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Divorce by Resolution of the Senate

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Introduction and Historical Background

With the enactment of the *Dissolution and Annulment of Marriages Act*,[1] one more step was taken in the evolution of the method of dealing with divorce and annulment of marriage for persons domiciled in Quebec and Newfoundland, the only provinces which do not have courts to deal with divorce.

The Parliament of Canada enjoys exclusive legislative jurisdiction over marriage and divorce by virtue of Section 91(26) of the *British North America Act, 1867*, but has exercised this jurisdiction quite sparingly. It has not, for instance, provided a standard code for divorce nor has it established divorce courts for Canada as a whole, although it might have done so under Section 101 of the *British North America Act* which confers on Parliament power to establish courts with respect to matters within federal competence. It did by the *Marriage and Divorce Act*[2] of 1925 eliminate the so-called "double standard" by providing that in any court having jurisdiction to grant a divorce *a vinculo matrimonii* a wife might sue for divorce on the ground of her husband's adultery only. Prior to this enactment the wife in addition to proving adultery on the part of her husband had to prove either incestuous adultery, bigamy coupled with adultery, adultery coupled with desertion, or adultery coupled with such cruelty as without adultery would have entitled her to a divorce *a mensa et thoro* (judicial separation), whereas the

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[1] 12 Eliz. II, ch. 10, assented to August 2, 1963.

[2] R.S.C. 1952, ch. 176.

husband suing the wife for divorce merely had to prove adultery. The *Divorce Jurisdiction Act*[3] of 1930, the second general statute on divorce, provides a specific exception to the general rule, that the domicile of a married woman is always that of her husband, by permitting a wife who had been deserted by and living separate and apart from her husband for a period of two years and upwards to institute proceedings in any province of Canada in which there is a court having jurisdiction to grant a divorce *a vinculo matrimonii* on grounds permitted according to the law of such province, if immediately prior to such desertion the husband was domiciled in that same province. This will be dealt with more fully later.

The Canadian Parliament gave divorce jurisdiction to the Supreme Court of Ontario by virtue of the *Divorce Act*[4] *(Ontario)* of 1930 which introduced into Ontario the law of England on dissolution and annulment of marriages as of July 15th, 1870. In case any aspect of this statute was beyond the legislative authority of Parliament, the Legislature of Ontario confirmed its provisions by the *Marriage Act*[5] of 1933 which provided[6]

> "So many of the provisions of the Divorce Act (Ontario) as are, or may be within the legislative competence of this Legislature, are hereby enacted as it fully set out in this Act".

Moreover the federal statute of 1930 was followed by an Ontario statute in 1931,[7] which dealt with maintenance, alimony, property settlements, the custody of children, and rules of procedure, none of which were dealt with by the federal statute.

The courts of the provinces of Alberta and Saskatchewan inherited jurisdiction from the laws previously in force in the North West Territories out of which these provinces were carved following Confederation. A Federal Statute[8] in 1888 declared the Law of England as of July 15, 1870, to be applicable in Manitoba. In British Columbia, the laws of England as of November 19th, 1858, were proclaimed in force by a Royal Proclamation of that date and an Ordinance of 1867 made the same provision after the union of Vancouver Island and British Columbia. These provisions were continued in force by the terms of the Imperial Order in Council ad-

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[3] R.S.C. 1952, ch. 84.

[4] R.S.C. 1952, ch. 85.

[5] *An Act to amend the Marriage Act*, 23 Geo. V, ch. 29. [*The Marriage Act, 1933*].

[6] At p. 52.

[7] *An Act to Confer upon the Supreme Court certain Powers in Actions for Divorce*, 21 Geo. V, ch. 25. [*The Matrimonial Causes Act, 1931*].

[8] *An Act respecting the application of certain Laws herein mentioned to the Province of Manitoba*, 51 Vict., ch. 33.

mitting that colony into the union on May 16th, 1871. 1857 petitions for divorce in England had to be heard by three judges from whom there was an appeal to the House of the Lords, but when the laws of England were introduced into British Columbia, these powers were granted to a single judge with no provision at the time for an appeal. It was therefore held by the courts, prior to 1937, that no appeal lay from a single judge in British Columbia, either granting or refusing a divorce petition. This was remedied in 1937 by a federal Act known as the *British Columbia Divorce Appeals Act.*[9] Nova Scota, New Brunswick and Prince Edward Island each had a pre-confederation divorce statute which was continued in force except as modified by the Acts of Parliament of Canada already referred to. As a result of this, cruelty is still a ground for divorce in Nova Scotia, the only province with such a ground.

The laws of England in force in Newfoundland prior to its joining Canada in 1949 were those of 1832, and the Newfoundland Supreme Court has held that the Newfoundland courts possessed at that time only the jurisdiction then possessed by the ecclesiastical courts in England which could not decree divorces *a vinculo matrimonii,* but only divorces *a mensa et thoro.*[10] When Newfoundland became a province, the pre-existing laws were continued in force by virtue of the *Newfoundland Act,*[11] so its courts have no jurisdiction over divorce *a vinculo matrimonii.* The same is of course true of Quebec, though the Quebec Courts have a substantial jurisdiction over nullity of marriage.

As a result of this, the Parliament of Canada since Confederation has granted by private act divorces *a vinculo matrimonii,* on the petitions of persons domiciled in Quebec and since 1949 on the petitions of persons domiciled in Newfoundland. Its jurisdiction is of course absolute as to the grounds on which it may pass a bill of divorce, but as a matter of policy it generally granted such relief only on the grounds recognized in England as of July 15th, 1870, the date which is given special significance in the federal legislation already referred to. The only exception is that the "double standard" of English Law was not followed in Canada and was formally eliminated by the Act of 1925.[12] There is no doubt that Parliament can grant a divorce on the instance of a person domiciled anywhere in Canada. As it has no desire to interfere where an alternative remedy

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[9] R.S.C. 1952, ch. 21.

[10] *Hounsell* v. *Hounsell* [1949] 3 D.L.R. 38 (Nfld.).

[11] *An Act to approve the Terms of Union of Newfoundland and Canada,* 13 Geo. VI, ch. 1, 51, 518 of the Schedule therein enacted.

is available before the court of one of the Provinces, however, such divorces are normally heard only when the petitioner is domiciled in Quebec or in Newfoundland, or there is a very serious doubt about the domicile, or where the petitioner comes within the provisions of the *Divorce Jurisdiction Act,* aforementioned.[13]

Each divorce was a Private Act of Parliament. Initial hearings of the evidence took place before the Standing Committee of the Senate on Divorce which made its recommendation. After passage by the Senate, the bill was sent to the House of Commons and in due course referred to the corresponding Committe of the House. There, the transcript of the documents, exhibits and evidence submitted before the Senate Committee was considered and its own findings based thereon was made, recommending or rejecting the Bill or referring it back for further evidence. In due course if no difficulties were encountered the Bill had its three readings in the House of Commons and eventually received Royal Assent. As the number of divorce petitions grew, however, a substantial body of opinion began to feel that as the time of Parliament was being increasingly taken up with the consideration of these petitions, it should be relieved of this unwelcome chore. Various attempts were made between 1949 and 1960 by means of private members' Bills to deal with the situation but they were all talked out, so by 1962 some members of Parliament to focus public attention on the problem began to block individual diverce Bills. After considerable discussion over a period of two years and by tacit all-party agreement the impasse was settled by the enactment in 1963 of the *Dissolution and Annulment of Marriages Act.*[14]

The Act provides [15] for the hearing of the evidence by an officer of the Senate designated by the Speaker of the Senate, who will report thereon, but who will not recommend that a marriage be dissolved or annulled except on the same grounds as existed under the laws of England, as of July 15, 1870 or under the *Marriage and Divorce Act,*[16] the Act which eliminated the double standard. The Act further provides [17] that the Senate may make such rules and orders respecting petitions for dissolution or annulment of marriage, the procedure at hearings thereon and all other matters as it con-

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[12] See *supra,* footnote number 2. This double standard has also been eliminated from English Law.

[13] R.S.C. 1952, ch. 84.

[14] 12 Eliz. II, ch. 10.

[15] At p. 53.

[16] R.S.C. 1952, ch. 176.

[17] At S. 4.

siders necessary or desirable for the carrying out of the provisions of the Act. By virtue of these rules which where adopted in due course it was provided that the report of the officer of the Senate who was designated as Commissioner would be examined by the Senate Standing Committee on Divorce before being referred to the Senate. This Committee has the right to summon the Commissioner to explain his recommendations or may refer the report back to him for review or rehearing of witnesses or for hearing of additional witnesses. The Committee then makes its report to the Senate, referring the report of the Commissioner to it and indicating whether or not it concurs with his recommendations. When it does concur a draft resolution is referred to the Senate with the Committe Report and in due course is adopted by the Senate. The Act further provides [18] that within thirty days after such adoption either party to the proceedings may appeal by presenting a petition to Parliament together with a draft Bill based thereon praying for the passage of an Act annulling or modifying such resolution. In such event the operation of the resolution is suspended until an Act based on the petition has been dealt with. If no objection has been taken by either party, within thirty days after its adoption, the resolution then has full force and effect.

The new legislation is novel from the constitutional point of view in that it represents the first time in which the Parliament of Canada has delegated specific legislative powers to one of its constituent elements, namely the Senate. It is to be noted, however, that the Senate is not passing an Act but adopting a resolution in each individual case by virtue of this new legislation. Furthermore, it is to be noted that Parliament has not divested itself of any of its authority over marriage and divorce. The new legislation does not abrogate the possibility of a petitioner proceeding by way of a petition to both Houses for the passing of an Act of Parliament, as in the past, but merely provides an alternative and simpler system. Parliament could still grant a divorce on any grounds it deems justified since it is only the Commissioner, in his recommendation to the Senate, who is limited to the grounds recognized under the Laws of England as of July 15th, 1870, and not Parliament itself. There is no mention in the Act or in the rules of the Senate of the question of domicile but in accordance with the practice of the Senate Standing Committee on Divorce under the former procedure, it is unlikely that the Commissioner would recommend or that the Senate would adopt a resolution for the dissolution of the marriage of a person clearly domiciled in one of the provinces of Canada,

[18] At S. 2(2).

which has a court with authority to grant such dissolution, unless the petitioner comes within the provisions of the Divorce Jurisdiction Act which will be discussed more fully later.

The present procedure represents certain improvements over the old. Hearings can now continue throughout the year, whereas the Senate Standing Committee on Divorce only sat while the Parliament was in session. It also relieves the House of Commons altogether of any responsibility in such proceedings as well as the members of the Senate Standing Committee on Divorce of the arduous task of hearing the evidence of the witnesses. It still presents certain disadvantages, among them the fact that although the hearing can take place at any time of the year, the Commissioner's report can only be considered by the Senate standing Committee on Divorce and the resolutions only adopted when the Senate is in session. Whether or not this is the last word on the matter is doubtful, but it would be inappropriate to comment further here since the question is at present under consideration by a Joint Committee of the Senate and of the House of Commons. This Committee, appointed to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, is empowered *inter alia,* to consider the possibility of extending the grounds for dissolution of marriage and to review the present procedure and possible improvements thereto.

In virtue of the new legislation, the writer was designated on November 19th, 1963, as the Officer of the Senate to hear the evidence and report thereon to the Senate, and on December 15th, 1963, the new rules were adopted. Hearings under the new system, were commenced in January 1964. In July 1964, following an amendment to the Exchequer Court Act, the Commissioner was appointed a Judge of the Exchequer Court of Canada, and in due course the Honourable Charles Cameron, Q.C., a retired Judge of the Exchequer Court of Canada was also designated as Commissioner to assist in the heavy volume of work and to replace the full-time Commissioner should it be necessary for him to recuse himself due to acquaintance with the parties or knowledge of the facts of any petition.

Although the law on the subject is set out in the *Dissolution and Annulment of Marriages Act*[19] and in the rules passed in virtue thereof, (copies of which can be obtained on request from the Clerk of the Senate Committee), there have been a number of precedents established over the years at the hearings before the Senate Stand-

[19] 12 Eliz. II, ch. 10.

ing Committe on Divorce, and a number of policies and practices adopted, which are being carried out and followed as closely as possible under the new procedure. Many of these are not recorded or readily available to attorneys contemplating such proceedings. Those attorneys practising regularly in this field have learned them by experience, and information about them can be obtained by corresponding or conferring with the clerks in the Commissioner's office, but it is felt that it might be helpful if some of these precedents and procedural practices were set out here. As to the rules themselves they must be rigidly followed and this is even more important than in court proceedings, since in his report to the Senate the Commissionner must include a statement to the effect that "the provisions of Part IV of the Rules of the Senate have been complied with in all material respects". The pitfalls for attorneys who do not comply strictly with the rather difficult rules are many, as can be seen from the check-list used by the clerks of the Commissioner's office, in examination of the proceedings before a date is fixed for hearing. This list includes no less than forty-five of the more common defects and the steps which have to be taken to remedy them, which steps are frequently time-consuming and costly. Many of these difficulties could be avoided if the forms set out in the rules were closely followed in the drawing of the petition and accompanying documents, including the Bailiff's return of service, instead of attempting to draft these proceedings independently without reference to the suggested forms, as many attorneys seem to do.

Applicable rules of evidence

The proceedings before the Commissioner are judicial proceedings. Rule 180 of the Rules of the Senate reads as follows:

> "The petitioner, the respondent, and co-respondent and all other witnesses appearing or produced before the Divorce Committee or the Commissioner shall be examined upon oath, or upon affirmation in cases where witnesses are allowed by the law of Canada to affirm; and the law of evidence shall, subject to the provisions in these rules, apply to proceedings before the Divorce Committee and the Commissioner, and shall be observed on all questions of fact".

By virtue of Section 36 of the *Canada Evidence Act*,[20] dealing with proceedings over which the Parliament of Canada has legislative authority, the laws of evidence in force in the province in which the proceedings take place applies to such proceedings, sub-

[20] R.S.C. 1952, ch. 307.

ject to the *Canada Evidence Act* and other acts of the Parliament of Canada. Although the proceedings deal with petitions for dissolution or annulment of marriage for persons domiciled in Quebec or Newfoundland (always subject to the exception provided in the Divorce Jurisdiction Act), they nevertheless take place in Ontario. As in other court proceedings they are only formally initiated when the documents are filed in the office of the court having jurisdiction, which in this case is the office of the Commissioner and hence the proceedings must be deemed to initiate in Ontario. This reads into the laws of evidence by which the Commissioner is governed the relevant sections of the *Ontario Evidence Act*.[21] Two important consequences of this will be dealt with later.

There is no provision for the taking of evidence by rogatory commission, and in fact there is some doubt as to whether the Canadian Parliament has the constitutional authority to provide for a rogatory commission for this purpose. The introduction of affidavit evidence is, however, provided for by Rule 181, which reads,

> "Declarations and affidavits allowed or required in proof may be made under the Canada Evidence Act or in a form valid in the jurisdiction in which they are made".

The practice is not to permit the introduction of affidavit evidence in any case in which the witness can be readily brought to testify in person. Thus the evidence of a witness resident in Ontario, Quebec or a near-by province or state would not be accepted by way of affidavit unless severe illness or disability prevented personal attendance. On the other hand the personal attendance of a party or witness living abroad or at a considerable distance from the court, such as in California, British Columbia or Newfoundlad is sometimes dispensed with and permission given to receive such evidence by affidavit or declaration when it appears that otherwise great hardship would ensue. A preliminary application has to be made, supported by affidavits indicating the financial or other hardship before permission to introduce such an affidavit or declaration is given. A petition is never permitted to proceed, however in which all the evidence is given by affidavit. That is to say, if the evidence for the petitioner is to be given by affidavit, then the evidence of adultery would have to be given by witnesses who will testify in person, and conversely if permission is given to receive the evidence of adultery in affidavit form then the petitioner will have to be personally present to testify. Needless to say the affidavit should annex the photograph of the party with respect to whom the evidence is being given for identification by the witness, as

[21] R.S.O. 1960, ch. 125.

well as the marriage certificate and any other documents referred to. It is also evident that affidavit evidence cannot be received in a contested petition, since there has to be an opportunity for the other party to cross-examine the witness.

Service of documents

Although it is not formally set out in the rules relating to dissolution or annulment of marriages, the Senate Standing Committee on Divorce passed a formal resolution some years ago that service should be made by Bailiff, Sheriff or Sheriff's Officer. This was to replace the service which was formally permitted in some jurisdiction by any person of the age of majority. The officer making the service must identify the respondent by photograph, if such photograph can be obtained, and must also ask both the respondent and co-respondent to acknowledge receipt of service on the back of the document which he then signs as a witness. If either or both refuse to acknowledge receipt of service, he shall so indicate in his return. He then must swear to his return of service before a Notary or Commissioner who will identify the exhibits referred to in the affidavit of service, namely, the Notice of Application for Divorce, the Petition and accompanying affidavit, the Information for Respondent and Co-Respondent, and the photograph of respondent.

The Bailiff, Sheriff, or Sheriff's Office, who has made the service is not deemed to be a suitable witness at the hearing as to the adultery. If he has made the investigation and is to be a witness at the hearing, then someone else should make the service.

The naming and/or serving of a co-respondent may be dispensed with by permission given on an application supported by affidavit setting out what efforts have been made to obtain the name and/or address of the co-respondent. While it is recognized that in some cases a co-respondent who is caught committing adultery may refuse to give his or her name or may give a fictitious name or address, or may have moved from the address given before service can be effected, nevertheless, before such permission can be given, the Commissioner must be satisfied that every reasonable effort has been made to obtain the name and/or address by further investigation, including inquiries from respondent, following of the co-respondent after the commission of the adultery, and other similar steps. The inability to provide the name and/or address of co-respondent always arouses some suspicion that the co-respondent may be a fictitious person or a person acting as a professional co-respondent in

an attempt at connivance to fabricate evidence; hence such applications are scrutinized most carefully.

It is an even more serious step to permit the petitioner to proceed without serving the respondent and while substitutional service is permitted, permission for it is only granted in very rare and exceptional cases. In addition to further investigation in an attempt to trace his whereabouts if he has disappeared after the commission of adultery, it is usually also necessary to make inquiries from the Missing Persons Bureau of the local police, the Provincial Police of the Province, and the R.C.M.P., to advertise for him in a newspaper at the place of his last residence and any place to which there is any indication he might have gone, and to require copies of the petition and accompanying documents to be sent in a sealed envelope addressed to him to each of his known relatives or close friends, with the request that they forward the communication to him. It is only after such cumbersome and costly procedures have been adopted that such substitutional service on him is acceptable. This practice is much stricter than the rule in the civil courts where on the simple return of *non est inventus* by the Bailiff, permission can be given to advertise for the defendant in a civil action, such advertisement having the effect of valid service on him.

In the event that a respondent or co-respondent refuses to acknowledge receipt of service when requested to do so by the Bailiff, or Sheriff's Officer, it is the practice for the Clerk of the Commissioner to send a registered letter to that person at the address where such service took place advising that a petition has been filed. If such registered letter is subsequently returned marked "Removed" or "Unknown" an explanation will be required from petitioner's attorney or the bailiff prior to the hearing. Service should always be made at the residence or business address of respondent and at the address given by co-respondent at the time of the investigation. Service at any other address arouses some suspicion. It must be remembered that although a Bailiff is required to identify the respondent by photograph, no such identification is possible in the case of the co-respondent. Every effort has to be made to eliminate the possibility of some person being substituted for the real co-respondent at the time of service. As the Bailiff has no means of identification of the co-respondent other than the latter's residence address, it is necessary that service be effected at that address in order to avoid substitution.

When the petition is finally fixed for hearing, notices of hearing are sent to all the parties even if there has been no contestation. Surprisingly, respondents or co-respondents frequently communicate

with the Commissioner's office for the first time at this late date indicating a desire to oppose the petition although the delays to do so have since expired. Since the Information to Respondent and Co-Respondent which is served with the petition clearly gives them thirty days to contest, any contestation after this date can be made only with permission of the Commissioner, on an application indicating why the contestation was not made within the proper delay. Nevertheless, an application to contest after the delays is usually granted since it is always desirable to give all parties an opportunity to be heard as the matter involves such serious consequences.

Domicile

The fundamental principles of private international law are used in the determination of domicile. Domicile in Canada is a provincial matter, but as was already stated the Senate, if it chose, could entertain a petition for a resolution dissolving the marriage of a person domiciled anywhere in Canada. It quite properly, however, refuses to do so when there is a competent provincial court to deal with the matter and hence for practical purposes the petitioner should establish his domicile in Quebec or in Newfoundland. This rule is subject to the exception set out in the *Divorce Jurisdiction Act*[22] already referred to, which permits a married woman who has been deserted by and living separate and apart from her husband for a period of two years and upwards to bring proceedings before the court of the province in which they were domiciled immediately prior to the desertion. This resulted from the Privy Council decision in *Attorney General of Alberta* v. *Cook*,[23] which dealt with an Alberta divorce obtained by the wife who had previously obtained a judicial separation from her husband in Alberta, and as a result claimed she had the right to establish her own domicile in that Province, though she and her husband were originally domiciled in Ontario and he had not lost his domicile there when he deserted her in Alberta. The Privy Council held that she could not acquire a domicile separate and distinct from her husband this being repugnant to the idea of unity of personality of the spouses. This judgment has been much discussed and criticized in the light of present day social condition.[24] The *Divorce Jurisdiction Act* attempts to overcome this, and it is interesting to note that the original draft of

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[22] R.S.C. 1952, ch. 84.

[23] [1926] A.C. 444.

[24] See: Horace E. Read, *The Divorce Jurisdiction Act, 1930*, (1931) 9 Can. Bar Rev. 73; Case and Comment (1929) 7 Can. Bar Rev. 126.

the Act went much further than the final legislation. It did not limit the grounds of separation to desertion, nor the jurisdiction to the province where the parties were domiciled before the separation. The Act as finally passed, however, so limits it, and permits the deserted wife to have recourse to the Courts of the province where the desertion took place and they were domiciled without the necessity of following her husband to the court of some other province, or outside the country, should he have left Canada, and acquired a domicile elsewhere. In the latter event however there might be some doubt as to the validity of such a divorce in private international law, unless the divorce would be recognized in the foreign jurisdiction where the husband has acquired a new domicile in which event the doctrine of 'renvoi' could apply and it would be recognized elsewhere also (*Armitage* v. *Attorney General* — 1906, p. 135).[25]

The Act as such would not apply to proceedings by way of resolution of the Senate by a wife deserted in Quebec or Newfoundland since it refers to

> "Any one of those provinces of Canada in which there is a *court*[26] having jurisdiction to grant a divorce *a vinculo matrimonii*"[27]

but the Senate has always adopted the same principle for these provinces, and it is now recognized by long-established practice that a married woman who is deserted by and is living apart for a period of two years and upwards from her husband who was domiciled in the province of Quebec or Newfoundland immediately prior to such desertion may thereafter petition for divorce by resolution of the Senate.

An interesting question arises in connection with the laws of the Province of Quebec. Article 83 of the Civil Code states:

> "a married woman not separated from bed and board has no other domicile than that of her husband".

Article 207 says:

> "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".

On this basis it has been argued that a woman legally separated according to the laws of the Province of Quebec, for whatever ground the separation is granted, and whether she is the innocent or the guilty party may choose a domicile separate and apart from her husband, whether this consists of retaining her domicile in the

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[25] *Armitage* v. *Attorney-General* [1906] p. 135.

[26] Stress mine.

[27] S. 2.

province when the husband has subsequently obtained a new domicile elsewhere, or obtaining a new one outside the province. The commentators all agree that this is the effect of this article.[28] However in the light of the *Cook* case, which, however it may have been criticized, must be considered as forming part of our law, and also in the light of the provisions of the *Divorce Jurisdiction Act*, it is clear that this interpretation is an over-simplification. While Quebec can undoubtedly legislate with respect to domicile it appears unlikely that such legislation can have extra-provincial effect. By virtue of these articles the Quebec courts could undoubtedly accept jurisdiction over matters depending on the domicile of a wife who has obtained a legal separation from her husband in Quebec and has retained her domicile there although he has obtained a domicile elsewhere. In the converse case where the wife following the legal separation in Quebec has herself established a domicile elsewhere, it appears very unlikely, however, that the courts of her new domicile would apply the provisions of the Quebec Civil Code so as to permit her to bring divorce proceedings there unless there were a similar provision in their law since questions involving the nature, acquisition and change of domicile, as distinct from the effets of domicile already established are determined by the *lex fori.*

Now it has already been stated that the Senate will apply the principles of the *Divorce Jurisdiction Act* and in cases of two-years' desertion accept jurisdiction over the divorce of a wife whose husband's domicile was in Quebec at the time of the desertion and he has subsequently acquired a domicile in, for example, British Columbia, but this is by virtue of the provisions of that Act and not of the Quebec Civil Code and would be restricted to instances of two-years' desertion and not when the separation has been obtained for other causes. Moreover on the basis of the legal principle *inclusio unius fit exclusio alterius* it can reasonably be assumed that had the Canadian Parliament intended to extend the exceptional provisions of the Divorce Jurisdiction Act to causes of separation other than desertion, it would have done so, and since it did not, it is not desirable to make a special exception in the case of Quebec on the basis of the Civil Code Articles. The Senate might perhaps do so on compassionate grounds where the husband has, following the separation, left Canada and it cannot be established where his new domicile is, but it seems clear that in the case of a husband who

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[28] E. Lafleur, *Conflict of Laws*, (Montreal, 1898), p. 57; Johnson, *Conflict of Laws*, (Montreal, 1962), 2nd ed., p. 93; Trudel, *Traité du Droit Civil de Québec*, vol. 2, p. 17.

has acquired a domicile elsewhere in Canada it would require the wife to bring proceedings before the Courts of such domicile if the grounds of the separation were other than two-years' desertion, and this despite the provisions of the Quebec Civil Code authorizing her to choose her own domicile.

Evidence of parties to the action

It has already been stated that laws of evidence of the Province of Ontario are applied to hearings before the Senate Commissioner, since the hearing takes place in Ontario. Now Section 10 of the *Ontario Evidence Act*[29] provides that in the case of proceedings instituted in consequence of adultery, the husbands and wives of the parties are competent to give evidence

> "provided that no witness in any such proceedings whether a party to the suit or not is liable to be asked or bound to answer any questions tending to show that he or she is guilty of adultery, unless the witness shall have already given evidence in the same proceeding in disproof of his or her alleged adultery."

The practice is to give such warning to the parties to the suit and make sure that they understand before they commence their testimony. In contested cases, of course, where the respondent and co-respondent frequently commence their testimony by denying the adultery with which they are charged, they leave themselves open to questioning with respect to it. There is jurisprudence to the effect, however, that even after such witness has answered some questions tending to show that he or she is guilty of adultery the witness can, nevertheless, at any time during his testimony, refuse to answer further such questions. In non-contested cases it is not uncommon for the proof to be made by the evidence of the respondent, and co-respondent, who after being given this warning, nevertheless agree to give such evidence and then admit the adultery with which they are charged. This admission of respondent and co-respondent is usually sufficiently conclusive proof without the necessity of corroborating evidence from other witnesses.

Production of birth certificates

On the same basis, and following the law of Ontario the production of birth certificate of adulterine children is not permitted even if such certificates originated in the Province of Quebec. Section 43 (2) of the *Vital Statistics of Ontario*[30] states

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[29] R.S.O. 1960, ch. 125.
[30] R.S.O. 1960, ch. 149.

"notwithstanding subsection 1 no birth certificate and certified copy of a registration of birth or still birth is admissible evidence to affect a presumption of legitimacy".

While it might appear that this refers to birth certificates issued under the provisions of the Vital Statistics Act by the Registrar General of Ontario, the Senate Standing Committee on Divorce has decided that no birth certificate, wherever the birth be registered, may be produced to establish illegitimacy and as a consequence the adultery of one of the parties in any proceeding for dissolution of the marriage by resolution of the Senate. This alters the former practice whereby the Committee might be shown such a birth certificate, and without same being filed as an Exhibit, would read into the record certain information therefrom, giving the date of birth and the names of the parents but omitting the name of the child.

It is to be noted, however, that it is only birth certificates as such which are excluded as a result of this interpretation of the *Vital Statistics Act of Ontario*. Testimony as to the birth of an illegitimate child is accepted. For example one of the god-parents could state that he was present at the baptism of such a child and saw the respondent in the divorce proceedings sign the Register of Baptisms admitting the child to be his. Moreover Judgments of the Quebec Courts in actions in disavowal of the paternity of a child brought by the petitioner in divorce proceedings whose wife has given birth to such an adulterine child have been admitted in evidence. In fact evidence of a petitioner denying the paternity of a child born to his wife during wedlock can seldom be accepted without the corroboration of such a judgment in disavowal of paternity, or of evidence indicating the impossibility of access.

Grounds for Divorce

The reference in the Act to the law of England relating to dissolution of marriage as they existed on July 15th, 1870, limits the grounds for divorce on the recommendation of the Commissioner to adultery, rape and sodomy or bestiality. With respect to proof of adultery the parties are seldom caught in the actual act and in most cases the adultery has to be inferred from circumstances which lead to it by fair inference as a necessary conclusion. At one time the Ontario Courts required the proof to be made beyond reasonable doubt but eventually adopted the viewpoint that only proof on the balance of probability is necessary. This viewpoint was approved by the Supreme Court of Canada in *Smith* v. *Smith and*

Sedman,[31] The Ontario Court of Appeal in *Boykowich* v. *Beykowich*,[32] stated

> "it is now definitely established that in an action for divorce on the grounds of adultery the standard of proof is that required in a civil action".

In theory the evidence of one witness alone is sufficient, as is the case in the proof of any fact, but in practice corroboration would almost always be required and it would only be in very rare and exceptional circumstances that the finding of adultery would be made on the basis of the evidence of one uncorroborated witness.

Welfare of Children

Questions relating to custody of children, alimony, and property settlements when same have not already been settled between the parties by agreement are left to be dealt with by the courts of the province. There is considerable controversy as to whether some of these matters do not come within Federal competence by virtue of its jurisdiction over 'Marriage and Divorce' rather than within the Provincial competence by virtue of its jurisdiction over 'Property and Civil Rghts', but in the absence of definitive Supreme Court jurisprudence the matter remains unsettled. It has been argued, for instance, that certain amendments made by the Provincial Legislature to the Civil Code since Confederation relating to sections dealing with marriage are unconstitutional (as for example the amendment in 1954 to the former article 188 which required that the wife could demand a separation on the basis of her husband's adultery only if he kept the concubine in the common habitation). When Parliament first began dealing with divorce, some of its ealier Acts covered matters other than mere dissolution of marriage. For example, in the case of *Campbell*,,[33] which dealt with judicial separation rather than divorce as such, the wife was declared to be separated from bed and board from her husband and provision was made both for alimony and for the custody of a child. Some of the earlier cases had clauses declaring the children of the marriage to be legitimate, and one of them, namely that of *Whiteaves*[34] went so far as to set aside the marriage contract conditions as well as declaring the marriage to be null and void and declaring the children of the marriage to be legitimate. This would certainly seem to be an infringement on Quebec law. In any event Parliament has not for some time

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[31] [1952] 2 S.C.R. 312.
[32] [1953] O.R. 827.
[33] *An Act for the relief of Eliza Maria Campbell*, 42 Vict., ch. 79 (1879).
[34] *An Act for the relief of Joseph Frederick Whiteaves*, 32 Vict., ch. 95 (1868).

attempted to deal with questions of custody of children or alimony and it is unlikely that such policy would be changed unless a test case were brought to the Supreme Court establishing its right to do so.

This does not mean, however, that the Senate is indifferent to the welfare of the children; at the hearing before the Commissioner an inquiry is made as to what arrangements have been made for their custody, support and welfare. While under the present practice no order is made relating to these matters, the resolution could nevertheless be withheld, or in extreme cases the petition could even be dismissed, if the conclusion were reached that the petitioner was showing a callous neglect for the welfare of his or her children. The granting of the resolution is a matter of grace and not of right and the Senate has always taken the position that it will not grant relief to a petitioner who is unworthy of it and demonstrates this by failing to support or by showing complete disregard for the moral or physical well-being of his children. While the inquiry into these matters is of necessity somewhat summary and does not go into the detailed evidence required in the Quebec civil courts when a petition for custody and alimony is presented on which the court will have to make a definite finding, it is nevertheless necessary for the petitioner to establish that the children will not suffer any more than is inevitable in any broken marriage, as a result of the granting of his petition.

Connivance and Collusion

Connivance means the intentional concurrence of the petitioner in the matrimonial offence and may consist of inviting, advising, enjoining or encouraging the act of which petitioner complains. Collusion is an agreement between the parties whereby a false case is presented to the Court, or a valid defence withheld. The false case may be presented either by procurement or pretending adultery or alternatively by the purchase of a divorce when the petitioner has no real desire for it. If there is no agreement however there can be no collusion. The existence of connivance or collusion has to be negatived in petitioner's affidavit annexed to his petition and inquired into during the course of his evidence. Connivance and collusion is given the same interpretation in hearings before the Commissioner as in the courts, so this need not be gone into here.

It is a requirement of the Rules that the existence of any previous proceedings relating to the marriage or any agreements between the parties must be disclosed in the petition or the fact that

there have been no such proceedings or agreements indicated, and an inquiry is made into this at the hearing. If there have been such proceedings or agreements, the nature and result of them must be disclosed though it is not necessary to file copies of the actual proceedings or judgments. The principal reason for this inquiry is that the information may be pertinent to deciding whether there has been connivance or collusion. For example, while it is perfectly proper and reasonable for the wife when she is petitioner to seek to make some property settlement with her respondent husband by means of some agreement (such as perhaps to require payment of the amounts promised under the Marriage Contract, or to arrange for the continuation of alimony for children which remain in custody of the wife, or other related matters), if such an agreement were signed a few days before evidence of adultery is obtained it would certainly arouse some suspicion as to the veracity of this evidence. It might seem altogether too fortuitous that as soon as a financial agreement is reached evidence of adultery immediately becomes available, unless by the nature of such evidence it appears that this has been going on for some time. Similarly the payment by the respondent of an excessive sum out of proportion to the possible legal claims of the petitioner against him, or to the means of the parties, would indicate that it might be a bribe to secure his freedom, and as a result the existence of connivance or collusion might be suspected. However when the evidence of adultery has been obtained and the petition duly served, there would appear to be nothing improper in the fact that a financial settlement and agreement relating to custody of the children should be made between the parties, especially since under Quebec Law the former wife has no claim to alimony for herself after the divorce becomes final.

Condonation

Condonation also has to be negatived in the affidavit annexed to the petition and in the evidence given at the hearing. Condonation means conditional forgiveness of the matrimonial offence and the restoration of the offending spouse to the *status quo ante*. Three elements must exist, namely, full knowledge of the offence, deliberate forgiveness and reconciliation, and full restoration to cohabitation but not necessarily to sexual intercourse. The resumption of sexual intercourse is conclusive evidence of condonation in almost all cases. When the two parties continue to live in the same house following evidence obtained by the petitioner of commission of adultery by the respondent there will be a strong presumption of condo-

nation, which it is unlikely that the evidence of the petitioner alone can destroy, unless his evidence is corroborated by that of the respondent herself or some other witness who can establish conclusively that they have not resumed sexual intercourse. Condoned adultery can be revived by subsequent misconduct of the respondent which misconduct need not consist of further adultery but could consist of desertion alone, even though desertion alone would not, in the first instance, have been grounds for dissolution of marriage.

Annulment of Marriage

The Act which we are dealing with is known as the *Dissolution and Annulment of Marriages Act.* The word "divorce" does not appear in it, the term "dissolution of marriage" being always used in place of it. In the course of this article the two terms have been used interchangeably, dissolution of marriage being commonly referred to as divorce. Annulment of marriage which is also dealt with by the Act, however under the same procedure, is a different matter altogether annulment of marriage was also considered by the English Courts as of July 15th, 1870 and could be based on impotency, bigamy, the fact that the marriage was not formally contracted in accordance with the law of the place where it was celebrated, absence of consent resulting from error, fraud, duress, insanity, drunkeness or temporary impediment, or the contracting of marriage within the prohibited degrees of consanguinity. To a considerable extent the federal statute overlaps the Quebec Civil Code in this connection. The Civil Code provides for annulment of marriage in case of bigamy, marriage within the prohibited degrees of consanguinity, absence of consent, failure to fulfil the requisite formalities connected with the celebration of the marriage. In most cases, therefore, if the parties are domiciled in Quebec, proceedings in annulment of marriage would be brought before the Quebec courts, provided that they are brought within the time limits imposed by the various articles of the Civil Code relating to the several grounds of nullity. It is unlikely that the Senate would wish to intervene to consider proceedings in nullity of marriage which could properly be brought before the Quebec courts. However, in the case of impotency, Article 117 of the Civil Code states

> "impotency, natural or accidental, existing at the time of the marriage renders it null but only if such impotency be apparent and manifest. The nullity cannot be invoked by anyone but the party who has contracted with the impotent person or at any time after three years from the marriage".

Quite often impotency may exist at the time of the marriage which is not apparent or manifest, and not infrequently the parties

persist in attempting to consummate the marriage and hope that the impotency will be cured, so no action is brought by the other party within three years of the marriage. It is primarily these cases which are the subject of petitions for resolutions of the Senate to annul the marriage for impotency. Jurisprudence has held that the impotency need not be of a physical nature but can be psychological, so that the impotent party may have a mental block which prevents him or her from accomplishing the sex act. It has also been held that it is possible for a person to be impotent with regards to his or her own spouse but not necessarily impotent towards other people. The main point is that it is not merely sufficient to prove the marriage has not been consummated which is usually accomplished by medical evidence after an examination of the wife which indicates that she is still a virgin, but it must also be established that the failure to consummate the marriage has resulted from impotency whether physical or psychological on the part of one spouse or the other. These proceedings are not uncommon and have frequently been preceded by an ecclesiastical annulment.

Interlocutory Matters

I have already dealt with some of the preliminary applications which have to be submitted to the Commissioner on questions of procedure. The necessity for such preliminary applications is not spelled out in the rules but is implicit in them. There is therefore no specific form in which they must be made. Among these are applications to be dispensed with naming and/or serving the co-respondent, for substitutional service on respondent, and for permission to introduce the evidence of one or more witnesses by way of affidavit. Another application frequently made is by the petitioner's respondent's wife for funds to contest the petition. When the petition is taken by a husband the form of information to be served on the respondent and co-respondent provides in Rule 162(3)(g) that

> "If the wife shows to the satisfaction of the Commissioner that she has and is prepared to establish upon oath a good defence to the charge made in the petition and that she has not sufficient money to defend herself, the Commissioner may make an order that her husband shall provide her with the necessary means to sustain her defence, including the cost of retaining counsel and the travelling and living expenses of herself and witnesses to and from Ottawa on her behalf, in such amount as the Commissioner shall determine subject to appeal to the Divorce Committee."

The purpose of this is to prevent petitioner from securing a dissolution or annulment of his marriage, when the petition is not well-founded, merely because his wife cannot afford to contest same.

On the other hand past experience has indicated that many contestations are frivolous, and it would impose undue hardship on petitioner to require to him to pay heavy expenses for his wife's legal fees and expenses in addition to his own only to find that her defence was entirely unfounded and his petition fully justified. To avoid this the practice of the Senate Standing Committee on Divorce which has been followed by the Commissioner, is first to establish by the affidavits supporting the wife's application that she is sufficiently indigent to make it unlikely that she could sustain all the costs of successfully contesting the petition. Once this has been determined an order is then made requiring petitioner to deposit in the form of a certified cheque made payable to respondent the sum of $200 which is sent to the Clerk of Senate Committees and held pending the outcome of the hearing. If at the conclusion of the hearing the Commissioner decides that the contestation was justified and serious even if it is not maintained, the cheque will then be released to her; but if, on the other hand, the contestation is not proceeded with, or is deemed to be of a frivolous and vexatious nature, then the certified cheque will be returned to the petitioner. The sum of $200 is the amount deemed sufficient to permit the Attorney to file a formal contestation setting out the grounds of opposition to the petition, and to attend for one day at Ottawa with the respondent for the contestation. If it appears at the conclusion of one day's hearing that a further hearing will be required and that perhaps other witnesses are necessary, a further order can be made by the Commissioner for the provision of additional funds. No more than $200, however, is normally allowed in the first instance, although rare exceptions to this might be made in cases where the respondent resides abroad or in a distant part of the country so that very heavy travelling expenses will be incurred in addition to legal fees. In all cases the relative means of the petitioner and the respondent will be taken into consideration.

Contestations

Rule 192 provides that if adultery be proved the respondent or co-respondent may nevertheless be admitted to prove connivance at or condonation of the adultery, collusion in the proceedings for divorce, or adultery or cruelty to the respondent or her children or bad conduct on the part of the petitioner. Rule 192A provides that where a petitioner has been guilty of a matrimonial offence all the facts in connection therewith shall be disclosed by the petitioner to the Commissioner at the hearing. In such a case in accordance with

the existing jurisprudence, discretion can be exercised in favour of the petitioner despite his or her own adultery. In deciding whether to exercise discretion, consideration will be given to whether it appears likely that respondent's own adultery resulted from the prior adultery of the petitioner or whether petitioner's own adultery was subsequent to that of the respondent, to the welfare of the children, to the possibility of remarriage of either or both parties, to whether any question of public order is involved, or to whether it would not be better to grant the divorce when both parties have been guilty of adultery.[35] When a contestation is made, respondent or co-respondent is required in accordance with the provisions of the form of information (which must be served on them) to send a notice to the Clerk of the Senate of Canada and to the Solicitor for the petitioner stating his residence and address, the name of the solicitor for him and of an Ottawa agent and a concise statement of the material facts upon which he or she relies in answer to the petition. This contestation is to be made within thirty days of service. While there is no provision in the rules for a motion for particulars there is some precedent for permitting it to be made when it appears that a party to the proceedings may be taken by surprise by allegations in the petition or in the contestation which are of too generalized a nature. While considerable latitude is allowed in the presentation of evidence at the hearing, the respondent or co-respondent cannot introduce evidence with respect to grounds of defence which have not been pleaded in the contestation.

Conclusion

It is obvious that this article is not intended to be a treatise on the law and practice of divorce in resolutions before the Senate of Canada, but merely an attempt to point out certain precedents and rules of practice which are followed but which do not appear from a reading of the Act or of the Rules themselves. It is hoped that these explanations may answer some of the questions which most frequently occur in connection with these rather unusual proceedings and about which practicing attorneys seeking guidance, make enquiries.

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[35] See *Blunt* v. *Blunt* [1943] A.C.517.