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REPORT ON DIVORCE A MENSA ET THORO AND RELATED MATTERS

IRELAND

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CHAPTER 1 INTRODUCTION

In this Report, we will examine the law relating to divorce a mensa et thoro and related matters. Our examination takes place at a time when broad issues of family law policy are under public discussion - in particular the question of the retention or removal of the Constitutional ban on divorce contained in Article 41.3.2°. It is not our function to make proposals on such questions of fundamental social policy - which necessarily require resolution through the democratic process and ultimately by way of Referendum. This does not mean, of course, that we should not make proposals on areas of law where such broader social questions are relevant. In the present Report, we examine the law on the basis of the existing Constitutional position. If there is to be a change in that position, this is a matter for the electorate, rather than a law reform agency, ultimately to resolve.

We decided that the subject under discussion would more appropriately be dealt with in a Report rather than by means of the two-stage procedure of a Working Paper and a Report. The delay involved in the two-stage procedure would not, in our view be warranted, having regard to the nature of the subject under discussion.

CHAPTER 2 THE PRESENT LAW RELATING TO DIVORCE A MENSA ET THORO

Introduction

In Chapter 1, it was stated that legislation providing for the grant of a dissolution of marriage is prohibited by Article 41. 3.2° of the Constitution. The High Court has, however, inherited from the former Ecclesiastical Courts jurisdiction to grant a decree of divorce a mensa et thoro[1]. The decree does not dissolve the marriage or entitle either party to remarry: it simply relieves the petitioner from the obligation to cohabit with the respondent.

Grounds on which a decree may be granted

A decree may be granted on one or more of three grounds: adultery, cruelty and unnatural practices.

(i) Adultery[2]

Adultery consists of the voluntary act of sexual intercourse between one of the spouses during marriage and any other person who is not the other spouse. Thus, where a wife is raped, she does not commit adultery.

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[1] Shatter, ch.8, Kisbey, chs.1-3, Geary, ch.8, 11-12, 566-567, Browne, 276-280, Shelford, ch.5, Burn, vol. 2, 495c-500a, 501i-503a, 503d-508a, Hayes, The Matrimonial Jurisdiction of the High Court, 8 Ir. Jur. (n.s.) 55, at 55-60 (1973).

[2] See, Shatter, 132-133, Kisbey, 5ff., Geary, 309-323, Shelford, 386-387, 394, 395-414, 416-422, Burn, vol. 2, 5031-503y.

There is no known Irish decison dealing with the quesiton of the burden of proof that the act of adultery involved voluntary as opposed to non-voluntary conduct. It is doubtful if an Irish Court would hold that the petitioner has only to prove the act of intercourse when there is a claim that the act was not voluntary and that the whole burden of proof as to the involuntariness of the act should fall upon the respondent[3].

For the commission of adultery, it would appear that in England an act falling short of complete sexual intercourse but involving at least some penetration is required[4]. There are no known Irish decisions on this point.

In proving adultery

> "/i/t is a fundamental rule, that it is not necessary to prove the direct fact of adultery; because, if it were otherwise, there is no one case in a hundred in which that proof would be attainable: it is very rarely indeed that the parties are surprised in the direct fact of adultery."[5]

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[3] But see the position in England where the burden of proof in this matter falls upon the respondent. In Redpath v Redpath, /1950/ All E.R. 600 (C. A.), it was held that "once the act of intercourse is established, the burden is on the /respondent/ to show that that act was one to which she was forced against her will": id., at 600, per Bucknill, L.J.). See also Long v Long, 15 P.D. 218 (Butt, J., 1890).

[4] Dennis v Dennis, /1955/ P. 153 (C.A.), Sapsford v Sapsford, /1954/ P. 394, cf., (Karminski, J.), Hamerton v Hamerton, 2 Hag. Ecc. 8, at 14, 162 E.R. 767, at 769-770 (1828). See also Shelford, 404-405.

[5] Loveden v Loveden, 2 Hag. Con.1, at 2, 161 E.R. 648, at 648 (per Sir William Scott, 1810). See also, Grant v Grant, 2 Curt. 16, 163 E.R. 322 (1839) (decree granted on circumstantial evidence). As to particulars of adultery which must be pleaded, see Bishop v Bishop, 43 I.L.T.R. 39 (High Ct., Andrews, J., 1909).

A confession of adultery, however, is not sufficient evidence without corroborating testimony[6].

The type of evidence that is necessary to establish adultery cannot be stated in specific terms, since the circumstances "may be infinitely diversified ...."[7] It has been stated that:

> "The only general rule that can be laid down upon the subject is that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion /that adultery has been committed/; for it is not to lead a rash and intemperate judgment, moving upon appearances that are equally capable of two interpretations, neither is it to be a matter of artificial reasoning, judging upon such things differently from what would strike the careful and cautious consideration of a discreet man."[8]

(ii) Cruelty

Where one spouse has behaved with cruelty towards the other spouse, the other spouse may obtain a decree of divorce a mensa et thoro[9]. In the decision of B. v B.[10], in 1970, Mr Justice

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[6] Cf. Burgess v Burgess, 2 Hag. Con. 223, at 227, 161 E.R. 723, at 724 (per Sir William Scott, 1817), Noverre v Noverre, 1 Rob. Ecc. 428, at 440, 163 E.R. 1090, at 1091 (per Dr Lushington, 1846), Crewe v Crewe, 3 Hag. Ecc. 123, at 131, 162 E.R. 1102, at 1105 (1800), Robinson v Robinson, 1 Sw. & Tr. 362, at 393, 164 E.R. 757, at 781 (per Cockburn, C.J., 1859). See, however, Mortimer v Mortimer, 2 Hag. Con. 310, at 316 (per Sir William Scott, 1820). See also Shelford, 410ff., Burn, 503q-503r.

[7] Loveden v Loveden, supra, fn.5, at 3 and 648, respectively. See also, Lyons v Lyons, /1950/ N.I. 181 (K.B.D.(Mat.), Andrews, J.).

[8] Id., at 3 and 648-649, respectively. See also, Shelford, 405ff., Burn, vol. 2, 5031ff.

[9] See generally Shatter, 133-136, Kisbey, ch. 3, Geary, 323-337, Biggs, passim, Shelford, 422-438, Burn, vol. 2, 503d-503h.

[10] Unreported, High Court, Murnaghan, J., with jury, 10 December 1970, reported in The Irish Times, 11 December 1970, p. 11.

Murnaghan is reported as having instructed a jury in proceedings for divorce a mensa et thoro that "it was much easier to say what was not cruelty than to define it. It was sufficient for the purpose of this case to say that the cruelty alleged was not of itself sufficient unless the result of that cruelty was to cause the petitioner actual ill health, mental or physical, or both." We may examine the concept of cruelty under these two headings of physical and mental cruelty, insofar as the courts have adverted to these factors in their decisions. It should be noted that in some cases the cruelty alleged against the respondent spouse may extend to both headings and that the dividing line between the two headings may on occasion be difficult to draw.

(a) Physical Cruelty

It is well established that the Court may grant a decree where the respondent has been guilty of physical cruelty towards the petitioner or where he threatens to do physical harm to the petitioner or to injure the petitioner's health. As Sir William Soctt said in the old decision of Evans v Evans[11]:

> "In a state of personal danger no duties can be discharged; for the duty of self-preservation must take place before the duties of marriage ...."

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[11] 1 Hag. Con. 35, at 37, 161 E.R. 466, at 467 (1790). See also, Harris v Harris, 2 Hag. Con. 148, at 149, 161 E.R. 697, at 698 (Sir William Scott, 1813), Waring v Waring, 2 Hag. Con. 153, at 154, 161 E.R. 699, at 699 (Sir William Scott, 1813).

Cases where several acts of physical violence were proved include: M'Keever v M'Keever, I.R. 11 Eq. 26 (Ct. for Mat. Causes, 1876), Murphy v Murphy, /1962-3/ Ir. Jur. Rep. 77 (High Court, Davitt, P., 1962). See also, D'Arcy v D'Arcy, 19 L. R. Ir. 369 (Ct. for Mat. Causes, 1887) (suit for restitution of conjugal rights met by defence of violent acts upon respondent (among others), as well as other misconduct). And see Courtney v Courtney, /1923/ 2 I.R. 31 (App., 1922).

In some cases one act of physical violence may be so serious as to constitute cruelty. In Reeves v Reeves[12] it was stated by the Judge Ordinary:

> "It has been laid down that where one gross act of cruelty is of such a nature as to raise a reasonable apprehension of further acts of the same kind, the Court will grant relief."

And in the old decision of Holden v Holden[13] Sir William Scott stated:

> "The law does not require that there should be many acts. The Court has expressed an indisposition to interfere on account of one slight act, particularly between persons who have been under long cohabitation; because if only one such instance of ill-treatment, and that of a slight kind, occurs in many years, it may be hoped and presumed that it will not be repeated. But it is only on this supposition that the Court forbears to interpose its protection, even in the case of a single act; because, if one act should be of the description which would induce the Court to think that it is likely to occur again, and to occur with real suffering, there is no rule that should restrain it from considering that to be fully sufficient to authorize its interference."

Indeed, even the threat of violence may in certain circumstances be so serious as to constitute cruelty[14]. However, the courts have on several occasions stressed[15] that they will not normally grant a decree on proof of one act of physical violence.

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[12] 3 Sw. & Tr. 140, at 141, 164 E.R. 1227, at 1228 (1860). See also Grossi v Grossi, L.R. 3 P. & D. 118 (1873).

[13] 1 Hag. Con. 453, at 458-459, 161 E.R. 614, at 616 (1810).

[14] Cf. Carpenter v Carpenter, Milw. 159, at 160 (per Dr Radcliff, 1827), Popkin v Popkin, 1 Hag. Ecc. 765, note (b), 162 E.R. 745, note (b) (Consistory, 1794).

[15] Cf. Smallwood v Smallwood, 2 Sw. & Tr. 398, 164 E.R. 1050 (1861), Westmeath v Westmeath, 2 Hag. Ecc. Supp. 61, at 73, 113, 162 E.R. 1012, at 1017, 1031 (1827), Curtis v Curtis, 1 Sw. & Tr. 192, at 200, 164 E.R. 688, at 691-162 (1858). See also, Hall, Note, 79 L. Q. Rev. 28, at 28 (1963), Shelford, 428-429, Burn, vol. 2, 503g-503h.

Physical cruelty is not limited to cases of force. It is probable that the Irish courts would take the same view as English courts in holding that the wilful communication by one spouse of venereal disease[16] to the other spouse constitutes cruelty[17]. Moreover, an attempted act of sexual intercourse by a spouse who knows that he or she is infected may constitute cruelty where the other spouse is aware of his or her condition and does not wish to have intercourse[18].

"Wilfulness" in this context extends to recklessness[19], but not to a case where a spouse believes that he or she has been cured of the disease[20].

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16 Including a disease which may be contracted innocently: Chesnutt v Chesnutt, 1 Sp. Ecc. & Ad. 114, at 201, 164 E.R. 114 at 117 (Dr Lushington, 1854).

17 Popkin v Popkin, 1 Hag. Ecc. 765, note (b), 162 E.R. 745 (1794), Collett v Collett, 1 Curt. 678, 163 E.R. 237 (1838), Ciocci v Ciocci, 1 Sp. Ecc. & Add. 121, 164 E.R. 70 (1853), N. v N., 3 Sw. & Tr. 234, 164 E.R. 1264 (1862); see also Parkinson v Parkinson, L.R. 2 P. & D. 27 (Lord Penzance, 1869). See generally Biggs, ch. 8.

18 Foster v Foster, [1921] P.438 (C.A.), differing from Ciocci v Ciocci, supra, fn.17, at 132 and 77, respectively, where Dr Lushington had stated:

> "In order to constitute an act of legal cruelty there must be, in my opinion, an actual communication of the disease and the running the risk is not sufficient."

See, however, Popkin v Popkin, supra, fn.17, which appears to favour the approach adopted in Foster v Foster.

19 Boardman v Boardman, L.R. 1 P.&D. 233 (Lord Penzance, with jury, 1866). See also Ciocci v Ciocci, supra, fn.17, at 130 and 76, Brown v Brown, L.R. 1 P.&D. 46, at 50 (Lord Penzance, 1865), Morphett v Morphett, L.R.1 P.&D. 707, at 707 (per Willes, J., dissenting, 1859); cf. id., at 704, where Lord Penzance states the position far more narrowly). In Browning v Browning, [1911] P.161 (Sir Samuel Evans, P.), the Court disapproved of the majority in Morphett v Morphett, and held that it was not necessary to prove wilfulness on the part of the respondent but that he or she might discharge the burden of proof of showing that the disease was innocently communicated.

20 Collett v Collett, supra, fn.17, at 680 and 238, respectively (per Dr Lushington).

The cruel treatment of his children by a father in the presence of their mother may amount to legal cruelty so as to entitle her to a decree[21]. In an Irish decision of over a hundred years ago[22], it was indicated that the converse case of cruelty to her children by a mother in the presence of a father could not constitute legal cruelty. One commentator has expressed[23] disagreement with the approach, and it is not likely that it would be followed today.

(b) Mental Cruelty

Where the petitioner does not allege that the respondent committed or is likely to commit physical acts of violence, the courts have beeen more reluctant to pronounce a decree. The courts formerly adopted a very restrictive approach. In Evans v Evans[24] in 1790, Sir William Scott said:

> "What merely wounds the mental feelings is in few cases to be admitted where they are not accompanied with bodily injury, either actual or menaced. Mere austerity of temper, petulance of manners, rudeness of language, a want of civil attention and accommodation, even occasional sallies of passion, if they do not threaten bodily harm, do not amount to legal cruelty: they are high moral

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21 Suggate v Suggate, 1 Sw. & Tr. 489, 164 E.R. 828 (1859), Sant v Sant, L.R. 5 P.C. 542 (1874) (applying Maltese law), Otway v Otway, 13 P.D. 12 (Butt, J., 1887), rev'd, 13 P.D. 141 (C.A., 1888), Wright v Wright, /1960/ P.85 (C.A.).

22 "I am by no means prepared to say that the doctrine ought to be applied .... to cases in which the wrong-doer is the wife. It may well be that violence practised on a child, in its mother's presence, would be injurious to the health of a woman, gifted, as most women are, with tender sensibilities when their offspring suffers; but men are supposed to be of sterner stuff": Manning v Manning, I.R. 6 Eq. 417, at 427 (Ct. for Mat. Causes, Warren, J., 1872). See also subsequent proceedings, I.R. 7 Eq. 520, at 522 (Warren, J., 1873).

23 Shatter, 136.

24 1 Hag. Ecc. 35 at 38, 161 E.R. 466, at 467 (1790).

> offences in the marriage-state undoubtedly, not innocent surely in any state of life, but still they are not that cruelty against which the law can relieve. Under such misconduct of either of the parties .... the suffering party must bear in some degree the consequences of an injudicious connection; must subdue by decent resistance or by prudent conciliation; and if this cannot be done, both must suffer in silence. And if it be complained that by the inactivity of the Courts much injustice may be suffered and much misery produced, the answer is that Courts of Justice do not pretend to furnish cures for all the miseries of human life. They redress or punish gross violations of duty, but they go no farther; they cannot make men virtuous; and, as the happiness of the world depends upon its virtue, there may be much unhappiness in it which human laws cannot undertake to remove."

Since then, the courts have adopted a more flexible approach. In the Irish decision of Carpenter v Carpenter[25], in 1827, Dr Radcliff accepted that the Court should intervene where the respondent's conduct was likely to lead to "injury to the person or health" of the petitioner.

And in the English decision of Kelly v Kelly[26] in 1870, where there had been no physical violence, Channell, B. said that:

> "It would be difficult to frame a definition of legal cruelty which should be applicable to all cases which may arise. The object of the Matrimonial Court in exercising its jurisdiction in decreeing judicial separation for cruelty is to free the injured consort from a cohabitation which has been rendered, or which there is imminent reason to believe will be rendered, unsafe by the ill-usage of the party complained of. It is obvious that the modes by which one of two married persons may make the life or the health of the other insecure are infinitely various but as often as perverse ingenuity may invent a new manner of producing the result, the Court must supply the remedy by separating the parties. The most frequent form of ill-usage which amounts to cruelty is that of personal violence but the courts have never limited their jurisdiction to such cases alone. ...."

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[25] Milw. Rep. 159, at 160 (1827).

[26] L.R. 2 P. & D. 58, at 60-61 (1870).

In McA. v McA[27], in 1981, Mr Justice Costello noted that it was:

> "clear that in the ecclesiastical courts a decree could be granted on the ground of the cruelty of the respondent even in the absence of proof of physical violence, the test being conduct which renders the co-habitation unsafe or which makes it likely that co-habitation will be attended by injury to the person or health of the party."

Mr Justice Costello noted that there were many cases in the English Reports in which decrees of judicial separation had been made "on the ground of what is somewhat loosely called 'mental cruelty', that is to say, acts not involving physical violence."[28]

In McA. v McA the respondent refused to communicate with his wife "except when absolutely necessary and then in the most formal way".[29] The spouses conversed together only on "the necessities of living together and nothing more".[30] Otherwise the respondent communicated with his wife through their three-year-old daughter or by means of notes. He sought protection from the strain in the family home in the practice of trans-cendental meditation but this "only aggravated the situation by making him appear emotionally cold and insensitive to his wife's needs."[31]. He refused to co-operate with his wife in trying to find a solution to their marital difficulties and declined to seek professional help from doctors or counsellors. Sexual intercourse between the spouses had ceased about three years before the hearing of the case.

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[27] /1981/ I.L.R.M. 361, at 362 (High Court, Costello, J.), citing Carpenter v Carpenter, Milw. Rep. 159, at 160 (Dr Radcliff, 1827).

[28] /1981/ I.L.R.M., at 363.

[29] Id.

[30] Id.

[31] Id.

Mr Justice Costello was satisfied that the respondent's conduct had injured the petitioner's health:

> "That conduct has been deliberate in the sense that it was consciously adopted by him. I should make clear, however, that the /respondent/, I am satisfied, has not set out deliberately to injure his wife's health. But this does not disentitle the petitioner to relief as it has been established in Kelly v Kelly[32] and confirmed in the House of Lords in a more recent case (see Gollins v Gollins[33]) that cruelty in matrimonial cases can exist in the absence of intention to injure."[34]

Mr Justice Costello referred to "/t/he difficulty in laying down anything but the broadest general principle"[35] in relation to conduct that may constitute mental cruelty. It is, of course, impossible to say whether any particular kind of conduct will afford a ground for a decree: all the circumstances of the individual case must be taken into account.

There are reported decisions[36] holding that abusive language and nagging may constitute cruelty, provided they result in injury to the petitioner's health.

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[32] L.R. 2 P. & D. 59 (1870).

[33] /1964/ A.C. 644.

[34] /1981/ I.L.R.M., at 363.

[35] Id.

[36] Kelly v Kelly, L.R. 2 P. & D. 59 (1870), Atkins v Atkins, /1942/ 2 All E.R. 637 (P.D.A. Div., Henn Collins, J.), Usmar v Usmar, /1949/ P.1 (Willmer, J., 1948), King v King, /1953/ A.C. 124 (H.L.(Eng.), 1952). Earlier decisions were generally to the contrary: cf. D'Aguilar v D'Aguilar, 1 Hag. Ecc. 773, 162 E.R. 748 (1794), Oliver v Oliver, 1 Hag. Con. 361, 161 E.R. 581 (1801), Kirkman v Kirkman, 1 Hag. Con. 409, 161 E.R. 598 (1807), Otway v Otway, 2 Phill. Ecc. 95, 161 E.R. 1088 (1812), Barlee v Barlee, 1 Add. 301, 162 E.R. 105 (1822), Chesnutt v Chesnutt, 1 Sp. Ecc. & Ad. 169, 164 E.R. 114 (1854), Carpenter v Carpenter, Milw. 159, at 159-160 (Dr Radcliff, 1827).

Formerly[37], the Courts do not appear to have regarded drunkenness per se as constituting cruelty, even where it affected the health of the petitioner[38]. Nowadays, however, drunkenness probably would be regarded as constituting cruelty if it affects the health of the petitioner or creates in the petitioner an apprehension of bodily injury[39].

(iii) Unnatural Practices

A third ground for the granting of a decree of divorce a mensa et thoro is that of unnatural practices performed by the husband[40]. The scope of this ground is uncertain, sincer there are very few reported decisions and those that have been reported are old and somewhat unclear.

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37 Cf. Chesnutt v Chesnutt, 1 Sp. Ecc. & Ad. 196, at 198, 164 E.R. 114 at 115 (per Dr Lushington, 1854):

> "However .... degrading habits of intoxication /may be/ - however annoying to a wife, especially the wife of a gentleman and a clergyman - these facts, standing alone, do not constitute legal cruelty."

See also, Brown v Brown, L.R. 1 P. & D. 46, at 50 (per Lord Penzance, 1865).

38 Cf. Marsh v Marsh, 1 Sw. & Tr. 312, 164 E.R. 744 (1858), Waddell v Waddell, 2 Sw. & Tr. 584, 164 E.R. 1124 (1862), Power v Power, 4 Gw. & Tr. 174, 164 E.R. 1483 (1865), Walker v Walker, 77 L.T. 715 (Barnes, J. with Special Jury, 1898)(semble). See also, Ruxton v Ruxton, 5 L.R. Ir. 455 (1880).

39 Cf. Baker v Baker, /1955/ 1 W.L.R. 1011, at 1015 (Liverpool Assizes, Davies, J.):

> "In my judgment, persistent drunkenness after warnings that such a course of conduct is inflicting pain on the other spouse, certainly if it is known to be injuring the other spouse's health, may well of itself amount to cruelty. In any case, such drunkenness, if it is combined with other acts of ill-treatment, may obviously be of the greatest importance."

See generally Biggs, ch. 7, especially at 129-130.

40 See Shatter, 115, Kisbey, 5, Geary, 350-351, Biggs, 163ff.

It appears certain that the commission of sodomy by the husband will afford a ground for a decree[41], whether the act is performed with the wife[42] or a third person. The charge of unnatural practices has not yet succeeded, the Courts evincing a reluctance to find it proved on the evidence of the wife alone. In N. v N.[43], the Court, in dismissing the wife's charge, stated[44]:

> "There was not on either side any corroborative evidence, nor could it well be expected that any could be adduced. In all cases where a crime is imputed, the presumption of innocence must prevail until guilt has been proved; and in proportion to the gravity of the charge and the rare occurrence of the crime imputed, it is reasonable to require more cogent evidence to overthrow the legal presumption of innocence. The crime here imputed is so heinous and so contrary to experience, that it would be most unreasonable to find a verdict of guilty where there is simply oath against oath, without any further evidence, direct or circumstantial, to support the charge. I cannot therefore come to the conclusion that this charge was proved."

It appears, moreover, the conviction of the husband of the crime of assault with intent to commit an unnatural act[45] or of indecent assault[46] will afford a ground for a decree.

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41 Cf. SANCHEZ, DE SANCTO MATRIMONII SACRAMENTO (1624), X DISP. 4, No.3 (quoted by Biggs, 163).

42 Cf. Geary, 332, 351. In Norris v Norris, unreported, Supreme Court, 22 April 1983 (278-1980), the plaintiff unsuccessfully challenged the constitutionality of the criminal sanction of sodomy contained in sections 61 and 62 of the Offences Against the Person Act 1861. The Supreme Court held that he had no locus standi, so far as the challenge related to sodomy between husband and wife.

43 3 Sw. & Tr. 234, 164 E.R. 1264 (1852).

44 Id., at 238 and 1265 respectively.

45 Bromley v Bromley, 2 Add. 152, note (c), 162 E.R. 252 (1793).

46 Mogg v Mogg, 2 Add. 292, 162 E.R. 301 (1824).

There does not appear to be any decision in this country relating to sodomitical conduct practised by a wife and a man who is not her husband, or to female homosexual conduct. In other jurisdictions, female homosexual conduct has been regarded as being capable of constituting cruelty[47] and there is no reason to consider that the Courts in this country would adopt a different approach, provided the other elements necessary for establishing cruelty can be proved.

On principle, it may be argued that the law should require that sodomitical practices indulged in by a wife should, of themselves, entitle a husband to a decree, without the husband being required to establish the other elements of cruelty. If the position were otherwise, the law would involve a discrimination between the sexes which it would be difficult not to regard as invidious.

Bars to a Decree

There are four absolute bars to a decree, each of which constitutes a complete defence to proceedings for divorce a mensa et thoro.

(i) Recrimination

A plea of recrimination[48] is the first bar to relief. The

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[47] Cf. Gardner v Gardner, /1947/ 1 All E.R. 630 (P.D.A. Div., Hodson, J.), Spicer v Spicer, /1954/ 1 W.L.R. 1051 (P.D.A. Div., Karminski, J.) (lesbian conduct not established but the wife's persisting in her association with another woman which was of such a kind as to give her husband "grave cause for anxiety ...." held to constitute cruelty).

[48] See generally, Shatter, 137-138, Kisbey, 12-14, Geary, 356, Browne, 279, Shelford, 439-444, Burn, vol. 2, 503i-503k.

plea may be made in proceedings based on adultery or cruelty[49] and consists of the assertion that the petitioner is himself or herself guildty of the conduct alleged against the respondent[50].

It has been held that proof of the petitioner's adultery need not involve "such strong facts .... as would be required to convict the other party of a suit for divorce".[51] It is not necessary for the respondent to establish that the petitioner's misconduct occurred before that of the respondent[52]. Where the respondent successfully puts forward the defence of recrimination and the petitioner fails to prove his or her charge, the Court may pronounce a decree of divorce a mensa et thoro in favour of the respondent[53].

The policy basis of the bar of recrimination was expressed

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[49] Shatter, 137, fn. 53, states that ".... adultery on the part of the petitioner may afford a good defence to the petitioner's allegation of cruelty". Kisbey, 12, states more broadly that recrimination "is a sufficient answer to a suit ....", not restricting the defence to any particular ground or grounds. (Although there does not appear to be any decision in point, it would seem that the defence should apply to a petition based on unnatural practices.)

[50] Thus, to a charge of adultery, it will not suffice to plead cruelty in bar: Chettle v Chettle, 3 Phill. Ecc. 507, 161 E.R. 1399 (1821), Harris v Harris, 2 Hag. Ecc. 376, at 411, 162 E.R. 894, at 907 (Dr Lushington, 1829), Chambers v Chambers, 1 Hag. Con. 440, at 451-452, 161 E.R. 610, at 614 (Sir William Scott, 1810).

[51] Forster v Forster, 1 Hag. Con. 144, at 153, 161 E.R. 504, at 508 (Sir William Scott, 1790), quoting from Lord Leicester v Lady Leicester (1738). Proof of mere solicitation of a woman will not, however, be sufficient: Chettle v Chettle, supra, fn.50. See generally, Shelford, 441-442, Shatter, 137.

[52] Proctor v Proctor, 2 Hag. Con. 292, 161 E.R. 747 (1819).

[53] Harris v Harris, 2 Hag. Ecc. 376, 162 E.R. 894 (1829), Kenrick v Kenrick, 4 Hag. Ecc. 114, 162 E.R. 1389 (1831).

somewhat graphically by Lord Stowel in Beeby v Beeby[54], speaking in the context of adultery:

> "The doctrine .... has its foundation in reason and propriety: it would be hard if a man could complain of the breach of a contract which he has violated; if he could comaplain of an injury when he is open to a charge of the same nature. It is not unfit if he, who is the guardian of the purity of his own house, has converted it into a brothel, that he should not be allowed to complain of the pollution which he himself has introduced; if he, who has first[55] violated his marriage vow, should be barred of his remedy: the parties may live together, and find sources of mutual forgiveness in the humiliation of mutual guilt."

An important qualification to the defence of recrimination is that where the adultery of the petitioner has been condoned, it does not constitute a bar to proceedings for divorce a mensa et thoro for a subsequent matrimonial offence by the other party[56].

(ii) Condonation

Condonation[57] is "forgiveness legally releasing the injury"[58] resulting from the adultery or cruelty of the other spouse. It affords a complete defence in proceedings for divorce a mensa et thoro based on either of these grounds. In contrast to connivance[59], which "necessarily involves criminality on the

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[54] 1 Hag. Ecc. 789, at 790, 162 E.R. 755, at 756 (1799).

[55] Or subsequently: see text above footnote 52, supra.

[56] Seller v Seller, 1 Sw. & Tr. 482, 164 E.R. 823 (1859).

[57] See generally, Shatter, 136-137, Kisbey, 14-16, Geary, 272-282, Shelford, 445-449, Burn, vol.2, 503h-502i.

[58] Beeby v Beeby, 1 Hag. Ecc. 789, at 793, 162 E.R. 755, at 757 (per Lord Stowell, 1799).

[59] Cf. infra, pp. 19-21.

part of the individual who connives"[60], condonation may take place "without imputing .... the slightest degree of blame, especially in the case of the wife, whose conduct might be more meritorious from her forgiveness of the injury".[61]

Before forgiveness will release the other spouse from the legal consequences of his or her conduct, it must be voluntary and made with knowledge of the offence[62]. Condonation may be express or implied[63]. In the case of a husband cohabiting with a wife whom he knows to be guilty of adultery, condonation may be implied, "for it is to be presumed he would not take her to his bed again unless he had forgiven her".[64]

In the converse case of a wife cohabiting with an adulterous husband, it has been stated in the old decision of Beeby v Beeby[65] that

> "the effect of cohabitation is justly held less stringent on /her/; she is more sub potestate, more inops consilii; she may entertain more hopes of the recovery and reform of her husband; her honour is less injured and is more easily healed. It would be hard if condonation by implication was held a strict bar against the wife. It is not improper she should for a time show a patient forbearance; she may find a difficulty either in quitting his house or withdrawing from his bed. The husband, on the other hand, cannot be compelled to the bed of his wife; a woman may

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60 Turton v Turton, 3 Hag. Ecc. 336, at 351, 162 E.R. 1178, at 1183 (Consistory Court of London, per Dr Lushington, 1830).

61 Id., at 350-351 and 1183, respectively.

62 Shatter, 136. Durant v Durant, 1 Hag. Ecc. 733, 162 E.R. 734 (1825).

63 Beeby v Beeby, supra, fn. 58, at 793 and 757, respectively.

64 Id.

65 Supra, fn. 58.

> submit to necessity. It is too hard to term submission mere hypocrisy. It may be a weakness pardonable in ma/n/y circumstances."[66]

Whilst some of the attitudes expressed in this passage would find little support - and would be likely, indeed, to provoke some indignation - among many people today, it remains true that, in some cases, a wife discovering that her husband is guilty of adultery may be induced, by economic necessity and concern for the welfare of her children, to remain with him in the hope that he will change his ways[67].

The forgiveness by the innocent spouse of the guilty spouse's misconduct is subject to an implied condition that the guilty spouse will in the future treat the innocent spouse in every respect with "conjugal kindness"[68]. Subsequent matrimonial misconduct revives condoned cruelty or adultery[69]. It is not necessary that "an injury ejusdem generis"[70] be committed;

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66 Id., at 793-794 and 757 respectively. See also Durant v Durant, supra, fn. 62, at 752, 760-761 and 744, respectively. Cf. Lady Kirkwall v Lord Kirkwall, 2 Hag. Con. 277, at 279, 161 E.R. 742, at 743 (per Sir William Scott, 1818)(headnote refers to connivance, but principle expounded would appear clearly to extend to condonation). The question is discussed by Shelford, 447-448, and by Shatter, 136.

67 Cf. Macrell v Mackrell, /1948/ 2 All E.R. 858 (C.A.).

68 Durant v Durant, supra, fn. 62, at 762 and 744, respectively. See also M'Keever v M'Keever, I.R. 11 Eq. 26, at 32 (Ct. for Mat. Causes, per Warren, J., 1876), D'Aquilar v D'Aquilar, 1 Hag. Ecc. 773, at 780-781, 162 E.R. 748, at 752 (per Lord Stowell, 1794).

69 Cf. Cooke v Cooke, /1948/ N.I. 46 (K.B.D.(mat.), Andrews, L.C.J., 1947). Intimacy falling short of adultery, or misconduct insufficient in itself to constitute cruelty will be sufficient to revive condoned adultery: see Cooke v Cooke, 3 Sw. & Tr. 126, 164 E.R. 1221 (1863), M'Keever v M'Keever, supra, fn. 68, Westmeath v Westmeath, supra, fn. 15, Winscom v Winscom, 3 Sw. & Tr. 380, 164 E.R. 1322 (1864), Bramwell v Bramwell, 3 Hag. Ecc. 618, 162 E.R. 1285 (1831), Gardiner v Gardiner, /1949/ N.I. 126 (K.B.D. (Mat.), Andrews, L.C.J.), Beard v Beard, /1946/ P.8 (C.A., 1945).

70 Durant v Durant, supra, fn. 62, at 762 and 744, respectively (quoting argument of counsel for the respondent).

cruelty will revive adultery, and adultery will revive cruelty[71].

(iii) Connivance

Connivance on the part of the petitioner in the respondent's adultery will bar the suit[72]. The defence

> "is founded on the obvious principle that no man has a right to ask relief from a Court of Justice for an injury which he was chiefly instrumental in effecting himself. Volenti non fit injuria."[73]

The defence appears to have been seldom made before 1790[74]. What constitutes connivance depends greatly on the facts of the case. It may range from a husband's procuring his wife to have unlawful carnal connection[75], to a spouse's corruptly failing

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71 Shatter, 137, D'Aquilar v D'Aquilar, supra, fn.68, at 782 and 753, respectively, Durant v Durant, supra, fn.62, at 765 and 745, respectively.

72 See generally Shatter, 138, Geary, 268-272, Shelford, 449-458.

73 Harris v Harris, 2 Hag. Ecc. 376, at 415, 162 E.R. 894, at 908 (per Dr Lushington, 1829). See also, to similar effect, Rogers v Rogers, 3 Hag. Ecc. 57, at 58, 162 E.R. 1079, at 1079-1080 (per Sir John Nicholl, 1830), Forster v Forster, 1 Hag. Con. 144, at 146, 161 E.R. 504, at 505 (per Sir William Scott, 1790). Reeves v Reeves, 2 Phill. Ecc. 125, at 130, 164 E.R. 1097, at 1098 (per Sir John Nicholl, 1813).

74 In Hodges v Hodges, 3 Hag. Ecc. 118, at 121, 162 E.R. 1100, at 1102 (1795), Sir William Wynne stated that he knew "of no case, except Cibber v Cibber, where the sentence was refused on the ground that the husband knew of and consented to his wife's guilt without complaining ...." Even Cibber v Cibber (1738) does not appear to have been a clear precedent: see the Editor's comment in note (b), id., at 120 and 1101, respectively. Two decisions in which the defence was successful decided shortly before Hodges v Hodges, were Timmings v Timmings, 3 Hag. Ecc. 76, 162 E.R. 1086 (1792) and Lovering v Lovering, 3 Hag. Ecc. 85, 162 E.R. 1089 (1792).

75 Such conduct may constitute a criminal offence under the Criminal Law Amendment Act 1885, sections 2, 3, 48 and 49 Vict., c.69 (as amended by the Criminal Law Amendment Act 1935, section 7 (no.6)).

to take the necessary steps for removing the other spouse from a situation of gross temptation[76].

Mere negligence or inattention on the part of the petitioner will not afford a defence[77]. It is necessary to establish knowledge or reasonable suspicion on the part of the petitioner of the likelihood of the adultery and an intention on his or her part that it should take place. Thus, a spouse who suspects the other spouse of adultery may delay taking proceedings until he acquires sufficiently strong evidence of the adulterous conduct[78]. Similarly, where a wife confesses

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[76] Cf. Forster v Forster, 1 Hag. Con. 144, 161 E.R. 504 (1790), Lovering v Lovering, 3 Hag. Ecc. 85, 162 E.R. 1089 (1792).

[77] Cf. Rix v Rix, 3 Hag. Ecc. 74, at 76, 162 E.R. 1085, at 1086 (Sir George Hay, 1777): "Inattention is not sufficient"; Hoar v Hoar, 3 Hag. Ecc. 137, at 140, 162 E.R. 1108, at 1109 (Lord Stowell, 1801): "It is not mere imprudence and error of judgment which the law deems connivance .... Different men have different degrees of judgment, and judge differently: nor are we to judge by the event. A Court of justice must look quo animo the step is taken, and, if it be meant well, though it have a fatal consequence, it were hard indeed to fasten on mere imprudence the consequences of guilt. Conduct to bar must be directed by corrupt intention"; Moorsom v Moorsom, 3 Hag. Ecc. 87, at 107, 162 E.R. 1090, at 1097 (Lord Stowell, 1793): ".... dulness (sic) of perception, or the like, which exclude intention, is not connivance"; Rogers v Rogers, supra, fn. 73, at 59 and 1080, respectively: "The injury must be volenti, it must be something more than mere negligence; than mere inattention; than over-confidence; than dullness of apprehension; than mere indifference: it must be intentional concurrence in order to amount to a bar"; Timmings v Timmings, 3 Hag. Ecc. 76, at 81, 162 E.R. 1086, at 1088 (Lord Stowell, 1792): ".... nor is it every degree of inattention on /the petitioner's/ part which will deprive him of relief"; see, however, Gilpin v Gilpin, Hag. Ecc. 150, at 153, 162 E.R. 1112, at 1113 (Sir William Wynne, 1804): "If there has been such extreme negligence to the conduct of his wife, such an encouragement of acquaintance and familiar intimacy as was likely to lead to the consequence that ensued - an adulterous intercourse - it would subject /the petitioner/ deservedly to a refusal of the sentence he prayed". See Shelford, 451-452.

[78] Timmings v Timmings, 3 Hag. Ecc. 76, at 83, 162 E.R. 1086, at 1088 (Lord Stowell, 1792), Reeves v Reeves, supra, fn. 73, at 130 and 1098, respectively. But even in such a case, he or she must not actively encourage the adultery: cf. Manning v Manning /1950/ 1 All E.R. 602 (C.A.).

to her husband her love for another man, a friend of the husband, the husband does not connive with her adultery when he informs his friend of this fact, in the hope that his friend will encourage the wife to remain faithful[79]. There is old authority favouring the view that,

> "though a husband is bound to take prompt notice of the infidelity of his wife, and is liable to have his neglect of so doing urged against him, when afterwards seeking his remedy; yet this doctrine is not to be pressed against a wife, unless in very particular cases."[80]

(iv) Collusion

Collusion[81] by the petitioner with the respondent will bar a suit for divorce a mensa et thoro.

In Crewe v Crewe[82] it was stated:

> "Collusion may exist without connivance[83], but connivance is (generally) collusion for a particular purpose. Collusion, as applied to this subject, is an agreement between the parties for one to commit, or appear to commit, a fact of adultery, in order that the other may obtain a

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79 Hoar v Hoar, supra, fn. 77. See also Harris v Harris, supra, fn. 73 (husband not guilty of connivance where he introduced wife to King's mistress, since adultery did not result, either directly or indirectly, from this introduction); cf. Graves v Graves, 3 Curt. 235, at 240-241, 163 E.R. 714, at 715 (Dr Lushington, 1842): "/I/t would go to sap the foundation of all morality if a husband might introduce to his wife persons of bad character, and when she followed the example held up to her, he be permitted to come to this Court and ask for a separation."

80 Lady Kirkwall v Lord Kirkwall, 2 Hag. Con. 277, at 279, 161 E.R. 742, at 743 (Sir William Scott, 1818).

81 See generally, Shatter, 138-139, Kisbey, 21, Geary, 282-283.

82 3 Hag. Ecc. 123, at 129-130, 162 E.R. 1102, at 1105 (per Lord Stowell, 1800).

83 Cf., Shatter, 138: "Collusion can be looked on as another aspect of connivance"; Kisbey, 21: "/C/ollusion/ is only another form of Connivance".

> remedy at law as for a real injury. There is no injury where there is a common agreement between the parties to effect their object by fraud in a court of justice."

The mere fact, however, that both parties are desirous of a separation after an act by one of them which would justify a decree of divorce a mensa et thoro is not proof of collusion[84]. Nor is the fact that a husband allows his wife alimony pending the proceedings[85], although this fact taken in conjunction with other considerations may give rise to an inference of collusion[86].

It has been observed by one Irish commentator that

> "/c/ollusion today has no practical importance, as, if spouses agree to separate, there is no sense in their colluding to bring proceedings for a divorce a mensa et thoro. They can simply enter into a separation agreement."[87]

Collusion has played a far more important role in legal systems which permit divorce a vinculo since there the public policy of

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[84] Crewe v Crewe, supra, fn. 82, at 130-131 and 1105, respectively:

> "/I/t is no decisive proof of collusion that, after the adultery has been committed, both parties desire a separation; it would be hard that the husband should not be released because the offending wife equally wishes it; she may have honest or dishonest reasons, innocent or profligate; an aversion to live with a man she has injured, a desire to live uncontrolled, or to fly into the arms of the adulterer; it would be unjust that the husband should depend upon her inclinations for his release; he has a right to it."

[85] Barnes v Barnes, L.R. 1 P. & D. 505, at 507 (1867).

[86] Cf. the facts of Barnes v Barnes, supra, fn. 85. See also Lloyd v Lloyd, 1 Sw. & Tr. 567, 164 E.R. 862 (1859). Cf. Harris v Harris, 4 Sw. & Tr. (Supp.) 234, 164 E.R. 1505 (1862), and the facts of Power v Cook, I.R. 4 C.L. 247 (Com. Pleas, 1869).

[87] Shatter, 139.

legal control over the determination of the marriage status comes into consideration[88].

Natural Justice as a Possible Discretionary Bar

In one decision, Scovell v Scovell[89], the Court recognised as a discretionary bar the defence that the petitioner had by wilful neglect conduced to his wife's adultery. This defence was not part of the law of the Ecclesiastical Courts but was incorporated into the English legislation of 1857[90], which gave the Courts of that country power to grant decrees of divorce a vinculo matrimonii. Referring to the English provision, Warren, J. stated:

> "It is true this section does not apply directly to this Court; but I think that the principles of divorce law incorporated in this statute apply to Ireland indirectly, in favour of natural justice."[91]

This decision appears to have gone very far, possibly in order to accommodate the respondent in subsequent proceedings for divorce a vinculo[92]. It is questionable whether a Court today

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88 Cf. Churchward v Churchward, /1895/ P.7, at 30 (Sir Francis Jeune, P., 1894):

> "It must always be remembered that, on grounds of public policy, second, perhaps, to none in importance, the marriage status cannot, however much the parties to it may otherwise desire, be altered, except in the fulfilment of certain conditions prescribed by law, conditions which relate to the conduct not only of the person against whom, but of the person by whom, relief is sought."

89 /1897/ 1 I.R. 162 (1895).

90 Matrimonial Causes Act 1857, section 31 (20 & 21 Vict., c. 85).

91 Supra, fn.89, at 163.

92 In order to obtain a legislative divorce a vinculo, it was then necessary for the husband to have obtained a decree for divorce a mensa et thoro: cf. Duncan, Desertion and Cruelty in Irish Matrimonial Law, 7 Ir. Jur. (n.s.) 213, at 215-216 (1972).

would regard the principles of natural justice as extending so far against a petitioner as to create a discretionary bar which found no support with the Ecclesiastical Courts.

Effect of a Decree of Divorce a Mensa et Thoro

As has already been mentioned, a decree of divorce a mensa et thoro does not dissolve the marriage. Instead it relieves the petitioner from the obligation to cohabit with the respondent. If at some future date the spouses again wish to cohabit, the decree may be discharged, whereupon the obligation to cohabit will be revived[93].

A spouse against whom a deceased spouse has obtained a decree of divorce a mensa et thoro is precluded from taking any share in the estate of the deceased spouse as a legal right or on intestacy[94].

Alimony

The High Court's jurisdiction to order the payment of alimony is similar to that formerly exercised by the Ecclesiastical Courts[95]. Alimony may only be awarded against the husband[96] and in favour of the wife[97].

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93 See Shatter, 131. Cf. Bromley, 183.

94 Succession Act 1965, section 120(2). See Shatter, 355.

95 See generally, Shatter, 281-282, Kisbey, ch.7, Geary, 380-392, Browne, 280, Shelford, 586ff, Burn, vol. 2, 505-508e.

96 Shatter, 281, Geary, 380. See also Order 70, rules 47 and 48 of the Rules of the Superior Courts (S.I. No.72 of 1962).

97 The Court may order that the alimony shall instead be paid to some person to be nominated in writing by the wife and approved of by the Court as trustee on her behalf: Order 70, rule 57 of the Rules of the Superior Courts (S.I. No. 72 of 1962).

There are two types of alimony: alimony pendente lite and permanent alimony.

(a) Alimony pendente lite

Provided that the factum of the marriage between the parties is established, alimony pendente lite may be awarded in proceedings for divorce a mensa et thoro[98], nullity[99] or restitution of conjugal rights[100] pending the determination of the proceedings, regardless of whether the proceedings are taken by or against[101] the wife.

The procedure is simple[102]. The wife applies for alimony by notice on motion supported by affidavit[103]. The husband files an affidavit in answer[104]. If the wife is not satisfied with the sufficiency of this affidavit, she may apply to the Court by motion or order her husband to give a further and fuller affidavit in answer or to order his attendance on the hearing of the motion for the purpose of being examined thereon[105].

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98 Shatter, 281-282.

99 Bird v Bird, 1 Lee 209, 161 E.R. 78 (1753)(husband petitioned for nullity alleging that wife had been guilty of bigamy, alimony pendente lite awarded; in a note to the decision, 161 E.R., at 79, note (a)[1], it is stated that "in a case of gross fraud, it would, I presume, be competent to the judge to condemn the asserted wife in costs, at the termination of the suit". See also Earl of Portsmouth v Countess of Portsmouth, 3 Add. 63, 162 E.R. 404 (1826); cf. Smyth v Smyth, 2 Add. 254, 162 E.R. 287 (1824).

100 Shatter, 281.

101 Cf. Bain v Bain, 2 Add. 253, 162 E.R. 286 (1824), Wilson v Wilson, 2 Hag. Con. 203, 161 E.R. 716 (1797).

102 See Order 70, rules 47-57 of the Rules of the Superior Courts (S.I. No. 72 of 1962).

103 Id., rules 47, 48.

104 Id., rule 49.

105 Id., rule 51.

If the husband's affidavit in answer alleges that the wife has property of her own, she may file an affidavit in reply, but the husband may not file an affidavit by way of rejoinder without permission of the Court[106]. Where the husband files no affidavit in answer, the wife may proceed with the motion or may apply to the Court by motion to order his attendance at the hearing of the motion for the purpose of being examined thereon[107]

Alimony pendente lite is awarded as periodical payments and not as a lump sum. In determining the amount to be awarded the Courts have allowed their decisions to be "regulated by and to vary according to circumstances"[108]. The Ecclesiastical Courts were "generally disposed"[109] to consider as a fair medium about one fifth of the husband's net income but, in the light of the

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106 Id., rule 52.

107 Cf. Hicks v Hicks, I.R. 9 Eq. 175 (Ct. for Mat. Causes, 1874), holding that a husband who had not filed an answer on oath to a petition for alimony pendente lite could not cross-examine or contradict the evidence of witnesses produced in support of the petition, either on a motion for an allotment of alimony pendente lite or on the hearing of the case as to an allotment of permanent alimony.

108 Hawkes v Hawkes, 1 Hag. Ecc. 526, at 526, 162 E.R. 666, at 667 (Arches Court, per Sir John Nicholl, 1828). In M'Donnell v M'Donnell, 42 I.L.T.R. 102 (K.B. Div. (Mat.), Andrews, J., 1908), an order for alimony pendente lite was made conditional on the wife discontinuing other proceedings against her husband, whose effect was to make him incapable of paying her any alimony.

109 Id. In Finlay v Finlay, Milw. 575 (1841), one-fourth of the husband's income was ordered to be paid as alimony, Dr Radcliff stating (id., at 575):

> "Under the circumstances of this case, I consider that the wife is entitled to more than the allowance of one-fifth. She has a title to support, which may induce more expense than that of a private gentlewoman; and alimony is generally more liberal where the wife complains ...."

In Irwin v Dowling, Milw. 629 (1842), the proportion of one-fourth was again awarded, the Court considering that the fact that the spouses had been living together for eighteen years entitled the wife to "a liberal allowance" during the suit.

In Butler v Butler, Milw. 529 (1842), however, the Court awarded an allowance of only one-eighth of the husband's income, since it appeared that the petitioner was "a person of a low situation in life, and has no rank to support" and had no children to maintain.

great changes in income and expenditure patterns since then, this practice would not be regarded as of major influence today.

Formerly, it had been held that

> "though .... during the pendency of the suit /she/ must be presumed not to be guilty, yet she is not to live exactly in the same way as if she were exempt from any imputation: she is as it were under a cloud, and should seek privacy and retirement."[110]

It is doubtful if this approach would be of any relevance to the social and economic conditions of today or would affect the Court in making an order for alimony pendente lite in such a case.

(b) Permanent Alimony

A wife who has obtained a final decree of divorce a mensa et thoro may apply to the Court for an allotment of permanent alimony[111]. Where a wife is guilty of adultery (and accordingly has been the unsuccessful petitioner or respondent in the proceedings) no order for alimony may be made in her favour[112]. There is, however, precedent for awarding some provision for the maintenance of a wife against whom a decree is made on the ground of cruelty[113].

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110 Hawkes v Hawkes, 1 Hag. Ecc. 526, at 526 and 162 E.R. 666, at 667, respectively.

111 For procedural requirements, see Order 70, rule 50 of the Rules of the Superior Courts (S.I. No.72 of 1961).

112 Shatter, 281. Cf. Durant v Durant, 1 Hag. Ecc. 733, at 761-762, 162 E.R. 734, at 744 (per Sir John Nicholl, 1825).

113 Prichard v Prichard, 3 Sw. & Tr. 523, 164 E.R. 1378 (1864), where the Judge Ordinary stated (id., at 526 and 1379, respectively) that "if there is no precedent, I ought to make one." Cf. White v White, 1 Sw. 7 Tr.591, 164 E.R. 874 (1859)(Court declined to award alimony to wife guilty of cruelty, in the absence of precedent); Dart v Dart, 3 Sw. 7 Tr. 208, 164 E.R. 1254 (1863)(following White v White). Prichard v Prichard was cited with approval in Goodden v Goodden, /1892/ P.1 (C.A., 1891).

Unless otherwise ordered, permanent alimony will commence at, and be computed from the date of the final decree of the Court[114]. As in the case of alimony pendente lite, no lump sum payment may be ordered: only periodical payments may be specified[115]. Nor has the Court power to award the wife a separate sum for the support of any children in her custody[116].

As regards the proportion of the husband's income that may be awarded by way of permanent alimony, it has been observed that "the allotment is always more liberal when the husband's delinquency stands proved than pending suit"[117]. The Ecclesiastical Courts appear to have adopted as the ordinary rule an allotment of a third of the husband's income[118] with a maximum of a half being awarded in particular cases[119].

Alimony awards are to be paid without deduction of income tax[120].

An "allotment" of alimony (whether pendente lite or permanent) may be increased or decreased by the Court on application to it by either spouse where the "faculties"[121] of either spouse

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114 Id., rule 56.

115 Shatter, 281.

116 Shatter, 281-282.

117 Kempe v Kempe, 1 Hag. Ecc. 532, 162 E.R. 668, at 669 (Arches Court, per Sir John Nicholl, 1828).

118 Cf. id. See also, Geary 386. See, however, Browne, 280,who states that "ordinarily the fourth part" of the husband's income will be awarded.

119 Cf. Geary, 386-387, Haigh v Haigh, L.R. 1 P. & D. 709, at 710 (1869).

120 Brolly v Brolly, /1939/ I.R. 562 (High Ct., O'Byrne, J.); see also Nolan v Nolan, /1941/ I.R. 419 (High Ct., Maguire, J.).

121 "Faculties" consist of "the property and income of the husband": Browne, 280.

have increased or decreased[122]. In M.C. v J.C.[123], Mr Justice Costello held that the term "allotment of alimony" used in Order 70, rule 55 of the Rules of the Superior Courts 1962 was not limited to cases where an order is made after a motion under order 70, rule 55 has been brought. He said:

> "It seems to me that the Rules Committee must have been well aware when this rule was adopted in 1962 that many matrimonial proceedings are settled without a hearing and before a motion under order 70 rule 54 is rendered necessary and it could not have intended to limit the review procedures permitted by order 70 rule 55 to cases in which motions under the preceding rules had been brought. So, it seems to me, an 'allotment of alimony' within the meaning of the rule I am now considering occurs when, by consent an order is made by the court directing payment of alimony at an agreed sum. I am also of the view that an 'allotment of alimony' is made within the meaning of the rule if the wife's claim is settled on the basis that the husband will pay an agreed sum in alimony and that his agreement will be received by the court and scheduled to the court's order, as has happened in this case. It is true that the wife's entitlement to alimony does not arise from an order of the court but from her husband's agreement, but none the less she has, it seems to me, been allotted alimony within the meaning of the rule. It would place a very restrictive meaning on the rule and impose an unjustified and unnecessary restriction on the court's power to review alimony payments on the application of the wife or the husband as the case may be if the review procedures could only take place when an agreement to pay

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122 Cf. Order 70, rule 55 of the Rules of the Superior Courts (S.I. No. 72 of 1961). See also Mogowan v Mogowan, /1921/ 2 I.R. 314 (K.B. Div. (Mat.), Ross, J.). In Halligan v Halligan, /1896/ 1 I.R. 244 (C.A., 1895), an award of permanent alimony was increased where the husband was relieved of the obligation of supporting his children by reason of custody of them being given to the wife. In Dempsey v Dempsey, /1943/ Ir. Jur. Rep. 47 (High Ct., Haugh, J.), the Court made a rule of Court a formal agreement between spouses providing for the termination of payments of permanent alimony made under a decree many years previously, in consideration of the husband assigning to his wife his interest in a dwellinghouse.

123 /1982/ I.L.R.M. 562 (High Ct., Costello, J.).

> alimony had been made a rule of court and not when it had been received and scheduled to the court's order."[124]

The decree of divorce a mensa et thoro may be discharged on application to the Court by the parties on the resumption of cohabitation[125]. There is some authority in favour of the view that the obligation to pay alimony ceases on the bona fide resumption of cohabitation, without the necessity of a Court order[126].

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[124] Id., at 565. Costello, J. considered that, since the question did not arise in the case before him, he "need express no opinion" as to the right of a husband to apply under order 70 rule 55 for a diminution order in a case where the spouses entered into a separation agreement by which the husband agreed to make specified periodic payments to the wife: id.

[125] Cf. Shatter, 131.

[126] Cf. Geary, 387, Bateman v Ross, 1 Dow. 235, 3 E.R. 684 (1813), Linton v Linton, 15 Q.B.D. 239, at 245 (C.A., per Brett, M.R., 1885). See also Haddon v Haddon, 18 Q.B.D. 778 (1887).

CHAPTER 3 PROPOSALS FOR REFORM OF THE LAW RELATING TO DIVORCE A MENSA ET THORO

Introduction

When approaching the question of making recommendations for reform we analysed the subject under seven main headings:

(a) an examination of the question whether the proceedings should be abolished completely;

(b) on the premise that the proceedings should not be abolished, an examination and review of existing grounds for a decree;

(c) an examination of possible new grounds for a decree;

(d) consideration of the existing bars to the granting of a decree for legal separation;

(e) consideration of alimony and related matters;

(f) consideration of the effects of a decree for legal separation;

(g) procedural and structural reform.

At the outset of this analysis, we should mention that in the following pages we refer to future legislation for "proceedings for legal separation". We consider this preferable to the continued use of the expression "proceedings for a divorce a mensa et thoro".

(a) Abolition of Proceedings for Legal Separation?

We first examined the question whether proceedings for legal separation should be abolished completely. The central argument in favour of abolition is that these proceedings

have in practice been rendered obsolete by the various statutory reforms over the past twenty-five years or so, in particular the Married Women's Status Act 1957, the Family Law (Maintenance of Spouses and Children) Act 1976, the Family Home Protection Act 1976 and the Family Law (Protection of Spouses and Children) Act 1981. The infrequency of proceedings[1] for legal separation suggests that these statutes adequately resolve questions of maintenance and property arising between the spouses, and that proceedings for legal separation offer no particular attraction to spouses whose marriages are in difficulties.

As against this, it can be argued that the law should continue to provide a specific legal remedy whereby in appropriate circumstances one spouse may be relieved of the obligation to live with the other spouse. There seems to us to be a sound justification in policy for retaining legal proceedings - whatever they may be called - enabling the spouse of, say, an adulterous or cruel partner to be relieved of the obligation to live with him or her. Accordingly, we do not recommend the abolition of proceedings for legal separation.

(b) A Review of the Existing Grounds for Legal Separation

(i) Adultery

Adultery has been a ground for divorce a mensa et thoro, legal separation or divorce in almost all countries.[2] It is easy

[1] The statistics relating to the number of petitions issued and of decrees granted are set out infra, p. 90.

[2] The recent move towards "no-fault" divorce in many countries has meant that adultery is in certain jurisdictions no longer regarded as a ground for a decree. Nevertheless, as evidence of "marital breakdown", "irreconcilable differences" or whatever other formulation that is adopted under the new law in these countries, adultery generally will constitute sufficient evidence in practice to entitle the other spouse to a decree.

to understand why this should be, since marital infidelity has been regarded as constituting a major breach of matrimonial obligations, as well as being likely to lead to much human unhappiness. We are satisfied that adultery should continue to be a ground for legal separation. We consider, however, that a number of minor changes and clarifications of the law, relating to proof of adultery, should be included in the legislation.

First, we recommend that the legislation should make it clear[3] that the onus of proof of adultery should remain on the petitioner even where the act of intercourse is established. This would not, in our view, impose an undue burden on the petitioner.

Another aspect of the proof of adultery is the rule that a confession of adultery will not be sufficient evidence without corroborating testimony. The rule appears to be based on the fear of collusion. We will be recommending below[4] that the bar of collusion should be removed. On that basis, it does not appear to us that the rule regarding confessions should be retained. We consider that, where the confession of adultery may, in the circumstances, be regarded as reliable, the fact that there is no corroborating testimony should not affect the right of the petitioner to a decree.

A final aspect of the proof of adultery relates to the question of the necessary degree of proof[5]. We recommend that the legislation should expressly provide that the standard of proof should be that of the balance of probabilities, which appears

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[3] Cf. p. 3, supra.

[4] Infra, p. 52.

[5] Cf. p. 3, supra, and Shatter, 132-133.

to be the standard of proof in respect of the other grounds for a decree and in respect of civil proceedings generally.

(ii) Cruelty

The present ground of cruelty appears to us to be generally satisfactory and we consider that it should be retained. The concept of cruelty appears sufficiently flexible in its application to ensure that no lacuna arises. In section (c) of this chapter, infra, pp. 36 ff., we shall consider whether a new ground of "unreasonable behaviour" should be included in legislation. Such a ground would have close similarities with that of cruelty. We will be examining the relationship between these two grounds in section (c).

(iii) Unnatural Practices

The present law relating to unnatural practices[6] is in need of substantial reform. It suffers from uncertainty of scope and inconsistency in policy. It is not clear whether the policy basis of the ground under present law is that the conduct in question is criminal, is perceived as immoral or is regarded as cruel.

In favour of the criminality interpretation, it may be argued that the (very few) reported decisions deal only with cases where the respondent has been alleged to have been guilty of a criminal offence. On this basis, where a woman discovers or is informed by him that her husband has homosexual tendencies but the husband has not been involved in criminal activities, she would not be entitled to a decree.

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[6] See supra, pp. 12-14.

The immorality interpretation would regard homosexual conduct as a ground for a decree on much the same basis as adultery: both have been considered to offend against widely accepted moral norms regarding sexual conduct[7].

In favour of the cruelty interpretation, it may be considered that homosexual conduct may well cause the other spouse considerable disgust and unhappiness. The fact that lesbian conduct (not offending against the criminal law) and other behaviour which suggests homosexual tendencies have been held in some jurisdictions to constitute cruelty tends to support this interpretation.

Whatever may be the policy basis of the existing law, this is a question separate from that relating to future legal policy on the subject. As to the latter question, we have already indicated the lines on which our analysis has proceeded. We do not favour the criminality approach. It would be unduly restrictive and would result in serious anomalies. Where a person discovers that his or her spouse is a homosexual, the question whether that spouse has behaved in a criminal fashion is not of primary importance.

On balance we consider the best approach would be for the legislation to abolish the specific ground of unnatural practices. This does not necessarily mean that such conduct could never be the basis of a decree for separation. In section (d) of this chapter, infra, pp. 36 ff., we will be examining the question whether, in appropriate cases, a decree based on the ground of unreasonable behaviour" might be sought and obtained in relation to homosexual conduct.

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[7] See, however, Tomkin, "Homosexuality and the Law", ch. 5 of D. Clarke ed., Morality and the Law (1982).

(c) Possible New Grounds for Legal Separation

We must now consider whether the legislation should include new grounds for legal separation, to supplement the existing grounds of adultery and cruelty, which, we have proposed, should continue to apply[8].

(i) "Unreasonable Behaviour"

A new possible ground for legal separation would be that:

> "the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent".

Thischange was made in the English divorce legislation of 1969[9] and in the legislation in Scotland[10] in 1976 and in Northern Ireland[11] in 1978, both of which are inspired by the English legislation.

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[8] With such modifications as we have proposed in relation to the ground of adultery.

[9] Cf. the Divorce Reform Act 1969, section 2(1)(a) (c. 55) (re-enacted in the Matrimonial Causes Act 1973, section 1(2)(b)(c. 18). See further Bromley, 199-207, Cretney, 112-122.

[10] Divorce (Scotland) Act 1976, section 1(2)(b) (c. 39). The definition is more expansive than in England and takes account of case-law in England analysing the concept. It provides that a petition for divorce may be based on the fact that

> "since the date of the marriage the defender has at any time behaved (whether or not as a result of mental abnormality and whether such behaviour has been active or passive) in such a way that the pursuer cannot reasonably be expected to cohabit with the defender".

See Thomson, Divorce - Scottish Style, 26 Int. & Comp. L.Q. 642, at 649-650 (1977).

[11] Matrimonial Causes (Northern Ireland) Order 1978, Article 3(2)(b).

One of the strengths of the "unreasonable behaviour" ground which commentators have stressed is that it conveys the essence of the concept of cruelty in less emotive language[12]. We accept that this is so but we do not consider that, on this account, the cruelty ground should be abolished

In our view the better approach is for the legislation to include both cruelty and "unreasonable behaviour" as grounds for a decree of legal separation. The notion of cruelty implies some element of intentional behaviour on the part of the respondent. Where such behaviour is established, cruelty rather than "unreasonable behaviour" would normally be the appropriate ground (provided of course that the other elements required under existing law were also established). Thus, cruelty would continue to be the appropriate ground to cover situations such as wife-beating, for example. Where, however, the respondent lacked the necessary element of intention, as, for example,[13] in at least some cases of gross addiction to drugs or alcohol or in at least some cases where a spouse engages in what are categorised as "unnatural practices" under existing law, the "unreasonable behaviour" ground would be appropriate.

(ii) Desertion

The next possible new ground is that of desertion. It is sometimes stated in error that desertion is already a ground in our law and it is relatively easy to see why this mistake should be made. Desertion constitutes a ground for separation

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[12] Cf. Meston, Divorce Reform in Scotland, [1977] Scot. L.T. 13, at 14.

[13] We wish to stress that the cases we mention are merely examples of conduct that could come within the scope of the "unreasonable behaviour" ground.

in English law[14]. It is also a ground for a decree of divorce in many jurisdictions[15]. In our law, as we have seen, desertion has a number of serious implications. The deserting spouse loses his or her maintenance rights[16], succession rights[17], and the right to veto a disposition of the family home under the legislation of 1976[18]. Moreover, he or she may be required to return to the deserted spouse by an order for the restitution of conjugal rights[19].

It is, therefore, somewhat surprising that desertion does not at present constitute a ground for a decree. In favour of introducing such a ground it may be argued that desertion constitutes a serious wrong towards the deserted spouse and that that spouse should be entitled to have the uncertainty[20] of his or her position resolved by obtaining a decree.

Against introducing the ground, it may be argued that, in this country, where divorce is prohibited by the Constitution, the

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[14] Matrimonial Causes Act 1973, section 17(1) (c. 18).

[15] E.g., in England (Matrimonial Causes Act 1973, section 1(2)(c), (c. 18)), Scotland (Divorce (Scotland) Act 1976, section 1(2)(c) (c. 39)), Northern Ireland (Matrimonial Causes Northern Ireland) Order 1978, Article 3(2)(c)) and Canada (Divorce Act 1968, section 4(1)(e)).

[16] See the Family Law (Maintenance of Spouses and Children) Act 1976, sections 5(2), 6(2) (No. 11).

[17] See the Succession Act 1965, section 120(2) (No. 27). (The desertion must have continued up to the death of the deceased for two years or more.)

[18] Family Home Protection Act 1976, section 4(3) (No. 27).

[19] See our Report on Restitution of Conjugal Rights, Jactitation of Marriage and Related Matters, pp. 1-5 (LRC 6-1983).

[20] Under present law, a spouse who is in desertion may end the desertion at any time by a bona fide offer to return. The effect of this rule is that the deserted spouse is never free to plan his or her life as a separate individual, no matter how long the desertion may have lasted, since it is always possible that the deserting spouse may wish to return at some time in the future.

law should constantly seek to encourage the reconciliation of the spouses. The present law relating to desertion, it may be said, promotes this policy: to allow the deserted spouse finally to exclude the deserting spouse from his or her life would not promote the possibility, however small it may be, of an ultimate reconciliation.

We consider, on balance, that the arguments in favour of introducing the new ground are more convincing. Before recommending its adoption, however, we should refer to a particular aspect of desertion not already mentioned, namely, constructive desertion. Constructive desertion arises where a spouse behaves in so deficient a manner as to justify the other spouse in leaving him or her.[21]

In such a case the spouse who remains is regarded as having (constructively) deserted the other spouse even though it was the other spouse who actually left the home. The statutory definitions[22] of desertion and constructive desertion contained in the Irish statutes closely reflect the English law on the subject.

We recommend that there should be a new ground of desertion, which should contain a provision (drafted on the same lines as in these statutes) to the effect that constructive desertion (as so defined) will constitute a ground for a decree.

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[21] See Shatter, 276-277

[22] Cf. the Succession Act 1965, section 120(3) (No. 27), the Family Law (Maintenance of Spouses and Children) Act 1976, section 3(1) (No. 11), the Family Home Protection Act 1976, section 4(3) (No. 27). See also C. v C., unreported, High Court, Kenny, J., 27 July 1973 - 144 Sp.), P. v P., unreported, High Court, Barrington, J., 12 March 1980-145 Sp.), M.B. v E.B., unreported, High Court, Barrington, J., February 1980) (1979-566 Sp.).

The question arises as to whether the legislation should prescribe a specific minimum period of absence from the home as an element in desertion. This is common practice in other countries[23], and it has the advantage of avoiding the waste of court time by troubling it with cases where the desertion may be temporary and where the intention of the party who has left the home is not finally determined.

As against this, it may be argued that the specification of a minimum period leads to uncertainty and injustice in a number of cases. Uncertainty can arise in cases where, before the final departure, the deserting spouse had come back to the home for short periods in the hope of a reconciliation.[24] Injustice can be caused where a spouse has clearly been finally and irrevocably deserted by the other spouse but the time period has not yet elapsed.

On balance, we consider that no minimum period should be specified for desertion. We also recommend that no minimum period should be specified for constructive desertion. In truth, constructive desertion in some respects bears a closer resemblance to cruelty than to desertion. It appears to us quite superfluous and unjust to require the spouse who has left the home on account of the misconduct of the spouse who stays to wait two years (or other minimum period) before being entitled to a decree.

The question of mental incapacity must be considered in relation

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[23] Including England (Matrimonial Causes Act 1973, section 1(2)(c) (c. 18) and Canada (Divorce Act 1968, section 4(1)(e)).

[24] The English legislation attempts to deal with this problem in section 2(5) of the 1973 Act.

to desertion. In England it has been held[25] that mental incapacity may be of such a nature and degree as to render a spouse incapable of forming the necessary animus deserendi. We consider that the same approach should be adopted in the proposed legislation. We also must frame a rule to cover the case where a spouse who is already in desertion becomes insane. In England, the House of Lords in 1951[26] held that in such circumstances the onus fell on the spouse who had been deserted to prove that the spouse who became insane nonetheless retained an animus deserendi. The onus would, of course, be impossible to discharge in many cases. Accordingly, legislation was enacted in England in 1958[27] to deal with the problem. The position is now covered by section 2(4) of the Matrimonial Causes Act 1973 which provides that, in determining whether a spouse is in desertion:

> "the court may treat a period of desertion as having continued at a time when the deserting party was incapable of continuing the necessary intention if the evidence before the court is such that, had that party not been so incapable, the court would have inferred that his desertion continued at that time."

This provision comes into operation only where desertion has already begun.[28]

We consider that this approach reaches a suitable accommodation of the respective interests of the spouses where a spouse in desertion becomes mentally incapable of continuing to form the necessary animus deserendi, and we recommend that the proposed legislation should include a provision drafted along these lines.

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[25] Perry v Perry, [1963] 3 All E.R. 766 (P.D.A. Div., Lloyd-Jones, J.). Cf. Brannan v Brannan, [1973] Fam. 120 (1972).

[26] Crowther v Crowther, [1951] A.C. 723 (H.L. (Eng.)).

[27] Divorce (Insanity and Desertion) Act 1958, section 2.

[28] Cf. Bromley, 211, fn. 4.

(iii) Gross Addiction to Drugs or Alcohol

It might be thought desirable that in cases of the respondent's gross addiction to drugs or alcohol the petitioner should be entitled to a legal separation without being obliged to bring the facts of the case within the definition of "unreasonable behaviour".[29] The law in some other countries[30] has so provided. We do not, however, consider that this would be desirable. We are satisfied that the ground of "unreasonable behaviour", which we have proposed, will provide a satisfactory criterion against which to assess the conduct of the respondent.

(iv) Breakdown of Marriage

We must now consider whether it would be desirable to introduce breakdown of marriage as a new ground for legal separation. "Breakdown of marriage" has been introduced as a ground for

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[29] Cf. supra, pp. 36-37.

[30] E.g., Canada (Divorce Act 1968, section 4(1)(b)). In many jurisdictions in the United States, habitual drunkenness (and in a small number, drug addiction) has constituted a ground for a divorce: Clark, 355 ff. (The position there has, however, been changing in recent years with the widespread introduction of "no-fault" divorce.) New Zealand law was formerly to similar effect. Section 21(e) of the Matrimonial Proceedings Act 1963, distinguished between the spouses in a manner that would be unlikely to command general support today; it prescribed as a ground:

> "That the respondent -
>
> (i) Being the petitioner's husband, has for a like period been an habitual drunkard or drug addict, has either habitually left his wife without means of support or habitually been guilty of cruelty towards her; or
>
> (ii) Being the petitioner's wife, has for a like period been an habitual drunkard or drug addict, and has either habitually neglected her domestic duties and rendered herself unfit to discharge them or habitually been guilty of cruelty towards him."

This ground applied only to divorce and not to separation proceedings: id., section 10.

divorce in several countries in recent years. It may be argued that it would make a valuable addition to the grounds for legal separation that we have already recommended should be included in the legislation.

First, it may be argued that where a marriage has broken down, either spouse should be permitted to obtain a decree relieving him or her from the obligation of living with the other spouse since it would be futile for the law to require spouses to live together where their relationship has ceased to be viable. We have recommended in a recent Report[31] that proceedings for the restitution of conjugal rights should be abolished. It may be argued that the corollary of this is that breakdown of marriage should be a ground for legal separation.

Secondly, in support of breakdown of marriage as a ground for legal separation, it may be argued that some people may prefer not to involve themselves in making allegations that their spouses have been guilty of matrimonial misconduct. Rather than make such allegations, they may wish to seek a legal separation on the basis that the marriage has broken down - a ground that involves no name-calling or criticism of the other spouse's behaviour.

Thirdly, there may be cases where both spouses would under present law be disentitled to a decree of legal separation on the basis of the bar of recrimination[32]. In such cases it might be considered that a better policy would be to allow both spouses, or either of them, to petition for a decree of legal separation on the basis of the breakdown of marriage.

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[31] Law Reform Commission's Report on Restitution of Conjugal Rights, Jactitation of Marriage and Related Matters, p. 12 (LRC 6-1983).

[32] See supra, pp. 14-16. See further infra, p. 50 for our recommendations in respect of the present law of recrimination.

A number of arguments may, however, be made against the proposed change to the breakdown criterion as a ground for a decree for legal separation.

First, it may be argued that to allow a spouse to obtain a decree when he or she has committed adultery or acts of cruelty or where he or she is in desertion would be contrary to the present policy of family law in this country, which provides that such conduct should have serious detrimental consequences for the guilty spouse. As has been mentioned, the legislation relating to maintenance[33] and to the family home[34] gives no rights to a spouse who is in desertion. The same is true in relation to the law of succession, where deserting spouses and spouses against whom a decree of legal separation has been made are precluded from taking any share in the estate of the deceased spouse as a legal right or on intestacy[35]. It may be argued that to retain the policy at present adopted throughout a wide range of family law, whilst abandoning it in the area of decrees for legal separation, would lead to a fundamental inconsistency in the law relating to domestic relations. To amend the law relating to maintenance, the family home and succession rights so as to bring it in line with the policy of a new law relating to legal separation allowing for a decree based on breakdown of marriage would be a fundamental and radical step.

The second argument is that the concept of breakdown of marriage might prove too uncertain in its practical application in specific cases to make it a sound basis for a decree. There

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[33] Family Law (Maintenance of Spouses and Children) Act 1975 (No. 11). Adultery constitutes a discretionary bar to maintenance in certain cases.

[34] Family Home Protection Act 1976 (No. 27).

[35] Succession Act 1965, section 120(2) and (3) (No. 27) (desertion must have continued for at least two years prior to death of the deserted spouse).

would be a likelihood of varying judicial interpretations, depending on the perceptions of different judges.

The third argument is that to base entitlement to a separation on breakdown of marriage might be unjust to the respondent[36]. A husband may wish to discard his wife in favour of a younger woman and may prefer the status that a decree of legal separation would give him to that of simply a deserting adulterer. (Similar considerations would of course apply to wives.)

The fourth argument is that to require the Court to make a serious investigation of the question whether a marriage has broken down could involve undue delay in the granting of a decree as well as an unsustainable increase in cost.

The fifth argument is that, if the Court is not to make a serious investigation of the question whether the marriage has broken down, it would be very difficult for the Court to refuse to grant a decree where one spouse maintains that the marriage has broken down. In England, this is accepted[37] as being the

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[36] Cf. the letter from the Rt. Hon. Lord MacDermott, L.C.J., Northern Ireland, to the Belfast Newsletter, 22 February 1977.

[37] Cf. Bromley, 195, Cretney, 102. Cretney quotes a passage from an address by Lord Simon of Glaisdale as follows:

> "If even one of the parties adamantly refuses to consider living with the other again, the court is in no position to gainsay him or her. The court cannot say, 'I have seen your wife in the witness-box. She wants your marriage to continue. She seems a most charming and blameless person. I cannot believe that the marriage has really broken down'. The husband has only to reply, 'I'm very sorry; it's not what you think about her that matters, it's what I think. I am not prepared to live with her any more'. He may add for good measure, 'What is more, there is another person with whom I prefer to live'. The court may think that the husband is behaving wrongly and unreasonably: but how is it to hold that the marriage has not nevertheless irretrievably broken down?"

case in fact, if not in legal theory.[38] This was also the view of nine members of the Morton Commission who stated:

> "If the case were undefended and the petitioner maintained that he would never go back to his spouse, and that the marriage was dead, and if his statement were perhaps supported by the evidence of relatives and friends, we do not see how the court could do otherwise than accept what he said and grant a divorce .... In a contested case the court would be in a similar difficulty. It would be practically impossible for a spouse who wished to resist divorce, perhaps for the sake of the children, to prove that the marriage had not broken down in the face of the other spouse's contention that it had. If, for instance, the husband were living with another woman and there were children of that union, it would be very difficult for the court to hold that the marriage had not broken down, however much the wife might argue that, for her part she regarded it as still intact."[39]

After much consideration we have come to the conclusion that the better approach would be for the legislation to include breakdown of marriage as an extra ground for legal separation, to supplement the other grounds, such as those of adultery and cruelty. We will be making further recommendations below[40] regarding the implications of this recommendation in relation to alimony and related matters and to the effects of a decree for legal separation.

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[38] Cf. Ash v Ash, [1972] Fam. 135 (Bagnall, J., 1971).

[39] Report of the Royal Commission on Marriage and Divorce 1951-55, para. 69 (XXXIV)-(XXXV). Where both spouses allege that their marriage has broken down, a Court could hardly realistically find that it had not. Cf. Finlay, Divorce Law Reform: The Australian Approach, 10 J. Family L. 1, at 2, 8-10 (1970.

[40] Succession raises particular difficulties: cf. infra. pp. 59 ff.

(v) Specified Periods of Separation as Grounds for a Decree

In several countries specified periods of separation are grounds for a decree of legal separation or divorce. Thus in Northern Ireland, for example, a petition for judicial separation may be presented by either party to a marriage on the ground that any of five facts exist. The fourth and fifth of these facts are as follows:

> "(d) that the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition (hereafter in this Order referred to as "two years' separation") and the respondent consents to a decree being granted;
>
> (e) that the parties to the marriage have lived apart for a continuous period of at least five years immediately preceding the presentation of the petition (hereafter in this Order referred to as "five years' separation")."[41]

Legislation in England and Wales and in Scotland is drafted on similar lines. In Australia where a decree of dissolution of marriage "shall be based on the ground that the marriage has broken down irretrievably", the ground is held to have been established and the decree of dissolution made "if, and only if, the court is satisfied that the parties separated and thereafter lived separately and apart for a continuous period of not less than 12 months immediately preceding the date of the filing of the application for dissolution of marriage". (See the Family Law Act 1975 (as amended) - an Act that replaced the previous Australian laws of divorce and nullity of marriage and superseded

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[41] See the Matrimonial Causes (Northern Ireland) Order 1978, Articles 3(2) and 19(1) (S.I. 1978/1045 (N.I. 15)). It is worth noting that in order to negative the possibility of the concept of irretrievable breakdown being introduced into the law of judicial separation the courts in Northern Ireland are precluded from considering "whether the marriage has broken down irretrievably" - Article 19(2) of the Order.

State and Territory laws of maintenance, custody and property where they related to marriages or children of marriages. Proceedings for judicial separation were abolished by section 8(2) of that Act.)

It has been mentioned above that two of the grounds for judicial separation in Northern Ireland are: (1) that the parties have lived apart for two years and that the respondent consents to a decree being granted ("two years' separation"); and (2) that the parties have lived apart for five years ("five years' separation"). We consider that this approach is generally desirable, and that our legislation should include grounds for a decree based on specified periods of separation, where the respondent spouse consents to a decree being granted, and where the respondent spouse does not so consent, respectively. The two years' period specified in Northern Ireland appears to us to be too long, however, especially as the parties may, if they wish, separate by an agreement that can be "converted" into a court order under section 8 of the Family Law (Maintenance of Spouses and Children) Act 1976[42]. We consider that the two years' separation where the respondent consents should become one year's separation. Where the respondent spouse does not consent, we are satisfied that the period of five years' separation would be appropriate.

[42] We will be recommending infra, p. 50, that the provisions of this section should be extended to cover cases where spouses wish to separate and have their separation agreement "converted" into a decree of judicial separation.

(vi) Empowering the Court to "Convert" a Separation Agreement into a Decree for Legal Separation

Section 8 of the Family Law (Maintenance of Spouses and Children) Act 1976 enables the court, where the parties to a marriage enter into an agreement (including a separation agreement) containing maintenance or property provisions, to make an order making the agreement a rule of court, provided it is satisfied that the agreement is a fair and reasonable one etc. It may be argued that a similar type of provision should be enacted enabling a separation agreement to be approved by the court and a decree of judicial separation granted. It might be objected that there would not be any point in this since a separation agreement would of itself satisfy the requirements of the separating spouses. But in many instances it would be desirable to give the additional weight of a judicial decree to the separation, e.g., so as to have the separation recognised abroad. (An order under section 8 of the 1976 Act is enforceable as a maintenance order in Northern Ireland and Great Britain under the Maintenance Orders Act 1974.) Moreover, the grant of a decree of judicial separation in this type of case does not prevent the parties coming together again as the decree can be discharged or rescinded. (See further infra, pp. 58-59, as to discharge and rescission.)

As against this ground, it may be argued that, although of course there is nothing wrong with the spouses agreeing to separate, this does not mean that the public interest requires the Court should necessarily make a decree to this effect.

Secondly, it would be difficult for the Court to establish with certainty whether or not pressure had been brought on one spouse by the other to enter into the separation agreement. Of the nature of things, proof of such pressure would be difficult to come by without a significant investigation, which would be hard to carry out in the face of the apparent agreement of the spouses

that all is well.[43] The Court could examine the maintenance and property provisions with some hope of getting at the truth, but on the questions why the separation is taking place and whether it is truly consensual the Court would in practice be at a disadvantage.

On balance we consider that the ground should be introduced into the law.

(d) Abolition of Bars to a Decree

We must now consider whether the proposed legislation should retain or abolish the present bars to a decree.

(i) Recrimination

Abolition of recrimination[44] would mean that a spouse could obtain a decree of separation in a case where he or she was himself or herself guilty of conduct entitling the other spouse to a separation. We favour this approach because we do not believe that it is a sound policy to require spouses to live with each other as a penalty for previous misconduct on the part of both of them.

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[43] On the general question of undue influence and pressure by one spouse on the other in the making of separation agreements, see Picher, The Separation Agreement as an Unconscionable Transaction: A Study in Equitable Fraud, [1972] Queens L.J. 441.

[44] Cf. supra, pp. 14-16.

(ii) Connivance

The present law[45] relating to connivance appears to embody a sound policy. A spouse who has encouraged his or her spouse to misbehave can hardly complain where the other spouse does so. The principle is recognised elsewhere in the law.[46] It does not appear to us to require any fundamental reform.

It could perhaps be argued that there is an inconsistency between recommending the abolition of recrimination and the retention of connivance. To take a specific example: a man wishing to induce his wife to commit adultery (so that he will have grounds for divorcing her) may invite men friends to his home and be absent for long periods.[47] In such a case he will be guilty of connivance and his petition based on his wife's adultery will fail. Where, however, with the same intention of inducing his wife to commit adultery, he himself commits adultery in a blatant and insulting fashion, the defence of recrimination will not apply. We appreciate the force of this argument but consider that it is not sufficiently strong to require the abolition of the bar of connivance.

(iii) Collusion

The present law[48] relating to collusion is relative unimportant. As we have already mentioned, one commentator has observed:

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[45] See supra, pp. 19-21.

[46] Cf. the Family Law (Maintenance of Spouses and Children) Act 1976, sections 5(3)(a), 6(4)(a) (No. 11).

[47] Cf. supra, pp. 19-20. The same point could, of course, be made in relation to analogous conduct by the wife.

[48] See, supra, pp. 21-23.

> "Collusion today has no practical importance, as, if spouses agree to separate, there is no sense in their colluding to bring proceedings for a divorce a mensa et thoro."[49]

The only question appears to us to be whether it would be desirable to abolish the defence (on the basis of its practical lack of utility) or to retain it on the basis that there may be some cases in the future where spouses will go through separation proceedings with the intention of depriving some third party of a benefit. It is difficult to envisage what circumstances could warrant such an unlikely course of action and we consider that the defence can safely be abolished.

(iv) Condonation

The present law[50] relating to condonation raises difficult questions of policy.

On the one hand the defence can be supported on the basis that it is in the interests of family solidarity that bygones should remain bygones and that a spouse should not be encouraged to disinter long-forgotten acts of misbehaviour on the part of the other spouse.

As against this, it may be argued that the condonation defence forces innocent spouses into a difficult decision when their partner has behaved in a manner that would entitle them to a decree for legal separation[51]. They are obliged to choose

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[49] Shatter, 139.

[50] See, supra, pp. 16-19.

[51] Cf. Fox, Condonation: An Obstruction of Reconciliation, 2 Family L.Q. 259 (1968).

between letting the matter rest, and thereby losing the right of ever subsequently petitioning for a decree in respect of that conduct, or of seizing the opportunity when it is still fresh and petitioning immediately for a decree - a course of action which might cause considerable hardship and distress, expecially where there are children.

One possibility, which we favour, would be for the legislation to abolish the defence of condonation but to provide in its stead a discretionary bar. We acknowledge that application of such a criterion would be difficult to predict with any great degree of certainty in individual cases. Nevertheless, the good sense of the Court to exercise its discretion to meet the needs of justice in particular cases has to be relied on and we recommend the adoption of a discretionary bar on the ground of condonation.

(v) Conduct Conducing to Adultery

It will be recalled[52] that the defence of conduct conducing to adultery was not part of the law of the Ecclesiastical Courts but that it was incorporated into the English legislation of 1857. As we mentioned, in one Irish decision[53], this defence was recognised as a discretionary one based on natural justice. Whether this approach would be favoured today is a matter of some doubt.

The question arises as to whether the defence should be incorporated in the proposed legislation. The matter is not one of great importance, since connivance covers most of the

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[52] Cf. supra, p. 23.

[53] Scovell v Scovell, [1897] 1 I.R. 162 (1895).

territory covered by "conduct conducing".[54]

We consider that the best approach would be for the law to provide that conduct conducing to adultery should constitute a substantive (rather than discretionary) bar. The concept is already part of the law relating to maintenance[55], and the change would have the advantage of bringing the two areas of law closer on this question.

(e) Alimony and Related Matters

Introduction

The present law[56] relating to alimony is clearly in need of reform. We will examine specific aspects of the subject in turn.

(i) Removal of Sex Discrimination

One important change which we recommend in relation to separation proceedings is that the present discrimination between the sexes regarding alimony should be abolished. The present denial of entitlement to alimony to all husbands could

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[54] Cf. Cretney, 115, Bromley, 216.

[55] Cf. the Family Law (Maintenance of Spouses and Children) Act 1976, sections 5(3)(a), 6(4)(a) (No. 11).

[56] Cf. supra, pp. 24-30.

well be unconstitutional[57] and is out of harmony with contemporary standards. The legislation relating to succession[58], maintenance obligations[59] and protection of the family home[60] is entirely free of discrimination between the sexes. These Acts are connected in substance or in practical effect with the right to support. In our view, the position under legislation dealing with decrees for legal separation should be no different.

We consider that the same principle of equality should apply to property orders, which we will recommend[61] for inclusion in the proposed legislation.

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[57] Cf. De Burca v A.G., [1976] I.R. 38 (Sup. Ct. 1975). The extent to which this decision renders unconstitutional legal distinctions between the sexes is uncertain: cf. Forde, Equality and the Constitution, 17 Ir. Jur. (n.s.) 295, at 320 ff (1982), Binchy, New Vistas in Irish Family Law, 15 J. Family L. 637, at 665 (1977). Legislative provisions in Alabama which discriminated between the sexes as regards alimony entitlement were struck down by the United States Supreme Court in Orr v Orr, 440 U.S. 268 (1979). Uniform Marriage and Divorce Act, section 308 places maintenance obligations after divorce or separation on a sexually neutral basis: see generally, Babcock et al, 619 ff., Davidson et al, 131, 148, 242-250, 278-279, Paulsen et al, 277-287.

In Australia, an element of sexual differentiation is retained in the law: section 75(2) of the Family Law Act 1975 (No. 53) refers to "the need to protect the position of a woman who wishes only to continue her role as a wife and mother" as a "relevant matter" in determining the maintenance obligations of the spouses.

[58] Succession Act 1965 (No. 27).

[59] Family Law (Maintenance of Spouses and Children) Act 1976 (No. 11), Guardianship of Infants Act 1964, section 11 (No. 7).

[60] Family Home Protection Act 1976 (No. 27).

[61] Infra, p. 57.

(ii) Conduct as a Factor in Maintenance Awards Consequent on a Decree for Legal Separation

On the difficult question of the relevance of conduct to the determination of maintenance awards, we consider that the legislation should follow the general lines of the Family Law (Maintenance of Spouses and Children) Act 1976. In other words, no maintenance would be awarded to a spouse who is in desertion, adultery would create a discretionary bar and other conduct would be a factor to be taken into consideration by the Court, with all the other circumstances of the case.

(iii) Maintenance of Children

At present the Court, in granting a decree for legal separation, is not empowered to make an order for the maintenance of children. We consider that this position is unsatisfactory and we recommend that the proposed legislation include provisions empowering the Court to make such orders.

The legislation should include a definition specifying the children who are entitled to be maintained, drafted in terms similar to that contained in section 3(1) of the Family Law (Maintenance of Spouses and Children) Act 1976.

(iv) Orders for Financial Provision on Making a Decree

The present law[62] relating to permanent alimony may be criticised for being too restrictive. Apart from the limitation of the

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[62] See supra, pp. 27-30.

right of alimony to wives, to which we have referred, the present law does not permit the Court to make any order, save one for periodical payments. We consider it desirable for the proposed legislation to permit the Court to make orders for the payment of lump sums and for the transfer of property, with the consent of the spouses, and for related matters.

Clearly, these new powers would have important consequences for family property law. We appreciate that this new jurisdiction should not be treated in isolation, without reference to more general policy questions regarding family property law. We note that the Government intends to introduce legislation relating to ownership of the family home. We do not, therefore, consider it advisable at this stage to prescribe specific details regarding property orders since these must depend on the structure of matrimonial property regimes that will become the basis of the law in the future.

(v) Custody of Children

Section 18(1) of the Guardianship of Infants Act 1964 enables the Court, in granting a decree for divorce a mensa et thoro, to declare that the respondent spouse is a person unfit to have custody of the children of the marriage or of adopted children. A parent who has thus been declared unfit is not, on the death of the other parent, entitled as of right to the custody of the children.

As we noted in our Report on Illegitimacy[63], the advantage of this provision is that it streamlines procedural matters, since, in a case where it applies, an application under section 11 of

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[63] LRC 4-1982, para. 372.

the Guardianship of Infants Act 1964 would not be required. But the provision does this by concentrating attention on the wrong-doing of one spouse as spouse rather than on the best interest of the child[64]. Moreover, the provision has no application in respect of the children born outside marriage (other than adopted children).

Accordingly, in our Report on Illegitimacy[65], we recommended the repeal of section 18(1), and its replacement by a more general provision[66]. We consider it desirable to refer to this recommendation, since it is of relevance to proceedings for divorce a mensa et thoro[67], and readers may not be familiar with the detail of our recommendations contained in our Report on Illegitimacy.

(f) Effects of a Decree for Legal Separation

(i) General Effects

In legislating for the new matrimonial cause of proceedings for legal separation special provision should be made for the effects on the parties of a decree of legal separation. We consider that where the court grants a decree it should no longer be obligatory for the parties to cohabit.

For the avoidance of doubt, special provision should be made for the rescission by the court of decrees of legal separation

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64 Cf. Shatter, 226.

65 LRC 4-1982, para. 372.

66 Id., para. 362.

67 Of course, our proposals relating to the ground of breakdown and separation would in any event have required us to review section 18(1) had we not already done so in our Report on Illegitimacy.

and for the automatic discharge of any such decree where the parties resume cohabitation. (See Bromley, p. 183 and footnotes.)

(ii) Succession Rights of Spouses

We must now consider the question of succession rights of spouses after a decree for legal separation has been made (and where the decree continues in operation, without having been rescinded). At present, as we have mentioned[68], a spouse against whom a decree for legal separation has been made is precluded from taking any share in the estate of the deceased spouse as a legal right or on intestacy. This approach may perhaps be justified on the basis that the only cases in which a decree for legal separation may be obtained - adultery, cruelty and unnatural practices - all may be considered to fall within the general category of "unworthiness to succeed" under Part X of the Succession Act 1965. An argument could, of course, be made against this atuomatic preclusion where a decree for legal separation is made - especially in cases where the respondent may have acted without any subjective guilt (as, for example, in the case of a mentally ill spouse who is found to have been cruel to the other spouse). There is, however, a certain logic to the existing approach, premised as it is on exclusively fault-based grounds.

When, as we propose, other grounds for a decree for legal separation are established, the position regarding succession becomes more complicated. The law no longer necessarily has to deal with a spouse who even arguably is unworthy to succeed. In some cases the respondent spouse may well be entirely worthy

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[68] Supra, p. 24.

to succeed, and, if anyone is unworthy, in some cases it may be the petitioner. This could be the position where a spouse who has behaved badly seeks a decree for legal separation based on the breakdown of the marriage or on the fact of five years' separation. The other spouse may have behaved loyally throughout and still be willing to continue to discharge the obligations of marriage. Conversely, there may be cases where both spouses, and other cases where neither spouse, may be considered unworthy to succeed to the other's estate. This could be the position in some cases where the spouses separate by consent and seek a decree of legal separation based on one year's separation or a decree "converting" a separation agreement into a separation decree. In the latter situation, however, it might also be argued that, although neither spouse is "unworthy" to succeed to the other's estate, equally he or she is not "worthy" to do so, in the sense that, the relationship between the spouses having faded or completely ended[69], there is no justification for the law to continue to confer valuable succession rights on the spouses relative to each other's estate.

We have analysed in detail several possible approaches to resolving these difficulties. One approach would be to retain the existing rule in relation to the grounds of adultery and cruelty (which will continue to be grounds under the proposed legislation), while providing that in other cases both spouses are to be precluded from taking a share in each other's estate. The weakness of this approach is that it might encourage some spouses to base their petition for a legal separation on cruelty rather than "unreasonable behaviour" in cases where the other

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[69] Of course the relationship may well continue on a fairly close basis, especially where there are children in the family. See Further Westman & Cline, Divorce Is a Family Affair, 5 Family L.Q. 1, at 1 (1981).

spouse's conduct fell within both grounds. This might be considered to encourage spouses to concentrate unnecessarily on the guilt and wrongdoing of each other's conduct. A second objection, from a different standpoint, is that to preclude spouses from a legal share in all cases other than adultery and cruelty might well be unjust. As we have mentioned, in the case of the breakdown and five-year separation grounds there is no simple solution: some respondent spouses may be "unworthy"; some may not. In some cases it might be considered inappropriate for either petitioner or respondent to have a share in each other's estate, not because either is "unworthy" but simply because legal policy would indicate that the argument in favour of entitlement to a legal share has not been made out.

Another general approach would be for the legislation to give the court a discretion, in its ancillary orders, to prescribe that either or both of the spouses will be precluded from a legal share on the other's death, as well as having a discretion to make financial orders in lieu of succession rights in appropriate cases. The argument against this approach is that it might encourage spouses to introduce evidence designed to blacken the other's character. The incentive to introduce this type of evidence, especially in cases of breakdown and separation, would be strong. This might be considered to run contrary to the spirit of the new grounds.

A third approach, which we favour, is for the legislation to provide that, on the granting of a decree for legal separation, each spouse is to be precluded from taking any share in the other's estate. This approach has, of course, the virtue of simplicity, but it could be argued that it would be unfair to innocent spouses who, perhaps in contrast to their spouse, have been guilty of no matrimonial misconduct. We appreciate the force of this argument, but we are satisfied that the Court could take these factors into consideration in the exercise of

its powers relating to alimony and property rights after the decree.

Where the decree is rescinded or discharged, we recommend that the succession entitlements of the spouses should be revived.

(g) Procedural and Structural Reform

A major criticism of the law and procedure governing the conduct of matrimonial proceedings is that the proceedings are adversarial in the sense that the petitioner has to establish his or her case, that there is in effect no real attempt made to have an independent inquiry into the facts of the marriage, that the witnesses are the parties' witnesses and not, as they should be, the court's witnesses, that the proceedings are too formal and that the system militates against reconciliation instead of encouraging it. To meet this criticism we recommend that the legislation should provide specifically that, in proceedings for legal separation, the court should proceed with the minimum of formality, that neither the judge nor the legal representatives should be robed, that the order of address of these representatives and of the parties is to be at the court's discretion and that the court may call any witnesses (expert or other) additional to those suggested or called by the parties. In this area the law and procedure in Australia constitutes a valuable precedent. (See section 97 of the Australian Family Law Act 1975 and Part XII (regulations 104 to 119) of the Australian Family Law Regulations. See also Articles 19(2) and 43 of the Matrimonial Causes (Northern Ireland) Order 1978.) Whatever procedure is decided on should be spelled out in the legislation and not left to rules of court. The legislature in matrimonial causes has a genuine interest in specifying the details of the procedure that will be followed in the proceedings.

We should stress that, if adversarial procedures are not to apply, then there should be a positive obligation on the court to enquire into the case and not simply to permit the case to proceed on whatever basis the parties may choose to present it. The legislation should, in express terms, require the court to discharge this function. In this context, we see no reason why, in order to import this obligation on the court, the legislation should not adopt wording similar to that used in Article 40.4.2° of the Constitution, which prescribes that "the [Court] .... shall forthwith enquire into the said complaint".

We also consider that if proper counselling services are available, whether provided by private agencies or the State, it could be made a necessary preliminary to the institution of court proceedings that recourse be had by the spouses to those services. We appreciate that there is a substantial body of opinion opposed to any degree of compulsion in relation to counselling and conciliation on the basis that it is ineffective but we consider that there is some merit to investigating the approach we have tentatively recommended, possibly on a pilot and experimental basis.

We propose that the court should have imposed on it the duty of protecting the children of judicially separated spouses; and it should be enacted that a decree of legal separation should not be granted unless there are no children of the marriage under 18, or where there are children under 18, proper arrangements (whether by court order or otherwise) have been made for their welfare (including custody and education of, and financial provision for them). Also, the court should in the separation proceedings themselves have power to make orders for the custody and education of the children.

Note: The proposals set out in this Chapter, and the summary of proposals in Chapter 5, are the proposals of the Commission. One member of the Commission, Mr Roger Hayes, does not agree with these proposals. His counter-proposals are set out in Chapter 4.

CHAPTER 4 COUNTER-PROPOSALS OF MR ROGER HAYES

1. The proposals for the reform of the law relating to divorce a mensa et thoro (correctly, toro) contained in this chapter are those of one member of the Commission, Mr Roger Hayes. His views differ in a number of significant respects from those of the Commission. The matters on which he disagrees and his proposals as to how these matters should be dealt with in the proposed legislation are set out hereunder. At the outset, it should be mentioned that the new proceedings for divorce a mensa et thoro should in the legislation be entitled proceedings for judicial separation rather than proceedings for legal separation. "Judicial Separation" is the term used in Britain since 1857 and in Northern Ireland since 1939 and is also the term in colloquial use in the State. Admittedly, 'legal separation' is the term used in the English text of The Hague Convention on the Recognition of Divorce and Legal Separations (1970), but in view of the existence of legal separations arising out of separation agreements, 'judicial separation' would appear to be a less confusing term for use in the State. (In the French text of the Convention the term is séparation de corps, which is the term used in the Code Civil and in the Code Civil Suisse.)

Breakdown of Marriage

2. If what is proposed by the Commission is implemented, breakdown of the marriage will be an additional ground for judicial separation. This proposal should, in Mr Hayes's view, be rejected.

3. Breakdown of marriage taken by itself is a nebulous concept, and in this context there is no difference between breakdown

and irretrievable breakdown, which is the term used in the legislation in Northern Ireland, the United Kingdom and Australia. In Mr Hayes's view irretrievable breakdown of marriage, which is no more than breakdown of marriage with a meaningless adjective, is a concept proper to dissolution of marriage and not to judicial separation. In cases of judicial separation the parties may come together again after the decree, which can then be rescinded or discharged. If this happens, the marriage can scarcely be said to have broken down, unless one is to say that it had temporarily broken down, which, of course, is not what is being said. On one view, the decree of judicial separation is automatically discharged on resumption of cohabitation. Indeed, provisions as to the effect of a decree of judicial separation on the rights of succession of one spouse to the property of the other must be related to the continuance of the separation at the time of the death of the other spouse. For example, Article 20(2) of the Northern Ireland Matrimonial Causes Order 1978 referred to infra, which abolishes the intestate succession rights of a judicially separated spouse to the other spouse's property, applies only where the separation is continuing. (As to the discharge or rescission of a decree of judicial separation, see Bromley, pp. 182-3, and the cases cited in the footnotes at p. 183, and Shatter, p. 131.)

4. The main problem that will arise if breakdown of marriage is introduced as a separate ground for judicial separation will be the difficulty of proof. How is the petitioner to establish that the marriage has broken down? It is noteworty that in Northern Ireland and in Britain, where the basis for divorce (i.e. dissolution of marriage) is irretrievable breakdown, the existence of the breakdown must be proved by establishing one or more of certain facts such as adultery, desertion, etc. In Australia, where a decree of dissolution of marriage "shall be based on the ground that the marriage has broken down

irretrievably", the ground is held to have been established and the decree of dissolution made "if, and only if, the court is satisfied that the parties separated and thereafter lived separately and apart for a continuous period of not less than 12 months immediately preceding the date of the filing of the application for dissolution of marriage". (See section 3(1) of the Matrimonial Causes (Northern Ireland) Order 1978, section 1(1) and (2) of the English Matrimonial Causes Act 1973 and section 48(1) and (2) of the Australian Family Law Act 1975 (as amended). The 1975 Australian Act replaced the previous laws of divorce and nullity of marriage and superseded State and Territory laws of maintenance, custody and property where they related to marriages or children of marriages. Proceedings for judicial separation were abolished by section 8(2) of the Act.)

5. The French concept is that of rupture de la vie commune - Articles 237-241 of the Code Civil; and the notion of la vie commune seems a preferable one and more in conformity with the idea of marriage as traditional in Judaeo-Christian society. Divorce or separation (séparation de corps) may be pronounced in France where there is mutual consent or rupture de la vie commune (which may be proved by six years' separation) or fault. The notion of la vie commune (Ger. die eheliche Gemeinschaft) as being at the basis of marriage is also to be found in the Code Civil Suisse. (See Articles 139 and 141-2 of that Code. See also use of terms convictus conjugalis, vita conjugalis and vita communis in cann. 1151-1155 (De Separatione Manente Vinculo) of the new Codex Juris Canonici (Rome, 25 January 1983).) However, the notion of "breakdown of marriage" or "irretrievable breakdown of marriage" has now acquired a certain currency in the English language and in English-speaking countries and it is not recommended that other terminology should be used in Irish legislation.

6. Under the Matrimonial Causes (Northern Ireland) Order 1978, a petition for judicial separation may be presented by either party to a marriage on the ground that any of the following facts exist -

> "(a) that, since the date of the marriage, the respondent has committed adultery:
>
> (b) that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent;
>
> (c) that the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition;
>
> (d) that the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition;
>
> (e) that the parties to the marriage have lived apart for a continous period of at least five years immediately preceding the presentation of the petition (hereafter in this Order referred to as "five years' separation")."
>
> (Articles 3(2) and 19(1) of the Order)

In addition and in order to prevent the possibility of the concept of irretrievable breakdown being introduced into the law of judicial separation, "the court shall not be concerned to consider whether the marriage has broken down irretrievably" - Article 19(2) of the Order. It is recommended that the proposed legislation should contain a similar rule that would cover not alone irretrievable breakdown but also breakdown.

7. A final and indeed major objection to the introduction of breakdown as an additional ground for judicial separation is that it will allow a petitioner who wishes to be judicially separated from his wife to obtain a decree after being married for say three or six months. All he would have to do is to cease to have any communication with his wife other than what was strictly necessary as a co-occupant of the family home, thus in effect living separately and apart from her although living in the same house and having her provide his meals. And it would not matter in the least that the wife wanted the

marriage to continue because of financial necessity or to avoid public scandal. This situation could, of course, also arise even where the marriage had already lasted for five or six years. To those who say that the courts would never grant a judicial separation just because the husband had stopped speaking to his wife and was generally ignoring her except where she was acting as the housekeeper or the mother of his children, the answer is that the courts would have no option. In this context, the quotation in Cretney from the Riddell Lecture of Lord Simon of Glaisdale is more than apt. "The court", said Lord Simon, "may think that the husband is behaving wrongly and unreasonably; but how is it to hold that the marriage has not nevertheless irretrievably broken down?" (See page 45, fn. 37 supra and Cretney at p. 102.) If the proposal of the majority of the Commission is accepted, all the husband will have to establish is breakdown and it may well be argued that this should be much easier to do than to establish irretrievable breakdown. Admittedly, Lord Simon was speaking in the context of divorce, but this makes no difference in so far as his argument against the concept of irretrievable breakdown as, by itself, a ground for ending a marriage is concerned.

8. An alarming aspect of the proposal by the Commission is seen when one considers what is more than likely to happen if its proposals are implemented and if subsequently in four or five years divorce is introduced. Normally, in countries that have both judicial separation and divorce the grounds on which a decree may be founded are the same. Indeed, it is scarcely conceivable that an Irish legislature would make breakdown a ground for judicial separation but not a ground for divorce. And there is little point in trying to argue that divorce is something completely separate, distinct and unrelated that is to be found only on another planet.

9. Subject to certain changes that will be discussed infra, Mr Hayes's recommendation is that the law in the State on judicial separation should follow that applicable in Northern Ireland, so that a petitioner would have to satisfy the court of one or more of the facts (a) to (e) specified in Article 3(2) of the Northern Ireland Order of 1978 and set out supra in para. 6 (provided, of course, that the court would not be concerned to consider whether the marriage has broken down). A number of considerations in regard to these matters will now be mentioned.

Adultery, Desertion and Cohabitation after the Event

10. The proposed legislation should provide specifically for cases of (a) condonation of and connivance in adultery, (b) constructive desertion and cohabitation after the event (e.g. the desertion or the separation or the final incident of unreasonable behaviour) relied on by the petitioner to support his or her allegation. (See sections 120(2) and (3) of the Succession Act 1965, sections 3(1), 5(3) and 6(4) of the Family Law Maintenance of Spouses and Children) Act 1976, and Articles 4(1) and 19(1) of the Northern Ireland Order of 1978.)

Unreasonable Behaviour

11. In the view of the minority of the Commission, 'unreasonable behaviour' clearly covers 'cruelty' (and (mental cruelty') and there is no need whatever to specify cruelty as a separate ground for a decree of judicial separation, any more than there is any need to specify 'unnatural practices' or to specifically abolish the ground of unnatural practices. The legislation will say what facts must be shown to a court to exist in order to entitle the petitioner to obtain a decree

- which will mean that it will be only on proof of one or more of these facts that a decree will be granted. 'Unreasonable behaviour' will, of course, cover unnatural practices.

Separation

12. It will be seen supra that two of the grounds for judicial separation in Northern Ireland are: (1) that the parties have lived apart for two years and that the respondent consents to a decree being granted ("two years' separation"): and (2) that the parties have lived apart for five years ("five years' separation"). The two years' separation period appears to be too long, especially as the parties may, if they wish, separate by an agreement that can be "converted" in a court order under section 8 of the Family Law (Maintenance of Spouses and Children) Act 1976, the provisions of which should be extended to cover cases where spouses wish to separate and to have their separation agreement "converted" into a decree of judicial separation.

13. It is recommended that the two years' separation should become one year's separation. In the case of desertion the period should also be one year. A deserted spouse should not have to wait for two years before being entitled to petition for a decree, but there should be a minimum period, even if only to establish that there has in fact been desertion. If a reasonable period is not prescribed, the parties could by agreement have the husband desert so as to allow the wife to petition for a decree after, say, a month. No change is proposed in regard to the five years' separation period.

14. In section 49(2) of the Australian 1975 Act it is provided that the parties to a marriage may be held to have separated and to have lived separately and apart notwithstanding that

they have continued to reside in the same residence or that either party has rendered household services to the other. It is considered that a provision on the lines of this subsection should be contained in the proposed legislation in order to cover situations where one spouse tolerates the conduct of the other spouse for the children's sake or to avoid public scandal or for reasons of financial necessity. In other words, provision should be made for what may be called "constructive separation", which finds a place in English law because of judicial decision.

Reconciliation

15. Any legislation to provide for judicial separation should include provisions allowing for and encouraging the reconciliation of the parties; and, before any legislation comes into operation, there should be established a proper counselling service (attached to or working in co-operation with the court) that would assist the parties in considering a reconciliation.

16. Under the Northern Ireland 1978 Order, the court may adjourn the proceedings for such period as it thinks fit to enable attempts to be made to effect a reconciliation; and if, during any such adjournment, the parties resume living with each other in the same household, no account is to be taken of that fact for the purposes of the proceedings. (See Article 8 of the Order.) The Australian 1975 Act contains in Part III elaborate provisions for counselling and reconciliation, and these provisions and Part II of the Australian Family Law Regulations are an excellent precedent for any provisions in Irish legislation. In Australia the counselling and reconciliation provisions apply not only to dissolution of marriage proceedings but also to financial or custodial proceedings "instituted by a party to a subsisting marriage"; and it is recommended that

this should also be the position in Irish law.

Separation Agreements

17. Section 8 of the Family Law (Maintenance of Spouses and Children) Act 1976 enables the court, where the parties to a marriage enter into an agreement (including a separation agreement) containing maintenance or property provisions, to make an order making the agreement a rule of court, provided it is satisfied that the agreement is a fair and reasonable one etc. A similar type of provision should be contained in the proposed legislation enabling a separation agreement to be approved by the court and a decree of judicial separation granted. It may be objected that there would be little point in doing this since a separation agreement would, of itself, satisfy the requirements of the separating spouses. But in many instances it would be most desirable to give the additional weight of a judicial decree to the separation agreement, e.g., so as to have the agreement recognised abroad. (An order under section 8 of the 1976 Act is enforceable as a maintenance order in Northern Ireland and Great Britain under the Maintenance Orders Act 1974.) Moreover, the grant of a decree of judicial separation does not prevent the parties coming together again as the decree may be discharged or rescinded. (Discharge and rescission are dealt with infra.)

18. In Mr Hayes's view the arguments of the Commission (supra, pp. 49 and 50) against a provision allowing for the conversion of a separation agreement into a decree of judicial separation are ill-conceived. Separation agreements have been part of the Irish matrimonial scene for a very very long time and have always been considered as an excellent way for spouses to settle their differences. Spouses are well able to protect themselves against pressure, which, of course,

may be exercised in respect of any agreement between members of a family or, for that matter, between persons who are not members of a family. It can be implied from the argument of the majority that a court may not be able to come to a proper decision as to whether a separation agreement is,in the words of the 1976 Act, "a fair and reasonable one which in all the circumstances adequately protects the interests of both spouses and the dependent children (if any) of the family". If this is the position, it seems to Mr Hayes to be more than passing strange; but it is, of course, not the position.

Effects of Judicial Separation

19. Special provision needs to be made for the effects on the parties of a decree of judicial separation. Where the court grants a decree, it should, of course, be no longer obligatory for the petitioner to cohabit with the respondent. Furthermore, if, while the decree is in force and the separation is continuing, either of the spouses dies, the other spouse should be precluded from taking any share in the estate of the deceased as a legal right or on intestacy. A properly drawn separation deed would normally contain a clause providing that neither spouse could succeed to a share on intestacy or as a legal right in the other spouse's estate. Now that spouses who cannot be reconciled are to be encouraged to separate by an agreement that would be capable of "conversion" to a decree of judicial separation, it is not good policy to continue a provision (section 120(2)) of the Succession Act 1965) that makes the "guilty" spouse in a judicial separation unworthy to succeed to a share in the estate of the deceased as a legal right or on intestacy. (For a precedent for the proposed new provision as to the effects of a judicial separation, see Article 20 of the Northern Ireland Order 1978. See also sections 113, 116 and 120(2) and (3), Succession Act 1965. The subsections in section 120 of the

Act should be repealed.)

Procedure

20. A major criticism of the law and procedure governing the conduct of matrimonial proceedings is that the proceedings are adversarial in the sense that the petitioner has to establish his or her case, and that there is, in effect, no real attempt made to have an independent inquiry into the facts of the marriage, that the witnesses are the parties' witnesses and not, as they should be, the court's witnesses, that the proceedings are too formal, and that the system militates against reconciliation instead of encouraging it. To meet this criticism, it requires to be specifically provided that, in proceedings for judicial separation, the court should proceed by way of inquiry into the facts, that the court should act without undue formality (such as addressing the judge as "my lord", "your honour" etc.), that neither the judge nor the legal representatives should robe, that the order of address of those representatives and of the parties is to be at the court's discretion and that the court may call any witnesses (expert or other) additional to those called or suggested by the parties. Here again the law and procedure in Northern Ireland and Australia constitute valuable precedents. Under Article 19(2) of the Northern Ireland Order, "it shall be the duty of the court to inquire, so far as it reasonably can, into the facts alleged by the petitioner and into any facts alleged by the respondent". (See also Article 43 of that Order, section 97 of the Australian 1975 Act and Part XII (regulations 104 to 119) of the Australian Family Law Regulations.) Whatever procedure is decided on should be spelled out in the legislation and not left to rules of court. The legislature in matrimonial causes has a genuine concern with and interest in specifying the details of the procedure that must be followed in the

proceedings. Once the procedure is laid down in the legislation, amendments could be made therein from time to time by order of the Minister for Justice, provided that any such order would not be effective unless specifically approved by the Dáil and Seanad.

Financial Relief for Parties and Protection of their Children

21. Any legislation providing for judicial separation should contain up-to-date provisions for financial relief for the parties to the marriage and for their children (if any). Provision should, in particular, be made for court orders pending suit, and, on the grant of the decree, for court orders for periodical payments, payments of lump sums and property transfers to the other party and for the benefit of any child of the marriage. These orders would replace alimony orders under the existing law relating to divorce a mensa et thoro; and section 3(1) of the Family Law (Maintenance of Spouses and Chrildren) Act 1976 needs to be modified accordingly. In the view of the Commission, property transfers should be made only with the consent of the spouses. This appears to Mr Hayes to be quite wrong. To provide that the court may make property transfer orders only on consent would be an exercise in futility. If the parties consent, they can make their own property adjustment orders without any authority from the court. If the property transfer were to be made to a child, presumably only the consent of the spouse who owned the property would be required. Admittedly, the Commission does not seem to be concerned with the question of the children. (See supra at pp. 56 and 57.) It is far from clear what provision for property adjustment orders in separation cases has really to do with matrimonial property regimes; and in Mr Hayes's view to postpone provision for property adjustment orders in matrimonial proceedings until

there is legislation in regard to matrimonial property regimes (which there may never be), or until the form of the legislation proposed by the Minister for Justice in regard to the co-ownership of the family home is known,is, to say the least, far from being realistic. If there are objections from the point of view of the Constitution to property transfers (without the consent of the parties) in matrimonial proceedings, the sooner the Constitution is amended the better, although, before any amendment is put to the People, it would seem better to have the Constitutionality of the proposed legislation tested in the Supreme Court.

22. The court should have specifically imposed on it the duty of protecting the children of judicially separated spouses; and it should be enacted that a decree of judicial separation should not be granted unless there are no children of the marriage under 18 or, where there are children under 18, unless proper arrangements (whether by court order or otherwise) have been made for their welfare (including their custody and education and maintenance). Detailed provisions concerning financial relief for parties to a marriage and their children and for the protection and custody etc. of the children are to be found in Parts III and IV of the 1978 Northern Ireland Order; and these provisions should be followed except, of course, where they are not relevant to our situation. It is particularly important to provide that the court should in the separation proceedings themselves have power to make orders for the custody and education of the children. (See Article 45 of the 1978 Northern Ireland Order and section 63 of the 1975 Australian Family Law Act.)

Rescission and Discharge of Decrees

23. For the avoidance of doubt, special provision should be

made for the rescission by the court of decrees of judicial separation and for the automatic discharge of any such decree where the parties resume cohabitation. (See Bromley, p. 183 and the footnotes.)

Collusion

24. Collusion is no longer relevant as a bar to judicial separation. The parties may separate by agreement and, if they wish, have the agreement made a rule of court by means of an application under section 8 of the Family Law (Maintenance of Spouses and Children) Act 1976. Moreover, it is now being proposed that, where such an agreement is approved by the court, it will be "converted" into a decree of judicial separation. Nevertheless, it should be provided, if only ex abundanti cautela, that nothing in the proposed legislation or in any rule of law should be taken as empowering or requiring the court to dismiss a petition for judicial separation (or an application to have a separation agreement made a rule of court or "converted" into a decree of judicial separation) on the ground of collusion between the parties. (See Article 5(1) of the 1978 Northern Ireland Order.) If this is done, the opportunity should be taken to abolish collusion as a bar to the granting of a decree of nullity. As Bromley points out, the bar of collusion in England did not prevent a false case being made in an undefended nullity suit, and withholding a decree for collusion was open to the objection that "the sanctity of marriage is maintained by insisting that people should remain married as a punishment for their behaviour". In addition, even if there is collusion, the court must be satisfied that the fact or facts on which the petitioner grounds his or her claim have been established. On the recommendation of the English Law Commission, collusion was abolished as a bar by section 6(1) of the English Nullity of Marriage Act 1971 and

in Northern Ireland by Article 51(2) of the 1978 Order. (See Bromley at p. 93 and Shatter at pp. 78 and 79, and the discussion at p. 82 of The Law of Nullity in Ireland (Office of the Attorney General, August 1976).) If collusion is to be abolished, recrimination might also be abolished and in this Mr Hayes's view is the same as that of the Commission. (See supra p. 52.) No special provision should be made in regard to connivance or condonation other than those recommended in regard to adultery at para. 10 supra of this Chapter.

Jurisdiction

25. In any legislation dealing with matrimonial proceedings provision should be made for the settling of questions of jurisdiction and for determining the law applicable, so as to provide a point of reference or connection for the purposes of private international law. Accordingly, the legislation should provide for the circumstances in which the Irish courts would have jurisdiction to hear a petition for judicial separation. Under existing law the position appears to be that the Irish courts have jurisdiction in petitions for divorce a mensa et thoro where it can be shown "either that the respondent's domicile was Irish, when the suit was instituted, or that he had a sufficient residence in Ireland to give this Court jurisdiction to grant such relief" (Sproule v Hopkins [1903] 2 I.R. 133 at 137, per Andrews J.). (See P.M. North, The Private International Law of Matrimonial Causes in the British Isles and the Republic of Ireland (1977), pp. 358-361.)

26. The Commission in its Report on Domicile and Habitual Residence as Connecting Factors in the Conflict of Laws (LRC 7-1983) is recommending that habitual residence should replace domicile as the connecting factor to be used in the conflict of laws to link a person to a particular system of

law. Accordingly, the proposed legislation should use habitual residence as the connecting factor that would ground the Irish courts' jurisdiction in judicial separation proceedings. The legislation should provide that the court shall have jurisdiction to entertain proceedings for judicial separation if, and only if, either of the parties to the marriage has his habitual residence in the State on the date when the proceedings are begun, and such habitual residence has continued for not less than one year immediately prior to that date. A similar rule should apply in the case of nullity. (See Article 2(1) and (2)(a) of The Hague Convention on the Recognition of Divorces and Legal Separations (1970), section 5(2) and (3) of the English Domicile and Matrimonial Proceedings Act 1973 and Article 49(2) and (3) of the Matrimonial Causes (Northern Ireland) Order 1978. See also section 7(2) of the draft Nullity of Marriage Bill 1976, appended to The Law of Nullity in Ireland (Office of the Attorney General, August 1976).)

Applicable Law

27. The question also arises whether the legislation should include a provision specifying the law to be applied in judicial separation cases involving a foreign element. Under the jurisdiction rule proposed above the Irish courts would have jurisdiction to grant a judicial separation where either party is habitually resident in the State. However, the other party might be habitually resident elsewhere or the marriage might have taken place elsewhere or the personal law of one or both of the parties might be that of some other State. In such circumstances, the question could arise whether Irish internal law should be applied to the judicial separation proceedings, or whether the law of the other party's habitual residence or the place of celebration of the marriage or the personal law of one of the parties should be applied.

28. This problem has been considered in England following the extension of the jurisdiction of the English courts in divorce and judicial separation proceedings to cover not only domicile but also habitual residence of one of the parties within the jurisdiction. (See Wolff, Private International Law (2nd ed., 1950), pp. 372-377; the English Law Commission's Report on Jurisdiction in Matrimonial Causes (Law Com. No. 48, 1972), paras 103-108; Cheshire and North, Private International Law (10th ed., 1979), pp. 364-366; Dicey and Morris, The Conflict of Laws (10th ed., 1980), pp. 336-337.) The law to be applied by an Irish court in deciding what are the grounds for judicial separation, what are the defences or bars to a decree etc. should in all cases be Irish law. For the reasons given in the English Law Commission's Report, there should be no room for the application of a foreign law to the determination of these questions. The English Law Commission's view was that it was unnecessary to have statutory provision made in order to achieve this result since the English Divorce Reform Act 1969 left no scope for the application of anything but English law to divorce proceedings. Accordingly, the Domicile and Matrimonial Proceedings Act 1973 does not contain any provision for the exclusive application of English law. Neither does the Matrimonial Causes (Northern Ireland) Order 1978 provide for the application of Northern Ireland law. However, it is notable that earlier English and Northern Ireland legislation did contain provision for the application of the domestic law in cases where jurisdiction was exercised on the basis of the residence of one of the parties in England. (See section 1(4) of the Law Reform (Miscellaneous Provisions) Act 1949, re-enacted in section 40(1) of the Matrimonial Causes Act 1965 and section 46(2) of the Matrimonial Proceedings Act 1973. See also section 1(4) of the Law Reform (Miscellaneous Provisions) Act (Northern Ireland) 1951.)

29. Cheshire and North questions the view of the English

Commission, arguing that the fact that the English Matrimonial Causes Act 1973 provides that a petition for divorce may be presented on specified grounds does not necessarily resolve the issue whether that provision applies to divorce petitions that could be governed by the law of a foreign country. For the avoidance of doubt, therefore, it is recommended that the proposed legislation should contain a provision to the effect that in proceedings for judicial separation the applicable law is to be Irish law. A similar provision is not recommended as respects the applicable law in nullity proceedings, as the separate and more difficult considerations that arise in the case of these proceedings fall to be considered in connection with legislation reforming the law as to nullity.

Conclusion

30. To sum up, Mr Hayes's view is that the Oireachtas in reforming the law as to legal separation should follow the model of the provisions in the 1978 Northern Ireland Order and in the Australian Family Law Act 1975 referred to supra, subject to the changes indicated. The recommendations in regard to financial relief for the parties to the marriage and the children, the protection and custody of the children, collusion and jurisdiction are, of course, also relevant in the case of other matrimonial causes (nullity and ordinary guardianship and custody of children cases); and it is suggested that these recommendations be, as appropriate, implemented in relation to such causes also.

31. Finally, there should be no need to stress that there is very much to be said for following Northern Ireland in matrimonial and family law reform (as indeed in other areas of legal reform as well), unless, of course, there are serious objections to doing so, which, in Mr Hayes's view, there certainly are not in the present instance.

CHAPTER 5 SUMMARY OF RECOMMENDATIONS

1. Adultery should continue to be a ground for legal separation: p. 33.

2. The legislation should make it clear that the onus of proof of adultery should remain on the petitioner even where the act of intercourse is established: p. 33.

3. Where a confession of adultery may, in the circumstances, be regarded as reliable, the fact that there is no corroborating testimony should not affect the right of the petitioner to a decree: p. 33.

4. The legislation should expressly provide that the standard of proof should be that of the balance of probabilities: p. 33.

5. Cruelty should continue to be a ground for legal separation: p. 34.

6. The legislation should abolish the specific ground of unnatural practices; in appropriate cases, unnatural practices could fall within the scope of the ground of "unreasonable behaviour" proposed in the next recommendation: p. 35.

7. The legislation should include as a ground for legal separation that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent: p. 37.

8. There should be a new ground, of desertion, which should contain a provision (drafted on the same lines as in the

legislation on succession, maintenance and the family home) to the effect that constructive desertion (as so defined) will constitute a ground for a decree of legal separation: p. 39.

9. No minimum period should be specified for desertion or constructive desertion: p. 40.

10. The legislation should make it clear that mental capacity may be of such a nature and degree as to render a spouse incapable of forming the necessary animus deserendi: p. 41.

11. The legislation should include a provision drafted on the following lines:

> "In determining whether a spouse is in desertion the court may treat a period of desertion as having continued at a time when the deserting party was incapable of continuing the necessary intention if the evidence before the court is such that, had that party not been so incapable, the court would have inferred that his desertion continued at that time.":

p. 41.

12. The legislation should not include the specific ground of gross addiction to drugs or alcohol; in appropriate cases such conduct could constitute "unreasonable behaviour" under recommendation 7: p. 42.

13. The legislation should include breakdown of marriage as an extra ground for a decree of legal separation: p. 46.

14. The legislation should include grounds for a decree of legal separation based on one year's separation where the respondent spouse consents to a decree being granted and five years' separation where the respondent spouse does

not so consent: p. 48.

15. The legislation should enable the court to "convert" a separation agreement into a decree for legal separation, provided it is satisfied that the agreement is a fair and reasonable one: p. 50.

16. Recrimination should no longer be a bar to a decree: p. 50.

17 Connivance should continue to be a bar to a decree: p. 51.

18. Collusion should no longer be a bar to a decree: p. 52.

19. Condonation should be made a discretionary bar: pp.52-53.

20. Conduct conducing to adultery should constitute a substantive (rather than discretionary) bar: p. 54.

21. The present discrimination between the sexes regarding alimony should be abolished: p. 54.

22. The same principle of equality should apply to property orders: p. 55.

23. On the question of the relevance of conduct to the determination of maintenance awards consequent on a decree for legal separation, the legislation should follow the general lines of the Family Law (Maintenance of Spouses and Children) Act 1976: p. 56.

24. The legislation should include provisions empowering the court to make orders for the maintenance of children: p. 56.

25. The legislation should include a definition specifying the children who are entitled to be maintained, drafted in terms similar to those contained in section 3(1) of the Family Law (Maintenance of Spouses and Children) Act 1976: p. 56.

26. The legislation should permit the court to make orders for the payment of lump sums and for the transfer of property, with the consent of the spouses, and for related matters: p. 57.

27. Special provision should be made for the effects on the parties of a decree of legal separation. Where the court grants a decree it should no longer be obligatory for the parties to cohabit: p. 58.

28. For the avoidance of doubt, special provision should be made for the rescission by the court of decrees for legal separation and for the automatic discharge of any such decree where the parties resume cohabitation: pp. 58-59.

29. The legislation should provide that, on the granting of a decree for legal separation, each spouse should be precluded from taking any share in the other's estate: p. 61.

30. Where the decree is rescinded or discharged, the succession entitlements of the spouses should be revived: p. 62.

31. The legislation should provide specifically that, in proceedings for legal separation, the court should proceed without undue formality, that neither the judge nor the legal representatives should robe, that the order of address of these representatives and of the parties is to be at the court's discretion and that the court may

call any witnesses (expert or other) additional to those suggested or called by the parties. Whatever procedure is decided on should be spelled out in the legislation and not left to rules of court: p. 62.

32. If adversarial procedures are not to apply, there should be a positive obligation on the court to enquire into the case and not simply to permit the case to proceed only on whatever basis the parties may choose to present it. The legislation should, in express terms, require the court to discharge this function. In this context, the legislation, in order to import this obligation, could adopt wording similar to that used in Article 40.4.2° of the Constitution, which prescribes that "the /Court/ .... shall forthwith enquire into the said complaint": p. 63.

33. If proper counselling services are available, whether provided by private agencies or the State, it could be made a necessary preliminary to the institution of court proceedings that recourse be had by the spouses to those services. This recommendation could possibly be investigated on a pilot and experimental basis: p. 63.

34. The court should have imposed on it the duty of protecting the children of judicially separated spouses; and it should be enacted that a decree of legal separation should not be granted unless there are no children of the marriage under 18, or where there are children under 18, proper arrangements (whether by Court order or otherwise) have been made for their welfare (including custody and education of, and financial provision for them). Also, the court should in the separation proceedings have power to make orders for the custody and education of the child: p. 63.

APPENDIX I TABLE OF ABBREVIATIONS

BABCOCK ET AL	B. Babcock, A. Freedman, E. Norton & S. Ross, Sex Discrimination and the Law: Causes and Remedies (1975).
BIGGS	J. Biggs, The Concept of Matrimonial Cruelty (1962).
BROMLEY	P. Bromley, Family Law (6th ed., 1981).
BROWNE	A. Browne, A Compendious View of the Ecclesiastical Law of Ireland (2nd ed., 1803).
BURN	R. Burn, The Ecclesiastical Law (9th ed., by R. Phillimore, 1842).
CLARK	H. Clark, The Law of Domestic Relations in the United States (1968).
CRETNEY	S. Cretney, Principles of Family Law (3rd ed., 1979).
DAVIDSON ET AL	K. Davidson, R. Ginsburg & H. Kay, Sex-Based Discrimination: Text, Cases and Materials (1974).
EVERSLEY	W. Eversley, Law of Domestic Relations (6th ed., by R. Stranger-Jones, 1951).
GEARY	N. Geary, The Law of Marriage and Family Relations (1892).

JACKSON	J. Jackson, The Formation and Annulment of Marriage, (2nd ed., 1969).
KISBEY	W. Kisbey, The Law of the Court for Matrimonial Causes and Matters (1871).
LATEY	W. Latey, The Law and Practice of Divorce and Matrimonial Causes (15th ed., 1973).
McQUEEN	J. McQueen, Husband and Wife (4th ed., by W. Paine, 1905).
NORTH	P. North, The Private International Law of Matrimonial Causes in the British Isles and the Republic of Ireland (1977).
PAULSEN ET AL	M. Paulsen, W. Wadlington & J. Geobel, Domestic Relations: Cases and Materials (2nd ed., 1974).
POYNTER	T. Poynter, Marriage and Divorce (2nd ed., 1824).
RAYDEN	W. Rayden, Law and Practice in Divorce and Family Matters in All Courts (12th ed., J. Jackson ed., in Chief, 1974).
RHEINSTEIN	M. Rheinstein, Marriage Stability, Divorce and the Law (1972).
ROGERS	F. Rogers, A Practical Arrangement of Ecclesiastical Law (1840).
SHATTER	A. Shatter, Family Law in the Republic of Ireland (2nd ed., 1981).

SHELFORD — L. Shelford, A Practical Treatise of the Law of Marriage and Divorce and Registration (1841)

TOLSTOY — D. Tolstoy, The Law and Practice of Divorce and Matrimonial Causes (6th ed., 1967).

APPENDIX 2 STATISTICS RELATING TO PROCEEDINGS FOR DIVORCE A MENSA ET THORO

Year	*Number of Petitions issued*	*Number of Decrees granted*
1970	40	11
1971	27	5
1972	30	9
1973	26	2
1974	51	10
1975	43	4
1976	37	3
1977	29	5
1978	40	1
1979	34	2
1980	27	2
1981	25	2
1982	20	6