AD JUSTUM MATRIMONIUM

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I. INTRODUCTION

On the first day of the year 1971 there came into force in England the Divorce Reform Act 1969. Despite the optimism with which its enactment was widely received, one doubts how auspicious are its prospects of bringing satisfaction either to those who seek matrimonial relief or have it sought against them or to those whose professional duty it is to advise parties in matrimonial causes; for, as its sponsors have acknowledged, the act has much in common with the corresponding Australian legislation, which in its nine years of operation has itself been subject to considerable, though not universal, discontented comment from both teachers and practitioners in the jurisdictions in which it holds sway. [1] By concentrating on the "breakdown of marriage" as the "sole" ground of divorce, some would argue, Parliament was simply following the path set by the House of Lords. [2] The writer disagrees. It is his view that till 1969, English law had been moving in a direction quite different from that taken by the act. Because it is also his view that experience will reveal in the near future the necessity of a further and radical change in the law, his present purpose is to recall a form that such change might well assume.

Quite apart from the moral objections to allowing divorce simply on the ground of the breakdown of marriage and the illogicality of the enactment which now purports to embody that principle, [3] if the divorce legislation as represented by the Matrimonial Causes Act 1965 was in need of reform (which cannot be denied) [4] then it is important that the reforms eventually adopted be in the spirit of the pre-existing law; otherwise the legal profession, its judicial masters and its lay clients will find themselves enmeshed in the toils of a monstrous and unmanageable web. For no legal system can absorb an innovation entirely foreign to its nature, as witness the English experience with the Rent Acts [5] and France's troubles with the

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[1] *See, e.g.,* Sackville, Book Review, 7 MELB. U.L. REV. 312 (1969) and Joan Rosanove, Q.C. as reported in the Melbourne Herald, Sept. 2, 1970.

[2] *See, e.g.* Brown, *Cruelty Without Culpability or Divorce Without Fault,* 26 MODERN L. REV. 625 (1963).

[3] *See* the Parliamentary Debates on the Divorce Reform Bill 1969 especially in the House of Lords per Lord Reid in 303 PARL. DEB., H.L. (5th ser.) 346.

[4] *See* ARCHBSIHOP OF CANTERBURY'S GROUP, PUTTING ASUNDER (1966) and LAW COMMISSION, THE FIELD OF CHOICE, CMND. No. 3123 (1966).

[5] *See* the strictures uttered by Rowlatt, J. in Williams v. Britannic Merthyr Steam Coal Co., [1924] 2 K.B. 334, 40 T.L.R. 687-88. Admittedly the Rent Acts are now well established and accepted, but that they are still obscure and otherwise imperfect is attested by R. E. Megarry in the preface of R. E. MEGARRY, THE RENT ACTS (10th ed. 1967).

criminal jury. [6] Therefore, before introducing the Divorce Reform Bill its sponsors should not have been doctrinaire but rather asked whether any, and if so what, lines of change were indicated by the workings of the law then current.

"Justum matrimonium est, si inter eos, qui nuptiae contrahunt, connubium est," wrote Ulpian. [7] It is the thesis of this article that the judges, bearing in mind that *nuptiae* are something the parties *contrahunt* and whenever the statutory provisions and binding precedents did not prevent them, were striving to alleviate the effects of the law then in force by treating marriage in a manner analogous to a contract. If this be the correct view, then one would submit that the most fruitful and natural line of reform is that which was proposed long ago by Mr. Justice Wool in *Pale v. Pale* as reported by Sir A. P. Herbert, [8] to model the acts relating to marriage and divorce on the Partnership Act, partnership being the form of contract most closely resembling the married state, and that the "field of choice" was not so narrow as the Law Commission would have had us believe. [9] In support of this thesis it is proposed to discuss relevant recent cases from Canada, England, New Zealand and Victoria. The year 1969 has been chosen as being the year in which the Divorce Reform Act was passed by the United Kingdom Parliament so that the cases reported in that year will reflect the law which was current at the time and was therefore the law which the legislators should have had in mind when deciding on their reforms.

Professor L. Neville Brown once wrote: [10]

> On June 21, 1963, the Lords Spiritual and Temporal rejected an amendment to the Matrimonial Causes and Reconciliation Bill which would have permitted a divorce after seven years' separation. On June 27 the House of Lords, sitting as the ultimate appellate tribunal, delivered itself, on one and the same day, of two decisions which . . . have so greatly expanded the concept of matrimonial cruelty that the basis of our divorce law has been tilted away from the traditional doctrine of the matrimonial offence and moved nearer to the principle of breakdown of marriage or "divorce without fault."

Professor Brown was referring to the cases of *Gollins* [11] and *Williams*. [12] In this writer's respectful submission Professor Brown misread the tendency reflected in those cases. Rather were the judges following the road mapped by Sir Henry Maine [13] and moving in their treatment of marriage from the

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[6] Professor C. J. Hamson's lectures on "French and English Legal Methods" delivered in the Faculty of Law of the University of Cambridge in the academic year 1968-69.

[7] ULPIAN, TIT. V2.

[8] A. HERBERT, UNCOMMON LAW 425 (1969).

[9] LAW COMMISSION, CMND. NO. 3123 (1966).

[10] Brown, *supra* note 2.

[11] Gollins v. Gollins, [1964] A.C. 644, [1963] 2 All E.R. 966.

[12] Williams v. Williams, [1964] A.C. 698, [1963] 2 All E.R. 944.

[13] H. MAINE, ANCIENT LAW 182 (new ed. 1930). The writer does not maintain that "status" will ever be completely eliminated from the law, but he would contend that Maine's is still a valid description of the bias of common law judges, though perhaps not of English legislation.

idea of status to that of contract. Truly the basis of our divorce law had been tilted away from the "traditional doctrine of the matrimonial offence," but its movement had been not towards "the principle of breakdown of marriage" but towards treating the grounds of divorce as breaches of contract. To explain the two decisions as examples of the divorce of spouses because of the breakdown of the respective marriages is to isolate them as special instances. To treat them as examples of breach of contract is to fit them into the then prevailing trend of judicial decisions in all fields of matrimonial law including divorce and nullity, enticement and harbouring, property disputes and maintenance.

II. Divorce and the Absolute Bars

It is convenient to begin with divorce and with the spirit levels used by Professor Brown to detect the direction of the tilt in the foundations of the law. If those foundations were shaking, the reverberations were not confined to England, for in *Herman v. Herman*, [14] Mr. Justice Dubinsky sitting in the Supreme Court of Nova Scotia expressly adopted the reasoning of the majority of the Lords of Appeal who were present at the hearing of *Williams v. Williams* [15] and held that insanity was irrelevant as a defence to a charge of cruelty, if the conduct alleged must be adjudged cruel regardless of any motive or intention of the respondent.

In the *Gollins* case [16] it was proved that the husband refused to take gainful employment and was therefore unable to support his wife and children. The consequent exposure of the wife to the harrassing of creditors and bailiffs was held to be cruelty for the husband's conduct had been grave and weighty, it had reduced the wife to ill-health and it mattered not that he had no wish nor intention to hurt her. In *Williams v. Williams* [17] the husband suffered from paranoid schizophrenia. He had treated his wife in a manner which, had he been sane, was undoubtedly cruel unjustly accusing her of misbehaviour with other men and thereby affecting her health. Because of his disease, though he knew what he was doing when he made the accusations, he did not know that he was doing wrong. The House of Lords held that the wife was entitled to a decree of divorce for the question was whether in all the circumstances the husband had treated her with cruelty, the test of which was objective. If the respondent's behaviour patently bore so harshly on the petitioner that she must have relief, the respondent's wishes and intentions towards the petitioner were of no account but if the respondent's acts in themselves were of a lower order of oppression then the respondent's frame of mind was relevant insofar as malevolence might render intolerable what should otherwise have been regarded as the inevitable irritations of married life. Therefore, insanity was not necessarily, and was not in this case, an answer to a charge of cruelty.

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[14] [1969] 3 D.L.R.3d 551 (N.S. Sup. Ct.).

[15] *Supra* note 12.

[16] *Supra* note 11.

[17] *Supra* note 12.

In *Mulhouse v. Mulhouse* [18] Sir Jocelyn Simon summarised the law established by the House of Lords, thus:

> [R]eviewing the whole of the evidence, taking into account on the one hand the repercussions of the conduct complained of on the health of the complainant and on the other hand the extent to which the complainant may have brought the trouble on himself or herself, the court must be satisfied that such conduct can properly be described as cruelty in the ordinary sense of that term. . . . It is, however, clear from the speeches in the House of Lords that a malevolent intention or desire to cause harm is not a necessary ingredient of the offence.

Referring to the parties before him His Lordship said:

> I think that they got on each other's nerves. I think that he did show signs of temper, shouting and banging doors, and occasionally using opprobrious language. I cannot find, however, that he has been guilty of the grave and weighty misconduct which the law requires to substantiate a charge of cruelty conduct which reasonably rendered matrimonial cohabitation unendurable to this wife. Nor do I think that all the matters of which the wife complains can be described as inexcusable on the part of the husband. I think that she, having fallen out of love with him, was partly responsible for his antagonistic attitude towards her.

These last words were appropriate if matrimonial cruelty was to be regarded as in effect a breach of a contract of partnership for in an action for dissolution of partnership the plaintiff may not rely on acts of the defendant which he himself has induced. As Sir John Romilly said in *Harrison v. Tennant*: [19] "[I]t is true . . . that no party is entitled to act improperly, and then to say the conduct of the partners, and their feelings towards each other, are such that the partnership can no longer be continued, and certainly this Court would not allow any person so to act, and thus to take advantage of his own wrong."

If cruelty were characterised as conduct amounting to a breach of a marital contract, then the respondent's adultery, which clearly constituted such a breach, had logically to be classed as cruelty if it affected the petitioner's health; and so it was. As was said in *Chalcroft v. Chalcroft*: [20]

> This is a problem which has arisen only in recent times, because until the Matrimonial Causes Act, 1963, condoned adultery could be revived, and, of course, was relied upon as a basis for the petition. Now, as it cannot be revived, the practice is becoming common of putting the allegation concerning the condoned adultery into the cruelty particulars, as has been done here. For my part, I think that is a perfectly reasonable and proper course to take.

The ground of simple desertion fitted neatly into the scheme for it was clearly a repudiation by the deserter of the duty imposed on him by the contract (if marriage were so regarded) to afford the other his consortium. Thus in *Rowland v. Rowland* [21] where the husband was confined to a mental hospital and unlikely to recover, it was held that there was no desertion by

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[18] [1966] P. 39, at 50-51, [1964] 2 All E.R. 50, at 56-57.

[19] 21 Beav. 482, at 493, 52 Eng. Rep. 945, at 950 (Rolls 1856).

[20] [1969] 3 All E.R. 1172, at 1173, [1969] 1 W.L.R. 1612, at 1614 (P.D.A.)

[21] [1969] 2 Ont. 615, [1969] 6 D.L.R.3d 292 (High Ct.).

the wife while she continued to visit him in the hospital. Once, however, she ceased to visit him, became interested in another man and left her mother-in-law to deal with the hospital concerning his welfare, the learned judge held that the period of desertion had commenced to run for she then regarded herself as, and was in fact, withdrawn from him.

Lord Reid in the *Gollins* case, [22] relying on *Lang v. Lang*, [23] suggested that such grave and weighty conduct as would, if the petitioner's health were thereby affected, constitute cruelty would, in any event, amount to constructive desertion. In other words, constructive desertion, too, was a course of conduct inconsistent with the terms of the marriage partnership. From this it followed that adultery might be as well an act of constructive desertion as a ground of divorce in its own right or an act of cruelty. This was noted in *Hind v. Hind.* [24] Indeed, since spouses are in duty bound to behave each to the other as behooves those united in matrimony, there was in addition, as Sir Jocelyn Simon P. said: [25] "the case neither of adultery nor of a reasonable belief in adultery but of a charge of conduct in relation to other women, albeit not giving rise to a reasonable belief in adultery but, nevertheless, so inconsistent with the married relationship as to amount to expulsive conduct [*i.e.*, to constructive desertion]." The converse proposition was also true; behaviour calculated to drive a spouse into the arms of another was so inconsistent with the married relationship as to amount to expulsive conduct for in *Slon v. Slon* [26] the Court of Appeal held to be good in law the husband's plea that the wife's unreasonable refusal to allow him sexual intercourse was an act of constructive desertion.

That adultery was conceived of as a breach of contract is further indicated by the fact that the petitioner could not rely on it if he had been to blame for it [27] or if he had waived it. This is how the courts interpreted the bars of connivance and condonation. In the leading case of *Godfrey v. Godfrey* [28] the husband was guilty of connivance because his conduct had induced the very adultery of which he was complaining. In contrast, in *Rumbelow v. Rumbelow* [29] the husband's connivance took the form of waiver, because "he was just content with the situation for three years, and it did not give him any worry or anxiety." Relief was refused because, though the petitioner's connivance had not led to the inception of the adultery, he had certainly consented to its continuance.

Condonation always took a form analogous to the waiver of a breach of contract. In *Hearn v. Hearn* [30] the wife who had for some months been living apart from her husband committed adultery which resulted in the birth of a child. The husband subsequently resumed cohabitation with her, know-

[22] [1964] A.C. 644, at 666, [1963] 2 All E.R. 966.
[23] [1955] A.C. 402, [1954] 3 All E.R. 571 (P.C.).
[24] [1969] 1 All E.R. 1083, [1969] 1 W.L.R. 480 (P.D.A.).
[25] [1969] 1 W.L.R. 480, at 484.
[26] [1969] 1 All E.R. 759, [1969] 2 W.L.R. 375 (C.A. 1968).
[27] Matrimonial Causes Act 1965, c. 72, § 5(4)(*c*)(ii), (iii), (iv).
[28] [1965] A.C. 444, [1964] 3 All E.R. 154.
[29] [1965] P. 207, at 209, [1965] 2 All E.R. 767 (C.A.).
[30] [1969] 3 All E.R. 417, [1969] 1 W.L.R. 1832 (P.D.A.).

ing of her adultery and accepting the child into the family. Cohabitation continued for ten years, the spouses sharing a bed but, by mutual consent, not engaging in sexual intercourse. The husband then left the wife who applied for maintenance on the ground of his desertion. The Divisional Court ruled that where, as here, cohabitation had continued for so long as ten years with knowledge of the wrong, the inference that condonation had taken place was almost irresistible. Mr. Justice Cairns said: [31]

> Indeed, in our view condonation is a particular manifestation of a general concept of English jurisprudence—in itself founded on basic considerations of justice. If A and B stand in a legal relationship giving rise to mutual rights and obligations, and A acts in a way fundamentally inconsistent with the relationship, B is entitled either to treat the relationship as terminated and himself exonerated from further performance of his own obligations thereunder, or, alternatively, to affirm the relationship (notwithstanding A's breach) and insist on A's further performance of his obligations thereunder. But B cannot pursue both courses; he cannot treat himself as freed from his own obligations arising from the relationship and at the same time continue to enjoy A's performance of obligations which are referable only to the relationship. [32]

As with adultery, so with cruelty. In *Quinn v. Quinn* [33] the husband had been guilty of cruelty which had led his wife to leave him. Later she returned, resumed cohabitation and sexual intercourse took place. Later still, however, she decided that she could not bear to live with him and again departed. She petitioned for divorce on the ground of cruelty, to which the husband pleaded condonation. The wife, relying on section 42(2) of the Matrimonial Causes Act 1965, [34] alleged that she had returned intending only to attempt to effect a reconciliation, an attempt which had failed. She had not told her husband that this was the reason for her return. The Court of Appeal held that she could not rely on the sub-section. She had returned freely and resumed full cohabitation. This was *ex facie* condonation. She could not avoid that appearance merely by reliance on a mental reservation.

Unlike conduct conducing which was expressly made by the Matrimonial Causes Act 1965 a discretionary bar to divorce for desertion, condonation was not by virtue of the words of the statute made a bar to a suit brought on that ground. Nonetheless the courts did not allow a petitioner to rely on an act of desertion which he had waived. In *France v. France* [35] the husband had been told by the wife in September 1961 that she no longer loved him, that she loved another and to leave the matrimonial home, which he did. Between June 1964 and May 1966 the parties met on six occasions and engaged in sexual intercourse. At the same time, unknown to the wife, he was committing adultery with a number of other women. In 1968 he petitioned for divorce on the ground of the wife's constructive desertion,

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[31] [1969] 1 W.L.R. 1832, at 1841.

[32] *Cf.* Suisse Atlantique Société d'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale, [1967] 1 A.C. 361, [1966] 2 All E.R. 61.

[33] [1969] 3 All E.R. 1212, [1969] 1 W.L.R. 1394 (C.A.).

[34] Matrimonial Causes Act 1965, c. 72, § 5(4)(*c*)(iv).

[35] [1969] P. 46, [1969] 2 W.L.R. 1141 (C.A.).

asking for the exercise of the court's discretion in his favour. As regards the sexual intercourse between him and the respondent he purported to rely on sections 1(2) and 42(1) of the Matrimonial Causes Act 1965. The trial judge, however, found that the petitioner had indulged in that intercourse not with a view to seeking a reconciliation but solely for the gratification of his senses. The Court of Appeal upheld the dismissal of his petition, not because of the exercise of the court's discretion adversely to him, but because in the light of his own acts he could not complain of his wife's and so had not proved her desertion. In the words of Lord Justice Sachs: [36]

> When, however, one looks as a whole at the evidence presented by the petitioner . . . it would appear to me that there were considerable grounds for suggesting that this was really a case of consensual separation in one sense, for . . . the [petitioner] was really content with a state of affairs which enabled him over the years to have sexual intercourse with a number of other women and with his wife as well. If that be the right view of the situation, then, to my mind, this [petitioner] had none of the sense of grievance (as it is sometimes called) which would justify him in presenting and succeeding on a petition for desertion.

The writer contends that if one disregards the absence of divorce by consent (which at that time was rendered impossible by statute) the parallel between the courts' treatment of dissolution of partnership and their treatment of dissolution of marriage was virtually exact. Surely, if in the foregoing cases the courts had been concerned only with whether the marriage in question had broken down, the judges would have looked only at the petitioners' attitudes to the respective respondents. In fact, however, in all cases attention was concentrated on the behaviour of the respondents themselves, its nature and its possible justification. The petitioners' attitudes were but subsidiary issues: did they constitute justification of, excuse for, or waiver of the respondents' acts? If there was beneath the decisions a basis present but not expressly acknowledged, it was not proof of the irretrievable breakdown of the marriages in question. Rather was it that on entering into matrimony each spouse became entitled to expect from the other a certain standard of conduct, not perfect in its charity, yet assuredly not grave and weighty in its oppression. In England a failure by a respondent to afford the petitioner such attention or forbearance as he or she might reasonably expect to receive, a failure which forced him or her to withdraw from the *consortium vitae* [37] entitled the petitioner to a divorce: at once on the ground of cruelty if the petitioner's health had or was reasonably likely to suffer, or on the ground of adultery if the respondent's lapse had taken the particular form of sexual incontinence; if neither of these, then on the ground of desertion at the expiration of the prescribed time. [38] Hence such failure was analogous to neglect to honour a fundamental term of a contract

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[36] [1969] 2 W.L.R. 1141, at 1147.

[37] Even in cases of cruelty and adultery so as to avoid any suggestion of waiver.

[38] Assuming that the respondent had not made any proper offer of reconciliation in the meantime. The prescribed time might perhaps be regarded as one of the statutory preventions to the handling of divorce completely as a dissolution of partnership; alternatively the prescribed period for the break in the consortium might have been the element necessary in the absence of damage to health to make the respondent's breach sufficiently fundamental to warrant rescission.

in that, like a breach of such a term in the commercial sphere, it entitled the injured party to rescission. The assertion that good conduct was a condition of the agreement to remain married is perhaps justified by a reference to the vows exchanged in the marriage ceremony.

Professor Brown has suggested to the writer that this seems to be "simply the language of the matrimonial offence." Were this so, it would nevertheless be consistent with the writer's allegation that the cases of *Gollins* [39] and *Williams* [40] did not indicate a move of English divorce law "nearer to the principle of breakdown of marriage or divorce without fault." But the writer, albeit with the greatest diffidence, cannot accept the suggestion. The old concept of the matrimonial offence had been drawn by analogy from the criminal law and, in particular, involved the idea of *mens rea*, a conscious wrongdoing. *Gollins* [41] and *Williams* [42] marked the abandonment of this concept as an essential, though not as a factor relevant, to the establishment of matrimonial cruelty. From a subjective stand point, the courts had changed to an objective one in determining whether there had been a breach of a fundamental obligation imposed by a contract. [43]

Apart from the so-called "matrimonial offences," the other ground of divorce was insanity, which the proponents of the "breakdown of marriage" system of divorce invariably claimed to be the thin edge of their wedge. But insanity is a ground also for the dissolution of partnership. In the partnership cases the judges look at how the disease has affected the defendant and not primarily at how it has affected the plaintiff's attitude towards him. "The insanity of a partner does not *per se* dissolve the partnership but is a ground for the dissolution thereof by the court by reason of the incapacity of the insane partner to perform his part of the partnership contract;" [44] and this was the position also in matrimonial law. The courts were not concerned with whether or not the petitioner could bear to stay married to a person so afflicted; they did not ask whether the marriage had broken down, but only whether the respondent's illness had left him or her fit to carry out the obligations imposed by matrimony. Such was the *ratio decidendi* in *R. v. R.*: [45]

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[39] [1964] A.C. 644, [1963] 2 All E.R. 966.

[40] [1964] A.C. 698, [1963] 2 All E.R. 994.

[41] *Supra* note 39.

[42] *Supra* note 40.

[43] It may well be maintained that the cruelty flowing from the madness of the respondent in the *Williams* case was not a breach of the "marriage contract," but that his madness caused the "contract" to be frustrated. But this does not affect the argument; for, as Diplock L.J. pointed out in Hong Kong Fir Shipping Co. v. Kawasaki Kisen Kaisha Ltd., [1962] 2 Q.B. 26, at 66, [1961] 2 All E.R. 257 (C.A.), fundamental breach and frustration are both events which render the performance of the contract fundamentally different from what was envisaged by the parties and both render the contract liable to be rescinded.

[44] 28 HALSBURY'S LAWS OF ENGLAND 567 (3d ed. Simonds 1959).

[45] [1969] N.Z.L.R. 27, at 28-29 (1968). *N.B.* that His Honour regarded himself as applying a provision identical in effect to the corresponding English legislation and, in particular, to be following the judgment of Phillimore J. in Whysall v. Whysall, [1960] P. 52, [1959] 3 All E.R. 389.

> In my opinion the legislature permits a respondent to be divorced if he or she is of unsound mind not because of his or her affliction but because of its effects in rendering him or her incapable of performing the ordinary duties of a husband or wife as the case may be.... I am satisfied that the petitioner in this suit has proved his case. It is clear... that the respondent's periods of lucidity are and always will be temporary and fragile, and that she will break down to the degree justifying recommittal, if she should be discharged, under stress. Since it is not reasonable to contemplate ordinary domestic life without stress it is clear that she will never be able to resume her domestic duties as wife save for the briefest periods. Any resumption of those duties with any reasonable degree of permanence is ruled out.

Wilful refusal to consummate the marriage was and remains in England by statute a ground of nullity. [46] The writer, with deference, agrees with all the protests against the illogicality of a "provision by which a marriage valid at the time it was made can be declared void *ab initio* as a result of a subsequent event." [47] However, had it been a ground of divorce as in Australia, [48] it might properly have been regarded as a ground for the rescission of the "marriage contract" either as being in its own right a breach of a fundamental term or as constituting a failure to conform to the standard of behaviour implied as a term; for it connotes "a settled and definite decision come to without just excuse." [49]

If divorce was to be deemed merely a variation on the theme of the rescission of a contract for breach of a fundamental obligation, it was appropriate that the relevant rules of evidence be the same as in other civil suits, a position which had been achieved by the decision of the House of Lords in *Blyth v. Blyth.* [50] However, in *Loewen v. Loewen* [51] it was held that "the standard of proof required of a petitioner in an action in which a decree, if granted, will bastardize a child born during the continuance of the marriage is that the adultery must be proved beyond reasonable doubt." In that case such a bastardization was involved, but was not in *Blyth v. Blyth* [52] nor in *Wright v. Wright,* [53] which *Blyth* [54] expressly followed so that it is probable, especially in the light of the opinion of Lord Pearce in *Blyth,* [55] that the

[46] Matrimonial Causes Act 1965, c. 72, § 9(1)(*a*). *See* now Nullity of Marriage Act 1971, c. 44, § 2(*b*).

[47] THE CHURCH AND THE NULLITY OF MARRIAGE 74 (1955). The Law Commissioners' view to the contrary is set out in their Working Paper No. 20, at para. 27 (June 14, 1968). Their reasons did not convince Lord Simon of Glaisdale, whose arguments in the Lords' debates on the Nullity of Marriage Bill remained, in the writer's deferential opinion, quite unanswered by Lord Hailsham and Lord Gardiner — 318 PARL. DEB., H.L. (5th ser.) 936.

[48] Matrimonial Causes (Property and Maintenance) Act, 6 & 7 Eliz. 2, c. 35, § 28(*c*).

[49] Horton v. Horton, [1947] 2 All E.R. 871, at 874, per Lord Jowitt L.C. and *cf.* Slon v. Slon, [1969] 1 All E.R. 759, [1969] 2 W.L.R. 375 (C.A. 1968).

[50] [1966] A.C. 643, [1966] 1 All E.R. 524.

[51] 68 W.W.R. (n.s.) 767, [1969] 5 D.L.R.3d 95 (B.C. Sup. Ct.).

[52] *Supra* note 50.

[53] 77 Commw. L.R. 191 (Aust. High Ct. 1948).

[54] *Supra* note 50.

[55] [1966] A.C. 643, at 673. *See also* F. v. F., [1968] P. 506, [1968] 1 All E.R. 242, at 247 (P.D.A. 1967). But note the different rule which now prevails in England by virtue of the Family Law Reform Act 1969, c. 46, § 26.

court in *Loewen* was correctly stating the law as well for the courts without as for those within the province of British Columbia. If so, this would be, in the writer's submission, a proper exception, since such cases involve not only the dissolution of a partnership but also the status of a third party.

III. Discretionary Bars to Relief

One acknowledges that in the past the discretionary bars had been so applied as to keep tied spouses whose marriage was entirely without substance. [56] But by 1969 the judicial attitude had changed:

> The matter of discretion as regards the granting of decrees of divorce is one of the more difficult matters that have to be dealt with by the courts from decade to decade. In principle, the factors to be considered may remain constant, but the weight to be given to the individual factors may vary greatly as time goes on, for the courts must take care not to sever themselves from that general climate of opinion which is hard to define, but is nonetheless important.... Today, we are perhaps faced with a new situation as regards the weight to be attached to one particular factor—that is, the breakdown of the marriage.[57]

But though the breakdown of marriage was a weighty factor it was not preponderant. If divorce was to be equated with the equitable remedy of rescission of a contract, it was appropriate that the divorce courts should enforce the equitable rule that he who comes to equity must come with clean hands and ensure that the petitioner did not obtain relief, to the prejudice of the respondent or others, from a situation which he himself had brought about through his own wrong. [58] Thus, if the petitioner had himself been guilty of a breach of the marital contract, the court was put on enquiry as to three matters: (a) did the respondent want the marriage to continue or had it utterly broken down; (b) did the petitioner's own fault contribute to bringing about the conduct of the respondent of which he complained; and (c) what were the interests of third parties?

These were the three questions posed by the Court of Appeal in *Masarati v. Masarati*, [59] where the husband had committed adultery. The wife, with whom the couple's fourteen-year-old daughter was living, petitioned for divorce and sought the exercise of the court's discretion in respect of the adultery which she had committed and was continuing to commit with a married man, her employer. The trial judge, though the petition was undefended, refused to exercise his discretion in her favour. The wife appealed. Between the trial and the hearing of the appeal she discontinued her own

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[56] A. Herbert, Holy Deadlock.

[57] Masarati v. Masarati, [1969] 2 All E.R. 658, [1969] 1 W.L.R. 393, at 396 (C.A.) (per Sachs, L.J.).

[58] Alternatively in those situations where it may be appropriate to regard the "marriage contract" as frustrated rather than broken, the courts could be considered as applying the rule that a plaintiff cannot rely on an event, which flows from his own deliberate act, as frustrating a contract: Maritime National Fish Ltd. v. Ocean Trawlers Ltd., [1935] A.C. 524 (P.C.). The underlying similarity of frustration and fundamental breach has already been noted *supra* note 43.

[59] *Supra* note 57.

adulterous association. The Court of Appeal held that a decree nisi should be granted. In the leading judgment Lord Justice Danckwerts said: [60]

> In this case, it seems to me that there is a great deal to suggest that the fact that the petitioner committed adultery was largely due to the treatment which she received from her husband and his insistence on committing adultery. In my view, the judge did not give enough weight to that consideration, nor to the fact that the petitioner's daughter was living with her. It seems to me undesirable that her mother should be tied for ever to an adulterous husband.

Alongside the discretionary bar of the petitioner's adultery [61] might have been ranged the discretionary bars of the petitioner's cruelty, [62] wilful separation [63] and wilful neglect or misconduct [64] as being enactments of the rule that he who seeks equity must do equity. The discretionary bar of the petitioner's unreasonable delay in presenting or prosecuting his petition [65] corresponded to the equitable defence of laches. However, the discretionary bar of collusion [66] as interpreted in 1969 did not fit in at all with the idea of marriage as a partnership contract for if marriage had been in all respects so regarded it would have followed that it be dissolvable at the will of both parties and that the court should not insist on taking itself (as it was bound by statute to do) [67] defences not raised by the parties respondent. But the prohibition of collusion was seen as the enactment of a contrary policy and effectively limited the judges' progress along Maine's road. [68] It was one of the statutory and precedental preventions acting on the judges which were referred to in the introductory section. [69] Yet even at the dawning of the day of divorce by consent, there is still need for some anti-collusive provision, if the courts are to oversee the interests of children or if there be prescribed the lapse of a minimum time after marriage or separation before the dissolution of a marriage may be allowed. [70]

IV. NULLITY

The Commissioners appointed by the Archbishops of Canterbury and York who prepared the report entitled "The Church and the Law of Nullity of Marriage," [71] though they almost certainly would not have accepted the writer's contention that divorce was to be regarded as the rescission of a partnership contract for the breach of one of its fundamental terms, yet

[60] [1969] 1 W.L.R. 393, at 396.

[61] Matrimonial Causes Act 1965, c. 72, § 5(4)(*b*).

[62] *Id.* § 5(4)(*c*)(ii).

[63] *Id.* § 5(4)(*c*)(iii).

[64] *Id.* § 5(4)(*c*)(iv).

[65] *Id.* § 5(4)(*c*)(i).

[66] *Id.* § 5(4)(*a*).

[67] *Id.* § 5(1)(*a*).

[68] Nash v. Nash, [1965] P. 266, at 276, [1965] 1 All E.R. 480 (Scarman, J.) and Michaels, *Collusion as a Discretionary Bar to Divorce*, 29 MODERN L. REV. 241 (1966).

[69] *See* the text following note 7 *supra*.

[70] Mulhouse v. Mulhouse, [1966] P. 39, at 43, [1964] 2 All E.R. 50 (per Simon, P.).

[71] THE CHURCH AND THE LAW OF NULLITY OF MARRIAGE (1965).

(with the exception of wilful refusal to consummate the marriage) [72] said of the statutory grounds of nullity that render a marriage voidable: [73]

> It would seem reasonable to see in these grounds a recognition by society of certain conditions which may be implicit in the making of the marriage contract, so that a person who, within the space of one year from the date of the marriage, started proceedings for nullity under one of these heads would be deemed to have made the absence of pregnancy, venereal disease and recurrent fits of insanity or epilepsy a condition precedent to the marriage contract.

With this statement the writer respectfully agrees and submits that this is the view which at least till 1969 was adopted by the courts as regards not only the statutory grounds but also impotence. Because of the limits imposed by statute, precedent and perhaps current opinion on public policy, the courts did not allow the parties to a proposed marriage to impose whatever conditions they liked on the implementation of the contract. [74] They could not, as it were, have the marriage certificate held in escrow. But the notion that the grounds of nullity were conditions precedent to the creation of the marriage contract was basic to their interpretation and application by the courts, so that the allegation of the existence of one of the grounds was not handled in the abstract nor only with regard to its effect on the petitioner. The courts looked mainly at its operation on the respondent's fitness as a spouse. [75]

Take the example of mental illness. The wife in *Bennett v. Bennett* [76] at the time she married her husband suffered from hysterical neurosis, an illness technically within the definition of mental disorder in section 4 of the Mental Health Act 1959. [77] Her medical adviser was not prepared to counsel her against marriage. She had a tendency to over-activity and occasional acts of totally harmless violence. In December 1965 her husband left her. His petition for a decree of nullity under section 9(1)(*b*) of the Matrimonial Causes Act 1965 was dismissed since on the evidence the wife's mental state did not fall within any of the clauses of paragraph (*b*). As to clause (i) Mr. Justice Ormrod said: [78]

> ... Singleton L.J. in *In the Estate of Park dec'd* [79] ... propounds the test thus ... "Was the deceased ... capable of understanding the nature of the

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[72] *See* the text *supra* note 47.

[73] *Supra* note 71, at 28.

[74] But *cf.* New York where love, affection, and even financial means have been held to go to the legal basis of a marriage and to warrant its annulment for fraud if the respondent has been guilty of misrepresentation regarding these matters, although more recently the trend of decisions has reversed. See Abrahams, *Annulments for Lack of Love and Affection*, 16 CLEVELAND-MARSHALL L. REV. 180 (1967).

[75] This was so even as regards the impotence of the petitioner, because if he was unable to have sexual intercourse with the respondent (especially for psychological reasons) this related to the fitness of the respondent as a spouse; and note that if the respondent had been otherwise a good spouse over a long period the petitioner would not get a decree. *See* Pettit v. Pettit, [1963] P. 177, [1962] 3 All E.R. 37 (C.A.).

[76] [1969] 1 All E.R. 539, [1969] 1 W.L.R. 431 (P.D.A. 1968).

[77] Mental Health Act 1959, 7 & 8 Eliz. 2, c. 72.

[78] [1969] 1 W.L.R. 431, at 434.

[79] [1954] P. 89 (P.D.A. and 127 (C.A.), [1953] 2 All E.R. 408 (P.D.A.) and 1411 (C.A.).

> contract into which he was entering, or was his mental condition such that he was incapable of understanding it? To ascertain the nature of the contract of marriage a man must be mentally capable of appreciating that it involves the responsibilities normally attaching to marriage. Without that degree of mentality, it cannot be said that he understands the nature of the contract."

As to clause (ii) Ormrod said:[80]

> It can only be those unfortunate people who suffer from a really serious mental disorder who can positively be stated in humane terms to be incapable of marriage. They may be thought by other people to be unfitted for marriage, but there are a great many people who are successfully and happily married who would be described by their neighbours as unfitted to marry. ... It is perfectly plain on the medical evidence and on the facts, that this lady was not unfitted for marriage; that she was going to be a rather difficult person to be married to may be, but that is a very different matter. Dr. Barker said that he thought that if she had married a different husband who understood her more, the marriage might well have been perfectly successful.

On clause (iii) his Lordship said that "insanity" could only mean the same as "unsoundness of mind" in clause (i).[81]

As one would expect if the grounds of voidability were deemed to be conditions precedent imposed by the petitioner, they might be waived by him. Hence arose the doctrine of approbation which was summed up by the Earl of Selborne in *G. v. M.* thus:[82]

> [T]he real basis ... is this and nothing more than this that there may be conduct on the part of the person seeking this remedy which ought to estop that person from having it: as for instance any act from which the inference ought to be drawn that during the antecedent time the party has with a knowledge of the facts and of the law approbated the marriage which he or she afterwards seeks to get rid of, or has taken advantage and derived benefits from the matrimonial relation which it would be unfair and inequitable to permit him or her, after having received them, to treat as if no such relation had ever existed. ... In cases of this kind many sorts of conduct might exist, taking pecuniary benefits for example, living for a long time together in the same house or family with the status and character of husband and wife after knowledge of everything which it is material to know.

The question in every case was: had the petitioner waived the condition? As was appropriate to a contractual situation and as was suggested by Lord Loreburn, he might be estopped from denying that he had done so. A fairly late example of such estoppel was *Pettit v. Pettit*, where it was said:[83]

> [I]f (as I think) we are bound to take into consideration the reaction and the interests of the respondent wife, there can, in my judgment, be but one answer to this petition. Here is a wife against whom no complaint has been, or could properly be made. Yet the argument for the husband virtually involves that he is entitled to relief against her without regard to what her

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[80] [1969] 1 W.L.R. 431, at 434.
[81] *Id.* at 435.
[82] 10 App. Cas. 171, at 186 (1885); *cf.* Nullity of Marriage Act 1971, c. 44, § 3(1).
[83] [1963] P. 177, at 190, [1962] 3 All E.R. 37.

> wishes or her interests might be. She has given up her whole life to the husband, has served him faithfully as wife and as mother to his child, as well as being of considerable financial help to him.

Therefore, in the event, the husband was unable to rely on his own impotence *ad hanc.*

As the commissioners who prepared the report on "The Church and the Nullity of Marriage" pointed out, [84] the conditions which had to be fulfilled before a petition could be brought on the statutory grounds of voidability were a statutory embodiment of the doctrine of approbation. This was recognized by the courts, so that the test of the petitioner's knowledge was objective, that is, he was deemed to have "discovered the existence of the grounds for a decree" within the meaning of section 9(2)(*c*) of the Matrimonial Causes Act 1965 once he was in possession of evidence on which any court would act, whether or not he actually drew the irresistible inference from those facts, for fear of the grave injustice which would otherwise be done to the other party whose interests had also to be taken into account. [85]

The grounds of nullity which rendered a marriage void as distinct from merely voidable also fitted neatly into the scheme of marriage as a contract. They were not conditions precedent but went to capacity, formality and consent, all of which are of the essence of the validity of any contract. [86]

A suit for nullity, therefore, had little or nothing to do with the breakdown of the marriage in question yet neither the Law Commission nor the Archbishop of Canterbury's Group, despite their advice that such breakdown be the sole ground of divorce, advised that nullity be abolished. If we are to retain nullity in our matrimonial law and treat it as we treat matters of essential validity, matters of formal validity and conditions precedent in the field of contract, then, if we value consistency in the law, divorce also should be brought within the bounds of that same field, so far as that is practical. This, in the writer's submission, was within the limits imposed on them the notable achievement of Her Majesty's judges. To discard that achievement without considering its merits was a sad omission on the part of the Law Commission. What the Commission should have done was to examine whether the faults of the law lay in these judge-made rules or in the limitations placed on their development by the relevant statutes.

V. Financial Relief

The power to award maintenance, the profession was reminded time and again, was a matter of discretion and in this instance, we were told in 1969

[84] The Church and the Nullity of Marriage 54 (1955).

[85] Smith v. Smith, [1948] P. 77, at 81, [1947] 2 All E.R. 741 (C.A.) (Bucknill, L.J.). See now the Nullity of Marriage Act 1971, c. 44, § 3(2) and (3).

[86] The tendency to treat duress as rendering a marriage voidable as distinct from void in cases such as H. v. H., [1954] P. 258, [1953] 2 All E.R. 1229, and Parojcic v. Parojcic, [1959] 1 All E.R. 1, [1958] 1 W.L.R. 1280 (which has been confirmed in the Nullity of Marriage Act 1971, c. 44, § 2(*b*), also accorded with the contractual scheme: Whelpdale's Case, 5 Co. Rep. 119 (1604).

(perhaps to point a contrast with the usual situation), "the discretion given to the court is complete and unfettered by anything in any statute or other instrument." [87] The statutes by which until 1969 this power was given to the English courts did not disclose the policy on which they were based. The only statement which the courts made on the point was that the wife was not to become, if it could be avoided, a charge on public funds, so that any agreement by her to forgo maintenance was void as against public policy. [88] Presumably the same consideration would have rendered void any such agreement by a husband as regards maintenance from his wife. However, the courts stated the considerations which weighed with them in determining how much maintenance was payable in a particular case. An extended pronouncement was that of Lord Justice Sachs in *Porter v. Porter.* [89] But, as His Lordship said, though:

> [I]t is to be observed that the actual principles governing the discretion were stated as long ago as 1891 by Lindley L.J. in *Wood v. Wood* [90] as follows: "The circumstances which have to be taken into account are—(1) the conduct of the parties; (2) their position in life, and their ages and their respective means; (3) the amount of provision actually made; (4) the existence or non-existence of children . . .; (5) any other circumstances which may be important in any particular case;"

yet:

> [t]he application of those principles and the practice of the Divorce Division has [sic] varied from decade to decade. The court takes into account the human outlook of the period in which they [sic] make their decisions both as regards that important factor, "the conduct of the parties," and also the "other circumstances" of the particular case. The practice as to discretion has thus naturally varied on this matter as on many others. . . . In the exercise of any such discretion the law is a living thing . . . and not a creature of dead or moribund ways of thought.

But whether a way of thought was dead or moribund was readily apparent to very few practitioners and certainly not to all county court judges, one of whom was the object of quite severe criticism from the learned Lord Justice in this very judgment. Yet the interpretation of Lord Lindley's principles must depend wholly on the way of thought of the interpreter for the principles themselves could hardly be less definite in their formulation. Thus in *Atkinson v. Atkinson,* [91] where two of the three judges of the Supreme Court of Victoria [92] who heard the appeal were adamant that they would not have made the settlement of property which was in fact awarded by the trial judge, yet they were not prepared to overrule him in a matter where the relevant legal principles were so unsure in their operation.

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[87] Porter v. Porter, [1969] 3 All E.R. 640, [1969] 1 W.L.R. 1155, at 1159 (C.A.) (per Sachs, L.J.).

[88] *See* National Assistance Board v. Parkes, [1955] 2 Q.B. 506, at 517, [1955] 3 All E.R. 1 (C.A.) (Denning, L.J.).

[89] [1969] 1 W.L.R. 1155, at 1159.

[90] [1891] P. 272, at 276 (C.A.).

[91] [1969] Vict. L.R. 278 (Sup. Ct. 1968).

[92] Of which the total membership of the bench was then no more than seventeen, so that even having comparatively few judges in a court did not render its practice in this field more certain.

Nevertheless, in this maze of uncertainty there were ways of thought perhaps more frequented than were others and, in the writer's submission, they were those which branched from the road that ran between the concepts of partnership and marriage, a road which, as he has already endeavoured to show, might almost be regarded as an arterial route. Partners are collaborators, not patron and client; and, as Mr. Justice Moorhouse of the High Court of Ontario said in *Knoll v. Knoll*: [93] "In this day and age the doctrine of assumed dependence of a wife is in my opinion in many instances quite out of keeping with the times and needs reconsideration under the new legislation. The marriage certificate is not a guarantee of maintenance."

Whether or not a wife could expect to be maintained by her husband would presumably depend on the circumstances in which she married him. If they were both professional people each intending to follow his or her career after the wedding as is common, for example, among actors then, one assumes, there would have been no obligation on the husband to maintain the wife, at least until after the acquisition of children. One assumes that the courts would have looked to any agreement made by the parties and in the absence of such would imply a term appropriate to their respective situations at the time of the marriage. Such a term might well be radically varied by any subsequent agreement (or indeed agreements) of the parties either express or to be implied from their conduct at any time following the ceremony. That the wife's right to maintenance in 1969 depended on the existence of such an implied term in the marriage contract seemed to be indicated by the cases. If so, that term was not so fundamental that its breach without more warranted a rescission of the contract by divorce on the ground of cruelty or constructive desertion. Failure to maintain was, as it were, only a breach of warranty, as distinct from a condition, of the "contract." [94] On the other hand, if divorce were being assimilated to the remedy of rescission, it was natural that maintenance should also have fallen into line with its contractual counterparts, of which one was damages. If maintenance was, in part, the equivalent of damages, it was appropriate that it be, as it was (and still is), available with or without rescission-cum-divorce depending on the circumstances of the case and the wishes of the plaintiff-cum-petitioner.

Suppose maintenance to have fitted that description, what then was the measure of damages? According to Lord Justice Willmer in *Brett v. Brett*: [95]

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[93] [1969] 2 Ont. 580, [1969] 6 D.L.R.3d 201, at 205 (High Ct.); *cf.* Matrimonial Proceedings and Property Act 1970, c. 45, § 2 under which a maintenance order may be made against either spouse for the benefit of the other.

[94] And so it gave rise only to an action for maintenance-cum-damages. *Similiter*, perhaps, with desertion: a departure of a spouse without just cause for a short period (less than three years) was but a breach of warranty and thus gave a complainant only a right to damages. Such a departure for a longer period was a breach of condition or a fundamental breach and gave the petitioner-cum-plaintiff a right of action for both damages and rescission or either of them.

[95] [1969] 1 All E.R. 1007, [1969] 1 W.L.R. 487, at 493 (C.A. 1968).

> Whether or not maintenance is called "compensation", I do not propose to depart from Lord Merrivale's test, that is to say, the test of taking into consideration the position in which the wife was entitled to expect herself to be and would have been, if the husband had discharged his marital obligation—the marital obligation being, of course, an obligation to maintain her on the scale appropriate to his station in life.

In that case the husband was worth approximately £500,000. The marriage was dissolved for his cruelty within ten months of its celebration after only six months of cohabitation. Though the wife was a qualified solicitor aged only twenty-one, she was awarded a lump sum of £25,000 and periodic payments at the rate of £2,000 per annum less tax until she remarried. The court obviously assumed that as the wife of such a man the petitioner would have expected, and been expected, not to work. It ensured that that expectation (implied term) was fulfilled (enforced). The same approach was adopted in assessing maintenance during the continuance of the marriage. [96]

It was often said as in *Brett v. Brett*, [97] that the conduct of the parties was not to be considered in maintenance proceedings for the purpose of punishing the more guilty partner. Nonetheless, the behaviour of the parties was relevant; and its relevance demonstrated an element common to compensatory maintenance and to damages, that to become liable to pay compensation one generally had to be in breach of one's own obligations. Thus, while in *Brett v. Brett* [98] the Court of Appeal regarded the husband's behaviour as precluding him from arguing that the maintenance should be small because the marriage had lasted only a short time, yet in *Ogden v. Ogden*, [99] where the husband though guilty of such misconduct as to justify the wife in leaving him, sincerely repented and made proper offers of reconciliation which were rejected, the Court of Appeal held that the wife was not entitled to maintenance because she was the one in desertion.

The other contractual counterpart of maintenance was the taking and settling of accounts on the dissolution of a partnership. We have seen that in those cases, where maintenance of a compensatory type (damages) was awarded, the party ordered to pay had been guilty of a matrimonial offence (a breach of contract). But on the dissolution of a marriage, maintenance might be awarded to the spouse on whom rested the responsibility for the break-up of the marriage. Here, however, the maintenance was not compensatory, but corresponded rather to a division of assets (which included the husband's earning capacity) according to each partner's contribution to the joint venture. Hence in *Porter v. Porter*, Lord Justice Sachs, who for the sake of argument was assuming that the wife had been guilty of adultery, said: [100]

> Next the court must always take into account how long the marriage has lasted and to what extent the wife has rendered domestic services to the

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[96] Kershaw v. Kershaw, [1966] P. 13, [1964] 3 All E.R. 635, at 637 (Simon, P.).

[97] *Supra* note 95.

[98] *Id.*

[99] [1969] 3 All E.R. 1055, [1969] 1 W.L.R. 1425 (C.A.).

[100] [1969] 3 All E.R. 640, [1969] 1 W.L.R. 1155, at 1160 (C.A.).

> husband. It is to be noted that one of the allegations which may in due course have to be considered is that in this particular case the husband wished her to concentrate on those services to the exclusion of doing any work herself. In such cases, indeed today in all cases, the words "compassionate allowance" . . . come from a past age. They have no place in today's vocabulary on maintenance. The wife either is or is not entitled in the discretion of the court to maintenance in cases such as the present. In cases where the marriage has lasted some 23 years it would be rare indeed, if ever, when she is living on her own . . . for her to get no maintenance at all.

In other words the wife was entitled to share in the security which she had helped to build up while the marriage lasted. [101]

Maintenance pending suit need not be considered at length, because it operated (as it still does) over a very small compass and its purpose was clear, that a spouse should not by the actuality or fear of destitution be deterred from seeking matrimonial relief. [102]

The "partnership" of marriage might be dissolved not only by the courts acting *inter vivos*, but by death. At that stage the capital of the deceased spouse, which probably would previously have had to be kept intact to enable the deceased to earn the income which was supporting him and his family, became available for distribution and so the courts by virtue of the powers given to them by the deceased persons' family maintenance legislation ensured that the surviving spouse received a share of what might be regarded at least in part as partnership property. [103] Likewise, the courts thought when awarding maintenance on a divorce that, in order to allow the husband to continue to bring in an income to support himself and his divorced wife and not to be reduced to penury, they generally should not touch his capital unless it was very large. [104] But when he died this consideration lapsed and the legislation let the courts have a second bite at the cherry so that they might make a final adjustment. In these cases, as in cases like *Porter v. Porter* [105] and *Noske v. Noske*, [106] we see the judges' concern to give the widow or ex-wife a fair share of what she had helped to build up.

In *Re Thornley* [107] the applicant and her husband had carried on a public house together, the property and the business being in the deceased's name but the debts and expenses being paid off by their joint efforts. The applicant after sixteen years of marriage left the deceased with admitted

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[101] *Cf.* Noske v. Noske, [1967] Vict. L.R. 677, at 678, where Barry J. of the Supreme Court of Victoria adopted and applied the observations made by Sir Jocelyn Simon, *The Seven Pillars of Divorce Reform*, 62 LAW SOCIETY GAZETTE 344, at 345 (1965).

[102] Farhood v. Farhood, [1969] Vict. L.R. 561, at 563 (Sup. Ct.) (Pape, J.).

[103] *See* Simon, *The Seven Pillars of Divorce Reform*, 62 LAW SOCIETY GAZETTE 344, at 345 (1965).

[104] Davis v. Davis, [1967] P. 185, at 192, [1967] 1 All E.R. 123 (C.A. 1966) (Willmer, L.J.).

[105] *Supra* note 100.

[106] [1967] Vict. L.R. 677 (Sup. Ct.).

[107] [1969] 3 All E.R. 31, [1969] 1 W.L.R. 1037 (C.A.).

justification on the ground of his cruelty. The deceased then took a mistress who assisted him in the business and put up with his occasional violence. In his will the deceased preferred the mistress to the applicant, who sought further provision from the deceased's estate. In acceding to her application Lord Justice Harman said: [108]

> The testator's moral obligation to the widow was much greater than that to [the mistress]. The widow had been married to him for 16 years. She had originally put up part of the money which started their joint life together. She worked at the "Marsham Arms," which between them they converted from a losing to a money-making concern; and she was no doubt partly responsible for the fact that they paid off this £4,000 of debt, so that by the time [the mistress] comes on the scene she comes into an established, profitable business already made; and although, no doubt, she in her turn worked hard behind the bar and generally in the furtherance of the business, yet here was a plum which dropped, so to speak, right into her mouth and was the fruits of the widow's efforts over a considerable time.

In *Re Cutts*, [109] dealing with an application under the corresponding Victorian legislation, the court adopted the words of Mr. Justice Lush in *Re Adams:* [110]

> The special factors relevant to a claim under this Act by a wife who has divorced her husband seem to me to include the following: first the testator's culpability in relation to the grounds of divorce, secondly the fact that the claimant is the mother of the deceased's children, thirdly the fact that she has had the upbringing of the deceased's children, fourthly the length of time from the separation of the spouses to the testator's death, and fifthly the course which the lives of the two spouses have followed since the separation. In cases of this type it would be wrong to ignore the fact of the divorce. After it the spouses return to their two individual lives. Subject to the laws relating to maintenance, whatever responsibility one had to the other is diminished. It is, I think, desirable that when possible a woman in this position should be self-reliant and should not be encouraged to regard a past marriage as a permanent security.

To these factors the court added the following considerations: [111]

> In . . . cases such as . . . the case of a chorus girl widowed after a few short months of marriage to a man divorced for adultery with her by the first wife with whom he had enjoyed a married life of say 30 years, the claim of the first . . . , unless an adequate settlement has been made in the divorce proceedings, may be stronger than that of the actual widow—indeed her position may be assimilated to that normally occupied by a widow. . . . And whether a woman can be self-reliant may depend very much on her age at the date of the divorce and the financial position she then enjoys.

It seems to the writer that in both *Adams* and *Cutts* the courts were agreed that the compensatory aspect of maintenance should, if possible, have been dealt with at the time of the divorce, so that at the death of the husband the court hoped to be concerned only with the final division of the "part-

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[108] *Id.* at 1040-41.

[109] [1969] Vict. L.R. 254, at 256 (Sup. Ct. 1968).

[110] [1967] Vict. L.R. 881 (Sup. Ct.).

[111] *Supra* note 109, at 258.

nership property" according to the contribution which each had made while the marriage lasted. But the payment of full compensation might not have been possible at the time of the divorce. In particular, it might have occurred quite late in the wife's life when only the husband was left with earning capacity, to which the wife may well have contributed by her domestic or other activities in leaving him free to further his career. Inevitably the husband had to be left in sole possession of that part of the "partnership capital" while he lived, so that the wife could not receive all the compensation, let alone the entire share of capital, to which in justice she was entitled with the result that on the husband's death the court had still to have some regard to the respective culpability of the spouses for the break-up of the marriage in order to see whether or not the wife had received her proper compensation at the time of the divorce.

It may well be asked why, if the writer is right and the judges were applying principles which are successful in the law of contracts in general and partnership in particular, the results were so uncertain, and therefore so unsatisfactory, in the determination of maintenance in the course of a marriage, or on divorce, or in the division of a deceased spouse's estate. The answer, in the writer's submission, is that then and now the institution of marriage was and is by statute insufficiently assimilated to that of partnership for the successful application of such principles. It is to be noted that actions for damages for breach of partnership agreements are not mentioned in the text-books or digests. Presumably they are not brought because the measure of damages is too uncertain and speculative. Instead the partners rely on the taking of accounts, that is, on dividing what they brought to the partnership and what was gained by the partnership while it lasted. But this cannot properly work in respect of marriage, because partnership property and partnership profits are not yet openly recognised as concepts applicable to marriage. Here lies the opening to fair and practical reform. If those concepts were adopted by statute into the institution of marriage then the judges would apply their existing techniques and we should be spared the worry of wondering whether or not our old dog, the law, can learn new tricks.

VI. Division of Property

> All property and rights and interests in property originally brought into the partnership stock or acquired whether by purchase or otherwise on account of the firm or for the purposes and in the course of the partnership business are called in this Act partnership property and must be held and applied by the partners exclusively for the purpose of the partnership and in accordance with the partnership agreement. [112]

More than a faint echo of these words may be detected in those following which fell from Lord Denning in *Gissing v. Gissing*: [113]

> [W]here a couple, by their joint efforts, get a house and furniture, intending it to be a continuing provision for them for their joint lives, it is the prima

[112] The Partnership Act 1890, 53 & 54 Vict., c. 39, § 20(1).

[113] [1969] 1 All E.R. 1043, [1969] 2 W.L.R. 525, at 529 (C.A.).

> facie inference from their conduct that the house and furniture is [sic] a "family asset" in which each is entitled to an equal share. It matters not in whose name it stands: or who pays for what: or who goes out to work and who stays at home. If they both contribute to it by their joint efforts, the prima facie inference is that it belongs to them both equally: at any rate, when each makes a financial contribution which is substantial.

In the case with which his Lordship was then dealing, the parties were married in 1935 when both were in their early twenties. In 1946 when the husband was out of work the wife got him a job with her employers where he did well. In 1951 a house was bought in his name as the matrimonial home in which the parties lived until 1961, when the husband left to live with another woman. The price paid for the house was £2,695 of which £2,150 was raised by the husband on mortgage and £500 was lent to him by the employers. He found the balance and costs from his savings. The wife paid £220 out of her savings for the furniture and for the laying of a lawn. On an application by the wife under section 17 of the Married Women's Property Act 1882 [114] for a declaration of her interest in the house the Court of Appeal held that it was equal to that of the husband. Lord Justice Phillimore's reasons were perhaps not so sweeping as those of Lord Denning. He seemed to insist on the need for a substantial financial contribution from the wife; but how easily he found that one existed: [115]

> How is it said that her initial contribution was not substantial—her cash contribution equalled his so far as their ability to move into this house is concerned? Is it to be suggested that her faithful services for over 20 years with the firm had nothing to do with [its] decision to grant her husband a loan of £500?
>
> It is, of course, said that he repaid the loan and he repaid the mortgage instalments in so far as they have been met. How could he have done this but for her help? She continued to work and thus relieved him of the cost of paying for her clothes, the child's clothes and the extras she contributed to the housekeeping. It is not suggested that he gave her any money for herself.
>
> Moreover she did the cooking and she cleaned the house. Could he have met his obligations and saved as he did but for her contribution?

In Canada it was noted some years ago that there was an increasing hollowness in the formality of the English judges' insistence that there must have been a substantial financial contribution by the wife before they would find that she had acquired an interest in the matrimonial home despite the absence of her name from the title deeds; and as Mr. Justice Judson stated in *Thompson v. Thompson*, [116] though there had been at the time he was speaking no reported case in England in which the wife had been found to have an interest where the property in question neither was in her name at least jointly with another nor was one to the purchase of which she had made at least some monetary contribution: "Yet, if the principle is sound when it is based on a financial contribution, no matter how modest, there seems to be no logical objection to its application . . . when there is no

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[114] Married Women's Property Act 1882, 45 & 46 Vict., c. 75.

[115] [1969] 2 W.L.R. 525, at 539.

[116] [1961] Sup. Ct. 3, 26 D.L.R.2d 1, at 9 (1960).

financial contribution when the other attributes of the matrimonial partnership are present." The prophecy implicit in his words was fulfilled in *Nixon v. Nixon.* [117] There, when the wife married the husband, he had for some years been running a green grocery business with the help of his brother. After the marriage a house was bought in the husband's name with a deposit paid by him and the balance provided by a mortgage. The wife worked in the business six days a week without pay. Eventually, out of the profits of the business and the profits on the sale of that first house and its successors, three farms were bought by the husband of which one was the matrimonial home and another was owned jointly by the husband and his brother. The wife and the son of the marriage worked the farm on which stood the matrimonial home. This was the position when the marriage broke up and the wife sought a declaration that the husband held his legal interest in all three farms on trust for him and her in equal shares. The Court of Appeal held that the husband's contributions to the business before the marriage must be recognised by leaving him the sole benefit of his legal interests in the other two farms, but that because of the wife's contributions since the marriage by working in the business and on the farm she was entitled to a half share in the main asset, namely, the farm on which stood the matrimonial home. As Lord Denning said: [118]

> Test it this way: if the wife had gone out to work and had earned wages which she brought into the family pool—out of which the shop and business were bought—she would certainly be entitled to a share. She should be in just as good a position when she serves in the shop and receives no wages, but the profits go into the business. The wife's services are equivalent to a financial contribution. And it has repeatedly been held that when a wife makes a substantial financial contribution, she gets an interest in the asset that is acquired.

In the light of this case is revealed the importance of the point made by both Denning and Phillimore that as regards her acquiring an interest in the matrimonial home there was no real distinction between the wife's going out to work and her staying at home to look after the house and children. In both cases she had made "her contribution to their joint efforts." Therefore, since the wife in *Nixon v. Nixon* [119] simply by working in the family business and without making an actual monetary contribution to its purchase gained an interest in the matrimonial home which was bought in the course of the marriage, the Court of Appeal had moved very close to holding that a wife became entitled to a proprietary share in the matrimonial home and other assets acquired for the purposes of and in the course of the *consortium vitae* simply by performing her housewifely duties.

In finding that the wife had an equal share in an item of property for which the husband had paid all or most of the money and in which the wife had no interest supported by the documents or the normal use of the equitable presumptions of resulting trust and advancement, the Court of Appeal had

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[117] [1969] 3 All E.R. 1133, [1969] 1 W.L.R. 1676 (C.A.).

[118] [1969] 1 W.L.R. 1676, at 1679.

[119] *Id.*

first found that the property in question was a "family asset." In *Pettit v. Pettit* [120] Lord Diplock defined the term "family assets" to mean "property, whether real or personal, which has been acquired by either spouse in contemplation of their marriage or during its subsistence and was intended for the common use and enjoyment of both spouses or their children, such as the matrimonial home, its furniture and other durable chattels. It does not include property acquired by either spouse before the marriage but not in contemplation of it." It seems, therefore, that in the view of the Court of Appeal, if a house, a farm, furniture or other durable property was acquired by either or both spouses in contemplation or in the course of their marriage for their joint use and purposes, it was to be regarded as "property originally brought into the partnership stock or acquired . . . on account of the firm or for the purposes and in the course of the partnership business," so that it became "partnership property" (a "family asset"). Then, as now, [121] the partnership between husband and wife was deemed equal, so that *prima facie* they held the partnership property (family assets), in equal shares. Nevertheless, just as Lindley says, [122] "It is for the partners to determine by agreement amongst themselves what shall be the property of the firm, and what shall be the separate property of one or more of them," so in marriage it was a matter for agreement: [123] the Court of Appeal had given us merely a *prima facie* rule. As Lord Diplock said in *Pettit v. Pettit:* [124]

> Ever since 1882 husband and wife have had the legal capacity to enter into transactions with one another, such as contracts, conveyances and declarations of trust so as to create legally enforceable rights and obligations, provided that these do not offend against the settled rules of public policy about matrimonial relations. Where spouses have done so, the court has no power to ignore or alter the rights and obligations so created. [125]

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[120] [1970] A.C. 777, [1969] 2 W.L.R. 966, at 994.

[121] *See* Seminuk v. Seminuk, 68 W.W.R. (n.s.) 249, 4 D.L.R.3d 253, at 260 (Sask. Q.B. 1969) per Davis, J. adopting the dicta of Widgery, L.J. in Gooday v. Gooday, [1968] 3 All E.R. 611, at 616 (C.A.); Matrimonial Proceedings and Property Act 1970, c. 45.

[122] LINDLEY ON PARTNERSHIP 359 (12th ed. Scamel 1962).

[123] *Cf.* Marriage Act 1958 (Victoria) § 161 (as amended).

[124] [1969] 2 W.L.R. 966, at 997.

[125] In 1970 (see [1970] 2 All E.R. 780, [1970] 3 W.L.R. 255) the House of Lords reversed the decision of the Court of Appeal in *Gissing v. Gissing,* largely on the ground that in their Lordships' opinions the doctrine of "family assets" as developed by the Court of Appeal worked a change in the law too great to be achieved otherwise than by statute. The House emphasised that there is no special law of family property and that in relation to such property the ordinary rules of property law must be applied; *i.e.,* one looks for evidence of an actual agreement and in the absence thereof one falls back on the presumptions of resulting trust and advancement where they are respectively applicable. But neither is there any special law of partnership property: § 20(1) of the Partnership Act of 1890 simply reflects the typical agreement of which the formation of a partnership is evidence. The later cases, such as Falconer v. Falconer, [1970] 3 All E.R. 449, [1970] 1 W.L.R. 1333 (C.A.), Davis v. Vale, [1971] 2 All E.R. 1021, [1971] 1 W.L.R. 1022 (C.A.) and Hazel v. Hazel, [1972] 1 W.L.R. 301 (C.A.), show how little the reverse has diverted the Court of Appeal.

VII. The Right to Occupy the Matrimonial Home

> [T]o decree specific performance of an agreement for a partnership for a term of years would involve the court in the superintendence of the partnership throughout the whole continuance of the term. As a rule, therefore, courts will not decree specific performance of an agreement for a partnership. [126]

The same argument applies to marriage and justifies the whittling away of the courts' powers first to enforce and finally to make a decree of restitution of conjugal rights. [127] However:

> [t]hese authorities show that where a partnership is not determinable at will, those partners who are desirous of carrying on the business in the proper way will be protected by the court from the unwarranted acts of a co-partner, whose only object may be to force the others to submit to him or to agree to a dissolution. . . . [128] Mere squabbles and improprieties, arising from infirmities of temper, are not considered sufficient ground for an injunction; but if one partner . . . persists in acting in violation of the partnership articles on any point of importance, or so grossly misconducts himself as to render it impossible for the business to be carried on in a proper manner, the court will interfere for the protection of the other partners. [129]

A "point of importance" in marriage is the right of each spouse to the consortium of the other, which in turn implies the obligation to provide a matrimonial home to which each must have the right of recourse so long as he or she is not guilty of "unwarranted acts." This right of recourse the court was prepared to protect by injunction. In *Gurasz v. Gurasz* Lord Denning said: [130]

> Some features of family life are elemental in our society. One is that it is the husband's duty to provide his wife with a roof over her head: and the children too. So long as the wife behaves herself, she is entitled to remain in the matrimonial home. The husband is not at liberty to turn her out of it, neither by virtue of his command, nor by force of his conduct. If he should seek to get rid of her, the court will restrain him. If he should succeed in making her go, the court will restore her. In an extreme case, if his conduct is so outrageous as to make it impossible for them to live together, the court will order him to go out and leave her there. This right is a personal right which belongs to her as a wife. It is not a proprietary right. It is not available against third persons. It is only available against the husband. No matter whether the house is in the wife's name, or in the husband's name, or in the names of both jointly, nevertheless she has this personal right which the court will protect. So long as she has done nothing to forfeit that right, the court will enforce it by making an injunction to restrain the husband from interfering with the exercise of it.

Here the house was jointly owned and the husband was so restrained.

That the obligation to provide the matrimonial home in which both parties might live was looked upon as, in effect, a contractual obligation,

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[126] *Supra* note 122, at 507.

[127] Matrimonial Proceedings and Property Act 1970, c. 45, § 20.

[128] *Supra* note 122, at 552.

[129] *Supra* note 122, at 555-56.

[130] [1970] P. 11, [1969] 3 W.L.R. 482, at 485-86 (C.A.); and *cf.* Matrimonial Homes Act 1967, c. 75 and Matrimonial Proceedings and Property Act 1970, c. 45, § 38.

so that it might by agreement of the parties be imposed on the wife instead of the husband was shown in *Shipman v. Shipman*: [131]

> ... [I]t is the duty of the husband and wife to live together, and if one or other wilfully absents himself, that is a matrimonial offence, and if a wife, without good cause, seeks to exclude her husband from the matrimonial home, [*scil:* which is owned by her] she seeks to get the court to enable her to evade a duty. Therefore I should be reluctant to lay down a rule that a wife can treat her husband in the same way as a stranger. So perhaps, in normal circumstances, the husband may have a right to enter the matrimonial home for duties which it is not only his right to demand but his duty to render, and under these circumstances, the husband would be guilty of no misconduct if his innocent presence did some damage, and I think the wife would have no claim.

An example of the application of these words, that is, of the refusal of the court to grant a wife an injunction restraining her husband from entering the matrimonial home which was her property, is *Gorulnick v. Gorulnick*. [132]

VIII. Enticing, Harbouring and Damages for Adultery

If one has a contract with another and a third person induces that other to break it, one has a right of action in tort against the third person to recover from him the damages which one has suffered as a result of the breach of contract. [133] In 1969 this right might have been considered the rationale of actions for enticement and harbouring on the one hand and for criminal conversion on the other. [134] For the defendant or co-respondent had *ex hypothesi* caused the plaintiff or petitioner's spouse to act in breach of that term of the "marriage contract" which required each party to the marriage so to behave towards the other as to make the continuation of the *consortium vitae* reasonably probable and tolerable. Desertion and adultery were both breaches of that term. [135] In *Fowl v. Myer*, [136] Lady Slate denounced this analogy on the ground that while in cases of inducing breaches of a commercial contract the plaintiff had a right of action as well against the party in default under the contract as against the tort-feasor, one spouse has no right to sue for damages from the other. But whatever might have been the position at the time her Ladyship was speaking, as the writer has tried to show, maintenance might in 1969 have been thought of as a species of damages. [137] Further, if the forms of action of enticement, harbouring and criminal conversation were regarded as aspects of the wider tort of

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[131] [1924] 2 Ch. 140, at 146, 93 L.J. Ch. 382 (C.A.). This case was approved by Lord Denning, M.R. in Gurasz v. Gurasz, [1970] P. 11, [1969] 3 W.L.R. 482, at 486 (C.A.).

[132] [1958] P. 47, [1958] 1 All E.R. 146 (C.A. 1957).

[133] Lumley v. Gye, 2 E. & B. 216, 118 Eng. Rep. 749 (1853).

[134] Abolished now in England by the Law Reform (Miscellaneous Provisions) Act 1971, c. 43, § 4 and 5.

[135] *See* the text following note 23 *supra.*

[136] A. Herbert, Uncommon Law 365, at 370 (1969).

[137] *See* the text following note 94 *supra.*

interference with contractual relations rather than as survivals of the days when wives were by law dealt with almost as the chattels of their husbands, then instead of the abolition of the common law as recommended by the Law Commission the reform which is incorporated in the Matrimonial Causes Act 1959 of Australia, whereby petitioner wives may sue female co-respondents for damages, is not only explained as a nod in the direction of sexual equality but justified in legal logic.

The working of the law relating to both enticement and harbouring was seen in *Spencer v. Relph* [138] where the judge said of enticement:

> I am of the opinion that before an action of this nature can succeed in these days there must be clear evidence that the third party deliberately persuaded the wife to leave her husband and thus break up the marriage. It may be that in earlier times a more strict view was taken, but while the remedy undoubtedly remains it must be applied with due regard to modern conditions of life.

The defendant was found not guilty of enticing the plaintiff's wife and the judge turned to harbouring, saying [139] that it was a defence if the defendant could prove that the wife had had just cause for leaving her husband; and: [140]

> In my opinion it is a necessary part of the tort of harbouring that the third party continues to give shelter to another's wife after he has been called upon to cease to do so.... [T]here is another ground which in my opinion is fatal to the [plaintiff's case]. An action for harbouring is an action on the case. This being so, in my opinion, proof of damage suffered by the plaintiff as a consequence of the [defendant's] continuing to allow the wife to live in his house is a necessary part of the cause of action. It is plain on the evidence that the [plaintiff's] wife under no circumstances was willing to return to her husband. How then can he allege that he has lost anything sounding in money as a result of [the defendant's] action in harbouring her.

Thus, just as in the commercial sphere, the judges insisted that the plaintiff must prove that the other contracting party (spouse) was induced by the defendant to break the contract and must prove that he had suffered loss as a result of that inducement. The same principles prevailed also in actions for damages for adultery. In *Holeczy v. Holeczy* [141] the judge was dealing with a husband's petition for divorce on the ground of his wife's adultery with the co-respondent. He said:

> It by no means follows that a husband who has established his wife's adultery is necessarily entitled to damages.... The fundamental factor that must affect the damages is the question: did the co-respondent cause the break-up of the marriage?... The only safe and practicable course is to see what, if anything, the husband has lost which can fairly be charged to the behaviour of the co-respondent.

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[138] [1969] N.Z.L.R. 713, at 725 (N.Z.C.A.).

[139] *Id.* at 727.

[140] *Id.* at 728.

[141] [1967] Vict. L.R. 294, at 297-98 (Sup. Ct. 1966).

IX. Conclusion

It has not been the writer's object to show that on a jurisprudential analysis of the common law current in 1969, marriage is found to have been not a status but a variety of partnership. This is all too evidently not so: the provision in section 5(1) of the Matrimonial Causes Act 1965 in England and the corresponding legislation in the other jurisdictions giving the divorce court the functions of an inquisition rather than of an arbitral tribunal is by itself sufficient to make the point unarguable. Nor has the writer sought to suggest by implication that, if his ideal of reform were enacted, marriage would be rendered in all respects a paradigm of partnership but it would indeed become part of the law of contract, so that individuals might so far as possible within the bounds of fair dealing preserve their freedom of action, in particular, their liberty by consent to vary the contractual terms or to end the contractual relationship. The writer subscribes wholeheartedly to the theory of Professor René David that the advantages which English law enjoys over other systems can be traced at least in part to the fact "qu'il a conservé quelque aspect évoquant la féodalité en envisageant plutôt des stats ou relations complexes (relation de mari et femme, de tuteur et pupille, de maître et serviteur, de représentant et représenté) que des droits subjectifs individuels." [142] In other words the general part of the English law of contract is almost non-existent. Rather does English law recognise that each legal relationship has its own peculiar incidents. Thus, as has already been stated, should marriage eventually be treated by statute as a contract not a status, there may well still have to be special rules regarding *inter alia* collusion between the parties [143] and evidence of the respondent's adultery. [144]

However startling might be the writer's opinions to his present readers, he gathers that his words would have a familiar ring at least to the French and, indeed, he finds that he has been anticipated by a passage in the treatise of Professors Marty and Raynaud: [145]

> Le mariage est un accord de volontés, les époux échangent leurs consentements et cet accord produit des effets juridiques, en particulier fait naître des obligations. Beaucoup d'auteurs ont conclu de cette analyse le mariage et un contrat. C'est d'ailleurs la définition de la Constitution de 1791 "le mariage n'est qu'un contrat civil." Cependant, cette explication est très discutée et très discutable. On peut lui reprocher d'être partiellement inexacte et incomplète.

What the writer has been seeking is to follow the prescription of Professor Hamson of Cambridge and, accepting that the law of marriage (using that expression widely) needed reform, to discover the "natural growing

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[142] R. David, Traité Elémentaire de Droit Civil Comparé 293 (1950).

[143] *See* the text *supra* note 70.

[144] *See* the text following note 55 *supra.*

[145] Marty and Raynaud, Droit Civil 67, (Tome 1, 2e volume, 2e édition 1967). The writer supposes that this is simply the reflection of the French reception of the Roman law represented by the proposition of Ulpian quoted at note 7 *supra.* If so, then the resemblance between these aspects of English and French law is not surprising since matrimonial law is one of the fields of English law in which the influence of Roman law on the English judges was considerable.

point" of that law on which the reforms might have been grafted and which moreover might have influenced beneficially their formulation, so that the resulting hybrid might quickly have been moulded to the natural conformations of the body of the law and not have risked the germination of a hydra. That growing point could have been found by the Law Commission only by an examination of the latest cases; and that examination, it is submitted, would have revealed that in their search for justice between the spouses who came before the Queen's courts, Her Majesty's judges had, perhaps unconsciously, applied to a very large extent the law of partnership. Here then surely was the formula of reform: to adapt the law governing relations between business partners to the relationship of husband and wife.

Whether or not the operation of the 1969 act will cause the English judges in the long run radically to depart from the lines of thought which the writer believes he has detected, can be for the moment only a matter of speculation. Yet one is confident that they will not. For surely the essence of the common law is the treatment of parties as rational beings capable of regulating their own affairs and such treatment must necessarily have recourse for its legal concepts to the law of contract. One's confidence is strengthened by the fact illustrated herein that in Australia, Canada and New Zealand, where by 1969 provisions like those of the Divorce Reform Act were already in operation, [146] the decisions of the courts were by no means in conflict with those of their English counterparts. One concludes therefore that in those parts of the Commonwealth where family law is based on the common law the way remains open to the eventual adoption of the proposals of Mr. Justice Wool made known to the English speaking world so long ago in the reports of Sir A. P. Herbert. [147]

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[146] Matrimonial Causes Act 1959-1966, Act No. 60 (Australia); Divorce Act, Can. Stat. 1967-68 c. 24; Matrimonial Proceedings Act 1963, Act No. 72 (N.Z.).

[147] A HERBERT, UNCOMMON LAW 425 (1969); and *cf.* "Matrimonial Property—Where Do We Go From Here," a lecture delivered in the University of Birmingham on January 29, 1971 by Professor Otto Kahn-Freund of Oxford and Pheasant v. Pheasant, [1972] 2 W.L.R. 353 (Fam. D.).