COROLLARY FINANCIAL RELIEF IN NULLITY AND DIVORCE PROCEEDINGS

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This paper analyses the jurisdiction of the courts to order permanent maintenance, variation of damage settlements and settlement of a wife's property in divorce and nullity proceedings. The writer examines the provisions of the Divorce Act, 1968, and the consequent need to reform provincial legislation regulating the jurisdiction of the courts' respective settlements. The paper was submitted for publication in February, 1969, and includes relevant judicial decisions reported prior to that date.

I. PERMANENT ORDERS [1]

A. *Definition of Statutory Powers*

Although the husband's common law obligation to maintain his wife terminates on annulment or dissolution of the marriage, statutory powers are vested in the courts to order maintenance and other benefits to be provided for a party to a marriage which is annulled [2] or dissolved. [3] These powers may be categorized as follows:

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[1] As to interim orders in nullity proceedings, see *infra* note 34. As to interim orders in divorce proceedings, *see* Divorce Act, Can. Stat., 1967-68 c. 24, § 10, [hereinafter cited as Divorce Act (Canada), 1968] which reads as follows:

> 10. Where a petition for divorce has been presented, the court having jurisdiction to grant relief in respect thereof may make such interim orders as it thinks fit and just
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> (*a*) for the payment of alimony or an alimentary pension by either spouse for the maintenance of the other pending the hearing and determination of the petition, accordingly as the court thinks reasonable having regard to the means and needs of each of them;
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> (*b*) for the maintenance of and the custody, care and upbringing of the children of the marriage pending the hearing and determination of the petition; or
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> (*c*) for relieving either spouse of any subsisting obligation to cohabit with the other.

[2] For the purposes of this paper the term "annulment" will, except where the context dictates to the contrary, include reference to judicial decrees issuing in respect of either void or voidable marriages.

[3] As to the power of the courts, on the death of a spouse, to order maintenance to be provided for the surviving spouse out of the deceased's estate, see *infra* note 85 and accompanying text.

(i) a power, in an action for annulment of marriage, to order the husband to secure to the wife a gross or annual sum of money for any term not exceeding her life [4] and/or to pay to the wife during their joint lives a weekly or monthly sum of money for her support and maintenance; [5]

(ii) a power, upon granting a decree nisi of divorce, to order either the husband or the wife to secure or to pay a lump sum or periodic sums for the maintenance of his or her spouse and/or the children of the marriage; [6]

(iii) a power, where the husband has obtained a divorce on the ground of his wife's adultery, to order that damages awarded against the co-respondent shall be settled for the benefit of the wife and/or the children of the marriage; [7]

(iv) a power, where the husband obtains a decree of divorce on the ground of his wife's adultery, to order that the whole or part of any property of the wife, whether in possession or reversion, shall be settled for the benefit of the husband and/or the children of the marriage; [8]

(v) a power, where a final decree of nullity or dissolution of marriage is pronounced, to order the variation of any ante-nuptial or post-nuptial settlement for the benefit of the children of the marriage and/or their respective parents. [9]

The co-existence of the above statutory powers tends to result in anomalies by reason of the absence of total reciprocity of obligation between the spouses. It is accordingly submitted that amending legislation should

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[4] *See e.g.*, The Domestic Relations Act, ALTA. REV. STAT. c. 89, § 23(1) (1955) (annual sum); The Matrimonial Causes Act, ONT. REV. STAT. c. 232, § 1 (1960) (gross or annual sum); The Queen's Bench Act, SASK. REV. STAT. c. 73, § 33(1) (1965) (annual sum). *See also* an Act to amend the Matrimonial Causes Acts, 1857 and 1866, by extending the powers of the Court in relation to maintenance and alimony, 7 Edw. 7, c. 12, § 1 (1907).

[5] *See e.g.*, The Domestic Relations Act, ALTA. REV. STAT. c 89, § 23(2) (1955); The Matrimonial Causes Act, ONT. REV. STAT. c. 232, § 2 (1960); The Queen's Bench Act, SASK. REV. STAT. c. 73, § 33(2) (1965).

[6] Divorce Act (Canada), 1968. Compare the more restrictive provisions of an Act to amend the law relating to Divorce and Matrimonial Causes in England, 20 & 21 Vict., c. 85 (1857), and an Act further to amend the Procedure and Powers of the Court for Divorce and Matrimonial Causes, 29 Vict., c. 32 (1866), [hereinafter cited as the Divorce and Matrimonial Causes Acts (England), 1857 and 1866] and of the provincial statutes modelled thereon: see sub-heading *Evolution of Statutory Powers, infra* at p. xx.

[7] *See* Divorce and Matrimonial Causes Act (England), 1857, § 33; The Domestic Relations Act, ALTA REV. STAT. c. 89, § 14 (1955); Divorce and Matrimonial Causes Act, B.C. REV. STAT. c. 118, § 18 (1960). It would appear that no similar power extends to those jurisdictions, such as Manitoba, New Brunswick, Nova Scotia, Ontario and Saskatchewan, wherein the common law action for criminal conversation has been retained.

[8] See sub-heading *Settlement of Wife's Property, infra* at p. xx.

[9] See sub-heading *Variation of Marriage Settlements, infra* at p. xx.

be enacted to place husband and wife on an equal footing with respect to orders for financial relief in nullity proceedings and orders for settlements of property in divorce proceedings. [10]

B. *Evolution of Statutory Powers*

Maintenance as a corollary remedy in divorce proceedings was introduced by the Divorce and Matrimonial Causes Acts (England), 1857 and 1866. Section 32 of the Divorce and Matrimonial Causes Act (England), 1857, empowered the court on any divorce decree to order the husband to secure to the wife such gross or annual sum of money for any term not exceeding her life as, having regard to her fortune, if any, to the ability of the husband and to the conduct of the parties, it should deem reasonable. Since this section failed to provide relief in cases where the husband had no assets on which maintenance could be secured, the power to order unsecured maintenance was introduced by amending legislation in 1866. Thus, section 1 of the Divorce and Matrimonial Causes Act (England), 1866 empowered the court on any decree of divorce to make an order on the husband for payment to the wife during their joint lives of a reasonable weekly or monthly sum for her support and maintenance. In the proviso to this section, the court was empowered to discharge, suspend or vary any such order if the husband subsequently became unable to make the payments ordered. [11]

The above provisions have been directly applied by the courts in Manitoba as the basis for awarding secured or unsecured maintenance [12]

[10] See Law Commission (England) Working Paper No. 9: MATRIMONIAL AND RELATED PROCEEDINGS—FINANCIAL RELIEF 12-13 (April, 1967):

> [T]he distinction now drawn . . . between the husband's and wife's rights and duties . . . should be abolished. In saying this we do not contemplate that, in the normal way, the wife will be ordered to maintain her husband . . . . Usually it is the husband who is the wage earner and the wife the housekeeper and mother, so that it will be she who requires financial support. But to an ever-increasing extent, both husband and wife . . . provide the financial support. When that is so, the question is whether the court should continue to be debarred, as in most respects it now is, from ordering the wife to pay maintenance . . . . The Australian Matrimonial Causes Act, 1959, draws no distinction, as regards the court's powers, between husband and wife . . . . The members of the Morton Commission were unanimously of the opinion that no distinction should be drawn between husband and wife: Cmd. 9678, par. 499 (1956). To a limited extent, this principle has now been conceded since . . . under section 2(1)(c) and (2) of the Matrimonial Proceedings (Magistrates' Courts) Act, (Eng.), 1960, a wife may in certain circumstances be ordered to contribute to the maintenance of her husband . . . . In connection with both husbands and wives there seems everything to be said for removing the residual discrimination . . . .

[11] § 1 of the Divorce and Matrimonial Causes Act (England), 1866 was silent as to the right of the husband to ask for discharge or modification of the order on the ground that the wife had remarried: *see* Perkins v. Perkins, [1938] P. 210, 107 L.J.P. (n.s.) 115; Fox v. Fox, [1925] P. 157, 94 L.J.P. (n.s.) 75 (C.A.). *See also* McLennan v. McLennan, [1940] Sup. Ct. 335, at 342, [1940] 2 D.L.R. 81, at 86.

[12] *See* Ashwin v. Ashwin, 42 Man. 8, [1934] 1 W.W.R. 641, [1934] 2 D.L.R. 763; X. v. X., 41 Man. 209, [1933] 2 W.W.R. 413 (K.B. 1932); Yates v. Yates, 34 Man. 170, [1924] 2 W.W.R. 64, [1924] 2 D.L.R. 1175.

but in most Canadian provinces corollary relief in matrimonial causes has been regulated by provincial statutes or rules of court.

In Alberta, the jurisdiction to award maintenance in divorce proceedings and other matrimonial causes, and the conditions of its exercise, have been defined in Part III of the Domestic Relations Act, which corresponds with some variations to the terms of the aforementioned English provisions. [13]

In British Columbia, section 32 of the Divorce and Matrimonial Causes Act (England), 1857, has been republished in the provincial statutes as section 17 of the British Columbia Divorce and Matrimonial Causes Act, [14] and orders for unsecured periodic maintenance were provided for by the Divorce Rules (British Columbia), 1943, which were validated by section 4(4) of the Court Rules of Practice Act, [15] "not withstanding that the said rules . . . contain substantive law as well as procedural law." [16]

In Ontario, the English law of dissolution and annulment of marriage as of July 15th, 1870, and jurisdiction to give effect to it were introduced into the province by the Divorce Act (Ontario), 1930 [17] and jurisdiction to grant maintenance in divorce and nullity proceedings was expressly conferred on the Supreme Court of Ontario by the Matrimonial Causes Act. [18] The provisions of this statute [19] differed from those of the English acts of 1857 and 1866 in that section 1 (secured maintenance) and section 2 (unsecured maintenance) included the condition "unless [the wife] has been guilty of adultery" and section 2 further provided for an order for weekly or monthly payments only "so long as [the wife] remains chaste."

In New Brunswick, the provisions of the Marriage and Divorce Act, [20] applied in conjunction with the Matrimonial Causes Amendment Act, [21] gave the courts jurisdiction to award maintenance to a wife who was entitled

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[13] ALTA REV. STAT. c. 89 (1955). For similar legislation in Saskatchewan, *see* The Queen's Bench Act, SASK. REV. STAT. c. 73, § 33 (1965).

[14] B.C. REV. STAT. c. 118 (1960).

[15] B.C. REV. STAT. c. 83 (1960).

[16] For an analysis of the effect of the Supreme Court Rules, 1961, upon the substantive rights conferred by the Divorce Rules, 1943, see Herbert, *The Supreme Court Rules 1961—Their Effect on the Subject of Maintenance*, 18 THE ADVOCATE 204 (1960). *See also* Downes v. McRae, 36 W.W.R. (n.s.) 323 (B.C. Sup. Ct. 1961); Ambrose v. Ambrose, 29 D.L.R.2d 766 (B.C. Sup. Ct. 1961); Tipping v. Hornby, 36 W.W.R. (n.s.) 278 (B.C. Sup. Ct. 1961).

[17] Can. Stat. 1930 c. 14.

[18] Ont. Stat. 1931 c. 25, *now*, ONT. REV. STAT. c. 232 (1960).

[19] *See* H. v. H., [1933] Ont. W.N. 490, [1933] 3 D.L.R. 792, wherein Middleton, J.A., stated: "[The Divorce Act (Ontario), 1930] being necessarily confined to matters over which the Dominion had jurisdiction, cannot deal with or affect property and civil rights within the province. This situation has been recognized by the legislature of the province when it passed . . . [the Matrimonial Causes Act, 1931 (Ont.), ch. 25,] conferring certain powers upon the Court with reference to the granting of alimony and dealing with the custody of children." *Id.* at 491, [1933] 3 D.L.R. 793.

[20] An Act, for regulating Marriage and Divorce, and for preventing and punishing Incest, Adultery, and Fornication, N.B. Stat. 1791 c. 5.

[21] An Act to amend the law relating to Divorce and Matrimonial Causes, N.B. Stat. 1860 c. 37.

to a *divorce a vinculo matrimonii* on the ground of adultery.[23]

In Nova Scotia, jurisdiction to award secured maintenance in divorce proceedings was expressly conferred by a pre-confederation statute,[23] which has since been amended to empower the courts to order the payment of periodical sums.[24]

The power to award corollary relief in divorce proceedings would now appear to be exclusively regulated by the provisions of the Divorce Act (Canada), 1968.[25] Section 11 of this act extends the powers formerly conferred by the aforementioned English and provincial statutes by providing that the superior courts of the respective provinces, upon the granting of a decree nisi of divorce, may order either the husband or the wife to secure or to pay such lump sum or periodic sums as the court thinks reasonable for the maintenance of the other spouse and/or the children of the marriage. The most fundamental change effected by this section is the imposition of reciprocal maintenance rights and obligations upon the spouses. It is probable that this innovation will not result in any significant demand for maintenance by husbands and that the courts will ordinarily order a wife to pay maintenance to her husband only when he is unable to support himself by reason of disability of mind or body or by reason of his incapacity to secure gainful employment.[26] The legislative recognition of mutual support obligations between the spouses, nevertheless, premises a substantial change of policy, which may well be reflected in the assessment of maintenance on a wife's petition, since section 11 impliedly asserts that a wife's own earning capacity or potential is relevant to a determination of the amount of maintenance that might properly be awarded.

C. *Legislative Jurisdiction*

In considering the respective powers of the Dominion and the provinces in relation to matters incidental to divorce, it has been held that the aforementioned provincial statutes are intra vires because they relate to matters of property and civil rights, which fall within the constitutional competence of the provincial legislatures under section 91(13) of the B.N.A. Act. Thus in *Lee v. Lee*,[27] Mr. Chief Justice Harvey stated:

> In my opinion it cannot be successfully contended that "alimony" comes within the subject of "marriage." It is true that it presupposes a marriage . . . . [I]t cannot be said that it is essential to divorce for even in England

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[22] *See* McLennan v. McLennan, [1940] Sup. Ct. 335, [1940] 2 D.L.R. 81; MacIntosh v. MacIntosh, 54 N.B. 145, [1927] 3 D.L.R. 1190.

[23] An Act to amend the laws relating to Divorce and Matrimonial Causes, N.S. Stat. 1866 c. 13, § 9. *See* Orlando v. Orlando, 12 Mar. Prov. 34, [1937] 1 D.L.R. 784 (N.S. Sup. Ct. 1936).

[24] An Act to amend the Statute Law Relating to the Court for Divorce and Matrimonial Causes, N.S. Stat. 1951 c. 24, § 1.

[25] See sub-heading *Legislative Jurisdiction, infra* at p. 377.

[26] *Supra* note 10.

[27] 16 Alta. 83, at 88, [1920] 3 W.W.R. 530, at 534, 54 D.L.R. 608, at 612.

> while it is given as an incident to divorce it is given quite apart from divorce upon failure to observe an order for restitution of conjugal rights. It is, in my opinion, nothing more nor less than a matter of civil rights arising out of a particular relationship and quite clearly therefore within the jurisdiction of a province if not included within the express words of "marriage and divorce" which for the reasons I have stated, in my opinion, is not the case.

Similarly, in *Langford v. Langford*, Justice Murphy stated: "Divorce is a matter of *status* which, as such, does not involve alimony at all. Maintenance or alimony is a matter of property and civil rights and so within the jurisdiction of the Province." [28]

It is to be observed, however, that the above decisions, which affirmed the legislative competence of the provinces to enact statutes regulating corollary relief in divorce proceedings, were reached at a time when the Dominion Parliament had not sought to occupy the field and they must now be reconsidered therefore in light of the corollary provisions of the Divorce Act (Canada), 1968.

In the Report of The Special Joint Committee of The Senate and House of Commons on Divorce, 1967 it is asserted that the exclusive jurisdiction over "marriage and divorce" assigned to the Dominion Parliament by section 91(26) of the B.N.A. Act extends to include jurisdiction over matters corollary to divorce:

> Parliament has not in recent years dealt with matters ancillary to divorce.
>
> Hitherto, these matters have been dealt with by the provinces, if for no other reason than that Parliament has refrained from doing so. The Committee is of the opinion that the exclusive jurisdiction of Parliament over divorce includes legislative authority over matters ancillary to divorce.
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> Divorces alter the legal status created by the marriage. Jurisdiction with regard to divorce thus includes the abolition of the rights and obligations created by the marriage and the restoration of certain pre-existing rights. Such rights can be terminated or restored in whole or in part.
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> A husband has a duty to maintain his wife. That obligation normally ceases when the marriage is dissolved because the relationship between the parties no longer exists. As Parliament is competent to legislate to divorce, it may also define the extent to which a dissolution of marriage alters the rights and obligations inherent in marriage. Parliament can, therefore, provide for the continuation of the obligation of the husband to support the wife.
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> A similar argument can be advanced regarding the maintenance and custody of children. While a marriage exists both parents have joint custody of the children and the husband is under an obligation to provide for their maintenance and education. The termination of the marriage by a divorce interferes with these obligations and Parliament's jurisdiction,

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[28] 50 B.C. 303, at 304, [1936] 1 W.W.R. 174, at 175 (B.C. Sup. Ct.). *See also* H. v. H., [1933] Ont. W.N. 490, [1933] 3 D.L.R. 792. *But see* McNair v. McNair, 19 Alta. 479, [1923] 2 W.W.R. 46, [1923] 2 D.L.R. 465, wherein the right to maintenance after divorce was held to be part of the substantive law of England as of July 15, 1870, which was introduced into the western provinces.

> relative to divorce, necessarily includes authority to stipulate to what extent they shall be continued, altered or destroyed.[29]

The assertion that the power to award maintenance is necessarily incidental to divorce and therefore within the jurisdictional competence of the Dominion Parliament derives some support from dicta in English[30] and Canadian[31] cases.

In view of the conflict of judicial opinion concerning the respective powers of the Dominion and the provinces it may be reasonable to conclude that, whereas the aforementioned provincial statutes were intra vires in the absence of any conflicting federal legislation relating to corollary relief in divorce proceedings, the corollary provisions of the Divorce Act (Canada), 1968 now supersede any provisions of the provincial statutes which are inconsistent therewith.[32] It should be noted that the corollary provisions of the aforementioned federal statute are confined to maintenance and custody in divorce proceedings and accordingly corollary powers relating to settlements on divorce remain subject to provincial control, as do also all corollary powers exercisable in matrimonial causes other than divorce.[33]

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[29] REPORT OF THE SPECIAL JOINT COMM. OF THE SENATE AND HOUSE OF COMMONS ON DIVORCE 56-57 (Canada, 1967).

[30] *See* Hyman v. Hyman, [1929] A.C. 601, 98 L.J.P. (n.s.) 81, wherein Lord Buckmaster stated: "It is, in my opinion, associated with and inseparable from the power to grant this change of status that the Courts have authority to decree maintenance for the wife." *Id.* at 625, 98 L.J.P. (n.s.) at 92. And Lord Hailsham stated: "I do [hold] that the power of the court to make provision for a wife on the dissolution of her marriage is a necessary incident of the power to decree such a dissolution . . . ." *Id.* at 614, 98 L.J.P. (n.s.) at 87. *See also* Lindsay v. Lindsay, [1934] P. 162, 103 L.J.P. (n.s.) 100.

[31] *See* Rex v. Vesey, 12 Mar. Prov. 307, at 320, [1938] 2 D.L.R. 70, at 81 (N.B. 1937), wherein Baxter, C.J., observed: "It is true that the federal parliament might legislate so as to confer jurisdiction upon a provincial Court in the matter of alimony . . . ." *See also* Reference on Divorce Jurisdiction, 29 Mar. Prov. 120, [1952] 2 D.L.R. 513 (P.E.I. Sup. Ct. 1951); Reference as to the Constitutionality of Adoption Act, Children's Protection Act, Children of Unmarried Parents Act, Deserted Wives' and Children's Maintenance Act, [1938] Sup. Ct. 398, [1938] 3 D.L.R. 497. *See now* Niccolls v. Niccolls, 68 W.W.R. (n.s.) 307, 4 D.L.R.3d 209 (B.C. Sup. Ct. 1969).

[32] For recent analysis of paramountcy doctrine, *see* Attorney-General of British Columbia v. Smith, [1967] Sup. Ct. 702, 65 D.L.R.2d 82.

[33] See REPORT OF THE SPECIAL JOINT COMM. OF THE SENATE AND HOUSE OF COMMONS ON DIVORCE 59 (Canada, 1967), wherein it is suggested that the Dominion Parliament may lack jurisdiction to enact legislation relating to the disposition of property in divorce proceedings: "The division of property between divorced persons (apart from the question of support or maintenance), as well as such matters as marriage settlements, dower, homestead rights . . . may well stand on a different footing. These matters do not involve rights and obligations between husband and wife, but they seem . . . to relate more to the property and civil rights of the parties to the marriage than to their legal status as married persons. They could vary from time to time and from jurisdiction to jurisdiction and a particular rule is not necessary or essential to constitute a marriage." Quaere, however, whether the above opinion does not ignore the fundamental basis of all forms of corollary relief in divorce proceedings, which is the provision of an equitable distribution of the economic assets, both actual and prospective, of the spouses on dissolution of the marriage.

D. *Maintenance in Nullity Proceedings*

Legislation empowering the courts to order permanent maintenance [34] in nullity proceedings has been enacted in several provinces, including Alberta, [35] British Columbia [36] and Ontario. [37] In the absence of any provincial statute expressly authorizing the award of maintenance in nullity proceedings, the right to maintenance in such proceedings is dependent upon the principles applied by the ecclesiastical courts. [38]

It has been held that applications for maintenance in nullity proceedings must be determined in the light of the particular facts of the case. In the words of Sir Henry Duke, P.: "[A]n appeal for permanent maintenance after a decree of nullity is not an appeal to a set of fixed principles, but one to the sense of propriety and moral justice of the court." [39] The evocation of the court's sense of propriety and moral justice is not confined to cases where there is legal, or even moral, wrongdoing by the party from whom maintenance is sought. The wrongdoing of either party may, however, have some bearing upon the court's discretion, although it is not necessarily decisive. [40]

It would appear that the same factors will be taken into account on an application for maintenance in nullity proceedings as are relevant to the determination of an application for maintenance in divorce proceedings. [41]

E. *Maintenance in Divorce Proceedings* [42]

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[34] Provided the financial and other circumstances of the parties warrant it, interim maintenance or disbursements will be allowed once a de facto marriage has been established. Interim maintenance may be ordered at any time until the issue of the final decree and may be awarded to a "wife" even if she is the defendant in the nullity proceedings, and irrespective of whether the marriage is alleged to be void or voidable: *see* Q'Part v. Q'Part, [1955] Ont. W.N. 687 (High Ct.); Barnet v. Barnet, [1934] Ont. 347, [1934] 2 D.L.R. 728; Foden v. Foden, [1894] P. 307, 63 L.J.P. (n.s.) 163 (C.A.).

[35] The Domestic Relations Act, ALTA REV. STAT. c. 89, § 23 (1955). For corresponding legislation in Saskatchewan, *see* The Queen's Bench Act, SASK. REV. STAT. c. 73, § 33 (1965).

[36] See cases cited *supra* note 16.

[37] The Matrimonial Causes Act, ONT. REV. STAT. c. 232, §§ 1, 2 (1960). *See* Sealey v. Bridge, 58 D.L.R.2d 18 (Ont. High Ct. 1966).

[38] Brown v. Brown, 10 West. L.R. 120 (B.C. Single Ct. 1909).

[39] Gardiner v. Gardiner, 36 T.L.R. 294 (Divorce Ct. 1920). *See also* Ambrose v. Ambrose (No. 2), 39 W.W.R. (n.s.) 241 (B.C. 1962), *sub nom.*, Ambrose v. Ambrose, 34 D.L.R.2d 438 (B.C. 1962); Holt v. Holt, 6 W.W.R. (n.s.) 336 (B.C. Sup. Ct. 1952); Hirst v. Inglett, 51 B.C. 306 (Sup. Ct. Chambers 1936); Clifton v. Clifton, [1936] P. 182, 105 L.J.P. (n.s.) 87.

[40] Ambrose v. Ambrose, *supra* note 39. *See also* Dailey v. Dailey, [1947] 1 All E.R. 847 (Divorce Ct.), *appealed and sent back to trial*, [1947] 2 All E.R. 269n. (C.A.). *But see* The Matrimonial Causes Act, ONT. REV. STAT. c. 232, §§ 1, 2 (1960).

[41] See statutory provisions *supra* notes 35 & 37.

[42] With regard to maintenance in divorce proceedings, § 11(1) of the Divorce Act (Canada), 1968 provides:

> Upon granting a decree nisi of divorce, the court may, if it thinks it fit and just to do so having regard to the conduct of the parties and the condition, means and other circumstances of each of them, make one or more of the following orders, namely:

F. *Orders to Secure Maintenance*

An order to secure maintenance is not an order to make payments and secure the payments, it is an order to secure and no more. The sole obligation arising under such an order is to provide the security; having done that, there is no further liability. The spouse who is ordered to secure maintenance, does not enter into a covenant to pay and never becomes a debtor in respect of payments. A spouse in whose favour an order to secure maintenance is made takes the benefit of the security and must look to it alone; if it ceases to yield the expected income, such spouse cannot call upon the other to make good the deficiency. [43]

The power to make an order to secure maintenance is within the discretion of the court and a spouse has no greater right to an order to secure than to an order to pay. [44] In exercising the discretion, however, the court must have due regard to the capital and secured income of the spouse against whom the order to secure is sought. [45] The court will not grant an order to secure upon property of a spouse which is not yielding income. [46]

If an order to secure maintenance has been made and the property constituting the security has been determined, the order does not create a floating charge over all the assets of the party who is ordered to give security but only charges the assets so determined. [47] Where an order to secure maintenance is made against a spouse who dies before the property constituting the security has been agreed, the order may be enforced against the deceased's estate. [48]

(*a*) an order requiring the husband to secure or to pay such lump sum or periodic sums as the court thinks reasonable for the maintenance of both or either
  (i) the wife, and
  (ii) the children of the marriage;
(*b*) an order requiring the wife to secure or to pay such lump sum or periodic sums as the court thinks reasonable for the maintenance of both or either
  (i) the husband, and
  (ii) the children of the marriage; and
(*c*) an order providing for the custody, care and upbringing of the children of the marriage.

[43] Cotton v. Cotton, 58 W.W.R. (n.s.) 65 (B.C. 1966); Shearn v. Shearn, [1931] P. 1, 100 L.J.P. (n.s.) 41 (1930). Where a smaller sum is paid than that secured, the remedy is not to issue execution since no debt is due, but to enforce the security: Smith v. Smith, [1923] P. 191, 92 L.J.P. (n.s.) 132 (C.A.).

[44] Shearn v. Shearn, [1931] P. 1, 100 L.J.P. (n.s.) 41.

[45] Barker v. Barker, [1952] P. 184, [1952] 1 All E.R. 1128 (C.A.). *But see* Aggett v. Aggett, [1962] 1 W.L.R. 183, [1962] 1 All E.R. 190 (C.A. 1961), wherein the court ordered maintenance to be secured on the husband's only asset, the matrimonial home.

[46] Shearn v. Shearn, [1931] P. 1, 100 L.J.P. (n.s.) 41. *See also* Amess v. Amess, [1950] N.Z.L.R. 428 (Auckland Sup. Ct.). *But see* Aggett v. Aggett, [1962] 1 W.L.R. 183, [1962] 1 All E.R. 190.

[47] Hyde v. Hyde, [1948] 1 All E.R. 362. An order charging all assets is objectionable in form and substance and should not be made: Barker v. Barker, [1952] P. 184, [1952] 1 All E.R. 1128.

[48] Mosey v. Mosey, [1956] P. 26, [1955] 2 W.L.R. 1118, [1955] 2 All E.R. 391 (1955).

An order to secure should not be made conditional upon future considerations which are merely a matter for conjecture but a token order may be made in contemplation of future contingencies, such order being variable in the event of material change in the means or circumstances of the parties. [49]

The power of the court to order security does not extend to confer jurisdiction upon the court to deprive a spouse of his or her property by ordering its transfer to the other spouse. [50]

It is uncertain whether an order to secure maintenance may be made in addition to an order to pay a lump sum or periodic sums and this must depend upon whether the word "or" in section 11(1), paragraphs (*a*) and (*b*) of the Divorce Act (Canada), 1968, is conjunctive or disjunctive. [51] Pursuant to legislation operating prior to the commencement of the Divorce Act (Canada), 1968, the granting of an order to secure maintenance did not preclude additional provision being made by way of an order for periodic payments, [52] and it is submitted that section 11(1) of the aforementioned statute does not reflect any intention on the part of the Dominion Parliament to abrogate the court's discretion in this context.

The application of statutes that were in force before the commencement of the Divorce Act (Canada), 1968 resulted in the following important distinctions being drawn between an order to secure and an order to pay maintenance:

(i) an order to secure maintenance could be granted for any term not exceeding the wife's life and accordingly the wife could receive the benefit of the security even though the husband predeceased her; an order for unsecured maintenance by way of weekly

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[49] *See* F. v. F., [1967] 1 W.L.R. 793 (Divorce Ct.), *sub nom.*, Ford v. Ford, [1967] 2 All E.R. 660, wherein an order directing a husband, who owned a bungalow but was otherwise of small means, to secure a charge of £1,000 on the bungalow to the wife "during her life but only from the date of the husband's death" was held to be improper. The object sought by the above order was, however, indirectly achieved by the substitution of an order to secure a nominal sum, which order might be subsequently varied pursuant to the statutory powers conferred by Matrimonial Causes Act, 1965 c. 72, § 31. *But see* note 112 and and accompanying text, *infra* at pp. 393-94.

[50] Olynyk v. Olynyk, 26 Alta. 485, [1932] 1 W.W.R. 825, [1932] 2 D.L.R. 785.

[51] See *supra* at p. 380.

[52] Cotton v. Cotton, 58 W.W.R. (n.s.) 65 (B.C. 1966); Shearn v. Shearn, [1931] P. 1, 100 L.J.P. (n.s.) 41 (1930). An application to secure a gross sum under § 1 of the Matrimonial Causes Act, ONT. REV. STAT. c. 232 (1960) can successfully be made notwithstanding that judgment absolute has been granted. But it cannot be made after judgment as an alternative to or by way of substitution for a prior order granted under § 2 of the act for periodic payments. While such periodic payments may be granted in addition to or in substitution for an order under § 1, the reverse is not provided for by the act. If the wife elects to take an order under § 2 of the act, she cannot later ask that the payments be secured under § 1 or that an order securing a gross sum be awarded to her in lieu of the one in existence: Minaker v. Minaker, [1949] Ont. W.N. 781 (High Ct.). Although an order may provide for maintenance to be partly secured and partly paid by periodic sums, no option can be conferred on a spouse whereby he may elect to secure a gross or annual sum or alternatively to pay periodic sums: Medley v. Medley, 7 P.D. 122, 51 L.J.P. (n.s.) 74 (C.A. 1882).

or monthly sums, however, could not be granted for a term beyond the joint lives of the spouses and automatically terminated on the death of either spouse; [53]

(ii) an order to secure maintenance was final and irrevocable but an order for unsecured maintenance could be discharged or varied on subsequent application to the court; [54]

(iii) an order to secure maintenance conferred quasi-proprietary rights upon the wife who could assign or charge her interest [55] whereas unsecured maintenance, like alimony, was regarded as an inalienable personal allowance. [56]

The distinctions set out in paragraphs (i) and (ii) above do not apply to orders made pursuant to the Divorce Act (Canada), 1968. Thus section 11(1) of the Divorce Act, unlike previous statutory provisions, does not specifically require that orders for unsecured maintenance shall be limited to a term not exceeding the joint lives of the spouses and the duration of all orders for maintenance, whether secured or unsecured, may now therefore be regarded as falling within the general discretion of the court. [57] Furthermore, section 11(2) of the Divorce Act, which defines the power of the court to vary or rescind maintenance orders, would appear applicable to all orders for maintenance, whether secured or unsecured, and whether granted before or after the commencement of the act. [58]

Section 11(1) further amends the previous law in that the court is now empowered thereby to order either the husband or wife [59] to secure a lump sum or periodic sums for the maintenance of his or her spouse. [60]

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[53] Cotton v. Cotton, 58 W.W.R. (n.s.) 65; Sexton v. Sexton, 35 Mar. Prov. 37 (N.S. Sup. Ct. 1954); Shearn v. Shearn, [1931] P. 1, 100 L.J.P. (n.s.) 41. See also text accompanying notes 11-23, *supra* at pp. 375-77.

[54] Cotton v. Cotton, *supra* note 53; Sexton v. Sexton, *supra* note 53; MacDonald v. MacDonald, [1952] Ont. 754, [1952] 4 D.L.R. 457; Hanley v. Hanley, [1949] Ont. 163, [1949] 2 D.L.R. 72; Shearn v. Shearn, *supra* note 53.

[55] Harrison v. Harrison, 13 P.D. 180, 58 L.J.P. (n.s.) 28 (C.A. 1888).

[56] MacDonald v. MacDonald, [1952] Ont. 754; Rex v. Vesey, 12 Mar. Prov. 307, [1938] 2 D.L.R. 70 (N.B. 1937); *In re* Robinson, 27 Ch.D. 160, 53 L.J.Ch. (n.s.) 986 (C.A. 1884).

[57] *See* Divorce Act (Canada), 1968 § 19(1)(*d*) which empowers the courts to make rules providing for the enforcement of corollary orders after death. The powers conferred by the provision have not, as yet, been exercised. See Law Commission (England) Working Paper No. 9: MATRIMONIAL AND RELATED PROCEEDINGS—FINANCIAL RELIEF para. 65-74 (April, 1967), wherein it is recommended that the English courts should be statutorily empowered to make orders for unsecured maintenance for any term not exceeding the life of the payee. *But see* Johnston v. Krakowski, 113 Commw. L.R. 552 (1965) wherein the High Court of Australia was divided on the question whether the Matrimonial Causes Act, Commw. Act. 1959 No. 104 [hereinafter cited as Matrimonial Causes Act (Australia), 1959] empowers the court to order unsecured maintenance for a term exceeding the joint lives of the parties.

[58] See sub-heading *Variation and Rescission of Maintenance Orders, infra* at p. 401 and *see* Divorce Act (Canada), 1968, § 25(3). *But see* notes 156, 184, and 185 and accompanying text, *infra* at pp. 402, 408.

[59] Hitherto, the jurisdiction to award maintenance could only be exercised in favour of a wife: see sub-heading *Evolution of Statutory Powers, supra*, at p. 375.

[60] Formerly, the court had no jurisdiction to order monthly or weekly payments

G. *Lump Sum and Periodic Payments*

The well-established practice has been to order maintenance payments on a monthly basis. [61] In the absence of the parties' consent thereto or express statutory authorization, the courts had no jurisdiction to order the payment of a lump sum. [62] Such jurisdiction is now expressly conferred by section 11(1) of the Divorce Act (Canada), 1968, which provides that the court may make an order requiring either the husband or the wife to secure or to pay such lump sum as the court thinks reasonable for the maintenance of his or her spouse.

Where a spouse is ordered to secure a lump sum, the secured property will revert to such spouse on the death of the beneficiary, except in so far as it has been diminished by advancements made in accordance with the powers defined in the deed of security. However, where a spouse is ordered to pay a lump sum, the payment will not be returned to such spouse in the absence of a retrospective variation or discharge of the order. [63]

The language of section 11(1) of the Divorce Act (Canada), 1968 does not make it clear whether an order for a lump sum may be made in addition to an order for periodic sums, [64] but it is submitted that the section should be so interpreted as to confer a broad discretion upon the courts to issue concurrent orders. [65] It is further submitted that the discretion of the court

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to be secured: *see* McColl v. McColl, [1953] Ont. 1017, [1954] 1 D.L.R. 604 (1953); MacDonald v. MacDonald, [1952] Ont. 754. See Law Commission (England) Working Paper No. 9: MATRIMONIAL AND RELATED PROCEEDINGS—FINANCIAL RELIEF para. 64 (April, 1967), wherein it is recommended that the English courts should have the fullest power as to the nature of the order and in all cases it should be possible to order secured maintenance.

[61] *See* Todd v. Todd, [1942] 2 W.W.R. 225, [1942] 3 D.L.R. 210 (Sask. K.B.), *aff'd*, [1942] 3 W.W.R. 653, [1942] 4 D.L.R. 698 (Sask.).

[62] *See* Maynard v. Maynard, [1951] Sup. Ct. 346, [1951] 1 D.L.R. 241; Green v. Hammond, [1941] 3 W.W.R. 161, [1941] 4 D.L.R. 335 (Alta. Sup. Ct. 1941).

[63] See notes 157-59 and accompanying text.

[64] See text accompanying note 51, *supra* at p. 382.

[65] See REPORT OF THE ROYAL COMMISSION ON MARRIAGE AND DIVORCE, (England), 1951-1955: CMD. 9678, para. 514-16 (1956):

> Several witnesses commented on the deficiencies and anomalies in the court's powers. In particular, it was suggested that the court should be given power to order a lump sum payment: a wife might prefer to have a capital sum, which would enable her to retain a sense of financial security and allow her to set up a new home, while her husband might be glad to be relieved once and for all of the responsibility of providing for her future maintenance.
>
> . . . [W]e think that the court should be given power to order a lump sum payment to be made by way of financial provision.
>
> . . . In exercising the power to order a lump sum payment by one spouse to the other, the court should not be precluded, if it thinks fit, from ordering additional provision to be made in some other way, for example by periodical payments. On the other hand, we think that the court should be able to direct that the payment of a lump sum should extinguish the right to claim maintenance where it appears to the court that a composition of this nature would be fair to both parties, and we recommend accordingly.

See now Matrimonial Causes Act (England), 1965, §§ 16, 19 and 20, which empower the courts to award a lump sum in lieu of or in addition to periodic payments on or

should be deemed to include the power to direct that the payment of a lump sum shall extinguish all rights to maintenance, since the public interest and that of the spouses require that, in appropriate circumstances, maintenance rights and obligations shall be determined finally and irrevocably. [66]

Some guidance as to the relevant considerations to be applied in adjudicating an application for a lump sum may be obtained from the recent decision in *Davis v. Davis*, [67] wherein an application was made pursuant to the provisions of the Matrimonial Causes Act (England), 1965. In this case, Lord Justice Willmer stated: [68]

> The only guidance to be obtained from the words of the statute is that the sum must be such "as the court thinks reasonable having regard to" . . . [the wife's fortune (if any), the husband's ability and the conduct of the parties]. [69] It seems to me that in those circumstances the question is one very much for the discretion of the judge who has to deal with it.
>
> . . . .
>
> It is to be observed from the terms of the section that a lump sum payment may be ordered either in lieu of or in addition to maintenance. [70] As a practical matter, it is clear that an order for a lump sum payment can only properly be made against a husband possessed of sufficient capital assets to justify it. It is not to be expected, therefore, that the question is likely to arise except in relatively rare cases. In the present case there can be no doubt that the husband is in a position to make a substantial capital payment. But, in assessing his capacity to do so, regard must be had to the fact that quite a substantial part of his capital assets must be tied up in order to serve as security for the secured provision of £4,500 a year.
>
> The real difficulty which I have felt is in ascertaining what the legislature had in mind in making this provision for a lump sum payment, either alternative to or coupled with an order for maintenance. I apprehend that one type of case in which a lump sum payment might be appropriate would be one where there is a wealthy husband whose wife desires to set herself up in business. In such a case, assuming that the wife is a woman who has had experience in business, it could well be reasonable and appropriate that a lump sum payment should be made. But that, of course, is not this case. What is suggested here is that the wife, who, while living with her husband, has been accustomed to a high standard of living, playing the part of a wife to the chairman of a large commercial organisation, should be

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after the granting of divorce, nullity or judicial separation. *See* Davis v. Davis, [1967] P. 185, [1966] 3 W.L.R. 1157 (C.A. 1966); Hakluytt v. Hakluytt, [1968] 1 W.L.R. 1145, [1968] 2 All E.R. 1022 (C.A.). It is arguable that the word "or" in section 11(1)(*a*) & (*b*) of the Divorce Act (Canada), 1968 is disjunctive and therefore implies that the Dominion Parliament intended that the various forms of financial relief should be alternative, leaving the spouse to opt for that which better suits his or her needs: see *supra* Davis v. Davis. *Cf.* Ceicko v. Ceicko, 69 W.W.R. (n.s.) 52 (Man. Q.B. 1969).

[66] *Supra* note 65, and *infra* note 172 and accompanying text.

[67] [1967] P. 185, [1966] 3 W.L.R. 1157 (C.A. 1966).

[68] *Id.* at 191-94, [1966] 3 W.L.R. at 1160-63.

[69] *Compare* Divorce Act (Canada), 1968, § 11(1), whereby the court is required to have regard to "the conduct of the parties and the condition, means and other circumstances of each of them."

[70] As to the position in Canada, see notes 64 and 65 and accompanying text, *supra* at p. 384.

> entitled to such a lump sum payment as will enable her to set herself up in a home commensurate with that to which she had been accustomed.
>
> There is no doubt that, in assessing an ordinary claim for maintenance, it is proper to have regard to the standard of living to which the wife was accustomed during the marriage. . . . I see no reason why the same should not apply to a claim made . . . for a lump sum payment. If the wife has been accustomed during the marriage to live in a luxuriously appointed house, I think she is entitled to ask for a lump sum payment of such an amount as will provide her with a standard of living commensurate with that to which she has been accustomed. I use the word "commensurate" advisedly, for I think that it must be obvious that she can hardly expect exactly equivalent accommodation; it would not be "reasonable" to award enough for that.
>
> . . . .
>
> . . . Moreover, the expenses of setting up a home do not stop at the purchase of a property, for when it is purchased it will probably require decoration and will certainly require furnishing. . . . Moreover, I think there is force in the contention that the lump sum to be awarded should, if possible, be sufficient to leave something over, after establishing a new home, by way of liquid capital which can be used, for instance, for buying a car, or for dealing with any emergency which may arise, or even to put by for use on a rainy day. . . . In my judgment, the award of £15,000 should be increased to one of £25,000.
>
> I should have been disposed to award rather more had it not been for the fact of the wife's own misconduct. But since, as I have pointed out, the relevant section of the Act is, in my judgment, to be read as requiring the court to take into consideration the conduct of the parties, the award must, I think, be somewhat lower than it otherwise might have been. [71]

H. *Orders Made "Upon Decree Nisi"*

The power of the court to make corollary orders pursuant to section 11(1) of the Divorce Act (Canada), 1968 is exercisable "upon granting a decree nisi of divorce." Such orders cannot be made, therefore, if the petition for divorce is dismissed. [72] Rejection of the corollary claim in the above circumstance would not appear unreasonable if, in consequence of the dismissal of the petition for divorce, the parties resume matrimonial cohabitation and re-establish their respective maintenance rights and obligations. It is rare, however, for these consequences to ensue and a spouse may therefore be unjustifiably denied reasonable provision for his or her separate

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[71] For more recent decisions illustrating the circumstances which may be relevant to the exercise of the court's discretion to award a lump sum and the amount of any such award, *see* Brett v. Brett, [1969] 1 All E.R. 1007; Curtis v. Curtis, [1969] 1 W.L.R. 422 (C.A. 1968); Hakluytt v. Hakluytt, [1968] 1 W.L.R. 1145, [1968] 2 All E.R. 1022 (C.A.); Ceicko v. Ceicko, *supra* note 65. For a brief but valuable analysis of the tax implications of lump sum and periodic payments, see Barbeau, *The Practitioner's Tax Notes*, 11 CAN. BAR J. 291 (1968).

[72] *See* Mainwaring v. Mainwaring (No. 3), 58 B.C. 24, at 26, [1942] 3 D.L.R. 458, at 459, wherein McDonald, C.J.B.C., stated: "I do not think any instance can be found where a wife, having failed to obtain a divorce, judicial separation, restitution of conjugal rights or nullity, has still been awarded alimony in that cause, on any ground whatever."

maintenance. It is accordingly submitted that the courts should be statutorily empowered to order maintenance in favour of either party, notwithstanding the dismissal of the petition for divorce, where such an order appears reasonable in the circumstances of the case. [73] Such powers are presently exercisable in Australia by virtue of section 89 of the Matrimonial Causes Act (Australia), 1959. [74]

It is open to question whether the statutory clause "upon granting a decree nisi" may be broadly interpreted to permit an application for maintenance within a reasonable time after issue of the decree nisi. In an analysis of the requirements set out in section 32 of the Divorce and Matrimonial Causes Act (England), 1857, [75] it has been stated: [76]

> Maintenance . . . may be refused on the ground of delay in applying therefor, but, although the Act of 1857 (sec. 32) says that the order shall be made "on" the making of the decree and the Rules prescribe a time within which the application is to be made, it is settled that it may be made within a reasonable time, depending on the circumstances of the case,[77]

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[73] See Law Commission (England) Working Paper No. 9: MATRIMONIAL AND RELATED PROCEEDINGS—FINANCIAL RELIEF para. 75-77 (April, 1967). See also *id.* at 99, para. 10:

> The court should be able to award maintenance even if a petition for divorce, nullity or judicial separation is dismissed—
>
> (a) in favour of the respondent or any child, and
>
> (b) if it was reasonable to institute the proceedings, in favour of the petitioner.

[74] Matrimonial Causes Act, Act No. 104 of 1959, § 89 (Austrl.) [hereinafter cited Matrimonial Causes Act (Australia), 1959]:

> (1) Except as provided by this section the court shall not make an order under this Part [which relates to maintenance and settlements] where the petition for principal relief has been dismissed.
>
> (2) Where
>
> (a) the petition for the principal relief has been dismissed on the merits; and
>
> (b) the court is satisfied that—
>
> (i) the proceedings for the principal relief were instituted in good faith to obtain that relief; and
>
> (ii) there is no reasonable likelihood of the parties becoming reconciled,
>
> the court may if it considers it desirable to do so, make an order under this Part, other than an order under section eighty-six of this Act [which relates to settlements of property].
>
> (3) The court shall not make an order by virtue of the last preceding subsection unless it has heard the proceedings for the order at the same time as, or immediately after, the proceedings for the principal relief.

[75] *Compare* The Matrimonial Causes Act, ONT. REV. STAT. c. 232, §§ 1, 2 (1960). ("In any action for divorce").

[76] W. POWER, ON DIVORCE 535 (2d ed. J. Payne 1964).

[77] Oliver v. Oliver, 42 W.W.R. (n.s.) 634 (B.C. Sup. Ct. 1963); Bryant v. Bryant, 42 W.W.R. (n.s.) 37, 39 D.L.R.2d 110 (B.C. Sup. Ct. 1963); Simmonds v. Simmonds, [1956] P. 47, [1955] 3 W.L.R. 129, [1955] 2 All E.R. 481 (1955); Hasting v. Hasting, [1948] P. 68, 119 L.J.P. (n.s.) 119, [1947] 2 All E.R. 744 (C.A. 1947); Pilichowsky v. Pilichowsky, [1947] 1 W.W.R. 257, [1947] 2 D.L.R. 444 (Sask. K.B.) *aff'd*, [1948] 1 W.W.R. 590, [1948] 2 D.L.R. 862 (Sask.); Todd v. Todd, [1942] 3 W.W.R. 653,

> and that even a long delay is not fatal if excusable, [78] and it has been held to be excusable where the making of an application would have been futile because the husband had no means to pay and no steady employment or definite prospects thereof. [79]

Substantial arguments may, nevertheless, be adduced in favour of a restrictive interpretation of the clause "upon granting a decree nisi." A strict interpretation of the clause would enable and indeed require the court to hear and determine at the same time all corollary claims arising out of the divorce proceedings [80] and would thus ensure that the issues incidental to the divorce were defined in the petition so that the spouses might examine their position at an early point of time with full knowledge of all the consequences of the contemplated proceedings. [81] Such interpretation would, moreover, operate to reduce the number of applications and hearings and consequently the cost

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[1942] 4 D.L.R. 698 (Sask.); Fisher v. Fisher, [1942] P. 101, 111 L.J.P. (n.s.) 28 (C.A.).

[78] *See* cases cited *supra* note 77. *See also* Bailey v Bailey, 31 W.W.R. (n.s.) 289, 23 D.L.R.2d 574 (B.C. Sup. Ct. 1960), wherein Mr. Justice McInnes, stated:

> [I]n no other case than the *McMahon* case [18 W.W.R. (n.s.) 284 (B.C. Sup. Ct. 1956)] was I able to find any authority where leave was granted unless either one or other of the following conditions existed: (1) The husband had been paying the wife under an agreement between the parties or under a Court order, and (2) where the wife had been lulled into a false sense of security by reason of the conduct or statements or acts of her husband.

Id. at 294, 23 D.L.R.2d at 579-80.

[79] Thorgierson v. Thorgierson, 50 Man. 245, [1942] 2 W.W.R. 339, [1942] 3 D.L.R. 767 (K.B.) (delay of two and a half years excused); Todd v. Todd, [1942] 3 W.W.R. 653, [1942] 4 D.L.R. 698 (Sask.) (delay of two and a half years excused where, in addition to the husband's poverty, the plaintiff had been ill in hospital for more than four months).

[80] *See* Matrimonial Causes Act (Australia), 1959, § 68, whereby applications for corollary relief must, except as permitted by the rules or by leave of court, be instituted by the same petition as that by which the proceedings for principal relief are instituted and the court is directed, so far as is practicable, to hear and determine at the same time all matters arising out of the petition. *Compare* Matrimonial Proceedings Act, New Zealand Stat. 1963 c. 71, § 40, which empowers the court to grant personal maintenance "on or at any time after the making of any decree of divorce."

[81] See Selby, *The Development of Divorce Law in Australia*, 29 MODERN L. REV. 473, at 488 (1966):

> The object of [section 68 of the Matrimonial Causes Act (Australia), 1959 and Rule 198 of the Matrimonial Causes Rules (Australia), 1960] . . . is to face the prospective petitioner with all the consequences of divorce. The obligation, imposed by the rules, to set forth in the petition the financial situation of the parties, the amount claimed, or proposed to be paid, as maintenance, particulars of any settlement of property sought, details as to the custody of the children, provisions for their maintenance and arrangements for their welfare, advancement and education brings to the forefront of the petitioner's mind some of the complications involved in a dissolution of marriage. Before the petition can be filed, these matters must be squarely faced and an attempt must be made to find a solution for each problem involved. It may be, as was intended by the legislature, that an overhasty petitioner, confronted by these matters, will have second thoughts about divorce and will be in a better frame of mind to consider the possibilities of reconciliation. Though he may have married in haste, the Act and Rules ensure that he must divorce at some leisure.

of proceedings. [82] Where the circumstances of either party preclude an order for substantial corollary relief at the time of the granting of the decree nisi of divorce, the court may properly exercise its power to grant a token order so as to permit a subsequent application for variation in the event of a subsequent change in the circumstances of the parties. [83]

I. *Abatement on Death*

If a spouse dies while the divorce proceedings are pending, any corollary claim for maintenance abates and no cause of action survives for or against the estate of the deceased. [84] In this circumstance, however, the marriage still subsists until the time of death, and the surviving spouse may be entitled to pursue other claims against the deceased's estate. Thus, if a husband or wife dies without making adequate provision in his or her will for the future maintenance of his or her spouse, such spouse may, pursuant to the provincial dependant's relief act, obtain an order for maintenance charged on the deceased's estate; and, if a spouse dies intestate, the surviving spouse will inherit a share of the estate pursuant to the provisions of the provincial devolution of estates act. [85]

J. *Discretion in Granting Relief*

The granting or withholding of an order for secured or unsecured maintenance is within the discretion of the trial judge. [86] The courts have, in the past, refused to lay down any specific rules governing the exercise of the discretion and each case must ultimately be decided on its own particular facts. It has been stated, however, that the discretion should be exercised not capriciously but cautiously and carefully, and, as far as possible, con-

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[82] See Toose, *The Matrimonial Causes Act 1959*, 34 AUST. L.J. 279 (1961).

[83] *See* Stephen v. Stephen, [1931] P. 197, 100 L.J.P. (n.s.) 86 (C.A.). *See also* F. v. F., [1967] 1 W.L.R. 793 (Probate).

[84] Dipple v. Dipple, [1942] P. 65, 111 L.J.P. (n.s.) 18. *See also* H. v. H., 14 W.W.R. (n.s.) 488, [1955] 3 D.L.R. 486 (B.C. Sup. Ct. 1955); Jarvis v. Jarvis, [1925] 1 W.W.R. 847, [1925] 2 D.L.R 415 (Man. K.B.). See text accompanying note 42, at p. 380.

[85] *See e.g.*, Dependant's Relief Act, ONT. REV. STAT. c. 104, § 2 (1960) and Devolution of Estates Act, ONT. REV. STAT. c. 106, §§ 8-11 (1960). If the marriage has been dissolved or annulled, however, the aforementioned statutory provisions confer no rights upon the survivor against his or her former spouse's estate. *Compare* Matrimonial Causes Act (England), 1965, §§ 26-28, *as amended by* Family Provision Act 1966 c. 35, whereby a divorced spouse may apply for maintenance out of the deceased's estate if the deceased has not made reasonable provision for the survivor. For critical evaluation of these provisions, see Law Commission (England) Working Paper No. 9: MATRIMONIAL AND RELATED PROCEEDINGS—FINANCIAL RELIEF para. 70-74 (April, 1967). As to the resolution of competing claims between the first wife and the widow of the deceased, *see In Re* Eyre, [1968] 1 W.L.R. 530, *sub nom.* Eyre v. Eyre, [1968] 1 All E.R. 968 (Divorce Ct. 1967).

[86] Davis v. Davis, [1967] P. 185, [1966] 3 W.L.R. 1157 (C.A. 1966); Milton v. Milton, [1948] Ont. W.N. 641 (High Ct.); McLennan v. McLennan, [1940] Sup. Ct. 335, [1940] 2 D.L.R. 81; MacIntosh v. MacIntosh, 54 N.B. 145, [1927] 3 D.L.R. 1190; Ashcroft v. Ashcroft, [1902] P. 270 (C.A.).

sistently with the interests of the parties themselves and the interests of public morality and of decent society. [87]

Section 11(1) of the Divorce Act (Canada), 1968 specifically declares that the court shall, in the exercise of its discretion, have regard to (i) "the conduct of the parties" and (ii) "the condition, means and other circumstances of each of them." The relevant considerations thus defined would appear more exhaustive than the considerations designated in previous legislation, namely, the fortune, if any, of the wife, the ability of the husband, and the conduct of the parties.

II. CONDUCT OF THE PARTIES

The phrase "conduct of the parties" was included in section 32 of the Divorce and Matrimonial Causes Act (England), 1857, and has been interpreted to refer to conduct before, as well as during, the marriage. [88]

A. *Orders against Innocent Spouse*

An order to secure or pay maintenance may be made in favour of a spouse against whom a decree of divorce has been issued [89] and the form of the decree is not conclusive as to the conduct of the parties. [90] The discretion of the court is unfettered and accordingly maintenance may be awarded in favour of a spouse notwithstanding his or her adultery [91] or other

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[87] In re Belaney ("Grey Owl") Estate, [1939] 3 W.W.R. 591, [1940] 1 D.L.R. 105 (Sask. K.B. 1939).

[88] Restall v. Restall, [1930] P. 189, 99 L.J.P. (n.s.) 123 (C.A.); Kettlewell v. Kettlewell (1), [1898] P. 138, 67 L.J.P. (n.s.) 16.

[89] Such an order may be made where the petition for divorce is based upon § 4(1)(*e*) of the Divorce Act and there appears no valid reason for denying a general power to make corollary orders irrespective of the ground upon which and the person by whom the decree of divorce is sought: *See* Divorce Act (Canada), 1968, § 9(1)(*f*); Doyle v. Doyle, 158 N.Y.S.2d 909 (Sup. Ct. 1957); Trestain v. Trestain, [1950] P. 198, 66 T.L.R. (pt. 1) 621, [1950] 1 All E.R. 618n. *Compare* The Matrimonial Causes Act, ONT. REV. STAT. c. 232, §§ 1, 2 (1960), discussed *supra,* in *Evolution of Statutory Powers* at p. 375. *Compare also* Matrimonial Causes Act (Australia), 1959, § 84(3), which expressly empowers the court to order the maintenance of a party against whom a decree of divorce has been made.

[90] Sydenham v. Sydenham, 118 L.J.P. (n.s.) 1424, [1949] 2 All E.R. 196 (C.A.). While the form of a divorce decree is not conclusive and, if, on an investigation of the facts, it appears that the conduct of the guilty wife has been much less blameworthy than that of her husband even though a decree has been pronounced against her, she is entitled to ask for maintenance, the blameworthiness should not be judged by any standards other than those recognized by the law of divorce: Cullimore v. Cullimore, 28 W.W.R. (n.s.) 526 (B.C. Sup. Ct. 1959).

[91] *See* M. v. M., [1962] 1 W.L.R. 845, 106 Sol. J. 433, [1962] 2 All E.R. 895 (Divorce Ct.) (application for maintenance refused by reason of wife's wilful failure to disclose her adultery); L. v. L., 20 Sask. 442, [1926] 1 W.W.R. 299, [1926] 1 D.L.R. 866 (K.B.); Wickens v. Wickens (No. 2), [1918] P. 282, 87 L.J.P. (n.s.) 169 (C.A.); Squire v. Squire, [1905] P. 4, 74 L.J.P. (n.s.) 1; Ashcroft v. Ashcroft, [1902] P. 270, 71 L.J.P. (n.s.) 125 (C.A.); Robertson v. Robertson, 8 P.D. 94, 48 L.T. 590 (C.A. 1883). *Compare* The Domestic Relations Act, ALTA. REV. STAT. c. 89, § 23(3) (1955)

matrimonial offence. [92]

It has been asserted that a husband or wife whose conduct is unimpeachable ought not to be compelled to maintain a guilty spouse, [93] but this assertion denies the social reality that divorce usually results from a general malaise to which both spouses have contributed. [94] The public interest [95] is therefore better served if the criterion of fault is de-emphasized and the rights of the parties determined primarily on the basis of "net need," that is, the applicant's actual financial requisite less current assets and earning potential in relation to the other spouse's capacity to pay. [96] It has accordingly been held that a husband whose conduct is unimpeachable may be ordered to secure or to

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and The Queen's Bench Act, SASK. REV. STAT. c. 73, § 33(3) (1965), which expressly empowered the court to order maintenance in favour of a wife notwithstanding that she had been guilty of adultery. See also *supra* note 89, and sub-heading *Dum Sola et Casta* Clause *infra* p. 395.

[92] Deacock v. Deacock, [1958] P. 230, [1958] 3 W.L.R. 191, [1958] 2 All E.R. 633 (C.A.).

[93] *See* Ross v. Ross, 47 W.N. (N.S.W.) 139 (Matrimonial Causes 1930). See also REPORT OF THE ROYAL COMMISSION ON MARRIAGE AND DIVORCE (England), 1951-1955: CMD. 9678, para. 502-03 (1956), wherein thirteen members stated that they were "satisfied that the court [could] be safely relied upon to order provision to be made for a guilty spouse only if it would be reasonable in the circumstances" but six members considered "it wrong in principle that a husband or wife should be called upon to maintain a guilty spouse." The view of the majority was recently endorsed by the Law Commission (England): *see* Law Commission (England) Working Paper No. 9: MATRIMONIAL AND RELATED PROCEEDINGS—FINANCIAL RELIEF para. 21-23 (April, 1967).

[94] Doyle v. Doyle, 158, N.Y.S.2d 909 (Sup. Ct. 1957). See also Law Commission (England) Working Paper No. 9, para. 21.

[95] Regardless of the conduct of the parties, society has an economic interest in maintenance proceedings since, if a spouse is barred from receiving maintenance, public assistance may become necessary, and the economic burden is thereby shifted from the other spouse to the taxpayer.

[96] *See* Doyle v. Doyle, 158 N.Y.S.2d 909; Phillips v. Phillips, 150 N.Y.S.2d 646 (Sup. Ct. App. Div. 1956), *aff'd*, 138 N.E.2d 738 (N.Y. 1956); Kahn v. Kahn, 78 So. 2d 367 (Fla. Sup. Ct. 1955). See also Foster & Freed, *Unequal Protection: Poverty and Family Law*, 2 INDIANA L.J. 192, at 204-06 (1967); Hofstadter & Levittan, *Alimony—A Reformulation*, 7 J. FAM. LAW 51 (1967); Milner, *The Place of "Fault" in Economic Litigation between Husband and Wife*, 109 L.J. 215 (1959); Paulsen, *Support Rights and Duties between Husband and Wife*, 9 VAND. L. REV. 709 (1955); Kelso, *The Changing Social Setting of Alimony Law*, 6 LAW & CONTEMP. PROB. 186, at 195 (1939). And see REPORT OF THE GOVERNOR'S COMM'N ON THE FAMILY (Calif.) 47-48 (Dec. 1966).

> Concomitant with our oft-stressed point that . . . procedures must be directed toward examining into and coping with the real problems of the family, we recommend that the element of marital misconduct as a controlling factor be eliminated from the law governing the award of alimony and that such awards be controlled by the needs and circumstances of the parties.
>
> We believe that the . . . Court must have the ability to take full cognizance of all aspects of the case before it, and must have the power to make orders suited to the needs and circumstances of the parties, having regard to their future functioning as productive members of society. We can only conclude that it is both unrealistic and unwise to require the court to predicate its provisions for maintenance upon a finding that the obligor has erred. Our decisional law is replete with judicial recognition of the fact that need and ability to pay should be the controlling factors, and yet this recognition

pay maintenance to his guilty wife where she is entirely without means and earning capacity. [97]

B. *Renunciation or Waiver: Effect of Separation Agreement*

A spouse cannot by any unilateral declaration or conduct renounce or waive the statutory right to claim maintenance. [98] A covenant by a spouse in a separation agreement not to invoke the jurisdiction of the court to order financial relief if a divorce is afterwards granted does not bar an application for, or the granting, of maintenance, [99] but where the agreement makes provision for maintenance, the court should not lightly upset or go behind the terms of the agreement. [100]

C. *Effect of Order under Deserted Wives' and Children's Maintenance Act*

An order obtained under a provincial deserted wives' and children's maintenance act does not preclude maintenance as corollary relief in subsequent divorce proceedings; on the contrary, the order ceases to have effect upon the dissolution of the marriage and it is the duty of the trial court in the divorce proceedings to consider and adjudicate any application for maintenance and to grant such relief as appears reasonable in the circumstances. [101]

D. *Conditions, Means and Other Circumstances of Parties*

The statutory requirement that the court shall determine the right to corollary relief having regard to "the condition, means and other circum-

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cannot be given full effect because of persistence of the doctrine of technical fault.

[97] Ashcroft v. Ashcroft, [1902] P. 270, 71 L.J.P. (n.s.) 125 (C.A.). Since the concept of the matrimonial offence as the criterion for divorce is now supplemented by that of permanent breakdown of marriage (*see* Divorce Act (Canada), 1968, § 4), it becomes increasingly difficult to justify a retention of emphasis upon the issue of guilt or innocence so far as corollary relief is concerned.

[98] Ross v. Ross, [1950] P. 160, [1950] 1 All E.R. 654.

[99] *In Re* Reciprocal Enforcement of Judgments Act, MacKowey v. Mackowey, 14 W.W.R. (n.s.) 190 (B.C. Sup. Ct. 1955); Hutton-Potts v. Royal Trust Co., [1949] 2 W.W.R. 1031, [1950] 1 D.L.R. 50 (B.C. 1949); Pilichowsky v. Pilichowsky, [1947] 1 W.W.R. 257, [1947] 2 D.L.R. 444 (Sask K.B.), *aff'd.*, [1948] 1 W.W.R. 590, [1948] 2 D.L.R. 862 (Sask.); Hyman v. Hyman, [1929] A.C. 601, 98 L.J.P. (n.s.) 81. *See also* Simmonds v. Simmonds, [1956] P. 47, [1955] 3 W.L.R. 129, [1955] 2 All E.R. 481; Spillett v. Spillett, [1943] 3 W.W.R. 110 (Man. K.B.). *Compare* Smith v. Smith, [1955] Ont. 695, [1955] 3 D.L.R. 808. See Payne, *Proposals For Reform Of The Law Relating to Separation And Maintenance Agreements*, 33 SASK. L. REV. 1 (1968).

[100] Morton v. Morton, [1954] 1 W.L.R. 737, 98 Sol. J. 318, [1954] 2 All E.R. 248 (C.A.). *See also* Haldorson v. Campbell, 8 W.W.R. (n.s.) 188 (Man. Q.B. 1953), *sub nom.* Haldorson v. Gilchrist, 61 Man. 71 (Q.B. 1953); *see further* In Re Haldorson Estate, 9 W.W.R. (n.s.) 145 (Man. Q.B. 1953); Bobbi v. Gilchrist, 9 W.W.R. (n.s.) 458 (Man. Q.B. 1953); Hutton-Potts v. Royal Trust Co., *supra* note 99.

[101] Hoggan v. Hoggan, [1957] Ont. W.N. 425; Roswell v. Roswell, [1950] Ont. 748, [1950] 4 D.L.R. 801 (High Ct.). *See also* Auld v. Auld, [1960] Ont. W.N. 62 (1959) (alimony); Clydesdale v. Clydesdale, 17 D.L.R.2d 429 (B.C. Sup. Ct. 1958) (alimony incidental to judicial separation).

stances of each of [the parties]" would appear to open up a virtually unlimited field of relevance. It has already been observed that the considerations thus defined in section 11(1) of the Divorce Act (Canada), 1968 do not totally correspond to those designated by earlier legislation,[102] and, accordingly, judicial decisions interpreting and applying such legislation must be regarded with caution. The following submissions may, nevertheless, be tentatively advanced in the light of judicial precedent.

Maintenance may be and, ordinarily, will be refused to a spouse who has ample means.[103] An order for corollary relief is not necessarily precluded, however, by reason that the claimant has some means,[104] or has managed to earn a living,[105] or subsist for a number of years through the assistance of relatives.[106] If a husband or wife has contributed, directly or indirectly, to his or her spouse's career or helped to increase his or her spouse's assets, such contribution may constitute a basis for financial provision, irrespective of the means or earning capacity of the contributing spouse.[107] The assumption of a continuing obligation to provide a home for the children is a material consideration in determining whether an order for maintenance should be made.[108] Cognizance must also be taken of the plight of the married woman who has devoted the greater part of her time to caring for the matrimonial home and the children of the family and thus had little opportunity to learn the skills necessary to earn a living.[109]

It is impossible to catalogue all the circumstances which may be deemed relevant by a court but it would appear that the circumstances must be "so nearly touching the matter in issue as to be such that a judicial mind ought to regard it as a proper thing to be taken into consideration."[110]

E. *Duration of Orders*

Section 11(1) of the Divorce Act (Canada), 1968, unlike previous statutory provisions, would appear to confer an unfettered discretion upon the court with respect to the duration of orders for maintenance, whether secured or unsecured.[111] Pursuant to such discretion, the court may presumably direct that an order for maintenance shall continue for a definite period or cease on the occurrence of a future event, for example, the divorced wife's

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[102] See sub-heading *Discretion in Granting Relief supra* at p. 389.

[103] MacIntosh v. MacIntosh, 54 N.B. 145, [1927] 3 D.L.R. 1190.

[104] Kirstein v. Kirstein, [1941] 2 W.W.R. 406 (Alta. Sup. Ct.).

[105] Fay v. Fay, [1945] Ont. W.N. 328 (High Ct.); Homuth v. Homuth, [1943] Ont. W.N. 290, [1943] 3 D.L.R. 603 (High Ct.), *aff'd with variation as to amount*, [1943] Ont. W.N. 570, [1943] 4 D.L.R. 428.

[106] McLennan v. McLennan, [1940] Sup. Ct. 335, [1940] 2 D.L.R. 81.

[107] Doyle v. Doyle, 158 N.Y.S.2d 909 (Sup. Ct. 1957). *See also* Hall v. Hall, 22 N.Z.L.R. 226 (C.A. 1902).

[108] Clear v. Clear, [1958] 1 W.L.R. 467, 102 Sol. J. 306, [1958] 2 All E.R. 353 (C.A.). *See also* Brewer v. Brewer, 88 Commw. L.R. 1 (1953).

[109] Doyle v. Doyle, 158 N.Y.S.2d 909.

[110] *See* Rogers v. Rogers, 3 F.L.R. 398, at 402 (N.S.W. Sup. Ct. 1962).

[111] See *supra* note 57 and accompanying text.

remarriage or the divorced husband's retirement from gainful employment, and such an order may be qualified by leave to apply for a further order on the expiration of the period or the occurrence of the event.[113] It is probable that an order made subject to the above limitations could be modified or rescinded pursuant to section 11(2) of the Divorce Act (Canada), 1968 if a material change of circumstances warranted variation or rescission of the order before the designated period or event. However, it would appear desirable for the court to eliminate all doubt in this context by expressly reserving a power in either party to apply for variation or discharge of the order.

F. *Conditions and Restrictions on Maintenance Orders*

Section 12 of the Divorce Act (Canada), 1968 provides that where an order for corollary relief is made pursuant to sections 10[113] or 11 of the act, the court may

> (*a*) direct that any alimony, alimentary pension or maintenance be paid either to the husband or wife, as the case may be, or to a trustee or administrator approved by the court; and
> (*b*) impose such terms, conditions or restrictions as the court thinks fit and just.[114]

The language of paragraph (*b*) quoted above would appear to confer an

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[112] *See* Carthew v. Carthew, 8 F.L.R. 301 (N.S.W. Sup. Ct. 1966); Capp. v. Capp, [1963] Austl. Argus L.R. 143 (N.S.W. Sup. Ct. 1962) and see sub-heading *Conditions and Restrictions on Maintenance Orders infra* at p. 394. Alternatively, provision might be made for the amount of maintenance designated in an order to be increased or decreased as from a future date or on the occurrence of a future event: *see* Hulton v. Hulton, 33 T.L.R. 137 (Divorce Ct. 1916); Naish v. Naish, 32 T.L.R. 487 (C.A. 1916); C. v. C., [1963] Vict. 131, [1963] Austl. Argus L.R. 481 (1962). *But see* F. v. F., [1967] 1 W.L.R. 793 (Divorce Ct.).

Evidence presented to THE ROYAL COMMISSION ON MARRIAGE AND DIVORCE (England), 1951-1955, included suggestions that the duration of all maintenance orders should be limited to a two year period with a power vested in the spouse to make fresh application for maintenance after the expiration of this period. Alternatively, it was suggested that the court should have a discretionary power to limit the duration of a maintenance order: CMD. 9678 para. 488 (1956). Commenting upon these suggestions, the commission (at para. 492) expressed the following opinions:

> We do not accept the suggestion that a specific limit should be set to the duration of all maintenance orders. The wife would then be in a position of uncertainty and would be put to the trouble of making a fresh application to the court if (as we think would happen in the majority of cases) she still required maintenance after the order had expired. The court would also be given a great deal of unnecessary work. It is open to the husband to apply to the court at any time for the order to be varied or (if the circumstances warrant this) for it to be discharged. On occasion, however, it might be preferable that the order should be expressed to last for a definite period. It seems uncertain if the court can do this at present but we think that it should have this power, and we recommend accordingly. The setting of a limit to the duration of an order should not, however, preclude the court from varying the order at any time during the period for which it was set to run or from making a fresh order at any time after the lapsing of an order.

[113] *Supra* note 1.

[114] *Compare* Divorce and Matrimonial Causes Act (England), 1857, § 24.

unfettered discretion upon the court.

G. *Dum Sola et Casta Clause*

The insertion of a dum sola et casta clause in an order for maintenance falls within the discretionary power of the court conferred by section 12 of the Divorce Act (Canada), 1968. [115] In determining whether such a clause should be included in the order the courts have hitherto refused to lay down specific rules regulating the exercise of the discretion and each case must therefore be decided on its own facts. [116] The issue to be determined is whether such a clause would be reasonable having regard to the conduct of the parties, [117] their position in life, ages and respective means, the amount of the provision made, the existence of children and the disposition of their care and custody, and any other circumstances which may be important in the particular case. [118]

A dum casta clause should not be included where maintenance is ordered in favour of an innocent spouse because such a clause "is an insult to any woman of spotless character." [119] The court may, however, insert a dum sola clause without adding the words "et casta" if the innocent party in whose favour maintenance is ordered is likely to remarry. [120]

It has been stated that the principal ground for ordering maintenance in favour of a guilty wife is to ensure that she will be protected from further temptation and lead a respectable life and, accordingly, a dum casta clause should ordinarily be included where maintenance is awarded to a guilty wife. [121] It has been held, however, that such a clause is unnecessary where

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[115] By virtue of § 2 of The Matrimonial Causes Act, ONT. REV. STAT. c. 232 (1960) which empowered the courts to order monthly or weekly sums to be paid for the support and maintenance of the wife "so long as she remains chaste," no general discretion was previously reserved to the courts of Ontario: *see* Cohen v. Cohen, [1947] Ont. W.N. 941, [1948] 1 D.L.R. 429 (High Ct. 1947); Sanders v. Sanders, [1947] Ont. W.N. 788, [1947] 4 D.L.R. 254 (High Ct.). *See also* Hanley v. Hanley, [1948] Ont. 827, [1948] 4 D.L.R. 741 (High Ct.) *aff'd*, [1949] Ont. 163, [1949] 2 D.L.R. 72, wherein it was held that, since the jurisdiction to grant an order to secure maintenance under § 1 of The Matrimonial Causes Act, ONT. REV. STAT. c. 232 (1960) is limited to cases where the wife has not been guilty of adultery, the deed of security should include a dum casta clause.

[116] Wood v. Wood, [1891] P. 272, 60 L.J.P. (n.s.) 66 (C.A.).

[117] Conduct before marriage may be material: *see* Kettlewell v. Kettlewell, [1898] P. 138, 67 L.J.P. (n.s.) 16 (1897), wherein the court had regard to the fact that the claimant had been divorced by her previous husband.

[118] Wood v. Wood, [1891] P. 272, 60 L.J.P. (n.s.) 66 (C.A.). *See also* cases cited *infra* note 119-23.

[119] Wood v. Wood *id.* at 276, 60 L.J.P. (n.s.) at 68. *See also* Squire v. Squire, [1905] P. 4, 74 L.J.P. (n.s.) 1 (1904); Smith v. Smith, [1898] P. 29, 67 L.J.P. (n.s.) 54 (1897).

[120] Smith v. Smith, *supra* note 119; Robertson v. Robertson, [1916] N.Z.L.R. 700 (Sup. Ct. 1916). The court will not ordinarily include a dum sola clause without the addition of the words "et casta" where maintenance is sought by a guilty spouse: Kettlewell v. Kettlewell, [1898] P. 138, 67 L.J.P. (n.s.) 16.

[121] Squire v. Squire, [1905] P. 4, 74 L.J.P. (n.s.) 1. *See also* Ollier v. Ollier, [1914] P. 240, 84 L.J.P. (n.s.) 23 (C.A.); Parry v. Parry, [1896] P. 37, 65 L.J.P.

only a bare allowance is ordered for the guilty wife's support and maintenance and the parties have lived separately and without communication for several years. [122] Where an order to secure maintenance is granted subject to such qualification, the dum sola et casta clause is not usually inserted in the order but in the deed of security. [123]

III. Amount of Maintenance

Maintenance is to be awarded in such an amount as the court thinks reasonable, "having regard to the conduct of the parties, and the condition, means and other circumstances of each of them." [124] An amount which is fixed without due regard to all these factors cannot be justified in law,[125] but, if the trial court's discretion is exercised properly, the amount ordered will not be interfered with on appeal. [126]

The conduct of both parties and not of one only must be considered, but it will be an extremely rare case for the conduct of a successful petitioner to be such as to justify an award of a sum which would leave less than sufficient to provide the necessities of life when the respondent's means are sufficient to allow a higher award. [127] The court must always keep in mind that the primary object of a maintenance order is to provide the financially dependent spouse with a reasonable allowance for his or her maintenance having regard to the station in life of both parties. [128]

In determining the amount of maintenance that may properly be awarded to a wife, the court will look to the husband's potential capacity to provide maintenance and not merely to the assets at his disposal when the application for maintenance is under consideration. [129] The husband's capacity to pro-

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(n.s.) 35; Edwards v. Edwards, [1894] P. 33, 63 L.J.P. (n.s.) 62 (1893); Bent v. Bent, 30 L.J.P. (n.s.) 175, 164 Eng. Rep. 1047 (Judge in Ordinary 1861).

[122] Lander v. Lander, [1891] P. 161, 60 L.J.P. (n.s.) 65. *Compare* Ollier v. Ollier, *supra* note 121.

[123] Medley v. Medley, 7 P.D. 122, 51 L.J.P. (n.s.) 74 (C.A. 1882).

[124] Divorce Act (Canada), 1968, § 11(1).

[125] Parrott v. Parrott, [1945] Ont. W.N. 180, [1945] 2 D.L.R. 264.

[126] Campbell v. Campbell, 14 W.W.R. (n.s.) 690 (B.C. 1955) (sufficient weight not given to relevant considerations by trial judge; amount reduced). *See also* Davis v. Davis, [1967] P. 185, [1966] 3 W.L.R. 1157 (C.A. 1966). Also see text accompanying note 71 *supra* at p. 386; Orlando v. Orlando, 12 Mar. Prov. 34, [1937] 1 D.L.R. 784 (N.S. Sup. Ct. 1936).

[127] Courtney v. Courtney, [1966] 2 W.L.R. 524, at 532, [1966] 1 All E.R. 53, at 58-59 (Divorce Ct. 1965) (per Rees, J.). And *see* Rodgers v. Rodgers, [1965] Austl. Argus L.R. 109, 38 A.L.J.R. 27 (High Ct. 1964), wherein it was stated that no punitive element enters into the assessment of maintenance. *But compare* M. v. M., [1962] 1 W.L.R. 845, 106 Sol. J. 433, [1962] 2 All E.R. 895 (Divorce Ct.) (Maintenance refused to wife who wilfully concealed her own adultery).

[128] See cases cited *infra* note 129 and Davis v. Davis, [1967] P. 185, [1966] 3 W.L.R. 1157 (C.A. 1966). See also *supra* note 10.

[129] Woodrow v. Woodrow, 13 W.W.R. (n.s.) 652 (Sask. Q.B. 1954); Pilichowsky v. Pilichowsky, [1947] 1 W.W.R. 257, [1947] 2 D.L.R. 444 (Sask. K.B.), *aff'd*, [1948] 1 W.W.R. 590, [1948] 2 D.L.R. 862 (Sask.); Holmes v. Holmes, 16 Sask. 390, [1923] 1 W.W.R. 86 (1922). But *see* F. v. F., [1967] 1 W.L.R. 793 (Divorce Ct.).

vide maintenance must be judged in the light of all attendant circumstances. This would include such factors as his mental and physical resources, the money at his disposal, his capital position and the rate of his current expenditure, the absence of regular income being an important but not a decisive factor.[130] Where the husband possesses an ample fortune, the amount of maintenance allowed the wife will not be determined only by reference to her needs or the extent of the husband's income. Thus, in *Acworth v. Acworth*, Lord Justice Scott observed:

> "Maintenance" is a very wide word, and, in my view, it should be read as covering everything which a wife may in reason want to do with the income which she enjoys. It includes much more than food, lodging, clothes, travelling, and so on. It includes, for instance, charity and making of arrangements for the future, incurring various liabilities in her discretion, and it is wrong to limit it to any particular form of expenditure. The figure arrived at by the court in the first instance was not arrived at primarily on the basis of her needs. It is not for the court, . . . to decide, by a close consideration of a wife's needs, how much she ought to spend. I do not say that the needs of a wife should be altogether disregarded, but I do say that that is not the primary consideration. In *Gilbey v. Gilbey* [1927] P. 197, at 200, 96 L.J.P. 55, at 57, Lord Merrivale, P. said: "Where the husband's whole income has been expended on the requirements of the matrimonial home, a third of the husband's means may well be required for the wife's maintenance; but where, beyond everything called for by such requirements in the most comprehensive view, the husband possesses an ample fortune, of which he can dispose for external purposes, the amount of his income affords no definite guidance as to what sum is required for personal, domestic, and social expenses, and what sum will supply to his sometime wife the necessaries, comforts, and advantages incidental to her station in life."[131]

Where the assets and income of the husband are small, the wife should be awarded maintenance at such a rate as will give her and the children in her custody a standard of living appropriate to the husband's financial condition, having regard always to the fact that his income will be required to support two households instead of one wherein household expenses were shared. In general, the standard of living of such wife and children will be necessarily lower than that enjoyed during the marriage but it should not be significantly lower than that which the husband enjoys. If an order would leave either spouse or the children without sufficient means of subsistence, account should be taken of the availability of social welfare benefits and an order may be made in such an amount as will have the effect of preventing any of them being deprived of proper means of subsistence.[132]

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[130] W. v. W. (No. 3), [1962] P. 124, [1962] 2 W.L.R. 700, [1962] 1 All E.R. 736; Donaldson v. Donaldson, [1958] 1 W.L.R. 827, 102 Sol. J. 548, [1958] 2 All E.R. 660 (Divorce Ct.). The capacity of the husband to provide maintenance may include in certain circumstances the ability to provide money through overdrafts or loans: J.-P.C. v. J.-A.F., [1955] 2 W.L.R. 973, [1955] 2 All E.R. 85 (Divorce Ct.) *aff'd with variation*, [1955] P. 215, [1955] 3 W.L.R. 72, [1955] 2 All E.R. 617 (C.A.).

[131] Acworth v. Acworth, [1943] P. 21, at 22-23, 112 L.J.P. (n.s.) 37, at 39-40 (C.A. 1942).

[132] Ashley v. Ashley, [1965] 3 W.L.R. 1194, [1965] 3 All E.R. 554 (Divorce Ct.)

The amount of maintenance should not be such as to discourage the husband's incentive to work or prevent him from reasonably expanding his business nor should it be based on the income of a year when he was exceptionally prosperous. [133] The court is not restricted to a consideration of the husband's income during the year immediately preceding the application for maintenance and, where there is a fluctuating income, it is usual to consider the average net income over the three years preceding the institution of proceedings. [134]

In examining the means and circumstances of a wife for the purpose of determining the amount of maintenance to which she is entitled, it has been held that a trust fund which had passed to her children on her remarriage should not be taken into account but the loss of the benefit of having the children of her former marriage fed and accommodated in the matrimonial home of the respondent, her second husband, is a relevant consideration. [135]

The fact that a wife is earning income should be taken into consideration but it does not prevent the award to her of a reasonable amount for maintenance. [136] In the words of Sir Jocelyn Simon, P. in *Attwood v. Attwood*:

(application under Matrimonial Proceedings (Magistrates' Courts) Act, 1960, c. 48, § 2). *See also* Attwood v. Attwood, [1968] 3 W.L.R. 338 (Divorce Ct.); Kershaw v. Kershaw, [1966] P. 13, [1964] 3 W.L.R. 1143, [1964] 3 All E.R. 635 (1964); Daley v Daley, [1966] Austl. Argus L.R. 936, 7 F.L.R. 70 (Qd. Sup. Ct. 1964); Benson v. Benson, 5 F.L.R. 275 (N.S.W. Sup. Ct. 1964); Castle v. Castle, 6 F.L.R. 363 (Tas. Sup. Ct. 1964); Fleming v. Fleming, 4 F.L.R. 91 (Tas. Sup. Ct. 1963); *compare* Giles v. Giles, [1965] Queensl. 13, 7 F.L.R. 142 (1964). The fact that the husband is receiving social welfare payments is not an absolute bar to ordering payment of more than a nominal amount but it is wrong to fix an amount which is too high for the husband to pay and to order that part thereof shall accumulate as arrears: Ivory v. Ivory, [1954] 1 W.L.R. 604, 98 Sol. J. 234, [1954] 1 All E.R. 898 (Divorce Ct.).

[133] Dixon v. Dixon, 58 Man. 48, [1950] 2 W.W.R. 49 (K.B.).

[134] Homuth v. Homuth, [1943] Ont. W.N. 290, [1943] 3 D.L.R. 603 (High Ct.), *aff'd with variation of amount*, [1943] Ont. W.N. 570, [1943] 4 D.L.R. 428. *See* Steinbeck v. Steinbeck, 29 W.W.R. (n.s.) 504 (B.C. 1959); Chichester v. Chichester, [1936] P. 129, 105 L.J.P. (n.s.) 38; Sherwood v. Sherwood, [1929] P. 120, 98 L.J.P. (n.s.) 66 (C.A. 1928); Dayrell-Steyning v. Dayrell-Steyning, [1922] P. 280, 91 L.J.P. (n.s.) 210; Theobald v. Theobald, 15 P.D. 26, 59 L.J.P. (n.s.) 21 (1889). As to income tax and insurance as factors, see Challenger y. Challenger, [1944] Ont. W.N. 714, [1944] 4 D.L.R. 639 (High Ct.) *See also* Schlesinger v. Schlesinger, [1960] P. 191, [1960] 3 W.L.R. 83, [1960] 1 All E.R. 721 (1959); J.-P.C. v. J.-A.F., [1955] 2 W.L.R. 973, *aff'd with variation*, [1955] P. 215; Roach v. Roach, [1944] 1 W.W.R. 511 (B.C. Sup. Ct.). In calculating the respective means of the parties for the purpose of assessing maintenance, account will be taken of reasonable expenditure by either party on the education of children by a former marriage: P. (J.R.) v. P. (G.L.), [1966] 1 W.L.R. 778, [1966] 3 All E.R. 439 (Divorce Ct. 1965); Williams v. Williams, [1965] P. 125, [1964] 3 W.L.R. 832 (C.A. 1965).

[135] P. (J.R.) v. P. (G.L.), *supra* note 134.

[136] Attwood v. Attwood, [1968] 3 W.L.R. 338; Levett-Yeats v. Levett-Yeats, 111 Sol. J. 475 (C.A. 1967); Fay v. Fay, [1945] Ont. W.N. 328 (High Ct.); Homuth v. Homuth, [1943] Ont. W.N. 290, [1943] 3 D.L.R. 603. *See* Divorce Act (Canada), 1968, § 11(1), whereby the court must have regard to the "means" of each of the parties. In Rogers v. Rogers, 3 F.L.R. 398, at 401 (N.S.W. Sup. Ct. 1962) Wallace, J., interpreted the phrase "the means of the parties" in § 84(1) of the Matrimonial Causes Act (Australia), 1959 as referring to capital assets, both actual and contingent, but this definition would appear to be unduly restrictive. It is accordingly submitted

> Where a wife is earning an income, that ought generally to be brought into account, unless it would be reasonable to expect her to give up the source of the income. Where a wife is earning an income, the whole of this need not, and should not ordinarily, be brought into account so as to enure to the husband's benefit. This consideration is particularly potent where the wife only takes up employment in consequence of the disruption of the marriage by the husband, or where she would not reasonably be expected to be working if the marriage had not been so disrupted.[137]

There has been a difference of judicial opinion as to whether the potential earning capacity of a wife who declines the opportunity of seeking gainful employment is material,[138] but it would appear to depend upon the facts of the particular case, being a matter within the discretion of the court.[139] In *Rose v. Rose*,[140] Lord Denning stated:

> [I]f a wife does earn, then her earnings must be taken into account: or if she is a young woman with no children, and obviously ought to go out to work in her own interest, but does not, then her potential earning capacity ought to be taken into account; or if she had worked regularly during the married life and might reasonably be expected to work after the divorce, her potential earnings ought to be taken into account. Except in cases such as these it does not as a rule lie in the mouth of a wrongdoing husband to say that she ought to go out to work simply in order to relieve him from paying maintenance.[141]

And in the Report of the Royal Commission on Marriage and Divorce (England), 1951-1955, it is stated:

> We are agreed that in principle it is undesirable nowadays that a woman should receive maintenance if she is well able to support herself, and would

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that the term "means" should be interpreted to include all the pecuniary resources of the parties, whether capital or income and whether actual or prospective.

[137] Attwood v. Attwood, [1968] 3 W.L.R. 338, at 342.

[138] Dixon v. Dixon, 58 Man. 48, at 53, [1950] 2 W.W.R. 49, at 52 (K.B.). *See also* Hall v. Hall, [1947] Ont. W.N. 997 (High Ct.); M. v. M., [1947] Ont. W.N. 474 (High Ct.); Homuth v. Homuth, [1943] Ont. W.N. 290, [1943] 3 D.L.R. 603; Hudson v. Hudson, 26 Ont. W.R. 688, 6 Ont. W.N. 503 (High Ct. 1914); Goodfriend v. Goodfriend, 21 Ont. W.R. 637, 3 Ont. W.N. 784 (High Ct. 1912); and see *infra* cases cited in notes 140 and 141.

[139] The language of § 11(1) of the Divorce Act (Canada), 1968, which defines the considerations relevant to the exercise of the court's discretion, is much broader than that of former statutory provisions, which declared "the fortune" of the wife to be material. The phrase "and other circumstances" in § 11(1) may be, and it is submitted should be interpreted so as to require the court to have regard to the wife's potential earning capacity in exercising the discretion to order a reasonable allowance. See text accompanying note 142 *infra* at pp. 399-40.

[140] [1951] P. 29, at 31-32, [1950] 2 All E.R. 311, at 313 (C.A. 1950).

[141] *See also* Attwood v. Attwood, [1968] 3 W.L.R. 338; Levett-Yeats v. Levett-Yeats, 111 Sol. J. 475 (C.A. 1967); P. (J.R.) v. P. (G.L.), [1966] 1 W.L.R. 778; Rodgers v. Rodgers, [1965] Austl. Argus L.R. 109; J.-P.C. v. J.-A.F., [1955] 2 W.L.R. 973 (Probate); and cases cited in *supra* note 96. *Compare* Le Roy-Lewis v. Le Roy-Lewis, [1955] P. 1, [1954] 3 W.L.R. 549, [1954] 3 All E.R. 57 (1954), wherein a wife who had been deserted by her husband and who had been employed before the marriage was held to be under no obligation "to go back to earning in order to reduce the husband's liability to maintain her," even though she was still a young woman and had no children dependent on her.

> in fact have to do so if she had been left a widow. At present the court takes into account the wife's capital, if any, and what she is earning at the time of the application. We consider that, if it does not already do so, the court should also have regard in every case to what may be termed the wife's potential earning capacity, if she is not working at the time of the application.
>
> We do not think it possible, or indeed appropriate, to lay down rules for the determination of a wife's potential earning capacity. The matter must be left to the court's discretion in the circumstances of the particular case. It is reasonable that a wife who has been left with young children or a wife who is incapacitated by age or illness should look to her husband for maintenance. On the other hand, the illustrations mentioned by Denning L.J. in his judgment in the case of *Rose* (see paragraph 483), namely, the young wife with no children or the wife who had worked regularly during the married life together are examples of cases where it would be reasonable to expect the wife to make some attempt to support herself. A third example is that of the wife who has worked regularly before her marriage and who is separated from her husband not long afterwards.
>
> We think, too, that the standard of living enjoyed by the wife before the marriage broke down should also be taken into consideration. Where the husband's income is sufficient, a wife who has been separated from her husband through no fault of her own should not be expected to suffer any material change in her way of life; and, indeed, this is a consideration to which the court at present has regard. It follows that a wife should not be expected to seek work which is quite unsuited to her age or to the position which she has occupied in the community, unless, of course, there is no alternative; it may also be reasonable that a wife should be allowed time to fit herself for suitable employment. Often, however, to keep up two separate establishments may be more than the husband's income can support and then both husband and wife will have to bear a reduction in their standard of living. [142]

A. *The Usual Amount*

There has been a long established practice whereby maintenance would usually be awarded to a wife in an amount representing one third of the husband's net income, [143] but the rigid application of the so-called one third rule has been regarded as inapplicable to modern conditions. The so-called rule has been regarded as inappropriate where the husband's income is very large [144] and as exceedingly difficult to apply where the parties have only limited means. [145] It may accordingly be concluded that there is no rule whereby the wife is entitled to any specific proportion of the husband's income or of their joint income, where the wife has independent means, and that

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[142] CMD. 9678, para. 493-95 (1956).

[143] *See* Homuth v. Homuth, [1943] Ont. W.N. 290, [1943] 3 D.L.R. 603; X v. X, 41 Man. 209, [1933] 2 W.W.R. 413 (K.B. 1932); Sherwood v. Sherwood, [1929] P. 120; Cobb v. Cobb, [1900] P. 294, 69 L.J.P. (n.s.) 125; Theobald v. Theobald, 15 P.D. 26 (1889); Lister v. Lister, 14 P.D. 175, *aff'd* 15 P.D. 4 (C.A. 1889).

[144] Gilbey v. Gilbey, [1927] P. 197, 96 L.J.P. (n.s.) 55; Hulton v. Hulton, [1916] P. 57, 85 L.J.P. (n.s.) 137 (C.A.); Kettlewell v. Kettlewell, [1898] P. 138.

[145] Ward v. Ward, [1948] P. 62, [1947] 2 All E.R. 713 (1947); X v. X, 41 Man. 209; Jones v. Jones, 142 L.T. 167, 46 T.L.R. 33 (Divorce Ct. 1929).

the rigid application of a fixed arithmetrical formula cannot operate consistently with the discretion conferred by section 11 of the Divorce Act (Canada), 1968.[146]

B. *Procedures for Determining Amount*

In an attempt to provide more efficacious procedures for determining the amount of maintenance which might properly be awarded, certain jurisdictions in the United States have adopted the use of such aids as standardized budgets for various income levels, while other jurisdictions utilize auditing offices equipped with accountants, investigators and social workers.[147] Considerable success in ascertaining the true assets and standard of living of the parties upon which to base a maintenance award has also been achieved in many jurisdictions in the United States by the requirement that both husband and wife must submit sworn detailed financial statements to the court.[148] The adoption of similar procedures in Canada would, it is submitted, assist the courts in ascertaining material facts upon which the determination of a proper maintenance award might be based and would thus facilitate a more equitable distribution of finanicial resources on dissolution of marriage.

IV. Variation and Rescission of Maintenance Orders

The Divorce and Matrimonial Causes Act (England), 1866, section 1 authorized the court, where the husband became unable to pay the monthly or weekly sum ordered for the maintenance of his wife, to discharge, modify,

[146] *See* Chichester v. Chichester, [1936] P. 129; Horniman v. Horniman, [1933] P. 95, 102 L.J.P. (n.s.) 33; Stibbe v. Stibbe, [1931] P. 105, 100 L.J.P. (n.s.) 82 (C.A.); Gilbey v. Gilbey, [1927] P. 197. *See also* Hakluytt v. Hakluytt, [1968] 1 W.L.R. 1145, at 1150, [1968] 2 All E.R. 868, at 872 (C.A.); Homuth v. Homuth, [1943] Ont. W.N. 290; X v. X, *supra* note 145.

[147] *See* Doyle v. Doyle, 158 N.Y.S.2d 909 (Sup. Ct. 1957), wherein Hofstadter, J., stated:

> From the point of view of procedure, it is manifest that there is a dire need of an integrated court, properly staffed and equipped with social aids, to handle all family matters. . . . [S]o that a court dealing with the family will be able to prescribe comprehensive and final relief rather than piecemeal and temporary palliatives . . . .
>
> Further, in an effort to reduce the numerous applications for rehearings and modifications of support allowances, consideration must be given to the use of more efficient methods employed in other jurisdictions to determine the financial capacity of the husband and the need of the wife. Standardized budgets for various income groups, court auditing offices equipped with accountants and investigators, sworn financial statements, etc., should be instituted. See also note 148, *infra* at p. 401.

[148] See Hofstadter & Levittan, *Alimony—A reformulation*, 7 J. Family L. 51 (1967). In an appendix to the aforementioned article, the authors propose that verified information should be submitted by husband and wife on a standard form questionnaire detailing information relating to such matters as earnings, assets, expenses and debts. Compare the requirements of current Divorce Rules operating in the Canadian provinces. *See e.g.*, Ontario Matrimonial Causes Rules (1968), Rule 787 and Form 140.

or temporarily suspend the order in whole or in part. The same or similar powers were conferred in several Canadian jurisdictions by provincial statutes or rules of court. [149] In some provinces such statutes or rules of court provided not only for decreasing the amount of maintenance ordered where the husband became unable to make the payments but also for increasing it where his means increased [150] or those of his wife decreased. [151] No power of variation was conferred, however, with respect to orders to secure maintenance made under section 32 of the Divorce and Matrimonial Causes Act (England), 1857, or under the provincial statutes or rules of court relating thereto. [152]

The provisions of the Divorce Act (Canada), 1968, which regulate the powers of the court to vary or rescind corollary orders for maintenance made pursuant to section 11(1) of the act, [153] are couched in more general terms than the aforementioned statutory provisions or rules of court and would appear to confer a wide discretion on the court. Section 11(2) of the Divorce Act (Canada), 1968, [154] confers a jurisdiction to vary and not a jurisdiction to fix de novo the amount of maintenance and accordingly the issue on an application to vary is not at large in the same way as it is on an original application for maintenance. [155] The power of variation and rescission conferred by the section is not expressly confined to orders for unsecured periodic payments and may presumably, therefore, be exercised also with respect to orders to secure maintenance [156] and orders for the pay-

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[149] The Domestic Relations Act, ALTA. REV. STAT. c. 89, § 26 (1955); B.C.D.R. 33 (1961); The Matrimonial Causes Act, ONT. REV. STAT. c. 232, § 2 (1960); The Queen's Bench Act, SASK. REV. STAT. c. 73, § 37 (1965). *See* Tidd v. Tidd, [1950] 1 D.L.R. 74 (N.S. Ct. for Divorce & Matrimonial Causes 1949); Orlando v. Orlando, 12 Mar. Prov. 34, [1937] 1 D.L.R. 784 (N.S. Sup. Ct. 1936).

[150] See statutes and rule cited *supra* note 149. *See also* Matrimonial Causes Act, 1907, 7 Edw. 7, c. 12, § 1(2)(b).

[151] See Alberta and Saskatchewan statutes and B.C.D.R. cited *supra* note 149, which also provided for reduction of the amount by reason of the wife's improved financial condition.

[152] See *supra* note 54 and accompanying text.

[153] As to variation and rescission of orders made in divorce proceedings instituted prior to the commencement of the act, *see* Divorce Act (Canada), 1968 § 25(3). *See also* Penny v. Penny, [1966] Austl. Argus L.R. 135, 6 F.L.R. 476 (N.S.W. Sup. Ct. 1965).

[154] § 11(2): "An order made pursuant to this section may be varied from time to time or rescinded by the court that made the order if it thinks fit and just to do so having regard to the conduct of the parties since the making of the order or any change in the condition, means or other circumstances of either of them."

[155] *See* Foster v. Foster, [1964] 1 W.L.R. 1155n, [1964] 3 All E.R. 541 (C.A.). *Compare* Payne v. Payne, [1968] 1 W.L.R. 390 (C.A. 1968), wherein it was held that a consent order made on the basis of information that did not fully disclose the husband's financial circumstances should not be regarded as sacrosanct, except in so far as it indicated the ratio of maintenance to income which the parties considered appropriate.

[156] *Compare* Matrimonial Causes Act (England), 1965 § 31, whereby the power to discharge, vary, suspend and revive the operation of an order to secure maintenance is expressly reserved; *see* Cotton v. Cotton, 58 W.W.R. (n.s.) 65, at 70-71 (B.C. 1967). *Compare also* Matrimonial Causes Act (Australia), 1959, §§ 87(1), (3); and *see* Penny

ment of a lump sum.[157] It would further appear that a variation may be ordered to operate retrospectively even though this has the effect of remitting payments already due,[158] and it may also be permissible for the court, in exceptional circumstances, to order the repayment of any periodic sums or lump sum already paid.[159]

A. *Effect of Remarriage*

There is no express requirement in section 11(2) of the Divorce Act (Canada), 1968 that the court shall vary or rescind a corollary maintenance order in the event of the subsequent remarriage of either party[160] and such remarriage must be regarded only as relevant and not decisive to a determination of the right to variation or rescission of an order.

The remarriage of a divorced husband is not of itself such a change of circumstance as entitles him to a reduction in the amount of maintenance

v. Penny, [1966] Austl. Argus L.R. 135, 6 F.L.R. 476 (N.S.W. Sup. Ct. 1965), wherein it was held that an order to secure maintenance made pursuant to state legislation operating prior to the commencement of the aforementioned act is immutable in the absence of express or necessarily implied statutory authority to rescind the order and there is no such authority conferred by the Matrimonial Causes Act (Australia), 1959.

[157] As to the former position, *see* Maynard v. Maynard, [1951] Sup. Ct. 346, [1951] 1 D.L.R. 241 (1950). *Compare* Matrimonial Causes Act (England), 1965, § 31, and *see* Young v. Young (No. 2), [1962] P. 218, [1961] 3 W.L.R. 1041, [1961] 3 All E.R. 793.

[158] *See* MacDonald v. MacDonald, [1964] P. 1, [1963] 2 All E.R. 857 (C.A. 1963); Macdonald v. MacDonald, [1957] Ont. W.N. 419, 10 D.L.R.2d 309 (High Ct. 1957).

[159] *But see* Brett v. Brett, [1969] 1 All E.R. 1007, at 1015, wherein Phillimore, L.J., stated that "once a capital sum has been awarded and paid, the order cannot be varied and the money cannot be recalled." *See also* Young v. Young (No. 2), [1962] P. 218, [1961] 3 W.L.R. 1041, [1961] 3 All E.R. 793 (1961), wherein the English courts were deemed to lack jurisdiction to order repayment by a wife of money received by her under an order of the court even though she had been guilty of concealing material facts which justified variation of the order. This decision turned upon the interpretation of § 28 of the Matrimonial Causes Act, 1950, 14 Geo. 6, c. 25 (1950), which empowered the courts to "discharge or vary" an order for maintenance. § 11(2) of the Divorce Act (Canada), 1968, however, empowers the court to "vary or rescind" an order and it is arguable that the term "rescind," unlike the term "discharge," necessarily implies a power to terminate retrospectively. See Law Commission (England) Working Paper No. 9: MATRIMONIAL AND RELATED PROCEEDINGS—FINANCIAL RELIEF para. 95-97 (April, 1967) wherein it is recommended that the English courts should be statutorily empowered to remit arrears, backdate variations, and, where the payee has failed to disclose a material change of circumstances, order repayment of sums already paid.

[160] Compare The Matrimonial Causes Act, ONT. REV. STAT. c. 232, § 2(1)(c) (1960) which provided that payments under an order for unsecured maintenance by way of monthly or weekly sums "shall cease on the wife marrying again." *Compare also* The Domestic Relations Act, ALTA. REV. STAT. c. 89, § 26(1) (1955) and The Queen's Bench Act, SASK. REV. STAT. c. 73, § 37(1) (1965), whereby the misconduct or the remarriage of the wife was expressly declared a ground on which a maintenance order might be varied, modified or temporarily suspended. For recommendation that the remarriage of the wife should automatically extinguish her right to claim or receive maintenance from her former husband, see REPORT OF THE ROYAL COMMISSION ON MARRIAGE AND DIVORCE (England), 1951-1955; CMD 9678, para. 496 (1956). *Compare* Law Commission (England) Working Paper No. 9: MATRIMONIAL AND RELATED PROCEEDINGS—FINANCIAL RELIEF para. 40, 69 (April, 1967).

which he has been ordered to pay his former wife.[161] The second marriage is, however, a factor to be considered on an application for variation of the order and may, in certain circumstances, warrant a reduction in the maintenance to be paid in order to enable him to fulfil his obligation to support his second wife, and in considering this factor the income and resources of the second wife are relevant.[162]

In the absence of a dum sola clause,[163] the remarriage of a divorced wife does not necessarily justify the discharge[164] or variation of an order for maintenance made in her favour but such remarriage is a circumstance which should be taken into account in considering whether her fortune has increased. Thus, where the second husband is a pecuniary asset to her and she is saved the expense of maintaining a separate establishment and therefore saves on food, rent and household expenses, the former husband is entitled to a reduction in the amount of maintenance proportioned to her increase in fortune, notwithstanding that his income has remained stable.[165]

B. *Effect of Sexual Misconduct or Adultery*

In the absence of a dum casta clause,[166] the fact that a divorced wife, after obtaining a maintenance order, has had sexual intercourse with a single man or committed adultery with a married man does not of itself require the court to discharge or vary the order by reducing it to a nominal amount.[167] Such conduct should be considered primarily in the light of the difference, if any, which it makes in the relative financial position of the parties.[168]

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[161] Edwards v. Edwards, [1938] 1 W.W.R. 880 (Alta. Sup. Ct.); Moody v. Moody, 34 B.C. 49 (Chambers 1924).

[162] Kinghorn v. Kinghorn, 34 W.W.R. (n.s.) 123 (Sask. Q.B. 1960). *See also* Roberts v. Roberts, The Times, Aug. 2, 1968; Grainger v. Grainger, [1954] 2 All E.R. 665 (Divorce Ct.). Where an application for increased maintenance is made by a wife who obtained a divorce, the fact that her former husband has remarried and has a child by the second marriage is a circumstance to be considered: Leeman v. Leeman, [1951] Ont. W.N. 50 (High Ct. 1950).

[163] See sub-heading *Dum Sola et Casta Clause, supra* at p. 395.

[164] Remarriage of a divorced wife may be a ground for suspending the order rather than discharging it, since the second husband may die or be unable to support her: M. v. M., [1916] N.Z.L.R. 797 (Sup. Ct.). See *supra* note 160.

[165] Perkins v. Perkins, [1938] P. 210, 107 L.J.P. (n.s.) 115. *See also* Oser v. Fenton, [1966] 8 F.L.R. 3 (N.S.W. Sup. Ct. 1965); Young v. Young (No. 2), [1962] P. 218, [1961] 3 W.L.R. 1041 (1961); Miller v. Miller, [1961] P. 1, [1960] 3 All E.R. 115 (1960); Bellenden v. Satherwaite, [1948] 1 All E.R. 343 (C.A.) (wherein both parties remarried and the order was reduced to a nominal amount). On an application for variation of an order for maintenance by reason of the remarriage of the divorced wife the court may take into account the circumstance that the wife has the custody of a child of the parties, in respect of whom she incurs expenditures in excess of the amount ordered for the child's maintenance: Kirke v. Kirke, [1961] 1 W.L.R. 1411, [1961] 3 All E.R. 1059 (Divorce Ct.).

[166] See sub-heading *Dum Sola et Casta Clause, supra* at p. 395.

[167] § 11(2) of the Divorce Act (Canada), 1968 would appear to confer an unfettered discretion on the court. *Compare* The Matrimonial Causes Act, ONT. REV. STAT. c. 232, § 1, 2 (1960); The Domestic Relations Act, ALTA. REV. STAT. c. 89, § 26(1) (1955) and The Queen's Bench Act, SASK. REV. STAT. c. 73, § 37 (1965).

[168] Stead v. Stead, [1968] 2 W.L.R. 1269, [1968] 1 All E.R. 989 (Divorce Ct.

The fact that a divorced husband cohabits with another woman and enjoys the benefits of free board and lodgings in circumstances of comparative affluence may be a relevant consideration in determining the extent of his liability to pay maintenance to his former wife.[169] But it is unlikely that an application by a divorced husband to reduce an award would be favourably entertained merely on the ground that he has voluntarily assumed an obligation to provide financial support for his mistress and her children.[170]

C. *Variation of Consent Order*

Where there is no indication that a final settlement is intended in derogation of the variable character of an order for maintenance, the statutory power to vary exists even though the order is made under a consent judgment.[171] But where an agreement providing for the payment of a lump sum in satisfaction of all present and future rights to maintenance is sanctioned by the court, no application for maintenance may be thereafter pursued.[172]

D. *Jurisdiction to Vary*

Where a corollary order has been made pursuant to section 11(1) of the Divorce Act (Canada), 1968, exclusive jurisdiction to vary or rescind the order is vested in the court that made the order.[173] Corollary orders made in divorce proceedings instituted before the commencement of the Divorce Act (Canada), 1968, may be varied or rescinded by "the court that would have

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1967); Neal v. Neal, 6 F.L.R. 378, [1965] N.S.W.R. 527 (N.S.W. Sup. Ct. 1965); Miller v. Miller, [1961] P. 1, [1960] 3 W.L.R. 658, [1960] 3 All E.R. 115 (1960). *See* Medlicott v. Medlicott, [1962] 1 W.L.R. 136, 106 Sol. J. 57, [1962] 1 All E.R. 449 (C.A.) (application by unchaste wife for increase in amount).

[169] Ette v. Ette, [1964] 1 W.L.R. 1433, 108 Sol. J. 181, [1965] 1 All E.R. 341 (Divorce Ct.).

[170] *See* Roberts v. Roberts, The Times, Aug. 2, 1968, wherein it was held that the husband's acceptance of an obligation to support his mistress and her children was a relevant circumstance to be taken into consideration on his wife's application for maintenance but did not rank in priority to the husband's legal obligation to support his wife and his own child.

[171] Yates v. Yates, 60 D.L.R.2d 202 (Ont. 1967) (alimony); Re Ward v. Ward, 20 W.W.R. (n.s.) 343 (B.C. Sup. Ct. 1956); Green v. Hammond, [1941] 3 W.W.R. 161, [1941] 4 D.L.R. 335 (Alta. Sup. Ct.).

[172] L. v. L., [1962] P. 101, [1961] 3 W.L.R. 1182, [1961] 3 All E.R. 834 (C.A. 1961); Mills v. Mills, [1940] P. 124, 109 L.J.P. (n.s.) 86, [1940] 2 All E.R. 254 (C.A.). *Compare In Re* S., Decd., [1965] P. 165, at 170, [1965] 2 W.L.R. 986, at 991, [1965] 1 All E.R. 1018, at 1022 (application for maintenance out of deceased's estate). But quaere whether *L. v. L., supra* and *Mills v. Mills, supra* are not abrogated by § 31 of the Matrimonial Causes Act (England), 1965; *see* Yates v. Yates, 60 D.L.R.2d 202, at 207-08 (Ont. 1966), explaining Maynard v. Maynard, [1951] Sup. Ct. 346, [1951] 1 D.L.R. 241 and *Mills v. Mills, supra. See also* Matrimonial Causes Act (Australia), 1959, § 87; Whittle v. Whittle, [1966] Austl. Argus L.R. 635, 7 F.L.R. 460, [1965] N.S.W.R. 141 (N.S.W. Sup. Ct. 1965); Shaw v. Shaw, [1966] Austl. Argus L.R. 631, 39 A.L.J.R. 139, 113 Commw. L.R. 545 (High Ct. 1965). Quaere whether § 11(2) of the Divorce Act (Canada), 1968 precludes the court from making any order which is not subject to variation.

[173] Divorce Act (Canada), 1968, § 11(2).

had jurisdiction to grant the decree of divorce corollary to which the order was made if this act had been in force." [174]

E. *Enforcement of Orders*

Since the object of maintenance is to provide an allowance for the dependent spouse to live on and not one which he or she may accumulate, it is well established that the court will not ordinarily order a defaulting spouse to pay an amount in excess of one year's accumulation of arrears. [175]

A judgment for permanent alimony or maintenance may be enforced by execution or garnishment. [176]

In British Columbia, Manitoba, Saskatchewan and, it seems, in Ontario, an order for maintenance cannot be enforced by attachment or committal but in New Brunswick and, it seems, Nova Scotia, arrest and imprisonment may be ordered on default under a maintenance order. [177]

F. *Fraudulent Conveyance*

A divorced wife holding a judgment for maintenance against her former husband has been held entitled to invoke the provisions of the Fraudulent Conveyances Act. [178] In *MacDonald v. MacDonald*, [179] it was held that a

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[174] Divorce Act (Canada), 1968, § 25(3).

[175] Re Execution Act, 42 W.W.R. (n.s.) 126 (B.C. Sup. Ct. 1963); Luscombe v. Luscombe, [1962] 1 W.L.R. 313, 106 Sol. J. 152; [1962] 1 All E.R. 668 (C.A.); Jachowicz v. Bate, 66 Man. 174, 24 W.W.R. (n.s.) 658, 14 D.L.R.2d 99 (Q.B. 1958); Thompson v. Thompson, [1958] Ont. W.N. 53 (High Ct. 1957); McMillan v. McMillan, [1949] 1 W.W.R. 769, [1949] 2 D.L.R. 762 (Sask.).

[176] W. v. W., [1961] P. 113, [1961] 2 W.L.R. 878, [1961] 2 All E.R. 56 (C.A. 1960); Dinesen v. Dinesen (No. 2), 29 W.W.R. (n.s.) 397, 20 D.L.R.2d 270 (B.C. Sup. Ct. 1959); Jachowicz v. Bate, *supra* note 175; Thompson v. Thompson, *supra* note 175; Rystrom v. Rystrom, 14 W.W.R. (n.s.) 118, [1955] 2 D.L.R. 345 (Sask. C.A. 1954); Moore v. Moore, [1945] 1 W.W.R. 234, [1945] 3 D.L.R. 135 (Alta. Sup. Ct.). *See also* Maintenance Orders Act, 6 & 7 Eliz. 2, c. 39 (1958).

[177] See W. POWER, ON DIVORCE 568-70 (2d ed. J. Payne 1964). As to position in Alberta, see Alimony Orders Enforcement Act, ALTA. REV. STAT. c. 12 (1955). For submission that the ultimate sanction of imprisonment may have salutary effect upon defaulters and should be authorised by statute, see REPORT OF THE ROYAL COMMISSION ON MARRIAGE AND DIVORCE (England), 1951-1955; CMD 9678 para. 1108-09 (1956). For progressive legislation in this context, *see* Contempt for Failure to Support Children; Sentence Earnings; Payment of Contributions by Welfare Agencies, MICH. COMPILED L. 552.201 (1948), *as amended by*, Mich. Stat. 1954, No. 6, whereby the court is empowered to commit a defaulter to the county jail "with the liberty of jail limits which shall be co-extensive with the limits of the county, during such hours as the court shall determine, for the purpose of allowing said party to go to and return from his place of employment . . . and the court may further direct that any portion or all of the earnings of such person . . . shall be paid to and applied for the support of the minor children."

[178] ONT. REV. STAT. c. 154 (1960). *Compare* Matrimonial Causes Act (England), 1965, § 32 and see Law Commission (England) Working Paper No. 9: MATRIMONIAL AND RELATED PROCEEDINGS—FINANCIAL RELIEF para. 98-101 (April, 1967). As to the power of the Canadian courts to issue an injunction to prevent a spouse disposing of property so as to avoid payment of maintenance, see W. POWER, ON DIVORCE 572 (2d ed. J. Payne 1964).

[179] [1957] Ont. W.N. 419, 10 D.L.R.2d 309 (High Ct.). *See also* Wessels v. Wes-

divorced wife with a judgment for maintenance against her former husband had the status to maintain a class action on behalf of all creditors as well as on her own behalf to impeach a conveyance as being fraudulent and void under the Fraudulent Conveyances Act, although nothing was owing to her under the judgment at the time of the challenged transaction. The trial judge concluded that even though the plaintiff was not strictly a creditor, she was one of the "others" under section 2 of the act, for whose protection the statute was intended and that in so far as she might be a subsequent creditor in respect of the impeached transaction, her cause of action did not disappear merely for failure to prove her former husband's intention to defraud or hinder his creditors generally.

G. *Charging Land*

Registration of an order or judgment for alimony or maintenance as a charge upon land is expressly provided for in some provinces.[180] Such provincial legislation does not interfere with the court's discretion to limit the payment of arrears of maintenance as the court sees fit.[181] So long as the order which the recipient spouse has registered against the paying spouse's land remains in force, there is no power in the court to discharge such registration in whole or in part.[182]

H. *Effect of Death*

The right to enforce an order for maintenance is personal to the spouse in whose favour the order has been made and does not pass on death to his or her personal representatives.[183]

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sels, [1941] 3 W.W.R. 94 (B.C. Sup. Ct.); Mackey v. Mackey, 42 B.C. 440, [1930] 1 W.W.R. 604, [1930] 3 D.L.R. 497 (Sup. Ct.); Shephard v. Shephard, 56 Ont. L.R. 555, [1925] 2 D.L.R. 897.

[180] *See* The Domestic Relations Act, ALTA. REV. STAT. c. 89, § 21 (1955); Land Registry Act, B.C. REV. STAT. c. 208, §§ 2(1), 174-181 (1960); Execution Act, B.C. REV. STAT. c. 135, § 34 (1960). Judgments Act, MAN. REV. STAT. c. 129, § 9 (1954); Alimony Act, N.S. REV. STAT. c. 7, § 2 (1954); Judicature Act, ONT. REV. STAT. c. 197, § 78 (1960); Land Titles Act, SASK. REV. STAT. c. 115, § 130 (1965). *See also* Divorce and Matrimonial Causes Act (England), 1857, § 32; F. v. F., [1967] 1 W.L.R. 793 (Divorce Ct.) *sub nom.*, Foard v. Foard, [1967] 2 All E.R. 660 (Divorce Ct.). The term "alimony" in § 78 of the Judicature Act, ONT. REV. STAT. c. 197 (1960) does not include maintenance awarded on the dissolution of marriage and an award of maintenance as corollary relief in divorce proceedings is consequently not registerable under that section: MacDonald v. MacDonald, [1952] Ont. 754, [1952] 4 D.L.R. 457. There would appear, however, to be no substantial reason for excluding an order for maintenance from the provisions of § 78 of the Ontario Judicature Act, and it is accordingly suggested that the aforementioned section should be amended so as to include orders or judgments for maintenance.

[181] Re Execution Act, 42 W.W.R. (n.s.) 126 (B.C. Sup. Ct. 1963).

[182] Klischies v. Klishchies, 30 W.W.R. (n.s.) 115 (Man. Q.B. 1959). It would seem desirable that amending legislation be enacted empowering the courts to direct the discharge or variation of the registration of an order or judgment where such discharge or variation is deemed reasonable in the circumstances of the case.

[183] Jachowicz v. Bate, 66 Man. 174, 24 W.W.R. (n.s.) 658, 14 D.L.R.2d 99 (Q.B. 1958). See Law Commission (England) Working Paper No. 9: MATRIMONIAL AND RELATED PROCEEDINGS—FINANCIAL RELIEF para. 150 and at p. 100 (April, 1967), where-

By virtue of the Divorce Act (Canada), 1968 section 11(1), the court may presumably make an order for unsecured maintenance for any term not exceeding the life of the recipient. If an order is made for such a term, the order will apparently be enforceable on a continuing basis against the estate of the deceased spouse. [184] It would appear, however, that an order for unsecured maintenance made pursuant to statutory provisions operating prior to the enactment of the Divorce Act (Canada), 1968, cannot be enforced against the estate of the spouse who is ordered to pay, except in respect of arrears of maintenance due at his or her death. [185]

I. *Effect of Bankruptcy*

A claim for maintenance, whether payable in the future or in arrears, is not a debt provable in bankruptcy or against an insolvent estate, [186] and the obligations arising under an order for maintenance are not released by an adjudication in bankruptcy. [187]

J. *Effect and Registration of Orders*

Section 14 of the Divorce Act (Canada), 1968 stipulates that corollary orders made pursuant to section 10 [188] and 11 of the act shall have legal effect throughout Canada. To facilitate the enforcement of such orders, section 15 provides that orders made under section 10 or 11 may be registered in any other superior court in Canada and may be enforced [189] in like manner as an order of that superior court or in such other manner as may be provided for by any rules of court or regulations made pursuant to section 19. [190] The

in it is recommended that arrears of maintenance should be recoverable as judgment debts and should survive the death of the creditor and be enforceable by the personal representatives on behalf of the estate, subject in all cases to an effective discretion in the court to vary or discharge the order with retrospective effect or to limit the extent of the recovery of arrears due.

[184] See *supra* notes 57 and 111 and accompanying text at p. 383. See also Law Commission (England) Working Paper No. 9, para. 148-51, wherein it is recommended that sums payable under a maintenance order should be recoverable as judgment debts and be enforceable against the estate of the debtor.

[185] Re Hudson, [1966] Ch. 207, [1966] 2 W.L.R. 398, [1966] 1 All E.R. 110 (1965); W. v. W., [1961] P. 113, [1961] 2 W.L.R. 878 (C.A. 1960); Sugden v. Sugden, [1957] P. 120, [1957] 2 W.L.R. 210, [1957] 1 All E.R. 300 (C.A. 1956); Barker v. Westminster Trust Co., 57 B.C. 21, [1941] 3 W.W.R. 473, [1941] 4 D.L.R. 514; McLeod v. Security Trust Co., [1940] 1 W.W.R. 423, [1940] 2 D.L.R. 697 (Alta. Sup. Ct.). See also notes 53 and 57 and accompanying text *supra* at p. 383.

[186] James v. James, [1964] P. 303, [1963] 3 W.L.R. 331, [1963] 2 All E.R. 465 (1963); Jachowicz v. Bate, 66 Man. 174, 24 W.W.R. (n.s.) 658; Coles v. Coles, [1957] P. 68, [1956] 3 W.L.R. 861, [1956] 3 All E.R. 542 (1956); Re Freedman, 55 Ont. L.R. 206, [1924] 3 D.L.R. 517; Kerr v. Kerr, [1897] 2 Q.B. 439, 66 L.J.Q.B. (n.s.) 838; Linton v. Linton, 15 Q.B.D. 239, 54 L.J.Q.B. (n.s.) 529 (C.A. 1885). See Law Commission (England) Working Paper No. 9, para. 151.

[187] Slemin v. Slemin, 7 Ont. L.R. 67 (C.P. Div. 1903).

[188] See *supra* note 1.

[189] Quare whether the term "enforced" may be interpreted to permit variation or rescission of a corollary order by the court wherein such order is registered.

[190] For procedure regulating registration under Divorce Act (Canada), 1968, § 15, see Divorce Rules. *See e.g.*, Ontario D.R. 813.

provisions of section 15 do not, however, apply in respect of corollary orders made in divorce proceedings instituted before the commencement of the Divorce Act (Canada), 1968, and accordingly such orders may only be registered and enforced pursuant to provincial legislation which provides for the reciprocal enforcement of maintenance orders as between the enacting province and designated reciprocating jurisdictions. [191]

K. *Settlement of Wife's Property*

Section 45 of the Divorce and Matrimonial Causes Act (England), 1857 authorized the court, where a divorce was granted to a husband on the ground of the wife's adultery, to order that the whole or part of any property of the wife, whether in possession or reversion, be settled for "the benefit of the innocent party and of the children of the marriage, or either or any of them." [192] Similar though not identical statutory provisions have been enacted in several Canadian provinces, [193] but in Ontario the corresponding discretionary power to order a settlement of the wife's property may only be exercised for "the benefit of the children of the marriage or their issue or any or either of them." [194]

The object of the above statutory provisions is to make good the pecuniary damage caused by the wife's matrimonial misconduct and the court will have regard to the probable pecuniary position which the husband, the wife and the children would have enjoyed if the marriage had not broken up. [195] The power of the court is not intended to be used as a punishment of the wife and/or of the co-respondent through the wife. [196]

The power to order a settlement of property pursuant to the afore-

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[191] *See e.g.*, Reciprocal Enforcement of Maintenance Orders Act, Alta Stat. 1958 c. 42, *amended*, Alta. Stat. 1960 c. 88. Reciprocal Enforcement of Maintenance Orders Act, Man. Stat. 1961 c. 36; Reciprocal Enforcement of Maintenance Orders Act, ONT. REV. STAT. 1960 c. 346 (1960), *amended*, Ont. Stat. 1961-62 c. 123. For principles applied under the aforementioned statutes, *see* Short v. Short, 40 W.W.R. (n.s.) 592 (Alta. Sup. Ct. 1962); Coopey v. Coopey, 36 W.W.R. (n.s.) 332 (Alta. Sup. Ct. 1961).

[192] As to the power of the court to order a settlement of the wife's property for a term exceeding her life, *see* Compton v. Compton, [1960] P. 201, [1960] 3 W.L.R. 476, [1960] 2 All E.R. 70; Style v. Style, [1953] 3 W.L.R. 613, [1953] 2 All E.R. 836 (Divorce Ct.), *varied*, [1954] P. 209, [1954] 2 W.L.R. 306, [1954] 1 All E.R. 442 (C.A.); Midwinter v. Midwinter, [1893] P. 93, 62 L.J.P. (n.s.) 77. As to jurisdiction of the court to ante-date the settlement of a wife's property, *see Style v. Style*, *supra*.

[193] *See* The Domestic Relations Act, ALTA. REV. STAT. c. 89, § 22 (1955); Divorce and Matrimonial Causes Act, B.C. REV. STAT. c. 118, § 34 (1960); The Queen's Bench Act, SASK. REV. STAT. c. 73, § 35 (1965).

[194] The Matrimonial Causes Act, ONT. REV. STAT. c. 232, § 3 (1960); Hughes v. Hughes, [1947] Ont. W.N. 170, [1947] 1 D.L.R. 744 (High Ct. 1946); Jasper v. Jasper, [1935] Ont. 269, [1935] 3 D.L.R. 64 (High Ct.) *aff'd*, [1936] Ont. 57, [1936] 1 D.L.R. 193.

[195] Moy v. Moy, [1961] 1 W.L.R. 552, 105 Sol. J. 179, [1961] 2 All E.R. 204 (C.A.); Lorriman v. Lorriman, [1908] P. 282, 77 L.J.P. (n.s.) 108; March v. March, [1867] L.R. 1 P. & D. 440, 36 L.J.P. (n.s.) 65. *See also* Hughes v. Hughes, *supra* note 194.

[196] Moy v. Moy, *supra* note 195; Hughes v. Hughes, [1947] Ont. W.N. 170, [1947] 1 D.L.R. 744; Matheson v. Matheson, [1935] P. 171, 104 L.J.P. (n.s.) 59.

mentioned statutory provisions is extremely limited. There is no power to order a settlement of the wife's property where a decree of divorce has been granted to the husband on a ground other than his wife's adultery.[197] Furthermore, there is no power to order a settlement of the wife's property where a judgment of divorce has been obtained by her nor any power to order a settlement of the husband's property, irrespective of which spouse obtains judgment for divorce.[198] The position thus existing would appear anomalous in light of the provisions of the Divorce Act (Canada), 1968, which not only introduce grounds for divorce other than adultery but also tend to equate the support rights and obligations of husband and wife.[199] It would accordingly appear desirable that the aforementioned statutes should be amended so as to empower the courts in any matrimonial cause[200] to order a settlement of the property of either or both parties, whether they be entitled thereto in possession or reversion, for the benefit of either or both of the parties to the marriage and/or the children of the family[201] and/or their issue.[202] Express provision should also be included in amending legislation to empower the courts to vary or rescind any settlement so ordered.[203]

V. VARIATION OF MARRIAGE SETTLEMENTS

Section 5 of the Divorce and Matrimonial Causes Act (England), 1859 empowered the court, where a final decree of nullity or dissolution of marriage

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[197] *Compare* Matrimonial Causes Act (England), 1965, § 17(2), whereby a settlement of the wife's property may be ordered where the husband obtains a divorce on the ground of his wife's adultery, desertion or cruelty.

[198] For criticism of the corresponding situation in England, see Law Commission (England) Working Paper No. 9: MATRIMONIAL AND RELATED PROCEEDINGS—FINANCIAL RELIEF para. 79, 84 (April, 1967).

[199] *See* Divorce Act (Canada), 1968, §§ 3, 4 (grounds for divorce) and §§ 10, 11 (corollary relief).

[200] There would appear to be no justification for denying the courts a statutory power to order a settlement of property in nullity proceedings: see Law Commission (England) Working Paper No. 9, para. 82. *See* The Queen's Bench Act, SASK. REV. STAT. c. 73, § 36 (1965) (settlement of property upon judgment for restitution of conjugal rights.)

[201] The phrase "children of the family" is intended to include any child of both spouses, whether legitimate, illegitimate or adopted by their joint consent, and any legitimate, illegitimate or adopted child of either spouse who has been accepted as a member of the family by the other spouse. *Compare* Divorce Act (Canada), 1968, § 2(*a*).

[202] See Matrimonial Causes Act (Australia), 1959 c. 104, § 86(1) which provides as follows: "(1) The court may, in proceedings under this Act, by order require the parties to the marriage, or either of them, to make, for the benefit of all or any of the parties to, and the children of, the marriage, such a settlement of property to which the parties are, or either of them is, entitled (whether in possession or reversion) as the court considers just and equitable in the circumstances of the case."

[203] See Law Commission (England) Working Paper No. 9, par. 88: "Anomalously, although there is power to vary an order for settlement of a wife's property made on a decree for restitution of conjugal rights [Matrimonial Causes Act (England), 1965, § 31] there is no such power in the case of a similar order made . . . on divorce or . . . judicial separation."

was pronounced, to order the variation of any ante-nuptial or post-nuptial settlement for the benefit of the children of the marriage and/or their respective parents.[204] There are similar provisions in the statutes of several Canadian provinces[205] but in Ontario the corresponding provision empowers the court to vary marriage settlements only where a decree of divorce is pronounced and only for the benefit of the children of the marriage.[206]

For the purposes of the above legislation, the term "settlement" has been broadly interpreted. Thus in *Prinsep v. Prinsep*,[207] Mr. Justice Hill stated: "The particular form of it does not matter. It may be a settlement in the strictest sense of the term, it may be a covenant to pay by one spouse to the other, or by a third person to a spouse. What does matter is that it should provide for the financial benefit of one or other or both of the spouses as spouses and with reference to their married state."[208]

The primary object of variation is to make proper provision for the injured spouse and the children of the marriage, and prima facie, settlements ought not to be interfered with further than is necessary for that purpose.[209] The court must not only protect the injured party but must also be fair to the wrongdoing party.[210] It is in no sense a penal juris-

[204] *See* Ulrich v. Ulrich, [1968] 1 W.L.R. 180, [1968] 1 All E.R. 67 (C.A. 1967); Radziej v. Radziej, [1967] 1 W.L.R. 659, [1967] 1 All E.R. 944 (Divorce Ct.), *aff'd*, [1968] 3 All E.R. 624 (C.A.); Cook v. Cook, [1962] 3 W.L.R. 441, [1962] 2 All E.R. 811 (C.A.); Young v. Young, [1962] P. 27, [1961] 3 W.L.R. 1109, [1961] 3 All E.R. 695 (C.A.); Compton v. Compton, [1960] P. 201, [1960] 3 W.L.R. 476; Prescott v. Fellowes, [1958] P. 260, [1958] 3 W.L.R. 288, [1958] 3 All E.R. 55 (C.A.); Jeffrey v. Jeffrey (No. 2), [1952] P. 122, [1952] 1 All E.R. 790 (C.A.); Lort-Williams v. Lort-Williams, [1951] P. 395, [1951] 2 All E.R. 241 (C.A.); Bown v. Bown, [1949] P. 91, 117 L.J.P. (n.s.) 1912, [1948] 2 All E.R. 778 (1948); Joss v. Joss, [1943] P. 18, 112 L.J.P. (n.s.) 19 (1942); Bowles v. Bowles, [1937] P. 127, 106 L.J.P. (n.s.) 68.

[205] Domestic Relations Act, ALTA. REV. STAT. c. 89, § 24 (1955); Supreme Court Act, B.C. REV. STAT. c. 374, § 14 (1960); The Queen's Bench Act, SASK. REV. STAT. c. 73, § 34 (1965). *See* Redgrove v. Unruh, 35 W.W.R. (n.s.) 682, 30 D.L.R.2d 555 (Alta. Sup. Ct. 1961, *aff'd*, 39 W.W.R. (n.s.) 317, 35 D.L.R.2d 688 (Alta. 1962); Painter v. Painter, 20 W.W.R. (n.s.) 300 (B.C. Sup. Ct. 1955); Burkmar v. Burkmar, 8 W.W.R. (n.s.) 397, [1953] 2 D.L.R. 329 (B.C. Sup. Ct. 1953); Duncan v. Duncan (No. 2), [1950] 1 W.W.R. 1003 (B.C.); Burns v. Burns, [1924] 1 W.W.R. 498, [1924] 1 D.L.R. 462 (Alta. Sup. Ct.); Church v. Christie, 20 N.S. 468 (Sup. Ct. 1888); (application under An Act to amend Chapter 12 of the Acts of 1884, of the separate property and rights of property of Married Women, N.S. Stat. 1885 c. 35).

[206] The Matrimonial Causes Act, ONT. REV. STAT. c. 232, § 4 (1960). These limitations upon the power of the court to order the variation of marriage settlements are anomalous and it is accordingly submitted that they should be eliminated by amending legislation modelled on § 86(2) of the Matrimonial Causes Act (Australia), 1959.

[207] [1929] P. 225, at 232, 98 L.J.P. (n.s.) 105, at 108.

[208] *See also* Smith v. Smith, 114 L.J.P. (n.s.) 30, [1945] 1 All E.R. 584, at 586 (Divorce 1945); Worsley v. Worsley, L.R. 1 P. & D. 648, at 651, 20 L.T. 546, at 547 (1869). An absolute assignment of property is not a settlement and the court has no jurisdiction to vary its provisions: Prescott v. Fellowes, [1958] P. 260, [1958] 3 W.L.R. 288 (C.A.); Redgrove v. Unruh, 35 W.W.R. (n.s.) 682, 30 D.L.R.2d 555 (Alta. Sup. Ct. 1961), *aff'd*, 39 W.W.R. (n.s.) 317, 35 D.L.R.2d 688 (Alta. 1962).

[209] Prinsep v. Prinsep, [1929] P. 225, 98 L.J.P. (n.s.) 105; and see cases cited in *infra* note 210.

[210] Redgrove v. Unruh, 35 W.W.R. (n.s.) 682, 30 D.L.R.2d 555 (Alta. Sup. Ct.

diction, and no question of inflicting a penalty on the guilty party can arise.[211] In determining whether any variation of a settlement should be made, the court has regard to the conduct of the parties, their respective financial positions, the relative contributions of the parties to the property which is subject to the settlement, and to the effect of the divorce, which has been decreed, upon the material circumstances of each of the parties and of the children of the marriage.[212]

Where an order for the variation of a marriage settlement has been made, it cannot be subsequently modified although it may be revised in the light of circumstances existing at the date of the order which were not brought to the attention of the court.[213]

A. *Variation of Marriage Settlement on Decree of Nullity*

In the absence of an order of the court made pursuant to the aforementioned statutory provisions,[214] the effect of a decree of nullity of marriage upon a settlement made in contemplation of or in consequence of marriage is that the consideration totally fails and the settlor is entitled to the settled property as if the marriage had never taken place,[215] at any rate where the marriage is void.[216] By virtue of the aforementioned statutory provisions, however, the court has power to make orders with respect to the application of settled property which is in existence at the time of the decree of nullity and to deal with the provisions of the settlement as if they were extended and varied so as to include in the description of "parties to the marriage"

1961), *aff'd*, 39 W.W.R. (n.s.) 317, 35 D.L.R.2d 688 (Alta. 1962); Best v. Best, [1956] P. 76, [1955] 3 W.L.R. 334, [1955] 2 All E.R. 839 (1955); Egerton v. Egerton, [1949] W.N. 301, 118 L.J.P. (n.s.) 1683, [1949] 2 All E.R. 238 (C.A. 1949); Colclough v. Colclough, [1933] P. 143, 102 L.J.P. (n.s.) 87; Alston v. Alston, [1929] P. 311, 98 L.J.P. (n.s.) 155; Prinsep v. Prinsep, [1929] P. 225, 98 L.J.P. (n.s.) 105.

[211] Ulrich v. Ulrich, [1968] 1 W.L.R. 180, [1968] 1 All E.R. 67 (C.A. 1967); Redgrove v. Unruh, 35 W.W.R. (n.s.) 682, 30 D.L.R.2d 555 (Alta. Sup. Ct. 1961), *aff'd*, 39 W.W.R. (n.s.) 317, 35 D.L.R.2d 688 (Alta. 1962); Best v. Best, [1956] P. 76, [1955] 3 W.L.R. 334 (1955); Tomkins v. Tomkins, [1948] P. 170, 117 L.J.P. (n.s.) 1028, [1948] 1 All E.R. 237 (C.A.).

[212] Lort-Williams v. Lort-Williams, [1951] P. 395, [1951] 2 All E.R. 241 (1948); Constantinidi v. Constantinidi, [1905] P. 253, 74 L.J.P. (n.s.) 122 (C.A.); Chetwynd v. Chetwynd, L.R. 1 P.D. 39, 35 L.J.P. (n.s.) 21 (Matrimonial Ct. 1865).

[213] Benyon v. Benyon, 15 P.D. 29, 59 L.J.P. (n.s.) 39 (C.A. 1890); Gladstone v. Gladstone, L.R. 1 P.D. 442, 45 L.J.P. (n.s.) 82 (1876). *See also* Newte v. Newte, [1933] P. 117, 102 L.J.P. (n.s.) 44; Taylor v. Taylor, 161 L.T.R. (n.s.) 236 (Divorce Ct. 1926). See Law Commission (England) Working Paper No. 9: MATRIMONIAL AND RELATED PROCEEDINGS—FINANCIAL RELIEF para. 95, (April, 1967) wherein it is recommended that the court should be statutorily empowered to vary all corollary orders granted in matrimonial proceedings.

[214] See notes 204-06 and accompanying text *supra* at pp. 410-11.

[215] *In Re* Wombwell's Settlement, [1922] 2 Ch. 298, 92 L.J. Ch. (n.s.) 18; *In Re* Garnett, 74 L.J. Ch. (n.s.) 570, 93 L.T.R. (n.s.) 117 (1905); Dormer v. Ward, [1901] P. 20, 69 L.J.P. (n.s.) 144 (C.A. 1900). *Compare* Newbould v. Attorney-General, [1931] P. 75, 100 L.J.P. (n.s.) 54. *See also In Re* Ames' Settlement v. Ames, [1946] Ch. 217, [1946] 1 All E.R. 689.

[216] *See In Re* Eaves, [1940] Ch. 109, at 121, [1939] 4 All E.R. 260, at 266 (C.A. 1939).

parties whose marriage was void or voidable, and, in the description of "children of the marriage" and "respective parents" the issue of the void or voidable marriage and their father and mother.[217]

[217] *See* Dormer v. Ward, [1901] P. 20, 69 L.J.P. (n.s.) 144 (C.A. 1900); *In Re* Ames' Settlement, [1946] Ch. 217, [1946] 1 All E.R. 689. *See also* Sharpe v. Sharpe, [1909] P. 20, 78 L.J.P. (n.s.) 21 (1908); Attwood v. Attwood, [1903] P. 7, 71 L.J.P. (n.s.) 129 (1902).