

A COMPARATIVE SURVEY OF THE DEVELOPMENT OF MATRIMONIAL RELIEF

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However carefully two persons consider marriage before entering into it, or however compatible they appear to be, circumstances may evolve which make the marriage intolerable. There then arises the question what relief, if any, should be available? This problem has plagued Western society for over two thousand years. Matrimonial relief may be in the form of divorce or annulment, after either of which a person is allowed to marry someone else, or judicial separation¹ which gives only the right to live separate and apart. Divorce is the dissolution of a valid marriage, whilst annulment is the declaration that a "marriage" is void *ab initio*. The relative importance of annulment and judicial separation depends to a large extent on how easy or difficult it is at a particular time to obtain a divorce.

Divorce, it is believed, was always available to the Romans, though at first it was seldom employed.² By the end of the Republican period, however, it became extremely common. No judicial intervention or decree was required for a divorce according to the Roman law, it was a purely private act between the parties concerned. This is not to say that it was necessarily an informal act. From early times it has been realized how important it is that people generally should know whether or not a marriage exists. It is also desirable that the parties concerned have, at a later date, evidence to bring forward to support their contention that a divorce has taken place. It is usual, therefore, to require some kind of formal act. In the Roman law, the ceremony required depended on the form of the marriage which the parties had entered into.

The *manus* marriage of the old law required a formal act to dissolve it; if constituted *confarreatione*, there had to be a religious ceremony of *diffarreatio*; if arising *coemptione* or *usu*, there must be *remancipatio*, a form by which the husband released the wife from his *manus*.³ It is necessary to distinguish between the ending of the *manus* and the ending of the marriage itself. In early times when *manus* was essential to the idea of marriage, termination of it would dissolve the union. But when free marriage became more predominant, it would probably merely

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1. This was known as divorce *a mensa et thoro* before the passing of the Divorce and Matrimonial Causes Act, 1857.

2. Corbett, *Roman Law of Marriage*, p. 218 and seq.

3. Buckland, *Textbook of Roman Law*, pp. 116-121.

transform it into a marriage without *manus*. Something extra would then be needed to end the marriage.

Marriage was of course a *de facto* relationship. The actual breach of conjugal life, in the parting between husband and wife in such a way as to make it obvious that they did not intend to come together again, would terminate the marriage. While the *manus* existed, such a parting could only be at the instance of the husband because of the control of his wife given to him by the *manus*.

There appears to have been a traditional formula to be used when sending the wife away. A reference is made to this in the Twelve Tables, though it seems unlikely that the formula was ever legally necessary. A legal act of re-emancipation of the wife was essential to break the *manus*. This could be to her father or some other person who could then set her free. The husband's power to sell his wife away could not be lightly exercised. Before doing so, he was required to summon a family council, including a representative of the wife's relatives and show good cause for his action. The reasons which would justify divorce are said to have been adultery, wine-drinking, tampering with keys, and witchcraft. It is not, however, suggested that divorce on insufficient grounds would render it invalid, although it might involve punishment by the censors.⁴

While marriage with *manus* continued, the wife was in the position of a daughter, and so was bound to be in an inferior position to the husband. Freedom of divorce was, however, expressly recognized when marriage without *manus* took the place of the former.⁵ Marriage came to be regarded as a private contract. It was therefore capable of termination by mutual consent. But in addition it could be terminated unilaterally. Marriage came into existence by agreement and marital affection, why then should it not be terminated by agreement when the marital affection no longer existed. Divorce by mutual consent was known as *divortium bona gratia*, and unilateral divorce as *repudium*. In the latter case Augustus required a formal repudiation before seven witnesses.⁶ In the East it was the practice to send a bill of divorcement (*libellus repudii*), this being made obligatory by Theodosius II and Valentinian III in A.D. 449 (Cod. 5.17.8 pr.).⁷ The adoption of Christianity did not avail to change the legal conception of marriage. It remained a human institution resting on the consent of the parties and determinable at the will of either or both of the parties.

The Christian Emperors did, however, make various efforts to keep their subjects within the bonds of marriage. Constantine started

4. Jolowicz, *Historical Introduction to Roman Law*, pp. 117-118.

5. *Ibid.*

6. *Lex Julia de Adulteriis*.

7. Lee, *The Elements of Roman Law*, pp. 67-78.

by prohibiting frivolous repudiation. A wife was not justified in divorcing her husband for drunkenness, gambling or flirtations. She could do so if he was guilty of homicide, the violation of sepulchres or the preparation of poison. The sanction was not the rendering invalid of the divorce, but the loss of all dowry and *donatio ante nuptias*, and also deportation.

A husband could only divorce his wife for adultery, preparation of poison, or procuring. Infringement of this would involve loss of *dos* and *donatio ante nuptias*. He was also prohibited from marrying again, but the sanction was not to make the divorce invalid, but gave licence to the rejected wife to seize the dowry brought by her successor.⁸

The rigor of these rules varied with successive Emperors. Chapter VIII and XIV of Justinian's one hundred and seventeenth Novel were devoted to a re-enactment with some alterations, of the reasons and penalties for divorce. But the laws were not satisfactorily observed and Justinian returns to the subject in Novel 143 C. II. There, it is laid down that persons divorcing without one of the reasons recognized in Novel 117 shall be sent to a monastery for life, and that their property shall be divided in fixed proportions between the monastery and their descendants or ascendants, or failing these, so in entirety to the monastery.⁹

The secular laws or ecclesiastical canons relating to divorce in the German kingdoms were a combination of Roman, Teutonic and Christian ideas. The imperial legislation, with a few changes introduced by the barbarian kings remained in force for the Roman population. The German folk laws had compromised to a certain extent with the Christian doctrine for practical reasons. The one-sided divorce at the will of the husband was not, at first entirely taken away, but the grounds on which he might act were more or less restricted in harmony with scriptural rules. Also the wife had a right of repudiation if the husband was guilty of very grave crimes. This was the position with regard to the secular legislation, but the Church took a firmer line. Despite this, it is interesting to note that three hundred years after St. Augustine had declared marriage to be a sacrament, and had laid down the uncompromising doctrine to which the Roman Catholic church has since been committed, the church was still wavering in its application, and there had been frequent compromises. Although most of the Church councils had agreed that indissolubility should be rigidly enforced, the Council of Vannes in 465 had made the exception that a man could put away his wife for adultery. The Council of Agde in 505 allowed more than one case of divorce and was only concerned about men who did not get the bishop's sanction.¹⁰

8. Corbett, *The Roman Law of Marriage*.

9. *Ibid.*

10. G. E. Howard, *History of Matrimonial Institutions*, Vol. II, p. 39.

When the Christian doctrine first began to influence England, the people of England were governed by laws which were probably very similar to those of their Teutonic kinsmen. The dooms of Aethelbert, who was, after all, a Christian, suggest that marriage could be dissolved at the will of either parties. Penalties would, however, appear to have been inflicted on parties who separated without adequate reason. A man would lose the purchase price for the bride or a woman would have to repay this. The established laws and customs did, of course, conflict with the Christian way of thinking, but step by step the Christian doctrines replaced them. The Council of Hertford in 673 decreed that divorce was only allowed on the grounds set out by the "holy evangel", but if a man did "put away the wife united to him in lawful wedlock, if he wish to be rightly a Christian let him not be joined to another, but remain as he is or else reconciled to his wife."¹¹ Two centuries later, the so-called Law of the Northumbrian Priests, laid down that, "a man must lawfully keep his wife, as long as she lives unless . . . they both choose, with the bishop's consent, to separate and will thenceforth observe chastity."¹² From this time onwards, the doctrine of indissolubility was unswervingly accepted by the English church. This is clearly shown by the canons of Dunstan, Aethelred at the Court of Eanham (in 1009) and later decrees.¹³

First, however, the discordant utterances of the fathers, the popes, and the Councils had to be harmonized or explained away. In this Gratian and Peter Lombard played a very large part. But the first step was to apply the intricate system of matrimonial jurisprudence to the people. This the church achieved in England by gaining control of all matters connected with matrimonial causes. The ecclesiastical courts had always been concerned with the sins of men, particularly the sins of the flesh. Cnut enacted that people guilty of adultery should be tried by the bishop.¹⁴ The bishop became the judge of the sinners, and the judge who punishes adultery must take cognizance of marriage. The way was paved for the complete control by the church of all matters appertaining to marriage. The church courts were encouraged in this matter by the common law courts who left questions of legitimacy to them.

The church was thus able to enforce its doctrine of indissolubility of marriage. Divorce proper was no longer possible or what is more important, re-marriage within the life of one's spouse became impossible. The Canon law continued to use the word divorce, but in a different context. This has led to a great deal of confusion. According to the Canon law two forms of divorce were possible, *divortium a vinculo matrimonii* which was in fact an annulment, and *divortium a*

11. *Id.*, at p. 40.

12. *Ibid.*

13. *Ibid.*

14. Pollock and Maitland, *History of English Law*, Vol. II, pp. 364-65.

mensa et thoro which is what is now known as a judicial separation.¹⁵ The latter form of divorce was merely a licence to live separate and apart, while the former was a declaration that there had never been a marriage.

Divorce *a mensa et thoro* was allowed for *fornicatio carnalis* of either party,¹⁶ for *fornicatio spiritualis*¹⁷ or for cruelty.¹⁸ It is not clear whether blows alone were sufficient to constitute cruelty, especially in the case of the woman petitioner, but the "dominant opinion inclines to leave the determination of this point to the discretion of the judge."¹⁹

Divorce *a mensa et thoro* was introduced and became important because of the Catholic doctrine of indissolubility of marriage. It was introduced as a compromise to allow some relief to married people without actually releasing them from the bonds of marriage. It was used then because it was the only relief available; it is used now mainly by people whose religious beliefs prevent them from obtaining a divorce even though they could legally do so and by women who, though not wanting a divorce, require maintenance from their husband. While divorce was impossible it flourished, when divorce became possible it became of less and less importance.

Divorce *a vinculo* was also of great importance for the same reasons. A careful study of the marriage would often reveal some small infringement of the elaborate system of prohibited degrees, e.g., pre-contract. Not only natural but spiritual relationships were taken into account. By baptism a spiritual relationship was set up, marriage was prohibited within seven degrees of consanguinity and affinity.

The rules of relationship in particular were said to have produced a flourishing business for the church. By the sixteenth century the confusion was so great that it was suggested, for sufficient consideration the ecclesiastical court could find a canonical fault in almost any marriage. The unknown author of *Piers Plowman* wrote bitterly that a man could rid himself of his wife by giving the judge a fur coat; church lawyers, he added, "make and unmake matrimony for money."²⁰ By the time of the Reformation the annulment of alleged false wedlocks on the grounds of pre-contract, forbidden degrees of affinity, spiritual relationship, consanguinity, or on some other canonical pretext, had become an intolerable scandal. A statute²¹ of Henry VIII complained that, "Marriages have been brought into such an uncertainty thereby that no marriage could be so surely knit or bounden but it should be in

15. The term, *Judicial Separation*, was introduced by the Divorce and Matrimonial Causes Act, 1857.

16. At first, it appears to have had a wider meaning than adultery.

17. Which consisted of apostasy or heresy.

18. Some authorities suggest cruelty is of relatively recent origin in the Canon Law. (See Jacobs and Gobel, *Cases on Domestic Relations* 4th edit., p. 428).

19. Howard, *History of Matrimonial Institution*, Vol. II, p. 54, Note 1, quotes Esmein as saying that at first it appeared that real danger to life of one of the parties was necessary, but later it was decided that *nima saevitia* would suffice, but this is not defined.

20. G. G. Coulton, *Five Centuries of Religion*.

21. 32 Henry VIII C. 83. Statutes at Large (London, 1763), II 298.

either of the parties power . . . to prove a pre-contract, a kindred and alliance, or a carnal knowledge to defeat the same.”

By the beginning of the sixteenth century feelings were mounting against the papal control of the Church in England and, in fact, the attitude of the Church generally. About this time a new theology made its appearance. It found an able exponent in England in John Colet, and in France in Lefèvre of Étapes, but by far its most important protagonists were Martin Luther and John Calvin. Luther denied that marriage was a sacrament. He asked the question, “What is the proper procedure for us nowadays in matters of marriage and divorce?” He answered that, “This should be left to the lawyers and made subject to the secular government”. Marriage was a secular and outward thing, having to do with wife and children, house and home, and with other matters that belong to the realm of the government, all of which are completely subjected to reason.²²

Together with other influential protestants they agreed that divorce, with the right to re-marriage, was necessary. In general, they suggested two grounds for relief, though some thought more were possible depending on their interpretation of the scriptures. They appealed to authority rather than reason and experience in their attempts to solve a great social problem. They often, therefore, found things in the scriptural texts which they personally wanted to find there. With many different personal approaches this was bound to cause confusion and a great deal of self-deception.

The grounds generally suggested for absolute divorce were adultery and malicious desertion. In the case of a woman petitioning adultery, however, all agreed that some discrimination was necessary. She should petition something in addition to adultery which aggravated the offence. They did not feel that these grounds should be added to as they were the only ones which could be justified by scriptural authority. Their solution was a wide interpretation of malicious desertion to include *saevitia* (cruelty) and even refusal of conjugal duty.

Nearly all English reformers of the sixteenth century agreed in rejecting divorce *a mensa et thoro* as “papist innovation” with no historical basis. Charles V made great efforts to check the spread of religious schism. In 1554 he arranged a conference between Roman Catholic and Lutheran theologians. It was clear from the first that the decisions of the council would be uncompromising in character. The doctrine of indissolubility of marriage was restated, although some of the shortcomings of the annulment doctrine, as substitute for divorce, were recognized. Despite strong criticism of the shortsightedness of this doctrine, the hypocrisy of denying divorce yet allowing the chosen (rich) few to obtain annulments continued. I personally believe that,

22. *The Sermon on the Mount*, Luther's Works (St. Louis: Concordia Publishing House, 1955), XXI, 93.

at least in the medieval period, things would have been worse without the doctrine. It challenged the traditional right of the husband to send away his wife at will, and contributed to the dignity and stability of the family life. Most of all, it gave women much needed protection in an age of violence.

The violent protestant reaction to Papal control resulted eventually in the break with Rome and the emergence of the Protestant church. In Scotland the break with the Church of Rome was followed by a general rejection of the idea of church control of marriage and divorce. It was felt that jurisdiction should lie with the Common Law courts and not the ecclesiastical courts. A minority in England were also protagonists of this theory, but no change was made in England until 1857, although in Scotland the much stronger Calvinistic influence caused the granting of jurisdiction to a special court set up as early as 1560. The English Presbyterian Church was influenced to a certain extent by Calvin, but the Scots church was based almost entirely on the work of Calvin.

As stated, the Reformation did not bring about any actual change in the law of divorce in England as it did in Scotland. There, divorces on the ground of adultery were granted immediately after the break with Rome and a statute passed in 1573 authorized divorce on the additional ground of desertion. The statute professed in its preamble to be declaratory of the law as it always had been held since the Reformation. The Scots divorce laws received religious approval at the Westminster conference of 1648, the Assembly of the Divines, dominated by the Presbyterians, considered divorce and agreed that "nothing but adultery or wilful desertion as can in no way be remedied, by the church or civil magistrate, is cause sufficient for dissolving the bond of matrimony."

In England a commission was, however, appointed under the provisions of 3 and 4 Edward VI chap. II, to examine the Canons, Constitutions and Ordinances, with a view to seeing what ought to be retained. The commission was presided over by Archbishop Cranmer and included Peter Martyr (Calvinist and Presbyterian) among its members. In 1552 a draft code was produced called the *Reformatio Legum Ecclesiasticarum*. There appears to have been no intention of removing jurisdiction in the matter of marriage and divorce from ecclesiastical courts. In fact, frequent references are made to the ecclesiastical judges. The commission recommended that divorce *a mensa et thoro* be abolished, ". . . since this practice is contrary to the Holy Scriptures, involves the greatest confusion and has introduced an accumulation of evils into matrimony, . . ." ²³ In its place there would be absolute divorce with a right for the innocent spouse to

23. Cranmer's, *Reformatio Legum Ecclesiasticarum*, Chapter XIX (which can be found in Appendix II, Royal Commission on Divorce, 1912-13).

remarry.²⁴ The grounds of relief were to be adultery,²⁵ desertion,²⁶ deadly hostility,²⁷ several years absence with presumption of death,²⁸ and ill-treatment, if prolonged.²⁹ In the case of adultery, certain punishments would be inflicted on the guilty party. If a man is convicted of adultery he is to restore his wife's dowry to her and give up to her half of his goods. Wives shall be deprived of their dowries and all benefits which might accrue to them from their husband's property. In either case the guilty party shall be condemned to perpetual banishment or imprisonment for life.³⁰ If both spouses were guilty divorce was not possible.³¹ In all cases it was for the ecclesiastical court to determine whether a just cause for separation existed.

The Royal sanction was never given to this work, although it must have carried great weight as expressing the view of the reformed church on what was then regarded as a purely ecclesiastical matter. The Royal commission set up in 1850 to look into the question of divorce came to the conclusion that remarriage during the lifetime of the other spouse had been possible between 1550 and 1602. They placed great weight on the evidence given to a select committee of the House of Lords, in 1844 by Sir John Stoddart. He had remarked that:

The *Reformatio Legum* would have been in all probability, if King Edward VI had lived, the law of England. But, although it was not the law of the land, it was the recognized opinion and sentiment of the English Church, at that time. It was drawn up by a sub-committee of eight persons out of the thirty-two nominated according to the directions of the Act of Parliament; and at the head of those was Archbishop Cranmer; and therefore I apprehend that the *Reformatio Legum* having been published as a work of authority, although not of legislative authority, it must have been, and in all probability was, followed; and for that reason in the Spiritual Courts there were dissolutions of marriage. Because I believe that from about the year 1550 to the year 1602 marriage was not held by the Church, and therefore was not held by the Law, to be indissoluble."³²

The abandonment of indissolubility must have been earlier than 1550 because of *Northampton's case* in 1548.³³ There it was held that the act of adultery dissolved the nuptial tie, and that the sentence of divorce by ecclesiastical courts which followed (although only of divorce *a mensa et thoro*) enabled the injured husband to remarry. Commenting at the time on Sir John Stoddart's observation, Robert Phillimore remarked that:

We do not, however, agree with Sir John Stoddart in thinking that the Ecclesiastical Courts gave sentences of express dissolution. We believe they adhered

24. *Id.* Chapters V, VIII, IX, X, XI.

25. *Id.* Chapter V.

26. *Id.* Chapter VIII.

27. *Id.* Chapter X.

28. *Id.* Chapter IX.

29. *Id.* Chapter XI.

30. *Id.* Chapter III, IV.

31. *Id.* Chapter XVII.

32. Minutes of Evidence p. 27. Select Committee of House of Lords, appointed to consider Bill for better administration of Justice in the Judicial Committee of Privy Council, and to extend its Jurisdiction and Powers. Session, 1844.

33. Macqueen's, *Parliamentary Divorce*, p. 468.

to their ancient form of judgment—they only divorced *a mensa et thoro*. But in whatever shape their decrees were pronounced, the community, in cases of adultery, relied upon them as justifying a second act of matrimony.³⁴

The matter was finally settled in 1602 in *Foljambe's Case*. As Mr. Sergeant Salkeld said in his notes on the case:³⁵

... in the beginning of the reign of Queen Elizabeth, the opinion of the Church of England was, that after a divorce for adultery the parties might marry again. But in *Foljambe's case*, anno. 44 Elizabeth, in the Star Chamber, that opinion was changed.

Although it was not possible to obtain a judicial divorce in England, it was still possible to obtain a divorce by private Act of Parliament. The origin of this practice is in some doubt, but it would appear to have begun in the sixteenth century. This was, of course, only for the wealthy, as the cost involved was usually around £1,000. The difficulties facing a poor spouse, bound by an impossible marriage, are illustrated by Maule, J. in the well-known case of *Regina v. Thomas Hall* in 1844.³⁶ There were, in fact, few of these Bills, the total being approximately 224,³⁷ of which all but four were on behalf of the husband.³⁸ The only successful ground was adultery, which, in the case of the wife seeking divorce, had to be aggravated in some way.³⁹

In the late eighteenth century and early nineteenth century the demand increased for cheaper and easier forms of divorce. People compared the generous divorce laws of France and the Scots divorce laws dating back to 1560, with the English divorce laws, which, apart from annulment, allowed only divorce *a mensa et thoro*. Such a decree was an open invitation to the husband to behave exactly as he wished. As long as he paid his wife a pittance he could commit adultery, etc. with impunity. Without the possibility of relief in the form of absolute divorce, such a decree was weighted completely against the woman. Women, particularly in those days, with few exceptions, depended entirely on their husband for support. Even if a woman was prepared to go out and work herself, she would have great difficulty in finding employment.

In 1854 an attempt was made to get a Bill through Parliament which would have made it possible to obtain a judicial divorce. Unfortunately it was abandoned. A similar Bill in 1856 just failed to be accepted. Finally, in 1857, the Divorce and Matrimonial Causes Bill was presented to Parliament. The Bills were, of course, highly controversial and there were heated debates in both Houses of Parliament.

34. 1. Law Review, p. 353 at p. 359.

35. *Id.*, at p. 361.

36. Unreported, but described in McGregor, *Divorce in England*, p. 15 and seq.

37. Latey, *Divorce* (4th edition), p. 2.

38. Rayden, *Divorce*, (8th edition), p. 6.

39. *Ibid.*

There were two major issues involved. The most controversial of all was, of course, whether divorce should be available to the poor (and presumably ignorant and immoral) as well as the rich (intelligent and moral). If so, should it be available to the wife as well as the husband. Although a great controversy arose over this matter, in strict practice no change was really made. As the Attorney General remarked in the second reading of the Bill in the House of Commons, ". . . the Bill makes no material alteration in the existing law of divorce."⁴⁰ The important point being that although judicial divorce was cheaper than Parliamentary divorce, it was still too expensive for the vast majority of people. This was particularly obvious where a woman petitioner might be involved, when one remembers the subjected state of women at that time and their utter dependence, financially, on their husbands. Divorce did, it is true, become available to a slightly wider class of people, but, as far as the mass of people were concerned, it was still for the rich. Dicey's comment that, "The divorce act of 1857 was a triumph of individualistic liberation. It did away with the iniquity of a law which theoretically prohibited divorce, but in reality conceded to the rich a right denied to the poor"⁴¹ is highly theoretical and quite unrealistic. The poor had always had the right to a Parliamentary divorce, they simply did not have the wealth to exercise it. The 1857 Act made it more possible for a wider group of people, but it was still financially outside the reach of many.

The Poor Persons Rules, 1925, did go some way towards helping this by providing financial assistance for litigants and must certainly have been a factor which contributed to the increase in the number of decree nisi's granted, from 2,454 in 1924 to 3,758 in 1928.⁴² Even, however, with the passing of the Legal Aid and Advice Act of 1949 which made it financially possible for anyone to obtain a divorce we cannot say the picture is complete. What of the second part of the idea of divorce which is taken for granted now; the chance to remarry? Although no man now is prevented from obtaining a divorce through lack of funds⁴³ the majority cannot in theory remarry because they are financially unable to run two homes. They are unable to support their first wife and possibly her children and in addition a second wife and possibly more children. Does this check the ideas some men may have of divorcing their wife at the first opportunity and starting another home? A visit to any Domestic Proceedings Court readily provides an answer; which is, of course, a very decided no! What really happens is that the first wife simply does not receive her maintenance.

The second issue was whether jurisdiction in matters of divorce should be taken from the Church, and if so, in whom should it be

40. *Hansard*, 3rd Series Vol. 147, col. 719.

41. *Law and Public Opinion in England in the 19th Century*, (2nd ed., p. 347).

42. Report of the Royal Commission on Marriage and Divorce, 1951-55, Table 2, appendix I, p. 359.

43. The Legal Aid and Advice Act, 1947, covers actions for divorce.

vested. This was, of course, a very delicate question, as the church strongly wished to retain control.

On August 21, 1857 the Divorce and Matrimonial Causes Bill passed the third reading in the House of Commons and a week later received the Royal Assent. The old ecclesiastical jurisdiction was abolished and a new secular court of matrimonial causes was set up. The Act allowed absolute divorce to the husband on the grounds of his wife's adultery and to the wife on the grounds of her husband's adultery coupled with some aggravating circumstances such as bigamy, rape, cruelty or desertion for at least two years. A wife was also allowed to petition on the grounds that her husband had been guilty of an unnatural offence, (Sodomy or Bestiality). Despite the recommendations of the Royal Commission in 1856 no right has yet been given to a man to petition on the ground, *per se*, of an unnatural act committed by the wife.

The Act changed the name of divorce *a mensa et thoro* to judicial separation. Section 7 said, ". . . in all cases in which a Decree for Divorce *a Mensa et Thoro* might now be pronounced the Court may pronounce a Decree of Judicial Separation, which shall have the same Force and the same Consequences . . ." The grounds existing at the time of the act were adultery, cruelty, and in the case of a wife petitioner, the committing by her husband of an unnatural offence. In addition, the act added desertion for two years. In Scotland no such addition has been made, nor is the committing of an unnatural offence a ground of relief. There, only cruelty and adultery are grounds for Judicial Separation.

The Divorce and Matrimonial Causes Act, 1857, was the beginning of judicial divorce as it exists today in England. But it was to have more far-reaching effect than simply the development of the English Law. It was also destined to play an important role in Canadian law.

The present law with regard to matrimonial relief in Ontario, Manitoba, Saskatchewan, Alberta and British Columbia is based on the 1857 Act.⁴⁴ This situation exists for two reasons. First, most of these provinces take the English law as it stood prior to 1870 as the basis for their law, which, of course automatically incorporates the 1857 Act. Secondly, the sole power to legislate on matters of divorce is in the hands of the Federal Government,⁴⁵ and they have been loathe to exercise this power. They have only done so on two occasions. In 1925 the Marriage and Divorce Act⁴⁶ was passed which made it possible for a married woman to marry her deceased husband's brother, and a married man to marry his deceased wife's sister. Also, adultery *per*

44. The provinces have enacted certain statutes giving jurisdiction to minor courts, such as Magistrates Courts, to make orders for the purpose of maintenance, etc., similar to provisions of English Matrimonial Proceedings (Magistrates Court) Act, 1960. In Manitoba the relevant act is the Wives' and Childrens' Maintenance Act R.S.M., 1954, Ch. 294.

45. British North America Act, 1867, S. 91 (26).

46. Now R.S.C., 1952, Ch. 176.

se, was made a ground of divorce for a woman. This is the only legislation which has actually modified the 1857 Act. The Divorce Jurisdiction Act,⁴⁷ passed in 1930, merely extended the jurisdiction of the divorce courts.

Newfoundland takes as the basis of its Law the law as it stood in England prior to 1832, which did not, of course, include the 1857 Act. Quebec did not take English Law. Therefore, as there has been no Federal legislation on this matter, divorce is only possible in Newfoundland and Quebec by Private Act of the Federal legislature. The Maritime Provinces (excluding, of course, Newfoundland) do not rely on the 1857 Act as they had their own grounds of divorce prior to Confederation and by s. 129 of the British North America Act, 1867, were allowed to retain them.

It is, I think, unfortunate that a statute enacted in England when particular social attitudes and conditions existed in the mid-19th century, should still bind one hundred years later, a country such as Canada where the social conditions and attitudes are now so different.

It appears that in almost every Parliamentary session in the last few years private member bills have been introduced with the intent of reforming divorce laws, but have never met with any success. On February 25, 1966, however, Mr. McCleare introduced such a bill and at last the Government took some action by referring the matter to a committee of the House of Commons. It is hoped that at long last a reform may be forthcoming.

The 1857 Act also affected significantly the laws of other Commonwealth countries. The divorce legislation which followed soon after in Australia and New Zealand was actuated by, and based on, this Act. This was due mainly to the fact that such Bills had to receive the Royal Assent, and could not therefore in practice precede or exceed the English Bill. Legislation in Australia was, of course, on the State basis. The Victoria Bill in its original form included desertion for four years and adultery of the husband, as grounds of divorce; but was rejected when submitted for the Royal Assent. The Australian divorce legislation began with the South Australia Act in 1858, followed by Tasmania in 1860, Victoria in 1861, Western Australia in 1863, Queensland in 1864, and New South Wales in 1873. The first New Zealand Act was in 1867. But development took place far more rapidly than in England. By 1881 New South Wales had introduced the provision that the adultery of the husband was *per se* a ground for the wife to petition for divorce, preceding by forty-two years a similar change in the English Law. New Zealand introduced this provision in 1898 and also added three more grounds of divorce, namely; wilful desertion for five years, habitual drunkenness for four years, coupled

47. Now R.S.C., 1952, Ch. 84.

with failure to maintain or habitual cruelty, and imprisonment for seven years or more for attempting to murder the petitioner.

A great development came in Australia in 1889 with the enactment in Victoria of *Shiels Act*. This vastly increased the number of grounds of divorce and was gradually adopted in most States. It also formed the basis of the Commonwealth Act of 1959, which gave Australia uniform grounds of divorce and gave for the purpose of divorce an Australian Domicile. *Shiels Act* added desertion for three years, and habitual drunkenness for three years coupled with, in the case of the husband, leaving the wife without support or treating her with cruelty, and in the case of the wife, neglect or unfitness to discharge her domestic duties. The Act also recognized the need for relief in some cases where one of the spouses was convicted of criminal activities and sentenced to prison. It made imprisonment for not less than three years under commuted sentence for a capital offence or under sentence of seven years imprisonment, a ground for divorce. Relief might also be sought if the husband had suffered frequent convictions in five years, spending an aggregate of three years in prison. Although cruelty *per se* was not a ground of divorce, a conviction for an attempt to murder or assault with intent to cause grievous bodily harm to the other party, or repeated assaults and cruel beatings of such party, during the year prior to the instituting of the proceedings, was a ground for relief.

The great English development came in 1937 with the Matrimonial Causes Act of that year. This was based on the report⁴⁸ of the Royal Commission set up in 1909 which had reported in 1912, a full twenty-five years before the passing of the Act. Three new grounds of divorce were added, namely, desertion for three years, cruelty and incurable insanity after five years confinement. Two recommendations of the Commission were at first introduced into the Bill but later dropped. These were habitual drunkenness, and imprisonment under a commuted death sentence, which in some degree reflected the earlier Australian and New Zealand legislation, and the provision in the Licensing Act, 1902, s. (5) which applied to Judicial Separation. In 1938 the Divorce (Scotland) Act added cruelty, insanity, sodomy and bestiality as grounds of divorce, bringing the English and Scots law into line.

Another Royal Commission was set up in 1951 and reported in 1956⁴⁹ making several important recommendations. It recommended the retention of the matrimonial offence as the basis of divorce, but in the case of a marriage which had completely broken down, demonstrated by the parties having lived apart for seven years, it should be possible for either spouse to obtain a decree dissolving the marriage,

48. Cd. 6478.

49. Cd. 9678.

provided that the other spouse did not object. Some members did in addition feel, however, that either spouse should be able to obtain a decree notwithstanding the other party's objection if they could show that the separation was due to the other party's unreasonable conduct.⁵⁰ This is, of course, interpreting a non-fault ground on a fault basis. A clause in a Bill introduced in 1951 by Mrs. Irene White had dealt with this as a ground for divorce but was withdrawn when it was agreed a Royal Commission should be set up. This was a section of Mr. Abse's Bill in 1963, but he agreed to withdraw it when it appeared his refusal might have jeopardized the whole Bill. It was raised in the Lords by Lord Silkin as an amendment to the remainder of the Bill, but was defeated.

The Commission suggested several other new grounds for divorce. They suggested the Wilful Refusal to Consummate should cease to be a ground for annulment and become a ground of divorce instead, and that acceptance by a wife of artificial insemination by a donor without her husband's consent should be a ground for divorce. This has now in fact become the law in New Zealand by the Matrimonial Proceedings Act, 1963, s. 21(b), influenced, no doubt, by the report.

Cruelty *per se* has never been a ground for divorce in New Zealand, although it has been a ground for Judicial Separation since 1867.⁵¹ It is, however, a ground of divorce when coupled with habitual drunkenness for four years. It has been a ground for Judicial Separation in Australia since the passing of the first divorce acts and for divorce since 1929⁵² in South Australia, and became a ground in the States which had not already adopted it with the passing of the 1959 Act.⁵³

Separation, of a form, has been a ground of divorce in New Zealand since 1920⁵⁴ and in Southern Australia since 1938⁵⁵ followed by the other states in the 1959 Act⁵⁶ if not already enacted. The New Zealand divorce law was consolidated and re-enacted in the Matrimonial Proceedings Act in 1963, and the Australian, in the Matrimonial Causes (Commonwealth) Act, 1959.

The principal Acts at present regulating divorce are, in Australia, the Matrimonial Causes (Commonwealth) Act, 1959, in New Zealand, the Matrimonial Proceedings Act, 1963, in England the Matrimonial Causes Act, 1950, (as amended by subsequent minor legislation) and in Scotland the Divorce (Scotland Act) Act, 1938, (as amended).

Although Colonists who settle in an uninhabited country take with them all the laws of their Mother country which are suited to their new

50. *Id.*, at para. 65, 67 and 68 respectively.

51. Divorce and Matrimonial Causes Act, 1867.

52. Matrimonial Causes Act, 1929.

53. Matrimonial Causes (Commonwealth) Act, 1959.

54. Divorce and Matrimonial Causes Act, 1920.

55. Matrimonial Causes Act Amendment Act, 1938.

56. *Supra*, note 53.

environment, they do not take the courts with them. Thus, until a tribunal is established, competent to administer a particular branch of the law, that branch is in abeyance, and will slumber until such a tribunal is set up.⁵⁷ There were no ecclesiastical courts in the American Colonies to administer the matrimonial laws as in England, as there were no Bishops, and so until such a court was set up by the state legislature, or jurisdiction given to an existing court no judicial divorce was possible.

Divorce was, therefore, only possible by the method which was employed at that time in England, namely, by Special Act of the Governing Body (in the case of England, Parliament). These Acts were extremely common in the New England Colonies, but extremely uncommon in the Southern Colonies. The Middle Colonies were in this respect, "much closer to the extreme conservatism of the South than the broad liberalism of New England."⁵⁸

The New England Colonies soon legislated on divorce and in fact anticipated thought and legislation in the Mother country by about 200 years. There was a strong reaction against the canonical and ecclesiastical systems. Influenced largely by the *Reformatio Legum Ecclesiarum*, judicial separation was, to a large extent, abandoned. Dissolutions were freely given for various causes such as desertion, cruelty or breach of marriage vow, and in many respects husband and wife were equal in the eyes of the law.

The statute books in the Southern Colonies were silent on the subject of divorce jurisdiction. Prior to the revolution, therefore, it appears no relief was available except legislative divorce, which was not used despite the examples set by New England and the English Parliament before the close of the 17th century.

In the Middle Colonies, generally, divorce was only by act of the legislature which even then was extremely rare. The major exception being New Netherland, where the civil courts exercised full powers of annulment, separation and dissolution. This liberal attitude was due almost entirely to the ideas which had been prevalent in the Netherlands, in particular the provinces of Holland and Zeeland who had allowed divorce continuously from the 12th century regardless of the Canon law.

The different attitudes towards divorce in various states is to a large extent a reflection of the attitudes of the people who formed the original Colonies. Many of the first State Constitutions failed to mention divorce and so impliedly left the power of granting it in the hands of the legislature. In Massachusetts in 1786 a Statute was passed which placed all questions of divorce and alimony within the jurisdiction of the Supreme Judicial Court of the County where the parties

57. Bishop, *Marriage and Divorce*, (1st Edition), s. 16 and seq.

58. Howard, *History of Matrimonial Institutions*, Vol. II, p. 376.

lived.⁵⁹ This Statute allowed divorce only on the grounds of adultery and impotency. At first, divorce *a mensa et thoro* (or limited divorce), was allowed only on the ground of extreme cruelty, but in 1811 desertion was added to this. In 1870 limited divorce was abandoned but has since been reinstated and is now possible on any grounds on which a petition for divorce can be entered. In 1838 wilful desertion for five years became a ground of divorce⁶⁰ and extreme cruelty was added in 1870.⁶¹

Most of the New England States followed generally these trends. New Hampshire was at the outset more liberal and developed more rapidly. A Statute in 1791 authorized divorce on the grounds of adultery, impotency, extreme cruelty, and three years absence.⁶² Limited divorce was not recognized. In 1839 desertion for three years was added. In Connecticut, an omnibus clause was added in 1849.⁶³ Divorce could be granted for, “. . . any such misconduct . . . as permanently destroys the happiness of the petitioner, and defeats the purpose of the marriage relationship.”⁶⁴ This was not repealed until 1878.⁶⁵ The laws in the other New England States have developed very much along these lines, and the present positions reflect to some extent concepts which are more akin to English law than to that of the South, South-East, Middle and Western States, which is, of course, to be expected, because of the strong influence of the early English settlers there. Impotence is not, with the exception of Vermont, a ground for divorce, while the other regions generally take it as such. Thus following the general idea in England of impotence being a defect at the time of the marriage and therefore a ground for annulment rather than divorce. Insanity in most New England States is not a ground of divorce, the exceptions being Connecticut and Vermont, reflecting the pre-1937 position in England. Adultery, cruelty and desertion are grounds for divorce in all the New England States. Intoxication and taking drugs in all except Vermont. New Hampshire, Connecticut, Rhode Island and Vermont all have separation Statutes, with the time limits varying from two years in New Hampshire to ten years in Rhode Island.

There was, as already stated, no divorce in the South and South-Eastern States prior to independence. There were the usual incidents which occur in these circumstances of separation by consent and separate maintenance, but that was all. After independence it was a considerable time in some of the States before even limited divorce became available, e.g., Virginia, Maryland.

59. Laws of the Commonwealth of Mass., 1780-1816, (1807-16), I, 303.

60. Act of April 17, 1838: Law of the Commonwealth of Mass. (1838), 415.

61. Supp. to Gen. Stat., 1860-72, I, 871.

62. Law of the State of N. Hampshire (1797), 295.

63. *Id.* (1839), 400.

64. Public Act (1849), 17, (June 19).

65. Public Act (1878), 305.

The initial divorce legislation in most of these States reflected the attempts by the legislature to give some of the powers to grant divorce to the judiciary but retain what might be called an assent for themselves. This was originally thought to afford a check on the freedom of divorce that might ensue for wild judicial interpretation.

In 1842 full jurisdiction in all matters of limited and absolute divorce was given to the Maryland Court. The grounds were adultery, abandonment with five years absence, impotence and any cause which could render a marriage null and void. The grounds have since increased in number but as in Virginia, cruelty remained only a ground for limited divorce. In South Carolina limited divorce has never been possible or the normal alternative of separate maintenance. Absolute divorce first became available in 1949. It is now possible on the grounds of adultery, cruelty, desertion for one year, and intoxication.⁶⁶ Limited divorce on the ground of adultery, cruelty and just cause for bodily fear became possible in Virginia in 1827,⁶⁷ supplemented in 1841 by desertion and abandonment.⁶⁸ In 1848 absolute divorce became possible on the ground of adultery. In 1853 desertion for three years was added with some other grounds. This requirement has now been reduced to one year, but cruelty remains only a ground for limited divorce.⁶⁹ West Virginia followed a similar path except that cruelty is a ground for absolute divorce.⁷⁰

Kentucky legislated at a very early stage on divorce. The Courts in 1809 were given jurisdiction to grant divorce on the grounds of abandonment and living in adultery, cruelty to a wife or desertion by a wife for three years and also conviction of a felony. There are now a large number of grounds for divorce. Limited divorce, is not only granted on any of the available for absolute divorce but also for any cause that the court deems sufficient.⁷¹

The North Carolina Statute of 1814 allowed the superior court to grant either limited or absolute divorce for bodily infirmity or for desertion and living in adultery. Limited divorce was sanctioned when "any person shall either abandon his family or maliciously turn his wife out of the door, or by cruel or barbarous treatment endanger her life, or offer such indignities to her person as to render her condition intolerable or life burdensome." The grounds have, of course, been extended, but cruelty, and now desertion, are only grounds for limited divorce.⁷²

The development of divorce laws in these States can be considered typical of the rest of the South and South-Eastern States even if the

66. South Carolina Code, 1952.

67. Acts of Gen. Assembly (1826-27), 21, 22.

68. Acts of the Assembly (1840-41), 78, 79.

69. Virginia Code Annot., 1960.

70. West Virginia Code Annot., 1955.

71. Kentucky Rev. Stat., 1959.

72. North Carolina Gen. Stat., 1950.

grounds now vary quite a lot. At the present time adultery is a ground for divorce in all the States. Cruelty of one kind or another is ground in all but Maryland, North Carolina, Virginia, Tennessee and Washington, D.C. Desertion is a ground in all but North Carolina. Conviction of a crime is a ground for relief in all but South Carolina. The taking of drugs or induced intoxication is a ground for relief in all but Washington, D.C., Maryland, North Carolina, South Carolina, Tennessee, Virginia and West Virginia, and insanity, impotence are grounds for relief in all but Arizona, Washington, D.C., Louisiana, Missouri, South Carolina, Tennessee, Virginia and West Virginia. Limited divorce is not possible in Florida, Georgia, Mississippi, Missouri, Oklahoma, South Carolina and West Virginia. Separation Statutes exist in Alabama, Arizona, Arkansas, Kentucky, Louisiana, Minnesota, North Carolina, Texas, Vermont and Washington, D.C. Incompatibility is a ground in New Mexico and Oklahoma.

When one considers the history of the grounds of divorce in the middle and Western States, little is revealed which is peculiar compared with that of the Southern or Eastern groups. There, States can really be said to have pursued a medial path and can be regarded as constituting the average American type. There is nothing very individual or very conservative about them.

New York must, of course, at once be singled out as being an obvious exception to this rule. Although judicial divorce has been possible there from a very early time the only ground at present on which divorce is available is adultery. This leads, however, to very wide and intricate grounds of annulment, to compensate for this fact. New Jersey, whose early history was so similar to New York has now become a State with quite liberal divorce laws. Her first Statute in divorce was in 1794 and, as so frequently happened, confused divorce and annulment. There are now four grounds for absolute divorce; adultery, cruelty, desertion for two years and impotence.⁷³ Pennsylvania, whose first Statute came in 1785, followed a similar pattern although wide grounds of divorce are now possible.⁷⁴

The history of divorce in the West began with the Statute adopted in the North-West Territory in 1795.⁷⁵ This gave jurisdiction in matters of divorce to the general and circuit courts. Absolute divorce was allowed on the grounds of adultery, impotency and bigamy, and partial divorce on the ground of extreme cruelty. As the territories became States they repealed this statute and introduced their own legislation. Typical is Ohio, which, in 1804, gave the supreme court sole cognizance of divorce suits.⁷⁶ Absolute divorce was allowed on

73. New Jersey Stat. Annot., 1951.

74. Pennsylvania Stat. Annot., 1930.

75. Chase, Stat. I, 192, 193 (act of July 15, 1795).

76. *Id.* 493, 494.

the grounds of bigamy, wilful absence for five years, adultery and extreme cruelty. No provision was however, made for the limited divorce which even now is not possible.

Early Iowa legislation illustrates one of the worst and most characteristic features of early American State legislation. The statute makers perennially, adapt, change, abrogate or re-enact divorce laws. In 1838 the courts were given jurisdiction to grant an absolute divorce on the grounds of adultery and impotence. Limited divorce was allowed for extreme cruelty and wilful desertion for one year.⁷⁷ This was repealed the next year and a new Statute passed which extended grounds for divorce by adding cruel treatment and indignities but omitted any mention of limited divorce.⁷⁸ This Statute was replaced three years later by another which simply added a proviso to one of the grounds.⁷⁹ In 1846 the proviso was dropped and an "omnibus" clause added.⁸⁰ In 1855 there was a drastic reduction in the number of grounds of divorce but limited divorce was possible on any of the grounds previously allowed for absolute divorce.⁸¹ This was shortlived, as in 1858 law was returned to the position in which it stood in 1851 and "omnibus" clause dropped.⁸² The present law is very similar to this.

In 1856 jurisdiction was given to the courts in Kansas to grant divorce on nine grounds including wilful desertion for two years, cruel and barbarous treatment and intolerable indignities.⁸³ In 1859 indignities were removed and in 1860 extreme cruelty substituted for this. There are now eleven grounds for divorce including desertion for one year and cruelty, but limited divorce is not possible.⁸⁴

In Oregon the courts were given jurisdiction in 1853 to grant divorces on ten grounds including two years desertion, harsh and cruel treatment and personal indignities.⁸⁵ These were reduced to eight in 1854 and the requirement of two years desertion was reduced to one year.⁸⁶ In 1862 this was increased to three years,⁸⁷ but in 1887 again reduced to one.⁸⁸ This is the requirement today. There are now seven grounds including cruelty.⁸⁹

The California district courts received jurisdiction in divorce matters in 1851. There were at first nine causes of divorce and limited

77. Laws of Ia. (1838-1839), 179, 180.

78. Laws of Ia. (1839-40), 120, 122.

79. Rev. Stat. of Ia. (1843), 237-41.

80. Law of Ia. (1845-46), 23.

81. Laws of Ia. (1854-55), 112, 113.

82. Laws of Ia. (1858), 97, 98.

83. Stat. of Kan. (1855), 310, 311.

84. Kan. Gen. Stat. Annot., 1949.

85. Gen. Laws of Ore. (1852), 49-51.

86. Stat. of Ore. (1853-54), 494-497.

87. Laws of Ore. (1862), 485.

88. Codes and Stat. of Ore. (1902), I, 275.

89. Ore. Rev. Stat., 1959.

divorce. Three were dropped in 1874, the six remaining grounds being re-enacted but only for absolute divorce. These included, extreme cruelty, wilful desertion for one year and habitual intemperance for one year. Limited divorce was abolished and is still not possible. There are now seven grounds for divorce. Montana and Idaho both adopted the Californian system and now have the same grounds. The final result in the Dakotas is very much the same, although the earlier development was different and limited divorce is now available. Nevada, as far as the grounds of divorce are concerned, follows California, although their interpretation of these grounds can be considered more liberal.

The position now is that adultery, cruelty and desertion are grounds for divorce in all States with, of course, the exception of New York, where adultery is the only ground. Taking the five other most common grounds of impotence, conviction of a crime and imprisonment, intoxication and drug taking, neglect and failure to maintain, and insanity, these are all available in Kansas, Nebraska, Colorado, Wyoming, Utah, Washington, California, Montana, Idaho, North Dakota, South Dakota, Nevada and Alaska. In Oregon and Pennsylvania neglect and failure to maintain is not a ground nor in Pennsylvania is intoxication and the taking of drugs. Insanity is not a ground of divorce in Iowa, Michigan, Ohio, Pennsylvania or Wisconsin, and impotence is not in Iowa, Michigan, Ohio, Pennsylvania, and Wisconsin. In most cases, there are additional grounds to replace these, e.g., in Pennsylvania, where four of the above are not available, there are four additional grounds. In Colorado, Idaho, Nevada, North Dakota, Utah, Washington, Wyoming, and Wisconsin, one of the additional grounds is voluntary separation for a period of years. The time of separation required varies from state to state. In Alaska, New Mexico and Oklahoma incompatibility is a ground for divorce, as it is in the Virgin Isles.

In general, the United States resembles Australia and New Zealand in having, in most States, a large number of grounds of divorce. It does not follow from this, necessarily, that this makes it easier to obtain a divorce there than in England or Scotland. A wide interpretation of a limited number of grounds can equate the position. New York, having only one ground for divorce, namely, adultery, has equated the position, to a certain extent, by a liberal interpretation of the grounds for annulment. Canada, finding itself in a similar situation in this respect to New York, has not adopted this practice.