(3) the only proper process of marshalling is that in favour of creditors who would otherwise have had no access to the policy.

It follows that

(a) where a debt has been secured by charging both the policy and another asset, the secured creditor should have recourse firstly to the policy, and

(b) funeral and testamentary expenses are also primarily payable from the policy.

If this is not done and the debts payable from the policy are paid primarily from unprotected assets, it is then that the equity in favour of the other creditors enables them to gain access to policy proceeds by marshalling.

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SEPARATION AS A GROUND FOR DIVORCE

CRABTREE v. *CRABTREE*

When the Federal Parliament passed the Matrimonial Causes Act in 1959 it introduced, in s.28(m), the concept of divorce without matrimonial fault. The *raison d'être* of this concept is shown by the following passage from an article written by the principal draftsman of the Act, Sir Garfield Barwick:

> When it can properly be concluded that a marriage has lost its reality, its significance for the parties and its significance for the community, and this situation is evidenced in the complete physical separation of the parties, the Parliament can no longer regard that marriage as stable or sound, could no longer regard it as performing the function stable and sound marriage performs in the organization of society. The situation proving incurable and the marriage insusceptible of being revitalised, then in the view of the Parliament the basis exists for dissolution of the new lifeless bond. Thought of this order resulted in the adoption by the Parliament of what is conveniently and compendiously called the principle of the breakdown of marriage as a principle to furnish a ground of dissolution.[1]

The statement of Sir John Salmond in the New Zealand case of *Lodder* v. *Lodder* is also apt: "When the matrimonial relation has . . . ceased to exist *de facto* it should, unless there are special reasons to the contrary, cease to exist *de jure* also."[2]

Section 28 reads as follows:

> Subject to this Division, a petition under this Act by a party to a marriage for a decree of dissolution of the marriage may be based on one or more of the following grounds:—
>
> (m) 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.

Section 28(m) is closely associated with ss.36[3] and 37. The effect of s.36

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[1] The Hon. Sir Garfield Barwick, "Some Aspects of the New Matrimonial Causes Act" (1961) 3 *Sydney L.R.* 409 at 418-19.

[2] (1921) N.Z.L.R. 876 at 878.

[3] Section 36 reads—

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

is that the separation may be either unilateral or consensual and its provisions concern the mechanics of s.28(m). Section 37 gives the circumstances when a court may refuse to make a decree on the ground of separation. The aim of this note is to discuss the concept of living separately and apart, a topic which is distinct from that involved in s.37.[4] No philosophical query as to the advantages or disadvantages of the separation ground is contemplated.[5] The emphasis in this note will be on the case of *Crabtree* v. *Crabtree*[6] which raised the issue of whether the continued residence of parties under one roof necessarily prevents a conclusion that they have separated and are living separately and apart within s.28(m).

The facts in *Crabtree* were that the parties, a husband and wife, not having a happy matrimonial home, agreed to live separately and apart from each other, each leading their own distinct lives. For both the children's sakes and the husband's career they agreed to reside in the same house. The parties slept in different rooms and neither spouse helped the other in any way; communication was by means of the children, meals being taken separately. At an opportune time the husband left the house. This particular case involved no factual determination for the Court (the Full Supreme Court of N.S.W.); it was merely a question of law to be determined so that the trial judge, applying their Honours' answers, could then decide the issue.[7]

* * * *

It is convenient to discuss the problem in the light of the threefold classification of Nagle, J. in *Crabtree* v. *Crabtree*:

> . . . firstly, the parties have separated, secondly, thereafter and for the required period they have lived "separately" and "apart", and thirdly, there is no reasonable likelihood of cohabitation being resumed.[8]

". . . HAVE SEPARATED"[9]

Though it is obvious that the parties must separate (hereinafter referred to as the "initial" act) before they can actually live separately and apart (the

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(2) a decree of dissolution of marriage may be made upon the ground specified in (m) 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) any agreement between the parties for separation.

[4] For a discussion of some aspects of s.37 see the paper delivered by the Hon. Sir Stanley Burbury, Chief Justice of the Supreme Court of Tasmania, at the 13th Legal Convention of the Law Council of Australia (Jan. 1963), reported in (1963) 36 *A.L.J.* 283 esp. at 287-89. See also undergraduate articles in (1960) *Tasmania L.R.* at 496, 590 and 866 and a paper by Ian McCall on "Living Separate and Apart for Five Years and the Federal Matrimonial Causes Act" in (1960) 5 *Univ. of West. Aust. L.R.* 51 at 69 and following.

[5] As to the advantages and disadvantages of such a ground see B. D. Inglis, *Family Law* (N.Z. 1960) at 178 and following; R. S. W. Pollard, *The Problem of Divorce* Ch. 6 (1958) and Nield, J. in *Murphy* v. *Murphy* (1962) N.S.W.R. 417 at 424-5.

As to the history of separation as a ground for divorce see article of Ian McCall *supra*; Nield, J. *supra*.

As to whether any stigma reasonably attaches to a respondent divorced on the ground of s.28(m) without fault on the respondent's part see comments of Gibson, J. in *Baily* v. *Baily* (Supreme Court of Tasmania) (1962) 3 F.L.R. 476, 477.

[6] (1963) 81 W.N. (N.S.W.) Part 2, 66.

[7] The case came to the Full Court by way of reference under s.86 of the Matrimonial Causes Act from Chambers, J. Such references were upheld as valid in *Horne* v. *Horne* (1963) S.R. (N.S.W.) 121.

[8] *Ibid.* at 74.

[9] The prototype of s.28(m) was s.69(6) of the Supreme Court Act, 1935-47 (W.A.) which resembles, as regards basic essentials, the Commonwealth provision save that there is no requirement of an initial act of separating.

"continuing" act), there is a question as to whether the essentials of both of these activities are the same.

Neither the joint judgment of Sugerman and Dovey, JJ. nor that of Nagle, J. in *Crabtree* discussed at any stage the words "have separated". Their Honours must have assumed that the spouses had separated, yet they did not even express that this fact was being assumed; this matter was completely ignored.[10] As the writer believes that this requirement is the crux of the matter, especially in interpreting s.28(m) in a "one-roof" case, a discussion of it seems essential.

To separate, the parties must sever the marriage, that is to say, the parties withdraw from the matrimonial relationship. There must be a state of affairs which the court can examine and from which the court is able to say that the parties have separated; that is, there is a minimum standard of matrimonial relationship and one more slight move towards breaking it *is* the act of separation. The court must be able to isolate this "last act"; it must be able to say that it happened at a particular moment.[11] There have been many judicial pronouncements as to when the parties have separated in desertion cases. The principles as to separation in one-roof desertion cases were expressly applied to s.28(m) by the Court in *Crabtree*.

Denning, L.J. in *Hopes* v. *Hopes* said:

> One of the essential elements of desertion is the fact of separation. Can that exist while the parties are living under the same roof? My answer is "Yes". 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. They may meet on the stairs or in the passageway, but so they might if they each had separate flats in one building. . . .[12]

Later he said:

> It is most important to draw a clear line between desertion, which is a ground for divorce, and gross neglect or chronic discord, which is not. That line is drawn at the point where the parties are living separately and apart. In cases where they are living under the same roof, the point is reached when they cease to be one household and become two households, or, in other words, when they are no longer residing with one another or cohabiting with one another.[13]

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[10] In fact, the question referred to the Full Supreme Court by the trial judge pursuant to s.86 as interpreted by the joint judgment of Sugerman and Dovey, JJ., is stated at 67 as ". . . whether, on the mere construction of Section 28(m), the continued residence of the parties to a marriage in the one dwelling house during the period relied upon of itself and necessarily prevents any conclusion that they *had separated* and thereafter had lived separately and apart for that period". (Writer's italics.) However, they did not at any stage consider whether Mr. and Mrs. Crabtree "had separated" while they resided under the same roof; their Honours stated that their task was to construe the words "live separately and apart" (see esp. 68).

[11] The reason why the court must be able to allocate a certain act as the "last" act or "breaking" act of marriage (that is, one step above "chronic discord") is obvious. The consequence of separation is the "living separately and apart", and this must last for five years. Before one can say the required period has expired the date of commencement must be ascertained. This involves questions of evidence, a problem mentioned by the Full Supreme Court in *Crabtree*, but not discussed.

[12] (1949) P. 227 at 235 (this was a one-roof case).

[13] *Ibid.* at 236.

Bucknill, L.J. in the same case laid down the test: . . . there must be . . . such a forsaking and abandonment by one spouse of the other that the Court can say that the spouses were living lives separate and apart from one another (at 234).

Lord Merriman, P., in *Naylor* v. *Naylor* ((1961) 2 All E.R. 129) said:

In *Smith* v. *Smith* ((1940) P. 49), *Wilkes* v. *Wilkes* ((1943) P. 41) and *Angel* v. *Angel* ((1946) 2 All E.R. 635) it had been held that one spouse could desert the other, although they were residing in the same house if, to quote Bucknill, L.J.

Both the judgments in *Crabtree* v. *Crabtree* adopted these judicial expressions.[14] Not only were desertion and separation treated as similar but the "one roof" case aspect in both grounds was considered as having closer ties. But, as pointed out, the above statements were considered only in the light of "living separately and apart"; no light was thrown on the question of whether the spouses could actually *separate* while living under the same roof.

This act of separation has two factors, an *animus* and a *factum*.

Section 36 shows that there must be an intention to separate. This intention may be unilateral (s.36(1)) or consensual (s.36(2)(b)).[15] It is an intention to break the matrimonial home or the *consortium vitae*, and that is broken when the above tests are fulfilled. The section says the parties "have separated", not just "separated". That is, the active, and not the passive, tense is contemplated. These points are made clear by the decision of Crisp, J. (Tasmanian Supreme Court) in *Collins* v. *Collins*;[16] the wife had decided to leave her husband but before she could put her plan into effect the husband was injured, which caused him to enter hospital where he remained for over a year. During this time the wife "did such things as she might for a man in hospital" and also lived in the matrimonial home. Before the husband left hospital the wife "skipped" the district in order to put her former plan into effect. Crisp, J. held that the parties had not separated when the husband entered hospital but only when the wife went away. His Honour held that separation is the antithesis of cohabitation and the intention to break this cohabitation was not manifest when the husband entered hospital (where there was physical separation) since (i) the hospitalization was treated as only temporary, and (ii) the wife did perform some wifely functions, for example, washing her husband's clothes.

Dovey, J. in *McDonald* v. *McDonald* [17] has stressed that the separation must come about by the intentional act of one or both of the parties. Applying the test of Bucknill, L.J. in *Hopes* v. *Hopes*, or Selby, J. in *Paton* v. *Paton* to the facts of *Crabtree* v. *Crabtree*, it is obvious that the parties had separated. But the Court did not have to decide on the facts.

"LIVED SEPARATELY AND APART"

It is suggested that s.28(m) is satisfied, at least as far as the first and second requirements are concerned, if the parties have in fact separated (as

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in *Hopes* v. *Hopes* "The Court can say that the spouses were living lives separate and apart from one another" ((1961) 2 All E.R. at 133).
Later Lord Merriman said (*ibid.* at 134):
As regards desertion, it is elementary that it is an essential ingredient of that offence that there is *de facto* separation of the spouses at the material time. It is plain from the findings of the magistrates in the case stated in *Evans* v. *Evans* ((1948) 1 K.B. 175) . . . that the desertion depended on the findings of fact that there was no common household and that in every sense the husband and wife were living separate and apart from each other and using separate parts of the house.

There are many Australian cases in which it has been held that there was desertion yet *the parties were living under the same roof*. Amongst these are *Watkins* v. *Watkins* ((1952) 86 C.L.R. 161); *Potter* v. *Potter* ((1954) 90 C.L.R. 391) and *Campbell* v. *Campbell* ((1951) 68 W.N. (N.S.W.) 174). More recently in *Paton* v. *Paton* ((1964) Arg. L.R. 240) where desertion was not proved but where the parties lived under the one roof, Selby, J. of the N.S.W. Supreme Court said:

In order to satisfy the Court that a complete severance has occurred the petitioner must prove that the marriage is one in name only, that the parties were living, as it were, in separate establishments, although under the same roof and that the respondent has treated the marriage ties as non-existent.

[14] With the exception of *Naylor* v. *Naylor* and *Paton* v. *Paton* (but these cases adopted the other cases as well).

[15] The actual case of *Crabtree* v. *Crabtree* involved the application of s.36(2)(b).

[16] (1961) 3 Fed. L.R. 17.

[17] 80 W.N. (N.S.W.) 394 (now overruled on grounds concerning s.37).

explained above) and have continued this state of affairs for five years. Any detailed discussion of the consequence of the separation, "the living separately and apart", which is the state of affairs to be maintained should, it is submitted, be relegated to a discussion of the basic factor, viz., the separation. However, the cases on s.28(m) have not followed such a theory, nor have they even considered it.

Sugerman, J. and Dovey, J. in their joint judgment ignored the words "have separated" and concentrated their efforts on the words "separate and apart". Before considering their judgment it is essential to glance at the background of earlier cases on separation, especially in relation to the "one-roof" cases.

The Earlier Cases

The first case of any importance discussing a separation provision was *Flindell* v. *Flindell*.[18] Section 69(6) of the Supreme Court Act, 1935-47 (W.A.), gave as the ground that the parties ". . . lived separately and apart . . . and it is unlikely that cohabitation will be resumed". Compared to s.28(m) of the Commonwealth Act, the provision is the same except that requirement "I" (the act of separating) is not specified. As far as the "separately and apart" factor was concerned, the judge laid down two requirements (a) complete physical separation of the parties from the same habitation, and (b) a cessation of cohabitation in the fullest sense leaving the parties without any semblance of relationship as man and wife. In *Flindell* v. *Flindell*[19] it was held that the particular husband and wife living in the same house had not been living separately and apart, but no ratio can be deduced from the decision as the reporter did not think it worthwhile to give the pertinent facts. Wolff, J. gave no distinct meaning to "separate" and "apart"; they were combined to form one unit. One year later[20] Wolff, J. dampened his views and held that, even though the husband had remained at the house of his wife, the parties had in fact lived separately and apart, for the husband was merely a boarder.[21] It was now no longer necessary to have a complete physical separation of the parties from the same habitation;[22] again the words were treated as a single concept and the conjunctive ignored.

The next case was decided by the High Court in 1949. In *Main* v. *Main*,[23] the basis of the petition was s.69(6) of the Western Australian Act. The parties had clearly been living separately and apart (the husband's hopeless medical condition necessitated him staying permanently in a hospital), yet Latham, C.J., Rich and Dixon, JJ. apparently thought it opportune to "clarify" the law.

> 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.[24]

Later on, after examining the requirements of the *consortium vitae*, their Honours said: "The word 'separate' should, it seems, be interpreted as importing the negation of such a matrimonial relationship."[25]

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[18] (1948) 50 W.A. L.R. 9. [19] Wolff, J.

[20] *Ayling* v. *Ayling* (1949) 51 W.A. L.R. 61.

[21] *Ibid.* esp. at 66.

[22] It was "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", *ibid.* at 65.

[23] (1949) 78 C.L.R. 636. [24] *Ibid.* at 641-42.

[25] *Ibid.* at 642. It seems logical that, because of the meaning given to the word "separate", the word "apart" implies the physical separation. That this is so is borne out by other passages in the case and by subsequent cases.

Analysing the situation before and after *Main* v. *Main* we find
(1) Before *Main's Case* the principles in the desertion cases (where the parties were living under the same roof) as to the destruction of the *consortium vitae* were applicable to "living separately and apart". Wolff, J. in *Ayling* v. *Ayling*[26] cited *Hopes* v. *Hopes*; physical separation was not essential as long as the test of Bucknill, L.J. was satisfied. *Main's Case* then declared that physical separation *was* necessary.
(2) Before *Main's Case* no effect was given to the word "and" in the phrase "separately and apart"; it was treated as one unit. In *Main's Case* the conjunctive is given its full force. Ian McCall sums[27] the situation up as follows; the High Court "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 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*".[28]

What degree of physical separation was required was not stated in the Court's judgment, but because of their straightforward language it seems that, as suggested by Ian McCall, the separation must be complete. The conclusion of *Main's Case*, as far as is relevant, is that s.69(6) was not satisfied where both the parties resided in the same house.[29]

This confusion might seem justified because of the expression of the West Australian provision. Section 69(6) merely said "living separately and apart", and a full interpretation had to be given to it. There was no preceding word from which the phrase could take its meaning. Section 28(m) of the 1959 Commonwealth Act did not take the form of s.69(6). It states that the *parties have separated* and thereafter lived separately and apart; the normal construction is to say that by "living separately and apart" the parties are merely continuing the state of affairs by which they separated. If the breach of the matrimonial relationship which has to last for five years is not the same as that which constitutes the initial break, then a court would be justified in discussing the first two requirements of Nagle, J. distinctly. However, it is contended that the continuing breach is the same, and probably involves a smaller break than the initial break.[30] If this is so the normal meaning of "have separated", which is less in degree than the meaning of the High Court in *Main* v. *Main* of the phrase "living separately and apart", should govern s.28(m). The difference between the two meanings, that is, the requirement of physical separation (whatever that may mean) of the High Court, would now become an anachronism. This approach involves a re-organization in thinking (as from that which was used for s.69(6)), and gives the words "have separated" their due importance. An application of this approach would avoid the upset caused by *Main* v. *Main* which has caused subsequent cases severe trouble.

THE CASES SINCE THE INTRODUCTION OF SECTION 28

Jackson, S.P.J. of the Supreme Court of Western Australia in *Sharp* v. *Sharp*,[31] applied *Main* v. *Main*. His Honour said:

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[26] (1949) 51 W.A. L.R. 61. [27] (1960) 5 *Univ. of West. Aust. L.R.* 51 at 59.
[28] This interpretation has been followed by Nagle, J. in *Crabtree;* Crisp, J. in *Collins* v. *Collins* and Nield, J. in *Murphy* v. *Murphy* ((1962) N.S.W.R. at 427).
[29] After the decision in *Main's Case*, the Western Australian Act was amended by omitting the word "apart". See the decision of Virtue, J. in *Bell* v. *Bell* (1953) 55 W.A.L.R. 87 esp. at 92.
[30] See *infra*. [31] (1961) 2 Fed. L.R. 434.

> In view of *Main's Case*, it seems clear that a petitioner must now *once more* prove not only a destruction of the matrimonial relationship for the necessary period but also a physical separation.[32]

The words "now once more" obviously show that his Honour must have thought that s.28(m) was in identical terms to s.69(6) of the West Australian Act, or at least its effect was the same, although the English cases on desertion, and, by that time the High Court,[33] had laid down a proposition that there may be separation without the necessity of physical separation, at least as far as desertion is concerned. Jackson, S.P.J. did not make particular reference to the change of the structure of the new separation provision.

The next case is *Murphy* v. *Murphy*.[34] The facts of the case can be well taken from the judgment of Nield, J. of the New South Wales Supreme Court.

> The Petitioner procured a decree for judicial separation in 1947, and at the time of obtaining that decree she sought other accommodation than the matrimonial home; but she was unable to find any other accommodation. She returned to the matrimonial home and lived there for a number of years. There is no doubt that cohabitation in the sense understood in the Divorce Courts had ceased and that nothing happened, during the entire period when she was resident in the same home under the same roof as the respondent, which caused the judicial separation decree to be at an end . . . There was a cessation of cohabitation although the parties were living under the same roof.[35]

The facts do not indicate the length of time between the making of the decree for judicial separation and the return of the petitioner-wife to the matrimonial home. The parties had definitely separated and the issue was whether the return of the wife to the matrimonial home necessarily prevented the spouses "living separately and apart".

Though the case required no comment on the act of separating (as regards the first requirement), and though Nield, J. did not discuss the requirements, the judgment at least recognized that the five years of living "separately and apart" was a continuation of the earlier event of "separating". The headnote adequately expresses a part of the judge's holdings:

> The words "separate and apart" . . . are to be construed together as a phrase indicating the existence of both the *factum* of separation in the sense of ceasing to cohabit and the *animus* of continuing that situation. . . .[36]

However, the judgment was concerned, *prima facie*, with the continuing state of affairs. The analysis of Nield, J. still did not give the due importance to the structure of the new section but was mainly concerned with *Main* v. *Main*; if the fact that the section was now changed had been positively realised the task would have been simpler and the method more logical.

The argument that Nield, J. pressed home was that the contention of Latham, C.J., Rich and Dixon, JJ., of requiring physical separation, was mere dicta. He said:

> It does not seem to me that I am bound by *Main* v. *Main* to so apply those words; and for this reason—that those words in *Main* v. *Main* are dicta only. They were unnecessary for the decision. In the case of *Main* v. *Main*, as the parties had not been living under the same roof at any period during the alleged separation, and it was not a necessary part of the court's determination that they should say that these words

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[32] *Ibid.* at 436.
[33] *Watkins* v. *Watkins* (1952) 86 C.L.R. 161; *Potter* v. *Potter* (1954) 90 C.L.R. 391.
[34] (1962) N.S.W.R. 417.
[35] *Ibid.* at 418.
[36] *Ibid.* at 417.

> "separately and apart" showed that physical separation was necessary. So, I am not thereby bound to apply that case as having decided this case in a particular way. If the *Main* v. *Main* parties had been living under the same roof and the High Court had said because they had been living under the same roof they had not been living separately and apart, and, therefore the petition should be dismissed—that would have even been one thing. It would have been involved in the determination of the case, that the statute had been so interpreted; but the position in this case was quite the reverse. The parties had not been living under the same roof; and the same court as a matter of fact decreed that dissolution should be the order of the court. It is not a case in which, as a basis of the Court's decision, there was this construction of the Western Australian Act.[37]

With the decision of *Main* v. *Main* out of the way[38] his Honour showed that the words we are now considering had long been used in "connection with the relationship of husband and wife", and, after quoting from an English case decided sixty years ago and examining the usual form of separation agreements, he put forward the conclusion that the words "separate" and "apart" were *interchangeable*. Together or apart the words meant no more than something adverse to cohabitation, a break in the matrimonial relationship.[39] The Judge could have completed the logical process, as advocated here, of saying that if such was the case, and the fact that separate and apart meant no more than separating in the sense of desertion, then, *a fortiori*, if there may be desertion where the parties are living under the same roof then there must be circumstances in which the parties are separate and apart yet living under the same roof. The rationale of the decision is that to live separately and apart there must be a *factum* of a state of affairs adverse to cohabitation plus a mental element of continuing this state of affairs—an *animus separationis*. This, the writer admits, is very similar to the view espoused by him but differs in that the whole concept is not traced back to the initial act of separating. This initial act was given no important role by Nield, J. in working out the mechanics of s.28(m).[40]

The judgment of *Murphy* v. *Murphy* is also important in that it rejects the view of the High Court in attaching distinct meanings to the words "separate" and "apart", yet the reason for Nield, J.'s approach was that of common usage and etymology—not for any practicality in the sense of simplicity or policy.[41] But, whether or not his approach is correct,[42] he could "see no reason in logic why one cannot say of people living under the same

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[37] *Ibid.* at 420, 421.

[38] (1962) N.S.W.R. 417.

[39] At 423 Nield, J. said: "It (the state of affairs in which the parties are living separately and apart) is a question of cohabitation having been brought to an end."

[40] The analysis used in *Murphy* v. *Murphy* and the emphasis on the second requirement and the consequent failure to give the first requirement a stronger nexus with the second are illustrated esp. at 425.

[41] Nield, J. was probably persuaded by the interpretation given to s.7(jj) of the New Zealand Divorce and Matrimonial Causes Amendment Act, 1953. The ground in s.7(jj) was simply "living apart"; there was no mention of the word "separate". In *Sullivan* v. *Sullivan* (1958) N.Z.L.R. 912 (see *infra*), the word "apart", which the Court of Appeal considered to correspond to the word "separate", was given the meaning of "the antonym of cohabitation", the opposite meaning to that allocated by the High Court in *Main* v. *Main*. See esp. the judgment of Turner, J. at 924.

[42] In *Koufalakis* v. *Koufalakis* (1964) A.L.R. 196, Travers, J. of the South Australian Supreme Court, following *Main* v. *Main* and adopting the judgment of Jackson, J. in *Sharp* v. *Sharp*, and without any discussion of the matter refused to follow the approach of Nield, J. The only "approach" in *Sharp's Case* that the writer could find was the adoption simpliciter of *Main's Case*. This unsupported and unreasoned remark, which was *obiter dicta*, by the learned judge, should, it is contended, be dismissed without more ado.

roof that they are living separate and apart; just as if they were living in different homes".[43] The relevant part of the judgment concludes as follows:

> I think the parties may be living under the same roof, they may be living in the same house, but not of it. In that sense, they could be described as being as "apart" as Wordsworth meant of Milton's soul. I think Wordsworth would agree that husband and wife could live separately and apart under the same roof.[44]

CRABTREE v. CRABTREE[45]

Crabtree v. *Crabtree*[46] was the first case in which a Full State Supreme Court had an opportunity to consider Section 28(m), all the other relevant cases being decided by single judges. It was an ideal chance for a superior body in the judicial heirarchy not only to lay down a proposition of law (which indeed the Court did) but to establish the general principles for the mechanics of s.28(m), clear and unambiguous, whose persuasive value would be quasi-compelling. However, the approach of both the joint judgment of Sugerman and Dovey, JJ., and that of Nagle, J., left much to be desired. The interpretational complexities accompanying the old Western Australian Act were carried over to s.28(m); at no stage was there recognition of the fact that the provision *had* in reality changed, that there *were* the words ". . . the parties have separated . . ." and consequently no discussion as to whether the difficulties imposed by *Main* v. *Main* had automatically become irrelevant, or at least, unimportant.[47]

Sugerman and Dovey, JJ. approached the issue by saying that the cases of *Hopes* v. *Hopes*, *Watkins* v. *Watkins* etc. allowed[48] desertion to take place, the requirements of which included, *inter alia*, an intentional destruction of the *consortium vitae* and a physical separation of the parties, even though both parties lived,[49] and continued to live, under the one roof. The words "separately and apart" had been used in the desertion cases to describe the mode of living sufficient to establish desertion in the "one-roof" situation and the same meaning *should* be given to the words in s.28(m).

> As they (the words) are thus used in relation to desertion, it is difficult at first sight to appreciate why they should not have a similar meaning in the related field of separation as a ground of divorce.[50]

The obstacle that then met the learned judges was the case of *Main* v. *Main*. Failing to realise that what they were interpreting was in reality a new provision compared to that in *Main* v. *Main*—the additional element and its effect on the second requirement being the ideal counter to the High Court's

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[43] (1962) N.S.W.R. 417 at 425.

[44] *Ibid.* at 427.

[45] After the Full Court gave its decision the matter was referred back to the trial judge and the case was relisted. Selby, J. held that, on the evidence, the parties had separated and had continued to live separately and apart within the meaning of s.28(m), and accordingly his Honour gave a decree *nisi* for dissolution of the marriage. *Crabtree* v. *Crabtree No. 2* (1964-65) N.S.W.R. 56.

[46] (1963) 81 W.N. (N.S.W.) P. 2 66.

[47] Sugerman and Dovey, JJ. at 69 pointed out that there was a difference between s.28(m) and s.69(6) but at no stage in their judgment commented on it or regarded it as even slightly important. Nagle, J., though he listed the three requirements (there were only two in s.69(6)) did not, in the whole of his judgment, even take note of the fact that s.28(m) and s.69(6) were in any way different, but positively stated that they were nearly the same, esp. at 74 where he said s.69(6) was "so similar" to s.28(m).

[48] That is, assuming that the other requirements of desertion were existing.

[49] That is, when the actual desertion commenced.

[50] (1963) W.N. (N.S.W.) Pt. 2 at 68.

test—Sugerman and Dovey, JJ. proceeded by a round-about way to come to the decision which justice and public policy required.

To simplify the "attack" on *Main* v. *Main* their Honours, taking an opposing view to that of Nagle, J., said that, practically speaking, it mattered little whether the words were treated as one concept with a single meaning or whether distinct meanings were to be given to the words "separate" and "apart" which were concepts on their own. In the final analysis, what was necessary was merely the unequivocal meaning that there were dual requirements—"physical separation" and "destruction of consortium." Their Honours said:[51] "The single meaning,[52] if it be such, must embody the ideas both of physical separation and destruction of consortium".

At this point some comment must be attempted. What the judges are attempting is to equate "separately and apart" in desertion and separation;[53] if the parties can so live in the same house and there still be desertion, then, *prima facie* the parties can live separately and apart under the one-roof within s.28(m). However, with respect to the learned judges, they have utterly confused themselves. The usual meaning of "consortium" is cohabitation;[54] if this is so the above quotation[55] requires (a) physical separation, and (b) destruction of cohabitation (*consortium vitae*); yet the only requirement of living separately and apart in desertion is (b), (a) not being a distinct factor but part of the "state of affairs" in (b), which is withdrawn from. That this is so is illustrated by a passage in *Hopes* v. *Hopes*,[56] a case cited with approval by Sugerman and Dovey, JJ. in which Lord Denning 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.[57]

There are other judicial statements to the effect that, to separate in desertion, all that is required (besides the intention to desert) is the destruction of cohabitation or the severance of the matrimonial relationship and that physical separation is not an essential element in this separation but only one of many factors.[58]

It is, therefore, contended that even though Sugerman and Dovey, JJ. were probably correct in stating that separation (and, living separately and apart) are the same in desertion and s.28(m)—it being common sense—they were not correct in stating that physical separation is a necessary ground for separation in desertion.[59] This naturally runs foul of their conclusion that physical separation is essential for s.28(m), because of the application of the desertion cases.

This dual requirement is typical of their Honours' attitude to the High Court's judgment in *Main* v. *Main*. Nield, J. in *Murphy* v. *Murphy* maintained that physical separation was not necessary; this was the result of a correct

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[51] *Ibid.* at 70.

[52] That is, of the expression "living separately and apart".

[53] The above quotation (n. 50) shows this.

[54] See Osborn, *A Concise Law Dictionary* (4 ed.) at 89.

[55] Note 46. This is again re-stated at 72: "Physical separation and destruction of the *consortium vitae* are necessary to both grounds. . . ." See also the last paragraph on 67.

[56] (1949) P. 229. [57] *Ibid.* at 237.

[58] See e.g., Selby, J. in *Paton* v. *Paton* (1964) A.L.R. 240 at 242; Crisp, J. in *Collins* v. *Collins* (1961) 3 F.L.R. 17 at 20.

[59] The joint judgment in *Main* v. *Main* of the High Court at least recognized that separation in desertion only required a destruction of the *consortium vitae* and that the concept of physical separation as a prerequisite was foreign to the field of desertion. This is well summed up in Ian McCall's article (*supra* at 59).

interpretation of the desertion cases. If physical separation was not necessary then the obstacle constituted by *Main* v. *Main* had to be withdrawn. Nield, J. made a frontal approach and declared outright that the relevant statement in *Main* v. *Main* was mere *obiter dicta* and, therefore, it was not necessarily to be followed.[60] Sugerman and Dovey, JJ. were more loyal to the High Court and no frontal attack on *Main* v. *Main* was made. Their Honours refused to follow Nield, J. in declaring that the relevant statement of the High Court was merely *obiter dicta*[61] and said that the High Court did not intend to lay down such a proposition. However, the statement of law laid down by their Honours is the one put forward in this case note, that is, the parties may be living separately and apart even if living under the one roof. This result was achieved by watering down the requirement (which the writer maintains is not a real requirement but a mere evidentiary factor) of physical separation. Thus physical separation is a matter of degree and even though the parties may have been living in the same house during the relevant five years a judge was not barred from finding that the circumstances were such that there was, in fact, physical separation. Though no tests or criteria were laid down for ascertaining the result of a given set of circumstances—each case being decided on its facts—there surely is a new concept of physical "apartness" if two people can live in the same house (though living separate lives sufficient to say that they were no longer husband and wife), especially if they have been living as such for five years, and still be living "apart". This concept of physical apartness will be discussed later, especially as to a theory that the "state of affairs" continuing for the five years may involve a less matrimonial break than the original act of separating (requirement 1) required.

The writer does not query the actual answer given to the question posed but only how their Honours came to such a conclusion. The following points are the key to the judgment:

(a) To separate in desertion there must be a physical separation as well as an intentional destruction of the *consortium vitae* (matrimonial relationship). As pointed out, physical separation has never been essential in desertion cases; it is only an evidentiary factor of separation in desertion. All that is needed is a destruction of the matrimonial relationship.

(b) There is no valid reason why the principles governing desertion should not apply to separation within s.28(m).[62]

(c) There have been many desertion cases in which the parties were living under the same roof yet the Court has held that the parties had ceased cohabitation.

(d) The passages quoted above from the majority judgment in *Main* v. *Main* were not *obiter dicta.*

(e) *Main* v. *Main* does not stand for the proposition that in no circumstances

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[60] See Nield, J.'s apology at 421.

[61] If the passages cited from *Main's Case* were *not obiter dicta,* how do we reconcile this view with the following passage from Sugerman and Dovey, JJ. at 69?

> *Main's Case* was not a case of parties who during the statutory period had lived under the same roof; accordingly the "one-roof" cases were not discussed in argument or in the judgments. There was no question of the physical separation of the spouses.

It must also be noted that the statements in *Main* v. *Main* concerning the definition of "separately and apart" have been impliedly overruled by the desertion case of *Watkins* v. *Watkins* (*supra*).

[62] 81 W.N. (N.S.W.) Pt. 2, 66 at 68:

> . . . although the ground of separation is a novel one, there is an association between it and the ground of desertion in the scheme of the Commonwealth Act which is opposed to the view that they were intended to be governed, in respects here relevant, by different principles.

could there be a physical separation of spouses who were dwelling under the same roof.

(f) It does not matter whether the words "separately and apart" are a combination of two words conveying their own distinct meaning (as suggested in *Main* v. *Main*) or a single expression with a single meaning; it is only essential that point (a) is satisfied, that is, there is both physical separation and a destruction of consortium. Their Honours seem to have followed the reasoning of Nield, J. in *Murphy* v. *Murphy* (which the writer adopts) but do not give a decisive statement in support of the view (also held by Nield, J. and adopted by the writer) that the words are only single expressions. Nagle, J. supports the other view put forward by Ian McCall, that specific meanings are to be given to the words "separate" and "apart".

(g) There may be physical separation (as well as destruction of the matrimonial relationship) where the parties are living under the same roof.[63]

Nagle, J., while agreeing with the conclusion of the judgment of his brothers, stated that the proper interpretation of s.28(m) "demands that specific meanings be given to each of the words 'separate' and 'apart', and that they should not be regarded as being used in the subsection as expressing a single concept. . . ."[64] His Honour adopted Lord Wenseleydale's "golden rule" of interpretation and the "grammatical and ordinary sense" required these distinct and different concepts. He said:

> One cannot do justice to the grammatical construction of the subsection unless some difference in meaning is attributed to the words. The subsection speaks of the parties concerned as having "separated" and then proceeds to require compliance with what would *prima facie* appear to be two distinct circumstances, firstly, a living "separately" and, secondly, a living "apart". Any other interpretation does less than justice to the construction of the subsection.[65]

After pointing out that the relevant statements of Latham, C.J., Rich and Dixon, JJ. in *Main* v. *Main* were probably *obiter* he said that, as the old Western Australian and the new Commonwealth separation sections were "so similar", he was unable to depart from what the High Court had said. Accordingly, the word "separate" is "the bringing to an end of (the matrimonial) relationship" and the word "apart" described "the physical separation of the spouses in marriage without there being of necessity a destruction of the marriage bond".[66]

There are two comments that can be made concerning what Nagle, J. has stated so far, especially as regards the earlier quotation (n. 65).

(1) The Court was not merely interpreting the words "lived separately and apart" but the whole of s.28(m) in the light of the Commonwealth Act in its entirety. The words were to be given their usual meaning, taken subject to the context.[67] What is more, it is obvious that the initial separation was to govern the continuing act of living separately and apart (the words "and thereafter" imply this). The ordinary and grammatical meaning to be given to the section, as a section, would be ascertained by not dividing the words into distinct concepts but by allowing the words to be a whole concept governed by the initial act of separating (*a fortiori*, if the initial act does not require physical separation then the continuing act would similarly not require it).

(2) If comment (1) is disregarded and the words "separate" and "apart" are given distinct meanings, are these meanings necessarily those which Nagle, J. and the High Court in *Main* v. *Main* have given them? In the New Zealand

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[63] *Ibid.* esp. at 72.
[64] *Ibid.* at 72, 73.
[65] *Ibid.* at 73.
[66] *Ibid.* at 74.
[67] See Lord Halsbury in *Leader* v. *Duffey* (1888) 13 App. Cas. 294 at 301.

case of *Sullivan* v. *Sullivan*[68] all five members of the Court of Appeal gave the word "apart", in Section 10jj. of the 1928 Divorce and Matrimonial Causes Act, the same meaning that is given to the word "separate" by Nagle, J., viz., the antonym of cohabitation.[69] Again, in *Nugent-Head* v. *Jacobs*[70] the words "separate" and "living apart" were treated as synonomous. It has also been expressed that the words are interchangeable, that is, they have exactly the same meaning.[71] But even so, there is a controversy as to what is comprehended by these words, that is, is there only a destruction of the *consortium vitae* or is physical separation also implied?[72] Then again, if physical separation is required, to what extent, it may be asked, is actual separation required, especially in regard to the continuing five years.[73]

After making some interesting comments about what evidence is required to prove that the parties have in fact "lived separately and apart" by reference to some American cases[74] he concludes that the whole question is one of fact to be decided by the trial judge. "The fact that the spouses during the requisite period are housed under the one roof is not, of itself, a fatal bar to the dissolution of a marriage under s.28(m) . . ."[75]

CONCLUSIONS

A. The Various Approaches to the First and Second Requirements of Section 28(m)

The possible approaches are four in number:

(1) The parties must prove not only a destruction of the *consortium vitae* but a physical separation. There can be no separation where the parties are living under the same roof. The words "separate" and "apart" are to be given distinct meanings—"separate" meaning the first element, "apart" meaning *complete* physical separation. (Jackson, J. in *Sharp* v. *Sharp*;[76] Travers, J. in *Koufalakis* v. *Koufalakis*.[77])

(2) The parties merely have to prove the *factum* of separation as used in desertion cases (that is, ceasing to cohabit) and an *animus separationis* of continuing that state of affairs. There is no requirement of physical apartness as long as there is a cessation of cohabitation—s.28(m) can be satisfied even if the parties are living under the same roof. The words "separate and apart" are one concept and both words are interchangeable. (Nield, J. in *Murphy* v. *Murphy*.[78])

(3) The parties have to prove both physical separation and a destruction of the *consortium vitae*. Physical separation, however, need not be absolute or complete; parties may be "living separately and apart" even if dwelling under the same roof. As to that phrase, it does not matter whether the words are given distinct meanings or it is treated as a single concept (Sugerman and Dovey, JJ. in *Crabtree* v. *Crabtree*); the words must be given distinct meanings the same as stated by the High Court in *Main* v. *Main* (Nagle, J. in *Crabtree*).

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[68] (1958) N.Z.L.R. 912.

[69] Turner, J. at 924 said:

> . . . I am of the opinion that cohabitation and "living apart" are mutually exclusive opposites, covering between them all possible relationships of the class between husband and wife.

[70] (1948) A.C. 321.

[71] See, for example, Nield, J. in *Murphy* v. *Murphy* (1962) N.S.W.R. 417 at 421, 422 and Denning, L.J. in *Hopes* v. *Hopes* (1949) P. 227 at 235, 236. Nagle, J. at 74 also refers to this possibility.

[72] See *supra*.

[73] As to this problem see *infra*.

[74] For a fuller discussion of these cases see Ian McCall's article, cited above.

[75] 81 W.N. (N.S.W.) Pt. 2 at 77.

[76] (1961) 2 Fed. L.R. 434.

[77] (1964) A.L.R. 196; see n. 42 *supra*.

[78] (1962) N.S.W.R. 417.

These three approaches consider that the phrase "living separately and apart" is the essential part and the initial act of separating (presumably) unimportant.

(4) To satisfy s.28(m) the parties must have separated in the sense used in desertion, that is, a cessation of cohabitation, and this state of affairs must continue for five years. The crux of this matter is the initial act of separating and, consequently, the phrase "living separately and apart" takes its meaning from this initial act. The word "cohabitation" in the third requirement is a further pointer that this is so. As the initial act does not require physical separation as an essential element, similarly, separation in the physical sense is not essential during the following five years as long as there is still a cessation of cohabitation. Possibly the continuing breach may be less than that which is required for the initial breach (Conclusion "C"). There may be separation within s.28(m) even if the parties dwell under the same roof. Section 28(m) is a new section which is not to be burdened with the obstacles imposed on s.69(6) of the former Western Australian Act. The initial act is the crux of the matter. (The writer.)

B. The Concept of "Physical Separation"

The first and third approaches require the element of physical separation; the second and fourth relegate this element to one of evidence in establishing separation in the sense of cessation of cohabitation.[79] *Crabtree* v. *Crabtree*, as well as many desertion cases, has rejected the view that physical separation must be absolute.[80] The judges in *Crabtree* v. *Crabtree* still insist on physical separation. What, then, on the answer given in *Crabtree*, does physical separation as used by Sugerman, Dovey and Nagle, JJ. comprehend? If two people can live in the same house, seeing each other, perhaps taking their meals together (as in *Ayling* v. *Ayling*[81]), talking to each other, even through the aid of intermediaries (as happened in *Crabtree*), and generally knowing that the other person exists for a period of five years (even though their relationship could not be called cohabitation), one can hardly say that they are living apart in any material sense. It only seems good sense to say that the parties are not physically separated. They are living together, but in such circumstances that this does not constitute cohabitation. Otherwise it would be to give the words "physically separated" a very artificial meaning. It is suggested that the word "cohabitation" is the appropriate word. However, it is obvious that *Crabtree* v. *Crabtree* does not give so low a meaning to the words "physically separated". The language used in both of the judgments indicates the physical separation to a degree going beyond that which is required to constitute a cessation of cohabitation; this is shown from the continual stressing of the two elements and the reliance on *Main* v. *Main*. (But the degre has to be estimated by the trial judge.)

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[79] In the second and fourth approaches it is obvious that if the physical separation is of so low a degree that it can be said that there is no longer a cessation of cohabitation then s.28(m) will not be satisfied.

[80] It might be noted that Sir Garfield Barwick's article in the *Sydney L.R.* (*supra* n. 1) as regards s.28(m), advocates that there must be "complete physical separation of the parties" (at 418-19). If "complete" is given its normal meaning, that is "total", "absolute" or "full", such a separation would, it is submitted, run counter to *Crabtree* v. *Crabtree* (the Full Supreme Court admitted that the physical separation need not be absolute, especially when their Honours "watered down" the effect of *Main* v. *Main*); *sed quaere*, was this the intention of the Federal Parliament? This very point makes the requirement of physical separation, as enunciated in *Crabtree*, even more artificial. See *infra*.

[81] (1949) 51 W.A.L.R. 61.

It seems, then, at least in theory, that the writer's approach (and that of Nield, J.) would allow s.28(m) to be satisfied in circumstances that the judges in *Crabtree* would not allow. The writer, however, maintains that his approach is the better one; it recognizes (a) that the present section and that involved in *Main* v. *Main* differ substantially, (b) that it is hardly logical if the continuing break in the matrimonial relationship is different in the nature from the initial break, and (c) that all that is needed in the initial break is cessation of cohabitation equivalent to the factum of desertion.

Crabtree v. *Crabtree* requires a higher degree of matrimonial break (that is of living separately and apart) during the five years but being silent as to the initial act of separating, if we apply the desertion law (as advocated in *Crabtree*), this continuing act involves more than the initial break. This is illogical. To be logical, an artificial meaning must be given to the words "physically separated", or a new meaning given to the verb "separate", something more than cessation of cohabitation. As, however, "separate" has had this meaning for over sixty years,[82] and it has been used in the matrimonial field as the antonym to cohabitation, the last solution should not be adopted. It is by far preferable for the section to be illogical or involve artificial concepts, but these problems need not have arisen if the fact that s.28(m) was a new section was recognised.

C. Can the Breach of the Matrimonial Relationship Necessary for the Initial Act of Separation Differ in Degree from the Continuing Breach?

This problem has been anticipated in "B". However, in "B" it was asked whether the continuing acts involved a higher degree of matrimonial breach than the initial break. This was dismissed as illogical. If we assume, on the other hand, that the continuing breach does not have to be any more than that required to constitute the initial act of separation (though of course it may be), the question can be posed as to whether a lesser breach would suffice requirement (2) than the bare minimum break necessary for requirement (1). Suppose, for example, the parties have occasional acts of intercourse or go away together, though on the whole they do not cohabit. The initial act of separation involves a break in the matrimonial relationship such that the marriage tie is non-existent. Yet the subsequent acts of intercourse, for example, would necessarily bring back to life this marriage tie but only for a moment; no one could really say that the parties had resumed cohabitation.

In *Sullivan* v. *Sullivan*[83] in a suit under the New Zealand separation section[84] there had been casual and intermittent acts of sexual intercourse between the spouses during the seven years required of "living apart".[85] Finlay, J. posed the problem:

> Does any act of intercourse in any circumstances terminate a state of living apart? If not, then in what circumstances does one act or in what circumstances do repeated acts of intercourse establish that state which is described as "living together"?[86]

The New Zealand Court of Appeal was constituted in this case by five judges, each of whom adopted different methods and whose answers meant

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[82] See *Rowell* v. *Rowell* (1900) 1 Q.B. 9 and Nield, J. in *Murphy* v. *Murphy* (1962) N.S.W.R. at 421.

[83] (1958) N.Z.L.R. 912.

[84] Section 10(jj), Divorce and Matrimonial Causes Act, 1928 (N.Z.). Its wording differs from s.28(m) only in that the word "separately" is omitted.

[85] "Living apart" in s.10(jj) was said to be "living separately and apart" and this meant the opposite of cohabitation. See n. 69.

[86] (1958) N.Z.L.R. at 918.

different things.[87] Finlay, J. answered the question by saying that the matter had to be considered by common sense principles. The significance of these acts of intercourse was to be determined in the light of the circumstances in which they took place; the significance was to be a pointer in ascertaining whether at any point of time there was in reality a resumed cohabitation.[88] The Court of Appeal held that the parties had not ceased to "live apart" during the seven years, even though there had been these several acts of intercourse. It was a question of fact.

In *Sharp* v. *Sharp*[89] the question before the Court was whether the casual association of the parties had meant that they were no longer "living separately and apart". The facts were that the parties had taken the children of the marriage on a motor trip lasting eight days. On one night, because of an accommodation shortage, the parties and the children had shared a room but no marital intercourse took place, either then or during the whole trip. At all other times the parties were physically separated. Jackson, J. applied *Main* v. *Main* but held that the physical separation had not ended since it was only a "temporary arrangement primarily so as not to disappoint the two boys".[90] His Honour concluded: "Even if there had been marital relations on that occasion, such a casual act should not, on the authority of *Sullivan* v. *Sullivan* be regarded as ending a period of living apart."[91]

Sullivan's Case applied the test in desertion cases as to when desertion is terminated by a resumption of cohabitation to termination of separation (living apart). On principle, the judges in *Crabtree* v. *Crabtree* would also adopt the desertion cases. However, such a mechanical application may involve some inherent problems.

Firstly, what do the desertion cases state? In *Perry* v. *Perry*,[92] Jenkins, L.J. said that the cases of *Mummery* v. *Mummery*[93] and *Bartram* v. *Bartram*[94] ". . . establish the proposition that in order to terminate or interrupt the state of desertion between a deserted and deserting spouse there must be a resumption of cohabitation, that is to say, the setting up of a matrimonial home together pursuant to a 'bilateral', which I take to mean a 'common' or 'mutual' intention to do so".[95]

In *Mummery* v. *Mummery* the spouses were living separately and apart; on a visit home from overseas (where he had been stationed) the husband saw the wife. The wife, seeking to effect a reconciliation, encouraged sexual intercourse and this happened on one occasion. The husband at no time intended to cohabit with the wife again in the future. Lord Merriman, P., held that this one act did not constitute a resumption of cohabitation (and thus condone the previous desertion of the husband) because, although there was an intention on the part of the wife, the husband lacked the necessary intent. Thus sexual intercourse, in the desertion cases, does not raise an irrebuttable presumption that the parties have resumed cohabitation.

It will be noticed that the desertion cases, especially *Eaves* v. *Eaves*,[96] *Marczuk* v. *Marczuk*,[97] *Batt* v. *Batt*,[98] *Hillary* v. *Hillary*,[99] *Pizey* v. *Pizey*[100]

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[87] For example, all judges concurred in that destruction of the consortium was essential but as to whether physical separation was essential two judges said no, two said yes, and the remaining one left the question open. The problem is one of interpretation, especially as to what "physical separation" comprehended.

[88] *Ibid.* at 921.

[89] (1961) 2 F.L.R. 434 (Supreme Court of Western Australia).

[90] *Ibid.* at 436.

[91] *Ibid.* 436-37.

[92] (1952) 1 All E.R. 1076 (C.A.).

[93] (1942) P. 107; (1942) 1 All E.R. 553.

[94] (1950) P. 1; (1949) 2 All E.R. 270 (C.A.).

[95] (1952) 1 All E.R. at 1088.

[96] (1939) 2 All E.R. 789.

[97] (1955) 3 All E.R. 60.

[98] (1953) N.Z.L.R. 260.

[99] (1941) V.L.R. 298.

[100] (1961) 2 All E.R. 658; (1961) P. 101 (C.A.).

and the cases cited above, emphasize that two elements are needed to terminate desertion, namely, an actual resumption of cohabitation and a bilateral intention to resume the same. All the cases stress that the intention must be bilateral, in fact this point probably is a *ratio decidendi* of Lord Merriman's judgment in *Cook* v. *Cook*.[101] Some cases, for example, *Perry* v. *Perry* and *Eaves* v. *Eaves*, place most stress on the intention element and treat the evidence of the resumption of cohabitation as subsidiary.[102]

The inherent difficulty is that most of the relevant desertion cases also involve the issue of whether the acts of intercourse are a condonation of the desertion and previous adulteries. Perhaps a court might, due to the serious nature of these acts which involve a matrimonial fault, require a greater intention of the parties to condone such acts than just merely to resume cohabitation and nothing else.

Also, it would appear easier to cease cohabitation than to resume the matrimonial relationship. Section 36(1) provides that a unilateral act may bring about the initial act of separation, yet the intention to resume cohabitation must be bilateral.

It will be seen that a discussion of this question overlaps into the third requirement of Nagle, J. It is submitted that many acts may be committed in this continuous period which, if they had occurred at the time of the alleged initial separation, would have prevented any court saying that cohabitation had ceased. The desertion cases show that a very strong intention is needed before there will be a resumption of cohabitation and thus subsequent acts of intercourse, if not too frequent, may still leave the parties living separately and apart.

It is submitted that no test can be laid down to determine whether the parties have lived separately and apart during the five year period. The criterion in *Sullivan's Case* should be followed, namely, every case depends on its own facts and should be decided by common sense principles.

D. No Reasonable Likelihood of Cohabitation Being Resumed

This is a question entirely of fact, and precedent would be of little value. So far as the writer is aware, there has been no judicial comment on this third requirement; in fact, this aspect of the cases on s.28(m) has been answered by a simple yes (all reported cases so far) or no. Some elements in determining whether there is a reasonable likelihood of a resumption would be:

(a) whether or not there has been intermittent or casual acts of intercourse during the five years, and if so, their number;
(b) whether the intention of the parties to separate during the five years is active or passive, that is to say, do the parties not want to cohabit or just merely do not cohabit, that is, not actively not want to cohabit;
(c) where the separation has been caused by illness and there were no positive acts to break the matrimonial relationship so as actively to separate, whether the ill party would possibly recover and if so, in how long and to what extent would recovery be complete, and

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[101] (1949) 1 All E.R. 384 at 388.

[102] This is, of course, subject to a proviso, namely, the compelling force of the evidence. Lord Merriman in *Marczuk* v. *Marczuk* ((1955) 3 All E.R. at 76) summed up the situation as follows:

> No doubt it may be difficult to draw the line between a series of what have been described in the authorities as casual acts of sexual intercourse and intercourse so regular and frequent as to compel a finding of resumption of cohabitation, on the principle that there must come a point at which a number of individual grains become a heap.

(d) whether or not one of the parties has formed an intention (as evidenced by acts of adultery or association with another person) to marry once the decree of dissolution becomes absolute.

The usual meaning of "reasonable" would apply. One very important aspect of this requirement is that it throws light on the meaning of the second requirement. If the first requirement refers to cohabitation only, and so does the third, then, *prima facie*, so would the second. If such is the case then it seems that the New South Wales Full Supreme Court erred in making "physical separation" essential or have given that term an artificial meaning.

E. How Does the Court Determine that the Parties are Living Separately and Apart?

Nagle, J. illustrates the American approach to this question as does Ian McCall's article. The American approach is to examine whether, in the eyes of the neighbours of the parties (that is, whether it is obvious to the community), the parties are no longer living as man and wife. Nagle, J. rejects this approach as inapplicable; McCall doubts its value. The Court, that is, the judge, in Australia is to be the adjudicator, and not the community in general. Problems of evidence are great enough already without accepting an "extra"-objective approach. The problem of deciding on the facts is to be tackled in the normal way.

B. MARKS, Case Editor—Third Year Student

CRUELTY IN MATRIMONIAL CAUSES

GOLLINS v. *GOLLINS*
WILLIAMS v. *WILLIAMS*

I INTRODUCTION

On June 27th, 1963, the House of Lords handed down two decisions on matrimonial cruelty which apparently effected a momentous change in this area of the law. The first decision was that of *Gollins* v. *Gollins*.[1] The respondent was an incorrigibly and inexcusably lazy man and that was the root of the trouble. The parties were married in 1946 and had two daughters, born in 1947 and 1949. The husband originally owned a farm but it was unsuccessful and he sold it. He then bought a house on mortgage and transferred title to his wife who had lent him large sums to purchase it. To maintain the family the wife ran the house, the matrimonial home, as a guest house. In this pursuit the husband did little or nothing to aid, and further he refrained from obtaining paid employment. The evidence did not show that the husband had wished to hurt his wife or that he had been aggressively unkind to her. Creditors of the husband tried to make the wife pay, and she did pay, some of his debts. His refusal to try to help her, or to earn money, and the frequent demands made on her by his creditors worried her and made her ill. The result was that she was reduced from a normal, active and capable woman to a physical and mental state where she could no longer maintain herself and their children. On her complaint, justices inserted a non-cohabitation clause in a maintenance order on the ground of her husband's persistent cruelty. The husband appealed to

[1] (1964) A.C. 644.