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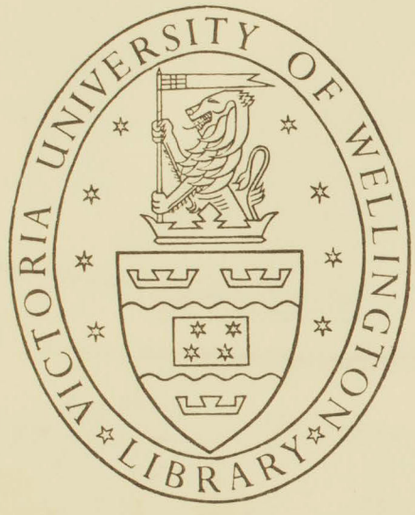

The aim of this paper is to assess the relevance of the bars to relief that exist in the Matrimonial Proceedings Act 1963, particularly the extent to which an erring spouse is prevented from successfully suing for divorce.

An initial reading of the Matrimonial Proceedings Act gives the impression that the basic emphasis in the divorce legislation remains that of matrimonial fault entitling relief upon the petition of an "innocent" spouse. Thus, it would appear that a general underlying assumption in the New Zealand legislation is that remarriage is something to be discouraged and, therefore, divorce is made more difficult to procure than a separation - at least one that is obtained under the Domestic Proceedings Act 1968.[1]

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[1] A judicial separation may still be obtained under the Matrimonial Proceedings Act on the ground of "adultery, cruelty, desertion without cause for not less than two years, or failure to comply with a decree for restitution of conjugal rights" (s.10). The decree is discretionary, and s.11 retains the criminal sanction (that no longer automatically accompanies a separation order under the Domestic Proceedings Act) protecting the petitioner from molestation by the respondent spouse.

As introduced, the Matrimonial Proceedings Bill omitted the separation provisions but they were re-inserted by the Statutes Revision Committee:

> "(They) thought that, although these provisions were rarely used - there was an average of about six decrees a year for the whole country - they did no harm and might be retained. . . . My own view is that it (the ground for judicial separation) could go, thus removing a bit of deadwood from the statute book." Hon. J R Hannan, NZ Parl. Debates, vol. 337 (1963) p.2393.

It is perhaps a pity that this opportunity to rationalise the new Act with the then Destitute Persons Act 1910 was in this way by-passed.

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The main tenet of the Domestic Proceedings Act 1968, is that a determination of the viable existence of a marriage should be based on a finding as to the relationships within that marriage, hence the emphasis on conciliation and the ground available in s.19(1)(a):

> "That there is a state of serious disharmony between the parties to the marriage of such a nature that it is unreasonable to require ~~(the parties)~~ to continue or, as the case may be, to resume, cohabitation with ~~(each other)~~, and that the parties are unlikely to be reconciled;"[2]

Thus accepting the principle that a marriage can have irretrievably broken down without a matrimonial offence having been committed by either party. The solution offered is to relieve the couple of the duty to cohabit whilst leaving intact all other rights and obligations arising out of the marriage, including the status of a married person (s.20). In addition, s.21 provides for the discharge of a separation order, either by the parties resuming cohabitation as man and wife, or by a court order. Thus the legislation exhibits characteristics of a true optimist in stressing the hope that a reconciliation might even at that late date be effected.

In accord with this approach, the Matrimonial Proceedings Act recognises, to a limited extent, that proceedings brought under it involve matters which require by their very nature more than merely a finding of "guilt" and "innocence". Thus s.4 enables the Court to adjourn a hearing if there is a reasonable possibility of reconciliation, and directs the Court,

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2. As amended by s.2 of the Domestic Proceedings Amendment Act 1971.

in s.28, to satisfy itself so far as it reasonably can as to the facts, thereby putting the Court on inquiry and away - at least theoretically - from a purely passive role customary in an otherwise adversary system. Although the practical difficulties involved in making such an inquiry probably means in reality that only if it is blatantly obvious to the Court that a fact or state of affairs is being distorted, will a judge be in a position to initiate, or, to challenge, what is placed before him. Also, especially in the case of the many divorces that are undefended, there seems little opportunity or need to inquire into whether there has, for example, been a collusive bargain, for otherwise the Court would be taking upon itself an unnecessarily officious role without achieving any beneficial result.[3] Indeed, as long as the parties can agree to sever their legal ties, only time and abiding by the correct procedure, accompanied by the payment of the appropriate fee, stands between them and the dissolution of their marriage vows.

The problems arise when the respondent spouse is unwilling to be divorced, and it is in this area that the

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[3] As was stated by Cooke, J. in connection with s.31(a) in Fairweather v. Fairweather and Lamont (unreported judgment of 13 March 1973, Supreme Court, Invercargill Registry 67/72):

> "In every case it is a question of the intent of the parties. If satisfied that a marriage has utterly broken down the Court is unlikely to be astute to ascribe to the parties an intention of perverting justice when in essence they have merely negotiated a settlement in as amicable and sensible a way as possible."

bars to relief make their mark.[4] For example, s.29(2) of the Matrimonial Proceedings Act directs that the Court "shall" dismiss a petition for divorce, if the respondent objects, if it is proved that the separation was due to the wrongful act or conduct of the petitioner, and the ground for the petition was either that in s.21(m) or s.21(n) i.e. that a separation agreement or a separation order has been in force for two years.

Hence one finds the two principles of "breakdown"[5] and "fault" intertwined despite the fact that the rationale of the former is at complete variance with that of the latter. They appear to originate from different premises: "fault" placing greater emphasis on marriage as an institutional entity, whilst "breakdown" stresses more the relationship that exists behind it.

Whether one finds s.29(2) an acceptable provision depends to a great extent on one's basic attitude to divorce. Objectivity being at best only relative, it becomes difficult to assess what is in fact realistic without merely transposing one form of realism for another; the latter being "realistic" only because one agrees with its underlying assumptions. That is, whether one fears that the absence of s.29(2) will "undermine the foundations of

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4. Despite the absolute bars in s.29(1) (where a petitioner has been accessory to or has connived at the adultery on which the petition is founded) or s.29(2) (where the matrimonial wrong complained of has been condoned), in both instances the Court "shall" dismiss the petition even if both spouses desire the divorce.

5. However, it should be noted that "breakdown" is not used in the New Zealand legislation, and as was pointed out by Richmond, J. in Walker v Walker (1973) 2 N.Z.L.R. 7, 13, line 14, s.19(1)(a) requires more than a breakdown of personal relationships between the spouses, for the requirements of the section are more complex than the phrases "complete matrimonial breakdown" and "general breakdown in the marriage" would suggest.

marriage"[6] as did speakers in the debate on the Divorce and Matrimonial Causes Amendment ~~Act~~ Bill 1921-22, s.2 of which introduced the mandatory provision equivalent to s.29(2), ~~or~~ or whether one prefers to agree with George Bernard Shaw who in his Preface to the play Getting Married (1908) stated:

> "Divorce, in fact, is not the destruction of marriage, but the first condition of its maintenance. ... Divorce only re-assorts the couples: a very desirable thing when they are ill-assorted."

In this connection it is interesting to parallel the development of the grounds for divorce which are now found in ss.21(m), (n) and (o) of the Matrimonial Proceedings Act with the bar to relief preventing a "guilty" spouse from successfully petitioning for divorce. Section 4 of the Divorce and Matrimonial Causes Amendment Act 1920 first enacted:

> "It shall be lawful for the Court, in its discretion, on the petition of either of the parties to a decree of judicial separation, or to a separation order made by a Stipendary Magistrate or by a Resident Magistrate, or to a deed or agreement of separation, or separation by mutual consent, when such decree, order, deed or agreement is in full force and has so continued for not less than three years, to pronounce a decree of dissolution of marriage between the parties, and in making such decree, and in all proceedings incidental thereto, the Court shall have the same powers as it has in making a decree of dissolution in the first instance."

This Act was introduced by the Hon. Mr MacGregor who had unsuccessfully attempted to incorporate a similar provision

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6. This speaker being the Hon. Mr Triggs 194 N.Z. Parl. Debates ~~vol 194~~ (1921-22), p.389.

into the legislation in 1894 by means of a private members Bill.

In introducing the Divorce and Matrimonial Causes Bill in 1894, the Honourable Member spoke of the original idea for this new ground of divorce having derived from French law, and he quoted fairly extensively from a letter he had received from a M. Naquet with whom he had been corresponding and who obviously found the concept of a judicial separation an unsatisfactory one. Part of his letter was quoted as stating:

> "It could never have been tolerated for a moment but for the idea having entered men's minds, as part of their religion, that marriage could not be dissolved without committing an offence against God; and, as the fruit of an attempted compromise, we have the ill-begotten monster of divorce a mensa et thoro (judicial separation), made up of purist doctrine and worldly stupidity."[7]

Having thereby disclosed the attitude to divorce with which he was in agreement, the Hon. Mr MacGregor went on to say:

> "My object is to abolish what I consider is a very objectional doctrine, and that is, the law of recrimination in divorce suits. It means that, when a petitioner seeks relief from the Court, the respondent can say, 'You are not entitled to redress, because you are just as guilty yourself.' So far as I can see, that is a doctrine which has nothing to commend it except its antiquity. Divorce is not for the punishment of the guilty or for the rewarding of the innocent. It is intended simply for the good of society as a whole, and for the enhancement of the happiness of the parties."[8]

Consequently, neither the 1894 Bill nor the 1920 Act contained any equivalent of the present s.29(2). Indeed,

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7. N.Z. Parl. Debates vol. 83 (1894), p.459

8. Ibid., p.460.

in the 1920 debate he again stated:

> "And I hope that no one will suggest that this remedy should be confined to the innocent party."[9]

However, his hope was short-lived for though the Act was passed without such a requirement one was introduced by the Divorce and Matrimonial Causes Amendment Act 1921-22.[10] In the same way as the new ground in s.4 had been enacted largely as the result of the innovative influence and support of an individual spokesman, so the proviso received its impetus from an individual source, namely a dissatisfied and unsuccessful litigant, one Mrs Mason.

Mr Mason had petitioned for the dissolution of the marriage on the ground that he and his wife had been separated for three years and more under a separation order obtained by Mrs Mason under the Destitute Persons Act 1910. The marriage had irremediably come to an end with husband and wife hopelessly alienated from each other. Nevertheless, because of her religious beliefs, Mrs Mason objected to being divorced and defended the petition, although she had no intention or wish to resume married life with the petitioner. At first instance[11] Herdman, J. found that the petitioner had

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9. N.Z. Parl. Debates ~~vol 187~~ 187 (1920), p.1163

10. s.2(1): "Provided that if upon the hearing of a petition under this section the respondent opposes the making of a decree of dissolution, and it is proved to the satisfaction of the Court that the separation was due to the wrongful act or conduct of the petitioner, the Court shall not make upon such petition a decree of dissolution of the marriage."

The proviso was added to s.4 of the Divorce and Matrimonial Causes Amendment Act 1920.

11. Mason v Mason (1921) N.Z.L.R. 955, at pp. 956-7.

deserted his wife without just cause, that she had then obtained a separation order on the ground of his failure to provide adequate maintenance for herself and their infant child, and being of the opinion that "the Court should not view with favour an application made by one whose misconduct had produced a state of affairs upon which he founds his application for the Court's assistance", he dismissed the petition.

The husband appealed, and the Court of Appeal held that he was entitled to a decree nisi. The judgment of the Court was delivered by Salmond, J. who stated:

> "It is clear ... that the fact of the petitioner's own misconduct being the cause of the separation is not in itself a bar to a decree of divorce. Nor does it seem possible to determine the exercise of the Court's discretion by reference to the degree of the petitioner's default, so as to grant a divorce to a petitioner guilty of a minor fault whilst refusing a decree to a petitioner whose misconduct is serious. Such a distinction in degree is in itself impracticable, and bears no obvious relation either to the provisions of the statute or to public policy. ...
> Prima facie, when husband and wife have been separated for three years, whether by a judicial decree or by mutual agreement, each of them is entitled to a dissolution of a marriage which has for that period been a marriage in name only and not in substance, in law and not in fact. The policy underlying this legislation is that it is not conductive to the public interest that men and women should remain bound together in permanence by the bonds of a marriage the duties of which have long ceased to be observed by either party and the purposes of which have irremediably failed. Such a condition of marriage in law which is no marriage in fact leads only to immorality and unhappiness, and the Court has now been entrusted with a discretionary jurisdiction to put an end to it."[12]

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12. Ibid., at p.961. Salmond, J. had made similar observations in Lodder v Lodder [1921] N.Z.L.R. 876 (Supreme Court).

Undeterred, Mrs Mason petitioned Parliament, and the 1921-22 Amendment was assented to before the decree nisi could be made absolute. Section 2(3)[13] was passed specifically for Mrs Mason's benefit,[14] and she opposed her husband's motion for a decree absolute. However, the appeal to the Court of Appeal had been on both law and fact and the Court had stated that it was not satisfied that the separation had not been as much the fault of the wife as of the husband. Adams, J. agreed[15] that subs. (3) clearly indicated that fresh evidence could be admitted, but that as the evidence necessarily was a repetition of that before the Court of Appeal it was not sufficient to disturb the Court of Appeal's findings. The hapless Mrs Mason had protested in vain.

Nevertheless, the proviso to s.4 remained on the statute books, its effect being to overrule the approach of Salmond, J. which he had first enunciated in Lodder v Lodder[16] and followed in Mason v Mason[17]. In Schlager v Schlager[18] the Full Court held that if the effective cause of the separation was the wrongful conduct of the petitioner, that conduct would be an absolute bar to an opposed divorce, whether or not the wrongful act or conduct amounted in law to a definite or recognized matrimonial offence. Also, the Court

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13. S. s.2(3): "No decree nisi heretofore made by the Court under the provisions of the Divorce and Matrimonial Causes Amendment Act 1920 shall become or be made absolute except on motion on notice. If the respondent opposes the making of the decree absolute, and it is proved to the satisfaction of the Court that the separation was due to the wrongful act or conduct of the petitioner, the Court may, in its discretion, refuse to make the decree absolute."
14. 194 N.Z. Parl. Debates vol. 194 (1921-22) pp.394-5.
15. Mason v Mason [1922] N.Z.L.R. 827.
16. [1921] N.Z.L.R. 876.
17. [1921] N.Z.L.R. 955.
18. [1924] N.Z.L.R. 1101.

In Steedman v Steedman[19], in further explaining the meaning of "wrongful conduct", accepted the suggestion rejected by Salmond, J. in Lodder v. Lodder[20] that:

> "the words of the statute held to include all conduct which the moral standard of the community regards as blameworthy as between husband and wife."[21]

Schlager v. Schlager[22] was approved in Emery v. Emery[23] where the Court of Appeal emphasised[24] that the proviso to s.4 had been re-enacted in s.18 of the Divorce and Matrimonial Causes Act 1928 without alteration, concluding that the Legislature had accepted the explanation given in Schlager's case as being in accord with its own interpretation. The Court of Appeal also approved of Sim, J.'s test in Steedman's case.[25]

In Emery itself the trial judge had not been satisfied on the evidence that the separation was due to the wrongful acts or conduct of the petitioner husband, and the Court of Appeal would not disturb his decision that a decree nisi be granted because the Court found that he had applied the correct legal principles. Thus, only in his initial determination on the facts is the judge able to exercise any form of 'discretion' in that he has first to decide whether

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19. [1926] G.L.R. 121.
20. [1921] N.Z.L.R. 876.
21. [1926] G.L.R. 121, per Sim, J. at p. 121.
22. [1924] N.Z.L.R. 1101
23. [1946] N.Z.L.R. 545
24. Ibid., at p. 552, line 8.
25. Ibid., at p. 552, line 22.

the petitioner's conduct caused the separation and whether that conduct was "wrongful" thereby bringing the bar into operation.

Nor is the judge bound by a finding on the face of a separation order that the separation was due to the conduct of the petitioner: Keast v. Keast[26]. In that case the separation order had been granted by consent and the Court went behind the order to satisfy itself that the wrongful conduct was proved as a fact. However, in Tickner v. Tickner,[27] Reed, J. (who had been one of the judges in the Court of Appeal in Keast) distinguished the situation in which there had been no or little inquiry at the time of the order from a situation, as was then before him, where the original order had been defended, after a prolonged and contested hearing in which both parties had been professionally represented. In the latter situation, although the Court was not estopped from further inquiry because of the order, the petitioner could not dispute that he had been guilty of persistent cruelty. The facts as stated in the order under these circumstances had very strong evidentiary value.

Consequently, once the petitioner's wrongful conduct was established then the law entitled a spouse at that spouse's whim

> "to hold the other suspended, like Mahomet's coffin, in a state which is neither marriage nor freedom".[28]

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26. [1934] N.Z.L.R. 316.
27. [1937] N.Z.L.R. 44.
28. Painter v. Painter (1963) 4 F.L.R. 216, at pp. 219-20.

Thus there arose situations, such as occurred in Glasgow v. Glasgow[29] where Christie, J. stated that if that course had been open to him he would have exercised his discretion in the petitioner's favour. The sole reason for the respondent wife defending the suit was to retain the benefits she received as a deserted wife under the Social Security Act, and she had no wish that the marriage should again become a marriage in fact as well as in law.

This brings up an important side-issue, namely, that if a petitioner husband (who earns an ordinary wage), having divorced an objecting and "innocent" spouse, then remarries, his ex-wife's provisions of maintenance will almost inevitably suffer a reduction. As Mahon, J. remarked in Newton v. Newton:

> "When in such a case there is a divorce and the husband re-marries, then his earnings are in theory to be spent in maintaining two households. Ex hypothesi that result is impossible to obtain."[30]

The solution the learned Judge came to was to take account of the fact that the ex-wife would be paid a benefit by the Social Welfare Department irrespective of the amount that the husband was ordered to pay by the Court. In such a case, when the money he pays goes to the relief of the general taxpayer and not directly to the wife, "it is hardly realistic to say that the husband's new domestic responsibilities must yield to his prior obligation to maintain his ex-wife".[31] The problem of

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29. [1948] N.Z.L.R. 810.
30. [1973] 1 N.Z.L.R. 225, at p.228, line 43.
31. Ibid., at p.288, line 49.

making a little go a long way is a difficult, and in some cases, an insoluble one, nevertheless a small income should not be capable of being used as an added punishment.[32]

As was stated by Jessup, J.A. in Lachman v. Lachman:

> "It could not be the intention of the statute that only men sufficiently wealthy to comfortably support two women are entitled to a divorce."[33]

The ancillary relief provisions of the Matrimonial Proceedings Act have provided the means by which a wife may be granted sufficient financial support by the Court, but only as long as the couple were in a sound financial position before the breakdown of the marriage. In the situation where there is only the husband's weekly wage to support the family perhaps the only solution, however unpalatable it may at first sound, is for the taxpayer to foot the bill where financial hardship is evident. This, together with the economic independence of women, is perhaps a more constructive solution than attempting to preserve a notion of a right to support. Again, like so many matters arising out of a marital upheaval, each situation has its own particular problems, both of an individual and of a general nature, for which no one simple solution is a panacea.

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32. Especially considering the recent approach of the Courts away from the idea of using maintenance as a means of punishing deserting husbands. For example, Malaquin v. Malaquin [1973] 1 N.Z.L.R. 490, 493 per Wilson, J., followed in Ekneligoda v. Ekneligoda (unreported, judgment, 30 July 1973, of Beattie, J. Supreme Court, Auckland, Registry No. M.449/73)

33. (1970) 12 D.L.R. (3d) 221, in the Ontario Court of Appeal.

Until 1 January 1965, the date when the Matrimonial Proceedings Act 1963 came into force, a petitioner could find that the "march of the Legislature ... from fault to circumstance"[34] had not journeyed far enough to enable such a petitioner to obtain a divorce if he had erred in any "wrongful" way, and had a spouse who objected to being a "divorcee".

The situation was eased by the 1963 Act which removed from the ambit of s.29(2) the ground of divorce based on living apart and unlikely to be reconciled for not less than seven (now four) years.[35] This ground had been introduced in 1953 by s.7 of the Divorce and Matrimonial Causes Amendment Act 1953, having been incorporated into that Act on the recommendation of the ~~Statues~~ Statutes Revision Committee.[36] The proposal ~~arose~~ was made to solve the difficulty ~~of a situation in which~~ where a petitioner who, although he had been living apart from his wife (in the case mentioned for twenty-one years[37]) was unable to obtain a divorce because he could not prove the existence of a separation agreement. However, the absolute bar of wrongful conduct remained applicable until the 1963 Act.

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34. Per McCarthy, J. (as he then was) in Mitchell v. Mitchell (~~judgment of the~~ Court of Appeal, 1 March 1973, ~~as yet~~ unreported, C.A. 61/72)

35. S.21(o): "That the petitioner and respondent are living apart and are unlikely to be reconciled, and have been living apart for not less than (four) years."

"four years" being substituted for "seven years" by s.2(f) of the Matrimonial Proceedings Amendment Act 1968

36. N.Z. Parl. Debates ~~vol. 300~~ (1953), p.1795

37. N.Z. Parl. Debates ~~vol. 299~~ (1953), p.822: the Hon. Mr Marshall in the Second Reading Debate.

The present position now means that an objecting spouse can only postpone a divorce and not veto it altogether, unless of course, the Court decides to exercise its discretion against the petitioner (s.30). Thus the Legislature had gone some way to anticipate the view expressed by the United Kingdom Law Commission:

> "The expedient of preserving the sanctity of marriage by insisting that one who has shown a wanton contempt for it should be punished by remaining married seems illogical and unattractive, especially if, as is usually the case, it involves punishing others as well."[38]

However, it should be noted that even if a petition is founded on a matrimonial wrong, s.31(b) gives the Court a discretion as to whether it grants the decree sought if

> "the petitioner's own habits or conduct have induced or contributed to the wrong complained of"

thereby highlighting the importance of the Court's "discretion" in the granting of a decree of divorce.

There is no right to a decree on a petition presented on the grounds in ss.21(m), (n) and (o). The other grounds for divorce in s.21 are subject to the bars to relief in ss.29 and 31, but, if they do not apply, or are not proven, the Court "shall" grant a decree of divorce (s.32). Consequently, the granting of a decree, in cases where the discretionary bars to relief are applicable, depends to a large extent on their interpretation by the Courts in the prevailing judicial attitude. The observation

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38. The Law Commission: Reform of the Grounds of Divorce. The Field of Choice. Nov. 1966 (reprinted 1970) Cmnd. 3123 para 44.

made by the Group appointed by the Archbishop of Canterbury in January 1964 is equally applicable to New Zealand:

> "What interested us most was the discovery that in practice the courts have already gone a considerable way towards transforming judgements theoretically founded on the matrimonial offence into what are virtually judgements on the state of the marriages in question. We came to the conclusion that, whatever the legal theory may be, legal practice was moving, in company with the mind of society, towards the concept of breakdown of marriage."[39]

It is interesting that since there has been no mandatory wrongful conduct bar to a divorce founded on "living apart" for four years the Courts have reverted to quoting Mason v. Mason[40] with approval as evidencing the general policy of the law.[41] Indeed, in Fraser v. Fraser Henry, J. commented:

> "In New Zealand, there is general knowledge that a respondent in a divorce is not necessarily a guilty party, and few people would know whether she was a petitioner or respondent and fewer would care. We have long had divorce without matrimonial fault."[42]

Having accepted divorce on the ground of husband and wife having lived apart for a specified number of years

> "it follows that it makes no difference whether it is the 'innocent' or 'guilty' party who seeks to convert the judicial separation into a final divorce. ... In a word, if there is no longer a viable marriage, the question of fault, of 'guilt' or 'innocence', is irrelevant."[43]

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39. Putting Asunder, London, S.P.C.K. 1966, para 25, p.17
40. [1921] N.Z.L.R. 955
41. For example, Newell v. Newell [1965] N.Z.L.R. 737; Fraser v. Fraser [1967] N.Z.L.R. 856.
42. [1967] N.Z.L.R. 856, at p.858, line 21.
43. Gleason v. Gleason 308 N.Y.S. 2d 347, 351, decision of Chief Judge Fuld, Court of Appeals of New York, Jan 21, 1970.

Bearing in mind that "divorce by unilateral repudiation is not yet part of the law"[44], (and ~~I am~~ the writer is not suggesting that it should be), there seems no reason to fetter the ~~C~~court's discretion as to whether to grant a decree in a particular case with technicalities. Few would disagree with the statement made by Mr Justice Barber:

> "The desirable aim is that laws relating to divorce should be rational and should accord with the community's notion of what is fair and reasonable, and be free of unnecessary complexity and uncertainty."[45]

The elimination of absolute prohibitions and the vesting of a more pervasive discretion in the Court would remove undesirable rigidity leaving in practice the resulting flexibility to remain guided by principle.

In this regard a distinction should be made between conduct intended to deceive the ~~C~~court and conduct which is used by the respondent spouse as a tactical device. Indeed, s.29(2) is now rarely used as a defence, possibly as a result of the ancillary relief provisions available in the Matrimonial Proceedings Act.

Obviously attempts to hoodwink the ~~C~~court should be proscribed by the ~~L~~legislature, but even this abuse of the system need not be framed as an absolute prohibition as the Court no doubt will not be favourably disposed to exercise a discretion in favour of a petitioner who has tried to deceive the Court.

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44. Barton, J.L. "Questions on the Divorce Reform Act 1969" (1970) 86 L.Q.R. 348, 350

45. "Divorce - The Changing Law", Hon. Mr Justice E.H.E. Barber, Divorce, Society and the Law (ed. H.A.Finlay) Butterworths, 1969.

It would perhaps be preferable to make such a provision a general one removed from the concept of bars to relief (such as condonation, collusion and conduct conducive) as was recommended by the United Kingdom Law Commission.[46] Such a provision would need to be carefully drafted with the motive of the parties being a determining factor so as not to inhibit the free discussion essential to a therapeutically based approach to the solution of marital disputes.

Thus, the Matrimonial Proceedings Act 1963 has a facade of a predominately fault based system, but its practical operation belies too great an emphasis on this initial appearance. The practical result tends to support Finlay's opinion that:

> "Divorce, once permitted, does not provide for half measures. Either people must be forced to remain married, with no possibility of divorce, or else divorce, once allowed, must become freely available."[47]

The latter is the view that, by and large, has found acceptance, thereby enabling the re-assortment of the ill-assorted to be accomplished with greater facility.

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46. Note 38, above, Cmnd. 3123, paras 108-109

47. H. A. Finlay, "Divorce Law Reform: The Australian Approach" vol. 10, Journal of Family Law (1970) 1, at p.9.

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