COMMENT

AUTOMATISM—THE ILLEGITIMATE OFFSPRING OF M'NAGHTEN'S CASE

Automatism may be described as a temporary eclipse of consciousness which leaves the person so affected still able to exercise ordinary bodily movements.[1] The defence is one rarely encountered in practice and raises issues of mental illness about which a lawyer must speak with hesitancy, and with which he will generally be to some degree unfamiliar.

It is recognised that a defence that the accused's act is involuntary entitles him to a complete and unqualified acquittal.[2] In view of this, it is strange to find eminent jurists suggesting that to recognise a state of automatism as justifying an acquittal on the ground that the act was thereby rendered involuntary is in defiance of basic legal principle.[3] They fear that such a defence might be raised in cases which would otherwise fall within the so-called M'Naghten rules.[4] It is our contention that automatism does not necessarily call for the application of those rules and that to extend the extra-judicial utterances of the House of Lords in 1843 to cover all cases of automatic conduct is an unwarranted and unreal extension. It is suggested that there is a distinction between inability to understand the nature and quality of an act done consciously and absence of knowledge that one is committing an act at all.

The M'Naghten rules are concerned solely with the cognitive faculties and presuppose that the individual in question was conscious of his actions. Those rules can be understood only in the light of their historical evolution. At the time when these principles were formulated it was considered that if persons suffering from disease of the mind, and thus likely to commit other acts of violence, were entirely acquitted, society might be subject to further acts of violence. This was the reason why the Trial of Lunatics Act, 1800, provided that a person in this condition should be committed during His Majesty's pleasure to a Criminal Lunatic Asylum.[5]

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1 Glanville Williams, *Criminal Law* (1953), vol. ii, p. 317. Similar meanings are given by Prevezer, in *Criminal Law Review* (1958), at p. 363, and by Gresson P. in *R. v. Cottle* (1958) N.Z.L.R. at p. 1020.

2 *Woolmington v. D.P.P.* [1935] A.C. 462, at p. 482. J. W. C. Turner in his article "Mental Element in Crimes at Common Law", published in *The Modern Approach to Criminal Law* (1948) at p. 195. The Tasmanian Criminal Code, 1924, Section 13 (1) provides in part: "No person shall be criminally responsible for an act, unless it is voluntary and intentional . . ."

3 Sir Owen Dixon in *Australian Law Journal*, 31 (1958), at p. 261.

4 *McNaghten's Case* (1845) 10 Cl. and Fin. 200, at pp. 208-12; 8 E.R. 718, at pp. 722, 723.

5 39 and 40 Geo. III, c. 49. Similar provisions are in force throughout the Anglo-American legal system. See, *e.g.*, section 420 of the Victorian Crimes Act, 1957, and sections 381 and 383 of The Tasmanian Criminal Code.

The recognition of conditions of post-traumatic automatism, which is a transient state of mind caused by concussion due to a blow on the head or some other accident, has caused discomfiture in legal circles only because it emphasises the inadequate state of the law.

In *R. v. Carter*,[6] the most recently reported decision on the subject, Sholl J. dealt with the exact limits of the defence of automatism as a basis for negativing criminal responsibility.

The accused was charged with: (1) Unlawfully and maliciously wounding with intent to murder, (2) unlawfully and maliciously wounding with intent to do grievous bodily harm, and (3) dangerous driving.

The Crown alleged that the accused had deliberately driven a motor car at the victim, a pedestrian. At the conclusion of the evidence, and before the addresses of counsel, the judge ruled that, on the facts, the defence did not amount to one of insanity within the meaning of section 420 of the Crimes Act, 1957, so that if the defence was to succeed, therefore, the proper verdict would be that of acquittal, and not one of acquittal on the ground of insanity, which is the appropriate verdict found in Victoria in such a case.

Sholl J., after examining the medical evidence presented on behalf of the accused, which showed that if a state of automatism did exist in the accused there was a partial lack of consciousness, was not satisfied on any view of the evidence "that what (was) set up (was) a defect of reason, but rather a defect of volition or will".[7]

In so holding, His Honour upheld the natural focussing of the M'Naghten rules on the capacity of the accused's cognitive powers as contrasted with his volition.

His Honour went further, however, and ruled that even if what was involved here did stem from a defect of reason, he was not satisfied that it arose from a disease of the mind, so as to raise the issue of insanity.

After referring to the policy of section 420 of the Crimes Act, he said:

> "It is, I think, quite outside the policy of the law to extend the practice of s. 420 to cases where there is no reason to fear any repetition of the crime and no evidence of any brain damage or disease which is likely to give rise to any repetition. . . .
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> "The term disease in the McNaghten formula is not used, I think, with reference to a temporarily inefficient working of the mind due only to such outside agencies as alcohol or drugs or applied violence producing trauma".[8]

In laying down these statements of law, Sholl J. was aware that he might appear to be at variance with the opinions of Dixon J. in *R. v. Porter*,[9] and of Devlin J. in *R. v. Kemp*.[10] Insanity may be of temporary

6 (1959) V.L.R. 105.
7 At p. 109.
8 At p. 110.
9 (1933) 55 C.L.R. 182, particularly at pp. 188, 189.
10 [1957] 1 Q.B. 399, at pp. 406-8.

duration, but there is no reason we suggest for treating all transient states of mind as falling within the legal definition of insanity for the purpose of determining criminal responsibility. It has been suggested in *Hill v. Baxter*[11] that "for the purposes of the law there are two categories of mental irresponsibility, one where the disorder is due to disease and the other where it is not".

Whether automatism can in a particular case amount to insanity must therefore depend on whether it can be classed as a "defect of reason" arising from a "disease of the mind". In suggesting a limitation to the wide interpretation of these phrases, Sholl J. has taken an important step towards attempting to bring the criminal law into line with modern medical knowledge.

It is submitted that the likelihood of repetition may validly be taken into account in determining whether what is alleged can be termed a "disease of the mind". In fact, Devlin J., who was responsible for a wide formulation of the meaning of "disease of the mind" in Kemp's case, placed a great deal of stress on this factor in *Hill v. Baxter*.[12]

The first *ratio decidendi* of *R. v. Carter* would seem to be that automatism caused by accident and being only transient is not a disease of the mind, nor a defect of reason within the M'Naghten rules.

In considering the question whether in relation to a charge of dangerous driving automatism can be a defence at all, Sholl J. held that certain authorities, which decide that this offence does not necessitate proof of *mens rea* in the sense of a guilty mind, did "not prevent the availability of the defence in relation to the question of the accused's volition to do the physical acts involved".[13]

Thus, the second *ratio decidendi* of *R. v. Carter* is that absence of volition in respect of the act involved is always a defence to a crime.[14] In a case of automatism, such as *Carter's* case, the defense will justify an unqualified acquittal. However, when the type of automatism involved stems from a defect of reason due to disease of the mind, the defence of involuntary action will merge in the defence of insanity.

Two cases illustrate this point.

In *R. v. Charlson*[15] the accused struck his young son, to whom he was devoted, on the head with a mallet and threw him out of a window into a stream below. His actions seemed unaccountable. The defence did not raise a plea of insanity, and in the opinion of the prison medical officer the accused was not suffering from a disease of the mind at the time of

11 [1958] 1 Q.B. 277, *per* Devlin J. at p. 285.

12 At p. 285: "If disease is not the cause, if there is some temporary loss of consciousness arising accidentally, it is reasonable to hope that it will not be repeated and that it is safe to let an acquitted man go free".

13 At p. 113. Counsel for the prosecution cited *R. v. Coventry* (1938) 59 C.L.R. 633, and *Hill v. Baxter* for the proposition that the offence of dangerous driving is absolutely prohibited.

14 There is a third *ratio* dealing with the burden of proving automatism, but this note is concerned only with the substantive question of the defence itself.

15 (1955) 1 W.L.R. at p. 317.

the assault. The doctor stated that from his examination of the accused and of the family medical history there was a strong possibility that the accused was suffering from a cerebral tumour, in which case he would be liable to motive outbursts of impulsive violence over which he would have no control.

Barry J., in a carefully worded summing up, explained to the jury the essentials of the three charges against the accused, *viz.*, (1) causing grievous bodily harm with intent to murder, (2) causing grievous bodily harm with intent to do grievous bodily harm, and (3) causing grievous bodily harm, without a specific allegation as to intention. In relation to the first two charges the prosecution had to prove the specific intent alleged, but in relation to the third charge they were not required to prove any such specific intention.

Barry J. said in relation to this charge:

> "In considering this third charge you have to ask yourself was the accused knowingly striking his son or was he acting as an automaton without any control or knowledge of the act which he was committing".[16]

This case has caused concern to some judges and textwriters. However, the only medical witness called in the case stated that the accused was not suffering from a disease of the mind, and so there was no evidence before the court which would justify a direction in accordance with the Trial of Lunatics Act.

Charlson's case simply affirms the requirement that the prosecution must prove a voluntary act, and that an act done unconsciously and without knowledge of its being done is not voluntary. The real significance of the case is, however, to stress the inadequacy of the present law in coping with problems of mental disorder. A diabetic may be subject to involuntary action if he is denied regular doses of insulin or some other drug. As Prevezer, in the *Criminal Law Review*, has pointed out it would be both impracticable and unjust to detain as insane all diabetics who act under automatism.[17] Similarly, it would be equally harsh to deny him the defence that his act was not voluntary. These cases do not necessarily present real problems. The possibility of the existence of types of mental disorder, predicated by the decision in *Charlson's* case, in which the accused cannot be said in any real sense of the word to be insane, does present a real problem for the courts.

The fact that the possibility of an acquittal is present in such circumstances does not present a valid reason for denying a defence of involuntary action in the different situation of post-traumatic automatism, such as in *Carter's* case, nor it would seem in cases where a defect of reason is apparent, but there cannot be said to be a disease of the mind.

The problem in the existing state of the law is to reconcile the demands of society for protection from harmful acts with that of fairness to the accused in determining criminal responsibility. Devlin J. was

16 At p. 321.
17 *Op. cit.*, p. 440, at p. 447.

faced with this problem in *R. v. Kemp*.[18] Kemp was charged with causing grievous bodily harm. The accused, an elderly man, was suffering from arteriosclerosis. Suddenly and without warning or motive he struck his wife on the head with a hammer. The medical witnesses agreed that all the other prerequisites of the M'Naghten rules were present, but it was a question whether what was involved was a disease of the mind. The prosecution, however, adduced evidence to show that the accused was suffering from a mental disease, namely, melancholia. The defence objected, without success, to the admission of such evidence.[19]

Devlin J. held that he was bound to give effect to the Trial of Lunatics Act, it having been given in evidence that the accused was insane, and he put the issue of insanity to the jury.[20] However, far from doubting the correctness of *Charlson's* case, he pointed out that if the accused was otherwise sane at the time of the act, but was then not conscious of his acts, he was entitled to an unqualified acquittal.[21]

Thus, in order to bring in a special verdict, it must still be shown that the accused was suffering from a defect of reason from disease of the mind, which in the last resort is a question for the jury to decide.

However, that case does suggest a way of overcoming the problems raised, and the accused in *Kemp's* case was probably surprised to find that by raising a plea of automatism he had in effect committed himself to an institution. This danger will in many cases provide a sufficient deterrent to the raising of the defence in unmeritorious cases.[22]

The important point to note is, however, that *R. v. Charlson* and, *a fortiori*, *R. v. Carter* are in no way inconsistent with *R. v. Kemp*, and that the decision in *R. v. Carter* is not only logically defensible but legally irreproachable.

It would indeed be unfortunate if the courts were forever to regard themselves as unable to take cognizance of the advances in medical knowledge, simply in consequence of some extra-judicial utterances of the House of Lords in 1843.

T. L. McDermott.
W. M. Hodgman.

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18 [1957] 1 Q.B. 399.

19 The manner in which this evidence was introduced is set out in *Modern Law Review*, 20 (1957) at p. 56 *et seq.* by Hall-Williams who had access to material in addition to the facts reported.

20 For an Australian case in which evidence of insanity was put to the jury against the objection of defence counsel, see *Sinclair v. The King* (1946) 73 C.L.R. 316.

21 (1957) 1 Q.B. 399, at p. 402.

22 It is suggested, however, that when the issue of insanity is left to the jury in circumstances in which the plea is not raised by the accused, the verdict should be appealable. At present no appeal lies from the special verdict. See *Felstead v. R.* [1914] A.C. 534, at p. 542, and also *Modern Law Review*, 20 (1957), at p. 57.

THE GOVERNOR'S RESERVE POWERS IN RELATION TO THE DISSOLUTION OF THE TASMANIA HOUSE OF ASSEMBLY

The Tasmania House of Assembly can be dissolved by proclamation at times other than those of the normal expiry. The Legislative Council in Tasmania, unlike the Federal, Victorian and South Australian Upper Houses, is aloof from the threat of dissolution, and therefore finds itself in the powerful position of being able to force a formal dissolution of the Lower House, and it did this in 1948 by refusing to pass supply. But this occurrence is rare and uncomplicated. However, other unscheduled dissolutions of the House of Assembly are not so rare and raise considerable differences of opinion. The circumstances attending the three post-war dissolutions and comments on their value as persuasive precedent may be of interest.

Tasmanian voters elect 35 members to the House of Assembly from five electoral districts by a system of proportional representation known as the Hare-Clark system. This otherwise quite admirable method does not overcome the problem of both Labor and Liberal Parties being returned in nearly equal strength. Since the end of the Second World War the Labor Party has retained office, but its position has been at times so precarious that dissolutions, or if not dissolutions, then over-cautious policy-making, have resulted. A system of proportional representation would no doubt be more successful if there were two, and only two, parties, because then it would require the rare defection of a Government member for the Government to be defeated. But when candidates can be elected as Independent members the presence of two Independents in a House where the number of Government members only exceeds that of the Opposition by one, means that the Government cannot be certain of commanding the majority of the House. For example, the strength of parties in the Tasmania House of Assembly until March of this year was 17 Labor, 16 Liberal and two Independent members. The Government depended upon the support of one Independent to retain office. With the resignation of the leader of the Opposition (Mr. Jackson) and Mr. Hodgman from the Liberal Party, the number of Independents is now four. Certainly the likelihood of a dissolution has receded with the onset of differences within the Liberal Party, but should all four Independents choose to vote with the Opposition on an important question the Government could still be driven to seek a dissolution. It will be seen from the next paragraph that attempts have been made by statutory amendment to avoid Government instability caused by equal party strengths. But those amendments can be invoked only if the House is composed of not more than two parties, *i.e.*, where there is no Independent member. Thus it appears that a cause of Government instability is the presence of Independent members. Whether or not the Independent member is worth while raises questions which are outside the scope of this article. Certainly a large number of Tasmanian voters supported the Independent candidates at the last election, but this could well have been attributed to the personal popularity of the candidates, rather than to a genuine desire of

the voters for Independent representation. It is possible, of course, to overcome this threat of instability by statutory disallowance of Independent candidature. But such a bold step would so challenge accepted principles of democracy that it is unlikely to be taken.

Some indication of the thought given to solving this problem is to be found in the amendments to the Constitution Act, 1934. Prior to the 1959 election the House of Assembly comprised 30 members. Provided no Independent candidate was elected and provided the parties had been returned with 15 members each, the Constitution Act, 1953 (No. 89 of 1953 gave the Governor power by proclamation to declare an unsuccessful candidate elected to the Assembly, such candidate being a member of that party which obtained the greatest number of votes at the election. This position was modified the following year by the Constitution Act No. 2, 1954 (No. 88 of 1954)[1] which provided for the Speaker of the House to be elected from the party with the least number of votes and, if not forthcoming from that party, then from the party which had obtained the greatest number of votes, the latter party being allowed to gain a new member to the House from the Speaker's electorate. However, and doubtless because of the urging of Mr. George Howatt, who had made a detailed study of our electoral system, it was decided by further amendment (No. 91 of 1958) that the House of Assembly should contain an odd number of members. Instead of five six-member electorates there are now five seven-member electorates.

A cause of dissolution can arise from an unexpected quarter at any time and reflections on the Governor's powers in regard to dissolution are therefore evergreen. In the first place, is the Governor bound to grant a dissolution on the Premier's request and, if so, in what sense is he bound? Secondly, if the Governor is not bound to accept his Premier's advice automatically, what factors is he entitled to consider and what advice may he seek in exercising his discretion? Thirdly, what is the utility, persuasiveness or authority of Commonwealth and other precedents?

It would appear from section 12 (2) of the Tasmanian Constitution Act, 1934, that no problem exists. That section provides that the Governor has the power to ". . . dissolve the Assembly whenever he shall deem it expedient to do so". Thus in legal theory the Governor's discretion is absolute, but in practice the exercise of this power is regulated by conventions. As a convention is derived from precedents, the latter require some examination. But which precedents? Those of Tasmania, of the other States, of the Commonwealth, or of the United Kingdom? The report of the Imperial Conference of 1926 said that the relationship between the Governor-General and his Ministers was to be the same as that between the King and his Ministers.[2] The Australian States were not specifically mentioned at the Conference, and since that time there

[1] Section 3 of this Act repealed section 24a of the principal Act and substituted a new section 24a.

[2] H. V. Evatt, *The King and His Dominion Governors*, p. 216.

has been discussion as to whether or not the Declaration applies to the States. Dr. H. V. Evatt's opinion is that there should be no valid distinction between the position of the Governor-General in relation to Ministers and the position of the State Governors. The Premier of Tasmania, Mr. Cosgrove (now Sir Robert Cosgrove), relied upon Evatt's view in his argument to the Governor when seeking a dissolution in 1950.

> "It is suggested, therefore, that there is no proper basis for distinguishing between the position of the Governor-General and the Governor of one of the States. If that be so it would appear that the Governor of the State of Tasmania is, like the Governor-General, required to act on the advice of his Ministers in matters of dissolution and dismissal, and would have the right to disregard such advice only in those cases where the King himself would be accorded that right by Constitutional usage in the United Kingdom".[3]

A. B. Keith takes the opposite view that the Governor has a discretion which is not to be fettered by any supposed analogy to the relationship between the Governor-General of a Dominion and His Ministers. He says that the declaration of the Imperial Conference of 1926 "has no application to the Governors of the States".[4] Keith goes so far as to assert that the Governor of an Australian State "still acts as an agent of the Imperial Government in addition to his normal function as a Constitutional Head of the State".[5] Mr. Cosgrove whilst Premier of Tasmania in 1956, in giving his reasons for seeking a dissoluton,[6] quite rightly argued that State Governors are no longer agents of the British Government. He pointed out that British Ministers have consistently refused to give directions to State Governors in constitutional crises, thus avoiding any suggestion that the Governor is an agent of the British Government. He quoted Mr. Amery's reply in the N.S.W. crisis of 1926: "It would not be proper for the Secretary of State to issue instructions to the Governor with regard to the exercise of his constitutional duties".[7]

Mr. Cosgrove claimed that there are only two alternatives — either the position of the State Governor is the same as that of the Governor-General or he is an agent of the British Government.[8] There is a third alternative which might explain why the States were excluded from the Federal Statute of Westminster Adoption Act, 1942 (this Act adopted *in toto* the Statute of Westminster, 1931, which gave effect to the 1926 Imperial Conference), namely, that the States be allowed to develop special usage of their own. However, it should be remembered that the States are component units of a federation and there is no reason why Federal precedents should not be accepted as being of persuasive value to State Governors as well as accepting the development of constitutional

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3 Journals and Papers of the Parliament of Tasmania, 1950-51, no. 10, page. 5.
4 A. B. Keith, *Constitutional Law of the British Dominions* (1933), p. 150.
5 *Ibid.*, p. 136.
6 Journals and Papers of the Parliament of Tasmania, 1956, no. 59, pp. 4-5.
7 *Ibid.*, p. 5.
8 *Ibid.*, p. 5.

conventions within the State itself. The precedents which occur in other States, provided they have constitutions similar to that of Tasmania, would likewise be a valuable, though not necessarily an authoritative, guide to the Tasmanian Governor.

Tasmania has experienced enough dissolutions upon which to build its conventions. The precedents occurring before 1926 have faded in importance because of the Imperial Conference. Among the pre-1926 precedents there have been occasions when a request for dissolution has been refused.[9] Those refusals were active evidence of the Governor's powers. Since 1926 the only active evidence of a Governor acting contrary to the wishes of his Ministers was the dismissal of the Lang Ministry, N.S.W., by Sir Phillip Game in 1932. In Tasmania the Governors' and Administrators' replies have never failed to include a "saving clause" claiming that the power to grant or refuse a dissolution is within their discretion. It will be seen from the forthcoming analysis of the three recent dissolutions that in 1956 the Leader of the Opposition (Mr. Jackson) relied upon the pre-1926 precedents.

The first of those three dissolutions occurred in March, 1950. The events leading up to the dissolution were as follows. The Labor Government had a majority of one after the general election of 1946. In 1948, however, the Legislative Council by refusing supply forced a formal dissolution contrary to the wishes of the Government. After the election which followed the Labor Party was only just able to form a Government. Its position was almost untenable seeing that it was in a minority of one from the moment the three Independents combined with the Opposition. Nevertheless, it carried on. In 1949, the Speaker died and Mr. Wedd, Independent, accepted the office, thus giving the Government a majority of one (except when the House was in Committee). The crisis came four months later when Wedd, in protest against the proposed apointment of the Hon. T. G. D'Alton as Agent-General, vacated the Speaker's chair. This occurred early in February while the House was in recess and placed the Government in the position of having to elect a Speaker from its own ranks and thereby reverting to a minority. This was the situation when the Premier (Mr. Cosgrove) advised His Excellency to dissolve Parliament. Mr. Cosgrove said: "The responsibility of Ministers of the Crown in tendering such advice is perhaps greater now than it was before the Imperial Conference of 1926 passed a resolution relating to this question. . . . Before that resolution was passed there were conflicting theories . . . as to a Governor's independence of Ministerial advice on the question of dissolution of Parliament. . . . All doubts on that question have now been resolved and the Governor of an Australian State holds in all essential respects the same position in relation to the administration of public affairs in that State as is held by His Majesty the King in Great Britain".[10] Mr. Cosgrove continued with an

9 1879, House of Assembly Journals, vol. XXXVII, no. 74; 1904, Journals of the Legislative Assembly, vol. L, pp. 142, 159; 1909, Parliamentary Papers, no. 52, pp. 1-2.

10 Journals and Printed Papers of the Parliament of Tasmania, 1950-51.

explanation why there is no distinction between the position of the Governor-General in Australia and the Governor of one of the States. He illustrated the Governor-General's power by quoting Sir Isaac Isaacs in connection with the 1932 Commonwealth dissolution.[11] The quotation appears to have been taken from page 236 of H. V. Evatt, *The King and His Dominion Governors*, and reads: " '. . . In view of the present constitutional position of the Governor-General of a Dominion as determined by the Imperial Conference of 1926, confirmed by that of 1930', it was his duty to accept the advice tendered." In actual fact this is not a complete quotation. Isaacs qualified the last nine words. His last words were, ". . . by that of 1930, I am of opinion, after *careful consideration*, that it is my duty in *existing circumstances* to accept the advice tendered by you and accordingly to grant the dissolution asked for".[12] Mr. Cosgrove continues to quote Isaacs from the same and following page of Evatt's work, " '. . . There are considerations in the known circumstances which *tend to support* the acceptance of the advice tendered to me. They are such as the strength and relation of various parties in the House of Representatives, and the probability in any case of an early election being necessary'." Would not the words "careful consideration", "existing circumstances" and "tend to support" imply that the Governor-General's acceptance was not quite so automatic after all? Evatt, at page 237, also implies that the Governor-General is allowed some discretion and says: "In all the circumstances the Governor-General felt able to infer that no alternative Ministry was reasonably possible", and, again two lines further on, the Governor-General "would certainly have been justified in getting in touch with the other party leaders". It appears from this closer examination of the 1931 Federal dissolution and of H. V. Evatt's writings that the Governor-General need not feel bound to accept the advice tendered but, on the contrary, that he could exercise a discretion.

Mr. Cosgrove continued his argument with a quotation from Chalmers and Hood-Phillips, *Constitutional Law* (1946), pp. 51-2, which says it has been the practice in the U.K. for over a century that the Sovereign should not refuse a dissolution when advised by his Ministers unless a dissolution were requested improperly and then only in an extreme case. Mr. Cosgrove submitted ". . . that in no sense is this in any manner of form an 'extreme case' which would justify a refusal. . . . On the contrary . . . it is clear that the Government . . . cannot be conducted with the authority which should be behind it. There is no prospect of an alternative Ministry . . .".[13] He conceded that the position of the Government was the same as it had been prior to Mr. Wedd accepting the Speakership, but that his Government had carried on then only because it felt obliged in the national interest to do so. The new situation, following the resignation of the Speaker and the acceptance of the leadership of the Opposition by an Independent, made the Government's position in the House completely untenable, because "it might be directed by the House to do

11 *Ibid.*, pp. 4-5.
12 Commonwealth Parliamentary Debates, vol. 132, Nov. 25, 1931, p. 1927.
13 Journals and Printed Papers of the Parliament of Tasmania, 1950-51, p. 6.

something quite contrary to its policy and moreover quite contrary to a specific and unequivocal attitude taken by it before the electors who returned it to power".[14]

Governor Binney's reply to the Premier was by no means an automatic granting of the request. "By an interview with the Leader of the Opposition" the Governor "satisfied himself that no alternative Government was possible". The Governor's reply addressed to the Premier said: "After full *consideration* of your advice . . . and in view of the Parliamentary situation, *I have decided* to accept that advice and grant the dissolution asked for".[15] If the Leader of the Opposition had been able to take the responsibility of forming an alternative Government, it is probable that the Governor would have commissioned him to do so and would accordingly have refused the advice given him by the Premier. The Governor did, however, clearly infer that the decision to grant or refuse a dissolution was his.

The defection of Mr. Bramich in 1956 brought another precedent into Tasmania's history of dissolutions. Mr. Bramich resigned from the Government and voted with the Opposition. A motion of no confidence put to the House during the third week of September was carried by one. Supply had been granted until the end of September and so there was sufficient time for an election. The Premier (Mr. Cosgrove) sought a dissolution.[16] In his submission he again claimed that the Governor should act on the same principle as the Queen, who would consider herself bound to accept advice. Mr. Cosgrove supported his arguments of 1950 with quotations from authoritative text writers. From Chalmers and Hood,[17] that a properly requested dissolution should not be refused. A proper reason would be that the House no longer reflected the opinion of the nation, and an improper reason would be when a Government sought a second dissolution on finding itself in the minority after the election. From Keith,[18] that a weapon which a Government possesses is the threat of dissolution. From Dawson,[19] that a Prime Minister's power to dissolve could be abused but that in most cases it should not be interfered with by the Governor. Mr. Cosgrove included Forsey's[20] contrary view that dissolution should be a last resort; Jenning's view[21] that there could be a refusal if circumstances arose but that it was difficult to see what those circumstances could be; Isaac's view[22] that since 1926 he had been bound by his Minister's advice except in extreme cases, and finally

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14 *Ibid.*, p. 6.

15 *Ibid.*, p. 8.

16 Journals and Printed Papers of the Parliament of Tasmania, 1956, no. 59, pp. 3-9.

17 Chalmers and Hood, *Constitutional Law* (1946), pp. 51-2.

18 Keith in Anson's *Law and Custom of the Constitution*, vol. II, 4th Ed., pp. 9-12.

19 Dawson, *The Government of Canada*, pp. 392-3.

20 Forsey, *The Royal Power of Dissolution of Parliament in the British Commonwealth*, p. 256.

21 Jennings, *Cabinet Government*, p. 317.

22 Isaacs, Commonwealth Parliamentary Debates, vol. 132, 1932, p. 1927.

Evatt's view[23] that the fact of a Prime Minister always having a dissolution in his pocket was unquestionable but regrettable, and that possible alternative ministries should not prevent the granting of a dissolution.

It will be remembered that section 24a of the Constitution Act, 1934, was in force. Mr. Cosgrove argued that because the life of Parliament was reduced from five to three years when section 24a was invoked, then by inference there should also be an earlier dissolution if the Government, which the section was designed to sustain, was to be overthrown by a change (Mr. Bramich's defection) for which the section made no provision.

The Parliamentary papers dealing with the 1956 dissolution also contain the communication addressed to His Excellency from the Leader of the Opposition (Mr. Jackson) in which he claimed the support of the majority in the House.[24]

Mr. Jackson stated that the Premier could ask for a dissolution but that his authority to advise had ceased. Also, that it was constitutional practice to consult with the Opposition with a view to forming an alternative Ministry, and proceeded to cite three Tasmanian precedents:

(1) that of 1914, when Earle was commissioned to form an alternative Ministry (on condition that he sought an immediate dissolution) thus, according to Forsey,[25] reaffirming the doctrine that dissolution should be refused (a) when an alternative Government is possible, and (b) when no important question is in issue.

(2) that of 1923, when the Administrator said that it was not his duty to grant a dissolution if he could replace his Ministers with others, whereupon Mr. Lyons, the Opposition Leader, formed a Ministry.

(3) That of 1950, when the request for dissolution was complied with, but only after an interview with the Leader of the Opposition. Mr. Jackson went to some lengths to refute Mr. Cosgrove's argument that section 24a altered by implication the Governor's power to grant or refuse a dissolution. In any case, Mr. Jackson asserted, section 24a no longer applied because the Liberals had 16 instead of 15 members.

Mr. Cosgrove wrote again to the Governor complaining of Mr. Jackson's letter. He said: "It is without precedent that the Opposition in any circumstance should tender advice to Your Excellency, as Your Excellency would then in effect have provided yourself with two sets of advisors".[26]

Governor Cross in reply, although granting the dissolution, said: "In the service of the discretion vested in me by section 12 (2) of the Constitution Act, 1934 . . . notwithstanding the assurances of the Opposition . . . I have come to the conclusion that the electorate should express

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23 Evatt, *Canadian Bar Review*, vol. 18, no. 1.

24 Journals and Printed Papers of the Parliament of Tasmania, 1956, no. 59, pp. 9-13.

25 Forsey, *The Royal Power of Dissolution of Parliament in the British Commonwealth*, footnote p. 34.

26 Journals and Printed Papers of the Parliament of Tasmania, 1956, no. 59, p. 13.

its will. . . . I do not accept your submission that it is only in extreme circumstances that I am entitled to reject your advice. Nor does my decision imply agreement with your submissions upon the effect of section 24a".[27]

The last precedent to be considered is that which occurred in April, 1959. The Treasurer (Dr. Turnbull) was dismissed from the Cabinet whereupon he announced that he would resign from the Labor Party. The Premier (Mr. Reece) requested a dissolution and submitted three reasons why his advice should be accepted:[28]

(1) that the constitutional practice of the United Kingdom was common to Tasmania, and that in the United Kingdom the Queen would have permitted her Prime Minister to choose the day for an election when Parliament was in its last year;

(2) "that a dissolution was necessary to preserve the discipline on which the party system was based . . .", that ". . . our party system requires that members should not be able to change sides without risking an appeal to the electors", and that because section 24a (which was operating) had been replaced by an Act which would increase the number of members in the Assembly to 35, this better system should be instituted as soon as possible;

(3) that there were important fiscal matters between the State and the Commonwealth which required the firm support of a stable House, and that in any event an autumn election would have been preferable to one later in the year, even if the Turnbull incident had not occurred.

It is worth noting in regard to that dissolution that the Government had not been defeated on an important issue, that the Leader of the Opposition was also in favour of an immediate election, and that there was supply until the end of July.

The Administrator (Sir Stanley Burbury) replied to the Premier. He did not consider an anticipated defeat a good enough reason by itself. Nor would he concede that it was only "in extreme circumstances" that he could refuse advice. However, "taking into account all the relevant circumstances . . .", and "pursuant to the discretion committed to me by section 12 (2) of the Constitution Act, 1934", Sir Stanley dissolved the House of Assembly.[29]

It is clear, therefore, that the two main causes of Government instability in Tasmania are (1) equality in the strength of the parties, and (2) the presence of Independent members.

While the first difficulty can be overcome by legislation, the problem of the Independent members remains.

W. H. Craig.

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27 *Ibid.*, p. 14.

28 Journals and Printed Papers of the Parliament of Tasmania, 1959, no. 6, pp. 2-3.

29 *Ibid.*, p. 4.

MATRIMONIAL CAUSES ACT, 1959 (COMMONWEALTH) SECTION 28 (m) AND THE EXERCISE OF JUDICIAL DISCRETION

"In general it is not in the interests of the parties or in the interest of the public that a man and woman should remain bound together as husband and wife in law when for a lengthy period they have ceased to be such in fact".[1] Recognising this principle the legislature, in section 28 (m) of the new Commonwealth Matrimonial Causes Act, 1959, has now enacted as a ground for dissolution of marriage "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 co-habitation being resumed".[2]

Separation for a period of years became a ground for dissolution of marriage first in New Zealand.[3] In substance the New Zealand legislation provides that where parties have lived apart by an agreement for separation for a period of not less than three years[4] or, alternatively, are living apart and are unlikely to be reconciled for not less than seven years,[5] the Court may, subject to section 18, dissolve the parties' marriage. Section 18 of the New Zealand Act states that where the petitioner has proved his or her case, *the Court shall have a discretion* as to whether or not a decree shall be made, but if the petition is defended, 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 dismiss the petition".

Of the Australian States only Western Australia[6] and South Australia[7] have provisions similar to the New Zealand legislation. Section 28 (m) is based in substance upon the ground in section 15 (j) of the Western Australian Matrimonial Causes and Personal Status Code, 1948. Like the New Zealand provisions, section 15 (j) of the Western Australian Act must be read subject to other sections of the Act. In section 26 the commission of certain matrimonial offences by a petitioner who relies on the ground of five years separation is an *absolute* bar to the

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1 *Lodder v. Lodder* (1921) N.Z.L.R. 876 *per* Sir John Salmond at p. 877.

2 This section must be read together with and subject to sections 36, 37, 40 and 69.

3 Divorce and Matrimonial Causes Act, 1928 (N.Z.), sections 10 (i), 10 (JJ).

4 S. 10 (i) *supra.*

5 S. 10 (JJ). This section was enacted in 1953 in the Divorce and Matrimonial Causes Amendment Act of that year. Both section 10 (i) and 10 (JJ) are to be read subject to section 18 of the Act.

6 Matrimonial Causes and Personal Status Code, 1948-1957 (W.A.) s. 15 (J).

7 Matrimonial Causes Act, 1929-1941 (S.A.), s. 6 (K), which states as follows:

"That during the 5 years preceding the commencement of the action the husband and wife have been living separately under and pursuant to a decree or order, granting a judicial separation or relief from co-habitation, and made whether before or after the enactment of this paragraph by any Court, whether superior or inferior, in any part of His Majesty's dominions".

granting of the petition. Subject to such absolute bars, the Court "may in its absolute discretion grant or refuse relief".[8]

The Commonwealth Act has not made section 28 (m) subject to the absolute bars to relief contained in section 40 or to the discretionary bars in section 41. Section 69 of the Act prescribes the general duty of the Court, upon being satisfied of the existence of any ground in respect of which relief is sought, to grant a decree, but section 37 puts special limitations upon this duty, in relation to section 28 (m). These limitations must be set out in full.

Section 37 (1): "Where on the hearing of a petition for a decree of dissolution of marriage on the ground specified in paragraph (m) of section twenty-eight of this Act (in this section referred to as 'the ground of separation') the Court is satisfied that, by reason of the conduct of the petitioner, whether before or after the separation commenced or for any other reason, it would, in the particular circumstances of the case, be harsh and oppressive to the respondent or contrary to the public interest, to grant a decree on that ground on the petition of the petitioner, the Court shall refuse to make the decree sought".

Section 37 (3): "The Court may, in its discretion, refuse to make a decree of dissolution of marriage on the ground of separation if the petitioner has, whether before or after the separation commenced, committed adultery that has not been condoned by the respondent or having been so condoned has been revived".

It is intended here to review the discretion placed in the hands of the Court under section 37 of the Act in the light of pronouncements as to the exercise of similar judicial discretion under the New Zealand and Western Australian Acts.

1. *Policy behind Section* 28 (*m*) *and Section* 37.

Section 28 (m) as enacted is a recognition by the Federal legislature of a principle oft repeated by courts during the last fifty years, namely, that it is not in the public interest that a man and woman should remain bound together in the bonds of a marriage which has irreconcilably failed. Sir John Salmond, in 1921, in the judgment already mentioned,[9] summarised in full the policy behind the New Zealand enactment. His judgment was approved and quoted at length by Sir Owen Dixon in *Pearlow v. Pearlow*[10] when considering the similar Western Australian provision. When a marriage has ceased to exist *de facto*, then unless reasons can be found to the contrary, it should be dissolved *de jure*. But in section 37 the legislature has recognised that to the general principle there are exceptions. While leaving a discretion to the Court, the legislature has said that where particular circumstances exist a decree shall

8 S. 25 (1).

9 *Lodder v. Lodder, supra.*

10 (1953) 90 C.L.R. 70. See, in particular, pp. 78-79. Sir John Salmond in *Mason v. Mason* (1921) N.Z.L.R. 955, delivering the judgment of the New Zealand Court of Appeal, re-expressed the views he had propounded in *Lodder v. Lodder.*

be refused. Divorce on the ground of five years' separation alone would tend to aggravate rather than curb the illness which it was intended to cure. "All divorce possesses at the same time the possibility of public mischief, inasmuch as it tends to lessen the sense of responsibility with which men and women enter into marriage and the fidelity and contentment with which they accept and obey the obligations resulting from it. It is for this Court, in the exercise of the discretionary authority which the legislature has seen fit to entrust to it, to weigh this private benefit to the parties against this possibility of public mischief and to grant or refuse a dissolution accordingly".[11] There may be cases in which the petitioner has been guilty of such grave matrimonial misconduct that in the public interest a decree should be refused.

The Court must have regard to both principles. There is frequently a conflict between the two, and the Court is then faced with the difficult task of deciding which should prevail. It is submitted that both the courts and the legislature have recognised that the former principle is dominant, and that only when the conduct of the petitioning party has been such as to make it clearly against the public interest that a decree should be granted, should the Court refuse a dissolution.

2. *Conduct of the Petitioner, whether Before or After the Separation Commenced*

The legislature has directed the Court to consider the conduct of the petitioner both before and after separation. Webb J., speaking of the discretion of the Court under the Western Australian provisions, said: "As stated by Salmond J. in *Lodder v. Lodder* and approved by the New Zealand C. of A. in *Mason v. Mason*, a chief element for consideration in determining whether to grant or refuse a dissolution of marriage under s. 15 (j) of the Act is the reason for the separation".[12] It is the conduct not only of the petitioner, but also of the other party to the marriage which must be considered. The Court must examine the actual parting in the light of the matrimonial history.

Gresson J., speaking of the Court's discretion under section 18 of the New Zealand Act, said: "A decision whether or not the separation was due to the wrongful act or conduct of the petitioner should be made not merely on the bare fact that the petitioner has, strictly speaking, been guilty of desertion, but upon an assessment of the position having regard to the behaviour of both parties and to the matrimonial history generally".[13] The Court must have before it sufficient evidence on which to exercise its discretion one way or the other.

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11 Sir John Salmond in *Lodder v. Lodder*, *supra*, at pp. 877-79.

12 *Pearlow v. Pearlow*, *supra*, at p. 84.

13 *Raymond v. Raymond* (1958) N.Z.L.R. 162 at p. 166. See also statements of McCarthy J. in *Arnst v. Arnst* (1957) N.Z.L.R. 722, and Sharland J. in *Freeman v. Freeman* (1955) N.Z.L.R. 924 at p. 926, which express a similar viewpoint; Dixon C.J. in *Pearlow v. Pearlow*, *supra*, at p. 81; F. B. Adams J. in *Black v. Black* (1959) N.Z.L.R. 163 at p. 169 —"I should have in mind, in particular, the petitioner's conduct throughout to the extent to which it may properly be subjected to criticism, and the petitioner's age and professional standing and probable future means"; *Main v. Main* (1949) 78 C.L.R. 636, at pp. 643-44.

3. *"Shall" and "May"*

It will be noted that in section 37 (1) the Court, upon being satisfied that to grant a dissolution of the marriage would have one of the consequences specified in the section, *must* refuse to grant a decree. It is a mandatory duty upon the Court so to act; but in section 37 (3) the Court is given a discretion to grant or refuse a decree, although adultery has been committed by the petitioner within the terms of the section. The operative words in the respective sections are "shall" and "may".

4. *The Nature of the Discretion and Authority of Previous Cases*

In section 37, only part (3) provides for the exercise of a true judicial discretion at law. The particular provision is similar to the adultery discretion already exercised under the State Acts.[14] Section 37 (1) allows no discretion to the Court at all—it *must* refuse to grant a decree. In the New Zealand and Western Australian Acts an express discretion is reserved to the Court; in Western Australia an absolute discretion, subject to the absolute bar; in New Zealand a discretion limited where the petition is defended, but not where it is undefended.

This difference between the Federal and New Zealand and Western Australian provisions is one of form rather than of substance. It is submitted that section 37 (1) embodies in fact the "judicial discretion" as it has been exercised under the New Zealand and Western Australian Acts. The words "in the particular circumstances of the case" are sufficiently wide to allow ample space for a discretion in fact, if not at law.

The Court must, whether exercising the discretion at law in section 37 (3) or the discretion "*in fact*" in section 37 (1), relate such discretion to the general policy and subject matter towards which the legislation is directed. Dixon C.J., speaking of the nature of the discretion conferred in section 25 (l) of the Western Australian Act, said: "It is a judicial discretion and one depending upon considerations affecting the justice or injustice, the desirability or undesirability, the expediency or inexpediency of maintaining the marriage union between the parties, or in some other way relevant to the propriety of granting or withholding in the proceeding before the Court the relief sought".[15]

But both the New Zealand and Australian Courts have refused to lay down binding factors to be considered in the exercise of the discretion. A general policy has been stated by the legislature — within this framework the discretion is directed toward the peculiar facts of each case. "The true question is whether, under all the circumstances of the case, there is proper ground for refusal and it is inadvisable to attempt to formulate any general rules. Where a statute confers an unfettered discretion on the Court, it is neither necessary nor permissible to lay down fixed and supposedly binding rules for its exercise".[16]

14 See *Blunt v. Blunt* [1943] A.C. 517.

15 *Pearlow v. Pearlow, supra,* at p. 77.

16 F. B. Adams J. in *Black v. Black, supra,* at p. 167. The learned Judge cites as authority the judgment of Lord Wright in *Evans v. Bartlam* [1937] A.C. 473, at pp. 488-89.

It is the essence of the section that the Court should be left free to decide in the particular instant, whether or not the discretion should be exercised. Previous decisions are only a guide from which a Court may derive assistance.

5. *Harsh and Oppressive to the Respondent, or Contrary to the Public Interest*

Legislative direction to the Courts in section 37 (1) names two instances in which a decree is to be refused if based on section 28 (m), *viz.*, when it would in the particular circumstances of the case be (a) harsh and oppressive to the respondent, or (b) contrary to the public interest.

Upon a literal reading of the section the grounds are expressed in the alternative. The Court may be satisfied that in the public interest the petitioner's marriage should be dissolved, yet be bound to deny such dissolution if, in the particular circumstances of the case, it would be harsh and oppressive to the respondent so to do. It is submitted that in fact the number of instances in which such a situation would occur would be extremely limited and that the "public interest" is to be the main consideration of the Court. The public interest is sufficiently wide to envelop a case which is harsh and oppressive to the respondent. With respect it is suggested that ground (a) may be largely tautologous, and it would have been preferable if the words "be harsh and oppressive to the respondent" had been omitted.

Decisions of the New Zealand and Western Australian Courts and of the High Court of Australia seem to support the proposition that it is the public interest which is the decisive factor. Consideration of the hardship to the respondent, if a decree were granted, is merely one of the matters to be weighed by the Court in reaching a decision. An illustration of this is the case of *G. & G.*[17] There the respondent wife had been confined for a considerable period in a mental institution. Before her confinement she had burnt down the matrimonial home "over the heads of her sleeping husband and children". The husband, petitioning under section 10 (JJ) of the New Zealand Act, refused to have his wife back upon her discharge from the institution. The wife opposed the granting of a decree alleging it was the husband's wrongful conduct, in so refusing, that led to the separation.

Turner J. was confronted with a situation in which it was undoubtedly harsh, and perhaps oppressive, that a decree should be granted. Upon full consideration of the facts, however, the learned Judge found the husband's attitude and conduct reasonable. He held that the marriage had irrevocably broken and that the public interest required it to be dissolved.

Again, the New Zealand Courts have said that they "will not, in general, exercise the discretion against a petitioning husband merely because the granting of a decree will embarrass or prejudice the wife in

17 (1958) N.Z.L.R. 883.

respect of future maintenance, or affect her rights in respect of the husband's estate".[18] In *Black v. Black*, a petition based upon the seven years separation provision in New Zealand,[19] the Court considered the question whether a decree should be refused on the ground that no home or furniture would be available for the wife and children as a result of the granting of the decree. F. B. Adams J. thought that he should so refuse unless no more satisfactory solution could be found.[20]

Failure to comply with an order for restitution of conjugal rights has been held to be no bar to the granting of a dissolution of marriage under Section 10 (JJ) of the New Zealand Act.[21] Gresson J. considered it to be one of the matters for consideration by the Court in relation to the exercise of its discretion.[22]

The High Court in *Pearlow v. Pearlow* dealt with the question of the exercise of the Court's discretion, the matter before it coming on appeal from the judgment of Wolff J. in the Supreme Court of Western Australia. The latter had refused to grant a divorce to the appellant's husband under section 15 (J) on two grounds—(a) lack of credit in respect of the appellant's evidence, and (b) the circumstances of the appellant's prior divorce. Dixon C.J. examined in detail the policy of the separation section and the discretion given to the Court. He pointed out[23] that the Western Australian legislature had not seen fit to make wrongful conduct of the petitioner an absolute bar to dissolution on the five-year separation ground. It was, however, a matter to be taken into account, weighing it with the other elements in the case and considering it with reference to the public interest.

Considering the evidence as a whole the Chief Justice found that inadequate materials had been before the judge at the time of exercising his discretion, and he therefore ordered a re-hearing of the action.

Pearlow v. Pearlow provides a useful guide to the possible attitude of the High Court in future cases arising under section 28 (m). Although the terminology of section 37 varies considerably from that of section 25 (l) in the Western Australian Act, the basic notion of the public

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18 *Black v. Black*, *supra*, at p. 169.

19 S. 10 (JJ) *supra*.

20 In the particular case the Judge held the decree nisi in suspense, and kept open the discretionary power under s. 18 of the N.Z. Act in order to refuse a decree if the circumstances of the case warranted that course, pending a deed of settlement between the husband and wife as to the home and furniture.

21 *Crewes v. Crewes* (1954) N.Z.L.R. 1116. McCarthy J. in *Arnst v. Arnst*, *supra*, followed this ruling, although with some uneasiness. He said, at p. 730: "It seems to me that a strong argument can be advanced in favour of the viewpoint that a person who has come to this court and sought assistance in the form of an order for restitution of conjugal rights should be entitled to claim, at a later stage, that order having been flouted, the court should exercise its discretionary powers in his or her favour".

22 For further discussion as to the nature of the discretion see, *inter alia*, *Thompson v. Thompson* (1946) N.Z.L.R. 265; *Southee v. Southee* (1947) N.Z.L.R. 378; *Glascrow v. Glascrow* (1948) N.Z.L.R. 810; *Davis v. Davis* (1949) N.Z.L.R. 520; (1950) N.Z.L.R. 115; *Redfern v. Redfern* (1954) N.Z.L.R. 872; *Adams v. Adams* (1955) N.Z.L.R. 1245; *McRostie v. McRostie* (1955) N.Z.L.R. 631; *Saunders v. Saunders* (1956) N.Z.L.R. 197.

23 *Pearlow v. Pearlow*, *supra*, at p. 80.

interest prevails in both. No doubt the State Courts vested with Federal jurisdiction and the High Court will lean heavily upon the decisions of the New Zealand and Western Australian Courts in the matter of the prolonged separation provisions in those jurisdictions.

SUMMARY

The public policy behind section 28 (m) has been applied generally to other grounds of dissolution of marriage. Parties to a marriage broken beyond repair should not be kept in permanent matrimonial fetters. In section 28 (m) the legislature has recognised that in the category of the five years separation provision there will be widely varying cases. In some the parties may have separated because of mere incompatibility of temperament, in others due to the misconduct of one of the parties. Separation within section 28 (m) is a sufficient ground for divorce, subject to the discretion of the Court. The Court must look behind the actual parting and adopt a realistic view in order to discover the real reason for the separation. Then, in the terms of section 37, if the Court is fully satisfied that, in the particular circumstances of the case having regard to the petitioner's conduct, it would be contrary to the public interest (which it has been submitted includes a case which is harsh and oppressive to the respondent) the Court shall refuse to grant a decree.

D. Chappell