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THE DIVORCE ACT, 1968 AND GROUNDS FOR DIVORCE BASED UPON MATRIMONIAL FAULT

D. MENDES DA COSTA*

This is a jurisdiction where technicalities and refinements are ill-adapted to the purposes the matrimonial causes law is meant to achieve. Opinions may properly differ whether or not dissolution of marriage through the courts should be provided as a means of dealing with the social problem created by marriages that have broken down through the commission of matrimonial offences. That question was settled for British communities, however, for all but disputatious purposes, in 1857. More than a century later, with divorce established, for good or ill, as a social mechanism available through the courts, the object to be achieved, and not merely to be desiderated, is a code of matrimonial causes law that is both intelligible in content and predictable in operation.1

Under sec. 91 (26) of the British North America Act, 18672 exclusive legislative authority over “Marriage and divorce” is conferred upon the federal Parliament. Prior to 1968, there had been only limited exercise of this constitutional power and for many years the divorce laws of Canada continued without comprehensive review. The result was a patchwork of laws derived from pre-Confederation, English and federal statutes.

In recent years it became increasingly clear that the state of the laws relating to divorce in Canada was unsatisfactory. A number of private members’ bills were introduced. This activity culminated in the appointment of a Special Joint Committee of the Senate and the House of Commons. The terms of reference of this Committee were wide: “to enquire into and report upon divorce in Canada and the social and legal problems relating thereto, and

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1 Skitch v. Skitch (1961), 2 F.L.R. 8 (Vic.), at p. 13 per Barry J.
2 30 & 31 Vict., c. 3, as amended.
such matters as may be referred to it by either House". Commencing on June 28th, 1966 the Special Joint Committee held twenty-four open meetings and received more than seventy briefs. The Report of the Committee, released in June, 1967, contained some twenty-one recommendations. Its proposals were restated in the form of a draft bill contained in Part V of the Report. On December 4th, 1967 the Divorce Bill, Bill C-187, was introduced in Parliament and read for the first time. The Report of the Special Joint Committee was used as a guide in the preparation of Bill C-187, though there were differences of substance between this Bill and the draft bill of the Special Joint Committee. Bill C-187 was assented to on February 1st, 1968 and was proclaimed in force on July 2nd, 1968.

I

THE STATUTE AS THE SOLE SOURCE OF DIVORCE LAW AND JURISDICTION

The purpose of the Divorce Act, 1968, a “radically new statute”, seems apparent: to provide a Canada-wide law of divorce, exclusively located in one statute. This result has been achieved. A Canadian law of divorce now exists for, of course, the Act of 1968 applies to the whole of Canada. However, while this Act seems to manifest the clear intention to cover the field in relation to substantive divorce law, it applies only to divorce and does not purport to directly relate to any other matrimonial cause. Repeal of all prior divorce laws was necessary, and this is accomplished by sec. 26. Sec. 25 speaks as to the position after July 2nd, 1968.

1. Repeal of prior laws

Sec. 26 of the Act of 1968 provides:

26. (1) The Dissolution and Annulment of Marriages Act, the Divorce Jurisdiction Act, the Divorce Act (Ontario), in so far as it relates to the dissolution of marriage, and the British Columbia Divorce Appeals Act are repealed.

(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.

At the first meeting of the Legislative Assembly of the newly formed Province of Ontario in 1792 it was enacted that the common law of England as at the

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3 Report of the Special Joint Committee of the Senate and House of Commons on Divorce, (1967).
4 102, Canada Gazette (Part 1), 1159.
15th October, 1792 should be received into Ontario. At that date the only method of divorce possible in England was by Act of Parliament. It was not until 1857 that judicial divorce was introduced into English law. Ontario entered Confederation without any law of divorce and this state of affairs continued until 1930 when the federal Parliament enacted the Divorce Act (Ontario), 1930:

2. The law of England as to the dissolution of marriage and as to the annulment of marriage, as that 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 Province, by any Act of the Parliament of the United Kingdom or 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.

3. The Supreme Court of Ontario has jurisdiction for all purposes of this Act.

Accordingly this statute introduced into Ontario, English law as to divorce and annulment of marriage as that law existed on the 15th July, 1870, and also by sec. 3 conferred divorce and annulment jurisdiction upon the Supreme Court of Ontario. The Divorce Act (Ontario), 1930, in so far as it relates to the dissolution of marriage, is now repealed by sec. 26 (1). While, therefore, the Act of 1930 remains the source of nullity law and jurisdiction, divorce law and jurisdiction in Ontario now rests upon the Act of 1968.

Other federal statutes are repealed by sec. 26 (1). Briefly stated, the Dissolution and Annulment of Marriages Act, 1963 provided a new procedure for granting parliamentary divorces; the Divorce Jurisdiction Act, 1930 was the Canadian "deserted wives" statute; and the British Columbia Divorce Appeals Act, 1937 conferred jurisdiction upon the Court of Appeal of British Columbia to entertain appeals in divorce and matrimonial causes. The divorce laws of provinces other than Ontario, whose existence did not so depend on federal statute, are repealed by the general provision of sec. 26 (2).

6 See now, Property and Civil Rights Act, R.S.O., 1960, c. 310.
10 R.S.C., 1952, c. 84. Initially, S.C., 1930, c. 15.
2. After July 2nd, 1968

Sec. 25 (1) provides:

25. (1) A petition for divorce presented in Canada after the coming into force of this Act shall be governed and regulated by this Act, whether or not the material facts or circumstances giving rise to the petition occurred wholly or partly before the coming into force of this Act.

Petition for divorce is defined in sec. 2 (g) to mean a petition or motion for a decree of divorce, either with or without corollary relief by way of an order under secs. 10 or 11. Sec. 5 provides that, subject to the limitations contained therein, the “court for any province” has divorce jurisdiction. Sec. 2 (e) defines the meaning of “court for any province” and sec 2 (f) defines the meaning of “court of appeal”.

Pursuant to sec. 22 of the Act, the Superior Court of Quebec and the Supreme Court of Newfoundland have been proclaimed to be courts for the respective Provinces for the purposes of the Divorce Act, 1968. The words of sec. 25 (1) make it clear that a petition, presented after the 2nd July, 1968, may be based on facts or circumstances which occurred wholly or partly before that date. Thus a petition may be presented under sec. 4(1) (e) on the basis of five or three years separation, even though the majority of the relevant period occurred prior to the commencement of the Act of 1968.

For petitions presented after the 2nd July, 1968 there appears no question but that the Divorce Act, 1968 is the sole repository of substantive divorce law in Canada. This Act is not merely a consolidation of earlier statutes. There is in Canada no residual “common law of divorce”; this follows from the general repealing provisions of sec. 26. That is, subject to this qualification: the Act makes use of various words, which it does not...

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14 As to Nova Scotia, see Webb v. Webb (1968), 3 D.L.R. (3d) 100 (N.S. Ct. for Divorce and Matrimonial Causes).

15 102, Canada Gazette (Part 1), 1159-60.

16 102, Canada Gazette (Part 1), 1612.


define, and which have been the subject of definition under the prior law. In the construction of the Act of 1968 the courts will, no doubt, on occasions construe these words by reference to their earlier meaning as so ascertained. To this extent the prior law will be carried forward. But even so, the only method of contact with this prior law will be by way of interpretation of the Divorce Act, 1968. The courts, however, are by no means constrained to reach back into the earlier law in this way. As has been stated, the statute “must be read as standing on its own and the Court must resist looking back”.

3. Transitional provisions

On July 2nd, 1968 there were no doubt proceedings for divorce which had been instituted in the Canadian courts but had not then been completed. Sec. 25 (2) controls these pending proceedings and provides:

25. 

(2) Notwithstanding the repeal by section 26 of the Acts and laws referred to in that section but subject to subsection (3) of this section,

(a) any proceedings for divorce commenced in any court in Canada of competent jurisdiction before the coming into force of this Act and not finally disposed of when this Act comes into force, shall be dealt with and disposed of in accordance with the law as it was immediately before the coming into force of this Act, as though that law had not been repealed; and

(b) any petition for the dissolution or annulment of a marriage filed under the Dissolution and Annulment of Marriages Act before the coming into force of this Act and not finally disposed of when this Act comes into force, shall be dealt with and disposed of in accordance with that Act, as though that Act had not been repealed.

Accordingly, to this extent, the law prior to the Act of 1968 is retained.


Levick v. Levick (1969), 4 D.L.R. (3d) 11 (N.S.S.C. App. Div.). Presumably an amendment cannot be made to pending proceedings, to include as a ground for divorce, a circumstance which did not so exist under the law prior to July 2nd, 1968, but which is now a ground for divorce under the Divorce Act, 1968. For such circumstance would constitute, as a new cause of action, a cause of action that did not exist at the date when the pending proceedings were commenced. Further, such an amendment would seem not to be a “petition for divorce” within the meaning of sec. 25 (1). And sec. 25 (2) requires that pending proceedings “shall be dealt with” under the prior law. This issue is, of course, of passing interest only.
Sec. 25 (3) deals with variation or rescission of orders for corollary relief made under the old law:

25. ........................................

(3) Where a decree of divorce has been granted before the coming into force of this Act or pursuant to subsection (2), any order to the effect described in subsection (1) of section 11 may be varied from time to time or rescinded in accordance with subsection (2) of that section by the court that would have had jurisdiction to grant the decree of divorce corollary to which the order was made if this Act had been in force at the time when the petition for the decree was presented and that court had made the order by way of corollary relief in respect of a petition presented to it.

Sec. 25 (3) refers only to orders to the effect described in sec. 11 (1). Its operation, however, is prospective and in this regard it differs from sec. 25(2). Thus in proceedings, commenced after July 2nd, 1968, for the variation of a custody order granted under the old law, sec. 25(3) was held to require the court to treat this order as if it had been made under the Act of 1968 and to consider any variation thereof under the provisions of sec. 11(2).

II

SOME STATISTICAL INFORMATION

On July 2nd, 1969 the Divorce Act, 1968 completed its first year of operation. Some statistical information relating to the number of petitions presented, and a breakdown as to grounds for divorce, may be of interest.

1. Number of divorce actions

Table "A" below contains the number of divorce actions commenced in some Canadian jurisdictions during the years 1966 and 1967 and from January 1st, 1968 to July 2nd, 1968. Also set out is the number of divorce petitions presented to the courts of these provinces and territories during the period July 2nd, 1968 to June 30th, 1969.

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23 The statistical information contained in Tables "A" and "B" has been obtained from the Press Release of the Department of Justice, Ottawa. Also from the Registrars or other administrative officials of the Superior Courts of the Provinces and Territories. The writer is much obliged to those concerned for their co-operation.
TABLE “A”
NUMBER OF PETITIONS PRESENTED

<table>
<thead>
<tr>
<th>Year</th>
<th>Manitoba</th>
<th>Nova Scotia</th>
<th>Ontario</th>
<th>P.E.I.</th>
<th>Yukon</th>
<th>Territory</th>
</tr>
</thead>
<tbody>
<tr>
<td>1966</td>
<td>529</td>
<td>517</td>
<td>5176</td>
<td>18</td>
<td>18</td>
<td></td>
</tr>
<tr>
<td>1967</td>
<td>539</td>
<td>541</td>
<td>5883</td>
<td>24</td>
<td>17</td>
<td></td>
</tr>
<tr>
<td>1968, to July 1</td>
<td>252</td>
<td>262</td>
<td>3173</td>
<td>14</td>
<td>8</td>
<td></td>
</tr>
<tr>
<td>July 2, 1968—June 30, 1969</td>
<td>1711</td>
<td>874</td>
<td>16495</td>
<td>91</td>
<td>61</td>
<td></td>
</tr>
</tbody>
</table>

It will be seen that while in each jurisdiction the number of divorce actions remained relatively constant during the periods prior to July 2nd, 1968, a sharp rise occurred thereafter. This increase no doubt reflects the fact that the Divorce Act, 1968 served a very real social need in so far as it made divorce possible for spouses who were unable to obtain this relief under the old law.

2. Breakdown as to grounds for divorce

To administer the jurisdictional provisions of the Divorce Act, 1968,24 a Central Divorce Registry, served by computer, has been established at Ottawa.25 This central administration has made possible the following table, Table “B”, which contains a breakdown of grounds for divorce in relation to petitions presented under the Act of 1968 from July 2nd, 1968 to June 30th, 1969. In this table, where a number is listed in respect of a ground under the letter “M”, that ground is one of multiple grounds listed in the petition. Where a number is listed in respect of a ground under the letter “S”, that ground is the single ground listed in the petition. As a result it will be noted that the total number of grounds indicated in the table is higher than the total number of petitions.

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<table>
<thead>
<tr>
<th>Case</th>
<th>Plaintiff</th>
<th>Defendant</th>
<th>Grounds for Divorce</th>
</tr>
</thead>
<tbody>
<tr>
<td>Case 1</td>
<td>John Doe</td>
<td>Jane Smith</td>
<td>Fault</td>
</tr>
<tr>
<td>Case 2</td>
<td>Jane Doe</td>
<td>John Smith</td>
<td>Fault</td>
</tr>
<tr>
<td>Case 3</td>
<td>Emily Roe</td>
<td>Michael Roe</td>
<td>Irreconcilable Differences</td>
</tr>
<tr>
<td>Case 4</td>
<td>Sarah Roe</td>
<td>David Roe</td>
<td>Irreconcilable Differences</td>
</tr>
<tr>
<td>Case 5</td>
<td>Emily Doe</td>
<td>Michael Doe</td>
<td>Abandonment</td>
</tr>
<tr>
<td>Case 6</td>
<td>Sarah Doe</td>
<td>David Doe</td>
<td>Abandonment</td>
</tr>
</tbody>
</table>

**Table 2**: Breakdown of Grounds for Divorce
It is clear from these tables that the grounds more frequently invoked are: sec. 3 (a), adultery; sec 3 (d), physical and mental cruelty; and sec. 4 (1) (e), three years separation. With the exception of Quebec, adultery has been more prevalent as a single ground for divorce than as a multiple ground: so too, without exception, has separation for three years. Conversely, physical and mental cruelty have predominantly been utilized as multiple grounds. It may be that physical and mental cruelty are frequently relied upon in the alternative. Possibly other factors are pertinent: for example, there may in many cases be sufficient, but not conclusive, evidence to support an allegation of cruelty.

III

RECONCILIATION

Although the Divorce Act, 1968 increases the grounds available for divorce, one of its main thrusts is the introduction of provisions, novel to Canada, aimed at reconciliation.26

1. Duty of legal adviser

Sec. 7(1) imposes a duty upon every legal adviser. Shortly put, except where the circumstances of the case are of such a nature that it would clearly not be appropriate to do so, the duty requires the lawyer to draw to the attention of his client, those provisions of the Act that have as their object the effecting where possible of a reconciliation;27 to inform his client of the marriage counselling or guidance facilities known to him; and to discuss with his client the possibility of a reconciliation. By sec. 7(2) every petition for divorce shall have endorsed thereon a statement of compliance with sec. 7.28

To what extent this provision has been productive in effecting reconciliations cannot be stated with any certainty. The attention of legal advisers has, however, obviously been directed to the possibility of reconciliation. Possibly, as a consequence of sec. 7, some kind of working relationship may emerge between lawyers and those social agencies that are concerned with marriage counselling and guidance.

26 The Australian Act contains reconciliation provisions. See, the Matrimonial Causes Act, 1959, Part III; also Part II; see too sec. 5 (1) containing the definition of “marriage conciliator” and “marriage guidance counsellor”. Generally, Toose, Watson and Benjafield, AUSTRALIAN DIVORCE LAW AND PRACTICE, (1968), 30-40. So too, to a lesser extent, does the New Zealand legislation, which followed the Australian lead. See, the Matrimonial Proceedings Act, 1963, sec. 4; also see sec. 15. Generally, Sim, DIVORCE LAW AND PRACTICE IN NEW ZEALAND, (1965), 7th ed., 16-17. See Payne, Statutory Reconciliation Provisions in Australia and New Zealand, (1968), 11 CAN. B. J. 226.

27 See secs. 2 (d) and 9 (3) (b).

2. Duty of the court

Sec. 8 imposes a duty upon the court. This section would seem to represent society's last endeavour to preserve the marriage status. It operates at the end-point of marital disputes when, no doubt, positions have been taken and have become more or less polarized. Sec. 8 provides:

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.

By sec. 21 (1) a person nominated by a court under the 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. By sec. 21 (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.

In Ontario the practice seems to be for the court itself to direct inquiries to the spouses; this occurs in open court. Several questions are, however, raised by sec. 8. This section requires the Court to direct inquiries to the spouses "before proceeding to the hearing of the evidence". Are the responses of the parties to the Court's inquiries themselves "evidence"? Should the inquiries be directed before the oath is administered; or after this has occurred? One approach has been to administer an oath varied so as to relate only to evidence touching the inquiries as to whether a possibility exists of reconciliation. The philosophy of sec. 8 is, of course, to achieve, where possible, a reconciliation. Absent other considerations, the practice which is designed to more readily accommodate this purpose would appear preferable. Sec. 8 directs the court to ascertain whether there is a possibility of reconciliation. The court is to base its determination upon the "nature of the case, the

29 Foley v. Foley (1969), (N.S.S.C.), (unreported); the judgment of which contains a form of varied oath.
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Evidence or the attitude of the parties or either of them.” This expression is very wide and enables the court to have regard to all relevant factors. But the attitudes of the parties may well differ. What if only one spouse desires reconciliation? This was the position in Paskiewich v. Paskiewich, where the Court was satisfied that the respondent-husband desperately wanted a reconciliation. The Court found, however, that there was no possibility of reconciliation. Gregory J. stated: 30

On the evidence I find that there is no possibility of a reconciliation. I am satisfied on the evidence that the petitioner will not go back and live with her husband as his wife and I hold that even the most fervent and sincere hope of one spouse that there will be a reconciliation cannot create “a possibility of a reconciliation” where the other spouse is unreconcilable.

Paskiewich v. Paskiewich was referred to in Matthews v. Matthews. 31 In the Matthews case the Court did adjourn the proceedings. There had on at least two earlier occasions been a separation and reconciliation, once after decree nisi but before decree absolute, and Cowan C.J.T.D. was of the opinion that in the case before him he should make every effort to give an opportunity to the parties to become reconciled. The proceedings were not adjourned to a fixed date, the Court’s interpretation of sec. 8 being that they should be adjourned without day.

Considerations, other than a determination of whether a possibility of reconciliation exists, appear involved in the application of sec. 8. In Rushton v. Rushton 32 the Supreme Court of Nova Scotia concluded its judgment by expressing concern about the procedural difficulties inherent in the inquiry directed by this section. McLellan, Local Judge, said:

As a result of the rather extensive questioning of the petitioner during her two appearances on the stand and the respondent’s one appearance, much of the matrimonial history of this unfortunate marriage was brought out. While it was under oath, I question whether it can be properly considered as evidence in the cause because of the special oath put to the parties. By the form of the oath, the evidence was limited to inquiries as to whether a possibility existed of a reconciliation between the parties. A more damning indictment of the procedure is the fact that the conduct of the cause was virtually taken out of the hands of counsel engaged. It may be that in the majority of cases a few perfunctory questions will satisfy the requirements of s.8, but in cases such as this, it seems to me that the court cannot discharge its duty without a searching inquiry. Most petitioners will simply state that no possibility of reconciliation exists, else why would they be proceeding with the action? The answer to the problem I have outlined may lie in the fact that the court ought to accept that statement as final and conclusive, but such acceptance does not seem to me to be discharging the positive duty laid on the court by s.8. In cases such as this, counsel may have to lead evidence covering many of the matters stated on the inquiry so that it becomes evidence in the cause.

Inquiries have been directed to the central administrative officials of the Superior Courts of all Canadian provinces and territories. From these inquiries the writer is aware of approximately ten occasions, all in Nova Scotia, upon

31 (1969), (N.S.S.C.), (unreported).
which there has been an adjournment pursuant to sec. 8. Local Registrars, however, have not been contacted and it may therefore be that there have been other cases which have been so adjourned. While the disposition of the cases which were adjourned cannot be stated with any certainty, it is believed that no reconciliations have been effected because of these adjournments.

IV
A MENTION OF SEC. 9: FACTORS WHICH MAY PRECLUDE RELIEF

Sec. 9, which is here only mentioned, contains factors which may preclude relief. Some provisions of this section apply to all divorce petitions while others are more specific in their operation and apply only to petitions presented under sec. 3, under sec. 4 and under sec. 4 (1) (e).

1. Those provisions which apply to sec. 3.

Sec. 9 (1) (c) and sec. 9 (2) are concerned with petitions presented under sec. 3. By sec. 9 (1) (c) it is the duty of the court, where a decree is sought under sec. 3, to satisfy itself that 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. Accordingly while condonation and connivance are bars to relief to a petition presented under sec. 3, the qualifying words relating to the public interest make it clear that they are no longer absolute bars to relief. The term "public interest" is not defined in the Act and will require interpretation by the courts. In Blunt v. Blunt, where both parties had committed adultery, Viscount Simon L.C., after referring to four considerations which guide a court in determining whether to exercise or withhold its discretion, stated:

To these four considerations I would add a fifth of a more general character, which must, indeed, be regarded as of primary importance, namely, 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. It is noteworthy that in recent years this last consideration has operated to induce the court to exercise a favourable discretion in many instances where in an earlier time a decree would certainly have been refused.

This fifth proposition of Viscount Simon L.C. was referred to in Bennett v. Bennett, where the issue before the Court was whether to exercise its dis-

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35 (1968), 69 D.L.R. (2d) 341 (N.S. Ct. for Divorce and Matrimonial Causes).
cretion and grant a divorce to a petitioner who had waited twenty-five years before asking for relief. The petition had been presented prior to July 2nd, 1968. The Divorce Act, 1968 was not therefore applicable and as adultery had been proved it would not have been necessary for the petitioner to rely upon the ground of permanent breakdown of marriage, had the petition been presented thereunder. The Court however referred to this statute as an expression that “the public does not now want the Courts to insist on two parties remaining married when it is obvious that the marriage has not been a marriage in practice for years”. This reasoning seems correct and would appear equally applicable to the interpretation of sec. 9 (1) (c). Should this be so the theory of marriage breakdown would, to this extent, be carried over to petitions presented under sec. 3. Assuming however that a court finds, in a petition so presented, that there is no possibility of reconciliation and that there has been a permanent breakdown of marriage, absent other factors, is the public interest served by a withholding of discretion and a refusal to grant a divorce?

By sec. 9 (2) any act or conduct that has been condoned is not capable of being revived so as to constitute a ground for divorce described in sec. 3. Condonation is defined in sec. 2 (d) of the Act so as not to 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. Sec. 2 (d) refers to any single period of not more than ninety days. Does this envisage the continuation or resumption of cohabitation on more than one occasion, if on each occasion the period of cohabitation does not exceed ninety days? To construe sec. 2 (d) as so permitting multiple periods of cohabitation would appear to enhance the possibility of reconciliation and, if this is so, to thereby further the purpose of this provision. However this may be, it appears that a period of renewed cohabitation which comes after reconciliation and which is not entered upon with a view towards reconciliation is outside sec. 2 (d), though in such a

36 Id. at p. 345 per McLellan, Co.Ct.J.

37 Compare sec. 42 (3) of the English Matrimonial Causes Act, 1965; “Adultery which has been condoned shall not be capable of being revived.” Generally, Rayden, 287-289, see footnote 33. As to the effect of the continuance or resumption of marital intercourse, see sec. 42 (1) of the English Matrimonial Causes Act, 1965; France v. France [1969] 2 W.L.R. 1141; sec. 39A of the Australian Matrimonial Causes Act, 1959, as amended: sec. 29 (4) of the New Zealand Matrimonial Proceedings Act, 1963.

38 Compare sec. 9 (3) (b) which contains the expression “.... a single period of not more than ninety day....” (Italics supplied).

case the court may still exercise its discretion under sec. 9 (1) (c) to grant a divorce.

2. Those provisions which apply to sec. 4.

By sec. 9 (1) (d) it is the duty of the court, where a decree is sought under sec. 4, to refuse the decree if there is a reasonable expectation that cohabitation will occur or be resumed within a reasonably foreseeable period. Under sec. 4 (2) where the existence of any of the circumstances described in sec. 4 (1) has been established, a permanent breakdown of marriage by reason of those circumstances shall be deemed to have been established. Sec. 9 (1) (d) acts as a qualification to this deeming requirement. Sec. 9 (1) (d) obviously seems inapplicable if the circumstance established is that contained in sec. 4 (1) (c)—the whereabouts of the respondent-spouse are not known. However a court may find established some other circumstance set out in sec. 4 (1), and so satisfy sec. 4 (2), and yet may also hold that there is a reasonable expectation that cohabitation will occur or be resumed; in which event by sec. 9 (1) (d) there is a duty to refuse the decree.

By sec. 9 (1) (e) there is a like duty to refuse a decree so sought if there are children of the marriage and the granting of the decree would prejudicially affect the making of reasonable arrangements for their maintenance. Discharge of this duty may require the court to act of its own volition and, to ensure a fair and just settlement of the maintenance problem, to make an order for maintenance even though such relief is not claimed in the petition. The purpose of paragraph (e) seems to be to protect “children of the marriage”. This expression is defined in sec. 2 (b):

2. In this Act,

(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;

Sec. 2 (b) (ii) refers to “illness, disability or other cause”. Does this include a child who is over sixteen years but who is attending school? Or is the expression “other cause” to be restricted by the * ejusdem generis * rule to causes akin to illness or disability? In * Grini v. Grini* the Court considered that the particular words in sec. 2 (b) (ii)—“illness, disability”—to be exhaustive of the whole genus to which they relate and that the general words

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40 Sec. 4 (1) . . . “(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;” See also, Sutt v. Sutt [1969] 1 O.R. 169.


—"or other cause"—should not be construed as restrictive. After a review of the authorities on the *ejusdem generis* rule, Wilson J. said:

And so, I reject the notion that I may not consider attendance at school as a reason whereby a child, issue of the parties to divorce proceedings, may properly look to a parent for maintenance even though that child be of the full age of sixteen years. In every case, of course, the decision to award or deny maintenance must depend on all the circumstances of the case, no less the ability of the concerned student to benefit from the education in question than the ability of the parent to bear the expense of the award demanded.

In the absence of a defence raising change of age, it has been held that the point of time at which the age of a child is material is the date of the filing of the petition and not the date of the hearing.\(^4\) These decisions are to be welcomed for, as was cogently stated by Lacourciere J. in *Johnston v. Johnston*,\(^4a\) upon a reading of the Act of 1968 as a whole it is plain "that Parliament intended that in divorce proceedings the Court should have a wide power to provide, both during and after the proceedings, for the proper maintenance, care, custody and upbringing of children whose interests would be affected by the grant of a decree absolute." The issue before the Ontario High Court was whether children who had been placed for adoption and adopted came within sec. 2 (b). The purpose of this provision having been so established, Lacourciere J. continued:

To say that such power is to be exercised in respect of children who are no longer in law the children of the spouses in the divorce proceedings, and the protection of whose interests is the legal obligation of a person or persons not privy to such proceedings, is, in my view, to ascribe to Parliament the intention to produce an absurd result.

Accordingly, as the children were not "children of the marriage" within the meaning of sec. 2 (b), service of the pleadings upon the Official Guardian pursuant to Rule 796 of the Ontario Rules of Practice was held to be not necessary.

3. *Those provisions which apply to sec. 4 (1) (e).*

Sec. 4 (1) (e) contains the "separation ground". With sec. 4 (1) (e) must be read sec. 9 (3) and sec. 9 (1) (f). Sec. 9 (3) relates to the calculation of the period of separation, and is not here discussed.\(^4\) Relief under sec.

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\(^4\) Sec. 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 (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."
4 (1) (e) may, it seems, be obtained against an “innocent” spouse, i.e. a spouse who has committed no matrimonial offence in the traditional sense. For this reason sec. 9 (1) (f) imposes a duty upon a court to refuse a decree sought under sec. 4 (1) (e) 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. Whether a court is obliged to so refuse a divorce must depend upon a review of all relevant factors. Two criteria are referred to by sec. 9 (1) (f): that the granting of the decree would be “unduly harsh or unjust” or would “prejudicially affect” reasonable arrangements for maintenance. The onus of proof appears to be upon the spouse seeking to invoke sec. 9 (1) (f) — and it seems, sec. 9 (1) (d) and (e). 44a

(a) “Unduly harsh or unjust”

The precise meaning of “unduly harsh or unjust” will be determined by the courts. A similar, though not identical, safeguard to a divorce under the separation ground was written into sec. 37 (1) of the Australian Matrimonial Causes Act, 1959. 46 There have been a series of Australian cases dealing with the meaning of this provision. The difficulty with which a court is faced was well stated by Walsh J. A. in Macrae v. Macrae: 46

For this reason, I think that there is much force in the view expressed by the Full Court of South Australia in Painter v. Painter that the “harsh and oppressive” provision in s. 37 (1) requires that there should be something in the particular case which goes beyond the normal, and indeed inevitable, consequences of the granting of a decree under s. 28 (m) or, as their Honours put it, something beyond what is “in the ordinary run of the mill” in such cases.

This extract was recently referred to by the Ontario High Court in Johnstone v. Johnstone. 47 One argument put forward in the Johnstone case was that a decree, if granted, would deprive the respondent-wife of her inchoate right to claim against her husband’s estate under the Dependents’ Relief Act of Ontario. This contention did not succeed. The Court, after a review of Australian cases, pointed out that whenever a decree absolute is granted, the wife automatically loses her rights under the Dependents’ Relief Act, and that it would appear that such an inevitable consequence as this could not be the type of thing Parliament had in mind when drafting sec. 9 (1) (f). Lacourciere J. stated:

The test of undue harshness or injustice is subjective, and connotes a real and substantial detriment to the respondent beyond such normal consequences of the granting of a decree.

46 Sec. 37 (1): “Where, on the hearing of a petition for a decree of dissolution of marriage on the ground specified in paragraph (m) of section twenty-eight of this Act (in this section referred to as “the ground of separation”), the court is satisfied that, by reason of the conduct of the petitioner, whether before or after the separation commenced, or for any other reason, it would, in the particular circumstances of the case, be harsh and oppressive to the respondent, or contrary to the public interest, to grant a decree on that ground on the petition of the petitioner, the court shall refuse to make the decree sought.”
After stating the dictionary meaning of “harsh” and “unjust”, the Court continued:

As qualified by the word “unduly”, these two words mean something to excess and beyond the due degree of harshness and injustice. The Act therefore impliedly recognizes that some decrees will inevitably have a certain degree of harshness or injustice without being unduly harsh or unjust.

While it may not be easy to determine, in any particular circumstance, whether the granting of a decree would, or would not, be “unduly harsh or unjust” within the meaning of sec. 9 (1) (f), the correct approach to the meaning of this phrase finds expression, it is considered, in this decision.

(b) “Prejudicially affect” the making of reasonable maintenance arrangements

This phrase, which occurs also in sec. 9 (1) (e), does not necessarily require a decree to be refused because of the mere fact that the petitioner-husband proposes to re-marry. As illustrations of the operation of this provision, two decisions may be mentioned, though the latter, it should be noted, turned upon the “unduly harsh or unjust” criterion. The protective provisions of sec. 9 (1) (f) were held not applicable where the case was not one of a wife who had assisted her husband in building up his estate, or had acted as his helpmate; though married since 1954 the spouses had lived together for less than three months, and the petitioner (who had for about fifteen years made his wife generous payments) in the interim had undertaken new and heavy responsibilities. On the other hand, where the parties had been married for thirty-three years and lived together for twenty-six years it was held, on the facts before the Court, that it would not be right for the petitioner-husband, for whatever reason, to divorce his wife at this stage in their lives and to leave her without a substantial asset of any kind as security for her living accommodation. A decree nisi could result, the Court said, in a situation which would be unduly unjust to the wife unless a lump-sum payment was ordered. Divorce would put an end to the wife’s rights under the Dower Act, and the Court, in addition to a monthly payment, ordered the petitioner to secure against the property which he owned—in which the wife was living—a lump sum in favour of the respondent-wife to be paid to her when this property should be sold.

4. General bars to relief

General bars to relief—that is, provisions which apply to all petitions whether brought under sec. 3 or under sec. 4—are contained in sec. 9 (1) (a) and (b). By sec. 9 (1) (a) it is the duty of the court to refuse a decree based solely upon the consent, admissions or default of the parties or either of them, and not to grant a decree except after a trial which shall be by a judge,

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without a jury. The wording of sec. 9 (1) (a) is very wide. Presumably, however, where spouses have agreed to live separate and apart a decree sought under sec. 4 (1) (e) would not be based solely upon their consent but would, rather, be based upon the provisions of that paragraph. The phrase “except after a trial” has been taken to be “an indication of an exception to what would otherwise be a bar to the use of admissions”, and sec. 9 (1) (a) has been held not to preclude a judge acting upon admissions presented in the form of sworn testimony in court. On the other hand, a court has felt precluded from acting upon an admission contained in a respondent’s answer, because to do so would enable spouses to obtain a divorce by consent:

Section 9 (1) (a) restricts the use of admissions, particularly those not under oath. Proof of the commission of the marital offence is necessary by means other than pleadings or statements outside of the court.

By sec. 9 (1) (b) it is the duty of the court 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. Collusion, which is defined in sec. 2 (c), therefore remains an absolute bar to divorce.

V

GROUNDS FOR DIVORCE BASED UPON MATRIMONIAL FAULT

Before commenting upon the grounds for divorce contained in sec. 3 of the Divorce Act, 1968, it is perhaps desirable to mention, in a general way, the position as to grounds for divorce in Canada before July 2nd, 1968.

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61 Ewasiuk v. Ewasiuk (1968), 70 D.L.R. (2d) 525 (N.W.T.T.C.), at p. 526 per Morrow J. See too, Foley v. Foley (1968), (N.S.S.C.), (unreported), where the Court did not have to decide whether it was required to refuse the decree, where the only evidence was that of the parties or either of them as, in the case then before the Court, there was other independent evidence, apart from the evidence of the petitioner, in support of the allegations of the petition. Also see, Monaghan v. Monaghan [1931] 2 D.L.R. 933. Sec. 9 (1) (a) bears a close resemblance to former Rules 796 and 797 of the Ontario Rules of Practice. As to former Rule 796 see, Elliott v. Elliott [1933] O.R. 206.


63 Sec. 2 (c): “‘collusion’ means an agreement or conspiracy to which a petitioner is either directly or indirectly a party for the purpose of subverting the administration of justice, and includes any agreement, understanding or arrangement to fabricate or suppress evidence or to deceive the court, but does not include an agreement to the extent that it provides for separation between the parties, financial support, division of property interests or the custody, care or upbringing of children of the marriage;” Generally, Sopinka, op. cit. The words “for the purpose of subverting the administration of justice” contained in sec. 2 (c) may be contrasted with the expression “with intent to cause a perversion of justice,” which expression occurs in both the Australian and New Zealand legislation. Collusion is an absolute bar to relief in Australia: see sec. 40 of the Australian Matrimonial Causes Act, 1959. In England collusion is now a discretionary bar to relief and a distinction is drawn between objectionable and non-objectionable collusion; sec. 5 of the English Matrimonial Causes Act, 1965; see, Gosling v. Gosling [1968] P. 1. Also, Bevan, The Scope and Effects of Collusion, (1966), 82 L.Q.R. 371.
1. **Prior to July 2nd, 1968**

In Newfoundland and Quebec, the courts did not, before the Divorce Act, 1968, possess jurisdiction to grant a decree of divorce. For persons domiciled in these Provinces the only method of obtaining dissolution of marriage was by a private Act of the Federal Parliament, a procedure also available to persons whose domicile was uncertain. Prior to 1930, this too was the position in Ontario. By the Divorce Act (Ontario), 1930, however, English law as that law existed on the 15th July, 1870 was introduced into this Province. In substance, therefore, the divorce law of Ontario rested upon the terms of the English Matrimonial Causes Act, 1857. This English statute also provided the foundation of the divorce laws of British Columbia, Alberta, Saskatchewan, Manitoba, the Northwest Territories and the Yukon Territory. By this Imperial Act a husband could obtain a divorce on the ground of his wife's adultery. For a wife to obtain a divorce, however, a showing of simple adultery was not enough; she had to prove that her husband had been guilty of either incestuous adultery, or of bigamy with adultery, or of rape, or of sodomy or bestiality, or of adultery coupled with such cruelty as without adultery would have entitled her to a divorce *a mensa et thoro*, or of adultery coupled with desertion, without reasonable excuse, for two years or upwards. A wife was, accordingly, placed in a more disadvantageous position. This so-called “double-standard” was removed in 1925 by the federal Marriage and Divorce Act, and adultery alone was made a ground for divorce upon the petition of the wife. Adultery, therefore, was a ground for divorce at the suit of either spouse. And rape, sodomy and bestiality were grounds available to a wife only. Pre-Confederation statutes were the source of the divorce laws of New Brunswick, Nova Scotia and Prince Edward

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70 Fletcher v. Fletcher (1919), 50 D.L.R. 23 (Sask. C.A.).
75 Marriage and Divorce Act, R.S.C., 1952, c. 176, sec. 4. Initially, the Divorce Act, S.C., 1925, c. 41. The Act of 1952 has been repealed in part by sec. 24 of the Divorce Act, 1968, and is now the Marriage Act, R.S.C., 1952, c. 176.
76 This was the position in Ontario; see, however, Upper v. Upper [1933] O.R. 1, 5.
Island. In all these Provinces adultery was a ground for divorce and so too was consanguinity within the degrees prohibited by an early statute. Cruelty and impotence were also grounds for divorce in Nova Scotia; while in New Brunswick and Prince Edward Island the additional grounds were frigidity or impotence.

Reference has been made to the repealing provisions of sec. 26 of the Divorce Act, 1968. The provisions of the Marriage and Divorce Act, so far as they relate to divorce, are likewise repealed by sec. 24. Accordingly the grounds for divorce in Canada are now exclusively contained in secs. 3 and 4 of this statute. These sections considerably increase the grounds upon which divorce may be so obtained though each adopts a different philosophy. Sec. 3 contains those grounds for divorce associated with the traditional doctrine of matrimonial fault and the concept of matrimonial offence. Sec. 4 blazes a new trail in so far as it introduces into Canadian law additional grounds for divorce predicated upon a permanent breakdown of marriage. Further comment upon sec. 3, but not upon sec. 4, is here proposed.

2. Section 3

Sec. 3 provides:

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,

(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.

These grounds are available to either spouse. They predicate some kind of wrongful activity committed by the respondent, activity committed since the celebration of the marriage. The theory of marriage breakdown does not apply to the offences set out in sec. 3, so that a petitioner is not entitled to relief simply because there has been a permanent breakdown of marriage.

69 32 Hen. VIII, c. 38.
71 Generally, G. v. G. [1943] S.C.R. 527. Bestiality was held not to constitute adultery, and so was not a ground for divorce in New Brunswick; Babineau v. Babineau (1924), 51 N.B.R. 501.
74 Sec. 16 provides that where a decree of divorce has been made absolute under the Act, either party to the former marriage may marry again.
There is, however, this point. Sec. 31 of the Imperial Matrimonial Causes Act of 1857, and sec. 5 of the Marriage and Divorce Act, 1952, provided that if the court was satisfied by the evidence that the case had been proved, then, save as was therein stated, the court "shall pronounce a decree" of divorce. This direction to the court was subject to the old absolute and discretionary bars to relief. The former absolute bars to relief, collusion, condonation and connivance, are now contained in sec. 9 of the Act of 1968, though condonation and connivance no longer retain their absolute character. The Divorce Act, 1968 contains however no reference to those factors the existence of which conferred, under the prior law, a discretion upon the court to grant or to withhold relief. Sec. 3 merely provides that "a petition for divorce may be presented". What if sec. 9 is satisfied and if adultery, for example, is proved; must the court grant a divorce? In Rushton v. Rushton the Supreme Court of Nova Scotia pointed out that there was nothing in the Act of 1968 stating that a court is bound to grant the relief sought on proof of the alleged ground. McLellan, Local Judge, said:

The mandatory duties of the court under the present act are set out in ss. 8 and 9, and certain discretionary powers are set forth in ss. 10, 11 and 12 ("Corollary Relief") and also in s. 13. There is nothing in the act imposing any duty on the court to make any particular finding or to grant any particular relief. Does the mere absence from the Divorce Act of a provision similar to s. 5 in the Marriage and Divorce Act indicate Parliament's intention that the court shall not be bound to grant the prayer of the petition even if the grounds have been proved?

The Court inclined to the conclusion that it was not bound to grant a decree on proof of the ground alleged. If this is the result of sec. 3, a statutory lacuna would appear to arise for, in such circumstances, on what basis should relief be granted or withheld? No assistance is to be derived from the Divorce Act, 1968, and in the Rushton case it seemed to the Court, on the assumption its conclusion was correct, that it ought to apply the principles which were being followed in Nova Scotia just prior to the commencement of this statute. In the result, a decree was granted.

While it is clear that the Divorce Act, 1968 does not expressly state that a court is bound to grant a decree if the petitioner proves the existence of a ground for divorce prescribed in sec. 3, it is however considered that this result is implicit in the statute. The bars to relief—collusion, condonation and connivance—are set out in sec. 9 and, as was pointed out in Delaney v. Delaney, the Act has ignored and by so doing swept away, what were formerly the discretionary bars to relief. The general repealing provisions of sec. 26 of the Act have left a complete void in the field of divorce law in Canada, a void filled exclusively by the provisions of this legislation. Reference

76 Now repealed.
77 As to the duty imposed upon the court by secs. 29 to 31 of the Imperial Matrimonial Causes Act of 1857, see MacNeil v. MacNeil (1967), 65 D.L.R. (2d) 171 (N.S. Ct. for Divorce and Matrimonial Causes).
78 (1969), (N.S.C.), (unreported).
79 See, for example, Bennett v. Bennett (1968), 69 D.L.R. (2d) 341 (N.S. Ct. for Divorce and Matrimonial Causes). Also, Ellis v. Ellis (1968), 1 D.L.R. (3d) 46 (Ont. C.A.).
to the old law is now only permissible if such law is preserved by, and if such a reference is directed by, the Divorce Act, 1968. Should sec. 3 be construed by implication as preserving and directing a reference to the old law as to discretionary bars to relief as that law existed in each Canadian jurisdiction prior to July 2nd, 1968? Absent collusion, condonation or connivance, it appears more consistent with the purpose of the statute, to provide a new law of divorce for the whole of Canada, to interpret sec. 3 as imposing a mandatory duty on a court to grant a divorce on proof of the ground alleged.

(a) Adultery

Adultery, a "serious matrimonial offence", is retained as a ground for divorce by sec. 3 (a). Adultery is not defined in the Act; nor was it defined in the prior provincial divorce laws. Indeed, the Report of the Special Joint Committee stated that there was "obviously no need for a statutory definition" of this offence. Presumably the old law will be carried over to the interpretation of sec. 3 (a). While the meaning of adultery may not have been the same in all countries or under all systems of law, in its essence it has always been regarded as an "invasion of the marital rights of the husband or the wife". And it does not matter that the adultery complained of was committed out of the jurisdiction where the parties were then resident and domiciled. In Kahl v. Kahl the High Court of Ontario stated:

Adultery has been defined by Orde J., in Orford v. Orford ..., as voluntary sexual intercourse by a married person with another person of the opposite sex, other than his or her spouse.

(i) Voluntary

As sexual intercourse, to constitute adultery, must be voluntary, or consensual, consent is a necessary ingredient. In the absence of evidence to the contrary, consent will be assumed. When a woman is raped she does not commit adultery. Though the position is not free from doubt, it is considered that once there is evidence of involuntariness the evidential burden shifts to the wife to adduce credible evidence of rape; but that the legal onus of proof that the intercourse was consensual remains at all times upon the

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81 See pp. 4-5 ante.
83 Report of the Special Joint Committee of the Senate and House of Commons on Divorce, op. cit., 104.
84 Orford v. Orford (1921), 49 O.L.R. 15, 22.
86 [1943] O.W.N. 558, at p. 559 per Kelly J. Also see, Babineau v. Babineau (1924), 51 N.B.R. 501, at p. 503: "In all of the authorities, adultery is defined "as the sin of incontinence between two married persons, or it may be when only one of them is married,"...." See too Chouinard v. Chouinard (1969), 1 N.B.R. (2d) 582.
husband. It has been held that a girl of a young age cannot be found guilty of adultery for, the premise seems to be, she cannot at law consent to the act of sexual intercourse. Merely however because her consent is no defence for the purpose of certain criminal proceedings does not necessarily mean that it should likewise be immaterial for the purpose of divorce law. There is, however, much to be said for the view that to find a girl of twelve years guilty of adultery would be "highly against public interest". In situations of this kind, the party acting voluntarily will, of course, commit adultery. Thus the commission of rape by a husband does constitute adultery on his part. And a claim for damages for criminal conversation may succeed against a male co-respondent although the divorce proceedings are dismissed for want of proof of voluntary intercourse on the part of the wife.

There is authority for the view that insanity precludes adultery; so too if the respondent was so drunk or under the influence of drugs as to be incapable of consenting, at least provided that this state of affairs is excusable in all the circumstances. The House of Lords has, however, recently held that insanity is not necessarily a defence to a charge of cruelty. The impact of this decision upon the earlier cases involving the reason for consent, or lack of consent, in the law of adultery cannot be stated with certainty.

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88 Cunningham v. Cunningham (1966), 11 F.L.R. 399 (Qld. S.C.), at p. 403 per D. M. Campbell J.: "In Vrska v. Vrska Chamberlain J. said: "The legal onus is on the plaintiff to establish adultery. It is true enough that if intercourse is proved, and nothing more, the plaintiff would not be expected to show positively that it was consented to. That would be assumed in the absence of evidence to the contrary. But once there is evidence which raises the issue of the voluntariness of the relevant act of intercourse the plaintiff will fail unless he establishes that element of his charge." In my opinion, this passage from the judgment of Chamberlain J. correctly states the position as to proof of adultery." Also, Clarkson v. Clarkson (1930), 46 T.L.R. 623. But see, Redpath v. Redpath [1950] 1 All E.R. 600; Hall v. Hall [1947] 1 W.W.R. 625 (Sask. K.B.). Generally, Cross, EVIDENCE, (1967), 3rd ed., 73.


94 Vrska v. Vrska [1960] S.A.S.R. 74. At pp. 79-80 Chamberlain J. said: "It would be an odd result if the co-defendant could escape the legal consequences of his adultery because it also amounted to rape".


97 Generally, Power, op. cit., 48, 416; Rayden, op. cit., 172-175, 301-302; Bromley, op. cit., 92-93; Tarlo, Intention and Insanity in Divorce Law, (1963), 37 AUSTR. L. J. 3, 12-16.


99 Contrast, Rayden, op. cit., 301-302; Bromley, op. cit., 93.
(ii) By a married person with another person of the opposite sex

Adultery is committed by a “married person”. To constitute adultery it is necessary that at least one party to the act of intercourse should be married: but both need not be. Intercourse before marriage is not adultery: at least if the other party involved was also single.\(^{(100)}\) Sec. 3 provides that a petition for divorce may be presented on the ground that the respondent, since the “celebration of the marriage” has committed adultery. Accordingly if before the marriage of H1 and W1, H1 had engaged in intercourse with W2, this would be adultery and provide a ground for divorce at the suit of H2. But not at the suit of W1, for the adultery was committed before the celebration of her marriage. Recent cases have raised the question as to whether a divorced wife can commit adultery. The position seems to be that if after the divorce the ex-wife engages in intercourse, this will not amount to adultery if the male party is unmarried;\(^{(101)}\) but if the male party is married both are, apparently, guilty of adultery.\(^{(102)}\)

Though a wife may perhaps be a participant to the rape of another woman,\(^{(103)}\) such conduct would not constitute adultery, for, \textit{inter alia}, another person of the “opposite sex” is not involved. Adultery does not include bestiality, for the requirement of “another person” is lacking.\(^{(104)}\)

(iii) Sexual intercourse

It is clear that to constitute adultery intercourse need not be complete.\(^{(105)}\) Partial, or \textit{quasi-sexual}, intercourse will suffice.\(^{(106)}\) Indeed on “the authorities adultery is committed even if there is only a slight degree of penetration, . . .”.\(^{(107)}\) Accordingly evidence that a woman against whom adultery is alleged is \textit{virgo intacta} is not necessarily inconsistent with a finding of adultery, though a very heavy burden of proof rests upon the party alleging adultery.\(^{(108)}\) There is, however, a question whether adultery requires penetration. In Russell v. Russell Lord Dunedin had stated that “... fecundation ab extra is, I doubt not, adultery”.\(^{(109)}\) This dictum, and a dictum by Lord Birkenhead in Rutherford v. Richardson,\(^{(110)}\) influenced decisions in Aus-


\(^{(107)}\) Forster v. Forster [1955] 4 D.L.R. 710 (Ont. C.A.), at p. 724 \textit{per} Schroeder J.A.


tralia\textsuperscript{11} and New Zealand\textsuperscript{12} to deny that penetration was essential. Recently, however, English cases have decided that there must be some penetration. In \textit{Dennis v. Dennis}, Singleton L. J. said:\textsuperscript{13}

I do not think that it can be said that adultery is proved unless there be some penetration. It is not necessary that the complete act of sexual intercourse should take place. If there is penetration by the man of the woman, adultery may be found, but if there is no more than an attempt, I do not think that a finding of adultery would be right.

According to this view an attempt at intercourse, or some lesser act of sexual gratification, without any penetration is insufficient.

\textit{In MacLennan v. MacLennan} the Court of Session of Scotland held that artificial insemination did not constitute adultery:\textsuperscript{14}

Just as artificial insemination extracts procreation entirely from the nexus of human relationships in or outside of marriage, so does the extraction of the nexus of human relationship from the act of procreation remove artificial insemination from the classification of sexual intercourse.... The introduction of a spurious element into the family, with all its consequences, may be the result of such conduct, but is not a necessary result, and it is by the means and not by the result that this issue is to be judged. If artificial insemination by a donor were to be regarded as adultery, then I opine the view that it would be adultery whether the seed germinated or not, and yet in the latter case there would be no resultant adulteration of the strain.

The Court reviewed the English cases and reached its conclusion primarily by an acceptance of the view there crystallized that some penetration is required. Against this stands the early case of \textit{Orford v. Orford},\textsuperscript{15} a decision of the Ontario High Court. This was a claim for alimony and the defence by the husband was, \textit{inter alia}, the wife’s adultery. The Court found that the plaintiff had committed adultery but proceeded to consider also the wife’s contention that it was not adultery for a woman to become artificially inseminated by means of a man other than her husband and without her husband’s knowledge. In deciding that this did constitute adultery, Orde J. said:\textsuperscript{16}

In my judgment, the essence of the offence of adultery consists, not in the moral turpitude of the act of sexual intercourse, but in the voluntary surrender to another person of the reproductive powers or faculties of the guilty person; and any submission of those powers to the service or enjoyment of any person other than the husband or the wife comes within the definition of “adultery”.

\textsuperscript{15} (1921), 49 O.L.R. 15.
\textsuperscript{16} Id., 22-23.
The judgment is grounded upon the view that extra-marital sexual intercourse by a wife is adulterous because it involves the possibility of introducing into the family of the husband a false strain of blood. Consequently any act on her part which produces such a possibility is likewise adulterous.

It is possible to contend that the Divorce Act, 1968 was enacted in light of the decision of Orford v. Orford and that Parliament must be presumed to have intended that the word “adultery” in sec. 3 (a) should be interpreted in accord with this decision. Having regard to the cases mentioned above, this matter cannot be regarded as beyond dispute. At root the issue involved is one of policy. What seems required is an elaboration of the purpose designed to be served by the creation, and retention, of adultery as a ground for divorce. In 1963 artificial insemination without the husband’s consent, as a ground for divorce by the husband, was introduced by statute into New Zealand law. The insertion of a like provision in the Divorce Act, 1968 would perhaps have been welcomed as an entirely appropriate resolution of this difficult question.

(iv) Standard of proof

Adultery is a fact. Until 1950 the standard of proof required to establish adultery could not be stated with certainty. Adultery was, historically, an ecclesiastic offence and the question which lingered on was whether a petition for divorce based upon this ground partook the nature of a criminal action and so required proof beyond all reasonable doubt. In England the position still seems somewhat uncertain. In George v. George, how-

117 The Matrimonial Proceedings Act, 1963. Sec. 21: “Grounds of divorce—(1) A petition for divorce, whether the marriage is governed by New Zealand law or not, may be presented to the Court on one or more of the following grounds, and on no other ground: .. (b) That the respondent, being the wife of the petitioner, has since the solemnisation of the marriage and without the consent of the petitioner been artificially inseminated with the semen of some man other than the petitioner: .. “…". Inglis, op. cit., 117.


119 An action for divorce is, in England, a civil action: Mordaunt v. Moncreiffe (1874), L.R. 2 H.L. Sc. & Div. 374. But see, Bolster v. Bolster [1953] 1 D.L.R. 18 (N.B.S.C. App. Div.), at p. 19 per Richards C.J.: “It is said by counsel for the respondent that in New Brunswick adultery is a misdemeanor by virtue of the unrepealed section 3 of 1854 (N.B.), c. 145 (Consolidated Statutes of New Brunswick 1903, p. 2397) and such an action is triable by indictment as in a criminal case. That is true; in this Province the charge of adultery, per se, is triable by indictment: .. …”


ever, the Ontario Court of Appeal had no doubt in holding that the standard of proof was that required in a civil action only. Two years later in *Smith v. Smith*, Locke J., delivering the judgment of the majority of the Supreme Court of Canada, in an "exhaustive judgment", arrived at the same conclusion and so settled the law of British Columbia. In 1955 in *Boykowych v. Boykowych*, this view was reiterated and held applicable to Ontario. Kerwin C.J. said:

In *Smith v. Smith & Smedman* this Court decided that by virtue of the English Law Act,..., the law in force in British Columbia in divorce and matrimonial causes is *The Divorce and Matrimonial Causes Act, 1857* (Imp.), as amended,..., and that under that law proceedings in divorce in that province are civil and not criminal in their nature and the standard of proof of the commission of a marital offence, where no question affecting the legitimacy of offspring arises, was the same as in other civil actions, i.e., a preponderance of evidence. The same rule applies in Ontario under the *Divorce Act (Ontario)*.

This rule has been applied in other provinces. And the standard of proof is not altered merely because a claim for damages for criminal conversation is joined with divorce proceedings. The evidence, however, should "be convincing". The judicial mind must "be satisfied". The proceedings will fail if the court is not reasonably satisfied on the evidence that adultery was committed:

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127 McDonald v. McDonald (1960), 45 M.P.R. 258, 260 (N.B.S.C. App. Div.).

128 George v. George [1950] O.R. 787, at p. 797 per Roach J.A. The passage reads: "The judicial mind must be 'satisfied' that the alleged act of adultery was in fact committed, but it need not be satisfied to the extent of a moral certainty as in a criminal case. Evidence that creates only suspicion, surmise or conjecture is, of course, insufficient. It is necessary that the quality and quantity of the evidence must be such as leads the tribunal—be it judge or jury—acting with care and caution, to the fair and reasonable conclusion that the act was committed." This passage was approved by Cartwright J. in Smith v. Smith [1952] 2 S.C.R. 312. Also see, Adolph v. Adolph (1964), 51 W.W.R. 42 (B.C.C.A.).

not committed. But a doubt as to whether or not adultery has been committed is not sufficient ground for dismissing a petition. However, as stated by Kerwin C.J. in the extract cited above, the Supreme Court in the Smith case dealt with the standard of proof where "no question affecting the legitimacy of offspring arises." It appears clear that proof beyond a reasonable doubt is required when a divorce is sought on evidence which, if accepted, would bastardize a child born during the continuance of the marriage.

(v) Inference of Adultery

It is a "fundamental rule" that it is not necessary to prove the direct fact of adultery: this can be inferred from circumstances that lead to it by fair inference as a proper conclusion. As has been said:

For example, where a court accepts the evidence of a wife that she had not had intercourse with anyone other than her husband and that she had been infected with venereal disease by her husband. But the inference of adultery should always be drawn with caution. There must be more than mere opportunity: there must be proof that the opportunity was used.

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130 Dorey v. Demone (1956), 6 D.L.R. (2d) 296 (N.S.S.C.), at p. 301 per Currie J.: "I do not say that the defendants have not committed adultery together. My conclusion is, I am not satisfied there is the evidence upon the fact that where adultery is in issue."


However, that a woman is virgo intacta is not necessarily conclusive against a finding of adultery; 137 for partial intercourse will suffice. 138

(vi) Appeal

A trial judge enjoys the advantage of hearing and observing the witnesses. The position of an appeal court when asked to review a finding of fact made by a judge sitting alone has been the subject of "voluminous case law". 139 In Little v. Little, Locke J. said: 140

There is no doubt that the learned judges of the Court of Appeal, even in cases where the issue depends upon the veracity of the witnesses, are not only empowered but that it is their duty to overrule the findings at the trial if, bearing in mind the principles to which I have above referred, they are satisfied that the trial judge has failed to use the advantage afforded to him of having seen the witnesses and observed their demeanour in the witness-box in coming to his conclusion and that it is clearly wrong.

Sullivan J. clearly scrutinized the evidence of these investigators with great care: there is no justification, in my opinion, for concluding that he overlooked any of the relevant evidence in the case, and to say that he was so clearly wrong that the judgment of the Court of Appeal on the facts should be substituted for his I consider to be error.

Where a divorce petition is dismissed on the ground of insufficient evidence to establish the allegation of adultery, an appeal court should not disturb this dismissal unless convinced that the trial judge was clearly wrong. 141 This rule applies "with equal force" where the petition has been granted. 142 However, a divorce is not to be refused "merely because there is conflicting" evidence, and the decision below may be upset if the trial judge is held to have approached the consideration of the material evidence from a mistaken viewpoint. 143 So too if the only inference that can properly be drawn from the proved circumstances is that, as alleged, adultery was committed. 144 But if a wrong principle has been applied below and the appeal court is unable to evaluate the evidence, a new trial may be ordered. 145 So too if the appeal court finds that there is some good and special reason to throw doubt upon

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139 Forster v. Forster [1955] 4 D.L.R. 710 (Ont. C.A.), at p. 725 per Schroeder J.A.


the soundness of the trial judge's conclusions.\textsuperscript{146} It may be mentioned that
the application of the controlling principles may not always be easy to predict.
Indeed, as has been mentioned, perhaps "one may be forgiven for wondering
if authority cannot always be found to justify the course which an appellate
Court thinks it ought to follow in a particular case."\textsuperscript{147}

(vii) \textit{Effect of the Divorce Act, 1968}

Sec. 20 (1) of the Divorce Act, 1968 provides that subject to this
or any other Act of the Parliament of Canada, the laws of evidence of the
province in which any proceedings under the Act are taken, including the
laws of proof of service of any petition or other document, apply to such
proceedings.\textsuperscript{148} Nothing in this section seems to directly affect the matters
of evidence discussed above. The decisions of the Supreme Court of Canada
relating to the standard of proof must, however, be viewed against the back-
ground of the Imperial Matrimonial Causes Act, 1857 which required that
a court should "be satisfied" on the evidence that the case for the petitioner
had been proved.\textsuperscript{149} This Act is no longer relevant. The standard of proof
of adultery must now be deduced solely from the Divorce Act, 1968. The
Act of 1968 is silent on this point for sec. 3 (a) states merely that a petition
for divorce may be presented to a court on the ground that the respondent,
since the celebration of the marriage, has "committed" adultery. There seems,
however, no reason to suppose that sec. 3 (a) of the Act of 1968 will be
construed otherwise than in accord with the \textit{Smith} and \textit{Boykowych} cases, and
that the words "has committed" adultery will be construed otherwise than as
requiring the civil standard of proof.\textsuperscript{149a}

(b) \textit{Sodomy, bestiality or rape}

By sec. 3 (b) a petition may be presented to the court on the
ground that the respondent has been guilty of sodomy, bestiality or rape, or
has engaged in a homosexual act. Such conduct, however, must have taken
place since the celebration of the marriage. Under the Imperial Act of 1857,
and in jurisdictions wherein this Act had been received, rape, sodomy or
bestiality were formerly grounds for divorce, but only at the suit of a wife.
Under sec. 3 (b) they are made available at the suit of husband or wife and,
in addition, sec. 3 (b) includes the expression "or has engaged in a homosexual
act". The Act does not define the meaning of this phrase; nor the meaning
of the words "sodomy, bestiality or rape".

\textsuperscript{146} Forster v. Forster [1955] 4 D.L.R. 710 (Ont. C.A.). Also, Parrington v. Par-

\textsuperscript{147} Forster v. Forster [1955] 4 D.L.R. 710 (Ont. C.A.), at p. 725 \textit{per Schroeder J.A.}

\textsuperscript{148} See, \textit{inter alia}, sec. 21 of the Divorce Act, 1968 relating to admissions and

\textsuperscript{149} 20 & 21 Vict., c. 85, sec. 31. See, George v. George [1950] O.R. 787. Also, the

\textsuperscript{149a} See, George v. George [1950] O.R. 787. Also, the

\textsuperscript{20} & 21 Vict., c. 85, sec. 31. See, George v. George [1950] O.R. 787. Also, the

\textsuperscript{20} Marriage and Divorce Act, R.S.C., 1952, c. 176, sec. 5. This Act of 1952 has been

\textsuperscript{21} 1968, and is now the Marriage Act, R.S.C.

\textsuperscript{176} c. 176. See also Lemenson v. Lemenson (1969), 70 W.W.R. 749 (Man. Q.B.).
Sodomy and bestiality have been the subject of definition at common law and rape is defined in the Criminal Code. Presumably this is the way in which sec. 3 (b) will be interpreted. Indeed the Report of the Special Joint Committee was of the view that a statutory definition of these marital offences was “unnecessary and undesirable”. Where sodomy is committed upon a wife, her consent has been held to be a defence. But the consent must be a “real consent”. The onus of proving such consent rests upon the husband, and the standard of proof required is the balance of probabilities. It has been said that the allegation of sodomy is an accusation which no court “will find proved” unless it is corroborated. However, though courts look “most anxiously” for corroboration, and usually there is held to be corroboration, in this context, is not required as a matter of law.

Generally if a husband is guilty of rape he will also have committed adultery. However, circumstances may exist where this does not necessarily follow: for example, a husband may be guilty as a party to the offence of the rape of his wife by another man. Perhaps a husband—or even possibly a wife—may likewise be a party to the offence of the rape of another woman; and, if this is so, may be thereby “guilty of... rape” so as to satisfy sec. 3 (b).

The expression “or has engaged in a homosexual act” raises further difficulty for it lacks a heretofore established meaning. It may be that this expression includes conduct which would not constitute “sodomy”. Being available to either spouse it may, perhaps, also encompass acts of lesbianism.

In any event, the precise content of these words cannot be stated with

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149a See Bustin v. Bustin (1969), 1 N.B.R. (2d) 496 where at p. 498 the Court said: “In fact, I find that there is no evidence of adultery which would satisfy me by any preponderance of evidence.”

150 Generally, Milner, “Sodomy as a Ground for Divorce,” (1960), 23 Mod. L. Rev. 43.

151 S.C., 1953-54, as amended, sec. 135.

152 Report of the Special Joint Committee of the Senate and House of Commons on Divorce, op. cit., 105.


156 Id., at p. 192 per Wrangham J.


158 Warden v. Warden [1951] 3 D.L.R. 356 (Ont. H.C.): the fact that the husband does not answer the charge provides some corroboration.


certainty. It should however be mentioned that unnatural or perverted practices, by either a husband or a wife, can be taken into account as part of a course of conduct amounting to cruelty.

It is to be noted that sec. 3 (a) speaks of a respondent having “committed” adultery; whereas sec. 3 (b) talks of a respondent as having “been guilty of” sodomy, bestiality or rape. Is this change in terminology significant? Do the words “been guilty of” connote the requirement that the respondent should have been charged and convicted of a criminal offence? This was not, it seems, necessary under the Imperial Act of 1857. The words used in sec. 3 (b) do not appear to require any different construction; and indeed they must now be read subject to the changes in the law effected by the Criminal Law Amendment Act, 1968-69. If this is so, if a conviction is not required, there is still a question as to the standard of proof. From the decision of the Supreme Court of Canada in Hanes v. Wawanesa Mutual Insurance Co. it appears that, in a civil action the existence of a fact which, if established, would constitute a criminal offence, need be proved only on the balance of probabilities. In Smith v. Smith, Cartwright J. said:

I wish, however, to emphasize that in every civil action before the tribunal can safely find the affirmative of an issue of fact required to be proved it must be reasonably satisfied, and that whether or not it will be so satisfied must depend upon the totality of the circumstances on which its judgment is formed including the gravity of the consequences of the finding.

This passage was cited in the majority judgment in Hanes v. Wawanesa Mutual Insurance Co. The nature and gravity of the consequences which flow from a finding of adultery are of a quite different order from those which follow upon a finding that the respondent was “guilty of” sodomy, bestiality or rape:

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164 This follows the pattern in the English Act; the Matrimonial Causes Act, 1965, c. 72, sec. 1. (By sec. 1 (b), however, rape, sodomy or bestiality are available only to a wife). Contrast the Australian Matrimonial Causes Act, 1959-66, sec. 28: “committed adultery”; “committed rape, sodomy or bestiality”, available to both parties. Also contrast the New Zealand Matrimonial Proceedings Act, 1963, as amended, sec. 21: “guilty of adultery”; “committed rape or sodomy or bestiality”, available only to a wife.


166 Sec. 7 amends the Criminal Code by inserting sec. 149A which excepts certain conduct from the provisions of sec. 147, which applies to buggery and bestiality, and sec. 149, which applies to acts of gross indecency.


or that the respondent had “engaged in” a homosexual act. As the degree of social repugnance varies, so also should the degree of probability required to establish proof: in “proportion as the offence is grave, so ought the proof to be clear”.\textsuperscript{169} Possibly this may be the approach that the courts will adopt to establish proof of conduct contained in sec. 3 (b).

(c) **Bigamous marriages**

A husband or wife who, since the celebration of the marriage, has gone through a form of marriage with another person, provides his or her spouse with a ground for divorce under sec. 3 (c). This ground is constituted by the husband or wife so going “through a form of marriage with another person”. Under the prior law a divorce could have been obtained by proving adultery consequent upon the bigamous form of marriage. If adultery can so be established this will constitute a ground for divorce under sec. 3 (a). By sec. 3 (c), however, proof of the first marriage and of the second form of marriage is all that is needed, \textit{i.e.} proof of adultery is not required.

A valid polygamous marriage is presumably outside the contemplation of this paragraph. A husband may be domiciled in a jurisdiction where polygamy is permitted and may marry in this jurisdiction two wives. The first wife may subsequently acquire a Canadian domicile and otherwise satisfy the jurisdictional requirements of the Act.\textsuperscript{170} She cannot, it is considered, successfully petition for divorce under sec. 3 (c), relying merely upon the second marriage. For the second ceremony would not appear to be a “form of marriage” within the meaning of sec. 3 (c) but to be, rather, a perfectly valid polygamous marriage. Further there is no reason to suppose that sec. 3 (c) was meant to abrogate in this way the rule in \textit{Hyde v. Hyde},\textsuperscript{171} namely that the courts do not have jurisdiction to dissolve a polygamous marriage.\textsuperscript{172} The words “with another person” indicate, no doubt, that sec. 3 (c) also has no application to a form of marriage entered into between parties who are already married. For example, where husband and wife, married by a civil ceremony, subsequently go through a religious ceremony of marriage.

Neither circumstance here discussed seems to disclose matrimonial fault, and this appears a necessary ingredient of conduct prescribed as a ground for divorce under sec. 3.

(d) **Cruelty**

Physical or mental cruelty of such a kind as to render intolerable the continued cohabitation of the spouses is enacted as a ground for divorce by sec. 3 (d). The degree of proof has, rightly it is considered, already been

\begin{footnotes}
\item[170] See, Mendes da Costa, \textit{“Some Comments”}, see footnote 13.
\item[171] (1866), L.R. 1 P. \\& D. 130.
\item[172] Generally, Mendes da Costa, \textit{“Polygamous Marriages in the Conflict of Laws”}, (1966), 44 CAN. B. REV. 293.
\end{footnotes}
stated to be not greater than that required in an ordinary civil action. Sec. 3 (d) requires that the respondent should have treated the petitioner with cruelty since the celebration of the marriage. Conduct prior to the marriage cannot therefore, of itself, amount to cruelty, though it may be material in considering whether later conduct can be held to be cruel. Cruelty is not defined in the Act and the Report of the Special Joint Committee stated that cruelty has never been satisfactorily defined. Indeed it has been said to be impossible to give a comprehensive definition of cruelty; and the English and Canadian courts have studiously avoided a precise legal determination of the limits of this concept.

For a better understanding of sec. 3 (d) it is necessary to briefly sketch the concept of "cruelty" in contexts other than the Divorce Act, 1968.

(i) Matrimonial cruelty in contexts other than the Divorce Act, 1968

While cruelty may never have been satisfactorily defined, it is clear that it is a word which in matrimonial law has meaning. This meaning is a creation of judge-made law, a process which dates back at least to the "well-known" decision of Lord Stowell in Evans v. Evans. In the words of Lord Pearce:

From the days of Lord Stowell down to the present it has been acknowledged that to support a finding of cruelty the matter must be grave and weighty. And in Russell v. Russell this House finally settled that conduct must, in order to constitute cruelty in the legal acceptance of the term, be such as to cause danger to life, limb, or health, bodily or mental, or to give rise to a reasonable apprehension of such danger. (See Lord Merriman in Jamieson v. Jamieson.)

Thus there have long been two safeguards against any extension of relief to cases founded on mere trivialities and incompatibility.

Cruelty therefore comprises two components: danger, or a reasonable apprehension of danger, to life, limb or health—the so-called "doctrine of danger"—and also the requirement that the conduct must be grave and weighty. Given these two components, cruelty has no "esoteric and certainly no arti-

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175 Generally see, REPORT OF THE SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS ON DIVORCE, op. cit., 105-107.
178 Delaney v. Delaney (1968), 1 D.L.R. (3d) 303 (B.C.S.C.), at p. 308 per Tyrwhitt-Drake, Co.Ct.J.: "Cruelty is a word which in matrimonial law has meaning: it has been carefully defined and exhaustively applied to a variety of situations co-extensive only with the sanguinary ingenuity of humankind. For examples, see 12 Hals., 3rd ed., pp. 269 et seg."
180 (1790), 1 Hag. Con. 35.
ficial meaning" in divorce law. And the categories of cruelty, it has been pointed out, are not closed. Each case of cruelty must be decided on its own facts, As stated by Currie J.: In *Gollins v. Gollins*, the House of Lords held that an intention on the part of one spouse to injure the other was not a necessary element of cruelty as a matrimonial offence. In *Williams v. Williams* this same tribunal also recently determined that insanity is not necessarily a defence to a charge of cruelty. These authorities have been considered by a growing number of Canadian courts. In jurisdictions where they are accepted some earlier cases will no doubt require reconsideration.

This interpretation of cruelty in a matrimonial sense, which may be termed the *Russell v. Russell* test, has been generally adhered to in Canadian common law jurisdictions: except Alberta and Saskatchewan. Thus, prior to the Act of 1968, cruelty was a ground for divorce in Nova Scotia and this was the way in which this concept was interpreted. Further the *Russell v.

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185 Le Brocq v. Le Brocq [1964] 1 W.L.R. 1085, at p. 1096 *per* Salmon L. J.


189 White v. White (1968), 69 D.L.R. (2d) 60 (N.S. Ct. for Divorce and Matrimonial Causes), at p. 64 *per* McLellan J.


Russell test has controlled and, apparently, will continue to control, the
meaning of cruelty in Ontario in applications by a wife for alimony.\textsuperscript{101} So too,
it would seem, in provinces other than Alberta and Saskatchewan in relation
to suits for judicial separation based upon cruelty.\textsuperscript{102} A very considerable
body of judicial experience has therefore been acquired in the disposition of
diverse kinds of matrimonial causes based upon cruelty as here described.
Indeed, there is a "veritable legion of decided cases which preceded and have
followed Russell v. Russell".\textsuperscript{103} There is no doubt that, under the prior law,
the "doctrine of danger" had become firmly embedded in the fabric of the
matrimonial law of the majority of Canadian jurisdictions; and that, in these
jurisdictions, a well-known meaning, if not definition, had long been assigned
to the interpretation of this term.

Alberta and Saskatchewan

Statutes in Alberta\textsuperscript{104} and Saskatchewan\textsuperscript{105} have defined cruelty to mean
conduct creating a danger to life, limb or health, or any course of conduct
that in the opinion of the court is grossly insulting and intolerable or is of such
a character that the person seeking relief could not reasonably be expected
or be willing to live with the other after he or she has been guilty of the
same.\textsuperscript{106} This definition is applicable to suits for judicial separation and for
alimony. In Reves v. Reves, after referring to the difficulties produced by the
need to prove that the defendant's conduct had endangered the plaintiff's
health, Disbery J. said:\textsuperscript{107}

It was no doubt to remedy this situation that the Legislature went on to
include in its statutory definition of cruelty, upon which a judicial separation could

\textsuperscript{101} McIlwain v. McIlwain (1916), 35 O.L.R. 532 (App. Div.); Hawn v. Hawn
[1944] 4 D.L.R. 173 (Ont. C.A.); MacDonald v. MacDonald [1954] O.R. 521 (C.A.);
70 D.L.R. (2d) 555 (Ont. H.C.).

\textsuperscript{102} Shamper v. Shamper (1956), 4 D.L.R. (2d) 760 (B.C.C.A.); Maxwell v. Max-
(2d) 723 (B.C.S.C.); Desautels v. Desautels (1954), 11 W.W.R. 142 (Man. C.A.);
Diamond v. Diamond (1962), 38 W.W.R. 153 (Man. Q.B.); Currey v. Currey (1910),
N.B.R. 96 (C.A.); Ritchie v. Ritchie [1953] 2 D.L.R. 730 (N.B. Ct. of Divorce and
for Divorce and Matrimonial Causes). Also, Green v. Green (1963), 49 M.P.R. 315
(Nfl. C.A.).

\textsuperscript{103} Zalesky v. Zalesky (1968), 1 D.L.R. (3d) 471 (Man. Q.B.), at p. 472 per
Tritschler, C.J.Q.B.

\textsuperscript{104} The Domestic Relations Act, R.S.A., 1955, c. 89, sec. 7 (2). See, Bateman v.

\textsuperscript{105} The Queen's Bench Act, R.S.S., 1965, c. 73, sec. 25 (3). Initially, The King's
Bench Act, 1949, c. 24, sec. 2.

\textsuperscript{106} Generally, Power op. cit. 485-486.

\textsuperscript{107} (1965), 52 D.L.R. (2d) 543, 554 (Sask. Q.B.). Also, Rathgeber v. Rathgeber
(Sask. Q.B.); Ostapchuk v. Ostapchuk (1959), 19 D.L.R. (2d) 746 (Sask. Q.B.).
be granted, two additional kinds of cruelty applicable to "course of conduct" cases. Such are set forth above where the said s. 25 (3) is set out. If either course of conduct is proved against a defendant, a judicial separation may be granted without any proof as to whether or not the life, limb or health of the plaintiff was endangered.

The inclusion of the words relating to "course of conduct" allows therefore the granting of relief in situations which would not meet the usual definition of cruelty as applied by the courts in matrimonial causes:¹⁹⁸ that is, would not satisfy the "doctrine of danger".

Quebec

The notion of cruelty, although the word itself is not used, is also found in the law of Quebec. Under Article 189 of the Quebec Civil Code,¹⁹⁹ a separation from bed and board may be demanded by a spouse on the ground of outrage, ill-usage or grievous insult committed by one toward the other. By Article 190 the grievous nature and sufficiency of such outrage, ill-usage or insult are left to the discretion of the court which, in appreciating them, must take into consideration the rank condition and other circumstances of the parties. There has been comment comparing Article 189 with the provisions of sec. 3 (d) of the Divorce Act, 1968.²⁰⁰

(ii) The Divorce Act, 1968

The first two reported cases dealing with cruelty under the Act of 1968 differed in their approach to the interpretation of sec. 3 (d). There now appears to be two divergent interpretations of this provision.

Delaney v. Delaney: the Russell v. Russell test

In Delaney v. Delaney,²⁰¹ a wife petitioned the British Columbia Supreme Court for divorce on, inter alia, the ground of cruelty as set out in sec. 3 (d). The Court found that the husband's conduct induced an undoubted injury to her health and, referring to Evans v. Evans and Russell v. Russell, held that she had established uncondoned cruelty such as would entitle her to a judgment for judicial separation. The Court then asked whether the Divorce Act, 1968 had changed the law. As was pointed out by the Court, sec. 3 (d) does not use the word "cruelty" alone: this word is preceded by the words "physical or mental". To construe "cruelty" in the Russell v. Russell sense raised the question as to the meaning, or want of meaning, attributable to the

¹⁹⁹ Generally, Mignault, Droit Civil Canadien, (1896), vol. 2, 8 et seq.; Trudel, Traité de Droit Civil du Québec, (1942), vol. 1, 595 et seq.
words "physical or mental"; for under this test "health" includes "bodily or mental health"; that is, cruelty includes mental cruelty.\textsuperscript{202} Tyrwhitt-Drake, Co. Ct. J. said:\textsuperscript{203}

I am not persuaded that the employment of the words "physical or mental" as modifiers of the word "cruelty" are to have any substantive effect on its meaning. As used in the context, they can only refer to the effect upon the petitioner of the respondent's conduct. As it is defined, and as the definition has been hitherto applied to conduct, cruelty embraces injury to mental as well as physical health. The phrase "mental cruelty" despite (or perhaps because of) its imprecision has achieved a good deal of recognition; it is now a convenient catch phrase. I can only assign to it the meaning that it is conduct injurious to mental health, or which may reasonably be apprehended to be so, and "physical cruelty" is referable to similar effects, real or apprehended, to bodily health. In my view the phrase "physical or mental cruelty" does not import any wider definition to the word "cruelty" than that which now obtains in matrimonial law.

In the view of the Court, therefore, the words "physical or mental cruelty" in sec. 3 (d) bear the same meaning as did the word "cruelty" under the prior law; at least in so far as danger, or reasonably apprehended danger, to health, mental or physical, is required. Having construed in this way the words "physical or mental cruelty" the Court then proceeded to consider the meaning of the concluding phrase of sec. 3 (d); that is, that the cruelty must be "of such a kind as to render intolerable the continued cohabitation of the spouses". The Court stated:\textsuperscript{204}

More difficulty lies in determining whether success in an action based on (physical or mental) cruelty "of such a kind as to render intolerable the continued cohabitation of the spouses" requires proof of something more than cruelty such as would justify judicial separation; or whether it requires the Court to take a radically new direction and redefine cruelty as something based on the future intolerability of cohabitation rather than on past conduct.

If the latter view is to prevail, Courts might be obliged, in some cases, to exercise a degree of prophetic insight with which, I venture to suggest, few Judges are endowed, and certainly none at liberty to employ. But quite apart from this, it seems to me that if I were to hold that the task of finding cruelty is to be approached in a radically different way from that which presently pertains, I would be putting a very strained construction on the plain words of s. 3 (d). I would be obliged to substitute, in effect, some such general expression as "conduct" for the specific word "cruelty" where it occurs in the phrase concerning future cohabitation. . . .

I incline to the first alternative which I propounded, as leading to a correct statement of the law as it now exists. The words "physical or mental cruelty" used in s. 3 (d) have a certain meaning in law (cf., \textit{Russell v. Russell, supra}); and the phrase "of such a kind as to render intolerable the continued cohabitation of the spouses" has the effect of requiring a petitioner to adduce such evidence of cruel conduct as will enable the Court to conclude that, on the balance of probabilities, continued cohabitation will be intolerable. What is intolerable to a petitioner in any case must, I think, be determined subjectively.


\textsuperscript{204} Id., 307-308.
Accordingly this interpretation of sec. 3 (d), seems to require proof of two factors. First, danger, or reasonably apprehended danger, to mental or physical health, and in addition such evidence of cruel conduct as will enable a court to conclude that, on the balance of probabilities, continued cohabitation will be intolerable.

Zalesky v. Zalesky: the new approach

In Zalesky v. Zalesky\(^{205}\) a wife petitioned the Manitoba Court of Queen’s Bench for divorce under sec. 3 (d). The petition was dismissed but the Court made it clear that in considering whether cruelty had been proved, it had not been hampered by the Russell v. Russell test. Tritschler, C.J.Q.B., said:\(^{206}\)

There is now no need to consider whether conduct complained of caused “danger to life, limb, or health, bodily or mentally, or a reasonable apprehension of it” or any of the variations of that definition to be found in Russell.

In choosing the words “physical or mental cruelty of such a kind as to render intolerable the continued cohabitation of the spouses” Parliament gave its own fresh complete statutory definition of the conduct which is a ground for divorce under s. 3 (d) of the Act.

As cruelty is a question of fact, the Court however stated that many of the principles laid down in the former cases will continue to be proper guides.

This difference between the Delaney and Zalesky cases has been noticed in subsequent decisions. In Paskiewich v. Paskiewich\(^{207}\) it was pointed out that these two judgments could not be reconciled with one another. And the Supreme Court of British Columbia expressly declined to follow the Delaney case and adopted, as its own, the reasoning in Zalesky v. Zalesky. The Zalesky case has been referred to with approval in New Brunswick\(^{208}\) and in Nova Scotia,\(^{209}\) and in Galbraith v. Galbraith\(^{210}\) has recently been approved by the Manitoba Court of Appeal. In Galbraith v. Galbraith the wife, in earlier proceedings, had appealed, inter alia, against a decree of judicial separation which had been granted to her husband on his cross-petition. The wife's appeal was allowed on the ground that her conduct toward her husband did not constitute "legal cruelty". Before the judgment of the Manitoba Court of Appeal was

\(^{205}\) (1968), 1 D.L.R. (3d) 471 (Man. Q.B.).

\(^{206}\) Id., 472.


\(^{208}\) Bustin v. Bustin (1969), 1 N.B.R. (2d) 496. But see Chouinard v. Chouinard (1969) 1 N.B.R. (2d) 582, where the Court rejected a petition because there was no evidence that the conduct of the respondent affected the health of the petitioner. But the Court stated that it was not following Russell v. Russell as it took a less restricted view of the meaning of cruelty and cited Zalesky v. Zalesky. Also see Maund v. Maund (1969), 1 N.B.R. (2d) 547.


delivered the husband commenced an action, the present action, for divorce on the ground of cruelty pursuant to sec. 3 (d). The wife pleaded res judicata in answer to this allegation of cruelty. The issue before the Manitoba Court of Appeal was whether in the earlier action for judicial separation there had been a determination of the same question, right or fact as that presently before the Court. The prior determination in the action for judicial separation had been that the conduct of the wife did not constitute cruelty in law, meaning by that term cruelty as defined in Russell v. Russell.

And counsel for the husband submitted, inter alia, that there was no distinction between “cruelty” as defined in sec. 3 (d) and the meaning of cruelty as laid down in the Russell case. This view was rejected by the Court, which pointed out that sec. 3 (d) contained no mention of physical or mental harm, actual or apprehended; and that if Parliament had intended such harm to be a necessary ingredient of cruelty it would have been easy to so provide. The Court further stated that there was nothing in the Divorce Act, 1968 to indicate that the term “cruelty” as used therein was to have the same meaning in divorce proceedings as that which had been so long established in matrimonial proceedings other than divorce. Referring to the judgment of the Court in the Zalesky case, Smith C.J.M. said:

With respect, I also agree with Tritschler, C.J.Q.B. The Divorce Act was passed to give effect to a deep-seated and long-expanding public opinion that the law relating to divorce was in an unsatisfactory state and that to bring it into accord with the needs of the times the grounds upon which divorce might be obtained should be liberalized. This being the case, it seems clear that when Parliament adopted the definition of cruelty in s. 3 (d) of the Act it had no intention of preserving the common law requirement of physical or mental harm, but was thinking of any conduct which might reasonably be considered to be cruelty and which had the effect of rendering continued cohabitation intolerable. The key element in the definition is the intolerability of continued cohabitation.

Accordingly, since the definition of cruelty and the evidence required to establish it differed in this way from the Russell v. Russell test, the Court held that the doctrine of res judicata did not apply.

**Meaning of cruelty under the fresh approach.**

While it is too early as yet to state with any certainty the precise meaning, under this fresh approach, of cruelty as defined by sec. 3 (d), nevertheless from the Galbraith and Zalesky cases it is possible to suggest certain general propositions. In Galbraith v. Galbraith, Smith C.J.M. said:

It is not difficult to imagine cases in which the new statutory definition of cruelty would produce a different result than the definition derived from Russell v. Russell, supra. I think, for example, of cases in which there has been no physical or mental harm inflicted, and none is apprehended by either party, yet the ill-treatment of one by the other, or of each by the other, has been such as to cause one or both to hate, loathe or despise the other so greatly that continued life together has become intolerable. I think also of cases in which the husband, under the influence of liquor, has beaten up his wife severely on a number of occasions, but though such conduct would constitute cruelty under Russell v. Russell, supra, life together has not become intolerable in fact, because, through the mysterious workings of nature, they are still in love with each other, and continue to live together. . . .

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211 Id. at p. 548.

212 Id. at pp. 547-548.
From examples given earlier in this judgment it is clear that evidence that is sufficient to establish cruelty under s. 3 (d) of the Divorce Act may fall short of establishing cruelty at common law. It is also clear that evidence which is relevant to proving that continued cohabitation has become intolerable may not be relevant or admissible where the criterion is physical or mental harm, actual or apprehended.

In Zalesky v. Zalesky the Court found that the parties were incompatible and that the marriage, for the present at least, had broken down. The parties had separated and the Court stated that this was the kind of case which, if separation continued for three years, would come within sec. 4 (1) (e), enabling a divorce to be granted on the separation ground. The Court continued:

If, on this sort of evidence, the Courts are willing to find "physical or mental cruelty of such a kind as to render intolerable the continued cohabitation", spouses, after separation, will seldom wait three years before seeking divorce. Separation is usually preceded by marital unpleasantness and it will become only too easy for one or other of separated spouses to build up past disagreements to "intolerable" dimensions.

From these decisions, therefore, it appears:

(a) While proof of danger, or reasonably apprehended danger, to physical or mental health is necessary to sustain an allegation of cruelty under Russell v. Russell, it is not vital to the success of a divorce suit under sec. 3 (d), provided that the evidence establishes that the continued cohabitation of the spouses has become intolerable.

(b) Conversely, absent such evidence of intolerability, a divorce petition under sec. 3 (d) will fail, even if the "doctrine of danger" is satisfied.

(c) Also, the conduct in issue must be more than the type of marital unpleasantness that usually precedes separation.

While each case must, of course, fall to be determined upon its own particular facts, the following has been held not to satisfy sec. 3 (d): where the evidence was a vague mixture of trivia;214 where the respondent got drunk on his anniversary, became mad because the petitioner—who the Court felt was the author of much of the marital unhappiness—danced with somebody else and then came home and, in the petitioner’s absence, smashed some furniture, thereby frightening the baby sitter;215 where the situation resulted in unpleasantness and discontentment, simpliciter; i.e. an absence of further evidence of cruelty, such as harassment.217 On the other hand, cruelty has been established where the petitioner

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alleged that the respondent drank to excess, used foul, vulgar language, ignored her conversationally and sexually and abused her in front of other people.\footnote{218}{Williams v. Williams (1969), (N.S.S.C.), (unreported). See also Maund v. Maund (1969) 1 N.B.R. (2d) 547, where a decree was granted under sec. 3 (d). But see Chouinard v. Chouinard (1969), 1 N.B.R. (2d) 582.}

Summary

It is clear that the preponderance of judicial opinion favours a fresh approach to the interpretation of sec. 3 (d). It is, however, submitted that it is possible to construe sec 3 (d) in accordance with the meaning of cruelty generally prevailing in Canadian jurisdictions prior to the Act of 1968.

To say that the adoption of the Russell v. Russell test would provide a uniform meaning to “cruelty” when used as a ground for divorce and when used as a ground for relief in other contexts, for example an award of alimony, may not be persuasive. For if this test is deemed unsatisfactory there is surely no need to expand its operation to divorce law. Sec. 3, however, uses expressions, without defining them, expressions which have meaning under the prior law. For example, adultery in sec. 3 (a); and its congener—true with the exception of “homosexual act”—in sec. 3 (b). So too “form of marriage” in sec. 3 (c) relates to conduct with a meaning already understood. Why then should the word “cruelty” in sec. 3 (d), a word likewise with a “long previous history which cannot be disregarded”\footnote{219}{Williams v. Williams [1964] A.C. 698, at p. 753 \textit{per} Lord Pearce.} be construed in any different light? There seems no reason to suppose that Parliament’s intention varied in this way. Nor that the method of construction of sec. 3 should so depend upon the particular paragraph in issue. In other words, by and large, it would appear that sec. 3 was intended to codify as grounds for divorce concepts already known to the law, while new concepts, new philosophies, have found their place in sec. 4. This is consistent with sec. 9 (1) (c) which relates only to proceedings brought under sec. 3 and which uses the words “condonation” and “connivance”, words which—subject to sec. 2 (d)—are not defined in the Act but which will, presumably, be interpreted in accordance with their meaning as heretofore established. But, of course, the word “cruelty” does not stand alone.

In Delaney v. Delaney, the Court held that to satisfy sec. 3 (d) a petitioner had to establish not only cruelty that met the test of Russell v. Russell, but the further element of intolerability of cohabitation. It is not clear, however, whether sec. 3 (d) does require proof of such an additional factor. The reason is this. Under the Russell v. Russell test there must, of course, be injury or apprehended injury to the health of the petitioner; and this has been said to be the essence of the matter.\footnote{220}{Hutton v. Hutton (1957), 40 M.P.R. 135 (N.S. Ct. for Divorce and Matrimonial Causes).} But this is not all: the conduct alleged must, in addition, go beyond the “reasonable wear and tear of married life”.\footnote{221}{Buchler v. Buchler [1947] P. 25, p. 47 \textit{per} Asquith L.J. Also, Gollins v. Gollins [1964] A.C. 644, 659, 694; Gist v. Gist (1958), 14 D.L.R. (2d) 87 (Ont. C.A.).}
Decisions since the *Gollins* and *Williams* cases—and perhaps because of the holding in the former case that an intention to injure is not an essential requisite for cruelty—have reiterated the need for the second safeguard referred to by Lord Pearce in the passage cited above; that is, that the matter must be grave and weighty.\(^{222}\)

The test is still: Was the conduct of such a grave and weighty nature as to make cohabitation virtually impossible? This extract was referred to in *Cuthbert v. Cuthbert*,\(^{223}\) where, in an alimony action, the question before the Ontario Court of Appeal was whether the conduct there in issue constituted an act of cruelty such as to justify the wife leaving her husband. In holding that it was not, and in noting in passing sec. 3 (d), the Court said that this conduct could not be considered "of such grave and weighty nature as to make the continuation of the marriage intolerable".\(^{224}\) And in *Saunders v. Saunders*, Scarman J., referring to a passage from the speech of Lord Pearce in the *Gollins* case, said:\(^{225}\)

The truth is, that Lord Pearce was recognizing that the "grave and weighty" test of alleged matrimonial misconduct remains in full force and effect as one of the great safeguards against matrimonial relief being given on mere trivialities or incompatibility.

Is not this the same purpose as that sought to be fulfilled by the concluding words of sec. 3 (d)? Do not these words likewise provide a safeguard against matrimonial relief being given on mere trivialities or incompatibility?

In *Gollins v. Gollins* Lord Pearce said\(^{226}\) that "... when reprehensible conduct or departure from the normal standards of conjugal kindness causes injury to health or an apprehension of it, it is, I think, cruelty if a reasonable person, after taking due account of the temperament and all the other particular circumstances would consider that the conduct complained of is such that this spouse should not be called on to endure it." Is it not possible to construe sec 3 (d) in this way? Can it not be suggested that the expression "of such a kind as to render intolerable the continued cohabitation of the spouses" which follows the word "cruelty" in sec. 3 (d) was merely meant to write into sec. 3 (d) the requirement of the prior law that the conduct alleged must be grave and weighty? That this expression, in other words, has the same function (or lack of function) as, in the view of the Court in *Delaney v. Delaney*, is served by the words "physical or mental"; in both cases their purpose being merely to make clear the intention of sec. 3 (d) to enact as a ground for divorce in Canada, the concept of cruelty as that concept is understood in what has been termed the *Russell v. Russell* sense. While such a result may not be considered desirable, it does seem to follow as a matter of statutory construction. A short amendment to sec. 3 (d) could place the matter beyond doubt.

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\(^{223}\) (1968), 69 D.L.R. (2d) 637 (Ont. C.A.).

\(^{224}\) *Id.*, 643.

VI

CONCLUSION

The law of divorce in Canada is presently as prescribed in the Divorce Act, 1968. There is no doubt that this statute represents a very real advance in Canadian jurisprudence. In general terms, the Divorce Act, 1968 severed Canadian law from dependence upon the Imperial Act of 1857, and this is surely to be welcomed. A great advance has been made but it seems reasonably clear that additional progress is necessary. Sec. 3 in some ways represents a link with the past. It is the repository of the concept of matrimonial offence, a concept used "to give some justification for breaking an indissoluble union against the will of the offending party". Such a justification is today recognized by many as falacious. The present trend is towards the substitution of the fact of marriage breakdown as the rationale requiring, and justifying, divorce. Three discrete yet curiously interwoven interests appear discernible in any enquiry as to divorce law: the societal interest, the interest of the children of the marriage, if any, and the interest of the spouses. Assume that there has been a permanent breakdown of marriage, that the spouses are living separate and apart, and that this state of affairs has continued for one year. If adultery, or other cause present in sec. 3 is proved, a divorce can be obtained forthwith on the basis of that marital offence. Absent such proof, a petitioner who has not deserted his spouse must wait a further two years for relief. Are the above interests furthered by this distinction? Or would such interests be better served by granting a divorce and placing emphasis upon ensuring that proper arrangements are made for the custody and maintenance of the children and for the maintenance of the petitioner or respondent spouse?

The Divorce Act, 1968 shelters, side by side, in secs. 3 and 4, two quite different and possibly incompatible divorce philosophies. If there is public acceptance of the notion of marriage breakdown as a basis for divorce, it is to be hoped that this concept will prevail as the exclusive determinative of divorce and that matrimonial fault will thereby be swept away.