[PRIVY COUNCIL.]

LANG . . . . . APPELLANT;
APPELLANT,

AND

LANG . . . . . RESPONDENT.
RESPONDENT,

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

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1954.

July 19, 20, 21, 22, 26, 27, 28, 29, 30;
Nov. 10.

Lord Porter,
Lord Oaksey,
Lord Reid,
Lord Tucker
and
Lord Asquith
of Bishopstone.

Matrimonial Causes—Dissolution of marriage—Constructive desertion—Intention—Inference from conduct—Desire that consequent conduct should not ensue—Marriage Act 1928 (*Vict.*) (*No.* 3726), *s.* 75 (*a*).

Desertion is established by proving the factum of desertion, certain outward and visible conduct, and the *animus deserendi*, the intention underlying this conduct to bring the matrimonial union to an end. In ordinary desertion the factum is the act of the absconding party in leaving the matrimonial home and the animus is the intention of the party leaving the home to break it up for good. In constructive desertion the factum is the course of conduct, which must be grave and convincing, pursued by the party remaining in the home. In determining whether, in such cases, the necessary intention exists, the real question is whether the party pursuing the course of conduct knew that, if persisted in, it would in all human probability result in the other party's departure. Although the requisite intention may legitimately be inferred from the acts alone, the inference may be rebutted by convincing evidence to the contrary. It is not rebutted by evidence that the party pursuing the course of conduct hoped and desired that his acts would not produce their probable effect of causing a separation.

Sickert v. *Sickert* (1899) P. 278; *Boyd* v. *Boyd* (1938) 4 All E.R. 181; 55 T.L.R. 3; *Edwards* v. *Edwards* (1948) P. 268; *Hosegood* v. *Hosegood* (1950) 66 T.L.R. (Pt. 1) 738; *Simpson* v. *Simpson* (1951) P. 320; *Bartholomew* v. *Bartholomew* (1952) 2 All E.R. 1035; 2 T.L.R. 934; *Pike* v. *Pike* (1954) P. 81 (*n*); *Moss* v. *Moss* (1912) 15 C.L.R. 538; *Dearman* v. *Dearman* (1916) 21 C.L.R. 264; *Bain* v. *Bain* (1923) 33 C.L.R. 317; *Baily* v. *Baily* (1952) 86 C.L.R. 424; *Sharah* v. *Sharah* (1953) 89 C.L.R. 167; *Deery* v. *Deery* (1954) 90 C.L.R. 211, referred to.

Decision of the High Court of Australia (*Lang* v. *Lang* (1953) 86 C.L.R. 432) affirmed.

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APPEAL from the High Court to the Privy Council.

This was an appeal by special leave by Eric Lang from the judgment of the High Court (*Dixon* C.J., *Fullagar* and *Kitto* JJ.) (*Lang* v. *Lang* (1)) affirming the decision of the Supreme Court of Victoria (*Lowe* J.) whereby Jean Wauchope Lang was granted a decree nisi for dissolution of her marriage with the appellant on the ground that he had without just cause or excuse wilfully deserted her and had without any such cause or excuse left her continuously so deserted during three years and upwards.

The facts and relevant statutory provisions appear in the judgment hereunder.

James Stirling, *Basil Buller Murphy* and *B. J. Wakley*, for the appellant.

J. E. S. Simon Q.C. and *John Latey*, for the respondent.

Their Lordships took time to consider the advice which they would tender to Her Majesty.

NOV. 10.

LORD PORTER delivered the judgment of their Lordships as follows :—

This is an appeal by special leave granted 28th May 1953 from a judgment dated 23rd February 1953 of the High Court of Australia. By that judgment the High Court of Australia (*Dixon* C.J., *Fullagar* and *Kitto* JJ.) dismissed the appeal of the present appellant from a judgment of the Supreme Court of Victoria (*Lowe* J.) whereby it was adjudged that the present respondent should be granted a decree nisi of dissolution of marriage with costs on the ground of the present appellant's desertion.

The parties were married in South Australia on 8th November 1924. On 29th October 1951 the wife presented a petition to the Supreme Court of Victoria praying for a divorce on the ground that her husband had without just cause or excuse wilfully deserted her and had continued in desertion for three years and upwards.

The matrimonial law of the State of Victoria differs notably from that of England. The main differences are : (1) that cruelty without more has in Australia never been a ground for divorce *a vinculo* as it has been in England since 1937 but only for a judicial separation ; (2) that desertion which without more became a ground of divorce in England in 1937, has been such a ground

(1) (1953) 86 C.L.R. 432.

a vinculo in Victoria as long ago as 1890 by provisions which so far as relevant to this case, were re-enacted without alteration by Statutes of 1915 and 1928.

The following are the provisions of the *Marriage Act* 1928 (No. 3726) of the State of Victoria which govern the relevant transactions:—" (75) Any married person who at the time of the institution of the suit has been domiciled in Victoria for two years and upwards may present a petition to the Court praying on one or more of the grounds in this section mentioned that his or her marriage with the respondent may be dissolved—(*a*) On the ground that the respondent has without just cause or excuse wilfully deserted the petitioner and without any such cause or excuse left him or her continuously so deserted during three years and upwards: (*b*) On the ground that the respondent has during three years and upwards been an habitual drunkard and either habitually left his wife without means of support, or habitually been guilty of cruelty towards her . . . (*d*) On the ground that within one year previously the respondent . . . has repeatedly . . . assaulted and cruelly beaten the petitioner: . . . If in the opinion of the Court the petitioner's own habits or conduct induced or contributed to the wrong complained of . . . such petition may be dismissed ".

By s. 77 of the same Act, a wife may present a petition for dissolution of marriage, *inter alia*, on the grounds of adultery coupled with cruelty and under ss. 63 and 64, a decree of judicial separation may be granted, *inter alia*, on the ground of cruelty. Unless, however, the cruelty can be brought within the terms of ss. 75 (*b*) or (*d*) or 77 (set out above), it is not a ground for dissolution of marriage under Victorian law.

If cruelty had been a sufficient ground for divorce in the State of Victoria, then assuming, as seems to their Lordships very probable, that the wife's health suffered from the treatment she received, the case would have presented no complications. As it is the wife, who had been brutally ill-used and insulted over a long period, since she was the first to leave the matrimonial home had to found her petition on desertion: and in order to succeed had to establish what is described as " constructive desertion ".

At this point, and before proceeding with any summary of the facts, their Lordships think it desirable to make certain general observations about the law (*a*) of desertion; (*b*) of so called " constructive desertion ".

Both in England and in Australia, to establish desertion two things must be proved: first certain outward and visible conduct —the " factum " of desertion: secondly the " *animus deserendi* "

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—the intention underlying this conduct to bring the matrimonial union to an end.

In ordinary desertion the factum is simple: it is the act of the absconding party in leaving the matrimonial home. The contest in such a case will be almost entirely as to the "animus". Was the intention of the party leaving the home to break it up for good, or something short of, or different from that?

Since 1860 in England and for a long time in Australia, it has been recognized that the party truly guilty of disrupting the home is not necessarily or in all cases the party who first leaves it. The party who stays behind (their Lordships will assume this to be the husband) may be by reason of conduct on his part making it unbearable for a wife with reasonable self-respect, or powers of endurance, to stay with him, so that he is the party really responsible for the breakdown of the marriage. He has deserted her by expelling her: by driving her out. In such a case the factum is the course of conduct pursued by the husband—something which may be far more complicated than the mere act of leaving the matrimonial home. It is not every course of conduct by the husband causing the wife to leave which is a sufficient factum. A husband's irritating habits may so get on the wife's nerves that she leaves as a direct consequence of them but she would not be justified in doing so. Such irritating idosyncrasies are part of the lottery in which every spouse engages on marrying, and taking the partner of the marriage "for better, for worse". The course of conduct—the "factum" —must be grave and convincing.

In the present case there is not the slightest question that the "factum" is sufficient. The facts are not in dispute. There are in effect concurrent findings that the husband grossly ill-used and insulted his wife over a period of five years and gave her ample justification for leaving him.

The whole and sole question is whether the wife has proved the necessary animus or intent on the part of the husband. How should that animus be ascertained? In particular (1) is it enough for her to show a course of conduct on the part of the husband which in the eyes of a reasonable man would by making her life insufferable, be calculated to drive the wife out, the husband's actual intention being immaterial on the footing that every man is presumed to intend the natural and probable consequences of his acts? Or (2) should the objective criterion of the reasonable man's reactions be rejected on the footing that the real question is, did this particular husband (who may not have been reasonable) know that his conduct, if persisted in, would in all human probability result

in the wife's departure :—it being remembered it is possible (human nature being what it is) for such knowledge on the husband's part to co-exist with a desire that she should stay, since people often desire a thing but deliberately act in a way which makes that desire unrealizable. Or again (3) should inferences which would naturally be drawn be wholly disregarded and an intention which would naturally be drawn from the husband's conduct negatived, provided there is proved to exist, de facto, on his part a genuine desire (however illogical or impossible it may be to square such a desire with his conduct) that the matrimonial union should continue ? On this view the husband's desire to maintain the home is conclusive whatever his conduct. All three of these views have found expression in the decided cases.

Their Lordships have thought it convenient to state in very general outline the legal issues involved before citing any authorities or concluding their summary of the facts. To this last task they now revert.

The material facts are conveniently summarised in the judgment of the Supreme Court of Victoria by *Lowe* J. " But I take up the story in some detail from the respondent's return from the Middle East in 1942. He had been on active service, and that was the time of his return. In a conversation with his son—and the substance of it was repeated to others—he said that thenceforward he was going to be master ; and when the son asked him whether that meant that he was going to knock his mother about he said that was the only thing she understood. From this time on, I find a series of constant disturbances and acts of violence on his part. There were slaps and punches which he administered to the petitioner on the face and the body. He struck her on occasions with a ruler and with a cane and with a slipper and did this in the undignified way, on occasion, of placing her across his knee and administering punishment in that way. There were bruises put upon her body by these means and the bruises on occasions were seen by other people. He twisted her arms behind her back and so caused her pain, and on occasion he so held the twisted arms in a position that continued for nearly an hour, and when the police arrived, on the summons of one of the children, he was still holding his wife's arms in that position. On two occasions at least he dragged her by the hair into the bathroom and held her under the cold shower. He abused her and he constantly called her a bitch, and there were nightly disturbances created by him, destroying his wife's rest. Now, that is a series of incidents and a course of conduct which persisted over several years. She told him on a number of

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occasions that if he continued that conduct she would have to leave as that conduct was affecting her health. And on one occasion she did leave, and left for some little time. I shall deal with that more particularly, but on another occasion she left and walked the street for the night so that she might not stop in the house". She separated from him on two occasions, viz., in 1943 and in July 1948, before they finally parted. On the first occasion she remained away for about two months and was induced to return by promises of amendment, which were however promptly and continuously thereafter violated. On some date in July 1948 he treated her with such violence that, not for the first time, the police had to be invoked. She then asked him to leave, and he did: returning however on 11th August. On 13th August occurred the culminating incident which caused her finally to leave him. The husband professed to have taken advice from a psychiatric friend as to how he could improve his relations with his wife, and to have been advised to try "Caveman stuff".

It is a little surprising that this suggestion was treated by the husband as a new departure: "Caveman stuff" is not an unfair description for the treatment he had been applying to his wife for years past and which had twice caused her to leave him. However, on 13th August, he planned and carried out what he referred to as the "rape of Lucrece"; in the words of the trial judge's finding he "forced sexual intercourse on her in circumstances of calculated and revolting indignity": and told her that he was going to "use her for the same purpose whenever he wanted to and as often as he wanted to". These last words are important. She then finally left and filed her petition, ignoring a number of letters which he wrote begging her to return but not expressing any intention to treat her differently if she did. Her patience was not unnaturally exhausted and even if he had expressed penitential sentiments it would not have been unreasonable for the wife to doubt their sincerity.

The Australian law as to constructive desertion is principally contained in three or four decisions of the High Court. Before considering these their Lordships would make some general observations.

In the present case the existence of conduct by the husband being of sufficient gravity to constitute the necessary factum, the question is what he intended, or must be taken to have intended, while so conducting himself? Did he intend to bring the matrimonial relations to an end? Let it be supposed that a husband intentionally persists in conduct which the hypothetical reasonable man would

think calculated to cause the wife to leave him, is he necessarily guilty of constructive desertion, notwithstanding that he genuinely desires the marriage to survive ? If so, evidence of his consistently expressed desire that the wife should stay with him is irrelevant and inadmissible. The formula, if satisfied, creates an irrebuttable presumption.

In other words if a man deliberately makes his wife's life unbearable according to an objective standard, i.e. the reasonable man's reactions, is he conclusively presumed to intend to drive her out; —the presumption that a man intends the natural and probable consequences of his acts being treated as irrebuttable ? This view has been in the ascendant in the leading decisions of the High Court of Australia, though of late traces of a recession from it have been discernible. In England this view finds expression in *Sickert* v. *Sickert* (1); *Edwards* v. *Edwards* (2) and generally in the cases where a husband has installed in the matrimonial home, or refused to expel from it, or to dismiss from his service a mistress—examples of which may be found in *Dickinson* v. *Dickinson* (3) and *Koch* v. *Koch* (4).

The other view, which is embodied in the English decision in *Boyd* v. *Boyd* (5) and in certain observations in *Bartholomew* v. *Bartholomew* (6), is that no matter how reprehensible has been the husband's behaviour, if there is positive and credible evidence negativing any actual intention on his part to end the marriage, the law will not impute such an intention to him.

In Australia on the other hand in *Moss* v. *Moss* (7) on appeal from New South Wales what has been referred to as the objective test of conduct amounting to constructive desertion was laid down in terms so designed as to make the deserter's actual intentions immaterial if the objective test were justified. If the course of conduct is sufficiently blameworthy and prolonged, the case decides that the law will impute to the guilty party an intention to bring the matrimonial union to an end, whatever his actual or professed desire. Overtures for a reconciliation, for instance, or a genuine de facto wish that the wife should stay, will in such a case be overridden by this imputation. The gist of the case of *Baily* v. *Baily* (8) decided forty years later, is to affirm what has been called the objective test except where there has been express desertion, and is accurately summarised in the judgment of the trial judge

(1) (1899) P. 278.
(2) (1948) P. 268.
(3) (1889) 62 L.T. 330.
(4) (1899) P. 221.
(5) (1938) 4 All E.R. 181; 55 T.L.R. 3.
(6) (1952) 2 All E.R. 1035; 2 T.L.R. 934.
(7) (1912) 15 C.L.R. 538.
(8) (1952) 86 C.L.R. 424.

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Lowe in the following passage:—"This is a wife's petition to dissolve the marriage on the ground of her husband's desertion. In fact it was she who left the matrimonial home and therefore the case is one of what has come to be known as constructive desertion. The term has been a good deal criticised, but for my part I must accept it that constructive desertion, if proved, is sufficient ground for the dissolution of the marriage. The matter has been very recently discussed in the High Court in the case of *Baily* v. *Baily* (1). That case makes it plain that the test which has to be applied in these cases is one either of actual intention by the husband to bring the matrimonial relationship to an end or an intention on his part to persist in a course of conduct which any reasonable person would regard as calculated to bring about such a result. It is the second limb of that test which is relied upon in this case, namely, that the facts are such as to show an intention on the husband's part to persist in a course of conduct which any reasonable person would regard as calculated to bring about a rupture in the matrimonial relationship".

Dearman v. *Dearman* (2) also an appeal from New South Wales is in line with these decisions, foreshadowing the second limb of the rule laid down in *Baily* v. *Baily* (1). *Bain* v. *Bain* (3) in substance affirms the same view; though it is a somewhat more complex decision, since it touches expressly on the problem created when there is a clash of intentions, or, if that be strictly impossible, a clash of intention with wish or desire, or aim.

Their Lordships will have to return to these among other Australian authorities and to say something about cases decided in England. But before doing so, they think it proper to deal with the judgment. It is unnecessary to analyse the evidence as the findings of fact are not in dispute.

It has been noted that the petition was filed on 29th October 1951, and particulars were supplied on 26th November 1951. None of the particulars relate to a period earlier than 11th August 1948. Yet the whole case was conducted, as regards evidence and argument, on the footing that the whole of the husband's behaviour from 1943 to 1948 was relevant. This seems to their Lordships an anomalous and regrettable state of affairs. However, no objection was raised to the excursion of the evidence far outside the limits covered by the pleadings, and the lesser evil is to treat the pleadings as amended so as to cover the additional matter.

(1) (1952) 86 C.L.R. 424.
(2) (1916) 21 C.L.R. 264.
(3) (1923) 33 C.L.R. 317.

The judgment of the Supreme Court of Victoria (*Lowe* J.) professes to be wholly based on the second limb of the formula in *Baily* v. *Baily* (1). Thus in the Record at line 5, p. 223, he says: "I have no doubt that the course of conduct which I have described indicates 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 relations, and consequently I think that his conduct does amount to constructive desertion". It is inherent in the logic of this formula that if the reasonable man would regard the course of conduct in which the husband intended to persist as calculated to bring the marriage to an end, it is not open to the alleged deserter to give evidence that that was the last thing he actually desired. Yet the logic is not quite rigidly observed for the learned judge pays regard to the wife's warnings that she would leave the respondent if he persisted, a fact mainly revelant to his actual intention and he deals on p. 223 at some length as to the question whether the husband's appeals to the wife to return to him after the final separation were sincere or not.

On appeal the High Court dealt somewhat briefly with the case partly because (as Sir *Owen Dixon* C.J. explained in the later case of *Deery* v. *Deery* (2)) the facts were so overwhelming. Sir *Owen Dixon* delivered the main judgment, *Fullagar* and *Kitto* JJ. merely expressing agreement. The Chief Justice quoted the actual words on which in *Baily* v. *Baily* (1), the High Court had held the criterion to consist:—"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" (3).

The Chief Justice, like *Lowe* J., found that the facts of the case brought it within the second limb of this formula; he met the argument that de facto the husband never desired his wife to leave him with the following quotation from *Bain* v. *Bain* (4):—"A man may intend to retain his wife's presence, but also at the same time to pursue a certain line of conduct. If at all hazards he deliberately pursues that line of conduct, his intention to retain his wife's presence is conditional on or subservient to the other intention. If his conduct is such that his wife, as a natural or necessary consequence, is morally coerced into withdrawing, it cannot be said with any truth that the husband intends her to remain. He knows in that case that the result of his deliberate act will be and is his

(1) (1952) 86 C.L.R. 424.
(2) (1954) 90 C.L.R. 211.
(3) (1952) 86 C.L.R., at pp. 426-427.
(4) (1923) 33 C.L.R. 317.

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wife's withdrawal, and, therefore, in every real sense he intends that withdrawal" (1). He went on to point out that "on countless occasions he must have been in the state of knowing that what he was doing would necessitate her withdrawal". No doubt the learned Chief Justice had in mind that she had again and again warned him that she would leave if he persisted, and had in fact twice actually left him.

It will be observed that this judgment involves a slight recession from the severely objective rule which infers an intention to desert conclusively when certain conduct is established since clearly the Court thought a purely subjective factor—the husband's de facto knowledge that she would leave—was relevant. There were already, their Lordships think, some signs of vacillation between a purely objective and the admission of certain subjective elements in *Bain* v. *Bain* (1).

In the English decisions there is discernible a similar dualism. The courts which decided *Boyd* v. *Boyd* (2) and *Bartholomew* v. *Bartholomew* (3) certainly use language which suggests that if the respondent desires the partner to remain with him, then the petitioner cannot ever prove constructive desertion. In these cases the court applied a subjective test, viz. the husband's intention. If intention bears the same meaning as desire, this reasoning, when pressed to its logical conclusion, leads to the result that a husband who desires his wife to stay in the matrimonial home simply in order that he may illtreat her or to make her a target for insult, cannot be guilty of constructive desertion. In *Hosegood* v. *Hosegood* (4), *Denning* L.J. (who thinks *Boyd* v. *Boyd* (2) was well decided and was a party to the *Bartholomew* decision (3)) conveniently summarises the two rival strains of English authority in the following passage. He says:—"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, 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

(1) (1923) 33 C.L.R., at p. 325.
(2) (1938) 4 All E.R. 181; 55 T.L.R. 3.
(3) (1952) 2 All E.R. 1035; 2 T.L.R. 934.
(4) (1950) 66 T.L.R. (Pt. 1) 735.

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* (1) with approval. In another passage, however, he seems to favour the second school, for he cites *Sickert* v. *Sickert* (5) with equal approval" (6).

He continues:—"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" (6).

The conflict of opinion in the English cases appears again in *Simpson* v. *Simpson* (7) where the view expressed in *Edwards* v. *Edwards* (3) is repeated and in *Pike* v. *Pike* (8) where the Court of Appeal re-affirmed the propositions expressed in *Hosegood* v. *Hosegood* (9).

These four cases so completely review the divergence which exists in this country that it would in their Lordships' opinion serve no purpose to quote from or refer to the many decisions whether given under the present law or at a time when adultery

(1) (1938) 4 All E.R. 181; 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) (1899) P. 278.
(6) (1950) 66 T.L.R. (Pt. 1), at p. 738.
(7) (1951) P. 320.
(8) (1954) P. 81 (n).
(9) (1950) 66 T.L.R. (Pt. 1), 735.

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by a husband was not of itself a ground of divorce, but required the presence of some other factor, viz., cruelty or desertion.

Nor at this stage is it necessary to consider the effect of those cases in which it is claimed that one who continues to live with a mistress has been held guilty of desertion even though he did not admit her to the matrimonial home but desired to retain the consortium of his wife.

So far as the Australian cases are concerned there is not, as their Lordships apprehend, so marked a dichotomy but the distinction between the instances in which desertion has been held to have been established and those in which the facts have been held to afford insufficient proof is a fine one. Apart from the cases already quoted the place at which the line is drawn is most clearly exhibited in the difference of result between that reached by the High Court in the present case and their decision in the later case of *Deery* v. *Deery* (1). In the latter case the High Court by a majority allowed an appeal by a wife against a finding that she had constructively deserted her husband on the ground that the incidents relied upon were due to the wife's permanent characteristics rather than to any design to drive the husband away: and therefore the evidence was insufficient to enable the Court to infer that the respondent had an actual intention to bring about a rupture of the matrimonial relationship or to persist in conduct calculated in the mind of any reasonable person to bring about such a rupture. "As I read the evidence" says *Dixon* C.J. "the one thing which I think she never intended to do was to drive her husband away" (2). Later he continues: "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" (3).

Of the present case *Dixon* C.J., who gave the leading judgment says: "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

(1) (1954) 90 C.L.R. 211.
(2) (1954) 90 C.L.R., at p. 224.
(3) (1954) 90 C.L.R., at p. 225.
(4) (1953) 86 C.L.R. 432.
(5) (1952) 86 C.L.R. 424.
(6) (1923) V.L.R. 421, at pp. 428-9.

to persist in a course of conduct with knowledge that it is completely inconsistent with the maintenance of the matrimonial relation" (1).

In these two cases the results at which the High Court arrived were different but in each two grounds for inferring desertion were accepted, viz., actual intention and intention inferred from conduct which any reasonable person would regard as calculated to bring the consortium to an end.

In spite of some of the expressions used in the cases both in England and in Australia it was not, as their Lordships understand, contended that certain types of action of necessity create an irrebuttable presumption that the party guilty of them must be held to intend to break up the marriage tie on the principle that a man must irrebuttably be held to intend the natural consequences of his acts. Indeed in *Simpson* v. *Simpson* (2) the learned President (Lord *Merriman*) expressly says "I venture to suggest that in this jurisdiction, at any rate, we may continue to use the time honoured maxim" (i.e. a man must be taken to intend the natural consequences of his acts) "provided always that we remember that it does not express an irrebuttable presumption of law and that it is only to be applied in connexion with conduct which can fairly be described as ill-treatment" (3). Nor do those who hold the other view maintain that an intention *deserendi* may not legitimately be inferred from acts alone. In *Hosegood* v. *Hosegood* (4) *Denning* L.J. accepted the position that there are many cases where the husband may be presumed to have had the intention to end the marriage.

The difference between the two views is rather what meaning is to be attached to the word "intention" and what evidence is sufficient to rebut a prima facie case.

Prima facie a man who treats his wife with gross brutality may be presumed to intend the consequences of his acts. Such an inference may indeed be rebutted but if the only evidence is of continuous cruelty and no rebutting evidence is given, the natural and almost inevitable inference is that the husband intended to drive out the wife. The court is at least entitled and indeed driven to such an inference unless convincing evidence to the contrary is adduced. In their Lordships' opinion this is the proper approach to the problem and it must therefore be determined whether the natural inference has been rebutted in the present case.

The fact that the question at issue involves a consideration of the effect of the actions of one person upon another adds to the

(1) (1954) 90 C.L.R., at p. 223.
(2) (1951) P. 320.
(3) (1951) P., at p. 333.
(4) (1950) 66 T.L.R. (Pt. 1) 735.

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complexities of the case. But, apart from this, the distinction between intention and desire has to be borne in mind. A man may wish one thing and intend another :—*video meliora proboque, deteriora sequor*—and indeed as the High Court have pointed out a man's intention does not necessarily always remain constant but fluctuates from time to time. Nevertheless some general principle must be sought and adopted.

But before the question of the rebutting evidence is reached it has first to be determined what is the exact connotation of the word " intention " as used in the relevant cases.

In *Bain* v. *Bain* (1) the High Court visualises the problem which may arise where the husband appears to be actuated by " intents " which conflict with, or contradict, each other. The answer given is in substance that in such a conjuncture the dominant intention must be ascertained and looked to. The passage from *Bain* v. *Bain* (2) which is cited by the High Court in the present case has already been set out.

Their Lordships are of opinion that this passage goes to the root of the matter. But they venture to question whether as a matter of strict terminology a man can be said to entertain conflicting " intentions ". A man may well have incompatible desires. He may have an intention which conflicts with a desire : i.e. he may will one thing, and wish another, as when he renounces some cherished article of diet in the interest of health. But " intention " necessarily connotes an element of volition : desire does not. Desires and wishes can exist without any element contributed by the will. What then is the legal result where an intention to bring about a particular result (be it proved directly or by inference from conduct) co-exists with a desire that that result should not ensue ? That is the substantial point raised by this appeal. The issue may be put more concretely. What legal inference is to be drawn where the whole of a husband's conduct is such that a reasonable man would know —that the particular husband must know—that in all human probability it will result in the departure of the wife from the matrimonial home. Apart from rebutting evidence this in their Lordships' opinion is sufficient proof of an intention to disrupt the home : but suppose further a husband's hope is that in some way his actions will not produce these natural consequences, that the wife will stay and that the home will not be disrupted. Where a man's own actions are concerned and not their effect on another, the answer is easy. If he desires to resist temptation but yields to it his intention is evidenced by his acts. His better self is, it may be, overborne, yet in the end his intention is to yield. Where

(1) (1923) 33 C.L.R. 317.

(2) (1923) 33 C.L.R., at p. 325.

however the effect of his actions upon other people is concerned and there is no certainty but only a high degree of probability as to what the result will be, is a court to say that if he did entertain an unjustified hope that his wife would stay, the intention normally to be inferred from his acts is rebutted and is the correct conclusion that he did not intend to drive her out ? In their Lordships' opinion no such conclusion is justified. If the husband knows the probable result of his acts and persists in them, in spite of warning that the wife will be compelled to leave the home, and indeed, as in the present case has expressed an intention of continuing his conduct and never indicated any intention of amendment, that is enough however passionately he may desire or request that she should remain. His intention is to act as he did, whatever the consequences, though he may hope and desire that they will not produce their probable effect.

To say that it is not enough unless he knows that separation must inevitably result from his actions is to ask too much. Men's actions and judgments are not founded upon certainty—in most cases certainty is unascertainable—but on probabilities. No doubt a high degree of probability is required but no more.

With these considerations in mind, can it be said that the appellant has rebutted the natural inference, which would be drawn from his acts if no countervailing testimony was given ?

In their Lordships' opinion no sufficient ground has been given for rejecting the finding of the High Court.

It is true that *Lowe* J. founded his judgment upon the wording used by the High Court in *Baily* v. *Baily* (1) in which one of the tests is expressed to be an intention to persist in a course of conduct which any reasonable person would regard as calculated to bring the matrimonial relationship to an end and in their Lordships' view this is too objective a requirement. But the High Court took a more subjective standard after examining the evidence as a whole. They found, and, as their Lordships think, were entitled to find, that the appellant must have known that what he was doing would necessitate her withdrawal if she acted as any reasonable creature would. Such a finding, if warranted, is in their Lordships' opinion decisive of the case and in spite of *Lowe* J.'s reliance upon what may be regarded as a purely objective test, there is in their view ample ground for coming to the conclusion that the appellant must have recognized the gravity of the effect of his behaviour though he hoped and desired that it might not have its natural result.

The Australian courts are ready to draw the inference of intention on evidence of the same nature as that adduced in the present

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

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case and have twice approved of its decision before it reached their Lordships' Board, once as already stated in *Deery* v. *Deery* (1) and again in the High Court in *Sharah* v. *Sharah* (2).

So far as England is concerned their Lordships' opinion is fortified by the cases which decide that constructive desertion is to be inferred where a husband retains a mistress in spite of the wife's protests even though the mistress was not brought into contact with the wife and the adulterous association took place away from the matrimonial home.

So far as their Lordships are aware such actions have always been regarded as justifying the wife's withdrawal and a holding that she had been constructively deserted if she leaves the house. *Farmer* v. *Farmer* (3); *Pizzala* v. *Pizzala* (4); *Garcia* v. *Garcia* (5); *Koch* v. *Koch* (6) and *Sickert* v. *Sickert* (7) are examples of this outlook and (unless one takes the view of the minority in the Australian case of *Donnelly* v. *Donnelly* (8)) support the view that, whatever the husband's desire may be, this behaviour of itself establishes an intention to break up the married life.

Before they conclude their review one proposition propounded on behalf of the respondent should be mentioned, viz.: that the law permitting divorce for desertion first enacted in Victoria in 1890 has been re-enacted in 1915 and in 1928 and between the first and later dates the courts of that State had interpreted the word "desertion" as bearing the objective meaning contended for by the respondent. Having regard to the opinion upon the main question it is unnecessary for their Lordships to express an opinion on this matter. As at present advised they would only say they are not satisfied that the law as laid down before 1928 is sufficiently clear to warrant an assumption that an *animus deserendi* must always be inferred where the deserter's action warrants it, whatever his real intention may be shown to be.

But for the reasons they have indicated their Lordships will humbly advise Her Majesty to dismiss the appeal. The appellant must pay the respondent's costs as between solicitor and client of the appeal to their Lordships' Board.

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R. D. B.

(1) (1954) 90 C.L.R. 211.
(2) (1953) 89 C.L.R. 167.
(3) (1884) 9 P.D. 245.
(4) (1896) 12 T.L.R. 451.
(5) (1888) 13 P.D. 216.
(6) (1899) P. 221.
(7) (1899) P. 278.
(8) (1939) 61 C.L.R. 577.