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DI METRAKIS  
NEARCHOU

v

FRANCISKA  
DEMETRAKI  
NEARCHOU THEN  
FRANCISKA  
MARTINEZ  
GARCIA

[L. LOIZOU, J.]

DEMETRAKIS NEARCHOU,

*Petitioner.*

*and*

FRANCISKA DEMETRAKI NEARCHOU THEN  
FRANCISKA MARTINEZ GARCIA,

*Respondent.*

(Matrimonial Petition No. 5/71).

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*Matrimonial Causes—Divorce—Cruelty—Constructive desertion—What constitutes cruelty and what conduct is capable of amounting to constructive desertion—Evidence in support of the husband's petition unsatisfactory—No reasonable excuse for petitioner to leave the matrimonial home—His obvious intention in so doing was to bring cohabitation permanently to an end—Husband's petition therefore has to be refused—Decree nisi granted to the wife on the ground of desertion by husband—Custody of the child to continue to remain with petitioner in the special circumstances of the case.*

*Divorce—Cruelty—Constructive desertion—See above.*

*Cruelty—What amounts to—See above.*

*Constructive desertion—What conduct may amount to constructive desertion—See above.*

*Civil marriage celebrated prior to the coming into operation of the Constitution—Husband a citizen of the Republic and a member of the Greek-Orthodox Church—Wife of Spanish nationality and a member of the Catholic Church—Dissolved on the ground of desertion by husband—Cf. also supra.*

This is a husband's petition for divorce on the ground of cruelty and constructive desertion. The wife by her answer prays for the dissolution of the marriage on the ground of desertion on the part of her husband. On the evidence adduced the learned judge dismissed the husband's petition, but granted the wife a *decree nisi* on the ground of desertion by the husband. The interest of this case lies in the dicta whereby

the learned judge restated the well settled principles governing the notions of 'cruelty' and 'constructive desertion'.

The parties were married under the provisions of the Marriage Law, Cap. 279, at the Commissioner's office, Famagusta, on the 14th January, 1957. The petitioner husband is a citizen of the Republic and a member of the Greek-Orthodox Church; the respondent wife is of Spanish nationality and a member of the Catholic Church. It is to be noted that the civil marriage in question celebrated prior to the coming into operation of the Constitution (August 16, 1960) is a perfectly valid marriage in view of the provisions of sections 34 and 36 of the Marriage Law (*supra*). Had the marriage been celebrated after August 16, 1960 (*supra*), grave doubts might have arisen as to its validity in view of the provisions of Article 111 of the Constitution (cf. in this respect the case *Anastassios Iosif HjiHanna v. Elizabeth HjiHanna etc.* (1973) 1 C.L.R. 186).

On the 28th June, 1959, a child was born of the marriage. It is an admitted fact that the petitioner left the matrimonial home in June, 1962. The respondent was adjudged a mental patient and has been confined in the Mental Asylum since the 25th September, 1969. Since then the petitioner has the custody of the child.

Dismissing the petition but granting the respondent wife a *decree nisi* and leaving the custody of the child to the petitioner in view of the special circumstances of the case, the learned judge :-

Held, (1)(a) What amounts to legal cruelty has been held in a line of cases to be conduct of such a character as to have caused danger to life, limb, or health (bodily or mental). See Rayden on Divorce, 8th ed. p. 120 and the leading cases *Russell v. Russell* [1897] A.C. 395 and *Jamieson v. Jamieson* [1952] 1 All E.R. 875.

(b) And in determining what constitutes cruelty regard must be had to the circumstances of each particular case, keeping always in mind the physical and mental condition of the parties, their character and social status.

(2)(a) On the other hand, constructive desertion and

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what conduct is capable of amounting to constructive desertion have been considered in the case of *Saunders v. Saunders* [1965] 1 All E.R. 838 (see the statement of the principle at p. 841, per Sir Joselyn Simon, P., set out *post* in the judgment).

(b) The generally accepted test of what conduct amounts to 'constructive desertion' is this: Has the spouse concerned (in the present case the respondent wife) been guilty of such grave and and weighty misconduct that the only sensible inference is that she knew that the husband would in all probability withdraw permanently from cohabitation with her, if he acted like any reasonable person in his position?

(3) (*After reviewing the evidence adduced*):

The evidence is vague and unconvincing and mostly uncorroborated. I do not feel that I can rely on such evidence to find that there was any danger to the husband's life, limb, or health or any reasonable apprehension of such danger. Nor can I find that he was compelled to leave the matrimonial home by the conduct of the wife. On the contrary it seems to me from the evidence that there was no reasonable excuse for the petitioner to leave the matrimonial home and that his obvious intention in so doing was to bring cohabitation permanently to an end; and there is nothing to show that this intention, his *animus deserendi*, was terminated at any subsequent time.

(4) Having come to this conclusion I must refuse the husband's petition and grant the wife a *decree nisi* on the ground of desertion by the husband.

(5) As regards the prayer for the custody of the child: The petitioner has had custody since December 1969, and he has made proper arrangements for her welfare and education. In the circumstances and in view of the respondent's condition, I am satisfied that the petitioner should

continue to have the custody of the child and I order accordingly.

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*Husband's petition dismissed.  
Decree nisi in favour of the  
wife on the ground of deser-  
tion. Custody order as above.  
No order as to costs.*

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Cases referred to :

*Russell v. Russell* [1897] A.C. 395;

*Jamieson v. Jamieson* [1952] 1 All E.R. 875;

*Saunders v. Saunders* [1965] 1 All E.R. 838. at p. 841.  
per Sir Joselyn Simon P., *applied*.

**Matrimonial Petition.**

Petition for dissolution of marriage because of the wife's cruelty and constructive desertion.

*Ch. Loizou*, for the petitioner.

*M. Ioannou*, for *C. Indianos*, for the respondent.

The following judgment was delivered by :-

L. LOIZOU, J. : This is a husband's petition for divorce on the grounds of cruelty and constructive desertion.

The wife by her answer prays for the dissolution of the marriage on the ground of desertion on the part of the husband.

The undisputed facts of the case are briefly as follows :

The parties were married at the Commissioner's office, Famagusta, on the 14th January, 1957. The petitioner is a citizen of the Republic and a member of the Greek-Orthodox Church and the respondent of Spanish nationality and a member of the Catholic Church.

After their marriage the parties resided at No. 7, Simos Menardos Street, at Famagusta. On the 28th June, 1959, a child was born of the marriage. It is an admitted fact that the petitioner left the matrimonial home in June, 1962. The respondent was adjudged a mental patient and has been confined in the Mental Asylum since the 25th

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September, 1969. Since then the petitioner has the custody of the child.

On the 20th March, 1971 the husband filed the present petition. It is alleged therein that the respondent since the celebration of the marriage treated the petitioner with cruelty by habitually using violent obscene language, by creating daily quarrels without any cause in the matrimonial home, at parties and at his place of work so that in June, 1962, he was driven from the matrimonial home and has not returned thereafter.

On the 19th May, 1971, on the application of the petitioner Miss Iro Andronikou, Welfare Officer, of Nicosia, was, by order of the Court, appointed guardian ad litem of the respondent for the purposes of these proceedings and on the 26th November, 1971, she filed the answer to the petition thereby denying that the respondent had been guilty of the conduct alleged in the petition and alleging that the petitioner failed to show the conjugal kindness and/or consideration towards the respondent necessary for the success of the marriage. It is further alleged in the answer that the petitioner deserted the respondent without cause and it is prayed that the marriage be dissolved on the ground of desertion.

The petitioner gave evidence on oath in support of his petition and called one witness. He stated in evidence that after their marriage he and the respondent lived happily until about two or three months after the birth of the child when there started to be friction in the family. He said that all of a sudden the respondent became homesick and did not like Cyprus and wanted the family to go to Spain. He told her that when they could afford it he would see what they could do but nevertheless the respondent kept on pressing for her demands and she used to go to his place of employment and create trouble and as a result he became a salesman of the company so that she would not find him at the office. Asked what exactly she used to do when she went to the office he said that some times he happened to have clients with him and she asked him for money to do shopping but this was an excuse because there was money at home.

He remembered an instance in September, 1959, when she called at the office and there was a scene between them. She tore his shirt and threw packets at him. In answer to a question by his counsel whether this had any repercussions on his work he replied that the clients started seeing him with a different eye and that he could not stay there working because he was creating a problem for the company. One year later, in September, 1960, he said, he accompanied his family to Spain and gave up his employment with the company with which he had been working; he stayed in Spain for 11 days and then he returned to Cyprus alone and in November of the same year he emigrated to the United Kingdom where he was employed by the Union Castle Line as a swimming pool attendant. He said that before his employment he visited his wife in Spain and again returned to London. Towards the end of 1961 he returned to Cyprus and shortly afterwards his wife returned together with the child. For one or two months, he said, they got on well and then the same incidents started and in June, 1962, he left the matrimonial home because he realized that there was no understanding between them, and has not returned to her ever since nor did he have any contact with her until September, 1969. In the meantime the respondent visited Spain twice and stayed with her parents for periods the duration of which he was not certain about. In September, 1960, they met in the street and she asked him for money to buy a house but he told her that he had no money. He then noticed that she was not normal in view of her behaviour towards the child whom she used to beat. He reported the matter to the Welfare Office and as a result she was examined by a doctor and was eventually adjudged a mental patient. Asked what he meant when he said that after she returned from Spain in 1962 the same incidents started again he said that she was jealous and used to get upset when she saw him talking to a woman in the street and could create a scene and that she used to do this even when the woman was a relative of his. He further said that since he left the matrimonial home he made no attempt to reconcile with the respondent.

Mr. Christodoulos Demetriades who was called as a

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witness for the petitioner is the Director of the company Chr. Demetriades & Co. Ltd. with whom the petitioner has been employed since 1955 and in whose service he still is; presumably he resumed his employment with his former employers when he returned from London in 1961. He is a brother-in-law of the petitioner. Due to his relation with the petitioner, he said, and to the fact that he was in his employment he had the opportunity of seeing that the petitioner was not getting on well with his wife. Asked whether he witnessed any incidents between them he said that he did on many occasions both at the office and in his house and specifically mentioned the incident when the respondent is alleged to have torn the shirt of the petitioner in the office and also an incident at the house of a Mr. Toumazis when she insulted the petitioner because he was talking to some other guests and she became jealous.

No evidence was called on the part of the respondent.

It was contended on the part of the petitioner that the conduct of the respondent above-described constitutes the ground of cruelty and constructive desertion. On the part of the respondent, on the other hand, it was contended that the conduct of the petitioner in leaving he matrimonial home was not warranted by the facts and that it, therefore, amounts to desertion.

What amounts to legal cruelty has been held in a line of cases to be conduct of such a character as to have caused danger to life, limb, or health (bodily or mental) or as to give rise to a reasonable apprehension of such danger. See Rayden on Divorce, 8th ed., p. 120 and the leading cases of *Russell v. Russell* [1897] A.C. 395 and *Jamieson v. Jamieson* [1952] 1 All E.R. 875; and in determining what constitutes cruelty regard must be had to the circumstances of each particular case, keeping always in mind the physical and mental condition of the parties, and their character and social status.

Constructive desertion, on the other hand, and what conduct is capable of amounting to constructive desertion have been considered in the case of *Saunders v. Saunders* [1965] 1 All E.R. p. 838. Sir Joselyn Simon P. said (at p. 841):

"The generally accepted test of what conduct amounts to constructive desertion is this: has the defendant been guilty of such grave and weighty misconduct that the only sensible inference is that he knew that the complainant would in all probability withdraw permanently from cohabitation with him, if she acted like any reasonable person in her position. So stated, factum and animus and, indeed, absence of consensuality are intimately bound up. Unless the conduct is so grave and weighty as to make matrimonial cohabitation virtually impossible, the defendant cannot know that his wife will reasonably withdraw from cohabitation. Unless the conduct is of such a nature as to overbear the complainant's willingness to remain in cohabitation, her withdrawal will have an element of consensuality."

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After due consideration I am not at all satisfied with the evidence adduced in support of the petition. With the exception of the one incident in December, 1959, when the respondent tore the petitioner's shirt the evidence is vague and unconvincing and mostly uncorroborated. I do not feel that I can rely on such evidence to find that there was any danger to the husband's life, limb, or health or any reasonable apprehension of such danger. Nor can I find that he was compelled to leave the matrimonial home by the conduct of the wife. On the contrary it seems to me from the evidence that there was no reasonable excuse for the petitioner to leave the matrimonial home and that his obvious intention in so doing was to bring cohabitation permanently to an end; and there is nothing to show that this intention, his *animus deserendi*, was terminated at any subsequent time. Having come to this conclusion I must refuse the husband's petition and grant the wife a *decree nisi* on the ground of desertion by the husband.

As regards the prayer for the custody of the child the petitioner has had custody since September, 1969, and he has made proper arrangements for her welfare and education. In the circumstances and in view of respondent's condition I am satisfied that the petitioner



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should continue to have custody of the child. I, accordingly, make a custody order in his favour.

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In the circumstances I do not propose to make any order for costs.

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*Husband's petition dismissed.  
Decree nisi in favour of the wife  
on the ground of desertion.  
Custody order as above.*