

HONG KONG FAMILY COURT PRACTICE

Fifth Edition

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subjective effect on the particular petitioner.¹³³ It is the state of the relationship between the parties that is examined, not whether the conduct is good or bad: *Carew-Hunt v Carew-Hunt*.¹³⁴ Therefore, the court does not pass judgment on marital conduct but only considers the impact of a respondent's behaviour on the petitioner. Whether an isolated case of uncharacteristic conduct would suffice for these purposes will depend on its nature and gravity: *Li Kao Feng Ning, Judy v Li Hung Lit*.¹³⁵ Determining the effect of the respondent's conduct involves a consideration not only of the behaviour of the respondent but of the character, personality, disposition and behaviour of the petitioner: *Ash v Ash*.¹³⁶ Mental illness is not deemed unreasonable behaviour: *Richards v Richards*.¹³⁷ Other examples include: *Shears v Shears*,¹³⁸ where the wife's behaviour in obtaining ex parte injunctions ordering her husband to leave the matrimonial home on grounds which afterwards proved baseless, were not deemed 'conduct' but where the wife persistently refused to allow her husband access to their child, this did constitute behaviour such that he could not reasonably be expected to live with her. In *Yeung Leung Yau Lin v Yeung Kam Wah*,¹³⁹ the petitioner was said to be neurotic and violent in temper with a distorted sense of rights and duties as a wife, whereas the respondent was a 'rough type' of person who was not able to handle a neurotic woman. The court was not satisfied there was irretrievable breakdown of marriage; if there was, it was due to the conduct of the respondent.¹⁴⁰

A party's mere disinclination and boredom with the marriage does not entitle the court to dissolve it: *Kisala v Kisala*.¹⁴¹ It was also said in that case that when a respondent desires to plead that the marriage has not broken down irretrievably, the common form denial of the petition does not achieve sufficient clarity: *Andrews v Andrews*.¹⁴² Conduct of sufficient gravity to justify a spouse leaving may be relied on but not simple desertion by the respondent, 'desertion' being one of the five 'facts'

133 *Katz v Katz* [1972] 3 All ER 219, [1972] 1 WLR 955; *Pheasant v Pheasant* [1972] Fam 202, [1972] 1 All ER 587; *Livingstone-Stallard v Livingstone-Stallard* [1974] Fam 47 at 54, [1974] 2 All ER 766.

134 *Carew-Hunt v Carew-Hunt* (1972) Times, 28 June.

135 *Li Kao Feng Ning, Judy v Li Hung Lit* [1983] 1 HKC 111 (CA), isolated incident precipitated by petitioner's own wrongdoing did not satisfy ground, applying *Carew-Hunt v Carew-Hunt*. As explained by the Court of Appeal in *Li Kao Feng*, the correct question to ask under the s 11A(2)(b) of the Matrimonial Causes Ordinance (Cap 179), which involves both a subjective and an objective element, is this, 'Would any right thinking person come to the conclusion that this husband has behaved in such a way that this wife cannot reasonably be expected to live with him, taking into account the whole of the circumstances and the character and the personalities of the parties.'

136 *Ash v Ash* [1972] Fam 135, [1972] 1 All ER 582.

137 *Richards v Richards* [1972] 3 All ER 695, [1972] 1 WLR 1073.

138 *Shears v Shears* (1972) 117 Sol Jo 33.

139 *Yeung Leung Yau Lin v Yeung Kam Wah* [1977-1979] HKC 328 (HC).

140 See also *Lindsay v Lindsay* [1983] 2 HKC 302 (DC).

141 *Kisala v Kisala* (1973) 117 Sol Jo 664.

142 *Andrews v Andrews* [1974] 3 All ER 643.

needed to establish irretrievable breakdown.¹⁴³ Association, not resulting in actual sexual intercourse, with a member of the opposite sex might constitute behaviour of a kind to justify a finding of irretrievable breakdown: *Wachtel v Wachtel*.¹⁴⁴ The fact that one spouse is living with the other spouse at the time of the hearing does not of itself establish that the first spouse should reasonably be expected to live with that other spouse: *Bradley v Bradley*.¹⁴⁵ It may not be reasonable to expect one of the spouses to live in the home but, albeit unreasonable, he or she may have no option but to do so.¹⁴⁶ The matter has been approached by considering whether any right-thinking person would come to the conclusion that the husband in question has behaved in such a way that his wife could not reasonably be expected to live with him, taking into account the whole of the circumstances and the characters and personalities of the parties: *Livingstone-Stallard v Livingstone-Stallard*.¹⁴⁷

The test to be applied prima facie is an objective one: *Lindsay v Lindsay*,¹⁴⁸ although in considering what is reasonable, the court, in accordance with its duty to inquire into the facts alleged as far as it reasonably can, will have regard to the history of the marriage and to the individual spouses before it, and from this point of view, would have regard to the petitioner and the respondent in assessing what was reasonable; the fewer prior assumptions the court makes about them, the better. The court must try to read the minds of the parties in order to evaluate their conduct: *Yeung Leung Yau Lin v Yeung Kam Wah*.¹⁴⁹ In *Wong Chan Oi Ying Sarita v Wong Yiu Cho*,¹⁵⁰ the court held that the respondent had neither disputed the petitioner's allegations nor provided a satisfactory explanation in response. The marriage was ended for practical purposes when, in particular, the respondent failed to offer any viable solution to settle his gambling debts, borrowed from the petitioner's relatives and had refused to sell the matrimonial home. Applying the objective test, any right-thinking person would come to the conclusion that the respondent had behaved in such a way that the petitioner could not reasonably be expected to live with him. In *Buffery v Buffery*,¹⁵¹ the English Court of Appeal laid a test in terms of the considerations of a

143 *Morgan v Morgan* (1973) 117 Sol Jo 223. Simple desertion comes within the provisions of s 11A(2)(e) of the MCO.

144 *Wachtel v Wachtel* [1973] Fam 72, [1973] 1 All ER 829, [1973] 2 WLR 366.

145 *Bradley v Bradley* [1973] 3 All ER 750, [1973] 1 WLR 1291 (CA, Eng).

146 *Bradley v Bradley* [1973] 3 All ER 750 at 752, [1973] 1 WLR 1291 (CA, Eng) at 1294, per Lord Denning MR.

147 *Livingstone-Stallard v Livingstone-Stallard* [1974] Fam 47 at 54, [1974] 2 All ER 766 at 771. The dicta in *Livingstone-Stallard v Livingstone-Stallard* supra, was applied in *Wong Chan Oi Ying Sarita v Wong Yiu Cho* [2007] 2 HKC 385 (DC) and also in *BL v SJY* [2009] HKCU 1428 (unreported, FCMC 7831/2008, 31 July 2009) (DC).

148 *Lindsay v Lindsay* [1983] 2 HKC 302 (DC).

149 *Yeung Leung Yau Lin v Yeung Kam Wah* [1977-1979] HKC 328 (CFU).

150 *Wong Chan Oi Ying Sarita v Wong Yiu Cho* [2007] 2 HKC 385 (DC) at 390.

151 *Buffery v Buffery* [1988] FCR 465, [1988] 2 FLR 365 (CA, Eng); *Borch v Borch* [1992] 2 FCR 545, [1992] 1 FLR 365 (CA, Eng), test subjective.

right-thinking person. Allowance would be made for the sensitive as well as to the thick-skinned: *Lindsay v Lindsay*.¹⁵² Whilst corroboration is not required as a rule of law, it is desirable: *Chan Cheng Siu Kun v Chan King Kan*.¹⁵³ However, in *BL v SJY*,¹⁵⁴ HHJ Melloy (at [10]) took the view that it was:

both a subjective and an objective test. The issue is not so much whether the husband or wife's actions are unreasonable per se, although this does come into it, but rather whether this particular husband or wife found the actions of the other unreasonable, given all of the circumstances and the character and personality of each.

Particulars of unreasonable behaviour must be stated in detail in the petition for divorce, although there is now a growing acceptance by the courts for less antagonistic 'watered-down' or mild particulars of unreasonable behaviour to avoid animosity between parties and cross-decrees of unreasonable behaviour where both parties actually consent to a divorce. 'Watered-down' particulars of unreasonable behaviour include particulars such as the respondent not demonstrating love and affection, failure to communicate, and the respondent having a different sense of values and attitudes. For an application for decree *nisi* on the grounds of unreasonable behaviour, the petitioner must not be living with the respondent for a period of more than six months preceding the application since the petitioner is relying on the fact that it is intolerable to live with the respondent.¹⁵⁵

Separation (Facts 3 & 4)

One year of separation with consent

[3-34]

It may be found that a marriage has broken down irretrievably where the petitioner satisfies the court that the parties to the marriage have lived apart for a continuous period of at least one year immediately preceding the presentation of the petition and the respondent consents to a decree being granted.¹⁵⁶ The one-year period is to be computed exclusive of the day on which the separation has taken place: *Warr v Warr*.¹⁵⁷ 'Living apart' does not carry the same meaning as 'has deserted', nor does it impute any fault: *Santos v Santos*.¹⁵⁸ It is undesirable that there should be cross-decrees where each party alleges that they have lived apart for one

152 *Lindsay v Lindsay* [1983] 2 HKC 302 (DC).

153 *Chan Cheng Siu Kun v Chan King Kan* [1977-1979] HKC 359 (CFI) at 361 per Commissioner de Basto QC.

154 *BL v SJY* [2009] HKCU 1428 (unreported, FCMC 7831/2008, 31 July 2009) (DC) at [10].

155 MCO, s 15A(4).

156 MCO, s 11A(2)(c).

157 *Warr v Warr* [1975] 1 All ER 85, [1975] 2 WLR 62.

158 *Santos v Santos* [1972] Fam 247, [1972] 2 All ER 246 (CA, Eng) at 250, per Sachs LJ.

year and the other consents to a decree.¹⁵⁹

Two years of separation

[3-35]

The court may find that a marriage has broken down irretrievably where the petitioner satisfies the court that the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition.¹⁶⁰ In computing the two-year period, the day of separation is excluded from the computation: *Warr v Warr*.¹⁶¹ The petition should contain no allegation of fault against the respondent: *Chapman v Chapman*,¹⁶² and in the ordinary way, there should be no order for costs in these cases. There is no need for any consent by the respondent, and indeed the respondent cannot pray in his answer for the petition to be rejected but must limit his prayer of rejection to those matters pleaded in the petition which he denies: *Parsons v Parsons*,¹⁶³ although there are, however, statutory restrictions to the grant of a decree.¹⁶⁴ Where there is a period of separation sufficient for the dissolution of the marriage, the court would be loathed to allow the parties to rely on other facts to use valuable court time to litigate on a matter which had no impact whatsoever on the divorce itself and which should be dissolved as quickly and painlessly as possible.¹⁶⁵

159 *Darvill v Darvill* (1973) 117 Sol Jo 223.

160 MCO, s 11A(2)(d).

161 *Warr v Warr* [1975] 1 All ER 85, [1975] 2 WLR 62.

162 *Chapman v Chapman* [1972] 3 All ER 1089, [1972] 1 WLR 1544 (CA, Eng).

163 *Parsons v Parsons* (1975) Times, 15 April.

164 See MCO, s 11A(2)(d).

165 *THY v CHFR* [2018] HKCU 1356, [2018] HKCA 240, *Grenfell v Grenfell* [1978] Fam 128, [1978] 1 All ER 561 (CA, Eng) and *SJH v RJH* [2012] 3 HKC 457, [2011] HKCA 280 are followed. See also *M v L* [2020] HKCU 862, [2020] HKCA 255. Re husband's allegation of adultery, as the Judge had reached the finding on the breakdown of the marriage on the basis of two-year separation, not necessary to investigate the issue merely to satisfy the husband's feelings or to allow bitter recrimination against the other party. Following the approach espoused in *Grenfell v Grenfell* [1978] Fam 128, [1978] 1 All ER 561 and *SJH v RJH* [2012] 3 HKC 457, [2012] 4 HKLRD 308 (CA), the sensible and pragmatic approach is to dissolve the marriage as quickly and painlessly as possible. *THY v CHFR* approved. As both parties are now of the same view that the marriage has been irretrievably broken down, the Court in exercising its divorce jurisdiction in a modern setting, will be loathed to allow the parties to use valuable court time to litigate on a matter which has no impact whatsoever on the divorce itself and which should be dissolved as quickly and painlessly as possible. As Ormrod LJ observed in *Grenfell v Grenfell* [1978] Fam 128, [1978] 1 All ER 561 at 566 that:

There is no point, as I see it, in a case like this in conducting an enquiry into behaviour merely to satisfy feelings, however genuinely and sincerely held by one or other of the parties. To do so would be a waste of time of the court and, in any event, would be running, as I think, counter to the general policy or philosophy of the divorce legislation as it stands today. The purpose of Parliament was to ensure that where a marriage has irretrievably broken down, it shall be dissolved as quickly and as painlessly as possible under the Act, and

Definition of separation

[3-36]

Physical separation of the parties without any intention to continue a marriage life together is good enough evidence of separation. Therefore, when one party moves out of the matrimonial home with or without informing the other party, separation of the parties has commenced. The period of living apart whether for one or two years must be continuous. In some cases, the spouses will not be considered to have been living apart whilst both recognise the matrimonial relationship as continuing even though they are separated: *Santos v Santos*.¹⁶⁶ Now very clearly there is and always has been an element of 'conspiracy' between parties, where necessary to maintain that there is a separation of 'bed and board' in principle, if not in fact. Where the parties, often by force of circumstances, have little choice but to live under the same roof but are clearly and demonstrably¹⁶⁷ leading entirely separate lives and the divorce is not being defended,¹⁶⁸ then the practical reality is that the courts are unlikely to look too closely.¹⁶⁹ However, this practical approach should not lead parties to think that they can easily dismiss judicial enquiry should it arise. The authorities show that, on occasion the courts have held that a relationship does not end by reason of a separation brought about by the pressures of external circumstances, such as an absence of professional or business pursuits, or in search of health or even of pleasure, sexual intercourse, dwelling under the same roof, society and protection, support, recognition in public and in private. Correspondence during separation may be regarded separately as different elements, the presence or absence of which go to show more or less conclusively that the matrimonial relationship does or does not exist. The weight of each of these elements varies with the health, position in life and all the circumstances of the parties.¹⁷⁰ The court must look for a definite termination of the consortium before the physical fact of being apart can be said to constitute separation: *Collins v Collins*.¹⁷¹

attempts to recriminate in the manner in which the wife in this case appears to wish to do should be, in my judgment, firmly discouraged.

166 *Santos v Santos* [1972] Fam 247 at 263, [1972] 2 All ER 246 (CA, Eng) at 255, per Sachs LJ.

167 For example, separate living arrangements, bank accounts, no sexual relations etc.

168 For example, on grounds of grave financial hardship.

169 In *Hollens v Hollens* (1971) 115 SJ 327 the parties lived apart albeit they stayed in the same house but did not speak to each other or eat together and the wife did nothing for the husband.

170 *Tulk v Tulk* [1907] VLR 64 at 65, applied in *Main v Main* (1949) 78 CLR 636 at 642; *Santos v Santos* [1972] Fam 247, [1972] 2 All ER 246 (CA, Eng); *Collins v Collins* [1961] 3 FLR 17; *R v Creamer* [1919] 1 KB 564 (CA, Eng); *Eadie v IRC* [1924] 2 KB 198.

171 *Collins v Collins* [1961] 3 FLR 17 at 22 (Tas), applied in *Santos v Santos* [1972] Fam 247, [1972] 2 All ER 246 (CA, Eng). See also *Mouncer v Mouncer* [1972] 1 All ER 289, [1972] 1 WLR 321 (living together); *Yuen Yu Bui v Yuen Nip Yulandna* [1977-1979] HKC 453 (HC) (living together); and *Hollens v Hollens* (1971) 115 Sol Jo 327 (living apart).

Cohabitation does not necessarily imply living together physically under the same roof: *Bradshaw v Bradshaw*.¹⁷² Where the parties are separated but not living apart, it is open to one of the parties to decide henceforth to live apart and such decision need not be communicated by word or conduct to the other party. An uncommunicated ending of recognition that a marriage is subsisting can mark the moment at which the parties begin to live apart: *Santos v Santos*.¹⁷³ Under the MCO,¹⁷⁴ a husband and wife are treated as living apart unless they are living together in the same household. By contrast with the concept of a 'house', which relates to something physical, the word 'household' is used, which has an abstract meaning, and essentially refers to people held together by a particular kind of tie, even if temporarily separated.¹⁷⁵

Periods of living together

[3-37]

In considering whether the period for which the parties to a marriage have lived apart has been a continuous period of at least one year or, as the case may be, two years, no account is to be taken of any period or periods, together not exceeding six months, during which the parties resumed living with each other. For these purposes, references to the parties of a marriage living with each other are to be construed as references to them living with each other in the same household.¹⁷⁶ The words 'living with each other in the same household' are not apt to describe the situation where the wife is indisputably living with another man in the same household and her husband is there as a paying guest: *Fuller (otherwise Penfold) v Fuller*.¹⁷⁷ However, in considering whether the period during which the parties to a marriage have lived apart has been continuous, no account shall be taken of any period or periods, together not exceeding six months, during which the parties have resumed living with each other. But no period during which the parties lived with each other shall count as part of the period during which the parties to the marriage have lived apart.¹⁷⁸

Desertion (Fact 5)

[3-38]

The court may find that a marriage has broken down irretrievably if the petitioner satisfies the court that the respondent had deserted the petitioner

172 *Bradshaw v Bradshaw* [1897] P 24 at 26, applied in *Santos v Santos* [1972] Fam 247, [1972] 2 All ER 246 (CA, Eng). See also *Nugent-Head v Jacob* [1948] AC 321, [1948] 1 All ER 414 (HL).

173 *Santos v Santos* [1972] Fam 247 at 259-262, [1972] 2 All ER 246 (CA, Eng) at 253-255, per Sachs LJ.

174 Section 11C(1).

175 *Santos v Santos* [1972] Fam 247 at 262, [1972] 2 All ER 246 (CA, Eng) at 255, per Sachs LJ, preferring *Smith v Smith* [1940] P 49, [1939] 4 All ER 533 to *Evans v Evans* [1948] 1 KB 175, [1947] 2 All ER 656 (DC, Eng).

176 MCO, s 15A(6).

177 *Fuller (otherwise Penfold) v Fuller* [1973] 2 All ER 650, [1973] 1 WLR 730 (CA, Eng).

178 MCO, s 15A(5).

for a continuous period of at least one year immediately preceding the presentation of the petition.¹⁷⁹ The standard of proof is on the balance of probabilities, the degree of probability depending upon the subject matter.¹⁸⁰

In essence, 'desertion' means the intentional permanent forsaking and abandonment¹⁸¹ of one spouse by the other without that other's consent¹⁸² and without reasonable cause, that is, without the consent or fault of the person asking for relief.¹⁸³

Desertion is a total repudiation of the obligations of marriage.¹⁸⁴

179 MCO, s 11A(2)(e).

180 *Blyth v Blyth* [1966] AC 643 at 669, 673-674, [1966] 1 All ER 524 (HL) at 536-539; *FHFK v NCM* [2008] 5 HKC 355, [2008] HKCA 254, wife received neither the petition nor the orders nisi or absolute, decree absolute voidable and set aside. Such jurisdiction has previously been recognised in Hong Kong in *LCM v LYY* [2003] 2 HKLRD 690, [2003] HKCU 625 (CA) and *MSK v PSK* [2006] 3 HKC 358 (CA). See also Hong Kong Law Society Circular AR 09-21 (PA), 12 January 2009.

181 Abandonment, see: *Hopes v Hopes* [1949] P 227 at 235, [1948] 2 All ER 920 (CA, Eng) at 925, per Denning LJ; *Jackson v Jackson* [1924] P 19 at 23, approved in *Weatherley v Weatherley* [1947] AC 628 at 632, [1947] 1 All ER 563 (HL) at 565, and in *Herod v Herod* [1939] P 11 at 21-22, [1938] 3 All ER 722 at 730; *Perry v Perry* [1952] P 203 at 205, [1952] 1 All ER 1076 (CA, Eng) at 1082, per Sir Raymond Evershed MR; *Beeken v Beeken* [1948] P 302 (CA, Eng) at 311; *Buchler v Buchler* [1947] P 25 at 29-48, [1947] 1 All ER 319 (CA, Eng) at 320-327; *Williams v Williams* [1943] 2 All ER 746 (CA, Eng) at 752, per du Parcq LJ, a total repudiation of the obligations of marriage; *Thomas v Thomas* (1923) 39 TLR 520 at 521, affd [1924] P 194 (CA, Eng); *Tulk v Tulk* [1907] VLR 64 at 65; *R v Leresche* [1891] 2 QB 418 at 420 (CA, Eng); *Townsend v Townsend* (1873) LR 3 P & D 129 at 131; *Fitzgerald v Fitzgerald* (1869) LR 1 P & D 694 at 697, as explained in *Pulford v Pulford* [1923] P 18; *Williams v Williams* (1864) 3 Sw & Tr 547; *Haswell v Haswell and Sanderson* (1859) 1 Sw & Tr 502 at 505.

182 Absence of consent, see: *Ward v Ward* (1858) 1 Sw & Tr 185; *Thompson v Thompson* (1858) 1 Sw & Tr 231; *Smith v Smith* (1859) 1 Sw & Tr 359 at 361; *Haviland v Haviland* (1863) 32 LJPM & A 65; *Buckmaster v Buckmaster* (1869) LR 1 P & D 713; *Charter v Charter* (1901) 84 LT 272; *Harriman v Harriman* [1909] P 123 (CA, Eng) at 148; *Fengl v Fengl* [1914] P 274; *Walter v Walter* [1921] P 302; *Pardy v Pardy* [1939] P 288 at 305, [1939] 3 All ER 779 (CA, Eng) at 784; *Spence v Spence* [1939] 1 All ER 52 at 56-57; *Edwards v Edwards* [1948] P 268 at 269, [1948] 1 All ER 157 (DC, Eng) at 158; *Pearson v Pearson* [1948] WN 225 (CA, Eng); *Kinnane v Kinnane* [1954] P 41, [1953] 2 All ER 1144; *Clark v Clark (by her guardian)* [1956] 1 All ER 823, [1956] 1 WLR 345; *Ingram v Ingram* [1956] P 390 at 411, [1956] 1 All ER 785 at 797; *Pinnick v Pinnick* [1957] 1 All ER 873 at 875, [1957] 1 WLR 644 at 647; *Bosley v Bosley* [1958] 2 All ER 167, [1958] 1 WLR 645 (CA, Eng); *Parkinson v Parkinson* (1959) Times, 14 April (DC, Eng); *Gallagher v Gallagher* [1965] 2 All ER 967, [1965] 1 WLR 1110 (CA, Eng); *Nutley v Nutley* [1970] 1 All ER 410, [1970] 1 WLR 217 (CA, Eng).

183 *Lane v Lane* [1951] P 284 at 286, affd [1952] P 34, [1952] 1 All ER 223 (CA, Eng); *Day v Day* [1957] P 202 at 210-211, [1957] 1 All ER 848 at 853. As to desertion as a fact proving irretrievable breakdown on which a petition for divorce may be presented, see MCO, s 11A; *Perry v Perry* [1952] P 203 at 210-211, [1952] 1 All ER 1076 (CA, Eng) at 1079.

184 *Williams v Williams* [1943] 2 All ER 746 (CA, Eng) at 752, per du Parcq LJ; *Perry v Perry* [1952] P 203 at 215, [1952] 1 All ER 1076 (CA, Eng) at 1082, per Sir Raymond Evershed MR; *Williams v Williams* (1864) 3 Sw & Tr 547 at 548, to

In view of the large variety of circumstances and individual 'lifestyles', the court has discouraged attempts at defining desertion, there being no general principle applicable to all cases.¹⁸⁵

Desertion is not the withdrawal from a place but from a state of things.¹⁸⁶ What the law seeks to enforce is the recognition and discharge of the common obligations of the married state.¹⁸⁷ The state of things may usually be termed, for short, 'the home'.¹⁸⁸ There can be desertion without previous cohabitation by the parties, or without the marriage having been consummated.¹⁸⁹ The person who actually withdraws from cohabitation is not necessarily the deserting party.¹⁹⁰ The fact that a husband makes an allowance to a wife whom he has abandoned is no answer to a charge of desertion.¹⁹¹ Consensual divorce is available in certain circumstances, that is, by petition or by joint application.¹⁹² However, consent to separation is not the same as consent to divorce and, if there is consent to separation, there is no desertion.

neglect opportunities of consorting with wife; not necessarily desertion; *Thomas v Thomas* (1923) 39 TLR 520 at 521, 'wilful breaking off of conjugal relations', affd [1924] P 194 (CA, Eng).

185 *Weatherley v Weatherley* [1947] AC 628 at 631, [1947] 1 All ER 563 (HL) at 564, per Lord Jowitt LC; *Perry v Perry* [1952] P 203 at 215, [1952] 1 All ER 1076 (CA, Eng) at 1082; *Lane v Lane* [1951] P 284 at 286, affd [1952] P 34, [1952] 1 All ER 223 (CA, Eng); *Cohen v Cohen* [1940] AC 631 at 645-646, [1940] 2 All ER 331 (HL) at 339; *Herod v Herod* [1939] P 11 at 21, [1938] 3 All ER 722 at 730; *Jackson v Jackson* [1924] P 19 at 23; *Pulford v Pulford* [1923] P 18 at 22, 'definitions are dangerous'; *Frowd v Frowd* [1904] P 177 at 179; *Williams v Williams* (1864) 3 Sw & Tr 547; *Graves v Graves* (1864) 3 Sw & Tr 350 at 353; *Thompson v Thompson* (1858) 1 Sw & Tr 231 at 233.

186 *Pulford v Pulford* [1923] P 18 at 21, per Lord Merrivale P, no cohabitation after marriage; there was nevertheless desertion; *Pardy v Pardy* [1939] P 288 at 302, [1939] 3 All ER 779 (CA, Eng) at 782, per Sir Wilfred Greene MR; *Lane v Lane* [1951] P 284 at 286, affd [1952] P 34, [1952] 1 All ER 223n (CA, Eng).

187 *Pulford v Pulford* [1923] P 18 at 22.

188 *Lane v Lane* [1951] P 284 at 286, per Lord Merriman P; affd [1952] P 34, [1952] 1 All ER 223 (CA, Eng).

189 *Timoney v Timoney* [1926] NI 75 at 79; *De Laubenque v De Laubenque* [1899] P 42; *Lee Shires v Lee Shires* (1910) 54 Sol Jo 874; *Shaw v Shaw* [1939] P 269, [1939] 2 All ER 381. See also *Bradshaw v Bradshaw* [1897] P 24 at 26-27; *Buckmaster v Buckmaster* (1869) LR 1 P & D 713; *Fassbender v Fassbender* [1938] 3 All ER 389, restitution of conjugal rights.

190 *Sickert v Sickert* [1899] P 278 at 284; *Buchler v Buchler* [1947] P 25 at 45, [1947] 1 All ER 319 (CA, Eng) at 326.

191 *MacDonald v MacDonald* (1859) 4 Sw & Tr 242.

192 MCO, ss 11A and 11B.

Duration of desertion

[3-39]

Desertion is a course of conduct¹⁹³ that exists independently of its duration.¹⁹⁴ However, as a fact on which a petition for divorce may be founded, it must exist for a continuous period of at least one year immediately preceding the presentation of the petition or, where the offence appears as a cross-charge, of the answer.¹⁹⁵ The period must be 'a continuous period' and cannot be satisfied by aggregating with a period of less than one year immediately preceding the presentation of the petition, an earlier, but detached, period of whatever duration.¹⁹⁶

Desertion differs from the other four 'facts' in s 11A(2) of the MCO in that the cause of action of desertion is not complete, but inchoate, until the suit is constituted.¹⁹⁷ Desertion is therefore a continuing matter.¹⁹⁸

Continuous period

[3-40]

The desertion must be for a continuous period of at least one year immediately preceding the presentation of the petition.¹⁹⁹ In completing the one-year period, the day of separation is excluded from the computation.²⁰⁰

Mutual desertion

[3-41]

Whilst it has been said that it is possible in law for a husband and wife to

193 *Thomas v Thomas* [1924] P 194 (CA, Eng) at 199; *W v W (No 2)* [1954] P 486 at 502, [1954] 2 All ER (CA, Eng) at 832.

194 *Jordan v Jordan* [1939] P 239 at 251, [1939] 2 All ER 29 at 36; *Beeken v Beeken* [1948] P 302 (CA, Eng) at 308; *Thomas v Thomas* [1924] P 194 (CA, Eng) at 199.

195 *Faulkner v Faulkner* [1941] 2 All ER 748.

196 *Jordan v Jordan* [1939] P 239 at 248, 249, [1939] 2 All ER 29 at 33-34, citing a decision of Hodson J in *Cohen v Cohen* [1939] 2 All ER 39n; revised, without affecting this point [1940] AC 631, [1940] 2 All ER 331 (HL). See also *Perry v Perry* [1952] P 203 at 211-212, [1952] 1 All ER 1076 (CA, Eng) at 1079, per Sir Raymond Evershed MR; *W v W (No 2)* [1954] P 486 at 502, [1954] 2 All ER 829 (CA, Eng) at 832-833, per Sir Raymond Evershed MR. However, see *Green v Green* [1946] P 112, [1946] 1 All ER 308, where, in a consideration of the wording of the UK Matrimonial Causes Act 1937, s 6(3) (repealed), a period of desertion of less than three years, that is, the relevant period of desertion in the UK Matrimonial Causes Act 1973, before the making of a non-cohabitation clause, inadvertently inserted in a maintenance order made by justices, was aggregated with a period of desertion of less than three years after the deletion of the non-cohabitation clause so as to provide a period of three years' desertion immediately preceding the presentation of the petition. See also *Bush v Bush* [1939] P 142, [1938] 4 All ER 598; *Lett v Lett* (1907) 23 TLR 569; *Churner v Churner* (1912) 106 LT 769.

197 *Perry v Perry* [1952] P 203 at 211, [1952] 1 All ER 1076 (CA, Eng) at 1079, per Sir Raymond Evershed MR, and at 213, 228, 232, 1081, 1089, 1092.

198 *Hartnell v Hartnell* [1951] WN 555 (DC, Eng) at 556; *Teall v Teall* [1938] P 250 at 256, [1938] 3 All ER 349 at 352.

199 MCO, s 11A(2)(e).

200 *Warr v Warr* [1975] 1 All ER 85, [1975] 2 WLR 62.

have deserted each other,²⁰¹ the view that two parties in respect of the same parting may each be guilty of desertion at the same time has been doubted.²⁰²

Elements of desertion

[3-42]

For desertion to exist, there must be both the *factum* (or physical separation), and the *animus deserendi* (or the intention to desert) in the sense of bringing cohabitation to an end.²⁰³

However, the necessary ingredients of desertion must continue throughout the statutory period.²⁰⁴ A de facto separation may take place without there being an *animus deserendi*, as where there is a separation by mutual consent or a compulsory separation.²⁰⁵ But if that *animus supervenes*, desertion will begin from that moment, whether or not that change of mind is communicated.²⁰⁶

201 *Hosegood v Hosegood* (1950) 66 (pt 1) TLR 735 (CA, Eng) at 740, per Denning LJ, criticising *Walter v Walter* (1949) 65 TLR 680; *Beigan v Beigan* [1956] P 313 at 320, [1956] 2 All ER 630 (CA, Eng) at 632, per Denning LJ; *Wevill v Wevill* (1962) 106 Sol Jo 155; *Price v Price* [1968] 3 All ER 543, [1968] 1 WLR 1735, overruled but not on this point which was specifically not discussed; see [1970] 2 All ER 497, [1970] 1 WLR 993 (CA, Eng).

202 *Simpson v Simpson* [1951] P 320 at 330, [1951] 1 All ER 955 (DC, Eng) at 960; see also *Spence v Spence* [1939] 1 All ER 52 at 58 and disapproved *Lang v Lang* (1953) Times, 7 July (CA, Eng); and *Price v Price* [1970] 2 All ER 497 at 498, [1970] 1 WLR 993 (CA, Eng) at 994, per Davies LJ, and at 501 and at 997 per Sachs LJ.

203 *Sickert v Sickert* [1899] P 278 at 282; *Pardy v Pardy* [1939] P 288 at 302, [1939] 3 All ER 779 (CA, Eng) at 782, per Sir Wilfred Greene MR; *Earnshaw v Earnshaw* [1939] 2 All ER 698 (CA, Eng) at 699; *Spence v Spence* [1939] 1 All ER 52 at 58; *Buchler v Buchler* [1947] P 25 at 29, [1947] 1 All ER 319 (CA, Eng) at 320; *Edwards v Edwards* [1948] P 268 at 269, [1948] 1 All ER 157 at 158; *Hopes v Hopes* [1949] P 227, [1948] 2 All ER 920 (CA, Eng); *Perry v Perry* [1952] P 203 at 212, [1952] 1 All ER 1076 (CA, Eng) at 1080; *Lang v Lang* [1955] AC 402 at 417, [1954] 3 All ER 571 (PC) at 573; *Price v Price* [1970] 2 All ER 497, [1970] 1 WLR 993 (CA, Eng), animus but no factum. See also *French-Brewster v French-Brewster* (1889) 62 LT 609, question of animus was left to the jury; *Davis v Davis* (1920) 124 LT 795, soldier's visits on leave to wife; adultery with another woman resumed immediately after last leave; desertion as from resumption. It has been said desertion is a question of fact (*R v Davidson etc, Durham JJ* (1889) 5 TLR 199 (DC, Eng) at 200), where it was also stated that formal declaration of an intention to desert is not necessary (*Re Duckworth* (1889) 5 TLR 608 at 609; *R v Leresche* [1891] 2 QB 418 (CA, Eng) at 420; *Balcombe v Balcombe* [1908] P 176 at 180), and so is the continuance of desertion: *Pratt v Pratt* [1939] AC 417 at 427, [1939] 3 All ER 437 (HL) at 442.

204 *Crowther v Crowther* [1951] AC 723 at 735, [1951] 1 All ER 1131 at 1132 (HL).

205 *Beeken v Beeken* [1948] P 302 (CA, Eng).

206 *Nutley v Nutley* [1970] 1 All ER 410, [1970] 1 WLR 217 (CA, Eng), unless there is consent to the separation by the other spouse; *Pardy v Pardy* [1939] P 288 at 302, [1939] 3 All ER 779 (CA, Eng) at 782; *Williams v Williams* [1939] P 365 at 368, [1939] 3 All ER 825 (CA, Eng) at 827; overruled on another point in *Crowther v Crowther* [1951] AC 723, [1951] 1 All ER 1131 (HL); *Gatehouse v Gatehouse* (1867) LR 1 P & D 331; *Stickland v Stickland* (1876) 35 LT 767; *Mahoney v M'Carthy* [1892] P 21 at 25-26, it is a matter of evidence; *Davis v Davis* (1920) 124 LT 795; *Beeken v Beeken* [1948] P 302 (CA, Eng); *Gallagher v Gallagher* [1965]

On the other hand, there may be *animus deserendi* without separation,²⁰⁷ as where the parties live not as two households under the same roof, but as one household.²⁰⁸

The *animus* may be evidenced by the fact of presentation of a petition for divorce.²⁰⁹ Where the *factum* and *animus* both exist, an offer in good faith to resume cohabitation may be made by the deserting party, for desertion is a continuing offence and refusal of such an offer may turn the tables and convert the hitherto deserted spouse into the deserter.²¹⁰ Where one spouse indicates to the other that if he or she leaves there will be no

2 All ER 967, [1965] 1 WLR 1110 (CA, Eng), withdrawal of consent to separation must be genuine. For consent fraudulently obtained, and is consequently of no effect, see *Harrison v Harrison* (1910) 54 Sol Jo 619; *Crabb v Crabb* (1868) LR 1 P & D 601 at 604; *Lepre v Lepre* [1963] 2 All ER 49 at 58.

207 *Hopes v Hopes* [1949] P 227 at 231, 235-238, [1948] 2 All ER 920 (CA, Eng) at 922 and 924-926; *Le Brocq v Le Brocq* [1964] 3 All ER 464, [1964] 1 WLR 1085 (CA, Eng).

208 *Jackson v Jackson* [1924] P 19 at 25-26; *Stevens v Stevens* (1929) 93 JP 120; *Littlewood v Littlewood* [1943] P 11, [1942] 2 All ER 515; *Wanbon v Wanbon* [1946] 2 All ER 366, desertion nevertheless found; doubted in *Hopes v Hopes* [1949] P 227, [1948] 1 All ER 920 (CA, Eng); *Angel v Angel* [1946] 2 All ER 635; *Everitt v Everitt* [1949] P 374, [1949] 1 All ER 908 (CA, Eng); *Bull v Bull* [1953] P 224, [1953] 2 All ER 601 (CA, Eng), lived under one roof despite two short periods of actual desertion. See also *Weatherley v Weatherley* [1947] AC 628, [1947] 1 All ER 563 (HL); and *Powell v Powell* [1922] P 278 at 279, neglect or contempt insufficient.

As for desertion where there was 'one household', see: *Powell v Powell* [1922] P 278; *Diver v Diver* (unreported); referred to in [1924] P at 28, [1940] P at 53-54, [1943] P at 42, [1949] P at 232; *Smith v Smith* [1940] P 49, [1939] 4 All ER 533; *Wilkes v Wilkes* [1943] P 41, [1943] 1 All ER 433; *Shilston v Shilston* (1945) 174 LT 105; *Wanbon v Wanbon* [1946] 2 All ER 366, desertion found even where there was 'only one household'; *Angel v Angel* [1946] 2 All ER 635, principles discussed; *Hopes v Hopes* [1949] P 227, [1948] 2 All ER 920 (CA, Eng), where *Wanbon v Wanbon*, supra, was doubted; and *Evans v Evans* [1948] 1 KB 175, [1947] 2 All ER 656 (DC, Eng), a decision on the meaning of 'resides with' in the UK Summary Jurisdiction (Separation and Maintenance) Act 1925 s 1(4) (repealed), was disapproved by Denning LJ. See also *Naylor v Naylor* [1962] P 253, [1961] 2 All ER 129 (DC, Eng); *Evans v Evans*, above, was, however, followed in *Wheatley v Wheatley* [1950] 1 KB 39, [1949] 2 All ER 428 (DC, Eng); in *Curtin v Curtin* [1952] 2 QB 552, [1952] 1 All ER 1348 (DC, Eng); and in *Hewitt v Hewitt* [1952] 2 QB 627, [1952] 2 All ER 250 (DC, Eng), *Santos v Santos* [1972] Fam 247 at 262, [1972] 2 All ER 246 (CA, Eng) at 255.

In Hong Kong, MCO, ss 11C(1) and 15A(6) 'conclusively' resolved the conflict against *Evans v Evans*, above, in favour of the view taken in *Smith v Smith*, above, and *Hopes v Hopes*, above. See *Mouncer v Mouncer* [1972] 1 All ER 289, [1972] 1 WLR 321. See also *Hanson v Hanson* (1954) Times, 10 March (CA, Eng), two households, but no desertion on the facts; and *Fishburn v Fishburn* [1955] 1 All ER 230 at 233, following *Hopes v Hopes*, above. See also *Thomas v Thomas* [1948] 2 KB 294, [1948] 2 All ER 98 (DC, Eng); *Walker v Walker* [1942] 2 All ER 138 (CA, Eng); *Baker v Baker* [1952] 2 All ER 248 (CA, Eng); *Weatherley v Weatherley* [1947] AC 628, [1947] 1 All ER 563 (HL), refusal of sexual intercourse by itself not desertion; and *Jones v Jones* [1952] 2 TLR 225 (CA, Eng) at 226.

209 *Gerrard v Gerrard* (1958) Times, 18 November; *Pursey v Pursey* (1959) Times, 9 April.

210 *Thomas v Thomas* [1946] 1 All ER 170.

question of having that spouse back, and that other spouse subsequently leaves, the leaving amounts to desertion if he or she has the necessary *animus*.²¹¹ It follows that the mere fact that one spouse is glad to see the other go makes no difference to the quality of the act of leaving.²¹²

It has been held that once a spouse leaves, a prompt and decisive determination evinced by the other spouse that he or she should not return may put the former in the same position in law as if he or she has rejected an offer of reconciliation of the other spouse. But this proposition has been doubted in *Beigan v Beigan* [1956] P 313, [1956] 2 All ER 630 (CA, Eng).²¹³ The result in such a case is that the spouse who shows the determination to have nothing further to do with the other, cannot maintain a petition for divorce on the ground of desertion. Thus, if the deserted party will not have the deserter back, a stalemate may be reached in which neither party is entitled to a decree of divorce under the MCO s 11A(2)(e), ie it has not been shown that that the respondent has deserted the petitioner for a continuous period of at least one year immediately preceding the presentation of the petition.

Desertion burden and standard of proof

[3-43]

The burden is on the petitioner to show that desertion without cause subsisted throughout the statutory period save where the deserting spouse was incapable of continuing the necessary intention.²¹⁴

The deserting spouse must be shown to have persisted in the intention to desert throughout the whole of the one-year period.²¹⁵ It has been said that a petitioner should be able to say honestly that he or she was all along willing to fulfil the duties of the marriage, and that the desertion was against his or her will, and continued throughout the statutory period without his or her consent.²¹⁶

211 *Beigan v Beigan* [1956] P 313, [1956] 2 All ER 630 (CA, Eng).

212 *Pizey v Pizey and Stephenson* [1961] P 101 at 108, [1961] 2 All ER 658 (CA, Eng) at 662, per Willmer J.

213 However, see *Fishburn v Fishburn* [1955] P 29 at 41, [1955] 1 All ER 230 at 236, per Willmer J; *Barnett v Barnett* [1955] P 21, [1954] 3 All ER 689.

214 *Pratt v Pratt* [1939] AC 417 at 420, [1939] 3 All ER 437 (HL) at 438, per Lord Macmillan; *Dunn v Dunn* [1949] P 98 at 103, [1948] 2 All ER 822 (CA, Eng) at 823, per Denning LJ; *Arding v Arding* [1954] 2 All ER 671, [1954] 1 WLR 944; *Perry v Perry* [1963] 3 All ER 766, [1964] 1 WLR 91. See also *Yeatman v Yeatman* (1868) LR 1 P & D 489 at 491-494; *Oldroyd v Oldroyd* [1896] P 175 at 182; *Beer v Beer* (1906) 22 TLR 338 at 340; *Greene v Greene* [1916] P 188 at 190; *Williams v Williams* [1943] 2 All ER 746 (CA, Eng) at 751-752; *Glenister v Glenister* [1945] P 30 at 37, [1945] 1 All ER 513 at 518; *Emanuel v Emanuel* [1946] P 115 at 188, [1945] 2 All ER 494 at 496; *Beer v Beer (Neilson cited)* [1948] P 10 at 14, [1947] 2 All ER 711 at 713; *Kafton v Kafton* [1948] 1 All ER 435 (CA, Eng) at 438.

215 *Pratt v Pratt* [1939] AC 417 at 420, [1939] 3 All ER 437 (HL) at 438.

216 *Pratt v Pratt* [1939] AC 417 at 421-422, [1939] 3 All ER 437 (HL) at 438-439, per Lord Macmillan, citing with approval *Macaskill v Macaskill* [1939] SC 187 at 193; *Herod v Herod* [1939] P 11 at 19-20, 32-33, [1938] 3 All ER 722 at 728-729, 737-738. See also *Mackenzie v Mackenzie* [1895] AC 384 (HL) at 389, per Lord Herschell LC; *Cohen v Cohen* [1940] AC 631 at 638, [1940] 2 All ER 331 at

In practice, however, it is accepted that once desertion has been started by the fault of the deserting spouse, it is no longer necessary for the deserted spouse to show that during the one year preceding the petition he or she actually wanted the other spouse to come back.²¹⁷

This is because the intention to desert is presumed to continue.²¹⁸ That presumption may, however, be rebutted. Where one spouse has committed the matrimonial offence of desertion, the desertion does not necessarily come to an end by the presentation and service upon the deserting spouse of a petition by the other spouse asking for dissolution of the marriage, or by the making of a decree *nisi* of nullity or dissolution of marriage. But it is a question of fact in each case whether the desertion has been terminated.²¹⁹

If, on the facts, it appears that a petitioner has made it plain to the deserting spouse that he or she will not be received by the petitioner, or if the petitioner has repelled all the advances made towards a resumption of married life, the petitioner cannot complain that there has been

334-335 (HL), per Lord Romer; *Crowther v Crowther* [1951] AC 723 at 731, 734-735, [1951] 1 All ER 1131 (HL) at 1133, 1135-1136; *Perry v Perry* [1952] P 203 at 211, 213, 228, 232, [1952] 1 All ER 1076 (CA, Eng) at 1079, 1081, 1089 and 1092; *Harriman v Harriman* [1909] P 123 (CA, Eng) at 148, per Buckley LJ, one spouse may be thankful that the other spouse has gone, but that other spouse may nevertheless be in desertion; see the comment on that case in *Spence v Spence* [1939] 1 All ER 52 at 57-58 and *Kinnane v Kinnane* [1954] P 41 at 46, [1953] 2 All ER 1144 at 1147. See also *French-Brewster v French-Brewster* (1889) 62 LT 609; *Wallace v Wallace* [1952] SC 197 at 169; *Crowther v Crowther*, supra at 734 and 1135; and *Cairns v Cairns* [1940] NI 183, petitioner must be prepared to take respondent back, but need not have emotional desire to do so.

217 *Beigan v Beigan* [1956] P 313 at 319, [1956] 2 All ER 630 (CA, Eng) at 632; *Bevan v Bevan* [1955] 3 All ER 332 at 335, [1955] 1 WLR 1142 at 1147; *Church v Church* [1952] P 313, [1952] 2 All ER 441, where Willmer J followed *Sifton v Sifton* [1939] P 221 at 226, [1939] 1 All ER 109 at 113. See *Crowther v Crowther* [1951] AC 723 at 731, 734-735, [1951] 1 All ER 1131 (HL) at 1133, 1135-1136; *Pratt v Pratt* [1939] AC 417 at 421, [1939] 3 All ER 437 (HL) at 438-439, in some cases it would be a mockery for the innocent spouse to pretend that there was a desire for the resumption of married life; *Lane v Lane* [1951] P 284 at 288 affd [1952] P 34, [1952] 1 All ER 223 (CA, Eng) constructive desertion — expelled wife must prove husband means, and continues at all material times to mean, what he says; otherwise, she fails; *Dunn v Dunn* [1949] P 98 at 103, [1948] 2 All ER 822 (CA, Eng) at 823; *Warburton v Warburton* (1965) 109 Sol Jo 290 (CA, Eng).

218 *Bowron v Bowron* [1925] P 187 (CA, Eng) at 195; *Sifton v Sifton* [1939] P 221 at 226, [1939] 1 All ER 109 at 111; *Williams v Williams* [1939] P 365 at 369, [1939] 3 All ER 825 (CA, Eng) at 828, overruled on another point in *Crowther v Crowther* [1951] AC 723, [1951] 1 All ER 1131 (HL).

219 *W v W (No 2)* [1954] P 486, [1954] 2 All ER 829 (CA, Eng), applying the observations of Lord Romer in *Cohen v Cohen* [1940] AC 631 at 635, [1940] 2 All ER 331 (HL) at 332-333, overruling *Stevenson v Stevenson* [1911] P 191 (CA, Eng), where the question was posed. But see also *Cohen v Cohen*, above, at 645 and 339, where Lord Romer points out that there may be cases where the petition contains gross charges against the respondent so reckless and so unfounded that the respondent cannot reasonably be expected to make any attempt to bring his desertion to an end.

persistence without cause in the desertion.²²⁰ The mere act of one spouse leaving the matrimonial home will in general make it easy to infer that the departing spouse intended to bring the matrimonial consortium to an end.²²¹ The court must be satisfied on the evidence that desertion is proved.²²² If the court is satisfied on the evidence of any such fact,²²³ then unless it is satisfied on all the evidence that the marriage has not broken down irretrievably, it shall²²⁴ grant a decree *nisi* of divorce. This appears to mean that desertion like other facts constituting irretrievable breakdown of marriage must be proved on the balance of probabilities, the degree of probability depending upon the subject matter.²²⁵

Corroboration

[3-44]

Corroboration is not required as an absolute rule of law.²²⁶

There is no rule which prevents a court from finding desertion has been proved in the absence of corroboration. If the court requires corroboration in an undefended suit, it will usually relate to the circumstances and terms of the separation and not to the duration of the desertion.²²⁷ On a petition for divorce on the same facts or substantially the same facts as those on which a decree of judicial separation or an order under the Separation and Maintenance Orders Ordinance (Cap 16) ('SMOO') has been granted, the court may treat the decree or order as sufficient proof of desertion or other grounds on which it was granted. But it may not grant a decree of divorce without receiving evidence from the petitioner.²²⁸

Constructive desertion

[3-45]

Desertion is not to be tested merely by ascertaining which party left the

220 *Pratt v Pratt* [1939] AC 417 at 420, [1939] 3 All ER 437 (HL) at 438; *Cohen v Cohen* [1940] AC 631 at 638-639, [1940] 2 All ER 331 (HL) at 335.

221 *Buchler v Buchler* [1947] P 25 at 30, [1947] 1 All ER 319 (CA, Eng) at 320, per Lord Greene, MR.

222 MCO, s 15(2).

223 As is mentioned in MCO, s 11A(2) or 11B(2).

224 Subject to MCO, s 15(3).

225 *Blyth v Blyth* [1966] AC 643 at 669, 673-674, [1966] 1 All ER 524 (HL) at 536-539.

226 *Marjoram v Marjoram* [1955] 2 All ER 1 at 7, [1955] 1 WLR 520 (DC, Eng) at 524; *Stone v Stone* [1949] P 165 (CA, Eng) at 168; *Tilley v Tilley* [1949] P 240 at 252-261, [1948] 2 All ER 1113 (CA, Eng) at 1117-1124, no one can corroborate himself; *DB v WB* [1935] P 80 at 82-85; *Joseph v Joseph* [1915] P 122 at 124; *Judd v Judd* [1907] P 241 at 243; *Robinson v Robinson and Lane* (1859) 1 Sw & Tr 362 at 392; *Williams v Williams* (1932) 147 LT 219 at 220-221; *Alli v Alli* [1965] 3 All ER 480 (DC, Eng); *Forster v Forster* [1910] 54 Sol Jo 403 goes too far by saying there must be corroboration; *Lawson v Lawson* [1955] 1 All ER 341, [1955] 1 WLR 200 (CA, Eng).

227 *Barron v Barron* [1963] 1 All ER 215, [1963] 1 WLR 57; *Forte v Forte* (1966) 110 Sol Jo 52.

228 MCO, s 13(2).

matrimonial home first.²²⁹ Thus, for example, if a husband without just cause or excuse persists in doing things which he knows his wife will probably not tolerate, and which no ordinary woman would tolerate, and then she leaves, the husband will have deserted her whatever his desire or intention may have been.²³⁰

There is no substantial difference between the case of a man who intends to cease cohabitation and leave his wife, and the case of a man who, with the same intention, compels his wife by his conduct to leave him.²³¹ The House of Lords has said that it may have to consider, should the point come before it, whether there is sufficient warrant for the doctrine.²³² However, it is clear that conduct by the respondent amounting to constructive desertion will, in the nature of things, constitute behaviour which is such that the petitioner cannot reasonably be expected to live with the respondent in any event. If such an allegation is made, it obviates the need to wait for the period of one year that is necessary in the case of desertion.

It is as necessary in cases of constructive desertion to prove both the *factum* and the *animus* on the part of the spouse charged with the desertion, as it is in cases of actual desertion. The practical difference between the two types of desertion lies in the circumstances which will constitute such proof. For, while the intention to bring the matrimonial consortium to an end exists, 'He did not act with the intention of driving

229 *Sickert v Sickert* [1899] P 278 at 284; *Bowron v Bowron* [1925] P 187 (CA, Eng); *Spence v Spence* [1939] 1 All ER 52 at 57; *Buchler v Buchler* [1947] P 25, [1947] 1 All ER 319 (CA, Eng); *Simpson v Simpson* [1951] P 320 at 331, [1951] 1 All ER 955 at 960-961; *Lang v Lang* [1955] AC 402 at 417, [1954] 3 All ER 571 (PC) at 573. If one spouse is forced by the conduct of the other to leave home, it may be that the spouse responsible for the driving out is guilty of desertion: *Sullivan v Sullivan* [1970] 2 All ER 168, [1970] 1 WLR 1008 (CA, Eng), pregnancy by another man at time of marriage: not expulsive conduct; *Graves v Graves* (1864) 3 Sw & Tr 350; *Koch v Koch* [1899] P 221, husband refused to discharge servant with whom he had committed adultery — wife left; *Pulford v Pulford* [1923] P 18 at 21; *Jones v Jones* [1952] 2 TLR 225 (CA, Eng), wife instigated justices into ordering husband to leave matrimonial home — wife held to be in desertion from that point in time; *Pratt v Pratt* (1962) 106 Sol Jo 876 (CA, Eng), married life made impossible.

230 *Gollins v Gollins* [1964] AC 644 at 666, [1963] 2 All ER 966 (HL) at 974, per Lord Reid; *Rothery v Rothery* (1966) Times, 30 March (DC, Eng).

231 *Sickert v Sickert* [1899] P 278 at 282; *Charter v Charter* (1901) 84 LT 272 at 273; *Harriman v Harriman* [1909] P 123 at 135; *Thomas v Thomas* [1924] P 194 (CA, Eng) at 199-203; *Pike v Pike* [1954] P 81n at 86, [1953] 1 All ER 232 at 233 (CA, Eng). This is the doctrine of constructive desertion; *Pike v Pike* [1954] P 81n at 86-88, [1953] 1 All ER 232 (CA, Eng) at 233-235; *Kashick v Kashick* (1951) 116 JP 6 (DC); *Simpson v Simpson* [1951] P 320 at 326, [1951] 1 All ER 955 at 957; *Lawrance v Lawrance* [1950] P 84 (DC) at 86; *Hosegood v Hosegood* (1950) 66 (pt 1) TLR 735 (CA, Eng) at 233-235; *Winnan v Winnan* [1949] P 174 at 179-181, [1948] 2 All ER 862 (CA, Eng) at 736-738; *Buchler v Buchler* [1947] P 25 at 29, 48, [1947] 1 All ER 319 (CA, Eng) at 864-865; *Spence v Spence* [1939] 1 All ER 52 at 58; *Herod v Herod* [1939] P 11 at 21-23, [1938] 3 All ER 722 at 729-731; *Teall v Teall* [1938] P 250 at 256, [1938] 3 All ER 349 at 352; *Bowron v Bowron* [1925] P 187 (CA, Eng) at 191.

232 See *Weatherley v Weatherley* [1947] AC 628 at 632, [1947] 1 All ER 563 (HL) at 564-565, per Lord Jowitt LC.

her out, but he acted with the knowledge that that was what would probably happen.²³³ In both cases, in actual desertion there is an abandonment, whereas in constructive desertion there is expulsion by words or by other conduct.²³⁴

Constructive desertion burden and standard of proof

[3-46]

In a case of constructive desertion, the onus of proving that the intention to desert continues may be much lighter than in a case of mere withdrawal from cohabitation.²³⁵ A mere wish or intention that the other spouse should leave is insufficient by itself to constitute constructive desertion.²³⁶ The wish or intention must be accompanied by conduct which is of such a grave and weighty character as to make cohabitation virtually impossible and which the court can properly regard as equivalent to expulsion in fact.²³⁷

Authorities on constructive desertion

[3-47]

As to case law and examples of conduct in constructive desertion generally, the list is a long one.²³⁸

233 *Gollins v Gollins* [1964] AC 644 at 666, [1963] 2 All ER 966 (HL) at 974, per Lord Reid.

234 *Buchler v Buchler* [1947] P 25 at 29-30, 45, [1947] 1 All ER 319 (CA, Eng) at 325-326. See also the 'simple case' of constructive desertion referred to in *Pike v Pike* [1954] P 81n at 87, [1953] 1 All ER 232 (CA, Eng) at 235, per Hodson LJ, and see at 86 and at 235-236, per Denning LJ. See also *Hui Shiu-wing v Cheung Yuk-lin* [1968] HKLR 501.

235 *Herod v Herod* [1939] P 11 at 22, [1938] 3 All ER 722 at 730.

236 *Buchler v Buchler* [1947] P 25 at 45, [1947] 1 All ER 319 (CA, Eng) at 325, per Lord Greene MR; *Charter v Charter* (1901) 84 LT 272. 'Go where you like. Do what you like'; wife left and refused to return: but husband not in desertion; *Lane v Lane* [1952] P 34 at 39, [1952] 1 All ER 223 (CA, Eng), per Jenkins LJ dissenting; *Partridge v Partridge* (1957) Times, 13 December, wife knew husband who was unpleasant with drink did not want her to go, although he told her to.

237 *Buchler v Buchler* [1947] P 25 at 34, 43-45, [1947] 1 All ER 319 (CA, Eng) at 322, 324-325; *Kaslefsky v Kaslefsky* [1951] P 38 at 41, [1950] 2 All ER 398 (CA, Eng) at 399, per Buckley LJ; *Young v Young* [1964] P 152, [1962] 3 All ER 120 (DC, Eng).

238 *Rothery v Rothery* (1966) Times, 30 March (DC, Eng), wife pregnant by another man; agreed with husband to give up child on its birth so that marriage might continue; she failed to do so; constructive desertion; *Saunders v Saunders* [1965] P 499 at 507, [1965] 1 All ER 838 (DC, Eng) at 843; *Edwards v Edwards (Moore intervening)* (1965) 109 Sol Jo 175; *Hall v Hall* [1962] 3 All ER 518, [1962] 1 WLR 1246 (CA, Eng); *Pratt v Pratt* (1962) 106 Sol Jo 876 (CA, Eng); *Kemp v Kemp* [1961] 2 All ER 764, [1961] 1 WLR 1030 (DC, Eng); *Pizey v Pizey and Stephenson* [1961] P 101, [1961] 2 All ER 658 (CA, Eng); *McMillan v McMillan* 1961 SLT 429; *Cox v Cox* [1958] 1 All ER 569 at 572-573, [1958] 1 WLR 340 at 344-346; *Patching v Patching* (1958) Times, 25 April (DC, Eng); *Roe v Roe* [1956] 3 All ER 478 at 483, [1956] 1 WLR 1380 (DC, Eng) at 1385-1386; *Pike v Pike* [1954] P 81n at 82, [1953] 1 All ER 232 (CA, Eng) at 233; *Timmins v Timmins* [1953] 2 All ER 187 at 191, [1953] 1 WLR 757 (CA, Eng) at 761-762, per Denning LJ; *Lane v Lane*

Fact of separation

[3-48]

When the fact of separation is proved, the intent to bring the home to an end can be inferred, amongst other things, from words so plain, that the spouse using them may be taken to mean what he says.²³⁹ If there is no background of ill-treatment, it may well be more difficult to prove that mere words of expulsion were intended to be final, conclusive and effective, than if there is such a background.²⁴⁰

Conduct

[3-49]

Conduct that might fall short of a MCO s 11A 'fact' constituting irretrievable breakdown of marriage, might be sufficient to justify the other party leaving.²⁴¹ But it is essential to examine the actual facts in order to see whether the conduct of the spouse who is to blame can fairly and clearly be said to have crossed the line which divides blameworthy conduct causing unhappiness to the other spouse from conduct equivalent

[1952] P 34, [1952] 1 All ER 223 (CA, Eng); *Chilton v Chilton* [1952] P 196, [1952] 1 All ER 1322 (DC, Eng); *Jones v Jones* [1952] 2 TLR 225 (CA, Eng); *Price v Price* [1951] 1 All ER 877; affd [1951] P 413, [1951] 2 All ER 580 (CA, Eng); *Allen v Allen* [1951] 1 All ER 724 (CA, Eng); *Hosegood v Hosegood* (1950) 66 (pt 1) TLR 735 (CA, Eng).

See also *Lawrance v Lawrance* [1950] P 84 (DC), husband's refusal of sexual intercourse; *Edwards v Edwards* [1950] P 8, [1949] 2 All ER 145 (CA, Eng); *Winnan v Winnan* [1949] P 174, [1948] 2 All ER 862 (CA, Eng), wife preferred cats to husband; husband left; wife in desertion; but see comment on this case in *Bartholomew v Bartholomew* [1952] 2 All ER 1035 (CA, Eng), dirty wife; no evidence she wished to bring consortium to an end; husband left; wife not in desertion; *Kaslefsky v Kaslefsky* [1951] P 38, [1950] 2 All ER 398 (CA, Eng), cruelty; *Holborn v Holborn* [1947] 1 All ER 32 at 33, unreasonable and inconsiderate sexual demands; *Buchler v Buchler* [1947] P 25 at 30, 41-42, 45, [1947] 1 All ER 319 (CA, Eng) at 320, 323-325, occasional angry remarks that wife could clear out and live with her mother if she did not like the very close friendship of husband with his bailiff; not sufficiently grave and weighty; even if the *animus* existed there was no *factum* of expulsion; *Leng v Leng* [1946] 2 All ER 590, neurotic condition of husband; nothing else; wife left; no desertion by husband; *Fletcher v Fletcher* [1945] 1 All ER 582, husband's membership of religious community and refusal of sexual intercourse; wife refused to live with him in community; husband in desertion; *Glenister v Glenister* [1945] P 30, [1945] 1 All ER 513; *Teall v Teall* [1938] P 250 at 256, [1938] 3 All ER 349 at 352, mere discovery of past adultery insufficient; *Pizzala v Pizzala* (1896) 12 TLR 451, husband adhered to mistress; wife left; husband in desertion; *Haviland v Haviland* (1863) 3 Sw & Tr 114, 'Go to your mistress if you like and when you are tired of her come back to me', not necessarily consent; *Dickinson v Dickinson* (1889) 62 LT 330, husband brought mistress into matrimonial home; wife left; husband in desertion; *Yeatman v Yeatman* (1868) LR 1 P & D 489 at 493-494, mere frailty of temper insufficient.

239 *Lane v Lane* [1951] P 284 (DC, Eng) at 286 and 287; affd [1952] P 34, [1952] 1 All ER 223 (CA, Eng).

240 *Lane v Lane* [1951] P 284 (DC, Eng) at 287; on appeal [1952] P 34 at 38, [1952] 1 All ER 223 (CA, Eng) at 224, per Somervell LJ; *Young v Young* [1964] P 152, [1962] 3 All ER 120 (DC, Eng).

241 *Buchler v Buchler* [1947] P 25 at 30, 45, [1947] 1 All ER 319 (CA, Eng) at 320, 326.

to expulsion from the matrimonial home.²⁴²

It has been suggested that where the faults are equal on each side, the act of a spouse leaving the matrimonial home with the intention not to return, constitutes desertion.²⁴³ Although the ordinary 'wear and tear' of conjugal life does not in itself suffice,²⁴⁴ neither would mere inconsiderate conduct which is one of the risks that a man or woman takes on entering into the condition of matrimony.²⁴⁵ For example, 'sluttishness' alone does not constitute a ground sufficient to establish constructive desertion.²⁴⁶

But if a husband has induced by his conduct, not by mere hearsay, a belief in his wife that he was conducting an improper affair with another woman, and the wife acting on that belief leaves the husband or turns him out, she is not in desertion.²⁴⁷ Likewise there may be conduct in relation to a third person which is not adulterous nor giving rise to a reasonable belief in adultery but which nevertheless is so inconsistent with the married relationship as to amount to expulsive conduct.²⁴⁸ Once a party's conduct has disrupted the marriage and constructive desertion has ensued, that desertion continues until appropriate steps are taken to terminate it.²⁴⁹

(1) Presumptions objective and subjective

[3-50]

Where conduct of the required nature is established, the necessary intention is readily inferred,²⁵⁰ on the reasonable grounds that, *prima facie*, a person is presumed to intend the natural and probable consequences of his acts.²⁵¹

If the words of expulsion are used and the other spouse leaves, the

242 *Buchler v Buchler* [1947] P 25 at 35, [1947] 1 All ER 319 (CA, Eng) at 322. See also *Pew v Pew* (1951) (unreported) (CA), referred to in *Simpson v Simpson* [1951] P 320 at 335-339, [1951] 1 All ER 955 (DC, Eng) at 963-965; *Hall v Hall* [1962] 3 All ER 518, [1962] 1 WLR 1246 (CA, Eng), drunkenness; and *Hanson v Hanson* (1954) Times, 10 March (CA, Eng), inadequacy of housekeeping allowance.

243 *Spence v Spence* [1939] 1 All ER 52 at 58.

244 *Buchler v Buchler* [1947] P 25 at 45-47, [1947] 1 All ER 319 (CA, Eng) at 322; *Squire v Squire* [1949] P 51 at 72, [1948] 2 All ER 51 (CA, Eng) at 60; *Edwards v Edwards* [1950] P 8 at 13, [1949] 2 All ER 145 (CA, Eng) at 148; *Simpson v Simpson* [1951] P 320 at 342, [1951] 1 All ER 955 at 967; *Rothery v Rothery* (1966) Times, 30 March (DC, Eng).

245 *Buchler v Buchler* [1947] P 25 at 35, [1947] 1 All ER 319 (CA, Eng) at 322.

246 *Bartholomew v Bartholomew* [1952] 2 All ER 1035 (CA, Eng); *Marjoram v Marjoram* [1955] 2 All ER 1 at 8, [1955] 1 WLR 520 at 527.

247 *Hunter v Hunter* (1961) 105 Sol Jo 990 (DC, Eng); *Baker v Baker* [1954] P 33 at 35, [1953] 2 All ER 1199 (DC, Eng) at 1200, husband deliberately induced wife to believe he had committed adultery.

248 *Hind v Hind* [1969] 1 All ER 1083 at 1086, [1969] 1 WLR 480 (DC, Eng) at 484.

249 *Burton v Burton* (1969) 113 Sol Jo 852 (DC, Eng).

250 *Buchler v Buchler* [1947] P 25 at 30, [1947] 1 All ER 319 (CA, Eng) at 321.

251 See *Pizzala v Pizzala* (1896) 12 TLR 451; *Sickert v Sickert* [1899] P 278 at 284; *Edwards v Edwards* [1948] P 268 at 269-273, [1948] 1 All ER 157 (DC, Eng) at 158-160; *Squire v Squire* [1949] P 51 at 56-57, [1948] 2 All ER 51 (CA, Eng) at 53, cruelty, approving *Edwards v Edwards*, above; *Hosegood v Hosegood* (1950) 66 (pt 1) TLR 735 (CA, Eng) at 738-739; *Simpson v Simpson* [1951] P 320 at 326, 332,