

with more or less frequent lapses into hysteria or complete irrationality. This is, in substance, the view taken of the case by the learned trial judge. That the husband's health was affected cannot be doubted, and it is impossible not to feel a degree of sympathy with him.

But, when the husband's case is put at its highest, it is impossible, in our opinion, to find on the evidence that animus, without proof of which a petitioner cannot, as the law stands, succeed in this type of case. It is clear that the wife had no actual intention or desire of driving him away or of bringing the matrimonial relation to an end. Such an intention might indeed be inferred from one or two irresponsible utterances on her part, but, on the evidence as a whole, such an inference appears to us to be quite impossible. The break took place against her actual wishes, and, after he had gone, she asked him verbally on three occasions to return. Later, on two occasions, she wrote to him asking him to return. In one of these letters, written on 18th March 1949, she says "I will do everything in my power to make your life happy, smooth running and successful". In the other, written on 14th May 1950, while telling him that he was "never justified in going", she says: "In such an event" (i.e. if he returns) "you could rely upon me to fulfil my part in straightening out our lives". It is possible, of course, that both of these letters were written under advice, but no reason is apparent for saying that they were not genuine and sincere. Late in 1945 she had gone from Hobart to Perth, taking the child, to stay with her parents who lived in that city. It was presumably hoped and intended that this holiday would give her pleasure and do her good in every way, but the probability is that it had a disastrous effect, since she suffered a severe attack of measles in Perth and her facial condition and her nervous condition seem to have become very much worse. But, be this as it may, she wrote to her husband from Perth a very long letter, which seems revealing. It is the letter of a woman who has become self-centred and is completely obsessed by her own physical and nervous condition and in an extremely irritable state, but it is not lacking in affection, it refers to domestic matters, and it is certainly not such a letter as would be written by a woman who contemplated the breaking up of her married life. In a post-script she says: "I wish we could get someone like Mrs. Keenan as a help: if I am no better by the time I get back, it is a sorry plight for us all". Somewhat similar letters were written by her a little later from a hospital in Melbourne. In one of these she discusses a number of plans for alterations to the home in Hobart.

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It seems indeed clear on the evidence that there was no actual intention to bring about a separation. And it is not, in our opinion, possible to say that the evidence establishes an intention to persist in a course of conduct calculated to bring about a separation. At this point the evidence of Dr. Beattie, a Hobart physician, is of great importance. It was accepted by *Morris C.J.* Dr. Beattie was treating the wife in the middle of 1946. After stating her condition in technical terms, he proceeded "It was a distressing condition of the skin, expressed in cracking of the lips and peeling of the face and dermatitis. It was a most distressing condition. The underlying factor appeared to be a seborrhoeic condition, which is very common. Her condition was an unusual and grave complication of it. Her condition was a severe vicious circle. The severe skin condition caused severe mental distress and nervous upset, and that in turn aggravated the skin condition, and so on. . . . She was very distressed mentally—felt hopeless—no one could do her any good. Her mental condition was a condition known as breakdown—pretty severe. This was aggravating the skin condition. . . . I had no doubt she was quite genuine in all her troubles. She was all the time in very great distress. I gave her all the treatment I could think of. She responded to me quite well, but relapsed. I decided I could not do any more for her. I prescribed a number of nervous sedatives, as well as skin treatment".

Dr. Beattie was not cross-examined by counsel for the husband. His evidence, as it stands, explains the conduct of the wife of which the husband complains, and leaves no room for the inference against her which must be drawn if he is to establish his case. It really excludes the possibility of inferring the necessary animus on the part of the woman. It is not that it means that she was incapable of forming an intention to adopt a course of conduct calculated to bring about a rupture of the matrimonial relation. But every act and omission on her part must be viewed against the background so clearly painted by that evidence. When they are so viewed, what might have been the prima-facie significance of acts and omissions disappears. They are not perhaps involuntary acts and omissions. They may be acts and omissions to which blame attaches. But they cannot be regarded as evincing an intention to persist in a course of conduct calculated to bring the matrimonial relationship to an end.

The view which the learned Chief Justice of Tasmania took of the facts of this case did not, we think, differ materially from that which we take. His Honour said that "*this condition of hers*



created a life which was intolerable, and which a man could not be asked to endure indefinitely". He referred to "a perversity arising from her *involuntary* nervous condition". He thought that "the sex maladjustment was attributable to her concentration on herself". "I see", he said, "a case where a wife's habits, *due to a large extent to illness* and not to any malignant desire to hurt him, but nevertheless habits which she knows are hurting him, are persisted in over a long period, and the whole situation bears down upon the husband in a manner which he finds intolerable". We can find nothing that we would criticise in these observations. Sympathy may be felt for the husband. It may well be that he cannot be fairly blamed for leaving his wife. But neither incompatibility nor general unhappiness, nor even a long continuance of "habits which hurt", is yet a ground for divorce in Tasmania. Still less is the acute or chronic illness of one spouse. The ground alleged in this case is constructive desertion. Constructive desertion is not established unless such an intention as we have described is proved. It is not proved by the evidence in this case.

The appeal should be allowed with costs, and the decree nisi set aside. In lieu thereof it should be ordered that the petition for dissolution of marriage be dismissed with costs.

*Appeal allowed with costs. Decree of the Supreme Court discharged. In lieu thereof order that the suit be dismissed with costs.*

Solicitors for the appellant, *Crisp & Wright*.

Solicitors for the respondent, *Russell, Kennedy & Cook*, agents for *Dixon & Parker*, Hobart, Tasmania.

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[HIGH COURT OF AUSTRALIA.]

LANG . . . . .

RESPONDENT,

AND

LANG . . . . .

PETITIONER,

APPELLANT ;

RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF  
VICTORIA.

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MELBOURNE,

Feb. 20, 23.

Dixon C.J.,  
Fullagar and  
Kitto JJ.

Matrimonial Causes—Dissolution of marriage—Constructive desertion—Intention—  
Termination of desertion—Marriage Act 1928 (Vict.) (No. 3726) s. 75 (a).

In a suit by a wife for dissolution of marriage on the ground of desertion it was proved that the husband had from time to time exhibited temperamental states in which he was full of animosity against his wife and full of an intention to cause her pain, do her harm and make her condition as a wife completely intolerable. After these states had passed the husband was able time after time to regain a certain amount of his wife's confidence and sympathy. Eventually in consequence of the husband's conduct the wife left the matrimonial home. After the wife had left the home the husband requested her to allow him to meet her for the purpose of discussing reconciliation. The wife refused to allow the husband the meeting which he sought and intimated to him that she would never under any circumstances live with him again.

Held that the element of intention in constructive desertion had been proved. *Bain v. Bain*, (1923) 33 C.L.R. 317 applied. *Baily v. Baily*, (1952) 86 C.L.R. 424 and *Bartholomew v. Bartholomew*, (1952) 2 T.L.R. 934 discussed.

[EDITOR'S NOTE.—On 4th May 1953 the Judicial Committee of the Privy Council granted special leave to appeal from the decision of the High Court.]



*Held* further that the refusal by the wife to permit the husband to meet her for the purpose of discussing reconciliation and her intimation to him that she would never under any circumstances live with him again did not terminate the desertion.

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

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APPEAL from the Supreme Court of Victoria.

Jean Wauchope Lang presented a petition dated 29th October 1951, praying that her marriage with Eric Lang be dissolved on the ground that the respondent did without just cause or excuse wilfully desert her and did without any such cause or excuse leave her continuously so deserted during three years and upwards. The desertion alleged was of the kind known as "constructive" desertion. The suit was defended.

The trial judge (*Lowe J.*) in a judgment delivered on 22nd September 1952 found that the course of conduct which was proved indicated an intention to persist in a course of conduct which any reasonable person would regard as calculated to bring about a rupture of the matrimonial relationship, and accordingly held that the conduct did amount to constructive desertion. The trial judge further held that this desertion was not brought to an end by reason of an intimation by the petitioner to the respondent that she would never under any circumstances live with him again, or by reason of her refusal to allow the respondent a meeting which he sought with her for the purpose of discussing reconciliation.

From this decision the respondent appealed to the High Court of Australia.

*Russell D. Barton*, for the appellant. It has never been suggested that the appellant intended to bring the consortium to an end or that the acts alleged against him were actuated by any such purpose. Constructive desertion is not established unless there is an actual intention to bring the consortium to an end. The law is correctly laid down in *Bartholomew v. Bartholomew*, per *Singleton L.J.* (1), per *Denning L.J.* (2), per *Hodson L.J.* (3). [He referred to *Boyd v. Boyd* (4); *Buchler v. Buchler* (5); *Hosegood v. Hosegood* (6).] An intention to persist in a course of conduct which any reasonable person would regard as calculated to bring about a rupture of the matrimonial relationship, which is the test stated

(1) (1952) 2 T.L.R. 934, at pp. 937-939.

(2) (1952) 2 T.L.R., at p. 939.

(3) (1952) 2 T.L.R., at p. 941.

(4) (1938) 55 T.L.R. 3.

(5) (1947) P. 25.

(6) (1950) 66 T.L.R. (Pt. 1) 735.



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in *Baily v. Baily* (1) is an objectionable test. It is inconsistent with the test stated in *Bartholomew v. Bartholomew* (2), in that an actual intention to bring the consortium to an end will not exist in all cases in which an intention to persist in a course of conduct which any reasonable person would regard as calculated to bring about a rupture of the matrimonial relationship exists. For example, a drunkard may intend to drink to excess in the future. His being in an unconscious state through drink may be conduct which any reasonable person would regard as calculated or likely to bring about a rupture of the matrimonial relationship, yet it could not be said in any sense that such a man intended to bring the consortium to an end, nor would such an intention be inferred. The test in *Baily's Case* (3) is only reconcilable with the test in *Bartholomew's Case* (2) by the application of the maxim that a man must be taken to intend the natural and probable consequences of his actions. But even if this maxim was applied the better opinion at the present day is that it is rebuttable. See e.g., *R. v. Steane* (4). Moreover, that maxim was referred to in *Baily's Case* (5) as a "highly dangerous" one.

[DIXON C.J. referred to *Bain v. Bain* (6)].

It is not true to say as was said in *Bain v. Bain* (7) that "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." In most cases that statement would be correct, but in certain cases it could be said with complete truth that the husband intends the wife to remain. A man who does not fulfil the requirements of an ordinary reasonable man at certain times ought not to be judged by the standards of one. [He referred to *Moss v. Moss* (8); *Dearman v. Dearman* (9); *Donnelly v. Donnelly* (10); *Townsing v. Townsing* (11).] If desertion was proved then it should have been held that the respondent by her conduct caused the desertion to continue, or at least prevented the possibility of its termination. [He referred to *Pratt v. Pratt* (12); *Cohen v. Cohen* (13); *Tickler v. Tickler* (14); *Merry v. Merry* (15); *Smith v. Smith* (16); *Tulk v. Tulk* (17).] It is not essential that repentance should be

(1) (1952) 86 C.L.R. 424, at p. 426.

(2) (1952) 2 T.L.R. 934.

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

(4) (1947) K.B. 997.

(5) (1952) 86 C.L.R., at p. 427.

(6) (1923) 33 C.L.R. 317, at p. 325.

(7) (1923) 33 C.L.R., at p. 325.

(8) (1912) 15 C.L.R. 538.

(9) (1916) 21 C.L.R. 264.

(10) (1939) 61 C.L.R. 577.

(11) (1942) A.L.R. 153.

(12) (1939) P. 117; (1939) A.C. 417.

(13) (1940) A.C. 631.

(14) (1943) 1 All E.R. 57.

(15) (1948) V.L.R. 26.

(16) (1950) V.L.R. 209.

(17) (1907) V.L.R. 64.



expressed. The rule to be extracted from the cases is "Did the conduct of the party alleging desertion deter the other party from taking steps to end his desertion."

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*H. Woolf*, for the respondent, was not called upon.

Feb. 23.

The following judgments were delivered :—

DIXON C.J. This is an appeal from a decision of the Acting Chief Justice of Victoria by which he pronounced a decree nisi in a suit for divorce. It was the wife's suit and the ground of the suit was desertion. The marriage took place on 8th November 1924, and there are two children of the marriage, a daughter born in 1925 and a son born in 1929. The desertion which the learned judge below has found against the respondent is of that kind which is commonly called, or miscalled, constructive desertion. The separation between the parties finally took place in August 1948, or possibly it might be said that it finally took place in September. The incident which brought it about was a culmination of a long course of ill-treatment which the wife endured at the hands of the husband. When that course of conduct on his part began and how it took its origin is not perhaps easy to say, but there is evidence that as far back as 1937 he expressed some resolve to dominate her physically and from that period onwards there developed recurrent attempts upon his part by all physical means to subject her to his will and to intimidate her, insult her and express his resentment. The occasions calling forth exhibitions of this conduct cannot, of course, at this distance of time be ascertained with any clearness. But he seems to have found in her attitude from time to time some reason or other for saying that his own nature was so worked upon as to result in emotional upsets and in temperamental outbursts on his part in which he behaved in this very reprehensible manner. Indeed, a part of his case seems almost to amount to a claim that allowance should be made for a certain degree of temperamental irresponsibility on his own part. I shall not take the course of recounting these painful incidents, which have been sufficiently described in the course of a dispassionate, clear and painstaking argument by Mr. *Barton*. It will be enough for me to say that by the expression of his rather passionate nature, the exercise of physical force and the use of insulting methods of speech the appellant made his wife's life, as I should think, completely unendurable, and I speak from the point of view of one who has only read the evidence. She, however, continued to endure it over a long period of time, until finally she appears to have come