SOCIAL ASPECTS OF DIVORCE LEGISLATION
IN BRITISH COLUMBIA

An Exploratory Study of Four Major Aspects of Divorce Legislation in British Columbia and Their Social Implications with an Examination of Comparative Legislation Suggesting Reforms

by

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Thesis Submitted in Partial Fulfilment of the Requirements for the Degree of

MASTER OF SOCIAL WORK

in the School of Social Work

Accepted as conforming to the standard required for the degree of

Master of Social Work

School of Social Work

1966

The University of British Columbia
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Date May 6, 1966
CHAPTER 21.

An Act to provide for Appeal to the Court of Appeal of the Province of British Columbia in Divorce and Matrimonial Causes.

SHORT TITLE.

1. This Act may be cited as the British Columbia Divorce Appeals Act. 1937, c. 4, s. 1.

2. The Court of Appeal of the Province of British Columbia shall have jurisdiction to hear and determine appeals from an order, judgment or decree of a court of the Province or a judge thereof having jurisdiction in divorce and matrimonial causes. 1937, c. 4, s. 2.

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OTTAWA, 1952

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R.S., 1952.
CHAPTER 176.

An Act respecting Marriage and Divorce.

SHORT TITLE.

1. This Act may be cited as the *Marriage and Divorce* Short title.  
   *Act*. R.S., c. 127, s. 1.

MARRIAGE.

2. A marriage is not invalid merely because the woman is a sister of a deceased wife of the man, or a daughter of a sister or brother of a deceased wife of the man. 1932, c. 10, s. 1.

3. A marriage is not invalid merely because the man is a brother of a deceased husband of the woman or a son of a brother or sister of a deceased husband of the woman. 1932, c. 10, s. 1.

DIVORCE.

4. In any court having jurisdiction to grant divorce *Right of wife to divorce husband for adultery*. any wife may commence an action *a vinculo matrimonii* praying that her marriage may be dissolved on the ground that her husband has since the celebration thereof been guilty of adultery. R.S., c. 127, s. 4.

5. If the court is satisfied by the evidence that the case *Conditions upon which decree pronounced*. of the wife has been proved, and does not find that the wife has been in any manner accessory to or has connived at the adultery of her husband, or that she has condoned the adultery complained of, or that the action was commenced and is prosecuted in collusion with the husband or the woman with whom he is alleged to have committed adultery, then the court shall pronounce a decree declaring such marriage to be dissolved; but the court is not bound to pronounce such decree if it finds that the wife during the marriage has been guilty of adultery, or if the wife in the opinion of the court has been guilty of unreasonable delay in R.S., 1952.
Chap. 176.  *Marriage and Divorce.*

in presenting or prosecuting such action or of cruelty towards the husband, or of having deserted or wilfully separated herself from the husband before the adultery complained of, and without reasonable excuse, or of such wilful neglect or misconduct as has conduced to the adultery.  R.S., c. 127, s. 5.

6. Nothing in sections 4 and 5 affects, restricts or takes away any right of any wife existing before the 27th day of June, 1925.  R.S., c. 127, s. 6.

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ABSTRACT

The present study is undertaken to explore social aspects of divorce legislation in British Columbia. The specific areas of procedures, grounds, domicile, and children of the marriage are examined as they would appear to have most significance for social welfare. The study attempts to draw attention to the relationship between law and human relations and to critically examine British Columbia divorce legislation, its functions and dysfunctions, in terms of the ideal whereby the law acts as an enabling device aimed at problem-solving.

Chapter I of the study reviews the historical significance of attitudes, customs, and law still affecting divorce legislation in British Columbia and points out areas where they may presently be divorced from social reality. Chapter II, III, IV, and V examine specific areas of divorce legislation and their significance in modern society in terms of a problem solving approach. Chapter VI involves a survey of expert opinion on matters pertaining to British Columbia divorce legislation. The purpose here is to lend credibility to social problems around divorce legislation outlined in preceding chapters based on library research. Chapter VII is a short survey of comparative divorce legislation in a variety of other jurisdictions. This survey indicates possible solutions to some of the social problems arising from legislation in British Columbia.

Throughout, the study method essentially involves library research with the exception of Chapter VI. A small sample of experts in a variety of fields interested in the question of divorce were interviewed. Experts include clergymen, politicians, lawyers, judges, social workers, etc. The interviews were structured by means of an interview schedule.

Initial exploration carried out in this study indicates that the adversary nature of British Columbia divorce legislation with its limited grounds is not conducive to problem-solving and appears instead to create new problems for those already suffering from damaged interpersonal relationships. A variety of social problems arising from the legislation are more closely defined and documented by reading and expert opinion. Some of these social problems involve the fact that in undefended divorce cases the true facts are unlikely to emerge.
The adversary system prevents the parties concerned from taking a mature look at what caused the marital breakdown. The law penalizes those who attempt reconciliation due to factors involved in condonation. Collusion bars also discourage discussion of matters of mutual concern or serve to keep such discussion secret. In some cases even though all personal and social functions of marriage have ceased to exist, the legal tie must be maintained because neither partner has committed adultery or is willing to engaged in fraud. In other cases, those who have grounds for divorce are unable to obtain same because of legal costs and difficulties in establishing domicile or travelling to a court that has jurisdiction. Scant investigation of proposed plans for children of the marriage is carried out unless the custody is contested. In general, British Columbia divorce legislation does not provide for any investigation concerning what really causes a marriage to fail. It provides no relief for many whose marriages have broken down beyond repair and no impetus towards problem-solving for others who might become reconciled or at least divorced with a minimum of secondary damage and with a recognition of responsibilities involving children.

Divorce legislation in other countries is suggested as offering possible solutions for many of the problems inherent in our own law. Literature from the United States of America concerning Family or Matrimonial Courts is seen in this study as the most fruitful. Hopefully then, the documentation of social problems associated with British Columbia divorce legislation and suggested solutions for change will aid others in future research of a more specific nature.
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ACKNOWLEDGEMENTS

We wish to express our thanks and appreciation to those whose assistance and support made this thesis possible. We particularly acknowledge with thanks the encouragement and help of Mr. J. MacDonald and Dr. J. Crane, both of the School of Social Work, University of British Columbia.

We also wish to acknowledge the contributions of those interviewed for expert opinion: Mr. John Stanton, Miss Norma Christie, lawyers; Dr. Ken Davies and Dr. J. R. Wilson, psychiatrists; Mr. Jim Karpoff and Mr. Derek Thompson, social workers; Father Roberts, priest; Rev. J. M. Taylor, minister; Mrs. Barbara Watts of the Canadian Law Reform Movement; and five others who wish to remain anonymous.
SOCIAL ASPECTS OF DIVORCE LEGISLATION

IN BRITISH COLUMBIA
INTRODUCTION

In working with the topic, Social Aspects of Divorce Legislation in British Columbia, one cannot help but become aware of the social problems arising out of human relations of which divorce is one of the most far reaching. One also, however, becomes aware that to examine all aspects of the divorce situation with its many legal and social implications is a formidable task. Hence, in this study we are attempting to view four major areas of divorce: procedure, grounds, domicile and the custody and maintenance of children. We will take into consideration that attitudes toward marriage and divorce are conditioned by the past and especially by the forces of religion. As a result, the major areas outlined above will be seen in the light of history as well as within the context of present legislation regarding them in British Columbia, and the social reality within which they now exist. It is hoped that an examination of the literature in these areas and a survey of expert opinion on the subject will help us clarify social problems that presently exist. It is not until these areas are defined that reforms can reasonably be suggested for their solution and/or future exploration of a more specific nature be initiated.
CHAPTER I

AN HISTORICAL VIEW OF DIVORCE

Our law of marriage of which the law of divorce is a branch is derived from three great sources: the Civil Law, the Canon Law, and the Common Law. When looking at these sources it is most important to consider the undeniable effect which the law has on human behaviour and conditions. "The interaction between law and social behaviour and thought, is a two-way interaction; the legal principles affect morals and behaviour, as well as vice versa."¹ Hence, the law becomes an important social factor. In an historical view of divorce, the interplay between social conditions and attitudes, and the law become readily apparent especially as it is possible to view the whole from a relatively objective outsider's viewpoint. It will then be the objective of this section of the paper to illustrate the development of attitudes and conditions surrounding divorce and to attempt to show how these attitudes, customs and laws have persisted to the present day, sometimes causing social problems when in times past they performed a useful or acceptable function.

In the patriarchal society of ancient Greece, women had few rights and very few in regard to divorce. As in most ancient social systems, women held a position of subordinance to their mate. Marriage was a union mainly for the procreation of children and as a result, the sexual function was of prime importance. Thus, grounds for divorce were related to the function of marriage and divorce was accepted socially when the woman whose business it was to bear children was either barren or adulterous. Since the husband had far more rights than the wife and his sexual behaviour was of less importance to the marriage, women were unable to get a divorce through some misdeed of the husband. Furthermore, divorce did not have legal connotations as it does today. In Greece it was mainly a private family affair and the granting of divorce was not under the jurisdiction of the state except in the case of the wife's adultery.

In ancient Rome (753-202 B.C.), the status of women and the place of divorce were not unlike that of Greece. By civil law the wife was first owned by her husband and later looked upon as being in the same legal position as his child. At no time did the Roman wife have property in the children of her marriage. It is in this situation that the remarks of Blackstone are rooted:
By marriage, the husband and wife are one person in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated or consolidated into that of her husband, under whose wing, protection and cover she performs everything.  

This legal unity which began in the social customs of Greece and Rome persisted until the 19th century in England and still exists today in the form of domicile laws whereby a married woman has no separate domicile from her husband despite the fact they may be judicially separated or she may have been deserted and knows not of his whereabouts. Again though, in ancient Rome these principles developed in social customs and the state was not involved in marriage and divorce. As divorce became more frequent, however, the Romans legislated effects on property rights and a body of civil law began to grow. Also, rights of divorce in this patriarchal society lay exclusively with the husband who was the only person recognized by law and who, as was stated earlier, literally owned his wife and children. The grounds for divorce acceptable to society were adultery, preparing of poisons, and falsification of keys, and although divorce was legally unrestricted, social controls were sufficient to limit blatant abuses of accepted patterns.

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Thus up to and including the advent of Christianity, marriage was considered almost solely a social institution rather than a legal one and this resulted in the belief which is still held by some people today that:

the duties which are incumbent upon marriage partners have their guarantee and sanction in the moral or religious conscience of the parties in established traditions and in social conventions. Only in marginal situations does the law step in to supplement the sanctions of the mores and to clarify doubtful situations.3

The civil law of Rome during the period of early Christianity was still not deeply involved in divorce legislation. It did incidentally, however, operate on two maxims:

1) If the parties are not living together the marriage cannot be said to exist, and

2) If marriages are made by mutual affection it is only right when that affection no longer exists that they should be dissolved by mutual consent.

The nature of marriage and the availability and grounds for divorce then coincided. No particular form of marriage was required by civil law and mutual consent was adequate reason for divorce. Hence, the idea of mutual consent rather than a system

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of fault on the part of one and innocence on the part of the other evolved here and continues to be discussed today in legal circles.

In England a tradition of common law and also the adaptation of Roman civil law took place. By this time (527-565 A.D.) Roman marriage laws were well settled. Christians also of this time no longer held that marriage and divorce should be a private matter. Through a process of evolution, the marriage ceremony became religious in nature and a function of the clergy. Marriage was uniformly contracted and received by the Church. Although during Saxon times divorce was freely allowed and from 668-698 A.D. the Archbishop of Canterbury allowed divorce on the grounds of desertion, adultery, impotence, relationship, long absence and captivity, religion was beginning to exert an influence in a new direction. The power of the emperors in Italy was declining and a succession of strong Popes made effective use of the prevailing anarchy by consolidating their power. Their decisions became Canon law and it spread as Christianity rapidly spread and bishops gained huge areas of land and acquired power. These bishops administered law in their local courts. They became more and more powerful and as they defined more areas as being of spiritual significance their influence grew. Royal courts accepted them and enforced ecclesiastical sentences. In
800 A.D. Charlemagne was crowned by the Pope and became the first temporal leader to proclaim marriage as indissoluble and divorce criminal. Hence, a new era in the history of divorce began despite the fact that not until 1164, was there a clear formulation of the now seven sacraments, marriage being the last to be accepted.

The concept of marriage being a sacrament is one that remains with us today despite the fact that marriage is also considered a civil contract. Canon lawyers were the first to proclaim the sacramental implications of marriage when they said that marriage represented a union between Christ and Church according to the analogy of St. Paul. Marriage was a state not a contract; a permanent relationship that could not be destroyed by man.

So high a view of marriage was held by the Church that a non-Christian ceremony or a purely legal one was, and still is, regarded as equally valid upon the parties concerned and should therefore be governed by the same rules.4

Thus, as the Church gained jurisdiction over matters of marriage and divorce the sacramental view had far-reaching implications.

The belief that marriage is an indelible sacrament started when the Canon lawyers attempted to translate parables and

analogies of the Bible into positive law. In the Gospel according to St. Mark, Chapt. X, v.6-12, Jesus is said to prohibit divorce. Unfortunately, the gospels are not consistent and "in Mathew V, v.32 and Mathew VI, v.9, Jesus is said to qualify his prohibitions of divorce in the case of fornication but prohibit remarriage because the sacrament is indelible 'for God never dies'." It is the general opinion of scholars that the qualification was added after Jesus' death although early in the history of the Christian church. There are two opinions why this qualification was added. One group says it is because the Jews to whom Jesus was talking believed adultery or fornication meant automatically a marriage was dissolved. The other group believes that the early Church recognized some form of divorce was needed and added the qualification believing it was not inconsistent with Jesus' teaching. Furthermore, the interpretation of fornication or adultery differs today within different religious groups. Some believe it was mentioned as an example, others that it allows divorce on one ground only. Hence we see the strong religious feelings associated in modern society with divorce reform.

The Canon lawyers, it appears, concluded that the scriptures mean that a marriage cannot be erased as it is a union created by God not man. They did, however, consider Mathew XIX, v. 11 and 12, where Jesus contemplates that all men cannot receive His doctrines and suggests that human needs must be taken into consideration. This was interpreted by the Church to mean that a judicial separation was permissible. Hence, judicial separation was granted on grounds of adultery (either physical or "spiritual" - "spiritual adultery" meaning one of the marriage partners leaving the Roman Catholic faith or preventing the other partner from practicing it), or if one partner wished to take religious vows. Remarriage on the part of either partner was not permitted due to the sacramental nature of marriage. The concept of fault then developed when judicial separations were not granted unless one party was guilty and the other innocent. "A judicial separation became a punishment for the guilty and a reward for the innocent." 

Later, when the Church had more power the grounds for divorce grew. By the 10th century two types of "divorce" existed: annulment and separation. The grounds were then extended to include cruelty and desertion. By the 12th century the church

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had undisputed jurisdiction over divorce and their courts were administered by Canon law. Common law courts were involved in so far as they determined property rights and thus frequently had to determine if there had been a marriage or not. It was here the defences of collusion, connivance and condonation developed as it was an established principle that one had to come to court "with clean hands". These absolute defences are incorporated into our present laws while the discretionary bars of adultery on the part of the plaintiff, delay, cruelty, desertion and conduct conducing developed as an offshoot of the great discretionary powers held by the ecclesiastical officials in their courts.

As time went on the Ecclesiastical courts gained more power and their jurisdiction spread. This was the result of "the astounding movement in the thirteenth century by which the church remodeled all the ideals and institutions of the age and integrated all social interests into a system of which it made itself the center and controlling authority."\(^7\) Marriage outside the Church had been referred to as a common law marriage and was considered valid but illegal by the Church in the sense that a valid marriage existed but that ecclesiastical restrictions were imposed upon

the parties since the church had not blessed the union. In 1563 the Council of Trent maintained all marriages were "void for both civil and ecclesiastical purposes if they were not celebrated in the presence of witnesses and a representative of the Church."\(^8\) They thus denied jurisdiction of the common law courts and although this was not made law, it led to conflict. Furthermore, the Church, now growing corrupt, began to enlarge the grounds for annulment until it became possible for any man (but not woman) to secure a "divorce" if he could spare the money for the cost of a dispensation. "Divorce which could only be obtained through crime and disgrace, was treated as itself criminal and disgraceful in all cases, and this tradition is still firmly embedded in law and certain sectors of public opinion."\(^9\) The Church position was formalized in Canon law and annulment was made only by formal decree. Legal regulation of marriage was in effect.

The period of the Reformation grew in response to the corrupt power of the ecclesiastics. It was basically "a religious movement opposed to the centralization of ecclesiastical power in the Pope in Rome."\(^10\) According to S. B. Kitchin,\(^11\) the


\(^10\) H.I. Clarke, p. 51.

\(^11\) S.B. Kitchin.
effect of the Reformation upon the Canon law was very slight:

Dogma succeeded dogma and the divine right of Kings under the influence of the Reformed ministers was substituted for that of the Pope. All that the Reformation achieved was, by splitting up the power of the Churches and making religious toleration possible at a future time, gradually to secularize marriage and divorce.12

Luther in particular was responsible for abandoning the concept that marriage is a sacrament and in so doing paved the way to transfer jurisdiction to civil courts. It was during the Reformation that ideas changed but it was many years before legislation caught up.

Henry VIII's demand for a divorce in this era was the impetus that led to England's revolt from the Roman Catholic church. Henry was unable to get a divorce in the Ecclesiastical courts but obtained one in the civil courts. Shortly thereafter, parliament threw off all papal jurisdiction over England by legislating the obedience of the clergy to the King. Henry tried to press for other liberalizing reforms during his time but died before they were passed in parliament. He was attempting through "The Reform of Ecclesiastical Laws" to extend the grounds for divorce to include adultery, desertion, cruelty, absence, and deadly hatred between spouses. In accordance with the fault

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12S.B. Kitchin, p. 122.
theory the innocent party would be free to remarry while the guilty party would be subject to penalties. These reforms did not become law and a state of chaos in divorce legislation continued for some time.

The struggle between ideologies propounding the sacramental versus contractual theories of marriage continued. Reformers began to direct their attacks not only against the character of marriage but against the ecclesiastical jurisdiction in matrimonial affairs on the ground that they were purely temporal matters. During the protectorship of Oliver Cromwell, the doctrines of the Reformation were partly incorporated into legislation with the passage of the Civil Marriage Act of 1653 which made a civil marriage ceremony obligatory for all. However, in 1661 King Charles was restored, the Act repealed and not re-enacted until the mid-1700's.

Divorce from the late 1600's up until 1857 was handled in parliament. A man first had to obtain a decree of judicial separation from the ecclesiastical courts, a judgment for damages from the Common Law courts and "then armed with these judgments the petitioner could go to parliament and ask for a bill of divorce." 13 In practice, this arrangement was not open to women

nor to the poor for it was most expensive. Interestingly, this institution of executive divorce by the sovereign became the basis for that practice of divorce by the legislature which still survives in Canada for the Provinces of Quebec and Newfoundland.

Gradually, legislation in England was inspired by the philosophy of enlightenment and individualism "which grew up from the 16th century to find its classical expression in the 18th century through the works of Locke, Kant, and others."¹⁴ A belief in the inalienable right of individuals to the pursuit of happiness encouraged the principle that marriage was a civil contract that could be dissolved. Thus, in 1753, the Harwicke Act was passed and gave expression to the formalities of the contract theory. It states in part:

that all marriages except those of Quakers, Jews and members of the royal family were to be solemnized only after publication of banns on the securing of a license and a ceremony performed in an Anglican church by Anglican clergy in the presence of two or more witnesses.¹⁵

And in 1836 a bill permitting civil marriage for those unwilling to accept established rites eliminated the Anglican bias of the first bill. Together these acts constitute our present laws on marriage and exemplify the principle of formal, public marriage.

¹⁴ M. Rheinstein, p. 12.
¹⁵ H. I. Clarke, p. 57.
contracts.

In 1857, the English Divorce and Matrimonial Causes Act was passed and since British Columbia adopted the law of England as of November 19th, 1858, further British developments are of little interest except in so far as they illustrate a trend toward more liberal laws whereas in Canada no such development has taken place. The law of 1857 was passed after much opposition in parliament on religious grounds. The Act transferred divorce and matrimonial jurisdiction to an entirely new Civil court - "The Court for Divorce and Matrimonial Causes." This court could grant divorce for the husband if his wife was guilty of adultery after marriage and for the wife upon proving adultery after marriage coupled with certain other specified matrimonial offences on the part of her husband. It provided for remarriage of either party after a divorce although there would be no compulsion on churches to perform a second marriage. Furthermore, provision was made for judicial separations on grounds of adultery, cruelty, or two years' desertion. In 1925, the Canadian Parliament enacted the Marriage and Divorce Act which provided that adultery alone was a sufficient ground for a wife to be granted divorce. The wife could sue on the old ecclesiastical grounds of sodomy and bestiality, as well.

Petitions were to be heard by three judges and this led to a curious results when the law was adopted by British Columbia. Provision was made in the Act for an appeal from these three judges
to the House of Lords. However, in British Columbia the powers afforded the three judges were granted to a single judge and no provision was made for an appeal. Since an appeal cannot exist apart from express enactment it was held prior to 1937 that there was no appeal. In 1937 an Act was passed giving the right of appeal.

The Divorce and Matrimonial Causes Act of 1857 continued the absolute bars of collusion, connivance and condonation, derived from principles of the early Common Law courts. Also included were discretionary bars such as adultery on the part of the petitioner, unreasonable delay in presenting the petition, cruelty of the petitioner towards the other party to the marriage, desertion prior to the adultery, and wilful neglect or misconduct as conduced to adultery. The broad discretion of the court, derived from the powerful Ecclesiastical courts, has resulted in changes in judicial attitudes during the present century to take into account the welfare of both parties, of third parties, and of society as a whole.

The Act of 1857 also gave power to the court to make orders as to the custody of children "as it may deem just and

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16 Brown vs. Brown (1909), 14 B.C.R. 142
There is, however, no obligation on the part of the court to make such orders. We would wonder what effect such vague legislation has on the welfare of children.

When the 1857 law was adopted by British Columbia it was subject to any relevant modifications made by the Dominion Parliament or Provincial Legislatures within their respective jurisdictions. Practically the only modification, according to Cartwright, is the Dominion Act of 1925 allowing marriage with a deceased wife's sister or a deceased husband's brother and abolishing the double standard in respect of matrimonial offences.

By the B.N.A. Act (Sections 91-92), the subject of "Marriage and Divorce" is within the purview of the Parliament of Canada; that of the "Solemnization of Marriage" in the province is within the purview of the provincial legislatures. Thus, because the Federal government did not pass a general Divorce Act, the laws which were in force in the various provinces at the time they entered Confederation have been allowed to remain with the result that each province is somewhat like a separate country in respect to divorce legislation. An exception here is Ontario. In the view of some, "it is preposterous

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19 See Appendix I.

that legislation in British Columbia should any longer stagnate at the level reached by England in 1857 especially in view of the fact that the reform then achieved was seen by men of vision to be woefully inadequate."^21

In the chapters to follow, an attempt will be made to examine present legislation and incumbent social problems within the areas of procedure, grounds, domicile, and children of the marriage. Summarizing the historical view of divorce legislation can, we believe, point out broad areas where one might expect to meet with problems.

First, we would suggest that the continued utilization of a law made in 1857 for use in British Columbia in 1966 is likely to create difficulties to the extent that the social reality for which it was adopted no longer pertains. J. P. Lichtenberger notes in relation to the influence of religious belief on the Act that:

> throughout the entire course of history religion has been one of the strong and determining factors in human conduct. Beliefs which have obtained the reinforcement of religious sanction have exerted a controlling influence in individual action, and social customs, which have been invested with a religious nature, have been determinative in social conduct.^22

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Generally, religion has been a strong conservative force and certainly was in 1857 when the Act in question was passed.

However, in recent times the restraints of religious influence have been somewhat modified. The Age of Reason has replaced the Age of Dogma, divorce rates have climbed due to the nature of modern social and intellectual life. Women, no longer, for example, are accepting an inferior status to men. Thus, principles such as the principle that a married woman is incapable of acquiring a domicile independent from that of her husband are intellectually hard to justify when women no longer are chattels. And when this principle is applied to a social system where high rates of mobility are accepted, the law is not only hard to justify but hard to utilize. This is only one example then of the problems created by transplanting laws into different social systems.

A third reason why religious conservatism is being modified is that ethical concepts are being revised. When the Act of 1857 was passed the impact of liberalism was nowhere as great as it is today while religious sanctions were stronger. Today people tend to believe that marriage was made for man and not man for marriage. The moral value of marriage is seen as consisting in the mutual happiness secured by those who enter into it and, in general, there are higher expectations of domestic
happiness. Thus, when we combine this with the increase in general education and the advances in psychiatric and psychological learning that are leading people to the belief that human relationships involve participation and responsibility on the part of both parties involved, people are seeing divorce as a "right" should they be unhappy and are rejecting the idea that any one person is entirely to blame should unhappiness occur. Hence, when we place the Act of 1857 into this new and changing ethical framework we would expect to discover more problems. The principle of the matrimonial offence is no longer acceptable to large groups of people and does not stand up to critical scrutiny. Nonetheless, "the professional judiciary cling resolutely to the idea of divorce as necessarily involving a triable issue of right and wrong, of guilt and innocence." This principle seems highly incompatible with that of joint responsibility for marital breakdown and the grounds of adultery are now seen by many as the symptom not cause of a breakdown in relationship.

If, then, on the one hand we have large groups of people involved in a social reality which involves the breakdown of

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marriages from which the parties feel justified in escaping, yet, on the other hand they are governed by an adversary system of law with very limited grounds for securing divorce, one would expect to find a discrepancy between the strict laws and actual practice as reflected in more or less generally indulged in collusive practices. Furthermore, an adversary system presupposes that the defendant should prevent the plaintiff from succeeding by bringing out the true facts and insisting on the best legal construction of these facts. Where this does not hold true, as in the case of undefended divorce actions, the rationale for the adversary system is undermined with a further lessening of respect for the laws in question.

In the following chapters a more thorough examination in the areas of procedures, grounds, domicile, and children of the marriage will take place. An attempt will be made in more detail to relate the divorce legislation and practices in British Columbia to social reality and point up and define specific problems arising. After examining divorce from an historical point of view hopefully the origins, both social and religious, of attitudes, customs, and laws still affecting divorce legislation will be more apparent. When aware of historical reasons for their existence, one is in a better position to say whether such reasons are obsolete or not in British Columbia, 1966.
CHAPTER II
DIVORCE PROCEDURE

In British Columbia, the Divorce and Matrimonial Causes Act\(^1\) is the substantive legislation that determines the eligibility of a person to institute a divorce action. Order 60 of the British Columbia Supreme Court Rules applicable to Divorce and Matrimonial Causes\(^2\) lays down the steps that must be gone through to obtain the divorce. Copies of both have been attached as Appendix I and Appendix II respectively.

**Adversary Nature of Proceeding**

It will be noted that in the divorce rules, section 2 clearly states the adversary nature of the proceeding. Action is started by a writ of summons covering an intended action between a "plaintiff" and a "defendant".\(^3\) Section 4(a) of the rules further enlarges on the fault theory of the proceeding by stating that every party with whom adultery is alleged must be

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\(^1\) *The Divorce and Matrimonial Causes Act*, R.S.B.C., 1960, ch. 118.

\(^2\) Order 60 of the British Columbia Supreme Court Rules applicable to Divorce and Matrimonial Causes.

\(^3\) *The Divorce Rules*, Rule 2.
made a co-defendant in the suit. If the adulterer is unknown, the judge may allow the issuing of the writ without adding a co-defendant. However, he must be satisfied all reasonable efforts were made to identify the adulterer and may specify that the plaintiff continue to search for the co-defendant's identity and amend his writ if such person is found.

Besides being an adversary proceeding, divorce is a civil action in Canada. This means that the defendant is not obliged to attend the hearing or to defend the action. The judge is bound to decide the case within the traditional framework of evidence presented and heard. The contents of the statement of claim define the limits of the issues to be dealt with. Besides the points covered, the judge has no obligation to ask other questions around the breakup of the marriage. In cases where discretion is asked by reason of the plaintiff's adultery, the judge may direct some questions to the plaintiff but this is a rare occurrence. As the vast majority of divorce cases are undefended and the trial conducted without the defendant present,

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4 The Divorce Rules, Rules 4(a)-5(1).
5 Ibid., Rule 5(3).
one can see that the "innocent" plaintiff's story has a good chance of being accepted without being challenged.

Although most judges and lawyers are well aware that a marriage breaks down usually because of the interaction of two people, rather than the fault of one, the system of hearing divorce cases negates this fact. Wives or husbands wishing to free themselves of a marriage grown burdensome, may present to the courts a picture of their own purity and their spouses' venality and no attempt is made to help both parties face their responsibilities in the marital breakdown.

Although the "fault" system of trial is carefully set up to prevent "divorce by mutual consent", its practical application in undefended cases makes "divorce by mutual consent" very likely. The present laws encourage only purported compliance with them. 7 The restrictive nature of the law is further justified as necessary for making people stick to their marriage and thus preserving its sanctity. However, as one expert has said, divorce is not a disease but a cure for a disease. 8 In its present form it is a cure that does not permit the parties or the community to take a mature look at what has caused the breakdown.

7 J. D. Payne, p. 27.
8 Ibid., p. 28.
**Statement of Claim**

The rules, after having established the adversary nature of the proceedings, set out the items that must be contained in the statement of claim. It is on this statement, together with any statement of defense, that might be submitted, that the trial is based.

The statement of claim, among other things, sets forth the date and the place of the marriage, the domicile of the husband, the names of the children of the marriage, and other proceedings instituted with respect to this marriage. The matrimonial offense must be stated and co-defendant named. If the plaintiff wishes to claim custody of the children, alimony, or maintenance, the facts on which such claims are based must be set forth. Any separation agreement or financial arrangements between the couple must be specified. The statement of claim ends with a paragraph requesting dissolution of the marriage, together with any other relief claimed such as: claim for custody of the children; claim for interim alimony or maintenance; or permanent alimony or maintenance; claim for damages or costs; and any request that the court exercise its discretion for the plaintiff.

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9. *The Divorce Rules*, Rule 11(1) and (2).
The statement of claim must be supported by the plaintiff's affidavit verifying the truth of the facts alleged. The plaintiff also states in his or her affidavit that no collusion or connivance has occurred. In the event that the plaintiff has committed adultery, grounds on which the discretion of the court is to be asked are placed in a sealed envelope and given to the judge. It is open to his inspection and the inspection of the Attorney-General, but no one else unless the judge so orders.  

The statement of claim must be delivered to the defendant personally and any amendments must also be delivered. The defendant may file a counterclaim. The form of the trial, usually by one judge, is set down in rules 18-21. Rules 22-25 permit the Attorney-General to intervene at any stage of the proceedings to show fraud or collusion. Rules 26-28 pertain to mentally ill and infant parties. Rules 29-30 deal with the recovery of the wife's costs. Rules 32-35 deal with alimony and maintenance.  

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10 The Divorce Rules, Rule 13.
11 Ibid., Rules 14-16.
12 Ibid., Rule 17.
13 Ibid., Rule 18-20.
14 Ibid., Rules 22-25.
16 Ibid., Rules 29-30.
Absolute Bars

The most difficult procedural problem for couples seeking a divorce are the absolute bars of connivance, condonation and collusion. If the judge suspects any of these, he is bound to investigate and to dismiss the suit if his suspicion proves correct. Let us examine each of these absolute bars separately.

Connivance

Connivance occurs when the adultery of one spouse is caused by or knowingly, wilfully or recklessly permitted by the other spouse as an assessor. To constitute connivance, the action must precede the adultery and the plaintiff's state of mind must be one of "corrupt intent" in promoting or encouraging the adultery.

The case of Hechter vs. Hechter and Cohen, although a Manitoba case, illustrates the court's current position on connivance. It elaborates on the foregoing definition by holding that a spouse can watch her partner and even lay a trap to catch the partner in the act of adultery provided she has reasonable grounds for suspecting the spouse of infidelity and that she

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17 The Divorce Rules, Rules 32-35.
18 J. D. Payne, p. 65.
does not desire the adultery to occur. 20

It is interesting to speculate on the results where a judicial finding of connivance is made. In these cases, one spouse has desired the other to commit adultery and placed the opportunity in his path. The tempted spouse acquiesces and divorce proceedings are commenced on the evidence so obtained. If the adulterous spouse wishes to plead connivance to "clear his name" and the conniving spouse has not committed adultery, the adulterous spouse's victory is to remain married to the conniver. Hence, the "fault" theory of divorce, declares the defending spouse "innocent" and for his reward leaves him married to the "guilty" conniving spouse - a curious result.

For a situation of this sort to arise, it is not strictly necessary for the defendant to plead connivance. Even in an undefended case, if the judge has reason to suspect connivance, it is his duty to ascertain the truth. 21 Although the nature of the proceedings of an undefended divorce makes this unlikely, it is a possibility that one seeking a divorce cannot rule out.

Condonation

W. Kent Power, in his leading treatise on divorce in Canada, defines condonation as forgiveness of adultery with a

20 Hechter vs. Hechter and Cohen, (1958) 12 D.L.R. (2d) 326.
21 Divorce and Matrimonial Causes Act, Sec. 15-16.
full knowledge of the circumstances, followed by reinstatement of the offending party to his or her former position in the home, subject to the implied condition that no further offense will occur.\textsuperscript{22} Again, as with all absolute bars, the judge is required to pursue a suspicion of condonation, even when it is not pleaded. The plaintiff is bound to disclose any facts which might yield a finding of condonation to the courts.\textsuperscript{23}

Beard vs. Beard, an English decision, followed in British Columbia, definitely establishes that condonation is conditional on the forgiven spouse's continued good behavior and that a subsequent lesser matrimonial offense can revive the condoned adultery. Such lesser offenses include cruelty, desertion, adultery, or an intent to commit adultery.\textsuperscript{24}

Thus a couple, one of whom has been guilty of adultery, must think very carefully before "trying again". The fact of adultery in a marriage usually indicates pre-existing problems. Each partner may well realize his part in the offense and wish to attempt a reconciliation. However, if for reasons short of a matrimonial offense, the couple find they cannot live together, the grounds for divorce are gone and the "innocent" spouse is

\textsuperscript{22}J. D. Payne, p. 51.
\textsuperscript{23}\textit{Ibid.}, pp. 54-55.
\textsuperscript{24}Beard vs. Beard, (1945) 2 All ER 306.
left with an empty marriage. This aspect of the law would seem to penalize the "innocent" spouse for his desire to make his marriage work and to perhaps deter some couples from attempting reconciliation. Any professional persons wishing to help the parties of the marriage work out a solution are also hamstrung by the law which makes it difficult to work towards a trial reconciliation.

Collusion

The British Columbian courts have not yet settled their position as regards what constitutes collusion. There seems to be two main trains of thought as exemplified in Dutko vs. Dutko and Johnson vs. Johnson and Arnet.

Dutko vs. Dutko, a Manitoba case, decided by Bergman, J. A., defined collusion as a corrupt agreement to which the plaintiff is party to obtain a divorce by manufactured evidence or by practicing a deceit or fraud on the courts.  

The Johnson vs. Johnson and Arnet case decided by Norris, J. in British Columbia, felt that collusion was inherent in any agreement that tended to obstruct the course of justice. Hence according to this case, any deceit, fraud, false evidence, is collusion but so is any agreement not to defend the case, even

where no defense is possible. Also an agreement to furnish evidence would be an implicit agreement not to defend and hence collusive. 26

Both judgments agree that it is an act of collusion to bargain for a divorce and that the plaintiff must desire redress for her wrongs rather than financial benefit.

The interpretation the courts give to collusion is of utmost importance to parties seeking divorce. As there is so much ambiguity surrounding collusion, the plaintiff usually reveals to the court any agreement existing which may be construed as such. Also, the judge is bound to study cases before him for signs of collusion and the Attorney-General can intervene if an agreement is brought to his attention. Hence, if parties to a divorce make a certain agreement to facilitate their divorce, e.g. the defendant supplies evidence and pays the costs, and reveal these in full to the court, they still run the risk of having the agreement declared collusive. One result of this is, of course, that agreements tend to remain private involving the parties in a process of concealment. The other effect is that parties to a divorce are fearful of discussing any matters pertaining to their action. It should be noted that the one

26Johnson vs. Johnson and Arnet, (1960) 31 WWR (NS) 403.
agreement parties are entitled by law to make is in regard to the custody of children.  

**Costs**

Rules 29 and 30 of the British Columbia Supreme Court rules pertaining to Divorce and Matrimonial Causes, state that whether the wife is the defendant or plaintiff, successful or unsuccessful, she may be awarded her costs, at the discretion of the court. The costs are usually asked for in the wife's favor. The rationale behind this rule is that no wife should be denied a divorce or a defense due to lack of funds. A judge can exercise judicial discretion and refuse costs. However, in British Columbia the wife is usually granted her costs unless the court feels that her suit or defense were farcical or where she has a private source of income. The wife can however find herself without funds to institute a divorce in cases where her lawyer wishes a deposit or where she must hire a detective to obtain proof of adultery. She can, of course, recover such costs following the court hearing.

In British Columbia, the cost of an undefended divorce is about $600. This includes the lawyer's fee which averages $400, 

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27 Equal Guardianship of Infants Act, R.S.B.C., 1960, ch. 130, sec. 11.  
28 The Divorce Rules, Rules 29-30.  
the cost of various technical details e.g. serving the defendant, of about $100, and the cost of a detective of about $100. A young lawyer might charge as little as $200 and an eminent lawyer considerably more than $400. Hence a husband in instituting a divorce must usually count on a bill of at least $500 and this bill can go well over $1500 mark.  

In British Columbia, according to one practising lawyer, Legal Aid is not normally provided for divorces as lawyers would be swamped! Legal Aid is provided in divorce cases where a qualified social worker has recommended such aid for the benefit of the infant children of the marriage or when a doctor has recommended aid on the grounds that the health of the applicant is endangered by continuing matrimonial problems. Legal Aid is also not rendered in divorce proceedings where a lesser remedy, such as judicial separation, will suffice. Legal Aid has been rendered to obtain divorces in cases of incest and brutality to the children.

These figures would seem to indicate that only a person with a steady, reliable job and not too many family responsibilities would stand a fair chance of formally ending his marriage.

The Hearing

On Fridays, between 11 and 1 o'clock, the Supreme Court of British Columbia hears undefended divorce actions. One of the authors attended one such session, and the following are her impressions of the hearing.

One walks into the court room; the officials are at the front and there are seats for spectators at the back. The judge is dressed in robes as are the lawyers. The court is called to order and the plaintiff is sworn in, asked his name, and his lawyer asks permission to lead the witness through the preliminary parts of the statement of claim. This is usually granted. A picture of the defendant is shown to the plaintiff to verify that the correct person was served with the writ and statement of claim. Domicile is established, the welfare of the children is asked after. The lawyer asks the plaintiff if she has connived at the adultery of the defendant or entered into a collusive bargain with him. The lawyer also asks the plaintiff, although it is not required in the rules, if she has condoned the adultery. Costs are asked for.

The matrimonial offense on which the divorce is granted is then proven. In one case, the birth of a child to the defendant, of which the plaintiff could not possibly be the father, was accepted as proof. In other cases, private investigators
were called. In one case, the testimony was as follows: Two investigators were watching the defendant’s apartment. At 2:45 the lights went out and at 3:15, the investigators knocked. A man answered the door dressed in his trousers only. The detectives identified themselves, and asked for the defendant wife. It was discovered that she was in bed and the detectives left. The defendant and co-defendant were identified in court by pictures. The procedure made the author feel uncomfortable as when listening to a not very funny dirty joke. The plaintiff looked uneasy and deeply embarrassed.

After this the judge may ask some questions about the children or alimony. The marriage is then dissolved.

The entire procedure lasts approximately ten minutes. The attitude in the court room is predominantly one of boredom. Court officials move about, the lawyer goes through his questions quickly, the judge does not inquire into anything except the occasional legal detail. The plaintiff, although nervous, has the air of one going through a necessary ritual. In one case, the male plaintiff’s voice broke and he needed a few seconds to recover himself, the attitude of the court was one of surprise and distaste - imagine having the bad taste to cry about a divorce! Generally one felt that the court and the parties wanted an unpleasant and embarrassing episode over with as quickly as possible. There was never any hint that anyone wished to
examine what had really caused the marriage to fail.

Hence in this province, the divorce laws and rules, carefully structured to prevent divorce by mutual consent and to punish the guilty spouse, are failing in their avowed purpose. The general practice of undefended actions make divorce by consent, or at least indifference, the rule. Where the law is invoked and connivance or condonation is found, it is the "innocent" spouse who is punished by being forced to continue in the marriage. The state of the law on collusion is such that many people, wisely, keep any agreements very private.

In a healthy society, the distance between the formal law of the country and what the population considers just is slight. As the law becomes further and further removed from the social realities, more and more ways are found to circumvent it. The divorce laws in Canada are frequently circumvented. In fact, it would appear that if a couple has money and are not open about their private communications, a divorce is assured. This widespread disrespect of one law, often the only one which "respectable" citizens or their friends come in contact with, can only taint our other laws. The divorce laws of Canada do not merely need an extension of the grounds on which divorce can be obtained, they need revision which allows the couple and the community to maturely study the reasons for the marital breakdown, to explore
the chances of reconciliation, and where impossible to make the necessary arrangements with as little disruption to the couple, their children and the community as possible.
CHAPTER III

GROUNDS FOR DIVORCE

Marriage is a legislated social institution which places a man and woman under legal and social obligations to each other and to society. It would seem that the formal dissolution of the marital bond in any society must be a corollary of the theory and practice of marriage, and that a direct relation exist in the law between these two aspects - marriage and divorce - of the same institution. Due mainly to the empirical character of the law, however, there is no general secular legal doctrine of marriage or a clear statement of its nature, aims, and purposes.¹ This lack makes the ideal of formulating a divorce law which would bear some congruence to our marriage law virtually impossible.

In practice, the basis for contracting marriage is voluntary choice and affection. We regard this, in fact, as the only justifiable grounds for entering into marriage. Yet while the law accepts these conditions as valid grounds for entering into marriage, it does not accept the absence of these conditions as

valid grounds for its discontinuance.²

On the matter of divorce grounds in general, there are few branches of law upon which public opinion is so sharply and widely divided, ranging from the belief that marriage is indissoluble except by death to the advocating of divorce by mutual consent. Our present legal philosophy is based on the doctrine of the matrimonial offense and principle of guilt which was adopted by the church to grant a divorce to the "innocent" party as a sanction for an offense committed by the other party in violation of the marriage contract.³ According to the current law in British Columbia, the primary matrimonial offense which justifies the dissolution of a marriage is that of adultery. (While rape, sodomy, and bestiality are additional grounds, they are apparently seldom used and have received relatively little attention as issues in divorce.)

Even if we accept the principle of the matrimonial offense, in the light of current psychological and sociological data (which our law has managed to ignore entirely), it would be very difficult to assert that most marriages suffer irreparable breakdown as a result of a single act or event.⁴ It is not the

³Lasok, p. 307.
⁴Ibid., p. 318.
purpose of this section to deliberate on the question of which comes first, the marital breakdown or the "offense", nor to consider the more current view that it is a multiplicity of factors which must be operative in order to render married life intolerable. Our law does, in fact, maintain the doctrine of the matrimonial offense, and adheres to the belief that this offense must be in the form of adultery.

The question must be asked as to whether or not there are more cogent causes than a single act of adultery for releasing a spouse from the marriage contract. It does not require much imagination or experience to be aware of the various situations which can be allowed to exist under our present law. The cruelty in a marriage can be so great that the mental and physical health of the spouses or children breaks, yet the law does not consider this sufficient grounds to grant release from the situation to the parties involved. An individual may find himself or herself bound in a marriage to someone who is so mentally ill as to require indefinite confinement; yet even though all the personal and social functions of marriage have ceased to exist, the legal tie must be maintained. In the case of desertion, a man or woman may remain away from his or her spouse forever, and still the deserted party is unable to re-marry or make a new life for himself. The individuals in these and innumerable other not uncommon and equally tragic situations
are denied the right to free themselves from their marriages. As a result, people are often forced into illegal common-law relationships because they are unable to contract legal ones.5

W. Kent Power has stated that the opinion of the majority of Canadians in the English-speaking provinces is that "... while marriage is of public concern and its sanctity should be strictly safeguarded by law, our present laws are out of touch with the conditions of modern life and should be changed by enlarging the grounds on which divorces are obtainable."6

The fundamental principles of our divorce law at present, as implied and adhered to by the decisions of the courts, are that we do not recognize divorce by consent, that marriage and divorce concern not only the parties involved but the public as well, and that it is in the public interest that the sanctity and importance of the marriage relationship should be maintained and protected. It is this last point which seems to be open to the greatest amount of questioning and criticism when viewed against the background of current social realities. Not only does it raise the very vital issue of public interest versus individual interest, but also the important question of how the


public interest is served by forcing the maintenance of a demoralizing relationship and disintegrated marriage. A decision handed down by the Supreme Court of Poland bears relevance to this point; in this particular case, it was stated that divorce is a necessary evil which was introduced for the public good in order to eliminate another social evil, namely the continuation of a formal matrimonial union in spite of the fact that the unity had disintegrated. A further statement by a "learned commentator" agrees that while matrimonial law is dominated by a paramount public interest, "... public opinion has long since recognized that there may be a public interest in the non-existence or in the discontinuance of a marriage as well."  

Although a large proportion of Canadians may believe that the present divorce grounds are inadequate and antiquated, yet they tolerate or even encourage a purported compliance with them when what they regard as real grounds for freeing the parties exist. Under the law as it stands at present, people who seek freedom from marriages which may be damaging to all concerned are forced to "construct" and "prove" adultery; it has,

7 Lasok, p. 298.
8 Power, p. 29.
9 Ibid., p. 27.
in fact, been asserted that the law itself has produced such abuses as dishonest detectives, professional co-respondents, and other legal practices which "... wink at the true state of affairs and bring the courts into disrepute."^10

If the individuals involved can afford the expense of doing so, it does not appear to be very difficult to "arrange" a case of adultery. It is safe to say that people not infrequently get divorces on the grounds of adultery which has never taken place or, if it has, which is not the "reason" for the divorce at all. Persons who are determined to end their marriages to each other will do so if they can afford the financial cost of proving adultery. And this is where the law lends itself to corruption and forces desperate people to engage in humiliating, degrading and dishonest behavior. Power goes so far as to say that collusion and other such illegal practices might actually disappear if the law were changed to prevent a single act of adultery being relied on as the cause of a divorce action.^11

In the final analysis, the gravest problem seems to be one of principle. Divorces can in fact be obtained on the grounds of adultery, real or contrived, but in the process the

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^10 Christie, loc. cit.
^11 Power, p. 27.
parties involved, the legal profession, and therefore society as a whole must suffer. A situation in which the rules of law are so grossly out of harmony with the beliefs and practices of the people which they are supposed to serve cannot in any way contribute toward the development of a healthy society.

There are several related legal factors with social implications which affect the granting of a divorce decree. One such matter is that of discretionary bars. When an individual undertakes divorce proceedings against his or her spouse, even though his case has been proved and the court has not found an absolute bar, it is not bound to grant a decree for divorce if it finds a discretionary bar exists, as specified in Section 16 of the Divorce and Matrimonial Causes Act. These discretionary bars are that the plaintiff himself has been guilty of: (1) adultery during the marriage; (2) unreasonable delay in presenting or prosecuting the petition; (3) cruelty; (4) desertion without reasonable cause; or (5) wilful neglect or misconduct which conduced to the adultery. 12

Where a discretionary bar arises, the law imposes on judges the duty of exercising a judicial discretion, but does not lay down any definitive rule upon which the discretion is to

12 Divorce and Matrimonial Causes Act, R.S.B.C., 1960, Ch. 118, Sec. 16.
be based. Apparently the decisions made must be based on consideration of the facts of each particular case, and a
decision on no one case can be an authority for another. This lack of definition seems to leave much room for flexibility and variation, but at the same time poses the question as to how much the individual opinions of judges enter into their decisions. Certainly those sitting on the bench represent all points along the continuum of views on divorce. A judge strongly opposed to the dissolution of marriage may well give more narrow interpretation to his discretionary power and be more apt to discover a discretionary bar than one who entertains a more liberal viewpoint. Because of the fuzziness of the law regarding discretion, it would be difficult to determine what factors weighed most heavily in producing the final decision in a particular case. Regardless of their individual opinions, however, it is the duty of judges to apply the law as they find it, and they are bound to give effect to its provisions to the best of their ability.

The discretionary bar which has received the most attention both in practice and in the literature, is that of adultery. According to Section 16 of the Divorce and Matrimonial Causes Act, "... the court is not bound to pronounce such (divorce) decree if it finds that the petitioner has during the marriage
been guilty of adultery. . . " Where the plaintiff is found guilty, Section 16 requires the court to decide whether or not to exercise discretion in his favor - that is, whether or not to grant the decree.

The principle that appears to be operating here is again that of guilt versus blamelessness. The doctrine requires that the plaintiff come into court with "clean hands" in regard to the current proceedings. As a result, he must disclose in full the details of his own adultery to his lawyer. This information is sealed in an envelope and inspected by the presiding judge when the case is opened. The plaintiff thereby places himself at the mercy of the court by confessing his own guilt and begging for leniency by asking that discretion be exercised in his favor.

There is no statement in the law which makes it mandatory for the plaintiff to disclose to the court his own adultery. The practice of discretion originated in the idea that if the plaintiff's own misconduct was likely to be brought to the attention of the court, there was more likelihood of favorable treatment for him if he himself disclosed it and sought favorable judgement.14 Whereas it is supposed to be the knowledge of the

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plaintiff's misconduct which gives rise to the exercising of discretion and not his disclosure of it, in actual practice, however, disclosure seems to be a practical necessity, as evidenced by the refusal of decrees which would otherwise have been granted due to discovery of the plaintiff's adultery. Yet adhering to even a strict interpretation of the law, the fact remains that the plaintiff should suffer no prejudice from non-disclosure, since he has no duty to make such a disclosure.

It appears to no longer be the exception that discretionary power is exercised in favor of the plaintiff. The changing social conditions in British Columbia and Canada have been reflected by more extensive exercise of judicial discretion in favor of the plaintiff than was formerly accorded. The judgment of the House of Lords in Blunt vs. Blunt, which has been consistently followed and applied by Canadian courts, established the circumstances which warrant exercise of discretion in the plaintiff's favor. Perhaps the one most important "circumstance" which has allowed the courts to exercise favorable discretion where formerly the decree would have been refused is the stated need to consider the interest of the community at large, "... to be judged by maintaining a true balance between

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15 Herbert, loc. cit.
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." 17

Justification for this current trend in the practice of exercising discretion seems to lie in the court's apparent belief that when a case requiring a discretionary decision comes before it, the marriage in question must be in such a state of disrepair that it would be in the best interests of all concerned to dissolve it. Yet again, the problem seems primarily to be one of principle. If one spouse commits adultery, the other can obtain a divorce, provided he can prove the adultery. If both commit adultery, one spouse must accuse the other first and beg for mercy for himself in order for the divorce to be obtained. This discretionary bar may in fact be a beneficial and valuable provision, as it can allow the dissolution of a marriage which has broken down; but sanctioning an individual to obtain a divorce on the grounds of his spouse committing an "offense" of which he himself is also guilty makes a mockery of the law and of the whole concept of marriage as well.

There are certain features of the law with regard to evidence and proof of adultery which deserve mention and consideration.

17 Power, p. 103.
To begin with, the burden is on the plaintiff to prove adultery, not on the defendant to disprove it.\(^{18}\) The standard of proof required to prove adultery was established by the case of Smith vs. Smith and Smedman, 1952, in which "... the Supreme Court of Canada held, so far as British Columbia is concerned, that the standard of proof required to prove adultery in a divorce action, where the legitimacy of offspring is not in question, is the civil standard of proof by preponderance of evidence rather than the criminal standard of proof beyond a reasonable doubt."\(^{19}\) However, "... a plaintiff who seeks a decree of divorce on evidence which, if accepted, will bastardize a child born during the subsistence of the marriage, must prove adultery beyond reasonable doubt. ...",\(^{20}\) which is the criminal standard of proof. In the opinion of the authors, the problem which arises here is that the question of illegitimacy is merely one of the matters which should affect the seriousness of the issues and should therefore receive due consideration by the courts but not the actual standard of proof required, which should still be the civil one of preponderance of evidence.

\(^{18}\) Power, p. 421.


\(^{20}\) Power, p. 427.
It is almost never possible to adduce direct evidence of adultery; it is usually circumstantial, and therefore must be sufficient to convince the court that it should infer that adultery occurred. It is also impossible to lay down any general rule defining the circumstances which are sufficient to justify a finding of adultery, "... except that the circumstances must be such as lead by fair and reasonable inference to that conclusion."22

Here again we find a double standard to exist: the petitioner for divorce is protected against questions as to his or her adultery, but the respondent is not.23 The haziness surrounding the issue of evidence is compounded by the use of vague and undefinable terms. Even though the charges of adultery are not denied, the court must be "... 'satisfied' on the evidence that the case of the petitioner has been proved..."24 The testimony of a single witness, even if it is an uncorroborated statement by the petitioner, is sufficient if it is "convincing". Admissions of guilt by the defendant are sufficient if they are deemed to be "trustworthy," but it has been found in practice that such admissions are looked upon with suspicion and zealously

21 Power, p. 427.
22 Ibid.
23 Ibid., p. 686.
24 Divorce and Matrimonial Causes Act, Sec. 16.
scrutinized for evidence of collusion, etc.⁵⁵ Whereas "hotel evidence" has been refused as sufficient by the courts in recent years, the uncorroborated evidence of private detectives is still admissible.⁵⁶ Proof of inclination, opportunity and association is not sufficient to prove that adultery has occurred, which seems to be a wise provision; for familiarities which would justify suspicion in certain environments are of little significance in other circles. In all, however, the rules regarding evidence are relatively vague and undefined, and seem to demand subjective decisions and value judgments.

In reviewing our laws regarding grounds for divorce, it is impossible to remain unimpressed with their glaring deficiencies and harmful elements. It has always been stated, at least in theory, that the purpose of laws is to enable people to govern themselves while at the same time protecting their best interests. Our current legal practices regarding divorce grounds are not enabling. In principle and in practice, the law is at odds with the social conditions of the times. It not only fails to reflect current beliefs and practices, but seems to present itself as a foe to those whom it would serve, foster the

⁵⁵ Power, p. 432.
⁵⁶ Ibid., pp. 443, 451.
very social and legal decay it is supposed to prevent, and generally lends itself to discredit. Under these circumstances it is very difficult to maintain a high regard for the sanctity of the law. The problem has been stated by one lawyer as follows: "No one is more painfully conscious than the legal profession of the utter imbecility of our present divorce procedure and the pernicious and almost wicked philosophy upon which it is based. Every honest lawyer is ashamed of the atmosphere of hypocrisy and lies in which he usually must handle a divorce case; every conscientious judge is bitter about his impotence under existing limitations and restrictions."  

If the law is to serve a truly useful purpose by attempting to protect the institution of marriage and the best interests of society, then it must aim to make and keep marriages that are socially useful and to provide methods of dissolution when continuance of the marriage is demoralizing to the partners. "The permanency of marriage does not rest on the external power of church or state; it endures because of its own intrinsic character. To compel people to remain married due to archaic religious beliefs and anachronistic statutes is as abhorrent as slavery. Divorce can be a healthy method of adjustment when marriage is

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The following statement delivered in conjunction with a divorce decision sums up many aspects of the current situation quite well:

People do make mistakes in marriage and discover too late that they cannot live together, and so separate. Under the law as it is at present, such persons cannot be divorced and given a chance to start over again upon a respectable basis unless one of the spouses commits adultery which, by some means, not only comes to the notice of the other spouse, but actual evidence of which also comes into the hands of the other spouse; or unless they manufacture a set of circumstances upon which the Court is asked to find that adultery has taken place. This means that respectable persons who neither commit adultery nor perpetuate a fraud upon the Court are without relief. The law gives relief to persons when one spouse commits adultery and engages in fraud. Is this in the national interest? . . . To make an isolated act of adultery the sole and only cause for divorce is wrong in principle and vicious in practice. It is time that the whole matter was considered by the responsible legislative authority. The sham which takes place in the courts in many of these matters should be put an end to.  

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28 Clarke, p. 150

29 Power, p. 31.
CHAPTER IV

DOMICILE

The third aspect of the present divorce legislation and practice in British Columbia, the social effects of which might arouse concern, is the concept of "domicile". This is not directly attributable to the divorce legislation itself, but arises out of the decisions determining whether or not a court has jurisdiction over the litigants applying for its service back through centuries of common law. There is no Canada-wide domicile, instead a person's domicile is located in a specific province.

The rules for determining domicile in divorce actions and other matrimonial causes do not differ from those applied in respect to other matters where a man's civil status is involved; and it may be that there are cases dealing with wills or other branches of the law in which the facts as to domicile are closely similar to, or even identical with, those in question in a divorce suit.1

It is not peculiar even to Canada.

Likewise there is not in respect to divorce, domicile at large in the United States of America; each state is a separate jurisdiction, or in the United Kingdom; England, Scotland, Northern Ireland, and Eire being separate 'countries'; as are also the cantons of Switzerland.2


2Ibid., p. 385.
The effect of the "domicile" rule can have unfortunate social results with regard to divorce proceedings because of a combination of factors. First, the wife's domicile (following the early social customs which made a woman, in effect, part of the husband's property) cannot differ from that of her husband. Thus, in England and the Canadian common law provinces, the domicile of a married woman is always that of her husband as long as a valid marriage subsists. In fact "this unity of domicile is created by operation of law even where the marriage is voidable" and "the identity of the domicile of a wife with that of her husband is not founded on any duty of cohabitation but is a consequence of the union between husband and wife brought about by the marriage tie. It is conclusively presumed, and the wife has no capacity to acquire independent domicile."

Secondly, the development of Britain as an expanding nation during the fifteenth to eighteenth centuries, combined with the development of the colonies (and, to a degree, Britain) during the seventeenth to nineteenth centuries as a refuge for the religiously or politically heretical of other nations, has prevented "domicile" from being simply considered a mere matter of birth or residence. Thus, "a person's domicile is entirely

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3Power, p. 387.
4Ibid.
5Ibid., p. 388.
distinct from, and in no way dependent upon, his nationality; it concerns his civil status not his political allegiance."\(^6\)

A person's domicile is either his domicile of origin or a domicile of choice. The domicile of origin is that which the law attributes to a person at his birth. It is not necessarily, as it is sometimes erroneously assumed to be, the country of his birth, but it is the domicile of the person upon whom he was then legally dependent.\(^7\)

The acquisition of a domicile of choice is the consequence which the law infers has resulted from the combination of two facts, viz: (1) Actual presence in the country of choice; (2) Coupled with the intention of settling there permanently, or, at least, as Lord Cairns said, 'for the rest of his natural life,' in the sense of making that place the person's principal residence indefinitely. Therefore a person may reside for many years in a place without acquiring a domicile there the moment he takes up residence if he has the required intention.\(^8\)

But, "since to establish a domicile of choice there must be the acquisition of a new place of residence with the intention of remaining there permanently, or at least indefinitely Sine Animo Revertendi, proof of actual residence is not sufficient."\(^9\) As can be seen the issue of domicile is not exactly a clear-cut one.

Finally, the conditions of modern life have made the old concepts of "domicile" particularly difficult to apply. Many a man, employed by a big national or international organization and

\(^6\) Power, p. 386.
\(^7\) Ibid., p. 400.
\(^8\) Ibid., p. 402.
\(^9\) Power, p. 405.
subject to change of job location at the organization's pleasure, is never, during his working years, going to be in a position to testify freely that he intends to settle in one place "for the rest of his natural life". Among the least affluent, too, a fair amount of travelling goes on, especially during periods of economic slump, in an effort to find a district where work exists. This may result simply in the husband moving away and settling in a province far from his family, but it may also involve his bringing his family with him to a new district and then, after a short unsuccessful stay, himself moving either back to the province of origin or on to a new province, alone because funds no longer permit the family to travel with him. If the marriage is already subject to some degree of stress and unhappiness, he is tempted to prolong the absence indefinitely.

The situation of the wife left behind with the children to care for by the deserting husband has been mitigated to a limited extent by Sec. 2 of the Divorce Jurisdiction Act R.S.C. 1952 Ch. 84 (passed in 1930 as ch. 15). This enables the wife to sue for divorce in the former domicile of her husband wherein she was deserted.

However, the problems revealed in a few B. C. cases show that the relief afforded by the Divorce Jurisdiction Act does not completely solve the problems of the deserted "innocent" wife who wishes to obtain her freedom.
For example, there is the case of the wife left in
Saskatchewan with her child in 1929, while her husband went to
live with another woman. In 1934 in order to make a living
for herself and her child, she moved to B.C., and around the
same time her husband moved to Manitoba. Some years later the
wife finally decided to take action for divorce and since she
was domiciled in B.C. and could prove her husband definitely
deserted, she attempted action in B.C. Her case was turned down
by the Court of Appeal. Either Saskatchewan, where she was
deserted, or Manitoba, where her husband was reportedly living
in adultery, were held to be the courts with possible jurisdic-
tion.

Even when the deserted wife sues in the province in
which the husband presently resides, and to which she has sub-
sequently moved, the Court will not exercise jurisdiction if
it considers that the husband is merely a temporary resident
because of his employment.

In recent years the B.C. courts have inclined to a more
sympathetic interpretation of domicile in divorce actions, and
pleas of lack of intention to reside indefinitely in B.C. have

10 Jolly vs. Jolly (1940) 2 WWR 148
11 Brewster vs. Brewster (1945) 2 WWR 382
been rejected as a defense, and the fact of having entered into a separation order has not been accepted as evidence that there was no desertion.

Apart from the effect of domicile when applied within Canada to determine which province has jurisdiction, there is, of course, the whole question of foreign, especially U.S. divorces. While marriages performed according to more lenient U.S. laws are normally accepted as valid by Canadian courts unless they were invalid according to the law of the state concerned, divorces obtained there are not legal in Canada unless granted in a state where the husband had legal domicile according to Canadian standards, (not residence) at the time the divorce was acquired. The question of foreign divorce is too large to be dealt with, but the existence of the above anomaly should be mentioned, particularly as it is usually the immature young who rush to obtain a U.S. marriage, and then, when they have had time to realize the wisdom of their elders' disapproval, discover that they are not permitted to correct their mistake as easily as they were allowed to make it.

13 Elkins vs. Elkins (1952) 6 WWR (NS) 48.
There is general agreement within the legal profession that the present law of "domicile", having developed out of centuries of common law, has not kept abreast of the living conditions of modern Canada.

A draft model statute on the law of domicile has been finally approved by the Conference of Commissioners on Uniformity of Legislation in Canada. The draft statute is intended to supercede the common-law rules for determining the domicile of a person and substantially amends the common-law in that it abolishes the doctrine of revival of the domicile of origin and also enables a married woman or an infant to acquire an independent domicile.15

Technically, the minor child's domicile continues to be that of his father even though his mother may have custody of him. However, in cases of custody, at least, the B. C. courts, especially, take a practical stand on the matter and hold that "the court has no jurisdiction to adjudicate upon the custody of a child who is not present within the territory over which the court has jurisdiction unless the person having the control and authority over that child is within that territory."16 The matter of custody and the position of the children involved will be considered in the next section.

16Ibid., p. 621.
So far as the non-legal literature is concerned, though social problems may arise out of "domicile", their exact source is not usually recognized and they are usually discussed along with other problems arising from divorce legislation without recognition of the part "domicile" may play in their creation. No study of any type appears to have been done to discover what proportion of deserted wives still exist, who have grounds for and would take action, but who are stopped by the necessity of paying for a lawyer and commencing the proceedings in other parts of Canada.
CHAPTER V

THE CHILDREN OF THE MARRIAGE

In the attempt to assess the social effect of the present legislation and practice in B. C. regarding divorce, let us now look at the children of the marriage. There were 587 men and 2877 women listed as "divorced heads of families" caring for 9308 children (3540 under the age of fifteen) in B. C. when the 1961 census was taken. However, as the earlier chapters have shown there may be difficulty in obtaining a divorce, and it is probably significant that at the same time there were 2465 "husband only at home" and 9335 "wife only at home" families caring for 35,376 children (16,244 under the age of fifteen).

Legislative jurisdiction regarding custody of the child has been held uniformly to be in the provinces. In B. C., the provisions made in Sec. 35 of the Act of 1857 were re-enacted unaltered as Sec. 20 of the Divorce and Matrimonial Causes Act, R.S.B.C., 1960, ch. 118. Under Sec. 20, action may be started to place the child under the protection of the Court of Chancery (in this Province the Supreme Court of British Columbia). The

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1Canada, Bureau of Statistics, Census of Canada 1961, Ottawa, Queen's Printer, 1962, 95-516, Table 73.

2Ibid.
chief reason for this section in the 1857 Act was probably to protect the inheritance and financial interests of the child. Today this section is supplemented by The Equal Guardianship of Infants Act, R.S.B.C., 1960, Ch. 130, Secs. 12 and 13, which clearly show that custody or guardianship may be removed from a parent.

When the court hears an action for divorce, nothing in these acts forces the judge to make any order regarding the children of the marriage. However, the Supreme Court Rules, 1961, Province of B. C., require every statement of claim to include: "Sec. 11(1)(1) - the names and dates of birth of all living issue, and, in the case of any such issue under 21 years of age, full particulars of its present and proposed homes, maintenance, and education." Thus there is no doubt, even in an uncontested divorce where custody is not being requested, the judge will know something about plans for the children of the marriage. However, no automatic provisions exist to provide for any independent investigation of these plans.

What principles determine the court decisions when proposed plans for the children are considered? So far as the Divorce and Matrimonial Causes Act is concerned, the criterion is such provision . . . as it may deem just and proper." The

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3 Divorce and Matrimonial Causes Act, R.S.B.C., 1960, ch. 118, Sec. 20.
Equal Guardianship of Infants Act gives the criteria as "such order as it may think fit" and "having regard to the welfare of the infant, and to the conduct of the parents, and to the wishes as well of the mother as of the father." In using these criteria precedents have established that "the governing principle in deciding the question of custody is that the paramount factor to be considered is the best interests of the child."

If neither party to the divorce is requesting custody and the divorce is uncontested, the judge will normally assume that the parents' plans, as outlined, will ensure "the best interests of the child." If custody is requested and neither the request nor the divorce are contested, he has one further piece of information provided to him in the statement of the claim: "Sec. 11 (1)(p), where the writ includes a claim for the custody of children, full particulars of the facts upon which such claim is founded." However, it is a reasonable assumption that in a majority of cases, unless the plans outlined in the statement of

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4 *Divorce and Matrimonial Causes Act*, R.S.B.C., 1960, Ch. 130, Sec. 13.  
5 *Ibid*.  
7 *Order LX - Divorce and Matrimonial Causes*, in *Supreme Court Rules, 1961*, Province of B.C., Victoria, Queen's Printer, 1960, p. 139.
claim are obviously inadequate or unusual, the judge will assume that the parents' plans ensure "the best interests of the child."

If the custody request is contested, the judge will receive the preceding details about both proposed plans, and will have the opportunity to question the parents concerned and any witnesses they produce in court. If he wishes a further independent assessment, he may request the Superintendent of Child Welfare to obtain reports on the two proposed homes, and adjourn the hearing for several months until these are received. For several reasons, these reports will not be written until after the hearing and the judge's request even though both parties concerned may be well-known to social agencies. Unless this last procedure and the consequent delay are decided on, the judge must decide from only a limited amount of evidence what "the best interests of the child" is.

Until this century the "divine rights of parents" to dispose of their children as they wished was generally accepted. In fact, the question of whether the mother, as well as the father, had some claim to protect and plan for her child was still being debated. (The clause already quoted with its "as well of the mother", both signifies the recognition of the mother's claim, and is evidence of how recently that recognition has occurred.) During the first half of this century an increasing suspicion has developed that parental love is not always
enough and that, at times, the most well-intentioned of parents are well-advised to seek expert help in handling a child's problems. The corollary developing in recent years is that the children of less perceptive and loving parents may even more frequently require the expert's help, and perhaps the state should devise methods to ensure that they receive it, even if their parents' rights have to be overruled.

It is not surprising that with this idea gaining acceptance the law journals, especially, are beginning to question whether the judge has sufficient evidence to decide "the best interests of the child", when he has only the parents' facts plus evidence from well-disposed but inexpert relatives and friends. Typical of the article suggesting the limitations of the present system is the following quotation:

... in reaching conclusions as to the best interests of a child and as to parental fitness, courts consider criteria which, although useful, are inadequate, in that they fail to force courts to consider essential factual, social, medical, and psychological information. Consequently, a judge may have nothing but his common sense to guide him to a wise solution of a complex problem.  

What is also needed is the professional assistance of experts to help the courts obtain essential facts. The traditional adversary process is inadequate in custody cases. 

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9 Ibid., p. 441.
To back the suggestion that the parents are not capable of wisely planning for their children, there is the article by a juvenile and family court judge who has counted his recent juvenile and family court cases and discovers that one-half of the children in trouble with the law come from parents divorced two or more times. Another article stresses the growing seriousness of the problem with the following comments:

'Longevity' one of the major causes of the increasing incidence of divorce. ... Sharp drop in mortality rate in childhood and adolescence ... increasing numbers of minor children have divorced parents and for more years. ... It may be necessary, there, to develop new legal instruments for the protection of the interests of the children of divorced parents.

A review of non-legal literature revealed only three published reports of serious attempts to get some data regarding the effect of divorce on children. First, an article by F. Ivan Nye reported on the result of attitude tests used on Washington high school students in an attempt to discover if the adjustment of children from broken homes was significantly different from that of children from unhappy unbroken homes. He concluded "in the light of these data, it should be concluded that,

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contrary to folk knowledge, the adjustment of children in homes broken by divorce is not more difficult or unsuccessful than in homes broken otherwise.\textsuperscript{13} Secondly, Thomas P. Monahan did a survey of comparative delinquency data in Philadelphia for the years 1916, 1927, 1940, and 1956.\textsuperscript{14} At the beginning of this period the major reason for homes being broken was the death of a parent, in the more recent years the home are frequently broken by separation or divorce. He concluded,

The trend in these Philadelphia data give no support to the belief in the overriding importance of the socially broken home -- as over against the orphaned home--in the persisting pattern of youthful delinquency. A rather regular and high proportion of delinquent children have come from broken homes over the past forty years in Philadelphia. The changing character of broken homes has not altered the overall proportion found.\textsuperscript{15}

Finally, there is the report by Judson T. Landis on a survey of the attitudes and ideas of 295 university students in California who were the children of divorced parents.\textsuperscript{16} He comments,

In analyzing the data it became clear that children of divorce cannot be treated as a homogeneous group. Divorce of parents affects children in various ways, 

\textsuperscript{13}Nye, p. 360.
\textsuperscript{15}Ibid., p. 364.
depending upon such factors as the age of the child at the time of the divorce and how the child viewed the home situation before he learned of the possible divorce.¹⁷

Thus, the only research reported in the literature suggests that children are adversely affected by anything that breaks up their first family: death, divorce, or separation, and that they are equally harmed if their parents remain unhappily living together. This would support the idea that every attempt should be made to provide extra community counselling facilities and to adapt court procedures in order to prevent marriages from breaking down, and to encourage a true reconciliation particularly of couples who are parents. There is less evidence here to support those who believe that the divorcing parent is less capable than other parents of judging the best interests of his child.

The literature quoted does not have its source in British Columbia or even in Canada. There appears to be almost no published research on Canadian divorces. In the 176 pages of The Family in Canada¹⁸ prepared for the Vanier Conference on the Family, the divorced and separated family gets just a shade over one page (almost entirely devoted to statistical material showing the fluctuation in the divorce rate).

¹⁷Landis, p. 7.

The most detailed appraisal has been published in the final report of the Commission on Christian Marriage and Divorce of the United Church of Canada. Its comment on the lack of available research is worth repeating: "there are scores of Canadians conducting research in the breeding and care of poultry and livestock. There does not appear to be one full-time research person in Canada devoting attention to data about marriage and its problems." This study takes time to consider the possible problems of the children of divorcing parents, and, of parents without partners or with common-law partners. It supports the position of those who believe that the courts need more expert information than is presently available to them.

We urge that divorce courts use the services of people with special training and skill in family matters. The minister, the trained social investigator, the marriage counsellor, the psychologist, the psychiatrist and others, have much to contribute when marriages are in trouble.

The only type of organized information that was found about divorced persons in British Columbia was of the statistical

20 Ibid., p. 4.
21 Ibid., pp. 30-31.
22 Ibid., pp. 32-33.
23 Ibid., p. 17.
variety. Thus the United Church report included statistics submitted by United Church ministers regarding divorced persons marrying in their churches in 1950 and 1960.24 In B. C. in 1950, 10.5% of the brides and grooms had been divorced, and in 1960 23.1% of them had been. (It should be remembered that because of the regulations of other denominations United Church ministers are often asked to perform marriage ceremonies for non-members when a divorced person is involved.) This is a far higher percentage than is reported from any other part of Canada since in 1960 the next closest city, Toronto, had just reached 10.3%. It is fairly obvious from these figures that remarriage not infrequently provides the children of the divorce with a two-parent family again.

The material obtained during the 1961 census provided a little information about a variety of British Columbia family groups.25 Some comparisons are possible between the three types of one-parent families; divorced, widowed, and "... only at home". The latter presumably contains a large number of separated or deserted spouses as well as a limited number whose separation is neither voluntary nor permanent (i.e., separated by work requirements, chronically hospitalized, or imprisoned spouses).

24 Commission on Christian Marriage and Divorce, p. 96.

The divorced appear to be the least disadvantaged families, and have incomes averaging about $400 more per year for each sex than the "... only at home" group. They also provide for a slightly smaller family, and have a better chance of sharing a relative's home. Their fifteen to eighteen year old children are more likely to be still in school than are those of the widowed or the separated parent. Statistically, therefore, it seems that the 'children of the marriage' that ends in divorce, on the average, are provided for rather more satisfactorily than the children of a marriage which ends in any other way. However, an alternate interpretation of these statistics is equally valid. From this viewpoint the statistics merely prove that people who belong to the more prosperous and socially advantaged classes can best afford to pay for a divorce.

No other statistical or researched social information appears to exist about the divorced family. Thus the entire question of how present procedure and legislation affects the children of the marriage, and of how correctly "the best interests of the child" are assessed, remains a matter of opinion and personal experience. A further look can be taken at some of the cases decided in B. C. courts to discover what type of decisions are being made.

The most interesting aspect of the more recent decisions regarding custody in B.C. courts is the lack of rigidity shown.
The fact that the mother is the defendant will not prevent custody of younger children being awarded to her. 26

In recent years, a judge has exercised his prerogative and given custody to relatives other than the parents. Here two cases, almost twenty years apart in time, show contrasting methods of protecting children. In 1942 the judge had decided that he could not leave children with the father and co-respondent. He believed they would keep in touch with their mother, and the bitterness of her feelings toward the co-respondent would affect them as the years went on. However, he had doubts about the mother's ability to raise the children satisfactorily herself. He awarded custody to her on condition that she and the children live in the home of her sister, with whose fondness for the children and understanding attitude the judge had been impressed. 27 In 1962 a judge considered another set of parents, neither of whom seemed very responsible, and awarded custody of their three-year old girl to the husband's sister so that the sister if she desired, could legally oppose either parent interfering with her care of the child. 28


27 Knox vs. Knox (1942) 3 WWR 612.

These cases seem to have been decided on the basis of evidence presented in the court and there is nothing to suggest that custody reports were obtained from the Superintendent of Child Welfare.

What additional guidance does the court have if a hearing is adjourned until a custody report is received? Provincially, the instructions suggest that the social worker should follow the outline used for foster home investigations, particularly noting the emotional and physical environment, and add a warning that hearsay and rumours should not be embodied in the report.²⁹ The foster home investigation outline covers the background of the "parents" involved, their marital situation, health, and attitudes toward the child. Similar detail is given about any other occupants of the home including other children. The number of visits a worker will make to acquire this information will vary. Locally, the social worker's immediate supervisor reads and approves the report before it is returned to Victoria. Here it is again read over by a supervisor, and normally nowadays it is forwarded on to the judge without any change.

That this service is utilized in difficult cases is shown by at least one recent judicial decision. The boy involved was almost ten years old and had been living with his father since

his parents separated when he was eight and one-half years old. His custody had been awarded to his father when his uncontested divorce was obtained a short time later. During the year following the separation the father first placed his son with another separated woman. Later this man set himself up in a new home and moved the woman, her children, and his son in also. (Marriage was impossible because the whereabouts of her deserting husband was unknown and she was, therefore, unable to obtain a divorce.) The first wife a few months later remarried and applied for the custody of her son. Apparently, there were reasons to doubt the stable character of both herself and her new husband. The social worker's comment that the father's common-law wife is "an unusually good mother" is mentioned by the judge in support of his decision not to award custody to the natural mother.  

From these examples, it is apparent that, in British Columbia at present, as a result of following the principle of "the best interests of the child", decisions about custody can vary greatly according to the circumstances of individual cases.

The last case also focuses on an effect of the present divorce legislation which has not been discussed. This is the

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probability that when people are unable to obtain a divorce some will enter a common-law relationship and keep their children with them. No figures exist to show how numerous such families are. The children in these situations enjoy the advantage of living in a two-parent family, but they suffer several social disadvantages. A change of their surname by adoption is impossible, their parent may feel guilty and transmit a sense of unworthiness to them, and they and their parent have no financial protection if the relationship breaks down. Finally the relationship is likely to result in additional children who are illegitimate. These are the concealed victims of the present divorce legislation.

This review has been concerned with the children of the marriage which ends in divorce, and particularly with the custody decisions made as permitted in the divorce legislation. In British Columbia, no action need be taken by the court regarding the children, and if their custody is being left unchanged and the reported plans sound satisfactory the judge has scant means to investigate further. Only when custody is being contested is the judge certain to hear witnesses, and possibly to ask the Superintendent of Child Welfare for custody reports. Case decisions based on "the best interests of the child" are varied. The modern stress on the child, rather than the parents, is increasingly raising the question of whether or not with present
procedures the judge can obtain sufficient information to make a good decision. Concern is also felt for those children regarding whose custody no decision is requested.

Unfortunately, little factual evidence of any type is available about the children of divorced parents so no conclusions are possible. Various suggestions are being made regarding methods of adjusting court procedures so that more attention is paid to the children. The little data found suggested that much more effort should be put into helping couples achieve a true reconciliation when there are children involved. For this reason those suggestions which involve methods to ensure that couples see a marital counsellor before they can start divorce proceedings seem the most desirable. Such a counsellor could then discuss planning for the children with the parents if divorce was necessary, refer the few parents and children who required more help to suitable resources, and routinely supply the judge with an observer's opinion of the plans the parents wish to make.

One other group of children is affected by present divorce legislation although no information is available about them. When present legislation prevents couples from obtaining a legal divorce, they tend to enter a common-law relationship. The effect of this on their children's attitudes, and on the later
offspring of the new relationship is a subject which needs more consideration. The present divorce legislation and procedure certainly does not appear to be operating to strengthen the family ties for the children of the marriage.
CHAPTER VI
EXPERT OPINION

Method

It was felt by the authors that points raised in Chapters II, III, IV, and V needed the verification and clarification that could be obtained by interviewing a number of people who had frequent contact with persons seeking a divorce. An interviewing schedule was designed to tap the experts' opinions. It was subdivided into seven sections: a general one to quickly seek out the main areas of dissatisfaction; a section each on grounds and procedure designed to ascertain whether people were dissatisfied with the sole ground of adultery, the method of trial or both; and sections on financial costs, domicile, and the custody of children. A short section entitled "Morality, the Church and Divorce" was included to try and illicit the current Catholic position on the possibility of change and the way non-Catholics viewed the role of the Church.

The experts were chosen to represent seven major categories: judges, lawyers, politicians, psychiatrists, social workers, ministers, and lay people involved in divorce reform movements. Two members from each category were interviewed,
except in the category of lay people where only the President of the Divorce Reform League was contacted. As so many of our respondents wished to remain anonymous, either because of their official position or private wishes, we decided not to name the remaining members. Lawyers were slightly over-presented inasmuch as both public representatives had had legal training.

As stated, our experts were not chosen randomly from a list of members of their professions, but rather because of their known concern with and knowledge of divorce matters. Hence it is possible that as a group they may express more liberal views than the bulk of the population.

In eliciting the answers to the questionnaire, we used an unstructured approach. The questions were put to the respondents but the interpretation was their decision. Depending on the fullness of the respondent's answers, individual questionnaires took anywhere from one-half to one and one-half hours to complete.

Our method of recording has been to state the question asked, followed by a summary of the answers received. Where it seemed significant, the profession of the respondent was identified. General conclusions and comments appear in a separate section at the end of the chapter.
Interview Results

General

1. From your experience, what are the major reasons people seek divorce?

Seven of the respondents gave incompatibility as the major reason for divorce. Four others wished to express this cause in sharper terms and preferred the terms "inflexibility", "disharmony, or immaturity" (the last of these was also given as an underlying reason by two of the seven who used "incompatibility").

Two respondents, both lawyers, avoided incompatibility altogether; one of them saying that each case was so individual that there was no major cause, but by the time they reached a lawyer's office, all divorce clients were mentally disturbed to some degree. The other lawyer felt that financial problems were the background cause of three-quarters of the cases seen as often the husband had been irregularly employed and there were heavy debts they quarreled over.

The other two causes which were mentioned by more than two respondents were mental illness (four) and separation (three). In view of the grounds on which divorce is granted in B.C., it is interesting that only two respondents, both of them
in the legal profession, even mentioned adultery as being among the major causes for divorce.

2. Do you know of cases where people who wish to are unable to obtain a divorce? Do you know the reason?

Only three respondents replied negatively to this question, all the rest knew cases where one spouse, at least, wished a divorce but could not obtain it. The most frequently mentioned reason (five) was the refusal of both spouses to give the other grounds, and two more broadly stated replies doubtless intended to include this reason in their answer. It should be noted that one clergyman clearly divided such cases he knew into two types: those where religious scruples prevented the couples acting, and those where he felt the basic reason was hostility.

The next two most mentioned reasons were desertion with the spouse's present whereabouts being unknown (four plus the two broad responses), and economic reasons (four). The next most mentioned reason (three plus one of the broad answers) was refusal of one spouse to take action although grounds already existed. Long imprisonment, lengthy mental illness, and a problem because of domicile were the other reasons cited.
3. Are you satisfied or dissatisfied with existent divorce legislation and procedures? Why?

There was unanimous dissatisfaction with present substantive divorce legislation, and only two people were satisfied with the present divorce procedure. One of these two, however, made it clear later in the interview that he was strongly opposed to one aspect of B.C.'s present procedure.

The major objection (nine) was that wider range of grounds should exist as the present law was not related to reality. Almost as many respondents (eight) complained in some form about the effect the present law had in lowering the participants' self-respect or in having detrimental effects on the children. Two other objections were raised, each from a couple of respondents; first, that disrespect for the law is encouraged, and second, that a proper understanding of the meaning of marriage is discouraged.

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Grounds

1. In your experience, is adultery on the part of one partner of the marriage the main cause of marital breakdown?

In the opinion of all respondents, adultery is a symptom rather than the cause of marital breakdown. One of the ministers
expressed the view that the adulterous partner sometimes used this approach to shock his spouse into changing.

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2. Do you consider uncondoned adultery should be the sole basis for granting a divorce?

No one felt that uncondoned adultery should be the sole grounds for granting a divorce.

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3. If the answer to question 2 is no, on what other basis would you consider divorce should be granted?

In considering what grounds would be suitable, the experts expressed a fairly wide range of opinion. In general, most felt that the grounds used in England - cruelty, desertion, adultery, and incurable mental illness - were satisfactory grounds. However, eight of the thirteen people interviewed felt that complete marital breakdown, generally referred to as incompatibility, should also be a ground. The Roman Catholic priest was among the eight respondents favouring divorce in cases where suitable evidence shows complete marital breakdown.

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4. Do you think condonation, connivance and collusion are sound absolute bars to divorce?

Seven people felt that condonation, collusion and connivance were sound absolute bars under the present system of law. Generally, it was thought that collusion was interpreted liberally and limited to a fraud being perpetrated on the courts. It was thought that condonation of previous adultery should be assumed in cases of "trial reconciliation" because it was felt that a sincere attempt at reconciliation could not occur if one partner held the whip of divorce over the other. The fact that condoned adultery can be revived by a future marital offense was felt to be sufficient protection should one of the parties wish to commence proceedings for divorce after failure of "trial reconciliation".

Six people felt that the three absolute bars were not sound bars. They felt that the state of the divorce laws in Canada were such to force many seeking the dissolution of their marriage to make collusive bargains with their spouses. Having these bars was felt to add to the stupidities of the law.

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5. Do you know any cases where a divorce was refused on grounds of condonation, connivance or collusion? If so, how many? If so, what were the circumstances surrounding the case?

Only lawyers and judges knew of cases where definitely one of the absolute bars led to the divorce being refused. Connivance was seldom evoked but cases were refused on the grounds of collusion and condonation. The judges felt that collusion should be interpreted as an intent to commit a fraud on the court and would refuse a divorce when this intent was present. Condonation has also been used as a bar. Interestingly one lawyer felt the judges were lenient in their interpretation of condonation, the other felt they were not.

In discussing collusion, one respondent expressed the belief that lawyers "set up" their cases so that they never had first hand knowledge of any collusion. For example, a lawyer may refuse to handle a case because the couple have made a collusive bargain, but the couple learn by the experience and the next lawyer consulted does not hear of the agreement.

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6. Do you know any cases where the plaintiff was refused a divorce on the sole grounds of adultery admitted in writing to the presiding judge?
No one knew of a case where a judge refused to exercise his discretion in favor of the plaintiff except where the defendant had cross-petitioned. To quote one judge: "we try to grant a decree when the court feels the marriage has had the course".

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7. Given that people are confronted with the problem of wishing to dissolve their marriage, do you think they see the law as a procedure enabling them to do this legally or as presenting a further problem or hurdle requiring circumvention in the form of dishonesty and fraudulent behavior in order to obtain their release from the marriage?

All but one respondent felt that people seeking divorce saw the law as a hurdle that one had to pass through to obtain their ends. However, not everyone felt that fraud or dishonesty was involved. One respondent said that historically the law was set up as a hurdle and is not intended to be an enabling procedure.

The one respondent who felt that the law was seen simply as a method of enabling people to get a divorce, was of the opinion that fraud was not as common as many people supposed. He felt that the widespread belief in the "set up" divorce was a method society had found to gloss over the unpleasant fact
that many of its most respectable citizens were indeed adulterers.

Both judges felt that the large majority of cases coming before them were bona fide. Other respondents also expressed the opinion that usually the adultery was bona fide and that the deceits practiced on the courts were more in terms of collusive bargains and the false importance given to the adultery. Theoretically, the horror of one spouse at the iniquity of the adulterous spouse compels her to take action. In reality, the adultery is often not the matter which has caused, or even contributed to the marital breakup as it has occurred after the couple has separated. One lawyer voiced the opinion that when one spouse or the other actually began divorce proceedings, it was because they or their spouse was living in a common law relationship. Divorce was not thought necessary until the possibility of remarriage occurred.

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Procedures

1. Do you think the present system of trial results in a sufficient exploration into the causes of marital breakdown?

No one felt that the present system of trial resulted in a sufficient exploration of the causes of the marital breakdown. One respondent did add, that in defended divorces the exploration
is quite thorough but is done, incidently, in the course of proving other points. As a judge pointed out, the plaintiff is entitled to a divorce if the adultery is proven and the trial procedure is designed to prove adultery as quickly and efficiently as possible.

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2. In your experience, what are the reactions of people when they take the matter of adultery into court?

Three respondents did not wish to express an opinion about this. Interestingly, all three are practicing lawyers.

Four respondents felt that people looked upon their day in court as a necessary evil but that they were not too disturbed by it. All added that, depending on the person's moral code and personal involvement in the procedure, it could be very traumatic.

One respondent felt that people treated the whole thing as a joke and two mentioned that people were cynical at having successfully deceived the courts. A psychiatrist felt that while initially people experienced guilt, the lasting emotion was one of hostility. Both judges were of the opinion that most people were disturbed by their court appearance. To quote one - Friday is a pretty sad day around here.

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3. In your opinion, what effect, if any, do the present divorce laws and procedures have on the citizen's respect for the law of the land?

Ten respondents felt that the present divorce laws lessened the citizen's respect for law generally; one lawyer did not feel that people's respect for the law was in any way lessened, except when the divorce was fraudulent.

Neither judge felt that the people's respect for the law was lessened. One felt that chicanery was less widespread than supposed and that only those engaged in fraud had their respect for the law lessened. The other judge felt that the average citizen was aware that the courts were unhappy with the situation and were trying to effect change. Also, he did not feel any dissatisfaction with the divorce laws carried over to other laws.

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4. What alternative type of trial proceedings, if any, do you deem appropriate in divorce proceedings?

Only one person was entirely happy with the present system of trial, although wanting the grounds expanded. Two people felt that a private trial was more appropriate but would retain the present adversary procedure. A lawyer was satisfied
with the present system of trial but felt that it should occur at the County Court level, freeing the Supreme Court for more important business.

A judge favoured a system whereby the couple could be referred to a marriage counsellor before the case was set for trial. He cited the Los Angelos courts as a satisfactory example of what he saw as appropriate.

The other eight respondents felt that the adversary system of trial was not appropriate to divorce cases, and that conciliation courts or boards were more satisfactory. The boards were conceived as multi-disciplinary with such members as judges, psychiatrists, ministers, sociologists, lawyers, and social workers sitting. Most envisioned counselling services attached to the courts (and one psychiatrist, one social worker, a lawyer and a priest), referrals being made before the couple was seen by the board. Some felt that these services should be compulsory, especially when children were involved.

As one would expect, respondents trained in the legal profession were more inclined to retain the adversary system of trial, although two of the strongest advocates of the "board" system were practicing lawyers.

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Financial Costs of Divorce Proceedings

1. What is the cost of obtaining an undefended divorce?

   The lowest figure quoted for costs was $150 for the lawyer's fee alone. This figure was cited by a social worker and could be low. Court disbursements and detective fees were extra. The lawyers interviewed charged between $350 and $400 excluding disbursements. Fees of up to $750 for an undefended divorce were known.

   In an uncomplicated case a detective will cost $75 to $125. If a person must be watched over a long period of time, this cost rises considerably. As one would expect, respondents who dealt primarily with the lower income groups quoted lower figures than those whose clientel were from the middle and upper classes.

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2. What is the potential cost to either or both partners, of a defended divorce?

   The costs of a defended divorce was at least double that of the undefended divorce and could run to well over $2000, depending on the length of trial, the detective fees etc.

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3. On what basis are costs awarded by the court as between the parties to a divorce proceeding?

The respondents who answered this question (lawyers and judges) indicated that the wife, whether plaintiff or defendant, was entitled to her costs unless her case was found to be frivolous. Even then her lawyer must be found to be acting in bad faith to be deprived of his fee, which the husband is liable for. The husband, of course, can sometimes recover costs and damages from the male co-defendant. A guilty wife might not recover costs if she has a private estate.

Many felt that this automatic granting of the costs to the woman was unfair in the light of today's social conditions. One of the lawyers felt that it actually worked against the woman as the husband was less inclined to be generous about the settlement if he had to pay the costs. Also husbands paying support often could not afford to pay costs and support and fell hopelessly behind in support payments and were faced with the threat of jail. If the husband did go to jail, the wife of course received no support and by the time the husband was released, he was so far behind in his payments that the temptation to leave the province or country was overwhelming.

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4. Do you know of cases where the commencement of divorce proceedings was delayed because of the inability of the person to afford the necessary legal and court fees? How common is this?

All respondents had heard of or personally known of people where the commencement of proceedings had been delayed by lack of finances. Although no one had exact statistics, it was felt this was quite common, especially among deserted wives.

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5. Do you know cases where commencement of divorce proceedings was prevented by reason of the financial circumstances of a person who would otherwise take such proceedings? How common is this?

Two respondents, one a lawyer and one a social worker, felt that anyone who really wanted a divorce eventually got the money. A lawyer did not feel even deserted wives could not raise the money. Apparently, banks will lend the woman money on the basis of a lawyer's letter.

The rest of the sample, except for two who had no opinion, knew cases where people never commenced divorce proceedings because of lack of money. Again, no statistics were available
but it was felt this was particularly prevalent among deserted wives. Although entitled to costs, a wife must pay the lawyer at least his disbursements in advance. Often, too, the husband is destitute and cannot pay costs even if assessed them.

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Domicile

1. In your opinion, have problems in relation to proof of domicile increased the fees for divorce?

The replies to this question varied according to the occupation of those interviewed. Four respondents did not know: the ministers and the psychiatrists. The two social workers and two of those engaged in political action believed the answer was affirmative. The two practising lawyers and the judges, plus one politician all replied that fees were not increased by these problems, but several of them went on to point out that other costs to the client could increase if domicile was difficult to prove and it was necessary to obtain evidence by affidavit from other jurisdictions, etc.

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2. What is your opinion concerning the fact that a wife has no domicile other than that of her husband? Is this
sound? What difficulties, if any, in your experiences does this present? What remedies would you suggest?

Four of those interviewed said clearly that a woman should be able to have her own domicile, and two more observed that the present law is archaic. Difficulties were seen arising from the present situation, although those professionally involved with the law knew a variety of devices available for overcoming the problem in many cases. The main suggestion for solution seemed to be the idea that the wife should be free to establish her own domicile, although some of the respondents foresaw difficulties arising out of this. One of those engaged in politics suggested Canada-wide domicile.

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3. Do you know of cases where the cost involved in going to the husband's domicile has meant a woman was unable to secure a divorce?

The majority of the respondents gave an affirmative answer. Only one minister and one social worker had known no cases, and one person engaged in politics had had no personal knowledge but felt such cases might exist.

The two lawyers replying felt that invariably with the combination of a good lawyer and a real desire for divorce, this problem did not present an impassable barrier. On the
other hand, two others in the legal profession each knew of a very few cases, as did the two psychiatrists, while two people involved in political action and one social worker all stated they knew of a large number of cases.

There seems no doubt that such a cost does prevent divorce in some cases, but the number of people affected is uncertain.

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4. Do you know of cases where a divorce has been postponed or proceedings never started because of difficulty involved in proving the domicile of a migrant husband or one who wishes to evade the court?

This question received the same majority of affirmative answers as the preceding one, with the interesting variation that the four people involved in the legal profession switched sides! One social worker knew of no cases where the problem was proving domicile, but of cases where the spouse could not be located. Five respondents knew of a few cases, and the two involved with social action knew of large numbers of such cases.

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Children and Custody

1. What effect, if any, has the inability to get a divorce had on children of the marriage?
The replies to this question generally indicated that the effect was undesirable. One lawyer thought the result might be good, if the husband stayed in the home as a result, and one social worker mentioned that a few exceptions occurred where the partners concerned finally made a satisfactory adjustment to each other because they could not escape the marriage. However, this respondent also pointed out that the effect more often was bad for the child, because of continued internal strife in the family, and this was the opinion of both psychiatrists and both ministers.

Several respondents pointed out that very often the parent who had the children entered a common-law relationship, although they varied in their opinion as to the effect this had on the children.

Three respondents pointed out that either staying together because of inability to get divorced, or getting the divorce, had bad effects on the children.

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2. Do you know of cases where parents with children are living in a common-law relationship because of the inability of one of the parents to get a divorce? If so, how long has this continued?
All the respondents replied that they knew of such cases, and all apparently knew of more than one such case. (In compiling results, the conflict between the answer to this question and to question 2 in the General section for three respondents was noted and the responses reviewed to see if there was any reason for the variation. It would seem that in replying to this question the respondents based their answers on less recent experience than they had earlier thought about, and also less intimate acquaintance with the parties involved.) Some of the respondents indicated that they had knowledge of one hundred or more such families through their work. That these were very often long-lasting relationships continuing for years was also brought out clearly in their answers. In a few cases among them, it was suggested that the inability to obtain a divorce was suspected not to be the real reason for continuing as a common law relationship, but the people involved "emotionally don't want", "won't be bothered", or "could have got money sooner".

3. In cases you know where divorces were obtained, did you feel more help was needed in planning for the children than was available?

One person interested in legislative action replied that the plans made by the parents were usually satisfactory, and
one other had had too little contact with such families to know. One minister and one lawyer felt that in their experience the families who needed help had been getting it from social agencies and had been able to make satisfactory plans. The remaining nine respondents all felt definitely there should be a flexible method so that help was given to the parents and children in the early stages of the marital breakdown, so that less pressure was felt by the children, even if their parents did get divorced. One lawyer suggested that the welfare department should have a division to help parents make mutually satisfactory plans for children, and to readjust them when necessary, without legal custody decisions being asked for.

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4. Were custody reports obtained by the court from the Superintendent of Child Welfare, and if so, did they contribute to a wise disposition?

Five respondents were unsure whether or not they knew cases where reports had been obtained and therefore had no opinions.

Two lawyers indicated that they were definitely opposed to permitting custody reports to be obtained as they had no confidence in the judgement and impartiality of the social workers making the reports. This opinion was shared by one
social worker, one of those in the field of social action, and one member of the judiciary. In fact only two of those replying thought the reports contributed to a good disposition; one lawyer and one social worker. It is worth noting that the lawyer's reason for favoring the reports indicates a misunderstanding of the probable subsequent action of the social workers, as the presumption was made that supervision of the children would continue. Also, later remarks of the social worker suggested that the reply was chiefly based on experience outside British Columbia.

5. Should the court be required to have an investigation made with regard to the welfare of the children as a condition of granting a divorce decree?

There was almost complete agreement that the court should be so required, but the additional comment showed that the question was receiving varying interpretations. Two of the legal profession pointed out that the divorce decree should not be conditional on this, apparently thinking of problems if investigation could not be promptly done, and one of these respondents had already suggested that plans for the children be counselled by the welfare department, generally without court involvement. One judge and one social worker suggested that
only some cases should be investigated.

The remaining nine replied affirmatively. Of those who elaborated their answer, two suggested social workers or marital counsellors attached to the court, and two others wanted the nature of the divorce court itself changed to permit other disciplines to share the bench.

6. Are there any other suggestion you would like to make whereby the interests of the children of divorced parents would be adequately protected?

The replies to this question show almost everyone thought that the present situation could be improved although they might have no ideas, except those already discussed about how. Five stressed some form of provision permitting marital counselling to start as soon as couples start to think about divorce, the counsellor probably being attached to the court. Three wanted arrangement to ensure investigation of proposed plans probably by more than one discipline, such as "a panel of experts".

One person suggested that if both parents were very antagonistic to each other so the children got used as weapons, the government should provide whatever subsidization was necessary to enable the children to be sent to private boarding schools
so they would be away from their parents for a large part of the year. It was felt this would cost less eventually than the present cost in emotionally damaged citizens. Thinking of similar types of situations where one parent is clinging to possession of a child chiefly to hurt the other parent, one social worker suggested that, for children who were quite young when divorce occurred, the court should be able to waive the consent to adoption of the parent who has been denied custody so that desirable step-parent adoptions could be completed.

Morality, The Church, and Divorce

1. Do you view marriage as a sacrament, a social contract, or some combination of the two? How does this viewpoint affect your feelings around divorce?

Almost all respondents replied that they viewed marriage as some combination of the two, although three of them indicated that personally they felt the sacramental element was the more important factor in the combination. One lawyer simply viewed it as a contract, and another stated that it was simply a status.

Generally, the respondents said that they tried to view divorce objectively while in their professional role. Three respondents (two of whom had not mentioned personal stress on
the sacramental element) said their own attitude made them believe that more care should be taken by society before permitting marriage so that divorce would not so often be necessary.

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2. What part do you feel churches or religious organizations play in retarding or advancing changes in divorce law and procedure? What part, if any, do you feel they should play?

All accepted, in some way, the idea that historically the Christian church has acted to discouraged divorce. However, there was a range of viewpoint regarding what the situation has been in the more recent past, and what it is today. Four respondents pointed out that during this period the different denominations have been working in different directions. Five pointed out in various ways that the recent political attitude has been perhaps based on what the politicians think their constituents think their church thinks on the issue, no one having dared to test their assumptions for a number of years.

The Protestant minister pointed out that the church leaders were more advanced today than many of their congregation in their ideas, and that there was an even larger mass of people
who based their attitudes on what they understood the church believed when they last visited it ten years ago.

Two respondents (not Roman Catholic) pointed out that the Anglican Church, as much as the Roman Catholic, discouraged change in the divorce law, one of them feeling the claim that the Roman Catholic attitude prevented change was merely convenient scapegoating.

The Roman Catholic priest explained that much thought has recently been given by his church to this problem. When the original marriage was simply a civil contract a civil divorce as a remedy to protect marriage and the family was not unacceptable. Furthermore, where a civil divorce is obtained after a church marriage and the spouses do not remarry, continued full participation in the church is encouraged. Even in cases where remarriage has occurred church attendance is welcomed, and in some parts of Europe these people are being admitted privately to the sacrament. The Roman Catholic Archbishop of Cairo presented a report last fall which presented evidence that the early fathers allowed remarriage after divorce, and studies based on new insights are still in progress. Adultery has never been accepted by the Roman Catholic church as a valid ground for breaking a marriage (they think this is a Protestant misinterpretation of scripture), but hate is a much greater sin.
Three respondents suggested, in different terms, that the churches should help provide more and better pre-marital education and/or counselling at least for those people getting married in a church, and also marriage counselling. One of them plus another respondent mentioned that the ministers should be bringing the more recent views of their church to the attention of their congregations.

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Conclusions and Comments

General

While those interviewed were selected because they were in fields of their profession or avocation which increased their opportunity to meet divorced people, they were also chosen in the expectation that they would see divorce from several different viewpoints. It is, therefore, significant that they were all dissatisfied with the present legislation. All of them had known people who wanted divorce but who could not obtain it. This supports the belief that the present legislation is preventing legal divorce, although it is not preventing separation.

None of those interviewed believed adultery was really the cause of divorce. The consensus of the majority was that the necessity for divorce arose not from any specific set of
actions, but from the personal feelings, attitudes, and reactions of the two individuals concerned. This would seem to support the viewpoint of those reformers who say that, although increasing the number of grounds on which divorce is available is better than no change, what is really required is a change in the whole "offense" system.

Procedure and Grounds

It was generally observed that people with training in law tended to be more satisfied with existing procedure than those who were trained in other professions. However, this was by no means a clear-cut division and would vary from question to question. For example, judges and lawyers were more satisfied with the absolute bars of connivance, condonation, and collusion. They were also less inclined to believe that a large number of divorces were fraudulent. Also the changes lawyers envisioned tended to be more in terms of enlarging the grounds on which divorce could be obtained rather than changing from an adversary system to a mutual consent system. However, two of the lawyers were among our more radical respondents. The age of the more conservative respondents tended to be somewhat older than the mean. Generally, however, the given responses would seem to be a function of personality rather than profession or age.
One concludes that the expert opinion was that at very least grounds should be considerably expanded. Many felt that the adversary system of trial was inappropriate and divorce by mutual consent should be allowed. However, the advocates of divorce by mutual consent were not by any means undervaluing the importance and sanctity of the family. In fact, their usual condition, that counselling be strongly recommended and in some cases compulsory, showed a real concern with the fate of the family. Every respondent seemed to feel that when a couple felt they were unable to live together happily after honestly trying to reconcile, the marriage should be dissolved.

The controversy around presumed fraud in the form of manufactured evidence of adultery was inconclusive. Lay people had more tendency to feel it was prevalent than lawyers. The judges felt most cases before them were bona fide. One mentioned that, in many cases, the proof of adultery was the existence of a common-law relationship. One lawyer felt the big problem was adultery on the part of both spouses and the hypocrisy of "begging discretion for the plaintiff". Another lawyer said that when evidence was fraudulent it was because of extenuating circumstances; for example, to protect an intended second wife, or because the husband being sued is impotent or homosexual, etc.

However, the hypocrisy of the law generally was attested to by all respondents. It was felt that the very form of trial
gives the impression of something being "put over" on the law. The law implies that adultery is a heinous offense. Often, however, both parties are adulterers and one begs the courts discretion. Also the trial is supposed to be an adversary one, but in actual fact it is often mutually agreed by the parties that a divorce at this time is desirable and they sometimes help to make grounds available. Also there should be no bargains made between the parties to a divorce when, in actuality, bargains of a collusive nature often exist but are not mentioned. The law also makes much of its desire to protect the family and especially to seek after the welfare of the children. In court, the children are mentioned only in passing and certainly there is no counselling service offered to keep the family together. It concerns itself with a single physical act, which is not realistic. They will remain thus until the law recognizes the realities of marital breakdown and reflects them in rational divorce laws and procedures.

Financial Costs of Divorce Proceedings

Although divorce is construed as a redress for an unbearable wrong, in actuality it is a luxury item. To obtain a divorce one does not have to be rich but one must have a steady income to budget from. Many deserted wives, and husbands struggling on inadequate and fluctuating incomes to raise a family
cannot afford a divorce. This leads to one-parent families and common-law relationships amongst "the poor". The very existence of these poor family conditions is often cited as one reason for the troubles of the delinquent child in adjusting to the larger society. Although we do not suggest a legal aid system for divorce cases will eradicate all social ills, it would seem to give the possibility of these families forming a more stable adjustment.

Domicile

Although the people interviewed were well-educated, and most highly trained professionally, some of the same vagueness regarding the actual degree to which domicile is responsible for problems appeared as had been noted in the literature. Obviously the less closely involved observers are vague about where a problem arises from the difficulty in simply locating the spouse, or from a difficulty in proving domicile. The general opinion was that some change should be made in the present law, but there was no agreement regarding how many people were being injured by the present law, or how large a problem it caused. There was no doubt from the replies that some people were being adversely affected.

The most frequently suggested solution seemed to be a law allowing the woman to establish her own domicile. It was noticeable that the problem arising from the husband being
outside of Canada was a much more prevalent source of difficulty than problems arising because he is in a different province.

**Children and Custody**

It became clear from the replies in this section that the present law is not protecting the children of the marriage at all from trauma because of their parents' antagonism. Almost without exception the respondents felt they saw as many bad effects resulting for children whose parents had not been able to get the divorce as for children whose parents were divorced.

The viewpoint that if divorce is not obtained a common-law relationship often results, received strong support from the experience of those interviewed, as they all knew at least a few cases. Many of these were long-lasting relationships, and they existed apparently because at least one person involved could not obtain a divorce.

There was a general feeling that more help should be provided to parents, preferably before the divorce got into court, partly to try to reconcile them, but at least to help them to understand their children's feelings and reach an amicable agreement on plans. The present system, of custody reports obtained through the Superintendent of Child Welfare by judge's request only, was not thought to be satisfactory, particularly since the information in them was only seen by the judge, and the skill of the social workers making them was
suspect. It was interesting that the idea of investigation by social workers employed by the court was suggested by some of those criticizing the present reports. There was also a number in favor of people from several disciplines being involved if any real investigation of alternate plans for the children should be desired. Two systems of achieving this were suggested; first that a psychiatrist and sociologist share membership on a board with the judge, second that a "panel of experts" be available to see those children and parents who were referred to them.

Morality, The Church and Divorce

The information received here confirmed the expectations aroused by the review of literature, with the exception that we learned that the Roman Catholic ideas are presently in the process of major revision. If this proceeds, this should either have a major effect on the chance of new legislation being accepted in Canada, or else the real opponents to any change in the law of 1857 will be forced to expose themselves.
In this chapter we hope to indicate avenues for reform by examining some comparative legislation in the divorce field. First, it seems pertinent to view recent changes in the British system which retains the fault theory. Then a look at Australian legislation is of value. This legislation has also retained the concept of a matrimonial offence yet so broadened the grounds for divorce that in fact it would seem to acknowledge theories concerning breakdown of marriages. Finally, legislation, largely American, based upon breakdown theory should be examined especially as it is related to the advent of family courts. Brief mention will also be made of areas where mutual consent is adequate reason for divorce. This, of course, represents an ultimate response to breakdown theories.

Recent English Family Law

In 1937 a reform bill was passed in England extending the grounds for divorce to not only include adultery but also desertion for three years preceding the petition, cruelty, and unsoundness of mind with continuous care and treatment for five years preceding the petition. There were additional grounds for the wife if her husband was guilty of rape, sodomy or bestiality.
The grounds apparently were extended as people began to see adultery as a symptom of marital breakdown and to recognize that it could not fairly be claimed as the only cause when a marriage ceased to work.

Then in 1956, the Royal Commission Report on Marriage and Divorce was published. This report rejected any move toward setting up family courts and retained the idea of a solemn and adversary system as opposed to an informal and investigatory system such as was represented by family courts. The Commission felt that only a formal adversary system could bring home to the marriage partners the gravity of the situation while at the same time protecting the paramount interest of society in the stability of marriage as a social institution. Nonetheless, while retaining the principle of marital offence the Commission did acknowledge that a radical change in the basis on which divorce was granted might make desirable a different kind of adjudicatory process.

Since the Royal Commission a number of changes have taken place in English procedure and law surrounding divorce. The changes were made in order to eliminate some of the social problems which we have indicated in relation to present British

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Columbian legislation.

The Royal Commission recommended adding two additional grounds to the existing ones of adultery, cruelty, desertion, rape, and certain other unnatural offences, and incurable insanity. The extensions were:

(i) the artificial insemination of the wife by a donor without the husband's consent, and

(ii) the wilful refusal to consummate the marriage

Thus, in England there has been an increased tendency to enlarge the grounds for divorce. At present, the ground of incurable insanity is an exception to the principle of resting a divorce on an offence. Furthermore, the broadened interpretation of cruelty and constructive desertion tend to lead one to the conclusion that marital breakdown theories are accepted informally if not formally. In the view of L. N. Brown, "some of the advantages of having no general grounds for divorce are mitigated by the breadth and flexibility with which the courts interpret the grounds of cruelty and desertion." Also, a divorce in England may be granted even if both partners to a marriage are at fault. Thus, "safety-valves" have been provided

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while retaining the basic premise of fault. Procedures have also been changed in England in order to mitigate problems of the existing divorce system without radically altering it. A new rule\(^3\) whereby the court may order the separate representation in the divorce suit of any children by appointing a guardian ad litem to watch over their interests indicates a growing concern for the welfare of children of divorced parents. Also, in the same spirit is "the practice existing in the Divorce Division in London and now being extended on the advice of the Royal Commission to the divorce courts in the provinces, whereby the services of a court welfare worker are made available to the court."\(^4\) This person, trained in social work, could then investi-gate the plans proposed by the marital partners concerning the future of the children under sixteen years of age, especially in cases where there was disagreement over the question of custody of access.

Furthermore, by Statute\(^5\) the court has now been given the power to refuse to make absolute a divorce decree until it is satisfied that the best possible arrangements have been made for

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\(^3\) Matrimonial Causes Rules, 1957, rule 56.

\(^4\) Brown, p. 55.

\(^5\) Matrimonial Proceedings (Children) Act, 1958, supra, s.2.
the future care of the children. If the court is in any doubt it can adjourn and call for a report from the welfare worker. It can also place children under the care and supervision of the welfare officer if this is necessary for their well being.

Another area in which English law surpasses ours in its concern for the welfare of children can be found in a new provision included in the Matrimonial Proceedings (Children) Act of 1958. This provision empowers the court to make orders as to the custody, maintenance and upbringing of children even where it dismisses the petition for divorce or other matrimonial relief. In other words, it is recognized that an unsuccessful petition for divorce is not going to increase marital harmony or cause parents to be solicitous of the welfare of their offspring.

Thus, it can be seen in England that there is a growing preoccupation of divorce courts with the plight of children and a movement towards more investigation around planning for children. There is also an increased extension of grounds and broad interpretation of those provided so that the ills of too limited grounds are mitigated. Furthermore, the Royal Commission paid tribute to the work done by marriage counsellors despite rejecting the creation of an official conciliation service and

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6 Matrimonial Proceedings (Children) Act, 1958, supra, s.3.
also recommended that facts learned by marriage counsellors in
the course of conciliation should be inadmissible as evidence in
any subsequent matrimonial proceedings between the spouses.
Hence, more emphasis was placed upon advice and counselling
rather than stricter litigation in order to preserve marriages.

Divorce Legislation in Australia

The Commonwealth Matrimonial Causes Act of 1959 brought
about some important divorce reforms in Australia which are of
interest to Canadians. Prior to the Act, the question of domic-
cile had been troublesome as it left individuals uncertain when
they approached the court as to whether the judge would be
satisfied that the domicile claimed would be the correct domicile.
The Act brought about uniformity of jurisdiction and of the
grounds for matrimonial causes throughout the Australian common-
wealth so that there are no longer conflicts of jurisdiction
and anomalies of law between the different parts of the country
as we find in Canada.

Grounds for divorce in Australia are quite extensive and
reflect a belief that marriages do, in fact, break down.
Nonetheless, the adversary system is retained in the courts.
At present, Australians cite fourteen grounds for divorce as
follows:
1. Adultery

2. Wilful desertion for not less than two years

3. Wilful and persistent refusal to consummate the marriage

4. Cruelty

5. Rape, sodomy, bestiality

6. Habitual drunkenness or drug addiction for not less than two years

7. Husband's frequent convictions for crime since marriage within five years with a minimum of three years imprisonment and habitually failing to support the wife

8. Respondent imprisoned since marriage for not less than three years for offence punishable by death or life imprisonment or imprisonment for five years or more and still in jail

9. Respondent since marriage and within one year immediately preceding the petition convicted on indictment of grievous bodily harm or the intent to inflict such on petitioner or attempt to murder petitioner.

10. Respondents habitual and wilful failure for two years immediately preceding the petition to maintain the petitioner under order or separation agreement

11. Respondent's failure to comply with a decree for restitution of conjugal rights after a year or more

12. Respondent of unsound mind at date of petition and unlikely to recover and since the marriage and within six years immediately preceding the petition has been for periods aggregating at least five years confined in a mental institution and is still so confined.
13. Separation whether by agreement or order for a continuous period of not less than five years immediately preceding the petition and no reasonable likelihood of resuming cohabitation (Qualification in Section 37)

14. Absence of spouse in circumstances and for a time sufficient to presume his or her death

It should be noted that the 13th ground listed approaches divorce by mutual consent. The English Royal Commission disapproved of divorce by mutual consent because it felt there were insufficient safeguards if a spouse was unwilling but slowly worn down by her partner to give consent. Australia apparently feels separation for five years is a sufficient safeguard.

Another section of the Act is also of specific importance as it provides "a new mechanism at the one moment designed to bring the consequences of divorce for the children to the notice of the parents, and to secure the welfare of the children when divorce ensues." The Act then provides that no divorce shall be granted until the court is satisfied that adequate provision has been made for the children.

Clause 14 of the Act represents "an endeavour to afford Australians an opportunity to have a law that will offer some machinery towards the saving of marriage." Clause 14 states:

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The court must give consideration from time to time to the possibility of a reconciliation of the parties to the marriage in appropriate cases, and with that end in view the judge may either adjourn the proceedings for a fortnight, or longer if the spouses desire it; or with the consent of the spouses interview them in his chambers, with or without counsel, as he thinks proper; or nominate an approved marriage guidance organization or a person with experience or training in marriage conciliation, or in special circumstances some other suitable person to endeavor, with the consent of those parties, to effect a reconciliation.\(^9\)

Clause 16 adds a necessary requirement that nothing said in the course of such conciliation proceedings will be admissible in any court.

There has been divided opinion about these clauses. Some feel that the official sanctioning of marriage counselling will enhance the prestige of organizations offering such services and thereby encourage couples to visit them before instituting divorce proceedings. Others feel that the court actually discourages reconciliation "because the whole court proceeding emphasizes that they are adversaries instead of two persons who are seeking a solution to common intimate problems."\(^10\)

The new Australian Commonwealth Matrimonial Cause Act of 1959 then has instituted some important reforms by creating a country-wide domicile, by protecting the rights of children in

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\(^9\)Commonwealth Matrimonial Causes Act of 1959, Clause 14.

so far as adequate provision must be made for them before a
divorce is granted, by introducing legal machinery to make
reconciliation between marital partners more possible, and by
creating extensive grounds for divorce so that persons who are
married in name only can be freed from matrimonial bonds.

At the same time, the adversary system of law still does
not guarantee that all the facts relevant to the case will be
brought out in uncontested divorces and does stress the fact
the marriage partners are in fact adversaries. Marriage coun-
sellors although supported by the system are not directly
connected with the court and may suffer as a consequence of this.
Furthermore, divorce cases are not dealt with against the
background of a family unit where all aspects of broken family
life come to light. Hence, it would seem important that we look
beyond the Australian system to other systems which offer family
courts as a response to modern legislation and modern times.

Grounds

Until very recently, the most frequently suggested divorce
reform has been to alter the grounds for divorce, with the trend
being to increase the number of grounds. As a result, New York
and several Canadian provinces are the only important common-law
jurisdictions which still retain adultery as the exclusive ground.\(^\text{11}\) In the United States, however, the overwhelming percentage of divorces are sought and granted on the grounds of cruelty or desertion, and it has been found that adultery is seldom alleged in States that permit these two other grounds. Regardless of this, the fact remains that it is generally recognized that the grounds alleged in divorce suits are seldom the real reasons for the marriage breaking up; at best, they are merely symptoms of basic causes.\(^\text{12}\)

The general world trend, then, is to allow for more general fault grounds, which really indicates a belief—although unadmitted—that breakdown occurs.\(^\text{13}\) It appears that those who take issue with this trend and advocate a tightening of the divorce laws in order to curb the divorce rate do not fully understand the situation, as experience has shown that as long as divorce is permitted on any ground at all, spouses who have agreed to part can obtain a divorce.\(^\text{14}\) It would seem much more desirable to eliminate much of the hypocrisy from modern divorce


\(^\text{12}\) \textit{Ibid.}, p. 301.


law by bringing the legal grounds closer to the realities of marital disintegration. One interesting proposal for divorce grounds reform was developed by the National Association of Women Lawyers which drafted a bill advocating adoption of a "therapeutic approach" to divorce. In line with this approach it was proposed that the focus of judicial investigation would be on one or more of five critical components of marriage: mutual fidelity, mutual respect, mutual right of "consortium" mental capacity and sexual capacity. The usual grounds of adultery, cruelty, insanity, desertion etc. would be embraced by these broader areas and given appropriate weight in the subsequent judicial decision.

It has been suggested that all previous reform efforts have failed because they were mainly attempts to "... graft good branches upon an ailing tree - to patch up a rotten structure on a sand foundation with a sound plank here and there." It must be admitted that reform attempts centered around the broadening of grounds alone are not basic or fundamental, and do not go to the root of the problem. Attempts to stifle these and


even more progressive types of reform are obviously based upon fallacies and misconceptions, such as the belief that divorce destroys marriages and breaks up families. Yet the legal section of the National Conference on Family Life held at Washington, D.C. in 1948 itself asserted the following conclusions: that the broken family is not the result of divorce, but divorce is the result of the broken family; that spouses are not divorced by the court, but divorce themselves before coming to court; that divorce is not the cause but the result of marriage failure.\textsuperscript{17}

Fault

One other major aspect of the divorce law which seems to be almost an absolute deterrent to dealing effectively with the problem of divorce is the concept of fault, which is inherent in the law. According to Kenneth D. Johnson, former Juvenile Court Judge and currently Dean of the New York School of Social Work, "The universal acceptance of the belief that people can be in need of help without being at fault is a relatively new belief."\textsuperscript{18}

And the law has not done much to incorporate this belief into its practices. As long as fault doctrines and adversary procedures are maintained, people coming to the courts for help will


be forced into positions of hostility, antagonism, and fighting, thereby making divorce almost inevitable; and basing divorce on proof of fault or guilt makes the adversary concept inescapable. Attempts at preventive justice under these circumstances are impossible. "And so it appears that the law by making guilt the index of marriage failure and by placing so much emphasis upon the grounds or forms of guilt has contributed to its own failure in its avowed purpose to preserve marriage and the family. It is not preventive; it is punitive. It does not conserve; it disserves." 19

Implicit in eliminating the fault concept in divorce proceedings and its adversary nature would be legal recognition of the fact that termination of the marital status by a divorce decree is not an award to a successful litigant; rather the decree would terminate the marital status for both parties equally as a decree of a court of equity would terminate a partnership. Yet because we have lived for so many years with fallacies and misconceptions about the relationship between divorce and the law, it has been asserted that we cannot be too optimistic about a complete change in the law. One thing which can be done, however, is to adopt a statute that would permit divorce courts

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to apply the skills of other professionals in an attempt to resolve marital problems; this would not disrupt the existing pattern of law and would be a good proving ground upon which to test the effectiveness of a new approach, at the same time improving the receptiveness of the public and the legislature toward changing our divorce laws. This is a rather conservative view, however, as compared with that of Paul W. Alexander, who asserts that we must reconstruct the entire philosophy of the law so that it conserves family life, and this would mean wiping the slate clean and starting from scratch. Our archaic legal philosophy as evidenced by ideas on guilt and punishment should be abrogated and in their place substituted the modern philosophy of diagnosis and therapy.

**Family Court**

The philosophy stated above by Alexander is the very basis of the suggested divorce reform which is currently receiving the most attention and which seems to be the most promising—that of the family court. Alexander, who is Judge of the Court of Common Pleas, Department of Domestic Relations, Lucas County (Toledo) Ohio, is the prime advocate of this reform. Enthusiasm

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21 "Family Life Conference. . .," p. 239.
for the movement has been attributed to dissatisfaction with other types of reform, Alexander's effective advocacy, the popularizing of psychiatry and specialized counselling, and the fact that family courts are acceptable to both the "liberals" and "conservatives" in the field of divorce.22

The term "family court" is loosely applied to various types of courts, and is sometimes synonymous with domestic relations courts. According to Alexander, the two primary functions of all family courts are: (1) judicial, and (2) ministerial or therapeutic.23 There are a variety of courts called family courts, but with differing procedures and services, in twelve States of the United States, and in four other States there are courts with provisions for investigation and procedures approaching those of the family courts.24,25

The characteristics of a family court are as follows: it is an inter-professional institution which has integrated jurisdiction over all family matters; it maintains a staff of specialists, such as investigators or caseworkers, which make factual investigations for the court, and also employs marriage

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22 Johnstone, p. 317.
and family counselors; and it exists for the purpose of providing help for families in trouble, employing extensive use of community resources to that end.\textsuperscript{26,27}

The family court movement can be considered as part of two broader trends in law: (1) greater absorption into substantive and procedural law of the knowledge and methods of the behavioral sciences; and (2) increased employment of social workers by the court and by government agencies in the administration of the law.\textsuperscript{28} More specifically, it seems to reflect the growing realization that a multitude of psychological and social factors contribute to divorce, and therefore a special court equipped with special staff is needed in order to understand and adjust these factors with a view to preventing divorce.

The idea of the family court is an outgrowth of juvenile courts, whose duty it is to safeguard, cure, rehabilitate, correct, and remedy causal situations; and to this end they employ informal procedures, work closely with community resources to provide psychiatric, educational, medical and financial help, avoid a penal approach, and employ a staff of specialists. The non-judicial staff which Alexander suggests would be necessary for a truly efficient family court would be a psychiatrist,

\begin{itemize}
  \item \textsuperscript{26} Johnstone, "Family Courts," p. 21.
  \item \textsuperscript{28} Johnstone, p. 21.
\end{itemize}
clinical psychologist, psychometrist, psychiatric caseworker, social caseworker, marriage counselor, group worker, minister, etc., and all of these would regularly invoke the services of the legal profession, church, school, public and private agencies, and all available community resources.  

Some illustration should be made here of various aspects of family court procedures and services which have been implemented by several United States courts. The family court movement is considered to be most developed in Ohio, as there are eight such courts in that State. Once the parties have filed for a divorce, there is a six-weeks waiting period before the case is heard, and they are invited during this time to apply for marital counselling, which is given free of charge by family counselors with a view to preventing the divorce. Special investigators or probation officers are used in the social investigation of cases coming before the court, and reports are made on the family and individuals in it to the court to assist in arriving at a decision. Under a 1951 law, all cases in which there are children under 14 years of age must be investigated. The social investigation reports are considered carefully, and the decisions reached are not hurried or casual.

but based upon the criterion of what is deemed best for the welfare of the family.  

A variation on this procedure is Illinois' "60-day cooling off period". On the belief that it is useless to attempt a reconciliation during the heat of divorce proceedings, a spouse files a notice of intention to file for a divorce (which contains no complaints or charges, thereby eliminating the adversary procedure) and then must wait 60 days before the summons for the case is lodged. When the summons is lodged, if the judge thinks that a reconciliation attempt may be worthwhile he calls the parties before him for an informal discussion, with the lawyers present, before the action for divorce is actually filed. If there is indication that the couple may benefit from the services of a marriage counsellor or some other expert, the judge then makes such a referral.  

In the State of Wisconsin, the 1960 Wisconsin Family Code rejects the specialized staff approach common to a model family court, but provides other features which are geared toward reconciliation. This code also provides for a 60-day waiting period before a divorce case may be heard in order to attempt

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30 Chute, p. 53.

31 Hahlo, p. 394.
a reconciliation, and even if no reconciliation is effected, there must be a one-year cooling-off period between the time the decree is granted and the date upon which it becomes final. The code contains requirements to compel the appearance of the defendant spouse for purposes of attempting reconciliation. No judgement in any action is made until a family court commissioner (who in this case is a lawyer) has "... made a fair and impartial investigation of the case and fully advised the court as to the merits of the case and the rights and interests of the parties and the public, and the efforts made toward reconciliation of the parties or the reason such reconciliation attempt has not been made."  

The proposed Pennsylvania Divorce Code does not establish a true family court as there is no integrated jurisdiction over all family matters, but it leaves room for family court-type staff as a local option and tries to promote the social philosophy of a family court. Probation officers are employed whose function it is to provide consultation and referrals if necessary, and perform marriage counselling in an attempt to effect reconciliations. The probation officer makes a report of his investigations into the family, and copies of this report

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are made available to all interested parties five days before the hearing of the case. If an objection is made to any aspect of the report, the latter may be received in evidence only if the probation officer who wrote it is made available for cross-examination by the objecting party. This investigation and report is required by the court if there are children of the marriage under 14 years of age, and the court may further require a conference between all involved parties when there are children. Before a divorce is granted, the court must find that "... attempts at reconciliation would be impracticable or futile and not to the best interests of the family." If there are no children involved the court can stay the proceedings up to sixty days, and up to six months if there are children, if it finds attempts at reconciliation are practicable and to the best interests of the family.33 The procedures of the Pennsylvania code limit the scope of traditional defenses, in that discussing property settlements, children, and coming to agreement between the parties are not considered to be collusion. And here again, the establishment of a fault situation which would make attempts at reconciliation difficult is avoided by providing that the notice of intention to file for a divorce does not contain any

33 Foster, pp. 13-17.
complaints or grounds. Both the Pennsylvania and Wisconsin codes protect privileged communication in marriage counselling, but shy away from compulsory counseling while at the same time providing leverage to induce or persuade the parties involved to submit to such counseling.

A more detailed look should be taken here at the philosophy and procedures of one of the most extensive family court systems— that of Los Angeles County. All the domestic relations functions of the Los Angeles Family Court come under the supervisory jurisdiction of a presiding judge, and in conjunction with and as an integral part of the judicial process, conciliation services are performed by trained and experienced social workers, their function, however, being limited to short-term counseling. The court operates on the belief that it has an obligation to provide expert limited social service on a non-compulsory basis in both investigation and counseling, to enable it to determine what is best for the health and welfare of the children involved and to save marriages otherwise doomed. The court endeavours to eliminate all adversary aspects as far as possible in domestic relations cases. Social workers are attachés of the court, are paid by the court, and work directly

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34 Foster, pp. 13-17.
35 Ibid., p. 16.
under its supervision. They serve firstly as investigators, and their reports into cases are filed as secret exhibits to be opened only upon order of the court, thereby maintaining confidentiality. At one time a recommendation was made by the social worker as part of his report, but this was eliminated in 1962 as it was found they only invited criticism and antagonism from attorneys. The purpose of the reports is to furnish the court with information to assist the judge in making a decision for the best interests of the children and all parties involved.  

The Los Angeles County Conciliation Court has extended the function of social workers to include counseling. This court "... represents a unique and pioneering interdisciplinary approach on the part of law and social work to provide an enabling service to families with marital discord." According to the law, "prior to the filing of any action for divorce, annulment, or separate maintenance, either spouse, or both, may file in the conciliation court a petition invoking the jurisdiction of the court for the purpose of preserving the marriage by effecting a reconciliation between the parties..." 

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37 Pfaff, pp. 565-566.
38 Ibid., p. 566
39 Chute, p. 58.
Access to the court is simple - a couple may literally walk in off the street. After one spouse files the above-mentioned petition, neither may file an action for divorce for at least thirty days, and during this time the attempts at reconciliation are made. Counseling is limited to a short-term basis, as it was found that extended counseling by the court results in criticism from other public and private family counseling agencies. As a result, the court works in close cooperation with other community agencies in order to refer cases which indicate a need for long-term counseling. The court also stresses the non-compulsory aspect of their counseling services, as this frees the social workers to devote their time to those cases in which the parties want and can use the help and frees them from the time-consuming task of processing all cases regardless of whether or not reconciliation attempts are desired or feasible.

The procedures of the court are informal, private, and confidential and there is no fee for any of the services. The first step is to file a conciliation petition, as mentioned above. A statement is then prepared which sets forth general information concerning the parties, their backgrounds, and contains a check-list of marital difficulties which aids the counsellor in determining what the specific problems in a case

\[40\] Pfaff, p. 567.
are. A notice is then sent to inform the respondent of the time and place of the hearing with the counsellor, and the court can issue a citation requiring the attendance of the respondent if necessary. In preparation for the hearing, the counsellor talks to the attorneys involved and informs the parties themselves of the purpose of conciliation court, stressing that they are not in any way forced to reconcile. The counsellor then confers with each party separately, and after that sees them together. If either party remains opposed to reconciliation, the proceedings are terminated and the attorneys so notified. Court orders can be made in respect to the conduct of the parties as it may deem necessary to preserve the marriage or to implement the reconciliation of the spouses. The duration of these orders is limited to thirty days from the hearing of the petition, unless the parties mutually consent to a longer duration. If reconciliation is decided upon, a reconciliation agreement is drawn up which sets forth the terms and conditions upon which the couple agree to reconcile. The parties sign this agreement, and can be found in contempt of court if they violate their promises, thereby facing the possibility of a jail sentence. A court order requiring compliance with the above agreement is attached and served on the parties. It is felt that this agreement lends dignity to the promises made and also serves as a working document to be referred to by the parties in times of
trouble. Third parties are named and brought into the proce¬
dedings as well, and may also sign an agreement. If after
thirty days the parties feel they cannot remain reconciled,
they may call for a new conference, and if their views remain
unchanged the agreement and court order will be terminated.
All aspects of the conciliation procedures are considered as
privileged communication and are not admissible as evidence.
The reconciliation agreement itself contains a paragraph en-
titled "Trial Reconciliation" which makes it clear that enter-
ing the agreement and resuming cohabitation will not be con-
strued as condonation or reconciliation itself; the parties
thereby retain grounds if they decide to seek a divorce later,
and are given the opportunity to decide finally at the end of
the trial period whether or not they wish to enter a "true"
reconciliation. 41

Regarding the results of the conciliation court's efforts,
4,095 applications for counseling were made in 1962. Using the
concepts and principles of social work, eleven trained marriage
counsellors reconciled sixty-four out of every one hundred
couples who participated in conciliation procedures; and three
out of four of these couples were still together one year later. 42

41Louis H. Burke, "The Role of Conciliation in Divorce
42Pfaff, p. 566.
The assertion has been made that this court is demonstrating that the law can provide a healing service to unhappy families, and is exploding the myth that couples on the verge of divorce cannot be helped. It is further demonstrating that communication and cooperation between the legal profession and social work are resulting in maximum benefit to estranged couples and therefore to the community at large. This assertion seems to be supported by a statement made by one of the world's great lawyers, the late Roscoe Pound: "In effect, what there is in the way of preventive justice. . . is achieved not by legal, but by social agencies. It is done, for the most part, not by the agencies of the law, but by the social workers." But the family court as it has been described here could in fact be considered a "social agency".

One very positive step made in the United States toward an enlightened divorce law was the appointment in 1948 by the American Bar Association of a Special Committee on Divorce and Marriage Laws and Family Courts. This committee in 1950 set


up an Inter-Professional Commission composed of professional people from the fields of psychiatry, medicine, sociology, law, and the ministry, to bring about an improvement in the divorce law; and the American Bar Association's Section on Family Law was the result of the work of this Commission.
CHAPTER VIII
CONCLUSION

The initial exploration carried out in this study indicates that the adversary nature of British Columbia divorce legislation with its restricted grounds is not conducive to problem-solving and tends to create new problems for those already suffering from damaged interpersonal relationships. Some of these secondary problems have been documented in this study and are briefly outlined as follows: one, the true facts in a case are unlikely to emerge during an adversary proceeding especially in view of the fact that many cases are undefended. Also, the adversary system prevents the parties concerned from taking a mature look at what caused the marital breakdown. The law penalizes those who attempt reconciliation due to factors involved in condonation. Collusion bars also discourage discussion of matters of mutual concern or serve to keep such discussion secret. In some cases even though all personal and social functions of marriage have ceased to exist, the legal tie must be maintained because neither has committed adultery or is willing to engage in fraud. In other cases, those who have grounds for divorce are unable to obtain same because of legal
costs and difficulties in establishing domicile or travelling to a court that has jurisdiction. Scant investigation of proposed plans for children of the marriage is carried out unless the custody is contested. In general, British Columbia divorce legislation does not provide for any investigation concerning what really causes a marriage to fail. It provides no relief for many whose marriages have broken down beyond repair and no impetus towards problem-solving for others who might become reconciled or at least divorced with a minimum of secondary damage and with a recognition of responsibilities involving children.

Comparative legislation then has been examined with a view to proposals for reform. In such an examination it becomes apparent that merely extending the grounds for divorce or adding legislation aimed at conciliation is less effective when incorporated in systems where fault theory is retained than in systems which do not proceed on an adversary basis. Hence, progressive legislation combined with specialized Family or Conciliation Courts would seem most fruitful for reducing social problems associated with divorce and for reconciling many who feel their marriages cannot be salvaged. In British Columbia, the formation of Conciliation Courts has a variety of implications. First, the court would need to be given juris-
diction in matters pertaining to divorce as this is presently under the jurisdiction of the Supreme Court. Legislation would need to be introduced to provide for conciliation procedures and services. These could perhaps be modeled after the Los Angeles experience. Such legislation implies the use of specially trained judges and lawyers who are qualified to handle family problems. It also would involve the use of trained staff such as social workers and psychiatrists if services were to be fully effective.

An alternative, and one which seems of secondary importance, is to maintain jurisdiction over divorce in the Supreme Court but provide for a division of that Court to operate on the basis of a Family Court. This alternative has the disadvantage of combining both adversary and breakdown theories within one jurisdiction and as such it is unlikely to produce the radical changes in dealing with divorce that a true Family or Conciliation Court might provide.

Paramount to the proposal that divorce jurisdiction be transferred to a newly-created Family or Conciliation Court is the belief that the law should be such as to strengthen family life and enable problem-solving. Conciliation services established without hinderance from a law stressing fault and an adversary system seem most likely to bring out the true reasons for marital breakdown and lead to a mature consideration of
these reasons. Without such a process many marriages might needlessly dissolve. Hence, conciliation services should be available prior to divorce action. Should they fail to re-unite the marital partners, they still provide an atmosphere whereby important decisions governing custody of the children, finances, etc. can be made. It would seem carefully considered decisions would more likely result in such an atmosphere than the hostile atmosphere engendered by an adversary system. Grounds for divorce in British Columbia need also to be expanded in harmony with breakdown theory so that those who find they cannot become reconciled may be enabled to use divorce as a means of problem-solving. Grounds that include incompatibility and desertion are in keeping with breakdown theory. Such grounds would allow divorce to be granted on realistic grounds, a factor which is not the case when the singular ground of adultery is present.

Other proposals for constructive changes in British Columbia divorce legislation include the proposal that a married woman be able to acquire a domicile separate from that of her husband and that a Canada-wide domicile be established so that the courts are made more readily available to those requiring their services.

Furthermore, it would be necessary for a Family or Conciliation Court established in British Columbia to provide
conciliation services free of charge if their frequent use was to be assured. If not, it would seem important that the present Legal Aid services be expanded to cover cases involving divorce.

In conclusion, the authors wish to submit that a Family or Conciliation Court with jurisdiction over divorce and the custody of children, operating within a framework recognizing the breakdown of marriages and eliminating the fault or adversary system would do more to preserve marriages and act in the best interests of society than the present restrictive British Columbia legislation. Surely in this province we must reaffirm through careful research followed by social action and social change, the words of H.H. Foster:

> It is not unduly optimistic to believe that it is possible to adapt a law to the needs of our times and to fashion it into a force for positive good as distinguished from negative control, so that it helps families in trouble rather than avenges mans' transgressions. Only if we adopt a problem-solving approach will we be able to make family law responsive to social needs and an effective instrument of social justice.1

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APPENDIX I

B. C. Rules Applicable to Divorce and Matrimonial Causes
DIVORCE AND MATRIMONIAL CAUSES

Definition

1. In this Order "matrimonial cause" means a cause or proceeding for any relief claimed under the provisions of the Act intituled "An Act to amend the Law relating to Divorce and Matrimonial Causes in England," being chapter 97 of the "Revised Statutes of British Columbia, 1943," and amendments thereto, referred to in this Order as the "principal Act."

Form of action

2. All matrimonial causes shall be by action commenced by writ of summons and shall be styled:—

In the Supreme Court of British Columbia

Between

and

Plaintiff

Defendant.

*These rules purport to abrogate certain substantive rights concerning alimony and maintenance which formerly existed under the Supreme Court Rules, 1943, as ratified by the Court Rules of Practice Act, RSBC, 1960, ch. 81. For an extremely valuable comment on these changes see Herbert, "The Supreme Court Rules 1961—Their Effect on the Subject of Maintenance" (1960) The Advocate, vol. 18, at 204-207, who states:

"Though it is clear that section 4 subsection 4 of the Court Rules of Practice Act is enacted subject to subsection 6—giving the Lieutenant-Governor in Council power to alter, add to, vary or repeal the orders and rules, one wonders whether the Executive Council speaking as of November 29, 1960—repealing the 1943 Rules and substituting the 1961 Rules speaks louder than the legislature through the Court Rules of Practice Act expressly declaring the Divorce Rules, 1943, to be valid and binding according to their tenor, notwithstanding the said rules and order contain substantive law..."

...and even more one wonders whether the legislature conscientiously intended that, in delegating to the Council, the power to make rules and orders relating to practice and procedure, it should have power to take away substantive rights expressly affirmed by the legislature..."

See also Doumes v. McRae (1961-62) 36 WWR 223, 1961 Can Abr 561; Ambrose v. Ambrose (otherwise Harris) (1961) 29 DLR (2d) 766, 1961 Can Abr 575; Tipping v. Hornby (falsely called Tipping) (1961) 29 DLR (2d) 36 WWR 275, 1961 Can Abr 577, wherein it was held that Order in Council No. 2573 which purported to repeal the Divorce Rules 1943 along with the Supreme Court Rules for 1943 and substitute therein the Supreme Court Rules for 1961, is not effective to repeal the substantive law as contained in Divorce Rule 65 of the Divorce Rules for 1943. ...

and, except as in this Order otherwise provided, the practice and procedure relating to actions commenced in the Court shall apply mutatis mutandis to matrimonial causes.

Jointure of causes of action, restriction of

3. (1) No cause of action, save for alimony, maintenance, the care, custody, or control of children, settlement of property under section 34 of the principal Act, or damages for adultery, shall be joined with a claim in a matrimonial cause without leave of a Judge, to be obtained ex parte before the service of the writ, or thereafter upon notice to all parties who have been served.

(2) The order granting such leave shall be served with the writ or amended writ, as the case may be.

Application of BR. 5 to 9

4. (1) This Rule and Rules 5 to 9 inclusive, apply only to actions for dissolution of marriage or for judicial separation.

Adulterers to be defendants

(2) Unless otherwise ordered, every person with whom adultery is alleged to have been committed, whether such adultery is alleged as the cause of action or by way of revival of a prior matrimonial offence which has been condoned, shall be made a defendant in the action if living at the date of the issue of the writ.

Adulterer unknown

5. (1) If the name of the person with whom adultery is alleged to have been committed is unknown to the plaintiff at the time of the issue of the writ, a Judge, on being satisfied that all reasonable efforts have been made to ascertain the name, may grant leave to the plaintiff to issue the writ without adding such person as a defendant.

(2) After a writ has been issued, a Judge may grant leave to amend the same by alleging adultery with a person whose name is unknown to the plaintiff.

(3) The order granting leave may require that the plaintiff continue to make all reasonable efforts to ascertain the name of the person with whom adultery is alleged; and that as soon as the name of such person is ascertained, he be added as a defendant and all necessary amendments be made.

(4) If the order is made after the writ has been served, it may require the amended writ, amended statement of claim, and affidavit verifying the same to be re-served, and in such...
case it shall also prescribe the times within which the appear-
ance and the statement of defence to the amended writ and
amended statement of claim shall be delivered.

(5) Unless the Judge otherwise orders, the order granting
leave shall be served with the writ or with the amended writ,
as the case may be.

Death of adulterer before action

6. Where a person with whom adultery is alleged to have
been committed has died before the issue of the writ, it shall
not be necessary to make the legal representative of such per-
son a defendant in the action.

Death of adulterer pending action

7. (1) Where a defendant with whom adultery is alleged to
have been committed dies while the action is pending, the action
may be continued without adding the legal representative of
such defendant as a party, unless the plaintiff intends to claim
in the action for any relief against the estate.

(2) Where no such claim is made against the estate, the
plaintiff shall file an affidavit verifying the death of the defen-
dant, and in all proceedings in the action thereafter the words
"now deceased" shall be added immediately after the name of
the deceased defendant in the style of cause, and the action
may be continued without notice to the legal representative
of such defendant.

Application may be made to represent deceased adulterer

8. Where a legal representative of a deceased person with
whom adultery is alleged to have been committed has not been
made a defendant, any person desiring to represent such de-
ceased person may apply to a Judge for leave to be added as
a defendant.

Where action based on criminal offence

9. If the action is based on a matrimonial offence which
constitutes a criminal offence for which the defendant husband
has been convicted in a Court of competent jurisdiction in Can-
ada, the other person with whom was involved in such offence shall
not be made a defendant in the action unless a Judge otherwise
orders.

Statement of claim to be filed and served with writ

10. The statement of claim shall be filed at the time the
writ is issued and shall be served therewith.

Contents of

11. (1) The statement of claim shall include the following
particulars:
(q) The existence of any separation agreement or any financial arrangement between the spouses:

(r) Where the writ includes a claim for alimony or maintenance, or for maintenance of the children of the marriage, a statement of the income and property of the respective spouses in so far as they are within the knowledge or belief of the plaintiff.

(2) The statement of claim shall conclude with a statement giving full particulars of the relief claimed, including:

(a) Any claim for dissolution or annulment of marriage, judicial separation, restitution of conjugal rights, or jactitation of marriage:

(b) Any claim for custody of children:

(c) Any claim for interim alimony or maintenance:

(d) Any claim for permanent alimony or maintenance:

(e) Any claim for damages or costs:

(f) In appropriate cases, a request that the Court will exercise its discretion in favour of the plaintiff, notwithstanding the commission of a matrimonial offence; and

(g) Any other claim.

Supporting affidavit

12. (1) Every statement of claim shall be supported by an affidavit of the plaintiff verifying the facts alleged of which he or she has personal knowledge and deposing as to belief in the truth of the other facts alleged.

(2) In actions for dissolution or nullity of marriage, judicial separation, or jactitation of marriage, the plaintiff shall further state in the affidavit that no collusion or connivance exists between the plaintiff and the other party to the marriage or alleged marriage.

(3) The affidavit shall be contained in the same document as the statement of claim, and shall be at the foot or end thereof.

Where discretion asked

13. (1) Where a party who has been guilty of a matrimonial offence intends to ask at the hearing that the discretion of the Court be exercised in his favour, a statement signed by such party setting forth all facts relating to such offence and the grounds upon which the exercise of the discretion is asked shall be placed in a sealed envelope and filed with the statement of claim or counterclaim, as the case may be.

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(2) Such statement shall be open to the inspection of the Attorney-General, but, except by the direction of a Judge, shall not be open to inspection by any other person.

(3) The Judge presiding at the trial may peruse the statement and may order it to be resealed or to be communicated to the opposite party, or to be otherwise dealt with as he sees fit.

Service of writ and other papers therewith

14. (1) Unless otherwise ordered in special circumstances, the writ and all papers required to be served therewith shall be served on the defendants personally.

(2) The provisions of Order IX, Rule 1, shall not apply to such service.

(3) Such service shall be made by some person other than the plaintiff or his solicitor.

(4) The affidavit of service or certificate under Order IX, Rule 8, shall state fully the means of knowledge of the deponent as to the identity of the person served, and shall be filed in the Registry.

(5) No judgment shall be pronounced unless it is clearly shown at the trial that the person served was the defendant.

Service ex juris

15. In a matrimonial cause no leave shall be required to issue or serve a writ for service out of the jurisdiction, and the time for appearance to such writ may be fixed by the Registrar in a summary way. This rule applies as well to notice of the writ, and all papers required to be served with the writ or notice thereof, as to the writ itself.

Amendment of statement of claim

16. (1) The statement of claim may be amended without leave before service thereof.

* Rule 1 reads:

1. No service of writ shall be required when the defendant, by his solicitor, undertakes in writing to accept service, and enters an appearance.

† Rule 8 reads:

8. Where any person serving in Her Majesty's Canadian Forces outside of Canada has been served by an officer of Her Majesty's Canadian Forces with a writ of summons, notice of a writ, or any originating notice, petition, notice of motion, or any originating proceeding under any statute, Rule of Court, or practice whereby proceedings can be commenced otherwise than by writ of summons, then proof of such service in the form of a certificate of service in Form No. 231 in Appendix B, certified by the officer, when filed in the Registry, may be accepted in lieu of the affidavit of service required under these Rules.
(2) After service of the writ and statement of claim, notice of any application to amend the same shall, unless otherwise ordered, be served on every defendant who has entered an appearance.

(3) The amendment shall be made by filing a new copy of the statement of claim verified by an affidavit complying with Rule 12 of this Order.

(4) The amended writ or statement of claim with the affidavit of verification and any order granting leave to amend shall be served upon the defendants, unless otherwise ordered, but service shall not be dispensed with where a new cause of action is added.

(5) This Rule is substituted for Rules 2, 3, and 4 of Order XXVIII, and Rules 8* and 9† of said Order shall not apply.

Counterclaim

17. (1) Where a defendant seeks relief in the action, he shall deliver a counterclaim.

(2) The rules relating to a matrimonial cause shall apply, mutatis mutandis, to a counterclaim.

No Judgment except upon trial

18. In any action for dissolution or nullity of marriage or for judicial separation, no judgment shall be entered upon consent of the parties, or in default of appearance or of pleading, or otherwise than after a trial.

Trial

19. (1) Before a matrimonial cause is set down for trial, the pleadings and proceedings in the cause shall be referred by the plaintiff or defendant to the Registrar, who shall certify that the same are correct and in order, and the Registrar shall cause any irregularity in the pleadings or proceedings to be corrected or refer any question arising thereon to a Judge for his direction.

(2) All matrimonial causes shall be heard by a Judge without a jury: Provided that in an action for dissolution of marriage where damages are claimed, upon the application of any party thereto for a trial with a jury, an order shall be made for trial by a Judge with a common jury.

(3) The application in such case shall be returnable not later than four days after notice of trial, or appointment for trial, as the case may be, has been given.

"Jury Act" to apply

20. The provisions of the "Jury Act" as to qualification, selection, drawing, and summoning of a common jury and the rules for empanelling such a jury shall apply to every trial by jury in a matrimonial cause.

Questions for Jury

21. Upon a trial by jury, all questions of fact shall be determined by the jury upon written questions submitted to them by the Judge. A general verdict shall not be taken.

Attorney-General may intervene

22. In any matrimonial cause the Attorney-General may intervene at any stage of the action for the purpose of showing collusion or fraud or of bringing any evidence before the Court.

Notice of Intervention

23. Where the Attorney-General intervenes, he shall file and serve a notice of intervention and shall thereafter be served with notice of all proceedings in the action.

Directions

24. Where the Attorney-General has intervened, he or any party to the action may apply on motion to a Judge for directions concerning the intervention.

Stay of proceedings

25. At any time before judgment the Court or Judge may direct a stay of proceedings for such time as they or he thinks fit in order that the Attorney-General may intervene, and may direct the Registrar to notify the Attorney-General accordingly.

Defendant mentally ill person

26. (a) Where a party defendant to a matrimonial cause is a mentally ill person within the meaning of the "Mental Hospitals Act" at the time of the issue of the writ, he shall be
served and the action proceed as in the ordinary case of a defendant who is a lunatic or person of unsound mind not so found by inquisition.

(b) Where a party defendant to a matrimonial cause becomes a mentally ill person within the meaning of the “Mental Hospitals Act” pending the action, such notice shall be given to his committee, guardian, or next of kin as the Court or a Judge may direct; and

(c) Where a party to a matrimonial cause is a mentally ill person within the meaning of the “Mental Hospitals Act,” the affidavits required by these rules to be made by such party if he were mentally sound shall not be necessary, but the committee, guardian, or next friend of such party shall in lieu thereof file an affidavit showing that he has made a careful inquiry into the facts, and that to the best of his knowledge, information, and belief the facts required to be deposited, if the party were mentally sound, are true.

Infants

27. (a) An infant who has attained the age of 14 years may elect a guardian ad litem for the purpose of any proceeding in a matrimonial cause on his or her behalf.

(b) The election, the consent of the guardian to act, and an affidavit showing fitness and no contrary interest must be filed in the Registry before an elected guardian can act on behalf of the infant.

(c) A guardian for an infant under the age of 14 years may be assigned by a Judge upon motion supported by affidavits.

Infants need not be represented except in certain cases

28. Subject to the last preceding Rule, it shall not be necessary for an infant, plaintiff or defendant, whose marriage is the subject of the proceeding and who has attained the age of 14 years, to be represented by his next friend or guardian for the purpose of any proceeding in a matrimonial cause, except in actions or matters where alimony, maintenance, or damages is claimed against him, or where a claim is made respecting his property.

Wife's costs

29. The Court or a Judge may at any time pending action, and if necessary from time to time, make such order as it or he thinks fit for payment of or security for the wife's costs, notwithstanding that the decision of the Court at the trial of the action is against the wife.

Interim alimony

30. Whether applied for or not in the statement of claim, the wife being the plaintiff in the action may apply to the Court or a Judge by motion at any time after the statement of claim has been duly served on the husband, or, being a defendant, after having entered an appearance, for interim alimony.

Permanent alimony, when begins

32. Permanent alimony or maintenance shall, unless otherwise ordered, commence from the date of judgment in the action.

Increase or decrease of alimony

33. A wife may, at any time after interim alimony has been granted to her, apply to the Court or a Judge by motion for an increase of alimony by reason of the increased means of the husband or the reduction of his own means, and the husband may likewise apply for a decrease of interim alimony by reason of his reduced means or the wife’s increased means. This Rule applies also to permanent alimony, except that in such case the application shall be by originating notice.

Evidence on applications for alimony

34. All applications for alimony or maintenance may be disposed of on affidavit or in such manner as the Court or Judge may direct.

Procedures under “Legitimacy Declaration Act, 1858”

35. This Order shall extend to proceedings under the “Legitimacy Declaration Act, 1858” (Imp.), so far as the same may be applicable thereto.

Queen’s Bench Act R.S.M., 1954, Ch. 52.

Alimony

51. The court shall have jurisdiction to grant alimony to any wife who would be entitled to alimony by the law of England, or to any wife who would be entitled by the law of England to a divorce, and to alimony as incident thereto, or to any wife whose husband lives separate from her without any sufficient cause and under circumstances which would entitle her by the law of England to a decree for the restitution of con-

*Quere whether the court is empowered to vary a maintenance order under the provisions of this section. See Herbert, (1960) The Advocate, vol. 18, at pp. 205, 207.
APPENDIX II

Divorce and Matrimonial Causes Act

Chapter 118
CHAPTER 118

Divorce and Matrimonial Causes Act

Whereas it is expedient to amend the law relating to divorce, and to constitute a Court with exclusive jurisdiction in matters matrimonial in England, and with authority in certain cases to decree the dissolution of a marriage: Be it therefore enacted as follows:—

1. All jurisdiction now vested in or exercisable by any Ecclesiastical Court or person in England in respect of divorces à mensa et thoro, suits of nullity of marriage, suits of jactitation of marriage, suits for restitution of conjugal rights, and in all causes, suits, and matters matrimonial, except in respect of marriage licences, belongs to and is vested in Her Majesty, and such jurisdiction, together with the jurisdiction conferred by this Act, shall be exercised in the name of Her Majesty in a Court of Record to be called the “Court for Divorce and Matrimonial Causes.” [20 & 21 Vict., c. 85, s. 6]; R.S. 1948, c. 97, s. 1.

2. No decree shall hereafter be made for a divorce à mensa et thoro, but in all cases in which a decree for a divorce à mensa et thoro might now be pronounced the Court may pronounce a decree for a judicial separation, which shall have the same force and the same consequences as a divorce à mensa et thoro now has. [20 & 21 Vict., c. 85, s. 7]; R.S. 1948, c. 97, s. 2.

3. The Lord Chancellor, the Lord Chief Justice of the Court of King’s Bench, the Lord Chief Justice of the Court of Common Pleas, the Lord Chief Baron of the Court of Exchequer, the Senior Puisne Judge for the time being in each of the three last-mentioned Courts, and the Judge of Her Majesty’s Court of Probate constituted by any Act of the present session, shall be the Judges of the said Court. [20 & 21 Vict., c. 85, s. 8]; R.S. 1948, c. 97, s. 3.

4. All petitions, either for the dissolution or for a sentence of nullity of marriage, and applications for new trials of questions or issues before a jury, shall be heard and determined by three or more Judges of the said Court, of whom the Judge of the Court of Probate shall be one. [20 & 21 Vict., c. 85, s. 10]; R.S. 1948, c. 97, s. 4.

5. A sentence of judicial separation (which shall have the effect of a divorce à mensa et thoro under the existing law, and such other legal effect as herein mentioned) may be obtained, either by the husband or the wife, on the ground of adultery, or cruelty, or desertion without cause for two years and upwards. [20 & 21 Vict., c. 85, s. 16]; R.S. 1948, c. 97, s. 5.
6. In all suits and proceedings, other than proceedings to dissolve any marriage, the said Court shall proceed and act and give relief on principles and rules which in the opinion of the said Court are as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts have heretofore acted and given relief, but subject to the provisions herein contained and to the rules and orders under this Act. [20 & 21 Vict., c. 85, s. 22]; R.S. 1948, c. 97, s. 6.

7. (1) Any husband or wife, upon the application of whose wife or husband, as the case may be, a decree of judicial separation has been pronounced, may, at any time thereafter, present a petition to the Court praying for a reversal of such decree on the ground that it was obtained in his or her absence, and that there was reasonable ground for the alleged desertion, where desertion was the ground of such decree.

(2) The Court may, on being satisfied of the truth of the allegations of such petition, reverse the decree accordingly, but the reversal thereof shall not prejudice or affect the rights or remedies which any other person would have had in case such reversals had not been decreed, in respect of any debts, contracts, or acts of the wife incurred, entered into, or done between the times of the sentence of separation and of the reversal thereof. [20 & 21 Vict., c. 85, s. 23]; R.S. 1948, c. 97, s. 7.

8. In all cases in which the Court makes a decree or order for alimony, it may direct the same to be paid either to the wife herself or to any trustee on her behalf, to be approved by the Court, and may impose any terms or restrictions which to the Court may seem expedient, and may from time to time appoint a new trustee, if for any reason it appears to the Court expedient so to do. [20 & 21 Vict., c. 85, s. 24]; R.S. 1948, c. 97, s. 8.

9. In every case of a judicial separation the wife shall, from the date of the sentence and whilst the separation shall continue, be considered as a feme sole with respect to property of every description which she may acquire or which may come to or devolve upon her; and such property may be disposed of by her in all respects as a feme sole, and on her decease the same shall, in case she shall die intestate, go as the same would have gone if her husband had been then dead; but if any such wife again cohabits with her husband, all such property as she may be entitled to when such cohabitation takes place shall be held to her separate use, subject, however, to any agreement in writing made between herself and her husband while separate. [20 & 21 Vict., c. 85, s. 25]; R.S. 1948, c. 97, s. 9.

10. In every case of a judicial separation the wife shall, whilst so separated, be considered as a feme sole for the purposes of contract, and wrongs and injuries, and suing and being sued in any civil proceedings; and her husband is not liable in respect of any engagement or contract
The provisions respecting the property of a wife who has obtained a decree for judicial separation or an order of protection shall be deemed to extend to property to which such wife has become or becomes entitled as executrix, administratrix, or trustee since the sentence of separation or the commencement of the desertion (as the case may be); and the death of the testator or intestate shall be deemed to be the time when such wife became or becomes entitled as executrix or administratrix. [21 & 22 Vict., c. 108, s. 7]; R.S. 1948, c. 97, s. 11.

12. (1) Any husband may present a petition to the said Court, praying that his marriage may be dissolved, on the ground that his wife has since the celebration thereof been guilty of adultery.

(2) Any wife may present a petition to the said Court, praying that her marriage may be dissolved, on the ground that since the celebration thereof her husband has been guilty of

(a) incestuous adultery; or
(b) bigamy with adultery; or
(c) rape; or
(d) sodomy or bestiality; or
(e) adultery coupled with such cruelty as without adultery would have entitled her to a divorce à mensa et thoro; or
(f) adultery coupled with desertion, without reasonable excuse, for two years or upwards.

(3) Every such petition shall state as distinctly as the nature of the case permits the facts on which the claim to have such marriage dissolved is founded.

(4) For the purposes of this Act incestuous adultery shall be taken to mean adultery committed by a husband with a woman with whom if his wife were dead he could not lawfully contract marriage by reason of her being within the prohibited degrees of consanguinity or affinity; and bigamy shall be taken to mean marriage of any person, being married, to any other person during the life of the former husband or wife, whether the second marriage shall have taken place within the dominions of Her Majesty or elsewhere. [20 & 21 Vict., c. 85, s. 27]; R.S. 1948, c. 97, s. 12.

13. (1) Upon any such petition presented by a husband, the petitioner shall make the alleged adulterer a co-respondent to the said peti-
tion, unless on special grounds, to be allowed by the Court, he is excused from so doing.

(2) On every petition presented by a wife for dissolution of marriage, the Court, if it see fit, may direct that the person with whom the husband is alleged to have committed adultery be made a respondent.

(3) The parties or either of them may insist on having the contested matters of fact tried by a jury as hereinafter mentioned. [20 & 21 Vict., c. 85, s. 28]; R.S. 1948, c. 97, s. 13.

14. Upon any such petition for the dissolution of a marriage, it is the duty of the Court to satisfy itself, so far as it reasonably can, not only as to the facts alleged, but also whether or no the petitioner has been in any manner accessory to or conniving at the adultery, or has condoned the same, and shall also inquire into any countercharge which may be made against the petitioner. [20 & 21 Vict., c. 85, s. 29]; R.S. 1948, c. 97, s. 14.

15. In case the Court, on the evidence in relation to any such petition, is not satisfied that the alleged adultery has been committed, or finds that the petitioner has during the marriage been accessory to or conniving at the adultery of the other party to the marriage, or has condoned the adultery complained of, or that the petition is presented or prosecuted in collusion with either of the respondents, then and in any of the said cases the Court shall dismiss the said petition. [20 & 21 Vict., c. 85, s. 30]; R.S. 1948, c. 97, s. 15.

16. In case the Court is satisfied on the evidence that the case of the petitioner has been proved, and does not find that the petitioner has been in any manner accessory to or conniving at the adultery of the other party to the marriage, or has condoned the adultery complained of, or that the petition is presented or prosecuted in collusion with either of the respondents, then the Court shall pronounce a decree declaring such marriage to be dissolved; but the Court is not bound to pronounce such decree if it finds that the petitioner has during the marriage been guilty of adultery, or if the petitioner has, in the opinion of the Court, been guilty of unreasonable delay in presenting or prosecuting the petition, or of cruelty towards the other party to the marriage, or of having deserted or wilfully separated himself or herself from the other party before the adultery complained of, and without reasonable excuse, or of such wilful neglect or misconduct as has conduced to the adultery. [20 & 21 Vict., c. 85, s. 31]; R.S. 1948, c. 97, s. 16.

17. (1) The Court may, if it shall think fit, on any such decree, order that the husband shall to the satisfaction of the Court secure to the wife such gross sum of money, or such annual sum of money, for any term not exceeding her own life, as, having regard to her fortune (if any), to the ability of the husband, and to the conduct of the parties, it deems reasonable, and for that purpose may refer it to any one of the
conveyancing counsel of the Court of Chancery to settle and approve of a proper deed or instrument to be executed by all necessary parties.

(2) The said Court may in such case, if it shall see fit, suspend the pronouncing of its decree until such deed shall have been duly executed.

(3) Upon any petition for dissolution of marriage the Court has the same power to make interim orders for payment of money, by way of alimony or otherwise, to the wife as it would have in a suit instituted for judicial separation. [20 & 21 Vict., c. 85, s. 32]; R.S. 1948, c. 97, s. 17.

18. (1) Any husband may, either in a petition for dissolution of marriage or for judicial separation, or in a petition limited to such object only, claim damages from any person on the ground of his having committed adultery with the wife of such petitioner, and such petition shall be served on the alleged adulterer and the wife, unless the Court dispenses with such service, or direct some other service to be substituted.

(2) The claim made by every such petition shall be heard and tried on the same principles, in the same manner, and subject to the same or the like rules and regulations as actions for criminal conversation are now tried and decided in Courts of Common Law.

(3) All the enactments herein contained with reference to the hearing and decision of petitions to the Court shall, so far as may be necessary, be deemed applicable to the hearing and decision of petitions presented under this enactment.

(4) The damages to be recovered on any such petition shall in all cases be ascertained by the verdict of a jury, although the respondents or either of them may not appear.

(5) After the verdict has been given the Court may direct in what manner such damages shall be paid or applied, and may direct that the whole or any part thereof shall be settled for the benefit of the children (if any) of the marriage, or as a provision for the maintenance of the wife. [20 & 21 Vict., c. 85, s. 33]; R.S. 1948, c. 97, s. 18.

19. Whenever in a petition presented by a husband the alleged adulterer is made a co-respondent, and the adultery has been established, the Court may order the adulterer to pay the whole or any part of the costs of the proceedings. [20 & 21 Vict., c. 85, s. 34]; R.S. 1948, c. 97, s. 19.

20. In any suit or other proceeding for obtaining a judicial separation or a decree of nullity of marriage, and on any petition for dissolving a marriage, the Court may from time to time, before making its final decree, make such interim orders, and may make such provision in the final decree, as it may deem just and proper with respect to the custody, maintenance, and education of the children the marriage of whose parents is the subject of such suit or other proceeding, and may, if it shall think fit, direct proper proceedings to be taken for placing such children under the protection of the Court of Chancery. [20 & 21 Vict., c. 85, s. 35]; R.S. 1948, c. 97, s. 20.

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Intervention by Attorney-General.

21. On any petition brought under this Act the Attorney-General may intervene, and may file a notice of intervention in the cause. R.S. 1948, c. 97, s. 21.

22. Upon intervention the Attorney-General may at any stage of the proceedings, and whether he has filed a notice of intervention or not, show collusion or fraud or that the petitioner has been accessory to or has connived at or condoned the adultery or any other facts upon which the petition may be dismissed. R.S. 1948, c. 97, s. 22.

Service of notice of intervention.

23. (1) Where the Attorney-General files a notice of intervention he shall serve a copy thereof on each of the parties or their solicitors; and he may thereafter by notice require the parties or any of them to serve upon him all pleadings and proceedings filed by them respectively in the cause, including those already filed.

(2) Any notice to be given under this section may be served in the same manner as is provided for the service of any document other than a petition. R.S. 1948, c. 97, s. 23.

Directions concerning intervention.

24. Where the Attorney-General has intervened he, or any party to the cause, may apply on summons to a Judge for directions concerning the intervention. R.S. 1948, c. 97, s. 24.

Power to stay proceedings to permit intervention.

25. At any time before the pronouncement of a decree in the cause a Judge may direct a stay of proceedings for such time as he thinks fit in order that the Attorney-General may intervene, and upon a Judge making such direction he shall cause the District Registrar of the Court to serve notice of the staying of proceedings upon the Attorney-General. R.S. 1948, c. 97, s. 25.

Questions of fact may be tried before the Court.

26. In questions of fact arising in proceedings under this Act it is lawful for, but, except as hereinbefore provided, not obligatory upon, the Court to direct the truth thereof to be determined before itself, or before any one or more of the Judges of the said Court, by the verdict of a special or common jury. [20 & 21 Vict., c. 85, s. 36]; R.S. 1948, c. 97, s. 26.

Where a question is ordered to be tried, a jury may be summoned as in the Common Law Courts.

27. (1) The Court, or any Judge thereof, may make all such rules and orders upon the Sheriff or any other person for procuring the attendance of a special or common jury for the trial of such question as may now be made by any of the Superior Courts of Common Law at Westminster, and may also make any other orders which to such Court or Judge may seem requisite.

(2) Every such jury shall consist of persons possessing the like qualifications, and shall be struck, summoned, balloted for, and called in like manner, as if such jury were a jury for the trial of any cause in any of the said Superior Courts.
(3) Every juryman so summoned is entitled to the same rights, and subject to the same duties and liabilities, as if he had been duly summoned for the trial of any such cause in any of the said Superior Courts.

(4) Every party to any such proceeding is entitled to the same rights as to challenge and otherwise as if he were a party to any such cause. [20 & 21 Vict., c. 85, s. 37]; R.S. 1948, c. 97, s. 27.

28. When any such question is so ordered to be tried, such question shall be reduced into writing in such form as the Court shall direct, and at the trial the jury shall be sworn to try the said question, and a true verdict to give thereon according to the evidence; and upon every such trial the Court or Judge has the same powers, jurisdiction, and authority as any Judge of any of the said Superior Courts sitting at Nisi Prius. [20 & 21 Vict., c. 85, s. 38]; R.S. 1948, c. 97, s. 28.

29. (1) Upon the trial of any such question or of any issue under this Act, a bill of exceptions may be tendered, and a general or special verdict or verdicts, subject to a special case, may be returned, in like manner as in any cause tried in any of the said Superior Courts.

(2) Every such bill of exceptions, special verdict, and special case respectively shall be stated, settled, and sealed in like manner as in any cause tried in any of the said Superior Courts, and where the trial has not been had in the Court for Divorce and Matrimonial Causes shall be returned into such Court without any writ of error or other writ.

(3) The matter of law in every such bill of exceptions, special verdict, and special case shall be heard and determined by the Full Court, subject to such right of appeal as is hereinafter given in other cases. [20 & 21 Vict., c. 85, s. 39]; R.S. 1948, c. 97, s. 29.

30. Every person seeking a decree of nullity of marriage, or a decree of judicial separation, or a dissolution of marriage, or decree in a suit of jactitation of marriage, shall, together with the petition or other application for the same, file an affidavit verifying the same so far as he or she is able to do so, and stating that there is not any collusion or connivance between the deponent and the other party to the marriage. [20 & 21 Vict., c. 85, s. 41]; R.S. 1948, c. 97, s. 30.

31. Every such petition shall be served on the party to be affected thereby, either within or without Her Majesty's dominions, in such manner as the Court by any general or special order from time to time directs, and for that purpose the Court has all the powers conferred by any Statute on the Court of Chancery, but the said Court may dispense with such service altogether in case it seems necessary or expedient so to do. [20 & 21 Vict., c. 85, s. 42]; R.S. 1948, c. 97, s. 31.

32. The Court may, if it thinks fit, order the attendance of the petitioner, and may examine him or her, or permit him or her to be examined or cross-examined, on oath on the hearing of any petition, but
no such petitioner is bound to answer any question tending to show that he or she has been guilty of adultery. [20 & 21 Vict., c. 85, s. 43]; R.S. 1948, c. 97, s. 32.

33. The Court may from time to time adjourn the hearing of any such petition, and may require further evidence thereon, if it sees fit so to do. [20 & 21 Vict., c. 85, s. 44]; R.S. 1948, c. 97, s. 33.

34. In any case in which the Court pronounces a sentence of divorce or judicial separation for adultery of the wife, if it is made to appear to the Court that the wife is entitled to any property either in possession or reversion, the Court may, if it thinks proper, order such settlement as it thinks reasonable to be made of such property or any part thereof for the benefit of the innocent party, and of the children of the marriage, or either or any of them. [20 & 21 Vict., c. 85, s. 45]; R.S. 1948, c. 97, s. 34.

35. Subject to section 36 and such rules and regulations as may be established as herein provided, the witnesses in all proceedings before the Court where their attendance can be had shall be sworn and examined orally in open Court; but parties, except as hereinbefore provided, shall be at liberty to verify their respective cases in whole or in part by affidavit, but so that the deponent in every such affidavit shall, on the application of the opposite party or by direction of the Court, be subject to be cross-examined by or on behalf of the opposite party orally in open Court, and after such cross-examination may be re-examined orally in open Court as aforesaid by or on behalf of the party by whom such affidavit was filed. [20 & 21 Vict., c. 85, s. 46]; R.S. 1948, c. 97, s. 35.

36. (1) Where a witness is out of the jurisdiction of the Court, or where, by reason of his illness or from other circumstances, the Court does not think fit to enforce the attendance of the witness in open Court, the Court may order a commission to issue for the examination of such witness on oath, upon interrogatories or otherwise, or, if the witness is within the jurisdiction of the Court, may order the examination of such witness on oath, upon interrogatories or otherwise, before any officer of the said Court, or other person to be named in such order for the purpose.

(2) All the powers given to the Courts of Law at Westminster by the Acts of the thirteenth year of King George the Third, chapter 63, and of the first year of King William the Fourth, chapter 22, for enabling the Courts of Law at Westminster to issue commissions and give orders for the examination of witnesses in actions depending in such Courts, and to enforce such examination, and all the provisions of the said Acts, and of any other Acts for enforcing or otherwise applicable to such examination and the witnesses examined, extend and are applicable to the Court and to the examination of witnesses under the commissions and orders of the said Court, and to the witnesses examined, as if such Court were
one of the Courts of Law at Westminster, and the matter before it were
an action pending in such Court. [20 & 21 Vict., c. 85, s. 47]; R.S.
1948, c. 97, s. 36.

37. The rules of evidence observed in the Superior Courts of Com-
mon Law at Westminster are applicable to and shall be observed in the
trial of all questions of fact in the Court. [20 & 21 Vict., c. 85, s. 48];
R.S. 1948, c. 97, s. 37.

38. (1) The Court may, under its seal, issue writs of subpœna or
subpœna duces tecum, commanding the attendance of witnesses at such
time and place as shall be therein expressed.

(2) Such writs may be served in any part of Great Britain or Ireland.

(3) Every person served with such writ is bound to attend, and to be
sworn and give evidence in obedience thereto, in the same manner as if
it had been a writ of subpœna or subpœna duces tecum issued from any
of the said Superior Courts of Common Law in a cause pending therein,
and served in Great Britain or Ireland, as the case may be; but any
petitioner required to be examined, or any person called as a witness or
required or desiring to make an affidavit or deposition under or for the
purposes of this Act, shall be permitted to make his solemn affirmation
or declaration instead of being sworn in the circumstances and manner
in which a person called as a witness or desiring to make an affidavit or
deposition would be permitted so to do under the Common Law Pro-
cedure Act, 1854, in cases within the provisions of that Act. [20 & 21
Vict., c. 85, s. 49]; R.S. 1948, c. 97, s. 38.

39. All persons wilfully deposing or affirming falsely in any proceed-
ning before the Court shall be deemed to be guilty of perjury, and are
liable to all the pains and penalties attached thereto. [20 & 21 Vict.,
c. 85, s. 50]; R.S. 1948, c. 97, s. 39.

40. The Court on the hearing of any suit, proceeding, or petition
under this Act, and the House of Lords on the hearing of any appeal
under this Act, may make such order as to costs as to such Court or
House respectively may seem just, but there shall be no appeal on the sub-
ject of costs only. [20 & 21 Vict., c. 85, s. 51]; R.S. 1948, c. 97, s. 40.

41. The Court has full power to fix and regulate from time to time
the fees payable upon all proceedings before it, all which fees shall be
received, paid, and applied as herein directed, and the said Court may
make such rules and regulations as it may deem necessary and expedient
for enabling persons to sue in the said Court in formâ pauperis. [20 &
21 Vict., c. 85, s. 54]; R.S. 1948, c. 97, s. 41.

42. When the time limited for appealing against any decree dissolving
a marriage or declaring a marriage null and void has expired, and no
appeal has been presented against such decree, or when any such appeal has been dismissed, or when in the result of any appeal any marriage is declared to be dissolved or declared to be null and void, but not sooner, it is lawful for the respective parties thereto to marry again, as if the prior marriage had been dissolved by death; but no clergyman in holy orders of the United Church of England and Ireland shall be compelled to solemnize the marriage of any person whose former marriage may have been dissolved on the ground of his or her adultery, or is liable to any suit, penalty, or censure for solemnizing or refusing to solemnize the marriage of any such person. [20 & 21 Vict., c. 85, s. 57]; R.S. 1948, c. 97, s. 42.

43. In any case where either of the parties with respect to whom there has, before the thirty-first day of January, 1942, been solemnized the rites or ceremony of marriage in accordance with any of the forms sanctioned by the Marriage Act, is a person whose previous marriage was dissolved by a decree absolute in divorce proceedings, and where the ceremony or rites were solemnized before the expiry of the time limited for appealing against the decree absolute, if the time limited for appealing has expired without any appeal having been presented against the divorce, and if there was no impediment to the marriage purported to have been solemnized by the said ceremony or rites other than the impediment imposed by section 42, the marriage purported to be so solemnized is declared to be valid; and the parties with respect to whom the ceremony or rites were solemnized shall be deemed to have been lawfully married on the date of the ceremony or rites. R.S. 1948, c. 97, s. 43.

44. When any minister of any church or chapel of the United Church of England and Ireland refuses to perform such marriage service between any persons who but for such refusal would be entitled to have the same service performed in such church or chapel, the minister shall permit any other minister in holy orders of the said United Church, entitled to officiate within the diocese in which such church or chapel is situate, to perform such marriage service in such church or chapel. [20 & 21 Vict., c. 85, s. 58]; R.S. 1948, c. 97, s. 44.

45. After this Act has come into operation no action shall be maintainable in England for criminal conversation. [20 & 21 Vict., c. 85, s. 59]; R.S. 1948, c. 97, s. 45.

46. It is lawful for the Judge Ordinary of the Court for Divorce and Matrimonial Causes for the time being to sit in Chambers for the dispatch of such part of the business of the said Court as can in the opinion of the said Judge Ordinary, with advantage to the suitors, be heard in
Chambers, and such sittings shall from time to time be appointed by the said Judge Ordinary. [21 & 22 Vict., c. 108, s. 1]; R.S. 1948, c. 97, s. 46.

47. The said Judge Ordinary when so sitting in Chambers has and shall exercise the same power and jurisdiction in respect of the business to be brought before him as if sitting in open Court. [21 & 22 Vict., c. 108, s. 3]; R.S. 1948, c. 97, s. 47.

48. All persons and corporations who shall, in reliance on any order or decree, make any payment to, or permit any transfer or act to be made or done by, the wife who has obtained an order of protection shall, notwithstanding such order or decree may then have been discharged, reversed, or varied, or the separation of the wife from her husband may have ceased, or at some time since the making of the order or decree been discontinued, be protected and indemnified in the same way in all respects as if, at the time of such payment, transfer, or other act, such order or decree were valid and still subsisting without variation in full force and effect, and the separation of the wife from her husband had not ceased or been discontinued, unless at the time of such payment, transfer, or other act such persons or corporations had notice of the discharge, reversion, or variation of such order or decree, or of the cessation or discontinuance of such separation. [21 & 22 Vict., c. 108, s. 10]; R.S. 1948, c. 97, s. 48.

49. In all cases now pending or hereafter to be commenced in which, on the petition of a husband for a divorce, the alleged adulterer is made co-respondent, or in which, on the petition of a wife, the person with whom the husband is alleged to have committed adultery is made a respondent, the Court may, after the close of the evidence on the part of the petitioner, direct such co-respondent or respondent to be dismissed from the suit, if it shall think there is not sufficient evidence against him or her. [21 & 22 Vict., c. 108, s. 11]; R.S. 1948, c. 97, s. 49.

50. The bill of any proctor, attorney, or solicitor for any fees, charges, or disbursements in respect of any business transacted in the Court for Divorce and Matrimonial Causes, and whether the same was transacted before the Full Court or before the Judge Ordinary, shall, as well between proctor or attorney or solicitor and client as between party and party, be subject to taxation by any one of the Registrars belonging to the principal registry of the Court of Probate, and the mode in which any such bill shall be referred for taxation, and by whom the costs of taxation shall be paid, shall be regulated by the rules and orders to be made under the Act of the twentieth and twenty-first of Victoria, chapter 85, and the certificate of the Registrar of the amount at which such bill is taxed shall be subject to appeal to the Judge of the said Court. [21 & 22 Vict., c. 108, s. 13]; R.S. 1948, c. 97, s. 50.
51. Where any trial has been had by a jury before the Full Court or before the Judge Ordinary, or upon any issue directed by the Full Court or by the Judge Ordinary, the Judge Ordinary may, subject to any rules to be hereafter made, grant a rule nisi for a new trial, but no such rule shall be made absolute except by the Full Court. [21 & 22 Vict., c. 108, s. 18]; R.S. 1948, c. 97, s. 51.
Extract from:

Chap. 130 EQUAL GUARDIANSHIP OF INFANTS ACT

Sections:

12. In case a decree for judicial separation or a decree either nisi or absolute for divorce is pronounced, the Court pronouncing the decree may thereby declare the parent by reason of whose misconduct the decree is made to be a person unfit to have the custody of the children (if any) of the marriage; and, in that case, the parent so declared to be unfit is not entitled as of right to the custody or guardianship of such children.

R.S. 1948, c139, s12

13. (1) The Court may, upon the application of either parent of an infant, make such order as it may think fit regarding the custody of the infant and the right of access thereto of either parent, having regard to the welfare of the infant, as to the conduct of the parents, and to the wishes as well of the mother as of the father, and may, alter, vary, or discharge such order on the application of either parent, or after the death of either parent, of any guardian.

(2) It is not necessary for any parent who is under the age of twenty-one years to bring or oppose any application under this section by a next friend or guardian ad litem.

R.S. 1948, c139, s13, 1956, c22, s2.
APPENDIX IV

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