INTENTION IN THE LAW OF DIVORCE

The present article is devoted to a discussion of the relevance of intention in two of the most important grounds for divorce (or in the case of cruelty in Queensland, judicial separation). In attempting such a discussion the purpose of the present writer has not been to provide a guide for practitioners through the host of English and Australian cases on this subject. That has been done by such well-known writers as Rayden, Latey and Joske. Rather it is to discuss in more general terms some of the essential ideas which have influenced the Courts in the development of the "common law" of divorce. (Hence the emphasis on English cases in which most of those ideas have been conceived). An understanding of those ideas is not only important in the daily practice of the courts:[1] it is also vital for an appreciation of the role to be played by the law of divorce in the life of the community—a role which it seems is important and possibly in need of careful direction.

1. DESERTION

It will be convenient to begin this part of the discussion by stating a definition of desertion which the present writer submits can be extracted from the cases: For the purposes of substantiating a charge of desertion there must be continuing throughout the statutory period a separation of the spouses, against the wish of one spouse and resulting from voluntary acts of the other spouse, committed with the intention of frustrating or interrupting the continuance of everything which is involved in a normal matrimonial relationship.

In the many judgments dealing with desertion a distinction seems to have been drawn, for the purposes of theoretical analysis as well as practical application, between the objective element of separation and the subjective element of intention[2].

1. For example, the need for a careful examination of the meaning of "intention" in constructive desertion was proved by the opinion of the Privy Council in *Lang v. Lang* [1955] A.C. 402.

2. E.g. *Pardy v. Pardy* [1939] p. 288 at 302 per Sir Wilfrid Greene, M.R.: "For the act of desertion both the factum of separation and the animus deserendi are required." Cp. the same judge in *Williams v. Williams* [1939] p. 365 at 368: "The act of desertion requires two elements on the side of the deserting spouse—namely the factum of separation and the animus deserendi." See also Blair C.J. in *Lowe v. Lowe* [1929] St. R. Q. 1 at 8-9; *Hopes v. Hopes* [1949] p. 227 at 238; *Watkins v. Watkins* (1952) 86 C.L.R. 161 at 167: "Both the animus and the factum of desertion are of course necessary." Cp. Lowe J. in *Singleton v. Singleton* (1945) 51 Argus L.R. 431 at 432: "Desertion on the part of the deserting spouse is constituted by fact and intention . . . the fact being the breaking off of matrimonial relations with the other spouse. and the intention being to bring that relationship to an end." Dixon C.J. in *Lang v. Lang* (1953) 86 C.L.R. 432 at 436 and Lord Porter in *Lang v. Lang* [1955] A.C. 402 at 417.

Charges of desertion seem to be viewed by the courts in two stages. Two questions are asked; firstly, are the spouses living apart? — secondly, why are they living apart? The first question is directed to ascertaining the degree to which it can be said that the spouses have ceased to perform in respect of each other the mutual obligations resulting from the contract and status of marriage. In seeking for the answer to this question, the judges began by being content with an objective examination of the facts tending to show such a discontinuance. They did not concern themselves with investigating the state of mind of a spouse in order to find the answer. Such an investigation was reserved for the second question, which is directed to ascertaining whether there was any justification for the separation. If there were, then it would not be wrongful and would not supply grounds for relief.

Judicial pronouncements on the theory underlying the law of desertion have maintained the use of the distinction between the fact of separation and the intention behind the separation. But all the time, in recent years, the judges have made frequent use of the necessity for showing an intention to desert in order to determine whether there has been a separation which amounts to desertion. This divergence between what the judges are actually doing, and what they say they are doing shows that, in reality, intention pervades every aspect of an inquiry into a charge of desertion. In fact an examination of the state of mind of the allegedly deserting spouse and that of the *soi-disant* deserted spouse is essential to determine whether there is any separation in a legal sense. It is impossible, for such a purpose, to dissociate the mental element in any case of desertion from the physical fact of separation. They have to be investigated concurrently. This has not always been done, although there are statements in some of the cases going a long way towards the recognition of this. It has not been done in cases of "desertion under the same roof"—where, as will be shown below, the recognition of the correct method of approach would have been invaluable.

The problem of desertion can best be discussed in the light of two questions—

(1) What constitutes separation for the purposes of relief?

(2) What acts or events can terminate or nullify the legal effect of such separation prior to the granting of relief?

It is mainly in relation to the first question that the law has undergone development—if not change—in the last few years. But, as will be evident later, that development is relevant to the second question also. The effect of recent cases is to show that what is involved in both questions is the recognition of the existence of a matrimonial relationship. If one spouse refuses such recognition against the wish of the other that spouse is guilty of desertion. In other words, what must be looked for in cases of desertion is the desire to escape from the obligations of matrimony.

This is the result of the acceptance and application of the reasoning in *Pardy v. Pardy*[3]. Before that case it was often thought that desertion was, in Lord Penzance's phrase in *Fitzgerald v. Fitzgerald*,[4] "an active withdrawal from a cohabitation which exists." But the language of Lord Penzance did not go uncriticised. Indeed Sir Henry Duke in *Pulford v. Pulford*[5] preferred to regard desertion not as a withdrawal from a place, but as a withdrawal from a state of things. He went on to anticipate the more recent attitude of the law by saying that what the law was seeking to enforce was "the recognition and discharge of the common obligations of the married state." There was thus a move away from the idea that desertion meant cessation of one aspect of matrimonial life, and towards the view that something deeper and more subtle was involved in the concept of matrimonial life, so that the legal idea of desertion should be made correspondingly more subtle. This view was definitely adopted in *Pardy v. Pardy*, though in a sense it had been foreshadowed by the decision in the Court of Appeal[6], the High Court of Australia[7], and the Supreme Court of New Zealand[8], that mere refusal of sexual intercourse

3. [1939] P. 288.

4. (1869) L.R. 1 P. & D. 694 at 698. Cp. the Annotation in 76 American L.R. 1023 (1931): "The general rule is that, where husband and wife have been living separately and apart by mutual consent there can be no desertion by the one party without a prior resumption of cohabitation, or, at least, a request by the complaining party to resume co-habitation."

5. [1923] P. 18 at 21.

6. *Jackson v. Jackson* [1924] P. 19.

7. *Maud v. Maud* (1919) 26 C.L.R. 1. But in *Heard v. Heard* (1943) 43 S.R. (N.S.W.) 82 the wife did more than refuse intercourse; she left the matrimonial home. Cf. *Dorr v. Dorr* [1947] St.R. Qd. 235.

8. *Barker v. Barker* [1924] N.Z.L.R. 1078.

did not in itself constitute desertion—a proposition not finally ratified by the House of Lords till 1947[9].

In *Pardy v. Pardy* it was accepted by the Court of Appeal as being law that there was a separation involving desertion whenever one spouse wilfully, and against the wish of the other manifested an intention of repudiating the terms of a separation agreement while yet living apart[10]. The basis of this decision was that desertion, in the later words of Latham C.J. in the High Court of Australia in *Powell v. Powell*[11], involved "a repudiation of matrimonial obligations amounting to abandonment of the party alleging desertion."

The possible defects of such a doctrine were canvassed by Dixon J. in the same case, in which *Pardy v. Pardy* was accepted and followed. His Honour thought that the change in the notion of intention, resulting from the English decision, necessitated a choice between three possible new meanings. In the first place, the intention to be considered could be an intention to deny or maintain a denial to the party deserted of the substantial benefit which would arise from the recognition and performance of the obligations flowing from the status of marriage. Secondly, it could mean an intention to neglect or refuse to maintain or establish any of the forms of association, or of relationship which in the circumstances of the parties would, or might be expected to result from a proper recognition of one another as husband and wife. Thirdly, it could mean "any attitude to which such expressions might be judicially applied as 'an intention to abandon the other party to the marriage' or 'an intention to abandon the marriage' " etc. To adopt this third meaning, Dixon J. thought, would be to substitute "figurative and dyslogistic expressions for a more precise legal standard," which would be "unenlightening and un-

9. *Weatherley v. Weatherley* [1947] A.C. 628. For different views taken by some American States see the annotation to *Weatherley v. Weatherley* in 175 American L.R. 708 at 711-716. In particular the Courts of Maryland and New Jersey have adopted the view that refusal of intercourse by itself is desertion since it "defeats the purpose of marriage" which is "the propagation of the race and the nurture and education of children in a home, as well as the prevention of licentiousness:" *Fleegle v. Fleegle* (1920) 136 Md. 630. Note also that in California, by statute, refusal of intercourse is evidence of desertion.

10. It was subsequently decided by the High Court of Australia (though there does not appear to be any English decision on the point) that in the absence of evidence that the repudiation of the deed was without the consent of the petitioning spouse there was no desertion: *McIlroy v. McIlroy* (1946) 73 C.L.R. 270.

11. (1948) 77 C.L.R. 521 at 530.

helpful." Desertion could then be safely described as a question of fact.[12]

The same fears did not assail Latham C.J. or Starke J. The former suggested in opposition to Dixon J. that *Pardy v. Pardy* created no radical revolution in the law;[13] for this assertion there is some authority, to be found mainly in Australian cases, although Smith J. in *Jackson v. Jackson*[14] took an opposite view. Starke J. thought there was no difficulty in the application of *Pardy v. Pardy* in the absence of subtlety[15]. The present writer is inclined to agree with Starke J., and to suggest respectfully that Dixon J., by his analysis, was unnecessarily and erroneously drawing a triple distinction. The submission is made that, if his language is carefully considered, no real difference will be found between his three glosses on intention. They all amount to the same thing; namely, an intention to forsake the essential obligations of matrimony, either by depriving the deserted spouse of the benefits of marriage, or by neglecting or refusing to maintain or establish a normal matrimonial relationship, or otherwise. The view of Latham C.J. and Starke J. is perfectly consistent with previously expressed views on desertion, especially in relation to cases where the parties were living under the same roof[16]. But revolutionary or not, it seems to provide a more realistic theoretical approach to the law, founded upon the idea of recognition of the continued existence of matrimonial relationship.

Such a recognition can exist even though the outward manifestations of such recognition are missing. In order to determine whether there is such recognition it is necessary to determine what are the essentials of the matrimonial relationship. Only by knowing that can it be decided whether in any particular instance a spouse is seeking to repudiate or deny his or her obligations and the relationship upon which they are based.

12. *Ibid.* at 539-540. Dixon J.'s comment about desertion *becoming* a question of fact is unjustified. For it seems to be recognised already by some judges that it *is* a question of fact: see e.g. Sir Raymond Evershed, M.R., in *W. v. W. (No. 2)* [1954] 3 W.L.R. 381 at 388.
13. (1948) 77 C.L.R. 521 at 530.
14. (1951) 58 Argus L.R. 56 at 58-60, basing his opinion on dissenting views held in the Victorian cases: *Merry v. Merry* [1948] V.L.R. 26; *Mathews v. Mathews* [1948] V.L.R. 326; *Cooke v. Cooke* (1943) 17 Aust. L.J. 274; *Reid v. Reid* [1949] V.L.R. 221; *Smith v. Smith* (1950) V.L.R. 209; Cp. also *Martin v Martin* [1948] V.L.R. 134; *Bickerton v. Bickerton* [1947] V.L.R. 91.
15. (1948) 77 C.L.R. 521 at 533.
16. See e.g. *Drake v. Drake* (1896) 22 V.L.R. 391; *Tonkin v. Tonkin* [1936] S.A.S.R. 100; *Cooke v. Cooke* (1943) 17 Aust. L.J. 274. Cp. the later case of *Campbell v. Campbell* (1951) S.R. (N.S.W.) 158, and the New Zealand case of *Dempster v. Dempster* [1948] N.Z.L.R. 857.

Cussen J. of Victoria in *Tulk v. Tulk*[17] spoke of "marital intercourse, the dwelling under the same roof, society and protection, support, recognition in public and private, correspondence during separation" as constituting the *consortium vitae* between husband and wife. But in the South Australian case of *Tonkin v. Tonkin*[18] Richards J. cited with approval the statement by Sir John Salmond of New Zealand in *Barker v. Barker*[19] that "matrimonial cohabitation means the maintenance of *consortium vitae* between husband and wife, not the fulfilment of the duties which they owe to one another." Richards J. went on to say that this was the difference between the relationship created by marriage and that created by contract. These two views seem to differ. For Salmond J.'s view of consortium is considerably narrower than that of Cussen J. The former did not look at matrimonial relations in the light of general obligations, only in the light of "cohabitation," which in the circumstances of the case (a petition for desertion based on refusal of intercourse) would appear to mean intercourse and all that was collateral thereto. But Cussen J. viewed the matrimonial relationship as one importing general obligations. This, it is submitted, is the better view. It has the merit of coinciding with the opinion of Birkett L.J. in *Best v. Fox*[20]. In that case, in which the nature of consortium was to some extent in issue, Birkett L.J., considering the meaning and implications of consortium, said that "companionship, love, affection, comfort, mutual services, sexual intercourse—all belong to the married state."

It is this view of the question, the submission is made, that should provide the basis for an investigation into the true nature of a separation between the spouses. For the repudiation of *all* these elements of consortium must be shown before there is such a refusal to recognize the existence of a matrimonial relationship as will amount to desertion. As long as one or more of these essential elements is still in being there can be no desertion.

For this reason some of the customary incidents of married life (such as cohabitation in the narrow, unsatisfactory sense mentioned above, financial and other support, the maintenance of friendly or other relations, even though sexual intercourse has ceased) may be absent, without necessarily affecting the

17. [1907] V.L.R. 64.
18. [1936] S.A.S.R. 100 at 102.
19. [1924] N.Z.L.R. 1078 at 1089.
20. [1951] 2 K.B. 639 at 665.

continuation of the matrimonial relationship[21]. Thus the spouses may be separated by war, internment, imprisonment, sickness involving a long stay in hospital, convalescent home or asylum, or the necessity for one spouse to go on business or other voyages for long periods. It is the state of the spouses' minds that determine whether separation under such circumstances involves the cessation of the matrimonial relationship. There may be no outward indication (such as letters), that the spouses continue to recognize the existence of their marriage. But if they intend it to continue, then the mere fact that they are prevented from manifesting their intention in any normal way will not mean that there is desertion by one spouse or the other[22]. On this basis the continuance of a matrimonial relationship could be evidenced by adherence to a separation deed entered into by the spouses. For such a deed recognized the existence of some relation between the parties viz. financial support and dependence on the part of the respective spouses. Therefore repudiation of such a deed could involve the beginning of a separation amounting to desertion (which we might call a *legal*, as opposed to *factual*, separation.)[23]

This is the real point of those cases where desertion is alleged even though the parties are still living under the same roof.[24] For the issue is whether there has been a repudiation

21. The problem of children is a more difficult one. Can it be said that one of the obligations of married life is the procreation of children so that a refusal to have children could amount to desertion or could justify one spouse leaving the other? The decision in *Baxter v. Baxter* [1948] A.C. 274 would seem to suggest that the answer is: no. But there are American cases (in the courts of Michigan and New York) in which it is held that a refusal after marriage to have children can support a petition for annulment on the ground of fraud. See an annotation to *Baxter v. Baxter* in 4 A.L.R. 2d. 227 esp. at 230-5. There is the further point that a petition could be based on cruelty. This is still an open question. But see the cases cited in note 55 below.
22. But a separation which does not produce desertion may be turned into desertion, e.g. by a wife sending a letter saying she would never live with her husband again. *Morgan v. Morgan* [1946] V.L.R. 446.
23. See *Pardy v. Pardy* [1939] p. 288; *McIlroy v. McIlroy* (1946) 73 C.L.R. 270; *Powell v. Powell* (1948) 77 C.L.R. 521. Cp. *Beeken v. Beeken* [1948] p. 302. *Haigmaier v. Haigmaier* [1925] St.R. Qd. 199; *Hoggett v. Hoggett* [1926] V.L.R. 505; and a curious case *Smith v. Smith* (1948) 76 C.L.R. 525, as a result of the facts of which the High Court was understandably divided. *Hurley v. Hurley* [1950] Q.W.N. 48.
24. *Powell v. Powell* [1922] P. 278; *Smith v. Smith* [1940] P. 49; *Littlewood v. Littlewood* [1943] P. 11; *Wilkes v. Wilkes* [1943] P. 41; *Hopes v. Hopes* [1949] P. 227; *Everitt v. Everitt* [1949] P. 374; *Bartram v. Bartram* [1950] P. 1; *Baker v. Baker* [1952] 2 All. E.R. 248; *Walker v. Walker* [1952] 2 All. E.R. 138; *Bull v. Bull* [1953] P. 224; *Drake v. Drake* (1896) 22 V.L.R. 391; *Simons v. Simons* (1898) 24 V.L.R. 348; *Tonkin v. Tonkin* [1936] S.A.S.R. 100; *Cooke v. Cooke* (1943) 17 A.L.J. 274; *Power v. Power* [1944] Argus L.R. 427; *Campbell v. Campbell* (1951) S.R. (N.S.W.) 158; *Watkins v. Watkins* (1952) 86 C.L.R. 161; *Dempster v. Dempster* [1948] N.Z.L.R. 857. For American cases see annotations in 51 American L.R. at 768-769; 111 A.L.R. at 871; 166 A.L.R. at 508-509.

of the matrimonial relationship. The separation of spouses in the ordinary case, i.e. where they live in different dwellings can provide at one and the same time evidence of the physical separation and the mental state required for desertion, as already outlined above. The physical separation points to the required intention. But where the spouses still live under the same roof it is submitted that the division into "two households," which English cases have laid down must necessarily be shown, provides evidence of the intention of the respondent, rather than evidence of physical separation. Yet the courts have referred to such cases as turning on the issue of physical separation rather than on the issue of intention. This approach, it is submitted, obscures the real point of the inquiry into the situation between the spouses. That inquiry is not into whether they are living apart, although living in the same dwelling, but into whether one of them has clearly manifested the intention of no longer recognizing the matrimonial relationship.

In this respect the High Court of Australia in *Watkins v. Watkins*,[25] by saying that "it is the factum that is in question," was guilty of obscurantism, in erroneously denying the validity of counsel's argument that Victorian courts (if not others in Australia) had previously adopted a view which was different from the English one, and was based on the doctrine of the continued subsistence of married life. The English courts seem to have mislaid the true principle when dealing with such cases. It is submitted that by doing so they made the task of determining whether there is desertion a more difficult one to perform.

It follows from all this that the essence of legal separation is the intentional disruption by one spouse, against the wish of the other, of the normal state of matrimony existing between the spouses. This involves a repudiation of *all* the elements of such a state. Even though some aspects of normal married life are absent, if there is something left of the marriage, a matrimonial relationship can be regarded as existing for the purposes of the law of desertion.

But if that matrimonial relationship has completely disintegrated e.g. by consensual separation, without any undertaking on the part of one spouse to provide financial support for the other, there can be no desertion. This will be true when one spouse has done something else which amounts to a repudiation of the obligations involved in matrimony so as to bring the relationship to an end. Thus, adultery by a spouse, if

25. (1952) 86 C.L.R. 161 at 167.

uncondoned, makes any subsequent leaving by the other spouse a separation in fact but not in law. So, too, with acts of cruelty, or other conduct which amounts to causing a "rupture of the matrimonial relation."[26] This is because adultery, cruelty, etc. of themselves upset and deny a normal matrimonial relationship. If separation follows, the spouse leaving cannot be deserting—for that spouse is not repudiating anything. This is the same thing as saying that the "desertion" is not "without cause." For the acts of the spouse who does not depart constitute a repudiation of the marriage.[27] Therefore the spouse actually leaving is not doing anything wrongful. He or she is not deliberately interrupting the continuance of everything which is involved in a normal matrimonial relationship. Separation in law involves the repudiation of the marriage, hence in the cases mentioned above, it is the non-departing spouse who is doing the repudiating.

On that principle the idea of constructive desertion is based. If the spouse remaining behind is the spouse who has destroyed or has manifested the intention of repudiating the marriage by his or her conduct, (whether by adultery or acts creating a reasonable belief of adultery,[28] or by cruelty, or, possibly, other conduct amounting to legal cruelty[29]), then the spouse remaining behind is the deserting spouse. But it must be quite clear that the respondent has manifested such an intention.

In this respect it is necessary to consider the doctrine of "natural consequences," which has bothered the law of divorce in many cases of constructive desertion and cruelty.

The precise effect of the maxim that a man must be taken to intend the natural consequences of his acts produced differ-

26. *Baily v. Baily* (1953) 86 C.L.R. 424 at 427.

27. See the discussion in *Crown Solicitor (S.A.) v. Gilbert* (1937) 59 C.L.R. 322 at 335-336 per Dixon J.; the case was disapproved on other grounds in *Waghorn v. Waghorn* (1941-2) 65 C.L.R. 289. Cp. in the case of a period of desertion having already begun, *Tuckey v. Tuckey* [1955] St.R. Qd. 1 at 3 per Hanger J.

28. See *Buchler v. Buchler* [1947] p. 25; cp. *Boyd v. Boyd* [1938] 4 All E.R. 181; *Edwards v. Edwards* [1948] p. 268; See also *Hosegood v. Hosegood* (1950) 66 T.L.R. (Pt. 1) 735; *Lane v. Lane* [1952] p.34; *Kemp v. Kemp* [1913] 2 All E.R. 553; cp. *Baker v. Baker* [1954] p. 33. See also *Forbes v. Forbes* [1954] 3 All E.R. 461.

29. This is still a vexed question: see *Pike v. Pike* [1954] p. 81n; *Dixon v. Dixon* [1953] P. 103; *Timmins v. Timmins* [1953] 1 W.L.R., 757; *Foster v. Foster* [1954] P. 67; *Bartholomew v. Bartholomew* [1952] 2 T.L.R. 934; *Baily v. Baily* (1953) 86 C.L.R. 424; *Lang v. Lang* (1953) 86 C.L.R. 432; *Bolton v. Bolton* [1952] N.Z.L.R. 238; *McNae v. McNae* [1952] N.Z.L.R. 886. See also Rosen, *Cruelty and Constructive Desertion* (1954) 17 M.L.R. 434 at pp. 438-441.

ences of opinion in English[30] and Australian[31] cases. There have been those who considered that the test of intention was subjective, so that the maxim was irrelevant, and an actual intention had to be shown; and there have been those who considered that the test was objective, so that the maxim was of great importance because it enabled an intention to be inferred. The latter view, however, gave rise to two different opinions on the force of the maxim. Some held it to be a conclusive irrefutable presumption; others took the "modified" view that the inference contained in the maxim was one which "may," not "must," be drawn.

This conflict, at least as far as constructive desertion is concerned, now seems to have been settled by the Privy Council in *Lang v. Lang*,[32] where the wife who left her husband because of his gross brutality petitioned successfully on the ground of constructive desertion.

After a discussion of the relevant English and Australian authorities, Lord Porter, delivering the advice of the Board[33] said:

> "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 brutality 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 Lordship's opinion, this is the proper approach to the problem . . . ."

In the course of the ensuing passage of the opinion, Lord Porter stresses that where there could seem to be conflicting or contradictory intents, "the dominant intention must be ascer-

30. See: *Boyd v. Boyd* [1938] 4 All E.R. 181; *Edwards v. Edwards* [1948] P. 268; *Hosegood v. Hosegood* (1950) 66 T.L.R. (Pt. 1) 735; *Simpson v. Simpson* [1951] P. 320; *Pike v. Pike* [1954] P. 81 n. *Timmins v. Timmins* [1953] 1 W.L.R. 757; See also the discussion in Rosen, *op. cit.* (*supra* note 29) at pp. 434-435.

31. See: *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; *Lang v. Lang* (1953) 86 C.L.R. 432; *Sharah v. Sharah* (1953) 89 C.L.R. 167; *Deery v. Deery* [1954] Argus L.R. 262.

32. [1955] A.C. 402. Cp. an earlier New South Wales case where the husband's conduct brought about his imprisonment and hence the separation which amounted to desertion; *Lawler v. Lawler* (1941) 58 W.N. (N.S.W.) 233.

33. [1955] A.C. at 428.

tained and looked to".[34] But Lord Porter goes on to doubt whether there can be conflicting "intents." He accepts the possibility that here may be "incompatible desires" which may make the husband ill-treat his wife while wanting her to stay with him. But Lord Porter's conclusion on the subject of conflicting intents is that:

> "If the husband knows the probable result of his acts and persists in them, in spite of a warning that the wife will be compelled to leave the home and indeed as in the present case, has expressed the 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."[35]

In the present writer's submission this judgment spells the victory of the "modified objective" view mentioned above.

Thus, to equate constructive desertion with cruelty, (as will be seen from what is said later) the respondent's conduct must be shown to have been "aimed at" the petitioner, thereby proving that the respondent, with the ordinary knowledge of a reasonable man must have realised and intended the break-up of the matrimonial relationship.[36]

The second question to be discussed was concerned with the termination of what has here been termed legal separation. The effect of an original intention to repudiate the matrimonial relationship can be nullified in five different ways.

Thus, if the deserted spouse comes to recognize the separation by the other spouse as the way in which their particular marriage is to be fulfilled, e.g., by making it clear to the deserting spouse that he or she is not wanted back, it must follow that the intention of the deserting spouse to repudiate the marriage ceases to produce a state of desertion.[37] However the institution

34. *Ibid.* at 428.

35. *Ibid.* at 429.

36. Discussion of the expression "aimed at" must be postponed to the section on cruelty where it is more relevant.

37. Although this point is raised obliquely in *Pratt v. Pratt* [1939] A.C. 417, where the deserted spouse refused to consider reconciliation, it was forcefully and directly raised in *Barnett v. Barnett* [1955] P. 21 and *Fishburn v. Fishburn* [1955] P. 29. Contrast the failure to communicate acquiescence, which meant that desertion continued in *Bradford v. Bradford* (1908) 7 C.L.R. 470. See also *McIntosh v. McIntosh* [1940] V.L.R. 289; *Groves v. Groves* [1941] Q.W.N. 36.

of matrimonial proceedings need not necessarily produce such an acquiescence in the other spouse's desertion as will interrupt the statutory period, should the proceedings fail.[38]

Secondly, the deserting spouses's intention to repudiate might cease to have any effect because, during the period of factual, and legal separation, the deserted spouse has independently manifested an intention of repudiating the marriage. This is what happens in cases of what the present writer has elsewhere called, "justifiable desertion"[39] i.e. where the deserted spouse commits adultery during the time the other spouse has been in desertion. In such cases everything turns on the deserting spouse's knowledge. If that spouse knows of the adultery then it is possible to say that that spouse is no longer guilty of deserting, because it can be said that he no longer intends to repudiate a matrimonial relationship which he knows no longer exists—as was discussed above. If that spouse does not know about the adultery, then it cannot affect his intention, for, as far as that spouse is concerned, he or she still believes a normal relationship was desired by the other spouse, and therefore still intends to frustrate or interrupt its continuance.[40]

The third way in which desertion can come to an end is by a change of mind on the part of the deserting spouse. This alteration must be manifested in a way which clearly shows that the hitherto repudiating spouse now wishes to affirm the marriage and is willing to undertake again the obligations of matrimony.[41] The usual example is that of the deserting spouse making bona fide advances towards a resumption of matrimony.

38. See *Cohen v. Cohen* [1940] A.C. 631; *W. v. W. (No. 2)* [1954] P. 486; *Bell v. Bell* [1940] V.L.R. 325; *Pryde v. Pryde* [1940] Q.W.N. 43; but contrast *Bryant v. Bryant* [1941] 59 W.N. (N.S.W.) 1 where proceedings *did* interrupt the desertion period.

39. Fridman, *The Period of Desertion* (1952) 102 L.J. Newspaper 451.

40. See *Herod v. Herod* [1939] P. 11; *Earnshaw v. Earnshaw* [1939] 2 All E.R. 698; *Richards v. Richards* [1952] P. 307; *Church v. Church* [1952] P. 313; *Dryden v. Dryden* [1953] 1 W.L.R. 952; *Waghorn v. Waghorn* (1941) 65 C.L.R. 289, disapproving *Crown Solicitor (S.A.) v. Gilbert* (1937) 59 C.L.R. 322. See also: *Burow v. Burow* [1944] St.R. Qd. 185; *Bowman v. Bowman* [1943] St.R. Qd. 243; *Tuckey v. Tuckey* [1955] St.R. Qd. 1. Contrast *Draper v. Draper* (1943) 17 A.L.J. 66.

41. An intimation that at some future date (left indefinite) the deserting spouse might be willing to re-establish matrimonial relations was insufficient to show a change of intent; *Ringold v. Ringold* (1920) Va. 104 S.E. 836; cp. *Ogilvie v. Ogilvie* (1900) 37 Oregon 171.

Even if these are not accepted the desertion will be over;[42] and refusal to accept them may turn the hitherto deserted spouse into the wrongful party, since a refusal to resume the matrimonial relationship will amount to intentional repudiation of it.[43]

But it may be that the matrimonial relationship has been outwardly re-established while the deserting spouse still maintains the intention of repudiating it. Thus the parties may live together again as a normal married couple before the deserting spouse again commences to live apart with the intention of abandoning the marriage. In such cases the secreted intention will suffice to maintain the state of desertion. For the erstwhile deserting spouse has not in fact accepted once again the matrimonial relationship.[44] His or her advances are not made bona fide. This is even stronger where there is no such outward re-acceptance, where the parties occupy the same home but there is no indication, as far as the outside world is concerned, that the deserting spouse intends to re-affirm the marriage. In such circumstances the period of desertion continues.[45]

But where the deserting spouse has the bona fide intention of resuming the matrimonial relationship, and such resumption is undertaken, that will mean the end of the period of desertion, and any subsequent separation in law will run from the date of the subsequent separation in fact, not from the beginning of the previous separation in law.[46]

42. *Pratt v. Pratt* [1939] A.C. 417. For the effect in American cases of a conditional request to resume marital relations (which does not seem to have come before English or Australian courts—except possibly in *Hall v. Hall* (1917) 22 C.L.R. 476, where the husband would only accept the wife without her illegitimate child) see an annotation in 76 American L.R. 1023. It would seem to be the general opinion that such a request will terminate the desertion as long as the conditions are not improper or unreasonable. See *Merritt v. Merritt* (1931) N.H. 155 at 692, where the request to a wife to return was coupled with an offer to pay her money for support if she did not come.

43. *Thomas v. Thomas* (1945) 62 T.L.R. 166. Cp. *Wells v. Wells* [1954] 1 W.L.R. 1390. (See also *Lowe v. Lowe* [1929] St.R. Qd. 1 and *White v. White* (1908) 7 C.L.R. 477; *Kellway v. Kellway* (1937) 58 C.L.R. 173.

44. *Perry v. Perry* [1952] P. 203. Cp. *Mummery v. Mummery* [1942] P. 107; *Whitney v. Whitney* [1951] P. 250. On this reasoning the Victorian case of *Singleton v. Singleton* (1945) 51 Argus L.R. 431 must be wrong. Contrast *Struthers v. Struthers* [1943] S.A.S.R. 89 and *Fairey v. Fairey* [1947] S.A.S.R. 69. See also *Campbell v. Campbell* (1944) Ala 19 So (2d) 354; and the annotation thereto in 155 American L.R. 132 where the different views of American cases are collected.

45. *Hillary v. Hillary* (1941) 47 Argus L.R. 319; *Jackson v. Jackson* (1951) 58 Argus L.R. 56; *Bartram v. Bartram* [1950] P. 1; *Everitt v. Everitt* [1949] P. 374; *Retallack v. Retallack* [1937] Q.W.N.1; *Andrews v. Andrews* [1938] St.R. Qd. 72; *Bedford v. Bedford* [1943] St.R. Qd. 195. (Contrast *Sullivan v. Sullivan* [1946] Q.W.N, 33),

46. See 155 American L.R. 132 at 141-142. Cp. *Williams v. Williams* [1904] p. 145.

The effect of such a resumption must be distinguished from condonation. For, as *Perry v. Perry*[47] made clear, there can only be condonation after the matrimonial offence is complete, as it was in *Maslin v. Maslin*,[48] where the husband had intercourse with his wife after his petition on the ground of his wife's desertion had been filed. In other cases the issue is whether the intention to resume matrimonial relations has been manifested in good faith and has been acquiesced in by the other spouse.

The last example of the way in which the intention to repudiate the marriage can be terminated is by the hitherto deserting spouse's becoming insane. The House of Lords, in *Crowther v. Crowther*[49] laid to rest the earlier idea[50] that insanity necessarily involved the conclusion that the intention to repudiate the marriage could not exist in the mind of the insane spouse. Such insanity now only results in the placing of a heavy burden on the petitioner of showing that such an intention did in fact exist. The present writer has elsewhere[51] expressed the view that Lord Oaksey's remarks as to burden of proof should be adopted, so as to make the continuance of an intention to repudiate the marriage a presumption of fact to be rebutted by the respondent, and not something which has to be proved by the petitioner.

II. CRUELTY

For conduct to amount to cruelty it must injure the complainant's mental or physical health or must cause real appre-

47. [1952] P. 203, Cp. Hodson L.J. in *Lane v. Lane* [1952] P. 34 at 45; "The question . . . is not primarily one of condonation but whether the desertion has been terminated, either by a resumption of cohabitation involving a bi-lateral act or by the deserted spouse refusing to receive his or her partner, thereby turning himself or herself into the deserted."

48. [1952] 1 All E.R. 477. Cp. *Mewett v. Mewett* (1952) 59 Argus L.R. 550. But in *Ivey v. Ivey* (1952) 59 Argus L.R. 1030, the three years' desertion had not resulted in a petition being filed. Nevertheless Dean J. held that the offence was complete for the purpose of condonation. See also *Wright v. Wright* (1921) Fla. 87 So. 156: which makes the point that there is no duty to condone a desertion which could give a cause of action.

49. [1951] A.C. 723; followed by Herring C.J. in *Scherger v. Scherger* (1952) 59 Argus L.R. 269. See also *Lewis v. Lewis* [1951] Q.W.N. 25 where Stanley J. took the view that an insane person could not form the intention to desert.

50. *Williams v. Williams* [1939] p 365; *Rushbrook v. Rushbrook* [1940] P. 24. See also *Newstead v. Newstead* (1941) 47 Argus L.R. 81. Contrast *Bennett v. Bennett* [1939] P. 274. For an Australian case where a husband though schizophrenic was capable of forming the intention to desert ("constructively"). See *Lovell v. Lovell* (1941) 58 W.N. (N.S.W.) 93.

51. Fridman, *Insanity in Matrimonial Causes* (1952) 102 L.J.. Newspaper '185 at p. 186.

hension of such injury.[52] Conduct which, without producing danger or the reasonable apprehension of danger of that sort, makes the purposes of marriage impossible to achieve, and frustrates the fulfilment of every, or any element of a normal matrimonial relationship, does not amount to cruelty. Thus, a failure or refusal to provide proper financial support without the additional perpetration of some other conduct, will not be cruelty.[53] Nor will the mere refusal, failure, or inability of a spouse to have normal marital intercourse of itself amount to cruelty, any more than it will amount to desertion.[54] But if such conduct has actually produced injury to health, or the fear thereof, it can amount to cruelty, even if a remedy would not be available on the ground of nullity or desertion.[55] Cases of that kind, in particular, raise questions of intention.

Early cases on cruelty, before and after the 1857 Act, put forward as the rationale for the court's intervention the inherent danger to the petitioning spouse in the respondent's conduct, and the consequent need to protect the spouse from the harmful effects of such conduct.[56] This was so even if the conduct resulted from the temperament of the wrongful

52. See Evershed L.J. in *Squire v. Squire* [1949] P. 51 at 61; cp. also *Evans v. Evans* (1790) 1 Hag. Con. 35 at 39 per Sir William Scott; *Kelly v. Kelly* (1870) L.R. 2 P. & D. 59 at 60-61 per Channell B.; *Russell v. Russell* [1895] P. 315 at 329; [1897] A.C. 395.

53. *Eastland v. Eastland* [1954] P. 403; Contrast *Simpson v. Simpson* [1951] P. 320; *Jamieson v. Jamieson* (1952) A.C. 525 and the decision of Napier C.J. in the unreported case of *Abbott v. Abbott* (1955) where deprivation was added to nagging.

54. *Cox v. Cox* [1949] S.A.S.R. 117. In *Bravery v. Bravery* (1954) 3 All E.R. 59 the Court of Appeal were divided on the question whether a husband's voluntary sterilization amounted to cruelty to his wife; Evershed M.R. and Hodson L.J. held that in the circumstances there was consent by the wife and there was no evidence of injury to her. Denning L.J. thought that even if the wife had consented to the operation she could still complain.

55. For cases where failure to have normal intercourse and produce a child did cause injury to health and was cruelty: see *White (orse-Berry) v. White* [1948] P. 330 especially at 339-340 per Willmer J., relying on dicta of Lord Jowett L.C. in *Baxter v. Baxter* [1948] A.C. 274 at 290; *Cackett (orse Trice) v. Cackett* [1950] P. 253 especially at 260-261 per Hodson J. See also *Knott v. Knott* [1955] 2 All. E.R. 305 and *Forbes v. Forbes* [1955] 2 All E.R. 311. (Contrast *Fowler v. Fowler* [1952] 2 T.L.R. 143).

56. *Evans v. Evans* (1790) 1 Hag. Con. 35 especially at 37 per Sir William Scott; *Kirkman v. Kirkman* (1807) 1 Hag. Con. 409; *Holden v. Holden* (1810) 1 Hag. Con. 453 at 458. Cp. also Butt P.'s charge to the jury in *Hanbury v. Hanbury* [1892] P. 222 at 224: "I believe that protection not punishment or retribution is the main object." Cp. also Henn Collins J. in *Atkins v. Atkins* [1942] 2 All E.R. 637 at 638. This was affirmed as a ground for intervention by the Court of Session in *M'Lachlan v. M'Lachlan* 1945 S.C. 382.

spouse.[57] "For better or worse" in the marriage service was not construed as excusing a spouse from liability for every kind of excess. A spouse was entitled to self-preservation, even at the cost of dissolution of the marriage bond. For it was recognised that in cases of cruelty, there came a time when the duties of matrimony could not be fulfilled. Nothing, however was said in these cases as to the intention of the wrongful spouse. The nearest approach to such a discussion seems to be contained in the remark of the Judge Ordinary in *Hall v. Hall*[58] that, although he had no doubt that cruelty did not cease to be a cause of suit if it proceeded from "violent and disorderly affections," "violence of disposition," or, "a liability to become excited in controversy," it was a different matter if it proceeded from "madness, dementia, positive disease of the mind." He went on to say that, although there was something in the idea of the court's intervention being based on protection, i.e. safety for the future, its sentence also carried with it "some retribution for the past." In the case of an insane spouse it seemed to him that two reasons prevented the considering of harmful acts by such a person cruelty. In the first place, the remedy against possible danger was restraint, not the release of the unoffending spouse: secondly, there was the injustice of acting on the excesses of a disordered brain, which meant that someone not responsible would be visited with the court's sanction.

The majority of the House of Lords in *Russell v. Russell*[59] rejected the idea that cruelty could embrace conduct which, while not harmful to health, rendered impossible conjugal duties between husband and wife. They based their decision squarely on the doctrine of danger. But nothing seems to have been said directly on the question of intention. The first clear indication of the modern doctrine seems to be in an unreported judgment of Shearman J. in *Hadden v. Hadden*[60] where it was said that a husband "had no intention of being cruel but his intentional acts amounted to cruelty." This statement clearly distinguishes between an intention, in the sense of desire, to be cruel and to hurt, for whatever motive, and an intention to

57. *White v. White* (1859) 1 Sw. & Tr. 591; *Hall v. Hall* (1864) 3 Sw. & Tr. 347; *Pritchard v. Pritchard* (1864) 3 SW & Tr. 523. Cp. Lord Asquith in *King v. King* [1953] A.C. 124 at 147.

58. (1864) 3 Sw. & Tr. 347 at 349.

59. [1897] A.C. 395.

60. 1919. The Times Newspaper, Dec. 5th. See also Sachs J. in *Carpenter v. Carpenter* [1955] 2 All E.R. 449 at 452. But see Griffith C.J. in the Supreme Court of Queensland in *Ohman v. Ohman* (1896) 7 Q.L.J. 19 at 21-22. He did not think that an intent to be cruel was a necessary ingredient.

do acts which in themselves are cruel, in the sense of causing injury to health or the reasonable apprehension of such injury, without necessarily appreciating the actual or possible effects of such acts.

The idea of wilfulness in relation to the acts, as opposed to desire in relation to their effects, was expressed by Bucknill J. in *Horton v. Horton*,[61] when he referred to the need for showing the commission of "wilful and unjustifiable acts;"[62] and the equation of wilfulness with knowledge or awareness that the acts were being committed seems apparent from the decision in *Brittle v. Brittle*, [63] in which case the onus was on the respondent of proving that acts in themselves cruel were in fact committed without the knowledge of the respondent because of the latter's insanity. Such an equation was foreshadowed by two decisions of Henn Collins J. in 1939.[64]

But that learned judge also introduced the idea of "malignity" into the meaning to be attached to intention, and in doing so he raised an issue, which is still open to debate, despite such recent House of Lords decisions as *Jamieson v. Jamieson*[65] and *King v. King*.[66]

In *Usmar v. Usmar*,[67] the case of the nagging wife, Willmer J. referred to "a course of conduct, consciously and intentionally pursued."[68] In *Lauder v. Lauder*,[69] the case of the sulking husband, Lord Merriman P. spoke of "voluntary conduct,"[70] and Pearce J., after speaking of "intentional conduct,[71] went on to say that, whether or not the sulks were meant to wound or hurt the wife, they had had that effect and had caused injury to her health.[72] Consequently they

61. [1940] P. 187.
62. *Ibid.* at 193. Cp. Henn Collins J. in *Atkins v. Atkins* [1942] 2 All E.R. 637 at 638:—"deliberate behaviour." It is submitted that the criticism of Bucknill J.'s remarks made by the House of Lords in *King v. King* [1953] A.C. 124 does not affect the question of wilfulness but only the question of justification.
63. [1947] 2 All E.R. 383. Cp. also Scott L.J. in *Bertram v. Bertram* [1944] P. 59 at 60, speaking of deliberateness; and cp. *Foster v. Foster* [1921] P. 438—intentional infection with venereal disease.
64. *Kellock v. Kellock* [1939] 3 All E.R. 972; *Astle v. Astle* [1939] P. 415. They also raised the problem of insanity, to be discussed below.
65. [1952] A.C. 525.
66. [1953] A.C. 124.
67. [1949] P. 1.
68. *Ibid.* at 10.
69. [1949] P. 277.
70. *Ibid.* at 294.
71. *Ibid.* at 311-312.
72. *Ibid.* at 313.

constituted cruelty. In *Squire v. Squire*[73] the Court of Appeal rejected outright the idea that "malignity" was involved in the kind of intention required to support a charge of cruelty. Tucker L.J. disagreed with the earlier opinion of Henn Collins J. in *Astle v. Astle*[74] that "intention or malignity is an essential ingredient in cruelty," and clearly restated the law in terms of knowing what one is doing.[75] Evershed L.J. agreed with this criticism, but expressed the view that malignity might be important in some cases.[76] It is probable that what his Lordship was referring to were cases in which prima facie the acts of the respondent were not considered harmful to health and were not "aimed at" the petitioner. This is apparent from the judgments of Denning L.J. in *Westall v. Westall*[77] and *Kaslefsky v. Kaslefsky*.[78] These judgments, when read together, provide an analysis, within the framework of which an investigation of the meaning and importance of intention in this branch of the law can be undertaken. In the earlier case, Denning L.J. distinguished between cases where there was an intention to injure the health of the petitioner and cases where, without actually intending such injury, the respondent made the petitioner the object, or butt of his or her acts. Whereas in the former class of case it was comparatively easy to conclude that actual injury resulted, in the latter class actual injury had to be proved plainly and distinctly. But it would seem that both of these classes of cases, in which malignity was irrelevant, had to be distinguished from cases where a specific intent to injure was necessary for the success of the petition. Thus, to show that drunkenness, gambling, or criminal acts were cruel, it had to be shown that such activity was indulged in expressly to harm, and with the effect of harming the petitioner. Spite or malignity was therefore important in such cases, for proof of it showed that the respondent's conduct was "aimed at" the petitioner.[79]

This expression of the law was evident in Bucknill L.J's judgment in *Kaslefsky v. Kaslefsky*,[80] where a husband, who

73. [1949] P. 51. Discussed in the South Australian case of *Cox v. Cox* [1949] S.A.S.R. 117. (See also Napier C.J. in *Harper v. Harper* [1951] S.A.S.R. 66 at 69-70.
74. [1939] P. 415 at 419-420.
75. [1949] P. 51 at 57-58. See and contrast the words of Hodson L.J. in *Fowler v. Fowler* [1952] 2 T.L.R. 143 at 145.
76. *Ibid.* at 60-61.
77. (1949) 65 T.L.R. 337.
78. [1951] P. 38.
79. Cp. Rosen, *Cruelty and Constructive Desertion* (1954) 17 M.L.R. 434 at p. 442: "It is submitted that 'aimed at' is 'malignity' rearing its ugly head in another form." But why is its head ugly?
80. [1951] P. 38 at 44.

proved that his wife had neglected the child of the marriage, refused him intercourse, and generally behaved in a lazy and sluttish manner, was not successful in a petition based on cruelty, because his wife's conduct was not specifically "aimed at" him, i.e. was not malignantly indulged in to cause him harm. Bucknill L.J. laid great stress on the word "treated" in the Matrimonial Causes Act, as indicating that there must be conduct which was aimed at the offended spouse.[81] Denning L.J. repeated, this time with a fuller treatment, his earlier analysis.[82] He divided cruel conduct into two categories. In the first came actions or words actually or physically directed at the petitioner, or displays of temperament, emotion, or passion, vented with intention of relieving emotions on the spouse. In such cases there was cruelty in law, even though there was no desire to injure or inflict misery. It is in regard to such conduct, it would seem, that Lord Merriman was correct in saying in *Jamieson v. Jamieson*[83] that he did not suggest that it was essential to impute to the wrongdoer a wilful intention to injure. But that statement, it is submitted, is too wide if it was intended to cover the second category discussed by Denning L.J. Into this category fell cases where there was no direct action but there was misconduct which indirectly affected the petitioner, e.g. drunkenness, gambling, or crime. Such activity would only be cruel if it was done "not only for the gratification of the selfish desires of the one who does it, but also, in some part, with an intention to injure the other and to inflict misery on him or her." In such cases, if there was no desire to injure or inflict misery, "the conduct only becomes cruelty when the justifiable remonstrances of the innocent party provoke resentment on the part of the other, which evinces itself in action or words actually or physically directed at the innocent party."[84]

Thus there could be cases where intention denoted not merely a realisation of what one was doing, but a desire to cause harm, i.e. not merely knowledge but motive. But in this connection there arises the vexed question of the applicability

81. *Ibid.* at 45, Cp. Henn Collins J. in *Astle v. Astle* [1939] P. 415 at 419.
82. [1951] P. 38 at 46 *et seq.*
83. [1952] A.C. 525 at 540.
84. This is what happened in *Wollard v. Wollard* [1955] P. 85, where a husband who persisted in a life of crime despite his wife's remonstrations was held guilty of cruelty: contrast *Warburton v. Warburton* (1953) The times, July 10, where there was only one act of larceny. In *Carpenter v. Carpenter* [1955] 2 All E.R. 449, Sachs J. considered that an association with another woman would only be cruel if (together with other circumstances) it had as a natural result injury to the wife. Contrast *Cox v. Cox* [1952] 2 T.L.R. 141.

of the maxim that every sane person intends the natural, (or natural and probable), consequences of his acts, a question which (as already seen) has also arisen, and has only just been settled by the Privy Council, in cases of constructive desertion.[85] For the question arises: Can the maxim be used to decide that a spouse whose conduct was not intended to injure must none the less be considered as having had the intention to injure?

It seems clear that this problem will not arise where injury (whether physical or mental) has been directly or immediately caused by the respondent. For, in such instances, since some cases lay down that intention means only knowledge of one's acts, there is liability without proof of knowledge or intention in respect of consequences; (the problem of insanity is relevant here but must be discussed separately later on). The problem of the maxim does arise, however, where injury has not been directly inflicted by the offending spouse; where the suffering of the petitioner is indirectly induced by the conduct of the respondent.

As far back as *Russell v. Russell,* the possibility that this maxim could be used to show the presence of the necessary intent was mooted by Lord Halsbury, one of the dissentients in the House of Lords. Speaking of the wife he said:

> "She persistently made accusations against him which, if believed, would drive him from human society; she made them where they would be most likely to be spread abroad, and as both in criminal and civil jurisprudence people are taken to intend the reasonable consequences of their acts she must have contemplated that all who encountered her husband would regard him with loathing and horror."[86]

Denning L.J. in *Westall v. Westall*[87] did not agree as to the compulsiveness of the maxim's applicability. He thought that

85. It is to be noted that the wording of the maxim differs according to some judges. Denning L.J. in *Westall v. Westall, Kaslefsky v. Kaslefsky* and *Hosegood v. Hosegood* (1950) 60 T.L.R. (Pt. 1) 735 at 738, and Lord Merriman P. in *Simpson v. Simpson* [1951] P. 320 at 330, spoke of "natural consequences;" whereas Lord Greene, M.R. in *Buchler v. Buchler* [1947] P. 25 at 30, and Tucker L.J. in *Squire v. Squire* [1949] P. 51 at 56, spoke of "natural and probable" consequences. There may be a difference; for although a natural, (i.e. direct, in the course of nature) consequence of an activity on the part of X is conduct or suffering on the part of Y, such a consequence might not be "probable," in the sense of foreseeable as a likely result of X's activity. To which consequences, therefore, does the maxim apply; to direct ones, or only to foreseeable ones? The consequences suggested by cases on divorce would seem to be foreseeable ones.

86. [1897] A.C. 395 at 425.

87. (1949) 65 T.L.R. 337.

the inference that such consequences were intended *might* be drawn, but need not *necessarily* be drawn. This point of view was reiterated by him in *Hosegood v. Hosegood*[88]—a case of constructive desertion. However, the language of Willmer J. in *Usmar v. Usmar*, and of Tucker, L.J. in *Squire v. Squire*, seems to suggest that the maxim automatically applies. The former spoke of it being unnecessary to prove that a spouse was knowingly cruel, for it was sufficient if the spouse was intentionally guilty of acts which are in fact cruel in their result. "That of course," he went on, "is in accordance with the doctrine that everybody is deemed to intend the natural consequence of his or her own act."[89] Tucker, L.J., said categorically: "One starts with the undisputed proposition that, generally speaking a man is presumed to intend the natural and probable consequences of his acts."[90] That proposition, he added, applied to acts amounting to cruelty in matrimonial causes.[91]

The state of the authorities can be summarised thus: *Squire v. Squire* rejected "malignity" as an element in cruelty, but that rejection was later limited by Denning L.J. to cases where there was clear and direct physical, (and presumably also mental), injury to the petitioner; in cases where "malignity" is still inessential the application of the maxim is unnecessary; where malignity is essential, however, the maxim is necessary, for it supplies a means of proving the relevant intent, i.e. an intent to harm.[92]

There are therefore two ways of regarding the interpretation of intention and the use of the maxim in cases of cruelty. On the one hand, it can be said that the intention required in all cases is an intention to injure, but the maxim makes it possible, but not obligatory, to infer such an intention where there is knowledge of one's acts; and this will be especially true of cases of indirect injury caused by conduct such as

88. (1950) 66 T.L.R. (Pt. 1) 735 at 735. The problem so far as constructive desertion is concerned seems to have been settled by *Lang v. Lang* [1955] A.C. 402.

89. [1949] P. 1 at 9.

90. [1949] P. 51 at 56.

91. Cp. Asquith L.J.'s interpretation of *Squire v. Squire* in *White v. White* [1950] P. 39 at 52. But note in *Jamieson v. Jamieson* [1952] A.C. 525 at 549 Lord Reid reserved his opinion on the question of applying the maxim to impute an intention which does not exist.

92. Mr. Rosen would not agree: *op. cit.* at p. 444; "whereas intention to hurt may be an important element in cruelty cases, it is not essential to show that the conduct was 'aimed at' the other spouse."

drunkenness, gambling, or crime.[93] On the other hand, it can be said that an intention to injure is irrelevant, making the maxim also irrelevant.

To adopt the first view means that the decision in *Squire v. Squire* is not as sweeping in its rejection of malignity as it may appear to be at first sight.[94] To adopt the second results in there being two meanings attributable to intention in the law of cruelty, one referring to knowledge and appreciation of the *nature* of one's conduct, the other referring to knowledge and appreciation of the *consequences* of that conduct. The submission is respectfully made, that the first view is the more suitable to adopt. This is so for two reasons. Firstly, it produces the result that intention in cruelty has only one connotation instead of two; this is clearly a more preferable interpretation of the law than one which involves the necessity of changing the scope of the word in different contexts. Secondly, it means that intention in cruelty will be equated with the "modified objective" view which it was suggested previously, when dealing with desertion, has emerged triumphant from *Lang v. Lang*. Recent cases on refusal of intercourse and on the effect of assaults upon the petitioner's child,[95] would seem to bear out the acceptance of the view put forward here. It is, in fact, an eminently *practical* view—which might be urged as a third reason for its acceptance.

There is, however, another reason which from the point of view of a consistent theory can be urged in favour of this interpretation of the element of intention in cruelty: it fits in with decisions of the Court of Appeal on the subject of insanity in cases of cruelty.

The question whether a spouse's insanity at the time of committing acts which were alleged to be cruel could operate

93. For an instance where it would seem that the presumption of intended injury can be very strong see *Lissack v. Lissack* [1951] P. 1, where Pearce J. thought that there could be no greater cruelty to a woman than the killing of her child. Yet there was no direct attack upon the wife. Cp. also recent cases where the cruelty alleged consisted of or included indecent assault upon the petitioner's child: *Cooper v. Cooper* [1955] P. 99—the respondent's child as well; *Ivens v. Ivens* [1955] P. 129 the respondent's step-daughter.

94. Cp. the opening remarks of Denning L.J. in *Westall v. Westall* (1949) 65 T.L.R. 337. See the decisions of Ross J. in *Beattie v. Beattie* (1954) S.A. Supreme Ct. (unreported—sulking was "aimed at" the wife, therefore it was cruelty) and *Fuller v. Fuller* (1954—unreported). Cf. also Napier C.J.'s reference to "mens rea" in cruelty in *Sorrell v. Sorrell* [1954] S.A.S.R. 113 at 115.

95. See e.g. *Cooper v. Cooper (No. 1)* [1955] P. 99; *Ivens v. Ivens* [1955] P. 129. *Knott v. Knott* (1955) 2 All E.R. 305. *Forbes v. Forbes* [1955] 2 All E.R. 311.

as a defence to a petition based on such acts was touched upon in the nineteenth century cases, but was left unanswered,[96]

More recently it received elaborate treatment in *Astle v. Astle*[97] and *Kellock v. Kellock*.[98] Henn Collins, J. decided, obiter, that insanity which came within the scope of the first limb of the M'Naghten Rules was a good defence, because it was necessary to show that a respondent knew the nature and quality of his or her acts. He based his decision on three grounds. Firstly, insanity absolved from both civil and criminal responsibility, therefore it should have the same effect in the divorce court;[99] secondly, the use of the word "treated" in the Matrimonial Causes Act connoted a conscious action, and indicated an action of which the doer knew the nature and quality;[100] thirdly, intention, or malignity, was an essential ingredient in cruelty, therefore an insane person could not possess the necessary state of mind.[101]

The first two reasons seem to have met with the approval and acceptance of Asquith L.J. in *White v. White*,[102] and of Hodson L. J. in *Swan v. Swan*.[103]

But Denning L.J. in the former case, and Pearce J. in *Lissack v. Lissack*[104] preferred to adopt the attitude that the court's intervention was designed to protect the wronged spouse rather than to punish wrongdoing. Hence it did not matter whether the respondent knew wrong was being committed. Furthermore, insanity could not be a defence since, to quote

96. See e.g. *Hall v. Hall* (1864) Sw. & Tr. 347 and *Hanbury v. Hanbury* [1892] P. 222.

97. [1939] P. 415, followed by Willmer J. in *Brittle v. Brittle* (1947) 2 All E.R. 383.

98. [1939] 3 All E.R. 972.

99. [1939] P. 415 at 418. With respect, this is a sweeping statement to make about civil responsibility: see *Morris v. Marsden* [1952] 1 All E.R. 925.

100. [1939] P. 415 at 419.

101. *Ibid.* at 420. Cp. *Inglis v. Inglis* 1931 S.C. 542 especially at 551-552. per Lord Anderson. But note that he was alone in that view and his opinion was later criticised in *M'Lachlan v. M'Lachlan* 1945 S.C. 382.

102. [1950] P. 39 at 52. Note however that this equation of divorce and criminal proceedings is not tenable in the light of modern authorities: e.g. *Preston-Jones v. Preston-Jones* [1951] A.C. 391.

103. [1953] P. 258 at 263-264. Courts in many American States have decided that insanity is a good defence to charges of cruelty. It must be insanity which deprives the defendant's conduct of the element of wilfulness: therefore it must be shown that the defendant was unable to differentiate between right and wrong and was rendered incapable of willing one or the other course; see Annotation in 19 American L.R. (2d) at 148-150.

104. [1951] P. 1 Cp. also *M'Lachlan v. M'Lachlan* 1945 S.C. 382—strongly criticised by Hodson L.J. in *Swan v. Swan* [1953] P. 258 at 265-266.

Denning, L.J.,[105] "a specific intent to injure is not an essential ingredient in cruelty any more than it is in assault and battery: *Squire v. Squire.*" But, against this view there are two arguments.

In the first place, the importance of the idea of protection as directing the divorce court's activity was over-stressed by Denning L.J., for even the earlier cases which he cited made some reservations; and that idea has now been rejected by the Court of Appeal in *Swan v. Swan* where Hodson, L.J. said:[106] "No effective protection is, in fact, provided by decree of the court from the violence of an insane spouse. He or she can only be protected in the same way as other members of the public, by the incarceration of the insane partner."

Secondly, in the light of previous discussion in this article, the nature of the intent required in cruelty, seems to be different from that which Denning, L.J. ascribed to it in *White v. White.* If, as it has been urged above, intention to injure is relevant, then it must follow that an insane person, incapable of appreciating what he is doing, can not be possessed of such an intent, and can not be charged with cruelty. The Court of Appeal, rejecting Henn Collins J.'s third ground in *Astle v. Astle,* were content in *White v. White* and *Swan v. Swan* to regard intention as equivalent to knowledge. In adopting this view they were relying upon the interpretation of *Squire v. Squire* which has already been criticised above. For the purpose of the actual decisions before them, however, such an interpretation of intention did not raise any difficulty and was not really an issue. For only the first limb of the M'Naghten Rules—the one concerned with knowledge of one's acts—was in question.

Moreover of both cases it could be said that the decision on insanity was obiter. In *White v. White* Bucknill and Asquith L.JJ., whose view represents that of the majority, were of the opinion that on the facts, the respondent, on the test laid down in *M'Naghten's Case,* knew what she was doing, and knew that what she was doing was wrong. Hence a decision on the effect of insanity was not really necessary. Denning L.J. on the other hand, thought that the wife *was* insane. Therefore, he considered that a decision on the issue of insanity was vital. But his opinion of the effect of the evidence differed from that of the Commissioner who tried the case. The latter had found that the wife's mental state did not fall within the M'Naghten Rules, which he therefore did not apply. Consequently, it is respect-

105. [1950] P. 39 at 59.
106. [1953] P. 258 at 268.

fully submitted that Denning L.J.'s view of the facts is not binding. It would therefore follow that his view of the law is also obiter.

In *Swan v. Swan* the situation was even more interesting. There the facts were that some acts of cruelty had been committed while the husband was sane. Subsequently there was conduct on the part of the wife which it was argued amounted to condonation. Following that there were more acts of cruelty, which were committed when the husband was insane. Hodson L.J. held that the earlier cruelty—upon which a petition could have been based, and to which there was no defence—had not been condoned. On that finding, it is submitted, it was not really necessary for him to have investigated the legal effect of the subsequent insane acts. For there was no condoned cruelty which required revival by subsequent wrongful acts. Hence, it is submitted, what Hodson L.J. said about insanity can be regarded as *obiter*. But Somervell L.J. argued the case in a different way. First he considered whether insanity was a defence. Then, having decided that it was, with the result that the petitioner could not rely on the latter acts of cruelty, Somervell L.J. went on to consider whether the earlier acts of cruelty could be pleaded by the petitioner. That depended on the issue of condonation. He concluded that there had been no condonation. Hence the petitioner could succeed. The question therefore arises whether in Somervell L.J.'s judgment the decision on insanity was necessary for the purpose of his conclusion. In view of his approach to the facts it is submitted that it may well have been. Consequently the respectful submission is made that, either there are *two* rationes decidendi for the case, only one of which involves insanity; or that there is *one* ratio (that of Hodson L.J.) but it does not depend on the decision in respect of insanity.

But the effect of this decision seems to have been settled by *Palmer v. Palmer*.[107] There the Court of Appeal held that the second limb of the M'Naghten Rules applied to cases of divorce so that a man who was guilty of cruel acts—assaults—and knew what he was doing was wrong, was not excused from responsibility for his acts on the ground of insanity.

This judgment makes two points quite clear. In the first place insanity is a good defence to a charge of cruelty. Secondly, for insanity to have that effect it must be of the same kind as

107. [1955] P. 4.

would provide a defence in a criminal court, i.e. it must come within one or other of the limbs of the M'Naghten Rules.[108]

Thus the vexed question whether the second limb of the M'Naghten Rules applies in divorce cases has been settled in a way which shows that "intention" in cases of cruelty denotes not merely the intent to do the acts committed, with knowledge of what those acts are, but also the intent to produce the consequences which result from those acts. In other words the "modified objective" view has been adopted. The respondent must be shown to have intent to injure; his insanity will affect his ability to intend anything. Hence his insanity is a good defence to a petition based on his acts. If "intention" in cruelty did not include "intent to injure" then there would be no justification for the application of the second limb of the M'Naghten Rules. For as Somervell L.J. said, rejecting such an application in view of the decisions in *Squire v. Squire* and *Kaslefsky v. Kaslefsky*: "If the respondent knew the nature of his acts it would be no defence for him to say that he or she did not know they were wrong."[109]

The rejection of Somervell L.J.'s opinion and the adoption of Hodson L.J.'s by the Court in *Palmer v. Palmer* has meant that the law has come down on the side of those who have argued that "malignity" or "aiming at" or "intent to injure" the petitioner is a vital element in a case of cruelty. As with constructive desertion, the courts have taken a middle course between the completely subjective and completely objective interpretations of intention.

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108. *Ibid.* at 7 per Lord Goddard C.J.
109. *Swan v. Swan* [1953] P. 258 at 270.

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