[HIGH COURT OF AUSTRALIA.]

DALGLEISH . . . . . APPELLANT;
PETITIONER,

AND

DALGLEISH . . . . . RESPONDENT.
RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1955.

MELBOURNE, *May* 31;

SYDNEY, *Sept.* 5.

Dixon C.J., Webb and Taylor JJ.

Matrimonial Causes—Dissolution of marriage—Respondent during statutory period an "habitual drunkard" etc.—Marriage Act 1928 (*No.* 3726) (*Vict.*), *s.* 75 (*b*).

In a divorce suit on the ground that a husband had during the statutory period been an habitual drunkard and had habitually been guilty of cruelty towards his wife the trial judge found that the husband was a heavy drinker who behaved brutally and without restraint on occasions and whose fondness for drink had caused him to postpone his obligations to his family and behave badly as father and husband, but that he was not an habitual drunkard.

Held, that in the circumstances the finding was justified.

The vital question for consideration when the allegation is made that a man is an habitual drunkard is the condition which his addiction to drink produces and not necessarily or solely the extent to which he partakes of liquor.

Decision of the Supreme Court of Victoria (*Barry* J.), affirmed.

APPEAL from the Supreme Court of Victoria.

Kathleen Elizabeth Dalgleish presented a petition, dated 31st March 1954, to the Supreme Court of Victoria praying that her marriage with Walter George Dalgleish be dissolved on the ground that since the celebration of the marriage he had during three years and upwards been an habitual drunkard and had habitually been guilty of cruelty towards her and on the further ground that since the celebration of the marriage and within one year previously he had repeatedly assaulted and cruelly beaten her.

H. C. OF A. 1955.

DALGLEISH v. DALGLEISH.

At the hearing of the suit, which was defended, evidence was called on both sides. The trial judge (*Barry* J.) found that the respondent was a selfish and inconsiderate man who postponed his obligations to his family to his fondness for drink; that he was a petty tyrant in the home and that, on occasions, he behaved brutally and without restraint; that the account given of the incident of 3rd December 1953, was correct; that he did ill-treat his wife in the fashion which she had described, and that she was quite justified in leaving him and would be quite justified in refusing to go back to him; that from his behaviour over a considerable number of years he had been regardless of the obligations of his status as husband and father; that there was unlikely to be any useful amendment in that regard. His Honour, however, was not satisfied that the respondent was an habitual drunkard, though he considered him a heavy drinker and was satisfied that his fondness of drink had caused him to behave very badly as father and husband. He accordingly found against the petitioner on the first ground. So far as the second ground was concerned his Honour found that the allegation that he had repeatedly assaulted and cruelly beaten the petitioner during the period of one year immediately preceding the presentation of the petition had not been sustained. He was prepared to find that the respondent was brutal without any provocation and that he was always self-opinionated and tyrannical but not that there were acts of brutality of a kind sufficient to make out this ground. His Honour accordingly dismissed the petition.

From this decision the petitioner appealed to the High Court.

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

Mrs. *J. Rosanove*, for the appellant.

N. E. Burbank Q.C. and *J. S. Mornane*, for the respondent.

Cur. adv. vult.

Sept. 5.

THE COURT delivered the following written judgment:—

This is an appeal from an order of the Supreme Court of Victoria dismissing a wife's petition for dissolution of marriage on the grounds: (1) that since the celebration of the marriage the respondent had during three years and upwards been an habitual drunkard and had habitually been guilty of cruelty towards the appellant; and (2) that since the celebration of the marriage and

within one year previously the respondent had repeatedly during that period assaulted and cruelly beaten the appellant.

The suit was contested and evidence was called on behalf of both the appellant and the respondent. The parties were married at Melbourne on 26th April 1930, and there have been five children of the marriage, four daughters and one son. The son was the second child of the marriage, but he died in April 1953 at the age of twenty-one years as the result of an accident. The four daughters are still surviving and at the time of the hearing of the suit they were aged approximately twenty-four, nineteen, seventeen and fifteen years. There was a great deal of conflict between the evidence called on behalf of the respective parties and in this conflict the daughters supported their mother, though counsel for the respondent was at some pains to point out a number of discrepancies in their testimony.

After the marriage the parties lived for relatively brief periods at Essendon, Caulfield and Castlemaine, and in 1934 they moved to Frankston where they lived until late in 1941. In that year the respondent enlisted in the Australian Military Forces. Although there had been some disagreements between the parties in the period prior to 1941 they appear to have been reasonably happy during that time and no suggestion is made of any conduct on the part of the respondent which could be said to be recognizable as the beginning of a state of affairs leading to matrimonial offences of the character alleged. The respondent remained in the Australian Military Forces until 1944 but from 1941 up to the time of his discharge he was able to, and frequently did, spend his periods of leave with his family. It was during this period, according to the appellant, that the respondent commenced drinking to excess. He would, she said, often show signs of heavy drinking when he came home on leave and on a number of occasions, almost immediately after returning home in this condition, he would fall asleep and have little to do with his family. In 1944 the respondent was discharged from the military forces on the ground of ill-health and shortly thereafter the family returned to Frankston where they remained until about the middle of the following year. During this period the respondent, according to the appellant, showed "signs of fairly heavy drinking". He was, she said, sometimes abusive but his conduct was, in general, inoffensive. He was at this time working as a house painter but in June 1945 he commenced work at Sorrento as a builder and subsequently as a painter. Apparently his business met with some success and in June 1946 the family moved to a rented house in Sorrento. This house was

H. C. OF A. 1955.

DALGLEISH v. DALGLEISH.

Dixon C.J. Webb J. Taylor J.

subsequently purchased in the joint names of the appellant and respondent out of the latter's earnings. According to the appellant's evidence the respondent, at this time, began to drink both more heavily and more frequently. In the latter half of 1946 she noticed "for the first time" that the respondent was spending his time in the hotels during the day and seriously neglecting his work. In or about March 1947 the son of the marriage commenced working with his father and thereupon, according to her, the respondent began to lean more and more upon his son to look after the affairs of the business while he was either "drinking or recovering from the effects of previous drinking bouts". The picture thereafter painted by the appellant's affidavit is a sordid one. Notwithstanding that it was a contested suit her evidence in chief was given by simply adopting the contents of this affidavit. Had the story it tells been accepted, her case would have been made out. She says that from 1948 onwards the respondent would be in a drunken state from Friday night of each week until the following Tuesday morning. In addition, he would be drunk four or five times during the week and his language was obscene, violent, abusive and threatening. In 1951 the respondent's son left home, according to her affidavit, saying he could stand the respondent's conduct no longer. From 1951 onwards there were occasions when the respondent assaulted the appellant and it is said that from then on he lost money very heavily in business because he would forget orders for jobs which had been offered to him. He would often fall in a drunken stupor on the roadway when returning home in the early hours of the morning and even during the daytime would have to be assisted home. His condition, it is said, was frequently filthy and dishevelled. About July 1953 the parties sold the house at Sorrento and came to Brunswick to live. There the respondent obtained employment with a public company as a painter, but his conduct did not improve and on 3rd December 1953 there was a violent quarrel and a serious assault on the appellant. Shortly thereafter the appellant obtained accommodation at Brunswick and thereupon withdrew from co-habitation. This is but a brief account of the appellant's evidence as it appeared in her affidavit, but it is sufficient to enable it to be said at once that if this evidence were accepted even substantially there could be no doubt that the issue of habitual drunkenness was made out. But in the course of her cross-examination it became apparent that the picture as originally drawn was the subject of considerable exaggeration. Indeed, the daughters who gave evidence by no means entirely bore out their mother's testimony. Nor, indeed, did they entirely bear out one another's testimony, although

their evidence did, in the main, depict the respondent as a person addicted to frequent drinking bouts which carried him many times well beyond the bounds of decency and sobriety. The evidence for the respondent was in sharp contrast with that adduced on behalf of the appellant. The respondent, whilst admitting that he was an "average" drinker, that in recent years he had drunk "a little more" than previously, and that he had in the course of his married life been drunk on "odd occasions", strenuously denied that his conduct and habits were as deposed to by his wife and daughters. He pointed to the fact that he had carried on his business successfully, that he had at all times adequately supported his wife and family out of his earnings and that the home at Sorrento had been purchased out of moneys from the same source. Moreover, he says, he was a member of the committee of the local football club and for a few years whilst there acted as a goal umpire for the second team. Both at Frankston and Sorrento he was a member of the volunteer fire brigade and, in all, served in this capacity for a period of eighteen years. Football club meetings required his attendance on some evenings and his membership of the fire brigade required his attendance, on occasions, for the purpose of assisting in checking and attending to fire-fighting equipment and, on other occasions, to be available to meet emergency calls. On no occasion, he said, did his drinking habits result in non-attendance or in failure to attend to his work. In this evidence he was supported by the local police constable at Sorrento, by another resident of Sorrento who knew both the respondent and his family while they lived there and by a person who had worked as an employee of the respondent from May 1952 until shortly before he left Sorrento in 1953. These three witnesses agreed—whatever each may have meant by the expression—that the respondent was a heavy drinker, but their evidence does not indicate that they were at all disposed to regard him as a drunkard or as a person whose drinking habits resulted in what they might regard as insobriety.

In the result the learned trial judge dismissed the appellant's petition. In doing so he did not make precise findings of fact, but his brief reasons clearly indicate that he was not disposed to accept unreservedly the evidence given on behalf of the petitioner, or, indeed, to believe the whole of the respondent's evidence. The respondent was, he said, a "petty tyrant" in the home and on occasions "he behaved brutally and without restraint". Moreover, his Honour was quite satisfied that the account which had been given of the events of 3rd December 1953 was correct and that the appellant was quite justified in leaving her husband and in

H. C. OF A. 1955.

DALGLEISH v. DALGLEISH.

Dixon C.J. Webb J. Taylor J.

refusing to go back to him. But he was not satisfied that the respondent was an habitual drunkard. He was, he said, a heavy drinker and his fondness for drink had caused him to behave very badly as a father and husband, but he was not satisfied that he was an habitual drunkard.

On the appeal to this Court it was contended that upon these findings of fact the appellant's petition should have succeeded. Alternatively it was argued that the petitioner's evidence should have been accepted and a decree made for the dissolution of the marriage.

It is unnecessary to refer again in this case to the functions of a court of appeal in dealing with appeals on questions of fact. The case was essentially one in which credibility was a vital factor and it is clear that the learned trial judge was not prepared to accept without question the evidence called on behalf of the appellant. Acceptance, or even substantial acceptance, of that evidence would inevitably have resulted in a finding on the first issue in favour of the appellant. But his Honour was not prepared to make such a finding. The farthest he was prepared to go was to find that the respondent was a heavy drinker and that his fondness for drink had caused him to behave very badly as a father and husband. No reason appears for doubting the validity of his Honour's finding. It is not uncommon in cases of this kind to find that the truth lies somewhere between the conflicting stories deposed to on behalf of the respective parties and there is no reason to suppose that this was an exceptional case. On the contrary a perusal of the transcript rather tends to support the conclusion that the respondent's failings, bad as they may have been, were exaggerated by the appellant and her daughters. It is reasonably apparent that, apart from the husband's drinking habits, there were many occasions when disputes arose between the appellant and the respondent and that in the course of those disputes the children of the marriage, when they were involved, invariably took sides against their father. There is clearly room for doubt whether he was always in the wrong. The home life of the family appears to have been such that in the latter years neither the appellant nor the children had any real affection for the respondent, but it by no means follows that this was the result of the respondent's drinking habits. They may have been a factor which contributed to this result, but many other factors were operating over a long period. In particular the evidence suggests that there were serious differences of opinion between the appellant and the respondent as to the degree and form of parental control which should be exercised with respect to the children and it is reasonably obvious that the respondent's attempts

to assert his paternal authority were, on occasions, the subject of resentment and produced quarrels between him on the one hand and his wife and children on the other. His drinking habits doubtless impaired the authority he might otherwise have been able naturally to exercise. There is much to suggest that both the resentment and resultant quarrels became extremely bitter as time went on and that they eventually resulted in conduct on the part of the respondent justifying the wife's withdrawal from co-habitation. It is probable that the atmosphere produced by this state of affairs did more to break up the marriage than any other single cause. In the result no reason exists why we should disagree with the view of the facts taken by the learned trial judge.

Before parting with the case some reference should be made to the suggestion that the evidence given on behalf of the respondent would itself justify a finding that the respondent had during three years and upwards been an habitual drunkard. The evidence was that the respondent was during the latter part of the married life at Sorrento and in Brunswick a " heavy drinker ". The first step in this faintly argued contention was that the expression " a heavy drinker " must be taken to mean a person who habitually drinks to excess, and the second, that a person who habitually drinks to excess is an habitual drunkard. It is, of course, true that an habitual drunkard is a person who drinks to excess ; the fact that he is a drunkard is a clear indication that he does so. But to say of a man that he is a heavy drinker is to describe his drinking habits ; it does not necessarily describe the condition produced by those habits and this is the vital matter for consideration when considering whether a man is an habitual drunkard. It is of course as unnecessary as it is fruitless to attempt to define drunkenness or to say what constitutes an habitual drunkard. The task has been discussed if not attempted on a number of occasions and *Sholl* J. has made a survey of a number of cases in *Sullivan* v. *Sullivan* (1). It suffices in this case to say that the vital question for consideration when the allegation is made that a man is an habitual drunkard is the condition which his addiction to drink produces and not necessarily or solely the extent to which he partakes of liquor. There is nothing in the evidence called on behalf of the respondent to suggest that his drinking habits resulted habitually in drunkenness over the necessary period ; on the contrary, it rather suggests that his heavy drinking habits did not habitually produce such a departure from normal standards of conduct as could fairly be classified as drunkenness. Accordingly there is nothing to support

(1) (1954) V.L.R. 67.

H. C. OF A. 1955.

DALGLEISH v. DALGLEISH.

Dixon C.J. Webb J. Taylor J.

the suggestion that upon this evidence the appellant was entitled to a decree. It should be added that this contention does not appear to have been raised upon the hearing. We were informed upon the hearing of this appeal that neither counsel addressed the learned trial judge and, apparently, they treated the suit as one which merely raised a disputed question of fact for determination. While this is by no means fatal to the contention when made in this Court it affords some indication of the impression created by observation of the respondent and the witnesses who gave evidence on his behalf and by their evidence as it was given. This circumstance must tend to confirm the view which has been already expressed.

The second ground upon which dissolution of the marriage was sought was not adverted to upon the hearing of the appeal until counsel for the appellant replied and it was but faintly pressed then. It has recently been discussed by *Davies* J. in *Baker* v. *Baker* (1) a discussion from which some of the difficulties will appear. In the circumstances of this case it is sufficient to say that the evidence does not warrant the making of a decree on this ground.

For these reasons the appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellant, *Darvall & Hambleton.*

Solicitors for the respondent, *Robert C. Taylor*, Frankston, by *Pavey, Wilson, Cohen & Carter.*

R. D. B.

(1) (1955) 1 W.L.R. 1011, at p. 1013.