DIFFERENCES IN THE USE OF THE CONCEPT OF DESERTION IN THE MANITOBA WIVES AND CHILDREN'S MAINTENANCE ACT, R.S.M. 1954, Ch. 35 AND THE CANADIAN DIVORCE ACT 1968

The concept of desertion is historically rooted in English common-law,[1] which derived it from the ecclesiastical law relating to matrimonial causes. It made its maiden appearance in statute law in England in the Matrimonial Causes Act 1857 from whence in turn it became part of Manitoban law by virtue of The Queen's Bench Act R.S.M. 1954, Ch. 52, section 49, whereby the Court of Queen's Bench in Manitoba had power to exercise the same extent of jurisdiction as did Her Majesty's Superior Courts of Common Law at Westminster as of 15th July, 1870.

Traditionally, the use of the concept of desertion as a basis for granting matrimonial relief stemmed from the eccclesiastical view of relief being only available for a matrimonial fault. Where one party to the marriage, the so-called guilty spouse commits a matrimonial 'offence' such as adultery or desertion the 'innocent' spouse may seek relief from the wrongdoer's conduct by obtaining an order freeing her from the matrimonial obligation of co-habitation. In ecclesiastical law, such relief was known as a divorce a mensa et thoro; the Matrimonial Causes Act 1857 re-named it 'judicial separation' to establish its new common-law character. In Manitoba, in effect the same relief is obtainable under the name of an order for non-cohabitation. Whatever the nomenclature of the relief, it was granted only in order to rectify a matrimonial 'fault' type of situation; and as indicated above, one of the matrimonial faults for which it could be sought was the fault of desertion.

The conceptual requirements for the existence of this fault to be proved became the subject matter of much case-law since 1857. Briefly, at present at common-law[2] for desertion to exist two requirements are essential.

(1) the intention to desert: animus deserendi
and (2) the physical fact of desertion.

In other common-law countries such as England, Australia and India, these requirements for the concept of desertion have been further refined. On the part of the 'guilty' spouse or deserter there must be the animus deserendi which includes the intention to permanently bring an end to the state of conjugal consortium;[3] and the fact of separation. It is not necessary

1. The term common-law is used to denote both case law and statute law in non-civil law jurisdictions and in contrast to 'civil' law.
2. See Rayden on Divorce 10th ed. by Jackson, Rowe & Booth, page 192 et seq.
3. *Pulford* v. *Pulford* [1923] Probate 18.
Lane v. *Lane* [1951] Probate 284
Hopes v. *Hopes* [1949] Probate 227 C.A.

for this purpose to live physically apart. It is sufficient, in order to establish desertion, that two households exist or separate lives are led under the same roof.[4]

On the part of the 'innocent' spouse or deserted party the requirements are: (1) the intention[5] not to desert viz., lack of consent to have the state of conjugal consortium terminated and (2) the fact that absence of conduct on his or her part which would give reasonable cause or lawful excuse to the other spouse to desert.

In 'constructive' desertion the fact situation is such that although one spouse, the wife, may physically have left the matrimonial home, such departure is caused by the conduct of the other spouse, the husband, which drives the wife out of the home. In such a situation, the wife is treated as the 'innocent' spouse and the husband as the deserter.

From this it becomes clear that the matrimonial offence or fault of desertion will not exist unless and until all the common-law requirements of the concept are fulfilled.

Common-law has also developed certain bars to the concept of desertion being used as a ground for matrimonial relief. These bars or defences are as follows:

> (1) Consent to separation. Where husband and wife agree to separate or agree to continue an existing separation the offence of desertion is wiped out. The agreement may be in the form of a formal document or 'Separation Deed'; or it may be an informal agreement by exchange of letters or merely oral; and in some cases it may even be implied. English Courts are not inclined to accept a Separation Agreement unless parties had a choice in the matter and even then are inclined not to treat such agreements as being of a permanent nature.
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> However, where there is a valid deed or agreement, or where consent to separate is proved, then desertion no longer exists and the concept is estopped from being used.
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> (2) Defence that there is no separation in fact. The fact requirement of the proper intention requirement does not exist. For example, a temporary separation does not amount to desertion.
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> (3) Defence of lack of the necessary intention. For example, mere indifference does not amount to animus deserendi.
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> (4) Just cause or lawful excuse for desertion. Where the so-called innocent party has by his conduct given the deserter just cause to desert him, the offence does not exist. For example, if the deserted spouse has committed adultery, or is cruel to the other spouse, or misbehaves seriously, the deserter has good reason to desert, and no offence is committed by the act of desertion. Desertion is wiped out by such conduct on the part of the 'innocent' spouse.

4. *Waubon* v. *Waubon* [1946] 2 All E.R. 366
Angel v. *Angel* [1946] 2 All E.R. 635
5. *Pratt* v. *Pratt* [1939] A.C. 417
Buchler v. *Buchler* [1947] Probate 25
Gollins v. *Gollins* [1964] A.C. 644 H.L.
Simpson v. *Simpson* [1951] Probate 320

(5) Desertion has been subsequently terminated. This defence may be raised when either the animus or fact requirement no longer exists, for example, where the deserter voluntarily returns to the conjugal consortium.

In the Manitoba Wives and Children's Maintenance Act,[6] Section 4 provides the grounds on which a wife may seek an order for non-cohabitation or maintenance. All the grounds contained in this section are based on the fault theory. Section 4(b) provides that where a married man has deserted her without lawful excuse the wife . . . may make an application . . . for an order.

Quite clearly then, this use of the concept of desertion conforms with the traditional use of the concept. Because the husband, the guilty spouse, has committed a matrimonial fault, the innocent spouse, the wife, may seek relief on the basis of the fault of desertion. This, it is submitted, is in accordance with the jurisprudential notion of the use of the concept of desertion at common law, and further, is the proper manner in which the concept should be used.

Turning now to the Canadian Divorce Act it is immediately apparent that there is a great difference in the use of the concept in this Act from the traditional manner in which it is used in the provincial statute.

The Canadian Divorce Act[7] is based jurisprudentially on two views of the circumstances in which the matrimonial relief of divorce may be sought to terminate a lawful marriage. The first is the traditional 'fault' theory. Where one party, the so-called 'guilty' spouse has committed a matrimonial fault such as cruelty or adultery this entitles the other party, the 'innocent' spouse to such relief for reason of the fault. The second is the somewhat more modern view of a 'break-down' of marriage due to any number of causes. Where the marriage has in fact broken-down, it is undesirable for society and the parties concerned that the empty legal shell should continue; hence either spouse may seek to formally terminate the sham by seeking a decree of divorce.

The Divorce Act provides by Section 3 that the matrimonial faults upon which a petition may be brought by the 'innocent' spouse are, specifically, four only: viz., adultery, bigamy, unnatural sexual acts and cruelty. The draftsmen of the Act were at pains to carefully exclude the traditional English common-law[8] ground of desertion from this section. Section 4 provides for divorce on the basis of the break-down theory. The fact that the marriage has broken-down may be shown or inferred from the fact that the parties are living separate and apart for any one of a number of reasons. The parties must have been living separate and apart

6. R.S.M. 1954 ch. 35.
7. 16 Eliz. II. 1968 S.C. Ch. 24.
8. The term 'common-law' is used here in contrast with non-English 'civil-law'. It includes both statutes and case-law of England and other 'common-law' jurisdictions.

on the date when the divorce petition is filed. The length of time for which they should have been living separate and apart prior to the date of filing varies and depends on the cause underlying the separation, such as non-consummation, gross addiction to alcohol, etc., which are stated in sub-sections (1) (a)-(e) of Section 4.

Section 4(1) (e) (i) provides that the petitioner may file a divorce petition for breakdown of marriage which is evidenced by the fact that the spouses have lived separate and apart for three years prior to the date of filing. The cause underlying the fact that the spouses are living separate and apart is any cause other than the traditional fault of desertion.

If however the cause underlying the fact of living separate and apart is desertion then the consequences are as follows:

Under 4(1) (e) (ii) if the petitioner is the 'guilty' spouse, the deserter, he must wait for five years and live separate and apart for five years before filing the petition for divorce based on the fact that the marriage has broken down.

Under 4(1) (e) (i) if the petitioner is the 'innocent' spouse he may file the petition after having lived separate and apart for only three years. He does not need to wait a full five years in order to show that his marriage has broken down.

The query which is thus raised is: When is the concept of desertion used in this section? It is submitted that the only occasion on which this concept becomes relevant is in the three-five year period contemplated between Sections 4(1) (e) (i) and (ii). This may be illustrated by the following examples.

> (1) Suppose wife and husband separate on 1st January, 1970, and thereafter live separate and apart. Suppose the underlying cause of separation is some reason other than desertion. At the end of three years either the wife or husband may file a petition for divorce in January, 1973, under Section 4(1) (e) (i). Neither wife nor husband may file a petition earlier than three years under Section 4(1) (e) (i).
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> (2) Now suppose on the above facts that the underlying cause of separation is desertion. Suppose the wife is the so-called 'innocent' or deserted spouse and the husband is the so-called 'guilty' spouse or deserter. Under Section 4(1) (e) (i) at the end of three years only the wife may file a petition for divorce in January, 1973. The husband is debarred or estopped from doing so under 4(1) (e) (ii). The effect of 4(1) (e) (ii) is to estop or debar the husband, the 'guilty' spouse or deserter from filing a petition during the two years between 4(1) (e) (i) and 4(1) (e) (ii).
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> (3) Under 4(1) (e) (ii) at the end of five years, the husband may file a petition in January, 1975. However, there is nothing to prevent the wife from filing a petition more than three years after being deserted. Three years is merely a minimum waiting period and there is no maximum period stipulated at the end of which she would be estopped by limitation from filing a petition. Hence, at the end of five years either wife or husband may file a petition.

It is submitted that the position as regards a divorce petition filed on the

basis of a break-down of marriage where the parties are living separate and apart, and the cause of their living separate and apart involves the concept of desertion, is as follows:

> Prior to three years from date of desertion:
> Neither spouse may file a petition.
> Between three and five years from date of desertion:
> Only the 'innocent' or deserted spouse may file a petition.
> After five years from date of desertion:
> Either spouse may file a petition.

It may be seen thus that the issue of desertion is irrelevant before three years or after five years from the date from which time begins to flow for the purpose of calculating the period during which the parties have lived separate and apart. It is unnecessary and irrelevant for both court and counsel even to raise the issue of desertion in a situation where the petition is filed after five years.

The use of the concept of desertion is very strictly confined in the Canadian Divorce Act. It is of use only in the three-five year period between Section 4(1) (e) (i) and (ii), and even there only to a limited extent. The extent to which it may be used is, it is submitted, as follows:

> In a petition based on marriage breakdown under Section 4 where the spouses have lived separate and apart for three and one-half years, which involves desertion as the cause of the spouses living separate and apart, suppose the 'wife' is the deserted spouse and the 'husband' is the deserter.
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> (1) Wife may petition for divorce on the basis of having lived separate and apart for at least three years. Husband may wish to defend the petition but husband is estopped from defending it by raising his own desertion. Wife would need to prove that the cause of the parties living separate and apart is desertion, and that the husband is the deserter.
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> (2) Husband (the deserter) may petition for divorce on the basis of having lived separate and apart for at least three years. Suppose the wife (the deserted spouse) wishes to defend the petition. She may raise the defence of desertion and allege that husband is barred or estopped by the fact that he is the deserter, from bringing the petition earlier than five years.

The importance of the concept of desertion in this Act is that it is not treated as a ground for divorce either on the basis of the fault theory or the marriage break-down theory. Neither spouse may seek a divorce based on the ground of desertion. The concept of desertion is used in this Act merely as a defence or a bar to prevent a deserter from filing a petition earlier than five years.

In fact situation (2) above, it is submitted that if the wife wishes to defend the petition and prevent the husband from continuing with the proceedings it would be necessary for her to prove that desertion exists; viz., that the common-law requirements for the concept of desertion are fulfilled and that she is the deserted spouse. It is not necessary for her to prove that the defences or bars to the concept of desertion are absent.

Further, suppose now that husband (the deserter) wishes to refute the defence raised by wife to his petition for divorce, viz., that desertion exists and that he is the deserter.

The question then is how may he refute this? It is submitted that he may refute it by raising any of the common-law defences or bars to the concept of desertion (1-5 enumerated above) which wipe out the concept. If desertion is raised as a defence it can be countered in the reply to the defence by a plea that the desertion which is alleged has in fact been wiped out (through any one of the five defences) and hence that there is in fact no desertion on the date of filing the petition and hence that the petitioner is not a deserter; and hence that he may bring his petition within the three-five year period.

How may this best be done? The most common defence to the fault of desertion which wipes it out is the existence of a separation deed or agreement. If it can be proved that a valid separation deed exists pursuant to which the parties have agreed to live separate and apart, or under which the respondent has sought some benefit such as maintenance, then obviously the allegation of desertion cannot be upheld. Thus, if husband (the alleged deserter) can prove that a separation deed exists pursuant to which husband and wife lived separate and apart, wife's attempt to block husband's petition in the three-five year period must fail, since husband can prove that he is not a deserter on the date of filing the petition.

It is submitted therefore that the use of the concept of desertion is very limited in the Divorce Act.

First, the concept is only of use in the three-five year period between section 4(1) (e) (i) and (ii). Secondly, when it is raised in this period, it is further limited in its use in that it can only be raised as a defence or bar by the respondent to prevent the petitioner from filing the petition earlier than five years; and even so, this bar or defence may be rebutted by proving that desertion is wiped out as of the date of filing through the existence of a separation deed or by raising some other common-law defence to the fault of desertion.

Thirdly, it may be of use in a negative manner under Section 4(1) (e) (i) in that the petitioner would need to prove that if the cause of the parties living separate and apart is desertion, then the petitioner is not the deserter.

The limited use of this concept in the Divorce Act and the comparative ease with which counsel may rebut its application leads to the suspicion that the use of this term in the context of Section 4 of the Act may be another illustration of sloppy draftsmanship. Counsel advising a client who has been living separate and apart for two years and who is the deserter would properly indicate that a consent agreement referring to the date of original separation in which the client and spouse expressed a willingness to continue permanently the separation which commenced two years ago, should be entered into. Once such an agreement providing for permanent

separation is entered into it wipes out desertion. Counsel may then properly bring a petition for such a client after a further waiting period of only one instead of three years under Section 4(1) (e) (i); and the bar of collusion under Section 9 could not properly be raised in such a case by the court, since under Section 4(1) (e) (i) the intention to live separate and apart needs to be shown, and is best shown by the existence of a separation agreement.

The purpose of this exposition is not merely to indicate the limited use of the concept of desertion in the Divorce Act 1968, but also to reveal the dangers inherent in sloppy draftsmanship. Presumably the draftsmen did not intend that the concept of desertion should be of such limited use in this Act. The danger arises in borrowing a term of art which is encrusted by legal connotation in another common-law jurisdiction and using it without sufficient thought of the consequences of such borrowing. The term 'desertion' is a term of art which is rooted in the fault theory of divorce. Only the 'innocent' spouse has a right to seek relief on the ground of the matrimonial fault of desertion — never the guilty spouse. This traditional concept has been preserved in other common-law jurisdictions such as Australia[9] and India,[10] and even in the United Kingdom Divorce Reform Act 1969[11] which is based on the marriage breakdown theory. To wrench this concept out of context and twist it in the manner done in Section 4 of the Divorce Act by the draftsmen is not only harmful but also dangerous. It is harmful because it does violence to the concept. The draftsmen, in Section 4(1) (e), have not treated desertion as a ground of divorce (as have the draftsmen of the United Kingdom Divorce Reform Act 1969, the Australian Matrimonial Causes Act 1959-66, the Indian Special Marriage and Divorce Act, and the Parsi Marriage and Divorce Act). The draftsmen here have merely used the concept as a bar to bringing a petition before five years of living separate and apart are complete. In so doing they have wrenched and distorted the established use of the concept. It is dangerous because terms of art such as desertion have a fixed legal meaning in common-law which is well-settled and known throughout the common-law countries. If such a term is used the legal mind is apt to refer by habit to precedent in other common-law countries. Where such a term is used but is wrenched out of context and used in a different manner from the established manner without a clear indication of the change then there is a grave risk that it will be misunderstood or abused in interpretation with the consequent risk of a miscarriage of justice.[12]

It is submitted that the draftsmen of this section did not perhaps intend

9. (Australian Federal) Matrimonial Causes Act 1959-66 Section 28(b).
10. Special Marriage Act XL III of 1954 (India) Section 27.
Parsi Marriage and Divorce Act III of 1936 (India).
11. Divorce Reform Act 1969 (United Kingdom).
12. See *Seminuk* v. *Seminuk* (1969) 68 W.W.R. 249.

to make use of the concept of desertion at all. Their intention was merely to provide a longer waiting period before a petition could be filed in a situation where the cause of the parties living separate and apart was the fault of the petitioner. This intention could have been given effect to without referring to or using the term 'desertion' at all. If this technique of clarity in draftsmanship were followed, much of the confusion surrounding Section 4(1) (e) would have been obviated. It is suggested that the intention of the draftsmen could have been given effect to by using terminology such as the following instead of the present Section 4(1) (e).

> Section 4A. "In addition to any other grounds provided by this Act and subject to Section 5 a petition by a party to a marriage for a decree of divorce may be based on the following grounds:
>
> (1) that the parties have been living separate and apart for a period of three years and such living separate and apart is not due to the conduct of the petitioner.
>
> (2) that the parties have been living separate and apart for a period of five years and such living separate and apart is due to the conduct of the petitioner."

It is submitted that such language where the term 'desertion' is not used both removes the difficulties caused by the use of such a term of art in an incorrect manner, and gives effect to the intention of the draftsmen.

If the draftsmen also intended that desertion should be included in the Divorce Act as a ground for divorce it is submitted that the proper way and the proper place in which to do so is in Section 3, the fault theory section of the statute, by adding another subsection as follows:

> 3(e). "has without just cause or lawful excuse deserted the petitioner for a period of not less than two years."

In conclusion it is submitted that consistency in legislative draftsmanship is not only highly desirable but of vital importance in order to conduce both clarity in the law and prevent the occurrence of a miscarriage of justice.

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