CASE NOTES

DIVORCE—CONSTRUCTIVE DESERTION

Two recent decisions of high authority on what has become known as "constructive desertion" illustrate once again the difficult distinctions courts are often forced to draw in applying "constructive" doctrines.

In each case the Court—the Privy Council in *Lang v. Lang*[1] and the High Court in *Deery v. Deery*[2]—was concerned with the problem of the requisite mental element in a petition for divorce on the ground of constructive desertion. In *Lang's* case the wife left the matrimonial home as the result of her husband's gross ill-use of her over a period of five years, he having adopted what was described as "cave-man stuff". However, it was clear that he did not desire to drive her away; on the contrary he genuinely wanted the marriage to continue. The Supreme Court of Victoria granted her a decree nisi and, upon this decision being upheld by the High Court, the respondent took the matter on appeal to the Privy Council.

Their Lordships reiterated the well-established principle that the deserting party is not necessarily the one who left the matrimonial home—it is the one who broke up the matrimonial relationship. But, they said, in the case of constructive desertion as in the case of actual desertion it is necessary to prove both the *factum* (conduct driving the other party away from the home) and the *animus* (the intention of bringing the matrimonial union to an end). In this case their Lordships entertained no doubts as to the *factum,* considering the petitioner had ample justification for leaving.

It was upon the required mental element that the argument really centred. Two divergent views were put to the Board. On the one hand was the "objective" test; namely that it is sufficient to show conduct by the respondent which in the eyes of a reasonable man would cause the petitioner to depart, his actual intention being immaterial on the basis that the man is presumed to intend the natural necessary consequences of his act. This test, whilst it may appeal for social reasons, is logically objectionable because it converts the presumption into an irrebutable one for, as Denning L.J. said in *Hosegood v. Hosegood*[3] "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'." On the other hand stands the "subjective" test; that if it is proved that he genuinely desired the matrimonial union to continue, desertion is impossible as the required *animus* is lacking. Of course, in most cases the Court will be loath to accept evidence of such a desire, considering, in

[1] [1954] 3 W.L.R. 762. [2] [1954] A.L.R. 262.
[3] (1950) 66 T.L.R. (Part I) 735, 737-8.

view of his conduct, that it was not genuine. In the present case it was clearly shown to exist. Whilst attractive logically, this test leads to the socially undesirable result that the wife will continue to be shackled to a husband whose conduct has driven her from the home.

Before turning to the relevant authorities, the Board referred to an important distinction which exists between English and Victorian divorce law. Cruelty has, without more, never been a ground for divorce in Australia, though it has existed as a ground in England since 1937. Therefore, in England, on facts such as these the petition would normally be based on cruelty and not on desertion, and it would not then be necessary to prove an intention to break up a matrimonial home.[4] Their Lordships stated that if cruelty had been a ground of divorce in Australia, "the case would have presented no complications".

In Australia the early tendency was to apply the objective test, but later cases, influenced perhaps by the English decisions after 1937, seemed to have adopted a more subjective approach. In *Moss v. Moss*[5] a basically objective test was adopted by the High Court and in *Bain v. Bain*[6] that Court took the matter further when it said (*per* Isaacs and Rich JJ.[7]), "Intention is a matter of fact . . . But there is always one commanding principle namely that 'In a Court of law every man is taken to intend the natural or necessary consequences of his action' (*per* Lord Parker in *Attorney-General for Australia v. Adelaide Steamship Co.*[8]) . . . If his conduct is such that his wife, as a natural or necessary consequence, is morally coerced into withdrawing it cannot be said with any truth that the husband intends her to remain." In *Baily v. Baily*[9] the High Court stated the seemingly objective test of proving either actual intention to bring the matrimonial relationship to an end or "an intention to persist in a course of conduct which any reasonable person would regard as calculated to bring about such rupture",[10] but they referred to "misunderstanding" of *Bain's* case and to the "somewhat unfortunate references to the highly dangerous maxim that every person must be taken to intend the natural and probable consequences of his actions".[11]

In the present case the High Court[12] relied on the second limb of the formula in *Baily's* case, but, in the view of the Privy Council, their judgment "involves a slight recession from the severely objective rule"[13] as they relied to some degree upon the fact that the husband knew his wife would leave if he persisted.

In England the balance of authority favours the subjective test. In *Boyd v. Boyd*[14] Bucknill J. said, "it may be that the husband has

[4] *Sqire v. Squire* [1949] P. 51.
[5] (1912) 15 C.L.R. 538.
[6] (1923) 33 C.L.R. 317.
[7] *Ibid.* 325.
[8] [1913] A.C. 781, 799.
[9] (1952) 86 C.L.R. 424.
[10] *Ibid.* 427.
[11] *Ibid.*
[12] (1953) 86 C.L.R. 432.
[13] [1954] 3 W.L.R. 762, 769.
[14] [1938] 4 All E.R. 181, 182-3.

behaved so badly that his wife leaves him, and it may be that this conduct amounts to cruelty, when the wife can get a divorce on that 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". This was dissented from in *Edwards v. Edwards*[15] but it has been affirmed by the Court of Appeal in *Bartholomew v. Bartholomew*[16] and *Hosegood v. Hosegood*.[17]

This difference of view between the two countries is possibly due to the fact that in Australia the Courts have unconsciously widened the scope of constructive desertion for social reasons, whereas this has been unnecessary in England where cruelty exists as a separate ground.

The Privy Council, however, adopted neither of these tests. They drew a distinction between "intention" and "desire" and stated that if the husband *knows* the probable results of his acts and persists in them, that is sufficient, no matter how passionately he may *desire* the wife to remain. In other words, the requisite intention exists if he knew what the results of the acts would be, irrespective of whether he desired them or not. In criticism it may be said that this is a rather fine distinction to apply, especially in a jurisdiction of this kind. Secondly, since apparently proof of knowledge by the respondent of the probable results of his conduct is necessary, it has been suggested[18] that this places a premium on stupidity and allows a respondent to show that, though a reasonable man may have recognized the probable results of his acts, *he* did not in fact recognize them and so is not guilty of constructive desertion. In addition, it could lead the Court back into the very problem from which it has just extricated itself. Knowledge of the results of conduct will normally be presumed where a reasonable man would have foreseen them, and so the Courts of the future may be faced with rival objective and subjective tests of knowledge, just as the Privy Council was here faced with such rival tests of intention. This difficulty is heightened by the fact that elsewhere in their opinion their Lordships sailed perilously close to the now-rejected objective test.

The difficulty of applying this test will be seen by considering the case of *Deery v. Deery*[19] where the Supreme Court of Victoria granted the husband a divorce for constructive desertion, regarding his married life as "intolerable" owing to his wife's constant hysterical outbursts, frequent abusive attacks on him and generally unstable emotional conduct which included two abortive suicide attempts. This conduct appeared to be brought about partly by her

[15] [1948] 1 All E.R. 157.
[16] [1952] 2 T.L.R. 934.
[17] (1950) 66 T.L.R. (Part I) 735.
[18] (1955) 71 L.Q.R. 32.
[19] [1954] A.L.R. 262.

passionate and hysterical temperament and partly by an unjustified suspicion of improper conduct by the husband. The High Court, giving its decision prior to the Privy Council's decisions in *Lang's* case, by a majority reversed this. Dixon C.J., applying the second limb of the test in *Baily's* case above, considered on all the facts that her conduct was due to her unstable temperament and not to any intention to terminate the matrimonial union. However it is noteworthy, that in interpreting *Baily's* case, he relied to a great extent on the English authorities. Webb J. agreed, but Kitto J. dissented, considering that the trial Judge was in a better position to assess the difficult questions of fact involved. He emphasized the repeated warnings which the respondent had received and concluded that "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."[20]

The conclusion of Kitto J. is so similar to the test of the Privy Council in *Lang's* case that if the High Court had had the Board's decision before it, it might not have reached the same conclusion. At least the case illustrates that the last word has yet to be said on constructive desertion and the difficulties that the courts of the future may still have in considering problems of this nature.

J. F. FOGARTY

[20] *Ibid.* 276.

CONSTITUTIONAL LAW
INJUNCTION AND PARLIAMENTARY PROCESS

That short judgments are no criterion of the amount of controversy that the decision will cause is illustrated by the recent case of *Hughes and Vale Pty. Ltd. v. Gair.*[1] The Parliament of Queensland passed a Bill to amend the system of licensing vehicles for the transport of goods. Claiming that certain of the provisions were invalid because they contravened the provisions relating to trade and commerce contained in s. 92 of the Constitution, the plaintiffs sought an *ex parte* injunction to restrain the presentation of the Bill to the Governor. This was unanimously refused by the Court of six – Dixon C.J., McTiernan, Webb, Fullagar, Kitto and Taylor JJ. – the last four of these being content to agree with the judgments of Dixon C.J. and McTiernan J.

The main difficulty arises when we try to discover the principle on which they agreed. For Dixon C.J. stated his opinion thus: "An application for an injunction restraining the presentation of a Bill for the Royal Assent is, I will not say unprecedented, but it is at least very exceptional. We do not think it should be granted *on this occasion or later or in any case.*"[2] This of course raises the question

[1] [1954] A.L.R. 1093. [2] *Ibid.* 1094. The italics are supplied.