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Glover v  
Walker (1998)  
24 FamLR 80

REPORTS OF CASES

DETERMINED IN THE

HIGH COURT OF AUSTRALIA

[HIGH COURT OF AUSTRALIA.]

MAGAARD . . . . . APPELLANT ;  
RESPONDENT  
AND

MAGAARD . . . . . RESPONDENT.  
PETITIONER,

MAGAARD . . . . . APPELLANT ;  
PETITIONER  
AND

MAGAARD . . . . . RESPONDENT.  
RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF  
NEW SOUTH WALES.

*Matrimonial Causes—Marriage—Dissolution—Constructive desertion—“ Just cause or excuse ”—Intention—Continuance to act whatever the consequences—Conduct—Inference—Evidence—Matrimonial Causes Act 1899-1954 (N.S.W.), s. 13.*

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SYDNEY,  
April 22-24 ;  
Aug. 13.

Dixon C.J.,  
McTiernan,  
Fullagar and  
Taylor JJ.

Misconduct which will afford a respondent “ just cause or excuse ” in withdrawing from cohabitation with a petitioner will not amount to constructive desertion of the respondent by the petitioner unless there be proved a “ subjective element ” namely an intention, actual or imputable, on the part of the petitioner to break the matrimonial relation. Where the question is as to “ just cause or excuse ” no inquiry into the intention of the petitioner need be undertaken. The misconduct must be grave, but the only question is as to the reasonableness of the departure of the respondent in the light of the petitioner’s conduct viewed objectively. The petitioner carries the burden of proof of absence of just cause.

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In a petition by a husband for a dissolution of his marriage on the ground of desertion, the wife by her answer counter-petitioned for a dissolution on the same ground, which, *in extenso*, was that the respondent had “without just cause or excuse left the petitioner continuously so deserted during three years and upwards”. The wife departed from the matrimonial home between early in 1949 and March 1951, for four periods each of a duration of six days or less ; for a period of about eight or ten weeks from 1st June 1951, and for a period of about ten months from October 1951, and she finally departed therefrom in March 1953 and she never returned. The wife’s defence to her husband’s petition was that she had “just cause or excuse” for leaving him and remaining away from him. In her petition she alleged “constructive” desertion, her case being that the same conduct on the part of her husband provided not merely an answer to his suit but a ground of divorce at her suit. During the five months preceding the wife’s last departure from the home the husband had offered her violence and applied most insulting terms to her on a number of occasions, and on the day of her departure had given her what he described as a “bloody good hiding”. It did not occasion serious bodily harm but it was of a most humiliating character, and she had reason to fear that similar conduct might occur in the future. During the succeeding three years he wrote a number of letters asking her to return to him, but he did not offer any assurance that he would behave better in the future. The wife’s behaviour was seldom pacificatory and at times she unnecessarily irritated her husband.

The judge of first instance held that the wife had just cause or excuse for leaving her husband, but that the evidence of his conduct did not establish constructive desertion of the wife by the husband, and dismissed both petitions. Both parties appealed to the High Court.

*Held*, that the judge had reached a correct conclusion and both appeals should be dismissed.

*Nicoll v. Nicoll* (1956) V.L.R. 591, at pp. 595, 596, referred to.

Decision of the Supreme Court of New South Wales (*Brereton J.*), affirmed.

APPEALS from the Supreme Court of New South Wales.

A petition under s. 13 of the *Matrimonial Causes Act* 1899-1954 (N.S.W.) for the dissolution of his marriage on the ground of desertion during three years and upwards was presented to the Supreme Court of New South Wales in its Matrimonial Causes Jurisdiction by Henry Gustav Hirsch Magaard against his wife Marie Rose Magaard, and a counter-petition was instituted by the wife against her husband on the same ground. The petition and the counter-petition were heard together by *Brereton J.* who dismissed both of them, holding that the wife had just cause or excuse for leaving her husband, but that his conduct did not amount to constructive desertion.

The husband and wife respectively appealed to the High Court. Further material facts appear in the judgment hereunder.



*R. L. Taylor* Q.C. (with him *J. B. Sinclair*), for the husband. The ill-temper, inconsiderateness and impatience on the part of the husband no doubt led to a considerable amount of trouble between husband and wife—that was trouble that arose from his nature—but those incidents did not warrant the wife remaining away from the husband. The husband admitted that frequently in the quarrels he did behave badly and lost his temper, and said things that he regretted afterwards, but there was no admission of the type of conduct that the wife alleged had taken place between them. The husband was always the one who sought to make up the quarrel and he was prepared to take the blame for things that sometimes, he thought, were not entirely his own fault. The letters indicate that the quarrels were things said in anger; quarrels where both people had lost their tempers, but there had not been any serious disruption to their married life. Most of the incidents were completely trivial. Taking that view of the incidents, the trial judge was wrong when he made the subsequent finding that they, plus the background, constituted a just cause. The wife had never really wanted to return to her husband. The husband's letters were genuine letters, and he genuinely wanted his wife to return to him, and did not want her to leave him. There is no evidence of any adverse effect upon the wife's health. The acts upon which the trial judge relied do not amount to conduct which would entitle the wife not only to depart from but to stay away for the necessary period of three years. Many of the incidents are trivial. The husband's conduct was not "grave and weighty" nor was it persistent ill-treatment (*Bain v. Bain* (1)).

[DIXON C.J. referred to *Hoggett v. Hoggett* (2).]

*P. M. Woodward* Q.C. (with him *T. Falkingham*), for the wife. The judge of first instance accepted the wife's version of the incidents by and large and took the view that the conduct of the husband had been such as to justify the wife in leaving him. The judgment must be interpreted as meaning that the wife had established the fact of the desertion but not that the husband intended to bring the matrimonial state to an end. If it can be shown that there was an intention on the part of the husband to do what he did then it is implicit in the judgment that there was desertion.

[FULLAGAR J. referred to *Baily v. Baily* (3) and *Lang v. Lang* (4).]

The contents of the husband's letters corroborate the wife's assertions and tend to prove the case sought to be made out by her.

(1) (1923) 33 C.L.R. 317.

(2) (1926) V.L.R. 505.

(3) (1952) 86 C.L.R. 424.

(4) (1953) 86 C.L.R. 432; (1954) 90

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The various matters indicate the necessary intention on the part of the husband to bring to an end the matrimonial relationship.

[FULLAGAR J. referred to *Bain v. Bain* (1).]

[*R. L. Taylor* Q.C. referred to *Nicoll v. Nicoll* (2).]

The use by the husband of foul and questionable language to his wife must have caused her considerable shock and pain. *Nicoll v. Nicoll* (2) says nothing more than that the question is, in effect, one of fact. The wife has established conduct on the part of the husband sufficient to ground constructive desertion, and there is ample evidence, coupled with the acts themselves, which either indicate a positive intention on the part of the husband to bring to an end the relationship, or from which, in the circumstances, it must be inferred.

*R. L. Taylor* Q.C., in reply. The authorities were examined in *Nicoll v. Nicoll* (3). The evidence does not establish reasonable cause for the wife leaving the husband. Regard should be had to the whole course of the conduct between the parties. [He referred to *Deery v. Deery* (4) and *Sharah v. Sharah* (5).] The judge of first instance specifically found that in doing these things, of which his wife complained, he was not acting with the knowledge that that type of conduct would necessarily cause his wife to leave the home.

*Cur. adv. vult.*

Aug. 13.

The following written judgment was delivered :—

DIXON C.J., McTIERNAN, FULLAGAR AND TAYLOR JJ. In this case a husband petitioned for a dissolution of his marriage under s. 13 of the *Matrimonial Causes Act* 1899-1954 (N.S.W.) on the ground of desertion. By her answer the wife counter-petitioned for a dissolution of the marriage on the same ground. That ground, stated *in extenso*, is that the respondent “has without just cause or excuse wilfully deserted the petitioner and without any such cause or excuse left the petitioner continuously so deserted during three years and upwards”. The wife departed from the matrimonial home on 7th March 1953, and has never returned. The husband’s petition was filed on 23rd March 1956, and the wife’s answer, containing the counter-petition, on 1st May 1956. The wife’s defence to the husband’s petition was that she had “just cause or excuse” for leaving him and remaining away from him. Her own petition alleged “constructive” desertion, her case being that the same conduct on the part of her husband provided not

(1) (1923) 33 C.L.R. 317.

(2) (1956) V.L.R. 591.

(3) (1956) V.L.R., at p. 595.

(4) (1954) 90 C.L.R. 211.

(5) (1953) 89 C.L.R. 167.



merely an answer to his suit but a ground of divorce at her suit. *Brereton J.* dismissed both petitions. He held that the wife had just cause or excuse for leaving her husband, but that his conduct did not amount to constructive desertion. Cruelty alone is not a ground for divorce in New South Wales. Both parties have appealed to this Court.

The distinction, which is involved in his Honour's decision, between conduct which will amount to a "matrimonial offence", such as constructive desertion, and conduct which will merely justify one spouse in leaving the other, may well be thought to be one of the many unsatisfactory features of our divorce law. It is, of course, of less importance in jurisdictions where cruelty alone is a ground of divorce. Cases in which it is necessary to give effect to it are probably not very common, but there can be no denying that the distinction exists and has been long established. In *Yeatman v. Yeatman* (1), Lord *Penzance* saw a degree of "inconsistency" in it, but regarded it as already then established. He said that it was "the work of the legislature, as interpreted by the full Court of Divorce" in *Haswell v. Haswell* (2). The authority commonly cited for it in this country is *Bain v. Bain* (3). That case, like the present, was a case of petition and counter-petition. The husband had been guilty of excessive drinking and a degree of sexual brutality. *Irvine C.J.* held that the wife was justified in leaving him, but was not herself entitled to a decree on the ground of constructive desertion, and his decision was affirmed by this Court. The matter has been recently discussed by *Sholl J.* in *Nicoll v. Nicoll* (4). His Honour says that the distinction has, for the most part, been rested on a difference between conduct justifying a "temporary" withdrawal and conduct justifying a "permanent" withdrawal. We would agree with his Honour when he says, in effect, that, practically speaking, the question in cases of this type may often resolve itself into a question of degree, but the real substance of the distinction is, we think, that, in order to establish constructive desertion, what has been called a "subjective element" must be proved—an intention, actual or imputable, to break the matrimonial relation: *Lang v. Lang* (5). Where, on the other hand, the question is as to "just cause or excuse", no inquiry into intention need be undertaken. The misconduct must be grave, but the only question is as to the reasonableness of the departure of the respondent in the light of the

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(1) (1868) L.R. 1 P. & D. 489, at pp. 491, 492.

(2) (1859) 1 Sw. & Tr. 502; [164 E.R. 832].

(3) (1923) V.L.R. 421; (1923) 33 C.L.R. 317.

(4) (1956) V.L.R. 591, at pp. 595, 596.

(5) (1953) 86 C.L.R. 432; (1954) 90 C.L.R. 529; (1955) A.C. 402.



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petitioner's conduct viewed objectively. The petitioner carries the burden of proof of absence of just cause or excuse.

In the present case, we have not entertained any doubt that the learned trial judge was right in dismissing the husband's petition. During the five months preceding the wife's departure from the home he had offered her violence and applied most insulting terms to her on a number of occasions, and on the day of her departure had given her what he described as a "bloody good hiding". The assault did not occasion serious bodily harm, but it was of a most humiliating character. She had reason to fear that similar conduct might occur in the future. During the succeeding three years he wrote a number of letters asking her to return to him, but in none of them did he offer any assurance that he would behave better in the future, and, in our opinion, she was justified in leaving him and in declining to return to him.

The question which arose on the wife's petition, however, is, as it so often is in such cases, a question of difficulty. It necessitates a consideration of a great deal of evidence. We think it clear, for several reasons, that we must approach this case on the basis that the wife's evidence is substantially true, and that she is generally to be believed in preference to her husband. (This is, of course, far from meaning either that the wife's evidence is to be taken as completely accurate and exhaustive, or that the husband's evidence may be ignored.) In the first place, his Honour has expressly said that, as to actual incidents described (and these are the most important things) he prefers her evidence to his, and her evidence "frequently has the ring of truth". Further he has expressly said that he accepts the evidence of the wife's brother, and this evidence, though very limited as to what it covers, does tend to corroborate not only the wife's account of the particular incident to which it relates but, by reason of the light which it throws on the husband's character and temperament, the wife's evidence generally. Again, his Honour could not have dismissed the husband's petition unless he had believed that the wife's evidence as to the last five months of cohabitation was substantially true, and there is no reason to suppose if this evidence is true, that her evidence as to earlier events is false or unreliable. Finally, this Court must in any case look at the evidence for itself, and, in the last resort, form its own opinion upon it. When one reads the evidence in this case, only one conclusion seems open. It is impossible to read it without feeling satisfied that the wife's evidence is on the whole true, and that the husband's evidence, where it is in serious conflict with the wife's, is not reliable. His Honour was emphatic that the "breakdown of the marriage"



was "equally the fault of both", and that "each party was equally responsible" for a deteriorating situation, and there is much to suggest that a degree of this responsibility must be attributed to the wife. But, if full effect were given to this "finding" of his Honour's, it could hardly be held that the wife had "just cause or excuse" for leaving the husband. In fact the husband himself said that his wife had been "a good wife" and an "excellent mother", and, although he qualified this later and blamed his wife for most of their quarrels, the evidence does not establish equality of blameworthiness, and is very far from establishing any justification for the husband's recurrent violence and abuse.

Before proceeding to the evidence, one remarkable feature of this case should be noted. This is that the wife in fact left the matrimonial home on no less than seven occasions, including the final departure from which she never returned. On some of these occasions she stayed away only for a very short time. It may help towards viewing the story in perspective if the dates of these departures are noted in advance. The marriage took place in October 1947. The wife left the home in January 1949, in July 1949, in June 1950, in January 1951, in June 1951, in October 1951 (when she did not return until August 1952), and finally in March 1953.

The parties were, as has been said, married in October 1947. The husband was by occupation a chartered accountant. He was a widower with one child, a girl named Mary who was about nine years of age. The wife was a trained nurse. She had not previously been married. He was forty-four years of age, and she thirty-six. Throughout the period of their married life they lived in a house at Pymble. There was one child of the marriage, a boy named Paul, who was born in April 1950. During the first nine months of the marriage no serious trouble seems to have taken place, though in some ways not very clearly specified the stepdaughter seems to have been a source of contention. She was in fact later sent to a boarding school. The first of a long series of incidents described by the wife was of a very trivial character and arose from her declining to drink wine with dinner. This was early in 1949. Another incident occurred in July 1949. She said: "We had a difference about Mary, and in front of Mary my husband told me I was a bloody liar and a mischief maker. I told him it was unfair to speak thus in front of the child and he told me then to get out and the sooner the better, that he was sick of me and that he had to protect his little girl; to get out." After this episode she left him and went to Artarmon where she stayed for six days. During this period he

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telephoned her begging her to come back. She said that he would cry on the telephone, saying that he could not do without her. She returned on 31st July.

In August 1949 she became pregnant and informed her husband of this fact. Shortly after this an incident took place which she described as follows :— “ I was nauseated and did not get up at the usual time, and my husband was furious. He ordered Mary to get his meal. She asked me about it, and I said I was all right then, that I would get it. My husband said ‘No, you won’t ; I want my daughter to look after me.’ I said ‘ I’ll get it now.’ As I walked out of the bedroom door into the hall, my husband came out of his dressing room and put both hands around my throat and said, ‘ My God, I’ll kill you.’ He squeezed my throat, causing me to fall backwards. He dragged me into my bedroom, he was yelling ‘ Curse you and your child. I hope to God it causes you as much unhappiness as it caused me’ ; and then he called out ‘ I can’t do it’ , and let me drop on the floor, and went downstairs calling out ‘ This is terrible ; this is terrible’ .”

The child Paul was born on 23rd April 1950. In the evening of 30th June of that year a quarrel of a most trivial nature took place. On the next morning (1st July) an incident occurred which she thus describes :—“ My husband got up late, and I told him breakfast was ready, but he walked past me and went out into the garden and stayed there. Later, when I was bathing the baby upstairs, he came upstairs and asked me when his breakfast was going to be ready, and I said that it had been ready when I told him the first time. He called me a bloody liar and a dirty bitch, and then he referred to my family as bloody wowsers. He then got me by the shoulders and tried to force my head into the baby’s bath water. I struggled and got away but he got me again, and again tried to force my head into the bath. Finally I broke loose, and went downstairs to the phone. He followed me, and each time I picked up the receiver he knocked it out of my hand and laughed. The baby started to cry and I went upstairs ; he was not dressed. I wrapped him in a thin blanket and went downstairs to the phone again. My husband knocked the both of us against the grandfather clock and said ‘ You need not think you are going to hide behind the baby. That won’t stop me’ . I called out and rushed out of the house. A neighbour called out to me to go in there, but my husband chased me around the back of the house, caught hold of me and pulled me into the house again, shut the back door and locked it. I was frightened and I tried to kick him away. I got away and went into my neighbour’s and rang my sister who came over.” It is to be



observed with regard to this incident that it is not to be supposed that he had any serious intention of drowning her or of seriously hurting her, but there can be little doubt that he handled her violently, and she may well have been genuinely afraid of what he might do to her.

On Christmas Day of 1950 another violent quarrel took place which had its origin in a triviality. He threatened her with violence in the morning and seems to have sulked all the afternoon. He said in the course of this quarrel that Mary would have to leave school and look after him as he would not be able to get a housekeeper.

On the morning of 30th January 1951, she stopped him from hitting Mary and he was very angry. When he returned home in the afternoon he said to her—"What, are you still here?" She said, "Yes, but I intend going." On the following morning he asked her if she had slept well. She said "No". He threw a lemon at her and said, "Well, you bloody fool, what do you expect with all these nervous upsets." She may have made some retort, or perhaps her silence angered him, but at any rate what followed is thus described by her:—"Then he said 'By God, you are a bitch of a woman. It's a wonder I haven't killed you yet, and I jolly well will before I am finished.' I still kept quiet, and he said, 'You bloody old spinster passed the age for marrying. You only married me to have a child.' I was hurt and said that it was not true. He started to laugh and said, 'At last I have you on the raw. Now I know how.' He kept repeating that I had been a bloody old spinster. Then he caught hold of my arm and forced me to pour the mixture on to the floor. I called out, and a neighbour sent a little girl in. My husband let me go and told the child to go home. Then I told him I really could not stand any more, and I would have to go. So he told me to go ahead and see what he would do, that he would drag my parents' name through all the mud he could through the divorce Court, that he would fight me for the child and would spend the rest of his life making mine hell."

She left him that day and went first to her parents' home and then to Collaroy. Very shortly after her departure on this occasion he apparently had a conversation with her father, after which he wrote a very remarkable letter to her in which he implored her to return to him. The letter contains the following passages:—"Darling, why did you go off without telling me where you were going? I did so much want to tell you what a beast I have been . . . . What more can I say than that I have behaved abominably. I wish to Heaven that I could recall it all . . . . I don't really want to hurt you. All this is terrible . . . . I am not

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the man I would like to be . . . Pop tells me that you are afraid of me. Oh, Marie, I don't want to hurt you. I love you too much to harm you. Please don't think this is hypocritical. Marie, I have been a beast to you over those quarrels. Please don't ever leave me. Oh Marie darling. Please come home . . . I want to see you, to speak to you and to Paul. I want to kiss you and say just how much I regret my beastliness. Much as I deserve it please don't punish me any further."

She did not write any reply to this letter, but shortly afterwards in response to his appeal she returned to the home. She appears to have been away on this occasion for about six days. She says that after her return her husband was very contrite, and she gives this account of a conversation with him:—"My husband told me he was very sorry and that a devil seem to possess him and say 'To hell with Marie'. He prayed to fight it and come to me, but always the devil won and then he neither knew what he said or did. He later said he had been to a psychologist who had explained his trouble as jealousy of the child, and he admitted that that was so."

Her return on this occasion seems to have been followed by a brief period of comparative peace, perhaps because for the greater part of it they were not living under the same roof. In February she went with the child for a fortnight's holiday at Blackheath, and the letters which passed between them whilst she was away are in affectionate terms. All that need be noted about these letters is that in one written by him to her he says, "I love you too much to want to hurt you. Why do we hurt each other so?" At the end of the same letter he says, "Look after yourself, get plenty of rest and plenty of nourishment because you have a difficult husband to cope with." In another he says, "I do miss you such a lot and I do really love you ever so much in spite of my beastliness."

The interlude was of brief duration. In March they went together with the child for a further holiday at Blackheath, and quarrels took place there and after their return home. He flew into violent tempers on a number of occasions, in the course of one of which he said that he "was sick of her and that he would finish her" but little importance attaches, we think, to these particular quarrels.

On 1st June 1951 she again left him and remained away on this occasion for a period which was probably between eight and ten weeks. There does not seem to have been any incident of importance which led up to this departure, but quarrels had taken place, and she said that she left because she was seriously frightened for the safety of herself and her child. The child had been ill at the end of May, and she had complained of what she regarded as a callous



indifference on his part. On the night of 31st May there was a quarrel, and he rushed out of the house and did not return until late. After her departure on 1st June she wrote him a letter in the following terms:— “All this week I have wanted to discuss matters with you but your unapproachable manner has made it impossible and I just could not stand another scene. Henry if ever a person wanted to make a success of this marriage, I did, because I loved you so. As you know I would do anything to help you, but your suspicion and jealousy has made it impossible. You promised and promised to try and control yourself but it is getting worse and I cannot go on living in such an atmosphere of fear. You once said that you really went mad during these tempers—you must or how could you have knocked me down and tried to strangle me when our baby was coming—or how, when you knew my fear of water, could you try to force my head into the baby’s bath as you did the day before his christening. Henry you surely cannot derive pleasure from calling me such vile names or raising your hand to strike my face, and now I am really afraid not only for myself but the baby, because you have proved that even with the babe in my arms you would not refrain from knocking me about. When we are out in the car I fear you may suddenly change—as you do—and may carry out your threat to kill me. And now during little Paul’s illness, just when I needed your understanding and co-operation you have failed me. Henry how could you go off to work each day without looking at the little chap or even inquiring about him. Henry if I stay any longer my health would give out so my dear it must be goodbye.”

There are three things to be said of this letter. The first is that the wife was in touch at this time with a lady solicitor, who may have had a hand in its composition. The second is that there is no evidence of any threats to kill her when they were out together in the car. The third is that the letter brings up incidents which had happened a very considerable time ago, which suggests that she may well, as her husband said, have been in the habit of referring to old and presumably forgiven offences whenever they fell out, which was certainly not seldom. After her departure he telephoned to her on several occasions and begged her to return. She said that when he telephoned her he usually cried. Ultimately a Mr. Knowles, a mutual friend, persuaded her to return to the home. The period of her absence on this occasion is not clear, but she was probably away about eight weeks.

The next incident of any moment took place on 1st October 1951. She had the child on her knees when the husband came upstairs.

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She says :— “ I told him he was frightening the child, and he called me a bloody bitch and went to strike me across the face. The child was frightened and I said to him not to do it. He again went to strike me across my face, and he laughed at me. Then he left me.” That night another quarrel took place which she thus describes :— “ My husband was still annoyed and he told me he was sick of me and he intended having his will altered. He said that he was sorry I had ever come back and that he was sorry that he married me and that he did not really want me. He accused me of going through his drawers, and I said that was not true. He told me I was a bloody liar. Then he started to call my parents bloody wowsers again. When he caught hold of my arm, I tried to pull his hair, and he laughed and said what a nasty temper I had. I went upstairs and he followed me and said he would let me have it, and I told him if he dared to touch me I would go to the police ; he left me alone then.” On 14th October, she said, “ I asked my husband to let us discuss the situation and he worked himself up and told me I was a liar, a mischief maker and jealous of his daughter. I told him that if he would only help me and co-operate, that I could manage Mary. She did not resent my corrections or my teachings and that I thought it cruel of him to persist in doing things to Paul that he knew alarmed me. He started to cry, and said that he realised he knew nothing about the management of children and that things were worse now, and that could not we start again—try again. I told him the strain was too great and that for the child’s sake, I would have to leave because it was impossible to bring up a normal happy child in that atmosphere. He asked me to kiss him, and I said I could not and be sincere. He was very emotional, crying loudly, and he ran down out of the house.” On the following morning (15th October) she says, “ My husband did not speak to me in the early part of the morning, and while I was upstairs making the beds he came up and accused me of being an unnatural mother, not allowing him to kiss and fondle his child. I told him that that was not true. The baby was on the floor between us and my husband went to kick the child aside. I bent down to pick him up and my husband went to strike me three times across the face, calling out bloody old bitch, filthy swine. Then he made as if to spit in my face. I just said ‘ You dirty old man ; I am afraid it is the German coming out in you.’ My husband then said ‘ I would rather be a German than a dirty bitch of a thing like you ’ ; and he went downstairs to his study, and afterwards went off to work.”

On that day she left the home again. On this occasion she left a brief note saying, “ Henry I am very ill and have gone home to my



mother's for the night." She, of course, took the child with her. This time, however, she remained away, living at her parents' home, for ten months and did not return until August 1952. In January of that year the husband had commenced proceedings for restitution of conjugal rights. Almost immediately after the return of the wife in August 1952 the parties ceased to occupy the same bedroom. In November 1952 there was an argument over her failure to do some trivial thing and when she offered an explanation she says he called her a "bloody liar". She goes on:— "He pushed me out of the kitchen and he started to go upstairs with his shaving mug of boiling water, and he told me I was a bloody liar . . . . He then turned and threw the mug of water at me and came downstairs and said 'Get into the kitchen where you bloody well belong'. He gave me a push, knocking me over. I fell on a chair—across a chair, and I cut my ankle and hurt my arm and my side. He still continued to force me down over the chair even though I called out I was hurt. Finally he let me go. I managed to get upstairs to my bed, and he later applied a dressing to my ankle and arnica to my side." She says that her ribs and back were badly bruised and she lay for some time on the bed because she had difficulty in breathing. A little later she went to a doctor, and it was found that one of her ribs had been broken.

On 15th February 1953 he accused her of having allowed some potatoes to go bad. When she said that she had not noticed them, he twice called her a bloody liar and a vile-tongued woman. She goes on:— "He rushed out of the kitchen and into the lounge and he slammed the door so hard that he broke the bolt and groove, and he rushed back through the other door and said My God, he would do for me, and he picked up a suitcase of books and threw them at me and hit me on my right elbow and arm. I was stunned, and just looked at him and said . . . . I forget what I just said to him then. But he said 'Now run and tell your bloody parents I have hit you'. I said No, that I would go to the police. He smacked me across the face. Later, he said that I was always 'give-me, give-me'. I said that was not true, that I had bought most of my clothes out of my own bank account and he said 'What about the £50 I once gave you?' I said 'How far do you think that would go?' He said 'That is the trouble with you; you never ask for anything. That is why I never give you anything, so that you will have to climb down off your haughty perch and beg for it.' I think it was at that incident that he told me that I had made us the laughing stock of Pymble by coming back home, and that he wished to God I would get out and let him get a housekeeper."

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About a week later there was a discussion in the evening about a quarrel which had taken place earlier in the day. She says, "We discussed the situation and my husband told me he was quite justified in hitting me across the mouth whenever he felt like it because I had such a vile tongue. He asked me what were my objections to getting a divorce, and I said None; and he asked me why had I stopped it the last time and I said that I had not, but I did not see why he should be the one to get the divorce. He said what did it matter who got the divorce, to go ahead, but for God's sake to get a decent lawyer . . . My husband came upstairs after me. He continued to be upset and said that I would listen to him, and he caught hold of me by both wrists and pulled me into his dressing room. He kicked the door shut and he forced me on to the bed. I looked at the open window and said I would call for help if he touched me. He let go one wrist and shut the window and then took both wrists again and I bit his wrist. He laughed and said 'Go ahead, hit me'. I said I would not. I got away into my bedroom. He came after me and I told him to get out and leave me alone. He said it was not my room anyway. I said it was for the time I was there. The baby awakened and cried, and my husband said he was sorry we had ever had Paul. I said, 'No, let me have that little bit of happiness.' He said, 'Well, if it is happiness to you, you can have him.' He then also said that I said I had to pawn a ring. I told him I had never said or had done such a thing, and he said 'Then someone must be mad. Go ahead and get a divorce', and again he told me to get a good lawyer. Then he started to cry about Mary and he said he wished to God he had—I think the word he used was 'guts', to kill himself and Mary. He went into his dressing room crying, and I locked the door fearing he might come back and do some harm."

A day or two later there was trouble over a letter written to him by his sister who probably did, in fact, play to some extent the part of a mischief maker. The wife told him that the sister was two-faced. She goes on:—"He told me that I was a bloody liar and that I was mad and having hallucinations again. Then he went to hit me and he said, No, that he had been warned not to do that, and that I could get out and do what I bloody well liked."

The final incident which led to the wife's departure on 7th March 1953 is thus described by her:—"I got up early in the morning and took the child downstairs. My husband later came down and asked me was I going out for the day with the child. I said Yes, and he said Good, that he was going out too. I went upstairs and I made



the beds. As I was coming downstairs I met my husband coming up and he said, 'My God, I am going to give you the hiding you deserve.' I said 'Don't you dare touch me.' He said 'Won't I; you wait and see.' He asked me why I would not go to a psychiatrist? I said 'Why should I?' He said 'Because you are mad' and he repeated that several times and said I knew I was mad . . . I turned to go upstairs, and he said 'Don't think you are going to get out of it as easily as this', and he caught hold of me and pulled me into the bedroom and forced me over the bed, pinned my face downwards, jammed my legs against the end of the bed with his legs, pulling my clothes over my head, ripped my underclothes, and he hit me several times on the buttocks. I finally was forced to cry out. He let me go and said, 'Now get home to your blasted wowsers of parents and tell them I hit you', and he chased me into the garden and out into the street, and I finally got to a neighbour's and rang for my brother. My brother came over, and then I went back into the house to get some clothing, and I could hear my husband yelling to my brother that he had given me a hiding and that he wished he had killed me."

Shortly after this incident the wife's brother, having been summoned by her by telephone, came to the house and had a conversation with her husband, who was evidently in a very distraught state. He said: "I have had enough; she is driving me crazy, and this is as far as I will go; this is the finish." He also said he claimed the right of any husband to chastise his wife. He described what he had done in the morning as giving her "a bloody good hiding" and referred to her in insulting terms. On that day she took her final departure, and went with her brother to his home at Wahroonga.

After the final departure the husband wrote several letters to the wife imploring her to return. In the first of these he says:—"I told you before you left that I was sorry—truly sorry and I meant it." Of the wife's replies it is sufficient to quote one. Others were to the same effect. On 29th January 1954 she wrote:—"I received your letter and while no doubt you believe what you say at the moment, my previous experience has taught me that if I were to take your protestations seriously you would after a while act as you did before. I am afraid you are too much set in your ways to change now. I am much happier as I am away from your conduct that has caused me so much worry and trouble in the past." There is no real reason for supposing that the husband's letters or at least the earlier letters were not sincere. Nor is there, on the other hand, any

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reason for saying that the wife was not quite justified in adopting the attitude which she did adopt.

A case of this kind can only be decided after a careful review of the evidence as a whole. Does the evidence which has been set out above establish constructive desertion of the wife by the husband? We do not think it does. We think, on the whole, that *Brereton J.* reached a correct conclusion.

To begin with, the evidence set out above is almost exclusively that of the wife. Reasons have been given for saying that that evidence ought to be accepted as substantially true. But this does not mean that it should be regarded as exhaustive, or as giving by itself anything like a complete picture of a complex situation. In some cases her account is most probably exaggerated: one example is the incident in which she endeavours to give the impression that he "kicked" the baby. The husband's accounts of the various incidents themselves are, for the most part, on their face unreliable or incredible. But, as *Brereton J.* observed, whereas the wife's account of what happened after the husband had been worked, or had worked himself, into a passion is generally clear and plausible, one feels sure that in some instances the account is incomplete and that, where the husband speaks of provocation, he is by no means always to be disbelieved. In particular, her account of the final episode on 7th March 1953 is an account of a gratuitous and unprovoked attack. The account itself may be taken as true enough, but that it was entirely unprovoked is not to be believed. The provocation may from time to time have taken a variety of forms, and may sometimes at least, not have been deliberate, but there is a great deal to suggest that her behaviour was seldom pacificatory, and that she managed at times both by speech and by silence to irritate him extremely when a trivial complaint might well have been met by a good-humoured response. Such considerations are far from excusing the husband's vulgar abuse and violence. But, when it is a matter of characterising his conduct from the point of view of the ultimate question here in issue, they do have a bearing on the significance to be attached to that conduct.

The ultimate question here in issue is (as it commonly, though not invariably, is in cases of this type) whether an intention on the part of the husband to bring the matrimonial relation to an end can be inferred or imputed to him. The burden of proof rests on the wife. It is impossible, in our opinion, to say here that the husband had at any time any actual intention or desire to drive the wife from the home, nor do we think that it was seriously contended that he



had any such actual intention. It is true that on more than one occasion he told her to “get out”, or that he wished she would “get out”, that he told her at least once to “get a divorce”, and that he said on one occasion that he was “sorry she had come back”. But little importance can be attached to such expressions used in the heat of verbal conflict. He appears to have been apt to fall into uncontrolled, if not uncontrollable, passions, and his behaviour appears at times almost irrational. He may sometimes have thought that it would probably be best if they did part, but it is out of the question to infer positively from his conduct that he had any purpose of driving her away. When she left him for more than a brief period, he implored her to return. Neither on the earlier occasions nor on the final occasion does any reason appear for saying that his requests to her to return were not sincere. In several letters, including one of those written after her final departure, he expresses contrition for his conduct, and we would regard these expressions too as sincere. He said himself that in these letters he was assuming, in the hope of achieving an improvement in their relations, a blame which could not fairly be assigned to him. We are disposed to think that he really felt himself to blame, and that his expressions of regret were sincere, but it does not matter which view one takes of those letters: on either view they indicate a desire not to break, but to resume and continue, the matrimonial relation. At one stage too he consulted the Marriage Guidance Council of New South Wales, and this can hardly have been with any other object in view than to save the marriage from failure.

Nor, in our opinion, is this case one of those in which it can be said that a spouse, however desirous or hopeful that the matrimonial relation shall continue, has intentionally persisted in a course of conduct in which he or she knows will certainly or very probably result in the departure of the other spouse. Perhaps the strongest way in which the wife's case here can be put on this footing is to begin by saying that the wife was reasonably afraid, by reason of her husband's conduct over a period, that he would kill her or inflict serious injury upon her, and then—referring to the words of the Privy Council in *Lang v. Lang* (1)—to say that he must (both as a matter of commonsense and from his wife's previous departures) have known the probable result of his acts, and that he nevertheless persisted in them until that result eventuated. But the argument cannot, in our opinion, be sustained. It is, of course, extremely difficult to gauge the nature and extent of the wife's actual fears.

(1) (1954) 90 C.L.R., at p. 543; (1955) A.C., at p. 429.

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That she feared—and with reason—that, if she returned, she would on occasions be again assaulted and insulted may be regarded as clear. That she feared that he would kill her or seriously injure her is very doubtful. That, if she did, her fear was reasonably entertained is more than doubtful. But, however this may be, this case bears no resemblance to *Lang v. Lang* (1) and the language of their Lordships does not embrace it. *Lang v. Lang* (1) was, one would think, about as strong a case of constructive desertion as ever came before a court. The respondent in that case had pursued a long course of quite deliberate brutality, which culminated in a revolting sexual assault, which he announced his intention of repeating whenever he felt inclined. It was most probably literally true that he had neither the intention nor the desire of bringing the matrimonial relation to an end, but for him to say so was a mockery. He must have known the practically certain result of his conduct: his wife had left him for good cause twice before her final departure, but had returned in response to his entreaties. Their Lordships said:—“If the husband knows the probable result of his acts and persists in them, in spite of warning that the wife will be compelled to leave the home, and indeed, as in the present case has expressed an intention of continuing his conduct and never indicated any intention of amendment, that is enough however passionately he may desire or request that she should remain. His intention is to act as he did, whatever the consequences, though he may hope and desire that they will not produce their probable effect.” (2) Those words do not fit the present case. It is not merely that the husband’s conduct here is not comparable with that of Mr. Lang. Here there cannot be said to have been anything in the nature of a deliberate persistence in a course of conduct at all. The husband was easily irritated, and perhaps in some degree unbalanced, and a comparatively trivial matter would throw him into a passion which he could not completely control. It may be said that he had the warnings of her previous departures, but by no means all of these can be said to have been justified. It cannot be said of him that he “intended to act as he did, whatever the consequences”. Probably no relevant intention of any kind lay behind his acts and words, many of which he later regretted. At any rate the evidence does not establish any relevant intention of any kind, and it is not possible to impute to him that subjective element which is a necessary element of constructive desertion.

(1) (1954) 90 C.L.R. 529 ; (1955) (2) (1954) 90 C.L.R., at p. 543 ;  
A.C. 402. (1955) A.C., at p. 429.



For these reasons both the husband's appeal and the wife's appeal should, in our opinion, be dismissed.

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*Appeal dismissed. Cross-appeal dismissed.  
Order that appellant Henry Gustav Hirsch  
Magaard pay costs of respondent Marie  
Rose Magaard of appeal and cross-appeal.*

Solicitors for Henry Gustav Hirsch Magaard, *W. R. Thomson & Co.*  
Solicitors for Marie Rose Magaard, *G. M. Stafford & Co.*

J. B.