LIVING SEPARATE AND APART FOR FIVE YEARS AND THE FEDERAL MATRIMONIAL CAUSES ACT.*

I. LEGISLATIVE HISTORY.

With the passing of the Commonwealth Matrimonial Causes Act 1959[1] a ground for dissolution of marriage formerly known to the States of Western Australia[2] and South Australia[3] alone becomes a ground for relief throughout the Commonwealth. The ground, commonly referred to as the five-years separation ground, is contained in section 28 (m) of the Act, which provides that a decree of dissolution may be based on the ground that:—

> "The parties to the marriage have separated and thereafter have lived separately and apart for a continuous period of not less than five years immediately preceding the date of the petition and there is no reasonable likelihood of cohabitation being resumed."

The fundamental policy question involved in all modern divorce legislation is whether the basis of dissolution decrees should be fault on the part of the respondent or whether a marriage should be permitted to be dissolved when it has been satisfactorily shown that it has in fact come to an end. The inclusion of this ground in the federal Act is a further recognition that in Australia both the above principles are relied upon as the foundation for the granting of relief in dissolution suits; a further recognition because for many years in the States of the Commonwealth incurable insanity,[4] which broadly speaking is based on the principle of marriage breakdown, has been a ground for dissolution and was probably the first departure from the ecclesiastical

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1 Act No. 104 of 1959. The Act is to come into operation on a date to be fixed by proclamation, but to date no such proclamation has been made.

2 See Matrimonial Causes and Personal Status Code 1948-1958, sec. 15 (j).

3 Matrimonial Causes Act Amendment Act 1929-1941, sec. 6 (k). The ground in South Australia was living separately for a period of five years pursuant to a decree or order for judicial separation, thus differing from the Western Australian ground under which the separation could be for any cause whatsoever.

4 *I.e.*, confinement in an asylum for a period of years as a person of unsound mind with no likelihood of recovery.

principle of fault.[5] To this ground is now added living separate and apart for a period of years.

The five-years separation ground, although known in the two States mentioned above, was nevertheless in both of them of comparatively recent origin.[6] It was, however, by no means new in other Anglo-American jurisdictions. In some of the American States it has been part of the divorce law for over a century, although other States of the Union have remained less liberal in their outlook and permitted no inroads whatsoever to be made into the principle of fault.

In the American jurisdictions divorce for separation for a period of years first appeared in the State of Kentucky, where in 1850 it was provided that a divorce could be granted "where the parties had separated and lived apart without any communication for a period of five years."[7] Wisconsin[8] followed in 1866 with a law providing for dissolution if the parties had for five years "voluntarily lived entirely separate", and Rhode Island[9] in 1893 if the parties had lived separate and apart for a period of ten years. Other States have followed from time to time, until by now in some 23 States this ground or some variant of it is to be found.[10] The period of the separation ranges from two to ten years; the proceedings are, generally speaking, available to both parties, although in a few instances restricted to one spouse only; the nature of the separation required varies from one which occurs from any cause whatsoever to one that is "voluntary", or one consequent upon the making of a separation decree. Special provisions commonly attached to this ground as a prerequisite to the granting of relief also vary; in some jurisdictions, for example, it must be proved that reconciliation is impossible or resumption of cohabitation unlikely. It is also not uncommon to make the granting of relief discretionary.

Whatever form these particular statutes take, they are all nevertheless based on the same policy, the particular variations being simply the differing evidentiary requirements imposed by the legislature in

5 First introduced in Western Australia in 1912: See Act No. 7 of 1912.

6 It was first introduced in Western Australia in 1945 (see Act No. 35 of 1945). In South Australia it was introduced in 1938 (see Act No. 2428).

7 See McCurdy: *Divorce—A Suggested Approach,* (1956) 9 VAND. L. REV. 701. (Not having American statutes available the writer has relied on this article and that cited in note 10 *infra* for the position concerning United States statutes.)

8 *Ibid.*

9 *Ibid.*

10 See *Divorce: Living Apart Statutes as Replacement of Fault,* (1959) 2 WASH. U.L.Q. 195, 205.

order that the court can be reasonably satisfied that the marriage has in fact terminated.

New Zealand in 1920[11] introduced a modified form of "living apart" ground by providing for relief if the spouses were parties to a decree or order for separation which had remained in force for a period of not less than three years. The relief was discretionary, and subsequently[12] an absolute bar was introduced to the effect that if the respondent opposed the making of a decree and showed the separation was due to the wrongful act of the petitioner the petition must be dismissed. In 1953, however, New Zealand added the "pure" "living apart" ground, the period being seven years.

In the Australian States the first step was taken by South Australia in 1938.[13] This introduced a modified ground, *viz.*, the parties must have lived separately pursuant to a decree or order for a period of five years, the only restriction being that a husband petitioner against whom the separation order had been made would not obtain relief until proper financial provision had been made for the wife and any children.

By 1945, Western Australia, after a number of prior unsuccessful attempts,[14] enacted a "living apart" ground. Unlike South Australia and New Zealand, that State did not introduce what has been termed the modified ground first, but permitted dissolution after five years of living separately and apart without the likelihood of resumption of cohabitation.[15] Again in common with the South Australian and New Zealand legislation, the relief was discretionary and default at the time of the petition in respect of maintenance due under any antecedent maintenance order was a bar.[16]

With the re-enactment of the whole of the divorce jurisdiction in Western Australia in the Matrimonial Causes and Personal Status Code in 1948, the ground re-appeared, but in a changed form. It was now "separation of the parties" that was to be proved and not "living

11 Divorce and Matrimonial Causes Amendment Act 1920 (N.Z.).
12 Divorce and Matrimonial Causes Act 1928 (N.Z.).
13 Matrimonial Causes Act Amendment Act 1938 (South Australia).
14 Bills had been introduced during the previous nine or ten years providing a period of firstly three and then five years' separation: See second reading speech of Mr. Styants, (1945) 115 PARLIAMENTARY DEBATES (Western Australia) 1325.
15 The period specified in the 1945 Bill as introduced was ten years but was reduced to five at a conference of managers of both Houses.
16 Supreme Court Act Amendment Act 1945 (Act No. 35 of 1945), sec. 2.

separately and apart"; an alteration in terminology which, as will be seen, materially altered the interpretation of the provision.

In the United Kingdom, unlike the jurisdictions which developed in her former colonies, an attempt to amend the law to introduce a similar ground was unsuccessful. In fact it was this attempt in the form of a private member's Bill that led to the establishment of the Royal Commission, which sat from 1951 to 1955, to enquire into the whole of the law of marriage and divorce in that country.[17] As is now well known, the Commission was divided on the question of whether divorce should be based on the additional principle of marriage breakdown[18] (as well as the principle of fault), and the nine members in favour of the introduction of such a principle were themselves divided in opinion as to the exact legislative form it should take.[19] The result has been that to date no further action has been taken in the United Kingdom Parliament to introduce an amendment to the law along these lines.

A broad view of all these legislative provisions shows that fault is not the only determinative in dissolution suits, but that they also indicate an acknowledgment that where the marriage has failed the interests of the parties and society are best served by legally dissolving the marriage tie. The extreme position of divorce by consent, however, is still not permitted. Proof is necessary of living under circumstances inconsistent with the continuation of a normal marriage relationship and the statutory requirements are for the purpose of adequately establishing this fact. But in some cases dissolution may not serve the interests of society best, nor the interests of an innocent respondent. Recognising these facts, safeguards have been provided in an attempt to cover these unusual situations. These extend from the general method of making the relief discretionary to the more specific of including particular matters which, if present, raise an absolute bar.

The provision in the federal Act is said to have been based on the Western Australian law.[20] This is broadly correct, but there are some major differences in detail. The requirement relating to living separately and apart is the same as the original Western Australian provision

17 See Report of Royal Commission on Marriage and Divorce 1951-1955 (Cmd. 9678), para. 63.

18 *Ibid.*, paras. 65-67.

19 *Ibid.*, para. 68.

20 See Explanatory Memorandum on Matrimonial Causes Bill 1959, 9.

of 1945, but instead of making the relief discretionary[21] the scheme is now to make relief a matter of right[22] but to impose certain absolute bars[23] which, although unknown to the Western Australian legislation, contain the principles that should have guided the exercise of the discretion vested in the Court. Another major departure is that the petitioner's adultery is now a discretionary[24] and not an absolute[25] bar.

It is not the purpose of this article to consider or evaluate the social policy or other reasons for or against extending the principle of fault, but to accept the fact that in Australia the extension has been made. It is the purpose, however, to examine the form which the extension of the fault principle has taken in other jurisdictions, to see the interpretation that has resulted, to compare the federal Act, and in the light of decisions on comparable provisions to attempt to predict the way in which the ground and its attendant safeguards will be interpreted in Australia.

The cases show that the questions most often arising are, firstly, the meaning of "living separate and apart" and secondly, the circumstances in which even though this first requirement is established relief is refused either through the exercise of a discretion against the petitioner or because of the existence of some other circumstances which the statute provides must result in denial of relief.

II. SEPARATE AND APART.

The first question that arises is what is meant by the parties having "lived separate and apart." Guidance can here be obtained from the few reported Western Australian decisions, particularly where such cases have been taken on appeal to the High Court. But, in addition, it is submitted, assistance can be obtained from decisions of the New Zealand and American Courts.

The expression has been judicially considered in a few reported Western Australian decisions and in one case that reached the High Court. These decisions indicate generally when the ground has arisen and give considerable guidance to the manner in which the federal

21 See Matrimonial Causes and Personal Status Code 1948-1958 (Western Australia), sec. 25 (1).
22 Matrimonial Causes Act 1959 (Commonwealth), sec. 69.
23 *Ibid.*, sec. 37 (1).
24 *Ibid.*, sec. 37 (4).
25 Matrimonial Causes and Personal Status Code 1948-1958 (Western Australia), sec. 26 (a) (i).

Act will be interpreted. As has been pointed out the terminology of the federal Act is by no means unique or new. In many American jurisdictions and in New Zealand a similar terminology is to be found but the interpretation has varied. It is proposed to examine firstly the development of the interpretation of the concept as it was originally in the Western Australian Act and secondly the development of the interpretation in the other countries mentioned. This will show marked similarity of interpretation apparently with little reference to the decisions of each other. It also shows some divergence, perhaps explained by reason of the different terminology used. This examination may assist in more clearly defining the interpretation of the federal law and thus assist in the prediction of the circumstances that will give rise to relief.

In *Flindell v. Flindell*,[26] the first reported Western Australian case in which these words were considered, Wolff J. said:—

> "The wording of the legislation so far as is material, is 'lived separately and apart . . . and it is unlikely that cohabitation will be resumed.' Cohabitation is a word of ambiguous import. It may mean living together as man and wife in the fullest sense or it may mean simply dwelling under the same roof. Then, again, the statute uses the words 'separately and apart', which seems to indicate a complete physical separation of the parties from the same habitation. In my view that is what the statute means. When it speaks about the likelihood of cohabitation being resumed, it contemplates that there has been a cessation of cohabitation in the fullest sense, leaving the parties without any semblance of relationship as man and wife."[27]

The learned judge was here dealing with a case in which the parties, although estranged and not engaging in sexual intercourse, nevertheless were living in the same house. The husband had for most of the period paid an allowance to the wife and it appears that the wife did perform domestic chores.[28] The parties were not "physically separated" from the same habitation and accordingly relief was refused. The judgment, even if imprecise, did indicate that more than the destruction of the *consortium* was intended by the legislature by the addition of the words "and apart."

26 (1948) 50 West. Aust. L.R. 9.

27 *Ibid.*, at 11.

28 These facts are not all fully set out in the judgment; some are to be found in the headnote to the case.

But in *Ayling v. Ayling*,[29] which was decided the following year, the same judge appeared to diverge from the path upon which he had set out in *Flindell*. The facts in *Ayling* were somewhat peculiar. The wife had obtained an order for separation in a summary jurisdiction court and also an order for maintenance which was assessed on the basis that she continued to occupy the matrimonial home. Some four years later the husband, being unable to obtain accommodation elsewhere, was permitted to reside in part of the home and to use the kitchen, other conveniences, and the garage. This arrangement was reduced to writing and rent was agreed to be paid for the use of this part of the house. Further payment was also made to the wife for doing such household duties as cooking and washing. It appears that the parties were on speaking terms and even took their meals together although there was a conflict of evidence as to the friendliness of the relationship.

Wolff J. ultimately held that this was sufficient to establish that the parties had during the period lived separately and apart. In his view the husband was nothing more or less than a boarder. The separation order entitled the wife to refuse any marital association with the husband and his occupancy of the room and garage was pursuant to an agreement. The situation was therefore "no different . . . in its legal implications from the case of the man who has become separated from his wife, occupying a room in a boarding house establishment conducted by the wife and in which she happens to live."[30]

With this ultimate finding the writer does not disagree;[31] but in arriving at this conclusion the learned judge did not give any effect to the conjunctive and allocate a separate meaning to the words of the provision but appears to have taken them together as indicating the one indivisible concept. After referring to his dictum in *Flindell* he went on to say:—[32]

> "When one speaks about complete physical separation of the parties from the same habitation it is possible to have circumstances in which this exists while the parties are living in the same premises. Familiar instances may be cited from that branch of the law dealing with desertion. (*Powell v. Powell*; *Smith v. Smith*). Contrast these cases with *Hopes v. Hopes*."

29 (1949) 51 West. Aust. L.R. 61.
30 *Ibid.*, at 66.
31 See *infra*.
32 (1949) 51 West. Aust. L.R., at 65.

And later,[33]

> "I reiterate, then, that it is possible to have a set of circumstances in which the parties to a marriage are living in the same habitation, but nevertheless living separately and apart within the legal conception of the statute."

As can be seen the judge relied heavily on the desertion cases to ascertain the meaning of living separately and apart—as well he might, for although desertion may now, and could even then, be defined as requiring a separation in fact and an intention to desert[34] there were a considerable number of dicta in the decisions to this time which indicated that there was virtually no difference in matrimonial law in the meaning of "separation", "living separately and apart", or "living apart" and these synonymous terms described the factual element of desertion.

Perhaps the strongest expression of this view was that of Denning L.J. in *Hopes v. Hopes*[35] when in deciding whether there was a sufficient factum of separation present to constitute desertion where the family still lived in the same house, he said:—

> "The parties must not be "residing with" one another; they must be "living separately and apart" or "living apart" from one another; or they must not be "cohabiting" with one another. All these phrases mean the same thing to my mind. At least I can see no sensible distinction between them. They all express the fact of separation."[36]

And again in the same case[37] Bucknill L.J. said that "the cases to which I have referred establish that there may be desertion, although the husband and wife are living in the same dwelling, if there is such a forsaking and abandonment by one spouse of the other that the Court can say the spouses were living separate and apart from one another."[38]

33 *Ibid.*, at 66.

34 See, for example, Pardy v. Pardy, [1939] P. 288.

35 [1949] P. 227; a case cited by Wolff J. in Ayling v. Ayling.

36 *Ibid.*, at 237. Also at 235: "The husband who shuts himself up in one or two rooms of his house, and ceases to have anything to do with his wife is living separately and apart from her as effectively as if they were separated by the outer door of a flat."

37 *Ibid.*, at 234.

38 See also Jackson v. Jackson, [1924] P. 19, "If one of the spouses causes the other to live separate and apart that is desertion," *per* Duke P. at 23.

It was quite apparent that there could be a sufficient separation for the purpose of establishing desertion if the parties lived in the same house even though the house was not divided so as to constitute separate apartments,[39] although in many of the cases cited in *Hopes v. Hopes* this was in fact the position.[40] It is not surprising then that the judge turned to the body of law on desertion and gave to the phrase "living separate and apart" in section 69 of the Supreme Court Act the same interpretation as the separation element in desertion had received. This involved an apparent recession from the position taken in *Flindell.*

This interpretation, however, did not last very long. In 1949 the High Court was given an opportunity to consider the section in *Main v. Main.*[41] Without referring to the two earlier decisions of the Supreme Court of Western Australia it gave the words separate meanings. It gave the words "live separately" the same meaning as the concept of separation has in desertion. But the word "apart" was also given a separate meaning and was interpreted as requiring the existence of something more before the ground had arisen. In these circumstances the only possible meaning that the word could have was to require "complete physical separation of the parties" as was said in *Flindell.* The majority held that "The two words "separately and apart" show that physical separation is necessary and that it is not enough that there has been a destruction of the *consortium vitae* or matrimonial relationship while the spouses dwell under the same roof. In matrimonial law the expressions like "live separately", "separated" and "separation" are commonly used to indicate that the conjugal relation no longer exists between the parties to the marriage."[42]

One is tempted to add that equally commonly used is the expression "live separately and apart" which has been construed to indicate the same thing. However, the rule of construction employed by the Court in giving to each of the words used a legal meaning is a perfectly legitimate and oft-used one,[43] even though at times it has been

39 A view with which the High Court does not disagree: See, for example, Potter v. Potter, (1953-1954) 90 Commonwealth L.R. 391.

40 For example, Thomas v. Thomas, [1948] 2 K.B. 294. A case which Wolff J. commented on as being particularly interesting because it bore some resemblance to the present case and involved similar principles: Ayling v. Ayling, *supra,* at 65.

41 (1948-1949) 78 Commonwealth L.R. 636.

42 *Per* Latham C.J., Rich and Dixon JJ. at 641-642. McTiernan J., who delivered a separate judgment, expressed a similar opinion, at 644.

43 See CRAIES ON STATUTE LAW, 5th ed., 101.

criticised.[44] As a result of *Main* one thing was clear, namely, the ground could not arise while both parties resided in the same house. That this interpretation did not accord with the legislative intent may be inferred from the fact that in 1948 the ground was repealed (as was the whole of the divorce law) and re-enacted in the Matrimonial Causes and Personal Status Code[45] in an altered form which did not permit the interpretation given in *Main*. The ground now read: "Separation of the parties for a continuous period of five consecutive years."[46] It was not long before the interpretation of the new provision was being considered. In *Bell v. Bell*[47] the circumstances were again that the parties had lived under the same roof for the required period but according to the plaintiff in such circumstances that the spouses were strangers and the matrimonial *consortium* no longer existed. Virtue J. decided that, in view of the reasoning in *Main* and the alteration of the language in the Western Australian provision, as a matter of law all that the word "separation" imported was the destruction of the matrimonial *consortium* and the absence of the word "apart" from the section now meant that it was not necessary to prove that the parties had ceased to use a common place of habitation.[48]

With this background of interpretation in Australia it is interesting to turn to the other jurisdictions in which the ground appears and see the development there. Turning to the New Zealand decisions made after the introduction of the ground in 1953[49] it soon became apparent that the ground required an interpretation involving more than the literal meaning conveyed by the words "have been living apart" used in the ground, which stated fully is:—

> "That the petitioner and respondent are living apart and are unlikely to be reconciled, and have been living apart for not less than seven years."

Recognising that "living apart" need not necessarily be due to a marriage breakdown and that physical separation alone was not

44 See, for example, Denning L.J. in Hopes v. Hopes, *supra*, at 237.

45 Which did not come into effect until 1st January, 1950.

46 Section 15 (j).

47 (1953) 55 West. Aust. L.R. 87.

48 However, he was not satisfied that the plaintiff had proved a destruction of the matrimonial *consortium* for the necessary period, because the evidence showed certain housewifely duties were being performed for him by the defendant; for this reason an order for dissolution was refused.

49 Divorce and Matrimonial Causes Amendment Act 1953 (No. 43 of 1953), sec. 7.

what was intended, MacGregor J. in *Wilson v. Wilson*[50] held that it must also be shown that the *consortium* had ended for the period. The circumstances in the case were that the husband had been admitted to hospital where he remained for two years but on his discharge he did not live with his wife again. During the period in hospital the wife had visited him once. Clearly the parties had been "living apart" in the literal sense, but this was not sufficient. As the judge could not say that the *consortium* had ended prior to the husband's discharge from hospital the petition was dismissed.

Wilson was referred to and followed in *McRostie v. McRostie*[51] where F.B. Adams J. said "that mere physical separation, so long at any rate as it is on the face of things, only of a temporary character, may not be enough for the purposes of sec. 10 (jj)."[52] The petitioner in this case established "living apart" by proving his own desertion. Whether something less or different would suffice the judge was not prepared to say but preferred to defer his opinion until the case arose. Again in *Henderson v. Henderson*[53] it was held that as it was impossible to find that the *consortium* had ended during a period when the respondent was admitted to an asylum, the ground had not arisen.[54]

Finally these decisions, all of single judges, were considered by the Court of Appeal in *Sullivan v. Sullivan*[55] which approved the view that living apart required more than physical separation. In the opinion of Turner J. a "physical separation and a mental attitude averse to cohabitation"[56] were required, and "living apart and cohabitation are mutually exclusive opposites"[57] was another judge's conclusion.

Although this case clearly establishes that for the ground to exist there must be a destruction of the *consortium* it is not clear that physical separation *is* required. Two judges[58] clearly say yes. But statements such as "the words living apart connote more than presence in a place and I think that neither presence in nor absence from a

50 [1955] N.Z.L.R. 175.
51 [1955] N.Z.L.R. 631.
52 *Ibid.*, at 635.
53 [1957] N.Z.L.R. 521.
54 Because while the respondent was confined it appears that both parties retained the expectation of resuming cohabitation after the respondent's discharge. This in fact did not occur.
55 [1958] N.Z.L.R. 912.
56 *Ibid.*, at 924.
57 *Per* McCarthy J., at 935.
58 Hutchison and Turner JJ.

particular house determines whether or not spouses are living apart"[59] and, "living apart is the antonym of cohabitation",[60] leave room to argue that physical separation is not required. The facts of the case show that the parties were residing apart and the Court was satisfied that the *consortium* was terminated. Also if any guidance can be taken from the headnote it would appear that the judgment has been taken as requiring physical separation.

In the United States[61] a similar conclusion has been reached on this question. Invariably the Courts have required residence of the parties in separate abodes as well as a termination of normal marital relationships before the ground can arise.[62] This does not mean separate buildings; separate apartments in the one building owned by one of the parties will suffice.[63] This conclusion has been reached, firstly, by applying a similar rule of construction to that employed by the High Court in *Main*. For example, in *McDaniel v. McDaniel,*[64] a decision of the Kentucky Court on that State's statute which allowed as a ground "living apart for five years without cohabitation", it was said:—

> "It will be noted that two facts must be proved to obtain a divorce under this provision, *viz.,* living apart and noncohabitation. The evidence for the appellant is sufficient to establish noncohabitation, but the counterclaim alleged, and the uncontradicted evidence shows, that appellee lived in the same house with her husband until within a month of the filing of the petition. Where two terms are used conjunctively in the same sentence of a statute separate effect should be given to the terms, if it may be done in reasonable construction . . . The accepted meaning of the term "living apart" is to live in a separate abode . . . That being true, the parties to this action had not been living apart for five years within the meaning of the Statute."[65]

59 *Per* Henry J., at 934.
60 *Per* McCarthy J., at 935.
61 The writer wishes to thank Dean D. J. Dykstra of the College of Law, University of Utah, for making available copies of the American decisions referred to hereafter.
62 See, for example, McNary v. McNary, (1941) 111 P. 2d 760; Caine v. Caine, (1955) 79 So. 2d 546; Quinn v. Brown, 105 So. 624; Christiansen v. Christiansen, (1942) 28 A. 2d 745; Reilly v. Reilly, (1937) 190 A. 476; McDaniel v. McDaniel, (1942) 165 S.W. 2d 966; Gates v. Gates, 232 S.W. 378; York v. York, (1955) 280 S.W. 553.
63 Stewart v. Stewart, (1923) 122 A. 778.
64 (1942) 165 S.W. 2d 966.
65 *Ibid.*, at 967. See also York v. York, *supra* note 61.

Secondly, however, the same conclusion is reached but not by an interpretation dictated by the literal meaning of the words. In *Quinn v. Brown*[66] a dictum in *Hava v. Chavigny*[67] was approved which was:—

> "the "living separate and apart" referred to in Act 269 is the life which is manifest in the community in which the spouses lives. The evidence thereof is not to be sought for behind the closed doors of the matrimonial domicile."

And further, from *Arnoult v. Litten,*[68] the following was approved:—

> "What the law makes a ground for divorce is the living separately and apart, of the husband and wife for a period of seven years. This implies something more than a discontinuance of sexual relations, whether the discontinuance be occasioned by the refusal of the wife to continue them or not. It implies the living apart, for the above period, in such a manner that those in the neighbourhood may see that the husband and wife are not living together."

In the Court of Appeals hearing appeals from the District of Columbia, which has as a ground voluntary separation from bed and board for five consecutive years without cohabitation, it did appear at one stage as if an interpretation would be made which permitted both parties to reside in the same house.

Although in *Pedersen v. Pedersen*[69] it was intimated that a statute which required "living separate and apart" would not be satisfied by continued residence in the same dwelling,[70] in *Boyce v. Boyce*[71] a decree was granted where the circumstances were extremely close to such a situation. The appellant wife lived in the basement and the husband in a room on the second floor. He paid all the household bills and provided food. They ate at the same dining table but at different times. The Court said that the argument that there was no separation from bed and board for five years was too refined, as they alternated in the use of the dining table. " The essential thing was not separate roofs but separate lives"[72] and "these parties were separated

66 (1925) 105 So. 624.
67 84 So. 892.
68 99 So. 218.
69 (1939) 107 F. 2d 227.
70 See *ibid.,* 231-232.
71 (1945) 153 F. 2d 229.
72 *Ibid.,* at 230.

as effectively as though they were living in different homes." However, in *Dorsey v. Dorsey*,[73] a decision of the District Court, in a judgment that was admittedly concerned mainly with the voluntariness of a separation that was brought about by the defendant's committal to a hospital for persons of unsound mind, Tamm J. said:—"What the Code requires . . . is not mere physical separation. . . . It is physical separation plus a mental disposition . . ."

This would indicate that despite the dicta in *Boyce* the District of Columbia Courts now construe the ground as requiring in fact a physical separation and presumably from the same abode.[74]

What then does a comparison of the decisions show? If the effect of *Sullivan* in New Zealand is that physical separation is required, then in each of the three countries whose decisions have been examined a similar interpretation has been reached despite textual differences. In Australia and the United States there is a common approach —the application of a rule of statutory interpretation. But the United States courts have adopted what may be termed a policy approach as well. New Zealand has arrived at the same interpretation more or less by necessity. Although it at first appeared that the Western Australian Court following Wolff J. might have arrived at a different conclusion, it must now be assumed that since *Main* Australia is committed to the interpretation that will not allow the ground to arise while the parties are residing in the same premises. The writer has already drawn attention to the fact that there is, or was, room to argue that this need not necessarily have been so. As well, if the desertion cases were to be relied upon to construe the ground, taken in their entirety, there would not have been room to apply the rule of statutory interpretation that requires separate meanings to separate words as the words used connoted one concept. Even if this view holds favour it is appreciated that the approach in *Quinn v. Brown* could be adopted. But is this not also open to question?

If desertion, which is simply the wilful termination of a marriage, can arise while parties reside together, why should not this ground? Both concepts are based on an ending to the marriage, but whereas in the former this is occasioned by the fault of one party, in the latter this need not necessarily be so. Economic circumstances seem to have influenced the courts in coming to the conclusion that desertion can

[73] (1950) 94 F. Supp. 917.

[74] See also *Divorce: Living Apart Statutes as a Replacement for Fault*, (1959) 2 WASH. U.L.Q. 188, at 196.

arise while parties live in the same house; circumstances such as a housing shortage, referred to in the decision of Denning L.J. in *Hopes v. Hopes*. If this is so why should they not be considered in working out the interpretation of this ground? In this American approach not only must there be the reality but also the appearance of marriage breakdown. But why should the absence of fault necessitate the fulfilment of appearance as well as reality in this ground? One can only conclude that this has been required as an added evidentiary safeguard in a ground based on principles contrary to those from which matrimonial law has grown.

The writer appreciates that in the federal Act there is greater scope for the employment of the strict construction approach because the word "separated" is twice used in contradistinction to the word "apart." The section reads "that the parties must have separated and thereafter lived separately and apart." In view of the interpretation of "separate and apart" in *Main* the word "separated" in the federal provision would appear redundant. If it was intended to convey a different meaning from that usually given to it in matrimonial law, for example, a physical separation, it is unfortunate that this was not said explicitly as if this is so the undesirable situation that has now arisen is that a similar word used twice in the same sub-section is to be given a different meaning each time it appears. On the other hand to give the word the same meaning on each occasion results in redundant repetition, which is equally undesirable and a construction which it is also preferable to avoid.

The first of the above two alternatives the writer feels should be discarded as being unsupportable in view of the history of the interpretation of the concept of separation. The second although leaving something to be desired from the point of view of legislative clarity is, nevertheless, open to an interpretation which will permit the ground to arise while the spouses are residing in the same house.

This problem of interpretation was created by an amendment to the clause as originally introduced. It then read:—

> "That, since the marriage, the parties to the marriage have been separated (whether by agreement, decree or otherwise) for a continuous period of not less than five years immediately preceding the date of the petition . . ."[75]

75 (1959) 23 COMMONWEALTH PARL. DEB. (H. of R.) 2231.

As can be readily seen the form of this original clause closely followed that of the Western Australian ground as it appeared in the 1948 Matrimonial Causes Code. The word "apart" was omitted and if one is entitled to assume that the draftsman had in mind the history of the ground and its interpretation in Western Australia, the conclusion to be drawn is that it was intended that the section should have the same meaning and effect as that given to the Western Australian legislation in *Bell* by Virtue J.

However, representations were apparently made to the Attorney-General that the ground as originally drawn could result in a decree being granted in the case of an involuntary separation,[76] such an interpretation being possible because of the ambiguity of the word "otherwise" in the phrase in parenthesis.

Accordingly for "clarity of expression"[77] and to dispose of any possible ambiguity the clause was amended by removing the offending words "whether by agreement decree or otherwise" and reproducing them in a separate section without the word "otherwise".[78] But, at the same time, and strangely, because there appears to be no explanation for doing so, the operative words were also amended from "the parties have been separated . . . for a continuous period of five years" to the present form "the parties . . . have separated and thereafter have lived separately and apart for a continuous period of five years . ."

Thus a clause which had a clear and unambiguous meaning, as well as a desirable one, was changed to one which can hardly be said to contain the former attributes, and in addition in the writer's view, perhaps contains an undesirable meaning.

The object apparently was to prevent the possibility of a decree being granted in the case of an involuntary separation. One questions

76 (1959) 25 COMMONWEALTH PARL. DEB. (H. of R.) 2855.

77 *Ibid.*

78 In sec. 36 which reads:—

(1) For the purposes of paragraph (m) of section twenty-eight of this Act, the parties to a marriage may be taken to have separated notwithstanding that the cohabitation was brought to an end by the action or conduct of one only of the parties, whether constituting desertion or not.

(2) A decree of dissolution of marriage may be made upon the ground specified in paragraph (m) of section twenty-eight of this Act notwithstanding that there was in existence at any relevant time—

(a) a decree of a court suspending the obligation of the parties to the marriage to cohabit; or

(b) an agreement between those parties for separation.

whether this object has been achieved, but even more basic is the question what is an involuntary separation? If what is meant by this phrase is an enforced living apart the ground will in any event not arise until an end has been put to the *consortium,* which otherwise normally continues despite the physical separation of the parties. This was the position in *Main,* in which the majority said that "there may be absences from one another, relinquishment of a matrimonial home and physical separations of long duration caused by circumstances and yet, if these conditions are treated as temporary by the parties themselves, it may be true that they are not living separately although they are living apart."[79]

What prevents the ground arising in the case of an involuntary separation is the necessity of seeing that the *consortium* has come to an end, and this is achieved by requiring the parties to live separately—not by inserting the word "apart" or removing the word "otherwise."

But, if the object of the amendment was to prevent relief in the *Main* situation, it is doubtful if this has been achieved. In *Main* the respondent had suffered a paralytic stroke. For the five years prior to the petition he had been an inmate of a home for invalids. He was badly afflicted physically, and to a degree affected mentally. There was no prospect of his recovering. These circumstances were held to amount to living separate and apart. That the parties were "apart" there was no doubt but the more difficult question was whether they had been living separately. After pointing out that the expression "live separately" in matrimonial law was commonly used to indicate that the conjugal relationship no longer existed between parties to a marriage the court applied this test to the circumstances of the case and said[80] ". . . the permanent state of physical incapacity of the husband, the hopelessness of his condition and the situation in which the parties found themselves make it an almost inevitable inference that for many years all conjugal relationship had been abandoned. . . . These are reasons for the conclusion that the case falls within the provision."

There appears to be nothing in sections 28 (m) or 36 which would prevent the same decision being given in similar circumstances under the federal law.

79 *Per* Latham C.J., Rich and Dixon JJ., (1948-1949) 78 Commonwealth L.R., at 642.

80 *Ibid.,* at 643.

Similarity in interpretation of the different legislative provisions is also apparent in another respect. The ground being based on an absence of fault in the respondent, it is unimportant why the separation has occurred. Thus hospitalisation,[81] imprisonment,[82] or confinement in an asylum[83] of one party will result in "living apart" and if the *consortium* is destroyed the ground is proved.

One divergence of interpretation, however, is apparent, and that concerns the effect of sexual intercourse between the parties during the period of separation. Again by employing the established principles in matrimonial law the New Zealand courts have held that the test for deciding whether acts of intercourse between the spouses bring to an end the "living apart" is the same as the test in the desertion cases for deciding whether the separation is terminated. The enquiry then is whether these acts are sufficient evidence of a bilateral intention to resume cohabitation.

Once reliance is placed upon the desertion cases to establish part of the meaning of the concept this must naturally follow. This question was the real issue in *Sullivan* where it was held that a number of casual acts during the period did not terminate the state of living apart. There is, therefore, no inflexible rule but an enquiry whether the acts are evidence of a resumption of cohabitation must be undertaken in each case to decide the question.

In the United States, however, there is evidence of a hard and fast rule. In a number of cases[84] it has been said that the ordinary relationships must come to an end. But in addition it was said in *Reilly v. Reilly*[85] that "It is clear that if during a portion of the ten-year period the parties engaged frequently in marital relations, as was found to be the fact in the instant case, there is still a prospect that a reconciliation between them may be affected and any such prospect is viewed with favour."

In Australia there appears to be no decision on this ground on the effect of intercourse between the parties during the period of separation. But in view of the reliance upon the desertion cases to establish the meaning of "live separately" there is no reason why these cases

81 Main v. Main, (1948-1949) 78 Commonwealth L.R. 636.
82 Colston v. Colston, (1944) 179 S.W. 2d 893.
83 For example, McRostie v. McRostie, [1955] N.Z.L.R. 632.
84 See, for example, Christiansen v. Christiansen, (1942) 28 A. 2d 745, at 746; Reilly v. Reilly, (1937) 190 A. 476.
85 (1937) 190 A. 476.

should not be used, as in New Zealand, to establish when the parties are not living separately and so cases such as *Mummery v. Mummery*[86] and *Perry v. Perry*[87] should provide the test.[88] Also, just as the payment of maintenance during the period of separation in desertion cases does not bring to an end the separation,[89] it should not interrupt the period from running in this ground. This was in fact the position in *Main*.[90]

III. CIRCUMSTANCES PREVENTING THE GRANTING OF A DECREE.

Although the ground of five years' separation together with two other grounds[91] is excluded from the otherwise general application of the discretionary bars,[92] and is only subject to the absolute bar of collusion with intent to cause a perversion of justice,[93] nevertheless the Act specifies circumstances which if present either make it mandatory for the Court to refuse to make a decree or give to the Court a discretion to refuse relief. In the absence of such circumstances it would appear that the Court must act upon the direction as to its duty,[94] and upon the existence of the ground being proved a decree must be granted.

To this extent the federal Act departs from the general scheme of both the former Western Australian Acts and of the New Zealand Acts where the granting of relief is in the absolute discretion of the Court. Western Australia originally[95] gave to the Court an absolute discretion to *refuse* relief in cases where the petitioner was not otherwise disqualified,[96] and although this provision in *Gore v. Gore*[97] appears to have been interpreted as an absolute discretion to *grant*

86 [1942] P. 107.
87 [1952] P. 203.
88 The occurrence of intercourse during the period cannot interrupt the living "apart" if the parties remain residing in different places of habitation.
89 See Pulford v. Pulford, [1923] P. 18.
90 The same result has been arrived at in the United States: See Stewart v. Stewart, (1923) 122 A. 778.
91 Confinement in an asylum as a person of unsound mind, sec. 28 (l); and absence for such period as to provide reasonable grounds for presuming death, sec. 28 (n).
92 See sec. 41.
93 See secs. 39, 40. What conduct amounts to collusion with respect to this ground is in itself an interesting question.
94 Sec. 69: "Except as provided by this Act, the Court, upon being satisfied of the existence of any ground in respect of which relief is sought, shall make the appropriate decree."
95 Supreme Court Act 1935-1945, sec. 69 (6).
96 By sec. 69A of the Supreme Court Act 1935-1945 it was an absolute bar if at the time of presentation of the petition the petitioner was in default in

or *refuse* relief, the High Court in *Main*[98] pointed out that the effect of limiting the discretion to a refusal of relief only was that "once facts are proved bringing the case within sub-sec. (6) [establishing the living separately and apart] a decree for dissolution should be pronounced unless the Court thinks on discretionary grounds that a decree ought to be refused. In other words the burden is not on the petitioner to show that special grounds exist justifying the use of a discretion to grant a decree. Once he or she comes within sub-sec. (6) the presumption is in his favour."[99]

Subsequently in the 1948 Code the discretion provision was amended to give the Court an absolute discretion to *grant* or *refuse* relief except where precluded by the existence of an absolute or discretionary bar.[100] Although the form of the legislation was changed, and presumably for the purpose of overcoming the decision in *Main,* the High Court in *Pearlow v. Pearlow*[101] pointed out that the result was substantially the same: "That if the constituent elements of the ground . . . are made out and no more appears, an order or decree of dissolution should be pronounced."[102]

Again in New Zealand where the petitioner has proved his case the Court is given a discretion "as to whether or not a decree shall be made"[103] in cases where there is not an absolute bar, and this provision appears to have been applied in a similar way to the direction given by the High Court in Australia. For example, in *Crewes v. Crewes*[104] Gresson J., after being satisfied that the living apart had been established, and the absolute bar raised by the respondent[105] was not established, said that "There remains the question whether the discretion

respect of an antecedent order or agreement for maintenance and also if during the five-year period it appeared to the Court that the petitioner had been guilty of conduct which would have permitted the respondent to petition for dissolution on any ground then available in Western Australia except desertion or failure to comply with a decree for restitution of conjugal rights.

97 (1947) 49 West. Aust. L.R. 60.

98 (1948-1949) 78 Commonwealth L.R. 636.

99 *Per* Latham C.J., Rich and Dixon JJ., at 643.

100 Matrimonial Causes and Personal Status Code 1948-1958, sec. 25 (1).

101 (1953-1954) 90 Commonwealth L.R. 70.

102 *Per* Dixon C.J., at 82.

103 Divorce and Matrimonial Causes Act 1928, sec. 18.

104 [1954] N.Z.L.R. 1116.

105 It is an absolute bar if the respondent opposes the making of a decree and it is proved to the satisfaction of the Court that the separation was due to the wrongful act or conduct of the petitioner: Divorce and Matrimonial Causes Act 1928, sec. 18.

of the Court should be exercised against the petitioner because he has in some degree misconducted himself,"[106] and further on, "Nor do I think the petitioner's disobedience to the order made in the restitution suit warrants the refusing of a decree."[107]

The technique employed in the federal Act in its terms is different, but as will be seen will probably be similar in its application.

By section 37 (3) a discretion to refuse relief is given if the petitioner has been guilty of adultery. It is not a general discretion that can be exercised in all cases, but only arises in the one specific instance.[108] All other cases are covered by section 37 (1) which provides that a decree shall be refused if the Court is satisfied that by reason of the petitioner's conduct or any other reason it would be harsh or oppressive to the respondent, or contrary to the public interest. Although it becomes mandatory to refuse a decree in these circumstances the Act has done nothing more than expressly incorporate the major considerations that have been taken into account by the Courts in deciding what principles should guide them in the exercise of their discretion under the statutes that have conferred discretionary power.

The public interest principle appears to have originated from the judgment of Salmond J. in *Lodder v. Lodder*,[109] where in dealing with the discretion vested in the Court to grant a decree in the case of three years' separation, he pointed out that the legislature must be taken to have intended that three years' separation is *prima facie* a good reason for divorce, but as there were exceptions which would depend upon the individual circumstances of particular cases it would be virtually impossible to formulate these into rules of law the matter had been left to the discretion of the Court; he then continued:—

> "In exercising this discretion the Court is to consider whether there is any special circumstance in the particular case which would render a decree of dissolution inconsistent with the public interest."[110]

This view was cited with approval in *Pearlow* and has been followed in subsequent New Zealand decisions.

106 [1954] N.Z.L.R. 1116, at 1120.
107 *Ibid.*
108 This was not so under the Western Australian Code where adultery during the period was an absolute bar: See sec. 26 (d) (ii).
109 [1921] N.Z.L.R. 876.
110 *Ibid.*, at 877-879.

One might have thought that the public interest bar was sufficient and that if the granting of the decree operated so as to result in unusual hardship being suffered by the respondent it would be contrary to the public interest to make the decree, particularly if the respondent's conduct was innocent in the sense that she had not been guilty of any matrimonial offence nor had been the cause of the separation. However, the New Zealand experience has shown that even though the making of the decree will result in financial hardship it is not contrary to public interest to make the decree and so the court should not in its discretion refuse relief. Salmond J. expressly repudiated the notion that the fact that a decree would prejudicially affect a wife respondent's financial position both with respect to maintenance and under the Family Protection Act (as this was a matter which could be effectively dealt with pursuant to the Court's powers regarding alimony and maintenance) was a circumstance to which weight should be attached. Nevertheless in *Thomson v. Thomson*[111] the discretion was exercised against a petitioning husband on the ground that the wife's position would be seriously prejudiced because her rights under the Family Protection Act, in the event of the husband's death, would be lost and her right to maintenance endangered. The public interest test of Salmond J. was not referred to but Fair J. simply said:—

> "The petitioner is, it appears to me, claiming the right to dissolve a marriage in circumstances which would make it inequitable to the respondent that it should be dissolved."[112]

In the following year, Callan J. in *Southee v. Southee*[113] was faced with a similar type of situation in that the respondent wife would lose a social security payment made to her as a deserted wife, if the marriage was dissolved. This however was held *not* to be a good reason for exercising the judicial discretion against the petitioner. The policy of the Act, it was said, following *Mason v. Mason,*[114] was that it was not conducive to the public interest to insist that spouses remain married when the duties of marriage had for some time failed to be observed by them but the jurisdiction was made discretionary to cater for special cases when a dissolution would be contrary to public interest. But if "in the exercise of discretion, the Court were to refuse a decree to a husband whenever his wife could show a danger that

111 [1946] N.Z.L.R. 265.
112 *Ibid.,* at 266.
113 [1947] N.Z.L.R. 378.
114 [1921] N.Z.L.R. 955

her financial interest would be adversely affected, it would not be acting on some merely special reason applicable to the particular case, but it would be adopting a general rule which would seriously frustrate the legislation."[115]

Of the two this decision would appear preferable. It was arrived at after due consideration of the principles to guide the exercise of the discretion whereas in *Thompson* the judge did not base his conclusion on any reason other than "inequitability." It would appear, therefore, that the first bar in section 37 of the federal Act was included to prevent a decision such as in *Southee* in Australia. But what then is the result? Even if the making of the decree is not contrary to the public interest it can still be refused because it would be harsh and oppressive to the respondent. This in itself may lead to an extremely restricted operation of the ground depending upon the interpretation of harshness and oppressiveness.

The practical effect of including these specific bars to the granting of relief and (except in the case of the petitioner's adultery) making the granting of a decree a matter of right, instead of omitting the bars and making the relief discretionary will, it is submitted, only differ to the extent that the Courts may hold that the making of a decree is oppressive to the respondent but not against public interest.[116]

This then leads to an examination of how these bars have been interpreted in the past and what is the likely interpretation in the future.[117]

(A) *CONTRARY TO PUBLIC INTEREST.*

A consideration of the meaning of this concept must inevitably begin with an appreciation of the policy underlying legislation which permits marriages to be dissolved after a period of living apart.

Stated shortly, the policy is that when the marriage has ended in fact it is not in the interest of the parties or the public to insist

115 *Ibid.*, at 380-381.

116 A further practical effect of the changed technique of the federal Act is that appeals can more easily be taken. Now an appeal can be taken against a *finding* that certain conduct is against the public interest whereas under the previous statutes it was a matter of upsetting the exercise of a judicial discretion.

117 In South Australia this question has not arisen because the granting of relief is mandatory upon proof of the ground and not discretionary: See Matrimonial Causes Act 1929-1941 (South Australia), secs. 6 (k) and 13.

upon the continuation of the legal tie. Divorce therefore is a good thing when it frees the parties from an obligation no longer based on the affection and esteem in which it had its origin. On the other hand, it contains the possibility of public mischief when it lessens the sense of responsibility with which persons enter into marriage. It is when this second consideration outweighs the first that the Court should hold that a decree would be against the public interest. The question then is when has this been or ought this to be so held.

Here again the judgments of Salmond J. in *Lodder* and *Mason*, approved as they have been by the High Court in *Pearlow*, provide the starting point, together with any relevant provisions in the Act indicating the materiality of any particular consideration.

Reason for the separation.

The first matter advanced by Salmon J. in *Lodder*[118] for consideration in determining whether a decree should be granted was the reason for the separation of the parties.

> "Where separation has been based on grave and sufficient grounds there will commonly be no reason of public policy for refusing a divorce. . . . it is otherwise, however, where the separation has been unjustified, being the outcome of mere levity and the wanton disregard by the parties of the obligations of the matrimonial state, . . . In such a case a decree may be properly refused altogether or granted only after a period of separation substantially in excess of the minimum period of three years established by the Legislature."[119]

In the first place it must be noted that this was a judgment on the ground of three years' separation pursuant to a separation agreement, a ground which did not require the petitioner to prove that reconciliation was unlikely as one of its elements and which did not contain the bar that if the respondent opposed the making of the decree and it was established that the separation was due to the wrongful conduct of the petitioner relief must be refused. These provisions have been subsequently incorporated[120] in the New Zealand legislation providing for divorce after living apart for seven years, and although the latter is not part of the federal law the equivalent of the former is.

118 [1921] N.Z.L.R. 876.
119 *Ibid.*, at 878.
120 See Divorce and Matrimonial Causes Act 1928, secs. 10 (jj) and 18.

This reason for refusing a decree was approved by the High Court in *Pearlow*[121] as being a consideration applicable to the Western Australian provision but it is submitted that in view of the necessity of proving that resumption of cohabitation is unlikely it is questionable whether in fact it is a material consideration. In the view of Salmond J., where the separation is brought about because of grave reasons this would conclusively establish that the marriage has terminated *de facto,* but this is not so where the reason for the separation is not so fundamental. The object of the enquiry appears solely to be for the purpose of being satisfied that the marriage has ended. If, as he pointed out, the separation was the outcome of mere levity, then the Court might be justified in requiring the separation to have continued for a period longer than the statutory minimum. Again this surely was for the purpose of being satisfied as to the termination of the marriage relationship. What then is the position when the Court is required to be satisfied as to this as a prerequisite to the ground being established? Does not then such a consideration become inapposite? It is suggested that now the reason for separating can only be looked to for assistance in determining whether there is any likelihood of cohabitation being resumed, or for the purpose of ascertaining whether the separation was brought about as a result of the petitioner's misconduct for the purpose of deciding whether it would, in the circumstances, be against the public interest to grant a decree to a petitioner who has been guilty of misconduct.

It is significant that in cases decided in New Zealand since the seven-year separation ground was introduced, in determining whether discretion should be exercised where the absolute bar, that the separation was brought about by the wrongful act or conduct of the petitioner, is not raised, no reference is made to the cause of the separation as a reason for exercising the discretion either for or against the petitioner. For example, in *Crewes v. Crewes,*[122] after being satisfied that the parties had been living apart for the required period and there was no likelihood of reconciliation, Gresson J. only considered whether the petitioner had been guilty of such misconduct that it was against public interest to grant a decree.[123]

121 *Supra,* note 92, at 79.

122 [1954] N.Z.L.R. 1116.

123 See also McRostie v. McRostie, [1955] N.Z.L.R. 631; Adams v. Adams, [1955] N.Z.L.R. 1245; Arnst v. Arnst, [1957] N.Z.L.R. 722; Raymond v. Raymond, [1958] N.Z.L.R. 162; G. v. G., [1958] N.Z.L.R. 883. In all these cases the cause of the separation was, it is admitted, for a grave reason and was not "the outcome of mere levity."

It is submitted therefore that once the petitioner has established living separate and apart for the required period of five years *and* there is no likelihood of cohabitation being resumed it cannot be against public interest to grant a decree even if the original separation was the result of an inconsequential breach of matrimonial obligations. This is a different question from refusing relief because of the petitioner's conduct which may have caused the separation.

Misconduct of the petitioner.

In *Mason v. Mason*[124] Salmond J. pointed out that once the petitioner established the ground prima facie he was entitled to relief, but he continued:—

> "Doubtless, however, there are special cases in which the conduct of the petitioner has been such that in the public interest a decree should be refused."[125]

As this view was cited with approval by the High Court in *Pearlow*[126] it would, therefore, appear safe to predict that it may be contrary to public interest for the Court to grant a decree where there has been matrimonial misconduct. But this does not mean a decree should be refused in all cases where the petitioner has been guilty of a matrimonial offence. In Salmond's view a rule that a decree should not be made in favour of a petitioner who has brought about the separation by his own misconduct was not only inconsistent with the terms of the statute but also not required or justified by considerations of public policy. In fact he went on to say:—

> "It seems clear that there are cases in which even a petitioner guilty of grave matrimonial misconduct should in the public interest be granted dissolution of the marriage."[127]

In *Mason* a number of instances were given in which it was considered that a decree might be against the public interest.[128] These were all examples of what might be called serious breaches of matrimonial obligations. Such examples were habitual drunkenness and persistent cruelty; desertion and adultery coupled with a refusal to return to the deserted spouse who remained willing to receive the erring spouse back; persistent disobedience to an order obliging him

124 [1921] N.Z.L.R. 955.
125 *Ibid.*, at 962.
126 (1953-1954) 90 Commonwealth L.R. 70, at 80.
127 Mason v. Mason, *supra* note 115, at 962.
128 [1921] N.Z.L.R. 955, at 962.

to pay maintenance if such order also decreed separation upon which the petitioner relied for the establishment of the ground.

The significant point in the judgment, however, is why such conduct is against public interest. The answer to this question seems to be twofold. In the first place the refusal of the decree is in the nature of a punishment imposed on the petitioner. As Salmond J. said: "It may be, for example, that his character, as proved by matrimonial misconduct . . . is so bad that in the public interest he should not be permitted to obtain that liberty of re-marriage which is the purpose or the result of the divorce sought by him."[129]

Is this not saying that this petitioner is not to be permitted the liberty of enjoying another marriage because of his past behaviour? But also it could be said that this dictum contains an element of extending to a proposed second wife a protection from becoming married to a person and trusting him to carry out his matrimonial obligations towards her when his past record indicates that he is a person who has little or no regard for such obligations.

With this background, what type of misconduct is or has been held by the courts to make a decree contrary to the public interest? Or perhaps it might be simpler to ascertain what matrimonial misconduct has been held not to prevent the granting of a decree on this ground.[130]

Desertion.

There are a number of reported decisions from New Zealand where the petitioner has been in desertion but this misconduct has apparently not been regarded as being sufficiently bad to warrant the Court's exercising its discretion against the petitioner.

In *McRostie v. McRostie*[131] F.B. Adams J. explained his interpretation of the policy of the ground in this way:—

> "The petitioner succeeds by proving desertion on her own part. This, however, is not anomalous but characteristic of this new ground of divorce, the purpose of which is, I think, that even guilty spouses may get relief where their marriages have ceased to be real unions."[132]

129 *Ibid.*, at 962.

130 Because there is a dearth of reported cases in which the decree has been refused.

131 [1955] N.Z.L.R. 631

132 *Ibid.*, at 637.

And then more specifically on the principle governing the exercise of his discretion he added:—

> "I have not overlooked the discretions given to the Court by ss. 16 and 18 of the Divorce and Matrimonial Causes Act 1928, but I see no reason for refusing a decree in this case. In the public interest . . . it is preferable that the petitioner should be allowed to regularise her position."[133]

There was no reference to the judgment of Salmond J. in *Mason* so presumably this was not one of those cases where the petitioner should be deprived of the liberty of remarriage which without doubt was the purpose and would be the result of the divorce sought by her. The petitioner had in this case deserted her husband some 17 years previously in New South Wales about the time he was committed to an asylum. She then went to New Zealand and lived with a man with whom she had committed adultery prior to the desertion. The judge was of the opinion that at one stage, about ten years prior to the proceedings, the husband had attempted to discover the whereabouts of the petitioner in the hope of resuming cohabitation but the petitioner had kept this concealed to prevent such a result. These facts were almost identical with the hypothetical case stated by Salmond J.[134] which he considered might justify the Court in refusing relief.

In the subsequent cases of *Adams v. Adams*,[135] *Marriott v. Marriott*,[136] *S. v S.*,[137] and *Raymond v. Raymond*,[138] petitioning husbands in desertion were granted decrees. It is significant that in each of the cases in this group the husband had during the period of living apart made financial provision for the deserted wife. In the first three, payments were made voluntarily, and in the last, pursuant to an order of a court of summary jurisdiction. In only one, *S. v. S.*, were there any additional circumstances which added to the gravity of the petitioner's matrimonial misconduct. This was an assault upon the wife at the time of parting in respect of which the husband was charged; but the charge was dismissed. On the other hand in *Raymond v. Raymond*, although the husband was in desertion, Gresson J. was not prepared to find that his conduct was the sole or substantial reason

133 *Ibid.*
134 Mason v. Mason, [1921] N.Z.L.R. 955, at 962-963.
135 [1955] N.Z.L.R. 1245.
136 [1956] N.Z.L.R. 126.
137 [1957] N.Z.L.R. 532
138 [1958] N.Z.L.R. 162.

for the separation, the wife being guilty of conduct which, though not amounting to just cause for the husband's leaving, nevertheless was not blameless.

These cases, with the exception of *McRostie v. McRostie,* would indicate that desertion without added serious disregard of matrimonial obligations has not been regarded by the courts as making the granting of the decree contrary to the public interest, but it can be assumed that in a case without the mitigating facts present in most of those mentioned above the court could readily find such to be the case.

Failure to comply with a restitution order.

The situation here is that the petitioner has had an order for restitution of conjugal rights made against him and subsequently has petitioned the Court for dissolution on the ground of five years' separation. The question is whether his conduct in disobeying the prior order should disqualify him from obtaining relief from his marriage. Such a situation faced Gresson J. in *Crewes v. Crewes.*[139] In the first place the respondent claimed a nonsuit on the basis that as the petitioner was in contempt the Court was debarred from hearing him. Gresson J. recognised the existence of such a principle but denied its application to this situation because:—

> "An order for restitution of conjugal rights is in a different category from other orders of Court inasmuch as provision has been made by the legislation for the case of non-compliance. No doubt the Court when it makes its decree expects compliance but unlike other cases . . . the statute enacts the consequences which are to flow from non-compliance and does not allow enforcement of the order by attachment."[140]

Having in this way overcome the first hurdle the judge had next to decide whether disobedience to the restitution decree warranted the refusal of a dissolution decree. The plaintiff's conduct was not the cause of the separation although he was not blameless. His financial provision for the respondent was not "ungenerous." All this added up to the fact that in the view of the judge a "dissolution of the marriage seems to me in this case to be desirable in the public interest."[141]

This was followed with some "uneasiness" in *Arnst v. Arnst*[142]

139 [1954] N.Z.L.R. 1116.
140 *Ibid.,* at 1118.
141 *Ibid.,* at 1121.
142 [1957] N.Z.L.R. 722, at 730.

and attention was drawn to the fact that in other cases there might well be added circumstances surrounding the order and non-compliance which would result in a decree not being granted. Such, however, was not this case.

Adultery.

The fact that adultery of the petitioner is made a discretionary and not an absolute bar[143] is recognition that it is not *per se* contrary to public interest to grant a decree to an adulterous petitioner. But the question that arises when the discretion is invoked under this section is, on what principle should the court act in deciding whether to grant a decree? When such a question is posed one immediately thinks of the principles that guide the exercise of the court's discretion in petitions on other grounds where the petitioner has committed adultery, namely, the principles in *Blunt,*[144] as providing the answer. But is this the correct answer? If the principles in *Blunt* are applied, then, as explained in *Henderson v. Henderson,*[145] the approach to the question would be that upon proof of the ground the petitioner is prima facie entitled to a decree, but because he has committed adultery the court is to consider a number of matters, if any or all of them are present, before exercising its discretion. These are, shortly, (a) the interest of the children of the marriage; (b) the interest of the party with whom the petitioner has committed adultery—with regard to the prospect of their future marriage; (c) the prospect of reconciliation if the marriage is not dissolved; (d) the interests of the petitioner in that he should be able to remarry and live respectably; and finally, (e) the interest of the community at large, to be judged by maintaining a true balance between respect for the binding sanctity of marriage and the social considerations which make it contrary to public policy to insist upon the maintenance of a union which has utterly broken down.[146] It is to this final consideration that primary importance is attached and that greater weight has been given, for as pointed out by Dixon J. some of the other considerations enumerated above are "more often than not a matter of speculation incapable of satisfactory decision."[147]

If this final consideration is to be the controlling factor in guiding the exercise of the discretion in five-year separation divorces does it

143 As it was previously in Western Australia. See note 99 *supra.*

144 Blunt v. Blunt, [1943] A.C. 517.

145 (1947-1948) 76 Commonwealth L.R. 529: See particularly at 541-545.

146 Blunt v. Blunt, [1943] A.C. 517, at 525.

147 Henderson v. Henderson, *supra* note 136, at 544.

not raise again the whole policy question, which has been determined by the very enactment of the ground, and depose the policy of the ground from its controlling position to a lesser place where it is to be balanced against respect for the sanctity of marriage? One would have thought that this final consideration was not applicable to this ground because its policy must in all cases weigh the scales in favour of dissolution. The court is here only concerned, or in all cases other than that of the adulterous petitioner, with the public interest in the sense that Salmond J. described it in *Lodder* and *Mason,* that is, deciding whether a decree should be refused because of the petitioner's misconduct; not with the question of public interest as described in *Blunt.* This question is already decided. To introduce the *Blunt* principles in this way seems to the writer to be inapposite and to destroy, in these cases of adulterous petitioners, the effectiveness of the legislation. It introduces principles determining a question of interpretation of a ground based on a policy of fault to determine a question of interpretation of a ground based on a non-fault policy.

To give to section 37 (3) an interpretation which is in conformity requires a new approach to the discretion question. It is submitted that the solution to the problem should be based on this type of thinking. The ground is based on a different policy approach from most of the other grounds contained in the Act. It requires a different technique to implement it and different considerations in its application. This has been appreciated and given effect to in the Act. The ground has been removed from the area of operation of the traditional principles applicable in matrimonial causes but special provisions applicable to it have been enacted instead. The ground and its attendant provisions have been constructed into a scheme separate from the others. However, into the midst of this scheme has been inserted this section 37 (3) which, if construed in its accepted manner, injects into the scheme considerations and principles inapplicable to it. The context therefore dictates a different meaning in this instance. What then is the different meaning or interpretation? Firstly, the insertion of section 37 (3) should be taken as a direction that adultery *per se* is not to be regarded as conduct which would make the granting of a decree against the public interest and so the bar in section 37 (1) is not automatically raised. Secondly, the discretion should not be exercised in accordance with the principles of *Blunt* but in accordance with the principles indicated in the judgments in *Lodder v. Lodder* and *Mason v. Mason.* This, it is appreciated, will mean only a re-application of the principles in section 37 (1), but nevertheless, it is

the only way to construe the subsection in conformity with the ground and its policy.[148]

McRostie[149] appears to be the only reported decision in which the petitioner had in fact committed adultery, and the question was apparently resolved by reference to both the above principles. F.B. Adams J. said:—

> "In the public interest *as well as*[150] in the interests of the petitioner and her second son and pretended husband it is preferable that the petitioner should be allowed to regularise her position."[151]

The reference to the petitioner, her second son who was born as a result of the adulterous association, the pretended husband who was the person with whom the adultery had been committed, all indicate determining the discretion question by reference to the 2nd, 3rd and 4th considerations in *Blunt*. This third approach, of superimposing the requirement of taking into account the considerations of *Blunt* on the public interest consideration, is equally open to objection once it is agreed that the *Blunt* principles are inapplicable.

Under this general heading of misconduct precluding relief the only reported case in Australia and in New Zealand on a simple discretion similar to that contained in the first part of section 18 of the New Zealand legislation in which relief was refused is *Gore v. Gore*.[152] The petitioner's first marriage had been dissolved on the ground of his desertion. His second marriage had factually ended by the parties entering into a deed of separation. Wolff J. refused a decree because "the Court should not be ready in cases like this one to exercise its discretion to grant a decree to the petitioner already in default in one matrimonial cause."[153] The Full Court on appeal would not interfere with the trial judge's exercise of the discretion which was the substantial ground for the dismissal.[154]

148 The illogical step of specifically providing that the petitioner's adultery raised a discretionary bar was recognised by the Attorney-General (Sir Garfield Barwick) in his second reading speech introducing the legislation but was simply accepted as such and explained as follows:

> "However, whatever the logic of the situation, the Government has provided in the bill that the Court will have a discretion to refuse a decree of dissolution on this ground if the petitioner has been guilty of adultery." (1959) 23 COMMONWEALTH PARL. DEB. (H. of R.) 2232.

149 [1955] N.Z.L.R. 631.

150 Italics supplied.

151 At 637.

152 (1947) 49 West. Aust. L.R. 60.

153 *Ibid.*, at 61.

This decision was made some years before the High Court in *Pearlow* indicated the manner in which the discretion should be exercised, but nevertheless implicit in the reason given is the same sort of thinking. Whether the same result would be arrived at under the federal Act is open to some doubt, but failure in two matrimonial ventures, particularly if both were the result of the petitioner's misconduct, might well be good reason for refusing a decree under section 37 (1).

(B) *CIRCUMSTANCES HARSH AND OPPRESSIVE TO THE RESPONDENT.*

The decision in *Thomson v. Thomson*[155] referred to in *Pearlow*[156] shows that a decree could be classified as being harsh and oppressive where the effect is to deprive the respondent of rights that would accrue on death of the petitioner under testator's family maintenance legislation, though in *Southee v. Southee*,[157] where a decree would have resulted in deprivation of a social security payment, it was held that this was not a good reason for refusing a decree. It seems clear that a decision such as *Southee* could not obtain under the federal Act[158] and *Thomson* would be followed.[159]

But what other circumstances will prevent a decree under this bar? Apart from financial hardship, and perhaps the unlikely situation of prejudice in employment as a result of changed status, it is difficult to envisage other circumstances in which it could be said that the granting of a decree would result in hardship to the respondent. It is submitted that the dissolution itself, in that it deprives the respondent of a legal spouse and accordingly the right to the incidents of *con-*

154 *Ibid.*, at 61-62. The decision of the Full Court was also based on another ground which seems to confuse the absolute bar contained in sec. 69 (6) of the Supreme Court Act 1935-1945 (which required as a prerequisite to relief that the plaintiff was not in arrears of maintenance under any antecedent orders or agreements) with the absolute discretion contained in the same section.

155 [1946] N.Z.L.R. 265.

156 (1953-1954) 90 Commonwealth L.R. 70, at 81.

157 [1947] N.Z.L.R. 378.

158 See *supra*, at 72.

159 But in Queensland, South Australia, and Western Australia a dissolution of the marriage will not in some cases affect the right of the surviving party to the former marriage to claim against the estate of the deceased. See Testator's Family Maintenance Act 1918-1943 (South Australia), sec. 2; Testator's Family Maintenance Act 1939-1944 (Western Australia), sec. 2; Testator's Family Maintenance Act 1914-1952 (Queensland), sec. 3 (1B); so to this extent in these States this decision will not be applicable.

sortium (other than the right to be maintained), cannot be regarded as a circumstance resulting in hardship to the respondent because the *consortium* has, after all, been factually ended for at least the previous five years. During this period she has been deprived of the privileges and rights arising out of the personal society of the other spouse. It would seem, then, that the decree of dissolution must operate against the respondent in a prejudicial manner with respect to something external to the personal rights and obligations arising out of the marriage. Beyond stating this general principle it is difficult to venture.

IV. CONCLUSION.

The federal Act cannot be termed a piece of pioneering legislation in this field. Having accepted the policy that it is in the best interest of society that a marriage which has broken down should be permitted to be legally dissolved—without proving more—the federal Parliament had the experience, and in some instances long experience, of the working of such a policy and a ground based upon it in other jurisdictions to draw upon in the formulation of its legislation to give effect to such a policy in Australia. This experience was not overlooked In particular the influence of decisions of the Courts of New Zealand can be seen in the special provisions applicable to this ground only, which taken together with the ground form this new scheme for dissolution. Accordingly it is to be expected that in the future in the course of working out the interpretation of the ground and in ascertaining what factual situations come within its compass and special provisions, reference will be freely made to such decisions for assistance and guidance.

The purpose of this article has been to look at the development of the interpretation of the ground in other jurisdictions, with a view to predicting the interpretation in Australia. But in examining the decisions perhaps there is another lesson to be learned, and that is this: The Act clearly separates this ground from all the others. It treats it separately and provides a separate set of principles applicable to it—as it should. Therefore, should not the interpretation of the ground be approached in the same way? Should it not proceed independently of and unencumbered by preconceived notions drawn from existing matrimonial law? In other words, should not the approach to the interpretation be dictated more by policy than by legalism?

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