Parliamentary Archives, HL/PO/JU/4/3/1114

HOUSE OF LORDS

WILLIAMS (A.P.)

v.

WILLIAMS (A.P.)

Lord Reid
Lord Evershed
Lord Morris of Borth-y-Gest
Lord Hodson
Lord Pearce

27th June, 1963

Lord Reid

MY LORDS,

This case requires a decision of the question whether an insane person can be held to have treated his wife (or her husband) with cruelty. The facts are not in dispute and they are clearly stated in the judgment of Mr.

Commissioner Gallop, Q.C., so I need only state in outline those which are relevant to the issue. The Respondent is a miner. For the first ten years of married life his behaviour was not above reproach, but he was never guilty of deliberate cruelty. There is insanity in his family, and in 1954 he began to hear voices and to think that people were after him. He was admitted to hospital as a voluntary patient for three months, and on his return home his wife says his condition was worse. One night he thought he heard people talking about him. He got up and dressed and went out with a knife looking for the people who were tormenting him. His wife reported this, and he was certified insane and taken back to hospital. It is found as a fact on medical evidence that from then until the trial in 1962 he was certifiably insane, and the evidence suggests that this is incurable. He frequently returned home for week-ends, but he was restless, and the voices began to say that his wife was a prostitute. Nevertheless in 1958 he was regarded as a voluntary patient, and in March, 1959, he discharged himself and went home. His wife did not want to have him, but says she could not stop him coming.

For the next nine months he was at home and his conduct during that time caused damage to the wife's health. This was caused by the voices which told him of men up in the loft of the house and of his wife's persistent adultery. He persisted in accusing her: if she tried to get away he would follow her about the house. Sometimes he would climb up into the loft to find the men. The learned Commissioner had no difficulty in holding that the case was proved unless the second limb of the M'Naghten Rules applies. He held that the Respondent knew what he was doing in making these accusations but that he did not know that they were wrong in any sense of the word. The medical evidence was that he thought that his accusations were based on sound fact and that he was fully justified in trying to resolve what was otherwise an intolerable situation.

The learned Commissioner in his judgment dealt in some detail with the authorities on the second limb of the M'Naghten Rules—a matter to which I shall return later. He said:

> " If it were *res Integra I* should have thought it virtually impossible
> " to import the second limb of the rule into Divorce Law. Is one
> " to find and examine the opinion which a spouse who was *ex hypothesi*
> " insane formed of the blameworthiness or culpability of the conduct
> " in question. That is if one treats the word ' wrong ' as meaning what
> " *Windle's* case [1952] 2 Q.B. 826, said it does not mean. If one
> " treats the word ' wrong' as what the Court of Criminal Appeal said
> " it does mean, then much of the texture of cruelty cases has nothing
> " to do with criminal law, or tort or contract for that matter."

But he held that on authority he was bound to dismiss the petition.

The Court of Appeal (Willmer and Davies, L.JJ.; Donovan, L.J., dissenting) held that they were bound to hold that the M'Naghten Rules applied and bound by *Palmer* v. *Palmer* [1955] P. 4 to hold that the second limb of those rules applied as well as the first. If that were so, then this petition must be dismissed. The majority further gave reasons why in

principle the second limb must apply, and I shall have to deal with those reasons later. So the appeal was dismissed; but leave was granted to appeal to this House.

In my judgment, before we come to the M'Naghten Rules at all, we must first decide the general question whether insanity in any sense is a defence to a petition for divorce for cruelty. The position as I see it is this. Before 1857 divorce *a mensa et thoro* on the ground of cruelty was a well-established remedy given by the Ecclesiastical Courts. By the Matrimonial Causes Act, 1857, the jurisdiction of those Courts was transferred to Her Majesty's Courts: divorce *a mensa et thoro* became judicial separation, but the same principles continued to apply. By the Matrimonial Causes Act, 1937 (now consolidated in the Act of 1950), divorce for cruelty was introduced for the first time. The Act requires that the respondent shall have " treated the petitioner with cruelty ".

There has been much argument about the meaning of the word " treated ". I attach no importance whatever to that word. What Parliament did in 1937 was to provide an additional remedy for cruelty. It did not touch the older remedy of judicial separation which is still available. So for that remedy cruelty must have the same meaning today as it had before 1937. It is incredible that cruelty now has a different meaning according to which remedy is chosen. But quite apart from that it seems to me obvious that Parliament cannot have intended to alter the former meaning of cruelty. If it had been intended to alter the meaning no one in or out of Parliament would have been so foolish as to leave that intention, and the extent of the intended alteration of meaning, to be inferred from the mere use of the word " treated ".

Accordingly it is necessary to see what the old law was. We have been referred to no case before 1857 in which there was actual insanity. The earliest was *Hayward* v. *Hayward,* 1 Sw. & Tr. 81, and I get little or no help from that case. But ungovernable passion, or a state of mind which was far from normal, was not unfamiliar, and I think it very helpful to see how those great judges Lord Stowell and Dr. Lushington dealt with this matter.

In *Kirkman* v. *Kirkman* (1807) 1 Hag. Cons. 409 Lord Stowell (then Sir W. Scott) said : " The evidence most clearly established that the wife " is not mistress of her own passions; and the Court would be wanting in " due attention to the safety of the injured party in this case if it did not " pronounce for a separation as absolutely necessary for that purpose." In *Holden* v. *Holden* 1810 1 Hag. Cons. 453 Lord Stowell said: "The Court " has had frequent occasions to observe that everything is in legal construction " *saevitia* which tends to bodily harm and in that manner renders co-" habitation unsafe; wherever there is a tendency only to bodily mischief " it is a peril from which the wife must be protected: because it is unsafe " for her to continue in the discharge of her conjugal duties; and to enforce " that obligation upon her might endanger her security and perhaps her " life. It is not necessary in determining this point to inquire from what " motive such treatment proceeds—It may be from turbulent passion or " sometimes from causes which are not inconsistent with affection and are " indeed often connected with it, as the passion of jealousy." Dr. Lushington was even more emphatic. He said in *Dysart* v. *Dysart* (1844) 1 Robert. 106 at p. 116: " When I find conduct towards a wife likely to prove dangerous " to her safety, but not in other cases, I shall consider it within my cog-" nisance, whatever may have been the cause thereof, whether having arisen " from natural violence of disposition, from want of moral control, or " from eccentricity. It is for me to consider the conduct itself, and its " probable consequences ; the motives and causes cannot hold the hand of " the Court, unless the wife be to blame, which is a wholly different con-" sideration. In plainer words, even if I were satisfied that conduct

" dangerous in itself arose from morbid feelings, out of the control of the " husband, I must act, if the danger exist, though it is not my province to " inquire into or ascertain such cause." I find it difficult to believe that either of those great judges if confronted with a case of insanity would have said that then he was powerless to afford any protection. And, apart

from incarceration of the insane spouse, counsel were unable to suggest any possible method of protection other than divorce *a mensa et thoro.* Even if cohabitation was not enforced the wife would, if she left her husband, have been penniless in the then state of the law.

In *Curtis v. Curtis* (1858) 1 Sw. & Tr. 192 the Judge Ordinary, Sir C. Cresswell, said (at p. 213) after quoting the above passage from *Dysart:* "If, " indeed, an act of violence were committed under the influence of an acute " disorder, such as brain fever, and it were made clear that, the disorder " having been subdued, there was no danger of a recurrence of such acts, " the case would be different. But, if the result of such a disease has been " a new condition of the brain, rendering the party liable to fits of un- " governable passion which would be dangerous to a wife, then undoubtedly " this Court is bound to emancipate her from such peril." The same learned judge in *Marsh* v. *Marsh* 1 Sw. & Tr. 312 decreed judicial separation where the husband's acts were committed at a time when he was suffering from delirium tremens.

In *Hall* v. *Hall* (1864) 3 Sw. & Tr. 347 Lord Penzance (then Sir J. P. Wilde) said: " I have no doubt that cruelty does not cease to be a cause " of suit if it proceeded from ' violent and disorderly affections', as said " in one case, or from ' violence of disposition, want of moral control, or " ' eccentricity', as said in another, or ' from a liability to become excited " ' in controversy', in the language of a third: but madness, dementia, " positive disease of the mind, this is quite another matter. An insane man " is likely enough to be dangerous to his wife's personal safety, but the " remedy lies in the restraint of the husband, not the release of the wife. " Though the object of this Court's interference is safety for the future, its " sentence carries with it some retribution for the past." A similar result was reached in the Scottish case of *Steuart* v. *Steuart* (1870) 8 M. 821. And stress has been laid in other cases on certification of insanity being an adequate protection. But the facts of the present case show that, owing to modern methods of treatment, certification is not now always an adequate protection. This Respondent was released though still certifiable, and then caused the injury to her health which the Appellant has proved. If the several learned judges who relied on certification as a protection had had to consider circumstances in which it was not, I am by no means sure that they would have reached the same result. They would have had to weigh the fact that separation is " some retribution " and is permanent even if the insane man recovers against the present danger to the wife if no remedy is given. Looking to the paramount importance which was attached to protection they might well have decreed separation.

There follows a gap in the authorities, until 1892. In *Yarrow* v. *Yarrow* [1892] P. 92 the President (Sir C. Butt) said: "I am by no means sure— " though I express no opinion upon it now—that insanity which would " entitle an accused to an acquittal on an indictment for a crime would

" constitute a valid defence to a suit for divorce on the ground of adultery." *Hanbury* v. *Hanbury* [1892] P. 222 was a petition for divorce on the ground of adultery coupled with cruelty. Sir C. Butt considered at some length the question of intermittent or recurrent insanity where the husband would be entitled to go home from time to time when he recovered. He said that though the insanity " may assume the form of a disease, yet if it is such " as to imperil the wife's safety she is entitled to the protection of this " Court". The jury found that the husband was capable of understanding " the nature and consequences " of his acts and decree was pronounced. In the Court of Appeal (8 T.L.R. 559) Lord Esher took this to mean that he knew what he was doing and that he was doing wrong, and said : " If the " disease in the mind of the person doing the act was not so great as to " make him unable to understand the nature and consequences of the " act which he was doing, that was an act for which he would be civilly or " criminally responsible to the law ". He reserved his opinion on the question whether the petitioner would be entitled to divorce if the respondent did not know the nature of what he was doing or that he was doing wrong. There appear to be no reported cases on this matter between 1892 and the passing of the Act in 1937 which permitted divorce for cruelty.

4

I can deal with the later cases more briefly. The first relevant case under the 1937 Act was *Astle* v. *Astle* [1939] P. 415. There the respondent did not know the nature and quality of those acts done while he was insane and Henn Collins, J., held that those acts could therefore not be held to be cruelty. The learned judge took this view chiefly because " the respondent " would not be held answerable outside this Court either civilly or criminally " for his assaults ", and he thought that the M'Naghten Rules should apply because they are the test applied in all other courts. In fact, counsel in the present case were unable to find any civil case, other than *Hanbury (cit. sup.)* and more recent divorce cases, in which the M'Naghten Rules have been applied. But the learned judge was able to grant decree on another ground. And, indeed, the present case appears to be the first reported case in which a petitioner has failed to get relief on some ground against a spouse who was insane.

Astle's case was criticised in *Squire* v. *Squire* [1949] P. 51, where the view that cruelty must be deliberate, malignant or intended was rejected. Lord Tucker refused to dispose of the case on the ground that the wife's conduct was not actuated by spite but was due solely to her state of health. My noble and learned friend, Lord Evershed, having pointed out that the wife was not insane, said : " She remained at all material times responsible for her " actions. If, therefore, her conduct to her husband was in fact cruel, she " cannot, as it seems to me, escape its natural consequences." A good deal was said about the presumption that a man intends the natural and probable consequences of his acts, a matter to which I must return.

White v. *White* [1950] P. 39 is an important case. There it was held, as the headnote states, that the mere fact that the respondent was insane is no defence. The Commissioner had held that the wife's mind was diseased and that she was not responsible for her acts of cruelty. Bucknill, L.J., quoted and followed the judgment of Lord Esher in *Hanbury* which in effect applied the M'Naghten Rules. This respondent's type of insanity did not come within those rules and was therefore disregarded. Bucknill, L.J., reserved

his opinion on whether the petitioner would have been entitled to protection if the respondent had come within the M'Naghten Rules, and indicated that danger might be removed to some extent because a spouse may be able to defeat a petition for restitution of conjugal rights although he fails to prove legal cruelty. Asquith, L.J., gave as one of his reasons a ground which to my mind is clearly wrong. He thought that if insanity is immaterial it must follow logically that no state of mind, intention or knowledge of the aggressor can be relevant. To my mind *non sequitur:* it is not illogical, though it might be wrong in law, to say that some conduct is so bad that it is cruel in itself (which seems to have been the view of Dr. Lushington in *Dysart)* while other conduct may be equivocal so that it can be excused by illness or insanity but aggravated by deliberate intention. But he went on to say " it is plain that the presence of insanity of some sort or other, " without more, will not necessarily afford a defence." Unfortunately he did not say why that was plain. Of course, if the insanity is of a type which did not in any way cause the cruel acts that would be plain. But he must have meant more than that because in *White's* case the insanity did give rise to the cruel acts, and it was only because the insanity was of a type which did not fit the M'Naghten Rules that he was for granting decrees of divorce. Denning, L.J., thought that the M'Naghten Rules do not apply to divorce, that this woman, if charged with a crime, would have been found insane by a jury, but that insanity is no defence in divorce proceedings.

In *Lissack* v. *Lissack* [1951] P. 1 my noble and learned friend, Lord Pearce, held that insanity was no defence, but I need not deal with this case because my noble and learned friend will state his view much better than I can. But *Lissack* was disapproved in *Swan* v. *Swan* [1953] P. 258, and we have now to consider whether in this *Swan* was right. I shall not attempt to deal with the judgment of my noble and learned friend, Lord Hodson, further than to note that he said that it is a contradiction in terms to describe as cruel the conduct of a person who did not know what he was doing, and that the word cruel carries with it implications of guilt. Somervell, L.J., held that insanity was a defence if the respondent did not know the nature

of his acts, but thought it would be no defence if he knew the nature **of** his acts but merely did not know that they were wrong. Jenkins, L.J., held that a man who does not know what he is doing cannot be guilty of cruelty, but reserved his opinion as to a man who knows what he is doing but does not know that it is wrong.

Finally, in *Palmer* v. *Palmer* [1955] P. 4, the husband was insane, with a delusion that his wife had been unfaithful and he assaulted her on a number of occasions. It was held that he knew what he was doing and knew it was wrong, and that both limbs of the M'Naghten Rules applied. So it did not matter that according to the medical evidence he might very well think that he was doing right by correcting her. I am bound to say that I think that this is a case in which a very antiquated view was taken about the way in which an insane man's mind must in law we deemed to work, and I would not regard some of the opinions expressed as a safe guide in other cases whichever way the present case is decided.

We were also referred to a number of Scottish authorities—quite properly because, as was said in *Jamieson* v. *Jamieson* [1952] A.C. 525, there was no difference in principle as to what is cruelty for the purpose of separation although there might be differences in the way in which principles were applied. The cases show that the picture is broadly the same in both

countries. With regard to insanity being a defence the law was not clear. In *Inglis* v. *Inglis,* 1931 S.C. 547, Lord Moncrieff emphasised the importance of protection, but Lord Anderson thought that cruelty must be intentional or with wilful disregard of consequences. In *McLachlan* v. *McLachlan,* 1945 S.C. 382, Lord Moncrieff's view prevailed, and this case was followed in *Dobbie* v. *Dobbie,* 1953 S.C. 379, 1955 S.C. 371. In *M'Kenzie* v. *M'Kenzie* 1960 S.C. 322, Lord Walker held that insanity was no defence, but in *Breen* v. *Breen,* 1961 S.C. 158, the Second Division held that insanity was a defence. This was a case which would not have come within the M'Naghten Rules, but the M'Naghten Rules are not part of the law of Scotland. But the defender was certifiable and his acts were committed under the influence of his insanity. Lord Patrick said (at p. 185) that the defender was not responsible for his conduct " because that conduct was " influenced by his insanity, so that he was disabled from forming a rational " decision in regard to it." Lord Mackintosh said (at p. 188) that " insanity, " if shown to be related to the acts of cruelty complained of, is a good " defence ". Lord Strachan said (at p. 197): " The defender was not able " to exert his reason to control his reactions in the normal way. I therefore " hold that he was not responsible for his violent acts and that he cannot be " held guilty of cruelty."

There appear to me to be four possible solutions of this problem. From the survey of the authorities which I have made I do not think that any can be said to be firmly established, and a consideration of the arguments for and against each leaves me with the opinion that none is in itself wholly satisfactory. But we must choose between them. We could follow the Court of Appeal in holding that the M'Naghten Rules must be applied: or we could hold that only the first limb of the M'Naghten Rules should be applied: or we could hold that insanity is no defence: or we could hold that insanity is always a defence if it appears that it had given rise to the cruel acts. I shall first consider the M'Naghten Rules.

Apart from their inherent defects, the M'Naghten Rules cannot be applied to civil cases in the same way as they are applied in criminal cases. There are many indications that the rules have often been applied liberally or even loosely in criminal cases. Much evidence was taken from distinguished and experienced witnesses by the Royal Commission on Capital Punishment, and in their Report (1953 Cmd. 8932) they say (p. 82): " It was generally " agreed that, as the Rules are now applied, the great majority of those " who have committed a crime as a result of insanity, and ought not to be " held responsible for the act, are in practice found guilty, but insane." Then they quote from the evidence of many witnesses. For example, Lord Goddard said: " I think a jury can always be trusted to do justice where " it might be impossible to bring the case strictly within the M'Naghten " Rules, but everybody would say that the man's acts were the acts of a " lunatic", and then they quote from the evidence of Lord Simon who

had been in turn Home Secretary and Lord Chancellor: "I imagine that " it would be conceded that the strict rigour of the Rules as to the intellectual " test is in practice to some extent qualified. A British jury, whatever " you say, will see that it is qualified if they are really convinced that " it is a proper case." On the other hand, there was evidence that sometimes the formula is applied rigidly in its literal meaning. The Royal Medico-

Psychological Association is quoted as saying (p. 86): "The Association " is fully aware that, if the Rules were rigidly interpreted, a majority of even " insane murderers would be judged criminally responsible." This may be an exaggeration but it seems clear that the accused at least often gets the benefit of the doubt. But it would be impossible in a divorce case to give the benefit of the doubt to an insane aggressor against the injured spouse.

And then there is a second difference. The second limb of the rules has been interpreted in criminal law so that " wrong " means contrary to law and not wrong in the eyes of the accused—*Reg. v. Windle* [1952] 2 Q.B. 826. Obviously that meaning cannot be applied in a divorce case and to substitute the meaning " morally wrong " is to alter the rules substantially.

I have come to be clearly of opinion that it would be wrong to take the M'Naghten Rules as a test. Not only have these rules been subject to persistent and powerful criticism for nearly a hundred years, but their strict application would lead to capricious results. It appears to be the general opinion of medical men, who at least have a better understanding of insanity than lawyers, that there are types of insanity not within the rules which deprive the insane man of choice or responsibility just as much as those types which are covered by the rules. So if guilt, culpability, or blameworthiness in some degree is to be held a necessary element in cruelty, I can see no rational basis for holding that if two persons are in fact equally irresponsible one is to be divorced because his type of insanity does not come within the rules, but the other is to have a defence because his case is covered by the rules.

The second possibility is that insanity should be a defence if it is so bad that the insane person does not know what he is doing, but not otherwise. This test seems straightforward whereas the test that a man knows that his acts are wrong may seem simple but in fact is not: it is a test which experts seem to have great difficulty in applying. Moreover I think that many people would say that if a man does not know what he is doing his acts are not really his acts at all, but they have at least a lingering suspicion that when a man does know what he is doing he cannot be wholly blameless whatever the experts may say. I think that this is a possible halfway house, but I would not much favour it myself. It is still subject to the objection that it discriminates between people who on evidence are proved to be equally irresponsible by reason of disease of the mind. But I must recognise that, if we are thinking of protection, a man who does not know what he is doing will, except in cases of epilepsy or temporary lapses into insanity, generally be detained, whereas a man certifiable for less serious types of insanity may be released at least for a time.

So it remains for me to choose between the two clear cut alternatives—either insanity is a defence or it is not. I think that ultimately the answer must depend on the meaning one gives to the word " cruel", and on this there are obviously two opinions even among judges. Some think there cannot be cruelty without some kind of *mens rea* and some think there can. To my mind " cruelty " is a word that can take its meaning from its context: often it connotes blameworthiness but quite often it does not. Let me give one or two examples. Even in comparatively recent times practically everyone, including men of the highest integrity and intelligence who were quite as civilised as any of us, firmly believed that persecution in one form or another was not only excusable but was a moral duty. Few would deny that their acts were cruel, but I do not see how we can reasonably blame them for not having anticipated modern ideas. And is it a misuse of language to call a cat cruel? Again, when we speak of the cruel sea no doubt we personify the sea but do we blame it? So the law cannot just take cruelty in its ordinary or popular meaning because that

is too vague: we must decide what, if any, mental state is a necessary ingredient.

7

I have already dealt with this in a general way in *Gollins's* case, but perhaps I should restate the argument shortly with special reference to this case.

If some mental or subjective element is necessary, the first possibility is that there must have been malignity or an intention to hurt. But that has long been abandoned. Such an intention may be an aggravation and may justify holding that acts are cruel where without that intention they would not be sufficiently grave and weighty to amount to cruelty: but it is not essential. The next possibility is that there must be some degree of *mens rea,* that at least the respondent must be blameworthy for what he did—and that requires careful consideration. But opinions have been expressed that it is enough if his acts were intentional, if he knew what he was doing, although he could not be held blameworthy. That would be a basis for holding that insanity is a defence if the insane person did not know what he was doing, but not otherwise. I have already dealt with that and I need not say any more about it than that that view would lead to this appeal being allowed because it is clear that this Respondent knew what he was doing but thought by reason of his delusions that he was justified in what he did. So to my mind the alternatives are either that no mental element is essential or that the Respondent must at least be blameworthy.

I have already dealt in *Gollins's* case with the man who knows that he is injuring his wife's health and persists in his conduct. He is clearly blameworthy unless he has adequate justification. But what if he did not realise the damage he was doing. Again it would be wrong to bring in the reasonable man and what he would have realised: that would throw no light on whether this man was blameworthy. It would be necessary to consider the particular Respondent with all his limitations. If it could properly be said that he ought to have realised, then he would be blameworthy, because that would be equivalent to a finding that he had shut his eyes to the consequences of his conduct.

But then we come to the really difficult cases if blameworthiness is to be a test. There are many cases of husbands and wives not insane but either sick in mind or body or so stupid, selfish or spoilt that they plainly do not appreciate or foresee the harm they are doing to the other spouse, and perhaps they are now so self-centred that nothing would ever get the truth into their heads. Certainly allowances have to be made, particularly when their condition is due to misfortune. But I suppose that no one would now maintain that cruelty cannot be proved against such a person if his acts are sufficiently grave and really imperil the other spouse.

It is often untrue that such a man is able to exert his reason so as to control his acts in the normal way or even that he is capable of forming a rational decision about them. Yet these are often the cases where the other spouse is most in need of protection. It is difficult in some of these cases to attribute more than a speck or scintilla of blame to the Respondent in the sense that he—not the reasonable man—ought to have realised the consequences of what he was doing and could have done otherwise if he had tried. If we are to make culpability an essential element in cruelty we can really only bring in these people by deeming them to have qualities

and abilities which the evidence shows that they do not possess. Surely it is much more satisfactory to accept the fact that the test of culpability has broken down and not to treat entirely differently two people one of whom is just short of and the other just over the invisible line which separates abnormality from insanity.

In my judgment decree should be pronounced against such an abnormal person not because his conduct was aimed at his wife, or because a reasonable man would have realised the position, or because he must be deemed to have foreseen or intended the harm he did, but simply because the facts are such that, after making all allowances for his disabilities and for the temperaments of both parties, it must be held that the character and gravity of his acts were such as to amount to cruelty. And if that is right for an abnormal person I see no good reason why the same should not apply to an insane person.

8

If that be accepted, then the appeal must be allowed. But I must add that we are not called upon to determine the character and gravity of this Respondent's acts. No attack was made on the findings of the learned Commissioner. I do not express any opinion about them, but I must not be taken as agreeing that acts like those of this Respondent put the wife in such peril as to necessitate protection, or that sufficient allowance was made for the facts that the Respondent was insane and that the Appellant knew that his charges against her were entirely the product of his insane delusions.

Lord Evershed

MY LORDS,

This case comes before your Lordships' House raising a single question, apparently but deceptively limited, namely, whether the second of the so-called M'Naghten Rules applies in the case of a petition for divorce on the ground of cruelty with the effect in the present case of defeating the petitioner's claim. The facts of the case are sufficiently stated in the Opinion of my noble and learned friend, Lord Reid, and I do not repeat them. It is sufficient to say that the learned Commissioner found *first* that the Respondent husband was aware of the nature and quality of the acts he was doing (namely, of his persistent accusation of his wife that she was committing promiscuous adultery), but *second* that he was, owing to his mental disease, unable to realise that his accusations were false and that accordingly his conduct was wrong. It should be added that the Commissioner had no difficulty in finding that the husband's course of conduct was in fact injurious to his wife's health. The learned Commissioner expressed the view that if the matter were *res integra* before him he would hold that the second M'Naghten Rule had no application; but he felt himself bound by authority to take a different view and he therefore found that the wife's claim based on cruelty was answered by the circumstance that the husband was unaware that what he was doing was wrong. The Court of Appeal (by a majority Willmer and Davies L.J.J., Donovan L.J. dissenting) affirmed this conclusion following recent decisions of that Court.

For myself I confess that I can feel no doubt that the answer to the

specific question raised in the case is that the second M'Naghten Rule has no application, with the consequence that the present appeal must be allowed. It will be of some assistance in regard to what follows if I briefly state the history of what I will call the intrusion of the so-called M'Naghten Rules into divorce law. The history may be said to begin with the case of *Hall* v. *Hall* (3 Sw. & Tr. 347) decided in the year 1864. In that case Lord Penzance, though stating that intemperance and conduct of that kind would be no answer to an allegation of cruelty, yet thought that insanity might be a different matter. The question did not arise again in the Reports until the case of *Hanbury* v. *Hanbury* in the year 1892. In the result the question did not call for decision, but in the Court of Appeal (8 T.L.R. 559) Lord Esher, M.R., expressed the view that the case might well have been different, that is to say, a petitioner might fail if it were shown that the Respondent was unaware of the nature and quality of what he was doing or alternatively, if he realized such nature and quality, did not know that he was doing wrong. Though Lord Esher made no reference in terms to the M'Naghten Rules the dictum to which I have alluded was clearly a paraphrase of them. Again there is a considerable interval until the year 1939 (that is, two years after the passing of the Matrimonial Causes Act, 1937) when in the case of *Astle* v. *Astle* [1939] P. 415, the first two M'Naghten Rules were for the first time specifically mentioned and applied by Mr. Justice Henn Collins in reference to his proposition that the word " treated " in the Act of 1937 denoted conscious action on the part of the person charged with cruelty. The next date to mention is one of great importance, namely, the year 1949 in which the case of *White* v. *White* came before the Court of Appeal (see [1950] P. 39). Though in this case, as in the case of *Astle,* the petition in fact succeeded, nevertheless Lord Justice Asquith in

the course of his judgment treated it as established that if the spouse charged was unaware through insanity of the nature and quality of his acts it would be a defence to the petition, and he added that if for such a purpose the first of the M'Naghten Rules had been invoked it was inevitable and logical that the second rule should also be available, that is to say, that even if the spouse charged did know the nature and quality of his acts he would have a defence if, through insanity, he was able to establish that he was unaware that what he was doing was wrong. This statement of Lord Justice Asquith has since been followed in the Court of Appeal, particularly in the two cases of *Swan* v. *Swan* [1953] P. 258, and *Palmer* v. *Palmer* [1955] P. 4. As my noble and learned friend, Lord Reid, has pointed out, in none of the reported cases has the application of these M'Naghten Rules or either of them in fact so far provided a defence to the claim, but it must be taken that during the past decade it has been accepted by the Court of Appeal that both M'Naghten Rules are or may be applicable in cases of divorce founded on charges of cruelty, and it was this view which commended itself to the majority of the Court in the present case.

As is well known, the so-called M'Naghten Rules consisted of answers given by the Judges to questions put to them by your Lordships' House in reference to the proper direction to be given at a criminal trial, and particularly at a murder trial. My noble friend, Lord Reid, has pointed out that of late the so-called Rules have not been regarded as entirely satisfactory

even in criminal cases—as may indeed be illustrated by the passing of the Homicide Act, 1957. But, apart from such criticism, it is my opinion that the Rules ought, as such, to have no application to divorce cases. It was of the essence of the so-called Rules that they should be invoked where the test for liability involved the existence of *mens rea* (that is, a criminal mind) which by the common law and in a great many cases of statutory offences is an essential ingredient to a criminal act. Cruelty is not a crime. Therefore, as it seems to me, it follows that *mens rea* as understood in our law should not be regarded as being of its essence—any more than it is generally so regarded in our civil law except in rare cases as, for example, the tort of malicious destruction of property. In any case, I should venture to think, with all respect to those who take a different view, that the Rules, and particularly the second Rule, can have no application to a case like the present Here the Respondent, Mr. Williams, was not doing things which were *ex facie* criminal or analogous to criminal acts. He was deliberately accusing his wife of adulterous associations, but he thought such accusations were justified because he believed that they were true, having been so induced to think by voices which informed him of the fact.

It is, however, clear that having regard to the arguments presented to your Lordships it would not be regarded as a sufficient answer to the present case merely to state that the second M'Naghten Rule has here no application. The case and the arguments presented to your Lordships' House have inevitably raised the general and important question—to what extent is insanity an answer to a plea of cruelty in a petition for divorce? I should here state that in all that follows I shall assume that the petitioner is able to establish injury to health or proper anticipation of such injury. Such a premise is essential for the establishment of cruelty, as was laid down by this House in the case of *Russell* v. *Russell* [1897] A.C. 395. I have already stated that in the present case the facts were found to establish such injury or anticipated injury, and in all that follows I shall assume the premise similarly established. The question whether cruelty is established may be said to involve two extremes of view. On the one hand it may be said that the question whether actions are " cruel " must be judged wholly objectively, that is to say, whether the actions complained of would be regarded by any reasonable man if done by one ordinary person to another as being cruel to the spouse affected. To take one of the illustrations given in the Oxford Dictionary of the meaning of the word " cruelty ", it was stated by an eminent writer of the last century that " ' Tis brutal cruelty to make any jest of the " weaknesses and sufferings of the patients in a hospital". If, therefore, a man is found in fact to be making jests of the weaknesses or sufferings of patients in a hospital, will it be any defence to the charge, will it, in

other words, make his actions not properly described as cruel if it be shewn that the jester is for any reason so insane as to be unaware that he is making a jest or as to be unaware that the persons against whom his remarks are directed are patients in a hospital? On the extreme objective view the answer will be " No ". On this view the behaviour of the man in question will be called properly cruel whether he is really aware of what he is doing or not. There is, however, another extreme view which essentially rests upon the premise that the test of cruelty is subjective, that is to say, that no one can properly be accused of cruelty unless there is something opprobrious,

something in his behaviour that must be condemned as inexcusable, a test which, it is said, cannot fairly be satisfied unless he is not only aware of what he is in fact saying or doing but knows or ought to know that what he is saying or doing is wrong or culpable. Put in another form, on this view it is said that cruelty properly so called involves essentially an element of malignity on the part of the person called cruel. On this view it would mean that insanity, if it were such that the actor was unaware of the nature and quality of his acts or thought that such acts were justified—and I assume that if he in a case such as the present accepted the truth of the hallucinations they would be justified—would disqualify the proper application of the word "cruel" to the actor's conduct.

The length and intricacy of the arguments presented shews how important it now is that your Lordships should if possible give an answer to this difficult and important question of such clarity as will enable Her Majesty's judges hereafter to know properly how to direct themselves in cases of this kind, and also to enable counsel and solicitors properly to advise their clients.

A reference to the very many cases cited shews that the problem has been much vexed by what I venture to call quasi-philosophical discussions upon certain other and related questions: for example, whether in order to establish cruelty the acts must in some real sense be " aimed at " the person affected, and the related question (if indeed it is not the same question differently expressed) to what extent must there on the part of the actor be an " intention " to hurt (or at least to do acts which hurt) whether such intention be conscious or deliberate or in some cases presumed: for, as the decisions show, the Courts have been compelled in the interests of justice and applied common sense to expand the requisite of intention so as to include presumed intention (the presumption being sometimes regarded as compelling only and sometimes as conclusive) and thereby to add greatly to what I have called the quasi-philosophical discussion upon the subject and therefore to its difficulty and uncertainty. It is no doubt true that in some cases, applying the ordinary standards of sense and language, proof of a deliberate intention on the part of the actor to hurt may be highly relevant in deciding whether his conduct amounts to cruelty. But, save in such " borderline " cases, my view is that the problems whether the conduct challenged was " aimed at" the person affected or was (or should be treated as) " intentional " do not properly arise in the jurisdiction with which we are now concerned, and I venture to think that their presence and the discussions of them in many of the cases has served seriously to cloud the law. We are here concerned with the formula stated in the Act of 1937, "has treated with cruelty". True it is that before 1937 the formula was (as it now is in Scotland) " guilty of cruelty ". As my noble and learned friend, Lord Reid, has pointed out, the formula " guilty of cruelty " was applicable before 1937 to a claim for judicial separation. In my opinion it is impossible to suppose that Parliament in 1937 intended that " cruelty " as a ground for divorce should have a different significance from that appropriate to the older remedy of judicial separation. To my mind the variation in the formulation makes no real difference. The use of the word " guilty " does not, as it seems to me, import the essentials of crime any more than it does in such a common context as "guilty of negligence". The phrase " has been guilty of cruelty " means no more and no less than " has acted cruelly to the person making the charge "; in other words, has been cruel to him or her. The formula is therefore in truth the same as that now involved in the Act, " has treated with cruelty."

I therefore conceive that the first essential thing is to decide what is meant by the word " cruelty ". The word is one of common use and is defined as meaning " delight in or indifference to pain or misery in others ". I observe at once that there is therefore inevitably involved the case, which must indeed be common if perhaps not the most common of all cases, where the conduct is founded not on delight in the pain of others but in indifference. The cases indeed shew clearly enough that so often the spouse charged with cruelty is doing little else than indulge his or her own purely selfish desires or instincts. It follows, therefore, in my opinion, that this essential meaning of the word must dispose of the argument involved in the proposition that the so-called cruel acts must in some sense be " aimed at" the other party concerned. If a man's acts are founded on stupidity or on disregard of anyone else or of anything but his own self-interest, it is clear that he nonetheless may fairly and properly be guilty of cruelty. On this simple ground, therefore (though I do not forget the type of case already mentioned when the presence of deliberate intention on the actor's part to hurt may be decisive in determining whether his conduct is fairly to be described as cruel), I would reject entirely the notion that " aiming at" the injured party or intention to hurt on the actor's part is an essential of cruelty. And I am assisted to that conclusion because of the necessity in any event for the injured party to prove that his or her health has been in fact affected or that he or she may fairly apprehend such result—in other words, that acts or conduct of the party charged have, whatever the aim or lack of aim, hit the other spouse. Force, as I venture to think, is given to this conclusion by considering such phrases " treated with stupidity " or " treated with disrespect ". It is not, as I venture to think, essentially inherent in either phrase that there was any " intention " on the part of the person said to have treated another with either stupidity or disrespect. I am also for my part unable to accept the view that there must be present in order to constitute cruelty any conscious moral obliquity. There is nothing in the word " cruelty " or in the formula chosen by Parliament to suggest such a thing, and (as Donovan, L.J., pointed out in his dissenting judgment in the present case) it would have been easy for Parliament so to provide if it had been intended that it should be of the essence of cruelty for the purposes of the Act either that there should be deliberate intention or that there should be moral obliquity on the part of the actor. I would add that if intention (whether actual or presumed) be introduced it must in any event be subject to some qualification such as " without lawful excuse ". This is shewn if the example be taken of a policeman attempting to arrest a fugitive criminal. In such cases the policeman may justifiably inflict some injury upon the person who is seeking to evade arrest. No doubt if the policeman exceeded what was reasonably necessary or proper for the performance of his duty he might expose himself to the charge that his action had been cruel. But if he did inflict injury properly in the execution of his duty he could not fairly be called cruel though it would be clear that the injury inflicted would be rightly regarded as intentional.

In the circumstances, it is indeed tempting to say that the test is in all cases purely objective. If a man is seen to be beating his wife, his child or his dog, the question would be whether according to the judgment of a reasonable man who saw the performance the actor would fairly be said to be treating his wife, his child or his dog with cruelty? There is, however, the difficulty at once presented to this simple view, namely, if in truth the man accused of cruelty is through insanity quite unaware of what he is doing,

can he fairly be said to be acting cruelly at all any more than it could fairly be said of a sleep-walker who inflicted some injury upon a child or a kitten or puppy in his sleep was cruel? It was the view of Donovan, L.J., that the use of the word " treated " does in some sense involve knowledge on the part of the actor of what he is doing. Moreover, as I have already observed, it seems in England from the year 1864 to have been consistently suggested by the judges that the acts of a madman should be differently treated from acts done in the heat of passion or intemperance. In other words, it may be said to have been part of our law as indicated by the judges (even if it has not in fact been applied in any reported cases so as to defeat

the plea made) that if a man who does acts which might otherwise and objectively regarded be thought to be cruel did not in truth know the nature and quality of those acts, then it should not be treated as cruelty. It is also true to say that if the purely objective test be taken there will inevitably be created a wide divergence between the law of England and the law of Scotland upon this matter, as the latter has been recently expounded.

On the other hand, my noble and learned friend, Lord Reid, has in his Opinion shewn that in the early part of the history of the law relating to cruelty considerable emphasis was laid upon the need to give protection to the sufferer, and therefore that prior to the decision in *Hall* v. *Hall (supra)* mental infirmity does not appear to have been regarded as inconsistent with the application of the epithet " cruel " to a spouse's conduct.

If the decision in this matter rested with me alone I am disposed to think that I should take the view that, upon the ordinary sense of language, a man could not and would not be said to be treating another with cruelty if he was shewn, by reason of mental disease or infirmity, not to be at all aware of what he was doing—if, to take an extreme case, a man who was observed to be beating physically his wife with the utmost severity were proved to be quite unaware that he was doing other than beating his drawing-room rug. Upon this particular question it may strictly not be necessary for me to express any concluded opinion. But, as I have earlier stated, the nature and extent of the arguments presented to your Lordships have undoubtedly raised, and raised before your Lordships' House for the first time, the whole question of the extent to which insanity may be an answer to petition for relief in a matrimonial cause based upon an allegation of cruelty ; and upon this question two of your Lordships take one view, and two of your Lordships another. In the circumstances I have felt it my duty to express a conclusion consistent with one or other of the divergent views which your Lordships entertain. I therefore conclude, though I confess with some hesitation, that the test whether one charged with treating his or her spouse with cruelty is to be applied wholly objectively and therefore that proof of insanity (that is, proof that he or she was unaware through mental disease or disorder of the nature and quality of his or her acts) is not necessarily an answer to the charge. I say deliberately " not " necessarily". The mental derangement of the person charged cannot, as I think, be wholly disregarded—certainly where the sufferer is himself or herself aware of the disorder. But the test will be still objective—in all the circumstances of the case should it fairly be said that the spouse charged has treated the other with cruelty? As I have said, since the matter will be judged objectively, *prima facie* the insanity of the person charged

will not disable an affirmative answer being given to the question. Beyond that, however, I would for myself prefer not to go ; for there may be instances where in all the circumstances of the case the objective observer would say that the conduct complained of was not in truth cruel. I do, however, conclude that generally speaking the conduct of the party charged will not fail to be properly described as cruel merely because he or she is unaware of the nature and quality of his or her conduct. Certainly if the conduct is regarded from the point of view of the sufferer it would not, in the ordinary case, be said that he or she was not cruelly treated; or indeed that the party charged did not in fact act cruelly though no doubt (unhappily) he or she was through insanity morally blameless. In reaching eventually this conclusion I have in mind the point made by my noble and learned friend. Lord Reid, that a distinction may otherwise unfairly and illogically be drawn between one kind of insanity and another—to the serious detriment of the sufferer—that is, between the case of the man or woman who through insanity does not know the nature or quality of his or her acts and the man or woman who, though aware of the nature and quality of his or her acts, nevertheless through mental disease or disorder genuinely is unaware that they are unjustifiable. I add, too, that the emphasis given in the older cases (as pointed out by my noble and learned friend, Lord Reid) to the need to give protection to the suffering spouse has certainly not been qualified by the fact in the present day and age that the break-up of a marriage is regarded much less seriously than it was a hundred years ago.

13

But whatever be the true and just answer to the question whether a husband or wife has treated his or her spouse with cruelty if he or she is through insanity unaware of the nature and quality of the acts complained of, I confess that I have no doubt that it can be no answer to a charge of cruelty on his or her part that, knowing the nature and quality of his or her acts, he or she is, through insanity, unaware that those acts are wrong. In other words, if the person charged with cruelty knows what he is doing, knows, that is to say, the nature and quality of his acts, then it is for the court or the jury to say whether the other party has in truth been cruelly treated thereby, and it will be no answer for the actor to say that he did what he did or failed to do what he ought to have done because he was justified on account of some hallucinations based on insanity or because he otherwise did in truth assume the facts to be such as would or might have justified his conduct. In such event it does seem to me that even if the test of inexcusability be applied his or her conduct will truly and fairly be said to be inexcusable though it may perhaps be explicable.

I add finally this, if it be said upon a true view that there must be some element of opprobrium, if there must on the part of the person charged be something which fairly can be said to be conscious and deliberate wrong-doing, then where does the matter end? As it seems to me, it cannot be said fairly to end by considering matters merely of insanity. Suppose the case be taken of one who is a devotee of some extreme religious dogma honestly and conscientiously held. For example, suppose the case of a man of such strict puritan views that he firmly believes that one who uses bad language is inevitably condemned to hell. He hears a child use some swear word, and in the belief that he will thereby be saving and cannot otherwise save the child from perdition, he then inflicts upon the child the most severe caning or other physical punishment. Can it be denied on the part of the person so behaving that his conduct has been cruel because (as he

says and honestly says) such conduct is based upon some extreme but sincerely held religious view? In other words, as I venture to think, it is impossible to stop at cases of insanity; and when questions of cruelty arise problems of the kind which I have mentioned will inevitably also arise, thereby adding to the law not only an altogether undesirable refinement but also a departure, as I think, from the ordinary sense and meaning of the language which Parliament has thought fit to use.

I would like upon this most vexed and difficult question to express my indebtedness to Dr. A. L. Goodhart for the full and lucid analysis of the problem contained in the article contributed by him to the Law Quarterly Review (Vol. 77) in January of the present year.

Lord Morris of Borth-y-Gest

MY LORDS,

The immediate question which is raised in this appeal is whether the Respondent treated the petitioner with cruelty. Linked with that question is the wider one as to the measure of the relevancy, if any, of the mental state of the Respondent, The problem which is raised may be posed in simple form by taking an imaginary case. If a respondent repeatedly assaulted a petitioner causing injury to health, would it be legitimate for a court to have regard to the fact that the assaults were all attributable to insanity in the respondent and to decline to give a decree. If it is legitimate to pay heed to the fact that a respondent is mentally deranged, the further question arises as to whether there is any set test or formula by which to assess and measure the extent of the relevancy of the particular mental derangement.

My Lords, in *King* v. *King* [1953] A.C. 124, in your Lordships' House, it was pointed out that the question whether one spouse has treated the other with cruelty is a single question which is only to be answered after all the facts have been taken into account. It was said that it is not right first to ask whether a respondent's conduct was cruel in fact and then

to ask whether it can be in any way justified. In the present case the main issue has by both sides been formulated as being whether insanity is a defence to a charge of cruelty in matrimonial causes. So formulated there is implicit a suggestion that in a judicial investigation in a cruelty case the acts complained of may first be isolated so that it may be decided whether they should be characterised as cruel and that it should then be decided whether the defence of insanity can be deployed. Such an approach seems to me to be undesirable and to be contrary to the guidance given in *King* v. *King.* Any questions which arise concerning the mental health of the parties should in my view be regarded as relevant and integral parts of the inquiry as to whether one spouse has treated the other with cruelty. If there is insanity it is a fact which is to be taken into account. Insanity does not, therefore, come in as a "defence": it comes in because it is a fact and a circumstance which may loom large in any true and complete narrative of the events which are under review in an inquiry as to whether

one person has treated another with cruelty. When human conduct is being assessed all its features, it would seem, possess relevancy. In their dealings with each other human beings recognise that there are occasions when in justice and humanity allowances must be made. I cannot think that it would be helpful ever to seek to catalogue or to define such occasions. Nor do I think that it would be desirable to confine the conception of cruelty within precisely defined limits. If a jury is asked to say whether one spouse has treated the other With cruelty the task should not be beyond the competence of just-minded and reasonable persons who, though lacking knowledge of decided cases, have an equipment of commonsense derived from a knowledge of human nature and of the ways of the world.

In such an inquiry some questions which arise can be answered with prompt and assured confidence although a full explanation of the exact stages of reasoning which warrant the answer may require skill in exposition, analysis and expression. But it is the answer that is important for the parties: a jury would be called upon to give the answer but do not give their reasons. If a devoted spouse by some quite unintentional mishap in the home caused severe personal injury to the other—no one would be likely to assert that the one had treated the other with cruelty. The same view would be likely to be taken even if the unintentional mishap was occasioned by carelessness. The statute does not in terms say that " accident" is a " defence ". It need not do so because anyone called upon to decide whether one person has treated another with cruelty would naturally and without question consider it to be highly relevant to know whether an occurrence was accidental. If one spouse while genuinely asleep unwittingly caused severe personal injury to the other, it would be unlikely that anyone would say that the former had treated the latter with cruelty. If one spouse in a state of self-induced but complete intoxication caused severe personal injury to the other different considerations might apply. So also some isolated incident might be viewed in one way and a series of incidents might be viewed in another. I would think, therefore, that there is no touchstone by which to appraise conduct. In *Thomas* v. *Thomas,* 1947 S.C. (H.L.) 45, 55, Lord Thankerton said: " The law has no footrule by which to " measure the personalities of the spouses." In some cases one approach may be apposite though in others it would not. In some cases one test may be adequate while in others it will not be. In *King* v. *King (supra)* Lord Normand (at p. 129) said: " I have no doubt that the test whether the con- "duct was wilful and unjustifiable, as well as injurious, was an adequate " test for what remained to be decided in *Horton's* case. What is open to " question is whether it can be taken to be an adequate test in all cases " of cruelty by nagging accusation. I think it is not always an adequate test, " and that Bucknill, J. did not put it forward as a universal and exhaustive " test in this type of case. The general rule in all questions of cruelty is " that the whole matrimonial relations must be considered, and that rule " is of special value when the cruelty consists not of violent acts but of " injurious reproaches, complaints, accusations or taunts. Wilful accusa- " tions may be made which are not true and for which there are no probable " grounds, and yet they may not amount to cruelty. To take an obvious

" example, they may have been provoked by the cruel conduct of the other

" spouse. There is in many cases no easy rule, no clear line of demarca-
" tion which divides cruelty from something which does not amount to
" cruelty. The issue may become one of great difficulty in which the decision
" must be largely a matter of the discretion of the judge who saw and heard
" the witnesses and who has considered the conduct of both parties, and
" the whole circumstances in relation to the temperament and character of the
" respondent spouse. If the trial judge in the exercise of this discretion
" comes to the conclusion that the conduct of the respondent is, notwith-
" standing the provocation received or the difficulties and stresses endured,
" really an inexcusable offence against the other spouse, his judgment should
" be respected and treated as conclusive. I have used the word ' inexcusable ',
" but ' unpardonable', or ' unforgivable ' or ' grossly excessive' would
" equally convey what I mean." Later on in his speech Lord Normand referred to the temperaments of the spouses in that case and said (see p. 131) that "both parties had great need of forbearance": he said (see p. 133) that the husband had "behaved with great want of consideration": he said (see p. 133): "They were both blameworthy and each was guilty of
" behaviour which, considered without reference to the behaviour of the
" other, might be regarded as cruel." All this serves to illustrate that in a cruelty case the conduct of both parties falls to be assessed as well as everything that is relevant to " the temperament and character of the respondent
" spouse ". In his speech in the same case my noble and learned friend, Lord Reid, said: " I do not intend to try to define cruelty. I doubt whether
" any definition would apply equally well to cases where there has been
" physical violence and to cases of nagging, or to cases where there has been
" a deliberate intention to hurt and to cases where temperament and unfor-
" tunate circumstances have caused much of the trouble. But in cases like
" the present the wife's conduct must at least be inexcusable after taking
" everything into consideration."

My Lords, applying these tests I consider that the factor of illness may often be highly relevant in assessing whether conduct has been cruel. What someone does while in a state of automatism may not unreasonably be said not to be that person's action at all. What someone does while suffering from a raging physical fever might be regarded as " excusable ". Is what someone does while suffering from that form of illness which dethrones reason and withdraws the power of control to be regarded as " inexcusable "? I cannot think that physical illness should be regarded as relevant but that mental illness should be regarded as irrelevant. Evidence concerning illness may be of high consequence in any survey which is designed to give that complete picture of domestic life against the background of which judgment is formed as to whether one spouse has treated the other with cruelty. In his speech in *Thomas* v. *Thomas (supra)* Lord Simonds approved of the
" clear recognition " which he discerned in the judgment of the Lord Ordinary of the fact that " the picture of the domestic lives of this man and woman
" must be surveyed as a whole before a true judgment can be formed of
" their possible future relations ". Lord du Parcq, in speaking in that case of an assault which had taken place, said (at p. 63): " The assault must
" be viewed not as an isolated fact, but in its setting, as an incident in a
" complicated series of marital relations. The intent and the mental condi-
" tion of the spouse against whom cruelty is alleged are always important
" considerations." He further said: " The fact that the defender was suffer-
" ing from a form of ill health likely to affect her conduct is not to be
" regarded as telling against her. I would not suggest that illness ought

" to be accepted as an excuse for cruelty, but when it is necessary to appre-
" ciate the quality of an act or a course of conduct, as it is when the grave
" accusation of *saevitia* is made, the law does not forbid a judge to have
" regard to any physical or mental strain under which the accused spouse
" was labouring."

My Lords, I think that it is right to view a charge of cruelty as a " grave " accusation ". Opprobium is involved if it is held that one spouse has treated the other with cruelty. It is described as a matrimonial " offence " not merely in common legal parlance but also in The Matrimonial Causes

Rules, 1957. The conduct of a spouse who is accused of cruelty and who enjoys normal physical and mental health will be judged by any such test as may be applicable having regard to the facts of the particular case. Some acts may follow a declared express intention to be cruel. Some acts may be such as to reveal or to make it proper to infer an intention to be cruel. In other cases there may be no such wilful intention but a complete failure, either from indifference or obtuseness, to appreciate that conduct is causing pain and hurt. These cases may present difficulties for judges, though it is not in this field alone that human beings demand of each other that they must conform to normal decent accepted standards. Whatever be the analysis philosophically of the oft-quoted phrase of Shearman, J.—" I do " not question . . . that he had no intention of being cruel . . . but . . . " his intentional acts amounted to cruelty "—(in *Hadden* v. *Hadden)* I venture to think that it expresses an accepted conception. If there are intentional acts which, viewed objectively, amount to cruelty, it is no relief for the injured spouse to be told that the offending spouse, being capable of normal rational thought, either failed to think at all or failed to appreciate. It is neither harsh nor unfair in such circumstances to say that the offending spouse ought to have known better. Different considerations may apply, however, if someone is suffering from ill health. Such a person may not know what he is doing. He may not be capable of normal rational thought. If he is not, then I would think it harsh and unfair to say of him that he ought to have known better. I would regard these as highly relevant considerations in any decision as to whether one spouse has treated the other with cruelty.

If in a particular case it were held that a spouse afflicted by mental ill health had not treated the other spouse with cruelty it might nevertheless be the case that the latter was in peril of suffering some injury or further injury from the former. That might suggest that there could be cases where a spouse needed protection but could get neither decree of dissolution nor decree of judicial separation. Such a consideration does not affect the present problem. Relief on the ground that a respondent is of unsound mind is given by statute. It is, however, only obtainable if the statutory conditions are satisfied. It would not be justifiable to extend the meaning of the words " has . . . treated . . . with cruelty " on account of the fact that in a particular case unsoundness of mind was not of the nature or duration which would form a ground for a petition.

In some of the early reported cases concerning cruelty there is a recognition of the need to give protection. The cases further show that it was not necessary to prove that acts of cruelty were caused by actual malignity. Thus in *Kirkman* v. *Kirkman* in 1807 (1 Hag. Con. 409) Sir William Scott referred to a suggestion that the wife's acts of violence were caused by jealousy and he said: " All the evidence tends to establish that there was no

" foundation, in the conduct of the husband, for feelings of that nature. " If such feelings were entertained, with or without reason, jealousy is a " passion producing effects as violent as any other passion and there will " be the same necessity to provide for the safety and comfort of the individual. " If that safety is endangered by violent and disorderly affections of the mind " it is the same in its effects as if it proceeded from mere malignity alone: " it cannot be necessary that, in order to obtain the protection of the Court, " it should be made to appear to proceed from malignity." That the reference to " violent and disorderly affections of the mind " was not understood as a reference to insanity is, I think, shown by the later case of *Hall* v. *Hall* (1864) 3; Sw. & Tr. 347. In that case after acts of violence were proved the court raised the question whether a decree ought to be made inasmuch as there was strong evidence that the husband was irresponsible for his actions. It was objected that the question did not arise on the pleadings, for it was said that " such a fact or defence must be before the Court in a known legal " manner ".

The case was adjourned so that further evidence should be obtained and the Judge Ordinary said that it was " faintly, and with great care not to be " too explicit, argued that madness would be no answer, even if pleaded ". The Judge Ordinary distinguished sharply between those causes of conduct

17

that do not proceed from " madness " and those that do. " With danger " to the wife in view, the Court does not hold its hand to inquire into motives " and causes. The sources of the husband's conduct are, for the most part, " immaterial." This was the same thought as that which had been expressed by Sir William Scott in 1810 in the case of *Holden* v. *Holden,* 1 Hag. Con. 453. " If bitter waters are flowing it is not necessary to inquire from what " source they spring." The Judge Ordinary in *Hall* v. *Hall* made the point very plain when he proceeded to say: " Thus, I have no doubt that cruelty " does not cease to be a cause of suit if it proceeded from ' violent and " ' disorderly affections', as said in one case, or from ' violence of disposition, " ' want of moral control, or eccentricity', as said in another, or ' from a " ' 'liability to become excited in controversy', in the language of a third; " but madness, dementia, positive disease of the mind, this is quite another " matter." The reference to " violent and disorderly affections " was a reference to *Kirkman* v. *Kirkman (supra)* in 1807, and the reference to " violence of disposition, want of moral control, or eccentricity " seems to have been a reference to *Dysart* v. *Dysart* (1844) 1 Rob. Ecc. 106.

My Lords, in a field in which your Lordships are free to direct the right path I would be well content to be guided by the clear light of this judgment delivered nearly one hundred years ago. Here also is simplicity of expression. If the conduct complained of " proceeded from " madness, dementia, or positive disease of the mind it should not be classed as cruelty. Here also is the justness of this approach explained. " An insane man is " likely enough to be dangerous to his wife's personal safety, but the remedy " lies in the restraint of the husband, not the release of the wife. Though " the object of this Court's interference is safety for the future, its sentence " carries with it some retribution for the past. In either aspect it would " be equally unjust to act on the excesses of a disordered brain: in the " latter, for the instance are not responsible ; in the former, for insanity may " be cured, and the danger at an end."

.It is to be noted that the Judge Ordinary considered that *White* v. *White* (1859) 1 Sw. & Tr. 591 supported his views. Reference may also be made to *Hayward* v. *Hayward* (1858) 1 Sw. & Tr. 81, in which case in a wife's suit for restitution the Judge Ordinary said: " If this lady at the time alleged " concealed a dagger or a knife, intending to do violence to her husband, " being insane, and she turns out to be insane, I find no authority for holding " that that is an answer to a claim for restitution of conjugal rights. A " husband is not entitled to turn a lunatic wife out of doors. He may be " rather bound to place her in proper custody, under proper care, but he is " not entitled to turn her out of his house. He is less than ever justified " in putting her away, if she has the misfortune to be insane. On the other " hand, she insists she is not insane, and if her assertion can be established, " she would be responsible for those acts of violence, and her husband would " be justified in refusing to receive her, or in using force to restrain her." In the Scottish case of *Steuart* v. *Steuart* in 1870 (8 Macph. 821) it was recognised that the pursuer was not entitled to succeed if the defender was insane.

My Lords, I am clearly of the opinion that in an inquiry as to whether one spouse has treated the other with cruelty the mental state of the parties and more particularly that of the former may be highly relevant: I am also clearly of the opinion that a consideration of the mental state of the spouse whose conduct is complained of may be a deciding factor in reaching a conclusion that that spouse has not treated the other with cruelty.

I pass, therefore, to consider whether there is any test or any formula or any set of words or any question by which to measure the extent of the relevancy of the mental state of a respondent.

The answers of the judges in *M'Naghten's* case (1843) 10 Cl. & Fin. 200 were given in a criminal case. I do not consider that they were ever intended to be applied automatically in a consistorial case. Nor do I find it necessary to consider whether they can have any bearing in civil actions and in claims for compensation. It is to be observed that in *Hall* v. *Hall* it did not occur to the Judge Ordinary that his guidance needed the assistance of or needed to be linked with the answers which had been given by the

Judges to the House of Lords some twenty-one years earlier. At a much later time references to the so-called M'Naghten Rules appeared in judgments. The test of those rules or of some of them may be appropriate in particular cases, but I do not consider that they should be used as a kind of codification of the law relating to insanity in cruelty cases. I observe that in his judgment in *White* v. *White* [1950] P. 39 Asquith, L.J. as he then was, said (at pages 52 and 53) that it would not suffice for a respondent to show that he suffered from a disease of the mind nor even to show that he would not have committed the acts complained of but for such disease, but that in order to avail a respondent " the insanity must, at all events, not fall short of such insanity " as would afford a defence to a criminal charge within the M'Naghten " rules ".

My Lords, the view that I have formed is that it is undesirable to seek to use any set form of words or any formula by which to measure whether someone who is mentally afflicted has treated another with cruelty. The M'Naghten Rules may often be helpful. If they are being referred to as useful guides I can see no justification for picking on some one of them to the

exclusion of others. To say that no heed should be paid to any consequence of insanity other than that of not knowing what one is doing seems to me to be a wholly unwarrantable limitation. Ultimately, however, the question is a question of fact which is to be decided as a fair-minded reasonable jury would decide it. If someone who in common parlance was plainly mad did some act while not knowing what he was doing I do not think that a jury would say that he was guilty of cruelty. Likewise if someone who was plainly mad did some outrageous thing and said that he had done it under divine direction a jury would not be likely to say that he was guilty of cruelty. A jury would be likely to think, as the Judge Ordinary thought in *Hall v. Hall,* that it would be " unjust " to condemn someone whose conduct resulted from " the excesses of a disordered brain ". They would be likely to think (as did the Judge Ordinary) that insanity is a form of illness and that a cure may be effected.

My Lords, I think that the reasoning which guided their Lordships in *Breen* v. *Breen,* 1961 S.C. 158, was much in tune with the reasoning in *Hall v. Hall.* I notice such expressions as—" such unsoundness of mind as to make " it impossible or at least unreasonable to say that he was guilty of cruelty ", and " The defender was not able to exert his reason to control his reactions " in the normal way." Though I refer to these passages I am very averse from seeking to select any set of words which could be regarded as a rigid or complete test. It has been pointed out that in directing juries in criminal cases in regard to the onus of proof which lies upon the prosecution it is the essence and spirit of the matter that must be conveyed and explained. There is no magic in the mouthing of some phrase or formula. So here. Did the conduct complained of proceed from and was it caused by madness? Did the conduct result from the excesses of a disordered brain? Was the Respondent responsible for what he did? Did he know what he was doing? Even if he knew what he was doing was he so affected by his abnormal mental condition that it caused him to act in a way that someone of normal mental condition would not have acted? Was there such a defect of reason due to disease of the mind that it would be unreasonable and unjust to say that the Respondent had treated the petitioner with cruelty? Were the Respondent's actions the result of insane delusions due to disease of the mind (see the fourth question put to the Judges in *M'Naghten's* case)? Were the actions of the Respondent symptoms of and were they carried out under the influence of insanity? Was the Respondent labouring under a defect of reason due to disease of the mind so that the conduct complained of resulted from his inability to control his actions or reactions in a normal way?

My Lords, no one of these questions is intended as a test of general application. They are singly and collectively but pointers. They are some of the questions that may arise in deciding an issue as to cruelty, for in my judgment if certain conduct can properly and fairly be said to be the definite result of mental illness (which may indeed only be temporary) it would be contrary to the fitness of things to stigmatise it as cruelty. I can but record

my view that a jury would shrink from finding a respondent guilty of the" matrimonial offence of cruelty in a case where they might very colloquially sum up their conclusion in the phrase " the poor creature is mad ". I consider that it is very desirable that an inquiry as to whether a respondent has treated a petitioner with cruelty should be regarded as an issue of fact uncomplicated as far as possible by questions of law and released from

anchorage to any phrase or formula. I consider that judges will not find it difficult to adjudge whether conduct has "proceeded from . . . madness, " dementia, positive disease of the mind ".

On the facts as found by the learned Commissioner and recorded in his careful judgment he was, I think, directed by authority to the conclusion which he reached. Not being bound by direct authority, I would reach the same conclusion. The Respondent, who had a bad family history, developed many of the sharply marked characteristics of a schizoid or a paranoiad or both. He had auditory delusions. He heard voices. They told him that his wife was committing adultery with numbers of men. In consequence he accused his wife. She tried to reason with him. She could not convince him that there were no voices. Distressing as it all must have been for the wife and injurious to her health as it has been found to have been, I cannot think that it would have been just to find the Respondent guilty of cruelty.

I would dismiss the appeal.

Lord Hodson

MY LORDS,

The issue in this case is whether insanity is a defence to a charge of cruelty.

The gravamen of the case presented by the wife was that the husband's repeated unfounded allegations of adultery against her must eventually have injured her health.

The foremost feature of the malady from which the husband suffered was auditory delusions. Voices were telling him that his wife was unfaithful and that men were in the house. Sometimes he would climb up into the loft to find the men, and on one occasion he took a knife and went outside to find the persons whose voices he was hearing in order to attack them. In general the wife spoke of her husband as a kind and good man but for his drinking, which the Commissioner did not regard as something which imperilled the marriage.

The Commissioner would but for the insanity of the husband have found that he had treated his wife with cruelty and pronounced a decree of divorce, but felt himself constrained to dismiss the petition because of the husband's insanity. The wife appealed to the Court of Appeal, which by a majority held that the defence of insanity rightly prevailed, and upon the hearing in that court and before your Lordships it was accepted that but for the insanity of the husband there was no answer to the charge of cruelty. In agreement with my noble and learned friend, Lord Reid, I am not to be taken as confirming the finding that on these facts cruelty was established.

I am also in agreement with my noble and learned friend that Parliament cannot have intended by its method of drafting to give any different meaning to the word " cruelty " than that it had previously borne in the Ecclesiastical Courts. For instance, in 1957 by the Matrimonial Causes Act, which first made cruelty (if coupled with adultery) a ground for divorce, the word " guilty " is used in association with the word " cruelty ". The phrase " guilty of persistent cruelty " still appears in the Matrimonial Proceedings (Magistrates' Courts) Act, 1960, and the word "guilty" appears in the

Divorce (Scotland) Act, 1938. In the corresponding English legislation the phrase is used " has treated the petitioner with cruelty ". Parliament must, however, by its language have recognised cruelty as connoting blameworthiness and must by the use of the phrase " treated with cruelty " have

recognised that a deliberate act must be done to the complaining party by his or her spouse before a remedy can be available. What, then, does cruelty signify in its natural and ordinary meaning and how was it understood by those great judges to whom my noble and learned friend refers? I find nothing in their utterances to lead me to suppose that they would regard a madman as cruel. References to turbulent passion, natural violence of disposition, want of moral control and eccentricity as examples of the motives and causes of cruel conduct are wholly inappropriate to describe what lies behind the actions of those who have lost their reason through disease of the mind. Rather are they appropriate to describe the motives of sentient beings subject to human frailties and passions.

It is true that those judges were concerned to afford protection for the suffering partner, for in those days the wife at any rate was in grave need of protection from any husband who took advantage of his superior position before the law. She was dependent on him for her sustenance and even when living with her husband might not find anyone else willing to give her credit even for the necessaries of life. When apart from her husband the position was even more difficult, for there was then no presumption that she could pledge his credit.

This need for protection no doubt was uppermost in the minds of the judges of the Ecclesiastical Courts, for they were able to enforce their orders for alimony and provide sustenance for the one to whom the remedy of separation by reason of adultery or cruelty was available. They were not, however, able in the nature of things to provide physical protection except to a limited extent and pointed out that such could only be secured by the confinement of a violent partner in some secure place.

The position was well summarised soon after the passing of the Matrimonial Causes Act, 1857, by Lord Penzance (then Sir C. P. Wilde) in *Hall* v. *Hall* (1864) 3 Sw. & Tr. 347, who said: " I have no doubt that cruelty " does not cease to be a cause of suit if it proceeded from ' violent and dis- " ' orderly affections', as said in one case, or from ' violence of disposition, " ' want of moral control, or eccentricity ', as said in another, or ' from a " ' liability to become excited in controversy ', in the language of a third ; but " madness, dementia, positive disease of the mind, this is quite another " matter. An insane man is likely enough to be dangerous to his wife's per- " sonal safety, but the remedy lies in the restraint of the husband, not " the release of the wife. Though the object of this Court's interference " is safety for the future, its sentence carries with it some retribution for " the past."

After the passing of the Divorce Act in 1857 there was some discussion in the courts as to the availability of a defence of insanity to a suit founded upon cruelty or adultery which was influenced by the advice given by the judges in 1843 in the *M'Naghten* case. The language of Lord Esher, M.R. in *Hanbury* v. *Hanbury* 1892 8 T.R. 559, is in line with that of the M'Naghten Rules, although he reserved his opinion on the question whether the rules were applicable, cf. *Yarrow* v. *Yarrow* [1892] P. 92 (an adultery

case) and the *Hanbury* case at first instance reported in [1892] P. at p. 222, where the President, Sir Charles Butt, considered the possibility of defence of insanity to either charge.

The first case in which the M'Naghten Rules were referred to *eo nomine* appears to be *Astle* v. *Astle* [1939] P. 415, where Henn Collins, J. was of opinion on the basis of these Rules that the " respondent would not be " held answerable . . . either civilly or criminally for his assaults ".

There may be different considerations applicable in civil cases generally, but there is this parallel between divorce cases (which are civil cases) and criminal proceedings in that the standard of proof is to all intents and purposes the same.

I come now to the case of *White v. White* [1950] P. 39, and to the judgment of Asquith, L.J. who was unable to accept the view that insanity could never be a defence, the suit being one based on cruelty, but added that it is plain that the presence of insanity of some sort or other without more will not

necessarily afford a defence. He went on to consider what type or degree of insanity would suffice as a defence, recognising no doubt that, as has been said, it is hard to determine when twilight becomes darkness. He drew the inference that to avail as a defence the insanity must at all events not fall short of such insanity as would afford a defence to a criminal charge within the M'Naghten Rules. " In other words ", he said, " if the actor " knows the nature and quality of his acts, that is to say knows what he is " doing, and knows he is doing wrong, the fact that he is suffering from " a disease of the mind is immaterial even if he would not have committed " the acts complained of but for such disease." Denning, L.J. was of opinion that, subject to the qualification that a point might be reached when the conduct was so irrational that it was obvious to the injured party that the conduct was not cruelty but was due to mental disease, insanity was no defence to a charge of cruelty. Bucknill, L.J. did not express any concluded opinion. In 1951 my noble and learned friend, Lord Pearce, decided in *Lissack v. Lissack* [1951] P. 1 that insanity was no defence, and to this he held there was no qualification. I need not refer to the cases of *Swan* v. *Swan* [19531 P. 258, and *Palmer* v. *Palmer* [1955] P. 4, save to say that the view put forward by Asquith, L.J. in *White's* case finally prevailed and the same applies to the decision of the majority of the Court of Appeal in the instant case.

Having heard the full argument which has been addressed to your Lordships and with all deference to those who take a different view, I cannot avoid the conclusion that the word " cruelty " of itself involves an implication of blameworthiness. Indeed, I agree with Asquith, L.J. in thinking that if insanity is immaterial it would appear to follow that the intention of the aggressor is irrelevant, for the act must then be looked at from the point of view of the victim and one looks no further than that. If cruelty is to be excused by insanity, that is because intention is relevant and the effect of insanity is to negative intention. True that there must be degrees of mental illness falling short of insanity, as there are of other maladies from which the person charged with cruelty may be suffering. In such cases allowance must be made for the condition of the sick person, as I

think all would agree, but once the line is crossed and a condition of complete insanity is reached the question is not what allowance must be made but whether a defence has been made out. It is in this way that I understand the observation of Asquith, L.J. to the effect that the presence of insanity " *of some sort or other* " will not necessarily afford a defence.

I do not think it necessary to discuss further the much discussed topic of intention which may often be inferred from inexcusable conduct or unwarrantable indifference. I do not draw any distinction between these two things. If one pushes someone who cannot swim into deep water one may expect to be called cruel, and no less so if one sees that person in the water and ignores his or her cries for help.

If insanity is to be an excuse for conduct either positive or negative it must in my opinion be a complete answer just as inevitable accident must be an answer. I understood counsel for the Appellant to concede that accident would be a defence, but he did not seek to explain why the same should not be the case where the person accused of cruelty is insane. From the victim's point of view the pain is the same whether suffering is caused by accident or by the act of a madman.

I do not accept the distinction which the Appellant sought to draw between acts objectively cruel and acts or omissions which only become cruel because of the intention proved which causes these acts or omissions to be cruel or makes them more likely to inflict suffering. In the one case it is said insanity is no answer although in the second case it would or might be relevant. This is to create an artificial subdivision of cruelty which I think is unjustifiable, creating two classes of cruel persons, those who are violent and those who have been called mentally cruel. This division is a convenient one, perhaps, as a figure of speech, but the essential elements of cruelty do not differ whatever label is attached.

22

I do not attempt to define cruelty, but would assert that it involves mercilessness and delight in or indifference to pain and suffering. These qualities are not present in an insane person, but they may be present in one who is so self-centred and lacking in control that he behaves cruelly.

I get no assistance upon the use of the word " cruel" in a rhetorical or picturesque sense. An adjective is often used to indicate a quality of the thing described. Thus the sea and fate may be called, as Donovan, L.J. noticed, " cruel", for this adjective is apt to show that each is without mercy. But to say of a man that he is merciless is to stigmatise him and cannot be justified if he is out of his mind. Anyone who has had any experience of hearing in our courts the unhappy disputes between spouses when a charge of cruelty is involved on one side or the other will be familiar with the bitterness aroused and the resentment felt at the accusation in nearly every case.

When considering the degree of insanity which must be established in order to furnish an answer to the accusation there are no doubt great difficulties. The so-called M'Naghten Rules at least have the merit of simplicity, but I recognise that there is no obvious justification other than that of convenience for their use in any particular class of civil case, and I would not seek to be bound by any form of words.

The first branch of the rules as applied to cruelty has received a wider measure of acceptance than the second and no doubt is the easier to apply, for if a man is unconscious of what he is doing he will be the more readily excused. This test goes some way towards recognizing the subjective element in cruelty. I cannot think, however, that it goes far enough, and it seems that the second branch or its equivalent is required to cover the case of one who is conscious of what he is doing but through disease of the mind does not know it is wrong. I think this is required to cover those cases when through his insanity a person has no power of moral judgment. After all, a man is supposed to be different from a brute beast in that very respect. The fox which robs a hen roost presumably knows perfectly well what he is doing, but he is following his natural instincts, and it is just as absurd to describe him as cruel as to say that he has committed larceny. It is to me equally objectionable to apply the adjective " cruel " to one who through disease of the mind does not know that what he is doing is wrong.

I appreciate that the difficulty in applying the second branch of the Rules has been enhanced by a difference of opinion in the criminal courts. In this country in *Reg.* v. *Windle* [1952] 2 Q.B. 826, the Court of Criminal Appeal held that in relation to a criminal charge the word " wrong " meant " contrary to law ". As Willmer, L.J. pointed out, this is inapt in relation to an offence such as cruelty. In the High Court of Australia, in *Stapleton* v. *R.*, 1952 Aust. L.R. 929, the test was thought to be whether the accused had the capacity to distinguish right from wrong according to the standard adopted by reasonable men. Sir Owen Dixon, C.J. thought that this conclusion followed from the words used by the judges in formulating their advice in the *M'Naghten* case.

I agree with Davies, L.J. who thought that the use of the word " wrong " by itself is sufficient.

A further difficulty has been felt, as is said, by reason of the unscientific nature of the test. I appreciate that disease of the mind is a topic upon which scientific evidence is commonly required in order to assist judge or jury, but the essential issue is one of fact on which juries in civil and criminal cases are required to give a decision. There must be many cases in which the Rules have been applied liberally in favour of the accused person, but I find it difficult to suggest a form of words which would give any better assistance to a jury of laymen.

In Scotland the question whether insanity is a defence to a charge of cruelty has not always been answered in the same way and no question of the direct application of the M'Naghten Rules arises, but the conclusion reached by the Court of Session in *Breen* v. *Breen,* 1961 S.C. 158, is summarised in the language of Lord Patrick at page 182: "In principle", he said, " no blame can be attached to a man who at the tune of the acts

" in question was by reason of alienation of mind disabled from coming to a " rational decision in regard to the acts." Lord Strachan agreed with this opinion and added: " The defender was not able to exert his reason to " control his reactions in the normal way. I therefore hold that he was not " responsible for his violent acts and that he cannot be held guilty of " cruelty." I agree that the Scottish Act speaks of " guilt" but, as I have already said, I do not see that the presence or absence of that word, which appears in some Acts of Parliament and not in others, in association with the word " cruelty " can affect the meaning of the latter word or do more than show that the Legislature has thought that " guilt" was an appropriate

word to use in association with " cruelty ".

A subsidiary argument was advanced that it would be wrong to allow the word " cruelty" to be associated with blame since the consequence would be that in such a case as the present there would, unless and until a divorce could be obtained on the ground of insanity under the Matrimonial Causes Act of 1937 as amended by the Divorce (Insanity and Desertion) Act, 1958, be no defence to a suit by the husband for restitution of conjugal rights and no means of obtaining maintenance for the wife so long as she refused to live with her husband. Orders for restitution of conjugal rights being no longer enforced, the only relevant consequence is the financial one in the event of circumstances arising in which the husband might be in a position to maintain his wife. In such a case the principles explained in *Lilley* v. *Lilley* [1959] 3 All E.R. 283 would apply, and the question would be whether a *de facto* separation was imposed on the wife by force of circumstances.

I would dismiss the appeal.

Lord Pearce

MY LORDS,

The problem of insanity has caused doubt and difficulty in every branch of the law. In the case before your Lordships it is conceded that the Respondent knew the nature and quality of his acts and that unless the second limb of the M'Naghten Rules or some equivalent rule applies, the wife is entitled to succeed. It is also conceded that if it does apply, she is not entitled to relief.

A criminal court cannot disregard the diseased mental condition of the man whom it is proposing to punish. It has a duty to punish; but it can grant to the insane any immunity that is consistent with that duty, and no individual hardship is thereby created. The criminal courts in 1843 adopted the M'Naghten Rules as the best solution to their problem. But the working of those Rules is dependent on medical opinions which change with advancing knowledge, and in practice they have given rise to doubt and dissatisfaction.

In the common law courts the problem is different. Immunity to an insane person can only be granted at the expense of an injured party, and a balance of hardship at once arises. In 1616 it was said that " if a lunatick " hurt a man, he should be answerable in trespass " *(Weaver* v. *Ward* (1616) Hobart 134). " Divergent views ", says Professor Fleming in his book on the Laws of Torts (2nd Edition, page 24) " have 'been expressed on whether " this stringent approach . . . should now be modified in conformity with the " change in theory regarding liability for trespass (see Salmond, Street, " Winfield, Pollock)". He points out that the New Zealand Court in Donaghy v. Brennan (1900) 19 N.Z. L.R.289, favoured the more stringent view, but in New South Wales *(White* v. *Pile* (1951) 68 W.N. (N.S.W. 176)), immunity was extended to a defendant in terms of the M'Naghten Rules.

In *Morris* v. *Marsden* [1952] 1 All E.R. 925 ; followed in *Beale* v. *Hayward,* (1960) N.Z. L.R. 131, Stable, J. steered a course between these extremes and awarded damages for assault against a defendant of unsound mind, deriving sufficient intent on the defendant's part from the fact that his mind " directed "the blows he struck." "This conclusion" (says Professor Fleming at

p. 25) " is shared by the better reasoned American cases and has the merit " of neither giving undue scope to the defence of insanity, nor departing " from the modern basis of liability for trespass which, as we have seen. " requires intentional or negligent conduct by the actor ". (See also Salmond on Torts, 19th Edition, 75.)

In contract, however, a different view is taken. The general rule appears to be that a person of unsound mind is bound by his contract even although his mental condition was such that he did not understand what he was doing, unless he can show that the other party was aware of his incapacity. If these two conditions are satisfied the contract is voidable at his option. (See Cheshire & Fifoot 2nd Edition as page 354; Chitty on Contracts 22nd Edition, page 429; and cases there cited.) Lord Esher, M.R. said in *Imperial Loan Company, Limited* v. *Stone* [1892] 1 Q.B. 599 at page 601: " I shall not try to go through the cases bearing on the subject; but what I " am about to state appears to me to be the result of all the cases. When " a person enters into a contract, and afterwards alleges that he was so insane " at the time that he did not know what he was doing, and proves the " allegation, the contract is as binding on him in every respect, whether " it is executory or executed, as if he had been sane when he made it unless " he can prove further that the person with whom he contracted knew him to " be so insane as not to be capable of understanding what he was about".

If the grounds for setting aside a contract on the ground of insanity were founded on the theory that the insane man's acts were not really his acts, one would expect the contract to be void, not voidable, and the knowledge of the other party would seem irrelevant. But presumably the compromise was evolved in the light of practical commercial considerations.

Thus the common law courts afford no clear or uniform solution.

The Divorce Court has more similarity to the common law courts which grant relief than to the criminal courts which merely inflict punishment. But it is peculiar in that it deals with the ties that bind two persons together and make it their duty to live with one another. I find, therefore, no great help in the somewhat uneasy compromises at which the criminal and common law courts have arrived.

I cannot accept the argument that divorce is partly punitive and should, therefore, look to the criminal law for guidance. The dissolution or permanent interruption of a union which is in theory life-long and indissoluble cannot be justified by any logic. But the frailties of humanity produce various situations which demand practical relief, and the Divorce Acts owe their origin to a merciful appreciation of that demand. Any extension of the area of relief has always been advocated on the ground that there are situations of hardship that must be alleviated, and has been contested on the ground that to extend relief would create corresponding hardship to the other party and would weaken the important and sacred institution of matrimony. Never does an intention to punish enter into the debate; nor is an extension of the grounds of divorce ever advocated or opposed on the ground that it will extend the area of punishment of errant spouses. It is true that the divorce law of England, following the ecclesiastical law, is founded on the concept of the matrimonial offence. That concept is used to give some justification for breaking an indissoluble union against the will of the offending party. But in the Divorce Acts there is nothing that suggests an intention to punish. If relief is to be granted, each party alike must

forfeit the status of matrimony or, in the case of separation, part of that status. One party loses it voluntarily, the other involuntarily, but the loss is inherent in the granting of relief. A guilty husband may have to pay maintenance but only in so far as necessity or fairness demands on a consideration of the means of both parties; and punitive considerations are excluded. Even when a co-respondent pays damages for breaking up a marriage, an apt occasion for punishment, the damages are confined to compensation for the loss suffered by the husband and are not punitive. Costs are no more punitive than in any other branch of the law; they are in fact less punitive in that for economic reasons a husband who has done no wrong may be ordered to pay the costs of his erring wife, and rarely is

25

any order made against her however bad her conduct has been. So far as a decree contains " some retribution for the past", the same may be said of a judgment in tort for damages; but such a judgment is universally distasteful to a defendant whereas a decree of divorce is earnestly desired by a large proportion of respondents. I do not find anything in the Divorce Acts to justify a theory that the law is intended to punish. They appear to intend a practical alleviation of intolerable situations with as little hardship as may be upon the party against whom relief is sought.

Certainly the subsection in the 1937 Act which first allowed divorce on the ground of cruelty alone was enacted in order to alleviate the hardship to respondents and petitioners alike of being tied for life to a marriage that had broken down. It gave as an alternative to the long-existing remedy of judicial separation on the ground of cruelty, the opportunity of divorce which would allow to both parties the freedom to remake their lives.

There was, I think, a deliberate omission of the word " guilty " in section 2 of the 1937 Act (now section 1 of the 1950 Act). The new section was breaking away from the old idea of insistence on a matrimonial offence in that it was adding incurable insanity as a ground for divorce. But the words " guilty of adultery " in the previous Act were no more a guide to penal intention than are (the words " guilty of negligence ", " tortfeasor " or, in Scotland, " delinquent ". I read the words " treated with cruelty " as being no more than a convenient description of a situation where one party has treated another, and that other has been treated, with cruelty. I do not see in those words any indication that the state of mind of the actor was to be a paramount consideration.

It is to the word " cruelty " as used in the subsection to which one must look for guidance. For all purposes under the Act it must, in my opinion, have the same meaning. The word had had a long previous history which cannot be disregarded.

There are many cases dealing with cruelty throughout the nineteenth century both before and after the passing of the 1857 Act. Those cases show that judges looked at the conduct itself regardless of motive. Spouses had a duty to cohabit unless they were separated by decree. Where one spouse was treated by the other with cruelty it was therefore necessary to relieve the ill-treated spouse by granting a divorce *a mensa et thoro,* or, later, a decree of separation. Where that cruelty sprang from a disordered mind, such relief was all the more necessary unless (which is not always the case)

it could be certain that the insane spouse would be confined in some institution. On the other hand, there are passages that show a reluctance to hold a person responsible for acts that were caused solely by a demented mind.

In 1807 in *Kirkman* v. *Kirkman* (1 Hag. Con. 409 at page 410), Lord Stowell, when referring to the necessity to provide for the safety and comfort of the individual, said: " If that safety is endangered by violent and disorderly " affections of the mind it is the same, in its effects, as if it proceeded from " mere malignity alone; it cannot be necessary that in order to obtain the " protection of the Court, it should be made to appear to proceed from mere " malignity ". He was thus equating cruel acts caused by a disordered mind to acts of deliberate intentional cruelty. In *Holden* v. *Holden* (1 Hag. Con. 453, 458) he said at 458: " The court has had frequent occasion to observe that " everything is in legal construction *saevitia* which tends to bodily harm, and in that manner renders cohabitation unsafe; whenever there is a tendency " only to bodily mischief it is a peril from which the wife must be protected ; " because it is unsafe for her to continue in the discharge of her conjugal " duties ; and to enforce that obligation upon her might endanger her security " and perhaps her life. It is not necessary in determining this point to inquire " from what motive such treatment proceeds. It may be from turbulent " passion or sometimes from causes which are not inconsistent with affection " and are indeed often connected with it, as the passion of jealousy. If " bitter waters are flowing it is not necessary to enquire from what source " they spring. If the passions of the husband are so much out of his control

" as that it is inconsistent with the personal safety of the wife to continue " in his society, it is immaterial from what provocation such violence " originated ".

In *Dysart* v. *Dysart in* 1844 (1 Rob. Ecc. 106; 163 E.R. 980) Dr. Lushington said: " When I find conduct towards a wife likely to prove " dangerous to her safety, 'but not in other cases, I shall consider it within " my cognizance, whatever may have been the cause thereof, whether having " arisen from natural violence of disposition, from want of moral control, " or from eccentricity. It is for me to consider the conduct itself, and its " probable consequences; the motives and causes cannot hold the hand of " the Court unless the wife be to blame, which is a wholly different con- " sideration. In plainer words, even if I were satisfied that conduct " dangerous in itself arose from morbid feelings, out of the control of the " husband, I must act, if the danger exist, though it is not my province to " inquire into or ascertain such cause." Thus he is taking a purely objective view of the cruel acts regardless of any intention to be cruel.

In 1858 in *Curtis* v. *Curtis* (1 Sw. and Tr. 192; 164 E.R. 688) Sir Cresswell Cresswell, after referring to those observations of Dr. Lushington, said at p. 213: " If, indeed, an act of violence were committed under the influence " of an acute disorder, such as brain fever, and it were made clear that, " the disorder having been subdued, there was no danger of a recurrence " of such acts, the case would be different. But if the result of such " diseases has been a new condition of the brain, rendering the party liable

" to fits of ungovernable passion which would be dangerous to a wife,
" then undoubtedly this Court is bound to emancipate her from such peril".
Thus if cruelty came from lack of control due to disease of the brain, he would order a separation. He also, like Lord Stowell and Dr. Lushington, was looking at the acts themselves, regardless of any intention to be cruel.

Earlier in the same year in *Hayward* v. *Hayward* (I Sw. and Tr. 81; 164 E.R. 638) he had expressed the view that though a lunatic wife threatens her husband with violence he is not entitled to turn her outdoors but may be rather bound to place her in an institution. These views are not necessarily inconsistent if one takes into account the practical difference between the circumstances of a wife and those of a husband.

In *White* v. *White* (1859 1 Sw. and Tr. 591), Sir Cresswell Cresswell made an order against a wife who had on several occasions been in confinement as an insane person, and concluded: " As far as I can judge from the
" evidence given, I suppose those attacks to have been the consequence,
" and not the cause, of her intemperance and the quarrels with her husband.
" The assaults committed upon him were not proved to have been produc-
" tive of any serious bodily injury ; but where a woman, either from the effects
" of drinking or any other cause, is entirely without the power of controlling
" her passion, and in such a state of mind is in the habit of assaulting her
" husband, it is impossible to say that he is not in such danger of bodily
" injury as entitles him to the protection of the Court."

Through all these cases runs a robust and practical approach. The judges are concerned to look at " the conduct *itself* and its probable consequences " to see whether it, the conduct, is cruel without searching into the motives or intentions that gave rise to it. On occasion an impression is conveyed that there may be a degree of mania that may be a defence, but that impression never crystallises in a successful defence on that ground.

In 1864 in *Hall* v. *Hall* (3 Sw. & Tr. 347) Lord Penzance (at p. 349) said:

" With danger to the wife in view, the Court does not hold its hand to
" inquire into motives and causes. The sources of the husband's conduct
" are, for the most part, immaterial. Thus, I have no doubt that cruelty
" does not cease to be a cause of suit if it proceeded from ' violent and
" ' disorderly affections', as said in one case, or from ' violence of disposi-
" ' tion, want of moral control, or eccentricity ', as said in another, or ' from
" ' a liability to become excited in controversy ', in the language of a third ;
" but madness, dementia, positive disease of the mind, this is quite another
" matter. An insane mam is likely enough to be dangerous to his wife's
" personal safety, but the remedy lies in the restraint of the husband, not

" the release of the wife. Though the object of the Court's interference is
" safety for the future, its sentence carries with it some retribution for the
" past. In either aspect it would be equally unjust to act on the excesses
" of a disordered brain; in the latter, for the insane are not responsible;
" in the former, for insanity may be cured and the danger at an end."

In *Hanbury* v. *Hanbury,* however [1892] P. 224, Sir Charles Butt, President, in charging a jury said: " Assuming for a moment that these attacks were
" not brought on the respondent by his own self-indulgence, assuming that
" they were the result of hereditary disease, I should still be disposed to hold
" that acts of cruelty committed in one of these tits of mania would entitle
" the wife to the remedy for which she asks—separation from her husband. If

" the mania is intermittent and recurrent, the husband is entitled to go home " when he recovers from time to time—the wife cannot refuse him admission " to the conjugal home ; and if the mania is likely to recur accompanied with " violence which would place the wife in peril, the ordinary protection which " she is supposed to obtain by proceedings in Lunacy is a delusion, because " it does not protect her against the return home of her husband, who is " liable at any moment to become a lunatic." Again one finds the practical approach rather than the theoretical. The Court of Appeal (8 T.L.R.559, 560) dismissed the husband's appeal without calling on the other side. Lord Esher. M.R. (with whom Lindley, L.J., and Kay, L.J., concurred) left open " the larger question which the President touched upon, but did not decide "—namely, whether, even if the respondent's mind had been such that " he did not know the nature of what he was doing or that he was doing " wrong, the petitioner would or would not be entitled to a divorce." Lord Esher there spoke the Language of the M'Naghten Rules, but he was not, I think, intending to lay down the proposition that if a defence of insanity was applicable to a divorce suit, it would necessarily be governed by those rules. (See also *Yarrow* v. *Yarrow* [1892] P. 92, 94)).

In more recent years in *White* v. *White* [1950] P. 39, the Court of Appeal by a majority held that mere insanity as such was no defence to a petition based on cruelty and that any defence on the ground of insanity, if it was to succeed, must at all events not fall short of the M'Naghten Rules. Denning, L.J., however, held that insanity would never be a defence to such a petition unless at any rate the petitioner knew that at the lime at which the respondent committed the acts, his conduct was due to mental disease; such knowledge was an element that had not hitherto been introduced into this particular problem, and it may be that it was suggested by analogy with cases in contract. In *Lissack* v. *Lissack* [1951] P. 1, it was held in reliance on the older cases to which I have referred and the observation of Denning, L.J. in *White* v. *White* that insanity was no defence. In that case a man deliberately killed the child of the marriage knowing (but regretting), as the correspondence showed, that it caused agony to the wife. In *Swan* v. *Swan* [19531] P. 258, however, the Court of Appeal held for the first time that the first limb of the M'Naghten Rules constituted a defence to a charge of cruelty, but they granted a decree on the ground that a previous act of cruelty had not been condoned. They were in doubt as to the second limb and conflicting opinions were expressed obiter. In *Palmer* v. *Palmer* [1955] P. 4, obiter opinions were expressed that the second limb constituted a defence. The ensuing grave difficulties in its application are shown in *Sofaer* v. *Sofaer* [1960] 1 W.L.R. 1173. Finally, in the present case for the first time it was held as the *ratio decidendi* by a majority of the Court of Appeal that the second limb applies. Thus the shackles of the M'Naghten Rules which have caused so much difficulty in criminal cases have been fastened on to divorce suits at a time when the criminal courts are emerging from their confinement. Your Lordships' House has now to consider for the first time to what extent, if at all, insanity provides a defence to a petition based on cruelty.

It is noteworthy that the present suit is the first reported case in the whole history of matrimonial law in which a respondent has ever succeeded on such a defence.

The practical considerations, which clearly weighed so heavily with the judges of the nineteenth century, may be outlined as follows. They are

30875 A8

more obvious in the case of a wife petitioner, but similar considerations (apart from those of finance) apply to a husband.

The case of the wife whose exceptionally strong and loving character is able to regard endurance of the cruelty resulting from the husband's mental illness as part of the duty which she undertook for better, for worse, need not be considered. She will not seek relief from the Court and no question of any defence will arise.

The less robust and more normal wife is in an unenviable position. The fact that cruelty comes from mental disorder may to a very few make it more tolerable. To the majority it will increase their apprehensions, since there is no limit to which it might not go. If the husband is sufficiently insane and is therefore to be given immunity for his acts of cruelty (and also in consequence for his acts of constructive desertion) but yet is not so continuously insane as to be detained permanently, it is at the very least doubtful, as the law now stands, if she has any " reasonable cause " within the meaning of the Acts for not living with him. If the wife leaves, she will probably be in desertion and without home or maintenance. It may be that the Court has a discretion and need not make a restitution order against her, but the sole authority for this is the case of *Timmins* v. *Timmins* [1953] 2 All E.R. 187, in which there is a powerful dissenting judgment by Hodson, L.J. (as my noble and learned friend then was). It may be that she can claim that she is " separated by necessity ", as a sailor's wife is during his duties at sea (see *Lilley* v. *Lilley* [1959] 3 All E.R. 283 at page 289 D ; but see also at page 291 F) and can therefore obtain maintenance. But this is a difficult matter and depends on her paying lip service at least to a willingness to return whenever it may be sate to do so, whereas the truth may well be that alter her ordeal she is not prepared to do so in any event. Under the Guardianship of Infants Act she can obtain custody of the children and maintenance for them, but without maintenance for herself she would not be able to support a home. She may, as sometimes happens in these cases, find some other man to help and support her and her children. She will then live with him in the hope that she may one day obtain release under subsection l(d) asking the Court for the exercise of its discretion, which in my experience of such cases has never been refused.

Her position is thus unhappy and at the best very precarious. There is no great alleviation in the fact that in live years she may possibly obtain a divorce on the ground of incurable insanity. The husband may not be pronounced incurable or there may be interruptions in his period of detention that will defeat a petition. Attempts by the doctors to cure the patient may well lead to such interruptions and in their attempts any consequent hardship to the wife will rightly be disregarded. Moreover, to a wife so placed five years will seem a long time.

I accept that in practice, perhaps in the majority of cases where serious cruelty has been inflicted, the respondent will by the time of the trial be under detention and that in upwards of live years the petitioner may possibly be able to obtain a divorce under section 1 (d). But if insanity be a defence, it cannot be waived in cases where it creates purposeless hardship. The judge must investigate it, even if it is not raised, and must, if the defence appears good, refuse a decree to a petitioner however long suffering. The defence will normally be in the hands of the Official Solicitor, and he will

be bound to plead insanity and call evidence in support of it where it appears to be the cause of the cruelty.

Against these hardships on the wife's side one must balance the hardships of the husband. These are indeed heavy. He will lose his marriage to a wife whom he may love. But that is a misfortune which ex hypothesi will fall on him in any event and does not come into these scales. The question here is whether it is really a greater hardship to be severed from her by divorce than to be tied to her in a marriage which this wife finds intolerable, which makes this wife ill, and from which she wishes to be free. In my opinion it is not. The real hardship to the husband would be that he was found guilty of cruelty when, apart from his illness, he may be a kindly man. It is fairly argued that he should not be asked to bear that stigma. But it must be remembered that in the majority of cases where

he continues under treatment it will mean little or nothing to him. In the cases where he recovers it is seldom that those who know of the decree will not also know of the illness which in the minds of decent people will obliterate all blame.

In my opinion the frequent hardship to a petitioner so greatly exceeds the more infrequent hardship to a respondent that the practical social considerations speak strongly against insanity as a defence to cruelty. It was for that reason that the Report of (the Royal Commission on Marriage and Divorce (1951-55), while admitting that " Whichever course is adopted. " there will be some hardship ", recommended " that insanity should not " be a good defence to a charge of cruelty in matrimonial proceedings." (Paragraph 256.)

Unless, therefore, there is a necessary implication from the words of the Act "treated with cruelty" or from some overriding legal principle in the light of which they have been enacted, I would not impose on those words either the gloss " intending to be cruel or knowing that it was wrong ", or even the gloss " intending to do the act which was in fact cruel".

I am of opinion that the first gloss is not necessary or justifiable. Section 2*(c)* of the 1937 Act (now section l*(c)* of the 1950 Act) was enacted to alleviate a certain kind of intolerable situation. That Act did not introduce any alteration of the law of cruelty previously in force (see *Jamieson* v. *Jamieson* [1952] A.C. 525). For the reasons set out by the majority in the case of *Gollins* v. *Gollins,* neither intention to hurt, nor knowledge that the act done is wrong or hurtful, is an essential ingredient.

I agree with Donovan, L.J. when he said in the present case in the Court of Appeal ([1962] 2 W.L.R. 977 at page 992): "If Parliament had " intended that the defence put forward in the present case should be a valid " defence to a petition for divorce based on cruelty, it would have been simple " so to provide, and I should have expected it to have been done in explicit " terms. I cannot think that Parliament would have left it to be implied " from the mere words ' has treated the petitioner with cruelty'. . . . In " particular, in the case of a man who intends to do something, and does " it, knowing what he is doing, the word ' treated' does not, in my opinion, " imply that he must be able to form a sound judgment upon the question " whether his act is right or wrong. If one looks no further than the words " of the statute, I think they afford the husband no defence. The word " ' cruelty' of itself does not assist in this respect. It connotes acts which " give unnecessary pain to others, or which are savage or inhuman or

" merciless, but it certainly does not carry with it the implication that " the doer is conscious that his acts are wrong."

I therefore see no justification for applying the second limb of the M'Naghten Rule.

Moreover, in my opinion, insanity should not constitute a defence to suits based on cruelty, even when a man did not know the nature of his acts. Suppose that an insane man inflicted some cruel torture on his wife not knowing what he was doing. To the question " Did he treat his " wife with cruelty'"? no jury would, I venture to think, answer " No ". Their answer would be " Yes ", but they would add a rider that the man was insane at the time and did not know what he was doing. The first part of the answer would appear to justify the Court in giving a decree unless the rider, on an objective view of the circumstances and parties, removed the act from the area of cruelty.

The argument for holding that a man should not be held to have treated his wife with cruelty if he did not know what he was doing has an attractive simplicity. But so to hold would create a dividing line which in practice is not easy to apply (even with medical help) which will at times make the Courts powerless to help when help is most needed ; and which will cause more hardship than it alleviates.

It is not the dividing line which has been drawn in criminal cases, nor is it that which has been drawn in cases of contract. It is that which has, after much doubt, been drawn in cases of tort. For divorce cases it has little practical justification.

30

Every man is to some extent at the mercy of his temperament. If one speaks in terms of culpability, there is not much greater blame on the man who is cruel because he was born without the capacity for self-restraint, or with a sadistic nature, than on the man who has lost the capacity for self-restraint through disease of the mind. Yet the Courts give relief for cruel acts when innate lack of self-control or even lack of self-control due to disease drives men inexorably to cruel conduct. So much is clear from the earlier cases to which I have referred. And inevitably it must be so if the Court is to exercise its duty of protection between spouses who are otherwise under a duty to live with one another. It may be that " to know " all is to pardon all "; but the Court cannot act on that maxim. If, then, a decree on the ground of cruelty can be granted against the man who is driven by the impulse of a diseased brain, because the practical nature of the Court's function demands it, why should there be a line, shared only by the law of tort, which puts those who do not know their acts into a different class from those who cannot avoid their acts? To say that the acts in the former class are not really *their* acts does not justify such a distinction, since the same may be said also of the acts in the latter class. The distinction is one of sentiment rather than logic. Since there is no uniform legal principle that compels such a distinction I see no reason why this House should impose it.

In my opinion insanity should, like temperament, and other circumstances, be one of the factors that may be taken into account in deciding whether a wife is entitled to relief.

Where, therefore, the conduct in question is such that it would not amount to cruelty in the absence of an actual intention to hurt, an insane man who could form no such intention would not be held to have treated his wife with cruelty. Where, however, the conduct would be held to be

cruelty regardless of motive or intention to be cruel, insanity should not bar relief.

I would allow the appeal.

(P/30785) Wt. 8024—149 35 8/63 StS.
