FAMILY LAW

Divorce—'living apart'

In *Santos* v. *Santos* [1972] 2 W.L.R. 889 the Court of Appeal was called upon to determine the legal meaning of "living apart" as contained in the Divorce Reform Act 1969. The parties had separated in 1966 but on three subsequent occasions the wife had returned to her husband and son in Spain for short periods.

The judgment discusses in some detail Commonwealth statutes and cases and concludes that the concept of "living apart" has retained its traditional meaning in the Divorce Reform Act 1969. That is to say, mere physical separation for two years is not sufficient to constitute "living apart" and that a petitioner has to prove not only the factors of separation for two years but also that he or she has ceased to recognise the marriage as subsisting and intends never to return to the other spouse, albeit that the petitioner's state of mind need not be communicated to the other spouse.

As a result of this finding a new trial was ordered since the trial judge had not taken into account the wife's state of mind and had also overlooked a relevant statutory provision.

Divorce—"wilful refusal to consummate"

In *Kaur* v. *Singh* [1972] 1 W.L.R. 105 the wife petitioned for nullity on the ground that her husband wilfully refused to consummate the marriage. The parties, two Sikhs, after going through a civil ceremony of marriage, separated and never communicated with each other again. According to Sikh religion it was the duty of the husband to arrange a religious ceremony of marriage at a Sikh temple after which the parties were expected to commence full matrimonial cohabitation. The husband failed to arrange the ceremony and eventually intimated that he would never do so.

The Court of Appeal had no hesitation in granting the decree nisi following *Jodla* v. *Jodla* [1960] 1 W.L.R. 236 which they found to be indistinguishable on its facts. In the words of Davies L. J. "the husband from the time of the register office ceremony entirely failed and refused to arrange a religious ceremony of marriage, and so failed to implement the marriage. I think that it is clear that in failing to implement the marriage he wilfully refused to consummate it" (ibid, 109).

Maintenance

The judgment of the Court of Appeal in *Lindsay* v. *Lindsay* [1972] N.Z.L.R. 184 is useful as an indication of the general principles that the courts will employ in assessing the quantum of maintenance under the Matrimonial Proceedings Act 1963. The parties had been married twenty years and there were six children. The appellant husband was concert master of an orchestra of which the respondent was a regular salaried member. After their marriage was dissolved the appellant married another younger member of the orchestra.

The first point of the appeal related to the award of $75 a month as maintenance for the wife and children. After the true amounts of

the respective incomes of the parties were revealed, the Court of Appeal reduced the amount to $60. In doing so, Wild C. J. who delivered the judgment of the Court adopted, 185, the words of Finlay J. in *Lyne* v. *Lyne* [1951] N.Z.L.R. 287, 289 where he said that "the obligation to provide for the first wife is the primary duty of her former husband and that the obligations accruing from his second marriage must not be discharged or allowed to be in any substantial sense at the expense of the first wife."

A further general principle of the assessment of the quantum of maintenance was adopted by Wild C. J., 186, from the case of *Powell* v. *Powell* [1951] P. 257, 262 where Evershed M. R. held that "these matters are . . . not to be decided by the application of some strict arithmetical process" and "the Court in the exercise of its discretion must arrive at what is in its opinion a fair result on the facts of the particular case."

The final point of appeal related to the order for payment of a capital sum of $2000 of which $1200 was to be paid forthwith and the balance within one year. The purpose was to enable the respondent to have necessary repairs done to the matrimonial home which she was occupying pursuant to an order under s. 57 Matrimonial Proceedings Act. The Court of Appeal affirmed the order, but were of the opinion that the appellant was entitled to know what money was being spent by way of repairs. Accordingly, the Court attached a condition that if the wife proposed to spend more than $100 for any one purpose she must inform the husband in writing, and if he disputed the proposal within fourteen days the question was to be referred to some competent independent person.

The point in issue in *Spanjerdt* v. *Spanjerdt* [1972] N.Z.L.R. 287 was whether the court should have regard to the ability of the wife to apply for some sort of benefit under the Social Security Act. The husband had appealed from the decision of the Magistrate who had fixed maintenance at $25 per week in favour of the wife. It was conceded by counsel that that amount was reasonably required by the wife and that the husband could reasonably afford it without reducing his own financial situation to an unreasonably low level. Following *McGill* v. *McGill (No. 2)* [1958] N.Z.L.R. 257 Richmond J. held that "as a matter of general public policy persons who can afford to perform their statutory obligations under the Domestic Proceedings Act should not be permitted to throw the burden of maintenance onto the Social Security Fund" (ibid, 288). Accordingly, the appeal was dismissed since the husband could reasonably afford to pay the amount fixed by the Magistrate.

Separation—Magistrate's discretion

In *Myers* v. *Myers* [1972] N.Z.L.R. 476 the wife had sought a separation order under paragraphs (a) and (c) of s. 19(1) of the Domestic Proceedings Act 1968. The Magistrate held that the grounds under paragraph (c) had not been established, and with regard to paragraph (a), although the three necessary elements had been established, he exercised his residual discretion to refuse the order. It seems that he was influenced by two factors. First, he was of the opinion that the final deterioration in the relationship had arisen largely

because the wife had left the matrimonial home and then instituted proceedings which had led to a prolonged hearing, and secondly, that she had not gone far enough in the attempts made to effect a reconciliation.

White J. allowed the appeal from the Magistrate's decision indicating that undue weight had been given to the conduct of the wife, and insufficient weight to the concept of matrimonial breakdown. On appeal reference to the Domestic Proceedings Act, Woodhouse J., who delivered the judgment of the Court, said that, 479, "its object is to define existing situations and so the issue is not the isolation of responsibility for the causes of domestic trouble but an estimation of their effects." He continued to state that a Magistrate does not have an unfettered discretion to refuse a separation order when the statutory grounds have been established:

> The jurisdiction to make an order under para. (a) does not arise at all until there has been consideration and proof of such intangibles as 'serious disharmony', the unreasonableness of requiring a resumption of cohabitation, and the improbability of reconciliation. Each element necessarily involves some initial exercise of discretion. But once an affirmative assessment has been made concerning each of those criteria and the jurisdiction to make an order has thereby been established then the area left within which the residual discretion might operate will have largely disappeared and the cases where it could or should be exercised against the application will be exceptional (479).

Naturally enough Woodhouse J. refused to specify or categorise any factors which would be taken into account in exercising the discretion, as each case will involve "individual considerations". But he was satisfied that the Magistrate had been influenced by wrong considerations.

D. M. Shirley

LAND LAW

Natural rights of support

The question as to whether or not a natural right of support extends to things placed upon the land came before the Court of Appeal in the case of *Bognuda* v. *Upton and Shearer Ltd.* [1972] N.Z.L.R. 741. The facts of that case were that the appellant had a wall on the boundary of his land. Excavation was done on the adjoining land, adjacent to the wall. This excavation caused a subsidence in the appellant's land and damage to the wall.

The Court of Appeal upheld Quilliam J's ruling that there was no right of support for the structure artificially placed upon the land, where without the weight of such a structure there would have been no subsidence. However it was established that the respondents had been negligent in the way in which they excavated. The Court of Appeal unanimously decided that although the appellant had no right of action with regard to damage to the wall, under the action for withdrawal of support, an action did lie against the respondents in negligence.

The Court held that the duty of care principle laid down by Atkin L. J. in *Donoghue* v. *Stevenson* [1932] A.C. 562, applied in the case