Separation

Until s. 19 (1) (a) Domestic Proceedings Act 1968 came into force in New Zealand it was not possible to get a separation order without showing that one or both parties to the marriage had been guilty of some matrimonial misconduct. Section 19 (1) (a) allows the court to make an order where it is satisfied that there is serious disharmony, the parties cannot reasonably be required to cohabit and are not likely to be reconciled. However, even where the applicant establishes these elements the wording of the section leaves the court with a residual discretion to refuse the order.

The scope of this discretion has been a source of considerable uncertainty. It is to be hoped that two recent decisions have helped to dispell this. In *Myers* v. *Myers* [1972] N.Z.L.R. 476 (Court of Appeal) Woodhouse J. has stressed that the object of the section is to assess the existing state of the marriage rather than to discover who is at fault. He went on to suggest that it would only be in exceptional cases that the discretion would be exercised against an applicant who had established the required grounds. He did not, however, elaborate on what might constitute an exceptional case.

The Court of Appeal in *Walker* v. *Walker* [1973] 2 N.Z.L.R. 7 was prepared to recognise that where there was a *de facto* separation and the "serious disharmony" was found to be the unilateral fault of one spouse this might be important or even decisive in considering whether or not an order should be made. This decision must, however, be read in the light of the decision in *Mitchell* v. *Mitchell* [1973] 2 N.Z.L.R. 190. In this case the wife deserted her husband and refused to return. Subsequently she sought a separation order which was granted in the Magistrates Court. On appeal to the Supreme Court ([1973] 1 N.Z.L.R. 334), however, Mahon J. said that the discretion had been wrongly exercised and suggested that where the disharmony is shown to be the overwhelming fault of the applicant or to have been deliberately manufactured by one spouse, then these might be regarded as exceptional cases within the meaning of the *Myers* decision. The Court of Appeal, however, was not prepared to accept this assessment. It was plainly stated that there is no general rule that the court should refuse to grant an order solely because the overwhelming fault lay with the applicant. Although the Court reaffirmed that the order should be refused it did so on different grounds. Turner P. based his decision not on fault, but on the justice of the case. He took account of the fact that as things stood the husband could petition for divorce on the grounds of his wife's desertion within a few months. To grant the order would be to prevent this while it would give no special advantage to the wife. Richmond J. took a similar view, noting that it is the policy of the statute to avoid fault for granting or refusing to grant a separation order.

Conciliation

In *Walker* v. *Walker* [1973] 2 N.Z.L.R. 7 the Court of Appeal accepted that the Domestic Proceedings Act (Part 2) placed no duty on the parties to take positive steps to effect a reconciliation. It was noted, however, that failure to do so might be taken into account by the court as an important factor in deciding whether or not to make a separation order. Hence if the parties failed to take some positive steps to achieve a reconciliation the court might be justified in refusing a separation order on the ground that the parties have failed to prove that they are unlikely to be reconciled.

Matrimonial property

Dryden v. *Dryden* [1973] 1 N.Z.L.R. 440 (Court of Appeal) arose from a dispute as to the ownership of a matrimonial home which was registered as a joint family home. The husband had made an application to the Supreme Court under s. 5 Matrimonial Property Act 1963 and had been granted an order giving him a two-thirds share in the home and the wife a one-third share. The wife appealed. It was held that a "question" arises sufficient to found jurisdiction under s. 5 where one spouse asserts a claim in the home which is different from that shown on the face of the title (per Richmond and Turner JJ.). The Court was not, however, prepared to uphold the order as both parties still lived in the home and, although there was serious disharmony, there was no divorce or separation pending. In view of this it was held that the Court should not make an order apportioning interests in the home and that the application was premature. The Court held that it also must be satisfied that the order would be just in all the circumstances before such an order would be made. McCarthy J. was of the opinion that "expressed" common intention (Matrimonial Property Act s. 6 (2)) might be read from conduct but was not prepared to accept that in this case the disharmony was sufficiently serious to negative the previously expressed common intention that they held the property as joint tenants.

E. J. M. Rawnsley.

LAND LAW

Licences — Equitable Estoppel

In *The Proprietors of Hauhungaroa 2 C Block* v. *Attorney-General* [1973] 1 N.Z.L.R. 289 the Court of Appeal held, following the decision of the Privy Council in *Plimmer* v. *Wellington City Corporation* (1884) 9 A.C. 199, that equity will protect a licensee where he has been encouraged to incur expenditure on the land in circumstances which give rise to a reasonable expectation that he will be able to continue to enjoy the benefits of his expenditure. On the facts in this case the Court held that: