[HIGH COURT OF AUSTRALIA.]

DEERY . . . . . APPELLANT;
RESPONDENT,

AND

DEERY . . . . . RESPONDENT.
PETITIONER,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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1953, MELBOURNE, *Oct.* 5, 6, 7.

1954, MELBOURNE, *Mar.* 4.

Dixon C.J., Webb and Kitto JJ.

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

A husband petitioned for dissolution of marriage on the ground of desertion for the statutory period. He alleged that he was forced to leave the matrimonial home by reason of the wife's conduct. The evidence showed that the wife was of an emotionally unstable and turbulent disposition and was easily excited into unreasonable actions, which included outbursts of rage and vituperative attacks upon the husband. The trial judge found that, notwithstanding repeated warnings, the wife persisted in conduct which any reasonable person would regard as calculated to bring about a rupture of the matrimonial relationship and which she knew was likely to lead to such a rupture, and granted a decree nisi.

*Held*, by *Dixon* C.J. and *Webb* J. (*Kitto* J. dissenting), that the wife was not guilty of constructive desertion, because it had not been proved that she intended to drive the husband away nor, having regard to the fact that the conduct complained of was merely the undesigned and spontaneous manifestation of her permanent characteristics and not physical violence or the consequence of an antipathy or an exhibition of animosity, had it been proved that she intentionally persisted in a course of conduct which she knew was inconsistent with the continuance of the matrimonial relation or which any reasonable person would regard as calculated to bring about a rupture of that relation.

The English and Australian authorities on constructive desertion considered by *Dixon* C.J. and *Webb* J.

Decision of the Supreme Court of Victoria (*Coppel* A.J.) reversed.

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APPEAL from the Supreme Court of Victoria.

Arthur Deery (formerly Artur Deutsch) presented a petition dated 3rd April 1952 to the Supreme Court of Victoria praying that his marriage with Perla Pola Deery (formerly Perla Pola Deutsch) be dissolved on the ground that the said Perla Pola Deery had, without just cause or excuse wilfully deserted him and had without any such cause or excuse, left him 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 (*Coppel* A.J.), in a written judgment delivered on 9th December 1952, held that the conduct relied on amounted to constructive desertion and granted a decree nisi for dissolution of marriage.

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

The facts and the argument sufficiently appear in the judgments hereunder.

*M. J. Ashkanasy* Q.C. and *Kevin Anderson*, for the appellant.

*D. M. Campbell* Q.C. and *W. C. Crockett*, for the respondent.

*Cur. adv. vult.*

Mar. 4, 1954.

The following written judgments were delivered :—

DIXON C.J. This appeal is from a decree nisi for dissolution of marriage pronounced by the Supreme Court of Victoria upon a husband's petition on the ground of constructive desertion.

The husband's complaint, which the decree nisi sustains, is that the wife, by constant hysterical outbursts, frequent abusive attacks upon him and various forms of unreasonable, if temperamental, conduct hostile to him, made his life intolerable and forced a separation.

The parties were married in Budapest on 17th April 1934. The husband, who is the respondent in the appeal, was then twenty-seven years of age and the wife, the appellant, was twenty-eight years of age. He had been born in Hungary, she in Bessarabia. He was a medical student, she a pharmaceutical chemist. She was pregnant at the time of the marriage and on that ground had lost her employment. Their first child was born on 30th June 1934, a girl. He soon qualified as a physician and he practised his profession in Milan, where they had gone, until 1938, when because of their Jewish origin they were compelled to leave Italy. After leaving

Italy they went to Cuba. There they remained for about a year. In January 1940, the respondent and his wife and child sailed for Australia, where they had arranged to settle. After a short time in Sydney, during which the respondent assumed his present name, they came to Melbourne. From that time forward he has practised medicine in Victoria, where he has acquired a domicile. He first did some work at Quambatook. He then took over the practice at Toora of a doctor who was absent on military service. There he remained for almost six years. In January 1947, he left Toora to take a partnership in a practice at Williamstown. The actual separation from his wife took place in February 1948 and he then set up practice in Healesville. Two more children were born while they were living at Toora, a boy on 4th April 1941 and a girl on 3rd May 1945. The respondent says that from the beginning the appellant made difficulties about his practising in the country. Moreover, she embarrassed and distressed him and prejudiced his work by her excitable outbursts and her temperamental behaviour. In his evidence the respondent described the appellant as emotionally unstable by nature, and as always having been so. He said that she was never quite satisfied or happy, the smallest thing became a tremendous problem for her; her state of mind was always high pitched, never even. According to the respondent's account of the appellant's behaviour while at Toora, she flew into passions over trivial faults of the children and shouted and screamed at them so that she could be heard in his surgery; she even broke windows in her rages; she constantly abused him in Italian, employing low and objectionable expressions. Besides many instances of violent and turbulent behaviour he gave examples of perverseness and irresponsibility both in relation to himself and the children. The learned judge who heard the suit was inclined to discount each of the rival descriptions which the parties respectively gave of the first ten years of their married life, his impression being that during that period they were reasonably happy. But his Honour took a different view of the later period, beginning with the year 1945. It appeared from independent evidence that while the behaviour of the respondent to the appellant was kind and considerate, she on her part, on not a few occasions upbraided him in the presence of visitors, ridiculed some of his pursuits or interests, flew into violent passions over trivial domestic incidents, shrieked at the children, resented domestic work, which she often neglected, attacked her eldest child on small provocation, complained continually of having to live in Toora and was easily excited into unreasonable actions. Her abusiveness was usually expressed in

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Italian but one witness had acquired enough of that language to understand some of the vituperation she directed at her husband when her ungovernable temper took possession of her.

In January 1947, they removed to town on the respondent's entering into the medical partnership in Williamstown. They went to reside in portion of a dwelling in Hall Street, Newport, which was close at hand. To this the appellant objected on grounds which, but for the acute shortage of accommodation, would doubtless have been very reasonable. She was called upon to share with unfriendly strangers a house that was probably neither adequate nor suitable. It is needless to go into the difficulties that ensued except to say that she did nothing to mitigate them. For some time their boxes were not unpacked or the house reduced to habitable order. The appellant did many erratic things. The respondent complains particularly of her repeatedly going out and leaving the children unattended so that they became his responsibility, although he was occupied with a busy medical practice. Indeed he says that she flatly refused to clean and maintain the house and look after the children. Her hysterical outbursts, according to him, increased in frequency and violence. In May 1947, on his returning to the house one day, he found her with her head on the kitchen table and the gas jets turned on. She appeared unaffected by the gas but shouted in an hysterical rage that she would do it next time.

The learned judge had no doubt that both at Toora and in Williamstown the respondent's life was intolerable. He accepted evidence too, that the respondent had lost his former brightness and looked thin and haggard. According to the respondent the unwillingness of the appellant to live in Hall Street, Newport was due in part to a desire to live in a flat in Elwood she thought to be obtainable where he would visit her only occasionally. But he on his side, both before and afterwards, told her in effect that, unless she mended her ways, he must leave her. The curious idea appears to have occurred to him that " because she did not recognize that a wife had duties as well as privileges " they should repair to a lawyer " to ask legal opinion as to whether a wife had a legal duty to help a husband and not to hinder him ". Failing to persuade her to look in that direction for a solution, he pressed her to see a psychiatrist, and this she did about the middle of the year. For reasons that are not material she was referred to another psychiatrist by whom she was seen on 19th November 1947. He regarded her at that time as mentally responsible but possessing an anxiety hysteria or anxiety neurosis. In the meantime, however, a new disturbing cause had arisen. It appears that, when in or shortly

after July 1947, the respondent's partner took a fortnight's holiday, a lady named Mrs. Edgar looked after his house, the house from which the practice was conducted. The respondent had met Mrs. Edgar once before, earlier in the year. During the fortnight their respective duties must have brought them into daily contact and he says that he told her of his difficulties with his wife. Mrs. Edgar had obtained or was in process of obtaining a divorce from her husband, but to that he says that no reference was made. In October 1947, Mrs. Edgar wrote to him and, unfortunately for him, his wife discovered the letter in his pocket. The letter was not produced in evidence. The appellant says that it was in endearing terms, a description the respondent denies. The respondent's account of its contents is, however, a little more circumstantial. He says that after Mrs. Edgar returned to Geelong at the conclusion of her engagement she wrote him a letter commiserating with him in his difficulties and exhorted him to be of good cheer; things would come out alright in the end. He adds: "The letter also contained some comments about the writer's own affairs the precise nature of which I cannot remember". The discovery of this letter occasioned a passionate outburst on the part of the appellant who, whatever the respondent may say, was evidently from then on consumed with suspicion and jealousy. (She said at once: "This is the cause of our trouble"). Her precise course of conduct during the next few weeks is not very definitely described but it is clear enough that matters went from bad to worse and that the subject was uppermost in her recriminations. At length a crisis occurred. She had obtained some dial (di-allyl-barbituric acid) and had made some threats to poison herself. A violent scene took place on or about 26th November 1947, in the course of which she seized the bottle and swallowed portion of its contents. Within a few minutes she went into a coma; remedies were applied and she was taken to the Royal Melbourne Hospital where she remained for about twelve days. She was then taken to a private hospital for mental and nervous cases and thence to Macedon for convalescence. She did not return to Newport until 30th January 1948.

In the meantime the respondent had decided to leave her. When he visited her at Macedon he told her that the children must go to boarding school and they must part because she had made their life impossible. He determined to give up his partnership and to set up practice in Healesville. He had arranged with Mrs. Edgar that she should act as his housekeeper and assist with the telephone and in the surgery. In the month or more that elapsed after the discovery of the letter and before the appellant was taken to

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hospital the respondent's only direct communication with Mrs. Edgar, so far as appears, was on one occasion when he passed through Geelong where she lived. He called at Mrs. Edgar's house. It is not likely that the appellant knew of this; at all events the respondent did not tell her. When the appellant was taken to hospital, it of course became necessary for the respondent to obtain domestic help and he arranged for a girl at Toora to come to his assistance. He was to drive down for her. He says that Mrs. Edgar happened to be at his partner's house and, at the suggestion of his partner, who thought he needed relief from driving on so long a journey, Mrs. Edgar accompanied him and his elder daughter. They stayed overnight at the hotel at Toora where Mrs. Edgar and his daughter shared a room. Possibly it was at this time that Mrs. Edgar agreed to housekeep for him, should he find a suitable practice. Later he asked Mrs. Edgar to come up from Geelong to Melbourne to assist him in purchasing clothing for the children to go to boarding school. She did so and had a meal with them. In January, he took his three children on a caravan holiday to Emerald. The place was chosen because it was suggested he might obtain a practice in the neighbourhood. Mrs. Edgar came up to Emerald bringing her child, a girl then four or five years of age. She and the child stayed at a guest house. At the end of the holiday they all drove over to Healesville and thence to Melbourne, whence Mrs. Edgar proceeded to Geelong. It must have been 30th January, for when he returned home, according to one version, his wife was there. Her return was unexpected and he had hoped to keep her at Macedon. According to another version he was there when she arrived. However it may be, when they met, they joined battle. The accounts of the conflict vary. According to him he objected to her ordering about the girl from Toora who gave domestic help. The appellant asserted her prerogative to do so and counterattacked him for cancelling, as she alleged, some medical appointment made for her. There was a turbulent scene in the course of which he told her to get out of the place before something happened. She went off to a neighbour's house, whence she returned at a later hour. He telephoned to his solicitor, whom he saw next day. She seems to have jumped to the conclusion that he was telephoning to Mrs. Edgar. He proposed to the appellant that they should see the solicitor together and come to a definite arrangement to separate, but this she would not do. Finally, in the middle of February he removed himself to a friend's for a few days, while he completed his arrangements to set up in Healesville, where on 1st March 1948, he commenced practice. After two or three months Mrs. Edgar

came with her daughter, to keep house. He had obtained the tenancy of part of a house in the Chum Creek Road. He has since found a more fitting residence, where he carries on his practice. Mrs. Edgar continued to keep house, attend to his accounts and assist in the surgery. The appellant has gone on living in Hall Street, Newport.

It is possible to bring the narrative of events to a stop at this point, because the separation was final. What happened afterwards, and much did, might conceivably throw a light back upon prior events, and it might conceivably be used by the appellant, if she were held to be a deserting party, in the hope of showing that there was just cause or excuse for continuing the desertion. But the question whether, when the respondent physically departed from the appellant, it was the result of conduct on her part which made the termination of the matrimonial relation constructively desertion by her is an issue that must be decided as at the time he so departed. No advantage is to be gained by discussing the subsequent behaviour of the appellant, the course taken over the custody of the children, or the persistence of the respondent in the separation. Neither does it seem to affect the issue if the appellant did attempt to support her view of Mrs. Edgar's position by the invention of a letter that was never written or by suggesting that she and a friend should qualify as witnesses of more than was to be seen. That may go to her credit but in any case her testimony was not accepted by the learned judge who pronounced the decree nisi and in the foregoing statement of facts nothing is based upon it. His Honour completely exonerated the respondent. He said: "I think I should make it clear that I am satisfied that there is not and never has been any foundation for the suspicions which the respondent (the now appellant) entertained of her husband's adultery or misconduct with any other woman".

This, of course, covers the position of Mrs. Edgar and means that her relations with the respondent were entirely innocent.

But on the question whether the appellant's conduct amounted to constructive desertion the actual innocence of the relations between Mrs. Edgar and the appellant is not the important thing. What is important is the place which the advent of Mrs. Edgar may have in explaining the appellant's conduct. For it may be supposed that a woman of a calm and reasonable mind might well, in like circumstances, have gone from disquiet to remonstrance and from remonstrance to angry and insistent protest and incredulity. In the case of a woman of the appellant's tempestuous, passionate and hysterical temperament, the most extreme consequences might be

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foreseen. It is, of course, hard to be sure what the appellant knew at various points of time of the place taken by Mrs. Edgar in the respondent's affairs. But it must be remembered that before the middle of February, she had been in contact with the children.

The appellant's mental condition was naturally under consideration while she was in hospital and the psychiatrists who saw her gave evidence. But no attempt seems to have been made to obtain from them any opinion as to her capacity for self-control and calm reasoning during the months that preceded the scene in which she took the overdose of dial. No one can read the accounts which the respondent has given in his affidavits and evidence of his married life without seeing that his lot has been a very hard one. But it is one thing to regard his matrimonial lot as hard and another to say that his wife constructively deserted him when he departed from the house in Hall Street, Newport in February 1947. His lot was made hard because of the unfortunate nature and disposition of the wife he married but his only title to a dissolution of the marriage must depend upon her being the deserting party. Temperamental, unstable, or other irregular behaviour by one party to a marriage must cause the other party distress and often misery. But the legislature has not seen fit to make that a ground of divorce, and the concept of constructive desertion cannot be stretched to cover cases of that sort. The concept of constructive desertion is not an artificial one. *Cussen* J. in speaking of the abandonment of a matrimonial relationship said : " Nor need the offending spouse be the one who has left the common home " and proceeded, " This last case is sometimes referred to, unfortunately I think, as constructive desertion, but there is a real desertion if by his or her conduct he or she intentionally drives the other away, and if there is no such intention there is no such desertion by him or her at all " : *Tulk* v. *Tulk* (1).

The law has since refined upon the simple description of conduct and of intention expressed in the words " drives the other away " but it remains true that there must be a real intention. In *Boyd* v. *Boyd* (2), *Bucknill* J. referred to counsel's contention that the case was one of constructive desertion and continued :—" He says that in effect the husband has behaved in such a way that his wife cannot be expected to live with him any longer. It seems to me that the essential element of desertion must be an intention to bring the cohabitation to an end. It may be that the husband has behaved so badly that his wife leaves him, and it may be that his conduct amounts to cruelty when the wife can get a divorce on that

(1) (1907) V.L.R. 64, at p. 66. (2) (1938) 4 All E.R. 181.

ground, but, before there can be a case of constructive desertion, the court must be satisfied that the conduct of the husband was such as to show a clear intention on his part to drive the wife away. There must be an intention on the part of the person charged with desertion to bring the cohabitation to an end " (1). In *Buchler* v. *Buchler* (2) the essential words of this passage were quoted with apparent approval by Lord *Greene* M.R. with whom in separate judgments *Asquith* L.J. and *Vaisey* J. agreed. The actual decision in *Boyd* v. *Boyd* (3) was that a husband convicted first of incest and then, after serving his sentence for that crime, of indecent assault, ought not to be taken to intend to bring the restored state of cohabitation to an end, although for his wife to leave him might be the natural consequence of his crimes. The contrary view was adopted by *Bonney* J. in the case of *Lawler* v. *Lawler* (4), where the crime was manslaughter, a decision based on an application of the presumption that a man intends the natural consequences of his acts that cannot be supported on principle unless by reference to the additional special facts. Notwithstanding Lord *Greene's* reference in his judgment in *Buchler* v. *Buchler* (2), to what *Bucknill* J. had said in *Boyd* v. *Boyd* (3), Lord *Merriman* P. in *Edwards* v. *Edwards* (5) said that he thought the judgment in *Boyd's Case* (3) was wrong and ought not to be followed. This led *Denning* L.J. in *Hosegood* v. *Hosegood* (6) to deal at length with the law of constructive desertion in a passage that I think it is desirable to set out. The case was one where the emotional outburst of temper of a husband who spent only the weekends with his wife led the wife to break with him altogether. At the hearing of the petition he was held to have constructively deserted her. *Denning* L.J. said :— " I confess that, if the law says that the husband deserted the wife, it speaks falsely. The one thing he wanted was to keep the home together. Yet he has been held guilty of desertion. It is called constructive desertion, but these ' constructive ' doctrines always lead to trouble. Take the doctrines of constructive malice and constructive notice : they are discredited nowadays because they have a way of getting out of bounds ; they lead in time to the law attributing to a man—quite falsely—a state of mind which he never possessed. The doctrine of constructive desertion has not quite reached that stage but, if we are not careful, we may find ourselves there. There are at present two schools of thought about constructive desertion. One school says that, in constructive desertion, as in actual desertion, a husband is not to be found guilty,

(1) (1938) 4 All E.R. 181, at p. 182.
(2) (1947) P. 25, at p. 29.
(3) (1938) 4 All E.R. 181.
(4) (1941) 58 W.N. (N.S.W.) 233.
(5) (1948) P. 268, at p. 271.
(6) (1950) 66 T.L.R. (Pt. I) 735.

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however bad his conduct, unless he had in fact an intention to bring the married life to an end. This school admits that there are many cases where he may be presumed to have that intention. For instance when a man deliberately makes his wife's life unbearable, he may be presumed to intend to drive her out, because he may be presumed to intend the natural consequences of his acts. But this school says that if in truth the facts negative any intention to bring the married life to an end, the courts should not attribute it to him. For instance, the conduct of an habitual criminal or an habitual drunkard may be so bad that his wife is forced to leave him ; but he may be devoted to her, and the last thing he may intend is that she should leave. In such a case this school of thought would hold that there is no desertion : *Boyd* v. *Boyd* (1). The other school of thought does lip-service to the necessity for such an intention, but says that, even if the husband had no intention in fact to bring the married life to an end, yet he is conclusively presumed to intend the natural consequences of his acts : and if his conduct is so bad or so unreasonable that his wife is forced to leave him, he must be presumed to intend her to leave and he is guilty of constructive desertion, however much he may in fact desire her to remain : *Sickert* v. *Sickert* (2) and *Edwards* v. *Edwards* (3). *Buchler* v. *Buchler* (4) does not resolve the difference between these two schools of thought. In one passage Lord *Greene* M.R., seems to favour the first school, for he cites *Boyd* v. *Boyd* (5) with approval. In another passage, however, he seems to favour the second school, for he cites *Sickert* v. *Sickert* (6) with equal approval. To my mind the views of the first school are logically unanswerable. When people say that a man must be taken to intend the natural consequences of his acts, they fall into error : there is no ' must ' about it ; it is only ' may '. The presumption of intention is not a proposition of law but a proposition of ordinary good sense. It means this : that, as a man is usually able to foresee what are the natural consequences of his acts, so it is, as a rule, reasonable to infer that he did foresee them and intend them. But, while that is an inference which may be drawn, it is not one which must be drawn. If on all the facts of the case it is not the correct inference, then it should not be drawn. That is made clear by the important judgment of Lord *Goddard* C.J., in *Rex* v. *Steane* (7), and I hope that I may be forgiven

(1) (1938) 55 T.L.R. 3.
(2) (1899) 15 T.L.R. 506, at p. 507 ; (1899) P. 278, at pp. 283, 284.
(3) (1948) 64 T.L.R. 61 ; (1948) P. 268.
(4) (1947) 63 T.L.R. 100 ; (1947) P. 25.
(5) (1938) 4 All E.R. 181.
(6) (1899) 15 T.L.R. 506 ; (1899) P. 278.
(7) (1947) K.B. 997.

if I refer also to my own judgment in *Westall* v. *Westall* (1) and to an article which I wrote in 61 L.Q.R. 379. Moreover, the supporters of this first school may well criticize the other school on the ground that their views may indirectly introduce new grounds of divorce, for instance, habitual crime or habitual drunkenness, which are not warranted by the statute" (2).

In *Simpson* v. *Simpson* (3) Lord *Merriman* P. repeated his view that *Boyd* v. *Boyd* (4) was wrongly decided and took leave to doubt the existence of two schools of thought about the application of the doctrine that a man must be taken to intend the natural consequences of his own conduct. This led to a reaffirmation in the Court of Appeal of the authority of *Boyd* v. *Boyd* (4). In *Bartholomew* v. *Bartholomew* (5) *Singleton* L.J. said:—"In *Buchler* v. *Buchler* (6) this court approved what *Bucknill* J. said in *Boyd* v. *Boyd* (4) and, if further authority be needed, it is found in the judgment of *Denning* L.J. in *Hosegood* v. *Hosegood* (7), a judgment to which *Bucknill* L.J. was a party, though *Bucknill* L.J. did not repeat what he had said in *Boyd* v. *Boyd*" (4).

*Denning* L.J. said (8): "The law about constructive desertion was laid down by *Bucknill* J. in 1938 in *Boyd* v. *Boyd* (4), in terms which were quoted with approval by Lord *Greene* M.R., in *Buchler* v. *Buchler* (6) in the passage my Lord has read, and the judgment of *Bucknill* J. was explicitly approved by this court in *Hosegood* v. *Hosegood* (7). The judgments in *Hosegood* v. *Hosegood* (7) were considered judgments, and I know that *Bucknill* L.J. agreed with what I said about the nature of constructive desertion".

A further decision of the Court of Appeal, *Pike* v. *Pike* (9), illustrates the view of constructive desertion now adopted in that court. In this Court *Griffith* C.J. in *Moss* v. *Moss* (10), formulated a test of constructive desertion which seemed to reduce the intention to little more than an implication, a formulation for which the authority of *Sickert v. Sickert* (11) was vouched. His Honour said: "As I understand the learned Judge, his meaning is 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" (12). This was considerably

(1) (1949) 65 T.L.R. 337.
(2) (1950) 66 T.L.R. (Pt. I), at pp. 737-738.
(3) (1951) P. 320, at pp. 331-332.
(4) (1938) 4 All E.R. 181.
(5) (1952) 2 All E.R. 1035, at p. 1037.
(6) (1947) P. 25.
(7) (1950) 66 T.L.R. (Pt. I) 735.
(8) (1952) 2 All E.R. 1035, at p. 1037.
(9) (1954) P. 81 (*n*).
(10) (1912) 15 C.L.R. 538, at p. 541.
(11) (1899) P. 278.
(12) (1912) 15 C.L.R., at p. 541.

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modified by the test applied by the Court in *Dearman* v. *Dearman* (1), a case relating to the supposed adultery of the wife. It is in these terms : " The wife's conduct . . . was not marked by persistence regardless of consequences or accompanied by any refusal to discontinue her conduct, so as to show an intention on her part to break off matrimonial relations, or, what is equivalent, an intention to persevere in behaviour which, independently of actual adultery, would make it intolerable to a self-respecting husband to remain " (2).

In *Bain* v. *Bain* (3), *Irvine* C.J., whose decision was affirmed in this Court, referred to the last limb of this test. His Honour said : " It is the last phrase which is not always easy to apply. Having regard to the authorities I have cited, I am disposed to think that that means behaviour which, if not proving an actual intention on the part of the offending spouse to put an end to the matrimonial relationship, would be in itself inconsistent with a continuance of that relationship in any real sense, and thus must be such as to evince an intention to put an end to it " (4). This seems a satisfactory explanation which is consistent with the view adopted in the Court of Appeal. But the judgments delivered in this Court in *Bain* v. *Bain* (5) show that the learned judges were prepared to treat the test as allowing of a merely imputed intention. In the judgment of *Isaacs* and *Rich* JJ., however, there is an explanation which does not go very far beyond the statement of *Irvine* C.J. Their Honours say (6) : " 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 " (7).

In *Baily* v. *Baily* (8) the question was again considered and the result expressed in the following passage : " The cases seem to show that what must be proved is either an actual intention to bring about a rupture of the matrimonial relation, or an intention to persist in a course of conduct which any reasonable person would regard as calculated to bring about such a rupture. There has been a tendency in Australia—possibly due to a misunderstanding of what was said by *Isaacs* and *Rich* JJ. in *Bain* v. *Bain* (9) to regard the ultimate question as being whether a particular course of conduct is such that no self-respecting man or woman could be

(1) (1916) 21 C.L.R. 264.
(2) (1916) 21 C.L.R. 264, at p. 267.
(3) (1923) V.L.R. 421.
(4) (1923) V.L.R. 421, at pp. 428, 429.
(5) (1923) 33 C.L.R. 317.
(6) (1923) 33 C.L.R., at p. 325.
(7) (1923) V.L.R., at p. 701.
(8) (1952) 86 C.L.R. 424.
(9) (1923) 33 C.L.R. 317, at p. 327.

expected to remain and endure it. And there have been somewhat unfortunate references to the highly dangerous maxim that every person must be taken to intend the natural and probable consequences of his actions. It is clear from a reading of the whole of their judgment that *Isaacs* and *Rich* JJ. did not mean to convey that the ultimate question in such cases related to the nature of the conduct of the respondent spouse. Their Honours were merely indicating the kind of conduct from which the necessary intention might often be inferred. The necessity of finding an intention is made as clear in other parts of the judgment as it is made by Lord *Greene* in *Buchler* v. *Buchler* (1). Where it is (as it must often be) a matter of inferring intention from conduct, the real position is also made clear by *Irvine* C.J. in *Bain* v. *Bain* (2) where his Honour speaks of ' behaviour which, if not proving an actual intention on the part of the offending spouse to put an end to the matrimonial relationship, would be in itself inconsistent with a continuance of that relationship in any real sense, and thus must be such as to evince an intention to put an end to it ' " (3).

In *Lang* v. *Lang* (4) where we thought it unnecessary to deliver a considered judgment because the facts appeared to be so overwhelming, we relied upon what we had said in *Baily* v. *Baily* (5) but emphasized the difficulty of distinguishing between an intention to destroy the matrimonial relationship and such an intention as the passage already quoted from the reasons of *Irvine* C.J. in *Bain* v. *Bain* (6) postulates. It amounts to an intention to persist in a course of conduct with knowledge that it is completely inconsistent with the maintenance of the matrimonial relation.

In the present case the ultimate finding made by the learned judge against the appellant was expressed as follows :—" Having regard to all the circumstances I have mentioned I am satisfied that the respondent knew that her conduct was likely to lead to a rupture of their matrimonial relationship, that notwithstanding repeated warnings she persisted in that conduct and that her conduct was such that any reasonable person would regard it as calculated to bring about such a rupture ". His Honour a little earlier in his judgment had stated the issue in the precise terms used by this Court in *Baily* v. *Baily* (7) viz. :—" The question is whether I am satisfied that the respondent intended to bring about a rupture of the matrimonial relation or intended to persist in conduct which any reasonable person would regard as calculated to bring about

(1) (1947) P. 25.
(2) (1923) V.L.R. 421, at pp. 428, 429.
(3) (1952) 86 C.L.R. 424, at pp. 426-427.
(4) (1953) 86 C.L.R. 432.
(5) (1952) 86 C.L.R. 424.
(6) (1923) V.L.R. 421.
(7) (1952) 86 C.L.R. 424.

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such a rupture " (1). Two things are to be noticed about the finding. The first is that it discards the first limb of the question, that relating to an intention to bring about a rupture. It may be that the reason is because his Honour was not prepared to find that the appellant had such an intention. Yet shortly before the passage the learned judge, after expressing his opinion as to her state of mind when she took the barbiturate, had said : " But I think that even before that episode she had evinced an intention to bring the matrimonial relationship to an end ".

The other matter to be noticed is that his Honour does not expressly say that the appellant did *intend* to persist in a course of conduct, etc. What he says is that she persisted after repeated warnings. There may be no significance in this. His Honour may have regarded the intent as an immediate inference from what he does say.

But upon the whole case it has not been easy to resist the impression that there has been an insufficient appreciation of the very great difficulty that exists in ascribing to the appellant a real or actual intention of the requisite kind. It is evident that the greater part of the grounds of complaint against her is due to what the respondent described as her emotionally unstable nature. Her excitable and turbulent disposition and her quick and perhaps uncontrollable temper would make both her character and her behaviour remarkable in this country. But it seems to be reasonably clear that she has been moved by these elements in her nature and not by any purpose or design in the things of which her husband most complains. In her new environment and conditions of life there may have been more to call forth manifestations of her nature but the respondent's account of their married life and his very clear account of his wife's character, which was quoted early in this judgment, show that she has not changed. Too much should not be made of the difference between the first ten years of their union and the subsequent period. Nothing like a sudden or definable change took place. More children, the loss of youthful resilience, uncongenial surroundings and domestic difficulties are enough to account for the difference such as it was. The evidence given for the respondent naturally heaps incident upon incident in the narrative of their domestic life but it should be borne in mind that what he describes occurred over a lengthy period. That is not to say that she was a woman, daily life with whom would ever be easy, congenial or agreeable. As I read the evidence the one thing which I think she never intended to do was to drive her husband away. I do not lose sight of the evidence of her occasional

(1) (1952) 86 C.L.R. 424, at p. 427.

statements tending to show that she adverted to the possibility of a separation or divorce. She may well have told her husband that if he did not like her ways he could get a divorce or that by taking her to Hall Street, Newport, he was making her live with him though she wished to live more or less without him in the flat at Elwood. Such things are said by angry and distraught women and to treat them as expressions of any settled intention or desire would be a mistake. But on the whole story one can feel sure that it was not her intention to bring about a rupture of the matrimonial relation.

The question whether she intentionally persisted in a course of conduct which she knew was inconsistent with the continuance of the relation or which any reasonable person would regard as calculated to bring about a rupture of the matrimonial relation may perhaps be a more doubtful question. But I have reached the conclusion that a finding against her under this head ought not to be sustained. It must be remembered that we are concerned with the years 1945 and 1946 at Toora and the year 1947 at Newport. Behind this she had ten years of life with her husband in which her temperament had been pretty freely exhibited and she had fallen into a general attitude of mind and manner of behaviour. It is easy to slip into the objective test of her conduct and to dwell on the recurring difficulties, embarrassment and unhappiness caused to her husband by her outbursts or her management of and conduct towards her children and her defaults in her domestic duties. But that is not the test. To treat the hardness of his case and the difficulty of enduring life with a woman of her mind and temperament as the controlling factor would be to add a new ground of divorce. It would be to lose sight of the necessity of finding a state of things truly amounting to desertion on her part. At Toora the instances of her temperamental conduct and difficult behaviour may have increased in number and perhaps in intensity. But can it be doubted that each instance was the undesigned and spontaneous result of the play of temperament upon some immediate and generally unforeseen cause ? We are not dealing with physical violence or with conduct that is the consequence of an antipathy or exhibiting animosity. It is a case of a wife whose permanent characteristics manifest themselves in word or deed according to circumstances. It may mean that to be her husband is a misfortune, but it does not mean desertion on her part. Little can be deduced from the futility of his remonstrances or warnings. They would not recur to her mind when she was thrown off balance or disturbed and in any case she would regard them as *in terrorem* when they were administered. At Newport it appears to me that her behaviour

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is to be accounted for by the circumstances. She seems to have pitted her will against her husband's over their place of residence. She had every ground of complaint with respect to the Hall Street house and her failure for so long to set the place up as a home is to be accounted for in part by her desire that they should not remain there. Once Mrs. Edgar became a factor in the appellant's mind, her emotional upset was completed. Apparently about six weeks or less elapsed from the date of the discovery of the letter until she was taken to hospital. Her belief that she had been wronged may have been very unreasonable, but it was genuine, one may be sure. The respondent's own account of the contents of Mrs. Edgar's letter is enough to account for her deep resentment. It is difficult to see how the behaviour of the appellant during that interval can be made a ground for inferring the requisite intention in either of its forms or branches. Once she was in hospital, her opportunities for causing domestic infelicity ended. When on 30th January 1948 she returned, she found that his departure had been determined upon.

In my opinion this is not a case which falls within the principles governing so-called constructive desertion.

The appeal should be allowed with costs. The decree nisi should be discharged and in lieu thereof a decree should be made dismissing the suit with costs.

WEBB J. I agree with the judgment of the Chief Justice and have little to add.

I am not satisfied that there is more justification for a divorce in this case than there was in *Baily* v. *Baily* (1). The respondent to the petition, Mrs. Deery, has always been temperamental and excitable, according to the petitioner, Dr. Deery, and her conduct throughout was attributable to that. She displayed no clearer intention to drive her husband from the home than did Mrs. Baily; although, like the latter, she persisted in her conduct despite its bad effect on him.

Nothing is to be gained by awaiting the judgment of the Privy Council on the appeal in *Lang* v. *Lang* (2), as it is not likely to state a more liberal view for a petitioner than was taken in *Baily's Case* (1).

In cold print the evidence of Mrs. Deery's witnesses, Mrs. Nathan and Leo Schulhof, seems to me to be reliable, although some of Dr. Deery's witnesses saw more of the parties at Toora. But Schulhof saw more of the parties at a time closer to their separation, and Schulhof's evidence suggests that Dr. Deery's liking for Mrs.

(1) (1952) 86 C.L.R. 424. (2) (1953) 86 C.L.R. 432.

Edgar was the cause of it. Again, Mrs. Deery's evidence as to the letters from Mrs. Edgar rings true. Admittedly Mrs. Deery was a clever woman—clever enough to recollect fully the contents of the more compromising of the letters after a fortnight's hard thinking about them, but hardly clever enough to invent them. The following is Mrs. Deery's version of the letter.

8.45 p.m.

" My Darling :

You have just rung and I am very happy. I hope we all will be at Healesville shortly. We both miss you very much.

Last night Joanna said ' I wish Arthur would be here '. I knew something upset her. She coughed last night quite a lot.

This morning I walked right into the city. I came home and cleaned the house all afternoon. Now I am looking up books to decide on our fireplace design. I feel very tired and I am off to bed as soon as this is finished.

After Saturday night I feel everything is alright. I am very happy to have you. You are so marvellous. I am sure I don't deserve you. My only hope is to make you as happy as you made me. I hope now being together with you I will be able to eliminate my odious characteristics. I saw today Stepmother, you were discussed. The only comment was ' He is certainly a foreigner '. She couldn't understand what you said. And I said ' Even Joanna understands him '. It is certainly her fault.

I love you very much more than ever. I am so contented you wanted me. All my love.

Kath ".

" Arthur " refers to Dr. Deery ; " Joanna " to Mrs. Edgar's young daughter.

The supporting evidence of Mrs. Heller was rejected by the learned judge, apparently because, having had this version read to her, she ventured to say that it corresponded with the original letter, which she had read, but of which naturally she could recollect only the compromising parts. If his Honour thought that Mrs. Heller was unreliable because of this feature of her evidence, then, with great respect, I do not agree with him. But on this phase of the case we cannot disregard the judge's findings, based as they were, not on what the witnesses said, according to his own notes, but on what he saw of them.

However, I am not prepared to find that Mrs. Deery drove her husband from the home, intending so to do. She complained that he " rationed " and eventually refused sexual intercourse with her, which ended about the time when he became so familiar with

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Mrs. Edgar, who had then just obtained or was about to obtain a divorce, that he not only discussed with her their matrimonial problems, but later resided with her for one year in a house in which there was only one bedroom. If Dr. Deery was so worn out by his wife's conduct during and after the years at Toora that he could not perform the sexual act with her, it is a coincidence that his complete disability so to do did not arise until he had met Mrs. Edgar.

No doubt this marriage if not dissolved seems doomed to failure and it might seem desirable that it should be dissolved. Still its termination is not warranted by the facts or the state of the law as I understand them.

I would allow the appeal and dismiss the petition.

KITTO J. This is an appeal from a decree nisi, made by *Coppel* A.J. in the Supreme Court of Victoria, for the dissolution of a marriage. The petitioner was the husband, and the ground of divorce alleged in the petition, which was dated 3rd April 1952, was that the wife (who, being the respondent to the petition, will be referred to as such although she is the appellant here), had without just cause or excuse wilfully deserted the petitioner and left him continuously so deserted during three years and upwards. The marriage was proved to have taken place in Budapest in 1934. Thereafter the parties lived together until February 1948, at first in Italy, then in Cuba, and, from early 1940 onwards, in Victoria. They have three children, one born in Italy in 1934, and the others born in Victoria in 1941 and 1945 respectively.

The petitioner made a case of constructive desertion, and the onus which lay upon him was to establish that, although it was he and not the respondent who withdrew from cohabitation, the termination of the matrimonial relationship must in truth be attributed to her, in the sense that it was brought about by conduct on her part, accompanied either by an actual intention to bring it about or by an intention to persist in a course of conduct which any reasonable person would regard as calculated to bring about such a rupture : *Baily* v. *Baily* (1) ; *Lang* v. *Lang* (2).

The learned trial judge rightly appreciated the issue before him, and, after hearing and seeing in the witness-box the parties themselves and a number of witnesses, he held that the petitioner had established his case. A careful review of the proceedings has satisfied me that there was ample ground in the evidence for his Honour's conclusion.

(1) (1952) 86 C.L.R. 424.

(2) (1953) 86 C.L.R. 432.

Nothing upon which either party relies as throwing any light upon the issue in the case occurred before the middle of 1944. The petitioner was then, as he still is, a medical practitioner, and he was carrying on the practice of his profession at Toora, a country town of Victoria. Early in 1947 the parties with their children moved to Newport, an industrial area near Melbourne and close to Williamstown, where the petitioner took a partnership in a medical practice; and there they lived until the separation in the following year. The respondent found both localities distasteful, but her aversion to her surroundings was not the only thing that operated on her mind. It seems clear that she had a sense of thwarted ambition. Before her marriage, she had been a pharmaceutical chemist in Budapest; and from time to time in the critical period between 1944 and 1948 she showed signs of resentment that the ties of married life stood in the way of her career. She admitted having complained at Toora that they were too far from the city and that she could not study. To the witness Pedersen she said that she wanted to get nearer to Melbourne where she could practice as a chemist; and, to Mrs. Pedersen she made a similar statement. Her reply to Mrs. Pedersen, when asked, soon after the separation, what she was going to do, was that she would make the petitioner put her through the University and set her up as a chemist. But whatever her reasons may have been, her conduct towards the petitioner from 1944 onwards, viewed objectively, was such as no man could reasonably be expected to suffer any longer than the petitioner suffered it; and to a woman of the respondent's intelligence it must have been obvious what would be the result of persisting in it.

On behalf of the respondent, two considerations were put forward, not so much as justifying her conduct, but as accounting for it otherwise than by inferring the *animus* which desertion involves. First, it was said that she was afflicted with a violent and excitable temperament, so that outbursts which, if she had been of a more placid disposition, might fairly have been taken to indicate a desire to be rid of her husband, should not be taken in her case as anything worse than manifestations of emotional instability. And secondly, it was said that trouble between the spouses did not become serious until 1947, and then only because the respondent became upset by an association which she found had developed between the petitioner and a Mrs. Edgar.

Undoubtedly the respondent was by nature vitriolic, and it was of great importance that the trial judge should assess the significance of her words and actions in the light of that fact; but this

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his Honour appears to have done, and he was in a much better position to form a true impression on the point than a court of appeal can be. In reference to Mrs. Edgar, it should be said at once that the finding of the trial judge, that there never was any foundation for the respondent's suspicions concerning the petitioner's relations with Mrs. Edgar, must be accepted as correct. But, this being so, there arises the question which, more than any other, has made it desirable to examine the evidence with some care. That question is whether the respondent's conduct is not to be explained, partly by her natural excitability and lack of self-restraint, and partly by a suspicion that her husband was intriguing with Mrs. Edgar, rather than by an intention either to end matrimonial relations or to persist in conduct inherently likely to end it.

It was in January 1947 that the petitioner entered into partnership with a Dr. Dobbin at Williamstown and took his wife and family to live at Newport. The respondent's story was that they had been there about two months when trouble commenced between the petitioner and herself because she suspected him of transferring his affections to Mrs. Edgar. Neither in fixing this time as that at which the trouble commenced, nor in assigning this reason for its commencement, does the respondent's evidence square with other evidence which the trial judge accepted. Three independent witnesses, who impressed his Honour as intelligent and impartial, told a story of the last three years of the period at Toora which makes it all too clear that the petitioner was constantly subjected to intolerable treatment by the respondent. Scenes in which she abused and ridiculed him and even interfered with the conduct of his practice were apparently frequent, and she did not leave to inference her discontent with the marriage tie. To one of the witnesses, Mr. Cheetham, she said on two or three occasions that she wanted to go to Melbourne, and that if the petitioner did not do so she would leave him and go. She hated Toora and everything in it, she frequently told him, and she said the same to Mr. and Mrs. Pedersen. Cheetham spoke of deterioration in the petitioner's appearance during the three years at Toora and the following year at Newport; and, in an apparently restrained account of the respondent's behaviour towards her husband, he revealed enough to explain why the petitioner, who had arrived at Toora "full of enthusiasm, bright, eager in his work, and looking well", came to appear "very thin, white, haggard and emotionally upset." If this change was apparent to Cheetham, the respondent could hardly have been oblivious to it. To Mrs. Pedersen the respondent said she hated housework, cooking and ironing, and she did not

want to look after his children. And when the move to Williamstown had been decided upon, the respondent, having gone to Melbourne and arranged for a flat at Elwood, flew into a rage when she learned that the petitioner had secured a tenancy of part of a house at Newport, and said: "I wanted to live apart from you and now you force me to live with you".

The facts concerning Mrs. Edgar, as they stood in the early part of 1947, were not such as to justify a genuine suspicion in the respondent's mind; and in view of the generally unsatisfactory character of the respondent's evidence, and the established history of the matrimonial life down to that time, it would have been surprising if the learned judge had concluded that the respondent's conduct towards the petitioner at that time underwent a change by reason of a real belief on her part that he was engaged in a liaison with Mrs. Edgar.

The respondent was not left to observe for herself how her behaviour was bringing the marriage to disaster, though it must have been painfully clear. When the move to Newport was made, the petitioner told her, as he was to tell her on more occasions than one thereafter, that this was her last chance. He said that if she did not pull herself together and behave, he would not give her another chance, and that he would not have her with him under the same roof if she did not give him a chance at Newport. But this made no difference, for she continued in a course of conduct which the trial judge described, with ample justification, as unbearable. In the second half of 1947, Mrs. Edgar, who had divorced or was divorcing her husband, came to the home of the petitioner's partner, Dr. Dobbin, to look after the children and attend to the surgery while Dr. Dobbin and his wife went for a holiday. Naturally, she and the petitioner met frequently. Their relations were obviously quite friendly, but there is not a word of evidence to suggest that there was at any time the slightest impropriety. But after the Dobbins had returned and Mrs. Edgar had gone back to her home at Geelong, the respondent found in the petitioner's pocket a letter from Mrs. Edgar, which she made the occasion of a violent scene at two o'clock in the morning, professing that it revealed to her the cause of the trouble between the petitioner and herself. The petitioner at once denied her accusations and said, "If you think that this will serve you as a good excuse to put on a story, you can go ahead and good luck to you". From that time onwards, she was constantly charging the petitioner with improper relations with Mrs. Edgar but, significantly enough, although she kept the letter, she failed to produce it at the trial and said in the

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box that she could not recollect what was in it. The petitioner swore that there was nothing in it to justify suspicion, and so the learned judge found. The respondent, giving evidence, said: "I knew for a long time there was another woman, but I kept it to myself. I was not sure and I did not want to stir up any trouble". She does not appear to have neglected any other opportunity of stirring up trouble, and every feature of this incident of the letter suggests that any stick was good enough to beat her husband with.

During 1947 the respondent received treatment for her neurotic and hysterical condition. The doctor who had most to do with her and was accepted as the most reliable by the trial judge, Dr. Graham, diagnosed her condition as one of anxiety hysteria, but he made it clear that she had no trace of insanity, that she was mentally quite responsible and of average intelligence, and that, from the time he first saw her, her mental condition was never much below par. Several times she absented herself from home for a few days, leaving the petitioner to look after the children and offering him no explanation. Upon her return from one such absence, lasting two days, a scene occurred in which she raved hysterically, and finally seized a sample bottle of a sedative, dial, and drank some of it. She was taken to hospital in a coma, and, when able to leave, went to a private hospital for mental and nervous cases called Mount Pleasant. She spent a month there, and, after a holiday at Mount Macedon, she returned home on 30th January 1948. It is not unimportant to bear in mind Dr. Sinclair's opinion that when she took the dial she was not attempting to commit suicide, but was merely trying to affect her husband's conduct and had a desire to obtain restful sleep. His reasons for this were that, being a pharmacist, if she wanted to commit suicide she would do it efficiently, that in a state of hysteria an attempt to commit suicide is only exceptionally genuine and is more commonly directed to bringing other people to heel, and that she took the dial when she knew remedial steps would be taken at once. After this incident, the petitioner finally decided that the marriage could go on no longer, and during the respondent's holiday at Mount Macedon he told her that he would never live with her again.

In the argument much was made of certain events concerning Mrs. Edgar in the period in which the respondent was in hospital. First, the petitioner arranged with Mrs. Edgar to act as his housekeeper when he should find a new practice to go to. Then, when the petitioner had occasion to drive to Toora for the purpose of bringing a domestic to Newport to look after the children, he took

Mrs. Edgar, at Dr. Dobbin's suggestion, to help with the driving. But he also took his daughter. They stayed a night at a hotel, Mrs. Edgar and the daughter occupying one bedroom, and the petitioner and a bank clerk occupying another. Then again, the petitioner availed himself of Mrs. Edgar's help in the buying of clothes for the eldest two children whom he was sending to boarding school. He also got her to go to Emerald to see a house which was offered for sale with a practice there; and while she stayed at a guest house, he and his children occupied a caravan, and they all had one or two meals together. But there is no evidence whatever to suggest impropriety in the relationship between the petitioner and Mrs. Edgar. His married life was ended; he was going to a new practice and had to have someone to run the house. He was thus in a position in which an adverse construction might be placed upon almost any step he took; and, in the event, the case presented against him has not been wanting in sinister suggestions. But evil imaginings are no substitute for evidence, and evidence of misconduct was completely lacking.

When the respondent returned home, on 28th January 1948, the petitioner was not prepared to try any more to make the marriage work. He left the house, went to reside with friends at Newport, and set about making arrangements to terminate his partnership with Dr. Dobbin and buy a new practice at Healesville. In the meantime the respondent was telling the maid in the house, Mrs. Elliott, that the petitioner was no good and that she would never have him back on any conditions. He commenced his practice at Healesville on 1st March 1948, and after a month or two Mrs. Edgar arrived, with her child, and took up residence as housekeeper in the premises he had obtained.

The respondent continued to harass him, and she wrote him an undated letter (Exhibit C) which contained an illuminating sentence: "There is the risk," she wrote, "for you to have to escape from Healesville as you had to escape from Newport". She sent him insulting telegrams, caused a violent scene at his house, and told some of his patients that she would hound him out of Healesville. It was the Healesville Court of Petty Sessions that she chose for proceedings for maintenance, which proved unsuccessful. To a Healesville resident, Mrs. Butterworth, she talked about the petitioner all one evening, saying that he was a bad man, that he had left her on her own with the children, and that she would never live with him again. She suggested that the two of them should go past his house and say that they saw him and Mrs. Edgar together. Mrs. Butterworth naturally refused to do so. It is a

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striking fact that from the population of Healesville, amongst whom the petitioner and Mrs. Edgar had been living for more than four years at the date of the trial, not one person has come forward to give any evidence upon which a suspicion of misconduct could fairly be based. The only rational explanation of the respondent's conduct seems to be that she had two objects, to injure the petitioner and to get money from him. She had caused the break by persisting over a long period in behaviour which she must have known the petitioner could not be expected to bear indefinitely, and she must either not have cared if it should drive him away, or actually desired that it should do so. And when the break came, she embarked on and persisted in a course of conduct which, she must have realised, could hardly fail to ensure its permanence.

In my opinion no reason has been shown for disagreement with the trial judge's decision, and the appeal should be dismissed.

*Appeal allowed with costs. Decree nisi discharged and in lieu thereof decree that the suit be dismissed with costs.*

Solicitor for the appellant, *Denis M. Byrne.*

Solicitor for the respondent, *Ian Lasry*, Healesville, by *G. N. Blakie.*

R. D. B.