of his company may pay him part or the whole of the company's contributions and interest;

(18) By art. 23 that the board may alter the regulations, but if the rights or obligations of members are thereby increased any member is to be entitled to withdraw the amounts shown by his account.

The appellant became entitled under art. 23 to withdraw the amounts shown by his account in the fund, and he did so. In his income tax return for the year ended 30th June, 1948, he returned the amounts so received from the fund in that year as a retiring allowance of £404, but claimed that only five per centum, or £20, was assessable income. Accounts rendered by the fund to the appellant in pursuance of art. 13, and the receipts given by the appellant for the moneys received from the fund, purported to specify how much of these moneys consisted of contributions by the company to the fund and interest thereon, and how much consisted of contributions by the appellant to the fund and interest thereon. However, the commissioner took the view that the whole amount received during the year ended 30th June, 1948, so far as it was represented to comprise the company's contributions to the fund and interest thereon, and interest on the appellant's contributions to the fund, was assessable income of the appellant.

Counsel for the appellant submitted that the moneys received from the fund were not assessable income, and that if they were it was only so in respect of the year of income in which they were credited to the account of the appellant in the fund, and not in the year of income in which the composite amount was paid over to him, which was in the year ended 30th June 1948. He also submitted that the moneys were really a retiring allowance paid before retirement. He compared the benefit in the fund to an insurance policy taken out by the employee and contributed to by the employer. He relied on the provision for investment, and the fact that the balance paid to a member's account might have little relationship to the amount paid in by the company; and submitted that the contributions paid in by the company lose their identity on being paid into the fund.

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Webb J.

Counsel for the commissioner submitted that the moneys received by the appellant from the fund were an allowance, gratuity, bonus or benefit under s. 26 (*e*) of the Act, and that the whole of the company's contributions from the commencement and interest thereon were taxable as in the year ended 30th June 1948. He relied on art. 19 of the fund regulations as indicating that the contributions of the company are part of the emoluments of the employee, because when the employee has paid £10,000 into the fund he need pay no more and the company then pays its contributions direct to the employee, including any additional payments under art. 10. He also relied on the provisions in the regulations for separate accounts which must always show, for the purposes of arts. 16, 17, 18, 20 and 21, " payments out of the fund to employees ", the amount of each contribution, whether by the company or its employee, and interest thereon.

I think that the moneys paid into the fund by the company were, as counsel for the commissioner submitted, really part of the remuneration of the appellant, or in any event were a " benefit . . . given or granted to him in respect of, or for or in relation directly or indirectly to " his employment, within s. 26 (*e*). Moreover, I think they became a benefit to the appellant as from the time when the company paid them into the fund. Upon such payment into the fund they ceased to be the property of the company and the payment then enured for the benefit of the appellant, although contingently on his serving for the necessary period to qualify to receive them (art. 16), which the appellant did in 1941. But I do not think that because the moneys in fact paid out of the fund to the appellant purported to be identified, in the yearly accounts given to him under art. 10 and in the receipts which he gave for these moneys, with moneys paid in by the company and interest thereon, that the moneys when paid out of the fund to the appellant still retained their identity as remuneration of the appellant and interest thereon. By art. 12 moneys of the fund, which included foundation moneys, were to be invested and earnings allocated to the members' accounts among other accounts. Investment in the manner indicated in art. 12 would, I think, cause the moneys paid into the fund to lose their identity as remuneration of the employees. They were invested, but a record was kept showing the exact amount of each contribution and interest earned thereon. The regulations required this to be done, as in certain cases they permitted payments to be made to an employee before his retirement of the amounts paid in by him and interest thereon; and also in some cases of the amounts paid in

by his company. If the money received by the appellant from the fund had been paid to him without purporting to show how it was made up it could not, I think, have been held to be taxable as remuneration of the appellant in respect of his employment. But this requirement of the regulations was merely one of keeping a record and did not, I think, have the effect of preserving the identity of the moneys in the fund as employers' and employees' contributions and interest thereon, so that when they were paid out of the fund to the appellant under art. 23 they still retained that character.

In my opinion, then, the moneys paid out of the fund to the appellant were not moneys paid for or in respect of his employment; nor were they in the events that happened a retiring allowance. Moreover, they were of a capital nature. That applies also to the appellant's contributions and interest thereon.

For these reasons I think that none of the amounts in question was assessable income of the appellant.

I would answer both questions in the case in the negative.

Questions (a) and (b) in the case stated answered: No. Costs of the case stated reserved for the judge disposing of the appeal.

Solicitors for the appellant, *Hilliard & Berry.*

Solicitor for the respondent, *D. D. Bell*, Crown Solicitor for the Commonwealth.

J. B.

Discd
Sharah v
Sharah (1953)
89 CLR 167

Disc
Lang v *Lang*
(1953) 86
CLR 432

[HIGH COURT OF AUSTRALIA.]

BAILY . . . . . APPELLANT;
RESPONDENT,

AND

BAILY . . . . . RESPONDENT.
PETITIONER,

ON APPEAL FROM THE SUPREME COURT OF TASMANIA.

H. C. OF A. 1952.

MELBOURNE, *March* 17, 18.

SYDNEY, *Aug.* 1.

Dixon C.J., Webb and Fullagar JJ.

Matrimonial Causes—Dissolution of marriage—Constructive desertion—Intention—Matrimonial Causes Act 1860-1947 (24 *Vict. No.* 1—11 *Geo. VI. No.* 67) (*Tas.*), *s.* 8 (2) (I).

The intention required for the purpose of establishing constructive desertion, is either an actual intention to bring about a rupture of the matrimonial relation, or an intention to persist in a course of conduct which any reasonable person would regard as calculated to bring about such a rupture.

A husband petitioned for dissolution of his marriage on the ground of desertion for the statutory period. He alleged that he was forced to leave the matrimonial home. The evidence showed that the wife had pursued a more or less constant course of conduct of an eccentric and extremely irritating character with more or less frequent lapses into hysteria or complete irrationality. Moreover, the wife showed general coldness towards the husband, and either refused, or was reluctant to have, sexual intercourse. On behalf of the wife medical evidence was given that she suffered from a distressing skin complaint expressed in the cracking of the lips, peeling of the face, and dermatitis and that this condition caused her severe mental distress and nervous upset which in turn aggravated the condition. Medical treatment of this condition had proved unavailing. The trial judge found that the wife had, by her persistent conduct over a long period, made life intolerable for the husband, and granted a decree nisi.

Held, that the animus requisite to the proof of constructive desertion had not been established since the evidence did not show that the wife had an actual intention to bring about a rupture of the matrimonial relation nor

did her conduct, when regarded in the light of the medical evidence, evince an intention to persist in a course of conduct which any reasonable person would regard as calculated to bring about such a rupture.

Decision of the Supreme Court of Tasmania (*Morris* C.J.) reversed.

APPEAL from the Supreme Court of Tasmania.

Frederick Garth Baily presented a petition dated 20th September 1950 to the Supreme Court of Tasmania praying that his marriage with Beryl Dormer Baily be dissolved on the ground that the said Beryl Dormer Baily had, without just cause or excuse, deserted him and, without any such cause or excuse, left him continuously deserted during three years and upwards. The desertion relied on was of the kind known as " constructive " desertion.

At the hearing of the suit, which was defended, evidence was called on both sides. The trial judge (*Morris* C.J.) on 6th June 1951 granted a decree nisi for dissolution of marriage on the ground relied on in the petition.

From this decision the respondent appealed to the High Court of Australia.

The facts and the argument sufficiently appear in the judgment hereunder.

R. C. Wright, for the appellant.

S. C. Burbury Q.C., and *O. F. Dixon*, for the respondent.

Cur. adv. vult.

Aug. 1.

THE COURT delivered the following written judgment:—

This is an appeal by a wife against a decree nisi for dissolution of marriage granted by the Supreme Court of Tasmania (*Morris* C.J.) on her husband's petition. The ground of the petition was desertion for the statutory period, which in Tasmania is three years, but the desertion alleged was what has come to be called, somewhat misleadingly, " constructive desertion ". It is a case in which an existing matrimonial relation has been actually severed by the departure of the petitioning husband from the matrimonial residence, but it is claimed that the departure was occasioned by conduct on the part of the respondent wife such as to make a continuation of cohabitation impossible or intolerable.

With regard to cases of this type Viscount *Jowitt* L.C. in *Weatherley* v. *Weatherley* (1) observed:—" On some future occasion it may be

(1) (1947) A.C. 628, at pp. 631, 632.

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necessary that this House should consider some of these decisions, and, in particular, should consider whether there is sufficient warrant for the doctrine of 'constructive desertion' which from time to time seems to have found favour." Since 1937, when the *Matrimonial Causes Act* (Imp.) (1 Edw. 8 & 1 Geo. 6, c. 57) of that year made desertion as such, for the first time in England, a ground for divorce *e vinculo*, a substantial number of cases have come before the courts in which the petitioner has relied upon a "constructive desertion", and it may well be that these cases will some day have to be exhaustively reviewed by the House of Lords or the Privy Council. But the general notion of "constructive desertion" began to be recognised very shortly after the enactment of the *Matrimonial Causes Act* 1857 (Imp.) (20 & 21 Vict. c. 85). It need only be mentioned that in *Graves* v. *Graves* (1) we find the Judge Ordinary granting a decree nisi in favour of a wife, on the ground of adultery coupled with desertion, in a case in which (to use his own words) "the respondent, without any fault on her part, brought about a withdrawal of the wife from his society". In the Australian States, in which desertion as such has for very many years been a ground for divorce *e vinculo*, the reported cases on "constructive desertion" are very numerous, and, although a generally cautious attitude has been adopted, it is safe to say that many thousands of decrees have been granted in cases in which the petitioner is the actually "departing" spouse.

It is not necessary in the present case, any more than it was in *Weatherley* v. *Weatherley* (2) to attempt an exhaustive analysis of what will constitute constructive desertion. It is necessary, however, to observe that, as Lord *Greene* M.R. pointed out in *Buchler* v. *Buchler* (3), "It is as necessary in cases of constructive desertion as it is in cases of actual desertion to prove both the factum and the animus on the part of the spouse charged with the offence of desertion". For the fundamental idea is that desertion is essentially not a departure from a place but a departure from a state of affairs. And the departure of one spouse from a place, while it marks the commencing point of a period of desertion, may be an act for which the other spouse is really responsible, so that it is that other spouse who must be held to have departed from a state of affairs and therefore to be the deserting party. But that other spouse cannot be held so responsible in the absence of a state of mind which is, or must be presumed to be, directed to a rupture of the matrimonial relation. The cases seem to show that

(1) (1864) 3 Sw. & Tr. 350 [164 E.R. 1310].
(2) (1947) A.C. 628.
(3) (1947) P. 25, at p. 29.

what must be proved is either an actual intention to bring about a rupture of the matrimonial relation, or an intention to persist in a course of conduct which any reasonable person would regard as calculated to bring about such a rupture. There has been a tendency in Australia—possibly due to a misunderstanding of what was said by *Isaacs* and *Rich* JJ. in *Bain* v. *Bain* (1)—to regard the ultimate question as being whether a particular course of conduct is such that no self-respecting man or woman could be expected to remain and endure it. And there have been somewhat unfortunate references to the highly dangerous maxim that every person must be taken to intend the natural and probable consequences of his actions. It is clear from a reading of the whole of their judgment that *Isaacs* and *Rich* JJ. did not mean to convey that the ultimate question in such cases related to the nature of the conduct of the respondent spouse. Their Honours were merely indicating the kind of conduct from which the necessary intention might often be inferred. The necessity of finding an intention is made as clear in other parts of the judgment as it is made by Lord *Greene* in *Buchler* v. *Buchler* (2). Where it is (as it must often be) a matter of inferring intention from conduct, the real position is also made clear by *Irvine* C.J. in *Bain* v. *Bain* (3), where his Honour speaks of " behaviour which, if not proving an actual intention on the part of the offending spouse to put an end to the matrimonial relationship, would be in itself inconsistent with a continuance of that relationship in any real sense, and thus must be such as to evince an intention to put an end to it."

It is in the light of these considerations that the present case must be approached. It will be sufficient to summarise the effect of the evidence briefly. So far as there was a conflict between the evidence of the husband and that of the wife, the learned Chief Justice of Tasmania preferred the evidence of the husband.

The parties, who were first cousins, were married on 19th April 1938. There is one child of the marriage, a boy, who was born on the 17th September 1940. For the greater part of their married life the parties resided in a house at Sandy Bay, Hobart. The husband left this home on 23rd June 1947. The wife is still residing in the home. The husband's petition was presented on 20th September 1950. The wife defended the suit, but did not present a counter-petition.

It is, in our opinion, a vitally important factor in this case that the wife suffered for long periods from a distressing skin disease,

(1) (1923) 33 C.L.R. 317, at p. 327.
(2) (1947) P. 25.
(3) (1923) V.L.R. 421, at pp. 428, 429.

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or diseases, affecting her face and particularly her lips, and at times her scalp. A good deal of the husband's evidence must be read in the light of this fact. The matters on which he relied as forcing his departure included general coldness and refusal of, or reluctance to have, sexual relations. She invited him at one stage to satisfy himself by committing adultery, but this appears to have been some years before the final break. He said that she would never come to bed at a reasonable hour, but would sit up for hours examining her face in a mirror. She would come into the bedroom in the small hours of the morning and start to dust and clean it. She became violent from time to time. On one occasion she threw a clock at him, and then stamped on the clock on the floor with her feet. On another occasion she hit him over the head with a frying pan, and on another threatened him with a bayonet and a dagger. She continually " nagged " at him. On one occasion when she was nagging, he struck her on the mouth. She several times spoke of divorce, and said that it was very easy to get a divorce. At one stage, when she was in a hospital in Melbourne, she said that she was not coming home, that the best thing they could do was to separate. Her general behaviour and attitude to him made it practically impossible for them to have any social life. It was alleged that she neglected her home and her child, but habitual neglect of either cannot be said to have been established. He went to Sydney on a business visit in 1947, and, while in Sydney, made up his mind that he could not endure life with his wife any longer. On his return to Hobart he found life with her no more tolerable, and he ultimately left the matrimonial home, as has been said, on 23rd June 1947. It should be mentioned that sexual intercourse took place, on the wife's initiative, on several occasions between his return from Sydney and his departure from the home—the last occasion being, he said, " perhaps in the last day or two ".

It may be conceded that the above bare outline does not do the husband's case complete justice. It is an extremely difficult thing to convey to any court an adequate picture of a matrimonial situation which has subsisted over a number of years. But the husband's evidence does convey a fairly clear impression of a very unhappy married life, for the unhappiness of which the wife is mainly, if not solely, responsible. No serious allegation against the husband's behaviour in any respect was made. The impression given is of a more or less constant course of conduct, on the part of the wife, of an eccentric and extremely irritating character,