

# “What is to be Done for Failed Marriages?” The Supreme Court and the Recovery of Jurisdiction over Marital Causes in Newfoundland in 1948

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THE ABSENCE OF EITHER A COMMON LAW or statutory provision for the separation or divorce of couples who wished to end their marriages is a notable feature of Newfoundland's legal history. For a century and a half as British colony and dominion (1825-1949), and for 20 years as a Canadian province prior to the first federal Divorce Act of 1968,<sup>1</sup> couples resident in Newfoundland could not legally divorce locally. If they did so informally, by simply ending the union, they denied themselves legal protections, safeguards and obligations which legal precedent or statute might have guaranteed. In addition, they left themselves open to charges of desertion, failure to provide support for a spouse, children or parent, and suits for the restitution of conjugal rights and the custody of children. During World War Two, lawyers and social workers employed by the Department of Health and Welfare drew up private contracts between spouses who wished to live apart.<sup>2</sup> But the government did not acknowledge that such separations were legal, and they were ultimately enforceable only by an aggrieved party bringing a civil action for breach of contract. Whether the courts would have recognized the validity of such separation agreements — there would have been no question of a legal divorce — before 1948 is an open question, as there are no reported cases in which private parties resorted to the courts on the basis of a private contract.<sup>3</sup> Had they done so, the courts would have had to rule on several contentious issues. Did the parties have legal standing? What were their respective rights? Were those of dependent children or parents affected? Had the contracts been truly consensual? Had the parties been

fully informed of their respective rights? The inequality of bargaining power between government officials or lawyers on the one hand, and penurious clients of modest formal education on the other, might raise questions. Were the contracts proposed by social workers intent on keeping marriages together rather than facilitating a formal separation? Private contracts offered a shaky basis for amicable permanent arrangements among incompatible couples.

Most Newfoundlanders before Confederation lived outside St. John's and would have had no local access to legal advice. Transportation to neighbouring or larger outports was by sea, a risky endeavour at the best of times. Those living within walking distance — sometimes a matter of several days — had an alternative, but the road system was barely developed outside St. John's, and the few miles which linked the capital to Conception Bay. In any case, before World War Two, women left behind at home were more likely than their menfolk to chafe at marriage ties. They faced isolation, household tasks which regularly filled a 16-hour day, and responsibility for the household economy while their men were away; but in addition society and the courts condoned levels of domestic violence we would condemn today as unacceptable. In this, Newfoundland was probably comparable to other jurisdictions at the time, but violence must have been a consideration for those seeking relief from oppressive marriages.

There were, of course, traditional ways of escaping the marriage bond, but these too seemed to favour the male partner. One might desert; one might contract a second and bigamous marriage; colluding couples might resort to the ancient custom (documented in Scotland as early as the eleventh century, and in England as late as the 1970s) of wife sale, in which a willing lover might compensate a husband for the loss and transfer of his wife. The long-standing convention of "besom" permitted unhappy couples to reverse their marriage ceremony by jumping backward over a broom of branches in the doorway to the marital residence. A more drastic solution lay in *ancien régime* France's use of the royal *lettre de cachet* to place erring spouses in state confinement. Even more drastic and permanent were suicide and spousal murder. Finally and desperately, women might pray to St. Wilgefortis, the patron saint of women who wished to rid themselves of their husbands.<sup>4</sup> None of these alternatives to state- or church-sanctioned separation or divorce have been documented for Newfoundland. On the other hand, their effectiveness might rest on their not becoming public knowledge.

For all sorts of reasons, divorce was simply not a practical option for most Newfoundlanders until 1968. Nor was divorce a topic of public discussion or debate. Newfoundlanders appear to have held attitudes similar to those throughout North America, signalled by what Lynne Carol Halem calls a "doctrine of moral pathology" whose "essence ... is the fear that divorce, by dissolving the family unit, jeopardizes values essential to the well-being of individuals and society.... Beyond the concept of marital union, the very preservation of society was believed to hinge upon the indissoluble marriage." James Snell argues that this response lay at the

heart of the Canadian divorce environment, endorsed by church, state and public opinion: "Most Canadians broadly accepted a restrictive divorce environment because it sustained familial values and gender-based attitudes. The maintenance of the existing divorce environment offered one way to enforce official standards of morality, family structure, and sexual conduct."<sup>5</sup>

These commentators examine the phenomenon of divorce and are interested in why the institution, once in place, failed to develop faster than it did. At this level they operate, in two respects, at a level of discourse far beyond that in Newfoundland. First, in Newfoundland, almost uniquely in North America, there was, as late as the mid-twentieth century, no local access to divorce. This was in sharp contrast to North American norms and to those of neighbouring Canadian provinces. Nova Scotia permitted divorce in 1756, a law which applied in what would become New Brunswick and Prince Edward Island until they became separate entities. New Brunswick established its own jurisdiction over divorce in 1785, and Prince Edward Island did so in law from 1833 to 1835, although a court was instituted only in 1945.<sup>6</sup> The reasons for their separate development lie beyond this paper, but the fact that they were settled by immigrants from the Thirteen Colonies is probably a key factor. One might say the same for Ontario, which did not establish divorce courts until 1930. Québec, after a flirtation with parliamentary divorce between 1839 and 1867, was content to stand aside thereafter and let petitioning couples resort to the federal parliament for relief. So Newfoundland's position, assessed in a Canadian context, was not entirely anomalous. It was not the only British North American jurisdiction which failed to follow England down the road to the Matrimonial Causes Act of 1857, which permitted judicial divorce.

Newfoundland's reluctance, shared with Ontario and Québec, is further emphasized when contrasted with the United States. Massachusetts was not typical, but it permitted civil marriage in 1621, a ceremony from which priests and ministers were specifically excluded, and judicially issued absolute divorce in 1629.<sup>7</sup> At least seven states adopted divorce courts before 1800, and another eight between 1803 and 1841. South Carolina appears to have been an exception, the only state of the Confederacy to stand aside, only briefly adopting a divorce regime for six years after 1872.<sup>8</sup> Long-standing and close fishery-related commercial links between Newfoundland and the "Boston States," which included a considerable degree of out-migration from Newfoundland, evidently did not translate into changed local attitudes to the family.

In a second respect the discourse concerning failed marriages in Newfoundland differed markedly from North American norms. For reasons to be discussed in this paper, the debate went far beyond the question of divorce. Newfoundlanders believed that they had failed even to adopt the threshold legal concept of court-sanctioned separation. It is this feature of the colony's legal development which is entirely anomalous and worthy of examination. Had the common law concept of legal separation — *divorce a mensa et thoro*, separation from bread and

board — never been received into Newfoundland? Had it been received, but not recognized? Was it deemed not needed, or perhaps undesirable? Was it extraneous to local needs?

For whatever reason, it was not a part of the legal landscape, in contrast to virtually every other North American and West European jurisdiction. Perhaps, in the early years from the seventeenth to the early nineteenth centuries, informal private resolutions such as those noted above, had sufficed effectively, if illegally. But the increasing formalization of state structures and institutions in the nineteenth century, an early feature of which was the emergence of a supreme court of judicature in 1791 and an increasing official emphasis on the regulation of marriage, might have raised the issue of what to do about failed marriages. But there is no sign that it did, from judges, legislature, bar, church or press. The situation changed only in 1948, when the Newfoundland Supreme Court decided after a delay of 156 years that it was competent to grant judicial separations.<sup>9</sup> This ground-breaking case, *Hounsell*, was unreported at the time. Page proofs for the 1948 *Newfoundland Law Reports*, the final volume before Confederation, were destroyed in a fire at the King's Printer. Contemporaneously, the case was ignored by the editors of the *Maritime Provinces Reports*. It was eventually published in the *Newfoundland and P.E.I. Reports* in 1970, probably in response to the first Divorce Act. The 1948 volume of the *Newfoundland Law Reports*, including *Hounsell*, finally appeared in 1997, at the initiative of The Law Society of Newfoundland, reproduced from a hand-corrected proof of the volume which was discovered in the library of the chief justice of the Trial Division of the Supreme Court. This paper is concerned with the background, context and possible explanations for the home-grown, possibly unique, legal experience which led up to the *Hounsell* case. Why, for so long, was legal finality denied couples whose relationship had irretrievably soured? What reasons can we tease out to help account for this anomalous judicial experience?

The only other jurisdiction which approximated Newfoundland in ignoring or banning local divorce for so long was Québec. Before World War Two, opinion there seems to have been as resistant to the idea of state-facilitated separation or divorce as it was in Newfoundland. However, in Québec significant change accompanied the Quiet Revolution of the 1960s, and the 1968 federal Divorce Act appears to have been embraced enthusiastically. Were there common historical factors which might explain this common resistance to divorce? Each was somewhat isolated from the mainstream of social and cultural developments in Canada until well after World War Two. In both, conservative religious denominations, especially the Roman Catholic Church, were influential. Both had denominational education systems which the churches were determined to safeguard.<sup>10</sup>

In Newfoundland, the churches had succeeded, before the grant of representative government in 1832, in pressuring the state to regularize the institution of marriage by making it a church monopoly.<sup>11</sup> They exercised a similar monopoly over annulment, the first local case (*Foley*) being brought to court in 1954 when, as a re-

sult of Confederation, that method of legally voiding marriages fell to the provincial supreme court. The churches also succeeded in controlling an education system which had been proposed in 1836 and initially operated along secular lines, and they policed a system of denominational power-sharing that emerged in the 1860s. Integrated into the state, the churches generally (though it is more often claimed than documented) are said to have been opposed, root-and-branch, to divorce, and Newfoundlanders acquiesced, leaving to the churches the legal regulation of marriage and the definition of when it began and when it ended.<sup>12</sup>

A survey of the entire run of reported supreme court cases between 1829 and *Hounsell* in 1948, and of published secondary sources on Newfoundland politics and law, offers not a single litigant, petitioner or lawyer, not one reform-minded member of the House of Assembly, Legislative or Executive Council, articulating a request for a judicial separation or a divorce before either the legislature or the courts.<sup>13</sup>

An exhaustive inquiry into the reasons for this silence would lead into unresearched areas of nineteenth-century Newfoundland history. As hypotheses, however, we offer the following. First, historic settlement patterns which had been marked by ethnicity, and with English or Irish ethnicity often went religion — Protestantism, especially Anglicanism and Methodism, and Roman Catholicism — which shaped the lives of many people in isolated outports where ministers and priests wielded considerable influence, backed by the denominational school system. Second, a lack of immigration after 1820 produced a largely static population, leavened by natural increase and occasional, often seasonal, out-migration. Third, a conservative political culture articulated from St. John's, where, after 1832, most politicians, among them prominent lawyers, had been educated and where they resided. They visited their districts only occasionally. After the achievement of responsible government in 1855 and renewed eruptions of factional sectarianism, the elites had fashioned a political compromise which shared out the spoils of office and patronage.<sup>14</sup> Part of this system was the entrenchment of denominational rights in and control of the educational system. Secular and state seem to have been restricted to funding. We are only beginning to appreciate the impact of a denominational, decentralized, underfunded system, staffed by dedicated but often untrained and transient teachers, in which the formal education of most students ended with the primary grades. Finally the economy, though supplemented late in the nineteenth century by jobs in land-based industries like mining and forestry, was based mainly on the fishery which was chancy, demanding, and poorly paid. Most of the population was preoccupied by the challenge of deriving a subsistence living from sea and land. For most, life was hard and uncertain. Politics and law remained the fiefs of a privileged elite in St. John's.

Prior to the emergence and consolidation of governmental and religious institutions in the early nineteenth century, there is some evidence of greater flexibility in official attitudes towards marital causes. An informal pragmatism may have held

sway in isolated communities, where magistrates after 1729 crafted effective local solutions to contentious family matters. Despite the restrictions of the English common law at home, married women brought suits in their own name and on their own behalf to magistrate's court, to the court of sessions and, before their dissolution in 1824, to (the governor's) surrogate's court. Paternity suits brought by single women on behalf of their children made single men, married men, and deserting husbands responsible for the costs of laying in and the maintenance of children. Less often, financial support for the mother might be mandated.<sup>15</sup>

On point is the *Hanahan* case from 1791. On 31 January, Margaret Hanahan deposed before the surrogate court in Ferryland that the previous evening she had returned home to the sound of her youngest child crying in bed "as if it were stifling." She questioned her husband Thomas, who replied that "he had covered it over and it would soon be gone." The plaintiff exclaimed, "Would you murder your child?" and found the child had almost suffocated. According to the deponent, her husband "then took the oldest child and swore it should have no supper and otherwise ill-used it." Some hours later the husband beat the child with a bough in order to oblige him to make water, and threatened the deponent that if she interfered, "he would take a hatchet or anything he could find and ill use her." Nothing more is said to have happened that night. The court issued Hanahan with a summons, returnable immediately, but made no temporary restraining order.

The next day the defendant was in court. Unable to mount a satisfactory defence, and confronted with evidence of marks of violence upon both wife and children, he was sentenced to 39 lashes on the bare back. Until he could find security for a peace bond, he was committed to jail. This stage of the proceedings concludes with the laconic note: "Plaintiff wished to be separated from defendant — granted." The husband remained in jail until 11 April when John Pritchett, planter, was bound for him. Immediately Hanahan was ordered by the court "to quit the district and never to return except by the approbation of the magistrates." Presumably he obeyed, for he disappears from the judicial record. The needs of wife, children and community were met by a separation *de iure*, which in this case probably amounted to a divorce *de facto*, once Hanahan had left the community.<sup>16</sup> The record is silent on how Mrs. Hanahan continued to support herself and her children. Perhaps she remarried. In similar cases, local communities voted monies in support of local inhabitants, although local voters and decision makers were always conscious of the danger of inhabitants becoming a public charge. (The courts pursued employers in order to garnishee the wages of defaulting debtors, and granted funds for the repatriation of the elderly indigent back home, usually to southern Ireland — a reverse form of transportation.)<sup>17</sup> In the same area, that of the southern Avalon Peninsula, individually crafted local solutions to marital problems continued through the middle of the nineteenth century. Willeen Keough's research into the court records has turned up six other separation cases in the period from 1750 to 1860. In all but one, wives initiated the proceedings. They were granted separations, custody of their

children and child support.<sup>18</sup> Gradually in the nineteenth century, old informalities surrounding marital relationships gave way to stricter regulation by the churches; by the twentieth century, the old informal ways were probably long forgotten.

The elites appear to have decided that once entered on, marriage was permanent. But did the colony in fact have the jurisdiction to deal with marital causes, if the government had been so inclined, even in the absence of local legislation? On the negative side are the *Instructions* issued to Governor Thomas Cochrane on the eve of representative government in 1832:

20. It is Our further will and pleasure that you do not ... give your assent to any Bill ... that may have been or shall hereafter be passed by the Council and Assembly of the Island under your government for ... the divorce of persons joined together in holy matrimony.

On its face, this seems a clear and absolute bar. Newfoundland was to follow the English precedent.<sup>19</sup> However, the contemporaneous *Royal Instructions* of the time issued to Cochrane noted that of the three relevant British statutes which continued in force, marriage, judicature, and fisheries,

the Marriage and Administration of Justice Acts, being matters exclusively of local concern, will remain in force until the local Legislature shall see fit to repeal or to alter them. If the Council and Assembly should think that any change is requisite on either of these topics, the remedy will therefore be in their own hands.<sup>20</sup>

Accordingly, the Newfoundland legislature after 1832 had the power to regulate marriage. But did that extend to un-marriage as well? The *Encyclopedia of Newfoundland and Labrador* claims that it did,<sup>21</sup> but marriage is marriage and divorce is divorce, and in light of the continuing prohibition of divorce in England until 1857, the constitutional ban must have continued until that date. After 1857 Newfoundland was surely free to adopt or adapt the English Divorce and Matrimonial Causes Act of that year, just as it was with regard to three English matrimonial property acts between 1876 and 1895.<sup>22</sup> It did not do so.

No doubt this decision was political, and taken on a reading of constituents' and churches' views, which most politicians shared. Just as there was virtually no debate over adopting almost in their entirety the English matrimonial property acts, so there appears to have been none over the possibility of adopting the English divorce legislation. Nevertheless, a diligent lawyer might have crafted several grounds upon which to bring an action. First in time were the early imperial statutes regulating Newfoundland's judicature. That of 1791 established a supreme court of civil jurisdiction for one year. When it was renewed and extended the following year, notably to include a criminal jurisdiction, it also assumed a jurisdiction in probate, a power exercised by the English ecclesiastical courts. The court was made

permanent by statute in 1809, and the first omnibus act of judicature in 1824 affirmed these jurisdictions. In probate's wake jurisdiction over judicial separation might follow.<sup>23</sup>

Another source upon which to argue an ecclesiastical jurisdiction is Governor Cochrane's *Instructions* of 1832, mentioned above. These entrenched a number of ecclesiastical concerns. The Bishop of Nova Scotia was to exercise powers of ecclesiastical appointment and supervision in Newfoundland. English marriage laws would obtain; the Book of Common Prayer would prevail; the rites of the Church of England were transferred; glebes for the support of Church of England priests might be provided; and "all laws already made against blasphemy, profaneness, adultery, fornication, polygamy, incest, profanation of the Lord's Day, swearing and drunkenness [are] to be rigorously executed."<sup>24</sup> Evidently, a considerable portion of English ecclesiastical law was received into Newfoundland. The question of how much would rest, as it had since Queen Elizabeth I's patent to Sir Humphrey Gilbert in 1578, on the test of local needs and relevance. Gilbert was to apply the law "as neere as conveniently may [be] agreeable to the forms of the lawes and policie of England."<sup>25</sup>

The case for the reception of that portion of English ecclesiastical law that was appropriate to Newfoundland's needs is strengthened by *The Royal Charter* of 1825 which granted colonial status to Newfoundland. The Supreme Court was mandated to admit qualified personnel from Great Britain and Ireland "to act as well in the character of barristers and advocates as of proctors, attorneys and solicitors in the supreme court." Lawyers were styled advocates when practising in admiralty, and proctors when pleading in the ecclesiastical courts. The Charter also reaffirmed the jurisdiction in probate of the Supreme Court, empowering it to issue letters of probate and of administration "in cases allowed by the law, as the same is and may be now used in the diocese of London."<sup>26</sup>

Church rites initiated marriage, and death terminated it. What of the intermediate status of the separated spouse? Judicial separation had been a feature of English ecclesiastical law since at least 1603.<sup>27</sup> A generous reading of the already wide ecclesiastical jurisdiction noted above would support the contention that judicial separation had been an early, if unexploited, power of the Supreme Court at least as far back as 1792, complementing the operation of the common law of settled cases such as that operative in *Hanahan*. Statutes in 1809 and 1824 had reaffirmed this power and strengthened it. Cochrane's *Instructions* offered examples of its operation. From what we know to date, the legislature failed to act on matrimonial matters before 1876, so the powers and instructions inherited in 1832 remained in force.

In the absence of clear statutory definition and with no one willing to test the jurisdictional waters, ambivalence — sometimes extending to disinterest and helplessness — seemed to prevail. As Minister of Justice in 1916, Richard Squires was asked where the law and the government stood on divorce. A Salvation Army offi-



cer was concerned about the marital relationship of one of his female soldiers. The woman had been married only a few years but serious troubles had developed. Her husband had been a fellow officer, but shortly after the marriage he had joined another religious denomination and was now attempting to prohibit his wife from practising her faith. The officer did not specify how the husband might have mistreated his wife, but he wondered if the husband's behaviour was within the limits of the law. He asked Squires to inform him about the woman's rights and options.

Squires was blunt. He wrote that "the marital relationship is an exceedingly difficult one in which to interfere." While a woman who felt herself abused could go before a magistrate, the husband might become more vindictive and make her home life very unpleasant. Religious differences, he wrote, were especially difficult for a couple to work through. He was sympathetic to the vulnerability and economic dependence of women in bad marriages, but although "you will say that it is unreasonable and unjust ... when a woman marries a man she has to put up with what she is getting ... [and] it is only under very exceptional circumstances which involve cruelty, lack of support or abnormally unreasonable behaviour, that the courts will interfere as between husband and wife." In effect, the law was inadequate to protect wives, and the mistreated woman would do well to accept the situation.<sup>28</sup>

Occasional correspondence has survived regarding a married woman's ability to withdraw from a union in the event of abuse or misconduct by her husband, but most women chose to stay put, whether through financial necessity, concern for children, religious beliefs, fear of social ostracism or reluctance to go to court. Those who found themselves in impossible situations may have preferred to avoid publicity and the legal system by informally separating. While "separated" had no status in law, that designation does appear in some census returns. Charles and his wife Lily were recorded in 1921 as a married couple residing with their children on the south side of Brigus, Conception Bay. The 1935 census found the couple living apart and, remarkably, lists each as divorced. Were these categories the result of self-definition or an enthusiastic enumerator? We do not know, but they were both misleading. When Charles fell to his death from a bridge two years later, his step-brother John Gushue testified at the inquest that Charles had lived with him for the previous 11 years. He went on to say that Charles had been married during that time but was living apart from his family. The home that Charles and Lily had shared had belonged to her prior to their marriage and she had continued to live there.

Ten years later another "divorced" woman, Evelyn, was living in the community. She reappeared in the government records in 1949 when she was seeking a pension after years of working as a domestic servant at Government House. At that time she had a dependent daughter and was described as separated from her husband.<sup>29</sup>

Without legal recourse, couples separated informally. This remedy may have met their needs in a timely and inexpensive manner, and the courts were available to order and enforce maintenance payments for dependent children, though less often for single dependent wives, although legislation permitted this for wives who were morally blameless.<sup>30</sup> While the mutual convenience of the parties may have been served by consensually living apart, they were unable legally to remarry. On the other hand, they may have been unwilling to do so, and rural Newfoundland is popularly said to have been tolerant of common law “marriages” and of the birth of “merrybegot” children.

The wealthy had other options. One was to obtain a foreign divorce, with the future opportunity to remarry. Researching the incidence of divorce among Newfoundland residents in 1944, the Commission of Government recorded two cases. Both involved members of prominent and comfortably-off families. The first, from 1936, involved a man from a prominent family who obtained a divorce on the grounds of infidelity. His wife had left him for another man with whom she moved to South Africa. Several years later the husband went there and obtained a divorce. The wife and her lover later married. In the second case a man had married an American woman. After a year or two, she returned to the United States, citing differences of temperament. She obtained a divorce there, and her former husband later married again. These instances indicate that during the Commission years at any rate, the government would not itself allow divorce, but might recognize as valid divorces granted in foreign jurisdictions. It was easier to turn a blind eye when the parties were unlikely to return to Newfoundland or seek to reconcile. But this was not the general rule. Other evidence shows that the Commission of Government debated whether couples divorcing elsewhere would be bigamous if they remarried and returned to Newfoundland.<sup>31</sup>

The Commission’s investigation was prompted by requests from the community for divorce legislation. In March 1940, two well-connected women of the St. John’s elite, each of whom lived on Rennie’s Mill Road, inquired why Newfoundland was without the power legally to separate unhappy couples and/or allow them to divorce. The first correspondent, Mrs. X, wife of a disbarred lawyer, emphasized, disingenuously it seems, that her request for information was not predicated upon a wish for a divorce; but she wanted to know why Newfoundlanders were forced to stay in unhappy marriages. She had consulted the Dominions Secretary in London who had informed her, *tout court*, that a divorce law would be impractical in Newfoundland. She was unable to comprehend why, and wrote the governor. To paraphrase her question, “What was to be done for failed marriages?” For some couples, divorce would be an act of mercy. Why ruin their lives by keeping them joined to those they no longer cared for? She asked if the Commission’s unwillingness to move with the times was due to the influence of the Roman Catholic Church. She denounced as hypocritical that denomination’s willingness to grant annulments, allowing its adherents to remarry, while seeming to prohibit the rest of the

population from doing the same. Forcing Newfoundlanders to seek a foreign divorce was “a disgrace to the country.” In a second letter, she attacked the government for failing to educate Newfoundlanders, most of whom did not know what the word divorce meant. The mass of the people were naive and dependent, and her sharp pen attacked unnamed medical, legal and religious leaders for not doing more to force the issue. Mrs. X was sure that they were aware of the hardship caused by the absence of divorce legislation, yet they remained silent. She warned that until steps were taken to guide and teach the people, Newfoundland would remain a backward island, incapable of governing itself.

Joining this campaign was her neighbour Mrs. Y. She was not as lofty in her ideals or as personally disinterested as Mrs. X claimed to be. Her appeal sprang from her misery as a wife, “placed in a very difficult position which only a divorce law can help.” The Commissioners knew that her husband had committed adultery. While they were sympathetic to her plight, they argued that this was not the time to tackle the issue of divorce. The Commission responded to her that it was prohibited from passing such legislation without having first obtained consent from London. Accordingly, it declined to act. In the end, having approached London and been referred to St. John’s only to be directed back to London, the petitioner was no further ahead. Her frustration must have been considerable.<sup>32</sup>

Mrs. X and Mrs. Y presented their cases at the same time. They appear to have been well educated, and both lived in a privileged section of town, and they may have collaborated. They moved in the same social circles as the governor and the Commissioners, but their pleas were ignored. However, they proved to be pioneers, as within a few years the Commission was subjected to a renewed flurry of complaints and requests. The plight of these new petitioners was taken more seriously and found more worthy of a sympathetic hearing. Official attitudes had not changed visibly, but World War Two had such an impact on Newfoundlanders at home and abroad that traditional assumptions had to be reassessed.

By 1942 more than 10,000 Newfoundland men and women were serving overseas. Foreign servicemen, British, American and Canadian, were posted to military bases hurriedly constructed in St. John’s, Argentia, Stephenville, Goose Bay and elsewhere.<sup>33</sup> The social impact of these complementary developments was far-reaching. The influx of servicemen and officials triggered a construction boom, and waged labour at the bases and in St. John’s drew men and women from rural areas. The cost of living rose, but wages and free-spending servicemen fuelled a new prosperity. When the Americans opened a base in Stephenville, young women were employed in the cafeteria and as maids at the unprecedented wage of \$8.00 a week. Newfoundland men employed in the fishery, and as unskilled labourers and office clerks, were unable to compete with the exotic new arrivals. Girlfriends, sisters and wives were intrigued, sometimes smitten, by the strangers, and formal and informal unions resulted. American officials discouraged liaisons between their servicemen and local women, whom they denigrated as both uneducated and calcu-

lating, willing to employ seduction and pregnancy to get a ticket out of Newfoundland. Permission of the base commander was a precondition for marriage between American servicemen and local women. It was infrequently and reluctantly granted.<sup>34</sup> Local girls were probably more naive than conniving, and certainly not solely responsible for a steep rise in the illegitimacy rate. Many of them were inexperienced, susceptible to new adventures, and too trusting when assured that their new friend was neither married nor engaged, to say nothing of being a parent, state-side.<sup>35</sup>

However, a double standard for sociability and sexuality was firmly in place. The women in Stephenville who gave birth to illegitimate children, for instance, were forced to leave their jobs and encouraged to return to the communities from which they had come. But the clock would not be turned back. Newfoundland as a redoubt of traditional Christian morality was being transformed. Attitudes were changing, including, probably, a greater willingness, in light of the widespread incidence of disappointed and severed wartime relationships, to consider judicial separation or even divorce.

The war also had affected the marital security and status of Newfoundlanders serving overseas. The Commission faced two unwelcome scenarios. The first was the evident breakdown of the marriages of Newfoundlanders serving abroad. In 1944, a gunner in the Royal Artillery stationed in England wrote that his wife in Newfoundland had been unfaithful. Overseas since 1940, he learned in December 1943 that his wife had been living with an American serviceman and that she was pregnant. The woman wrote her husband several months later to inform him that she had given birth to twins, and desired a divorce so that she could marry the American. Her husband did not wish to stand in her way, and wrote to inquire how he might officially end his marriage.<sup>36</sup> Another request arrived from an able seaman in the Royal Navy who had also been informed of his wife's adultery. The Commission recognized that it would likely face a barrage of such requests. The war had created marital situations which would not be addressed by inaction and old denials of jurisdiction. The Commission could not shut its eyes to what was emerging as a challenge, if not a crisis.

Besides evidence of marriage breakdown, the Commission was presented with legislative initiatives in the United Kingdom over which it had no influence, and which had an impact on Newfoundlanders. A 1944 War Marriages Act enabled some Newfoundlanders serving overseas to get divorced, or made them vulnerable to divorce proceedings by their British spouses. The conditions were precise: British women who had married soldiers from the colonies might end their marriages if they chose not to relocate with their husbands when the latter returned home at the end of the war. The Commission was quickly confronted with three cases in which Newfoundlanders were involved. How was it to respond? As the English statute's main goal was to protect the interests of British women, the Commission chose to accept the act.<sup>37</sup> But it was uncertain about the legality of remarriage by Newfound-

land men who had formerly been married to the British women now freed by the act. And was there reciprocity for Newfoundland women who married overseas and wished to return home unaccompanied by their husbands? Or were they expected to stay in Britain? Clearly, the statute did not apply to British women who moved to Newfoundland and then changed their minds. Perhaps a quarter of the 800 British wives who came to Newfoundland found themselves in this unenviable situation.<sup>38</sup> By relocating they had forfeited the protection of the statute which might have given them an English divorce, and arrived in a jurisdiction which denied them both legal separation and divorce. They were in a legal limbo.

In February 1943, a Scottish woman married a Newfoundlander serving in the Royal Navy. She moved with him in August 1946 to his home town, where they lived with his mother. By November she had had enough, alleging months of bad treatment by both mother and son. When she left, she understood that she would not be eligible for alimony and also that she could not divorce her husband. But she retained a lawyer when she received a letter from her husband informing her that another woman was pregnant with his child, and advising her to seek a divorce in Britain. Her inquiry of the Commission elicited the bald reply from the acting Deputy Secretary for Justice that "there is no provision in Newfoundland for divorce, and [your client] cannot receive the relief she seeks before our courts."<sup>39</sup>

A situation which had seemed immovable was about to change, since the scale and nature of the problems experienced by war veterans and their spouses evoked a degree of official sympathy which the heartfelt pleas from pre-war Rennie's Mill Road had not. In a letter to Governor Sir Humphrey Walwyn in March 1944, Peter Clutterbuck of the Dominions Office wondered how many more war veterans would return to marriages that were over. He foresaw a significant number, and asked if they might "possibly have some influence in bringing about a modification of the attitude of the various denominations in Newfoundland towards divorce legislation?"<sup>40</sup>

Clutterbuck's inquiry reflected the received wisdom, then as now, that the churches were not only implacably opposed to divorce, but that they were the major hindrance to reform and probably the major reason for perpetuating the official veto on judicial separation and divorce. Individual prelates, priests and laymen probably remained unalterably opposed to both, but they do not appear to have voiced their concerns publicly. To what extent had the churches voiced an official policy? The Roman Catholic Church had been officially opposed and remained so in 1968 when that opposition was voiced as official policy. Roman Catholic Archbishop Roche's personal antipathy to divorce is said to have been well known, but he did not publicly express it during the post-war debates concerning Newfoundland's future.<sup>41</sup> The Pentecostal Assemblies of Newfoundland were officially opposed, and remained opposed on historical and scriptural grounds a generation later. So was the Anglican bishop, William Charles White, but he was succeeded in 1944 by Philip Selwyn Abraham. His personal views are unknown, but given that

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he was relatively young, and English born and trained, he was unlikely to take a public stand against the concept of judicial separation. It is unlikely that the Salvation Army was opposed, nor the United Church, to judge by the tolerant attitude that the latter displayed in Canada. In short, opposition to separation and divorce may not have been so firm and universal by the 1940s as it had been earlier.

Archbishop Roche refused to express an official position on either divorce or the denominational school system, but although the perpetuation of the churches' role and influence in the latter was, for him, the key element in the Confederation debate, he let others speak for him. Early in the war, *The Monitor*, a monthly publication of St. Patrick's parish in St. John's, but generally held to reflect Roche's views, featured a series of columns titled "With This Ring." It expatiated on the evils of birth control, married women's paid labour, and divorce — "the most vicious factor in a vicious circle of evil that will eventually destroy this nation." Even annulments, which the Roman Catholic Church granted infrequently and grudgingly, seemed to be frowned upon.<sup>42</sup> The Church championed the idea of marital unity, and emphasized its contribution to strengthening marriages. A letter written in 1938 by Archbishop Roche to the papal nuncio to Newfoundland and Canada conveyed this conviction. Ildebrando Antoniutti had forgotten to forward to St. John's forms reporting on the Church's ecclesiastical tribunals in matrimonial causes. Roche responded that there was no need to send the forms. Not only had there been no matrimonial cases during the year in question, there had been none during Roche's 24 years in the diocese: "Our people here have the greatest reverence for the sacrament of Marriage, and ... divorce is not permitted by the Civil Law in Newfoundland."<sup>43</sup>

Roche's antipathy to divorce may not have been shared by others, even within his own church. Indeed, as senior an official as the papal nuncio may have been among them. In 1947, J.R. Smallwood was convinced that the two issues which might derail confederation were any perceived threat to the denominational system of education, and divorce:

I was implacably determined to see that the terms and conditions of Newfoundland's union with Canada would contain absolute protection for the existing rights of the churches to public funds for the operation of their schools.... I vowed that the status quo should be maintained in the most unalterable way ... within the actual terms of union....

I was aware, too, of the Roman Catholic Church's opposition ... to ... divorce ... not only for their own people in Newfoundland, but for all people.

However, he may have miscalculated about divorce. While in Ottawa that year, he cajoled Gordon Bradley, leader of the delegation, into visiting the papal nuncio. Bradley was charmed by his reception, and the upshot was that "the Archbishop did not seem too concerned about the divorce matter — his concern was for the financ-

ing of their schools.” This was welcome news, but Smallwood consulted Prime Minister Louis St. Laurent, who agreed to include in the draft terms of union constitutional guarantees on both heads, denominational rights in education, and divorce courts only if Newfoundlanders requested them. Gordon Higgins, a prominent Roman Catholic layman and lawyer, was entrusted with drafts to present to Archbishop Roche, and Smallwood “was to deliver copies to the heads of the other religious bodies in Newfoundland and seek their approval.” In the event, Roche did not receive Higgins and offered no response to the drafts. Constitutionally, the result was the inclusion of Term 17 safeguarding denominational education. On the issue of divorce, Smallwood was surprised, but undoubtedly relieved, that “the importance of the divorce matter seemed to evaporate.”<sup>44</sup>

This did not mean that the divorce issue — a potential landmine — would not reappear. It did, briefly, in January 1948, just before the close of the National Convention. It was raised by Archelaus Northcott, an anticonfederate businessman from Lewisporte and an adherent of the United Church. The tone of Smallwood’s reply — playful and teasing, verging on ridicule — indicates that Northcott’s intervention was unwelcome.<sup>45</sup> But Smallwood used the opportunity to underline his personal abhorrence of divorce and his conviction that it would not come to Newfoundland as long as the House of Assembly opposed it.

[W]e have no divorce laws in Newfoundland. We never did, and I hope we never will.... If Newfoundland goes into confederation ... it’s ... highly unlikely that we’ll ever get a House of Assembly elected here that will pass a divorce law.... I don’t think ... any of us who should happen to be in the provincial legislature ... will ever vote to pass a divorce law.

Newfoundland under confederation would be in the same situation as Québec: divorce would be available only through the Canadian parliament. Smallwood was also careful to point out that private petitions to Ottawa were expensive — about \$1,000 to \$1,500, a figure well beyond the resources of the vast majority of Newfoundlanders.<sup>46</sup>

Two weeks later, Gordon Higgins took issue with Smallwood’s position as “a deliberate attempt to deceive the members of this Convention and possibly the people of this country,” because he had implied that divorce would be a matter for the provincial legislature to adopt and regulate. He wished to emphasize that “the parliament of Newfoundland would have no power to either set up divorce courts or to prevent them from being set up. That is a matter solely and entirely within the province of the federal government.” Smallwood’s final word came the following evening, 28 January 1948:

We have no divorce law in Newfoundland, and I hope we never shall. If we go into confederation we will take no divorce law in with us.... What about after we get in?

Will we pass a divorce law then? No, we will not. Will Canada pass a law for Newfoundland? No, sir, Canada will not.... [T]hey will set up no divorce court in Newfoundland, unless ... we ask them to do it. And that ... we are unlikely to do.... Never in all of Canada's history has the Parliament of Canada used its power to set up a divorce court in a province unless and until that province asked for it.

As a clincher, Smallwood noted the willingness of Ottawa to entrench constitutionally a ban on divorce courts in Newfoundland, should local opinion desire it. There was only one condition for Ottawa to meet: "that the heads of our Newfoundland churches, our Newfoundland denominations, ask to have it done and it will be done."<sup>47</sup> The Convention closed two days later, the confederates prevailed in the second referendum, and with the agreement of the churches, denominational rights in education were enshrined in the Terms of Union. No constitutional provision on divorce appears to have been requested or proposed.

On the eve of confederation, then, the long-standing taboo against discussing the possibility of local separation or divorce laws was still in place. Personal pleas from private parties had proved futile. The Commission of Government was reluctant to act, and the National Convention was either uninterested, or satisfied with Smallwood's assurances. Canada, should Newfoundland confederate, would not act unilaterally, and would wait for a request from the local House of Assembly, as it had done for Ontario as recently as 1930. There was no official desire to open a public debate, and when it came, two decades later, it arose from proposals to frame a federal divorce act which would broaden grounds for divorce and streamline procedures.

It is this context which makes quite remarkable the decision of Justice Brian Dunfield in *Hounsell* in October 1948 that the Newfoundland Supreme Court had been endowed with a jurisdiction over judicial separation for 156 years, without having exercised it. Nevertheless, continuity remained the order of the day. The judges of the Supreme Court — Emerson, C.J. (Chief Justice), Dunfield and Harry Winter — joined by Walsh, C.J., after Emerson's sudden death in 1949, were strongly predisposed to maintain the marriage bond. They were men of their time. The three judges of 1948 were in school before Queen Victoria died and had been called to the bar before World War One. Walsh was younger by a decade, born in 1900 and able to attend Dalhousie Law School in the 1920s as a result of holding a winning ticket in the Irish sweepstakes. All four were members of religious denominations which opposed divorce: Emerson and Walsh were Roman Catholics, and Dunfield (son of a priest) and Winter were Anglicans. They were cautious judges, but respected for their sharp legal minds. And while they were open to strong legal arguments, they took an incremental view of the law and stressed continuities rather than sharply delineated change. Whether the war had encouraged them to reassess old attitudes, we can only speculate.

Men of their background and experience were unlikely to welcome a flood of petitions for legal separation, and this did not happen; but there was now room for



those exceptional cases where the reconciliation of the parties appeared impossible. A judicial separation, of course, did not comprise, and did not have to lead to, divorce. Separated spouses were still spouses, and could not remarry. It would be another 20 years before what Smallwood had deemed impossible in 1948 became reality when, with the support of the provincial government and legislature, the Newfoundland Supreme Court assumed a jurisdiction over divorce.<sup>48</sup>

The *Hounsell* case was brought before the Supreme Court in April 1948 by the plaintiff, Winifred Hounsell, who charged that her husband Thomas had expelled her from the marital home and refused to provide her with an allowance proportionate to her needs. Probably at the suggestion of the judge, she was permitted to amend her plea to embrace the restitution of conjugal rights. Before the case could proceed, Eric Cook, counsel for the husband, raised two preliminary issues. First, he argued that when the Supreme Court of Newfoundland had been established in 1791 and 1792, jurisdiction over matrimonial causes in England had been exercised by ecclesiastical courts, and they had not been introduced into Newfoundland. In the alternative, counsel argued that an award of maintenance to the wife was an inappropriate remedy. She could only claim the right to pledge her husband's credit for necessities. Counsel for Mrs. Hounsell, Isaac Mercer, assisted by Fabian O'Dea and Arthur Mifflin, engaged in much historical research in order to rebut defending counsel's objections. Mercer's arguments prevailed and are probably reflected in the judge's decision.<sup>49</sup> Dunfield was conscious of the importance of his judgment: "These are questions of far-reaching effect and have not ... been discussed in this court before."

Dunfield's enthusiasm for the law is obvious in his discussion of the issues raised by the case: (1) Does the court exercise the jurisdiction formerly held by English ecclesiastical courts? (2) If so, did these courts award maintenance to wives out of their husband's estates? (3) Did other courts enjoy these rights, and had the supreme court inherited their jurisdiction? (4) If the court had jurisdiction, did it come via statute or charter, by virtue of being a settled British colony, or by some other means? After a long and scholarly historical exegesis on the reception of English law, Dunfield determined that Newfoundland was a settled colony, as distinct from a conquered one, into which the settlers had introduced as much of the common law as was appropriate to their needs. This law included powers of the English ecclesiastical courts which were not expressly tied to church doctrine; for example, matters of everyday concern to the people: probate and administration, and marital causes, including nullity of marriage and *divorce a mensa et thoro*, including maintenance. Dunfield found that the "law of common things" administered by the ecclesiastical courts was part of the law of England, not of the Church as such; "and indeed after the assumption of the headship of the Church by the sovereign, in early Tudor times, even the governing law of the Church may be said to be the King's law." English common law was firmly entrenched in Newfoundland with the Judicature Act of 1791, and the Supreme Court's powers were expanded

by the subsequent acts of 1792, 1809 and 1824. An Ecclesiastical Courts Commission in England in 1932 had removed matrimonial causes for separation and nullity of marriage from the ecclesiastical courts, stating that they were purely questions of civil rights. This, however, did not affect the instant case, for when Newfoundland was granted representative government in 1832 it was empowered to adopt its own laws. Changes to the ecclesiastical or common law of England might be adopted or adapted (divorce in 1857 or the reforms of 1932) but they were no longer automatically received. While the legislature followed the lead of Britain in most regards, it was sovereign in its choices of law. The Judicature Act of 1791 gave Newfoundlanders a court with a very general jurisdiction. The 1792 Judicature Act, made perpetual in 1809, granted the court powers in all cases of a civil or criminal nature exercised by English courts. One of those, it followed, was jurisdiction over *divorce a mensa et thoro*. A series of local statutes in the nineteenth century had specifically embraced the English norms of equity, including the court's jurisdiction over adultery.

Could a wife claim alimony following a judicial separation? Dunfield noted that marriage is a contract, and one of its key incidents is that a man support his wife. This obligation did not end when spouses separated: "for the consequences of that contract and for breaches of it there must be remedies." Great changes in the legal status of women had taken place since Newfoundland had won representative government. No longer did husbands have coercive powers over their wives. Single and married women controlled their personal property and had won the vote, although the law was often slow to reflect changes in social mores and values. By the law of contract, by the common law rights which attached to the legal status of wife, and probably via the law of equity, long since fused with the common law, a wife had a right to maintenance. "Where there is a right, there must be a remedy." Having so found, the judge announced the law and threw the issue directly to the elected representatives of the people:

[I]t is regrettable that the court should have to find its jurisdiction in these cases by adopting the practice of earlier centuries. The Legislature ought to consider the question and take some steps towards defining the position of women at law along the lines adopted in other jurisdictions. Our law is out of date in a good many respects.<sup>50</sup>

Dunfield's careful analysis of Newfoundland's legal history enabled him to clarify a particularly thorny area of family law. By verifying that the Judicature acts supplied the Supreme Court of Newfoundland with the power to rule on cases of judicial separation, Dunfield signalled a new era in Newfoundland's legal development. The court had finally recognized that when marriages broke down it had the authority to separate couples, freeing them from having to reside together.

So it was for Winifred Hounsell. In April 1949 the trial took place on the facts. She had requested alimony or, in the alternative, restitution of conjugal rights.

Dunfield was a stickler for form and always ready to score points off counsel for deficiencies in their pleadings. He held that Mrs. Hounsell's first choice should have been the restitution of conjugal rights, and that she should seek alimony only if restitution was not granted. From the jurisdictional hearing the previous year the judge knew that Mrs. Hounsell had been encouraged to vacate the family home. Her husband claimed that he had

separated himself from the plaintiff for good cause, ... paid ... suitable alimony, ... [that] she consented to his taking possession of the house, and ... that his life with the plaintiff has been rendered intolerable by her so that he should not be compelled to live with her.

Judge Dunfield found that the defendant had taken "the initiative in breaking up the conjugal home." The judge clearly regretted that fact. Had he the power, he would have brought the couple back together. While noting that "any order for restitution would probably be futile," he issued an order for the restitution of conjugal rights. Since the defendant was a sea captain in the coastal service the normal period of 14 days for restitution would be extended to 30: "This at any rate affords the parties an opportunity of reconciliation." Only then did he indicate that "in default of compliance ... the plaintiff can on a further application in the same action prove the non-compliance and apply for a judicial separation and alimony."<sup>51</sup> At this point the Hounsell's disappeared from the judicial record. Presumably the order for the restoration of conjugal rights was ignored, since Mrs. Hounsell returned to court to receive a judicial separation and an award of maintenance.

Simple and straightforward on its facts, *Hounsell* was a precedent-setting case which clarified and endorsed a previously unsuspected jurisdiction on the part of the Supreme Court of Newfoundland. As far as we know the legal issues it raised had never been litigated, and in the result it overturned assumptions and conventions which had been assumed and propagated for over a century. It is surely significant that while Dunfield was deliberating between April and October 1948 on the jurisdictional issues raised by *Hounsell*, the Supreme Court *en banc*, of which he was a member, was coming to the same conclusion in an appeal case decided in November.

*Peckford v. Peckford* was the first reported case, and probably the first case in actual fact in which a judicial separation was granted, because Mrs. Hounsell's judicial separation was not granted until April 1949. In August 1948 Chief Justice Lewis Emerson had required Lester Peckford to pay support and maintenance to his wife Mary and their young daughter. The couple were living separately, and so divided by a history of disagreements over religion, and by the violent and vindictive behaviour of the husband, that there was no prospect of a reconciliation. Emerson ordered a reference before the court registrar to discover the actual income of the husband, so that he could settle on the sum for the support of mother and daughter.

Lester Peckford appealed Emerson's decision, and in November Winter, J., concurred in by Dunfield, J., noted that Emerson's decision at trial had "in effect made an order for the judicial separation of the parties." An order explicitly granting a judicial separation had been requested by Mrs. Peckford, not opposed by Mr. Peckford, and granted. Custody of the daughter went to Mrs. Peckford until the child reached the age of seven when a new hearing would decide the questions of custody and her religious upbringing. At the November appeal the defendant's counsel argued that England and other common-law jurisdictions took a "more indulgent and lax view of the marriage bond and the sanctity of the marriage ceremony than is held in this country." Judge Winter agreed, but noted that the case was "not a suit for divorce involving the breaking of a valid marriage, but merely for a judicial separation, which leaves the marriage bond still intact."

In *Peckford*, Judge Winter granted a legal separation and the prospect of support. While this was a welcome precedent for parties who found themselves in untenable marriages, the grounds upon which future applications might succeed, in an era in which physical abuse was an important, even a necessary factor, were demanding. In defining the law in Newfoundland, Judge Winter reached back to an English appeals case of 1897 which held that a case for judicial separation rested on the issue, or degree of, cruelty:

the cases agree that a certain minimum standard ... of cruelty must be reached ..., including the threat or danger as well as the actual existence of cruelty.... [In a precedent case] it was said that cruelty must be "of such a character as to have caused danger to life, limb or health (bodily or mental); or as to give rise to a reasonable apprehension of such danger." The important feature of it appears to me to be this: that real bodily injury, actual or menaced, must be proved of such an effect upon the mind of the sufferer as has actually produced or, if continued, will almost certainly produce, serious ill health.... [T]he law regards cruelty for this purpose objectively rather than subjectively.

His emphasis on cruelty, on the objective standard upon which it could be assessed, and on its quantifiable physical consequences indicated a cautious judicial response. Was he even going so far as to take judicial notice of the fact that some degree of physical and mental violence, typically perpetrated by husbands upon their wives, would be, if with reluctance, tolerated by the courts?

On the custody of the Peckford child and her religious upbringing, Justice Winter noted that a father's right to custody was not absolute, though it was "clearly established in English law as a *prima facie* principle." There might be a presumption of his right to dictate the religious upbringing of his child but it would rest on the facts of the case — essentially on his fitness to be a parent. There was a possible inconsistency here with the Welfare of Children Act (1944), which assumed that the religion of an illegitimate child was that of its mother.<sup>52</sup>

Judge Dunfield's caution, even reluctance, to embrace the remedy of judicial separation had been clear in *Hounsell*. Although he concurred with Winter in *Peckford*, Dunfield entertained the hope that required monthly visits by the child to her father would result in the Peckfords seeing the error of their ways and agreeing to "be reunited, as is greatly to be hoped."

[W]e lay it on their souls, if a Court can do so, and particularly upon the souls of the relatives ... that they do not tamper with the child's innocence and never let their quarrels appear in her sight or hearing.... When years have passed, they will see ... that their quarrels were wrong.<sup>53</sup>

In the area of matrimonial law, Newfoundland women who sought a life apart from their married partners had to take into account both legal precedent and judicial personality.

To these cautions might be added the desirability that the parties be represented by legal counsel. Litigation on the matrimonial front was becoming more complex and judges would not easily be convinced. Men of their background and experience were unlikely to welcome a flood of petitions for legal separation, and this did not happen; but there was now room for exceptional cases where the reconciliation of the parties was impossible.

During World War Two and its aftermath, calls for change were afoot which would permit couples whose marriages had failed to separate permanently. They do not appear to have been numerous. Rather, they were a few desperate cries in the wilderness. Government, churches and the legal community had maintained a unified front in the face of isolated but growing demands for relief in the past and, despite a certain sympathy for petitioners, maintained that attitude down to 1948. Pleas for change had been voiced for some time but had gone unheeded. A few individuals in positions of power, Squires, Emerson and Clutterbuck for example, had expressed sympathy, but it had been isolated and sporadic. Caution, the easy familiarity of long-standing attitudes, and a fear of moral decline and radical social change contributed to some notable fence-sitting. There was no unified movement advocating reform. There were only the letters of people who suffered because they had married the wrong person and discovered too late that the law offered no solution to their misfortune.

We have no conclusive answer as to why generations of officials and elites ignored the remedies of legal separation and divorce. Was it due to an innate conservatism? Was it a by-product of the family-oriented fishery when survival depended upon family solidarity and mutual contributions to the family as an economic unit? Was it born out of a desire to keep families together in order to preserve social order? Feminist historians have examined the relationship between matrimonial law and the subordination of women. Can the absence of judicial separation be explained in those terms? Causation is seldom explained by a single factor, particu-

larly in cases where attitudes, emotions and beliefs are at stake. An amalgam of factors contributed to the long-standing political and judicial avoidance of judicial separation as a remedy for failed marriages. Was it feared as a halfway house to divorce? Ironically, the old ways never seemed more secure than at the moment they were about to disappear. World War Two was probably the catalyst, and the law was not immune.

## Notes

<sup>1</sup>*Statutes of Canada* [S.C.], (1968) 16 Eliz. II, c. 24.

<sup>2</sup>*Statutes of Newfoundland* [S.N.] 22 Geo. V, c. 12, *Health and Public Welfare Act, 1931*, Part xxv. Information courtesy of Terry Bishop-Stirling.

<sup>3</sup>In their report to the Government of Newfoundland on divorce, one of 14 studies commissioned by the government on areas of family law, Gushue and Day in 1973 noted that seven actions for judicial separation were mounted in the Supreme Court between 1940 and 1970. So at least one, unsuccessfully mounted, appeared before the precedent-setting case of *Hounsell v. Hounsell* in 1948. The grounds upon which this, or those, actions were mounted is unclear. Raymond Gushue and David Day, *Family Law in Newfoundland* (St. John's, Government of Newfoundland, 1973), 402; [1970] *Hounsell v. Hounsell*, 47 Newfoundland and Prince Edward Island Reports [N.F.L.D. and P.E.I.R.] 108 (S.C.), [1997] 16 Newfoundland Law Reports [N.L.R.] 310 (S.C.).

<sup>4</sup>Roderick Phillips, *Putting Asunder: A History of Divorce in Western Society* (Cambridge: Cambridge University Press, 1988), 279-97, and *Untying the Knot: A Short History of Divorce* (Cambridge: Cambridge University Press, 1991), 85-91.

<sup>5</sup>Lynne Carol Halem, *Divorce Reform* (New York: The Free Press, 1980), 9; James G. Snell, *In the Shadow of the Law: Divorce in Canada, 1900-1939* (Toronto: University of Toronto Press, 1991), 16-17.

<sup>6</sup>Day, *Family Law*, 478. Generally, the sole ground for divorce was adultery (which also embraced rape, sodomy and bestiality). Nova Scotia was unique in offering multiple grounds in 1758: adultery, desertion (to 1761), impotence, and marriage to kindred within prohibited degrees of consanguinity.

<sup>7</sup>Halem, *Divorce Reform*, 12, 13.

<sup>8</sup>Phillips, *Putting Asunder*, 154, 437, 445, 450.

<sup>9</sup>Day and Gushue push the date for the reception of a local jurisdiction over judicial separation back to 1610, subsuming the jurisdiction of English ecclesiastical courts within the common law which every Englishman carried with him to a new settled colony. Day, *Family Law*, 476. Dunfield, J., in *Hounsell*, was either not asked to consider this argument, or declined to do so.

<sup>10</sup>A useful series of essays on the Newfoundland experience of the nineteenth and twentieth centuries is William A. McKim, ed., *The Vexed Question: Denominational Education in a Secular Age* (St. John's: Breakwater, 1988).

<sup>11</sup>See the essay by Trudi Johnson in this volume.

<sup>12</sup>(1954) *Foley v. Foley*, 34 M.P.R. 273 (S.C.). (1836) 6 William IV, c. 13, An Act for the Encouragement of Education in this Colony. Successive education acts: (1838) 2 Vic., c.

5; 6 (1843) 6 Vic., c. 6; (1843) 6 Vic., c. 7; (1874) 37 Vic., c. 5; (1876) 39 Vic., c. 3 are discussed in Christopher English, "The Development of Denominational Education in Newfoundland, 1800-1970," mss. 1975.

<sup>13</sup>With the exception of the undocumented case or cases between 1940 and 1948 alluded to in n. 3 above.

<sup>14</sup>Gertrude E. Gunn, *The Political History of Newfoundland, 1832-1864* (Toronto: University of Toronto Press, 1966), *passim*.

<sup>15</sup>Krista L. Simon, "Women's Participation in the District Courts of Placentia, 1757-1823," mss. 2003. This is proposed for a forthcoming volume of essays on the legal history of Newfoundland and of Prince Edward Island.

<sup>16</sup>Provincial Archives of Newfoundland and Labrador [PANL], GN5/4/C/1, Ferryland, Pleas in the Surrogate Court of Sessions, 1786-1812, (1791) *Hanahan v. Hanahan*, 31 Jan., 1 Feb., 11 Apr. (Surrogate Court).

<sup>17</sup>Christopher English, "Spiry Sheep, Good Samaritans and Divorce: The Reception and Adaption of Law in Ferryland District, Newfoundland, 1786-1812," mss.

<sup>18</sup>Willeen Keough, "The Slender Thread: Irish Women on the Southern Avalon, 1750-1860," Ph.D. dissertation, Memorial University of Newfoundland, 2001, 593-602. Since *Hanahan*, like its successor, *Hounsell*, went unreported in the law reports (1 *N.L.R.* contains cases from 1819 to 1829), it was unlikely to serve as a legal precedent. Until the many volumes of handwritten district judicial reports from the magistrate, sessional and surrogate (to 1824) courts are explored, we offer the hypothesis, already noted, about the increasing formalization in the nineteenth century of family law under the aegis of the churches and their confreres among the social elites.

<sup>19</sup>*S.N., Consolidated Statues [C.S.]* [third series], 1916 [*S.N., C.S.* 1916] (St. John's, 1919), Appendix xviii, xvi, xvii, *Instructions*, Goderich to Cochrane, 26 July 1832. While other banned initiatives were reserved for reference by the governor to London: section 13: the constitution of the legislature; s. 17: laws concerning the revenue; s. 19: changes in the property rights of non-residents, there was no such provision in s. 20 for divorce.

<sup>20</sup>*S.N., C.S. 1916*, Appendix xviii, xxxix, *Instructions* and *Royal Instructions*, Goderich to Cochrane, 26 and 27 July 1832.

<sup>21</sup>"Divorce," *Encyclopedia of Newfoundland and Labrador [ENL]*, (St. John's: Newfoundland Book Publishers, 1981), I, 626-7.

<sup>22</sup>Trudi Dale Johnson, "Matrimonial Property Law in Newfoundland to the End of the Nineteenth Century," Ph.D. thesis, Memorial University of Newfoundland, 1998, 224-34. The English acts of 1870 and 1882 were adopted locally with minor variations and delays by: *S.N.*, (1876) 39 Vic., c. 11, (1883) 46 Vic., c. 11, (1895) 59 Vic., c. 17.

<sup>23</sup>(1791) 31 Geo. III, c. 29; (1792) 32 Geo. III, c. 46; (1809) 49 Geo. III, c. 27; (1824) 5 Geo. IV, c. 68.

<sup>24</sup>Cochrane, *Instructions*, s. 55.

<sup>25</sup>Richard Hakluyt, *The Principal Navigations Voiages and Discoveries of the English Nation* (Cambridge: Hakluyt Society, 1965), 2, 678.

<sup>26</sup>U.K. [1825], "Royal Charter for Establishing the Supreme and Circuit Courts of Newfoundland," in Newfoundland Law Reform Commission, *Legislative History of the Judicature Act, 1791-1988* (St. John's: NLRC, 1989), 39-46.

<sup>27</sup>Its origins go back to the Council of Trent, 1563; Day, *Family Law*, 461.

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<sup>28</sup>Memorial University of Newfoundland, Centre for Newfoundland Studies, Archives, Papers of Sir Richard Squires, Coll-250, R. Bowering to R.A. Squires, 3 March 1916; Squires to Bowering, 10 March 1916.

<sup>29</sup>Government of Newfoundland, Newfoundland Colonial Secretary's Office, *Census of Newfoundland* (St. John's, 1921), 12; 1935; *Ibid.*, 1935, 31; Government of Newfoundland, Department of Justice and Defence, Magisterial Enquiries, 1937, PANL, GN 5/3/B/1, Box 12, 41-57; Government of Newfoundland, Department of Public Welfare, 1949, PANL, GN 38/1 O.A.P. 272, File 7961.

<sup>30</sup>The Health and Public Welfare Act, 1931, could be enforced to require maintenance of a deserted wife if she was destitute, likely to prove a public charge and "the Magistrate is satisfied that her behaviour and moral character are such that her husband ought not to be called upon to support her." A deserting wife must satisfy the court "that the behaviour and moral character of the husband are such as to justify her refusal to live with him ..." s. 575.

<sup>31</sup>PANL, GN 38, Box S 4-1-4, File 5.

<sup>32</sup>PANL, GN 38, Box S 4-1-4, File 5. These were memoranda for circulation to the Commissioners which discussed the circumstances of Mrs. X and Mrs. Y. They had a decidedly gossipy tone in which the criminal conviction of Mr. X and the infidelity of Mr. Y were discussed.

<sup>33</sup>Neary, *North Atlantic World*, 118, 139, 155.

<sup>34</sup>*Ibid.*, 212.

<sup>35</sup>Cecilia Benoit, "Urbanizing Women Military Fashion: The Case of Stephenville Women," in Carmelita McGrath et al., *Their Lives and Times, Women in Newfoundland and Labrador: A Collage* (St. John's: Killick Press, 1995), 120. See also, Hilda Chaulk Murray, *More Than 50%: Women's Lives in a Newfoundland Outport, 1900-1950* (St. John's: Breakwater, 1979), 80, and Nancy Forestell, "Times Were Hard: The Pattern of Women's Paid Labour in St. John's Between the Two World Wars," in McGrath, 82.

<sup>36</sup>PANL, GN 13/1/B 105A, File 51.

<sup>37</sup>*Ibid.*

<sup>38</sup>George Casey and Maura Hanrahan, "Roses and Thistles," *Newfoundland Studies* 10.2 (1994), 247.

<sup>39</sup>PANL, GN 13/1/B, File 51.

<sup>40</sup>PANL, restricted file.

<sup>41</sup>John Edward FitzGerald, "'The True Father of Confederation'?: Archbishop E.P. Roche, Term 17, and Newfoundland's Confederation with Canada," *Newfoundland Studies* 14.2 (1998), 199.

<sup>42</sup>*The Monitor* (July-August 1940), 19.

<sup>43</sup>Archbishop Roche to the Papal Nuncio, 17 November 1938 (Accession number misplaced and irrecoverable due to temporary closure of PANL).

<sup>44</sup>Smallwood, *I Chose Canada*, 306-9.

<sup>45</sup>"Mr Northcott asks me to say something on the question of divorce. I am trying to fathom why [he] is so interested in the question of divorce. I know [he] is happily married, and that's why I've been trying to figure why he is so interested... I'm sure that he has no motive except a perfectly good one." James K. Hiller and Michael Harrington, eds., *The Newfoundland National Convention, 1946-1948. Debates, Papers and Reports* [National Convention] (Kingston: McGill-Queen's, 1988), 14 January 1948, 1182.

<sup>46</sup>*Ibid.*



<sup>47</sup>Ibid., 27 January, 1396, 28 January 1948, 1443-4.

<sup>48</sup>Dunfield, J. (1888-1968) was one of three justices of the supreme court, a position he had held since 1939. Bert Riggs calls him “a failed politician, a moderately successful lawyer, and a successful civil servant and judge.” By birth and education, as distinct from wealth, he was a member of the St. John’s elite. The son of Anglican clergyman Canon Henry Dunfield, he had attended Bishop Feild College and the University of London where he received a B.A. degree. His law degree appears to have been achieved via correspondence with that same university. He articulated under Edward Morris, and probably kept the latter’s practice alive between 1911 and 1918 while Morris served as prime minister (1909-1918) before joining the imperial war cabinet. The firm probably folded as a result of Morris’s permanent translation to England, and Dunfield entered the business world. He married Sybil Johnson, daughter of supreme court justice George Johnson (1902-1926). In 1928 Dunfield was appointed counsel to the Justice Department and Acting Deputy Minister of Justice. He chaired the inquiry into the Knights of Columbus hostel fire in 1942 and was founding chairman of the St. John’s Housing Corporation from 1944 to 1949, concerned with developing better housing for the poor of St. John’s. In 1960 he chaired another commission of inquiry into the International Woodworkers of America strike of the previous year. District Judge of the Admiralty Division of the Exchequer Court of Canada after 1949, he resisted mandatory retirement from the supreme court at age 75 in 1963. Thrice denied the position of chief justice, he was nevertheless respected by his peers as a very capable judge. *The Churchill Harbinger*, 16 September 1996; “Sir Brian E. S. Dunfield,” *ENL*, I, 655; Bert Riggs, “Sir Brian Dunfield,” [1997] 16 *N.L.R.*

<sup>49</sup>Mercer (1912-2002) attended Dalhousie Law School, was called to the bar in 1938 and had scratched a living as a sole practitioner during the war, based in Argentia and dealing largely with insurance claims. He had some successes in the area of family law, notably defending young women at the base accused of infanticide. O’Dea held a law degree from Oxford University and had received his call to the English bar. He served as lieutenant-governor of the province (1963-1969). Mifflin would eventually become chief justice of the trial division of the supreme court (1975-1979) and chief justice of Newfoundland as head of the appeals division of the same court (1979-1986). *Hounsell* confirmed a trend towards formal and sophisticated legal representation. Law Society of Newfoundland, *Project Daisy*, interviews with Isaac Mercer in 1995. Eric Cook (1909-1986), called to the bar in 1932 and Canadian senator from 1964, was about to form a law partnership with Albert Walsh when the latter succeeded Emerson, C.J., in 1949.

<sup>50</sup>[1970] *Hounsell*. All quotations that follow are taken from the judgment. Ibid., 110, 118, 119.

<sup>51</sup>(1949) *Hounsell*, 60, 62.

<sup>52</sup>*Peckford v. Peckford*, (1948) 16 *N.L.R.* 347 (S.C.) per Emerson, C.J.; *ibid.*, 353 (S.C.) *en banc* per Winter, J.; Welfare of Children Act, s. 17.

<sup>53</sup>*Peckford* at 364-5.