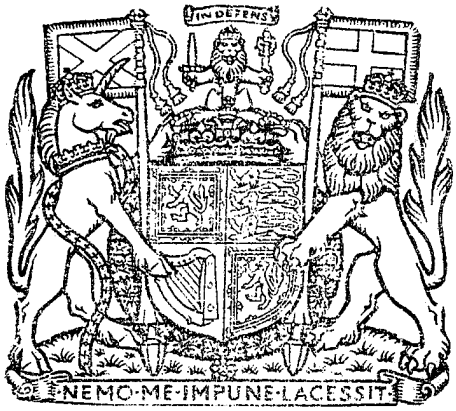

SCOTTISH LAW COMMISSION

DIVORCE

The Grounds Considered

Presented to Parliament
by the Secretary of State for Scotland and the Lord Advocate
by Command of Her Majesty
May, 1967

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The Scottish Law Commission was set up by section 2 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law of Scotland. The Commissioners are:

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Scottish Law Commission

TO: THE RIGHT HONOURABLE WILLIAM ROSS, M.B.E., M.P.,
Her Majesty's Secretary of State for Scotland, and

THE RIGHT HONOURABLE GORDON STOTT, QUEEN'S COUNSEL,
Her Majesty's Advocate.

I. INTRODUCTION

On 19th December 1966 we were invited, in terms of section 3(1)(e) of the Law Commissions Act 1965, to review, in relation to Scotland, the ground covered by the Law Commission in relation to England in their Report to the Lord Chancellor entitled *Reform of the Grounds of Divorce—The Field of Choice* (Cmnd. 3123).[1] That Report was concerned to advise the Lord Chancellor upon the proposals for divorce law reform put forward by the group appointed by the Archbishop of Canterbury, and contained in the Report named *Putting Asunder*.

2. We were asked to report on four specific questions; as we come to deal with each we shall set it out with, for ease of reference, the wording of the passages in the Law Commission's Report upon which we were asked to comment. The questions were, however, put to us without prejudice to our freedom to offer advice on any possibilities of reform of this branch of the law. We have come to the conclusion that it makes for ease of comprehension if we begin by setting out the Scottish legal background against which our advice has to be examined, and our own views on reform with particular reference to what we have to say about the proposals in *Putting Asunder*.

II. THE PRESENT LAW AND THE ENGLISH PROPOSALS

The Historical Background

3. At the outset, we must draw attention to the very different historical backgrounds to the problem as they are seen in Scotland and England respectively. Divorce *a vinculo* (divorce as we know it), as contrasted with divorce *a mensa et thoro* (what we now know as a decree of separation), was introduced into Scotland in the early years of the Reformation, almost exactly 300 years before it could be granted by the English Courts. "Reformed Kirk Sessions, which for some time usurped the judicial functions of the Courts until they were restrained by the Privy Council, began to grant decrees of divorce for adultery as early as 1559. Thereafter such divorces were dealt with by the Courts exercising the consistorial jurisdiction. . . . Divorce for desertion was introduced by the Act of 1573, c. 55, although the statute itself narrates that divorce had been allowed

[1] Hereinafter referred to as *The Field of Choice*.

on that ground since the Reformation."[1] The other grounds of divorce, as they exist today, were introduced by the Divorce (Scotland) Act 1938, and are the same as in England, namely, cruelty, sodomy, bestiality, and incurable insanity. Marriage may also be dissolved under this Act upon the proof necessary to presume the death of a missing spouse. It is unnecessary to look further into the history of the law, but we must emphasize at the beginning of our observations that we are required to advise on the consistorial law of Scotland, which is, in history, development and detail, different from that of England.

Specific Grounds

4. *Putting Asunder* recommends the entire abandonment of the existing grounds of divorce and their replacement by a single ground, breakdown of the marriage. It puts in issue some of the fundamental assumptions of the law of divorce in England and Wales, and these are fundamental assumptions of the existing law of Scotland also. One of these assumptions has been that divorce is given as a remedy to an "innocent" spouse because his[2] partner has committed a matrimonial offence; we would go so far with the Archbishop's Group as to agree that divorce should not be regarded as a punitive measure, but rather as a recognition that a marriage is dead, and ought to be buried "with the minimum of embarrassment, humiliation and bitterness".[3] To say this, however, is not necessarily to condemn the present grounds as inappropriate or irrelevant, though there may be room for maintaining their inadequacy.

5. The present law of Scotland sets out a series of peremptory grounds of divorce which are well-known and clearly stated. Married persons are aware that certain conduct on their part entails the risk of the dissolution of their marriage and in this way the law provides at least some disincentive to the more serious breaches of matrimonial obligations. These grounds are reasonably well understood. People know where they stand, and lawyers can advise their clients of the probable outcome of legal proceedings. The existence of clear and comprehensible grounds of action largely accounts for the fact that in Scotland under 5 per cent of divorces are defended. Unnecessary litigation is reduced and unnecessary expense to the parties avoided. These advantages of the present law should not lightly be discarded. Such disadvantages as exist arise, to some extent, from a mere matter of nomenclature. It is necessary to emphasize that in fact the present grounds of divorce, whatever may have been the case before 1938, cannot be classified under an omnibus title of "matrimonial offence", since they include incurable insanity, and also on one view, injurious conduct (cruelty) committed under the influence of mental disease.[4] Such cases evidence the misfortune, not the "criminality", of the defender. To maintain the present peremptory grounds, therefore, would not in fact mean advocating an exclusively punitive approach to the problem. There is nothing inconsistent about adding to the existing grounds another ground, namely irretrievable breakdown; this would not mean, as was suggested in

[1] Professor R. D. Ireland, Q.C., Stair Society's Publications, Volume 20, (*An Introduction to Scottish Legal History*), pp. 95 to 96.

[2] It will be understood that in certain passages of this Report, we use the masculine to include the feminine and *vice versa*.

[3] *The Field of Choice*, para. 120(1).

[4] *Williams v. Williams* [1964] A.C.698. It is not certain whether the Court of Session will follow this case in view of *Breen v. Breen* 1961 S.C.158.

Putting Asunder[1], that the new ground, which is not an offence charged against one of the spouses at the instance of the other, was being added to a class of other grounds, all of which exhibit that characteristic. The result would be the same as under our present law, namely, that the grounds of divorce, taken as a whole, had only this in common, that upon proof of any of them, the court would dissolve the marriage. Furthermore, if to the old grounds there were added the new, this would be in accordance with the precedents of Australia, New Zealand, and the State of New York.[2]

Breakdown of Marriage

6. Before looking at the recommendation of the Archbishop's Group to which we have referred, the function of any court in relation to breakdown of the marriage ought to be examined. Every action of divorce is now brought *because* a marriage has irretrievably broken down, though not *on the ground of* the breakdown. Marriage being, as a minimum, a partnership, it is enough that one partner maintains irretrievable breakdown for the breakdown to be a fact, however strenuously and sincerely it may be denied by the other partner. It is hardly possible to explain the motives of a sane pursuer who petitions the court to dissolve a marriage which in his view is still viable. Whoever was to blame (or if no one was to blame), however disgraceful the conduct of either of the partners may have been (or if one virtuous person has merely got tired of another), the litigation demonstrates that there is one partner who has decided that the partnership must be dissolved. This is the rationale of the application to the court. Outside matrimony no partnership or legal relationship involving close personal relations can be maintained in such a situation, and the law makes provision for dissolution. The matrimonial partnership in such a situation can only survive because the law demands that the breakdown shall have occurred as a consequence of certain limited and specified events. The pursuer determines the fact of the breakdown by refusing to forgive a "matrimonial offence" or to overlook incurable insanity; the court will, as a general rule, dissolve the partnership if, and only if, the specified event is proved to have occurred. The court does not enquire whether there has been irretrievable breakdown; the raising of the action would, if such enquiry were called for, be sufficient evidence of that.

7. Basically, therefore, the proposals of the Archbishop's Group amount to this, that the court should no longer concern itself, in general, with the "specified event", but should instead institute an enquiry into whether, a partner having applied for permanent dissolution of the partnership, that partnership has irretrievably broken down. At first sight it would not appear that such an investigation could lead to any useful conclusion.

8. It is, however, significant that, while the Archbishop's Group was set up in order to review the law of England concerning divorce, one of the immediate purposes was to examine proposals to make marriage dissoluble—on the ground of breakdown—at the instance not of the "victim" of a matrimonial offence, but of the "perpetrator". It would not be surprising if it were to that category of situation that the doctrine of breakdown was appropriate, and if to other situations it appeared either irrelevant or superfluous. This is because

[1] Para. 69, p. 57.
[2] *The Field of Choice*, paras. 87–89.

it is really the essence of such a case that the application for dissolution is being made by the party through whose conduct the marriage has ultimately broken down. The "injured" or "innocent" party in such a case has a ground for divorce as the law now stands, but since that party does not desire a divorce, even provision for divorce by consent would not be effective as a means of getting rid of the dead marriage. It is necessary, as it were, to confer a ground of divorce upon the "guilty" party, and the only available ground seems to be irretrievable breakdown. We deal with the "separation ground" in paragraphs 18 to 27.

Divorce by Consent

9. We have already given our reasons for suggesting that irretrievable breakdown, being an essential of every application for divorce, cannot usefully be made a ground of divorce in the sense of being the subject matter on which the court, in deciding whether the marriage is to be dissolved or not, should come to a conclusion. This makes it necessary carefully to scrutinize the relevance of the commission of a matrimonial offence, or, as we prefer to put it, the proof of a peremptory ground, to the question whether a marriage should be dissolved; if it be irrelevant, there could be no answer to the setting up of the simple consent of parties as a ground, though not necessarily the only ground, for divorce.

10. We see certain attractions in permitting divorce by consent. The fact that over 95 per cent of divorce actions in Scotland are undefended suggests that, even at present when divorce by consent is unknown to the law, a significant proportion of divorces are effectively divorces by consent, in the sense that both parties wish the marriage to be dissolved with the minimum of fuss. Yet one of these parties, instead of asking the court to register their agreement to dissolve the marriage, must make a parade of his hostility to the other, and, at least under the present law, disclose to the public the infidelities, cruelty or desertion of the other. Moreover, there are many cases where neither of the parties has given grounds for a divorce and yet both acknowledge that the marriage has effectively broken down. To their request to be allowed to dissolve the marriage the law cannot always answer that the interests of the children preclude this, for there may be no children. If, in such a case, it is objected that to recognize divorce by consent would be to reduce marriage to the level of a private contract and to ignore the community's interest in the stability of marriage, it may be replied that the direct interest of individuals in their own personal happiness should not always be sacrificed to the remote interests of the community in the stability of its legal and social institutions.

11. On the other hand, while we recognize the force of this argument, the community's interest cannot be treated lightly, and we have come to the conclusion that consent of parties, unless coupled with such a period of separation as will evidence the breakdown of the marriage, is opposed to that interest and ought not to constitute a ground of divorce. Any discussion of this subject is bound to raise questions truly appropriate to a body more widely representative than a Law Commission. Nevertheless divorce cannot be looked at as if it were a mere piece of legal procedure in isolation from its social consequences; it is inevitable that, even in the course of giving advice on questions

of law, some estimate be made of the weight of public opinion and private feeling, which is another way of describing the interest of the community.

12. It has to be recognized, in making any such estimate, that there are many who, refusing to be deterred by pity for hard cases, justify the refusal of all divorce *a vinculo* as being necessary for the sustentation of a monogamous society. Between that position and the position of those who would view with complacency a system of marriage dissoluble at the will of the parties lie many grades of opinion. One thing, however, most people have in common. When they marry, they intend a permanent relationship terminable only by death. Of those who marry, about 80 per cent publicly avow that intention in some form of religious ceremony. Only some 5 per cent of marriages, as a long-term average, end in divorce.[1] Quite apart, therefore, from the interest of the community in the stability of marriage and the family as a social institution, this is an ideal which is being pursued by the great majority of the ordinary citizens of this country, and any law of divorce which weakened that ideal would be difficult to defend. We believe that a provision for divorce by consent would inevitably shake the resolution of permanence with which marriages are now entered into, and encourage a less responsible attitude; this would not only be contrary to the policy of the community, but would be unacceptable to public opinion.

13. Furthermore, we accept the view expressed by the Law Commission, that "there is a real danger that the economically weaker party (normally the wife) might be overborne by the stronger, and that accordingly it would not be safe to assume that her signature to an agreement necessarily represented a real and free consent."[2]

14. The social objections to divorce by consent have never been better stated than they were about 200 years ago in the forcible, if somewhat archaic, language of Erskine's *Institutes of the Law of Scotland*.[3] On the subject of the "unlimited power of divorcing", which is how he describes the Roman doctrine of divorce by mere repudiation, he says that "it is adversary to the rules, not only of our holy religion, but of right reason and of sound policy: For married persons, if they shall be left at full liberty to break off from their first engagements, may be too apt, on the slightest disgust, to look out for more agreeable companions; and thus the natural ties, between parents and their first issue, must be quickly slackened, if not totally dissolved, and the education of children miserably neglected". This emphasis upon the "education" of children, which of course, includes their emotional and psychological development, is interesting and significant.

Retention of Existing Grounds

15. We recommend, accordingly, that the present grounds of divorce should be retained, and we would identify their legal significance in this way, that if a party can prove one of these grounds, there then arises an irrebuttable presumption that the marriage has irretrievably broken down, and must be dissolved. The "separation ground", which we consider in paragraphs 18 to 27, falls into a similar pattern; it may be identified as arising in cases where the

[1] The current increase in the number of divorces may be due to temporary factors.
[2] *The Field of Choice*, para. 83.
[3] I, vi, 37.

fact of the parties having lived separate lives for a stated period may raise a rebuttable presumption that the marriage has broken down.

16. We do not interpret our terms of reference as calling for a complete review of the Scottish law of divorce; nevertheless there is one particular in which it has been submitted to so much criticism that we think we are justified in referring to it here. The law relating to cruelty imposes on the courts a most unsatisfactory duty of attempting to evaluate the conduct of spouses against an unnecessarily legalistic standard, and exposes pursuers to the temptation of painting in lurid colours, in order to satisfy that standard, conduct which truly falls far short of any literal meaning of cruelty. We therefore suggest that the legislature substitute for "cruelty" a new ground of divorce, namely "conduct of a character so intolerable as to make it unreasonable to expect the pursuer to adhere". Our proposal is in line with that made, for Scotland only, by a majority of the Morton Commission over 11 years ago.[1]

17. Our second proposal is consequential upon the introduction of the "separation ground". Should the suggestion of the Law Commission (with which we are about to express our concurrence) be adopted, namely, that after two years' separation[2] either party could obtain a divorce if the other consented or did not object, the period of separation required to found an action of divorce on the ground of desertion should obviously be reduced from three years to two.

The Separation Ground

18. It may be assumed that generally, when spouses have for a number of years voluntarily lived separately because they cannot happily live together, their marriage has irretrievably broken down, and that that is true whether or not the separation was a consensual one. Proposals are regularly made that the law should take account of this fact of marital life, and permit the dissolution of such marriages at the instance of either spouse, irrespective of his "guilt" or "innocence".

19. Two situations are clearly distinguishable, namely the case where both of the spouses consent to or do not oppose the dissolution of the marriage, and the case where one of the spouses is opposed to the dissolution of the marriage.

20. In the first of these situations, we consider that where, after a reasonably long period of separation, the spouses agree that the marriage should be dissolved, or acquiesce in its dissolution, the interest of society in the stability of marriage in general does not demand the denial to parties themselves of the right to fashion their own lives. The present Scottish ground of desertion does not cover this situation, because it starts from the hypothesis of an "innocent" spouse who was willing to adhere at the opening of the three year period of desertion, and a "guilty" spouse who was in wilful desertion. There are many cases, however, where two spouses simply come to the conclusion that they can no longer live together. At present such spouses cannot obtain divorce

[1] Report of the Royal Commission on Marriage and Divorce (Cmd. 9678) para. 170(iii).

[2] The word "separation", as it is used throughout this Report, does not necessarily connote living in different houses. It means non-adherence; "there may well be refusal of adherence both at bed and board though the spouses are living in the same house"—*Lennie v. Lennie* 1950 S.C. (H.L.) 1 per Lord Normand at page 5.

unless one is prepared to commit perjury or the other to commit adultery. We do not believe that such a law can serve any purpose useful to society.

21. If the law were to permit the dissolution of marriages whose breakdown is evidenced by separation alone, the next problem would be to fix the period of separation. Here we readily adopt the views of the Law Commission:—

> "The aim should be to fix a period which is not so short that it might undermine the stability of marriage but not so long that parties who had grounds for petitioning on the basis of a matrimonial offence would not be prepared to wait. If both parties are anxious to end their marriage without rancour and without seeking to secure a public finding of guilt or innocence, they may be prepared to wait, it seems to us, as long as two years."[1]

22. The second situation is where, even after the parties have lived separately for a number of years, one of them is still not prepared to acquiesce in the dissolution of the marriage. An "innocent" spouse may have grounds for divorce but, because of religious objections, hatred of the other spouse or of the paramour, or fear of the financial consequences of divorce, he refuses to proceed and the spouses must remain bound by the ties of marriage.

23. In recent times there has been a growing volume of criticism of this position. Without approving the conduct of the "guilty" spouse, many people argue that the law in its present form leads to serious injustice. When, as is very often the case, the "guilty" spouse has entered into an illicit union, some regard must be paid to the situation of the other party to that union and to the issue of it. It has been estimated that in England some 40 per cent of illegitimate children are born to stable illicit unions,[2] and we have no reason to think that the proportion is significantly different in Scotland. These children must remain illegitimate until the "innocent" party consents to sue for divorce; this is a social problem which the introduction of the new ground would help to solve.[3] Even when the "guilty" spouse has not formed another union, or has not raised a second family, the situation of the marriage is anomalous and unsatisfactory.

24. The objections to such a ground of divorce have been often stated, and if we suppose that the "guilty" party is the husband, they include the wife's loss of status and the financial hardship occasioned to her and to the children, if any, of the lawful marriage. The financial hardship is a serious objection, but we cannot help thinking that it flows mainly from the fact that the ordinary man cannot afford to keep two families. The hardship would not be greatly increased, if at all, by the legalisation of the marriage which is to be substituted for concubinage. But this is not the whole answer, and we draw attention in paragraph 41 to the great importance to be attached to the insistence on financial justice for wives on divorce and express our misgivings as to whether the law as it now stands is adequate in this field. It is often said, too, that it is an injustice to the "innocent" spouse that she should be divorced against her will. Apart from financial loss, however, the only injustice consists in her loss of

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[1] *The Field of Choice*, para. 93.

[2] *The Field of Choice*, para. 34.

[3] While, at present, the law of Scotland is that a bastard is not legitimated by the subsequent marriage of his parents if there was an impediment to that marriage at the date of his conception or birth, we have made representations that the law ought to be changed. (*Memorandum on Legitimation per subsequens Matrimonium*, Cmnd. 3223.)

status and the blow to her personal pride. It is arguable, however, that here the real blow fell when her husband left her. It is, moreover, one of the unhappy consequences attending the break-up of a marriage that the reconciling of all interests, without wronging any of them, becomes impossible, and the injustice to the "innocent" wife must be balanced against the interests of other parties, including the innocent children of the illicit union. Finally, it is said that the introduction of a ground of divorce based merely upon a period of separation would deprive wives and mothers of the security flowing from the knowledge that, except in the case of their insanity, their marriage cannot be dissolved against their will unless they themselves commit a "matrimonial offence". This argument has rather less weight than at first sight appears since, as the Archbishop's Group point out,[1] "the power to keep one's legal status is not synonymous with security of the home and family from disruption".

25. We have no difficulty in coming to the conclusion that these objections are not fatal to the concession of the separation ground to a "guilty" spouse against the will of the other. When the prospects of reviving a marriage have disappeared, the law should acknowledge the situation by dissolving the legal tie. There is, however, room for difference of opinion as to the length of separation which in such cases should evidence the breakdown of the marriage.

26. One view is that two years' separation is by itself sufficient evidence of the breakdown of the marriage, even when one of the parties declines to co-operate in the dissolution; to suppose that there can be a viable marriage where the parties have been separated for two years and one is demanding a divorce is to delude oneself. It is hard to imagine (say) a man debating whether he would leave his wife for another woman, and being deterred from doing so because for five years at least he would have to live in mere concubinage with her if his wife did not consent to a divorce, either for adultery at once, or for breakdown or desertion after two years. Nor would the wife who withholds her consent between the second and the fifth year be a woman who was hoping against hope for a reconciliation; she would be a woman who was "nursing her wrath to keep it warm". Another view, however, is that a period of two years' separation is not in itself conclusive of the breakdown of the marriage. Even if it were, a rule that a mere two years' factual separation gave one spouse the right unilaterally to repudiate the other would not conduce to the support of marriages which have a chance of survival. A person enters upon marriage relying on the knowledge that, provided he observes his part of the bargain, the union is secure for a considerable number of years; if that period were reduced to as little as two years, marriage could no longer be regarded as a long-term contract. This would be detrimental to the interest of society in the stability of the relationship. We regard the existence of these different views as itself demonstrative of the fact that the length of the period is not a question of logic or legal policy but of social and political expediency, and therefore ultimately to be decided by Parliament itself.

27. We think it possible that the introduction of the "separation ground" might reduce the number of cases which are defended. The manner in which the average defended case is conducted by the parties is quite enough to kill any marriage stone dead, even if it may have had a flicker of life in it up to the trial; the defended case is commonly one of the most unpleasant and anti-social forms of litigation known. At the best, a marriage is dissolved with the

[1] *Putting Asunder*, para. 67, p. 55.

maximum publicity, pain and unkindness. At the worst, two bitter enemies are forcibly held together in a bond which is no real marriage. It could be one of the beneficent consequences of the introduction of the "separation ground" that the defended action might become less common. For example, a woman leaves her husband on the allegation of cruelty, and brings an action against him on that ground. In deciding that he will not defend, the husband might be influenced by the fact that, were he to be successful, nevertheless within a relatively short period his wife, though perhaps now technically in desertion, would be in a position to bring an action on the ground of irretrievable breakdown. The successful defence would have been only a temporary victory.

III. THE SPECIFIC QUESTIONS

28. We now turn to the specific questions which were put to us. First, we were asked to say whether we "concur in the general description of the problem contained in sub-paragraphs (1)–(4) of paragraph 120" of *The Field of Choice.*

The Objectives of Divorce Law

29. Sub-paragraph (1) reads as follows:—

> "The objectives of a good divorce law should include (*a*) the support of marriages which have a chance of survival, and (*b*) the decent burial with the minimum of embarrassment, humiliation and bitterness of those that are indubitably dead."

We agree that the objectives stated are proper objectives of a good divorce law, and that they are not achieved by our law as it now stands. To them we would add a further objective, namely, that a good divorce law should operate as inexpensively as possible. This is not to encourage divorce, since few today are deterred from divorce by the expense of it, but there is some feeling at the moment that our consistorial procedures are unnecessarily costly and elaborate.

The Three Years' Bar

30. Sub-paragraph (2) reads as follows:—

> "The provision of the present law whereby a divorce cannot normally be obtained within three years of the celebration of the marriage may help to achieve the first objective. But the principle of matrimonial offence on which the present law is based does not wholly achieve either objective."

We are not persuaded that any material contribution towards these objectives is made by the English rule that, except in the exercise of judicial discretion, a divorce cannot be obtained in the first three years of marriage.[1] The Morton Commission,[2] who considered and rejected a proposal to introduce the rule into

[1] It appears to have been adopted for Parliamentary reasons, in order to facilitate the acceptance of the wider grounds of divorce introduced by the Matrimonial Causes Act 1937. See Herbert, *The Ayes Have It*, p. 65, referring to clause 1 of the Bill, afterwards section 1 of the Act: "Some said (I said it myself) that we should not have got a Second Reading without it. . . ."

[2] Report of the Royal Commission on Marriage and Divorce (Cmd. 9678), paras. 215 and 218.

Scotland, justified this restriction as encouraging husbands and wives to face and resolve their differences in the period of adjustment which necessarily follows marriage. There is little to suggest that the restriction operates to this effect. In Scotland, only 8·27 per cent of the marriages dissolved by divorce in 1964 had lasted less than three years. In some of those cases, had they arisen in England, discretion would have been exercised; the remaining number is not substantial, and there is little reason to think that any of them would have survived if the parties had been obliged to postpone proceedings. On the other hand, it seems clear to us that, where the spouses' incompatibility is revealed during the early days of marriage, the balance of social advantage clearly lies with the speedy termination of the marriage. This is not to approve irresponsible or trial marriages. Most persons, as we have pointed out, enter into marriage without considering the terms of the law of divorce and upon the assumption that *their* relationship will be permanent.

Reconciliation

31. Sub-paragraph (3) reads as follows:—

"Four of the major problems requiring solution are:—

(*a*) The need to encourage reconciliation. Something more might be achieved here; though little is to be expected from conciliation procedures after divorce proceedings have been instituted.

(*b*) The prevalence of stable illicit unions. As the law stands, many of these cannot be regularized nor the children legitimated.

(*c*) Injustice to the economically weaker partner—normally the wife.

(*d*) The need adequately to protect the children of failed marriages."

32. We agree that, once an action has been raised, reconciliation is pretty well out of the question. At an early stage, however, while the dispute is still in the hands of the family solicitor, he may be able to compose petty differences which might have blown up into a serious division between the parties. But when proceedings have begun, we are not convinced that this is a domain into which the law can usefully intrude. For example, in Australia the Commonwealth Matrimonial Causes Act 1959 Part III makes quite elaborate provisions to facilitate reconciliation of the parties. It lays upon the court the duty to give consideration, from time to time, to the possible reconciliation of the parties. A judge may interview the parties in his chambers with a view to effecting a reconciliation or nominate an approved marriage guidance organisation or a suitable person to endeavour to effect such a reconciliation. Commenting on these provisions Mr. Justice Selby of the Supreme Court of New South Wales remarks: "Experience suggests that the provisions of Part III remain in the realm of pious hope. By the time a matrimonial cause reaches a hearing the parties are too far apart, one of them, at least, is too anxious for a final determination of the suit and too much bitterness has been engendered to allow any reasonable prospect of reconciliation. It is only on the rarest occasions that attempts are made, pursuant to Part III, to effect a reconciliation after the hearing has begun, and it is doubtful if any such attempt has been successful."[1] French experience has been to the same effect.[2] The Law Commission[3] refer to an Australian rule requiring that the solicitor for the petitioner should certify

[1] 29 *Modern Law Review* (1966), p. 487.

[2] *Travaux de la Commission de Réforme du Code Civil* (1947–48), p. 507.

[3] *The Field of Choice*, para. 31.

that he has brought to his client's attention the existence of the appropriate marriage guidance organisation and has discussed with his client the possibility of reconciliation. We do not recommend the introduction of a similar rule into Scottish practice. We consider that it would be an ineffective formality.

33. We express our views on (*b*), (*c*) and (*d*) respectively in paragraphs 23, 41 and 42 of this Report.

Practical Considerations and Public Opinion

34. Sub-paragraph (4) reads as follows:—

> "The field of choice for reform is circumscribed by a number of practical considerations and public attitudes, which cannot be ignored if acceptable and practicable reforms are to be undertaken."

We think the best way to deal with the conclusion in this sub-paragraph is to go to paragraph 52 of *The Field of Choice* which is the basis of that conclusion, and give our views in relation to Scotland on the factors which are there set out.

> "(*a*) Public opinion would not accept any substantial increase in the difficulty of obtaining a divorce or of the time it takes, unless it could be shown that an appreciable number of marriages would be mended as a result."

We entirely agree with that statement.

> "(*b*) Experience shows that the chances of reconciliation between the parties have become almost negligible by the time that a petition for a divorce is filed."

We have already expressed our concurrence.

> "(*c*) Whether a divorce is obtainable or not, husbands and wives in modern conditions will part if life becomes intolerable. The ease with which names can be changed under English law simplifies the establishment of a new and apparently regular "marriage"; where the deception is not complete, the resulting children are the main sufferers because of the stigma that still attaches to the status of illegitimacy."

We agree.

> "(*d*) Children are at least as vitally affected by their parents' divorce as are the parents themselves."

We would hesitate, as the Law Commission did in paragraph 50 of *The Field of Choice*, to generalize; certainly it is notorious that the consequences to the children, although not affecting their status, can be disturbing.

> "(*e*) Breakdown of a marriage usually precedes the matrimonial offence on which the divorce petition is based. Thus, an isolated act of adultery or isolated acts with different partners may be the grounds for divorce, but are likely to be the result of the breakdown of the marriage rather than its cause."

Again we would not be prepared to generalize. In our experience, many marriages break down when a wife discovers her husband's casual adulteries, which he accepted, and she does not, as compatible with a reasonably stable marriage.

> "(*f*) Public opinion would be unlikely to support a proposal which had the effect of, say, doubling the amount spent on divorce proceedings. . . ."

We agree.

"(*g*) Public opinion would be equally unlikely to support a great expansion of the Queen's Proctor's Office or the employment of additional public servants with the function of investigating the truth of the evidence given by parties to divorce proceedings. . . ."

We have no equivalent in Scotland to the Queen's Proctor's Office, but we have no doubt that the employment of, for example, the probation service, with the object of providing machinery for confirming or rejecting allegations of the breakdown of marriages, which could only operate at the expense of other more urgent social work, would be quite unacceptable.

"(*h*) Even where a marriage is childless, divorce granted automatically if the parties consent ("Post Office divorces") would not be acceptable; there must be an independent check if only to ensure that the economically weaker party really and freely consents to the divorce and to approve the financial arrangements worked out by the parties and their solicitors. The need for outside intervention is, of course, far greater where there are children."

We agree that on any view of divorce by consent it would not be acceptable were it to be obtainable either automatically or by an administrative act. For the two reasons stated here, the protection of a spouse's financial interests and of the interests of any children, the oversight of a Court of Justice would invariably be required. Were it to be suggested that the oversight should be handed over to some administrative tribunal, as we understand to be the practice in some Scandinavian countries, this would merely be to set up another kind of court, because the tribunal would obviously have to apply judicial principles in coming to its conclusions.

Breakdown with Inquest

35. We were next asked to "consider the Law Commission's conclusion in sub-paragraph (5) that the proposals made in *Putting Asunder* are procedurally impracticable and advise as to whether this would be the case in Scotland also." We can see no answer to the objections raised by the Law Commission in paragraphs 60 to 62 of *The Field of Choice*. The impracticabilities would be as great in Scotland as in England. Since we have already said why, in our opinion, proof, to the satisfaction of the court, of the irretrievable breakdown of marriage is not acceptable as the sole ground of divorce, we do not think we need elaborate upon the theme that it could not operate as such under anything resembling our present judicial and administrative system.

Alternative Proposals

36. We were also asked to "consider the alternative proposals in sub-paragraph (6), advise on their practicability in Scotland and draw attention to any further proposals which in the Commission's view would be practicable in Scotland and should be considered".

37. The first of these alternative proposals is referred to as "breakdown without inquest". Having rejected the feasibility of adopting "breakdown with inquest" as a unique ground of divorce, the Law Commission examined the practicability of adopting instead the unique ground of breakdown of the marriage evidenced

by a fixed period of separation.[1] We agree with the Law Commission that it would not be practicable to make separation for a period the unique ground of divorce unless the period of separation were a short one, since it would be a hardship if speedy matrimonial relief were not available, especially in cases of cruelty. If, however, the period were short, the proposal might tend to lead to the dissolution of marriages which still had a chance of survival. The same objection would not apply if, in addition to the peremptory grounds, provision were made for proving the breakdown of the marriage by separation for a reasonably lengthy period, and this provision we have dealt with in paragraphs 18 to 27.

38. The second alternative proposal is "divorce by consent". We have set out in paragraphs 9 to 14 our reasons for rejecting consent alone as a ground for divorce. We are, however, as we have said, prepared to recommend divorce by consent as a ground of divorce when coupled with other evidence of the breakdown of a marriage, such as a period of separation, for the reasons stated in paragraphs 18 to 27.

39. Thirdly, the Law Commission propose as an alternative the "separation ground". We have already expressed our agreement with the Law Commission's opinion that the introduction of this ground of divorce is both practicable and, so far as we can see, unobjectionable. We have not, however, made any recommendation as to the length of period of separation appropriate in the case in which one of the parties does not consent or acquiesce since we think that this is a policy question for Parliament.

Safeguards

40. We were also asked "to consider in relation to Scotland the need for safeguards such as those suggested in sub-paragraph (7) in the event of the introduction of additional grounds of divorce". Sub-paragraph (7) reads as follows:

> "If any of these proposals were adopted, the following safeguards would appear to be necessary:
>
> (*a*) The three year waiting period . . . should be retained."

We have already pointed out that the three year waiting period does not apply in Scotland, and we are not in favour of introducing it.

> "(*b*) The court should have power to adjourn for a limited period to enable the possibilities of reconciliation to be explored."

We agree, although the occasions for the exercise of such a power would in our view be rare.

> "(*c*) The court should have a discretion to refuse a decree if attempts had been made by the petitioner wilfully to deceive it; but the present absolute and discretionary bars would be inapplicable to petitions on these new grounds."

We agree that the rules relating to connivance, condonation and collusion would have no application in "separation" cases. As regards the peremptory grounds, we think that condonation must clearly continue to have the effect of extinguishing the particular ground to which it is referable. An act of forgiveness is negative of irretrievable breakdown. We see no reason to relax the rule against collusion, since the breakdown of which it is evidence can be dealt

[1] *The Field of Choice*, paras. 71–76.

with under the new ground which has been proposed. The very rare case of connivance, that is, where one spouse is held to be accessory to the adultery of the other, may also be retained as a bar to divorce on the peremptory ground. We do not agree, however, that the court should have a discretion to refuse decree where there has been wilful deception. In Scotland the dismissal of a summons of divorce is no bar to the raising of another action on the same grounds, so that the exercise of this discretion would have only the effect of adding to expense. It would not be reasonable to keep a marriage in being in order to punish the misconduct of a party. Other means are at the court's disposal for that purpose.

> "(*d*) Additional safeguards would be needed to protect the respondent spouse and the children. These should include:
>
> (i) A procedure to ensure that the respondent's decision to consent to or not oppose a divorce, had been taken freely and with a full appreciation of the consequences.
>
> (ii) Retention, and possible improvement, of the provisions of the present law designed to ensure that satisfactory arrangements are made for the future of the children.
>
> (iii) Provisions protecting an innocent party from being divorced against his or her will unless equitable financial arrangements are made for him or her."

We entirely agree, and deal with these proposals in the following paragraphs.

Family Interests

41. The proposals necessary to effect just settlements on divorce may involve a very wide consideration of the financial basis of the institution of marriage. This was clearly recognized both by the Archbishop's Group and by the Law Commission; the latter have, as we are informed, this aspect of family law already under review. We are satisfied, from our own experience, that the breakdown of many marriages is caused or at least accelerated by quarrelling about money. Moreover, whereas in the "separation" case, in the view we have taken, the conduct of the parties in the past is otherwise irrelevant, nevertheless for the purpose of arriving at a just financial settlement some judicial investigation into the responsibility for the breakdown could easily be called for. Two extreme positions could be envisaged—(*a*) where the husband is tired of the wife who has faithfully provided him with a home and shared in the upbringing of their children; reasonable provision for her should be a charge taking priority over any provision which the husband might wish to make for a new wife: (*b*) where the wife has wantonly broken the marriage tie; she may in a real sense be said to have abandoned her status and all that that implies. In between these positions is room for innumerable gradations. In this connection we refer to the Succession (Scotland) Act 1964, section 26(2), which provides that the court, in settling the property rights of parties on divorce, must have regard to all the circumstances of the case. These circumstances should preferably not be investigated in open court. Great care would be required not only in "separation" cases but also in all undefended cases. Each process ought to be examined in order to ensure that the parties had had independent legal advice as to their rights and as to the way in which they were to be safeguarded. It is possible that some simple form of acknowledgment, to be signed by defenders in presence

of their solicitors, would be necessary. We cannot overestimate the importance, nor should we minimize the difficulty, of devising some acceptable bulwark for the protection especially of women whose reasonable expectations of support and security have been disappointed. From our own experience we are satisfied that the public is at least as much interested in this problem as in the question of divorce law reform.

42. As regards the interests of children, in our experience section 8 of the Matrimonial Proceedings (Children) Act 1958 is working reasonably well; it is difficult to see what could be put in its place. There may, however, be a case for making statutory provision in relation to the exercise out of their respective jurisdictions of the powers of calling for reports, committing into care, and the ordering of supervision conferred by the Act on the English and Scottish courts. We are at present investigating this question.

43. A further possible safeguard is referred to by the Law Commission in the following terms:

> "It is for consideration whether there should be a further discretionary bar based on protection of interests wider than those of the parties alone. If such a bar were introduced, it should be defined as precisely as possible so as to promote consistency in its exercise and to enable legal advisers to give firm advice to their clients."[1]

The question is whether the granting of a decree of divorce to a guilty spouse in a defended action, after the elapse of the statutory term of years, should in certain circumstances be subject to control by judicial discretion. These circumstances may be (*a*) where the financial or other interests of the innocent spouse and/or children might appear to call for such control, and (*b*) when the pursuer during the cohabitation of the spouses has exhibited behaviour destructive of the marriage. We have no doubt that under (*a*), the answer should be in the affirmative, for the reasons which we have stated, but in the case under (*b*), we are of opinion in the negative.

44. The Archbishop's Group recommend that in all "separation" cases "the court should have a duty to refuse a decree, even though breakdown had been proved, if to grant it would be contrary to the public interest in justice and in protecting the institution of marriage."[2] The Law Commission do not unequivocally recommend the imposition of such a bar, but suggest that should it be considered essential it might be formulated as follows:—"The Judge may in his discretion refuse to grant a divorce if satisfied that, having regard to the conduct and interests of the parties and the interests of the children and other persons affected, it would be wrong to dissolve the marriage, notwithstanding the public interest in dissolving marriages which have irretrievably broken down".[3] Such a provision, while differing from those operating in the laws of Australia and New Zealand, would, as the Law Commission point out, approximate to the principles which have been worked out in the application of the statutory bars by the courts of those countries.

45. We have come to the conclusion that, so far as Scotland is concerned, this particular safeguard by way of judicial discretion ought, for the following reasons, not to be introduced.

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[1] *The Field of Choice*, para. 120(7)(*e*).
[2] *Putting Asunder*, para. 66, p. 53.
[3] *The Field of Choice*, para. 119.

(a) It would be, in Scotland, a relatively unfamiliar procedure in this field. For example, under the present law of England, differing in this respect from the law of Scotland, a petitioner seeking divorce who has committed adultery during the subsistence of the marriage must disclose the fact to the court and, in this event, the court has a discretion, which in practice it seldom exercises, to refuse to dissolve the marriage.[1] The court has also a discretion when there has been unreasonable delay in presenting a petition. Again, the English court has, and the Scottish court has not, a discretion to refuse a decree in a petition presented within three years of marriage.

(b) In the exercise of such a discretion as is proposed in *Putting Asunder* the court would be required to weigh two essentially incommensurable groups of interests, namely, on the one hand the interest of society in the stability of marriage, and also in seeing that dead marriages are not kept in existence, and on the other the interests of the petitioner in obtaining his freedom, together possibly with those of another family in achieving a legitimate status. In consequence we fear that the discretion would be exercised only in rare cases and then only to mark the court's disapproval of the conduct of the spouses. In our view, this should not be the task of the court in a divorce action.

(c) We consider that the introduction of such a discretion would introduce an unnecessary element of uncertainty into the law. Like the Law Commission[2] we have in mind the client consulting his solicitor as to whether his action is likely to be successful. The answer we would wish to discourage is, "That depends upon who is on the Bench".

(d) We think it is inconsistent simultaneously to introduce dissolution of marriage on the ground of irretrievable breakdown and also to make provision for the preservation, by way fundamentally of punishment for the past conduct of a spouse, of marriages which have admittedly so broken down.

IV. CONCLUSIONS

46. We summarize our conclusions as follows:—

(a) Divorce should continue to be granted in Scotland upon proof of one of the several grounds for divorce now existing, but there should be substituted for "cruelty" a new ground—namely, "conduct of a character so intolerable as to make it unreasonable to expect the pursuer to adhere". (Paragraphs 15 and 16).

(b) The period of non-adherence after which a spouse may bring an action of divorce for desertion should be reduced from three years to two. (Paragraph 17).

(c) The English rule that, subject to the discretion of the court, a divorce action cannot be raised within three years of the marriage ought not to be introduced into the law of Scotland. (Paragraph 30).

(d) No provision should be made for compulsory reconciliation procedure. (Paragraphs 31 to 32).

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[1] *Halsbury's Laws of England*, 3rd Edn., Vol. 12, p. 311.

[2] *The Field of Choice*, para. 115.

(e) The power of the court to continue a case with a view to allowing negotiations for reconciliation ought to be declared by statute. (Paragraph 40.)

(f) The court ought not to be empowered to refuse a decree of divorce on the ground only that the pursuer has attempted to deceive the court. (Paragraph 40).

(g) It should be competent for a spouse to bring an action for divorce on the ground that the marriage has irretrievably broken down after the spouses have been separated—

(i) for two years if both parties consent to or acquiesce in the dissolution of the marriage, or

(ii) if one party does not consent or acquiesce, for such period as Parliament may decide. (Paragraphs 26 and 39).

(h) It should be a condition precedent to the granting of any decree of divorce that the court should be aware of, and be satisfied in the circumstances of the justice of, the financial and other provisions to be made for the parties to the action and any dependent children. (Paragraphs 41 and 42).

47. Finally, we wish to record our appreciation of the information we have received from the office of the Registrar General for Scotland in connection with the statistical data, taken largely from his Annual Reports, which we have used in the preparation of this Report.

17th *March* 1967.

C. J. D. SHAW
Chairman

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