separation. A some years later goes to England, and the question of her marital status is for some reason raised for determination by an English court. According to the law of New South Wales she is divorced, according to the law of X she is married. What line would the English court take in such a situation? By the decision in *Travers* v. *Holley*[27] it is bound to recognize the decree of the New South Wales court given under similar assumed jurisdiction — by the decision in *Har-Shefi* v. *Har-Shefi*[28] it is bound to give effect to the decree of the court of the domicile. If such a situation, or a similar one, were to arise, the court would have to choose which decree would prevail, as the two can obviously not stand together.

In conclusion, therefore, it is pointed out that whilst *Travers* v. *Holley*[29] attempts to liberalize the recognition of divorces in the international sphere, an application of the rule laid down in the case may in certain situations such as those mentioned above, come into conflict with the law of the domicile. In those situations the rule must either prevent the courts from giving full scope to the law of the domicile, or its application must be limited to those cases where there is no conflict with the domicile.

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COLLUSIVE AGREEMENTS

JOHANNSEN v. *JOHANNSEN*

This South Australian case of *Johannsen* v. *Johannsen*[1] again raised the problem of what test is to be applied in order to determine whether arrangements between parties to a matrimonial suit are collusive or not. Here Johannsen's mother-in-law offered to pay his costs if he would institute divorce proceedings against his deserting wife. Subsequently, Johannsen decided that reconciliation was impossible and he commenced a suit accepting a sum of Fifty Pounds from his mother-in-law. The Court held that this arrangement between Johannsen and his mother-in-law was not one "tending to pervert the course of justice" and was therefore not collusive.

Ross, J., when delivering judgment, assumed that the proper view of collusion was that which had been stated by the South Australian Full Court in *Brine* v. *Brine*,[2] and later by the New South Wales Supreme Court in *Cohen* v. *Cohen*.[3] He preferred to regard as qualified the broad proposition enunciated in *Churchward* v. *Churchward*[4] even though the High Court had approved it in *Hanson* v. *Hanson*.[5]

In *Churchward* v. *Churchward*[6] Sir Francis Jeune said: "if the initiation of a suit be procured, and its conduct (especially if abstention from defence be a term) provided for by agreement, that constitutes collusion although no one can put his finger on any fact falsely dealt with or withheld. . . ."[7] Here the petitioner was induced to institute a suit on the ground of adultery, which was not to be defended, in consideration of the respondent undertaking, *inter alia*, to settle money on the child of the marriage and pay certain costs. The court held that the petition was presented purely in accord with and in consequence of the agreement between the parties and collusion was established.

In *Brine* v. *Brine*,[8] however, two of the judges thought collusion required something more than a mere bare agreement relating to the institution or the

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[27] *Ibid.*
[28] 1953) P. 161.
[29] (153) S.A.S.R. 141.
[1] (1953) S.A.S.R. 141.
[2] (1924) S.A.S.R. 433.
[3] (1942) 43 S.R. (N.S.W.) 37.
[4] (1895) P.7.
[5] (1937) 58 C.L.R. 259.
[6] (1895) P.7.
[7] *Id.*, at 30.
[8] (1924) S.A.S.R. 433, *per* Poole and Murray, JJ.

conduct of a matrimonial suit. Poole, J. said that "the something more" was to be "found in the object of the provision itself[9] which is for the protection of the public interest . . . ."[10] According to Murray, J., collusion meant an agreement express or implied between the spouses for the purpose of obtaining a divorce "contrary to the justice of the case . . . ."[11] Both judges concluded that the object of the agreement must be to deceive or impose upon the court in some way as, for example, where the parties arrange to submit false evidence to the court or to withhold material facts from it.

Napier, J., the third judge in *Brine* v. *Brine*,[12] agreed with the majority decision, but preferred to follow the proposition in *Churchward* v. *Churchward*.[13] He regarded the crucial question as being whether the suit had been instituted only as a result of the prior arrangement, and concluded that on the facts before the court this was not so.

> If I had been satisfied that there was the true nature of a bargain in this case — that the husband should transfer this property to his wife and that in consideration thereof the *wife should assume the desire to be relieved from the marriage*,[14] then . . . collusion. But the petitioner has sworn that she really does desire the relief claimed and the trial judge has believed her.[15]

In *Doutrebande* v. *Doutrebande*[16] and later in *Cohen* v. *Cohen*[17] further attempts were made to limit what was regarded as the unqualified proposition in *Churchward* v. *Churchward*.[18] In each case a suit for judicial separation had been instituted by the wife on the ground of adultery, and in consideration of certain monetary promises made by the husband, the petition had been amended by the wife to a prayer for dissolution of the marriage. In both cases the arrangements were held not to be collusive. Owen, J.[19] and Jordan, C.J.[20] both rejected the suggestion that all agreements relating to the institution and conduct of the suit were collusive. They said that the true test was whether the *effect*[21] of such agreements was to deceive the court or whether it was calculated to have this effect.

> What matters is, not the consideration which led to the parties to enter into the agreement but the effect which the agreement is likely to produce. If it is likely to lead to the suppression or fabrication of evidence it is collusive whether it has been induced by a money payment, by a consideration of the social ills likely to result from people continuing in a condition of being at once married and unmarried . . . or by pure altruism. If it is not, the fact that it was induced by a money payment does not make it so.[22]

Davidson, J. in *Cohen* v. *Cohen*[23] dissented on the ground that the monetary consideration was the sole motive force at the foundation of the agreement to amend the petition. He approved *Churchward* v. *Churchward*[24] and held that as the consideration moved entirely from the respondent, and as the petitioner was therefore not *bona fide*, this was in effect an agreement procuring the institution of the suit and thereby collusive. Moreover, he disapproved the reasoning in *Doutrebande* v. *Doutrebande*[25] but suggested that the decision arrived at could be justified on the *Churchward* v. *Churchward*[26] view if the court were satisfied with the explanation of the parties and had concluded that the petitioner was *bona fide* and had changed her mind for no improper reason. This, he

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[9] Matrimonial Causes Act, 1929-1941, s.11(b) (S. Aust.).
[10] (1924) S.A.S.R., at 438.
[11] *Id.*, at 441.
[12] (1924) S.A.S.R. 433.
[13] (1895) P.7.
[14] Italics supplied.
[15] (1924) S.A.S.R., at 440.
[16] (1929) 29 S.R. (N.S.W.) 456.
[17] (1942) 43 S.R. (N.S.W.) 37.
[18] (1895) P.7.
[19] (1929) 29 S.R. (N.S.W.) 456.
[20] (1942) 43 S.R. (N.S.W.) 37.
[21] Italics supplied.
[22] (1942) 43 S.R. (N.S.W.), at 55, *per* Jordan, C.J.
[23] *Id.*, at 57-62.
[24] (1895) P.7.
[25] (1929) 29 S.R. (N.S.W.) 456.
[26] (1895) P.7.

affirmed, was a question of fact to be decided by the court in each case before it.

It is submitted that the High Court would not uphold the decisions reached in *Doutrebande* v. *Doutrebande*[27] and *Cohen* v. *Cohen*[28] unless they were to find as a fact that in each case the petitioner's change of mind was independent of the monetary offer made by the respondent.[29] This submission is strengthened by the *dicta* of Latham, C.J. in *Hanson* v. *Hanson*.[30]

> A mere concurrence of desire for a divorce is not fatal, but I am constrained by the law to hold that an agreement that a divorce should be obtained by one party, with the consent of the other, however honest and creditable to both parties the agreement may be, is a bar to either of them obtaining matrimonial relief . . . collusion . . . includes any actual agreement for the initiation or conduct of a suit for the dissolution of marriage by the parties or their agents. *Churchward* v. *Churchward*[31] is still a case of authority.[32]

The Chief Justice took a different view of the facts and dissented from the majority of the High Court who held that collusion had been proved.

Whilst it is apparent that the proposition enunciated in *Churchward* v. *Churchward*[33] will catch more agreements than will that laid down in *Brine* v. *Brine*,[34] nevertheless the area of its operation is not without limits. Various unjustified attempts to qualify the former proposition[35] have been the result of a failure on the part of some judges to comprehend its true extent. *Churchward* v. *Churchward*[36] does not rule out all agreements, but it gives a collusive label to two types only. Firstly, it forbids agreements *whereby one party is induced to bring a matrimonial suit in consideration of some bribe made by or on behalf of the other party*.[37] This is in effect procuring the institution of the suit. There, the petitioner does not genuinely seek relief but merely assumes the desire to be relieved from the marriage. "In other words, the project proceeds entirely from the guilty spouse and the petition is only induced by his promise of a lump sum or of permanent maintenance."[38] Such agreements cannot always be said to tend "to pervert the course of justice"[39] except insofar as it may be argued that they deceive the court by presenting the petitioner as *bona fide* and genuinely anxious for the relief sought when in fact this desire is merely assumed as a result of the bribe.

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[27] (1929) 29 S.R. (N.S.W.) 456.
[28] (1942) 43 S.R. (N.S.W.) 37.
[29] See *Heffernan* v. *Heffernan* (1953) V.L.R. 321, where the Victorian Full Court rejects *Cohen* v. *Cohen* (1942) 43 S.R. (N.S.W.) 37.
[30] (1937) 58 C.L.R. 259, 268-275.
[31] (1895) P.7.
[32] (1937) 58 C.L.R., at 268.
[33] (1895) P.7.
[34] (1924) S.A.S.R. 433.
[35] *Ibid.*
[36] (1895) P.7.

[37] *Hanson* v. *Hanson* (1937) 58 C.L.R. 259, where the guilty husband induced his wife to institute divorce proceedings by an offer *inter alia* of payment of a lump sum and permanent alimony. *Held*: Collusion established; *Lloyd* v. *Lloyd* (1861) 30 L.J. (P.M. & A.) 97, where the husband was induced to institute suit against the guilty wife by offer of money and costs made by the wife's father. Here again the Court held that there was collusion; *Percival* v. *Percival* (1944) S.A.S.R. 40, where a wife was induced to divorce her guilty husband on consideration of being adequately maintained. She had known for a long time that her husband was living with another woman. *Held*: Collusion. *Robb* v. *Robb* (1952) V.L.R. 255, where the guilty husband supplied the whole of the relevant evidence concerning the adultery in consideration of the petitioner instituting the suit. *Held*: Collusion. *Wood* v. *Wood* (1937) 4 AII E.R.9, where the husband induced his wife to sue for divorce by an offer to pay off a pressing debt owed by her to a third party. *Held*: Collusion established.

In the following cases, however, the Court decided that there was no collusion. *Malley* v. *Malley* (1909) 25 T.L.R. 662; here the wife was induced to bring a suit against her husband who was living apart from her, by his offer to pay £100 and costs, though he already owed her £325 under a separation agreement. *Held*: No collusion. *Semble* this decision is wrong in law, *contra Wood* v. *Wood* (*supra*), *Scott* v. *Scott* (1913) P. 52, where husband induced wife to institute divorce proceedings by agreeing to supply her with the necessary evidence and pay maintenance after the decree was made. *Held*: Collusion not established. Bucknill, L.J. defined collusion as an "improper act done or the improper refraining from the doing of an act for a dishonest purpose . . ." This decision was disapproved in *Hanson* v. *Hanson*. (*supra*).

[38] (1937) 58 C.L.R., at 276, *per* Dixon, J
[39] (1953) S.A.S.R., at 152.

Secondly, *Churchward* v. *Churchward*[40] *forbids the actual conduct of the suit to be provided for by agreement.* Thus arrangements whereby, for some consideration offered by one spouse, the other spouse agrees not to oppose the suit,[41] or agrees to continue a suit,[42] or to withdraw a defence to an alleged charge;[43] or to commit some matrimonial offence in order that the other party may obtain a remedy at law as for a real injury;[44] these have all been held to be collusive.

But the parties may make certain arrangements in relation to the suit and *Churchward* v. *Churchward*[45] does not necessarily render these collusive.

> The mere fact of having given her (the wife) money both before and after the institution of the suit does not prove collusion. I see no impropriety in a husband making his wife a reasonable allowance whilst a suit is pending in order to save the expense of an application to the court for alimony.[46]

But if the promise to pay the maintenance or costs is the consideration for a promise relating to the institution or conduct of the matrimonial proceedings, the suit is collusive and it is immaterial that the wife has the ultimate right to maintenance and costs.[47] Here lies the true distinction, and in each case the court must determine whether this has been the effect of any agreement or arrangement before it. In *Beattie* v. *Beattie*,[48] where a guilty husband had consistently offered to pay his wife's costs if she instituted divorce proceedings, and subsequently the wife did commence proceedings and accepted Fifteen Pounds from the husband, it was held that the mere acceptance of the money did not constitute a collusive bargain in consideration of which the proceedings were commenced, but that the wife had made up her mind by this time that she wanted a divorce for her own reasons.

Moreover, the mere fact that one party provides the other with certain evidence which is acted upon is not of itself collusive, provided that the actual acting upon the evidence is *not* in pursuance of any understanding between the parties, but is the result of the petitioner's own independent decision.[49] This will be a question of fact in each case, to be decided by the court on the evidence before it. It is submitted that the correct position was stated in *Robb* v. *Robb*.[50]

> In general, where proceedings for dissolution of marriage are initiated or prosecuted by the parties acting in concert, their agreement will be regarded as collusive. But in certain circumstances the parties may agree as to the payment of alimony, maintenance or costs without the agreement necessarily being held collusive provided that the initiation and conduct of the proceedings are *not* the result of such agreement rather than of the independent action of the petitioner.[51]

In the present case, it is submitted that the decision would have been the same had the court preferred to apply Sir Francis Jeune's proposition, since

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[40] (1895) P.7.
[41] *Barnes* v. *Barnes* (1867) L.R.1P.&D. 505.
[42] *Lowndes* v. *Lowndes* (1950) P.223.
[43] *Emanuel* v. *Emanuel* (1946) P.115.
[44] *Crewe* v. *Crewe* (1800) 3 Hagg. 123.
[45] (1895) P.7.
[46] *Barnes* v. *Barnes* (1867) L.R.1 P.&D. 505, *per* Lord Penzance.
[47] (1950) P.223.
[48] (1938) 2 AII E.R. 74.
[49] (1937) 3 AII E.R. 885.
[50] (1937) 3 AII E.R. 885, where a guilty husband sent petitioner a hotel bill on which to base petition. *Held*: the institution of the suit was *not* in pursuance of any understanding, but because the petitioner believed that it was the proper thing to do in the circumstances. *Cf. Todd* v. *Todd* (1938) S.A.S.R. 304, where the husband induced the guilty wife to give a written admission of adultery in consideration of his not claiming damages in excess of named sum. No defence was filed and it was held that the agreement was not collusive, since there was no evidence of any understanding that if the action was brought, it would be undefended. It is submitted, however, that such an arrangement is one procuring the "initiation and providing for the conduct of the suit" within the meaning laid down in *Churchward* v. *Churchward* ((1895) P.7) and is collusive. The Court, however, preferred to follow *Brine* v. *Brine* ((1924) S.A.S.R. 433) and *Wyatt* v. *Wyatt* ((1937) 3 AII E.R. 885).
[51] *Supra* at 891.

Ross, J. found on the facts that the initiation of the suit was the result not of the money payment but of the petitioner's realization that a reconciliation with the wife was impossible. This being the true inducement leading to the institution of the suit, it is not collusive merely to accept certain moneys on account of costs.

The propositions formulated by Ross, J.[52] are not inconsistent with the proposition in *Churchward* v. *Churchward*,[53] though they do not cover all collusive arrangements. Ross, J. states that the true test of collusion is whether the agreement has any "tendency to pervert the course of justice".[54] It is submitted, however, that although such agreements will always be found to be collusive, yet there are other agreements which the courts may decide do not have this effect, but which will nevertheless be collusive within the *Churchward* v. *Churchward*[55] meaning, in that they constitute the sole motivating force which leads to the institution of the suit, or they provide for its conduct in the manner that has been described above.

In all events, the court is bound to investigate all agreements and arrangements made in relation to the suit, and it seems that the onus is on the petitioner to satisfy the court, on the balance of probabilities, that the suit is brought, not as a result of the concerted action of the parties, but in accordance with the petitioner's own independent decision.

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INSANITY AS A DEFENCE TO MARITAL CRUELTY

SWAN v. *SWAN*

The English Courts in recent years have differed as to the existence of the defence of insanity to the matrimonial offence of cruelty. In a recent decision of the Court of Appeal in *Swan* v. *Swan*[1] this question is discussed, but not necessarily settled.

The wife presented a petition for divorce on the ground of cruelty. The Commissioner found the husband had been guilty of cruelty up to and including August 1947, but that such cruelty had been condoned. As to cruelty subsequent to that date, he found that at the time of the commission of the cruel acts, the husband did not know what he was doing, or that what he was doing was wrong. Accordingly he dismissed the petition. The Court of Appeal granted the decree on the ground that the wife's conduct prior to 1947, did not amount to condonation. Contained in the judgments is a discussion of three controversial questions relating to the law of cruelty. Firstly, whether or not an intention to do the cruel act is an essential ingredient of the offence; secondly, whether or not insanity is a defence to cruelty; thirdly, if insanity is a defence to cruelty, what is its scope.

(1) Is Intention an Essential Element of Cruelty.

It was once thought that a malicious motive was an essential element in cruelty. But the Court of Appeal in *Squire* v. *Squire*[2] decided that it was not necessary in cruelty suits to prove that the conduct proceeded from malignity. It also held that in determining whether a party intended to be cruel, the Courts should have regard to the principle that a man is presumed to intend the natural and probable consequences of his acts.

Asquith, L.J. in *White* v. *White*[3] illustrated the first point decided in *Squire* v. *Squire*[4] as follows: A hits B and injures him. In a cruelty suit it is only necessary to show he intended to hit B; it is not necessary to prove an

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52 (1953) S.A.S.R., at 152.
53 (1895) P.7
54 (1953) S.A.S.R., at 152.
55 (1895) P.7.
1 (1953) 3 W.L.R. 591.
2 (1949) P. 51.
3 (1950) P. 39.
4 (1949) P.51.