BILL C-187†*

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Some four weeks ago I was asked to prepare a paper on Bill C-187 for presentation to the present assembly. I have deliberated long and hard on the particular method of approach that I should follow with regard to the form and substance of my address. Since many of you may not be very familiar with the contents of Bill C-187 I reached the conclusion that perhaps the best method would be to analyse the more important sections of the Bill in their numerical sequence. Accordingly, I will first turn to section 2 of the Bill which constitutes the interpretation section. It will be noted that in section 2(a) and 2(b) the terms "child" and "children of the marriage" are defined so as to include the illegitimate children of either spouse and the adopted children of either spouse where such children have been accepted as members of the family at the relevant time. It is possible that certain difficulties may arise in consequence of these statutory definitions. For example the expression *in loci parentis* is rather vague and one may question whether Parliament might not have done better to adopt the definition presented in the Matrimonial Proceedings Act (New Zealand), 1963, section 2, wherein the phrase "who was a member of the family of the husband and wife at the [relevant] time" is preferred to the more nebulous formula *in loci parentis*. A difficulty which might arise by virtue of the definition of "children of the marriage" set out in section 2(b) concerns the extent to which the section may be interpreted to include children over the age of sixteen years who are incapable of maintaining themselves by reason of being engaged in continuing education at community colleges or universities. It is arguable that the provisions of the statute do not extend to such children since the expression "or other cause" in section 2(b)(ii) may be interpreted restrictively in light of the preceding words "by reason of illness, [or] disability".

Section 2(c) sets out a definition of collusion which quite clearly amends the common law insofar as it provides that collusion does not include an agreement which provides for separation between the parties. This clause is inserted in light of the provisions of section 4(1)(e) which introduce living apart as a ground for divorce in Canada. Beyond this modification of the existing law, the definition set out in section 2(c) could be regarded as declaratory of the common

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† Now, substantially, the Divorce Act (1968), 16 Eliz. II, c. 24.

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law as enunciated in such cases as *Johnson v. Johnson*[1] and *Emanuel v. Emanuel*.[2] The statutory definition, however, explicitly restricts the operation of the doctrine of collusion to cases wherein "an agreement or conspiracy to subvert the administration of justice is established". This definition, in my opinion, operates to reduce the ambit of the concept of collusion more narrowly than was hitherto permissible. Some guidance in this context may be obtained by reference to the present law in Australia and New Zealand. Under the Matrimonial Causes Act (Australia, 1959), and the Matrimonial Proceedings Act (New Zealand, 1963), collusion operates as a bar only if there is "intent to cause a perversion of justice".[3]

It should be noted that collusion is retained as an absolute bar to relief by section 9(1)(b) and that it applies both in respect of the grounds set out under section 3 and those set out under section 4 of Bill C-187.

Section 2 (d) provides that the bar of condonation does not include the continuation or resumption of cohabitation during a single period of not more than ninety days, where such cohabitation is continued or resumed with reconciliation as its primary purpose. It should be noted that condonation has now been made a discretionary bar under section 9(1)(c) and that, unlike collusion, it applies only in respect of the grounds for divorce set out under section 3 of Bill C-187.

It is submitted that section 2(d) permits only a single resumption of cohabitation and that such period of cohabitation must not continue for more than ninety days.

It may be noted that this section is similar but not identical to section 2 of the Matrimonial Causes Act (England), 1963, which has been re-enacted in section 42(2) of the Matrimonial Causes Act (England, 1965). The efficacy of this section may well be questioned in the light of recent English decision in *Mackleworth v. Mackleworth*[4]; and *Brown v. Brown*,[5] wherein it was held that section 2(1) of the Matrimonial Causes Act (England, 1963), extends to cases where the continuation or resumption of cohabitation is with a view to reconciliation but not to cases where the continuation or resumption of cohabitation is the consequence of reconciliation. Accordingly, the section does not create a probationary period during which

1 (1960). 31 W.W.R. 403.

2 [1946] P. 115.

3 For judicial interpretation of this clause, which corresponds substantially to the definition set out in section 2(c) of Bill C-187, see *Grose v. Grose*, [1965] N.S.W.R. 429, *Bell v. Bell*, [1964] A.L.R. 29, and *Barrott v. Barrott*, [1964] N.Z.L.R. 988.

4 *The Times*, May 7th, 1964.

5 [1964] 3 W.L.R. 899.

a wronged spouse who has been reconciled to the wrongdoer can recall the decision.

Although such interpretation of the English legislation threatens to reduce its efficacy, the significance of the above decisions is not so substantial in Canada since condonation is an absolute bar to relief in England but only a discretionary bar under section 9(1) (c) of Bill C-187.

By the provisions of Bill C-187, jurisdiction in divorce proceedings is vested in the trial division or branch of the Supreme Court of New Brunswick. The question might well be asked: does the vesting of jurisdiction in the trial division or branch of the Supreme Court of New Brunswick preclude a concurrent jurisdiction being exercised by the County Courts pursuant to provincial legislation?

The arguments in favour of vesting a concurrent jurisdiction in the County Courts are discussed in the Report of the Roebuck Committee at page 20, wherein it is recommended that "the County Courts of all Provinces [should] be given jurisdiction in divorce equally and concurrently with the Supreme Courts of the respective Provinces". Briefly stated, the advantages of vesting concurrent or even exclusive divorce jurisdiction in the County Courts center upon (1) the cost of proceedings and (2) the accessibility of the court.

With respect to the question whether the Province of New Brunswick may statutorily confer concurrent jurisdiction in divorce and ancillary matters upon the County Courts, reference should be made to a recent decision of the Supreme Court of Canada, *Attorney-General of British Columbia v. McKenzie*.[6] There it was held that the Supreme Court Amendment Act, 1964 (B.C.), which conferred jurisdiction upon the judges of County Courts to try divorce proceedings in their capacity as local judges of the Supreme Court of British Columbia was constitutionally valid.

The issue to be resolved, therefore, is whether the decision in the aforementioned case will be abrogated by enactment of Bill C-187. The decision in *Attorney-General of British Columbia v. McKenzie*,[7] was given at a time when the Federal Parliament had not occupied the field of divorce jurisdiction pursuant to powers conferred under section 101 or section 91(26) of the B.N.A. Act.

It may be of significance to observe that in giving reasons for the decision, Ritchie, J. stated:

> The Dominion Parliament has not seen fit to pass any legislation pursuant to its power under section 101 of the B.N.A. Act providing for the establishment of courts for the administration of the law

6 [1965] S.C.R. 490.

7 *Ibid.*

> of 'marriage and divorce' in British Columbia and I am accordingly in agreement that it is within the legislative competence of the Legislature of that Province to pass laws relating to the constitution, maintenance and organization of such courts.[8]

While section 2(e) and other sections of Bill C-187 do not constitute federal legislation enacted "pursuant to section 101 of the British North America Act", such legislation is enacted pursuant to section 91(26). It might therefore be contended that, in accordance with general principle established by judicial authority, occupation of this field by Parliament precludes any provincial legislation at least to the extent that such provincial legislation "clashes at the level of law enforcement..'[9]

It might therefore be concluded that the power of the provinces to enact legislation conferring a concurrent divorce jurisdiction upon the County Court is at least of doubtful constitutional validity. It may be argued, however, that provincial legislation conferring divorce jurisdiction upon County Court judges "in their capacity as local judges of the Supreme Court" would not "clash" with section 2(e) of Bill C-187 which confers jurisdiction upon the Supreme Court.

Grounds for Divorce

Section 3: Section 3 of Bill C-187 sets out the following offences as grounds for divorce at the instance of the innocent spouse:

1. adultery;
2. sodomy, bestiality, rape or homosexual act;
3. bigamy or, *quaere*, polygamy; and
4. physical or mental cruelty of such a kind as to render intolerable continued cohabitation of the spouses.

There is no need to comment on adultery as a ground for divorce under the new Bill since this merely projects the present ground for relief.

With respect to the commission of sodomy, bestiality or rape, it will be noted that these grounds constitute a basis for divorce at the instance of the innocent husband or wife and that the terms of the section do not require a criminal conviction to have been secured. With respect to the offence of sodomy, it would appear that inter-spousal sodomy may constitute a ground for relief subject to the discretionary bar of connivance.[10]

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8 *Ibid.*, at p. 495.

9 *Attorney-General of British Columbia v. Smith* (1968), 65 D.L.R. (2d) 82 (Fauteaux J.).

10 See *Bampton v. Bampton*, [1959] 1 W.L.R. 842 (C.A.).

With respect to the term "engaged in a homosexual act", uncertainty would appear to be the watchword of this phrase. It is uncertain but probable that the phrase includes acts of lesbianism and that it is confined to "homosexual acts" which involve the surrender of the sexual organs.

With respect to a divorce being obtainable on proof that the respondent has, since the celebration of his or her marriage, gone through a form of marriage with another person, it would appear probable that the intent of Parliament was to establish bigamy as a ground for divorce. It would appear, however, that the language of the section would be sufficiently broad to permit the party to a monogamous marriage to obtain a divorce where his or her spouse has entered into a second polygamous marriage. This conclusion is not inconsistent with the ruling in *Hyde v. Hyde*,[11] wherein it was held that recognition could not be afforded to a first polygamous marriage for the purpose of granting divorce relief.

Section 3(d) provides that a petition for divorce may be presented by either spouse on the ground that the respondent has, since the celebration of the marriage, treated the petitioner with physical or mental cruelty of such a kind as to render intolerable the continued cohabitation of the spouses.

In order to appreciate the difficulty which may be encountered in interpreting this section, it will be necessary to advert to the current definitions of cruelty adopted in the Canadian provinces. Subject to exception in Alberta and Saskatchewan, "cruelty" in relation to matrimonial causes has not hitherto been defined by statute, but the governing principle which has been applied in Canada is that established in *Russell v. Russell*[12], wherein it was held that in order to constitute cruelty the acts or conduct complained of must have caused "injury to life, limb or health, bodily or mental, or a reasonable apprehension thereof".

In Alberta and Saskatchewan, cruelty is defined by provincial statutes for purposes of proceedings for alimony and judicial separation as including "conduct which creates a danger to life, limb or health [and also] any course of conduct that in the opinion of the court is grossly insulting or intolerable or of such a character that the person seeking [relief] could not reasonably be expected to be willing to live with the other [spouse] after he or she has been guilty of such conduct."[13]

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11 (1866), L.R. I P. & D. 130.

12 [1897] A.C. 395.

13 See Domestic Relations Act, R.S.O., 1955, c. 89, s. 7; and Queen's Bench Act, R.S.S., 1965, c. 73, s. 25(3).

A significant issue which merits consideration is whether section 3(d) implements the *Russell v. Russell*[14] criterion or whether it projects a wider definition corresponding to that in Alberta and Saskatchewan.

It might be contended that the words "physical and mental cruelty" imply adoption of the *Russell*[15] criterion and that in order to satisfy the conditions set out in section 3(d) it will be necessary to establish two factors:

(i) conduct causing injury to health or reasonable apprehension thereof; and

(ii) that such conduct renders further cohabitation intolerable.

Since amendment of this section appears somewhat unlikely at the present time, it would appear that the suggested uncertainty of section 3(d) must await decision of the courts.

With respect to "cruelty" as a ground for divorce, it would appear that "intent to cause injury", though a relevant element, is no longer a condition precedent to a finding of matrimonial cruelty.[16]

It will be noted that section 3(d) requires proof of cruel conduct of such a kind as to render intolerable "the continued cohabitation of the spouses". A question arises as to whether this last phrase now requires the petitioning spouse to prove a need for protection from the threat of future misconduct on the part of the respondent spouse. In *Meacher v. Meacher*,[17] it was held that a decree of divorce on the ground of cruelty should be based on past behaviour and that it was not necessary to have regard to whether there was a reasonable apprehension of further ill-treatment. One may question whether the intention of Parliament in section 3(d) is to affirm or abrogate the possible application of this decision in Canadian jurisdictions.

Section 4: Section 4(1) sets out additional grounds for divorce which include the respondent's imprisonment, gross addiction to alcohol or narcotics, disappearance, or incapacity or refusal to consummate the marriage. Time does not permit, however, a detailed investigation of these provisions and I will accordingly direct your attention to the more important provision set out in section 4(1)(e)(i). Under this section a petition for divorce may be presented by either spouse where the marriage has permanently broken down by reason of the spouses having lived separate and apart for a period

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14 [1897] A.C. 395.

15 *Ibid.*

16 See *Gollins v. Gollins*, [1963] 3 W.L.R. 176; *Williams v. Williams*, [1963] 3 W.L.R. 215 (H.L.)

17 [1946] P. 216.

of not less than three years immediately preceding the presentation of the petition for any reason other than that set out in sub-paragraph (ii).

Since sub-paragraph (ii) refers to the case where the petitioner has deserted the respondent, it would appear that the petitioner who has been deserted by the respondent falls within the ambit of section 4(1)(e)(i).

The operation of this section, however, is not confined to the circumstance where the petitioner has been deserted by the respondent for the designated period of three years. It would thus appear that the section may afford divorce relief in cases where the separation was by consent of the parties or where it was a consequence of illness, whether physical or mental. Indeed, provided there is a permanent marriage breakdown by reason of the spouses having been living separate and apart for the designated period, the circumstances or causes leading to the separation would appear irrelevant provided that they are not such as give rise to the operation of the statutory bar to relief set out in section 9(1) (f).

Further observations may be made with respect to the operation of section 4(1) (e) (i):

1. To satisfy the section it will be necessary to establish (i) that there has been a permanent breakdown of the marriage and (ii) that the permanent breakdown of the marriage occurred by reason of the spouses having been living separate and apart for the designated period. By virtue of section 4(2), however, proof of separation for the designated period will require the courts to presume a permanent breakdown of the marriage, but it is submitted that such a presumption may be provisional and not conclusive.

   If section 4(2) is interpreted as creating a conclusive presumption of marriage breakdown on proof of separation for the designated period, then difficulties will inevitably arise where the spouses have lived separate and apart under compulsion, as, for example, where the husband has been separated from his wife pursuant to military service. Such difficulties could, of course, be resolved by a restrictive interpretation of the separation provision in section 4(1)(e)(i) but it would appear wiser and perhaps more probable for the courts to interpret section 4(2) as giving rise to only a provisional presumption of marriage breakdown.

2. For the purposes of interpreting section 4(1)(e)(i), a period in which the parties have been living separate and apart is not interrupted or terminated by reason (a) that either spouse has become incapable of forming or having an intention or volition

to live separate and apart; or (b) by reason of a resumption of cohabitation during a single period of not more than ninety days with reconciliation as its primary purpose.[18]

3. The phrase "separate and apart" is susceptible to two interpretations. In many American statutes wherein this phrase is adopted the courts require physical separation of the spouses to such a degree as is manifest to the local community. The minority opinion in the United States asserts, however, that the essential issue is not whether the spouses are living under separate roofs but rather whether they are living separate lives. This latter view would appear to receive support from relevant Australian decisions.[19] Some further support for this conclusion may also be inferred from the decision of the Court of Appeal of Ontario in *J. B. v. A. W. B.*[20], wherein it was held that a finding of desertion may be made where the household has ceased to be in substance one household or one home.

4. It will be observed that a spouse may petition for divorce under section 4(1), paragraphs (a) to (d), where the *respondent* has been imprisoned for a designated period, grossly addicted to drugs or alcohol, has disappeared, or where the marriage has not been consummated by reason of the respondent's disability or wilful refusal to consummate the marriage. Although the aforementioned paragraphs clearly preclude a remedy under such paragraphs to the spouse under disability, it is open to argument that such spouse may petition for divorce pursuant to the provisions of section 4(1) (e) (i) [or (ii)] since, as stated previously, where a permanent marriage breakdown occurs by reason of the spouses living separate and apart for the designated period, the circumstances or causes leading to such separation would appear irrelevant provided that they do not justify refusal of relief pursuant to the absolute bar under section 9(1) (f).

5. The availability of relief under sections 4(1) (e) (i) and (ii) is circumscribed by the provisions of section 9 (1) (f) which provide that where a decree of divorce is sought by reason of the circumstances described in section 4(1) (e), it shall be the duty of the court to refuse the decree if the granting of it would be unduly harsh or unjust to either spouse or would prejudicially affect the making of reasonable arrangements for the maintenance of either spouse. This provision is similar but not identical with section 37 (1) of the Matrimonial Causes Act (Australia,

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18 See s. 9(3).

19 *E.g.*, *Murphy v. Murphy*, [1962] N.S.W. Rt. 417; *Crabtree v. Crabtree* (1963), 5 F.L.R. 307.

20 [1958] O.R. 281.

1959), and the uncertainty attaching to the phrase "unduly harsh or unjust" may perhaps be reduced, but not eliminated, by reference to the interpretation accorded to the phrase "harsh and oppressive" by the Australian courts. It would appear that the phrase requires proof of some substantial detriment as a result of the granting of a decree, and generalities such as the real or imagined stigma of divorce or the loss of the marriage status are not embraced by the phrase. Thus, in *McDonald v. McDonald*[21] Herrin, C. J. stated:

> Each of the two words in the phrase 'harsh and oppressive' must be given its meaning. The test of harshness and oppressiveness is subjective and must relate to the respondent. What is envisaged is not some such concept in the abstract or as applying generally to others, or even to the reasonable man or woman. The phrase connotes some substantial detriment to the party before the court. It is not satisfied by argument based on generalities or on social philosophy or that the petitioner is at fault or by suggested injustice, e.g., loss of status or such as would be said to result from unsuccessful opposition by the respondent.[22]

It would further appear that the decree will not be refused solely on the basis of a spouse's conscientious or religious objections to divorce.[23] A decree might well be refused, however, where the petitioner has neglected to make reasonable and equitable arrangements for the disposition of matrimonial assets,[24] or where the issue of the decree would unjustifiably deprive a spouse of pension or insurance rights, dower, or of rights under family inheritance legislation.

Jurisdiction of Court

Section 5 of Bill C-187 provides that the court of any province has jurisdiction in divorce if the petitioner is domiciled in Canada and either the petitioner or the respondent has been ordinarily resident in the province for a period of at least one year immediately preceding the presentation of the petition and has actually resided in the province for at least ten months of that period. This section reflects a fundamental change from the present basis of jurisdiction which is premised upon proof of domicile within the jurisdiction wherein proceedings are instituted. Its significance becomes even greater when the section is read together with the provisions set out in section 6 (1) which states that the domicile of a married woman shall be determined as if she were unmarried and, if she is a minor, as if she had obtained her majority.

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21 (1964), 64 S.R. (N.S.W.) 435.

22 *Ibid.*

23 See *Painter v. Painter* (1963), 4 F.L.R. 216, at p. 220.

24 See *McDonald v. McDonald* (1964), 64 S.R. (N.S.W.) 435.

Some uncertainty will inevitably exist over the meaning of the phrase "ordinarily resident" but guidance in interpreting this phrase may be obtained from the decision of Karminski, J. in *Stransky v. Stransky*[25], wherein it was suggested that absences from the jurisdiction whether on business or for pleasure would not necessarily break the period of ordinary residence.[26]

To avoid possible difficulties arising from the above jurisdictional rule where petitions for divorce are pending in two courts, provision is made in section 5 (2) whereby the court to which a petition was first presented has exclusive jurisdiction to grant relief between the parties. It is questionable whether this provision adequately solves the problem of conflicting jurisdictions and it might well have been better to leave a general discretion in the courts to order a stay of proceedings.

The Recognition of Foreign Decrees

Section 6 of Bill C-187 would appear to preserve the present rules regulating recognition of foreign decrees and further provides that recognition will now be afforded to a foreign decree issuing from a court which exercises jurisdiction on the basis of the wife's separate domicile. This extension of the existing common law rule is a necessary corollary to section 5 (1) and 6 (1) which enable a Canadian court to exercise jurisdiction in divorce on the basis of the wife's separate domicile.

With respect to the recognition of foreign decrees, time does not permit an examination of the extent to which Canadian Courts may adopt the reasoning of the House of Lords in *Indyka v. Indyka*[27], wherein it was suggested that the criterion for recognition should depend upon the existence of a substantial connection between the petitioner and/or respondent and the foreign jurisdiction.

Duties of Solicitors and Courts respecting possibility of reconciliation

Section 7 imposes a duty on solicitors to advise divorce clients of the reconciliation provisions set out in Bill C-187, to inform the client of marriage counselling facilities available, and to discuss with the client the possibility of reconciliation with his or her spouse. It is also the duty of a barrister and solicitor to certify on any petition for divorce that he has duly discharged the above obligations. It will be noted that there is no statutory sanction imposed for non-compliance with section 7 (1) and it might well be contended that the provision will have little practical effect and constitutes merely

25 [1954] P. 428.

26 See also the definition accorded to this phrase in *Thomson v. M.N.R.*, [1946] S.C.R. 209.

27 [1967] 2 All E.R. 689.

"the sugar-coating which rendered the Bill acceptable to the sensitive public palate". A more effective provision aimed at promoting reconciliation between the spouses is set out in section 8 of Bill C-187 which requires the court, before proceeding to the hearing of evidence, to direct such inquiries to the petitioner and where the respondent is present, to the respondent as the court deems necessary in order to ascertain whether a possibility exists of matrimonial reconciliation. The section further provides that if at that time or any later time in the proceedings it appears to the court that there is a possibility of such reconciliation, the court shall adjourn the proceedings to afford the parties an opportunity to become reconciled, and with the consent of the parties or in the discretion of the court, nominate a person to endeavour to assist the parties with a view to their possible reconciliation. Section 8 (2) provides that where fourteen days have elapsed from the date of any adjournment under sub-section 1, either of the parties may apply to the court to have the proceedings resumed.

It may well be that the power to order an adjournment pursuant to section 8 (1) will not be exercised very frequently. Thus, if the practice adopted in Australia, where corresponding legislation exists, is followed, the occasions upon which an adjournment will be ordered will be few. In Australia, where the power to order such adjournments has existed since 1961, only fifteen cases were reported up to the end of 1965 in which this procedure was adopted and reconciliations were effected in only two of these cases.

Bars to Divorce

Before commenting upon the bars to divorce specifically set out in section 9, it should be noted that Bill C-187 includes no section comparable to section 5 of the Marriage and Divorce Act,[28] making it mandatory for the court to grant the decree where no statutory absolute or discretionary bars are established. Notwithstanding the omission of such provision, however, it is submitted that the only absolute and discretionary bars to relief are those expressly set out in Bill C-187. Thus the traditional discretionary bars of the petitioner's adultery, cruelty, desertion, delay and conduct conducing would appear no longer applicable even in respect of the grounds of divorce set out in section 3, the offence section.[29]

Section 9 (1) (a) of Bill C-187 provides that it shall be the duty of the court on a petition for divorce to refuse a decree based solely upon the consent, admissions or default of the parties or either of them, and not to grant a decree except after trial which shall be

28 R.S.C., 1952, c. 176.

29 But see *Williams v. Williams and Des Roches* (1967), 52 M.P.R. 368 (P.E.I.).

by judge without a jury. The language of this section would be wide enough to preclude any undefended petitions for divorce, but this could not have been the intent of the Federal Parliament since the possibility of the respondent entering no defence is clearly contemplated by the provisions set out in sections 8 (1) and 4 (1) (c). It is submitted that the object of section 9 is to secure a trial of the issues in the court. It would appear that admissions made prior to the divorce proceedings or on an examination for discovery are admissible evidence but that such evidence is not self-sufficient to justify the issue of a divorce decree. It is further submitted that section 9 (1) (a) is not intended to preclude a divorce being granted where the sole evidence adduced is an admission in the witness box during the course of the divorce proceedings.[30]

It is unnecessary to discuss section 9 (1) (b) in any detail since I have already commented upon the absolute bar of collusion in the discussion of section 2 (c). It should be noted, however, that section 9 (1) (b) would appear to place the onus on the plaintiff to prove the absence of collusion, and this constitutes a reversal of the previous rule of law on the point. The position would now seem to correspond with that in England where it has been held that there is a presumption against collusion, that it is provisional only and is counterbalanced by circumstances which lead to a reasonable suspicion thereof, whereupon it falls upon the plaintiff to negative collusion.[31]

Section 9 (1) (c) provides that the court must satisfy itself as to absence of condonation and connivance on the part of the petitioner and must dismiss a petition if the petitioner has condoned or connived at the act or conduct complained of unless, in the opinion of the court, the public interest would be better served by granting the decree. It will be noted that condonation and connivance have been converted from absolute to discretionary bars to relief. The circumstances which will govern the exercise of the court's discretion may, but will not necessarily, correspond to the conditions set out in *Blunt v. Blunt*[32]. It will be observed that these bars apply only in respect of petitions founded upon the offences designated in section 3. They have no application with respect to divorces sought on the grounds stipulated in section 4. As in the case of collusion, the onus would appear to rest on the petitioner to prove an absence of condonation or connivance.

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30 See *Elliott v. Elliott*, [1933] O.R. 206, wherein the term "admissions" in Rule 14 of the Rules respecting the Conduct of Matrimonial Causes (1933) was held to refer to admissions made in the pleadings or by counsel at trial and did not include admissions made on examination for discovery.

31 See *Emanuel v. Emanuel*, [1946] P. 115.

32 [1943] A.C. 517.

It has already been observed that section 2 (d) restricts the definition of condonation so as to exclude the circumstance where the parties resume cohabitation for a single period of not more than ninety days and such cohabitation is continued or resumed with reconciliation as its primary purpose.

A significant question that arises with respect to the discretionary bar of condonation is whether section 9 (1) (c) is consistent with the provision set out in section 9 (2) which reads "any act or conduct that has been condoned is not capable of being revived so as to constitute a ground for divorce described in section 3." It is submitted that the aforementioned subsections are not inconsistent and that their respective effects may best be illustrated by reference to a specific fact situation. Consider the case where a husband commits adultery and his wife condones the offence but the husband thereafter resumes association with the adulteress and acts of intimacy falling short of adultery occur. Under existing law the wife may complain of the condoned adultery by asserting a revival of the offence by reason of the husband's subsequent conduct. If the court accepts the wife's assertion and finds the condoned offence revived, then a decree of divorce must issue—the absolute bar of condonation has been erased by operation of the doctrine of revival.[33] Let us now consider the above facts in light of the provisions of section 9 (1) (c) and 9 (2). Under these provisions the wife in the above circumstances would not be entitled to a decree of divorce as of right since the doctrine of revival has been abolished by reason of the provision set out in section 9 (2). The court would accordingly be called upon to exercise its discretion in accordance with the conditions set out in section 9 (1) (c).

With respect to the bar of connivance set out under section 9 (1) (c), it has already been observed that this is now a discretionary bar and that the courts in exercising the discretion may, but will not necessarily, take into account the considerations set out in *Blunt v. Blunt*.[34] It should be further noted that the bar of connivance is now extended beyond the offence of adultery to all matrimonial offences set out under section 3 of Bill C-187. It is probable that in exercising the discretion in respect of the bar of connivance, the courts will more readily grant a divorce in cases of passive connivance but there is, of course, nothing which precludes the court from granting a divorce even though active connivance is established. In all cases, however, the court must be satisfied that the public interest would be better served by granting the decree.

Where a decree of divorce is sought pursuant to the grounds set out under section 4, it is the duty of the court under section 9 (1)

33 See *Tilley v. Tilley*, [1949] P. 240, at p. 260 (C.A.).
34 [1943] A.C. 517.

(d) to refuse the decree if there is a reasonable expectation that cohabitation will occur or be resumed within a reasonably foreseeable period. It will be observed that under this provision the court *must refuse* a decree if it concludes that there is a reasonable expectation of resumption of cohabitation within the foreseeable future. In the event that the court is in doubt as to possibility of a resumption of cohabitation, it would seem quite appropriate for the court to order an adjournment of proceedings pursuant to the provisions set out in section 8 in order that the opportunity for reconciliation of the spouses may be duly considered. It will be noted that the operation of section 9 (1) (d) is confined to the circumstance where a decree for divorce is sought pursuant to the grounds set out under section 4, and it has no operative effect in respect of the grounds set out under section 3. It is submitted that section 9 (1) (d) will have a strictly limited application, for where it is established that the marriage has broken down for the reasons designated in section 4, the natural inference to be drawn from this is that there is no reasonable expectation of a resumption of matrimonial cohabitation. It is furthermore difficult to envisage the court refusing a decree pursuant to the provision to section 9 (1) (d) in cases where the petitioner has declared an unwillingness to resume cohabitation.

Section 9 (1) (e) provides that where a decree of divorce is sought on the grounds set out in section 4, the court must refuse the decree if there are children of the marriage and the granting of the decree would prejudicially affect the making of reasonable arrangements for their maintenance. The phrase "children of the marriage" is defined in section 2 (b) which has been previously discussed. Like section 9 (1) (d), the bar to divorce arising under paragraph (e) applies only where a divorce decree is sought pursuant to the grounds established under section 4. It is, in my opinion, unfortunate that the protection of children's rights is confined to the circumstance where a decree is sought pursuant to the grounds established under section 4. It is arguable that where no adequate arrangements have been made for the maintenance of children of the marriage the court must refuse the decree and has no power to adjourn the proceedings pending the making of reasonable arrangements for maintenance of such children. In practice, however, the courts will no doubt order an adjournment where reasonable arrangements have not been made for the maintenance of such children at the time when the divorce decree is sought. It is interesting to contemplate the effect of this section in a not uncommon circumstance which arises when the party to a divorce proceeding contemplates an early remarriage. The prospect of early remarriage following the divorce decree may clearly affect the provision of reasonable maintenance for the children of the dissolved marriage, for the divorcee will be naturally inclined to favour the competing claims of his second wife

and the children born of his marriage to her. It is uncertain whether the intent of Parliament was directed at this specific circumstance but no doubt the issue will require due consideration by the courts in the days that lie ahead.

It is uncertain whether an onus falls upon the petitioner under section 9 (1) (e) to satisfy the court that the issue of a decree would not prejudically affect the making of reasonable arrangements for the maintenance of such children and whether such onus, if it exists, is duly satisfied by the petitioner's sworn evidence as to arrangements made for the children. It could be argued that the Bill requires the court ot go beyond its ordinary judicial functions in acting upon a *prima facie* case established by uncontradicted sworn evidence and that the court must exercise an inquisitorial function in order to give efficacy to this provision. With respect to a not dissimilar provision set out in the Matrimonial Causes Act (Australia, 1959), as amended in 1965, the opinion has been extra-judicially expressed by the Chief Justice of the Supreme Court of Tasmania that the function of the Court remains judicial and not inquisitorial and accordingly there is no independent duty imposed on the Court to take active steps itself to inquire into the effect of a decree upon the provision of reasonable maintenance for children of the marriage.

Section 9 (1) (f) provides that where a decree is sought under section 4 (1) (e), the court must refuse the decree if the granting of it would be unduly harsh or unjust to either spouse or would prejudicially affect the making of such reasonable arrangements for the maintenance of either spouse as are necessary in the circumstances. With respect to section 9 (1) (f), the bar set out in this section applies only with respect to divorce decrees which are sought pursuant to section 4 (1) (i) and (ii). The question arises under this sub-section, as under the provision set out in paragraph (e), as to the effect of possible remarriage operating to prejudicially affect reasonable arrangements for the maintenance of either spouse to the dissolved marriage.

With respect to the operation of the clause "unduly harsh or unjust", it is possible to contemplate circumstances where a decree sought pursuant to section 4 will be refused if the cause of separation arose by reason of the physical or mental ill-health of a spouse. However, it would be unwise at this time to attempt to formulate any criterion as to the application of this formula in such cases. As to the more general significance of this phrase, this has already been discussed in relation to section 4 (1) (e).

With respect to the operation of section 9 (3), it is provided that, for purposes of interpreting section 4 (1) (e), a period in which the parties have been living separate and apart is not interrupted or

terminated (a) by reason that either spouse has become incapable of forming or having an intention or volition to live separate and apart; or (b) by reason of a resumption of cohabitation during a single period of not more than ninety days with reconciliation as its primary purpose. The object of paragraph (a) is to prevent interruption of the period of desertion or separation arising by reason of supervening insanity on the part of either spouse. With respect to the operation of paragraph (b), similar considerations to those set out in relation to section 2 (d) would appear applicable. It is noteworthy that in calculating the duration of the period of separation or desertion pursuant to section 4 (1) (e), the period of not more than ninety days during which the parties cohabit with a view to reconciliation is to be included.

Corollary Relief

Sections 10 to 12 of Bill C-187 empower the court to make orders for interim alimony, permanent maintenance and the custody of children. Perhaps the most significant change arising under sections 10 and 11 is the legislative recognition of mutual obligations of maintenance between the spouses. Hitherto, the courts have been empowered to order maintenance only in favour of the wife but the position has been changed under sections 10 and 11 and the court by virtue of these provisions may now order interim or permanent relief to either spouse. A further substantial change arising by virtue of section 11 is that the court is now empowered to order either spouse to pay a lump sum as distinguished from a periodic sum for the maintenance of a spouse and-or the children of the marriage. It is noteworthy that section 11 contains no terms limiting the duration of maintenance orders and it would thus appear that duration is a matter for the discreation of the court to be exercised having regard to the conduct of the parties and the condition, means and other circumstances of the parties. The adultery of a spouse does not preclude an award of maintenance although it may be relevant for consideration by the court.

With respect to the opening clause of section 11 (1), which reads "upon granting a decree nisi", it would appear that the use of this phrase in other legislation has been broadly interpreted to admit an application for maintenance subsequent to the decree providing that such application is made within a reasonable time.[35]

Section 11 (2) empowers the court to vary or rescind a maintenance order made in prior proceedings and instructs the court to exercise its discretion having regard to the conduct of the parties since the making of the order or any change in their condition, means

35 The meaning of the phrase is duly considered in the second edition of *Power on Divorce* (1964, Toronto), at pp. 535 and 649.

or other circumstances. It is worthy of observation that no express reference is made in this section to the effect of the remarriage of either spouse. Presumably, therefore, the effect of such remarriage will merely be a relevant consideration to the exercise of the court's general discretion.

Section 13 provides that every decree of divorce shall be a decree nisi in the first instance and no such decree shall be made absolute until three months have elapsed from the granting of the decree nisi. Exceptions are admitted to this general provision by virtue of subsection 2 where special circumstances render it in the public interest that the decree absolute be granted before the expiration of the aforementioned period. Subsection 3 provides for intervention in a divorce cause by any person and effects no substantial amendment in current practices. Subsection 4 provides that the respondent to a divorce cause may obtain a decree absolute in the event of the petitioner's neglect to convert the decree nisi into a decree absolute. It may be noted that under this section no power is conferred upon the respondent to apply to have the decree vacated.

Section 14 stipulates that the decree of divorce granted pursuant to Bill C-187 and an order made pursuant to sections 10 or 11 shall have legal effect throughout Canada. To facilitate the enforcement of ancillary orders made pursuant to section 10 or 11, section 15 further provides that orders may be registered in any superior court in Canada and may be enforced in a like manner as an order of that superior court.

Section 16 provides that where a decree of divorce has been made absolute under this action, either party to the former marriage may marry again. It is probable that the intent of this section is to affirm the principle set out in *Re Schepull*[36], wherein it was held that the relationship of affinity will be terminated by divorce. It is submitted, however, that such intent would have been better realized had the provision stipulated that where a decree of divorce has been made absolute, "it shall be lawful for the respective parties thereto to marry again as if the prior marriage had been dissolved by death".

Appeals in divorce proceedings are regulated by the provisions set out in sections 17 and 18 of Bill C-187, which would appear to be self-explanatory. Suffice it to observe that by virtue of section 17, no appeal may be made against a decree absolute.[37] Sections 19 and 20 are concerned with the promulgation of rules of court and the preservation of provincial laws of evidence and would appear to present no real difficulties with respect to their interpretation.

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36 [1954] O.R. 67.

37 For consideration as to whether this rule amends the existing law, see *Power on Divorce* (1964, 2nd ed., Toronto) at pp. 149 to 152.

Section 21 provides that where a person has been appointed by the court under section 8 to assist the parties in achieving reconciliation, such person is not competent or compellable in any legal proceedings to disclose any admission or communication made to him in his capacity as the nominee of the court. Subsection 2 further provides that evidence of anything said or any admission or communication made in the course of an endeavour to assist the parties to a marriage with a view to their possible reconciliation is not admissible in any legal proceedings. The language of subsection 2 is wide enough to embrace admissions or communications made to persons other than nominated counsellors under section 8 but it is doubtful whether the intent of the Federal Parliament was to extend the privilege to a more general class.

The reason for this section is clear. It recognizes that if reconciliation between litigating parties is to be achieved through counselling, then it is imperative that the parties and the counsellor feel free to discuss all pertinent facts without the threat of such facts being held against the parties in subsequent litigation.

It is unnecessary for me to spend time analysing the contents of section 22 and 23 which regulate the jurisdiction in respect of divorces sought by persons in Quebec and Newfoundland. With respect to section 24, this section would appear to be self-explanatory.

Section 25 is concerned with transitional provisions and time does not permit a discussion of this section at this particular moment. Section 26 merits some consideration. It would appear that in the Province of New Brunswick all subsisting legislation on divorce is effectively repealed upon commencement of Bill C-187. However, existing remedies relating to damages for adultery, settlement of property, and, in general, jurisdiction and powers in matrimonial causes other than divorce are expressly preserved by section 26 (2).