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knowledge or state of mind is admissible in favor of and against the principal. . . ."³⁵

The reasons behind the prima facie rule are apparent—public policy considerations, and a belief by the courts that the declarations have a degree of reliability due to the element of corroboration. The policy considerations are indeed important in this area because the operative facts of agency and course of employment are matters peculiarly within the knowledge of the principal and the agent, and it is frequently difficult for a plaintiff to establish them. But that such declarations are reliable is open to question. It is submitted, therefore, that policy considerations standing alone are an insufficient basis to admit the hearsay declarations of the agent into evidence to prove course of employment, unless the authority of the agent to speak has been otherwise established.³⁶

E. MICHAEL MASINTER

DIVORCE ON GROUND OF SEPARATION

In 1960 the Virginia General Assembly enacted section 20-91(g) of the Code. This section adds separation for three years to the statutory grounds for divorce¹ and seems to indicate an intent on the part of the legislature to depart from the previous divorce policy of the state.

Until the passage of this recent legislation, Virginia had maintained a policy opposing divorce by consent.² This policy was based on the concept that marriages, although entered into by the agreement of the parties, cannot be terminated by the agreement or consent of the parties, as the state has an interest in the continued stability of the marriage relationship.³ The state has heretofore pro-

³⁵163 F.2d 71, 73 (1947), quoting the Restatement of Agency, *supra* note 32.

³⁶Professor Charles V. Laughlin suggests that the same result could have been obtained in the Turner case without admitting the hearsay declarations, if the court had regarded the Thayer presumption (See *Kavanaugh v. Wheeling*, 175 Va. 105, 112, 7 S.E.2d 125, 128 (1940)) as an inference type rather than a policy type presumption. *Annual Survey of Virginia Law*, 46 Va. L. Rev. 1481, 1506 (1960). Using the inference approach, once the defendant introduces rebutting evidence the presumption of course of employment, which arises from proof of ownership and employment, would disappear; but the inference connected with it would remain as a question for the jury. Therefore, in cases such as *Turner* the jury would still be allowed to determine the question of course of employment. For a detailed discussion see Laughlin, *In Support of the Thayer Theory of Presumptions*, 52 Mich. L. Rev. 195, 218 (1953).

¹Va. Code Ann. § 20-91(g) (Supp. 1960).

²*Grim v. Grim*, 126 Va. 245, 101 S.E. 140 (1919).

³1 Nelson, *Divorce and Annulment* § 3.04 (2d ed. 1945).

tected its interest in marriage by granting divorces only upon the grounds of fault set forth in the statute.⁴ Even when parties have been separated for years and the marriage relationship is factually, if not legally, at an end, the Virginia courts have consistently refused to grant a legal termination. It is said that "mere separation by mutual consent is not a desertion by either party."⁵ Furthermore, when the courts have suspected collusion between the parties, they have required a strict degree of proof that the defendant was truly at fault.⁶

This policy is clearly shown in section 20-99 of the Code of Virginia⁷ which relates to divorce procedure. In *Bailey v. Bailey* the court elaborated upon the scope and purpose of this statute saying:

"[A]ll that was intended by [the statute] . . . was to put in the form of a statutory enactment, that principle which had been well settled by the ecclesiastical courts of England and the whole current of decisions of the courts of the States of the Union, to wit, that a divorce would never be granted merely upon the consent, or on the default of the party charged, but only on proof of the cause alleged."⁸

It should be noted that section 20-99 was left unamended by the 1960 General Assembly. It is difficult to see how a case decided under the recently enacted section 20-91(g), which provides for divorce solely on the ground of separation for three years, can be reconciled with the doctrine of *Bailey v. Bailey*.

The belief that divorce should be granted only upon substantial grounds of fault is well-rooted in our legal traditions and no doubt has its basis in ecclesiastical doctrine.⁹ However, other legal systems

⁴"The power to grant divorces in Virginia is purely statutory. Section 63 of our Constitution reads: 'The General Assembly shall confer on the courts power to grant divorces,' etc. From this it follows that that the courts have no power except such as is in this manner conferred upon them." *White v. White*, 181 Va. 162, 166, 24 S.E.2d 448, 450 (1943).

⁵*Devers v. Devers*, 115 Va. 517, 79 S.E. 1048 (1913).

⁶"[The legislature] having specified particularly the causes for which the courts might sever the ties which bind together husband and wife, their purpose was to prevent a divorce from being obtained by the collusion of the parties." *Bailey v. Bailey*, 68 Va. (21 Gratt.) 43, 50 (1871).

⁷"The courts should consider the testimony in an uncontested application for a divorce with the most painstaking and scrupulous care, and if collusion or consent appears, directly or indirectly, should deny the relief sought." *Dinsmore v. Dinsmore*, 128 Va. 403, 414, 104 S.E. 785, 788 (1920).

⁸Va. Code Ann. § 20-99 (1950):

"Such suit shall be instituted and conducted as other suits in equity, except that the bill shall not be taken for confessed, nor shall a divorce be granted on the uncorroborated testimony of the parties or either of them. . . ."

⁹*Bailey v. Bailey*, 68 Va. (21 Gratt.) 43, 50 (1871).

¹⁰Litchenberger, *Divorce—A Social Interpretation* 77-94 (1931).

have not adhered to this principle. For example, under Jewish rabbinical law a husband and wife who agree to effect a dissolution of the marriage ties may do so.¹⁰ In recent years such consent divorces have been permitted under the laws of Belgium, Norway, Portugal, and Russia.¹¹

No jurisdiction in this country has yet adopted the policy of the immediate consent divorce; but many have done away, at least partially, with the notion of "fault" by the passage of the separation or living apart statutes. The statutes generally provide that when the parties have lived apart for a specified period of time without cohabitation, such separation constitutes a ground for divorce.¹² The public policy consideration behind these separation statutes is that when a husband and wife have lived apart for the required length of time and have no intention of resuming conjugal relations, the best interests of society and of the parties themselves will be promoted by a dissolution of the marriage bond.¹³ Today, twenty-four jurisdictions in this country have adopted statutes which to some degree embody this policy. A summary of these statutes appears in the appendix at the end of this comment.

The length of time for which the parties are required to live apart varies widely. Generally, the period of separation is from three to five years, although Rhode Island requires a ten year separation and Louisiana and North Carolina require only a two year separation. It should also be noted that the legislatures tend to reduce the required period of separation after the statutes have been in effect rather than to lengthen them. For example, Texas reduced the required time of separation from ten years to seven years; similarly, Louisiana reduced the length of separation from seven years to two years.¹⁴

In general, the living apart statutes make divorce on grounds of separation available to either party regardless of fault, but there are exceptions. The Vermont and Wyoming statutes specifically deny the party at fault the right to bring suit.¹⁵ While the North Carolina statute makes no mention of fault, the courts of that state have interpreted the statute as barring the party at fault from utilizing the statutory ground of separation.¹⁶

¹⁰See *Silbermuntz v. Silbermuntz*, 97 N.J. Eq. 451, 129 Atl. 420, 421 (Ch. 1925).

¹¹20 Colum. L. Rev. 472 n.28 (1920).

¹²Keizer, *Marriage and Divorce* § 455 (3d ed., Morland 1946).

¹³Annot., 51 A.L.R. 763 (1927).

¹⁴See appendix *infra*.

¹⁵Vt. Stat. Ann. tit. 15, § 551(7) (1958); Wyo. Comp. Stat. Ann. § 20-47 (1957).

¹⁶*Pharr v. Pharr*, 223 N.C. 115, 25 S.E.2d 471 (1943).

The most significant problem which will face the Virginia courts in the application of the new statute will be to determine the nature of the separation contemplated. An examination of the statutes of other jurisdictions reveals that there are three distinct types of separation. Five jurisdictions require that the separation be pursuant to court decrees;¹⁷ five are restrictive in allowing divorce only after a *voluntary* separation;¹⁸ while the statutes of twelve allow divorce regardless of the voluntariness of the separation.¹⁹

An analysis of the Virginia statute requires the drawing of a distinction between voluntary and involuntary separation. A separation that is voluntary is one entered into by an agreement between the two parties.²⁰ There must be an intent to separate, and there must be an element of mutual consent.²¹ If, on the other hand, one party withdraws against the wishes of the other, the separation is classified as involuntary.²² In some states that do not require a voluntary separation, a separation of any sort for the statutory period may suffice.²³

The statutes of some states explicitly require that the separation must be voluntary, while others do not. Generally, those statutes which require that the separation be voluntary are similarly worded. For example, the Delaware statute allows divorce "when [the] husband and wife have voluntarily lived separate and apart, without any cohabitation for three consecutive years . . ." ²⁴ In Delaware the statute has been interpreted as meaning that the voluntary separation referred to must be, either explicitly or tacitly, the action of both parties.²⁵ The District of Columbia statute provides, "A divorce from the bond of marriage . . . may be granted for . . . voluntary separation from bed and board for five consecutive years without cohabitation . . ." ²⁶ For a plaintiff to be entitled to a divorce under this sec-

¹⁷Alabama, Colorado, Minnesota, North Dakota, and Utah. Wisconsin permits divorce after five years voluntary separation or five years separation pursuant to a judgment of legal separation. See appendix infra.

¹⁸Delaware, District of Columbia, Maryland, North Carolina, and Wisconsin. See appendix infra.

¹⁹Arizona, Arkansas, Idaho, Kentucky, Louisiana, Nevada, Puerto Rico, Rhode Island, Texas, Virginia, Washington, and Wyoming. See appendix infra.

²⁰Parker v. Parker, 210 N.C. 264, 186 S.E. 346 (1936). See also Annot., 166 A.L.R. 498 (1947).

²¹Nichols v. Nichols, 181 Md. 392, 30 A.2d 446 (1943).

²²Butler v. Butler, 154 F.2d 203 (D.C. Cir. 1946); See Campbell v. Campbell, 174 Md. 229, 198 Atl. 414. (1938).

²³North v. North, 164 La. 293, 113 So. 852 (1927); George v. George, 56 Nev. 12, 41 P.2d 1059 (1935).

²⁴Del. Code Ann. tit. 13, § 1522 (Supp. 1958).

²⁵Rolph v. Rolph, 149 A.2d 744 (Del. Super. Ct. 1959).

²⁶D.C. Code Ann. § 16-403 (1951).

tion, it must be established that the separation was voluntary at the outset, or that the defendant's acquiescence made the separation voluntary in the statutory sense.²⁷ The Maryland statute provides for divorce when the parties "shall have voluntarily lived separate and apart, without any cohabitation, for three consecutive years prior to the filing of the bill of complaint . . ."²⁸ The Maryland court has held that a voluntary separation connotes more than a physical separation²⁹ and requires a common intent and mutual consent to separate and not resume marital relations.³⁰ A separation, involuntary in its inception may later become voluntary if the parties manifest agreement in a common intent not to live together again.³¹ However, in contrast to the District of Columbia ruling,³² it is held in Maryland that the separation must continue without interruption for three years from the time of agreement before either spouse is entitled to a divorce under the statute.³³ The Wisconsin statute³⁴ is similar to that of Maryland. Delaware, the District of Columbia, Maryland, and Wisconsin thus constitute the bloc of jurisdictions whose statutes specify that the separation must be voluntary.

The North Carolina statute does not use the word "voluntary"; however, the North Carolina court has interpreted the statute to require that there must be an element of mutuality between the husband and wife when the separation is effected.³⁵ Thus North Carolina by judicial interpretation falls into the "voluntary" group.

On the other hand, a majority of the statutes do not require that the separation be voluntary. The statutes of this group make no qualification as to the type of separation and the courts have generally held that a *voluntary* separation or agreement of any sort is not necessary.³⁶ In such jurisdictions a divorce may be granted no matter what the original cause of the separation.³⁷ For example, in Kentucky the statute provides that a divorce may be granted to either party on

²⁷Butler v. Butler, 154 F.2d 203 (D.C. Cir. 1946).

²⁸Md. Ann. Code art. 16, § 24 (1957).

²⁹Benson v. Benson, 204 Md. 601, 105 A.2d 733 (1954).

³⁰France v. Safe Deposit & Trust Co., 176 Md., 306, 4 A.2d 717 (1939).

³¹Hahn v. Hahn, 192 Md. 561, 64 A.2d 739 (1949).

³²See note 27 supra.

³³Misner v. Misner, 211 Md. 398, 127 A.2d 547 (1956).

³⁴Wis. Stat. § 247.07 (1959).

³⁵Pearce v. Pearce, 225 N.C. 571, 35 S.E.2d 636 (1945); Oliver v. Oliver, 219 N.C. 299, 13 S.E.2d 549 (1941).

³⁶Young v. Young, 207 Ark. 36, 178 S.W.2d 994 (1944); Cotton v. Cotton, 306 Ky. 826, 209 S.W.2d 474 (1948).

³⁷Vogt v. Vogt, 205 Ky. 569, 266 S.W. 49 (1924); North v. North, 164 La. 293, 113 So. 852 (1927).

the grounds of "living apart without any cohabitation for five consecutive years next before application."³⁸ This has been held to mean that the separation may be either voluntary or involuntary.³⁹ The Arkansas statute allows divorce for separation for three years "whether such separation was the voluntary act or by the mutual consent of the parties . . ." ⁴⁰ This statute has been interpreted as not requiring agreement between the parties to separate.⁴¹

In addition to the examination of treatment in other jurisdictions, it is helpful to review the legislative history of the Virginia statute in an effort to anticipate the interpretation that will be placed upon it. As introduced in the Senate, the bill⁴² followed almost verbatim the Maryland statute,⁴³ which makes *voluntary* separation a ground for divorce. This bill passed the Senate with only a slight modification.⁴⁴ In the House the bill was referred to the Committee for Courts of Justice. It was reported out with an amendment eliminating the word "voluntary," and it was so passed by the House.⁴⁵ The Senate concurred in the amendment. The Act provides:

20-91 A divorce from the bond of matrimony may be decreed . . .
(g) On the application of either party if and when the husband

³⁸Ky. Rev. Stat. Ann. § 403.020 (Supp. 1958).

³⁹Best v. Best, 218 Ky. 648, 291 S.W. 1032 (1927); Ward v. Ward, 213 Ky. 606, 281 S.W. 801 (1926).

⁴⁰Ark. Stat. Ann. § 34-1202 (Supp. 1959).

⁴¹Brooks v. Brooks, 201 Ark. 14, 143 S.W.2d 1098 (1940); Parrish v. Parrish, 195 Ark. 766, 114 S.W.2d 29 (1938).

⁴²S.B. No. 54, offered January 19, 1960. See letter from Miss A. Clark Peirce, Deputy Clerk of the Virginia House of Delegates, to Miss Louise Moore, Law Librarian, Washington and Lee University, Oct. 20, 1960, on file in The Washington & Lee Law Review Office. The amendment was introduced to the Senate by Senator Curry Carter of Staunton in the following form:

"A divorce from the bond of matrimony may be decreed: . . . (g) Whenever it shall appear to the court that the husband and wife shall have voluntarily lived separate and apart, without any cohabitation, for three consecutive years prior to filing the bill of complaint, and such separation is beyond any reasonable expectation of reconciliation."

⁴³The Maryland Statute provides a divorce may be granted "when the husband and wife shall have voluntarily lived separate and apart, without any cohabitation, for three consecutive years prior to the filing of the bill of complaint, and such separation is beyond any reasonable expectation of reconciliation. . . ." Md. Ann. Code art. 16, § 24 (1957).

⁴⁴The last phrase was changed from "and such separation is beyond any reasonable expectation of reconciliation" to "and there is no probability of a reconciliation."

⁴⁵The bill was referred by the House Committee for Courts of Justice to a subcommittee consisting of Delamater Davis of Norfolk, R. Crockett Gwyn, Jr. of Marion and Stanley A. Owens of Manassas. It was then reported out with an amendment which was agreed to by the House. The amendment was in the language of the final act as found in the 1960 Code Supplement.

and wife have lived apart and separate without any cohabitation and without interruption for three years, and at the time of separation were each resident and domiciled in Virginia. Divorce on this ground shall not be granted where service of process is by publication.

This provision is quite unlike the language of the Maryland statute in that the word "voluntary" has been omitted so that the final act more closely resembles the North Carolina statute. While the North Carolina statute has been interpreted to require *voluntary* separation, other jurisdictions whose statutes do not specify "voluntary" have not been interpreted to require a voluntary separation.⁴⁶

There is, therefore, a basis for two different interpretations of the new Virginia statute. It can be argued that the Senate intended to require the separation to be voluntary and that the House did not change this basic intent. The logic supporting this argument is that the original bill contained the word *voluntary*, which in the process of amendment was deleted, but that the final bill is a close paraphrase of the North Carolina statute which the North Carolina courts have interpreted to require a *voluntary* separation.

Conversely, it can be argued that since the language of the Senate bill was changed to delete the word "voluntary," the change must have been intentional. Therefore, the final product is a statute resembling the statutes of many of the states that do not require the separation to be voluntary.

The Virginia statute does not specifically require the separation to be voluntary. In following the literal wording in interpreting the statute, the courts will be in accord with the underlying policy behind these statutes. The separation and living apart statutes are intended to provide a legal method for the dissolution of marriages which are in fact already dissolved. When these unfortunate conditions exist, it is against the underlying policy of such statutes to require the separation to be entered into by the mutual consent of the parties, that is, voluntarily. The public policy behind such a statute is to permit the dissolution of marriages when the husband and wife have been living separate and apart for years with no intention of reuniting. Whichever interpretation is decided upon, section 20-91(9) constitutes a noteworthy addition to Virginia divorce law.

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⁴⁶North Carolina seems to be the only jurisdiction that interprets a statute which does not specifically require the separation to be voluntary as requiring the separation to be entered into by mutual consent or with some element of mutuality. See note 35, *supra*.

APPENDIX

TABLE OF LIVING APART STATUTES

<i>State</i>	<i>Years of Separation</i>	<i>Party Who May Sue</i>	<i>Nature of Separation</i>
Alabama	Four	Either	Pursuant to final decree of divorce from bed and board or of separate maintenance. ¹
Arizona	Five	Either	Without living together or cohabitation. ²
Arkansas	Three	Either	Living apart without cohabitation. ³
Colorado	Three	Either	Separation by force of a decree of a court of record of a state or territory. ⁴
Delaware	Three	Either	Voluntarily living separate and apart. ⁵
District of Columbia	Five	Either	Voluntary separation from bed and board without cohabitation. ⁶
Idaho	Five	Either	Living separate and apart without cohabitation. ⁷
Kentucky	Five	Either	Living apart without any cohabitation. ⁸
Louisiana	Two	Either	Living separate and apart. ⁹
Maryland	Three	Either	Voluntarily living separate and apart without any cohabitation. ¹⁰

¹Ala. Code tit. 34, § 22(1) (1958).²Ariz. Rev. Stat. Ann. § 25-312(7) (1956).³Ark. Stat. Ann. § 34-1202 (Supp. 1959).⁴Colo. Rev. Stat. Ann. § 46-1-2(9) (Supp. 1958).⁵Del. Code Ann. tit. 13, § 1522 (Supp. 1958).⁶D.C. Code Ann. § 16-403 (1951).⁷Idaho Code Ann. § 32-610 (1947).⁸Ky. Rev. Stat. Ann. § 403.020 (Supp. 1958).⁹La. Rev. Stat. § 9:301 (1950).¹⁰Md. Ann. Code art. 16, § 24 (1957).

<i>State</i>	<i>Years of Separation</i>	<i>Party Who May Sue</i>	<i>Nature of Separation</i>
Minnesota	Five	Either	Separation under decree of limited divorce. ¹¹
	Two	Either	Separation under an order or decree of separate maintenance. ¹¹
Nevada	Three	Either	Living separate and apart. ¹²
New Hampshire	Two	Wife	Husband willingly absented from wife without providing for support of wife. ¹³
	Two	Husband	Wife willingly separates herself from husband without his consent. ¹³
North Carolina	Two	Party at fault precluded by courts from utilizing these grounds.	Courts have required element of mutual consent to separation. ¹⁴
North Dakota	Four	Either party at court's discretion.	Under decree for separate maintenance. ¹⁵
Puerto Rico	Three	Either	Separation of spouses. ¹⁶
Rhode Island	Ten	Either	Separation. ¹⁷
Texas	Seven	Either	Living apart without cohabitation. ¹⁸
Utah	Three	Either	Lived separate under a decree of separate maintenance. ¹⁹
Vermont	Three	Faultless libelant	Living separate without fault on part of libelant. ²⁰

¹¹Minn. Stat. § 518.06(8) (1945); Minn. Stat. Ann. § 71-8585(Supp. 1940).

¹²Nev. Rev. Stat. § 125.010 (1957).

¹³N.H. Rev. Stat. Ann. § 458:7 (Supp. 1957).

¹⁴N.C. Gen. Stat. § 50-6 (1950).

¹⁵N.D. Rev. Code § 14-0605 (1943).

¹⁶P.R. Laws Ann. tit. 31, § 321(9) (1955).

¹⁷R.I. Gen. Laws Ann. § 15-5-3 (1956).

¹⁸Tex. Rev. Civ. Stat. art 4629(4) (Supp. 1954).

¹⁹Utah Code Ann. § 30-3-1(8) (1953).

²⁰Vt. Stat. Ann. tit. 15, § 551(7) (1958).