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REPORT ON DIVORCE

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REPORT

OF

THE SPECIAL JOINT COMMITTEE
OF THE SENATE AND HOUSE OF COMMONS

ON

DIVORCE

June 1967

Joint Chairmen
THE HONOURABLE A. W. ROEBUCK, Q.C.
A. J. P. CAMERON, Q.C., M.P.

MEMBERS OF THE SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS ON DIVORCE

(as of May 17, 1967)

FOR THE SENATE:

The Honourable A. W. Roebuck, Q.C., *Joint Chairman*

The Honourable Senators

Aseltine,
Baird,
Bélisle,
Burchill,
Connolly (*Halifax North*),
Croll,
Denis,
Fergusson,
Flynn,
Gershaw,
Haig,
Roebuck.

FOR THE HOUSE OF COMMONS:

A. J. P. Cameron, Q.C., M.P., (*High Park*), *Joint Chairman*

Messrs.:

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Brewin,
Cameron (*High Park*),
Cantin,
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MacEwan,
Mandziuk,
McCleave,
McQuaid,
Otto,
Peters,
Ryan,
Stanbury,
Tolmie,
Wahn,
Woolliams.

NOTE: See Part 1, pp. 4 and 5 for list of all who served on the Committee during the 1st Session, 27th Parliament, 1966-67.

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INTRODUCTION

Public interest in divorce law and practice has developed markedly in Canada in recent years and the opinion has grown that our divorce law has become inadequate to meet the needs of modern society. Two changes only in the substantive law of divorce have been made in the past one hundred years, one with regard to the so-called "Double Standard" and the other as to the right of action of married women deserted by their husbands.

An indication of the prevailing dissatisfaction is the fact that during the last session of Parliament a number of Members of Parliament in the Commons introduced bills to reform the divorce laws of Canada.

On the 24th day of February 1966, the present Senate Co-Chairman of your Committee introduced such a bill in the Senate and on second reading he asked for the appointment of a Joint Committee of both Houses of Parliament to study the entire subject of divorce in Canada.

The request was promptly granted and on the 23rd day of March 1966, the Senate passed the following Resolution:

> "The Honourable Senator Connolly, P.C., moved, seconded by the Honourable Senator Roebuck:
>
> That the Senate do unite with the House of Commons in the appointment of a Special Joint Committee of both Houses of Parliament to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, and such matters as may be referred to it by either House;
>
> That twelve Members of the Senate to be designated at a later date, act on behalf of the Senate as members of the said Special Joint Committee;
>
> That the Committee have power to engage the services of such technical, clerical and other personnel as may be necessary for the purpose of the inquiry;
>
> That the Committee have the power to send for persons, papers and records, to examine witnesses, to report from time to time, and

to print such papers and evidence from day to day as may be ordered by the Committee and to sit during sittings and adjournments of the Senate; and

That a Message be sent to the House of Commons to inform that House accordingly."

On March 29th, 1966, the following Senators were named members of the Committee:

The Honourable Senators Aseltine, Baird, Bélisle, Bourget, Burchill, Connolly (*Halifax North*), Croll, Fergusson, Flynn, Gershaw, Haig and Roebuck.

(On becoming Co-Chairman of the Special Joint Committee of the Senate and House of Commons on Employer-Employee relations in the Public Service of Canada, Senator Bourget retired from the Committee and was replaced by Senator Denis.)

The Commons had acted promptly and on March 15th, 1966, the House of Commons passed the following Resolution:

"On motion of Mr. McIlraith, seconded by Mr. Hellyer, it was resolved—that a Special Joint Committee of the Senate and House of Commons be appointed to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, and such matters as may be referred to it by either House;

That 24 Members of the House of Commons, to be designated by the House at a later date, be members of the Special Joint Committee, and that Standing Order 67(1) of the House of Commons be suspended in relation thereto;

That the Committee have power to engage the services of such technical, clerical and other personnel as may be necessary for the purpose of the inquiry;

That the Committee have the power to send for persons, papers and records, to examine witnesses, to report from time to time, and to print such papers and evidence from day to day as may be ordered by the Committee, and that Standing Order 66 be suspended in relation thereto; and

That a Message be sent to the Senate requesting Their Honours to unite with this House for the above purpose, and to select, if the Senate deems it so advisable, some of its Members to act on the proposed Special Joint Committee."

On March 22nd, 1966, the following Members were appointed to the Committee:

Messrs. Aiken, Baldwin, Brewin, Cameron (*High Park*), Cantin, Choquette, Chrétien, Fairweather, Forest, Goyer, Honey, Leflamme, Langlois (*Mégantic*), MacEwan, Mandziuk, McCleave, McQuaid, Otto, Peters, Ryan, Stanbury, Trudeau, Wahn and Woolliams.

Commencing on the 28th day of June 1966, the Joint Committee has held 24 open meetings in which the views of churches, organizations and individuals have been presented supported by more than 70 briefs. Your Committee is deeply indebted to the many witnesses who have come to Ottawa to give information to Parliament on the subject of divorce and for the many well considered and most informative briefs presented.

The following witnesses have been heard:—

List of Hearings and Witnesses

No. 1, June 28, 1966: E. Russell Hopkins, Senate Law Clerk and Parliamentary Counsel. Mr. Justice A. A. M. Walsh, Senate Commissioner.

No. 2, July 5, 1966: Dr. P. M. Ollivier, House of Commons Law Clerk and Parliamentary Counsel.

No. 3, October 18, 1966: Department of Justice: E. A. Driedger, Q.C., Deputy Minister and Deputy Attorney General. Seventh-Day Adventist Church in Canada: Rev. Darren L. Michael, Barrister, Secretary for public affairs, National Executive Committee.

No. 4, October 25, 1966: Parents Without Partners of Windsor: John P. Walsh, Chairman, The Single Parents Divorce Reform Committee.

No. 5, November 1, 1966: The Canadian Bar Association: Perrault Casgrain, Q.C., President; A. Gordon Cooper, Q.C., Dominion Vice-President; Ronald C. Merriam, Q.C., Secretary.

No. 6, November 8, 1966: G. R. B. Whitehead, Barrister and Solicitor, Montreal.

No. 7, November 15, 1966: John H. McDonald, Q.C., Barrister and Solicitor, Ottawa. The Congress of Canadian Women: Mrs. Nora Rodd, Brief Chairman; Mrs. Hilda Murray, National Secretary.

No. 8, November 12, 1966: The United Church of Canada: Rev. J. R. Hord, Secretary of the Board of Evangelism and Social Service; Rev. Frank P. Fidler, Secretary of the Commission on Christian Marriage and Divorce, and of the National Marriage Guidance Council, Associate Secretary of the Board of Christian Education; Rev. R. S. Hosking, Chairman of the Commission on Christian Marriage and Divorce, and Member of the National Marriage Guidance Council; Rev. W. E. Mullen, Director, Pastoral Institute; Douglas F. Fitch, Barrister, Solicitor and Notary, Member of the Pastoral Institute; Roy C. Amaron, Advocate, Barrister and Solicitor, Member of the Marriage Guidance Council, Convenor of the Law and Legislation Committee of the Montreal Presbytery and Representative of the Quebec Sherbrooke Presbytery.

No. 9, November 29, 1966: James C. MacDonald and Lee K. Ferrier, Barristers and Solicitors, Toronto. The Canadian Committee on the Status of Women: Mrs. W. H. Gilleland, Chairman; Mrs. J. F. Flaherty, Press Secretary; Mrs. R. S. W. Campbell, Secretary.

No. 10, December 6, 1966: The Catholic Women's League of Canada: Mrs. H. T. Donihee, National President; Miss Catherine Toal, Past National President; Mrs. G. J. Connolley, Diocesan President; Mrs. Roland Taylor, Past Diocesan President; Francis G. Carter, Esq., Solicitor for the League. Canadian Mental Health Association: Gowan T. Guest, Lawyer, National President; John D. Griffin, M.D., General Director.

No. 11, December 13, 1966: The Baptist Federation of Canada: The Reverend Dr. Edgar J. Bailey, President; The Reverend Fred Bullen, General Secretary.

No. 12, January 31, 1967: The Ontario Law Reform Commission: The Honourable James C. McRuer, LL.D., Vice-Chairman. The National Council of Women of Canada: Mrs. F. E. Underhill, Chairman of Laws; Mrs. Margaret E. MacLellan, Vice-President.

No. 13, February 7, 1967: His Honour P. J. T. O Hearn, Judge of the County Court, Halifax, N.S. Professor J. J. Gow, Faculty of Law, McGill University, Montreal, Quebec.

No. 14, February 9, 1967: The Presbyterian Church in Canada: Reverend Wayne A. Smith, B.A., B.D.; Reverend A. J. Gowland, M.A.; Reverend W. L. Young, B.A.; Reverend Fred H. Cromey, B.A. The Canadian Psychiatric Association: J. B. Boulanger, M.D., Director; F. C. R. Chalke, M.D., Director.

No. 15, February 14, 1967: His Excellency Sir Kenneth Bailey, C.B.E., Q.C., High Commissioner For Australia. Barristers' Society of New Brunswick: John F. Palmer, Q.C., Benjamin R. Guss, Q.C.

No. 16, February 16, 1967: Douglas A. Hogarth, Barrister at Law, on behalf of Mothers Alone Society, All Lone Parents Society (ALPS), Canadian Single Parents and Parents without Partners.

No. 17, February 21, 1967: The Unitarian Congregation of Don Heights, Scarborough, Ontario: Reverend Kenneth Helms; F. Stewart Fisher, Barrister at Law. Professor Julien D. Payne, Faculty of Law, University of Western Ontario.

No. 18, February 23, 1967: The Anglican Church of Canada: The Right Reverend E. S. Reed, M.A., D.D., Bishop of Ottawa; Reverend Canon M. P. Wilkinson, M.A., L.Th., General Secretary, Department of Christian Social Services; Reverend A. R. Cuyler, Rector of parish of New Liskeard; and Professor H. R. S. Ryan, Q.C., Faculty of Law, Queen's University. Professor C. Gordon Bale, Faculty of Law, Queen's University. Professor Bernard L. Adell, Faculty of Law, Queen's University. Professor H. R. S. Ryan, Q.C., Faculty of Law, Queen's University.

No. 19, February 28, 1967: Howard Hilton Spellman, Attorney and Counsellor at Law, New York, U.S.A.

No. 20, March 2, 1967: Robert McCleave, M.P., Ian Wahn, M.P.

No. 21, March 9, 1967: Professor Stephen J. Skelly, Faculty of Law, University of Manitoba. The Honourable A. W. Roebuck, Q.C., Robert McCleave, M.P.

No. 22, March 14, 1967: Professor Julien D. Payne, Faculty of Law, University of Western Ontario.

No. 23, March 21, 1967: Ron Basford, M.P. Andrew Brewin, M.P. Robert Prittie, M.P. Robert Stanbury, M.P. Arnold Peters, M.P.

No. 24, April 20, 1967: James Byrne, M.P.

The experience possessed by the members of your Committee, supplemented by the knowledge of many witnesses, and our investigations of conditions both within Canada and abroad convinced your Committee that considerable changes are required in the divorce laws of Canada. Canada's Constitution as expressed in the British North America Act confers jurisdiction in the matter of "Marriage and Divorce" exclusively

upon the Parliament of Canada.[1] The Act also provides that the laws in force in the several provinces at Confederation should continue until amended or repealed by the governmental authority having jurisdiction. Thus, authority in the matter of divorce is in the Parliament of Canada. While English laws of divorce of over one hundred years ago, in the form of pre-Confederation Statutes, are in force in most of the Canadian provinces, the provincial legislatures concerned have been unable to abolish or amend them or to enact new or more timely provisions.

There are a number of causes for the dissatisfaction which your Committee finds to exist but the strongest and most universal source of complaint is the grounds to which the courts are restricted for the dissolution of marriages. With the exception of the one Province of Nova Scotia, the principal ground for divorce is adultery. In the Province of Nova Scotia cruelty by one spouse towards the other is an additional ground for the dissolution of marriage.

While adultery furnishes good reason for the termination of the marriage bond, and has been so recognized from time immemorial, there are several other marital offences which drastically interfere with the continuance of the marriage relationship but for which the law of Canada provides no relief. In addition, conditions arise in marriage in which no provable fault or misdemeanor is chargeable against either spouse and yet in which, in the interests of all concerned, including the children and the community, the legal ties should be removed.

This incompleteness of the judicial process has brought disrespect upon the courts, where much too frequently the ground pleaded is not the real cause of the marriage breakdown, the charge of adultery being the restricted form of procedure required by law to achieve the desired result.

Because of the inability of the courts to grant relief, except on the one ground, many thousands of Canadian citizens are driven into illicit unions and actually forced into what is popularly known as "Common Law" marriage. Where a party to such an irregular union is subject to a previous undissolved and subsisting marriage, the Common Law gives no legality or status to such a union. The words "Common Law marriage" may have some social significance, but are otherwise misleading. The relationship confers no rights of marriage, except to the extent of special statutory provisions such, for instance, as are found in certain war veterans legislation. The children of such a union are illegitimate.

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[1] See Report, section on Canadian Law, pp. 47-60.

These and other undesirable conditions in Canada have been carefully considered by your Joint Committee and are dealt with to the best of its knowledge and judgment in the following Report.

Your Committee as authorized by Parliament, has directed its study to the problem of divorce, but it has been made aware that such an inquiry raises still wider questions of human relations. Representatives of the churches and of social organizations have urged the need for premarital education, family guidance and conciliation in event of marriage breakdown, and they have raised questions as to the legal minimum age for marriage.

While the provision of educational, social and conciliation services on a nation-wide scale presents extraordinary administrative and constitutional difficulties, the need has been borne in mind by your Committee and should not be lost sight of when consideration is given to the Committee's specific Recommendations.

The Report is divided into five parts. Part I deals with the Committee's conclusions, shortly stated, and its recommendations. Parts II, III and IV set forth in more extended form, where necessary, the product of the Committee's thinking and investigations. Part V is a draft bill incorporating the Committee's recommendations in legal form. All five parts should be read for a complete understanding of the Committee's recommendations and of the reason therefor.

With the aid of many witnesses, your Committee has studied the law and practice of divorce in Canada and other countries. Particular attention has been given to the divorce laws of England, upon which the divorce laws of Canada and its provinces are now based, and where notable changes have been made during the past thirty years. The laws of Australia and New Zealand are especially worthy of attention, for like Canada, these countries of the Commonwealth have followed English precedents and have made notable advances in recent years. The law of divorce in the State of New York has in the past been similar to that of Canada in that adultery has been the sole recognized ground for the dissolution of marriage. Recently, however, New York State has altered drastically its former divorce practice, so that its experience is of special interest in Canada. Something has also been learned of the divorce laws of Scandinavian and other European countries.

A study of this experience from abroad together with a knowledge of divorce conditions in Canada and her provinces, and aided by the information and advice of a considerable number of public spirited and

well informed witnesses, has enabled your Committee to reach the several definite conclusions set forth in the first part of this Report. All parts are respectfully submitted.

Your Committee closes its introduction to the first part of its Report with an expression of its gratitude to all those who have assisted it as witnesses in personal appearances and in written briefs, at no inconsiderable cost to themselves in time, thought and outlay. These witnesses have made a major contribution to the national well-being and their assistance to your Committee is gratefully acknowledged.

Your Committee is also indebted to its Special Assistant, Dr. Peter J. King, Associate Professor of History at Carleton University, who has made an outstanding contribution to the production of this Report.

The Services of Mr. Patrick J. Savoie, of the Committees Branch of the Senate, have been most efficient and most valuable. He has acted throughout as the Committee's Secretary. The excellence of his work is the more remarkable as it is his first experience in such an office.

To all officers and members of the Senate and Commons and of the public who have assisted, your Committee expresses its thanks.

A. W. ROEBUCK,
A. J. P. CAMERON (*High Park*)
Joint Chairmen

ADULTERY

It has been urged upon your Committee by a number of responsible witnesses that the entire theory of marital offences as grounds for divorce be abandoned and that there be substituted therefor the fact of marriage breakdown.[2] The practicability of adopting marriage breakdown as the exclusive ground for divorce is discussed elsewhere in this Report.[3]

From time immemorial, adultery on the part of one of the spouses has been deemed a violation of the basic obligations of the marriage relationship entitling the wronged and innocent partner to an immediate dissolution. The marriage need not necessarily break down should the infidelity be forgiven but should the offended spouse consider otherwise, he or she should be entitled to a release from the marital ties without delay. In our monogamous society a woman is allowed but one husband and a man but one wife.

There is obviously no need for a statutory definition of adultery. It was not defined in the Imperial Statute of 1857 or subsequently, nor has it been defined in any of the Canadian provinces whose law is based upon that statute or in the pre-Confederation law of any of the other provinces. What adultery is in law has been made plain in the decided cases and no difficulty has been experienced in the courts, not even when the law was amended for the abolition of the double standard.

RECOMMENDATION

Your Committee recommends that the marital offence of adultery be retained as a ground for the dissolution of marriage on the petition of the offended spouse, subject of course to the legal defences.[4]

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[2] See Report pp. 102-104.
[3] See Report pp. 117-23.
[4] See Report, section on Bars to Divorce, pp. 32-34 and pp. 144-47.

RAPE, SODOMY AND BESTIALITY

The unnatural offences of rape, sodomy and bestiality are violations of the marriage relationship akin to adultery and in some instances are included in that definition.[5] They were made grounds for divorce in the English Act of 1857 and thus became grounds in Canada in those provinces which adopted the law of England as of the 15th of July, 1870. They should be retained as separate grounds for the dissolution of marriage.

A statutory definition is unnecessary and undesirable.[6]

RECOMMENDATION

Your Committee recommends that rape, sodomy and bestiality be retained in Canadian law as grounds for divorce.

[5] See Report pp. 104-105.
[6] See Report, section on Scots Law, pp. 74-75.

CRUELTY

Cruelty by one spouse towards another is a violation of the marriage undertaking.[7] Cruel conduct on the part of one spouse may create intolerable conditions in the home that are highly detrimental to the children and dangerous to the life and health of the victim spouse.

Cruelty is so abhorrent in the matrimonial relationship that it has been made a ground for the dissolution of marriage in most civilized countries, including England, Australia and the United States.

Cruel conduct in order to constitute grounds for divorce should of course be of substantial character, and, for the determination of this, reliance may be placed upon the wisdom and good sense of Canadian judges, guided as they are by decisions made in our own country in actions for judicial separation and for both judicial separation and divorce in Nova Scotia, and elsewhere in the divorce practice of the United Kingdom, and Australia. Some witnesses before the committee expressed concern lest trivial actions be included as cruelty, but the jurisprudence developed in the experienced tribunals mentioned would be considered by the Canadian Bench as authoritative and would be followed, without the need of a detailed definition of the offence. In fact, a comprehensive and satisfactory definition of marital cruelty is not possible, nor is it desirable for the good reason that acceptable conduct within the home differs from time to time and from place to place and among differing classes in society. On the other hand, a competent judge has no difficulty in recognizing cruelty for what it is when the circumstances are before him.

RECOMMENDATION

Your Committee, therefore, recommends that cruelty be made a ground for the dissolution of marriage, and that for the present at least, this ground should be undefined and its administration be left to the learning, good sense, responsibility and wisdom of Canadian judges, guided as they are by the jurisprudence of our own courts and those of England.

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[7] See Report pp. 105-107.

DESERTION

Desertion is a marital offence which is much too common in Canada and when the husband is the deserter it is usually a cruel disaster to the wife and family and, as well, an injustice to the community. Marriage creates a duality of responsibility. The husband is normally the breadwinner while the wife takes care of the children and the home, and acting together they supply the essentials of fatherly guidance and motherly love, the essential elements of a home.[8]

When a wife deserts, the husband is left without the comforts and supports of married life and the children are forsaken. Desertion by the husband can be even more cruel for it leaves the home without the guidance and discipline which a father can supply and often without the financial support essential to the household.

In Canada, many thousands of wives have been left by their husbands in lonely neglect to bear the burden of their own support and that of the children, and many deserted wives are struggling heroically to maintain as well as to care for their family households and to feed, clothe and educate their children.[9]

Family Courts in some of the provinces make a real effort to enforce Maintenance Orders, but deserting husbands are frequently difficult to locate and even when, at considerable public expense, they are brought back to book, the effort is frustrated by the wrongdoer by a plea of poverty.

Irregular unions are the inevitable result of the unnecessary restrictiveness of our laws of divorce. Faced with this impossible situation many deserted wives and husbands have been driven into what is known as "Common Law" marriage. There are said to be thousands of couples living in what is legally adultery and whose children are according to law illegitimate. This is highly undesirable for the couples themselves and for the community.[10]

In the interests of deserted spouses, of the children of marriages broken by desertion and of the community, desertion for some considerable period of time, without reasonable prospect of resumption of cohabitation should be made a ground for divorce.

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[8] See Report pp. 107-10.

[9] *Proceedings of the Special Joint Committee of the Senate and House of Commons on Divorce*, No. 4, Oct. 25, 1966, p. 173.

[10] See Report pp. 107-10.

RECOMMENDATION

Your Committee, therefore, recommends that desertion for a period of three years,[11] on the petition of the deserted spouse, where there is no reasonable prospect of a resumption of cohabitation within a reasonable period of time, be made a ground for the dissolution of marriage. Provided that a period of cohabitation of not more than three months for the primary purpose of reconciliation be excluded from the count of the said three years. Your Committee is of the opinion that the definition of desertion other than as above, should be left to the courts, guided by the jurisprudence developed in Canada in relation to judicial separation and in the courts of the United Kingdom in respect of both divorce and separation.[12]

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[11] See Report pp. 109-10.
[12] See Report, section on English law, pp. 69-70.

WILFUL NON-SUPPORT

Traditionally the duties of homemaking are divided between the marriage partners, the wife caring for the house, the children and her husband's comfort and the husband supplying the essential financial support. The husband is the breadwinner, and when he fails to discharge his share of the duty the home is disrupted. Distress and privation result; the children are neglected, the wife is frustrated. Happiness is no longer possible and the marriage breaks down.

When such disastrous conditions are brought about by involuntary unemployment or illness on the part of the natural provider, most people are genuinely sympathetic and the public purse is available without much hesitation to avoid actual tragedy, but when these conditions are brought about by the wilful neglect, bad faith and selfishness of the head of the house, his conduct is reprehensible and a violation of the expressed or implied marital undertakings.

Such conduct on the part of the husband places the wife in a most difficult position and if persisted in should make it possible for the court to free her from the marital ties. Both she and the children may be better off without the incubus of a deliberately neglectful husband and father.

Wilful non-support on the part of the husband is a serious marital offence, but each such case must be judged on all the circumstances, with due regard to the degree of culpability on the part of the husband and the effect of his neglect on the wife and family. The court should accordingly be allowed the fullest discretion and, in its own good judgment, should have power to decree judicial separation or to dissolve the marriage.

RECOMMENDATION

Your Committee recommends that wilful refusal or neglect without lawful excuse on the part of the husband to provide support for his wife and family for a period of one year be made a ground for dissolution of marriage, subject, however, to the fullest discretion on the part of the court.

BIGAMY

In the past in Canada, bigamy has been adjudicated upon on the basis of adultery; this is satisfactory, except that proof is required that the parties to the second marriage have cohabited. The deserted spouse is under the necessity of proving three essentials, the first marriage, the second bigamous marriage and the adultery. Cohabitation usually follows a bigamous marriage, but not necessarily so.

Proving the adultery together with the bigamy may be difficult, at times impossible, and almost always, expensive.

The present ground of adultery in the event of bigamy must logically be retained, but your Committee is of opinion that bigamy of itself should be sufficient to justify dissolution of the legal marriage, thus freeing the innocent spouse. When it is shown that the respondent spouse has remarried bigamously, the legal marriage should surely be capable of being dissolved.

RECOMMENDATION

Your Committee recommends that a bigamous marriage by the respondent spouse be made a ground for the dissolution of the first or legal marriage.

NON-CONSUMMATION OF MARRIAGE

Wilful refusal by one of the spouses to consummate a marriage is ground for annulment in England, but not in Canada.[13] In those provinces of Canada where the law of England as it was on the 15th of July 1870 is in force, non-consummation because of some physical or mental defect on the part of one of the spouses renders the marriage voidable at the suit of the other partner. Some of these defects are possible of correction, but the consent and cooperation of the party having the defect is required.

When non-consummation of the marriage is due to the wilful refusal of one of the spouses, the law at present affords no right of action to the other marital partner. No relief is available when the purpose of marriage is thus frustrated by the abnormal conduct of one of the spouses.

RECOMMENDATION

Your Committee recommends that the present law as to the non-consummation of marriage due to the physical or mental defect of one of the spouses be retained and that wilful refusal to consummate by one of the spouses for a period of one year or more be made a ground for dissolution of the marriage at the instance of the other spouse.

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[13] See Report pp. 138-39;
See Report, section on English Law, p. 67.
Power On *Divorce*, p. 194.

MARRIAGE BREAKDOWN

It has been impressed upon your Committee by a number of prominent and responsible witnesses that the presently existing adversary system of trial in divorce cases on the ground of alleged matrimonial offence be abandoned and that there be substituted therefor an inquisitorial procedure of trial on the ground that for some or any reason the marriage has broken down. It was argued that the present court procedure, based on an alleged misdemeanour by one of the spouses, promotes antagonisms between the parties and decreases the likelihood of reconciliation.

Whether an "inquest" by public officials into family conditions at the instance of one of the spouses would be less objectionable is open to argument, and the whole subject of marriage breakdown is considered by your Committee at length in Part III of this Report.[14]

It is sufficient at the moment to make clear that your Committee is opposed to the abandonment of the traditional British system of court trial conducted by an independent judge presiding, while opposing interests, if any, present their evidence and arguments.[15]

Moreover, such a change would be impracticable. Aside from the excessive cost of such proceedings, the necessary trained social workers are not available and the comparative few who do exist are engaged in other important activities.[16]

While the adoption of marriage breakdown as the sole cause of action in divorce proceedings is neither practical nor desirable, at least not at present, the idea is not without merit. Nor is it something new. That a marriage in fact is no longer subsisting, that the parties are separated in antagonism and that a resumption of cohabitation is impossible, are circumstances which a judge must necessarily bear in mind in any matrimonial proceeding, and particularly so when both plaintiff and defendant are at fault.

Should Parliament see fit to widen the grounds of divorce sufficiently to relieve the thousands of Canadians caught in the bonds of dead marriages, marriage breakdown is the natural criterion when the marital relationship has failed without reasonable prospect of revival and without culpable and triable fault or matrimonial offence on the part of either spouse.

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[14] See Report pp. 111-23.
[15] See Report pp. 117-23.
[16] See Report pp. 119-20.

Many marriages fail through no fault of either partner. The parties to the marriage may be just fundamentally incompatible. Often such partners try repeatedly to revive the affection that they once had for each other or believed they had. Sometimes such couples separate because the tensions within the home have an adverse effect upon both the partners and their children. The marriage is simply dead, or, in other words, has broken down.

Such conditions of dead marriages do exist in Canada in large numbers with disastrous results in the lives of many Canadians. The misfortune of innocent spouses caught in the merely legal ties of dead marriages cries out for relief. The remedy is considered by your Committee in the following paragraphs.

There are a number of conditions destructive of marriage which do not involve a marital offence, such as mentioned earlier, on the part of either spouse, but which terminate cohabitation effectively. Among these are the disappearance over a long period of time of one of the parties, gross and habitual drunkenness, drug addiction, persistent criminality resulting in long terms in penitentiary and lengthy illness, mental or physical.[17]

1. *Illness*

An illness such as insanity may create conditions which effectively destroy the substance and purpose of marriage.[18] While the regrettable marriage failure may not be due to any conscious fault on the part of the incapacitated partner, the resulting condition frequently involves a disastrous hardship to the other spouse.

Recognizing the need for relief under such circumstances, many jurisdictions have adopted insanity as a ground for divorce. Great Britain introduced it in 1937 and witnesses before your Committee have strongly urged its inclusion in Canadian law.

A lapse into mental illness is not a marital offence, but if of long duration without prospect of cure in the foreseeable future, it effectively terminates the marriage relationship. It is thus not the illness that constitutes ground for the dissolution of the marriage but rather the consequences which flow from the illness, the termination of cohabitation and of the marriage state.

Witnesses have spoken to your Committee of "chronic" or "incurable" unsoundness of mind, but the representatives of the Canadian

[17] See Report p. 135.
[18] See Report pp. 135-38.

Mental Health Association and of the Canadian Psychiatric Association have testified that the words "unsoundness of mind" covers the whole field of mental illness. The Canadian Bar Association stipulated that for mental illness to be actionable in divorce, the patient must have been confined in a mental institution for some long period of time. Such confinement was said to be the best evidence available of the permanence of the illness, and in addition would of itself destroy the marriage.[19]

As to the word "incurable", medical men are conscious of the advances in medical science and refrain from testifying that an insane person is incurable.[20]

The Canadian Mental Health Association witnesses objected to mental health being considered differently from other illness. To single out mental illness for special provisions with regard to marital relations would, they said, intensify the stigma which has traditionally been attached to mental illness. Other chronic disabling illness may affect marital relations severely.[21]

RECOMMENDATION

Your Committee therefor recommends that marriage breakdown and separation for a period of three years by reason of mental or physical illness be constituted a separate ground for divorce, provided that no reasonable prospect exists of a resumption of cohabitation and that there is no satisfactory evidence of a reasonable expectation of recovery and of a resumption of cohabitation in the foreseeable future, and further that the dissolution of the marriage will not be unduly harsh or unjust to the disabled spouse and that reasonable arrangements have been made for the maintenance, care and custody of the affected spouse and the children.[22]

The granting of a divorce on this ground should be within the discretion of the presiding judge, subject to appeal.

2. *Criminality and Imprisonment*

Several witnesses have urged that persistent or habitual criminality and imprisonment be included as a ground for divorce.[23] This would be

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[19] See Report p. 136.
[20] See Report pp. 136-37.
[21] See Report p. 137;
See Report, sections on English and Scots Law, pp. 70-71, 73.
[22] See Report pp. 137-38.
[23] *Proceedings* No. 3, October 18, 1966, p. 154;
No. 7, November 15, 1966, p. 335;
No. 11, December 13, 1966, p. 573;
No. 15, February 14, 1967, p. 804;
No. 16, February 16, 1967, p. 850.

in keeping with the practice of several other jurisdictions. There seem to be two issues here: firstly, the criminal behaviour itself, and secondly, the consequences of it which may include imprisonment. The first aspect seems to be that criminal behaviour by one spouse is itself an offence against the marriage partner. A spouse may be desirous of ending a legal tie to someone who has demonstrated anti-social tendencies and bad character. A spouse might well be rid of such a partner and the children also might be better off. To make criminal behaviour *per se* a marital offence would involve difficult problems of definition. What criminal offences would be included and how many offences would constitute the persistent or habitual?

However, the incarceration of one partner for an extended period of time terminates matrimonial cohabitation as effectively as if the imprisoned partner had deserted. The economic effects can be as serious and the need to re-establish a stable family environment for the partner and children as imperative. Long or repeated imprisonment makes impossible the fulfilment of the role of husband, wife and parent.

The objection that has been raised to granting divorce on the ground of long imprisonment is that the husband or wife of the criminal may play a part in his or her rehabilitation. The restoration of the prisoner to a family environment may well improve his likelihood of again becoming a useful citizen. However, any spouse who seeks a divorce on this ground is not one to patiently await the prodigal's return or who would be of very much help in his rehabilitation. Those who would be of use in the rehabilitation of criminals would not seek divorce. The defining of persistent or habitual criminality or the length of sentence is difficult, but separation having taken place, the court in exercise of its discretion could consider the likelihood of resumption of cohabitation. It could determine whether there is any substance of marriage left in the circumstances.

The marriage breakdown caused by imprisonment should therefore be ground for divorce, subject to the discretion of the court.

Serving a term of imprisonment for a period of at least three years should provide ground for the dissolution of marriage.

RECOMMENDATION

Your Committee therefore recommends that the breakdown of marriage consequent upon the serving of a term of imprisonment by the spouse of not less than three years, or for successive terms totalling

three years within the five years preceding the institution of proceedings, be grounds for divorce, provided that there is no reasonable possibility of a resumption of cohabitation, and subject to the discretion of the court.

3. Alcoholism and Drug Addiction

Alcoholism and drug addiction have been made the grounds for divorce in numerous jurisdictions, Australia for example. Their adoption in Canada has been urged by several witnesses before the Committee, including the Seventh Day Adventists, and it was proposed in one of the bills introduced in the Commons and referred to the Committee.[24] Like insanity and imprisonment, alcoholism and drug addiction may involve marriage breakdown. Alcoholism and drug addiction are conditions more akin to illness than to wilful or culpable conduct and their effects can ruin a marriage and produce misery for the other spouse and the children. The Baptist Federation suggested that they be classed as a form of insanity. When these conditions lead to a commital to an institution for a protracted length of time they amount to marriage breakdown and not infrequently to cruelty.

To be a ground for divorce the condition must have extended over a considerable period of time, show little prospect of cure and be such as to have made the normal marital consortium impossible. It must have caused an irretrievable breakdown of marriage. It is not so much the actual condition that gives rise to a ground for the dissolution of marriage as it is the results of the condition upon the marriage and the family that are abhorrent.

RECOMMENDATION

Your Committee therefore recommends that the breakdown of marriage by reason of gross and protracted addiction to alcohol or drugs be made a ground for divorce, subject to the discretion of the court and to the absence of substantial prospect of cure, or a resumption of cohabitation within a reasonable period of time.

4. Disappearance

Section 240 of the Canadian Criminal Code provides that no person commits bigamy by going through a form of marriage if the spouse of

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[24] See Report p. 135;
Proceedings, No. 3, October 18, 1966, p. 155.

that person has been continuously absent from him for seven years immediately preceding the time when he goes through the form of marriage, unless he knew that his spouse was alive at any time during those seven years.[25]

If the remarrying spouse did not hear directly or indirectly from the missing partner for the full seven years, he or she cannot be convicted of bigamy but this exemption from the prosecution does not affect the validity of the first marriage.

Should the missing spouse reappear the first marriage is still valid. The second marriage is a nullity and the children of that marriage are illegitimate. Such an eventuality is terrifying and the very possibility hangs like the Sword of Damocles over the spouses of the second marriage and their family perhaps for years. If desertion for the three years is sufficient to afford ground for divorce, disappearance for a similar period, whatever the cause, or for unknown cause, should be sufficient to release the remaining spouse from its sterile bonds. If the missing spouse is in fact alive he or she should realize that failure to communicate may end the marriage. Three years absence should be a sufficient length of neglect in this age of world-wide communication and widely scattered and diversified facilities.

RECOMMENDATION

Your Committee recommends that absence of either the wife or husband without knowledge by the other spouse of or from the missing partner for a period of three years be made a ground for the dissolution of the marriage, thus enabling the deserted spouse to remarry in legal security.

5. *The Separation Ground*

The introduction of the ground of separation for a specified period would be the most practical way to solve the problems of simple marriage breakdown.[26] There can be no better evidence that a marriage has failed than the termination of cohabitation and the failure to resume it after a substantial period of time. If there is no likelihood of reconciliation, there is little point in retaining the empty legal shell of the marriage.

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[25] See Report p. 138.
[26] See Report pp. 124-26.

There is little doubt that the concept of marriage breakdown envisaged in the separation ground seems to have won wide acceptance. The majority of witnesses appearing before the Committee have advocated it in one form or another, usually in the form of a separation ground. It has been introduced into numerous jurisdictions whose legal and social structure are not dissimilar to our own, Australia and New Zealand, and various American states—and it has existed for a long time in most European countries, notably Scandinavia.[27] Undoubtedly, as practical legislation in all of these countries, it does work.

Certain safeguards would need to be introduced along with the separation ground:

(i) the court should have the power to adjourn for a specified period if there seems to be a possibility of reconciliation;

(ii) provision should be made for the financially weaker party, usually the wife, before a decree is granted;

(iii) no decree should be issued until satisfactory arrangements have been made for the care and custody of the children;

(iv) the court should have discretion to refuse the decree on the ground of public interest.[28]

Your Committee is consequently of the opinion that a period of separation of three years[29] immediately prior to the institution of proceedings would be sufficient to establish the breakdown of marriage and should be introduced as a ground for divorce with the safeguards discussed above.

RECOMMENDATION

Your Committee recommends that marriage breakdown as evidenced by at least three years of separation immediately preceding the institution of proceedings in which the parties have not cohabited and in which there appears no reasonable expectation of a resumption of cohabitation within a reasonable period of time, be made a ground for divorce, provided that:

(1) the Court may adjourn the proceedings for such time as it deems desirable should there seem to it to be reasonable possibility of a reconciliation;

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[27] See Report p. 126.
[28] See Report pp. 126-30.
[29] For further detail on the period of separation, see pp. 130-31.

(2) due provision has been made for the future maintenance of the wife, and under special circumstances of the husband, and for the custody, access, maintenance, care and education of the children as may be necessary; and

(3) the Court may refuse the decree if it considers in its discretion any public interest may be adversely affected or that such a decree would be unduly harsh to the respondent or the dependent children.

ALIMONY AND RIGHTS ANCILLARY TO DIVORCE

Alimony for the wife, maintenance for the children and their custody and the division of marital property are all matters ancillary to divorce and are thus within the jurisdiction of Parliament.[30] For this your Committee has the authority of the then Deputy Minister of Justice, Mr. E. A. Driedger, as follows:

> ". . . jurisdiction to make laws in relation to divorce is in essence jurisdiction to make laws for the alteration of the legal status created by the marriage; the jurisdiction therefore extends to the abolition of the rights and obligations created by the marriage and the restoration of pre-existing rights. As I have already indicated, I think it must follow that these rights and obligations can be terminated in whole or in part.
>
> "It is the husband's duty to maintain the wife. If the marriage is dissolved, that obligation normally ceases because the relationship of husband and wife no longer exists. For the reasons I have indicated, I think that Parliament is competent to define the extent to which a dissolution of marriage alters the rights and obligations inherent in the marriage and therefore could provide for a continuation of the obligation to support . . .
>
> "The same reasoning would apply to maintenance and custody of children. During marriage the husband is under a duty to maintain and provide for the education of the children of the marriage, and the husband and wife have joint custody. These are rights and obligations that arise out of the marriage relationship. A divorce, which terminates the marriage relationship, obviously interferes with these rights and obligations, and in my opinion Parliament's jurisdiction in relation to divorce would include jurisdiction to prescribe the extent to which these rights and obligations are to be abrogated or continued . . .
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> "The division of property between divorced persons (apart from the question of support or maintenance), as well as such matters as marriage settlements, dower, homestead rights, the right of married women to own property and sue in their own names, etc., may well stand on a different footing. These matters do involve rights and obligations between husband and wife, but they seem to me to relate more to the property and civil rights

[30] See Report, section on Court Procedure, p. 151.

of the parties to the marriage than to their legal status as married persons. They could vary from time to time and from jurisdiction to jurisdiction and a particular rule is not necessary or essential to constitute a marriage."[31]

The Parliament of Canada has at one time exercised this constitutional authority.

According to Dr. P. M. Ollivier, Parliamentary Counsel and Law Clerk of the House of Commons, in the early years of Confederation, a number of acts were passed by Parliament dissolving marriages and providing maintenance for the wife and children. Parliament has not exercised this jurisdiction in recent years and divorced women are left to the provincial courts for relief. In Ontario, maintenance is frequently granted together with a decree of divorce by the courts of that province, but in Quebec, a wife has no legal claim for maintenance against her former husband following the dissolution of her marriage.

Your Committee is of the opinion that a wife's right to maintenance after divorce is a question for the courts to decide in each individual case and the decision should be made by the judge who decrees the divorce, when the facts are freshly before him. He should also deal with the division of marital property and the custody, access to and maintenance of children. These matters are connected with and arise out of the divorce decree, or in legal language are ancillary to divorce. The courts should, of course, be possessed of a continuing power to modify the court order as changing conditions require and so as not to interfere with provincial laws enacted under Property and Civil Rights provision of the *British North America Act*. It is, in your Committee's opinion, essential in the interests of justice, irrespective of the province in which the parties reside, that the court which hears the evidence in first instance and issues the divorce decree have power to complete its judgment with respect to the ancillary matters above-mentioned, and your Committee so recommends.

The courts of the provinces should be given power to issue orders coincident with decrees of divorce and ancillary thereto with respect to the division of property between the parties, the future maintenance of the wife and under special circumstances of the husband, and the future custody, maintenance, care and education of the children of the household affected[32] and with power to modify or repeal such orders from

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[31] For further discussion see pp. 56-60, esp. pp. 57-60. *Proceedings*, No. 12, January 31, 1967, pp. 622-623.

[32] See Report p. 151.

time to time, all as required in the circumstances and the Senate should be given similar powers with the exception of the division of property between the parties.

RECOMMENDATION

Your Committee recommends that the courts of those provinces having jurisdiction in divorce be given power to issue orders coincident with decrees of divorce and ancillary thereto with respect to the division of marital assets between the parties, the future maintenance of the wife and children, and under special circumstances of the husband, and the future custody, care and education of the children to whom either of the parties stands *in loco parentis,* and access to such children, and with power to modify or repeal such orders from time to time as required in the circumstances, and that the Senate by virtue of the *Dissolution and Annulment of Marriages Act* be given similar power, with the exception of the division of marital property between the parties.

DOMICILE

As the law stands, a court may exercise jurisdiction in divorce proceedings only if the parties are domiciled in the province in which the proceedings are commenced. In effect, this means the province in which the husband is domiciled. A married woman automatically acquires the domicile of her husband on marriage and retains it so long as the marriage subsists. This unity of domicile derives from the common law doctrine that the husband and wife are one person. While this requirement presents little difficulty to the husband, who takes his domicile with him, and who can, therefore, institute divorce proceedings wherever he is domiciled, it often causes great hardship to the wife.

Before 1930, if a wife was deserted by her husband and the husband departed to live in another province or country, the wife could seek a divorce only in that province or country, not where she herself resided. *The Divorce Jurisdiction Act* of 1930 alleviated this situation by permitting a wife deserted for a period of two years by her husband to petition for divorce in the province where the couple were domiciled at the time of desertion.

While the Act of 1930 did help the situation to a considerable degree, it has by no means solved the problems that arise from the rule of domicile. Society today is highly mobile. People move freely from province to province and from country to country, and the right to commence divorce proceedings in the province of desertion may be most inconvenient. It may not be practical for a wife to remain in the province in which she was deserted, or return there later. In any case, the 1930 Act requires that the wife prove desertion as well as actual ground for the divorce, and it does not cover those cases of separation where no actual purposeful desertion took place.

The present law of domicile discriminates against the wife, who lacks access to the courts similar to that enjoyed by her husband. Women's groups appearing before the Committee have urged that married women be given the right to their own domicile.[33]

There have been two major solutions proposed to the Committee. One would be to abandon the concept of domicile and permit either spouse to petition for divorce in the province in which he or she resides. This has been suggested by the Manitoba Bar Association, the Law Society of British Columbia, the Canadian Committee on the Status of

[33] *Proceedings* No. 7, November 15, 1966, p. 334;
No. 9, November 29, 1966, p. 498;
No. 12, January 31, 1967, p. 627.

Women, Mr. Justice McRuer and Professor Stephen Skelly. The other suggestion is to abandon the concept of provincial domicile in favour of that of national domicile. This is premised on the fact that Canada is one country and should be regarded for divorce purposes as such. This would be to follow the precedent set by Australia which introduced the law of Australian domicile in matrimonial proceedings to overcome the difficulties encountered in that country due to separate state domicile. This suggestion has been made by the Barristers Society of New Brunswick, the Canadian Congress of Women and Professor Julien Payne.

To rely on residence alone for the institution of matrimonial proceedings might present complications in international law and lead to difficulties in the recognition abroad of Canadian divorce.

The requirement of domicile would restrict the use of Canadian courts to those of residence in this country who intended to remain permanently and a one year residence requirement would prevent "shopping" from province to province or the choice of a province on the basis of its inconvenience to the respondent or co-respondent.

RECOMMENDATION

Your Committee recommends:—

(i) A husband or wife domiciled in Canada may institute proceedings praying for the dissolution or annulment of the marriage, and for ancillary relief, in any province with a court having jurisdiction to provide such relief, if the petitioner or the respondent has resided continuously in that province for a period of at least one year immediately preceding the presentation of the petition.

(ii) For this purpose "Canadian Domicile" is defined as follows:

(a) a husband has Canadian domicile if he is domiciled, in accordance with the existing rules of private international law, in any province of Canada; and

(b) a wife has Canadian domicile if she would, if unmarried, be domiciled, in accordance with the existing rules of private international law, in any province of Canada.

BARS TO DIVORCE

1. *Collusion*

Collusion in divorce cases is illegal at common law and is prohibited by statute in the Law of England as it existed on the 15th of July 1870 and the prohibition was thus introduced into certain of the Provinces of Canada.[34] It should be included in any Act of the Parliament of Canada consequent upon this Report, but not so as to discourage or prevent negotiation between the parties or their solicitors or agents with a view to the reconciliation of spouses or the making of *bona fide* and proper arrangements with regard to the custody of and access to children, the maintenance of the wife or division of assets. It is not desirable that the man and wife be kept at arm's length by a rule of law and prevented from doing what is right and honourable under the circumstances or that which may lead to reconciliation.

Collusion has not been defined by statute either in England or Canada, and confusion and misunderstanding exists in the public mind and even among solicitors as to what it means and as to what its prohibition actually prohibits. This is not in the public interest and should be corrected.

A dictionary meaning of collusion is "a secret agreement for an unlawful or evil purpose." It is the evil purpose of the agreement that renders it collusive.

> "It is very important that the ignorance about what collusion is or may be should be dispelled . . . collusion means a corrupt bargain . . . to bribe the party bringing the petition, or, it may be to suppress a defence or to falsify the facts."[35]

There must be a corrupt agreement or conspiracy to which the petitioner is a party to obtain a divorce by some fraud or deceit practiced on the court to pervert the course of justice, or by bribing the respondent or co-respondent to deprive the court of the opportunity of hearing what may be the truth.

RECOMMENDATION

Your Committee recommends that collusion be prohibited in somewhat the following terms:

> Collusion shall be a bar to divorce, being a corrupt agreement or conspiracy to which the petitioner or respondent is a

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[34] For fuller discussion, see Report pp. 145-47.

[35] Lord Merriman, Debate in House of Lords, *Hansard* Vol. 199, col. 133, Power On *Divorce*, p. 78.

party, to effect some illegal, wrongful or improper purpose such as the bribery of a respondent or co-respondent not to defend the action or to appear as a witness or to perform an illegal or improper act in order to furnish evidence, or to pretend to do so, to give false evidence thus deceiving the court or depriving it of an opportunity to learn the truth, and an agreement for the reasonable support and maintenance of a husband or wife or children shall not be deemed to be collusive.

2. *Condonation*

Like collusion, condonation is also a statutory bar to divorce and, like collusion, it has never been given statutory definition.[36] The bar prevents a spouse who agrees to resume cohabitation with a partner who has committed a matrimonial offence from holding that offence over the other partner's head for ever after. The condoned offence is, however, subject to revival if the forgiven spouse should commit another matrimonial offence.

The existence of condonation as an absolute bar, however, actively discourages attempts at reconciliation. One spouse may condone an act of adultery to try to save the marriage and prevent the destruction of the family. If, however, the gesture proves futile and the marriage is not saved, the ground for a divorce action is lost. Thus the law at present encourages couples not to seek reconciliation because by attempting reconciliation and failing, they would put the eventual dissolution of their marriage in jeopardy.

For this reason, your Committee has been urged to make condonation a discretionary bar so that the courts could take all the factors in the situation into account when deciding to reject or grant the petition. Such a solution, however, might still leave doubt as to when and how the courts will exercise their discretion and may still, therefore, tend to discourage reconciliation attempts. The parties preferring to "play safe" and keep at arm's length.

One of the provisions introduced into English law by the *Matrimonial Causes Act* of 1963 provides a solution to this problem. By that Act, a period of cohabitation for not more than three months, which has reconciliation as its primary purpose, is not deemed to have condoned the offence. Although in English law condonation remains an absolute bar.[37]

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[36] See Report pp. 144-45.
[37] See Report pp. 67-68 and p. 152.

Furthermore, your Committee recommends that the doctrine of revival be abolished. If attempted reconciliation is not considered condonation, the doctrine of revival is unnecessary. If the reconciliation attempt fails, a divorce may still be granted. If, however, the reconciliation succeeds, it is better that the couple put the past completely behind them, so that the marriage may make a fresh start with nothing, in the legal sense at least, hanging over it.

RECOMMENDATION

Your Committee recommends that the statutory bar to divorce of condonation be retained in the law of Canada subject to the discretion of the Court provided that a resumption of cohabitation by the spouses for a period of not more than three months which has reconciliation as its primary purpose shall not be deemed condonation, and further provided that a marital offence which has been condoned shall not be capable of being revived.

3. *Connivance*

Connivance is where the petitioner spouse encourages, assents to or aids in the commission of the matrimonial offence, thus becoming accessory to the offence. The aid or encouragement may under certain circumstances be by silent as well as spoken action, or implied consent, or by so arranging conditions as to assist its commission. Such action on the part of the petitioner should of course, deprive the petitioner of the aid of the court as against the respondent and co-respondent.

It is unnecessary to attempt a definition of connivance as it has been a bar to divorce for many years and is made known in numerous decisions of the courts both in England and Canada.

RECOMMENDATION

Your Committee recommends that connivance remain a bar to divorce within the discretion of the court in each individual case.

JUDICIAL SEPARATION

Judicial separation is on occasions a useful power to be possessed by the Court.[38] Prior to the United Kingdom Act of 1857, it was known in England as divorce *a mensa et thoro* and its meaning is separation from bed and board without the right of remarriage. Its usefulness is when the court wishes to give legal status to a separation which usually has already taken place and frequently in association with orders involving maintenance and the custody of children. Such a legal arrangement, while having legal validity which the police will enforce as between man and wife, does not preclude the possibility of eventual reconciliation.

For some reason authority to order judicial separation was omitted from the Dominion Act of 1930 which conferred on the Supreme Court of Ontario power to decree dissolution and annulment of marriage. That Act should be amended to correct what was likely an inadvertent omission.[39]

Most, if not all, of the other provincial courts have had the power as a result of pre-Confederation law which remained in force by virtue of Section 129 of the *British North America Act*. As such, the provinces are unable to amend or abolish the pre-Confederation law, so the time has come for the Parliament of Canada to accept its responsibility which it has possessed for the past one hundred years and has continually avoided.

RECOMMENDATION

Your Committee recommends that the *Divorce Act (Ontario)*, of 1930 be amended to conform and that the prospective Divorce Act of Canada contain a provision granting to the courts of all the Provinces of Canada and to the Senate by virtue of the *Dissolution and Annulment of Marriages Act*, a uniform authority to decree Judicial Separation.

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[38] See Report p. 148.
[39] See Report pp. 61-62.

COURT JURISDICTION

In the *Divorce Act (Ontario),* which conferred authority to decree dissolution of marriage, and in the pre-Confederation statutes in the provinces other than Quebec and Newfoundland, it was uniformly the Supreme or Superior Court which was selected to administer the law of divorce.[40] In the experience in Ontario of almost forty years and in the other provinces of the past one hundred years, the Supreme Courts have proven in some respects inadequate for the task. The Judges of the Supreme Courts visit the county towns, other than the cities, usually twice a year, so that long lists of divorce cases await the Assizes and are dealt with perfunctorily. They are run through rapidly as something of a nuisance in order that the more interesting and financially important actions may be heard.

Moreover, such matrimonial and family proceedings are continuing matters. While the marriage itself may be permanently and decisively disposed of, matters such as the division of marital property, alimony and the custody and maintenance of the children remain to be dealt with from time to time. To reach the judge who made the original order involves a trip to the provincial capital or a wait for a maximum of six months for the next Assizes, when unfortunately a different judge may be sitting.

To meet this obvious difficulty, the former Chief Justice of Ontario, the Honourable James McRuer, advised that the County Courts be given concurrent jurisdiction with the Supreme Court in matters of divorce. The County Court Judges are resident in the county towns and their local offices and officials are available at all times. The judges are present when required to explain or vary an order or to make additional provisions.

Chief Justice McRuer spoke from his own long experience of the Supreme Court when speaking of the obvious advantage of having matrimonial matters dealt with by local judges. He would not interfere with the present authority of the Supreme Court Bench. Divorce litigants should have access to the Supreme Court if they wished a High Court trial, as they are now in cases beyond the jurisdiction of the County Courts, but neither should the great advantage of the County Courts be denied them. Your Committee has had recommendations that Matrimonial Causes be sent to family courts. This is a matter that could be

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[40] See Report pp. 149-51 and p. 61.

left to conferences between the Minister of Justice and Provincial Attorneys General because of the lack of uniformity in such courts at present.

RECOMMENDATION

Your Committee recommends that the County Courts of all provinces having jurisdiction to dissolve marriage be given jurisdiction in divorce equally and concurrently with the Supreme Courts of the respective provinces.

PARLIAMENTARY DIVORCE

The Parliament of England has for centuries possessed power to dissolve marriages and when the *British North America Act* gave to Canada a Constitution "similar in principle to that of the United Kingdom", the Parliament of Canada obtained a similar jurisdiction, and has exercised that authority as it has been necessary to the present time.[41] The Courts of Quebec have not at any time possessed jurisdiction in divorce, nor had those of Ontario until the passing of the *Divorce Act (Ontario)* of 1930. When Newfoundland entered Confederation in 1949 her courts also had no such jurisdiction. Those seeking divorce in Ontario and Quebec therefore petitioned Parliament, until Ontario obtained her own courts. Thereafter, Quebec was alone in this respect until joined by Newfoundland. Since then divorce for persons domiciled in these two provinces has been by way of private bill and by Act of Parliament. The jurisdiction still remains but in 1963 Parliament conferred power on the Senate to dissolve marriages by Resolution by passing the *Dissolution and Annulment of Marriages Act.* This enactment constituted a supplementary procedure, which in practice has been a marked success. Professional jurists hear the evidence respecting each petition and report thereon with recommendations, and the Senate by passing a Resolution enacts the dissolution or annulment or rejection of the petition as it sees fit, on Report of the Standing Committee on Divorce.

The number of divorces granted since Confederation have grown with the passing years. Dr. Ollivier told your Committee that in the first twelve years following Confederation Parliament when acting for both Ontario and Quebec enacted eight divorces. In the year 1966, the Senate passed over one thousand divorce resolutions.

A consideration of this procedure may not be within your Committee's terms of reference, but, in any event, the system created by the Act of 1963 is working satisfactorily; your Committee has not examined it critically and makes no recommendations at this time with respect to it. Should a considerable increase in the number of divorce petitions result from the additional grounds which the Committee is recommending, the problem can be readily solved by an increase in staff.

Your Committee is of opinion that the changes in the substantive law of divorce which it is recommending should be of Canada-wide application. The purpose of the changes proposed is to give relief as required to Canadian citizens and to improve the administration of

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[41] See Report pp. 53-54 and pp. 64-65.

justice to the benefit of the individual. The recommendations are not regional in character and Parliament's relevant jurisdiction and responsibility is to the nation as a whole.

RECOMMENDATION

Your Committee recommends that the *Dissolution and Annulment of Marriages Act* be amended as required to make the provisions of the prospective Canadian Divorce Act herein recommended applicable to divorce by Senate Resolution as well as to divorce by decree of the Courts.

APPEALS IN PARLIAMENTARY DIVORCE

In one particular the *Dissolution and Annulment of Marriages Act* has proven in practice to be unsatisfactory. This is as respects so-called appeals against a Resolution of the Senate passed on the authority of a report by the Standing Committee on Divorce and almost always in accordance with a recommendation by the Senate Commissioner. The Resolution does not take effect so as to dissolve the marriage, and thus permit the parties to remarry, until thirty days after its passage, and during these thirty days, an aggrieved party may file a petition for a private bill, the effect of which is to stay the operation of the Senate Resolution until the bill has been disposed of.

Only one such petition has been filed since the Act was passed in 1963, so that the procedure of appeal has not been accepted as satisfactory by those affected, and it has proved to be unsatisfactory in practice.

The period of delay after the passing of the Resolution until the thirty days have elapsed or the bill is disposed of is undesirable, and the consideration of the bill by a Senate Committee presents problems. If the bill is considered by the Standing Committee on Divorce, objection is taken that the so-called appeal is to the judicial body which has already acted in the matter by approving the divorce in the first place and then presenting the Resolution to the Senate. This objection is made though the individuals on the Committee did not sit when the Resolution was under consideration and were unfamiliar with the facts of the case.

If a committee were chosen to hear the appeal whose members were not on the Standing Committee, the members would be inexperienced in parliamentary divorce under the *Dissolution and Annulment of Marriages Act*. In addition the highly undesirable situation would be created of one committee of the Senate overruling or revising another committee in a judicial proceeding, and particularly so since the evidence submitted to the second committee is not restricted to that heard by the first committee, and in practically all instances would differ substantially.

It is, therefore, recommended that when the Commissioner makes his decision on the evidence heard by him, he notify the parties accordingly and that a thirty day delay take place thereafter before the Commissioner's decision be considered by the Standing Committee, during which time the parties may appeal to the Standing Committee on the evidence already presented.

If no appeal is taken the Standing Committee may move the Resolution on the authority of the Commissioner's decision. If an appeal is taken, the Standing Committee's duty would be to review the evidence and hear such argument as the parties might present on the evidence, and recommend to the Senate such action as the Committee might deem just. The Senate itself would then act with finality.

This change would shorten and speed the procedure. The Commissioner would be relieved of reporting at length on the facts of each case as now, except when an appeal is taken, and the aggrieved party could appeal to an experienced body which would come fresh to the hearing.

RECOMMENDATION

Your Committee recommends that the *Dissolution and Annulment of Marriages Act* be amended by the repeal of Sections 2 and 3 thereof and the substitution therefor of the following:[42]

Marriage dissolved or annulled.

2. (1) The Senate of Canada may, on the petition of either party to a marriage, by Resolution declare that the marriage is dissolved or annulled, as the case may be, and immediately on the adoption of the Resolution the marriage is dissolved or annulled, as the case may be, and shall be null and void, and thereafter either party may marry any person whom he or she might lawfully marry if the said marriage had not been solemnized.

Officer's Recommendation.

(2) The Senate shall adopt a Resolution for the dissolution or annulment of a marriage only upon referring the petition therefor to an officer of the Senate, designated by the Speaker of the Senate, who shall hear evidence, and report thereon, but such officer shall not recommend that a marriage be dissolved or annulled, except on a ground on which a marriage could be dissolved or annulled, as the case may be, under the laws of England as they existed on the 15th day of July, 1870, or under the *Marriage and Divorce Act,* Chapter 176 of the Revised Statutes of Canada, 1952, or on any ground added by the *Divorce (Extension of Grounds) Act,* 1967.

Report of Commissioner.

(3) In any uncontested case, the Commissioner shall report his recommendations to the Senate's Standing Committee on Divorce, together with such facts and finding as may be required in each instance by the Committee or the Chairman thereof and the Committee may recommend the

[42] See Report pp. 164-65.

passage of a Resolution in accordance with the Commissioner's recommendation and on the authority thereof, or may take such other action as to it seems just.

Notification of Parties.

(4) Following the hearing of each contested case the Commissioner shall deliver personally or by registered mail to the parties or their respective legal representatives of record a copy of his report and recommendation and on the expiration of thirty days thereafter such report and recommendation may be taken into consideration by the Standing Committee of the Senate on Divorce.

Provision for Appeal.

3. (1) During the said thirty days, any of the parties to such contested case may give notice of appeal against the recommendation of the Commissioner to the Standing Committee of the Senate on Divorce, which shall hear the appeal on the evidence already submitted, together with arguments and representations of the parties or their legal representatives.

(2) If no such appeal is lodged within the said thirty days, the said Standing Committee may recommend the passage of a Resolution in accordance with the Commissioner's recommendation and on the authority thereof, or may take such other action as to it seems just.

(3) If an appeal is lodged with the said Standing Committee within the said thirty days, the Committee shall hear the appeal on the evidence already presented, together with the arguments and representations of the parties or their legal representatives, and may approve the Commissioner's recommendation or may vary and amend it as to the Committee seems just and may recommend to the Senate accordingly.

CONCLUSION

In the foregoing pages is set forth what your Committee believes to be a comprehensive reform of the divorce laws of Canada. The acceptance of the Committee's recommendations would broaden the grounds upon which marriages may be dissolved, in order to meet the needs of modern society. It would give to the courts of the provinces and to the Senate on Resolution, authority to dissolve marriages on proof of such marital offences as adultery, cruelty and desertion, and to dispose of the legal ties in cases where the marriage is irretrievably broken down because of the incapacitating illness of one of the spouses, whether mental or physical, or of criminality and long-term imprisonment, alcoholism, drug addiction or non-consummation, or of the disappearance of one of the marriage partners, and in addition where the marriage has broken down although there is no triable fault alleged, or incapacity, but in which there is no reasonable prospect of a resumption of cohabitation.

The exercise of these powers by the courts and the Senate, in accordance with the safeguards provided, will bring relief to many thousands of Canadian citizens, a relief which is sorely needed, and will contribute to the well-being of society and to the happiness of many.

In addition to broadening the grounds for divorce, married women deserted by their husbands will be given access to the courts on equality with men. Decrees as to alimony or maintenance, the division of marital property and the custody of and access to children will become possible, coincident with decrees of divorce as ancillary to divorce. Decrees of judicial separation will be uniform within the jurisdiction of the courts in all provinces. The law with respect to collusion and condonation will be clarified, and access to the assistance of the courts will be more readily available when the County Courts are given concurrent jurisdiction with the Supreme or Superior Courts in matrimonial causes and matters.

It has been the effort of your Committee to make the law of divorce and related matters more in accordance with the needs of the people, more humane and at the same time more practical.

While this first part of your Committee's Report contains its recommendations concisely stated, a reading of the following parts is respectfully urged upon those who would understand your Committee's thinking and reasons therefor.

PART II

CANADIAN DIVORCE LAW AND THE LAW OF OTHER COUNTRIES

CANADA

1. *The Evolution of Canadian Divorce Law*

Although the Parliament of Canada enjoys exclusive jurisdiction over marriage and divorce by virtue of section 91, head 21 of the *British North America Act* of 1867, expressed in the words "Marriage and Divorce," the essence of Canadian divorce law is to be found in an intermingling of English and pre-Confederation colonial statutes that have undergone only limited amendment by the federal Parliament. The courts of eight of the provinces (British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, New Brunswick, Nova Scotia and Prince Edward Island) have the power to grant divorces *a vinculo matrimonii* (from the bonds of marriage) while those of Quebec and Newfoundland have not. In the Yukon and Northwest Territories, the courts also have authority to grant divorces. Parliamentary divorces are provided for persons domiciled in Quebec and Newfoundland, or whose domicile is uncertain. With the exception of the three Atlantic provinces, which have divorce law of their own enactment antedating Confederation, the divorce law administered by the courts of the provinces, other than Quebec and Newfoundland, is basically the same as the English divorce law as it was on July 15, 1870. The English law of that date was set out in *The Divorce and Matrimonial Causes Act* of 1857.

This complicated pattern and the predominance therein of nineteenth century English law has resulted from the piecemeal growth of Canada and the introduction of English law into the various colonies before they joined Confederation. In colonies of settlement, such as Nova Scotia, the common law of England and the then current existing English statute law became the law of the colony, while in colonies acquired by cession, such as Quebec, the existing laws of the territory, if there were any, continued in force until or unless expressly altered by the colonial legislature.

In colonies of settlement, it was established by the eighteenth century that laws could be made only with the assent of an assembly in which the people were present either in person or by their representatives. Once a colony possessed its own legislature and made its own laws, statutes passed in England no longer automatically applied to the

colony unless specifically stated to do so. While the Imperial Parliament could, and often did, legislate for the Empire as a whole and for certain specific colonies on particular occasions, Imperial legislation became applicable *prima facie* to the United Kingdom only and not the colonies. Any colony could, of course, adopt English law in whole or in part by legislative action and any law so instituted could be changed by the colonial legislature.

At the time of Confederation, section 129 of the *British North America Act* provided that the law then in force in the provinces of Upper and Lower Canada, Nova Scotia and New Brunswick should continue in force until and unless repealed, abolished or altered by the Parliament of Canada or the provincial legislatures according to their respective legislative authority as set out in the Act. Similar provision was made for the continuance of the existing law of the other provinces and territories when they joined the Canadian federation.

The three provinces of Nova Scotia, New Brunswick and Prince Edward Island were all originally part of Nova Scotia, which was a British colony of settlement and subject to the law of England. Nova Scotia was granted a Legislative Assembly, the first meeting of which was held on October 3, 1758. Nova Scotia law, therefore, was the English law as of that date, and thereafter subject to change by the colonial legislature, or by Imperial legislation that by express terms or necessary implication applied to Nova Scotia. Since England had no divorce law at that time other than judicial separations granted by the ecclesiastical courts, there was no divorce court in Nova Scotia empowered to grant divorces *a vinculo matrimonii*.

Prince Edward Island, acquired in 1763, became a separate province in 1769 and its first Assembly met in 1773, while New Brunswick became a separate province with its own legislature in 1784. These provinces thus acquired the law of England as of October 3, 1758, and later Nova Scotia law as of 1773 and 1784 respectively. Thereafter these provinces made their own law. But since there were no civil divorce courts in England in 1758, there were none in Prince Edward Island or New Brunswick. Nova Scotia, however, lost no time in enacting its own civil divorce law. An Act of 1758[1] gave the Governor with the members of his Council authority to hear and determine matters relating to prohibited marriage and divorce. The Nova Scotia legislature provided that marriages should be declared null and void only on

[1] 17 Geo. II, c. 17.

grounds of impotence and consanguinity within the degree prohibited by the English Statute 32 Henry VIII, c. 38 and that divorce could be granted for adultery, and desertion without necessary maintenance for three years. In 1761 a further Act[2] removed desertion as a ground for divorce but added cruelty. Nova Scotia is still the only province in Canada in which cruelty is a ground for divorce. The composition of Nova Scotia courts was somewhat altered in 1841, and in 1866 a "Court for Divorce and Matrimonial Causes" was established. This court retained not only the pre-existing authority but it was also given the same powers in respect of, and incidental to, divorce and matrimonial causes and the custody, maintenance and education of children which were possessed by the divorce courts of England at that time. By virtue of section 129 of the *British North America Act,* these laws continued in force after Confederation and form the basis of divorce law in Nova Scotia, except as modified by the Dominion Statutes of 1925 and 1930.

New Brunswick also entered Confederation with a divorce law of its own enactment. The first Act was passed in 1787 but later revised in 1791[3]. This established a Divorce Court and provided as grounds for divorce frigidity, impotence, adultery and consanguinity within the prohibited degrees. While the number of reported cases from New Brunswick is small, it seems that the effective ground for divorce in that province is adultery.

Theoretically, Prince Edward Island acquired the divorce law of Nova Scotia when it was constituted a separate province in 1769, but this law remained in practice a dead letter until the province established its own divorce courts by Acts of the legislature in 1833 and 1835. The Act of 1835 was not utilized, however, until 1945 when Rules of Practice and Procedure applicable to the divorce court were promulgated. Concurrent jurisdiction was conferred on the Supreme Court of Prince Edward Island in 1949.

The Province of Ontario became a separate province with its own legislature by virtue of the *Constitutional Act* of 1791. When the Legislative Assembly first convened on October 15, 1792, the common law of England was adopted as the law of the province, but otherwise English law ceased to apply. Thus Upper Canada had no divorce law. Since none had been enacted before Confederation either by the legislature of Upper Canada or by that of the United Province of Canada,

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[2] I Geo. III, c. 7.
[3] 31 Geo. III, c. 5.

Ontario entered Confederation without any such law. Since divorce fell within Federal jurisdiction by the *British North America Act,* the province has since Confederation been unable to enact legislation on divorce of its own. The Ontario courts derive their jurisdiction from a statute passed by the Federal Parliament in 1930. This act introduced the law of England as to the dissolution and annulment of marriage as of July 15, 1870.

Quebec too entered Confederation without any provisions for the dissolution of marriage. Although English criminal law was introduced into Quebec in 1763 and was subsequently continued, the *Quebec Act* of 1774, section 8, re-established Quebec law in matters concerning property and civil rights. The French Civil law was continued by the *Constitutional Act* of 1791. The Civil Code, which was enacted by the United Province of Canada in 1866 and which was continued in force by the British North America Act, states quite clearly in Article 185: "Marriage can only be dissolved by the natural death of one of the parties, while both live it is indissoluble." Since the Quebec legislature cannot repeal or amend that clause and since the Parliament of Canada which can, has not done so, the courts of the province of Quebec have no authority to grant dissolutions of marriage. They do, however, have power to grant judicial separations and declarations of nullity.

Although Newfoundland did not join Canada until 1949, its courts lack the power to grant divorces *a vinculo matrimonii.* Newfoundland did not acquire the English law of 1857 because Newfoundland received its own legislature in 1832. Thus the laws of England which applied in Newfoundland were those in force in 1832 only, and the Supreme Court of the province has held[4] that the provincial courts had in 1832 only the jurisdiction of the English Ecclesiastical Courts, which could decree only judicial separation (*divorce a mensa et thoro*) and not dissolutions of marriage (*divorce a vinculo matrimonii*). The English secular courts did not acquire jurisdiction to grant divorce until twenty-five years later.

The divorce law of the remaining provinces, British Columbia, Alberta, Saskatchewan and Manitoba and the Yukon and Northwest Territories is substantially that contained in the English *Divorce and Matrimonial Causes Act* of 1857. The reason for this again is due to the introduction of English law and its subsequent continuation when these territories and provinces became part of Canada.

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[4] *Hounsell v. Hounsell* (1949) 3 L.R. 38, Nfld.

In the case of British Columbia, the laws of England as of November 19, 1858, were declared to be in force by a Royal proclamation in 1858. Similar provision was made by a United Kingdom Ordinance in 1867 when Vancouver Island and British Columbia were united and the same provision remained in force after British Columbia entered the Canadian federation in 1871, subject of course to alteration either by the Parliament of Canada or the provincial legislature, according to their respective jurisdiction under the *British North America Act*. Thus British Columbia now has in force the English Act of 1857.

The provinces of Manitoba, Alberta, Saskatchewan were all carved out of the territory surrended by the Hudson's Bay Company in 1869. The *Rupert's Land Act* of the Imperial Parliament[5] which provided for the acquisition by the Crown of Rupert's Land and the Northwest Territories from the Hudson's Bay Company, also provided that the laws in force in these territories on July 15, 1870, when they were united with Canada would remain in force until altered by the Canadian Parliament or the Lieutenant-Governor of the Northwest Territories. The *Northwest Territories Act* of the Canadian Parliament in 1886 provided that the laws previously in force in the Territories would continue and the *Alberta and Saskatchewan Act* of 1905 similarly provided that the then existing laws would continue in force in the provinces of Alberta and Saskatchewan until altered or repealed by the Dominion Parliament or the respective provincial legislature. Thus the law of divorce in these provinces is still the law of England as of July 15, 1870, and consequently their divorce law is based upon the English Statute of 1857. The situation in Manitoba is essentially the same, although as a result of a court case[6] a Provincial Statute and a Federal Statute were felt necessary to declare it so formally.

Likewise, the divorce law of the Northwest Territories and Yukon is based on the 1857 English Statute. By the *Northwest Territories Act* of 1886, the Civil and Criminal Law of England as of July 15, 1870, was continued in the Territories, subject of course to repeal or amendment by the appropriate authority. The Yukon which was carved out of the Northwest Territories in 1898 acquired the existing law of the Territories.

What then was the Law of England on the magic date of July 15, 1870? The *Matrimonial Causes Act* of 1857 provided for a dissolution of marriage on the petition of the husband if his wife had committed

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[5] 31-32 Victoria, c. 105.
[6] *Sinclair v. Mulligan*, 5 Man. L.R., 17.

adultery since the celebration of the marriage.[7] For the wife, however, to obtain a divorce, it was necessary for her to prove that since the celebration of the marriage the husband had been guilty of either (i) incestuous adultery; or (ii) bigamy with adultery; or (iii) rape, sodomy or bestiality; or (iv) adultery coupled with such cruelty as would have entitled her to a divorce *a mensa et thoro*; or (v) adultery coupled with desertion for two years or longer without reasonable excuse. Thus a "double standard" was established that permitted a husband a greater latitude in this regard than was possessed by his wife.

This so-called "double standard" was removed in Canada in 1925 when the Parliament of Canada exercised for the first time its general legislative jurisdiction over Marriage and Divorce. Heretofore, Parliament had passed only private divorce acts. The *Marriage and Divorce Act* of that year permitted the wife to sue for divorce on the ground of her husband's adultery alone. This act applied, of course, only in those provinces where the courts had power to grant divorces *a vinculo*, but the same principle has been followed since in parliamentary divorce.

Since then there have been only four other federal acts directly concerned with divorce. Two of these were applicable to specific provinces only and all of them concerned the extension of the jurisdiction of the courts rather than the grounds for granting divorces. The *Divorce Jurisdiction Act* of 1930 permitted a wife who had been deserted for two years or more by her husband to petition for divorce in the province in which she was domiciled at the time of the desertion. Before this measure, since the domicile of a married woman is in law that of her husband, the deserted wife had to petition in the province or country in which her deserting husband was then domiciled. In the same year, Parliament granted to the Supreme Court of Ontario jurisdiction to decree dissolution and annulment of marriage in accordance with the law of England as it existed on July 15, 1870. This gave Ontario its first divorce law.

The fourth act of Parliament, passed in 1937, regularized a curious situation that had arisen in British Columbia. By the 1857 Act, divorce cases in England had been heard by three judges from whom there was an appeal to the House of Lords. But when the laws of England were introduced into British Columbia, the powers exercised by three judges in England were granted to a single judge in British Columbia and no provision was made for appeal. Consequently, it was held that there was no right of appeal from a single judge in British Columbia when either

[7] See Report pp. 65-66.

granting or refusing a divorce. The *British Columbia Divorce Appeals Act* of 1937 of the Dominion Parliament conferred the right of appeal in divorce cases to the Court of Appeal of British Columbia.

The last and most recent act to be passed by Parliament on the subject of divorce was the *Dissolution and Annulment of Marriages Act* of 1963. This act provided a new procedure for the granting of parliamentary divorces. Before the importance of this act can be considered, it is necessary to look more closely at parliamentary divorce.

2. *Parliamentary Divorce*

A parliamentary divorce is procured by the passage of a private Act of Parliament dissolving a particular marriage. Parliament, as the supreme leglislative power, has the right to exempt persons from the application of specified laws of the country, if it sees fit to do so. The Parliament of the United Kingdom granted divorces by private Act of Parliament long before the establishment of the English Divorce Courts in 1857. Thus, although marriages were otherwise indissoluble under the ordinary law, Parliament made exceptions in specific instances. The preamble of the *British North America Act* indicates the intention of the federating provinces to have a constitution "similar in principle to that of the United Kingdom." Accordingly, the Parliament of Canada exercised after Confederation a jurisdiction similar to that of the English Parliament. The Parliament of Canada is the only legislative body in Canada with authority to pass private divorce acts, since it alone has jurisdiction in matters of "Marriage and Divorce".

The existence of parliamentary divorce has met the need of persons domiciled in provinces which lack divorce courts, to obtain dissolutions of marriage. Thus, although residents of Quebec and Newfoundland, and prior to 1930, of Ontario, have been unable to seek relief in the courts of their provinces, they have been able to appeal to Parliament. While Parliament has not imposed an unwanted divorce jurisdiction on the courts of those provinces not seeking it, it has not prevented the residents of those provinces from obtaining divorces.

Theoretically, the jurisdiction of Parliament in granting parliamentary divorce is quite unfettered. It has power to grant a dissolution of marriage to any petitioner domiciled in Canada and for any cause or for no cause at all, as it may se fit. However, Parliament has not exercised its wide jurisdiction to the full. Its practice has been to grant

divorce only on such grounds as the English courts recognized in 1870, save that it will grant a wife a divorce on the ground of her husband's adultery without qualification.

Similarly, although Parliament's power to grant a divorce is unqualified, in fact it has entertained petitions only from persons who lack an alternate remedy in the courts. That means from those domiciled in Quebec and Newfoundland, or from those whose domicile in a province is in doubt.

While parliamentary divorces were rather few in the nineteenth century, the number has grown rapidly since 1900. Consequently, in 1963 the *Dissolution and Annulment of Marriages Act*[8] delegated to the Senate the power to dissolve and annul marriages by resolution, without concurrence by the House of Commons; subject to an appeal to Parliament as a whole. Such an appeal may be made by the aggrieved party within 30 days after the passage of such a resolution by petitioning Parliament for a private act. Such a petition has the effect of staying the resolution until the bill has been disposed of by Parliament. If the appeal is not made, the resolution becomes effective 30 days after the adoption of the resolution by the Senate.

Under the *Dissolution and Annulment of Marriages Act,* each petition must be referred to an officer of the Senate, designated by the Speaker, who hears the evidence in the case and reports on it to the Senate. This officer, however, may recommend the dissolution or annulment of the marriage only "on a ground on which a marriage could be dissolved, or annulled, as the case may be, under the laws of England as the existed on the 15th day of July, 1870, or under the *Marriage and Divorce Act,* Chapter 176 of the Revised Statutes of Canada, 1952." In effect, this means that parliamentary divorces are granted on the same grounds as divorces are granted by the courts in the Prairie Provinces, British Columbia and Ontario.

The existence of this procedure does not fetter Parliament in any way. When the case has been referred to the Divorce Commissioner and his Report has been received, the Senate has a right to refuse or to grant a Resolution of Divorce as it sees fit, subject, of course, to the right of the parties to apply for a private bill from Parliament as a whole. Parliament can still pass private divorce bills as it has in the past. The Senate has been given an additional jurisdiction in respect of divorce, but the sovereign power of Parliament in matters relating to marriage and divorce has not been impaired.

[8] 12 Eliz. II, c. 10.

3. *Jurisdiction*

Parliament is assigned exclusive jurisdiction over "Marriage and Divorce" by the *British North America Act*. The provincial legislatures enjoy exclusive jurisdiction over "Solemnization of Marriage" in their respective provinces. Parliament's jurisdiction extends to the right to grant divorces *a vinculo matrimonii*. The provinces have the right to prescribe the necessary procedural rules and this they have done. The provinces draw their authority from Section 92, subsection 14, of the *British North America Act,* whereby the provinces are authorized to make laws dealing with "administration of justice in the province, including the constitution, maintenance and organization of provincial courts, both of civil and criminal jurisdiction, and including procedure in civil matters in those courts." While the courts for the administration of divorce laws are at present the provincial courts, Parliament has authority to establish a federal divorce court under section 101 of the *British North America Act*. Parliament may also confer divorce jurisdiction on provincial courts as it has done in the courts of Ontario. It may do so explicitly or implicitly by passing a law without establishing a court for its administration. In this case, it is presumed that Parliament intended the law to be administered by the provincial courts.

While the situation regarding dissolutions of marriage and procedure are quite clear, the jurisdiction of Parliament over judicial separation and matters ancillary to divorce is not specifically stated. However, it is the considered opinion of the Deputy Minister of Justice that Parliament's jurisdiction extends to judicial separation. In ecclesiastical law, a decree of judicial separation from bed and board was known as a divorce *a mensa et thoro,* and this decree was granted only by the church courts. The English Act of 1857 transferred this jurisdiction from the ecclesiastical to the civil courts and renamed the decree judicial separation. The decree under both courts had the similar effect of dissolving the marriage without conferring on the parties the right of remarriage, so that when ten years after the passage of the Act of 1857, the *British North America Act* conferred divorce jurisdiction on the Canadian Parliament, it follows that divorce *a mensa et thoro* (judicial separation) was included with divorce *a vinculo.*

Looked at from another point of view, a marriage creates a new legal status for the parties. New rights and duties are created, such as the obligation to support and the right to consortium, while a right to again marry is extinguished. A divorce *a vinculo* destroys the legal status involved in the marriage and restores the parties to their former positions.

When the divorce is granted, these rights and obligations cease and the parties are free to remarry. A judicial separation is a divorce without the right to remarry. "The legal status created by the marriage has been extinguished," to quote a witness before the Committee, "but the status enjoyed by the parties thereto immediately before the marriage has not been fully restored . . . If Parliament can say that pre-existing rights are fully restored, it can also say they are only partially restored."

It is interesting to note, that in 1879, a parliamentary divorce was granted, an Act for the relief of Eliza Maria Campbell[9] which in fact was a judicial separation, providing that "the said Eliza Maria Campbell shall be and remain separated from the bed and board of her husband." This Act was passed by a Parliament containing as members many of the authors of the *British North America Act.* They seemed to have had no doubts as to Parliament's jurisdiction. However, it should be added that this was the only act of judicial separation passed by Parliament and that its validity has not been judicially tested. But neither has it been judicially questioned.

Parliament has not in recent years dealt with matters ancillary to divorce.

Heretofore, these matters have been dealt with by the provinces, if for no other reason than that Parliament has refrained from doing so. The Committee is of the opinion that the exclusive jurisdiction of Parliament over divorce includes legislative authority over matters ancillary to divorce.

Divorces alter the legal status created by the marriage. Jurisdiction with regard to divorce thus includes the abolition of the rights and obligations created by the marriage and the restoration of certain pre-existing rights. Such rights can be terminated or restored in whole or in part.

A husband has a duty to maintain his wife. That obligation normally ceases when the marriage is dissolved because the relationship between the parties no longer exists. As Parliament is competent to legislate to divorce, it may also define the extent to which a dissolution of marriage alters the rights and obligations inherent in marriage. Parliament can, therefore, provide for the continuation of the obligation of the husband to support the wife.

A similar argument can be advanced regarding the maintenance and custody of children. While a marriage exists both parents have joint

[9] 42 Victoria, c. 79.

custody of the children and the husband is under an obligation to provide for their maintenance and education. The termination of the marriage by a divorce interferes with these obligations and Parliament's jurisdiction, relative to divorce, necessarily includes authority to stipulate to what extent they shall be continued, altered or destroyed.

The Committee's authority for the foregoing is a memorandum of E. A. Driedger, Q.C., Deputy Minister of Justice. This document is presented here verbatim:

DEPARTMENT OF JUSTICE

Ottawa 4, December 28, 1966.

The Honourable A. W. Roebuck,
The Senate,
Ottawa, Ontario.

Dear Senator Roebuck:

In your letter of October 20 you asked for my views on two additional points as follows:

(a) whether Parliament has jurisdiction with regard to judicial separation, and

(b) whether Parliament has jurisdiction with respect to alimony, custody and maintenance and division of property of divorced persons and their families.

I have now given some consideration to these problems and am able to put my views before you. I should like to state at the outset, however, that the views hereinafter expressed are not in any sense to be regarded as the views of the Government or any member thereof. They are merely my own personal opinions which I offer for such assistance as it may be to your Committee.

Before dealing with your questions I think it is important to bear in mind the fundamental nature of marriage and divorce from a legal point of view. A marriage creates a new legal status between the parties thereto. At the moment of marriage new rights and obligations between the parties thereto arise, and at the same time a pre-existing right is extinguished. Thus, there arise the obligation to support and the right to consortium; at the same time, the pre-existing right to marry is lost. These are some of the essential legal characteristics of a marriage; without them, the marriage status would not exist.

A divorce *a vinculo matrimonii* also changes the legal status of the parties; it destroys the legal status created by the marriage and restores the parties to the status they had before the marriage. At the moment the divorce takes place, the rights and obligations inherent in the marriage cease and the parties are thereafter free to re-marry.

Coming now to your first question, you may recall that I did touch upon this when I appeared before your Committee. I said at that time that having regard to the nature of a decree of judicial separation it was reasonable to conclude that Parliament's jurisdiction extended to both divorce *a vinculo matrimonii* and judicial separation. I might now add to that observation that a judicial separation is in reality a divorce without the right to re-marry. The legal status created by the marriage has been extinguished, but the status enjoyed by the parties thereto immediately before the marriage has not been fully restored. I would therefore consider that the expression "marriage and divorce" includes judicial separation, because the latter deals with the legal status of married persons and the effect of a judicial decree on that status. Putting it another way, one might say that the greater includes the less; if Parliament can say that pre-existing rights are fully restored, it can also say that they are only partially restored.

Dealing now with your second question, as I have indicated, jurisdiction to make laws in relation to "divorce" is in essence jurisdiction to make laws for the alteration of the legal status created by the marriage; the jurisdiction therefore extends to the abolition of the rights and obligations created by the marriage and the restoration of pre-existing rights. As I have already indicated, I think it must follow that these rights and obligations can be terminated in whole or in part.

It is the husband's duty to maintain the wife. If the marriage is dissolved, that obligation normally ceases because the relationship of husband and wife no longer exists. For the reasons I have indicated, I think that Parliament is competent to define the extent to which a dissolution of marriage alters the rights and obligations inherent in the marriage and therefore could provide for a continuation of the obligation to support. The remarks of Lord Atkin in *Hyman v. H.* (1929) A.C. 601, would support this line of argument. He there said at pp. 628-9:

> "The necessity for such provisions is obvious. While the marriage tie exists the husband is under a legal obligation to maintain his wife. The duty can be enforced by the wife, who can pledge his credit for necessaries as an agent of necessity, if, while she lives apart from him with his consent, he either fails to pay an agreed allowance or fails to make her

> any allowance at all; or, if she lives apart from him under a decree for separation, he fails to pay the alimony ordered by the Court . . .When the marriage is dissolved the duty to maintain arising out of the marriage tie disappears."

This view is also supported by the remarks of Crocket, J. in *McLennan v. McLennan* (1940) S.C.R. 335, and by the British Columbia Court of Appeal in *Rousseau v. Rousseau* (1920) 3 W.W.R. 384.

The same reasoning would apply to maintenance and custody of children. During marriage the husband is under a duty to maintain and provide for the education of the children of the marriage, and the husband and wife have joint custody. These are rights and obligations that arise out of the marriage relationship. A divorce, which terminates the marriage relationship, obviously interferes with these rights and obligations, and in my opinion Parliament's jurisdiction in relation to divorce would include jurisdiction to prescribe the extent to which these rights and obligations are to be abrogated or continued. In the *Reference re Adoption Act* (1938) S.C.R. 398, the Supreme Court of Canada upheld provincial legislation, but at page 402 Chief Justice Duff left the door open to federal legislation when he said that

> "We are not concerned with any ancillary jurisdiction in respect of children which the Dominion may possess in virtue of the assignment to the Dominion Parliament by section 91 of the subject of Marriage and Divorce."

The division of property between divorced persons (apart from the question of support or maintenance), as well as such matters as marriage settlements, dower, homestead rights, the right of married women to own property and sue in their own names, etc., may well stand on a different footing. These matters do involve rights and obligations between husband and wife, but they seem to me to relate more to the property and civil rights of the parties to the marriage than to their legal status as married persons. They could vary from time to time and from jurisdiction to jurisdiction and a particular rule is not necessary or essential to constitute a marriage.

The provinces of course have jurisdiction over property and civil rights. Since Parliament has exclusive jurisdiction over marriage and divorce, it would seem to be clear that the provinces could not define the status of marriage or divorced persons and therefore could not prescribe the rights and obligations constituting a marriage or the extent to which the rights and obligations created by the marriage shall be abrogated or continued by a divorce. However, generally speaking, their jurisdiction over property and civil rights would include the matters mentioned in the preceding paragraph as well as the welfare of the

people of the province. The provinces could therefore make provision for the support of its residents, whether they be single, married, divorced, children or adults. Provincial legislation dealing with property and civil rights, and not being legislation *qua* marriage or divorce, would no doubt be valid. If, however, any particular provincial law should clash with a federal law, then, under the normal rule, the latter would prevail.

I was also asked by the Special Assistant of your Committee to clarify the comment I made when I appeared before the Committee to the effect that at the time that Prince Edward Island was established there was no divorce law because the *Divorce and Matrimonial Causes Act* of England was not enacted until 1857. What I had in mind, of course, was that the English *Divorce and Matrimonial Causes Act* did not become the law of Prince Edward Island because the Act was passed after Prince Edward Island established its own legislature in 1773. Between 1773 and the year 1883, when Prince Edward Island enacted its own Divorce Act, the law of Nova Scotia would have applied because Prince Edward Island was originally part of Nova Scotia. However, I believe there was in Prince Edward Island no court with divorce jurisdiction between 1773 and 1883, so that the substantive law of divorce that was carried forward into Prince Edward Island had no practical effect. As I indicated earlier, rules of procedure were not promulgated in Prince Edward Island until 1945 so that between 1883 and 1945 the Prince Edward Island divorce law was not in practice being applied.

I hope that the foregoing clarifies all of the additional points that have been raised. If I can be of any further assistance to your Committee, please let me know and I shall do my best to accommodate you.

Yours truly,

E. A. Driedger,
Deputy Minister.

It may be of significance to note, that in the past, Parliament in the passage of private divorce bills has exercised jurisdiction over these matters. In the Campbell case referred to previously, Parliament prescribed alimony for the wife and laid down how it should be paid. It also determined not only the custody of a child of the marriage but also provided for the child's maintenance. There were five other private divorce acts, passed in the period between Confederation and the year 1896, which made provision for the custody of the children.[10]

[10] 47 Victoria, c. 47; 50-51 Victoria, c. 131; 51 Victoria, c. 110-111; 55-56 Victoria, c. 80.

4. *A Note on Judicial Separation*

Parliament has jurisdiction over judicial separation as well as over the dissolution of marriage. Judicial separation has been defined as "divorce without the right to remarry". Lord Buckmaster in the case of *Hyman v. Hyman*[11] has provided the classic description. He said:

> "Judicial separation, which has been the subject of much learned and mighty censure, is nothing but enforcing through the order of the court an arrangement which the parties could—were they willing—equally effect for themselves, it merely makes in the form and with the force of a decree an arrangement for the parties to live apart."

The law concerning judicial separation in Canada has been determined by the same processes that established the law on dissolution of marriage. British Columbia and the Prairie provinces thus base their law of judicial separation on the law of England as it was on November 19, 1858 and July 15, 1870. The exception is Alberta which in 1927 passed an act purporting to govern judicial separation. The legislature acted on the assumption that the subject was one of civil rights. Judicial separation clearly affects the rights and obligations resulting from the marriage status and thus falls within federal jurisdiction. Hence the validity of this provincial legislation is doubtful. The provisions of the *Domestic Relations Act,* however, are not dissimilar to those in force in the other Prairie provinces.

The English law is founded on the English Act of 1857 already mentioned. The grounds provided in the English Act are adultery, cruelty, and desertion without just cause for two years or more. However, that act provided that relief could also be granted on principles which, in the opinion of the court "are as nearly as may be conformable to those followed by the English Ecclesiastical Courts before 1857." Thus the grounds may be somewhat wider than those actually enumerated. Alberta and Saskatchewan have by statute widened the former grounds for judicial separation adding (i) desertion constituted by the fact that a spouse has failed to comply with an order for restitution of conjugal rights; and (ii) sodomy or bestiality or attempts to commit either offence.

In Nova Scotia and Newfoundland the substance of the English law of 1857 also provides the legal basis for judicial separation. In the latter province, the Supreme Court has all the powers exercised by the English Ecclesiastical Courts prior to 1832 and this includes competence in actions for judicial separation. Nova Scotia has conferred on

[11] (1929) A.C. 601.

its divorce courts the jurisdiction to grant separations in accordance with principles and practices of the English courts in 1866. In New Brunswick the law dates back to an Act of 1791 and the grounds for a separation are the same as those for divorce with the addition of desertion.

Thus in seven provinces there is a degree of uniformity in the law providing for judicial separation. The exception are Ontario, Prince Edward Island and Quebec. Prince Edward Island seems to have no grounds specified at all for the granting of judicial separation, and the Courts of Ontario have held they do not possess the jurisdiction to grant relief in this field. They base their contention on the wording of the *Divorce Act* (*Ontario*), 1930, which provided for the dissolution and annulment of marriage only, and not for matrimonial causes generally. Consequently, in Ontario there is no law of judicial separation which in practice is dealt with as a matter of legal contract between the parties concerned.

Quebec is an exception only in the sense that its law is not based upon the English law of 1857. The Courts of Quebec do grant "separations from bed and board". Voluntary separation has no legal recognition in that province. A written separation agreement made by the spouses will not be enforced by the courts. While the existence of such an agreement may indicate that no desertion has taken place, it can in no way change the legal duties of the marriage partners to each other or to their children. By Quebec law, a husband and wife owe each other mutual fidelity, succor and assistance. A wife is under an obligation to cohabit with her husband, and reside with him wherever he chooses to live. For his part, a husband has a duty to receive his wife and maintain and support her to the best of his ability and condition. Any breach of these conditions by one partner, gives the other grounds for action in separation from bed and board. Such separation may be demanded on the grounds of adultery or of "the outrage, ill-usage or grievous insult committed by the other."

Since a dissolution of marriage can be obtained in Quebec only through parliamentary divorce and since a proportion of the population of the province find divorce contrary to their religious beliefs, judicial separation is a common procedure in that province.

ENGLISH DIVORCE LAW

Since the basis of Canadian divorce law rests, for the most part, upon English law, it may be useful to put on record a brief summary of the English law of divorce and its development in order to provide a basis of comparison.

1. *Ecclesiastical Courts*

Until the *Matrimonial Causes Act* of 1857, the English civil courts lacked the jurisdiction to grant divorces. Up to that time, matrimonial causes had been reserved to the Ecclesiastical Courts. These courts, however, could grant a decree of judicial separation, divorce *a mensa et thoro,* only. Dissolution of marriage, or divorce *a vinculo matrimonii,* was not within their jurisdiction. Exclusive jurisdiction of the Ecclesiastical Courts over all matters relating to marriage and its dissolution extends back very far in English history. Matrimonial causes had been the exclusive prerogative of the Ecclesiastical Courts since the thirteenth century, and perhaps even earlier.

The trial of matrimonial causes within the Ecclesiastical Courts meant that it was canon law rather than common law or even Roman civil law that shaped the law of divorce in England. Before the Reformation, the church regarded marriage as a sacrament and thus it was virtually impossible to obtain a divorce *a vinculo*. The Pope alone could grant a dissolution of a validly contracted marriage and he rarely did. It was relatively easy, however, to obtain a decree of nullity. The grounds for a nullity were precontract (proof of a binding promise to marry another), consanguinity and affinity. Consequently elaborate rules of a highly artificial character grew up around the table of prohibited degrees set out in the Book of Leviticus. These even included blood relationship and relationship by marriage down to the seventh degree. The doctrine of spiritual affinity invented by the Emperor Justinian also became the basis for a similar set of complex rules. The extent of these rules is well illustrated in the case of Roger Donnington whose marriage was declared null and void because before its celebration he had had sexual intercourse with a third cousin of his future wife.

The Reformation worked some changes in the English law. Jurisdiction still remained with the church courts, but the relations between church and state were put on a new basis. Under Henry VIII, the King became head of both Church and State and, by the *Act in Restraint of Appeals* of 1533, the right of appeals from the Ecclesiastical

Courts to Rome was abolished. The Protestant reformers restricted the degrees of affinity by the famous Statute of 32 Henry VIII, c. 38, and thus tightened the procedure whereby nullity proceedings had become a virtual substitute for divorce. At the same time, however, it came to be regarded in the sixteenth century that a divorce granted by the courts on the ground of adultery was a divorce *a vinculo* and entitled the parties to marry again.

This state of affairs did not remain in existence for long, however. In 1602, in Fuliambe's case the court of Star Chamber sitting under Archbishop Bancroft held that a pronouncement of divorce by the Ecclesiastical Courts did not dissolve a marriage completely. This decision effectively closed the door to anyone attempting to obtain a dissolution of his marriage from the church courts. Thereafter, the proceedings in the Ecclesiastical Courts were restricted to granting a divorce *a mensa et thoro*. These were granted on the grounds of adultery, cruelty and unnatural practices. Desertion was remedied by a decree of restitution of conjugal rights, not by a divorce. Disobedience to this decree led to the miscreant being declared contumacious and being excommunicated. By the *Ecclesiastical Courts Act* of 1813 the divine sanction was replaced by a more immediate one; the sentence of excommunication was replaced by imprisonment for not more than six months. The courts also pronounced decrees of nullity on the grounds of consanguinity or affinity, mental incapacity, impotence, force or error, impuberty (i.e. marriage under age) or a prior existing marriage.

2. *Parliamentary Divorce*

While divorce *a vinculo* was unobtainable from the Ecclesiastical Courts, there was a remedy to Englishmen who wanted their marriages dissolved. This was by resort to a private Act of Parliament specifically dissolving their marriage. This was an extremely expensive practice which grew up at the end of the seventeenth century and was a "proceeding, which was open, as a matter of course, on sufficient evidence, to anyone who was rich enough to pay for it."[12] It was a procedure that was little used. Between 1715 and 1852 the number of such divorces averaged less than two a year.

At the end of the eighteenth century, in 1798, as a result of resolutions passed by the House of Lords, the process of parliamentary divorce was rendered more difficult and expensive. After that date all petitions had to be supported by a divorce *a mensa et thoro* from the

[12] Cmd. 9678, p. 4.

Ecclesiastical Courts and by a verdict of damages for criminal conversion brought against the wife's seducer in the Common Law Courts, or to show circumstances explaining their absence. Adultery was the only ground upon which a petition could be presented and normally relief was granted only to a husband; there are only four cases of relief being afforded to the wife and those concerned circumstances of aggravated enormity. It is significant to note, however, that care was taken that the wife was not left destitute. The House of Commons possessed an official known as the "Ladies Friend" whose task it was to ensure that a husband made 'suitable but moderate provision' for his divorced wife.

3. *The Matrimonial Causes Act of 1857*

Following a Royal Commission appointed in 1850, the situation was radically changed by the *Matrimonial Causes Act* of 1857. That act achieved two things. In the first place it established a Civil Court upon which was conferred all jurisdiction then exercised by the Ecclesiastical Courts of England in all matters, causes and suits matrimonial. It also provided for the dissolution of marriage, divorce *a vinculo*. The act substituted judicial separation for "divorce *a mensa et thoro*" and provided that such a decree could be obtained by either husband or wife on the ground of adultery, cruelty or desertion without cause for two years.

Dissolution of marriage was provided for on the ground of adultery of the wife. If a wife wished a divorce, however, she had to establish more than mere adultery, namely:

(i) incestuous adultery;

(ii) bigamy with adultery;

(iii) rape, sodomy or bestiality;

(iv) adultery coupled with such cruelty as would have entitled her to a divorce *a mensa et thoro;*

(v) adultery coupled with desertion, without any reasonable excuse, for two years or upwards.

These more stringent provisions in the case of the wife simply followed the established procedure for the granting of parliamentary divorce. In the case of judicial separation, on the other hand, no distinction was made because of the sex of the petitioner.

By the Act of 1857, connivance, condonation and collusion were made absolute bars and adultery on the part of the petitioner, delay, desertion, cruelty or conduct conducive of adultery were made discretionary bars to petitions for divorce.

While the law passed in 1857 still forms the basis of the divorce law of most of Canada, it has ceased to provide the basis for the current law of divorce in England. There have been numerous acts concerning divorce passed by the British Parliament since 1857. In 1923, the so-called "double standard" was removed, placing the wife on an equal footing with her husband, in that she could sue for divorce on the ground of her husband's adultery alone. She was no longer obligated to prove further matrimonial offences. A similar step was taken in Canada, as previously mentioned, in 1925.

The English divorce courts derived from the practice of the church courts the power to award alimony *pendente lite*. The Act of 1857 further allowed the courts to award permanent alimony and maintenance after decrees were granted of judicial separation or dissolution of marriage. In 1907, the courts were given similar powers after making a decree of nullity of marriage.

A Royal Commission had been the spur to produce the *Matrimonial Causes Act* of 1857. A further Royal Commission, the Gorell Commission, was appointed in 1909 to enquire into the state of divorce law. That Commission recommended that the grounds for granting divorce should be widened to include not only (i) adultery, but also (ii) wilful desertion for three years and upwards; (iii) cruelty; (iv) incurable insanity after five years of confinement; (v) habitual drunkenness found incurable after three years from the first order of separation; (vi) imprisonment under commuted death sentence. It was also recommended that the "double standard" be abolished. This latter was the first, and really the only one, of their recommendations that found early fulfilment.

4. *The "Herbert Act", 1937*

Changes recommended by the Gorell Commission did not find their way into law until 1937. Then a private members bill, introduced by A. P. (later Sir Alan) Herbert was enacted. This Act, the *Matrimonial Causes Act* of 1937 provided three additional grounds for divorce: (i) wilful desertion for three years and upwards; (ii) cruelty; and (iii) insanity after five years confinement. It also made provision for the dissolution of the marriage on the presumption of death of the

other spouse. The additional grounds for nullity recommended by the Gorell Commission were also introduced substantially by the 1937 Act. These were (i) wilful refusal to consummate the marriage; (ii) that either party at the time of the marriage was of unsound mind or mentally defective or subject to recurrent fits of insanity or epilepsy; (iii) that the respondent was at the time of marriage suffering from venereal disease of a communicable form; or (iv) was pregnant by some person other than the petitioner. Grounds (ii) through (iv) were restricted by the proviso that: (i) that at the time of the marriage the petitioner was ignorant of the fact alleged; (ii) that the proceedings were instituted within a year of the marriage; and (iii) that matrimonial intercourse with the consent of the petitioner had not taken place since the discovery by the petitioner of the existence of the ground for the decree.

The relevant English statutes were consolidated in the *Matrimonial Causes Act* of 1950 and in 1965 a further consolidating statute was passed incorporating changes made in the law since 1950.

An important provision of the 1937 Statute stipulated that no divorce proceedings could be taken within the first three years of marriage without special leave. The rationale behind this requirement was that young people in many cases were not making sufficient efforts to overcome the difficulties of adjusting to married life. In case of exceptional hardship to the petitioner or in the event of exceptional depravity on the part of the respondent, special leave can be obtained from a judge to begin proceedings before the three year period has expired.

5. *Bars to Divorce*

In 1963 and 1965, by the *Matrimonial Causes Acts* of those years, the law relating to condonation and collusion was amended. Before those acts, the forgiveness of one spouse for an act of adultery committed by the other was conditional on the offending spouse committing no further matrimonial offences. If further offences were committed, and these could include cruelty and desertion as well as adultery, the old offence of adultery was revived. The 1963 Act, however, provided that adultery which had been condoned could not be revived. It also provided that a period of cohabitation between the parties for not more than three months, which had as its primary purpose reconciliation, should not be deemed to have condoned an act of adultery or cruelty.

The 1963 Act also attempted to solve the problem arising from agreements made by the parties to a divorce before or during divorce

proceedings, such as *bona fide* arrangements to settle questions of maintenance for the wife and children, but there was always the risk that such agreements might be held to be collusive. The 1963 Act, therefore, made collusion a discretionary bar and also made it possible for the court to take any such agreement into consideration and give direction upon it. If the court approves any such agreement, it is freed from the taint of collusion. If the court does not approve, it can either be rewritten or simply abandoned. This provision has made it possible for sensible arrangements to be reached by the parties without running the risk of losing the divorce action because of collusion. At the same time, the bar of collusion still applies to improper agreements. As the judge in the case of *Nash v. Nash*[13] stated:

> "... since the enactment of the *Matrimonial Causes Act,* 1963, it is no longer appropriate to treat all collusion as mischievous or all who negotiate collusive bargains as mischief makers. A collusive bargain, which in the ordinary meaning of the word is corrupt, remains an offence legally and morally, e.g. the procurement of a decree upon a false case of improper pressure by financial bribes or threats upon a spouse to bring a suit or abandon a defence; but a collusive bargain, which represents an honest negotiation between the parties which is not intended to deceive the court either by putting forward false evidence or suppressing or withdrawing a good defence and which takes its place in an agreement which is intended to make reasonable provision for the parties, according to its subject matter, is a perfectly reputable transaction. There is no objection to solicitors and counsel negotiating such a bargain ... the institution of marriage should not be undermined by an unworthy and disreputable market in its dissolution."

Since the introduction of cruelty, desertion and insanity as grounds for divorce in England by the 1937 Act, a considerable jurisprudence has grown up on these subjects. Cruelty and desertion were left undefined in the act and it has been the duty of the courts to evolve practical definitions.

6. *Cruelty*

The legal definition of cruelty in England has stressed that such conduct must have caused danger to life, limb or health, either bodily or mental, or at least given rise to a reasonable apprehension of such danger. Until 1964, it was also assumed that cruelty must have been aimed at, or intended to hurt, the other spouse or the children of the marriage. However, in the cases of *Gollins v. Gollins* and *Williams v. Williams,* the House of Lords held that if the conduct complained of was grave and weighty and if the injury or apprehended injury to the

[13] L.R. 1965, p. 266.

petitioner's health was shown, then it was not necessary to prove that there was an intention to injure.

Actual physical violence is not necessary to establish cruelty. The matrimonial relations between the spouses must be considered, particularly in cases where the alleged cruelty consists not of actual physical violence but of persistent and injurious reproaches, accusations and "nagging". The knowledge and intentions of the respondent, the nature of his or her conduct, the character and physical and mental weaknesses of the husband and wife must all come under consideration. In the Gollins case it was held "that when reprehensible conduct or departure from the normal standards of conjugal kindness caused injury to health or an apprehension of it, it was cruelty if a reasonable person, after taking account of the temperament of the parties and all other particular circumstances, would consider that the conduct complained of was such that 'this spouse should not be called upon to endure it.' "It is a question of fact in each case whether the conduct of this man to this woman, or vice versa, is cruelty."[14]

It is interesting to note that in England, drunkenness, gambling and wilful neglect to maintain are not cruelty *per se*. If persisted in, however, they become so, especially if the culprit has been warned that the conduct may be injurious to the health of the other spouse.

If the petitioning spouse provoked the cruelty complained of, he or she is not entitled to relief. Nevertheless, the provocation must be such as to deprive a reasonable person of self-control. The accused party must be acting under the stress of such provocation and the mode of expressing their resentment must not be unreasonable.

7. *Desertion*

Desertion, like cruelty, has no statutory definition. The Royal Commission on Marriage and Divorce defined desertion as follows:

> "A separation of the spouses which is against the will of one spouse and which is accompanied by an intention on the part of the other spouse without just cause permanently to end the married life together."[15]

It was introduced into England as a ground for divorce in 1937. The physical departure of one spouse from the matrimonial house does not, however, make that spouse necessarily the deserting partner. Desertion is not so much a withdrawal from a place as from a state of things.

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[14] *Proceedings of the Special Joint Committee of the Senate and House of Commons on Divorce*, No. 1, June 28, 1966, p. 19.

[15] Cmd. 9678, p. 47.

Desertion commences from the time when the *factum* of separation coincides in point of time with the will to desert (*animus deserendi*). A separation may take place without there being an *animus*, as in a case where the separation is by mutual consent or by compulsion. If the spouses part by mutual consent without any stipulation as to the length of the separation, either of them may at any time put an end to the agreement. If this happens, the other spouse will be treated as being in desertion from that time on and the three year period would be counted as having begun at that time.

It is possible for the *animus deserendi* to arise before the actual physical separation, and this occurs when the other partner is driven from cohabitation. The mere fact of having left the matrimonial home does not make the partner who actually leaves of necessity the deserting party. If that spouse was forced out by the conduct of the other party, it may be that the other party may be the deserting partner.[16] This is the doctrine of constructive desertion.

Under the *Matrimonial Clauses Act* of 1965 Section 1 (2), if the parties resume cohabitation for a period not exceeding three months with the primary purpose of attempting reconciliation, that period is not considered as interrupting the three year period for establishing desertion.

8. *Insanity*

Unsoundness of mind was first introduced as a ground for divorce by the *Herbert Act* of 1937. By that act the respondent had to be of incurably unsound mind and to have been under care and treatment continuously for a five year period immediately prior to the presentation of the petition. However, if the conduct of the petitioner has been conducive to the insanity either through neglect or otherwise, the decree may be refused. It is required that the respondent be under treatment in a mental hospital and the continuity of the care and treatment and the statutory requirement regarding the detention of persons of unsound mind must have been strictly adhered to. Non-compliance may have the effect of breaking the continuity and thus lead to a rejection of the petition. An Act of 1959, the *Divorce (Insanity and Desertion) Act*, permits a break in continuity of detention for less than 28 days to be disregarded.

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[16] *Winnan v. Winnan*, L.R. 1949, p. 174.

Finally, the degree of insanity is of no concern to the court. The position that has been taken in defining "incurable unsoundness of mind" is that the phrase describes a mental state, which, despite five years treatment, makes it impossiblet for the spouses to live a normal married life, and there being no prospect of improvement which would make it possible in the future.

9. *Provision Regarding Children*

Following the recommendations of a Royal Commission, the Morton Commission, which reported in 1956, greater attention is now paid to the interests of the children of the marriage in any matrimonial proceedings.[17] The *Matrimonial Causes Act* of 1965, section 33, provides that the court may not grant a decree absolute unless it is satisfied with the arrangements made for the care and upbringing of all "relevant" children, if it is practicable to do so and that the arrangements are satisfactory, or are at least the best that can be made in the circumstances. The services of court welfare officers can be drawn upon to assure the court of the suitability of the arrangements and the court can order that the children be separately represented. Despite the introduction of these provisions, there is still dissatisfaction in England not only with the way these provisions are working, but also with their scope as well. The Law Commission has expressed its intention to undertake a thorough investigation of this subject as soon as possible.[18]

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[17] Cmd. 9678, pp. 106-110.
[18] Cmnd. 3123, p. 24.

SCOTS DIVORCE LAW

Although similar to English divorce law, the law of divorce in Scotland is quite distinctive and based upon its own traditions. Currently, the grounds for the dissolution of marriage in Scotland are: cruelty, adultery, desertion, incurable insanity and sodomy or bestiality. A marriage may also be dissolved on the presumption of death of one of the partners. Adultery is a ground derived from the common law while the other grounds have a statutory basis in the *Divorce (Scotland) Act* of 1938. Desertion, however, has been a ground for divorce in Scotland since the sixteenth century when it was introduced by an Act of 1573. Cruelty, insanity, bestiality or sodomy and presumption of death were introduced by the 1938 statute.[19]

1. *Adultery*

Adultery has no statutory definition in Scotland. The term is construed in the light of cases anterior to 1938. In Scots law, adultery committed by the pursuer (petitioner) is no defence to an action of divorce for adultery; the discretionary bar raised by the petitioner's own adultery in English law is unknown. Also long delay or *mora* is no bar to the successful pursuit of an action on the ground of adultery.

2. *Desertion*

In Scotland desertion is a ground for divorce if the defender (defendant) "has wilfully and without reasonable cause deserted the pursuer and persisted in such desertion for a period of not less than three years." The Scottish courts have built up a considerable body of jurisprudence on the subject of desertion in the course of applying the Statute of 1573. The term in the 1938 Act is, therefore, construed in the light of cases decided before 1938. The deserted party must have intimated a desire to continue or resume cohabitation, or in Scots terminology to "adhere". Cruelty, adultery or sodomy would be good grounds for refusing to adhere and thus constitute a good defence. A spouse who commits adultery during the three year period (*the triennium*) is considered to have demonstrated an unwillingness to adhere and to have given the other spouse a cause for non-adherence. Thus he or she cannot seek divorce on the ground of desertion. However, the three year period is vital; once that time has elapsed the right of action vests regardless, and adultery committed after the three year period by the pursuer does not constitute a bar to divorce.

[19] T. B. Smith, *A Short Commentary on the Law of Scotland* (Edinburgh, 1962).

The doctrine of "constructive desertion", whereby a party driven from the matrimonial home may petition on the ground of desertion is unknown to the law of Scotland.[20] Conduct that falls short of a matrimonial offence may, however, be relied on as a defence to a petition based on desertion.

3. *Insanity*

Incurable insanity has been a ground for divorce in Scotland since 1938. The court has discretion to refuse to grant a decree on this ground if the pursuer has been guilty of such wilful neglect or misconduct as to have conduced to the insanity, although adultery *per se* is no bar. The defender to be proved incurably insane must have been under "care and treatment as an insane person" for five years preceding the action. A person is deemed to be under "care and treatment as an insane person" if he or she has been receiving treatment for mental illness as a resident of certain approved institutions, whether as a voluntary patient or otherwise. The period must be continuous for five years, although an interruption of less than twenty-eight days is disregarded.

On granting a decree for insanity, the court may make an order for the pursuer (petitioner) to pay an allowance for the maintenance of the defender and the children of the marriage.

4. *Cruelty*

By the 1938 Act, the courts may grant decrees of divorce where the defender has been guilty of such cruelty toward the pursuer as would justify the granting of a separation *a mensa et thoro* according to the law of Scotland at the time of the passage of the act.

The basic definition of cruelty in Scots law is very similar to the one prevailing in England:

> "Personal violence, as assault upon the woman, threats of violence which induce the fear of immediate danger to her person, maltreatment of her person so as to injure her health . . . (Furthermore,) any conduct towards the wife which leads to any injury either creating danger to her life or danger to her health, that too must be taken as sufficient ground for divorce."[21]

However, the Scottish courts have interpreted this definition with more rigidity of late than have the English judges. Intention to injure on the part of the defender is virtually an essential element in actions based upon cruelty. Particularly in cases of mental cruelty, the Scottish

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[20] See Report p. 70.

[21] Lord Brougham in *Paterson v. Russell,* (1850) 7 Bell's App. 337 at p. 363; See Smith, op. cit., pp. 327-28.

courts have stressed that the conduct complained of must have been "aimed at" the pursuer, even though such conduct did cause an injury to health and that the consequence of it could be foreseen by the defender. Lord President Clyde observed in *Hutton v. Hutton*:[22]

> "To establish cruelty the facts must enable the courts to infer that the defender's persistence in a course of crime was deliberately pointed at the wife."

In cases of alleged cruelty, the English and Scottish law are not identical. The Scottish courts have held that to be guilty of cruelty, volition must be shown. Thus under Scots law, insanity is a good defence against cruelty.[23]

There is a further difference between the two British legal systems on cruelty. This rests on that provision of the 1938 Act which gave the courts power to grant divorces on the ground of such cruelty as would justify the granting of a decree of judicial separation under the existing law. At that time, to obtain a decree of judicial separation, it was necessary to establish not only that the defender had acted cruelly but that the pursuer could not in safety resume cohabitation. Thus, consideration of future danger to the petitioner is relevant in Scots law. While in England divorces on the ground of cruelty are based purely on past behaviour, in Scotland the future protection of the spouse is a vital factor. The actual test is not whether the pursuer was in danger at the time of the action or prior to it but whether he or she would be in danger if cohabitation were resumed. It is, of course, incumbent upon the defender of the action to establish that he has reformed his conduct, and that the spouse would not be in danger.

There is one other interesting provision of the Scottish law on cruelty. By the *Licensing Act* of 1903, section 73, habitual drunkenness, as defined by the *Habitual Drunkards Act,* 1879, section 3, if established in a matrimonial cause, is held to be equivalent in law and to have the same effects as cruelty and bodily violence by the habitual drunkard toward his or her spouse. No ill-treatment of the other spouse by the habitual drunkard is necessary to satisfy this statute.

5. *Sodomy or Bestiality*

These grounds were added by the statute of 1938. The crime must have been committed since the marriage, and under the criminal law of Scotland, it seems that they refer to acts committed by males but

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[22] 1962, S.L.T., 67.

[23] See Report pp. 68-69; Smith, p. 330; *Breen v. Breen,* 1961 S.C. 1583, c.f. *Williams v. Williams.*

not by females. The 1938 Act, unlike the 1937 English Statute (which introduced rape, sodomy and bestiality as grounds in England) omits rape as a separate ground. Under Scottish law, cases of rape would be covered by the ordinary law regarding adultery.

6. *Dissolution of Marriage*

A married person who can establish reasonable grounds for supposing that the marital partner is dead may obtain a decree dissolving the marriage. Continuous absence for seven years, if the applicant has no reason for believing that the absent party has been living during that time, is evidence of death unless the contrary can be proved. However, there is doubt in Scots law as to the status of a subsequent remarriage should the absent partner eventually reappear. The Royal Commission on Marriage and Divorce urged that the matter be clarified, but as yet nothing has been done.[24]

7. *Bars to Divorce*

Three defences to a divorce action in Scotland are: Condonation, connivance (or *lenocinium*), and collusion.

(i) *Condonation*

As in English law, condonation of the defender's adultery by the pursuer is a bar to divorce. Generally, condonation must be established by a resumption of cohabitation; a verbal expression of forgiveness which is no followed by a resumption of cohabitation does not constitute condonation. Unlike Canadian practice, or English practice before 1963, however, condoned adultery cannot be revived by the subsequent misconduct of the erring spouse.

In cases of cruelty, however, if a spouse forgives an act of cruelty and resumes cohabitation, and if the cruelty is repeated and a divorce is sought, the injured party is entitled to reopen the past history for certain purposes. Acts of cruelty prior to the reconciliation cannot form the sole basis for a divorce action, but they can be considered in the determination of the real issue of the case, whether the pursuer could with safety to health and person resume cohabitation with the defender.

(ii) *Connivance*

Connivance has never been defined either statutorily or judicially in Scotland. It is a defence that is rarely presented and even more rarely

[24] Cmd. 9678, p. 308.

successful. An essential element that must be established is something of an active character. One spouse must have been an accessory to the conduct of the other partner, or a participant in the crime, or a direct occasion of it.

(iii) *Collusion*

The doctrine of collusion prevailing in Scotland differs from the one current in England. Scottish judges have emphatically rejected the English position. In Scotland, the definition of collusion is more limited than in England. It is "permitting a false case to be substantiated, or keeping back a just defence."[25] Collusion is only relevant in a Scottish divorce case when there has been fabrication or concealment of evidence. "Mutual desire that a decree in a consistorial cause should be obtained, and mutual action to facilitate this end, are not collusion if there be no fabrication or suppression."[26] If a husband or wife invites their spouse to commit adultery, and he or she does so, this is no basis for a defence of collusion. It may, however, provide a defence of connivance. However, mere acquiescence in the other spouse's unilateral expression of intention to commit adultery, would not raise either bar to an action under Scots law.

[25] *Walker v. Walker*, 1911 S.C. 163 at pp. 168-9.
[26] *Administration of Austrian Property v. von Lorang*, 1926 S.C. 598 at p. 628.

AUSTRALIAN DIVORCE LAW

Your Committee believes it worthwhile to draw attention to the divorce law of some jurisdictions which have an affinity to Canada either because their law, institutions and society are similar to our own or because they have adopted measures which provide valuable experience upon which the Committee can draw. The situations in Australia and New Zealand are obvious areas of study. As sister Commonwealth nations their legal structure enjoys the same foundation as ours in the English common law and the divorce law of both countries has recently undergone revision and reform.

1. *Grounds*

The two most distinctive features of the *Australian Matrimonial Causes Act* of 1959 are first, its departure from exclusive reliance on the concept of matrimonial offence and, secondly, its provisions designed to promote reconciliation. The act provides fourteen grounds for the dissolution of marriage. In three of these grounds there is no element of matrimonial offence whatsoever. These are the grounds of insanity, separation for five years and presumption of death. The other eleven grounds are (i) adultery, (ii) desertion for not less than two years, (iii) habitual cruelty during a period of not less than one year, (iv) wilful and persistent refusal to consummate the marriage, (v) rape, sodomy or bestiality committed since the marriage, (vi) habitual drunkenness or intoxication by drugs for a period of not less than two years, (vii) frequent conviction for crimes and habitually leaving the petitioner without reasonable means of support within a period of five years, (viii) serving a term of imprisonment of not less than three years after conviction of a crime punishable by death or imprisonment for life and still being in prison at the time of the petition, (ix) conviction of attempting to murder or unlawfully kill the petitioner or of committing offences involving the infliction of grevious bodily harm on the petitioner, (x) wilful and habitual failure to pay maintenance under a court order or separation agreement over a two year period, (xi) failure to comply throughout a period of at least one year with an order for the restitution of conjugal rights.

The provisions regarding insanity are not dissimilar to the English acts: the other party of the marriage must be of unsound mind and unlikely to recover and have been confined to an institution for an aggregate of five years within a continuous six year period preceding the institution of divorce proceedings.

Most interest, however, is presented by the Separation Ground. Section 28(m) of the act provides that a petition for the dissolution of marriage may be based on the ground that:

> "the parties to the marriage have separated and have thereafter 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 cohabitation being resumed."

The intention of this section is to provide divorce on the basis that the marriage has irretrievably broken down. The act provides specifically that the termination of cohabitation need be due to the conduct of only one spouse, whether constituting desertion or not, and notwithstanding the existence of any court decree suspending the obligations of the parties to cohabit or the existence of a separation agreement. While many divorces are granted on the ground of separation, it is far from being the most widely invoked ground.

Certain safeguards were introduced, however. The courts are given discretion to refuse to grant a decree if such would prove "harsh or oppressive to the respondent, or contrary to public interest." It is also provided that the court may withhold the decree until the petitioner has made adequte financial arrangements for the maintenance of the respondent, if such are required. The court is also given the discretion to refuse a decree if the petitioner has committed adultery which had not been condoned either before or after the separation. And finally, the court is not to grant a decree on the ground of separation in cases where both partners bring petitions, if it can properly make a decree upon the other petition on any other ground.

Australian courts are still in the process of developing their jurisprudence on the interpretation of these safeguards. The second stipulation concerning financial safeguards for the respondent does not seem to have presented any major problems. However, there does not seem to have developed any clear definition of what is meant by the terms "harsh and oppressive" or "contrary to public policy". Indeed, the Full Court of New South Wales has held that the test must relate to the actual circumstances of the case:

> "What is envisaged is not some such concept in the abstract or as applying generally to others, or even to the reasonable man and woman. The phrase connotes some substantial detriment to the party before the court."[27]

The courts have given effect to what they understand to be clear intention of the Australian Parliament, "that a petitioner is not to be

[27] (1964) 65 S.R. (N.S.W.), 450-51.

denied a decree merely because it can be shown that he was at fault in bringing about the separation that has taken place."[28]

There also seems to be a feeling among Australian judges that they are to act judicially and not inquisitorially, that is, they do not believe that a court must satisfy itself that reasons for refusing a decree do not exist, and that in undefended cases it would be highly exceptional to withhold a decree.

The Australian Act of 1959 has also written the doctrine of constructive desertion into statute law. Section 29 reads:

> "A married person whose conduct constitutes just cause or excuse for the other party to the marriage to live separately or apart, and occasions that other party to live separately or apart, shall be deemed to have wilfully deserted that other party without just cause or excuse, notwithstanding that that person may not have intended the conduct to occasion that other party to live separately or apart,"[28a]

2. *Reconciliation*

The Act of 1959 is a *Matrimonial Causes Act*, not simply a divorce statute and consequently, the Australian legislation has incorporated provisions aimed at facilitating reconciliation. Two major approaches have been used. One has been to empower the Attorney-General to give approval to marriage guidance agencies and also to make grants from public funds to support them. The agencies themselves, however, remain private bodies. No governmental guidance organization has been established. The sum appropriated for the current year to subsidize marriage guidance agencies is A$183,000 (that is about $200,000 in Canadian funds).[29]

While the agencies remain independent, to secure approval they must report to the Attorney-General on their activities and the government has encouraged the agencies to co-ordinate their activities and, in consultation with university social welfare departments, to set up courses for the training of marriage guidance personnel. The work of marriage guidance organizations has improved and increased substantially since the introduction of the act.

Furthermore, by the procedural rules established by the act, solicitors cannot proceed with a matrimonial petition until they have drawn the attention of the parties to the procedures in the act relating to reconciliation and until they have brought to their notice the approved mar-

[28] *Proceedings*, No. 15, February 14, 1967, p. 765.

[28a] The final clause of the section, concerning intention, was to specifically overrule judicial decisions then current.

[29] *Proceedings*, No. 15, February 14, 1967, p. 761.

riage guidance agencies that are available. Additionally, the solicitor must discuss with his clients the possibilities of reconciliation. There is some evidence that members of the Australian Bar are taking these obligations seriously.[30]

The Australian law now requires, by section 14 of the act, the judge, in those cases where there is reason to believe that reconciliation is possible, to adjourn the case to give the parties the opportunity to become reconciled. Additionally, he may attempt reconciliation himself, or nominate either a marriage guidance agency or some other suitable person to attempt to act as a conciliator. The most recent information available on this provision, however, would indicate that it has achieved little. By the time the case gets to court, a least one of the parties is usually determined to terminate the relationship, and judges have seldom instituted reconciliation attempts and there is little evidence that those instituted have been successful.[31]

Marriage guidance counsellors have received protection from forced disclosure of any information they might acquire in the course of their duties. They are required to take an oath of secrecy and they cannot be compelled to disclose to the court any communication made to them in their capacity as marriage guidance counsellors. This has given them greater opportunity to fully gain the confidence of their clients and render more effective help.

The act has also attempted to "draw the teeth of the bogey of collusion". The rules provide that before a defended suit can be set down for trial, a conference must be held between the petitioner and respondent, so that they may make a *bona fide* endeavour to reach agreement on matters of maintenance of a party, property and care, maintenance and custody of children. Similarly, section 40 of the act no longer provides an absolute bar of collusion but requires "collusion with intent to cause a perversion of justice".

An amendment to the 1959 Act, passed in 1965, has adopted the English restrictions on the bar of condonation, whereby a period of cohabitation for not more than three months with reconciliation as its object is not considered as condonation. Analogous provisions are also made which prevent the interruption of the statutory two year period of desertion and five year period of separation.

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[30] *Proceedings*, No. 15, February 14, 1967, p. 761.

[31] D. M. Selby, "The Development of Divorce Law in Australia", *Modern Law Review*, XXIX, 487, 1966.

One other provision intended to promote reconciliation is the rule that normally requires all matters of ancillary relief to be instituted in the petition asking for the dissolution of the marriage. The need to make a claim for financial assistance, to set forth the financial position of the parties and so forth and to detail the provisions for maintenance, the education and welfare of the children and many other matters, all of which must be faced and solutions proposed, was intended to bring home to the petitioner the complications involved in the dissolution of marriage and to cause an overhasty party to think again and consider reconciliation.

Finally, the *Australian Matrimonial Causes Act* of 1959, section 71 and the *Matrimonial Causes Act* of 1965, section 12 both lay great emphasis on the necessity to safeguard the welfare of the children of divorced parents and have empowered the courts to withhold the decree *nisi* until they are satisfied that suitable arrangements have been made for the care of the children.

3. *Domicile*

As a federal country, Australia in the past, like Canada today, suffered from complications caused by the requirements of domicile for instituting divorce proceedings. The 1959 Act attempted to solve these difficulties by abolishing separate state domiciles in favour of a single Australian domicile. The 1959 Act provides that proceedings can only be instituted by a person domiciled in Australia. A deserted wife is deemed to be domiciled in Australia if she herself was domiciled in Australia immediately before her marriage; if her husband was domiciled in Australia immediately before he deserted her; or if she has been resident in Australia for three years immediately before her petition is presented. The last provision makes it possible for a wife to seek a divorce on the basis of three years residence alone, without any need to rely on domicile at all. While the petition will normally be heard in the courts of the state or territory where the petitioner is resident, the petition may be presented to courts of any state or territory, which have the authority either to hear it or to transfer it elsewhere.

NEW ZEALAND DIVORCE LAW

1. *Grounds*

New Zealand has long been considered the pioneer in Commonwealth divorce legislation. The latest New Zealand Statute, the *Matrimonial Proceedings Act* of 1963, is the culmination of a series of statutes, and incorporates many changes made as long ago as 1920. This act makes little change in the grounds available for divorce in New Zealand. The only addition is that a husband may now divorce a wife who undergoes artificial insemination without his consent.

New Zealand was the first country in the Commonwealth to introduce the separation ground. In 1920, separation by agreement for three years or longer was made a ground for divorce. Since that date separation by agreement or court order has remained a ground. By the 1963 Act, however, the ground is a discretionary one. While it is unnecessary to establish that there is no prospect of reconciliation, it does forbid the granting of the decree if the respondent opposes the petition and can show that the separation was due to the wrongful act or conduct of the petitioner.

In 1953, the idea of marriage breakdown was extended and separation, where the parties have been living separate and apart for seven years or more and are unlikely to be reconciled, was made a ground for divorce. By the 1953 Act the court, however, was obliged to refuse the decree if the respondent objected and could show that the separation was caused by the conduct of the petitioner. This limitation was removed by the latest Act. Nevertheless, this bar still applies to the ground of three years separation under a separation agreement or order. The ground is, however, a discretionary one. Yet, while the court is specifically directed not to refuse a decree because either party had committed adultery since the separation, no other guidance is provided as to how the court shall exercise its discretion.

Another interesting feature of the grounds for divorce provided in New Zealand is the absence of a ground of cruelty. There is a ground of "inebriety and cruelty for three years" but it is little used. However, the grounds are wide enough in New Zealand to insure that anyone with a just cause can find relief somewhere.

Of the many grounds provided by the New Zealand Act, only four or five are used to any extent—(i) a separation agreement between the

parties that has been similarly in effect for three years; (ii) a separation order that has been similarly in effect for three years; (iii) adultery; (iv) desertion; and (v) the parties have lived separate and apart for seven years and are unlikely to be reconciled. It is obvious that while the separation grounds are widely used in New Zealand, more so than in Australia, there is still considerable reliance upon the matrimonial offences of adultery and desertion.

2. *Domicile*

Although New Zealand is not a federal country, its law has always shown considerable concern for the fate of the wife deserted or left by her husband, who, because of the rules of domicile, found access to the courts difficult or impossible. The 1963 Act has provided an extremely simple solution to this problem. For the purposes of the act, a married woman's domicile is to be determined as if she was unmarried, and a divorce petition may be founded upon the domicile of either the husband or the wife in New Zealand.

3. *Reconciliation and Bars*

Provisions for reconciliation were introduced into New Zealand by the recent act. The court must now consider the possibilities of reconciliation between the parties and may adjourn the proceedings from time to time and appoint conciliators, if it believes it worthwhile.

Following the practice of Australia and England, New Zealand has also relaxed the bar of condonation, so that a trial period of cohabitation with reconciliation as its primary intention, will not raise a bar to any subsequent divorce petition. The act provides for "one occasion for a continuous period of not more than two months". The New Zealand Act also follows the 1963 English Act by abolishing the anomalous rule that a husband who had sexual intercourse with his wife after becoming aware of a matrimonial offence on her part was conclusively presumed to have condoned the offence. Under the new rule, sexual intercourse raises the presumption of condonation for both parties but this may be rebutted by evidence of the contrary.

New Zealand has adopted the most liberal provisions on collusion of any Commonwealth country, combining both the British and Australian law. Not only was collusion made a discretionary bar to divorce by the 1963 New Zealand statute, even in cases of adultery,

but following the Australian Act, the scope of the bar was limited still more by the addition of the words "with intent to cause a perversion of justice" to the appropriate provision of the act (section 31).

Previously, since 1867, in New Zealand collusion had been an absolute bar only in cases of adultery; in petitions based upon other grounds it was merely discretionary. Furthermore, the existence of the separation ground based upon an agreement by the parties, has meant that the New Zealand courts have had to develop a more restricted view of the concept of collusion.[32]

4. *Maintenance and Children*

With regard to the custody and maintenance of children, New Zealand has again followed Australia and England in making it a prerequisite to the granting of a decree that adequate arrangements have been made for the custody and welfare of all the children of the marriage. "All the children" is defined widely to include not only the children of parties to the divorce, but any child who was a member of the family of the husband or wife at the time when the couple ceased to cohabit or instituted proceedings.[33]

Finally, New Zealand law has attempted to put the two sexes on a greater footing of equality. Henceforth, the third party in a case of adultery has now become a co-respondent and is liable for damage regardless of sex. Also, a husband can now claim maintenance from his wife, if he is unable, by his own means or labour, to support himself.

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[32] *Proceedings* No. 17, February 21, 1967, p. 1055.
[33] *Proceedings* No. 17, February 21, 1967, p. 1005.

THE DIVORCE LAW OF THE STATE OF NEW YORK

1. *Grounds*

Until the passage of chapter 254 of the laws of 1966, the State of New York permitted a dissolution of marriage only on the ground of adultery. The major provisions of the Act of 1966 will become operative on September 1st, 1967. The grounds for the dissolution of marriage in the State of New York will be (i) cruel and inhuman treatment so as to endanger the physical or mental well-being of the plaintiff and to render cohabitation unsafe or improper; (ii) abandonment for two years or more; (iii) confinement in prison for three or more consecutive years; (iv) adultery, which is defined as:

> "the commission of an act of sexual or deviate sexual intercourse, voluntarily performed by the defendant, with a person other than the plaintiff after the marriage of plaintiff and defendant."[34]

(v) that husband and wife have lived apart pursuant to a decree of judicial separation for a period of two years after the granting of such decree; (vi) that husband and wife have lived separate and apart pursuant to a written separation agreement for a period of two years after the execution of such an agreement. (Chapter 254 and proposed amendments to it are to be found in appendices No. 66 and No. 68 of the *Proceedings*, pp. 1185 ff and 1202 ff. The major proposals in appendix No. 68 HAVE NOT been adopted).

It is further provided under items (v) & (vi) that the plaintiff must have "duly" performed all the terms and conditions of the separation decree or agreement. It is also stipulated that any separation agreement must be filed with the clerk of the county in which the parties reside within thirty days of its execution, if it is to form the basis of a subsequent divorce action. Merely having lived separate and apart is not sufficient to found a petition on the ground of separation. It should also be noted, that these provisions are regarded specifically as "grounds for divorce" and not in any way as *prima facie* evidence of marriage breakdown. Thus the court does not have the discretion to refuse the decree if there is a likelihood of a resumption of cohabitation.[35] Insanity does not exist as a ground for divorce under the New York Domestic Relations Law. However, if either spouse can be shown to be permanently insane, then the marriage can be dissolved. However,

[34] *Proceedings* No. 19, February 28, 1967, p. 1186.
[35] *Proceedings* No. 19, February 28, 1967, p. 1170.

provision has to be made for the upkeep of the insane partner. This is neither a divorce proceeding nor an annulment but is provided for under the state mental hygiene laws.[36]

New York has also sought to abolish the traditional defences and bars to divorce. Until the introduction of recent legislation, a divorce could be denied because of the equal guilt of both parties, as well as because of collusion, connivance or condonation. However, in New York the distinction between law and equity is recognized, and it is felt that the bars of collusion and connivance are thus unnecessary because a court would refuse a divorce as a matter of justice in cases where the evidence has been faked or the court deliberately misled.[37]

2. *Domicile*

The state of New York permits a married woman to establish her own domicile. Section 61 of the New York *Domestic Relations Law* states:

> "The domicile of a married woman shall be established by the same facts and rules of law as that of any other person for the purposes of voting and office-holding."

A married woman may commence matrimonial proceedings if she is resident in the State of New York regardless of where her husband lives. Section 231 of the *Domestic Relations Law* reads:

> "If a married woman dwells within the state when she commences an action against her husband for divorce, annulment or separation, she is deemed a resident thereof, although her husband resides elsewhere."

A recent amendment to the *Domestic Relations Law,* section 230, effective September 1, 1967, provides that an action for divorce may be maintained when "either party has been a resident of the state for a continuous period of at least two years immediately preceding the commencement of the action".[38]

3. *Conciliation*

It is the purpose of New York's *Domestic Relations Law* to save marriages as well as to dissolve them.

The 1966 Act established a conciliation bureau in each Judicial District (Art. 11—B, Section 215a)[39] and the law provides that the

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[36] *Proceedings* No. 19, February 28, 1967, p. 1171.
[37] *Proceedings* No. 19, February 28, 1967, pp. 1164-1170.
[38] *Proceedings* No. 19, February 28, 1967, p. 1191.
[39] *Proceedings* No. 19, February 28, 1967, pp. 1188-1190.

plaintiff to a divorce action must file within ten days a notice of commencement of his action with the conciliation bureau of the Judicial District wherein the action is commenced. Such a notice must give full details of the family, including the children.

The commissioner of the conciliation bureau may then decide whether a conciliation proceeding is called for. If he decides it is not, a report is made to the supervising justice and the suit goes forward. Otherwise the case may be referred by the commissioner to a conciliation counsellor. The counsellor must hold at least one conciliation conference, which both parties can be compelled to attend, and such further conferences as the rules may call for. Such conferences are conducted on an informal basis. The counsellor must file a final report with the commissioner within thirty days.

If reconciliation is effected the case is dismissed; if no reconciliation can be achieved, the counsellor refers the matter to the commissioner who may decide (i) that reconciliation is at an end or (ii) hold a conciliation hearing, attendance at which is mandatory for all parties to the proceedings.

The conciliation hearing is a formal procedure at which the parties may present evidence, cross-examine witnesses and be represented by attorneys. If upon the evidence, the commissioner finds that reconciliation is possible and in the interests of the parties and the children, he may apply to the supervising justice for an order requiring that the parties attempt to effect a reconciliation for a period not exceeding sixty days. If, on the other hand, the commissioner finds that reconciliation is not possible, he reports the facts to the supervising justice and the conciliation procedure is at an end.

The act also provides that the records of conciliation conferences shall be confidential and available only to employees of the bureau or to the parties and their attorneys. If there are minor, handicapped or incompetent children of the marriage, a special guardian may be appointed. Such a guardian becomes a party to the proceedings with a duty to look after the interests of the children in the proceedings and to recommend temporary care, custody and maintenance during the hearings.

The conciliation bureau is empowered to appoint marriage counsellors to its own staff and may also use public, religious and social agencies in the various judicial districts.

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PART III

GROUNDS FOR DIVORCE

INTRODUCTION

Marriage is the institution at the root of our society; the family is the fundamental unit of our social organization. Canada is part of the tradition of western civilization, which has always recognized marriage as monogamous and for life. Through marriage, two human beings are enabled to find mutual support and comfort and ensure for themselves a richer and fuller life. Ideally marriage provides love and affection, economic benefit and security, and the environment in which future generations are born and reared. Society is vitally concerned in the preservation of marriage, for by fostering the institution of marriage it is preserving itself. It is not only in the interests of society, however, that marriage should be monogamous and life-long, but also in that of the parties themselves and the children. A stable family environment not only benefits society as a whole, but is essential for the well-being and happiness of the individual.

Nevertheless, human beings are not creatures of perfection and it must be recognized that some marriages will not last for life. In almost all societies divorce has been recognized in some form. When marriage fails, no service is rendered to either society or the parties themselves by preserving the empty legal shell of a relationship that no longer exists as a fact. Divorce, therefore, cannot be eliminated from society. Marriages have failed in the past and today the rapid pace of social change and the increasing complexities of life subject the institution of marriage to greater stress than ever before.

Canadian divorce law was established over a century ago, when ideas of marriage and divorce and the nature of society were very different from those prevailing today. The existing system of divorce law has long since served its purpose and is in need of reform. The witnesses before your Committee and the briefs it has received, have all urged that reform be undertaken. There has hardly been a voice raised anywhere to defend the status quo. Before your Committee undertakes a discussion of the deficiencies of the present law and its suggested remedies for them, it is essential that it make clear the climate in which it has been working and the assumptions which it has made.

Marriage is not an ordinary contractual relationship. Few people have considered it as such in the past, and your Committee believes few in Canada take that view today. Marriage is not only a contract with which society is vitally concerned, but one which has to most Canadians a deep religious significance as well. When society was fairly homogeneous in its religious beliefs and when the state was content to leave matrimonial affairs to the Spiritual Authorities or to accept their lead, those religious beliefs were written into the law of the land. Today, however, the situation is different. We live in a pluralistic society. People differ widely in their religious and ethical beliefs and hold differing views on the institution of marriage and the status of divorce. Our society believes in religious freedom, indeed in freedom of belief generally; it does not believe that the ideas and creed of any one section of the community should be forced unwillingly upon all of society's members. Witnesses before your Committee have stressed:

> "That those whose religious principles are against divorce in any form should no longer be able to impose restrictions on the personal lives of those whose principles differ in this respect."[1]

This view has been unchallenged and the representatives of the churches appearing before your Committee have wholeheartedly endorsed it. "The Christian Church no longer has the right to force its views on a pluralistic society",[2] declared the Baptist Federation of Canada, a view endorsed by the Catholic Women's League of Canada:

> "While we do not believe in divorce ourselves we cannot expect the laws of this country to be used in such a manner as to prevent those who, unlike ourselves, do not believe that marriage is monogamous and indissoluble, from acting in accordance with their own religious convictions . . . We would also emphasize that while we have beliefs in the matter of marriage, we do not wish to impose those beliefs on the entire Canadian society through the medium of civil law."[3]

Your Committee thus accepts the proposition that marriage is the foundation of the family and of social organization. It believes that marriage should be essentially monogamous and for life and any divorce law should have as its primary objective the reinforcement of the stability of marriage and not its destruction. Nonetheless, it recognizes that some marriages do fail and irretrievably break down. Once this happens, nothing is to be gained by preserving the empty shell. It should be removed with "the maximum of fairness, and the minimum

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[1] *Proceedings of the Special Joint Committee of the Senate and House of Commons on Divorce*, No. 9, November 29, 1966, p. 469.
[2] *Proceedings* No. 11, December 13, 1966, p. 572.
[3] *Proceedings* No. 10, December 6, 1966, p. 523.

of bitterness, distress and humiliation."[4] Divorce should not be made so easy that there is no inducement to overcome temporary troubles and to make the marriage work. Nor should the form and procedure of the divorce courts hinder or hamper attempts at reconciliation. Indeed, when possible they should actively promote it.

It renders no respect to the institution of marriage, and does little to help its stability, to preserve in form marriages that have ceased to exist in fact. To do so merely encourages illicit sexual unions, "common law" relationships and the procreation of illegitimate children. Far from preserving the institution of marriage, it encourages disrespect for it. That a person should wish to be freed from one marriage so that he can contract another, as an alternative to establishing a common law relationship, shows respect for the institution of marriage, not contempt.

Divorce law should make it possible to dispense with the legal bond of matrimony when it has ceased to have any reality in fact. To quote the English Law Commission: "If the marriage is dead, the object of the law should be to afford it a decent burial."[5] Equally important, if the marriage is to be dissolved, it must be done with justice to all concerned. This means not only with justice to the partners but also to the children of marriage, who may be the innocent victims of their parents failures and mistakes. The marriage should also be dissolved in a dignified manner. This means not merely the observance of traditional court proceedings but also the recognition of the dignity of the unfortunate spouses themselves as human beings, thus causing the minimum possible of embarrassment and humiliation to them and their children. The law should do nothing to further embitter the relationship between them and their children.

Finally, the law must be capable of understanding and worthy of respect by the public at large. Unless the principles upon which it is based are generally understood and respected, the law will almost certainly fail in its wider aims of bringing stability to the institution of marriage while alleviating the suffering of those citizens whose marriages have failed.

A viable, practical system of divorce should not make the obtaining of a divorce more complicated or expensive to the parties or to the State. Any system that requires a great expansion of courts or the appointment of investigators and large numbers of additional public

[4] *The Law Commission. Reform of Grounds of Divorce: The Field of Choice*, Cmnd. 3123, p. 10.

[5] Cmnd. 3123, p. 11.

servants, would probably be unacceptable to the public. The amount of public money available is limited and so are the numbers of trained social workers and welfare personnel.

Under modern conditions a husband and wife will part when life becomes intolerable and some will enter illicit relationships or common law unions after so doing. Once marriages have broken down and the spouses are in the divorce courts, the chances of reconciliation while not totally absent are remote. Marriage is not simply a matter concerning the two parties to it; the children are as vitally affected by a divorce as are the husband and wife. In every divorce proceeding where there are children their interests should be carefully protected.

RISING DIVORCE RATE

It is inevitable that when the grounds for divorce are widened, the divorce rate will increase to some degree. Initially, it can be expected to advance for a few years as the number of broken marriages that have been without relief heretofore are dissolved. Thereafter, the rate can be expected to fall somewhat. This has been the experience in other countries when the divorce laws have been reformed. The mere increase in the number of divorces granted, however, should not necessarily be a cause for alarm. The number means little if it merely reflects the regularization of what previously have been illicit unions. It is better for society that the divorce rate be higher, if the number of "common law" or bigamous unions be thereby reduced. It must be borne in mind that there has been an increase in the number of marriages in the twentieth century. In England, for example, the number of married women in the population has doubled. This is not only because the population has increased, but because women now marry earlier and the ratio of married to unmarried women in society is altered.

Because people now marry earlier and live longer, marriages are almost doubled in their duration and also consequently are the risks they face. There is no evidence that marriages break down more readily now than in the past. Divorce is now an accepted solution to a broken marriage. In the past, this was less so, not only because of religious objections to divorce and the social scandal that it occasioned, but also because to a major portion of the population divorce was an expensive luxury beyond their financial means. In recent years, however, with great changes in the social structure and educational system of the country, divorce and the resultant possibility of remarriage, have become desired by many who were formerly content with illicit unions.

Your Committee is of opinion that the need for reform of the divorce laws is made more urgent by these changes and that an increase in either the number of divorces or of the divorce rate per head of population would not indicate a weakening of the institution of marriage. On the contrary, the fact that more people seek divorce in order to terminate impossible matrimonial relationships may be indicative of greater respect for the institution of marriage.

GROUNDS FOR DIVORCE

Field of Choice

In selecting the system which may be used to effect the dissolution of marriage, there is in theory a fairly wide choice available. There are essentially four bases for divorce in the world today: unilateral declaration, consent, matrimonial offence or fault, and marriage breakdown. These doctrines are not mutually exclusive and can be combined in numerous ways. Your Committee has considered each of them.

UNILATERAL DECLARATION

The unilateral system has existed in the past and it exists in many parts of the world today, particularly in Islamic countries. With such a system one spouse, usually the husband, can simply dissolve the marriage more or less at will and with little reason and without any consultation with the other, who is merely informed that the divorce has taken place. This system was current in Talmudic times in Israel where a husband delivered a bill of divorce to the wife. Traditionally, it has been a system whereby a man may get rid of his wife, rather than one which allowed a wife to be rid of her husband. Such a system has been advocated by no one and does not seem to merit serious consideration by your Committee. It need not detain us further.

DIVORCE BY CONSENT

Divorce by consent is an ancient method of terminating marriages and one that goes back to Roman times and earlier. In essence this is founded upon the proposition that marriage is a contract between the parties and like any other contract, may be terminated with the consent of both parties to it. Under Roman law the state was concerned or involved in a divorce proceeding only in so far as it was necessary to insure that the legal forms had been observed and that the contract was terminated in the proper manner. The state had no concern with the actual termination of the contract itself or the grounds for it.

Since divorce by consent is a term that has been used widely and often imprecisely by many people, it should be made clear what your Committee understands by the term. Divorce by consent means a divorce at the will of the parties to the marriage. If they wish the marriage to be dissolved, then it will be dissolved. The role of the state or the courts, if they are called upon to play any part at all, is simply to see that the proper forms are observed. The state would have no discretion at all to prevent the granting of the divorce. Once the state assumes a discretionary power to refuse the decree, it is no longer divorce by consent. Under such a system, therefore, it is the will of the parties alone that determines the issue. Under the present system, even though the parties may both wish to have their marriage dissolved, it is the courts which actually dissolve it and which have the authority to refuse a decree, if they find there to be good reason for so doing.

1. *Arguments for Divorce by Consent*

At least two witnesses before your Committee have urged the adoption in Canada of some form of divorce by consent as an addition to, though not as a substitute for, the present system. These are Mr. J. H. MacDonald and The Baptist Federation of Canada.[6] It is contended that if a couple find that they cannot successfully live together and wish to be rid of their marriage ties, it is impossible to make that marriage a reality and it would be better to allow them to terminate it. No purpose is served by the retention of an empty tie. It is further argued that this would only introduce an element of reality in the divorce picture. At the present time, 90 per cent of divorce cases are uncontested and thus there is a strong element of consent involved in them. To allow divorce by consent would permit a couple to obtain a dissolution of marriage without the

[6] *Proceedings* No. 7, November 15, 1966, p. 325;
No. 11, December 13, 1966, p. 573, p. 583.

need to allege or to actually commit matrimonial offences. Thus all the distasteful features of the present system could be avoided, as could the need to prove offences and to wash a great deal of matrimonial dirty linen in public. Embarrassment and bitterness could be removed thereby from divorce proceedings.

2. *Objections to Divorce by Consent*

There are several obections to the introduction of divorce by consent that your Committee believes to be valid. In the first place, there is an inherent contradiction between the proposition that marriage should be a lifelong union and the one that it can be terminated at will by the parties to it without any need to show cause for such a dissolution. *Putting Asunder* makes this point very strongly:

> "(Divorce by consent) subjects marriage absolutely to the joint will of the parties, so making it in essence a private contract. Since it gives the court, as representing the community, no effectual part in divorce, it virtually repudiates the community's interest in the stability of marriage. Moreover, if the convenant that initiates marriage is to be revocable by mutual consent, its intention cannot meaningfully be called 'lifelong': provision for a divorce can be reconciled with a lifelong intention only if divorce is subject to an authority that is independent of the will of the parties."[7]

It is in society's interest to maximize the number of stable marriages within the community and there are many people who suspect that the introduction of divorce by consent would seriously undermine this objective. It is significant that most of the briefs presented to your Committee which have advocated a widening of the grounds for divorce in Canada, especially those supporting the introduction of marriage breakdown, have taken pains to stress that their proposals would not lend to divorce by consent and would not thus weaken the institution of marriage.

Since society does have an interest in the preservation of marriages, the marriage contract is not like any other contract. The community should have a greater part to play in the dissolution of marriage than merely overseeing the legal requirements for the dissolution of a private contract. The spouses, and above all the children, have a vital interest in the existence of the marriage tie. They are vitally affected by any change in it. The community has the duty to see that its interests are safeguarded. The interests of the spouses and the children require that society through the courts oversees and sanctions the dissolution of the

[7] *Putting Asunder*, p. 34.

marriage bonds. With their judgements distorted by marital unhappiness and tension, the parties cannot be relied upon to keep the interests of society, the children, or even themselves always in mind.

A further cogent objection has been raised by the Scarman Commission. Mutual consent may not always be true consent. There will always be the danger that the stronger partner, especially in the economic sense, may exert pressure on the weaker to give consent to a divorce. It is unlikely that the parties will be in equally strong positions.[8]

Divorce by consent would tend to effect the dissolution of marriages that had not really broken down or been destroyed. Unless some test or provision were introduced to determine this fact, there is the likelihood that many couples would rush into divorce without really giving their marriage a chance to work or without trying to work out what might well be soluble problems.

As the sole ground for divorce, consent would not be practical. Many marriages should be dissolved whether or not both parties consent. While divorce by the consent as the sole ground for divorce is both impractical and objectionable, it has been suggested to your Committee by Mr. John M. MacDonald, Q.C., that it be given serious consideration in the case of childless couples.[9] Certainly, if there are no children, one reason for judicial oversight is removed. However, all the other objections to divorce by consent still apply: the implicit threat to the institution of marriage as a lifelong union; the danger that the weaker party economically may be overborn by the stronger; the possibility that essentially good marriages may be terminated in the heat of a matrimonial dispute.

A test that the marriage has failed would still be required. A period of separation as a test of breakdown would be essential. If separation were introduced as a ground in itself, however, the need for divorce by consent would disappear. Marriages could still be dissolved without the public allegations and bitterness that may be present in a proceeding based upon the fault ground. There would be some test marriage breakdown, and furthermore, the interests of the parties could be safeguarded by the courts.

The Scarman Report also mentions one further final objection to the introduction of divorce by consent for childless couples. This is that

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[8] Cmnd. 3123, pp. 41-42.
[9] *Proceedings* No. 7, November 15, 1966, pp. 304ff.

it would distinguish between two kinds of marriages.[10] It would be basically unjust to discriminate between fruitful and fruitless marriages in this way. One objection to making such discrimination is the effect such a distinction could have on the children themselves. Marriages with children are liable to break up as well as those without children. To make special provisions that would in effect make divorce easier or, at least, less troublesome for childless couples, might very well cause resentment on the part of couples with children against their children for being an obstacle to their obtaining matrimonial relief. Since the object of divorce law is to provide relief for marriages that have failed, to distinguish between marriages on criteria other than those of their health and stability would be unreasonable.

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[10] The Baptist Federation of Canada seems to be advocating something akin to divorce by consent for childless couples, *Proceedings* No. 11, December 13, 1966, pp. 573, 583. Cmnd. 3123, p. 41.

THE MATRIMONIAL OFFENCE CONCEPT

Traditionally, the grounds for divorce have been based upon the concept of matrimonial offence. From a civil point of view, marriage has been seen as a rather special kind of contract with certain rights and duties incumbent upon the parties to it. The violation of any of these provisions by one spouse is a breach of the contract and entitles the other, or wronged, spouse to a dissolution of the marriage. Under this system, it is the right of the wronged or injured partner to sue for divorce on the ground of the transgressions of the other. If the court finds that one spouse committed the offence alleged, the marriage is dissolved. The option to sue rests with the wronged party. If that party chooses not to do so, then the couple remain married, at least, in law, if not in fact.

Generally, the spouse who offends cannot terminate the marriage on the basis of his own offence; the criminal, as it were, cannot benefit from his own crime. There are, your Committee believes, great numbers of people in Canada, who share this view. Of course, as times change, so do people's views of marriage and what should be expected of the partners to a marriage in respect to each other. The gradual evolution of the status of women during the last hundred years has modified the idea of marriage current over a century ago when Canada's divorce law was founded in Victorian England. A wife is no longer regarded as her husband's property and is no longer expected to be not only faithful but also obedient and submissive to her husband's commands. The twentieth century sees the marriage partnership somewhat differently and consequently has different views as to what conduct constitutes a matrimonial offence.

The grounds for a dissolution of marriage at present permitted by Canadian divorce law rest exclusively on the idea of fault or offence, namely adultery, and, in Nova Scotia only, adultery or cruelty. The divorce law of most other common law jurisdictions is similarly based upon the notion of matrimonial offence. This is the traditional system for granting divorces in the Canadian and British courts and while, as a concept it is now under attack, its merits, as well as its weaknesses, require careful examination. Because the existing law in Canada is in need of reform and because that law rests upon the doctrine of matrimonial offence, it does not of necessity follow that it is the matrimonial offence concept in itself that is erroneous.

The advantages of the matrimonial offence idea urged by those favouring its retention are numerous. In the first place, it is a definite system generally understood by the public at large. The parties know that if they restrain their conduct within certain bounds they cannot be divorced; if they transgress they can. It has been argued that this provides security for the marital relationship, especially for the wife past middle age who has lost her youthful charm and whose husband has a roving eye.

Other additional factors are relevant too. Because the present system is definite and well understood, the courts have a real issue to determine: was or was not the alleged offence committed. Thus lawyers can advise clients as to their rights with some degree of confidence.

Furthermore, there seems little doubt that the matrimonial offence concept in some form is widely held by the public. Most briefs that your Committee has received advocating reform, have assumed that this would be the basis of any prospective reform. Few groups have called for its actual abolition although almost everyone has asked that the grounds for divorce be broadened.

While some witnesses before your Committee advised the abandonment of divorce on the ground of offence and the adoption of the marriage breakdown theory, whereby the ground would be the separation of the spouses for a specified period with no reasonable prospect of a resumption of cohabitation, your Committee is of the opinion that the public in general holds that in the case of the major matrimonial offences, such as adultery, cruelty and desertion, the innocent and offended party is entitled to an immediate divorce.

1. *Adultery*

It would be difficult to dispense with the matrimonial offence theory completely. Most people regard marriage as an institution which provides certain specific rights and duties for the spouses in respect of each other. There is a commitment to mutual love, support and assistance; and it provides the social basis for the engendering and raising of children. Marriage is a normal, indeed natural institution in our society and most people partake. The basic pledge in the marriage bond is that the parties will keep exclusively one to the other. Moreover, this is a monogamous society in which we live. A husband can have but one wife and a wife but one husband. Should either a husband or wife depart from the standard

of marital fidelity, the other should have the right to a divorce and immediately so, if he or she so wishes. If one partner to a marriage dishonours its basic obligations, the other should have the right to be free of the legal ties. On the other hand, a spouse who is willing to forgive and forget, does not appear in the divorce courts.

Adultery strikes at the root of the institution of marriage and in consequence has from time immemorial, been recognized as a valid ground for divorce in those societies which accept divorce at all. Its retention as such has not been seriously questioned. Even the advocates of marriage breakdown as the sole ground for divorce, the United Church for example, admit that evidence of adultery creates a special case meriting special treatment.

The English Royal Commission on Divorce sitting between 1951 and 1955, did consider changes in the law of adultery. It was suggested that a single act of adultery should not be enough for the granting of a divorce but that there should be proof of either an adulterous association or repeated acts of adultery. These views have not found favour in the testimony of any witnesses before your Committee. Nor does your Committee look favourably upon them either. One act of adultery is sufficient to destroy a marriage. If the marriage is a sufficiently stable one, a single act of adultery may not lead to divorce, if the offended spouse is willing to forgive and forget. But if the offended spouse is determined that the infidelity of the other partner has terminated the marital relationship, then is should be possible for him or her to dissolve the legal bond.

Accordingly, your Committee is of the opinion that the marital offence of adultery should be retained as a ground for the dissolution of marriage on the petition of the offended spouse, subject of course to the usual defences. There is obviously no need for a statutory definition of adultery. It was not defined in the Imperial Statute of 1857, nor has it been defined in any of the Canadian provinces whose law is based upon that statute, nor was it defined in the pre-Confederation law of any of the other provinces. What adultery is in law has been made plain in the decided cases and no difficulty has been experienced in the courts, not even when the law was amended for the abolition of the double standard.

2. *Rape, Sodomy and Bestiality*

At present rape, sodomy and bestiality are recognized as grounds for divorce only at the suit of the wife and in those provinces whose divorce law is based upon the English Statute of 1857. Several of the

private bills which have been referred to your Committee propose their inclusion as such a ground, as have several witnesses, including the Canadian Bar Association. Most proposals for the inclusion of these grounds generally include them under the heading of adultery, and indeed this is logical, because they are clearly a rejection of the sexual commitment by one marriage partner toward the other. It is perhaps arguable that they are included in the meaning of adultery itself but the courts may not be prepared to accept this interpretation. The Barristers' Society of New Brunswick following the practice of the State of New York, suggested a definition of adultery for inclusion in a statute which encompasses these offences within the same general category:

> "The commission of an act of sexual or deviate sexual intercourse voluntarily performed by the defendant after marriage with a person other than the Plaintiff (Petitioner) or with an animal."[11]

This definition would also have the advantage of putting both sexes upon an equal footing.

While a statutory definition is unnecessary and undesirable, your Committee is of the opinion that these marital offences should be included as grounds for the dissolution of marriage.

3. *Cruelty*

The real defect of the matrimonial offence theory as now in practice in Canada seems to be not its existence but that the offences recognized as grounds for divorce are inadequate. The concept of what is to be expected from and endured in marriage changes with the times. There is more to modern marriage than merely abiding by a standard of sexual fidelity. The obligation of husband and wife to love and cherish one another, as expressed in the marriage ceremony, should be observed by each of the parties and should be recognized in law. Cruelty by one spouse toward the other is a violation of this elementary undertaking. It threatens the life and health of the injured spouse and is detrimental to the children. Cruelty may create intolerable conditions in the home, intense suffering both physical and mental to the offended spouse and an unhealthy environment for the children. Nova Scotia alone of the Canadian provinces recognizes the right of a spouse to petition for divorce on the ground of cruelty. Other Canadians require a similar right.

Cruelty is now recognized in all but one province of Canada as ground for judicial separation. Cruel conduct is considered in all these

[11] *Proceedings* No. 15, February 14, 1967, p. 804.

provinces as sufficient ground for divorce *a mensa et thoro*, which is, in more modern terms, judicial separation, and which terminates cohabitation thus destroying the essentials of the marriage. Yet it is in Nova Scotia only that cruelty is recognized as a ground for the complete dissolution of marriage.

Canadian divorce law has not changed with the times. Society now believes that cruelty is sufficient ground for the dissolution of a marriage. Husbands are no longer thought to own their wives nor to possess the right to beat and ill use them. Nor does modern society tolerate brutality on the part of the wife.

Witnesses appearing before your Committee were of the opinion that cruelty in order to constitute grounds for divorce should be of a substantial character. The Canadian Bar Association suggests that cruelty must be conduct such as to endanger the life and limb of the marital victim, or to be so grossly insulting and intolerable that the person complaining could not reasonably be expected to cohabit with a spouse guilty of such conduct.[12] These, of course, are general terms and would not be really helpful in the trying of cases.

Cruelty has never been satisfactorily defined. For one reason, because public opinion as to what constitutes cruelty is continually changing and differs considerably from place to place and among different individuals and classes of individuals. One English judge is quoted as saying that, while it is impossible to define cruelty, there is no difficulty in recognizing it when one sees it.

Fortunately, your Committee does not believe it necessary to attempt a definition of cruelty. Some witnesses have expressed concern lest the introduction of cruelty as a ground would open wide the door to numerous abuses and hence they have urged careful definition. However, in Canada, we have a bench of judges upon whom we may rely and moreover, there has been built up over the years a body of jurisprudence which all Canadian judges would be expected to follow and would follow.

In the first place, there are all the numerous decisions in those provinces which grant divorce *a mensa et thoro*, or judicial separation. Courts in the Province of Nova Scotia have been granting dissolutions of marriage on the ground of cruelty for many years. While such adjudications have not been very numerous, they yet form a body of useful precedents, and they illustrate the common sense which we may expect from

[12] *Proceedings* No. 5, November 1, 1966, p. 202.

Canadian judges. Furthermore, the provinces of Alberta and Saskatchewan have enacted a statutory definition of cruelty for purposes of alimony and judicial separation. This definition includes conduct which creates a danger to life, limb or health and conduct which, in the opinion of the court, is grossly insulting or intolerable, or of such a nature that the petitioner could not be reasonably expected to live with a partner who indulges in such conduct.[13]

In addition to this Canadian experience, there is the vast jurisprudence built up in the English courts since the passing of the *Matrimonial Causes Act* over a hundred years ago. A study of the leading cases as decided in the British courts shows a continuous growth in human understanding and an ability of the bench to change with the growth of that universal understanding which we recognize as public opinion.[14]

Your Committee is of the opinion that cruelty should be made a ground for the dissolution of marriage, and that its administration be left to the good sense of Canadian judges, guided as they are, by the experience gained already in our own courts and those of the United Kingdom.

4. *Desertion*

Marriage involves more than mutual love and respect, more than that the partners refrain from committing adultery and acts of cruelty against each other. The family is the basic unit in our social organization. Such a unit provides for the husband and wife the companionship most human beings seem to require in life as well as allowing the true fulfilment of their sexual desires. Normally in such a relationship the husband is expected to bear the economic burden, to maintain and provide for his wife and family, while the wife in return cares for the home, the husband and the children. This association is a vital part of any marriage and if one partner withdraws from it a basic part of the marriage is destroyed.

Desertion is not an isolated occurrence, indeed in the opinion of one brief, it is probably the most prevalent of all matrimonial offences.[15] Certainly in its effect and its consequences it can be most serious, especially if the husband is the deserting partner, as is most often the case. If there are no children, a wife can often support herself, but not always so. If there are children, however, the situation can be most severe. The effect of desertion is generally to deprive the wife and children of economic support. But the wife at present is unable to remarry, when remar-

[13] *Proceedings* No. 17, February 21, 1967, p. 926.
[14] See Report pp. 68-69.
[15] *Proceedings* No. 16, February 16, 1967, p. 847.

riage may be her only hope of restoring economic security, the legal dissolution of the first marriage is thus necessary.[16] It may be possible for a wife through the courts to extract maintenance from a deserting husband, but to leave her chained legally to a man who does not care enough for his family to remain with them is both futile and unjust.

Economic difficulties are not the only evils that result from desertion. The withdrawal of support is serious, but the children are deprived often of parental control and a full family life as well. The effects of desertion upon the children can be particularly evil when it is the wife who is the deserting party.

Desertion inevitably leads to other difficulties as well. If the deserting party is the husband, he is often difficult to locate and it is not uncommon for him to neglect his financial obligations even if he can be found. Not unnaturally the costs incurred in keeping himself apart from his family, especially if he has taken up with another woman, make great inroads into his financial resources and thus make it very difficult for him to contribute to the support of his family. As has been pointed out to your Committee, often a deserted wife is not only left with the family, but also with a large collection of debts contracted in good faith under the assumption that the marriage would last. The effects of this can be serious indeed.

Consequently, many wives realizing the need for a stable environment for their children and for steady financial support, often enter into "common law" relationships. Thus illicit unions are encouraged and more illegitimate children result. To enable a deserted partner, especially a wife, to establish a lawful and stable relationship, a protracted period of desertion should be a ground for divorce.

Desertion can, of course, be more than the mere removal of one party from the matrimonial home. In English law it has never been given a statutory definition. Indeed, it has been described as not so much a withdrawal from a place as from a state of things. It is even possible that the one spouse who remains in the matrimonial home may in fact have been the deserting party, because his or her conduct was such that, without being cruelty sufficient to occasion a divorce, it drove the other party out.[17] Consortium is a vital aspect of married life and destruction of it by one partner without the consent of the other, whether it be by physical

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[16] *Proceedings* No. 4, October 25, 1966, p. 173.
[17] *Proceedings* No. 1, June 28, 1966, pp. 20-21;
Proceedings No. 6, November 8, 1966, p. 272;
Winnan v. Winnan, L.R. 1949, p. 174.

separation or merely by conduct such as refusal of support or refusal to fulfill the obligations of marriage, could very well be desertion.

There seems to be general agreement among the witnesses who have appeared before your Committee that desertion should be ground for divorce in Canada. Indeed, in a brief presented by a group of organizations whose members have had ample and bitter experience of desertion and its baleful effects, the view was expressed that desertion would become the most widely used ground for requesting divorces in a reformed system.[18] This may or may not be true generally. In England, which has had such a ground since 1937, this has not proved to be the case. But in many segments of Canadian society it may well prove to be a much used ground. In any case, there would seem to be a very large number of people, particularly wives who have been deserted by their husbands, who are now desperate for release from their marriage bonds. The testimony of such associations as Parents without Partners, the Mothers Alone Society and Canadian Single Parents establishes this.[19] Your Committee has received large numbers of letters from deserted wives pleading for a change in the law to enable them to be rid of the shackles of empty and meaningless marriage ties to husbands who have long since disappeared, so that they may regularize illicit unions that they have been forced to contract and to provide legitimate fathers for their offspring. Anyone who has read these letters cannot but be convinced of the misery and unhappiness that exists because of the failure of our present law to permit divorce on the grounds of desertion.

It has been argued that in most of these cases, a ground already exists, since many desertions involve adultery as well. The husband may desert to take up with another woman, or may do so after he has deserted; the wife may be forced into a "common law" union, which is technically adulterous, after her desertion simply to provide a home and support for her children. However, the problem of finding the husband and proving the adultery may not be an easy one; in fact, it is often impossible. Desertion should be a ground in itself and it would not only be more practical but more just to treat it as such. Nothing terminates marital consortium so effectively as desertion over a protracted period.

The question that remains is the time period of the desertion. A period of one year with the mutual consent of the parties was suggested by the Single Parents Associated, but the Baptist Church of Canada favoured a period as long as five years. The figure most often suggested

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[18] *Proceedings* No. 16, February 16, 1967, p. 835.
[19] *Proceedings* No. 16, February 16, 1967, pp. 847-848.

was three years; the Canadian Bar Association, the New Brunswick Barristers' Society and the Anglican Diocese of Huron to name but three. Three years is the period specified in England and this seems to be the reason for the general approval of this figure. Certainly, the time should be long enough to ensure that the desertion was not a passing whim or fancy and to establish that the deserting party has decided to terminate the marriage relationship. Desertion without cause for a period of three years should be long enough to establish this. Longer periods only increase the number of illicit unions and illegitimate children.

Some witnesses feel that there should be reasonable certainty that reconciliation is not possible before a divorce is granted. A court should certainly consider the likelihood of reconciliation before terminating a marriage on this ground, but after three years absence, the chances of reconciliation would in most cases be slight. However, couples who honestly try to patch up their marriage relationship and fail, should not be penalized for so doing. Consequently, in determining the period of desertion it would seem a sensible idea to adopt the English practice whereby a period of cohabitation for not more than three months with reconciliation as its primary object, should not stand in the way of granting a divorce, should the attempt prove to be unsuccessful. The three month period would not be considered as interrupting the stipulated time for desertion.

Your Committee, therefore, is of the opinion that desertion for a period of three years, on the petition of the deserted spouse, where there is little likelihood of a resumption of cohabitation within a reasonable period of time, should be made a ground for the dissolution of marriage.[20] Your Committee is of the opinion further that the definition of desertion, other than as above, be left to the courts, guided by the jurisprudence created in Canada in relation to judicial separation and in the courts of the United Kingdom in cases of both divorce and separation.[21]

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[20] See Report p. 14.
[21] See Report pp. 69-70.

MARRIAGE BREAKDOWN

During this course of its public hearings, your Committee has been urged almost continuously to abandon the presently prevailing doctrine of marital offences, such as adultery, as the ground for divorce and substitute marriage breakdown as the sole ground for the dissolution of marriage. The arguments in favour of such a course were most impressive and were presented by persons of responsibility and knowledge. Among the most impressive were the presentations of the United Church and the Anglican Church of Canada.

In 1962, the Board of Christian Education of the United Church of Canada published a report of a commission of that church on *Marriage Breakdown, Divorce, Remarriage* which had been approved by the church and in which the marriage breakdown idea is discussed. The best exposition of the idea has originated not in Canada but in the United Kingdom. In 1964, a study group was appointed by His Grace, the Archbishop of Canterbury, under the chairmanship of the Rt. Rev. R. C. Mortimer, Bishop of Exeter, consisting of distinguished churchmen, lawyers, doctors and sociologists. This group recommended that marriage breakdown be the sole ground for divorce in Great Britain. Their Report was published last year under the title *Putting Asunder* (London, S.P.C.K., 1966) and it has received a very extensive circulation.

A careful study of the implications of *Putting Asunder* have been made by the English Law Commission. Their report under the title of *Reform of the Grounds of Divorce*: *The Field of Choice* (Cmnd. 3123), was presented to the United Kingdom Parliament by the Lord Chancellor in November of last year. In the report, the Law Commission, under the chairmanship of Mr. Justice Scarman, emphasize the difficulties and objections of the substitution of the marriage breakdown approach for the traditional marital offence doctrine based on the adversary system. The implications of this study will be examined later.

1. *Marriage Breakdown*: *What it is and its implications are*

While the phrase Marriage Breakdown has recurred very often, precise definition of it, the implications of it, and suggestions as to how and how far it should be incorporated into Canadian law have been left somewhat vague. Your Committee apparently has been presented with three alternatives:

(i) to accept marriage breakdown as the sole ground allowable for the dissolution of marriage,

(ii) the complete rejection of the idea altogether,

(iii) its incorporation into the existing system by some means or another.

It would be most useful to consider it first in its purest and most absolute form: that is as the sole ground for divorce. As the Pastoral Institute of the United Church of Canada has said:

> "the adoption of the concept of 'marriage breakdown' and the elimination of the concept of 'matrimonial offence' as the sole basis for divorce is by far the most important point for consideration by this Committee."[22]
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> " 'Marriage breakdown' is a basis for divorce that adopts the policy that a marriage which has irretrievably broken down in fact should be dissolved in law. Conversely a marriage should not be dissolved in law until it is clearly demonstrated that in fact it has irretrievably broken down."[23]

This breakdown would be the only ground on which a petition for divorce could be presented. The task of the court would be to satisfy itself that the marriage had broken down and that there was no likelihood of reconciliation between the parties and no hope of resumption of cohabitation. The question the court would have to ask itself is this:

> "Does the evidence before the court reveal such failure in the matrimonial relationship, or such circumstances adverse to that relationship, that no reasonable probability remains of the spouses again living together as husband and wife for mutual comfort and support?"[24]

The most important circumstances in the proof of the breakdown would be that the parties had been living apart for some considerable time before the petition was made. Separation in itself, however, would not be conclusive proof of a breakdown. The court would have to consider each case on its merits. Those actions which under the existing Canadian and English law constitute matrimonial offences, i.e. adultery, cruelty, etc. would be available as evidence to prove the breakdown but would not in themselves be grounds for granting a divorce. Also the court would have to take into consideration many factors that are not at present considered in divorce cases. This basically is the position taken by the Mortimer Group, as your Committee understands their report.

The form in which this scheme was actually presented to your Committee suggested specifically that the court should, upon the presentation of a petition by one of the parties to a marriage, decree a dissolution whenever the marriage had irretrievably broken down. To prove the

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[22] *Proceedings* No. 8, November 22, 1966, p. 392.
[23] *Proceedings* No. 8, November 22, 1966, pp. 411-12.
[24] *Putting Asunder*, pp. 38-39.

irretrievable breakdown there must be evidence that there is no reasonable expectation of resumption of cohabitation and also evidence that the parties are in fact living separate and apart and have so lived for a continuous period immediately prior to the date of granting the decree for three years, or one year where the respondent has been guilty of adultery, extreme cruelty, sodomy, bestiality, or an attempt to commit sodomy or bestiality. In determining separation, a period of cohabitation no more than two months with reconciliation as its primary purpose would not be considered.

It was also pointed out that certain safeguards would obviously be required in such a scheme to protect not only the innocent victims of a divorce, that is the children and perhaps an unwilling spouse, but also the institution of marriage itself. Thus the United Church Pastoral Institute has proposed that no decree would be issued if the court believed it to be contrary to public policy. Public policy permitting such refusal would be (a) that the decree would prove unduly harsh or oppressive to the defendant or respondent or (b) that the defendant had failed to comply with a court order or is likely to fail to comply with an order of the court concerning maintenance of the respondent or a child of the parties or as to the custody of, or access to, such a child.[25] The Mortimer Group envisage similar safeguards in their proposals.

The proponents of the pure marriage breakdown thesis have advanced many arguments in its favour and made numerous criticisms of the existing system of divorce based upon matrimonial offence. While not wishing to repeat criticisms of the current system made elsewhere in this report, some of these points are worth noting. The fundamental argument against the present system, even with the addition of further grounds, is that it fails to get to the heart of the matter—the state of the marriage itself. It merely deals in superficialities and external or overt factors. The Pastoral Institute has agreed that:

> "The addition of numerous legal grounds, based upon the matrimonial offence is evidence of a struggle to do justice to persons whose marriages are in trouble without coming to grips with the marriage breakdown as such."

Adultery may be evidence of marital trouble but it may not mean that the marriage has broken down. It may merely point to the need for counselling and education rather than to divorce. The existence of matrimonial offences may not thus prove a breakdown, and hence legitimately occasion a divorce; conversely, a marriage can break down without any

[25] *Proceedings* No. 8, November 22, 1966, pp. 411-12.

matrimonial offence having been committed. Many other factors must be considered in determining the failure of a marriage; such factors as immaturity, personal inadequacies, marked difference in background, inadequate preparation for marriage and external interference from in-laws and outsiders. There are many factors in society, economic, moral and social which threaten marriage and family life.

Besides being remote from the realities of the marriage, the existing law engenders a great deal of bitterness and encourages recrimination on the part of the parties by the use of the adversary system and the use of the idea of a guilty party. Marriage breakdown by abolishing the adversary system and getting rid of the idea of a "guilty party", would end all this. Furthermore, whereas the present law inhibits attempts at reconciliation, the marriage breakdown theory would encourage it because an attempt at reconciliation would almost certainly precede most divorce actions, if for no other reason than that an attempted reconciliation that failed would provide good evidence of a marriage breakdown in any subsequent proceedings.

As the Mortimer Group have stated it:

> "A divorce law founded on the doctrine of breakdown would not only accord better with social realities than the existing law does, but would have the merit of showing up divorce for what in essence it is—not a reward for marital virtue on the one side and marital delinquency on the other; not a victory for one spouse and a reverse for the other; but a defeat for both, a failure of the marital 'two-in-one relationship' in which both its members, however unequal their responsibility, are inevitably involved together."[26]

Furthermore, it is argued, such a system would not only provide relief for those situations where marital offences have not occurred, but would provide relief for those whose moral sense and civic responsibility prevents them from deliberately committing adultery or perjury to obtain a divorce. By so doing, it will eliminate the possibility for easy divorce and divorce by consent that the law affords to those deliberately willing to commit or pretend adultery. Thus it will not make divorces harder for those who merit them; but it will impede those who do not. As the United Church has pointed out, divorces are at present granted quite quickly and the three year waiting period will allow a system of marriage counselling to operate and thus supersede the system of instant divorce following isolated matrimonial offences which give the counsellor no time to operate.[27]

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[26] *Putting Asunder*, p. 18.
[27] *Proceedings* No. 8, November 22, 1966, p. 414.

Additional benefits, it has been suggested, that would flow from this system are the eradication of the vengeful or vindictive spouse who deliberately thwarts a divorce for no good reason, and the opportunity for full argument on property settlements and maintenance. The court having fully investigated the facts, it will be no longer necessary for the wife to forgo legitimate alimony or the husband to pay excessive settlements simply to get their divorce.

The Mortimer Group have also proposed other reasons for adopting marriage breakdown, which are not at the moment relevant to the Canadian situation but which would be, if certain other recommendations before your Committee were to be followed. The inclusion of the ground of insanity in the English law is inconsistent with the idea of matrimonial offence, being based on an underlying moral principle. Yet, "if it is morally right to grant divorces in cases where the common life has been brought to an end by circumstances outside the control of either party, it is hard to see why the law should make the decrees depend on the commission of an offence except in the one case."[28]

Finally, it has been urged, marriage breakdown would consider the subject of divorce from the social standpoint and would strengthen family life, the preservation of which is a major concern of society. Under marriage breakdown, society, through the courts, would decide who had the right to remarry, not the parties themselves. Under current procedures either the innocent or the guilty party may decide whether the other shall remarry either by concealing evidence of their offence, or by refusing to institute divorce proceedings.

The ground of separation suggested by the Canadian Bar Association and other groups would not really fit the marriage breakdown conception in this regard it is alleged. Because if separation alone is the ground for divorce, the parties would know that if they stayed apart, eventually they would be free to remarry, even if it took some time. Thus the choice still basically rests with the parties.[29] By requiring something beyond mere separation, society will be able to assert its vital interest in the stability of family life, by giving the final decision to the court, society's representative, not the parties themselves.

A good summary of the argument advanced by the proponents of the marriage breakdown theory is provided by the following paragraph:

> "Present legislation significantly fails to permit the legal dissolution of marriages that are broken down beyond reasonable hope of restoration. Many persons with broken marriages are quite capable of re-estab-

[28] *Putting Asunder*, p. 31.
[29] *Proceedings* No. 8, November 22, 1966, pp. 412-13.

> lishing family life, but are unable to obtain divorces because there has been no proven and uncondoned adultery. Many too find themselves denied divorces, or their divorces may be placed in jeopardy, because of the often capricious judgment of an estranged spouse not to mention the financial difficulties of affording the cost of the proceedings. To broaden present legislation mainly by adding to the number of matrimonial offences will not alone be a realistic way of protecting human dignity, or of contributing to healthier family life."[30]

The novelty of the marriage breakdown theory does not lie simply in the grounds it proposes for dissolutions of marriage, but also in the procedure that would be required to effect the system. Indeed, it is not the essential validity of the theory that seems to merit the most careful inspection at this stage, but the practical consequences that would flow from it, were it to be adopted.

The existing system for the trial of divorce cases based upon the adversary method, the traditional practice of our courts, whereby the judge is the arbiter between two contending parties, would have to be changed. The procedure would have to be that of an inquest or inquiry into the state of the marriage, if the marriage breakdown system were to work. The parties would not provide all the evidence and the court might have to seek out and introduce evidence of its own. As the Mortimer Group have expressed it:

> "We believe that to alter the law while leaving the method of its administration just as it now is would be to make divorce easier to obtain without any compensating advantages."[31]

The court would no longer be concerned with establishing the guilt or otherwise of a person against whom it is alleged a certain offence had been committed. Instead it would be inquiring into the alleged fact and causes of the "death" of a marital relationship. The Mortimer Group believe that:

> "It would have to be made possible for the court, therefore, to inquire effectively into what attempts at reconciliation had been made, into the feasibility of further attempts, into the acts, events, and circumstances, alleged to have destroyed the marriage, into the truth of the statements made (especially in uncontested cases), and into all matters bearing upon the determination of public interest."[31a]

In short, the court would need to know far more about both partners to a marriage and their respective conduct toward each other than is now the case.

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[30] *Proceedings* No. 10, December 6, 1966, p. 554.
[31] *Putting Asunder*, p. 67.
[31a] *Ibid.*

In pursuit of all the relevant facts, the courts would necessarily require assistance. As the Mortimer Group declare:

> "it would be contrary to the ethos of English law to ask judges to act as inquisitors."[32]

It would presumably be equally contrary to the ethos of Canadian law to so ask Canadian judges. Therefore, the court will need officers to assist it, especially as a great deal of the information will be required of experts trained in the social sciences and family matters who can advise the courts on reconciliation and its likelihood of success, the effects of the situation on the children of the marriage and so forth. Such officers would also be needed to supervise the arrangements made for maintenance and custody.

It has been pointed out by advocates of this system, that an inquisitorial procedure is not unknown in Canadian legal practice. In the Province of Ontario, social workers carry out an investigation in divorce cases where there are children under sixteen and they file a report with the court on behalf of the Official Guardian. The courts also conduct inquiries where there is suspicion of connivance and collusion and may, and often do, conduct what amounts to an inquiry where it is necessary to consider whether the court's discretion should be exercised in favour of a plaintiff who has also committed a matrimonial offence.[33] Nevertheless, the fact that a particular procedure may be resorted to from time to time, is not necessarily an argument that should be the basic procedure to be applied in every case.

Although not necessarily connected with the essence of the breakdown theory, the advocates of it propose that at the time of the divorce, the court should also deal with all aspects of the case, making provision for maintenance, custody, the division of family property and the award of possible pension rights to the wife and so forth. In making these arrangements it would bear in mind all the facts of the case that it had discovered.

2. *Marriage Breakdown: Problems of implementation*

While there may be many general arguments against the adoption of the marriage breakdown theory as the sole ground for divorce, it seems first of all worthwhile to consider just how feasible such a scheme would be in actual practice. Your Committee has not heard from any witnesses who were prepared to dispute the validity of the doctrine under discussion

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[32] *Ibid*, p. 70.
[33] *Proceedings* No. 9, November 29, 1966, pp. 509-10.

from a practical point of view. However, most of the witnesses who proposed it did so as an addition to the present system, not as a substitute for it. This is largely because the public generally was unaware of the theory before the hearings began, as were some members of your Committee.

Nonetheless, it has raised many questions in the minds of your Committee members, questions which have been examined recently in a Report of the English Law Commission published in November of 1966.[34]

The English Law Commission believes that despite the contention of witnesses that the issue of breakdown is triable, it is doubtful if it can be adequately tried under the present court system; and no one, not even the Mortimer Group has suggested a root and branch reform of the court structure and procedure in divorce cases. In any case, the actual test of breakdown leaves considerable room for interpretation and discretion. The attitude and decisions of individual judges may vary greatly. As a result, decisions would be varying and highly unpredictable, and lawyers would encounter the greatest difficulty in advising their clients. The alternative would be to spell out in the legislation the requisite conditions for finding a breakdown of marriage in endless detail, but this would hardly be practical. In any case, even if it were, the result, given the tenor of our legal system, would probably be for judges to treat the stipulations as formulas, and if the external facts fitted, to grant the divorce without really delving into the heart of the matter. Even if the details were not spelled out, and the judges did rapidly begin to render their verdicts with some degree of consistency, there would be a danger, especially given the propensity and tradition of our courts to look to precedents, that once a particular set of circumstances had been established as proving that a marriage breakdown had occurred, that there would be a marked tendency for lawyers to plead and judges to accept, these circumstances in future cases as proof of breakdown. Obviously adultery, desertion, cruelty and separation would be such circumstances. It is quite likely, therefore, not merely in the long, but probably in the short run too, that the matrimonial offence doctrine, if it were formally tossed out of the front door of the legislature, might in fact surreptitiously creep in again through the court house window.

The English Law Commission was also concerned with the personal aspects of a divorce case. The trial of a divorce, even an undefended one, can be a bitter and humiliating experience for the parties concerned.

[34] Cmnd. 3123.

Under the marriage breakdown system, the inquest would be on a scale far more extensive and intensive than is now the case. Such a proceeding would certainly prove extremely distasteful and embarrassing to most people. It is hard to see how this would contribute to the minimization of bitterness, distress and humiliation, which should be one of the objects of a good divorce law.[34a]

The Commission points out that not only would trial procedure be more painful to the parties, but it would be considerably more extensive in the time and space it would occupy. If all cases were to be inquired into, trials would inevitably be longer. The vast majority of cases at present are undefended and therefore can be dealt with both swiftly and without complications. The proposed system would necessitate more courts, more judges, and, most essential, the new procedure would require large numbers of trained investigators and social workers to assist the court. All this would be extremely expensive and would have to be paid for largely by the taxpayer, although it would no doubt be reflected in higher cost of divorce to the parties as well.[35] Far from making divorces simpler and cheaper, it might well have the opposite effect.

Above all, the weakness in Canada would be a lack of the social workers and experts in marriage counselling: they simply do not exist. The Scarman Commission has alluded to the shortage of such trained personnel in England, and expert witnesses have testified before your Committee that the shortage is no less acute in Canada. Not only that, but were such highly trained people to be absorbed in the divorce court structure, they would be denied to many other, and perhaps more worthwhile services such as probation work, child care, as well as marriage guidance and reconciliation procedures.[36]

Finally, there is the strong probability that this system would react in a detrimental way on the existing facilities for marriage counselling and reconciliation. Most witnesses before your Committee, whether they have advocated marriage breakdown or not, have emphasized the importance of counselling and reconciliation. While the advocates of marriage breakdown did not agree among themselves whether reconciliation attempts should be mandatory, discretionary, or absent in the divorce procedure, the Pastoral Institute of the United Church has suggested that since an attempt at reconciliation that had failed would be a strong argument in the court for proving marriage breakdown, it would thus encour-

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[34a] Cmnd. 3123, p. 10.
[35] *Proceedings* No. 16, February 16, 1967, p. 828.
[36] *Proceedings* No. 10, December 6, 1966, pp. 537-38.

age reconciliation attempts. While this might be laudable in itself, especially if it took place before the marriage had completely broken down, there is a greater probability that conciliation attempts will become simply standard pre-trial procedure, undertaken on legal advice, with little hope of success. Thus the existing agencies would be swamped with what are largely hopeless cases to the detriment of those who could indeed be helped by conciliation procedure.

The Scarman Commission has also expressed the belief that marriage counsellors and conciliation agencies are disturbed by such a proposal. They fear that one or other of the parties may wish to subpoena them to persuade a judge that every effort has, or has not, been made to save the marriage. The agencies fear that if this became common practice, public confidence in them would be undermined and their efficacy gravely impaired.

From the procedural point of view, there is an added complication in Canada to be borne in mind when considering the practical implementation of marriage breakdown. While this may not be insoluble in theory, it is one that raises a great many practical difficulties. This is the very matter of court procedure itself. If the implementation of marriage breakdown is to be left to the provincial courts which now administer the divorce laws, it will be a provincial, not a federal matter, to establish their procedure. While the federal authority may be able to set out general guide lines, the details would rest with each individual province. The establishment of a series of federal divorce court with their own procedure and staff would probably be the only way out. But this would be a radical step and would raise further problems.

For example, the hope that all matters pertaining to a divorce could be dealt with altogether at the same time, raises very serious jurisdictional problems. As has been outlined in a previous section of this Report, while federal authority extends to matters of custody and maintenance, once the question of pension rights, marital property, the continuing custody, maintenance and guardianship of children are at issue, federal jurisdiction becomes very dubious, indeed probably non-existent. To establish a federal divorce court to achieve comprehensive proceedings and then to find that part of its activity is *ultra vires* would be to leave matters worse than before.[37]

While the scheme in its most absolute form would, therefore, seem to raise insuperable problems of implementation, there is much in the

[37] See Report pp. 55-60.

underlying idea that is appealing. To some degree already, the idea has crept into divorce law along with matrimonial offence, especially in jurisdictions which have added insanity to their grounds. For insanity is not an *offence* but a condition that destroys marriage. (Insanity as a ground for divorce is discussed elsewhere.)[38] There would seem to be a somewhat less cumbersome method of procedure that could be used. The essence of this would be to dispense, to as great a degree as possible, with the investigation to satisfy the court that the marriage has irretrievably broken down. This full scale inquest would be the most expensive, distasteful and time consuming part of the process. The court would likely assume on the basis of easily provided external evidence that the marriage had broken down unless there was clear evidence to the contrary.

A scheme somewhat along these lines seems to have been in the minds of the authors of the brief presented by the Pastoral Institute of the United Church of Canada, albeit perhaps unconsciously. Nevertheless, the best exposition of a simplified breakdown procedure was provided by the English Scarman Commission, although not recommended by it. A divorce case based on marriage breakdown has to answer four questions. Firstly, has the marriage broken down? Secondly, if so, are there any reasonable prospects of reconciliation? Thirdly, if not, is there any reason of public policy, especially involving the parties or the children, why the divorce should be denied? And finally, if not, what arrangements should be made regarding the parties and the children?

By the suggested procedure, *on proof of a period of separation alone,* the court would be prepared to assume a positive answer to the question: has the marriage broken down; and in the absence of evidence to the contrary, it would assume similarly that reconciliation is not reasonably likely and that there is no reason to withhold the divorce. If there was anything in the evidence that led the court to believe reconciliation was possible, it could adjourn the case for an attempt to be made, but unless the fact of the marriage breakdown was strongly disputed by one of the parties, there would be no inquest to establish that the marriage had irretrievably broken down. As the Scarman Commission put it:

> "the ending of cohabitation and a sustained failure to resume it are the most cogent, objective and justiciable indications of breakdown."[38a]

Probably the only occasion for a full inquest into a marriage would be when a wife opposed it on the grounds that it would bring hardship

[38] See Report pp. 135-38. [38a] Cmnd. 3123, p. 36.

upon her and her children, despite the fact that a husband had made quite an equitable arrangement. These cases would probably be few and the courts would be able to cope with them without any undue strain.

In a suggested bill appended to their brief, the United Church Pastoral Institute proposed what in practice would be a similar system:

> "The court shall upon a petition by one of the parties to the marriage, decree dissolution whenever the marriage had irretrievably broken down . . . Irretrievable breakdown of marriage shall be proven by evidence that there is no reasonable possibility of a resumption of cohabitation and shall include evidence that the parties are in fact living separately and apart and have lived separately and apart for a continuous period, . . . such a period to be either:
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> (a) One year when the respondent has been guilty of adultery, extreme cruelty, sodomy, bestiality or an attempt to commit sodomy or bestiality, or
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> (b) three years in every other case."[39]

The authors of this proposal expressed the hope that the judges would inquire into the marriage rather than accept the external fact of separation or separation with adultery, but admitted the possibility that they might not, especially at first. It was hoped that the new system having been introduced alongside the old system, the new would eventually displace it: the old being swallowed up by the new. There is perhaps some room for scepticism on that point.

The real problem with this simplified version of the marriage breakdown theory is an extremely basic one. How long a period of separation should be required before a husband or wife can ask the courts for a divorce? The witnesses proposing the inclusion of separation as a ground for divorce in some system or another, have suggested various periods of time ranging from two to seven years. Similarly, the Mortimer Group in England thought three years; the members of the English Royal Commission on Marriage and Divorce (1951-1955) believed seven years[40] to be a reasonable time. If the period chosen is too short, the parties might rush into a divorce without having time to recover from either a violent matrimonial quarrel or a passing affair or infatuation. Nor might they have time to consider whether the difficulties in their marriage were capable of solution.

On the other hand, if the period is a relatively long one, say three years, what becomes of those who presently can obtain divorces on the

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[39] *Proceedings* No. 8, November 22, 1966, pp. 428-29.
[40] Cmd. 9678, p. 25.

ground of outrageous conduct by their spouse. Must they have to wait three years? It seems unlikely that a period could be agreed that would render justice to all parties in both categories. Therefore, it does not seem possible that breakdown could constitute the sole and comprehensive ground. If the period of separation is to be more than six months, then it can only offer a practical solution if it is coupled with other grounds which would provide far more rapid relief. This is not to reject marriage breakdown ideas completely. Far from it. The introduction of it through the ground of separation is discussed in the following section of the report.

THE SEPARATION GROUND

Your Committee is of the opinion that marital offences, such as adultery, cruelty and desertion, cannot be abandoned as grounds for divorce, yet it realizes that many marriages fail for reasons other than provable offences on the part of one of the spouses. The plight of thousands of persons caught in the bonds of dead marriages presents a problem of major importance. It is in this connection that the principle of marriage breakdown provides a practical solution.

Many marriages fail through no fault of either partner. Neither party commits adultery, there are no acts of cruelty, and one spouse does not actually desert the other. The parties to the marriage may be fundamentally incompatible. Often such partners try repeatedly to revive the affection that they once had for each other or believed they had. Sometimes such couples separate because the tensions within the home have an adverse effect upon both the partners and the children. Under such circumstances the partners may be better off if remarried and the children given a more healthy family environment. As one brief expressed it:

> "It is difficult, if not impossible, to see what interest the State might have in the promulgation of this marital bond . . . It is difficult to see what possible interest the State could have in endeavoring to reunite or preserve the bond between two people who have absolutely no intention of resuming cohabitation . . . Providing all the ancillary obligations are dealt with, [there is no reason why these people should not have a divorce.]"[41]

As the law now stands such broken marriages are indissoluble unless one of the partners is prepared either to commit the matrimonial offence of adultery, or to fabricate evidence that a court might accept as proof of such misconduct. This is not a happy situation. The widening of the grounds for divorce by the addition of cruelty, desertion, and so forth, would not alleviate this situation. The present law, as has been pointed out, punishes those whose integrity prevents them committing perjury or adultery, but allows those less scrupulous to obtain relief. The object of a good law should be the very reverse.

There are many cases where one of the spouses has simply disappeared leaving no proof of conscious desertion, or any other fault such as adultery or cruelty. Some marriages have ended and future cohabition has become impossible by reason of some incapacitating

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[41] *Proceedings* No. 16, February 16, 1967, p. 851.

physical or mental illness or by persistent alcoholism, drug addiction or criminal behaviour.

The utter cruelty of denying to an unfortunate spouse the right to a normal married life under such circumstances is obvious. The great number of persons so affected is such that the problem can no longer be ignored. The several classes of such cases will be dealt with individually in the course of this report.

1. *The Separation Ground as Proof of Marriage Breakdown*

The introduction of the ground of separation for a specified period would be the most practical way to solve the problem of simple marriage breakdown. There can be no better evidence that a marriage has failed than the termination of cohabitation and the failure to resume it after a substantial period of time. If there is no likelihood of reconciliation, there is little point in retaining the empty legal shell of the marriage. As one brief before your Committee succinctly put it:

> "If after living apart . . . a couple have no desire to ever again live together as man and wife, no law can make it so and no service is rendered mankind to refuse divorce."[42]

Only by divorce can the partners to a broken marriage hope to be free of their marital ties, and thus enabled to lead full lives again. To deny such people the opportunity to contract new and possibly more happy and stable marriages serves no public good. Indeed, it is difficult to see what service is rendered to the concept of marriage as a life long union, to retain fossilized relics of it that only cause hardship and misery, and are likely to lead to irregular and illicit unions and the procreation of more illegitimate children.

The introduction of the separation ground into Canadian divorce law may appear to some to be revolutionary. Certainly it would be a departure from the principles at present in vogue. In actual fact, the radical nature of the proposal is more apparent than real. If insanity, drug addiction and criminality are introduced as grounds for divorce, one has already departed from the matrimonial offence concept. The tendency in cases of cruelty and even desertion is now to look to the circumstances produced by these offences as justifying the relief, rather than to the offences themselves. This is to recognize in large measure the fact that the marriage has broken down.

There is little doubt that the concept of marriage breakdown envisaged in the separation ground seems to have won wide acceptance.

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[42] *Proceedings* No. 4, October 25, 1966, p. 173.

The majority of witnesses appearing before your Committee have advocated it in one form or another, usually in the form of a separation ground. It has been endorsed by such large and representative bodies as the United Church of Canada, the Anglican Church and the Baptist Church, as well as the Canadian Bar Association, The Congress of Canadian Women, and the Canadian Committee on the Status of Women. A large number of social organizations with considerable experience in the problems of divorce, as well as many legal societies, medical associations and individuals with wide experience in the problems of family and matrimonial law have similarly endorsed the principle. It has been introduced into numerous jurisdictions whose legal and social structure are not dissimilar to our own; Australia, New Zealand, and various American States, and it has existed for a long time in most European countries. There is no doubt that, as practical legislation in all of these countries, it does work.

There are, nevertheless, certain problems connected with the introduction of the separation ground that must be examined and solved. The procedure must be determined and certain safeguards introduced. In accordance with the separation ground, as presented to your Committee, divorce would be available to either spouse where the husband and wife have lived separate and apart for a period of three years immediately preceding the commencement of proceedings. The ending of cohabitation and the failure to resume it are clear and objective indications that the marriage has broken down. It may not necessarily mean that it has broken down irretrievably, but it does indicate a reasonable presumption that this is so. If the parties are convinced that reconciliation is impossible, the chances of saving the marriage are very remote. As the Scarman Report justifiably notes on page 36:

> "the parties are likely to be better judges of the viability of their own marriage than any court could hope to be."

2. *Safeguards*

Nevertheless, there should be safeguards in such a system. In the first place, the court should be reasonably satisfied that there is no hope of reconciliation, otherwise the proceedings should be adjourned. The realities of the situation in all probability, however, are that unless the marriage has fully broken down, the parties would not be before the court asking for a divorce.

Before granting the divorce, the court should be satisfied on two other matters. Firstly, that the granting of the divorce would not be

unjust or cause undue hardship to either of the parties to the marriage or to the children. The phraseology suggested by the witnesses supporting the introduction of this ground is:

> "that the issue of a decree will not prove unduly harsh or oppressive to the respondent spouse."

Secondly, the court should be assured that satisfactory arrangements have been made for the maintenance of the defendant spouse and the maintenance and custody of the children.

Circumstances exist, however, when the court should exercise its discretion. The financial circumstances of the wife are important. It would be intolerable for a husband to divorce his wife after three years and leave her without means of support, and especially so if she has the task of rearing the children. The financial arrangements must be fair and equitable in the circumstances. Should a husband remarry after his divorce, it might be well that his financial resources would not extend to the support of two women. Again, if a divorce is granted to the husband, a wife may lose pension rights or other benefits thus causing her great hardship. In such circumstances it would be necessary to withhold the granting of a decree. The interest of the children might similarly preclude the granting of a divorce. Also, outrageous conduct on the part of the petitioner might be a legitimate cause for refusing a decree. The Scarman Report has pointed out that while it may not exactly help the institution of marriage to keep someone in it who flagrantly abuses it, it is equally possible that by letting him escape he may serve as a bad example to others. Spouses who indulge in outrageous conduct should not be permitted to get away with it.[43] It would perhaps be wise to add as a condition to the granting of a decree that it not be unduly harsh or oppressive to a defendant spouse.

Finally, it would also be necessary to consider the interests of the petitioner himself and also of any partner or offspring he may have as the result of an illicit union.

The most controversial and troublesome aspect of the separation ground is the problem of the so called "innocent spouse" who is divorced against his, or most probably, her will. The safeguards discussed above would deal in large measure with this problem, although they are also applicable when both spouses agree to the divorce proceedings. Both the Mortimer Group and the English Law Commission have

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[43] Cmnd. 3123, p. 20.

examined this problem very carefully. The conclusions may be summarized as follows:

> There seem to be four ways in which the wife may be adversely affected if it were possible for her husband to divorce her against her will:
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> 1. that she would suffer economic deprivation;
> 2. that she would lose status by being divorced;
> 3. there would be the public scandal of the petitioner taking advantage of his own wrong; and
> 4. the wife would have a feeling of insecurity knowing that she could be divorced at any time against her will regardless of her own conduct.

The first problem can be overcome by the safeguards already introduced. Adequate financial arrangements must have been made for the support of the wife while unmarried and the children.

A wife may object to a divorce on religious grounds. However, if the marriage really is dead, there can be little point in the preservation of its legal form. From a theological point of view, most Churches do not object basically to divorce as such but to remarriage. A wife with strong religious scruples who has been divorced, with due financial safeguards, is not compelled to remarry.

The second problem, loss of status, is not a major ground for rejecting divorce against the will of an objecting spouse. Divorce is no longer the social scandal it was in Victorian times. Indeed, the whole purpose of the divorce legislation proposed is the relief of hardship and suffering in society. As the Scarman Report has shrewdly observed:

> "from the point of view of the wife herself, it is not clear that the status of a rejected wife is at the present day superior in society's esteem to that of a divorcee."[44]

The scandal of the wrong-doer benefiting from his own bad conduct would be safeguarded by allowing the court's discretion to refuse the divorce, if it believes it to be contrary to public policy. As the Scarman Report states:

> "The expedient of preserving the sanctity of marriage by insisting that one who has shown wanton contempt for it should be punished by remaining married seems illogical and unattractive, especially if, as is usually the case, it involves punishing others as well."[45]

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[44] Cmnd. 3123, p. 22.
[45] *Ibid.*, p. 23.

This matter could be safely left to the discretion of the court. In such a case, the interests of other persons, the common law partner and the illegitimate children of the petitioner must also be considered.

Finally, the threat to the security of the wife, has been very much overemphasized. As the Mortimer Group have pointed out, the power to keep one's legal status is not the same as being secure from the disruption of the home and family. A petition for divorce arises only after that disruption has occurred, and it does occur, whether or not there is a separation ground for divorce. In the words of the Mortimer Group:

> "Whenever a husband (or wife for that matter) has so far broken away from the original marriage as to set up a new ménage with the intention that it should be permanent, the lot of the deserted partner cannot be appreciably improved, in terms of human life, by mere maintenance of the legal *status quo*. The real damage has already been done."[46]

The real fear is that if divorce could be granted on the ground of separation despite the objection of one of the parties, this would lead to increased insecurity in marriage and a lack of respect for the permanence of marriage. This has not been borne out by the events in jurisdictions which have introduced this ground into their law. While it is possible to imagine cases where it would not be desirable to grant a divorce on the ground of separation, and it is clearly essential in such cases that the courts have the discretion to refuse them in actual practice, the courts would probably need to exercise it little.

It is equally possible to envisage situations where it clearly would be desirable to grant a divorce in spite of the strenuous objections of the other party. The objections of some partners may be based upon nothing more than sheer spite or vindictiveness, no matter what excuse may be given. A wife might wrap herself in a cloak of religious objections merely to hold up her husband for a higher maintenance settlement.

For these reasons, it seems to your Committee to be desirable to introduce "separation without fault" as a ground for divorce subject to certain safeguards, whether or not both spouses agree. The alternative, to make the ground voluntary separation, as proposed by the Canadian Bar Association, is not acceptable.[47] This could rule out divorce in many cases where it would be most desirable.

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[46] *Putting Asunder*, pp. 55-56.
[47] *Proceedings* No. 5, November 1, 1966, p. 202.

To summarize briefly the safeguards that it would be necessary to attach to a separation ground: (i) The court to have the power to adjourn for a specified period when there seemed to be a possibility of reconciliation; (ii) Provisions to be made for the financially weaker party; (iii) No decree to be issued until satisfactory arrangements have been made for the care and custody of the children; (iv) The court to have discretion to refuse the divorce on the ground of public interest. In addition, in cases where the other spouse does not object to the petition, provision should be made to ensure that the spouse has independent advice, realizes what is involved, and the consequences of the granting of the petition. The Scarman Report suggests that it might even be desirable to send a welfare officer to visit the non-objecting spouse to make sure that all the implications are fully understood.

Since the introduction of the separation ground would be a complete departure from the matrimonial offence concept, the usual bars of collusion, condonation and connivance would not apply. They would clearly be inapplicable in the circumstances.

3. *Determining the Period of Separation*

A question to be resolved on the introduction of the separation ground, is the length of the period of separation to be required. The length of time suggested to your Committee has varied from a minimum of one year to a maximum of seven. Three years is the time span most generally suggested. Clearly it must fulfill two conditions. In the first place, the period must not be so short as to undermine the stability of marriage and lead to quick and easy divorce. But on the other hand, it must not be so long as to preserve in legal existence marriages that have not existed in fact for a considerable time, since in cases of desertion this would withhold the right to remarry and would foster illicit sexual relationships. Seven years is certainly too long; one year is almost certainly too short. If the period is too long, those couples who could get a divorce on another ground, but who would prefer to use the separation ground to avoid the recrimination and hostility usually associated with the more usual grounds, would not be prepared to wait. The Scarman Report thought that those couples seeking to end their marriages without public fault finding might be prepared to wait two years.

The object of the separation ground is to provide relief for those marriages which have irretrievably broken down. In fixing the period of separation, therefore, the prime consideration should be, does this period provide a fair test that the marriage has broken down? It has

been suggested that two years separation is sufficient to establish this, especially if the case is undefended. If the parties have lived apart for two years and then take steps to end the marriage, there is little hope of reconciliation. In any event, the court would have the power to inquire into the possibilities of reconciliation, if it appeared warranted. Two years might be a little on the short side. Three years would perhaps be better.

The Scarman Report also suggested, although no witnesses before your Committee endorsed it, that there should be a longer period of separation in cases where one spouse objects. If the period for undefended cases were to be set at two years, there might be a case for taking this position. If the parties have been separated for three years, or longer, however, it is hard to believe that the marriage had not irretrievably broken down. Certainly the court would be expected to consider carefully defended cases especially with a view to the possibility of reconciliation. However if a couple were irreconcilable after three years, it is unlikely that they will be more amenable to cohabitation after five years.

The introduction of two periods of separation, one for defended, and another for undefended cases, does not seem to have much merit. Two periods might provide a less scrupulous spouse with an opportunity for blackmail by threatening to defend the action.

Your Committee is consequently of the opinion that a period of separation of three years immediately prior to the institution of proceedings would be sufficient to establish the breakdown of a marriage and should be introduced as a ground for divorce with the safeguards discussed above.

4. *Can Marriage Breakdown and Matrimonial Offence Doctrines be Mixed?*

It has been argued, most notably and forcefully in *Putting Asunder,* that the separation ground should not be added as simply one more ground for divorce. Either marriage breakdown alone should be the sole ground, or else reliance should be made upon matrimonial offences exclusively. Basically, it is asserted the two concepts are based on fundamentally different principles and to have a divorce law containing both would be glaringly illogical.

This argument has as its premise the contention that Parliament must choose one principle as the exclusive one. Your Committee does not subscribe to this view. There is no reason why the one principle

cannot be used to satisfy the case of the spouse against whom a wrong has been committed, while the other principle can serve in the case of those spouses against whom no offence or misconduct can be proven. The legal system often uses different principles to dispose of distinguishable situations. The aim of your Committee is to suggest practical remedies for real grievances.

Basically, those opposed to mixing the two concepts are arguing that only one principle can apply; as one brief rejecting such a mixed system stated:

> "If you start with breakdown you are premising your solution on a particular meaning of marriage, and must act accordingly."[48]

Your Committee questions whether society at large has one particular view of marriage. Parliament is legislating for the whole of Canada. There is no doubt that many still hold to the matrimonial offence concept, just as it is clear that others are coming to believe in marriage breakdown. To reject one theory held by many, to replace it exclusively by one as yet held by relatively few would not be desirable.

Mr. Justice Scarman has expressed what seems to your Committee to be a realistic approach to the problem:

> "I believe that society recognizes that a spouse should be able to get a divorce when he or she has been deserted, has been treated with cruelty, or has had to face the infidelity of adultery. Why should a spouse, if in a position to prove any of these 3 situations, have to go further and prove irretrievable breakdown, or consent or failure of attempts at reconciliation? The ordinary man's sense of justice revolts at any such requirement. The law would do well to keep in touch with the ordinary man's idea of what is right and proper, and, though the lawyer can argue that the logical way to handle offences is solely as evidence of underlying breakdown, I think this argument, if carried to a logical conclusion, would fail to win general approbation and would certainly impose a very much greater strain on the administration of justice than our limited resources in legal manpower could meet."[49]

Another argument against the combination of the two systems is that it would provide an open-ended law and thus make divorce easier. The motto would be, if all else fails, try marriage breakdown.[50] With all due respect to the authors of *Putting Asunder*, your Committee does not accept this contention. It seems to ignore the fact that such a combination does exist in Australia, New Zealand, numerous American States and European countries. Were the separation ground to be introduced, there might immediately be a considerable number of divorces

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[48] *Proceedings* No. 9, November 29, 1966, p. 505.
[49] *Proceedings* No. 17, February 21, 1967, p. 920.
[50] *Putting Asunder*, p. 59.

sought under it. This would merely prove the need for the ground. Thereafter, the rate would decrease to a steady figure. Australian experience bears this out. Two years after the introduction of the separation ground, the number of petitions based on that ground fell off sharply and at no time was it the most widely used ground for seeking divorce:

> "One conclusion may be reached. The inclusion of the Act of the ground of separation has not brought the flood of divorces which was so confidently prophesied."[51]

It has also been objected that the separation ground would introduce divorce by consent. This is not so. Divorce by consent means that the parties alone shall act as the judges of their case.[52] Under the separation ground, the court would have to formally approve the divorce and would have the power and, indeed the duty, to refuse to grant it under the circumstances discussed above. However, the fact remains, that divorce with consent exists in every system as a matter of fact. Despite the rigors of the present law 90 per cent of all cases at present are uncontested. This indicates a large measure of consent on the part of the parties. The introduction of the separation ground would not weaken the institution of marriage. The separation ground would involve waiting for three years or longer.

It has been suggested that the separation ground be restricted to those marriages where the partners are living apart under a judicial separation. This was advocated by the Barristers' Society of New Brunswick and Judge P. T. J. O Hearn of Nova Scotia. A similar practice is followed in the State of New York. Your Committee can see little merit in the proposal. If a separation exists, it matters little whether it is merely *de facto* or whether concurrent with a judicial decree. It is the separation that is crucial, not the accompanying formalities.

Also it would be a superfluous provision on the one hand, and provide a bogus ground for divorce on the other. Judicial separations are granted only on certain specific grounds, grounds which under a revised statute would themselves be grounds for divorce, i.e. cruelty, desertion and adultery. Thus, the proceedings for a dissolution of the marriage could be based on these grounds. The element of separation

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[51] D. M. Selby, "The Development of Divorce Law in Australia", *Modern Law Review*, XXIX, 476, 1966.

[52] See Report p. 98.

would add nothing. Furthermore, it is hard to see what advantage would be gained by the necessity of going to court twice: once for the judicial separation and again for the divorce. It would place an added burden upon the courts and inflict financial hardship upon many people. It might even make the cost of divorce prohibitive for others.

SEPARATION WITHOUT FAULT

There are a number of conditions destructive of marriage which do not involve a provable marital offence on the part of either spouse but which, nevertheless, terminate cohabitation effectively. Among these are insanity, gross and habitual drunkenness, drug addiction, persistent criminality resulting in long terms in the penitentiary, and the disappearance over a long period of one of the parties.

While these conditions might be encompassed within the separation ground already recommended, they are of an identifiable nature and it seems more logical to treat them as separate or special cases of marriage breakdown. Besides, difficulty might be experienced in trying to bring these conditions under the general ground of separation. Difficulties have been encountered in the United States, for example, where the courts have refused to grant decrees on the ground of separation where the separation was caused by insanity.

We shall deal with these conditions individually beginning with insanity.

1. *Insanity and Illness*

Matrimonial offences, such as cruelty and desertion, are valid as grounds for divorce, not only because they violate the rights and duties of the matrimonial bond, but because they create situations which actually destroy the marriage itself. With desertion and cruelty the offensive conduct is wilful but other cases can arise where the conduct of a spouse effectively terminates the marriage as a viable union, even though no real fault is involved. Such a situation may exist when one partner to a marriage is insane. Many jurisdictions have introduced insanity as a ground for divorce. Great Britain introduced it in 1937 and the majority of witnesses before your Committee have strongly urged its inclusion in any reformed Canadian legislation.

To introduce insanity as a ground for divorce would be a departure from the essence of the matrimonial offence doctrine, and would recognize that insanity breaks up a marriage, not because becoming mentally ill is a crime committed by one partner against the other, but because it creates a situation where the marriage can no longer exist. The actions or behaviour of the patient may render continued cohabitation impossible or the sick partner may be detained for an extended period in a mental institution thus frustrating most of the purposes of marriage.

In such circumstances, it is unjust for one partner to be tied to the mere legal shell of a non-existent marriage.

The introduction of insanity as a ground for divorce is a matter which needs the most careful consideration. It must be firmly kept in mind that it is not the insanity itself that is the ground for divorce but the consequences that flow from it.

The usual ground suggested to your Committee has been "chronic" or "incurable unsoundness of mind". However, both the Canadian Mental Health Association and the Canadian Psychiatric Association have pointed out the dangers of these phrases. "Unsoundness of mind" in itself covers the whole gamut of mental illness, from minor neurosis to extreme psychotic conditions. As leading psychiatrists have pointed out to your Committee, no one is completely of sound mind, just as no one is in perfect physical health. There could be many occasions where a patient may be mentally ill, and thus technically of unsound mind, but perfectly capable of fulfilling matrimonial responsibilities.[53] It is for these reasons that witnesses, like the Canadian Bar Association, have stipulated that the patient must have been confined to a mental institution for a long period of time. This would be tangible evidence of the serious nature of the illness, but more important, such confinement would destroy the marriage.

It must be perfectly clear, therefore, that if insanity is to be considered a ground for divorce, it must apply only to those cases where the insanity by its consequences actually destroys the marital relationship.

The insanity must be incurable. This, however, raises a problem. Medical science is making sweeping advances. Even in the last five years, tremendous strides have been taken in the treatment and cure of mental illness. Consequently, the medical profession is very loath to say flatly and categorically that a person is incurably insane. Mental illness can be treated in the majority of cases, and your Committee is assured that even patients who are suffering from psychosis and who are confined to mental institutions for treatment, usually improve enough to leave the hospital. Psychiatric skill, knowledge and drugs are constantly improving, thus the Canadian Mental Health Association believes:

> "It is becoming increasingly difficult, therefore, even for a high qualified specialist in psychiatry to certify that a person suffering from mental illness is incurable, and that he will never be able to live at home in the community again."

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[53] *Proceedings* No. 10, December 6, 1966, pp. 534-35.
Proceedings No. 14, February 9, 1967, pp. 722-24.

Thus while a husband or wife may be in a mental institution and have been there for some considerable time, it is by no means certain that they may not be cured.[54]

The medical profession and those experienced in dealing with mental health are very reluctant to see insanity included as a ground for divorce. To do so would raise serious difficulties and would also discriminate against mental illness. This is a serious point that is often overlooked. Mental illness has suffered from a social stigma in the past, one that is only now being overcome. To single out mental illness would reinforce this stigma. There are other physical illnesses of a severe and chronic nature whose effects on a marital relationship can be every bit as severe as insanity: multiple sclerosis, cerebral hemorrhage or even severe disabling arthritis, and these are diseases which can produce profound character changes on the part of those suffering from them. It would be logical, it has been argued by the Canadian Mental Health Association, to make disabilitating illness, either physical or mental, a ground for divorce, if its consequences were such as to destroy the marriage.[55]

Since it is the consequences, rather than the insanity itself, that destroy the marriage, it has also been suggested that insanity as a ground could be dispensed with altogether and that its consequences could be dealt with under other proposed grounds, especially if the separation ground were to be introduced. Cruelty might very well be a ground as a result of the conduct of a mentally ill spouse, and the case of *Williams v. Williams* before the House of Lords in 1963 held that insanity was no defence to cruel treatment because it was the nature of the conduct, not the intention behind it, that the court had to consider in establishing cruelty. Furthermore, if the separation ground is introduced, it might be possible to deal with the cases of spouses committed to a mental hospital for protracted periods of time. The consequences of this committal seem to be the major motive for the advocacy of insanity as a ground for divorce at all. Indeed, the Canadian Mental Health Association's submission suggested that, if separation for a period of three years were adopted as a ground, there would be no need for a separate ground of insanity at all. Certainly, the Mental Health Association believes that in cases of real incurable insanity a divorce should be granted, so long as the defendant spouse is not unduly oppressed by the granting of such a decree. However, they argue that it

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[54] *Proceedings* No. 10, December 6, 1966, p. 545.
[55] *Proceedings* No. 10, December 6, 1966, pp. 540, 546.

would be better to grant the divorce for the real reason, the separation rather than making the chronic unsoundness of mind itself the ground for divorce.

Consequently, your Committee is of the opinion that marriages in which the conjugal life has been effectively prevented for a period of three years or longer by the mental or other disabling illness of one of the spouses, and in which there is no reasonable likelihood of a resumption of cohabitation, should be capable of dissolution subject to the discretion of the court, provided that the dissolution of the marriage shall not be unduly harsh or unjust.

2. *Disappearance and Presumption of Death*

There are circumstances where a marriage is destroyed through the disappearance of one of the spouses who leaves no proof behind of conscious desertion, or any other matrimonial offence such as adultery and cruelty, and whose absence would make it difficult to proceed under the separation ground. In such a situation, cohabitation is at an end and the marriage has ceased to exist, but at present the other spouse has no remedy.

Your Committee believes that the present situation, whereby a spouse who has reason to believe that their partner is dead, can remarry only at his or her peril, should be ended. While presumption of death is sufficient to protect the partner who remarries from a charge of bigamy should the missing spouse eventually reappear, it does not protect the second marriage. This becomes a nullity and any children of it illegitimate. Your Committee, therefore, believes that legislation should be introduced permitting the courts to decree a dissolution of marriage if there are reasonable grounds for assuming that the petitioner's spouse is dead.

3. *Non-Consummation*

Wilful refusal to consummate a marriage is ground for annulment in England (it was introduced by the *Matrimonial Causes Act* of 1937) but not in Canada.[56] In those provinces in which the law in force is that of England as of 1870, to be a ground for annulment the non-consummation of the marriage must be because of some physical or mental defect which renders coitus impossible. Experience has shown this limitation to be so restrictive as to prevent relief in cases where the purpose

[56] Power On *Divorce*, p. 194.

of the marriage is frustrated by the abnormal behaviour of one of the spouses.

A better approach to the problem of non-consummation is with respect to the effect of the non-consummation on the marriage, one of the basic purposes of which is the procreation of children. Were relief granted on the ground of marriage breakdown resulting from non-consummation, the reason for the non-consummation would be of secondary importance, and would include voluntary refusal over a protracted period as well as physical or mental inability.

The introduction of wilful refusal to consummate as a ground for divorce has been suggested by the Canadian Bar Association, the Benchers of the Law Society of British Columbia and the York County Law Association.[57] The suggestion is logical since a decree of nullity is granted for some defect of incapacity existing at the time of the marriage ceremony, whereas divorces are granted for conditions that arise after the ceremony. Wilful refusal to consummate occurs after the wedding has taken place. In Australian Law this distinction has been made. The *Australian Matrimonial Causes Act* of 1959 provides for divorce on the ground of wilful refusal to consummate, while retaining impotence as a ground for annulment. In New Zealand, however, the *Matrimonial Proceedings Act,* 1965, follows the English practice and allows wilful refusal as a ground for annulment.

The actual designation, whether divorce or nullity, may be of secondary importance, and were relief given on the ground of marriage breakdown by reason of non-consummation rather than directly on the non-consummation itself, the proceedings would clearly fall within divorce and not nullity.

Your Committee, therefore, is of opinion that non-consummation either wilfully over a protracted period or because of some physical or mental disability rendering coitus impossible, should be made a ground for divorce, subject to the discretion of the court and the absence of any substantial prospect of resumption of cohabitation within a reasonable period of time. However, the above shall not preclude an immediate dissolution of marriage by way of nullity on the grounds of non-consummation by reason of impotence on the petition of one of the spouses. It is, therefore, recommended that in addition to the new ground for divorce, the right to petition for nullity on the ground of impotence, as it exists at present, shall remain.

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[57] *Proceedings* No. 5, November 1, 1966, p. 202.
Proceedings No. 10, December 6, 1966, p. 558.
Proceedings No. 14, February 9, 1967, p. 749.

PART IV

PROCEDURE AND JURISDICTION

DOMICILE

This has been fully discussed in Part I. No further comment is required.

BARS TO DIVORCE

1. *Condonation*

Your Committee has been widely urged to make condonation a discretionary instead of an absolute bar to divorce. Although condonation has received no statutory definition and derives from the common law, it is a statutory bar to divorce in Canada.[1] The purpose of the bar of condonation is clear. It is to prevent a spouse who agrees to resume cohabitation with a partner who has committed a matrimonial offence, from holding that offence over the other's head forever afterwards. A resumption of cohabitation, which is an outward sign of forgiveness, is held to seal off the past. It would hardly augur well for the success of a marriage, if the atmosphere was potentially poisoned by the ability of one spouse to hold a former offence over the other's head and threaten divorce on it at some later date.

The condoned offence, however, is subject to subsequent revival, if the former erring spouse commits another matrimonial offence. Such an offence does not have to be of so serious a nature as the original one which as the law now stands would have been adultery (except in Nova Scotia). Cruelty or desertion can revive former acts of adultery. In this sense, condonation does not constitute absolute forgiveness, but rather conditional forgiveness on the understanding that the guilty spouse behaves correctly thereafter.

While the purpose of the bar is understandable, its existence as an absolute bar, does severely restrict the freedom of parties seeking a divorce. One spouse, particularly a wife, may very well condone an act of adultery in order to save the marriage and avoid the pain and heartbreak of family disintegration. If, however, the gesture proves futile and the marriage is not saved, the ground for a divorce action is lost. Thus an absurd paradox exists; if a couple attempt to save their marriage and fail, thereby proving its death, they cannot get a divorce, whereas, if they make no attempt at reconciliation, the marriage can be dissolved. Thus the real evil stemming from condonation as an absolute bar is that it directly discourages reconciliation. Consequently a law which has as its avowed purpose the preservation of the stability of marriage, actively mitigates against its professed object. For this reason the Canadian Bar Association, the Seventh Day Adventist Church, the United Church of Canada, the Canadian Committee on the Status of Women, and other witnesses, have urged that condonation be made a discretionary

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[1] *Matrimonial Causes Act*, 1857, section 30; *R.S.C.* 1952, c. 176, section 5.

bar to divorce. Thus the court could take into consideration all the factors involved in the situation in deciding whether to reject the petition.

An alternative solution would be the one adopted in the United Kingdom, as well as in Australia, whereby condonation remains an absolute bar to divorce but a period of cohabitation for a period of not more than three months, which has reconciliation as its primary purpose, is not deemed condonation.

The English act also provides that acts of adultery which have been condoned can never be revived at law regardless of the circumstances. This is a logical provision, if attempted reconciliation is no longer considered condonation. For should the reconciliation fail, the divorce may proceed and the doctrine of revival becomes quite unnecessary. If the reconciliation succeeds, then it is better that the couple put the past completely behind them. The forgiven partners know that their former lapses are finished with and cannot later be held against them. A marriage can thus make a fresh start with nothing, in a legal sense at least, hanging over it.

The English solution to this problem has one clear advantage. An attempted reconciliation does not raise a bar, whereas, if the bar were merely made discretionary, there might be some doubt as to the circumstances in which the courts might seek to apply it. However, if cohabitation for the purpose of reconciliation is not deemed condonation, this doubt would be resolved.

2. *Collusion*

Collusion is presently an absolute bar to divorce in Canada. Although collusion derives from the common law, it has been explicitly made an absolute bar to divorce by statute.[2] Unfortunately, there has been neither a statutory comprehensive judicial definition of collusion and there is considerable confusion not only in the mind of the public but even among lawyers as to what exactly collusion is.

As a result of this uncertainty, lawyers tend to keep their clients at arm's length from their spouses, lest any negotiations made between the parties to a divorce, or any agreement reached by them, be held as collusive and the action be lost. This is most undesirable. It not only

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[2] *Matrimonial Causes Act*, 1857, c. 85, sections 30 & 31; *Marriage and Divorce Act*, R.S.C. 1952, c. 176, section 5.

hinders possible reconciliation, but actually discourages it. Prior agreements or maintenance, custody and distribution of matrimonial property are similarly discouraged.

The general principles underlying the doctrine of collusion are clear enough. Collusion is a corrupt bargain to deceive the court either by fabricating evidence suppressing a valid defence, or bribing the petitioner respondent or co-respondent. The intent is clearly to prevent deliberate attempts to pervert the course of justice by misleading the court. However, the actual application of this general principle to particular cases has tended to be somewhat erratic and on appeal the verdicts have seldom been unanimous. This is especially so in "good cases", that is where the adultery alleged did actually take place. One spouse may voluntarily provide the evidence the other needs; this may not be collusion. Nor is it necessarily collusive for a husband to make financial arrangements for his wife in the interim before the divorce proceedings or for the parties to agree on the amount of maintenance to be paid afterwards. However, in drawing up agreements particularly if they deal with who shall pay for the action, lawyers may be verging on dangerous ground, especially in some provinces. For one spouse to invite the other to proceed or to facilitate the divorce by providing evidence and/or to offer to pay the expenses of the action has been held collusive in some cases but not in others. The courts do not seem to have drawn the line with any clarity or consistency, and it is a clear line that can be reached, but not transgressed, that lawyers need in advising their clients.

Witnesses before your Committee have urged that the present law be changed to make collusion a discretionary bar, so that if doubts arise as to the actions of the parties, or one of them, but without a clear intention to defraud the court, the court may use its discretion and grant the dissolution. By this means, it is hoped that a husband and wife could come to some reasonable agreement regarding the financial provisions to be made both before and after the divorce, for the care and custody of the children, the maintenance of the wife and the division of the family property. Only in cases where the parties actually conspired to withhold a just defence or put forward a false case would the bar of collusion be applied.

The basic problem in recommending this solution, is the attitudes of the courts. If there is uncertainty now as to what the court will hold as collusive, there will no doubt also be uncertainty as to the circumstances in which the court will exercise its discretion. If it is possible

to establish the circumstances in which collusion will operate as an absolute bar and those in which it will not, it ought to be equally possible to define what collusion is. A definition of collusion would be far more desirable and render the law far more certain than the introduction of another element of uncertainty, a discretionary bar, into an already uncertain field.

The proposals of the English Royal Commission on Marriage and Divorce, 1951-55, are worth noting:

> "Collusion should be defined by statute on the basis of the following considerations:
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> (i) The spouses should be restrained from conspiring together to put forward a false case or withhold a just defence, and
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> (ii) divorce should not be available if one spouse has been bribed by the other spouse to take divorce proceedings or has exacted a price from him or her for so doing.
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> "In addition, it should be provided by statute that it should not amount to collusion if reasonable arrangements are arrived at between husband and wife, before the hearing of the suit, about financial provision for one spouse and the children, the division of the matrimonial home, and its contents, the custody of, and access to, the children, and costs. It should be the duty of the petitioner to disclose any such arrangements to the court at the hearing and the parties should be able to apply to the court before or after the presentation of the petition for its opinion on the reasonableness of any contemplated arrangements."[3]

This last provision was introduced in England by the *Matrimonial Causes Act* of 1963.[4]

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[3] Cmd. 9678, p. 312.

[4] See Report pp. 67-68 and pp. 75-76.

JUDICIAL SEPARATION

Judicial separations may be granted by the courts of every province in Canada with the exception of Ontario. The *Divorce Act (Ontario)* of 1930 which authorized the courts of Ontario to grant dissolutions of marriage omitted to grant specifically the power to decree judicial separations. The courts of Ontario have consequently held that they do not possess this authority.[5]

Judicial separation is a useful device, although it is tending to fall somewhat into disuse. Its utility lies in the fact that it gives legal status to a separation and the sanction of the courts to any arrangements that are made for the maintenance of the wife and the maintenance and custody of the children, and similar matters. For those couples who wish to live apart without actually dissolving their marriages, it provides a convenient arrangement. It is especially useful where one or both of the spouses are opposed to divorce for religious reasons.

At present, if a couple in Ontario decide to separate but not seek a divorce, they may make a separation agreement with regard to such matters as alimony, the disposal and assignment of their property and the custody and maintenance of the children. However, problems arise when a couple cannot agree on the terms of the agreement, or if one partner does not wish to terminate cohabitation. In every other province of the country, in such circumstances, the matter can be brought before the courts by a petition for judicial separation. In Ontario, however, there is no clear remedy for this problem.

Consequently, your Committee feels that it would be in keeping with the desire for the uniformity of law throughout Canada, as well as in the interests of the inhabitants of Ontario, if the courts of the province were authorized to grant judicial separations. Since the grounds for judicial separation are virtually uniform in the eight common law provinces[6] other than Ontario, and based on the English Act of 1857, Ontario should be given the power to grant judicial separations according to the law of England as it existed on July 15, 1870.

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[5] See Report p. 62.
[6] See Report pp. 61-62.

COURT JURISDICTION

1. *Jurisdiction*

It is the practice in those provinces where dissolutions of marriage are granted for jurisdiction to be exercised by the Superior Courts. This practice has obvious disadvantages. The procedure of the Superior Courts is costly and involved, and these courts, burdened with cases of a more weighty character, tend to dispose of their long lists of divorce cases as quickly as possible and in a perfunctory manner. The Superior Courts lack the assistance of social workers and counsellors such as Family and Juvenile Courts possess. Most people are unfamiliar with their procedure and atmosphere, which, while dignified, is not conducive to the therapeutic or conciliatory approach to marital problems. Even more important, the judges of the Superior Courts are often remote from the parties to the action and their circumstances, especially where the divorce actions are heard at Assizes by a visiting judge.

Nor should it be overlooked that family and matrimonial proceedings are often continuing affairs. The marriage may be dissolved, but matters arising from the dissolution, maintenance and custody of children, division of marital property, rights of visitation and the like, may still have to be dealt with from time to time. This may involve a trip to the provincial capital to reach the judge who made the original order, or a long delay until next Assize, when a different judge, quite unfamiliar with the circumstances, may be sitting. The Honourable James McRuer, former Chief Justice of Ontario, demonstrated decisively the problems that face Superior Court judges in dealing with matrimonial causes.[7]

To overcome these difficulties it has been suggested to your Committee by the Pastoral Institute of the United Church, that a special domestic proceeding court be established to deal with all matters, both civil and criminal, in which the parties are, or were, married to each other and with jurisdiction over divorce, separation, nullity, restitution of conjugal rights, presumption of death, custody, adoption, affiliation, wardship, maintenance and alimony, consent to marriage, school attendance, and crimes where one of the parties injured is married to the accused.[8] Such a wide and sweeping reorganization of the court structure of the nation is beyond the terms of reference of your Committee. It would require, in any case, far more study than your Committee could give to it.

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[7] *Proceedings of the Special Joint Committee of the Senate and House of Commons on Divorce*, No. 12, January 31, 1967, pp. 597-600.

[8] *Proceedings* No. 8, November 22, 1966, pp. 423-25.

As a practical solution to the problem there seems to be two alternatives open for consideration. One is the transfer of the jurisdiction to the Family Courts, the other is to give jurisdiction to the County Courts concurrently with the Supreme Court.

The Family Court, at first glance, would seem to be the obvious place to deal with divorce and other matrimonial causes. The case for this was most ably argued by Judge P. J. T. O Hearn of Nova Scotia. He pointed out that Family Courts deal with questions every bit as important as divorce and of equal difficulty, juvenile offences, neglect of children, maintenance and wardship are all such questions. The basic problems in divorce cases are seldom purely legal. These are the questions dealing with the state of the marriage and the provisions to be made after its dissolution. The Superior Courts have none of the auxiliary help that Family Courts enjoy in the way of social workers, personnel trained in family matters, and ready access to welfare and similar agencies. Such services are essential to a proper disposal of a divorce action, and it would be far better to give divorce to the Family Courts than to risk the confusion that would be created by trying to apply Family Court techniques in the Superior Courts.[9]

The basic argument against vesting jurisdiction in the Family Courts is a practical one. Not every province has an established system of Family Courts that are qualified to deal with divorce cases. Some Family Courts may be competent, but your Committee believes that, at present, such courts are in a minority. In the future, as the Family Courts develop, the problem may be worthy of further consideration, but at present your Committee is opposed to jurisdiction in divorce matters being given to Family Courts.

It would seem a far better solution to vest in the County Courts concurrent jurisdiction with the Supreme Courts. These courts have advantages over the Superior Courts for the disposal of local divorce cases. Their procedure is less involved and consequently less costly. County Court judges are resident in County towns and their local offices and officials are readily available at all times. The judges can be easily reached when an order needs to be explained or varied and when additional provisions are required. Furthermore, County Court judges are more familiar with the local circumstances and situation, as well as being more accessible, and consequently are in a better position to make helpful judgments.

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[9] *Proceedings* No. 13, February 7, 1967, pp. 647ff.

Your Committee believes that the County Courts should receive concurrent, not exclusive, jurisdiction. The right to proceed in the Superior Courts should be retained for those who wish to use it. In some cases, which hinge particularly on legal questions, the Superior Court provides the better forum. Nevertheless, your Committee believes that divorce petitioners should be allowed the advantages of trial in the County Courts, not the least being in speed and cost, and readiness and continuity of access.

2. *Provisions Regarding Children*

Closely related to the question of the forum in which divorce cases are determined, is the scope of the hearing. Many witnesses have urged that all matters pertaining to a divorce be disposed of at the same time and in the same hearing. It must be realized that in granting a divorce, the courts are not merely dissolving a marriage but are also often dissolving a family as well. The first duty of the court must be to see that the members of the family do not suffer from the rupture of family life more than is necessary. The Court must be satisfied that proper arrangements have been made first for the custody, maintenance and welfare of the children, and then that the provisions made for the maintenance of the wife, if applicable, are appropriate. These matters are all within federal jurisdiction, as ancillary to divorce, and Parliament should provide that all these matters should be dealt with at the same time.

If these matters are dealt with together at the same hearing, the overall situation can be kept in view. Furthermore, the withholding of a decree until suitable arrangements have been made provides a strong incentive on the part of the petitioner to be cooperative. To deal with various ancillary matters in different courts at different times, not only increases the complexity and expense of divorce actions, but prevents an overall view being taken by each court. In such a piecemeal approach, the children are apt to suffer.

Your Committee, therefore, believes that no divorce should be granted until arrangements have been made for the care and upbringing of all minor children, and that such arrangements are satisfactory or are the best that can be devised in the circumstances. This would be to follow existing British practice. All minor children should be taken to mean all children in the family whether they are the offspring of the couple before the court or only of one of them by a former union, or of the family by adoption.

RECONCILIATION AND MARRIAGE COUNSELLING

While it is your Committee's opinion that a broadening of the grounds for divorce would not undermine the stability of marriage as an institution, it does believe that legislation seeking to rationalize the dissolution of marriage should not overlook the fact that dissolution is only the ultimate solution to a broken marriage and that an alternative is to try to mend it. Many witnesses before your Committee have stressed the desirability of an established reconciliation procedure to save as many marriages as possible. Some witnesses have urged that reconciliation attempts should be mandatory before divorce petitions are permitted to proceed. This has been suggested by the United Church of Canada, together with such organizations as the Catholic Women's League of Canada.[10] Others have urged mandatory conciliation and counselling in certain cases and there has been considerable support for the establishment of marriage counselling services as adjuncts to the courts. Most witnesses would be satisfied, nevertheless, if provision were made for counselling and reconciliation procedure in those cases where it might prove beneficial.

Two separate issues are really involved here: Firstly, the provisions of the actual law itself regarding reconciliation procedure, and secondly, the far wider implications of how much active interest the institutions of government should take in marriage guidance and counselling services.

To take up the first question, there is no doubt, that the law as it stands at the moment, does little to promote the reconciliation of couples contemplating divorce, and some of the provisions actually tend to discourage it. The existence of the absolute bars to divorce of collusion and condonation tend to keep the parties at arm's length. The law should be changed to ensure that any efforts a couple may make to save their marriage should not be held against them if they are unsuccessful in the attempt. In both the United Kingdom and in Australia, to cite but two examples, this problem has been recognized, and steps taken to obviate the difficulties. These provisions have been made to ensure that cohabitation for a limited period of time with reconciliation as its objective should not be considered as condonation and that reasonable negotiation between the parties should not be held as collusive. Such reforms are clearly necessary in Canada.[11]

More can be done, however, than simply removing the legal obstacles to reconciliation. Steps can be taken to actively promote it. However, this is no simple task. Compulsory reconciliation procedure is not

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[10] *Proceedings* No. 8, November 22, 1966, p. 374, 524; No. 10, December 6, 1966, p. 524.
[11] See Report, section on Condonation and Collusion, pp. 144-47.

the answer. There are numerous objections to such a step. In the first place, it must be realized that in the vast majority of cases, once the case has reached the divorce courts, the time for reconciliation in most cases has passed. Couples do not lightly rush into divorce actions without making sincere and strenuous attempts to save their marriages. Therefore, in the great majority of cases, compulsory reconciliation would be futile.

In any case, marriage counselling is not a task just any person can do; it requires considerable training and skill and the number of persons so qualified is limited in Canada today. Counselling services would be swamped and in the vast majority of cases, their counsellors would be wasting time and talents that would be better spent trying to save those marriages that were salvageable. Compulsory marriage counselling is not a practical proposition.

Nevertheless, not all cases that reach divorce courts are lost causes. The practice followed in Australia, and other jurisdictions, of giving the judge the authority to adjourn the proceedings in order for reconciliation to be attempted, if from the evidence before him it seems warranted, certainly has a great deal to commend it. It might even be desirable to empower the judge to direct a couple, in such a case, to take marriage counselling, if he has reason to believe there might be a reasonable chance of its succeeding.

However, while the introduction of such provisions into the law might be desirable, it would be a mistake to expect too much from them. The experience in Australia, and some other jurisdictions, would lead one to believe that such powers tend to be exercised infrequently.

There are other steps that could be taken which might have some effect. The Australian practice of requiring lawyers to bring marriage counselling services to the attention of their clients and to explore the possibilities of reconciliation with them, before they can proceed with the action, is an interesting experiment. However, it is to be hoped that conscientious lawyers would do this without official urging. The unconscientious lawyer could easily turn this into a mere formality, were it to be required. It is doubtful, if at present, there are adequate marriage counselling services available to which clients could be referred.

More helpful perhaps would be to adopt another Australian practice which protects marriage counsellors from being compelled to reveal in court the information they discover in the course of their professional

activities. This certainly would render their work more effective and enable married couples to deal in complete frankness with counsellors without fear of what they disclosed being later used against them in a divorce action. The Scarman Commission indicated that there was unease in English marriage counselling circles about lack of such protection in the existing English law, which is the same as the Canadian in this respect.

One fundamental obstacle to the introduction of elaborate reconciliation machinery as adjuncts to the divorce courts, is the sheer lack of personnel. Until there are ample numbers of trained people, any discussion of the desirability of such facilities must be academic.

It is not within the reference of your Committee to explore fully and make recommendations in these matters, and it has not done so. Nevertheless, your Committee believes it relevant to observe that both the federal and the provincial governments should examine what can be done to promote the growth and development of marriage guidance services and the training of personnel in this field of social work. Your Committee has been told that there are at present only two institutions in Canada especially organized for the training of professional marriage counsellors and that there is need for the establishment of professional standards as well as more training programs.[12] The Australian government, for example, has already undertaken financial assistance to marriage guidance organizations and encouraged the development of training programs, all with beneficial results. If society is serious in its belief in the stability of marriage and the preservation of this institution, it should consider what positive steps can be taken to assist those whose marriages are in difficulties.

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[12] *Proceedings* No. 10, December 6, 1966, p. 548.

PART V

DRAFT BILL

INTRODUCTION

In a Report to Parliament on a subject so important as divorce, clarity is essential. This is particularly so in the present instance because of the many facets of the subject and the fact that the substantive law has remained almost unaltered for so many years while public opinion with regard to the matters involved has been constantly changing. One of the best methods of promoting definiteness and clarity of thought is to state proposals in legal form such as one might find in an Act of Parliament.

With this desire for definiteness and clarity in mind, and in an effort to be helpful, your Committee has restated its proposals in the form of a draft bill which it sets forth below.

Some explanation of the draft bill is required. It is assumed that it is unnecessary and also undesirable to restate the present law as to divorce on the ground of adultery. No objection has been taken to the present substantive law in that regard by any of the informed witnesses who have addressed your Committee. They have urged an extension of the grounds, not an alteration or reform of grounds as at present in force.

The draft bill accordingly deals only with the grounds recommended in the Report which are in addition to any ground upon which a marriage may now be dissolved. This general policy of non-interference with the law as it now exists has been carried through in the draft bill. For instance, the matter of non-consummation of marriage on account of physical or mental defect is unaffected and the draft bill deals only with wilful refusal to consummate.

The bill is in three divisions. Part I deals with marital offences, in addition to the existing ground of adultery, such as desertion, cruelty, bigamy, non-support, and wilful non-consummation, followed by such stipulations as are necessary.

Part II defines marriage breakdown and provides for dissolution when the separation is caused by mental or physical illness, alcoholism or drug addiction, imprisonment, disappearance or other cause. These are circumstances in which the marriage has completely failed but in which there is no apparent wilful fault on the part of one of the spouses. The enumeration is followed by the necessary stipulations.

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Part III is headed "General" and takes care of such matters as giving co-ordinate jurisdiction to the County or District Courts, domicile and the right of access to the courts of women deserted by their husbands, the granting of relief in matters ancillary to divorce such as maintenance and the custody and care of children, condonation, collusion, amendments to the *Dissolution and Annulment of Marriages Act,* rules of court and the coming into force of the proposed Act.

Your Committee trusts that this statement of its recommendations in legal form will prove useful and will be substantially carried out.

In conclusion, your Committee gratefully acknowledges the valuable assistance given it by E. R. Hopkins, the Senate's most competent Law Clerk and Parliamentary Counsel, in the preparation of the draft bill which appears in the following pages. Mr. Hopkins has given freely of his professional ability and legal knowledge and experience and his advice has been sought on many occasions. He has made a major contribution to the production of this Report.

THE BILL

2nd Session, 27th Parliament, 16 Elizabeth II, 1967.

An Act to extend the grounds upon which courts now having jurisdiction to grant divorces *a vinculo matrimonii* may grant such relief, and to provide for related matters.

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

1. This Act may be cited as the *Divorce (Extension of Grounds) Act,* 1967. Short title.

PART I

Matrimonial Offences.

2. (1) Subject to section 9, in any court having jurisdiction to dissolve marriages, any husband or wife may commence an action praying that the marriage be dissolved, on any of the following grounds, in addition to any ground upon which the marriage may now be dissolved; namely, that the respondent Grounds added.

(a) has deserted the petitioner without cause for a period of at least three years immediately preceding the presentation of the petition; "Desertion."

(b) has, since the celebration of the marriage, treated the petitioner with cruelty; "Cruelty."

(c) has, since the celebration of the marriage, gone through a form of marriage with another person; "Bigamous marriage."

(d) has wilfully refused to consummate the marriage for a period of at least one year immediately preceding the presentation of the petition. "Wilful refusal to consummate."

(2) Where the ground of the petition is desertion

(a) before pronouncing a decree of dissolution, the court must be satisfied that there is no prospect of resumption of cohabitation within a reasonable time, and Qualification.

(b) any period of resumption of cohabitation not exceeding three months, for the primary purpose of reconciliation, shall be excluded from the calculation of the three-year period of desertion mentioned in subsection (1).

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"Wilful non-support."

3. (1) Subject to section 9, in any court having jurisdiction to dissolve marriages, a wife may commence an action praying that the marriage be dissolved on the ground that her husband, for a period of at least one year immediately preceding the presentation of the petition, has wilfully and without lawful excuse refused or neglected to support the petitioner, the children of the marriage or any child to whom either party stands *in loco parentis*.

Qualification.

(2) The court may pronounce a decree of dissolution on the ground mentioned in subsection (1), but shall not do so unless it is satisfied, having regard to all the circumstances, including the degree of fault on the part of the husband and the effect of his refusal or neglect on his wife or dependent children, that the decree should be pronounced.

Duty of court.

4. If the court is satisfied by the evidence that the case of the petitioner has been proved on any of the grounds added by sections 2 or 3 and, where the ground of the petition is cruelty, the petitioner has not in any manner condoned the cruelty, and that the petition is not presented or prosecuted in collusion with the respondent, the court shall pronounce a decree of dissolution, but if the court is not satisfied with respect to any of the aforesaid matters, it shall dismiss the petition: Provided that the court shall not be bound to pronounce a decree of dissolution and may dismiss the petition if it finds that the petitioner has during the marriage been guilty of adultery, or if, in the opinion of the court, the petitioner has been guilty

Proviso.

(a) of unreasonable delay in presenting or prosecuting the petition; or

(b) of cruelty towards the other party to the marriage; or

(c) where the ground of the petition is desertion or non-support, of such wilful neglect or misconduct as has contributed to the desertion or non-support.

PART II

Marriage Breakdown.

"Marriage breakdown" defined.

5. For the purposes of this Part a marriage has completely broken down if the parties are living separate and apart and if, in the opinion of the court, there is no prospect that they will resume cohabitation within a reasonable time.

"Marriage breakdown" when a ground.

6. Subject to section 9, in any court having jurisdiction to dissolve marriages, a husband or wife may commence an action praying that the marriage be dissolved on the ground that it has

completely broken down for any of the following causes; namely, that the respondent

(a) has suffered from mental or physical illness for a period of at least three years immediately preceding the presentation of the petition during which the parties have not cohabited and in respect of which there is no reasonable prospect of recovery or resumption of cohabitation; "Protracted illness."

(b) has been grossly addicted to alcohol, narcotics or drugs restricted by statute, for a period of at least three years immediately preceding the presentation of the petition and there is no reasonable prospect of the respondent's recovery; "Addiction."

(c) has served a term of imprisonment for at least three years, or several terms totalling at least three years in the five-year period immediately preceding the presentation of the petition; "Long imprisonment."

(d) has been absent from the petitioner for a period of at least three years immediately preceding the presentation of the petition, during which period the petitioner, having made reasonable efforts to acquire such knowledge, has had no knowledge, direct or indirect, of or from the respondent. "Disappearance."

(e) has been living separate and apart from the petitioner, for any cause other than those mentioned in paragraphs (a) to (d), for a period of at least three years immediately preceding the presentation of the petition. "Separation."

7. (1) Where the ground of the petition is marriage breakdown, the court may, if it is satisfied that the facts are as alleged, pronounce a decree of dissolution, but shall do so only if it is satisfied that Duty of court.

(a) every reasonable effort has been made by the petitioner to remove or alleviate the cause of the breakdown and to effect a reconciliation of the parties and a resumption of cohabitation;

(b) where the cause is as mentioned in paragraph (a) or (e) of section 6, due provision has been made for the future maintenance of the respondent, and where the ground is marriage breakdown for whatever cause, for the maintenance, custody, care and education of any children of the marriage or to whom either party stands *in loco parentis,* and for access to such children;

(c) no public interest would be thereby adversely affected; and

(d) the pronouncement of the decree would not work an undue hardship on the respondent.

(2) In the course of any hearing pursuant to this Part, the court may, having regard to the available facilities and the prospects for succeeding therein, adjourn the proceedings from time to time, as it sees fit, for the purpose of attempting to remove or alleviate the cause of the breakdown and to reconcile the parties.

PART III

General.

Jurisdiction of County and District Courts.

8. In any province with courts having jurisdiction to dissolve marriages, the County or District Courts shall have jurisdiction, equally and concurrently with the Superior Court therein, to dissolve marriages and to provide ancillary relief, on any existing ground or on any ground added by this Act: Provided that, on the application of any party thereto, an action for dissolution commenced in a County or District Court shall be transferred to the Superior Court, and provided further that any ancillary relief granted by the Superior Court coincidentally with a pronouncement of dissolution may be enforced, and may be varied from time to time as circumstances may require, by the County or District Court in the county or district in which the petitioner resides.

Provisos.

Residence as a basis for jurisdiction.

9. (1) A husband or wife domiciled in Canada may institute proceedings praying for the dissolution or annulment of the marriage, and for ancillary relief, in any province with a court having jurisdiction to provide such relief, if the petitioner or the respondent has resided continuously in that province for a period of at least one year immediately preceding the presentation of the petition.

"Canadian domicile" defined.

(2) For the purposes of this section

(a) a husband has Canadian domicile if he is domiciled, in accordance with the existing rules of private international law, in any province of Canada; and

(b) a wife has Canadian domicile if she would, if unmarried, be domiciled, in accordance with the existing rules of private international law, in any province of Canada.

(3) The court has jurisdiction to grant the relief sought by a petition presented pursuant to subsection (1).

Repeal.

(4) The *Divorce Jurisdiction Act,* chapter 84 of the Revised Statutes of 1952, is repealed.

10. The court, in entertaining a petition for the dissolution of a marriage on any ground added by this Act, may, coincidentally with the pronouncement of a decree of dissolution, grant such ancillary relief, relating to the maintenance of the respondent, to the maintenance, custody, care and education of any children of the marriage or to whom either party stands *in loco parentis,* for access to such children, or for the division of property, as a Superior Court may now grant in respect of a petition for dissolution on an existing ground. Ancillary relief.

11. Notwithstanding anything contained in this Act or in any other Act, for the purpose of any petition for dissolution on the ground of a matrimonial offence Bars to divorce.

(a) the resumption of cohabitation for any period of not more than three months, with reconciliation as its primary object, shall not be deemed to be a condonation of the matrimonial offence, subject to the discretion of the court; "Condonation".

(b) a matrimonial offence, once condoned, shall not be capable of being revived;

(c) "collusion" is defined as a corrupt agreement or conspiracy, to which the petitioner or the respondent is party, to effect an illegal or improper purpose, such as the bribery of a respondent or co-respondent not to defend the action or appear as a witness; to perform an illegal or improper act in order to furnish evidence or pretend to do so or to give false evidence, or to fabricate or suppress evidence in a manner calculated to deceive the court or to deprive it of an opportunity to learn the truth, and an agreement such as for the reasonable support and maintenance of a husband, wife or children shall not be deemed to be collusion; "Collusion"

(d) where the matrimonial offence complained of is adultery, connivance thereat shall be deemed to be a discretionary, rather than an absolute, bar to the pronouncement of a decree of dissolution. "Connivance"

12. Section 2 of chapter 85 of the Revised Statutes of 1952, is repealed and the following substituted therefor: R.S., 1952, c. 85.

"2. The law of England as to the dissolution of marriage and as to the annulment of marriage, and as to judicial separation, as the law existed on the 15th day of July, 1870, in so far as it can be made to apply in the Province of Ontario, and in so far as it has not been repealed, as to the Judicial separation in Ontario.

Province, by any Act of the Parliament of Canada or by this Act, and as altered, varied, modified or affected, as to the Province by any such Act, is in force in the Province of Ontario."

1963, c. 10.

13. Sections 2 and 3 of the *Dissolution and Annulment of Marriages Act,* and the headings thereto and therein, are repealed, and the following substituted therefor:

Marriage dissolved or annulled.

"2. (1) The Senate of Canada may, on the petition of either party to a marriage, by resolution declare that the marriage is dissolved or annulled, as the case may be, and may coincidentally therewith make such ancillary orders, hereinafter called "ancillary relief", as it considers just concerning the maintenance of the respondent, the maintenance, custody, care and education of any children of the marriage or to whom either party stands *in loco parentis,* and access to such children, and immediately on the adoption of the resolution by the Senate the marriage is dissolved and annulled, as the case may be, and shall be null and void, and thereafter either party may marry any person whom he or she might lawfully marry if the said marriage had not been solemnized.

Officer's Recommendation.

(2) The Senate shall adopt a resolution for the dissolution or annulment of a marriage only upon referring the petition therefor to an officer of the Senate, designated by the Speaker of the Senate, who shall hear evidence, and report and make recommendations thereon, including any recommendations for ancillary relief, but such officer shall not recommend that a marriage be dissolved or annulled, as the case may be, except on a ground on which a marriage could be dissolved or annulled, as the case may be, under the laws of England as they existed on the 15th day of July, 1870, or under the *Marriage and Divorce Act,* chapter 176 of the Revised Statutes of 1952, or on any ground added by the *Divorce (Extension of Grounds) Act,* 1967.

Report of Commissioner.

(3) In any uncontested case, the Commissioner shall report his recommendations to the Senate's Standing Committee on Divorce, together with such facts and findings as may be required in each instance by the Committee or the Chairman thereof and the Committee may recommend the passage of a resolution in accordance with the Commissioner's recommendation and on the authority thereof, or may take such other action as to it seems just.

(4) Following the hearing of each contested case the Commissioner shall deliver personally or by registered mail to the parties or their respective legal representatives of record a copy of his report and recommendation and on the expiration of thirty days thereafter such report and recommendation may be taken into consideration by the Standing Committee of the Senate on Divorce. Notification of parties.

3. (1) During the said thirty days, any of the parties to such contested case may give notice of appeal against the recommendation of the Commissioner to the Standing Committee of the Senate on Divorce, which shall hear the appeal on the evidence already submitted, together with arguments and representations of the parties or their legal representatives. Provision for appeal.

(2) If no such appeal is lodged within the said thirty days, the said Standing Committee may recommend the passage of a resolution in accordance with the Commissioner's recommendation and on the authority thereof, or may take such other action as to it seems just.

(3) If an appeal is lodged with the said Standing Committee within the said thirty days, the Committee shall hear the appeal on the evidence already presented, together with the arguments and representations of the parties or their legal representatives, and may approve the Commissioner's recommendation or may vary and amend it as to the Committee seems just, and may recommend to the Senate accordingly."

14. The court may make such rules of court as it may deem desirable or expedient for the exercise and application of the jurisdiction conferred by this Act. Rules of court.

15. This Act, or any Part or section thereof, shall come into force on a day or days to be fixed by proclamation of the Governor in Council. Coming into force.