The Law Commission

(LAW COM. No. 25)

FAMILY LAW

REPORT ON FINANCIAL PROVISION IN MATRIMONIAL PROCEEDINGS

Laid before Parliament by the Lord High Chancellor pursuant to section 3(2) *of the Law Commissions Act 1965*

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THE LAW COMMISSION

Second Programme—Item XIX

Family Law

FINANCIAL PROVISION IN MATRIMONIAL PROCEEDINGS

To the Right Honourable the Lord Gardiner,
the Lord High Chancellor of Great Britain

INTRODUCTION

1. In April 1967 we circulated our Working Paper No. 9 under what was then Item X of our First Programme. That Item has now been subsumed under Item XIX of our Second Programme, and the object of this Report is to make firm recommendations regarding those financial provisions in the Matrimonial Causes Act 1965 and certain ancillary matters which we are satisfied require revision. These recommended reforms will be needed whether or not the Divorce Reform Bill now before Parliament is enacted. That Bill radically amends the Matrimonial Causes Act 1965 in relation to the grounds of and defences to petitions for divorce and judicial separation, but, in general, does not affect the provisions relating to the financial arrangements which the court can make in respect of the parties and children. These, however, are equally in need of reform. In Working Paper No. 9 we made tentative proposals on certain questions and raised other questions which required further consideration. As a result of consultation on the Working Paper we have, for the time being, dropped certain of our proposals but are now able to make some additional recommendations. The Report itself makes clear how far we have modified or added to our provisional conclusions and, for the benefit of those who have copies of the Working Paper,[1] we refer in footnotes to the numbers of the relevant paragraphs of it. In order to keep this Report reasonably short we have not always repeated in full the arguments canvassed in the Working Paper but, where these arguments are relevant to a full assessment of our recommendations, the appropriate paragraphs are extracted in Appendix II and footnote references made to it. In Appendix I we set out draft legislative clauses to implement those of our recommendations which require legislation.

2. This Report deals with the powers in matrimonial proceedings of the High Court and county courts, which we compendiously describe as " the divorce courts " (not with the powers of magistrates' courts). These powers are of two types: first to order cash payments by one spouse to the other or to or for the benefit of the children, secondly to adjust the property rights of the spouses in the light of the breakdown of the marriage. We deal first with cash payments by one spouse to the other, then with cash payments for children,

[1] Copies are obtainable on application to the Librarian at the offices of the Law Commission and are available at the major English law libraries.

then with property adjustments and finally with a number of miscellaneous matters. It should be emphasised that this Report does not attempt a root-and-branch reform of family property, a far more intractable problem on which we hope, within the next few months, to publish a preliminary study in a further Working Paper. Nevertheless if our present proposals are implemented they will go some way towards enabling the court on the breakdown of a marriage to deal with the family assets on an equitable basis, and will therefore achieve some of the objectives sought by the Matrimonial Property Bill, which recently received a Second Reading in the House of Commons but was subsequently withdrawn. We have also taken the opportunity to recommend certain amendments to section 33 of the Matrimonial Causes Act 1965. This section, which deals with the related question of the court's duty to ensure that proper arrangements are made concerning children, was the subject of an investigation carried out on our behalf by Mr. John Hall of the Cambridge Law Faculty, and circulated in Working Paper No. 15.[2]

3. In Part I of Working Paper No. 9 we suggested a rationalisation and reformulation of the common law and statutory duties to maintain. At present these duties consist of an untidy amalgam of common law duties arising out of the fact of marriage and the birth of children, statutory duties to reimburse to public authorities sums expended by them on the maintenance of a spouse or children, and duties to maintain imposed by an order of the court under a number of miscellaneous jurisdictions conferred by statute. Clearly, a code of family law should contain a detailed statement of the duties of one member of the family to maintain another. But nothing so ambitious can be attempted within the limited scope of this Report. Our present recommendations are restricted to proposals for rationalising the present powers of the court in matrimonial proceedings. It may be objected that this will have the undesirable result of giving the spouses and children of broken marriages greater legal protection than those of happy marriages. In our view this objection is unfounded. The realities of the situation are that in a happy marriage the intervention of the courts is unnecessary; to allow suits for financial provision to be brought by one spouse against the other or by the children against their parents might be an unwarranted interference in the family relationship likely to do more harm than good. Where, however, the marriage has broken down, legal intervention is necessary unless the parties are able to resolve their differences. Clearly, legally enforceable rules are then required both to encourage the parties to resolve their differences and to enable justice to be done if they cannot.

PROVISION BY CASH PAYMENTS FOR A SPOUSE

4. Powers to order cash payments by one spouse to the other arise in two circumstances:

(*a*) where a financial order is applied for as ancillary to the grant of a decree of divorce, judicial separation, nullity or restitution of conjugal rights,[3] and

[2] See n. 1.

[3] We have, in our *Report on Restitution of Conjugal Rights* (Law Com. No. 23) recommended the abolition of that remedy and in the present Report we have assumed that it will be abolished before, or contemporaneously with, the implementation of the proposals herein.

(*b*) where the application is not ancillary to any such matrimonial cause.

Ancillary Provision

5. In Working Paper No. 9 we drew attention to the present confused terminology which draws distinctions between interim alimony, permanent alimony, maintenance and periodical payments. The following sub-paragraphs show the different financial orders which the court can at present make and in what circumstances.

(*a*) *From presentation of the petition until the determination of the suit:* alimony pending suit, payable by the husband to the wife, except where the wife seeks a divorce or judicial separation on the ground of the husband's insanity in which case it is payable by the wife to the husband.[4]

(*b*) *After a decree of divorce or nullity:* any one or more of unsecured maintenance, secured maintenance, or a lump sum, payable only by the husband to the wife, except where the wife obtains a divorce on the ground of the husband's insanity in which case the maintenance or lump sum is payable only by the wife to the husband; in the case of unsecured maintenance the payments must be monthly or weekly but there is no such limitation in the case of secured maintenance (or in the case of payments mentioned in (*c*) and (*d*) below); secured maintenance may be ordered for the life of the payee, but unsecured maintenance ends on the death of the payer.[5]

(*c*) *After a decree of judicial separation:* unsecured permanent alimony or a lump sum or both, payable only by the husband to the wife, except where the wife obtains a judicial separation on the ground of the husband's insanity in which case the alimony or lump sum is payable only by the wife to the husband.[6]

(*d*) *After a decree of restitution of conjugal rights which is disobeyed:* any one or more of unsecured permanent alimony, unsecured periodical payments[7] and secured periodical payments, payable only by the husband to the wife; or periodical payments out of the wife's earnings or profits of a trade (but not out of any other income) payable only by the wife to the husband.[8]

6. As we see it, there are only three meaningful distinctions which need to be preserved:

(*a*) The first is between payments made pending the outcome of the principal suit and payments ordered on or after the conclusion of that suit. This distinction is important because the criteria determining whether an order should be made are different. Payments ordered at the conclusion of the principal suit will depend to some extent on the court's findings regarding the respective conduct of the parties;

[4] Matrimonial Causes Act 1965, s. 15.
[5] *Ibid.* ss. 16, 19.
[6] *Ibid.* s. 20.
[7] There is no practical distinction between permanent alimony and periodical payments, the existence of these two alternative names being due to purely historical reasons.
[8] Matrimonial Causes Act 1965, s. 21.

payments ordered pending the outcome of the suit will be made prior to the court's adjudication on conduct, and indeed, before there has been a full investigation of the parties' means.

(*b*) The second is between periodical payments (using that expression in a non-technical sense) and lump sums. The former are designed to provide an income for the payee; a lump sum is designed to provide support by way of a capital sum.[9] In Australia, under comparable provisions, it has recently been suggested that in awarding a lump sum the court should take into account the contribution made by the wife in looking after the home and thus freeing the husband for economic activities and to the wife's right to share in the fruits of these activities, including his pension rights.[10]

(*c*) Thirdly, there is a distinction between maintenance which is secured and that which is not secured. In the case of secured maintenance, which alone can in some cases be made payable for the life of the payee as opposed to joint lives, investments are set aside to provide security in the event of default by the payer.[11]

7. In our view the one expression " financial provision "[12] should be substituted for the present " maintenance ", " alimony " and " periodical payments " in the case of all orders other than those pending suit, and this should apply whether the order be for a lump sum or periodical payments and whether these be secured or unsecured. When a payment is ordered pending the outcome of the proceedings it should be described as " maintenance pending suit ";[13] we think that the word " interim " should be avoided since this leads to confusion with an award made as an interim measure whether pending the outcome of the suit or not. For example, on the grant of a divorce the court might make an interim financial order pending a fuller investigation of the parties' means and needs. This would not be the same as, and in our view should be clearly distinguished from, an award of maintenance pending the outcome of the divorce proceedings.

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[9] See *Davis* v. *Davis* [1967] P. 185, C.A.; *Hakluytt* v. *Hakluytt* [1968] 1 W.L.R. 1145, C.A.; *Curtis* v. *Curtis* [1969] 1 W.L.R. 422, C.A.; *Brett* v. *Brett* [1969] 1 W.L.R. 487, C.A. Sometimes, as in *Curtis* v. *Curtis*, this sum is merely a capitalisation of periodical payments which the court would have awarded in that form if it thought that the husband could be relied upon to pay them. Sometimes, as in *Brett* v. *Brett*, the court takes the view that the wife is entitled to a share of the husband's capital. In *Brett* v. *Brett* a husband (worth about half a million pounds) was ordered to pay a lump sum of £30,000 plus annual maintenance of £2,000; notwithstanding that the marriage had lasted only 5½ months, this was the sum required to put the wife in " the position in which she was entitled to expect herself to be and would have been, if her husband had properly discharged his marital obligation ": at 493 and 495 (quoting Lord Merrivale, P. in *N.* v. *N.* (1928) 44 T.L.R. 324, at 328).

[10] *Noske* v. *Noske* [1967] V.R. 677. On appeal this question was left open: (1968) 42 Aust L.J. 183.

[11] There is at present also the somewhat mysterious power to " secure lump sums". We do not know of any case in which such an order has been made and, in the light of the extended powers to order settlements which we recommend below (see para. 66) there will be no need to retain power to secure a lump sum but only power to order security for the payment by instalments of a lump sum.

[12] We think this expression is preferable to " maintenance "—the expression provisionally recommended in the Working Paper—which suggests some inferiority or incapacity on the part of the recipient.

[13] Here we think that maintenance is the appropriate word since it is intended not as a long term financial re-arrangement but to allow the recipient to maintain herself pending the outcome of the proceedings.

8. In the Working Paper we also proposed[14] that, so far as concerns the court's powers, the present distinctions between husbands and wives and petitioners and respondents should be done away with. In other words, the court should have power to order the husband to provide for the wife or the wife to provide for the husband[15] irrespective of which was petitioner and which was respondent. We emphasise that this recommendation was merely that the present shackles on the court's powers should be removed; it was not intended to alter the principles on which payments are awarded. The proposal has met with general approval. Its implementation, which we recommend, would do away with the present anomaly that alimony or maintenance can be awarded to a husband only when the petition is on the ground of his insanity and that he cannot in such a case be ordered to pay alimony or maintenance to the wife.[16]

9. Although the court at present has power to award lump sums it has been stated that this is a power which should be exercised only in exceptional circumstances.[17] It is our considered opinion that the courts should be more ready to award lump sums. We say this because the award of periodical payments very frequently gives rise to difficulties of enforcement and tends to prolong what has proved an unhappy situation between the parties and to exacerbate their hostile feelings. A lump sum, on the other hand, avoids the difficulty of attempting to recover at intervals relatively small periodical payments and, being a judgment debt, can be enforced by bankruptcy proceedings.[18]. Furthermore, it enables the parties to start afresh without relics of the past hanging like millstones round their necks. Such an award may also be the best method of compensating the wife for the loss of a possible widow's pension. We note that recent Court of Appeal decisions on this subject[19] appear to show a greater readiness to award lump sums. We appreciate, of course, that unless there is some capital a lump sum cannot be awarded. But if, for example, the husband owns the matrimonial home we see no reason why, in appropriate circumstances, he should not be ordered to pay a lump sum which he could raise by charging the house.[20] It is sometimes objected that a woman inexperienced in finance might administer a lump sum improvidently or in such a way as not to provide a hedge against future inflation. We are not much impressed with this objection especially in the present context where the woman in question will have a legal representative to advise her. Moreover the court can always protect her against unforeseen

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[14] See paras. 21–23. The Morton Commission was of the same view: *Report of the Royal Commission on Marriage and Divorce* (1956) Cmd. 9678, paras. 499, 515.

[15] That a husband should, in some circumstances, be able to obtain a maintenance order against the wife is already recognised in the magistrates' court (Matrimonial Proceedings (Magistrates' Courts) Act 1960, ss. 1(1)(i) and 2(1)(*c*)), but not, save where he is divorced on the ground of his insanity, in the divorce court.

[16] This anomaly has necessarily been preserved by the Divorce Reform Bill (Schedule I, paras. 4, 5, 7 and 9) since the court's powers to award financial provision are outside the scope of that measure.

[17] See *per* Willmer L.J. in *Davis* v. *Davis* [1967] P. 185, at 192 and *Hakluytt* v. *Hakluytt* [1968] 1 W.L.R. 1145, at 1149.

[18] See *Curtis* v. *Curtis* [1969] 1 W.L.R. 422, C.A., where a recalcitrant husband was ordered to pay a lump sum of £33,600 (representing capitalised maintenance of £2,400 per annum) since it was clear that only the threat of bankruptcy would induce him to pay.

[19] *Curtis* v. *Curtis, supra*; *Brett* v. *Brett* [1969] 1 W.L.R. 487, C.A., see n. 9 above.

[20] Lord Denning M.R. suggested this in *Gissing* v. *Gissing* [1969] 2 W.L.R. 525, C.A., at 530C.

eventualities by additionally ordering periodical payments of a nominal or small amount which can be varied if her circumstances change.[21]

10. We proposed in the Working Paper[22] that when ordering financial provision the court should have power to award an additional lump sum in respect of any period prior to the institution of proceedings. This power would be useful when a wife has reasonably incurred liabilities to maintain herself and the children before instituting the proceedings and needs the lump sum to discharge those liabilities. This proposal was generally approved. The case for it is further strengthened, if as we recommend below,[23] the wife's agency of necessity is abolished, since this at present provides a method whereby, in theory rather than in practice, she might be able to obtain necessaries on credit. We also recommend that it should be made clear that any lump sum awarded can be ordered to be paid by instalments.

11. For reasons similar to those given in para. 9, we think that the courts should be more ready than they are at present to award secured provision. It is this alone which can afford the wife any security for the rest of her life, and if she is unable to maintain herself it should, in our view, be possible to order her to be maintained by the husband until she dies or remarries. This has been recognised in principle by section 26 of the Matrimonial Causes Act 1965 which entitles her to make a new claim for provision out of the husband's estate. But as we pointed out in the Working Paper[24] this is not as favourable from her point of view as if she were initially awarded provision for her life. In the Working Paper we suggested that the court should have power to award even unsecured payments for the life of the payee but, in the light of our consultations, we do not at present feel able to recommend that, since the view of most of those whom we consulted was that this would cause great practical difficulties in the administration of the estate of the deceased payer.[25] Nevertheless we think that it would be desirable that secured payments for the payee's life should be awarded more readily. At present they are rarely, if ever, awarded unless the husband has free investments in addition to the home and its contents and the like. We see no reason why in suitable cases the home should not be used to secure payments to the wife.

12. At present secured provision cannot be awarded on the grant of a decree of judicial separation. However the same result can often be achieved by applying before the grant of the judicial separation for a decree of restitution of conjugal rights and secured periodical payments, or, before or after the decree of judicial separation, for an order under section 22 of the Matrimonial Causes Act 1965. Again, although secured provision can be ordered on a decree of restitution of conjugal rights or under section 22 it cannot be for a longer period than joint lives—not for the life of the payee. Secured provision for the life of the payee is permissible only if the marriage is ended by divorce or nullity. The effect of our recommendations will be to remove these

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[21] It is to be noted that in the two recent cases in which large lump sums were awarded (see n. 19), periodical maintenance was ordered as well.

[22] Para. 37.

[23] See paras. 108–110 below.

[24] Paras. 72–74.

[25] We are not wholly convinced that this need be so and we note that there is such a power in Scotland where it does not seem to cause any difficulty.

distinctions. Every form of financial provision (other than maintenance pending suit[26]) will be capable of being secured and, if secured, of being awarded for the life of the payee or until he or she remarries. Our consultations have confirmed us in the view that this is the right solution.

13. In the preceding paragraphs we have referred to the cessation of payments on remarriage. At present a wife's maintenance does not cease on her remarriage although, if she is then maintained by her second husband, the former husband may apply for a variation of the order and it is customary to reduce it, often to a nominal sum. This means that if at a later date she ceases to be maintained by her second husband, for example, because of his death or another divorce, she can apply for the order against her first husband to be increased.

14. In the Working Paper we raised the question whether periodical payments should not cease finally and for all time on remarriage of the payee.[27] Although this is already the position when maintenance is awarded out of the estate of a deceased spouse or ex-spouse[28] we had assumed that this would be regarded as a controversial proposal requiring further discussion. In fact, however, our consultations suggest that there is almost unanimous support, which includes that of the various women's organisations that favoured us with their comments, for the view that periodical payments should finally cease on remarriage. We accordingly so recommend. For this purpose " remarriage " should include a foreign marriage or a void or voidable marriage. A wife who has gone through a form of marriage with a second " husband" should not, in our view, be entitled to revive her rights against her first husband by having her second " marriage " annulled. If the annulment is in England the English courts have power to order financial provision from the second " husband ". If it is in a foreign country the courts of that country may not have that power[29] and she may be left without rights against either husband. But in our view the principle must be that once another marriage has been contracted that destroys any claim against a former spouse.[30]

15. A spouse who brings proceedings for divorce, nullity or judicial separation and fails to obtain a decree cannot be awarded financial provision except on an independent application based on the other spouse's wilful neglect to maintain. We suggested in the Working Paper[31] that, as in Australia,[32] the court should be empowered to award financial provision notwithstanding that the petition for divorce, nullity or judicial separation is dismissed. However, in the light of our consultations we do not recommend this as desirable in advance of a complete reformulation of the obligation to maintain. The need for such a

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[26] Provision of security involves the preparation of a trust deed, which takes time, and is obviously inappropriate in the case of an order which is intended to come into immediate operation and to last only for a temporary period.

[27] Paras. 40 and 69. The Morton Commission so recommended: Cmd. 9678, para. 496.

[28] Under the Inheritance (Family Provision) Act 1938, see s.1(2)(*a*) or under s. 26 of the Matrimonial Causes Act 1965, see s. 26(3).

[29] Indeed, that might be the position if the marriage was dissolved rather than annulled.

[30] See para. 92 below regarding the position if the remarriage of the payee is not known to the payer. Obviously this recommendation must apply also to maintenance orders made in a magistrates' court which, not infrequently, are allowed to continue after a divorce.

[31] Paras. 75-77.

[32] s. 89 of the Australian Matrimonial Causes Act 1959–1966.

provision will be much reduced if our recommendations in paras. 18–20 are implemented.

16. We also suggested in the Working Paper[33] that maintenance pending suit should continue in force after the suit as financial provision unless the court otherwise ordered. This suggestion has, in broad effect, already been implemented by the new Matrimonial Causes Rules[34] and accordingly no recommendation on this matter is called for.

17. To summarise our recommendations:

(*a*) The distinctions in nomenclature between maintenance, alimony, and periodical or lump sum payments should be abolished. All should be described as " financial provision " except alimony pending suit which should be renamed " maintenance pending suit ": paras. 5–7, see Appendix I, clauses 1 and 2.

(*b*) There should be no distinction between the powers of the court in relation to husbands and wives, or petitioners and respondents: para. 8, see Appendix I, clauses 1 and 2.

(*c*) All forms of periodical financial provision, but not maintenance pending suit, should be capable of being secured and, if secured, of being awarded for the life of the payee or until he or she remarries whichever be the shorter: para. 12, see Appendix I, clauses 2 and 7(1), (2)(*b*) and (*d*).

(*d*) All periodical financial provision should cease on the remarriage of the payee and not be capable of being revived: para. 14, see Appendix I, clauses 7, 20, 25(2) and 31.

(*e*) The court should be empowered to award a lump sum[35] not only in respect of the future but also to enable the payee to discharge liabilities reasonably incurred prior to the institution of the suit in order to maintain the payee or the children, and to order any lump sum to be payable by instalments: para. 10, see Appendix I, clause 2(2).

The above recommendations will require legislative changes, and draft clauses to implement them will be found in Appendix I.

(*f*) Greater use should be made of the powers to award lump sums and secured provision: paras. 9 and 11.

This recommendation does not require any legislative changes. The statutory powers already exist; our recommendation is in the nature of a respectful exhortation to judges and registrars that they should exercise the powers more readily—and indeed an exhortation to the parties' legal advisers to ask for such orders more often.

Non-ancillary provision

18. Under section 22 of the Matrimonial Causes Act 1965 a wife may apply

[33] Para. 64.

[34] Matrimonial Causes Rules 1968, r. 82, which provides a simple procedure for converting an order for alimony pending suit into one for maintenance.

[35] As already emphasised, lump sums are also to some extent a means of bringing about an adjustment of capital and they are therefore relevant to what we say in paras. 64–69 below.

for an order that the husband make periodical payments to her. Although this section appears in Part II of the Act under the heading " ANCILLARY RELIEF " it is not in fact ancillary to anything but an independent proceeding entitling the wife to obtain financial provision without asking for any other form of relief. There is a similar power vested in the magistrates' courts which can be exercised in a rather wider range of circumstances. In practice surprisingly little use has been made of section 22[36] and if it remained in its present form it seems likely that even less use of it would be made now that the financial limits on the magistrates' courts have been removed by the Maintenance Orders Act 1968. It could be argued, therefore, that the section might be repealed leaving the whole matter to be dealt with by the magistrates' courts. This, however, would not appear to us to be a satisfactory solution because secured provision cannot be awarded under a magistrates' order. In view of the great advantages from the point of view of the payee of having an order which is secured and which, therefore, is not likely to present any problems of enforcement, we should expect that greater use would have been made and would continue to be made of section 22 were it not for the fact that the section suffers from a number of weaknesses. Of these, perhaps the greatest is that there is no power to award maintenance pending suit. A spouse who is left without means needs to obtain something straightaway. This she may get if she petitions for judicial separation or restitution of conjugal rights; but not if she applies under section 22 when no award can be made until she has established at a hearing that the husband has wilfully neglected to maintain her. We see no reason why the fact that the court has not yet determined whether the husband will be liable to have a final order made against him should prevent the court from ordering maintenance pending suit, any more than it does in cases for divorce or judicial separation when the ultimate liability may be equally dependent on the final result. Accordingly we recommend that section 22 should be amended by empowering the court to make an award of maintenance pending suit.

19. Another weakness of the section is that it operates only when there has been wilful neglect by the *husband*. In no circumstances can the wife be ordered to provide for the husband, although in the magistrates' court a wife can be ordered to make payments to the husband if his earning capacity has been impaired through age, illness or disability.[37] We recommend that the section should be amended by enabling the court to make an order in favour of the husband to the same extent as the magistrates' court could. Logically, we should go further and entitle the husband to apply in all circumstances; for we have recommended as regards ancillary provision that there should be no distinction between husbands and wives. However, without a complete re-casting of the section and a complete reformulation of mutual obligations to maintain, this would hardly be workable. For the time being, therefore, we content ourselves with the suggestion that the precedent of the Matrimonial Proceedings (Magistrates' Courts) Act 1960 should be adopted.

20. At present there is no power under section 22 to award a lump sum. In our view there should be no difference in this respect between orders under

[36] In 1966 there were 199, and in 1967, 231 summonses under the section (*Civil Judicial Statistics*, Table 11(ii)D).
[37] Matrimonial Proceedings (Magistrates' Courts) Act 1960, ss. 1(1)(*i*) and 2(1)(*c*).

section 22 and those which can be made on a decree of judicial separation. We accordingly recommend that there should be a power to award a lump sum and that our recommendation in paragraph 17(*e*) should apply. At present orders made under section 22 cannot extend beyond joint lives even if the payments are secured. Consistently with our foregoing recommendations, we recommend that secured provision awarded under section 22 should be capable of lasting for the life of the payee. If the order is continued after a divorce, payments should, as previously recommended in the case of other maintenance orders, cease finally on remarriage of the recipient.

21. No order can be made under section 22 unless it is proved that the husband has been guilty of *wilful neglect* to provide reasonable maintenance. This, as we pointed out in the Working Paper,[38] means that if the husband has not known that the wife is in need[39] or has genuinely thought that he has an excuse for not maintaining her,[40] the application has to be dismissed notwithstanding that it is clear that the wife is entitled to provision for the future and that the husband is unlikely to pay. While the position is clearly less than satisfactory it cannot be properly reformed until the whole basis of the duty to maintain is reformulated in relation both to the divorce court and the magistrates' courts. When that occurs it may well be possible to get away from the concept of wilful neglect and to base the jurisdiction, as in New Zealand,[41] on the fact that the applicant " is not receiving or is not likely to receive " such maintenance as is objectively reasonable in the circumstances.

22. *To sum up:* Section 22 in relation to provision for a spouse should be amended:

(*a*) By empowering the court to grant maintenance pending suit: para. 18, see Appendix I, clause 6(5).

(*b*) By entitling a husband to apply " where, by reason of the impairment of the husband's earning capacity through age, illness, or disability of mind or body, and having regard to any resources of the husband and wife respectively which are, or should properly be made, available for the purpose, it is reasonable in all the circumstances to expect the wife . . . to provide or contribute" to the maintenance of the husband:[42] para. 19, see Appendix I, clause 6(1)(*b*).

(*c*) So as to entitle the court to award a lump sum: para. 20, see Appendix I, clause 6(6)(*c*).

(*d*) To enable orders for secured provision to extend for the life of the payee-spouse or until remarriage: para. 20, see Appendix I, clause 6(6)(*b*) and 7(2)(*d*) and (3).

(*e*) So as to provide that any order for periodical payments ceases finally on remarriage of the payee-spouse: para. 20, see Appendix I, clauses 7(3), and 20.

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[38] Paras. 28 and 39.
[39] *Jones* v. *Jones* [1959] P. 38.
[40] *West* v. *West* [1954] P. 444.
[41] Domestic Proceedings Act 1968, ss. 25–30.
[42] *cf.* Matrimonial Proceedings (Magistrates' Courts) Act 1960, ss.1(1)(*i*) and 2(1)(*c*).

PROVISION BY CASH-PAYMENTS FOR CHILDREN

Definition of Children

23. Before dealing with detailed questions relating to provision for children there is the major problem of what children should be covered thereby. This problem was discussed in paras. 165–173 of the Working Paper.[43] There it was pointed out that there are still differences regarding the classes of children covered by the various sections of the Act. With the possible exception of those relating to property, to which we revert later,[44] we are of the opinion that there is no justification for retaining any of those differences. Accordingly the first question for discussion is what the general definition of children should be. In this connection we would point out that at present the Act refers to " relevant children ", an expression defined under section 46. This seems to us to be a singularly infelicitous expression and our first recommendation is that " child of the family " should be substituted. This is the expression which is in fact used in the Matrimonial Causes Rules 1968 and in the Matrimonial Proceedings (Magistrates' Courts) Act 1960 where it is defined in much the same terms as " relevant child " is defined in the Act. Accordingly, in the following paragraphs we have used throughout the expression " child of the family " except where, for the sake of clarity, it is necessary to use the actual words of the Act.

24. As pointed out in the Working Paper,[45] the present definition of child of the family represents a somewhat illogical compromise between a test based on the blood tie and a test based on adoption or acceptance into the family. This can produce inexcusable anomalies in circumstances such as those illustrated in paragraph 169 of the Working Paper.[46] Our consultations reveal general agreement with the view that the residual reliance on a blood tie should be done away with. In other words, if a child has been accepted as one of the family he should be a child of the family whether or not he was the natural child of one or other party to the marriage in question. This is in accordance with the recommendations of the Morton Commission.[47]

25. The next question concerns the expression " accepted as one of the family " and the interpretation put upon this expression by the courts.[48] The Morton Commission had talked of " living in family " and " being taken into the family ", but in the resulting legislation these expressions were translated into " has been accepted as one of the family by the other party ". This formula would in any case have to be altered if our recommendation in the preceding paragraph is implemented because the child concerned will not necessarily be the natural child of either party.

26. The formula suggested by the Morton Commission[49] was " children

[43] Set out in Appendix II.

[44] See paras. 70–73 below.

[45] See Appendix II, para. 168.

[46] See Appendix II.

[47] Cmd. 9678, para. 393.

[48] Since the publication of the Working Paper a number of decisions, additional to those referred to in para. 167 of that Paper, have been reported: see *Dixon* v. *Dixon* [1968] 1 W.L.R. 167, *R.* v. *R.* [1968] P. 414. *B.* v. *B. & F.* [1968] 3 W.L.R. 1217. See also *S.* v. *S. The Times* 8th May 1969.

[49] Cmd. 9678, para. 393(iv).

(excluding boarded-out children) who were living in family with the spouses and maintained by one or both of them at the time when the home broke up ". If this were adopted it would mean a change in the law as interpreted in the recent cases in that an illegitimate child of the wife believed by the husband to be his child and accepted and maintained in that belief would be treated as a child of the family although he is not a " relevant child " under the present formula. In the Working Paper we provisionally adopted the view that an exception should be made so that such a child would continue to be excluded.[50] This view has been criticised by some of those who have commented on the Working Paper and there has also been some criticism of the recent decisions to the like effect.[51] The first point that is made is that, whatever may be the position regarding the husband's liability to pay maintenance in respect of such a child, it is quite wrong that the child should be excluded for all purposes from being regarded as a child of the family. It is said, for example, that such a child is pre-eminently one regarding whose care and upbringing the court should satisfy itself in accordance with section 33 of the Act before making the decree absolute. It is argued secondly that although there may be many cases in which the husband should not be afforded any rights or placed under any obligation in respect of the child, it is going too far always to deprive the court of any power to make orders in respect of the child.

27. Some of the recent cases certainly support the view that it does indeed go too far. For example, in *R.* v. *R.*[52] the parties had been married in 1943 and the child was born in 1956. The child was brought up normally as a child of the husband until 1961 when the husband discovered documents, which led him to believe that the child was the result of adultery by the wife. He thereupon repudiated the wife and child and started divorce proceedings which were not heard until 1967. The result of holding that the child was not a child of the family was that no orders could be made in respect of maintenance, custody or access and that the decree had to be made absolute without any check to ensure that reasonable arrangements had been made for the child. Furthermore, it was far too late for maintenance to be obtained from the true father. The facts in *B.* v. *B. & F.*[53] were even more striking. In October 1964 the wife left the husband taking with her the six children, all of whom the husband believed to be his and who had always been treated as his. The wife then telephoned the husband telling him that he was not the father of the two youngest children. The husband started divorce proceedings and in 1965 on the husband's application an order was made that he should have access to the two youngest children. In February 1968 an order was made for these children to be blood-tested with the result that it became clear that the husband was not their father. When the divorce case was heard the husband applied for a continuation of the order that he should have access to the two children and expressed his willingness to contribute towards their maintenance. It was held nevertheless that these two children had never been accepted into the family after he knew that they were not his and that accordingly they were not " children of the family " and no orders could be made in respect of them. Doubt was expressed on whether it was ever possible

[50] Appendix II, para. 172.
[51] Including published criticism: see (1969) 113 Sol.J. 4.
[52] [1968] P. 414.
[53] [1968] 3 W.L.R. 1217.

to accept a child into the family once the family had become separated; in any event, acceptance involved agreement on the part of both spouses, and merely because the husband had obtained access and the wife had not resisted it was insufficient evidence of a mutual acceptance with full knowledge of the material facts. In stressing the need for mutual agreement, the court followed the earlier decision in *Dixon* v. *Dixon*.[54] The absence of such agreement formed the basis of the decisions in the later cases of *P.* v. *P.*[55] and *S.* v. *S.*[56].

28. One of the things that we find disturbing about some of these decisions is that they look at the question solely from the point of view of the spouse and not at all from that of the child whose interests are equally important and, perhaps, paramount.[57] It may be hard for a cuckolded husband to have to continue to bear a responsibility which he has assumed in ignorance of some of the relevant facts. But his ignorance is not the fault of the child but of the wife whom he took for better or worse, and the hardship to the child of being deprived of support is even greater. Moreover, how far will the courts be prepared to go in saying that acceptance involves knowledge of material facts? A mistaken belief that one is the parent is clearly highly material, but is it the only material factor? Suppose the husband accepts the child in the belief that it is the child of his brother, whereas in fact it is the child of a stranger of a different race, religion and colour? Many people would regard this as an equally fundamental mistake. Yet surely the mistaken beliefs of the husband, though they may be relevant in determining his position vis-à-vis the wife, should not determine his position vis-à-vis the child, or, more especially, operate to exclude for all purposes the child from being a child of the family.

29. To some extent our provisional conclusion in paragraph 172 of the Working Paper would mitigate the effect of the above decisions. We there suggested that an acceptance by the husband in ignorance that the child was not his should bind him if he did not disclaim within a time reasonably required for reflection after discovering the true facts. Under such a rule the decision in *B.* v. *B. & F.*[58] would presumably have been different since the husband certainly never disclaimed. But, in the light of the foregoing cases and arguments we now think that our suggestion did not go far enough. The fact that the husband has disclaimed responsibility is clearly a factor that the court should take into consideration in determining to what extent, if any, he should be ordered to maintain the child. But it seems to us to have no relevance to the basic question of whether the child should be regarded as a child of the family. In

[54] [1968] 1 W.L.R. 167.
[55] [1969] 1 W.L.R. 898.
[56] *The Times*, 8th May 1969.
[57] *cf.* the Guardianship of Infants Act 1925, s. 1: " Where in any proceedings before any court . . . the custody or upbringing of an infant . . . is in question, the court in deciding that question, shall regard the welfare of the infant as the first and paramount consideration . . .". " Custody or upbringing " is regarded as including access; yet in *B.* v. *B. & F.* above no regard was paid to the welfare of the infants which was irrelevant to the particular issue with which the court was concerned—namely whether children were " children of the family ". But the effect was to deprive the husband of access and it seems clear that whether or not he was the father, access could have been awarded to him in an application other than under s. 34 of the 1965 Act if the welfare of the children so demanded: [1969] Cam. L.J. 37: *cf.* *J.* v. *C.* [1969] 2 W.L.R. 540, H.L.
[58] But not *R.* v. *R.*

our view, the child is clearly one in respect of whose care and upbringing the court should be required to be satisfied in accordance with section 33 and in respect of whom it should have power to award custody and access. For the same reason, we do not think that the formula suggested by the Morton Commission[59] would be adequate. The fact that the child is " maintained by one or both of [the spouses] " is certainly an indication that the child has become one of the family. But the mere fact that he is not being maintained by either at the time when the marriage breaks up should not, in our view, mean that the court can wash its hands of the matter, and have no responsibility under section 33 and no power to order one or both to contribute in future to the child's maintenance. On the contrary, it may well be a case in which such responsibility and power are most needed.

30. Accordingly it seems to us that the basic definition of child of the family should include:

(*a*) any child (including an illegitimate[60] or adopted child) of both spouses, and

(*b*) any other child (other than a child boarded out with the spouses) who has been treated[61] by both spouses as a child of their family.

However, in relation to the maintenance of a child of class (*b*) it should be made clear that, in deciding to what extent (if any) a spouse who is not the natural or adoptive parent should be ordered to contribute towards the child's maintenance, regard should be had to:

(i) the extent (if any) to which, the length of time during which, and the basis upon which that spouse had assumed responsibility for the child's maintenance,[62]

(ii) whether that assumption of responsibility was with knowledge that the child was not his own, and

(iii) the liability of any other person to maintain the child.[63]

31. We think that children of class (*b*) in the immediately foregoing paragraph are defined with sufficient precision to exclude those whom one would wish to exclude and to include those who should be included. " Boarded-out children " is, of course, a term of art, meaning children taken in care by a local authority or voluntary organisation and by them boarded out with foster parents.[64] In such circumstances it is the local authority or voluntary organisation which is *in loco parentis* and which, on the break-up of the marriage of the foster parents, will be under a duty to see that proper arrangements are made for the children. It would therefore be inappropriate for such children to be included. In the

[59] Para. 26 above.

[60] If the child is of both parents, in practice it will generally have been legitimated by their marriage.

[61] An advantage of the word " treat " is that it retains one of the criteria which the courts have regarded as an essential condition of acceptance while avoiding the criterion of full appreciation of the facts.

[62] *cf.* Matrimonial Causes Act 1965, s. 34(4)(*a*).

[63] *cf.* Matrimonial Causes Act 1965, s. 34(4)(*b*). At present that paragraph contemplates the liability of, for example, the father of the wife's illegitimate child. Under the extension proposed it will cover also the liability of the natural parents of a child of neither spouse.

[64] See Children Act 1948, ss. 13, 14 and 33 and Boarding-Out of Children Regulations 1955 (S.I. 1955/1377).

case of other foster parents all will depend on whether or not they have treated the children as children of their family. While they are more likely to have done so if the natural parents have failed to contribute towards the children's maintenance we would not regard this as decisive one way or the other. The foster parents may well have treated the children as children of the family despite the fact that the natural parents have contributed financially; and may well not have done so despite the absence of any financial contribution.[65] If the children have been treated as children of their family, the orders which the court will make on the divorce, nullity or judicial separation will merely regulate the position as between the foster parents and the children and will not affect in any way the rights and liabilities of the natural parents; indeed, as already emphasized, as regards financial orders it will take into account the latters' liability. Au pair girls will clearly be excluded, and so will nephews and nieces, cared for in the school holidays because their parents are abroad. Where the child is that of one of the parties it will, obviously, be more likely that both have treated him as one of their family but it will still be open to them to show that the other has not done so.[66]

32. If something on the lines of the above proposal were adopted it would not, we think, be necessary to consider widening the present definition of "adopted" which (except for the purposes of sections 23–25 of the 1965 Act[67]) includes only adoptions according to the law of any part of the United Kingdom, the Isle of Man or the Channel Islands and, apparently, certain limited classes of foreign adoptions, *viz.* "overseas adoptions" within the meaning of the Adoption Act 1968.[68] In view of the varying character of foreign adoptions we think it better that a child should not become a child of the family merely because of other types of foreign adoption but should be covered only if such child comes within class (*b*).

Payments for Children—Ancillary Provision

33. We pointed out in paragraph 154 of the Working Paper[69] that the various types of provision granted in favour of a spouse may enure for the benefit of any children being looked after by that spouse and that in making awards to a spouse this is a factor which the court can and does take into consideration.[70]

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[65] A useful guide is, we suggest, whether the children have been encouraged to address the foster-parents as mother and father or merely as aunt and uncle.

[66] As in *S.* v. *S.*, above, where, on the facts as found, the child would not, in our view, be a child of the family under our suggested test. The husband had never treated the child as one of the family although he had allowed the child to be looked after in the same way as the other children. *P.* v. *P.*, above, is a borderline case. The husband was anxious to make the wife's illegitimate children, children of the family and had in fact maintained them. But the wife had made it clear that she did not agree to his having any control of them. Under our suggested formula it would be a question of fact whether it could be said that the children "had been treated by both parties as children of their family". It would no longer be necessary to establish that the wife had *agreed* to his *accepting* them.

[67] We pointed out in para. 166 of the Working Paper (Appendix II) that its meaning for the purposes of these sections is obscure. We revert to this below: see para. 95 n. 14.

[68] This seems to be the effect of s. 4(1) of the 1968 Act.

[69] Appendix II.

[70] See *Northrop* v. *Northrop* [1968] P. 74, C.A. If our foregoing recommendation that provision for a spouse should cease on remarriage is implemented it will behove the courts to draw a clearer distinction than they always do at present between provision for a spouse herself and provision for children, since payments relating to the latter should not cease on the remarriage of the spouse.

In addition the Act contains powers to make awards direct to the children or to trustees for them. These powers are contained in section 34 of the Act. At present, as we also pointed out in the Working Paper,[71] the powers are expressed somewhat cryptically, and in any new Act we think they should be spelt out more clearly.

34. In general, what we have recommended above in relation to provision for a spouse applies equally to provision for children whether this is in proceedings ancillary to a matrimonial cause or not. The present distinctions between maintenance and periodical payments should be done away with and the expression "financial provision" used instead. In all cases it should be possible for it to be secured or not and there should be a power to award a lump sum[72] instead of or in addition to periodical payments. We do not envisage that a lump sum would often be awarded to a child since in general this is obviously inappropriate. On the other hand, there might well be cases where such a sum was apposite; for example, in order to set the child up in a business or profession: advancement is relevant as well as maintenance.

35. On the other hand, there are obvious differences between provision for a spouse and provision for children. The former, we have suggested, should be capable of lasting for the life of the payee if secured or for joint lives if unsecured (but, in either case, ceasing on the payee's remarriage). Clearly the duration of orders in respect of children should be shorter since the primary object is to maintain them during minority. The first question which arises therefore is up to what age should it be possible to make orders in respect of children.

36. In our Working Paper[73] we drew attention to the lack of consistency in the various statutory provisions regarding the maximum age to which orders in favour of children could extend. Our recommendation[74] was that the normal maximum age should be 16 but that there could be an extension until 21 in the case of children physically or mentally incapable of wholly supporting themselves, and an extension for a definite period which might extend beyond 21 so long as the child is not financially independent because he is receiving education or training. As we envisaged,[75] these recommendations have to some extent been overtaken by the Report of the Latey Committee on the Age of Majority[76] which recommended that the age of majority should be reduced to 18. This recommendation will be implemented by the Family Law Reform Bill now before Parliament. Nevertheless the Bill expressly recognises that maintenance orders may continue until the age of 21 years.[77]

37. Our suggestions were widely criticised by those who commented on the Working Paper as being unduly restrictive. Accordingly in the light of those criticisms we have modified our provisional conclusions. We now recommend that:

(*a*) so long as compulsory schooling ends at the age of 15, financial provision for children should not normally extend beyond their 16th birthdays;

[71] Appendix II, para. 153.
[72] Which might be ordered to be paid by instalments.
[73] Appendix II, paras. 174–178.
[74] *Ibid.* para. 180.
[75] *Ibid.* para. 181.
[76] 1967; Cmnd. 3342.
[77] Clauses 4 and 5.

(*b*) the court should nevertheless be empowered to make or extend an order up to the age of majority (i.e. 18); but not beyond that age[78] unless

(i) the child is or will be receiving educational instruction or undergoing training for a trade, profession or vocation; or

(ii) there are special circumstances justifying the making or extension of an order beyond the age of majority.

38. As regards recommendation (*a*), this merely restates the existing practice. Although the court is at present empowered to make orders up to the age of majority and apparently beyond that age in the case of unsecured provision, it is not its normal practice to do so in the first instance. The vast majority of children still leave school at 15 and are earning by the time they attain 16. Hence the most convenient practice is for the order to cease at the age of 16, leaving it to the parties to apply for an extension if the child remains at school beyond that age or is not in fact earning his living by then. However the school-leaving age will shortly be raised to 16 and, when that occurs, if hardship is to be avoided orders should normally be made to cease at the child's 17th birthday. Hence we do not think that it would be appropriate to recommend an inflexible legislative rule that the maximum age is to be 16. The court should have a discretion to make orders up to any age not exceeding 18, but in the exercise of its discretion should not at present normally make orders extending beyond the age of 16 in the first instance. That practice, however, need not be followed if, for any reason, the child is not fully self-supporting at the age of 16. Many children are not, even though they have left school. That alone could hardly be regarded as a " special circumstance " within the meaning of recommendation (*b*)(ii) and we do not want to put any restraint on the power of the court to extend orders up to the age of 18, the new age of majority, if the circumstances justify it.

39. But if the order is to be made or continued in respect of an adult child some special justification must be shown; hence recommendation (*b*). The usual justification will be that the child is still undergoing whole or part-time education or training ((*b*)(i)). There may, however, be other special circumstances (hence (*b*)(ii)), of which the most obvious example is where the child's earning capacity is impaired through illness or disability. This example is the only one recognised in some other comparable legislation,[79] but so far as the power of the divorce courts is concerned we would not wish to limit it to that one case. If, for example, a wealthy father has promised his son an allowance until he attains 25 and the son has planned his career accordingly, we see no reason why, on a divorce, the court should not make an order which recognises the father's moral obligation. In our view it is not a valid objection that, if there had not been a divorce, the obligation would not have been legally enforceable; the realities of the situation are that the moral obligation would have been fulfilled without question but for the break-up of the family.

[78] According to *Le Mare* v. *Le Mare* [1961] P. 10, unsecured maintenance may at present continue beyond the age of 21.

[79] See the Matrimonial Proceedings (Magistrates' Courts) Act 1960, s. 16(1) and the Guardianship of Infants Act 1925, s. 7(1)(*a*). Under the latter, magistrates' courts may not make orders in respect of children over 16 unless the child's earning capacity is impaired (though county courts and the High Court can); but an order made in respect of a child under 16 may continue until 21 without the need to show such impairment.

40. When an order is made or extended in respect of a child over the age of majority we do not now recommend, as we proposed in the Working Paper, that the order can be made only for a definite period. This proposal was strongly criticised as unnecessarily restrictive. On the other hand we do not suggest that the court should in future, any more than it does at present, make an order which would compel the parents of, say, a permanently disabled child, to maintain him for life. To avoid hardship we think that there is a strong case for enabling the court on the break-up of the marriage to give effect to moral obligations which, but for the break-up, would have been fulfilled for a temporary period beyond the age of majority; but maintenance obligations of parents should normally end at the age of majority at the latest.

41. Within the scope of this Report we can merely make recommendations regarding the powers of the divorce courts in matrimonial proceedings. Nevertheless, as was pointed out during the Committee Stage[80] of the Family Law Reform Bill now before Parliament, it will not be satisfactory if the ages to which financial provision can be awarded differ according to whether the application is under the Matrimonial Causes Act or the Guardianship of Infants Act, or if the rules are more restrictive when application is made for maintenance from the estate of a deceased parent under the Inheritance (Family Provision) Act.[81] We would therefore hope that consideration will be given to generalising our proposals so that they apply equally to these Acts and to the Matrimonial Proceedings (Magistrates' Courts) Act 1960.

By whom applications may be made

42. In the Working Paper[82] we drew attention to the somewhat confused position regarding the power for persons other than the spouses to apply for orders concerning provision for the children. Rule 69 of the new Matrimonial Causes Rules 1968 entitles guardians or those having custody to apply under section 34 of the Matrimonial Causes Act 1965 for a child's maintenance order. Under rule 69 the application can never be made by the child himself, and it is only in the light of the forthcoming reduction in the age of majority to 18 that the need has arisen to provide for this possibility. In future there will be many cases where orders will be obtainable in respect of children over 18 but still being educated. It would obviously be absurd to require them to apply through a guardian *ad litem* despite the fact that they are adults. We accordingly recommend that rule 69 should be amended so as to entitle a child of the family over the age of 18 to apply if he has obtained leave to intervene for that purpose. We think leave should be required so as to avoid the possibility of capricious interventions by children in their parents' matrimonial proceedings. We should make it clear that we do not recommend that such a child should be entitled to apply except in a suit between the parents. In other words, all he should be entitled to do is to intervene with leave in his parent's suit for divorce, nullity or judicial separation in order to apply for financial provision. We do not think that it would be desirable to give a child

[80] House of Commons, Official Report, Standing Committee B, 22nd April 1969, cols. 67 and 81.

[81] The powers then should be more extensive, as they already are in certain respects, since it is no longer a question of paying from resources which may be needed by the parent but of ensuring that the estate of the deceased parent is not disposed of unfairly.

[82] Appendix II, paras. 162–163.

(particularly an adult child) a power to take his parents to court to obtain finance because, for example, he wants to embark on a scheme of training which they are not prepared to support.

Payments for Children—Non-Ancillary Provision

43. Section 22 of the Matrimonial Causes Act 1965, which, as we have seen[83] entitles a wife to apply for financial provision without asking for any other form of matrimonial relief if her husband has wilfully neglected to maintain her also affords her a remedy if there has been wilful neglect to maintain a child. But at present this applies only if the child is that of both parties to the marriage. We recommend that it should be extended to any child of the family as defined in para. 30 but with the same limitations as there suggested. We further recommend that our proposals in para. 37 should apply; i.e. that orders should normally cease when the child attains 16 but could be made or continued in respect of a child up to the age of majority, and beyond that age in the exceptional circumstances referred to in that paragraph.

44. We have already recommended that section 22 should be amended so as to entitle a husband, whose earning capacity is impaired, to apply for an order against the wife, as he can under the Matrimonial Proceedings (Magistrates' Courts) Act 1960. However, as regards neglect of children there is an anomaly in the wording of the relevant provision. As worded, it does not entitle the husband to apply for financial provision *even in respect of children* unless the husband's earning capacity is impaired by age, illness or disability. Yet the wife's liability to contribute to the maintenance of the children should not be dependent on the reasons why the husband cannot do so adequately. If a husband having care of the children is unable to provide for them for *any* reason he clearly should be able to obtain a contribution from the wife if her means permit. This he would be able to do in an application ancillary to divorce, nullity or judicial separation, or under the Guardianship of Infants Act; and, indeed, if the wife were the complainant she could be ordered to contribute towards their maintenance.[84] He equally should be able to do so in a separate application. We accordingly recommend that the wording of the amended section 22 should make it clear that an order can be obtained by a husband against the wife on the ground of her wilful neglect to contribute to the maintenance of a child of the family, when it is reasonable to expect her to contribute, without having to prove that his, the husband's, earning capacity is impaired.[85] Similarly the right of the wife to obtain an order from the husband in respect of children should not be dependent on her ability to prove that he has wilfully neglected to maintain her; for example, her claim in respect of children should not fail because she has forfeited her right to be maintained by committing adultery.

Duty of Court to Protect Children

45. We have already mentioned section 33 of the Matrimonial Causes Act

[83] Paras. 18–22 above.
[84] See Matrimonial Proceedings (Magistrates' Courts) Act 1960, s. 2(1)(*h*).
[85] An early opportunity should be taken to make a similar amendment to s. 1(1)(*i*) of the 1960 Act.

1965 which provides that the court shall not make absolute a decree of divorce or nullity or make a decree of judicial separation unless it is satisfied as respects every child of the family who is under 16 regarding arrangements for his care and upbringing. We obtained a valuable report on the working of this section from Mr. John Hall of the Cambridge Law Faculty which we circulated with our Working Paper No. 15. In so far as this suggests that the procedure needs to be improved, most of the necessary steps can be taken by rules of court or by practice directions. However, certain amendments to the section itself seem to be advisable. In the first place, the section applies only to children of the family under the age of 16. In the light of our foregoing recommendations we think it should be extended so as always to cover not only children under the age of 16 but also other minors if receiving educational instruction or undergoing training for a trade, profession or vocation. This on its own, however, would mean that the court would never be under any obligation regarding adult children still being educated or of the type referred to in para. 37(*b*)(ii). We do not think that it is either necessary or desirable that the court should normally be called upon to enquire into the position of children unless they are under 16 or minors still being educated.[86] On the other hand, if it appears that there are children in respect of whom financial or other arrangements ought to be made by the parties the decree should not normally be perfected until these arrangements have been made to the court's satisfaction. We think that the best solution is that adopted in the revised version of the section in section 71 of the Australian Matrimonial Causes Act 1959–1966. Subsection (3) of that section provides that it shall extend to children over 16 if the court so directs because it is of the opinion that there are special circumstances justifying this.

46. We also think that the Australian version of the section has advantages over the present wording of our section 33 in five respects:

(*a*) It makes it clear that the decree absolute is ineffective unless the section is complied with. This accords with the decision on section 33 of Scarman J. in *B.* v. *B.*[87] but the section itself does not say so specifically.

(*b*) It specifically requires the court to declare that it is satisfied either that there are no children to whom the section applies or that the only children to whom it applies are those named in the declaration[88] and that the needful arrangements have been made for them so far as it is practicable to do so. This should help to prevent the occurrence

[86] It would, for example, not be sensible to include a married daughter of 23 merely because she is reading for the Bar.

[87] [1961] 1 W.L.R. 856, recently followed, with some reluctance, by Cairns J. in *P.* v. *P.*, *The Times*, 1st June 1969, see below. The New Zealand Matrimonial Proceedings Amendment Act 1968 reverses this, apparently because of the doubts raised by *Shelton* v. *Shelton*, below. We do not agree with this; if the protection of the children is to be effective there must be an effective sanction. But we do agree that the doubts raised by *Shelton* v. *Shelton* should be stilled: see (*d*).

[88] This could create a problem when there is an unresolved dispute on whether or not a child is a child of the family. In the draft clause in Appendix I this problem is dealt with: see clause 17 and the Notes thereto.

of the situation that arose in the recent case of *P.* v. *P.*[89] where no declaration had been made in respect of a child born between decree nisi and decree absolute.

(*c*) It requires the court to declare *by order*, thereby ensuring that an appeal is possible against a declaration of satisfaction. Under the present English section there seems to be no means of challenging the court's decision since there is no order to appeal against and there can be no appeal against a decree absolute by a party who had an opportunity of appealing against the decree nisi.[90] This, we think, could best be met by requiring the judge to declare by order either that he is satisfied or that he is not.

(*d*) By saying " unless the court . . . has declared " it avoids a possible argument based on *Shelton* v. *Shelton*[91], that if a declaration ought not to have been made or ought to have been cancelled because, for example, the circumstances have changed,[92] the resulting decree absolute is a nullity. Accordingly if, in circumstances such as those in *P.* v. *P.*,[93] a declaration in accordance with (*b*) above were made, the resulting decree absolute would be valid.

(*e*) Instead of referring to the child's " care and upbringing "—an expression which has led to some divergence of view as to its scope—it refers to the child's " welfare " and specifically states that, where the circumstances make it appropriate, " welfare " includes " advancement and education ". It seems to us to be useful to make it clear that financial provision is included as well as custody and education.

Tax Aspects

47. In the Working Paper we also drew attention to the differing tax consequences according to the way in which the orders were framed.[94] Since the Paper was circulated the position has been radically changed by two sections of the Finance Act 1968. One of these improves the position of the wife *qua* mother; the other operates to her disadvantage. The first is section 17 which implements the recommendation in the Report of the Committee on Statutory Maintenance Limits[95] by increasing the limits of " small maintenance payments " from which tax is not to be deducted by the payer. Previously only weekly payments were covered and the limit in respect of a child was £2 10s. 0d. per week. Monthly payments are now included and the limits are raised to £7 10s. 0d. weekly and £32 10s. 0d. monthly.[96] This will be a considerable help to a wife having custody of the children since she will receive a gross sum, instead of a sum net of tax with the right, where her circumstances

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[89] n. 87 above.
[90] Supreme Court of Judicature (Consolidation) Act 1925, s. 31(1)(*e*).
[91] (1965) 109 Sol.J. 393.
[92] Steps to prevent this occurring have already been taken by Practice Direction [1969] 1 W.L.R. 228.
[93] n. 87 above.
[94] Appendix II, para. 159.
[95] 1968; Cmnd. 3587, Ch. 5.
[96] The Treasury can further increase these by order from time to time.

so entitle her, to recover the whole or part of the tax deducted.[97] On the other hand her position may be prejudiced by the second change introduced by section 15 whereby unearned income of minor unmarried children is to be aggregated with that of the parents. Hitherto the maintenance payments have been treated as (i) the mother's income if payable to her otherwise than as a trustee, (ii) the father's income if payable to trustees for the children, but (iii) the children's income if payable to them. Now, in case (iii) the sums will be the mother's income (if she has custody of the children) until the child concerned attains the age of 18.[98] Hence for the first time such sums will be aggregated with her income and she will be liable to tax accordingly. It is not for us to make recommendations on fiscal policy and, indeed, we see the logic of the amendment which will remove some of the anomalous distinctions to which we drew attention in the Working Paper. We also realise that the matter lies within a comparatively narrow compass since it is generally only in the Divorce Court that orders direct to the children can be made (and there consent orders are frequently made in this form in order to reduce tax liabilities). In the magistrates' courts such orders cannot be made unless the child concerned is over 16. At the same time we feel that we should point out that the inevitable effect will be substantially to increase the tax burden on some wives and thereby to make it likely that they will be unable to maintain themselves and the children without assistance from social security benefits. The change came into operation in 1969–1970 and it is likely to cause particular hardship in the case of existing orders, the value of which to the recipient will be suddenly reduced. This change of circumstances is, no doubt, one on the basis of which an increase in the order might be asked for. But in most cases the father, who secures no comparable benefit, will not be able to pay more. Moreover, as the researches of the Committee on Statutory Maintenance Limits graphically revealed, very little use is in fact made of the power to increase awards.[99] We therefore hope that further thought will be given to this matter to see whether there cannot be some alleviation, possibly by increasing child relief, at any rate where the taxable income of the parent liable to tax is below a prescribed limit.[1]

48. *To summarise our recommendations* regarding provision for children:

(*a*) The statutory description " relevant children " should be replaced by " children of the family ", which should be defined as including:

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[97] Difficulties are sometimes experienced because the payer fails to forward the tax deduction certificates without which a refund of tax cannot be claimed. This is part of a larger problem which is liable to arise whenever income payments are made with tax deductions. Failure to deliver the certificate has, from the payee's viewpoint, the same effect as a failure to pay the full amount. The payer is under an obligation to deliver a certificate to the payee if a written request is made (Finance Act 1963, s. 50) but it seems that the obligation is enforceable only by a High Court action, which is taking a steam-hammer to crack a nut. The position has become the more serious since the removal of the former limit on the amount which magistrates can order. In the High Court some Registrars adopt, where they think it expedient, the practice of incorporating in the order an obligation to deliver certificates at reasonable intervals.

[98] Not 21 as a result of the concession in the Finance Bill 1969 cl. 16(3). But in case (ii) the income will remain that of the father until the child attains 21 or is over 18 and " regularly working ".

[99] Cmnd. 3587, paras. 141–145 and Tables 13, 14 and 15.

[1] We appreciate that family allowances have recently been increased, but these increases were coupled with a *reduction* in the parent's total tax allowances. Some parents may, however, benefit by the increased " additional personal allowance " proposed in the Finance Bill 1969.

(i) any child (including an illegitimate or adopted child) of both spouses, and

(ii) any other child (other than a child boarded out with the spouses) who has been treated by both of the spouses as a child of their family: paras. 23–32, see Appendix I, clause 25(1).

(*b*) In proceedings for divorce, nullity or judicial separation or in independent proceedings replacing section 22, the court should be empowered to order either spouse to make financial provision by way of periodical payments or lump sums, secured or unsecured, to or for the benefit of a child of the family: para. 34, see Appendix I, clauses 3 and 6(6) (*d*) and (*e*).

(*c*) The powers should be exercisable for the benefit of minor children and in the first instance an order for periodical payments should not normally be made to extend beyond the child's 16th birthday so long as the school leaving age remains 15.[2] The court should always be empowered to make or extend an order up to the age of majority but not beyond unless

(i) the child is or will be receiving educational instruction or undergoing training for a trade, profession or vocation; or

(ii) there are special circumstances justifying the making or extension of an order beyond the age of majority: paras. 35 to 41, see Appendix I, clause 8.

(*d*) In deciding to what extent (if any) a spouse who is not the natural or adoptive parent should be ordered to contribute to the maintenance of the child, regard should be had to:

(i) the extent (if any) to which, the length of time during which, and the basis upon which that spouse had assumed responsibility,

(ii) whether that assumption of responsibility was with knowledge that the child was not his own, and

(iii) the liability of any other person to maintain the child: para. 30, see Appendix I, clauses 5(3) and 6(4).

(*e*) On an application under an amended section 22, a husband should be able to obtain from the wife financial provision for the children if the wife has wilfully neglected to maintain them whether or not his earning capacity was impaired by age, illness or disability, and an application in respect of children should not fail because there has been no wilful neglect to maintain the spouse: para. 44, see Appendix I, clause 6(1)(*b*)(ii) and (3).

(*f*) Section 33, which requires the court to satisfy itself regarding arrangements for the child's care and upbringing before finally granting a decree of divorce, nullity or judicial separation, should be amended as follows:

(i) so as to apply to any minor child of the family under the age of 16 or over that age if receiving educational instruction or under-

[2] When that age is raised to 16, the normal practice should be for orders to extend to the child's 17th birthday.

going training for a trade, vocation or profession and to such other children of the family as the court may in special circumstances direct;

(ii) to make it clear that the decree is ineffective unless this section is complied with;

(iii) to require the court to declare that it is satisfied that there are no children to whom the section applies or that all the children to whom it applies or may apply are named in the declaration;

(iv) to provide that the declaration of satisfaction or non-satisfaction with the arrangements shall be by order;

(v) to make it clear that the decree is valid so long as the court *has* declared its satisfaction;

(vi) by substituting " welfare " for " care and upbringing " and by defining " welfare " as including financial provision as well as custody and education:

paras. 45 and 46, see Appendix I, clause 17.

(*g*) Rule 69 of the Matrimonial Causes Rules should be amended so as to entitle a child of the family over the age of 18 to intervene with leave to apply for financial provision in his parent's suit for divorce, nullity or judicial separation: para. 42.

(*h*) Consideration should be given to alleviating the consequences of section 15 of the Finance Act 1968 in relation to maintenance payments to children of separated parents: para. 47.

PROVISION BY PROPERTY ADJUSTMENTS

The existing law

49. The various types of financial provision dealt with above are primarily intended to provide income for the maintenance of the spouses and children, not to adjust the rights to property in the light of the breakdown of the marriage. Provision of income is still the primary object even where secured provision is ordered, since the owner of the property providing the security is not deprived of it but merely made to secure his payments on it. However, the introduction in 1963 of a power to order payment of a lump sum has blurred the line between provision from income and provision by way of adjustments of capital.[3] Moreover, there has always been some recognition that property adjustments may need to be made on the breakdown of a marriage. This is primarily under the court's power to order a settlement and to vary ante- or post-nuptial settlements under what is now section 17 of the Matrimonial Causes Act 1965. In the Working Paper[4] we pointed out some of the obvious deficiencies of this section and suggested that the court should be given wider powers. Although, as already emphasised,[5] this Report does not attempt to deal with the whole problem of what type of family property regime is appropriate or with the controversial question of whether there should be

[3] See para. 6(*b*) above.
[4] Paras. 78–85.
[5] Para. 2, above.

introduced some form of "community of property",[6] it cannot ignore the need to rationalise the powers of the court to adjust proprietary rights when the marriage breaks down. That this is regarded as urgent is shown by the substantial majority recently given to the Matrimonial Property Bill 1969, and to the public support for its basic principle. In the light of these considerations, this branch of our subject requires rather more elaborate discussion.

50. The present law can be briefly summarised as follows:

(*a*) *Ordering a settlement*. On the grant of a divorce[7] or judicial separation[8] to the husband on the ground of the wife's adultery, cruelty or desertion the court can order her to settle any of her property for the benefit of the husband and children or either of them. On the relatively rare occasions when this power is exercised it can be, and is, used not to punish the wife but to re-allocate the family assets so as to maintain the pecuniary status as nearly as possible as it was before the termination of the married life.[9] There is no power in any circumstances to order the husband to settle his property for the benefit of his wife or children. On the other hand, the husband can, as we have seen, be ordered to pay a lump sum to the wife. Under this power the court *could* order the husband to pay his wife a lump sum approximately equal to, say, a quarter of his assets;[10] but it would obviously hesitate to do so, especially if there were children of the marriage, for it would enable her to leave everything to any subsequent husband and any children of a later union. At present there is no power to order the husband to settle property. Even by consent the court cannot make an order which it has no jurisdiction to make, though to some extent this difficulty can be avoided if the parties come to an agreement.[11] None of these difficulties would arise if, under the Divorce Reform Bill, a wife were divorced on the basis of two or five years' separation because, under clause 6 of the Bill, the court could refuse to make the decree absolute until the husband had executed a settlement (even though the court could not directly order a settlement). Hence respondent wives divorced on that basis would be protected but other divorced wives (petitioners or respondents) would be less secure.[12]

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[6] And if so whether it should be immediate or deferred community and whether of all the property of the spouses or, for example, only of "acquests" or of "matrimonial property". These questions, which have implications on many other branches of the law (e.g. succession, conveyancing and bankruptcy), will be discussed in a future Working Paper.

[7] Matrimonial Causes Act 1965, s. 17(2). Apart from the special (and understandable) provisions regarding insanity, this is unique in making the financial order that can be granted dependent on the grounds on which the decree was granted. The Divorce Reform Bill maintains this principle by restricting the subsection to cases where the husband relies on the wife's adultery, desertion or intolerable behaviour to establish breakdown: see Sched. I, para. 6 of the Bill.

[8] Matrimonial Causes Act 1965, s. 20(2). But not on a nullity decree.

[9] *Matheson* v. *Matheson* [1935] P. 171; *Moy* v. *Moy and White* [1961] 1 W.L.R. 552, C.A. (where a quarter of the wife's property was settled on discretionary trusts with the child as the primary object until he attained 25, thereafter to the wife for life with remainder to the child absolutely).

[10] *cf. Moy* v. *Moy and White, supra.*

[11] *Mills* v. *Mills* [1940] P. 124, C.A. Difficulties of enforcement may arise unless there is an enforceable contract between the parties: *Re Hudson* [1966] Ch. 209.

[12] This apparent anomaly is, of course, explained by the fact that it is only in separation cases that an "innocent" wife can be divorced against her will. In every other case she will either have committed the equivalent of a matrimonial offence or, being the petitioner, will have had the choice whether to be divorced or not.

(*b*) *Variation of settlements.* If, however, there is an " ante- or post-nuptial settlement " then, on the grant of a divorce[13] or nullity decree[14], this can be varied for the benefit of either party or the children of the marriage. This power is said to be exercisable on precisely the same principles as the power to order a settlement[15]—yet, as we have pointed out, the proceedings in which it can be exercised are not the same and it arises only if there is settled property (so that the property of the husband outside any settlement cannot be touched). Fortunately a wide interpretation has been placed on " ante- or post-nuptial settlements ". It includes not only marriage settlements in the formal sense, but also, in effect, any property acquired by the parties to the marriage or either of them as husband or wife other than under an out-and-out disposition in favour of one of them alone. This, as we pointed out in the Working Paper,[16] produces the rather odd result that if the husband and wife acquire a house in joint names there is apparently a settlement which can be varied,[17] while if the house is owned by one alone, even though as the result of a gift from the other, there is not.[18]

(*c*) *Determining property disputes.* To counteract the unfair results flowing from (*b*) above, courts have sought to make use of their powers under section 17 of the Married Women's Property Act 1882,[19] which provides a summary procedure for resolving property disputes between husbands and wives. Until recently it was thought by some that on an application under this section the court had a complete discretion to re-allocate the disputed property on a fair and equitable basis.[20] It is now clear that this is not so and that the section is merely procedural and that, in applications under it, if the parties' proprietary rights are ascertainable the court must give effect to them.[21] Only if it appears that each spouse has some proprietary interest but that its exact extent is unclear, can the court allocate on an equitable basis, in which event it leans in favour of a rule that " equity is equality ". If the property is clearly owned in law by one spouse but the other has contributed towards its acquisition or, perhaps, its improvement, this contribution may suffice to entitle that other to an equitable interest in the property.[22] Where the property in question is the home it is almost inevitable that each spouse will have contributed in one way or another but it is still unclear how substantial this has to be or, indeed, whether any such contribution can suffice to give rise to a proprietary interest in the absence of a contract to that effect.[23] If each has a

[13] Matrimonial Causes Act 1965, s. 17(1).
[14] Matrimonial Causes Act 1965, s. 19. But not judicial separation.
[15] *Ulrich* v. *Ulrich and Felton* [1968] 1 W.L.R. 180, C.A.
[16] Para. 81.
[17] *Brown* v. *Brown* [1959] P. 86, C.A.; *Cook* v. *Cook* [1962] P. 235, C.A.
[18] *Prescott* v. *Fellowes* [1958] P. 260, C.A.
[19] As extended by s. 7 of the Matrimonial Causes (Property and Maintenance) Act 1958.
[20] Lord Denning M.R. was the main protagonist of this view: see, for example, *Fribance* v. *Fribance (No. 2)* [1957] 1 W.L.R. 384, C.A.; *Hine* v. *Hine* [1962] 1 W.L.R. 112.
[21] *Pettitt* v. *Pettitt* [1969] 2 W.L.R. 966, H.L.
[22] *Appleton* v. *Appleton* [1965] 1 W.L.R. 25, C.A.; *Jansen* v. *Jansen* [1965) P. 478, C.A.; *Button* v. *Button* [1968] 1 W.L.R. 457, C.A.; *Gissing* v. *Gissing* [1969] 2 W.L.R. 525, C.A.; *Pettitt* v. *Pettitt, supra.*
[23] *Ibid.*

proprietary interest there will normally be an " ante- or post-nuptial settlement " which, on the grant of a divorce or nullity decree, the court can vary under (*b*) above.[24] Hence (*b*) and (*c*) are closely interrelated; but whereas the court's power to vary a settlement under (*b*) can be exercised only when the marriage is dissolved or annulled, its powers under (*c*) to deal with property disputes can be exercised only while the marriage subsists.

(*d*) *Right to occupy the home*. Finally, there are the provisions of the Matrimonial Homes Act 1967, enacted since the Working Paper was circulated, under which a spouse, who has no proprietary interest in the matrimonial home, may, nevertheless, have a right to continue or resume occupation, a right which may be protected by registration of a land charge. Primarily this right exists only so long as the marriage continues, but during the subsistence of the marriage the court may direct that the right to occupy shall continue after the termination of the marriage[25] and statutory tenancies may be transferred from one spouse to the other on the grant of a decree of divorce or nullity.[26] In other respects the Act does not affect the propietary rights of the spouses, and if the spouse in occupation of a house owned by the other pays rent, mortgage instalments or like outgoings, the payment is equivalent to a payment by the owner, but this " shall not affect any claim . . . to an interest in the dwelling house by virtue of the payment ".[27]

51. In the summary in para. 50 we have concentrated on the general effect of the various legislative provisions and have ignored minor blemishes and obscurities and the extraordinarily tortuous wording of section 17 of the 1882 Act. But enough has been said, we hope, to bring out the illogicality of the present position and the urgent need for legislation. Wide support for reform in this field was manifested in the course of consultations on the Working Paper and in the Parliamentary and public debates prompted by the Matrimonial Property Bill. In the very recent decision of the House of Lords in *Pettitt* v. *Pettitt*[28] the speeches emphasise the urgent need for comprehensive legislation.[29]

52. In our view the first need is to draw a clear distinction between the powers of the court prior to the breakdown of the marriage and its additional powers thereafter.[30] While the parties are living together it is questionable whether any special provision for intervention by the court is necessary or desirable. In fact section 17 of the 1882 Act is rarely invoked unless the parties have separated or are about to. But, ever since 1882, it has been possible to employ the special procedure of that section as a means of settling property disputes between spouses who, in every other respect, are happily married, and there seems to be no need to destroy that possibility; conceivably it may occasionally

[24] *Ulrich* v. *Ulrich and Felton*, above.
[25] Matrimonial Homes Act 1967, s. 2(1) and (2).
[26] *Ibid.* s. 7. The order must be made prior to decree absolute.
[27] *Ibid.* s. 1(5), i.e. the Act recognises that the rules as to contributions referred to in (*c*) above may apply.
[28] [1969] 2 W.L.R. 966, H.L.
[29] Per Lord Reid at 974. *cf.* Lord Morris of Borth-y-Gest at 982, Lord Hodson at 987.
[30] As explained in para. 65 below, we think that these additional powers should come into operation on a divorce, nullity or judicial separation.

be useful in enabling one potential source of marital disharmony to be removed. What seems clear, however, is that then the role of the court should simply be to determine the question on the basis of existing proprietary rights so far as they are ascertainable. As the Law Society stressed in their comments on the Working Paper, to allow the court at this stage to adjust the proprietary rights on equitable principles might be a source of marital trouble rather than a cure. Furthermore, so long as the marriage has not broken down the most that can be needed is power to determine the right to particular items of property.

53. However, once the marriage has broken down the position is entirely different. If, on a divorce, there is an application under either subsection of section 17 of the 1965 Act the court is necessarily and rightly involved in a limited readjustment on equitable principles. Moreover, what may be needed on marriage breakdown is not just a determination of the right to individual items of property but an overall review in the light of the new circumstances.

54. Accordingly the next need, as we see it, is to distinguish between the court's power to determine the right to individual items of property and its wider powers to make the needed adjustments after breakdown. The former power should be directed to determining existing proprietary rights. The second set of powers should come into operation on a breakdown of the marriage and should give the court a discretion to produce an equitable result by ordering payments or settlements by either spouse for the benefit of the spouses and children, or variations of existing settlements.

Determination of Rights to Individual Items of Property

55. The main problem here is that, because of the informality that normally and rightly prevails between husband and wife, it may be extraordinarily difficult to determine what their respective proprietary rights are. Hence, as Lord Diplock said in *Pettitt* v. *Pettitt*[31]: " on a matter of such general social importance the principles applied by the courts in exercising their jurisdiction ought to be clear ". Unfortunately, even after the decision of the House of Lords in that case, the principles are not wholly clear, since their Lordships did not speak with one voice. A clarification and restatement of these principles falls outside the strict limits of this Report, but it has been represented to us by the Bench, legal practitioners, and members of the public, that immediate legislative action on this " matter of such general social importance " is essential. There are at present annually some 900 applications under section 17 of the 1882 Act in the High Court alone as well as over 500 in the county court and a few cases where property disputes fall to be resolved otherwise than under the section. It is unlikely that a fair and sensible result can be reached in all these cases in the light of the existing uncertain principles; nor can practitioners advise their clients with any assurance.

56. We have therefore given extended consideration to the question whether, in advance of the completion of a thorough review of matrimonial property law, it would be possible to lay down clearer principles to assist in the determination of the respective rights of the spouses. We have reluctantly concluded that any immediate attempt at a comprehensive codification of these principles would not be practicable. But one important step could, we think,

[31] [1969] 2 W.L.R. 966 at 995.

be taken immediately. As the House of Lords stressed in *Pettitt* v. *Pettitt*[32] little difficulty is in practice experienced when both spouses have contributed in money or money's worth to the initial acquisition of the property. The main area of doubt is where one has subsequently paid for or carried out improvements on property acquired by the other. If the work done is no more than a husband or wife might reasonably be expected to undertake in respect of property enjoyed by the family, it is now clear[33] that this will not entitle him or her to any proprietary interest. But at present the position is unclear where, as in *Jansen* v. *Jansen*,[34] one spouse has, for example, given up his other work in order to carry out major works of conversion to the other's property. In *Jansen* v. *Jansen* it was held that this entitled the husband to an interest in the property. However in *Pettitt* v. *Pettitt*, Lords Hodson and Upjohn thought that this decision was wrong whereas Lords Reid and Diplock thought it was right. It is this doubt which, in our view, ought to be resolved immediately.

57. To achieve this we recommend that it should be provided that where one spouse contributes in money or money's worth to the improvement of property vested in the other spouse or in their joint names, the spouse so contributing shall, if the contribution is of a substantial nature and subject to any agreement between them, acquire a beneficial interest by virtue of that contribution. In any dispute as to the extent of that beneficial interest the court should be empowered to make such order as may be just in all the circumstances.

58. It will be observed that the suggested formula comes close to that adopted in the Queensland legislation with which, in *Pettitt* v. *Pettitt*, Lord Morris of Borth-y-Gest expressed sympathy. It also accords closely with the " common intention " test favoured by Lords Reid and Diplock, while avoiding the admitted fiction of imputing a common intention when, in all probability, there was none. It also avoids the fiction of reliance on agreement[35] (though it precludes the court from disregarding the spouses' agreement in the event of there being one) or on presumptions of advancement and resulting trust which a majority of the Law Lords felt to be outmoded.[36] It makes it clear, as in our view is right, that the same general principle applies to improvements as to original acquisition so long as the contribution was substantial as in *Jansen* v. *Jansen*.[37] It admittedly gives the court something in the nature of a discretion, but a very limited one exercisable only in circumstances where a discretion is inevitable because of the informality of family arrangements. It differs fundamentally from the wider discretion which the courts need after the marriage breaks down. The court, under the present recommendation, will be able to pay regard only to the contribution in money or money's worth in respect of the particular item of property concerned. After breakdown (and in practice it is then only that a dispute is very likely to arise) it will have wider powers and be able to have regard to the contributions to the assets of husband

[32] [1969] 2 W.L.R. 966, H.L.

[33] As a result of *Pettitt* v. *Pettitt*, *supra*.

[34] [1965] P. 478.

[35] "The conception of a normal married couple spending the long winter evenings hammering out agreements about their possessions appears grotesque, and I certainly cannot take the further step of working out what they would have agreed if they had thought of making an agreement" : *per* Lord Hodson in *Pettitt* v. *Pettitt*, *supra*, at 987.

[36] These presumptions certainly seem to have been ignored in most of the recent cases.

[37] But not when it is simply " doing the ' do-it-yourself jobs ' which husbands often do " (the expression of Lord Denning M.R. in *Button* v. *Button* [1968] 1 W.L.R. 457 at 461).

and wife which each has made whether or not in money or money's worth and to their contributions to the general welfare of the family. The legislative provision suggested cannot appropriately be effected merely as an amendment to section 17 of the 1882 Act. As was stressed in *Pettitt* v. *Pettitt* the principles must be the same whether the dispute is determined under that section or in any other type of action, such as one for detinue or conversion.

59. There is one further piece of remedial action which we think should be taken immediately. This is to make it crystal clear that in respect of the matrimonial home a spouse has a registrable right of occupation under the Matrimonial Homes Act 1967 notwithstanding that he or she may also be entitled to an equitable interest therein by virtue of a contribution to its acquisition or improvement. That this was the intention is shown by the final words of section 1(5) of the Act. It has, however, been argued that where a spouse has become entitled to an equitable joint interest or interest in common he or she is " entitled to occupy . . . by virtue of an estate or interest " so that section 1(1) of the Act does not apply with the result that there is no registrable right of occupation—*a fortiori* where the interest was merely in the proceeds of sale under a trust for sale.[38] But the Court of Appeal seem to take the view that, notwithstanding the statutory conversion of concurrent interests to equitable interests under a trust for sale, those so entitled in equity have the same rights of occupation as legal tenants in common had before 1926.[39] In practice we have no doubt that solicitors will advise a husband or wife to register in such circumstances and that registration will confer *de facto* protection since an intending purchaser or mortgagee is unlikely to proceed with the transaction unless the registration is discharged or the spouse concurs. But it is obviously unsatisfactory that there should be a serious doubt regarding the *de jure* position. Accordingly we recommend that the 1967 Act should be amended by providing expressly that, when a legal estate in a dwelling house is vested in one spouse and the other is entitled to an equitable interest therein jointly or in common with him, the spouse so entitled shall be deemed for the purpose of section 1(1) of the Act to be not entitled to occupy by virtue of the equitable interest but shall have the rights conferred by the Act. Hence, although the equitable rights will be liable to be over-reached, rights in the proceeds will remain, as will rights of occupation if registered. And, in practice, if the right of occupation is registered, there will not be a sale or mortgage without the concurrence of both spouses.

60. We have also given lengthy consideration to the question whether, in the interests of purchasers and mortgagees of a property vested in one spouse in which the other has acquired an equitable interest, it is necessary to clarify the circumstances in which a sale by the spouse in whom the legal interest is vested over-reaches the equitable interest of the other. On the whole we have concluded that in the light of the decisions this matter can be left for the time being. The recent decision of Stamp J. in *Caunce* v. *Caunce*[40] makes it clear

[38] *Re Bagot* [1894] 1 Ch. 177; *Re Earl of Stamford and Warrington* [1925] Ch. 162.
[39] *Bull* v. *Bull* [1955] 1 Q.B. 234; *Cook* v. *Cook* [1962] P. 235, especially at 242, 243. In *Gurasz* v. *Gurasz, The Times*, 10th July 1969, both spouses were legal joint tenants and it was held that the 1967 Act did not operate. The wife, in that case, was fully protected because of her legal title but would not have been protected had her interest merely been an equitable one liable to be over-reached on a sale by the husband.
[40] [1969] 1 W.L.R. 286.

that a person dealing with the spouse in whom the legal interest is vested is not under an obligation to enquire as to the rights of the other spouse and is not deemed to have notice of any equitable interest that that other spouse may have notwithstanding that he or she may be sharing the occupation of the property. Hence, unless the purchaser or mortgagee knows that the other spouse has an equitable interest, he will normally take free of it. This question generally arises in relation to the matrimonial homes and there our foregoing recommendation regarding registration of a right of occupation under the 1967 Act will help to clarify the position and will, we think, preserve a proper balance between purchasers and mortgagees on the one hand and the spouse on the other. If the property concerned is the matrimonial home the spouse will be able to protect his or her right of occupation by registration with the result that there will not be a sale or mortgage without his or her consent. If the property concerned is not the matrimonial home or if, though it is the matrimonial home, there has been no registration, the purchaser or mortgagee will be protected so long as he acts in good faith and will not be put on notice of the rights of the other spouse.

61. There are also two matters concerning section 17 of the 1882 Act which should, we think, be dealt with immediately. A serious weakness, to which we drew attention in the Working Paper and which our consultations have confirmed, is that the section cannot be invoked once the marriage has ended. Proceedings under the section rather than actions in tort are preferable both procedurally and because, although there is no discretion regarding determination of title, there is a discretion regarding the making of orders for possession.[41] Hence it would clearly be advantageous if the summary procedure could be invoked for some time after, as well as before, a decree absolute of divorce since it may not be until then that property questions come to be thrashed out. It is particularly important that the procedure should be available whenever the wider powers on breakdown of the marriage are invoked. It may then be necessary to clarify the existing position regarding ownership of property before the court decides how that position should be changed. Hence, on a breakdown of the marriage it will often be appropriate to invoke both sets of powers: those under the 1882 Act to determine the existing proprietary rights of the parties; those under an amended Matrimonial Causes Act to enable those rights to be altered to produce an equitable result in the light of the breakdown. We have considered whether the remedy under section 17 should be available to or against personal representatives of a deceased spouse but, on balance, believe that this would be inappropriate.[42]

62. It is also important that applications under the section should be dealt with by the same court as will deal with any matrimonial suit between the parties; there is a close inter-relation between these applications and those for cash provision.[43] We are aware that the Supreme Court Rule Committee has instituted discussion of a suggestion that jurisdiction under section 17 of the 1882 Act should, in the High Court, be assigned exclusively to the Divorce Division and that the same suggestion is made in the recently published

[41] *Pettitt* v. *Pettitt, supra.*
[42] Formerly the personal representatives of the wife could invoke the section: see s. 23 of the 1882 Act. But s. 23 was repealed by the Law Reform (Husband and Wife) Act 1962, resulting from the Ninth Report of the Law Reform Committee (1961; Cmnd. 1268).
[43] As was stressed in *Gissing* v. *Gissing* [1969] 2 W.L.R. 525, C.A.

proposals for a Family Division. We warmly support this suggestion which, with the aid of administrative steps, should ensure that applications for financial provision were dealt with at the same time and by the same tribunal as that which determined the preliminary question relating to ownership of individual items of property.

63. *Accordingly we recommend* that:

(*a*) It should be made clear that a substantial contribution in money or money's worth by one spouse to the improvement of property vested in the other or in both, confers, subject to any agreement to the contrary, a beneficial interest in that property, and that in any proceedings, whether under s. 17 of the Married Women's Property Act or otherwise, the court should make such order as may be just to give effect to that interest: paras. 55–58, see Appendix I, clause 27.

(*b*) The Matrimonial Homes Act 1967 should be amended so as to make it clear that a spouse who is entitled to a beneficial interest by virtue of a contribution has a registrable right of occupation under the Act: paras. 59–60, see Appendix I, clause 28.

(*c*) Applications under section 17 of the Married Women's Property Act 1882 to determine disputes regarding the spouses' rights to individual items of property acquired prior to the end of the marriage should be permissible within three years after the dissolution or annulment of the marriage: para. 61, see Appendix I, clause 29.

(*d*) In the High Court exclusive jurisdiction under the section should be assigned to the Divorce Division: para. 62.[44]

Adjustment on Breakdown

64. The urgent need, as we have indicated, is to rationalise and extend the powers of the court when the marriage breaks down. The House of Lords in *Pettitt* v. *Pettitt*[45] attached great importance to the fact that wider powers were then available.[46] Unfortunately, as we have already pointed out, these powers are neither adequate nor consistent. A major anomaly is that although it is normally the wife who needs protection, as the law stands at present, while her property can sometimes be settled for the benefit of the husband, his property can never be settled for her benefit.[47] Some extension and a considerable rationalisation of the present powers are essential.

65. As already stressed, these wider powers should arise only when the marriage has broken down. The first question is how that time should be defined. Clearly if there has been a decree of divorce or nullity, the marriage has broken down permanently. So, normally, has it when there is a decree of judicial separation. Admittedly there may be, and sometimes is, a reconciliation after a judicial separation, but it ends the obligation to live

[44] This can be achieved without legislation.

[45] [1969] 2 W.L.R. 966, H.L.

[46] "If these circumstances [i.e. those attending the breakdown] are such as to call for an adjustment of the spouses' respective proprietary rights which resulted from their previous transactions the court has jurisdiction to make such adjustments under the Matrimonial Causes Act 1965": *per* Lord Diplock at 1000. See also Lord Upjohn at 993.

[47] It is 14 years since the Morton Commission recommended the removal of this anomaly: Cmd. 9678, para. 516.

together and almost invariably denotes the death of the marriage. In some cases, especially those involving members of certain religious denominations which do not countenance divorce, it may be the only severance of the legal tie which the parties contemplate. Hence we think it essential that it should be possible to ask for a property adjustment on the grant of a judicial separation.[48] Accordingly we recommend that the court's powers to adjust proprietary rights should be exercisable in proceedings ancillary to divorce, nullity or judicial separation. We recognise that a marriage may have broken down without any of these decrees having been obtained. Accordingly we have considered whether applications for a property adjustment should be permissible in other circumstances.[49] On the whole we have decided that that would not be advisable. Such a re-adjustment is a somewhat drastic step which should not be taken unless it is pretty clear that the marriage has broken down permanently. Unless it has, an application is likely to hinder the prospects of a reconciliation.

66. The next problem is to define the powers of the court on such an application. In our view the court should have power:

(*a*) to order settlements or transfers of any property to which either or both spouses are entitled, whether in possession or reversion, for the benefit of the spouses and children[50] or any of them; and

(*b*) to vary, for the benefit of the spouses, the children[50] or any of them, any ante- or post-nuptial settlements.

Proposal (*a*) widens the existing law in section 17(2) of the Matrimonial Causes Act 1965 by enabling the court to order the *husband* to settle or transfer property (at present he can only be ordered to pay cash under s. 16) and by generalising its application so that it applies to nullity as well as to divorce and judicial separation, and irrespective of the grounds upon which any of these decrees are based. Proposal (*b*) merely extends the existing section 17(1) of that Act so that it applies to judicial separation as well as to divorce and nullity. Its scope of operation would, however, be somewhat diminished in practice. As we have pointed out, because of the present restricted scope of section 17(2) the courts have given an exceptionally wide construction to "settlements" in section 17(1). Once section 17(2) is widened so as to apply to both spouses it will be necessary to invoke section 17(1) only where there is a settlement in the true sense; where there is joint property it will no longer be necessary to treat this as settled property since the same result will be achieved more rationally by ordering a settlement or transfer of the interest of one or other spouse under the amended section 17(2). We think, too, that the power to vary should continue to be limited to ante- or post-nuptial settlements (i.e.

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[48] But not an order in the magistrates' court. Although a separation (as opposed to a maintenance) order has the effect of a decree of judicial separation (Matrimonial Proceedings (Magistrates' Courts) Act 1960, s. 2(1)(*a*)) it is obviously inappropriate that magistrates' courts should deal with property adjustments and we do not think that the fact that a separation order has been obtained should enable application for a property adjustment to be made to the divorce court since, as we have stressed, that should be dealt with by the same court as deals with maintenance. As separation orders are granted very rarely the matter is not of great importance.

[49] For example, "in the event of a matrimonial dispute or estrangement"—the formula employed in the Matrimonial Homes Act 1967, s. 2(2). We also considered whether it should be permissible to apply whenever there is an application under the Matrimonial Causes Act 1965, s. 22.

[50] We discuss below (paras. 71–73) what children should be included for this purpose.

those made on the parties *qua* husband and wife) and not to all settlements; only if the settlement is a " marriage " settlement in this broad sense is it appropriate that the court should have power to vary it in exercise of its matrimonial jurisdiction. We have considered whether some clearer expression could be substituted for " ante- or post-nuptial " but are unable to suggest anything better. The existing expression is familiar to lawyers and the courts, hallowed by long usage and, in meaning, now reasonably definite; to change it would be likely to do more harm than good. It should, however, be made clear that the expression " ante- or post-nuptial settlements " includes one made by will as well as *inter vivos* settlements; it has been held that a disposition by will is not at present included even though this directs the property concerned to be held on the same trusts as a marriage settlement which can be varied.[51]

67. It will be observed that we recommend that, as at present, the court's powers should operate on any property of the spouses, whether acquired before or after the celebration of the marriage. We do not, in the present exercise, wish to introduce any concept of matrimonial or family property, which, if it is to be introduced, will require the most careful consideration and present difficult problems of definition. If, at a later date, a form of community of property is introduced, we do not envisage that the powers which we recommend in this Report will be rendered obsolete. The court's powers to review property rights will, we think, still be needed; the only difference will be that they will then deal with rights held in common[52] instead of rights under the present system of individual ownership.

68. It will also be noted that we have recommended that the court should be empowered to order a transfer, as well as a settlement, of any of the spouses' property. We do not envisage that out-and-out transfers will normally be ordered except as an alternative to a lump sum in cash. In our view, however, it is essential that the court should have this power if only in order to remove the anomaly that at present it can order a lump sum payment but not the transfer of investments. Moreover there could be circumstances where a transfer of a particular item of property, for example, the matrimonial home,[53] might be appropriate. And, as already suggested, where property is jointly owned it would often be appropriate to order one spouse to transfer his interest to the other; continued joint ownership after a divorce will rarely be a happy arrangement. Needless to say, the court's powers will not derogate in any way from the rights of third parties not before the court. Hence it will not be possible to order a transfer of a tenancy or of the benefit of a hire purchase agreement if the tenancy or agreement forbids an assignment. The only exception to this will remain that under the Matrimonial Homes Act under which a statutory tenancy of the matrimonial home may be transferred from one spouse to the other notwithstanding that such a tenancy is not transferable property.[54]

69. In a later paragraph[55] we recommend that in the exercise of the court's armoury of powers to order financial provision it should be directed to have

[51] *Garratt* v. *Garratt* [1922] P. 230.
[52] The considerations to which regard is to be had when exercising the powers (see para. 82 below) may then need reconsideration.
[53] See *Curtis* v. *Curtis* [1969] 1 W.L.R., 422 at 429, C.A.
[54] See para. 50(*d*) above.
[55] See para. 82 below.

regard to various criteria. Among these there is one of outstanding importance in relation to the adjustment of property rights as between the spouses. This is the extent to which each has contributed to the welfare of the family, including not only contributions in money or money's worth (as in the determination of rights to particular items of property[56]) but also the contribution made (normally by the wife) in looking after the home and family.[57] This should meet the strongest complaint made by married women, and recognised as legitimate by the Morton Commission in 1955,[58] namely that the contribution which wives make towards the acquisition of the family assets by performing the domestic chores, thereby releasing their husbands for gainful employment, is at present wholly ignored in determining their rights. Under our proposal this contribution would be a factor which the court would be specifically directed to take into account. But it should be emphasized that although the courts would be directed to have regard to the spouses' contribution during the marriage, their powers to adjust will not be limited to assets acquired during the marriage any more than they are at present.[59]

70. We do not intend that the recommended powers should be exercised so as to transfer property to *children* (as opposed to settling it for their benefit) except as an alternative to a lump sum payment where this would be an appropriate way of providing for the maintenance, education or advancement of the children. There may be circumstances in which a transfer of securities would be more advantageous and businesslike than a payment in cash. In general, however, if children are to benefit from property adjustments that should be by means of a settlement, not an out-and-out transfer.

71. Hitherto we have spoken of settlements and variations of settlements for the benefit of the spouses "*and children*" leaving undefined the classes of children for whose benefit the powers may be exercised. Two questions arise in this connection. The first is whether the children should be the same as those for whose benefit financial provision can be ordered (i.e. children of the family as defined in para. 30 above). The second is whether, as in the case of cash provision, the court's powers should be exercisable only for the benefit of those children of the family fulfilling the age or other conditions referred to in para. 37. At present both subsections of section 17 of the 1965 Act are restricted to "children of the *marriage*"[60]—a much narrower class than "relevant children" (or children of the family) for whom financial provision can be ordered. But, under both, there is no restriction regarding age or disability; the court can order the wife to settle property for the benefit of children of full age and capacity, and settlements can be varied for their benefit.

72. As regards the first question; so far as concerns orders to the parties to settle their property there can, in our view, be no justification for limiting these to settlements for the benefit of children *of the marriage*. The power is intended to be complementary to the power to award cash provision and should, we

[56] See para. 57 above.

[57] *cf.* the observations of Barry J. in the Australian case of *Noske* v. *Noske* referred to in para. 6(*b*), n. 10 above.

[58] They wished the court to be able to give "effective recognition, in appropriate cases, to the wife's contribution to the marriage, whether by her work in the home or by the help she has given her husband in building up or running his business": Cmd. 9678, para. 692.

[59] *Brett* v. *Brett* [1969] 1 W.L.R. 487, C.A., where the marriage had lasted only 5 months.

[60] i.e. legitimate, legitimated and adopted children of both spouses.

think, clearly operate for the benefit of the same class of children, i.e. to "children of the family" as defined in paragraph 30, but with the same conditions as suggested in that paragraph regarding the considerations to be borne in mind when the child is not a child of both spouses. On the other hand the position is less clear so far as concerns variation of existing settlements. If the wife's father executed a marriage settlement he probably intended to benefit only the children of the marriage, or, at any rate, children of his daughter, and it might be regarded as objectionable to vary it for the benefit, say, of the husband's illegitimate child accepted into the family. Even so, however, "children of the marriage" appears to be too narrow. If, as might well be the case, the settlement by the wife's father was on the wife for life, then for the husband for life, and then for *her* children, it would be absurd if the settlement could not be varied for the benefit of all her children but only for those by the husband.[61] Similarly if the marriage was dissolved because of the wife's adultery, it would be hard if the settlement could not be varied for the benefit of the husband's children (by a former marriage) who have become children of the family, and who will have to be maintained by him. Moreover, consideration of the settlor's wishes may be of paramount importance when the settlor is a third party (say a parent of one of the spouses) but appears to be of less weight when the settlor is one (or both) of the spouses. If the husband has, on marriage, settled his property on himself for life, then for the wife, and then for the children of the marriage and if, during the marriage, other children have been received into the family, there seems to be every reason for enabling the court on, for example, a divorce, to vary the settlement for the benefit of those children.[62] In the light of these considerations, and bearing in mind that the court's powers are discretionary, we think that the expression "children of the family" can safely be used in this case too. However, where there is an application to vary a settlement and the settlor is still alive we think that he should be entitled to be heard on the application and that the Rules of Court should be amended accordingly.[63]

73. The second question is whether the powers should be exercisable only for the benefit of children fulfilling the age or other conditions specified in paragraph 37. So far as concerns an out-and-out transfer to children we think it clearly should. As we have already emphasized,[64] we regard the power to order an outright transfer of property to a child as one to be exercised only as an alternative to a lump sum payment in cash where needed for the advancement or education of a child. We do not favour a rule which would enable the spouses' assets to be given immediately to the children; this would put them in a better financial position than if the marriage had not broken down whereas the object is simply to preserve their former position and to protect their reasonable expectations.[65] But so far as ordering or varying settlements is concerned, practical considerations demand, as we see it, retention of the present rule under which there is no such restriction. To insist that in

[61] Yet this seems to be the effect of the present s. 17(1) though the point appears to be ignored in practice.

[62] It is no real answer to say that the court could, in any event, order the husband to settle his life interest; an interest *pur autre vie* might not be worth much.

[63] At present it appears that the settlor *qua* settlor, has no right to be heard, although the trustees have: Matrimonial Causes Rules. 1968, r. 74.

[64] Para. 70 above.

[65] Paras. 81-83 below.

the absence of special circumstances the courts should not order or vary a settlement except to benefit children while they were minors would be to limit the courts' present powers so severely that the only settlements (or variations) which they could order would be ones which no sensible person would ever make. Often it would mean that inevitably there would be a reversion to the settlor which would have highly detrimental consequences for taxation and estate duty purposes. Hence we recommend that there should be no such limitation regarding settlements or variations of settlements.

74. There is one further point that arises in relation to variation of settlements. Not infrequently the variation takes the form of deleting the interests of the guilty party. Yet it is not clear how this can always be legally justified if all that the court can do is to vary for the benefit of the spouses and the children. Suppose, for example, that the settlement is on W for life, then for H for life, then for the children, and then for W's next of kin. And suppose that there are no children and that W divorces H because of his adultery. It seems clear that the court should have power to vary the settlement by deleting H's life interest (indeed it always seems to be assumed that it already has power to do so). Yet this cannot conceivably confer any financial benefit on W herself, or on children because there are no children. We therefore recommend that any legislative provision replacing section 17(1) should expressly state that the court, in addition to its power to vary for the benefit of the spouses and children, always has power to extinguish the interest of either.

75. We deal below with the question of variation of orders.[66] But we should mention at this stage that, as at present, an order for an out-and-out transfer, like one for payment of a lump sum, should not be variable after it has been executed. Nor should a settlement or variation made on the dissolution or annulment of the marriage. On the other hand, a settlement or variation made on a judicial separation should be variable on a subsequent divorce or rescission of the judicial separation.

Tax Aspects

76. Hitherto the power to order property distributions has been so limited and exercised so sparingly that the estate duty and tax consequences have received little attention. It is understood that the Revenue treat a lump sum payment made under an order of the court as being made for full consideration on the basis that it is the compounding of future maintenance liability, so that estate duty would not be payable even if the payer died within seven years. It is understood that they would take the same view of a disposition in favour of a spouse or children under a court order in matrimonial proceedings. Hence no problem should arise as regards estate duty. The main problem relates to liability for capital gains tax on a transfer or settlement of property. No such liability arises on disposals between spouses while the marriage subsists and they are living together;[67] a charge on any gain (or relief for any loss) is postponed until the property is disposed of outside the marital unit when the tax position is computed by reference to the original acquisition cost. But the powers

[66] See paras. 85–93 below.
[67] Finance Act 1965, Schedule 7, para. 20.

recommended above would be exercised when the spouses were living apart and, generally, when the marriage has ended. Moreover, there is no exemption from liability in connection with settlements on children. Hence the charge would not be postponed.[68]

77. The principle on which our recommendations are based is that when the court orders financial provision it gives effect to the equitable rights of the spouses and children. Hence in our view the implementation of the order should not be deemed a disposition giving rise to a liability to capital gains tax. Although it may be said that the marital unit has ceased to exist the effect of the order is essentially to re-allocate the property so as to give effect to the existing equitable rights of the marital unit. Accordingly it should not be regarded as a disposition. We appreciate that there will be a potential liability on a subsequent disposition computed by reference to the original cost of acquisition. This, however, seems to us to be inevitable and right; the ending of the marriage should not afford the marital unit tax-advantages which would have been denied had the marriage survived. We have not thought it necessary or appropriate to suggest any legislative clause to resolve any doubt there may be on the matters dealt with in this paragraph.

Bankruptcy

78. A further question arises in relation to bankruptcy (including the administration of an insolvent estate). Whether the claims of the family should prevail over those of creditors is essentially a question of social policy. The answer given by the Matrimonial Homes Act 1967 is that the claims of a spouse should be subordinated to those of creditors,[69] and this is the view which we favour. Marriage is a form of partnership and, on normal partnership principles, neither partner should compete with the partners' creditors. Accordingly we recommend that a transfer or settlement, notwithstanding that it is made under an order of the court, should be regarded as a settlement which can be avoided by a trustee in bankruptcy of the transferor or settlor in accordance with section 42 of the Bankruptcy Act 1914. This section does not at present apply to the administration of a deceased's insolvent estate even if the estate is being administered in bankruptcy under s. 130 of the Bankruptcy Act. Accordingly the only way in which a settlement can then be set aside is by showing that it was made with intent to defraud creditors so that section 172 of the Law of Property Act 1925 can be invoked.[70] Although it is not impossible that a collusive arrangement between husband and wife might lead to the court making a consent order which, in fact, was designed to defraud creditors, it would be invidious to set aside on this basis a settlement ordered by the court. Accordingly we recommend that consideration should be given to extending section 42 so that it applies to the administration of a deceased's estate in bankruptcy. We do not make any formal recommendation on this further point as a general change in the law relating to the administration of insolvent estates is beyond the scope of this Report.

[68] But a transfer by one spouse to the other of a private residence formerly occupied by the married couple would ordinarily be exempt under s. 29 of the Finance Act 1965.
[69] s. 2(5).
[70] *Re Eichholz decd.* [1959] Ch. 708.

Intestate Succession

79. At present, subject to one exception, the rights of one spouse on the death intestate of the other are affected only where the marriage has actually been ended by a decree of nullity or dissolution. The exception is in section 20(3) of the Matrimonial Causes Act 1965 which provides that on a judicial separation:[71]

(*a*) any property thereafter acquired by the *wife* while the separation continues, and

(*b*) where the decree *is obtained by the wife* any property to which she is then entitled in remainder or reversion,

shall, if she dies intestate, devolve as if her husband had pre-deceased her. The section is capable of producing the most arbitrary results and grave practical difficulties.[72] In the Working Paper[73] we suggested that after a judicial separation neither spouse should have rights to succeed on the intestacy of the other if death occurs during the separation. The comments which we have received generally support this conclusion. We do not think that the same should apply merely because the parties have separated or because one has obtained a matrimonial order from the magistrates[74] or an order under section 22.

80. *To summarise our recommendations* relating to property adjustments:

(*a*) In proceedings ancillary to divorce, nullity or judicial separation the court should be empowered, on application by the parties or by or on behalf of any child of the family,[75]

(i) to order settlements or transfer of any property to which either or both spouses are entitled, whether in possession or reversion, for the benefit of the spouses and children or any of them; and

(ii) to vary, for the benefit of the spouses, the children, or any of them, any ante- or post-nuptial settlements:

paras. 64–74, see Appendix I, clause 4.

(*b*) A lump sum payment, settlement or transfer under an order of the court should not be treated as a disposition for the purposes of capital gains tax: paras. 76–77.

(*c*) It should, however, be regarded as a settlement liable to be set aside under section 42 of the Bankruptcy Act 1914: para. 78, see Appendix I, clause 21.

(*d*) After a decree of judicial separation[76] neither spouse should have rights to succeed as widow or widower on the intestacy of the other if the death of that other occurred during the separation: para. 79, see Appendix I, clause 30.

[71] Or a *separation* (as opposed to a maintenance) order granted by a magistrates' court: Matrimonial Proceedings (Magistrates' Courts) Act 1960, s. 2(1)(*a*).

[72] It involves an attempt to separate the part of the wife's property to which the section applied from the part to which it does not.

[73] Paras. 211–213.

[74] This is essentially a summary remedy provided for the immediate protection of the applicant and, even in the rare case where there is a non-cohabitation clause, is not any clear evidence of the permanent breakdown of the marriage.

[75] Our recommendations in para. 42 above regarding interventions by or on behalf of children are equally applicable here.

[76] But not a magistrates' separation order.

CRITERIA TO BE OBSERVED WHEN ORDERING FINANCIAL PROVISION

81. Section 16 of the Matrimonial Causes Act 1965 states that in ordering secured provision by the husband for the wife the court shall have " regard to her fortune (if any), his ability and the conduct of the parties".[77] As regards other forms of financial provision the court is merely directed to award what it " thinks reasonable ",[78] " thinks fit "[79] or " thinks just ",[80] or what " may be just ".[81] We think it is desirable to provide a uniform and more detailed set of guidelines to which the court should have regard when exercising all or any of its armoury of powers on the grant of a decree of divorce, nullity or judicial separation. This seems to us to be requisite especially having regard to the wider and more flexible powers which we have recommended in relation to property adjustments.

82. *Accordingly we recommend* that in the exercise of the courts' powers to award financial provision it should have regard to all the circumstances and in particular to the following considerations, or to such of them as are appropriate in the particular case:

(*a*) As regards provision for a spouse:

(i) the respective means, needs, earning capacity and financial responsibilities of each spouse;

(ii) the standard of living of the parties;

(iii) the parties' respective contribution, direct or indirect, to the welfare of the family, including any contribution by looking after the home and children; and

(iv) in proceedings for divorce or nullity, to the value of any benefit, such as a pension, which by reason of the dissolution or annulment either party will lose the chance of acquiring,

and should exercise the powers, so far as possible and so far as it is just to do so having regard to the conduct and needs of the parties, to put the spouse in the position he or she ought to have been in had the marriage not broken down:

see Appendix I, clause 5(1).

(*b*) As regards provision for a child;

(i) the needs, means and, where appropriate, earning capacity of the child,

(ii) the family's standard of living,

(iii) the manner in which he was or was expected to be educated and trained,

and should exercise the powers, so far as possible and so far as it is just to do so having regard to the means and needs of the parents, to put the child in the position he ought to have been in had the marriage not broken down:[82]

see Appendix I, clause 5(2).

[77] s. 16(1)(*a*).
[78] s. 16(1)(*b*) and (*c*), s. 17(2), s. 34(3).
[79] s. 17(1).
[80] ss. 20(1) and 21(1).
[81] s. 22(1).
[82] As we have seen (para. 50(*a*) above) this is the principle on which the court operates at present when ordering a settlement of the wife's property: *Moy* v. *Moy and White* [1961] 1 W.L.R. 552, C.A.

83. Of the criteria mentioned in paragraph 82(*a*), (i) and (ii) will be especially relevant to periodical cash provisions; the others to property adjustments and lump sum awards. But, as already emphasized, the two types of financial provision cannot and should not be kept wholly distinct, and all criteria are, or may be, revelant to both.

PROVISION FROM THE ESTATE OF A DECEASED SPOUSE

84. In the Working Paper[83] we mentioned that the provisions in section 26 of the Matrimonial Causes Act 1965 (which, in effect, extended the provisions of the Inheritance (Family Provision) Act 1938 to divorced spouses), needed review. This, however, cannot adequately be undertaken in isolation from a review of the 1938 Act and accordingly cannot be dealt with in the present Report. In the light of the previous recommendations and those in para. 91 below, the importance and urgency of this aspect of the matter is reduced. The need for a thorough revision of the Inheritance (Family Provision) Act 1938 will, however, be highlighted if our recommendations relating to property adjustment (summarised in para. 80) are implemented. The recommendations summarised in para. 63 will improve the position of the surviving spouse, whether or not the marriage has survived until the death of the other spouse, since they will diminish the uncertainty regarding the establishment of claims to a proprietary interest in items of property. But the wider powers summarised in para. 80 will operate only when there has been a divorce, nullity or judicial separation and to that extent a spouse whose marriage ended in divorce might be better protected than one whose marriage survived until the death of the other spouse. For reasons given in para. 3, this does not disturb us unduly. The realities of the situation are that, while a spouse almost invariably needs legal protection when the marriage ends unhappily in a divorce, he or she rarely needs it when the marriage has not broken down. Nevertheless there are cases where, for example, the deceased husband by his will leaves all his property to, say, a hitherto unsuspected " other woman ". At present the only remedy of the widow is an application under the 1938 Act. Although she can be awarded a lump sum[84] this is only for the purpose of making reasonable provision for her maintenance and is not designed to secure a property adjustment. Moreover, as pointed out in the Working Paper,[85] some courts tend to construe the provisions of the 1938 Act as requiring the widow to establish that the husband acted unreasonably in cutting her out of his will (not merely that she has not been reasonably provided for). In our forthcoming Working Paper on Family Property we shall have to examine carefully the position of widows (and widowers) with a view to seeing how this possible hardship can be avoided. It will be necessary to consider whether this can best be done by further extensions of the 1938 Act and of the Matrimonial Homes Act 1967, by a system of community of property, by introducing a system of a fixed portion for the survivor, or by other means. Any recommendations on these matters are, however, beyond the scope of the present Report.

[83] Paras. 70–74.
[84] Inheritance (Family Provision) Act 1938, ss. 1(4) and 4, and the Matrimonial Causes Act 1965, s. 26(3) as amended by the Family Provision Act 1966, s. 4.
[85] Para. 72. But see *Re Clarke decd.* [1968] 1 W.L.R. 415; *Re Eyre decd.* [1968] 1 W.L.R. 530; *Re Goodwin decd.* [1969] 1 Ch. 283; *Re Thornley decd.* [1969] 1 W.L.R. 1037, C.A.

VARIATION AND DISCHARGE OF ORDERS

85. At present all orders relating to any of the matters dealt with in the previous paragraphs of this Report can be discharged, varied or suspended,[86] except the following:

(*a*) lump sum payments,[87]

(*b*) secured provision by a parent for a child,[88]

(*c*) secured provision payable by one spouse to the other after the death of the spouse ordered to pay,[89]

(*d*) settlements of the wife's property on a divorce or judicial separation,[90] and

(*e*) variation of ante- or post-nuptial settlements.

86. We think that the general principle should be that all orders for financial provision are variable at any time. To this, however, there must necessarily be some exceptions.

87. In the first place we think that a distinction has to be drawn between orders for cash provision and orders for property adjustment. The former are primarily designed to provide income for the maintenance of the spouse or children and must, as at present, be reviewable on any change of circumstances. Of these circumstances the most important is any increase or decrease in the means of the parties,[91] but of some relevance also are the parties' responsibilities[92] and their conduct. Somewhat different considerations apply to property adjustments (i.e. to our recommendations summarised in para. 80) which are primarily designed to re-adjust the spouses' property having regard to the breakdown of the marriage. Here the means and needs of the parties are not the main consideration as they are in the case of orders for cash provision. And, as we see it, the parties' conduct *after* the end of the marriage is of very little relevance. These considerations suggest that a review of property adjustments should not be allowed as readily as that of cash provisions. Considerations of convenience point strongly in the same direction. In most cases it will be convenient, as well as just, that periodical payments should fluctuate with the income of the parties; it would be highly inconvenient, and not necessarily just, if property adjustments could be re-opened on any change in the parties' circumstances.

88. Hence we recommend that property adjustments should not normally be reviewable. There should, however, be a limited exception where a property adjustment has been made on or after a judicial separation. In such a case the court should be empowered on a subsequent divorce to make a fresh

[86] For a summary of the various sections so providing, see Working Paper No. 9, paras. 88–97.

[87] Matrimonial Causes Act 1965, s. 31(1).

[88] *Ibid.* s.34(5) applies only to unsecured maintenance under s.34(1).

[89] *Mosey* v. *Mosey and Barker* [1956] P. 26. But it may be varied prior to the death: *ibid.* s. 31.

[90] But settlements ordered on a decree of restitution of conjugal rights under s. 21(3) may be varied: see s. 31(1).

[91] *cf.* Matrimonial Causes Act 1965, s. 31(3): " In exercising the powers conferred by this section the court shall 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 ".

[92] For example, to a second wife or to an additional child.

adjustment of property, and on a subsequent divorce or application to rescind the judicial separation (for example, because there has been a reconciliation) to vary any settlement ordered on the judicial separation and any ante- or post-nuptial settlements. It seems to us to be vital that a variation should be possible in these two cases. The circumstances attending the divorce may make it palpably unjust that the property adjustments made on the earlier judicial separation should be allowed to stand.[93] If the parties become reconciled they may be able to re-adjust the property dispositions themselves without resort to the court but this will not be possible if, for example, infant children are entitled under a settlement ordered on the judicial separation. Accordingly, on an application to rescind the judicial separation the court should be empowered to alter settlements. We do not think that the order should be variable except in these two situations. If, after a judicial separation, there could be an application for a variation on any change of the parties' circumstances, a wife might be encouraged to apply for judicial separation rather than divorce with a view to applying for a further slice of the husband's property should his fortune increase. And once the marriage has ended by divorce or nullity there should be no question of re-opening the property adjustments which the court ordered.

89. On the other hand, orders for cash provision ought normally to be reviewable. But, here again, there must be an exception to this general rule. This relates to orders for a lump sum payment. Once a payment has been made it obviously cannot be cancelled or varied. If, however, the order has not been fully complied with it could be effectively varied and it is necessary to consider whether this should be permissible; its importance is mainly, of course, in cases where a lump sum has been ordered to be paid by instalments. In our view variations should not be permitted. An order for a lump sum of £5,000 payable by five yearly instalments of £1,000 is to be distinguished from financial provision of £1,000 per annum for five years. Apart from the different tax consequences, the former should not end on the death or remarriage of the payee whereas the latter would. If a lump sum is ordered it should be on the basis that the payee is entitled to it here and now although, to soften the blow to the payer, actual payment may be spread over a number of years. In our view once an order for a lump sum has been perfected its amount should not be variable whatever may happen later. This, of course, does not mean that a subsequent order cannot be made which may have the effect for the future of undoing the original payment. If, on a judicial separation, the husband had been ordered to pay the wife £1,000 and if the husband subsequently divorced her because of her adultery and was granted custody of the children, it might well be that the court would then order her to pay him £1,000 or some other sum. This would not be a variation of the original order, but a new order made in the light of the changed circumstances when a second occasion arose to review the financial position.

90. It has been held that, notwithstanding that a lump sum award cannot be

[93] We have in mind a case when, for example, the wife obtained a judicial separation and custody of the children but was later divorced by the husband because of her adultery and deprived of custody.

varied, the court can award a lump sum on an application to vary a periodical award.[94] Retention of this rule would be inconsistent with the view which we hold that property adjustments made on the dissolution or annulment of the marriage should not be variable. We do not think that an exception should be made in the case of lump sums (on the basis that these can be commutations of future periodical payments rather than property adjustments), and if it were made it would be difficult not to extend the exception to transfers or settlements of property. Accordingly we recommend that the rule be abrogated. In *H.* v. *H.*, the decision in question, it was conceded that only in rare circumstances would it be appropriate to award a lump sum in variation proceedings. If similar facts to those in *H.* v. *H.* occurred again it would be possible to achieve the desired result either by back-dating the order for increased periodical payments or by temporarily increasing the periodical payments still further, and, in either case, by ordering that the payments be secured. Indeed, if no application had initially been made for a lump sum, it would be possible for the court to grant special leave to apply for it and to make an award as an initial order.[95]

91. At present there are two exceptions in relation to secured maintenance:

(*a*) secured provision for children is never variable, and

(*b*) after the death of a spouse ordered to pay secured maintenance to the other there can be no variation.

We see no adequate reason for these exceptions. The first seems obviously wrong. As regards the latter, a new situation arises on the death of the payer and this may be precisely the sort of change which calls for a variation, either downwards or upwards. During the life of the person liable he may have acquired other responsibilities, for example, to a second wife or to children of the second marriage and their position may be dramatically changed by the cessation of his earnings on his death. Alternatively the cessation on his death of unsecured financial provision and the payment of large capital sums under his assurance policies may make it reasonable to increase the secured provision or the security. It is true that dependants might then apply under the Inheritance (Family Provision) Act 1938 or section 26 of the Matrimonial Causes Act 1965, but if there is already an order for secured provision we see no reason why there should not instead be an application to increase it. In this case there would be none of the difficulties which it is said might arise if *unsecured* provision could continue after death. On the other hand, it is important to ensure that an application is made promptly. Hence application

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[94] *H.* v. *H.* [1966] 3 All E.R. 560.

[95] Under the Act the order can be made " on granting a decree . . . or at any time thereafter (whether before or after the decree is made absolute) ": Matrimonial Causes Act 1965, s. 16(1). But by the Rules application must be made in the petition or answer or, *with leave of the judge,* subsequently in a separate application: Matrimonial Causes Rules 1968, r. 68. We are not proposing that these provisions should be altered. Accordingly if special leave is obtained the application could be made and dealt with even after decree absolute. The order in *H.* v. *H.* would have been made on this basis but for the fact that the President held that the statutory power to make an initial order of a lump sum did not apply to petitions filed before the relevant Act was passed.

should be permissible only if made within the time allowed by the 1938 Act and by section 26.[96]

92. Where an order for periodical payments is discharged or varied the new order can be back-dated, which may have the effect of remitting payments already due.[97] Moreover the court has a discretion as to what arrears may be recovered by enforcement proceedings and by refusing to allow enforcement can in effect remit the arrears.[98] This is valuable since it happens not infrequently that, on a change in the circumstances, the party liable to pay ceases to do so or reduces the payments but dispenses with the formality of applying to the court relying on the other's acquiescence—a reliance which may later prove misplaced. However, at present two difficulties are met with. The first is that on enforcement proceedings it is not easy to ensure that the court is given sufficient information to decide whether or not it is right to remit arrears.[99] As a partial solution to this problem[1] we recommend that leave of the court should be required before enforcement proceedings can be taken in respect of any sum payable more than 12 months previously.[2] The second difficulty is that the court has no power to order the reimbursement of payments actually made. This means that if, say, a wife conceals from the husband a change in her circumstances that would justify a reduction in the order so that the husband continues to pay the original amount, although the court can reduce or discharge the order it cannot, apparently, order her to repay what she has received. In the Working Paper we raised the question whether it would be possible to impose a duty on the wife in such circumstances to disclose the change of circumstances,[3] but as a result of consultations we are satisfied that to make such an obligation effective would present insuperable difficulties. The position will be ameliorated on the implementation of our recommendation that all orders for financial provision for a former spouse should cease on remarriage of the payee; we assume that any subsequent payments would be regarded as having been made without legal obligation and under a mistake of fact and would therefore be recoverable. But although remarriage may be one of the commonest changes of circumstances which are not disclosed it is far from being the only one. Accordingly we recommend that the court should

[96] I.e. within six months of probate or letters of administration unless the court allows an extension, ss. 2(1) and 26(1): see *Re Miller decd.* [1969] 1 W.L.R. 583. There is a slight anomaly here in that an order under the Inheritance (Family Provision) Act 1938 or s. 26 of the Matrimonial Causes Act 1965 is subsequently variable, within limits, on a change of circumstances: s. 4 of the 1938 Act and s. 27 of the 1965 Act. Logically we should recommend that the secured provision should be variable within similar limits. This, however, would give rise to complications since the security would not normally be the same as " property the income of which is . . . applicable for the maintenance ". Pending the full investigation of family property law we do not feel able to go further than we have recommended in the text. Since the wife or ex-wife is not deprived of her right to proceed under the 1938 Act or s. 26 she is not prejudiced by our proposal.

[97] *MacDonald* v. *MacDonald* [1964] P. 1, C.A.

[98] *Robins* v. *Robins* [1907] 2 K.B. 13; *Campbell* v. *Campbell* [1922] P. 187; *James* v. *James* [1964] P. 303.

[99] These difficulties are explained in Working Paper No. 9, paras. 144–147.

[1] The solution is only a palliative and many problems remain in relation to enforcement which, for reasons explained below (para. 111), we cannot deal with in this Report.

[2] This recommendation carries further the effect of the circular of the Senior Registrar quoted in the Working Paper at para. 144. No problem arises where the order is registered for enforcement in the magistrates' court since enforcement proceedings can be taken only as a result of an order made on the hearing of a complaint: Magistrates' Courts Act 1952, s. 74.

[3] Working Paper No. 9, paras. 96 and 97.

be expressly empowered to order the repayment of financial provision paid in excess of the amount actually due, and whether the overpayment resulted from the fact that, unknown to the payer, the order had ceased, or because a variation order was backdated. We have no doubt that this power will be exercised sparingly and only where the court is satisfied that the change in circumstances is such that the payee should have realised that she ought to inform the payer of it and deliberately failed to do so. There is no need to provide for the converse case where the payer fails to disclose a favourable change in his circumstances, since the court can then back-date an increase or order a lump sum payment.

93. *We accordingly recommend* that:

(*a*) Orders for settlements, transfers and variations of settlements should not be variable except that, where an order has been made on a judicial separation, the court should be empowered on a subsequent divorce to make a fresh adjustment of property, and, on a subsequent divorce or rescission of the judicial separation, to vary any settlement ordered on the making of the decree of judicial separation and to vary any ante- or post-nuptial settlements: para. 88, see Appendix I, clause 9 (2)(*d*), (3), (4) and (7).

(*b*) Orders for cash provision (secured or unsecured) should be variable at any time on any change of circumstances except that

(i) a lump sum payment should not be variable,

(ii) on an application to vary an order for periodical payments it should not be possible to award a lump sum, settlement, transfer, or variation of settlements,

(iii) secured provision should not be variable after the death of the payer unless application is made within the time prescribed by the Inheritance (Family Provision) Act 1938:[4]
paras. 89–92, see Appendix I, clause 9(1), (2) and (6).

(*c*) It should continue to be possible to back-date a variation of an order for periodical cash provision, thus remitting arrears, and to remit arrears on enforcement proceedings. To make these powers more effective:

(i) leave of the court should be required before enforcement proceedings could be taken in respect of any sum payable more than 12 months previously, and

(ii) the court should be empowered to order the repayment of sums paid in excess of the amount actually due whether the overpayment was because the payer was kept in ignorance that an event (for example, remarriage, or death of a child) had occurred which brought the order to an end or because a variation was back-dated: para. 92, see Appendix I, clauses 10 and 11.

VARIATION OF MAINTENANCE AGREEMENTS

94. Under sections 23 to 25 of the Matrimonial Causes Act 1965 the court has power to vary maintenance agreements where there has been a change of

[4] I.e. within six months of probate or letters of administration unless the court allows an extension.

circumstances or the agreement does not contain proper financial provision for any child of the marriage. In the Working Paper we drew attention to certain conditions on the exercise of this power which appeared to us to be too restrictive.[5] The first of these is that the sections apply only to agreements made " for the purposes of their living separately ".[6] Hence agreements made for the purpose of their resuming cohabitation cannot be considered by the court, even if the reconciliation does not last[7] and the agreement deals with maintenance. In such a case if the husband has covenanted to pay maintenance to the wife she may be able to obtain increased payments by applying under section 22,[8] but the husband cannot apply to have the payments reduced if circumstances change. The second condition is that the sections do not apply to maintenance agreements made more than six months after the dissolution or annulment of the marriage.[9] Hence, if the agreement was made a year after a divorce, the husband, once again, would be prevented from applying for a reduction although the wife might be able to obtain increased maintenance. The third condition is that there must be " a change in the circumstances in the light of which " the financial arrangements were made. This seems fair, but, as construed by the courts, is again liable to cause injustice to the payer husband. The wife may be able to obtain increased maintenance, for example, under section 22 if the amounts payable under the agreement have become inadequate to the knowledge of the husband. But the husband cannot apply for a reduction of the amounts payable under the agreement however drastic the change of circumstances, unless these were " quite outside the realisation of expectations " of the parties at the time of the agreement.[10]

95. Furthermore, although the court can vary financial arrangements made in the agreement in respect of any children,[11] it cannot alter the agreement so as to insert a proper provision for children unless they are children of the marriage.[12] For similar reasons to those in paragraph 72[13] we think that the court should be empowered to make proper provision for any child of the family as defined in paragraph 30.[14] Although, if the maintenance agreement is to

[5] Working Paper No. 9, paras. 86 and 87.

[6] s. 23(2).

[7] *Ewart* v. *Ewart* [1959] P. 23.

[8] An agreement cannot oust the court's powers to order financial provision (see the review of the authorities in *Re Minter* [1967] 3 All E.R. 412) and a provision in a maintenance agreement which purports to do so is expressly avoided by the Matrimonial Causes Act 1965, s. 23(1).

[9] s. 24(1). The wording of s. 25(1) at first suggests that this does not apply if the agreement is to continue beyond joint lives and the application is made after the death of one of the parties. It appears, however, that this is not so since the survivor can apply only for an order which could have been made " immediately before the death ". The wording, however, is unclear and should be revised when the section is re-enacted.

[10] *K.* v. *K.* [1961] 1 W.L.R. 802 at 810, C.A.

[11] This appears to be the joint effect of s. 23(2) and s. 24(1) but the sections are not easy to construe.

[12] Which in this case is expressly defined as " any child of both parties to the marriage, whether legitimate or not, and any child adopted by both parties to the marriage ": s. 23(2). As pointed out in the Working Paper (Appendix II, para. 165) the definition of " adopted " in s. 46 expressly does not apply to s. 23(2) so that its meaning in this context is obscure.

[13] Which, indeed, apply *a fortiori* since we are here dealing only with income and not with capital.

[14] If that were done the usual definition of " adopted " could safely be applied. But it should be made clear (see n. 11 above) that provision made in the agreement for *any* child can be varied.

continue after the death of one party, the other can apply within a limited period after his death to vary it,[15] the personal representatives of the deceased cannot. In effect this means that, once again, the surviving wife can apply for more but the husband's personal representatives, on behalf of the other dependants, cannot apply for a reduction. Finally, the jurisdictional requirements seem to us to be unduly restrictive; both parties must be domiciled or both resident in England.[16] It seems to us that it should suffice if each party is either domiciled or resident here, thus extending the jurisdiction to cases where one is domiciled and the other resident.[17]

96. *We accordingly recommend* that:

(*a*) The relevant sections of the Matrimonial Causes Act 1965 should be redrafted: para. 94, see Appendix I, clauses 13–15.

(*b*) " Maintenance agreement " should be re-defined omitting the words " for the purpose of their living separately ": para. 94, see Appendix I, clause 13(2).

(*c*) The power to vary should apply although the agreement was made more than six months after the dissolution of the marriage: para. 94, see Appendix I, clause 14(1).

(*d*) The fact that the changed circumstances were foreseeable should not preclude a variation: para. 94, see Appendix I, clause 14(2)(*a*).

(*e*) The court should be empowered to vary the agreement so as to make proper provision for any child of the family: para. 95, see Appendix I, clause 14(2).

(*f*) On the death of one party his personal representatives should be able to apply for a variation, not just the other party: para. 95, see Appendix I, clause 15(1).

(*g*) The English courts should have jurisdiction so long as each of the parties is either domiciled or resident here: para. 95, see Appendix I, clause 14(1).

AVOIDANCE OF TRANSACTIONS

97. Under section 32 of the Matrimonial Causes Act 1965 the court has power to restrain pending transactions or to set aside transactions made within three years of the application if such transactions are not for valuable consideration, and are intended to defeat claims for financial provision under certain sections of the Act. A disposition which in fact has the consequence of defeating a claim is presumed to be made with that intention. We suggested in the Working Paper[18] that the section was unduly limited in its scope. In our view it should apply to any transaction intended to defeat a claim for any of the forms of financial provision which we have recommended. This should include a claim to vary any such provision except that it should not be possible to set aside a transaction on the ground that it was designed to defeat a claim to vary

[15] s. 25.
[16] s. 24(1).
[17] We do not suggest any alteration in respect of the jurisdiction of magistrates' courts (s. 24(2)) or the requirement that there can be an application against a deceased's estate only if he were domiciled here (s. 25(1)).
[18] Paras. 98–101.

a secured provision or financial arrangements in a maintenance agreement after the death of the party chargeable. There is at present no power to set aside transactions designed to defeat posthumous claims by dependants and it would be anomalous to introduce such a power until it can be extended equally to claims under the Inheritance (Family Provision) Act 1938 and section 26 of the Matrimonial Causes Act 1965. Any such extension must await a full review of Family Property Law. We further suggest that there should not be any rigid time-limit of three years. The latter precludes the court from intervening if, for example, a husband who knows that in five years the wife will be due to retire and will then be able to ask for financial provision, disposes of all his property in order to defeat her future claim. But while this needs to be prevented, it is important that steps should be taken to prevent harassment by a vindictive spouse or sterilisation of property on the off-chance that a claim may be made at some future date. We think that both aims can be best achieved by removing the three year time-limit except as regards the presumption that a disposition which in fact defeats a claim was made with that intention. In other words if a disposition is made more than three years before the application the onus should be on the applicant to prove positively that the disposition was made with the intention of defeating the claim.

98. *We accordingly recommend* that s. 32 should be re-drafted so as to empower the court to restrain or set aside any disposition (other than one for valuable consideration) if satisfied that it was intended to defeat a claim by a spouse, or by or on behalf of the children of the family, for financial provision under any of the foregoing provisions (other than a variation of secured provision or of financial arrangements in a maintenance agreement after the death of the party chargeable); where the disposition was made within three years of the application and has the effect of defeating the claim under any such provision, there should, as at present, be a rebuttable presumption that it was made with the intention of defeating that claim: para. 97; see Appendix I, clause 16.

DAMAGES FOR ADULTERY, etc.

99. Under s. 41 of the Matrimonial Causes Act 1965 the husband, on a petition for divorce or judicial separation or for damages only, may be awarded damages against any person with whom the wife has committed adultery. The wife has no comparable right against the woman with whom the husband has committed adultery. In the Working Paper[19] we set out the arguments for and against the retention of this remedy and made it clear that we were of the opinion that it should be abolished. We recognised, however, that this was essentially a social question on which opinion was likely to be divided. Our consultations have confirmed that this is indeed so. None of the arguments advanced in the course of the consultations has caused us to resile from our view which still is that damages for adultery should be abolished. But, as already stressed, this is essentially a social question to which we are not qualified to give a final answer.

100. If Parliament should decide that a right to claim damages should be

[19] Appendix II, paras. 128–142.

retained, it seems to be generally agreed that some rationalisation of the remedy is needed. What is sauce for the gander should be sauce for the goose, i.e. the wife should be entitled to claim against an adulteress. In addition it appears to be generally accepted that it should not be possible to petition for damages alone; the claim should be permissible only if coupled with one for divorce or judicial separation. It should also be made clear that damages are to be awarded only when the adultery is a factor in the breakdown of the marriage and that they are to be regarded as compensation for the petitioner and children of the family for the loss they have suffered as a result of that breakdown. To this end the court should have powers to order a settlement of the damages on the spouses and children.[20]

101. In the Working Paper[21] we also referred to the analogous actions for enticement, seduction and harbouring of a spouse or child, the abolition of which we suggested both there and in our Working Paper on Loss of Services.[22] The consultations on both Papers make it clear that this suggestion is generally accepted.

102. *We accordingly recommend* that:[23]

(*a*) The action for damages for adultery should be abolished: para. 99, see Appendix I, clause 32.

(*b*) If that recommendation is rejected, the action should be available only in proceedings for divorce or judicial separation but against both male and female adulterers alike; damages should be awarded only if it is shown that the adultery was a factor in the breakdown of the marriage, and should be awarded as compensation for the loss which the petitioner and children of the family suffer thereby: para. 100, see Appendix I, alternative clause in Notes to clause 32.

(*c*) In any event, the actions of enticement, seduction and harbouring of a spouse or child should be abolished: para. 101, see Appendix I, clause 33.

COSTS

103. The foregoing paragraphs cover the various matters at present dealt with in the Matrimonial Causes Act 1965 on which we recommend immediate legislative action. There are, however, a number of other matters not in the Act which we dealt with in the Working Paper and on which we think that action should be taken at the same time. The first of these relates to costs. We dealt with this matter at some length in the Working Paper[24] since the

[20] *cf.* Matrimonial Causes Act 1965, s. 41(3). An award of compensation from the co-respondent would not, of course, affect in any way the award of financial provision from the respondent spouse except that the compensation, if recovered, would be part of the recipient's " means " to which the court would have regard when awarding financial provision.

[21] Appendix II, paras. 128–142, especially para. 133.

[22] Working Paper No. 19. We shall in due course be submitting a Report based on this Working Paper recommending what should be done about those actions outside the field of family law where, in practice, they normally arise, and where, as a recent decision has emphasized (see *The Times*, 13th June 1969, p. 3) their objectionable features are most obvious.

[23] Similar recommendations have recently been made in the Report of a Research Committee of Inquiry of the Conservative Party under the Chairmanship of Mr. Anthony Cripps, Q.C.: *Fair Share for the Fair Sex* (Conservative Political Centre, 1969), pp. 27 and 28.

[24] Paras. 102–127.

peculiar rules applying in matrimonial proceedings mean, in effect, that they are part of the code whereby the husband is required to maintain his wife.

104. Of the provisional recommendations which we made two have received general approval and were, indeed, recommended by the Morton Commission as long ago as 1955.[25] The first, and most important, of these relates to the rule whereby a wife can apply for an order against the husband for security for costs. Today this right is used comparatively rarely and it seems to be generally accepted that it has become an anachronism. It discriminates against men and fails to recognise women's economic emancipation. In the majority of cases husbands have not sufficient means to justify its use and attempts to invoke it cause bitterness and delay. Legal aid makes it possible for a wife to litigate without the need for security and it is of negligible value to the Legal Aid Fund. Indeed, those experienced in the administration of the Legal Aid Scheme have expressed the view that, on balance, applications for security, and attempts to enforce an order if made, lead to frustration and to a waste, rather than a saving, of public money. Accordingly we recommend that security for costs under the Matrimonial Causes Rules 1968[26] should be abolished. This, of course, would not affect the general power to order security under R.S.C. Ord. 23 where, for example, the petitioner is abroad.

105. The second relates to the special practice whereby a husband may have to pay his wife's costs, even though she was unsuccessful, or may not obtain an order for his costs against her. This is a further facet of the present discrimination between husbands and wives and equally anachronistic. In recent years the courts have, in fact, been much more ready to order an unsuccessful wife to pay her husband's costs and the former practice seems to be disappearing. This is not a matter requiring legislative action, either by statute or rules of court, for these already afford the court a complete discretion. Nor, indeed, is it a matter on which we now need to make any recommendation. All we need do is respectfully to concur in the views recently expressed by the Court of Appeal[27] and to say that we hope that they will lead to the eradication of the last vestiges of the former practice. At the same time we would emphasize that we do not regard matrimonial proceedings as normal adversary litigation in which it is appropriate that costs should " follow the event " almost automatically. Such a rule would be even more inappropriate if and when the Divorce Reform Bill is in operation. Divorce jurisdiction will then be based on breakdown rather than on matrimonial offence. The question for the court will be whether the marriage should be dissolved, and, whatever it decides, it will often be incorrect to regard one party as having won and the other as having lost; indeed, in cases where breakdown is inferred from a period of separation it may be a matter of chance or choice which spouse petitions. In our view the court's discretion regarding costs in matrimonial cases should be exercised in the light of all the circumstances in each case unfettered by any rule of thumb whether in favour of the wife or of the winner.

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[25] Cmd. 9678, paras. 438–460.

[26] Rule 37; and R.S.C. O.112, r. 6.

[27] *Gooday* v. *Gooday* [1969] P.1,C.A. where the Court stated that there was no rational ground, under present-day conditions (where in many cases husbands and wives are equally capable of earning their own living), to continue the former practice. As that case shows, the special rules applying to legal aid cases will normally lead to a limitation of the amount of costs awarded.

106. In the light of our consultations we do not think it necessary to make any recommendation on the other matters concerning costs canvassed in the Working Paper.

107. *We accordingly recommend* that the special rules relating to security for costs in rule 37 of the Matrimonial Causes Rules 1968 and Order 112, rule 6 of the Rules of the Supreme Court should be abolished: para. 104.

THE WIFE'S AGENCY OF NECESSITY

108. At present a husband may be liable for debts contracted by the wife on one or more of three bases:

(*a*) She may have been expressly or impliedly authorised by him to contract them. While they are living together she is presumed to have his authority to pledge his credit for " necessaries " for the family.

(*b*) He may have held her out to a particular tradesman as having authority to pledge his credit, for example by paying the bills for goods ordered by her.

(*c*) If she is left without means she may be entitled, as a so-called " agent of necessity ", to pledge his credit for necessaries, including the costs of legal proceedings taken against him.

In the Working Paper[28] we provisionally recommended that the agency of necessity doctrine referred to in (*c*) should be abolished generally or, at any rate, in relation to costs.

109. We recommend, without hesitation in the light of our consultations, that the doctrine of the wife's agency of necessity be abolished *in toto*. We should make it clear that this recommendation does not affect in any way the actual or presumed agency referred to in paragraph 108(*a*), or the agency by holding-out referred to in paragraph 108(*b*). Both these are true cases of agency, are reasonable rules and capable of being useful to the wife. Our recommendation relates only to (*c*), the anomalous " agency of necessity ", which is not a true agency at all and which today achieves no useful purpose; it has long been an anachronism and, in the light of social security legislation, of the right to obtain maintenance without limitation of amount in the magistrates' court, and of the Legal Aid Scheme, it fulfils no social purpose. In relation to costs the doctrine can indeed be positively mischievous[29] and in conflict with the modern practice referred to in paragraph 104.

110. *We accordingly recommend* the abolition of the wife's agency of necessity: para. 109, and see Appendix I, clause 34.

ENFORCEMENT OF ORDERS

111. In the Working Paper[30] we discussed various problems relating to the enforcement of orders. One of these, remitting of arrears, has already been referred to[31] but there are a number of other outstanding questions. However,

[28] Appendix II, paras. 41–52 and 108.
[29] *Ibid.* para. 108.
[30] Paras. 143–152.
[31] Para. 92 above.

as we envisaged,[32] these need to be carefully reviewed in the light of the recommendations of the Committee on the Enforcement of Judgment Debts, whose most detailed Report has recently been published.[33] In any event they could not appropriately be dealt with in the same legislation as that implementing the foregoing recommendations of this Report.

PENSIONS

112. In the Working Paper we also dealt at some length with the problem of pension rights and canvassed various possible ways of protecting a divorced wife's expectations under her husband's pension scheme. In view of the public interest in this matter we reproduce the relative paragraphs of the Working Paper among those in Appendix II.[34] The problem remains unsolved and, after full consultation, we believe it to be incapable of direct and complete solution. It can, nevertheless, be alleviated indirectly. Indeed, since the publication of the Working Paper three events have occurred which have or will result in some alleviation. The first of these is the enactment of the Matrimonial Homes Act 1967[35] which secures the wife's right to continue to occupy the matrimonial home; this, coupled with our foregoing recommendations regarding property adjustments will, as emphasized below,[36] go some way to help relieve any hardship flowing from a loss of pension expectations on divorce. The second is the recent publication of the Government's White Paper, *National Superannuation and Social Insurance—Proposals for Earnings-Related Social Security*.[37] As we pointed out in the Working Paper,[38] under the present State Scheme the divorced woman is already protected to a considerable extent; if divorced under the age of 60,[39] she can, if this is to her advantage, have her retirement pension calculated by taking over her ex-husband's contribution record for the period of the marriage. Under the new scheme she will be able to take over his record for the period before as well as during the marriage.[40] Moreover these rights, as well a those of separated wives,[41] will become more valuable because the pension is likely to be larger under the new earnings-related scheme. The main difficulty is not, therefore, in relation to the State scheme but in relation to the widely divergent occupational schemes both in the public and private sectors. Although a recent survey by the Government Actuary[42] makes it clear that the proportion of schemes conferring an unconditional or conditional right to a pension for a widow is continuing to increase, the percentage of schemes with unconditional rights is still small in the private sector and in both public and private sectors there are wide variations in the rights conferred. This and the difficulties regarding transferability

[32] Working Paper No. 9, para. 143.
[33] 1969; Cmnd. 3909.
[34] Appendix II, paras. 182–210.
[35] See above, para. 50(*d*).
[36] Para. 114.
[37] 1969; Cmnd. 3883.
[38] Appendix II, paras. 186 and 187.
[39] If divorced over the age of 60, a relatively unusual case, she receives on her ex-husband's insurance the full amount of the present flat rate pension for a single person and, under the new scheme, will have a corresponding right: Cmnd. 3883, para. 84.
[40] Cmnd. 3883, para. 83.
[41] *Ibid.* para. 85.
[42] *Occupational Pension Schemes*, Third Survey by the Government Actuary (1968, H.M.S.O.): see especially paras. 73–78.

on a change of employment are the main obstacles in any direct attempt to protect the former expectations of wives after a divorce or separation.

113. The third of the alleviating events referred to in the previous paragraph is the inclusion of various safeguards in the Divorce Reform Bill now before Parliament. Under clause 6 if a respondent is divorced on the basis of two or five years' separation, she may apply to the court for consideration of her financial position after the divorce whereupon the court is not to make the decree absolute unless satisfied that the petitioner should not be required to make any financial provision for the respondent or that the provision made is reasonable and fair or the best that can be made in the circumstances. The court is specifically directed to have regard, *inter alia*, to " the financial position of the respondent as, having regard to the divorce, it is likely to be after the death of the petitioner should the petitioner die first ". Hence if the petitioner is in a position to provide adequate compensation for loss of pension expectancies he will be made to do so. Where he lacks any means of doing so, clause 6 will, inevitably, be ineffective, but the court will be able to exercise its power under clause 4 whereby the court must dismiss the petition if satisfied that the dissolution of the marriage would result in grave financial or other hardship to the respondent and that it would be wrong in all the circumstances to dissolve the marriage. Accordingly respondents divorced on the basis of breakdown evidenced by separation will be protected as fully as it is possible to protect them. The unsolved problem, therefore, relates not to innocent respondents but to other women whether they be petitioners or respondents.

114. It is in this respect that the increased and more flexible powers which we have recommended, especially those relating to lump sum payments and property adjustments, should be especially valuable. They will alleviate the problem in two ways. In the first place they will reduce the extent of any hardship which loss of a pension expectancy may cause. As we said in the Working Paper:[43] " 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 ". Secondly, the court's powers will enable it directly to compensate for loss of pension expectations in its order for lump sum payments and property adjustments. It will have been observed that in para. 82(*a*)(iv) we have referred specifically to the loss of a chance of a pension as among the considerations to be regarded in exercising the powers to order financial provision. This is designed to draw the court's attention to this precise point. Once the court has the recommended powers it will not, as under clause 6 of the Divorce Reform Bill,[44] merely be able to protect an innocent respondent by refusing a divorce to the petitioner until he voluntarily provides the respondent with adequate recompense for her loss of expectations; it will be able to protect any party by ordering the other to make whatever payment, transfer, or settlement is required.

COMPREHENSIVE SUMMARY OF RECOMMENDATIONS

115. (1) As regards cash provision for a spouse in proceedings ancillary to divorce, nullity or judicial separation:

[43] Appendix II. para. 210.

[44] See para. 113 above.

(*a*) The distinctions in nomenclature between maintenance, alimony, and periodical or lump sum payments should be abolished. All should be described as " financial provision " except alimony pending suit which should be renamed " maintenance pending suit ":
paras. 5–7, see Appendix I, clauses 1 and 2.

(*b*) There should be no distinction between the powers of the court in relation to husbands and wives, or petitioners and respondents:
para. 8, see Appendix I, clauses 1 and 2.

(*c*) All forms of periodical financial provision, but not maintenance pending suit, should be capable of being secured and, if secured, of being awarded for the life of the payee or until he or she remarries whichever be the shorter:
para. 12, see Appendix I, clauses 2 and 7(1), (2)(*b*) and (*d*).

(*d*) All periodical financial provision should cease on the remarriage of the payee and not be capable of being revived:
para. 14, see Appendix I, clauses 7, 20, 25(2) and 31.

(*e*) The court should be empowered to award a lump sum not only in respect of the future but also to enable the payee to discharge liabilities reasonably incurred prior to the institution of the suit in order to maintain the payee or the children, and to order any lump sum to be payable by instalments:
para. 10, see Appendix I, clause 2(2).

(*f*) Greater use should be made of the powers to award lump sums and secured provision:
paras. 9 and 11.

(2) As regards non-ancillary cash provision for a spouse, section 22 of the Matrimonial Causes Act 1965 should be amended:

(*a*) by empowering the court to grant maintenance pending suit:
para. 18, see Appendix I, clause 6(5).

(*b*) by entitling a husband to apply " where, by reason of the impairment of the husband's earning capacity through age, illness, or disability of mind or body, and having regard to any resources of the husband and wife respectively which are, or should properly be made, available for the purpose, it is reasonable in all the circumstances to expect the wife . . . to provide or contribute " to the maintenance of the husband:
para. 19, see Appendix I, clause 6(1)(*b*).

(*c*) so as to entitle the court to award a lump sum:
para. 20, see Appendix I, clause 6(6)(*c*).

(*d*) to enable orders for secured provision to extend for the life of the payee-spouse or until remarriage:
para. 20, see Appendix I, clauses 6(6)(*b*) and 7(2)(*d*) and (3).

(*e*) so as to provide that any order for periodical payments ceases finally on remarriage of the payee-spouse: para. 20, see Appendix I, clauses 7(3) and 20.

(3) As regards cash provision for children:

(*a*) The statutory description " relevant children " should be replaced by " children of the family ", which should be defined as including:

(i) any child (including an illegitimate or adopted child) of both spouses, and

(ii) any other child (other than a child boarded out with the spouses) who has been treated by both of the spouses as a child of their family:

paras. 23–32, see Appendix I, clause 25(1).

(*b*) In proceedings for divorce, nullity or judicial separation or in independent proceedings replacing section 22, the court should be empowered to order either spouse to make financial provision by way of periodical payments or lump sums, secured or unsecured, to or for the benefit of a child of the family:
para. 34, see Appendix I, clauses 3 and 6(6)(*d*) and (*e*).

(*c*) The powers should be exercisable for the benefit of minor children and in the first instance an order for periodical payments should not normally be made to extend beyond the child's 16th birthday so long as the school-leaving age remains 15. The court should always be empowered to make or extend an order up to the age of majority but not beyond unless:

(i) the child is or will be receiving educational instruction or undergoing training for a trade, profession or vocation; or

(ii) there are special circumstances justifying the making or extension of an order beyond the age of majority:

paras. 35 to 41, see Appendix I, clause 8.

(*d*) In deciding to what extent (if any) a spouse who is not the natural or adoptive parent should be ordered to contribute to the maintenance of the child, regard should be had to:

(i) the extent (if any) to which, the length of time during which, and the basis upon which that spouse had assumed responsibility,

(ii) whether that assumption of responsibility was with knowledge that the child was not his own, and

(iii) the liability of any other person to maintain the child:

para. 30, see Appendix I, clauses 5(3) and 6(4).

(*e*) On an application under an amended section 22, a husband should be able to obtain from the wife financial provision for the children if the wife has wilfully neglected to maintain them whether or not his earning capacity was impaired by age, illness or disability, and an application in respect of children should not fail because there has been no wilful neglect to maintain the spouse: para. 44, see Appendix I, clause 6(1)(*b*)(ii) and (3).

(*f*) Section 33, which requires the court to satisfy itself regarding arrangements for the child's care and upbringing before finally granting a decree of divorce, nullity or judicial separation, should be amended as follows:

(i) so as to apply to any minor child of the family under the age of 16 or over that age if receiving educational instruction or undergoing training for a trade, vocation or profession, and to such other children of the family as the court may in special circumstances direct;

(ii) to make it clear that the decree is ineffective unless the section is complied with;

(iii) to require the court to declare that it is satisfied that there are no children to whom the section applies or may apply or that all the children to whom it applies are named in the declaration;

(iv) to provide that the declaration of satisfaction or non-satisfaction with the arrangements shall be by order;

(v) to make it clear that the decree is valid so long as the court *has* declared its satisfaction;

(vi) by substituting " welfare " for " care and upbringing " and by defining " welfare " as including, financial provision as well as custody and education:

paras. 45 and 46, see Appendix I, clause 17.

(*g*) Rule 69 of the Matrimonial Causes Rules should be amended so as to entitle a child of the family over the age of 18 to intervene with leave to apply for financial provision in his parents' suit for divorce, nullity or judicial separation: para. 42.

(*h*) Consideration should be given to alleviating the consequences of section 15 of the Finance Act 1968 in relation to maintenance payments to children of separated parents: para. 47.

(4) As regards the determination of disputes between spouses concerning particular items of property:

(*a*) It should be made clear that a substantial contribution in money or money's worth by one spouse to the improvement of property vested in the other or in both, confers, subject to any agreement to the contrary, a beneficial interest in that property and that in any proceedings, whether under s. 17 of the Married Women's Property Act or otherwise, the court should make such order as may be just to give effect to that interest: paras. 55–58, see Appendix I, clause 27.

(*b*) The Matrimonial Homes Act 1967 should be amended so as to make it clear that a spouse who is entitled to a beneficial interest by virtue of a contribution has a registrable right of occupation under the Act: paras. 59–60, see Appendix I, clause 28.

(*c*) Applications under section 17 of the Married Women's Property Act 1882 to determine disputes regarding the spouses' rights to individual items of property acquired prior to the end of the marriage should be permissible within three years after the dissolution or annulment of the marriage: para. 61, see Appendix 1, clause 29.

(*d*) In the High Court exclusive jurisdiction under the section should be assigned to the Divorce Division: para. 62.

(5) As regards adjustments of property rights on the breakdown of the marriage:

(*a*) In proceedings ancillary to divorce, nullity or judicial separation the court should be empowered, on application by the parties or by or on behalf of any child of the family:

(i) to order settlements or transfers of any property to which either or both spouses are entitled, whether in possession or reversion, for the benefit of the spouses and children or any of them; and

(ii) to vary, for the benefit of the spouses, the children, or any of them, any ante- or post-nuptial settlements:

paras. 64–74, see Appendix I, clause 4.

(*b*) A lump sum payment, settlement or transfer under an order of the court should not be treated as a disposition for the purposes of capital gains tax: paras. 76–77.

(*c*) It should, however, be regarded as a settlement liable to be set aside under section 42 of the Bankruptcy Act 1914: para. 78, see Appendix I, clause 21.

(*d*) After a decree of judicial separation neither spouse should have rights to succeed as widow or widower on the intestacy of the other if the death of that other occurred during the separation: para. 79, see Appendix I, clause 30.

(6) In the exercise of the court's powers to award the above forms of financial provision it should have regard to all the circumstances and in particular to the following considerations or such of them as are appropriate to the particular case:

(*a*) As regards provision for a spouse:

(i) the respective means, needs, earning capacity and financial responsibilities of each spouse;

(ii) the standard of living of the parties;

(iii) the parties' respective contribution, direct or indirect, to the welfare of the family, including any contribution by looking after the home and children; and

(iv) in proceedings for divorce or nullity, to the value of any benefit, such as a pension, which by reason of the dissolution or annulment either party will lose the chance of acquiring,

and should exercise the powers, so far as possible and so far as it is just to do so having regard to the conduct and needs of the parties, to put the spouse in the position he or she ought to have been in had the marriage not broken down: para. 82, see Appendix I, clause 5(1).

(*b*) As regards provision for a child:

(i) the needs, means, and, where appropriate, earning capacity of the child,

(ii) the family's standard of living,

(iii) the manner in which he was or was expected to be educated and trained,

and should exercise the powers, so far as possible and so far as it is just to do so having regard to the means and needs of the parents, to put the child in the position he ought to have been in had the marriage not broken down: para. 82, see Appendix I, clause 5(2).

(7) As regards variation and discharge of orders:

(*a*) Orders for settlements, transfers and variations of settlements should not be variable except that, where an order has been made on a judicial separation, the court should be empowered on a subsequent divorce to make a fresh adjustment of property, and, on a subsequent divorce or rescission of the judicial separation, to vary any settlement ordered on the making of the decree of judicial separation and to vary any ante- or post-nuptial settlements: para. 88, see Appendix 1, clause 9(2)(*d*), (3), (4) and (7).

(*b*) Orders for cash provision (secured or unsecured) should be variable at any time on any change of circumstances except that:

(i) a lump sum payment should not be variable,

(ii) on an application to vary an order for periodical payments it should not be possible to award a lump sum, settlement, transfer, or variation of settlements,

(iii) secured provision should not be variable after the death of the payer unless application is made within the time prescribed by the Inheritance (Family Provision) Act 1938:

paras. 89–92, see Appendix I, clause 9(1), (2) and (6).

(*c*) It should continue to be possible to back-date a variation of an order for periodical cash provision, thus remitting arrears, and to remit arrears on enforcement proceedings. To make these powers more effective:

(i) leave of the court should be required before enforcement proceedings could be taken in respect of any sum payable more than 12 months previously, and

(ii) the court should be empowered to order the repayment of sums paid in excess of the amount actually due whether the overpayment was because the payer was kept in ignorance that an event (for example, remarriage, or death of a child) had occurred which brought the order to an end or because a variation was back-dated:

para. 92, see Appendix I, clauses 10 and 11.

(8) As regards the court's power to alter maintenance agreements:

(*a*) The relevant sections of the Matrimonial Causes Act 1965 should be redrafted: para. 94, see Appendix I, clauses 13–15.

(*b*) " Maintenance agreement " should be re-defined omitting the words " for the purpose of their living separately ": para. 94, see Appendix I, clause 13(2).

(*c*) The power to vary should apply although the agreement was made more than six months after the dissolution of the marriage: para. 94, see Appendix I, clause 14(1).

(*d*) The fact that the changed circumstances were foreseeable should not preclude a variation: para. 94, see Appendix I, clause 14(2)(*a*).

(*e*) The court should be empowered to vary the agreement so as to make proper provision for any child of the family: para. 95, see Appendix I, clause 14(2).

(*f*) On the death of one party his personal representatives should be able to apply for a variation, not just the other party: para. 95, see Appendix I, clause 15(1).

(*g*) The English courts should have jurisdiction so long as each of the parties is either domiciled or resident here: para. 95, see Appendix I, clause 14(1).

(9) The court should be empowered to restrain or set aside any disposition (other than one for valuable consideration) if satisfied that it was intended to defeat a claim by a spouse, or by or on behalf of the children of the family, for financial provision under any of the foregoing provisions (other than a variation of secured provision or of financial arrangements in a maintenance agreement after the death of the party chargeable); where the disposition was made within three years of the application and has the effect of defeating the claim under any such provision, there should, as at present, be a rebuttable presumption that it was made with the intention of defeating that claim: para. 97, see Appendix I, clause 16.

(10) As regards actions for damages:

(*a*) The action for damages for adultery should be abolished: para. 99, see Appendix I, clause 32.

(*b*) If that recommendation is rejected, the action should be available only in proceedings for divorce or judicial separation but against both male and female adulterers alike; damages should be awarded only if it is shown that the adultery was a factor in the breakdown of the marriage, and should be awarded as compensation for the loss which the petitioner and children of the family suffer thereby: para. 100, see Appendix I, alternative clause in Notes to clause 32.

(*c*) In any event, the actions of enticement, seduction and harbouring of a spouse or child should be abolished: para. 101, see Appendix I, clause 33.

(11) The special rules regarding security for the wife's costs should be abolished: para. 104.

(12) The wife's agency of necessity should be abolished: paras. 108–109, see Appendix I, clause 34.

116. Implementation of these recommendations will involve the repeal or amendment of most of the sections in Parts II and III of the Matrimonial Causes Act 1965. Of the draft legislative provisions set out in Appendix I, those in Part I relate to matters which should in due course find their way into a new consolidation Act to replace that of 1965. The latter was never wholly satisfactory and, once the Divorce Reform Bill is enacted, it will be gravely out-of-date since Part I will be copiously amended thereby—and amended in a way which could not be accomplished by textual amendments. We intend to see that preparation of a new consolidation, totally replacing the 1965 Act, is undertaken as soon as possible. This, however, must await our Report on Jurisdiction (a Working Paper on this subject will be circulated for consultation in the near future) and on Nullity.[45] It should then be possible to produce

[45] Working Paper No. 20. As stated in n. 3 to para. 3 above, we have assumed, for the purposes of this Report and the legislative clauses in Appendix I, that our recommendation in Law Com. 23 that the remedy of restitution of conjugal rights be abolished will be implemented before, or contemporaneously with, the recommendations in this Report.

a modernised and reasonably comprehensive Matrimonial Causes Act as a step towards the codification of Family Law which is our ultimate objective.

(*Signed*) LESLIE SCARMAN, *Chairman.*
L. C. B. GOWER.
NEIL LAWSON.
NORMAN S. MARSH.
ANDREW MARTIN.

J. M. CARTWRIGHT SHARP, *Secretary.*
23rd July 1969.

APPENDIX I

DRAFT FAMILY LAW REFORM (No. 2) BILL

(with Explanatory Notes)

ARRANGEMENT OF CLAUSES

PART I

PROVISIONS WITH RESPECT TO ANCILLARY AND OTHER RELIEF IN MATRIMONIAL CAUSES AND TO CERTAIN OTHER MATRIMONIAL PROCEEDINGS

Maintenance pending suit in cases of divorce, etc.

1. Maintenance pending suit in cases of divorce, etc.

Powers of court in cases of divorce, etc., to make orders with respect to financial provision for parties to the marriage and children of the family

2. Financial provision for party to a marriage in cases of divorce, etc.
3. Financial provision for child of the family in cases of divorce, etc.
4. Orders for transfer and settlement of property and for variation of settlements in cases of divorce, etc.
5. Matters to which court is to have regard in deciding what orders to make under ss. 2, 3 and 4.

Additional powers of court to make orders requiring party to marriage to make payments to other party, etc.

6. Neglect by party to marriage to maintain other party or child of the family.

Further provisions relating to orders under sections 2, 3, 4 and 6

7. Duration of certain orders made in favour of party to marriage and effect of remarriage.
8. Provisions as to powers of court to make orders in favour of children and duration of such orders.

Provisions as to variation, discharge and enforcement of certain orders

9. Variation, discharge, etc., of orders for financial provision.
10. Payment of certain arrears unenforceable without the leave of the court.
11. Power of court to order sums paid under certain orders to be repaid in certain cases.
12. Application of Maintenance Orders Acts to orders under ss. 1, 2, 3 and 6.

Maintenance agreements

13. Validity of maintenance agreements.

14. Alteration of agreements by court during lives of parties.

15. Alteration of agreements by court after death of one party.

Avoidance of transactions intended to defeat certain claims

16. Avoidance of transactions intended to defeat certain claims.

Protection, custody, etc., of children

17. Restrictions on decrees for dissolution, annulment or separation affecting children.

18. Orders for custody and education of children affected by matrimonial suits.

19. Orders for custody of children in cases of neglect to maintain.

Miscellaneous and supplemental

20. Order for maintenance of party to marriage under Matrimonial Causes Act 1965 to cease to have effect on remarriage of that party.

21. Settlement, etc., made in compliance with order under s. 4 may be avoided on bankruptcy of settlor.

22. Commencement of proceedings for financial provision orders, etc.

23. Direction for instrument to be settled by conveyancing counsel.

24. Payments, etc., under order made in favour of person suffering from mental disorder.

25. Interpretation.

Transitional provisions and savings

26. Transitional provisions and savings.

PART II

MISCELLANEOUS PROVISIONS

Provisions relating to property of married persons

27. Contributions by spouse in money or money's worth to the improvement of property.

28. Rights of occupation under Matrimonial Homes Act 1967 of spouse with equitable interest in home, etc.

29. Extension of s. 17 of Married Women's Property Act 1882.

30. Judicially separated spouses not entitled to claim in intestacy of each other.

Effect of remarriage on maintenance ordered by magistrates' court

31. Order for maintenance of party to marriage made by magistrates' court to cease to have effect on remarriage of that party.

Abolition of certain causes of actions, etc.

32. Abolition of right to claim damages for adultery.
33. Abolition of actions for enticement, seduction and harbouring of spouse or child.
34. Abolition of wife's agency of necessity.

PART III

SUPPLEMENTARY

35. Minor and consequential amendments, and repeals.
36. Citation, construction, commencement and extent.

SCHEDULES:

Schedule 1—Transitional provisions and savings.

Schedule 2—Minor and consequential amendments.

Schedule 3—Repeals.

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BILL

TO

MAKE FRESH PROVISION for empowering the court in matrimonial proceedings to make orders ordering either spouse to make financial provision for, or transfer property to, the other spouse or a child of the family, orders for the variation of ante-nuptial and post-nuptial settlements, orders for the custody and education of children and orders varying, discharging or suspending orders made in such proceedings; to make arrears due under an order made in such proceedings unenforceable in certain cases without the leave of the court; to empower the court in certain cases to order sums paid under such an order to be repaid; to provide for orders for periodical payments made in such proceedings in favour of a spouse to cease to have effect on the remarriage of that spouse; to re-enact with amendments sections 23, 24, 25, 32 and 33 of the Matrimonial Causes Act 1965; to declare what interest in property is acquired by a spouse who contributes to its improvement; to make provision as to a spouse's rights of occupation under section 1 of the Matrimonial Homes Act 1967 in certain cases; to extend section 17 of the Married Women's Property Act 1882 and section 7 of the Matrimonial Causes (Property and Maintenance) Act 1958; to amend the law about the property of a person whose marriage is the subject of a decree of judicial separation dying intestate; to abolish the right to claim damages on the ground of adultery; to abolish causes of action for the enticement or harbouring of a spouse or for the enticement, seduction or harbouring of a child; to abolish the agency of necessity of a wife; and for purposes connected with the matters aforesaid.

BE IT ENACTED BY the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

PART I

PROVISIONS WITH RESPECT TO ANCILLARY AND OTHER RELIEF IN MATRIMONIAL CAUSES AND TO CERTAIN OTHER MATRIMONIAL PROCEEDINGS

Maintenance pending suit in cases of divorce, etc.

Maintenance pending suit in cases of divorce, etc.

1. On a petition for divorce, nullity of marriage or judicial separation, the court may order either party to the marriage to make to the other until the determination of the suit such periodical payments for his or her maintenance as the court thinks reasonable.

Powers of court in cases of divorce, etc., to make orders with respect to financial provision for parties to the marriage and children of the family

Financial provision for party to a marriage in cases of divorce, etc.

2.—(1) On granting a decree of divorce, a decree of nullity of marriage or a decree of judicial separation or at any time thereafter (whether, in the case of a decree of divorce or of nullity of marriage, before or after the decree is made absolute), the court may, subject to the provisions of section 22(1) of this Act, make any one or more of the following orders, that is to say—

(*a*) an order that either party to the marriage shall make to the other such periodical payments and for such term as may be specified in the order;

(*b*) an order that either party to the marriage shall secure to the other, to the satisfaction of the court, such periodical payments and for such term as may be so specified;

(*c*) an order that either party to the marriage shall pay to the other such lump sum as may be so specified.

(2) An order under this section that a party to a marriage shall pay a lump sum to the other party—

(*a*) may be made for the purpose of enabling that other party to discharge any liabilities reasonably incurred by him or her in maintaining himself or herself or any child of the family before the presentation of the petition;

(*b*) may provide for the payment of that sum by instalments of such amount as may be specified in the order and may require the payment of the instalments to be secured to the satisfaction of the court.

Financial provision for child of the family in cases of divorce, etc.

3.—(1) Subject to the provisions of section 8 of this Act, in proceedings for divorce, nullity of marriage or judicial separation, the court may make any one or more of the orders mentioned in subsection (2) below—

(*a*) before or on granting the decree of divorce, of nullity of marriage or of judicial separation, as the case may be, or at any time thereafter (whether, in the case of a decree of divorce or of nullity of marriage, before or after the decree is made absolute);

(*b*) where any such proceedings are dismissed after the beginning of the trial, either forthwith or within a reasonable period after the dismissal.

EXPLANATORY NOTES

PART I

This Part contains the provisions which will in due course be incorporated in a new consolidated Matrimonial Causes Act to replace that of 1965.

In the meantime Part I can be separately cited as the Matrimonial Causes Act 1969: see clause 36(2).

Clauses 1 and 2

1. Clauses 1 and 2 are the basic provisions implementing the recommendations in paragraphs 7–17 of the Report. They replace sections 15, 16 and 20(1) of the Matrimonial Causes Act 1965 and section 19 thereof in so far as it applies section 16 to nullity suits.

2. Clause 1 relates to maintenance pending suit and clause 2 to permanent financial provision. In place of the present confused diversity summarised in paragraph 5 of the Report there will be a unified set of powers whereby:

(*a*) In the case of either divorce, nullity or judicial separation the court can award maintenance pending suit and financial provision to either husband or wife and to either the petitioner or the respondent. At present orders can in most cases be made only in favour of the wife.

(*b*) In the case of any order, other than maintenance pending suit, secured provision or a lump sum may be awarded, in addition to or instead of unsecured periodical payments; clause 2(1)(*b*) and (*c*).

(*c*) A lump sum may be awarded for the purpose of enabling a spouse to discharge liabilities reasonably incurred to maintain him or a child of the family prior to the proceedings: clause 2(2)(*a*).

(*d*) A lump sum may be ordered to be paid by instalments and security for the instalments may be ordered: clause 2(2)(*b*). This replaces the, never-used, power to order a lump sum to be secured.

3. The maximum duration of orders under clause 2 is dealt with in clause 7 and such orders cannot be made prior to decree nisi: see clause 22(1) to which clause 2(1) is accordingly expressed to be subject.

4. The guiding principles on which these powers, and those relating to property adjustments in clause 4, are to be exercised are dealt with in clause 5(1).

Clause 3

1. This clause is the basic provision implementing the proposals in paragraphs 23–41 of the Report in respect of financial provision for children. It replaces that part of section 34 of the Matrimonial Causes Act 1965 which relates to maintenance of children (that part which deals with custody and education is replaced by clause 18).

2. For the definition of " child of the family " see clause 25(1). Orders may be made only for the benefit of children who come within that definition (which is somewhat wider than the present definition of " relevant child ") and who fulfil the age and other requirements referred to in clause 8. Clause 8 deals also with the maximum duration of such orders.

(2) The orders referred to in subsection (1) above are—

(*a*) an order that a party to the marriage shall make to such person as may be specified in the order for the benefit of a child of the family, or to such a child, such periodical payments and for such term as may be so specified;

(*b*) an order that a party to the marriage shall secure to such person as may be so specified for the benefit of such a child, or to such a child, to the satisfaction of the court, such periodical payments and for such term as may be so specified;

(*c*) an order that a party to the marriage shall pay to such person as may be so specified for the benefit of such a child, or to such a child, such lump sum as may be so specified.

(3) An order under this section for the payment of a lump sum may provide for the payment of that sum by instalments of such amount as may be specified in the order and may require the payment of the instalments to be secured to the satisfaction of the court.

(4) While the court has power to make an order in any proceedings by virtue of subsection (1)(*a*) above, it may exercise that power from time to time; and where the court makes an order by virtue of subsection (1)(*b*) above in relation to a child it may from time to time make a further order under this section in relation to him.

Orders for transfer and settlement of property and for variation of settlements in cases of divorce, etc.

4. On granting a decree of divorce, a decree of nullity of marriage or a decree of judicial separation, or at any time thereafter (whether, in the case of a decree of divorce or of nullity of marriage, before or after the decree is made absolute), the court may, subject to the provisions of sections 8 and 22(1) of this Act, make any one or more of the following orders, that is to say—

(*a*) an order that a party to the marriage shall transfer to the other party, to any child of the family or to such person as may be specified in the order for the benefit of such a child such property as may be so specified, being property to which the first-mentioned party is entitled, either in possession or reversion;

(*b*) an order that a settlement of such property as may be so specified, being property to which a party to the marriage is so entitled, be made to the satisfaction of the court for the benefit of the other party to the marriage and of the children of the family or either or any of them;

(*c*) an order varying for the benefit of the parties to the marriage and of the children of the family or either or any of them any ante-nuptial or post-nuptial settlement (including a settlement made by will or codicil) made on the parties to the marriage;

(*d*) an order extinguishing or reducing the interest of either of the parties to the marriage under any such settlement;

and the court may make an order under paragraph (*c*) above notwithstanding that there are no children of the family.

3. Apart from the effect of the provisions referred to in Note 2 to this clause, subsections (1), (2) and (4) repeat the present law applicable in proceedings for divorce or nullity and apply it also to proceedings for judicial separation. For the effect of subsection (3), see Note 2(*d*) to clauses 1 and 2.

4. The guiding principles on which these powers, and those in clause 4 relating to property adjustments, are to be exercised are dealt with in clause 5(2) and (3).

Clause 4

1. This clause gives effect to the recommendations in paragraphs 64–75 of the Report and replaces section 17 of the Matrimonial Causes Act 1965 and sections 19 and 20(2) insofar as they apply section 17 to nullity and judicial separation respectively.

2. Under the present law there is a power equivalent to that in clause 4(*c*) (except that there is no power to vary settlements made by will or codicil) in cases of divorce and nullity only, and a power equivalent to that in (*b*) in cases of divorce and judicial separation where the wife is guilty of adultery, desertion or cruelty. The object of the clause is to rationalise and generalise the court's powers.

3. So far as orders for the benefit of children are concerned, the children must be " children of the family " as defined in clause 25(1) and if the order is for a transfer of property under paragraph (*a*) they must fulfil the age and other qualifications expressed in clause 8.

4. As in the case of orders for financial provision in favour of a spouse under clause 2, orders under the present clause cannot come into force prior to decree absolute: see clause 22(1) to which the present clause is accordingly expressed to be subject.

5. Paragraph (*d*) is designed to make it clear that the court has power to extinguish the interest of a spouse under any ante-nuptial or post-nuptial settlement notwithstanding that this does not benefit the other spouse or children: see paragraph 74 of the Report.

6. The guiding principles upon which these powers, and those in clauses 2 and 3, are to be exercised are dealt with in clause 5.

Matters to which court is to have regard in deciding what orders to make under ss. 2, 3 and 4.

5.—(1) It shall be the duty of the court in deciding how to exercise its powers under section 2 or 4 of this Act in relation to a party to a marriage to have regard to all the circumstances of the case and in particular to the following matters, that is to say—

(*a*) the income, earning capacity, property and other financial resources of each of the parties to the marriage;

(*b*) the financial obligations and responsibilities of each of the parties to the marriage;

(*c*) the standard of living enjoyed by the family before the breakdown of the marriage;

(*d*) the contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family;

(*e*) in the case of proceedings for divorce or nullity of marriage, the value to either of the parties to the marriage of any benefit (for example, a pension) which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring;

and so to exercise those powers in relation to that party as to place him or her, so far as it is practicable and, having regard to the conduct and needs of the parties, just to do so, in the same financial position as that party would or (where the other party failed to discharge his or her financial obligations to that party) ought to have been in had the marriage not broken down.

(2) Without prejudice to subsection (3) below, it shall be the duty of the court in deciding how to exercise its powers under section 3 or 4 of this Act in relation to a child of the family to have regard to all the circumstances of the case and in particular to the following matters, that is to say—

(*a*) the financial needs of the child;

(*b*) the income, earning capacity (if any), property and other financial resources of the child;

(*c*) the standard of living enjoyed by the family before the breakdown of the marriage;

(*d*) the manner in which he was being and in which the parties to the marriage expected him to be educated or trained;

and so to exercise those powers as to place the child, so far as it is practicable and, having regard to the considerations mentioned in relation to the parties to the marriage in paragraphs (*a*) and (*b*) of subsection (1) above, just to do so, in the same financial position as the child would or (where either of the parties to the marriage failed to discharge his or her financial obligations to him) ought to have been in had the marriage of the parties not broken down.

(3) It shall be the duty of the court in deciding whether to exercise its powers under the said section 3 or 4 against a party to a marriage in favour of a child of the family who is not the child of that party and, if so, in what manner, to have regard (among the circumstances of the case)—

EXPLANATORY NOTES

Clause 5

1. Subsections (1) and (2) of this clause are designed to give effect to the recommendations in paragraphs 81–83 of the Report. They lay down uniform guidelines in place of the present divergent formulae referred to in paragraph 81.

2. In the case of provision for a spouse (subsection (1)), the guidelines are intended to ensure that the overall result of the exercise of the court's various powers is, in the words of Lord Merrivale P., in *N.* v. *N.* (1928) 44 T.L.R. 324 at 328, to put the spouse " in the position in which she was entitled to expect herself to be and would have been, if her husband had properly discharged his marital obligation." Some elaboration of that formula is necessary when it is translated into legislation to cover the possibility that, for example, both parties may have failed to discharge their marital obligations: see the final words of the subsection.

3. Similarly in the case of provision for a child (subsection (2)), the guidelines are designed to produce the result of preserving, as far as possible, the pecuniary position of the child as it would have been had the marriage not broken down. However, the expectations of the child can be preserved only so far as that is consistent with justice to the parents: see the final words of the subsection. If the marriage is dissolved the probability is that both parents will re-marry and possibly one or both will have more children than was likely if they had remained married to one another. It would clearly be unjust to insist on a settlement which would leave nothing for the new dependants.

4. Paragraph (*d*) of subsection (1) emphasises that the contribution of a wife in looking after the spouse and children is a factor to which the court should have regard. The court already does so to some extent but the limitations on its present powers in respect of property adjustments restrict its ability to recognise it adequately. The wider powers in clause 4 will remove these limitations.

5. Paragraph (*e*) of subsection (1) likewise emphasises that where the decree will deprive the parties of the status of married persons (and therefore of the potentiality of becoming the widow or widower of the other) the loss of any chance to qualify as such for a pension or the like must be taken into account. This, too, is something that the court does to some extent but, once again, its present restricted powers hamper it in providing adequate compensation for the loss of that chance. As is pointed out in paragraph 114 of the Report, the wider powers conferred by clauses 2 and 4 are designed to enable it to do so more effectively.

6. Subsection (3) implements the recommendations in the latter part of paragraph 30 (summarised in paragraph 48(*d*) of the Report). It amplifies section 34(4) of the Matrimonial Causes Act 1965 which it replaces. Its object is to make clear that, in deciding whether, and to what extent, a spouse who is not the natural or adoptive parent of the child (i.e., where the child is a child of the family by virtue of (*b*) in the definition in clause 25(1)) shall be required to make financial provision for the child, regard shall be had, first, to whether the spouse had assumed responsibility for the child's maintenance and, if so, to what extent, on what basis, and for how long. It is possible, though unlikely, that a child may have been " treated as a child of their family " although one or both spouses assumed no financial responsibility. What is more likely is that the extent of the financial responsibility undertaken will have been expressly limited. It may have been limited to a prescribed amount or proportion or may have been on the basis that liability would be assumed only until certain events occurred. All these factors are clearly relevant in deciding whether and

(a) to whether that party had assumed any responsibility for the child's maintenance and, if so, to the extent to which, and the basis upon which, that party assumed such responsibility and to the length of time for which that party discharged such responsibility;

(b) to whether in assuming and discharging such responsibility that party did so knowing that the child was not his or her own;

(c) to the liability of any other person to maintain the child.

Additional powers of court to make orders requiring party to marriage to make payments to other party, etc.

Neglect by party to marriage to maintain other party or child of the family.

6.—(1) Either party to a marriage may apply to the court for an order under this section on the ground that the other party to the marriage (in this section referred to as the respondent)—

(a) being the husband, has wilfully neglected—

(i) to provide reasonable maintenance for the applicant, or

(ii) to provide, or to make a proper contribution towards, reasonable maintenance for any child of the family to whom this section applies;

(b) being the wife, has wilfully neglected to provide, or to make a proper contribution towards, reasonable maintenance—

(i) for the applicant in a case where, by reason of the impairment of the applicant's earning capacity through age, illness or disability of mind or body, and having regard to any resources of the applicant and the respondent respectively which are, or should properly be made, available for the purpose, it is reasonable in all the circumstances to expect the respondent so to provide or contribute, or

(ii) for any child of the family to whom this section applies.

(2) The court shall not entertain an application under this section unless it would have jurisdiction to entertain proceedings by the applicant for judicial separation.

(3) This section applies to any child of the family for whose maintenance it is reasonable in all the circumstances to expect the respondent to provide or towards whose maintenance it is reasonable in all the circumstances to expect the respondent to make a proper contribution.

(4) Where the child of the family to whom an application under this section relates is not the child of the respondent, then, in deciding—

(a) whether the respondent has been guilty of wilful neglect to provide, or to make a proper contribution towards, reasonable maintenance for the child, and

(b) what order, if any, to make under this section in favour or for the benefit of the child,

the court shall have regard to the matters mentioned in section 5(3) of this Act.

to what extent the spouse in question should be ordered to make provision. So, though perhaps to a lesser extent, is the length of time during which that spouse discharged the responsibility which he assumed. Secondly, regard is to be had to whether the party assuming or discharging the responsibility did so knowing that the child was not his own. The fact that, unknown to the husband, the child was not his may well reduce the extent of the financial contribution which should in future be borne by him. Finally regard is to be paid to the liability of any other person (e.g., that of the other spouse and that of the natural parents).

Clause 6

1. This clause deals with financial relief in separate proceedings not ancillary to divorce, nullity or judicial separation. It replaces sections 22 and 35(2) of the Matrimonial Causes Act 1965 and gives effect to the recommendations in paragraphs 18–22 and 43–44 of the Report.

2. It makes the following changes of the present law:

(*a*) Either party may apply; at present the wife only can do so. Where the application is based on neglect to maintain a child of the family (as defined in clause 25) there is no difference at all as between husband and wife: paragraphs (*a*)(ii) and (*b*) (ii) of subsection (1). Where, however, it is based on neglect to maintain a spouse a difference is preserved for reasons explained in paragraph 19 of the Report. As under the Matrimonial Proceedings (Magistrates' Courts) Act 1960, sections 1(1)(*i*) and 2(1)(*c*), the husband can obtain an order against the wife only if his earning capacity is impaired through age, illness or disability: paragraph (*b*)(i) of subsection (1), *cf.* paragraph (*a*)(i).

(*b*) Application may be made in respect of any " child of the family ", as defined in clause 25, not merely on behalf of a child of both parties, but only if it is reasonable to expect the respondent to provide for, or contribute towards, the maintenance of the child: subsection (3). And when the child is not a child of the respondent the considerations mentioned in clause 5(3), (q.v.) must be taken into account in deciding whether there has been wilful neglect and what order should be made: subsection (4).

(*c*) The maximum duration of orders is the same as under clauses 2 and 3: see clauses 7 and 8. This means that secured provision for a spouse can be ordered for her life or until remarriage and not merely for joint lives as at present.

(*d*) An interim award may be made prior to the determination of liability: subsection (5).

(*e*) As under clauses 2 and 3, a lump sum may be awarded, and it may be made payable by instalments in which event security for the instalments may be ordered: subsections (6)(*c*) and (*f*) and (7).

3. In other respects the clause repeats the effect of sections 22 and 35(2) of the Matrimonial Causes Act 1965. Thus subsection (2) is identical with section 22(1)(*b*) of that Act. Its effect is that the English courts have jurisdiction where both parties are domiciled or resident in England, where the respondent is resident in England or, under section 40(1)(*a*) of the Matrimonial Causes Act

(5) Where on an application under this section it appears to the court that the applicant or any child of the family to whom the application relates is in immediate need of financial assistance, but it is not yet possible to determine what order, if any, should be made on the application, the court may order the respondent to make to the applicant until the determination of the application such periodical payments as the court thinks reasonable.

(6) Where on an application under this section the applicant satisfies the court of any ground mentioned in subsection (1) above, then, subject to the provisions of section 8 of this Act, the court may make such one or more of the following orders as it thinks just, that is to say—

(*a*) an order that the respondent shall make to the applicant such periodical payments and for such term as may be specified in the order;

(*b*) an order that the respondent shall secure to the applicant, to the satisfaction of the court, such periodical payments and for such term as may be so specified;

(*c*) an order that the respondent shall pay to the applicant such lump sum as may be so specified;

(*d*) an order that the respondent shall make to such person as may be specified in the order for the benefit of the child to whom the application relates, or to that child, such periodical payments and for such term as may be so specified;

(*e*) an order that the respondent shall secure to such person as may be so specified for the benefit of that child, or to that child, to the satisfaction of the court, such periodical payments and for such term as may be so specified;

(*f*) an order that the respondent shall pay to such person as may be so specified for the benefit of that child, or to that child, such lump sum as may be so specified.

(7) An order under this section that the respondent shall pay a lump sum—

(*a*) may be made for the purpose of enabling the applicant to discharge any liabilities reasonably incurred by the applicant in maintaining himself or herself or any child of the family to whom the application relates before making an application under this section;

(*b*) may provide for the payment of that sum by instalments of such amount as may be specified in the order and may require the payment of the instalments to be secured to the satisfaction of the court.

Further provisions relating to orders under sections 2, 3, 4 *and* 6

Duration of certain orders made in favour of party to marriage and effect of remarriage.

7.—(1) The term to be specified in any order made by virtue of section 2(1)(*a*) or (*b*) of this Act or section 6(6)(*a*) or (*b*) thereof shall be such term, being a term not longer than the maximum term, as the court thinks fit.

(2) In subsection (1) above " the maximum term " means—

1965, where the wife is the applicant and the husband has deserted her or been deported and, immediately before the desertion or deportation, he was domiciled in England. Subsection (3) of section 22, which provides that an order under that section may be enforced in the same manner as an order for alimony in proceedings for judicial separation, has not been repeated as it appears to be unnecessary; orders under clause 6 will be enforceable in the same way as orders for financial provision under clauses 1, 2 and 3.

Clause 7

1. This clause prescribes the maximum periods for which periodical provision in favour of a spouse can be awarded under clause 2 or 6. The principal change in the present law is that orders cease on remarriage of the payee (subsections (2) and (3)) and cannot be made after remarriage of the payee (subsection (4)),

(*a*) in the case of an order made by virtue of the said section 2(1)(*a*) in proceedings for divorce or nullity of marriage, the joint lives of the parties to the marriage or a term ending with the date of the remarriage of the party in whose favour the order is made, whichever is the shorter;

(*b*) in the case of an order made by virtue of the said section 2(1)(*b*) in any such proceedings, the life of that party or a term ending with the date of the remarriage of that party, whichever is the shorter;

(*c*) in the case of an order made by virtue of the said section 2(1)(*a*) in proceedings for judicial separation or made by virtue of the said section 6(6)(*a*), the joint lives of the parties to the marriage;

(*d*) in the case of an order made by virtue of the said section 2(1)(*b*) in any such proceedings or made by virtue of the said section 6(6)(*b*), the life of the party in whose favour the order is made.

(3) Where an order is made by virtue of the said section 2(1)(*a*) or (*b*) in proceedings for judicial separation or by virtue of the said section 6(6)(*a*) or (*b*) and the marriage of the parties affected by the order is subsequently dissolved or annulled but the order continues in force, the order shall, notwithstanding anything in it, cease to have effect on the remarriage of the party in whose favour it was made, except in relation to any arrears due under it on the date of such remarriage.

(4) If after the grant of a decree dissolving or annulling a marriage either party to that marriage remarries, that party shall not be entitled to apply for an order under section 2 or 4 of this Act against the person to whom he or she was married immediately before the grant of that decree unless the remarriage is with that person and that marriage is also dissolved or annulled or a decree of judicial separation is made on a petition presented by either party to that marriage.

Provisions as to powers of court to make orders in favour of children and duration of such orders.

8.—(1) Subject to subsection (3) below—

(*a*) no order under section 3, 4(*a*) or 6 of this Act shall be made in favour of a child who has attained the age of eighteen; and

(*b*) the term for which by virtue of an order under the said section 3 or 6 any payments are to be made or secured to or for the benefit of a child shall not extend beyond the date when the child will attain that age.

(2) The term for which by virtue of an order under the said section 3 or 6 any payments are to be made or secured to or for the benefit of a child shall not in the first instance extend beyond the date of the birthday of the child next following his attaining the upper limit of the compulsory school age unless the court which makes the order thinks it right in the circumstances of the case to specify a later date therein.

For the purposes of this subsection the upper limit of the compulsory school age means the age that is for the time being that limit by virtue of section 35 of the Education Act 1944 together with any Order in Council made under that section.

(3) The court may make such an order as is mentioned in subsection

thereby implementing the recommendation in paragraph 14 of the Report. Clause 25(2) defines " remarriage " in such a way as to make it clear that it includes a void or voidable marriage.

2. The other change is that all orders for secured provision can be made to last for the life of the payee (or until his or her remarriage). At present secured orders under section 22 (replaced by clause 6) cannot last beyond joint lives: see paragraph 20 of the Report.

3. When an order is made under clause 6, or under clause 2 on a judicial separation, the parties are not in a position to remarry since the subsisting marriage is not dissolved. But it is not uncommon for the original financial order to be allowed to continue notwithstanding a subsequent divorce. This possibility is taken care of by subsection (3). Clause 31 contains similar provisions regarding orders made by magistrates' courts which are frequently allowed to continue notwithstanding a divorce.

Clause 8

1. Clause 8 gives effect to the proposals in paragraphs 33–41 and 73 of the Report and regulates the powers of the court when making orders for financial provision for children.

2. Under subsection (1), the court's power under clauses 3 and 6, and under clause 4(*a*), which relates to transfers of property, are not to be exercised in favour of a child who has attained the age of 18 years (subsection (1)(*a*)) and orders for periodical payments are to cease on his attaining that age (subsection (1)(*b*)). But that is subject to the two qualifications in subsections (2) and (3).

3. Subsection (2) states the general rule to be observed when ordering periodical payments, namely that in the first instance payments should cease on the child's birthday next after the upper limit of compulsory school age. At present this age is 15 and consequently orders will normally cease when the child attains 16. This is in accordance with present practice. But, as pointed out in paragraph 38 of the Report, when the school-leaving age is raised to 16 orders should normally continue until the 17th birthday. Under the formula used in subsection (2) this result will occur without the need for any legislative change. The final words of the subsection make it clear that the court may, nevertheless, make an order to continue until a later age than 16 (or in the near future 17). If, for example, it is clear that the child will remain at school

(1)(*a*) above in favour of a child who has attained the age of eighteen, and may include in an order made under the said section 3 or 6 in relation to a child who has not attained that age a provision extending beyond the date when the child will attain that age the term for which by virtue of the order any payments are to be made or secured to or for the benefit of that child, if it appears to the court that—

(*a*) that child is, or will be, or if such an order or provision were made would be, receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation, whether or not he is also, or will also be, in gainful employment; or

(*b*) there are special circumstances which justify the making of the order or provision.

(4) Any order made by virtue of section 3(2)(*a*) of this Act or section 6(6)(*d*) thereof shall, notwithstanding anything in the order, cease to have effect on the death of the person liable to make payments under the order, except in relation to any arrears due under the order on the date of such death.

Provisions as to variation, discharge and enforcement of certain orders

Variation, discharge, etc., of orders for financial provision.

9.—(1) Where the court has made an order to which this section applies, then, subject to the provisions of this section, the court shall have power to vary or discharge the order or to suspend any provision thereof temporarily and to revive the operation of any provision so suspended.

(2) This section applies to the following orders, that is to say—

(*a*) any order under section 1 of this Act;

(*b*) any order made by virtue of section 2(1)(*a*) or (*b*) or 2(2)(*b*) of this Act;

(*c*) any order made by virtue of section 3(2)(*a*) or (*b*) or 3(3) of this Act;

(*d*) any order made by virtue of section 4(*b*), (*c*) or (*d*) of this Act on or after granting a decree of judicial separation; and

(*e*) any order made by virtue of section 6(5), 6(6)(*a*), (*b*), (*d*) or (*e*) or 6(7)(*b*) of this Act.

(3) The powers exercisable by the court under this section in relation to an order shall be exercisable also in relation to any instrument executed in pursuance of the order.

(4) The court shall not exercise the powers conferred by this section in relation to any such order made by virtue of the said section 4(*b*), (*c*) or (*d*) on or after granting a decree of judicial separation except on an application made in proceedings—

(*a*) for the rescission of that decree, or

(*b*) for the dissolution of the marriage of the parties to the proceedings in which that decree was made.

(5) The court hearing an application for the variation of any order made by virtue of the said section 2(1)(*a*) or (*b*), the said section 3(2)(*a*)

until he has taken his " A " Level examinations, the 18th, or later, birthday will be appropriate and, in the circumstances envisaged, a later age than 18 can be chosen: see subsection (3).

4. Subsection (3) provides that, exceptionally, an order may be made initially in favour of a child over 18 or may be extended beyond that age. The normal case where this will occur is when the child is continuing or will continue to receive education or training beyond that age even if that is combined with employment: subsection (3)(*a*). There may, however, be other exceptional circumstances such as disability (see paragraph 40 of the Report): subsection (3)(*b*).

5. Subsection (4) makes it clear that unsecured provision ceases on the death of the payer.

Clause 9

1. This clause replaces section 31 of the Matrimonial Causes Act 1965 and gives effect to the recommendations in paragraphs 85–93 of the Report.

2. Subsections (1) and (2) enable the court to vary, discharge, etc., certain orders, namely those under:

clause 1 (viz. maintenance pending suit);

clause 2(1)(*a*) or (*b*) or 2(2)(*b*) (viz. unsecured or secured periodical provision or instalment orders for a spouse in proceedings ancillary to divorce, nullity or judicial separation);

clause 3(2)(*a*) or (*b*) or 3(3) (viz. unsecured or secured periodical provision or instalment orders for a child in such proceedings);

clause 4(*b*), (*c*) or (*d*) (viz. settlements or variations of ante- or post-nuptial settlements) but only if made on or after granting a judicial separation;

clause 6(5), 6(6)(*a*), (*b*), (*d*) or (*e*) or 6(7)(*b*) (viz. unsecured or secured periodical provision or instalment orders for a spouse or child when granted in proceedings based on neglect to maintain, i.e. not ancillary to divorce, nullity or judicial separation).

Hence orders for lump sum payments (except in relation to the instalments or the security therefor) and out-and-out transfers are not variable at all and orders for other property adjustments are variable only if made on the grant of a judicial separation and then only in the circumstances stated in subsection (4). But all other orders are variable. This includes, thus altering the present law, secured provision for children, and secured provision for a spouse after the death of the spouse liable to pay: see subsection (6).

3. It will be observed that though the amount of lump sums will not be variable (the reasons for this are set out in paragraph 89 of the Report) the provisions relating to the instalments or any security therefor will be variable. A change of circumstances may make it just either to extend or to curtail the time of

or (*b*) or the said section 6(6)(*a*), (*b*), (*d*) or (*e*) shall not have power to vary that order by making an order for the payment of a lump sum or any such order as is mentioned in section 4 of this Act.

(6) Where the person liable to make payments under an order made by virtue of the said section 2(1)(*b*), the said section 3(2)(*b*) or the said section 6(6)(*b*) or (*e*) has died, an application under this section relating to that order may be made by the person entitled to payments under the order or by the personal representatives of the deceased person, but no such application shall, except with the permission of the court, be made after the end of the period of six months from the date on which representation in regard to the estate of that person is first taken out.

(7) In exercising the powers conferred by this section the court shall have regard to all the circumstances of the case, including any change in the means or needs of either of the parties to the marriage or of any child in whose favour the order in question was made and, where the party against whom that order was made has died, the changed circumstances resulting from his or her death.

(8) The personal representatives of a deceased person against whom any such order as is referred to in subsection (6) above was made shall not be liable for having distributed any part of the estate of the deceased after the expiration of the period of six months referred to in that subsection on the ground that they ought to have taken into account the possibility that the court might permit an application under this section to be made after that period by the person entitled to payments under the order; but this subsection shall not prejudice any power to recover any part of the estate so distributed arising by virtue of the making of an order in pursuance of this section.

(9) In considering for the purposes of subsection (6) above the question when representation was first taken out, a grant limited to settled land or to trust property shall be left out of account and a grant limited to real estate or to personal estate shall be left out of account unless a grant limited to the remainder of the estate has previously been made or is made at the same time.

(10) For the purposes of section 162(1) of the Supreme Court of Judicature (Consolidation) Act 1925 (which relates to the discretion of the court as to the persons to whom administration is to be granted), a person who after the death of the person against whom any such order as is referred to in subsection (6) above was made proposes to make an application under this section in relation to that order shall be deemed to be a person interested in the estate of the deceased person.

Payment of certain arrears unenforceable without the leave of the court.

10.—(1) A person shall not be entitled, except with the leave of the court, to enforce through the court the payment of any arrears due under an order made by virtue of section 1, 2(1), 3(2), 6(5) or 6(6) of this Act which became due more than twelve months before proceedings to enforce payment of the arrears are begun.

(2) On any application for leave to enforce the payment of any such arrears, the court may refuse leave, or may grant leave subject to such restrictions and conditions (including conditions as to the allowing of

payment of the instalments or, indeed, to increase or reduce the number of instalments. And after a number of the instalments have been paid it may be reasonable to reduce the amount of the security.

4. Subsection (3) repeats subsection (2) of section 31 of the 1965 Act.

5. Subsection (4) limits the power to vary settlements or variations of settlements made on a judicial separation so that it is exercisable only on a subsequent rescission of the decree of judicial separation or a subsequent divorce: see paragraph 88 of the Report. It has not been thought necessary to refer to the possibility of a nullity decree because such a decree is not possible after a judicial separation (which amounts to a judicial determination that there is a marriage), at any rate unless it is first rescinded.

6. Subsection (5) states that on an application to vary an order for periodical payments the court cannot order a lump sum or a property adjustment. This reverses, for reasons stated in paragraph 90 of the Report, the present position as declared in *H.* v. *H.* [1966] 3 All E.R. 560.

7. Subsection (6) provides that, after the death of the person ordered to pay secured provision, an application for a variation or discharge of the order may be made either by the payee or by the personal representatives of the payer: see paragraph 91 of the Report. But application must be made within the time prescribed by the Inheritance (Family Provision) Act 1938 and section 26 of the Matrimonial Causes Act 1965 as amended, i.e. within six months of the grant of representation unless the court grants leave. This subsection is supplemented by subsection (8), which protects personal representatives who have distributed the estate after the expiration of the six months, and by subsections (9) and (10). These subsections are identical with section 2(1B), (1C) and (2) of the Inheritance (Family Provision) Act 1938 as amended by the Family Provision Act 1966.

8. Subsection (7) replaces section 31(3) of the Matrimonial Causes Act 1965.

Clause 10

1. This clause and clause 11 give effect to the recommendations in paragraph 92 of the Report.

2. Clause 10(1) provides that periodical payments which became due more than 12 months previously shall not be recoverable in the High Court or county court except with leave. As pointed out in paragraph 92 of the Report this carries further an existing practice of the Divorce Registrars.

3. Clause 10(2) provides that the court may refuse leave or grant it subject

time for payment or the making of payment by instalments) as the court thinks proper, or may remit the payment of such arrears or of any part thereof.

Power of court to order sums paid under certain orders to be repaid in certain cases.

11.—(1) Where—

(*a*) on an application for the variation or discharge of an order made by virtue of section 1, 2(1)(*a*) or (*b*), 3(2)(*a*) or (*b*), 6(5) or 6(6)(*a*), (*b*), (*d*) or (*e*) of this Act or for leave to enforce through the court the payment of arrears due under such an order, or

(*b*) in any proceedings to enforce through the court the payment of such arrears,

it appears to the court that, by reason of a change in the circumstances of the person entitled to payments under the order since the order was made, the amount received by that person under the order exceeds the amount which the person liable to make payments thereunder should have been required to pay, the court may order the person so entitled to pay to the person so liable such sum, not exceeding the amount of the excess, as the court thinks just.

(2) Where on an application made for the purposes of this subsection it appears to the court that payments under such an order as is mentioned in subsection (1) above were made by the applicant in respect of a period after the time when the applicant ceased by reason of the order having ceased to have effect to be liable to make them, the court may—

(*a*) order the person to whom the payments were made to pay to the applicant a sum equal to the payments so made; or

(*b*) where it appears to the court that it would be unjust to make an order under the preceding paragraph, either order that person to pay to the applicant such lesser sum as the court thinks fit or dismiss the application.

Application of Maintenance Orders Acts to orders under ss. 1, 2, 3 and 6.

12.—(1) Any order made by virtue of section 1, 2, 3 or 6 of this Act or any corresponding enactment of the Parliament of Northern Ireland shall be included among the orders to which section 16 of the Maintenance Orders Act 1950 applies (which section specifies the orders enforceable under Part II of that Act); and any order made by virtue of the said

to conditions or may remit arrears. This is in accordance with the existing law but at present that is based on practice and decided cases and is not stated in the legislation.

Clause 11

1. This clause implements the recommendation in paragraph 92 of the Report that the court should be empowered in certain circumstances to order the restoration of payments in excess of what should have been paid. As pointed out in that paragraph, this may occur in two different situations: (*a*) when the court backdates a variation order under clause 9 or when there is an application under clause 10 to enforce an order, and (*b*) when the order has ended because, for example, of the remarriage of the former wife or the death of one of the children in respect of whom a maintenance order was made, and, in ignorance of that event or because of an oversight, the payments have been continued.

2. Situation (*a*) is dealt with by subsection (1). This gives the court a discretionary power to order repayments of an amount not exceeding the excess over the amount which should properly have been payable. The subsection is worded in such a way as to make it clear that the power arises only if the change is in the circumstances of the payee. If the husband-payer obtains a reduction because of a change in his circumstances he cannot obtain a refund of sums which he has already paid. The subsection is intended to operate only when the wife-payee has concealed from the husband a change in her circumstances which would have led to a discharge, or reduction of the amount, of the order. Even then, as emphasised in paragraph 92 of the Report, it is envisaged that the power will be exercised sparingly and only when there has been a deliberate failure by the payee to notify the payer of a change which the payee should have realised ought to have been disclosed.

3. When, however, the term of the order has ended (the situation dealt with in subsection (2)) the position is quite different. Here the payee has received money to which she has no entitlement and, *prima facie*, the whole of it ought to be refunded. In many cases the payer would, as is pointed out in paragraph 92, probably be entitled to recover it in an action for money paid under a mistake of fact. Subsection (2) does not destroy the possibility of such an action. What it does is to provide a remedy by application in the divorce court of which the payer may avail himself whether or not an action would lie. The subsection is so worded as to make it clear that normally the recipient should be ordered to repay the whole of the excess: subsection (2)(*a*). However, if the court thinks that that would be unjust it may instead order the repayment of part only or even dismiss the application: subsection (2)(*b*).

4. Circumstances in which it would be unjust to order the payee to restore the whole of the payments are particularly likely to arise in the years immediately following the commencement of the new Act. Existing orders will be expressed to be for the wife for her life or for joint lives. The effect of clause 20 is that they will also end on her remarriage. Not everyone will know of this change of the law and it is likely that many payments will continue for some time to be made and received in perfect good faith notwithstanding remarriage. It might well be unjust to order the wife to restore in such circumstances.

Clause 12

This clause makes it clear that orders made under clause 1, 2, 3 or 6 are orders which, under the Maintenance Orders Act 1950, are registrable for enforcement in other parts of the United Kingdom and, under the Maintenance Orders Act 1958, are registrable for enforcement in magistrates' courts and by an attachment of earnings order.

section 1, 2, 3 or 6 shall be a maintenance order within the meaning of the Maintenance Orders Act 1958.

(2) This section, so far as it affects Part II of the Maintenance Orders Act 1950, shall extend to Scotland and Northern Ireland.

Maintenance agreements

Validity of maintenance agreements.

13.—(1) If a maintenance agreement includes a provision purporting to restrict any right to apply to a court for an order containing financial arrangements, then—

(*a*) that provision shall be void; but

(*b*) any other financial arrangements contained in the agreement shall not thereby be rendered void or unenforceable and shall, unless they are void or unenforceable for any other reason (and subject to sections 14 and 15 of this Act), be binding on the parties to the agreement.

(2) In this and in the next following section—

"maintenance agreement" means any agreement in writing made, whether before or after the commencement of this Act, between the parties to a marriage, being—

(*a*) an agreement containing financial arrangements, whether made during the continuance or after the dissolution or annulment of the marriage; or

(*b*) a separation agreement which contains no financial arrangements in a case where no other agreement in writing between the same parties contains such arrangements;

"financial arrangements" means provisions governing the rights and liabilities towards one another when living separately of the parties to a marriage (including a marriage which has been dissolved or annulled) in respect of the making or securing of payments or the disposition or use of any property, including such rights and liabilities with respect to the maintenance or education of any child, whether or not a child of the family.

Alteration of agreements by court during lives of parties.

14.—(1) Where a maintenance agreement is for the time being subsisting and each of the parties to the agreement is for the time being either domiciled or resident in England and Wales, then, subject to subsection (3) below, either party may apply to the court or to a magistrates' court for an order under this section.

(2) If the court to which the application is made is satisfied either—

(*a*) that by reason of a change in the circumstances in the light of which any financial arrangements contained in the agreement were made or, as the case may be, financial arrangements were omitted from it (including a change foreseen by the parties when making the agreement), the agreement should be altered so as to make different, or, as the case may be, so as to contain, financial arrangements, or

(*b*) that the agreement does not contain proper financial arrangements with respect to any child of the family,

Clauses 13–15

1. These three clauses replace sections 23–25 of the Matrimonial Causes Act 1965. An attempt has been made to express their meaning more clearly but in general the wording and arrangement of the present sections, with which practitioners will be familiar, have been preserved and no more changes made than are necessary to give effect to the recommendations in paragraphs 94–96 of the Report. Accordingly clause 13, equivalent to the present section 23, bans attempts to restrict application to the court for financial provision but makes it clear that other provisions in maintenance agreements shall be valid (clause 13(1)) and contains definitions (clause 13(2)). Clause 14, equivalent to the present section 24, deals with the power of the court to alter maintenance agreements during the lives of both parties thereto. And clause 15, equivalent to section 25, deals with the court's power to alter such agreements after the death of one party in the event of the agreement providing for its continuance thereafter (normally the death of either party will bring the agreement to an end).

2. The substantive changes effected by the clauses are:

(*a*) The definition of " maintenance agreement " in clause 13(2) omits the requirement in the present section 23(2) that the agreement must be between the parties " for the purpose of their living separately."

(*b*) Clause 14(1) omits the words " (other than an agreement made more than six months after the dissolution or annulment of the marriage) ", which appear in section 24(1). Accordingly the fact that the agreement is entered into more than six months after the dissolution of the marriage will no longer prevent the court from exercising its powers to alter the agreement when circumstances demand.

(*c*) Clause 14(1) also substitutes for the formula in section 24(1) " the parties . . . are for the time being both domiciled or both resident in England ", the requirement that each is either domiciled or resident there. This has the effect of extending the application of the clause to cases where one spouse is domiciled in England and Wales but not resident there, and the other resident, but not domiciled, there.

(*d*) Clause 14(2)(*a*) expressly states that the changed circumstances include " a change foreseen by the parties when making the agreement ", thus changing the interpretation put upon the wording of the present section 24(1)(*a*) in *K.* v. *K.* [1961] 1 W.L.R. 802 at 810, C.A., under which the fact that the change was foreseen of itself precluded the court from varying the financial arrangements.

(*e*) Clause 14(2) further makes it clear that the court can alter the agreement so as to make proper provision for any child of the family (as defined in clause 25(1)) whether or not the child is a child of the marriage for whom arrangements were originally made in the agreement.

(*f*) Clause 15 extends the power to alter agreements which continue after the death of one party by enabling either the other party or the personal

then, subject to subsections (3), (4) and (5) below, that court may by order make such alterations in the agreement—

(i) by varying or revoking any financial arrangements contained in it, or

(ii) by inserting in it financial arrangements for the benefit of one of the parties to the agreement or of a child of the family,

as may appear to that court to be just having regard to all the circumstances, or, as the case may be, as may appear to that court to be just in all the circumstances in order to secure that the agreement contains proper financial arrangements with respect to any child of the family; and the agreement shall have effect thereafter as if any alteration made by the order had been made by agreement between the parties and for valuable consideration.

(3) A magistrates' court shall not entertain an application under subsection (1) above unless both the parties to the agreement are resident in England and Wales and at least one of the parties is resident in the petty sessions area (within the meaning of the Magistrates' Courts Act 1952) for which the court acts, and shall not have power to make any order on such an application except—

(*a*) in a case where the agreement includes no provision for periodical payments by either of the parties, an order inserting provision for the making by one of the parties of periodical payments for the maintenance of the other party or for the maintenance of any child of the family;

(*b*) in a case where the agreement includes provision for the making by one of the parties of periodical payments, an order increasing or reducing the rate of, or terminating, any of those payments.

(4) Where the court decides to alter, by order under this section, an agreement by inserting provision for the making or securing by one of the parties to the agreement of periodical payments for the maintenance of the other party or by increasing the rate of the periodical payments which the agreement provides shall be made by one of the parties for the maintenance of the other, the term for which the payments or, as the case may be, so much of the payments as is attributable to the increase are or is to be made under the agreement as altered by the order shall be such term as the court may specify, but that term shall not exceed—

(*a*) where the payments will not be secured, the joint lives of the parties to the agreement or a term ending with the remarriage of the party to whom the payments are to be made, whichever is the shorter;

(*b*) where the payments will be secured, the life of that party or a term ending with the remarriage of that party, whichever is the shorter.

(5) the court hearing an application for an order under this section—

(*a*) in deciding whether to alter an agreement by inserting in it financial arrangements for the benefit of a child of the family, and

representatives of the deceased party to apply for an alteration of the financial arrangements. Under the present section 25 only the surviving party can apply.

3. Subsections (4) and (5) of clause 14 have been inserted to make it clear that when the court alters the agreement by inserting new provisions for periodical payments for a spouse or child it should observe the conditions laid down as respects orders for periodical provision by clauses 7(1) and (2) and 8 respectively. There is nothing in the Bill to prevent the parties, if they are so minded, from providing for payments to an ex-wife for the rest of her life even if she remarries or for payments to a child for his lifetime or until some age well above 18. But if there is an application to insert a new provision for maintenance or to increase the agreed payments, the new provision or the increased provision, as the case may be, must cease on the ex-wife's remarriage and, in the case of a child, must be limited to the period during which he fulfils the age and other qualifications in clause 8.

4. In other respects the effect of the clauses is identical with that of sections 23-25 of the 1965 Act as amended, in the case of section 25, by section 5 of the Family Provision Act 1966.

(b) if the court decides to alter an agreement by inserting in it provision for the making or securing by one of the parties to the agreement of periodical payments for the maintenance of such a child or by increasing the rate of the periodical payments which the agreement provides shall be made or secured by one of the parties for the maintenance of such a child, in deciding the term for which under the agreement as altered by the order the payments or, as the case may be, so much of the payments as is attributable to the increase are or is to be made or secured for the benefit of the child,

shall proceed as if the order under this section were an order under section 3 of this Act, and the provisions of section 8(1), (2) and (3) of this Act shall apply accordingly with the necessary modifications.

(6) For the avoidance of doubt it is hereby declared that nothing in this or the last foregoing section affects any power of the court before which any proceedings between the parties to a maintenance agreement are brought under any other enactment (including a provision of this Act) to make an order containing financial arrangements or any right of either party to apply for such an order in such proceedings.

Alteration of agreements by court after death of one party.

15.—(1) Where a maintenance agreement within the meaning of section 13 of this Act provides for the continuation of payments under the agreement after the death of one of the parties and that party dies domiciled in England and Wales, the surviving party or the personal representatives of the deceased party may, subject to subsection (2) below, apply to the High Court for an order under section 14 of this Act.

(2) An application under this section shall not, except with the permission of the court, be made after the end of the period of six months from the date on which representation in regard to the estate of the deceased is first taken out.

(3) If a maintenance agreement is altered by the court on an application made in pursuance of subsection (1) above, the like consequences shall ensue as if the alteration had been made immediately before the death by agreement between the parties and for valuable consideration.

(4) The provisions of this section shall not render the personal representatives of the deceased liable for having distributed any part of the estate of the deceased after the expiration of the said period of six months on the ground that they ought to have taken into account the possibility that the court might permit an application by virtue of this section to be made by the surviving party after that period; but this subsection shall not prejudice any power to recover any part of the estate so distributed arising by virtue of the making of an order in pursuance of this section.

(5) Section 9(9) of this Act shall apply for the purposes of subsection (2) of this section as it applies for the purposes of subsection (6) of the said section 9; and for the purposes of section 162(1) of the Supreme Court of Judicature (Consolidation) Act 1925 (which relates to the discretion of the court as to the persons to whom administration is to be granted)

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a person by whom an application is proposed to be made by virtue of this section shall be deemed to be a person interested in the deceased's estate.

Avoidance of transactions intended to defeat certain claims

Avoidance of transactions intended to defeat certain claims.

16.—(1) Where proceedings for relief under any of the relevant provisions of this Act (hereafter in this section referred to as " financial provision ") are brought by a person (hereafter in this section referred to as " the applicant ") either on his own behalf or on behalf of a child against any other person (hereafter in this section referred to as " the other party "), the court may, on an application by the applicant—

(*a*) if it is satisfied that the other party is, with the intention of defeating the claim for financial provision, about to make any disposition or to transfer out of the jurisdiction or otherwise deal with any property, make such order as it thinks fit for restraining the other party from so doing or otherwise for protecting the claim;

(*b*) if it is satisfied that the other party has, with the intention aforesaid, made a disposition to which this paragraph applies and that if the disposition were set aside financial provision or different financial provision would be granted to the applicant, make an order setting aside the disposition and give such consequential directions as it thinks fit for giving effect to the order (including directions requiring the making of any payment or the disposal of any property);

(*c*) if it is satisfied, in a case where an order under the relevant provisions of this Act has been obtained by the applicant against the other party, that the other party has, with the intention aforesaid, made a disposition to which this paragraph applies, make such an order and give such directions as are mentioned in paragraph (*b*) above;

and an application for the purposes of paragraph (*b*) above shall be made in the proceedings for the financial provision in question.

(2) Paragraphs (*b*) and (*c*) of subsection (1) above apply respectively to any disposition made by the other party (whether before or after the commencement of the proceedings for financial provision), not being a disposition made for valuable consideration (other than marriage) to a person who, at the time of the disposition, acted in relation to it in good faith and without notice of any such intention as aforesaid on the part of the other party.

(3) Where an application is made under this section with respect to a disposition which took place less than three years before the date of the application or to a disposition or other dealing with property which is about to take place and the court is satisfied—

(*a*) in a case falling within subsection (1)(*a*) or (*b*) above, that the disposition or other dealing would (apart from this section) have the consequence, or

Clause 16

1. This clause replaces section 32 of the Matrimonial Causes Act 1965 and gives effect to the recommendations in paragraphs 97 and 98 of the Report.

2. The substantive changes are:

(*a*) The power to set aside transactions is extended to dispositions designed to defeat a claim to any of the new forms of financial provision or a claim to vary such provision except a claim to alter, after the death of the party chargeable, either secured provision or a maintenance agreement: subsection (4).

(*b*) The time limit of three years in section 32(2) is deleted from subsection (2) of the clause but is retained in subsection (3). The effect is that although a transaction can be set aside, though made more than three years before the application for financial provision, the onus of proof that the transaction was designed to defeat the claim is then on the claimant. If, however, the transaction was less than three years before the application and had the effect of defeating the claim the presumption (as at present—see section 32(3)) is that it was made with that intention.

3. In other respects the clause is, apart from drafting amendments, identical with section 32. But the new clause does not apply to a disposition made more than three years before the commencement of the new Act: subsection (5). Hence past dispositions which could not be set aside under the present section 32, because three years had elapsed, will not become vulnerable as a result of the new provisions.

(*b*) in a case falling within subsection (1)(*c*) above, that the disposition has had the consequence,

of defeating the applicant's claim for financial provision, it shall be presumed, unless the contrary is shown, that the other party disposed of the property with the intention aforesaid or, as the case may be, is, with that intention, about to dispose of or deal with the property.

(4) In this section—

" disposition " does not include any provision contained in a will or codicil but, with that exception, includes any conveyance, assurance or gift of property of any description, whether made by an instrument or otherwise;

" the relevant provisions of this Act " means any of the provisions of the following enactments, that is to say, sections 1, 2, 3, 4, 6, 9 (except subsection (6)) and 14 of this Act;

and any reference to defeating an applicant's claim for financial provision is a reference to preventing financial provision from being granted to the applicant, or to the applicant for the benefit of a child, or reducing the amount of any financial provision which might be so granted, or frustrating or impeding the enforcement of any order which might be or has been made at the instance of the applicant under the relevant provisions of this Act.

(5) The provisions of this section shall not apply to a disposition made more than three years before the commencement of this Act.

Protection, custody, etc., of children

Restrictions on decrees for dissolution, annulment or separation affecting children.

17.—(1) The court shall not make absolute a decree of divorce or nullity of marriage, or make a decree of judicial separation, unless the court, by order, has declared that it is satisfied—

(*a*) that for the purposes of this section there are no children of the family to whom this section applies; or

(*b*) that the only children who are or may be children of the family to whom this section applies are the children named in the order and that—

(i) arrangements for the welfare of every child so named have been made and are satisfactory or are the best that can be devised in the circumstances; or

(ii) it is impracticable for the party or parties appearing before the court to make any such arrangements; or

(*c*) that there are circumstances making it desirable that the decree should be made absolute or should be made, as the case may be, without delay notwithstanding that there are or may be children of the family to whom this section applies and that the court is unable to make a declaration in accordance with paragraph (*b*) above.

(2) The court shall not make an order declaring that it is satisfied as mentioned in subsection (1)(*c*) above unless it has obtained a satisfactory

Clause 17

1. This clause replaces section 33 of the Matrimonial Causes Act 1965 and gives effect to the recommendations in paragraphs 45–46 of the Report. The changes effected and the reasons for them are set out in paragraph 46 of the Report.

2. It will be observed that subsection (1)(*b*) and (*c*) refer to children " who are *or may be* children of the family to whom this section applies ". The words italicised are to cover the situation where there is an unresolved question whether or not a child is a child of the family, for example where the petitioning husband does not know whether a child born to the wife after the parties separated is his or not. Normally a dispute regarding paternity will be determined prior to decree absolute but there may be circumstances where this is not possible. If, whether or not the child is a child of the family, the best possible arrangements have been made for him or if the only party appearing is the petitioning husband and it would be impracticable for him to make any such arrangements, it would obviously be an unnecessary hardship to hold up the decree absolute until the paternity of the child is decided. Yet, but for the words " or may be ", this would be inevitable since the court would not be in a position to declare either that the child was or that it was not a child of the family. With the addition of these words the difficulty is avoided. The court will declare that the only children to whom the section may apply include the child concerned and that it is satisfied in accordance with the subsection. Such a declaration will not involve the court in making any decision on paternity or on whether or not the child is a child of the family.

undertaking from either or both of the parties to bring the question of the arrangements for the children named in the order before the court within a specified time.

(3) If the court makes absolute a decree nisi of divorce or of nullity of marriage, or makes a decree of judicial separation, without having made an order under subsection (1) above the decree shall be void.

(4) If the court refuses to make an order under subsection (1) above in any proceedings for divorce, nullity of marriage or judicial separation, it shall, on an application by either party to the proceedings, make an order declaring that it is not satisfied as mentioned in that subsection.

(5) This section applies to the following children of the family, that is to say—

(*a*) any minor child of the family who at the date of the order under subsection (1) above is—

(i) under the age of sixteen, or

(ii) receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation, whether or not he is also in gainful employment, and

(*b*) any other child of the family to whom the court by an order under that subsection directs that this section shall apply;

and the court may give such a direction if it is of opinion that there are special circumstances which make it desirable in the interest of the child that this section should apply to it.

(6) In this section " welfare ", in relation to a child, includes the custody and education of the child and financial provision for him.

Orders for custody and education of children affected by matrimonial suits.

18.—(1) The court may make such order as it thinks fit for the custody and education of any child of the family who is under the age of eighteen—

(*a*) in any proceedings for divorce, nullity of marriage or judicial separation, before, by or after the final decree;

(*b*) where such proceedings are dismissed after the beginning of the trial, either forthwith or within a reasonable period after the dismissal;

and in any case which the court has power by virtue of paragraph (*a*) above to make an order in respect of a child it may instead, if it thinks fit, direct that proper proceedings be taken for placing the child under the protection of the court.

(2) Where the court makes or makes absolute a decree of divorce or makes a decree of judicial separation, it may include in the decree a declaration that either party to the marriage in question is unfit to have the custody of the children of the family.

(3) Where a decree of divorce or of judicial separation contains such a declaration as is mentioned in subsection (2) above, then, if the party to whom the declaration relates is a parent of any child of the family, that party shall not, on the death of the other parent, be entitled as of right to the custody or the guardianship of that child.

3. The object of providing that the court should declare *by order* if it is satisfied (subsection (1)) and, if not, that it is not satisfied (subsection (4)) is, as pointed out in paragraph 46(*c*) of the Report, to ensure that a decision is reached which can be appealed against. At present if the court declares that it is satisfied and makes a decree absolute there can, apparently, be no appeal. Similarly if the court is not satisfied at present it merely holds up the decree and can apparently do so indefinitely without either party being able to require it to come to a final decision against which there can be an appeal.

4. As pointed out in paragraph 46(*b*) of the Report, the new clause should obviate the embarrassing situation which arose in the recent case of *P.* v. *P.*, *The Times*, 1st June 1969. There a child was born to the wife-respondent after the date of the decree nisi. No declaration had then been made because there were then no children, and the decree had been made absolute without any declaration having been made. The court reluctantly held the decree absolute to be void. Under this clause the court will in all cases be required to make a declaration. Only if it fails to make one will the decree be void: subsection (3).

5. Subsections (1)(*c*) and (2) repeat the effect of the present section 33(2). Subsection (5) defines the class of children to whom the section applies. In addition to being " children of the family " as defined in clause 25(1) they must fulfil the requirements of paragraphs (*a*) and (*b*) of subsection (5): see paragraph 45 of the Report. Subsection (6) makes it clear that the child's " welfare " (the word substituted for " care and upbringing " used in section 33) includes financial provision as well as custody and education. Under the definitions in section 25(1), " custody " includes access and " education " includes training.

Clauses 18 and 19

The Report has not dealt with custody as such. But the present provisions relating to maintenance of children are interwoven with those relating to custody in sections 34 and 35 of the Matrimonial Causes Act 1965. Provisions relating to maintenance have been extracted and appear in revised form in the previous clauses. It is accordingly necessary to re-enact the remaining portions of sections 34 and 35. That is done by these clauses which make no substantive change except that they apply to " children of the family " as defined in clause 25(1), a definition slightly wider than " relevant children " for the purposes of the 1965 Act (see paragraphs 23–32 of the Report) and contain provisions (clauses 18(5) and 19(2)) enabling orders for custody to be discharged, varied, etc.

(4) While the court has power to make an order in any proceedings by virtue of paragraph (*a*) of subsection (1) above, it may exercise that power from time to time; and where the court makes an order by virtue of paragraph (*b*) of that subsection with respect to a child it may from time to time until that child attains the age of eighteen make a further order with respect to his custody and education.

(5) The court shall have power to discharge or vary an order made under this section or to suspend any provision thereof temporarily and to revive the operation of any provision so suspended.

Orders for custody of children in cases of neglect to maintain.

19.—(1) Where the court makes an order under section 6 of this Act, the court shall also have power from time to time to make such orders as it thinks fit with respect to the custody of any child of the family who is for the time being under the age of eighteen; but the power conferred by this section and any order made in exercise of that power shall have effect only as respects any period when an order is in force under that section and the child is under that age.

(2) Section 18(5) of this Act shall apply in relation to an order made under this section as it applies in relation to an order made under that section.

Miscellaneous and supplemental

Orders for maintenance of party to marriage under Matrimonial Causes Act 1965 to cease to have effect on remarriage of that party.

20.—(1) An order made, or deemed to have been made, under section 16(1)(*a*) or (*b*) of the Matrimonial Causes Act 1965 shall, notwithstanding anything in the order, cease to have effect on the remarriage after the commencement of this Act of the person in whose favour the order was made, except in relation to any arrears due under it on the date of such remarriage.

(2) An order for the payment of alimony made, or deemed to have been made, under section 20 of the said Act of 1965, and an order made, or deemed to have been made, under section 21 or 22 of that Act, shall, if the marriage of the parties to the proceedings in which the order was made was or is subsequently dissolved or annulled but the order continues in force, cease to have effect on the remarriage after the said commencement of the party in whose favour the order was made, except in relation to any arrears due under it on the date of such remarriage.

Settlement, etc., made in compliance with order under s. 4 may be avoided on bankruptcy of settlor.

21. The fact that a settlement or transfer of property had to be made in order to comply with an order of the court under section 4 of this Act shall not prevent that settlement or transfer from being a settlement of property to which section 42(1) of the Bankruptcy Act 1914 (avoidance of certain settlements) applies.

Clause 20

This is essentially a transitional provision designed to ensure that the cessation on remarriage of periodical provision for a spouse (see clause 7(1)–(3)) applies equally to existing orders made under the corresponding provisions of the Matrimonial Causes Act 1965. Remarriage, *after the commencement of the new Act*, will bring such orders to an end.

Clause 21

1. This clause gives effect to the recommendation in paragraph 78 of the Report. It has the effect of making a transfer or settlement of property pursuant to an order made under clause 4 a settlement to which section 42(1) of the Bankruptcy Act 1914 applies. The result is that it will be " void against the trustee in bankruptcy " if the transferor or settlor becomes bankrupt within two years, or within 10 years unless it can be proved that he was able to pay his debts without the aid of the property concerned. " Void against the trustee in bankruptcy " has been held to mean " voidable " so that a *bona fide* purchaser, without notice, of the property acquires a good title: *Re Carter and Kenderdine's Contract* [1897] 1 Ch. 776, C.A.

2. As pointed out in paragraph 78 of the Report, section 42 does not at present apply to the administration of a deceased's estate in bankruptcy.

Commencement of proceedings for financial provision orders, etc.

22.—(1) Where a petition for divorce, nullity of marriage or judicial separation has been presented, then, subject to subsection (2) below, proceedings under section 1, 2, 3, or 4 of this Act may be begun, subject to and in accordance with rules of court, at any time after the presentation of the petition; but—

(*a*) no order under section 2 or 4 of this Act shall be made unless a decree nisi of divorce or of nullity of marriage or a decree of judicial separation, as the case may be, has been granted;

(*b*) without prejudice to the power to give a direction under section 23 of this Act, no such order made on or after granting a decree nisi of divorce or of nullity of marriage, and no settlement made in pursuance of such an order, shall take effect unless the decree has been made absolute.

(2) Rules of court may provide, in such cases as may be prescribed by the rules—

(*a*) that applications for ancillary relief shall be made in the petition or answer; and

(*b*) that applications for ancillary relief which are not so made, or are not made until after the expiration of such period following the presentation of the petition or filing of the answer as may be so prescribed, shall be made only with the leave of the court.

In this subsection " ancillary relief " means relief under any of the following provisions of this Act, that is to say, sections 1, 2, 3 and 4.

Direction for instrument to be settled by conveyancing counsel.

23. Where the court decides to make an order under this Part of this Act requiring any payments to be secured or an order under section 4 of this Act—

(*a*) it may direct that the matter be referred to one of the conveyancing counsel of the court for him to settle a proper instrument to be executed by all necessary parties; and

(*b*) in the case of an order under section 2, 3 or 4 of this Act, it may, if it thinks fit, defer the grant of the decree in question until the instrument has been duly executed.

Payments, etc., under order made in favour of person suffering from mental disorder.

24. Where the court makes an order under this Part of this Act requiring payments (including a lump sum payment) to be made, or property to be transferred, to a party to a marriage and the court is satisfied that the person in whose favour the order is made is incapable, by reason of mental disorder within the meaning of the Mental Health Act 1959, of managing and administering his or her property and affairs, then, subject to any order, direction or authority made or given in relation to that person under Part VIII of the said Act of 1959, the court may order the payments to be made, or, as the case may be, the property to be transferred, to such persons having charge of that person as the court may direct

Clause 22

1. This is a supplementary provision which replaces, with verbal amendments only, section 18 of the Matrimonial Causes Act 1965 (subsection (1)) and section 29 of that Act (subsection (2)).

2. In subsection (2)(*b*) the wording of the present section 29(1)(*b*) has been expanded so as to make it clear that rules may provide that certain applications not made in the petition or answer may be made without the leave of the court so long as they are made within a prescribed time.

Clause 23

This is identical with section 16(2) of the Matrimonial Causes Act 1965 which applies to divorce and to nullity (see section 19), except that it is expressly extended so as to apply to orders under clause 4 as well as to orders for secured provision under clauses 2, 3 and 6. Under the Act of 1965, the provision corresponding to paragraph (*a*) extends to orders under section 22 but not to orders relating to settlements under section 17.

Clause 24

1. This replaces, in more up-to-date language, section 30(2) of the Matrimonial Causes Act 1965. At present section 30(2) applies only where the petition is presented on the ground of the respondent's insanity or mental disorder, but by virtue of Schedule I of the Divorce Reform Bill it will apply whenever the court is satisfied of that mental condition irrespective of whether it was relied on in the petition. This clause generalises the provision so that it applies to any type of order for a payment or transfer under the foregoing provisions if the person in whose favour the order is made is incapable by reason of mental disorder. It enables the payment or transfer to be made to such person having charge of the patient as the court may direct.

2. The present section 30(2) expressly excludes lump sum payments: this new clause expressly includes both them and transfers of property. If the patient's property is being administered under the Court of Protection, its jurisdiction is preserved and protected by the words " subject to any order, direction or authority made or given in relation to that person under Part VIII of the [Mental Health Act 1959]."

Interpretation.

25.—(1) In this Part of this Act—

"adopted" means adopted in pursuance of—

(*a*) an adoption order made under the Adoption Act 1958, any previous enactment relating to the adoption of children, the Adoption Act 1968 or any corresponding enactment of the Parliament of Northern Ireland; or

(*b*) an adoption order made in the Isle of Man or any of the Channel Islands; or

(*c*) subject to sections 5 and 6 of the Adoption Act 1968, an overseas adoption within the meaning of section 4 of that Act;

"child", in relation to one or both of the parties to a marriage, includes an illegitimate or adopted child of that party or, as the case may be, of both parties;

"child of the family", in relation to the parties to a marriage, means—

(*a*) a child of both of those parties; and

(*b*) any other child who has been treated by both of those parties as a child of their family, other than a child who has been boarded-out with those parties by a local authority or any voluntary organisation;

"the court" means the High Court or, where a county court has jurisdiction by virtue of the Matrimonial Causes Act 1967, a county court;

"custody", in relation to a child, includes access to the child;

"education" includes training.

(2) For the avoidance of doubt it is hereby declared that references in this Part of this Act to remarriage include references to a marriage which is by law void or voidable.

(3) Any reference in this Part of this Act to any enactment is a reference to that enactment as amended by or under any subsequent enactment, including this Act.

Transitional provisions and savings

Transitional provisions and savings.

26. Schedule 1 to this Act shall have effect for the purpose of the transition to the provisions of this Part of this Act from the law in force before the commencement of this Act and with respect to the application of certain provisions of this Part of this Act in relation to orders made, or deemed to be made, under the Matrimonial Causes Act 1965.

Clause 25

This is the definition clause applicable to Part I of the Bill. The definitions of " adopted ", " child " and " child of the family " in subsection (1) replace definitions in section 46(2) of the Matrimonial Causes Act 1965 and give effect to the recommendations in paragraphs 23–32 of the Report.

2. The definition of " adopted " has been brought up-to-date in the light of the Adoption Act 1968. It applies throughout and without the exception in section 46(2) relating to section 23(2) (maintenance agreements): see paragraph 95 n. 14 of the Report.

3. The expression " child of the family " has been substituted for the expression " relevant child " used in the 1965 Act, and the definition in (*b*) is wider in two respects: (i) the child need not be the natural or adopted child of either spouse and (ii) a new formula has been substituted for the present " a child of one party to the marriage who has been accepted as one of the family by the other party ". The reasons for these changes are fully explained in paragraphs 23–32 of the Report.

4. The remaining definitions in subsection (1) do not appear to require any explanation.

5. Subsection (2) is to make it clear that " remarriage " in clauses 7(2), 7(3), 7(4), 14(4), 20(1) and 20(2) includes a marriage which is void or voidable: see paragraph 14 of the Report. As stated in that paragraph it is also intended to include a marriage (valid, void or voidable) celebrated in a foreign country but it has not been thought necessary to say this expressly since " marriage " and " remarriage " do not imply any territorial limitation.

Clause 26

This clause merely introduces the transitional provisions and savings (which are necessarily somewhat lengthy) in Schedule 1.

PART II

MISCELLANEOUS PROVISIONS

Provisions relating to property of married persons

Contributions by spouse in money or money's worth to the improvement of property.

27. It is hereby declared that where a husband or wife contributes in money or money's worth to the improvement of real or personal property in which or in the proceeds of sale of which either or both of them has or have a beneficial interest, the husband or wife so contributing shall, if the contribution is of a substantial nature and subject to any agreement between them to the contrary express or implied, be treated as having then acquired by virtue of his or her contribution a share or an enlarged share, as the case may be, in that beneficial interest of such an extent as may have been then agreed or, in default of such agreement, as may seem in all the circumstances just to any court before which the question of the existence or extent of the beneficial interest of the husband or wife arises (whether in proceedings between them or in any other proceedings).

PART II

Part II of the Bill contains those provisions not directly concerned with matrimonial causes and which, therefore, will not in due course form part of a consolidated Matrimonial Causes Act replacing that of 1965.

Clause 27

1. This section implements the recommendation in paragraph 57 of the Report. It is intended to clarify the point left in doubt as a result of the decision of the House of Lords in *Pettitt* v. *Pettitt* [1969] 2 W.L.R. 966, namely in what circumstances, if at all, a contribution by one spouse to the improvement, as opposed to the original acquisition, of property owned by the other or in joint names, confers on the contributor a beneficial interest therein. It provides that, if the contribution is substantial it shall, subject to any agreement to the contrary, confer such an interest. It thereby affirms the decision in *Jansen* v. *Jansen* [1965] P. 478.

2. As pointed out in paragraph 58 of the Report, the intention is to apply to improvements the same principle as the courts have clearly adopted in the case of contributions to the initial acquisition of property. There are, however, certain inherent differences in the application of that principle in the two situations. When the contribution is towards the initial acquisition of the property and the extent of the contribution of each spouse is determinable, each spouse is deemed to have an equitable interest proportionate to his contribution. It is only when the extent of their respective contributions is not determinable that the court exercises a discretion to make such order as is just and it then normally decides in favour of an equal sharing. To lay down a similar application in the case of contributions towards the subsequent improvement of property would scarcely be workable. Suppose, for example, that before the War the husband bought a house for £1,000 which is now worth £6,000; and suppose that the wife today spends £1,000 on improvements which increases its market value to £6,500. In what proportions should they share? Equally (on the basis that each has contributed £1,000)? Two-thirds, one-third (on the basis that the husband has contributed £1,000 and the wife £500)? Six-sevenths, one-seventh? (on the basis that the husband has contributed £6,000 and the wife £1,000)? Or twelve-thirteenths, one-thirteenth (on the basis that the husband has contributed £6,000 and the wife £500)? Either of the latter two may perhaps seem fairer than the former, but even if that is accepted a choice between the latter two may depend on the circumstances (if the improvements have been undertaken in their joint interest or primarily in that of the husband, the wife should obviously be credited with the whole cost and not merely with the increased market value). Hence it has been thought better not to prescribe any rule that the share must be commensurate with or proportional to the cost or value of the improvements, but to allow the court, in the event of a dispute, to make such order as it thinks just in all the circumstances, i.e., to adopt a similar rule to that which applies to acquisitions when the exact extent of the relative contributions is indeterminable.

3. The discretion thus afforded the court is a strictly circumscribed one. The contribution must be in money or money's worth (such as work and labour) and must be a contribution to the improvement of the other spouse's or joint property. In contrast with the court's powers under clause 4 on making a decree of divorce, nullity or judicial separation, a general contribution to the welfare of the family does not qualify (though, as in the case of acquisitions, it

Rights of occupation under Matrimonial Homes Act 1967 of spouse with equitable interest in home, etc.

28. There shall be inserted in section 1 of the Matrimonial Homes Act 1967 (which protects against eviction from the home the spouse not entitled by virtue of any estate or interest, etc., to occupy it) a new subsection—

"(9) It is hereby declared that a spouse who has an equitable interest in a dwelling house or in the proceeds of sale thereof is to be treated for the purposes of this section as not being entitled to occupy the dwelling house by virtue of that interest (and accordingly as not being precluded, on the ground only of having that interest, from being entitled to rights of occupation under this section)".

will be different if the improvements have been paid for out of a common pool to which each has contributed). And the contributions must be " of a substantial nature " and not merely the doing of the " do-it-yourself jobs " which married couples often undertake: see paragraph 58 of the Report. And if there is an agreement between the parties, either as to their respective shares or to the effect that there shall be no sharing, this is decisive.

4. The words " be treated as having acquired by virtue of his or her contribution *a share or an enlarged share* " recognise that the clause may have to operate either when the contributing spouse formerly had no interest or when he had. If initially the spouses had equal shares (either because it was so agreed or because the property was acquired out of a common pool to which each had contributed to an indeterminate extent) but then the wife alone pays for a substantial improvement, she may as a result acquire " an enlarged share ". This, however, will depend on " all the circumstances of the case "; the court may well think it appropriate to preserve the existing equality either because it is able to imply an agreement to that effect or because it regards that as the just solution.

5. The powers of the court to decide on the existence or extent of the shares are not limited to applications under section 17 of the Married Women's Property Act 1882 (as amended). Though it is normally in such proceedings that the question will be litigated, the same rule is to be observed in all proceedings, whether between the spouses under section 17 or otherwise, or in any other proceedings (for example actions between one or both of the spouses and a third party): see paragraph 58 of the Report.

6. It is not intended that this clause should affect in any way the provisions of section 1 of the Married Women's Property Act 1964 whereby property derived from a house-keeping allowance is to be treated, in the absence of contrary agreement, as belonging equally to the husband and wife.

Clause 28

1. This clause gives effect to the recommendation in paragraph 59 of the Report and deals with a possible weakness which has come to light in the Matrimonial Homes Act 1967 which was designed to protect the rights of occupation of each spouse in the matrimonial home. The registrable rights of occupation conferred by that Act arise " where one spouse is entitled to occupy a dwelling house by virtue of an estate or interest . . . and the other spouse is not so entitled ". It was assumed that if the other spouse was so entitled he or she would not need any further protection. This is indeed so when the estate or interest is a legal one. But if a spouse merely has an equitable interest he or she will not be fully protected, unless the Act applies, since the interest will not prevail against a purchase of the legal estate or interest without notice of the equitable interest. However, it was assumed that a person merely entitled to an equitable interest did not have a right of occupation, so that the Act would apply. But, as pointed out in paragraph 59, the Court of Appeal seem to be wedded to the contrary view even in the case where the interest is in the proceeds of sale under a statutory trust for sale. Hence, if, say, the husband is the legal owner of the matrimonial home, but the wife is entitled to an equitable interest by virtue of a contribution to its acquisition or (see clause 27) to its improvement, it is arguable that she has no registrable right of occupation under the Act. That this was not the intention is clearly shown by the final words of section 1(5).

2. This clause closes this possible loop-hole. Notwithstanding that a spouse may be entitled to an equitable interest and notwithstanding that that may

Extension of s. 17 of Married Women's Property Act 1882.

29. An application may be made to the High Court or a county court under section 17 of the Married Women's Property Act 1882 (powers of the court in disputes between husband and wife about property) (including that section as extended by section 7 of the Matrimonial Causes (Property and Maintenance) Act 1958) by either of the parties to a marriage notwithstanding that their marriage has been dissolved or annulled so long as the application is made within the period of three years beginning with the date on which the marriage was dissolved or annulled; and references in the said section 17 and the said section 7 to a husband or a wife shall be construed accordingly.

Judicially separated spouses not entitled to claim in intestacy of each other.

30.—(1) If while a decree of judicial separation is in force and the separation is continuing either of the parties whose marriage is the subject of the decree dies after the commencement of this Act intestate as respects all or any of his or her real or personal property the property of that party as respects which he or she died intestate shall devolve as if the other party to the marriage had then been dead.

(2) Notwithstanding anything in section 2(1)(*a*) of the Matrimonial Proceedings (Magistrates' Courts) Act 1960, a provision in force in an order made, or having effect as if made, under that section that a party to a marriage be no longer bound to cohabit with the other party to the marriage shall not have effect as a decree of judicial separation for the purposes of this section.

(3) Section 20(3) of the Matrimonial Causes Act 1965 (which provides that in a case of judicial separation certain property of the wife shall, if she dies intestate, devolve as if her husband had then been dead) shall cease to have effect except in relation to a case where the death occurred before the commencement of this Act.

(if the Court of Appeal are right) confer a right of occupation, he or she will, in addition, have a right of occupation under the 1967 Act which, if registered in accordance with section 2(6) or (7) of that Act, will afford protection against the possibility of being over-ridden by a sale or mortgage by the other spouse.

3. The provision inserted by this clause is not limited to cases where the equitable interest arises by virtue of a contribution to the acquisition or improvement of the home (though it is normally in that case that it will be important). It applies generally to all cases where the spouse's interest is merely an equitable interest in the home or its notional proceeds of sale and the other spouse has a legal interest therein entitling him to occupation.

Clause 29

1. This gives effect to the recommendation in paragraph 61 of the Report. It extends section 17 of the Married Women's Property Act 1882 (as extended by the 1958 Act) so that it applies to property disputes after the marriage has ended by divorce or nullity (but not by death). The object is to ensure that the summary procedure and the court's discretion as to making orders for possession remain available throughout the time when the divorce court may be called upon to exercise its powers to deal with financial provision and property adjustments.

2. However it has not been thought appropriate that the special procedure and discretion should remain available longer than is necessary once the parties have ceased to be man and wife. Hence it is provided that the section shall remain available only for a period of three years from decree absolute. This, of course, does not mean that property disputes, unless otherwise statute-barred, cannot be litigated after the expiration of that three years; merely that the special procedure of section 17 ceases to be available.

Clause 30

1. This clause replaces section 20(3) of the Matrimonial Causes Act 1965 and gives effect to the recommendations in paragraph 79 of the Report.

2. It provides, in place of the present half-hearted, anomalous and inconvenient rule in section 20(3), that if there is a judicial separation and one spouse dies intestate while the separation continues, his or her property shall devolve as if the other spouse were dead. In other words judicial separation is, for this purpose, treated as equivalent to a dissolution of the marriage. The rules of intestate succession are intended to give effect to what the average reasonable person would have been likely to provide had he made a will and when the parties are separated under a decree of judicial separation it seems inconceivable that either spouse would have wished the other to take what, in the case of most estates, amounts to the whole of the property. If reasonable provision is not made for the surviving spouse the protection of the Inheritance (Family Provision) Act will be available.

3. It will be observed that subsection (1), the operative provision, applies only when the " decree of judicial separation is in force and the separation is continuing ". Whether or not a resumption of cohabitation brings the decree to an end (a question on which the law is not wholly clear) it definitely will have the effect of excluding the application of the subsection.

4. Section 2(1)(*a*) of the Matrimonial Proceedings (Magistrates' Courts) Act 1960 provides that a magistrates' order containing a non-cohabitation clause (a rare occurrence) has the same effect as a decree of judicial separation. This presumably means that section 20(3) of the 1965 Act is attracted. As stated in

Order for maintenance of party to marriage made by magistrates' court to cease to have effect on remarriage of that party.

Effect of remarriage on maintenance ordered by magistrates' court

31. At the end of section 7 of the Matrimonial Proceedings (Magistrates' Courts) Act 1960 there shall be added the following subsections—

"(4) Where after the making by a magistrates' court of a matrimonial order consisting of or including a provision such as is mentioned in paragraph (*b*) or (*c*) of section 2(1) of this Act the marriage of the parties to the proceedings in which that order was made is dissolved or annulled but the order continues in force, then, subject to subsection (5) of this section, that order or, as the case may be, that provision thereof shall cease to have effect on the remarriage of the party in whose favour it was made, except in relation to any arrears due under it on the date of such remarriage.

(5) Subsection (4) of this section shall not apply where the party in whose favour such an order as is therein mentioned was made remarried before the commencement of the Family Law Reform (No. 2) Act 1969.

(6) For the avoidance of doubt it is hereby declared that references in this section to remarriage include references to a marriage which is by law void or voidable."

paragraph 79 of the Report it is not thought that separations under such orders should have the same effect as regards intestate succession. On the other hand it would be lamentable to continue to apply the anomalous rule laid down in section 20(3); it is still not unknown for separations under such orders to be short but frequent and an attempt to work out the consequences of applying section 20(3) would be even more difficult than in the case of a judicial separation proper which almost invariably marks the final end of married life. Hence subsection (2) of this clause provides that subsection (1) does not apply to magistrates' separation orders and subsection (3) (and Schedule 3, Part II) repeals section 20(3) of the 1965 Act. The effect is that in future magistrates' orders, even if they contain a non-cohabitation clause, will have no effect on intestate succession.

Clause 31

This clause applies to magistrates' orders the same rule as is applied to other orders for periodical provision by clauses 7(2) and (3) and 20, i.e., they will in future cease on the remarriage of the payee even though they have been allowed to continue after a divorce: see paragraph 14 of the Report. Remarriage is defined in the same terms as in clause 25(2).

Abolition of right to claim damages for adultery.

32. After the commencement of this Act no person shall be entitled to petition the court for or include in a petition a claim for damages from any other person on the ground of adultery with the wife of the first-mentioned person.

Abolition of actions for enticement, seduction and harbouring of spouse or child.

33. No person shall be liable in tort under the law of England and Wales—

(*a*) to any other person on the ground only of his having induced the wife or husband of that other person to leave or remain apart from the other spouse;

(*b*) to a parent (or person standing in the place of a parent) on the ground only of his having deprived the parent (or other person) of the services of his or her child by raping, seducing or enticing that child; or

(*c*) to any other person for harbouring the wife or child of that other person,

except in the case of a cause of action accruing before the commencement of this Act if an action in respect thereof has been begun before the said commencement.

Clause 32

This implements the recommendation in paragraph 99 of the Report by totally abolishing the action for damages for adultery* except in respect of petitions filed prior to the commencement of the new Act. This applies whether the claim for damages is in a petition for divorce or judicial separation or in a separate petition, and accordingly section 41 of the Matrimonial Causes Act 1965 is repealed by Schedule 3, Part II.

Clause 33

1. This clause gives effect to the recommendations in paragraphs 101 and 102(*c*) by abolishing the actions of enticement, harbouring and seduction of a spouse or child. It does not abolish the action of a master for the loss of a servant's services in the rare cases where such an action lies.

2. " Raping " has been specifically mentioned as well as " seducing " since, although this is properly regarded as an aggravated form of seduction (see *Mattouk* v. *Massad* [1943] A.C. 588, P.C.), it seems that a spouse or parent may, in the case of rape, have an alternative basis for his claim, viz. that the rape constituted a tort against the wife or daughter leading to a loss of her services. Although the action for loss of services is not generally abolished it is intended to do away with those aspects of it which concern the family relationship and it is obviously desirable to make it clear that this alternative basis cannot be relied on in such a case. To ensure that this result is achieved it has been thought desirable to refer specifically to rape, especially as it is referred to as well as seduction among the excepted proceedings in Schedule 1, Part II of the Legal Aid and Advice Act 1949.

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* If this recommendation should be rejected paragraph 100 of the Report recommends that the action should be available not only to husbands, as at present, but also to wives (but, in either case, only when coupled with a claim for divorce or judicial separation) and damages should be awarded only as compensation for the loss suffered as a result of the breakdown of the marriage and when the adultery was a factor in causing the breakdown. Effect could be given to that alternative by the following clause:

Extension to wife o right to claim damages for adultery and regulation of such claims by husband and wife.

(1) After the commencement of this Act a husband shall not be entitled to petition the court for damages only on the ground of adultery with his wife; but after the said commencement a wife shall be entitled to include in a petition for divorce or for judicial separation (other than one presented before that commencement) a claim for damages from any woman on the ground of adultery with her husband.

(2) Accordingly there shall be substituted (except in relation to proceedings on a petition presented before the said commencement) for section 41 (damages for adultery) of the Matrimonial Causes Act 1965 the following section—

Damages for adultery.

" 41.—(1) A husband or wife may, on a petition for divorce or for judicial separation, claim damages from any person on the ground of adultery with the wife or husband of the petitioner.

(2) Damages on the ground of adultery shall be recoverable by a husband or wife only if he or she proves that the adultery caused or contributed to the breakdown of his or her marriage and only to the extent necessary and, having regard to the degree to which the breakdown was due to the adultery, just to compensate the husband or wife and child of the family for the loss suffered by them in consequence of that breakdown; but subject to that a claim for damages on the ground of adultery shall be tried, in the case of a claim by a husband, on the same principles and in the same manner as such claims were tried before the commencement of this Act, and in the case of a claim by a wife, on principles analogous to those applied to the trial of a claim by a husband before the said commencement and in the same manner.

(3) The court may direct in what manner the damages recovered on any such petition are to be paid or applied, and may direct the whole or any part of the damages to be settled for the benefit of the children, if any, of the family or the wife or husband or either or any of them.

(4) In this section the expression " children of the family " has the same meaning as it has for the purposes of Part I of the Family Law Reform (No. 2) Act 1969."

Such a clause would properly appear not as clause 32 but in Part I of the Bill.

Abolition of wife's agency of necessity.

34.—(1) Any rule of law or equity conferring on a wife authority, as agent of necessity of her husband, to pledge his credit or to borrow money on his credit is hereby abrogated.

(2) Section 20(4) of the Matrimonial Causes Act 1965 (which provides that if in a case of judicial separation alimony has been ordered but has not been paid by the husband he shall be liable for necessaries supplied for the use of the wife) shall cease to have effect.

PART III

SUPPLEMENTARY

Minor and consequential amendments, and repeals.

35.—(1) The enactments specified in Schedule 2 to this Act shall have effect subject to the amendments specified in that Schedule.

(2) The enactments specified in Schedule 3 to this Act are hereby repealed to the extent specified in the third column of that Schedule, but subject, in the case of the enactments specified in Part I of that Schedule, to the saving mentioned at the end of that Part.

Citation, construction, commencement and extent.

36.—(1) This Act may be cited as the Family Law Reform (No. 2) Act 1969.

(2) Part I of this Act may be cited as the Matrimonial Causes Act 1969.

(3) In ascertaining the meaning of any provision of this Act or of any enactment amended or otherwise affected by any such provision regard may be had to the Report of the Law Commission on Financial Provision in Matrimonial Proceedings (Law Com. No. 25).

(4) This Act shall come into force on 1st January 1971.

(5) Subject to the provisions of section 12(2) of this Act, this Act does not extend to Scotland or Northern Ireland.

Clause 34

1. This implements the recommendation in paragraph 109 of the Report by abolishing the wife's so-called agency of necessity. It is emphasized that this has no effect on the authority which she is presumed to have while running the husband's household or on any authority which she may have been held out by the husband as having. But, in the absence of actual or ostensible authority, a wife will no longer be able to pledge the husband's credit in respect of either legal costs or household necessaries, a power which has long existed in theory rather than practice.

2. Subsection (2) deals with the only statutory reference to the agency of necessity, viz. section 20(4) of the Matrimonial Causes Act 1965 which it, and Schedule 3, Part II, repeal.

PART III

Clause 35

This effects consequential amendments to other legislation (subsection (1)) and consequential repeals (subsection (2)).

Clause 36

1. Subsection (1) specifies the short title and subsection (2) provides that Part I, which will in due course become part of a newly consolidated Matrimonial Causes Act, may in the meantime be cited separately as the Matrimonial Causes Act 1969.

2. The Law Commission's and Scottish Law Commission's *Joint Report on The Interpretation of Statutes* (1969, Law Com. 21; Scot. Law Com. 11) has recommended that Reports of Commissions and Committees leading to legislation and, in appropriate cases, explanatory notes published with a Bill should be admissible in aid of interpretation. Subsection (3) is accordingly designed to ensure that the Report (including this Appendix) is admissible for this purpose. A similar provision appears as clause 8(3) in the draft clauses appended to the Law Commission's and Scottish Law Commission's *First Report on Exemption Clauses: Amendments to the Sale of Goods Act 1893* (1969, Law Com. 24; Scot. Law Com. 12).

3. In subsection (4) 1st January 1971 has been suggested as the date for the coming into operation of the legislation. That day is the date now prescribed for the coming into operation of the Divorce Reform Bill and it is thought that it would be convenient to practitioners if the present Bill came into operation at the same time. No date significantly earlier is practicable since new rules of court will be needed.

Section 26

SCHEDULE 1

Transitional Provisions and Savings

Variation, etc., of certain orders made, etc., under the Matrimonial Cause Act 1965

1.—(1) Subject to the provisions of this paragraph, section 9 of this Act shall apply to an order (other than an order for the payment of a lump sum) made or deemed to be made under any of the following provisions of the Matrimonial Causes Act 1965 (hereinafter referred to as " the Act of 1965 "), that is to say—

(*a*) section 15, except in its application to proceedings for restitution of conjugal rights,

(*b*) section 16(1), that subsection as applied by section 16(3) and by section 19,

(*c*) section 20(1) and section 17(2) as applied by section 20(2),

(*d*) section 22,

(*e*) section 34(1)(*a*) or (*b*), in so far as it relates to the maintenance of a child, and section 34(3),

as it applies to the orders mentioned in subsection (2) of the said section 9.

(2) Subject to the provisions of this paragraph, the court hearing an application for the variation of an order made or deemed to be made under any of the provisions of the Act of 1965 mentioned in sub-paragraph (1) above shall have power to vary that order in any way in which it would have power to vary it had the order been made under the corresponding provision of Part I of this Act.

(3) The said section 9, as applied by sub-paragraph (1) above, shall have effect as if for subsections (4), (5) and (6) thereof there were substituted the following subsections—

" (4) The court shall not exercise the powers conferred by this section in relation to an order made or deemed to be made under section 17(2) of the Act of 1965, as applied by section 20(2) thereof, in proceedings for judicial separation except on an application made in proceedings—

(*a*) for the rescission of the decree of judicial separation, or

(*b*) for the dissolution of the marriage of the parties to the proceedings in which that decree was made.

(5) The court hearing an application for the variation of any order made or deemed to be made under section 16(1), 20(1), 22, 34(1) (*a*) or (*b*) or 34(3) of the Act of 1965 or under the said section 16(1) as applied by section 16(3) of that Act or by section 19 thereof shall not have power to vary that order by making an order for the payment of a lump sum or any such order as is mentioned in section 4 of this Act.

(6) Where the person liable to make payments under a secured periodical payments order made or deemed to be made under the

Schedule 1

The basic principle sought to be achieved is that the powers conferred by the Bill will be available to the courts as soon as the Bill is brought into operation, i.e. on 1st January 1971 (see clause 36(4)). That principle, however, necessarily requires some working out and some qualification in particular instances. This Schedule* which is introduced by clause 26, is designed for this purpose.

Paragraph 1

1. Clause 9 of the Bill deals with variation and discharge of orders, etc. Where, after the coming into operation of the Bill, the court is asked to vary or discharge an order it will exercise its powers under the new legislation notwithstanding that the orders were made under the Act of 1965 or under earlier Acts replaced by it and (by virtue of paragraph 1 of Schedule 1 of that Act) " deemed to be made " under it: sub-paragraph (1).

2. When the court does so it will, except as provided in sub-paragraphs (4) and (5), have the same powers as if the order had been made under the corresponding provision of the Bill: sub-paragraph (2).

3. In order that the provisions of clause 9 may be readily applicable in such circumstances, textual replacements of subsections (4), (5) and (6) are made by sub-paragraph (3). A reference to section 22 of the 1965 Act has been included in the revised subsection (6) since, although at present orders under that section cannot extend beyond joint lives, it will in future be possible to vary them so that they last for the life of the payee or until her remarriage.

4. Sub-paragraph (4) merely repeats a transitional provision which now appears as paragraph 9 of Schedule I of the 1965 Act. Its effect is to limit the power to vary orders for secured provision for a wife made before 16th December 1949 (when the Law Reform (Miscellaneous Provisions) Act 1949 came into operation and for the first time made orders for secured provision variable).

5. Sub-paragraph (5) empowers the court to vary or discharge orders made in proceedings for restitution of conjugal rights. Even if restitution is abolished, whether by the Bill or previously thereto, financial orders made on past decrees will continue in existence and in future they will be variable in accordance with the powers conferred by clause 9(1) and (3).

6. Sub-paragraph (6) provides that pending applications for a variation or discharge shall be determined in accordance with the present law.

* Amendments may be needed after the transitional problems involved have been the subject of further discussion with those concerned and will depend on whether restitution of conjugal rights has already been abolished with appropriate transitional provisions. For the present this Schedule has been drafted on the basis that a section abolishing the remedy of restitution of conjugal rights will be included in the Bill.

said section 16(1), 22 or 34(3) or under the said section 16(1), as applied by the said section 16(3) or by the said section 19, has died, an application under this section relating to that order may be made by the person entitled to payments under the order or by the personal representatives of the deceased person, but no such application shall, except with the permission of the court, be made after the end of the period of six months from the date on which representation in regard to the estate of that person is first taken out.

In this subsection ' secured periodical payments order ' means an order requiring a person to secure an annual sum or periodical payments to some other person."

(4) In relation to an order made before 16th December 1949 which, by virtue of paragraph 1 of Schedule 1 to the Act of 1965, is deemed to have been made under section 16(1)(*a*) of that Act or the said paragraph (*a*) as applied by section 19 of that Act, the powers conferred by this paragraph shall not be exercised unless the court is satisfied that the case is one of exceptional hardship which cannot be met by discharge, variation or suspension of any order made, or deemed as aforesaid to have been made, under section 16(1)(*b*) of that Act or that paragraph, as so applied, as the case may be.

(5) Subject to sub-paragraph (6) below, section 9(1) and (3) of this Act shall apply to an order made or deemed to be made under section 15 of the Act of 1965 in its application to proceedings for restitution of conjugal rights, under section 21 of that Act or under section 34(1)(*c*) thereof as they apply to the orders mentioned in subsection (2) of the said section 9, and in exercising the powers conferred by virtue of this paragraph the court shall have regard to all the circumstances of the case, including any change in the means or needs of either of the parties to the marriage or of any child in whose favour the order in question was made.

(6) Where proceedings on an application made under section 31 of the Act of 1965 are pending at the commencement of this Act, that application shall be determined as if this Act had not been passed.

2. Section 10 of this Act shall apply in relation to the enforcement of the payment of arrears due under an order made, or deemed to be made, under any of the following provisions of the Act of 1965, that is to say, sections 15, 16, 20, 21, 22 and 34 and section 16, as applied by section 19, where proceedings to enforce through the court the payment of such arrears are begun after the commencement of this Act as it applies in relation to the enforcement of the payment of arrears due under any such order as is mentioned in that section.

3.—(1) Section 11(1) of this Act shall apply in relation to—

(*a*) an application for the variation or discharge of an order made, or deemed to be made, under any of the following provisions of the Act of 1965, that is to say, sections 15, 16(1)(*a*) and (*b*), 20(1), 21 and 22, section 16(1)(*a*) and (*b*) as applied by section 16(3) and by section 19, section 34(1), in so far as it relates to main-

Paragraph 2

This paragraph provides that clause 10, relating to leave to enforce periodical payments due more than 12 months previously, applies equally to arrears under existing orders so long as the enforcement proceedings were begun after the commencement of the Bill.

Paragraph 3

This paragraph applies clause 11, relating to the recovery of overpayments, to overpayments made under existing orders. Where the overpayment results from a decision on an application to vary an order or from a decision made in an application to enforce payment (i.e. when clause 11(1) applies), the paragraph applies only to applications or proceedings begun after the commencement of the Bill: sub-paragraph (1).

tenance, and section 34(3), or for leave to enforce through the court the payment of arrears due under such an order, or

(*b*) any proceedings to enforce through the court the payments of such arrears,

where the application is made, or the proceedings are begun, after the commencement of this Act as it applies in relation to such an application and such proceedings as is or are mentioned in that section.

(2) Section 11(2) of this Act shall apply in relation to any such order as is mentioned in sub-paragraph (1)(*a*) above as it applies in relation to any such order as is mentioned in subsection (1) of the said section 11, and the powers conferred on the court by the said subsection (2) as applied by this sub-paragraph shall accordingly be exercisable on an application made for the purposes of that subsection as so applied.

4. Section 18(5) of this Act shall apply in relation to an order for the custody or education of a child made or deemed to be made under section 34 of the Act of 1965, and in relation to an order for the custody of a child made or deemed to be made under section 35 of that Act, as it applies in relation to an order made under the said section 18.

Provisions with respect to certain maintenance agreements

5. Where the party chargeable under a maintenance agreement within the meaning of section 13 of this Act died before 17th August 1957, then—

(*a*) subsection (1) of that section shall not apply to the agreement unless there remained undistributed at that date assets of that party's estate (apart from any property in which he had only a life interest) representing not less than four-fifths of the value of that estate for probate after providing for the discharge of the funeral, testamentary and administrative expenses, debts and liabilities payable thereout (other than any liability arising by virtue of that subsection); and

(*b*) nothing in that subsection shall render liable to recovery, or impose any liability upon the personal representatives of that party in respect of, any part of that party's estate which had been distributed before that date.

6. No right or liability shall attach by virtue of section 13(1) of this Act in respect of any sum payable under a maintenance agreement within the meaning of that section in respect of a period before 17th August 1957.

Avoidance of transactions intended to defeat claims for relief under the Act of 1965

7.—(1) Subject to sub-paragraph (3) below, section 16 of this Act shall apply in relation to proceedings for relief under any of the following provisions of the Act of 1965, that is to say, sections 16, 17(2), 20(1), 22, 24, 31, 34(1)(*a*) or (*b*), 34(3) and 35, section 16(1) as applied by section 19 and section 17(2) as applied by section 20(2), where the proceedings are pending at the commencement of this Act, and in relation to proceedings for relief under section 21 or 34(1)(*c*) of the Act of 1965, as it applies in

Paragraph 4

This paragraph applies clause 18(5) (which enables orders under that section to be discharged, varied, etc.) to orders made under section 34 or 35 of the 1965 Act.

Paragraphs 5 and 6

These paragraphs merely repeat the transitional provisions relating to the validity of maintenance agreements which now appear in paragraphs 6 and 7 of Schedule 1 of the 1965 Act. The effect is to limit the application of clause 13(1) in relation to an agreement where the party chargeable under the agreement died before 17th August 1957 (when the Maintenance Agreements Act 1957 came into force), and in relation to sums payable before that date.

Paragraph 7

1. This paragraph applies the wider powers under clause 16 to set aside transactions designed to defeat claims for financial provision to claims under the corresponding provisions of the 1965 Act when such claims are pending at the commencement of the Bill (sub-paragraph (1)) or when an order has been obtained under those provisions (sub-paragraph (2)). Sub-paragraph (1) also applies the wider powers under clause 16 to similar claims made in restitution proceedings which have been begun before that remedy was abolished.

relation to proceedings for relief under any of the provisions of this Act specified in section 16(4) of this Act.

(2) Without prejudice to sub-paragraph (1) above and subject to sub-paragraph (3) below, the said section 16 shall apply in a case where an order has been obtained under any of the provisions of the Act of 1965 mentioned in sub-paragraph (1) above as it applies in a case where an order has been obtained under any of the provisions of this Act specified in the said section 16(4).

(3) Where proceedings on an application made under section 32 of the Act of 1965 are pending at the commencement of this Act, that application shall be determined as if this Act had not been passed.

Applications under section 22 of the Act of 1965

8. Section 22 of the Act of 1965, as amended by section 5(3) of the Family Law Reform Act 1969, and section 35(2) of the Act of 1965 shall continue to apply in relation to an application under the said section 22 the proceedings on which are pending at the commencement of this Act.

Protection, custody, etc., of children

9. Section 33 of the Act of 1965 shall continue to apply, and section 17 of this Act shall not apply, in relation to any proceedings for divorce, nullity of marriage or judicial separation which are pending at the commencement of this Act.

10. Where the court has made an order by virtue of section 34(1) of the Act of 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 or 18 of this Act as it has where it makes an order in relation to a child under subsection (1) of the said section 3 or 18.

11. Where the court has made an order under section 22 of the Act of 1965 the court shall have the like power to make orders under section 19 of this Act with respect to the custody of any child of the family as it has where it makes an order under section 6 of this Act.

Saving for orders and directions made, etc., under the Act of 1965

12. Without prejudice to the provisions of section 38 of the Interpretation Act 1889 (which relates to the effect of repeals), nothing in any repeal made by this Act shall affect any order made, or deemed to have been made, or any direction given, or deemed to have been given, under any enactment repealed by this Act, and subject to the provisions of this Act, every such order or direction shall, if in force at the commencement of this Act, continue in force.

2. Under section 32 of the 1965 Act dispositions can be set aside only if they were made within three years. The transitional problems caused by the deletion of this limitation (except as regards the presumption of intention to defeat) are largely met by clause 16 itself, subsection (5) of which provides that the clause shall not apply to a disposition made more than three years before the commencement of the Bill. The only outstanding problem relates to applications to set aside a transaction which may be pending when the Bill comes into operation. Sub-paragraph (3) provides, in effect, that these shall be determined on the basis of the present law, i.e. under section 32 of the 1965 Act.

Paragraph 8

This paragraph provides that the present provisions of section 22 of the 1965 Act shall continue to apply to an application under that section pending at the time when the Bill comes into operation.

Paragraph 9

To avoid the practical complications which would otherwise arise, this paragraph provides that section 33 of the 1965 Act (and not clause 17) shall continue to apply to proceedings begun before the commencement of the Bill.

Paragraph 10

This paragraph provides that where the court has made an order in respect of a child under section 34(1) of the 1965 Act (which relates to custody, maintenance, etc.), it may thereafter make a further order under clause 3 or 18 just as it could if the original order had been made under clause 3 or 18: see clauses 3(4) and 18(4).

Paragraph 11

Similarly, where the court has made an order in respect of a child under section 22 of the 1965 Act it may thereafter make custody orders in respect of that child under clause 19 as if it had initially made an order under clause 6.

Paragraph 12

This is a common-form provision saving the validity of orders, etc., made under existing provisions repealed by the Bill.

Section 35

SCHEDULE 2

MINOR AND CONSEQUENTIAL AMENDMENTS

1.—(1) In section 26(4) of the Matrimonial Causes Act 1965 (matters to which court is to have regard on application for maintenance from estate of deceased spouse), after sub-paragraph (ii) there shall be inserted the following sub-paragraph—

"(iii) where the survivor is a former wife or a former husband of the deceased, for an order under section 2 or 4 of the Matrimonial Causes Act 1969".

(2) In subsection (1) of section 36 of the said Act of 1965 (power to commit children to care of local authority), and in subsection (1) of section 37 of that Act (power to provide for supervision of children), after the words "this Act" there shall be inserted the words "or of the Matrimonial Causes Act 1969".

(3) In subsection (5) of the said section 37 after the words "this Act" there shall be inserted the words "or under the Matrimonial Causes Act 1969".

2.—(1) Section 2 of the Matrimonial Causes Act 1967 (jurisdiction of divorce county court to exercise powers exercisable under certain provisions of the Matrimonial Causes Act 1965 relating to ancillary relief and the protection of children) shall be amended as follows—

(*a*) in subsection (1), after the words "Matrimonial Causes Act 1965" there shall be inserted the words "or under the Matrimonial Causes Act 1969" and for the words "that Act" there shall be substituted the words "the said Act of 1965 or under section 6 or section 14 of the said Act of 1969"; and

(*b*) in subsection (3), after the words "Matrimonial Causes Act 1965" there shall be inserted the words "or under section 15 of the Matrimonial Causes Act 1969"; and

(*c*) at the end of subsection (4) there shall be inserted the words "or section 14 of the Matrimonial Causes Act 1969".

(2) Any reference in the Matrimonial Causes Act 1967 to that Act, to section 2 of that Act or to any provision of the said section 2 shall be construed as a reference to that Act, to that section or to that provision thereof, as the case may be, as amended by this section.

3. At the end of paragraph (*b*) of subsection (1) of section 2 of the Domestic and Appellate Proceedings (Restriction of Publicity) Act 1968 (restriction of publicity for certain proceedings) there shall be inserted the word "and" and the following paragraph shall be added at the end of that subsection—

"(*c*) proceedings under section 6 of the Matrimonial Causes Act 1969 (which relates to proceedings by a wife against her husband, or by a husband against his wife, for financial provision) and any proceedings for the discharge or variation of an order made under that section or for the temporary suspension of any provision of any such order or the revival of the operation of any provision so suspended".

Schedule 2

1. This schedule merely effects minor and consequential amendments to legislation not repealed by the Bill.

2. Paragraph 1 relates to continuing provisions in the Matrimonial Causes Act 1965, paragraph 2 to provisions of the Act of 1967 (which conferred divorce jurisdiction on the county courts) and paragraph 3 to provisions of the Domestic and Appellate Proceedings (Restriction of Publicity) Act 1968 (which restricted the publicity which could be given to, *inter alia*, matrimonial proceedings).

Section 35

SCHEDULE 3

REPEALS

PART I

Repeals arising out of Part I of this Act

Chapter	Short title	Extent of repeal
1965 c.72.	The Matrimonial Causes Act 1965.	Section 15, except in relation to proceedings for restitution of conjugal rights. Sections 16, 17, 18 and 19. Section 20(1) and (2). Sections 22, 23, 24 and 25. In section 29(2), the words from " section 16(1) " to " 20(1) ". Section 30(2). Sections 31, 32 and 33. In section 34, in subsection (1), paragraphs (*a*) and (*b*) and the words from " and in any " to the end, subsections (2), (3) and (5), in subsection (6) the words from the beginning to " 18; and " and subsection (7). Section 35. In Schedule 1, paragraphs 5, 6, 7, 9, 10 and 11.
1966 c.35.	The Family Provision Act 1966.	In section 5(3), the words "section 25(1) and in ".
1968 c.36.	The Maintenance Orders Act 1968.	In the Schedule, the entry relating to the Matrimonial Causes Act 1965.
1969 c.46.	The Family Law Reform Act 1969.	Section 5(3).
1969 c.	The Divorce Reform Act 1969.	In Schedule 1, paragraphs 4, 5, 6, 7, 9 and 10.

The repeals in this Part of this Schedule are made subject to the provisions of section 26 of, and Schedule 1 to, this Act.

Schedule 3

This schedule makes the repeals consequential on the provisions of the Bill. For convenience it is divided into two Parts corresponding to the two operative Parts of the Bill.

PART II

Repeals arising out of Part II of this Act

Chapter	Short title	Extent of repeal
24 & 25 Geo. 5. c.41.	The Law Reform (Miscellaneous Provisions) Act 1934.	In section 1(1) the words from " or seduction " to the end.
12 & 13 Geo. 6. c.51.	The Legal Aid and Advice Act 1949.	In Part II of Schedule 1, paragraph 1(*d*).
1965 c.72.	The Matrimonial Causes Act 1965.	In section 20, subsection (3) except in relation to a case where the death occurred before the commencement of this Act and subsection (4). In section 41, subsection (1), subsection (2), except in relation to the trial of a claim made before the commencement of this Act and subsection (3), except in relation to damages recovered on a claim so made.

EXPLANATORY NOTES

APPENDIX II

EXTRACTS FROM WORKING PAPER No. 9

MATRIMONIAL AND RELATED PROCEEDINGS—FINANCIAL RELIEF

25th April 1967

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

[44] *Eastland* v. *Burchell* (1878) 3 Q.B.D. 432.

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 section 22 of the Act). That is because section 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 section 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 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 paragraph 108 below.

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[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 275.
[47] *Biberfeld* v. *Berens* [1952] 2 Q.B. 770, C.A.
[48] *Deare* 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, [1955] 1.Q.B. 575.
[50] *Cale* v. *James* [1897] 1 Q.B. 418.

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 husband in necessitous circumstances. Its effectiveness has been further diminished by legislative tinkering, as illustrated by section 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 10s. 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 paid the bills, the tradesman may go on supplying goods until

[51] In *Nabarro & Sons* v. *Kennedy*, *supra*, [1954] 2 All E.R. at 606 G and H.
[52] See para. 108.
[53] *Supra*.
[54] [1947] 1 All E.R. 425.
[55] *Supra*.

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 paragraph 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 section 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 section 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 section 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 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 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

[56] ss. 16(1), 19 and 20. [Matrimonial Causes Act 1965.]

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 paragraph 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 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.

Costs—Agency of necessity

108. 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

[20] Paras. 41–52.

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 section 2(2)(*e*) of the Legal Aid and Advice Act 1949 . . . . 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. The doctrine is, in this field at any rate, an unnecessary and embarrassing anachronism.

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

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[21] [1966] P.1.

[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, [1955] I.Q.B. 575.

[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.

[42] s. 41(1). [Matrimonial Causes Act 1965.]

[43] s. 41(2).

[44] s. 41(3).

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, domicile in England is unnecessary; the action is treated as one in tort.[50]

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 the 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

[45] *Re Muirhead* (1876) 2 Ch. D. 22, C.A.
[46] [1920] P. 126.
[47] [1967] P. 195, C.A.
[48] [1923] P. 142.
[49] Law Reform (Miscellaneous Provisions) Act 1934, s. 1(1).
[50] *Jacobs* v. *Jacobs & Ceen* [1950] P. 146.
[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).

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 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, 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

[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.

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 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:

[58] The Gorell Commission: Cd. 6478, paras. 393–395.

(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.

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 benefit of the children. This is expressly recognised in the case of settlements (section 17), periodical payments (section 22) and variations of maintenance agreements (sections 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 section 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 section 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 section 34(3) though it does not expressly say so.

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.

[81] *Northrop* v. *Northrop* [1966] 3 W.L.R. 1193. [Now [1968] P. 74, D.C. & C.A.].
[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.

158. In addition to section 34, which applies where there are matrimonial proceedings section 35(2) incorporates by reference section 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 section 32, enabling the court to set aside transactions, apply to transactions designed to defeat claims of the children under sections 34 and 35. Nobody reading section 32 alone would realise this, for these sections are not listed among the " relevant provisions of this Act " as defined in section 32(4). However, section 32 is in fact made to apply by virtue of sections 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

[86] Income Tax Act 1952, s. 205, as amended.
[87] Para. 75.
[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.

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 section 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 sections 24–25.[95] A guardian appointed to act jointly with a surviving parent or to the exclusion of a 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. Sections 17 (settlements) and 21(3) (settlements, etc. of wife's property on decree for restitution of conjugal rights) relate to "children of the marriage". Sections 22 and 35(2) (neglect to maintain: periodical

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

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 section 46(2) the term " child of the marriage " includes a child adopted by both parties to the marriage. Section 23, defining " child of the marriage " for the purpose of sections 23–25 (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 sections 33 and 34 (care and maintenance of children) refer to " relevant child " and section 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 ".

Section 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 sections 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 sections 23–25 is undefined by section 23(2). Three interpretations are possible: it could mean adopted in accordance with English (internal) law;[1] or it could perhaps mean adopted whether legally or informally; or it could mean adopted according to the law of the domicile 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 domicile. In the light of the recent Hague Convention,[3] the " habitual residence " of the adopter may be a better test than domicile.[4]

[97] s. 22(2).

[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.

[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 (1965) Cmnd. 2613; 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.

167. For the purposes of all sections save sections 17 and 21(3) " child " also includes an illegitimate child of both parties to the marriage.[5] And, finally, for the purposes of sections 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 sections 22 and 35(2).[8] Moreover, even when the most extensive definition applies, the law 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 sections 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

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[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. [Now [1968] P. 39].

[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.

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

175. ...Three courts [the magistrates' court, the county court and the High

[9] *Le Mare* v. *Le Mare* [1961] P. 10.

Court] have jurisdiction under [the Guardianship of Infants Acts 1886–1925]. 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. 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 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 section 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.

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:

[Footnotes 10 and 11 omitted]
[12] Matrimonial Proceedings (Magistrates' Courts) Act, s. 16(1).

(*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.

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,

[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 three 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 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

[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.
[22] 1956; Cmd. 9854, 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.

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 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

[24] H.M.S.O. 1966, paras. 95–102.

[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.

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 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 section 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. If existing rights under section 26 were extended, the position of the ex-wife would be improved, but only to a limited extent.

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 therefore, 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 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 argued, 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.[27]

[27] 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.

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 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.

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. 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[28] 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.

[28] [Now the Matrimonial Homes Act 1967.]

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