[HIGH COURT OF AUSTRALIA.]

SHARAH . . . . . APPELLANT;
RESPONDENT-PETITIONER,

AND

SHARAH . . . . . RESPONDENT.
PETITIONER-RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Dec.* 11, 12.

Webb, Kitto and Taylor JJ.

Matrimonial Causes — Marriage — Dissolution — Constructive desertion — Spouse charged—Intention—Proof—Absence of finding—Appeal—Evidence—Examination.

In constructive desertion the spouse charged must be shown to have been guilty of conduct equivalent to " driving the other spouse away " from the matrimonial home and to have done so with the intention of bringing the matrimonial consortium to an end.

Where in a suit by a wife for dissolution of marriage on the ground of constructive desertion the trial judge, having found the factum but not making any reference to animus on the part of the spouse charged, made a decree for the dissolution of the marriage, the High Court, upon an appeal by the husband, examined the evidence and not being satisfied that a finding of animus should be made thereon allowed the appeal and ordered a new trial.

Baily v. *Baily* (1952) 86 C.L.R. 424, *Lang* v. *Lang* (1953) 86 C.L.R. 432, and *Buchler* v. *Buchler* (1947) P. 25, referred to and discussed.

Decision of the Supreme Court of New South Wales (*McClemens* J.) in part affirmed and in part reversed.

APPEAL from the Supreme Court of New South Wales.

A petition dated 15th February 1952 was presented to the Supreme Court of New South Wales in its matrimonial causes jurisdiction by Veronica Lilah Sharah praying that her marriage with Nicholas Joseph Sharah be dissolved on the ground that the said Nicholas Joseph Sharah had without just cause or excuse wilfully deserted her and, without any such cause or excuse had left her continuously so deserted during three years and upwards.

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The allegation of desertion was denied by the husband, who, in a cross-petition dated 15th April 1952, prayed that the marriage between his wife, Veronica Lilah Sharah, and himself be dissolved on the ground that she had without just cause or excuse wilfully deserted him and without any such cause or excuse had left him continuously so deserted during three years and upwards. The wife denied the allegation.

There was one child of the marriage, a boy born on 1st October 1946.

The suits were consolidated, the wife having the carriage thereof.

Upon the hearing of the suits, which lasted eleven days, a great deal of evidence was presented to the Court.

In a reserved judgment the trial judge said, *inter alia*, that the evidence compelled him to the conclusion that the wife's continuance in the matrimonial home was rendered absolutely impossible by the husband's weakness for liquor, and that when under the influence, his behaviour to her was so intolerable as to render it impossible for her as a self-respecting woman to remain with him. It was in relation to liquor that all the criticisms of the husband that had been urged were urged and his Honour was driven to the conclusion that the husband was a solitary drinker, given to intermittent bouts of drunkenness under circumstances where his wife would not know when he was next likely to become intoxicated for a day or longer period, and that when affected he was liable to strike her, to use indecent language to her, and generally to render it impossible for her to continue to live with him as his wife. His Honour further said that he had had a very good opportunity of being able to form an opinion as to the credence which he could place upon the parties because the evidence took in all nine days. The petitioner was in the witness box for the best part of three days and was cross-examined for some eight hours, and the respondent was in the box for over two days and was also very lengthily cross-examined. His Honour said that the decision at which he had arrived was one which was based on the view he had formed of the credibility of the petitioner and the respondent and of the other witnesses in the case. His Honour did not think it either necessary or proper to embark on an exhaustive analysis of the extent to which he believed or disbelieved either the petitioner or the respondent. The view he had formed on an investigation of the whole of the evidence, including the letters (between the parties), was that the husband's conduct was such that any self-respecting spouse, situated as the petitioner was situated, would have felt compelled, if she were to preserve her decency and safety,

to determine the matrimonial relation. His Honour believed that Mrs. Sharah when she withdrew from cohabitation had found the circumstances of the matrimonial life caused by her husband's drinking habits so intolerable that she felt herself as morally compelled to withdraw. He accepted specifically the evidence of the petitioner that whilst intoxicated the respondent used to her foul and obscene language and referred to her and close relatives of hers in foul and obscene terms of the nature disclosed in evidence, and he accepted the wife's evidence generally of the course of the married life leading up to the happenings on 12th February 1949, showing that the husband had assaulted his wife on several occasions, these being, in his Honour's opinion, the culmination of a series of incidents which finally forced the wife to go, and she believed that she was justified in remaining away during the three years relied on by a well-founded belief that if she returned there would be a repetition of similar behaviour.

The judge pronounced (i) that the respondent had not sufficiently proved the contents of his petition and dismissed it accordingly; and (ii) that the petitioner had sufficiently proved the contents of her petition and on that petition granted a decree nisi for the dissolution of the marriage.

From those decisions the husband petitioner appealed to the High Court.

By an order of that Court the husband was granted leave to prosecute his appeal as a poor person.

Upon the appeal coming on for hearing the Court was informed by counsel for the appellant that it was not proposed to proceed on the appeal against the dismissal of the husband's petition.

H. R. Hudson, for the appellant.

M. D. Healy, for the respondent.

Cur. adv. vult.

Dec. 12.

THE COURT delivered the following written judgment:—

This is an appeal from a decree for the dissolution of the marriage between the appellant and the respondent. The decree was made in consolidated suits in the Supreme Court of New South Wales in its matrimonial causes jurisdiction and was made upon the respondent wife's petition. The appellant husband's petition was dismissed.

Upon the hearing of the appeal we were informed by counsel for the appellant that it was not desired to pursue the appeal

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against the dismissal of the latter's petition and the argument was, therefore, confined to an attack on the decree for dissolution made on the respondent's petition. This petition was based upon an allegation of constructive desertion.

Upon the hearing of the suits, which we were informed lasted some nine days, a considerable body of evidence was adduced. That adduced on behalf of the respondent wife, who was the petitioner in the suits as consolidated, testified to a course of conduct on the part of the appellant which was, at the very least, calculated seriously to endanger the marriage tie. The appellant, it was said, regularly drank to excess and was given to assaulting his wife whilst under the influence of drink. To this were added allegations that no adequate financial provision was made by the appellant for the maintenance of the household and that the appellant's general conduct towards his wife was of such a character as to lead to the ultimate destruction of the marriage. In particular, the effect of the evidence of the respondent and her sister is that the occurrence of any difference between the appellant and the respondent became the occasion on the part of the former for violent conduct and language of the most obscene kind. The evidence called on behalf of the appellant is a complete denial of these allegations. Not only does the appellant deny them but his denial is supported by what is claimed to be a substantial body of independent evidence. The appellant himself claims, indeed, that his conduct has been more or less exemplary and that, though there have been differences between him and his wife, they have proceeded in the main from his wife's dissatisfaction with the mode of life dictated by their financial circumstances and from her extravagant gambling habits. That she was so dissatisfied or that she indulged extravagantly in gambling is denied by the respondent. The extent of the conflict between the parties is apparent from this brief reference to the nature of the evidence before the Supreme Court and it is clear that the case of one party, at least, was founded not only upon exaggeration, but also upon testimony which was deliberately false. But it by no means necessarily follows from the rejection of the evidence of one party that the evidence of the other was or is worthy of full acceptance. At the conclusion of counsel's address the learned trial judge came to the conclusion that " the wife's continuance in the matrimonial home was rendered absolutely impossible by the husband's weakness for liquor and that, when under the influence, his behaviour to her was so intolerable as to render it impossible for her as a self-respecting woman to remain with him ". It was, his Honour says, " In relation to

liquor that all the criticisms of the husband that have been urged are urged and I am driven to the conclusion that he was a solitary drinker, given to intermittent bouts of drunkenness under circumstances where his wife would not know when he was next likely to become intoxicated for a day or longer period, and that when affected he was liable to strike her, to use indecent language to her, and generally to render it impossible for her to continue to live with him as his wife ". His Honour accepted specifically evidence that the appellant's use of foul language concerning his wife and her relatives was of frequent and regular occurrence. He also accepted the respondent's evidence generally concerning the course of the married life leading up to the events of 12th February 1949, when the respondent finally left the matrimonial home after her husband had on that day assaulted her. His Honour also accepted the evidence of two specified witnesses called on behalf of the respondent but it is proper to observe that the evidence of these witnesses was concerned with the appellant's conduct after 12th February 1949, and had no real relevance to the issues to be decided between the parties. Upon his view of the evidence his Honour further said: " The view I have formed on an investigation of the whole of the evidence, including the letters, is that the husband's conduct was such that any self-respecting spouse situate as the petitioner was situated, would have felt compelled, if she were to preserve her decency and safety, to determine the matrimonial relation. I believe that Mrs. Sharah when she withdrew from cohabitation had found the circumstances of the matrimonial life caused by her husband's drinking habits so intolerable that she felt herself as morally compelled to withdraw ".

These observations of the learned trial judge constitute the substance of his findings in the suit and his reasons for holding that the appellant had deserted his wife. Indeed his Honour deliberately chose to go no further. He said: " Apart from these observations I do not propose to go laboriously through the balance of the evidence, to indicate which witness I accept and which I reject because I regard it as undesirable in view of the history of this case that I should give either party the chance to use my remarks for the purpose of future litigation as they have attempted to use in these proceedings the remarks of other judicial officers. It only becomes necessary for me, therefore, to say that in this case I propose to find marriage and domicile in the affirmative. I propose to find the second issue desertion by the husband or wife, affirmatively in the wife's favour ".

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It is readily apparent that his Honour omitted in the course of his observations to make any reference whatever to one matter of vital significance in the case. It has repeatedly been pointed out that: "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. The practical difference between the two cases lies in the difference in the circumstances which will constitute such proof. In actual desertion the spouse charged must be shown to have abandoned the matrimonial consortium in fact, and to have done so with the intention of deserting. In constructive desertion the spouse must be shown to have been guilty of conduct equivalent to driving the other spouse away (per *Bucknill* J. in *Boyd* v. *Boyd* (1)) from the matrimonial home and to have done so with the intention of bringing the matrimonial consortium to an end". (per Lord *Greene* M.R. in *Buchler* v. *Buchler* (2)).

That proof of such an intention is essential was recently emphasized by this Court in *Baily* v. *Baily* (3) and *Lang* v. *Lang* (4) and in England in *Bartholomew* v. *Bartholomew* (5). In *Baily* v. *Baily* (3) it was said: "The cases seem to show that 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* (6)—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)" (7).

(1) (1938) 55 T.L.R. 3.
(2) (1947) P. 25, at pp. 29, 30.
(3) (1952) 86 C.L.R. 424.
(4) (1953) 86 C.L.R. 432.
(5) (1952) 2 T.L.R. 934.
(6) (1923) 33 C.L.R. 317, at p. 327.
(7) (1952) 86 C.L.R., at pp. 426, 427.

Although in *Baily* v. *Baily* (1) no fault could be found with the conclusion of the learned trial judge that the condition of the wife " created a life which was intolerable, and which a man could not be asked to endure indefinitely ", it was held that it was impossible, in the circumstances of the case, to find on the wife's part any intention inconsistent with the maintenance of the matrimonial relation. The position of the parties in *Lang* v. *Lang* (2) was decidedly different. That case presented itself to the members of the Court as completely described by the language used by *Isaacs* and *Rich* JJ. in *Bain* v. *Bain* (3) :—" A man may intend to retain his wife's presence, but also at the same time to pursue a certain line of conduct. If at all hazards he deliberately pursues that line of conduct, his intention to retain his wife's presence is conditional on or subservient to the other intention. If his conduct is such that his wife, as a natural or necessary consequence, is morally coerced into withdrawing, it cannot be said with any truth that the husband intends her to remain. He knows in that case that the result of his deliberate act will be and is his wife's withdrawal, and, therefore, in every real sense he intends that withdrawal " (4).

To the members of the Court the facts in *Lang* v. *Lang* (2) showed that : " On countless occasions he must have been in the state of mind of knowing that what he was doing would necessitate her withdrawal if she acted as any reasonable creature would. However, he was able time after time to regain a certain amount of her womanly confidence and womanly sympathy. As a result there was no final separation until at last she felt it inevitable " (5).

The vital point of distinction between that case and *Baily* v. *Baily* (1) is obvious but it is perhaps permissible to " point the distinction " by quoting the following passage from the latter case : " Dr. Beattie was not cross-examined by counsel for the husband. His evidence, as it stands, explains the conduct of the wife of which the husband complains, and leaves no room for the inference against her which must be drawn if he is to establish his case. It really excludes the possibility of inferring the necessary animus on the part of the woman. It is not that it means that she was incapable of forming an intention to adopt a course of conduct calculated to bring about a rupture of the matrimonial relation. But every act and omission on her part must be viewed against the background so clearly painted by that evidence. When they

(1) (1952) 86 C.L.R. 424.
(2) (1953) 86 C.L.R. 432.
(3) (1923) 33 C.L.R. 317.
(4) (1923) 33 C.L.R., at p. 325.
(5) (1953) 86 C.L.R., at p. 437.

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are so viewed, what might have been the prima-facie significance of acts and omissions disappears. They are not perhaps involuntary acts and omissions. They may be acts and omissions to which blame attaches. But they cannot be regarded as evincing an intention to persist in a course of conduct calculated to bring the matrimonial relationship to an end" (1).

In the present case his Honour found facts which established a justification of the respondent in leaving the appellant and that clearly justified the dismissal of the appellant's petition. But his Honour, in dealing with the respondent's petition did not advert in any way to the factor upon which *Baily* v. *Baily* (2) and *Lang* v. *Lang* (3) hinged and which those cases so clearly indicate was also a vital factor in this case. Possibly it was left to be assumed by the learned trial judge that he was satisfied to conclude that underlying the appellant's conduct there was an intention to bring the marriage to an end or to persist in conduct which any reasonable person would regard as calculated to produce such a result. But if this was so it is a matter of regret that such a finding was not made. The fact that no such finding was made obliges this Court to say that the decree cannot stand unless such a finding necessarily follows from his Honour's conclusions or unless this Court, upon a re-examination of the evidence, is satisfied that it should now be made.

We should at once observe that we do not think it possible to say that the somewhat summary findings of his Honour, considered by themselves, would justify us in reaching a conclusion favourable to the respondent on this vital point. It is quite possible that the finding of the learned trial judge on this point would have been favourable to the respondent if he had adverted to it. But this does not mean that there is involved in any of the findings actually made a finding of the necessary intention on the part of the appellant. We were, indeed, invited to say otherwise but no reason of any substance was advanced why we should do so.

We have therefore re-examined the evidence in the light of his Honour's findings. Accepting generally the respondent's evidence, should the conclusion now be reached that, underlying the appellant's conduct there was an intention on his part either 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 ? The task of an

(1) (1952) 86 C.L.R., at p. 430.
(2) (1952) 86 C.L.R. 424.
(3) (1953) 86 C.L.R. 432.

appellate court in endeavouring to satisfy itself on such a question of fact from a consideration of a written transcript is not made any easier by the unwillingness of a trial judge to deal in some adequate measure with the evidence submitted to him, and this is particularly so where there is such a conflict as in the present case and where no measurable degree of assistance is to be obtained from documentary evidence. To approach the case on the basis that the respondent's evidence as to the course of the married life is to be accepted generally may enable us on her evidence to reach a conclusion in a very general way as to the nature of the appellant's conduct. But in a case such as the present this is, we feel, insufficient to enable us with any degree of confidence to form an opinion as to the appellant's state of mind. That there were quarrels and that these were not of rare occurrence is apparent. So also is the fact that on occasions, more or less frequent, the appellant resorted to violence and the fact that he was given to excessive drinking and the use of foul language. But upon this very general picture it is impossible to conclude with any real degree of satisfaction that he intended to bring the marriage to an end or to persist in conduct which any reasonable person would regard as calculated to bring about that result. That is a question which should be decided, and which we think can only be decided satisfactorily, on a more complete picture of the married life of the parties than is afforded by a consideration of the written transcript in the light of such findings as his Honour has made. We are most reluctant to order a new trial on the respondent's petition, but that course is the only satisfactory method of dealing with the problem which has arisen on this appeal.

For the reasons given we are of opinion that the appeal should be allowed and that there should be an order for a new trial of the issues raised in the suit instituted by the respondent.

Order that the decree in the consolidated suits in so far as it pronounced that the petitioner had sufficiently proved the contents of her petition No. 525 *of* 1952 *and in so far as upon that petition it ordered and decreed that the marriage celebrated on 8th December* 1945, *at Elizabeth Bay, Sydney, in the State of New South Wales, between the said petitioner and the respondent, the appellant in this appeal, be dissolved by reason that since the celebration thereof the said respondent had without just cause or excuse wilfully deserted the petitioner and without any such cause*

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or excuse left her continuously so deserted during three years and upwards, be set aside and order a new trial of the suit instituted by the said petitioner. Otherwise appeal dismissed.

Solicitors for the appellant, *J. P. Sharah & Co.*
Solicitor for the respondent, *Adrian C. R. Twigg.*

J. B.