The Federal Divorce Act (1968) and the Constitution

F. J. E. Jordan *

Introduction **

Throughout the proceedings of the Special Joint Committee of the Senate and the House of Commons on Divorce which sat from June, 1966 through April of the following year and throughout the debates of the House of Commons and the Senate during December, 1967 and January, 1968 on Bill C-187, nearly as much attention was focussed on questions of legislative jurisdiction in relation to divorce and related matters as was directed to the substantive changes to be made in reforming the grounds for divorce in Canada.

On some of the constitutional issues, opinions as to legislative competence were nearly unanimous; on others, they were much more divided. In Bill C-187 as finally enacted, a substantial number of these issues were resolved in favour of the federal Parliament's jurisdiction and sections were included in the *Divorce Act*[1] dealing with the creation of a federal divorce court, the jurisdiction of provincial courts, questions of domicile and recognition of foreign decrees and matters of corollary relief in divorce proceedings; however, at least two significant issues were left untouched by Parliament because of doubts as to its legislative competence in relation to them: judicial separation and corollary matters and the division of matrimonial property on dissolution of a marriage. Also omitted from the legislation, without comment, is the matter of annulment of marriage.

In result, we have a new federal divorce law — indeed, the first real federal divorce law — which, in going as far as it does to provide a comprehensive coverage of the field of divorce, raises some doubts as to the validity of certain provisions in the Act, while at the same time, in stopping short of the desired coverage, leaves us with an enactment which fails to deal with some important aspects of the termination of marriage otherwise than by death of a spouse.

---

* Associate Professor, Faculty of Law, Queen's University.

** I wish to acknowledge my gratitude to my colleague Professor Gordon Bale who prepared the parts of this paper dealing with *Jurisdiction of the Courts* and *Domicile and Recognition.*

[1] 16 Eliz. II, S.C. 1967-68, c. 24.

Indeed, what this legislation does is raise the century-old question of which legislative body in Canada should exercise jurisdiction over matrimonial matters. Should it be a divided jurisdiction as is presently the case under the *B.N.A. Act* or should there be a constitutional amendment to vest jurisdiction solely in the provincial legislature on all matrimonial matters? Quite obviously, the other alternative — exclusive federal jurisdiction — is impractical and unacceptable.

This paper sets out to examine each of the constitutional issues mentioned above as they are raised by their inclusion in or exclusion from the new *Divorce Act*, to consider some of the possible problems for the courts in dealing with those included, to comment on the reasons advanced for excluding others and, finally, to discuss the question of constitutional amendment in matrimonial matters.

History of Matrimonial Jurisdiction in Canada

Pre-Confederation Legislation

In considering the provisions of the *B.N.A. Act* relating to jurisdiction over matrimonial matters one must recall that, at the time of drafting that document, there already existed in England a number of laws relating to matters of marriage and divorce [2] as well as the practice of parliamentary divorce. Substantial parts of this legislation and practice had been adopted, with variations, in certain of the colonies which federated in 1867 and which, up to that date, possessed general legislative competence limited only by the overriding powers of the Imperial Parliament. Since the existence of this legislation had substantial bearing on the provisions in the *B.N.A. Act* relative to matrimonial matters as these appeared in 1867 and as they were subsequently construed, it is useful at the outset to indicate briefly the laws which were enacted in the four federating colonies prior to 1867.[3]

In the two maritime provinces which joined the union in 1867, pre-Confederation legislation existed relating both to marriage and divorce. Nova Scotia had, since 1758, provided for divorce and nullity

---

[2] 32 Hen. 8, 1540, c. 38; 4 Geo. 4, 1823, c. 76; 20 & 21 Vict., 1857, c. 85; 21 & 22 Vict., 1858, c. 108; 22 & 23 Vict., 1859, c. 61; 23 & 24 Vict., 1860, c. 144; 27 & 28 Vict., 1864, c. 44; 29 & 30 Vict., 1866, c. 32.

[3] It is not intended to detail the provisions of the legislation. See J. H. Blumenstein, *Matrimonial Jurisdiction in Canada*, (1928), 6 Can. Bar Rev. 570 at pp. 578-593 and J. A. Gemmill, *The Practice of the Parliament of Canada upon Bills of Divorce*, (Toronto, 1889), c. IV, pp. 33-34, for elaboration.

of marriage actions [4] and prescribed various requisites for the solemnization of marriage.[5]

Similarly, New Brunswick in 1791 enacted legislation dealing both with dissolution and annulment of marriage and with solemnization of marriage.[6]

Ontario — as Upper Canada following the *Constitutional Act of 1791* — introduced the laws of England as to property and civil rights in 1792 but, of course, received no divorce laws at that early date. In the following years, the legislature enacted a number of measures relating to marriage.[7] However, it did not, during the period of its separate existence before 1840, legislate in relation to nullity or divorce, and following reunion with Lower Canada, legislation on the matter of divorce became impossible.

Although Lower Canada had its own legislation on marriage from the time of its creation as a separate entity in 1791, it was not until just before Confederation in 1866 and 1867 that this jurisdiction enacted comprehensive laws on marriage, judicial separation and nullity with the adoption of the Civil Code and the Code of Civil Procedure.[8] There was, however, no provision made for divorce since this was not countenanced by the Roman Catholic Church.

In each of these colonies, the enactment of matrimonial laws had been surrounded by religious controversies and these were very much in evidence when the Confederation conferences took place, particularly during the debates on the Quebec Resolutions in the Legislature of the Province of Canada.

The Quebec Resolutions, 1864-65 and the B.N.A. Act, 1867.

The draft resolutions agreed upon by the delegates to the closed Quebec Conference in 1864 contained several provisions with a bearing on matrimonial matters. The enumerated heads of Resolution 29, giving the general Parliament power "to make laws for the peace, welfare and good government of the federated provinces", included "especially laws respecting ... (31) Marriage and divorce" and "(37) generally respecting all matters of a general character, not specially and exclusively reserved for the local Governments and Legislatures".[9]

---

[4] 32 Geo. II, S.N.S. 1758, c. 17.

[5] L. G. Hinz, *The Celebration of Marriage in Canada*, (Ottawa, 1957), pp. 46-47.

[6] 31 Geo. III, S.N.B. 1791, c. 5.

[7] See Hinz, *op. cit.*, pp. 55-57.

[8] See Blumenstein, *loc. cit.*, pp. 580-585.

[9] These Resolutions may be found in, among other places, the Senate *Report Relating to the Enactment of the British North America Act, 1867*, (Ottawa, 1939), Annex 4, pp. 51-52. (Cited hereinafter as the *O'Connor Report*).

Resolution 31 empowered Parliament to establish additional courts when the same should appear necessary or for the public advantage to execute the laws of Parliament.[10]

By Resolution 43 the local legislatures were empowered to make laws respecting "(15) Property and civil rights, excepting those portions thereof assigned to the general Parliament... (17) the administration of justice, including the constitution, maintenance and organization of the courts, — both of civil and criminal jurisdiction, including also the procedure in civil matters" and "(18) generally all matters of a private or local nature, not assigned to the general Parliament." [11] No provision appeared at this time for the continuation of the existing laws until they were changed by the new legislative bodies.

When the Quebec Resolutions came up for debate in the Provincial Parliament of Canada at Quebec in February and March of 1865, considerable consternation was expressed, especially by the French Roman Catholic members from Lower Canada, over the apparent fact that matrimonial matters, particularly marriage, were to be placed substantially in the hands of a central legislature despite their close relationship to laws of property, religion and administration of justice which were to be the responsibility of the local legislature.

While many of these members of the Legislative Council and Assembly were reluctantly prepared to permit jurisdiction over divorce matters to rest in the central Parliament as "an exception being made in favour of co-religionists" [12] most were vigorously opposed to granting similar jurisdiction over marriage. Hon. A. A. Dorion (Hochelaga) summed up their fears and objections.

> I can well understand what is meant by the regulation of the law of divorce; but what is meant by the regulation of the marriage question? Is the General Government to be at liberty to set aside all that we have been in the habit of doing in Lower Canada in this respect? Will the General Government have the power to determine the degree of relationship and the age beyond which parties may marry, as well as the consent which will be required to make a marriage valid?... Will all these questions be left to the General Government? If so, it will have the power to upset one of the most important portions of our civil code, and one affecting more than any other all classes of society.[13]

The Premier, Sir E. P. Taché (Montmagny) and the Solicitor-General East, Hon. Hector Langevin (Dorchester) sought to explain

---

[10] *Ibid.*, p. 53.

[11] *Ibid.*, p. 54.

[12] *Parliamentary Debates on the Subject of the Confederation of the British North American Provinces*, (Quebec, 1865), p. 192. (Cited hereinafter as the *Confederation Debates*).

[13] *Ibid.*, p. 267.

the limited meaning intended for the term "marriage" and the reasons for placing it and divorce under federal jurisdiction. Marriage was not to be defined to include matters of property and civil rights but was included in Resolution 29 only

> to invest the Federal Parliament with the right of declaring what marriages shall be held and deemed valid throughout the whole extent of the Confederacy, without, however, interfering in any particular with the doctrines or rites of the religious creeds to which the contracting parties may belong.[14]

In other words, Parliament's sole power in relation to marriage would be to provide that a marriage validly performed by the laws of one province should be deemed valid in any other province.[15]

With regard to jurisdiction over divorce, vesting it in Parliament was not a recognition of any new legal right by the members from Lower Canada, but a recognition that laws on the subject did exist in certain jurisdictions giving such a right. In light of this, it was decided to place legislative powers in the general Parliament where it would be more difficult to obtain laws enabling divorce.[16] The Solicitor-General went on to point out that under Quebec law there existed a means of dissolving a marriage in certain cases by annulment proceedings. In other jurisdictions (Upper Canada) it occurred by parliamentary bill.

> This power to grant a separation is therefore necessarily vested in the Parliament, by whatever name such separation may be designated, and we are not to be reproached for the interpretation which others may give to such name, different from that which we assign to it.[17]

The explanation by the Solicitor-General East of the term "marriage" along with his assurance on behalf of the Government that appropriate amendments would be made, satisfied some of the Opposition that Parliament's role in relation to marriage would be confined to enactment of appropriate conflict rules.[18] Hon. Joseph Cauchon (Montmorency) also agreed with Mr. Langevin that since divorce was an existing evil in certain jurisdictions and an inherent power vesting in the legislatures, it was safest to place jurisdiction in relation to the subject in the central Parliament "where its consequences would be less serious, because they would be more cramped in their development, and consequently less demoralizing and less fatal in their influence." [19]

---

[14] *Ibid.*, pp. 344 and 388.
[15] *Ibid.*, p. 389.
[16] *Ibid.*
[17] *Ibid.*, pp. 389-90.
[18] *Ibid.*, pp. 578-79.
[19] *Ibid.*, p. 578.

The member from Hochelaga was not so readily convinced on either matter of debate. On the subject of marriage, Mr. Dorion believed that if the explanation given by the Solicitor-General was correct, then there was no need to vest Parliament with jurisdiction, for private international law rules already required recognition in a second jurisdiction of a marriage valid by the laws of the jurisdiction in which it was performed. He suspected, however, that such was not the true intent of the provisions under Resolution 29; rather it was to enable Parliament to legislate to preclude a local legislature from declaring invalid marriages between parties not professing the same religious beliefs.[20] Mr. Dorion saw in such jurisdiction additional implications including the power of the general Parliament to legislate to change the civil conditions of marriage. "I should see with considerable apprehension and alarm this power given to the General Parliament, because it will be composed of men who have ideas entirely at variance with ours in relation to marriage." [21]

As for divorce jurisdiction, Mr. Dorion failed to appreciate how any Roman Catholic could sanction legislation on the subject by the federal Parliament when he could not in conscience support such a measure before the local legislature. In his view, divorce was a matter to be prevented, not encouraged, and this was best accomplished by leaving the subject to the local legislature, at least in Lower Canada.[22]

> ...I go further, and I say that the leaving of this question to the Federal Legislature is to introduce divorce among the Catholics. [While no Catholic can now get a divorce from the legislature or before the courts of the colony], suppose that the Federal Parliament were to enact that there shall be divorce courts in each section of the province, the Catholics will have the same access to them as the Protestants. And who is to prevent the Federal Legislature from establishing a tribunal of this kind in Lower Canada, if they are established elsewhere?[23]

The member for Verchères, F. Geoffrion, supported Dorion's position on divorce jurisdiction, pointing out to the Solicitor-General East that the separation of parties permitted under Lower Canada's annulment laws was very different from the kind to be derived from a divorce power vested in Parliament.[24]

It remained for two other members of the Provincial Parliament, one from Lower Canada and one from Upper Canada, to conclude debate on the issue of marriage and divorce jurisdiction in the new federation and they both emphasized the reciprocal advantages to

---

[20] *Ibid.*, pp. 579 and 691.
[21] *Ibid.*, p. 691.
[22] *Ibid.*
[23] *Ibid.*
[24] *Ibid.*, p. 777.

be gained by placing the subject-matters under federal jurisdiction. The member for Vaudreuil, A. C. de Lotbiniere Harwood, observed that while, as a Roman Catholic, he was opposed to divorce and to marriage being regarded as a mere civil contract, he realized that "the system on which the new Constitution will be based is to be considered in the aspect which it bears to all the provinces." To safeguard the interests of the minorities and respect the desires of the majorities in each of the provinces, it was essential that matters of marriage and divorce not be left to the local legislatures.[25]

John Scoble of Elgin West responded with the Protestant viewpoint. Just as the Roman Catholics wished to have their religious views respected, so too did the Protestants expect theirs to be recognized. Since there was much less assurance of either group's beliefs on marriage and divorce being preserved in the hands of a local legislature, it was only prudent to vest jurisdiction over these matters in the federal Parliament.[26]

Although the draft provision relating to marriage and divorce was adopted by the Provincial Parliament precisely as it appeared in the Quebec Resolutions, the first set of London Resolutions drafted by the delegates from the uniting provinces on December 4, 1866, contained a significant change, designed to meet, in part at least, the objections voiced the preceding year in Quebec. Legislative powers of the general Parliament still included "marriage and divorce." [27] (and power to create additional courts to administer the laws of this Parliament) but added to the powers of the local legislature in relation to property and civil rights was the phrase, "including the solemnization of marriage."[28] This parenthetical addition was subsequently given a status separate from property and civil rights and both were qualified by the term "in the Province".[29] The final draft followed a similar division and was a joint effort of the Canadian delegation and the British Law Officers.[30]

Thus, as the bill was finally introduced in the British Parliament and passed by that body in March, 1867 as the *British North America Act*,[30a] the federal Parliament by section 91(26) was empowered to legislate in relation to matters of marriage and divorce, while the provincial legislature was vested with jurisdiction over the solemnization of marriage in the province under section 92(12).

---

[25] *Ibid.*, p. 834.
[26] *Ibid.*, p. 911.
[27] *O'Connor Report*, Annex 4, p. 61.
[28] *Ibid.*, p. 63.
[29] *Ibid.*, p. 44.
[30] *Ibid.*, p. 45.
[30a] 30 & 31 Vict., 1867, c. 3.

Significantly, since, as noted earlier, each of the uniting colonies already had laws dealing with matrimonial matters, section 129 of the *B.N.A. Act*, included at a late stage in the drafting,[31] provided for the continuation in each province after federation, and until changed by the appropriate legislative body, of all existing laws and courts.

Post-Confederation Legislation

In each of the territories or colonies which became provinces and joined the federation subsequent to 1867 under section 146 of the *B.N.A. Act*, there were or were declared to be existing laws, including those relating to matrimonial matters. In each case, the union was made subject to the terms of section 129 of the *B.N.A. Act* to continue the local laws in force until changed by the appropriate legislative body.

British Columbia, which joined the union in 1871, brought with it the English matrimonial laws of 1858, so far as applicable, and this was affirmed by the Privy Council in 1908.[32] In the Prairie provinces, Manitoba, which became a province in 1870, was declared by federal act of 1888[33] to have the "laws of England relating to matters within the jurisdiction of the Parliament of Canada," as of July 15, 1870. That this included matrimonial laws was affirmed by *Walker* v. *Walker*[34] in 1919. In Alberta and Saskatchewan, both of which were admitted as provinces in 1905, the laws of England as of July 15, 1870 were in force by virtue of a federal enactment of 1886.[35] In 1919, *Board* v. *Board*[36] confirmed this fact with regard to matrimonial matters in Alberta and the same reasoning was applied in a Saskatchewan case the following year.[37] Prince Edward Island entered the union in 1873 with all of its laws intact, subject to section 129 of the B.N.A. Act, including divorce and matrimonial causes legislation enacted in 1836[38] as well as marriage laws.[39] New-

---

[31] *Ibid.*, p. 121.

[32] *Watts* v. *Watts*, [1908] A.C. 573, C.R. [1908] A.C. 511, 77 L.J.P.C. 121. See *Power on Divorce*, 2nd ed., by J. D. Payne, (Toronto and Calgary, 1964), pp. 14-15.

[33] 51 Vict., S.C. 1888, c. 33, s. 1.

[34] [1919] A.C. 947, [1919] 2 W.W.R. 935, 48 D.L.R. 1, 88 L.J.P.C. 156.

[35] 49 Vict., S.C. 1886, c. 25, s. 3.

[36] [1919] A.C. 956, [1919] 2 W.W.R. 940, 48 D.L.R. 13, 88 L.J.P.C. 165.

[37] *Fletcher* v. *Fletcher*, (1920), 13 Sask. L.R. 51, [1920] 1 W.W.R. 5, 50 D.L.R. 23. See Power, *op. cit.*, pp. 15-16.

[38] 5 Wm. IV, S.P.E.I. 1836, c. 10.

[39] Hinz, *op. cit.*, pp. 49-50.

foundland, the last to join the federation in 1949, had marriage[40] but not divorce laws at that date; it was held however to possess the laws of England relating to divorce *a mensa et thoro* as of 1832.[41]

Despite the seemingly limited field of legislative action left to the provinces in the area of matrimonial matters, virtually all of the enactments relating thereto have come from the provincial legislatures. Few attempts have been made by provincial legislatures to deal with matters of divorce or judicial separation, save as to matters of ancillary relief and procedure, except in the case of Alberta which, in 1927, enacted the *Domestic Relations Act*[42] which in Part II purports to deal exhaustively with the question of judicial separation.[43] In relation to certain aspects of marriage and annulment of marriages, however, there has been substantial provincial legislation, particularly evident once the opinion of the Privy Council was rendered in the *Reference re Marriage Legislation in Canada,*[44] holding as it did that Parliament's jurisdiction over marriage did not extend to the whole field of validity and that the provincial legislature might "enact conditions as to solemnization which may affect the validity of the contract." [45] Hinz, in his dissertation, outlines the major changes in the marriage laws of the provinces up to recent times and there is ample evidence of the extent to which the legislatures have acted in matters relating to the solemnization of marriage.[46] Moreover, in fields related to matrimonial matters, provincial legislatures have enacted much legislation bearing on the marital relationship.[47]

Federal enactments in the field of matrimonial matters between 1867 and 1967 are extremely limited both in quantity and substance. This, despite uncounted attempts within and outside Parliament to

---

[40] *Ibid.*, pp. 43-44.

[41] Power, *op. cit.*, p. 22.

[42] 17-18 Geo. V, S.A. 1927, c. 5.

[43] R. S. A. 1955, c. 89. For examples of attempts by provincial legislatures to deal with "matters of divorce" see *Correspondence, Reports of the Ministers of Justice and Orders in Council upon the Subject of Provincial Legislation, 1896-1920*, vol. II, (Ottawa, 1922), pp. 401 and 410-11 and *Andrews* v. *Andrews*, [1945] 1 D.L.R. 595 (Sask. C. A.).

[44] [1912] A.C. 880, C.R. [1912] 1 A.C. 126, 11 E.L.R. 255, 7 D.L.R. 629, 81 L.J.P.C. 237.

[45] *Ibid.*, at p. 887 (A.C.). *Correspondence, Reports of the Ministers of Justice and Orders in Council upon the Subject of Dominion and Provincial Legislation, 1867-1895*, Vol. I, pp. 436, 438, 472, 655-56, 657-58; Vol. II, p. 83, for illustrations of doubtful enactments prior to 1912.

[46] *Op. cit.*, pp. 41-76.

[47] A check of the *Revised Statutes of Ontario* 1960, reveals about fifteen statutes dealing in whole or in part with matrimonial matters.

induce the legislators to deal with matters of marriage and divorce. Mr. Andrew Brewin, welcoming the measure introduced in the House of Commons by the Minister of Justice on December 4, 1967, observed this fact.

> The archaic divorce laws we have had have caused untold misery to many thousands of Canadians. This measure of reform is long overdue. As the minister [of Justice] pointed out, parliament has had jurisdiction over this matter for 100 years and yet has never boldly exercised it in any way. It has legislated in a piecemeal way...[48]

Piecemeal indeed! During the first century of Confederation, Parliament acted only seven times on matrimonial matters. In 1882 and 1914, corrective legislation was enacted dealing with permitted degrees of affinity in marriage.[49] In 1925, Parliament abolished the so-called "double-standard" for women in divorce proceedings by permitting a wife to bring an action for divorce based on her husband's adultery alone.[50] This enactment was followed by another in 1930 which extended the jurisdiction of the divorce courts, permitting a deserted wife in certain circumstances to petition for divorce in the province of domicile at the time of desertion.[51]

Two other federal acts in the 1930's dealt with the jurisdiction of the Ontario and British Columbia courts in divorce matters. The *Divorce Act (Ontario)*[52] of 1930 introduced in that province the English law of dissolution and annulment of marriage as of July 15, 1870, giving Ontario the same laws as the Prairie provinces. In 1937, the *British Columbia Divorce Appeals Act*[53] conferred appellate jurisdiction in divorce cases on the Court of Appeal in that province.

The last federal enactment prior to 1967 came in 1963, and provided the first major procedural reform in the handling of parliamentary divorces. More will be said of the *Dissolution and Annulment of Marriages Act*[54] in the next section. However, it can fairly be said

---

[48] *House of Commons Debates*, 4 December 1967, V, p. 5017.

[49] 45 Vict., S.C. 1882, c. 42 and 53 Vict., S.C. 1890, c. 36; 13-14 Geo. V, S.C. 1923, c. 19 and the *Marriage and Divorce Act*, R.S.C. 1952, c. 176, ss. 2 and 3 (now re-named the *Marriage Act* by 16 Eliz. II, S.C. 1967-68, c. 24, s. 24).

[50] 15-16 Geo. V, S.C. 1925, c. 41, s. 2, and the *Marriage and Divorce Act*, R.S.C. 1952, c. 176, ss. 4 and 5. (These sections have now been repealed by 16 Eliz. II, S.C. 1967-68, c. 24, s. 24(3)).

[51] 20-21 Geo. V, S.C. 1930, c. 15 and *Divorce Jurisdiction Act*, R.S.C. 1952, c. 84, (now repealed by 16 Eliz. II, S.C. 1967-68, c. 24, s. 26).

[52] 20-21 Geo. V, S.C. 1930, c. 14 and R.S.C. 1952, c. 85 (now repealed by 16 Eliz. II, S.C. 1967-68, c. 24, s. 26).

[53] 1 Geo. VI, S.C. 1937, c. 4 and R.S.C. 1952, c. 21 (now repealed by 16 Eliz. II, S.C. 1967-68, c. 24, s. 26).

[54] 12 Eliz. II, S.C. 1963, c. 10 (now repealed by 16 Eliz. II, S.C. 1967-68, c. 24, s. 26).

that this move by Parliament, perhaps more than any other factor, provided the impetus for the reform laws of 1968.

The foregoing summary indicates the sorry state of the matrimonial laws in Canada in 1967. In the limited field of their competence — solemnization of marriage — provinces have been able to legislate from time to time and, indeed, have acted.[55] Likewise, in the related matrimonial areas of provincial jurisdiction, laws have kept abreast of the changing times.[56] However, in the very important areas of matrimonial relations, namely, divorce and capacity to marry, a reluctant Parliament had left the people with laws and practices much better suited to the Victorian age in which they had been enacted.

We turn now to the first of these — parliamentary divorce — to consider the changes brought about by the *Divorce Act.*

Parliamentary Dissolution : A Federal Divorce Court

The shortest-lived provision of the new *Divorce Act* must be section 23, creating a Divorce Division of the Exchequer Court to hear divorce petitions from the provinces of Quebec and Newfoundland.[57] Indeed, for all practical purposes the section was still-born with the decisions taken by the Governments of Quebec[58] and Newfoundland [59] on March 29, 1968 and June 5, 1968 respectively to move under section 22 of the Act to vest jurisdiction over divorce matters in the provincial superior courts. As a result, by the time the *Divorce Act* was proclaimed in force on July 2, 1968, the only function remaining for the Divorce Division of the Exchequer Court is to act as a court of removal under section 5(2)(b) in the unlikely event of a conflict in jurisdiction between two provincial courts such as contemplated by that sub-section.

It seems ironic that, after nearly a century of pleas for the establishment of a federal divorce court to replace the much-condemned practice of parliamentary dissolution of marriages, its need should be rendered nugatory on the eve of its creation. However, it is unlikely that the proponents would mourn the loss since, more often than not, the federal court was but a second-best proposal to the

---

[55] See Hinz, *op. cit.*, pp. 41-75.

[56] e.g., R.S.O. 1960: *The Child Welfare Act*, c. 53; *The Children's Maintenance Act*, c. 55; *The Deserted Wives' and Children's Maintenance Act*, c. 105; *The Legitimacy Act*, 10-11 Eliz. II, S.O. 1961-62.

[57] 16 Eliz. II, S.C. 1967-68, c. 24, s. 23(1).

[58] Can. Gazette, Vol. 102, pp. 1159-60.

[59] Nfld. Order-in-Council No. 383-'68.

seemingly hopeless plan for vesting divorce jurisdiction, throughout the whole nation, in the provincial courts.

The practice of legislative dissolution of marriage as it had developed in the Imperial Parliament during the eighteenth and early nineteenth centuries [60] carried over to the British North American colonies as a similarly inherent power of the colonial legislatures. Naturally, the power was not exercised by those legislatures which had vested divorce jurisdiction in the courts at an early date,[61] nor was it exercised, for religious reasons, in Lower Canada. But in Upper Canada the power was recognized and exercised in a few cases by the legislature both before and after union with Lower Canada, not without vigorous objections by the religious minority.[62] Even at this early date, attempts were made to have the Provincial Legislature of Canada adopt a law vesting divorce jurisdiction in "a proper legal tribunal", but each initiative was doomed to failure.[63]

After 1867, the Parliament of Canada, vested with jurisdiction over marriage and divorce, proceeded to exercise its power by means of private bills of divorce, annulment and, in one case at least, judicial separation for parties domiciled in the jurisdictions which possessed no divorce courts.[64] Thus was the practice of parliamentary dissolution established in Canada, as in England, "in the rudest and most inconvenient manner; for the proceeding was a judicial one by a legislative process, and it had all of the inconveniences which necessarily result from the discussion of such a question in a mixed and popular assembly." [65]

From the outset, objection was taken to Parliament dealing with these matrimonial matters in a case-by-case fashion attempting to act as court, and proposals were advanced from time to time to have general divorce legislation enacted which would vest jurisdiction over all matters of matrimonial relief either in the existing courts of every province or in a special divorce court. Gemmill records the fate of such early efforts: divorce should not be easily obtained; the more impediments — including the lengthy parliamentary process — the better.[66]

---

[60] Gemmill, *op. cit.*, pp. 9-13.

[61] New Brunswick and Nova Scotia.

[62] Gemmill, *op. cit.*, pp. 17-18.

[63] *Ibid.*, pp. 19-20.

[64] *Ibid.*, pp. 20-21.

[65] *Ibid.*, p. 11.

[66] *Ibid.*, pp. 22-26.

Similar efforts in 1916 [67] and in 1918 [68] also failed, occasioning a severe editorial attack on the parliamentary practice and inaction on reform by Henry O'Brien, K. C.[69]

Between 1930, when Parliament was finally relieved of handling cases from Ontario, and 1956 Senator Aseltine fought vigorously for complete divorce reform including the establishment of the Exchequer Court as a federal divorce court.[70]

Dissatisfaction with the practice of parliamentary divorce and frustration with the Government's seeming unwillingness to enact reform measures had reached the point by the parliamentary session of 1962-63 where several members of the New Democratic Party joined forces to delay the passage of private bills of divorce in the House of Commons. Their stated objective was to convince the Government that the existing system of providing matrimonial relief for persons domiciled in Quebec and Newfoundland was archaic and totally inadequate for the number of cases being handled each session. Not only was the procedure cumbersome but it also failed to deal with some of the most important aspects of dissolution — custody and maintenance of children. The reformers would settle for nothing less than a royal commission of inquiry "to go into this whole matter — to discuss it from coast to coast, and eventually relieve parliament of a duty which it does not want and is not equipped to perform adequately."[71]

For the moment, however, reform was to be more modest. In the 1963 session of Parliament, despite the continuing reluctance of the Government to act,[72] a private member's bill, drafted by all-party agreement, was introduced on August 1st and passed by both Houses on August 2nd, which vested the Senate with power to grant divorces by resolution, after the cases had been examined and referred to that body by a designated officer of the Senate.[73] The officer of the Senate was, in due course, made a judge of the Exchequer Court.[74]

---

[67] *House of Commons Debates*, 14 February 1916, I, pp. 762-793.

[68] *Ibid.*, Sess. 1918, pp. 3760-3791.

[69] *The Law of Divoree in Canada*, (1919), 55 Can. L.J. 361.

[70] See *House of Commons Debates*, 19 December 1967, V, 5636.

[71] *House of Commons Debates*, 20 December 1962, II, pp. 1829-30.

[72] *Ibid.*, 29 November 1962, II, p. 2128 and 6 December 1962, III, pp. 2387-88.

[73] *Dissolution and Annulment of Marriages Act*, 12 Eliz. II, S.C. 1963, c. 10. See *House of Commons Debates*, 1 August 1963, III, p. 2883 and 2 August 1963, III, pp. 3000-1; *Senate Debates*, 1 August 1963, vol. 112, pp. 476-479 and 2 August 1963, pp. 507-508.

[74] *An Act to Amend the Judges Act and the Exchequer Court Act*, 13 Eliz. II, S.C. 1964, c. 14.

This procedural reform, although recognized as an important step in removing the subject of divorce-granting from the legislative process [75] was characterized as but an interim measure by the New Democratic Party leader.

> This is by no means the end of the road. There are other things that should be done. We in this party have always felt that the Exchequer Court was the proper court to handle divorces, but that may be a future development from the step we are now taking.[76]

Divorce by Senate resolution [77] was to have a relatively short life, although such was not the view of the Special Joint Committee on Divorce appointed in 1966 "to inquire into and report upon divorce in Canada and social and legal problems relating thereto...".[78] Uncertain that its mandate extended to matters of parliamentary divorce,[79] the Committee looked at the system briefly, found it to be working satisfactorily and made no recommendations for change.[80]

The Minister of Justice, Mr. Trudeau, however, was of another mind and, in what he characterized as a "little" departure from the report of the Committee, included in the new Act provisions for repeal of the *Dissolution and Annulment of Marriages Act* (1963) and creation of a federal divorce court within the Exchequer Court under the authority of section 101 of the *B.N.A. Act.*[81]

Since for all practical purposes, this new court will exist only on paper, it is not proposed to deal with it at any length. Briefly, the Act amends the *Exchequer Court Act*[81a] to establish a Divorce Division of that Court, with an undesignated number of judges.[82] This Court is designated as the divorce court for Quebec and Newfoundland until such time as those provinces act to vest divorce jurisdiction in their provincial superior courts.[83] It is given the same jurisdiction in Quebec and Newfoundland as the other provincial courts are granted under the Act, including the power to deal with

---

[75] *House of Commons Debates*, 1 August 1963, III, p. 2900.

[76] *Ibid.*, p. 2902.

[77] See Hon. Allison A. M. Walsh, *Divorce by Resolution of the Senate*, (1967), 13 McGill L.J. 1, for a first-hand account of the procedure under the 1963 Act.

[78] Senate Resolution, March 23, 1966 and House of Commons Resolution, March 15, 1966.

[79] Canada, Parliament. Report of the Special Joint Committee of the Senate and House of Commons on Divorce, (June, 1967), p. 38. (Cited: *Divorce Report*).

[80] *Ibid.*

[81] *House of Commons Debates*, 4 December 1967, V, p. 5015.

[81a] R.S.C. 1952, c. 98.

[82] *Divorce Act*, 16 Eliz. II, S.C. 1967-68, c. 24, s. 23(1).

[83] S. 2(e)(ii) and (iii).

[84] Ss. 10, 11 and 12.

corollary matters.[84] While it may adopt appropriate rules of court,[85] the Divorce Division is required, in proceedings before it, to apply the laws of evidence of the province in which jurisdiction is exercised.[86] The functions of this federal court are two: to hear divorce petitions (it is given no jurisdiction over annulment or judicial separation) from persons resident in Quebec and Newfoundland in all cases,[87] and to hear divorce petitions in cases where a husband and wife have presented separate petitions to courts of different provinces on the same day and neither of them is discontinued.[88] It is in this latter role that the federal court will now operate, if at all.

As events have developed since the passage of the *Divorce Act*,[89] the most significant provision of the Act relating to procedural reform for divorces in Quebec and Newfoundland is section 22 which anticipated the eventual establishment of a divorce jurisdiction in the superior courts of the two provinces. Although the Minister of Justice may have been aware that the response to section 22 from Quebec and Newfoundland would be favourable and prompt (certainly his opening speech on the Bill emphasized the temporary nature of the machinery created by section 23 of the Act),[90] such was not the view of some others. Indeed, as Senator Roebuck explained, his Joint Committee had avoided even recommending a transfer of the Senate's divorce jurisdiction to the Exchequer Court for fear of raising opposition from Quebec.[91] In its brief to the Special Joint Committee, the majority members of a committee appointed by the Bar of Montreal, while recommending a transfer of jurisdiction to the Exchequer Court, doubted the acceptability at this time of giving divorce jurisdiction to the Quebec courts.[92]

Of quite another opinion was the minority brief of the same committee, however. Advocating an immediate vesting of divorce jurisdiction in the Quebec Superior Court, it observed:

> The opinion has often been expressed that the Quebec legislators would never accept such a delegation of authority to the Superior Court. We submit that to date no serious attempt has been made in this direction

---

[85] S. 19(1).
[86] S. 20.
[87] S. 5(1).
[88] S. 5(2)(b).
[89] See *supra* footnotes 58 and 59.
[90] *House of Commons Debates*, 4 December 1967, V, p. 5015.
[91] *Senate Debates*, 25 January 1968, vol. 116, p. 770.
[92] 27th Parl., 1st Sess., 1966-67, Proceedings of the Special Joint Committee of the Senate and House of Commons on Divorce. No. 16, Feb. 16, 1967, p. 865. (Cited hereinafter as the *Divorce Committee Proceedings*.)

> and that neither the civil nor religious authorities would shy away from the idea of studying the problem and accepting the responsibilities it involves.[93]

Mr. Trudeau, apparently willing to test this hypothesis, set upon the course of sections 22 and 23 of the Act, "not to force upon any province a mode of procedure in the courts that it is not prepared to attain, but to suggest that, when these provinces are ready, we are ready..." [94]

The provisions of sections 22 and 23 were greeted in the House with full approval, both as to the abolition of the private bills process, "that travesty of the legislative process," and as to the opportunity for Quebec and Newfoundland courts to assume jurisdiction over divorce matters. In particular, the members expressed the hope that the two provinces would act to give effect to section 22 of the statute.[95]

While the establishment of a federal divorce court for Quebec and Newfoundland would have been a distinct improvement over the system pertaining until July 2 of this year, providing a completely judicial process, a realistic appellate procedure, a more expeditious proceeding at a lower cost to the parties and most important, a body able to deal with most of the matters incidental to a divorce decree, it still could not provide the advantages which action under section 22 of the Act does — partly because of the inherent limits on a federal court and partly because of constitutional obstacles.

To deal first with the limits on a federal court acting in a provincial jurisdiction, the most apparent advantage to having the laws administered locally as opposed to centrally is that of facility of access for the people. While evidently it was intended that the trial judges of the Divorce Division would travel to the provinces in question to hear cases [96] and possibly even that there would be Divorce Division judges resident in the provinces,[97] it is nevertheless a fact that, as a court with a home-base outside the provinces in question, the Divorce Division would not be as accessible to the parties as would be the case with provincial courts. This becomes a particularly important consideration when one recalls the reconciliation pro-

---

[93] *Ibid.*, p. 869.

[94] *House of Commons Debates*, 4 December 1967, V, p. 5015.

[95] *Ibid.*, p. 5021, 14 December 1967, V, p. 5460, 15 December 1967, V, pp. 5483 and 5489-90.

[96] *Divorce Act*, 16 Eliz. II, S.C. 1967-68, c. 24, s. 23(1).

[97] *Ibid.*, s. 23(2). The Minister explained this section rather as a means of eliminating congestion which might occur from time to time: *House of Commons Debates*, 19 December 1967, V, p. 5635.

ceedings envisaged by section 8 of the Act with their attendant delays. Some members of Parliament believed that with these requirements in a divorce action, the provincial superior courts would be too inaccessible. The problem could be compounded with a court in Ottawa which went on periodic circuits. On the matter of appeals, the accessibility of a provincial appellate tribunal would be a distinct advantage over the Exchequer Court [98] which would undoubtedly sit in Ottawa.

Closely related to the foregoing is the fact that, insofar as the existence of provincial courts reduces the delays and eliminates the necessity for Ottawa agents, the less costly the proceedings will be.[99]

Although the new federal divorce court is empowered to deal with matters of corollary relief in entertaining a petition for divorce,[100] the provisions of the Act give no indication whether the federal divorce court is to develop its own jurisprudence in dealing with these matters or to follow that already established by the provincial courts of each province. It appears eminently more desirable that the provincial superior courts undertake this task since these judges are more likely to have a better grasp of the social policies and laws of the particular province than are judges appointed to the Exchequer Court, especially if these judges do not happen to have been appointed from the province in which they hear divorce petitions. This is particularly true in the case of Quebec with its civil law system. To take one example, in an application for custody of children in a divorce action, the law governing custody in the Civil Code [101] is rather different from the common law jurisprudence on the matter.

The constitutional impediments to the effective operation of a federal divorce court are perhaps even stronger reasons for vesting divorce jurisdiction in the provincial superior courts.

Although the Minister of Justice agreed with his Deputy Minister that judicial separation was a matter within federal jurisdiction, despite the views of others to the contrary, it was decided not to deal with the matter or its incidents in the *Divorce Act*, but to await extensive consultations with the provinces.[102] Nor was the matter of annulment of marriage touched, where judicial authority

---

[98] S. 2(f) (ii) and s. 23(3).

[99] See observations of Mr. Justice Allison Walsh in a recent press interview in the *Kingston Whig-Standard*, July 11, 1968, p. 8.

[100] 16 Eliz. II, S.C. 1967-68, c. 24, ss. 10 and 11.

[101] Arts. 200 and 240-245.

[102] *House of Commons Debates*, 4 December 1967, V, pp. 5016-7. Judicial separation is dealt with *infra* at pp. 262 *et seq.*

has recognized a limited competence in the provincial legislature in relation to solemnization of marriage.[103]

In consequence of the exclusion of these subjects from the *Divorce Act*, the exercise of jurisdiction by the federal divorce court is strictly limited to matters of divorce[104] and petitions for judicial separation and annulment must be brought before the provincial courts under the existing laws. This means that, without the implementation of section 22 of the *Divorce Act*, parties would still have to go to one matrimonial court for divorce and another for all other matrimonial remedies, and the divorce court would be precluded from granting the lesser remedy if one of the parties should so request as is possible where the provincial court has full matrimonial jurisdiction.[105] Again, with two courts, there is the possibility in a single province of two divergent sets of jurisprudence governing in the one case corollary relief in divorce proceedings and in the other, corollary relief in judicial separation actions.

A similar constitutional problem is posed by the matter of division of matrimonial property on termination of a marriage by other than death of a spouse. This matter was omitted from the provisions of the *Divorce Act* dealing with corollary relief because the Minister was of the informed opinion that it fell within provincial jurisdiction.[106] The problem raised by this omission in relation to the federal divorce court was pointed out, in the context of Quebec law, by Mr. Ovide Laflamme (Quebec-Montmorency). A Quebec petitioner before the Divorce Division would have to commence a separate action in the Superior Court to obtain a "conservatory order" protecting the matrimonial property pending the outcome of the divorce action. Likewise, the final disposition must be dealt with by the provincial court. Vesting jurisdiction over divorce in the Superior Court would avoid this costly double procedure.[107]

The Minister of Justice appreciated the problem but reiterated the view that Parliament could not deal with conservatory orders any more than it could deal with division of matrimonial property.[108]

---

[103] See Power, *op. cit.*, p. 189. Annulment is dealt with *infra* at pp. 266-7.

[104] This is a more restricted jurisdiction than that formerly possessed by the Senate under the *Dissolution and Annulment of Marriages Act* of 1963.

[105] See Power, *op. cit.*, p. 228. *House of Commons Debates*, 5 December 1967, V, pp. 5088-9.

[106] This question is examined, *infra* at pp. 261-2.

[107] *Ibid.*, 15 December 1967, V, pp. 5489-90. See Walker, *The Disintegrating Marriage*, in The W.C.J. Meredith Memorial Lectures (1965 Series) on Family Law, (Montreal, 1965), p. 17.

[108] *House of Commons Debates*, 19 December 1967, V, pp. 5626-7.

In all of these matters, the prompt action by the Governments of Quebec, Newfoundland and Ottawa to give effect to the provisions of section 22 of the *Divorce Act* appears to have been an eminently wise course. It added a number of practical advantages to the ones gained by the abolition of parliamentary divorces and the creation of a federal divorce court and, in precluding the operation of the federal divorce court, it avoided the problems posed by the jurisdictional limitations imposed by the constitution — or so it is believed — on such a court. Finally, it provides, for the first time, a complete and exclusive jurisdiction in the provincial courts of Quebec and Newfoundland over matrimonial laws.

Jurisdiction of the Courts

The question of where the power lies to legislate in relation to the conferring of jurisdiction to grant divorce decrees, in the sense of what court or tribunal may hear divorce petitions, is a particularly relevant issue in that the Canadian Parliament has in the *Divorce Act* conferred divorce jurisdiction on the superior court in each of the provinces and territories with the exception of Quebec and Newfoundland.[109] In the case of Quebec and Newfoundland, as indicated earlier, the necessary steps have been taken under section 22 of the Act to vest the Superior Court of Quebec and the Supreme Court of Newfoundland with similar jurisdiction.[110] Divorce jurisdiction thus resides in the superior court of each of the provinces and territories.

It is significant to note that the Special Joint Committee on Divorce recommended that the county courts should have jurisdiction equally and concurrently with the superior courts of the provinces. The committee had been impressed with the argument that there should be a court dealing with divorce and ancillary matters, such as maintenance and custody, which is less costly and more accessible to the people, particularly those who reside in and around small county towns, than is a superior court.[111] The Minister of Justice, however, considered that it would be advisable to restrict jurisdiction to the superior courts, "especially at the outset when we are breaking new ground and asking our judicial system to determine the operation of important laws, and to create a whole jurisprudence, a whole system of case law, which will govern these matters for many years to come."[112]

---

[109] 16 Eliz. II, S.C. 1967-68, c. 24, ss. 5 and 2(e).
[110] See *supra* footnotes 58 and 59.
[111] *Divorce Report*, pp. 36-37.
[112] *House of Commons Debates*, 5 December 1967, V, p. 5086.

The *Divorce Act* also provides an appeal to the court of appeal in the province and on a question of law to the Supreme Court of Canada with leave of the court of appeal. When clause 17 of the Bill was being considered the Minister was asked why it was not sufficient to leave the matter of appeals to the provinces. The Minister replied that "we want to avoid a different application of divorce laws by the various provinces. It is with this in mind that we decided that appeals should be dealt with in a uniform manner." [113]

In the debates in the House of Commons on the matter of court jurisdiction in relation to divorce, substantial controversy ensued over the issue of legislative jurisdiction. Several members urged the Minister to reconsider the decision to vest jurisdiction exclusively in the superior courts, and to vest at least concurrent jurisdiction in the county courts.[114] Mr. Trudeau reiterated his own preference for the superior courts, but observed that any province that wished might act to designate its county court judges as local judges of the supreme court for divorce purposes, under the authority of *Attorney-General of British Columbia* v. *McKenzie.*[115]

When amendments were introduced during second reading of the Bill to give jurisdiction to the county courts,[116] the Minister insisted that the administration of justice was a provincial matter.

> We are giving the provinces a choice. We are saying that divorce is a high court matter and we are putting this into the law. But we are going on to say that if a province wants to provide for additional local judicial officers of the high court, to which county court judges can be appointed then it can do so. But it will do so by provincial legislation...[117]

Mr. Trudeau answered in a similar vein an attempt by members of the Senate Banking and Commerce Committee to introduce an amendment which would give the county courts jurisdiction, again citing the *McKenzie* case.[118]

The legislative power to confer jurisdiction in divorce and to prescribe appeal provisions is not as clear as it should be and therefore warrants consideration. Until the Supreme Court of Canada decision in the *McKenzie* case,[119] there was no doubt that, by virtue

---

[113] *Ibid.*, 19 December 1967, V, p. 5633.

[114] *Ibid.*, 15 December 1967, V, pp. 5479, 5481, 5486-87 and 5498.

[115] [1965] S.C.R. 490, 51 D.L.R. (2d) 623. See *House of Commons Debates,* 18 December 1967, V, pp. 5561-2.

[116] *House of Commons Debates,* 18 December 1968, V, pp. 5563-6 and 5569.

[117] *Ibid.*, p. 5572.

[118] *Proceedings of the Standing Committee on Banking and Commerce,* No. 23, p. 223 (Feb. 1, 1968).

[119] [1965] S.C.R. 490, 51 D.L.R. (2d) 623.

of section 91(26) of the *B.N.A. Act*, Parliament had competence to confer divorce jurisdiction on any court, body or official which it chose. In cases in which the substantive law falls within federal competence, it has been held that Parliament may confer jurisdiction upon any tribunal it wishes including provincial courts, in relation to the federal substantive law.[120]

In the *McKenzie case*, the constitutional validity of British Columbia legislation conferring divorce and other matrimonial causes on county court judges in their capacity as local judges of the supreme court was challenged. Mr. Justice Ritchie who rendered the judgment of the court said that "it is within the *exclusive* power of the Provincial Legislature to define the jurisdiction of Provincial Courts presided over by federally appointed Judges".[121] Mr. Justice Ritchie later reiterated this proposition when he distinguished the British Columbia legislation from the Ontario legislation considered in *In re Judicature Act: Attorney-General for Ontario* v. *Attorney-General for Canada*[122] which empowered the Lieutenant-Governor in Council to assign the judges of the Supreme Court who were to constitute an appellate division and to designate a chief justice of each division. He stated that "it is the difference between the power to designate or appoint individual Judges of the Superior and County Courts which is vested in the Federal authority and the power to define the jurisdiction of the Courts over which those Judges are to preside, which in civil matters is *exclusively* within the provincial field."[123]

The proposition that the provincial legislatures have exclusive power under section 92(14) to define jurisdiction and procedure even when the substantive law falls within the exclusive competence of Parliament has been accepted by the British Columbia Court of Appeal. In *Forsythe* v. *Forsythe*,[124] McFarlane, J.A., with whom Bull and Lord, JJ.A., concurred, in reference to the *McKenzie* case, said:

> That judgment, particularly what was said by Ritchie, J., ... removed doubts which had existed previously and made it clear that the legislative power to confer such jurisdiction upon properly constituted Courts is vested exclusively in the Provincial Legislature by virtue of s. 92(14) of the *B.N.A. Act*. It follows that the Parliament of Canada did not have the power to

---

120 This had been so held in *Valin* v. *Langlois*, (1879), 3 S.C.R. 1; aff'd (1879-80), 5 App. Cas. 115, C.R. [8] A.C. 251; *In re Vancini*, (1904), 34 S.C.R. 621 and *Attorney-General for Alberta* v. *Atlas Lumber Co.*, [1941] S.C.R. 87, [1941] 1 D.L.R. 625.

121 [1965] S.C.R. 490 at p. 497, 51 D.L.R. (2d) 623 at p. 630 (Emphasis added).

122 [1925] A.C. 750.

123 [1965] S.C.R. 490 at p. 500, 51 D.L.R. (2d) 623 at p. 632 (Emphasis added).

124 (1965), 56 D.L.R. (2d) 322, 54 W.W.R. 577.

> confer appellate jurisdiction in divorce matters on this court and that the Act of 1937 did not confer such jurisdiction as it purported to do.[125]

It appears difficult to contend that the Supreme Court of Canada intended to hold that the provincial legislature under section 92(14) has exclusive power to define the jurisdiction of provincial courts presided over by federally-appointed judges, even when the substantive law falls within the legislative competence of Parliament. This would have involved the Supreme Court of Canada overruling a number of its earlier decisions. To do so without even mentioning these decisions seems unlikely, particularly in view of the fact that the Supreme Court of Canada has not yet decided whether it is bound by its own decisions and decisions of the Privy Council rendered on appeal from a Canadian Court. In the *McKenzie* case, the British Columbia legislation, which conferred the power to adjudicate in divorce and other matrimonial causes on county court judges, acting as local judges of the Supreme Court, could have been upheld merely by holding that divorce jurisdiction was a concurrent power in that there was no conflicting federal legislation. The sole matter before the Supreme Court of Canada was whether the British Columbia legislation was *intra vires*. The Court never really directed its attention to the issue of whether divorce jurisdiction was an exclusive or a concurrent field.

It should also be emphasized that Mr. Justice Ritchie's proposition about the exclusive power of the provincial legislature to define the jurisdiction of provincial courts can be classified as an *obiter dictum*. Ritchie, J., stated:

> [T]he impugned legislation does not in my opinion create any substantive right or make any changes in the law or jurisdiction in that regard. The right to grant a divorce in British Columbia remains vested in the Supreme Court as it previously did...[126]

The authority cited for the proposition that the provincial legislature has exclusive power to define the jurisdiction of the provincial courts was *In re County Courts of British Columbia*.[127] Ritchie, J., quotes the following passage from Mr. Justice Strong's decision: "if the jurisdiction of the courts is to be defined by the provincial legislatures that must necessarily also involve the jurisdiction of the judges who constitute such courts."[128] This passage does not support the proposition that the provincial legislature has exclusive power to define the jurisdiction of provincial courts even though the substantive law

---

[125] At pp. 336-7 (D.L.R.), p. 592 (W.W.R.).

[126] [1965] S.C.R. 490 at p. 496, 51 D.L.R. (2d) 623 at p. 628.

[127] (1893), 21 S.C.R. 446.

[128] *Ibid.*, at p. 453, cited by Ritchie, J., at [1965] S.C.R. 497, 51 D.L.R. (2d) 630.

falls within the federal competence.[129] The only other authority cited was *Dupont* v. *Inglis,*[130] which also fails to support the proposition concerning exclusive jurisdiction.

Mr. Justice Ritchie's judgment in the *McKenzie* case must be read with the omission of "exclusive" and "exclusively" in cases in which the substantive law falls within the competence of Parliament. To fail to do so would mean that Parliament could not confer jurisdiction on provincial courts in regard to federal substantive law and therefore, unless the provincial legislatures co-operated, it would be necessary for the federal Parliament to exercise its power under section 101 to establish additional courts to administer federal substantive law.[131] It is difficult to believe that this could be the situation in Canada.

Some confusion has thus arisen in regard to the conferring of jurisdiction on the courts in cases in which the substantive law falls within the federal competence. It is rather interesting that in *Forsythe* v. *Forsythe,* the British Columbia Court of Appeal has performed a complete about-turn in holding that the power to confer appellate jurisdiction in divorce matters resides exclusively with the provincial legislature. There existed a long line of British Columbia cases in which it had been held that the power to confer appellate jurisdiction

---

[129] However, part of Mr. Justice Strong's judgment immediately preceding the quotation seems to indicate the provincial legislatures have exclusive power to define jurisdiction. Strong, J., stated: "The powers of the federal government respecting provincial courts are limited to the appointment and payment of the judges of those courts and to the regulation of their procedure in criminal matters. The jurisdiction of parliament to legislate as regards the jurisdiction of provincial courts is, I consider, excluded by subsec. 14 of sec. 92, before referred to, inasmuch as the constitution, maintenance and organization of provincial courts plainly includes the power to define the jurisdiction of such courts territorially as well as in other respects. This seems to me too plain to require demonstration." If procedure is defined as including jurisdiction of the Courts, then *Davison* v. *Davison,* [1954] 1 D.L.R. 567 (B.C.S.C.) provides some support for the proposition that the province has exclusive power in regard to jurisdiction of the courts. Manson, J., said at p. 568: "Under the *B.N.A. Act,* s. 91 (26), exclusive legislative authority was given to the Parliament of Canada to make laws with respect to marriage and divorce. Subsection (26) does not extend to procedure in marriage and divorce matters as s.-s. (27) does with regard to procedure in criminal matters. Section 92 (14) of the Act gives exclusive jurisdiction to the Legislature of the Provinces..."

[130] [1958] S.C.R. 535 at p. 542; 14 D.L.R. (2d) 417 at pp. 423-24.

[131] It can be argued that the Canadian Parliament can establish a Canadian court under section 101 of the *B.N.A. Act* by merely conferring additional jurisdiction on a provincial court. This argument was accepted by the Supreme Court of Canada in *Valin* v. *Langlois,* (1879), 3 S.C.R. 1.

in divorce matters resided exclusively with the federal Parliament. The first of these was *Scott* v. *Scott*[132] in which Begbie, C.J., said:

> Now, an appellate jurisdiction can only be given by a competent Legislature. The Colonial Legislature, previous to Confederation in 1871, while the colony was still autonomous, had admittedly made no express provision on the subject; neither has the Dominion Parliament since 1871. The Provincial Legislature, indeed, had declared that an appeal should be to the Full Court here from all decisions of a single Judge. But since Confederation all matters concerning divorce are expressly reserved to the Dominion Parliament; and the Provincial Legislature in purporting to give appellate jurisdiction must be presumed to have contemplated such matters only as were within its own power, and not such matters as were expressly removed from its regulation. And even if the power of appeal, or any other jurisdiction in divorce matters had been since Confederation expressly conferred on us by the Provincial Legislature, the gift would manifestly be illegal.[133]

In *Brown* v. *Brown*[134] an appeal was taken to the Full Court from an order fixing interim alimony in a divorce cause. The appellant relied on the Act of 1885 conferring appellate jurisdiction on the Full Court. The Full Court refused to limit the *Scott* case and held that the Full Court lacked jurisdiction to hear appeals in divorce matters. These decisions were followed by the British Columbia Court of Appeal in *Claman* v. *Claman*[135] and *Jamieson* v. *Tytler*.[136]

It is submitted that the British Columbia Court of Appeal came to the wrong decision in *Jamieson* v. *Tytler* when it held that the power to convey appellate jurisdiction in divorce matters resides *solely* with the federal Parliament and also in *Forsythe* v. *Forsythe* when it held that such power was *exclusively* within the competence of the provincial legislature. Jurisdiction of the courts in relation to divorce should be regarded as a concurrent field with the federal legislation having the usual paramountcy. This was decided in *Bilsland* v. *Bilsland*.[137] In this latter case, a divorce petition had been refused and the petitioner appealed to the Manitoba Court of Appeal. The respondent contended that no appeal lay to that court. It was argued that the *Court of Appeal Act*,[137a] which gave the Court of Appeal jurisdiction to hear appeals from every judgment or decision of a single judge could not be construed as including appeals in divorce actions as this would be *ultra vires* the provincial legislature. Perdue, C.J.M., said:

---

132 (1891), 4 B.C.R. 316.
133 *Ibid.*, at p. 319.
134 (1909), 14 B.C.R. 142, 10 W.L.R. 15.
135 (1925), 35 B.C.R. 137.
136 (1935), 50 B.C.R. 263, [1935] 3 W.W.R. 510.
137 [1922] 1 W.W.R. 718, 63 D.L.R. 120.
137a R.S.M. 1913, c. 43.

> It appears to me that the Judges who decided *Scott* v. *Scott* and *Brown* v. *Brown* did not pay pay sufficient regard to subhead No. 14 of sec. 92 of the *B.N.A. Act,* which confers upon the Legislature in each Province jurisdiction to make laws in relation to "the administration to justice in the province, including the constitution, maintenance and organization of provincial Courts, both of civil and criminal jurisdiction, and including procedure in civil matters in those Courts".
>
> Under sec. 101 of the same Act, the Parliament of Canada may provide for the establishment of additional Courts for the better administration of the laws of Canada. Parliament has not created a divorce Court. The administration of the law of divorce where it is in force in a province is therefore left to the Provincial Court having jurisdiction to apply that law: *Board* v. *Board.*[138] If it is provided in the constitution of the provincial Court that the trial of the case shall take place before a single Judge in the first instance and that his decision shall on the application of either party be re-heard and varied or reversed by the Full Court, this, it appears to me, would be within the powers conferred by No. 14 of sec. 92 of the *B.N.A. Act.* This right of appeal will apply even where the matter in litigation arose under one of the subjects included in sec. 91 of the *B.N.A. Act,* except criminal law, if there was no Dominion legislation already occupying the field.[138a]

A similar view was taken by Rand, J., in *Hellens* v. *Densmore*[139] in which he said:

> That after Confederation a right of appeal could be given by provincial law appears to me to be unquestionable although the opposite opinion seems to have been held in the provincial Courts: the administration of justice by the Province surely extends to the final determination within the Province of the judgments of its own Courts.[139a]

The conflicting lines of decision in British Columbia and Manitoba were considered by the Prince Edward Island Supreme Court in

---

[138] [1919] A.C. 756, 48 D.L.R. 13, 88 L.J.P.C. 165.

[138a] [1922] 1 W.W.R. 718 at pp. 720-1, 63 D.L.R. 120 at pp. 122-3.

[139] [1957] S.C.R. 768, 10 D.L.R. (2d) 561.

[139a] *Ibid.,* at p. 783 (S.C.R.) and p. 568 (D.L.R.).

However, in the same case, Locke, J., one of the dissenting judges, with whom Abbott, J., concurred, said at pp. 788-9 (S.C.R.), 572-3 (D.L.R.): "As head 26 of s. 91 of the B.N.A. Act vests exclusive legislative authority in the Parliament of Canada in relation to divorce and as the Province is, accordingly, excluded from that field, save as to matters of procedure, it is to the Imperial statute that one must look to determine the extent of the Court's jurisdiction...

...It is to be remembered that the power vested in the Court to grant decrees of divorce is conferred by the Statute of 1857 as amended and by c. 41 of the Statutes of Canada for 1925. The Province, as pointed out, could not legislate on this aspect of the matter, though the course that has been followed in British Columbia since 1938 would rather indicate that the Legislature has assumed that it could do so." The other judges of the Supreme Court refrained from expressing an opinion on this matter.

Reference re Divorce Court Act.[140] The reference was to determine the validity of an amending act which conferred concurrent jurisdiction in divorce and matrimonial causes on the Prince Edward Island Supreme Court. Campbell, C.J., said:

> After a full consideration of the two lines of cases, and of the underlying principles, I have come to the conclusion that the reasoning in the Manitoba decisions is more cogent, and I am therefore of the opinion that, in the absence of Dominion legislation conferring jurisdiction and regulating procedure in Divorce and Matrimonial Causes, a provincial Legislature may confer such jurisdiction on a provincially constituted Court, and may regulate the procedure therein. To hold otherwise would lead analogously to the conclusion that provincial statutes conferring jurisdiction on provincial Courts must be construed not to extend to cases concerning such a subject as *(e.g.)* bills of exchange, for the reason that such subject is substantively under the exclusive legislative jurisdiction of the Dominion.[141]

It is clear that the Canadian Parliament may confer divorce jurisdiction and appellate jurisdiction upon any tribunal it wishes, including provincial courts by virtue of sections 91(26) and 101 of the *B.N.A. Act.* It also seems probable that the provincial legislature has power to confer divorce jurisdiction on superior or county court judges and that it has the power to confer appellate jurisdiction.[142] The only limitations on the provincial legislature are, firstly, that divorce jurisdiction, which is a traditional superior court function,

---

140 [1952] 2 D.L.R. 513.

141 *Ibid.*, at p. 522.

142 In *Attorney-General of British Columbia* v. *McKenzie*, [1965] S.C.R. 490, 51 D.L.R. (2d) 623, only Judson, J., stated that it is competent for the province simply to confer divorce jurisdiction on the county courts rather than local judges of the Supreme Court. Ritchie, J., with whom the rest of the court concurred noted that the Privy Council had in *Watts* v. *Watts*, [1908] A.C. 573, given express approval to the judgment of Martin, J., in *Sheppard* v. *Sheppard*, (1908), 13 B.C.R. 486 and quoted the following passage which appears at p. 519: "Moreover, while on the one hand it is true that the Legislature of a Province has no power to legislate in divorce matters so far as expending [*sic*] or contracting the jurisdiction in that respect possessed by its Courts before the Union, yet on the other hand it is equally true that the Court itself has inherent power to make rules regulating its procedure, and that power the Provincial Legislature can take from it in divorce matters as it has in all other matters in this Court, and therefore may, in this sense, legislate by rules of court or otherwise, respecting the regulation of the procedure by which the unalterable Ante-Union jurisdiction may be exercised." If Ritchie, J., is adopting tbe statement of Martin, J., then it means that he is disagreeing with Judson, J., (and with *Reference re Divorce Court Act (P.E.I.).* If the ante-union jurisdiction in regard to divorce is unalterable by the province except in regard to procedural matters it means that divorce jurisdiction can only be conferred on county court judges in their capacity as local judges of the superior court.

cannot be conferred upon provincial appointed officials as this would encroach upon the power of the Governor-General to appoint superior court judges under section 96 of the *B.N.A. Act* and, secondly, that since divorce jurisdiction is an area of concurrent legislative power, the provincial legislation is subject to the paramountcy of federal legislation in cases of conflict.

It is now proposed to consider the way in which the legislative power of the provinces in relation to divorce jurisdiction has been circumscribed by the passage of the new *Divorce Act*. The *Divorce Act* clearly provides that it is the superior court of the province that is to exercise divorce jurisdiction. Does this mean that a province can no longer validly enact that its county court judges are to have exclusive or concurrent divorce jurisdiction? The provinces certainly cannot validly enact that the county courts are to have exclusive divorce jurisdiction. This would be patently repugnant to the *Divorce Act*. As the Minister of Justice said, "this bill does not permit any province to say that divorce will not be a matter for the supreme court... but shall be a matter for some other matrimonial or divorce court. This the province cannot do. It must make divorce a matter for the supreme court." [143] It is less clear that a provincial enactment conferring concurrent divorce jurisdiction on its county courts would be inoperative. The courts might conclude that the Dominion had fully occupied the field by inferring that Parliament had determined that divorce jurisdiction was to be exercised by a superior court and by no other court. Alternatively, the courts might consider the provincial legislation conferring divorce jurisdiction on county courts as not repugnant but merely supplemental to the federal legislation which had conferred divorce jurisdiction on superior courts. The Minister of Justice considered that such provincial legislation would be repugnant to the *Divorce Act*. Indeed, the Minister rejected, on second reading of the Bill, two amendments attempting to provide concurrent jurisdiction, on grounds that it was the Government's express policy that only the superior courts should deal with matters under the *Divorce Act*.[144] However, he did on two occasions suggest that a province could give divorce jurisdiction to its county court judges by giving them such jurisdiction in their capacity as local judges of the supreme court.[145] Such action would appear possible under section 2(e)(i) of the *Divorce Act* since that section defines "court" and not "judge". Consequently, by designating the county court judges as local judges of the supreme court, as

---

[143] *House of Commons Debates*, 19 December 1967, V, p. 5634.

[144] *Ibid.*, 18 December 1967, V, pp. 5565-5573. Both amendments were negatived.

[145] *Ibid.*, 15 December 1967, V, p. 5479 and 19 December 1967, V, pp. 5633-34.

British Columbia does, it would be possible to permit the county court judges to exercise jurisdiction under the Act.[146] In regard to appellate jurisdiction, it would appear that the Dominion has fully occupied the field by virtue of sections 18 and 19 of the new Act.

Domicile and Recognition

The Right to Petition for Divorce and Annulment

Jurisdiction is often used in another sense. We say that a court has jurisdiction to hear a divorce petition if the parties are domiciled in that particular state or law district. This is a very distinct issue from the choice of the court which is to exercise divorce jurisdiction. The changes which the *Divorce Act* has made in jurisdiction in the sense of who has the right to petition for divorce before a court upon which divorce jurisdiction has been conferred will now be considered.

The Canadian Parliament has provided that a person may petition for divorce if he is domiciled in Canada and either the petitioner or respondent has been ordinarily resident in that province for at least one year and has actually resided in that province for at least ten months of the year.[147] Before the new *Divorce Act,* there was no specific residential qualification. As long as the husband was domiciled in a province whose court had divorce jurisdiction, the court could hear the petition. As domicile does not require any specific residential qualification but only the coalescing of residence and intention to remain indefinitely in the law district, in theory the right to petition for divorce has been restricted by the added residential qualification. In reality, the shorter the period of residence, the more difficult it has been for the petitioner to establish that he is domiciled in the province. The adoption of the concept of the Canadian domicile has, however, extended the right to petition for divorce. In the past a person who had come to Canada from abroad and had decided to remain indefinitely in Canada but who had not decided upon the province in which he would reside indefinitely would not be able to obtain a divorce in Canada because he would not be domiciled in a particular province. Such a person would now be domiciled in Canada and if the residential qualification had been satisfied he could petition for divorce in the province of his residence.

---

[146] See statement by Mr. Trudeau on British Columbia practice in *Proceedings of the Standing Committee on Banking and Commerce,* No. 23, p. 223 (Feb. 1, 1968).

[147] *Divorce Act,* 16-17 Eliz. II, S.C. 1967-68, c. 24, s. 5.

The major change in jurisdiction in the sense of who has the right to petition for divorce is contained in section 6(1) of the Act. This section states that:

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

This section goes far beyond the *Divorce Jurisdiction Act* of 1930[148] which is now repealed by the *Divorce Act*. The former Act merely provided that a married woman who had been deserted and had been living separately from her husband for two years could petition for divorce in the province in which her husband was domiciled immediately before the desertion. However, a married woman now has the capacity to acquire a separate domicile from that of her husband for the purpose of founding divorce jurisdiction. It might even be argued that a married woman now has greater capacity to acquire a domicile for the purpose of divorce jurisdiction than has a married man. It has long been recognized that the domicile of a minor is that of his father if he is legitimate and that of his mother if he is illegitimate.[149] There is no Canadian or English case which holds that a minor married man can establish a domicile independent from that of his relevant parent. This is in contrast to the clear proposition contained in section 6(1) that a married woman, even though she is a minor, has the capacity to acquire a separate domicile as though she were unmarried and as though she had attained her majority. It is evident that the Special Joint Committee on Divorce never intended that a married woman should have greater capacity than a married man. The Committee, in its report stated that, "In addition to broadening the grounds for divorce, married woman deserted by their husbands will be given access to the courts on equality with men." [150] It is therefore to be hoped that when the matter of determining the domicile of a minor married man arises, the Canadian courts will either argue by analogy from section 6(1) of the *Divorce Act* and hold that he may acquire an independent domicile or they will rely upon the realistic American cases which have recognized that an

---

[148] R.S.C. 1952, c. 84.

[149] *Dicey and Morris on the Conflict of Laws*, 8th ed., ed. by J.H.C. Morris, (London, 1967), pp. 110-113; G.C. Cheshire, *Private International Law*, 7th ed., (London, 1965), pp. 165-169.

[150] *Divorce Report*, p. 43.

emancipated child whether married or unmarried may acquire an independent domicile.[151]

Section 6(1) does assure that married women who are resident in Canada and who intend to reside in Canada indefinitely will have access to the divorce courts on a basis at least as favourable as married men. It should, however, be recognized that married women who are resident outside of Canada and who intend to reside in that foreign state indefinitely will no longer have access to a Canadian court as a result of their husband being domiciled in a Canadian province as was the case prior to the *Divorce Act*. Section 5(1)(a) provides that the court for any province has jurisdiction if "the petition is presented by a person domiciled in Canada" and this in conjunction with section 6(1) will prevent married women who are resident outside Canada and who intend to continue to reside in that foreign state from petitioning for divorce in Canada simply because their husband is domiciled in Canada. However, if a husband or wife domiciled in Canada petitions for divorce and the spouse even if domiciled abroad opposes the petition, the court is empowered by virtue of section 5(3) to grant to the spouse opposing the petition "the relief that might have been granted to him or her if he or she had presented a petition to the court seeking that relief and the court had had jurisdiction to entertain the petition under this Act." This would permit a wife (or husband) domiciled abroad who opposes the petition presented by her husband (or wife) domiciled in Canada to cross-petition for divorce.

The question of the constitutional competence of the Canadian Parliament and provincial legislatures to legislate in regard to jurisdiction, in the sense of who has the right to petition for divorce or for a nullity decree will now be considered. This is a significant question in view of the fact that the Canadian Parliament has legislated in regard to who may bring a divorce petition and it has substantially increased the married woman's access to the divorce courts. It is also significant in that Parliament has not provided that the married woman is to have the capacity to acquire a separate domicile for the purpose of establishing nullity jurisdiction. This had been recommended by the Special Joint Committee on Divorce.[152] Could a provincial legislature provide that a married woman is to have the right to bring a divorce or nullity petition on the basis of one year's

---

[151] G.W. Stumberg, *Principles of Conflict of Laws*, 3rd ed., (Brooklyn, 1963), pp. 43-44; Herbert F. Goodrich, *Handbook of the Conflict of Laws*, 4th ed., (St. Paul, 1964), pp. 54-57.

[152] *Divorce Report*, pp. 31 and 162.

residence in the province, irrespective of where she may be domiciled? Could a provincial legislature provide that a married woman is to have the capacity to acquire a separate domicile for the purpose of establishing nullity jurisdiction?

It is submitted that nothing can be of a more substantive nature than whether one has the right to bring an action or petition. The form in which one makes a petition and the court before which it is presented may be comprehended under section 92(14) of the *B.N.A. Act*, "The Administration of Justice in the Province," but the right to petition for divorce is, it is submitted, a substantive matter which can only fall under section 91(26), "Marriage and Divorce." In *Reference Re Divorce Court Act*,[153] Campbell, C.J., clearly implied that the *Divorce Jurisdiction Act* of 1930 was substantive divorce law. It is further contended that the same applies with regard to determining who may present a petition for a nullity decree. However, one qualification must be made because of section 92(12), "The Solemnization of Marriage in the Province." This section would probably give the province the power to legislate in regard to nullity decrees if the marriage was celebrated within the province and if the defect was in regard to the formal validity of the marriage. Otherwise, it would seem that determining who has the right to petition for a nullity decree would come exclusively within the competence of the Canadian Parliament under section 91(26).

Assuming then that only the Canadian Parliament can legislate explicitly with reference to who has the right to bring a divorce petition and, subject to the above exception, who may bring a nullity petition, it is important to consider whether a province can incidentally affect the right to bring a petition for divorce through legislating in regard to domicile. This is significant in that there has been growing dissatisfaction with the definition of the concept of domicile both in Canada and in England.[154] For instance, the Commissioners on Uniformity of Legislation in Canada in 1961 recommended for enactment by the provinces a draft model act to reform and codify the law of domicile.[155] It is submitted that a province could not define domicile if it did so in regard only to matrimonial causes; if however, it legislated with respect to the meaning of domicile generally, there is some possibility of the enactment being held entirely *intra vires*

---

[153] [1952] 2 D.L.R. 513, at pp. 517-518.

[154] Mendes Da Costa, *Some Comments on the Conflict of Laws Provisions of the Divorce Act, 1968*, (1968), 46 Can. Bar Rev. 252, at p. 254 and footnote 12.

[155] *Proceedings of the Conference of Commissioners on Uniformity of Legislation in Canada*, (1961), pp. 23-24 and 139.

even though it incidentally affected the right to bring a divorce or nullity petition.

A strong argument could be made that section 91(26) of the *B.N.A. Act* — "Marriage and Divorce" — confers exclusive legislative competence in divorce matters, including the right to petition for a divorce or nullity decree. It might also be maintained that the right to petition for a divorce or nullity decree is a concurrent legislative field in that it falls within not only 91(26) but also 92(13), "Property and Civil Rights in the Province," and, in addition 92(14), "the Administration of Justice in the Province." Dean Lederman has noted that, "there seems to be a definite increase in the number and importance of concurrent fields being presently established by the courts"[156] but he also states that "the words 'exclusive or 'exclusively' occur in section 91 of the *B.N.A. Act* respecting federal powers and in section 92 respecting provincial powers, hence the priority for the attempt at mutual exclusion."[157] It is submitted that a court would not have to strive very hard in order to find that section 91(26) was an exclusive grant of legislative power which comprises jurisdiction, in the sense of who can bring an action for a divorce or an annulment. Section 92(13), "Property and Civil Rights in the Province," undoubtedly confers on the provincial legislature power to legislate in regard to the definition of domicile generally but to the extent that it affects who may bring a divorce or nullity petition, it is submitted that this is beyond the competence of the provincial legislature.[158] Lord Haldane in *John Deere Plow Co.* v. *Wharton* said:

> The expression "civil rights in the province" is a very wide one extending, if interpreted literally, to much of the field of the other heads of section 92

---

156 Lederman, *The Concurrent Operation of Federal and Provincial Laws in Canada,* (1963), 9 McGill L.J. 185, at p. 189.

157 *Ibid.*, p. 186.

158 Tarnopolsky in *The Draft Domicile Act — Reform or Confusion?,* (1964), 29 Sask. Bar Rev. 161, at p. 175 states: "Moreover, since Marriage and Divorce is a class of subject which by section 91 (26) of the *British North America Act* is assigned exclusively to Parliament, and since divorce and nullity jurisdiction is a matter coming witbin that class of subject, only Parliament can reform the law of domicile as it affects such jurisdiction. Therefore, unless Parliament can be persuaded to enact a similar Act, the common law rules would prevail as regards domicile for purposes of establishing jurisdiction in divorce and nullity suits."

However, the brief of the Government of the Province of Manitoba to the Special Joint Committee on Divorce assumes that provincial legislation in regard to domicile would affect divorce jurisdiction. The brief statos:

> 36. Likewise, the enactment by the respective provincial governments of the draft statute of the Law of Domicile which was approved by the Conference of Commissioners on Uniformity of Legislation in Canada, at

> and also to much of the field of section 91. But the expression cannot be so interpreted, and it must be regarded as excluding cases expressly dealt with elsewhere in the two sections, notwithstanding the generality of the words.[159]

It is this writer's contention that section 91(26) is an effective subtraction from section 92(13) of the power to legislate in regard to who may bring a divorce or nullity decree, and furthermore, that the right to petition for a divorce or nullity decree is of such a substantive nature that it cannot fall within 92(14).

Even if the courts were to hold that this is a concurrent field and not a field within the exclusive competence of the Canadian Parliament, it could still be argued that through section 6(1) of the *Divorce Act*, Parliament has fully occupied the field of reform of the concept of domicile in regard to the right to bring a divorce petition. It could also be argued that through the adoption of the concept of a Canadian domicile for the purpose of determining who has the right to bring a divorce petition, there is no necessary connection between a Canadian domicile and a domicile in a province. If the provinces enacted such provisions of the model Domicile Code, such as, "The domicile of a person continues until he acquires another domicile" and "a person shall be presumed to intend to reside indefinitely in the state and sub-division where his principal home is situate," [160] a court might construe such an enactment as having no impact upon the issue of whether a person is domiciled in Canada but referring only to whether a person is domiciled in a province. If a Canadian domicile and a domicile in a province are independent concepts, it would be possible as a result of provincial legislation for a person to be domiciled in a province of Canada but not domiciled in Canada for the purpose of being able to present a divorce petition.

The provincial enactments in regard to domicile will now be considered. In 1927, the Alberta legislature purported to reverse the Privy Council decision in *A.-G. for Alberta* v. *Cook*.[161] The *Domestic Relations Act*,[162] passed in 1927 gave the judicially separated married woman the capacity to acquire a separate domicile. It provided that, "after a judgment of judicial separation has been granted ... b) the

---

the Proceedings of the Third Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada in 1961, would alleviate many of the problems caused by our current law of domicile as it relates to divorce. *Divorce Committee Proceedings*, No. 24, p. 1465 (Apr. 20, 1967).

[159] [1915] A.C. 330, at p. 340; 18 D.L.R. 353, at p. 359.

[160] *Proceedings of the Conference of Commissions on Uniformity of Legislation in Canada (1961)*, p. 139.

[161] [1926] A.C. 444, [1926] 2 D.L.R. 762.

[162] 17 Geo. V, S.A. 1927, c. 5, s. 10, and R.S.A. 1955, c. 89, s. 11.

wife shall... be reckoned as *sui juris* and as an independent person for all purposes, including the acquisition of a new domicile distinct from that of her husband." It has been suggested that this section might enable the Alberta Supreme Court to assume divorce jurisdiction on the basis of the judicially separated married woman's independent domicile,[163] but as far as can be determined no judicially separated wife has ever brought an action for divorce on the basis of her separate Alberta domicile. The provision of the Alberta statute, although in general *intra vires* the Province under section 92(13), would seem to be *ultra vires* to the extent that it affects the jurisdiction of the courts in divorce and nullity matters. As a result of section 6(1) of the *Divorce Act*, however, the Alberta provision has been rendered inoperative in regard to the right to bring a divorce petition, even if it were *intra vires* in regard to affecting the jurisdiction of the courts in divorce and nullity matters.

Another provincial statute dealing with domicile is *The Married Women's Property Act*,[164] of New Brunswick.
Section 9(2) provides:

> Any married woman who lives apart from her husband for any of the causes hereinbefore in this section mentioned, or whose husband neglects to provide for her support or that of his family as aforesaid, or who would on any ground be entitled to maintain a suit for a divorce *a mensa et thoro* or for a divorce *a vinculo matrimonii* shall with respect to any proceeding instituted in any of the Courts of the Province be deemed to have been or to be domiciled in this Province so long as she maintains *a bona fide* residence herein, and notwithstanding that her husband has a domicile elsewhere.

However, section 10 states that "nothing in this Act shall affect the jurisdiction of the 'Court of Divorce and Matrimonial Causes'." This seems to indicate that either the New Brunswick legislature or more realistically the Attorney-General's department considered that to affect the jurisdiction of the courts in matrimonial causes was outside the Province's legislative competence or that it did not wish to alter that jurisdiction. It is submitted that it was probably the former.

It is interesting to note that the New Brunswick provision, for the separate domicile for the wife who was living apart from her husband in certain circumstances, was first enacted as an amendment

---

[163] Bowker, *Procedure in Divorce Actions in Alberta*, (1938-40), 3 Alta L.Q. 51, at pp. 54-55. Dean Bowker, however, did not discuss the constitutional law problem. Neither Cartwright nor Power mention this section as permitting an Alberta court to assume jurisdiction.

[164] R.S.N.B. 1952, c. 140. I wish to thank Dean W.F. Ryan for bringing this provision to my attention.

to the *Married Women's Property Act*[165] in 1906. At that time, section 22 of *The Married Women's Property Act,*[166] read: "nor shall anything herein contained abridge the authority of 'The Court of Divorce and Matrimonial Causes'."

It was not until 1951, when *The Married Women's Property Act*[167] was passed that the wording was changed from "abridge" to "affect" the jurisdiction of 'The Court of Divorce and Matrimonial Causes'. Therefore, if it was within the legislative competence of the Province to affect jurisdiction in matrimonial causes incidentally through legislating about domicile generally, it could be argued that from 1906 to 1951 jurisdiction in matrimonial causes had been extended. It appears, however, that there are no reported cases in which jurisdiction had been assumed on the basis of the wife's separate domicile during that period of 45 years.

The Civil Code of the Province of Quebec in articles 79 to 85 inclusive and article 207 contains detailed provisions in regard to domicile. Until the *Divorce Act,* there was no problem about the constitutional validity of these provisions in that section 129 of the *B.N.A. Act* provided for the continuance of existing laws in Canada which included the Civil Code of Lower Canada. Article 207 states that:

> The separation relieves the husband from the obligation of receiving his wife, and the wife from that of living with her husband; it gives the wife the right of choosing for herself a domicile other than that of her husband.

If the Quebec courts had simply been given divorce jurisdiction, it is submitted that a woman who had been legally separated from her husband and who had her "principal establishment" in Quebec would have had the right to petition for divorce in Quebec even though her husband had acquired a domicile elsewhere.[168] There would not have been the constitutional law problem in regard to article 207 as there was in regard to the provision of the *Domestic Relations Act* of Alberta in that article 207 was enacted before Confederation and was continued in force by virtue of section 129 of the *B.N.A. Act.* However, if the married woman legally separated from her husband in Quebec had come to Ontario, an Ontario court would not have assumed jurisdiction on the basis of her separate domicile. The concept of domicile has consistently been defined solely by the *lex*

---

[165] 6 Edw. VII, S.N.B. 1906, c. 9.

[166] C.S.N.B. 1903, c. 78.

[167] 15 Geo. VI, S.N.B. 1951, c. 182, s. 10.

[168] Castel, *Canadian Private International Law Rules Relating to Domestic Relations,* (1958-59), 5 McGill L.J. 1, at p. 14.

fori.[169] The capacity of acquiring a separate domicile would not have been treated by the Ontario court as a separate question to be referred to the law of Quebec.[170] The Ontario Court would simply have applied Ontario law and following *A.-G. for Alberta* v. *Cook* held her to be domiciled in Quebec where her husband was domiciled.[171]

The *Divorce Act* by virtue of section 6(1) has restricted the operation of part of article 83, "A married woman not separated from bed and board, has no other domicile than that of her husband." This article has been altered in regard to determining divorce jurisdiction in that a married woman whether or not she is judicially separated now has the capacity to acquire a separate domicile.

Recognition of Foreign Decree

For the first time in Canada there is legislation in regard to the recognition of foreign divorce decrees. Section 6(2) of the Divorce Act reads as follows:

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

Although section 6(2) is not without ambiguity,[172] it appears that a divorce decree granted to a wife is to be recognized if in the eyes of Canadian law the wife was domiciled in the law district in which the divorce decree was granted. The basis upon which the foreign court has in fact assumed jurisdiction is not material. The sole consideration is whether a Canadian court would, according to Canadian law, consider that the married woman was domiciled in the law district where the decree was granted, provided that the foreign tribunal or authority has jurisdiction according to its own law. The Minister of Justice, Mr. Trudeau, stated:

> It is domicile as defined and understood by our courts in connection with our statutes and common law.

---

[169] Dicey and Morris, *op. cit.*, pp. 117-118.

[170] Professor Graveson has argued that there should be a separate choice of law rule in regard to capacity to acquire a domicile of choice but this view has never found acceptance. See Graveson, *Capacity to Acquire a Domicile*, (1950), 3 Int. L.Q. 149.

[171] Walsh, *Divorce by Resolution of the Senate*, (1967), 13 McGill L.J. 1, at pp. 12-13.

[172] Bale, *Comment*, (1968), 46 Can. Bar Rev. 113, at pp. 134-136; Mendes da Costa, *loc. cit.*, pp. 281-290.

> This means that if a person goes to Reno and obtains a divorce on the basis of residence and the person is effectively domiciled in Nevada — domiciled, once again, as understood by our courts — we will recognize that divorce because it was granted by a tribunal which had jurisdiction under the law of Nevada. In other words, the Nevada law will apply if the person is resident in Nevada under Nevada law and will be recognized in Canada if the person is domiciled there. Once again, the Canadian courts have always interpreted the word "domicile" in a Canadian statute according to Canadian laws and standards. This is the rule.[173]

The fact that married women do not have the capacity to acquire a separate domicile in the foreign jurisdiction is not significant. For instance, a Canadian court should recognize an English divorce decree in a situation in which the English court assumed jurisdiction on the basis of the wife's residence in England for three years under section 40 of the *Matrimonial Causes Act.*[174] This is subject to the proviso that the wife was not only resident in England but had the intention of continuing to reside there indefinitely and so in the eyes of Canadian law, but not English law, would be domiciled in England for the purpose of divorce jurisdiction.

The *Divorce Act* does not purport to codify the rules in regard to the recognition of divorce decrees. Furthermore, there has been no legislative attempt to introduce some order into the chaotic state of the cases in regard to the recognition of foreign nullity decrees.[175] It is therefore material to inquire as to where the competence to legislate in regard to the recognition of foreign divorce and nullity decrees resides. Fauteux, J., in *Sampson* v. *Holden,* said:

> Au Canada, où la souveraineté législative en matière de droit civil appartient exclusivement aux provinces, c'est le droit international privé de la province où le litige est soumis — en l'espèce, la province de Québec — qui régit.[176]

This statement might appear to indicate that conflict of law rules in general fall within the exclusive legislative competence of the province. However, this statement because of its context must be construed more narrowly. In *Sampson* v. *Holden,* damages were being claimed for the wrongful death of an individual by his heirs. This matter was thus within the legislative competence of the province under section 92(13). It is submitted that legislative competence with respect to conflict rules corresponds with the allocation of the power to pass internal or domestic law set out in sections 91 and 92. For instance, section 91(18) "Bills of Exchange and Prom-

---

[173] *House of Commons Debates,* 19 December 1967, V, p. 5609.

[174] 1965, c. 72.

[175] Lysyk, *Jurisdiction and Recognition of Foreign Decrees in Nullity Suits,* (1964), 29 Sask. Bar Rev. 143.

[176] [1963] S.C.R. 373, at p. 378.

issory Notes" carries with it the legislative competence to enact the conflict rules relating to bills of exchange which are found in the *Bills of Exchange Act.*[177] Similarly, section 91(26), "Marriage and Divorce" carries with it the legislative competence to enact conflict rules with respect to the recognition of foreign divorce or nullity decrees. This would not appear to be a concurrent field of legislative power. The grant of legislative power in section 91(26) necessarily carries with it the competence to enact conflict rules relating to marriage and divorce and this is a subtraction from the grant of legislative power in section 92(13).

The province cannot even enact choice of law rules relating to the formal validity of marriage in that the grant of power in section 92(12), "The Solemnization of Marriage in the Province," does not grant power with respect to formal validity generally but only permits the provincial legislature to prescribe the solemnities in regard to marriages celebrated in the province. A conflict rule in regard to the formal validity of a marriage celebrated outside the province cannot be comprehended under "The Solemnization of Marriage in the Province." In *Vamvakidis* v. *Kirkoff,* Logie, J., said: "whether our *Marriage Act* is valid or invalid, it can confer no jurisdiction upon an Ontario Court to declare a marriage in another Province either valid or invalid."[178]

It thus seems clear that the provincial legislative jurisdiction over matters of domicile and conflict laws as these relate to divorce and annulment actions is very limited, and to the extent that these matters have not been dealt with by the *Divorce Act,* they will continue to be governed by the existing laws, not subject to change by any province.

Corollary Relief

Introducing Bill C-187 in the House on December 4, 1967 the Minister of Justice outlined two fundamental problems which had faced the Government in drafting the divorce legislation: the division of legislative powers and the division of religious views. Speaking to the first issue, the Minister indicated that his Government, recognizing the desirability for a degree of uniformity in the law and the fact that the constitution vested divorce jurisdiction in Parliament, had

> decided against shirking our responsibilities and we drew up an act dealing with the divorce problem, attaching to the solution of that problem measures

[177] R.S.C. 1952, c. 15, ss. 160-164.
[178] [1930] 2 D.L.R. 877, at p. 879.

> of a corollary nature, that is which cannot be separated from the effects of a broken marriage as such.[179]

He then specified the matters which were considered corollary to divorce: alimony, maintenance and custody.[180] They are dealt with in three sections of the *Divorce Act*.[181]

This step, of course, opens to question the meaning of the term "divorce" in section 91(26) of the *B.N.A. Act* and the scope of Parliament's legislative jurisdiction thereunder. Not only is it a question of what lies within the federal legislative competence but also a question of the effect which such federal law might have on existing provincial laws relating to matters of ancillary relief in matrimonial proceedings, some of which were enacted prior to Confederation and others afterwards on the assumption that they fell within provincial competence.

That the issue of legislative jurisdiction over matters of support, property division and custody as they relate to matrimonial proceedings is fraught with uncertainty is evidenced by the diversity of opinions expressed before the Special Joint Committee on Divorce and in the House of Commons and Senate. The paucity of judicial decisions dealing with the question is explained only by the absence of federal legislation prior to now.

Three main views seem to exist on the matter. The first sees laws relating to support, custody and property division as matters flowing directly from divorce proceedings and consequently within federal jurisdiction as "ancillary" or "necessarily incidental" to divorce. The second considers all three of these matters substantively in relation to property and civil rights in a province. Simply because they may arise as incidents of a divorce does not change their character. The middle view characterizes laws dealing with support and custody as clearly incidental to divorce but not those governing property division; thus, only the first two fall to federal jurisdiction as matters within the subject of divorce.

Chairman Senator Arthur Roebuck of the Special Joint Committee was firmly of the opinion that all of these matters were an integral part of divorce.[182] His view became that of the Special Joint Committee which recommended that new federal legislation deal with alimony, maintenance, custody and division of matrimonial property,

---

[179] *House of Commons Debates*, 4 December 1967, V, p. 5014.

[180] *Ibid.*, p. 5015.

[181] 16-17 Eliz. II, S.C. 1967-68, c. 24, ss. 10, 11 & 12.

[182] *Divorce Committee Proceedings*, No. 21, p. 1280 (Mar. 9, 1967).

"all matters ancillary to divorce and ... thus within the jurisdiction of Parliament." [183]

Legal experts testifying before the Committee were less certain. E. Russell Hopkins, Senate Law Clerk and Parliamentary Counsel, believed that all of these matters were ancillary to divorce legislation, but wished to give no firm opinion.[184] Mr. Justice Walsh, Senate Commissioner, disagreed. These were matters of property and civil rights in the province and Parliament must confine itself solely to grounds for divorce and annulment.[185]

E. A. Driedger, Deputy Minister of Justice, saw the question as one of degrees of incidental relationship to divorce.

> Alimony is one thing, but when you get on to support and maintenance of children, the further you go into the area of property and civil rights the further you perhaps get away from federal jurisdiction and there may be a twilight area here. I do not know where you draw the line.[186]

In a subsequent letter to the Committee (which the Deputy Minister emphasized expressed merely his "own personal opinions") Mr. Driedger was more specific on the matter of legislative jurisdiction. Characterizing Parliament's jurisdiction to make laws in relation to divorce as "in essence jurisdiction to make laws for the alteration of the legal status created by the marriage," the Deputy Minister asserted that this jurisdiction "extends to the abolition of the rights and obligations created by the marriage and restoration of pre-existing rights ... I think it must follow that these rights and obligations can be terminated in whole or in part" [187] by laws of Parliament.

Mr. Driedger considered alimony and maintenance for the wife as a marital obligation which clearly fell into the above category. He would apply the same reasoning to maintenance and custody of children since these were rights and obligations arising from the marriage. Since the result of a divorce was to terminate the marriage relationship, clearly interfering with the rights and obligations, it was the Deputy Minister's opinion that "Parliament's jurisdiction in relation to divorce would include jurisdiction to prescribe the extent to which these rights and obligations are to be abrogated or continued." [188]

---

[183] *Divorce Report*, p. 27. See also p. 162 for provisions of the draft bill dealing with these matters.

[184] *Divorce Committee Proceedings*, No. 1, pp. 17-18 (June 28, 1966).

[185] *Ibid.*, pp. 24-25.

[186] *Ibid.*, No. 3, p. 146 (Oct. 18, 1966).

[187] *Ibid.*, No. 12, p. 622 (Jan. 31, 1967).

[188] *Ibid.*

As to property matters other than support or maintenance — division of matrimonial property, marriage settlements, dower, homestead rights, a married woman's rights to own property and bring suits — these did not fit the above category.

> These matters do not involve rights and obligations between husband and wife, but they seem to me to relate more to the property and civil rights of the parties to the marriage than to their legal status as married persons. They could vary from time to time and from jurisdiction to jurisdiction and a particular rule is not necessary or essential to constitute a marriage.[189]

The Deputy Minister concluded his analysis by observing that while a provincial legislature may not legislate on the rights and obligations of marriage and divorce, it might legislate generally on such matters in relation to property and welfare of the people in the province.

> Provincial legislation dealing with property and civil rights, and not being legislation *qua* marriage or divorce, would no doubt be valid. If, however, any particular provincial law should clash with a federal law, then, under the normal rule, the latter would prevail.[190]

In the House, the Minister of Justice explained why his Government had adopted the view of his Deputy Minister rather than that of the Parliamentary Committee. Alimony, maintenance and custody, in his opinion, are integral parts of marriage and divorce [191] whereas separation of estate (separate maintenance) is essentially a matter of provincial jurisdiction. This was not to suggest that some questions of marital property — "those which perhaps came from the marriage tie itself" — could not be dealt with by federal laws,

> But in practice, since it will be very difficult to distribute these possessions which are often worth little in comparison with the personal property of the husband and wife, it would have been a mistake to try to decide how property should be divided by the present legislation.[192]

At least one member of the House had serious doubts about Parliament's competence to deal with *any* matters of corollary relief, particularly separate maintenance.[193] But, in the Senate, opinion was strongly in favour of the view that the division of family property on dissolution of marriage "is part of and actually is inseparable from the authority given under the *British North America Act* to the federal Government (*sic*) to deal with marriage and divorce."[194] An amendment to this effect was narrowly defeated in the Senate

---

[189] *Ibid.*, pp. 622-623.
[190] *Ibid.*, p. 623.
[191] *House of Commons Debates*, 4 December 1967, V, p. 5015.
[192] *Ibid.*, 5 December 1967, V, pp. 5088-89.
[193] *Ibid.*, 18 December 1967, V, pp. 5543-44. See speech by Mr. Yves Forest.
[194] *Senate Debates*, 23 January 1968, V, 116, p. 743.

Banking and Commerce Committee [195] only after the Deputy Minister of Justice, D. S. Maxwell, and the Minister of Justice firmly reiterated that "laws of this kind fall within provincial jurisdiction as to property and civil rights." [196]

Are the views of the Department of Justice and the Minister, on the question of legislative jurisdiction over alimony, maintenance, custody and division of property as these are reflected in sections 10, 11 and 12 of the *Divorce Act,* tenable? To judge this one must examine some constitutional history and case law.

Insofar as English legislative history prior to 1867 is a guide to the meaning of terms in the *B.N.A. Act,* it seems evident that the word "divorce" as used in Imperial legislation between 1857 and 1866 included as a part of its proceedings related matters of alimony and maintenance,[197] custody, maintenance and education of the children of a marriage,[198] as well as settlement of a wife's property [199] and application of property subject to marriage settlements.[200] That these matters were considered an integral part of divorce may be inferred from the preamble of the *Divorce and Matrimonial Causes Act* of 1857: "Whereas it is expedient to amend the laws relating to Divorce and to constitute a court with exclusive jurisdiction in matters matrimonial . . ." [201]

The *Confederation Debates* offer no guide as to the legislative content of the term "divorce" in section 91(26) of the *B.N.A. Act;* Canadian practice on the matter, however, sheds some light on what was believed to be the extent of Parliament's competence.

In the exercise of its power to grant dissolution of marriage, Parliament frequently, for the first forty years, provided in the private bills for some matters of incidental relief. This practice appears to have ended in 1905, after which the bills simply decreed the dissolution.[202] The summary of divorce cases before Parliament between 1867 and 1888 prepared by Gemmill [203] indicates that Parlia-

---

[195] *Proceedings of the Standing Committee on Banking and Commerce,* No. 23, pp. 207-213 (Jan. 31, 1968).

[196] *Ibid.,* p. 208 (Jan. 31, 1968) and p. 224 (Feb. 1, 1968).

[197] 20 & 21 Vict., 1857, c. 85, s. 32 and 29 & 30 Vict., 1866, c. 32, s. 1.

[198] 20 & 21 Vict., 1857, c. 85, s. 35 and 22 & 23 Vict., 1859, c. 61, s. 4.

[199] 20 & 21 Vict., 1857, c. 85, s. 45; 22 & 23 Vict., 1859, c. 61, s. 5; 23 & 24 Vict., 1860, c. 144, s. 6.

[200] 22 & 23 Vict., 1859, c. 61, s. 5.

[201] 20 & 21 Vict., 1857, c. 85.

[202] Hogg, *Parliamentary Divorce Practice in Canada,* (Toronto, 1925), p. 110.

[203] *Op. cit.,* pp. 153-245.

ment did deal, in a number of instances, with matters of alimony and custody and, on one occasion, with protection of the wife's estate.[204]

One case of particular interest, the Campbell Case[205] in 1879, raised squarely the issue of Parliament's jurisdiction over matters incidental to a divorce or judicial separation. The petition by the wife asked for annual payment of "support and maintenance" to the wife, custody of the child, annual payment for "support and education" of the child and for a possible settlement of part of husband's property in lieu of maintenance payments.[206]

On third reading of a bill incorporating these measures of relief, some senators objected to its passage on several grounds, including the legislative incompetence of Parliament to deal with the ancillary relief provisions.[207] Ontario law already provided for matters of maintenance and custody and any attempt by Parliament to deal with them would be an invasion of property and civil rights.[208]

While it is true, replied Senator Miller, relying upon a constitutional opinion prepared by Alpheus Todd,[209] that the provinces have exclusive jurisdiction over property and civil rights,

> ...it cannot be controverted, I think, that when the Parliament of Canada has exclusive power to deal with any subject of legislation, so far as it is necessary to deal with civil rights in connection with such legislation, we have the undoubted power to deal with them: where this Parliament has the right to legislate on any subject it must be considered that we have the power to legislate regarding all matters incident to that subject... Marriage and divorce and everything which is incident to marriage and divorce, as a logical sequence and corollary, are within our jurisdiction. What then is alimony? It is maintenance after separation of the husband and the wife. It is an incident of the contract of marriage. So control of children is also a right growing out of the same contract...[210]

Acting on this opinion, the bill was passed.[211] This Act was really the only attempt by Parliament to deal comprehensively with the ancillary aspects of matrimonial causes. Some later private acts dealt summarily with custody of children and with the legitimacy of subsequent off-spring of the former wife but, following 1905, the bills provided only for dissolution and the right of remarriage for the innocent party.

---

204 *Ibid.*, p. 160.
205 *Ibid.*, pp. 165-174.
206 *Ibid.*, p. 167.
207 *Ibid.*, p. 170.
208 *Ibid.*, p. 712.
209 See *Senate Debates*, 18 April 1879, p. 287 for Todd opinion.
210 *Ibid.*, pp. 293-294. See Gemmill, *op. cit.*, pp. 173-174.
211 *An Act for the Relief of Eliza Maria Campbell*, 42 Vict., S.C. 1879, c. 79.

Thus, the only conclusion to be drawn from parliamentary divorce practice is that, when challenged, Parliament asserted its jurisdiction over matters ancillary to dissolution of marriage, but preferred to leave these matters to the provincial courts under existing provincial laws.

Colonial laws dealing with questions of alimony, maintenance, custody and property rights both in relation to divorce actions (in those jurisdictions with laws permitting divorce) and in relation to annulment and judicial separation proceedings (save Ontario) existed prior to 1867. In the jurisdictions which subsequently became provinces of Canada, similar laws were either found or declared to exist. In most of the provinces, the legislatures have, since the date of union, enacted legislation on all of these matters adding to or changing the original laws. These laws have been passed seemingly on the assumption either that the matters fall exclusively within the class of subjects "Property and Civil Rights in the Province" or that they are matters of concurrent jurisdiction on which Parliament has not acted.[212]

In Ontario, for example, following enactment of the *Divorce Act (Ontario)*[213] in 1930 by Parliament introducing the divorce and annulment laws of England as of 1870, the provincial legislature enacted legislation[214] dealing with alimony in divorce and nullity actions, property settlements in divorce actions and custody and support of children in similar cases. It further granted to a divorced wife the status of *feme sole.* For whatever matrimonial causes law might not be covered by this enactment, the Legislature in 1933 declared further that those provisions of the *Divorce Act (Ontario)* (1930) as were within provincial jurisdiction were thereby enacted.[215]

In addition to this legislation, various acts have been passed on matters incidental to matrimonial causes such as the *Deserted Wives' and Children's Maintenance Act,*[216] *Married Women's Property Act,*[217]

---

[212] See Power, *op. cit.*, pp. 515-518.

[213] R.S.C. 1952, c. 85.

[214] *An Act to confer upon the Supreme Court certain powers in Actions for Divorce,* 21 Geo. V, S.O. 1931, c. 25, and *The Matrimonial Causes Act,* R.S.O. 1960, c. 232.

[215] *An Act to amend the Marriage Act,* 23 Geo. V, S.O. 1933, c. 29, and *The Matrimonial Causes Act,* R.S.O. 1960, c. 232, s. 10.

[216] R.S.O. 1960, c. 105.

[217] R.S.O. 1960, c. 229.

and *The Infants Act.*[218] Similar laws have been enacted in the other jurisdictions.[219]

Canadian case law on the question of legislative jurisdiction over matters incidental to matrimonial causes is rather limited and the issue has never been pronounced upon by the Supreme Court of Canada. In examining what few cases there are two points must be borne in mind; firstly, in none of them was the court faced with the task of choosing between competing federal and provincial enactments and secondly, in a number of the cases, the provincial legislation was not dealing with questions of alimony or custody as an incident of divorce proceedings, but rather generally with rights of spouses and offspring of a marriage.

In one case, however, Middleton, J.A., sitting as trial judge in *H.* v. *H.*,[220] an annulment action involving a question of the application of provincial rules of practice in actions under the *Divorce Act (Ontario)*, stated that Parliament's competence did not extend, under section 91(26) of the *B.N.A. Act*, to matters ancillary to divorce in any respect.

> The enactment [*Divorce Act (Ontario)*] is, moreover, necessarily confined to matters over which the Dominion has jurisdiction and cannot deal with or affect property and civil rights within the Province. This situation has been recognized by the Legislature of the Province for it passed a reciprocal Act conferring upon the Supreme Court certain powers in actions for divorce by 1931 (Ont.) c. 25. This Act conferred certain powers upon the Court with reference to the granting of alimony and dealing with the custody of children and also declared the status of a divorced woman with reference to her property and right to contract...[221]

On the question of alimony and maintenance, the case of *Lee* v. *Lee*[222] considered the jurisdiction of the provincial legislature to deal with alimony. While Harvey, C.J., was considering only the validity of a provincial law empowering the Supreme Court to grant alimony as a separate remedy, his words appear to have wider application.

> In my opinion it cannot be successfully contended that "alimony" comes within the subject of "marriage". It is true that it presupposes marriage.

---

[218] R.S.O. 1960, c. 187.

[219] For a discussion of provincial enactments see Power, *op. cit.*, pp. 515-524 (alimony and maintenance), pp. 579-80 and 610 (child maintenance and custody) and pp. 542-551 (property settlements). See also *Matrimonial Property Law*, ed. by Friedmann, (Toronto, 1955), pp. 239-266. For Quebec law see Walker, *The Disintegrating Marriage* in The W.C.J. Meredith Memorial Lectures (1965 Series), (Montreal, 1965).

[220] [1933] 3 D.L.R. 792 (Ont. S.C.).

[221] *Ibid.*, p. 793.

[222] [1920] 3 W.W.R. 530 (Alta. S.C., App. Div.).

> The duty of the husband to support his wife whether she lives with him or apart from him is a matter of civil rights as between husband and wife and it is not the subject of "husband and wife" but of "marriage and divorce" which is assigned to the Dominion Parliament... It is, in my opinion, nothing more nor less than a matter of civil rights arising out of a particular relationship and quite clearly therefore within the jurisdiction of a province if not included within the express words of "marriage and divorce" which for reasons I have stated, in my opinion, is not the case.[223]

A case before the British Columbia Court of Appeal in the same year, dealing with the same question, treated the matter with more caution than Mr. Justice Harvey's words suggest. Speaking for the Court, Martin, J.A., held that the provincial law providing for alimony apart from divorce was valid property and civil rights legislation but added that only Parliament could deal with "that right as incident to divorce."[224]

In 1923, the Saskatchewan Court of Appeal dealt with the question of validity of a provincial law providing for alimony as an independent relief.[225] While Haulting, C.J.S., adopted the view of Harvey, C.J., in *Lee* v. *Lee*[226] his Lordship did distinguish between maintenance which follows a divorce and alimony which "presupposes a subsisting marriage", and, on this basis, holding that only divorce was within the competence of Parliament, found that alimony (as distinguished from maintenance) clearly fell within "property and civil rights".[227]

Langford v. *Langford*,[228] a case concerned with the validity of court rules governing orders for alimony in matrimonial causes, purported to follow *Rousseau* v. *Rousseau*, holding alimony and maintenance to be matters of property and civil rights.[229] However, Mr. Justice Murphy then tempered this view, by suggesting a possible concurrent jurisdiction.

> The argument that, even if maintenance is a matter of property and civil rights, it is also so connected with divorce as to fall under the jurisdiction of the Dominion as ancillary to its exclusive divorce jurisdiction even if correct (as to which I am not called upon to express an opinion) is of no moment... because the Dominion has enacted no legislation dealing with alimony or maintenance ancillary to divorce legislation... It is, of course, trite law that where a matter is incidental or ancillary to one of the enumerated subsections of section 91 and is also within one of the enumer-

---

223 *Ibid.*, p. 534.
224 *Rousseau* v. *Rousseau*, [1920] 3 W.W.R. 384, at p. 387.
225 *Holmes* v. *Holmes*, [1923] 1 D.L.R. 294.
226 [1920] 3 W.W.R. 530.
227 At pp. 299-300.
228 [1936] 1 W.W.R. 174 (B.C.S.C.).
229 *Ibid.*, at p. 175.

> ated subsections of section 92 if the field is clear provincial legislation will be valid . . .[230]

In *Rex* v. *Vesey* [231] the possibility of concurrent jurisdiction over alimony and maintenance was also recognized, although the Chief Justice doubted the practicability of Parliament enacting such incidental legislation.[232]

Finally, a leading English case [233] was firmly of the opinion that the power of the court to make provision for a wife on the dissolution of marriage is a necessary incident of the power to decree such a dissolution.[234] While this opinion was not, of course, directed to the question of a division of legislative competence, it is indicative of the content of the term "divorce".

Turning to the law dealing with the question of maintenance and custody of children, the few cases are equally unhelpful in guiding one on the issue of legislative competence.

Re Gutsch,[235] a case before the Ontario High Court, considered the validity of the section of the *Children's Maintenance Act*,[235a] requiring a father to provide maintenance for deserted children. While the issue was specifically the possible conflict of this law with child support provisions of the Criminal Code, Mr. Justice Ferguson, in upholding the provincial law, spoke generally of a province's power to deal with child welfare, concluding that "it is now too late to suggest that a Province has no power to pass legislation which in pith and substance deals with maintenance of children . . ."[236]

The issue of legislative competence over custody was considered in *Welsh* v. *Welsh* and *Nicholson*[237] where the validity of B.C. legislation vesting jurisdiction in the Supreme Court on all questions of custody wes questioned as an attempt to amend the *Divorce and Matrimonial Causes Act*. Wilson, J., was of the opinion that:

> since the custody of children is not necessarily an incident of divorce, [it does not] involve any invasion by the legislature of the federal right to legislate regarding divorce. Clearly only parliament can legislate as to divorce, but the province can legislate as to the custody of children.[238]

---

[230] *Ibid.*, at p. 176.
[231] [1938] 2 D.L.R. 70 (N.B.S.C., App. Div.).
[232] *Ibid.*, at p. 81.
[233] *Hyman* v. *Hyman*, [1929] A.C. 601 (H.L.).
[234] *Ibid.*, at p. 608, per Lord Hailsham.
[235] (1959), 19 D.L.R. (2d) 572.
[235a] R.S.O. 1950, c. 52.
[236] (1959), 19 D.L.R. (2d) 572, at p. 576.
[237] (1958), 26 W.W.R. 403 (B.C.S.C.).
[238] *Ibid.*, at p. 407.

In *Ref. re Adoption Act*[239] however, Chief Justice Duff was of the opinion, in passing, that there could well be an "ancillary jurisdiction in respect of children which the Dominion may possess in virtue of the assignment to the Dominion Parliament by section 91 of the subject of Marriage and Divorce."[240] He had no doubt, though, of the province's power to legislate generally to require husbands to support wives and children.[241]

It is thus evident that one is provided with little clear direction from the case law on the question of legislative jurisdiction over matters of alimony, maintenance and custody. That there is obviously a general competence over the matters in the provincial legislature under section 92(13) and (16) seems clear.[242] The presence of a federal competence and its scope is less evident.

The traditional approach to resolving the issue of Parliament's legislative competence in relation to a subject-matter seemingly broader than a particular enumerated head in section 91 of the *B.N.A. Act* is to test the provisions in the legislation against the "ancillary" or "necessarily incidental" doctrine, first enunciated in *A.-G. Ont.* v. *A.-G. Can.*[243] which purports to determine the extent to which federal legislation may "intrude upon provincial classes of jurisdiction" when Parliament is enacting laws in relation to an enumerated head of section 91. According to this doctrine (variously described as the "ancillary" or "trenching" doctrine) Parliament may, in legislating on a matter falling under section 91, also deal with certain related matters which, standing alone, fall under provincial competence, where such provisions are "necessarily incidental to full-rounded legislation upon a Dominion subject-matter, or to the effective exercise of an enumerated Dominion power, or to prevent the scheme of an otherwise valid act from being defeated."[244]

This, indeed, appears to have been the approach in those few cases just discussed wherein the judges were prepared to concede some measure of jurisdiction over alimony, maintenance and custody, matters otherwise clearly within provincial legislative competence, to Parliament.[245]

---

239 [1938] S.C.R. 398.

240 *Ibid.*, at p. 402.

241 *Ibid.*

242 See Power, *op. cit.*, pp. 515-517.

243 [1894] A.C. 189, at pp. 200-201.

244 MacDonald, *Judicial Interpretation of the Canadian Constitution*, (1935), 1 U. of T. L.J. 260, at p. 274.

245 See *Rousseau* v. *Rousseau*, [1920] 3 W.W.R. 384; *Langford* v. *Langford*, [1936] 1 W.W.R. 174; *Rex* v. *Vesey*, [1938] 2 D.L.R. 70; *Ref. re Adoption Act*, [1938] S.C.R. 398.

This rationalization of the validity of a federal enactment has been attacked by two leading constitutional authorities as "a torturous method of explaining the 'aspect' doctrine"[246] which "does not represent a separate problem in or approach to interpretation at all", but "just another way of describing a dual-aspect situation".[247]

> To make what can only be an artificial distinction between those provisions of a federal enactment which are strictly in a federal aspect and those necessarily incidental to the effective operation of the legislation, is to trifle with legislative objectives and with the draftsman's efforts to realize them... — a super-refined and unnecessary embellishment of the aspect doctrine which can only divert attention from the need for close and careful consideration of the problem of aspect.[248]

Elaborating, Dean Lederman asserts that,

> We are not interested in what some part of a Dominion statute would have meant standing alone, because it does not stand alone. It takes some features of meaning from its context which it would not have if isolated.[249]

Accepting the views of these scholars, one's task in determining the question of constitutional validity is not to ascertain if the challenged provisions of an enactment are, though basically within provincial jurisdiction, necessarily incidental to the federal enactment and therefore within Parliament's "trenching" power, but rather to ascertain whether the enactment, taken as a whole, and assessing its "constitutional value", is within Parliament's powers. This latter point is important for the subjects of section 91 and the laws enacted thereunder are "vehicles through which social or economic or political policy are expressed" and the courts must direct attention to this constitutional value, when determining the validity of legislation.[250]

This approach was espoused by four members of a five man Supreme Court of Canada in a 1962 case dealing with the power of Parliament to vest the Exchequer Court with jurisdiction to determine an action by the Crown against a person who caused injury to a member of Her Majesty's armed forces, such personnel being designated servants of the Crown.[251] The defendant argued that the creation of a civil right of action in the Crown against

---

[246] Laskin, *"Peace, Order and Good Government" Re-examined*, (1947), 25 Can. Bar Rev. 1054 and 1061.

[247] Lederman, "Classification of Laws and the British North America Act", in *Legal Essays in Honour of Arthur Moxon*, (Toronto, 1953), p. 183 at p. 205.

[248] Laskin, *loc. cit.*

[249] Lederman, "Classification of Laws and the British North America Act", pp. 205 and 206.

[250] Laskin, *Constitutional Law*, 3rd ed., (Toronto, 1966), pp. 85-86.

[251] *A.-G. Can.* v. *Nykorak*, (1962), 33 D.L.R. (2d) 373.

members of the public in section 50 of the *Exchequer Court Act* was "not necessary to the exercise of full legislative power (by Parliament) over militia, military and naval service and defence" under section 91(7). It was rather legislation relating to property and civil rights.[252]

Counsel for the Crown responded that the provision was ancillary to 91(7) legislation notwithstanding that it affected civil rights in the province.[253]

Judson, J., rejected both arguments. Observing that it was essential to examine legislative competence in terms of present day realities, he found the defendant's argument "unduly restrictive of Parliament's exclusive jurisdiction under s. 91, head 7."[254] Modern military forces

> ...are part and parcel of the everyday life of the country. With this use of mechanized vehicles, the public interest requires that the Crown should be in the same position as any other master for the torts of its servants... If the Crown is to assume this responsibility to the public, there is every reason to insist on a reciprocal right of recovery... and legislation of this kind comes squarely under head 7 of s. 91, notwithstanding the fact that it may incidentally affect property and civil rights within the Province. It is meaningless to support this legislation... on the ground that it is "necessarily incidental" to legislation in relation to an enumerated class of subject in s. 91.[255]

As Mr. Justice Laskin observed in commenting on this opinion, Judson, J., is not suggesting an enlargement of the federal power but is merely indicating "that there is an independent constitutional basis for what can "rationally" be brought within federal authority..."[256] He might well have added that, in assessing the "constitutional value" in such cases, it is essential to consider the present-day context of the legislative subject-matter.

Whether one takes the "ancillary" approach or the "true aspect" approach to considering the validity of sections 10, 11 and 12 of the *Divorce Act,* it is submitted that the matters dealt with therein as "Corollary Relief" are within the legislative competence of Parliament, notwithstanding the fact that such provisions may, and indeed do, affect property and civil rights in the province.

Section 10 empowers the court to grant interim orders "as it thinks fit and just" for alimony and custody and support of the children pending determination of the petition.

---

252 *Ibid.*, at p. 377.
253 *Ibid.*
254 *Ibid.*
255 *Ibid.*, at pp. 377-78.
256 Laskin, *Constitutional Law*, p. 104.

Section 11 similarly empowers the court to issue permanent orders for payment of maintenance by either the husband or wife (a novel addition) for support of the other spouse and the children by lump sum or periodic payment. It further authorizes orders pertaining to custody, care and upbringing of the children.

In relation to orders made under sections 10 and 11, the Court is permitted by section 12 to make directions as to payments and to impose such conditions or restrictions as the court thinks fit and just.

It is clear that these matrimonial matters are ones which are dealt with under provincial legislation, but it is equally clear that they are matters which form an essential part of any divorce proceedings. As Mr. Driedger pointed out, each of them involves rights and obligations arising out of marriage and consequently go to the determination of status occasioned by the divorce.[257]

Historically we have seen that, from the outset, alimony, maintenance and custody have been treated as integral parts of divorce law, and this view was perpetuated in the practice of parliamentary divorce. As Power points out, while the term "divorce" as contained in s. 91(26) has never been judicially defined, "it has been assumed, and the assumption must now be considered beyond question, that the word has at least the same meaning in the *B.N.A. Act*"[258] as it does in the *Divorce and Matrimonial Causes Act.* Lord Buckmaster in *Hyman* v. *Hyman*[259] viewed alimony and maintenance as "associated with and inseparable from the power to grant this change in status..."[260]

Even some of the Canadian cases considered earlier were prepared to hold that, as legislation ancillary to divorce, Parliament might enact laws dealing with these matters. In one case before the Supreme Court of Canada dealing peripherally with the question, Mr. Justice Crockett was of the view that alimony and maintenance were an integral part of divorce law and proceedings.[261]

It would seem that a similar argument could be made for matters of maintenance and custody of children of the marriage following dissolution of the status. These matters, while generally the subject of property and civil rights, are, in relation to divorce, essential incidents of that subject, since obviously some provision must be made for the welfare of these products of the defunct marriage.

---

[257] *Divorce Committee Proceedings*, No. 12, p. 622 (Jan. 31, 1967).
[258] Power, *op. cit.*, p. 1.
[259] [1959] A.C. 601.
[260] *Ibid.*, at p. 625.
[261] *McLennan* v. *McLennan*, [1940] S.C.R. 335, at p. 344-45.

Thus, despite the opinion of some cases that "divorce is a matter of status which as such does not involve alimony at all"[262] and that "custody is not necessarily an incident of divorce",[263] it is submitted that the issue is by no means closed. Indeed, a good case can be made for the validity of sections 10, 11 and 12 as matters necessarily incidental both on the basis of historical development and on the basis of statements by the judges in some of the same cases which so firmly upheld provincial jurisdiction ![264] Although none of these matters is technically indispensible to a divorce law (Parliament ignored them for sixty years), it is clear that they are essential to a *good* divorce law and as such are "necessarily incidental to full-rounded legislation upon a Dominion subject-matter, or to the *effective* exercise of an enumerated Dominion power..." within the intention of MacDonald's statement of the rule.[265]

Equally, and more properly, considering the subject of divorce as a legislative vehicle for providing relief to persons who no longer wish to maintain their married status, it is difficult to conceive of it as a subject-matter which does not encompass questions of support for the needy spouse and custody of and support for minor children of the family unit which has been dissolved. Although these are matters which can be — and are — dealt with in a context broader than divorce, when they arise in connection with this subject they are matters intimately related to a satisfactory disposition of the change in status.

Regarding the *Divorce Act* as a whole, it is abundantly clear that this is legislation, in its true aspects, in relation to "divorce" and those particular parts (sections 10, 11 and 12), while seemingly in relation to "property and civil rights" standing alone, take their true color from the context of the legislation in which they appear,[266] and this true color or aspect is "divorce", despite the fact that the provisions *affect* "property and civil rights".

Rand, J., explained it in a slightly different way in *A.-G. Can.* v. *C.P.R.* and *C.N.R.*:[267]

---

[262] *Langford* v. *Langford*, [1936] 1 W.W.R. 174, at p. 175.

[263] *Welsh* v. *Welsh*, (1958), 26 W.W.R. 403, at p. 407.

[264] See *Rousseau* v. *Rousseau*, [1920] 3 W.W.R. 384, at p. 387; *Langford* v. *Langford*, [1936] 1 W.W.R. 174, at p. 176; *Rex* v. *Vesey*, [1938] 2 D.L.R. 70, at p. 81; *Ref. re Adoption Act*, [1938] S.C.R. 398, at p. 402.

[265] *Judicial Interpretation of the Canadian Constitution*, (1935), 1 U. of T. L.J. 260, at p. 274.

[266] A paraphrase of Dean Lederman's explanation, *supra*, footnote 249.

[267] [1958] S.C.R. 285, at p. 290.

> Powers in relation to matters normally within the provincial field, especially of property and civil rights, are inseparable from a number of the specific heads of s. 91... under which scarcely a step could be taken that did not involve them. In each such case the question is primarily not how far Parliament can trench on s. 92 but rather to what extent are property and civil rights within the scope of the paramount power of Parliament.

Considered in the present day context, as an expression of social policy by the Parliament, it is imperative that legislation dealing with the dissolution of marriage also deal with those immediate consequences which rank in importance with the dissolution itself. Parliament did not deal with all of the matters corollary to divorce but, it is submitted that those included in sections 10-12 of the Act do possess a "constitutional value" of divorce.

It will be recalled that the Special Joint Committee recommended that the matter of division of matrimonial property also be dealt with in the new legislation.[268] This was rejected by the Minister in one instance on grounds that such legislation would be *ultra vires*[269] and on another occasion because, although Parliament could regulate those aspects of property flowing from the marriage tie, this would be difficult and it was better left to provincial law.[270]

One could quarrel with the view that such legislation would be outside of Parliament's competence since the disposition of marital property on dissolution of a marriage can be considered just as essential an incident of divorce as the other corollary matters and thus legitimately within the purview of Parliament. However, one cannot disagree with the Minister's second, and more practical explanation of Parliament's reluctance to act on the Committee's recommendation.

Divorce legislation from the outset, as noted above, included measures empowering the courts, in granting a divorce, to make orders relating to the disposition of certain matrimonial properties. This legislation was directed however to property of the guilty wife and to marriage settlements only and not generally to property of the parties. The ownership and disposition of property of married people is dealt with generally by provincial legislation apart from matrimonial causes.[271]

While providing for uniformity of laws in the incidental matters of alimony, maintenance and custody does not cause a great deal of

---

[268] *Divorce Report*, pp. 29 and 163.

[269] *Proceeding of the Standing Committee on Banking and Committee*, No. 23, p. 224 (Feb. 1, 1968).

[270] *House of Commons Debates*, 5 December 1967, V, p. 5089.

[271] E.g., dependant's relief, partition, dower, etc.

disturbance in the present practice across the country, such is not the case with the question of property. There are essential differences in the matrimonial property regimes of the provinces — particularly between the civil law regime of Quebec and the common law arrangements — and any attempt by Parliament to act in this area would have created difficulties.

Consequently, while recognizing that there are certain matters of the disposition of matrimonial property upon divorce which could be dealt with by Parliament as an integral part of divorce legislation, the seemingly wiser course is to recognize that diversity is preferable to uniformity in this regard and leave questions of property law to be dealt with generally by the provinces.[272]

Other Matrimonial Causes

Judicial Separation

The Special Joint Committee spent little time on the matter of judicial separation. In the opinions of those witnesses averting to the question, there was no doubt of Parliament's jurisdiction under section 91(26). His Honour Judge P. J. T. O'Hearn asserted that while judicial separation affected much of property and civil rights, "it is historically and of its nature a matter of marriage and divorce..."[273]

The Deputy Minister of Justice conceded that "divorce" might not include judicial separation but believed that, historically, the term in the *B.N.A. Act* must have been intended to include it.[274] In his subsequent letter, Mr. Driedger elaborated as follows:

> I might now add to that observation that a judicial separation is in reality a divorce without a right to re-marry. The legal status created by the marriage has been extinguished, but the status enjoyed by the parties thereto immediately before the marriage has not been fully restored. I would therefore consider that the expression "marriage and divorce" includes judicial separation, because the latter deals with the legal status of married persons and the effect of a judicial decree on that status... if Parliament can say that pre-existing rights are fully restored, it can also say that they are only partially restored.[275]

Fortified by these views the Committee recommended inclusion in any new legislation of provision for judicial separation on grounds

---

[272] See comments of the Ontario Law Reform Commission, *Study of the Family Law Project, Property Subjects*, (1967), vol. III, pp. 549-550.

[273] *Divorce Committee Proceedings*, No. 13, p. 671 (Feb. 7, 1967).

[274] *Ibid.*, No. 3, p. 145, (July 5, 1966).

[275] *Ibid.*, No. 12, pp. 621-622 (Jan. 31, 1967).

uniform throughout Canada.[276] It noted that even with expanded grounds for divorce, judicial separation would remain an important alternative where religious convictions presented a barrier to divorce.[277]

The Minister of Justice, while agreeing with the constitutional opinion of his deputy, explained why the Government had finally decided not to deal with judicial separation in the new law. It was not a constitutional incapacity which dictated the "temporary" shelving of the matter but rather a pragmatic problem since all provinces but Ontario had laws and procedures dealing with judicial separation and ancillary relief. To legislate, it would be necessary first to consult extensively with the provinces as to the necessary changes in their laws.[278]

In other words, being a subject-matter on which Parliament had never acted and given the existence of varying provincial laws, it would be unreasonable for Parliament to exercise its undoubted power without prior consultation.[279]

Is judicial separation a matter within the scope of "marriage and divorce" under section 91(26)? Historically, a judicial separation was called divorce *a mensa et thoro* — a separation from bed and board — pronounced by the ecclesiastical courts. Such a separation was variously referred to as a "partial divorce" or a "divorce without the right to remarry". The effect of such was not to dissolve the marriage bond or to alter the legal rights of the parties in the marriage relationship except to suspend or to terminate the legal obligation to cohabit. Neither did it preclude the parties from fully resuming the marriage relationship at a future date.[280]

With the enactment of *The Divorce and Matrimonial Causes Act* in 1857, the term "judicial separation" replaced the expression "divorce *a mensa et thoro*," the new decree to have the same force and consequences as the old.[281] The grounds for the new decree were as before — adultery, cruelty and desertion for upward of two years

---

[276] *Divorce Report*, pp. 35, 61-62 and 148.

[277] *Ibid.*, p. 148.

[278] *House of Commons Debates*, 4 December 1967, V, 5016. Presumably, since he asserted the existence of federal competence, the Minister was speaking of a political necessity and not a constitutional necessity to consult. This is interesting since Mr. Trudeau found no similar necessity regarding divorce and related matters.

[279] *Ibid.*, 5 December 1967, V, pp. 5086-87.

[280] See Gemmill, *op. cit.*, pp. 2-3; Power, *op. cit.*, p. 221, footnote (n).

[281] 20 & 21 Vict., 1857, c. 85, s. 7.

without cause.[282] Sections dealing with matters of ancillary relief were included.[283]

On the basis of this historical change, it is argued that judicial separation was included in the term "divorce" in section 91(26) of the *B.N.A. Act.*[284] This view appears to have found favour with Parliament which, initially, at least, granted judicial separations as a part of its parliamentary divorce power.[285] However, the practice was not continued as all provinces, save Ontario, had laws vesting provincial courts with jurisdiction. In Ontario, the courts held that the *Divorce Act (Ontario)* of 1930 did not grant jurisdiction over judicial separation to the courts.[286] Interestingly, the legislature of that province has not attempted to vest such jurisdiction in the Ontario courts.

In the other jurisdictions, the laws of judicial separation existed as of the date of union or the declared date. Some provinces have enacted minor amendments. One province, however, acting on the assumption that judicial separation was a matter of provincial jurisdiction, enacted new legislation in 1927 dealing with all aspects of the question.[287]

Judicial opinion on the constitutional question is scant but sheds some light on the nature of judicial separation. In *Hyman* v. *Hyman*[288] Lord Buckmaster viewed judicial separation, unlike divorce, as "nothing but enforcing through an order of the Court an arrangement which the parties could — were they willing — equally effect for themselves; it merely makes in the form and with the force of a decree an arrangement for the parties to live apart..."[289] Lords Atkin and Hailsham agreed that while divorce changes the status of the parties, judicial separation merely affects the relationship of husband and wife.[290]

This distinction in nature was given application to the federal division of legislative competence by the Chief Justice of Saskatchewan in 1923.

---

[282] *Ibid.*, s. 16.

[283] *Ibid.*, ss. 25, 26, 32, 35 and 45.

[284] Gemmill, *op. cit.*, p. 47; Power, *op. cit.*, p. 223; *Divorce Committee Proceedings*, No. 3, p. 145, (Oct. 18, 1966), per E. A. Driedger.

[285] Gemmill, *op. cit.*, pp. 49 and 165-174.

[286] Power, *op. cit.*, pp. 223-24.

[287] *Domestic Relations Act*, R.S.A. 1955, c. 89, Pt. II.

[288] [1929] A.C. 601.

[289] *Ibid.*, at p. 625.

[290] *Ibid.*, at pp. 608 and 630.

> The word 'divorce' as used in sec. 91(26) of the *B.N.A. Act*, 1867, has not been... the subject of judicial interpretation. There can be no doubt that since 1857 the use of the word is confined to the dissolution of a valid marriage, and it is only and exclusively in that sense that it is used in the Matrimonial Causes Acts...
>
> I would, therefore, venture the opinion that the exclusive jurisdiction of Parliament is confined to dissolution of marriage and other cases where the status of marriage is concerned. A judicial separation... does not destroy the relation of husband and wife or finally determine the status of the parties...
>
> I am, therefore, of opinion that the subjects of judicial separation and restitution of conjugal rights do not come within the exclusive jurisdiction of Parliament, but are matters concerning civil rights in the Province...[291]

Although it seems correct to insist that there is a fundamental distinction in nature between a divorce and a judicial separation, the former being a dissolution of the marriage status as the word suggests, the latter but a judicial termination of the legal obligation to continue marital cohabitation, it does not necessarily follow, as the *Holmes* case holds, that judicial separation is outside of Parliament's jurisdiction.

Parliament's jurisdiction encompasses both divorce and *marriage* and while the provincial jurisdiction under section 92(12) is more extensive than the words "solemnization of marriage" may suggest,[292] Parliament nevertheless has power to enact laws relating to status and capacity — the essential validity of marriage. As Hellmuth, K. C. pointed out in argument before the Privy Council:

> There is a broad distinction between marriage and solemnization. The Dominion has exclusive power to legislate as to the competence of parties to contract marriage, its obligatory force, *the status of the parties to it thereafter*, its effect upon the status of the children, and the power of dissolving the tie when entered into.[293]

While not a divorce in any real sense of the word, a judicial separation is a court decree authorizing the parties to discontinue permanently their legal reciprocal obligation of cohabitation arising out of the marriage. This is clearly an alteration or modification of the marital status, an action which can be authorized only by federal legislation under section 91(26). In exercising its power to authorize a court to alter (as opposed to dissolve) "the status of the parties" to a marriage, it is submitted that Parliament may at the same time empower the court to make orders dealing with matters of

---

[291] *Holmes* v. *Holmes*, [1923] 1 D.L.R. 294, at pp. 299-300 (Sask. C.A.), per Haultain, C.J.S.

[292] *In re Marriage Legislation in Canada*, [1912] A.C. 880 held that provinces could, in dealing with matters of solemnization, enact laws which affect the validity of a marriage.

[293] *Ibid.*, at p. 882. (Emphasis added).

corollary relief as matters falling within the scope of marriage and alterations thereto commonly called judicial separation.

Annulment of Marriage

The chief concern of the Special Joint Committee on Divorce was with changes in the machinery and grounds relating to dissolution of marriage. Consequently, virtually no attention was directed to the matter of annulment which involves questions, not of matrimonial offences or marriage breakdown, but of legal impediments to a valid marriage.

Two briefs presented to the Committee did avert to annulment of marriage, both urging Parliament to deal with the grounds for nullity actions to the extent of that legislature's competence.[294] However, the Committee confined itself to divorce and judicial separation; its only reference to annulment was the recommendation that non-consummation of marriage due to the physical or mental defect of a spouse be retained as a ground for annulment and that wilful refusal to consumate the marriage be made a ground for divorce.[295]

In the *Divorce Act,* both non-consummation due to illness or disability and wilful refusal to consummate were included as circumstances in which the court could find a marriage breakdown.[296]

In ignoring the question of annulment of marriage, Parliament has left the existing provincial laws in operation and has terminated the power of the Senate to grant annulments [297] without granting a similar jurisdiction to the Divorce Division of the Exchequer Court.

Legislative jurisdiction over annulment of marriage is divided between the federal and provincial legislatures as a result of the opinion in the *Marriage Reference case,*[298] which held that a province could, acting under section 92(12), affect the validity of a marriage contract, and subsequent cases which upheld provincial laws invalidating marriages which had not complied with requirements of parental consent and age.[299]

However, with this exception, the power of Parliament relating to capacity to marry — the essential validity of a marriage — is exclusive and it has the competence to enact laws governing the

---

294 *Divorce Committee Proceedings,* No. 13, pp. 666-671 (Feb. 7, 1967) (O'Hearn brief) and No. 17, pp. 941-943 (Feb. 21, 1967) (Payne brief).

295 *Divorce Report,* p. 18.

296 S. 4(1)(d).

297 *Ibid.,* s. 26(1).

298 [1912] A.C. 880.

299 *A.-G. Alta.* and *Neilson* v. *Underwood,* [1934] S.C.R. 365; *Ross* v. *MacQueen,* [1948] 2 D.L.R. 536.

grounds for and the matters corollary to an action for annulment of marriage under section 91(26), "Marriage", of the *B.N.A. Act.*[300]

In the absence of any comment on the subject of annulment by the Minister of Justice one can only assume that, while it recognized Parliament's competence to legislate in this regard, the Government was either satisfied with the existing laws or reluctant to test the scope of Parliament's authority over marriage.

Amendment of the B.N.A. Act

In his brief to the Special Joint Committee on Divorce, His Honour Judge P.J.T. O'Hearn repeated a proposal which he had made earlier [301] to amend the constitution by vesting jurisdiction over marriage and divorce in the provinces, leaving Parliament with "a more general power to regulate the recognition of the laws and judicial decrees of the provinces in other provinces and territories..."[302]

This is not the only proposal for constitutional reform of jurisdiction over matrimonial causes. In 1960, Senator Pouliot advocated a similar change.[303] And in 1966, Robert Prittie (Burnaby-Richmond) introduced Bill C-41, to amend the *B.N.A. Act*, giving the provincial legislature concurrent jurisdiction with Parliament over marriage, divorce and other matrimonial causes.[304]

More recently, Premier Johnson of Quebec has advocated a transfer of complete matrimonial jurisdiction to the provinces, essentially for the reasons outlined by Messrs. Fowler and Faribault.

> Both marriage and divorce are private and personal matters and involve property rights and questions of inheritance and succession. It would be difficult to imagine any subject that is more clearly a matter of merely local and private concern. We think Marriage and Divorce should be deleted from the list of federal powers as they are clearly matters of provincial jurisdiction. However, there should be provision for the recognition throughout Canada of divorces granted within any province...[305]

One may wonder if this is the time to raise the question of transferring legislative jurisdiction over matrimonial matters now that Parliament has for the first time exercised, in a broad fashion, its jurisdiction in relation to divorce. However, in this exercise, which, it must be remembered, deals not at all with judicial separation,

---

[300] See Power. *op. cit.*, pp. 188-190 and 339-340.

[301] O'Hearn, *Peace, Order and Good Government*, (Toronto, 1964), pp. 5, 44, 158 and 170.

[302] *Divorce Committee Proceedings*, No. 13, p. 665 (Feb. 7, 1967).

[303] *Senate Debates*, 1960, p. 1020.

[304] See *Divorce Committee Proceedings*, No. 23, pp. 1424-25 (Mar. 21, 1967).

[305] *Ten to One: The Confederation Wager*, (Toronto, 1965), pp. 82-83.

annulment or marriage, it was apparent how difficult it is for Parliament to move any significant step at all, in the area of matrimonial relations, without fear of either exceeding its constitutional authority or at least of impinging upon civil rights, property rights or other matters of a local and private nature. Thus, it is not unfair to wonder if the wiser course might be for Parliament to relinquish its legislative jurisdiction over the entire subject-matter.

The fact that no class of subjects in section 91 of the *B.N.A. Act* relates more intimately to purely local matters than marriage and divorce was clearly recognized by members of the Provincial Parliament during the Confederation debates. Substantial opposition was raised, to no avail, to placing matrimonial matters — especially marriage — under federal control.[306]

How closely intermingled are the matters of marriage and divorce and those matters matrimonial in the province is evidenced by a cursory examination of enactments in Ontario which deal specifically or incidentally with matrimonial relations. About fifteen pieces of legislation are involved, not including those dealing with administration of justice in relation thereto.[307] Similarly, under the Civil Code of Quebec, one finds numerous articles dealing in detail with matrimonial relations and the incidents thereof.[308]

In presenting the Divorce Bill to Parliament, Mr. Trudeau emphasized the nature and the magnitude of this difficulty — the desire to make the divorce legislation realistically comprehensive without destroying the "current traditions and laws in the various provinces"; a need to seek uniformity in the laws while yet respecting the desire for diversity. The conflict between the federal policy of a uniform and comprehensive divorce law and existence of provincial laws on matrimonial matters manifested itself on numerous occasions during the debates. It arose during discussion on questions of judicial separation, rules of procedure, laws of evidence, court jurisdiction, corollary relief, domicile and even on reconciliation proceedings where the Minister insisted on the use of the term "marriage counselling

---

306 *Confederation Debates*, pp. 15, 267, 578, 690-92, 776-77 and 779. See *supra*, for some of these comments.

307 R.S.O., 1960: *Change of Name Act*, c. 49; *Child Welfare Act*, c. 53; *Children's Maintenance Act*, c. 55; *Dependants' Relief Act*, c. 104; *Deserted Wives' and Children's Maintenance Act*, c. 105; *Devolution of Estates Act*, c. 106; *Dower Act*, c. 113; *Infants Act*, c. 187; *Marriage Act*, c. 228; *Married Women's Property Act*, c. 229; *Matrimonial Causes Act*, c. 232; *Partition Act*, c. 287; *Reciprocal Enforcement of Maintenance Act*, c. 346; *Vital Statistics Act*, c. 419; *Wills Act*, c. 433. See also the *Legitimacy Act*, 10-11 Eliz. II, S.O. 1961-62, c. 71.

308 Book I, Titles II, IV, V, VI, VII & VIII and Book III, Title IV.

and guidance" rather than "family counselling" because the former phrase was more constitutionally correct!

Indeed, the entire enactment illustrated so vividly the problem faced by Parliament attempting to legislate in the field, that perhaps an utterance at one point by the Minister foreshadows an inevitable solution to the problem: "Should we hold up divorce reform for X number of years until we have written a new constitution and perhaps given the provinces jurisdiction over marriage and divorce or should we perhaps attempt with the provinces to deal with this matter... ?"[309] While the latter course was chosen in this instance, the former course remains a possibility in the future.

What are the arguments for retaining the present federal jurisdiction over marriage and divorce? There appear to be three which merit attention: the need for national uniformity of laws; the need to protect the rights of religious minorities in some provinces; and the need to ensure recognition of marriage and divorce decrees of one jurisdiction in the courts of another.

The first — national uniformity of laws — was emphasized by the Government on introducing the legislation[310] and cited as one of the reasons for vesting jurisdiction over divorce matters in the superior courts[311] and for providing a system of appeals.[312]

Of course, a single law for the whole nation is preferable for simplicity but in a federal system one must go beyond this criterion to ask if a national law is important to the effective operation of the system and where the subject-matter in question is more effectively dealt with.

Looking at the subject-matter of marriage and divorce, it would appear that there exists no compelling reason for a national, uniform law. Subject to some provision concerning recognition of marriages and divorce decrees from jurisdiction to jurisdiction, and a residence requirement in each jurisdiction to prevent forum-shopping, it would seem reasonable that each province should enact its own laws on marriage and divorce, including matters of grounds, procedures and ancillary questions.

Such a transfer would permit the provincial legislature to integrate the laws of marriage, divorce, annulment and judicial separation with those closely related laws now under provincial jurisdiction to provide a rational and complete system of matrimonial legislation.

---

309 *House of Commons Debates*, 18 December 1967, V, p. 5551.
310 *Ibid.*, 4 December 1967, V, p. 5014.
311 *Ibid.*, 18 December 1967, V, p. 5567.
312 *Ibid.*, 19 December 1967, V, pp. 5632-33.

That there would be variations in the law is clear — and they might be substantial — but would it be any different from the present disparities in property, business, or taxation laws? After all, diversity is the essence of a federal system and where else should it be evidenced than in matters of a local nature where custom is important? The more important problem is the danger that, in a particular jurisdiction, there may be no divorce laws. This is considered next.

Differences of religious views have from the outset played a major role in discussions on matrimonial jurisdiction and this issue was used both by the proponents and the opponents of making marriage and divorce a federal subject-matter. The Confederation debates in 1865 are liberally sprinkled with the fears of the Roman Catholic members over the placing of these matters under federal jurisdiction where the beliefs and traditions of the church would lie open to destruction at the hands of a non-Catholic majority. Equally the majority feared that to leave the matters in provincial hands was to invite religious discrimination against the non-Catholic minority in Quebec.

The dissenters were persuaded to the majority view only when satisfied that divorce legislation would be even more difficult to come by if left in federal hands and that as regards marriage laws, Parliament's jurisdiction would extend only to "declaring what marriages shall be held deemed valid throughout the whole extent of the Confederacy . . . " [313]

Does the same problem remain today? With regard to marriage, since 1907 there has been no problem in any province concerning the restrictions on marriages based on religious views and it seems unlikely that any would now arise. However, certainly the arrangements which existed until recently for divorce in Quebec and Newfoundland would suggest that a problem remained in assuring divorces for those whose religious views countenanced dissolution of marriage while respecting the seeming wish of the majorities in the provinces that no provincial divorce courts be established.

Recent events, however, would suggest that the original religious obstacle to vesting divorce jurisdiction in the provincial legislature may have largely disappeared.

In its presentation to the Special Joint Committee the Canadian Catholic Conference indicated that it would not oppose divorce legislation which did not go beyond the needs of "advancing the common

---

[313] *Confederation Debates*, p. 388. For a discussion of the foregoing views see *Confederation Debates*, pp. 192, 335, 388-90, 577-79, 690-92, 776-79, 782, 785-86, 834 and 846.

good of a civil society," recognizing the different religious beliefs of the people in Canada.[314]

This changing attitude of the church was recognized in the majority report of the committee appointed by the Bar of Montreal,[315] and led the minority members of the same group, as noted earlier, to suggest that both the religious and civil authorities in Quebec were prepared to accept divorce in the province.[316]

These were prophetic words, as we know, for both Quebec and Newfoundland subsequently permitted the vesting of divorce jurisdiction in the provincial courts. Whether the legislatures of these provinces are prepared to take the additional step of enacting divorce laws is perhaps another matter, but it would appear distinctly possible that they have developed a great enough sense of social responsibility to do so. Given the existence of the present divorce laws, it would seem unlikely that the provinces would enact legislation substantially less than that.

The matter of recognition from one jurisdiction to another in Canada of marriages and divorce decrees is important with the growing mobility of the people, for one must be able to move throughout the country with a minimum of legal impediments. If the provinces were given jurisdiction over marriage and divorce and these laws varied from jurisdiction to jurisdiction, unless recognition was full, a marriage by the law of one jurisdiction might be a nullity by the law of another. Again a remarried divorcee in one jurisdiction might be a bigamist in another.

Such a problem should not, however, be a bar to considering a transfer of legislative jurisdiction to the provinces for it can be resolved to a substantial degree by a constitutional reservation which required the provinces and courts for all purposes to recognize as valid marriages and divorce, annulment and judicial separation decrees which are valid by the laws of the provincial jurisdiction in which they occurred. With such a constitutional guarantee, there should be no major problem on the matter of recognition.

There would be some other problems, such as a return to a concept of provincial domicile and possible changes in residence qualifications but, on balance, there would be a much more workable and rational system of matrimonial law in each province if the entire field were transferred to the provincial legislatures by amendment of the *B.N.A. Act.*

---

[314] *Divorce Committee Proceedings*, No. 24, p. 1512 (Apr. 20, 1967).
[315] *Ibid.*, No. 16, p. 861 (Feb. 16, 1967).
[316] *Ibid.*, p. 869.