

FULL COURT—(Madden, C.J., }
Holroyd & Hood, JJ.) } Oct. 26, 27.

COSHAM v. COSHAM.

"Marriage Act 1890" (No. 1166), sec. 74 (a)—
Divorce — Desertion — Insane delusion of respondent as to matter which, if true, would justify desertion—Effect of as a ground for refusing petition—Rule in MacNaghten's Case — Applicability to divorce proceedings.

In a suit by husband against wife for divorce, on the ground of desertion, facts amounting to desertion were proved, but it appeared that the respondent was, during the whole or part of the period covered by the petition, under an insane delusion as to the existence of conditions which would, if true, have justified her action.—

Held, that there had been no "desertion" within the meaning of sec. 74 (a) of the "Marriage Act 1890."

The rule in *MacNaghten's Case*, 10 Cl. & F. 200, applied.

APPEAL from the decision of A'Beckett, J., reported *ante*, p. 218.

NEIGHBOUR and JACOBS for the appellant.

WOOLF and ASG for the respondent.

The following authorities were cited:—*Drummond v. Drummond*, 2 V.L.R. (I.P. & M.) 78; *Yarrow v. Yarrow* (1892), P. 92; *Hanbury v. Hanbury* (1892), P. 222; *Mordaunt v. Moncrieffe*, H.L. 2 Sc. & Div. 374; *Hall v. Hall*, 3 Sw. & Pr. 347; *Yeatman v. Yeatman*, 1 P. & D. 489, at 491; *Ousey v. Ousey*, 3 P. & D. 223; *Simons v. Simons*, 4 A.L.R. 241; *Drake v. Drake*, 2 A.L.R. 297; *Reg. v. Leresche* (1891), 2 Q.B. 418; *Powell v. Powell*, 26 Am. Rep. 774; *Broadstreet v. Broadstreet*, 7 Mass. Rep. 473.

The judgment of the Court was delivered by MADDEN, C.J.—This is an appeal from the decision of A'Beckett, J., in a case in which he found that the respondent in fact resolutely denied to her husband access to her sexually, and that she continued so to deny access for the statutory period of three years. He also found that over the whole period, which is practically material in this case, she was suffering from certain delusions, and notably one by which she imagined that her husband was affected with a venereal disease, and was dangerous and objectionable to her. It is not denied that it was under the influence of these delusions that she denied her husband the access in question; but it is contended that her conduct amounts, notwithstanding, to a desertion on her part within the meaning of the Act. It is chiefly so maintained because the expression of the will of the Legislature is conveyed in distinct and definite language, without exception, that "a marriage may be dissolved on the ground that the respondent has without just cause or excuse wilfully deserted the petitioner and without any such

"cause or excuse left him or her continuously so "deserted during three years and upwards."

It is maintained that all that the Legislature requires by that enactment is that it shall appear that the respondent has in fact wilfully deserted—which means merely deserted—the petitioner without just cause or excuse. It is said that here it is undoubted that the respondent resorted to conduct which might amount to legal desertion within the meaning of that section, and it is suggested that, though she was insane, as it may be supposed, and afflicted with a form of insanity which had distinct relation to the alleged desertion, she is not to be heard to set up that insanity as an answer to the husband's claim for a divorce. Now, as to that, it has been held, in *Reg. v. Tolson*, 23 Q.B.D. 168, that the words of a Statute, though they be rigid in expression, are not, except in very special circumstances, to be deemed as conclusive that the mere satisfying of the words of the Statute will constitute the offence which the Statute intended, but that in most cases, inasmuch as the wilful intent to commit an offence is involved, the Court may, for the purpose of determining the Act, consider the consequences of a rigid interpretation. And where it is clear that an interpretation of those words, though they appear to be rigid, would be such as, in all probability, to be outside the contemplation of the Legislature by reason of the grievous result it would lead to, the Court is not bound to interpret it rigidly, but may interpret it to exclude a state of facts which, though literally within the Act, appear, by reasonable intentment, to be outside of its intended operation. Therefore, we may take it that the words in this particular Act, though they appear as rigid as Counsel for the petitioner insists, may and ought, notwithstanding, to be interpreted so as to avoid coming to the conclusion that the Legislature intended to do that which would be a great injustice in many cases to persons who, by mental illness, are placed outside the pale of reasoning beings. Therefore, if we are so far absolved, we may look further.

It is also not disputed that if in this case the rule in *MacNaghten's Case*, 10 Cl. & F. 200, can be applied, the judgment below would be right. And in the case of *Yarrow v. Yarrow* (*supra*), it was said to be probably the case that the rule in *MacNaghten's Case* would apply to divorce proceedings. But it was not there decided, nor has it been actually decided in any case. But the tendency of the decisions is plainly in that direction. In *Reg. v. Tolson*, Sir James Fitzjames Stephen is clearly of opinion that the rule in *MacNaghten's Case* does comprehensively apply to legal proceedings in the various jurisdictions. Hannen, J., in *Bowden v. Knight*, 3 P. & D., at p. 71, deals with the question of the mental capacity requisite to a testator, and refers to *MacNaghten's Case*. [His Honour read a lengthy passage from the judgment of Hannen, J.] In that case, His Lordship appears to take it for granted that the rule in *MacNaghten's Case* would apply to all other jurisdictions practically, as well as to the Criminal Court. And he puts the case that authority has determined, that where a suit is brought for nullity of

marriage on the ground of insanity at the time of the marriage, that rule was plainly in force and available. And if it be available for dissolution of marriage on that ground, it is difficult to see why it should be excluded in respect of marital offences committed under the influence of insanity. In the case of *Hall v. Hall* (*supra*), cited by my brother Hood in argument, the learned Judge who decided that case, who was extremely eminent in this jurisdiction, put it quite plainly that insanity is a clear defence. He does not examine the matter as to authority; but he speaks evidently after great consideration, and he says unreservedly that it is a defence. Then, if it be assumed that that rule applies, this case is easy. It is not denied that, though this lady withdrew from her husband completely, she nevertheless did so because she honestly and firmly believed that he was infected with a disease which would be extremely dangerous to her, and render it desirable that she should then have nothing to do with him. Then, assuming that her withdrawal from him to that extent would amount to a desertion, if there were no question of her being insane at the time she withdrew, she in fact did not know it was wrong to do so, but her disordered mind made it plain to her that it was right to do so. Therefore, she falls distinctly within the letter of the second *placitum* in *MacNaghten's Case*. If that be so, then the decision of A'Beckett, J., was right, and the appeal should be dismissed, with costs.

We do not venture to go generally into the large field of insanity involved in this matter. But, however it may be in any other case, the fact that the respondent did not know the distinction between right and wrong as to desertion, enables us to act with confidence in this instance.

Appeal dismissed.

[Proctors—For petitioner, Ebsworth; for respondent, Upton and Plante.]

FULL COURT—(Madden, C.J., }
Williams & A'Beckett, JJ.) } Aug. 16, 17.

**In re a TRANSFER from the
BRITISH BANK, &c., LTD. to EVANS.**

"Transfer of Land Act 1890" (No. 1149), secs. 172, 174, 175, 194 (iii.), 209—*Subdivisional plan of land divided into allotments for sale—Application to register transfer of reserve marked on plan—Refusal of Registrar to register—Lodging caveat—Procedure.*

Where the Registrar of Titles may lodge a caveat, under sec. 194 (iii.) of the "Transfer of Land Act 1890," he is at liberty, instead of doing so, to refuse to register a dealing with the land concerned, leaving the applicant, if dissatisfied, to his remedy under sec. 209 of the Act.

The mere lodging, under sec. 172 of the "Transfer of Land Act 1890," of a sub-

divisional plan of a piece of land which has been divided into allotments for the purpose of sale, does not justify the Registrar of Titles in subsequently refusing to register a transfer of a reserve marked therein as a "Park," if such plan does not indicate any intention on the part of the vendor to appropriate such reserve for the benefit of purchasers of the adjoining allotments, and the certificates of title of such purchasers do not refer to such plan. The mere marking of such a reserve on the plan is not evidence of such an appropriation, and its deposit in the Office of Titles was intended by the Legislature to be merely for the purposes of facilitating reference.

SUMMONS, under sec. 209 of the "Transfer of Land Act 1890," to the Registrar of Titles to show cause why an application to register a transfer should not be allowed.

The case and grounds for refusal by the Commissioner were as follows:—

"(1) On the 15th June, 1891, the British Bank of Australia Limited became the registered proprietor, under Certificate of Title, Vol. 2366, Fol. 473,156, of the land comprised therein, including the land referred to in the said transfer, and therein described as 'all that piece of land being part of Crown Allotments 5 and 5A, Section 4, Parish of Truganina, County of Bourke, being the block of land known as Alfred Park, and shown on the plan of subdivision No. 1205, lodged in the Office of Titles.'

"(2) The plan of subdivision No. 1205 is a plan of subdivision which was lodged on the 27th August, 1886, by the then registered proprietor of the said land, under the provisions of sec. 172 of the 'Transfer of Land Act 1890,' and in compliance with the said section, the said plan set forth certain roads, streets, passages, thoroughfares, and reserves set apart for the use of the purchasers, and amongst them a reserve consisting of a block of land, being an area of about six acres, occupying a central position in the said subdivision set out by metes and bounds, and having written thereon in large type 'Alfred Park,' being the Alfred Park mentioned in the said transfer.

"(3) The streets are so arranged that the said park is bounded on each side by a street, and every subdivisional lot has access to it.

"(4) The said lodged plan No. 1205 has, ever since the date of its lodgment in the Office of Titles, remained in the office uncanceled and unaltered, open to inspection by intending purchasers and the public generally, as representing the subdivision of the land contained in the said title and the roadways and reserves of such subdivision, on the basis of which the land would be sold and purchased.

"(5) The said Bank, and its predecessors in the title, have since lodgment of the said lodged plan sold and transferred a great number of the said subdivisional lots; each transfer refers to the said plan, and describes the land comprised in the transfers merely by its lot number (or numbers) on the said plan, and many of the lots sold by the said Bank immediately face the said park and abut on the road surrounding it.