Appl
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(1953) 86
CLR 432

Cons
Glover v
Walker (1998)
24 FamLR 80

[HIGH COURT OF AUSTRALIA.]

DONALD STUART BAIN . APPELLANT AND RESPONDENT;
PETITIONER AND RESPONDENT,

AND

LILIAN EMMA BAIN . . RESPONDENT AND APPELLANT.
RESPONDENT AND PETITIONER,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Oct.* 10, 11, 12; *Nov.* 9.

Knox C.J., Isaacs, Gavan Duffy, Rich and Starke JJ.

Husband and Wife—Divorce—Desertion—Constructive desertion—"Just cause or excuse"—Conduct not amounting to matrimonial offence—Marriage Act 1915 (*Vict.*) (*No.* 2691), *secs.* 97, 122, 127.

Sec. 122 of the *Marriage Act* 1915 (Vict.) provides that a married person may petition for dissolution of the marriage on the ground (*inter alia*) that "the respondent has without just cause or excuse wilfully deserted the petitioner and without any such cause or excuse left him or her continuously so deserted during three years and upwards."

Held, that in order to show "just cause or excuse" it is not necessary to show that the petitioner has been guilty of a matrimonial offence, but it is sufficient to show that the respondent had reasonable grounds for deserting the petitioner.

A husband was guilty of such conduct towards his wife as reasonably justified her in leaving him and remaining away from him, but such conduct did not constitute a matrimonial offence, nor was it such that it could be inferred as a matter of fact, or imputed to the husband as a matter of law, that he intended to break off the matrimonial relationship.

Held, that cross-petitions by the husband and wife for divorce on the ground of desertion for three years and upwards were properly dismissed, that of the husband on the ground that the wife had just cause or excuse for her desertion of him, and that of the wife on the ground that the husband had not deserted her.

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Per Isaacs and *Rich* JJ. :—Desertion as between husband and wife is always an actual desertion connoting both an act and an intention. The intention of one of the parties and its intimation to the other may be established by the natural or necessary consequences of the act, for they must be assumed to be contemplated. The question is always "Who is the real deserter ?"

Decision of the Supreme Court of Victoria (*Irvine* C.J.): *Bain* v. *Bain*, (1923) V.L.R., 421 ; 45 A.L.T., 17, affirmed.

APPEAL from the Supreme Court of Victoria.

A petition for divorce was instituted by Lilian Emma Bain against her husband, Donald Stuart Bain, on the ground of desertion for three years and upwards, and a counter-petition was instituted by the husband against the wife on the same ground. The petition and counter-petition were heard together by *Irvine* C.J., who dismissed both of them, holding on the wife's petition that the husband had not deserted her and on the husband's petition that the wife had just cause or excuse for her desertion of him and for her continuing such desertion : *Bain* v. *Bain* (1).

The husband now appealed against the dismissal of his petition, and the wife gave notice of cross-appeal against the dismissal of her petition.

The other material facts are stated in the judgments hereunder.

T. Brennan (with him *Harry Woolf*), for Donald Stuart Bain. On the evidence the learned Chief Justice should have found that the wife deserted the husband. The wife's evidence should not be accepted in the absence of corroboration. That is a rule of prudence (*McConville* v. *Bayley* (2) ; *Little* v. *Little* (3)).

[*Knox* C.J. referred to *Weinberg* v. *Weinberg* (4).

[RICH J. referred to *Riches* v. *Riches and Clinch* (5).]

The "just cause or excuse" referred to in sec. 122 (*a*) of the *Marriage Act* 1915 (Vict.) must be something which amounts to a matrimonial offence. If that is not so, it must be a grave and weighty matter, and the facts found by *Irvine* C.J. are not sufficient. It must be shown that it is practically impossible for the two to live together (*Greene* v. *Greene* (6) ; *Synge* v. *Synge* (7)).

(1) (1923) V.L.R., 421 ; 45 A.L.T., 17.
(2) (1914) 17 C.L.R., 509, at p. 513.
(3) (1873) 4 A.J.R., 143.
(4) (1910) 27 T.L.R., 9.
(5) (1918) 35 T.L.R., 141.
(6) (1916) P., 188, at p. 190.
(7) (1901) P., 317.

Bryant K.C. (with him *Basil Murphy*), for Lilian Emma Bain. As to the wife's petition, if the position is such that life with her husband becomes unendurable to a wife she is entitled to leave him (*Pizzala* v. *Pizzala* (1)), and as he had brought about that position she is entitled to assume that he wished her to go, and intended to put an end to the matrimonial relation. In those circumstances there is constructive desertion by the husband (*Moss* v. *Moss* (2) ; *Hutchinson* v. *Hutchinson* (3) ; *Dearman* v. *Dearman* (4) ; *Sickert* v. *Sickert* (5) ; *Harriman* v. *Harriman* (6)). As to the husband's petition, there was just cause or excuse for the wife deserting the husband, and his conduct during the following three years was such as to constitute just cause or excuse for her continuing the desertion.

T. Brennan, in reply.

Cur. adv. vult.

Nov. 9.

The following written judgments were delivered :—

KNOX C.J. AND GAVAN DUFFY J. The parties to this appeal, who are husband and wife, presented cross-petitions for divorce, the ground relied on in each case being wilful desertion without just cause or excuse for three years and upwards. *Irvine* C.J. held that the conduct of the husband afforded the wife just cause and excuse for leaving him and that his conduct after the separation afforded her just cause and excuse for refusing to return to him, and dismissed his petition. On the wife's petition he held that the conduct of the husband before the wife left him was neither such as to found an inference in fact of his intention to break off the matrimonial relationship nor such as to cause that intention to be imputed to him in law, and that, therefore, the constructive desertion alleged against the husband was not established, and he dismissed this petition also. The husband having appealed against the dismissal of his petition, the wife gave notice of cross-appeal against the dismissal of her petition.

In our opinion both the appeal and the cross-appeal fail. With

(1) (1896) 12 T.L.R., 451.
(2) (1912) 15 C.L.R., 538.
(3) (1908) V.L.R., 411 ; 30 A.L.T., 23.
(4) (1915-16) 21 C.L.R., 264.
(5) (1899) P., 278.
(6) (1909) P., 123, at p. 135.

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regard to the husband's petition, we do not think any other conclusion than that at which the learned Chief Justice arrived was fairly open on the evidence, and, just cause for the wife's desertion of her husband having been established, the petition must necessarily be dismissed. With regard to the wife's petition, we agree with *Irvine* C.J. in thinking that there may be conduct of the husband which affords a just cause or excuse for the wife deserting her husband, and yet falls short of establishing constructive desertion on the part of the husband. In our opinion the evidence in this case did not establish any actual intention on the part of the husband to break off the matrimonial relationship, or afford sufficient ground for imputing such an intention to him in law, and therefore the allegation of desertion which was the ground of the wife's petition was not proved.

In the Supreme Court both petitions were dismissed without costs. It is unnecessary to consider whether this order was correct, as the parties have agreed that the judgment shall be varied by directing that the appellant husband shall pay one-half of the taxed costs of the wife of the proceedings in the Supreme Court. They have also agreed that the appellant husband shall be ordered to pay the respondent's costs of this appeal.

ISAACS AND RICH JJ. By cross-petitions Donald Stuart Bain and Lilian Emma Bain respectively sought divorce from the other, each petition being founded on alleged desertion without just cause or excuse. The learned Chief Justice of Victoria dismissed both petitions, and each petitioner has appealed. On the argument several questions of importance were argued, and, having regard to the great and increasing number of similar petitions based on the statutory law which now represents the accepted public policy of Australia, we think we ought to express our opinions on the points contested.

The relevant facts found by the learned Chief Justice (and his findings cannot be impeached) are shortly as follows :—It was the wife who deserted the husband and continued that desertion for the necessary period. She deserted him because he pressed for his marital rights in a manner and to an extent that was not merely

often disagreeable to her but even painful, and sometimes with brutal assertion of his rights, especially when intoxicated. Sometimes this happened when her health should have precluded intercourse. For some little time before leaving him, she contracted ulcers, not caused by him, but painful, and, although he did not force her, his importunity was so great that she consented, though reluctantly, to intercourse, which naturally produced considerable pain. Altogether his demeanour was such as to destroy any affection she might have had for him and to arouse disgust instead. The ulcers were only temporary, and healed shortly after she left. The learned Judge held that though she deserted her husband she had just cause or excuse for leaving him in July 1919. But she continued her absence for three years in all in circumstances which, as the Court found, did not lead either to an inference in fact, or an implication of law, that her husband intended to break off their matrimonial union. In short, the Court found that she deserted her husband for the statutory period and he did not actually or constructively desert her at all. Necessarily her petition failed. We entirely agree with the view so taken. On the husband's counter-petition, in which he complained of her desertion, the wife set up just cause or excuse, not merely for her original departure, but also for the whole period. As to this it appeared that the husband wrote a large number of letters to his wife, a few to her father and also to her sister. Some are imploring and contrite, others are insulting, abusive and threatening. Taken as a whole, they are the product of an unbalanced and abnormal character and perfectly justify the judicial conclusion arrived at that the wife had a just cause and excuse to continue her desertion for the period complained of. The husband's petition was, therefore, also rightly dismissed.

With two exceptions, we have mentioned the facts so far as they are necessary to understand the points of law contended for. Those exceptions, however, are very important. The first is that there was no corroboration of the wife's evidence as to the husband's overbearing and inconsiderate sexual conduct during their cohabitation. The other is that, both by his personal conduct before separation and by his letters afterwards, the husband, so far from manifesting a personal wish to terminate matrimonial relations,

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indicated a violent desire for their continuance and resumption. This second fact raises in a clear and distinct form one of the vital questions in this class of cases.

On the facts established as we have narrated them, the following contentions were raised and contested:—For the husband it was urged: (1) that there could not, within the meaning of the *Marriage Act*, be any just cause or excuse for desertion that did not amount to a matrimonial offence, and, that having been negatived, his appeal should be allowed; (2) that *Irvine* C.J. had failed to give the necessary weight to the rule requiring corroboration in such cases. For the wife it was said: that, since the husband's conduct justified her leaving him and remaining away for the prescribed period, his conduct amounted to constructive desertion notwithstanding his personal desire for continuance and resumption of their relations, and so her appeal should succeed.

The husband's first contention cannot be maintained. A husband's conduct, morally offensive or physically violent, may be such that no matrimonial offence could be proved against him, and yet such as to allow him no right to complain if his wife so far resented it as to leave him. The law is not so unreasonable as to compel a wife, unable to prove that her husband has passed the utmost limit of misconduct allowed by law, to choose between complete submission, for instance, to ill-usage which has not developed into legal cruelty and herself becoming an offender by deserting him. The words "just cause or excuse" do not primarily connote a matrimonial offence, and there is nothing in the context necessarily to attach to them such a meaning. The test is reasonableness in the circumstances. The second point taken for the husband equally fails. No doubt the dissolution of the marriage tie is a very serious step, and from a variety of considerations, both public and individual, the duty cast upon the Court is by no means a light one. The solemn nature of the bonds it is called upon to break, the consequences to the parties themselves and to others, perhaps innocent, would be sufficient to induce a Court to move with more than ordinary caution. But the Legislature has not left the matter unnoticed, and by sec. 127 of the *Marriage Act* it is declared (as all such enactments declare) that "it shall be the duty of the Court to satisfy itself, so far as it reasonably

can, as to the facts alleged." *Read* v. *Read* (1), *coram Hodges* J., is an instance where the Court, in performance of its duty to so *satisfy* itself, required further evidence where it appeared that was procurable. In *Curtis* v. *Curtis* (2), on the other hand, *Bargrave Deane* J. said: "As a general rule the Court would not act on the uncorroborated evidence of a petitioner; but there was no rule which prohibited it from so acting if, on consideration of the whole of the materials before it, the Court was *satisfied* that the story put forward was a true one." The position, then, is that the law lays a duty on the Court "to satisfy itself, so far as it reasonably can" &c. The law does not insist on corroboration; but, as in many cases it is reasonable to expect corroboration if the story be true, the Court properly requires that confirmation before being satisfied. That is simply obvious caution, a rule of prudence as it is sometimes called; and it is a rule that must be applied according to circumstances. In the somewhat analogous case of a claim against a deceased person's estate, *Lachmi Parshad* v. *Maharajah Narendro Kishore Singh Bahadur* (3), Lord *Morris* said it had always been considered necessary to establish "as reasonably clear a case as the facts will admit of." If that is done and the Court believes it, the absence of corroboration, where it is not reasonable to expect it, is no cause for distrust. There is no ground in the present case for supposing that *Irvine* C.J. was not fully alive to the requirement of caution, and the duty of being satisfied as the law requires. His close examination of the facts demonstrates the contrary, and shows the care he bestowed on their investigation. It would be wholly unreasonable to expect corroboration in the present case.

The point taken for the wife—"constructive desertion"—needs closer analysis. As was pointed out in *Fremlin* v. *Fremlin* (4), desertion is a comparatively new offence in our legal history. As a matrimonial offence it was unknown to the ecclesiastical or the common law. It has now become the most prolific ground of divorce in Australia. It is not defined by statute. Its application to various circumstances has evoked a corresponding variety of expressions by Judges, until there has become a danger of substituting accidental

(1) (1905) V.L.R., 424; 27 A.L.T., 8.
(2) (1905) 21 T.L.R., 676, at p. 677.
(3) (1891) L.R. 19 Ind. App., 9.
(4) (1913) 16 C.L.R., 212, at p. 236.

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circumstances or secondary tests for inherent and primary essentials. Not for the purpose of framing any definition of "constructive desertion," as it is called, but in order intelligibly to give our reasons for rejecting the contention in hand, we state what we conceive to be the result of the relevant judicial expositions. What is desertion? Inherently, as was said by Sir *James Wilde* in *Williams* v. *Williams* (1), "to desert is to forsake or abandon." But always the subject matter must be regarded. Between 1864 and 1922 much judicial consideration has been given to desertion in relation to husband and wife; and so we may come at once to *Pulford* v. *Pulford* (2), where Sir *Henry Duke* says:—"Desertion is not the withdrawal from a place, but *from a state of things*. The husband may live in a place and make it impossible for his wife to live there, although it is she, and not he, that actually withdraws. The law does not deal with places in the narrow sense. What it seeks to enforce is the recognition and discharge of the common obligations of the married state." By the "state of things" the learned President of course meant the matrimonial relation. His words represent the effect of many judicial utterances because they demonstrate that what is called "constructive desertion" is no imaginary concept or fiction. It is a reality. Desertion as between husband and wife is always an actual desertion. Where matrimonial relations are abandoned the question must be "Who is the real deserter?" It may be the spouse who actually withdraws from the matrimonial home, if there is one, but it may be the other spouse. Which of the two was the real, the effective, cause of the abandonment? And, as desertion connotes both an act and an intention, and where a wife is the one who actually withdraws and charges her husband with conduct that drove her out, then, as Sir *F. Jeune*, for himself and *Gorell Barnes* J., said in *Charter* v. *Charter* (3): "The principle which underlies the cases is the intention of the husband to break off matrimonial relations." If a husband's conduct is the real and effective cause of the wife's departure from the home, that is the "act" to which the separation is attributable, whether he thrusts her out by physical strength or causes her withdrawal by moral compulsion. Again,

(1) (1864) 3 Sw. & Tr., 547. (2) (1922) 92 L.J. P., 14.
(3) (1901) 84 L.T., 272, at p. 273.

an enforced separation when it occurs may, like a voluntary separation, bear a temporary or a permanent significance. Which of the two must be determined, and by the circumstances. The intention must always be sought for; and the problem is how is that to be discovered. Is it sufficient to say that, as here, the husband violently desired his wife's presence and that ends it? Is the test found by asking what would a self-respecting woman do in the circumstances, or would she think the husband's conduct intolerable? We think that confusion and possible error are only to be avoided by adhering to fundamental principles. Intention is a matter of fact. Where one party withdraws and the intention of the other becomes material, that is to be ascertained by the same process as any other fact is found. But there is always one commanding principle, namely, that "in a Court of law every man is taken to intend the natural or necessary consequences of his action" (per Lord *Parker* in *Attorney-General for Australia* v. *Adelaide Steamship Co.* (1)). How rigorously that principle is applied, even in criminal cases, is apparent from *R.* v. *Sheppard* (2). 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. Lord *Westbury* in *Carter* v. *McLaren & Co.* (3) said there were two maxims which must never be weakened, and one of these was "that you must ascribe to every man a knowledge of that which is a necessary and inevitable result of an act deliberately done by him." Consequently, a husband whose deliberate conduct drives his wife away, although he does not by physical means force her out, is not in a position to assert an intention inconsistent with the intent that is naturally or necessarily involved in his acts. *Irvine* C.J. quoted from the valuable case of

(1) (1913) A.C., 781, at p. 799. (2) (1810) Russ. & Ry., 169.
(3) (1871) L.R. 2 H.L., Sc., 120, at p. 126.

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Pizzala v. *Pizzala* (1) the following words of Sir *Francis Jeune* :— " The wife may assume from her husband's conduct that he intends that she shall not live with him. Once you have evidence of this it amounts to the husband leaving his wife." That indicates the reality of the husband's intention, which the wife may assume. It also indicates you must have *evidence* of that. The succeeding words of the learned President are all important. He said : " He does not, however, force her by his conduct to leave him "—that is, he does not physically force her. " But," continues Sir *Francis Jeune*, " *a man must be assumed to contemplate the consequences of his acts.* I think the respondent has here *intimated his intentions*—within the meaning of *Graves* v. *Graves* (2), and there must, therefore, be a *decree nisi.*" So, also, per *Gorell Barnes* J. in *Sickert* v. *Sickert* (3) ; and see *Dearman* v. *Dearman* (4).

These principles enable the Court to answer such questions as have arisen here. The facts ascertained as narrated show that the intention of the husband, as gauged by the natural and necessary consequences of his conduct, was not to break off matrimonial relations. He did nothing from which his wife could assume such an intention, because, though his behaviour before separation was such that he must have contemplated that his wife might resent it as inconsiderate and selfish and might reasonably even withdraw from his society temporarily, he would not contemplate that she would regard it as intimating an intention to terminate their matrimonial relations. And, when she had left, the natural and necessary consequence of his letters was not to manifest a desire to terminate their relationship, or to produce such moral coercion as a wife would normally experience, compelling her for the preservation of her own decency or safety to withdraw permanently. The letters, on the other hand, though falling short of that, were naturally calculated to arouse resentment and antipathy such as might reasonably justify or excuse her from returning. Thus they amounted to just cause or excuse for her desertion but did not supply the necessary desertion by act and intention by her husband.

(1) (1896) 12 T.L.R., 451.
(2) (1864) 3 Sw. & Tr., 350.
(3) (1899) P., at pp. 283-284.
(4) (1915-16) 21 C.L.R., at p. 267.

Cases like *Moss* v. *Moss* (1) are instances only of the practical application of the principles we have mentioned. It is most frequently the best working test, in order to discover the husband's intention from his conduct, to ask "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?" But it must never be forgotten that that is only, in most cases, a practical method of applying the legal test for the purpose of reaching the intention, and is not itself the legal standard of desertion or of intention.

[*Note.*—See, in accordance herewith, *Jackson* v. *Jackson* (2).—*I.A.I. G.E.R.*]

STARKE J. These were petitions by Lilian Emma Bain and Donald Stuart Bain respectively, for the dissolution of their marriage. The wife alleged that the husband had deserted her, and the husband that the wife had deserted him. The Chief Justice of the Supreme Court of the State of Victoria dismissed both petitions, and both parties have appealed to this Court. The Chief Justice dismissed the wife's petition because he held that the husband had not deserted her, and the husband's petition because he found that the wife had just cause and excuse for leaving him. By the law of Victoria any married person domiciled in Victoria may petition for the dissolution of his or her marriage on the ground (*inter alia*) that the other party to the marriage has, without just cause or excuse, left him or her continuously deserted during three years and upwards (*Marriage Act* 1915, sec. 122). As a matter of fact the wife left the matrimonial home, and refused to return to it. The learned counsel who appeared for the husband insisted that there was no "just cause or excuse" for this action on the part of the wife, because the husband had not committed any matrimonial offence. But that is too narrow a view of the meaning of the section. No doubt the cause or excuse must be grave and weighty; but a "just cause or excuse" is established if the deserting party proves reasonable grounds, in the circumstances, for leaving her or his spouse (cf.

(1) (1912) 15 C.L.R., 538. (2) (1924) P., 19.

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Marriage Act, sec. 97 (1); *Yeatman* v. *Yeatman* (1); *Russell* v. *Russell* (2)). The Chief Justice found that the wife had reasonable excuse for leaving her husband in the present case, and there is ample evidence to sustain his finding. Accordingly, the husband's petition was rightly dismissed.

The wife's petition remains for consideration. Desertion, according to the cases, consists in the cessation of cohabitation with intent to abandon or forsake the other party to the marriage. The intent must exist, "as matter of real or assumed fact, in order to constitute . . . desertion." And it should be assumed "if it appears that the husband voluntarily did what compelled the wife to leave him, . . . because men usually mean to produce those results which naturally and necessarily flow from their actions" (*Bishop on Marriage and Divorce*, 3rd ed., sec. 794). *Irvine* C.J. examined the facts of the present case with extreme care, and found that the conduct of the husband was neither such as to found an inference in fact of his intention to break off the matrimonial relationship, nor such as to cause that intention to be imputed to him in law. This conclusion cannot, on the facts found by the learned Chief Justice, be disturbed, and the appeals ought to be dismissed.

Decree in each suit varied by ordering that the husband do pay one-half of the taxed costs of the wife. Otherwise appeals dismissed with costs.

Solicitors for Donald Stuart Bain, *J. A. Wilmoth & Co.*
Solicitors for Lilian Emma Bain, *Crisp & Crisp.*

B. L.

(1) (1868) L.R. 1 P. & D., 489.

(2) (1895) P., 315, at p. 334.