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MATRIMONIAL AND RELATED PROCEEDINGS - FINANCIAL RELIEF

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FINANCIAL RELIEF

INTRODUCTION

Scope of Paper

1. In this Paper, in accordance with the terms of Item X of the First Law Reform Programme of the Law Commission, we make a preliminary examination of one branch of matrimonial law, namely, the statutory provisions by virtue of which one of the parties to a marriage or a former marriage may be required to make financial provision for the other or for their children. These statutory provisions are contained in the Matrimonial Causes Act 1965, the Matrimonial Proceedings (Magistrates' Courts) Act 1960, the Guardianship of Infants Acts 1886 and 1925, the Children and Young Persons Acts 1933 to 1963, the National Assistance Act 1948 and the Ministry of Social Security Act 1966. We have also examined corresponding legislation in other countries, and we set out in Appendix C certain provisions of the Matrimonial Causes Acts 1959 and 1965 of the Commonwealth of Australia and of the Matrimonial Proceedings Act 1963 of New Zealand to which frequent reference will be made in this Paper. In our opinion, those provisions afford useful guidance in considering amendments of our own Matrimonial Causes Act 1965.

2. In order to attempt a comprehensive study we have had to cover a good deal of ground and the Paper is longer in consequence than we would wish for the convenience of readers. We hope that many of them will read it all but would ask those who cannot find the time to do so to read this introduction and then turn to Part VI. Our conclusions are summarised there and reference made to those paragraphs which deal at length with each topic. We shall be grateful if comments can be sent to the Law Commission by 1st October, 1967.

3. Because early reform of the grounds of divorce has become a possibility, we concentrate in this Paper on financial relief in the High Court, which alone has jurisdiction to grant divorces. Under the terms of a Bill now before Parliament the trial of undefended divorces will be transferred to the county court, and our recommendations will also apply to divorce proceedings there. We have for the most part not sought to recommend changes in the law or procedure of magistrates' courts unless they appeared to us to follow inevitably from our proposals for the High Court, but we

have thought it useful to point out in Appendix B some of the problems that will have to be considered in relation to the magistrates' courts when opportunity offers. These problems are not identical with those in the High Court. Procedure in magistrates' courts is summary; the issues must be readily ascertainable and clear cut so that cases can be disposed of rapidly. It would be quite inappropriate to require magistrates' courts to try complex issues which cannot be isolated without preliminary pleadings or to exercise far wider discretions than they do now.

4. An Enquiry is at present being undertaken under Professor O. R. McGregor of Bedford College which should elicit far more information than is known at present about the functions now being performed by the magistrates' courts in family matters. If their function is merely to afford a temporary remedy they may be reasonably well-adapted to their role. Nevertheless there is some reason to suppose that these courts are not, in reality, merely taking emergency action to deal temporarily with the dislocation of marriages which will ultimately either be mended or dissolved by divorce, but rather that in many cases their orders are the final judicial ruling on the breakdown of the marriage. If this is correct - and the McGregor Enquiry should enable us to know - it is far from clear that the constitution or procedure of the courts or the nature of the relief that can be granted is what is needed.

5. We are also putting in hand a study of the law of family property. This is being handled as a separate undertaking, because basic reform of this branch of family law is a pioneering job which will require more time to bring to a conclusion than many of the topics reviewed in the present Paper. The dividing line between the two studies is not always easy to draw and we have overstepped it in this Paper where it seemed convenient to do so; broadly, however, the present Paper is concerned with the maintenance, whether by way of periodical payments or lump sums, of members of the family, whereas the other study will deal with such subjects as rights in the matrimonial home and other family assets and rights of succession on death. Some improvements in these respects have recently been made by the Family Provision Act 1966 and others will be achieved when the Matrimonial Homes Bill, now before Parliament, is enacted. We are also preparing a separate study of the law relating to recognition of foreign divorces and other international aspects of family law which, accordingly, are largely ignored in the present Paper.

Observations on the Acts of 1965 and 1960

6. Of the Acts referred to in para.1, the Matrimonial Causes Act 1965 and the Matrimonial Proceedings (Magistrates' Courts) Act 1960 are the most important for the purposes of this Paper. It might be thought that there would be little to criticise in Acts passed so recently, but, in the case of the 1965 Act, almost all the provisions with which this Paper is concerned are open to criticism for one reason or another. That is not the fault of the draftsman or, indeed, of Parliament. The Act of 1965 is a consolidating Act and only very minor amendments of the law can be effected by such an Act. The defects of the existing law are largely the result of its relatively long and spasmodic development. Since the first Matrimonial Causes Act was enacted in 1857 there have been bouts of amending legislation, followed on several occasions by consolidation. The law has been examined by various Royal Commissions and Committees but very often the changes which they have recommended have been superimposed on the previous law without, it would seem, full regard being had to the effect of the existing law and the amendments looked at as a whole. It may be, too, that more attention has been paid to the law governing the grounds for divorce, nullity and judicial separation than to the ancillary relief which may be granted in such a suit, even though the ancillary relief is often at least as important to the parties as the principal relief sought. Whatever the reasons for the present state of the law, it is believed that anyone who studies the relevant provisions of the Act of 1965 - principally those in Part II of that Act - will be convinced, as we are, that the anomalies, uncertainties and gaps in the law are such as to require clarifying and amending legislation as soon as practicable. A comparison with the recent Australian legislation in the same field is instructive. This legislation is on very general lines and leaves the courts free to make such financial orders as the justice of the individual case may dictate. Our Act of 1965, on the other hand, has the effect - no doubt because of its history - of unduly restricting the powers of the courts, making it harder in some cases to do substantial justice.

7. The enactments from which the Act of 1960 derives have a less unsatisfactory history. For one thing they are later in origin and, as they are more limited in scope than those from which the Act of 1965 derives, anomalies and inconsistencies are fewer. But the main reason why the Act of 1960 is a far better Act is that although it is primarily a consolidating measure it also comprises

amendments recommended by a Departmental Committee under the chairmanship of Mr. Justice Arthian Davies. That Committee was concerned to produce a draft Bill the provisions of which would constitute a convenient, workable and up-to-date code relating to matrimonial proceedings in magistrates' courts. Consequently, the Act, as it now stands, is comparatively satisfactory. Nevertheless, in our opinion the law with which it deals is capable of improvement. For the most part, however, for the reasons mentioned in paras.3 and 4 above, the problems arising out of the law governing proceedings in magistrates' courts are left for later consideration.

General Conclusions

8. The present law dealing with the granting of financial relief in matrimonial and related proceedings raises numerous questions. Some of these are purely technical. Others raise wider issues. Nevertheless there are some legislative reforms which we suggest can be prepared without delay, provided always that public reaction to the relevant parts of this Paper is favourable. On the other hand, there are some fundamental problems which will need further examination and discussion before legislation is possible. Our provisional view is that the best way of making progress may be to take the following steps:-

(a) to give as wide a circulation as possible for this Paper so that public reaction to its conclusions may be obtained,

(b) where public opinion is plainly favourable, to put in hand the preparation of legislative proposals, and

(c) to undertake further examination in due course of those questions which public reaction to this Paper show to require further investigation and enquiry.

We would suggest that there is as yet no reason to think that it would be useful to refer any of these questions to an ad hoc Committee or any other body outside the Law Commission itself. It may be said that we should not initiate legislative proposals until the whole topic can be covered at once. This would, we believe, impose intolerable delay where reform is already clearly needed. And it must not be forgotten that family law never can stand still: it will need constant adjustment to changing social conditions. Reform by stages has much to commend it in this field.

9. The general principles on which we have based our main

recommendations in the following parts of this Paper can be summarised as follows:-

(a) Matrimony and parenthood essentially involve the assumption of rights and obligations of financial support between the spouses, and between them and the children.

(b) These rights and obligations attach to both husband and wife, and subsist while the marriage runs smoothly, when it gets into heavy weather and, usually, even after it has been ship-wrecked. Parents' obligations towards their children last until the children have been launched into the adult world and do not cease on the termination of the marriage.

(c) It is irrelevant to the existence of these rights and obligations whether it is the husband, wife or child who is seeking their enforcement and at what moment of time.

(d) The commission of a matrimonial offence should not necessarily put an end to a spouse's right to support.

(e) The death of either spouse should not necessarily relieve his estate from these obligations.

(f) The quantum of support provided should at all times be related to the means and needs of all the parties and the broad justice of the situation.

(g) Hence, orders directed to the enforcement of the obligations should be variable at any time.

(h) All property of either spouse should be available to provide the needed support and it should not be possible to evade the obligations by disposing of that property.

In addition, some of our conclusions arise simply out of the need to correct anomalies, many of which have arisen from the continual consolidation of the statute law without any systematic overhaul.

Terminology

10. A confusing feature of this branch of the law is the varied terminology used to describe orders whereby one spouse is required to support the other or the children. The expression used by the former ecclesiastical courts to describe payments ordered to be made by a husband to a wife on a judicial separation[1] was "alimony".

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1. Then known as "divorce a mensa et thoro".

is still used in relation to payments made pending the outcome of a matrimonial suit[2], or after a judicial separation[3] or a decree of restitution of conjugal rights[4]. More recently, statutory provisions have added other types of order and these are, in the statutes, designated "maintenance"[5] when payments are ordered on a decree of nullity or divorce (or when ordered by magistrates), and "periodical payments" when ordered by the High Court without any other matrimonial relief[6] or as an alternative to alimony on the grant of a decree of restitution of conjugal rights[7]. To add to the confusion, maintenance may now be secured on property or awarded in the form of a lump sum[8], thus making it virtually indistinguishable from another type of order - a settlement of property - which at present can be made only against a wife[9].

11. In this Paper we have used the generic term "maintenance" to describe any form of support, and have resorted to the technical terms "alimony", "maintenance" and "periodical payments" only when it appeared necessary to do so. As will be seen, we recommend that in future these distinctions of terminology should be abolished.

PART I

THE DUTY TO MAINTAIN

Codification

12. Our First Programme contemplates in Item X the eventual enactment of a code of family law. One would expect that such a code would contain a more or less detailed statutory statement of the duty to maintain one another which the law imposes on members of a family. The code should reformulate this part of the law as a logical unity and should also repair its inadequacies in certain respects mentioned in this and the following Parts of this Paper.

13. At present the law falls into three distinct but related parts:-

(a) The common law duty to maintain arising out of the facts of marriage and the birth of children;

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2. Matrimonial Causes Act 1965, s.15 (interim alimony).
3. Ibid., s.20.
4. Ibid., s.21(1)(a).
5. Ibid., s.16.
6. Ibid., s.22.
7. Ibid., s.21(1)(b).
8. Ibid., s.16.
9. Ibid., s.21(3).

(b) The duty to reimburse public authorities sums expended by them on maintenance of spouse and children; and

(c) The duty to maintain imposed by an order of the court under a number of miscellaneous jurisdictions conferred by statute.

(a) The common law duty to maintain

14. At common law a husband is bound to provide for his wife in a manner in keeping with his means, but a wife is under no legal duty to maintain her husband. He will have discharged his duty if he provides a home and enables his wife to obtain necessaries by making her a sufficient allowance or by giving her his authority to order them as his agent. If the husband and wife are living together the wife is presumed to have her husband's authority to pledge his credit for the purchase of the necessaries appropriate to the style in which they live, but this presumption may be rebutted by proof that the husband prohibited his wife from pledging his credit, expressly revoked her authority or had given her an adequate allowance.

15. A husband's obligation to maintain his wife is suspended during her desertion and ceases if his wife commits adultery unless he either connived at or condoned the offence. Similarly, a decree of divorce or nullity puts an end to his common law obligation. As a general rule the wife loses her right to pledge her husband's credit if they are living apart; if, however, he has deserted her, expelled her from the home without just cause or so ill treated her as to force her to leave or, while they are still living together, has failed to provide her with a sufficient allowance, she may pledge his credit as an "agent of necessity"[10] for the purchase of necessaries, including the costs of bringing legal proceedings against him, e.g. for divorce. Nevertheless, the wife's right to pledge her husband's credit is terminated by her commission of adultery(unless he connived at or condoned it) and the supplier of necessaries to the wife will be without a remedy against her husband even though, as would usually be the case, he has no notice of her adultery.

16. A father's duty to maintain his infant legitimate children was regarded by the common law as no more than an unenforceable moral obligation (unless the neglect injured their health in which case it might be a criminal offence). For this reason a child cannot

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10. See paras.41-52 and 108.

have an agency of necessity. The courts, however, give some weight to the father's moral obligation, e.g. by recognising that the wife's agency extends to cover the needs of the children, provided that she remains entitled to the agency for her own needs. A moral obligation of perhaps a less compelling nature is also recognised as binding on the mother and this extends also to her illegitimate children[11].

(b) The statutory duty to reimburse costs of maintenance

17. Under the old Poor Law of Elizabeth I, the parish could compel a father to reimburse sums expended on the maintenance of his children. Modern social security legislation imposes a positive duty, for the purposes of that legislation, on a man to maintain his wife and his children under 16, including children of whom he has been adjudged to be the putative father, and on a woman to maintain her husband and her children under 16, including her illegitimate children[12]. If a person persistently refuses or neglects to maintain himself or any person whom he is liable to maintain for the purposes of this legislation and as a result assistance is provided for himself or any other such person, he (or she) is liable to prosecution[13]. Moreover, the public authority which has provided assistance may make a complaint to a magistrates' court against any person who, for the purposes of the relevant Act, is liable to maintain the person assisted; and the court, having regard to all the circumstances and in particular to the resources of the defendant, may order him to pay such sum, weekly or otherwise, as it considers appropriate[14]. As a result, a growing practice is for a wife who is left by her husband without means to obtain support from the Supplementary Benefits Commission which recovers what it can from the husband[15]. Among the circumstances to which the magistrates must pay regard are circumstances recognised by the

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11. Clarke v. Wright (1861) 6 H. & N. 849 at p.860; Bazeley v. Forder (1868) L.R. 3 Q.B. 559 at p.565.

12. Ministry of Social Security Act 1966, s.22, substantially reproducing and largely superseding s.42 of the National Assistance Act 1948.

13. Ministry of Social Security Act 1966, s.30; National Assistance Act 1948, s.51.

14. Ministry of Social Security Act 1966, s.23; National Assistance Act 1948, s.43.

15. This, however, is far less common than cases in which the wife obtains the order but the Commission pays her a full weekly assistance grant obtaining her authority to collect any money paid into court under the order: see H.C. Official Report 27th June 1966, Col.176, Written Answers. If the Commission obtains an order against the husband it ceases if the wife ceases to receive assistance (because, for example, she takes up a full-time job), whereas an order obtained by the wife will not cease automatically, though the husband may, of course, apply for a variation.

law as relieving a husband of his obligation to maintain his wife. Thus, the desertion or adultery of his wife would be a highly relevant circumstance for the purposes of s.43 of the National Assistance Act 1948 (and now s.23 of the Ministry of Social Security Act 1966) and it may be a conclusive circumstance which would prevent the court from making an order against the husband. But the wife's agreement to live apart without maintenance will not relieve the husband from liability under these Acts[16].

18. It is relevant also to mention here the situation that arises under the Children and Young Persons Acts 1933 to 1963 where a child under the age of 17 is found by a court to be in need of care or protection or is a juvenile offender and is committed to the care of a fit person, sent to an approved school or received into the care of the local authority. In this case, it is the duty of the father and mother to make contributions in respect of the child up to the age of 16. Although the child may still be in the care of a local authority or other fit person or in an approved school after the 16th birthday, no payments can be required under a contribution order made on the father or mother.

(c) The duty to pay maintenance under an order of the court

19. The legislature has intervened to confer on the court power to order the payment of maintenance in a number of different circumstances. Apart from orders for Ancillary Relief[17] in Matrimonial Proceedings in the Divorce Court[18], with which we deal in Part III, the courts have power to award financial relief in the following cases:-

(a) High Court Maintenance Orders for periodical payments under s.22 of the 1965 Act, secured or unsecured, for the benefit of the wife and children of the marriage where the husband has been guilty of wilful neglect to provide reasonable maintenance (see paras.24-33 below). This form of maintenance appears under the heading of Ancillary Relief in Part II of the Act of 1965 but is rather misleadingly so called since the relief sought is only in form ancillary to a finding of wilful neglect.

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16. National Assistance Board v. Parkes [1955] 2 Q.B. 506, C.A.

17. i.e. the award of maintenance on a decree of divorce, nullity, judicial separation or restitution of conjugal rights.

18. We use this term in order to include the county court in the event of divorce jurisdiction being conferred on that court.

(b) Magistrates' Maintenance Orders made by magistrates' courts against the other party to the marriage on the causes of complaint set out in s.1 of the Matrimonial Proceedings (Magistrates' Courts) Act 1960 (see Appendix B). These orders may contain a non-cohabitation clause in which event they are described as separation orders, rather than maintenance orders. They then have the same effect as a decree of judicial separation. But today such clauses are very rare and are inserted only when it is clear that they are needed for a spouse's protection. Normally the sole purpose of the order is to provide maintenance apart from circumstances in which a matrimonial offence has been committed. The wife only may apply on a complaint that the husband has compelled her to submit herself to prostitution or that he has wilfully neglected to provide reasonable maintenance for her or any dependent child of the family[19]. A husband may apply for an order on the ground that the wife has wilfully neglected to provide reasonable maintenance for him or any dependant child of the family in a case where it is reasonable to expect the wife to make such provision in view of the impairment of the husband's earning capacity through age, illness or disability of mind or body and having regard to the resources of the husband and wife[20]. It will be observed that at present there is no corresponding power enabling the High Court to order a wife to maintain her husband. The weekly sum ordered to be paid may not exceed £7 10s.0d. and no maintenance order may be made if the complainant is shown to have committed adultery during the subsistence of the marriage, unless the defendant has condoned, connived at it or, by wilful neglect or misconduct, conduced to it[21]. Either or both of the spouses may be ordered to pay a weekly sum for the maintenance of a child of the family not exceeding the sum of 50/- each. Divorce does not automatically discharge a maintenance order.

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19. S.1(1)(g) and (h).
20. S.1(1)(i).
21. S.2(3).

(c) Orders made under the Guardianship of Infants Act. Under the enactments relating to the guardianship of infants there are three cases in which a court may make an order requiring the father or mother of an infant to pay towards the maintenance and education of the infant such periodical sum as the court considers reasonable. Although the Chancery Division of the High Court and the county court have jurisdiction to make these orders, by far the greatest number are made by magistrates' courts. The maximum sum which the magistrates can order to be paid towards the maintenance and education of each infant is 50/- a week. Detailed consideration of guardianship proceedings will have to wait, like other proceedings in the magistrates' courts, for further study.

(d) Orders in Affiliation Proceedings are similarly limited to 50/- a week. Affiliation proceedings likewise will be the subject of a later study by the Law Commission.

20. Under Item XI of our First Programme an interdepartmental committee is examining the financial limits on magistrates' orders in proceedings mentioned in (b), (c) and (d) of the foregoing paragraph. This committee has been set up by the Home Secretary under the chairmanship of Miss Jean Graham Hall.

PART II

MAINTENANCE - A PRINCIPAL HEAD OF RELIEF IN THE DIVORCE COURT?

Basic Principles

21. Some of the main principles that have guided us in our consideration of the granting of Financial Relief by the courts must here be re-stated and amplified. Applications for maintenance, and maintenance alone, should be clearly stated to be a separate head of relief in the Divorce Court. At present applications under s.22 of the Matrimonial Causes Act 1965 are in form applications for a finding that the respondent has been guilty of wilful neglect to provide reasonable maintenance and any resulting order for maintenance is dependent upon this finding. These applications, therefore, now rest on an unsatisfactory basis and in paras.24-28 below we propose that it should no longer be necessary to prove any matrimonial

once when applying for maintenance alone. This proposal, if carried out, would be a reform of some theoretical significance. Moreover in any application for maintenance, whether as ancillary relief or not, we have adopted two guiding principles: as regards the powers of the court (as opposed to the exercise of those powers), the distinction now drawn in the Matrimonial Causes Act 1965 between the husband's and wife's rights and duties and between the guilty and the innocent party should be abolished. In saying this we certainly do not contemplate that, in the normal way, the wife will be ordered to maintain her husband or that guilt or innocence should be disregarded. Usually it is the husband who is the wage earner and the wife the housekeeper and mother, so that it will be she who requires financial support. But, to an ever-increasing extent, both husband and wife (and sometimes early in the married life when the husband is completing his studies or his training, the wife alone) provide the financial support. When that is so, the question is whether the court should continue to be debarred, as in most respects it now is, from ordering the wife to pay maintenance. Similarly, few would suggest that in awarding maintenance the conduct of the parties should not be an important consideration. But it is now widely recognised that on the break-down of marriages there are usually faults on both sides and that it is often impossible with justice to stigmatise one as "guilty" and the other as "innocent". At present, as the analysis contained in this Part and Part III of this paper shows, the wife can be awarded most, but not all, types of maintenance notwithstanding her guilt. The husband, however, normally cannot. He is discriminated against if he is the innocent party and discriminated against still more if it is on the basis of his matrimonial offence that a decree is obtained.

22. The Australian Matrimonial Causes Act 1959 draws no distinction, as regards the court's powers, between husband and wife or between the "innocent" and the "guilty" party. The members of the Morton Commission were unanimously of the opinion that no distinction should be drawn between husband and wife[22]. To a limited extent, this principle has now been conceded since, as pointed out in para.20(b) above, under s.2(1)(c) and (2) of the Matrimonial Proceedings (Magistrates' Courts) Act 1960, a wife may in certain circumstances be ordered to contribute to the maintenance of her husband. On the second question, whether there should continue to be the present distinction between the "guilty" and the "innocent"

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22. Cmd. 9678, para.499.

party, the members of the Morton Commission were divided. The majority (thirteen) thought there should not; a minority (six) thought there should[23].

23. So far as concerns the High Court's powers regarding the most important types of ancillary financial relief in favour of the wife[24], the distinction between innocence and guilt has already been largely eroded. Hence, if the husband were treated like the wife the distinction between the innocent and guilty would largely disappear. In connection with both husbands and wives there seems everything to be said for removing the residual discrimination and, if some other principle such as "irretrievable breakdown" is to supersede or supplement that of the "matrimonial offence" as the basis of divorce, it will be impossible to maintain the distinction so far as ancillary relief is concerned.

Wilful Neglect to Maintain

24. As we have seen, under s.22 of the Matrimonial Causes Act 1965, the High Court may already make orders for maintenance of a wife and the children of the marriage where the husband has been guilty of wilful neglect to provide reasonable maintenance. So may the magistrates' courts, under s.2 of the Matrimonial Proceedings (Magistrates' Courts) Act 1960, and applications there are very much more numerous than those made to the High Court[25]. These sections are logically the starting point for the Commission's consideration of what the Divorce Court's powers should be to award Financial Relief.

25. S.22 provides that, if the husband has been guilty of wilful neglect to provide reasonable maintenance for his wife or any child and the court would have jurisdiction to entertain proceedings by the wife for judicial separation, it may order the husband to make to her such periodical payments as may be just. It has been held that the words relating to jurisdiction mean no more than that the parties must be domiciled or resident in England, not that there must be grounds for judicial separation[26]. The

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23. Cmd. 9678, paras. 502,503.

24. See Part III.

25. In 1965 there were 209 applications under s.22 as compared with 27,262 in the magistrates' courts. The figure shown in the Criminal Statistics (Cmnd. 3037) includes applications for Attachment of Earnings Orders which should be disregarded in this context.

26. Rusby v. Rusby [1950] W.N. 349; Woodward v. Woodward [1952] P.299.

periodical payments can be secured; but, though the Act does not expressly say so, they cannot last beyond "joint lives"[27] (only so long as both parties are alive).

26. Although the relief obtainable by the wife under s.22 is not ancillary to the obtaining of any other form of relief such as divorce, nullity or judicial separation, the grant of maintenance is nevertheless dependent on proof of a matrimonial offence: "wilful neglect to provide reasonable maintenance". We consider that one party should be ordered to pay maintenance to the other if, being liable to maintain her, he has not done so, and that the liability should not be dependent on his commission of the matrimonial offence of having wilfully failed to do so. It also appears unsatisfactory that statutory rights to maintenance should still be to some degree dependent on the question whether at common law the husband would be under an obligation to maintain his wife. It seems preferable to us to entitle a wife, husband or child who contends that he or she is not being adequately maintained, to apply for an order for maintenance against the husband or wife or, in the case of the child, against either or both, and to empower the court to make an order if it thinks it reasonable in all the circumstances so to do. Because of the importance we attach to this matter we have thought it convenient to set out in Appendix A a draft clause indicating the general lines on which legislative effect might be given to this proposal in regard to the rights inter se of the husband and wife.

27. It will be seen that the draft clause attempts to give guidance to the court, especially as to the sort of circumstances in which a wife should be ordered to maintain her husband. Some may say that the draft will result in palm tree justice, that it will make it hard for solicitors to advise their clients and that it may cause difficulty in connection with legal aid. It is, however, important that in this branch of the law the courts should have a wide discretion. The law can only lay down guide-lines. If the legislative provisions are too detailed they become fetters rather than sign-posts. As far as legal aid is concerned, practical experience suggests that it will not be difficult to decide in the light of the draft whether legal aid should be granted on the facts of any particular case.

28. It is of great importance - especially if our proposal is to be extended at some stage to proceedings in magistrates' courts -

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27. Pigott v. Pigott [1958] P.1, C.A.

to ensure that the practical effect is not to lengthen or complicate proceedings or to impose on the court unduly wide or embarrassing discretions. In our view this will not occur. Indeed in many cases the difference in practical effect between failure to maintain and wilful neglect to maintain will be slight for, as Hodson L.J. said[28] in relation to the présent law: "The wrongdoing may, however, consist of the very fact of a failure to maintain. There need be no other matrimonial offence imputed to the husband". An example of a class of case which would probably be decided differently under our proposal is the case where a husband pays the maintenance which he has agreed or been ordered to pay but does not know that, because of a change of circumstances, his wife is in need. It has been held in Jones v. Jones[29] that in such a case, if he is ignorant of his wife's needs, he cannot be said to have been guilty of wilful neglect to maintain her. Presumably, however, he has failed to maintain her and she would succeed if our draft clause were enacted.

29. The draft clause also seeks to clear up the present obscurity in the law as to the position if the wife has committed adultery, At common law the husband's duty to maintain her ceases on her adultery but legislation has considerably mitigated this absolute rule. The court,on granting a decree of divorce, nullity or judicial separation, may award maintenance under s.16 or s.20 (as the case may be) of the Matrimonial Causes Act 1965 to a guilty wife inspite of her commission of an act of adultery. Further, the magistrates' court can make a maintenance order although the complainant has committed adultery, provided that the defendant has condoned, connived at it, or by wilful neglect or misconduct, conduced to it[30]. Nevertheless, it seemd to be the view of the Court of Appeal in West v. West[31] that an adulterous wife had no rights under what is now s.22. In that case the husband was held to be reasonably justified up to the date when his divorce petition was dismissed in believing that his wife had committed adultery. Hence, it was held that her application for maintenance prior to that date should have been dismissed. On the other hand, in the recent case of Spence v. Spence[32] (in which West v. West does not appear to have been cited)

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28. Lilley v. Lilley [1960] P.158 at 180.
29. [1959] P.38.
30. Matrimonial Proceedings (Magistrates' Courts) Act 1960, s.2(3).
31. [1954] P.444.
32. [1965] P.140.

Lloyd-Jones J. obviously regarded this as an open question[33]. Furthermore he held that an order under s.22 was not discharged as a result of adultery subsequent to the order, which stood until varied or discharged under what is now s.31. In Spence v. Spence the order was not discharged nor was the amount varied, notwithstanding that the wife, in her discretion statement in subsequent divorce proceedings, disclosed adultery prior to the date when the amount originally payable under the order was substantially increased.

30. The highly anomalous result seems to be that, if the wife has committed adultery or is reasonably believed to have committed adultery, she forfeits any claim for periodical payments in the High Court: West v. West. Arguably, this may be so even if the adultery has been condoned, connived at or conduced to, notwithstanding that a magistrates' court could then grant her a maintenance order. If, however, she refrains from adultery until she has obtained an order for periodical payments she retains her order unless and until the court in its discretion varies or discharges it; she may, apparently, get it increased notwithstanding her adultery. Under the suggested clause, the husband would not cease to be liable to maintain the wife merely because she had committed adultery or, a fortiori, merely because he reasonably believed she had. On the other hand, her adultery or her conduct which led to his belief would be a factor which the court would take into consideration in assessing what maintenance, if any, was reasonable.

31. It would be wrong in any event to let the court's power to award maintenance to an adulterous wife be limited to cases where the husband had connived at the adultery, condoned it or conduced to it by his conduct or neglect. The law on these three defences to a charge of adultery is in many respects unsatisfactory and such a limitation would in some cases inhibit the court from doing substantial justice. Accordingly, our draft clause gives the court discretion to award maintenance to an adulterous wife in proper cases. It is perhaps hardly necessary to emphasise again that giving the court a wide discretion does not mean that a wife who is in desertion or an adulterous wife would often be successful in an application for maintenance against an innocent husband.[34]

32. It will also be seen that the draft clause in Appendix A does not make it a formal requirement that the parties should have

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33. See especially at p.142 C and D.

34. This presumably would also be so in a case like Lindwall v. Lindwall [1967] 1 All E.R. 470, C.A., where the wife, though not found to be in desertion, unjustifiably lived apart from her husband.

ceased to cohabit. In our view the wife should not be forced to leave before she can obtain proper maintenance[35]. In this it follows the present law laid down by s.22 of the 1965 Act. At present there is here an important difference between applications for maintenance in the High Court and in magistrates' courts. Under s.7 of the Matrimonial Proceedings (Magistrates' Courts) Act 1960 a matrimonial order made while the parties are cohabiting is unenforceable until they have ceased to cohabit and no liability accrues under it; moreover an order made while the parties are cohabiting itself ceases to have effect if the parties continue to cohabit for a period of three months from the date of the order and all matrimonial orders, with certain exceptions, cease to have effect if the parties resume cohabitation. It would clearly be unsatisfactory if our suggested clause applied only to proceedings in the Divorce Court, leaving the existing rules, requiring proof of a matrimonial offence and a cessation of cohabitation, to continue to apply in magistrates' courts. However, for reasons already explained, we cannot at this stage, make any firm recommendations regarding the latter courts. If the matrimonial jurisdiction of such courts is to be maintained, important questions, which are touched on in Appendix B, will need to be settled.

33. The draft clause provides, as does the present law, that the order shall be for an ascertained periodical or lump sum. Occasionally it might be desirable for one spouse to receive from the other periodical payments which fluctuate automatically according to the payer's means. The parties may agree, for example, that the wife shall be paid one-third of the husband's net income or of his net income from a particular source. Normally this will not be a suitable arrangement, especially if the husband's sources of income are liable to fluctuation or if his net income is not readily ascertainable. But in some circumstances it could be of advantage to all concerned: indeed, parties sometimes agree that maintenance shall be paid on this basis. It means that the wife's allowance automatically rises (or falls) as her husband's income varies, without her having to try to find out what salary increases he receives and to apply each time for an increase based on the resulting change of circumstances. The court has no power to make such an order[36] and the only way that it can give effect to an agreement to pay maintenance on this basis is by extracting an undertaking from the husband; even so, there are formidable

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35. Cf. Caras v. Caras [1955] 1 All E.R. 624 n.

36. Contrast the Australian Act s.87(1)(J): Appendix C.

difficulties of enforcement[37]. In posing the question whether the court should be given the power to make such an order we are aware that there are strong objections to execution, by committal or otherwise, being allowed to issue except in respect of an order for a precisely ascertained sum. It may be that the appropriate power would be that of declaration - leaving it to the wife to apply for an order in respect of arrears if the husband disregarded the declaration. We shall welcome any views on this matter.

The Commencement of Maintenance

34. It will be generally agreed that under the present law great hardship may be suffered by a dependent spouse in the period between the beginning of a temporary or permanent separation following a matrimonial quarrel and the date when the first maintenance payment arrives. In theory the wife's agency of necessity provides a rather limited and unsatisfactory means whereby she can obtain the necessaries of life for herself and the children. In paras.41 to 52 and 108 we consider the exact extent of this doctrine and examine its continued usefulness. A more satisfactory remedy is provided by the National Assistance Act 1948 and the Ministry of Social Security Act 1966 which, as we have seen above[38], enable the dependent spouse, without sufficient resources, to obtain immediate relief, formerly from the National Assistance Board and now from the Supplementary Benefits Commission, and also impose on both husband and wife the duty to maintain each other and the children; but the level of maintenance payable under this social security legislation is, for obvious reasons, generally lower and, in some cases, considerably lower, than the amount of maintenance which the courts would eventually order on an application for maintenance under s.22.

35. Although the High Court has power to award alimony pending suit in any case where a decree of divorce, nullity or judicial separation is sought, there is no power under s.22 to make an interim award where the wife is seeking periodical payments alone. It is true that once the court has determined that the husband has been guilty of failure to provide reasonable maintenance, the court can make an interim order to run until a final order can be made at an adjourned hearing. On the other hand, by the time that this stage has been reached a considerable liability may have accumulated by way of arrears. The court can backdate its order to run from the date of the wife's application but not earlier[39]. By the time that the court's award

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37. Re Hudson [1966] 1 All E.R. 110: paras.148-152 below.
38. See para.17 above.
39. McLellan v. McLellan [1954] P.138.

is made the husband may well have spent all that he has earned in the period since the summons was issued and may therefore be unable to pay off the accumulated arrears as well as the current periodical payments. In practice the courts are reluctant in most cases to backdate an order. If, in the meantime, the wife has contracted debts for the maintenance of herself and her children she too will be unable to discharge them out of periodical payments as she receives them.

36. Accordingly we recommend that the Divorce Court should have power to award interim maintenance to any husband or wife whom the other spouse is bound to maintain and who has applied under s.22 (or whatever provision replaces it) for maintenance. We believe that a number of petitions for judicial separation at the present time are made only for the purpose of obtaining a High Court order for alimony pending suit and we expect the number of petitions for judicial separation to be substantially reduced if the law is altered as we recommend.

37. Similarly, although the High Court at the present time can award a lump sum as well as periodical payments on the grant of divorce, nullity or judicial separation[40], it has no power to award a lump sum to applicants under s.22. This seems anomalous since, as we have seen, the court can already backdate an order to the date of the application. Our recommendation, however, goes further than simply turning a backdated order into an order for payment of a lump sum to cover the arrears. We recommend that the court should be free in making its final order to award a lump sum which may exceed the total payments due since the date of the application. It may well be right that the respondent should pay a lump sum in respect of a period prior to the institution of the proceedings. Moreover, a lump sum may sometimes be the appropriate way of awarding future maintenance though it is less likely to be so than when the marriage is ended by a decree of divorce or nullity.

38. Clearly the powers of magistrates' courts to make interim orders under s.6 of the Matrimonial Proceedings (Magistrates' Courts) Act 1960 and their lack of any power to award a lump sum are matters that we shall have to revert to in Appendix B in which we deal with the law governing matrimonial proceedings in magistrates' courts.

Duration of Maintenance

39. As we have seen, at present maintenance, under s.22, cannot ever be made to last beyond joint lives; in other words it

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40. Ss.16(1), 19 and 20 of the Act of 1965.

ceases on the death of the paying husband although the wife still lives and is in need[41]. In cases where maintenance is awarded as ancillary to divorce or nullity proceedings it can, if the husband is ordered to provide security, but not otherwise, be made to extend for the life of the wife. In paras.65-69 below we set out the advantages and disadvantages of limiting unsecured maintenance to joint lives and conclude that the court when granting ancillary relief should be empowered to award maintenance, whether secured or unsecured, to last for the life of the wife (subject, of course, to a power for the husband or his personal representatives to apply for a variation). The case for this is particularly strong where maintenance has been awarded but the marriage has not ended in divorce. The widow's sole remedy then will be to apply for maintenance under the Inheritance (Family Provision) Act 1938 and, as pointed out in para.72 below, the principles on which the court has awarded maintenance under that Act are very much more restrictive than those under which it awards maintenance inter vivos. Accordingly we make the same recommendations here and the suggested clause so provides.

40. It has been suggested, however, that a spouse's right to maintenance should automatically cease on his or her re-marriage. This is not so at present. Normally the ex-wife's maintenance will be reduced if she re-marries and the ex-husband applies for a variation[42]. But if she is widowed or again divorced and left without means she may apply for an increase and not infrequently will obtain it. The view is strongly held in some quarters that all rights against a first husband should cease on acquiring a second, and that a much-married woman should not be allowed to make financial claims on a succession of husbands. This view seems to have been recognised to some extent by the Inheritance (Family Provision) Act 1938 under which maintenance awarded to a widow or widower ceases on his or her re-marriage[43] and by s.26 of the Matrimonial Causes Act 1965 under which no claim against the estate of a deceased spouse can be made by an ex-spouse who has re-married and any periodical maintenance awarded an ex-spouse ceases on re-marriage. There appears here to be an unresolved conflict of principles. If it be the correct principle that re-marriage should not destroy the right to be maintained, the provisions of the Inheritance (Family Provision) Act and s.26 of the Act of 1965 seem to require changing. If it be the wrong principle, then all rights

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41. She may, however, be able to obtain maintenance from his estate by an application under the Inheritance (Family Provision) Act 1938 or s.26 of the Act of 1965.

42. See Snelling v. Snelling [1952] 2 All E.R. 196.

43. S.2(a).

to maintenance should, it is thought, cease on re-marriage. That, of course, might occasionally result in the State having to maintain an ex-wife of a wealthy man. We invite views on this question.

The Agency of Necessity

41. It will now be opportune to consider with some care the doctrine of the wife's agency of necessity, whether it should be abolished and, if so, what should replace it.

42. At common law a wife, in her capacity of housekeeper, is presumed to have her husband's authority to pledge his credit for necessaries for the members of the household. This is merely a presumption which can be rebutted, for example, by showing that the husband has forbidden her to pledge his credit or has supplied her with an adequate allowance to enable her to pay cash. Similarly if a tradesman has supplied goods to the wife for which the husband has habitually paid, the tradesman will be entitled to rely on the wife continuing to have authority until he is informed that it has been revoked. Both these rules are based on normal principles of agency and do not in fact depend on the presence of the legal tie of matrimony.

43. These rules are, however, supplemented by a further one which is generally described as "agency of necessity" though really it is a branch not of the law of agency but of matrimonial law. Under this rule where the husband is under a common law duty to maintain the wife but fails to do so she is entitled to pledge his credit to the extent to which this is necessary in order to maintain herself and any children of the marriage that the husband is liable to maintain. In the reported cases on this subject the husband and wife have been living apart but presumably the rule applies equally where they are living together, thereby imposing a limitation on the extent to which the husband can effectively revoke the presumed authority which the wife will normally have as housekeeper.

44. The exact extent of this so-called agency of necessity is not as clear as it might be partly because most of the decisions on it are of considerable antiquity and do not appear to be entirely consistent with the few modern ones. It is thought, however, that the legal position can be summarised as follows:-

(a) The wife will be entitled to pledge her husband's credit as agent of necessity only if he is under a common law duty to maintain her. Hence, she will have no such right if she has committed adultery (unless that has been condoned or connived at by the husband)

or has deserted him, or they have separated voluntarily and she has agreed to maintain herself or to accept a specified allowance. In the last case so long as he has paid the allowance it seems that she will have no right to pledge his credit even though the allowance is or becomes inadequate[44].

(b) If, however, she has obtained a court order against her husband and that proves inadequate, her common law right to pledge his credit normally remains notwithstanding that the husband has duly kept up his payments[45]. That, however, is not so if there is a High Court order to pay alimony (as opposed to periodical payments under s.22 of the Act). That is because s.20(4) of the Act expressly provides that "If ... alimony has been ordered to be paid ... and has not been duly paid by the husband, he shall be liable for necessaries supplied for the use of the wife" and it has been said that "it is manifest that [this subsection] must be taken impliedly to exempt from his common law liability in respect of necessaries a husband who, after a judicial separation, has duly paid alimony which he has been ordered to pay"[46].

(c) Although, while living with her husband, she will be presumed to have his authority to pledge his credit for household necessaries even though she has means of her own, her authority as agent of necessity only entitles her to pledge his credit if she is without adequate means of her own[47]. It may be, though this is not clear from the authorities, that the range of "necessaries" is also somewhat narrower than the "goods suitable for the station in life of the husband" for which she is presumed to be authorised to pledge his credit while the common household remains.

(d) On the other hand, if the above quoted s.20(4) places the wife in a worse position in one respect it clearly places her in a better position in another. If the alimony has not been duly paid the husband incurs a

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44. Eastland v. Burchell (1878) 3 Q.B.D. 432.
45. Sandilands v. Carus [1945] 1 K.B. 270, C.A.
46. Ibid., per du Parcq L.J. delivering the judgment of the Court of Appeal, at p.275.
47. Biberfeld v. Berens [1952] 2 Q.B. 770, C.A.

statutory liability to pay necessaries supplied for the use of the wife even though she has forfeited her right to pledge his credit because, for example, she has committed adultery and even though she may have acquired other means of her own. A husband who does not bother to obtain a discharge of an order for alimony, when entitled to do so but merely ceases to pay, will, apparently, have no defence to actions by anyone who supplies the wife with necessaries.

(e) At common law the wife's right was merely to pledge her husband's credit; she had no authority to borrow money on his credit for the purpose of buying necessaries. Equity, however, allowed the lender to recover from the husband[48].

(f) The authority of the wife extends so far as to entitle her to pledge her husband's credit for the purpose of instituting matrimonial proceedings against him so long as the above conditions are fulfilled[49]. It has been held, however, that this does not extend to costs of obtaining a separation or maintenance order in the magistrates' court[50]. The application of the doctrine to costs of legal proceedings is dealt with in para.108 below.

45. The antiquated nature of the above rules hardly needs stressing. In the words of Stable J.[51]:

> "This right of a wife, her right at common law, goes back in our social history to the time when a woman was, for practical purposes, a chattel, and, when the husband took the wife, he took, not only the woman, but everything that she had, with the result that, if he did not provide for her, she had no means of providing for herself. It may be that the changed social conditions and the completely changed status of women may ultimately result in some further amendment of the law".

In our view that ultimate result should now be achieved. The value of the rule to the wife is undermined by being based on the common law duty of the husband to maintain her; it is subject to exceptions which weaken its power to protect adequately the wife left by her

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48. Dear v. Soutten (1869) L.R. 9 Eq.151.

49. Halsbury, Laws of England (Third Ed.) Vol.19 para.1428 contends, on the authority of certain old cases, that the wife can then pledge her husband's credit even though she has means of her own. But this is clearly incorrect since Biberfeld v. Berens, supra: see Nabarro & Sons v. Kennedy [1954] 2 All E.R. 605.

50. Cale v. James [1897] 1 Q.B. 418.

51. In Nabarro & Sons v. Kennedy, supra, at p.606 G and H.

husband in necessitous circumstances. Its effectiveness has been further diminished by legislative tinkering, as illustrated by s.20(4).

46. It seems quite clear that at the present day the doctrine is rarely invoked except in relation to the recovery of costs of matrimonial proceedings where, as we shall endeavour to show elsewhere[52], its effect is detrimental to a rational restatement of the law. So far as concerns its application in other circumstances, there are only three reported cases since the War in which it has been invoked and these are of some interest as they illustrate both the circumstances in which there may be a need for a remedy and the highly fictitious nature of the remedy based on agency of necessity. The first of these cases was Sandilands v. Carus[53]. There a charitable boarding-house keeper had taken in and cared for the wife who was in poor health, knowing that her only means were 10/- per week under a magistrates' maintenance order and a small voluntary allowance from her brother (which ceased on his death shortly after). Eight years later the wife obtained a divorce but the boarding-house keeper then successfully sued the husband for the cost of board and lodging. The second was Weingarten v. Engel[54]. There the husband had deserted the wife. During a period of seven months he made no payments to her and her brother gave her £90 which she used for the support of herself and the children. Thereafter she instituted divorce proceedings and was granted alimony pendente lite. The brother succeeded in recovering the £90 in an action against the husband. Finally in Biberfeld v. Berens[55] a wife who had left her husband because of his cruelty accepted from her brother a weekly payment of £5 per week for her board and lodging and purchase of necessaries. On the subsequent divorce, she was granted maintenance of £5 10s.0d. per week from decree absolute. The brother then sued the husband to recover the £5 per week previously paid. He failed because the wife had capital of her own of about £1,450.

47. It will be observed that in all three cases the circumstances were very different from the classic "agency of necessity" case in which the wife pledges her husband's credit with a tradesman on the purchase of necessary goods. Clearly no tradesman is going to supply a wife on those terms. If the husband has previously

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52. See para.108.
53. Supra.
54. [1947] 1 All E.R. 425.
55. Supra.

paid the bills, the tradesman may go on supplying goods until notified that the husband will no longer accept liability. Once he is told that, he will stop and if he takes legal advice no lawyer will advise him otherwise since he will be safe only if the conditions in para.44(a) or (d) are fulfilled; it is not practicable for the tradesman to cross-examine the wife to determine whether she has committed adultery.

48. Where the doctrine still has some continuing life is where a relation or friend has supported the wife. Normally this will be by advancing money - as in Weingarten v. Engel and Biberfeld v. Berens - thus invoking the equitable gloss rather than the basic common law rule itself. Undeniably in such cases the rule can work justice - provided the plaintiff can overcome the hidden traps associated with the common law responsibilities of a husband for the support of his wife. But the same result - at less expense and with less risk - could be achieved by appropriate reforms in the law and practice relating to maintenance. At present, hardship arises because maintenance awarded in matrimonial proceedings is not in practice dated back; interim alimony normally dates from the filing of the petition and permanent alimony or maintenance from final decree. When the wife proceeds for periodical payments under s.22 the problem is aggravated since there is at present no power to make an interim award. It would be far more sensible and inexpensive if the wife in her proceedings for divorce or under s.22 were awarded a sum in respect of past maintenance so as to enable her to discharge her indebtedness to those who have been looking after her previously. In fact the court now has power to grant a lump sum, in addition to periodical ones, on the grant of divorce, nullity or judicial separation(56). If the court were given similar power on an application under s.22 (and were also empowered on such an application to make an interim award) and, if more use were made of this power, the need to invoke the independent remedy of an action based on agency of necessity would disappear for all practical purposes. If such an action is brought entirely independently of the wife it may play havoc with the maintenance arrangements which the court has prescribed for her, for the husband's ability (and willingness) to keep up the payments is likely to be adversely affected by judgment and execution against him.

49. The only circumstances in which the root-and-branch abolition of the wife's agency of necessity might operate unfairly

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56. Ss.16(1), 19 and 20.

is where the wife's proceedings abate because of her death before she is awarded maintenance. Logically where the wife is claiming the award of a lump sum in respect of past maintenance her death ought not to cause the claim to abate. Elsewhere in this paper[57] we suggest that arrears of maintenance under a court order should be enforceable as a debt and therefore survive death. We see no reason why this should not be extended so as to entitle the wife's personal representatives to continue the suit so as to recover judgment for a lump sum in respect of maintenance prior to her death.

50. An alternative method of approach would be to recognise openly that the well-wisher who helps to maintain the wife is to that extent fulfilling the functions of the Supplementary Benefits Commission and should therefore be given rights against the husband similar to those which the Commission has. The great difficulty about this, however, is that, whereas the Supplementary Benefits Commission has a machinery for assessing need and well-defined rules as to the extent of the benefits that it will provide, the well-wisher has neither. Hence, it is impracticable to afford him a summary remedy to recover from the husband what he has paid to the wife in the same way as the Commission has a remedy. It would, no doubt, be possible to provide that where maintenance has been awarded under any court order and the husband has failed to pay it in full, the husband should be liable to the extent of the amount unpaid to anyone who has helped to maintain the wife. This would at least eradicate some of the anomalies flowing from the present statutory gloss on the agency of necessity doctrine which are pointed out in para.44(b) and (d). But it would not be altogether satisfactory from the point of view of the well-wisher who would need to investigate the exact state of the accounts between husband and wife. Nor would it cover the situation where there is no existing court order. It could be extended to cases where maintenance is payable under an agreement, but could not easily be extended to situations in which the extent of the husband's liability has not already been settled either by a court order or agreement.

51. No solution could be regarded as satisfactory unless it applied mutually, as the agency of necessity doctrine does not. Where the circumstances are such that the wife is in breach of her obligation to maintain the husband she too should be liable if her obligations are discharged by a third party - just as she is liable to reimburse the Supplementary Benefits Commission. We doubt if anyone would favour extending the present agency of necessity

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57. See para.150.

doctrine so that a husband could, in corresponding circumstances, be regarded as entitled to pledge his wife's credit for necessaries.

52. In our view the agency of necessity doctrine is an anachronism which on balance does more harm than good. The occasions on which the wife is helped by it appear to be very rare indeed. What may be of value to her are her presumed authority as housekeeper and the fact that a tradesman to whom her husband has held her out as having his authority is entitled to assume that that authority continues until he learns the contrary, and these we do not suggest altering in any way. Whatever residual value there may be in the wife's agency of necessity could be better secured in other ways. We accordingly recommend that the doctrine should be abolished but that:-

(a) the court should be empowered

(i) to make an interim award on any application for maintenance, and

(ii) when making its final order to award a lump sum in respect of maintenance which the other spouse ought to have provided in the past, and

(b) a claim for a lump sum in respect of past maintenance should not abate because of the death of the claimant whose personal representatives should be entitled to continue the suit.

PART III

ANCILLARY RELIEF IN THE DIVORCE COURT

53. In this Part and Part IV of the Paper we seek to analyse the law governing ancillary relief in proceedings in the Divorce Court in order to point out anomalies and uncertainties in so far as they have not already been dealt with in Part II. Except where otherwise stated reference to sections are to those of the Matrimonial Causes Act 1965.

Interim Alimony

54. This can be ordered in all types of petition, whether the relief sought is divorce, nullity, judicial separation or restitution of conjugal rights. It can never be ordered in favour of the husband, except where the wife is petitioning on the ground of her husband's insanity[58]. It can always be ordered in favour of the wife except where she is petitioning on the grounds of her husband's insanity. It may be ordered whether the wife is allegedly

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58. In practice it is not awarded if he is being maintained in a State institution.

the guilty or the innocent party; at this stage in the proceedings there has been no determination of guilt.

Maintenance

55. This may be ordered on the grant of a decree of divorce or, by virtue of s.19, of nullity. It may take the following forms[59]:-

(a) Secured maintenance, which may be either a lump sum or an annual sum payable for any term not exceeding the life of the wife;

(b) Unsecured maintenance, which must be a weekly or monthly sum and cannot be made payable beyond the joint lives of the husband and wife. This rule lays down a maximum but not a minimum period, because, by virtue of ss.29(2) and 31, the court can discharge, vary or suspend the order. But it cannot, as with secured maintenance, extend the period beyond the joint lives to cover the life of the surviving wife; or

(c) An unsecured lump sum, which is distinguished from a "secured" lump sum by the fact that the husband will never get it back; in the case of a secured lump sum he will get back whatever is left on the death of his wife: i.e. the capital sum, less any advancements which had been made to the wife in accordance with a power contained in the settlement.

56. As with interim alimony it cannot be awarded in favour of the husband except when the wife obtains a divorce on the ground of her husband's insanity. Again, as with interim alimony, in that case it cannot be awarded to the petitioning wife. The Morton Commission[60] recommended the removal of this anomaly, pointing out that in some cases it would be reasonable that the wife should maintain the husband but in others that the husband, although insane, should help to maintain the wife.

57. As with interim alimony, it can be ordered whether the wife is petitioner or respondent and even if she has committed adultery, but the section states that where secured maintenance is awarded the court must have regard "to her fortune (if any), his ability and the conduct of the parties". The limitation of this directive to secured maintenance, as opposed to unsecured maintenance or a lump sum, is misleading for the court has regard to these considerations in all cases[61]. An attempt was made in

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59. S.16.

60. Cmd. 9678, para.497.

61. J. v. J. [1955] P.215, per Hodson L.J. at p.238; Davis v. Davis [1966] 3 W.L.R. 1157, per Willmer L.J. at p.1160.

the 1965 consolidation to generalise the statutory directive but the attempt failed since it was felt that this would exceed the permissible bounds of consolidation.

Permanent Alimony

58. This can be awarded on the grant of a decree of judicial separation or restitution of conjugal rights[62]. It can be awarded only to the wife, except (as in the case of divorce and nullity) where the wife has petitioned on the ground of her husband's insanity, in which event the husband can, but the wife cannot, obtain permanent alimony. On a judicial separation (as on a divorce) it can be awarded to her whether she is the innocent or guilty party; on restitution it can be awarded only if the decree is made on her application.

59. Permanent alimony is less advantageous to the wife than an order for periodical payments under ss.21 and 22 because it cannot be secured[63]. Hence, no wife who is properly advised and whose husband has property available to provide security will apply only for a judicial separation and alimony. She will either apply first for a decree for restitution of conjugal rights and for secured periodical payments; if she obtains this she can retain it (subject to the power of the court to vary or discharge it under s.31) notwithstanding the subsequent judicial separation. Alternatively she can, either before or after the decree of judicial separation, apply for secured periodical payments under s.22[64].

60. In effect, therefore, permanent alimony for the wife has only one minor use in practice: a lump sum can be awarded instead or in addition. There is also the point referred to in para.44(b) above: viz., that if the husband fails to pay the alimony due, he is expressly stated by s.20(4) to be liable for necessaries for the use of the wife. In other respects a better remedy is available in the form of periodical payments. On the other hand it does perform some function as relief for the husband. This is because it is the only way that he can obtain financial support from his wife if she is granted a judicial separation on the ground of his insanity.

Periodical Payments after Restitution Decree

61. Under s.21 where a decree of restitution of conjugal rights is made on the application of the wife, the court may order the

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62. S.21(1)(a).

63. See para.55 above.

64. King v. King [1954] P.55, C.A.; Hodges v. Hodges [1963] P.201.

husband to pay to the wife, if the decree is not complied with, such periodical payments as the court thinks just. Though the statute does not expressly say so, such payments cannot be made to last beyond joint lives[65].

62. Under s.21(3) if the husband obtains an order for restitution of conjugal rights against the wife and she is in receipt of any profits of trade or earnings, the wife may be ordered to pay him or their children "such part of the profits or earnings as the court thinks reasonable to be paid periodically by the wife". This, the only present power to order the wife to pay "maintenance" to the husband (except in cases of his insanity), is, for no apparent reason, limited to cases where he obtains a decree of restitution - a remedy which is hardly ever used and should be considered for abolition in a reformed divorce law. It also seems anomalous that the payments can be awarded only out of profits of trade or earnings and not out of unearned income.

63. Whereas maintenance payments are expressed to be either "annual" sums or "monthly or weekly" sums, periodical payments are merely described as "periodical" with no limitation on the period[66].

Simplification of Forms of Maintenance

64. We see no justification for the continued distinctions between the various forms of maintenance and the modes of their payment. Interim alimony, maintenance, alimony and periodical payments should be abolished and replaced by a single form of periodic financial relief, available in all classes of matrimonial proceedings, which the court could award to either spouse or any children. It would be known as maintenance and could be permanent, interim or limited until the occurrence of a specified event or the expiration of a particular time. An order made pending the hearing of a suit for divorce or other principal relief should continue in force after the decree unless the court otherwise ordered. As in the case of maintenance as principal relief, the court should have the fullest power as to the nature of the order and in all cases it should be possible to order secured maintenance.

Duration of Maintenance

65. It will have been observed that in most cases maintenance cannot be ordered to last beyond the joint lives of the spouses. An order to last for the life of the recipient can be made only in

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65. Tangye v. Tangye [1914] P.201.

66. Alimony is simply described as such with no implication that this implies periodicity except that it is distinguished from a lump sum.

relation to secured maintenance granted on a decree of divorce or nullity. In our view these limitations should be swept away and the court should be empowered to make an order to last for any period not exceeding the life of the recipient whenever awarding maintenance and whether or not the maintenance is ordered to be secured.

66. The suggestion that this proposal should extend to unsecured maintenance perhaps requires justification. It may be said that unless the husband (we assume that he is the party ordered to pay) has capital, there will be no point in ordering maintenance to extend beyond his death since there will be nothing from which to pay it. There are a number of answers to that. The fact that the husband may presently have no capital suitable to afford security certainly does not mean that he will necessarily leave no estate when he dies. This is now recognised by the Inheritance (Family Provision) Act 1938 and s.26 of the Act of 1965 which respectively entitle a widow and a former wife to apply then for maintenance out of the estate. Nor does it follow that because a husband has some capital the court will order secured maintenance to the full extent of that capital or at all. In ordering security the court thinks primarily of how much of the husband's capital ought to be tied up to guard against a default in payment; the question whether or not maintenance should extend for the wife's life is not treated as the primary consideration in ordering security. Yet it is only to the extent that security is ordered that the wife can, at present, obtain maintenance for her life. Secondly, it may be argued that practical difficulties may be caused if the maintenance is to continue after the husband's death in cases where no sum has previously been set aside to secure the payments. Hence, it is said, the present solution is preferable, namely, to end unsecured maintenance on the death of the husband but to entitle the wife to make a new application after his death under the Inheritance (Family Provision) Act 1938 or s.26 of the 1965 Act. That objection, however, seems to be sufficiently answered by the fact that many estates are subject to liabilities to pay continuing sums (annuities, charitable donations, etc.) and this does not in practice cause insuperable difficulty.

67. As the law now stands there are a number of reasons why it would be more convenient for the recipient of maintenance, if unsecured as well as secured, maintenance could be made to run on for the duration of the payee's life in preference to having to rely on the making of an application, under the Inheritance (Family Provision) Act or s.26 of the 1965 Act, after the payer's death. If the powers

of the court to vary or discharge orders (see paras.88-97 below) and to enable the wife to recover arrears outstanding at the husband's death (see paras.148-152 below) were made adequate as we propose, two of these arguments would disappear. There is, however, the further difficulty that the court does not exercise its powers under the Inheritance (Family Provision) Act or s.26 of the 1965 Act (or has not until recently - see paras.72 and 73 below) in the same way as it does when awarding maintenance inter vivos. Furthermore these provisions apply only if the deceased died domiciled in England. Hence the husband can defeat the wife's claim by changing his domicil. So he can by disposing of his property inter vivos to his mistress or children.

68. However, even if the courts exercised their power under the Inheritance (Family Provision) Act or s.26 in the same way as they do when awarding maintenance inter vivos, we would recommend that the court should be empowered to award unsecured maintenance for the life of the payee. If the court had this wider power to award maintenance continuing for the life of the wife it would be in a better position to deal with the intractable problem of her loss on divorce of a widow's pension rights(67). It is true that, unless there is an earmarked fund out of which the maintenance is to be paid, a temporary cessation of payments on the death of the husband is often inevitable, if only because there will be no one to pay it until a grant of probate or letters of administration is obtained. On the other hand, since unsecured maintenance is the rule and secured the exception, the wife or ex-wife under the present system usually suffers a cessation of maintenance which lasts until she succeeds in a claim under the Inheritance (Family Provision) Act or s.26. She would certainly fare better if her rights remained until the executors applied for a variation. This might be cheaper than a fresh application and generally the executors would be in a better position to apply than the wife or ex-wife. The estate might suffer unduly if there was delay on their part in applying for a variation which would be appropriate, unless the court, when it made the original order, was able to foresee the position on the husband's death with unusual accuracy. On the other hand this hardship could be avoided by backdating the variation.

69. We have already, in connection with maintenance as principal relief, raised the question whether an ex-spouse's right to maintenance should not cease on re-marriage(68). The same question arises, of course, in connection with maintenance as ancillary relief and we should welcome views on it.

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67. See paras.182-210 below.

68. See para.40 above.

Maintenance from Estate of Deceased Spouse

70. Under the Inheritance (Family Provision) Act 1938 as amended[69] a wife or husband or dependent children may apply for maintenance out of a deceased's estate if he or she has not made reasonable provision for them. Under ss.26-28 of the Act of 1965[70] a like right is afforded to a divorced wife or husband who has not re-married. These provisions will be dealt with in greater detail in our subsequent study of the law of family property. Even on the present basis of family property they are in need of review notwithstanding certain improvements made by the Family Provision Act 1966, but here no more will be said than is strictly necessary in the present context. The Inheritance (Family Provision) Act is not technically ancillary relief in matrimonial proceedings; indeed jurisdiction under the Act is not exercised by the Divorce Court but by the Chancery Division and, in the case of small estates, the county court. But it performs the same function as regards separated spouses as does s.26 of the Act of 1965 in the case of divorced couples.

71. These provisions partially fill the gap left by the fact that, at present, maintenance awarded inter vivos to a wife normally ceases on the death of the husband. It is unlikely that the husband will have provided for her in his will and if there has been a divorce she will not inherit on his intestacy or be entitled to a pension as his widow. Hence, she is given the right to apply to the court for maintenance out of his estate if what she acquires under his will or intestacy is not such as to make reasonable provision for her maintenance. Such reasonable provision as the court thinks fit may then be made either by way of periodical payments terminating not later than the wife's death or re-marriage or by way of lump sum. It will be observed that the husband is afforded a like right notwithstanding that at present the wife is normally under no legal liability to maintain her husband. When the application is by a divorced wife or husband under s.26, no application can be made if he or she has re-married[71] and the court must have regard, inter alia, to any application for maintenance inter vivos and to the order made on such application[72].

72. The principles upon which the courts have acted in making an award under these provisions have been very different from those applying to awards of maintenance inter vivos. The test applied has

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69. The amended Act is reprinted in the Third Schedule to the Family Provision Act 1966.

70. As also amended by the Family Provision Act 1966.

71. S.26(1).

72. S.26(4).

not been what it is reasonable for the husband to pay, but whether he was unreasonable in not making more adequate provision for the wife. There is a very recent case[73] in which the husband had been paying £1 a week to his wife under a separation agreement and it was held not unreasonable for him to make no provision at all for her out of his estate of £1,000 which he had left to the other woman with whom he had been living for many years. Stamp J. said[74]:

> "It would no doubt have been reasonable for the deceased out of his very small estate to have made up to his wife the £1 a week she was to lose by his death, but a judge cannot interfere with the deceased's dispositions merely because he thinks that he would have been inclined, if he had been in the position of the deceased, to make provision for the claimant. The court has to find that it was unreasonable on the part of the deceased to make no provision ... or ... not to make a larger provision".

He was also prepared to accept that:

> "where the deceased's estate is so small and the means of the claimant so exiguous that the only effect of making provision for the claimant will be pro tanto to relieve the National Assistance Fund, it would not be unreasonable for the deceased [to make no provision]".

In Re Watkins[75] it was held not unreasonable to make no provision out of a large estate for a mentally defective daughter who was being maintained free of charge under the National Health Service. These cases were brought under the Inheritance (Family Provision) Act, not under the Matrimonial Causes Act. Although the wording of the two Acts is not identical there appear to be no material differences and in Re Talbot[76] it was held that the same principles should be applied.

73. As illustrated by the cases cited, these principles are very different from those that would be adopted when awarding maintenance inter vivos: cf. Parry v. Parry[77]. However, some Divorce Judges seem to be striving to interpret their statutory powers rather more liberally than the Chancery Judges have done. In Re Bellman Decd.[78] it was argued that, as the Matrimonial Causes Act required the court to "be satisfied" that the deceased had not made reasonable provision, whereas the 1938 Act merely required the court to be "of opinion" that he had not done so, the

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73. Re E. Decd. [1966] 1 W.L.R. 709.

74. Ibid. at p.714 D and E.

75. (1949) 65 T.L.R. 410.

76. [1962] 1 W.L.R. 1113.

77. (1966) 110 S.J. 247 and "The Times" 10th March 1966, C.A. It is interesting to observe that Harman L.J. pointed out that a husband is not entitled to pare down maintenance by relying on payments from the National Assistance Board, letting the tax-payer shoulder his liabilities.

78. [1963] P.239.

onus under the Matrimonial Causes Act was even heavier. Scarman J. did not merely reject this view but said that the duty of the court was simply "to reach a conclusion as to whether or not it is established by the evidence that it would have been reasonable for the deceased to make provision for the maintenance of the applicant"[79]. This approach was followed by Simon P. in Roberts v. Roberts[80]. This, indeed, appears to be precisely what the legislature has said in both Acts. If it were consistently applied there would be less difference between maintenance inter vivos and maintenance from a deceased's estate.

74. In view of the conflicting interpretations by the courts of the Inheritance (Family Provision) Act and s.26 of the Act of 1965 we suggest that the language of these sections be reconsidered. Further we think that consideration must be given to the question whether a claim under s.26 should be barred by re-marriage and whether periodical maintenance awarded under that section or the Inheritance (Family Provision) Act should automatically cease on re-marriage. If the general rule remains that re-marriage does not end a right to claim maintenance (itself a question which we have raised for consideration[81]), we find some difficulty in supporting these exceptions to the general rule. We shall welcome views on this.

Unsuccessful Petitions

75. If the claim for substantive relief (divorce, nullity or judicial separation) fails, so, at present, does the wife's claim for maintenance by way of ancillary relief. The assumption seems to be that if the substantive petition is dismissed the parties will resume cohabitation or that, if they do not, the wife will have forfeited her right to be maintained. The first assumption is obviously unfounded. The parties occasionally come together again after a decree nisi or remarry after a decree absolute, but we can recollect no case in which they have been reconciled after the dismissal of contested divorce proceedings. To the bitterness of a broken marriage has then been added the bitterness of defeat - a combination not conducive to a reconciliation. Whether the second assumption - that the wife will have forfeited her right to be maintained - is well-founded depends on the circumstances. Had she been divorced the court could have granted her maintenance even though she might have been the guilty party. But if, not having been divorced, she claimed maintenance in new proceedings under s.22

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79. Ibid. at p.243.
80. [1965] 1 W.L.R. 560.
81. See para.40 above.

she might not fare as well. Normally a wife petitioner who failed to establish her case would be in desertion if she failed to return to the husband and therefore would not be entitled to maintenance under s.22 as now worded. But the husband might become the deserter if she made a genuine offer to return and he declined her offer. And if she had failed to establish a case of cruelty she might nevertheless be justified in leaving him if his conduct was such as to make it reasonable for her to do so, despite the fact that the conduct did not amount to legal cruelty.

76. We know of no case in which application under s.22 has been made after unsuccessful divorce proceedings; the overwhelming majority of petitions are successful so that the question rarely arises. The defects in the present law are not therefore a matter of great importance but on balance we think that the law could be improved by empowering the court to grant maintenance notwithstanding that a petition for divorce, etc., is dismissed (thus making it unnecessary to start new proceedings). This is the position in Australia(82). It has been urged on us that the prospect of this relief would encourage irresponsible separations, the parties feeling that they have nothing to lose. We think on the other hand, that the court which has heard the petition is in the best position to do justice between the parties, though it may well think it advisable to adjourn the issue of maintenance to be dealt with in Chambers at a later date when their intentions for the future have become clearer and some of the heat has died out of the dispute.

77. In the Australian legislation the court may not make an award in favour of the unsuccessful petitioner(83) unless satisfied that the proceedings for the substantive relief were instituted in good faith and that there is no reasonable likelihood of reconciliation. We think it obviously right that the court should be able to award the successful respondent maintenance and We think that the exercise of the power to award it to an unsuccessful petitioner should be subject to a safeguard - but not the same as in the Australian legislation. As we have already said, we think that the prospects of reconciliation in these cases are minimal and we think that the subjective character of the test of good faith in the institution of proceedings would be improved by substitution of the objective test of whether it was reasonable to institute the proceedings.

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82. See s.89 of the Matrimonial Causes Act 1959 (Appendix C).

83. See the amending Matrimonial Causes Act, No.99 of 1965 (Appendix C).

Settlements

78. Under s.17 on granting a decree of divorce or nullity[84] the court may vary any "ante-nuptial or post-nuptial settlements" for the benefit of the parties or the children[85]. Further, where the court grants a divorce (or judicial separation[86]) by reason of the adultery, desertion or cruelty of the wife the court may order her to settle any of her property for the benefit of the innocent husband and/or children[87].

79. It will be observed that s.17(2) is available only in favour of the husband and only if he is the innocent party. On this occasion it is the husband in whose favour there is discrimination. Anomalously, there is no power to order a husband (innocent or guilty) to settle his property. The Law Society has drawn our attention to the fact that this can have particularly regrettable consequences as regards the children. If the husband divorces the wife a settlement of the wife's property may be made on the children who may, indeed, benefit still further, since the court can order any damages recovered from the co-respondent also to be settled[88]. If, however, it is the wife who divorces the husband the children are in an inferior position since no settlement of the husband's property can be ordered. Admittedly he can be ordered to secure a lump sum in favour of the children[89], but not after they reach the age of 21, even if they continue to require support during a period of full-or part-time education or training. Any subsequent payments to them by the husband will be voluntary payments and therefore liable to estate duty if he dies within five years.

80. If there is already an ante- or post-nuptial settlement the wife and children will be in a better position since this can be varied in their favour under s.17(1). And fortunately a very wide interpretation has been given to the expression "ante- or post-nuptial settlement"; it has been held to cover any inter vivos disposition on the parties to the marriage or either of them in a nuptial capacity other than an absolute disposition in favour of one of them alone. It enables the court to go further than it could under subs.(2) because it may vary the rights of all the beneficiaries under the "settlement" so long as it acts in the overall benefit of the children and the innocent party.

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84. S.19.
85. S.17(1).
86. S.20(2).
87. S.17(2).
88. See para.129.
89. S.34(3).

81. Some anomalous results can flow from the joint effect of the two subsections. If, for example, the husband and wife acquire a house as beneficial joint tenants or tenants in common this apparently constitutes a settlement which can be varied[90]. If, however, the house is owned by one spouse alone, even though as a result of a gift by one to the other, there is no variable settlement[91]. If it is the wife who owns, she can be ordered to settle it for the benefit of the innocent husband and children under s.17(2). But this cannot be done if it is the husband who owns. The court's powers are then limited to using it as security for secured maintenance. If it wishes the wife to be entitled to live there, all it can do is to exercise persuasion by providing for reduced maintenance so long as the husband permits the wife to reside in the house.

82. Subs.(1) applies only where the marriage has ended. Hence there can be no variation of settlements on a grant of judicial separation notwithstanding that in practice this may frustrate the whole basis on which the marriage settlement was made. On the other hand the wife may, under subs.(2), be ordered to settle her property where the husband obtains a judicial separation. But she cannot be ordered to do so where he obtains a decree of nullity. The historical reason for this is that it was intended to operate only where she had committed a matrimonial offence and hence it was thought that it should have no application, for example, where he was incapable of consummating the marriage. But the border-line between divorce and nullity has now become so blurred that there can be no justification for retaining the distinction. A wife who has wilfully refused to consummate or who conceals the fact that she was pregnant by another man at the time of the marriage may be as culpable as one who has committed adultery, cruelty or desertion.

83. A final anomaly is that apparently the court has no power under s.17(1) to vary the terms of a settlement created by will, notwithstanding that the will directs that the funds be held on the same trusts as the marriage settlement[92]. This can produce anomalous results for it may be entirely arbitrary whether, and to what extent, the settlement is inter vivos or by will[93].

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90. Brown v. Brown [1959] P.86, C.A.; Cook v. Cook [1962] P.235, C.A.
91. Prescott v. Fellowes [1958] P.260, C.A. Particular difficulty can arise if the spouse who owns disappears after the divorce.
92. Garratt v. Garratt [1922] P.230.
93. As in Garratt v. Garratt.

84. We recommend that the court should be given a wide power, such as that possessed by the Australian courts[94] to order either party to settle property for the benefit of all or any of the parties to, and the children[95] of, the marriage and to vary ante- or post-nuptial settlements made, whether inter vivos or by will[96]. The court could, for example, order one party to settle a capital sum for investment in the Unit Trusts now administered by the Public Trustee so that the income was payable to the other party for life. The joint effect of the power to settle and to vary existing settlements would also enable the court to deal more adequately with problems concerned with the home. The Matrimonial Homes Bill, now before Parliament, will when enacted help in this regard but its provisions are limited; it does not, for example, deal with the contents of the home but only with the home itself.

85. At the present time, applications under s.17 of the Married Women's Property Act 1882 to settle disputes between husband and wife as to the title to, or possession of, property, can be made in divorce proceedings, provided that the application is made before the decree absolute. Frequently, however, disputes do not arise concerning, say, the matrimonial home until after decree absolute. It is anomalous that whereas applications concerning liability to maintain a former spouse can be dealt with subsequently as part of the original divorce proceedings, disputes about property cannot. Accordingly, we recommend that the power of the court to determine property disputes between husband and wife under s.17 of the Act of 1882 should be exercisable after as well as before a divorce. Further we would invite views on whether the powers of the court under the two ss.17 should not be merged so that at all times the court will have power to deal with the property of husband and wife in accordance with equitable principles and having regard to the parties' conduct and needs rather than on the basis of strict proprietary rights[97].

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94. Matrimonial Causes Act 1959 (Austr.), s.86 (Appendix C).

95. Up to the same age as we recommend for maintenance orders: para.180

96. It does not matter whether the settlement is made by one or both or by a third party.

97. After a conflict of judicial opinion it now seems to be generally accepted that the court at present must give effect to existing proprietary rights, if ascertainable, in applications under s.17 of the Married Women's Property Act: National Provincial Bank v. Ainsworth /1965/ A.C. 1175; Bedson v. Bedson /1965/ 2 Q.B. 666, C.A.

Maintenance Agreements

86. S.24 of the Matrimonial Causes Act 1965 enables the court (or a magistrates' court within certain limits) to vary the terms of a maintenance agreement (as defined by s.23) where there have been changes of circumstances or the agreement does not contain proper financial arrangements for any child of the marriage. Since this power is declared to be without prejudice to any other powers of the court to make an order for financial provision and since s.23 invalidates any provision purporting to restrict the right to apply, it does not add much so far as the wife is concerned. On the other hand, in the rare case where the agreement provides for payment of maintenance by the wife it does confer on the husband rights which he would not otherwise obtain. By s.25, where the agreement provides for the continuance of payments after the death of one of the parties, application to the court can be made after that death. To that extent it can be used by either spouse as an alternative to s.26. Because of the wording of the section the courts have given a somewhat restrictive interpretation to their powers and are reluctant to vary the agreement if the changed circumstances are ones which the parties contemplated as possibilities at the time when the agreement was entered into[98]. We invite views on whether the court should be given a wider discretion.

87. It should be noted, however, that the sections apply only to agreements made "for the purposes of their living separately"[99]. Hence the court has no power under these sections to vary agreements made with a view to reconciliation[1]. This can operate unfairly, for it is clear that at common law such an agreement cannot preclude an application by the wife for periodical payments under s.22. Hence, in effect, the wife can apply for increased maintenance but the husband cannot get a reduction of the maintenance prescribed in the agreement (except on a divorce or nullity decree when it could presumably be varied as a post-nuptial settlement). Furthermore, ss.24 and 25 apply only to agreements made during the marriage or within six months after divorce or nullity[2]. S.23, however, is not so limited. Hence if, say, a year after divorce, the parties enter into a maintenance agreement this will not preclude the wife from applying for an increase of any maintenanceorder but the husband will be prevented

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98. K. v. K. [1961] 1 W.L.R. 802, C.A.; Gorman v. Gorman [1964] 1 W.L.R. 1440, C.A.

99. S.23(2).

1. Ewart v. Ewart [1959] P.23.

2. Ss.24(1) and 25(1).

from applying for a reduction of the maintenance prescribed in the agreement. We recommend that these restrictions should be removed.

Variation and Discharge of Orders

88. The court has power under s.31 to discharge, vary or suspend any order made under the following sections and to revive the operation of any order so suspended, other than an order for the payment of a lump sum: s.15 (interim alimony), s.16 (maintenance, secured or unsecured), s.20(1) (alimony), ss.21(1) and (2) and 22 (periodical payments), and s.21(3) (settlement of wife's property or payment from her earnings on restitution of conjugal rights). In exercising this power the court is directed to "have regard to all the circumstances of the case, including any increase or decrease in the means of either of the parties to the marriage"[3]. Anomalously, although there is power to vary an order for settlement of a wife's property made on a decree for restitution there is no such power in the case of a similar order made under s.17(2) on a divorce or under s.20(2) on a judicial separation. Different considerations may apply on a divorce, which finally ends the marriage, but judicial separation and restitution seem indistinguishable for this purpose.

89. Although secured maintenance can be varied or discharged, it is doubtful whether there is a way in which this can be done after the death of the husband[4]. It can now, in effect, be varied upwards by making a supplemental award under s.26, but whether and if so on whose application, it can be discharged or varied downwards, remains in doubt.

90. These doubts do not apply to an order made after death under s.26. S.27 provides for discharge, variation or suspension of such an order and subs.(2) lists those who may apply. These include any former spouse, any dependant and the trustees or beneficiaries of any relevant property.

91. Unsecured maintenance awards in favour of children may apparently be varied as a result of the provisions of s.34(5), which states that where a court has power to make an order under s.34(1) "it may exercise that power from time to time". On the other hand, there appears to be no power at all to vary an order for secured maintenance in favour of a child. Subs.(3) does not contain the mystic words "from time to time" and there is no express power to vary equivalent to that in s.31 or s.27.

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3. S.31(3).

4. Mosey v. Mosey & Barker [1956] P.26.

92. A variation order can be backdated even if this has the effect of remitting payments already due[5]. But if this is done the court cannot order the repayment of money already paid, even though the wife has concealed the change of circumstances (for example her remarriage) which justified the reduction[6]. On the other hand if[7] the original order was rescinded because of non-disclosure on the making of the decree, presumably money paid under it would be recoverable.

93. Where the order is registered in a magistrates' court under Part I of the Maintenance Orders Act 1958, an application to vary will normally have to be made to the magistrates' court[8]. So far as concerns an increase in the amount, the powers of the magistrates' court are limited[9], but the court may remit the application to the High Court[10].

94. Once an order varying an ante- or post-nuptial settlement has been drawn up it cannot subsequently be varied except that it may be revised in the light of circumstances existing at the date of the original order and not brought to the notice of the court[11]. The sections relating to alteration of maintenance agreements[12] contain no provision regarding the variation of the original order. The reason for this is that a fresh application can be made to vary the agreement as originally varied.

95. Accordingly we recommend that all orders should be variable at any time, even after the death of the spouse ordered to pay until completion of the administration in due course of the estate. We further recommend that the court should be able to backdate variations and (to save unnecessary juggling with backdating of orders) to remit arrears. The backdating of a downward variation should not, however, automatically entail the repayment of sums which had actually been paid. To that question we advert in the succeeding paragraph.

96. One frequent cause of dispute and injustice is that one party does not always notify the other of a material change of circumstances which would justify the revocation or variation of

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5. MacDonald v. MacDonald [1964] P.1, C.A.
6. Young v. Young (No.2) [1962] P.218.
7. As in Clifford v. Clifford (1950) 100 L.J. 274.
8. Maintenance Orders Act 1958, s.4(2).
9. Ibid.,s.4(3).
10. Ibid.,s.4(4).
11. Gladstone v. Gladstone (1876) 1 P.D. 442; Benyon v. Benyon (1890) 15 P.D. 54, C.A.; Newte v. Newte & Keen [1933] P.117.
12. Ss.24 and 25.

the order; indeed, there is no legal obligation to do so[13]. Perhaps the illustration of this which is most serious is where an ex-wife re-marries, conceals from her ex-husband that she has done so and continues to receive maintenance from him notwithstanding that she is being adequately maintained by her new husband. In circumstances such as this, we think that the court should have power, when the facts come to light, to vary or revoke the order retrospectively and to order the repayment of sums paid since the date to which the order is made retrospective. We are well aware that orders to repay money which has already been spent can cause hardship and difficulty but we see no reason why this is not a matter which can be left to the good sense of the courts. We do not think that the power to order repayment should be limited to cases of concealed re-marriage. This is the most obvious case but there are others which would justify the making of such an order: for example, undisclosed receipt of a substantial windfall or the ending of an obligation to maintain a child. We think it essential to leave the court free to make such an order when the justice of the case requires it and to order repayment to the extent that justice requires. Unless the court has power to order repayment when backdating a variation, the man who has been unpunctual in his maintenance payments will be given an advantage over a regular payer. Where the order was to pay a lump sum, it would only be in the most exceptional circumstances that the court would think of varying it downwards and ordering a repayment of the excess.

97. It would certainly help in this regard if parties could be placed under an obligation to disclose to the other party material changes of circumstances. In that event, of course, the obligation should be mutual; the payer would be obliged to disclose material increases in his available means just as the payee would be obliged to reveal reductions in her needs. We invite views on whether it would be practicable and desirable to specify the various changes of circumstances which ought to be disclosed: for example, re-marriage, increase or decrease of means by more than £X per month, cessation of liability to maintain a child, etc. Alternatively some means might be found to impress upon recipients of maintenance their duty to disclose any substantial change in their financial circumstances. If parties knew that they were under such an obligation, the court would not need to feel so reluctant to order the repayment of sums which would not have been paid had the obligation been performed.

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13. See Young v. Young (No.2), supra.

Avoidance of Transactions

98. Under s.32, the court now has power to restrain or set aside any disposition aimed at defeating claims under ss.16 (maintenance), 17(2) (settlement of wife's property), 20(1) (permanent alimony), 21 and 22 (periodical payments) and 34 and 35 (maintenance of children). But this power does not extend to dispositions designed to defeat variation of settlements under s.17(1), maintenance from the estate of a deceased spouse under ss.26-28, or variations of maintenance agreements under ss.24 and 25. It is not clear that all these should be excluded.

99. Dispositions, if made within three years before the date of application, can be set aside unless made for valuable consideration (other than marriage) to a person who acted in good faith and without notice of the intention to defeat the spouse's claim. "Disposition" does not include a disposition by will: this seems to be right in view of the court's powers under the Inheritance (Family Provision) Act and ss.26-28. Where the court is satisfied that the effect of the transaction would be to defeat the claim there is a presumption that it was made with that intention.

100. Apart from the fact that the section is limited in its scope its wording appears to be defective if it is to enable the court to intervene effectively to prevent the defeat of the claims to which it is intended to apply. The court can intervene only when proceedings are being brought under any of the named sections of the Act andif the court is satisfied that the disposition is intended to defeat "the claim". Suppose, therefore, that a divorced or separated wife now aged 55 is in a well-paid job so that no, or only nominal, maintenance has been awarded to her. The husband knows, however, that she will retire at age 60 without an adequate pension. To defeat her future claim for increased maintenance he settles all his property on his second wife or mistress. If the wife waits until she is 60 it will be too late to apply as more than three years will have elapsed. If she applies immediately for maintenance she will be awarded only a nominal amount or a nominal increase and, it seems, the disposition cannot be set aside since her right to a nominal award will not be defeated by the disposition[14].

101. It seems right that s.32 should be amended to enable a disposition to be set aside although no actual or immediately pending claim for financial relief can be made. In that event the court

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14. This might be avoided by the device of providing that the nominal order should be increased to a substantial figure in five years' time but in practice such an order is unlikely to be made.

should be empowered to make any necessary orders to protect the property recovered from another similar disposition. It will still, of course, be necessary to show, as it now is under subs.(1), that the disposition was made with the intention of defeating the claim for financial relief. There is a rebuttable presumption that this is the intention if the disposition would have, or has had, the consequence of defeating the applicant's claim for financial relief[15]. Moreover, it seems right that the three year time limit on applications relating to past dispositions should be abolished. We do not think that this would introduce undue uncertainty in property transactions since dispositions for valuable consideration to persons acting in good faith are protected[16]. Although we do not envisage that magistrates' courts should have power to set aside transactions, there seems to be no reason why the claims protected by s.32 should be limited to High Court proceedings; the section could well be extended to operate on resources that are, or may be, the subject of a claim for maintenance in the magistrates' court.

Costs

102. The peculiar way in which costs are awarded in matrimonial proceedings makes it necessary to refer to them since, in effect, they form part of the code whereby the husband is required to maintain his wife. Whereas the usual rule in England is that "costs follow the event", i.e. that the loser pays the taxed costs of both sides, the practice is very different in matrimonial cases where the wife if she loses is rarely ordered to pay her husband's costs and will frequently recover her costs from the husband. The historical reasons for this are well set out in the Report of the Morton Commission[17]. Briefly the present position is a relic of the old rule that on marriage the wife's property passed to the husband. She would therefore be without funds to enable her to take or defend matrimonial proceedings. To enable her to obtain justice (and, incidentally, to protect a solicitor acting for her), it was established that, as a general rule, whether she was petitioning or defending, her costs were "necessaries" for which she might pledge her husband's credit as an agent of necessity. Further she had the more valuable right to apply for an order that he give security for her costs. Even if unsuccessful she would seldom be ordered to pay her husband's

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15. S.32(3).
16. S.32(2).
17. Cmd. 9678, paras.438-447.

costs and would generally be awarded her own costs up to, and sometimes beyond, the amount of the security.

103. The reasons for the practice have long since disappeared. It is true, of course, that in most cases the husband will be the wage-earner and the wife less likely than the husband to have resources to pay for legal proceedings. But, as the Morton Commission pointed out, since the implementation of the Legal Aid and Advice Act 1949 a wife is assured of the service of a solicitor and of the ability to bring or defend proceedings whenever she has reasonable grounds for doing so. Accordingly the Commission recommended that the special practice of the Divorce Division should be abolished and that in respect of liability for costs husband and wife should be treated on exactly the same footing[18]. They suggested:-

(a) that the wife's costs of bringing or defending matrimonial proceedings should no longer be regarded as necessaries for the provision of which the husbandis liable;

(b) that the special practice of the Divorce Division whereby a wife may obtain security for costs should be abolished; and

(c) that in the exercise of the court's discretion to award costs a husband should not as a general rule be made liable for the costs of an unsuccessful wife or have to prove that she had sufficient means before he could obtain an order for costs against her.

104. These recommendations have never been implemented, but, as a result of the growing economic equality of husband and wife, security is asked for and granted somewhat less often (especially when the wife has obtained a legal aid certificate) and the courts are more ready to make the wife liable in costs.

105. In considering whether the change recommended by the Morton Commission should now be made, we have been concerned to ensure that this would not increase the cost to the State of the Legal Aid Scheme under which the majority of divorce suits are brought. Prima facie it might be thought that the burden on the Legal Aid Fund is diminished as a result of the right of an unsuccessful legally aided wife to recover costs from the husband. In fact, however, it appears that this benefits the Fund comparatively rarely. This is because under the modern practice a successful

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18. Ibid., paras.456-460.

husband is not ordered to pay his wife's costs except to the extent of any security that he may have been ordered to give and because in most cases security is not asked for where the wife has obtained a Civil Aid Certificate. It was found that, if security was always asked for, cases tended to grind to a halt since frequently the husband was unable or unwilling to provide it. Hence those administering the Legal Aid Scheme no longer put pressure on the aided wife's solicitor to apply for security. The solicitor ought to do so where it is clear that the husband is in a position to provide it and generally, no doubt, the solicitor then does so[19]. But he is not under the same inducement to do so for his own protection as he would be if there were no Civil Aid Certificate, for he knows that his costs are secured in any event.

106. The present rules regarding costs therefore protect the Legal Aid Fund from loss in those comparatively rare cases where the legally aided wife has obtained security. They do so where the wife has been unsuccessful but had the usual order made in her favour to the extent of the security and in practice they also do so in the much more frequent cases where she has succeeded, because unless security has been given it may be impossible to enforce the order for costs which she will then obtain. As against that, the present rule whereby a losing wife is rarely ordered to pay costs acts to the detriment of the Fund. On balance, however, we have no doubt that the straight implementation of the Morton recommendation would be detrimental to the Legal Aid Fund and cause the Scheme to become more expensive to the State. Though we do not think the amount involved would on balance be large, we are reluctant to support any recommendation which would make the scheme more expensive unless convinced that this is required in the interests of justice.

107. In our view the implementation of those parts of the Morton recommendation relating to (1) the abolition of the wife's agency of necessity and (2) the removal of the difference in the position of husband and wife as to costs, are required in the interests of justice and would not be detrimental, but the reverse, to the Legal Aid Fund; but, as regards the part relating to (3) the abolition of security for costs, its implementation would not be in the interests of justice and would, as already pointed out, be marginally detrimental to the Fund. We proceed to deal separately with each of these three parts of the recommendation.

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19. For a recent example where he did and the Legal Aid Fund was thus protected from loss, see Carter v. Carter [1966] P.1.

(i) Agency of necessity

10. To the broader question whether the wife's agency of necessity (as opposed to her presumed authority to pledge the husband's credit for family necessaries) should be totally abolished, we have referred elsewhere[20]. Irrespective of what the decision may be in other situations, we have no hesitation in recommending that the doctrine should be abolished in respect of costs in matrimonial proceedings. As the Morton Commission pointed out, since the implementation of the Legal Aid and Advice Act the doctrine is not needed for the wife's protection. Although there is a historical connection between the doctrine and the powers of the court to order security and to order the husband to pay his wife's costs, as Carter v. Carter[21] clearly illustrates, both powers are now possessed by the court whether or not the agency of necessity doctrine applies. The court now possesses adequate inherent powers to protect the wife's solicitor when protection is needed[22]. The continued existence of the agency of necessity doctrine makes it impossible to rationalise the rules relating to costs, for it means that although the court awards the wife only party-and-party costs or no costs at all her solicitors may be able to recover from the husband the whole of their solicitor-and-own-client costs[23]. Indeed, it seems that the rule is capable of destroying the protection intended to be afforded by s.2(2)(e) of the Legal Aid and Advice Act 1949 (see next para.) to a legally aided husband. Suppose that in a defended divorce case brought by a wife against a legally aided husband, the wife's solicitor-and-client costs are £1,000, her taxed party-and-party costs, £800, but the court limits the costs payable to her by the husband to £100. It seems that the wife's solicitors may be entitled to sue the husband for the whole of the £1,000 if the wife does not pay[24]. Since 1897, the agency of necessity rule has been held to have no application to costs of proceedings before magistrates for a separation or maintenance order[25]. In our view it is high time that it was abolished generally so far at any rate as costs are concerned.

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20. Paras.41-52.

21. Supra, n.19.

22. See, for example, Jinks v. Jinks [1911] P.120 and Carter v. Carter, supra.

23. See, for example, Nabarro & Sons v. Kennedy [1954] 2 All E.R. 605.

24. Cf. Nabarro & Sons v. Kennedy where she went to Australia. It is not an answer to say that the wife's solicitors would have no chance of recovering from the husband; they might, for assets such as his home and furniture, which are excluded in assessing his maximum contribution, are not protected from execution.

25. Cale v. James [1897] 1 Q.B. 418. In Nabarro & Sons v. Kennedy, Stable J. regretted that he felt unable to extend the ambit of that decision.

The doctrine is, in this field at any rate, an unnecessary and embarrassing anachronism.

(2) Different liability for costs of husband and wife

109. We equally have no hesitation in saying that a husband should not be mulcted in costs merely because he is the husband, nor the wife escape liability for costs merely because she is a wife. Here, as elsewhere, husband and wife should be treated alike so far as the court's powers to order costs are concerned. This would mean that, as the Morton Commission recommended, a successful husband would not have to prove that the unsuccessful wife had sufficient means before he could obtain an order for costs against her. On the other hand it would not, in practice, mean that an order for costs would often be made against either party that was beyond his or her ability to pay. This is because parties who are impecunious will normally be legally aided and, under the Legal Aid and Advice Act 1949 an assisted person's "liability by virtue of an order for costs made against him ... shall not exceed the amount (if any) which is a reasonable one for him to pay having regard to all the circumstances, including the means of all the parties and their conduct ..."[26]. In practice this normally means he will not be ordered to pay more than a further year's maximum contribution out of income.

110. It seems clear, however, that the provision just quoted not infrequently produces the undesirable consequence that a respondent or co-respondent obtains legal aid not because he really wants to defend but solely in order to protect himself against full liability for costs. Similarly petitioners often obtain legal aid not because they cannot afford to pay their own costs but in order to protect themselves against heavy liability for costs in the unlikely event of the petition being defended. We think that steps should be taken to minimise the waste of public funds that this may involve. Accordingly we make three tentative suggestions in this regard for consideration:-

(a) to discourage fruitless claims for costs in petitions;

(b) to discourage last-minute amendments of petitions claiming costs; and

(c) to enable parties to limit their liability to pay costs to a maximum amount; this will be fixed by the Supplementary Benefits Commission after an assessment of their means as for purposes of legal aid.

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26. Legal Aid and Advice Act 1949, s.2(2)(e).

(a) Discouraging Claims for Costs

111. Our first suggestion is designed to ensure that costs are not claimed where the circumstances are such there there is little hope of their being recovered. The rules already provide that if costs are claimed there must be a prayer for costs in the petition[27]. It is our impression, however, that sometimes a claim for costs against the respondent (and co-respondent if any) is inserted as a common form plea without adequate consideration whether it is really justified or because it is feared that its omission may lead to a suspicion of collusion. Often the petitioner will know only too well that it is hopeless to expect costs to be recoverable. In these circumstances the sensible course is not to ask for costs and thereby reduce the risk of the petition being defended (however half-heartedly) and of the costs being greatly increased. We accordingly think that solicitors, and barristers settling petitions, should be exhorted to give careful consideration to this question. So far as concerns cases outside the Legal Aid Scheme we cannot go beyond exhortation. But about 70% of divorce petitioners are legally aided and it is here that the question is particularly important and where, at present, a prayer for costs is perhaps most likely to be included. If the petitioner's contribution is only nominal he or she will have no personal interest in whether costs are claimed or not and is therefore unlikely to express any views on the subject. It is the Legal Aid Fund alone that is then really interested and in the absence of any instructions the petitioner's solicitors are likely to feel that costs should be claimed since they might be criticised by those administering the Legal Aid Scheme if they omitted to do so. In fact, as it seems to us, the omission of a claim will often be more truly in the interests of the Fund. Accordingly we think solicitors acting for legally aided petitioners should in each case carefully consider whether it is appropriate to claim costs; if they decide that it would not, they should not be liable to criticism or be penalised on that score.

(b) Amendments Asking for Costs

112. We also think that where costs are not claimed in the petition the respondent or co-respondent should be able to rely more confidently than at present on the fact that costs will not be awarded against him. It is our impression that some courts have been too ready to allow a last-minute amendment of the petition by inserting a prayer for costs. The result is that a respondent

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27. Matrimonial Causes Rules 1957, r.4(4).

or co-respondent, on receipt of the petition not claiming costs, cannot feel complete confidence that there is no possibility of costs being awarded against him. Indeed, so far as a husband-respondent is concerned it has been suggested that he can hardly be prejudiced by an amendment since he would in any case be liable to a separate action to recover costs based on the agency of necessity doctrine[28]. This affords another reason for the abolition of that doctrine. We think that it would go too far to suggest that in no circumstances should an amendment claiming costs be allowed. But we do suggest that a practice direction should be given to the effect that such an amendment should not be allowed against a party unless the amended petition is re-served and time allowed for that party to obtain legal aid and appear and defend if he has not already done so. This proposal, coupled with that in the last paragraph, would, we think, help to reduce the number of cases in which a respondent or co-respondent applies for legal aid ostensibly to defend but really only as a protection against unlimited liability for costs.

(c) Limitation of Liability for Costs

113. Thirdly we suggest that a provision analogous to s.2(2)(e) of the Legal Aid and Advice Act[29] should apply generally in matrimonial causes whether or not the parties are legally aided. What we have in mind is to enable any party, without having to apply for or obtain legal aid, by taking the appropriate steps to ensure that his "liability by virtue of an order for costs made against him shall not exceed the amount (if any) which is a reasonable one for him to pay having regard to all the circumstances, including the means of all the parties and their conduct". In order to make this workable, a procedure would have to be devised whereby a party who did not wish to obtain legal aid could nevertheless obtain an assessment from the Supplementary Benefits Commission of his maximum contribution, which assessment would be made available to the court when it came to award costs. So far as the respondent and co-respondent are concerned this would mean that when served with a petition claiming costs they could have their maximum contributions assessed and obtain the protection, at present afforded by s.2(2)(e) to legally assisted litigants only, without having to waste public money by obtaining or attempting to obtain legal aid to defend the indefensible. The petition, or a notice served with it, would have to draw their attention to this right. We can see no particular difficulty

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28. Booth v. Booth [1966] 2 W.L.R. 482 at p.485.
29. Quoted in para.109 above.

in enabling the assessment to be obtained. In effect all it would mean is that the financial part only of the Legal Aid application would be completed and sent, as at present, to the Commission which would make the assessment in the usual way. We see no reason why the same right should not be afforded the petitioner. Since those parties who are conscious of and worried by the possible burden of costs already apply for legal aid and have their means assessed whether or not a Certificate is ultimately granted, we do not think that this would materially increase the number of cases in which the Supplementary Benefits Commission would be required to make assessments.

114. In any event the assessment of means by the Commission is relatively inexpensive compared with the subsequent investigation by Certifying Committees. The number of applications which these Committees would be called upon to consider would, we are sure, be materially reduced, and some cases where, at present, certificates are granted, thereby imposing a still greater burden on the Legal Aid Fund, would never come before them at all. It is true that there would be some cases where, at present, the legally aided party would obtain a full order for costs against the other (non-aided) party but where, under this proposal, only a limited order would be obtained. But we doubt whether, in practice, many such orders prove enforceable up to the hilt. Furthermore the proposal would undoubtedly lead to some cases, which at present are defended when they should not be, going through as undefended cases with a considerable saving in costs.

115. In our view, therefore, this proposal would, in the majority of cases, benefit not only the party whose liability to costs was limited, but also the Legal Aid Fund. Moreover, the only circumstances in which it could be detrimental to the other party are where, under the present law, (i) a full order for costs would be made, and (ii) such order could be enforced up to the hilt, notwithstanding that the costs exceeded the maximum contribution assessed by the Supplementary Benefits Commission. Even where this unusual concatenation of circumstances existed, the other party would still not suffer a detriment if he himself was legally aided unless a recovery of full costs from his opponent would have entitled him to a refund of part of the contribution which he himself had been required to pay. He would benefit whenever the proposal led to a case going through undefended and whenever it saved him from pouring good money after bad by seeking to get blood out of a stone.

116. In our view a reform on these lines would have a number of desirable consequences. It would reduce the present wasteful expenditure on legal aid when legal aid is not really needed. It would minimise the number of cases in which unenforceable orders for costs are made and prevent wasted expenditure on abortive attempts to enforce them. Perhaps most important of all, it would reduce the bitterness and family disruption caused by keeping undischargeable orders for costs hanging round the necks of husbands, wives and co-respondents (often the second husband). It is this last consideration which gives the answer to an objection which may be raised to the proposal. It may be said that to limit liability for costs in matrimonial proceedings alone would be to introduce an anomalous distinction between matrimonial causes and other types of litigation. The fact is that a distinction is already drawn and, although we do not think the present distinction is drawn in the right way, we do think that it is right not to equate matrimonial causes with normal litigation. Divorce is not a private adversary process in the same way as is normal litigation. It is a method of ending a marriage; not a lawsuit which the parties can settle out of court if they want to. Once the court proceedings are over everything should be done to enable the family to settle down again. All this, in our view, justifies a rather different approach to the whole problem of liability for costs.

Should Costs follow the Event?

117. For the same reason we do not think that it is appropriate to introduce into matrimonial proceedings a rigid rule that "costs follow the event", i.e. that the loser pays. In perhaps the majority of divorce cases the ending of the marriage is regarded by both husband and wife (whichever be the petitioner or respondent) as the best solution to their matrimonial problems. Accordingly it is inappropriate that one should always be regarded as the loser who pays and the other as the winner who is indemnified. As between husband and wife (we deal later with the position of the co-respondent) the fact that, under our present divorce system based on proof of a matrimonial offence, one must be regarded as winning and the other as losing should be but one factor among many in determining liability for costs. All the circumstances, including the conduct and means of the parties as well as the verdict on the issue of guilt (often an unreal issue), should be taken into consideration. In our view in matrimonial proceedings the court should have and exercise an unfettered discretion regarding costs.

Any attempt to determine liability for costs solely on the basis of winning or losing would become still more inappropriate if the matrimonial offence were superseded or supplemented by breakdown, whether in the pure form recommended by the Archbishop's Group on Divorce in Putting Asunder[30] or in the form of the separation ground canvassed by us in our Report, Grounds for Divorce - The Field of Choice[31]. It would then often be quite arbitrary which party instituted proceedings (indeed it may be that joint petitions by both should be permissible) and neither should be regarded as having lost or won.

(3) Security for costs

119. For much the same reason we do not favour the abolition of security for costs. As previously pointed out, we think that its abolition would have detrimental consequences to the Legal Aid Fund. We also think that it would cause hardship to wives whose means take them just outside the Legal Aid Scheme but who could not bear the costs of a suit if that were defended. But neither of these is the basic reason why we recommend its retention - and indeed its extension so that in appropriate circumstances (i.e. a wealthy wife and a poor husband) the wife may be ordered to provide security for her husband's costs. We do so because it seems to us to be an eminently sensible and desirable institution, at any rate in the context of matrimonial proceedings. It ensures that money is immediately available to discharge any order for costs that may be made and avoids the frustration and hostility caused by abortive attempts to recover costs after the suit is over.

120. We do not suggest that attempts to obtain an order for security should become an automatic step in every divorce suit. We are sure that the Legal Aid authorities are right in thinking from their experience that this very often merely causes delay and additional expense. At the same time we do think that the question whether an order should be applied for is one to which consideration should always be given, both in legal aid cases and others. We suspect that in legal aid cases the tendency not to apply for security has gone too far and that those responsible for administering the Scheme should consider asking Certifying Committees to direct in each case whether security should be applied for. There would be nothing new in such a request, for these Committees used to address their minds to this very question during the time when cases in which the applicant's contribution was less than £10

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30. Putting Asunder: A Divorce Law for Contemporary Society, S.P.C.K. 1966.

31. Cmnd. 3123; LAW COM. No.6.

had to be left to the Law Society's Divorce Department unless the Committee thought that security could be obtained.

Costs Against Co-Respondents or Women Named

121. In the foregoing paragraphs we have assumed no basic change in the principles on which costs are awarded against a party with whom the respondent is alleged to have committed adultery. Before discussing this basic question it is necessary to draw attention to a procedural distinction between men and women which seems to us to be anomalous and anachronistic. Wherever the petition (or answer) alleges adultery it must, unless contrary leave is given, be served on the man or woman with whom adultery[32] is alleged[33], and he or she is entitled to dispute the allegation[34]. But whereas a male adulterernamed in the petition automatically becomes a party (the co-respondent) to the suit and is named in the title of it, an adulteress is merely "the woman named" and does not become a party unless she intervenes or costs are claimed against her[35]. We can see no justification for the retention of these sex discriminations. Logically there is much to be said for the procedure applicable to the woman which ensures that she does not become a party in law unless she is truly a party in fact. On the other hand public opinion might not take kindly to the introduction of the novel concept and style of "the man named", whereas the meaning of "co-respondent" is generally understood. Provided that liability to be condemned to pay the costs is the same for both sexes and any procedural distinctions between them are abolished, it is a matter of secondary importance what the legal designation of the alleged adulterer and adulteress should be. We shall be grateful for any suggestions.

122. Originally the rule of practice was that costs would not be awarded against a co-respondent unless the husband-petitioner could prove not only that the co-respondent knew the wife was married but also that he was aware of this fact at the time adultery commenced. Although this rule has subsequently been somewhat relaxed, the practice ten years ago was summarised by the Morton Commission[36] as follows: "A husband will not usually obtain his costs unless he can show that the co-respondent knew that the respondent was a married woman or that, if he did not know, the circumstances were

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32. Or sodomy - but this is so rarely alleged that we ignore it in the discussion which follows.

33. Matrimonial Causes Rules 1957, r.9(1)(a).

34. Ibid., r.16(1).

35. Ibid., r.5.

36. Cmd. 9678, para.462.

such that it would be just to condemn him in costs". The Commission accepted the criticism that this is a burden which, in many cases, could only be discharged with the greatest difficulty. They thought that the burden of proof should be reversed and that it should be for the co-respondent, once the adultery had been proved, to show cause why he should not be condemned in costs. They recommended that this should be achieved by providing that there should be a presumption, until the contrary was proved, that the co-respondent committed adultery with the respondent in the knowledge that she was a married woman.

123. It is not obvious, however, why it should necessarily be unjust to condemn a co-respondent in costs merely because he can show that he did not know that the respondent was married. It could be argued that to this extent one engages in illicit sexual intercourse at one's peril. In the case of costs, as opposed to damages for adultery, there can be no question of blackmailing claims being made by the petitioner-husband in collusion with the respondent-wife, since all that can be recovered is the whole or part of the costs actually incurred in the suit.

124. Bearing in mind that the vast majority of divorce suits are legally aided it is clearly in the public interest that costs should be recoverable from as wide a range of parties as is consistent with justice. It is accordingly recommended that if a decree nisi has been granted on the ground of adultery, the adulterer (whether a man or woman) against whom costs are claimed should be liable to be ordered to pay the costs of any other party, unless he or she can show that it would be unjust in the light of the conduct of the parties and the other circumstances of the case. The mere fact that he or she did not know that the respondent was married should not be sufficient to exempt from liability; equally knowledge of the marriage should not necessarily make him or her liable for costs in a case where the marriage had already broken down, or where the wife was a prostitute, or where for some reason it would not be just to make him or her pay. Since the Morton Commission reported, the courts have in fact moved to a position very close to that suggested(37).

125. The final question that arises is whether a person should be liable for costs only when he or she has been found guilty of adultery. It is generally assumed that only in these circumstances

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37. See Lycett-Green v. Lycett-Green & Du Puy [1956] 1 W.L.R. 990; Jackson v. Jackson & Pavan [1964] P.25. These cases stressed that the court has an unfettered discretion and in the latter the co-respondent was ordered to pay costs because he ought to have known that the wife was married although there was no evidence that he did.

can costs be awarded against him[38]. And obviously it would normally be utterly unjust to condemn in costs someone who has successfully defended an allegation of adultery. But one can conceive of circumstances in which it would be eminently reasonable. If, for example, a wealthy man has broken up the marriage by inducing the wife to share his bed and board there is no reason why he should not pay the costs of divorce proceedings instituted by the husband even if these are abortive because he succeeds in proving that he was impotent and that therefore no actual adultery has taken place. Rayden on Divorce[39] cites an unreported case in which a co-respondent was ordered to pay costs notwithstanding that the allegations against him of actual adultery were dismissed[40]. We think that if adultery has been proved the co-respondent should not necessarily escape liability for costs if the petition is dismissed because of the petitioner's adultery[41]. We accordingly recommend that the rule should be that where proceedings for divorce or judicial separation are based on adultery the alleged adulterer should be liable to have an order for costs made against him or her whatever the outcome of the suit, although only in exceptional circumstances should a co-respondent who is dismissed from the suit be ordered to pay costs.

126. None of the foregoing recommendations is intended to derogate from what we have said in paras.111-118. Costs should not be recoverable from the alleged adulterer unless they have been asked for in the petition and petitioners should be discouraged from asking for costs unless it is reasonable to suppose that they will be recoverable. The alleged adulterer should be able, without having to obtain legal aid, to limit his or her liability in the way suggested in para.113 and the court should have an unfettered discretion regarding costs.

127. We have considered whether, in the light of the arguments in paras.119 and 120, the court should not be empowered to order a co-respondent to give security for costs. We do not think so. Despite the advantages of ensuring that a fund from which costs can be paid is in hand before the decree is granted, it would, in our view, be unreasonable and undesirable to place any such obstacle in the way of a man or woman who wished to contest an allegation of adultery. It might also encourage bogus divorces based on a false

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38. The point was left open in Howell v. Howell [1953] 2 All E.R. 628, C.A.

39. 10th Edition at p.747.

40. Karney v. Karney & Turner (1959).

41. Ravenscroft v. Ravenscroft & Smith (1872) L.R. 2 P. & D. 376.

confession of adultery by husband and wife which the alleged other party would be discouraged from exposing by a threat that if he defended application would be made for security.

Damages for Adultery or Enticement

128. A husband, but not a wife, may on a petition for divorce or judicial separation claim damages from any person on the ground of adultery with his wife; alternatively, though this is rare, damages may be claimed without asking for other relief[42]. Item XV of our First Programme includes the husband's right to claim damages for adultery among the parts of the law "which seem to rest on social assumptions which are no longer valid".

129. A claim for damages for adultery is tried on the same principles as the old action for criminal conversation which it replaced in 1857[43]. The court may direct in what manner the damages are to be applied and may direct them to be settled for the benefit of the children (if any) or the wife[44]. Accordingly, if the petitioner gives an undertaking to bring the damages into court, as is frequently required, bankruptcy proceedings cannot be taken by him to enforce payment against the co-respondent[45]. This gives rise to difficulties of enforcement with which any amendment of the law on this subject ought to deal.

130. The compensatory principles upon which damages are to be assessed were fully reviewed in Butterworth v. Butterworth & Englefield[46] and Pritchard v. Pritchard & Sims[47]. Claims for damages, except when joined with claims for divorce, are exceedingly rare. They are closely related to actions for enticement which, however, may be brought by a wife as well as by a husband. A claim for damages may be brought after the death of the wife or after a divorce: Kent v. Atkinson[48]. It will, however, abate on the death of either the husband or the adulterer[49]. If the petition is limited to a claim for damages, domicil in England is unnecessary; the action is treated as one in tort[50].

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42. S.41(1).
43. S.41(2).
44. S.41(3).
45. Re Muirhead (1876) 2 Ch. D.22, C.A.
46. [1920] P.126.
47. [1966] 3 All E.R. 601, C.A.
48. [1923] P.142.
49. Law Reform (Miscellaneous Provisions) Act 1934, s.1(1).
50. Jacobs v. Jacobs & Ceen [1950] P.146.

131. The Morton Commission[51] reviewed this remedy but made no recommendation except that a wife should be given the same right to claim damages from an adulteress as her husband has to claim them from an adulterer. This recommendation has not been carried out.

132. We have already pointed out the close connection between claims for damages for adultery and the independent action for enticement which enables a husband or wife to sue a third party who has induced the other spouse to leave or remain apart. This action was recommended for abolition by the Law Reform Committee in their Eleventh Report[52] and is also among those actions we are charged under Item XV of our First Programme to review. Many of the same objections apply both to actions for damages for adultery and for enticement. Both treat the wife as the husband's chattel, and lend themselves to blackmail especially when there is collusion between husband and wife. Both encourage perjury when there is collusion between the wife and her seducer. But in some respects, the action for damages for adultery is more objectionable than that for enticement. The latter at least recognises that the claim is based on the fact that the husband, because of the defendant, has lost his wife. The former purports to compensate the husband for the fact that the defendant has had sexual intercourse with the wife. This rather barbarous theoretical basis of the action has adverse practical consequences in that the parties are able to place one another in a humiliating position and when proceedings are brought they tend to create great bitterness between the parties. The action for enticement also has the merit of treating both sexes alike, for the English courts (differing in this respect from those of some other parts of the common law world) have held that it is available to a wife as well as a husband[53], whereas damages for adultery in divorce proceedings are obtainable only by the husband against the male co-respondent[54].

133. Strictly speaking, the action for enticement, not being a matrimonial cause, falls outside the scope of this Paper. But it is so closely related to damages for adultery, which, as already indicated, cannot be excluded from consideration here, that we cannot ignore it. As already pointed out, the Law Reform Committee recommended its abolition. No steps have been taken to implement this proposal, but the action is among those for which legal aid is

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51. Cmd. 9678, paras.429-435.

52. Cmnd. 2017.

53. Gray v. Gee (1923) 39 T.L.R. 429; Newton v. Hardy (1933) 149 L.T. 165; Elliott v. Albert [1934] 1 K.B. 650, C.A; Best v. Samuel Fox, Ltd. [1952] A.C. 716 at 729 per Lord Goddard C.J.

54. S.41(1).

not available[55], which may be taken as some sign of legislative discouragement of the action. It is an action which is uncommon and which had almost fallen into desuetude until public attention was drawn to its continued existence by a case which attracted some notice in 1932[56]. Success is rarely achieved since the plaintiff has to discharge the onus of proving that the alleged enticer has done more than offer advice or alienate the spouse's affection and the courts are reluctant to allow an action against parents-in-law[57]. The Law Commission's provisional view is that the action should be abolished.

134. If enticement is to go, it would be highly anomalous to retain damages for adultery which, as already pointed out, seem still more objectionable. Nevertheless, though enticement seems to have few supporters, there appears to be less unanimity regarding the abolition of damages for adultery. Basically, we think this is because a claim in divorce proceedings seems less objectionable than an independent action in the Queen's Bench Division. However, other arguments have been put forward in favour of retaining it.

135. It is sometimes said that the right to claim damages from an adulterer gives the petitioner some satisfaction for his injured feelings, but for which he would assault the adulterer. We think that this is a little far-fetched, for at the moment when an angry husband hears what has occurred he very seldom knows that he can get damages from the adulterer. By the time that he consults his lawyer his first anger will be over and the danger of physical assault will generally be small. Another argument sometimes put forward is that the risk of liability to damages deters would-be adulterers, but we do not believe that, in practice, this can often be a risk that is weighed or that if it was, it would often deter.

136. A more potent argument in favour of retaining the action for damages is that at present it is often the only way in which a husband can recover maintenance for himself or the children when a wife has been seduced by means of the co-respondent's wealth. This, it is said, fully justifies the retention of the action, and indeed its extension, so that there could be an award of damages payable by instalments, thus empowering the court to order the co-respondent without capital to provide maintenance out of current income. We think, however, that there is some danger here of concentrating on financial considerations alone. An order whereby the co-respondent,

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55. Legal Aid and Advice Act 1949, Sch.I Pt.II, 1(d).
56. Place v. Searle [1932] 2 K.B. 497, C.A.
57. Gottlieb v. Gleiser [1958] 1 Q.B. 267 n.

who in many cases will have become the second husband, is required to continue indefinitely to pay damages to the first husband would inevitably tend to keep alive bitterness between the parents which can only be harmful to the children. If the wife has married the co-respondent, the existence of a court order against him can hardly encourage him to accept the children into his home or to welcome them as visitors there.

137. The need for damages as a means of obtaining maintenance would be diminished if (a) husband and wife were placed on the same footing as regards a right to apply for maintenance, and (b) it were made clear that the court, in assessing the means of the wife, can have regard to what she may be expected to receive from her seducer. This, it is true, would not cover the case where the wife's association with the co-respondent had also broken up. This might be dealt with by empowering the court to order the co-respondent to settle property on the husband, wife and children or any of them. In that event, it is thought, agreeing to this extent with the Morton Commission, that the same rule should apply to the "woman named" who, if such a claim were made against her, would have to be joined as co-respondent. This solution is very similar to that recommended by the Royal Commission on Divorce and Matrimonial Causes as long ago as 1912(58).

138. At the present time the courts, in the course of proceedings for divorce or judicial separation or where damages for adultery alone are claimed, are prepared in a proper case to make an award of damages even though the co-respondent did not know that the respondent was married at the time when adultery was committed, especially if he is shown to have been culpably ignorant or reckless whether she was married or not. The circumstances may vary through endless gradations of guilt, from the wealthy man who seduces a wife by means of his money and breaks up a family down to the rich but inexperienced young man who is led into a brief affair by an unscrupulous woman whose relationship with her husband amounts only to a disreputable business partnership. Only if the court were given a complete discretion could it do what justice requires in every circumstance. Accordingly, if the solution suggested by the Gorell Commission were adopted it would seem that the court should be empowered to make an order requiring any co-respondent or woman named, as the case may be, to settle for the benefit of any member of the family such sum as the court thinks reasonable, having regard to the conduct of the parties and all

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58. The Gorell Commission: Cd.6478, paras.393-395.

other relevant circumstances. In deciding what sum would be reasonable the court would, no doubt, seek to quantify the financial loss, actual and prospective, suffered by members of the family in consequence of the dissolution of the marriage.

139. If the Gorell Commission solution were adopted it would have to be made clear that the property which the co-respondent or woman named might be ordered to settle was not intended in any way as damages for adultery. It would be awarded on the same principles as those applying to an order against the wife to settle property under the present law, i.e. as a method of restoring as far as possible the financial position of the parties to what it would have been but for the break-up of the marriage. There would be no independent action against the co-respondent or woman named; he or she would be subject to an order to settle only in proceedings for divorce or judicial separation. The court would have a discretion whether or not to order such a settlement and would normally order one only when the co-respondent or woman named had been responsible for breaking up the marriage and if a settlement by him or her was the only way to restore the financial position.

140. We realise that the Gorell Commission's proposal may appear to the non-lawyer to be not very different from the present action for damages. The differences would be as follows:-

(1) A wife petitioner would be placed in the same position as a husband petitioner and the woman named would be joined as a party and called a co-respondent.

(2) The petitioner would not be able to seek a settlement except in conjunction with a petition for divorce or judicial separation.

(3) Provision would have to be made for evidence of the means of the co-respondent to be adduced before the court; otherwise any order of the court might bear unduly hardly on his family, wreck another marriage and harm more children.

(4) The basis of the power to order a settlement would be purely to compensate for economic loss and would take no account of injured feelings.

141. This proposal is open to most of the same objections as the action for damages. It would lend itself to blackmail by collusion between husband and wife; it would encourage perjury if the wife and her seducer were in collusion; the proceedings, whether

successful or not, would be certain to increase and perpetuate bitterness between the parties. Nor would the proposal deter adulterers from committing adultery or outraged husbands from taking the law into their own hands. It would still be illogical and discriminatory to retain any form of financial liability for breaking up a marriage by committing adultery with one of the spouses, while abolishing it when the marriage is broken up without adultery having been committed or being susceptible of proof. Cases have recently occurred where a young wife has left her husband at the instance of a member of some exclusive religious sect, being persuaded that she will be damned if she continues to co-habit with a non-believer. In the eyes of many people conduct of this character may be as hard to excuse as the commission of adultery. But does anyone really favour widening the range of co-respondents so that anyone who is alleged to have caused the breakdown of the marriage can be joined and a claim made against him? If damages were to be payable by the wealthy interloper whose familiarities with the wife led the husband reasonably to petition on the ground of adultery but who can prove his technical innocence because he is impotent (though he should, of course, be condemned in the costs of the proceedings), or even by a member of an exclusive religious sect who persuades a wife to leave her husband, how does one draw the line so as to prevent the growth of a spate of bitter and fruitless actions against interfering mothers-in-law?

142. Accordingly we are inclined to the view that damages for adultery (and the action for enticement) should be abolished altogether and not replaced by any financial liability (other than for costs). However, we feel that this is not a question on which we at this stage ought to give a firm opinion. It is a matter for the moral judgment of society generally, which may feel that in outrageous cases a rich seducer should be made to pay. We shall welcome comments from the readers of this paper, both lay and legal.

Enforcement

143. There is now a wide variety of means of execution available to enforce orders for the payment of money. The Maintenance Orders Act 1958 has enabled a High Court order to be registered in a magistrates' court and an attachment of earnings order to be made. But grave difficulties are still being experienced arising out of the common inability to maintain more than one family and the habitual determination to prefer the new wife to the old. The whole question of the enforcement of judgment debts is at present under review by the Committee on the Enforcement of Judgment Debts

set up by the Lord Chancellor in February 1965 under the chairmanship of Mr. Justice Payne. It will doubtless have something to say about the enforcement of matrimonial orders[59]. Such orders - whether made by the Divorce Court or by magistrates' courts - present particular difficulties of effective enforcement[60]. This is borne out by the Report of the National Assistance Board for 1965[61] which shows that about 43,000 of the separated wives who were in receipt of assistance had maintenance orders and of these only about 21,000 were being complied with regularly, 15,000 were not being complied with at all and 7,000 were being paid irregularly.

144. Even as regards the purely legal questions there are still a number of anomalies and uncertainties. It seems reasonably clear that, just as the court may remit arrears by backdating a variation order[62], so too it has a discretion regarding the amount of arrears of alimony and maintenance which are recoverable by execution[63]: it is obviously desirable that the court should have this discretion because it happens not infrequently that a husband, learning of a change in the wife's circumstances (for example, her adultery or re-marriage), merely discontinues payments without taking

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59. It is worth mentioning in this connection the sociological investigation now being carried out by Professor O.R. McGregor of Bedford College and Mr. L. Blom-Cooper into the effectiveness of matrimonial orders made in magistrates' courts. This investigation, to which we have already made reference in para.4 of this Paper, is conducted under the supervision of the Matrimonial Courts Committee set up and presided over by the President of the Probate, Divorce and Admiralty Division.

60. We have found the observations of Mrs. Margaret Wynn in her book "Fatherless Families" (Michael Joseph, 1964) at pp.58-73 of considerable interest, although more recent statistics are now available than some of those relied on there.

61. Cmnd.3042. It is stated on p.27 of this Report that of some 50,000 separated wives who had neither court orders nor out-of-court agreements, 22,000 husbands had left the country or were untraced. The Board estimated that 104,000 separated wives were in receipt of assistance. By extracting figures from Table 13 in the Report and from an answer given to the House of Commons last February (H.C. Official Report, 6th February 1967, Col.1090, Oral Answers) one can summarise the known facts about their sources of income as follows:-

Separated Wives and Divorced Women with legitimate children -	£
Received from the National Assistance Board	32,274,000
Received from husbands and ex-husbands ...	3,323,000
The Board received from husbands and ex-husbands	2,700,000
Total contributed by husbands and ex-husbands	6,023,000
The Exchequer contributed	29,574,000

62. See para.92.

63. See, for example, Robins v. Robins [1907] 2 K.B. 13; Campbell v. Campbell [1922] P.187; James v. James [1964] P.303.

steps to apply for the discharge or variation of the order. In such circumstances it is obviously unfair that the wife should be allowed to let the "arrears" pile up and then levy execution for them. On the other hand, it is not easy for the court effectively to prevent this despite its discretion. A write of fi.fa. or sequestration may be issued out of the Registry on an affidavit of service of the original order and of non-payment[64]. The writ issues as of course unless an application for modification of the order is pending in which case the leave of the Registrar must be obtained[65]. Hence the court may not be seised of the matter in time to exercise any discretion. In an attempt to meet this difficulty, the Senior Registrar issued a circular on 4th March 1965 to the following effect:

> In reliance upon the established practice of the court that it will relieve a husband wholly or partially from the payment of arrears of alimony or maintenance if it is just to do so, it is considered that a registrar has a discretion to limit the amount of arrears of alimony or maintenance, payment of which it is sought to enforce by the issue of a writ of fieri facias or sequestration, to a sum which he considers reasonable in the circumstances. An application to issue such a writ in respect of more than a year's accumulation of arrears of alimony or maintenance is to be referred by the Contentious Department to the Registrar of the Day for a decision as to the amount for which it should issue.

145. In these cases, therefore, some special attention is given to this point, though, inevitably, because of the ex parte nature of the application, it has to be decided on evidence produced by the creditor wife only which is unlikely to include information as to the extent to which she has acquiesced in non-payment or under-payment. The debtor has some further protection because he can apply for the enforcement to be stayed whilst he applies for variation.

146. It should be pointed out, however, that "a year's accumulation of arrears" is taken to mean the amount of one year's payments. If, therefore, the order is for payment at the rate of £200 per annum, execution for not more than £200 will issue without query, notwithstanding that this may in fact represent ten years' accumulation of underpayments of £20 in which the wife acquiesced.

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64. Matrimonial Causes Rules 1957, r.64(1).
65. Ibid.

147. In other cases, where it is necessary to apply for leave of the court, the position is theoretically better, but in practice probably worse because it is left to the debtor to ask the court to invoke its discretion regarding the recovery of arrears. If this is done the court is reluctant to allow more than one year's arrears to be recovered[66]. There is, however, nothing in the papers served on the debtor to indicate to him that the court can be asked to make a special direction about arrears and, unless he is legally represented, the point is likely to go by default unless raised by the court of its own volition.

148. Having regard to the court's discretionary powers to vary the order or limit the amount recoverable under it, neither future payments nor arrears are provable in the bankruptcy of the husband[67]. This, on the whole, benefits the wife because the husband's liability is not discharged by his bankruptcy. The real hardship to her may arise on his death. As we have seen, most orders for alimony, maintenance or periodical payments cease on the death of the husband though the wife may have a remedy under ss.26-28 of the Act of 1965. There is, however, considerable obscurity as to whether arrears due to her at the date of his death are recoverable. The earlier cases appear to have established that arrears of alimony were recoverable from his estate, at any rate if the estate was solvent[68], but that arrears of maintenance were not[69]. The Court of Appeal in Re Bidie[70], which concerned a magistrates' maintenance order, approved Re Hedderwick and Re Woolgar[69] and did not follow Re Stillwell[68]. On the other hand, Denning L.J. in Sugden v. Sugden[71] stated that arrears were recoverable as a result of the Law Reform (Miscellaneous Provisions) Act 1934. Furthermore, Phillimore J. and the Court of Appeal held in W. v. W.[72] that the effect of the various relevant Rules of Court[73] when read together was to make orders enforceable in the same manner as judgments, notwithstanding the contrary decision in Re Woolgar. In the light of that decision, Buckley J. in Re Hudson[74] expressed doubts whether

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66. Pilcher v. Pilcher (No.2) [1956] 1 All E.R. 463; Luscombe v. Luscombe [1962] 1 W.L.R. 313, C.A.
67. Coles v. Coles [1957] P.68; James v. James [1964] P.303.
68. Re Stillwell [1916] 1 Ch.365.
69. Re Hedderwick [1933] Ch.669; Re Woolgar [1942] Ch.318.
70. [1949] Ch.121.
71. [1957] P.120.
72. [1961] P.113.
73. Matrimonial Causes Rules 1957, r.82, R.S.C. O.45 (now O.49) and O.42, r.24 (now O.45, r.1 which is in different terms but continues to equate judgments and orders for the payment of money).
74. [1966] 1 All E.R. 110.

it was any longer the law that methods of recovery of arrears cease on the death of the person ordered to pay:

> "An order to pay may be enforced in the same manner as a judgment (see R.S.C. O.42 r.24). If, which I do not decide, that rule is applicable to an order of the Probate, Divorce and Admiralty Division for payment of unsecured maintenance, it would seem to follow that instalments of maintenance, as they fall due under such an order, would constitute debts recoverable at common law and that a cause of action in respect of arrears under such an order would survive the death of the person owing such arrears" (75).

149. However, in Re Hudson there was no effective court order but, instead, an undertaking by the husband to the court that he would pay the wife one-third of his income, the former order being suspended in consideration of that undertaking. Buckley J. held that after the husband's death there was no method of recovering arrears. Moreover, the reasoning in W. v. W., based as it is on Matrimonial Causes Rules and Rules of the Supreme Court, would have no application to orders made in magistrates' courts, as regards which Re Bidie(76) is presumably still authoritative.

150. The whole position is obviously highly unsatisfactory. What seems to be needed to restore coherence is to lay down:-

(a) that arrears due are recoverable as debts and therefore survive death, subject in all cases to an effective discretion of the court(77); and

(b) that they are not provable in bankruptcy or against an insolvent estate.

The difficulty about (a) is to evolve means of ensuring that the court is in a position to exercise its discretion without placing unnecessary obstacles and expense in the way of enforcement. To require that leave to levy execution should be obtained in all cases might be too cumbersome. O.46, r.2 of the Rules of the Supreme Court requires leave to be obtained where the party entitled or liable to execution has died. A possible alternative would be to require that execution should not be levied to recover arrears of more than, say, six months without first serving a prescribed notice on the person liable informing him of the intention to enforce the order and of his right to apply to the court. The court should then be given express power to vary or discharge the order with retrospective effect, or to limit the extent of the

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75. Ibid. at p.112 D & E.

76. Supra.

77. Cf. Morton Report, Cmd. 9678, para.594.

recovery of arrears due. The disadvantage of having to give notice is, as the Morton Commission pointed out[78], that it would give the husband the chance to withdraw his property from the reach of the sheriff's officers. However, the wife could avoid this risk by enforcing the order in good time instead of allowing the arrears to pile up. Moreover this objection would not apply if the notice or the leave of the court were required only when it was sought to enforce the order after the husband's death.

151. The argument that a wife should not be able to prove in cases of insolvency is not as strong in the case of a deceased's estate as it is in the case of bankruptcy. To allow the wife to prove in the bankruptcy would make it altogether too easy for the legitimate claims of trade creditors to be defeated. Moreover, the wife may be able to obtain payment out of the husband's current earnings and thereby may do better than if she had to prove in the bankruptcy. If, however, the husband is dead there will be no current earnings and to deny her a right to prove in the administration of his estate is to prevent her from ever recovering anything. Moreover, there is less risk of collusive arrangements designed to defeat the creditors. On the whole, however, it would seem that a wife - even a divorced or separated wife - who, after all, originally took him "for better for worse, for richer for poorer" - should never be allowed to claim alimony or maintenance in competition with the husband's ordinary creditors.

152. Something also needs to be done to avoid the anomaly revealed in Re Hudson[79]: that there are no means of recovering arrears due under an undertaking once the giver of the undertaking has died. If, however, the court had a wider power as to the types of order it could make, the need to resort instead to undertakings would disappear.[80]

PART IV

MAINTENANCE OF CHILDREN

General

153. The statutory rules regarding the court's power to award maintenance for the children are expressed remarkably cryptically. However, their effect seems to be reasonably clear.

154. In the first place it must be realised that the various types of financial relief referred to above may also enure for the

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78. Ibid., para.592.
79. Supra.
80. Cf. s.87(1)(l) of the Australian Act: see Appendix C.

benefit of the children. This is expressly recognised in the case of settlements (s.17), periodical payments (s.22) and variations of maintenance agreements (ss.24 and 25). In addition, maintenance or alimony awarded to the wife will in practice take into account the needs of any of the children in her care[81].

155. However, the court also has power to award maintenance direct to the children or to trustees for them. This may take the form of unsecured maintenance awarded under the general power conferred by s.34(1) ("the court may make such order as it thinks just for the custody, maintenance and education of any ... child ..."). Such an order may be made in any proceedings for divorce, nullity, judicial separation or restitution of conjugal rights whether or not the proceedings are successful, but in the case of restitution of conjugal rights an order may not be made after the decree unless the respondent fails to comply with it. The Act gives no indication about the nature and duration of the maintenance but it has been held that in a proper case it may extend beyond the age of 21 years[82]. It has also been held that the wife as well as the husband may be ordered to pay maintenance for the children[83], but there appears to be no case where the "innocent" wife has been so ordered. On the other hand, it seems that the order automatically ceases on the death of the party ordered to pay maintenance and cannot be made to extend beyond his death[84].

156. In addition to, or instead of, unsecured maintenance, the children may also obtain secured maintenance under s.34(3). The circumstances in which this is obtainable, however, are very much more restricted. First it is only the husband who can be ordered to provide secured maintenance; the wife cannot be ordered to do so unless she obtains a divorce on the ground of his insanity. Secondly, it can be granted only in divorce or nullity proceedings and then only if the decree is granted. And thirdly, the term for which any sum is secured cannot extend beyond the date when the child will become 21. On the other hand, it seems that secured maintenance, if ordered during the husband's lifetime, can extend beyond his death. This was so stated by Denning L.J. in Sugden v. Sugden[85], and it is accepted in practice that this is the implication of s.34(3) though it does not expressly say so.

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81. Northrop v. Northrop [1966] 3 W.L.R. 1193.
82. Le Mare v. Le Mare [1961] P.10.
83. Hering v. Hering & Wilson [1943] 2 All E.R. 424.
84. Sugden v. Sugden [1957] P.120.
85. [1957] P.120 at p.134.

157. As we have seen, unsecured maintenance can be awarded beyond the age of 21 and, under the Inheritance (Family Provision) Act 1938, maintenance or a lump sum may be awarded to dependent adult children. But until the death of the husband secured provision cannot be made for adult children nor is there any power to award a lump sum as there is in favour of a wife. If the court had power to order secured provision or payments of a lump sum it would avoid the risk that if voluntary payments are in fact made within five years of death they are treated as gifts on which estate duty may be payable.

158. In addition to s.34, which applies where there are matrimonial proceedings, s.35(2) incorporates by reference s.22 and enables periodical payments to be made to the child or any other person for the benefit of the child, instead of to the wife.

159. The form in which the order is made can have an important effect on the tax position of those concerned. For example, the wife may receive the payments as an addition to her own income, or as income of the children in their own right, or as income deemed to arise under a settlement in such a way that it is treated for tax purposes as income of the father. If required to be paid weekly the payments in respect of the wife and children will be "small maintenance payments" so long as they do not exceed £7 10s.0d. per week in respect of the wife and £2 10s.0d. per week in respect of each child[86]. This means that they are paid without deduction of tax - a considerable boon to the wife. If, however, they are paid monthly, quarterly or in any other way than weekly, they fall outside this definition notwithstanding that the annual amount payable may not exceed the equivalent of the prescribed weekly maxima. The wife will then be put to the trouble and delay of recovering the tax which the husband will have had to deduct.

160. An interesting and valuable feature of the provisions relating to maintenance for children is that an order can be made in the matrimonial proceedings even though these are unsuccessful. There is here a marked contrast with the provisions for maintenance for the spouse where, as previously pointed out[87], the granting of a decree is an essential pre-condition for the making of the order.

161. The provisions of s.32, enabling the court to set aside transactions, apply to transactions designed to defeat claims of the

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86. Income Tax Act 1952, s.205, as amended.

87. Para.75.

children under ss.34 and 35. Nobody reading s.32 alone would realise this, for these sections are not listed among the "relevant provisions of this Act" as defined in s.32(4). However, s.32 is in fact made to apply by virtue of ss.34(7) and 35(3).

162. There is no express provision in the Act whereby direct application can be made to the court by or on behalf of the children. Since, in general, the grant of maintenance is dependent on the institution of matrimonial proceedings between husband and wife this is what one would expect in most cases. The rules do provide, however, that a guardian or other person who has obtained leave to intervene may, after entering an appearance, apply on behalf of the children in certain cases(88). Anomalously, however, there are no similar rules in the case of variation of settlements or settlement of a wife's property. Then the rules merely provide that the court may order that the children be separately represented(89), and the function of making the initial application seems to be left exclusively to the husband or wife. However, it is stated in the books, on the authority of old cases(90), that application may be made by the children's guardian even after the death of the petitioner. If that is correct the Rules should surely be revised as they are distinctly misleading. A trustee of a settlement cannot apply for its variation under s.17(1), but he can be heard in opposition(91). Equally, there appears normally to be no right for anyone to apply on behalf of the children in the cases where orders can be made outside the context of other matrimonial proceedings. It is only the wife who can apply for maintenance for the children on the ground of wilful neglect to maintain(92) and there seems to be no right for anyone to intervene on behalf of the children(93). There is, however, a general power to order that the children be separately represented(94). The position seems to be identical where the application is to vary a maintenance agreement under ss.24-25(95). A guardian appointed to act jointly with a surviving parent or to the exclusion of a

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88. See Matrimonial Causes Rules 1957, r.43(4) (maintenance), r.44(4)(c) (avoidance of dispositions) and r.46 (periodical payments after non-compliance with order for restitution of conjugal rights), which assume that an application may be made on behalf of the children.

89. Ibid., r.44(3).

90. Ling v. Ling & Croker (1865) 4 Sw. & Tr. 99 and Smithe v. Smithe & Roupell (1868) L.R. 1 P. & D. 587.

91. Corrance v. Corrance & Lowe (1868) L.R. 1 P. & D. 495; Smith v. Smith & Graves (1887) 12 P.D. 102.

92. Ss.22 and 35(2).

93. See r.58.

94. See r.56.

95. See r.58A.

surviving parent may apply for the award of maintenance by that surviving parent[96], but where both parents are alive they seem to be the sole arbiters of the amount to be expended on the children's maintenance so long as they keep above the subsistence level.

163. We accordingly invite views on whether, and if so how, it should be made possible for action to recover maintenance for a child to be taken otherwise than by the parent or guardian. We have in mind the sort of situation in which a wife of a relatively wealthy husband refuses to have anything to do with him or to obtain any maintenance order from him. This, it may be thought, is unfair to the children in her care, who, as a result, may not obtain as good an upbringing and education as they should and would if their mother would swallow her pride. Should, say, the grandparents then be able to institute proceedings on the children's behalf? The practical difficulties of doing so without the consent and co-operation of the mother are obviously great. Another situation in which the grandparents or other relatives might wish to take action on a child's behalf is where the parents unreasonably refuse to pay for some training needed by the child which it is well within their means to afford. But outside intervention would be likely to do more harm than good by destroying what family harmony remains. Hence, we see grave difficulties in widening the class of those who may apply.

164. Similar problems arising in magistrates' courts are discussed in Appendix B. There too it is for consideration whether the class of people with the right to apply for maintenance for children should be widened and whether such applications should normally be divorced entirely from the issue of custody.

Children for whom Maintenance Orders may be made

165. The provisions of Parts II and III of the Matrimonial Causes Act 1965 make a number of unjustifiable differences between the classes of children to which they apply. Ss.17 (wettlements) and 21(3) (settlements, etc. of wife's property on decree for restitution of conjugal rights) relate to "children of the marriage". Ss.22 and 35(2) (neglect to maintain: periodical payments) relate to "any infant child of the marriage in question and any infant illegitimate child of both parties to the marriage"[97]. In these sections by virtue of s.46(2) the term "child of the marriage" includes a child adopted by both parties to the marriage. S.23, defining "child of the marriage" for the purpose of ss.23-25

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96. Guardianship of Infants Act 1925, s.5(4); Children and Young Persons Act 1932, s.79.

97. S.22(2).

(maintenance agreements) refers to "any child of both parties to the marriage, whether legitimate or not, and any child adopted by both parties to the marriage". Finally ss.33 and 34 (care and maintenance of children) refer to "relevant child" and s.46 defines this as:

> "(a) a child of both parties to the marriage in question; or
>
> (b) a child of one party to the marriage who has been accepted as one of the family by the other party,
>
> and in paragraphs (a) and (b) of this definition 'child' includes illegitimate child and adopted child".

S.46 also states that:

> "'adopted', except in section 23(2), means adopted in pursuance of an adoption order made under the Adoption Act 1958, any previous enactment relating to the adoption of children or any corresponding enactment of the Parliament of Northern Ireland or made in the Isle of Man or any of the Channel Islands".

The definition of "children of the family" for the purposes of the Matrimonial Causes Rules is equivalent to the definition of "relevant child" and so is the definition of "child of the family" for the purposes of the Matrimonial Proceedings (Magistrates' Courts) Act 1960[98].

166. The net result is this: legitimate children of the marriage are, as one would expect, included for all purposes and this now includes children adopted by both parties to the marriage. Except in one case (maintenance agreements under ss.23-25) "adopted" means adopted according to the law of any part of the United Kingdom,[99] the Isle of Man or Channel Islands. What it means for the purposes of ss.23-25 is undefined by s.23(2). Three interpretations are possible: it could mean adopted in accordance with English (internal) law[1]; or it could perhaps mean

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98. See s.16(1). But a "child" in s.22 of the Ministry of Social Security Act 1966 is limited to the natural or adopted child of the person concerned and liability under this Act does not extend to step-children.

99. The Adoption Act applies to Scotland.

1. The draftsman of the consolidating Matrimonial Causes Act 1965 obviously thought it did not have that meaning in the enactments consolidated in ss.23-25, for, if it had, s.1 of the Adoption Act 1964 would have applied and brought within the scope of the sections adoptions elsewhere in the United Kingdom or in the Isle of Man or Channel Islands and he would have made the extended definition apply as he did elsewhere in the Act of 1965.

adopted whether legally or informally; or it could mean adopted according to the law of the domicil at the time of adoption[2]. In principle one would have thought that this last meaning ought to apply generally; if the court has jurisdiction to grant a divorce, etc., there seems no reason why it should not order maintenance to a child adopted under the law of a former domicil. In the light of the recent Hague Convention[3], the "habitual residence" of the adopter may be a better test than domicil[4].

167. For the purposes of all sections save ss.17 and 21(3) "child" also includes an illegitimate child of both parties to the marriage[5]. And, finally, for the purposes of ss.33 and 34 (child's maintenance) it also includes the legitimate and illegitimate child of one party provided that the other has accepted that child as one of the family[6]. Where the child is a child of one party only it is expressly provided that, in considering whether any and what order should be made requiring the other party to make any payments towards the maintenance or education of the child, the court shall have regard to the extent to which he had assumed responsibility for the child's maintenance and the liability of any other person to maintain the child[7].

168. These sections graphically reveal a gradual humanisation of the law whereby protection has been extended from legitimate children to adopted or illegitimate children of both parties[5], and finally to children of one party, including adopted or illegitimate children, provided that they have been accepted into the family. But, as pointed out above, the final extension has not yet been made to cover all sections. It is particularly surprising that, whereas on the grant of a decree of divorce, nullity, judicial separation or restitution the court can award maintenance to children accepted into the family, it cannot do so when ordering periodical payments under ss.22 and 35(2)[8]. Moreover, even when the most extensive definition applies, the law

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2. Cf. Re Valentine's Settlement [1965] Ch.831, C.A.

3. "Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions", signed at The Hague on October 28th 1964 (see Cmnd.2613; (1965) 14 I.C.L.Q. 558-564).

4. This and allied questions of international law will form the subject of a separate study by the Law Commission.

5. Since 1959, of course, the extension to illegitimate children of both parties means little since they will have become legitimated by the subsequent marriage unless the father was domiciled abroad at the date of that marriage.

6. On the meaning of "acceptance" see Bowlas v. Bowlas [1965] P.450, C.A.; Holmes v. Holmes [1966] 1 W.L.R. 187; Caller v. Caller [1966] 2 All E.R. 754.

7. S.34(4); see Caller v. Caller above.

8. See the observations of Baker J. In P. v. P. [1966] 1 All E.R. 439 at p.441 F-H.

still stops short at a point which it is impossible to justify on any ground of logic or justice. To say that a man should not have to maintain a child unless he is related to the child by blood or adoption can be justified logically. But once one goes beyond that, there is no logical or just stopping place short of acceptance into the family. It makes no sense to couple that with a relationship by blood or adoption to the other party to the marriage.

169. The absurdity that may result from the present law can be illustrated by the following example:

> H marries W, a widow with three young children (it makes no difference for purposes of ss.33 and 34 whether they were her legitimate or illegitimate children). H accepts them into the family. On a subsequent divorce an order for unsecured maintenance for the children could be made against H or W and an order for secured maintenance against H. Suppose, however, that W dies and H, wishing to find a mother for the children, marries W2. A few years later he runs off with P, leaving W2 with the children. In the subsequent divorce proceedings an order for their maintenance cannot be made against either H or W2. (Such an order could be made, however, if H and W, or H alone, or H and W2 or W2 alone had adopted the children). Yet the moral obligation of H is even stronger than it would have been on a divorce between him and W.

170. Accordingly we recommend that the test of responsibility should be the acceptance of a child into the family on a permanent basis at any time before the marriage breaks up. Payment of money for the maintenance of the child is not necessarily conclusive evidence of acceptance since a husband may pay money to maintain his wife's child outside the family, for example, with foster-parents or at a boarding school. Similarly foster-parents will not be presumed to have accepted into their family children boarded out with them.

171. If acceptance into the family became the absolute test of responsibility, H, and presumably W2 also, in the example in para.169 would both be liable to be ordered to maintain the children. Again, if one supposes that W had obtained a divorce from her first husband who was alive at the date of her marriage to H, H might agree to marry her on the understanding that the

children would be maintained by her first husband and, on the latter's subsequent failure to do so (for example on his death), H, if he has accepted the children into the family, should be regarded as having taken the risk of having to maintain them to the extent that the first husband failed to do so.

172. There is only one exception that we should wish to make to the general test of acceptance into the family. If a husband accepts a child into the family in the belief that he is its father and subsequently learns that he is not, his initial acceptance in ignorance of the truth ought not to place him under any liability. His duty to maintain the child by virtue of his acceptance of it should cease from the moment when he disclaims liability for it; but, if he does not disclaim liability within the time reasonably required for reflection, he should be taken to have ratified the acceptance. In any event, the court should have power to order maintenance for the child where the issue of paternity is disputed, until it can be determined by the court either in an application for maintenance, divorce proceedings or proceedings for judicial separation.

173. Accordingly we recommend that, apart from any children for whose maintenance the natural or adoptive parents are already responsible under the present law, the court should be empowered to order any person who has accepted a child into his or her family on a permanent basis to maintain that child. Which adoptions under a relevant foreign law are to be recognised by our courts so as to impose a duty to maintain on the adoptive parents is a question which will be dealt with in our paper on the international aspects of Family Law. There appears to be no objection to the unmodified application of the recommendation contained in this paragraph to proceedings in magistrates' courts.

Duration of Child Maintenance Orders

174. S.34(1) of the Act of 1965 empowers the court in proceedings for divorce, etc., to make orders for the maintenance of a child. The Act gives no indication as to the nature and duration of the maintenance but it has been held that in a proper case it may extend beyond the age of 21[9]. Under s.34(3) the court has power on or after the grant of a decree of divorce or nullity to order the husband and, in the case of a decree of divorce made on the ground of the husband's insanity, the wife to provide secured maintenance for the children. In this case the Act provides that

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9. Le Marc v. Le Marc [1961] P.10.

the term for which any sum is secured shall not extend beyond the date when the child will become 21.

175. The circumstances in which an order for the maintenance of an infant may be made under the Guardianship of Infants Acts 1886-1925 have been summarised in para.19(c) of this Paper. Three courts have jurisdiction under those Acts. The magistrates' court may not entertain any application (other than an application for variation or discharge of an existing order) relating to an infant who has attained 16 unless the infant is physically or mentally incapable of self-support. The powers of the High Court and the county court under these Acts are not limited in this respect.

176. It is of interest to remember that a parent's liability to maintain his or her children under the National Assistance Act 1948 and the Ministry of Social Security Act 1966 ends when the child attains the age of 16, even if the child is a dependant[10]. Similarly, a parent's liability to make contributions in respect of a child sent to an approved school, committed to the care of a fit person or received into the care of a local authority under the Children and Young Persons Acts 1933-1963[11] comes to an end when the child reaches the age of 16; though in certain circumstances a child may be detained in an approved school until he is 19 and may remain in the care of a local authority or other person until he is 18.

177. By virtue of s.16 of the Matrimonial Proceedings (Magistrates' Courts) Act 1960 a child between the ages of 16 and 21 is not eligible for maintenance as a dependant unless his earning capacity is impaired through illness or disability of mind or body[12] or unless he is receiving full-time instruction at an educational establishment or is required to devote the whole of his time to vocational, etc., training for a period of not less than two years. We do not understand the need for such a stringent requirement since children often require support while receiving part-time instruction or undergoing an intensive short course of training. There seems to be no reason why the court should not be left to decide, (a) whether it is reasonable for the child to receive the instruction or undergo the training and (b), if so, whether it is right for his parent to contribute to his support during that time.

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10. Para.17 above.

11. See para.18 above.

12. Matrimonial Proceedings (Magistrates' Courts) Act, s.16(1).

178. Under the Inheritance (Family Provision) Act 1938 maintenance or a lump sum may be awarded even to dependent adult children. This, however, is maintenance awarded from the income of an estate which the deceased no longer needs for his own maintenance. Moreover, the maintenance is not paid for the purpose of enabling the children to complete their education or training. Hence this Act does not appear to provide much guidance on what the rule should be in maintenance inter vivos.

179. We think that orders for maintenance in matrimonial proceedings should not extend indefinitely beyond the age of 21 but should be limited to the purpose of giving the children a suitable start in life. Unless the power to award maintenance in matrimonial proceedings were so limited it would have the result of entitling adult children of parents in matrimonial difficulties to rights denied to adult children of happy marriages. On the other hand we think that where differences between the parents prevent them from reaching necessary decisions on giving the children a start in life the court ought to have power to act in loco parentis and to make such arrangements as parents normally would.

180. Accordingly, the court should be empowered to make orders for the maintenance of children extending -

(a) in any event till they attain the age of 16 or such later age as is appointed for the end of compulsory education; and

(b) until they attain the age of 21 if they are physically or mentally incapable of wholly supporting themselves; and

(c) for a definite period which may extend beyond the 21st birthday so long as the child is not financially independent, because he is receiving full- or part-time instruction at an educational establishment or undergoing full- or part-time training for a trade, profession or vocation.

181. Our recommendations concerning child maintenance orders generally are likely to be overtaken by the publication of the Latey Committee on the Age of Majority in the next few months. When its conclusions are known, it will be necessary to consider their impact on our recommendations.

PART V

MISCELLANEOUS PROBLEMS

Pensions

182. There is no doubt that one matter on which there is strong public feeling is the loss of a potential widow's pension that a wife may suffer if she is divorced by or divorces her husband. She may have been married for 20 years or more during which the husband has been a member of a superannuation scheme under which the wife, if she survives him, would be entitled to a pension or lump sum, or, if not entitled, would be the likely recipient of benefits either at the discretion of the trustees or as a result of a nomination by the husband. On the dissolution of the marriage her prospective rights or expectations are normally destroyed, since she can no longer become his widow. This is often regarded as a hardship under the present law notwithstanding that an innocent wife cannot be divorced against her will. It will be regarded as an even greater hardship if the present basis of the law is altered in such a way as to empower the court to dissolve a marriage against the wishes of a wife who has not committed any matrimonial offence. It should be borne in mind, however, that if the wife is divorced while young (and most divorces affect women under 35) the probability is that unless she is handicapped by the care of young children she will be able to find pensionable employment and may well remarry in due course and thereby acquire a pension expectancy in right of her new husband. When that occurs there is little hardship if she forfeits her expectancy in right of her former husband. The real hardship arises in respect of women left with children to bring up and, more especially, in respect of the older women - those who are 45 or older when divorced. Statistics show that these have a poor expectation of remarriage so that if they lose their hope of an occupational pension in right of the first husband they are likely to lose all hope of an occupational pension; even if they can find pensionable employment, which may not be easy at their age, the pension is likely to be small.

Present position of widows and divorcees

183. So far as the State scheme is concerned, under the National Insurance Act 1965 (as amended by the National Insurance Act 1966), a widow may be entitled in right of her husband's contributions to the following benefits: (a) for 26 weeks from the husband's death, to a "widow's allowance"[13]; (b) thereafter,

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13. National Insurance Act 1965, s.26 (as amended by s.4(3) of the 1966 Act).

if she has children under the prescribed age limits, to a "widowed mother's allowance"[14]; (c) if not entitled to a widowed mother's allowance, to a "widow's pension" if over 50 when widowed or when her entitlement to widowed mother's allowance ceases and the marriage has lasted 3 years[15]; (d) on retirement at age 60 or later to a "retirement pension"[16] and "graduated retirement benefit"[17]. An employed married woman, though not required to pay flat rate contributions, must pay graduated contributions, but a widow having a retirement pension can receive with it one-half of the graduated pension which her husband's contributions had earned[18]. For a woman who is already a widow when she reaches the minimum retirement age of 60 the retirement pension for which she can qualify is in principle based on her own insurance but the husband's contribution record can be taken into account in calculating her pension[19].

184. A widow, whose husband died as a result of an industrial accident or war service may obtain somewhat better treatment under the industrial injuries or war pensions schemes, but it is unnecessary to go into details.

185. For a woman divorced under 60 there is nothing directly comparable to widow's allowance or widow's pension. When the marriage ends she reverts to the status of a single woman for national insurance purposes and if employed becomes liable to pay contributions. If she does not get a job, she will still have to pay Class 3 National Insurance contributions in order to maintain her eventual right to a retirement pension. This applies even if the husband dies subsequently but if she has a child towards whose maintenance the husband was contributing she may become entitled on his death to a "child's special allowance"[20] for the child though this ceases if she remarries.

186. However, under amendments of the regulations made in 1957 as a result of the Reports of the Morton Commission[21] and

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14. Ibid., s.27.
15. Ibid., s.28.
16. Ibid., ss.30-35.
17. Ibid., ss.36-37.
18. Ibid., s.37.
19. Ibid., s.33.
20. Ibid., s.38.
21. Cmd.9678, paras.712-716.

of the National Insurance Advisory Committee[22], for the purposes of retirement pension, a divorced woman (or one whose voidable marriage - but not void marriage- has been annulled) can, like a widow, use her ex-husband's record of contributions for the actual period of the marriage, and if she is divorced when over 60 she qualifies for the same rate of retirement pension as would have been awarded to her had her husband died at that time[23].

187. Accordingly, although under the State scheme divorced wives are treated less well than widows their position is now protected to some extent. Though there is no provision for a widow's pension for a divorced woman who is under 60 on the death of her former husband, some provision is made for the preservation of rights to a retirement pension acquired by a divorced woman from her husband's contributions during the period of her marriage. The fundamental reason for not making similar provision for widow's pension is that, when a man marries, his wife acquires on the marriage, or soon thereafter, full rights to a pension if and when she is widowed. To provide a pension for a previous wife would involve either abridging the rights of the new wife or expecting the National Insurance Fund to meet a double (or conceivably with the much-married man treble or quadruple) charge because of divorce.

188. It is possible to contract out of the National Insurance Graduated Pension Scheme if comparable benefits are provided by the relevant private scheme. But in assessing comparability no account is taken of benefits for wives, dependants or relatives. Hence contracting out is possible notwithstanding that the private scheme contains no provisions for widows or, of course, former wives.

189. As regards pension schemes other than the national insurance one, so far as we have been able to ascertain none, whether in the public or private sector, attempts to make any provision for safeguarding the position of a divorced wife as such. For a variety of reasons it would be difficult for them to make provision similar to that made by the State scheme. There are, as is made clear in the recently published Survey of Occupational Pension Schemes by the Government Actuary[24], wide variations in

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22. Cmd.9854 of 1956, paras.85-91.

23. National Insurance (Married Women) Regulations 1948: S.I. 1948/1470; Rev. XVI, p.123; 1948 I, p.2795, as amended by Regulation 5 of the National Insurance (Married Women) Amendment Regulations 1957: 1957/1322; 1957 I, p.1681 and by the National Insurance (Annulled Marriages) Regulations 1957: 1957/1392; 1957 I, p.1522.

24. H.M.S.O. 1966, paras.95-102.

the nature of the provisions in such schemes for widows and other dependants. Some schemes have no such provisions. Others provide for the payment of benefits in the event of the employee-husband's death in service but often these benefits are payable to the personal representatives, not to the widow as such, or may be paid to dependants selected by the trustees. Some additionally provide for benefits on death after retirement but often only if the death occurred very soon after retirement. Some schemes allow the employee to elect to give up part of his pension so that a reversionary annuity can be paid to the widow or other nominated dependant but relatively few employees seem to take advantage of this right. Only a minority of schemes give a widow an unconditional right to a pension and fewer still if the death of the employee occurred after retirement[25]. Even if the widow has an unconditional right, the amount of the pension will normally not be determined or determinable until the death of the husband. Furthermore a very high proportion of men leave pensionable employment in circumstances in which in fact no pension rights are preserved[26].

Suggested Solutions

I. Divorced Wives' Pensions

190. It has sometimes been suggested that the solution to this problem is to ensure that all pension schemes provide pension rights for an ex-wife. In effect it is suggested that a wife should acquire on marriage an indefeasible right to a pension on the death of the husband proportionate to the number of years that she has been married to him, which right she would retain on a divorce. So far as the National Insurance Scheme is concerned, it would be theoretically possible for the widow's pension to be shared between the widow and the ex-wife, possibly dividing it according to the time that the marriages had lasted, but this would add to the administrative difficulties and the cost of effecting the division would be quite disproportionate to the amounts involved. The result of sharing the pension might be to reduce the income of both widow and ex-wife below subsistence and would hardly be worthwhile. Alternatively, it may be suggested that a husband, on divorce, might be required to pay increased National Insurance contributions so as to provide

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25. In the private sector, of insured schemes only about 2% provide for any widow's pension and of non-insured schemes about 33% provide for widow's pension on death in service and 20% on death after retirement. The percentages are increasing however. See Occupational Pension Schemes (H.M.S.O. 1966) para.98.

26. Occupational Pension Schemes (supra) paras.103-114 gives some details of the extent to which rights are preserved at present.

his ex-wife with a deferred pension. This would leave his new wife's rights untouched and, as National Insurance contributions are deducted at source by the majority of employers, would eliminate one difficulty of enforcement. But, apart from the fact that the extra contributions to the National Insurance Fund would not meet the cost to the Fund in the early days, and that the additional charge on a husband's income would be a ground for reducing the current maintenance payable to his ex-wife, the practical difficulties of administration would be formidable. It would compel employers to investigate the marital status of their male employees and the Ministry of Social Security to conduct elaborate enquiries to prevent evasion. We think it unlikely that any government would accept such a fundamental alteration of the National Insurance Scheme and we do not recommend it.

191. As regards schemes other than the national insurance one, the difficulties are great. It would have to be made compulsory that all schemes both in the public and private sector should provide for pensions both for widows and for ex-wives and that their rights should be preserved notwithstanding dismissal or voluntary withdrawal of the employees. Employers would then have to keep track not only of ex-employees but of their wives and ex-wives.

192. There is, however, one respect in which there does seem to be an element of unfairness in present pension arrangements which give a definite entitlement to the widow. This injustice might perhaps be mitigated to the advantage of the ex-wife without causing serious difficulties to those operating pension schemes or adding appreciably to their costs. When there is a divorce and the husband marries again, it is, no doubt, inevitable that it is the second wife rather than the first who should be entitled to any pension or death benefit payable to his widow. But suppose the husband (Mr.A) does not remarry. In that event the divorce at present operates quite arbitrarily to the advantage of the pension fund. Had there been no divorce, benefits would have been payable to Mrs.A if she survived him. Because there was a divorce no benefits are payable to Mrs.A (or any other widow) because there is no "widow". The present position seems particularly unfair when the amount of contributions to the fund is assessed on the basis that benefits to the widow will be payable. The benefits which have been paid for are forfeited because of the divorce. Would it be practicable to provide by statute that

when a pension scheme, whether in the public or private sector, provides for a pension or other benefits for the member's widow and the member leaves no widow but does leave an ex-wife, the ex-wife should be treated as a widow? If so worded this would, of course, cover the situation not only of a husband who did not remarry but also that of one who did remarry but was not survived by his second wife. It would also lead occasionally to situations in which a much-married man left two or more "widows", i.e. former wives, in which event they would presumably share on the basis suggested in para.190 (a basis which, as there pointed out, presents certain difficulties). Would it be argued that all this would increase the actuarial risk to the Fund since there would be a greater chance that someone would survive to qualify as widow?

193. Even if the suggestion made in the foregoing paragraph was workable it would only help in a small minority of cases. In general, it would seem that protection of the ex-wife in respect of pension expectancies (as already pointed out it is normally an expectancy rather than a right) will have to be left to the courts. The question, then, is what additional powers can be conferred on the courts to enable them effectively to provide that protection. In the following paragraphs we set out certain possible answers.

II. Allowance for Loss of Pension in Maintenance Award

194. Theoretically the loss of pension prospects is something that the courts already can take into account when deciding what maintenance to award. But in practice this is scarcely possible. At the time when the order is made no pension will have accrued and it will not be known how much it will be. Indeed, at that stage, if the pension scheme is contributory it will be a charge on the husband's income and not an addition to his means. Furthermore, except for secured maintenance, payments cannot, at present, be made to continue after the husband's death and it is only after his death that it is appropriate for payments to be made to balance the lost pension. It is true that an application can now be made after the husband's death under s.26 of the Matrimonial Causes Act, but the principles on which the court then acts are not always such as to ensure that the ex-wife is compensated for any pension that she has lost[27]. If existing rights under s.26 were extended, the position of the ex-wife would be improved, but only to a limited extent.

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27. See paras.72 and 73.

195. As we see it one of the great weaknesses of the present provisions relating to the award of maintenance is that they are more likely to ensure that the ex-wife is maintained by her husband in the early years following the divorce (when she will be comparatively young and thefefore, unless burdened with the care of children, able to earn her own living) than in her old age. Since women have a longer expectation of life than men the probability is that the ex-wife will survive her ex-husband and in her declining years be particularly in need of maintenance. Under the present law it is precisely then that she is least likely to obtain it.

196. It is thought that the court would be able to deal more effectively with this problem if, as suggested in para.68 of this Paper, it had power to grant maintenance, whether secured or unsecured, which continued for the lifetime of the wife, subject to a power to vary. In that event the court could, as at present, award maintenance on the divorce at a sum which seemed reasonable at that time. On the death of the husband his personal representatives could apply to vary it but the court could have regard to the financial position not only of the estate but also of his dependants. If either the estate or the dependants directly had, as a result of his death, received benefits under a pension scheme this is a fact that the court would take into consideration in assessing what it would be reasonable for the ex-wife to continue to receive.

III. Award of Pension

197. Ideally one would like to be able to go further than that and to enable the court, at the time of the divorce, to award part of the pension to the divorced wife. The court might be empowered to make an order to the effect that a proportion fixed by the court of any pension or lump sum payable as a result of the death of the husband should be payable to the ex-wife. If served on those operating the pension fund (the employer, trustees or insurance company) they would be bound in due course to comply. The order should be variable (for example if the ex-wife remarried). But an order of this sort would give rise to the same difficulties as an attachment of earnings order. Practical difficulties would be experienced on a subsequent change of employment and a bitter husband might indeed prefer to throw up his present pensionable employment for a non-pensionable job rather than allow his ex-wife to share in "his" pension. Even where the husband did not throw up his job his employers might

be amenable to a suggested re-arrangement of his terms of employment and superannuation so as to cut out the rights of his ex-wife. Trouble and expense would sometimes be caused by tracing an ex-wife, possibly many years after a man's retirement, or in establishing that she had died. For all these reasons this proposal would be unlikely to be popular with those operating pension funds.

IV. Award of Lump Sum Compensation for Loss of Pension Expectancy

198. The court might be empowered and placed in a position to make an immediate financial award at the time of the divorce designed to compensate the wife for the loss of her expectancy of a pension in the future. As we see it, there are a number of ways in which this might be done. The first would be to attempt an approximate valuation of the wife's expectancy based on the actual position of the husband at the time of the divorce. We are advised that this would be possible if certain assumptions were made. If the court was prepared to estimate what the husband's salary was likely to be at the date of his retirement if he remained in his present employment (and this would be to make the sort of estimate the court is often required to make in personal injury cases) and if it were assumed that he and the trustees of the pension fund would allocate to his widow the maximum possible under the scheme, we understand that it would be possible to value the wife's expectancy having regard to the respective ages of the parties. Armed with this information the court could then decide what proportion of this it would be fair and right to order the husband to pay to the wife (we leave until later the question how it should be paid).

199. One obvious objection to this solution is that it would work only if the husband was in pensionable employment at the time of the divorce. Another is that the need to supply the court with actuarial valuations would add to the expense of the proceedings. An alternative, therefore, might be to ignore the actual position of the particular husband and to lay down a scale based on what pension a husband of the age of the particular husband and earning what the particular husband is earning ought to ensure that a wife of the age of the particular wife would be left with if she survived him. If that were done, the court might be supplied with Tables which would enable it to ascertain the present value of her rights. The court would then have to decide how much of that value the husband should be required to pay. One factor here would be the conduct of the parties, another would

be the wife's needs. Indeed, as regards the latter point, it is arguable that in calculating the amount of the hypothetical deferred annuity which the husband ought to provide, the wife's means should be taken into account. If that was thought right then the Tables would become somewhat more complicated for they would have to include the wife's means as well. However, as meticulous accuracy is neither aimed at nor attainable, it is thought that the wife's means are a factor which could be better left to the court to take into account in deciding what proportion of the present value of the hypothetical annuity the husband should be required to pay.

200. In calculating the present value of the hypothetical deferred annuity, regard would need to be paid not only to the respective ages of the parties but also to the statistical likelihood of a wife of the relevant age remarrying and thus forfeiting her expectancy of a pension in right of her former husband. Hence, the value would be substantial only in the case of the older woman - the case where present hardship is likely. With younger women the value might be negligible, not only because of the long deferment but also because of the probability of remarriage. But, even in the case of the younger woman, there would be another factor which might have to be taken into account - if she had children to look after this would affect both her prospects of remarriage and her prospects of obtaining pensionable employment. If only for this reason we do not think that it would be practicable to provide a cut-off age below which no pension compensation would be payable. Indeed, it might be that the number and ages of dependent children would be another factor which would have to enter into the calculations in the Tables.

201. A still more difficult question would be how the payment should be made. Ideally the husband should be required to pay up before the divorce is granted; apart from anything else this would avoid the grave difficulty which wives all too frequently experience in recovering maintenance. In the case of a wealthy husband there seems no particular reason why he should not be required to pay whatever lump sum the court assesses and if the husband was the petitioner the decree absolute could be held up until he paid. The position would be more difficult where the husband had little or no capital and here, if not before, the proposal seems to break down. It has been suggested that something might be done in the main case in which loss of pension expectancies would be felt to be a grave hardship, namely, if a

husband were enabled to obtain a divorce from an innocent wife on the basis of breakdown. It is generally agreed that a substantial period of separation should precede a petition on this ground. It is agreed, therefore, that it would be possible to require a husband who proposes to petition on this ground to pay into court by instalments during the separation period the present value of the hypothetical deferred annuity[28]. This he could do either in a lump sum or by instalments spread over the five years and the money could be invested, possibly by the Public Trustee, in a way that would protect it against inflation. Where the husband had not paid the whole sum as adjusted by the court at the time of decree nisi, decree absolute might be postponed indefinitely in appropriate cases until he did so.

202. Another suggested method of encouraging the husband to meet the cost of compensating the ex-wife for loss of her pension entitlement would be to provide that for pension purposes the ex-wife should continue to be treated as his wife - and thus entitled to a widow's pension after his death - until his obligations to her under this head had been discharged. This might be practicable as an additional inducement to the husband, but if all the required payments were not actually made by the date of decree absolute it would have the disadvantage of perpetuating bitterness between the former spouses. Moreover, it would not work where the trustees of the fund had a discretion to pay any dependant selected by them. To cover this case, it would be necessary to empower the court to make the sort of order envisaged in para.197.

203. In our view these suggestions, even if feasible, would not be likely to prove acceptable to public opinion. They would be thought to look like buying divorce on the instalment plan.

V. Award of Deferred Payment

204. Hitherto we have assumed that on decree absolute the wife should be paid the sum provided by way of compensation to do what she liked with. She ought, theoretically, to use it to buy an endowment policy or deferred annuity for herself, but in many

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28. If the husband contended that his means did not make this feasible he might, perhaps, be entitled to have the Supplementary Benefits Commission (the successors of the National Assistance Board) assess his maximum contribution on the same basis as for legal aid purposes. If then he paid in his maximum contribution out of capital and, for five years, his maximum contribution out of income the total so paid in should be treated as discharging his obligations even if that total was less than the present value of the hypothetical annuity.

cases probably she would use it for current expenditure. This could be avoided by empowering the court to order that the sum should remain invested with the Public Trustee. In that event it would have to be decided when she would be entitled to payment. The value of the deferred annuity would have been based on the actuarial prospect of her surviving her ex-husband and not remarrying, but it does not follow from that either that she should necessarily be entitled to payment if her ex-husband died while she was still young, active but unmarried, or that she should not be so entitled when, say, she attained the age of 60 even though her ex-husband was still alive. If the main object is to provide for her in her old age there would be much to be said for providing for payment at age 60. One point that has to be borne in mind is that the realities of the situation are that what the ex-wife has lost by the break-up of the marriage is not only (or even mainly) the loss of her own pension expectancy but, rather, the loss of the expectation that she will be maintained in her old age out of the husband's own earnings or pension. Alternatively, she might be entitled either on the death of the husband or on attaining the age of 60, whichever first happened. Since maintenance from the husband is likely to be reduced on his death, even if it does not disappear completely, this would have some merit. We would have thought that entitlement should not depend on the question of whether she has remarried - the chance of remarriage has already reduced the amount to which she is entitled. In our view she should not be discouraged from remarriage by the prospect of forfeiting her entitlement. On the other hand it could be argued that a woman should not be entitled to pension rights in respect of more than one husband and that if she remarries she accepts her new husband with such pension rights as he and his widow enjoy and should give up any entitlement in respect of the former husband.

205. Despite the theoretical attraction of the solution canvassed in the last paragraph, we doubt whether, in fact, it would be preferable to making an out-and-out payment to the wife on the divorce. We think that women, rightly or wrongly, would regard attempts to protect them from their own improvidence as excessive paternalism.

VI. Payment of Premiums for Deferred Annuity

206. Any scheme whereby the husband provides a capital sum on the divorce in full discharge of his obligations is preferable to one involving a continuing obligation. However, as the

difficulties of providing for payment in advance seem to be virtually insuperable, it might be provided that payments should be made by the husband in the future, the payments being used to buy a deferred annuity for the wife. If this solution were adopted the present value of the hypothetical annuity would presumably be irrelevant. The court would merely have to see from the Tables what the amount of the hypothetical pension should be, decide what proportion of this the husband ought to provide in the circumstances of the particular case and then order the husband to pay annually such an amount as would provide an annuity of that amount for the wife contingently on her surviving the husband and not remarrying. An alternative, which might be preferable for reasons canvassed in para.204 would be to order that the annual premiums thus calculated should be used not for a deferred annuity on survival unmarried but for an annuity or endowment on age 60 or earlier death of the ex-husband.

207. The main difficulty about the alternative referred to in the last paragraph, apart from that of recovering the payments from the husband once he had got his divorce, is that, except in the case of rich husbands, it would inevitably mean that less could be paid by way of maintenance. Many women, it is thought, would prefer to have paid to them the maximum maintenance that the husband could afford rather than have somewhat less in order to provide for an annuity in future which would be payable only if they survived their husbands. Once again they would probably regard the court's well-meaning attempt to protect them in their old age as excessive paternalism.

Conclusions

208. These various possibilities are merely thrown out for consideration. We should welcome views on their practicability and desirability. The only one of them regarding which we feel able at present to make any firm recommendations is that the court should be empowered to order even unsecured maintenance to last for the life of the recipient and not merely for joint lives[29].

209. Throughout our treatment of this topic we have dealt only with the wife's loss of pension expectations. Despite our desire to equate the position of husband and wife, the emancipation of women has not, we think, yet benefited men to the extent that many pension schemes enable a widower to qualify for a pension in right of his wife's service. Certainly the loss on divorce of any such rights has not yet become a current problem.

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29. See paras.65-69 and 39.

In theory, however (and we think that as yet it is only theoretical), a husband who loses pension expectancies because of a divorce should be treated in the same way as a wife who does so.

210. We think that implementation of the various proposals made elsewhere in this Paper will help to alleviate the present hardship that wives may suffer on divorce by loss of pension prospects. A direct and complete solution of the pension problem has, however, escaped us. It may be that it can be completely solved only by a thoroughgoing reform of the law of family property. Even so, one must not over-estimate the contribution that our proposed study of the law of family property could make to a solution. The bed-rock of difficulty is simply that most men have neither the capital nor the income resources to provide adequately for the wife (or wives) they have deserted as well as for themselves and their new commitments. No amount of ingenuity by actuaries, lawyers or legislators can alter the facts, which may be summarised as follows:-

(a) wealthy men present the law with no problems;

(b) poor men present problems which can be solved only within the framework of national insurance, and Supplementary Benefit legislation;

(c) the man who is neither rich nor poor generally has available an earned income, a pension expectancy and a capital asset - a house which may be encumbered with a mortgage. He rarely has much else.

It is immediately clear how important is the matrimonial home and how necessary legislation is along the lines of the Matrimonial Homes Bill to ensure that the wife's interest in it be protected. It may well be that if there should be legislation giving effect to our provisional recommendations and protecting the wife's interest in the matrimonial home, her hardship arising from loss of pension rights upon divorce might be considerably relieved. If the wife knew that on divorce she would be entitled to a fair share of the family assets (including the home) which her services as a wife and mother had helped the husband to build up, loss of a future pension would be regarded as a less serious and pressing problem.

Death Intestate after Judicial Separation

211. The survival of one extraordinary statutory relic in s.20(3) of the Matrimonial Causes Act 1965 is best mentioned

among miscellaneous matters. This provides that on a judicial separation -

(a) any property which is acquired by or devolves on a wife after the decree and while the separation continues, and

(b) where the decree is obtained by the wife, any property to which she is entitled for an estate in remainder or reversion on the date of the decree,

shall, if she dies intestate, devolve as if her husband had then been dead. It will be observed that this provision applies only to the wife and, as regards reversionary property, only if she is the party who obtained the decree. Furthermore by distinguishing between property acquired before the separation and property acquired during the separation, it is liable to cause inconvenience in the administration of her estate.

212. Since it appears that judicial separation is likely to be retained in our law, it is obviously desirable that it should be clear whether or not it has the effect of ending the marital state for the purposes of succession. For the purposes of intestate succession in Australia a marriage is treated as at an end as regards both spouses so long as the judicial separation is in operation[30]. This is surely the right answer so long as the parties are living apart under a Divorce Court decree of judicial separation or under an order for maintenance under s.22[31]. In the latter case, it is arguable that a neglected wife after a violent quarrel and to meet an urgent need, might get a maintenance order although there was a prospect of reconciliation in the future. Should the husband die before the reconciliation she would lose all her rights to succeed on his intestacy. On the other hand, under our recommendations, her maintenance order would continue after his death and would be variable. The law of intestacy is intended to give effect to the likely dispositions of the deceased had he made a will and it seems clear that a rule that disinherits the separated spouse is more likely to achieve that result than one which preserves his or her rights.

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30. S.55 of the Matrimonial Causes Act (Aust.) 1959: see Appendix C.

31. S.2(1)(a) of the Matrimonial Proceedings (Magistrates' Courts) Act 1960 provides that a matrimonial order made by magistrates containing a non-cohabitation clause is to "have effect in all respects as a decree of judicial separation". The effects of matrimonial orders in the magistrates' courts, whether with or without a non-cohabitation clause, would require careful consideration if the law relating to decrees of judicial separation were amended as suggested.

213. This topic is clearly one that will have to be further considered in the context of a general review of the law of Family Property. But in the meantime s.20(3) cannot be left as it stands in any revision of Part II of the Act. We recommend therefore that a couple living apart under a decree of judicial separation made by the Divorce Court should be in the same position as regards rights of succession as if they were divorced.

Polygamous Marriages

214. Although after some hesitation the English courts have come to recognise a spouse under a polygamous marriage as a husband or wife for certain purposes, they have hitherto refused to recognise such a union for the purposes of exercising matrimonial jurisdiction(32). However, recent cases have decided that this does not apply if a marriage which was priginally potentially polygamous has become monogamous as a result of a change of domicil(33) or a change in the law(34).

215. Australia by an amendment to its Matrimonial Causes Act has tackled this problem by, in effect, providing that the first marriage, notwithstanding that it was at its inception potentially polygamous, should be generally recognised for all purposes of matrimonial jurisdiction, whether there has been a subsequent marriage or not, so long as the laws of the countries of the parties' domicil at the date of the union recognised polygamy(35). A strong case can obviously be made out for the introduction of some such change in the law here, especially as the United Kingdom is the centre of a Commonwealth many of whose members recognise polygamy. This, however, is beyond the scope of the present Paper.

216. There seems to be an overwhelming case for allowing a wife of a polygamous union to obtain maintenance from her husband. This would prevent injustice and afford protection to the British taxpayer. At present a Commonwealth citizen from a polygamous country can enter this country with his wife or wives and then resist any claim by her or them for maintenance, thus perhaps making it necessary for the State to maintain them(36) unless

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32. See Hyde v. Hyde (1866) L.R. 1 P. & D. 130; Risk v. Risk [1951] P.50; Sowa v. Sowa [1961] P.70.

33. Cheni v. Cheni [1965] P.85; Ali v. Ali [1966] 2 W.L.R. 620.

34. Parkasho v. Singh (1966) 110 S.J. 868.

35. S.6A (see Appendix C) inserted by the Matrimonial Causes Act No.99 of 1965. For a criticism of the drafting of this provision see (1966) 40 Aust. L.J. 148.

36. As pointed out below, the State may then be able to recover from the "husband".

and until it can repatriate them. It would also remove the strange anomaly that a "wife" who enters into a bigamous and unlawful marriage in this country with a man who is already married may obtain maintenance on obtaining a nullity decree declaring the marriage void[37], whereas a wife who has been lawfully married in a country which recognises polygamy cannot do so if her marriage was potentially polygamous. Far from the introduction of such a provision being tantamount to a recognition or encouragement of polygamy it would, if anything, discourage it. Our present rule enables the husband to enjoy the benefits of polygamy and relieves him of the burden[38].

217. Already the wife of a polygamous marriage is recognised as a wife for certain social security purposes. S.113(1) of the National Insurance Act 1965 provides:

> 113.-(1) A marriage pefformed outside the United Kingdom under a law which permits polygamy shall be treated for any purpose of this Act as being and having at all times been a valid marriage if and so long as the authority by whom any question or claim arising in connection with that purpose falls to be determined is satisfied that the marriage has in fact at all times been monogamous.

It will be seen that this covers a wife if the marriage is in fact monogamous even though potentially polygamous. For the purposes of supplementary benefits (formerly national assistance) the law goes much further, for it has recently been held that in s.42 of the National Assistance Act 1948 (substantially repeated in s.22 of the Ministry of Social Security Act 1966) a "wife" whom a man is liable to maintain includes a wife of a polygamous marriage even though it is actually, and not merely potentially, polygamous[39]. Hence if the Supplementary Benefits Commission (the former National Assistance Board) maintains any of the wives it can recover from the "husband".

218. This produces the somewhat odd result that, although the wife cannot directly obtain maintenance from the husband, he can, indirectly, be made to pay for her maintenance if she has been on national assistance. Generally, obtaining maintenance through

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37. Matrimonial Causes Act 1965, s.19.

38. The matrimonial history of Mr. Sammy-Joe (Sammy-Joe v. Sammy-Joe: "The Times" June 9th 1966; Sammy-Joe v. G.P.O. Mount Pleasant Office [1967] 1 W.L.R. 370) affords a recent illustration where maintenance ought obviously to have been awarded to a polygamous wife as indeed it was.

39. Imam Din v. National Assistance Board [1967] 2 W.L.R. 257,D.C.

the Supplementary Benefits Commission will be the most efficacious way of recovering, but it seems somewhat anomalous that direct action by the wife against the husband should not be possible in those cases where it is appropriate. The present position would be extremely unsatisfactory where the standard of living of the parties is well above subsistence level. A millionaire Moslem prince should obviously maintain his wives more generously than at the austere standards adopted by the Supplementary Benefits Commission.

219. What seems to be needed is a provision similar to that in s.7(3) of the Uniform Maintenance Act, enacted in most of the Australian States in 1964-5. This provides:-

> "(3) For the purposes of this Act a man and a woman married by a subsisting marriage, whether monogamous or polygamous, shall if the marriage is lawful and binding in the place where it was solemnised be regarded as husband and wife."

This, it will be observed, goes considerably further than s.6A of the Australian Matrimonial Causes Act, mentioned at para.215 above, since it affords recognition for purposes of maintenance to any polygamous marriage - not only the first. We recommend that a similar rule should apply in England for the purposes of s.22 of the Matrimonial Causes Act (wilful neglect to maintain) and for the purposes of magistrates' maintenance orders.

220. It has been suggested that the wording of the Australian provision is defective in that it appears to test the validity of the marriage solely by the law of the place of celebration. Under English conflict of law rules a marriage may be void notwithstanding that it was valid by the lex loci celebrationis; essential validity is governed by the law of the domicil. While we see the logic of this criticism we are not persuaded that it is well founded. If a Nigerian domiciled in England enters into customary law marriages while on visits to Nigeria and then brings his wife or wives to England, we see no reason why he should not be made to maintain them; if he does not the Supplementary Benefits Commission will probably have to. Whether, at present, the ladies would be regarded as "wives" for the purposes of the National Assistance Act and Ministry of Social Security Act, is not clear (in the Imam Din Case the parties were domiciled in Pakistan when they married there), but we think that they ought to be. And equally we think that the husband should be liable at the direct suit of the wife. We are

unimpressed with the argument that if the marriages had been entered into in England they would have been void and the man would not have been under any liability to maintain. Since English law provides no facilities for polygamous marriage ceremonies, it may be that the English courts would refuse jurisdiction even to declare them null. If, however, formal English marriage ceremonies were entered into here, the second or later wife could, in fact, institute nullity proceedings and recover maintenance under s.19 of the Matrimonial Causes Act 1965[40]. It is arguable that s.113(1) of the National Insurance Act 1965[41] makes the law of the place of celebration decisive. Whether in fact the Australian provision necessarily does so is less clear. It applies only if the marriage "is lawful and binding in the place where it was solemnised". It by no means follows that the marriage would be regarded by Nigerian law as lawful and binding if one of the parties was not domiciled in Nigeria. In our view, however, for maintenance puposes, technicalities should be avoided as far as possible. If the parties have gone through a ceremony of marriage recognised as binding in the country where it was celebrated, we think that the English courts should have power to order one party to maintain the other until the marriage has been dissolved. Indeed, it may well be that the obligation to maintain should not be destroyed merely because a foreign court has dissolved it. One of the most common hardships attendant on the recognition of a foreign divorce is that at present it may deprive the English courts of any power to order maintenance in favour of a party resident here. This, however, raises a wider problem which will be dealt with in another Paper concerned with the recognition of foreign divorces and international law problems generally.

221. Nor are we impressed by the argument that if a husband were made liable to maintain more than one wife, the National Insurance provision would be regarded as unduly restrictive in that a man can get an increase of benefit in respect of one wife only (and that only if the marriage was not in fact polygamous), whereas he might be ordered by the courts to maintain several. The answer to that was given in the Imam Din Case where it was said "not to bear a moment's close examination"[42] ...."As the man paid only one lot of contributions, calculated on the basis

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40. To this extent the English courts already exercise matrimonial jurisdiction over "polygamous" marriages.

41. Quoted in para.217.

42. Per Salmon L.J. at [1967] 2 W.L.R. 263 H.

of one wife at a time, the [National Insurance] Acts applied only in case of monogamous marriages. It would clearly be wrong for a man paying contributions on the basis indicated to reap benefits in respect of perhaps three or four current wives"(43).

222. It has also been suggested that unless the Divorce Court is to be given general jurisdiction to dissolve polygamous marriages it would be anomalous to give it jurisdiction to award maintenance under s.22 of the Matrimonial Causes Act (or whatever replaces it), and that maintenance should be obtainable only in the magistrates' court. We do not agree. We see no reason why a power to grant maintenance should be in any way dependent on jurisdiction to grant a divorce. Moreover, the suggested restriction would rob the reform of its main point. When the appropriate maintenance is small it can already be recovered from the husband by the Supplementary Benefits Commission. An independent right of action by the wife is most needed where the husband is wealthy and the appropriate maintenance beyond the limits of the Supplementary Benefits Commission or the magistrates' court. The Imam Din Case has in effect made a polygamous husband indirectly liable to maintain his wives to subsistence level. We recommend that he should be made liable directly to maintain them at whatever level is appropriate.

PART VI

CLASSIFIED SUMMARY OF CONCLUSIONS

223. In this Part of this Paper we set out such provisional conclusions as we have been able to reach concerning the reform of the law governing proceedings in the Divorce Court. They are only provisional because the comments which we hope to receive from our readers may change them. (As we have said in para.2 above, we shall be grateful if comments can be sent to the Law Commission by 1st October 1967).

224. We have arranged our conclusions in three groups:-

(I) relating to questions on which we have been able to arrive at provisional recommendations which seem to us (subject to any comments we may receive) to be ready for early implementation;

(II) relating to questions on which we have not felt able to make provisional recommendations at this stage but the answers to which may emerge from a

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43. Ibid. at264A.

study of comments received from our readers; and

(III) relating to problems unlikely to be solved by legislation in the near future, if at all.

225. Among the questions in the second and third groups are a number requiring moral or social judgments which we as a body of lawyers have no special competence to make; on these last we shall particularly value the views of laymen as well as lawyers.

226. Group I (provisional recommendations which may be ready for early implementation)

(1) As regards the powers of the court to award maintenance (as opposed to the exercise of those powers) the distinction between the husband's rights and the wife's rights and between the guilty and innocent parties should be abolished (paras.21-23);

(2) Liability to be ordered to maintain a spouse or child should no longer depend on proof of a matrimonial offence (paras.21,24-28; Appendix A);

(3) The commission of an act of adultery should cease to be a bar to an application to the Divorce Court for any form of maintenance (paras.29-31);

(4) The court should always have power to award interim maintenance (paras.34-38);

(5) The wife's agency of necessity should be abolished (paras.41-52 and 108);

(6) Interim alimony, maintenance, permanent alimony and periodical payments should be replaced by a single form of periodic financial relief, available in all kinds of matrimonial proceedings to any wife, husband or child. It should be called maintenance and could be made permanent, interim or limited until the occurrence of a specific event or the expiration of a definite time (paras.53-64); the court should be able to order maintenance to be paid in a weekly,monthly, or other periodic sum (para.64); and it should always be able, when making its final order for maintenance, to order the payment of a lump sum in respect of future maintenance or of maintenance for any period prior to the institution of proceedings (paras.37, 48 and 52);

(7) An order for maintenance made pending the hearing of a suit for divorce or other principal relief should continue in

force after the decree unless the court otherwise orders (para.64);

(8) In all cases it should be possible to order secured or unsecured maintenance (para.64; see also para.54);

(9) The court should be empowered to make unsecured maintenance orders extending for the life of the payee (paras.65-69 and 39);

(10) The court should be able to award maintenance even if a petition for divorce, nullity or judicial separation is dismissed -

(a) in favour of the respondent or any child, and,

(b) if it was reasonable to institute the proceedings, in favour of the petitioner (paras.75-77);

(11) The court should be given power to order either party to proceedings to settle property for the benefit of all or any of the parties to, or children of, the marriage and to vary ante- or post-nuptial settlements, whether made inter vivos or by will (paras.78-84);

(12) The power of the court to determine property disputes between husband and wife under s.17 of the Married Women's Property Act 1882 should be exercisable after, as well as before, divorce (para.85);

(13) The power of the court to vary maintenance agreements should be widened as suggested in para.87;

(14) All maintenance orders should be variable at any time and even after the death of the spouse ordered to pay until the administration of the estate has been completed in due course (paras.88-95). The court should be able to remit arrears, to backdate variations and, where the payee has failed to disclose a material change of circumstances, to order repayment of sums already paid (paras.96 and 97);

(15) The existing powers of the court to set aside transactions designed to defeat claims for maintenance should be enlarged -

(a) to enable dispositions to be set aside although no actual or immediately pending claim can be made,

(b) to enable the protected property to be safeguarded from similar dispositions,

(c) to protect resources that are or may be the subject of a claim for maintenance in the magistrates' court, and

(d) by the abolition of the three year time limit on applications relating to past dispositions (other than dispositions made for valuable consideration to a purchaser in good faith) (paras.98-101);

(16) The special practice of the Divorce Division as regards costs should be reformed -

(a) by the abolition of the wife's agency of necessity as recommended in conclusion (5) above,

(b) by the removal of the difference in the position of husband and wife as regards costs, and

(c) by extending the right to apply for security for costs to husbands (paras.102-120);

(17) On the grant of a decree of divorce or judicial separation on the ground of adultery, the adulterer (whether a man or a woman) against whom costs are claimed should be liable to be ordered to pay the costs of any other party, unless he or she can show that it would be unjust in the light of the conduct of the parties and the other circumstances of the case (paras.121-124). Exceptionally a co-respondent, who is dismissed from a suit brought on the ground of adultery, should be liable (as he may be under existing law) to pay the costs of proceedings which were reasonably instituted as a result of his conduct (paras.125 and 126). There should be no power to order a co-respondent to give security for costs (para.127);

(18) Any sum payable under an order for maintenance should be recoverable as a judgment debt and -

(a) where the debtor has died, be enforceable with the leave of the court against the estate,

(b) where the creditor has died, be enforceable by the personal representatives on behalf of the estate, and

(c) in any event, the court should have power to limit the amount of the arrears which can be recovered (paras.143-152 and 52(b));

(19) No spouse or ex-spouse should be entitled to prove for arrears of maintenance in bankruptcy in competition with the ordinary creditors (paras.148-150);

(20) The court should be empowered to order any person who has accepted a child into his or her family on a permanent basis to maintain that child save that -

(a) a second husband who has accepted a child into

the family on the basis that the first husband will maintain it will be responsible for its maintenance only in so far as the first husband defaults, and

(b) a husband who learns that a child which he has accepted into the family as his own is not his should be free of any liability for its maintenance unless he fails to disclaim responsibility within a reasonable time (paras.165-173);

(21) The court should have power to make orders for the maintenance of children extending -

(a) in any event, until they attain the age of 16 or such later age as is appointed for the end of compulsory education,

(b) until they attain the age of 21, if they are physically or mentally incapable of wholly supporting themselves, and

(c) for a definite period, which may extend beyond the 21st birthday, so long as the child is not financially independent, because he or she is receiving full- or part-time instruction at an educational establishment, or undergoing full- or part-time training for a trade, profession or vocation (paras.174-181);

(22) On a judicial separation neither party should have rights to succeed on the intestacy of the other if death occurred during the continuance of the separation but should be in the same position as if they had been divorced (paras.211-213);

(23) For the purpose of awarding financial relief the court should treat a subsisting marriage as valid if the marriage, whether monogamous or polygamous, was valid under the law of the place where it was celebrated (paras.214-222);

Group II (questions on which we have not yet been able to make provisional recommendations)

(24) Should s.1 of the Inheritance (Family Provision) Act 1938 and s.26 of the Matrimonial Causes Act 1965 be amended to make it clear that the court should be satisfied that it would have been reasonable for the deceased to make provision for the applicant? (paras.72-74)

(25) Should the court be empowered to vary the terms of a maintenance agreement even though the changed circumstances are ones which the parties contemplated as possibilities at the time

of entering into the agreement? (para.86)

(26) Should recipients of maintenance under a court order be required to disclose material changes in their circumstances? How could disclosure be required and material changes be defined? (paras.96 and 97)

(27) How can the expenditure of public funds be reduced in relation to applications for legal aid made solely in order to obtain protection against full liability for costs? In particular -

(a) should hopeless claims for costs in petitions be discouraged?

(b) should last minute amendments of petitions claiming costs be discouraged? and

(c) should parties be enabled to limit liability to pay costs to a maximum amount to be fixed by the Supplementary Benefits Commission after an assessment of their means? (paras.109-118)

(28) Should Certifying Committees be asked to direct in each case whether security for costs should be applied for ? (paras.119 and 120)

(29) Should the action for damages for adultery -

(a) be abolished altogether, or

(b) be replaced by a new claim for a settlement on the lines recommended by the Gorell Commission of 1912? (paras.128-142) This would be available against women named as well as against co-respondents, but could be made only in conjunction with a petition for divorce or judicial separation. If so, should the category of third parties against whom such a claim could be made be enlarged to include anyone, other than an adulterer, who is alleged to have caused the breakdown of the marriage? (para.141)

(30) Should the action for enticement be abolished? (paras.132 and 133)

(31) When the recipient of maintenance under a court order seeks to enforce the payment of a large amount of arrears, how (without impeding the normal process of enforcement) can the court be placed in a position to exercise its discretion to limit the amount recoverable? Should the person liable to pay be notified of his rights if the payee seeks to enforce payment of more than a specified amount? (para.150)

(32) Should a person be enabled to prove for arrears of maintenance in the insolvent estate of his or her former spouse? (para.151)

(33) Should the property of a spouse, who dies intestate while the parties are living apart during the running of an order for maintenance, devolve as if the other spouse had then been dead? (paras.211-213)

Group III (problems unlikely to be solved by legislation in the near future, if at all)

(34) Should a spouse continue to be able to apply to the Divorce Court for a maintenance order while the parties are co-habiting and should an order so made be enforceable during cohabitation? If so, should the present divergence between the rule in the High Court and that in magistrates' courts be preserved? (para.32 and Appendix A)

(35) Should the court be empowered to order a proportion of a spouse's net income (or of the net income from any particular source) to be paid as maintenance? (para.33)

(36) Should remarriage automatically extinguish any right to maintenance by a former spouse? If not, should remarriage continue necessarily to prevent a person from applying for reasonable maintenance from the estate of a deceased former spouse? (paras.40 and 69)

(37) Should the powers of the court under s.17 of the Married Women's Property Act 1882 and s.17 of the Matrimonial Causes Act 1965 be merged and exercised on the same equitable principles? (para.85)

(38) Should it be made possible for action to recover maintenance for a child to be taken otherwise than by the parents or guardians? (paras.162-164)

(39) What should be done to prevent a married woman losing the prospect of obtaining a fair proportion of her pension rights as a potential widow, if she is divorced by or divorces her husband? (paras.190-210)

APPENDIX A

DRAFT CLAUSE

Failure of one spouse to maintain other

(1) Where one spouse has failed to provide, or to make a proper contribution towards, reasonable maintenance, for the other spouse, the court may on the application of that other spouse (in this section referred to as "the applicant") make an order under this section against the first-mentioned spouse (in this section referred to as "the respondent") in favour of the applicant.

(2) In determining whether the respondent has failed to provide, or to make a proper contribution towards, reasonable maintenance for the applicant, the court shall have regard to all the circumstances of the case and, in particular, to -

(a) the conduct of the spouses in relation to each other;

(b) the duty of the spouses to care for and bring up any children of the family;

(c) the domestic arrangements of the spouses;

(d) the earning capacity of each spouse and the extent, if any, to which that capacity has been impaired through age, illness or disability of mind or body or is for the time being diminished by reason of the fact that he is receiving instruction at an educational establishment or is undergoing training for a trade, profession or vocation;

(e) the earnings and other resources, if any, of each spouse;

(f) the financial obligations of each spouse.

(3) Without prejudice to subsection (2) of this section, the court may make an order under this section notwithstanding that it is proved -

(a) that the applicant has during the subsistence of the marriage committed a matrimonial offence; or

(b) that the respondent reasonably believed that the applicant had during the subsistence of the marriage committed such an offence.

(4) An order under this section may contain one or more of the following provisions:-

(a) a provision requiring the respondent to pay to the applicant for the applicant's maintenance, during such term not exceeding the applicant's life as may be specified in the order such sum as the court thinks reasonable, the sum to be paid at such regular intervals as may be so specified;

(b) a provision requiring the respondent to pay to the applicant for the applicant's maintenance such lump sum as the court thinks reasonable;

(c) a provision requiring the respondent to secure to the applicant, to the satisfaction of the court, for the applicant's maintenance during such term not exceeding the applicant's life as may be specified in the order such lump sum, or such sum to be paid at such regular intervals as may be so specified, as the court thinks reasonable;

(d) a provision requiring the respondent to pay to the applicant for the applicant's maintenance during a period before the date on which the applicant applied for an order under this section such lump sum as the court thinks reasonable.

(5) Where an application is made to the court for an order under this section, the court may, at any time before making a final order on the application, make an order under this subsection requiring the respondent to pay to the applicant for the applicant's maintenance at such regular intervals as may be specified in the order such sum as the court thinks reasonable; and an order under this subsection shall cease to be in force on whichever of the following dates occurs first, that is to say -

(a) the date, if any, specified for the purpose in the order;

(b) the date of the expiration of the period of three months beginning with the date of the making of the order;

(c) the date of the making of a final order on, or the dismissal of, the application by the court.

APPENDIX B

APPLICABILITY OF OUR CONCLUSIONS TO MAGISTRATES' COURTS

(Reference in this Appendix to sections are to the Matrimonial Proceedings (Magistrates' Courts) Act 1960, unless otherwise stated).

1. As stated in para.3 of this Paper, the first subject for reform must be financial relief in the courts which have power to grant divorces. Consideration of the repercussions of these reforms on proceedings in magistrates' courts should, however, begin without waiting till our main recommendations are in final form.

Paragraph 226(1) and (2)[44]

2. Causes of complaint on which either party may apply to the court under s.1 are (in brief) -

(a) desertion;

(b) persistent cruelty to the complainant, an infant child of the complainant or an infant child of the defendant who, at the time, was a child of the family;

(c) conviction for certain assaults or sexual offences;

(d) adultery;

(e) that the defendant while knowingly suffering from a venereal disease has insisted on, or has, without the complainant being aware of the presence of that disease, permitted sexual intercourse between the complainant and the defendant;

(f) habitual drunkenness or addiction to drugs.

3. The causes of complaint on which the wife alone may apply under s.1 are -

(g) that the defendant has compelled her to submit herself to prostitution or has been guilty of such conduct as was likely to result and has resulted in her submitting herself to prostitution;

(h) that the husband has wilfully neglected to provide reasonable maintenance for her, or for any child of the family who is a dependant.

4. S.1(1)(i) enables a husband to apply for an order on the ground that his wife has wilfully neglected to provide reasonable maintenance for the husband or for any dependent child of the family in a case where "by reason of the impairment of the

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44. (1) As regards the powers of the court to award maintenance (as opposed to the exercise of those powers) the distinction between the husband's rights and the wife's rights and between the guilty and innocent parties should be abolished (paras.21-25); (2) Liability to be ordered to maintain a spouse or child should no longer depend on proof of a matrimonial offence (paras. 21, 24-28; Appendix A).

husband's earning capacity through age, illness or disability of mind or body" and having regard to any resources of the husband and wife which should be made available, it is reasonable to expect the wife to maintain the husband or such a child.

5. Any order for maintenance made on a complaint under s.1 may also contain a provision that the complainant be no longer bound to cohabit with the defendant ("a non-cohabitation clause") and that provision while in force has effect, by virtue of s.2(1)(a), in all respects as a decree of judicial separation. Such separation orders are relatively infrequent.

6. A complaint must be made within six months from the time when the matter of complaint arises[45]. The only exception is that made by s.12 which enables a complaint on the ground of the commission of an act of adultery to be heard if it is made within six months from the date when the act of adultery first became known to the complainant. In the case of matrimonial proceedings it is doubtful whether the value of the six months' rule in discouraging stale claims outweighs its disadvantages. A party with a cause of complaint may in some cases feel obliged, or be advised, to take proceedings in order to protect his or her rights, thus reducing the likelihood of a reconciliation. Moreover there is no precisely similar rule applicable to similar proceedings in the High Court. The Gorell Commission in 1912[46] suggested that in order to prevent delay and stale claims it was desirable to preserve the six months' rule, subject to the modification that the court should have power in its discretion to extend the limit. There seems to be much to be said for a fixed period of limitation subject to this suggested discretion to extend in exceptional cases. It may well be, however, that the present six months' limitation period is too short. The period in affiliation proceedings is twelve months and this might well be made the basic period.

7. If it is accepted that, as regards the powers of the court (though not the exercise of those powers), no distinction is to be drawn between husband and wife, the Act of 1960 requires amendment. As it stands now, except for the case where the husband is an habitual drunkard or drug addict and the court makes a separation order, a maintenance order can be made against a wife in favour of her husband only where his earning capacity has been impaired. But as pointed out in paras.21 and 22 of this

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45. Magistrates' Courts Act 1952, s.104.

46. Cd.6478, para.192.

Paper, there are many cases in which it would be reasonable for a wife to be ordered to contribute to the maintenance of an impecunious husband, notwithstanding that his lack of means is not due to any impairment of his earning capacity through age, illness or disability. She can be made to do so already indirectly because of her liability under s.42 of the National Assistance Act 1948 or s.22 of the Ministry of Social Security Act 1966. It seems right that what can be done indirectly should be able to be done directly, even if, as we expect, the practical effect of such a change would be small.

8. Similarly, if it is accepted that as regards liability to pay maintenance no rigid distinction should be drawn between the "innocent" and the "guilty" party, the Act of 1960 requires further amendment. As will be seen from paras.2-4 of this Appendix, the magistrates can make a maintenance order only on proof of a matrimonial offence although admittedly this may consist merely of "wilful neglect to provide reasonable maintenance" - a ground similar to that on which application can be made to the Divorce Court under s.22 of the Matrimonial Causes Act 1965.

9. However, it has been argued that to abandon in proceedings in magistrates' courts the distinction between innocent and guilty parties and, still more, the abolition of the need to prove wilful neglect to maintain in applications for maintenance would be too radical a departure from the present position. In the vast majority of cases in the High Court a claim for maintenance is ancillary to a claim for substantive relief. The hearing of the substantive claim will at the very least provide some indications as to the history of the marriage and the maintenance claim can be determined against this background. In the case of magistrates' courts, however, the position is quite different. The only formalities before the hearing (apart from the requirement, laid down in Practice Directions by the High Court, that brief particulars of allegations of adultery should be made available to the defendant before the hearing) are the making of the original complaint and the subsequent issue of the summons to the defendant. If an unqualified right to apply to magistrates' courts for maintenance were allowed, some difficult procedural implications would have to be examined. Although the court, in reaching its decision, would have to take into account all the circumstances set out in the draft Clause in Appendix A, there is a danger that no very clear indication of the particular circumstances that would be most relevant could be given before the court had heard the case. Would it be possible to give any summary of

particulars of the grounds on which the complaint was based either in the original complaint or in the summons to the defendant? Would the case go before the court with a sufficiently clear indication to the defendant of the allegations that he would have to meet or of the evidence that he would need to adduce? Would the court have sufficient guidance about the issues which it would be required to decide unless a system of preliminary pleadings were introduced or there was resort to adjournment more frequently? Would not either course tend to rob the proceedings of their summary character?

10. The broad effect of the Act of 1960 is that the wife must establish the husband's "guilt" and her own "innocence" to obtain an order at all and must bring her claim within one of the grounds for application set out in s.1. Abolition of these specific grounds might mean that the court and all the parties concerned would be deprived of sufficient guidance about the formulation of the issues which the court should consider and how these issues should be decided.

11. In the year 1965, 27,262 applications for matrimonial orders were made(47). Of these, however, only 16,442 resulted in orders being made and 10,820 were unsuccessful. The number of unsuccessful wives was probably even higher than this because under the Act of 1960, even though the wife was unsuccessful in her own claim, the court may proceed to grant her an order in favour of any children. If the wife's guilt is no longer to be relevant to her entitlement to an order for maintenance but only to the amount of that order, these figures might be substantially altered. The consequence might be that many more men would be ordered to pay maintenance to wives against whom they had a legitimate grievance. The enforcement of maintenance orders already presents magistrates' courts with a serious problem and orders against "innocent" husbands would certainly prove an even greater problem. They are likely to be less willing to pay, as a class, than husbands who get freedom to remarry in Divorce Court proceedings and regard financial provision for a wife who is to some extent guilty as a price worth paying.

12. If the removal of the need to prove a matrimonial offence on the part of the defendant (or "innocence" on the part of the complainant) resulted in a substantial increase in the number of applications made to magistrates' courts, staffing problems would be created and the courts would be even more

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47. These figures exclude applications for attachment of earnings orders as a means of enforcing an existing matrimonial order.

hard-pressed in busy areas than they are at present. It would, of course, also impose a further burden on the Legal Aid Fund.

13. In para.23 of the Paper we have pointed out, in relation to the powers of the Divorce Court, that a distinction between innocence and guilt has been largely eroded. This is not true of matrimonial proceedings in magistrates' courts. If the law is to depart from its present linking of maintenance and the matrimonial offence, it would seem desirable that the necessary legislation should lay down clear principles for the courts to follow. The conduct of the hearing itself is governed by Rule 18 of the Magistrates' Courts Rules 1952, the provisions of which are fairly rudimentary. If magistrates' courts up and down the country - and there are more than a thousand of them - are not to give inconsistent decisions, legislation corresponding to the Draft Clause contained in Appendix A may have to give them still more precise guidance.

14. In para.22 of this Paper we have drawn attention to the Australian legislation dealing with financial relief ancillary to proceedings for dissolution of marriage, etc. This draws no distinction, as regards the powers of the court, between the "guilty" and the "innocent" party. The individual State laws, however, relating to applications for maintenance alone still require the court to be satisfied before making a maintenance order, (a) that the complainant has been left without adequate means of support provided by the defendant, and (b) that the defendant did not have just cause or excuse for so leaving the complainant[48].

Paragraph 226(3)[49]

15. By virtue of s.2(3) a magistrates' court is debarred from making a maintenance order if the complainant is proved to have committed adultery (in the absence of condonation or connivance) during the subsistence of the marriage. This restriction on the power of a magistrates' court is quite different from the power of the High Court under s.22 of the Matrimonial Causes Act 1965 which is not in terms so limited, although, as we have pointed out in paras.29-30 of this Paper, the powers of the courts under the two Acts are not, in fact, as dissimilar as might have been expected. There is, however, no obvious objection to giving magistrates a discretion, in any case where the complainant has committed adultery, to award him or her maintenance if they think it just to do so in the light of the conduct of both parties.

48. For example, Maintenance Act (New South Wales) No.74 of 1964, ss.9, and 11-16; and Maintenance Act (Queensland) 1949 ss.8 and 11.

49. (3) The commission of an act of adultery should cease to be a bar to an application to the Divorce Court for any form of maintenance (paras.29-31).

Paragraph 226(4) and (6)[50]

16. The delay between the first failure of the spouse to maintain the complainant and the hearing of the complaint by the magistrates is likely to be some weeks. It is true that s.6 (unlike s.22 of the Matrimonial Causes Act 1965 in relation to applications to the High Court) makes provision for the magistrates' court (and, in certain circumstances, the High Court on appeal) to make an interim order for the payment of maintenance for the complainant and for the children of the marriage. An interim order may be made before the court makes any determination whether or not the defendant has been guilty of wilful neglect to maintain or one of the other grounds of complaint mentioned in paras.2-4 of this Appendix. Such an order may not be made unless the hearing is adjourned for not less than one week and may remain in force, unless otherwise ordered, for three months. But unless the decision of Karminski J. in McLellan v. McLellan[51] extends to magistrates' courts the magistrates may have no power to award maintenance in respect of the period between the issue of the complaint and the hearing - let alone any period between the first cessation of maintenance and the issue of the complaint.

17. Although a complaint by a destitute spouse will normally come on for hearing sooner in the magistrates' court than in the High Court, the length of time during which no maintenance is being received and the absence of any power to backdate the orders eventually made (or to award a lump sum) in respect of the period that has elapsed since the first failure to maintain may clearly be the cause of some hardship to the complainant.

Paragraph 226(14)[52]

18. By virtue of s.76 of the Magistrates' Courts Act 1952, read with s.13(1) of the Act of 1960, the court hearing a complaint for the revocation, revival or variation of a maintenance order may remit the whole or any part of the sums due under the

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50. (4) The court should always have power to award interim maintenance (paras.34-38); (6)... [The court] should always be able, when making its final order for maintenance, to order the payment of a lump sum in respect of future maintenance or maintenance for any period prior to the institution of proceedings (paras.37, 48 and 52).

51. [1954] P.138.

52. All maintenance orders should be variable at any time, even after the death of the spouse ordered to pay until the administration of the estate has been completed in due course (paras.88-95). The court should be able to remit arrears to backdate variations and, where the payee has failed to disclose a material change of circumstances, to order repayment of sums already paid (paras.96 and 97).

order, but this power does not include power to order the repayment of sums already paid before the date of the complaint. In Fildes v. Simkin[53] a substantial sum had accumulated in the hands of the justices' clerk; there had been a divorce and the wife, who had married again without the husband's knowledge, had ceased to collect the payments made to the clerk by her former husband. In such circumstances it would obviously be unjust for the wife to claim the money. The power of the court to order its return would be a useful one. Where the wife had actually been paid the money, the power should be exercised sparingly since an order to repay money which has already been spent may cause undue hardship.

Paragraph 226(34)[54]

19. If this controversial question were to be settled by making the law governing magistrates' courts conform to that governing proceedings in the High Court, s.7(1) would have to be repaaled. S.7(1) provides inter alia that if a maintenance order is made while the parties to the marriage are cohabiting - (a) until the parties have ceased to cohabit the order cannot be enforced and no liability accrues under it, and (b) the order itself will cease to be valid if the parties continue to cohabit for the period of three months. Moreover, under subs.(2) a maintenance order (except for certain provisions relating to children) ceases to have effect if the parties resume cohabitation.

20. It will be seen that a maintenance order can already be made while the parties are cohabiting. This is so because it is necessary to deal with the situation where the wife is justified in leaving the husband because of his conduct but cannot afford to do so until she has an order. If our provisional recommendation in relation to the Divorce Court of abolition of the distinction between innocent and guilty parties were extended to magistrates' courts "housekeeping" orders of this kind might become very much more frequent, even if s.7(2) were not amended.

21. Those who think that cohabitation should be no bar to the making of an enforceable maintenance order against a spouse argue that the wife's inability to ascertain her husband's means is a frequent cause of discord, because she is left in doubt as to whether she is being fairly treated. If she could at any

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53. [1960] P.70.

54. Should a spouse continue to be able to apply to the Divorce Court for a maintenance order while the parties are cohabiting and should an order so made be enforceable during cohabitation? If so should the present divergence between the rule in the High Court and that in magistrates' courts be preserved? (para.32 and Appendix A).

time obtain a ruling from the court as to what it was right for the husband to pay for her maintenance and that of the children, it might, it is argued, enhance the stability of the marriage. This line of reasoning suggests the possibility of a two-stage proceeding: (1) to enable the wife to obtain a sworn statement of her husband's means and (2) proceedings for an order if it then appears that he is not making her a reasonable allowance. It would be generally agreed that husband and wife should in the ordinary way make full disclosure of their means to one another and it is urged by those of this school of thought that this should be made a legally enforceable obligation.

22. On the 25th April 1952 Dr. Edith Summerskill, then a Private Member of the House of Commons, moved the Second Reading of the Women's Disabilities Bill. Clause 3 of this Bill would have conferred a legal right on a wife to an adequate allowance to cover household expenses and her personal needs. She was to be enabled to apply to the court to fix a reasonable periodical allowance. In the event of a husband failing to comply with the order the money was to be deducted from his wages at the source. If he still failed to pay, the proceeds of his property in any form would be vested in the wife. The Bill was opposed and failed to secure a second reading.

23. A number of lawyers spoke in the course of a full debate both for and against the Bill. Mr. J. E. S. Simon, Q.C., M.P., (as he then was) expressed misgivings about Clause 3 although he considered that it remedied a real wrong and might perform a valuable function in saving many marriages; his real doubt was based on the feeling that the magistrates' court - which also exercises minor criminal jurisdiction - was not the right court to decide these matters(55).

24. Apart from doubts about the right tribunal to fix a proper housekeeping allowance (whether the magistrates' court, the county court or some form of arbitration), the objections to any proposal of this kind appear formidable. Although grievances about money frequently cause discord between husband and wife who are living together, their forceful expression before a third person, even in the absence of the public, would tend to make a breach in their affection and mutual trust harder to heal. Frequently the making of effective maintenance orders in these circumstances would do more harm than good and might well provoke a husband to walk out of the home rather than submit to what he considered to be a harsh and impertinent order.

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55. House of Commons, Official Report, 25th April 1952; Col.970.

25. A further objection is the unpredictable volume of additional work which would be cast on the courts by a proposal of this kind. In any event, and especially if the need to prove neglect to maintain were abolished, it is clear that a great number of quite trivial disputes might be brought to the courts resulting in increased cost to the tax-payer for Legal Aid and perhaps even for new court accommodation.

26. This controversial question is one on which we invite views. At the same time we would like to seek reactions to a far more modest proposal which seems atractive to us: an experimental resumption of cohabitation with a view to reconciliation should not affect the continued existence and subsequent enforceability of a magistrates' maintenance order - i.e. an application of the principle underlying ss.1(2) and 42(2) of the Matrimonial Causes Act.

Paragraph 226(38)[56]

27. In magistrates' courts the question of maintenance is tied to the question of custody. Even in guardianship proceedings, it is still necessary for the applicant to apply for custody as an essential prerequisite of a claim for maintenance of a child. This fact has tended to conceal the real nature of the guardianship proceedings which now take place in magistrates' courts; more often than not these are in reality matrimonial proceedings limited to the question of child maintenance. Before the Act of 1960, if a woman failed to obtain an order for her own maintenance, any application in the same proceedings in respect of the children also failed. Accordingly, if the woman felt any doubt about the success of her application it was accompanied by a separate guardianship application in respect of the children. Since 1960, as a result of the new provisions introduced in the Act of that year, the failure of the mother's own application no longer prejudices the claim in respect of the children. The result can be seen in the steady increase of matrimonial applications since that time, in contrast with the failure of guardianship applications to increase substantially. There are, however, still about 5,000 guardianship applications a year in magistrates' courts. It may be that in many cases these are brought because the mother entertains no hope of obtaining an order for herself and does not wish to describe in court more of the matrimonial history than is

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56. Should it be made possible for action to recover maintenance for a child to be taken otherwise than by the parents or guardians? (paras.162-164).

necessary for the purpose of enabling the court to determine what will be for the welfare of the infant. We think that, if the issue of maintenance were taken out of guardianship proceedings, which would then be limited to disputes about custody, the nature of the proceedings themselves could be simplified and the number of remaining guardianship proceedings would dwindle to a negligible amount. Moreover, if applications for maintenance of a child were distinct from applications for its custody, legislation could go on to provide that persons other than the father or mother could apply for maintenance without necessarily raising the issue of custody.

APPENDIX C

COMMENTS ON SOME RELEVANT PROVISIONS IN AUSTRALIAN AND NEW ZEALAND LEGISLATION

A number of Australian and New Zealand provisions which are referred to in this paper or are relevant to matters discussed in it are set out below. It may be helpful to draw attention here to certain of the most interesting features of the Australian Act which in arrangement and clarity affords a model which might be followed:-

(a) The court is given wide discretionary powers and, accordingly, the legislation tends to be brief and simple.

(b) The court's powers are the same in relation to husband and wife and in relation to "innocent" and "guilty" parties: s.84.

(c) S.84 provides simply for the payment of maintenance which can be either permanent or pending the disposal of the proceedings: s.87(1)(h). Contrast the confusing differences in nomenclature in English Law: interim alimony, maintenance, alimony and periodical payments.

(d) Maintenance can take the form of a lump sum or a weekly, monthly, yearly or other periodical sum: s.87(1)(a).

(e) In all cases it can be secured or unsecured: s.87(1)(b),(c) and (d).

(f) It can last for a fixed term or for life or during joint lives or until further order: s.87(1)(h).

(g) Maintenance is recoverable as a judgment debt and can be enforced with the leave of the court against the estate of the deceased party: s.104.

(h) Maintenance can be awarded even if the principal petition is dismissed so long as the court is satisfied that the proceedings were instituted in good faith and that there is no likelihood of reconciliation: s.89.

(j) The court has power to order either party to settle property for the benefit of all or any of the parties and the children (s.86(1)) or to vary ante- or post-nuptial settlements: s.86(2).

(k) Any of these orders can be made irrespective of the nature of the principal relief claimed: s.87(1).

(l) There is a general power to discharge, modify, suspend, revive or vary an order (s.87(1)(j)), to sanction an agreement (s.87(1)(k)) or to make any order which the court thinks it "necessary to make to do justice": s.87(1)(l) .

(m) There is power to set aside any disposition intended to defeat an existing or anticipated order for costs, maintenance or the making or variation of settlements. Though the court is required to have regard to the interests of a bona fide purchaser (or indeed any other person interested) a sale as well as a gift can be set aside if the circumstances justify it and there is no rigid time limit: s.120.

(n) There is a single definition of children applicable to all sections: s.6.

Certain children to be deemed to be children of the marriage.

6. (1) For the purposes of the application of this Act in relation to a marriage -

(a) a child adopted since the marriage by the husband and wife or by either of them with the consent of the other;

(b) a child of the husband and wife born before the marriage, whether legitimated by the marriage or not; and

(c) a child of either the husband or wife (including an illegitimate child of either of them and a child adopted by either of them) if, at the relevant time, the child was ordinarily a member of the household of the husband and wife,

shall be deemed to be a child of the marriage, and a child of the husband and wife (including a child born before the marriage, whether legitimated by the marriage or not) who has been adopted by another person or other persons shall be deemed not to be a child of the marriage.

(2) For the purposes of the last preceding sub-section, in relation to any proceedings the relevant time is -

(a) the time immediately preceding the time when the husband and wife ceased to live together or, if they have ceased on more than one occasion to live together, the time immediately preceding the time when they last ceased to live together before the institution of the proceedings; or

(b) if the husband and wife were living together at the time when the proceedings were instituted, the time immediately preceding the institution of the proceedings.

(3) The provisions of the last two preceding sub-sections apply in relation to a purported marriage that is void as if the purported marriage were a marriage.

Polygamous marriages.

6A. (1) Subject to this section, a union in the nature of marriage entered into outside Australia or under Division 3 of Part IV. of the Marriage Act 1961 that was,

when entered into, potentially polygamous is a marriage for the purposes of proceedings under Part VI. of this Act in respect of the union, and for the purposes of proceedings in relation to any such proceedings, where it would have been a marriage for those purposes but for the fact that it was potentially polygamous.

(2) This section does not apply to a union unless the law applicable to local marriages that was in force in the country, or each of the countries, of domicile of the parties at the time the union took place permitted polygamy on the part of the male party.

(3) This section does not apply to a union where, at the time the union took place, either of the parties was a party to a subsisting polygamous or potentially polygamous union, but this section does apply to a union notwithstanding that the male party has, during the subsistence of the union, contracted, or purported to contract, a further union in the nature of marriage, whether or not the further union still subsists.

Effect on rights to sue, devolution of property, &c.

55. (2) Where a party to a marriage dies intestate as to any property while a decree of judicial separation is in operation, that property shall devolve as if that party had survived the other party to the marriage.

Definition.

83. In this Part, "marriage" includes a purported marriage that is void.

Powers of court in maintenance proceedings.

84. (1) Subject to this section, the court may, in proceedings with respect to the maintenance of a party to a marriage, or of children of the marriage, other than proceedings for an order for maintenance pending the disposal of proceedings, make such order as it thinks proper, having regard to the means, earning capacity and conduct of the parties to the marriage and all other relevant circumstances.

(2) Subject to this section and to the rules, the court may, in proceedings for an order for the maintenance of a party to a marriage, or of children of the marriage, pending the disposal of proceedings, make such order as it thinks proper, having regard to the means, earning capacity and conduct of the parties to the marriage and all other relevant circumstances.

(3) The court may make an order for the maintenance of a party notwithstanding that a decree is or has been made against that party in the proceedings to which the proceedings with respect to maintenance are related.

(4) The power of the court to make an order with respect to the maintenance of children of the marriage shall not be exercised for the benefit of a child who has attained the age of twenty-one years unless the court is of opinion that there are special circumstances that justify the making of such an order for the benefit of that child.

Powers of court in custody, &c., proceedings.

85. (1) In proceedings with respect to the custody, guardianship, welfare, advancement or education of children of a marriage -

(a) the court shall regard the interests of the children as the paramount consideration; and

(b) subject to the last preceding paragraph, the court may make such order in respect of those matters as it thinks proper.

(2) The court may adjourn any proceedings referred to in the last preceding sub-section until a report has been obtained from a welfare officer on such matters relevant to the proceedings as the court considers desirable, and may receive the report in evidence.

(3) In proceedings with respect to the custody of children of a marriage, the court may, if it is satisfied that it is desirable to do so, make an order placing the children, or such of them as it thinks fit, in the custody of a person other than a party to the marriage.

(4) Where the court makes an order placing a child of a marriage in the custody of a party to the marriage, or of a person other than a party to the marriage, it may include in the order such provision as it thinks proper for access to the child by the other party to the marriage, or by the parties or a party to the marriage, as the case may be.

Powers of court in proceedings with respect to settlement of property.

86. (1) The court may, in proceedings under this Act, by order require the parties to the marriage, or either of them, to make, for the benefit of all or any of the parties to, and the children of, the marriage, such a settlement of property to which the parties are, or either of them is, entitled (whether in possession or reversion) as the court considers just and equitable in the circumstances of the case.

(2) The court may, in proceedings under this Act, make such order as the court considers just and equitable with respect to the application for the benefit of all or any of the parties to, and the children of, the marriage of the whole or part of property dealt with by ante-nuptial or post-nuptial settlements on the parties to the marriage, or either of them.

(3) The power of the court to make orders of the kind referred to in this section shall not be exercised for the benefit of a child who has attained the age of twenty-one years unless the court is of opinion that there are special circumstances that justify the making of such an order for the benefit of that child.

General powers of court.

87. (1) The court, in exercising its powers under this Part, may do any or all of the following:-

(a) order that a lump sum or a weekly, monthly, yearly or other periodic sum be paid;

(b) order that a lump sum or a weekly, monthly, yearly or other periodic sum be secured;

(c) where a periodic sum is ordered to be paid, order that its payment be wholly or partly secured in such manner as the court directs;

(d) order that any necessary deed or instrument be executed and that such documents of title be produced or such other things be done as are necessary to enable an order to be carried out effectively or to provide security for the due performance of an order;

(e) appoint or remove trustees;

(f) order that payments be made direct to a party to the marriage, or to a trustee to be appointed or to a public authority for the benefit of a party to the marriage;

(g) order that payment of maintenance in respect of a child be made to such person or public authority as the court specifies;

(h) make a permanent order, an order pending the disposal of proceedings or an order for a fixed term or for a life or during joint lives or until further order;

(i) impose terms and conditions;

(j) in relation to an order made in respect of a matter referred to in any of the last three preceding sections, whether made by that court or by another court and whether made before or after the commencement of this Act -

(i) discharge the order if the party in whose favour it was made marries again or if there is any other just cause for so doing;

(ii) modify the effect of the order or suspend its operation wholly or in part and either until further order or until a fixed time or the happening

of some future event;

(iii) revive wholly or in part an order suspended under the last preceding sub-paragraph; or

(iv) subject to the next succeeding sub-section, vary the order so as to increase or decrease any amount ordered to be paid by the order;

(k) sanction an agreement for the acceptance of a lump sum or periodic sums or other benefits in lieu of rights under an order made in respect of a matter referred to in any of the last three preceding sections, or any right to seek such an order;

(l) make any other order (whether or not of the same nature as those mentioned in the preceding paragraphs of this sub-section, and whether or not it is in accordance with the practice under other laws before the commencement of this Act) which it thinks it is necessary to make to do justice;

(m) include its order under this Part in a decree under another Part; and

(n) subject to this Act, make an order under this Part at any time before or after the making of a decree under another Part.

(2) The court shall not make an order increasing or decreasing an amount ordered to be paid by an order unless it is satisfied -

(a) that, since the order was made or last varied, the circumstances of the parties or either of them or of any child for whose benefit the order was made, have changed to such an extent as to justify its so doing; or

(b) that material facts were withheld from the court that made the order or from a court that varied the order or material evidence previously given before such a court was false.

(3) The court shall not make an order increasing or decreasing -

(a) the security for the payment of a periodic sum ordered to be paid; or

(b) the amount of a lump sum or periodic sum ordered to be secured,

unless it is satisfied that material facts were withheld from the court that made the order or from a court that varied the order or that material evidence given before such a court was false.

Execution of deeds, &c., by order of court.

88. (1) Where -

(a) an order under this Part has directed a person to execute a deed or instrument; and

(b) that person has refused or neglected to comply with the direction or, for any other reason, the court thinks it necessary to exercise the powers of the court under this subsection,

the court may appoint an officer of the court or other person to execute the deed or instrument in the name of the person to whom the direction was given and to do all acts and things necessary to give validity and operation to the deed or instrument.

(2) The execution of the deed or instrument by the person so appointed has the same force and validity as if it had been executed by the person directed by the order to execute it.

(3) The court may make such order as it thinks just as to the payment of the costs and expenses of and incidental to the preparation of the deed or instrument and its execution.

Power of court to make orders on dismissal of petition.

89. (1) Except as provided by this section, the court shall not make an order under this Part in favour of the petitioner where the petition for the principal relief has been dismissed.

(2) Where -

(a) the petition for the principal relief has been dismissed after a hearing on the merits; and

(b) the court is satisfied that -

(i) the proceedings for the principal relief were instituted in good faith to obtain that relief; and

(ii) there is no reasonable likelihood of the parties becoming reconciled,

the court may, if it considers that it is desirable to do so, make an order under this Part in favour of the petitioner other than an order under section eighty-six of this Act.

(3) The court shall not make an order by virtue of the last preceding sub-section unless it has heard the proceedings for the order at the same time as, or immediately after, the proceedings for the principal relief.

(4) In this section, "principal relief" means relief of a kind referred to in paragraph (a) or (b) of the definition of "matrimonial cause" in sub-section (1) of section five of this Act.

Recovery of moneys as judgment debt.

104. (1) Where a decree made under this Act orders the payment of money to a person, any moneys payable under the decree may be recovered as a judgment debt in a court of competent jurisdiction.

(2) A decree made under this Act may be enforced, by leave of the court by which it was made and on such terms and conditions as the court thinks fit, against the estate of a party after that party's death.

Transactions intended to defeat claims.

120. (1) In proceedings under this Act, the court may set aside or restrain the making of an instrument or disposition by or on behalf of, or by direction or in the interest of, a party, if it is made or proposed to be made to defeat an existing or anticipated order in those proceedings for costs, damages, maintenance or the making or variation of a settlement.

(2) The court may order that any money or real or personal property dealt with by any such instrument or disposition may be taken in execution or charged with the payment of such sums for costs, damages or maintenance as the court directs, or that the proceeds of a sale shall be paid into court to abide its order.

(3) The court shall have regard to the interests of, and shall make any order proper for the protection of, a bona fide purchaser or other person interested.

(4) A party or a person acting in collusion with a party may be ordered to pay the costs of any other party or of a bona fide purchaser or other person interested of and incidental to any such instrument or

disposition and the setting aside or restraining of the instrument or disposition.

(5) In this section, "disposition" includes a sale and a gift.

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2. ..."Child of the marriage" means any child of the husband and wife; and includes any other child (whether or not a child of the husband or of the wife) who was a member of the family of the husband and wife at the time when they ceased to live together or at the time immediately preceding the institution of proceedings, whichever first occurred; and, for the purposes of this definition, the parties to a purported marriage that is void shall be deemed to be husband and wife.

12. (2) If, while a decree of separation is in force, either the husband or the wife dies intestate as to any property, that property shall devolve as if the survivor had predeceased the intestate.