[HIGH COURT OF AUSTRALIA.]

DONNELLY . . . . . APPELLANT;
PETITIONER,

AND

DONNELLY . . . . . RESPONDENT.
RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1939.

MELBOURNE, *May* 16.

Latham C.J., Rich, Starke, Evatt and McTiernan JJ.

Divorce—Desertion—Constructive desertion—Intention to determine matrimonial relationship—Marriage Act 1928 (*Vict.*) (*No.* 3726), *sec.* 75 (*a*).

On a petition by a wife for dissolution of marriage on the ground of desertion the trial judge found that the husband had not supported his wife and had formed an infatuation for his cousin, a girl aged sixteen years, which was resented by his wife, and had been gambling and drinking. On one occasion the wife found the husband under the influence of drink attempting to have intercourse with this girl against her will in the bed-sitting-room occupied by the husband and wife, after which the husband suggested that his wife and the girl should live with him as if they were both married to him, which suggestion they both repudiated. On a later occasion he treated his wife with violence. His wife thereupon left him. The trial judge was not satisfied that an intention to determine the matrimonial relationship should be imputed to the husband; accordingly, he dismissed the petition.

Held, by *Latham* C.J., *Rich* and *Evatt* JJ. (*Starke* and *McTiernan* JJ. dissenting), that, having regard to the trial judge's findings of fact, an intention to drive his wife away from him permanently should be imputed to the husband, and, therefore, that desertion by the husband was established.

Moss v. *Moss*, (1912) 15 C.L.R. 538, applied.

Decision of the Supreme Court of Victoria (*O'Bryan* A.J.) reversed.

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APPEAL from the Supreme Court of Victoria.

Violet Olive Donnelly sought a dissolution of her marriage with William Donnelly on the ground of desertion for three years and upwards under the *Marriage Act* 1928 (Vict.), sec. 75 (*a*). The petitioner relied upon constructive desertion by the respondent in that his conduct was such as obliged her to leave him. The facts relating to the desertion are fully stated in the judgments hereunder. The petition, which was unopposed, was heard by *O'Bryan* A.J., who was not satisfied that an intention to determine the matrimonial relationship should be imputed to the respondent; he said that he was not prepared to hold that the respondent's conduct was of such a marked character or was persisted in to such a degree that the inevitable result was that there was no other course open to his wife, consistent with her self-respect and dignity, but to withdraw permanently from his society. He accordingly dismissed the petition.

From that decision the petitioner appealed to the High Court.

Joan Rosanove, for the appellant. In considering the question of constructive desertion the respondent's conduct should be looked at as a whole. *O'Bryan* A.J. dealt with it piecemeal. If it is the natural result of the respondent's conduct that the petitioner leaves him, it is sufficient to constitute constructive desertion. It is not necessary to go the length of showing that the petitioner's leaving him is the inevitable result of the respondent's conduct. [She was stopped.]

There was no appearance for the respondent.

The following judgments were delivered :—

LATHAM C.J. This is an appeal from an order dismissing a wife's petition for a dissolution of marriage. The ground of the petition was desertion for three years and upwards (*Marriage Act* 1928 (Vict.), sec. 75 (*a*)). The petitioner relied upon constructive desertion by her husband. The learned trial judge found certain facts, and his findings upon the facts deposed to in evidence are not challenged in this court. But it is said that, upon the basis of the facts actually found by the learned judge, he should have come to a conclusion

with respect to constructive desertion in favour of the petitioner. The facts found are shortly these :—The parties were married in 1924 ; the wife was aged nineteen years and the husband thirty-nine. They lived together for some time at a guest house. The wife was earning her own living and receiving a wage of £4 10s. per week. The husband at no time contributed to her support. After some time the husband, a civil servant, was transferred to Geelong. The wife remained behind in Melbourne. With the consent and apparently at the request of her husband, she brought to live with her a girl cousin of the husband, aged sixteen years. The husband corresponded with the wife and with the girl. Some of his letters, which were not produced, were described by the girl as love-letters. The learned judge accepted this description as accurate. The girl showed the letters to the wife, who objected to their tone and character. When the respondent visited Melbourne, as he had done from time to time at week-ends, he exhibited, according to the wife and according to the evidence of the girl, undue affection towards the girl. His Honour accepted this evidence and found that the girl had not encouraged him and was frightened by his advances. So the position, therefore, was that the husband was not supporting the wife, had formed what his Honour described as an illicit infatuation for this girl, which was resented by his wife, and, further, it was found that he was gambling and drinking. In October 1929 the wife went into the bed-sitting-room occupied by her husband and herself and found him (to some extent under the influence of drink) attempting to have intercourse with this girl who was living in the home with the wife. Both husband and wife were under a special obligation to protect the girl in relation to her morals. The wife was very angry at what she saw, and a quarrel took place. The husband urged the wife and the girl to live with him as if both were married to him. They repudiated and resented this proposal. Her husband went away to Geelong, but in about a fortnight he returned and another quarrel took place, in the course of which the husband treated his wife with violence. Letters were written asking that prior letters (not produced) should be destroyed so that other persons at least should not become aware of what he had done.

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Latham C.J.

Upon these facts the learned judge asked what I think is the right question. To use the words of the learned judge, "Was the husband's conduct such that any self-respecting spouse would have felt compelled if she were to preserve her decency or safety to determine matrimonial relations? Was the conduct such that the innocent spouse was morally coerced into withdrawing?" His Honour then quoted *Moss* v. *Moss* (1) to the following effect:—"What would a self-respecting woman do in the circumstances? Would she think it intolerable to remain? Would she regard herself as morally compelled unless willing to surrender her honour or womanly sense of decency to withdraw?"

Upon this appeal no challenge is made of any of the findings of fact in relation to the facts upon which evidence was given. The only question which arises is that of the application to the facts of this particular case of the principles involved in these questions. His Honour has answered these questions in the negative. For myself, applying my own mind to the same facts as the learned judge, I answer them in the affirmative. I say that a self-respecting woman in those circumstances, that is to say, the attempt to have intercourse with a girl living in the home, and the proposal for the husband to live with both of them, added to the other facts I have mentioned, would make it intolerable to remain. She would regard herself as morally bound to withdraw unless willing to surrender her honour or womanly sense of decency.

Answering these questions in the affirmative as I do, in my opinion the appeal should be allowed, the order of the Supreme Court set aside, and a decree nisi granted.

RICH J. I agree.

We are not interfering in any way with the findings of fact of the learned judge. We are, however, at liberty to draw our own inferences from the facts proved or admitted and to decide accordingly (*Mersey Docks and Harbour Board* v. *Procter* (2)). Taking all the facts into consideration I draw the conclusion that the husband's conduct was such as to compel his wife to leave him (*Moss* v. *Moss* (1)). Any self-respecting woman would have been compelled to determine the matrimonial relationship.

I agree with the order proposed by the Chief Justice.

(1) (1912) 15 C.L.R. 538.

(2) (1923) A.C. 253, at p. 259.

STARKE J. I do not agree with the decision of the court.

I think the practice of substituting its own opinion for the findings of fact of the trial judge is entirely wrong. It is quite unnecessary for me to consider what finding I should myself have reached in this particular case, but, sitting here, I consider that I should accept the findings or conclusions of fact of the trial judge unless they are clearly wrong, and that is the proposition which has now the authority of the House of Lords in *Powell* v. *Streatham Manor Nursing Home* (1). I am far from thinking in this case that the learned judge was clearly wrong.

EVATT J. I agree with the Chief Justice and my brother *Rich* that the appeal should be allowed.

In my opinion the Chief Justice has correctly stated the precise question in issue and has correctly answered that question.

I think it important to state the facts as to the husband's behaviour as they were found by *O'Bryan* A.J.; in doing so I quote his Honour's own words, wherever possible :—

(1) "I am satisfied that during a period of two or three months prior to the assault the husband was showing a marked affection for this young girl, that he did supply her during that period with money for clothes and that he was showing a marked preference for her company and society over that of his wife. I am satisfied that this did arouse alarm in the mind of the cousin and caused dissatisfaction to his wife."

(2) "I am satisfied that the husband was overborne during this period by an illicit infatuation for his cousin." He was "unduly attentive to her and displayed undue affection for her in the presence of his wife. These displays I think probably aroused alarm in the mind of his cousin and also disturbed his wife's peace of mind."

(3) "I accept the petitioner and her cousin's version of the fact that the husband did attempt to have sexual relations with his cousin on the night referred to in the petitioner's affidavit." (As his Honour negatived consent on the cousin's part, this is a finding that, in his wife's home, the husband attempted to commit the felony of rape.)

(1) (1935) A.C. 243.

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(4) With regard to the suggestion that his cousin should be incorporated into their married life as a second wife to him, "I accept the cousin's evidence that the husband did make a suggestion of this sort after the assault."

To these facts the learned judge sought to apply the correct rule of law for determining the issue of constructive desertion, the rule being, in substance, that "an intention to bring the existing state of cohabitation to an end is to be imputed to the husband irrespective of his actual intention, if by his conduct he shows that continued cohabitation is only possible for the wife upon conditions which a self-respecting woman cannot be expected to accept" (*Moss* v. *Moss* (1), per *Griffith* C.J.), i.e., whether the husband's conduct "was such as to be intolerable" (*Moss* v. *Moss* (2), per *Isaacs* J.).

In my opinion the learned judge erred in finding (or holding) that the conduct which he described would not be "intolerable" to any "self-respecting woman."

In a proper case this court, like every court of appeal, will reverse a finding of a judge who is sitting without a jury. In every case it must review such finding if it is called upon to do so. In this case, however, it is not required to do so. We are applying the admitted standard of the law to admitted facts, and in the circumstances we occupy a position of equal advantage to that occupied by the primary judge. Nothing whatever turns upon credibility of witnesses or conflict of testimony. Therefore it is quite impossible to shelter behind the established rule that we should not interfere unless the conclusion of the court below is clearly wrong. Here the judge's ruling is either right or wrong, and, in my opinion, it is wrong. It is a clear case of constructive desertion by the husband.

I agree with the order proposed.

McTIERNAN J. In my opinion the appeal should be dismissed. I am not satisfied that the trial judge arrived at an inference which in the circumstances of this case appears to be unreasonable. The question is whether the finding upon which he dismissed the petition is erroneous. The onus rested upon the wife to make out her case. A passage from the judgment of *Griffith* C.J.

(1) (1912) 15 C.L.R., at p. 541. (2) (1912) 15 C.L.R., at p. 544.

in *Dearman* v. *Dearman* (1) is in point:—"But if the tribunal of first instance, having seen and heard the witnesses, comes to a conclusion in favour of the party upon whom the burden of proof does not lie, it is almost hopeless to try to induce a court of appeal to interfere with that finding unless it has clearly proceeded upon a wrong principle. That is the general rule of law which prevails in courts of appeal." In this case it is not suggested that the learned trial judge did proceed upon a wrong principle. The question is whether the trial judge was in error in not making the inference from the facts found by him that the husband had constructively deserted the appellant. In the circumstances of the case I am unable to say that the trial judge was in error in not drawing that inference. His Honour said:—"On these findings, having regard to the age of the girl in question and the age of the respondent, her relationship to the respondent and her relationship to the petitioner, I am not prepared to hold that the respondent's misconduct was of such a marked character or was persisted in to such a degree that the inevitable result was that there was no other course open to his wife consistent with her self-respect and dignity but to withdraw permanently from his society. I bear in mind that on the night of the assault he was in drink and that his suggestion thereafter of a tripartite matrimonial relationship was made while he was in drink and under the stress of the discovery of his vile act. In my opinion, a self-respecting woman who really desired to fulfil her duties as a wife would not have felt coerced into withdrawing permanently from matrimonial relations with him or into permanently refusing thereafter to have anything more to do with him."

I am not satisfied that in finding that the husband was not guilty of desertion the trial judge came to a wrong conclusion.

Appeal allowed. Order of the Supreme Court of Victoria set aside and decree nisi granted.

Solicitor for the appellant, *Joan Rosanove.*

H. D. W.

(1) (1908) 7 C.L.R. 549, at p. 553.