DOMESTIC RELATIONS: THE DIVORCE ACT, 1968

*H. Albert Hubbard**

In future, this survey will cover four main areas of the law of domestic relations: divorce; nullity; alimony and maintenance; and custody, guardianship and adoption. However, the 1968 Divorce Act [1] is of such scope and importance that it has been decided to devote the whole of this article to a consideration of the changes effected by that act.

I. INTRODUCTION

The B.N.A. Act, 1867, conferred exclusive legislative jurisdiction over "Marriage and Divorce" upon the Parliament of Canada. [2] A century passed before the promulgation of a truly Canadian law of divorce having uniform application throughout Canada. Although the Divorce Act of 1968 undoubtedly has its defects, how radically it has altered and improved the law is readily apparent. [3]

General dissatisfaction with the divorce laws led to the appointment in 1966 of the Special Joint Committee of the Senate and House of Commons on Divorce. The committee was "to enquire into and report upon divorce in Canada and the social and legal problems relating thereto, and such matters as may be referred to it by either House." [4] It embarked upon a comprehensive review of Canada's divorce laws, held numerous open meetings and received a great number of briefs from individuals and associations. The committee's report was released in June of 1967. A draft bill, departing from the report's recommendations in some substantial respects, was prepared and received first reading in Parliament as Bill C-187 on December 4, 1967. The bill was given assent on February 1, 1968, and came into force July 2, 1968.

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* B.A., 1952, University of Ottawa. Professor of Law, Faculty of Law (Common Law Section), University of Ottawa.

[1] Can. Stat. 1968 c. 24. [Hereinafter cited Divorce Act, 1968.] The act was proclaimed in force July 2, 1968.

[2] The B.N.A. Act § 91(26).

[3] Prior to the act, judicial divorce was unobtainable in Newfoundland and Quebec, and there was no uniformity in the grounds for divorce in the other provinces. Whereas adultery was a ground throughout Canada, desertion was not a ground in any province, and only in Nova Scotia could marriage be dissolved on the ground of cruelty. In several provinces, the additional grounds of rape, sodomy and bestiality were available to wives, but not to husbands. Although traditionally related to nullity, impotence, frigidity and relationship within prohibited degrees were grounds for divorce in some provinces. For the historical explanation as to how this situation could come to pass in a federation the central authority of which has exclusive jurisdiction over marriage and divorce, *see generally* POWER, ON DIVORCE (2d ed. J. Payne 1966).

Except for temporary application during a transitional period, [5] all laws respecting divorce that were in force in Canada or any province immediately before the coming into force of the Divorce Act are repealed. [6] The new act is clearly intended to constitute the exclusive source of the substantive law of divorce throughout Canada, [7] but it is equally clear that the Divorce Act is not intended to alter other than divorce law. [8] This is particularly important with respect to the law of nullity.

Certain duties respecting the possibility of reconciliation are imposed on both counsel and the court by sections 7 and 8 of the act, but these provisions do not seem susceptible of meaningful comment as yet. The act does not appear to require either counsel or the court to abandon their traditional roles and become active conciliators, and the view of the Joint Committee appears to have been heeded :

> [W]hether an "inquest" by public officials into family conditions at the instance of one of the spouses would be less objectionable [than the existing adversary system] is open to argument . . . your Committee is opposed to the abandonment of the traditional British system of court trial conducted by an independent judge presiding, while opposing interests, if any, present their evidence and arguments. [9]

The act also enlarges the grounds for divorce (sections 3 and 4), modifies the circumstances precluding the dissolution of marriage (section 9), provides for interim and permanent corollary relief for spouses and children (sections 10 to 12), defines the operation of decrees and orders made thereunder (sections 13 to 16), and deals with the matters of appeals (sections 17 and 18), rules of court (section 19), evidence (sections 20 and 21) and consequential amendments (sections 23 and 24). The act contains as well an interpretation section (section 2) and an opting-in provision respecting the acquisition of divorce jurisdiction by the courts of Quebec and Newfoundland (section 22).

In view of the comprehensive nature of this statute, and in the absence of judicial interpretation of its provisions, this survey will deal only with its most important features, under the following headings : Jurisdiction and Recognition; The Grounds of Divorce; Circumstances Precluding Divorce; and Corollary Relief.

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[4] REPORT OF THE SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS ON DIVORCE at 3 (1967).

[5] Divorce Act, 1968, § 25(2).

[6] Divorce Act, 1968, § 26.

[7] Divorce Act, 1968, §§ 25(1) and 26.

[8] Divorce Act, 1968, §26(2). *See also id.* at § 26(1), respecting Ontario.

[9] *Supra* note 4, at 19, 117-23.

II. JURISDICTION AND RECOGNITION

A. *Jurisdiction*

In one respect the divorce jurisdiction formerly exercised by provincial courts is restricted by the act, for that jurisdiction is made to depend not upon domicile alone but upon a fixed period of residence as well. [10] However, the former jurisdiction has been enlarged in another direction, in that it is only necessary for the petitioner to be domiciled *in Canada* as opposed to being domiciled in the province in question. [11] Although a person domiciled in any of the provinces can be said to be domiciled in Canada, the better view is that Canadian domicile can exist even in the absence of provincial domicile. [12] In most instances, this distinction will make no practical difference, but it would be crucial in the case of a resident who, not having decided in which province he wishes to settle, intends nevertheless to make his permanent home somewhere in Canada.

Since the concept of domicile is not defined in the act, it retains its common-law meaning. This meaning is extended to embrace the notion of a national or federal domicile *for the purpose of divorce jurisdiction only*. The act effects no change in this regard with respect to other matrimonial causes, and this is of particular importance in relation to nullity of marriage. Once the court has properly assumed jurisdiction in a divorce proceeding, presumably it can deal with the question whether there is a valid marriage to dissolve, even though the parties are not domiciled in the province. [13] In that event, however, the court would have no jurisdiction *to pronounce a decree of nullity* as an alternative remedy. [14] This jurisdictional factor is quite significant in relation to voidable marriages as well, and it will be the initial consideration in cases of impotence in deciding whether to seek a divorce under section 4(1)(d) of the act, or an annulment under the law of nullity.

The Divorce Jurisdiction Act, 1930, [15] partially alleviated the hardship imposed upon a wife by the common-law rule that she could not acquire a domicile separate from that of her husband. [16] Jurisdiction to entertain a

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[10] Divorce Act, 1968, § 5(1).

[11] Divorce Act, 1968, § 5(1)(a).

[12] Mendes Da Costa, *Some Comments on the Conflict of Laws Provisions of the Divorce Act, 1968*, 46 CAN. B. REV. 252 (1968).

[13] Lack of jurisdiction to declare a marriage void did not impede the Ontario courts prior to 1930 from determining the validity of a marriage as an issue in a larger question to which their jurisdiction extended. *See* Vamvakadis v. Kirkoff, [1930] 2 D.L.R. 877, at 884 (Ont. High Ct. 1929).

[14] The act does not change the rule that jurisdiction in nullity is based on domicile in the province. See POWER, *supra* note 3, at 396-400.

[15] CAN. REV. STAT. c. 84 (1952).

[16] Attorney-General of Alberta v. Cook, [1926] A.C. 444 (P.C.).

petition for divorce at the suit of a deserted wife whose husband was domiciled elsewhere was conferred upon the court of the province in which he had been domiciled at the time he deserted her, provided they had been living separate and apart for at least two years. Although that act is repealed, [17] it has been replaced by a much more liberal provision. It is no longer necessary for a wife whose husband has strayed (jurisdictionally as well as otherwise) to prove that he deserted her and that they have been living separate and apart for a particular length of time, nor need she suffer the inconvenience of a two-year delay. Under section 6(1) of the Divorce Act "the domicile of a married woman shall be determined as if she were unmarried and, if she is a minor, as if she had attained her majority." The positive and primary purpose of this provision is to confer jurisdiction at the suit of a wife who would not be domiciled in Canada (or in a province of Canada) at common law, but whose connection with the jurisdiction is in fact as substantial as that of domicile. The provision has a negative aspect also, in that it deprives the court of jurisdiction at the suit of a wife who, despite her husband being domiciled in Canada, has acquired a domicile abroad. Section 6(1) is limited to the purpose of establishing the jurisdiction of the court to grant a decree of divorce, and it is of at least academic interest that this might be taken to effect a separation of the *lex domicilii* and the *lex fori*, thus raising the question as to which law is to be applied. [18] However, there can be little doubt that the divorce courts in this country will apply Canadian law exclusively in determining whether to grant a divorce. The provision, of course, can be used neither to assert nor to deny jurisdiction in other matrimonial causes.

In addition to the requirement of Canadian domicile, in order for the "court for any province" [19] to have jurisdiction to entertain a particular divorce petition, it is necessary that "either the petitioner or the respondent has been *ordinarily* resident in that province for a period of at least one year immediately preceding the presentation of the petition and has *actually* resided in that province for at least ten months of that period." [20] The expressions "ordinarily resident" and "actually resided" are not defined, and the meaning of each is somewhat obscured by the presence of the other. The words "ordinarily" and "ordinarily resident" appear in other statutes, and the many decisions in which they have been construed may be of some assistance in

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[17] Divorce Act, 1958, § 26(1).

[18] Mendes Da Costa, *supra* note 20, at 277-79. Briefly, it may be said that the operation of § 6(1) is exhausted once the jurisdiction of the court is established, and that the common-law rules (including those as to domicile) apply to any subsequent questions. Accordingly, if at common law the respondent husband is domiciled outside Canada, the law of the forum and the law of the domicile of the parties are different and there is a choice of law problem.

[19] This expression is defined in § 2(e), which names the courts to which it is applicable. The courts named are the existing superior courts of first instance in each of the provinces and territories.

[20] Divorce Act, 1968, § 5(1)(b) [emphasis added].

determining their meaning in the present context. [21] How appropriate these decisions will be remains to be seen, and there would be little point in summarizing them here. However, it might be pointed out that, apart from the Divorce Act, ordinary residence does not connote a continuous physical presence, and normal absences from the jurisdiction "in the course of the customary mode of life of the person concerned" do not interrupt a period of ordinary residence. [22] The provision obviously indicates that one can be *ordinarily* resident in the province without *actually* residing there, and the problem is whether "actually resided" is to be given a restricted meaning in order to preserve the usual meaning of "ordinarily resident," or whether the latter expression is to receive an expanded meaning so that *actual* residence will not be made synonymous with physical presence. To require that one of the parties has been physically present in the province for ten of the twelve preceding months seems unnecessarily stringent, and the courts might refuse to so interpret the provision. However, to reject that interpretation is to say that temporary and customary (*i.e., ordinary*) absences do not interrupt a period of *actual* residence, and this invites the conclusion that *extra-ordinary* absences do not interrupt a period of *ordinary* residence. It is to be hoped that the courts will arrive at some acceptable compromise between these extremes. This is the kind of question in relation to which a priori answers usually prove sterile, and to attempt to formulate some middle position without regard to actual cases would risk falling into the trap of equating "ordinarily" and "actual" on the practical plane.

A husband and wife may fulfil the residence requirement in different provinces, and each of them may then petition in those provinces if they are domiciled in Canada. The practical danger is that the husband may petition in one province and the wife in another, but theoretically either or both could petition in two provinces, since the residence of *either* the petitioner *or* the respondent will suffice. This raises the question of concurrent jurisdiction in respect of the dissolution of the same marriage, the answer to which is found in section 5(2). In such circumstances, the court to which a petition was first presented has exclusive jurisdiction, unless that petition is discontinued within thirty days. If the petitions were presented on the same day, and neither is discontinued within thirty days, the pending petitions are removed into the exclusive jurisdiction of the Divorce Division of the Exchequer Court. Essential information concerning every divorce petition in Canada is to be forwarded to a central office in Ottawa and stored in a

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[21] English decisions relating to § 40(1) of the Matrimonial Causes Act, 1965, would be amongst the most appropriate. *See generally*, A. DICEY & J. MORRIS, THE CONFLICT OF LAWS 295-307 (8th ed. 1967).

[22] Thomson v. Minister of National Revenue, [1946] Sup. Ct. 209, at 224.

computer, which is then used to determine rapidly whether a petition in respect of the same marriage is pending in any other court in Canada. [23]

Section 5(3) of the act creates an exception to the jurisdictional requirements. It provides: "Where a husband or wife opposes a petition for divorce, the court may grant to such spouse the relief that might have been granted to him or to her if he or she had presented a petition to the court seeking that relief and the court had had jurisdiction to entertain the petition under this Act." The last three words of this sub-section are quite important, because they indicate that the court is not given a special jurisdiction to grant any kind of relief whatever, but only that relief that the respondent would have been entitled to under the act had he or she been a petitioner domiciled in Canada and resident sufficiently long in the province in question. Thus, this provision could not be used as the basis of jurisdiction to declare a marriage void where at common law the parties are not domiciled within the province. Finally, the better view is that, once divorce proceedings have commenced, the jurisdiction of the court is not lost as the result of the petitioner's change of domicile. [24]

B. *Recognition*

It is not intended to deal at length with complex questions of private international law. The primary purpose is to comment on the scope and operation of the Divorce Act within Canada without reference to foreign elements. However, there are a number of questions relating to the recognition by Canadian courts *of decrees granted under this act* that require some reference to the common-law rules as to the recognition of foreign decrees. A much more comprehensive treatment of the conflict of laws problems raised by the act can be found elsewhere in this *Review*. [25]

(1) *Non-Canadian Divorce Decrees*

Section 6(2) expressly applies the principle of reciprocity or comity [26] to the jurisdiction-conferring capacity to acquire a separate domicile that has been accorded to married women by subsection (1) of that provision.

This provision is expressed to be "for all purposes of determining the marital status in Canada of any person," and this constitutes an impingement of the act on other than divorce law. There will now be instances in which a declaration of nullity on the ground of bigamy must be refused where previously it would have been granted because of the invalidity under the former law of a foreign decree dissolving the prior marriage in question.

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[23] Divorce Regulations, 102 CAN. GAZETTE 636 (1968). See MacDonald, *Divorce Enters the Computer Age*, 11 CAN. B.J. 242 (1968).

[24] Mendes Da Costa, *supra* note 28, 268-72.

[25] MacKinnon, *Conflict of Laws* at p. 131 *supra*.

[26] Travers v. Holley, [1953] 2 All E.R. 794 (C.A.); Robinson-Scott v. Robinson-Scott, [1958] P. 71, [1957] 3 All E.R. 473.

Parliament's exclusive jurisdiction in the matter of "marriage and divorce" should make this provision applicable in every cause of action in which marital status is in issue, whether the cause of action as such is within the exclusive legislative competence of the provinces or not. This affects matrimonial causes generally, succession, family relief legislation, loss of consortium and a host of other matters.

The fiction involved in this section is that a wife is to be regarded neither as a married woman nor as an infant; but this fiction does not extend to the concept of domicile itself. Accordingly, the Canadian courts no doubt will continue to apply their own concept of domicile in determining whether the non-Canadian tribunal had jurisdiction, and the fact that that tribunal had found the petitioner to have been domiciled within its jurisdiction will remain inconclusive. [27] It is, therefore, probable that a non-Canadian decree will be refused recognition on the basis of section 6(2) where the wife, considered as an unmarried woman of majority, would still not have been regarded by the Canadian courts as having been domiciled within the jurisdiction of the granting forum.

Section 6(2) is enacted "without limiting or restricting any existing rule of law applicable to the recognition of decrees granted otherwise than under this Act." Consequently, the common-law rules that require recognition of foreign decrees remain in force. Those rules probably would have resulted in the recognition of foreign divorce decrees granted in the circumstances set out in the provision in any case, and the statutory extension of the principle of reciprocity to these circumstances does not appear to affect the rules that require a refusal of recognition. The grounds upon which a foreign decree can be attacked include fraud, failure of natural justice and repugnance to public policy. [28] Although the stipulation that "recognition shall be given to a decree of divorce" granted by a non-Canadian tribunal on the basis of the wife's separate domicile might give pause, it is unlikely that this will be construed as conferring even on such foreign decrees an immunity from attack on these grounds. It would be strange if a decree of the court of the wife's domicile were required to be recognized despite the existence of circumstances that would require a decree of the court of the husband's domicile to be denied recognition.

(2) *Canadian Divorce Decrees*

Since the act deals only with divorce decrees, the rules as to the recognition of "foreign" decrees *other than decrees of divorce* remain applicable

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[27] Drake v. MacLaren, [1929] 3 D.L.R. 159 (Alta. Sup. Ct.); MacDonald v. Nash, [1929] 4 D.L.R. 1051 (Man. K.B.).

[28] A. DICEY & J. MORRIS, *supra* note 21, at 317-24. *See also* Fromovitz v. Fromovitz, 31 D.L.R.2d 221 (Ont. High Ct. 1961).

even where the "foreign" tribunal is a court for another province. The rules relative to the recognition by the courts of one province of a divorce decree granted by the court for another province do not appear to be affected by section 6(2). Although the subsection states that it is not to be read as restrictive of the rules as to the recognition of decrees granted "*otherwise* than under this Act," it cannot be inferred from this that it is to be taken as restricting the applicability of existing rules to decrees granted *under* the act, particularly since there is nothing in the rest of the provision that could have any intended application to a Canadian decree of divorce. However, it may be that section 14 renders some or all of these rules inapplicable to Canadian decrees, since it states that "A decree of divorce granted under this Act . . . has legal effect throughout Canada."

One commentator begins an excellent analysis of the effect of the Divorce Act on the recognition of non-Canadian divorce decrees with a brief statement respecting the position of Canadian divorce decrees. He writes :

> Section 14 of the Act provides, *inter alia*, that a decree of divorce granted under the Act has legal effect throughout Canada. Thus, for example, a divorce granted by the Courts of British Columbia is assured recognition in Ontario. This precludes the contention that such a decree should be denied effect in Ontario : for example, because the petitioner was not domiciled in Canada according to the interpretation, by the Ontario courts of the concept of domicile. [29]

Presumably, it is his contention that section 14 renders all Canadian divorce decrees immune from attack in any Canadian court on any conceivable ground, the ground of want of jurisdiction being but an example. The premises from which this conclusion is drawn are not articulated; but perhaps it *is* an obvious conclusion, although the same writer states elsewhere that "the effect of a different view of domicile in the courts of two provinces is undecided." [30]

Until the Supreme Court of Canada provides a uniform concept of domicile it would seem preferable to refuse to allow a Canadian decree to be challenged on the basis of a differing opinion as to the meaning of "domicile" and of "domiciled in Canada." It would be unfortunate were the courts to hold otherwise; but whether section 14 *precludes* the courts from denying effect to a Canadian decree in this situation depends on the answers to a number of questions. The decree is to be given effect throughout Canada *if it is granted under the act*. If a decree is granted by a Canadian court that clearly had no jurisdiction to grant it, can it be said to have been granted under the act? If the jurisdiction is questionable, is it not questionable whether the decree was granted under the act? Is that not a triable issue?

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[29] Mendes Da Costa, *supra* note 12, at 281.

[30] *Id.* at 254, n.11.

The point is readily and logically illustrated by an admittedly absurd hypothesis in the practical order : assume that the court for British Columbia found that the petitioner was *not* domiciled in Canada, but nevertheless granted a decree. Are we to suppose that the courts in Ontario must recognize that decree? On what basis could its recognition be refused? Presumably on the basis that the decree was not granted under the act, there having been no jurisdiction in the court in accordance with the terms of the act. Is it not then open to the Ontario courts to determine whether a decree granted in British Columbia is a decree granted under the act? Does this not mean that an Ontario court may be called upon to determine whether the British Columbia court had jurisdiction? In that event, whose concept of domicile is to prevail in determining the issue? Is the Ontario court to renounce its own view as to the meaning of domicile, or is it to assume that the expression "domiciled in Canada" as used in the federal act has more than one meaning?

Of course, no Canadian court will grant a decree of divorce despite its own conclusion that the petitioner is not domiciled in Canada. However, the questions raised by the hypothesis are more than idle speculation. Assume that the Ontario court interprets "domiciled in Canada" to mean domiciled in a province of Canada, whereas the British Columbia court holds the view that one may be domiciled in Canada without being domiciled in a province. Assume, further, that a husband and wife are not and never have been domiciled in any province of Canada, although each of them intends to settle permanently somewhere in this country, the husband being resident in Ontario and the wife in British Columbia. If the wife's petition in Ontario is dismissed for want of jurisdiction, will she be estopped throughout Canada from asserting the identical circumstances as constituting proof of a Canadian domicile? [31] Must the British Columbia court deny its jurisdiction to entertain the wife's subsequent petition for reasons with which it disagrees and contrary to which it asserts jurisdiction respecting petitions generally? What if, following the dismissal of her petition in Ontario, the wife obtains a decree of divorce in British Columbia and, pursuant to section 15 of the Divorce Act, seeks to register in the Supreme Court of Ontario a corollary order made under sections 10 or 11 of that act? Must that decree be recognized in Ontario despite the prior Ontario judgment dismissing the petition, the circumstances, conduct, allegations and issues in the two petitions having been identical? Can registration of the corollary order be refused or rescinded? What attitude should the courts of Alberta, for instance, have toward the Ontario judgment and the British Columbia granted decree?

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[31] Section 14 cannot apply here. It does not deal with the effect of a *refusal* to grant a decree. See the distinction made in Thoday v. Thoday, [1964] 2 W.L.R. 371 (C.A.), concerning "cause of action estoppel," "issue estoppel" and "fact estoppel." As to res judicata generally in matrimonial causes, see Hubbard, *The Effect of Prior Judgments in Matrimonial Causes : Anomalies in the Law*, 1 OTTAWA L. REV. 67 (1966).

Much the same questions can be asked in relation to the applicability to Canadian decrees of the other grounds upon which divorce decrees have been attacked in the past, and the desirability of concluding in favour of their immunity from challenge on such grounds may not be as pronounced. Surely section 14 does not preclude the setting aside in the province in which it was granted of a divorce decree obtained as a result of irregularities causing a failure of natural justice. [32] Once this inroad is made on the supposed absoluteness of the immunity conferred by the section, what is there in its terms that requires the courts in one province to recognize a similarly defective decree granted by the court for another province? Are they to give immediate recognition to a decree that is subject to being set aside in the granting forum? In order to have a decree set aside, it must be such as could properly be described as a nullity. [33] Is a decree of the court for another province that is properly described as a nullity nevertheless to be recognized?

Analogous problems are bound to arise in relation to the grounds of divorce, the meaning of several of which are debatable : for example, whether cruelty requires a danger to life, limb or health. The situation would be chaotic were other courts in Canada permitted to substitute their interpretation of the grounds of divorce set out in the act for that of the granting forum in order to treat a decree as a nullity, and it is to be hoped that a proper basis for preventing this from happening will be found. Once the Supreme Court of Canada has settled the meaning of a particular provision, the possibility of such problems arising in connection with that provision will become purely academic. In the meantime, however, these problems are very real. What would be the effect of a decree granted on a ground that clearly does not exist under the act? Section 3(d) either requires danger to life, limb or health, or it does not. If it does, does it not follow that a decree granted on the basis of conduct not productive of such danger is a decree granted on a non-existent ground? Is it entitled to any more recognition or effect than a decree granted on the ground that, for example, the petitioner just discovered that the respondent had racial antecedents repugnant to the petitioner? What if a wife who is domiciled in Canada and resident in Ontario is refused a decree of divorce in that province because the cruelty of which she complained involved no danger to her physical or mental well-being? May she then petition in British Columbia, where her husband resides, and in which province she has learned that a divorce may

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[32] A proceeding to set aside a decree absolute of divorce may be a separate proceeding, Evans v. Evans, 8 W.W.R. (n.s.) 295 (Man. Q.B. 1953); Fromovitz v. Fromovitz, *supra* note 37; and § 17 of the Divorce Act, 1968, which states that an appeal lies from a judgment or order "other than a decree absolute," does not militate against this.

[33] Fromovitz v. Fromovitz, 31 D.L.R.2d 221 (Ont. High Ct. 1961); Woolfenden v. Woolfenden, [1948] P. 27, [1947] 2 All E.R. 653 (1947).

be granted on the ground of cruelty even though such danger to her health is absent? If the court in British Columbia then grants a decree, must the courts of Ontario give effect to it?

It may be that section 14 affords the complete answer to all these difficulties, but if it does, it wants explaining. It may also be that the answer lies in another direction. Although Parliament has exclusive jurisdiction in divorce, prior to the Divorce Act each province had its own divorce law and each was a separate jurisdiction for the purpose of divorce. In the eyes of each province, divorce decrees granted in the other provinces were "foreign" decrees and subject to the rules pertaining to such decrees. There is now a divorce law for the whole of Canada, and the provincial courts no longer administer a federally conferred or permitted provincial divorce law. [34] The whole of Canada is a single jurisdiction for the purposes of one nation-wide divorce law. That law is administered in that jurisdiction (Canada) by several courts, one of which is located in each province and happens to be called "the court for the province." The divorce decrees of any of these courts can no more be characterized as "foreign" in any other province than could one county court regard the judgment of another county court in the same province as a "foreign" judgment. Indeed, it is submitted that section 14 lends itself to this conclusion. It does not say that a divorce decree shall be *recognized* throughout Canada, but that it shall have *effect* throughout Canada, *provided it is granted under the Act.* The fact that two courts can have divorce jurisdiction with respect to the same marriage also supports this conclusion. Thus, with respect to the "recognition" of Canadian divorce decrees by Canadian courts, there are no existing rules precisely applicable to the new system of divorce created by the act, nor does section 14 appear to constitute a panacea for all these problems.

It is submitted that there can be no question of recognition, or refusal of recognition, by Canadian courts respecting Canadian decrees, but that whether a decree has been granted under the act must be reviewable on some grounds. It is to this matter that the courts must address themselves. The basis upon which, prior to the act, a divorce decree could be challenged in the granting province will provide useful, but not entirely apposite, analogies. In a proper case, and it will be for the courts to determine what is a proper case, a divorce decree should be capable of being set aside in the province in which it was granted. It would not seem at all appropriate for a decree granted in one province to be set aside elsewhere, simply because Canada constitutes a single divorce jurisdiction. [35] However, if the decree is such

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[34] This very point is made by Mendes Da Costa in his submission that there is now a Canadian domicile for divorce purposes.

[35] Prior to the Divorce Act, 1968, a divorce decree granted by one judge of the Supreme Court of Ontario, for instance, could be set aside by another judge of that court. The position of the court for one province vis-à-vis the court for another province does not seem sufficiently analogous

that it could be (or could have been) set aside in the province in which it was granted, should it be given immediate and unquestioned effect throughout Canada? Should it make any difference whether or not proceedings to set it aside are pending, or contemplated? What if the decree was obtained in circumstances in which it could be set aside in another province had it been granted there, but which circumstances are not thought by the province in which it was granted to warrant setting it aside? If section 14 does not provide all the answers, and it might not be desirable to hold that it does, then the courts can and must develop a set of rules that will do so. They should not hide behind a facade of inapplicable precedents, but formulate in forthright fashion such rules and principles as are needed to satisfy the public interest and to make the act workable and reasonable throughout Canada.

It is inescapable that the court for each province must apply the terms of the act *according to its own interpretation* until such time as a uniform interpretation is authoritatively handed down; yet the nation-wide effectiveness of a divorce decree must not be jeopardized by differences of opinion as to the meaning of the act. A divorce decree that has been granted in formal accordance with the act must be effective; yet if it is obtained through fraud or irregularities causing a substantial failure of natural justice, it must be challengeable. Some framework must be constructed within which these conflicting principles can be reconciled or balanced, and in accordance with which, practical rules may be laid down to indicate the extent to which each of these principles must be taken to limit the other. Primarily for the purpose of illustration, one possible approach is advanced with considerable diffidence. Canadian divorce decrees could be considered to fall within three categories : those that are valid, those that are void, and those that are voidable. A valid decree is one that could not be challenged successfully in any Canadian court. A void decree is one that is a nullity and may be so treated without any prior judgment setting it aside. A voidable decree is one that must be treated as valid until it is actually set aside. A decree would be void if it is not granted under the act, in that there was a *clear* failure to follow the terms of the act. This could happen only if the granting forum purported to act otherwise than in accordance with the act or with the Supreme Court's interpretation of the act. Since this will simply not happen, there would in practice be no void Canadian divorce decrees, and the category is mentioned simply for purposes of logic and symmetry. In the absence of a contrary

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to permit the setting aside in one province of a divorce decree granted in another. Besides, § 11(2) states that a corollary order may be rescinded by the court that made it, and the implication is that it cannot be rescinded by any other court. If a divorce decree could be set aside in another province, this would effect a rescission of the corollary order that depends upon it, Ducharme v. Ducharme, 39 D.L.R.2d 1 (Ont. 1963). In dealing with corollary orders, it is suggested that such orders should be capable of revision or rescission outside the granting province, and the reasons given for that conclusion would indicate some desirability in having divorce decrees capable of being set aside in other provinces as well.

decision of the Supreme Court of Canada, and subject to what will be said about setting a decree aside, a decree that is granted in accordance with the granting forum's interpretation of the act is a decree granted under the act and must be given effect throughout Canada, no matter what differences of opinion may be held as to the correct interpretation of the act. A judgment dismissing a divorce petition will make certain matters res judicata; but it cannot preclude another forum from entertaining a petition or granting a decree where the question is whether the circumstances bring the petitioner within the jurisdiction of that other forum, or whether the circumstances amount to a ground of divorce, and the answer depends on how the act is interpreted, in which regard the two forums hold differing views. [36] A decree should be capable of being set aside in the province in which it was granted upon the same conditions that formerly obtained; but until it is set aside it is a decree under the act and, with one exception, it must be given effect throughout Canada. If proceedings to have a decree set aside are pending in the granting forum, the decree should not be given effect elsewhere until such proceedings are concluded. Another possible exception that might be worthy of consideration is where proceedings to have a decree set aside are about to be instituted. [37]

III. The Grounds for Divorce

The pragmatic adoption of competing rationales is reflected in the setting forth of the grounds for divorce in two sections of the act. The traditional concept of divorce as a remedy available to the victim of a matrimonial offence finds expression in section 3, although the list of offences for which divorce is now a remedy is greatly increased. Section 4 gives considerable scope to the modern view that the absence of matrimonial fault (or, indeed, its presence) should not preclude the dissolution of a marriage that has suffered a permanent breakdown.

A. *The Matrimonial Offence Grounds* [38]

Adultery is retained as a ground for divorce and needs no comment. Sodomy, bestiality and rape were offences the commission of which provided

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[36] Nothing in the present theory of res judicata is so apposite and authoritative as to require a different conclusion. It would be unjust to make the petitioner's rights depend upon the accidental choice of the wrong forum. Until the highest court has interpreted the act, the interpretation of neither forum can be said to be incorrect, and the petitioner is entitled to proceed in any forum that has jurisdiction. On the other hand, there may be reasons, as yet not apparent, that would make it more sensible to estop the petitioner from re-litigating the exact same circumstances in another forum in the hope of obtaining relief under the same act and to which he has already been told he is not entitled.

[37] Consider the case of a husband whose wife obtained a decree of divorce in British Columbia upon perjured evidence of adultery and of service upon the husband, who learns of the decree for the first time when a corollary maintenance order is about to be enforced against him in Ontario. If he intends to take proceedings to have the decree and order set aside, should the Ontario court nevertheless enforce the order? Could it suspend giving effect to the order for a reasonable time for the purpose of affording the husband an opportunity to institute proceedings in British Columbia?

[38] Divorce Act, 1968, § 3 :

grounds for divorce at the suit of a wife in some of the provinces. Such offences will now provide grounds for divorce at the suit of husbands as well as wives throughout Canada. To this list of unnatural offences has been added the expression "has engaged in a homosexual act," the meaning of which is not entirely clear. However, the structure of the section makes it appear that it is at least intended to include acts of lesbianism, since it is provided that "a petition may be presented to a court by *a husband* or wife, on the ground that the respondent . . . has engaged in a homosexual act."

It should be noted that the following expressions are used in connection with each of the other grounds set out in the section, in the order in which they appear: "committed," "has engaged in," "has gone through" and "has treated." It is submitted that the use of the word "guilty" preceding the words "sodomy, bestiality or rape," should not be taken to mean that a petitioner whose spouse has committed one of these offences cannot obtain a divorce on that ground unless the respondent has been *convicted* of such an offence under the Criminal Code. [39] Such a conclusion would be completely repugnant to the liberalizing tenor of the act, and is contrary to the principles of statutory interpretation. [40]

Whereas previously the contracting of a bigamous marriage did not afford the legal spouse a ground for divorce nor relieve him or her from the necessity of proving adultery, section 3(c) makes the bigamous ceremony of marriage a ground for divorce in itself. Although this ground appears to be straightforward, a number of problems may be anticipated. Prima facie, all the petitioner need do is prove his or her marriage to the respondent and the subsequent bigamous marriage of the respondent and a third party. However, is it required that the bigamous form of marriage be recognized in the place where it is gone through as being a valid form capable of producing a valid marriage? [41] In the light of the matrimonial offence doctrine, does the respondent's ignorance of the existence of a subsisting marriage with the petitioner have the same relevance as it does respecting the crime of

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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.

[39] CRIM. CODE §§ 147, 135.

[40] A word in a statute should be given its plain primary meaning, unless to do so leads to absurdities and contradicts the intention of the legislature. To suggest some technical or secondary meaning productive of absurdities and contrary to the intention of Parliament would be preposterous; but it can be answered in kind. The word "guilty" precedes the list of offences set forth as grounds for divorce under the displaced law, which offences included sodomy, bestiality and rape as well as adultery, and the respondent's conviction of a criminal offence was not a condition precedent to divorce. The use of the word "conviction" in § 4(1)(a) indicates that the word "convicted" would have been used in § 3(b) had that been the true intention.

[41] CRIM. CODE § 240.

bigamy? [42] Would an invalid prior divorce secured by the petitioner estop him or her from obtaining a divorce on this, or any other ground? [43]

In terms of Canadian law, the most important innovation in section 3 is clause (d), making cruelty a ground for divorce throughout Canada. Unfortunately, "cruelty" is not defined in the act, and this may prove to be a contentious point. [44] Cruelty is a ground for various forms of relief everywhere in Canada and a considerable jurisprudence exists in relation to its meaning. [45] Except where a differing statutory definition has applied, [46] the Canadian courts appear to have adopted the principles laid down by the House of Lords in *Russell v. Russell.* [47] They have refused to make a finding of matrimonial cruelty where the conduct complained of did not result in injurious consequences to the bodily or mental health of the complainant, unless it appeared that such conduct would be persisted in with the likelihood that such consequences would ensue. [48] The words "physical or mental" preceding the word "cruelty" in section 3(d) do not appear to preclude the application of the established judicial meaning of cruelty in the interpretation of this provision. Although the remaining part of the clause clearly indicates that the cause of action created by section 3(d) is not co-extensive with the cause of action defined in *Russell*, it is not clear whether, in comparison with *Russell*, these words have a broadening or a narrowing effect.

The words "of such a kind as to render intolerable the continued cohabitation of the spouses" may mean that where there is cruel conduct making cohabitation intolerable, then the petitioner is entitled to a divorce whether or not that conduct has resulted in actual or apprehended injury to the petitioner's health. This more liberal interpretation may be desirable in that section 4 provides for the dissolution of marriage where the spouses have lived separate and apart for a stated period, and where that separation has been caused by such cruelty as to render cohabitation intolerable it might be well to construe section 3(d) as providing an immediate right to divorce.

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[42] A mistaken belief that the former spouse was dead is a defence to a criminal charge of bigamy, but a mistaken belief in the validity of a prior divorce is not. *See* CRIM. CODE § 240, The King v. Morgan, 16 Mar. Prov. 335 (N.S. Sup. Ct. 1942); Regina v. Tucker, 8 W.W.R. (n.s.) 184 (B.C. 1953).

[43] Hubbard, *supra* note 31, at 90-96.

[44] This seems to be borne out by two decisions handed down since this article was submitted to the *Review*: Delaney v. Delaney, 1 D.L.R.3d 303 (B.C. Sup. Ct. 1968); Zalesky v. Zalesky, 1 D.L.R.3d 471 (Man. Q.B. 1968). The former suggests that the definition of cruelty established in Russell v. Russell, [1897] A.C. 395 applies. A contrary view was expressed in *Zalesky*; it was said that "Parliament gave its own fresh complete statutory definition of the conduct which is a ground for divorce under s. 3(d) of the Act." *Id.* at 472.

[45] *Supra* note 12, at 13, 105-07.

[46] See, for instance, the way in which cruelty is defined in Saskatchewan for the purposes of an action for judicial separation: Queen's Bench Act, SASK. REV. STAT. c. 73, § 25(3) (1965). Alberta has a similar provision, Domestic Relations Act, ALTA. REV. STAT. c. 89, § 7(2) (1955).

[47] [1897] A.C. 395.

[48] The Ontario Court of Appeal decision in Hawn v. Hawn, [1944] 4 D.L.R. 173 (Ont.), is representative of the accepted meaning of "cruelty" in Canadian jurisprudence.

However, the concluding words of the clause might be construed as restricting the availability of divorce on the ground of cruelty to circumstances that not only come within *Russell*, but which *also* render continued cohabitation intolerable. Such an interpretation would appear to reduce the last fourteen words of the clause to a mere tautology, since continued cohabitation would seem to have been necessarily rendered intolerable in any case where the petitioner is driven to seek divorce by reason of such cruelty as that defined in *Russell*. Had Parliament intended the *Russell* definition to apply, the paragraph could have ended with the word "cruelty." Although the courts will probably not resort to the *Report of the Joint Committee of the Senate and House of Commons on Divorce* to aid in interpreting the meaning of the Divorce Act, [49] it is interesting to note that the committee recommended that "this ground should be undefined and its administration be left to the learning, good sense, responsibility and wisdom of Canadian judges, guided as they are by the jurisprudence of our own courts and those of England." [50] By section 2(b) of its draft bill, the committee would have created a ground of divorce where the respondent had "since the celebration of the marriage, treated the petitioner with cruelty." [51] To the layman, who is not conditioned to closing his eyes to certain forms of relevant evidence, the fact that Parliament added a clear qualification to the words used by the committee would be taken to indicate that it was not intended to "leave the matter entirely to the learning, good sense, responsibility and wisdom of Canadian judges." Should the ground of cruelty receive a restricted interpretation, consonant with existing jurisprudence, the opponents of such a view will no doubt feel that Parliament's reluctance in this regard was not without reason. Nevertheless, in the avoidance of innovation, the traditionally conservative Canadian courts have overcome greater obstacles than arguments such as these, and in the absence of a clear and applicable statutory definition it should come as no surprise if the well-established judicial meaning of cruelty is followed. Support for such a position can be found in the existing distinction between legal cruelty and constructive desertion. Except where otherwise required by statute, cruel conduct making cohabitation intolerable has not been held to amount to legal cruelty unless there was a danger to life, limb or health, but such conduct does place the cruel spouse in desertion if the other spouse is thereby driven away. [52] The Divorce Act does not make desertion *as such* a ground for divorce, but desertion brings about the condition of living separate and apart which, if it endures for the required period, will evidence a permanent breakdown of the marriage. Thus, the intention

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[49] Attorney-General of Canada v. Reader's Digest Ass'n, [1961] Sup. Ct. 775.

[50] *Supra* note 4, at 13.

[51] *Id.* at 159.

[52] Power, *supra* note 3, at 492-504.

of the act may be taken to be that neither desertion nor, a fortiori, constructive desertion is a ground for divorce in itself, although either may be the occasion for a dissolution under section 4.

B. *The Permanent Breakdown Ground*

Section 4 of the act makes the permanent breakdown of marriage a ground for divorce, [53] but only in certain prescribed circumstances. The section does not adopt fully the "breakdown" principle as a basis for divorce, and sound reasons for this position can be found in the *Report* of the committee. [54] To provide a ground for divorce, the permanent breakdown of the marriage must be attributable to one or more of the circumstances set out in paragraphs (a) to (e) of sub-section (1). Proof of the existence of any of these circumstances is deemed by sub-section (2) to establish both the permanent breakdown of the marriage and that such breakdown is attributable to those circumstances. [55] The common element running through section 4(1) is that the parties must be living separate and apart at the time the petition is presented.

(1) *Section 4(1) (a)-(c)*

Paragraph (a) sets forth clearly the circumstances in which the petitioner may obtain relief on the ground of the imprisonment of the respondent, and there should be no practical difficulties in its application. [56] Similarly, paragraph (b), which deals with the respondent's addiction over a three year period to alcohol or narcotics, seems straightforward, except that the phrases "grossly addictd," "reasonable expectation . . . of cohabitation" and "reasonably foreseeable period" have no clear or settled denotation and will have to be interpreted by the courts.

Prior to the enactment of paragraph (c), [57] it was not possible for a person who did not know the whereabouts of his spouse to re-establish a

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[53] Divorce Act, 1968, § 4.

[54] *Supra* note 4, at 131-34.

[55] *Quaere* whether the word "deemed," in § 4(2) of the act, establishes a conclusive presumption. Section 4(1) requires that the marriage have broken down permanently *and* that such breakdown be attributable to one of the enumerated circumstances; it does not make such circumstances grounds for divorce in themselves, regardless of whether they are productive of such breakdown. To construe § 4(2) as establishing a conclusive presumption would appear to convert the enumerated circumstances into independent grounds for divorce, permitting the dissolution under the § of marriages that have not in fact broken down permanently. On the basis of this inconsistency it might be argued that § 4(2) establishes a rebuttable presumption only, support for which view can be found in Gray v. Kerslake, [1958] Sup. Ct. 3.

[56] Nevertheless, questions that will probably remain of merely academic interest can be raised. For instance, what is the effect of a pardon of a wrongly convicted innocent person?

[57] Divorce Act, 1968, § 4(1)c:

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

family life through a subsequent marriage with confidence in its validity. In Ontario for instance, a spouse in such a predicament could not obtain a marriage licence without first securing an order for the presumption of death of the missing spouse. This required proof of a continuous absence of at least seven years during which time the applicant, who must have made reasonable inquiries, had no reason to believe the missing spouse to be alive. [58] However, it is not within the constitutional authority of the provinces to do more than make it possible for a subsequent marriage ceremony to take place legitimately [59] and, if the missing spouse was in fact alive at the time, that ceremony would result in a void marriage. Although such provincial provisions will remain available in "missing spouse" cases, paragraph (c) provides the only realistic remedy, and the three-year period it imposes is consonant with the section as a whole.

(2) *Section 4(1)(d)* [60]

Paragraph (d) sets out two distinct situations in which a marriage that has not been consummated can be dissolved : first, where "the respondent, for a period of not less than one year, has been unable by reason of illness or disability to consummate the marriage," and second, where the respondent, for a similar period, "has refused to consummate it." The one-year period is referrable to the *reason* the marriage has not been consummated, rather than to the requirement that the marriage be unconsummated, and thus the period begins to run only from the moment the respondent's inability or refusal to consummate occurs. Usually this will coincide with the date of the marriage, but a marriage may remain unconsummated for a considerable time for reasons other than the respondent's inability or refusal. Temporary inability of the petitioner or the involuntary separation of the parties are examples of such situations. A period of at least one year must elapse from the respondent's subsequent inability or refusal.

Although it is not expressly stated that the period must immediately precede the petition, the use of the present perfect continuous tense ("has been unable") and the present perfect tense ("has refused") indicates that

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. . .

(*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;

[58] Marriage Act, ONT. REV. STAT. c. 228, § 11 (1960).

[59] B.N.A. Act § 92(12) confers upon the provinces the exclusive legislative jurisdiction over "the Solemnization of Marriage within the Province." Nullity of marriage (except for formal defects) and divorce are exclusively within the federal sphere as set out in B.N.A. Act § 91(26).

[60] Divorce Act, 1968, § 4(1)(d) :

(*d*) the marriage has not been consummated and the respondent, for a period of not less than one year, has been unable by reason of illness or disability to consummate the marriage, or has refused to consummate it; or

this is so. A different intention would require a different grammatical construction ("*had* been unable" and "*had* refused"). Where the respondent has recovered the ability to consummate the marriage prior to the presentation of the petition, [61] or having had that capacity has expressed a genuine willingness to consummate it, a dissolution of the marriage under this section would seem to be precluded. [62] In such circumstances the petitioner is in no worse position than one whose spouse deserted following consummation of the marriage. The remedy for the latter is found in paragraph (e), and it appears to be within the spirit of the act to place the remedy for the former within that more general paragraph as well. Since the petitioner's desertion affects the length of the period of living separate and apart required to be established under paragraph (e), the application of that paragraph in these circumstances raises a difficult question. Would the respondent's refusal over the period of one year justify the petitioner in remaining separate and apart in spite of the belated, but bona fide, willingness of the respondent, or would that offer to consummate place in desertion a petitioner who remains apart without other justification? While a definitive answer is wanting the decision of the courts in an analogous situation might be indicative of what that answer is likely to be. It has been held that a deserted spouse's rejection of the deserting spouse's genuine offer to resume cohabitation will place the former in desertion, unless he or she is otherwise justified in remaining apart. [63] On the other hand, the seriousness of the inability or refusal to consummate for such a period is evidenced by it having been made a ground for divorce. Even should the intervening recovery or willingness of the respondent preclude divorce on that ground, perhaps it will not be taken to have removed the justification for remaining apart.

Whether the petition is based on the inability or the refusal of the respondent to consummate the marriage, it is a requirement of paragraph (d) that "the marriage has not been consummated." These words are likely to give rise to certain difficulties, especially where the allegation is refusal to consummate. Since a marriage is consummated by the first act of sexual intercourse between the parties as spouses, the courts will have to determine what amounts to sexual intercourse for the purposes of this paragraph. The meaning of sexual intercourse depends in part on the purpose for which it is

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[61] If the ability were recovered, or the willingness expressed, after presentation of the petition but before the granting of the decree, the courts might apply the reasoning in the analogous case of G. v. G., [1961] P. 87. In that case the impotent respondent declared at the trial her willingness to submit to a simple operation that would cure her and which she had earlier refused to undergo. It was held that the offer came too late. *See also* M. v. M., [1957] P. 139; A. v. A., 40 Ont. W.N. 543 (High Ct. 1931). *But see* S. v. S. No. 1, [1962] All E.R. 816 (C.A.).

[62] In any event, such recovery or willingness would be relevant under §§ 8 and 9(d) of the act, concerning reconciliation proceedings and the court's duty to refuse a decree sought under § 4 where there is reasonable expectation of a resumption of cohabitation.

[63] Frind v. Frind, 14 Ont. W.N. 133 (Div. Ct. 1918); Beattie v. Beattie, [1945] Ont. 129. Ellis v. Ellis, [1962] 1 All E.R. 797 (C.A.); Thomas v. Thomas, [1945] 115 L.J.P. (n.s.) 75 (Div. Ct.).

being defined. In the context of annulment on the ground of impotence, it has been held that "sexual intercourse, in the proper meaning of the term, is ordinary and complete intercourse, it does not mean partial and imperfect intercourse." [64] Having regard to the nature and objects of marriage, few would quarrel with the proposition that a marriage should be annullable where the parties are incapable of performing an ordinary and complete act of intercourse. It has been held that penetration alone amounts to adultery, [65] and the soundness of the view that this is sexual intercourse for the purpose of granting relief on the ground of adultery can hardly be doubted. The problem is whether that sexual intercourse by reason of which a marriage may be said to have been consummated for the purposes of paragraph (d) is sexual intercourse as narrowly defined in the "impotence-annulment" cases, or whether it should be more broadly defined.

The practical nature of the problem can be seen in a series of English decisions dealing with a statutory provision declaring wilful refusal to consummate to be a ground for annulment. [66] In *Cowen v. Cowen*, [67] the spouses practised condomistic intercourse by agreement for a number of years. When the agreed reason for the practice ceased, the wife requested that it be abandoned. The husband refused and, when contraceptive sheaths were not available, he practised *coitus interruptus* without her consent. The Court of Appeal, relying on the narrow definition of sexual intercourse applied in the impotence cases, ruled that the marriage should be annulled on the ground of the husband's refusal to consummate. In *Baxter v. Baxter*, [68] although *coitus interruptus* was not in issue, the House of Lords expressly overruled *Cowen* on the question of condomistic intercourse for reasons that appear applicable also to *coitus interruptus*. It was subsequently held in *Cackett v. Cackett* [69] that *coitus interruptus* consummates a marriage for the purposes of precluding annulment on the ground of wilful refusal to consummate. [70] The House of Lords in *Baxter* took the view that, whereas

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[64] D. v. A., 183 Eng. Rep. 1039, at 1045 (Consistory Ct. 1845). *See also* Komon v. Komon, [1950] Ont. W.N. 384 (High Ct.).

[65] Dennis v. Dennis, [1955] 2 All E.R. 51 (C.A.); Forster v. Forster, [1955] 4 D.L.R. 710 (Ont.). *Quaere*: Would the artificial insemination of the wife amount to "sexual intercourse" and, hence, consummate the marriage? Would it make any difference whose semen was used, or whether the husband consented? It is submitted that in the present context artificial insemination should not be held to consummate a marriage.

[66] Matrimonial Causes Act, 1950, 14 Geo. 6, c. 25, § 8(a) (originally Matrimonial Causes Act, 1937, 1 Edw. 8 & 1 Geo. 6, c. 57, § 7(1)).

[67] [1945] 2 All E.R. 197 (C.A.).

[68] [1948] A.C. 274.

[69] [1950] P. 253, [1950] 1 All E.R. 677. *See also* White v. White, [1948] P. 330; Grimes v. Grimes, [1948] P. 323, *contra*, seems inconsistent with the decision of the House of Lords in the *Baxter* case.

[70] Of course, where permanent *impotentia seminalis* is regarded as impotence, the marriage may be annulled on that ground. H. v. H., [1927] 2 W.W.R. (Alta. 366); Miller v. Miller, [1947] Ont. 213. But where parties who are not impotent have indulged in such practices neither of them

the meaning of sexual intercourse established in that connection still applies to the question of impotence, different considerations must obviously apply to the question of wilful refusal. The word "consummation" in a modern statute establishing a novel remedy must be given a broad connotation consonant with its common meaning. In the public mind intercourse with a contraceptive sheath is intercourse, and if between spouses it consummates their marriage. Similarly, it can be argued that *coitus interruptus* consummates a marriage.

The reasoning in *Baxter* is even more cogent where the remedy for refusal is divorce rather than annulment, since this provides a further basis for distinguishing between the "impotence-annulment" cases and the "refusal to consummate" ground for relief. In the divorce context sexual intercourse has already been given a broad connotation in defining adultery and it is submitted that paragraph (d) should be interpreted and applied in the light of these principles. Surely it is not intended by the act to allow spouses who have practised condomistic intercourse or *coitus interruptus* to obtain a divorce on the ground of a refusal to consummate the marriage. A spouse whose marriage was unquestionably consummated on the wedding night cannot obtain relief under this provision simply because the other spouse the next day refuses or becomes unable to have further intercourse. In the absence of any other ground, that spouse must wait three or five years, as the case may be, in order to petition under paragraph (e). It would be most anomalous if, within one year of insisting on a change in sexual practices, a spouse who had freely enjoyed what a majority of the population would describe as a normal marital sex life were able to obtain a divorce on the ground of non-consummation due to refusal.

The problem under the Canadian provision is exacerbated by the inclusion of "unable to consummate" in the same paragraph as "refused to consummate." Although several issues distinguish annulment for impotence from dissolution for inability to consummate, as causes of action, the expression "unable to consummate" appears to have the same meaning as "impotence." Thus, it might be argued that in interpreting section 4(1)(d) the *Baxter* reasoning must be rejected because it is not applicable to the meaning of "consummated" in relation to the inability to consummate, and "consummated" can have but one meaning in paragraph (d). It was not at all unreasonable for the English courts to draw a distinction between the meaning of consummation in the context of a remedy that had its source in eccle-

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can deny that the marriage has been consummated in order to obtain relief on the basis that the other refused consummation. It is to be noted that, even if such practices prevent the application of § 4(d), they may amount to cruelty so as to provide a ground for divorce under § 3(d). Forbes v. Forbes, [1955] 2 All E.R. 311 (Divorce); Fowler v. Fowler, [1952] 2 T.L.R. 143 (C.A.); White v. White, *supra* note 69; Rice v. Raynald-Spring-Rice, [1948] 1 All E.R. 188; Cackett v. Cackett, *supra* note 69; Walsham v. Walsham, [1949] 1 All E.R. 774 (Divorce); Knott v. Knott, [1955] 2 All E.R. 305 (Divorce).

siastical law and practice and the meaning to be assigned that term in the context of a novel and modern statutory remedy designed to answer a quite different need. Without any undue inconsistency they were able to conclude that, whereas "consummation" has an established meaning for the purposes of annulling a marriage on the ground of inability to consummate it (impotence), it requires a different meaning for the purpose of annulling a marriage on the ground of refusal to consummate. In Canada, dissolution on the ground of inability to consummate is as novel as it is on the ground of refusal to do so, and the remedy for both is provided in the same paragraph of the act. An element essential to relief on either basis is expressed only once in the statute, by the words "the marriage has not been consummated." It is difficult to see how the courts could interpret this phrase to intend different things, depending upon which of the circumstances set out in the remainder of the paragraph have been alleged by the petitioner. For instance, it has been held in some jurisdictions that *impotentia seminalis* is impotence, and that a marriage may be annulled on that ground even though penetration had been effected. [71] In short, penetration did not amount to consummation. On the other hand, as already pointed out, penetration without ejaculation within the vagina (*coitus interruptus*) has been held to be consummation. Is paragraph (d) to be interpreted in such a way that penetration will amount to consummation where the complaint is refusal, but not where the complaint is inability? This would amount to distinguishing between two cases on the basis of conduct that was performed in neither. In both cases there was penetration, but in neither case was there ejaculation. The sole ground for such a distinction is that, in one case he would, if he could, but he can't, whereas in the other he could, if he would, but he won't. As a matter of logic, "consummated" cannot be given two meanings for the purposes of the one paragraph. It is submitted that the proper meaning of the word as used in this provision is that attributed to "consummation" in the English decisions on wilful refusal. Where any act that is sexual intercourse as understood by the public has taken place between the spouses, then the marriage should be considered to have been consummated for the purposes of this legislation, whether the petitioner's allegation be inability or refusal to consummate. While this would make no practical difference in "inability to consummate" cases, the provision would be ridiculous in relation to "refusal to consummate" cases were any other view adopted. To the objection that under this interpretation a wife whose husband is unable to ejaculate could not obtain a divorce if she dutifully submitted to penetration before his disability was discovered, it need only be pointed out that she may still obtain an annulment and is not without an adequate remedy. [72]

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[71] *Supra* note 70.

[72] In these circumstances the wife could not obtain an annulment in any jurisdiction that refused to regard *impotentia seminalis* as impotence. R. v. R., [1952] 1 All E.R. 1194 (Divorce).

With respect to the "refused to consummate" branch of paragraph (d), it remains to be seen whether the expression will be given a meaning broader than would have been the case had the refusal been qualified by the term "wilful," as in the English annulment provision, [73] or by the words "wilfully and persistently," as in the Australian divorce provision. [74] Should it be held that *coitus interruptus* and condomistic intercourse consummate a marriage so that neither party could subsequently claim that the other had refused consummation, a difficult question which does not appear to have been before the courts may well arise. What if the marriage has not been consummated because one of the spouses insists on the use of contraceptive measures and the other insists on intercourse free from such measures? It would be very difficult for a court to conclude that either had refused to consummate the marriage. If it were decided that neither had refused then, if no other ground were immediately available, the petitioner would have to wait the requisite time and petition under paragraph (e). However, it is more probable that the court would attempt to determine whether, having regard to all the circumstances, the petitioner was acting reasonably. If so, and particularly if the respondent were not acting on the strength of a firm conviction, it is not likely that the decree would be refused. This was basically the approach used in the somewhat analogous circumstances of *Jodla v. Jodla.* [75] In that case, practising Roman Catholics married in a registry office on the understanding that they would not cohabit prior to a religious ceremony that the husband subsequently refused to arrange. Although the wife refused to have intercourse, it was the husband who was held to have refused wilfully to consummate the marriage.

Whether a marriage has been consummated or not, the refusal of sexual intercourse might amount to cruelty [76] and provide a ground for divorce under section 3(d). The existence of a separate and specific remedy where the respondent, for a period of not less than one year, has refused to consummate the marriage should not prevent the petitioner from obtaining a divorce where that period has not expired and the refusal in the circumstances amounts to cruelty.

A consideration of the scope of the "unable to consummate" branch of paragraph (d) requires the drawing of a clear distinction between annulment on the ground of impotence and divorce on the ground of inability to

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But then, if the meaning of consummation is taken from the "impotence-annulment" cases, she could not obtain a divorce in such jurisdictions on that basis anyway.

[73] Cases in note 68 *supra.* In Horton v. Horton, [1947] 2 All E.R. 871 (H.L.), it was held that wilful refusal to consummate the marriage connotes "a settled and definite decision come to without just excuse," and that the whole history of the marriage must be looked at.

[74] Matrimonial Causes Act, COMM. STAT. No. 104 § 28(c) (1959). Concerning this provision *see* Zayed v. Zayed, 5 F.L.R. 126 (A.C.T. Sup. Ct. 1964); Hardy v. Hardy, 6 F.L.R. 109 (N.S.W. Sup. Ct. 1964); Mylonas v. Mylonas, 10 F.L.R. 1 (N.S.W. Sup. Ct. 1967).

[75] [1960] 1 All E.R. 625 (Divorce).

consummate. It is of obvious importance to know whether a particular incapacity affords a ground for divorce only, or for annulment only, or for both as alternative remedies. It bears repetition that the court's jurisdiction to annul a marriage requires domicile in the province, but it may have jurisdiction to dissolve a marriage even though the parties are domiciled elsewhere in Canada. If the meaning of "consummated" in paragraph (d) is the broad one suggested, then dissolution could not be granted on the ground of inability simply because the respondent is incapable of ejaculation. Apart from this situation, it would seem that when (and probably only when) [77] impotence could be established for the purpose of annulment, could the inability to consummate be established for the purpose of divorce.

There would appear to be no reason why the words "unable by reason of illness or disability" should not include incapacity due to mental illness [78] and the incapacity of one spouse in relation to the other but not in relation to third persons. [79] However, the causes of action for divorce and for annulment on the ground of sexual incapacity are distinguished by other issues. A divorce cannot be granted unless the inability is that of the respondent and has lasted at least one year, [80] whereas an annulment can be granted on the ground of the petitioner's impotence [81] and it is not a requirement that the condition has lasted for any particular length of time. [82] An annulment cannot be granted unless the impotence existed at the time the marriage was contracted, [83] but a divorce can be granted where the

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[76] Walsham v. Walsham, *supra* note 70; Ward v. Ward, [1952] 2 All E.R. 217.

[77] Any broader meaning attributed to the words "unable by reason of illness or disability to consummate the marriage" would appear to be inconsistent with the act as a whole. For instance, can it have been intended to provide for the dissolution of a marriage where the respondent was unable to consummate it, having been in a body cast for over a year as the result of an accident on the wedding day? Such cases properly belong under § 4(1)(e). However, it might be considered worthwhile extending the scope of the provision so as to include an eager but syphillitic or similarly deseased respondent within the category of those unable to consummate due to illness or disability.

[78] Impotence is the inability to perform the act of sexual intercourse, and that inability cannot be characterized as something other than impotence simply because it is caused by unusual or even bizarre circumstances. A psychologically caused inability is as much impotence as is a structural defect.

[79] Greenlees v. Greenlees, [1959] Ont. 419 (High Ct.); Orr v. Orr, 2 D.L.R.2d 627 (N.S. Divorce Ct. 1956); M. v. M. 13 W.W.R. (n.s.) 505 (Man. Q.B. 1954). The requirement in § 4(1)(d) that the incapacity be that of the respondent should be satisfied if the inability is mutual, as might be the case with a giant married to a midget. More usually, the cause of the mutual inability would be psychological.

[80] There is one instance in which § 4(1)(d) might be held to apply even though neither the inability nor the refusal lasted for one year, and that is where one of them was followed by the other and the marriage was not consummated by reason of a combination of them over a period of one year. Thus, if the respondent at first refused and then, having become willing, was unable to consummate the marriage, the petitioner should be able to succeed even though only a year has elapsed from the original refusal. The paragraph lends itself to this desirable interpretation.

[81] Harthan v. Harthan, [1948] 2 All E.R. 639 (C.A.); Paiken v. Paiken, [1959] Ont. W.N. 51 (High Ct.); Greenlees v. Greenless, *supra* note 79.

[82] Jones v. Jones, [1948] Ont. 22; Tice v. Tice, [1937] 2 D.L.R. 591 (Ont.); Fyfe v. Fyfe, [1946] 2 W.W.R. 477 (Alta. Sup. Ct.).

[83] Orr v. Orr, *supra* note 79; C. v. C., [1949] 1 W.W.R. 911 (Man. K.B.); F. v. D., [1948] 2 W.W.R. 811 (Man. K.B.); Rae v Rae, [1944] 2 D.L.R. 604 (Ont.); Napier v. Napier, [1915] P. 184.

inability to consummate the marriage arose subsequently. In annulment proceedings it must be established that the impotence is permanent and incurable. [84] The reason for this requirement does not apply to divorce proceedings. It is because the attainment of the objects of marriage are from the beginning and forever excluded that the marriage is voidable, and if the impotence is not permanent and incurable the attainment of these objects is not impossible. Dissolution for inability to consummate does not proceed on the ground that the ends of marriage are physically impossible of achievement, but on the assumption that if the condition of inability has lasted for a particular length of time and has driven the petitioner to the divorce court, the marriage can be said to have permanently broken down.

Although it is difficult to see how the courts could read such conditions into section 4(1)(d), whether it will be decided that the inability to consummate must be permanent and incurable in order to constitute a ground for divorce remains to be seen. If the condition is curable by medical intervention to which the respondent refuses to submit, he would be deemed to be permanently and incurably impotent for the purpose of annulling the marriage, [85] and this would no doubt apply for the purpose of dissolution as well; in any event, the petitioner could probably obtain a divorce on the ground of refusal to consummate in such a case. What if the respondent had been unaware that the condition was curable? What if the condition were temporary and would correct itself in time? [86] While these circumstances might in a given case make the granting of the decree harsh or unjust to the respondent, this would seem to be immaterial. Section 9(f) of the act imposes a duty on the court to refuse the granting of the decree if it would be unduly harsh or unjust to grant it, but this duty is expressly made to apply exclusively where the decree is sought under section 4(1)(e).

(3) *Section 4 (1)(e)* [87]

As with its counterparts in other jurisdictions, paragraph (e) of section 4(1) will likely become known as the "separation ground" for divorce. Either spouse can come within its term simply by establishing the requisite period of living separate and apart. Subject to the effect of section 9(1), neither guilt nor innocence, nor any other circumstance, will prevent the dissolution of marriage on this ground. The reason for the separation does not matter, whether it be desertion, incompatability, insanity or anything else, except that desertion of the petitioner affects the length of the period of separation required to be established.

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[84] Rae v. Rae, *supra* note 83.

[85] Jones v. Jones, [1948] Ont. 22; Szrejher v. Szrejher, [1936] Ont. 250 (High Ct.); and *see supra* note 61.

[86] These circumstances would at least be relevant under §§ 8 and 9(d) of the act. *Supra* note 62.

[87] Divorce Act, 1968, § 4(1)(e) :

The influence of the "marriage breakdown" concept is most evident in this particular paragraph. Not only is desertion by the respondent not mentioned as a separate ground, but even a deserter is entitled to petition. However, the requirement that a petitioner in desertion wait an additional two years seems to run counter to the concept of breakdown. Is it not anomalous that whether a given marriage has irretrievably failed is made to depend on which spouse petitions? Unless we are to assume that it is actually intended to penalize and discourage desertion, or to compensate the deserted spouse by affording him or her the dubious satisfaction of forcing the other to wait an additional two years, the only apparent rationalization is that where both spouses regard the marriage as hopelessly broken down, then there is more reason to so conclude than would be the case where one of them continues to harbour hope.[88] Even if this obviously specious proposition were true, its application in the provision would proceed on the false assumption that every deserter regards his marriage as hopelessly broken down, whereas all deserted spouses (save those who petition) are ready and willing to reconcile. The reconciliation proceedings set out in section 8 and the safeguards enacted by section 9 are clearly meant to secure the objects that motivate such a rationalization, and it seems unjustifiable exaggeration to assert that the distinction introduced into this paragraph was intended simply to serve the same purpose. It is suggested that the distinction is intended to impose an additional waiting period on a deserting spouse because of the offence of desertion, and not because of any danger in deeming a viable marriage to have suffered a permanent breakdown.

Paragraph (e) is badly worded, and difficulty in interpreting it is to be anticipated. There are at least three possible interpretations. First, it might be said that where the petitioner *deserted* the respondent a five-year period of living separate and apart must be established, but that in any other case the period is three years. Second, it might be said that where the petitioner *is in desertion of* the respondent a five-year period must be established, all other cases requiring proof of a three-year period only. Third, it might be argued that, except where the three-year period preceding the petition is free from desertion on the part of the petitioner, a five-year period of living separate and apart must be established. The difference between these three views, and the importance of determining which of them applies, is easily illustrated. Suppose that, one year after deserting his wife, a husband entered into a separation agreement with her, putting an end to his desertion but not to their living separate and apart. Depending upon which of these interpre-

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(e) the spouses have been living separate and apart
  (i) for any reason other than that described in subparagraph (ii), for a period of not less than three years, or
  (ii) by reason of the petitioner's desertion of the respondent, for a period of not less than five years,
immediately preceding the presentation of the petition.

tations applied, the earliest the husband could obtain a divorce under this provision would be five or three or four years, respectively, from the date of the original desertion.

Although the first view is probably indicative of the general initial reaction to the provision, it will be seen upon a closer reading to be incorrect. It must not be thought that simply because the original cause of the separation was the petitioner's desertion of the respondent, then the circumstances necessarily fall within the second clause of the paragraph. This could be so only had the provision been worded in some such fashion as this: "the spouses *separated and have since lived apart* . . . (ii) by reason of the petitioner's desertion of the respondent, for a period of five years." However, the use of the present perfect continuous tense ("the spouses *have been living separate and apart* . . . by reason of the petitioner's desertion") indicates that it is not the original parting, but a continuous living apart for a particular length of time which, if it is attributable to the petitioner's desertion, will bring the case within one branch of the provision rather than the other. Where the petitioner's desertion ended, but the spouses continue to live separate and apart, it cannot be said that they are now living separate and apart by reason of the desertion. Consequently, from the time the desertion ended, "the spouses have been living separate and apart for [a] reason other than [the petitioner's desertion of the respondent]." It follows that, where the petitioner is not presently in desertion, it may not be necessary to establish a five-year period of living separate and apart, and this is so even if the petitioner had deserted the respondent less than five years prior to the petition.

Thus, a husband who has just entered into a separation agreement is not required to wait four years before petitioning under paragraph (e) simply because he had deserted his wife one year ago. A more difficult question is whether the three-year period of living separate and apart that such a petitioner must establish has to be free from desertion on his or her part. Must the husband in the illustration wait three years, or could he successfully petition two years hence?

By logical and necessary transposition, clause (i) of paragraph (e) can be taken to read as follows: "(i) the spouses have been living separate and apart for any reason other than the petitioner's desertion of the respondent, for a period of three years immediately preceding the presentation of the

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[68] Where divorce is obtainable only upon proof of misconduct the petitioner has a lever with which to bargain as to maintenance and custody of the children. (The bar of collusion has not prevented this undesirable situation in the past, and it is unlikely to do so in the future). The extra time that the deserter must serve unless reprieved by his or her spouse affords the latter a tactical advantage that should have been guarded against, rather than fostered.

petition." It is submitted that this three-year period must be completely unattributable to desertion on the part of the petitioner. It is perfectly clear that clause (i) distinguishes between two classes of cases, and that it can do so on only one of two possible bases: either (a) the distinction is drawn between a three-year period that is wholly attributable to the petitioner's desertion and one that is not wholly so attributable (whether it is in part so attributable or not); or (b) the distinction is drawn between a three-year period that is in no part attributable to the petitioner's desertion and one that is in some part, or wholly, so attributable. There does not seem to be any a priori reason to construe the clause in accordance with one of these possible distinctions rather than the other. However, it is in projecting the effects of the former that the latter distinction is seen to be more appropriate. Under the distinction first drawn, a petitioner who is presently in desertion could bring himself within clause (i) by establishing that he has not been in desertion for the full three-year period preceding the petition, during which period the spouses have in fact been living separate and apart. This would be the case, for instance, where the petitioner accepted the respondent's repudiation of a separation agreement entered into three years ago, in consequence of which the respondent has been in desertion ever since. [59] While there may be nothing wrong with this from the point of view of what the law ought to be, such a consequence seems quite inconsistent with the provision having in it any reference at all to the deserting spouse. It seems clear that Parliament was unable to rid itself of the influence of the matrimonial offence philosophy even here, and that some added delay is intended to be imposed on a spouse who is in desertion. If it is correct to say that a petitioner presently in desertion cannot come within clause (i), even though the period of his desertion is less than the three-year period of living separate and apart that he has established, it follows that clause (i) applies only where the required three-year period is wholly free from desertion on the petitioner's part.

The proper interpretation of paragraph (c), according to this submission, may be summed up in two propositions. First : where at the time of the petition the spouses have been living separate and apart for a period of not less than three years, then only if no part of that period is attributable to the petitioner's desertion of the respondent shall the permanent breakdown of the marriage be deemed to have been established. The petitioner's desertion of the respondent prior to the commencement of the required three-year period is irrelevant. Second : where the petitioner cannot bring himself within the first proposition, the permanent breakdown of the marriage shall be deemed nevertheless to have been established upon proof that the

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[59] Clark v. Clark, [1939] 2 All E.R. 392 (Divorce); Pardy v. Pardy, [1939] 3 All E.R. 779 (C.A.).

spouses have been living separate and apart for a period of not less than five years immediately preceding the petition, notwithstanding any element of desertion on the petitioner's part.

The act does not define "desertion," and this omission might prove troublesome in the interpretation of paragraph (e). Is it intended to include "constructive" desertion? In matrimonial law generally, the elements of desertion are "the factum of separation, the animus deserendi, and the absence of consent on the part of the deserted spouse." [90] However, the circumstances might be such that neither spouse can be said to intend to desert or to consent to live apart, yet the behaviour of one of them makes it unreasonable to expect the other to continue in cohabitation. In this event, the withdrawal of the "innocent" spouse will place the other in constructive desertion for the purpose of affording a remedy to the former which would otherwise be denied. [91] In this connection, Professor Kahn-Freund observed that the English courts "have, under the present law, had to go a long way towards interpreting 'desertion' and 'cruelty' so as to make them in fact undercover substitutes for a general clause envisaging culpable destruction of the marriage." [92]

Although the distinction between clauses (i) and (ii) of paragraph (e) reflects the matrimonial fault principle, the guiding principle of section 4 is that of marriage breakdown. This would appear to furnish the courts with a sufficient reason to insist on a strict interpretation of desertion and to reject the view that a petitioner who is in desertion constructively only should be required to wait an additional two years. They might also find support in the anomalous consequence that would otherwise follow. A spouse who is guilty of legal cruelty is not automatically in constructive desertion, for this depends upon whether the other spouse is thereby driven away. Thus, the petitioner's legal cruelty, *simpliciter*, will not take the case out of clause (i) of the paragraph. For instance, if a husband and wife separated by mutual agreement three years ago, the husband is not precluded from petitioning under paragraph (e)(i) simply because he has been guilty of legal cruelty during the last year. Would it not be strange to hold that a petitioner whose cruel conduct fell short of legal cruelty is excluded from relying on clause (i), even though he lacked the *animus deserendi* requisite to desertion as

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[90] J.B. v. A.W.B., 13 D.L.R.2d 218, at 225 (Ont. 1958).

[91] *E.g.*, W. v. W. (No. 2), [1961] 2 All E.R. 626 (Divorce); Kay v. Kay, 36 D.L.R.2d 31 (N.B. 1963); Lee v. Lee, [1927] 1 D.L.R. 94 (Ont.).

[92] *Divorce Law Reform*, 19 MODERN L. REV. 573, at 592 (1956). In similar vein, in commenting on the effect of §§ 28(b) and 29 of the Australian Matrimonial Causes Act, 1959, in relation to constructive desertion, the Chief Justice of the Supreme Court of Tasmania said this: "The equating to the matrimonial offence of desertion of conduct by one spouse constituting just cause or excuse for the other to cease cohabitation without requiring proof of intention to terminate the matrimonial relationship is a realistic extension of the concept of constructive desertion as worked out by the courts. But to call it desertion is in my view to perpetuate a fiction." Sir Stanley Burbury, *Some Extra Judicial Reflections Upon Two Years' Judicial Experience of The Commonwealth Matrimonial Causes Act, 1959*, 36 AUSTL. L.J. 283, 289 (1963).

strictly defined? It is understandable that the courts should have developed a doctrine that could require a husband to support his wife who was living apart from him in consequence of his gross misbehaviour, although he had not technically deserted her or treated her with such cruelty as to endanger her health. [93] Nor was it inconsistent to apply such reasoning to matrimonial law generally. However, constructive desertion is in reality a hybrid: it *resembles* desertion in that the parties separate in consequence thereof; yet it is basically cruel behaviour that falls short of legal cruelty not because of the conduct in itself, but because it does not happen to produce a particular consequence in relation to the victim's health. It is suggested that such conduct should be taken for what it is, a reason for living separate and apart "other than" the petitioner's desertion, and that the word "desertion" should be construed strictly.

The Meaning of "Living Separate and Apart"

The first part of subsection (1) of section 4 makes applicable to each of the succeeding five paragraphs the requirement that the husband and wife be "living separate and apart" at the time the petition is presented. For its purposes, paragraph (e) sets a minimum period during which the spouses must have been "living separate and apart." Although the act does not define "separate and apart," there is no reason to suppose that this expression will be interpreted differently than was a similar provision in Australia. Divorce on this ground was introduced into Western Australia in 1945 and subsequently was made applicable to the whole of Australia by section 28(m) of the Commonwealth Matrimonial Causes Act, 1959, which provides for divorce on the ground "that the parties to the marriage have separated and thereafter have lived separately and apart for a continuous period of not less than five years immediately preceding the date of the petition, and there is no reasonable likelihood of cohabitation being resumed."

In *Crabtree v. Crabtree*, [94] the Full Court of New South Wales held that spouses living under the same roof were nevertheless living "separately and apart" for the purposes of section 28(m) of the Australian act. In reaching this decision the court observed that the words "separately" and "apart," used alone or together, were not unfamiliar to the courts prior to the enactment of the provision, and that "Parliament intended them to bear the sense which had become a familiar one in matrimonial law." [95] It was recognized that "desertion" and "living separate and apart" are not conterminal con-

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[93] Of course, had the courts defined legal cruelty in more reasonable terms, there would have been no need to invent "constructive" desertion. The dissenting opinions in Russell v. Russell, *supra* note 47, are significant in this regard.

[94] 64 N.S.W. 110 (1963) (per Sugerman, Davey, J.J., and Nagle, C.J.).

[95] *Id.* at 113. See also Schiach v. Schiach, [1941] 2 D.L.R. 590 (Sask. K.B.), in which the expression "separate and apart" used in the now repealed Divorce Jurisdiction Act, CAN. REV. STAT. c. 84 (1952), was considered.

cepts, and that as grounds for relief they rest on different principles, one on matrimonial fault and the other on marriage breakdown. However, each requires the *factum* of physical separation and an *animus* indicative of the de facto discontinuation of the *consortium vitae*, and these may exist even though the spouses live under one roof. [96] The *Crabtree* case was considered with approval in *Macrae v. Macrae,* [97] and it was held that the ground of living separately and apart requires a determination of both factum and animus and that physical separation and the destruction of the *consortium vitae* or matrimonial relationship are each involved.

The soundness of these Australian decisions seems evident. The *factum* of separation is common to desertion and living separate and apart, and the *animus* required to establish either condition is an intention not to resume cohabitation, as opposed to an intention to separate or remain apart temporarily. [98] Although there can be no desertion unless the spouses are living separate and apart, desertion requires as additional elements that the separation be without justification or consent. Thus, the essential difference between desertion and living separate and apart is that in the former the *animus* must be both unilateral and unjustifiable (in short, it must be an *animus deserendi*), whereas in the latter the *animus* may be neither unilateral nor unjustifiable. It follows that the wealth of jurisprudence dealing with desertion is of considerable importance with respect to the meaning of "living separate and apart."

The applicability of the Australian decisions is indicated not only by their soundness, but because the elements of *factum* and *animus* are implicitly recognized by section 9(3) of the Canadian act. [99] It is evident from the first paragraph of that provision that there can be no condition of living separate and apart without the necessary *animus* at its inception, and that

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[96] *See also* Pulford v. Pulford, [1923] P. 18 (1922); J.B. v. A.W.B., 13 D.L.R.2d 218 (Ont. 1958); Naylor v. Naylor, [1961] 2 All E.R. 129 (Divorce).

[97] 9 F.L.R. 441 (N.S.W. 1967). *See also* Collins v. Collins, 3 F.L.R. 17 (Tas. Sup. Ct. 1961); *compare* Koufalakis v. Koufalakis, [1963] S. Austl. 149 (Sup. Ct.).

[98] With respect to desertion, J.B. v. A.W.B., *supra* note 96. With respect to living separately and apart, *see* Crabtree v. Crabtree, *supra* note 94, at 120. Although Schiach v. Schiach, *supra* note 95, does not examine the meaning of "separate and apart" in depth, it was held that the two years of living separate and apart required to be established under the Divorce Jurisdiction Act, CAN. REV. STAT. c. 84 (1952), was not interrupted by the spouses having resumed a limited cohabitation with a view on the wife's part to effecting a reconciliation.

[99] Divorce Act, 1968, § 9(3) :

> (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
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> (*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

such *animus* must continue throughout except in the circumstances described. That the *factum* of physical separation is necessary is self-evident, but its necessity is clearly implied in paragraph (b) of the sub-section.

In every petition brought under section 4 it is necessary that the spouses be living separate and apart *at the time of the petition*, but only under paragraph (e) of section 4(1) is it necessary to establish that this condition has continued for any length of time. For example, in a petition brought under paragraph (c) of that provision the petitioner might have maintained hope of a reunion with the missing spouse until the eve of the petition, at which time a renunciation of the marital relationship would establish the *animus* required to convert the mere physical separation into a living separate and apart. However, under paragraph (e) a definite and continuous period of living separate and apart is required, and section 9(3) is of obvious importance in the calculation of that period. The provision is not as simple as it at first appears, and the two paragraphs that it contains need close analysis.

Section 9(3)(a) has a double effect, and one of its consequences can only be considered unfortunate. Its desirable and obvious effect is that, once the parties have separated and begun to live apart, the continuity of the time required to be accumulated by the petitioner is not necessarily affected by the supervening unsoundness of mind of *either* party. For instance, when a husband deserts his wife, time begins to run for the purpose of enabling *either* of them to petition for divorce. In the absence of any circumstance altering the situation, the wife could petition after three years, or the husband could petition after five years. Assuming the desertion to be continuing, *ex hypothesi* the element of *animus* involved in their living separate and apart cannot be attributed to the wife, as it consists solely in the husband's *animus deserendi*. Should the husband become of unsound mind, then, but for this provision, it might have been found that the *animus deserendi* had ceased to exist and that the period of living separate and apart had been terminated. [100] In that event, neither party could petition on the ground of separation until at least three years after a fresh period of living separate and apart had commenced by the formation of a new *animus* attributable either to the wife or, assuming his recovery, to the husband.

In substance, section 9(3)(a) simply states that, if it appears probable that the separation would have continued anyway, the supervening incapacity of forming or having the required intention shall not be taken to have interrupted or terminated the period of living separate and apart. It does not

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(*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.

[100] There is authority for the proposition that a supervening mental disorder will terminate desertion if it renders the deserting spouse incapable of retaining the animus deserendi: 12 HALSBURY, LAWS OF ENGLAND 225 (3d ed. 1959) and cases cited therein.

say that, if it is *not* made to appear probable that the separation would have continued anyway, then the supervening incapacity *must* be taken to have interrupted or terminated the period. However, this is clearly the effect of the provision, even if it cannot be inferred directly from it. The element of *animus* necessary to establish a living separate and apart is either solely attributable to the spouse whose incapacity is in question, or it is not. If it is not, then there is clear evidence that the separation would probably have continued anyway; indeed, it would continue so long as the other spouse retained the requisite intention. If the *animus* had been solely attributable to a spouse who became incapable of sustaining it, then the *animus* ceased to exist at that time and, consequently, the period of living separate and apart terminated. This is the established rule [101] to which the statute provides an exception, "if it appears to the court that the separation would probably have continued." What is undesirable about the provision is that it requires evidence of the probability that the separation would have continued if the incapacity had not occurred. It would have been more sensible had the provision read "*unless* it appears to the court that the separation would probably *not* have continued," so that the incapacity in question could not be held to have interrupted or terminated the period of living separate and apart *unless* there was positive evidence that a reconciliation had been imminent. Evidence of a probability of reconciliation would be obvious if it existed, as would be the case, for example, where one of the spouses becomes deranged before the expiration of ninety days of a resumed cohabitation entered into with reconciliation as its purpose. But what evidence can there be of a probability that the separation would have continued? For instance, how could a deserter's protestations that he would never return, however contumaciously and publicly proclaimed, amount to anything more than the *animus deserendi* involved in every case of desertion? Unless the absence of evidence to the contrary is to be taken as evidence that the separation would probably have continued, it is difficult to see how the principal part of the paragraph could ever apply for the benefit of the petitioner. However, to put such a construction upon the provision would appear to be tantamount to amending it.

Quite apart from the apparent absurdity involved in its application, there appears to be no sound reason for the conditional clause in the paragraph to exist at all. The wisdom of providing that the period required to be established should not be considered to have been interrupted or terminated by any intervening mental incapacity is plain. It seems meretricious, however, to deprive the petitioner of the benefit of this rule, whether because he has failed to establish the probability that the separation would have

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[101] See authorities *supra* note 100.

continued, or because the probability that it would not has been established. The principle at work here is marriage breakdown; matrimonial fault has nothing to do with what is at issue. The only conceivable justification for this seemingly bizarre rider is that a marriage should not be deemed to have broken down permanently where there is a possibility of reconciliation. This praiseworthy attitude of caution has been adequately expressed in other sections of the act, and the attempt to give it additional scope in this particular way seems only to work mischief. In the light of the marriage breakdown principle, what justification can there be for requiring a spouse who was deserted, and who (*animus* or not) has lived alone for three years, to live alone for yet another three years simply because the deserter has become insane? Any chance of reconciliation that might have existed almost invariably will have been destroyed by the supervening incapacity. Even in the highly unlikely circumstance that some chance of reconciliation had existed and has survived the incapacity, this aspect of the provision is unnecessary as a safeguard against the premature dissolution of a marriage that is potentially still viable, because by section 9(1)(d) the divorce would not be granted "if there is a reasonable expectation that cohabitation will occur or be resumed within a reasonably foreseeable period." This humane and flexible principle is overriden by the ill-conceived stipulation in section 9(3)(a), and even if a resumption of cohabitation has become forever impossible because of the deserter's incurable insanity, the petitioner must wait three [102] more years because a now-extinguished *probability* of reconciliation existed before the insanity supervened. What makes it even worse is that the onus appears to be on the petitioner to establish that the separation would probably have continued, and this must be extremely difficult to do, if indeed it is possible. At the very least, a presumption of continued separation should have been incorporated in the provision.

In order that the possibility of reconciliation not be jeopardized by reluctance to risk losing the right to divorce, section 9(3)(b) *enlarges an existing exception* to the general rule that a resumption of cohabitation terminates a period of living separate and apart. On first reading this provision, one is likely to assume that any resumption of cohabitation for the purpose of reconciliation lasting more than ninety days *must* be considered to have

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[102] If the petitioner was in desertion, the respondent's insanity does not bring that desertion to an end and, if the desertion continues, a five year period must be established. But, *ex hypothesi*, we are dealing with the respondent's intention to live apart. If that intention is destroyed through the mental incapacity to retain it, this should not automatically place the petitioner in desertion. Surely the petitioner, in view of the respondent's incurable insanity, will not *become* a deserter simply by the subsequent intention to live separate and apart. Would not the courts reasonably hold that there was justification preventing that intention from being an animus deserendi? Should not justification now be regarded not only in the light of offensive conduct by the other spouse, but in the light of the viability of the union? The section would be all the more rediculous if it required a deserted petitioner whose spouse becomes insane within one week of a possible petition to wait another *five* years on the asumption that the spouses are either not living separate and apart or else the petitioner is in desertion. Both branches of that assumption are equally absurd.

interrupted the period of living separate and apart, and that more than one distinct period of resumed cohabitation for that purpose *must* be taken to have had the same effect. However, the provision does not purport to determine what it is that will interrupt or terminate a period of living apart; it only declares that one particular circumstance shall *not* be considered to have that effect. If the courts would not otherwise conclude that a particular period of living separate and apart had been interrupted or terminated, there is nothing in section 9(3) that would require them to alter that conclusion. It is only where they would otherwise conclude that the period had been interrupted or ended by the circumstances set out in paragraphs (a) and (b) that these provisions operate so as to require a contrary conclusion. With respect to paragraph (a), it happens that the courts would invariably conclude that the period had been interrupted or terminated by the disappearance of the requisite *animus* resulting from the mental incapacity of the party to whom that *animus* had been exclusively attributable. Thus, paragraph (a) *creates* an exception to a rule which would otherwise invariably apply. With respect to paragraph (b) the situation is quite different, because there is already an exception to the rule that resumed cohabitation puts an end to separation. It is well established that a resumption of cohabitation *for the purpose of attempting reconciliation* does not interrupt or end the separation, [103] and paragraph (b) simply extends the substance of this exception to one particular situation in which the courts might otherwise have encountered difficulty. As a practical matter, the longer the spouses remain together after resuming cohabitation on a trial basis, the more likely is it to be concluded that an actual reconciliation has been effected, and paragraph (b) operates to prevent the court from concluding that such is the case where the period of renewed cohabitation did not exceed ninety days. But where it is perfectly clear that no reconciliation was ever effected, the paragraph does not require a contrary conclusion only because the period exceeded ninety days; nor is there anything that would require the courts to reach the absurd conclusion that a brief interlude of resumed cohabitation in an unsuccessful bid to effect reconciliation has interrupted or ended the separation simply because it was preceded (perhaps by nearly three years) by a similar unsuccessful episode. In short, except to add to the circumstances in which it cannot be held that a period of separation has been interrupted, paragraph (b) does not alter the established position as it was expressed by Lord Justice Denning in *Bartram v. Bartram* :

> Once the period of desertion has begun to run, it does not cease to run simply because the parties attempt a reconciliation and for that purpose come together again for a time. That was laid down by Lord Merriman P.

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[103] *See supra* note 98. The same principle has been applied where the spouses were living separate and apart under a separation agreement. Smith v. Smith, 30 D.L.R.2d 548 (B.C. Sup. Ct. 1961).

> in *Mummery v. Mummery* and has never been doubted since. Indeed, I would say in such a case the period of desertion does not cease to run unless and until a true reconciliation has been effected. [104]

IV. Circumstances Precluding Divorce

Although it is nowhere stated in the act that the court *shall* grant a decree on proof of a ground for divorce, it could hardly be suggested seriously that this omission confers a general discretionary power to refuse the decree. [105] One effect of section 26 of the act is that the traditional bars to divorce are removed, and only the circumstances set out in section 9(1) can preclude the granting of a decree. If the ground is established and none of these circumstances exists, then obviously a decree of divorce *must* be granted.

Paragraphs (a) and (b) of section 9(1) [106] create general bars to relief applicable to petitions brought under either section 3 or section 4. Paragraph (a) seems designed to prevent divorce by mutual consent, and the courts might well have this in mind when interpreting its very wide wording. It is to be presumed that this provision will be construed reasonably and in the light of the more liberal approach to divorce that the act is intended to bring to our matrimonial law. Thus, it should not be taken to embrace such circumstances as an undefended petition for divorce, or a divorce sought on the separation ground where the parties have lived separate and apart by mutual agreement.

Paragraph (b) retains collusion as an absolute bar to divorce, but it is to be hoped that the definition of that term contained in section 2(c) of the act [107] will permit a relaxation of the inflexible attitude thus far exhibited by the courts in dealing with this bar. If the evil of collusion lies only in the fact that there is no real injury to the petitioner, [108] it is anomalous that it

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[104] [1950] P. 1, at 6 (C.A.).

[105] By way of contrast, see the wording of §§ 27-31 of the Divorce and Matrimonial Causes Act, 1857, and § 5 of the Marriage and Divorce Act, Can. Rev. Stat. c. 176 (1952).

[106] Divorce Act, 1968, § 9(1)(a)(b):

> (1) On a petition for divorce it shall be the duty of the court
>
> (*a*) 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, without a jury;
>
> (*b*) to satisfy itself that there has been no collusion in relation to the petition and to dismiss the petition if it finds that there was collusion in presenting or prosecuting it;

[107] Section 2(c) reads as follows: "'Collusion' means an agreement or conspiracy to which a petitioner is either directly or indirectly a part 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."

[108] Woods v. Woods, [1937] 4 All E.R. 9, at 15 (Divorce).

should be a bar to divorce on the ground of marriage breakdown. It would seem to have been thought equally important, however, to prevent the abuse of the judicial process through collusion, [109] and that would appear to be the rationale in retaining this absolute bar. Since collusion by definition now requires that the petitioner enter into an agreement "*for the purpose of* subverting the administration of justice," it may be open to the courts to require proof of a positive intention to subvert justice and not merely that the kind of agreement entered into has some vaguely dangerous tendency in that direction. If this definition were so construed it would remove the taint of collusion from many petitions which, on the basis of existing precedents, would otherwise be barred quite pointlessly. [110] The statutory definition expressly excludes an agreement to the extent that it provides for separation between the parties, and this must be taken to have been intended to prevent any possibility that a divorce under section 4(1)(e) might be precluded simply because the parties were living apart by mutual consent.

Paragraph (c) [111] makes both connivance and condonation bars, but only where the decree is sought under section 3. Moreover, these familiar bars are no longer absolute, since the decree is to be granted notwithstanding their presence should the court be of the opinion that the public interest would be better served by granting it. However, to speak of these bars as discretionary could be misleading. Adultery, delay, cruelty, desertion and conduct conducing to adultery (all on the part of the petitioner) were truly discretionary bars under the repealed law, because the legislation setting up these bars imposed no fetters on the court, stating simply that the court shall not be bound to pronounce the decree in such circumstances. It was, of course, recognized that the discretion had to be exercised judiciously, not arbitrarily, and the courts were not long in developing rather firm principles by which the exercise of discretion was to be guided. [112] However, if paragraph (c) is taken literally, the courts have no discretion in the matter. They must make a determination as to whether or not dissolution of the marriage contributes positively to the public interest, and grant or refuse the decree accordingly. Whether the principles heretofore called into assistance in the exercise of their unfettered discretion will continue to afford the courts much guid-

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[109] McLean v. McLean, [1948] Ont. 691 (High Ct.).

[110] A full discussion of the difficulties, anomalies and "lack of judicial harmony on the subject of collusion" is ably and convincingly set forth in POWER, *supra* note 3, at 74-94. Roscoe Pound, in reference to the "settled judicial doctrine against collusive divorce," concluded that "[o]bviously there is a bad adjustment of the social interest in the security of the social institution of marriage and the social interest in the individual life. Hence there is nothing to induce individuals to move to vindicate the social interest in the institution of marriage as against the strong individual interests involved." 3 JURISPRUDENCE 369 (1959). Is it too much to hope that the courts will not perpetuate that "bad adjustment" by returning the law of collusion to the state from which it seems intended to have been rescued?

[111] Divorce Act, 1968, § 9(1)(c), quoted in note 116 *infra*.

[112] *See* particularly Blunt v. Blunt, [1943] A.C. 517 and G. v. G., [1943] Sup. Ct. 527.

ance cannot be determined in advance. Nevertheless, the two most important considerations recognized in relation to the old discretionary bars are implicit in the act as a whole, and the public interest in this regard is "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." [113] Except where one of the grounds set out in section 3 has been established and there are no bars to divorce on that ground, it would appear to be contrary to the public interest to dissolve a union that has *not* permanently broken down, for any other view would run counter to the tenor of the act. [114] It also must be perfectly clear that, unless it would in the circumstances be positively harmful to the public interest, that interest is better served by the dissolution of a marriage that has *in fact* utterly broken down. Although the court cannot dissolve a marriage on the ground of breakdown unless the circumstances come within section 4, it is still possible for a marriage to have suffered a permanent breakdown *in fact* even though such circumstances are not present. It is submitted that, in the absence of other considerations, it must be held that it would serve better the public interest to dissolve such a marriage; but it is impossible to forecast a complete catalogue of those circumstances that will be held to require the dismissal of a section 3 petition for connivance or condonation *despite* the fact that the marriage has completely broken down.

Connivance is not defined by the act, and it will undoubtedly be dealt with in accordance with the pre-statute decisions. By section 2(d) : " 'condonation' does not include the continuation or resumption of cohabitation during any single period of not more than ninety days, where such cohabitation is continued or resumed with reconciliation as its primary purpose." [115] The practical effect of this will be that there will be relatively few instances of condonation involved in divorce petitions. Apart from this narrowing effect, the established meaning of condonation will apply, as nothing is made condonation that would not otherwise have been considered condonation. However, the doctrine that a condoned offence will be revived by a subsequent lesser offence is abolished by section 9(2).

Paragraphs (d) and (e) of section 9(1) [116] do not appear to involve any

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[113] Blunt v. Blunt, *supra* note 112, at 525.

[114] *See* particularly §§ 4, 7, 8 and 9(1)(d).

[115] A continuation of resumption of cohabitation for some purpose other than reconciliation might be held to fall outside the scope of this provision. *Cf.* the interpretation of a similar provision in England, Brown v. Brown, [1964] 2 All E.R. 828 (Divorce); Herridge v. Herridge, [1966] 1 All E.R. 93 (C.A.).

[116] Divorce Act, 1968, § 9(1)(d) and (e) :

(*d*) where a decree is sought under section 4, to refuse the decree if there is a reasonable expectation that cohabitation will occur or be resumed within a reasonably foreseeable period;

theoretical difficulties, and little can be said about them in practical terms in advance of judicial experience in their application. Since they relate to every section 4 petition, their inapplicability to annulment on the ground of impotence could be a factor in deciding whether to pursue that cause of action or to petition for divorce under section 4(1)(d). However, the doctrines of approbation and sincerity are such that there would seldom be any practical advantage in seeking an annulment simply to avoid the effect of these paragraphs. [117] Indeed, in relation to the preclusive effect attributed to given sets of circumstances in each of the causes of action, the advantage would more often lie in petitioning for divorce rather than annulment. For instance, the adoption of a child may well be taken as approbation and bar the annulment of the marriage, even though reasonable arrangements for the child's maintenance could have been made. [118] On the other hand, the fact that a child was born to the parties through fecundation *ab extra* in an unsuccessful attempt to consummate the marriage would not in itself amount to approbation; [119] nor would the fact that reasonable arrangements for the child's maintenance could not be made necessarily amount to approbation. [120]

It has already been observed that paragraph (f) of section 9(1) applies only to a petition brought under paragraph (e) of section 4(1). In all other divorce petitions, the fact that the granting of the decree would be "unduly harsh or unjust," or would "prejudicially affect" the making of reasonable maintenance arrangements, is irrelevant. As with paragraphs (d) and (e), there does not appear to be anything difficult in principle in paragraph (f), although problems as to their applicability to various situations are sure to arise. Some guidance in this regard may be afforded by Australian decisions interpreting a somewhat similar provision of the Australian Matrimonial Causes Act, 1959, which requires the court to refuse to make the decree where 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

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(*e*) where a decree is sought under section 4, to refuse the decree if there are children of the marriage and the granting of the decree would prejudicially affect the making of reasonable arrangements for their maintenance; and

[117] A general discussion of these doctrines can be found in Bevan, *Limitations on the Right of an Impotent Spouse to Petition for Nullity*, 76 L.Q.R. 267 (1960).

[118] *Cf.* W. v. W., [1952] 1 All E.R. 858 (C.A.).

[119] Snowman v. Snowman, [1934] P. 186; Clarke v. Clarke, [1943] 2 All E.R. 540 (Divorce); Pettit v. Pettit, [1963] 3 All E.R. 37 (C.A.); L. v. L., 28 W.W.R. (n.s.) 279 (Man. Q.B. 1959). As to artificial insemination in an impotency case, *see* L. v. L., [1949] 1 All E.R. 141 (Divorce).

[120] The "general ground of injustice" referred to by Bevan, *supra* note 117, at 276, would appear to be wider than the doctrine of approbation; *see* Harthan v. Harthan, [1948] 2 All E.R. 639 (C.A.); Scott v. Scott, [1959] 1 All E.R. 531 (Divorce); Morgan v. Morgan, [1959] 1 All E.R. 539 (Divorce). However, it would not appear to be so wide as to bar the annulment where the petitioner's conduct has been beyond reproach, but he (or she) happens to be in a condition of poverty. It should be noted that the circumstances set out in § 9(1)(f) would not bar a petition for divorce under § 4(1)(d), but an annulment would probably be barred on the "general ground of injustice" if it would be "unduly harsh or unjust to either spouse" to grant it.

decree . . . ." on the ground of separation. [121] In this Australian provision : " 'harsh' ordinarily means 'rough, discordant, severe, unkind'; 'oppressive' denotes what is 'tyrannical, burdensome, *unjust*' . . . . It may be 'harsh' is intended to bring in the immediate sensation, the impact, caused to a respondent by the grant of a decree, 'oppressive' requires perhaps continuous adverse consequences.' " [122] This Australian safeguard is close enough to paragraph (f) to make it likely that some resort will be made to the interpretative decisions of the Australian courts, but there are differences that might prove significant. Whereas the Australian provision applies where it would be *both* harsh *and* oppressive (unjust), the Canadian provision applies where it is *either* harsh *or* unjust, but only if it is "unduly" so. [123]

What will make it "harsh" or "unjust" to grant a decree will depend, of course, on the facts of a particular case, and there is no point in attempting to synthesize the Australian decisions in a vain search for firm principles or a comprehensive definition. Those decisions furnish concrete examples only, and it will be necessary for the Canadian courts to develop their own approach in accordance with the peculiar needs and desires of Canadian society. However, there is one general proposition of some breadth, laid down in relation to the Australian provision, that should prove applicable here : "there should be something in the particular case which goes beyond the normal, and indeed inevitable, consequences of the granting of a decree." [124] Thus, for instance, to grant the decree in opposition to the respondent's religious objections cannot be considered harsh and oppressive. [125] Any circumstance that is not peculiar to the case, but which exists generally in broad classes of cases, would appear to fall within this principle. Parliament must have had such circumstances in mind when it enacted the separation ground, and these circumstances cannot be used to frustrate its intention or cut down on the positive scope of that ground.

Paragraph (f) also requires that the decree be refused if the granting of it would prejudicially affect the making of reasonable maintenance arrangements. This "safeguard," as well as that created by paragraph (e) in respect of the maintenance of children, may be more illusory than real. In *Penny v. Penny*, [126] a man who had been living openly for a number of years with

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[121] Matrimonial Causes Act, COMM. STAT. No. 104, § 37(1) (1959). This provision was considered in Macrae v. Macrae, *supra* note 97, and reference to several other pertinent decisions can be found therein. *See also* McDonald v. McDonald, 64 N.S.W. 435 (1964), and Penny v. Penny, 65 N.S.W. 366 (1965).

[122] McDonald v. McDonald, *supra* note 121. The word "unjust" is not italicized in the original text.

[123] Since the expression "duly unjust" would appear to be self-contradictory, perhaps the word "unduly" qualifies the word "harsh" only.

[124] Macrae v. Macrae, *supra* note 97, at 465.

[125] *Id.* at 460-61. Religious opposition is a circumstance taken into account in the Australian cases, and in a given set of circumstances it might be found harsh and oppressive to override those objections : Lamrock v. Lamrock, 4 F.L.R. 81, (N.S.W. Sup. Ct. 1963).

[126] *Supra* note 121.

"another woman" was denied a divorce on the ground that it would be harsh and oppressive to grant the decree. He was deeply in debt and unable to support adequately either his first wife, from whom he was divorced, or his second wife, from whom he sought to be divorced. To grant him a divorce and allow him to assume further financial obligations would have been harsh and oppressive. Whether or not our courts would consider the decree unduly harsh or unjust, in these circumstances they might feel constrained to refuse it on the ground that it would affect prejudicially the making of reasonable maintenance arrangements. However, it is clear that our courts are not going to ignore the actual needs of an illegitimate family, and those needs are bound to influence the enforcement of whatever maintenance arrangements have been made for the benefit of the legitimate family. It is obvious that this provision is not going to prevent the formation of illegitimate families, and the soundness of precluding the possibility of their becoming legitimate is rather questionable. [127] For this reason, the Canadian courts might evoke these provisions with reluctance, and only where they are inescapably applicable.

V. Corollary Relief

The constitutionality of the corollary relief sections of the act, [128] will be questioned seriously, but it is submitted that the Joint Committee on Divorce was correct in its view that such matters are within the competence of Parliament as being necessarily incidental to its jurisdiction over "marriage and divorce." [129] Although "continual use affords no answer to ultra vires," [130] it seems that the provinces have jurisdiction with respect to alimony, maintenance and custody where divorce is not in question; and if it is, only if the field is unoccupied. [131] In *Langford v. Langford*, [132] the court expressly refrained from deciding whether these matters could be legislated upon by Parliament as well, taking the view that it made no difference because there was no federal legislation dealing with such matters. [133] It

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[127] Sir Stanley Burbury's comment in this regard, *supra* note 92, at 295, is most apt: "The truth is that with the single exception where a settlement is exacted as the price of a decree in the case of propertied parties, the arrangements for the welfare of the children will continue to be dealt with by the parties in the course of human affairs as they always have been and always will be. The court may on behalf of the Welfare State momentarily require an alteration in existing arrangements before it sanctions the final dissolution of the marriage. Things will then promptly revert to exactly what the parties desire themselves . . . . But as a matter of legal formalism and fiction it can be said that before this marriage was dissolved the interests of the children were protected because the court said proper arrangements had been made."

[128] Divorce Act, 1968, §§ 10, 11, 12.

[129] B.N.A. Act § 91(26). *Supra* note 4, at 27-29, 56-60.

[130] Rex v. Vesey, [1938] 2 D.L.R. 70, at 79 (N.S. Sup. Ct. 1957).

[131] *See e.g.*, Lee v. Lee, [1920] 54 D.L.R. 608 (Alta.); Langford v. Langford, [1936] 1 W.W.R. 174 (B.C. Sup. Ct.); Adoption Act Reference, [1938] Sup. Ct. 398.

[132] *Supra* note 131.

[133] The same view was taken in the *Adoption Act Reference*, but there was the vaguest hint that Parliament has some jurisdiction. Chief Justice Duff, *id.* at 402, said: "We are not concerned with any ancillary jurisdiction in respect of children which the Dominion may possess . . . . Whatever may be the extent of that jurisdiction, we are not concerned with it here and I mention it only to put it aside."

was said that "where a matter is incidental or ancillary to one of the enumerated subsections of section 91 and is also within one of the enumerated subsections of section 92, if the field is clear provincial legislation will be valid in the absence of legislation by the Dominion." [134] This is one of the well-established principles of Canadian constitutional law. [135] The essential connection between divorce and the making of conditions upon which divorce is to be granted is perfectly obvious. Indeed, as a matter of logic, if not judicial opinion, alimony and custody relate to "marriage." However, neither reason nor precedent requires the courts to deny Parliament the power to determine the conditions of alimony, maintenance and custody that are to be imposed as corollary to the dissolution of a marriage. It is to be hoped that common sense will prevail for the benefit of the Canadian people, and that the courts will see that the authority to legislate for the maintenance of a divorced spouse is "associated with and inseparable from the power to grant this change of status." [136]

Since it is very likely that the constitutionality of these provisions will be upheld, the position of provincial legislation in the field is called into question. [137] It was long ago observed in *Hodge v. The Queen* that "subjects which in one aspect and for one purpose fall within section 92, may in another aspect and for another purpose fall within section 91." [138] Where both Parliament and a provincial legislature enact legislation in the same field, which legislation is otherwise competent to both under the aspect doctrine, then the provincial legislation must give way unless the two can stand together. [139] The paramountcy of federal legislation in these circumstances is well established. [140] The problem is to determine whether two pieces of

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[134] *Supra* note 131, at 176.

[135] Although Mr. Justice Laskin considers that the "ancillary or necessarily incidental" doctrine was, at long last, effectively punctured by Mr. Justice Judson in the Supreme Court of Canada in A.-G. Can. v. Nykorak, [1962] Sup. Ct. 331, *see* B. LASKIN, CANADIAN CONSTITUTIONAL LAW 164 (3d ed. 1966), this would seem to be basically a justifiable prejudice against a form of expression that has caused considerable confusion. The point is that a given piece of legislation may have both a federal and a provincial aspect bringing it directly within competing heads of power. Even though it is not necessary (or is wrong) to support federal legislation that could have been enacted by a province on the ground that it is a matter ancillary to a federal power, it is clear that valid provincial legislation can be rendered inoperative by federal legislation in the same field. B. LASKIN, *supra* at ch. 3.

[136] Hyman v. Hyman, [1929] A.C. 601, at 625. The full statement which was not made in reference to the division of powers in Canada, but which is nevertheless quite relevant, is as follows: "It is, in my opinion, associated with and inseparable from the power to grant this change of status that the courts have authority to decree maintenance for the wife."

[137] Of course, given that such matters are prima facie within provincial competence, it could not be seriously suggested that provincial law regulating support obligations and custody rights with respect to subsisting marriages are in jeopardy in consequence of the Divorce Act. They are clearly not in the same field. But it is otherwise with respect to provincial legislation providing for such matters *as ancillary to divorce.*

[138] 9 App. Cas. 117, at 130 (P.C. 1883).

[139] In general, the provincial legislation is rendered inoperative, its effect being suspended only. However, it has been suggested that *subsequent* provincial legislation is *ultra vires* and does not revive upon federal withdrawal from the field, Comment, 19 CAN. B. REV. 607 (1941).

[140] The point is made time and again in precedents so numerous that there is no need to cite them. Most of the cases are collected in B. LASKIN, *supra* note 135.

legislation do meet in the field, such that they cannot stand together. It would require an excursus too extensive to be introduced here in order to present an analysis of the many precedents that relate to the constitutional aspects of this complex matter. However, it can be said that where provincial legislation is not repugnant to federal legislation (in the sense that one requires what the other prohibits) *and* the provincial legislation is broader in scope than the federal legislation (in the sense that it has application to circumstances to which the federal legislation cannot be made to apply), then the provincial legislation remains operative. [141] This would appear to be the case, for instance, with the pertinent sections of the Matrimonial Causes Act of Ontario. [142]

The Ontario law is broader than the federal law in that it applies "in any action for divorce or to declare the nullity of a marriage." [143] Thus, the Ontario provisions remain operative in nullity actions and could perhaps be applied where a divorce petition is dismissed, [144] since sections 10 to 12 have no application in these circumstances. This conclusion should not be affected by the fact that the federal legislation is broader in other respects, namely, in that an adulterous wife is not excluded from alimony and maintenance, nor is her continuing chastity essential, [145] and a husband may be

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[141] A scholarly analysis of paramountcy has been provided by Lederman, *The Concurrent Operation of Federal and Provincial Laws in Canada*, 9 McGILL L.J. 185 (1963). Dean Lederman says :

> Provincial legislation may operate if there is no federal legislation in the field or if the provincial legislation is merely supplemental to federal legislation that is in the field. Duplicative provincial legislation may operate concurrently only when inseverably connected with supplemental provincial legislation, *otherwise duplicative legislation is suspended and inoperative.* Repugnant provincial legislation is always suspended and inoperative.

Id. at 199 [emphasis added]. Others maintain that purely duplicative legislation remains operative, *see* Laskin, *Occupying the Field : Paramountcy in Penal Legislation*, 41 CAN. B. REV. 234, at 257 (1963). The difference of opinion could be significant if it should be found that parts of provincial legislation dealing with alimony, maintenance and custody are purely duplicative *and* severable. Apart from this caveat the distinction will not be alluded to again.

[142] ONT. REV. STAT. c. 232, §§ 1, 2, 5. Reference need not be made to the similar legislation found in the other provinces, because it is sufficient to examine the law of one province in order to illustrate the principles applicable to them all.

[143] Matrimonial Causes Act, *supra* note 142, §§ 1 and 2. *See* McGuire v. McGuire, [1947] Ont. W.N. 835 (High Ct.).

[144] It could be argued that, respecting divorce actions, the provisions of the Divorce Act have fully occupied the field, preventing the application of the provincial statute even where the divorce action is dismissed. And query : if the court's jurisdiction is based on a factor that would not have given it jurisdiction under the old law, such as the wife's acquisition of a separate domicile (§§ 5 and 6 of the Divorce Act), does its jurisdiction under the Matrimonial Causes Act of Ontario disappear upon the dismissal of the petition? Is the question purely academic? *See* Bavin v. Bavin, [1939] 3 D.L.R. 328 (Ont.); Weatherall v. Weatherall, [1937] 3 D.L.R. 468 (Ont.); Hindley v. Hindley, [1957] 2 All E.R. 653 (Divorce); Scott v. Scott, [1950] 2 All E.R. 1154 (C.A.).

[145] Unlike the Ontario provisions, § 11(1)(2) does not refer to adultery or future chastity but these would be taken into account, in that regard must be had to the conduct of the parties. Section 10 of the Divorce Act does not contain this stipulation, referring instead to the necessity of having regard to the means and needs of the spouses. It is questionable whether the words "may make such interim orders as it thinks fit and just" in § 10 entitle the court to have regard to the conduct of the parties, since the expression "fit and just" is used in both subsections of § 11 in conjunction with the words "having regard to the conduct of the parties," and the omission of these last words in § 10 must have some significance.

the beneficiary of such orders as well. It would seem, however, that the provincial legislation could not be applied in preference to the federal legislation. [146] Thus, if a divorce is granted, the court could not refuse to make an order in favour of the wife *solely* because she committed adultery.

The expression "children of the marriage" is defined in section 2(b) of the act to mean "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."

In view of the meaning attributed to "child of a husband and wife," [147] the word "children" appears to signify relationship rather than status, and a child who would otherwise come within section 2(b)(ii) is not excluded because of the attainment of majority. However, what it is that will bring within the ambit of this definition a child of sixteen years of age or over is bound to be contested. The ability of a child to provide for himself is a question of fact, and whether the determination of that fact has been left entirely to the courts is the problem. Attendance at school is one of the most important circumstances, and certainly the most usual one, by reason of which a child of sixteen years of age or over may be unable to provide for himself; indeed, the very object of his attendance at school is the acquisition of self-sufficiency. It is in this connection that the problem will probably be brought before the courts, because the expression "by reason of illness, disability or other cause" is in a form that evokes from many Canadian lawyers the sage observation: "Ah, the *ejusdem generis rule*!" It is submitted that the words "other cause" prima facie mean "other cause *of whatever kind*" and, unless the intention of Parliament as seen from the act as a whole requires it, there can be no justification for shattering their plain meaning by inserting the word "similar" between them. Nothing in the act indicates an intention to curb any supposed judicial tendency towards an excess of generosity in the matter of the maintenance of children. On the contrary, the intention seems to be to provide for the reasonable maintenance of dependent children, and there is no apparent reason to suppose that Parliament did not intend the question of dependence to be determined in accordance with current standards and social reality. [148] The *ejusdem generis*

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[146] This would seem to be a rather straightforward application of the doctrine that valid federal legislation has paramountcy over valid provincial legislation with which it cannot stand. See B. LASKIN, *supra* note 135, at 104.

[147] "Child" is defined in § 2(a) as follows: "'child' of a husband and wife includes any person to whom the husband and wife stand *in loco parentis* and any person of whom either of the husband or the wife is a parent and to whom the other of them stands *in loco parentis*."

[148] In this regard, it should be noted that the Interpretation Act, Can. Stat. 1967 c. 7, § 11 provides that every enactment "shall be deemed remedial, and shall be given such fair, large and

rule must not be elevated to the position of a substantive law to be followed however unreasonable its effect, or to be applied blindly wherever a series of words are set down in a particular order. It is an aid in statutory interpretation, and where it ceases to be of assistance it should not be applied. [149]

As these general observations may not stand in the way of those who would apply the rule, it is necessary to examine the technical arguments for and against its application, with particular regard to the attendance at school circumstance. Had the words "by reason of illness, disability or other cause" been omitted, the definition of "children of the marriage" might have been taken to comprehend the situation of a child of sixteen in attendance at school. The addition of these words (the argument would run) requires the existence of a particular kind of cause for the inability of a child of such an age to provide for himself, the implication being that not every cause will bring the case within the scope of the provision. Attendance at school, as a reason for the inability to be self-supporting, is neither an illness nor a disability, unless disability means "unable for any cause," which cannot be so without making the reference to causes wholly redundant; nor can attendance at school, as a cause for the inability in question, be subsumed under "other cause," because, according to the *ejusdem generis rule*, it is not an "illness, disability or other *similar* cause."

Against this arbitrary use of the *ejusdem generis* rule, it should be noted that the rule only applies where there are general words following *particular and specific* words, in which case (if there is reason to apply the rule at all) the general words must be confined to things of the same kind as those specified. [150] It is not illogical, and it might be convenient or expedient, to say that "by reason of a cold, broken leg or other cause" means other similar causes, such as measles or a broken arm, and excludes dissimilar causes, such as attendance at school. But illness and disability are not *particular and specific* words. They are themselves generic. Together they constitute and exhaust a category. There is no species of cause that is neither a disability nor an illness, yet is similar either to disability or illness and forms with them some even higher genus exclusive of still other causes of inability to provide for oneself. Thus, the application of the *ejusdem generis* rule (which, it is submitted, is uncalled for in the first place) not only produces an undesirable consequence, but it renders the words "or other cause" completely superfluous, since there could then be no other cause. It would seem to be pushing the rule too far, if its application deprives of all meaning the very words it is meant to interpret. Although this rejection of the *ejusdem*

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liberal construction and interpretation as best ensures the attainment of its objects."

[149] CRAIES, ON STATUTE LAW 181 (6th ed. 1963).

[150] This is a paraphrase of the way in which it was put by Lord Campbell in R. v. Edmundson, 28 L.J.M.C. 213, at 215 (1859).

generis rule might be resisted on the ground that it makes the whole reference to causes mere surplusage, the answer to such an objection is that the reference was made *ex abundanti cautela*, and that it is to be interpreted to mean "by reason of illness, disability or other cause of *whatever kind*."

Section 14 states that "an order made under section 10 or 11 has legal effect throughout Canada," and by section 15 such orders may be registered in any superior court in Canada and enforced in the same manner as an order of that superior court. Even if these provisions are *intra vires*, provincial legislation providing for the enforcement in the enacting province of maintenance orders made in reciprocating jurisdictions remains operative because of its broader application. [151] Such provincial legislation is broader in that it extends to orders respecting *subsisting* marriages, and it should continue to be applicable to such circumstances. [152] Such legislation is also broader than the provisions of the Divorce Act in that it provides for the enforcement of non-Canadian orders; but whether it will continue to be effective in that regard remains to be seen. Is the enforcement of orders made corollary to divorce decrees now a federally occupied field, and does that field include foreign orders made corollary to foreign divorce decrees? If so, is provincial legislation inoperative to the extent that it purports to make such foreign orders effective in the enacting province? In that case, would the provinces cease to be reciprocating states, with the result that corollary orders made under the Divorce Act could not be made effective abroad? If so, and particularly if the whole of Canada now constitutes a single divorce jurisdiction, would it follow that federal legislation for the reciprocal enforcement of corollary orders is required?

Section 11(2) provides that a corollary order "may be varied or rescinded from time to time by the court that made the order . . . ." Although section 15 states that such an order "may be registered in any other superior court in Canada and may be enforced in like manner as an order of that superior court . . . ," it is improbable that this would be taken to confer jurisdiction on the registering court to vary or rescind the registered order, simply because it could so deal with a similar order of its own. [153] It is most unfortunate that only the court that made the corollary order is permitted to vary or rescind it, and this is bound to impose undue hardship and inconvenience in a great many cases. Not only may the spouses

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[151] *E.g.*, The Reciprocal Enforcement of Maintenance Orders Act, ONT. REV. STAT. c. 346 (1960). See POWER, *supra* note 3, at 576.

[152] See the discussion *infra* as to the constitutionality of §§ 10-13, and *supra* notes 135, 137, 141.

[153] In order to effect such a purpose it would probably be necessary to have a provision such as § 5(5) of the Reciprocal Enforcement of Maintenance Orders Act, *supra* note 151. That provision states, *inter alia*, that: "Where a provisional order has been confirmed under this section, it may be varied or rescinded in like manner as if it had been originally made by the court in Ontario that confirmed it . . . ." For reasons given *infra*, a similar provision should be enacted by Parliament.

be resident in different provinces when the petition is presented, but neither of them may be resident in the granting province when circumstances requiring a corollary order to be varied or rescinded arise. One gets a picture of scores of husbands and wives travelling back and forth across the country, their children in tow, in order to have their interests protected as changing circumstances require by a court in a province with which none of the parties has any further substantial connection. The inconvenience of this provision is particularly obvious respecting the prospective adoption of children of divorced spouses. Clearly, an adoption order would rescind a prior custody order, and it follows from section 11(2) that an adoption order cannot be made in respect of a child whose custody has been determined by an order under the Divorce Act, unless and until the court that made that order rescinds it. [154] Thus, for instance, if a wife resident in British Columbia obtained a divorce and an order for the custody of her child in Ontario, upon her remarriage in British Columbia she and her new husband could not adopt that child without having the custody order rescinded in Ontario, nor could the Ontario court mitigate the inconvenience by making the adoption order. [155] It is also conceivable that the provincial court that made the custody order would hold a different view as to the desirability of an adoption order being made, and it might refuse to rescind its custody order even if the court where the prospective adopting parents reside were willing to make an adoption order.

The Divorce Act does not appear to effect any essential change in the principles governing the question of the custody of children, although the application of such principles is altered in certain respects. As already noted, a corollary custody order can be made only in respect of children of the marriage as defined in the act. However, if a divorce petition is dismissed, provincial legislation providing for the making of an order for the custody (and maintenance) of a child *in any action for divorce* might then apply, [156] and it is possible that the meaning of "child" under such legislation may be different. The jurisdiction in which the act applies is Canada, and custody orders are effective throughout Canada. Thus, as long as either the child or the person having the control or authority over him is present within Canada, the court should no longer assume that it has no jurisdiction to adjudicate upon the child's custody simply because neither of them is present within the province. [157]

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[154] It might be argued that this is a good thing. In *Re* Equal Guardianship of Infants Act, 27 W.W.R. (n.s.) 285 (B.C. Sup. Ct. 1958), it was said that an application to vary, alter or discharge a custody order should, where possible, be made before the same judge of the court that made the order. But what if the parties are no longer in the jurisdiction and that court (or that judge) cannot make an adoption order?

[155] *See* The Child Welfare Act, Ont. Stat. (1965) c. 14, § 70(1).

[156] Matrimonial Causes Act, ONT. REV. STAT. c. 232, § 5 (1952).

[157] *See, e.g.*, Cleaver v. Cleaver, [1949] Ont. W.N. 640, [1949] 4 D.L.R. 367.

VI. CONCLUSION

It was remarked at the outset that the Divorce Act, 1968, despite its defects, represents a great improvement in the divorce law of Canada. In spite of general legislative inertia in this field, minor amendments to the act should be easily secured as their need becomes apparent. However, it is unfortunate that the law of nullity, outmoded, confused and lacking in uniformity, was not examined with a view to reform before the main impetus was spent. Although few provisions of the act could be characterized as undesirable, many of them are unclear, and some new problems have been created for which no solutions have been offered.[158] It is to be hoped that the courts, in coping with their tasks of interpretation and the creative solution of such new problems, will look upon the act as providing a fresh point of departure. Automatic reliance on pre-statute precedents for the solution of doubtful cases should be avoided, not merely because the judicial record in family law matters is not uniformly felicitous, but because such precedents are no longer particularly relevant.[159] They formed a part of a general law, developed through a particular approach, the underlying principles of which have been substantially rejected. What appears to remain of the old law should not be engrafted upon the new simply because it is handy, or because of an excessive respect for *stare decisis*. As Lord Atkin observed in another connection: "When . . . ghosts of the past stand in the path of justice, clanking their mediaeval chains, the proper course for the judge is to pass through them undeterred."[160] Will the judges of today's divorce courts be deterred because the "ghosts" that confront them are apparitions of more recent vintage?

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[158] Instances of undesirable, unclear and problem-creating provisions have been pointed out in this survey. *See, e.g.*, the discussions of §§ 9(3)(a), 3(d), and 14 *infra*.

[159] An example of a precedent-founded proposition that the courts might be tempted to isolate and preserve, notwithstanding its present inappropriateness, is the obviously unrealistic rule that one act of marital intercourse, following the husband's knowledge of his wife's misconduct, is an automatic condonation by him of her offence, regardless of the circumstances, Henderson v. Henderson, [1944] A.C. 49. The justification for the discriminatory character of the rule—and, really, for its very existence—is that such intercourse subjects the wife to the risk of pregnancy. Apparently, it was overlooked that the husband is thereby subjected to the risk of having another child to maintain; nor does the rule appear to permit of exceptions for sterile husbands, or for cases of barren wives or condomistic intercourse, Morley v. Morley, [1961] 1 All E.R. 428 (Divorce). A particularly ludicrous application of the rule is to be found in Willan v. Willan, [1960] 2 All E.R. 463 (C.A.). The *Henderson* rule is not expressly excluded by § 2(d) of the act, since that section may be held to be inapplicable where there has been no resumption of cohabitation. However, as part of an overall view of condonation, that rule was softened by the doctrine of the revival of condoned offences, now abolished by § 9(2). Formerly, if the husband had intercourse with the wife following knowledge of her offence, the offence thereby condoned would be revived by her subsequent misconduct such as desertion, and the condoned offence could be relied on as a ground for the relief sought. Surely, the Henderson rule (which is of dubious merit in any case) ought not to be applied so as to preclude a *subsequently deserted* husband from obtaining a divorce under § 3 of the act where, apart from the arbitrary rule in question, it is plain that there was no condonation.

[160] United Australia Ltd. v. Barclays Bank Ltd., [1940] 4 All E.R. 20, 37 (H.L.).