

William & Mary Law Review

Volume 8 (1966-1967)
Issue 4

Article 6

June 1967

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THE PROBLEM OF FAMILY LAW REFORM IN ENGLAND

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The setting up of the Law Commission in England in 1965¹ began an era of massive and systematic reform of the law. It is not quite certain as yet whether codification² will be the end product of this process but it is reasonably clear that a concentrated effort is being made to bring the law up to date. This is not to say that the law has been static. Indeed there has been a steady contribution both by the Legislature and the Judiciary, but whilst the former indulged in sporadic and fragmentary legislation the latter confined itself to a creative activity within the doctrine of precedent. English Judiciary, unlike the United States Supreme Court, even at the level of the House of Lords, has always been rather reluctant to take policy-making decisions or champion great social causes but has never been afraid of being instrumental in the adaptation of the law to the needs of the changing society. American³ critics may well see fault in this attitude of the English Judiciary but it seems that, in the light of British politics, the Judiciary knows its role even though the principle of separation of powers does not emerge quite clearly from the unwritten constitution. With us Parliament holds the key to any major reform of the law although naturally there are also other forces at work.

Ten years have already elapsed since the ponderous Report of the Royal Commission on Marriage and Divorce⁴ which might have initiated an era of reform of family law. As no fundamental changes have taken place to date it seems appropriate to consider the experience of the last

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1. Law Commissions Act, 1965, 13 Eliz. 2, c. 22, Lord Chorley and G. Dworkin. The Law Commissions Act, 1965, 28 Mod. L. Rev. 675 (1965).

2. Codification was doubted by Sir Leslie Scarman, the Chairman of the Law Commission in his address to the Faculty of Law at the University of Birmingham; Sol. J. Oct. 28, 1966, p. 798.

3. E.g., Davis, *The Future of Judge-Made Public Law in England; A Problem of Practical Jurisprudence*, 61 Col. L. Rev. 201 (1961).

4. 1956, Cmd. 9678, cf. Kahn-Freund, *Divorce Law Reform*, 19 Mod. L. Rev. 573 (1956). McGregor, *The Morton Commission: A Social and Historical Commentary*, 7 BRITISH JOURNAL OF SOCIOLOGY 171 (1956).

decade in order to pin-point the problems involved and the solutions found and proposed. Hence this article.

I. HUSBAND AND WIFE

The Legal Concept of Marriage

Historically and juridically the English law of marriage is an heir to Canon Law of the Church of Rome. In spite of the Reformation and the rejection of the decrees of the Council of Trent,⁵ ecclesiastical courts administered the pre-tridentine law of the Church of Rome and retained their jurisdiction until the 19th century reforms.⁶ However, secularization did not wipe out religious influence⁷ altogether and the civil form of marriage became merely facultative.⁸ Religious ceremony is to this day predominantly⁹ resorted to and it remains a vital element in the doctrine of the common law marriage.¹⁰

In most systems of law procreation of children is regarded as an essential, primary function of marriage. This indeed was the sentiment in England¹¹ until the momentous decisions of the House of Lords in 1947¹² and 1948.¹³ The question arose whether the persistent use of contraceptives rendered the marriage voidable for non-consummation. The House of Lords held that it did not as the procreation of children is not the principal end of marriage in the eyes of English law.¹⁴

The sharp shock administered by the House of Lords to the established concept of marriage must in the long run affect the general attitude to divorce and nullity on the ground of impotence or wilful refusal to consummate the marriage, although immediate effects are still difficult to gauge. One can prognosticate, as can be seen from practice, an increase in petitions for divorce on the ground of cruelty arising from

5. 1545-1653; cf., G. H. JOYCE, *CHRISTIAN MARRIAGE* 123 *et seq.* (1948).

6. In particular, Matrimonial Causes Act of 1857, 20 & 21 Vict., C. 85, which introduced judicial divorce.

7. Cf., Hargrove, *Some Religious Factors in Family and Welfare Law*, CURRENT LEGAL PROBLEMS, 121 (1961).

8. Since the Marriage Act of 1836, 6 & 7 Will. 4, C. 85.

9. E.g., it is estimated that out of the total of some 347,000 marriages in 1961 only some 97,000 were registry marriages.

10. R.v. Millis, [1944] 10 Cl. & Fin. 534; *Taczanowska v. Taczanowski*, [1957] P.301; [1957], 2 All E.R. 563 (C.A.); cf., Andrews, *The Common Law Marriage*, 22 MOD. L. REV. 396 (1959).

11. 17 ENCYCLOPAEDIA BRITANNICA 753 (11th ed.).

12. *Weatherley v. Weatherley*, [1946] 2 All E.R.1 (C.A.); [1947] A.C.628 (H.L.).

13. *Baxter v. Baxter*, [1947] 2 All E.R.886; [1948] A.C.274 (H.L.).

14. Cf., Gower, *Baxter v. Baxter in Perspective*, 11 MOD. L. REV. 176 (1948).

sexual maladjustment and a decrease in petitions for nullity. This tendency may well lead to a confusion between nullity of marriage and divorce and thus pave the way for a solution accepted in several American states where sexual maladjustment may be a ground of either nullity, or divorce,¹⁵ or divorce only.¹⁶

A more liberal attitude towards Christian marriage seems paralleled by an equally liberal attitude towards polygamy, that is polygamy valid in accordance with the English rules of the conflict of laws. Here, however, recognition of the polygamous marriage operates only in respect of certain legal aspects. A new era began shortly after World War II with the recognition of polygamous marriages¹⁷ contracted in India as a bar to subsequent marriages contracted in England on the ground of *impedimentum vinculi*. As a bar to lawful marriage polygamy achieved equality with Christian marriage.

A concession to polygamy was granted by legislation.¹⁸ Accordingly, spouses who have lawfully contracted a polygamous marriage in accordance with their (foreign) personal laws may be admitted to welfare state benefits¹⁹ on condition, however, that they do in fact practice monogamy. This does not mean that polygamy has become legally respectable in England, but simply that the welfare state extends a benevolent hand to *de facto* marriages.

As regards the general effects of polygamy the courts prefer to avoid the issue as far as they can, confining their decisions to specific claims involved.²⁰

In the field of matrimonial causes the theory that the machinery of the administration of justice is geared to the monogamous concept of marriage seems to founder. English courts cannot be resorted to in order to dissolve²¹ even a potentially polygamous marriage contracted abroad as long as the parties remain subject to a foreign law. This principle

15. Arkansas, Georgia, North Carolina, Virginia.

16. Alabama, Alaska, Arizona, California, Colorado, Florida, Illinois, Indiana, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah, Washington, Wyoming.

17. *Scrini Vasan v. Scrini Vasan*, [1946] P.67; *Baindail v. Baindail*, [1946] P.122.

18. Family Allowances and National Insurance Act of 1956, 4 & 5 Eliz.2.c.50; now National Insurance Act of 1965, 10 & 11 Eliz.2.c.51, § 3.

19. *Iman Din v. National Assistance Board*, sol. jo. Dec. 2, 1966, p. 906.

20. *E.g.*, *Mawji v. R.*, [1957] A.C.126 (P.C.)—conspiracy to commit crime; *Coleman v. Shang alias Quartey*, [1961] A.C.481 (P.C.)—widow's rights of inheritance.

21. *Ohochuku v. Ohochuku*, [1960] 1 All E.R. 253.

was applied to a suit for judicial separation and maintenance²² by an African party to a potentially polygamous marriage. However the court did assume jurisdiction in a more recent case²³ involving a petition for nullity of marriage. The parties, who were Egyptian Jews capable of a polygamous union if the wife did not produce a child within ten years of the marriage, were allowed to argue the validity of the marriage on the ground that they had become domiciled in England, and that the husband was no longer permitted to take a second wife as his wife had fulfilled the condition which turned their potentially polygamous union into a monogamous one. On the other issue involved, namely whether the marriage should have been annulled on the ground of consanguinity, the wife being a niece of the husband, the court decided in the negative, although by English domestic law²⁴ the parties were incapable of marrying each other. It seems that a subsequent acquisition of an English domicile is capable of converting a potentially polygamous union which is *de facto* monogamous, into one which is *de jure* monogamous so as to enable an English court to assume jurisdiction.²⁵ Yet having assumed jurisdiction in the case cited above the court held that a divorce could not be granted on the grounds of desertion and cruelty committed at the time when the marriage was polygamous.

Conversion of a monogamous marriage into a polygamous one appears less readily acceptable. But in a case²⁶ which started off with a monogamous ceremony in England between an English woman and an Egyptian and drifted into several marriages and divorces both of a Christian and Moslem type in Egypt, this became inevitable. Less convincing was the decision of the Privy Council²⁷ which sanctioned the husband's capacity to take several wives upon his conversion to the Moslem religion. Although the effects of this case are limited to Ceylon, whose marriage laws are adapted to the religious beliefs of the parties, its likely repercussions in England are not difficult to imagine. Thus a woman domiciled in England whose husband goes to Ceylon, and there having embraced the Moslem faith takes another wife, may either remain

22. *Sowa v. Sowa*, [1961] 1 All E.R. 687 (C.A.).

23. *Cheni v. Cheni*, [1962] 3 All E.R. 873.

24. Marriage Act of 1949, § 1 (i) and schedule I.

25. *Ali v. Ali*, [1965], *TIMES*, Dec. 21; followed in *Mirza v. Mirza*, Sol. J. Sept. 16, 1966, p. 708.

26. *Russ (or se Geffers) v. Russ* (*Russ or se De Waele* intervening), [1962] 3 All E.R. 193 (C.A.).

27. *Atty. Gen. of Ceylon v. Reid*, [1965] 1 All E.R. 812 (P.C.); [1965] A.C. 720.

without a remedy or claim a divorce on the ground of "adultery" of her husband with his "lawful" wife.

The subtle distinction between matrimonial causes and other matters enabled the court to decide, in a recent case,²⁸ that a dower payable under a polygamous marriage contract could be enforced in England. The parties were Mohammedans, who contracted a potentially polygamous marriage in Hyderabad and who entered into a marriage contract by which the husband was to provide the wife with deferred dower, payable on his death or in the event of a divorce. The court found the husband's obligation to be of a contractual nature and exercised jurisdiction on the assumption that there was no claim for matrimonial relief but a claim of a pecuniary nature which under the Indian Code could be pursued by civil action without matrimonial proceedings.

The intrusion of polygamy has fashioned a certain development of the conflict of laws which cannot remain indifferent to persons domiciled in England. In the absence of a statutory system of the conflict of laws the problem has become one of urgent law reform. Yet neither the Law Commission nor writers have so far directed their attention to this situation.

On the criminal side of the law the traditional²⁹ view that only monogamy may constitute the basis for the prosecution for bigamy has been upheld.³⁰ A Hindu party to a polygamous marriage contracted in India was acquitted on a charge of bigamously marrying an English woman in England, although in the light of the previous decisions³¹ he was barred from contracting another marriage. The logic of this decision seems indefensible, and the discrepancy between civil law and criminal law is hardly commendable in this respect. However, one can, it appears, defend the decision as being consistent with the principle of restrictive interpretation of penal law, and as corresponding to the spirit of the relevant statute³² enacted at the time of total disregard of polygamy.³³ If the decision is correct the penal statute involved must be out of date.

28. *Shahnaz v. Rizwan*, [1964] 2 All E.R.993.

29. *Warrener v. Warrener*, [1835] 2 Cl.&F.488; *Harvey v. Farni*, [1880] 6 P.D.35; *R. v. Naguib*, [1917] 1 K.B. 359.

30. *R. v. Sarwan Singh*, [1962] 3 All E.R.612.

31. *Supra* note 17.

32. Offences against the Person Act of 1861, 24 and 25 Vict.c.100.

33. *Hyde v. Hyde*, [1866] L.R. 1 P.&D.130.

Nullity of Marriage

A series of recent cases exposed, at least in the opinion of the present writer,³⁴ a substantial flaw in the English law of nullity of marriage in so far as the law (or perhaps the Judiciary) has closed the door to the doctrine of validation of marriage, and further accentuated the irrational distinction between void and voidable marriage.

Taking the second point first:—The distinction between a void and a voidable marriage, for which there seems to be neither historical nor logical explanation,³⁵ is firmly entrenched in English law and only legislation can remedy the position. A marriage is void on the ground of nonage (i.e., either party being under 16 years of age at the time of the ceremony), a subsisting valid marriage, prohibited degrees of consanguinity or affinity, adoption and absence of consent of the parties. It is voidable on the ground of impotence of either party, wilful refusal to consummate the marriage, unsoundness of mind or mental disorder, venereal disease in communicable form and, in the case of the husband petitioner, pregnancy of the wife by another man. A marriage is, of course, invalid if the prescribed formalities are not observed, but in the case of minor irregularities the defect may be cured by the Secretary of State for Home Affairs under statutory authority.³⁶

In the case of a void marriage³⁷ (it seems quite incorrect to speak of a "marriage" in such a situation) the union has no legal effect whatsoever, and can be repudiated by either party without the necessity of a court decree. The contract is void *ab initio* but the courts have, as far as possible, endeavoured to mitigate the harshness of this rule.³⁸

In the case of a voidable marriage the union cannot be repudiated unilaterally by either spouse, but must be formally annulled by a court order. However, the judgment does not operate *ex nunc*, as is the case with divorce, but is retrospective in accordance with a fiction that the parties, no matter how long they have in fact lived together, have to be regarded as never having been married. Apart from being absurd this legal fiction clearly stands in a sharp contrast to the doctrine of *de facto*

34. Lasok, *Approbation of Marriage In English Law and the Doctrine of Validation*, 26 MOD. L. REV. 249 (1963).

35. Newark, *The Operation of Nullity Decrees*, 8 MOD. L. REV. 203 (1945).

36. Marriage Validity (Provisional Orders) Acts of 1905 and 1924.

37. Cohn, *The Nullity of Marriage*, 64 LAW QUART. REV. 524 (1948); Tolstoy, *Void and Voidable Marriages*, 27 MOD. L. REV. 385 (1964).

38. E.g., *Shaw v. Shaw*, [1954] 2 ALL E.R. 638 (C.A.)—a "widow", who on the death of her "husband" discovered that she was a party to a bigamous marriage, was allowed to recover against the estate on the ground of "breach of promise to marry".

marriage evolved during World War II to bring relief to the members of illicit unions of the men serving their country and extended later under the impact of social legislation, which admits concubinage to most benefits of the welfare state.

The artificial distinction between void and voidable marriages has long been under attack and the Royal Commission on Marriage and Divorce has recommended³⁹ that the distinction be abolished, and the effects of a decree of nullity be assimilated to the effects of divorce as indeed is the case in most European countries. More recently the Chairman⁴⁰ of the Law Commission suggested a simplification of the law urging that a voidable marriage "would be far better dealt with under divorce", as is the case in New Zealand.

Far more intricate and complex is the question of validation of defective marriages. English law, it is true, subscribes to the doctrine of marriage by repute⁴¹ and claims to adhere to the maxim *semper prae-sumitur pro matrimonio*, but at the same time allows nullity to operate automatically and capriciously when an extent defect has been revealed.

English law is destitute of any positive device (except, of course, the repetition of the ceremony) to enable the parties to a defective union to raise it to the status of marriage by approval or ratification. As long as they acquiesce in their defective marriage they live under the threat of the law of nullity which can be put into motion at random by either of them. If anyone of them desires to defend the marriage he can rely only on adjective law which does not cure the defect but simply bars the remedy of the other. In order to achieve this he must attack the sincerity of the petitioner or to rely, in other words, on the plea of approbation or insincerity. He is, however, by no means sure of the outcome because the law is not based on statute but on precedent and precedents, as we shall soon observe, offer in this branch of the law an unreliable guide.

It has been said that the doctrine of approbation (or insincerity or estoppel, as the plea is sometimes referred to) is derived from the decision in the House of Lords in *G.v.M.*,⁴² in which the respondent wife in answer to her husband's petition for divorce successfully sued for nullity on the ground of his impotence. The dictum of Lord Shelborne

39. REPORT, paras. 88, 89.

40. SCARMAN, FAMILY LAW AND LAW REFORM 13 (1966).

41. Re Taylor *dec'd.*, [1961] 1 All E.R.55 (C.A.).

42. [1885] 10 App. Cas. 171.

that a party forfeits his right to relief if he has . . . "with a knowledge of the facts and of the law, approbated the marriage . . . or has taken advantages and derived benefits from the matrimonial relation"⁴³ . . . " has been accepted as the classic statement of the law, although it seems that this merely expounded the doctrine of insincerity defined by Lord Stowell in a much earlier case."⁴⁴

Of the older precedents only *Aldridge v. Aldridge*,⁴⁵ where it was held that an agreement to live apart and not sue each other constituted an approbation of a marriage unconsummated because of the incapacity of the wife, deserves to be cited. Indeed for some 50 years the courts had little opportunity to consider the plea of approbation until the whole series of cases recently had focused the attention on this point. Of these we shall consider only the leading ones.

In *Scott v. Scott* (orse Fone)⁴⁶ a "marriage for companionship" between two middle-aged persons was upheld on the ground that the husband had accepted the marriage for what it was worth. Similarly in *Morgan v. Morgan* (orse Ransom)⁴⁷ an ante-nuptial agreement excluding sexual intercourse between the spouses debarred the husband from obtaining a decree of nullity on the ground of his own impotence although the parties never lived together.

In *W.v.W.*⁴⁸ the Court of Appeal, reversing the judgment of the court below, decided that adoption of a child jointly by the spouses constituted an approval by the husband of the marriage unconsummated because of the incapacity of the wife. However, a distinction was made in *R.E.L. (Orse R.) v.E.L.*,⁴⁹ where the wife, although artificially inseminated with her husband's seed, made it categorically clear that for her normal sexual intercourse was a vital part of the marriage and thus never approbated her unconsummated marriage.

Artificial insemination by a donor and adoption of a child did not, in the opinion of the Court of Appeal, amount to approbation in the case of *Slater v. Slater*.⁵⁰ The judge of the first instance thought that there was approbation on the part of the wife and refused the decree, but the Court of Appeal decided otherwise having distinguished the judg-

43. *Id.* at 186.

44. *Briggs v. Moran*, [1820] 2 Hagg. Con. 321.

45. [1888] 13 P.D.210.

46. [1959] P.103.

47. [1959] 1 All E.R.539.

48. [1952] 1 All E.R.858; [1952] P.152 C.A.).

49. [1949] P.211.

50. [1953] 1 All E.R. 246; [1953] P.235.

ment in *W.v.W.* on the ground that the petitioner did not know the law at the time of the adoption of the child. A similar premium on the alleged ignorance of the law was put in *Q.v.V.*,⁵¹ where artificial insemination by a donor, to which the husband consented, was held short of approbation of the marriage by the wife.

Birth of a child by *fecundatio ab extra* to a wife incapable of consummation was not held to be a bar in cases⁵² where the husband in his answer to a petition for divorce brought by his wife on the ground of his adultery successfully cross-petitioned for nullity on the ground of her incapacity. One might argue that such a decision should be contrary to public policy, but it was also held that there was no bar to a nullity decree on the ground of wilful refusal to consummate in spite of the fact that a child was born as a result of ante-nuptial intercourse and the suit was brought seventeen years after the celebration of the marriage.⁵³

The doctrine of approbation may also be pleaded in cases where a party, in order to obtain some advantage, insisted on the validity of the marriage in previous proceedings. Thus in *Tindall v. Tindall*⁵⁴ the Court of Appeal dismissed the wife's suit for nullity in answer to her husband's petition for divorce because of her previous action for alimony. The court held that it would be inequitable as between the parties and contrary to public policy to allow the wife to question the validity of the marriage after she had asserted its existence. Even a passive conduct in proceedings, postulating the existence of the marriage, may be construed as approbation as shown in *Woodland v. Woodland*.⁵⁵ Thus a respondent in an uncontested suit for restitution of conjugal rights could not dispute the validity of the marriage when faced with a decree ordering him to resume cohabitation.

Prior knowledge of the defect does not necessarily mean approbation. In *Nash v. Nash*⁵⁶ the bride of a seventy-four year old man was not prevented from obtaining a decree of nullity on the ground of her husband's impotence although in the circumstances of the case she must have been aware of his potentialities. Similarly in *J.v.J.*⁵⁷ the Court of Appeal, reversing the judgment of the court below, held

51. *TIMES*, May 12, 1960.

52. *Clarke (orsee Talbot) v. Clarke*, [1943] 2 All E.R.540: C.v.C., [1960] *TIMES*, July 12.

53. *Dredge v. Dredge (orsee Harrison)*, [1947] 1 All E.R.29.

54. [1953] P.63 (C.A.).

55. [1928] P.169.

56. [1940] P.60.

57. [1947] 2 All E.R. 43 (C.A.).

that a wife who went through a ceremony of marriage fully aware that a few weeks before, contrary to her wishes, the husband went through an operation rendering him sterile, did not in fact approbate the marriage. Moreover the court took a lenient view of the delay of eleven years in bringing her petition because, it was said, she was ignorant of the law at the relevant time. The decision of the Court of Appeal is manifestly inconsistent with the doctrine of *Baxter v. Baxter*,⁵⁸ and indeed it was criticised on that ground,⁵⁹ but it remains an example of an erratic attitude towards approbation.

Mere delay in bringing the suit will not necessarily prove fatal to the action in spite of the fact that the parties had lived together and in a sense must have, at least during cohabitation, approbated the marriage. No matter how long the delay it will be disregarded if the party charged with approbation is capable of explaining his tardiness. Thus the delay of eleven⁶⁰ years, twelve⁶¹ years, thirteen⁶² years, fourteen⁶³ years, fifteen⁶⁴ years, sixteen⁶⁵ years, seventeen⁶⁶ years, twenty-one⁶⁷ years, twenty-four⁶⁸ years, twenty-eight⁶⁹ years, and thirty-three⁷⁰ years from the date of the marriage made no appreciable impression upon the courts who in none of the above mentioned cases considered the parties to have approbated their marriage. The last case in this assembly is quite significant as the court allowed the husband to repudiate his marriage on the ground of the wife's refusal to consummate although apparently during the twenty-seven years of uninterrupted cohabitation he was satisfied with the services and companionship of his wife and never seriously claimed his full matrimonial rights. On retirement, in the autumn of his life, pleading ignorance of the law (although by virtue of his profession he was frequently working with lawyers) he managed to overcome his wife's

58. *Supra* note 13.

59. Per Lord Jowitt in *Baxter v. Baxter*, *supra* note 13 at 891.

60. *W. v. W.* (1961) *TIMES*, Feb. 14.

61. *Pollard v. Wyburn*, [1828] 1 *Hagg*.725.

62. *G. v. G.* (*orse H.*), [1960] 3 *All E.R.*56.

63. *Lewis v. Hayward*, [1866] 35 *L.J.P. & M.*105 (*H.L.*).

64. *Clarke v. Clarke*, *supra* note 52; *S. v. S.* (*orse W.*), [1962] 2 *All E.R.*816 (*C.A.*).

65. *Sparrow v. Harrison*, [1841] 3 *Curt.* 27.

66. *S. v. B.* (falsely called *S.*), [1905] 21 *T.L.R.* 219; *Dredge v. Dredge*, *supra* note 53.

67. *Castleden v. Castleden*, [1861] 9 *H.L. Cas.* 185.

68. *Dicker v. Dicker* (*orse Parris*), [1959], *TIMES*, Nov. 10.

69. *C. v. C.*, [1961], *TIMES*, Oct. 31.

70. *Notley v. Notley*, (*orse Roberts*), [1960], *TIMES*, Nov. 4.

plea that over all these years he had, in fact, acquiesced in the marriage.

The extraordinary success of the plea of ignorance of the law seems to have reached the high water mark and is likely to recede in the light of the judgment of the Court of Appeals in *Pettitt v. Pettitt*.⁷¹ In that case the husband's suit on the ground of his wife's impotence was rejected, not so much because of the delay of twenty years, but because of the circumstances and his intention of marrying another woman.

It is evident from the preceding cases that the doctrine of approbation has been limited to the narrow confines of impotence and wilful refusal to consummate the marriage. It cannot be extended any further because by statute⁷² suits for nullity on the ground of unsoundness of mind or mental disorder, venereal disease or pregnancy *per alium* must be brought within a year from the date of the marriage.

Approbation is ineffective in the case of void marriages for these being void *ab initio* cannot, in the eyes of English law, be ratified by the parties. Dicta to the contrary⁷³ do not seem to derogate from the principle no matter how unsatisfactory this broad rule may be in practice. An attempt⁷⁴ to do so in the case of a bigamous marriage (which in fact ceased to be *bigamous* because the first husband was presumed to be dead at the time of the second marriage) was reprobated in a later case⁷⁵ as contrary to principle. However this principle can hardly command respect in the case of a void marriage for non-age as clearly demonstrated in two recent cases. In *Burleigh v. Burleigh*⁷⁶ the marriage, which gave life to four children, was declared a nullity after twenty-nine years of uninterrupted cohabitation on the ground that the wife was under age at the time of the ceremony. The same was decreed in *Chambers v. Chambers*⁷⁷ where cohabitation, resulting in five children, had lasted for sixteen years. Before 1929 such a situation might have put into operation the doctrine of approbation as under the then existing law nonage rendered the marriage voidable, and the canonical doctrine of validation could have been invoked.

71. [1962] 3 All E.R.37 (C.A.); cf., *Mogridge v. Mogridge*, Sol. J. 1965, p. 8, 414.

72. Matrimonial Causes Act of 1950 § 8(1), re-enacted in Matrimonial Causes Act of 1965, § 9(2) (b).

73. In *Valier v. Valier*, [1925] 133 L.T. 830 (832).

74. *Bullock v. Bullock*, [1960] 2 All E.R.307 (310).

75. *Hayward v. Hayward*, [1961] 1 All E.R.237.

76. [1960] DAILY TELEGRAPH, Nov. 1.

77. [1961] DAILY TELEGRAPH, Jan. 11.

However Parliament,⁷⁸ somewhat thoughtlessly, decreed that nonage must render the marriage void as if maturity could not be attained in the marriage bond.

In the field considered above English law is out of step with modern European systems of law which, in their solicitude for stability and certainty of the legal status of marriage, do not allow the law of nullity to operate mechanically; insist that petitions for nullity must be brought promptly so that the parties may start afresh in the prime of their lives and; following Canon Law,⁷⁹ allow defective marriages to be validated by operation of law and ratification by the parties' conduct in cases where the original impediment has ceased to be effective and the parties have, through their spontaneous cohabitation, demonstrated that they themselves regarded their marriage as binding. Moreover, the evolution of the continental European laws shows a clear distinction between the juristic concept of nullity and dissolution of marriage, the by-product of which is the relegation of impotence and refusal to consummate to the realm of divorce.⁸⁰

There is at present a very slender prospect of the law of nullity being reformed along the lines of our discussion as the Royal Commission did not consider the problem of validation of defective marriages, and only confined itself to the recommendation that wilful refusal should become a ground of divorce.⁸¹ Unfortunately, the business of unravelling of matrimonial ties has captured the imagination of the would-be reformers so much so that little interest has been left for salvage operations.

Divorce

The English system of divorce is based entirely on statute,⁸² the grounds of divorce being enumerated,⁸³ but nowhere defined, by the Legislature. English law does not count the objective criterion of "complete and irreparable breakdown" of the marriage among the grounds of divorce; and, broadly speaking, the system operates as a

78. The Age of Marriage Act of 1929, 19 & 20 Geo.5,c.36.

79. See Lasok, *supra* note 34 at 257-267.

80. However in France, West Germany and Switzerland the plea of impotence may be resorted to in suits for nullity on the ground of error.

81. REPORT, para. 89.

82. Now Matrimonial Causes Act of 1965.

83. *Id.* at § 1: adultery, cruelty, desertion, insanity and, in the case of the wife petitioner, rape, sodomy or bestiality committed by the husband.

judicial relief to the "innocent" party and a sanction for the "matrimonial offense"⁸⁴ committed by the other.

Since the burden of interpreting the laconic provisions of the statute, and of evaluating facts to fit the statutory concept of matrimonial offense has been imposed upon the courts an analysis of precedents should provide a clue to the present tendencies in this field. However, a detailed study would go far beyond the scope of this article. It may, therefore, suffice to concentrate on matrimonial cruelty as the most expansive ground of divorce. In this area the courts proved not only capable of a liberal and extensive interpretation of the law, but also embarked on what an English lawyer would hesitate to label as "judicial legislation".

It is fair to say that the whole of the law relating to cruelty is judge-made,⁸⁵ because the great task of defining cruelty in individual cases has fallen upon judicial shoulders. In the past courts postulated a narrow concept of cruelty, that is physical violence of the husband and violent and insulting behaviour of the wife.⁸⁶ Today more sophisticated criteria apply. Moreover, since cruelty appears incapable of a comprehensive definition it is often thought that there must be as many kinds and degrees of cruelty as there are shades of human conduct. Thus the judicial notion of cruelty oscillates between "grave and weighty matters",⁸⁷ on the one hand, and "conjugal unkindness",⁸⁸ on the other. Moreover, whereas in the past marriage was supposed to endure a certain amount of "wear and tear",⁸⁹ today it is more readily assumed that it will founder under the steady attrition⁹⁰ of comparatively trivial incidents. "The general rule in all questions of cruelty," said Lord Normand,⁹¹ "is that the whole matrimonial re-

84. The inclusion of insanity as a ground of divorce has undermined the doctrine of matrimonial offence.

85. Per Lord Merriman in *Simpson v. Simpson*, [1951] P.320 (326).

86. 1 BLACKSTONE, COMMENTARIES 440.

87. Per Lord Penzance in *Yeatman v. Yeatman*, [1868] L.R. 1 P. & D. 489 (494); *cf.*, *Buchler v. Buchler*, [1947] 1 All E.R. 319 (C.A.); *Barker v. Barker*, [1949] P.219; *Edwards v. Edwards*, [1950] P.9; *Cooper v. Cooper* (No. 2), [1955] P.168.

88. Per Asquith L.J. in *Buchler v. Buchler*, *supra* note 87 at 326; *cf.*, *Postlethwaite v. Postlethwaite*, [1957] W.L.R. 819.

89. *Buchler v. Buchler*, *supra* note 87, *Thompson v. Thompson*, [1957] P.19.

90. *Cf.*, *Kelly v. Kelly*, [1869] L.R. 2 P. & D. 31; *Bethune v. Bethune*, [1891] P.205; *Lauder v. Lauder*, [1956] P.344; *King v. King*, [1953] A.C.124; *Wright v. Wright*, [1960] P.85.

91. In *King v. King*, [1952] 2 All E.R. 584 (586) (H.L.); *cf.*, *Waters v. Waters*, [1956] 1 All E.R.432; (437); *Crawford v. Crawford*, [1956] P.195 (200).

lation must be considered, and that rule is of special value when the cruelty consists, not of violent acts, but of injurious reproaches, complaints, accusations or taunts. . . .", or, as more succinctly put by Lord Merriman,⁹² "the general picture of the married life has to be considered." With this approach it is not surprising that trivialities, when added together, are capable of making up a substantial case.⁹³

The statutory formula that the respondent must have "treated the petitioner with cruelty" may be construed as implying behaviour directly affecting the petitioner. This indeed has led to a dualist approach: i.e., that the conduct of the respondent must have "aimed at" the petitioner, whilst the other interpretations required "an intention to injure".⁹⁴ The latter led in turn to the application of the doctrine of *mens rea* with all its ramifications as if matrimonial offences were of a criminal character. Consequently, the mental element became an issue. Thus it was suggested⁹⁵ that the word "cruel" implies malignity which suggestion, if generally followed, might have considerably narrowed the scope of matrimonial cruelty. As it happened, the theory that man is presumed to intend the natural consequences of his acts⁹⁶ redirected the issue to the injurious act itself as so clearly shown in *Squire v. Squire*.⁹⁷ In that case the Court of Appeal in a majority decision, reversing the judgment of the court below, held that it was unnecessary for the husband to prove any malice or spite on the part of his wife afflicted with illness. She was cruel, although on account of her health she could hardly help it. The House of Lords followed suit⁹⁸ so much so that, as long as the petitioner can prove that he was "treated with cruelty" and suffered in consequence injury or illness, he should obtain his freedom.

This evolution reached its climax in *Gollins v. Gollins*,⁹⁹ a case of considerable publicity. The husband, an amiable but idle man, persistently failed to support his wife and children. He did not mean to hurt

92. In *Jamieson v. Jamieson*, [1952] A.C.525 (550).

93. Cf., *Matrimonial Cruelty*, 20 Mod. L. Rev. 336 (1967); Kahn-Freund, *Mental Cruelty*, 16 Mod. L. Rev. 68 (1953).

94. Per Denning L.J. in *Westall v. Westall*, [1949] 65 T.L.R. 337 (C.A.) and *Kaslefsky v. Kaslefsky*, [1951] P.38 (46), expressly disapproved by Lord Reid in *Gollins v. Gollins*, [1963] 2 All E.R.966, (968) (H.L.).

95. By Hudson J. in *Fowler v. Fowler*, [1952] 2 T.L.R. 143 (145), (C.A.).

96. *Hadden v. Hadden*, [1919], TIMES, Dec. 5; *Land v. Lang*, [1955] A.C.402 (428).
97. [1949] P.51 (C.A.).

98. In *Jamieson v. Jamieson*, *supra* note 92; cf., *Cooper v. Cooper* (No. 1), [1955] P.99.

99. *Supra* note 94; cf., L. N. Brown, *Cruelty without Culpability or Divorce without Fault*, 26 Mod. L. Rev. 625 (1963).

anybody but his conduct did affect his wife's health so that ultimately the House of Lords decided by a slender majority that he was guilty of cruelty.

The Judiciary seemed to have gone far enough so that retreat had to be sounded. In *Le Brocq v. Le Brocq*¹⁰⁰ the domineering wife of an apathetic husband was unable to convince the court that his conduct, though exasperating to her, was cruel. He was equally unsuccessful in his cross-petition on the ground of her desertion, as being barred from the bedroom (which he did not bother to enter) hardly signified desertion in a legal sense. Salmon, J. remarked that . . . "cruelty has no esoteric and certainly no artificial meaning in the law of divorce . . ." and . . . "I do not consider *Gollins v. Gollins* as having altered the law save that it gave the quietus to the doctrine that conduct in order to be cruel must be aimed at the party complaining. . .".

Le Brocq begins a series of cases in which sexual maladjustment assumed the plea of cruelty. This enabled the courts to restate the basic elements of matrimonial cruelty. Thus in *P.v.P.*¹⁰¹ the husband's abstinence from sexual intercourse due to lack of desire on his part was not regarded as cruelty notwithstanding that the wife's health was adversely affected. This approach was followed in another case¹⁰² where the petition by a wife against her undersexed husband failed on the ground that, although she was dissatisfied with his performance, it could not be said that he deliberately pursued a course of conduct calculated to injure her health. However, refusal of sexual intercourse by a reasonably healthy wife who was afraid of having a child was classified as cruelty.¹⁰³

The mental element which we have noted earlier has naturally been exploited for the purpose of defense to a charge of cruelty.¹⁰⁴ The original approach was modelled upon the construction of the *McNaughten*¹⁰⁵ Rules applicable to criminal proceedings which meant that only a person insane in a legal sense, that is a person who did not understand either the character or the quality of his acts, or one, who knew what he was doing, but did not appreciate that what he was doing was wrong, could escape the sanction of matrimonial cruelty.

100. [1964] 3 All E.R. 464 (C.A.).

101. [1964] 3 All E.R. 919.

102. *B. (L.) v. B. (R.)*, [1965] 3 All E.R. 263 (C.A.).

103. *P. (D.) v. P. (J.)*, [1965] 2 All E.R. 456.

104. Cf., Hall, *Matrimonial Cruelty and Mens Rea*, CAMB. L.J., April, 1963, p. 104.

105. *Marsh v. Marsh*, [1858] 1 Sw. & Tr. 372; *Power v. Power*, [1865] 4 Sw. & Tr. 173.

Of course today, largely under the impact of the Royal Commission on Marriage and Divorce, there is a consensus of opinion that the McNaghten Rules are quite inappropriate in matrimonial proceedings.¹⁰⁶ It follows that a party may be guilty of cruelty even though incapable of forming an intent or appreciating the effects of his acts. The courts took time to reach this conclusion¹⁰⁷ which has finally received a blessing from a small majority of the House of Lords, in the case of *Williams v. Williams*.¹⁰⁸ The history of this case is rather interesting: The wife brought a suit for divorce alleging cruelty on the part of her husband who was suffering from paranoid schizophrenia and persecuted her with persistent accusations of infidelity. The judge of the first instance rejected her petition, and the Court of Appeal¹⁰⁹ in a majority judgment confirmed the decision, thus giving effect to the husband's defense. However, the House of Lords by a narrow majority reversed in turn this judgment considering the McNaghten Rules irrelevant, and confirming that insanity provides no longer a defense to a charge of cruelty in divorce proceedings.¹¹⁰

Applying this doctrine the court went one step further relaxing the criterion of mental disorder in *Crumph v. Crump*.¹¹¹—The wife had an uncontrollable obsession with "cancer germs" which she suspected to be everywhere in the house. As a regular routine she would prepare a list of articles to be treated with germicide, and required the husband to take part in this ritual, which went on for hours. The court held her guilty of cruelty even though an excuse could be found in her mental condition which, incidentally, was far removed from insanity.

When the concept of matrimonial cruelty was still in its infancy a new branch, as it were, began developing under the impact of the notorious *Russell*¹¹² case. The husband attempted to establish cruelty on the part of his wife who accused him of homosexual practices. His suit failed but the case led to the doctrine of "mental cruelty" which we owe to the ingenuity of the courts. In the opinion of an eminent jurist¹¹³ "the distinction between physical and mental cruelty is quite

106. REPORT, para. 256.

107. *Swan v. Swan*, [1953] P.258; *Elphinstone v. Elphinstone*, [1962] 3 W.L.R. 422.

108. [1963] 2 All E.R. 994 (H.L.).

109. [1962] 3 W.L.R. 977.

110. *Supra* note 108.

111. [1965] 2 All E.R.980.

112. *Russell v. Russell*, [1897] A.C.395.

113. Sir Carleton K. Allen, *supra* note 93 at 68.

arbitrary and is made for convenience only." We may add to this observation that the doctrine of mental cruelty is a further expression of the expansionist tendency of the law of matrimonial cruelty. The most recent examples of this tendency are the cases of cruelty being inferred from the husband's "coldness"¹¹⁴ towards his wife, selfishness¹¹⁵ of the husband, the husband's platonic friendship with another woman,¹¹⁶ the husband's interest in a schoolgirl,¹¹⁷ the wife's "callousness"¹¹⁸ and the husband's insistence on his wife's tickling his feet.¹¹⁹ Although, in principle, incompatibility of temperament is irrelevant, and the judges purport to draw a line between cruelty and peculiar development of the respondent's character, one cannot help feeling that these distinctions are doomed to disappear if the present trends continue. Thus the two classic examples¹²⁰ of incompatibility would probably be decided otherwise today in the light of recent decisions.

In England drunkenness is not *per se* a ground of divorce. However, drunkenness falls into a special category as it can, in the opinion of the Court of Appeal,¹²¹ constitute a justification for leaving the dipsomaniac spouse, and thus provide a defense to the charge of desertion. It seems, therefore, that only a little more is required to equate drunkenness with "expulsive conduct" and thus enable the non-alcoholic spouse to obtain divorce on the ground of constructive desertion.

Constructive desertion,¹²² as an offshoot of cruelty, may be regarded, in spite of denials by the Judiciary,¹²³ as a judge-made ground of a divorce. Indeed the validity of the doctrine of constructive desertion may one day be disputed¹²⁴ in the House of Lords, but in the meantime precedents continue to strengthen its presence. Constructive desertion may be described as expulsive conduct which on the one hand

114. *Gibson v. Gibson*, [1963] DAILY TELEGRAM, March 14; *Stroud v. Stroud*, [1963], *ibid.* March 30.

115. *Simpson v. Simpson*, [1951] P.320; *Hanson v. Hanson*, [1964] TIMES, March 10.

116. *Windeat v. Windeat*, [1963] DAILY TELEGRAM, Feb. 22.

117. *Charman v. Charman*, [1963] DAILY TELEGRAM, June 1.

118. *Poupart v. Poupart*, [1963] DAILY TELEGRAM, May 18.

119. A case referred to in a debate in the House of Lords on July 19, 1963.

120. *Kaslefsky v. Kaslefsky*, *supra* note 94 (wife lazy and inconsiderate, neglected husband and child); *Bohnel v. Bohnel*, [1960] 2 All E.R.422 (effeminate husband masquerading as a woman).

121. *Hall v. Hall*, [1962] 3 All E.R. 518 (C.A.).

122. ROSEN, MATRIMONIAL OFFENSES 47-54 (2nd ed. 1965).

123. Cf., Lord Greene, M. R. in *Buchler v. Buchler*, *supra* note 89 at 29 and Lord Merriman, P. in *Long v. Long*, [1946] 62 T.L.R. 362.

124. *Dicta* in *Weatherley v. Weatherley*, [1947] A.C. 628 (632), and *Simpson v. Simpson*, *supra* note 115 at 339.

provides a justification for leaving the spouse guilty of such conduct (and thus negate desertion), and acts as an independent ground of divorce on the other. The relationship between cruelty and constructive desertion has not been fully explained to date, and doubt still exists whether a petitioner, unsuccessful on the ground of cruelty may leave the respondent and obtain a decree of divorce after the requisite three years period of separation, alleging constructive desertion by the respondent. This possibility has been denied in principle by the Judiciary¹²⁵ but practice is anything but uniform. Here perhaps the Court of Appeals¹²⁶ is largely to blame so much so that in one case the judge stated in despair that it was impossible to reconcile the authorities.¹²⁷ This is a serious indictment bearing in mind the doctrine of *stare decisis* by which the courts are bound in England.

More recent cases tend to show that what may not be cruelty can provide a defense against the charge of desertion, and thus, it can be argued, it may be construed as constructive desertion. Thus in *Young v. Young*¹²⁸ the husband was exonerated from the charge of persistent cruelty but found guilty of wilful neglect to provide maintenance for his wife and child. The wife, who refused to return to him, was not guilty of desertion as the court held that his conduct (without being cruel in the legal sense) made cohabitation virtually impossible. In *Hutchinson v. Hutchinson*¹²⁹ unjustified refusal of sexual intercourse was held to be expulsive conduct and thus a good defence to a suit on the ground of desertion. The case of *Bohnel v. Bohnel*¹³⁰ (No.2) is particularly instructive. In 1960¹³¹ the wife's suit on the ground of her husband's cruelty (following homosexual propensities the husband in secrecy from his wife used to masquerade as a woman) failed. But three years later she was successful in justifying her leaving him on substantially the same grounds.

The cases mentioned in the preceding paragraph have this in common that they show a sympathetic attitude of the courts to what one might describe as "breakdown of the marriage". Although not a ground of divorce the appreciation of a complete and irreparable dis-

125. Per Hodson J. (as he then was) in *Barker v. Barker*, [1949] 1 All E.R.247 (250).

126. Cf., *Edwards v. Edwards*, [1949] 2 All E.R. 145 (149); *Hill v. Hill*, [1954] 1 All E.R. 491.

127. *Dixon v. Dixon*, [1953] 1 All E.R.910.

128. [1962] 3 All E.R.120.

129. [1963] 1 All E.R.1.

130. [1963] 2 All E.R.325.

131. [1960] 2 All E.R.442.

ruption of the marriage seems to be the real ground¹³² on which the courts dissolve certain marriages if the facts can be brought within the scope of matrimonial cruelty or constructive desertion. This in itself is a harbinger of reform.

The legislature was not entirely idle during the period under consideration. Several measures¹³³ were adopted within the compass of the existing divorce law, and there were three significant attempts to bring about substantial changes. In 1949,¹³⁴ in connection with the Law Reform (Misc. Provisions) Bill, an attempt was made to introduce in a package deal a notion of divorce through *de facto* separation. In 1951¹³⁵ in a Private Members Bill a renewed attempt was made which, though unsuccessful, led to the setting up of the Royal Commission on Marriage and Divorce. The third attempt was made recently.¹³⁶

The latter was a mixed bag of certain measures¹³⁷ to remove obvious anomalies, and a controversial clause which purported to authorize divorce at the option of either spouse after a period of *de facto* separation. This rather revolutionary innovation, it was claimed, was necessary to alleviate hardship of the children of illicit unions who, under the present law, were doomed to be illegitimate if one of their parents was unable to obtain a divorce from his lawful spouse. As the arguments run, parents of such children, if free from the formal bonds of their defunct marriages, would marry each other, and thus improve the status of the "little ones".¹³⁸ The supporters of this Bill, of course, could not guarantee that there would be a rush into marriage by such parents, and seemed to have overlooked the fact that the law of illegitimacy may be effectively reformed without undermining the institution of marriage. However, as a price for the passing of the Bill in the House of Commons the controversial clause was removed only to be

132. Dictum of Hodson J. (as he then was) in *Barker v. Barker*, *supra* note 125 at 250.

133. Matrimonial Causes (Property and Maintenance) Act of 1958, 6 & 7 Eliz. 2.c.35; Maintenance Orders Act of 1958, 6 & 7 Eliz.2,c.39; Matrimonial Proceedings (Children) Act of 1958, 6 & 7 Eliz.2,c.40; Divorce (Insanity and Desertion) Act of 1958, 6 & 7 Eliz.2,c.54; Matrimonial Causes Act of 1963, 12 Eliz.2,c.45; Matrimonial Causes Act of 1965, 14 Eliz.2,c.

134. Hansard, H. C. 1949, col. 1245.

135. Hansard, H. C. 1951, col. 1535-6.

136. Matrimonial Causes and Reconciliation Bill, Hansard, H. C. 1963, cols. 806-884, which became the Matrimonial Causes Act of 1963, *supra* note 133.

137. E.g., amendment of the law of condonation (§ 1), collusion (§ 4), revival of condoned adultery (§ 3); desertion (to enable the parties to attempt reconciliation (§ 2)); maintenance and alimony (§§ 5 & 6).

138. Abse, *Divorce Commonsense*, THE LAWYER, 31 (1963).

restored in the House of Lords and heavily defeated.¹³⁹ The Bill, minus the clause, was duly passed into law.¹⁴⁰ One can rest assured that the matter will not end there. Indeed we witness at present a formidable discussion as to whether to adopt the breakdown principle as a comprehensive ground of divorce, or merely extend to the list of matrimonial offenses.

The possibility of adopting a comprehensive ground of divorce of a general nature has been canvassed¹⁴¹ and considered by the Royal Commission on Marriage and Divorce.¹⁴² This the Commission rejected¹⁴³ by an insignificant majority, but it was quite prepared to consider an additional ground based on the breakdown of marriage.¹⁴⁴ However, no firm recommendation emerged as the members of the Commission disagreed among themselves on the details and the rights of the parties.¹⁴⁵

The theme has recently been revived by a Study Group appointed by the Archbishop of Canterbury whose Report¹⁴⁶ purports to reflect the views of the Established Church on divorce in contemporary society. The Report goes far beyond a pastoral advice to the faithful as it grapples with the secular problem of divorce.¹⁴⁷ It begins with an analysis of the present state of the law, and concludes with proposals for a root-and-branch reform. The most significant single conclusion is that the doctrine of matrimonial offense should be swept away, and replaced by the principle of matrimonial breakdown as the sole ground of divorce. The Group oppose the idea that breakdown should become an additional ground to supplement the existing grounds. They are neither for "easy" nor for "difficult" divorce but advocate a system which would necessitate an inquest upon the marriage in question, and lead to a judgment upon its continuation. The court should be able to advise the parties, consider reconciliation and, if genuine efforts to keep the marriage alive (assuming such efforts are possible at all) fail, pronounce a formal dissolution.

139. Hansard, H. L. 1963, cols. 419-430.

140. Matrimonial Causes Act of 1963, *supra* note 133, now incorporated in Matrimonial Causes Act of 1965.

141. Bloom-Cooper, *The Broken Marriage in Divorce Proceedings*, 19 MOD. L. REV. 545 (1955); Kahn-Freund, *Divorce Law Reform?* 19 MOD. L. REV. 573 (1955).

142. REPORT, para. 69.

143. *Id.* at para. 69 (XXXIV).

144. *Id.* at para. 67.

145. *Id.* at para. 70 (VII) and 71 (I).

146. PUTTING ASUNDER, A DIVORCE LAW FOR CONTEMPORARY SOCIETY, S.P.C.K. (1966).

147. For a detailed analysis see Paulsen, *Divorce, Canterbury Style*, 1 VAL. L. REV. 43 (1967).

The acceptance of the Report would necessitate, in effect, a complete reorganisation of the machinery of justice; a switch from the adversary to inquisitorial proceedings, more detailed pleadings, more protracted hearings and, of course, an extensive assistance from skilled social workers trained for the purpose of assisting the courts and the parties. Thus this theoretically attractive solution seems in many respects unacceptable, if not impractical, to the present generation of English lawyers. A great deal of learning and research has gone into the Report including a consideration of some foreign systems. Yet an empiric study of a system which has adopted the breakdown principle would have revealed that in practice courts either rely on their discretion or search for a disruptive element, i.e., a matrimonial offense.

A reaction of the Law Commission was soon to follow, but those who expected a constructive contribution must have been disappointed. The Law Commissioners¹⁴⁸ limited themselves to an analysis of the present law, an emphatic rejection of the "Canterbury¹⁴⁹ style" of divorce proposed by the Church of England Study Group, and a consideration of the ways in which the law might be change without, however, making any specific recommendations. They singled out four major problems for the attention of the would-be reformer: encouragement of reconciliation, stable illicit unions, the injustice suffered by divorced wives and the plight of the children of broken homes. Addressing themselves to the grounds of divorce they refused to abandon the doctrine of matrimonial offence; but clearly favoured a broadening of the basis of divorce by adding breakdown, separation for two years and a qualified form of mutual consent to the existing grounds of divorce. So broad are these additions that in spite of the retention of the adversary procedure, (the Commissioners are definitely opposed to "matrimonial inquests"), their adoption might well undermine the concept of marriage as a lifelong union governed by law; and limit the practical application of the doctrine of matrimonial offense.

Less controversial, and certainly more constructive, are the suggestions to give the wife and children a more adequate financial protection to be sanctioned by a new bar to divorce in cases where no such provisions are made.

As the divorce proceedings in England are under the Legal Aid Act of

148. The Law Commission, *Reform of the Grounds of Divorce, The Field of Choice*, Cmnd. 3123, 1966.

149. Phrase coined by Prof. Paulsen, *supra* note 147.

1949, financed to a considerable extent by the taxpayer,¹⁵⁰ a reform of the procedure has also been considered by the Church of England Group and the Law Commission, but neither seems in favor of an American-style "Family Court".¹⁵¹ In the meantime a minor reform aiming at a decentralization of the divorce jurisdiction and transfer of uncontested suits to the County Courts has been put before Parliament.¹⁵²

It seems that the two Reports have accomplished as much as the Royal Commission ten years ago—a basis for further discussion. However, one cannot help sensing a mood for "easier" divorce which seems reflected in the various suggestions¹⁵³ to extend the list of matrimonial offenses, and to accept separation as a ground of divorce without guilt and recrimination.¹⁵⁴ This mood may well fashion a still more liberal attitude of the Judiciary which, after all, endeavours to dispense justice according to the trends prevailing within the society.

Personal and Property Relations

The common law fiction that husband and wife constitute one person has been for some time crumbling down under the impact of modern conditions which have emphasized the equality of the sexes, and brought about emancipation of the wife from erstwhile submission to her husband.

It seems unlikely that the Inland Revenue will abandon the fiction of unity so convenient for the collection of taxes, but other surviving relics of the past may soon vanish. These are the husband's right to claim damages for his wife's adultery, and for the loss of his wife's consortium resulting from her incapacity to perform her "wifely" duties caused by a wrongful act of another. The wife has no corresponding right in either case, and it seems that the law should either give her this right or abolish it altogether. The Law Commission¹⁵⁵ promised to look into these matters.

150. The estimated yearly cost of divorce is about 4 million pound sterling or 12 million dollars.

151. Cf., Kohut, *Family Courts and Separation Statutes: Correlatives or Non-Correlatives*, 4 T. FAMILY L. 71 (1964).

152. Matrimonial Causes Bill of 1967, details SOL. J. February 10, 1967, p. 101.

153. LAW REFORM NOW, GARDINER and MARTIN ed. (successor to THE REFORM OF THE LAW, 1951, Williams ed. 139, 140 (1963); SCARMAN, FAMILY LAW AND LAW REFORM, 17 (1966).

154. As in Australia and New Zealand.

155. Law Commissions Act of 1965, First Programme of the Law Commission, London, 1965, p. 13-14.

More conspicuous are the recent developments in the area of tortious liability between spouses, matrimonial property and maintenance.

The fiction of unity made it impossible for husband and wife to sue each other in the common law courts. Of course, there was a good reason for that in the old law because the marriage operated as a conveyance of the wife's property to the husband. As a result of the reform in 1935¹⁵⁶ the principle of the married woman's separate property was fully implemented so that marriage ceased to have any effect upon the individual property of the spouses. From this followed the principle of separate liability for the torts committed by them. However the principle applied only *vis-à-vis* third parties and not between the spouses themselves. The consequences made themselves felt particularly in the present mechanised age. Accordingly, a man would be liable in damages to his mistress for injury suffered as a result of his negligently driving a motor car (which in most cases would be paid by his insurers) whereas his lawful wife would be debarred from making any claim on him. This anomaly was wiped out in 1962,¹⁵⁷ and today a man's wife is, as far as his tortious liability is concerned, in the same position as his mistress. He has a corresponding action in respect of his wife's torts.

The law of matrimonial property seems to be in a state of ferment. The reform of 1962 was confined to claims in respect of personal injuries, and claims in respect of property remain under the regime of the old law. This is rather important because in English law property rights are asserted and defended through actions in tort.¹⁵⁸ There are no "real" actions on the pattern of Roman law *rei vindicatio* or *actio negatoria*. As actions in tort (personal injuries excepted) are not available to spouses in order to pursue their property rights against each other their conflicts in this respect, as hitherto, are subject to discretionary powers of the court under Section 17 of the Married Women Property Act of 1882.¹⁵⁹

Precedents which emerged from the application of Section 17 in practice suggest two schools of thought: the older, which insists that the judge must decide the question of property between spouses accord-

156. Law Reform (Married Women and Tortfeasors) Act of 1935, 25 & 26 Geo. 5., c. 30.

157. Law Reform (Husband and Wife) Act of 1962, 10 & 11 Eliz.2, c. 48.

158. KAHN-FREUND, *MATRIMONIAL PROPERTY LAW*, Friedman ed., 292 (1955).

159. § 17 reads: . . . "in any question between husband and wife as to the title to or possession of property, either party may apply to a judge and the judge . . . may make such order with respect to the property in dispute . . . as he thinks fit" . . .

ing to their strict rights,¹⁶⁰ and the present tendency expressed in the dictum that "cases between husband and wife ought not to be governed by the same strict considerations, but at law and equity, as are commonly applied to strangers."¹⁶¹ It follows that in doubt the judge should apply the equitable principle that "equality is equity," and divide assets on a fifty-fifty basis.

There is no difficulty where the title to property is not in issue because there the principle of the separation applies, but the main source of litigation is the conflict in respect of acquests, that is property acquired since the celebration of the marriage which is not the separate property of either spouse. The problem is wide and complicated, but the law can best be illustrated in the light of cases involving a dispute as to ownership or occupation of the matrimonial home. The problem is acute in view of the scarcity of accommodation, the relatively high value of this asset and the fact that in the modern conditions the wife, through her personal earnings, contributes towards the acquisition of the matrimonial home.

In accordance with the principle of separation the ownership is vested in the spouse who has actually purchased the property. Consequently, if the property is purchased from the earnings of the husband and is conveyed in his name he acquires the title thereto.¹⁶² If he purchases it in the name of his wife the law may presume an advancement in her favor.¹⁶³ However, such a presumption may be rebutted if it is shown, e.g., that the legal title was vested in the wife for convenience, but the real intention was that she should hold for her husband.¹⁶⁴ Such cases are rare, and difficulties arise mainly in cases where both contribute towards the purchase and the property is purchased in the name of the husband or jointly.

In *Rimmer v. Rimmer*¹⁶⁵ the house was bought in 1935, the wife having paid a deposit and the husband having borrowed the balance on a mortgage. He paid off only a part of the mortgage, and the remainder was discharged by the wife out of her own earnings. The Court of Appeal, reversing the judgment of the court below, decreed that the proceeds of the sale were to be divided equally although the wife's contributions in actual cash were greater.

160. *Kelner v. Kelner*, [1939] *Hoddinott v. Hoddinott*, [1949] 2 K.B.406 (C.A.).

161. Per Romer L. J. in *Rimmer v. Rimmer*, [1953] 1 Q.B.67 (76) (C.A.).

162. *Re Sim's Question*, [1946] 2 All E.R.138.

163. *Moate v. Moate*, [1948] 2 All E.R. 486.

164. *Mansfield v. Mansfield*, Sol. J. November 4, 1966, at 831.

165. *Id.* at 161.

In *Cobb v. Cobb*¹⁶⁶ both spouses contributed equally to the deposit. The house was conveyed to them jointly, but the husband assumed responsibility for the repayment of the mortgage whilst the wife contributed to the expense of the household. When the marriage broke down the court apportioned the respective claims on an equal basis.

The case of *Cook v. Cook*¹⁶⁷ presents a certain variation of the previous case. Here the bulk of the purchase money was raised on an insurance policy to which the wife had contributed. The conveyance was in the name of the husband only. The Court of Appeal, confirming the judgment of the court below, held that the parties were entitled to equal shares of the proceeds on sale.

More recently¹⁶⁸ the court clarified the legal position, holding that where property was purchased in the husband's name, although the purchase price was contributed by both spouses, the parties were to be regarded as tenants in common "in equity". Consequently, injunction was granted to the wife to restrain the husband from selling the property without her consent.

In *Hine v. Hine*¹⁶⁹ the house was bought in joint names but the wife provided a substantial sum, the remainder being borrowed on mortgage for which they were both jointly liable. The wife did not go out to work, and made no pecuniary contribution to the household expenses. The Court of Appeal reversing the judgment of the court below, ordered the wife to be paid the sum advanced by her and one half of the balance.

In *Wilson v. Wilson*¹⁷⁰ the Court of Appeal also ordered the division of the balance of the proceeds of sale in equal shares. The house was conveyed in joint names, but the deposit was provided partly by the husband and partly from loans. The remainder was left on mortgage for which both were responsible, but the husband alone repaid a part of the debt before the marriage came to an end. It seems that here, like in *Hine v. Hine*, the fact that there was conveyance in joint names was quite relevant.

The husband may also be entitled to a share of the proceeds of sale

166. [1955] 2 All E.R.696 (C.A.).

167. [1962] 2 All E.R.262, 811 (C.A.).

168. *Waller v. Waller*, *supra*, jo. February 3, 1967, p. 94.

169. [1962] 3 All E.R.345 (C.A.).

170. [1963] 2 All E.R.447 (C.A.); followed in *Bedson v. Bedson*, [1965] 3 All E.R.307 (C.A.).

of his wife's house as demonstrated in a recent case¹⁷¹ where it was held that he should be given some reward for work done to enhance the value of the property.

Although the wife's contribution has been recognized, it is evident from the cases cited above that her claim to a moiety would succeed only if it is impossible to apportion the respective rights exactly. Moreover, she must have made some contribution towards the purchase of the property. Her thrift, even her contribution to the household expenses, which must in turn enhance her husband's capacity to pay off the debt, count for nothing. The ancient rule that whatever she saves from the housekeeping allowance belongs to the husband¹⁷² was severely criticized,¹⁷³ but remained law until the passing of the Married Women's Property Act of 1964.¹⁷⁴ Today the economic value of the housewife's work, thrift, and care for the family is to a considerable extent recognized by the law, and she is, by statute, entitled to share the savings she makes out of the housekeeping allowance provided by her husband. This, however, does not entitle her automatically to any share in the acquets.

The question of the occupation of the matrimonial home is quite distinct from the ownership. By common law the duty of providing a home for his wife rests with the husband. She is entitled to her home by virtue of her marital rights, that is *consortium*, and as long as she does not forfeit her right to *consortium* as a result of a matrimonial offense, she is entitled to the occupation of the matrimonial home and the use of its contents. If she commits such an offense, e.g., adultery, the husband, if owner of the matrimonial home, may effect her eviction.¹⁷⁵ Should this be unfounded she may obtain an injunction to restrain her husband from any machinations to restrict her occupation or even to sell the property.¹⁷⁶ Should he be as impudent as to install his mistress in the matrimonial home, the wife will obtain an order for the re-

171. *Appleton v. Appleton*, [1965] 1 All E.R.44 (C.A.); *Jensen v. Jensen*, [1965] 3 All E.R.363.

172. *Blackwell v. Blackwell*, [1943] 2 All E.R. 579 (C.A.); *Hoddinott v. Hoddinott*, *supra* at 160.

173. ROYAL COMMISSION ON MARRIAGE AND DIVORCE, REPORT, para. 701, Kahn-Freund, *Inconsistencies and Injustices in the Law of Husband and Wife*, 16 Mod. L. Rev. 34, 118 (1953).

174. 10 & 11 Eliz.2,c.19.

175. *Wabe v. Taylor*, [1952] 2 All E.R.420 (C.A.); *Short v. Short*, [1960] 3 All E.R.6 (C.A.).

176. *Lee v. Lee*, [1952] 1 All E.R.1299 (C.A.).

moval of the other woman.¹⁷⁷ If, on the other hand, the husband is guilty of a matrimonial offense or behavior threatening her life or safety, she may obtain an injunction to restrain her husband from entering his own house.¹⁷⁸

In this connection we encounter a difficult question of protecting third party rights against a spouse in occupation of a house owned by the other. This is particularly vital in the case of a deserted wife who may find that, unknown to her, the property has been sold by her husband. Until the case of *Bendall v. McWhirter*¹⁷⁹ the courts were of the opinion that her right of occupation could not be enforced against a purchaser. In *Bendall v. McWhirter* the Court of Appeal held that she should be protected against the husband's trustee in bankruptcy. In other cases her rights were enforced as against the husband's brother in law,¹⁸⁰ against the husband's mistress¹⁸¹ who was fully aware of the position, and against a purchaser with notice.¹⁸²

The position differs if the property is burdened with a mortgage because in such a case the deserted wife's rights are not protected absolutely as against the mortgagee.¹⁸³ It appears that a bank or any other person lending money in good faith on mortgage is entitled to assume that the relations between the husband and wife are normal, and that the lender should be protected if, unknown to him, this should not be so. The deserted wife's rights can be protected by injunction restraining the husband from disposing of the property or a claim for support and maintenance. Her position should be improved further if the Matrimonial Homes Bill,¹⁸⁴ now before Parliament, becomes law as she will be able at least to continue to occupy the matrimonial home.

At common law the husband has no right to be supported by his wife but, by virtue of the *consortium*, he is entitled to the occupation

177. *Pinckney v. Pinckney*, [1966] 1 All E.R. 121.

178. *Silverstone v. Silverstone*, [1953] 1 All E.R. 556; *Montgomery v. Montgomery*, [1964] 2 All E.R.22.

179. [1952] 1 All E.R.1037 (C.A.).

180. *Ferris v. Weaven*, [1952] 2 All E.R. 233.

181. *Street v. Denham*, [1954] 1 All E.R.532.

182. *Jess B. Woodcock & Sons Ltd. v. Hobbs*, [1955] 1 All E.R. 445 (C.A.).

183. *Lloyd's Bank Ltd. v. Oliver's Trustee*, [1953] 2 All E.R.1443; *Barclay's Bank Ltd. v. Bird*, [1954] 1 All E.R.449; *Westminster Bank Ltd. v. Lee*, [1955] 2 All E.R.883; *National Provincial Bank Ltd. v. Hastings Car Mart Ltd. (No. 2)*, [1963] 3 All E.R. 649; [1964] 3 All E.R.93 (C.A.).

184. *Details Sol. J.* July 29, 1966, p. 596.

and enjoyment of the matrimonial home owned by his wife as long as he does not commit any matrimonial offense.¹⁸⁵

When the marriage comes to an end whether by death, divorce or a decree of nullity the rights of *consortium* become extinguished and the rights to the matrimonial home are determined in accordance with the respective title. The courts can no longer resort to their discretion, but must give effect to the legal title. If the title is in dispute the property will be sold, and the proceeds divided in accordance with the practice indicated above.

As we have observed earlier the state of the law governing matrimonial property is in the balance. The Royal Commission, though recommending a recognition of the wife's services now implemented by statute,¹⁸⁶ was not quite decided whether to advocate introduction of a system of community of matrimonial property.¹⁸⁷ Without any recommendation a notion of a community of acquests seems to be emerging from the case law we have discussed in the preceding paragraphs.

The problem of matrimonial property was scarcely mentioned in the Church of England Report on Divorce which indicated, however, a preference for a sort of community of property, which, the Group felt, would alleviate the hardship of the economically weaker party on divorce.¹⁸⁸ Motivated by the same purpose the Law Commission¹⁸⁹ also mentioned the necessity of reform in this field without elaborating the point further. However, a general line can be anticipated if the views of the Chairman of the Law Commission are to prevail. He is in favor of equal partnership of the spouses, and of a concept of "deferred community of property" as practised in the Scandinavian countries.¹⁹⁰ This particular approach seems to be gaining momentum as it has been singled out for adoption by scholars,¹⁹¹ and endorsed recently by the President¹⁹² of the Divorce Division of the High Court.

185. *Gorulnick v. Gorulnick*, [1951] 1 All E.R.146 (C.A.).

186. *Id.* at 174.

187. REPORT, para. 650.

188. They recommended that "the possibility of introducing community of property should be investigated"; REPORT, p. 72.

189. This problem will be considered in a separate report, REPORT, *supra* note 39, para. 39.

190. 1966 SOL. J. 858.

191. Kahn-Freund, *Matrimonial Property—Some Recent Developments*, 22 MOD. L. REV. 241 (1959); LAW REFORM NOW, *supra* note 153 at 134.

192. SIMON, WITH ALL MY WORLDLY GOODS . . . 33 (1964).

At common law the duty of supporting his wife and children was squarely on the husband's shoulders. Indeed this was a corollary to the principle that marriage operated as a conveyance of the wife's property to him. She would forfeit her rights as a result of adultery unless connived at or forgiven by the husband. Any subsequent matrimonial offense would revive the original forfeiture. The doctrine of revival was repealed recently,¹⁹³ but in spite of far-reaching changes in law and social conditions the system has substantially survived to date.

The most important modification occurred in 1948¹⁹⁴ when the duty of supporting her husband was extended to the wife if the husband is in receipt of public assistance. It means, in effect, that the state can reimburse itself from either spouse to the extent of the sums expended on the support of the other irrespective of his or her adultery or desertion. The rights of the state are independent of the intention of either party, and can be enforced even if the recipient of public assistance has given up his rights against the other spouse.¹⁹⁵

The principle of the equality of the sexes was further implemented by statute¹⁹⁶ whereby the wife has become liable to support her husband who through age, illness, physical or mental infirmity has become unable to support himself, and where the wife has obtained a separation order on the ground of her husband's drunkenness or drug addiction. His adultery or desertion will deprive him of any right in this respect.

The law of matrimonial support and maintenance is in a muddle in view of the diversity of actions available and interplay of jurisdictions quite remarkable in a unitary system of law. It is unnecessarily complicated, and certainly calls for an overhaul as far as the substantive rules, procedure and enforcement are concerned. Proposals in a recent publication¹⁹⁷ would like to see the system simplified, based on the equality of the sexes (which implies an equal liability of the spouses to support each other "in need" and the children), and the discretion of the courts as far as the amount to be payable is concerned. However, the principle of equality is not to be applied absolutely as primarily the husband¹⁹⁸ should be obliged to support his wife who

193. Matrimonial Causes Act of 1963, § 3, *supra* note 133.

194. National Assistance Act of 1948, 11 & 12 Geo. 6, c. 29; §§ 42 and 43.

195. National Assistance Board v. Parkes, [1955] 3 All E.R.1.

196. Matrimonial Proceedings (Magistrates' Courts) Act of 1960, 8 & 9 Eliz.2, c.48.

197. LAW REFORM NOW, *supra* note 153 at 136.

198. *Id.* at 132.

would lose her rights as a result of a breach of matrimonial obligations on her part. The husband's duty should cease on his wife's remarriage in any case, but her own misconduct or change of status would not affect his obligations towards the children as the children's rights to support should not be, as hitherto, included in their mother's claim.

The prospect of this scheme becoming adopted seems rather remote. The reform of the procedure is inseparable from the reorganization of the administration of the divorce law, and the reform of substantive law depends very much on the change, if any, in the basic concepts of divorce.

The Church of England Report expressed concern with the unsatisfactory state of the present law, and suggested that "the court should be at liberty to order maintenance with regard partly to need, partly to means, and partly to the behaviour of the spouses during the marriage."¹⁹⁹ The Law Commission was also alive to the problem, and promised to look into the matter.²⁰⁰

As in the case of the matrimonial property the Chairman of the Law Commission was a little more definite though he was concerned chiefly with the enforcement of orders for support. However, he proposed nothing new as he simply endorsed an idea which has already gained currency, namely that the state should provide subsistence to the family in need, and reimburse itself from the defaulting party.²⁰¹ This seems hardly adequate especially in cases where the defaulter has no means and no wish to provide for his dependents.

It seems, in conclusion, that as a practical proposition, minor points apart, the reform of the matrimonial property law and matrimonial support may have to wait for the very much expected fundamental reforms of divorce law. It is anybody's guess when this will come about.

II. PARENT AND CHILD

The law of parent and child has been developing far less dramatically than the law of husband and wife. The great debate on divorce once more awakened the interest in children, particularly those of broken homes, but here again a full-scale reform can hardly be expected.

199. REPORT, *supra* note 39 at 72; details REPORT, App. C. pars. 31-38.

200. *Id.* at 20, para. 39.

201. SCARMAN, *supra* note 153 at 31.

Legitimacy

Legitimate are children born in wedlock, that is, children born during the existence of their parents' marriage or posthumous children. However, as regards the latter there is, unlike in European continental laws,²⁰² no statutory period of utero-gestation, and English mothers are allowed a certain latitude unknown to their continental sisters. Thus it was held in one case²⁰³ that a period of 349 days was not impossible, but the court considered the period of 360 days excessive²⁰⁴ to raise the presumption of paternity of the husband who had no access to his wife during that period. The principle applies to posthumous²⁰⁵ children as well as children born after the decree *nisi* of divorce.²⁰⁶ This has recently been extended to a child born after the decree of divorce *absolute*²⁰⁷ having regard to evidence of access at the material time. The problem of conflicting presumptions, i.e., the status of the child conceived before the decree of divorce and born after the re-marriage of the child's mother has not been solved, and each case must be considered on its merits. It seems that the adoption of a statutory period of gestation would go a long way towards a solution.

Children of voidable marriages were made legitimate²⁰⁸ by statute, but it was soon revealed that the statute gave no relief to children born as a result of pre-marital²⁰⁹ intercourse, *fecundatio ab extra*,²¹⁰ and artificial insemination²¹¹ if the marriage was annulled on the ground of incapacity or wilful refusal to consummate. This anomaly was removed in 1949.²¹²

Children of void marriages had to wait until the Legitimacy Act²¹³ of 1959, which on the recommendation of the Royal Commission, in-

202. *E.g.*, FRENCH CODE CIVIL, art. 312—300 days; same, ITALIAN CODICE CIVILE, art. 232; SWISS ZIVILGESETZBUCH, art. 252; GERMAN BURGERLICHES GESETZBUCH, para. 1592—301 days.

203. *Hadlum v. Hadlum*, [1948] 2 All E.R. 412.

204. *Preston-Jones v. Preston-Jones*, [1951] 1 All E.R.124 (H.L.).

205. *Re Heath*, [1945] Cr. 417.

206. *Evans v. Evans*, [1904] P.378.

207. *Knowles v. Knowles*, [1962] 1 All E.R.659.

208. Matrimonial Causes Act of 1937, 1 Edw. 8 & 1 Geo. 6, c. 57, § 7(2).

209. *Dredge v. Dredge*, [1947] 1 All E.R., *supra* note 52.

210. *Clarke v. Clarke*, [1943] 2 All E.R.540, *supra* note 53.

211. *L. v. L.*, [1949] 1 All E.R.141; *sub. nom.* R.E.L. v. E.L.

212. Law Reform (Misc. Provisions) Act of 1949, 12, 13, 14, Geo. 6, c. 100, now Matrimonial Causes Act of 1965.

213. 7 & 8 Eliz.2,c.73.

troduced into the laws of England the canonical doctrine of putative marriage. The statute is somewhat obscure as it purports to legitimate children generally born of void marriages if both or either of the parents reasonably believed that the marriage was valid. According to a recent judicial interpretation, a child of a bigamous union whose mother was unaware of her husband's bigamy at the time of her marriage, but a few years later testified against him in his trial for bigamy, was held legitimate.²¹⁴ An opposite conclusion was reached last year in a case²¹⁵ where the mother "married" another man before being divorced by her first husband. These two conflicting cases raise the question as to what is "reasonable belief", and demonstrate the need of a further protection of the interests of the child.

Illegitimacy

There has been in recent years a rise in illegitimate births, but apart from social problems arising from this fact the state of the law has been a cause of considerable concern. Throughout centuries the common law of England resolutely resisted the invasion of Roman law ideas so much so that until 1926 even the subsequent marriage of the parents of illegitimate children did not affect their status. The Legitimacy Act of 1926,²¹⁶ like the Roman law, allowed legitimation by subsequent marriage of the parents, created the same parental rights and obligations as in the case of birth in lawful wedlock and, again like Roman law, denied the benefit of legitimation to the offspring of adultery. The incapacity of adulterine children was removed in 1959.²¹⁷ However, there is nothing in English law like the Roman law *legitimatio per rescriptum principis* (adopted in various forms in European continental laws)²¹⁸ to effect legitimation, should the parents through the intervention of death or supervening incapacity, fail to unite in matrimony.

Under the Poor Law²¹⁹ system, which so much influenced the law in the United States,²²⁰ the mother of an illegitimate child was made liable to maintain him, and she is by law invested with parental rights and obligations in respect of the child. As far as his father is concerned

214. *Sheward v. Att.-Gen.*, [1954] 2 All E.R.324.

215. *Hawkins v. Att.-Gen.*, [1966] 1 All E.R.392.

216. 16 & 17 Geo. 5, c. 60.

217. Legitimacy Act of 1959, *supra*.

218. Which takes the form of a court order (e.g., in Switzerland) or an administrative act (e.g., in Italy).

219. Instituted under Poor Law statute of 1576, 18 Eliz.1,c.3.

220. E.g., the law of Virginia.

the child is still a *filius nullius*; and, although the blood relationship is recognized by the law,²²¹ the father has no legal obligations unless he voluntarily undertakes them or the mother obtains a paternity order ("affiliation order") against him. Even then the putative father's obligation is only of a pecuniary nature designed to relieve the burden of the child's support resting upon the mother. However a putative father may now obtain the custody of the child, which in some respects will put him into the position of a legitimate father.²²²

The so-called "blood-tie case"²²³ has recently highlighted the problem especially that the emergence of the putative father's rights in respect of the child is a novel development and a potential threat to the smooth working of the adoption law. In this case the putative father was a married man, and the mother a young spinster who refused to marry him when he became divorced from his wife. She placed the child for adoption, but the court refused to make an adoption order (although the child had lived for 18 months with the prospective adopters) and granted custody to the putative father. The trial judge, who was rather hard on the young mother, felt that the child "should know who he is and be brought up by his own people", meaning the putative father and his wife with whom he had become reconciled. The Court of Appeal,²²⁴ by a majority judgment confirmed the decision, and by a Delphic pronouncement that "the tie of blood was crucial to the child's future" almost equated the biological link claimed by the putative father to a rule of law. If properly understood this case may pave the way for the adoption of the French *action en réclamation d'état*, which enables a child to bring an action for the determination of his status.²²⁵

The law governing affiliation proceedings bristles with anomalies. To enumerate only a few: the child has no right of action and no redress should the mother fail to do so within the prescribed time. Only a "single woman" (and this includes now a married²²⁶ woman

221. Marriage Act of 1949, *supra* note 24, § 1 and I and II Schedule—prohibition of inter-marriage, Sexual Offences Act, 1956, 4 & 5 Eliz.2,c.69, §§ 10 and 11—incest.

222. Legitimacy Act of 1959, *supra*, § 3.

223. Re C. (M.A.) (an infant), [1966] 1 All E.R.838.

224. *Id.* at 844.

225. This must be confused with the "declaration of legitimacy" which is an action for determination of claims to British citizenship or inheritance based on birth in lawful wedlock.

226. Legitimacy Act of 1959, *supra*, § 4. The principle has been extended to a married woman living under the same roof as her husband if they lead, in fact, entirely separate lives: Whitten v. Garner, [1965] 1 All E.R.70.

separated from her husband as well as a woman who married since the birth of the child²²⁷ has a right of action against the putative father. Thus a seducer of a married woman living with her husband incurs no obligation vis-à-vis the child unless the mother breaks up her marriage. The suit savours of criminal proceedings as indicated by the statutory terminology, the burden of proof being always on the complainant, the accused having the benefit of doubt and protection from self-incrimination. The complainant must corroborate her complaint and prove her case beyond reasonable doubt;²²⁸ but the accused may refuse to give evidence,²²⁹ and even procure witnesses to attract the credit of the complainant by alleging that anyone of them might be the father, without running any risks themselves.²³⁰

There is no alternative to affiliation proceedings, as the institution of recognition by the putative father, so prominent on the continent of Europe, is unknown to English law. Moreover, English lawyers seem to be unable to grasp its purpose and value.²³¹

With one exception an illegitimate child has no right of inheritance on his parents' intestacy. However, in order to qualify for the right to inherit from his mother under the Legitimacy Act of 1926, the child must not have any legitimate brother or sister. Should this be so he is incapable of inheriting even on his mother's intestacy. He has no right of inheritance on his father's intestacy, and is not regarded as a "dependent person" for the purpose of support and maintenance under statutes²³² which modify the testamentary power of a deceased liable to support certain persons. The law is likely to be changed radically as a Committee of Enquiry under the chairmanship of Lord Justice Russell²³³ has recently recommended that the above mentioned disabilities be abolished. Such a measure would, in effect, go a long

227. *Healey v. Wright*, [1912] 3 K.B.249; Lasok, *The "Single Woman" in Affiliation Proceedings*, 1965 LAW J. 191.

228. *Moore v. Hewitt*, [1947] 2 All E.R.270; *Simpson v. Collinson*, [1964] 1 All E.R.262.

229. *Cracknell v. Smith*, [1960] 3 All E.R.569; *but see S. v. E.*, 1966 Sol. J. 945.

230. *Cracknell v. Smith*, *supra* note 229; Lasok, *The "Exceptio Plurium Concumbentium" in English Affiliation Proceedings*, 1961 LAW J. 952.

231. Pace, Stone, *Illegitimacy and Claims to Money and Other Property, A Comparative Survey*, INT'L & COMP. L.Q. 526 (1966).

232. Inheritance (Family Provision) Act of 1938, 1 & 2 Geo. 6, c. 45, as amended; *Re Makein*, [1955] 1 All E.R.57; *Re T. and T.*, *The Times*, October 13, 1956.

233. REPORT OF THE COMMITTEE ON THE LAW OF SUCCESSION IN RELATION TO ILLEGITIMATE PERSONS, Cmnd. 3051, London, 1966.

way towards equality between legitimate and illegitimate children. Furthermore, it would bring the law of inheritance into line with recent legislation which gave the illegitimate child a right to claim compensation in respect of the death of the person supporting him (including his putative father²³⁴).

Another anomaly has been removed by the British Nationality Act of 1964.²³⁵ Hitherto an illegitimate child of a British woman born outside British territory could not claim British nationality, and in most cases would be, indeed, stateless unless given a citizenship by the law of the place of his birth. By restoring the law to what it was during the reign of Queen Anne, that is by allowing a British mother to transmit her citizenship to her children, the statute brought about equality of legitimate and illegitimate children in this area.

The reform of the law of illegitimacy appears long overdue,²³⁶ yet there seem to be some forces acting against it, or perhaps the urgency of reform has not been sufficiently impressed upon the Legislature. As recently as 1962²³⁷ a Private Member's Motion urging the setting up of a "Committee of Enquiry into the legal and social disabilities of Illegitimate Persons" was talked out in the House of Commons on the ground that there was nothing wrong with the law as the existing disabilities have been "deliberately allowed to remain." It seems that the Motion was far too wide as it purported to include matters outside the law, and this might have had a bearing upon the negative attitude of the government of the day. Similarly, the attempt to improve the status of the "little ones" by relaxing the law of divorce to which we have alluded earlier,²³⁸ has proved a non starter mainly, it seems, because of an inept attitude to law reform which, we suggest, ought to avoid one legal institution doing violence to another.

A study of illegitimacy independent of the ramifications of divorce was recently made under the auspices of the Church of England Board for Social Responsibility. The Report²³⁹ produced by this Study Group proceeds from an unequivocal criticism of the existing law and culminates in a definite scheme of reform. Two issues dominate the Re-

234. Fatal Accidents Act of 1959, 7 & 8 Eliz.2,c.65, § 1(2) (c).

235. British Nationality (No. 2) Act of 1964, 13 Eliz.2,c.54.

236. Cf., Lasok, *Legitimation, Recognition and Affiliation Proceeding*, INT'L & COMP. L.Q. 123 (1961).

237. Hansard, H. C. 1962, col. 1794 et seq.

238. *Ibid.*

239. FATHERLESS BY LAW? A STUDY OF THE BOARD OF SOCIAL RESPONSIBILITY OF THE NATIONAL ASSEMBLY OF THE CHURCH OF ENGLAND (1966).

port: the right of each individual to a legal status, and the responsibility of each individual (in this case the progenitor) for his acts. As the child is entitled to know his father he ought to be able to bring a paternity suit against his putative father. Depending on the circumstances of the case the court should either impose reasonable financial obligations on the putative father or confer upon him obligations and rights modelled upon legitimate relationship. To avoid litigation and give effect to paternal instincts, the Group suggested introduction of the institution of recognition (as understood in continental European laws)²⁴⁰ subject to appropriate safeguards for all parties concerned. The Group refrained from making recommendations in respect of inheritance rights as this matter was subject to inquiry by the Russell Commission,²⁴¹ but on the whole favored approximation of the legal status of the illegitimate child to that of the child born in lawful wedlock. So far no comments have been made by the Law Commission, and the danger is that the illegitimate child will be forgotten once his plight can no longer be used as a lever to easier divorce.²⁴²

Adoption

Since the introduction of legal adoption in 1926²⁴³ the law has developed in this field mainly by statute,²⁴⁴ and the resulting system compares favourably with the European continental laws.²⁴⁵ With the recent addition²⁴⁶ of rules governing recognition of foreign adoption orders the system seems now complete.

The law tends to balance up parental rights with a sense of welfare of the child which is the paramount consideration involving judicial discretion. Adoption requires the consent of the natural parent, but the courts have power to supplant this consent when it is lacking or unreasonably withheld.²⁴⁷ There have been several important cases involving the problem of consent, and the courts have proved extremely

240. *Ibid.*

241. *Id.* at 233.

242. *Ibid.*

243. Adoption of Children Act of 1926, 16 & 17 Geo.5,c.29.

244. Adoption of Children Act of 1949, 12, 13, 14, Geo.6,c.98

" " " " " 1958, 7 & 8 Eliz.2,c.5

" " " " " 1960, 8 & 9 Eliz.2,c.59.

245. H. Heinisch, BEENDIGUNG UND NICHTIGKEIT DER ADOPTION (1960).

246. Adoption Act of 1964, 13 Eliz.2,c.57.

247. Adoption of Children Act of 1958, *supra* note 284, §§ 4 and 5; Re P. (Infants), [1962] 3 All E.R. 789; Re G. (T.J.) (an infant), [1963] 1 All E.R. 20.

weary of encroaching upon parental rights.²⁴⁸ A new complication arose in this connection as a result of Section 3 of the Legitimacy Act of 1959, which, as we have observed earlier, granted certain rights to the father of an illegitimate child notwithstanding that there is strictly no legal relationship between such a child and his father. As the putative father became entitled to claim the custody of the child he proved able to interfere with the adoption proceedings. This led in practice to grave inconvenience, and impeded the working of the adoption law so much so that children authorities in certain areas began looking for the putative father before authorizing the adoption. Needless to say this exercise was quite futile as in most cases fathers of illegitimate children prefer to remain anonymous. The doubt was, however, resolved by the Court of Appeal which put an end to this practice and decreed that the putative father can have a *locus standi* only if he has been entrusted by the court with the custody of the child.²⁴⁹ The "blood-tie"²⁵⁰ case once more resurrected the problem of the putative father, and also focused attention on the possible harm to the child likely to result from protracted adoption proceedings.

Guardianship of Children

Guardianship of children is governed by a number of statutes which culminated in the Guardianship of Children Act of 1925.²⁵¹ The working of the law appears quite satisfactory but in spite of the professed equality of the parents in this respect the law is so framed that it gives advantages to the father as the "natural guardian". There is no machinery to enforce this vestige of equality unless the parents separate and live apart. A Private Member's Bill²⁵² to remedy this position was talked out in the House of Commons, the promoter herself being persuaded in the course of the debate that the measure should be withdrawn. The Bill did not merit mourning on its premature death, but an opportunity to look into this branch of the law and to consider the rights of the mother in modern society has been wasted.

Generally speaking, the guardianship laws seem to have incurred

248. *Hitchcock v. W. B.*, [1952] 2 All E.R.119; *Re K.*, [1952] 2 All E.R.877 (C.A.); *Re C.* (an infant), [1964] 3 All E.R.483 (C.A.); *Re W.* (infants), [1965] 3 All E.R.231; *In re R (M)* (an infant), 1966 Sol. J. 670; *In re B (S)* (an infant), *id.* at 671.

249. *Re Adoption Application No. 41/67*, [1962] 2 All E.R.833; (1962) 3 All E.R.553 (C.A.); *Re Adoption Application No. 41/61* (No. 2), (1963) 2 All E.R.1082.

250. *Re C (M.A.)* *supra* note 223.

251. 15 & 16 Geo. 5, c. 45.

252. Guardianship of Infants Bill of 1962, Hansard, H. C. 1962, col. 885, et seq.

little criticism except the ancient institution of the wardship of court.²⁵³ Wards of court have recently attained a considerable degree of notoriety as a result of which the law has not been shown in the best light. In practice a child is declared a ward of court at the instance of the parent or guardian who is unable to control his child. In effect the child remains under the care and authority of the court, and although his parents may continue to exercise their parental rights, they too are subject to the guidance of the court. The main object of wardship is to regulate the child's education, to prevent his associating with undesirable individuals or contracting an imprudent marriage. The sanction for disobedience of the order or interference with the ward lies in the offense of the contempt of court. This sanction proved particularly ineffective as far as the marriage²⁵⁴ of the ward is concerned as short of keeping the ward under close physical supervision, it is impossible, in the present state of the law of marriage, to prevent such persons contracting a marriage. It has been suggested,²⁵⁵ therefore, that the institution be abolished and the matter regulated by injunction. It is difficult to see how the law would be improved as the whole procedure of wardship together with the threat of imprisonment for contempt has already proved quite useless. An injunction being as irrelevant as the wardship it seems that the tightening of marriage formalities, which at present are quite capable of abuse, might be a little more effective.²⁵⁶

CONCLUSION

Our survey of the present state of the law is by no means complete, but it depicts the main defects and indicates possible reforms. Throughout the period under consideration the law has not remained static, but, like the society it serves, has experienced currents and cross-currents of opinions. In a free society the reform of the law is a cumbersome task and a compromise so hard to achieve.

The empiric and pragmatic character of English law gives occasion to great debates and frustrations that follow inconclusive investigations and reports. Yet discussion and controversy must naturally precede an emergence of ideas and proposed solutions. In this process

253. Lasok, *Some Reflections on Wards of Court*, SOL. J. 1963, No. 39.

254. *E.g.*, *Re Crump*, [1963] where a pregnant wife and her husband were goaled for contempt of court caused a great deal of adverse publicity.

255. LAW REFORM NOW, *supra* note 153 at 144.

256. Lasok, *supra* note 253.

attention must focus on the Law Commission. So far this body has confined itself to a statement of problems for consideration and reports which purport to provide a basis for further discussion. Undoubtedly the choice of remedies lies with the Legislature, but the Legislature ought to be furnished with concrete proposals, otherwise it only continues to act as a talking shop. It seems that the Law Commission itself will have to decide whether to continue the task so far performed by legal writers, or whether to move to the more sophisticated field of draftsmanship and thus take a more positive part in the great venture of law reform.