
# The Law Commission

**(LAW COM. No. 51)**

# MATRIMONIAL CAUSES BILL

## REPORT ON THE CONSOLIDATION OF CERTAIN ENACTMENTS RELATING TO MATRIMONIAL PROCEEDINGS, MAINTENANCE AGREEMENTS, AND DECLARATIONS OF LEGITIMACY, VALIDITY OF MARRIAGE AND BRITISH NATIONALITY.

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*by Command of Her Majesty*
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The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law. The Commissioners are—

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*To the Right Honourable the Lord Hailsham of Saint Marylebone, Lord High Chancellor of Great Britain.*

The Matrimonial Causes Bill which accompanies this Report seeks to consolidate certain enactments relating to matrimonial proceedings, maintenance agreements, and declarations of legitimacy, validity of marriage and British nationality. In order to produce a satisfactory consolidation we are making the recommendations set out in the Appendix to this Report.

Some of the proposals in our recommendations could have been authorised under the Consolidation of Enactments (Procedure) Act 1949, but the amendments proposed in Recommendations 1 to 4 and 8, although in our view desirable, are somewhat too substantial to be effected under that Act. We therefore thought it preferable to make this Report and recommend that those, as well as the amendments proposed by Recommendations 5, 6, 7, 9 and 10, be made.

The principal registry of the Family Division of the High Court have been consulted and agree with our recommendations.

LESLIE SCARMAN,

*Chairman of the Law Commission.*

9 *November* 1972.

## APPENDIX

### RECOMMENDATIONS

**1.** The operation of sections 4, 5 and 6 of the Divorce Reform Act 1969 depends upon the court being satisfied (section 4(2)(*a*)) or having held (sections 5 and 6(1)(*b*)) that the "only" fact mentioned in section 2(1) of that Act on which the petitioner is or was "entitled to rely in support of his petition" is or was the five year separation fact (section 4), the fact of two years' separation coupled with the respondent's consent to a decree being granted (section 5) or either of those facts (section 6). Sections 5 and 6 both operate after the grant of a decree nisi, and rule 55(3) of the Matrimonial Causes Rules 1971, with these two sections in view, provides as follows:—

> "Where a decree nisi is pronounced on a petition in which any such fact as is mentioned in paragraph (*d*) or (*e*) of section 2(1) of the Act of 1969 is alleged, the decree shall state whether that fact was the only fact mentioned in the said section 2(1) on which the petitioner was entitled to rely in support of his petition."

In our view it is clear that sections 4, 5 and 6 were intended to protect the interests of the respondent where the only available basis for the grant of a decree or, where a decree has been granted, the only actual basis for the grant was one of the "separation facts" set out in section 2(1)(*d*) and (*e*) of that Act. These were in substance new occasions (if not technically "grounds") for divorce; and the purpose of sections 4, 5 and 6 was undoubtedly to prevent undue hardship to persons who might become liable to be divorced by virtue of section 2(1)(*d*) or (*e*) without reference to anything which could be regarded as fault on their part.

That being so, we believe that the words quoted above are intended to indicate that the operation of the safeguards in sections 4, 5 and 6 is to depend on whether one of the separation facts, and one of the separation facts *only,* is to be or was the basis for the grant of a decree nisi. However, read literally the words used in these provisions require not only positive reliance on a separation fact as a basis for the grant of a decree but also the positive rejection of any other section 2(1) fact which might in the circumstances of the case provide a basis for the grant of a decree. Sections 5 and 6 require the court to have held that *the only* section 2(1) fact on which the petitioner was entitled to rely in support of his petition was a section 2(1)(*d*) fact (section 5) or a section 2(1)(*d*) or (*e*) fact (section 6). On analysis, it is clear that this requirement calls for two holdings by the court, namely:—

(1) that the petitioner *was entitled* to rely on a section 2(1)(*d*) or (*e*) fact; and

(2) that the petitioner *was not entitled* to rely on any other section 2(1) fact.

But the second of these holdings may be lacking even though the decree is clearly based on one of the separation facts only. Suppose, for example, that a petitioner alleges in his petition both adultery (and that he finds it intolerable to live with the respondent) and desertion, and that he adduces evidence on both issues. Towards the end of the proceedings the respondent decides to consent to a decree; the petitioner thankfully amends the desertion charge to two years' separation coupled with the respondent's consent and gets a decree on that basis without pursuing the charge of adultery any further. It seems to us clear that in such a case the petitioner ought to be obliged to take the burden of the separation fact along with the benefit. He has in the end got his divorce by relying on the fact of two years' separation coupled with the respondent's consent. But the court will not have made a finding one way or the other on the adultery charge, so that the second of the two holdings mentioned above (that the petitioner *was not entitled* to rely on any other section 2(1) fact) will not be present. If, therefore, the reference in sections 5 and 6 to the court having held that "*the only*" section 2(1) fact on which the petitioner was entitled to rely in support of his petition was a section 2(1)(*d*) or (*e*) fact is

interpreted literally, so as to allow the respondent to claim the protection of those sections only if the court has made the second as well as the first holding mentioned above, the result would in our view be both unjust and absurd in the case described above.

This absurdity can best be shown by applying section 5 to the circumstances of the case just described. The petitioner having got a decree nisi on the basis of the fact of two years' separation coupled with the respondent's consent, it then turns out that he misled the respondent into consenting. This in effect vitiates the whole basis for the decree. It would be absurd if the mere fact that he had alleged adultery in his petition and tried at one stage of the case to prove it, but without actually pressing it to a decision, could save him from having his decree rescinded, when an element of the fact on which the decree *was* actually based (consent) is shown never to have genuinely existed.

In our view, therefore, it would be unfortunate if a literal interpretation of the words used in sections 5 and 6 were adopted, but in practice this has not so far happened. In *Rule* v. *Rule* [1971] 3 All E.R. 1368 Bagnall J. held that a petitioner should be regarded as being "entitled to rely" on a particular fact for the purposes of sections 4, 5 and 6 of the Divorce Reform Act only if he had both pleaded and proved it to the satisfaction of the court, so as to give rise to the court's duty under section 2(3) of that Act to grant a decree unless satisfied that there was no irretrievable breakdown. He went on to take the view, on a consideration of the provisions of the Act and of Rule 55(3) of the Matrimonial Causes Rules 1971 (quoted above), that a court granting a decree under the new law should state in the decree every section 2(1) fact which had been established to the satisfaction of the court and on which, therefore, the petitioner was entitled to rely. On that footing, if the only fact mentioned in the decree were a section 2(1)(*d*) or (*e*) fact, it was in his view unnecessary for the court to state whether it had held the fact in question to be "the only" fact on which the petitioner was entitled to rely in support of his petition: since failure to mention in the decree any other section 2(1) fact would necessarily imply that the court had held that the section 2(1)(*d*) or (*e*) fact mentioned was the only fact on which the petitioner was entitled to rely.

However, as explained above, this does not necessarily follow. Where the decree mentions only a section 2(1)(*d*) or (*e*) fact as having been established to the satisfaction of the court this represents the first of the two holdings mentioned above, but not the second. If the court is bound to state in the decree every section 2(1) fact established to its satisfaction (and on which, therefore, the petitioner is entitled to rely), all that is *necessarily* implied from the mention in the decree of a section 2(1)(*d*) or (*e*) fact, without more, is that the court *has not held* that the petitioner *was* entitled to rely on any other section 2(1) fact pleaded: not that the court *has* positively held that the petitioner *was not entitled* to rely on any other such fact.

Nevertheless, in our view *Rule* v. *Rule* represents a practical and sensible approach to the interpretation of the words in question in sections 5 and 6 of the 1969 Act. On the facts of that case it was justifiable to equate "the court has held that *the only* section 2(1) fact on which the petitioner was entitled to rely in support of his petition was a section 2(1)(*d*) or (*e*) fact" with "the court has held that the petitioner was entitled to rely in support of his petition on a section 2(1)(*d*) or (*e*) fact *and has not so held* as respects any other section 2(1) fact". The petitioner could not have been entitled to rely (in the sense given to those words by Bagnall J.) on any other section 2(1) fact, because all allegations of other section 2(1) facts had been struck from the pleadings. In the circumstances, therefore, it would have been pointless to require the court formally to hold that the petitioner was not entitled to rely on any other section 2(1) fact, in order to bring the section 6 safeguards into operation. But the case described above, where the petitioner has pleaded another section 2(1) fact and even adduced evidence in support of his allegation, but has in the end not pressed the issue to decision, would be more difficult. *Rule* v. *Rule* might well be followed in such circumstances, and the mention in the decree of a separation

fact, without more, might be held to imply that the court had held that *the only* fact on which the petitioner was entitled to rely was the separation fact. But we cannot be certain that this desirable development will in fact take place.

It is in our view clearly wrong that the law as respects safeguards for a respondent divorced by virtue of one of the new separation facts established by the Divorce Reform Act should not be certain. Although, therefore, we think *Rule* v. *Rule* would probably be followed in the case described above, we think the opportunity should be taken in this consolidation Bill to make the words of sections 5 and 6 of the 1969 Act say what Bagnall J. has held them to mean. Section 4 is rather a different case, because if the respondent invokes its protection the petitioner will be obliged to press any other section 2(1) facts available in the circumstances in order to get a decree nisi at all. In effect, therefore, in a case where other section 2(1) facts are pleaded, the second of the two holdings mentioned above will always be present if section 4 is successfully invoked. However, it seems to us desirable that the language of section 4 should match that of sections 5 and 6, and it is on that account that our recommendation extends to section 4.

We therefore recommend that sections 4, 5 and 6 of the Divorce Reform Act 1969 should be amended so as to make the rights of the parties thereunder depend, not on a finding that the only fact mentioned in section 2(1) of that Act on which the petitioner is entitled to rely in support of his petition is a section 2(1)(*d*) or (*e*) fact (as the case may be), but on a finding that the petitioner is entitled to rely in support of his petition on one or other of those facts, *not* accompanied by a finding to similar effect as to any other fact mentioned in section 2(1). Effect is given to this recommendation in clauses 5(2) and 10(1) and (2) of the Bill.

**2.** In section 36(2) of the Matrimonial Causes Act 1965 there is a reference to representations by a local authority "as to the making of an order for payments for the maintenance and education" of a child whom it is proposed to commit to the local authority's care. This reference was not altered by the Matrimonial Proceedings and Property Act 1970, but its terms are not appropriate to the modern law of financial provision established by that Act. Orders under the new law are no longer, in terms, for "maintenance", and certainly not for "maintenance and education". The terminology of section 36(2) as it stands, therefore, does not fit the situation under the Matrimonial Proceedings and Property Act 1970, but the problem is to determine what in terms of that Act is the appropriate replacement for the reference under consideration.

In the context of the Matrimonial Causes Act 1965, the words "an order for payments for the maintenance and education of the child" appear to be directed at orders for maintenance and education under section 34(1) of that Act. They do not seem apt to cover an order under section 34(3) "to secure for the benefit of the relevant children such lump or annual sum as the court thinks reasonable". If on that account secured provision were excluded in attempting a strict translation of these words into terms appropriate to the Matrimonial Proceedings and Property Act 1970, the scope of a local authority's representations should probably be confined to the making of an order for periodical payments in favour of the child. But in our view there is no good reason for adopting a strict translation and thus limiting the scope of the representations a local authority may make. A local authority may not often wish to represent to the court that an order for secured periodical payments or a lump sum order (with or without provision for instalments secured or otherwise) should be made in favour of a child, but on the rare occasion when it does wish to do so we think it ought to have a right to be heard. In our view a local authority should be entitled to make representations as to the making of any sort of financial provision ("financial provision order" in terms of the Bill) for the benefit of a child before an order is made committing the child to care.

We therefore recommend that section 36(2) of the Matrimonial Causes Act 1965, in its application to cases falling within the new law as to financial provision set out in the Matrimonial Proceedings and Property Act 1970, should be amended so as to refer to the making of any sort of financial provision for the

benefit of the child, instead of to the making of an order for payments for the maintenance and education of the child. Effect is given to this recommendation in clause 43(2) of the Bill.

3. Section 4 of the Matrimonial Causes Act 1965 requires a husband petitioner or respondent alleging adultery to join the alleged adulterer as a co-respondent unless excused by the court, and a wife petitioner to make an alleged adulteress a respondent if directed to do so by the court. By subsection (3) the court is given power to discharge from the suit a person joined as co-respondent or respondent under the section on a husband's or wife's petition where after the close of the evidence on the part of the petitioner it finds there is not sufficient evidence against the person joined.

This section is unsatisfactory in several respects.

First, it is odd that the husband's answer is mentioned in subsection (1), but only petitions elsewhere, and particularly in subsection (3), which deals with both subsections (1) and (2). This express mention of the answer first appeared in the Judicature Act of 1925 (section 177), presumably as a result of the decision in *Kenworthy* v. *Kenworthy* [1919] P.65, holding that section 28 of the Matrimonial Causes Act 1857 applied to a husband's answer. There seems no reason to suppose a similar decision would not have been reached in the case of the wife's answer, but only the husband's answer made its appearance in the statute. At all events, the fact that the answer is only expressly mentioned in subsection (1) of section 4 seems to have been quite ignored in interpreting subsection (3), which has been applied not only to the case of a party cited in an answer (*Beal* v. *Beal* (*Reade cited*) [1953] 1 W.L.R. 1365) but also to the case of an intervenor named in a wife's answer (*Gilbert* v. *Gilbert and Abdon* (*Adams intervening*) [1958] P.131).

Secondly, the difference of treatment of the case of the alleged adulterer (subsection (1) of section 4) and that of the adulteress (subsection (2) of section 4), looks odd in the context of the modern law since the abolition of the husband's right to damages against an adulterer (Law Reform (Miscellaneous Provisions) Act 1970 section 4).

Finally, section 4 applies only to divorce proceedings, not to judicial separation, though a finding of adultery in proceedings for judicial separation may be treated as proof of the adultery in later divorce proceedings (in which the adulterer would have to be joined, by virtue of section 4): section 3(2) of the 1965 Act.

But perhaps the biggest objection to the survival of section 4 in its present form is the fact that it no longer constitutes a safe guide to what actually happens in practice as to the joining of alleged adulterers and adulteresses. The divergence of practice from the words of the statute, on section 4(3), has already been noted above, but the inadequacies of section 4, also noted above, have led to a wide divergence from the provisions of the section in the Matrimonial Causes Rules, in one respect at least in a manner which might be thought inconsistent with the section itself. Rule 13 of the Matrimonial Causes Rules 1971 deals with the joinder of parties. The first thing to notice about it is that it appears to apply to any petition alleging adultery, whether it is a petition for divorce or a petition for judicial separation. The second is that it requires a woman named in a wife's petition alleging adultery to be joined unless the court otherwise directs: a requirement which appears to be inconsistent with the terms of section 4(2), which contemplates a *positive* direction by the court as to the joining of an alleged adulteress in any particular case. And the third notable thing about rule 13 is that it requires a petitioner alleging an improper association (other than adultery) with, or rape upon, a person named to apply to the court for directions as to whether the person named should be made a respondent in the cause. As to this last matter, rule 98(6) is also relevant: it applies where an answer alleging adultery is filed in response to an application under section 6 of the Matrimonial Proceedings and Property Act 1970 in case of neglect to maintain, and requires the alleged adulterer to be made a party cited: and in this case there is no " unless otherwise

directed". Rule 13 is applied to the wife's answer as well as the husband's, and to any other pleading by either spouse, by rule 22.

Thus it will be seen that in one respect the Matrimonial Causes Rules 1971 are possibly inconsistent with section 4 of the 1965 Act (the treatment of the alleged adulteress) and that in many others they go beyond the terms of that section. The divergence of the rules from section 4(2) as to treatment of the alleged adulteress dates back as far as the rules of 1937, which, by rule 5, required a woman named to be made a respondent if the petition contained a claim for costs against her: this, though more limited than the present rule, nevertheless constituted a departure from the direction in a particular case authorised by section 4(2). The application of the requirement of joinder to the wife's answer as well as the husband's is not new, either, but dates back to rule 17(2) of the 1947 rules, and the application of the requirement to a petition for judicial separation dates back at least to rule 5 of the 1937 rules. An instance of extension of the requirement beyond the case of alleged adultery may be seen in the Matrimonial Causes Rules 1968, rule 13(1)(*c*).

It is not too much to say, then, that for a considerable period of time section 4 of the 1965 Act, and its predecessors, have provided but a partial indication of what actually happens in practice. Apart from the rules about alleged adulteresses, which seem inconsistent with section 4(2), it seems to us undesirable that section 4 should be left on the statute book in its present form, looking as if it is intended to be comprehensive, when it is not comprehensive at all. It seems to us that practice has out-run the terms of the section because those terms ought to be exceeded: there is nothing reasonable in the limitations written into the section considered above. We think that in order to produce a satisfactory inter-relationship between the statute and the practice under it, the provisions of the Bill replacing section 4 should be framed to fit what the Matrimonial Causes Rules now do or may want to do in the future: for the rules are more reasonable than section 4 as it stands.

We therefore recommend that section 4 of the Matrimonial Causes Act 1965 should be repealed and replaced by new provisions which—

(*a*) apply both to divorce and judicial separation, and to any pleading praying for either form of relief (not merely to a petition);

(*b*) authorise the Matrimonial Causes Rules to make a general exemption from the requirement to join an alleged adulterer or adulteress, but only in cases where he or she is not named (that is to say, in cases where he or she is unknown, for, if known, an alleged adulterer or adulteress should be named: see *per* Hill J. in *Highley* v. *Highley* (1924) 40 T.L.R. 236);

(*c*) empower the court to dismiss from the suit any party joined by virtue of the requirements of the provisions in question; and

(*d*) authorise the Matrimonial Causes Rules to make provision for joinder and dismissal of parties in other cases of alleged adultery or other improper conduct.

There will be nothing in the new provisions to require any particular terminology to be used to describe the party joined (as in the case of "co-respondent" and "respondent" in section 4(1) and (2) respectively), and as to (*b*) above, they will be so framed as to permit a continuance of the distinction drawn in rule 13 of the 1971 rules between the case of the alleged adulteress and that of the alleged adulterer: i.e. they will permit a general exemption of the wife petitioner from the requirement to join an *unnamed* alleged adulteress. It is thought that some justification still exists for this distinction, since it still remains true that a wife petitioner may find it more difficult than a husband petitioner to establish the identity of the person with whom the adultery was committed. It would be possible, however, under the provisions we propose for the rules to exempt both husband and wife alike from joining an unnamed adulterer or adulteress, should it ever be thought proper to exempt the husband also from the need to show special grounds for failure to join an unnamed adulterer.

Effect is given to this recommendation in subsections (1) to (4) of clause 49 of the Bill.

**4.** This paragraph is concerned with the scope of the Matrimonial Causes Rules at present defined by section 7 of the Matrimonial Causes Act 1967. The problems which arise in this connection may be divided into two groups, which are dealt with in sections A and B of this paragraph. Section C of this paragraph sets out our proposals for dealing with the problems discussed in sections A and B.

**A.** Section 7 of the Matrimonial Causes Act 1967 establishes a committee known in practice as the Matrimonial Causes Rule Committee as "the authority having power to make rules of court" for certain purposes listed in subsection (1). The purposes defined by paragraph (*c*) of that subsection are the purposes of "any enactment passed after this Act [i.e. the Act of 1967] which relates to any matter dealt with in the Matrimonial Causes Act 1965 or this Act, other than such proceedings as are specified in paragraph (*a*) of this subsection". The excepted proceedings are proceedings in the county court under section 26 or 27 of the Matrimonial Causes Act 1965 (maintenance from the estate of a deceased former spouse) and proceedings under section 39 of that Act (declarations of legitimacy and validity of marriage).

Two questions arise on section 7(1)(*c*). The first is the scope of its past effect, and the second is how to preserve in the consolidation its effect as to the future.

As to its past effect, it appears to have been intended to have a wide operation. The word "matter" is a flexible one, capable of a wide or a narrow meaning, depending on the context, and there is nothing in the context here to require a narrow construction. Also, the connecting word is "relates": not "exclusively relates", but "relates": i.e. touches upon in any way. In fact, the provision has been interpreted widely in practice, in the sense that it has apparently been relied on to bring within the scope of the Matrimonial Causes Rules the purposes (in particular) of the Divorce Reform Act 1969 (see, for instance, rules 55(3), 56, 57 and 65(2)(*g*) of the 1971 rules). Many of the provisions of that Act were quite new, and for section 7(1)(*c*) of the Matrimonial Causes Act 1967 to be regarded as bringing the purposes of the 1969 Act within the scope of the Matrimonial Causes Rules it is necessary to read "matter" as meaning a whole topic, such as, for instance, "dissolution of marriage" or "matrimonial relief in the High Court or a county court", as distinct from the subject-matter of particular provisions. Similarly, the Nullity of Marriage Act 1971 contained no independent provision to bring it within the Matrimonial Causes Rules yet it can scarcely be doubted that any rules of court made for the purposes of that Act must have been intended to be Matrimonial Causes Rules, whether or not they dealt with proceedings in respect of a voidable as distinct from a void marriage: grounds of voidability being the only subject-matter (in the narrow sense of subject dealt with by a particular provision) in common between the Matrimonial Causes Act 1965 and the 1971 Act. Also, section 1(4) of the Matrimonial Proceedings (Polygamous Marriages) Act 1972 authorises rules of court to require notice of proceedings to be given to third party spouses and to confer on them a right to be heard, and where the proceedings in question are for matrimonial relief in the High Court or a county court, otherwise subject to regulation by the Matrimonial Causes Rules, it is unlikely that the rules to deal with polygamous marriages were intended to be respectively Rules of the Supreme Court and County Court Rules.

This apparent reliance on section 7(1)(*c*) in later Acts is not, of course, conclusive, but it is believed that it adds sufficient weight to the arguments in favour of a wide construction of the provision (which is certainly open on its wording) to justify consolidating its past effect, together with the references in section 7(1) to the purposes of the 1965 Act and the paragraph (*d*) inserted in section 7(1) by the Matrimonial Proceedings and Property Act 1970, in terms of "for the purposes of . . . this Act". Pure consolidation would also require the exceptions in paragraphs (*a*) and (*d*) of section 7(1) to be carried through into the Bill, and an additional exception for those aspects of the Matrimonial Proceedings (Polygamous Marriages) Act which cannot

be said to relate even to the broadest of topics dealt with in the 1965 Act: i.e. matrimonial relief in magistrates' courts proceedings, and declarations concerning the validity of a marriage (expressly excluded in the only form in which they appeared in the 1965 Act from the "matters" dealt with in that Act for the purposes of section 7(1)(*c*)). We propose below an amendment as to the exception of declarations of validity, but in other respects subsections (1)(*a*) and (2)(*a*) and (*b*) of clause 50 of the Bill, in so far as they bring the Bill, subject to exceptions, within the scope of the Matrimonial Causes Rules, represent pure consolidation in accordance with the view taken above of the past effect of section 7(1)(*c*).

The next question is, how to reproduce section 7(1)(*c*) for the future? Strictly, the answer depends on what the reference in section 7(1)(*c*) to the Matrimonial Causes Act 1965 should now be regarded as meaning. Section 38(1) of the Interpretation Act 1889 provides as follows:

> "Where this Act or any Act passed after the commencement of this Act repeals and re-enacts, with or without modification, any provisions of a former Act, references in any other Act to the provisions so repealed, shall, unless the contrary intention appears, be construed as references to the provisions so re-enacted."

There is no direct authority for assuming that this applies to split up and bring up to date a reference to a whole Act, though common-sense requires that it should, but even assuming that it does apply, to pick out those provisions of the Bill which have an indirect or direct ancestor in the 1965 Act and substitute a reference to them for the reference in section 7(1)(*c*) to the 1965 Act would look very odd and might have an unduly narrowing effect on the operation of the equivalent provision to section 7(1)(*c*) in the Bill. Even if section 2(1)(*a*) to (*c*) of the Divorce Reform Act 1969 can be regarded as re-enacting, with modifications, the old law about grounds of divorce, the equivalent in the Bill of paragraphs (*d*) and (*e*) of section 2(1) (which were quite new) would probably have to be excluded, and so also would the equivalent provisions in the Bill to sections 3(1) and (2) and 4 to 6 of that Act, sections 10, 11, 12, 22 and 23 of the Matrimonial Proceedings and Property Act 1970, sections 1 and 4 to 6 of the Nullity of Marriage Act 1971, and section 1 of the Matrimonial Proceedings (Polygamous Marriages) Act 1972. Thus picking out particular provisions of the Bill and excluding others would make it very difficult to argue convincingly for the future that "matter" in the equivalent in the Bill of section 7(1)(*c*) means a general topic rather than the subject-matter of a particular provision. For instance, some of the divorce provisions would be in and some would not: how then could one of the "matters" dealt with in the Bill be regarded as being the general topic of "dissolution of marriage"? Moreover, the effect of thus excluding provisions of the Bill with no direct ancestry in the 1965 Act in defining the power of the Matrimonial Causes Rule Committee in relation to future enactments would be strange indeed as respects future enactments on the lines of sections 10, 11, 15 and 22 of the Matrimonial Proceedings and Property Act 1970. That Act inserted in section 7(1) of the Matrimonial Causes Act 1967 a paragraph (*d*) which (without prejudice to the generality of section 7(1)(*c*)) included within the scope of the Matrimonial Causes Rules Part I of and Schedule 1 to the 1970 Act, with the express exception of proceedings *in the county court* under section 10, 11, 15 or 22 (or paragraph 5 of Schedule 1, which was the equivalent for orders under the 1965 Act of section 11 of the 1970 Act). High Court proceedings under the provisions in question are therefore within the scope of the Matrimonial Causes Rules. But only section 15 of the 1970 Act has a direct predecessor in the 1965 Act (section 25). Thus only the equivalent in the Bill of section 15 of the 1970 Act need not (and could not) be excluded in defining, by the new version in the Bill of section 7(1)(*c*) of the 1967 Act, the power of the Matrimonial Causes Rule Committee in relation to future enactments. This means that future enactments on the lines of section 15 of the 1970 Act would (in the absence of contrary provision by those enactments) automatically fall within the scope of the Matrimonial Causes Rules even as to county court proceedings, which are expressly excluded by section 7(1)(*d*) in the case of section 15 itself.

Sections 10, 11 and 22 of the 1970 Act, on the other hand, are not re-enactments of anything in the 1965 Act, and would have to be entirely excluded in framing the new version of section 7(1)(*c*) to define the scope of the Matrimonial Causes Rules as to future enactments. Future enactments on the lines of sections 10, 11 and 22, therefore, would never fall automatically within the scope of the Matrimonial Causes Rules, without provision by the enactments themselves: not even as respects proceedings in the High Court, although High Court proceedings under the existing sections *are* covered.

These difficulties lead us to think it is essential to start again, and produce a general formula which will reproduce the present effect of section 7(1)(*c*) as nearly as possible, with appropriate exceptions. The closest equivalent of "matter dealt with in the Matrimonial Causes Act 1965" in terms of the modern law is, it is submitted, "matter dealt with in this Act". This preserves the possibility of wide interpretation which existed on section 7(1)(*c*) and has been relied upon in subsequent enactments. It is clear that there should be an exception for the provisions of the Bill derived from the Matrimonial Proceedings (Polygamous Marriages) Act 1972 relating to proceedings in magistrates' courts. As for the other possible exceptions, which may be seen in section 7(1)(*a*) and (*d*) of the 1967 Act, it will appear from the difficulties encountered on the present form of section 7(1)(*c*) that exceptions as to future enactments framed by reference to particular existing provisions are not very successful. For instance, section 25 of the Matrimonial Causes Act 1965, the predecessor of section 15 of the Matrimonial Proceedings and Property Act 1970, contained no provision for independent jurisdiction for county courts, and there was, therefore, no need to except it from section 7(1)(*a*) of the 1967 Act. This meant that, applying section 38(1) of the Interpretation Act to section 7(1)(*c*), the successor of section 25 of the 1965 Act, section 15 of the 1970 Act (which re-enacted it "with modification"), could not be excluded in any of its aspects in defining the future enactments to which the Matrimonial Causes Rules were to apply, although county court proceedings under section 15 were excepted by section 7(1)(*d*) of the 1967 Act. It seems better, therefore, to devise a generalised exclusionary provision as well as a generalised inclusionary provision. Apart from the exception in section 7(1)(*a*) for *all* proceedings for a declaration of legitimacy, etc., under section 39 of the 1965 Act, about which more is said below, the exceptions in section 7(1) as it stands are intended to preserve the application of the County Court Rules in relation to proceedings for the exercise of any jurisdiction possessed by all county courts, as distinct from a jurisdiction conferred only on divorce county courts. It is thought that a general exception framed by reference to this underlying object would have a greater chance of success in excluding future enactments from the ambit of the Matrimonial Causes Rules in cases where they need to be excluded.

A proposal is included in the recommendation set out in section C of this paragraph to give effect to the views we have expressed above as to the reproduction of section 7(1)(*c*) in the Bill.

**B.** Apart from the difficulties arising on section 7(1)(*c*), section 7(1) has been found wanting in other respects since it was enacted.

First, the exclusion of all proceedings under section 39 of the 1965 Act (whether in the High Court or a county court) from the ambit of the Matrimonial Causes Rules has proved to be a mistake. Proceedings in the High Court under section 39 are by petition, and it has been found necessary for the Rules of the Supreme Court to apply the provisions of the Matrimonial Causes Rules to such proceedings (Order 90, rule 15). It would be more convenient for practitioners if proceedings in the High Court under section 39 were governed solely by the Matrimonial Causes Rules. The same arguments of convenience apply to proceedings in the High Court for a bare declaration of matrimonial status. They are required by Order 90 rule 13 to be brought by petition, as in the case of a matrimonial cause, and Order 90 rule 15 applies the Matrimonial Causes Rules to them as well as to High Court proceedings under section 39.

Practical convenience also favours the inclusion within the scope of the Matrimonial Causes Rules of proceedings under section 17 of the Married Women's Property Act 1882 and section 1 of the Matrimonial Homes Act 1967.

Section 45 of the Courts Act 1971 provides (*inter alia*) that rules of court may provide for the transfer or re-transfer from a county court to the High Court, or from the High Court to a divorce county court, of proceedings under section 17 of the Married Women's Property Act 1882, and may also provide for assimilating such proceedings in the divorce registry to proceedings in a county court. The rules in question are Matrimonial Causes Rules (section 45(7)). Thus the present position as to proceedings under section 17 is as follows:

(*a*) county court proceedings are governed by the County Court Rules;

(*b*) transfer to the High Court is governed by Matrimonial Causes Rules;

(*c*) High Court proceedings (originating or transferred there) are governed by Rules of the Supreme Court;

(*d*) transfer from High Court to county court is governed by Matrimonial Causes Rules;

(*e*) Matrimonial Causes Rules govern when and for what purposes (including the application of the County Court Rules) proceedings in the divorce registry are to be treated as county court proceedings.

This is far from ideal, and a reduction of the number of different sets of rules applicable at different stages is in itself desirable. But an even stronger argument is afforded by the fact that a considerable majority of applications under section 17 in the High Court are in fact associated with divorce proceedings (in the period mid-1970 to mid-1971 the proportion of all such applications in the divorce registry which was so associated was roughly three-quarters). It is clearly convenient to practitioners that the same set of rules should govern proceedings under section 17 in the High Court as govern the divorce proceedings to which the section 17 proceedings are often, in effect, ancillary. And to a considerable extent the same arguments apply in the case of proceedings under section 1 of the Matrimonial Homes Act 1967. These too are more often than not in effect ancillary to a suit for divorce or judicial separation (more than 60 per cent. in 1971 and 70 per cent. in the first three months of 1972, where proceedings brought in the divorce registry are concerned). Moreover, the Rules of the Supreme Court, by Order 89 rule 3, apply the provisions as to proceedings under section 17 of the Married Women's Property Act 1882 to proceedings under section 1 of the Matrimonial Homes Act 1967, which means it would be inconvenient to move the regulation of the former to the Matrimonial Causes Rules without at the same time moving the regulation of the latter.

In this connection section 7 of the Matrimonial Homes Act 1967 should also be mentioned. The section gives the court by which a decree of divorce is granted power in effect to transfer rights and liabilities under a protected or a statutory tenancy from one spouse to the other. It is arguable that the making of rules of court for the purposes of section 7 of the Matrimonial Homes Act is brought within the scope of the Matrimonial Causes Rules by section 7(1)(*c*) of the Matrimonial Causes Act 1967, in that it is an enactment passed after the latter Act which relates to a matter dealt with in that Act: i.e. (*inter alia*) the powers of a divorce county court on granting a decree of divorce. This is the view taken by the Matrimonial Causes Rules (rule 104). To remove any possible doubt about section 7 of the Matrimonial Homes Act, however, our proposals below include provision for express mention of section 7 in the provision of the Bill dealing with the Matrimonial Causes Rules.

**C.** In the light of the difficulties discussed in sections A and B of this paragraph, we therefore recommend that in re-enacting section 7 of the Matrimonial Causes Act 1967 in the Bill—

(*a*) in place of section 7(1)(*c*) new provision should be made for the application of the Matrimonial Causes Rules for the purposes of future enactments, framed by reference to matters dealt with in the Bill

and the Matrimonial Causes Act 1967 and containing a general exception for aspects of future enactments dealing with proceedings in county courts in the exercise of ordinary county court jurisdiction ;

(*b*) proceedings in the High Court under the equivalent in the Bill of section 39 of the Matrimonial Causes Act 1965 should no longer be excluded from the ambit of the Matrimonial Causes Rules ;

(*c*) proceedings in the High Court for a bare declaration as to matrimonial status, and proceedings in the High Court under section 17 of the Married Women's Property Act 1882, should be included within the ambit of the Matrimonial Causes Rules ;

(*d*) proceedings in the High Court under section 1 of the Matrimonial Homes Act 1967, and proceedings under section 7 of that Act whether in the High Court or a county court, should be included within the ambit of the Matrimonial Causes Rules.

Effect is given to this recommendation in clause 50(1) and (2) of and paragraph 7 of Schedule 1 to the Bill. Paragraph 10(1)(*b*) of Schedule 2 to the Bill makes a consequential amendment in Schedule 1 to the Administration of Justice Act 1970.

**5.** Sub-paragraph (1) of paragraph 2 of Schedule 1 to the Matrimonial Proceedings and Property Act 1970 provides that sections 13, 15, 21, 30(1), 31, 34(1), (4) and (5) and 46(2) of the Matrimonial Causes Act 1965 shall continue to apply in relation to proceedings for restitution of conjugal rights begun before the commencement of the Matrimonial Proceedings and Property Act 1970 and in relation to decrees and orders made in such proceedings. Sub-paragraphs (2) and (3) make ancillary provision. Paragraph 3(5) of Schedule 1 to the 1970 Act provides that section 9(1) and (3) of that Act (variation of financial orders) shall apply to an order made or deemed to have been made under section 15 of the Act of 1965 in its application to proceedings for restitution of conjugal rights or under section 21 or 34(1)(*c*) of that Act, and requires the court in exercising the powers conferred on it by virtue of that paragraph to have regard to all the circumstances including any change in any of the matters it was required to have regard to in making the order in question. Paragraph 6 of Schedule 1 (*inter alia*) applies the provision of the 1970 Act authorising variation, discharge etc. of custody orders (section 18(6)) to an order for the custody or education of a child made or deemed to have been made under section 34 of the Act of 1965, including section 34(1)(*c*) (custody orders in connection with restitution proceedings).

The relationship between paragraph 2 on the one hand and paragraphs 3(5) and 6 on the other is not clear. It is logically correct to say that proceedings concluded before the commencement of the 1970 Act must also have been begun before it, but nevertheless the stress on the beginning of the proceedings by the use of the word " begun " in paragraph 2 is odd if the provisions of that paragraph were intended to apply in relation to proceedings concluded before the commencement of the 1970 Act as well as in relation to pending proceedings. Concluded proceedings would constitute the great majority of cases, and it would be strange if a word much more apt to the minority of cases, i.e. to proceedings pending when the 1970 Act came into force, were used to cover concluded proceedings too. Moreover, one of the provisions preserved by paragraph 2 in relation to orders made in the proceedings to which paragraph 2 applies is section 31 of the Act of 1965, which gives power to vary or discharge orders under (*inter alia*) sections 15 and 21 of that Act. Paragraph 3(5) applies to orders under sections 15 and 21 those provisions of section 9 of the 1970 Act which most closely approximate to the provisions of section 31 of the 1965 Act. If paragraph 2 should be regarded as applying to both pending and concluded proceedings, the preservation of section 31 of the 1965 Act in relation to orders made in such proceedings would render paragraph 3(5) otiose in so far as it deals with orders under sections 15 and 21. Even if paragraph 2 were confined to pending proceedings there would remain a small overlap between paragraph 2 and paragraph 3(5) as to orders made in pending proceedings, but

at least paragraph 3(5) would have effect in relation to orders made under sections 15 and 21 in concluded proceedings—the majority of cases.

It is believed, therefore, that paragraph 2 constitutes the provision for proceedings pending at the commencement of the 1970 Act. But if that is so, paragraph 2 seems to preserve much more than it ought to do, in the light of the very restricted provision made by paragraphs 3(5) and 6 in relation to orders made in connection with concluded restitution proceedings (and in relation to orders made in pending proceedings, though the provision in that case is, as we have seen, to some extent superfluous because of the provisions of paragraph 2, even if paragraph 2 is confined to pending proceedings). All that paragraphs 3(5) and 6 allow is the variation or discharge of orders for financial provision and custody made in restitution cases under the relevant provisions of the 1965 Act. They do *not* permit the making of new orders under those provisions. By contrast, paragraph 2 preserves continuing powers under the 1965 Act (sections 21(1)(*b*), 31 and 34(1) and (5)) capable of application long after the proceedings for restitution have been concluded. (Custody orders have been made in divorce cases not merely after decree absolute but even after the death of one of the parties to the marriage in question: *Pryor* v. *Pryor* [1947] P. 64; *B.* v. *B. & H.* (*L. intervening*) [1962] 1 All E.R.2. There is no reason to suppose the court would take a narrower view of its powers in restitution cases.)

In the result, therefore, we have this situation: if paragraph 2 is *not* confined to pending proceedings, it renders paragraph 3(5) otiose over two-thirds of the area on which it was apparently intended to operate, and if paragraph 2 *is* confined to pending proceedings the ample provision it makes for preserving the powers of the court in relation to such proceedings long after the proceedings are concluded contrasts oddly with the very restricted provision made by paragraphs 3(5) and 6 for proceedings concluded before the commencement of the 1970 Act. Either way the result is unsatisfactory.

It is most unlikely that any proceedings for restitution will still be pending at the commencement of this Bill, but it is impossible to be absolutely sure. In the circumstances, the sensible approach seems to be to preserve as little as possible of the 1965 Act's application, in order merely to ensure that any proceedings for restitution or for financial provision in a restitution case which are actually on foot can be brought to a conclusion, without allowing any later application for financial provision or custody orders to be made by reference to proceedings which were pending when the 1970 Act came into force. The equivalent in the Bill of paragraphs 3(5) and 6 (paragraphs 18 and 19 of Schedule 1) will ensure that any ancillary orders actually made in restitution cases can be varied under the Bill.

We therefore recommend that the application of the provisions of the Matrimonial Causes Act 1965 in relation to proceedings for restitution of conjugal rights pending when the Matrimonial Proceedings and Property Act 1970 came into force should be preserved only to the following extent—

(*a*) to allow the proceedings on the petition for restitution itself to be concluded; and

(*b*) to allow ancillary proceedings for financial relief or custody which have been started before the Bill comes into force to be concluded;

with the necessary consequence that the protection against dispositions intended to defeat claims under section 21 or 34(1)(*c*) of the Act of 1965 given by paragraph 9(1) of Schedule 1 to the 1970 Act, and the power of the court (preserved by the 1970 Act) to make care or supervision orders under section 36 or 37 of the 1965 Act (clause 43 or 44 of the Bill) in connection with restitution proceedings, should be correspondingly limited.

Effect is given to this recommendation in paragraphs 4, 24(1) and 25(1) of Schedule 1 to the Bill.

**6.** Paragraph 11 of Schedule 1 to the Matrimonial Proceedings and Property Act 1970 provides that where in any proceedings for divorce or nullity of

marriage the court has made an order by virtue of section 34(1) of the Matrimonial Causes Act 1965 in relation to a child the court shall have the like power to make a further order from time to time in relation to that child under section 3 (financial provision) or 18 (custody or education) of the 1970 Act as it has where it makes an order in relation to a child under subsection (1) of section 3 or 18: without prejudice to its power in any such proceedings to make an order under either of those sections in relation to any other child of the family.

Paragraph 11 is not happily expressed, in that it confuses two quite different aspects of sections 3(5) and 18(5) of the 1970 Act. These provisions each enact, in relation to a power to make an order in proceedings for divorce, nullity of marriage or judicial separation "before or on granting the decree . . . or at any time thereafter" in the case of section 3 and "before, by or after the final decree" in the case of section 18, that the court may exercise that power from time to time. These provisions give the court a power to make new provision from time to time which it would not otherwise hold itself to have; see *L.* v. *L.* [1962] P. 101. In other words they give the court power to make a new order *in spite* of having made one before, not because of it. The wording of paragraph 11 is not very appropriate to this case for it looks as if the "like power" of the court to make an order from time to time under section 3 or 18 is dependent upon "where . . . the court has made an order". This apparent dependence seems to be the reason for the insertion of the saving for the power to make an order under section 3 or 18 in relation to another child of the family: i.e. where no order under section 34(1) of the 1965 Act has been made. In fact, the wording of paragraph 11 seems more appropriate to the other aspect of sections 3(5) and 18(5). These two provisions also operate in relation to the power of the court, under sections 3(1)(*b*) and 18(1)(*b*) respectively, to make an order where proceedings for divorce, nullity of marriage or judicial separation are dismissed, either forthwith on dismissal or "within a reasonable period after the dismissal". Sections 3(5) and 18(5) enable the court to go on making orders from time to time (subject only to age limits) once it has made an order under section 3(1)(*b*) or 18(1)(*b*). Thus their function is quite different in this case. Here there is a time limit: "a reasonable period after the dismissal". The effect of sections 3(5) and 18(5) is to remove that time limit provided that an order is first made within the limit. Their operation, therefore, *does* depend upon the making of a previous order, and it *is* necessary to provide that the making of a previous order under the corresponding provisions in the 1965 Act shall be sufficient to bring them into operation.

It is believed that it would be an improvement if paragraph 11 were replaced in the Bill by a provision which deals separately with these two aspects of the equivalent provisions in the Bill to sections 3(5) and 18(5). In addition, there is a mistake in the references in paragraph 11 to "any such proceedings" which confine its operation to the proceedings for divorce or nullity of marriage mentioned in paragraph 10. Orders under section 34(1)(*a*) and (*b*) could be made in, or on or after dismissal of, proceedings for judicial separation also, and in our view it is clear that such orders should be covered. The provision of the Matrimonial Proceedings and Property Bill which became paragraph 10 originally covered any proceedings for divorce, nullity or *judicial separation* pending at the commencement of that Act, but it was amended on Report in the Lords without a consequential amendment being made to the reference in the next following paragraph to "any such proceedings". This should now be put right.

We therefore recommend that paragraph 11 of Schedule 1 to the Matrimonial Proceedings and Property Act 1970 should be replaced in the Bill by a provision which—

(*a*) covers orders made under section 34(1)(*a*) or (*b*) of the Matrimonial Causes Act 1965 in connection with proceedings for judicial separation as well as in connection with divorce or nullity proceedings; and

(*b*) deals separately with the two aspects of the provisions of the Bill replacing sections 3(5) and 18(5) of the 1970 Act by discounting for the purposes of those provisions orders under section 34(1)(*a*) of the 1965 Act and using orders under section 34(1)(*b*) of that Act as a foundation for further orders under those provisions.

Effect is given to this recommendation in paragraph 20 of Schedule 1 to the Bill.

**7.** Section 16 of the Maintenance Orders Act 1950, which defines orders which may be enforced under that Act in one part of the United Kingdom though made in another, lists, in subsection (2)(*a*) " an order for alimony, maintenance or other payments made or deemed to be made by a court in England under any of the following enactments . . . sections nineteen to twenty-seven of the Matrimonial Causes Act 1950 ". The effect of section 38(1) of the Interpretation Act 1889 (set out above at page 10) is to translate this reference to provisions of the 1950 Act into a reference to the corresponding provisions of the Matrimonial Causes Act 1965. But the orders available under Part III of that Act had their origin to a great extent in provisions of the Matrimonial Proceedings (Children) Act 1958, and would not have been covered by virtue of the operation of section 38(1) of the Interpretation Act on the reference in section 16 of the Maintenance Orders Act 1950 to sections 19 to 27 of the Matrimonial Causes Act 1950. The Matrimonial Causes Act 1965 therefore contained a provision, derived from section 17 of the Matrimonial Proceedings (Children) Act 1958 and also (confusingly) labelled section 38(1), bringing orders made under Part III of the Matrimonial Causes Act 1965 or under any corresponding enactment of the Parliament of Northern Ireland into section 16 of the Maintenance Orders Act 1950. Section 38(1) of the Matrimonial Causes Act 1965 contained a saving for the operation of section 38(1) of the Interpretation Act: this is because the latter provision was capable of operating in relation to orders made under provisions of Part III of the 1965 Act traceable to section 26 of the Matrimonial Causes Act 1950. The equivalent provision to section 38(1) of the Matrimonial Causes Act 1965 in the Matrimonial Proceedings and Property Act 1970 is section 12(1). The 1970 Act did not " deem " orders made under the 1965 Act to be made under itself and was obviously not intended to constitute a " repeal and re-enactment " for the purposes of the application of section 38(1) of the Interpretation Act to references in other statutes to orders under the 1965 Act ancillary to divorce etc. proceedings. Section 12(1) of the 1970 Act therefore had to make provision for bringing all relevant 1970 Act orders into section 16 of the Maintenance Orders Act 1950, and that is what it did, referring also, as section 38(1) of the 1965 Act had done before it, to orders under corresponding Northern Irish enactments.

The situation under section 16 of the Maintenance Orders Act 1950 is thus a little complicated at present, though the complications are not apparent on the surface of the section. It is thought that the cleanest solution is to sweep up what has happened in the past in a verbal amendment, and this is done in paragraph 3 of Schedule 2 to the Bill.

So far this is pure consolidation. But there is an awkwardness in the present law which it would be advisable to take this opportunity to remove. Both section 38(1) of the Matrimonial Causes Act 1965 and section 12(1) of the Matrimonial Proceedings and Property Act 1970 operate in relation to orders under corresponding Northern Irish enactments by enacting that such orders " shall be included among the orders to which section 16 of the Maintenance Orders Act 1950 applies " without specifying section 16(2)(*c*) as the part of section 16 under which the orders are to fall. Paragraph 8 of Schedule 8 to the Administration of Justice Act 1970 and paragraph 9 of Schedule 1 to the Attachment of Earnings Act 1971 both refer to " an order to which section 16 of the Maintenance Orders Act 1950 applies by virtue of subsection (2) . . . (*c*) of that section ". It may be said that section 16(2)(*c*) is the only possible destination for the corresponding Northern Irish orders included in section 16 by section 38(1) of the Matrimonial Causes Act 1965 and section 12(1) of the Matrimonial Proceedings and Property Act 1970 respectively: but nevertheless

it is not expressly stated to be so, and in the circumstances the operation of the Administration of Justice Act 1970 and the Attachment of Earnings Act 1971 in relation to such orders is not happy.

We therefore recommend that in reproducing the effect of the present law by a verbal amendment of section 16 of the Maintenance Orders Act 1950 the opportunity should be taken to make it clear that the Administration of Justice Act 1970 and the Attachment of Earnings Act 1971 apply to the corresponding Northern Irish orders covered by section 38(1) of the Matrimonial Causes Act 1965 and section 12(1) of the Matrimonial Proceedings and Property Act 1970. Effect is given to this recommendation in paragraph 3 of Schedule 2 to the Bill.

**8.** Section 8(1) of the Matrimonial Causes Act 1965 provides as follows:—

> "Where a decree of divorce has been made absolute and either—
>
> (*a*) there is no right of appeal against the decree absolute; or
>
> (*b*) the time for appealing against the decree absolute has expired without an appeal having been brought; or
>
> (*c*) an appeal against the decree absolute has been dismissed;
>
> either party to the former marriage may marry again."

The ancestry of this provision may be traced to section 57 of the Matrimonial Causes Act 1857. At that time there was no such thing as decree nisi and absolute, so section 57 merely provided:

> "When the time limited for appealing against any decree dissolving a marriage shall have expired, and no appeal shall have been presented against such decree, or when any such appeal shall have been dismissed, or when in the result of any appeal any marriage shall be declared to be dissolved, but not sooner, it shall be lawful for the respective parties thereto to marry again, as if the prior marriage had been dissolved by death: . . ."

This provision clearly conferred capacity to remarry after a decree of divorce, but only on terms, and it was held in *Chichester v. Mure* (1863) 3 Sw. & Tr. 223 (followed in *Rogers* v. *Halmshaw* (1864) 3 Sw. & Tr. 509) that a remarriage contracted before the expiration of the time for appealing against the dissolution of a former marriage of one of the parties was null and void.

Section 8(1) differs considerably from section 57. It is, for one thing, more difficult to apply in practice, for the existence of a right of appeal against decree absolute depends upon whether or not the party seeking to appeal had "time and opportunity" to appeal against the decree nisi and failed to do so (section 31(1)(*e*) of the Judicature Act of 1925): a question which may not be easy to determine. However, the differences between section 8(1) and section 57 are not such as to affect the application of the reasoning in the two cases mentioned above to invalidate a remarriage contracted before the conditions set out in section 8(1) are satisfied. Thus, if no other factors had supervened since those two cases were decided, a remarriage without the conditions in section 8(1) having been satisfied would be void, whether or not the decree absolute was ever in fact challenged and rescinded.

But other factors have supervened as respects marriages celebrated after 31st July 1971: i.e. after the commencement of the Nullity of Marriage Act 1971. Section 1 of that Act enacted that a marriage celebrated after its commencement should be void "on the following grounds *only*" and listed the grounds. One of these grounds is "that at the time of the marriage either party was already lawfully married", but since a decree absolute of divorce ends the marriage for all purposes "unless and until" it is rescinded (*Marsh* v. *Marsh* [1945] A.C. 271, P.C.) the bigamy ground cannot be held to cover the case where there is a right of appeal against decree absolute and the party in whose favour the decree was pronounced remarries before the time for appeal has expired. Section 2 of the Nullity of Marriage Act 1971 provides that a marriage celebrated after its commencement shall be voidable *only* on certain grounds. The implication from both sections 1 and 2 taken together is that if

a marriage cannot be impugned on one or other of the grounds set out in these sections it can be neither void nor voidable: that is to say, no-one, neither a party to the marriage nor anyone else, will be able to obtain a decree declaring it null and void.

As to marriages celebrated after 31st July 1971, therefore, it seems that section 8(1) of the Matrimonial Causes Act 1965 cannot live with the provisions of the Nullity of Marriage Act 1971. As to marriages celebrated before 1st August 1971, section 8(1) will either have conferred capacity to contract, by fulfilment of the conditions it lays down, or have failed to do so, through their non-fulfilment. In either event, the situation as to marriages celebrated before 1st August 1971 will not be affected by the repeal of section 8(1) (see section 38(2)(*b*) of the Interpretation Act 1889). It could therefore be repealed as a matter of pure consolidation, if it were certain that it could have no surviving effect in relation to marriages to which the provisions of the Nullity of Marriage Act 1971 apply.

But there is one small doubt. It is just possible that it might be argued that although once the remarriage has taken place section 8(1) can no longer be invoked to challenge its validity, nevertheless section 8(1) could constitute a sufficient "impediment of . . . any other lawful cause . . . to bar or hinder the solemnization of the marriage" (section 16(1)(*a*) of the Marriage Act 1949), or a sufficient "lawful hindrance to the marriage" (section 28(1)(*a*) of that Act) to constitute a "lawful impediment" justifying the superintendent registrar in refusing to issue a certificate authorising the marriage (sections 31(2)(*a*) and 32(2)(*a*) of that Act). In *R.* v. *Brentwood Superintendent Registrar of Marriages, ex parte Arias* [1968] 3 All E.R. 279 it was held that an incapacity to remarry recognised by the law of a person's domicile was a sufficient "lawful impediment" to justify refusal to issue a certificate. That, however, was a case where the marriage, if contracted, would have been void because of the incapacity in question, in accordance with the rules of private international law governing capacity to contract a marriage. That is not the case here, as regards marriages to which the Nullity of Marriage Act 1971 applies. Supposing, however, that section 8(1) could be regarded as a "lawful hindrance" in terms of the marriage laws, the most its continued existence on the statute book could do is to delay a remarriage after a divorce, and then only if its applicability in the circumstances were noticed by the superintendent registrar. Where a decree absolute has been pronounced the applicability of section 8(1) would depend on whether the other party had had "time and opportunity" to appeal against decree nisi, and the superintendent registrar might not find the question an easy one to determine. In 1971 4,351 respondents were served by advertisement. In such a case, how is the superintendent registrar to determine whether the respondent has had time and opportunity to appeal against decree nisi? The respondent may have seen the advertisement and seen a report of the grant of the decree nisi: or he may not have seen either.

We think therefore that section 8(1) as a "lawful hindrance" would probably be unworkable in practice. And even if it could work, to what end? In a case where a right of appeal against decree absolute has arisen, the parties to a remarriage will not be secure even if they are required to wait until after the expiration of the ordinary time for appeal before marrying. There has never been a restriction on remarriage after a decree absolute of nullity, but in *Whitehead* v. *Whitehead* [1963] P.117 the court held it had power (though in that case it did not exercise it) to grant leave to appeal out of time in such a case long after the remarriage had taken place. Non-transgression of any rule about the time when a remarriage may take place is thus not necessarily a protection. That being so, why should parties be required to wait until the ordinary time for appeal has expired before remarrying? The court will no doubt rescind a decree absolute of divorce in a proper case *whenever* any remarriage may have taken place. If a person appealing against a decree absolute out of time has a good case, a remarriage by the other party before the expiration of the ordinary time for appeal will not hinder him any more than a remarriage after that time. There can be no advantage to the possible

appellant in delaying the remarriage, and it could be a considerable disadvantage to the person wishing to remarry.

Now that section 8(1) has been deprived of its original effect in determining capacity to remarry, a remarriage after decree absolute of divorce, whenever it takes place, will be valid unless and until the decree absolute is successfully challenged. This is surely right. But it would, we think, be most unsatisfactory if the possibility of a residual effect of section 8(1) as a "lawful hindrance" for the purposes of the marriage laws were allowed to survive the enactment of the Nullity of Marriage Act 1971 which deprived section 8(1) of its original effect. As a provision for, in effect, delaying remarriage it would, we think, be unworkable in practice and undesirable in principle.

We therefore recommend that section 8(1) should be repealed without being re-enacted in the Bill.

**9.** Section 12(3) of the Matrimonial Causes Act 1965 provides as follows:—

> "The court may, on an application by petition of the spouse against whom a decree of judicial separation has been made and on being satisfied that the allegations in the petition are true, rescind the decree at any time on the ground that it was obtained in the absence of the applicant or, if desertion was the ground of the decree, that there was reasonable cause for the alleged desertion."

In this provision, "absence" means physical absence: *Wilkinson* v. *Wilkinson* [1962] P.37, affirmed by the Court of Appeal: [1963] P.1. It has been held that the court's power to rescind under this provision is discretionary, and that in order to succeed the applicant must explain the circumstances that gave rise to his or her absence and also state circumstances calculated to satisfy the court that the decree should not have been granted: *Phillips* v. *Phillips* (1866) L.R.1 P. & D. 169; *Wilkinson* v. *Wilkinson* (above); *Regan* v. *Regan* (1965) 109 Sol. Jo. 629. Thus glossed, the power under section 12(3) to rescind a decree of judicial separation is difficult to distinguish from the court's inherent power to rescind a decree where it has been granted in circumstances of procedural irregularity or contrary to the justice of the case, in relation to which the procedure is regulated by rule 54 of the Matrimonial Causes Rules 1971. If the applicant was absent because he had not been served, or because he had been deceived in some fashion by the other party, he could obtain rescission and a rehearing under the inherent jurisdiction almost automatically, subject only to his case against the decree not being obviously without chance of success: see *Montague* v. *Montague* [1967] 1 All E.R. 802, a case on an application for rescission of a decree nisi of divorce in which the principles on which such applications should be dealt with are discussed. Even if the applicant was absent because he deliberately stayed away, he might be able to obtain a rehearing under the inherent jurisdiction if he could show that the decision would *probably* have been different if all the facts had been before the court: *Montague* v. *Montague* (above). There are authorities which hold that rescission of a decree absolute of divorce would be much more difficult to obtain, at all events where no right of appeal against the decree absolute exists: see *Meier* v. *Meier* [1948] P.89; *Edwards* v. *Edwards* [1951] P.228. But a decree absolute affects status, and there is no reason to suppose the decisions on rescission of a decree absolute would constitute any obstacle to the exercise in relation to decrees of judicial separation of the court's inherent jurisdiction to rescind a decree granted in circumstances of procedural irregularity or contrary to the justice of the case.

It seems, then, that as to rescission on grounds of "absence" section 12(3) merely duplicates the court's inherent power. But even if it gave more to the applicant than is available under the court's inherent power, it is difficult to see why it should do so: why this special right to rescission should be given to the person against whom a decree of judicial separation has been pronounced. Similarly, as to rescission under section 12(3) on the ground that there was reasonable cause for the alleged desertion on which the decree was based (i.e. no desertion), in a case where that defence though available at the trial was deliberately withheld it might be possible to obtain rescission and a rehearing under the

court's inherent power: and if it were *not* possible, why this special treatment of the case of a decree of judicial separation based on desertion? Similarly again, where desertion *was* fought at the trial, section 2(3) gives in effect a special right of appeal, without limit as to time. Again, it is difficult to see any justification for this special treatment for the person against whom a decree of judicial separation has been pronounced. *Prima facie* there is a good case for abolishing the special rights given by section 12(3): a case which is, it is believed, reinforced by the apparent rarity of their use. In more than a hundred years of this provision's existence (it dates back to section 23 of the Matrimonial Causes Act 1857) there have only been three reported cases on it: *Phillips, Wilkinson* and *Regan* mentioned above.

We therefore recommend that section 12(3) of the Matrimonial Causes Act should be repealed without being re-enacted in the Bill.

**10.** Section 43(2) of the Matrimonial Causes Act 1965 is derived from section 198 of the Judicature Act of 1925, which re-enacted for the High Court the provisions of section 3 of the Evidence Further Amendment Act 1869. The history of the provision is as follows.

Section 2 of the Evidence Act 1851 provides as follows:—

> "On the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or other proceeding in any court of justice, or before any person having by law, or by consent of parties, authority to hear, receive, and examine evidence, the parties thereto, and the persons in whose behalf such suit, action, or other proceeding may be brought or defended, shall, except as hereinafter excepted, be competent and compellable to give evidence, either *viva voce* or by deposition, according to the practice of the court, on behalf of either or any of the parties to the said suit, action or other proceeding."

Section 4 of that Act excepted proceedings instituted in consequence of adultery. Section 1 of the Evidence Amendment Act 1853 did for the spouses of parties what section 2 of the 1851 Act had done for the parties themselves, and in identical terms, while section 2 of the 1853 Act contained a corresponding exception for proceedings instituted in consequence of adultery. These exceptions, in section 4 of the Evidence Act 1851 and section 2 of the Evidence Amendment Act 1853, were both repealed by section 1 of the Evidence Further Amendment Act 1869, which by section 3 enacted as follows:—

> "The parties to any proceeding instituted in consequence of adultery, and the husbands and wives of such parties, shall be competent to give evidence in such proceeding: Provided that no witness in any proceeding, whether a party to the suit or not, shall be liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery, unless such witness shall have already given evidence in the same proceeding in disproof of his or her alleged adultery."

Section 3 of the 1869 Act was repealed as to proceedings in the High Court by the Judicature Act of 1925 and repeated in a provision which is now to be found in section 43(2) of the Matrimonial Causes Act 1965. There are minor verbal differences between the provisions, but in substance they are the same.

Had the Evidence Further Amendment Act 1869 merely repealed the two exceptions for proceedings instituted in consequence of adultery, there could have been no doubt that the general rule as to competence and compellability of parties and their spouses established by the two earlier Acts was to apply to such proceedings. Doubt arose, however, from the fact that section 3 of the 1869 Act referred to competence only. This doubt was resolved by the decision of the Court of Appeal in *Tilley* v. *Tilley* [1949] P. 240. The court there held that the parties and their spouses were not only competent but compellable to give evidence in proceedings instituted in consequence of adultery. Denning L. J. and Hodson J. (at pages 255-9 and 267-8 respectively) took the view that the effect of the repeal of the exceptions for proceedings instituted in consequence of adultery had been to render the general rule derived from section 2 of the 1851 Act and section 1 of the 1853 Act applicable, and that therefore the general

rule (competence and compellability) and the particular provisions of section 198 of the Judicature Act of 1925 (section 3 of the 1869 Act) were both applicable in the case of proceedings instituted in consequence of adultery. They were affirmative enactments which could and should be construed consistently with one another. In the result, therefore, the court in *Tilley* held in effect that the general rule as to competence and compellability of parties and spouses applied in proceedings instituted in consequence of adultery, with section 198 of the Judicature Act of 1925 (and section 3 of the Evidence Further Amendment Act 1869) superimposed upon the general rule for the purpose of qualifying compellability under that rule to the extent of the privilege contained in the latter part of each provision with respect to questions tending to show that the witness had been guilty of adultery. This privilege has since been abolished, and the relevant portions of section 3 of the 1869 Act and section 43(2) of the Matrimonial Causes Act 1965 repealed, by section 16(5) of the Civil Evidence Act 1968. That being so, there seems no reason for the continuing survival of the first half of sections 3 and 43(2) respectively, which has never done more than duplicate, as to competence, the general rule derived from the Acts of 1851 and 1853. The remainder of section 3 of the Evidence Further Amendment Act 1869 can be left to a Statute Law Repeals Bill, but it is appropriate to deal with section 43(2) as part of the present exercise in consolidation. We therefore recommend that what is left of section 43(2) of the Matrimonial Causes Act 1965 since the repeal by the Civil Evidence Act 1968 of the privilege with respect to questions tending to establish adultery should be repealed without being re-enacted in the Bill.

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