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Divorce Reform A Reality

Stephen J. SKELLY *

With the passing of Bill C-187 by the Federal Parliament early last year came the end of an era. For a hundred years, from Confederation to the present day, no real change had been made to Canadian divorce laws. The early or mid-19th Century social philosophy on which these laws were based was naturally rather out of place in the second half of the 20th Century, but despite this few believed until quite recently that a reform of the type contained in Bill C-187 could ever become law.

It is difficult to say when thinking changed and reform became a possibility but certainly the 23rd of March 1966 must be considered a day of great significance. On that day the Senate passed a resolution that :

... the Senate do unite with the House of Commons in the appointment of a Special Joint Committee of both Houses of Parliament to enquire 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.

The Committee thereby created, received over 70 learned briefs containing a wide range of opinions and a vast array of information. Having considered these and the evidence of many witnesses they produced their report in June 1967. This was a comprehensive and well presented document setting out the Committee's recommendations and their reasons for making them. These were, to a large extent, embodied in Bill C-187.

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Divorce Act 1968

Jurisdiction

5. (1) The court for any province has jurisdiction to entertain a petition for divorce and to grant relief in respect thereof if,

- (a) the petition is presented by a person domiciled in Canada ; and
- (b) either the petitioner or the respondent has been ordinarily resident in that province for a period of at least one year immediately preceding the presentation of the petition and has actually resided in that province for at least ten months of that period.

Section 5 (1) (a) creates for the purpose of divorce proceedings under this Act a Canadian domicile, following the Australian precedent.¹ The important difference in Australia, however, is that there, annulment is also covered by this provision.² It seems rather anomalous to have a Canadian domicile for divorce purposes, but a provincial domicile for purposes of annulment.³

Bearing in mind the recommendations of many of the witnesses before the Committee, some of whom suggested residence as a basis for jurisdiction and other Canadian domicile, it is strange, after reading Section 5 (1) (a), to discover that Section 5 (1) (b) establishes an additional jurisdictional requirement of one year's residence in the province where the petition is brought, of which at least ten months must be actual residence. The residence requirement is necessary, says the Report, to prevent 'shopping' from province to province for a divorce.⁴ This might possibly be a problem in isolated instances but it would not seem a sufficiently serious one to justify the inconvenience which will, no doubt, be caused to a large number of people where work, etc., causes them to move around the country and who, therefore, may have difficulty in satisfying this requirement. Australia has no such

¹ S. 23(4) *Matrimonial Causes Act*, 1959 (Aus.).

² *Ibid.* "Proceedings for a decree of dissolution of marriage or for a decree of nullity of a voidable marriage shall not be instituted under this Act except by a person domiciled in Australia."

³ It is assumed that the principle established by *Att. Gen. for Alta. v. Cook*, [1926] A.C. 444 is still good law.

⁴ At page 31.

provision and has not, it seems, experienced any serious 'shopping' around problems.⁵

6. (1) For all purposes of establishing the jurisdiction of a court to grant a decree of divorce under this Act, the domicile of a married woman shall be determined as if she were unmarried and, if she is a minor, as if she had attained her majority.

Because of the hardship and injustice to the wife which can be caused by the concept of domicile, in particular the idea of unity of husband and wife, Section 6(1) was enacted. This allows the wife for the purpose of establishing jurisdiction to acquire a domicile separate from that of her husband.⁶ The subsection then goes on to destroy another basic tenet of the concept of domicile, that a minor cannot acquire a domicile of choice. Under this provision a *married woman*, but not a married man, may do so.⁷ This could produce the anomalous situation that if a married couple who are both minors, settle in Canada and decide to reside here permanently, the wife would be entitled to petition for a divorce under the Act, once she had satisfied the residence requirements, but the husband would be unable to petition during his minority, if he had a dependant domicile which was not Canadian.

The wisdom of these provisions can be questioned in the light of the fact that domicile is of importance in other areas of the law, such as annulment and succession. It seems odd to have unity of domicile and dependant domicile for some purposes but not for others.

In many respects it would seem that Provincial residence *per se* would be the easiest solution. Residence is a very simple concept and

⁵ A residence requirement is included in the Australian Act where an action is brought in an Australian Capital Territory but is far less strict than under the Canadian Act. S. 23(7) *M.C.A.* 1969 (Aus.) requires that "...at least one of the parties to the proceedings —

(a) is, at the date of the institution of the proceedings, ordinarily resident in the Territory; or

(b) has been resident in the Territory for a period of not less than six months immediately preceding that date."

⁶ This approach was carefully examined by the *Royal Commission on Marriage and Divorce*, 1956, Cmd. 9678 and expressly rejected, paras. 819-826. The English Act attempts to overcome the problem of the wife petitioner who is unable to establish a domicile separate from her husband by introducing two exceptions to the general rule. The courts have jurisdiction to hear a wife's petition where her husband has deserted her and established a domicile somewhere else, but at the time of the desertion they were domiciled in England. Secondly, a wife who has been ordinarily resident in England for at least three years may petition. (*Matrimonial Causes Act*, 1965 S. 40). The Australian Act allows the courts to presume a domicile in such circumstances (*Matrimonial Causes Act*, 1959 S. 24).

⁷ The New Zealand Act has the same provisions (*Matrimonial Proceedings Act*, 1963, S. 3(1)).

carries with it none of the problems connected with domicile.⁸ In rejecting this suggestion, the Committee stated that :

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.⁹

It is suggested that this is not a real problem¹⁰ and that as we are a country which is constantly encouraging immigration, our main concern should be with regard to the power of our courts to recognize foreign decrees, rather than with regard to the recognition of our decrees abroad.

Recognition of foreign decrees

6. (2) For all purposes of determining the marital status in Canada of any person *and without limiting or restricting any existing rule of law applicable to the recognition of decrees of divorce granted otherwise than under this Act*, recognition shall be given to a decree of divorce, granted after the coming into force of this Act under a law of a country or subdivision of a country other than Canada by a tribunal or other competent authority that had jurisdiction under that law to grant the decree, on the basis of the domicile of the wife in that country or subdivision determined as if she were unmarried and, if she was a minor, as if she had attained her majority.¹¹

The provisions of Section 6(2), as it stood in the original bill would have had the effect of reducing the powers of our courts to recognize foreign divorce decrees. It would, it is suggested, have limited recognition to situations where a foreign court had taken jurisdiction on the same *basis* as our own courts would have taken jurisdiction. If it had stated that recognition would be accorded where the foreign court took jurisdiction in a factual situation where our courts would have taken jurisdiction, then the full extent of the *Travers v. Holley*¹² and *Robinson-Scott v. Robinson-Scott*¹³ principle accepted here under

⁸ The arguments in favour of this were set out by the writer in an article entitled "Divorce Reform", 1967 *Western L. Rev.* 131 *et seq.* and in a brief presented to the Committee contained in Report 21.

⁹ At page 31.

¹⁰ See very liberal approach to recognition by New Zealand Act (S. 82 *Matrimonial Proceedings Act*, 1963 (N.Z.)).

¹¹ My italics indicate rider added in Committee.

¹² [1953] 2 All E.R. 794 ; [1953] P. 246 (C.A.).

¹³ [1957] 3 All E.R. 473 ; [1958] P. 71.

the old law,¹⁴ would have applied. As the Bill stood our courts would have been able to recognize a decree where there was reciprocity of rules of jurisdiction between the foreign country and ourselves (this might be considered the *ratio* of *Travers v. Holley*),¹⁵ but not where there was reciprocity of facts, as applied in *Robinson-Scott v. Robinson-Scott*.¹⁶

It may have been that the person who drafted the section had in mind the idea that we should recognize a divorce granted in a foreign country, provided one of the persons was domiciled there at the time of the presentation of the petition or granting of the decree or some such event, domicile being defined as in section 6(1). If this was the case then the problem could have been solved easily by re-drafting. Instead, when Justice Minister Trudeau (as he then was) noticed the problem at Committee stage, he added the rider that the provisions of the section were not to "limit or restrict" any existing rules applicable to recognition of foreign decrees.¹⁷ Since the original section appears narrower than the existing law, this rider would seem to have made the rest redundant.¹⁸ Its retention can only be justified on the ground that it does give the court the right to recognize a foreign decree where the foreign court took jurisdiction solely on the basis of the wife's separate domicile there, a right which it did not clearly possess before.

Grounds for divorce

The grounds of divorce are contained in sections 3 and 4 of the Act. Two sections are necessary because the Act attempts to incorporate two different approaches to divorce, one based on the Matrimonial Offence Concept and the other on the principle of Marriage Breakdown.

Matrimonial Offence (Section 3)

3. Subject to section 5, a petition for divorce may be presented to a court by a husband or wife, on the ground that the respondent, since the celebration of the marriage,

¹⁴ See e.g. *Januskiewicz v. Januskiewicz*, (1966) 55 W.W.R. 73.

¹⁵ *Supra*, note 12.

¹⁶ *Supra*, note 13.

¹⁷ (1967) 112 H. of C. Deb. 5606. Bringing back the possibility in Canada of a decision such as that made by the House of Lords in *Indyka v. Indyka*, [1967] 2 All E.R. 689 ; [1967] 3 W.L.R. 510.

¹⁸ The New Zealand Act sets out a number of grounds for recognition including the idea of Nationality and residence of the parties. S. 82 *Matrimonial Proceedings Act*, 1963 (N.Z.). The Australian Act sets out the Common Law. S. 95 *Matrimonial Causes Act*, 1959 (Aus.).

- (a) has committed adultery ;
- (b) has been guilty of sodomy, bestiality or rape, or has engaged in a homosexual act ;
- (c) has gone through a form of marriage with another person ; or
- (d) has treated the petitioner with physical or mental cruelty of such a kind as to render intolerable the continued cohabitation of the spouses.

The grounds set out in section 3 are dealt with in the conventional way with the usual bars, albeit now on the whole discretionary rather than absolute.¹⁹ There is no question that Adultery and Cruelty should be grounds and the argument put forward by the Committee that Bigamy should also be included is convincing.²⁰ However, the writer has difficulty in accepting that rape, sodomy, bestiality or homosexuality are necessary grounds. One sees here memories of the 1857 Act. These could be covered by the ground of cruelty. It is still more amusing, however, to discover that it is now open to a husband to petition for a divorce on the ground that his wife is guilty of rape, sodomy or bestiality. This is true equality.

Although cruelty is a new ground of divorce for the majority of Canada,²¹ it has existed as a ground for Judicial Separation for many years.²² As recommended by the Committee, the Act makes no attempt to define cruelty, the view being held that it was better to rely upon English and Canadian decisions to guide the courts in interpreting this ground.²³ Much has been written of late as to what is meant by cruelty. Suffice it is here to outline the necessary elements and see if they might be effect by the wording of the Act.

Before legal cruelty can exist two essential elements must be proved. They are 'injury to health' and 'grave and weighty' conduct. Since the decision of the House of Lords in *Russell v. Russell*²⁴ in 1897, it has been accepted without question that there cannot be legal cruelty unless the petitioner's physical or mental health has been affected or there is at the very least an apprehension of this. However, this is

¹⁹ The discretionary bars which existed prior to the Act have now apparently disappeared.

²⁰ At page 17.

²¹ It was of course a ground for divorce prior to the Act in Nova Scotia.

²² Also, as a ground for separation and maintenance in the Family or Magistrates Court, though usually in the form of persistent cruelty ; e.g. S. 4(c) *Manitoba Wives and Children's Maintenance Act*, R.S.M. 1954, Chap. 294.

²³ At page 13.

²⁴ [1897] A.C. 395.

becoming in some respects, more of an academic requirement, the medical profession with advancing scientific techniques being more and more able to detect slighter and slighter degrees of injury, and the courts showing themselves ready to accept a certificate from a doctor that injury has resulted or is likely to result, as satisfying the requirements and not setting any minimum degree of injuries which must be shown. The recent decision of the House of Lords in *Gollins v. Gollins*²⁵ may be cited as an example of this trend, where the wife's complaint of injury was that she had suffered from a moderate state of mental anxiety.

The requirement that conduct be of a certain type, the expression 'grave and weighty' is commonly used and is attributed to Lord Stowell in the case of *Evans v. Evans*,²⁶ has been, of late, much more strictly interpreted and it is now, it is suggested, the most important element of cruelty. Other expressions have been employed by the courts but the objective is to indicate that for there to be cruelty the conduct complained of must be of a serious nature.²⁷ In *Le Brocq v. Le Brocq*²⁸ the Court of Appeal made this point very strongly and refused a decree where nothing more than injury to health had been proven. They emphasized that cruelty had no esoteric 'divorce court' meaning and that conduct must be at least what the ordinary man would call cruel.

Finally, it was decided by the House of Lords in *Gollins v. Gollins*²⁹ and *Williams v. Williams*³⁰ that it was not essential that the conduct complained of be 'aimed at' the petitioner or that the respondent intended his conduct to hurt the petitioner. In future, evidence of intention will go to weight of conduct. Where conduct might not of itself be considered 'grave and weighty', if the respondent intended to hurt then this would add weight to the conduct viewed as a whole. On the other hand, where the conduct of the respondent is so bad that the petitioner must have a remedy, intention does not enter into it. Such a case was *Williams v. Williams*.³¹

The decision in *Le Brocq v. Le Brocq*³² is seen by the writer as a reaction to this liberalizing trend. It was obvious to the Court of Appeal

²⁵ [1963] 2 All E.R. 966 ; [1964] A.C. 644 (H.L.).

²⁶ (1790) 1 Hag. Con. 35.

²⁷ Such expressions have been used as : "inexcusable, unpardonable, unforgivable or grossly excessive" per Lord NORMAND, in *King v. King*, [1952] 2 All E.R. 584, 586, H.L. and "wilful and unjustifiable acts inflicting pain and misery" per BUCKNELL, L. J., in *Horton v. Horton*, [1940] 3 All E.R. 380, 384.

²⁸ [1964] 3 All E.R. 464 ; [1964] 1 W.L.R. 1085, (C.A.).

²⁹ [1963] 2 All E.R. 966 ; [1964] A.C. 644, (H.L.).

³⁰ [1963] 2 All E.R. 944 ; [1964] A.C. 698, (H.L.).

³¹ *Ibid.*

³² *Supra*, note 28.

that for the reason stated above, injury to health was no longer a very significant requirement, intention had gone with *Gollins* and *Williams* and all that was left was conduct ; hence the taking of a stricter stand on this than had been taken prior to these decisions.³³

Returning to our Divorce Act, paragraph (d) speaks of cruelty *of such kind as to render intolerable the continued cohabitation of the spouses*. How might this affect our interpretation of cruelty ? This provision was not recommended by the Committee so no guidance can be obtained from their comments. It is the writer's hope that this will be interpreted by the courts as doing nothing more than emphasizing that the conduct complained of must be of a serious nature. It will not, it is hoped, be seen as a directive to return to an outdated idea known as the 'protection theory' which allowed relief on the ground of cruelty only when it was necessary to do this in order to protect the innocent spouse from further injury. The 'protection theory' is inconsistent with the Matrimonial Offence concept. If the Legislature desired the courts to look to the future prospects of the marriage before relief was granted, then it would have been better to have put cruelty in the Marriage Breakdown section.

Marriage Breakdown (Section 4)

4. (1) In addition to the grounds specified in section 3, and subject to section 5, a petition for divorce may be presented to a court by a husband or wife where the husband and wife are living separate and apart, on the ground that there has been a permanent breakdown of their marriage by reason of one or more of the following circumstances as specified in the petition, namely :

(a) the respondent

- (i) has been imprisoned, pursuant to his conviction for one or more offences, for a period or an aggregate period of not less than three years during the five year period immediately preceding the presentation of the petition, or
- (ii) has been imprisoned for a period of not less than two years immediately preceding the presentation of the petition pursuant to his conviction for an offence for which he was sentenced to death or to imprisonment for a term of ten years or more,

³³ See also stricter interpretation of *Gollins* by Sir Jocelyn SIMON, in *Saunders v. Saunders*, [1965] 1 All E.R. 838 ; [1965] P. 499.

against which conviction or sentence all rights of the respondent to appeal to a court having jurisdiction to hear such an appeal have been exhausted ;

- (b) the respondent has, for a period of not less than three years immediately preceding the presentation of the petition, been grossly addicted to alcohol or a narcotic, as defined in the *Narcotic Control Act*, and there is no reasonable expectation of the respondent's rehabilitation within a reasonably foreseeable period ;
- (c) the petitioner, for a period of not less than three years immediately preceding the presentation of the petition, has had no knowledge of or information as to the whereabouts of the respondent and, throughout that period, has been unable to locate the respondent ;
- (d) the marriage has not been consummated and the respondent, for a period of not less than one year, has been unable by reason of illness or disability to consummate the marriage, or has refused to consummate it ; or
- (e) the spouses have been living separate and apart
 - (i) for any reason other than that described in subparagraph (ii), for a period of not less than three years, or
 - (ii) by reason of the desertion of the petitioner, for a period of not less than five years, immediately preceding the presentation of the petition.

(2) On any petition presented under this section, where the existence of any of the circumstances described in subsection (1) has been established, a permanent breakdown of the marriage by reason of those circumstances shall be deemed to have been established.

The proof that any of the circumstances listed in section 4 exists, raises a *prima facie* case that the marriage has broken down. The requirement that the parties must be living separate and apart at the time of the petition, is an unfortunate one when put as a general condition, since it is a little inappropriate to some of the situations covered by the section.^{33a} This applies in particular to the situation envisaged by

^{33a} In fact in the absence of this provision it would have been possible to include adultery and cruelty in section 4 and to treat them on the marriage breakdown basis. This is very much the approach taken in the Divorce Reform Bill introduced (but not passed) during the last session of the English Parliament.

paragraph (b), i.e. where relief is available on proof that for a period of not less than three years the other spouse has been grossly addicted to alcohol or narcotics, and to that covered by paragraph (d) which makes impotence and wilful refusal grounds for divorce. In all these situations the parties must separate before they can petition for a divorce. This would seem to work against any chance of reconciliation which may exist.

Impotence was, of course, a ground for annulment prior to the Act. Although wilful refusal was not *per se* a basis for relief it was often covered by a liberal interpretation of what was known as invincible repugnance to the act of sexual intercourse. This amounted to Impotence.

It is, I think, an open question whether it is still possible, in those jurisdictions where impotence was a ground for annulment, to obtain an annulment on this ground. This was a Common Law Action and Section 26 (2) does not seem to effect it.

26. (2) Subject to subsection (3) of section 19, all other laws respecting divorce that were in force in Canada or any province immediately before the coming into force of this Act are repealed, but *nothing in this Act shall be construed as repealing any such law to the extent that it constitutes authority for any other matrimonial cause.*³⁴

Returning to section 4, neither paragraph (a) nor paragraph (b) are grounds of major importance. They exist as grounds in Australia and New Zealand but are not widely used. Paragraph (c) is not of major significance either but it does make the law a little more logical. Whereas until now the courts of many provinces have, by provincial legislation, had the power where one of the spouses disappeared (for seven years) to presume him or her dead so as to allow the other to re-marry, they have been unable to afford any assistance if the 'dead' spouse returned.^{34a} The second marriage then became void. As the Committee stated :

Such an eventuality is terrifying and the very possibility hangs like the Sword of Damocles over the spouse of the second marriage and their family for years.³⁵

Now after three years in such circumstances a divorce may be obtained.

The provisions which are likely to get the most use initially are contained in paragraph (e). The division of this paragraph into two

³⁴ My italics

^{34a} E.g. S. 25 of the *Manitoba Marriage Act*, R.S.M. 1954, Chap. 154. See also Section 240, *Canadian Criminal Code*.

³⁵ At page 24.

parts is a result of the retention of the old offence idea and the notion that a 'guilty' party should not easily be allowed to take advantage of his wrongdoing. It is suggested that the only effect of this provision will be to cause unnecessary confusion. Once the principle is accepted that a guilty party may use his own wrongdoing as a basis for relief, *i.e.* that we are giving relief because the marriage has broken down, then the cause of the breakdown is irrelevant. If two spouses live apart for three years this is surely sufficient indication that the marriage has broken down. It should not matter whether they have separated by consent, because the petitioner deserted or because the respondent deserted. If concern is felt for an 'innocent' respondent who opposes a divorce then the path to be taken is to provide adequate safeguards by means of discretionary bars.

The essential feature for a petition under paragraph (e) is that the parties shall have lived separate and apart for the period specified, *i.e.*, either three or five years depending upon whether the situation falls under clause (i) or clause (ii). It would seem in theory, therefore, that in every action the court would be called upon to decide whether or not the separation of the parties is due to the desertion of the petitioner. In fact what will no doubt happen is that the petition will invariably be brought under section 4(1)(e)(i) and the problems will only arise where the petition is defended. If the respondent does not wish to defend he or she can be presumed to have consented to the separation and the petitioner cannot then be said to be guilty of desertion.

The concept of living 'separate and apart' is well known from the field of desertion and is taken to mean that there is a complete cessation of cohabitation. Normally the situation will be that the parties have separated physically and now live in different houses. The necessary degree of separation is then easily proved. However, the situation sometimes arises that although the parties (or one of them) have decided to treat the marriage as at an end, they still continue to live under the same roof. The law is quite clear on this point that "there must be a complete rejection of all the obligations of marriage."³⁶ Thus while the parties continue to live under the same roof there will not be desertion where there is a refusal of sexual intercourse but otherwise the parties treat each other as husband and wife.³⁷ For there to be the necessary degree of

³⁶ *Per* EVERSHED, M. R., in *Perry v. Perry*, [1952] 1 All E.R. 1076, 1082; [1952] P. 203, 215, (C.A.).

³⁷ *Weatherley v. Weatherley*, [1947] 1 All E.R. 563; [1947] A.C. 628, (H.L.); *cf. Hutchinson v. Hutchinson*, [1963] 1 All E.R. 1; [1963] 1 W.L.R. 280, where a husband was held guilty of desertion in a situation where the parties were living apart. He refused to return unless wife promised no sexual intercourse and she would not agree.

separation the parties must be living as two separate households, *i.e.* performing no services for one another in the capacity of a husband or wife.³⁸

The further question which arises in the light of the Australian Courts' treatment of separation as a ground of divorce is whether any particular type of mental element is necessary. Paragraph (e) clearly contemplates a situation where there is a unilateral or bilateral intention to bring the matrimonial cohabitation to an end. This has been held to be the effect of the Australian Act.³⁹ However, does it also contemplate a situation where no such intention exists? What if the parties separate for business reasons for three years always intending to resume cohabitation? After this period has passed the husband petitions for a divorce under clause (i). Would the courts have to say he was guilty of desertion from the time he formed the intention to petition and as a guilty petitioner must wait a further five years or would they say living 'separate and apart' is the only criterion and that clause (i) applied?

This point has been dealt with in several Australian decisions.⁴⁰ In a recent case it was stated that :

The provision of the Act contemplates something going far beyond a situation in which, for one reason or another, the parties are living at a separate address for this in itself by no means implies, [...], that the marriage has been destroyed. The situation contemplated is a complete destruction of the *consortium vitae*, the arrival at a stage in the marriage at which both parties no longer recognize the mutual obligations which their matrimonial relationship imposes.⁴¹

This is, I think, the approach to be taken here since the basis for relief under section 4 is that there has been a permanent breakdown of the marriage by reason of one or more of the circumstances set out in that subsection. But note section 4(2) which deems a breakdown where any one of the circumstances is proved.

Intention could, therefore, be important to determine whether the ground is proved but will be major factor in determining whether or not desertion exists once *de facto* separation has been established. Where the intention is a unilateral one, then this is desertion, provided the other elements of desertion are present, and the deserter will be the

³⁸ See *Hopes v. Hopes*, [1948] 2 All E.R. 920 ; [1949] P. 227 (C.A.) ; *Le Brocq v. Le Brocq*, [1964] 3 All E.R. 464 ; [1964] 1 W.L.R. 1085 (C.A.).

³⁹ See TRAVERS, J., in *Koufalakis v. Koufalakis*, [1963] S.A.S.R. 149.

⁴⁰ See *Collins v. Collins*, (1961) 3 F.L.R. 17 ; *Koufalakis v. Koufalakis*, *supra* ; *Kirwan v. Kirwan*, [1964] Unreported (N^o 1226) ; *M. v. M.*, [1967] N.Z.L.R. 931 ; *McRostie v. McRostie*, [1955] N.Z.L.R. 631.

⁴¹ *Per SELBY, J.*, in *Macrae v. Macrae*, [1965] A.L.R. 523, 527 ; (1964) 6 F.L.R. 224, 226.

spouse who has formed the intention. For there to be desertion it must also be shown that the innocent spouse did not consent to the separation, and that the person who left the other did not have just cause for so doing.

The element of just cause is of particular importance as it usually determines which, if either, of the spouses is guilty of desertion. This is due to the fact that it has long been accepted that it is not necessarily the spouse who leaves the matrimonial home who is the deserter.⁴² If one spouse by his or her conduct has driven the other out then the former will be the deserter. This is the doctrine of Constructive Desertion.

The conduct complained of must be of a serious nature before it can be said to justify one spouse in leaving and thereby make the other guilty of constructive desertion. The expression 'grave and weighty' is again employed as in the context of cruelty and it is considered that, in general, the type of conduct looked for in both cases is of the same nature.⁴³ In connection with constructive desertion the mental element, *i.e.* that the guilty spouse intended to drive the other out, is, where necessary, implied from the conduct of the guilty party.⁴⁴

As stated above,⁴⁵ it is considered in practice that the question as to whether or not there is desertion is mainly going to arise where the petition is defended, but there is another very important situation in which it may arise, and that is in the area of Corollary Relief. There is no clear indication in the Act that guilt is *not* going to be of significance in assessing the quantity of maintenance a spouse should receive, or that a deserting spouse is now to be entitled to maintenance. Obviously in many situations where one of the spouses attempts to obtain maintenance and the other opposes this, the court is going to be called upon to decide whether or not the spouse requesting maintenance is in a state of desertion.

9. (3) For the purposes of paragraph (e) of subsection (1) of section 4, a period during which a husband and wife have been living separate and apart shall not be considered to have been interrupted or terminated

⁴² See *Graves v. Graves*, (1864) 3 Sw. & Tr. 350; *Sickert v. Sickert*, [1899] P. 278.

⁴³ First used in *Yeatman v. Yeatman*, [1866] L.R. 1 P. & D. 489; see also *Gollins v. Gollins*, [1963] 2 All E.R. 966; [1964] A.C. 644.

⁴⁴ See *Buchler v. Buchler*, [1947] 1 All E.R. 319; [1947] P. 45 (C.A.); *Lang v. Lang*, [1954] 3 All E.R. 571; [1955] A.C. 402 (P.C.); *Hall v. Hall*, [1962] 3 All E.R. 518; [1962] 1 W.L.R. 1246 (C.A.); *Saunders v. Saunders*, [1965] 1 All E.R. 838; [1965] P. 499.

⁴⁵ At page 93.

- (a) by reason only that either spouse has become incapable of forming or having an intention to continue to live so separate and apart or of continuing to live so separate and apart of his or her own volition, if it appears to the court that the separation would probably have continued if such spouse had not become so incapable ;
or
- (b) by reason only that there has been a resumption of cohabitation by the spouses during a single period of not more than ninety days with reconciliation as its primary purpose.

It should be noted that section 9 (3) makes provisions in paragraph (a) for imputing an intention to continue in a state of desertion where the party's mental state is such that he clearly could not actually be said to have such an intention. Paragraph (b) introduces what is sometimes called a 'probationary' period of 90 days during which time the parties may resume cohabitation with reconciliation as its primary purpose without terminating a period of desertion. Such a provision is now contained in the English,⁴⁶ Australian,⁴⁷ New Zealand⁴⁸ and Scottish Statutes.⁴⁹

Bars to relief (Section 9)

Matrimonial Offence Grounds

9. (1) On a petition for divorce it shall be the duty of the court
- (b) to satisfy itself that there has been no collusion in relation to the petition and to dismiss the petition if it finds that there was collusion in presenting or prosecuting it ;
 - (c) where a decree is sought under section 3, to satisfy itself there has been no condonation or connivance on the part of the petitioner, and to dismiss the petition if the petitioner has condoned or connived at the act or conduct complained of unless, in the opinion of the court, the public interest would be better served by granting the decree ;

⁴⁶ S. 1(2) *Matrimonial Causes Act*, 1965 (Eng.).

⁴⁷ S. 41A(2) *Matrimonial Causes Act*, 1959 (Aus.) [Added by S. 10 *Matrimonial Causes Act*, 1965 (Aus.)].

⁴⁸ S. 26(1) *Matrimonial Proceedings Act*, 1963 (N.Z.).

⁴⁹ S. 2(2) *Divorce Act*, 1964 (Scotland).

The old bars of collusion, connivance and condonation are retained but only collusion remains as an absolute bar.⁵⁰ This is most surprising as collusion was generally considered in the past to be the most unjust and archaic of the absolute bars. In New Zealand and England collusion is a discretionary bar, although in both jurisdictions connivance and condonation are absolute bars.⁵¹ This is the one area where the courts discretion could so easily be exercised. Although the definition attempts to include only situations where there is an agreement or conspiracy to subvert the course of justice, nevertheless it is considered a party may innocently do this and his action be barred, he must then go to the expense and trouble of bringing a new action untainted by the collusion, when in fact the court could so easily have exercised a discretion and allowed the action to continue subject to certain conditions.⁵²

Collusion is the only one of the three bars which applies both to petitions under sections 3 and 4. Connivance and Condonation apply only to section 3 and having discovered their existence the court still has a discretion to disregard them, if it is in the public interest so to do. The exercise of this discretion will no doubt be based on the principle laid down by the House of Lords in *Blunt v. Blunt*⁵³ with regard to what used to be the discretionary bars. This has found acceptance in Canada in the past.^{53a}

Neither connivance nor condonation are defined in the Act. In the case of the former the Committee expressed the view that this was unnecessary as its meaning was well known.⁵⁴ The writer is somewhat

⁵⁰ S. 9(1) (b) and (c).

⁵¹ S. 5 *Matrimonial Causes Act*, 1965, (Eng.) ; Ss. 29 and 31. *Matrimonial Proceedings Act*, 1963 (N.Z.).

⁵² Collusion as an absolute bar was strongly criticized in *Mulhouse v. Mulhouse*, [1964] 2 All E.R. 50, 52 and *Nash v. Nash*, [1965] 1 All E.R. 480.

⁵³ [1943] 2 All E.R. 76, 78 ; [1943] A.C. 517, 525 (H.L.). The following factors are to be considered :

- (a) the position and interest of any children of the marriage ;
- (b) the interest of the party with whom the petitioner has been guilty of misconduct with special regard to the prospect of their future marriage ;
- (c) the question whether, if the marriage is not dissolved, there is a prospect of reconciliation between the husband and wife ;
- (d) the interest of the petitioner, and in particular the interest that the petitioner should be able to remarry and live respectably ;
- (e) the interest of the community at large, to be judged by maintaining a true balance between respect for the binding sanctity of marriage and the social considerations which make it contrary to public policy to insist on the maintenance of a union which has utterly broken down.

These guidelines were formulated in a situation where the petitioner had been guilty of adultery but have been applied to all of the discretionary bars. See also *Bull v. Bull*, [1965] 1 All E.R. 1057.

^{53a} See e.g. *Battersby v. Battersby*, (1948) 2 W.W.R. 623 ; *Russell v. Russell*, (1953-54) 10 W.W.R. 62.

⁵⁴ At page 34.

doubtful of this, but since it is a discretionary bar perhaps its exact limits are of less significance.

2. (d) "condonation" does not include the continuation or resumption of cohabitation during any single period of not more than ninety days, where such cohabitation is continued or resumed with reconciliation as its primary purpose ;

The act introduces in a novel way the now widely accepted idea that two spouses should be able to resume cohabitation for a 90 day probationary period with the object of effecting a reconciliation yet not condoning a past offence unless they become reconciled. This appears in the English,⁵⁵ Scottish,⁵⁶ Australian⁵⁷ and New Zealand⁵⁸ Acts but never as a definition of *condonation*. Also in this context section 9(2) makes condonation permanent ; there can be no revival of a condoned offence. This was recommended by the Committee on the basis that :

If attempted reconciliation is not considered condonation, the doctrine of revival is unnecessary. If the reconciliation attempt fails, a divorce will 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.⁵⁹

The writer has sympathy with this point of view but feels that it overlooks two important points. The first is that there is only one probationary period. If that attempt fails then we are back in the old situation. This is not to suggest that there should be more than one such period but only to emphasize that the doctrine of revival in such a situation may still be of importance. Secondly, the doctrine of revival may in some ways encourage reconciliation. If a spouse knows that condonation is permanent and that however bad the other spouse's conduct is in the future, if it doesn't fall within one of the grounds of divorce, no relief will be possible, he or she might be unwilling to risk a reconciliation.

Marriage Breakdown Grounds

9. (1) On a petition for divorce it shall be the duty of the court

⁵⁵ S. 42 *Matrimonial Causes Act*, 1965 (Eng.).

⁵⁶ S. 2(1) *Divorce Act*, 1964 (Scotland).

⁵⁷ S. 41A(1) *Matrimonial Causes Act*, 1959 (Aus.), [Added by S. 10 *Matrimonial Causes Act*, 1965 (Aus.)].

⁵⁸ 29(5) *Matrimonial Proceedings Act*, 1963 (N.Z.).

⁵⁹ At page 34.

- (d) where a decree is sought under section 4, to refuse the decree if there is a reasonable expectation that cohabitation will occur or be resumed within a reasonably foreseeable period ;
- (e) where a decree is sought under section 4, to refuse the decree if there are children of the marriage and the granting of the decree would prejudicially affect the making of reasonable arrangements for their maintenance ; and
- (f) where a decree is sought under section 4 by reason of circumstances described in paragraph (e) of subsection (1) of that section, to refuse the decree if the granting of the decree would be unduly harsh or unjust to either spouse or would prejudicially affect the making of such reasonable arrangements for the maintenance of either spouse as are necessary in the circumstances.

Here again as already stated collusion is an absolute bar. On the whole, the other bars to this section are fairly straightforward. Under paragraph (d) a decree must be refused where cohabitation is reasonably likely to be resumed in a reasonable period of time, such being a sign that the marriage has not broken down. Under paragraph (e) a decree must be refused where its granting would affect the making of satisfactory maintenance arrangements for children of the marriage.

The only bar which may raise problems is under paragraph (f). This applies only to paragraph (e) of subsection (1) of section 4, *i.e.*, separation and desertion as grounds of divorce, and deals with a situation where the granting of a decree would prove unduly *harsh or unjust* to either spouse, or where it might affect the making of satisfactory maintenance arrangements between the spouses. This gives the same protection to the spouses as paragraph (e) does to the children.

Such a provision as the former is found in the Australian Statute in connection with separation as a ground of divorce.⁶⁰ The expression used there is 'harsh and oppressive', but the Committee seemed to have a similar idea in mind. The Australian provision has received considerable judicial interpretation but it is by no means clear what it is intended to cover. What is clear, however, is that the bar will not easily be raised. Loss of status of a wife, or loss of consortium are not in themselves 'harsh and oppressive'. As was stated in one Australian case :

⁶⁰ S. 37(1) *Matrimonial Causes Act*, 1959 (Aus.).

What... (the section) ... envisages it that there are present in the history of the marital life considerations applicable to this particular case which are not *per se* merely the result of the application of the section itself. To decide otherwise would be contrary to the policy of the Act.⁶¹

Religious beliefs have never been accepted as *per se* grounds for refusing a decree but it has been accepted that a decree would be 'harsh and oppressive' where the wife sincerely believed in the sanctity of marriage, and in addition the husband had constantly disregarded orders of the courts and in particular an order of restitution of conjugal rights.⁶² Another situation where a decree was refused on this basis was where it would have affected rights under Testator Family Maintenance provisions.⁶³ It has been suggested that it might also apply where the granting of a decree might prejudice a spouse's chance of future employment.

Corollary relief

The Court may make an order under section 10 or 11 requiring one of the parties to the marriage to pay maintenance for 'children of the marriage'.

'Child of the marriage' is defined by section 2 (b) as follows :

- (b) "children of the marriage" means each child of a husband and wife who at the material time is
- (i) under the age of sixteen years, or
 - (ii) sixteen years of age or over and under their charge but unable, by reason of illness, disability or *other cause*, to withdraw himself from their charge or to provide himself with necessaries of life ;⁶⁴

It is of great importance that it be possible for the court to order maintenance for a child over 16 who is neither ill nor disabled but is in need of financial support because he is undergoing some form of higher education. The need for such powers had been recognized in a number of cases decided under the Divorce and Matrimonial Causes Act 1857.⁶⁵ It is not clear, however, that such power is given by section 2 (b). The expression 'or other cause' could be interpreted as referring only to situations similar to those referred to immediately prior to it. The New Zealand and Matrimonial Proceedings Act 1963, however,

⁶¹ *Per* HERRON, C. J., in *McDonald v. McDonald*, [1964] A.L.R. 166, 174.

⁶² *Macrae v. Macrae*, [1965] A.L.R. 523 ; (1964) 6 F.L.R. 224.

⁶³ *Thompson v. Thompson*, [1946] N.Z.L.R. 265.

⁶⁴ My italics.

⁶⁵ See *e.g.* *Thomasset v. Thomasset*, [1894] P. 295 ; *Ferguson v. Ferguson*, (1949) 2 W.W.R. 879 ; *Firman v. Firman*, [1951] O.W.N. 66.

deals specifically with the question of higher education giving the court there, power to make an order.⁶⁶

Reconciliation

Much emphasis in the Act is placed on reconciliation of the parties where this is at all possible. No one can dispute the importance of this, the only issue is whether the Act goes far enough. The sections mainly concerned with this are 7, 8 and 21, although the Act generally is drawn up with this in mind. The duty to attempt to promote or encourage a reconciliation, where possible, can be divided into two parts ; the duty of the Lawyer and the duty of the Court.

Duty of Lawyer

7. (1) It shall be the duty of every barrister, solicitor, lawyer or advocate who undertakes to act on behalf of a petitioner or a respondent on a petition for divorce under this Act, except where the circumstances of the case are of such a nature that it would clearly not be appropriate to do so,

- (a) to draw to the attention of his client those provisions of this Act that have as their object the effecting where possible of the reconciliation of the parties to a marriage ;
- (b) to inform his client of the marriage counselling or guidance facilities known to him that might endeavour to assist the client and his or her spouse with a view to their possible reconciliation ; and
- (c) to discuss with his client the possibility of the client's reconciliation with his or her spouse.

(2) Every petition for divorce that is presented to a court by a barrister, solicitor, lawyer or advocate on behalf of a petitioner shall have endorsed thereon a statement by such barrister, solicitor, lawyer or advocate certifying that he has complied with the requirements of this section.

The Lawyer's role is a semi-passive one and could easily become a mere formality. He must draw to his client's attention the reconciliation provisions of the Act, inform him or her of any counselling or guidance facilities *he knows of* and discuss the possibility of reconciliation. Having completed this procedure he certifies his compliance by a statement to that effect on the petition. He is given an additional

⁶⁶ See S. 52(1) (b).

'out' by section 7(1) where it states that he need not perform any of these duties if it is clear that it would be inappropriate in the circumstances.

No doubt the conscientious lawyer will not allow this to become a mere formality. If applied properly these provisions could establish an important procedure in the process of obtaining a divorce. Starting from the premise that there are insufficient marriage counsellors to interview everyone who wishes to obtain a divorce, this section could provide a sifting process whereby the lawyer would divide the parties who came before him into three general categories. The first category would consist of those who he feels are beyond counselling. Secondly, those who he feels can be helped but only by expert counselling, and, finally, those who he feels he can counsel himself. The parties in the first category would be considered to come within the provisions of section 7(1). He would make a great effort to persuade people in category two to see marriage counsellors. People in category three would be counselled by him. This may have been done by many lawyers in the past but the Act may serve to jog the memory of others or serve as a directive.

Ideally, perhaps, the procedure should require that the parties see a marriage counsellor first and be referred to a lawyer by him or her, where necessary.

Duty of Court

8. (1) On a petition for divorce it shall be the duty of the court, before proceeding to the hearing of the evidence, to direct such inquiries to the petitioner and, where the respondent is present, to the respondent as the court deems necessary in order to ascertain whether a possibility exists of their reconciliation, unless the circumstances of the case are of such a nature that it would clearly not be appropriate to do so, and if at that or any later stage in the proceedings it appears to the court from the nature of the case, the evidence or the attitude of the parties or either of them that there is a possibility of such a reconciliation, the court shall

- (a) adjourn the proceedings to afford the parties an opportunity of becoming reconciled; and
- (b) with the consent of the parties or in the discretion of the court, nominate
 - (i) a person with experience or training in marriage counselling or guidance, or
 - (ii) in special circumstances, some other suitable person,

to endeavour to assist the parties with a view to their possible reconciliation.

(2) Where fourteen days have elapsed from the date of any adjournment under subsection (1) and either of the parties applies to the court to have the proceedings resumed, the court shall resume the proceedings.

The duty of the Court is to make enquiries, where appropriate, to see if there is any hope of reconciliation. If there appears a possibility the Court must, it seems, adjourn the proceedings to afford the parties an opportunity of reconciling but it has no power to order them to see a marriage counsellor, etc. However, after 14 days from the time of the adjournment either party can apply for the proceedings to be resumed and the court must allow this.

The effectiveness of such a provision must be seriously questioned, since by the time the parties have reached the stage of court proceedings any love which existed between them is likely to have been replaced by indifference or even hatred and the chance of reconciliation at the 12th hour would seem extremely remote. This seems to be born out by the experience in Australia.⁶⁷

21. (1) A person nominated by a court under this Act to endeavour to assist the parties to a marriage with a view to their possible reconciliation is not competent or compellable in any legal proceedings to disclose any admission or communication made to him in his capacity as the nominee of the court for that purpose.

(2) Evidence of anything said or of any admission or communication made in the course of an endeavour to assist the parties to a marriage with a view to their possible reconciliation is not admissible in any legal proceedings.

Finally section 21 is inserted with the object, it is assumed, of encouraging the parties to confide fully in the counsellor appointed by the court.

Conclusion

Needless to say, the writer considers that the Divorce Act 1968 is not the ultimate in divorce legislation and that it has its shortcomings. Nevertheless it is a very positive step forward and will bring to many people the freedom from a marriage which has become a hideous legal bond.

⁶⁷ See D. M. SELBY, "The Operation of the Commonwealth Matrimonial Causes Act in New South Wales," (1962) 2 *Fed. L. Rev.* 1, 2-3.