CASE AND COMMENT

CRIMINAL LAW — SEDUCTION — A WOMAN OR GIRL OF PREVIOUSLY CHASTE CHARACTER —CRIMINAL CODE, SECTIONS 210-213 and 301.— In the law, we learn. Today we find that a slip of one kind on our part disentitles our client to any relief. Tomorrow we learn that a slip of another kind, sprung from the same pressure of work or happy ignorance, reflects adversely only on the scrivener who moves against it. We learn as we go, never perhaps becoming wiser because of these things, but growing more proud or more humble as our natures require.

Thus it was in 1931, in *Rex* v. *Cracknell*,[1] that we learned that when Parliament said "and" in section 19 of the Criminal Code it obviously meant "or". At first sight and outside the law, it might be thought that when Parliament said "and", it meant "and". In the profession we know better and our view is the more strong on this point today since Parliament has left the "and" unchanged, these seventeen years past, fearful, no doubt, that if it were now to say "or", we should read it as "and".

Thus we have learned again in 1948 in *Rex* v. *Johnston*[2] that when Parliament refers to a girl of "previous chaste character" in section 301(2) of the Criminal Code, it does not mean a girl "previously chaste".

The purpose of this note is not to criticize the proposition which is now well settled law,[3] but to warn unwary members of the profession against the concept of old-time chastity which is still current among large sections of the public.

Havelock Ellis wrote a study on "The Function of Chastity" in which he traced the various concepts still in existence, through changing civilizations.[4] There is the primitive idea that chastity is a form of property brought by the wife to the marriage. There is the persisting early Christian asceticism, and the enforced celibacy of mediaeval times. Chastity was something more than virginity but it was nothing less. Thus it remained through Protestant and evangelical revolts. John Milton had a high opinion of its protective qualities and expressed it in "A Maske presented at Ludlow Castle, 1634: on Michaelmasse night":[5]

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[1] [1931] O.R. 634 (C.A.).
[2] [1948] O.R. 290 (C.A.).
[3] Tremeear's Criminal Code (5th ed.) pp. 207-8, 346; *Magdall* v. *Rex* (1920), 61 S.C.R. 88,where Duff J., dissenting, at p. 95 criticized the majority view in strong terms, saying it "would be playing fast and loose with justice".
[4] Studies in The Psychology of Sex, Vol. II, Part III; Sex in Relation to Society, Chap. V.
[5] Comus, ll. 420-431.

'Tis chastity, my brother, chastity:
She that has that, is clad in compleat steel,
And like a quiver'd Nymph with Arrows keen
May trace huge Forests, and unharbour'd Heaths,
Infamous Hills and sandy perilous wildes,
Where through the sacred rayes of Chastity,
No savage, fierce, Bandite, or mountaineer
Will dare to soyl her Virgin purity,
Yea, there, where very desolation dwels
By grots, and caverns shag'd with horrid shades
She may pass on with unblench't majesty,
Be it not don in pride, or in presumption.

There's the old-time chastity for you! It is the absolute purity of the innocent mind, undefiled body and noble character. It is in that sense that the word is still used by many. Their view was expressed by Duff and Brodeur JJ. in their dissenting judgments in *Magdall* v. *Rex* in 1920.[6]

The modern legal concept of chastity can be claimed as a peculiarly Canadian achievement. In a day when we are searching for symbols and national distinctions, here is one ready-made. It arises from words used at various times in various sections of the Criminal Code dealing with seduction and allied offences. There are:

S. 210 — 1900 — "previous unchastity"
S. 211(1) — 1892 — "previously chaste character"
S. 211(2) — 1920 — "previously chaste character"
S. 212 — 1892 — "previously chaste character"
S. 213 — 1900 — "previously chaste"
S. 301(2) — 1920 — "previous chaste character"
S. 301(4) — 1934 — "previously chaste character".

With some encouragement from Parliament,[7] our courts, forsaking Milton, have interpreted these phrases in what might properly be called a Christian spirit.[8] In effect the judges can instruct juries to forgive and forget and direct them to embark on an archangel's search for the known woman's "actual moral status".[9]

In *Rex* v. *Johnston*[10] the accused was charged with having carnal knowledge of a girl between 14 and 16 years of age contrary to section 301(2) of the Criminal Code which requires the known

[6] (1920), 61 S.C.R. 88: Duff J. at pp. 94-5; Brodeur J. at pp. 96-98.
[7] Criminal Code, R.S.C., 1927, c. 26, s. 211(2), s. 301(4).
[8] The story of Mary Magdalene, Luke VII, 37-50; the story of the woman taken in adultery, John VIII, 3-11; Davies C.J. in *Magdall* v. *R.* (1920), 61 S.C.R. 88, at pp. 90-91.
[9] Crankshaw's Criminal Code (6th ed.) p. 191.
[10] [1948] O.R. 290 (C.A.).

girl to be "of previous chaste character". The jury had been instructed that the issue was the girl's virginity. The Court of Appeal disagreed and ordered a new trial. Laidlaw J.A. held at page 298 that character "is intended . . . to mean the sum of all mental and moral qualities possessed by the girl. If the aggregate of those qualities distinguishes her as one who can be properly described as decent and clean in thought and conduct, she comes within the meaning of the chaste character as used in this particular section of the Code." Roach J.A. agreed and added at page 304, "Chastity may be lost and later regained and the possession of it at any given time is a question of fact to be determined by the conduct of the woman not only prior to but at the time in question". Hogg J.A. at page 310 held that the meaning of the words "previous chaste character" was a matter of law to be applied to the facts.

All the judges agreed that a virgin was not necessarily "of chaste character" and other cases under the Code have held that a girl could be of chaste character though not a virgin. Chastity under the Code we are told may be lost and found again. It is a state of mind like domicile or intent to defraud.

The heartening part of the judgment is that the matter "is essentially a question of fact for the jury to be determined by them applying their common sense and good judgment and, in doing so, bringing to bear upon their deliberations their common knowledge of human conduct and reactions".[11] There is no real peril. The real difficulties are in the words of Parliament and in the world of Woman. Did Parliament mean different things by the different words it has used in the sections? The courts seem to assume that it meant the same things. If so, why did it not use the same words? Why did Parliament use the words "previous" or "previously"? [12] And is there a distinction between the seduction of section 211, the seduction *and* illicit connection of section 212 and the seduction *or* illicit connection of section 213? And do all these differ from the carnal knowledge of section 301 and the unlawful carnal knowledge of section 302? [13] If we can transpose "or" and "and" the task is simplified and if we can believe that Parliament means the same thing when using different words, interpretation becomes a delight, though the supremacy of Parliament may tremble. And as for "character", can we rely on Pope's quotation from Martha Blount,[14] "most women have

[11] Roach J.A. at p. 304.
[12] See *R.* v. *Lougheed* (1903), 8 C.C.C. 184.
[13] The sections are neatly summarized in Crankshaw's Criminal Code (6th ed.) p. 191.
[14] Pope's Second Epistle 1, 2.

no character at all", which none of the Bench have been bold enough to cite?

These sections of the Criminal Code and the law built up around them merit at least three further comments. First, the protection given to women and girls of previously chaste character is exceptional. It is not found in English criminal law. The English law relating to offences against persons distinguishes between intercourse by consent and without consent. The one is a freedom which the law permits; the other is a crime which the law punishes. The sections listed in this comment, with the exception of section 301, were originally enacted to punish offences against public morality, and are still found in Part V of the Code relating to offences against religion, morals and public convenience. They are not in essence offences against the person for they are done with the person's consent. Yet they are crimes only because of the true moral character of the person consenting and in some cases the nature of the enticements offered her. The second comment is that the difference between crime and innocence rests in these cases on no predictable foundation. Whether the man commits a crime depends essentially not on his intent or action but on the view which twelve of his fellow citizens will take of the moral stature of his companion. Her reputation, her physical purity, her conduct in the past, her conduct on the occasion do not determine, although they may influence the matter.

Thus the Canadian woman or girl of previous chaste character is not only distinctively Canadian but is uniquely protected by our laws.

It is a principle not to be extended, or we shall have crimes of breach of contract with "an essentially honest man", or of borrowing from "a God-fearing citizen", or of injuring another's "self-respect".

Of mortals, only juries can determine if such crimes have been committed. Parliament should at least be precise and consistent in defining them.

But we learn as we go.

PETER WRIGHT

Toronto

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WILLS MADE IN THE FORM DERIVED FROM THE LAWS OF ENGLAND — JUDGMENT OF SUPREME COURT OF CANADA — ESSENTIAL FORMALITIES — In the March issue of the Canadian Bar Review[1] attention was drawn to the decision of the Quebec

[1] (1948), 26 Can. Bar Rev. 590.

Court of King's Bench in *Gingras* v. *Gingras*[2] on the important question of the formalities necessary for the making of a valid will "in the form derived from the laws of England". The conclusions of that note were two: first, that the provincial court of appeal had been wrong under articles 851 and 855 of the Quebec Civil Code in holding valid a will the witnesses to which had not signed in each other's presence; and, second, that the court had been wrong in considering such questions as the testator's intention, the possibility of fraud and the "spirit" of article 851 where the words of the Code were clear. Implicit throughout the note was the plea for a strict application of the provisions of the Civil Code prescribing the formalities for the making of a will in the form derived from the laws of England. The decision of the Court of King's Bench in the *Gingras* case has now been reversed by the Supreme Court of Canada in a unanimous judgment.[3]

It may be well to recall the facts of the case very briefly. The testator, Jean-Xavier Gingras, died on December 2nd, 1945. A few days before he had called to his sick-room a confidential clerk named Desjardins and dictated to him the terms of his will. At the bottom of the will Desjardins wrote the words, "Moi Marcel Desjardins j'ai signé pour M. Jean-X. Gingras", signing himself as a witness underneath. Opposite these words the testator made his mark. It was then realized that a second witness would be required and Desjardins brought to the room a man called Quenneville. The will was read by Desjardins in the presence of Quenneville and the testator, acknowledged by the testator and signed as a witness by Quenneville. The only questions before the Supreme Court were whether in these circumstances the making of the will had fulfilled the formalities required by the Civil Code and whether, if it had not, the will was invalid.

The Supreme Court did not say expressly that in Quebec the witnesses to a will in the form derived from the laws of England must sign in each other's presence; indeed Mr. Justice Rand in a brief judgment noted that "The judgment below proceeded on the view that Article 851 requires the witnesses to sign in the presence of each other as well as in that of the testator, but in the circumstances that question does not arise". They put the grounds of their decision somewhat differently. Article 851 C.C. requires that the testator's signature should be "acknowledged by the testator as having been subscribed by him to his will then

[2] [1947] K.B. 612.
[3] As yet unreported.

produced, in presence of at least two competent witnesses together, who attest and sign the will immediately, in presence of the testator and at his request". Gingras may have acknowledged his will, at one stage, in the presence of two witnesses together, but, in the words of Mr. Justice Taschereau who delivered the leading judgment, he "n'a jamais reconnu sa signature *devant deux témoins présents qui ont signé ensuite*". The acknowledgment of the testator's signature before the two witnesses must precede the signature of the witnesses. The point was put neatly by Mr. Justice Rand:

> This [the words of article 851 just quoted] means that the witnesses must sign after the acknowledgment to them together; each thereafter attests to the same thing, including the joint acknowledgment prescribed by the Article. Here that formality was not observed. The acknowledgment was first to and in the presence of one witness only, who thereupon signed; and later to both witnesses, the second of whom only then signed. Although a testator may acknowledge his signature, the Article does not provide for the acknowledgment of the signature of a witness.

It may be a long time before the circumstances of the *Gingras* case are repeated and the most inportant feature of the Supreme Court's judgment for the future is their recognition that in making a will in the form derived from the laws of England the formalities of article 851 must be strictly observed if the will is to be valid. In this connection Mr. Justice Taschereau said:

> La Cour d'Appel en est arrivée à la conclusion confirmant le jugement de la Cour Supérieure, M. le Juge Marchand dissident, qu'il était nécessaire d'éviter une interprétation trop rigide de l'article 851, et que tout en s'efforçant d'entourer la confection des testaments de toutes les précautions possibles, il ne fallait pas en l'absence de possibilité de fraude, annuler un testament dans des conditions qui se sont présentées dans la cause qui nous est soumise.
>
> Avec toute la déférence possible, je ne puis partager cette vue et je crois qu'il faut, au contraire, s'incliner devant la rigidité des articles 851 et 855 qui prononcent la nullité d'un testament, si les formalités requises n'ont pas été observées. Sans doute, les régles imposées sont sévères, et leur application peut conduire peut-être à la nullité de testaments qui sont bien l'expression de la volonté d'un testateur, mais la loi est trop claire et trop spécifique pour qu'il soit permis de la mettre de côté. C'est le rôle de la legislature d'intervenir dans un cas comme celui-ci, et non pas celui des tribunaux judiciaires.

The same point was made by Chief Justice Rinfret in the following passage:

> D'ailleurs, la majorité de la Cour d'Appel, qui a tenu le testament pour valide, paraît avoir considéré que les formalités exigées par la loi n'avaient pas été strictement suivies dans le cas qui nous occupe, mais elle a cru pouvoir passer outre en déclarant qu'il ne fallait pas insister pour une trop grande rigidité de la loi.

> Mais l'article 855 du code civil est bien impératif. Il dit que toutes les formalités 'doivent être observées à peine de nullité, à moins d'une exception à ce sujet'.
>
> Ici, les formalités exigées par l'article 851 n'ont pas été suivies été aucune exception ne justifie la façon dont on a procédé.
>
> En tout respect, je ne crois pas que le code nous permette de reconnaître comme valide un testament où il manque une des formalités prescrites, et il s'en suit que nous sommes forçés de le déclarer nul. (Voir Mignault, Vol. 4, p. 265).

Practitioners can now advise their clients with some confidence on this question of the formalities necessary for making a will in the English form.

G.V.V.N.

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CRIMINAL LAW — BREACH OF TRUST BY PUBLIC OFFICER — CRIMINAL CODE, SS. 2(33), 155, 158 AND 160. — The criminal liability of the Public Officer had, by the beginning of the twentieth century, assumed settled scope and definite contour at common law. The principles applicable to it are classically stated by Lord Mansfield in *Rex* v. *Bembridge*:[1]

> ... there are two principles applicable: first, that a man accepting an office of trust concerning the public, especially if attended with profit, is answerable criminally to the King for misbehaviour in his office; this is true, by whomever and in whatever way the officer is appointed. ... Secondly, where there is a breach of trust, fraud, or imposition, in a matter concerning the public, though as between individuals it would only be actionable, yet as between the King and the subject it is indictable. That such should be the rule is essential to the existence of the country.

Canadian development occurred in *The Queen* v. *Arnoldi*,[2] where the Chief Mechanical Engineer of the Department of Public Works of Canada was found guilty of misbehaviour in office. The case held particularly that proof of undue gain was unnecessary to support the conviction. Knowledge of the whole facts by the defendants' superior officers was held also to be no defence to the indictment.

Various definitions, or descriptions, of "Public Officer" will be found at common law, for example:

"In my opinion, everyone who is appointed to discharge a public duty, and receives a compensation, in whatever shape,

[1] (1783), 3 Doug. K.B. 327, at p. 332.
[2] (1893), 23 O.R. 201 (Ch. Div.).

whether from the crown or otherwise, is constituted a public officer."[3]

". . . a man accepting an office of trust concerning the public, especially if attended with profit . . ."[4]

"To make the office a public office, the pay must come out of national and not out of local funds, and the office must be public in the strict sense of that term."[5]

In *Rex* v. *Whitaker*[6] the accused, a colonel of one of His Majesty's regiments, was indicted for misbehaviour in accepting bribes from a firm of caterers to induce him to accept their representative as tenant of the regimental canteen. He based his appeal on the definition in Stephen's Digest of the Criminal Law (5th ed., Article 123):

> The expression 'public officer' in this chapter means a person invested with authority to execute any public duty and legally bound to do so, but does not include any member of either House of Parliament as such, or any ecclesiastical, naval, or military officer acting in the discharge of duties for the due discharge of which he can be made accountable only by an ecclesiastical, naval, or military court.

He argued that he, being a military officer, did not come within this definition. The court found no support for such a restriction and dismissed the appeal. In the course of his judgment, Lawrence J. defined "public officer" as ". . . an officer who discharges any duty in the discharge of which the public are interested, more clearly so if he is paid out of a fund provided by the public. If taxes go to supply his payment and the public have an interest in the duties he discharges, he is a public officer."[7]

The common-law offence is thus set out in Halsbury: "Any public officer is guilty of a common law misdemeanour who commits a breach of trust, fraud, or imposition in a matter affecting the public, even although the same conduct, if in a private transaction, would, as between individuals, have only given rise to an action".[8]

Section 160[9] of the Criminal Code sets out the offence essentially as it was defined in the *Bembridge* case. The only distinction

[3] *Henly* v. *The Mayor and Burgesses of Lyme* (1838), 5 Bing. 91, *per* Best C.J. at p. 107.

[4] *Rex* v. *Bembridge*, *supra*, footnote 1, at p. 332.

[5] *In re Mirams*, [1891] 1 Q.B. 594, at p. 596.

[6] [1914] 3 K.B. 1283; 24 Cox C.C. 472.

[7] [1914] 3 K.B. 1283, at p. 1296.

[8] (2nd ed.), Vol. ix, p. 337.

[9] "*Breach of Trust By Public Officer.*—Every public officer is guilty of an indictable offence and liable to five years' imprisonment who, in the discharge of the duties of his office, commits any fraud or breach of trust affecting the public, whether such fraud or breach of trust would have been criminal or not if committed against a private person."

is in the penalty; section 160 provides a maximum penalty of five years, while two years was the usual maximum for misdemeanours at common law. The Code provided no definition of "public officer" until the appearance of section 2(33)[10] in the 1927 Revised Statutes. This puny "definition", curiously, mentions only the class of officer to which, in England, the application of the term "public officer" was in doubt prior to the *Whitaker* case. Section 160 remained uninvoked on the statute books for fifty-five years, a happy reflection on the stability of the Canadian Civil Service.

The unanimous judgment of the Ontario Court of Appeal in the recent case of *Rex* v. *McMorran*[11] provides the first clarification. The accused, employed by the Wool Administration of the Wartime Prices and Trade Board as Cloth Allocations Officer, was charged under section 160 with the preferential allocation of priority cloths, found guilty and sentenced to three years in the penitentiary. The evidence disclosed that his salary approximated $5,000 a year and that within the administration he was subject to direction by at least two superiors who were themselves subject to executive direction in the board hierarchy.

The accused's main ground for appeal was founded on the submission that he was not a public officer within the definition in section 2(33) of the Code and that the "public officer" in section 160 must of necessity be restricted to the examples specifically mentioned in the definition. In view of the common-law background and the use of the word "includes" in section 2(33), it may be doubted whether this argument was advanced very seriously. In any event it was not entertained by the Court of Appeal, Hope J. A. disposing of it in the following words:[12]

> In my opinion the word 'includes' in s. 2(33) is not restrictive, but rather expansive, bringing within the common law definition, for greater certainty, those categories specifically named in the subsection.
>
> If the appellant's contention were correct, then 'includes' as used in s. 2(33) must be taken as synonymous with 'means'. What use did Parliament make of these two words in the interpretation section, s. 2? The word 'includes' is used thirty-two times. The word 'means' is used nine times and the two words are used twice conjunctively, namely, 'means and includes'. A careful review of the many subsections of s. 2 makes it abundantly clear that these two words are not employed interchangeably, and with the same intent. It would appear

[10] " 'Public officer' includes any excise or customs officer, officer of the army, navy, marine, militia, Royal Canadian Mounted Police, or other officer engaged in enforcing the laws relating to the revenue, customs, trade or navigation of Canada;"

[11] [1948] O.R. 384; 91 C.C.C. 19.

[12] At p. 388.

> that 'means' is used in a strictly restrictive sense, while 'includes' is not restrictive of those persons or things specifically named but rather extensive of the common law meaning of the term 'Public Officer'.

With the increased administrative activity accompanying every phase of government, it may well be that the section will assume greater importance. The first obstacle to its application has now been neatly cleared by the Ontario Court of Appeal.

One further source of confusion results from the initial sections of Part IV of the Code. Section 155(c) mistily defines "Official or employee of the government" as extending to and including "the Commissioners of the Transcontinental Railway and the persons holding office as such commissioners, and the engineers, officials, officers, employees and servants of the said commissioners". This almost futile "definition" has most direct reference to section 158, which sets out the offence of frauds upon the government. The body of "officials or employees of the government" is nowhere defined and whether a distinction exists between a "Public Officer" and an "Official or employee of the government" is nowhere made clear.

Consider the hypothetical case of a Public Officer guilty of misbehaviour and breach of trust, in the course of which he received benefits for assisting some individual in the transaction of business with the government. This, essentially, is the offence set out in section 158(1)(e), the punishment for which is much less severe than the punishment provided in section 160. Would such an offence sustain convictions on both charges? Or must they be taken as conflicting, section 158(1)(e), as the specific, overriding section 160 as the general, offence? Clearly, minor employees who by no stretch of the imagination could be considered Public Officers are subject to the liabilities created by section 158; clerks and secretaries, for example, who have access to government files, might be in positions to defraud the government in the manner contemplated by the section. However it is equally clear that the two designations overlap along a wide margin; surely McMorran, whom the jury found to be a Public Officer, was also an "Official or employee of the government".

It is apparent, too, that the present sophisticated, heterogeneous mass of state officialdom has outgrown the simple conceptions upon which these sections of the Code were based. A renovation, particularly in the definition sections, is due.

Hamilton Sydney Paikin

MARRIAGE — NULLITY — WILFUL REFUSAL TO CONSUMMATE — USE OF CONTRACEPTIVES—BAXTER v. BAXTER*.—The recent decision of the House of Lords in the case of *Baxter* v. *Baxter*,[1] which has caused perhaps more ferment in the public mind than any decision of that tribunal touching on the relation of law to religious doctrine, since the great *Free Church of Scotland* case,[2] is a striking illustration of the inability of a modern legal system to found its rules solely upon religious precepts, however admirable and incontestable those precepts may be. Stated quite simply, the point decided in that case was that where a wife refused intercourse to her husband unless he wore a contraceptive device which would prevent conception, and intercourse took place between them solely upon that basis, she was not thereby guilty of a wilful refusal to consummate the marriage. The basis of the decision was that intercourse under such conditions was full intercourse and amounted in itself to consummation. It will be seen therefore that the court was constrained to examine what, for the purpose of English law, amounts to consummation of a marriage and, in order to arrive at a solution to this question, it was necessary further to inquire into the fundamental purpose of that institution itself. The nature of this inquiry cannot be fully apprehended without due regard to the historical relation between the modern English law on this subject and the law and practice of the old ecclesiastical courts which were superseded, as regards matrimonial jurisdiction, by the civil Divorce Court in 1857. It is therefore proposed, before examining the case in detail, to say a few words about that historical relation.

Until 1857 the matrimonial law of England was as laid down and applied in the ecclesiastical courts. Those courts, in accordance with canon law, did not allow divorce as such,[3] but did permit suits for nullity where certain circumstances, *e.g.* incapacity to, consummate, existed *at the date of the marriage* and thereby rendered the marriage void or voidable. The ecclesiastical courts had, therefore, no power to dissolve a marriage on account of any occurrence subsequent to its celebration. The Matrimonial Causes Act of 1857, however, set up for the first time a civil court for divorce and matrimonial causes and empowered that

* For a previous note on this case see R. M. Willes Chitty (1948), 26 Can. Bar Rev. 576.—*Editor.*

[1] [1947] 2 All E.R. 886.

[2] *Overtown* v. *Free Church of Scotland,* [1904] A.C. 515; wherein the House of Lords held that, in order to determine the disposition of trust property, the court was bound to inquire into and determine what was the true doctrine of the Free Church.

[3] *Cf.* the definition of marriage "as understood in Christendom", *per* Lord Penzance in *Hyde* v. *Hyde* (1866), 1 P. & D. at p. 133: "The voluntary union for life of one man and one woman to the exclusion of all others".

court to grant decrees of divorces based on the adultery of a spouse committed *after* celebration of the marriage. This provision was of course an entirely new departure, and the distinction between divorce and nullity was recognized by the Act itself which laid down that, "in all suits and proceedings, *other than proceedings to dissolve any marriage*, the court shall proceed and act and give relief on principles and rules which in the opinion of the court shall be as nearly as may be conformable to the principles and rules on which the ecclesiastical courts have heretofore acted and given relief. . . . "[4] In other words, while nullity proceedings were, so far as practicable and subject to the provisions of the Act of 1857, to continue to be governed by the former rules and practices of the ecclesiastical courts, divorce proceedings, being entirely novel, were not subject even by analogy to such rules and practices. This then sets the key-note of future development, so that whereas in suits for nullity it has been necessary to go to the fountain-head of ecclesiastical law and also to the canon law from which it was derived, the law of divorce strictly so-called has been developed, perforce, on independent lines.

It is, therefore, not surprising that in proceedings for nullity the courts still adhere closely to the notions of matrimony entertained by the Christian Church as embodied in the rules of ecclesiastical law. For example, in *Napier* v. *Napier*,[5] it was held by the Court of Appeal that no decree of nullity could be granted for wilful and persistent refusal by one spouse to allow intercourse with the other. Pickford L.J. gave the following reasons for the decision: "It is in my opinion contrary to the principles of the ecclesiastical law as administered in the ecclesiastical Courts. Those Courts did not grant a divorce *a vinculo matrimonii* for any cause arising after the marriage, but only a separation *a mensa et thoro*, and in the cases which a decree of nullity or divorce *a vinculo* was granted it was in consequence of an impediment existing at the time of the marriage which made it no marriage".[6] Even, however, in matters relating to nullity, the practice of the ecclesiastical courts was not necessarily in accordance with the strictest application of the Christian view of marriage. Thus the Book of Common Prayer sets forth the doctrine that matrimony was ordained for the procreation of children, but this has not deterred either the old ecclesiastical courts or their successors from holding a marriage valid where sexual intercourse is possible, notwithstanding that one of the

[4] S. 22. See now, Judicature Act (1925), s. 32.
[5] [1915] P. 184.
[6] At. p. 189.

spouses is and was at the date of the celebration of the marriage, incurably sterile, or that the wife was beyond the age of childbirth, or suffering from a malformation which rendered conception utterly impossible.[7]

In this connection it may be recalled that the House of Lords, in another historic case,[8] arrived at the conclusion that Christianity as such is not part of the law of England. "The phrase 'Christianity is part of the law of England' is really not law; it is rhetoric. . . . Ours is, and always has been, a Christian State. . . . English law may well be called a Christian law, but we apply many of its rules and most of its principles, with equal justice and equally good government, in heathen communities, and its sanctions, even in courts of conscience, are material and not spiritual."[9] There are few branches of the law more closely modelled upon Christian doctrine than that appertaining to matrimony, but this is far from saying that doubtful points of interpretation are to be settled by recourse to the basic principles of that doctrine.

It will be appreciated that such reasoning applies with especial force to that portion of matrimonial law concerned with divorce in the strict sense, inasmuch as divorce gives rise to considerations that are outside the scope of the traditional Christian notion of marriage as an indissoluble union. If then divorce involves a departure from that fundamental notion, it is not easy to see how guidance is to be obtained therefrom in investigating the construction to be placed upon the grounds of divorce permitted under modern statutes. In a dissenting judgment delivered in *Weatherley* v. *Weatherley*,[10] Scott L.J. took the view that, since it is stated in the Book of Common Prayer that matrimony is ordained for the procreation of children, a refusal by one spouse of sexual intercourse with the other constitutes in itself desertion sufficient to found a decree of divorce.[11] Of this opinion, Lord Jowitt L.C. said: "I think this is a dangerous and fallacious line of argument. It proceeds on the basis that any fundamental breach of the obligations contracted in holy matrimony, as laid down in the Book of Common Prayer, constitutes desertion within the meaning of the Act of 1937. . . . The fact is that the law of the land cannot be co-extensive with the law of morals, nor can the civil consequences of marriage be

[7] See *D.* v. *A.* (1845), 1 Rob. Eccles. 279.
[8] *Bowman* v. *Secular Society*, [1917] A.C. 406.
[9] At pp. 464–5 (Lord Sumner).
[10] [1946] 2 All E.R. at p. 4.
[11] Under Matrimonial Causes Act (1937), s. 2.

identical with its religious consequences. We must remember . . . that marriage, whether solemnised in a Church or a registry office, whether contracted between Christians or between those who have different or no religious beliefs, must in each case have the same legal consequences and, remembering those things, we shall, I think, find the solution to the question which arises for determination in this case and in similar cases, not on a consideration of the Christian doctrine of marriage as laid down in the Book of Common Prayer, but on the true construction of the relevant Acts of Parliament."[12]

Until the passing of the Matrimonial Causes Act of 1937, nullity was confined, as shown by the case of *Napier* v. *Napier* already cited, to cases where some fundamental defect existed at the date of the celebration of the marriage. Events subsequent to that date might provide ground for divorce but not for a decree for nullity. The Act of 1937, however, disregarded this distinction by providing for a decree of *nullity* to be obtainable on the ground of wilful refusal to consummate the marriage.[13] This introduces a curious anomaly, since it enables a marriage to be annulled on account of circumstances which are necessarily subsequent to the date of the marriage. Although, therefore, the Act itself specifies this as a ground of nullity, it will be apparent that it bears a closer analogy in its nature to the modern law of divorce than to the ecclesiastical rules relating to nullity, and for this reason alone it might be expected that the courts would, in construing its effect, feel constrained to interpret the new statutory provision on its own merits rather than by recourse to the former doctrines of the ecclesiastical courts.

In *Baxter* v. *Baxter*[14] the House of Lords was faced with the problem of the meaning of the word "consummate" in the new statutory ground of nullity. Was a marriage consummated in the legal sense where the only sexual intercourse between the spouses had been accompanied by the use of a contraceptive device with the object of preventing conception? If indeed it were held that such intercourse did not amount to consummation, then where one of the spouses persistently refused intercourse except on that basis, the other spouse might be able to rely upon those facts as constituting a wilful refusal to consummate the marriage sufficient to ground a decree of nullity. The Court of Appeal acceded to this argument in the earlier decision of *Cowen* v. *Cowen*,[15] where the only intercourse that had taken

[12] [1947] 1 All E.R. at p. 565.
[13] S. 7 (1) (a), which renders such a marriage voidable.
[14] [1947] 2 All E.R. 886.
[15] [1946] P. 36.

place between the spouses was either with the interposition of a contraceptive sheath or by way of *coitus interruptus*, the husband having refused intercourse on any other basis. The judgment of the court was based on the view that intercourse must be "ordinary and complete intercourse; it does not mean partial and imperfect intercourse",[16] and that intercourse, which involves the artificial prevention of the passage of the male seed into the body of the woman, cannot be complete in this sense. "To hold otherwise would be to affirm that a marriage is consummated by an act so performed that one of the principal ends, if not the principal end, [i.e. the procreation of children], of marriage, is intentionally frustrated".[17] The court held further on the facts that the wife was not debarred from her remedy by consent to this mode of intercourse, since there had in fact been no genuine acquiescence on her part. This decision was later applied by the Court of Appeal to a case where a husband before marriage underwent an operation whereby, though he remained capable of penetration and emission, the male sperm could not leave his body, so that conception was rendered impossible. The court granted a decree of nullity, not on the ground of wilful refusal to consummate, but on that of incapacity, it being held that the husband was incapable of consummation by reason of a structural defect in the organs of generation.[18]

The case of *Cowen* v. *Cowen* was overruled, and that of *J.* v. *J.* disapproved, by the House of Lords in *Baxter* v. *Baxter*,[19] on the ground that both decisions were based on an erroneous view of the meaning of "consummation" for the purpose of the law of nullity. The facts of that case closely resembled those in *Cowen* v. *Cowen*. In this instance the husband was the petitioner and he alleged against his wife that she had refused intercourse with him except on condition that he wore a contraceptive sheath.[20] Hodson J. and the Court of Appeal had held that there had been no consummation of the marriage but that the husband, having acquiesced in this state of affairs for some ten years, though reluctantly, was debarred from relying upon such non-consummation as a ground of nullity. The House of Lords

[16] Citing Dr. Lushington in *D.* v. *A.* (*ut supra*, at p. 298).
[17] At p. 40.
[18] *J.* v. *J.*, [1947] P. 158.
[19] *Ut supra.*
[20] It is to be noted that in *Baxter* v. *Baxter* no question of *coitus interruptus* arose, and the House of Lords expressly reserved its views as to whether that practice would give rise to different considerations from those relevant to artificial methods of contraception, [1947] 2 All E.R. at p. 888. It may well be argued that *coitus interruptus* is not full sexual intercourse (or *vera copula*), regardless of its effect in preventing the procreation of children, and therefore could not in itself result in consummation.

reversed these findings. It was held (in a unanimous opinion delivered by Lord Jowitt L.C.) that there was no real acquiescence on the part of the husband, so that if he had a ground in law for seeking nullity he was entitled to avail himself of it. The House then turned to consider the vital issue in the case, *viz.*, whether on the facts as stated there had been legal consummation of the marriage. In arriving at the conclusion that the marriage had been fully consummated (and thereby overruling *Cowen* v. *Cowen*) the Lord Chancellor examined the question from two aspects. Firstly, and this is perhaps the portion of his Lordship's speech to which most criticism has been directed — the House rejected the view that the principal end of Christian marriage was the procreation of children.[21] For this purpose some guidance was derived from the rules of the ecclesiastical law (already adverted to) to the effect that sterility of the husband or barrenness of the wife had never been recognized as in themselves affording grounds of nullity. Particular reliance was placed upon the decision of Dr. Lushington in *D.* v. *A.*[22] where it was held that, though the wife had no uterus and was therefore utterly incapable of conceiving, this was not in itself a sufficient ground on which to found a decree of nullity. "The only question is, whether the lady is or is not capable of sexual intercourse, or, if at present incapable, whether that incapacity can be removed."[23] *D.* v. *A.* was followed by Horridge J. in *L.* v. *L.*[24]— a case not cited in *Cowen* v. *Cowen* but approved in the present case — where the wife had undergone an operation before marriage rendering her totally incapable of conceiving, though complete penetration was still possible. This was held not to amount to incapacity. In any event, Lord Jowitt L.C. went on to point out the dangers of adhering too strictly to the particular phraseology of the marriage service contained in the Book of Common Prayer, and recalled his observations on this subject in *Weatherley* v. *Weatherley*.[25]

Having thus rejected the basis on which the Court of Appeal arrived at their decision in *Cowen* v. *Cowen*, the Lord Chancellor proceeded to indicate the viewpoint from which the issue should rightly be regarded. In the opinion of the House, the decision

[21] "In any view of Christian marriage the essence of the matter, as it seems to me, is that the children, if there be any, should be born into a family, as that word is understood in Christendom generally, and in the case of a marriage between spouses of a particular faith, that they should be brought up and nurtured in that faith" (at p. 890).

[22] *Ut supra.*

[23] At p. 296.

[24] (1922), 38 T.L.R. 697.

[25] *Supra.*

involved in essence the construction of particular words used in a statute, and those words had to be construed in the light of the social conditions obtaining at the date of the statute. In legislation of this kind, Parliament must be taken to have borne in mind the wide-spread use of contraceptive devices in marital life at the present-day, and by using the word "consummate" in connection with the new ground of nullity, could not have intended that the courts should be involved in inquiries of the kind that would be entailed by the application of the principles laid down in *Cowen* v. *Cowen*. Furthermore, the difficulty of determining the extent of such inquiries is underlined when account is taken of the fact that medical science does not recognize any type of contraceptive device as being absolutely certain of preventing conception, and this applies especially to such a practice as *coitus interruptus*. It would therefore be somewhat remarkable for a court to go so far as to hold that intercourse of this nature was incapable of amounting to *vera copula* even in the sense of being incapable of resulting in conception and, viewed practically, it is difficult to see how there could ever be satisfactory evidence before the court as to the degree of certainty of the particular method employed in fact in any individual case. Difficulty of proof does not of course justify the court in shrinking from its task of investigation, but the nature of the inquiry which such an investigation would entail must inevitably cast doubt on whether the legislature ever intended to impose any such duty upon the court. The strange result which might emerge from compliance with the decision in *Cowen* v. *Cowen* is perhaps sufficiently illustrated by the fact that, under that ruling, a spouse might be entitled to claim a decree of nullity where the other spouse had, for example, wilfully refused intercourse save by way of *coitus interruptus*, and such intercourse had actually resulted in conception. It may be that a court would be reluctant to accept the evidence relied upon by the petitioner in such a case, but the suggested situation is at least theoretically possible.[26]

In the course of his speech the Lord Chancellor indicated that a refusal to have intercourse otherwise than with contraceptives might be a relevant factor "when the sexual life of the spouses, and the responsibility of either or both for a childless

[26] It is realized that the same situation may arise in nullity based on incapacity, where *e.g.* the evidence shows that the wife is incapable of *vera copula*, but a child has nevertheless been born to her as a result of fecundation *ab extra* (see *Clarke* v. *Clarke*, [1943] 2 All E.R. 540). But in such a case it is possible by medical evidence to establish incapacity as a fact, whereas the effectiveness of individual methods of contraception as employed by the parties is necessarily not susceptible of independent proof.

home, form the background to some other claim for relief".[27] The nature of this qualification is conveniently exemplified in the subsequent case of *Rice* v. *Raynold-Spring-Rice*.[28] There a wife brought a complaint before the justices alleging desertion against her husband. The evidence disclosed that the husband had always been anxious to have a family, but that the wife was opposed to having offspring and had consistently refused intercourse except by way of *coitus interruptus*. This attitude of the wife led to constant nagging, displays of bad temper and quarrels. Eventually the husband withdrew from the matrimonial home, and the justices took the view that the wife's conduct was such that normal married life was not possible and that the husband was justified in refusing to live with her. On appeal to the Divorce Division it was held that the justices had correctly appreciated the matters raised, that the previously quoted words of Lord Jowitt L.C. were applicable to the case and that the decision of the justices should be upheld. Lord Merriman P., however, went on to point out that there was nothing irrevocable about the position between the parties. "The wife can mend her ways. She can determine, and show she is determined, to resume cohabitation in the full sense of the word and to render her husband wifely duties not merely in connection with sexual matters, but in the daily conduct of married life. If so, the husband is not entitled to take up the view that it is finally decided that this marriage is at an end. Far from it. It will be his duty, in turn, to be ready and willing to resume cohabitation. If not . . . it will be he who will assume the character of deserter."[29] Moreover, this situation was not affected by the fact that the wife had since undergone a serious operation which had rendered her sterile, for the authorities make it abundantly plain that mere sterility is not in itself a factor preventing consummation in the full legal sense. It may be added that just as the refusal to have intercourse, otherwise than with contraceptives, may be a factor in determining whether one spouse has left the other with just cause, so the court may well treat it as an element in ascertaining whether legal cruelty[30] has been established. In this way, though such a refusal would not in itself ground a decree of nullity, it might be relied upon as a form of cruelty entitling the aggrieved party to a divorce. Indeed, there seems no reason why the court should not grant a divorce on that ground alone as constituting cruelty,

[27] At p. 892.
[28] [1948] 1 All E.R. 188.
[29] At p. 190.
[30] A ground of divorce, as provided by s. 2 of the Matrimonial Causes Act (1937).

provided the petitioner could show (as is requisite in all cases of cruelty[31]) that such conduct resulted in a serious danger to his (or her) bodily or mental health, or gave rise to a reasonable apprehension of such danger.

DENNIS LLOYD

University College, London

AN EIGHTEENTH CENTURY PROPOSAL FOR PRE-TRIAL

The method of proceeding in these courts in civil actions might be as follows. The plaintiff might bring a declaration or plaint, in writing, into court, which might be either in the French or English language, as he thought proper, praying the process of the court to cause the defendant to be summoned to answer it; but not to be arrested by his body. This plaint should be read to the judge in open court, in order that he should determine whether or no it contained a good cause of action; and, till he approved it, no summons should be issued upon it. If he approved it, he should order it to be filed amongst the records of the court by the clerk or register of the court, and should award a summons to be sent to the defendant to come and answer the plaintiff's demand, at such time as he, the judge, should therein appoint. If he neglected to come at the time appointed by the summons, without any good reason for his neglect, he should be condemned to pay the plaintiff a moderate sum of money, to be ascertained by the judge, as a compensation to him for his expense and trouble in attending the court, at the time appointed by the summons, to no purpose; and he should be summoned to come and answer the plaintiff's demand on another day. If he then also refuse to come, judgment should go against him by default. When the defendant appeared, he should make his answer to the plaint of the plaintiff's in writing, and either in the French or English language, as he thought proper: and this answer should be filed amongst the records of the court. The judge should then himself interrogate the parties concerning the facts, in their account of which the parties seemed to differ, and which appeared to him to be material to the decision of the cause: and these interrogatories and the answers of the parties should be reduced to writing by the judge, or by the clerk of the court from the words dictated to him by the judge. When the judge had thus found out in what facts material to the decision of the cause the parties differed, he should himself state these facts in writing, and declare that it was necessary for him to be informed, by proper testimony, whether they were true or false; and should ask the parties whether both, or either of them, desired that he should inquire into the truth of these facts by means of a jury, or by examining witnesses, or other proofs himself. If both, or either of the parties, desired to have a jury, a jury should be summoned to attend, at such following session as the judge should appoint. This jury should be paid for their attendance by the party that desired to have a jury; and if both desired it, then equally by both parties. (From a draft report on the State of the Laws and the Administration of Justice in the Province of Quebec, prepared by Francis Maseres for Governor Guy Carleton in February 1769)

[31] See *Russell* v. *Russell*, [1895] P. 315.