

MARRIAGE
MATRIMONIAL BREAKDOWN *AND SOCIAL*
CLASS IN ENGLAND AND WALES
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ABSTRACT

English matrimonial law until the mid-nineteenth century was administered by the ecclesiastical courts. The high legal fees charged by these courts restricted the number of matrimonial disputes which came before them. Moreover they were not empowered to grant divorce a vinculo. This matrimonial relief could be obtained only from Parliament but few husbands could meet the heavy expenses of a Private Act.

The transfer of divorce hearings to a civil court in 1857 benefitted the middle class, though the mass of the people still remained debarred by inability to pay legal and court fees. Wives were additionally handicapped by economic and legal disadvantages. The need to provide working class wives with a quick, cheap and accessible means of protection from cruel husbands led to the establishment of the matrimonial jurisdiction of magistrates' courts in 1878. Study of the resort to divorce before the Second World War shows that it was the de facto non-availability of divorce rather than the lack of acceptable grounds that resulted in the great majority of broken marriages being dealt with in the summary court. Concern over evidence that the inability of working class spouses to obtain divorce resulted in the formation of illicit unions, led to the development of legal aid provisions culminating in the Legal Aid and Advice Act of 1949. This Act has been of special benefit to wives seeking divorce. Legal Aid, higher real wages and greater acceptance of divorce within the community have allowed an increasing number of broken working class marriages to be dissolved.

Findings from a sample of 1961 divorce petitions show that social class and the rate of divorce are inversely associated. However, a broad breakdown into a non-manual/manual dichotomy hides variations within individual class groupings. Thus, white-collar workers have a higher rate of divorce than do manual workers. The social class of petitioners was also found to be associated with such demographic characteristics ~~such~~ as age at marriage and divorce.

Although the divorce courts have been opened to all sections of the population, the criminal courts continue to hear the matrimonial disputes of the very poor. Evidence from a survey of maintenance orders held in magistrates' courts in 1966 suggests that some 165,000 marriages are neither maritally united nor legally dissolved. Half of these separated spouses never seek divorce.

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Marriage has many pains, but celibacy has no pleasures

Samuel Johnson: Rasselas

PREFACE

History of the legal regulation of marriage breakdown since the Middle Ages features the inequality of access to divorce between rich and poor and husband and wife. A proper historical and sociological enquiry would require reliable information covering both de facto and de jure breakdown among the population at risk. When this thesis was first begun the only existing empirical data on divorce in England and Wales was that provided annually by the Registrar General's Statistical Review and the Lord Chancellor's Office's Civil Judicial Statistics. Valuable information about the possible association between the increasing resort to divorce and the social class distribution of petitioners in 1951 had been provided by the study of Rowntree and Carrier. However, little or nothing was known about the utilization of the matrimonial jurisdiction of magistrates' courts, though observers strongly suspected that it handled only the broken marriages of the very poor. Since then, information about the legal and social characteristics of this jurisdiction has been published by Professor O.R. McGregor, Dr. L. Blom-Cooper and the writer in Separated Spouses.

My purpose is to focus upon and analyse the varying social class patterns in the resolvment of marital breakdown. To this end, the following work draws together already existing information and links this with unpublished findings emerging from a survey of petitions, filed in 1961, that provides new knowledge on the association between social class and divorce. The results show that unskilled workers' marriages have the highest rate of divorce. But the summary courts are still used by a large number of working class wives, causing some 165,000 marriages to be neither maritally united nor legally dissolved.

Current variations in social class resort to differing jurisdictions cannot be meaningfully explained without comprehending past habits and opportunities. Nor can our present two tier legal structure for handling matrimonial disputes be properly understood without reference to the courts' paternity.

A chronological framework of development traces this ancestry from canon law administered by the Spiritual Courts to a secular process in which papal authority was replaced by the legislative supremacy of Parliament. At this stage, legalistic knowledge gives way to sociological scrutiny. Curiosity necessitates examination of social behaviour and conduct within a monogamous society where divorce and the consequent right to enter a second marriage was denied to the vast mass of the population.

Development of State regulations prescribing the conditions in which marriage could be contracted led to similar control being exercised over the formalities governing dissolution of marriage. Transfer of divorce hearings to the civil courts meant that in theory dissolution should have been open to all but in practice the availability of divorce was restricted to only a slightly wider population than before. It was not that separated spouses were altogether ignorant of the legal remedy, for study of Parliamentary Reports and official statistics show that many sought dissolution of their dead marriages but were debarred by the prohibitive cost of petitioning. It is only since the end of the Hitler War that a significant proportion of working class broken marriages have been able to obtain dissolution instead of non-cohabitation orders. The result has been a dramatic fall in the proportion of all matrimonial cases dealt with by magistrates from almost 75% in 1935 to under 40% in 1966. The introduction of legal aid in 1950, together with an increasing real income for wage earners, have allowed more people the chance of a second marriage if the first should prove a failure.

At the same time there has been a growing approval by both laymen and clerics of divorce as an appropriate end to an irretrievably broken marriage. The Church of England's acceptance of such an attitude is illustrated by Dr. Mortimore, the Bishop of Exeter, informing his parishioners that indissolubility of marriage "is rejected by the vast majority of the community, not excluding many Christians. This does not mean that the vast majority of people who enter a marriage do not intend it to last for life, but availability of divorce is recognised if things go desparately wrong...divorce and remarriage now carries with it no social stigma." (1)

(1) Quoted in The Daily Telegraph, 30th October, 1968.

The history of divorce reflects the gradual improvement in the wife's legal position. For instance, legal aid has largely removed the financial handicap that wife petitioners, when compared to their husbands, had to face. But, as the findings in Chapters 12 and 13 indicate, there are significant demographic differences between wife petitioners from differing social classes. Wives, because of their maternal role, are less able to maintain themselves and their families. However, evidence suggests that for working class wives the husband's obligation to maintain is often a legal fiction.

There is evidence that, in spite of the use made of legal aid, there are still a great number of de facto broken marriages which are not formally ended through divorce. Only about half of all marriages dealt with by the summary courts proceed to divorce. It appears that factors, other than limited means, still cause certain sections of the working class population to ignore divorce as a de jure means of destroying a marriage which is no more than an **e**empty shell.

THE ECCLESIASTICAL COURTS' JURISDICTIONEcclesiastical influence on matrimonial matters

In Anglo-Saxon Britain, marriage law was governed by the Church. Divorce a vinculo was possible until the coming of the Normans;^{1/} but little is known about the law regulating family matters, though probably it was administered by bishops and abbots sitting alongside magistrates in the civil courts.

As a result of Norman settlement, the rule of canon law over local law in matters of marriage began to be established. The canon law of marriage became English law roughly about the middle of the twelfth century, from which time the ecclesiastical courts alone had the right to give judgment on matrimonial matters.^{2/} From then the fetter of papal dogma on English marriage law can be traced through eight subsequent centuries. Understanding of this bond between canon law and the regulation of marriage is essential to any study of the development of divorce law and practise in this country.

The early mediaeval church based her blueprint for the Christian society upon Roman law, which in time was modified by ecclesiastical needs to form canon law.^{3/} As Lord Bryce critically records, "to pass from the civil law of Rome to the ecclesiastical law of the Dark and Middle Ages is like quitting an open country, intersected by good roads, for a tract of mountain and forest where rough and tortuous paths furnish the only means of transit."^{4/} However, canon law, administered by ecclesiastical courts was to regulate some of the most important affairs of an Englishman's life.

- (1) See Essays in Anglo-Saxon Law, Henry Adams et.al., 1876, ch. 'The Anglo-Saxon Family Law' by Ernest Young, at p. 179.
- (2) See Sir F. Pollock and F. W. Maitland, History of English Law (to the reign of Edward I), 2nd ed., 1923, Vol. 2, pp. 367-68. This work is the standard reference upon early English divorce law.
- (3) "Ecclesiastical law was composed of four elements: Civil (Roman) Law, Canon Law, Common Law, and Statute. Whenever there was any clash between these elements, the Civil Law submitted to the Canon Law, both of these to the Common Law and all three to Statute". Preface to R. Burn, Ecclesiastical Law, (1809 ed.).
- (4) James Bryce, ^{Studies} Essays in History and Jurisprudence, 1901, Vol. 2, p. 416.

The origins of ecclesiastical courts are found in the Norman reform of English church administration.^{1/} Wishing to increase his own power, William I removed all ecclesiastical transactions in 1076 to a separate ecclesiastical court in each diocese.^{2/} In carrying out William's orders, the first Norman archbishop of Canterbury, Lanfranc, took as his guide the existing continental canon law. Canon law laid emphasis on the authority of the bishop over the people of his diocese in both spiritual and secular matters that concerned Christian teaching. This resulted in ecclesiastical courts being administered by the bishops who had sole jurisdiction within them of 'pleas affecting episcopal jurisdiction', and 'any cause concerning the government of souls'. A bishop's secular judicial function was to correct and bring to repentance those who offended the moral law.^{3/} He also had the duty to settle and reconcile disputes brought by the parties themselves. The distinction between these two judicial roles was similar to that existing today between criminal and civil actions. Realising that the law in the twelfth century was developing into a complexity beyond their own handling, the bishops began to transfer their judicial duties to men appointed for their knowledge and training in law. These experts in the practise of both civil and ecclesiastical law provided the foundation for a new profession.

Obedience to the Church's teaching and authority was a normal factor in the government of the individual's everyday life and an essential element in his spiritual salvation.^{4/} The English Church courts derived

- (1) Study of the ecclesiastical courts is fraught with difficulties, as explained by Sir Charles Dibden: "their origin, their functions, their procedures are equally obscure . . .", 'The Report of the Royal Commission on Ecclesiastical Courts 1883', Quarterly Review, 1883. Sir Geoffrey Cross and Mr. G. D. G. Hall record: "It is not easy to define exactly the limits of the jurisdiction exercised by the Church courts, for their claims were perhaps nowhere admitted in full by the temporal power, and the extent to which effect was given to them in practice varied very much in different countries at different times in their history." The English Legal System, 1964 (4th ed.).
- (2) John Johnstone, A Collection of the Laws and Canons of the Church of England, 1850-51 (new ed.), vol. 1, p. 20 f.
- (3) This aspect of the ecclesiastical jurisdiction is documented by Geoffrey May, Social Control of Sex Expression, 1930.
- (4) Chief Justice Hale is reported to have said that Christianity was part of the Common Law of England. (Alan Harding, A Social History of English Law, 1966, p. 236).

their authority not from the King of England but from the Pope, for "the jurisdiction of the Court Christian was a jurisdiction over Christians who, in theory, by virtue of their baptism, became members of a one Catholic and Apostolic Church." ^{1/} One of the main principles of canon law was the doctrine that marriage was a sacrament that represented the union of Christ with his Church. Because this bond was ever-lasting, so equally were the bonds of matrimony. ^{2/} This was the doctrine which led to the principle of indissolubility and the exclusive competence of the Church to deal with matrimonial causes. ^{3/}

Our laws of marriage remained bound by obligation to that declared by canon law ~~up~~ until the Reformation. ^{4/} Though indissolubility of marriage was the rule of the Roman Church, an important escape route was provided by the concept of nullity, in which the marriage was declared void and each party was restored to the single state. Nullity could be due to either a flaw in the marriage ceremony or an impediment to the union of the husband and wife. In the former case it was sufficient to prove that the marriage ceremony was deficient in formalities or that there had been duress. The second way was to show that there existed a relationship by blood, or through marriage, between the spouses. A marriage was invalid if through

- (1) James L. J. in Niboyet v. Niboyet (1878), 4 P.D., pp. 4-6.
- (2) Ecclesiastical casuistry further argued that as the mystical union which formed the sacrament of marriage was not complete until the marriage had been consummated, so neither was the marriage. Hence non-consummation was one of the ecclesiastical grounds for declaring a marriage invalid.
- (3) By the early Middle Ages, the Common Law dealt with ^{matters} ~~rights~~ arising from family relationships which came under headings of property or breach of the peace; whilst incidents of matrimonial relationship were the province of the Church courts.

The sacred character of Christian marriage gave ecclesiastical courts the right to pronounce upon questions of illegitimacy; though the temporal lords after the Council of Merton in 1236 would no longer concede the spiritual court's rule of legitimation by subsequent marriage.

- (4) Notable scholars and ecclesiastics such as Maitland, Dibdin, Stubbs and Ogle have differed in their opinions as to whether canon law provided the matrimonial law of England before the Reformation, or whether there had always been a separate, independent English Church authority. For a brief account of both arguments see Joseph Jackson, The Formation and Annulment of Marriage, 1969, 2nd ed., pp. 31-33.

the prohibited degrees of consanguinity, a person unwittingly married anyone descended from their great-great-grandfather; or by affinity as a result of one spouse's sexual union - before or after marriage - with a third party who was related within the four degrees of descent to the other spouse. "The law as to consanguinity and affinity were extraordinarily complex . . . It was a mixture of mathematics and mysticism, based on the view that sexual intercourse made man and woman one flesh, and so related to one another regardless of marriage."¹ A marriage could also be annulled if there was proof of a previous binding contract to marry another.

In reality there was a very wide liberty of divorce in the Middle Ages for the rich who were able to pay the ecclesiastical lawyers and judges for finding a dispensable impediment within the tortuous maze of forbidden degrees. "So tangled was the casuistry respecting marriage at the beginning of the sixteenth century, that it might be said that, for a sufficient consideration, a canonical flaw could be found in almost any marriage."^{2/} The one strong consideration preventing the Pope annulling^{3/} the marriage of Henry VIII was that Katherine's nephew, the Emperor Charles V, was the most powerful man in Europe.

On the Continent, the Protestant reformers rejected marriage as a sacrament, holding that its significance was entirely secular. With the Reformation, church courts disappeared from the Protestant states of Switzerland and Germany, and in the countries of Denmark and Norway. Of the countries that repudiated Catholicism at this time, it was only England which retained the canon law as her law of marriage.^{4/} During the reign of Henry VIII Parliament had enacted that a review of canon law

- (1) Joseph Jackson, The Law Quarterly Review, Vol. 85, p. 286.
- (2) C. F. and C. F. B. Twing, The Family: An Historical and Social Study, 1887, p. 83. Also see Pollock and Maitland, op.cit., Vol. 2, p. 389.
- (3) By reason of quasi-affinity created by Katherine's prior betrothal to Arthur, Henry's dead brother.
- (4) The opinion of Sir Lewis Dibdin was: "As Church law stood before the Reformation . . . so it stood under the canons of 1604, so it stood after the Divorce Act of 1857, and so it stands today". (Law Quarterly Review, October 1911).

should take place, though it was to remain unrevised.^{1/} Consequently, "upon these statutes now depends the authority of the canon law in England."^{2/} The purpose of Henry VIII's break with Rome was not to free the people from religious direction, nor did the Church of England claim to be a new church. Its defenders saw the Established church as embodying in itself the powers and traditions of the early, untarnished, catholic church; and so the same ecclesiastical courts that existed in pre-Reformation England remained unaltered. English matrimonial law remained that as laid down within the ecclesiastical courts until 1857. With this in mind it is important to understand the powers and procedures of the ecclesiastical courts.

- (1) This legislative review did occur during the reign of Edward VI. An ecclesiastical law commission - the Reformatio Legum Ecclesiasticarum - under Archbishop Cranmer recommended that complete divorce should be allowed on the grounds of adultery, desertion, cruelty, long absence and deadly hatred between the spouses. The report never obtained the royal assent, and so the canon law remained in force so far as it was not contrary to the common law or the royal prerogative. The sole lasting effect of the legislative activity of Henry VIII in matters of matrimonial law was a reduction in the number of the prohibited degrees of consanguinity and affinity, resulting from the Statute of Pre-Contract in 1540.
- (2) Randle Lewis, Reflections on the Causes of Unhappy Marriages, 1805, p. 117.

A notable ecclesiastical judge, Sir William Scott (later Lord Stowell) in a case involving Scottish law, held that: "the canon law . . . is the basis of the marriage law of Scotland, as it is of the marriage law of all Europe." Dalrymple v. Dalrymple (1811) 2 Hag. Con. 54, 81; 161 E.R. 665, 675. A. L. Manchester discusses this matter in "The Principles and Rules of Ecclesiastical Law and Matrimonial Relief", Sydney Law Review, Vol. 6 (1968), p. 34.

The ecclesiastical court's jurisdiction

Much of what is today indisputably within the province of secular law, was, up to the mid-nineteenth century, administered either in the ecclesiastical courts, or at least by ecclesiastical lawyers versed in civil law. Defamation, probate, matrimonial causes, admiralty, and many matters concerning morality, were all within the ecclesiastical lawyers' province. By the Middle Ages the ecclesiastical courts had a two-fold jurisdiction over misdemeanours and disputes involving firstly, clergy only; and secondly, laity. The latter consisted of either: (a) disagreements between parishioners and clergy - such as non-payment of tithes, riotous behaviour in church, or ornamentation and fabric of individual churches; or (b), matters that were believed to affect adversely faith or morality. Within this last group fell the Church's criminal jurisdiction over heresy, blasphemy, church non-attendance, defamation, usury and slander; and its civil jurisdiction covering the administration of estates of deceased persons and construction of wills of personalty,^{1/} and matrimonial matters.

The Church courts' jurisdiction over matrimonial and nullity suits allowed them to make the following decrees: divorce a mensa et thoro, restitution of conjugal rights,^{2/} nullity, jactitation of marriage and contracts

(1) Ecclesiastical interest in testamentary matters resulted from a belief that it was the Church's duty to urge Christians to make wills that left the deceased's affairs settled and his family financially protected. The Church also expected testators to make provision for the poor, as a sign of good deeds in this life and the well being of their souls in the next. During the seventeenth and eighteenth centuries, administration of estates passed to Chancery, whilst the ecclesiastical courts still pronounced upon wills of personal property and made grants of probate or letters of administration. The deceased's land passed to his heir, whilst moveable goods were held in trust by those responsible to the church courts for executing the will. This was one of the basic causes of the division between the laws of real and personal property.

(2) See Rayden,^{10th ed.} p. 192 and 193 fn.(a). Under ecclesiastical law the voluntary separation of spouses was illegal. The remedy for a breach of consortium vitae was the decree of restitution of conjugal rights. Defence was by either (a) denying the validity of the marriage, or (b) proving the plaintiff to be guilty of either adultery or cruelty. This decree was also used when a suit for a mensa et thoro failed through lack of evidence.

Desertion only became a matrimonial offence in the civil courts through the 1857 Act (s.16b) which allowed the decree of judicial separation; see Evans v Evans (1790), 1 Hag. Con. 35, at pp. 119-20.

of marriage and espousals;^{1/} but they did not have the right to dissolve a validly contracted marriage. Divorce a mensa et thoro was the only legally approved course by which the marriage consortium could be set aside. It was available to either husband or wife upon proof of the spouse's committal of one or more matrimonial offences, these being adultery, cruelty, unnatural offences or heresy and apostacy, but not desertion. The sentence of separation enabled the complaining spouse to live apart from the defendant spouse, but gave neither party the right to enter a second marriage during the other's lifetime.^{2/}

The ecclesiastical courts' jurisdiction was restricted by the common law to their prescribed area of operation. The common law was affirmed by the Statute of Citations Act of 1531.^{3/} The Statute, which included matrimonial causes, enacted that:

No manner of person shall be from henceforth cited or summoned, or otherwise called to appear by himself, or herself or by any procurator, before an ordinary, archdeacon, commissary, official, or any other judge spiritual, out of the diocese, or peculiar jurisdiction where the person which shall be cited, summoned or

- (1) A detailed account of these matrimonial suits is provided in, The Reports of the Commissioners on the Practice and Jurisdiction of the Ecclesiastical Courts of England and Wales, 1832 (199), p. 43.
- (2) The Ecclesiastical Constitution, drawn up in 1597, required that complainant's entered into a bond to this effect before the court would make the sought decree. Thus Philip Floyer, an advocate of Doctors Commons, writes (The Proctor's Practice in the Ecclesiastical Courts, 1746, 2nd ed. pp. 101-2) that a sentence of divorce a mensa et thoro would not be given until security against remarriage had been paid into court. This requirement made perjurers of those who went on to seek from Parliament a Private Act of divorce a vinculo.

The Canons of 1604 reinforced the 1597 Enactment against divorce a vinculo. Part of canon 107 reads: "That the parties so separated shall live chastely and continently; neither shall they, during each other's life, contract matrimony with any other person".

- (3) 23 Hen. VIII, c. 9. (Sometimes known as the Ecclesiastical Jurisdiction Act), J. Jackson (op.cit., ch. 10) provides a detailed account of the 1531 Act and its consequences, which this account follows. Jackson notes (p. 373) that "parts of the enacting clause are still to be found cited and explained in the ^{most} ~~more~~ recent judgements concerning jurisdiction in matrimonial affairs".

otherwise (as is above said) called, shall be inhabiting and dwelling, at the time of awarding, or going forth of the same citation or summons; except that it shall be for, in, or upon any of the cases or causes hereafter written . . .^{1/}

No person could now be cited out of the diocese in which he dwelt (unless for a spiritual offence) except on appeal from his own bishop's court.^{2/} This ruling had resulted from the fact that the ecclesiastical courts' jurisdiction was exercised pro salute animae (for the sake of the souls of the parties who were before the courts). It was therefore necessary that the body (and soul) before the court should reside within the area of the court's spiritual and temporal authority.^{3/} The 1531 Act, however, did not stop a court judge from transferring, by means of letters of request, the hearing of the suit to a superior ecclesiastical court. But as Lord Merrivale emphasised in Raeburn v. Raeburn (1928): "what is clear on the words of the Statute of Citations and in the proceedings of the Ecclesiastical Courts is that residence was the condition precedent of jurisdiction."^{4/}

Types of Ecclesiastical Court

For ecclesiastical purposes England and Wales were divided into the provinces of Canterbury and York, each under its own archbishop. Within each province operated a complex system of ecclesiastical courts, with provinces divided into dioceses, dioceses into archdeaconeries, archdeaconeries into rural deaneries. There were also 'peculiars' belonging to the

- (1) J. Jackson, op.cit., p. 372. Before the 1531 Act persons could be cited out of their own diocese to appear at London, Canterbury or York.
- (2) The Act was affirmation of the old common law. A judgement given by Dr. Lushington in 1845 declared: "the court always looks, on a question of jurisdiction, to the statute of Hen. VIII, c. 9, which was passed in affirmance of the common law, and by which this court, amongst others, had local limits assigned to it. That statute is the document by which this court must be governed in these proceedings."
- (3) See Padolecchia v. Padolecchia (1968), P. 314.
- (4) 44 T.L.R. 384, 385.

Crown, the archbishops, bishops, deans, chapters and prebendaries. In the nineteenth century there were altogether about four hundred ecclesiastical courts of which twenty-six were consistory courts, twenty-two in the province of Canterbury and four in the province of York.^{1/} The bishops' diocesan or consistory courts were presided over by the Bishop's Chancellor - also known as Official Principal,^{2/} who was a lay officer appointed by the bishop to assist and advise in matters of law.^{3/} By the seventeenth century such appointments were for life.^{4/} It was only the consistory courts, together with the two Archbishops' courts, that had the jurisdiction to deal with matrimonial suits.^{5/} Matrimonial appeals were heard by the two

- (1) See Reports of the Commissioners on the Practice and Jurisdiction of the Ecclesiastical Courts of England and Wales, 1832 (199) at Appendix D, No. 11 (p. 567). In a large diocese the court might sit at more than one place.
- (2) The two offices were usually combined in the same person: see Arthur J. Willis, Winchester Consistory Court: 1561-1602, 1960, p. 1. C. Morris, "A Consistory Court in the Middle Ages", Journal of Ecclesiastical History, Vol. 14 (1963) p. 155 fn. 1; notes that by the early sixteenth century there had been an amalgamation of the post of Official Chancellor, Commissary General and Vicar General. Cases heard at the consistory court of the bishop of Lichfield and Coventry in 1221 came before a clerk who was 'Vicar General and Official Principal' of the bishop (A. K. R. Kiralfy, A Source Book of English Law, 1957, pp. 410-11).
- (3) Archdeacons also appointed officials to act as their deputy, the official being the archdeacon's Chancellor. Qualifications for appointment were laid down by Canon 127 in 1603. There was no proper system of hierarchy between the ecclesiastical courts.
- (4) S.P.C.K., The Ecclesiastical Courts, 1954, p. 11.
- (5) This belief is based upon the absence in all of the standard ecclesiastical law books of any mention of a matrimonial jurisdiction being exercised by the archdeacons' court. Confirmation of this view is provided by Brian Woodcock's Mediaeval Ecclesiastical Courts in the Diocese of Canterbury, 1952.

By the eighteenth century, "cases coming to the Court (of Arches) on appeal or by letters of request were invariably from one of the Consistory Courts so far as matrimonial causes were concerned." Professor T. E. James 'The Court of Arches During the 18th Century: Its Matrimonial Jurisdiction', The American Journal of Legal History, Vol. 5 (1961), p. 55.

metropolitan courts, these being the Court of Arches in the province of Canterbury,^{1/} and the Chancery Court in the province of York.^{2/}

The Court of Arches matrimonial jurisdiction was threefold: original, by letters of request from inferior courts,^{3/} and on appeal.^{4/} The original jurisdiction applied to certain London parishes. Other cases, whether by letters of request or on appeal, came to the Court of Arches from the consistory courts of the province of Canterbury.^{5/} Matrimonial appeals could be either from the final decision on the case or from a grievance, the latter being an interlocutory order such as the granting of alimony

- (1) The title, "Court of Arches" was derived from the Church of St. Mary de Arcubus or Bow Church, in which the steeple was supported by bows or arches of stone. The Court of Arches met here from 1300 until 1672, when it moved to Exeter House in the Strand and afterwards at Doctors' Commons.
- (2) There were two other courts of the archbishop in the province of Canterbury. (i) A court of appeal and equity, called the Court of Audience or Chancery. As well as hearing appeals the court also dealt with administrative matters and the exercise of discipline as a court of first instance jurisdiction. There was little practical difference between the Audience and Arches Courts. Ronald A. Marchant, The Church Under the Law: Justice, Administration and Discipline in the Diocese of York, 1560-1640, 1969, p. 13; and M. Doreen Slatter, "The Records of the Court of Arches", Journal of ^{Ecclesiastical} Economic History, Vol. 4 (1953), pp. 139-153.
(ii) The Prerogative or Testamentary Court, having jurisdiction over wills which the archbishop claimed when the property lay in two or more dioceses (as was usually the case for important testators). A "close relationship" existed between this Court and the Court of Arches. Slatter (ibid., p. 153) notes about the Prerogative Court of Canterbury: ". . . little is known of its proceedings owing to the partial accessibility of its records".
- (3) A. J. Stephens, Statutes Relating to Ecclesiastical and Eleemosynary Institutions, 1845, Vol. 1, p. 132 fn. 6: "Stat. 23 Hen. 8, c. 9, devolves upon the Dean of Arches the power of accepting letters of request in matrimonial suits without the consent of the party proceeded against. . ."
- (4) Record of the steps taken in a case at each court sitting are contained in the Act Books. The records of the Court of Arches from 1660 to 1880 are now in the Bodleian Library, Oxford: "There is no doubt that during the last century the records have suffered considerable damage from damp, dirt and neglect". M. Doreen Slatter, op.cit., p. 140.
- (5) Rayden notes (op.cit., p.2) that ". . . this in important cases was not infrequently done."

pendente lite to the wife.^{1/} From the Reformation up until 1833 further appeal from a decision of the Court of Arches went to the Court of Delegates.

Until the Reformation, appeals from the Archbishops' Courts went to the Papal Curia in Rome. From the Act in Restraint of Appeals 1533,^{2/} onwards: "the English ecclesiastical courts were subject only to such appeals within the kingdom as were provided by statute; the law they administered henceforth was English statute law together with that part of the canon law which was retained in force."^{3/} An Act for the Submission of the Clergy and Restraint of Appeals in 1534^{4/} provided that appeals from the Archbishops' courts now went to the king in Chancery, where a special commission would be appointed, as in Admiralty appeals, to hear such cases.^{5/}

- (1) Alimony pendente lite was due to the wife as long as a complaint (the "libel") brought by either party remained undecided upon by the consistory court. The wife had nothing to lose in appealing to the Court of Arches, even if the successful husband had brought the complaint upon strong grounds, for he was still liable to pay all costs as well as maintenance until the matter had been decided, unless the wife had a separate income of her own. Miss Slatter records (op.cit. p. 147) that ". . . it is clear that the wife's claims for adequate maintenance were often one of the causes of disputes."
- (2) 24 Hen. VIII, c. 12.
- (3) J. Jackson, op.cit., p. 32.
- (4) 25 Hen. VIII, c. 19.
- (5) During the reign of the Tudors and early Stuarts there also existed a Court of High Commission. The Court's duties were primarily to see that the will of the government in religious affairs was observed, by enforcing the Acts of Supremacy and of Uniformity. The High Commission was disbanded in 1641; not being re-established at the Restoration (apart from 1686 to 1688) as were the ecclesiastical courts and the Court of Delegates.

As the detested ex officio was also abolished in 1641, a person could no longer be compelled to confess, accuse or purge himself. The resultant problem of proof made ecclesiastical court censure on moral matters such as adultery, fornication and incest much harder, for a presentment upon suspicion could not effect a conviction. See R. G. Usher, The Rise and Fall of the High Commission, 1913.

The commission, consisting of civil and canon lawyers, formed a court called the High Court of Delegates.^{1/} For four centuries it remained the principal appellate court in the English civil law hierarchy, until mounting criticism led to the transference of its powers to the Judicial Committee in 1832.^{2/}

Lawyers and judges of the ecclesiastical courts

Advocates were employed in the courts of the two archbishops and at the busier diocesan courts. Those who practiced in London became known as Civilians, due to the necessity that they should have obtained the degree of Doctor of Civil Law from the Universities of either Oxford or Cambridge before the Archbishop of Canterbury could authorise their appointment.^{3/} In 1511 the Civilians formed themselves into an Association of Doctors of Law, which in effect ruled the body of Civil lawyers and served the same purpose that the Inns of Court performed for the common law.^{4/} Their residence, formed in 1565 near St. Paul's Church London, was known as Doctors' Commons; later to be incorporated by Royal Charter in 1768, under the name "The College of Doctors of Law exercent in the Ecclesiastical and Admiralty Courts". In accordance with the Court of Probate Act, the society of Doctors' Commons was dissolved in 1857.^{5/}

- (1) For the history, jurisdiction and procedure of this court, see G. I. O. Duncan, The High Court of Delegates, 1971.
- (2) See ch. 4, p. 59.
- (3) Marchant (op.cit., p. 52) records that in the seventeenth century "at York and elsewhere the bishops admitted such university graduates as they thought fit"; at York he was usually a bachelor of laws.
- (4) Priests could not become members of Doctors' Commons.
A.C. Ducarel, A Summary Account of the Society of Doctors' Commons, 1753; C. Coote, Sketches of the Lives and Characters of Eminent English Civilians, 1804. More recent sources upon the Doctors' Commons are: W. Senior, Doctors' Commons and the Old Court of Admiralty, 1922; Leonard W. Cowie, 'Doctors' Commons', History Today, Vol. XX (June 1970), pp. 419-26.
- (5) 21 & 22 Vict. c. 77, s. 116. The reasons for their dissolution are explained in ch. 4, infra. Also see F. L. Wiswall Jr., The Development of Admiralty Jurisdiction and Practice since 1800, 1970 (Cambridge University Press), ch. 3 'The Fall of Doctors' Commons'.

Unlike advocates, proctors did not have to be graduates of law. The proctors' work was akin to that of solicitors. They conducted a cause through its formal stages in court, and were responsible for drawing up the documents connected with it. In courts other than those of the two archbishops, they very often undertook the whole management of a cause, including legal argument before the judge.^{1/} Some had their own private practice in addition to that at court.^{2/} Proctors, like the Civilians, were entitled to conduct suits in the Admiralty courts. In the mid-eighteenth century there were some 23 advocates and 58 proctors;^{3/} by 1833 there were between 20 and 30 advocates and 111 to 140 proctors.^{4/}

The requirement that practitioners and judges of the ecclesiastical courts had to be clerics was abandoned at the Reformation,^{5/} though the majority of judges still remained clerics. It was only the Testamentary Court, the Court of Arches and the Consistory Courts of London and Rochester sitting in Doctors' Commons that enjoyed the expert advocacy of the Civilians. At Doctors' Commons any of the Civilians might be commissioned to act as judge in a particular case; then returning to advocacy when the hearing had been completed. A large proportion of the Civilians' income was derived from acting as surrogates to the ecclesiastical officials, such as Official Principle ~~commonly known as the Dean of Arches~~, who were de jure in charge of the church courts.

Also attached to the court were: an examiner who took the testimony of witnesses for written presentation to the judge, a registrar and an ^{ari} ~~ap~~pointor. The latter was appointed by the judge of the court; their role, being similar to that of a policeman, was to keep order and to serve notices of the court on the persons concerned.

- (1) Marchant, op.cit., p. 17.
- (2) Willis, op.cit., p. 2.
- (3) Phillip Floyer, op.cit., pp. 9-10.
- (4) Report from the Select Committee on the Prerogative Court, Admiralty Court, and Dean of Arches and Consistory Courts, and to whom the Reports of the Ecclesiastical and Common Law Commissions, and Irish Admiralty Courts, were referred, 1833 (670), evidence^{9/} 25, 46, 47 and 509. The Law Times of 1846 (Vol. 7, p. 147) records that there were 3,080 barristers and 28 sergeants-at-law, practicing at the Bar alone in 1846.
- (5) In 1545, by 37. Hen. VIII, c. 17. Woodcock (op.cit., note 1, at pp. 11-13) records: "in the lower as well as the higher courts the judges were not necessarily trained ecclesiastical lawyers, in spite of the provisions of Canon 127 (of 1603)."

Procedure

Procedure within the ecclesiastical courts for dealing with matrimonial matters, as with civil cases generally, was more akin to Chancery than Common Law practice. Once a complaint had been made to the court registrar, three main stages followed.^{1/}

- (i) The suit was instigated by the issue of a citation delivered by the court apparitor to the defendant. Then followed the 'libel',^{2/} this being similar in design to a divorce petition of today. In the 'libel' the complainant, or more commonly a proctor as legal representative, 'alleges' and 'propounds' his case. Every 'allegation' had to be upheld by 'articles' showing each fact upon which the charge was made, together with 'exhibits' such as letters. A typical matrimonial suit was that heard in the Lichfield consistory court in 1821. The wife, who was represented by a proctor, charged her husband in the 'libel' with adultery. Letters written by the husband were produced as evidence of the allegation that he had fathered three illegitimate children since the marriage.^{3/}
- (ii) The defendant might in reply - or 'answers' - either accept, reject, or 'refuse to answer' the facts set out in the 'articles'. If the charge was denied, the defendant could produce supporting documents or depositions of witnesses, or both if he wished. Rules of evidence required two witnesses, whereas in lay tribunals one witness was accepted as sufficient if no more were available.^{4/} Witnesses from both parties were examined in private by a court official called an examiner, upon

- (1) The account of procedure is based on the following sources: Harding, op.cit., p. 122, 141; Slatter, op.cit., p.143; Rayden, op.cit., pp.4-5; S.P.C.K., op.cit., pp. 14-15; Marchant, op.cit., pp. 6 & 14.

Marchant provides necessary caution to any broad generalisation, observing (op.cit., p. 14): ". . . , while church courts transacted a uniform type of business, there was no one uniform pattern for the country. The court to which one went for litigation or to obtain a licence varied from diocese to diocese. Over most of the country the situation depended on the way in which the bishop and his archdeacons shared the work between them." No study shows how procedure changed, if at all, over the centuries.

- (2) The first plea in criminal proceedings was called 'articles', in testamentary causes it was called an 'allegation'. Subsequent pleas in all causes were called 'allegations'. See Sir Robert J. Phillimore, The Ecclesiastical Law, 1873 ed., Vol. ii, p. 1254.
- (3) See Kiralfy, op.cit., pp. 410-19.
- (4) George E. Howard, A History of Matrimonial Institutions, 1904, p. 107.

questions previously set by a judge or registrar. Such examination was to elicit required information upon specific charges itemized in the 'libel'. Depositions were then published, to which the complainant could reply by 'replication', whilst the defendant was allowed further time to disapprove of the 'replications' by means of a 'rejoinder'. As the taking of evidence and the cross examination were by deposition, a protracted case would result in many pages of handwritten evidence and a costly court fee for the complainant. A typical court record of an a mensa et thoro hearing examined by the writer consisted of some 120 pages, three quarters of which were depositions or exhibits coming from twelve witnesses providing evidence in support of the complainant's allegations.^{1/} When the judge was satisfied that all the necessary evidence to the 'libel' and later 'rejoinders' and 'answers' had been obtained, he closed this stage of the proceedings.

- (iii) Documents, pleas, exhibits, depositions, and interrogatories were studied by the judge before the actual court hearing began. The case was then argued and discussed in open court by the advocates of both sides. There was no jury, the judge giving both verdict and sentence. The standard sentence for a mensa et thoro, in this case awarded to a husband upon his wife's adultery, was as follows.^{2/}

And we also pronounce decree and declare further according to the lawful proofs made before us in the said cause as a foresaid that the said M.A.K., after the solemnization and consummation of the said Marriage being altogether unmindful of her conjugal vows not having the fear of God before her eyes and being instigated and seduced by the Devil did at the times libellate or some or one of them commit the foul crime of adultery and thereby violated her conjugal vow - Wherefore and by reason of the Premises we do pronounce decree and declare that the said N.K. Esquire ought by Laws to be divorced from bed and board and mutual cohabitation with the said M.A.K. his wife until they shall be reconciled to each other.

The slow and expensive hearing effectively debarred complaints from the working classes. A decree provided little real benefit to the complaining spouse, allowing neither husband or wife the right to enter a second marriage during each others lifetime. A successfully complaining wife had no practical means of enforcing the court's maintenance order. For these reasons the spiritual courts' matrimonial jurisdiction was seldom resorted to,^{3/} as the next chapter explains.

- (1) Seen by the writer during an examination of Parliamentary divorces. The ecclesiastical court papers were filed with the Private Act Bills, in the House of Lords.
- (2) Ibid.
- (3) See W. E. Tate, The Parish Chest, 1969 (3rd ed.), p. 145.

ECCLESIASTICAL JURISDICTION IN MATRIMONIAL DISPUTES

This chapter focuses mainly on the hundred and fifty years prior to the Matrimonial Causes Act of 1857.^{1/} As Parliamentary divorce debarred all but the very wealthy, the question arises as to whether the ecclesiastical courts' matrimonial jurisdiction was in any way adequate to deal with the majority of broken marriages that occurred through all sections of the population.^{2/}

Those who believe that this jurisdiction was used by both rich and poor have to explain why the latter wives would wish to use a procedure that was both costly and slow, though offering no practical benefit if the hearing was successful? Nor did a divorce a mensa et thoro offer any real advantage to the middle-class wife. Randle Lewis refers to the church decree as that:

which is the suit for alimony, a term which signifies maintenance, and which suit the wife, in case of separation, may have against her husband, if he neglects or refuses to

- (1) 20 and 21 Vict., c. 85.

Knowledge of the matrimonial doctrines and rules, applied in the spiritual courts, is necessary to gain insight into the practice and judgement of the newly formed civil Divorce Court. Section 22 of the 1857 Act, which was later replaced by s.32 of Supreme Court of Judicature (Consolidation) Act [15 & 16 Geo. 5. c.49] 1925, required judges to act in all suits (other than the newly established divorce proceedings) upon principles previously established in the ecclesiastical courts.

Some examples of ecclesiastical court practice operating in our divorce courts are connivance and collusion (up until 1970) (see Rayden, 10th ed., pp. 267-8, fn.(b)) and delay in bringing a suit to court (ibid., p. 309). Also see Harvey v. Lovekin (otherwise Harvey), 1884, 10 P.D. 122.

- (2) As Lord Hardwicke L.C. declared in 1737, "there is no colour to say the ecclesiastical courts want jurisdiction, for the authority they exercise in matrimonial cases is the general law of the land, and extends to persons not only of full age, but under, provided they are old enough to contract matrimony." Hill v. Turner (1737), 1 Atk. 515; 26 E.R. 326.

make her an allowance suitable to their station in life. This is an injury to the wife, and the court christian will redress it by assigning her competent maintenance, and compelling the husband by ecclesiastical censures to pay it.^{1/}

This suggests that maintenance was the de facto reality and adultery or cruelty the de jure justification for the wife seeking a decree of separation. But if the husband would not voluntarily support his wife, it is unlikely that the court order would be respected through threat of spiritual censure. A more likely explanation was that a middle-class wife who was cruelly treated, or found her husband's adultery intolerable, sought the church's seal to live apart from him in a time when violation of spiritual norms resulted in social censure within her social strata. The ecclesiastical decree would show that she was morally blameless. This argument would also explain the husband's resort to the ecclesiastical court. But all this is conjecture. Unfortunately many of those ecclesiastical records that have survived destruction at the hands of librarians seeking space in over-crowded archives, remain uncatalogued. As Canon Kemp declares, "the records of the ecclesiastical courts, particularly in the post-reformation period, form one of the most intractable and forbidding of historical sources. Much labour is apt to produce little save material for an historical gossip column."^{2/} This is a proper warning, but study of available sources does offer explanation of why the ecclesiastical courts' matrimonial jurisdiction was seldom used.

(1) Op.cit., p. 123.

(2) E. Kemp, review in Journal of Ecclesiastical History, Vol. XIV, p. 266. The opinion of Colin Morris (op.cit., p. 150) is that "unfortunately the records, although quite voluminous, have survived only in a haphazard and intermittent way, and it is, as yet, impossible to form any general conclusions about the subject as a whole."

The business of the courts

Even before the Reformation there seems to have been little resort to the ecclesiastical courts matrimonial jurisdiction, this being mainly due to the already very high cost of proceedings. The Canterbury consistory court, with jurisdiction over the eastern and Thanet regions of Kent, heard a yearly average of 39 matrimonial causes in the three years 1373, 1374 and 1397; though this fell to between 10 and 20 annually for the years 1415 to 1507.^{1/} Canterbury was typical of other consistory courts; for Lincoln consistory court had 13 'matrimonial or divorce' causes, forming 14 per cent out of 90 causes in the process of adjudication, in the year 1430-1.^{2/} Study of the Lincoln court's work showed that all 90 cases were ". . . instance causes and, to the modern eye, they do not appear to have very distinct ecclesiastical importance, most of them being suits over property or over rights" ^{3/} Lack of cases concerning spiritual discipline is also evident in the work of the York consistory court at the end of the sixteenth and first half of the ^{seventeen}seventeenth century.

The records at York give a reliable indication of the type and amount of work handled by consistory courts in this period. In the church court year for 1581-2, matrimonial cases formed 15 per cent of the 306 cases dealt with; this proportion falling to 10 per cent of the 357 cases in the year 1591-2; and under 2 per cent of the 305 cases dealt with in both the years 1626-27 and 1638-39.^{4/} The figures for York show that, by the time of the Stuarts, matrimonial cases coming to court had almost completely disappeared, whilst there were no such cases in the ecclesiastical courts of Norwich and Nottingham at this time. Table 1 shows the type of business dealt with by consistory courts in the years 1636-1639.

Suits for defamation and tithe formed the main part of the consistory courts' work at this time. Cases of defamation were brought by victims - mostly women - of slanderous gossip usually concerning alleged immorality, blasphemy or cursing.^{5/} The ecclesiastical courts were the self-appointed

- (1) Brian Woodcock, Medieval Ecclesiastical Courts in the Diocese of Canterbury, 1952, p. 85, fn. 1.
- (2) C. Morris, op.cit., p. 157, fn. 4.
- (3) Ibid., p. 157.
- (4) Marchant, op.cit., table 8, p. 62.
- (5) Marchant, op.cit., p.71 et. seq., provides further details of this charge. A.Warne, Church and Society in Eighteenth Century Devon, 1969, p.80; refers to typical cases where the plaintiff woman has been called a "whore" or a man referred to as a "bastard-making rogue".

Table 1

Litigation coming before the consistory courts
of Norwich, Nottingham and York in the 1630's (1)

Type of Case	Consistory court and court year		
	Norwich (1636-37)	Nottingham (1637-38)	York (1638-39)
Defamation	56	29	42
Tithe	31	23	41
Disciplinary (private prosecutions)	7	7	—
Disciplinary (official prosecutions)	—	35	—*
Testamentary (action between parties)	5	—	—
Matrimonial	—	—	1
Appeals	—	—	4
Other	1	6	12
Total %	100	100	100
Number of cases	123	105	305 ⁺

(1) Source: Marchant, op.cit., table 3, p.20; table 21, p.194; table 8, p.62

* Official prosecutions in York had been removed to a separate court by this time.

⁺ In 8 cases the cause was not stated.

Table 2

Cases heard by the consistorial court of Exeter
in 1759 and 1792

Type of case	1759 %	1792 %
Bastardy	29	—
Antehuptial fornication	10	—
Incest	—	1
Tithes	10	50
Wills	51	—
Faculties or alterations	—	49
Total %	100	100
Number of cases	91	155

Source: Warne, op.cit., p.84.

guardians of the people's morals. Their powers were such that they could punish fornication and adultery, as the registers of Sutton Valence Church in Kent record: "November 15th, 1717. On which day Eliz. Stace did public penance for ye foul sin of adultery committed with Tho. Hutchins junr. in Sutton Valence Church, as did Anne Hynds for ye foul sin of fornication committed with Theo. Daws".⁽¹⁾ Evidence of fornication was provided by the birth of an illegitimate child, in which case the mother had to name the father in her confession. This requirement did not come from a spiritual interest in the circumstances of fornication but, rather, the parish's desire to be rid of the responsibility for the child's maintenance.

By the end of the eighteenth century the records of the consistorial court of Exeter show that their work consisted almost exclusively of tithe and faculties hearings.⁽²⁾ The courts' original purpose of spiritual guidance had disappeared.

There is no reason to suppose that the cases heard by the Exeter consistorial court were not typical of the work done by other similar courts throughout the country. Fornication and bastardy hearings had faded-out by 1792; the former as a result of the Ecclesiastical Suits Act of 1787 disallowing prosecution once the parties had been married. Before the Act of 1787 ecclesiastical procedure in cases of antenuptial fornication had been "... singularly vexatious", in one instance prosecution occurring fifteen years after marriage.⁽³⁾ The Ecclesiastical Courts Report of 1832 concluded that the courts had de facto ceased to concern themselves with sexual offences; noting that their jurisdiction was "... competent to institute Criminal Proceedings for Incest, Adultery and Fornication; but in the Arches Court and the Consistory of London, no such suit had been brought for a long series of years; in some of the country courts they have been very rare".⁽⁴⁾

- (1) Quoted by Tate, op.cit., p.146
Further examples provided by Warne, op.cit., pp.76-77; also Marchant, op.cit., p.137 and 138, who records that in sixteenth century England both the adulterous parties had to do penance.
- (2) A special dispensation granted to a parishioner to do that which the common law would not allow, such as the erection of a monument in a church.
- (3) Mr Holdsworth, MP, Parliamentary Debates, 1787, Vol.26, col. 625.
- (4) Op.cit., (199), p.64.

Testamentary hearings, which had formed over half of the cases heard by the Exeter court in 1759, were no longer heard by 1792; this being probably due to the necessity of such work being undertaken by the trained advocates at Doctors' Commons, London.⁽¹⁾ There is no mention in either year of hearings for divorce a mensa et thoro having taken place at Exeter, such hearings being "extremely rare".⁽²⁾

Research on the records of the Court of Arches in which Professor James took four random three-year periods throughout the eighteenth century, "give some idea, albeit tentative, of the amount of matrimonial litigation at that time".⁽³⁾ Professor James' findings are shown below in table 3.

TABLE 3

Matrimonial cases before the Court of Arches in four selected three year periods during the eighteenth century*

Type of cause	P e r i o d				Total
	9 Oct.1702 23 Oct.1705	2 May 1734 9 May 1737	17 June 1747 15 June 1750	3 Nov.1768 20 Jan.1772	
Jactitation of marriage	-	2	-	1	3
Contract of marriage	6	1	2	-	9
Nullity for impotence	1	-	-	1	2
Restitution of conjugal rights	5	2	1	-	8
Decree <u>a mensa et thoro</u>	1	4	5	6	16
Uncertain	1	1	-	-	2
Total	14	10	8	8	40

*Source: James, *op.cit.*, pp.64-65.

(1) The Lord Chancellor explained in 1836, "... if part of the deceased person's estates, to the amount of only £5 was within the jurisdiction of another court, the process when taken out, would be invalid", (Hansard, 3rd ser., Vol.XXXI, col.327; see also Lord Ellenborough, ibid, col.674). The Report of the Ecclesiastical Courts of England and Wales, (1832 (199), Appendix (D)), shows that in the three years, 1827-1829 a total of 434 testamentary causes were heard in London (410 being at the Prerogative Court). Provincial Courts dealt with the remaining 513 similar causes (54% of the total of 947); though over half (278) were heard in three courts: St David's (Carmarthen), York Exchequer and Prerogative, and Chester. Marchant (*op.cit.*, p.189) notes that testamentary business (other than recovery of legacies) within the Nottingham consistory court jurisdiction was normally sent to the Archbishop's Court at York from the beginning of the seventeenth century. Another reason for going direct to London was to reduce the expenses of a possible appeal from the outlying courts.

(2) Warne, *op.cit.*, p.80.

(3) T.E. James, *op.cit.*, p.61

The Court of Arches was a court of appeal, though by means of letters of request it did ~~not~~ deal with unheard cases from the consistory courts. See supra pp. 10-11.

Matrimonial hearings before the Court of Arches averaged three a year, of which one-third were separation orders. These figures are too small to base any firm conclusions apart from the rarity of such proceedings in everyday life. Professor James notes in conclusion: "One of the most striking facts which appear from this analysis is that the divorce a mensa et thoro and nullity decree were not previously the exclusive privilege of the nobility and landed gentry".⁽¹⁾ Professor James's researches also led him to observe: "Indeed it is difficult to understand how the practice and procedure in matrimonial causes was preserved in the outlying Courts".⁽²⁾ The answer to this poser is that the matrimonial jurisdiction exercised by the consistory courts outside London had almost completely vanished by the early nineteenth century. With Doctors' Commons, the judges and advocates were usually competent to fulfil their duties; at the outlying courts the position was seldom satisfactory. Outside Doctors' Commons, the great majority of diocesan court judges were legally untrained clerks in holy orders assisted by proctors. This state of judicial inefficiency caused "many instances of persons being completely ruined through the ignorance of those before whom they had to plead in the Ecclesiastical Courts."⁽³⁾

Official returns show that only a small number of matrimonial suits were commenced in the ecclesiastical courts of England and Wales in the first half of the nineteenth century, and the great majority of these were dealt with in London. In the four years 1840 to 1843, a total of 162 - or a yearly average of 40 - matrimonial suits were instituted in the ecclesiastical courts, though just under four-fifths (124:77%) of the suits were commenced in eleven consistory courts, producing a yearly average of under one case a year for those courts, whilst a further fifteen courts did not hear a single case between them.⁽⁴⁾→

(1) Op.cit., p.66. James goes on:

"Moreover, having regard to the usual form of the pleadings whatever the cause of complaints, nullity seems to be very frequently raised. It may be that a large number of matrimonial conflicts never reached the ecclesiastical courts but the marriage was assumed to be a nullity. When property and children were not involved there would perhaps be small ground for a complaint. This aspect would be extremely difficult if not impossible to investigate satisfactorily. It would however be possible and interesting to discover how many of the ecclesiastical divorce decrees were followed by the promulgation of private divorce bills in Parliament. Considerable researches outside the Lambeth Palace Library would be required for this purpose."

(2) Ibid, p.59.

(3) Mr J.G.Phillimore, Hansard, H.of C., Vol.142, 1856, col.452.

(4) Return of Matrimonial Suits in each Metropolitan Diocesan Court in England and Wales, 1840 to 1843; (354), 1844.

Table 4

(a) Causes commenced in the provincial and diocesan courts of England and Wales, in the three years 1827-1829.

Province of	Type of cause			Total
	Matrimonial	Testamentary	Other	
Canterbury in:				
(a) England	83	586	508	1,177
(b) Wales	1	82	152	235
York	17	279	195	491
Total: number	101	947	855	1,903
% distribution	5%	50%	45%*	100%
Causes commenced in London courts: Consistory, Arches and Prerogative	58	420	29	507

* 'Other' consists of: defamation 18%, tithes 10%, church seat and faculties 10%, church rate 3%, miscellaneous 2%, brawling 1%, appeals 1%; total 45%.

(b) Distribution of matrimonial causes heard in the three years 1827-1829, by court.

Number of causes heard by each court.	Number and names of courts	Total number of causes heard.
None*	14	0
1 up to and including 4	7 (St. Aspath 1, Bath & Wells 1, Exeter 1, Hereford 3, Lichfield & Coventry 2, Rochester 2, Winchester 1)	11
5 " " " " 10	4 (Chester 9, Gloucester 10, Norwich 5, York 8)	32
Over 10	1 (London)	42
	<u>26</u>	<u>85</u>
	Court of Arches (provincial court)	<u>16</u>
		<u>101</u>

* Two of the 14 courts sat at two different places. These were Bristol (Bristol & Blandford) and St. David's (Carmarthen & Brecon); in neither case the the court have a matrimonial hearing.

Source: Reports of the Commissioners on the Practice and Jurisdiction of the Ecclesiastical Courts of England and Wales, sess. 1831-32 (199) vol. 24, Appendix D, No. 11, p.567, and at p.12.

These findings were typical of the work passing through the ecclesiastical courts in this period, similar results having been earlier obtained for the years 1827 to 1829 by the Ecclesiastical Commission of 1832. Table 4a, which summarises the latter returns, shows that of the 1,903 causes commenced in these three years, only 101 (5%) were classified as matrimonial causes. The Commissioner's Report does not indicate whether these 101 cases were for a mensa et thoro only, though it seems most unlikely as the table breakdown gives no other suitable classification for inclusion of such other matrimonial matters as jactitation, restitution and nullity - which could only have been dealt with by provincial or diocesan courts.⁽¹⁾ Even if the improbable assumption is made that the 101 'matrimonial causes' referred to spouses seeking a decree of a mensa et thoro, the yearly average for such suits would number no more than 33. Table 4(b) records that only London out of the twenty-six consistory courts had more than 10 matrimonial causes, whilst fourteen courts did not hear any during the three years. This meant that the great majority of courts lacked experience of administering and judging such matters. Nearly half (46%) of all matrimonial and lucrative testamentary causes, but only 3% of unremunerative 'other' causes, were commenced in London (see Table 4a), with the result that only the London advocates at Doctors' Commons were able to support a skilled bar and bench. This helps to explain why findings from a study of Parliamentary divorces shows that over four-fifths (82%) of all the necessary prior ecclesiastical court sentences of a mensa et thoro occurred in London; though only one-third of the divorce petitioners gave their residence as London.

Further evidence which suggests that matrimonial cases were dealt with in London is that the Ecclesiastical Reports of matrimonial causes for the period 1789 to 1857 that still exist, and Lee's Reports for 1752 to 1758, are in respect of the London Consistory, the Prerogative Court of Canterbury and the Court of Arches, all of whom sat at Doctors' Commons, London.⁽²⁾

(1) (199), 1832, op.cit., p.567.

(2) Reports by Haggard cover the years 1789-1810 and 1810-1822. Official Law Reports were not published until 1818 when the first volumes of Joseph Phillimore's Ecclesiastical Report appeared; although in all other courts regular and authorised reports were being published by the beginning of the nineteenth century.

The majority of consistory courts, most of whom lacked the legal expertise provided by Doctors' Commons, were in practice no more than registry offices when it came to deciding matrimonial suits; passing the hearing of the suit on to the Court of Arches in London by means of letters of request.⁽¹⁾ The Dean of Arches was bound to accept such letters of request from bishops (in practice their chancellors) within whose jurisdiction an ecclesiastical cause had arisen but who desired to waive their right of jurisdiction.

Cost of matrimonial proceedings

Witnesses to the Ecclesiastical Courts' Commission gave details of the high costs and delays in matrimonial proceedings.⁽²⁾ Later evidence to the Campbell Commission reported that if the case was unopposed, the hearing might take some six to eight weeks; but if defended, it was at least three to four months before a decision was given, and in extreme cases it could take two to three years.⁽³⁾ My analysis of the 54 cases (100%) heard in the London consistory court over six years from 1845 to 1850 indicates that the Deputy Registrar was somewhat optimistic, for 57% of the cases took over six months from commencement to conclusion. Completion of 9 cases (17%) took over a year, though 7 of these were opposed. An unopposed case resulted in a quicker hearing, for all of the cases completed in less than six months were undefended. Half of all the complainants experienced a wait of between four and seven months before completion.⁽⁴⁾

Some sixty per cent of the 54 London cases were 'promoted' by the husband. In all but one of the 33 husband petitions, the ground for complaint was adultery, the wife opposing in only 4 of the 33 hearings, whilst 23 were unopposed and 6 were in poenam. Adultery featured in 15 of the 21 cases promoted by the wife, a further 2 were for cruelty and 4 for adultery and cruelty combined. The husband ^{opposed in} ~~is~~ one-third of all ^{wife} cases, did not oppose in 10 whilst 4 were held in poenam. No indication is given as to the wealth

- (1) A similar conclusion is reached by Professor James from his research into records of the Court of Arches in the eighteenth century. He goes on to record (op.cit., p.61) that "there are no comparative figures of matrimonial causes in a Consistory Court of this period....".
- (2) (199) 1832, op.cit., p.69.
- (3) Evidence of J. Shepherd, Deputy Registrar to the Consistory court of London to the 1853 Commission (1604), op.cit., evidence, p.28.
- (4) Warne (op.cit., p.85) points out: "Delays, expensive in time and money were possible at every turn of proceedings, but these delays were no greater than those in Common Law and Chancery Courts in the same period; nor did delays in the ecclesiastical courts ever reach the scandalous proportions of those in the Court of Chancery under Lord Eldon, (Chancellor from 1801 to 1827)".

or class of these people, but the same table shows that in 13 cases the complainant went on to promote a costly Private Bill for divorce. As some of the 41 remaining complainants might well have proceeded to the Lords after the table was compiled, it does seem probable that somewhere in the region of one-third of all London cases later sought a divorce a vinculo. The decree of a a mensa et thoro was a necessary stepping stone for those wealthy enough to contemplate seeking a Private Act of divorce.

A lawyer, concerned at the heavy court expenses likely to be incurred by those seeking a divorce a mensa et thoro at the beginning of the nineteenth century, gave the following advice: "To the affluent, we recommend to proceed in such a suit, but we do not (nor will the civilians) offer such advice to the indigent suitors, we mean such as are not worth £300 after their debts are paid, or who cannot spare so much without bankruptcy, or wasting the money to which others have a just claim".⁽¹⁾ The writer went on to recommend to poor parties that they should only seek the opinion of the court upon their cases, which could be obtained for £40, rather than involve themselves in heavy costs. Some forty years later, Stephen Lushington was declaring to a Select Committee of the House of Lords in 1844 that: ".... the expense, under certain circumstances is really enormous, I have known it in certain contested cases to be so oppressive as to be utterly impossible for a moderate fortune to encounter."⁽²⁾ There seems little chance that the ecclesiastical courts were used by the working man when the average wage paid to the manufacturing labourer in the 1830's was only 14/- a week.⁽³⁾ With such a fact in mind one can well appreciate Lushington's answer, in replying to a question from the 1844 Committee concerning the cost of proceedings, that he had known cases of the humbler classes of society "being deterred by the cost of proceedings".

(1) R Lewis, op.cit., pp.140-41.

(2) Evidence reprinted as Appendix of Campbell Commission Report (1604), 1853, op.cit., p.37.

(3) Arthur L. Bowley, Wages in the United Kingdom in the Nineteenth Century, 1900, p.70. Though Bowley's findings are "tentative", they are the best available. A "London type of artisan" earned double this wage of 14/- a week.

Poor persons could proceed as paupers if they were not worth £5 after payment of debts. This also applied to the wife who wished to defend the charge made against her.⁽¹⁾ There were, according to Lushington, usually one or two pauper cases pending. This power of suing in forma pauperis did not apply to Parliamentary divorces, though the Campbell Report notes as a footnote⁽²⁾ to Lushington's evidence that this was in fact allowed in the case of Chippindall in 1850. But on the question of pauper rights in the ecclesiastical courts, Lewis notes that the maximum capital limit of £5 was fixed:

"Upwards of three hundred years ago; and in all probability, at that period it was sufficient to ascertain a party's right, in any court in this country; but on a moderate computation of the value of money between that and the present time five pounds then may be estimated to be nearly equal to £100 now; besides it must be admitted that if a man is not worth (indeed if he cannot command^d), a moiety of the last mentioned sum, it is imprudent to risk the event of a suit in the superior temporal, much less in any of the spiritual courts.*⁽³⁾

Lewis goes on to observe that few suits were judicially determined for under £300.⁽⁴⁾ However there was little to be gained by turning to the Court of Chancery, for the same case heard there could be three times as much. Sir Robert Phillimore notes that the expenses in Doctors' Commons for a wife seeking a decree of separation from her husband on the ground of cruelty, and the custody of her minor children, would be just over £200 in a case where the order was aggravated by contumacy (a refusal to obey the order of an ecclesiastical court). In the Chancery Court costs would be between £600 and £700, even without an appeal.⁽⁵⁾ A deserting husband who had moved out of the diocese, left his cast-off wife without remedy unless he agreed that the hearing should take place in his new diocese of residence. But the wife's costs would be greatly increased with this unlikely latter occurrence. If he left the country she would lose the right to pursue her claim, even though he may have left property in England.⁽⁶⁾

- (1) See Evidence published in the Campbell Report (1604) 1853, op.cit. p.45
- (2) See p.49 infra.
- (3) R.Lewis, op.cit., p.127.
- (4) Ibid, p.130. The 1853 Commission noted that undefended ecclesiastical decrees were anything from £300 to £500.
- (5) Robert J Phillimore, Practice of Civil and Ecclesiastical Law, 1848, p.42.

M Doreen Slater, op.cit., p.144 fn.3 records that "A bill taxed in July 1828 in the suit between the Countess and the Earl of Portsmouth gives the expenses in the Consistory Court of London and in the Court of Arches since 1826 amounting to £3820 1s.11d. This is 6 inches wide and about 104 feet long."

- (6) See p.345 infra.

Maintenance in the ecclesiastical court

Until 1857, the wife's right to maintenance lay within the authority of the ecclesiastical courts. The decision of a majority of English common law judges hearing the case of Manby v Scott in 1663 held that the common law courts gave the wife no remedy or independent right to maintenance, but left her with the remedies of the ecclesiastical jurisdiction.⁽¹⁾ Mr Justice Windham observed: "Debates between the husband and wife are not to be brought to the common law but are left to the Ordinary to whom it belongeth by the ancient common law alimony is with them in the proper jurisdiction in the Spiritual Court".⁽²⁾ In a dissenting opinion Mr Justice Twisden explained one consequence of leaving the wife's remedy in the ecclesiastical courts: "... if maintenance is compellable only in the Spiritual Courts, husbands will be cruel to their wives when they know that punishment at the worst will mean excommunication; and what little regard the men of this age have for that is too well known; and then the entangling of the body and soul of the husband in the meshes of excommunication will neither feed nor clothe the wife".⁽³⁾

Manby v. Scott remained a precedent for the proposition that a wife's right to maintenance was enforceable exclusively in the ecclesiastical courts, until Parliament intervened two centuries later in 1857. However alimony could not be ordered by the ecclesiastical courts until separation had occurred upon the fault of the husband. Church courts were concerned only with incidents of the matrimonial relationship, and an order for alimony was ancillary to the decree of separation.

The foundation of the wife's right to maintenance lay in common law, through status acquired by marriage.⁽⁴⁾ The parties to a marriage, as a consequence of entering into that status, are under an obligation to cohabit. By marrying, a man voluntarily contracted a new status from which followed an obligation to support his wife and children according to his estate and condition.

- (1) Smith's Leading Cases, 13th ed., Vol.2, p.418.
A detailed discussion of this case and its implications in the history of the wife's right to maintenance, is provided by O.R.McGregor, Louis Blom-Cooper and Colin Gibson, Deserted Spouses, 1971, pp.2-6.
- (2) 1. Keble 80; 83 E.R. 823 to 825.
- (3) Smith's Leading Cases, Vol.2, pp.431-2.
- (4) See Lush on the Law of Husband and Wife, ed. S.N. Grant-Bailey, 4th ed. 1933, p.381; who, referring to Bacon's Abridgement, 17th ed., (1732), Vol.1, tit. Baron & Feme, p.713; holds that, "the foundation of the wife's right to maintenance by her husband is not contract, but status, and, moreover, not statute, but common law." For this reason the ecclesiastical courts did not make any provision in nullity suits for the support by the man of a woman who had believed herself to be validly married. (See Lush, p.413).

The ecclesiastical courts' award of alimony to a wife was a means of enforcing an obligation which would have been incumbent on the husband even if a decree had not been made. The purpose of alimony arose from the common law duty of the husband to keep himself and not become a charge on the community. This duty also implied keeping his wife. A consequence of the doctrine of unity of legal personality was that the husband was bound by law to provide his wife with necessaries, and if she contracted debts in obtaining them he was obliged to pay such bills. The husband was not chargeable for any thing other than necessaries if he had previously notified tradesmen that he would not be held liable for these expenses, or the wife had a separate maintenance allowance.

Upon marriage the wife's property passed to her husband, unless it was held for her by settlement. Very few wives had their own means, which would allow them to be financially independent of their husbands. For this reason ecclesiastical courts recognised that, unless the wife was to be a pauper, it was essential to provide the means to live separate from her husband in accordance with the decree a mensa et thoro.⁽¹⁾ A wife would ask in her prayer to the court that she "may be divorced and separated from the Bed, Board and Mutual Cohabitation with (her husband) ... and he be condemned in the Costs and Alimony made or granted and to be made or granted in this Cause on her behalf and condemned to the due payment thereof by you, ...".⁽²⁾

The requirements of 'guilt' and 'innocence' were basic to the courts' resolution of maintenance for the wife. In 1554, the clergy had presented a petition to Convocation "that in divorces which are made from bed and board (a mensa et thoro) provision may be made that the innocent woman may enjoy such lands and goods as were hers before the marriage, and that it may not be lawful for the husband, being for his offence divorced from the said woman, to intermeddle himself with the said lands or goods, unless the wife be to him 'reconciled'". Three centuries later the Campbell Commission of 1853 declared that the husband should provide "liberally" for his matrimonially "innocent" wife; the alimony ordered for her benefit was to depend on the degree of "the delinquency of the partner". Ecclesiastical courts had power to grant alimony to a 'guilty' wife.⁽³⁾ If the wife had wealth in her own

(1) The husband was not liable to maintain his wife if she had an income of her own sufficient to maintain herself according to her husband's station in life / Liddlow v. Wilmot (1817) 2 Stark. 867 or if she earned money while living apart / War v. Huntly (1703) 1 Salk 1187.

(2) Set before Lichfield Consistory Court, 1821. Quoted by Kiralfy, op.cit., p.415.

(3) This ecclesiastical power was transferred to the newly formed Divorce Court, by s.17 of 1857 Act, when dealing with applications for restitution of conjugal rights and judicial separation. This provision now operates through s.20(i)(a) of The Matrimonial Causes Act, 1965. See Rayden (10th ed.), p.805 fn.(a).

right before marriage but was found to be living in adultery, then "the allotment of alimony would be no more, than, with some regard to her former situation, and the fortune she brought, would be absolutely necessary for a maintenance".⁽¹⁾

Ecclesiastical courts provided for the everyday needs of the wife by granting alimony during the progress of a suit. If the wife was ultimately successful, maintenance was "dealt out with as much liberality as precedent will warrant".⁽²⁾ Assessment of alimony payable to the wife was dependent on the pecuniary means of the husband, and could be subsequently raised or lowered according to either spouses' changing circumstances.⁽³⁾ If the parties could not agree, the wife had to file an affidavit setting out details of her husband's financial position and her own dowry. From this information the judge would decide upon the amount of maintenance to be ordered. Law Reports indicate that normal maintenance was, as a rule of thumb guide, one third of the husband's income; though the amount could fall below or exceed this proportion.⁽⁴⁾ A jeweller with an income of £300 was ordered to pay his wife £80 permanent alimony in 1791; whilst the Countess of Pomfret in 1796 obtained one third of her husband's yearly £12,000 income. In this latter case, the husband's income was largely due to his wife's wealth, but it was held that she had obtained rank in return, whilst the husband had the dignity of the peerage to support.

Judges were unwilling to be too severe on 'guilty' husbands whose wealth came from their wives' dowries. In Smith v. Smith (1813), the wife obtained a decree of separation on the ground of her husband's adultery and cruelty. A great part of the husband's yearly income of £1,500 was due to his wife's wealth, whilst the wife had a separate income of £300 per year. Sir John Nicolls, sitting in the Court of Arches, observed: "It is a rule of equity, that no man shall take advantage of his own wrong; perhaps it would be but just, that where the husband violates the matrimonial engagement, and the fortune was originally belonging to the wife, that he should give back the whole of it. Courts, however, have not gone that length; yet, in such a case as the present, this Court would give as large an allotment as in any".⁽⁵⁾ The wife received from the Arches Court a further £550 a year in addition to the original £450 alimony.

(1) T. Poynter, Doctrine and Practise of the Ecclesiastical Courts, 1824, p.251.

(2) Ibid., p.251.

(3) See Alfred Waddilove: A Digest of Cases Decided in the Court of Arches, 1849, pp.53-60; also L.Shelford, A Practical Treatise on the Law of Marriage and Divorce, 1841, pp.586-607.

(4) For further examples see Rayden, 10th ed., p.809, fn.(d) and (e).

(5) 2 Phillimore, p.152 and 236; quoted Poynter, op.cit., p.253.

Further reason why ecclesiastical courts were seldom approached by wives of poor husbands is given by Coote, who records: "however small, precarious, or uncertain the income of the husband may be, it is, notwithstanding, always liable to a deduction for alimony. The only exemption that occurs is on the husband suing in forma pauperis".⁽¹⁾ Thus the guilty husband could be exempt from the duty of supporting wife and family by reason of his own poverty. Such suits though were very ^{un}common and the number of adulterous husbands so absolved must have been few. But if the author's words are taken literally, then maintenance (of even a nominal amount) has not always been required from the guilty husband.

Even if a penurious wife successfully obtained a decree she would have little practical means of enforcing the court order on an unwilling husband. The wife trying to find his address would probably receive an unhelpful response from the authorities where the husband now resided, if in the meantime he had formed a liaison with another woman. The removal of the husband to prison might well have meant that the keep of his illegitimate offspring fell upon parish rates.

Ecclesiastical courts had no power over the husband's property but only over his person. Because of this, alimony could not be made an assignable or chargeable asset any more than could the wife's right ^{to} be supported. Alimony was seen as a personal allowance paid by the husband for the maintenance and support of his wife, and as such it was "allotted from year to year".⁽²⁾ It was neither the property of the wife or a debt due from the husband. This was because alimony was only intended to provide for the wife's day to day needs in the expectation of a resumption of cohabitation between the parties.⁽³⁾ This hope, together with a belief that the wife should not accumulate a private fortune through alimony, justified the courts' practice not to enforce arrears of many years standing.⁽⁴⁾

(1) Henry C. Coote, The Practice of the Ecclesiastical Courts, 1847, p.343.

(2) Coote, op.cit., p.349.

(3) See Kiralfy, op.cit., p.419; reporting an appeal before the Court of Arches, in which their sentence was that the wife should be "divorced and separated from Bed, Board and Mutual Cohabitation" with her husband, "until they shall be reconciled to each other". The wife was ordered to live chastely, whilst neither of them "...shall, in the lifetime of each other, in any wise attempt or presume to contract another marriage,....".

(4) De Blaquiere v. De Blaquiere (1830), 3 Hag. Ecc. 322; Wilson v. Wilson (1830), 3 Hag. Ecc.329,n.; quoted Rayden, p.499 fn.(e).

Enforcement of the court order

The ineffective enforcement procedure of the ecclesiastical courts debilitated their authority. The only sanction the courts had directly at their disposal was excommunication. This was a threat of spiritual censure which caused little fear or practical disadvantage, except that an excommunicant could not be buried in a churchyard; nor could he within common law serve upon juries, be a witness in court, or bring action to recover land~~z~~ or mon~~ey~~ due to him.⁽¹⁾ Marchant, writing of the sixteenth and seventeenth centuries, records: "the average contumacious person lived and died excommunicate. If he was poor, the legal disabilities would weigh lightly on him...".⁽²⁾ The result was that "...church discipline by itself had little compulsive effect on the poorer classes. Excommunication hardly touched them...".⁽³⁾

As far back as Tudor times there had been "... failure to secure attendance of offenders who were cited" and "even if and when the court succeeded in securing the appearance of offenders before it so that orders might be given, a further and greater difficulty faced the authorities in the lack of exacting obedience to such commands".⁽⁴⁾ Why disrespect was shown to ecclesiastical censure is explained by Archdeacon Hale: penance, suspension and even excommunication, being "punishments which affect only the mind and conscience; they have little influence upon persons who have no respect for religion".⁽⁵⁾ In many cases the defendants accepted excommunication as a means of postponing any disciplinary action which might be taken against them.

- (1) William Blackstone, Commentaries on the Laws of England, 1765-69, Vol.3, p.102 (9th ed., 1783). From 1813 there was no civil incapacity except imprisonment: see p.56 infra.
- (2) Op.cit., p.221.
- (3) Ibid, p.223; see also pp.224-25.
- (4) F. Douglas-Price, "The Abuses of Excommunication and the Decline of Ecclesiastical Discipline under Queen Elizabeth", English Historical Review, Vol.LVII (1942), p.106 and p.108.
- (5) Precedents and Proceedings... Illustrative of the Discipline of the Church of England, 1847, Introductory Essay, pp.1-1i.

Lord Coke in Caudrey's Case (5 Coke Rep, at p.VI) distinguished ecclesiastical law from temporal law solely by the remedies. He said: "The Ecclesiastical Law and the Temporal Law have several proceedings and to several ends: The one being Temporal to inflict punishment upon the body, lands or goods. The other being Spiritual, pro salute animae; the one to punish the outward man, the other to reform the inward:..."⁴

Quoted by Lord Justice Denning, "The Meaning of 'Ecclesiastical Law' ", Law Quarterly Review, Vol.60, p.235.

Because the original purpose of the courts had been to save souls, the usual form of court sentence in disciplinary matters was for the culprit to do penance. This form of ecclesiastical discipline was still normal in the late eighteenth century.⁽¹⁾ Shades of the courts' papal heritage were evident in the fact that penance was often commuted for a money payment.⁽²⁾ Refusal to obey the order of the court might lead to the issue of a writ of excommunication for contumacy. If an excommunicated person refused to submit to the church court within forty days, the judge could then signify the contempt by issuing a significavit against him.⁽³⁾ Notification of contempt, by the ecclesiastical court to the Court of Chancery, resulted in the latter issuing a writ de excommunicato (or de contumace after 1813) capiendo.⁽⁴⁾ The sheriff could now imprison the offender until such time as he, or she, submitted.⁽⁵⁾ In one case a woman had been "confined eleven years at Nottingham because she refused to admit she was not a married woman".⁽⁶⁾

(1) Warne, op.cit., p.78

In Devon at this time, forms for presentment were all printed. Reform was not always achieved as shown by the further excommunication in 1775 of "Margaret Whore (sic) of Roborough for having a base child since her last penance." (Quoted by Warne, p.79).

(2) Price, op.cit., p.111; and Warne, op.cit., p.78, who notes that the money payment was called a pecuniary mulct. See reported nineteenth century cases in Parliamentary Debates, Vol.26 (1813), col.706.

(3) "The writ (significavit) had no efficacy unless the party who obtained it went to considerable trouble to secure its enforcement, and many writs were never executed". H.G.Richardson, in a book review, Law Quarterly Review, Vol.60 (1944), p.200. See also Price, op.cit., pp.112-13.

(4) Resulting from "An Act for due Execution of the Writ De Excommunicato Capiendo", 5. Eliz.I., c.23 (1562). See A.J.Stephen, op.cit., pp.408-15, and Henry Gee, The Elizabethan Clergy and the Settlement of Religion 1558-1564, 1898, pp.191-2.

Excommunication was abolished for non-spiritual matters in 1813, but imprisonment for contempt remained. See p.56 supra. Rayden (p.500, fn (a)) records: "The Ecclesiastical Courts enforced orders for alimony by pronouncing a party contumacious, and so, through the Court of Chancery, committing him for contempt, and from then onwards the purely personal character of alimony has been recognised continuously, and in consequence the (Divorce) Court has maintained its complete control of the enforcement of all arrears of alimony".

(5) Notification of the prisoner's submission by the bishop to Chancery allowed the writ de excommunicato deliberando to release the recalcitrant from prison. (Blackstone, Vol.3, p.102), Dr Lushington remarked in Parliament (Hansard, Vol 26 (1835), cols.912-13) on a case of a man who had appeared before him, and subsequently went to prison on a defamation charge: "He sent the man there, and there he was at present, and there he might remain, for he knew not of any law by which he could be released". The Attorney General was of a different opinion, holding "... ecclesiastical courts had the power already, in common with the courts of law, of discharging a person who was in custody for contempt". (Hansard, Vol.55 (1840), col.1193).

(6) Parliamentary Debates, Vol.26 (1813), col.707.

This was the enforcement procedure laid down; but "in practice, the time and money which would have had to be consumed was prohibitive". In⁽¹⁾ the diocese of York in 1623, over two thirds of ecclesiastical court actions - the majority of which were concerned with spiritual matters - resulted in the persons charged ignoring the court's authority.⁽²⁾ If the 2,026 contumacious persons involved had been duly imprisoned, the prisons would have been filled in a very short time. The courts' defective enforcement machinery was underlined by the Lord Chancellor's belief in 1831 that excommunication had become a brutum fulmen (a threat to which effect cannot be given)⁽³⁾ It was not the ultimate deterrent of imprisonment but the threat of excommunication that was the de facto means of enforcement of an ecclesiastical court order.

The weakness of the ecclesiastical courts was apparent to the 1832 Ecclesiastical Courts Commission: "It does appear wholly inconsistent with any sound principles of Jurisprudence, that exclusive right of adjudication on certain subjects should be vested in any Court, and yet that Court be left without the means of carrying its decrees and orders into effect".⁽⁴⁾ The tone of the Report suggests that imprisonment was seldom used in matrimonial matters, and indeed confirmation is provided by a Return of all ecclesiastical court imprisonments in the three years 1827-1829.⁽⁵⁾ Only two out of the sixty-nine committals were matrimonial, one case being of a barrister imprisoned for three days for not paying costs of £64 in a separation case brought by his wife; the second was that of a labourer who spent one week in prison for, "not answering in a cause of Divorce and Separation". The question as to how effective the process for enforcing the matrimonial decrees and orders of the courts is answered by the Commission: "as the law now stands in these Courts, justice is liable to be defeated in various ways, especially in Matrimonial Suits."⁽⁶⁾ These courts, in short, had no means of enforcing an order for maintenance.

One reason why the courts' powers of enforcement "affords a very ineffectual remedy",⁽⁷⁾ was that during the time this procedure took to operate, the husband could leave the country. The Court of Chancery had power, in cases involving a decree of separation with alimony, to grant a writ ne exeat regno that commanded the Sheriff of the County in which the husband

(1) Marchant, op.cit., p.222.

(2) Ibid., p.205, table 26.

(3) Hensard, Vol.6 (1831), col.1017. The Lord Chancellor was citing Blackstone.

(4) Report, 1832 (199), op.cit., p.67.

(5) Ibid., Appendix D (No.12).

(6) Ibid. p.66.

(7) Report, 1832 (199), op.cit., p.67.

lived, to restrain him from leaving the country. But the cases were "extremely rare in which this assistance is really useful; ...", as like committal proceedings, the husband could leave the country before service of the writ. Wilfully defaulting husbands had little reason to fear the enforcement procedure of the ecclesiastical courts.

An alimony defaulting husband's property could not be attached by authority of the ecclesiastical courts, or by the assistance of any other tribunal. The 1832 Report wanted power to ^fop husbands escaping their maintenance commitments by leaving the country, so "that in all cases of disobedience there should be power to attach the Party, and distrain upon his property."⁽¹⁾ The Court of Chancery might intervene upon rare occasions, as when a wealthy husband deserted his wife without making provision for her, to settle maintenance for her benefit from his estate.⁽²⁾ Their right to grant alimony had existed since the early seventeenth century. It was not dependent upon a previous decree from the ecclesiastical courts, nor limited by any Statute of Citations. But as J. L. Barton records, "Chancery proceedings were growing progressively more dilatory and more costly, and during the first decades of the nineteenth century were beyond the reach of all but the most prosperous. Applications to Chancery by a deserted wife never seem to have been very common, and by the time the Matrimonial Causes Act, 1857, was passed to have fallen into desuetude."⁽³⁾

However, the basic position of the common law remained unchanged until 1857; the temporal courts would not recognise any separation which had not been decreed by the spiritual courts.⁽⁴⁾ The few who proceeded from the ecclesiastical courts to the House of Lords and divorce a vinculo highlighted the social injustice of the matrimonial laws of England and Wales.

(1) Ibid.

(2) Lewis (op.cit., p.144) records that - quoting 'a late Lord Chancellor' - no court had original jurisdiction to give a wife separate maintenance but it "may be given incidentally as on a supplicavit ('a writ which issued out of Chancery for taking surety of the peace, upon articles filed on oath, when one was in danger of being hurt in his body by another'; it was seldom used: Jowett.) in Chancery, or a divorce a mensa et thoro propter soevitiam in the ecclesiastical court", Lewis goes on to ask (p.145) why maintenance should not be "made incidentally by the courts of law, where the parties are concurring, at a considerable less expence and in a much shorter period than by the spiritual court".

(3) J. L. Barton: "The Enforcement of Financial Provisions", p.355, A Century of Family Law 1857-1957, ed. R.Graveson and F.R.Crane, 1957. See also supra, p. 27 (observation of Phillimore).

(4) Henry Prater, Law Relating to Husband and Wife, 1834, p.42.

DIVORCE BY PRIVATE ACT OF PARLIAMENT

The net result of the Reformation upon England's marriage laws was the abolition of the evasions and loopholes which had made the medieval system tolerable in practice. Even in the latter half of the sixteenth century a widely held view of English divines was that adultery was a valid reason for dissolution of marriage, though a second marriage was seldom permitted if the first spouse was still living. The Marquis of Northampton's second marriage, after first obtaining a decree of divorce a mensa et thoro, was recognised by a court of Bishops. This case was not the first Parliamentary divorce, as the Marquis's Private Act of 1551 only confirmed that, because of his first wife's adultery, the already existing second marriage should be lawful and the children legitimate. A somewhat similar Private Act in 1546 allowed the wife of Sir Ralph Sadler to remain his wife, though her prior husband still lived.

Parliamentary recognition in the latter half of the sixteenth century of divorce a vinculo had been rejected by the ecclesiastical authorities when deciding the case of Rye v Fuliambe in 1602. In this important case the Court of the Star Chamber held that only divorce a mensa et thoro could be granted for adultery and that such a decree did not allow the husband or wife to enter a second marriage during the lifetime of the other spouse. The Star Chamber verdict, as MacQueen, writing in 1842 explains; "... has ever since been considered the law of the land. This important decision was in effect a re-assertion of the doctrine of matrimonial indissolubility; a doctrine exploded in other Protestant countries of Europe, but retained in England, and still held sacred and inviolable in all our courts of justice."⁽¹⁾ Parliament was the only authority with power to overrule ecclesiastical law.

Parliament, with increased authority resulting from the Civil War (1642-49), was now prepared to circumvent divine law by passing, in a few cases, a Private Act allowing divorce. The first Private Act of divorce in 1670 allowed Lord Roos, who enjoyed the special favour of Charles II, to enter a second marriage.⁽²⁾ For a further two centuries, Private Act procedure was the only legally prescribed course by which husbands inconvenienced by an existing valid marriage, could marry another woman at some future date, though the first wife was still living.⁽³⁾

- (1) J.F. MacQueen, Practical Treatise on the Appellate Jurisdiction of the House of Lords, 1842, pp.470-71.
- (2) See J.F. MacQueen, op.cit., 1842, p.551. Some authorities disagree with MacQueen's opinion of Lord Roos as the first parliamentary divorce: for instance Howard, op.cit., Vol.II, p.103 fn.3.
- (3) The only possible exception was if the husband transferred his domicile to a country permitting divorce, the most obvious example being Scotland. See infra, pp.73-74.

The fact that divorce a vinculo could be obtained caused churchmen concern. Many of them agreed with the following nineteenth century opinion of Divorce Bills: "as things now stand the judicial and the legislative authorities proceed on opposite principles, and the legislative assumes judicial functions for the express purpose of doing what according to the general law of the land, and according to scripture, as expounded by that law, ought not to be done at all."⁽¹⁾ Parliamentary divorces appear, at first sight, to be an anachronism when it is remembered that ecclesiastical courts had been allowed to retain their pre-Reformation authority over matrimonial matters. The question arises why the legislature allowed these Private Acts, each one of which was a denial of the Church's teaching of the indissolubility of marriage?

The answer was that the majority of early Acts were meant only to protect the aristocracy's purity of breed. This safeguard was essential in a society where family wealth was in land, which was transmitted by a system of inheritance and family succession whereby the first born son acquired all the property. The impossibility of a second marriage, following failure of a valid first marriage, was an intolerable situation for ill-yoked but eminent husbands with titles and large estates to protect. Thus, Parliament devised a method whereby the landed gentry and peerage could, by invoking the ancient public right of petitioning the Crown to redress a private grievance, be protected against spurious offspring disturbing legitimate claims of paternal kin. A patrilineal society in which the practice of primogeniture operated, demanded that the legitimacy of the wife's first born son should be beyond doubt. The Act of Lord Roos, after declaring his adulterous wife's children illegitimate, went on to record that there is "no probable expectation of posterity to support the family in the male line but the said John Manners (Lord Roos)".⁽²⁾ Such Bills did not purport to challenge the Church's doctrine, but only to create for the nobility a dispensation in particular cases. As Professor Graveson explains: "The basis of this legislative jurisdiction rested on the constitutional omnipotence of Parliament... The Private Act of Parliament was historically no more than the pre-Reformation Papal decree, by which alone a valid English marriage could at that time be dissolved".⁽³⁾

- (1) Essay on Divorce Bills, copies from 'The New Times' into 'The St. James' Chronicle', 29 September, 1824; quoted by Hector D. Morgan, Doctrine and Law of Marriage, Adultery and Divorce; 1826, Vol. 2., p.256.
- (2) Quoted by Clifford, op.cit., p.397. A randomly selected petition presented to the House of Lords in 1843, declared that the husband was liable to have "issue imposed upon him unless the said marriage be declared void and be annulled by the authority of Parliament". The prayer has an odd pre-Reformation fiction about it as there was seldom dispute that the marriage in question was neither void nor voidable.
- (3) R.H. Graveson "The Background of the Century", in Graveson and Crane (eds), A Century of Family Law, 1857-1957, pp.5 and 7.

Parliamentary divorces were rare until the accession of George I and the House of Hanover in 1714; only 10 Acts passing before that period. Afterwards their numbers considerably increased. Between 1715 and 1760 there were 24 such Acts, the next forty years had 99 Acts, whilst between 1800 and 1857 there were 184 Acts. Table 5 shows that altogether 317 Private Acts of divorce were passed by Parliament up until the 1857 Act; 283 of them occurring in the hundred years following 1757. That over a quarter of all Private Acts were passed in the twenty years before 1857 indicates the increasing use being made of the procedure.

TABLE 5

Private Acts of Parliament for dissolving marriage and enabling the parties to marry again, from the Reformation to 1857*

Period Act was passed	No.	%
Before 1714	10 ⁽⁺⁾	3
1715 up to and including 1759	24	8
1760 " " " "	1779	46
1780 " " " "	1799	53
1800 " " " "	1819	49
1820 " " " "	1839	59
1840 " " " "	1856	76
Total	317	100

(+) One Act (that of Northampton) was afterwards repealed during the reign of Mary.

* Source: Parliamentary Papers, 1857, Sess. 2. (123), p.121.

Survey of Parliamentary divorces

The Parliamentary Return of 1857, (recorded in Table 5) provides the only empirical information to date about Private Act divorces.⁽¹⁾ The Return sets out the number of such divorces by the year each Private Act was passed, but unfortunately does not give names of petitioners. The Legal Research Unit, Bedford College, carried out a survey of Parliamentary divorce with the purpose of remedying lack of knowledge concerning the obscure legal facets of this procedure and the social and demographic characteristics of the petitioners.

(1) Dr. Hollingworth has published an important demographic study of the British peerage which encompasses their utilisation of parliamentary divorce. T.H. Hollingsworth, "The Demography of the British Peerage", Population Studies, Vol.18 (1964-65), supplement; see especially ch.2, pp.8-28 (on marriage).

By examination of the annual House of Lords' Journals, researchers obtained names of petitioners and the year when the Private Bill was presented. Parliamentary proceedings over the Bill are to be found mainly in the respective Journals of both Houses, though occasionally Parliamentary Debates and Hansard provide a record of the Bill's progress. The reason why Parliamentary sources contain this information is explained by Lord Westbury: "this proceeding was in spirit a judicial, though in form a legislative act".⁽¹⁾

The House of Lords' Library holds Private Act divorce Bills. Also filed with the Bill is the supporting evidence from the previous ecclesiastical and civil hearings; these papers containing witnesses' affidavits in support of the allegations made by the husband, and if defended, denied by the wife. From these records a questionnaire was designed to contain as much demographic data as could be accurately compiled from the records. ~~The questions asked were:~~

The five pre-seventeenth century Private Acts shown on the 1857 Return are either of dubious account as divorces a vinculo,⁽²⁾ or provide insufficient detail for coding.⁽³⁾ Lack of a list of the names of all Private Act divorce petitioners means that there is no sure way of knowing that the survey's list is complete, whilst there is reason to think that the 1857 Return may not be absolutely accurate for the reasons just given. Confidence in the survey's reliability is strengthened by the fact that comparison of our list of Private Acts, by period when made, compares very favourably with that of the 1857 Return. This comparison is shown in Table 6.

TABLE 6

Period of time in which Private Act of divorce
was passed

Period	Source: *			
	1857 <u>Return</u>		Bedford College Survey	
	No.	%	No.	%
Pre - 1760	34	11	24	8
1760 - 1799	99	31	100	31
1800 - 1857	184	58	194	61
Total	317	100	318	100

*The date of 4 Acts was not known.

- (1) Shaw v Gould, 1868 [L.R. 3E and I. App.84].
- (2) 1540 - Henry VIII, 1550 - Marquis of Northampton (see ibid., p.36), 1690 - James Campbell (Clifford, op.cit., p.400, notes this Act was to annul and make void a forced marriage, and was therefore not good precedent).
- (3) 1670 - Lord Roos, 1697 - Lord Macclesfield.

Status of petitioner

Knowledge of the husband's status was necessary to test the belief that towards the end of the eighteenth century husbands other than landowners began to resort to Private Act divorce. Information about status, as indicated by occupation or other available information on the petition, was not always provided. The peers and knights who petitioned would clearly be landowners.⁽¹⁾ However, the peerage and the great landed magnates were not synonymous. The problem is how to classify the three-quarters of all divorcing husbands recorded as 'esq.', or gentlemen'. Acknowledgement of the petitioner as 'esq.' or 'gentleman' might infer classification as a member of the landed gentry; a group about which Professor Aydelotte holds: "I doubt that any firm definition ... can be devised".⁽²⁾ The first edition of Burke's Landed Gentry described its contents as the history of the 'Commoners of Great Britain and Ireland enjoying territorial possessions or high official rank but uninvested with heritable honours'.⁽³⁾ Many of the greater landlords were commoners, who enjoyed far larger incomes than the poorer peers. The landed gentry, were, however, far from forming a homogeneous group. Indeed, due to the linkage through kinship and marriage between families whose wealth may have come from business to those with income from their land, it was misleading by the mid-eighteenth century to talk of a landed interest hierarchy of aristocracy, gentry and freeholders.⁽⁴⁾ [Petitions do not show what proportion of the 108 professionally occupied husbands had incomes coming solely from their work. One possibility is that the majority of these husbands were the younger sons of

- (1) Knights could be hereditary (Baronets) or none-hereditary (Sir). Though our group was the latter, only four were shown to have occupations, three being in the Army.
- (2) N.O. Aydelotte, "The Business Interests of the Gentry in the Parliament of 1841-47", p.291, Appendix to G. Kitson Clark, The Making of Victorian England, 1962 (1965 ed., Methuen & Co. Ltd.). W.L. Guttman writes that the term 'gentleman' had by the nineteenth century "... become perplexing to foreign and English writers alike": (The British Political Elite, 1968 ed. p.113; Guttman refers to A.R. Wagner, English Genealogy, 1960, pp.102-21 passim).
- (3) 1837, title page. There were nearly four hundred families recorded in this edition. This work cannot be seen as a definitive record of the landed gentry. Professor Aydelotte (op.cit., p.292) notes "... Burke does not adequately explain his selection, and I have every reason to believe after much use of the work that it was compiled with something less than meticulous care".
- (4) See G.E. Mingay, English Landed Society in the Eighteenth Century, 1963; ch.1; and F.M.L. Thompson, English Landed Society in the Nineteenth Century, 1963, ch.1.

gentry who, without inheritable land, had to earn their living. Many younger sons would enter the Army, Navy, Church or Law, thereby still being seen as a 'gentleman'. But W.L. Guttm^sman queries whether the term 'occupation' can be applied in such cases. He notes "... it is in the very essence of aristocratic occupational pursuits, that while conferring power, they did not mean a 'job' which would interfere with the style of life of a country gentleman, or his counterpart in the cities".⁽¹⁾

A second possibility is that the 108 'professional' husbands' parentage might be that of the manufacturing and commercial classes who had invested their wealth in landed property to gain status acquired from ownership of land. The newly formed bourgeoisie families, though owning land, were not members of the landed ^{gentry} or nobility.

The third possibility is that by the early decades of the nineteenth century, a significant proportion of petitioners seeking Private Acts were wealthy middle class husbands in professional occupations. Three-quarters of the 108 Acts involving 'professional' husbands were heard between 1800 and 1857,

The proportion of husbands who had earned incomes increased during the eighteenth and early nineteenth century, so that by the period 1839-57 they formed 57% of all Private Act divorces. Altogether nearly half (48%) of all divorces were obtained by husbands who were occupied in some form of work activity. Table 7 indicates the form of their occupation.

TABLE 7

The form of employment of husbands described as 'occupied', by period in which Act was passed

Period	Occupation					Total	Occupied husbands, i.e. 'Total, as a proportion of all divorces in period
	Army or Royal Navy	Clergy-men	'Professional'*, Bankers or Civil Servants	Merchants	'Others'		
Pre-1760	-	1	-	1	1	3	13%
1760-1799	12	5	11	8	11	47	47%
1800-1857	41	12	27	13	8	101	52%
Total	53	18	38	22	20	151	48%

*'Professional' is strictly defined in this group, i.e. lawyer, as compared to 'professional type of occupation' which comprised the above first three table groupings.

Two-thirds (101) of all occupied husbands obtained a divorce a vinculo between the years 1800 and 1857. The largest group (40%) of these 101 husbands were serving in the Army or Royal Navy; a large minority of them obtaining divorces whilst serving overseas, the most common ^{country} spot being India. It seems that by the beginning of the nineteenth century Private Acts of divorce were far from being a monopoly of those whose wealth and status came directly from real property.

(1) Guttm^sman (ed.), The English Ruling Class, 1969, p.112.

Children

Out of the 308 wives for which information was available, 119 (39%) were found to be childless. One-fifth of all wives had four or more children. Half of the wives whose marriages up until the time of separation had lasted less than five years, were childless, compared to a third for marriages in which separation took place after ten or more years of marriage. A third (31%) of all wives had at least one ^{son} living at the time of the petition, half (53%) had no sons, whilst information was not available for the remaining 16%. The 53% of wives with ~~no~~^{out} son were composed of the original 39% of wives without children and 14% who had only girls. The marriage's failure to produce an heir might well have proved an important factor in the husband's desire for divorce if the great majority of petitioners had been members of the territorial aristocracy. This was so for Acts made before 1760, with 88% of the wives ^{not} having ~~no~~ sons, whilst the great majority (87%) of the divorcing husband's were classified as 'Gentry'. But this hypothesis does not fit the facts for Acts passed in later periods. After 1760 a significant number of husbands were in occupations fitting a middle-class status; and 38% of wives for which information was available in the period 1800-57 had sons. Examination of all Acts by husband's occupation revealed that the 'gentry' (i.e. non-occupied), 'professional', 'merchants', and 'other employment', all had either 30% or 31% of husbands with sons. These findings suggest that from the mid-eighteenth century lack of an heir was no longer associated with divorce.

The upper ranks of the nobility and the wealthy land-owners did not attempt or pretend to lead a life of ~~no~~^{so}briety and solemnity that was to be later proclaimed the hallmark of the Victorian era. "It was a notably calloused and cynical age The best society, despite its wit, elegance and learning, was much preoccupied with drunken routs, foppery and seduction."⁽¹⁾ The illegitimate offspring of the noble and wealthy were acknowledged and maintained by their parents without comment or rebuke from society. This was because "sexual adventurousness was possible for a wealthy primogenitary class that stuck to the rule of securing a ~~make~~ heir of known parentage; and its members were not often put to the inconvenience and expense of obtaining a divorce by Private Act of Parliament".⁽²⁾ It was husbands whose wealth came from business and professional enterprise who had reason to fear the consequences of a wife's adultery. Divisible wealth allowed all one's children to an inheritance, and so the middle class demanded unimpeachable female chastity.

(1) Maurice Quinlan, Victorian Prelude - History of English Manner 1700-1830, 1941, p.11. See also J.H. Plumb, England in the Eighteenth Century, 1950, who records (p.84): "Many (aristocrats) felt no necessity for restraint and allowed their personalities full indulgence."

(2) O.R. McGregor, op.cit.; p.68.

Less than a third of all marriages lasted ten years or more before separation occurred, whilst 28% ended within five years. Forty four per cent of couples divorcing before 1760 separated within five years of marriage compared ^{with} to 27% for divorces occurring between 1760 and 1857. An explanation might be that the pre-1760 divorces, comprising mainly of land-owning husbands, were unprepared to countenance a wife's indiscretion if a legitimate son had not yet been born.

The Development of Private Act Procedure

The case of Lord Roos indicates that Parliament expected petitioners seeking a Private Act divorce, unless a very good excuse was provided, to first obtain an ecclesiastical decree of separation. The fact that the Duke of Norfolk's estate would fall into Catholic hands if he did not have a direct heir, whilst the wife was a Papist and a Jacobite, probably explains the passing ^{in 1700} of this Act without a prior ecclesiastical decree. Box's Act in 1701 made no mention of an heir to the husband's property. The Gorell Commission believed that this Act "appears to have been one of the first if not the first case where, without any special circumstances, the legislature granted a divorce a vinculo after sentence in the Arches Court". The reason the House of Lords gave for allowing Mr. Box's Bill was that the wife had "lived in adultery, as he hath fully proved in the Court of King's Bench, and obtained a definitive sentence in the Arches Court of Canterbury". But it was not until a hundred years later that Parliament, by a standing order of the House of Commons in 1801, formally expected the petitioner to have obtained a prior verdict of damages for criminal conversation secured against the wife's seducer in the Common Law courts.

Damages were intended to compensate the husband for the injury done by the loss of his wife's consortium. Evidence shows that Parliament at all times insisted on either damages being awarded or that the petitioner had attempted to seek damages but for good reason had failed. The Legal Research Unit survey shows that there had never been a civil hearing in at least 45% of the Acts passed before 1780; this proportion dropping to 17% between 1780 and 1857. Altogether 38% of all husbands obtaining Parliamentary divorces either did not seek damages, were unsuccessful, or only received a nominal amount from the jury.

A deed of separation between husband and wife made before the wife's adultery meant that no injury was done to the husband who had voluntarily relinquished his wife (his property), therefore an action for damages failed. The House of Lords were normally unwilling to allow Acts where separation agreement had been entered into, holding that such agreements repudiated the very nature of the marriage contract.

Just over half of the suits brought resulted in damages of £1,000 or more. As the nineteenth century progressed so the amounts awarded decreased. Table 8 shows that almost a quarter of the damages awarded before 1820 were for amounts of £5,000 or more, compared to 8% in the period 1820 to 1857.

TABLE 8

Damages awarded to husbands by the Common Law courts in successful criminal conversation suits, for Private Acts passed before 1820 and between 1820 and 1857

Period of Act	Damages awarded to husband						Total		
	£100		£500		£1,000			£3,000	
	Under £100	£100 - £500	£500 - £1,000	£1,000 - £3,000	£3,000 - £5,000	£5,000 & over			
Before 1820	No.	8	12	17	30	8	22	97	
	%	8	12	18	31	8	23	100	
1820 to 1857	No.	9	22	19	21	8	7	86	
	%	10	26	22	25	9	8	100	
All	No.	17	34	36	51	16	29	183	
	%	9	19	20	28	8	16	100	

Indian cases showed, in addition, 14 awards of damages in rupees.

In the period before 1820, damages of £20,000 were awarded to Lord Valentine Cloncurry (1811) against Mr. Merchant, and to the Hon. Henry Wellesley (1810) against Lord Paget. Five husbands had between £10,000 and £15,000 damages, and thirteen had between £5,000 and £10,000 damages awarded to them. What such amounts meant in those times is shown by Colquhoun who estimated that in 1803 the wealthy elite of some 300 peers had average incomes of £8,000 a year whilst that of 2,000 eminent merchants was put at an average of £2,600 a year. Damages of £5,000 was two hundred times the labourer's yearly wage of £25. Using the tables constructed by Professor Phelps Brown and Sheila Hopkins,⁽¹⁾ and Professor Routh⁽²⁾, the cost of living from the 1790's to present time must have increased at least sixfold, resulting in £5,000 having a current value of £30,000.

The fact that juries after 1820 were increasingly unwilling to award the heavy damages of earlier years may have been a reflection of the falling cost of living after 1810. Only 2 out of 56 husbands with known damages after 1833, obtained £5,000 or more.

- (1) 'Seven Centuries of the Price of Consumables, Compared with Builders' Wage-Rates', Economica, Vol. XXIII, 1956; see table extracted from this article and provided by J. Burnett, A. History of the Cost of Living, 1969, p.199.
- (2) G. Routh, Occupation and Pay in Great Britain 1906-60, table 49, pp.110-11.

Whatever the theory behind suits for criminal conversation, juries must have intended such sizeable sums to have been a penalty against the adulterer and not just as compensation to the husband. These suits were also meant to show that there had not been collusion between the spouses. The opposite possibility of the law being perverted by collusive action for damages might well explain certain of the suits. Certainly the Campbell Commission discredited this action as a means of barring collusion, holding: "If the parties are anxious to collude, what is to prevent the plaintiff from receiving the damages with his right hand, and then, as soon as the Bill of Divorce has passed, returning them with his left?"⁽¹⁾

If such high damages as recorded in Table 8 were obtained by wronged husbands in the eighteenth century, then sexual intercourse with a married woman by a wealthy seducer was indeed a severely punished matter. But a far more likely explanation is that damages were never paid, nor even enforced by the court. However, MacQueen writes, "With the view of negating all presumptions or surmises of collusion, the petitioner ought to discover active diligence in enforcing the recovery of such damages and costs as may be awarded against the adulterer. It has been held that he must show; not only that the damages and costs have been bona fide; but also that they have been bona fide retained".⁽²⁾ The latter part of this opinion does not always fit the facts, for the Bill of Mr. Lindham (1829) shows that £5,000 damages awarded against the Rev. R. Mallock had not been paid. The House of Lords was informed in the case of Major Weston (1805) that damages of £5,000 had not been levied nor the recalcitrant seducer arrested, as the petitioner's solicitors knew: there was no possibility of recovering this amount and they wished to save their client further expense.⁽³⁾

Only 9% of husbands seeking damages were awarded an amount of under £100. Juries would show their disapproval of actions brought by cruel or callous husbands, by awarding nominal damages. Unsympathetic juries awarded Mr. Chamberlain (1813) 1/- plus costs, Mr. Malpas (1835) £2, nominal amounts to Viscount Lismore (1826) and Mr. Grahame (1827); but in each case a divorce was granted.⁽⁴⁾ Parliament was less ready to entertain a Bill brought by a husband who had separated from his wife, leaving her without means of support, and had subsequently failed to maintain her. Such neglect would cause the Bill to be rejected, as were Captain Moreau's (1755), Mr. Simmons' (1845), Mr. Llewelyn's (1851) and Mr. Batley's (1852).

(1) Op.cit., (1604), 1853, p.18, fn.9.

(2) Op.cit., (1842), p.493.

(3) House of Lords Journal, Vol.45, p.246.

(4) See MacQueen, op.cit., pp.486-93.

Parliamentary Procedure

In 1798 the Parliamentary divorce procedure was regularised by standing orders⁽¹⁾ of the House of Lords which required that all applications for Private Acts should be supported by a sentence of divorce a mensa et thoro together with a copy of evidence received by the ecclesiastical court.⁽²⁾ An ecclesiastical decree could be given for either adultery or cruelty by the respondent, though evidence was inevitably directed towards proof of the former charge, as this was the only ground acceptable to the House of Lords. All ecclesiastical hearings were heard in the consistory court of the diocese in which the wife lived, but the ecclesiastical courts' antiquated procedure of allegations, articles, objections, interrogatories and compulsories, made the hearing very slow and costly. Three-quarters of all ecclesiastical hearings occurring in England, Wales and Ireland were heard in London, yet only 29% of these petitioners actually resided in London. The petitioner living away from London had the additional expenses of witnesses' fares to London, board, and incidental expenditure, as well as the usual lawyers' and court fees. By the period 1840-57, the proportion of British hearings occurring in London had risen to 84%; this was a reflection on the increasing inability of ecclesiastical courts outside London to judge upon matrimonial matters.

Parliament's requirement of proof that the husband, before seeking a Private Act of divorce, had used all the remedies that the law provided and had still found them unsatisfactory for the wrong done to him, lay behind Parliamentary insistence that the husband should first obtain, or attempt to obtain, a decree of a mensa et thoro against his wife and damages against the seducer. The latter also proved the opinion of a jury that the husband was acting genuinely and without collusion, and that he had not contributed to his own dishonour. This being so, the husband sought further relief by the promotion of a Private Bill which originated in the House of Lords. However, even if damages and an ecclesiastical decree had been obtained, the House of Lords were not bound to pass the Bill if they felt the standard of proof was unsatisfactory.⁽³⁾

- (1) Standing Order 141, which was largely the work of Lord Louthborough.
- (2) There were only two Acts heard prior to 1798 in which a decree of a mensa et thoro had not been obtained, these being the divorces of the peers Norfolk and Macclesfield.
- (3) The House of Lords required stricter proof than did the ecclesiastical courts. Lord St. Helier, P., observed in Symons v. Symons (1897, p.175) "it is not too much to say that unless corrupt connivance were proved, the Ecclesiastical Court considered that no conduct of the husband conducing to his wife's adultery barred his right to relief".

The second reading of the Bill normally took place the next day fortnight following the first reading in the Lords. The second reading was essentially the trial of the case. The petitioner had to attend unless the House gave permission of absence, as they did in the case of Major Cunliffe (1820), who was stationed in India. Witnesses whose testimony was necessary to support the petitioners' allegations of adultery also had to be present at the second reading. A copy of the marriage registration and a witness to the ceremony also had to be produced. After the Bill had been read a second time, it passed to a committee of the whole House who could amend the Bill if they so wished. Following its third reading the Bill was sent to the House of Commons. If the Commons passed it, the royal assent followed ^{a matter} as of course, and the petitioner was now free to enter a second marriage. "Everything was satisfactory except the delay, the expense, and in many hard cases the terrible exposure."⁽¹⁾

Parliament had always made it a rule that the husband had to provide a wife, who wished to defend the Bill, with money for this purpose.⁽²⁾ The consequent additional cost to a working man, when compared to the wages of the time, show the improbability of him being able to use this procedure. The wage of a London compositor in 1810 was around £2 a week, making him "probably the highest-paid of all artisans"; whilst a similarly employed worker with a wage of £2. 7s. 6d. a week to support a wife and two children, was experiencing "affluence approaching middle-class standards".⁽³⁾

Financial provisions were generally made for the wife when the Bill was in the Committee stage of the House of Commons. In the earliest case Parliament provided by express enactment that the wife should not be left destitute.⁽⁴⁾ Later, the House of Commons came to have a functionary known as the "Ladies' Friend", an office usually filled by some member interested in the private business of Parliament, who undertook to see to it that any husband petitioning for divorce made suitable provision for his spouse. The wife who brought a fortune to her husband at marriage normally received maintenance in proportion to the size of this fortune. Because the wife of Mr. Howard (1794) had a fortune of £12,600 at marriage and as she would be left destitute it was felt necessary that some provisions should be made for the divorced wife, and so a sum of £7,000 was invested for her benefit. Clauses relating to the maintenance

- (1) J.F. MacQueen, Divorce and Matrimonial Jurisdiction, 1858, p.26.
- (2) An example of this is the Act of Sir J. Dimeley who was ordered to give his wife, who had brought a fortune of £20,000 at marriage, the sum of £130 for her defence.
- (3) J. Burnett, Plenty and Want, 1966, p.62.
- (4) In Daly's case (1768) the petitioner's counsel was directed to come before the Lords' Committee on the Bill as no financial provision had been made for the wife. The result is not known.

of the wife were no longer inserted in the Bills after the case of Mr. Loveden (1811)⁽¹⁾, although it was well understood that they would not pass through Committee in the Commons unless husbands had entered into bonds to secure moderate incomes for their wives. The principle of the House of Commons was that whether the wife had brought a fortune to her husband or not, he was not entitled to throw her penniless into the world. This practice continued until the Private Act procedure was abolished in 1857.

Wife petitioners

There is record of only eight wives presenting petitions for Acts of divorce a vinculo, in each instance the suit being presented between 1800 and 1857. In the four successful cases the husband was proved guilty of adultery and an additional aggravating offence such as bigamy or incest. There were reasons other than legal disparity that caused only a very small number of wives to seek redress. Few women had the financial means to pay the very high expenses required for Private Acts. Wives with property at marriage had no protection against unscrupulous husbands until the end of the eighteenth century when the granting to women of separate estates in equity became accepted practice.

The first of the four Acts was granted to Mrs. Addison in 1801 because of adultery by the husband with her sister. The Church held that under the rules of affinity, adultery between husband and wife's sister forbade reconciliation between the spouses as future relationship between husband and wife would be incestuous. In 1831 Mrs. Turton obtained an Act on similar grounds as Mrs. Addison. Mrs. Battersby's Act of 1840 resulted from her husband's bigamous marriage in 1837 which had ended in a sentence of seven years transportation. Similarly Mrs. Hall's Act of 1850 followed her husband's subsequent bigamous marriage.

Criticism of Parliamentary divorce

A proctor of Doctors' Commons justified the high cost of an application to Parliament, by the belief that it "renders the dissolution of a marriage impracticable to the mass of society; so that, notwithstanding occasional exceptions to the rule of indissolubility, the purity of public morals in this respect, has been generally maintained; these impediments having the effect of weakening an attraction to the (spiritual) crime of adultery, which might otherwise have been deliberately and collusively committed."⁽²⁾ But in reality restricted usage of Private Acts of divorce meant that:

- (1) The House of Commons changed the marriage settlement to give the wife an annuity of £400 a year, but the amendment was rejected by the House of Lords following a petition by the husband who argued it was "against the clearest interests of society" that he should support the adulterous wife.
- (2) Thomas Hynter, Doctrine and Practice of the Ecclesiastical Courts in Doctors' Commons ... relative to ... Marriage and Divorce, 1824, pp.172-173.

Each enactment for the benefit of a single individual declared the injustice of the law, from which it exempted the particular person. The procedure, which legalised in exceptional cases that which was forbidden by the law, was an awkward and grossly partial expedient. It in fact accorded to the wealthy and powerful the privilege which the law injuriously withheld from the needy and obscure.(1)

The Campbell Commission reported in 1853 that the cheapest Private Act of divorce, "can hardly be less than £700 or £800; and when the matter is much litigated, it would probably reach some thousands".(2) The Commission concluded: "The great expense and the long delay of these proceedings is a grievous hardship and oppression to individuals, and they amount in many cases to a denial of justice".(3) The unopposed suit in the Church courts cost between £120 and £140, whilst Parliamentary proceedings were at least £200 without counsel.(4) Such costs meant that Private Acts were the prerogative of the wealthy. It is little wonder that the "remarkable rarity of these Private Acts adequately demonstrates that the action of the State in treating marriage contractually and discarding the traditional ecclesiastical concept of status caused no wholesale resort to the remedy they provided ..."(5)

The Private Act of Mr. Chippendale (1850) was the only one obtained by means of the in forma pauperis procedure. Being a clerk in an Attorney's office, "... at a salary barely sufficient to procure the common necessities of life, he is wholly unable to provide the funds required for prosecuting a Bill through their Lordships' House ... he may be permitted to ... prosecute a Bill to dissolve his said marriage ... without payment of the usual fees, and to enable him to marry again; ... "(6) The petition to proceed in forma pauperis was granted after the Bill of divorce had been read a first time. This Bill failed the second reading in 1847, but was successfully reintroduced three years later. Again, leave to proceed in forma pauperis was granted, thereby resulting in the fees of both Houses being remitted, and Chippendale's counsel acting gratuitously.

The aristocracy's belief in their own moral superiority is apparent in Sir Charles Wetherell's declaration that divorce should be allowed for those of his

(1) J.C. Jeaffreson, Brides and Bridals, Vol. 2, 1872.

(2) (1604), 1853, p.18.

(3) Ibid.

(4) Ibid.

Evidence (p.32 qu.5) by G.B. Ellicombe, a Parliamentary Agent, revealed that his average payment over 26 Private Acts of divorce was £129, whilst a further average sum of £59 was received as Parliamentary Agent, making an average total of £188. On top of this, Counsel's fees and charges for witnesses were probably an extra £50 to £100. Counsel's expenses at Bar, ~~for one day~~, including the fee and consultations, were not less than £30 a day. Further likely expenses were Solicitor's fees and his charge for witnesses, who were often numerous.

(5) Reginald Haw, The State of Matrimony, 1952, p.137.

(6) Lords' Journal, Vol. 80, pp.20, 46.

own class but not to "the lower classes, whose morals were more corrupt, and whose principles on these subjects were more lax than those of the higher classes", for the former "would be continually applying for divorces, while the facility of obtaining them at a small expense would increase the immorality of adultery, and, indeed give encouragement to the commission of that offence".⁽¹⁾ It was the aristocracy who had unknowingly already helped to clear the path to secular divorce by being the instrumental group behind the State's insistence in 1753 that celebration of marriage could only take place in an Anglican Church. The Marriage Act of 1753 forced many Catholics and Protestant Dissenters to flout either the law or their consciences and led finally to the Marriage Act of 1836 which broke the Church of England's exclusive control over marriage by establishing an alternative and wholly secular rite.

The opinions of advocates of secular divorce were expressed by Hector Morgan: "... there is a partiality in the law, in giving to the rich man a means of redress which the poor cannot obtain; and which, if it were dispensed at all, should be dispensed equally and fairly before the legal tribunals."⁽²⁾ The middle class understood who "the poor" were in this matter.

Seventeen years before the Report of the first Royal Commission on divorce was published, their chairman had declared his views on Private Acts of divorce.

It was a disgrace to the House of Commons, and to the House of Lords, and to the whole country, that whilst marriages by the law of the land were indissoluble, they could be dissolved by prerogative. When the case of a divorce Bill was before either House, and witnesses were examined at the Bar, the whole proceeding was a mere farce - a most expensive farce, it was true - but a farce that brought no credit at all to any party.⁽³⁾

This was to be the majority opinion within Parliament in 1857 when the Church of England's control over matrimonial jurisdiction was transferred to the secular courts, thereby de facto abolishing Private Act divorces in England.⁽⁴⁾

- (1) Hansard, H.C. Deb., Vol. 24 (1830), col. 1269.
- (2) H.D. Morgan, Doctrine and Law of Marriage, Adultery and Divorce, 1826, Vol. 2, p.261.
- (3) Hansard, H.C. Deb., Vol. 26 (1836), col. 915. Lord Campbell was then Sir John Campbell.
- (4) There was nothing in Standing Orders to stop a husband or wife of English domicile from applying to Parliament for a divorce under circumstances not provided for by the 1857 Act, such as desertion. Standing orders still allowed Private Bills of divorce to be presented from Ireland and other countries of the Empire, Roberts (op.cit., p.33) mentions six Acts to wives upon adultery and cruelty or desertion between 1857 and 1906.

CHAPTER 4

DECLINE OF THE ECCLESIASTICAL COURTS

Industrial changes of the late eighteenth century had brought prosperity to merchants and manufacturers of the middle class; the aristocracy no longer provided the grouping with the highest proportion of the national income as it had done at the beginning of this century.⁽¹⁾ Whilst the landed interests were represented in Parliament, those of the newly formed wealth^y, but landless, middle-class were not. Support for middle-class discontent over their lack of enfranchisement was provided by the classical economists and utilitarian philosophers. David Ricardo expounded his theory of rent in The Principles of Political Economy and Taxation (1817); arguing that the landlord was no more than a parasite who gave nothing in return for his unearned rent. The profit-making middle-classes were victims of this exploitation by the ruling classes, who had no need to earn. When James Mill said that it was in "the Representative System alone the securities of good government are to be found";⁽²⁾ what he was really advocating was the replacement of aristocratic by middle-class political leadership. The middle-class were demanding the abolition of patronage and corruption by means of "such a reform of the House of Commons as may render its votes the express image of the opinion of the middle^{orders}-class of Britain."⁽³⁾ It was this class, whose wealth and income from trade and industry often far surpassed the land-owners, who remained politically impotent due to a system of parliamentary representation that no longer bore any relation to the distribution of population or wealth.

The actual source of conflict was not between differing interests but between opponents and defenders of property, as Lord Francis Jeffrey appreciated when he observed: "the real battle is not between Whigs and Tories, Liberals and Illiberals and such gentlemen-like denominations, but between property and no-property-Swing and the law."⁽⁴⁾ →

- (1) This conclusion is drawn from the works of Gregory King, Natural and Political Observations and Conclusions upon the State and Condition of England, 1696, pp.48-49 (1810 ed.); and Patrick Colquhoun, A Treatise on Indigence, 1806, table at pp.23-24. At the beginning of the nineteenth century, the aristocracy formed 16% and merchants and manufacturers 17% of the national income.
- (2) Essay on "Government", written originally for the Supplement to the 5th edition of the Encyclopaedia Britannica, and reprinted by Traveller Evening Newspaper, 1821.
- (3) Edinburgh Review, 1829, ^{Vol. XCIX,} p.125; quoted Perkin, op.cit., pp.228-29.
- (4) Quoted by Lord Cockburn in his Life of Lord Jeffrey, 1852, Vol. 2, p.223.

The middle-class objected to the discrepancy between the privileges and power of the aristocratic landowners compared with the owners of industrial property. Thus the middle-class had to attack the aristocracy without wishing to, or appearing to wish to, attack the principle of private property itself. The middle-class knew that behind them were those who wished to abolish the private ownership of all land and property. Among the great landowners the one most open to attack and less capable of defence was the Established Church. The Church acted as other members of the territorial aristocracy, though the latter were in a less anomalous position over the collection of tithes than a cleric who was "at once the plaintiff and the priest, the prosecutor and the pastor, the guardian of the flock and the sharer ⁱⁿ of the fleece".⁽¹⁾

Church Reform

Many of the middle-class saw the distortion of matrimonial laws as only one element in their belief that the Church of England received wealth, and wielded power, out of all proportion to its true historical role. Whether the charges were true or false, this is what the critics of the Established Church felt. Their attacks concentrated on the Churches' property and function, holding that Establishment was an instrument of the governing classes. John Stuart Mill believed, "if the case were not already far more than sufficiently made out, it would be pertinent to observe that the Church of England, least of all religious establishments is entitled to dispute the power of the legislature to alter the destination of endowments, since it owes to the exercise of such a power all its own possessions".⁽²⁾ William Cobbett rejoiced that "Parliament has a right to deal with the property of the Church - that it is public and not private property".⁽³⁾ Bentham had already noted the weakness of the Church, declaring: "the life then of this Excellent person being in her gold, - taking away her gold you take away her life".⁽⁴⁾ The Church of England became the scapegoat upon which the middle-class projected their discontent.

- (1) Quarterly Review, 1830, Vol. XLII p.109; quoted by William Law Mathieson, English Church Reform 1815-1840, 1923, p.19. A.V. Dicey, Lectures on the Relation between Law and Public Opinion in England During the Nineteenth Century, 1905 (3rd ed. 1952), p.315; notes that tithes and the mode of their collection "were a hindrance to the proper cultivation of the land, and made the parson of the parish, in the eyes of farmers who had no objection to the doctrine of the Church, stand in the position of an odious and oppressive creditor."
- (2) Collected Works of John Stuart Mill, (ed.) F.E.L. Priestley, Vol.IV, 1967; quoted in Essays on Economics and Society, p.209. Reprinted from "Art.1 - Corporation and Church property", The Jurist, (Feb.1833).
- (3) Quoted by O.J. Brose, op.cit., p.28.
- (4) Mother Church Relieved by Bleeding: or, Vices and Remedies: extracted from "Church of Englandism", 1825; quoted Brose, op.cit., p.23.

At this point it is necessary to examine what was understood by "Establishment". Lord Selborne explains this relationship between Church and State.

The Establishment of the Church by law consists essentially in the incorporation of the law of the Church into that of the realm, as a branch of the general law of the realm, though limited as to the causes to which, and the persons to whom it applies; in the public recognition of its Courts and Judges, as having proper legal jurisdiction; and in the enforcement of the sentences of those Courts, when duly pronounced according to law, by the civil power. The 'Establishment' (so understood) of the Church of England grew up gradually and silently, out of the relations between moral and physical power natural in an early stage of society; not as the result of any definite act, compact, or conflict, but so that no one can now trace the exact steps of the process by which the voluntary recognition of moral and spiritual obligation passed into custom, and custom into law.⁽¹⁾

The Church Establishment at this time, as Dicey records, "... exhibited two special weaknesses of its own which both provoked assault by and promised success to its assailants. The National Church was not the Church of the whole nation; the privileges of the Establishment were in many cases the patent grievances of the laity."⁽²⁾ Attacks upon the Church came from a virulent anti-clerical press; whilst works like John Wade's "The Black Book; or Corruption Unmasked! Being an account of Places, Pensions, and Sinécures, The Revenues of the Clergy and Landed Aristocracy; ..."⁽³⁾ provided a picture of pluralists amounting to one third of all the clergy, of a three-to-two proportion of non-resident to resident clergy, of bishops holding livings, cathedral stalls and deaneries. Even a person like Anthony Trollope, who was not unfriendly to the Church, looking back over the past thirty years, felt that: "... it must be admitted that the bench of bishops ... was not conspicuous for its clerical energy, for its theological attainments, or for its impartial use of the great church patronage which it possessed. They who sat upon it ordinarily wore their wigs with decorum and lived the lives of gentlemen; but looking back for many years, a church man of the Church of England cannot boast of the clerical doings of its bishops."⁽⁴⁾

(1) Roundell Palmer (Earl of Selborne), A Defence of the Church of England Against Disestablishment, 1886, p.10.

(2) Op.cit., p.314.

(3) First published in 1820, revised in 1831.

(4) Clergymen of the Church of England, 1866, p.22.

The Reform Act of 1832 did not give direct political power to the urban middle-class. In England, almost three-quarters of the 471 seats went to either the small boroughs with under 1,000 electors or the counties.⁽¹⁾ Both Houses of Parliament, as John Bright explained in 1848, remained "... exclusively aristocratic in character".⁽²⁾ What the 1832 Act did show was that previously accepted institutions had to show cause for their existence, and the one institution most open to attack and ^{least} less capable of defence was the Established Church.⁽³⁾ Many Churchmen and Dissenters believed that the Church would be disestablished and disendowed. The Tory Robert Southey held "no human means are likely to avert the threatened overthrow of the Establishment"; and the Liberal Conservative Dr. Thomas Arnold of Rugby wrote, "the Church, as it now stands, no human power can save". Already the repeal of the Test and Corporations Acts in 1828, Roman Catholic emancipation in 1829 and the Reform Act signified a change in the historical link of Church and State. Dr. Brose observes:

Instead of being an end in itself, the question of internal reform became a weapon that all critics of the Church could use against the idea of an established church. Conversely, the final importance of internal reform in the eyes of Churchmen was as a necessary preliminary to the survival of the Establishment in the reform era.⁽⁴⁾

All Churchmen agreed that the Established Church was in danger, but the necessity of reform was less openly accepted. High Churchmen understood the appeal of Newman:

A notion has gone abroad that they can take away your power. They think they have given and can take it away. They think it lies in the Church property, and they know that they have politically the power to confiscate the property.⁽⁵⁾

Newman knew the wealth of the Church had been that of bishops, deans, chapters and other ecclesiastical corporations, all of whom formed the Established Church. Ecclesiastical Commissioners appointed to enquire into the financial condition of the Establishment noted the evils of distribution of Church wealth which resulted in the Archbishop of Canterbury and the Bishop of Durham each receiving £19,000 a year whilst the Bishop of Llandy had only £900. a year. There was little opposition from Whig and Tory parties, or the bishops, to the resulting legislation of the Ecclesiastical Commissioner's Acts of 1836 and 1840.⁽⁶⁾ The newly formed Ecclesiastical Commissioners for England were to act as trustees for the surplus revenue of the bishops and chapters, and use the money to carry out necessary reforms. Bentham and the Utilitarians demand that revenues of the Church be used towards the end of public utility

- (1) N. Gash, Politics in the Age of Peel, 1935, pp.65-85, 88-9; quoted Perkins, op.cit., p.314, fn.1.
- (2) G.M. Trevelyan, Life of Bright, 1913, p.166; quoted Perkins, op.cit., p.314.
- (3) "Certainly the complex of the Church-State relationship from roughly the third to the sixth decade of the nineteenth century still adds up to a paradox, an incongruity, even after one has grappled with its component elements." O. Brose, op.cit., p.207.
- (4) Op.cit., p.10.
- (5) Ad Clerum, the first of the Tracts for the Times, Vol.1, 1833-4, No.1, pp.3-4; quoted Dicey, op.cit., pp.330-1.
- (6) 1836 : 6 & 7 Will.IV, c.77; which relates to bishoprics.
1840 : 3 & 4 Vict. c.113; relating to chapters.

and administrative efficiency had now been partially accepted. The Ecclesiastical Commissioners' extensive financial re-organisation averted the threat of disestablishment. Bishops' property and privilege had been largely taken away without compensation (as owners of slaves had received in 1833); so that, by the 1840's, Gladstone could hold: "it is now impossible to regulate the connection between Church and State in this country by reference to an abstract principle."⁽¹⁾ The Church of England, by accepting limited reform, was able to preserve its links with the State. As Dicey observes, "in all ecclesiastical matters English men have favoured a policy of conservatism combined with concession."⁽²⁾ Signs of this concession were recognizable in 1854 when Oxford University allowed the entrance of students who were not members of the Church of England, and in 1868 when the Church Rate Abolition Act abolished means of compelling payment of such rates. "Concession" was also apparent in the eclipse of the ecclesiastical courts. Their virtual demise of power has to be studied within this setting.

Reasons for dissatisfaction with ecclesiastical courts

The presence of the Courts Christian in medieval times had been justified on the basis that its jurisdiction was governed to the spiritual guidance and betterment of Christian society. The ecclesiastical courts of the early nineteenth century still functioned on the principles laid down in the 1076 Ordinance of William I. Continuing existence of their judicial authority over secular matters had become outdated by the nineteenth century; but "an anachronism is not generally reformable; it usually comes to a painless extinction ...".⁽³⁾ Yet the amazing thing is that a procedure designed for the needs and thinking of early medieval society had changed so little from its earliest days.

Ecclesiastical courts had been unable to reform themselves, whilst governments of the day were chary of interfering with the powerful interests centred in the Established Church. History of ecclesiastical courts in the hundred years before 1857 shows a slow but steady eroding of their past powers and jurisdiction. As early as 1733 a Bill "for the Better Regulation of Proceedings in the Ecclesiastical Courts" had been presented to, and passed by, the House of Commons, but the influence of the Government was exercised to prevent it proceeding further than second reading in the House of Lords.⁽⁴⁾

(1) Lathbury, Gladstone's Correspondence on Church and Religion, Vol.II, p.7; quoted Brose, op.cit., pp.210-11.

(2) Op.cit., p.317.

(3) Warne, op.cit., p.86.

(4) See N. Sykes, Edmund Gibson, 1926, pp.150-52.

Ballad mongers of the time proclaimed the iniquity of the courts, which 'instead of reforming sought nothing but gain', so:

That were Judas alive he might lay by all fears

And demand to be tried by his spiritual Peers;

(quoted Sykes, p.50; from 'The Knight and the Prelate', 1733, Percival, Political Ballads, No.34).

The Ecclesiastical Suits Act of 1787⁽¹⁾ disallowed prosecution for fornication once the offending parties had been married. Mr. Bastard, in presenting the Bill, held:

The Ecclesiastical Courts were rapacious to an extreme. If a poor person was tried in the inferior courts and convicted, then he could only have recourse by appeal to the Court of Arches, which was so very expensive that he could not bear it, and consequently became obliged to lie under all the infamy to which, from the sentence passed on him, he was necessarily subjected.⁽²⁾

The presence of excommunication aroused a great deal of ill-feeling; Sir Samuel Romilly referring to "the injurious tendency of the jurisdiction in question".⁽³⁾ Utilitarian reformers, like Romilly and Bentham, were constant critics of the spiritual courts' jurisdiction over secular matters.⁽⁴⁾ Portents of the spiritual courts' eventual doom was visible in the Ecclesiastical Courts Act of 1813 which removed their jurisdiction over complaints for non-payment of church rates where the amount claimed did not exceed £10, and the validity of the rate, or liability of the party charged was not disputed.⁽⁵⁾ The same Act also abolished the previous civil penalties, apart from imprisonment, following the ecclesiastical sentence of excommunication, which was now to be seen as spiritual censure only.⁽⁶⁾ Instead of excommunication the ecclesiastical judge now pronounced the offending person contumacious. The contempt was significant to the Court of Chancery who then issued the writ de contumace capiendo (this replacing the old writ de excommunicato capiendo), thereby allowing imprisonment of the offender.⁽⁷⁾ This Act did nothing to alleviate the discontent of those who bitterly resented the unreasonable powers of imprisonment still remaining in the hands of the ecclesiastical courts. Many agreed with Mr. Western's opinion that: "there was no man in this country who could be exempt from the arbitrary authority of these arbitrary courts".⁽⁸⁾ →

(1) 27 Geo.3. c.44: "An Act to prevent frivolous and vexatious suits in the ecclesiastical courts".

(2) Parliamentary History, Vol.26 (1787), col.624.

(3) Hansard, H. of C. Deb., Vol. XXIII (1812), col.808.

(4) For the life of Sir Samuel Romilly see C.G. Oakes, Sir Samuel Romilly, 1757-1818 ..., 1935. Also see Bentham's Book of Church Reform, 1831.

(5) "An Act for the better Regulation of Ecclesiastical Courts in England; and for the more easy Recovery of Church Rates and Tithes": 53 Geo.3, c.127 (1813). See A.J. Stephens, op.cit., Vol.1., pp.1050-62 at p.1059. The Bill had been first brought in the previous year by the notable Civilian Sir William Scott (later Lord Stowell) in an attempt to abolish excommunication by process, following the petition of Mary Dix who was imprisoned for two years because she was too poor to pay for her release. (See Hansard, Vol.21, 1st ser., 1812, col.21).

(6) It had been proposed and accepted by the House of Commons in 1733 that excommunicated persons ought to enjoy all the territorial privileges and benefits of the law.

(7) See Halsbury's Statutes of England, 2nd ed., Vol.17, pp.193-94.

(8) Hansard, H.C. Deb., Vol.26 (1812), col.705.

Sir Samuel Romilly believed "very considerable improvement necessary, or rather loudly called for, in the present state of the ecclesiastical law".⁽¹⁾ One of his aims was for the removal of defamation suits from these courts.

The 1832 Commissioner's Report showed how clearly Sir Samuel's proposed reform was justified.⁽²⁾ Sixty-nine persons had been imprisoned by the ecclesiastical courts in the three years 1827-1829; nearly half (32) had been sentenced on charges of defamation resulting from non-appearance or non-payment of costs.⁽³⁾ Disparity of enforcement, and sentencing policy, is shown by the fact that 13 of the 32 defamation cases had been heard by the consistory court of Chester. One man spent nearly two and a half years in Chester Castle gaol for "contempt, in not appearing to a citation in a cause of defamation". Another man died in the same gaol, upon the same charge, after being in custody for one year. Thirteen defamation cases had spent over three months in prison. Half the 32 committals were women.

Increasing pressure to reform the ecclesiastical courts came as a result of the publication of three Parliamentary Reports between 1832 and 1834. The Ecclesiastical Commissioners, under the chairmanship of the Archbishop of Canterbury, had shown in their Report of 1832 how half the court cases were of a testamentary nature.⁽⁴⁾ These figures, a later Commission concluded, "tell their own tale. The courts of the Church's hierarchy had come to be mainly concerned with business which had only a remote connection with the primary reason for their existence, the government of souls."⁽⁵⁾ Testamentary matters formed a very lucrative part of ecclesiastical jurisdiction, and judges and proctors had no wish to lose it, for without it the Doctors' Commons could not survive as an independent body. Sir John Nicholl explained, in evidence to a Select Committee on the ecclesiastical courts in 1833, that "The business of the Testamentary Court is about nine-tenths of the whole business in Doctors' Commons, and if that Testamentary Court were removed ... proctors would not have the means of livelihood."⁽⁶⁾ Sir H. Jenner Fust agreed, observing: "the only

(1) Ibid, col.707.

(2) (199), op.cit. Appendix (D), Return No.12; providing the names, description of occupation and reasons for imprisonment due to proceedings in ecclesiastical courts, for all persons either in prison or who had been imprisoned during the three years 1827-1829.

(3) These figures result from an analysis of Return No.12 (ibid.). The number of defamation cases was probably higher than 32, but in certain of the remaining cases the offence is shown only as "contempt for not answering".

(4) Op.cit.(199); also see table 4, p.23 supra.

(5) The Report of the Commission on Ecclesiastical Courts set up by the Archbishops of Canterbury and York in 1951 at the request of the Convocations, p.22, published by S.P.C.K. in 1954 as: The Ecclesiastical Courts.

(6) Report from the Select Committee on the Prerogative Court, Admiralty Court and Dean of Arches and Consistory Courts, and to whom the Reports of the Ecclesiastical and Common Law Commissions, and Irish Admiralty Courts, were referred, (670), 1833, note 6, p.16, q.50. The Report recommended that a new court consisting of the Court of Arches and the Prerogative Court of Canterbury should be the only court for the probate of wills.

thing that keeps the Bar alive in time of peace is the prerogative business."⁽¹⁾
But the Real Property Commission, headed by Sir (later Lord) John Campbell recommended that "Probate of wills should be discontinued, and the whole testamentary jurisdiction of the spiritual courts, contentious and voluntary, abolished".⁽²⁾

The 1832 and 1833 Reports were followed by an indirect attack in the form of a Select Committee's criticism of sinecure offices.⁽³⁾ Joseph Hume described the Church courts as a "nest of sinecures";⁽⁴⁾ more recently A.H. Manchester observes: "such sinecures certainly existed within the system of the ecclesiastical courts, and Doctors' Commons were no exception".⁽⁵⁾ In 1848, The Times attacked the monopoly allegedly enjoyed by the family of Sir H. Jenner Fust in the Court of Arches, in the following terms: "a defendant may have one Jenner on the bench, another as advocate against you, and a third acting as the hostile proctor"; and wondered "even if the impartiality be preserved, how can the public ever be persuaded of the fact?"⁽⁶⁾ The same newspaper later carried on its attack: "The Court has ceased to be known and described as the Court of Arches (an unmeaning name), it is now called the Court of Jenners."⁽⁷⁾

There was also concern as to the method by which the judges of the ecclesiastical courts were appointed. In a Parliamentary debate of 1828, Lord Brougham, the Whig Lord Chancellor, recorded these strong views: "Is it a fit thing that the judges in these most important matters should be appointed, not by the Crown, not by removable and responsible officers of the Crown - but by the Archbishop of Canterbury and the Bishop of London, who are neither removable nor responsible - who are not lawyers - who are not statesmen - who ought to be no politicians - who are, indeed, priests of the highest order, but not, on that account, the most proper persons to appoint judges of the highest order?"⁽⁸⁾ Both the Archbishop of Canterbury and Dr. Lushington - the eminent ecclesiastical judge and authority - felt that judgeships of the ecclesiastical courts should be granted by the Crown.⁽⁹⁾ Church dignitaries now appreciated that the old system of appointments would have to be overhauled if their

(1) Ibid., p.38, q.350.

(2) Fourth Report of the Commissioners of Inquiry into the Law of England respecting Real Property, (226), ~~1833~~, p.65.

(3) Report from a Select Committee on Papers and Returns respecting the Nature, Tenure and Emoluments of all Sinecures Offices within the United Kingdom; (519), 1834, p.3.

(4) Quoted by Mathieson, op.cit., p.156.

(5) A.H. Manchester, op.cit.,¹⁹⁶⁶ p.58. The article gives an excellent review of this particular topic.

(6) 31st January, 1848, quoted Manchester, ibid. pp.61-62.

(7) 7th February, 1848, quoted Manchester, op.cit., p.62.

(8) Hansard, H.C. Deb., Vol.XVIII (1828), col.151.

(9) See note 6, at p.23, q.123 and 124; also p.55, q.546 of Report from the Select Committee ... and to whom the Reports of the Ecclesiastical and Common Law Commissions, and Irish Admiralty Courts were referred; (670), 1833, p.379.

courts were to remain unmolested by Parliament. But realisation of the need for change had come too late, and in 1832 Parliament transferred the power of the ecclesiastical appellate court - the High Court of Delegates - to the civil authority.

Again it was Lord Brougham who led the attack on the High Court of Delegates. By the beginning of the nineteenth century the number of appeals coming to this court of ultimate appeal had fallen to a small number.⁽¹⁾ This was partly a reflection of the decreasing amount of work coming to the consistory courts, the expense of proceedings, and to the low regard held for the Court of Delegates; being, as Lord Brougham observed, "one of the worst constituted courts which was ever appointed, and that the course of its proceedings forms one of the greatest mockeries of appeal ever conceived by man."⁽²⁾ The main body of the court was formed by those civilians who were available for selection due to lack of work. For this reason Spenslow, in Dickens's David Copperfield, remarks that the Delegates were "advocates without any business". The high cost of suits heard in the consistory court, made higher by consequent appeal to an Archbishop's Court (the Court of Arches in London, for the province of the Archbishop of Canterbury), restricted those who contemplated making a further appeal to the Court of Delegates. In one extended case involving a disputed will, the expenses of printing the pleadings and evidence alone came to over £2,000, whilst the costs totalled over £6,000.

Mounting criticism against this system of appeal led to the Privy Council Appeals Act 1832⁽³⁾ whereby the powers of the Court of Delegates were transferred to the King in Council (the Privy Council at large). A year later, by the Judicial Committee Act,⁽⁴⁾ appeals lay to the Judicial Committee of the Privy Council as advisors to the King. By the mid-nineteenth century there were basically two final courts of appeal; The House of Lords for the Common Law and Equity, and the Judicial Committee of the Privy Council for the Church and the colonies.⁽⁵⁾

- (1) In the first thirty-five years of the nineteenth century, there were 95 appeals to the High Court of Delegates of which 21 were matrimonial. Of these 21 cases, 6 were reversed and 1 was settled or abandoned. See 1832 Report (199), op.cit., p.360.
- (2) Hansard, H.C. Deb., Vol.18 (1828), col.151.
The Court's unsatisfactory operation was brought to the attention of Parliament by the case of Clark and Clark v. Dew (1826) D.E.L. 7/12: See G.I.O. Duncan, The High Court of Delegates, 1971.
- (3) 2 & 3 Wm.IV., c.92.
- (4) 3 & 4 Wm.IV., c.41.
- (5) For a general review see S.A. Leathley, The History of Marriage and Divorce, 1916, p.100.

Lack of suitably qualified judges and practitioners of sufficient competence to deal with matrimonial and testamentary matters in the courts outside London had been a matter of concern for a long time. In their Report of 1832 the Commissioners recommended abolition of all peculiar, archdeaconal and consistory courts. Matrimonial and testamentary business should be transferred to a new provincial court consisting of the Court of Province and Prerogative Court; and correction of clergy causes removed to a new tribunal under a bishop. The Report led to mounting criticism from both those who wished to see the ecclesiastical courts abolished and the more moderate reformers who believed the courts should transform themselves internally if the former critics wishes were to be averted.

A series of Bills, based upon the 1832 Report, were presented to Parliament between 1834 and 1837; but though welcomed by Civilians and leading churchmen, legislation did not result. One example of such a failure was the Bill introduced by the Lord Chancellor in 1835 to create a single Court of Probate, in which the judge would be appointed by warrant. Suits relating to tithes and offerings would be heard by the Court of Exchequer, whilst ecclesiastical court jurisdiction over church rates would cease. General dissatisfaction with the Church courts, especially in testamentary matters, was emphasised by a similar Bill in 1836. Why the existing outdated procedure for handling wills and probate needed overhaul was explained by Lord Cottenham, the Lord Chancellor: "In former times, when the property of the country consisted chiefly of land, the importance of this jurisdiction was not so great as it was at the present time, when so large a portion of the property of the country was in the shape of money and other personalty."⁽¹⁾ He went on to criticise the ecclesiastical courts' handling of church rates as, "... duties which they were very ill adapted to execute, and which, it was thought, might be much better performed by another process."⁽²⁾ Feelings were especially high over the criminal jurisdiction of the courts, as the speech of Sir John Campbell makes clear:

The criminal jurisdiction of the Ecclesiastical Courts ought long ago to have been abolished. Their proceedings pro salute animae, were really for the sole purpose of putting fees into the pockets of the officers of the Courts He was glad that the Bill would abolish between three and four hundred Ecclesiastical Local Courts, for these were Courts purely mischievous.⁽³⁾

(1) Hansard, H.L. Deb., Vol.XXXI (1836), col.325.

(2) Ibid, col.326.

(3) Hansard, H.C. Deb., Vol.XXVI, cols.914-15.

In 1840 the Judicial Committee of the Privy Council received power to discharge persons held in custody under the writ de contumace capiendo, even though costs had not been paid.⁽¹⁾ Previously a prisoner could be released by order of an ecclesiastical court judge only if the costs of custody were paid. Parliament's unwillingness to see indiscriminate imprisonment resulting from the spiritual courts' jurisdiction was emphasised by their rejection in the same year of a more moderate Bill presented by Dr. Nicholl, an ecclesiastical court judge.

Three years later Dr. Nicholl introduced a reasonable and reforming Bill based upon the 1832 Report of Commissioners. The Bill proposed that the whole of the temporal jurisdiction should be transferred to London to a court whose judge would be appointed by the Queen with an appeal to the Queen in Council. It was supported by three chancellors, the Ecclesiastical Commission, ^{lawyers} ~~the Attorney Generals~~ from both sides of the House, and a Committee of the House of Lords. There was strong opposition from those who, like Sir R. Inglis, saw "another wedge driven in to sever the Church from the State, the ecclesiastical from the civil polity of the realm."⁽²⁾ The following year Parliament once again rejected the Bill which had been amended to a more conservative form from that first introduced by Dr. Nicholl. The strongest resistance to the centralising proposals of 1843 came from country lawyers and country gentlemen who denounced it as a conspiracy to despoil the rural districts for the enrichment of London.⁽³⁾ The Edinburgh Review said of country based proctors and attorneys: "When their columns advance, or their lines deploy, we know well how ⁽⁴⁾ powerful is their charge on even a thoroughly disciplined parliamentary phalanx."

- (1) 3 & 4 Vict. c.93: "To amend Act for the better regulation of Ecclesiastical Courts in England".
This Act resulted from a Bill introduced by Viscount Morpeth (in the absence of Lord John Russell) following public concern over the fate of Mr. Thorogood. This conscientious Dissenter had refused to appear before the consistory court of London when summoned to attend over a matter of church rates to the sum of 5s.6d. As a result of his contempt he had already spent eighteen months in prison. Though having the means he would not pay the costs that would have secured his release.
- (2) Hansard, H.C., Vol. 68 (1843),
~~Ibid.~~, col.800.
- (3) It was these two groups who had opposed a Bill of 1831 to establish a general office for the registration of deeds. See Lord Brougham's remarks, Hansard, 3rd ser., Vol. lxxiii (1844), cols.1340-41; referred to by Mathieson, op.cit., pp.159-60.
- (4) "Results of Tory Rule", Vol.80 (1844), p.487.

Pressure mounted to abolish, rather than reform, the ecclesiastical courts. The legal profession increasingly felt that even for matters of law, the traditional ways of the ecclesiastical courts were now obsolete. The Law Times of 1853 summarises the case for such an opinion:

They (the civilians) declare their willingness to submit to any reform that may be desired: but they protest against their abolition. But it is not a case for reform: the objection to them is not merely that they abound in monopolies and abuse, but that their foundation and structure are unsound, unfitted for the time, an insult to one half of the community, and an injustice to the other. It is as Ecclesiastical Courts that they are condemned. It is ^{as} such that they have usurped a jurisdiction over wills and marriages which they cannot be permitted to retain under any pretence or with any promise of reforms. But then they say, you must have tribunals for these questions. Why not the regular Courts of Law and Equity? Why should a will be tried twice over? Why could not the same judges who now determine the validity of wills in certain cases, do so in all cases? And why should not the regular courts try a divorce as well as the validity of a marriage? ⁽¹⁾

The prospect of financial gain to the ^{London based} common law lawyers that would result from the transfer of testamentary business to the civil courts was a further cause to justify the legal profession's desired ending of the ecclesiastical courts' prerogative. It was in this setting that The Law Times of 1853 declared: "the throwing open to them [the profession] of so vast an amount of business properly belonging to them but from which they are now excluded by a monopoly, will be a boon for which they cannot make too strenuous an effort." ⁽²⁾ The common lawyers' efforts were to be rewarded in 1857 by the Court of Probate Act, which transferred all testamentary business from the ecclesiastical courts' authority to the newly created Probate Court whose decisions upon the validity of wills, whether of personality or realty, became binding on all persons. By the time the Law Times had made its attack on the ecclesiastical courts, the Doctors' Commons had already lost its importance in being the source of advocacy in the High Court of Admiralty. ⁽³⁾

- (1) Vol.20, p.159; quoted Manchester, ^{op.cit., 1966,} ~~ibid~~, p.75. ^{granting of letters of administration. They had no}
The ecclesiastical courts testamentary work was the proving of wills and the jurisdiction in land, and therefore a suit involving both real and personal property could result in contradictory decisions.
- (2) Ibid, p.231.
- (3) With the dissolution of Doctors' Commons in 1857 handling of international cases became the function of the attorney-general and solicitor-general. Prize money in maritime disputes had considerably fallen since the eighteenth century, whilst the common law courts were making inroads into the jurisdiction of the Admiralty courts. (See Harding, op.cit., pp.308-09, 383).

Dissatisfaction was also mounting over three basic weaknesses in the ecclesiastical system for dealing with matrimonial relief. Firstly, the clergy themselves had little interest in the highly secularised proceedings. Secondly, ecclesiastical divorce did not give even the innocent spouse the right to remarry during the lifetime of the other. Dr. Phillimore had tried to introduce a motion in the House of Commons in 1830 that would have allowed ecclesiastical courts to grant divorce a vinculo. Parliamentary divorce, he reported to the 1832 Ecclesiastical Courts Commission, "... is liable to grave and obvious objection."⁽¹⁾ The 1832 Commission did not make any recommendations as to possible alterations in the law and practice of the ecclesiastical decree of a mensa et thoro; observing that: "whether the remedy ... should be further extended ... to allow the parties to marry again ... is a question of the gravest importance; ... we deem it most expedient to leave the consideration of the subject to the wisdom of the Legislature, without venturing to recommend any specific alterations in the existing law."⁽²⁾ But the third and main incongruity was the exclusive claim of the Courts Christian to deal with all matrimonial disputes within the realm. The ecclesiastical courts' claim had been acceptable to the great mass of the English people whilst they had all held identical religious beliefs and practised them through the Catholic, and later the Anglican, Church. But from the eighteenth century, an increasing number of dissenters and other minority religious groups who no longer subscribed to the religious beliefs of the Church of England, had come to resent the privileges which the Established Church enjoyed. Partial recognition of the Nonconformists' claims came in 1836, when they were allowed to solemnise their own marriages.⁽³⁾ Their fight for equal legal and social status was reflected in a struggle for reform of the ecclesiastical courts' jurisdiction in all secular matters. But the ecclesiastical courts were unable to satisfy their critics' desire for a judicial system in line with the needs of the mid-nineteenth century. Such piecemeal reform as the transfer of actions for defamation from ecclesiastical to civil courts in 1855⁽⁴⁾ was not sufficient to prevent the abolitionists' aims being virtually accomplished in 1857.⁽⁵⁾

(1) Report, (199), op.cit., p.152.

(2) Ibid, p.43.

(3) The Marriage Act, 1836 (6 & 7 Will. 4, c.85), which also gave the same rights of marriage to Roman Catholics.

(4) Ecclesiastical Courts Act: 18 & 19 Vict. c.41 (1855).

(5) Ecclesiastical courts retained some of their jurisdiction over the laity until 1860: when the Ecclesiastical Courts' Jurisdiction Act, (23 and 24 Vict. c.32) transferred suits of brawling to the civil courts. Today, ecclesiastical courts are for the most part confined to corrective jurisdiction over the clergy, and the granting of 'faculties' for making additions to, or alterations in, churches and other consecrated places. They still have "the status of public courts of limited but, within their own sphere, exclusive jurisdiction": (Radcliffe & Cross, op.cit., 1964 ed., p.238).

MARRIAGE AND FAMILY LIFE PRIOR TO 1857Part A. Legal Doctrine and Social PracticeThe Regulation of Marriage

From the Restoration in 1660 to the 1857 Act, there passed a period of two centuries in which validly contracted marriages remained judicially indissoluble in England and Wales. Parliament did not make any attempt to change the divorce laws until the latter end of this period but, instead, directed its attention towards the evils connected with the formation of marriage.

A consequence of the Church's view that marriage was a counterbalance to man's natural tendency towards promiscuity had led canon law to adopt a presumption in favour of marriage. The Reformation in England, though revising the prohibited degrees of relationship, had left the previously existing papal laws of nullity and precontract unaltered.⁽¹⁾ One of the most significant social effects of the retention of unreformed canon law was the continued existence in England of clandestine marriages ~~up~~ until the mid-eighteenth century.⁽²⁾

From the thirteenth century until 1753 there were three ways in which a marriage might be contracted.

- (i) By celebration in facie ecclesiae in which the marriage took place according to the rites of the Church after the banns had been declared.

- (1) A contract to marry, without a church service at the time of the contract, continued in England long after their abolition in the Catholic world as a result of the Council of Trent in 1564. The Council had made privy contracts null and void and had directed that all marriages should be performed by a priest in the church of the parish where one of the parties dwelt. Laslett notes (op.cit., p.142) that espousals "... were in a sense officially abolished here by the Act of 1753, ... but it seems improbable that so deep-seated a usage ever completely disappeared from the countryside".
- (2) Couples could still elope to Scotland where clandestine marriages were still allowed after their abolition in England in 1753. Such elopements were seriously impeded by the making of the 1823 Marriage Act (see p. 69 infra, fn.); and later, by Lord Brougham's Act of 1856 (19 and 20 Vict. c.96, s.1.), this latter Act requiring three weeks residential qualification in Scotland before a valid marriage could be contracted.

- (ii) Clandestinely, per verba de praesenti before a clerk in holy orders, but not in, ^{nor} ~~and~~ with the blessing of the Church, as in facie ecclesiae.(1) Fleet style marriages were typical of this type of ceremony.
- (iii) The parties became betrothed by declaring aloud a present (per verba de praesenti); or future (per verba de futuro) intention to accept each other as man and wife; in the latter case the marriage being formed by sexual union between the couple. Due to the absence of fees these two forms of marriage were common amongst the poor.

All three types of ceremony were held to form binding marriages and were therefore indissoluble.

The distinction between valid and invalid marriages largely depended whether an ordained clerk was present or not; though it did not matter if he did not have a church of his own. Areas of London became notorious for the ease with which a marriage could be contracted; the service, such as it was, being conducted by those passing as clerics. The most celebrated area in London for such marriages was around the Fleet. W.Lecky writing about marriages contracted in the Fleet style, observes, "It is not surprising that contracts so lightly entered into should have been as lightly violated. Desertion, conjugal infidelity, bigamy, fictitious marriages, celebrated by sham priests, were the natural and frequent consequences of the system".(2) Clandestine marriages were, as far as London was concerned, "almost universal among the very poor, very general in the lower of the middle classes, frequent in the higher middle grades, and not uncommon among the rich and aristocratic."(3) Indeed as Professor P.M.Bromley notes: "By the middle of the eighteenth century matters had come to such a pass that there was a danger in certain sections of society that such marriages would become the rule rather than the exception." (4) Sometimes over 100 couples were married

(1) It is almost impossible to provide suitable definitions embracing all forms of clandestine marriages. See J.Jackson, The Formation and Annulment of Marriage, 1969 (2nd Ed.), p.17, fn.5.

F.R.H. du Boulay, (op.cit., pp82-86) provides an account of medieval forms of marriage.

(2) W.E.H.Lecky, A History of England in the Eighteenth Century, 3rd ed.(1883), Vol.1, pp.490-91; quoted by O.R.McGregor, op.cit., p.13.

(3) John Cordy Jeaffreson, Brides and Bridals, 1872, Vol.II, p.173.

(4) Family Law, 1962 (2nd ed.), p.36.

in this manner by one clergyman in the same day. An exponent of such work was the Rev. Alexander Keitt who between 1709 and 1740 is recorded to have 'solemnized' some 36,000 marriages; whilst another Fleet parson earned £75 in October 1748, as a payment for his services. The keeping of the registers recording clandestine marriages was a scandal. They were easily falsified; whilst additional payment would result in the marriage being predated, or at a later time the record to be lost or destroyed. Clandestine marriages without witnesses allowed spouses, united only by their desire to separate, to collude in denying the existence of the marriage. In such cases both could marry again.

The concern of the nobility and upper middle-class, fearing loss of the family fortune by the clandestine marriage of an heir or heiress, resulted in one of the few occasions during the eighteenth century when social needs had any influence upon the development of the law. Increasing pressure upon Parliament to regularise the marriage laws of England led to Lord Hardwicke's Marriage Act of 1753 for, "the better prevention of clandestine marriages". The importance of this Act upon the subsequent history of our marriage laws show, in the words of Professor P.M. Bromley "that the principles underlying the modern law cannot be understood unless it is appreciated that it is still based upon the desire to prevent the clandestine marriages which were the disgrace of eighteenth century England."⁽¹⁾ The reward for Lord Hardwicke's efforts was "to be libelled, lampooned, mobbed, and otherwise exhibited to obloquy, as though he were a pedantic despot, an enemy of freedom, and a foe to domestic virtue. His measure for the amendment of the lay law of marriage passed through the House of Lords without encountering much opposition; but in the House of Commons it was assailed with impudent falsehood and rancorous spite by the Chancellor's personal enemies, and by every individual of the House who had private reasons for thinking leniently of the abuses of secret marriage".⁽²⁾ Critics in the House of Commons felt that depopulation would result from the poor not marrying due to the cost of the now obligatory church service. At the same time there would be even less chance of the wealth of the rich finding its way into the pockets of the working classes, if heirs or heiresses could no longer elope with the less wealthy. Even eugenicist reasoning came into Parliamentary debate, with one M.P. declaring: "... if this Bill passes, our quality and rich families will daily accumulate riches by marrying only one another; and what sort of breed their offspring will be, we may easily judge: if the gout, the gravel, the pox and madness are always to wed together, what a hopeful generation of quality and rich commoners shall we have amongst us?"⁽³⁾

(1) Op.cit., p.39.

(2) J.C. Jeaffreson, op.cit., Vol.2, p.182.

(3) Parliamentary History, Vol.XV (for 1753), col.15.

An account of the Act's Parliamentary history is given by A.S. Turberville, The House of Lords in the XVIIIth Century, 1927, pp.274-76; and by Lecky, op.cit., Vol.II, pp.115-25. -66-

The passing of the 1753 Act meant that marriages were valid only if celebrated by an ordained priest of the Church of England in a church or a chapel. The Act forbade the solemnization of marriage without banns or license; it also enacted that "in no case whatsoever shall any suit or proceeding be had in any ecclesiastical court in order to compel a celebration in facie ecclesiae by reason of any contract of matrimony whatsoever whether per verba de praesenti or per verba de futuro". The two important principles now brought into marriage law was that firstly, a marriage would be henceforth "... a public and certain contract".⁽¹⁾ Secondly, the Church lost its authority to the legislature in declaring what was a valid marriage, though not its duty to uphold the now secular laws of marriage. Clandestine marriages could no longer be recognised by the ecclesiastical courts who had responsibility for the strict interpretation of the 1753 Act. This meant that a declaration that the marriage was not validly contracted was an answer to a mensa et thoro proceedings.

The grave defect which Lord Hardwicke's measure contained has been well pointed out by Sir George Trevelyan: "The Chancellor insisted that everybody, including Roman Catholics and dissenters, must either be married according to the ritual of the Establishment or not be married at all; whatever objections they might entertain to a service some passages of which cause even the most devout pair of church people to wince when it is read over them".⁽²⁾ The Marriage Act of 1823, which repealed the 1753 Act, regulated marriages within the Church of England. Every marriage now had to be preceded by publication of banns, or a special license^f from the ecclesiastical authorities. The result was a division between marriage formalities which would, and that which would not, result in a marriage ceremony being held void. Between 1753 and 1823 the slightest error of form in the marriage ceremony allowed a decree of nullity, though few of the resultant defective marriages were brought before the ecclesiastical courts.

(1) O.R. McGregor, op.cit., p.14.

(2) Sir George Trevelyan, Early Life of C.J. Fox, p.14: quoted by William Connor Sydney, England and the English in the Eighteenth Century, 1891, Vol.11 p.402. Chapter XX provides an interesting account of the 'Fleet Chaplains and the Fleet Weddings'. The only exceptions were Jews and Quakers who were permitted by the 1753 Act to celebrate their own marriages.

The stringest provisions of the Marriage Acts of 1753 and 1823 led to defiance by those whom the law aimed to control. Growing pressure, especially from the great body of dissenters, eventually led to the removal of this grievance by the Marriage Act of 1836. This Act permitted non-Anglican denominations to conduct marriage ceremonies in their own places of worship. Of greater significance was the establishment of a civil marriage procedure conducted by state officials in registry offices.⁽¹⁾ English law, for the first time since the Middle Ages, recognised the validity of a marriage ceremony which was purely civil in character and completely divorced from any religious element. Those wishing to marry now had the choice of either religious or secular vows of marriage.

Parliament had partly conceded the rational consequences that followed its breaking of the exclusive dominion of old canon law principles in 1753. But it also logically followed that if the State insisted that it control the formation of all marriages, then jurisdiction for their subsequent regulation should also be in the hands of the State. The question that then arose was, if marriage was now permitted to all at a nominal cost in civil registry offices after 1836, then why should not divorce also be made readily available in the civil courts? Yet, at this time matrimonial law was still administered primarily in the ecclesiastical courts even though the parties may not have been members of the Church of England or even Christian. Reformers and conservatives appreciated that civil marriage was contrari^{ous}~~ety~~ to the ecclesiastical theory of marriage. Such problems and paradoxes were, by the mid-nineteenth century, becoming an increasing embarrassment which Parliament was hard put to ~~to~~ justify.

(1) The Births and Deaths Registration Act of 1836 was passed immediately after the Marriage Act, to provide the means for a complete register of births, deaths and marriages in England and Wales. A detailed history of these Acts is provided by J. Jackson, op.cit., p.251 et.seq.

A Society Without Divorce

Until 1753 it was possible for marriages to be dissolved under the old canon law of nullity and pre-contract.⁽¹⁾ But with Lord Hardwicke's Act these methods were removed and so for the next century, up until 1857, it was impossible to escape from an unhappy marriage except by the costly Private Act procedure and the limited law of nullity still in force. Only a recluse could imagine that the practical impossibility of divorce enforced a state of matrimonial bliss for all those who had vowed conjugality to one another until death ~~did~~^{parted} them ~~part~~. Marriage had been translated "... into a drooping and disconsolate household captivity, without refuge or redemption".⁽²⁾

We know that the poor were very poor. They did not have the money necessary to attempt legal action in ecclesiastical courts, let alone contemplate going on to seek a Private Act of Parliament. It was impossible for the majority of working men to provide their families with anything other than the bare necessities of life. Families were often left destitute by ~~the~~ unemployment, sickness or death of the husband.

What, then, did the great majority of the married population who were not wealthy do when a marriage broke down? Unfortunately we cannot answer with any certainty for there is no sound empirical evidence upon which to base reliable conclusions. All that can be done is to make generalisations based upon the subjective evidence of eighteenth and nineteenth century writers. This evidence suggests that dishonour of the marriage vows was no less common then because of the impossibility of divorce a vinculo than in later times. Indeed it was not until the passing of the Legal Aid and Advice Act of 1951 that divorce became in any meaningful sense available to the ordinary working-class man.

(1) Both H. Concett, The Practice of the Spiritual or Ecclesiastical Courts, 1708 (3rd ed), pp.279-80; and John Ayliffe, Paregon juris canonici Anglicani, 1726, (2nd ed., 1734); adversely comment upon the widespread fraud in obtaining annulments and illegal second marriages after divorce a mensa et thoro. Similar practices occurred during the reign of Henry VIII: (see Powell, op. cit., pp. 64-65).

(2) John Milton, The Doctrine and Discipline of Divorce, 1643, (1645 ed., p.2).

The social unreality of describing England and Wales as a 'divorceless society' is corroborated by Randle Lewis, writing in 1805: "it is a lamentable truth that scarcely a week passes without advertisement in some of the daily prints, publishing the parting by elopement, adultery, agreement or otherwise of some unhappy pair. A much greater number separate without that unnecessary step." (1) The result of these separations and desertions is graphically described by Miss George.

The journeyman who found himself suddenly forced to pawn even his tools or threatened with imprisonment for debt, only followed a general custom when he left his family and disappeared. The worst result of this very usual tragedy was in the number of deserted children in the streets of London, due to the fact that such people, if they were immigrants to London, probably had no parochial settlement there. 'Mechanics, handicraftsmen and labourers,' wrote Sir John Fielding '... daily came to London, whither they are soon followed by their families; where many of them have lived industriously, maintaining their wives and children until the latter have been almost old enough to go into the world. But about this critical period, their fathers either dying or absconding, the mothers are left to support the families, who often sink under the burthen, and the children, incapable of inquiring into or enforcing their settlement, are turned into the streets...' (2)

Joseph Massie, writing in the same period as Sir John Fielding, realising that there was a need to look after deserted wives, proposed the provision of charity houses (workhouses) for "Wives or Widows and Young Children of manufacturers, labourers, seamen, or soldiers as shall be destitute of Support, and do either belong to Parishes which are not in the Metropol, or within one mile of the Suburbs thereof, or do not know where these Places of Settlement are". (3)

- (1) Randle Lewis, Reflections on the Causes of Unhappy Marriages, 1805, p. 63.
- (2) Mary D. George, London Life in the Eighteenth Century, 1925, p. 317; quoting from 'An Account of the Receipts and Disbursements relating to Sir John Fielding's Plan for the Preserving of distressed Boys by sending them to sea as Apprentices in the Merchant Services...'; 1769. The Superintendent of Hulks told the Select Committee on Police, in 1828, that one-third of his 300 boys were fatherless, whilst a third of these had lost their mothers as well. (See Tobias, Crime and Industrial Society in the 19th Century, 1967, p. 161)
- (3) J. Massie, A Plan for the Establishment of Charity Houses for Exposed or Deserted Wives, 1758, p. 3.

Theoretically it seems likely that wives did not often leave their husbands unless the marital conditions were so ~~awful~~^{unbearable} as to make desertion the only solution. A woman, probably with children to maintain, was in danger if alone in society of that time. If a wife became destitute her only remedy was the Poor Law with all its known miseries, or to resort to prostitution. Men were more able to find new work and so husbands were better placed to leave their wives. Economic disparity existing: firstly, within the population, and secondly, between the sexes, resulted in some strange customs. These were wife sales, bigamy, and disregard of marriage formalities.

Wife Sales

In the late eighteenth century, a number of working men believed that the right to sell their wives did exist. It was supposed that the disposal of the wife as a chattel with a halter round her neck in the market place, legally severed the marriage.⁽¹⁾ One commentary at the beginning of the nineteenth century records that "this degrading custom seems to be generally received by the lower classes, as of equal obligation with the most serious legal forms".⁽²⁾ The wife no longer had any further claims on her husband for support as, so the belief went, all rights and duties had passed in the sale. If the wife consented to be sold the husband did not commit an offence, but as he had connived at her adultery he would still be held legally liable for maintenance.

The wit of The Times extended itself in the eighteenth century to write:

By some mistake or omission, in the report of the Smithfield market, we have not learned of the average price for wives for the last week. The increasing value of the fair sex is esteemed by several eminent writers as the certain criterion of increasing civilisation. Smithfield has, on this ground, strong pretensions to refined improvements, as the price of wives has risen in that market hall from half a guinea to three guineas and a half.⁽³⁾

- (1) This was a symbolic gesture to deprive the husband of any rights of prosecution for damages against the wife's purchaser.
- (2) Quoted by John Ashton, Social England under the Regency, 1890, Vol.1, p.374. Also see his Old Times, 1885, p.217 and p.342.
- (3) The Times, 22 July, 1779. Quoted by G.Mueller, "Inquiry into the State of a Divorceless Society", University of Pittsburgh Law Review, Vol.18, p.545. This excellent article covers in great detail the subject of wife selling. For further reading see: C.Kenny, "Wife Selling in England", Law Quarterly Review, Vo. 45, p.494.

On a similar sale two years earlier the same newspaper had observed: "Pity it is, there is no stop put to such depraved conduct in the lower order of people, whilst in 1797 it recommended that "It would be well if some law was enforced to put a stop to such degrading traffic."⁽¹⁾ The sale of a wife at Knaresborough in 1807 for sixpence and a quid of tobacco, was reported by The Morning Post, who protested that this was "one of those disgraceful scenes, which have, of late, become too common..."⁽²⁾

Mueller in his extensive research could find only one case where imprisonment for the husband followed the sale of his wife. His findings reveal that, "not only wife sales and auctions, appropriately copied from cattle sales, had become a matter which the law would overlook, or in which it would acquiesce, if an established pattern was followed without flagrant transgressions, but from time to time, other modes of more or less commercial transfer occurred."⁽³⁾

In the bizarre case of Henry Cook~~s~~, whose wife and child were in the Effingham workhouse, the husband was persuaded by the parish officers to sell his wife. The master of the workhouse took Mrs. Cook~~s~~ to Croydon market and sold her for one shilling; whilst the parish officers, relieved to be rid of their charge, paid the expenses of the journey and the cost of the 'wedding' dinner.⁽⁴⁾ This, as Miss Pinchbeck notes, shows not only the futility of parish administration under the old Poor Law "but also of the straits to which women were reduced by the weakness of their economic and social position".^⑤

(1) Mueller, Ibid.

(2) Quoted by John Ashton, The Dawn of the XIXth Century in England, 1886, Vol. 2, p.66

(3) Op. cit., p.571. 'Other modes' were wife exchanges and the transfer of the wife as a gambling loss. In the former case, consent by the wife disallowed the husband's prosecution; but in the case of gambling, consent did not prevent it being unlawful as gambling offended the morals of that society.

(4) Quoted by Ivy Pinchbeck, Women Workers and the Industrial Revolution 1750-1850, 1930, p.83. The unfortunate Mrs. Cook~~s~~ was later deserted by her second husband when he realised the invalidity of their marriage. The parish officials appealed unsuccessfully to the magistrates to get Henry to maintain his wife and her now larger family.

⑤ Ibid.

Bigamy

Committing bigamy was one possible method by which the already married person could clothe a new liaison with social respectability. The available evidence suggests that bigamy was not committed in any greater numbers than at the present time.⁽¹⁾ But in an age in which centralised checking of marriage certificates was not attempted, the 'dark figure' of 'successful' bigamous marriages remains unknown. However, the official statistics show that though England had a population six times larger than that of Scotland, it had forty-three times as many court proceedings for bigamy.⁽²⁾ MacQueen associated this difference between the two countries to the availability of divorce in Scotland, and prophesied that this crime would decline in England, "because when divorce is available the temptation to commit bigamy will no longer arise." At this point it becomes necessary to examine the system of Scottish divorce because, firstly, of its very existence over the period of time when Parliament prohibited divorce to the citizens of England and Wales; and secondly, as the only means of entering a second marriage open to still married English persons, other than by a Parliamentary divorce.

Scottish Divorce

A comparison between the two countries shows how different their respective divorce procedures were. When papal supremacy was thrown off in 1534, Scotland came out of the schism far better than England and Wales. Calvinism held that the sin of adultery was such as to dissolve the innocent spouse's obligation to lifelong partnership. The consequence of this belief was that the remedy of divorce a vinculo had been available in Scotland from the days of John Knox. In England, Parliament eventually stepped into the Pope's shoes by assuming the jurisdiction of divorce a vinculo. The difference in legal costs between the two procedures was shown by Dr. Phillipmore in 1830, when he noted that the cost of Parliamentary divorce amounted to at least £600 or £700, whereas in Scotland a divorce could be had for £10 or £15. The Campbell Commission reported:

- (1) In 1961, 78 men and 16 women were tried for bigamy in England and Wales (Source: N. Walker, Crime and Punishment in Britain, 1968 ed., p.320). Caution should be observed in viewing the official statistics of prosecutions in the nineteenth century as representing the number of bigamous marriages. All we can say is that the figures of persons committed or bailed for bigamy in 1854 (83) and 1855(85) provide a minimum indication of the number of such "marriages".
- (2) J.F.MacQueen, Divorce and Matrimonial Jurisdiction, 1858, p.34.

The average cost of rescinding a marriage in Scotland is £30. Where there is no opposition £20 will suffice... Of ninety-five sentences of divorce the parties litigant were almost all of the humbler classes, including four servants, four labourers, three bakers, three tailors, two soldiers, one sailor, a butcher, a shoemaker, a carpenter, a weaver, a blacksmith, an exciseman, a rope-maker, a hairdresser, a quill seller, a plasterer, a carver, a tobacconist, and a last maker, as well as every variety of small tradesmen and petty shopkeepers; but except in a single instance (the case of a lady of rank against her husband) not one of the Scottish gentry figure in the list.⁽¹⁾

In more than one third of these ninety-five cases, the wife succeeded in complaint against her husband.

Both the Church law and Civil law of Scotland permitted a decree of divorce a vinculo on the grounds of adultery or malicious desertion for four years or more, no matter where the parties resided or the marriage had taken place. The rules governing second marriages were more restrictive, the Church of Scotland forbidding the marriage of guilty parties in 1566, and an Act of the Scottish Parliament in 1600 disallowed the marriage of paramours. Incidents of collusive agreements between English couples no doubt occurred within the Scottish courts whereby the husband would induce the wife by offer of a tempting settlement to admit to his perjured evidence. But the available data do not indicate that this was an 'escape route' from unhappy marriages for many English citizens. Between 1789 and 1817, James Ferguson could show evidence of only nineteen cases in which the parties were domiciled in England. The cost of transport to Scotland, together with the necessary period of residence there, meant that the possibility of a Scottish divorce was out of the question for the working classes of England.

Even though English complainants to the Scottish courts were sometimes successful in obtaining a divorce a vinculo, failure was often the ultimate recompense for their journey. The English courts were on their guard to discourage such excursions from their jurisdiction and developed the rule that a consequent second marriage in this country would not be recognised here if the divorce had been granted by an alien court upon a ground that would not have been allowed in England. Upon such a doctrine the luckless Mr. Lolley, after remarrying in England, found himself charged with bigamy and duly sentenced to five years transportation.⁽²⁾

The availability of civil divorce in Scotland compared to our slow and costly Parliamentary Private Act procedure led critics to discuss the efficiency of English divorce law.

(1) Op.cit., (1604), 1853, p.73. Note II: "Paper on Divorces in Scotland, with list of decrees from November 1836 to Nov.1841."

(2) See R v Lolley's case, R. and R.C.C. 237, 168 Eng. Rep. 779 (1812). Perhaps Lolley might have fared better if he had remarried in Scotland and then moved south ?

THE COMING OF JUDICIAL DIVORCE: 1800-1857The Need for Reform

It has already been noted that one of the principal causes of the Matrimonial Causes Act of 1857 was increasing middle-class discontent at the working and procedure of the ecclesiastical courts. The law reform movement was led by utilitarian thinkers like Sir Samuel Romilly and Jeremy Bentham. Such men were motivated by a wish to rationalise the legal process rather than a desire to assist the working-classes to greater access to the civil courts. Criticism of existing judicial machinery was also being directed towards Private Act divorce procedure and its restraining high cost. The 'immorality' of the aristocracy was made a focus of attack by the Benthamites, who saw Parliamentary divorce representing yet another example of the aristocracy's and gentry's hold over the laws of the country to the detriment of the morally superior middle-class. Utilitarian advocates of divorce reform observed with approval the system of civil divorce operating in Scotland and other European countries.⁽¹⁾

In post-revolutionary France, rejection of the old ecclesiastical regime led to the introduction of free divorce in 1792. In Paris alone, nearly 6,000 divorces were granted while in 1797 the divorce decrees in that city actually outnumbered the marriages. Though consensual divorce in France was severely restricted in 1803, the influence of such radical legislation on the Continent was brought to the attention of the middle class by the writings of such thinkers as Jeremy Bentham. The realism of Bentham led him to observe that, "the rule of liberty would produce fewer stray families than the law of conjugal captivity. Render marriages dissoluble and there would be more apparent separations but fewer real ones".⁽²⁾ He went on to argue that the number of broken marriages need not necessarily increase with the introduction of judicial divorce, though immorality would be reduced. Consequent history of divorce in this country shows that the theme of "immorality" has always remained in the forefront of divorce law reform debate.

(1) See Sir John Campbell's observations: Hansard, H.C. Deb., Vol. 26 (1836) col. 916.

(2) Jeremy Bentham, The Theory of Legislation, (ed. Charles Ogden, re-issued 1932), p. 225.

The fundamental principle of legislation for Bentham was that "the public good ought to be the object of legislation". In comparison with the divorce laws of France and Germany the choice of legal redress available in England seemed unsatisfactory. Here the only de facto remedy available to a wife whose husband was guilty of adultery or cruelty was the ecclesiastical courts decree of a mensa et thoro, which, in the words of Lord Lyndhurst, put her:

...almost in a state of outlawry. She may not enter into a contract, or, if she does, she has no means of enforcing it. The law, so far from protecting, oppresses her. She is homeless, helpless, hopeless, and almost destitute of civil rights. She is liable to all manner of injustice, whether by plot or by violence. She may be wronged in all possible ways, and her character may be mercilessly defamed; yet she has no redress. She is at the mercy of her enemies. Is that fair? Is that honest? Can it be vindicated upon any principle of justice, of mercy, or of common humanity? ⁽¹⁾

The opinion of Joel Bishop, an American lawyer, writing in 1852, is expressed even more fervently, seeing a mensa et thoro as

that excrescence, that carbuncle on the face of civilised society, that demoralising mock-remedy for matrimonial ills, which, in the language of Lord Stowell, casts out the parties, 'in the undefined and dangerous characters of a wife without a husband, and a husband without a wife'; in the language of Judge Swift, 'places them in a situation where there is an irresistible temptation to the commission of adultery, unless they possess more frigidity or more virtue than usually falls to the share of human beings'; and in the language of Mr. Bancroft, 'punishes the innocent more than the guilty'; the divorce a mensa et thoro. ⁽²⁾

The economic dependance of wives upon their husbands' support was beginning to be realised by a society that seldom doubted ^{a wife's} ~~their~~ legal appearance should be that of a chattel. Certain radical opinion also wished to see these same new fashioned principles of equality being applied beyond middle class wives to working class broken marriages, where low income restrained them from the courts, for otherwise the proclaimed equality in law would be cruel delusion.

- (1) Lord Lyndhurst, one time Lord Chancellor, speaking on the second reading of the Matrimonial Causes Bill; (Hansard, H. of L. deb., Vol.142 (1856), col.410).
- (2) J.P.Bishop, Commentaries on the Law of Marriage and Divorce and Evidence in Matrimonial Suits, 1852, par.277 (pp.217-18).

Behind the criticisms of the existing legal framework lay the overtones of those who argued that the wrong done to a spouse - especially the husband - could only be remedied by divorce a vinculo. Hector Morgan, writing in 1826 ^{on} ~~of~~ divorce, believed "if justice require that the wrongs of the husband should be redressed by a divorce, the redress should be more expeditious, more within the reach of every man".⁽¹⁾ The Rev. Martin Madan saw no reason why divorce should not operate for all husbands as a remedy for the innocent and punishment for the guilty. "Why is such a one to be forced to live with an adulteress; to maintain by the sweat of his brow, the children of other people; to suffer all the miseries and inconveniences which a profligate wife may bring upon him?"⁽²⁾

Books by notable writers, such as Disraeli's Sybil in 1845 and Dickens's Hard Times in 1854, described working class life and conditions as it actually was, with all its hardships and financial impoverishment. Stephen Blackpool, the poor factory labourer in Hard Times, was informed that there was a law to help to break the marriage bonds holding him to his drunken wife, but as Mr. Bounderby observed, "it (a Parliamentary Act) is not for you at all. It costs money ... I suppose from a thousand to fifteen hundred pounds, perhaps twice the money." Financial debarment from the ecclesiastical courts, even though they offered no prospect of a second marriage, had resulted in sections of the working classes developing over the years a sub-culture which allowed deviancy from the expected code of behaviour of their betters. The resultant wife sales, desertion, disregard of marriages formalities and bigamous marriages, have already been described. The criminal court records showed a number of cases in which bigamous husbands were brought to trial even though the evidence clearly proved that their original wives had deserted without cause or justification. Such husbands saw bigamy as the only course open to them, if wishing to set up home with another woman and provide her and any children of the liaison with the socially and legally expected aura of marriage to cover their cohabitation.⁽³⁾

- (1) The Doctrine and Law of Marriage, Adultery, and Divorce; 1826, Vol.2, p.257. Morgan was no different from the majority of fellow legal writers in refusing to acknowledge that the rights of the wife should be considered in any future reform.
- (2) Martin Madan, Thelyphthora; or, A Treatise On Female Ruin, 1780 (2nd ed 1781), Vol.2, p.76 fn.
- (3) See Lord Campbell speech in the House of Lords debate on the 1856 Bill: Hansard, Vol.142 (1856), col.1985.

In sentencing the luckless Hall for bigamy at the Warwick Assizes in 1845, Mr. Justice Maule gave vent to a classic piece of sustained irony, the report of which gave an impetus to the movement for a change in the law. The prisoner was informed about the procedure he should have undertaken before marrying again.

"You ought to have brought an action for criminal conversation; that action would have been tried by one of Her Majesty's Judges at the Assizes; you would probably have recovered damages; and then you should have instituted a suit in the ecclesiastical court for divorce a mensa et thoro. Having got that divorce, you should have petitioned the House of Lords for a divorce a vinculo, and should have appeared by counsel at the bar of their Lordships' House. Then, if the Bill passed, it would have gone down to the House of Commons; the same evidence would possibly be repeated there; and if the Royal Assent had been given after that, you might have married again. The whole proceeding would not have cost you more than £1,000." The prisoner: "Ah my Lord, I never was worth a thousand pence in all my life." Mr. Justice Maule: "That is the law, and you must submit to it." Hall's final comment was, "That is a hard measure to us who are poor people, and cannot resort to the remedy which the law has afforded to the rich."⁽¹⁾

The grave irony of the learned judge was felt to represent a state of things well-nigh intolerable, and reform of the law was felt to be inevitable. There was a disparity of matrimonial justice, not only between the rich and the poor but also between the very rich and the increasingly powerful middle class. What the 1832 Reform Act had produced was aristocratic rule by consent rather than by prescription. Aristocratic politicians had no wish to see an essentially middle class party created to oppose them, and so it was essential for their continuing control of power that attention should be paid to the most independent and rapidly growing section of the electorate.

(1) This is the account provided by Lord Campbell, ibid.

It was the middle classes, as the Whig Prime-Minister Earl Grey acknowledged, who "form the real and efficient mass of public opinion, and without them the power of the gentry is nothing."⁽¹⁾ The latter's self-imposed contraction of its previous power and privilege resulted in reforms within the Church, the Civil Service, the Universities of Oxford and Cambridge, and the abolition of Church rates and the landed property qualifications for M.P.'s. It was, as Mr. T.F. Kennedy, Whig M.P. for Ayr, appreciated, "of the utmost importance to associate the middle with the higher orders of society, in the love and support of the institutions and government of the country".⁽²⁾ The middle-class were no longer prepared to accept anything less than that which had been available to the aristocratic and governing classes for the previous two hundred years.

The Established Church's authority in both spiritual and secular matters had weakened since 1800. At the same time the numbers of Dissenters had increased, forming a fifth of the country's population in 1811. By the mid-nineteenth century half those attending church were non-Anglicans composed mainly of Dissenters and non-conformists.⁽³⁾ The 1847 general election returned twenty-six M.P.'s from the middle class Dissenting party with Church disestablishment amongst its objectives, whilst a further thirty-four M.P.'s were pledged to the same aim. Their supporters detested the power of the Established Church in all fields of social and ^{pol}itical life. Its patronage in the administration of the laws of marriage and divorce was only one aspect of the Church of England's linkage with the Roman Church which the Dissenters so intensely disliked and wished to see abolished.⁽⁴⁾ Largely due to middle-class criticism of the outmoded divorce procedure, the Whig government formed a Royal Commission in 1850 to inquire into the whole state of the law relating to matrimonial offences.

- (1) Henry (Earl) Grey (ed.), The Correspondence of Earl Grey and King William IV, 1867, Vol.1, p.376 (fn).
- (2) Memorandum submitted to Lord John Russell, quoted by N. Gash, Politics in the Age of Peel, 1953, p.15.
- (3) Census of England and Wales, 1851, Religious Worship, Tables pp.cclii et. seq.
- (4) Further examples were: Act for the Submission of Clergy (1533), Statute of Bigamy (1603), Marriage of Lunatics Act (1724), Marriage Acts (1753: Lord Hardwicke's Act, and 1835).

The First Royal Commission on Divorce

The Commission, under the chairmanship of Lord John Campbell, included secular and ecclesiastical judges - amongst whom were the Lord Chief Justice and Dr. Lushington. Lord Campbell, after taking silk in 1827, had entered Parliament in 1830. After being Solicitor-and Attorney-General he was created a Baron in 1841. It has been said of him that "he cast in his lot with the Liberal party, and on the great questions of Catholic emancipation, the repeal of the Test Act, the suppression of slavery, and parliamentary reform he was on the side of freedom; but his strong conservative instincts, and his comparatively slight interest in such matters, prevented him from taking a leading part".⁽¹⁾ The advice which he gave his brother, "for God's sake do not become a radical"⁽²⁾, was practised by Lord Campbell within the Committee's deliberations.

The legal and social problems facing the Committee needed investigation and solution. If the Committee were to decide that the ecclesiastical courts had outlived their usefulness, then what type of tribunal was to replace the old system? The Commission recommended in their Report of 1853 that a "new tribunal shall be constituted to try all questions of divorce".⁽³⁾ But if they were to finally recommend transferring the divorce jurisdiction to a secular court, then, should the House of Lords' tradition of allowing divorce a vinculo only upon the suit of the husband be the new practise? The Commission's recommendation was that no change should take place and "that divorces a vinculo shall only be granted on the suit of the husband, and not (as a general rule) or the suit of the wife".⁽⁴⁾ Upon the most important social question of whether the poor and lower income groups ^{sh} would have reasonable access to secular divorce, the Commissioners gave no view. After noting the likely cost of divorce a vinculo was never less than £700 or £800 in England, they observed, "In Scotland the average cost of rescinding a marriage is said to be £30, and that when there is no opposition, £20 will suffice.→

- (1) The Dictionary of National Biography, 1908 ed., Vol. 3, p.832. See also Life of Lord Campbell, an "autobiography" edited by his daughter the Hon. Mrs. Hardcastle.
- (2) Ibid, p.832.
- (3) First Report of the Commissioners (on) Law of Divorce, (1604), 1853; p.22. The Report also contained, as an appendix, the evidence given to a Select Committee of the House of Lords in 1844, which had been formed to consider a Bill for the amendment of the jurisdiction of the Privy Council.
- (4) Ibid, p.22.

← In Scotland, also, it is not a privilege for the rich, but a right for all; and it is not unworthy of notice that out of ninety-four cases between November, 1836, and November, 1841, the parties litigant were almost all of the lower classes."⁽¹⁾ But the idea of Scottish practice coming southwards was not to their liking. They quoted with approval Sir James Mackintosh's belief that "To make the dissolution of marriage in the proper case alike accessible to all, is one of the objects to which, in great cities, and in highly civilised countries, it is hardest to point a safe road".⁽²⁾ Lord Redesdale, in dissenting from the Majority recommendation of judicial divorce, foresaw the likely outcome of his colleague's proposals was to be that:

These divorces will thus be opened to another and numerous class, but a still more numerous class will equally be excluded as at present. Once create an appetite for such license by the proposed change, and the demand to be permitted to satisfy it will become irresistible. The cry for cheap law has of late been universally attended to ... and must ultimately lead to extreme facility in obtaining such divorces.

Such an opinion contradicted his earlier view that in:

determining this question, it is our duty to inquire whether the present state of the law is felt as a grievance - whether it is generally complained of. It is a remarkable fact, that not withstanding the prejudice which might naturally arise among the middle and industrial classes from such divorces being open to the rich and denied to themselves, there has never been any popular demand for a change in the law. I cannot think that we are justified in forcing such a change on those who do not ask for it, and particularly as the present state of the law, as it affects them, has answered so well for their general happiness and morality.⁽³⁾

In fact the working classes had long before been forced to an acceptance of unofficial ways legitimatizing their rejection of the prescribed legal channels to deal with marriage breakdown.

(1) Report, (1604), p.18.

(2) Ibid., p.26.

(3) Report, op.cit., p.24.

The Matrimonial Causes Act, 1857

Parliamentary debate

The Commission does not appear to have inquired into the advisability of adding to the grounds of divorce, and the Act which was passed upon their findings did not attempt to make any new law upon the subject. The Matrimonial Causes Bill was passed upon its fourth attempt in 1857 after the first Bill had been presented to Parliament by Lord Cranworth, the Lord Chancellor, on behalf of the Government, in June 1854. There was very little information about the likely results of the new Act. Parliamentary debate provides insight into the minds of the legislators as they set the legally prescribed divorce pattern for the next eighty years. The most active opposition came from a minority of bishops led by Wilberforce of Oxford and Kerr Hamilton of Salisbury, who believed that the Christian faith did not allow dissolution of marriage. Such a view was in direct contrast to the past attitude of bishops who had not opposed or protested against Private Divorce Bills when these came before them in the Lords, as being against the secular or divine law. Support for the proposed Act was obtained from Bishop Tait of London who felt that such a Bill would mean no change from what the ecclesiastical courts had been practicing over the previous hundred years or more, and it had the merit of substituting a regular court procedure for the haphazard method of private Bills.⁽¹⁾ Opposition from the secular Lords was led by Lord Redesdale. He believed family stability was being threatened by such intending legislation: "It was perfectly well known that a legal divorce was an impossibility, and to that circumstance might be traced the sacredness of the marriage tie among the lower orders of the English people which was so remarkable".⁽²⁾ Though the language was of the Victorian conservative, the argument against easing the divorce laws ~~has~~ remained remarkably similar over the following century.

(1) See Hansard, H. of L. Deb., Vol. 147 (1857), col.2059.

(2) Hansard, H. of L. Deb., Vol. 142 (1856), col.1982.

In a later debate, the Bishop of Oxford made one criticism that was to remain valid until the 1940's: believing that the Bill "...professed to give relief to persons to whom it would never reach ...,"⁽¹⁾ Lord Campbell noted that only a wider group, but not all the married population, would benefit from the Bill. He doubted whether the working classes accepted the current marriage laws without complaint, citing the Maule judgement as a case where bigamy had been the only available solution.⁽²⁾ The Marquess of Lansdowne accurately observed the working of the marriage and divorce laws as they affected women, and the legislators unawareness of the consequent injustices; "On the subject of the cruelty and injustice of the English law towards women, I would not have your Lordships judge by the cases that come before you here. Many as are the cases of great hardship and injustice which must have come to your Lordships' knowledge in those elevated classes of society with which you are naturally more intimately associated, I believe that they are as nothing compared with that great mass of injustice which has for years existed among the lower and inferior classes of the community".⁽³⁾ Another supporter of the Bill, Lord Lyndhurst, a former Lord Chancellor, argued with clear, forceful logic for a more drastic revision of the law in conformity with the practice of other countries. In refuting Lord Redesdale's prophesy that the Bill's legislation would lead to increased immorality and family breakdown, Lord Lyndhurst maintained "that the direct tendency of the present law is to demoralise and degrade the lower classes. A man finds his wife committing adultery; he has no remedy; he cannot apply to a court of justice to dissolve his marriage; he therefore continues to live on with her, committing acts of brutal and degrading violence on her - or he turns her out, and she goes to live with the adulterer. What is the effect of such a scene upon the lower orders of the people? ... what, I should like to know, can be more destructive of the morality of the lower orders?"⁽⁴⁾ Like other Victorian and later reformers, Lord Lyndhurst appreciated that successful transformation of our laws governing divorce could best be achieved by showing that the victims of injustice were in moral danger.

(1) Hansard, H. of L. Deb., Vol.145 (1857), col.531.

(2) Hansard, H. of L. Deb., Vol.142 (1856), col.1985.

(3) Ibid, col.1973.

(4) Hansard, H. of L. Deb., Vol.145 (1857), col.500.

The Bill was strongly attacked in the House of Commons by Mr. Gladstone, for both its ecclesiastical and social wrongs; especially the sexual discrimination over grounds acceptable for divorce, which he regarded as immoral. Gladstone argued that divorce legislation would bring about the end of family life. "At no time have the middle and lower classes of the English people known what it was to have marriage dissoluble. Take care, then, how you damage the character of your countrymen. You know how apt the English nature is to escape from restraint and control; you know what passion dwells in the Englishman".⁽¹⁾ Whatever sympathy might have been felt by members of the House of Commons for such views, they knew that the economic reality of divorce had to be made available to at least the middle class. On the 21st August, 1857, the Matrimonial Causes Bill passed its third reading in the House of Commons, receiving the Royal Assent one week later, and becoming statute on New Year's Day, 1858.

The Act

The legislators had made it very clear that their intention was to amend only the existing procedure for divorce while leaving the law unaffected. As the Attorney General, Sir Richard Bethell, explained to the Commons, the Act "involved only long-existing rules and long-established principles, and it was intended to give only a local judicial habitation to doctrines that had long been recognised as part of the law of the land, and for a century and a half administered in a judicial manner, although through the medium of a legislative assembly".⁽²⁾ In July, 1857, Lord Campbell wrote "I am very glad that the Divorce Bill finally passed the Commons framed almost exactly according to the recommendations of the Commission over which I had the honour to preside - preserving the law as it has practically subsisted for two hundred years;..."⁽³⁾ Eighteen months later fiendish doubts were forming in Lord Campbell's mind: "... I have been sitting two days in the Divorce Court and, like Frankenstein, I am afraid of the monster I have called into existence ... I had no idea that the number would be materially increased if the dissolution were judicially decreed by a Court of Justice instead of being enacted by the Legislature".⁽⁴⁾

(1) Ibid, Vol.147 (1857), col.854.

In view of the Prime Minister, Lord Palmerston, Mr. Gladstone only exhibited 'the old standard set-up form of objecting to any improvement, to say that it does not carry out all the improvements of which the matter in hand is susceptible'. Quoted by (Lord) John Morley, The Life of William Ewart Gladstone, 1903, Vol.1, p.571.

(2) Hansard, H. of C. Deb., Vol.147 (1857), cols.718-9. This speech was made during the second reading of the Bill.

(3) Quoted by David Morris, The End of Marriage, 1971, p.36, (source not given).

(4) Ibid, pp.36-37.

Those members in both Houses of Parliament who desired that the localised County Courts should have matrimonial jurisdiction were given little encouragement by the Act.⁽¹⁾ Their arguments were strongly criticised by the Bishops, who saw these proposals as a move to far greater opportunity of divorce than the Bill envisaged.⁽²⁾ Nor was the Attorney-General willing to see the County Courts "charged with the duty of trying the question of adultery".⁽³⁾ In the same manner, Lord Chancellor Cranworth was unprepared to "confer on any inferior tribunals questions of such delicacy and nicety".⁽⁴⁾ Professor Dicey was too optimistic in his belief that the 1857 Act/ "did away with the iniquity of a law which theoretically prohibited divorce but in reality conceded to the rich a right denied to the poor".⁽⁵⁾ In reality "the only principle abandoned in 1857 was the propriety of giving legal remedies for matrimonial difficulties to the aristocracy and withholding them from the growing upper middle class."⁽⁶⁾ As one humorous writer of the time explained: "Divorce is possible now, but very select indeed. Repudiation for the million will never do. Saturday-night wife-beaters would be divorced on Monday as regularly as Monday came, and remarried as regularly the next Sunday three weeks. The wives want protection and not Free Trade".⁽⁷⁾ The incomes of the working classes still did not put them in a position to contemplate petitioning for divorce. This was the first and most important weakness of the 1857 Act.

(1) See Hansard, H. of C. Deb., Vol.147 (1857), cols.1236-39.

(2) Ibid, Vol.145 (1857), col.528.

(3) Hansard, H. of C., Vol.147, col.1240.

Sir Richard Bethell did not explain in what way the County Courts were less capable of judging matters of adultery than had been the ecclesiastical courts over the past centuries.

(4) Hansard, H. of L., Vol.145, col.797.

(5) A.V. Dicey, Lectures on the Relation Between Law and Public Opinion in England During the Nineteenth Century, (2 ed. 1914), p.347.

(6) O.R. McGregor, op.cit., p.19.

(7) Blackwoods Edinburgh Magazine, Vol.82 (November 1857), p.594.

The second imperfection was the legislators' unwillingness to break away from the ecclesiastical hold upon our matrimonial laws. The principles and procedures of the canon law relating to matrimonial causes as practised in the ecclesiastical courts were transferred into the new statute law administered in the Crown Courts. Canon law had been converted, moulded and formed into a statute that could be dealt with by the courts dealing with the new conditions of dissolution. By section 22 of the 1857 Act the new civil Divorce Court had in suits other than divorce^{ro} "... to proceed and act and give relief on principles and rules which in the opinion of the said Court shall be as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts have heretofore acted and given relief ...". It is essential to appreciate the influence of canon law within the divorce laws of England at the inception of the new procedure. Their influence has never been lost, though their pedigree is often forgotten. Holdsworth and Tidswell record "Its (the 1857 Act) framers, however, have wisely confined themselves to that measure of relief for which there is a distinct Scripture Warrant".⁽¹⁾ The legislators had confined the Matrimonial Causes Act so successfully to canon law, that an American scholar, Professor Howard, could still write fifty years later; "It is, indeed, wonderful that a great nation, priding herself on a love of equity and social liberty, should thus for five generations tolerate an invidious indulgence, rather than frankly and courageously to free herself from the shackles of an ecclesiastical tradition!"⁽²⁾

The third main criticism was that the grounds previously recognised by the House of Lords for divorce a vinculo prior to 1857 were left unchanged by the Act.⁽³⁾ Though an improvement in the substantive law had occurred with Parliament's rejection of the doctrine of indissolubility; the adoption of adultery as the only ground acceptable for divorce, revealed the new statute's familial links with Private Act procedure. Section 27 allowed the husband to petition on the ground of his wife's adultery alone, but the wife had to prove "... her husband had been guilty of incestuous adultery, or of bigamy with adultery, or of rape, or of sodomy or bestiality, or of adultery coupled with such cruelty as without adultery would have entitled her to a divorce a mensa et thoro, or of adultery coupled with desertion, without reasonable excuse, for two years or upwards".⁽⁴⁾

- (1) William T.A. Holdsworth and Richard T. Tidswell, The New Law of Marriage and Divorce Popularly Explained, 1857, p.6.
- (2) Howard, op.cit., Vol.2, p.109.
- (3) Parliamentary practice in Private Act divorces was reproduced in many of the provisions of the 1857 Act; see Roberts, op.cit., p.8.
- (4) There was little opposition to adultery as the only ground, though Lord Lyndhurst had wished to see wilful and malicious desertion as an acceptable ground for divorce. The Campbell Commission expressed general influential opinion, in writing: "Adultery destroys altogether the primary objects of the married state". (Report (1604), pp.36-37).

The Introduction of Civil Divorce.

From the 1st January 1858, dissolution of marriage became the prerogative of the civil courts. Further Matrimonial Acts that were passed in the fifty years after 1857 dealt mainly with ancillary questions relating to property and maintenance, custody of children, and various procedural matters.⁽¹⁾ The divorce laws of England had not in any meaningful sense been changed by the 1857 Act; nor were they to be modified until 1923, and more fundamentally by the Herbert Act of 1937.

Parliament had followed The Times desire that "divorce ought not to be obtained on trifling grounds; it ought not to be impossible; above all, it ought not to be awarded by two or three successive tribunals at an extravagant cost!". Though The Times of the 4th August, 1857, was correct in its belief that the 1857 Act was "not in the form of an isolated boon to an influential nobleman"; it was certainly not "a general measure of relief for all", for, in practice, the availability of divorce was restricted to only a slightly wider proportion than before. Discrimination existed against both the poor and women. Working classes broken marriages were not able to afford the high costs, and so separated without resort to the divorce courts, being effectively debarred by their low incomes. Wives were severely restricted by the additional wrongs they had to prove against their husbands, whilst economically they were normally dependent upon husbands for support and general well being. Over the next century there was a slow but steady blunting of both forms of discrimination. The remaining section of this chapter, and the next three chapters develop the story of how the unwarranted barrier to divorce for these two groups has been partially removed. Yet today the presence of an inequitable two tier system of divorce court and magistrates court for dealing with society's marital breakdowns is a reminder that injustice and discrimination that existed a century ago have not yet been eliminated.

(1) The Matrimonial Causes Acts that followed that of 1857 were those of 1858, 1859, 1860, 1864, 1866, 1873, 1878, 1884 and 1907. Only the 1878 and 1884 Acts were of any consequence. The 1860 Act required a statutory three month delay before the divorce decree could be made absolute. This period was extended to six months by the 1866 Act.

The 1866 Act provided for the intervention of the Queen's Proctor in cases of alleged collusion. Up to 1893 the number of instances of intervention were 426, or about an average of twelve a year.

The wife had to wait for nearly seventy years before the Matrimonial Causes Act, 1923, gave her equality of treatment. The harsh Victorian double standard of morality is exemplified by Sir Creswell Creswell's judgment that, "it will probably have a salutary effect on the interests of public morality, that it should be known that a woman, if found guilty of adultery, will forfeit, as far as this court is concerned, all right to the custody of or access to her children."⁽¹⁾ This rule, which was never deemed applicable to a man, was not altered until 1910⁽²⁾. The justification for such indiscriminate justice was expressed by The Times: "in the conjugal relation, at least, the laws of nature have produced a dissimilarity of position between husband and wife, whatever may be their respective claims to superiority. It is only on one side that spurious offspring can be introduced into the family."⁽³⁾ Opponents of the Act in the House of Commons felt that if divorce was going to be granted by the civil courts, then on Christian principles the wife should have the same rights as the husband, Mr. Gladstone holding that it was "a measure which... would lead to the degradation of women."⁽⁴⁾ The effect of this clause was affirmed by John Stuart Mill: "No amount of ill usage, without adultery superadded, will in England free a wife from her tormentor."⁽⁵⁾

It was not until 1891 that the courts decided that a wife had a right to her personal liberty and with it the consequential right to live apart from her husband.⁽⁶⁾ The law of England no longer allowed the husband to bear or to restrain his wife's freedom of movement by means of imprisonment. In the words of Judge McCardie; "From the date of their decision the shackles of servitude fell from the limbs of married women and they were free to come and go at their own will."⁽⁷⁾ Yet for the majority of working class wives with children to feed and clothe, but without money or assets, the Court of Appeal's decision had no significance. They were unable to utilize their middle class sisters' newly won freedom of movement, for such action rendered them homeless and destitute.

(1) Seddon v. Seddon and Doyle, (1862) 2 S.W. & Tr.640.

(2) Stark v Stark & Hitchins(1910), p.190.

(3) 4th August, 1857.

(4) Hansard, H. of C. deb., Vol. 147 (1857) col. 393.

(5) J.S.Mill, The Subjection of Women, 1869 (1906 ed., p.86)

(6) R.v.Jackson, (1 Q.B.671).

(7) Place v. Searle, (1932) 2 K.B. 497.

The Matrimonial Causes Act of 1884

The Court of Appeal's decision in R v Jackson followed logically from the Matrimonial Causes Act of 1884 repeal of judicial power to imprison wives who, upon receipt of an order for restitution of conjugal rights, refused to return to their husbands. But of even greater importance, the wife could couple the restitution decree to her husband's adultery and straight away petition for divorce without having to wait the statutory period of two years needed for desertion. By this means the wife openly committed perjury. The decree of restitution declared her de jure hope for her husband's consortium, but de facto intention to obtain dissolution of the marriage. As Lord Gorell shrewdly observed in 1907: "It is not too much to say that the restitution part of the proceeding is a farce; because their true object is not the object which appears on the face of them".⁽¹⁾

The immediate effect of the 1884 Act on the number of wives petitioning was nil.⁽²⁾ The Act had little or no effect for almost thirty years. The reason for this surprising delay was that the majority of wives whose marriages broke down did not have the means to pay the costs involved in petitioning for divorce, let alone the additional financial burden of a prior petition for restitution of conjugal rights to the High Court. In 1914 a change occurred in the Poor Person rules whereby a small number of those working class people, previously barred from the High Court because of poverty were, now able to contemplate divorce proceedings.⁽³⁾ But as well as wives now having greater help towards payment of legal costs, there was also the disrupting influence of the Great War. Marriages were broken by the disintegrating effect of large numbers of husbands being sent away from their homes and families. With the return of peace an increasing number of wives petitioned for a decree of restitution of conjugal rights as a quick remedy against the legal handicap that had been placed upon them by the 1857 Act.

The decree of restitution had at all times been sought almost exclusively by women.⁽⁴⁾ In 1919, the proportion of wives petitioning for restitution was almost half the number seeking dissolution; by 1924 the proportion had fallen to only 3 per cent. The usefulness of a restitution decree no longer existed when wives were placed on par with their husbands by the 1923 Matrimonial Causes Act.

(1) Kennedy v Kennedy, (1907) P.51.

(2) In the five year period 1878-1882 the annual average number of petitions for restitution of conjugal rights was 19; it remained the same figure for the period 1888-1892; whilst the annual average number of wives petitioning for divorce moved slightly upward from 207 in the former to 220 in the latter period.

(3) This is discussed more fully later on, see pp.133-136.

(4) Husbands petitioning for restitution averaged approximately 3 per year for each of the three decades - 1891/1900, 1901-1910, 1911-1920.

Maintenance provisions under the 1857 Act

Up Until 1857 the wife's right to alimony was based on the fact that though the spouses had separated they were still married, and, therefore, the husband's consensual duty to maintain his wife remained undisturbed. New problems of maintenance were introduced by the right to obtain a divorce from the civil court; for with the dissolution of marriage, the duties, including that of maintenance, which the husband owed his wife, no longer existed. The 1857 Act declared that a decree of dissolution would only be given if the husband settled upon his wife sufficient property to produce an income for her basic support.⁽¹⁾ The Act had simply given to the new divorce court the same power that Parliament had formerly exercised. Alimony remained alterable at the discretion of the court, but once the deed securing the divorced wife's maintenance had been executed, it was on the same footing as any other deed.

Maintenance had now become a legal debt enforceable by the civil courts, though the Act gave no indication of how this was to be done. One legal commentary of the time records that "it had been normal, in the first instance, to grant the wife a sum about equal to the fifth part of the husband's income, leaving either party at liberty to apply to the court to vary it, should his income be reduced or increased in the course of the proceedings."⁽²⁾

The new divorce court was initially reluctant to exercise its powers of maintenance. The wife, if a respondent, would only get financial provision in quite exceptional circumstances; whilst in 1861 Sir Cresswell Cresswell, the first Judge Ordinary, held that the petitioning wife should receive no more maintenance than was sufficient for her support, and that it should be assessed on a much more moderate basis than alimony in cases of judicial separation.⁽³⁾ This judgement was repudiated four years later by Sir Cresswell's successor, Sir J.P. Wilde. Later as Lord Penzance, he was to play a signifi-

- (1) Section 32 of the 1857 Act stated that "the court may, in such case, if it sees fit, suspend the pronouncing of its decree until such deed shall have been executed" (that is, for payment of money to the wife) "and upon any petition for dissolution of marriage the court shall have the same power to make interim orders for payment of money, by way of alimony or otherwise, to the wife as it would have in a suit instituted for judicial separation."
- (2) Holdsworth & Tidsell, op.cit., p.33. They go on to observe (p.34) 'The court will no doubt feel the same disinclination which the ecclesiastical courts have been in the habit of expressing, to enforce arrears of alimony of many years standing, since alimony is allotted to the maintenance of the wife from year to year'.
- (3) (1861), 2Sw. and Tr.410.

cant part in the formation of the summary courts' matrimonial jurisdiction. For this reason alone his judgment is of interest:

Those for whom shame has no dread, honourable vows no tie, and cruelty to the weak no sense of degradation, may still be held in check by an appeal to their love of money; and I wish it to be understood, that, so far as the powers conferred by the section go, no man should, in my judgment, be permitted to rid himself of his wife by ill-treatment, and at the same time escape the obligation of maintaining her.(1)

The 1857 Act had provided that maintenance would be secured by the husband's property; but such a remedy gave no thought to a petitioning wife whose husband had no property, even though his earnings would have enabled him to make provision for her. The Matrimonial Causes Act, 1866, was passed largely as a result of Sir J.P. Wilde's criticism. Its purpose, as the Act's preface explains, was to allow the courts to order weekly or monthly sums of maintenance for the benefit of the wife, "against a husband who had no property on which the payment of any such gross or annual sum can be secured, but nevertheless he would be able to make a monthly or weekly payment to the wife during their joint lives." The full impact of this provision was reduced by a judgement of the Court of Appeal which held that the 1866 Act applied only to cases where the husband had no property on which maintenance could be secured, and that secured and unsecured maintenance were alternative.⁽²⁾ This meant that if the husband's property could only produce a small yearly secured maintenance allowance, the court had to make an order for maintenance under the 1857 Act, and ignore the possibly more advantageous financial remedy provided by the 1866 Act. Matters were not put right until the Matrimonial Causes Act of 1907.⁽³⁾ The passing of the 1907 Act gave the court powers to make concurrent orders for secured maintenance and maintenance by way of periodical payments in favour of the same person. Judges could now increase the original order if the husband's means had improved from the time of divorce, or conversely they could reduce the payment if his financial position had been reduced.⁽⁴⁾ A further humane change in the law was reflected in this Act allowing 'periodical payments' to be made to the respondent wife.⁽⁵⁾

(1) Sidney v Sidney (1865), 4 Sw. and Tr. 178.

(2) Medley v Medley (1882) 7 P.D. 122.

(3) 7 Edw. 7, C.12.

(4) S.2.

(5) S.1.

Largely due to the high cost of divorce, the court's new powers of maintenance under the 1866 Act were available in practice to only a tiny segment of the married population. The first six quinquennial periods from 1858 to 1888 saw a steady rise in the average yearly number of petitions for dissolution filed by wives, from 15 in the years 1858-1862 to 220 in the years 1884-1888; making an average of some 180 per year for the thirty years after 1858.⁽¹⁾ The total of these thirty years (5,480) is less than one fifth of the petitions (33,906) filed by wives in 1968. Only one quarter of all petitioners in 1871 were 'manual workers' or clerical workers and shop assistants. The number of wives seeking divorce from husbands who were unable to provide secured maintenance was clearly only a small proportion of the wives petitioning for divorce in the 19th century.

The 1857 Act also enabled a deserted wife to apply to the local magistrate's court or, if she preferred, to the Court for Divorce and Matrimonial Causes, for an order to protect any future earnings or property she might acquire from being seized by her husband or his creditors.⁽²⁾ Such a protection order did no more than give the wife the right to her own assets. But as Sir William Geary, writing in 1892, observed: "So to a poor wife a protection order was but little, if any advantage, and now seems absolutely useless, for it did not relieve her from cohabitation, it did not compel the husband to pay her any alimony and it did not permit her to pledge his credit for necessaries".⁽³⁾ Many of the deserted working class wives were unable to either seek or obtain work because of such reasons as age, ill health, children or lack of employment. For such destitute wives, the only remaining source of relief was the Poor Law, with its workhouse guardians, means test, hardship and human misery.⁽⁴⁾ No other legitimate source of maintenance and support was open to such wives until the legislation of 1878, 1886 and 1895 brought about the formation of the magistrates' courts matrimonial jurisdiction. Working class broken marriages were now to be regulated by the criminal courts.

(1) Civil Judicial Statistics, 1894, Table C.

(2) S.21.

(3) Geary, op.cit., pp.363-364.

(4) Even the moral insensibility of the workhouse system was extended by the recommendation of the Central Authority in its first Annual Report (for 1871-72) that deserted wives should not be given outdoor relief for the first twelve months after desertion. This was modified in 1880.

THE FORMATION OF THE MAGISTRATES' COURT MATRIMONIAL JURISDICTION

The state of married society in early Victorian England had been curtly proclaimed by Mr. Justice Coleridge: "there can be little doubt of the general domination which the law of England attributes to the husband over the wife."⁽¹⁾ One aspect of the second class citizenship of women was their lack of voting rights. No concern was felt about this deprivation by James Mill, the leading advocate for a representative system of government. Mill severely limited those whom he wished to see enfranchised: "one thing is pretty clear, that all those individuals whose interests are indisputably included in those of other interests, may be struck off without inconvenience."⁽²⁾ The interests of "almost all" women were represented in those of their fathers ^{or} ~~of~~ husbands; though Mill gave no thought for women who had neither a father or husband living. The husband had right to his wife's current and future possessions, even her children, in the name of marital duty. This same fiction of 'one flesh' allowed the husband to force his wife to return if she left him. Even access to her children could be denied to the wife up until the Custody of Infants Act, 1839. The 1839 Act conceded custody rights to the mother over her children up to the age of seven, though the court would decide, if possible, in favour of paternal rather than maternal rights.⁽³⁾ The right of the father, rather than the equality and partnership of father and mother, can be judged by Lord Justice Bowen's terse comment in 1883 regarding, "the natural law which points out that the father knows far better as a rule what is good for his children than a court of justice can."⁽⁴⁾

The degrading condition of British women in the mid-nineteenth century was being challenged by the women's rights movement. Between 1840 and 1850 the political emancipation of women was supported by Benjamin Disraeli and John Stuart Mill. The latter gave the subject a foremost place in his election campaign of 1865. Four years later, in the The Subjection of Women, he exclaimed "there remain no legal slaves except the mistress of every home". Mill believed that "the family, justly constituted, would be the real school of the virtues of freedom". But at that time the law denied to wives "any lot in life but that of being ^{the} personal body-servant of a despot, and is dependent for everything upon the chance of finding one who may be disposed to make a favourite of her instead of merely a drudge, it is a very cruel aggravation of her fate that she should be allowed to try this chance only once".⁽⁵⁾

(1) Re Cochrane (1840), 8 Dowl.633.

(2) Essay on 'Government', reprinted by Traveller Evening Newspaper, 1821, p.20-21. See also Leslie Stephens, The English Utilitarians, 1900, p.80.

(3) Re Halliday (1853), 17 Jur.56.

(4) Re Agar Ellis (1883), 24 Ch. D.317.

(5) Everyman Edition, 1929, p.249. The Subjection of Women was first written in 1861 but not published until 1869.

Though the women's rights movement aimed mainly at a greater reorganisation and improved status for the middle class women, its resultant pressures extended down to the working class women. The need for political pressure was well understood by a leading Feminist, Miss Frances Power Cobbe.

We live in these days under Government by pressure and the office must attend first to the claims which are backed by political pressure; and members of Parliament must attend to the subjects pressed by their constituents; and the claims and subjects which are not supported by such political pressure must go to the wall... were women to obtain the franchise tomorrow, it is morally certain that a Bill for the Protection of Wives would pass through the legislation before a session was over.(1)

Parliament's apology for the exclusion of women from the right to vote was provided by the view that feminine interests and wants were best left to Parliament, who would ensure that these needs were not neglected.(2)

Enfranchised male voters had already been increased five-fold by the Acts of 1832 and 1867, to two and a half million by 1870. But Governments of this time had no desire to extend voting rights to meet the intellectual appeal of the middle class Feminist womans' movement or the pressures of the unskilled male worker. To justify the limited franchise it became necessary for the legislature to remedy some of the more pressing social evils and legal injustices that could be observed in Victorian society, especially those concerning women.

Wife Assaults

It was still true to record that marriage a hundred years ago turned a woman into "a mere nonentity in point of law".(3) One aspect of the legal subjection of wives was reflected in the right of the husband to chastise his wife. Such authority had been declared by Canon Law in the twelfth century, holding "a man may chastise his wife, and beat her for her correction, for she is of his household and therefore the Lord may chastise his own,...".(4) Blackstone writing in the eighteenth century records,

The husband by the old law might give his wife moderate correction, for as he is to answer for her misbehaviour, the law thought it reasonable to entrust him with his power of restraining her, by domestic chastisement, in the same moderation that a man allowed to correct his apprentices or children, for whom the parent is also liable in some cases to answer.(5)

- (1) 'Wife Torture in England' The Contemporary Review, April 1878, p.80. In this article Miss Cobbe was vehemently protesting against the amount of physical cruelty caused to working class wives by their husbands.
- (2) John S.Mill moved an amendment to the 1867 Representation of the People's Bill that would replace the word 'man' by 'person'. The Commons rejected the proposal by 196 to 73 votes.
- (3) Montague Lush, in A Century of Law Reform, 1901, ch. 14, p.349.
- (4) Quoted in Life in the Middle Ages, translated by G.G.Coulton,(1930, Vol.2, p.119) from Gratian's Decretum, published in or around 1140. The latter was throughout the Middle Ages the great text book of Canon Law.
- (5) Commentaries, 1763, Vol.1, bk.i, ch. 15.

There is abundant evidence that the working class husbands knew their legal 'rights'. At the beginning of the nineteenth century, Randle Lewis declares, "The lower rank of people, however, still claim and exert their ancient privilege; yet some of the men outstep all reasonable bounds; and some women undeservedly and patiently endure it". (1) In 1901, Lord Bryce commenting upon Blackstone's observations on the husband's rights of chastisement, affirmed that, "This touching attachment to their old common law still survives among 'the lower rank of people' in the form of wife beating". (2) A few years later Lady Bell wrote of working class life in Middlesborough, "wife-beating is not so entirely a thing of the past as some of us would like to think".(3)

The remedy of a mensa et thoro provided by the ecclesiastical courts prior to 1857, and divorce or judicial separation by the civil courts after 1857 offered no practical form of legal relief to working class wives. The North British Review records a case brought to court in 1857, in which the husband had been charged with assaulting his drunken wife, the magistrate confessing that

he had great difficulty in knowing how to act in this case. The present defective state of law did not enable poor persons to obtain a separation, which could be done by the rich, or the defendant would certainly be entitled to be removed from the society of such a woman as the complainant, and she from his violence, provoked as it might be, by her misconduct. Until some power was given to magistrates, or other tribunals, to separate persons in the humbler walks of life, there was no chance of putting an end to such cases as the present, which sooner or later terminated in fatal results.

The same journal went on to observe, "it really matters very little to the poor man what is the state of the law, if, by reason of its costliness, it is not within his reach." (4) The Review's solution was to suggest amendment of the 1856 Matrimonial Causes Bill then proceeding through Parliament, to provide powers for stipendiary magistrates to decide whether matrimonial cases should be allowed to proceed to the Divorce Court as in forma pauperis suits. But the 1857 Act gave no such remedy, with the result that "Those who stand most in need of the protection of the law are those who have most difficulty in appealing to it. This is especially the case where women are concerned.... Evidence for this came... from among an enormous mass of tiresomely similar ones, reported in the newspapers of the day." (5) Indignation that the state of the law was ineffective was reinforced by such lurid newspaper reports and the campaigns of reformers such as John Stuart Mill, Frances Power Cobbe and Serjeant Pulling.

(1) Reflections on the Causes of Unhappy Marriages, 1805, pp.86-7.

(2) James Bryce, Studies in History and Jurisprudence, 1901, Vol.2, p.430.

(3) Florence Bell (Lady), At the Works, 1907 (1969 ed., David and Charles Reprints, p.238).

(4) The North British Review, Vol.27 (1857), pp.187-8.

(5) C.Rose, European Slavery, or Scenes From Married Life, 1881, p.5.

John Stuart Mill writing after the 1857 Act had come into operation, believed the answer to this social evil was by granting the courts' powers to provide decrees of dissolution or separation against cruel husbands.

Until a conviction for personal violence, or at all events a repetition of it after a first conviction, entitles the woman, ipso facto to a divorce, or at least to a judicial separation, the attempt to repress these 'aggravated assaults' by legal penalties will break down for want of a prosecutor, or for want of a witness... When we consider how vast is the number of men, in any great country, who are little higher than brutes, and that this never prevents them from being able, through the law of marriage, to obtain a victim, the breadth and depth of human misery caused in this shape alone by the abuse of the institution swells, to something appalling. (1)

Mill held the law denied to wives in the mid-nineteenth century, "any lot in life but that of being the personal body-servant of a despot." (2) The marital relationship was that of husband and slave, in the eyes of Miss Frances Power Cobbe, who wrote: "The position of women before the law as wife, mother and citizen remains so much below that of a man and husband, father and citizen that it is a matter of course that she must be regarded by him as an inferior." (3) Relief from intolerable physical conditions and not economic hardship was the real spur to legislative action. Wives were deterred from prosecuting their husbands before the justices since the remedy - further financial suffering resulting from their spouses' imprisonment and renewed physical violence on release - was worse than the condition sought to be remedied. As Serjeant Pulling noted in an address to the Social Science Congress in Liverpool in 1876: "The lesson taught to the ruffian is, that if he ill-uses his dog or his donkey he stands a fair chance (thanks to the Society for Preventing Cruelty to Dumb Animals) of being duly prosecuted, convicted, and punished; but that if the ill-usage is merely practised on his wife the odds are in favour of his entire immunity, and of his victim getting worse treatment if she dare appear against him." (4)

- (1) The Subjection of Women, 1869 'Everyman' edition: p.252.
- (2) Ibid, p.249.
- (3) 'Wife Torture in England', The Contemporary Review, 1878, p.80.
- (4) Transactions of the National Association for the Promotion of Social Science, 1876, p.46.

Parliamentary Action: The 1878 Act

The need for a parliamentary Bill to protect working class wives from the assaults of their husbands was raised in "an appeal for women" by Colonel Egerton Leigh in the House of Commons in 1874. The Conservative Prime Minister, Benjamin Disraeli, asked Colonel Leigh to allow:

the Secretary of State for the Home Department, whose mind is now occupied with this and similar subjects, time to reflect as to the practical mode in which the feeling of the country upon this subject can be carried into effect Her Majesty's Government would bear in mind the evident feeling of the House on this subject.(1)

Statistical justification for parliamentary action was provided in the following year by a Home Office Report.⁽²⁾ Miss Cobbe estimated from evidence contained in the Report and the reports of Chief Constables that approximately 1,500 brutal assaults were yearly committed by men on women, the great majority being that of husband on wife.⁽³⁾ For Serjeant Pulling, the judicial answer to wife beating was that of flogging and imprisoning the convicted husband. But Miss Cobbe appreciated that assaulted wives needed financial provision as well as protection from brutal husbands. Her remedy was that:

A Bill should, I think, be passed affording to these poor women by means easily within their reach, the same redress which women of the richer classes obtain through the Divorce Court. They should be enabled to obtain from the Court which sentences their husbands a Protection Order, which should in their case have the same validity as a judicial separation. In addition to this, the custody of the children should be given to the wife, and an order should be made for the husband to pay the wife such weekly sum for her own and her childrens' maintenance as the Court may see fit.(4)

Such a Bill was prepared in 1878 by Mr. Alfred D.Hill, a Birmingham magistrate and also an acquaintance of Miss Cobbe.

In the previous year, Mr. Herschell (later Lord Chancellor) and Sir Henry Holland (later Viscount Knutsford) had presented a Bill (No.147) dealing with the requirements for maintenance in the Divorce Court. Due to the end of that Parliamentary session it was re-introduced next year in 1878. On being passed from the House of Commons to the House of Lords, Lord Penzanze made a vital change in the Bill's intention, by proposing an amendment which would bring the Bill's applicability from Divorce Court to summary court level. Further amendments were made, but on the third reading, Lord

- (1) Hansard, H.C. Deb., Vol.219, col.396.
- (2) The State of the Law Relating to Brutal Assaults, 1875, Cmd.1138, (P.P's 1875, Vol.61.)
- (3) An examination of Police Returns (Table 8) for the years 1870-74 shows an average of 2,155 convictions for aggravated assaults on women and children. The number increased each year over the five years to 2,275 convictions in 1874. This suggests the Home Office figure of 1,500 was a conservative estimate.
- (4) Wife Torture in England, op.cit., p.83.
See also her autobiography: Life of Frances Power Cobbe, 1894, Vol.2, pp.218-225, especially pp.220-221.

Penzance proposed that a wife whose husband had been convicted of an aggravated assault upon her should have the right to obtain a separation order together with maintenance from the magistrate's court. This all important amendment was accepted by the Lords and approved by the Commons. Lord Penzance had previously shown sympathy for the plight of the ill-used married woman in his judgments as a divorce judge from 1863 to 1872. In Kelly v. Kelly in 1869, he referred to a country clergyman who had tried to force his wife into a state of complete subservience:

the feature of this case is the adoption by the respondent of a deliberate system of conduct towards his wife with the view of bending her to his authority. A man who sets about to achieve this end by purposely rendering a woman's daily life unhappy is in danger of overstepping his rights, as he is pretty sure to fall short of his duties The health and safety of the wife is, no doubt, the leading consideration of the law.(1)

The latter sentiment was reflected in the legislation of 1878.

The Matrimonial Causes Act of 1878 provided that if the husband was convicted of an aggravated assault upon his wife the court before which he was convicted could make a separation order "if satisfied that the future safety of the wife is in peril". Magistrates could in addition to making a separation order for the wife, order under section 4 (1) of the Act that the husband should:

pay to his wife such weekly sum as the court or magistrate may consider to be in accordance with his means, and with any means that the wife may have for her support, and the payment of any sum of money so ordered shall be enforceable and enforced against the husband in the same manner as ... under an order of affiliation; and the court or magistrate ... shall have power from time to time to vary the same on the application of either the husband or the wife, upon proof that the means of the husband or wife have been altered in amount since the original order(2)

Working class wives had acquired for the first time a statutory right to financial support from their husbands. However, maintenance was ancillary to the granting of a separation order. The former matter had been a secondary

(1) (1869), 2P.D. 32.

(2) The original Bill had provided that the husband should pay to the board of guardians for the parish or union in which he resided at the time of the conviction, such amount as the magistrate or court felt he was able to pay; the guardians passing this on to the wife. The guardians would also have been able to claim against the husband, as if the wife had actually become chargeable to the Board, for the sums spent maintaining her, by summons through a magistrate. (See Hansard, H. of L. Deb., Vol. 239, col.191). In the subsequent history of the magistrates' matrimonial jurisdiction, Lord Penzance's proposal has contemporary interest, for it is now widely argued that payment from the husband should be direct to the Supplementary Benefits Commission.

consideration in the legislators' minds, and for this reason there was no statutory limit as to the amount of maintenance that might be ordered.⁽¹⁾ The court also had discretion to give the wife the legal custody of the children of the marriage under ten years of age. But proved adultery by the wife disqualified her from maintenance unless such adultery had been condoned, condoned or connived at.

The sponsors of the 1878 Act had wished to see available a quick and cheap legal remedy providing protection to wives of brutal husbands. But the Act did not effectively achieve its purpose because wives were unwilling to complain when they knew that maintenance was unlikely to be regularly paid, and a non-cohabitation clause could^{not} be effectively enforced against a ruffian husband. Mr. C. Rose provides a vivid explanation of the Act's failure:

The difficulty in obtaining legal protection for a half-killed wife is so great, the probability that she (should she survive) will find it her wisest course to condone the grossest offences, is so strong, as to almost entirely deprive her of the protection of natural relations or friends, and even of that protection which, in a civilized country, is extended to every other human being and to some brute beasts, by the common sentiment of humanity of the general public.⁽²⁾

Nor did the 1878 Act help wives who had been deserted. In such a situation, the wife's need was for maintenance not protection. A deserted wife without financial means was forced to enter the workhouse before the Parish authorities could take action against the husband.⁽³⁾ The two other available remedies were of no practical benefit to a working class wife. The common law right of pledging her husband's credit for necessaries was an ineffectual remedy in practice. The remaining possibility was to petition for financial provision to the Divorce Court by way of a decree of restitution of conjugal rights, judicial separation, nullity or dissolution of marriage.⁽⁴⁾ The latter remedy involved legal fees and court costs beyond the pocket of the housewife without means of her own. Such criticisms were to be partially remedied by more sweeping reforms in 1886 and 1895.

- (1) In 1878 the High Court declined to interfere with a justice's decision to award a wife £3 a week maintenance on the ground that it had not been plainly shown that this amount was excessive.
Grove v. Grove (1878), 39. L.T.546; 27 W.R.324.
- (2) European Slavery or Scenes from Married Life, 1831, p.10.
- (3) The history of the Poor Law's attitude to deserted wives is discussed in Separated Spouses, ch.10.
- (4) Section 2 of the original 1886 Bill had given the justices power to make a judicial separation order on proof of the husband's desertion.
(Parliamentary Papers, 1886, Vol.4., p.25).

The Married Women's (Maintenance in case of Desertion) Act, 1886

The Married Women's (Maintenance in case of Desertion) Act gave a more direct and economically useful remedy to wives. The Act was "the source of the ... most important of the streams of legal development ..." in "the intricate history of this (the law of maintenance) branch of family law."⁽¹⁾ For the first time summary courts could make orders for deserted wives, that had previously been only obtainable from the Parish authorities. Magistrates were enabled to award the wife maintenance up to a maximum limit of £2 a week, if she could show the Bench that her husband was able to support her and their children but had refused or neglected to do so and had deserted her. The House of Lords rejected a provision in the original Bill that would have allowed maintenance to be ordered for children of the marriage in their own name. The 1886 Act, like the 1878 Act, was intended to act as a safeguard for the working class wife. Unlike the 1878 Act, it did not provide for the wife's protection by way of a non-cohabitation order; indeed, the 1886 Act by implication reinforced the wife's duty to live with her husband by declaring that she was bound to give her husband consortium if he wished to re-establish cohabitation. But she could still proceed under the terms of the 1878 Act if she requested protection.

The 1886 Act allowed no financial provision for the wife forced to leave her husband because of his cruelty and maltreatment. Ill-treatment of wives caused one magistrate to remark: "the sight of this domestic misery completely appalls me. I can bear it no more."⁽²⁾ Another magistrate commented: "If I were to sit here from Monday morning till Saturday to protect women that had drunken and brutal husbands I should not get through half of them."⁽³⁾ Wives who left their husbands under such conditions were unable to provide for themselves or their children. ~~For these ill-used wives the choice was either the debasement of the workhouse or the immorality of an irregular union or the vicious life of a prostitute.~~

(1) O. Kahn-Freund, Matrimonial Property Law, Ed. W. Friedmann, 1955, p.306 and p.303.

(2) Thomas Holmes, Pictures and Problems from a London Police Court, 1900, p.61.

(3) Ibid, p.62.

The Summary Jurisdiction (Married Women) Act, 1895

The Summary Jurisdiction (Married Women) Act, 1895, consolidated and amplified the law; unifying the earlier separate conditions for protection given by the 1878 Act, and maintenance provided by the 1886 Act. The maximum amount that the justices could order for the wife remained at two pounds set by the 1886 Act. Children were to wait another twenty-five years until the Married Women (Maintenance) Act of 1920, before separate provision could be ordered for them under this jurisdiction.

The Lord Chancellor described the 1895 legislation as a jurisdiction to benefit "the poorer classes".⁽¹⁾ Mr. E.W. Byrne, the promoter of the 1895 Bill, modestly described its purpose as getting rid of "some of the anomalies which existed in the civil law and the criminal law in cases of aggravated assaults on wives by husbands, and further, to give similar relief in cases of persistent cruelty by a husband towards a wife as now existed in cases of aggravated assault."⁽²⁾ The new Act was significant because it conferred a general matrimonial jurisdiction on magistrates' courts. They were given extensive powers which in certain respects were, and have remained, wider than those of the High Court. Magistrates were now able to make maintenance orders where husbands had wilfully neglected to maintain their wives and families. It was not until 1949 that the High Court had the power to do the same.

The 1895 Act contained the nucleus of grounds for complaint that now appear in the Matrimonial Proceedings (Magistrates' Court) Act of 1960. A wife could complain to the magistrates' courts (a) when her husband had been convicted of an aggravated assault; (b) when her husband had been convicted on indictment of an assault upon her and had been sentenced to pay a fine of more than £5 or to a term of imprisonment exceeding two months; (c) when her husband deserted her; (d) when her husband had been guilty of persistent cruelty to her, causing her to leave the home and live separately from him; and (e) when her husband was guilty of wilfully neglecting to provide reasonable maintenance for her or her infant children whom he was bound to maintain, such as to cause her to live separate from him.

(1) Hansard, H. of C. Deb., Vol.34, col.62.

(2) Ibid.

Maintenance Orders

The husband's adultery by itself did not allow the wife to obtain maintenance. A double moral standard operated between men and women, for though wives had no redress against their husband's infidelity, a maintenance order obtained on some other ground could be revoked upon proof of her subsequent misconduct. Another grievance of wives was that they could not obtain an order whilst still living under the same roof as the husband. As one magistrate explained to the 1909 Royal Commission on Divorce and Matrimonial Causes: "I say to the wife, 'Have you left him?' she says, 'I have not left him'. I say 'But you must leave him for his cruelty or failure to maintain.' She says 'How can I leave him? I have my children; where am I to go?'"⁽¹⁾ The only place for many such wives was the workhouse with all its squalid associations.

Some wives who succeeded in obtaining an order found themselves with an amount totally inadequate for the needs of the family. In one case a wife and one child were awarded three shillings a week out of the husband's wage of twenty eight shillings.⁽²⁾ One clergyman remarked: "It seems to me the magistrate takes rather a lenient view of the man and rather a large view of the man's necessities, and says the man must be able to keep himself respectable; and if he is to be at work he must live well; those things are taken into consideration and dwelt upon too largely."⁽³⁾ Other witnesses felt that this was done with the purpose of forcing a wife to return to her husband.⁽⁴⁾ The truth was that magistrates had to balance from one working wage the needs of two separate households; on the one hand a wife and children, with that of the husband who was often supporting a common law wife and family. This still remains an insoluble problem.

Arrears in payment of maintenance were widespread. Failure to receive maintenance led many wives to find another man who could provide for them. As a police court missionary explained, "a woman cannot live on the maintenance money if paid irregularly; she generally has to resort to taking lodgers or keeping a small shop, and if she takes lodgers she almost invariably enters into another connection."⁽⁵⁾ The ensuing adulterous relationship could then be seized on by the husband to absolve him from any maintenance obligation.

Evidence was given about the difficulties of enforcing maintenance. The Metropolitan Police Magistrate for West London, Mr. E.W. Garrett, explained that "Even if (the magistrate) leaves the man only the barest necessities of existence, in which case he will not comply with the order, there is insuf-

(1) Minutes of Evidence, Vol. 1, Cd. 6479, p.93, q.1948.

(2) Ibid, Vol. 2, Cd.6480, p.311, q.20178.

(3) Ibid, p.315, q.20277.

(4) Ibid, Vol. 1, p.440, q.11175-8.

(5) Ibid, Vol. 2, p.301, q.19898.

(6) Only 16% of the 512 husbands who had had maintenance orders made against them by the Newcastle-upon-Tyne justices during the previous eight years were still paying. (Evidence, Vol. 1, pp.333-4, q.8175-76).

ficient to maintain the wife and children in a separate home. In my experience the result in the majority of cases is that the wife has no alternative but either to return to her husband, in which case her position is worse than before, or to go with her children into the workhouse."⁽¹⁾ Many witnesses pointed to the futility of the situation in which the wife could not enforce her rights without means of finding the whereabouts of her husband, for the police could provide little assistance without his address; and even if he was traced, the hopes of enforcing maintenance were slender. Wives who pursued their defaulting husbands had to pay for the summons, the committal order, and the process to enforce the order. The summons was costly and gave the wife no advantage, for the ultimate sanction of imprisonment cancelled the arrears, whilst allowing no possibility of payment. At the same time a husband who through unemployment or poverty could not pay the maintenance order, nor get the amount reduced, might find himself continuously in and out of prison if a vindictive wife repeatedly obtained a fresh summons.

A warrant which gave the police authority to bring the husband before the court, was issuable only on behalf of the poor law guardians if the wife obtained outdoor or workhouse relief. But wives felt a "very strong feeling that going into the workhouse carried with it a sort of stigma which attaches permanently"⁽²⁾. Indeed, "for many a woman, unless she has sunk to a hopeless condition, the association of the workhouse is the most humiliating experience of her life".⁽³⁾ But the condition of separated wives was such that they formed a large proportion of the workhouse population.⁽⁴⁾ This, and similar evidence, led the Commission to recommend that: "the Guardians should have power to apply for and meet the expenses of a warrant on her behalf, without the necessity of her becoming chargeable. At present, if the wife is unable to recover her maintenance money through lack of means, she becomes chargeable in many cases".⁽⁵⁾ Because of the problems encountered by wives in collecting maintenance from their husbands as well as the difficulties of enforcement the Report proposed that maintenance orders should be paid through the court and not directly to the wife, this recommendation being implemented by the Criminal Justice Administration Act of 1914. The same Act allowed the court to take enforcement proceedings on behalf of the wife. This procedural device transformed the situation of separated wives attempting to enforce their declared rights to be maintained by their husbands.

(1) Evidence, Vol. 2, p.31, q.12952.

(2) Evidence, Vol. 1, p.318, q.7784, the evidence of Mr. B.C. Brough, the Stipendiary Magistrate for the Potteries District.

(3) Evidence, Vol. 2, p.291, q.19554. See also ibid, p.306, q.20029.

(4) See Cecil Chapman, Marriage and Divorce, 1911, p.80.

(5) Report, Cd.6478, par.173.

TABLE 8(a)

Wive's' maintenance applications and orders made in
magistrates' courts: 1893-1913

Year	Matrimonial applications	Matrimonial orders made	Percentage successful
1893*	4,307	3,416	79
1894*	4,677	3,631	78
1895*	4,130	3,271	79
1896	7,428	5,314	72
1897	7,766	5,464	70
1898	8,187	5,867	72
1899	9,267	6,438	69
1900	9,553	6,583	69
1901	10,450	7,257	69
1902	10,595	7,395	70
1903	11,829	7,962	67
1904	11,251	7,681	68
<u>Yearly average</u>			
1895-99	7,355	5,271	72
1900-04	10,736	7,375	69
1905-09	11,067	7,500	68
1910-13	10,765	7,408	69

Notes

* For years 1893, 1894 and 1895, two separate figures are provided showing applications and orders:

- a) for maintenance under the 1886 Act, and;
- b) separation orders together with maintenance under the 1878 Act.

<u>Orders made under:</u>	<u>(a) 1886 Act</u>	<u>(b) 1878 Act</u> ≠
1893	2,591	825
1894	2,588	1,043
1895	2,236	1,035

≠ (Orders under the 1878 Act were made for all complaints in 1893 and 1894, whilst only 17 wives were unsuccessful in 1895.)

Source: Judicial Statistics, England and Wales, Part I,

'Criminal Statistics',
 Table XIV. 1893 is the first year for which maintenance figures are available.

The fact that wives began to exercise their rights to seek maintenance under the Acts of 1886 and 1895 produced a slight decline in the Poor Law Offence of 'deserting or neglecting to support the family' from some 5,300 orders in the 1880's. The 1895 Act's implementation at the beginning of 1896 resulted in an immediate increase in the number of wives turning to the magistrates' court. There was a 60 per cent increase in the number of complaints made in 1896 (7,428) compared with 1894 (4,677); a further 30 per cent rise in the number of complaints took place between 1896 and 1900 (9,553). Between 1900 and the outbreak of the first World War, complaints increased by one-fifth. Largely due to the implementation of the Licensing Act of 1902, the largest number of complaints between 1895 and 1914 were made in 1903 (11,829).⁽¹⁾

The passing of the Licensing Act 1902 filled a gap in the protective network for ill-used wives by adding habitual drunkenness as defined in the Habitual Drunkards Act, 1879 as a ground for complaint. Through section 5 of the 1902 Act a wife could obtain maintenance under the 1895 Act if her husband was an habitual drunkard.⁽²⁾

Separation orders

Under section 5(a) of the 1895 Act, justices could order "that the applicant be no longer bound to cohabit with her husband (which provision while in force shall have the effect in all respects of a decree of judicial separation on the grounds of cruelty)".⁽³⁾ The fact that the ratio of separation orders to maintenance orders in 1903 was 93% shows that magistrates now included, as a matter of course, a non-cohabitation clause in every order for maintenance.

There had been very little Parliamentary debate over the 1895 Act, and "it may be doubted whether the effects of its provisions (section 5(a)) were adequately appreciated at the time it was passed".⁽⁴⁾ The exclusive focusing of magisterial attention on giving the wife a separation order received a sharp jolt from the judiciary. In 1906 Sir John Gorell Barnes, then President of the Probate, Divorce and Admiralty Division of the High Court, condemned the widespread use of separation orders, reminding magistrates that the 1895 Act intended that a non-cohabitation clause was to be used only in cases of cruelty and habitual drunkenness, where protection as well as maintenance was required.

- (1) In 1903, 281 separation orders were given to wives of habitual drunkards, followed by 163 such orders in 1904. The yearly average now dropped to 127 orders in the years 1905-09, and 133 in the years 1910-13, then fell further to 71 in 1924 - the last year for which a figure is available.
- (2) The word "habitual" is not explained or defined in the 1879 Act and so it becomes a question of fact whether drunkenness is only occasional or is "habitual" within the meaning of the Act.
- (3) It is perhaps not without significance that the relevant section of the 1960 Act, S.2(1)(a), omits "on the grounds of cruelty".
- (4) Report of the Royal Commission on Divorce and Matrimonial Causes: Cmd.6478 1912, p.67, par.137.

He went on to observe:

Those who were concerned with it [the 1895 Act] appear to have their minds, if not entirely yet mainly, on the protection of women rather than on the general effects of the Act and its probable influence on the morality of the country Permanent separation without divorce has a distinct tendency to encourage immorality and is an unsatisfactory remedy to apply to the evils it is supposed to prevent.(1)

Spouses were being judicially separated without the opportunity to enter a new marriage, the result being the formation of new illicit unions.

Newspaper reports in the late nineteenth century contained references to informal cohabitation among the working classes.(2) But as Rowntree and Carrier note: "How frequently such cases were and how many of them arose because of the difficulty of obtaining legal divorce from a previous spouse we do not know".(3) Informal 'marriage' to a second person whilst the first spouse was still living was incorrectly seen by some to be legally permissible if a document of agreed separation was signed, or after seven years separation.(4) Upper class opinion was shifting to a concern with the reported imperfections of working class sexual behaviour and to a recognition that environmental and social influences were obstacles to the acceptance of the approved familial code.

Working class conditions

What we know today about Victorian working class family life depends very largely on that written by the middle-class pens of philanthropists, social workers and civil servants; and from published evidence to and reports of government enquiries.(5) The working-classes did not have the education, ability or leisure to write books and keep diaries of their everyday life. Nor could Victorian middle-class society learn by conversation with the working classes about conditions under which the latter laboured and lived; for the social structure did not allow this social contact.

(1) Dodd v Dodd, (1906) ^P203, 207.

(2) Griselda Rowntree and Norman Carrier, 'The Resort to Divorce in England and Wales, 1858-1957', Population Studies, 1958, p.189, fn.2. Examples given are Weekly Budget (8.8.1891), Court Circular (15.8.1891), and News of the World (1.3.1891).

(3) Ibid. Neither the 1912 Gorell or 1956 Morton Commissions were able to estimate the extent of de facto separation or subsequent cohabitation.

(4) See Lady's Own Paper, 30th September, 1871: and Reynold News, 5th September, 1891.

(5) The history of the family in this country has not yet been written, in the words of Professor Glass it is "largely an untold tale". The following three pages do not attempt to correct this vacuum, but rather, focusses on the increasing Victorian concern about the reported condition of the working classes.

This explains why much of the Victorian commentaries are biased by the traditional puritan moral code of middle class belief. The joint aim of reform and improvement of the lot of those whom they describe sometimes colours these middle-class accounts of working class life.⁽¹⁾ The picture of rife immorality, loose-living, prostitution, drink and gambling as common features of working-class industrial quarters must be judged in this setting. Yet many of these writings do bring a brief glimpse of what conditions must have been like; and they are the only source we have.

Customary behaviour and practice was easily transmitted and learnt in the overcrowded tenement conditions of the poor. Helen Dendy remarked: "So often marriage is accepted as the only way of escape from conditions which have become unbearable."⁽²⁾ Observation in the slums of East London showed

Marriage, as an institution, is not fashionable in these districts. Yet so long as cohabitation is possible - that is to say, so long as neither the hospital, the prison, nor the churchyard effects a separation - the couples are fairly faithfully, and look upon themselves as man and wife If you ask the couples who live happily together why they don't get married, some will tell you frankly that they never gave it a thought, others that "it's a lot of trouble, and they haven't had time."⁽³⁾

A similar picture of working-class family life was presented by C.S. Devas: "these labourers are not tied in bonds, like the upper classes, by the institution of marriage".⁽⁴⁾ These reports of the life and moral standards of the poor were an embarrassment to a prosperous middle-class Christian society that based its own well being - and therefore the country's - on the persuasion that divine dogma was their guideline.⁽⁵⁾

- (1) One notable exception is the study of iron workers in Middleseborough by Lady Florence Bell, At the Works, 1906; "A fierce light beats in these days upon the working classes, revealing much that in more prosperous quarters is not seen, but it is probably there all the same" (p.270).
- (2) H. Dendy (née Bosenquet), The Family, 1906.
- (3) George R. Sims, How the Poor Live, 1889, p.38. See Lady Bell, op.cit., p.241; who notes that such ties were felt to give the woman a hold over the man which did not exist in marriage.
- (4) Studies in Family Life, 1886.
- (5) By 1885 the Social Purity Alliance could boast of a membership of 3,000.

[Observations of the daily life of the poor produced in Victorian middle-class reformers a moral revulsion that prevailed in a good deal of their pressure to ameliorate working class family life. But much of the reported immorality was no more than to be expected within conditions of gross overcrowding.⁽¹⁾ An enquiry carried out by the London Congregational Union describes life in the poor quarters:

Those who appear to be married are often separated by a mere quarrel, and they do not hesitate to form similar companionships immediately.⁽²⁾

Charles Booth thus commented on attitudes in parts of East London at the end of the 1890's:

With the lowest classes pre-marital relations are very common, perhaps even usual. Amongst the girls themselves nothing is thought of it if no consequences result; and very little even if they do, should marriage follow, and more pity than reprobation if it does not.... This peculiar code of morality is independent of recognised law, and an embarrassment to religion, but it is intelligible enough and not unpractical in its way I do not know exactly how far upwards in the social scale this view of sexual morality extends, but I believe it to constitute one of the clearest lines of demarcation between upper and lower in the working class.⁽³⁾

It would be a mistake to conclude from these and similar statements that working class family life in 1900 was completely at variance with expected practice. The hierarchy of status and class within the working-class ranged from skilled artisan and foreman down to the unskilled labourer. Reports of working-class immorality are largely describing the depressed lumpen proletariat. They record an accepted sub-culture of informal 'marriage' amongst a large segment of the population which was at odds with the proclaimed norms of society. Cause must be attributed to the unchangeable bonds of marriage prescribed by English law for those who could not afford to pay the high costs of judicial

(1) See Lady Bell, op.cit., p.240. It is no coincidence that incest was only made a criminal offence in 1908 by The Punishment of Incest Act, which allowed imprisonment for up to two years if found guilty of this misdemeanor.

(2) The Bitter Cry of Outcast London, p.7.

(3) Life and Labour of the People of London: Religious Influences, (Third series) (1902), Vol. 1, pp.55-56.

divorce. For a minority of the poor, marriage remained an alien institution that need not be contemplated. For others, the lottery of marriage became a gamble within a society which allowed the loser no formal second chance until widowhood.

The middle and upper class population had to face the reality that within their industrial society the great mass of their countrymen were perpetually liable to physical and material degradation. Social anxieties were still further aroused by fears for the Empire following the large percentage of army recruits rejected for the Boer War due to physical defects.⁽¹⁾ Uneasiness was also felt amongst the higher income groups over their declining birth rate by eugenicist claims that "this systematic depletion of the best blood of the country is a new phenomenon in the history of England."⁽²⁾ The remedy was felt to be provision of a better environment for the mass of the population to work and live in.⁽³⁾ These influences lead Winston Churchill as President of the Board of Trade in the Asquith Government to defend the social policy of the Liberal Party.

People talk vaguely of the stability of society, of the strength of the Empire, of the permanence of a Christian civilization. On what foundation do they seek to build? There is only one foundation - a healthy family life for all. If large classes of the population live under conditions which make it difficult if not impossible for them to keep a home together in decent comfort, if the children are habitually underfed, if the housewife is habitually overstrained, if the breadwinner is under-employed or under-paid, if all are unprotected or uninsured against the common hazards of modern industrial life, if sickness, accident, infirmity, or old age, or unchecked intemperance, or any other curse or affliction, break up the home, as they break up thousands of homes, and scatter the family, as they scatter thousands of families in our land, it is not merely the waste of earning-power or the dispersal of a few poor sticks of furniture, it is the stamina, the virtue, safety and honour of the British race that are being squandered ... the object of every constructive proposal (which we are making) is to buttress and fortify the homes of the people.⁽⁴⁾

Similar considerations, too, led Sir Gorell Barnes to ~~continue~~^{give} his judgement in the case of Dodd v. Dodd as a call to reform.

- (1) See the Report of the Inter-Departmental Committee on Physical Deterioration; Cd.2175, 1904.
- (2) W.C.D. and C.D. Whetham, 'The extinction of the upper classes', Nineteenth Century, July, 1909, pp.97-108. Using Burke's Peerage as a source, the Whethams examined families who had held their title to nobility for at least two previous generations, ~~and~~ choosing 100 consecutive fertile marriages for each decade from 1830 to 1890. They found a drop from 7.1 births per fertile couple in 1831-41 to 3.13 births for 1881-90.
- (3) 1909 saw the introduction of income tax rebates for children.
- (4) The People's Rights, 1910, p.120.

CONSTRAINTS OF POVERTY AND INEQUALITY OF SEX: 1900-1949

England at the beginning of this century had two systems of legal remedy for matrimonial difficulties. The wealthy brought their broken marriages to the High Court in London. An increasing willingness to seek divorce compared with half century earlier had been helped by the fact that by now ownership of capital had replaced land as the predominant and most important form of wealth. Upon divorce the middle class could now divide their assets in the form of stocks and shares without interfering in any way with the fortunes of their offspring or kin, as would previously have resulted from the necessity of unscrambling complex marriage settlements involving real property. But Victorian commercial and industrial expansion did nothing to ease the chances of divorce for less wealthy disunited spouses. Some 11,000 working class wives annually sought matrimonial orders from the local magistrates' courts. Working class lack of access to the divorce court meant that in the period 1901-05 for every one petition filed for dissolution or nullity fourteen maintenance applications were made to summary courts. Discrimination existed not only against the less wealthy but also against all women. The double standard operating in the grounds for divorce ensured that only about four out of every ten dissolution and nullity petitions were presented by wives. A comparison of the two jurisdictions in the period 1901-05 shows that for every one wife seeking a licence to marry again, thirty-six sought the cold comfort of a maintenance order. Both the working classes and women had reason to dislike our matrimonial laws and their administration.

Thus, upon the eve of the Kaiser War, the Womens Movement, consisting essentially of members drawn from the middle class, were protesting against their insubordinate position in the divorce court; and at the same time the Labour Movement was resentful that its working class members of either sex were being debarred by poverty from seeking divorce. Permanent separation lead to the formation of illicit new unions and illegitimate offspring. This involuntary repudiation of the institution of marriage caused many observers to query whether a more satisfactory and permanent solution was required for the great mass of broken marriages than that offered by the summary courts. It was clear that the divorce laws of this country as expressed in the 1857 Act had failed as a viable remedy for the working classes. The urgent need to reform this unsatisfactory state of affairs was brought to the attention of both Parliament and the public by the judgment in 1906 of Sir John Gorell Barnes in the case of Dodd v Dodd.

That the present state of the English law of divorce and separation is not satisfactory can hardly be doubted. The law is full of inconsistencies, anomalies, and inequalities amounting almost to absurdities; and it does not produce desirable results in certain important respects. Whether any, and what, remedy should be applied raises extremely difficult questions, the importance of which can hardly be over-estimated, for they touch the basis upon which society rests, the principle of marriage being the fundamental basis upon which ... civilised nations have built up their social system This judgment brings prominently forward the question whether ... any reform would be effective and adequate which did not abolish permanent separation, as distinguished from divorce, place the sexes on equality as regards offence and relief, and permit a decree being obtained for such definitive grave causes of offence as render future cohabitation impracticable and frustrate the object of marriage. (1)

Here in 1906, the President of the Divorce Court was providing much more than a warning against objectionable summary court practice; it was a general condemnation of the two-tier system of divorce and separation. There was an immediate response of approval from the press. (2) The Westminster Gazette (30th April, 1906) wrote: "Undoubtedly the position of people living under permanent separation orders without divorce is an anomalous one which has a tendency to produce immorality." The Daily Telegraph (7th May, 1906) was outright in its opinion: "It is not and it cannot be denied to be a fact, that a law exists which is declared to be contrary to the interests of public morality by the highest authority concerned in its interpretation upon the bench. A law of that kind ought not to remain upon the Statute Book for twenty-four hours after a declaration of that character." Nor did the Church Times (4th May, 1906) doubt the injustice of the divorce laws: "That the existing law, with all its inequalities, inflicts hardship in certain cases, we are not prepared to deny; neither should we be opposed to alteration tending to minimise injustice."

(1) (1906) P.207 - 208.

(2) The newspaper quotations are taken from Richard T. Gates, Divorce or Separation: Which?, 1912, p.30 et.seq.

Foremost in the mind of critics was the aspect of sexual morality. The Observer of 1st September 1907 records: "The real difficulty lies with cases of unforeseen incompatibility arising after marriage, and with regard to the scope of admissible incompatibility. Separation is always a doubtful remedy - morally." In similar vein The Guardian (14th April, 1909) declared:

We think it exceedingly probable that these orders are responsible for far more immorality than divorce itself. Whereas divorce recognises and registers the civil results of immorality actually committed, separation orders facilitate and encourage its future commission by placing thousands of married men and women in a position of enforced celibacy.

A few months later The Times (19th July, 1909) wrote:

We do not weaken the marriage law, it is said, by removing some obvious and accidental unjust effects; the freedom with which judicial separations are granted is a scandal, and does mischief to the respect in which marriage is held among the poor. It is urged, and obviously with some force, that the worst way of preserving the sanctity of marriage is to facilitate separations, which, with human nature as it is, very often becomes in fact, though not legally, divorces.

The animated correspondence on the subject of separation orders and divorce for the poor in The Daily Telegraph during August and September, 1908, provides an example of public dissatisfaction with the law and practice of our divorce laws. Its editorial comment on the 6th August, 1908 expressed the views felt by many leading persons on the unsatisfactory nature of our divorce laws:

It is difficult to believe that in a Christian and civilised country there is permitted to exist by statute an intermediate condition, neither that of matrimony nor divorce, which leaves to the woman nothing of marriage but its harshest fetters, and yet leaves the man free in everything but name. The situation created by the rapid increase of separation arrangements is not even remotely realised by the average person. But a profound moral evil is there. It has been created by artificial and irresolute legislation. The abuse has been maintained and is increasing, not only in despite but in direct defiance, of all that is sound in public opinion.

Legal injustice to the working classes resulted in The Standard (8th April 1909) writing:

Thus it comes about that the magistrates find themselves engaged with increasing frequency in dissolving marriages by a kind of legal fiction. Ill-assorted couples of the working classes, unable to go to the High Court, appear before the stipendiary and obtain a separation, which enables them to live apart, but does not give either party the right to marry again.

Lord Gorell once again judicially reminded public and legislators by his judgment in Harriman v Harriman of the hardships of the poor to which he had already drawn attention three years earlier.⁽¹⁾ Our laws neither insisted upon permanent marriage nor allowed free divorce, whilst the compromise of a legal separation satisfied few. In 1909, Lord Gorell unsuccessfully tried to persuade Parliament to allow County Courts to hear the divorce petitions of poorer persons. The high cost of divorce had led many poor people to write to him when he was President of the Divorce Court, "urging reform in this matter, and protesting against the injustice to them of the present system".⁽²⁾ Legislators were growing more humane and less rigidly disposed to regard the institution of marriage from ecclesiastical presuppositions.⁽³⁾

Formation of a Royal Commission

Growing demand for divorce law reform secured the appointment by the Asquith Government in 1909 of a Royal Commission on Divorce and Matrimonial Causes, sitting under the chairmanship of Lord Gorell. The Commission's terms of reference were

to inquire into the present state of the law of England and the administration thereof in divorce and matrimonial causes and applications for separation orders, especially with regard to the position of the poorer classes in relation thereto.. and to report whether any and what amendments should be made in such law, or the administration thereof....⁽⁴⁾

(1) (1909), P.123.

(2) Hansard, H. of L. Deb., Vol.II, col.473.

(3) Marriage with a deceased wife's sister was legalised in 1907.

(4) Report of the Royal Commission on Divorce and Matrimonial Causes, 1912, Cd. 6478. p.1.

Poor person's inability to pay the expenses necessary to obtain a divorce or to obtain assistance from the in forma pauperis procedure was the subject of most concern to the Committee. Provision of pauper suits in this country, compared with either Scotland, Germany, France or the Netherlands showed "...how fallacious it is to consider that a small number of divorces in England is indicative of a high state of morality in the country"⁽¹⁾ It was largely upon questions of morality that the Committee focussed their deliberations. The authority to make separation orders (which were the equivalent to the High Court decree of judicial separation) gave justices, practically all laymen, nearly all the powers possessed by High Court judges except actual dissolution of marriage. The fact that magistrates usually, as a matter of course, made separation orders in conjunction with an order for maintenance, regardless of whether the former was necessary for the immediate protection of the wife, had placed 200,000 persons in a position of 'potential immorality' in the fifteen years since 1895.⁽²⁾ Many witnesses felt that matrimonial legislation had ignored the moral consequences of separation orders which condemned "the parties obtaining them either to a life of celibacy, or immorality, both of which states are against public policy and the general welfare of the nation."⁽³⁾ Dr. Ethel Bentham told the Commission of the likely undesirable consequences when a home was broken up by the wife's desertion; "A man left with children is forced to have a housekeeper, and in the small houses of the poor, decent sleeping arrangements are not possible, and disaster nearly always ensues".⁽⁴⁾

The Commissioners observed that "as a general rule it will be found that the home once definitely broken up is not re-formed".⁽⁵⁾ Evidence showed that return of a spouse to the matrimonial home was more often out of economic necessity than any sign of genuine reconciliation. As Lord Gorell explained to Mrs. E. Hubbard of the Mothers' Union: "The reconciliations which have been spoken of in so many cases are not reconciliations in fact at all; the necessities of the parties make them come together."⁽⁶⁾ It was clear that the Commission was unimpressed with the argument that separation orders hindered reconciliation; they were critical of separation orders for the reverse reason that they led to the formation of illicit unions.

(1) Ibid, p.46, par.76.

(2) Evidence of W.G.Ramsay Fairfax, Vol.1 (Cd. 6479), p.212, q.5138.

(3) Richard Gates, op.cit., p.7. Fellows (op.cit., p.72), writing in 1932 declares, "each such legal celibate...is a menace to the honour of the women with whom he associates".

(4) Evidence, Cd.6481, Vol 3, p.31, q. 34629. Also see Report, p.98, par.254.

(5) Report, op.cit., p.98, par.255.

(6) Evidence, Vol. 2, p.193, q. 16993; see also Vol.1, p.440, q.11 167-8.

The inadequacy of the lay magistracy was a recurrent theme of the evidence to, and content of the Commission's Report. Lay magistrates did not have the knowledge or legal training to adequately deal with domestic hearings.⁽¹⁾ Mr. J. Hay Halkett, the stipending magistrate for Hull, told the Commission that "the reason why the Act (1895) has an unsettling influence is that it is not understood by, I am afraid, many of the justices of the peace in the country to be permissive - that the court may, but it is not necessarily obliged to separate people".⁽²⁾ Sir John Macdonell, the editor of the Civil Judicial Statistics from 1894 until his death in 1921, gave evidence "that these powers given under the various Acts are exercised somewhat differently by magistrates throughout the country."⁽³⁾ This and other like evidence showing the misunderstanding and misuse of separation orders lead the Commission to the conviction that criminal courts were inadequate to handle grave family issues affecting women and children. Surprisingly, nobody suggested linking this civil jurisdiction with that of the juvenile court established in 1908. Because permanent separation was unsatisfactory and led to immorality the Commission recommended that ideally, the power of magistrates' courts to make orders having the permanent effect of a decree of judicial separation - and thereby the de facto dissolution of marriage - should be abolished. If permanent separation was a necessary remedy then it should be through a simplified process in the High Court.⁽⁴⁾ But total abolition of magistrates matrimonial powers was unrealistic, being "at present the only remedy within the reach of the very poor".⁽⁵⁾ Therefore the summary courts' powers should be limited so that separation orders "should only be granted where they are necessary for the reasonable immediate protection of the wife or husband, or the support of the wife and the children with her".⁽⁶⁾ The Commission went on to recommend that separation orders should not continue for longer than two years, "partly because that period gives ample time for the exercise of the magistrates' powers to produce its effect", after which time the complainant should be required to apply for a decree of judicial separation.⁽⁷⁾

(1) Report, Cd. 6478, p.52, par.94. There were 19 stipendiary magistrates outside the Metropolitan area.

(2) Evidence, Vol 1, p.298, q.7234.

(3) Ibid, p.22, q.343.

(4) Report, Cd. 6478, p.69, par.145.

(5) Ibid, par. 144.

(6) Ibid.

(7) Report, p.73, par. 162.

Only one quarter of petitioners seeking divorce in 1908 came from the working class population.⁽¹⁾ The limited opportunities for divorce amongst the poor meant that the existence of this remedy was either not known, or, if known, not sought because of inability to meet the cost. The opinion of one vicar's wife who had lived in the East End of London for 18 years was that working class people had no desire for increased divorce facilities and if made available it would remain an unused remedy.⁽²⁾ A Stepney Council alderman and railway clerk informed the Chairman that he had never met a case of the poor wanting divorce.⁽³⁾ Similarly, a Church Army welfare visitor to prisoners' wives and families had during her eleven years experience never heard of anyone amongst her 3,000 cases desiring divorce.⁽⁴⁾ Yet official statistics showed that some 7,000 working class broken marriages annually came before the magistrates. This type of evidence suggests that within the subculture of the very poor divorce was something so alien to their knowledge and practice that it was never considered when a marriage broke down. It was the skilled worker, or his wife, who desired the prior approval of the law before establishing a new relationship. The Majority Report concluded: "The remedy of divorce is at present... practically inaccessible to the poorest classes and the evidence before the Commission shows that this state of things does not tend to develop due regard for marriage, but the reverse".⁽⁵⁾ They therefore proposed that divorce should be made more accessible to the poor. One way of reducing the cost for working people was to decentralize the London Divorce Court and allow petitions from those with joint incomes of less than £300 per year and assets of under £250 to be heard in the provinces by specially appointed Commissioners having the powers of High Court judges.⁽⁶⁾ Nothing was done to implement this recommendation until after the Second World War.

- (1) Table XVA (compiled by Sir John Macdonell: working class being defined by occupations of husbands at date of marriage), Appendices to the Minutes of Evidence, Cd. 6482, appendix 3, p.35.
- (2) Evidence, Cd. 6480, Vol.2, pp.205-6, q's 17145 and 17166.
- (3) Evidence, Vol.3, p.326, q.20645.
- (4) Ibid, p.384, q. 40705.
- (5) Report, p.95, par. 241.
- (6) Report, pp.62-3, par.117. A similar proposal had already been made by the Report of the County Courts Committee under Lord Gorell in 1909.

The basic tenet of the Majority Report was to "recognize human needs, that divorce is not a disease but a remedy for a disease, that homes are not broken up by a court but by causes to which we have already sufficiently referred, and that the law should be such as would give relief where serious causes intervene, which are generally and properly recognised as leading to the break-up of married life".⁽¹⁾ This principle is reflected in the core of their recommendations, that firstly, working class people should have the same chance of divorce as the more wealthy, and secondly, that women should have the same rights to divorce as men. But nothing was done by the Government due to the priority given to the Kaiser War. With the return of peace, Lord Buckmaster in 1920 introduced a Bill, based upon the Majority Report, that required wives with separation orders to proceed after two years to the High Court and petition for divorce. The Bill, though passed by the House of Lords and backed by a petition with over 100,000 signatures was unacceptable to the Conservative Government, as was also a similar Bill a year later. These Bills show the concern felt by many over enforced separation without divorce. This was to be a problem increasingly discussed over the next fifty years.

(1) Report, p.95, par.242.

Between The Two World Wars

The ideals of the female suffrage movement had gained support during the First World War through women's wartime efforts in undertaking work previously carried out by men. Parliament, by a large majority, passed a Bill in 1917 implementing the proposals of a Speakers Conference which had unanimously recommended a limited form of suffrage for women aged at least thirty. The Sex Disqualification (Removal) Act of 1919 opened almost all professions to women, though the diplomatic and consular services still refused to accept women. The movement towards sexual equality was reflected in the Matrimonial Causes Act of 1923. The 1923 Act implemented the Gorell Commission's recommendation of female equality with men in divorce by allowing a wife to petition upon the grounds of her husband's adultery without the necessity of proving an additional aggravating offence. This first significant divorce law amendment to the 1857 Act had removed sexual inequality, but class disparity remained. The introduction of the Poor Person's Procedure in 1914, though with many procedural and administrative defects, had already resulted in an increasing number of those with low incomes obtaining a divorce. However, four out of five broken marriages that resorted to a court in the years 1921-25 still turned to the justices for matrimonial relief. It was to be the matrimonial jurisdiction of magistrates' courts rather than the divorce courts that Parliament focussed its attention over the next twenty years.

Up Until 1920 a wife could only obtain a maintenance order up to the sum of £2. a week for herself and her children regardless of the size of family to be supported. The Married Women (Maintenance) Act of 1920 introduced maintenance orders up to ten shillings a week for children under sixteen. A further improvement for deserted wives came about when the Gorell Commission recommendation that a wife whose husband had been persistently cruel or had wilfully neglected to maintain her, should not have to leave him before applying for a maintenance order, was implemented with the passing of the Summary Jurisdiction (Separation and Maintenance) Act of 1925. But the order was still not enforceable as long as she resided with her husband, and if the wife remained after three months the order was cancelled. Additional new grounds under the 1925 Act on which a wife could issue a complaint were that her husband (a) was guilty of persistent cruelty to her children; (b) insisted on sexual intercourse while knowingly suffering from venereal disease, and (c) was forcing her to engage in prostitution. The Act brought two further benefits to wives by, firstly, introducing interim orders in cases where the hearing was adjourned to a later date; and secondly, requiring husbands with maintenance orders to notify the court of any change of address. The passing of the 1925 Act reflects the change in social and legislative action shifting away from physical protection of the wife in favour of providing her with financial security.

There was a great deal of support in both Houses of Parliament and by womens' organisations throughout the country for the proposal contained within the 1925 Act's preceding Bill to allow magistrates the power to award the wife a right to the home and to a proportion of the household contents. The proposal proved to be unacceptable to Parliament, and wives had to wait another thirty years before the judiciary began to examine afresh the problem of matrimonial property.

Maintenance default

Enforcement of maintenance orders became an increasing public concern. The real source of the problem was clear to Miss Eleanor Rathbone when she explained that, "a separation, at least in working class marriages, is always a desperate expedient, for there it involves, not only the break-up of the home and the severance of the children from one parent or the other, but the splitting up into two of an income which is usually barely sufficient for the upkeep of one household."⁽¹⁾ The proportion of maintenance defaulters annually imprisoned compared to new orders made reached the staggering proportion of 46% in 1923, in 1932 it was still 40%. The 3,648 maintenance defaulters imprisoned in 1932 formed 7% of all prison receptions. Between the five years 1925-29 the average yearly number of maintenance defaulters imprisoned was 3,905, of which 43% were for periods of two months or more. Clearly imprisonment was not a deterrent to defaulting husbands. The reason was that many of these husbands were not wilful defaulters, but, rather, simply did not have the means to pay. It is not therefore surprising that the highest number of yearly imprisonment coincided with the periods of greatest industrial depression. A letter published in a church magazine in 1931, from one such unemployed husband helps to explain why the numbers of imprisonments were so high. His wife had obtained a maintenance order for herself and two children totalling 25s. a week. At the same time he received 30s. a week unemployment pay, out of which had to be met his board and keep as well as the amount of the order. Within two months arrears totalled £6. 7s. for which the husband was arrested and sent to prison. He observes that: "The folly and futility of this idiotic operation of the law is that I was deprived of the opportunity of working for my living, my wife and children became chargeable to the State, and I lost my right to unemployment benefit for four weeks, totalling £6, almost the amount I went to prison for". The writer went on to make a plea for reform of the divorce laws. "I am 42, healthy and intelligent, and if I require a mate cannot get a divorce unless I commit adultery, which is utterly against my principles. Surely if separation lasts over three years, divorce should follow as a matter of course as in Scotland, as it is in the interests of the State to have happy contented citizens. The marriage laws of this country are obsolete."⁽²⁾

(1) The Disinherited Family, 1924, p.97.

(2) Reprinted by J.F.Worsley-Boden, op.cit., p.275.

[Statistics provided by Miss Margery Fry to the Magistrates Association in 1932, suggested that a large number of husbands were being imprisoned because of their poverty rather than their wilful refusal to obey the court order. Commenting upon Miss Fry's figures, Claud Mullins, a London magistrate, wrote"... Justices should act upon the spirit of justice, and that spirit demands that a man be not sent to prison for not paying money unless his default has been wilful".⁽¹⁾ This had been the view expressed a year earlier in the Report of a Departmental Committee on Imprisonment by Courts of Summary Jurisdiction in Default of Payment of Fines and Other Sums of Money (the Fischer Williams Committee).⁽²⁾ They felt it was not possible to generalise about reasons for non-payment.

The Fischer Williams Committee found it disturbing that in many cases justices were unable to obtain reliable information about the man's earnings. It was essential that the court should investigate a defaulter's financial and social circumstances before committing him to prison. It concluded unhappily that a situation where "a court dispensing justice should have to act on less information than a society dispensing charity is an indication of one of the defects of the present system."⁽³⁾ As a result of the Committees' recommendations, the Money Payments (Justices' Procedure) Act 1935 was passed with the intention of reducing the number of civil prisoners. Section 8 (1) (b) required the court to determine that non-payment of a maintenance order resulted from wilful refusal or from culpable neglect before sending a defaulter to prison. At the same time Sir John Simon, the Home Secretary, sent a Circular Letter to all justices, requesting, as a matter of great social importance, their co-operation in reducing the number of maintenance committals.

This army of persons reaches prison not because offences have been committed... but because of failure to pay sums due under decisions of the courts... The presence of prisoners of this type in the same prison as those who are sentenced as a direct punishment for their offences makes harder the task of the prison authorities.⁽⁴⁾

The memorandum appended to the letter noted that "...there appears sometimes to be a tendency for a Court, having regard to the hardship of the woman's position, to take insufficient account of the man's means".

The proportion of prison committals to new maintenance orders made dropped from 25% in 1935 to 19% in 1936. Until the last war, the proportion remained constant around 18%, dropping during the war to around 12%, but picked up in the post-war years with a return to the mid 1930's proportion of around one-quarter, the numbers actually imprisoned running at well over 3,000.

(1) Wife v. Husbands in the Courts, 1935, pp.117 and 122.

(2) 1934, Cmd. 4649,

(3) Ibid, p.41, par.125.

(4) Quoted by Cecil Geeson, Just Justice? Husbands and Wives in the Police Courts, 1936, p.16. This must be one of the few occasions when reform of family law has been advocated because of the adverse effect of civil prisoners on a prison system organised to deal with criminal offenders.

Reform of the summary procedure

Mr. Cecil Geeson, the justice's clerk at Newcastle-upon-Tyne, made a strong plea for reform in the manner matrimonial cases were dealt with in the Police Courts.

A humble pride exists among the vast majority of the labouring and working classes, which shrinks from association with the 'House of Correction'... In these days of social progress, we owe it as a reform due to the respectable working class that their marital misfortunes should not thus be stigmatized, or suffer the ill-associated publicity such procedure entails. ⁽¹⁾

There was also concern, especially amongst stipendiary magistrates, over the suitability of summary courts to deal with family matters. In 1925 a London magistrate had observed that it was exceedingly difficult for the facts to be "...properly sifted in a court which is fully occupied with other matters". ⁽²⁾

Another magistrate expressed a similar view.

Police Courts do not appear to be the proper tribunal, if a tribunal at all is needed, to unravel the tangled threads of matrimonial trouble. They are concerned chiefly with the administration of the criminal law and maintenance of public order. Their business is with offences against the public order, not with domestic squabbles. ⁽³⁾

Three 'Courts of Domestic Relations' Bills had been unsuccessfully presented to the House of Commons between 1928 and 1930. The insistence on procedural reform was nevertheless maintained. In 1934 the Magistrate's Association made it known that they "... would welcome the establishment of special courts for dealing with domestic relations with a panel of justices and a special time set apart for the hearing of such cases and with procedure for preliminary inquiries before the hearing". Later in the same year Lord Listowell introduced a Summary Jurisdiction (Domestic Procedure) Bill designed to produce a "special technique" for dealing with domestic cases. Both the Archbishop of Canterbury and Lord Reading (Rufus Isaacs, an ex-Lord Chief Justice) felt that more attention should be devoted to attempts at reconciliation. But many lawyers disliked any proposed alterations of the basic common law principles rooted in the legislation. The Bill was withdrawn upon the Lord Chancellor announcing the setting up of a government inquiry, "to be directed to the general question of providing the courts with adequate means of carrying out the whole of these social services".

(1) Ibid, p.39.

(2) Cecil Chapman, The Poor Man's Court of Justice, 1925, p.61.

(3) J.A.R.Cairns, Drab Street Glory, p.131.
1934,

[The Committee, under the chairmanship of Mr. S.W.Harris, hoped their Report would "draw public attention to the value and growing importance of the social side of the administration of justice".⁽¹⁾ They found that the law relating to the making of separation and maintenance orders made no provision for reconciliation, though the majority of courts did recognise the need. The Committee's recommendations tried to reconcile the fact that conciliation and the provision of legal remedies by way of judicial process did not sit easily together. Conciliation was not to be excluded; indeed it was to be encouraged. But it was not to be formalised, and should be left to the discretion of the courts.

From an analysis of returns provided by 65 courts (including all the largest county Borough Courts, and 14 Metropolitan courts) the Committee concluded that a "diversity of practise was apparent not only in the number of conciliations effected and the methods and persons employed but also in the stage at which conciliation was applied, and in the willingness or the reluctance of the court to make separation orders". The Report showed that far more wives approached the courts than appeared at hearings. Replies from courts indicated that only 15% of the wives who approached the court eventually had orders.⁽²⁾ The Committee warned that reconciliation could not be inferred "because the partners do not appear before the court within a limited period".⁽³⁾ The men and women who resorted to the magistrates courts were the poorest and least informed members of society. Because this was so the Committee proposed that there should be greater provision for legal representation of those who could not afford it, as "many of the parties in matrimonial disputes before Justices are not legally represented, and are of not sufficient education or ability to put their cases before the court in a proper manner, or to give all the information which may be available to them".⁽⁴⁾

(1) Report of the Departmental Committee on the Social Services in Courts of Summary Jurisdiction, 1936, Cmd. 5122, p.VIII.

(2) Ibid., calculated from tables, appendix III, pp.154-55.

(3) Ibid, p.10, par.13.

(4) Ibid, p.46.

The Summary Procedure (Domestic Proceedings) Act 1937 largely enacted the Harris Report's recommendations. Implementation of the Act removed some of the prevailing criminal atmosphere of the magistrates' courts, and also recognised the use of probation officers to encourage reconciliation. Parliamentary opinion was in agreement with Lord Merrivale's⁽¹⁾ observation that:

It is a curious thing... how, since there came to be magisterial jurisdiction to deal with domestic disputes, the tendency has been always increasingly strong down to very recent times to make the business merely a judicial business. It is not merely a judicial business; it is a matter of the social well being of our fellow countrymen and countrywomen.⁽²⁾

The introduction of the Poor Person's Procedure had already assisted a small proportion of the poor to seek divorce; resulting in four out of ten divorce petitions filed in the five years 1931-35 being legally aided. But for the majority of broken marriages there still remained a lack of practical choice between the summary and High Court jurisdictions. Differences between the two types of court were not only apparent in the available legal remedy, but also in the disparity in the quality of justice between that meted out to the poor and that provided for the wealthy. Geeson pungently wrote:

Those whose names appear in the Society columns of the Press would not dream of applying at, say, Bow Street for a legal separation; but the man of moderate or slender means who had suffered disaster in his married life, must, with his wife, have his case dealt with amid the police court atmosphere, where, in many courts throughout the country, he will find himself rubbing shoulders with a packed, ill-assorted crowd including gamblers, pickpockets and reckless motorists... Dread of association with a police court is felt by all law-abiding citizens, and not less by the respectable poor than by their more fortunate fellows.⁽³⁾

Similarly, Mr. J. Cairns described the Metropolitan Police Court as a "miniature Divorce Court", sympathetically observing that "complete emancipation costs money, and as in so many other things, the poor have to be satisfied with the second best".⁽⁴⁾

(1) A past President of the Probate, Divorce and Admiralty Division, who had previously introduced a similar Bill to Lord Listowell's.

(2) Hansard, H. of L. Deb., Vol. 100, col. 646.

(3) Cecil Geeson, op. cit., p. XIV and pp. 7-8.

(4) Op. cit., p. 134.

Resort to the Summary Courts

In the five year period 1931 to 1935, the summary court dealt with three applications brought by wives for every one divorce petition filed by either the husband or wife. The great majority of broken marriages coming before justices did not subsequently experience either reconciliation or dissolution. Such facts contradict the utopian belief of Lord Merrivale:

The social system was based on the marriage tie, and that the success of marriage as an institution was shown by the fact that with 8,000,000 households in Great Britain, only 4,000 decrees of divorce had been promulgated last year⁽¹⁹³⁴⁾. The remainder of the husbands and wives of the country knew better than those who gossiped about easy divorce and the facilitation of the discharge from the matrimonial tie.

Lord Merrivale unwittingly went on to dispel his own image of a maritally united kingdom.

On the other hand, during the preceding year, 11,000 orders had been made by Justices under the Summary Jurisdiction (Married Women) Acts. This jurisdiction was much closer than that of the Divorce Division to the domestic lives of the people because, in the great majority of cases, separation was involved, and separation by magistrates' order practically precluded any reconciliation. About 50,000 such orders were said to be in operation. (1)

It was against this type of thinking that Alfred Fellows wrote: "This ostrich policy of pretending that we have a system of Christian monogamy might be regarded as a harmless one, and a normal product of unctuous rectitude, save for the fact that it results in real and grievous hardship". (2)

The number of applications for maintenance had hardly varied in the fifteen years between 1921 (13,244) and 1935 (13,806) but the number of petitions filed for dissolution had risen by 85% to 5,157 in 1935. Middle class public opinion had, in the years following the first World War, been increasingly unwilling to display censure on those who had been divorced, though there is evidence that within working class circles divorce "was considered a worse disgrace than drink". (3)

- (1) Reported in Justice of the Peace, 2nd November, 1935; and quoted by Gleeson, op.cit. p.54.
- (2) The Case Against the English Divorce Law, 1932, p.VIII - IX.
- (3) Jane Walsh, Not Like This, 1953, p.21.

Reform of the divorce laws.

Collusion was commonly known to have occurred in a number of divorce suits. In such cases the wife would be informed by her husband or his solicitors of the date and place where evidence of adultery would be available, "the adultery being in fact committed in order that the suit might go through".⁽¹⁾ It was this situation that caused the Report of a Joint Committee of the Two Convocations of the Church of England in 1935 to "register an emphatic protest against the way in which it is now possible to arrange a divorce, desired for quite different reasons, under the cover of an inferred act or series of acts of adultery".⁽²⁾ Hotel chambermaids were financially encouraged to witness such compromising night arrangements that would later allow the court to impute the committal of adultery from her evidence. Yet in many cases, as A.P. Herbert's Holy Deadlock showed, the respondents' hands still remained de facto clean. The law was easy for the rich and harsh to the poor. The working of the law was described by "A Barrister":

A rich person seeking legal advice relating to matrimonial affairs consults the family solicitor, or some other solicitor recommended by someone who knows him well. The matter is talked over quietly and privately... If it is decided to apply for divorce, the guilty party is very often advised to give evidence of his or her adultery to the other party in order to minimise the unpleasantness and difficulty of the proceedings, and both parties are advised how to co-operate whilst avoiding the pitfall of "collusion".⁽³⁾

Divorce by mutual consent was possible if one was wealthy enough to pay for a hotel bill, private detectives, witnesses' corroborative evidence and legal and court fees. Those, like Colonel Josiah Wedgwood M.P., who made it known that they had not committed adultery though they had been divorced for this reason, were not subsequently prosecuted for their temerity. However, the law showed just vengeance on a gardener who declared at his divorce hearing the tactless truth that adultery had never taken place with the woman named on the wife's petition. The petition was dismissed and the man was subsequently charged with conspiring to manufacture false evidence. Yet if he had committed adultery the court would have granted the mutually sought after divorce rather than impose a prison sentence of four months. On the other hand the law did not allow both spouses to admit adultery. As Lord Chief Justice Hewart observed in 1935: "Perhaps it is not vouchsafed to everybody, whether in Holy Orders or

(1) Evidence of Sir Edward Clarke, K.C., to the Gorell Commission, Vol 3, p.446.

(2) Quoted by Lord Merrivale, Marriage and Divorce, 1936, p.63.

(3) Justice in England, 1938, p.178.

out of them, to appreciate the full sublimity and beauty of the doctrine that if one of two married persons is guilty of misconduct there may properly be divorce, while if both are guilty they must continue to abide in the holy estate of matrimony".(1)

Public opinion began to appreciate that the circumstances leading to break down of marriage were often more complex than proof of the only matrimonial offence the law recognised. Once again there was the feeling, as expressed by the Archdeacon of Coventry, that the existing divorce law"... had resulted in a state of affairs which was disastrously prejudicial to public morality. As the law stands at present, those who wish to bring an end to marriage were forced to take one of two alternatives - either one must commit adultery or one must commit perjury".(2) It was within this framework of thinking that the Matrimonial Causes Act 1937 came to be passed.

The Matrimonial Causes Act 1937

Mr. A.P.Herbert, following his success in a Parliamentary Ballot, introduced a Private Members Bill into the Commons in February 1936. The Bill did not receive a reading but was reintroduced by Mr. Rupert de la Bère in November 1936.(3) Largely due to a combination of Mr. Herbert's skill, a series of fortunate accidents, and eventual government approval, the now considerably amended Bill received the Royal Assent in July 1937.

The feeling behind the Matrimonial Causes Act is shown in the preamble.

Whereas it is expedient for the true support of marriage, the protection of children, the removal of hardship, the reduction of illicit unions and unseemly litigation... and the restoration of due respect for the law, that the Acts relating to marriage and divorce be amended.

This attitude is reflected in Lord Gorell's speech to the House of Lords in 1937, when he observed that a husband's desertion left the wife "in the position of being neither married nor unmarried - a position not at all in keeping with the dictates of public morality".(4)

(1) Quoted R.M.Jackson, op.cit. (1965 ed.), p.56; from Daily Telegraph 21st October, 1935.

(2) As quoted by Mr. A.P.Herbert when justifying his Bill to the House of Commons, (Hansard, Vol.317 (1937), col.2082).

(3) Clause 10 (1) of this Bill (No.5) contained provision for a petition of divorce to be presented to a magistrates' court for consideration and, if the court thought proper, for reference to the High Court. In the meantime, the summary court could make an interim order. (Parliamentary Papers, 1936-37, Vol.3, p.515 and Vol.8, Bill 77).

(4) Hansard, H. of L. Deb., Vol.105, col.846.
Ronald Gorell Barnes was the third baron, being the younger brother of Henry who was killed at Ypres in 1917.

The Act came into operation at the beginning of 1938. It implemented some of the 1912 Royal Commission proposals by extending the grounds for divorce to:

- a) desertion for three years.
- b) cruelty
- c) unsoundness of mind being continually under treatment for a period of at least five years. This was the first inroad into the concept of the matrimonial offence.

The Act brought incidental change to the summary courts matrimonial jurisdiction by extending the grounds of complaint for a maintenance order to include adultery.⁽¹⁾ The fact that desertion was now a ground for divorce made it even more important than before that magistrates should be careful to give a non-cohabitation clause only upon the specific request of a wife who needed its protection. However, the fact that 61% of all maintenance orders in the years 1931-35 had a non-cohabitation clause attached reflects magistrates misunderstanding of High Court pronouncements on the purpose of separation orders. The making of such an order meant that a wife could not complain to the divorce court of her husband's desertion from the time of the order, for he had been ordered to live apart from the wife. The practical consequences are underlined in one case where the wife still had to wait three years before being allowed to petition although the magistrates had rescinded a separation order made twelve years previously.⁽²⁾

Following the 1937 Act no further changes in the acceptable grounds for divorce were to occur until 1969, whilst grounds for a maintenance order in the summary court have remained unchanged. The increasing availability of legal assistance for all sections of the population has been more important than extending the grounds of divorce, in affecting the increasing resort to divorce since 1937.

(2) Reported in The Times, 12th April 1938.

(1) This had been proposed in the Summarys Jurisdiction (Matrimonial Causes) Bill of 1913 and 1914, but the Bill was rejected on both occasions.

CIVIL DIVORCE WITHOUT WORKING CLASS MEANS OF ACCESS

When the hearing of divorce suits was transferred from the ecclesiastical courts and the House of Lords to a civil court in 1857, a notable authority on the law observed: "There are two ways of withholding divorce from the poor. One is to say so in words; another is to erect an unapproachable tribunal".⁽¹⁾ The working of the new divorce procedure had been forecast with remarkable accuracy, for only a small number of broken marriages could contemplate the high legal cost of presenting a divorce petition to the newly formed Court for Divorce and Matrimonial Causes in London. All divorce petitions had to be heard in London; though section 12 of the 1857 Act clearly stated that 'The Court ... shall hold its sittings at such place or places in London or Middlesex or elsewhere as Her Majesty in Council shall from time to time, appoint'. But the clause was very soon a dead letter, for the judges decided to restrict the legislator's intention that an issue of fact might be tried before a judge of Assize in any county. This judicial fettering of the power given by Parliament remained unaltered until 1920.

Working class people constituted four-fifths of the population of England and Wales in 1871; but only 17% of the petitioners in that year were from the manual classes, the latter being mostly skilled artisans or their wives.⁽²⁾

At this time the earning ability between skilled craftsmen and labourers was considerably wider than it is today. Then, skilled men such as carpenters or masons could earn around £1.50 a week compared to an unskilled labourer's wage of 75 pence. The former's earnings allowed the possibility that if the marriage failed enough might be saved by thrift and perseverance to pay for a divorce. Skilled labourers were aware that the gulf between them and their unskilled brothers was not only displayed in earnings but also in ways of life that accepted the social ideals of the middle-classes. Such 'ideals' did not allow broken marriages to be resolved by the formation of new family bonds outside the status of marriage. This theorising is supported by, and explains, the reason why the 1871 'manual' divorcing population were almost without exception from the skilled artisan class. The only means by which the lower paid working classes could seek a divorce was by the in forma pauperis procedure. But, as the next section shows, this supposed aid gave no practical help to the poor.

(1) J.F.MacQueen, Divorce and Matrimonial Jurisdiction, 1858, p.129

(2) Griselda Rowntree and Norman H.Carrier, "The Resort to Divorce in England and Wales, 1858-1957", Population Studies, Vol.XI (1958), p.222, table II and fn.2.

The law allowed very poor litigants to apply for certain limited forms of free legal assistance by the in forma pauperis procedure which dated from the fifteenth century.⁽¹⁾ The only hope offered by Parliament in 1857 to the poor man wishing to obtain a divorce was the statement that judges would eventually frame rules for suing in forma pauperis as far as might seem expedient!⁽²⁾ But at the same time Lord Chancellor Cranworth noted that the benefits provided to the rich man compared to the poor was "a state of things which was incidental to the very existence of men in society, and which no legislation could obviate".⁽³⁾ Until 1914, this procedure was the officially provided avenue for would-be divorce petitioners who were unable to pay their own legal fees. To qualify for assistance the petitioner had to be worth less than £25 with an income of under 30s. a week.⁽⁴⁾ No special department or formal machinery existed to assist poor persons to obtain the required court permission to proceed as an in forma pauperis petitioner. Such persons had neither the financial means to engage a lawyer nor the ability to prepare their own application for hearing in the divorce court. Poor litigants who were determined to get a divorce had to find altruistic solicitors and counsel willing to assist them free of charge. The solicitor had to prepare and present grounds for the divorce suit before counsel, who in turn, produced an opinion as to the reasonableness of the proceedings. If counsel's opinion was favourable, an application was made to court for leave to petition in forma pauperis. All this had to be successfully completed before the petitioner could proceed. As the solicitor and barrister helping the petitioner to present a successful application were themselves likely to be selected by the court to conduct the subsequent divorce petition free of charge, it is not surprising that only a few poor petitioners found it possible to present an application.⁽⁵⁾

- (1) 1495, (11 Henry VII c.12), "An Act to admit such persons as are poor to sue in forma pauperis". J.M. Maguire "Poverty and Civil Litigation", Harvard Law Review, Vol.36, 1923, pp.361 ff., gives a full account of the Act's early history.
- (2) Hansard, H. of L. Deb., Vol.CXLVI (23rd June 1857), col.213.
- (3) Ibid, col.212.
- (4) The capital limit was raised from £5 to £25 in 1883. The Gorell Commission noted (par.73) about the financial limits: "... income not exceeding 30s. to 32s. per week, though, in case of a wife suing, this limit may be extended to about 40s., and no means above £25 and clothing ...". Lord Gorell recorded (Evidence, Vol.1, par.76-8) : "the general line is 30s. a week ...", income being usually assessed on present earnings (par.122-3).
- (5) However, a successful application to present a pauper petition gave no formal entitlement to the services of solicitor or counsel.

In the twenty-five years 1858 to 1882 the number of in forma pauperis applications averaged five a year. During the next quarter of a century the average rose to 32 applications a year, forming four per cent of all annually filed matrimonial petitions.⁽¹⁾ However, the number of applications that proceeded to the stage of filing a petition were even fewer. The Judge might dismiss the application; for instance, in 1911 a quarter of the 39 applications were rejected. If successful the applicant was merely released from the obligation to pay court fees amounting to about £6, but he would still have to pay the cost of witnesses' fares to London, hotel expenses and any other "out of pocket" expenses of his solicitor and counsel. This meant that in an undefended pauper suit the petitioner had to pay a minimum sum of £10, though it would be considerably more if the case was defended or the petitioner lived some way from London. But generally the average sum required from the 'pauper' petitioner to meet such expenses varied from about £12 to £21.⁽²⁾

The small proportion of divorce petitioners in England and Wales receiving assistance from the in forma pauperis procedure when compared to the sizeable effect of the generous system of legal aid operating in France, highlights the paltry help given to the poor in this country. In 1891, when the 38 in forma pauperis suits formed 7% of divorce petitions in this country, 7,834 petitions for assistance judiciaire were admitted in France, forming 44% of the 17,867 divorce petitions in that year.⁽³⁾ It was not only better financial assistance towards the cost of divorce that led to France having 26.1 divorces for every 1,000 marriages in 1891, as against England's comparable ratio of 2.1 for the same year. French law allowed a judicial separation to be converted after three years into a judgment for divorce. This explains why one-fifth of divorce and judicial separation suits in France were composed of the latter group. It is reasonable to assume that half of all French divorce petitioners were from the working class. In England low working class wages meant that only a minute proportion of all broken marriages could seek divorce without additional official financial assistance.

- (1) Calculated from annual Civil Judicial Statistics. In the period 1883-1907, the total of 15,506 petitions for dissolution formed 80 per cent. of the 19,318 matrimonial petitions filed: making the unlikely assumption that all 812 "matrimonial" applications for leave to sue or defend in forma pauperis were for dissolution petitions, the proportion only rises from 4% to 5%.
- (2) Royal Commission on Divorce and Matrimonial Causes, Cd.6478, 1912, p.45, par. 69.
- (3) Civil Judicial Statistics, 1894, 'Introduction', p.59.

The separate investigations of Booth in London and Seebohm Rowntree in York showed that some 30% of the population of these cities were living in poverty due to the combined factors of large families and low wages. Only 18% of London's four million population could be classified as 'lower- and upper-middle class and all above', 51% were 'the regularly employed and fairly paid working class of all grades', the remaining 31% being 'the poor and the very poor'.⁽¹⁾ The latter had "...at the most an income which one time with another averages 21 shillings or 22 shillings for a small family (or up to 25 shillings or 26 shillings for one of the larger size) and in many cases falling below this level". Rowntree's study of poverty in York showed that "the wages paid for unskilled labour in York are insufficient to provide food, clothing and shelter adequate to maintain a family of moderate size in a state of bare physical efficiency."⁽²⁾ By 1913 the average weekly wage was: 24s. for unskilled labourers, 26s. 6d. for semi-skilled manual workers and 38s. for skilled manual workers.⁽³⁾ Many of the unskilled and semi-skilled workers must therefore have earned a weekly wage below the limit of 30s. a week set by the in forma pauperis requirements. It was not that large numbers of the working class were too wealthy to qualify, but that they were so poor that petitioners had nothing left over from their slender financial resources to pay solicitors' "out of pocket" expenses.

In cases where the wife was the aggrieved party there was even less scope to save the minimal expenses incurred in petitioning. The only practical remedy offered to ^aworking-class wives upon a breakdown of marriage was to seek a maintenance order against her husband from the local magistrates' courts. Official statistics show that in the years 1901-10, a ratio of one petition for dissolution or nullity were filed in the High Court for every ten complaints made by wives to the summary courts.

- (1) Charles Booth, Life and Labour of the People in London, First Series; Poverty, Vol.2, pp.20-21.
- (2) B. Seebohm Rowntree, Poverty: A Study of Town Life, 1901, p.133.
- (3) G.Routh, Occupation and Pay in Great Britain 1906-60, 1965, table 47,p.104.

As the County Courts Procedure Committee, under the chairmanship of Lord Gorell, reported in 1909: "Without doubt, there is a practical denial of justice in this matter to numbers of people... who belong to ranks in life in which the relief to be obtained under the Divorce Acts is probably more necessary than in ranks above them".⁽¹⁾ The 1912 Report of the Royal Commission on Divorce and Matrimonial Causes estimated that an undefended petition brought by a person living in or near to London would entail minimum cost of between £40 and £45, though this figure increased by £12 or more if witnesses were required. About one third of divorce petitions were defended, and in these cases the costs varied between £70 and £500.⁽²⁾ Yet it was estimated that 88 per cent. of the population had wages of under £3. 2s. a week.⁽³⁾ The Majority Report of the Commission quoted with approval evidence given by Mr. Fitz-simmons, the Court Missionary at the Thames Police Court, observing it was "weighty".

It is not so much a question of demand. I think the poor should not be denied the benefit of any law by reason of poverty. Respecting the question as to whether there is any demand for it, it ought to be remembered that the poor have known that the question of divorce was so far out of their reach that the idea of asking for the thing never occurred to them.⁽⁴⁾

The effect upon working class people produced by the association between the workhouse and the Poor Law is described by Judge Parry: "the self-respect of working men in many cases hinders them from applying for assistance rendered nominally distasteful by the pauper taint."⁽⁵⁾ A similar view was expressed by the Gorell Commission.⁽⁶⁾

Such were the stringent conditions attached to the in forma pauperis procedure that The Times in a leading article called them 'prohibitive'⁽⁷⁾ whilst The Law Journal spoke of the system as 'next door to worthless'.⁽⁸⁾ Considerable agitation for reform of the outdated and now almost inoperative procedure in the years 1912 and 1913 led to its replacement by the Poor Person's Procedure in 1914.

(1) Op. cit., p.23.

(2) Op. cit., Cd.6478, p.44

(3) L.G.Chiozza Money, Riches and Poverty, 1911 (1st pub. 1905, revised 1911), p.50. A.L.Bowley, Wages & Income in the United Kingdom since 1860, 1937, similarly shows that in 1906 only 16% of men employed in industry earned more than £2. a week.

(4) Op. cit., Cd.6478, p.48.

(5) Sir Edward Parry, The Law and the Poor, 1914, p.184.

(6) Op. cit., Cd.6478, par.73.

(7) December 30th, 1912. Three days earlier The Times had written "...the duties of the office of poor man's lawyer must be entrusted to some person of unquestioned integrity, who might...be appointed under the supervision of the Government".

(8) Vol.47 (1912), pp.48-50. -131-

The Poor Persons' Procedure: 1914-1949

The years 1914-1925

From its inception ~~up~~ until 1926 the Poor Persons' Procedure was run by the newly formed Poor Persons' Department, within the Office of the Supreme Court. Although the Department was not confined to matrimonial matters, some 90 per cent of its work was related to divorce cases. From the beginning of 1914 a 'poor person' could be legally aided in the High Court if he had a reasonable cause of action or defence, and his means did not exceed £50, though this sum could be raised to £100 in special circumstances.⁽¹⁾ Even if, by diligent saving, the working man could raise the necessary amount to pay for his own legal fees, there was always the additional potential liability of his wife's own costs to be remembered. A wife often obtained an order for security of costs, because costs were regarded as necessaries, and the solicitor was entitled to be protected when he was supplying necessaries to a wife. These costs had to be paid by the husband regardless of whether he was successful or not, except when the wife respondent had substantial means of her own. This meant that the husband of limited means had to raise more money to petition than did his wife. In one such case the successful petitioner had a meagre yearly income of £117, but he still had to pay his adulterous wife's costs of £45, with little hope of damages from the penniless co-respondent.

Matrimonial applications to proceed under the Poor Persons' Procedure were initially made to a Registrar of the Probate, Divorce and Admiralty Division. The Registrar in turn referred investigation of applicants' means and the cases' merits to barristers and solicitors, known as 'reporters', who undertook the work on a voluntary basis. A report, often "quite worthless", was presented to the court, which then gave its decision on the application.⁽²⁾ The court's granting of a certificate allowed court fees to be remitted, while the case was conducted free of charge by volunteer lawyers. But any 'out of pocket' expenses incurred by these lawyers had to be paid by the applicant. The initial intention for the new procedure was to have been to provide a Treasury fund to pay these expenses, but this plan did not materialise.⁽³⁾ What had proved to be the fundamental weakness of the in forma pauperis procedure still existed.

- (1) A detailed account of the working of the Poor Persons' Procedure is presented in the Report of the Committee on Legal Aid and Legal Advice in England and Wales (The Rushcliffe Committee), Cmd.6641, 1945, pp.1-7.
- (2) The Report of the Committee to Enquire into Poor Persons' Rules, 1919, Cmd.430, par.23.
- (3) R. Egerton, Legal Aid, 1946 ed., p.11. This work provides a full description of the Poor Persons' Procedure.

Only a minority of solicitors and barristers were willing to undertake Poor Person cases. Less than a tenth of the 790 London solicitors undertaking divorce work in 1918 had handled a Poor Person's case. However, the burden of such work fell on London solicitors, as both the interlocutory proceedings and hearings had to take place in London. A Committee under Mr. Justice Lawrence reported in 1919, "Many firms never undertake matrimonial cases and would not undertake them even for their own clients, much less are they inclined to undertake them gratuitously for other persons."⁽¹⁾ Even more disturbing was the evidence that some of the supposedly willing solicitors charged Poor Person petitioners a sum of money to cover alleged 'office expenses' in addition to their actual out-of-pocket expenses. Such solicitors would not begin the case until the money was provided. If the money was sent, the solicitor proceeded until he decided the money had been exhausted; and "when this occurs more money is asked; if it is not forthcoming, the case stops; if more is sent, the case proceeds as before."⁽²⁾ The Committee's Report secured the abolition of this dubious practice as well as a reduction in the required deposit for solicitors' out-of-pocket expenses to about £5, the latter being paid at the time of making the application to the Poor Persons' Department. It is not surprising that with these economic and professional obstructions few applicants, though passing the 'means and merits' test, obtained the desired divorce.⁽³⁾ In 1918 only a quarter of applicants for legal aid reached ^{ed} the stage of filing their petitions. The Lawrence Committee found that this was:

mainly due to the Poor Persons being unable to find the necessary out-of-pocket expenses to enable them to start or to proceed with their cases It is futile for a Poor Person to attempt to get a divorce unless such a person is prepared to find at least £10 in an ordinary case and £25 in a nullity case Unless a fund is constituted out of which the expenses of the Poor Persons can be defrayed, the really poor or quite destitute persons have no chance of availing themselves of the Rules to obtain a divorce. (4)

(1) Cmd.430, op.cit., par.20.

(2) Ibid.

(3) The severity of the 'merit' test is revealed by comparing the 51 per cent of all divorce petitioners who obtained decrees absolute in the five years 1916-20, with the 'success rate' of 97 per cent for Poor Person petitioners in 1918.

(4) Cmd.430, 1919, pars. 7, 8 and 10.

Their report resulted in the introduction in 1921 of an income means test of £2 a week, or in special circumstances, £4 a week, to the existing capital limit of £50, or £100 in special circumstances. The new income limit meant, as Alfred Fellows noted in 1932:

... the wealthiest poor person, allowable as such by special grace, cannot now have an income of more than £4 a week and a capital of £100, and an artisan whose wages were just above this standard would have to pay as much for the privilege of divorce as a millionaire so far as court fees were concerned, though probably solicitors and counsel would mitigate theirs. As a practical matter, poor people were virtually denied the remedy of divorce, unless someone with money took their cases up, or some sympathetic solicitor placed his time and money (1) for nothing at the disposal of one he deemed hardly treated.

The problem, and its possible solution, is described by Mrs. Gallichan:

If the assisting of the poor is not to remain a sham the means must be provided whereby, when once the applicant has proved his or her right to be helped and shown that he or she has good cause of action, the case shall proceed to trial as a matter of certainty. The obvious thing to do is that the Department shall undertake all the necessary work, ... (2)

Disruption of married life by the First World War resulted in 5,085 petitions flooding into the London Divorce Court in 1918 compared with an average of 965 for the years 1911-13. The two divorce judges could not cope and the only solution was to implement the Gorell and Lawrence Reports' recommendations in favour of provincial hearings. Though it was enacted in 1922 that Poor Persons' divorce cases could be heard at local Assizes it was not until the Poor Persons' Department was decentralised in 1926 that such cases were heard outside London. (3) Petitions could now be filed in one of twenty six District Registries, the hearing taking place at the nearest one of ten Assize courts. The need for such an improvement is reflected in almost half (47%) of all Poor Persons' petitions in the five years 1926-30 being filed in District Registries. There was no significant variation between the proportion of Poor Persons' petitions coming from wives in the District Registries (58%) compared with London (61%); altogether wives formed 60% of Poor Persons' petitions.

(1) The Case Against the English Divorce Law, 1932, p.99

(2) Mrs. W.M.Gallichan, nee Catherine G.Hartley, Divorce (Today and Tomorrow), 1921, p.151.

(3) Matrimonial Causes at Assizes Order (S.R. & O. 1922, No.757) which brought into effect Section 1 of the Administration of Justice Act 1920, as from the 19th October, 1922. (The Assizes ranked as the High Court.) The Order followed a Bill introduced by Lord Birkenhead in 1920.

An Assize judge could now also hear undefended petitions.⁽¹⁾ The latter provision gave qualified help to those outside the limits of the Poor Persons' scheme who did not have the means to pay the costs of a London hearing. But decentralisation did nothing to help those persons whose low income did not give them the means to pay any contribution towards the cost of a divorce suit. Nor did it benefit those whose wages were too high to obtain a certificate but insufficient to pay their own legal fees. The plight of the latter group underlined a fundamental weakness of the scheme, for there was no system whereby a person of moderate means need pay only part of the cost.

The report of a second committee appointed under Mr. Justice Lawrence, if ill-founded in its analysis of the 'difficulties', provides a commentary on legal outlook and practice at that time.

The difficulties which have arisen in the working of the Poor Person's Rules have been caused solely by reasons of inability of the Poor Persons' Department to find an adequate number of solicitors willing to undertake the conduct of the large number of divorce cases brought by and against poor persons On the 31st December, 1924, there were in the Poor Persons' Department 412 divorce applications in which favourable reports had been made for which no conducting solicitors could be found Many solicitors, for various reasons, object to undertaking divorce work of any kind. Others, who have no such general objections, do not like to receive at their offices persons who are often ill-dressed and frequently ill-mannered.⁽²⁾

Control by the Law Society

The government heeded the Report's criticisms, and in 1926 the running of the Poor Persons' Department was transferred from the Office of the Supreme Court to the London and Provincial Law Societies, who in turn set up some ninety committees throughout England and Wales. Since that time legal aid has been dominated by the legal profession whilst lay representation has been noticeably absent. The area committees, whose members were drawn from the local legal profession, were far better placed to encourage solicitors to voluntarily undertake this matrimonial work. Power to grant or refuse applications that had previously resided with the courts, now lay with the area committees. The weaknesses of the new procedure are pungently explained by Mr. Egerton:

The solution adopted arose from a very simple line of reasoning: there is a certain amount of voluntary effort available which it would be stupid to waste; therefore the services of lawyers should remain gratuitous. A gratuitous system depends upon the goodwill of solicitors therefore the demands of solicitors must be met. These were: more decentralization of divorce work, a Government grant towards administration expenses, and control of the scheme.⁽³⁾

(1) Discretion statements still had to be heard in London until 1944. As a result of the Report of the Matrimonial Causes (Trial in the Provinces) Committee in 1943 (Cmd.6480), the 1944 Order (S.R. & O.1944, No.396/L17) was passed repealing the requirement. Up until 1944, a local solicitor would normally appoint a London solicitor to act for him.

- (2) Report of the Poor Rules Committee, 1925, Cmd.2358, pars. 1, 5 and 7.
- (3) Op.cit., p.15.

Some of the committees felt it part of their duty to reduce the number of divorces, sharing the belief of one committee secretary "that it is so easy for a petitioner in an undefended divorce case to obtain a decree that, if the chance of success and not the merit of the applicant were taken as the test, help would be given to the wrong people".⁽¹⁾ In certain cases the function of the divorce judge was further usurped by committees 'trying' discretion cases to the extent of refusing relief - and thus the opportunity of divorce, though the court might well have given a decree if the case had come before it. Sanctimonious disapproval of discretion cases is shown in the moralising censorship of one provincial committee that declared: "' the parties have obviously regarded a marriage so lightly' that it had 'felt reluctant to put the court and the conducting solicitor to so much trouble in bringing about its dissolution' ".⁽²⁾ The weakness of the 1926 Rules were commented upon by Lord Justice Atkins in the following critical terms.

Nowhere in the Rules now obtaining were any regulations set forth determining or indicating in any way the manner in which the committee... was to perform its duties. He confessed that it startled him to find that a non-judicial body, from whose decision no appeal would lie, should have the power, as was here the case, to refuse an application by a person to sue in forma pauperis, without granting him an interview and without stating any reasons for their decision.⁽³⁾

After 1926 no further changes took place in the Poor Persons' Procedure until the Second World War. A further Committee, under Mr. Justice Finley, felt litigation should not be 'encouraged', though they made no suggestion that wealthy persons or corporations should be discouraged. Their Report rejected the analogy between legal and Health Insurance by saying that "It is manifestly in the interests of the State that its citizens should be healthy, not that they should be litigious."⁽⁴⁾ This insensibility of the real problem

(1) Report of Poor Persons' Procedure for 1936, quoted by Egerton, op.cit., p.61.

(2) Quoted by 'A Barrister', Justice in England, 1938, p.181.

(3) Solicitors' Journal, Vol.70, p.745: on Everett v. the Law Society, June, 1926.

(4) Final Report of the Committee on Legal Aid for the Poor, 1928, Cmd.3016, par. 17.

The Committee had produced an earlier First Report (Cmd.2638), under the same Chairman, in 1926. Judge Parry referred to it as "a disappointing document. It merely suggests that the State should wash its hand of the business and expresses the hope that charitable lawyers and laymen will look after it somehow or other". (E.A.Parry, The Gospel and the Law, 1928, p.273.)

came, in the words of Professor M.Jackson, from "a Report compounded of ignorance and stupidity. The critics had no desire to encourage litigation any more than to encourage surgical operations: the contention was that people who really needed professional services should not be debarred by poverty."(1) As with so many committees formed to investigate the working of our legal system, the Finlay Committee made no attempt to first examine the social factors affecting legal aid. Indeed as Professor Jackson perceptively observed in 1940:

"By setting up this bogey of making people litigious the opponents of the reform have fermented class feeling... 'The main obstacle to reform of English Justice is sheer ignorance of the facts', the ignorance being that of our upper classes. The poorer classes are of course better informed. If the obstacle to reform is not ignorance then it must be wilful intention to inflict injustice."(2)

Not all the members of the Finlay Committee were complacent in their approach to legal rights. The Minority Report signed by Dorothy Jewson and Rhys J.Davies, considered that "the need for a better provision of free legal aid is urgent and imperative and we are not satisfied that it will be met merely by the appeal for further voluntary help made in the report." The remedy should be the provision of legal advice by the local authority. The Council of County Court Judges recommendation allowing Registrars in certain cases to remit court fees and to provide free legal assistance, should, the Minority Report felt, be extended to civil cases in courts of summary jurisdiction. But even if this latter recommendation was implemented, Miss Jewson and Mr.Davies were doubtful if it would be enough to secure "that equality in the eyes of the law that justice demands".

(1) The Machinery of Justice in England, 1964 ed., p.308, fn.2. The attitudes expressed over forty years ago in the Finlay Report take a long time to die. Witness Lord Gardiner, then Labour Lord Chancellor, in an interview with the editor of New Law Journal (Vol.120, p.3.) at the beginning of 1970: "Health is a good thing and to be fostered, but litigation is not necessarily good or to be encouraged. Legal aid is a service like any other service, and I am not sure why people should expect to have legal services for nothing."

(2) Op.cit., 1940 ed., pp.259-60.
The quote is from English Justice, by 'Solicitor', p.239.

Wages of Manual Workers

The inflationary effect of the 1914-18 War resulted in semi and unskilled workers earning an average weekly wage of £2. 8s. in the early 1920s.⁽¹⁾ Though wages had risen, the means test remained that set in 1921. As a result large numbers of working class husbands found themselves outside the financial limits of legal aid. Social survey findings of the 1930s demonstrate how unrealistic was the supposition that those with incomes between £2, and £4 a week could afford to take legal proceedings. A random survey of 5,000 family budgets in 1936-37 indicated that 15 per cent. of Great Britain's population had a weekly wage below £2. 8s., half of which was spent on food.⁽²⁾ A further 60 per cent. had wages of between £2. 8s. and £4.16s. a week. Making allowance for differences in family size within this latter group, the estimated weekly 'per capita' income averaged £1 of which almost 40 per cent was spent on food. There was little left from the weekly wage after the additional expenditure on rent and clothing for the husband to contemplate divorce. In 1937 Seebohm Rowntree calculated in The Human Needs of Labour that the minimum income on which a tolerable standard of living could be maintained for a man with a wife and three children came to 53s. a week, or 41s. a week in rural areas. Where earnings fell below this sum it was almost certain that there would be a shortage of some of the necessities of life.

These social statistics show that from 1921 until the outbreak of the Second World War the majority of working class persons seeking divorce were barred from the usage of the Poor Persons' Procedure by the harsh £2 a week income limit rule.⁽³⁾ There was also a minority, who were so poor that, though their wages qualified them for legal aid, they could not afford the required lawyers 'out of pocket' expenses. Those who benefited by the Poor Persons' Procedure were a 'privileged' section of the low income groups within the working classes, who fell between the two limits of dire poverty and an average working wage.

(1) Calculated from G. Routh, op.cit., p. 104, table 47.

(2) Sir W. Crawford and H. Broadley, The People's Food, 1938.

Similar results were provided by the survey of John Boyd Orr in his investigation, Food, Health and Income, 1936.

(3) A.L. Bowley has calculated that real wages had risen 35% between 1914 and 1935.

Table 9

The proportion of all husbands and wives who applied under the Poor Persons' Procedure who (i) obtained a certificate, and (ii) filed a petition : 1921-1940

Period	Petitioner	Applicants for legal aid (yearly average)	Percentage of applicants who :	
			obtained certificate	filed petition
1921-30	Husband	1,937	36	26
	Wife	2,011	40	30
	Total	3,948	38	28
1931-40	Husband	4,057	38	25
	Wife	4,264	47	32
	Total	8,321	43	28

Source : Calculations based upon annual Civil Judicial Statistics.

Table 10

The proportions of petitions filed with legal aid : 1921-1968

Period	All matrimonial petitions filed (yearly average)				Total : All petitioners (100 per cent.)	Percentage of husband/wife petitioners with legal aid		
	Husband No.	%	Wife No.	%		Husband	Wife	All
1921-25	1,367	43	1,840	57	3,207	32	19	24
1926-30	1,715	41	2,495	59	4,210	34	35	34
1931-35	2,181	44	2,766	56	4,947	40	37	38
1936-40	3,583	47	4,082	53	7,665	32	41	37
1941-45	8,938	55	7,257	45	16,195	36	19	23
1946-50	21,374	55	17,750	45	39,124	Not available		22
1950-55	14,311	44	18,026	56	32,337	46	67	58
1956-60	12,423	45	15,276	55	27,699	23	58	42
1961-65	15,706	41	22,219	59	37,925	53	78	68
1968	20,614	37	34,642	63	55,256	43	75	63

Source : Ibid.

Table 11

Poor Persons' Procedure applicants who were unable to petition for divorce, as a proportion of all matrimonial petitions filed : 1921-1940

Period	Yearly average					
	All matrimonial petitions filed (I)	Applicants for legal aid (II)	Legally aided petitions filed (III)	(III) as percentage of (I)	Legally aided applicants unable to petition (IV) = (III - I)	IV as percentage of all (I) matrimonial petitions filed
1921-25	3,207	3,478	781	24	2,697	84
1926-30	4,210	4,419	1,448	34	2,971	71
1931-35	4,947	5,605	1,890	38	3,715	75
1936-40	7,665	11,036	2,841	37	8,195	107

Source : Ibid.

The Official Statistics

Study of the annual Civil Judicial Statistics between the two World Wars confirms that the majority of applicants seeking divorce under the Poor Persons' Procedure were restricted both by the limited financial assistance and the insufficient numbers of solicitors and barristers willing to take these cases.

Table 9 indicates that only 28 per cent of all applicants for certificates under the Poor Persons' Procedure ^{in the years 1921-1940} ever reached the point of filing a petition. Wives were more successful than husbands in obtaining a certificate for legal assistance, nearly half succeeding over the period 1931-40 compared to 38% for husbands. Yet only a third of the original wife-applicants and a quarter of the husband-applicants in 1931-40 reached the first stage in the judicial process of having their petitions filed. This meant that a yearly average of 1,215 applicants (see table 9: 15% of 8,321, i.e. 43% less 28%) obtained certificates but did not file their petitions. Failure was probably due to applicants' inability to pay lawyers 'out of pocket' expenses. During the period 1921-30, 13% of those who had filed petitions abandoned their cases before the hearing, compared to 4% between 1931 and 1940.

Tables ~~9 and 2~~ ^{also} suggest that the non-working wife might seem to have been in a more favourable position as the income bar would probably not disqualify her. This was not the case, as working-class wives had little knowledge about the availability of legal aid. And those wives who did seek divorce by means of the Poor Persons' Procedure still had to pay their solicitors' "out of pocket" expenses.

Tables ~~1 and 2~~ ¹⁰ provides the proportion of husbands and wives who, between 1921 and 1950, petitioned for divorce with the assistance of the Poor Persons' Procedure. There was a steady increase between the two Wars in ~~the~~ ^{proportion of} petitioners with legal aid, rising from a yearly average of 24 per cent to 37 per cent between the two periods 1921-25 and 1936-40. (1) Limited and imperfect though the Poor Persons' Procedure had proved to be, a minority of all the low income spouses with broken marriages were now able to petition for divorce by virtue of the changes brought about in 1914. By the 1930's well over a third of all divorces were granted to Poor Persons petitioners, and it was shown that, "the granting of these facilities has raised the divorce rate over 50 per cent." (2)

- (1) There was a fall from 37 per cent to 28 per cent between 1937 and 1938 in the proportion of assisted husbands due to the backlog of unassisted husbands who petitioned following the 1937 Matrimonial Causes Act.
- (2) D.V.Glass, 'Divorce and Separation', Political Quarterly, Vol.V.(1934) p.259

Table ⁱⁱ~~3~~₄ shows that between 1921 and 1940 Poor Persons' Procedure applicants who were never able to petition the High Court seldom totalled less than three quarters (rising to 107 per cent in the period 1936-40) of all petitions that were filed in a year. Further calculations show that some 90,000 men and women sought, but were unable to obtain, a divorce between the two World Wars.(1) The Poor Law stigma attaching to the Poor Persons' Procedure meant that only those who were qualified through poverty and who were also prepared to ignore the stigma would attempt to obtain legal aid. Therefore it is reasonable to suppose that these 90,000 de facto broken but de jure united marriages came from working-class backgrounds.

The majority of broken marriages still turned to the magistrate's court which dealt with three times more cases than the divorce courts in the five years 1931-35. Official statistics show that the average yearly number of dissolution and nullity petitions filed in this period was 4,784, whilst the magistrates' courts had a yearly average of 13,945 complaints from wives for maintenance orders. Only wives could obtain maintenance orders from summary courts whilst husbands had no practical legal alternative to the divorce court. This means that the ratio of three complaints to one petition must be seen as only a minimal indication of the working classes' general inability to seek divorce due to their lack of means or legal knowledge. The Fischer Williams Committee Report estimated that there were over 50,000 live maintenance orders in England and Wales in 1932. There were thus some 100,000 persons who had little chance or ability to obtain release from a broken marriage. This figure, together with the 90,000 debarred petitioners and those who turned neither to divorce nor to the magistrate's court, suggests that there were some 300,000 husbands and wives united only by their inability to seek or obtain, a divorce.(2)

- (1) Though figures under 'matrimonial petitions' include restitution of conjugal rights and judicial separation as well as dissolution and nullity; the former two categories were mainly middle class complaints and were unlikely to be sought by those applying for legal aid. Petitions for restitution and judicial separation formed 7 per cent of the combined total in the years 1921-30 and 2 per cent in the years 1931-40.
- (2) 50,000 maintenance orders together with the 90,000 debarred petitioners, results in some 140,000 broken marriages. Allowing that an unknown - say half - of the magistrate's court cases were included in the figure of 90,000, then some 115,000 marriages result. We have no idea of the number of dead marriages that sought neither divorce or a maintenance order, but their number could hardly be less than 35,000. (In 1965 61,000 separated wives, neither divorced or with a magistrate's court order, received assistance from the National Assistance Board - Cmnd.3587, 1968, table 17(b), p.93). Upon this calculation, there were some 150,000 broken marriages existing in England and Wales in the mid 1930's.

The War Years

The Matrimonial Causes Act of 1937 did not include revision of the Poor Persons' Procedure; and so the majority of the working class still remained excluded from access to the divorce court. The new grounds did, however, lead to a 60 per cent rise in Poor Person petitioners between 1936 and 1938; the increase being due to the backlog of wives who used the new grounds.⁽¹⁾ After 1937 the increasing numbers of petitioners revealed more clearly than ever the unwillingness or inability of solicitors to undertake Poor Person divorce suits. Dissatisfaction with the procedure led to the formation of another Committee, this time under the Chairmanship of Mr. Justice Hodson; but the outbreak of war stopped their work. Even before the Hitler War there were signs that solicitors were no longer willing to countenance a system which put a special burden on those practising in working class areas. The Welsh Law Societies declared in June, 1939, that they would no longer deal with Poor Persons' cases unless, amongst other demands, their members received a reasonable fee for this work. The bluff of the Council of the Law Society and previous Government Committees in threatening the formation of State-financed salaried solicitors to critics of the voluntary system was openly being challenged.

The transfer of two thirds of the solicitors to war duties in 1939 meant that the already extended Poor Persons' Procedure became hopelessly inadequate. In some areas applicants had to wait two or more years before their cases could be dealt with by the remaining solicitors willing to undertake this work. At the same time ~~the~~ many servicemen were receiving a wage that put them above the financial limits of the procedure. Probably nothing would have been done at this critical time but for the Government's concern that service men's morale should not be endangered by anxieties over their domestic affairs. The Government's solution was the formation in 1942 of the Services' Divorce Department, which was followed by the creation of a Poor Persons' civilian section conducted on the same lines and operating within the Services' Divorce Department.⁽²⁾ Effective working and organisation of the Department, which was financed by the Treasury and run by salaried solicitors and staff employed by the Law Society, helped to underline the inadequacy of the pre-war system.

- (1) In both 1936 and 1938, wives formed 53% of all petitioners. There was an increase of 1,340 legally aided petitioners between the two years, which consisted of wife petitioners in 80% of these cases.
- (2) This history of the Services' Divorce Department is described in the Rushcliffe Committee Report, op.cit., Cmd. 6641, pp.5-6, 13-14.
hand

The Poor Persons' Procedure £4 limit was not increased at the end of the War for the expedient reason that there were not enough volunteer solicitors to cope with the large rise in applications anticipated from such a move. Censure cannot be put upon those members of the legal profession who were unwilling to undertake work without fee, profit or remuneration.⁽¹⁾ Blame lay with successive Governments who relied on the goodwill of solicitors and barristers. The overriding principle of charity ensured that the procedure's stringent means test was designed to underline the fact that applicants had no means whatever to pursue unassisted their own divorce action. The necessity that legal help should be available to all within the development of postwar social services, was anticipated by Professor E.W.Kenton, who wrote in 1942: "If one of the objects of the present war is the achievement of social security for the less wealthy sections of the community, then a State system of legal aid for the poor, with reasonable remuneration for those who are employed upon it, is just as much a necessity as a scheme of national health insurance".⁽²⁾

Most working-class men by 1945 had wages above the £4 limit imposed by the Poor Persons' Procedure, and meant that a smaller proportion of people qualified for assistance.⁽³⁾ This is reflected in a decline from 38 per cent. of petitioners being legally aided in the 1930s to 20 per cent. in 1945; but higher real wages also meant diligent husbands could save towards the likely full scale charges of £50 to £70 required for a straight-forward undefended divorce case.⁽⁴⁾ Self-respect still stopped many others from applying for legal assistance from a procedure that was heavily marked by the pauper brush.

- (1) Sir John Withers estimated that an average undefended divorce suit represented a contribution of £20 by the conducting solicitor (Law Times, Vol. 165, p.402).
- (2) "Law Reform After The War", Law Quarterly Review, Vol.58, p.255.
- (3) A wage rates index calculated by A.L.Bowley ("Index Numbers of Wage Rates and Cost of Living", Journal of the Royal Statistical Society, 1952, p. 501), in which 1938 had a base rate of 100, shows a rise in the index from 91 in 1935 to 154 in 1954 and 197 in 1950. The Ministry of Labour estimated that the average manual wage was around 70s. a week in 1938; though there was a difference of £1. 5s. between the earnings of skilled and unskilled workers.
- (4) The sum of £50 to £70 is quoted by the Second Interim Report of the Committee on Procedure in Matrimonial Causes - The Denning Committee, 1946, p.8.

The need for better facilities and access to court was observed by the Law Journal:

It is, or should be, generally realised that the present system of legal assistance to poor persons is altogether too limited - particularly with regard to the class of persons who can benefit by it - to do more than touch the fringe of the problem created by the fact that litigation is an expensive matter for the litigant. The whole matter is one as to which something will before very long have to be done. (1)

It was in these circumstances that Lord Simon, the Lord Chancellor, in 1944 set up a Committee under the chairmanship of Lord Rushcliffe "to enquire what facilities at present exist in England and Wales for giving legal advice and assistance to Poor Persons, and to....make recommendations". The Report, published in 1945, recommended that those who did not have the means to pay should receive free legal aid, others who could pay part of the legal costs should be assessed by a contribution scale. "The precise contribution expected from a man in a particular case will depend upon the amount of the costs to be incurred. Our formula is merely to arrive at a maximum and whatever the action cost, he would not be liable to contribute more than this maximum".(2) Investigation of means should be left to the National Assistance Board (now the Supplementary Benefits Commission) whilst the merits of the case would be decided by a Committee of lawyers. The Report further recommended that the Law Society should establish Legal Aid Centres in appropriate towns and cities, where legal advice should be provided for 2s.6d. to anyone unable to pay the ordinary fee. (3) Cost of the complete scheme envisaged by the Committee was to be borne by the State but administered by the legal profession. Barristers and solicitors should receive adequate payment for the work they undertook. It was upon these proposals that the Legal Aid and Advice Act of 1949 was based.

(1) Vol.94 (1944), p.42.

(2) Cmd.6641, op.cit., par.148.

(3) This was not implemented in the 1949 Act.

THE EFFECT OF LEGAL AID ON DIVORCE IN ENGLAND AND WALES SINCE 1950 *

Postwar social legislation in health, welfare and education was witness to the desire not to return to social conditions existing before 1939. The Rushcliffe Committee had already reported:

We think that it would be impossible to expect any extension of gratuitous professional services, particularly as there appears to be a consensus of opinion that the great increase in legislation and the growing complexity of modern life have created a situation in which increasing numbers of people must have recourse to professional legal assistance.

It follows that a service which was at best somewhat patchy has become totally inadequate and that this condition will become worse.(1)

The ten years following 1939 had seen a four-fold increase in the yearly number of petitions to 38,901 in 1949. The problem had now grown too big to depend any longer on voluntary aid from the legal profession.

The Legal Aid and Advice Act of 1949

The Bill that was to become the Legal Aid Act was described by the Labour Attorney General, Sir Hartley Shawcross, as, "the charter of the little man to the British courts of justice. It is a Bill which will open the doors of the courts freely to all persons who may wish to avail themselves of British justice without regard to the question of their wealth or ability to pay." (2) The Opposition Conservative party spokesman, Sir David Maxwell Fyfe, welcomed the Bill as a "workable and helpful scheme which would improve the position of a section of the community which badly needed help." The Bill had unopposed second readings in both Houses of Parliament and received the Royal Assent on the 30th July, 1949.

The preamble of the Legal Aid and Advice Act of 1949 reads: "An Act to make legal aid and advice in England and Wales.. more readily available for persons of small or moderate means (and) to enable the cost of legal aid or advice for such persons to be defrayed wholly or partly out of the moneys provided by Parliament..." →

* A substantial section of this chapter appeared under the same title as an article written jointly with Miss A.Beer in Family Law, Vol.1, (1971), pp.122-128.

(1) Cmd.6641, op.cit., pars. 125-26.

(2) Hansard, H. of C. Deb., Vol.459 (1948), col.1221.

Within the Act were the principles upon which the operation and practice of legal aid has since been based. The Act provided that legal aid in civil proceedings would be granted in all the principal courts of law, from magistrates' courts to the House of Lords, and would make more readily available the legal assistance already provided for people of limited means in the criminal courts. In the words of Professor McGregor: "It thus required a delay of thirty-eight years before the principle of the Report of 1912 that no person should be denied access by poverty to the divorce court, became a reality." (1)

The Act only came into force by instalments due to government economy cuts as part of its post-war austerity programme. Responsibility for seeing that legal aid and advice covering civil matters were available to the public, and for administering the general working of the Act was entrusted to the Law Society. There was opposition to this plan, some seeing it as no more than a "sew-up between two branches of the legal profession". (2) In Parliamentary debate over the Bill, Mr. Emrys Roberts said it was a mistake for the scheme to be run as "a closed shop, entirely the preserve of lawyers"; another M.P. cynically hoped to hear that "the Miners Federation will be given a similar trust in connection with the nation's coal resources". (3)

The Divorce Department of the Law Society continued after the return of peace-time conditions, to help petitioners whose assessed contribution was £10 or less. In 1950 the Department's own salaried solicitors dealt with some 9,600 cases, but as wages rose so the numbers fell to about a third of the original figure by 1959. The work of the Department began to be wound down in 1960 and now all matrimonial cases are dealt with by solicitors in private practice.

The two hurdles of legal merit and financial privation that had existed under the old Poor Persons' Procedure were continued as a basis for assessing applications for assistance. The Law Society's attitude to the question of legal merit is clearly expressed in a letter from the Secretary of their Contentious Business Committee to The Solicitors' Journal:

The test universally approved by the Area Committees, which has judicial support, is for members of the committee to consider whether they would advise a paying client for whom the provision of the cost would be something of a sacrifice, and the risk of losing a factor to be weighed up with care, to issue proceedings and pursue the matter to a hearing if need be. (4)

(1) Op.cit., p.34.

(2) Mr. C.Royce M.P.; as quoted by Brian Abel-Smith and Robert Stevens, Lawyers and the Courts, 1967, p.325. Chapter XII provides an account of the involvement of the legal profession in the history of legal aid.

(3) Ibid.

(4) The Solicitors' Journal, 9th December 1966, p.929; quoted by Edward Moeran, Practical Legal Aid, 1969, p.2.

Judge Ormrod has recently exposed one of the unsatisfactory aspects of rejected applications.

Counsel for the Law Society pointed out that there is a possible lacuna in the legal aid scheme in that there is no machinery for appealing from a decision of an area committee even in matters in which they exercise what might be called an original jurisdiction, as in this case, in connection with legal aid in appellate proceedings, but he steadfastly maintained that an area committee was not required to give its reasons for refusing a certificate in proceedings like the present. There is nothing in the 1949 Act, as far as I know, to prevent them disclosing their reasons in a proper case. The decision not to disclose them is, presumably, a matter of policy. One can see a number of reasons for adopting such a policy in general, but it is poor comfort for a rejected applicant or his legal advisers merely to be told, as the husband in this case was, that his application was rejected on two grounds, namely grounds 'E' and 'F' on the printed form which read as follows:

'E' You have not shown that you have reasonable grounds for taking steps to assert or dispute the claim, or for taking, defending, or being a party to proceedings.

'F' It appears unreasonable that you should receive legal aid in the particular circumstances of the case. (1)

A significant new improvement was the provision of legal aid to persons of moderate means through a system of contributory aid, as well as to the very poor who could still receive free assistance. To qualify for assistance under the Law Society's scheme the applicant was required to have a disposable income of less than £420 a year and disposable capital under £500, these assessments being calculated by the (then) National Assistance Board according to set regulations.(2) The applicant, if assessed above the free limits, had to reimburse the Scheme such amounts as were set down in the scale rates. The difference between the cost of the case and that contributed by the applicant was provided out of Government funds.

(1) Povey v Povey, (All E.R. 1970, pp.624-5).

(2) The term 'disposable' refers to what a husband or wife is calculated to have left in their possession after making certain deductions from their gross income and capital. Thus in calculating 'disposable' income, allowance would be made for clothing, heating, hire purchase commitments, maintenance payments etc., whilst 'disposable' capital would not normally include the value of the applicant's house, furniture or other household possessions.

The effect of the 1949 Act

The part of the Act relating to the provision of legal aid in the High Court came into force on the 1st October, 1950, so that 1951 was the first full year of petitioning under the new scheme. The number of petitioners receiving legal aid rose three-fold from 8,184 in 1949 to 24,865 in 1951, and as a proportion of all petitioners they increased from 23% in 1949 to 65% in 1951.⁽¹⁾ We would expect the extension of legal aid facilities to result in an increased number of divorce petitioners, because husbands and wives in the lower income groups, previously unable to bear the financial burden of divorce proceedings, could now petition. Indeed, between 1949 and 1951 there was a 9% rise in the number of petitions filed. However, it was a 21% rise in the number of wives petitioning which accounts for this increase; the number of husbands petitioning in 1951 declined by 3% over the 1949 figure. The introduction of legal aid did not reverse the downward trend, begun in 1948 after the post-war boom in divorce, in the number and proportion of petitions presented by husbands. Poverty had hindered far more wives than husbands from access to the divorce courts, and wives were the immediate and most numerous beneficiaries of the legal aid scheme.

The introduction of legal aid in 1950 did not lead to a permanent rise in the divorce rate once the backlog of cases had been cleared. The rate of 52 petitions per 10,000 married women aged 16 to 49 in 1951 fell yearly to a rate of 41 in 1953. The proportion of legally aided cases also declined from 65% in 1951 to 59% in 1953. The reasons for the limited effect of the 1949 legislation are twofold. Firstly, post-war higher wages and full employment allowed wage earning petitioners to save to meet the cost of divorce up until 1950. Secondly, the new legal aid provisions did not provide full legal fees for all financially assisted petitioners. Free legal aid was only available to those with less than £156 disposable income and £75 disposable capital. Applicants who qualified for help from the scheme but were assessed above the free legal aid limits could be asked to contribute up to half the amount by which their own disposable income exceeded £156 and the excess over £75 of capital. This sliding scale of contribution meant that

(1) These and all subsequent statistics in this chapter, unless otherwise stated, refer to matrimonial petitions, that is, dissolution, nullity, restitution of conjugal rights and judicial separation. Ideally, it would have been best to limit the analysis of official statistics to dissolution only, but this was impossible because the Lord Chancellor's Office and the Law Society's legal aid statistics, when referring to matrimonial petitions, do not provide breakdown by type of petition. In the fifteen years 1951-1965, 97% of all matrimonial petitions filed (i.e. both assisted and unassisted) were for dissolution, 2.3 per cent for nullity and 0.7 per cent for restitution of conjugal rights and judicial separation.

TABLE 12

Percentage of (i) husband and wife petitioners who were legally aided, and (ii) petitions filed by wives; in the years 1949-1968

Year	Percentage legally aided			Number of matrimonial petitions filed	Percentage of petitions filed by wives
	Husband	Wife	All petitioners		
1949	} Not available		23	35,433	52
1950			25	29,868	55
1951	56	71	64	38,551	57
1952	50	69	61	34,753	56
1953	47	69	59	30,701	56
1954	41	65	54	29,184	55
1955	33	61	49	28,495	55
1956	27	61	45	28,640	55
1957	21	57	41	28,062	54
1958	18	54	38	26,444	55
1959	18	54	38	26,561	55
1960	32	63	50	28,790	57
1961	48	75	63	32,152	57
1962	55	76	67	34,892	58
1963	56	80	70	37,548	58
1964	54	79	69	41,780	60
1965	50	80	68	43,255	60
1966	48	78	66	46,890	61
1967	49	80	68	51,269	63
1968	43	75	63	55,256	63

Source: ^{calculations based on} annual Civil Judicial Statistics

TABLE 13

Proportion of petitioners in each social class who received legal aid in 1961

Party petitioning	Husband's social class by present occupation*						In prison, retired, disabled, servicemen, students	Occupation not known or inadequately described	All classes
	I&II	III Nm.	III Man.	IV	V	Total I - V			
	Percentage legally aided in each group								
Husband	20	32	47	52	81	44	62	71(+)	46
Wife	48	64	78	82	80	71	81	89	74
Total	36	50	63	67	80	58	74	87	62

*Social class based upon occupation of husband as recorded on the petition, and subsequently coded by the Registrar General's Classification of Occupations manual.

(+) This percentage is based on very small numbers.

← Those with incomes assessed at nearly the maximum were required to pay a considerable part of their own fees. Writing in 1957, Professor O.R. McGregor records that "The sliding scale operates in such a way that it would not be worth the while of a person whose disposable income was £300 a year or more to use the scheme for an undefended divorce costing £75".⁽¹⁾ The effect of legal aid upon the propensity of spouses to seek divorce is described by Rowntree and Carrier: "In fact it seems as if the introduction of legal aid in the middle of the period of prosperity did not contribute substantially to the lowering of absolute barriers to divorce (except possibly to the backlog cases), though it may have provided a minor degree of relief to those low-income petitioners who were previously struggling to meet legal costs independently".⁽²⁾

The mid 1950's saw the number and proportion of legally aided petitioners continuing to fall until 1958 when only 38% of petitioners were legally aided compared with 59% in 1953. The decrease in the number of legally aided petitioners may be explained by the fact that the legal aid scheme failed to adjust its financial limits and rules for assessing the means of litigants to take account of the increases in prices and wages. Between 1945 and 1959, for instance, the cost of living rose by some 75%; and the wage of the average male worker rose 80% between 1946 and 1957 from 121 shillings to 217 shillings per week - or £565 a year - in 1957.⁽³⁾ Between the years 1948 and 1956 the rates for national assistance had been increased on five occasions with the result that they had risen almost 70% over this period. None of the allowances in the Assessment of Resources Regulations, however, was amended to take account of inflation.

Table 12 shows that the proportion of husbands who were legally aided fell from 47% in 1953 to 18% in 1958 whilst in the same period the proportion of legally aided wives fell from 69% to 54%. The more rapid decline in the proportion of husbands receiving legal aid was as one would expect, because wives' financial resources are in general more limited than those of husbands. Thus, wives' financial resources qualification to receive legal aid was less affected, than that of husbands, by inflation placing them beyond the upper income limits of legal aid, or by increases in the contributory payments required by the scheme.

(1) Op.cit., p.46, fn1.

(2) Griselda Rowntree and Norman H. Carrier 'The Resort to Divorce in England and Wales, 1858-1957', Population Studies, Vol.11, pp.211-12.

(3) Peter Benenson, The Future of Legal Aid, (Fabian Research Series No.191), 1957, p.17.

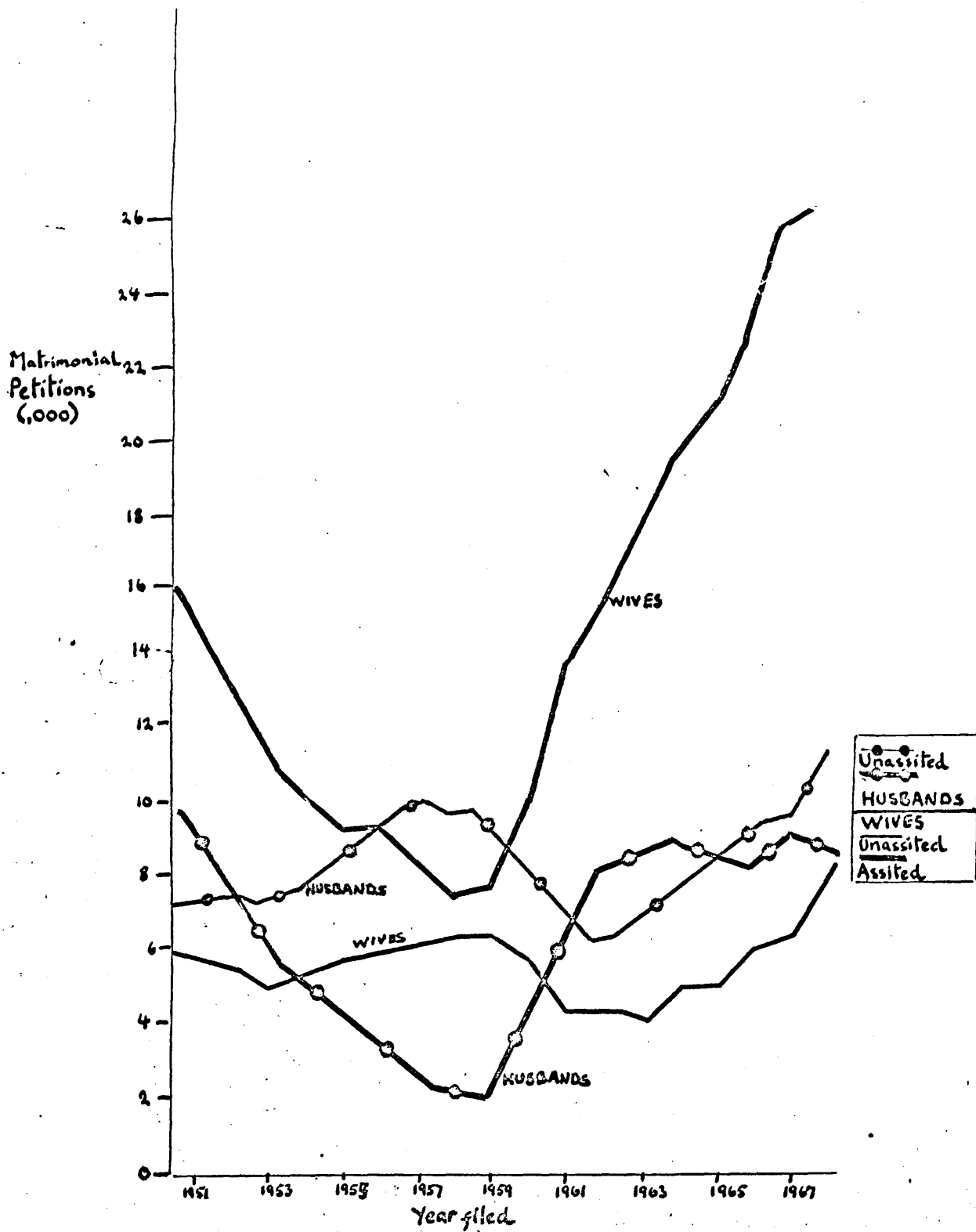


Figure 1
Husbands and wives with and without legal aid, 1951 to 1968,

The fall in the proportion of petitioners who were legally aided from 59% in 1953 to 38% in 1958 was accompanied by a decline in the rate of divorce from 41 petitions for every 10,000 married women age 16 - 49 in 1953 to 35 petitions per 10,000 in 1958. This association between the numbers receiving legal aid and the total number of divorces led the Law Commission to conclude that "There is reason to think that these fluctuations in the number of divorces were caused mainly by the availability of legal aid and that there would not have been a continued fall in numbers prior to 1960 but for the fact that fewer couples could afford a divorce if they wanted it"⁽¹⁾. The Law Commission were correct in their beliefs in so far as a drop during the 1950's in the numbers and proportions of petitioners receiving legal aid was associated with a drop in the annual number of petitions filed. But what they did not record was that between 1953 and 1958 the total number of petitioners decreased proportionately less than the number of assisted petitioners. The 9,936 legally aided petitioners in 1958 were 45 per cent below the 1953 figure of 18,091 legally aided petitioners, whilst the total number of all petitions filed in 1958 was only 14 per cent below that of 1953. This latter finding is explained by the increase in the number of unassisted petitioners from 12,610 in 1953 to 16,483 in 1959. Figure 1 displays the increasing numbers of unassisted petitioners that partly compensated for the drop in assisted petitioners experienced during the 1950's. These two movements when examined together, suggest that the increasing difficulty in obtaining legal aid during this period did not influence the divorce rate as strongly as the Law Commission implied.⁽²⁾

Because the Law Commission have been so interested in the legal disabilities of women, it is surprising that they did not extend their arguments further to cover the effect of legal aid upon women petitioners. If they had they would have found that the provisions of legal aid and numbers petitioning for divorce are more closely related for wife petitioners than for husband petitioners. This is reflected in figure 2 which shows the annual number of financially assisted and unassisted spouses who have petitioned since 1951. The numbers of unassisted husband petitioners rose rapidly as their ability to obtain legal aid declined during the 1950's, but this was not found in the case of wife petitioners. Thus, a 49% drop between 1951 and 1958 in the number of wives petitioning with legal aid resulted in a 34% drop in the total number of wives petitioning. A 78% decrease in the number of husbands receiving legal aid, however, was associated with a decline of only 29% in the total number of petitioning husbands. It appears that the majority of wives who no longer qualified for legal aid in the 1950's were, unlike husbands, unable to proceed unassisted with divorce proceedings. Legal aid was of major importance to the divorce rate of wives at this time, although its associations with the number of husbands petitioning was much less marked.

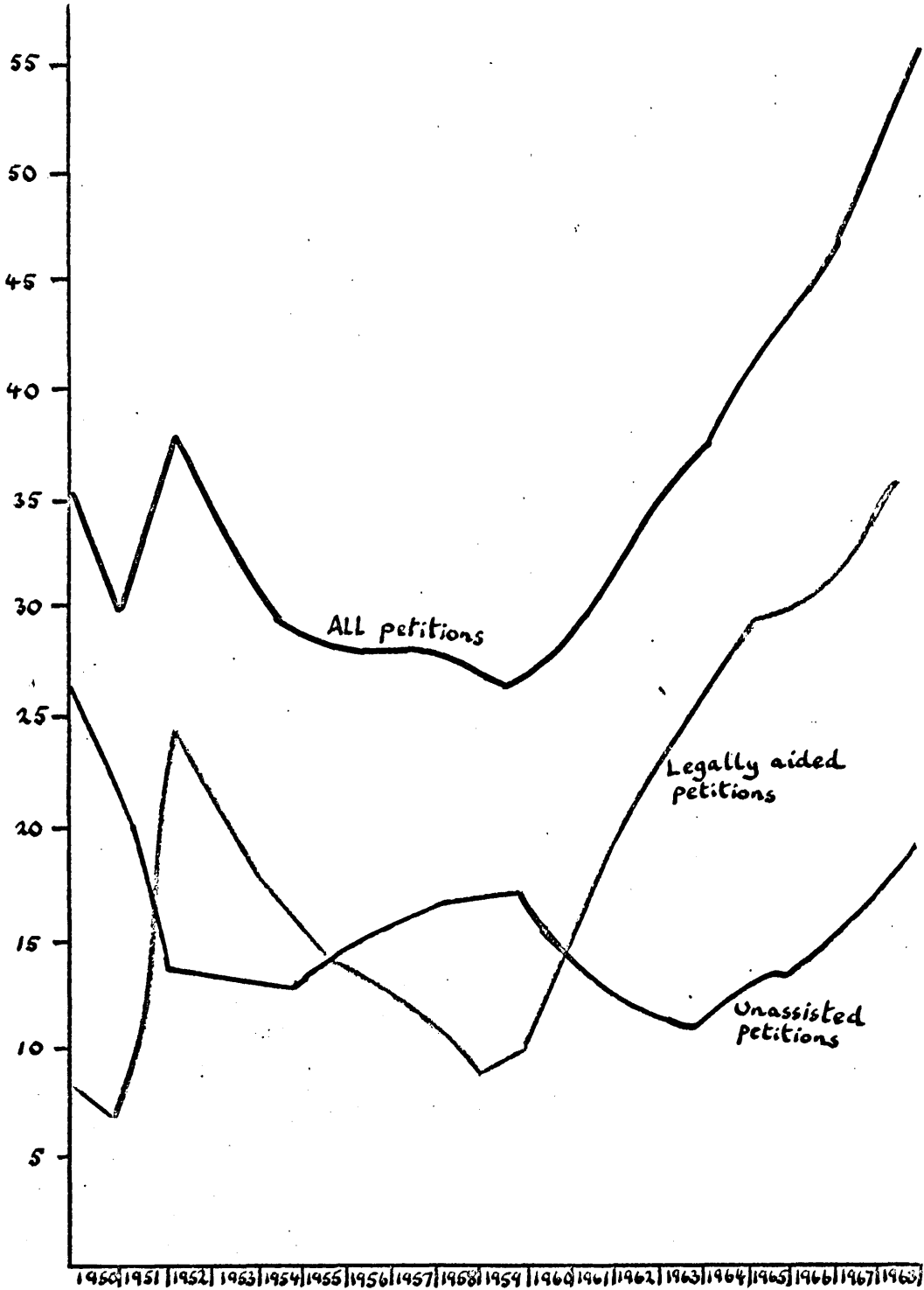
(1) Reform of the Grounds of Divorce: The Field of Choice, Cmnd. 3123 (1966), p.8.

(2) Rowntree and Carrier came to a similar conclusion from their study of the years 1953-56 (op.cit., p.213).

Figure 2

Total number of petitions filed annually compared to
(i) legally aided petitions, and (ii) unassisted petitions for
the years 1950 to 1968.

Matrimonial
petitions
(,000)



The Legal Aid Act of 1960

The benefits of legal aid had thus been steadily eroded throughout the 1950's by inflation which had caused £420 in 1949 to be worth about £280 in 1958. The effect was to exclude from the scheme people whose financial position would, in 1949, have qualified them for assistance. As a result of this rise in the cost of living a Committee recommended in 1959 that the income limit should be raised to £275 for free legal aid and to £700 for contributory financial assistance.⁽¹⁾ The 1960 Legal Aid Act implemented the Committee's recommendations on a slightly less generous scale. Free legal aid was made available to those with a disposable income of up to £250 and disposable capital of up to £125. Contributory legal aid was raised from a maximum limit of £420 to £700, although it could be refused if the applicant had disposable capital above £500. The maximum contribution that an applicant could be asked to make was one-third of the amount by which disposable income exceeded £250, and all capital over £125. Professor R.M.Jackson calculated that "when these figures of income are translated from 'disposable' back to actual, the top limits are an income of about £1,200 for a single man to £1,600 for a married man with three children."⁽²⁾

The cost of living rose 52% between 1949 and 1960, whilst the increase from the old income upper limit of £420 to £700 was 66%, and therefore, the new rate did compensate for the decline in the value of money over the first decade of the 1949 Act's operation.⁽³⁾ The 1960 Act provided a further refinement; section 1 allowing for the future increase of permitted ^{maximum} levels of yearly income and capital to "such larger figure as may be prescribed". As 'prescribed' is defined in section 17 of the 1949 Act as regulations made by the Lord Chancellor, legal aid limits could now be raised by the issue of new Regulations without need of further legislation. Thus, it might be expected that the 1960's would not witness the de facto lowering of legal aid limits by inflation that had been experienced during the 1950's.

(1) Report of the Advisory Committee upon the Financial provisions of the Legal Aid and Advice Act 1949 and the Legal Aid (Assessment of Resources) Regulations 1950, Cmnd.918, 1959.

The limits proposed by this Committee were calculated to take account of rises in both the cost of living and litigation so that legal aid should be provided on as generous a scale as ^{that} recommended by the Rushcliffe Committee. The Law Society considered that these proposed figures were too high and would "make a class of litigant eligible for legal aid who had never been eligible in the past and would involve a large proportion of the litigious business of some solicitors."

(2) The Machinery of Justice in England, 1964 (4th ed.), p.313.
See also E. Moeran, op.cit., p.47 et.seq.

(3) See Hansard, H. of L. Deb., Vol.616, col.648.

The number of divorce petitions rose again following the 1960 Act which, in conjunction with the introduction of more liberal regulations governing the assessment of means, brought a larger section of the population within the scheme.⁽¹⁾ The proportion of all petitioners who were legally aided rose from 38% in 1958 to 63% in 1961. Taking all petitions filed in a year, the proportion formed by legally aided husbands rose by 12% - that is from 8% to 20% - between 1958 and 1961; whilst legally aided wives increased their share by 13% - that is from 30% to 43% - between the same years. Thus, the increase in the income limits appears to have had an almost equal effect on the proportionate rise of husbands and wives petitioning with legal aid.

Inflation in the 1960's

The influence of inflation upon the proportion of husband petitioners who were legally aided, which was observed in the 1950's, is again apparent in the latter half of the 1960's. A reduction in the proportion of legally aided husbands from 54% in 1964 to 43% in 1968 was not accompanied, however, by a lowering in the numbers of husbands seeking divorce. Between the same years the number of husband-petitioners with financial assistance fell by 197, whilst the number of unassisted husbands increased by 3,892. The availability of legal aid helped husbands to pay a proportion of their divorce fees, but the absence of such assistance did not reduce their propensity to petition. In contrast to legally aided husbands, the numbers of legally aided wives increased by 6,416 in these five years. The fall in the number of husbands compared to the increase in wives obtaining legal aid is explained by rising wages and the earnings differential between men and women, which placed many husband's income above the limits set by the legal aid regulations.

Anxiety was felt by the Law Society that legal aid was once again failing to keep pace with inflation. Their Report for 1965-66 observed that since 1960:

"...there has been a continuous rise in the number of applicants who, although hopeful that they may be financially eligible for Legal Aid, are found to be outside the fixed financial limits... The Council consider that the present upper financial income limit and the contribution ceiling need re-examination." (2)

- (1) The Legal Advice (Assessment of Resources) Regulations, 1960 (S.I.1960 No. 1471), which came into force on the 22nd August, 1960, allowed the National Assistance Board to be more generous in their calculation of "disposable" income and capital. There had been similar Regulations in 1959 (S.I. 1959/1350). See Legal Aid Handbook (The Law Society), 1966 (3rd ed.), H.M.S.O., p.163 et. seq.
- (2) Legal Aid and Advice, (Sixteenth Report of the Law Society, and Comments and Recommendations of the Lord Chancellor's Advisory Committee), 1967, p.3.

← In 1968 the Advisory Committee on Legal Aid recommended that, in order to take account of the decline ^{in the value} of money since 1960, the free legal aid limit should be raised by 24% to £310, whilst the contributory proportion should be lowered from one-third to two-fifths.⁽¹⁾ Commenting upon the Advisory Committee's proposals, the Law Society expressed concern that no alteration in the free capital allowance had been proposed, and suggested that "at least £500 should be the sum which an assisted person is permitted to retain before being required to make a contribution from his capital resources".⁽²⁾ This alteration would have brought the free capital allowance under legal aid more closely into line with the capital allowance of £800 which a person receiving Supplementary Benefit was allowed to have before being required to provide for his own subsistence.⁽³⁾

The recommendation of an increase in the free capital limit has not been implemented by the Government. Regulations⁽⁴⁾, however, were introduced in November, 1970, to increase the upper disposable income limit governing eligibility for legal aid from £700 to £950, and to increase the free legal aid limit from £250 to £300. The Solicitor General commenting upon these new limits noted that "These new figures of £300 and £950 must be considered alongside the Assessment of Resources Regulations,⁽⁵⁾ which will have the effect of increasing the figures that I have mentioned by an average of £50 in each case."⁽⁶⁾ These regulations effect a change in the method of assessment of an applicant's resources by the Supplementary Benefits Commission, as was recommended by the Legal Aid Advisory Committee in their nineteenth Report. The Commission now disregards the first £104 of every applicant's income whereas previously disregards under the old regulations averaged out at £54 per applicant.

As the then Lord Chancellor, Lord Gardiner, observed in the House of Lords' debate preceding the increase: "The result of not up-rating the figure has been as to the top limit, that every year there have been people who could have got legal aid last year but cannot now do so; and at the bottom end, while no one has been deprived of legal aid, it has meant calling on people for contributions when, obviously, they cannot afford to make them".⁽⁷⁾

(1) Ibid, Seventeenth Report (1967-1968), 1968, p.61.

(2) Legal Aid and Advice, (Eighteenth Report: 1967-68) 1969, p.2., par. 4.

(3) The Supplementary Benefit (Claims and Payments) Regulations, 1966 (S.I. 1966, No.1067); see Supplementary Benefits Handbook, (April 1971 ed), par 25.

(4) The Legal Aid (Financial Conditions) Regulations, 1970 (S.I.1970, No.1707).

(5) The Legal Aid (Assessment of Resources) (Amendment) Regulations, 1970 (S.I. 1970, No.1162).

(6) Hansard, H. of C. Deb., Vol. 806, (11th November, 1970), col.542.

(7) Hansard, H. of L. Deb., Vol.310 (15th May, 1970), col.879.

The Matrimonial Causes Act, 1967

The net average cost incurred by Legal Aid funds due to matrimonial petitions is calculated by adding together retained contributions due from and damages and costs awarded to the petitioner, and then subtracting this total amount from payments made by the Scheme to solicitors and Council for their services. In the year April 1960 - March 1961 the Treasury had to reimburse the Legal Aid fund an average sum of £29 for each financially assisted petitioner. By 1963-64 this had become £75 per case, forming a total amount of £1,617,083 for the 21,415 assisted persons. The remaining 49,340 legally aided litigants that year cost government funds £790,976 or £16 a case. This led the Lord Chancellor's Advisory Committee to express concern that "the taxpayer was left to pay the lion's share" in legally aided ^{divorce hearings.} ~~matrimonial costs.~~ They went on to observe:

....unless your Lordship can find ways of reducing the average cost of both assisted and unassisted cases of different types, especially those in the divorce courts (whether by way of procedural reforms or otherwise), we think that there is little scope for any major economy so long as the demand for legal aid remains at its present level or continues to rise.(1)

The Matrimonial Causes Act of 1967 was passed with the intention of bringing about a reduction in the costs of divorce (2) by allowing County Courts to hear undefended petitions. (3) The administration of the divorce courts had been reformed not so much to help those who had experienced marriage failure but rather to reduce the financial burden of such hearings upon the taxpayer. With this legislation came the right of solicitors to present undefended divorce petitions, which constitute the vast majority of such cases, without the need to employ a barrister as required if the petition was heard in the High Court. (4)

If the aim of the Act succeeded in reducing the cost of petitioning, then it follows that both assisted and unassisted ^{petitioners} would benefit, the former by lower contributions and the latter by reduced legal fees. One likely consequence of lower costs should have been an increase in both types of petitioner after the Act came into force in April, 1968. As expected, there was a large increase of 4,043 unassisted petitioners between 1967 and 1968. However, for the first time since 1960, the annual number of those legally aided fell by the slight amount of 76. This is further confirmation that the association between cost of divorce, legal aid and the divorce rate is neither direct nor simple.

Legal Aid and Advice, (1) ibid, (Fourteenth Report: 1963-64), pp.56-57.

(2) See comments of the Lord Chancellor, Hansard, H. of L. Deb., (2nd February, 1967) Vol.280, cols.172 and 175.

(3) Since the last War, Commissioners drawn mainly from County Court judges had been allowed to sit at selected provincial towns and in London ^{where} ~~in~~ the jurisdiction allowed a High Court judge in divorce and matrimonial cases.

(4) The right to allow County Courts to hear divorce suits was opposed by the Bar Council who felt such a move would not result in a saving. (See The Guardian, 27th July, 1965, p.3).

Survey of Legally Aided Petitioners

It ~~is~~ ^{was not} known to what extent the rate of petitioning amongst the social classes ~~is~~ ^{was} affected by the availability of legal aid. Study of 1951 divorce petitions by Miss Rowntree and Mr. Carrier tentatively suggested that the occupational structure of those divorcing and those remaining married ~~is~~ ^{was} strikingly similar. (1) A survey carried out by the Legal Research Unit, Bedford College, University of London, provides new information about the social class distribution of legally aided petitioners in 1961. (2) Data was obtained from a random sample of every fortieth petition filed in Divorce Registries in England and Wales in 1961, which resulted in the granting of a decree absolute. (3) Various characteristics of those divorcing within our sample, such as husband or wife petitioning, duration of marriage, number of children, age of husband and wife at marriage and at divorce, compare very well with the figures for the whole divorcing population provided by the Registrar General in his Statistical Review for 1961. Our sample of some 700 petitions showed that 62% were legally aided as compared with 63% for all matrimonial petitions filed in England and Wales in 1961. These comparisons strengthen confidence in the belief that the sample is representative of all petitioners who received legal aid in 1961.

Occupational structure of the divorcing population and its association with legal aid

Nearly two-thirds of the petitioners were husbands or wives with husbands employed in manual occupations. (3) It is amongst this section of the divorcing population that one would expect to find the largest proportion of legally aided petitioners. This was found to be so, with 73% of all legally aided petitioners being classified into manual occupations.

As social class is an indicator of a person's income and wealth, it is not surprising that a considerably higher proportion of the lower social classes are found to be legally aided. Thus, **Table 13** indicates that just over a third of petitioners in social classes I and II combined (professional and intermediate) receive legal aid compared with 80% in social class V (unskilled). The proportion of petitioners (36%) receiving legal aid in social classes I and II combined is unexpectedly high. This may be partly explained by the fact that this combined class of aided and unaided petitioners was composed mainly (82%) of petitioners from social class II, which includes a number of relatively high status but low paid occupations, e.g. teachers, musicians, laboratory assistants.

(1) Op.cit., table 12, p.223.

(2) The petition has to provide the husband's last employment, though this is not always known to wife-petitioners. A note on the association between occupation and social class is provided in Appendix 1.

(3) No information about the social class of divorcing couples is provided by the annual Civil Judicial Statistics and Legal Aid and Advice issued by the Lord Chancellor's Office.

Clearly the availability of legal aid is very important in helping those with low incomes to seek a divorce upon the breakdown of marriage. Some two-thirds of all manual petitioners proceed to the divorce courts with the assistance of legal aid. The similarity in the resort to legal aid of husbands (81%) and wives (80%) petitioning in social class V shows that very low wage earning husbands in this class are no more able than their wives to pay for divorce. Within each of the other social classes there is roughly a 30% difference between the proportions of husbands and wives who are legally aided. In all but social class V, therefore, wives are more dependent than husbands upon financial assistance when seeking divorce.

A breakdown of all divorces classifiable into a social class shows that only about half (53%) of all manual husband petitioners were helped by legal aid (Table 14). This suggests that even the new maximum legal aid limit of £700 introduced in 1960 was still too low to benefit many working-class husbands.

TABLE 14

Proportion of petitioners in each group who were legally aided, by non-manual/manual classification

Petitioner	Non-manual	Manual	All
Husband	26%	53%	44%
Wife	56%	79%	71%
All	43%	67%	58%

Disposable income and capital of legally aided petitioners

The 1960 Legal Aid (Assessment of Resources) Regulations set out the general principles to be followed by the Supplementary Benefits Commission (then the National Assistance Board) in determining the resources of an applicant for legal aid. (1) The Commission estimates 'disposable' income and capital; that is, what a person has left to spend after making certain deductions from their gross income and capital. For this purpose, the resources of an applicant for legal aid are not aggregated with those of his or her spouse. The income taken into account in determining 'disposable' income is normally estimated income, before deductions of income tax, for the period of 12 months immediately following the date of application. Certain allowances are then deducted from the estimated income to arrive at disposable income; these allowances include income tax and national insurance contributions, maintenance for dependants and hire purchase commitments. In computing the amount of capital an applicant has, such

(1) See Legal Aid Handbook, prepared by The Law Society, 3rd ed. 1966. H.M.S.O., pp.163-172.

items as household furniture and tools of trade are disregarded. The value of an applicant's interest in the house in which he resides is only taken into account to the extent of half the amount by which its value exceeds £3,000. Allowances, such as any debt owed by the applicant, are deducted from the assessed capital to arrive at the figure of 'disposable' capital.

Information concerning the financial details of legally aided petitioners was drawn from an additional sample of every tenth petition filed in the London Registry in 1961 which resulted in the dissolution of the marriage.⁽¹⁾ The social class distribution of petitioners was not the same in the London sample and the District Registries sample. For instance 40% of all petitioners in the London sample were from the non-manual classes compared with only 26% of District Registry petitioners. Also, a lower proportion of petitioners in each social class (except social class V - unskilled manual workers, where the proportion is the same) were legally aided in the London sample as compared with the District Registry sample. These findings indicate that the legal aid survey results for London filed petitions may not be typical of those based upon petitions filed in the District Registries. But they do illustrate how the scheme operates.

The London findings^(Tables 5) indicate that two out of every five legally aided petitioners were assessed as being below the then free disposable income limit of £250. At the other end of the legal aid scale, 45% of assisted husbands and 10% of assisted wife-petitioners had an assessed disposable income of between £400 and the then allowed maximum of £700.

Whereas 57% of petitioners with legal aid certificates were above the income limit of £250 for free legal aid, only 4% were above the capital limit of £125 for entitlement to free legal aid, and 83% were assessed as having no capital. It is disposable income and not capital, that decides what contribution, if any, the vast majority of successful legal aid applicants will be required to make to the Legal Aid Fund.

Contributions by legally aided petitioners to the Legal Aid Fund

Before proceeding under the legal aid scheme, the applicant is advised of the maximum amount he or she could be required to pay to the Legal Aid Fund as a contribution towards his or her costs. Contributions towards costs are usually payable by instalments. Excess contributions are refunded if the actual cost of the divorce case turns out to be less than the amount contributed by the applicant.

(1) Owing to the length additional time required to record details of legal aid from the petitions, we considered it unreasonable to ask District Registry Officials to do the work. Extraction of this data was therefore limited to the London Registry where our own research workers completed the task.

The maximum contribution payable from income is an amount equal to one-third of the excess over the free limit for legal aid; for example, if an applicant has a disposable income of £400, his contribution is £400 less £250, divided by 3, which equals £50. The maximum contribution from capital is the amount by which 'disposable' capital exceeds the free limit of £125. If disposable capital exceeds £500 the applicant is outside the scheme, except in certain cases where it is considered that the applicant could not afford to proceed without aid.

In only 4% of the 486 legally aided London Registry filed petitions did the assessed maximum contribution differ from the actual contribution asked from the petitioner.⁽¹⁾ In 4% of the cases the petitioner was required to make a contribution of over £100, whilst 43% were not asked for any contribution.⁽²⁾ There were marked differences between the proportion of husbands and wives receiving free legal aid. In cases where the petitioner is granted costs against another party, the contributions shown in Table 16 are not actually paid by the wife due to the husband being ordered to meet the costs of the case. Over half (54%) of the wife-petitioners with legal aid certificates were not required to make any payments to the Legal Aid Fund compared with a fifth (19%) of husband-petitioners. Eighty six percent of the 209 petitioners receiving free legal aid were wives. Nearly half of the husbands and a tenth of the wives were expected to make contributions of £50 or more.

Table 17 indicates that 27% of non-manual legally aided husband-petitioners were not required to make a contribution, compared with 13% of manually occupied husbands. A possible reason for this surprising finding is that husbands in non-manual occupations who petitioned with the help of legal aid were in poorly paid occupations. The average contribution of all legally assisted husbands in non-manual occupations was £46 whilst manually occupied husbands' contributions averaged £48. Non-manual wives had to make an average contribution of £26: manual wives, £18; and "unclassifiable" wives, £9. (3)

- (1) Contributions were coded in the survey into £10 groupings up to £50, and from then onwards by £25 groupings up to £150. By 'differ' it is meant that actual and maximum contributions did not fall into the same groupings; i.e. an actual contribution of £40 and a maximum contribution of £47 would not differ; if the latter amount was £51 then they would differ.
- (2) Petitioners may be granted costs against another party and therefore do not make a contribution.
- (3) This strongly suggests that legally aided wives in the "unclassifiable" grouping were married to husbands in low income manual occupations.

TABLE 15

Income of petitioners with legal aid in 1961

Disposable income	Party petitioning		Total %
	Husband %	Wife %	
Under £250	19	54	43
£250 but under £300	8	13	11
£300 " " £400	28	23	25
£400 " " £500	24	7	13
£500. " " £600	18	2	7
£600 " " £700	3	1	1
Total	100	100	100
Number	157	330	487

TABLE 16

Petitioner's contributions to the Legal Aid Fund in 1961

Petitioner's contribution	Party petitioning		Total %
	Husband %	Wife %	
Nil	19	54	43
Under £50	34	35	35
£50 but under £100.	40	9	18
£100 " " £125	7	1	3
£125 and over	-	1	1
Total	100	100	100
Number	157	329	486

TABLE 17

Actual contribution to Legal Aid Fund ^{from} petitioning husbands and wives, by occupational grouping.

Actual contribution	Husband's occupational grouping at divorce			
	Husband petitioner		Wife petitioner	
	Non-manual %	Manual %	Non-manual %	Manual %
Nil	27	13	49	53
£1 but under £50	27	39	32	35
£50 and over	46	48	19	12
Total	100	100	100	100
Number	45	99	84	164
Average contribution	£46	£48	£26	£18

In addition, there were 13 husband and 81 wife petitioners not classifiable, as husband's occupation was not provided.

Costs

When deciding whether costs should be awarded to a legally aided party, the Court should completely disregard the fact that he (or she) is so aided. However, where an assisted person is held to be liable for the costs of another party, this liability must "not exceed the amount (if any) which is a reasonable one for him to pay having regard to all the circumstances, including the means of all the parties and their conduct in connection with the dispute".⁽¹⁾ The legally aided party is, thus, protected against an order for costs being made against him which is beyond his means to pay; this is a privilege not enjoyed by an unassisted person.

Our survey showed that 55% of successful petitions for dissolution filed during 1961 in England and Wales were from wives. Seventy-four per cent of the successful wives and 6% of respondent husbands were legally aided.⁽²⁾ Thus the great majority of respondent husbands who were unassisted (94%) might well have found themselves with a bill for costs some months after the divorce hearing had occurred. This bill, in addition to a maintenance order, as well as the possible loss of the matrimonial home, might force the unassisted respondent husband earning a low wage to give up any attempt to obey the court orders concerning maintenance and costs.⁽³⁾

- (1) Legal Aid and Advice Act 1949, S.2. (2)(e).
- (2) Eight per cent of respondent husbands in unskilled manual occupations were legally aided compared to 11% of non manually occupied husbands. The reason why more respondent husbands in the upper social classes were legally aided might be explained by their greater awareness of legal rights, and by the fact that they had sought a solicitor's advice. The higher income husbands would have such ancillary matters as maintenance for wife and children, and settlement of the matrimonial home, for which legal advice would be sought.
- (3) The Lord Chancellor's Advisory Committee when discussing debts under the Legal Aid Fund, comment that "bad debts are inevitable under the Legal Aid Scheme because orders for costs are made by the Courts against assisted persons' opponents irrespective of their ability to pay and sometimes without knowledge of their whereabouts." Legal Aid and Advice, Nineteenth Report of the Law Society, (1968-69), p. 40.

Conclusion

Since 1950, the Legal Aid Scheme has enabled many working class spouses to move out of the class described by Lady Wootton as "homeless spirits, neither married nor unmarried, but suspended between the chance of heaven in a happy marriage with a new partner and the certainty of hell in life with the old one". (1) But legally aided divorce has not been, as believed by Lady Bragg, "one of the most important reasons for the breakdown of family life". (2) Through legal aid, low income groups have been provided with the right to legal assistance. This right has helped husbands and wives without the means to pay the full cost of divorce, to bring their marriages to a formal end, though legal aid cannot be recorded as the cause of this collapse.

Today, applicants have to be very poor to obtain free legal aid. Rising post-war wages have meant that half the skilled and semi-skilled manually employed husbands have been able to pay their own divorce costs without resort to legal aid. It is the wife petitioner without means of her own to whom legal aid has been of special help.

Current evidence indicates that, in spite of the use made of legal aid, there are still a great number of de facto broken marriages which are not formally ended through divorce.

Another survey's findings have shown that only half of all marriages dealt with by the summary courts proceed on to divorce. (3) Factors, other than limited means, lead certain sections of the working class population to ignore divorce as a de jure means of destroying a marriage which is no more than an empty shell.

(1) "Holiness or Happiness", The Twentieth Century, November 1955, p.415

(2) As quoted by O.R.McGregor, "The Stability of the Family in the Welfare State", Political Quarterly (1960), Vol.31, p.135. See also the similar belief of Dame Joan Vickers, Hansard, H. of C. Deb., 5th Series, Vol. 671, col. 823. Professor McGregor comments (ibid.) on Lady Bragg's observation; "She is merely emphasizing her dislike of equality before the law in matrimonial proceedings."

(3) See ch. II.

CHAPTER 11

THE RELATION BETWEEN THE SUMMARY AND THE HIGH COURT JURISDICTIONS

When a marriage breaks down, there are two distinct types of court that a spouse may turn to. The first course is to successfully petition the divorce court for dissolution of the marriage. Maintenance may be obtained by the wife, but this is ancillary to the main matter of deciding, since the beginning of 1971, whether the marriage has irretrievably broken down, or prior to 1971, that a matrimonial offence had been committed by the respondent. The other recourse is by complaint to a magistrate's court, where proof of a matrimonial offence against the defendant still remains the means by which justices have authority to make a maintenance order in favour of the complainant. Such an order is invariably obtained by wives whose husbands have deserted, leaving them without adequate financial provision. The wife can obtain a maintenance order for the children of the marriage, though she is unable to prove a matrimonial offence against her husband. Children are thereby protected against financial hardship irrespective of their mother's matrimonial conduct. The function of the magistrates' matrimonial jurisdiction is to provide a reasonably quick and cheap procedure for making decisions about maintenance, after consideration of the circumstances leading to the marriage failure, the needs of the wife and children and the husband's ability to pay. They do not have the power to dissolve a marriage, and so neither spouse can enter into a second marriage without first proceeding on to the divorce court. Husbands and wives when leaving the magistrates' court are neither de jure divorced or de facto married; for there is no evidence that reconciliation occurs in many cases. The one significant form of relief common to both courts is the provision of maintenance.

The summary courts' matrimonial jurisdiction.

Knowledge of the legal and social characteristics of the matrimonial jurisdiction of magistrates' courts has emerged from the Bedford College national survey of some 1,200 matrimonial orders currently being enforced in forty-five summary courts on the 1st January 1966.⁽¹⁾

Despite the imperfections of court records for the purposes of social analysis, they tell enough to establish in rough outline the main characteristics of the couples whose failures are recorded and regulated by the summary matrimonial jurisdiction. Court records contain some

(1) O.R. McGregor et al., Separated Spouses, 1971.

information about the occupations and incomes of defendant husbands, and thus provide a rough guide to the parties' social class. The records contained occupational data for about 68% of defendants in the Bedford College sample, these being tabulated in Table 18.

TABLE 18

Social class distribution of defendant husbands by occupation at the time a summary court maintenance order was first made against them, compared to all married men in England and Wales at the time of the census of 1961.

Married men	Social Class						%	Total (number)
	I	II	III	IV	V	VI*		
	Percentages							
With maintenance order)	1	5	50	20	17	7	100	(841)
(Bedford College sample)	1	5	54	22	18		100	(776)
Census 1961 ⁺	4	17	51	20	8		100	(11,471,360)

⁺ Source: Census of England and Wales, 1961, Occupation Tables, Table 20.

* This is an additional category not recognised by the Registrar General to cover those instances where husbands at the time of the order being made, had retired, were unemployed or in prison.

The occupational distribution of husbands with maintenance orders presented in Table 18 must be treated with caution because the inadequate descriptions of occupations in court records tend to result in an upgrading of all occupations which fall above social class V (unskilled manual worker).⁽¹⁾ Even if this distinction is ignored, comparison with the occupational distribution of the whole male population emphasises the extent to which the Registrar General's social classes I (professional) and II (intermediate) are under-represented among husbands appearing as defendants in matrimonial hearings before magistrates. Only 5½% of the defendant husbands fell into social class I and II (and this percentage is certainly an overestimate) whilst 21% of all men in the country were similarly classified by the 1961 census.

This occupational information suggests that the upper social classes make little use of the matrimonial jurisdiction of the magistrates' courts. The conclusion is strongly reinforced by what is known about the incomes

(1) Court records usually state occupations in such stark terms as 'miner' or 'engineer' with no indication of whether the work requires considerable and specific skill or no skill. The difficulties of interpretation lead to a tendency to translate ambiguous occupational descriptions into higher rather than lower social class categories. This conclusion is supported by detailed examination of a number of cases where additional information was available, for example, as the result of a challenge to a defendant's statement of his means.

of defendants. Again, this information is thinly spread in court records. Surprisingly, the courts are under no obligation to obtain details of a defendant's financial resources, and their only specific power in this respect is to call for a probation officer's report.⁽¹⁾ Moreover, the court learns only what complainants know, or defendants volunteer, about their earnings and must make its own judgment of the truth of what it is told. Only 60% of the court records contained information about defendants' incomes, but there are no grounds for believing that these are not representative of all defendants. Eighty-seven per cent of husbands had incomes of less than £16 a week when the order against them was made. Even allowing for the strong incentive of defendants to understate their earnings and the inadequate means of checking in many courts, 83% of the husbands (182=100%) against whom orders were made in 1964-65 had incomes of less than £18 a week. The average wage of all 182 defendants in these two years was £14 6s., a figure significantly below the average earnings of men in manufacturing industry of £18 a week in 1965.

The conviction that the rough and ready description of defendants' occupations in court records has resulted in an upgrading of those falling into the categories above social class V is strengthened by the fact that when the order was first made, 60% of the small number of defendants in social classes I and II, and 84% of the defendants in social class III had incomes of less than £16 a week. Further, one-third of the defendants in social class III had incomes of less than £10 a week.

These data relating to the occupations and incomes of defendants are crude but they demonstrate clearly that the matrimonial jurisdiction of magistrates is used almost entirely by the working class and very largely by the lowest paid among them.

The duration of the marriage at the time of the order was known for two-thirds of the orders. Half of the marriages had lasted for nine or more years and 14% for more than twenty years before seeking the help of the court. The average length of marriage for all orders was ten years.

Almost a third (31%) of wives in the magistrates' court sample married before they were twenty compared with 23% of all brides in 1956.⁽²⁾ The corresponding figure for husbands in the survey was 14%; among all bridegrooms in 1956, it was only 4%. There was thus a significantly higher proportion of teenage (defined as marrying before the age of twenty) brides and grooms in the sample than among those who married in 1956.

(1) Section 60, Magistrates' Courts Act, 1952.

(2) The year 1956 was selected because analysis of the data showed that half the marriages in this sample occurred before 1956.

Marriage data obtained from the 1961 census of England and Wales indicates a strongly marked social class differential in age at marriage. Between the years 1947 - 1961 (the period during which most of the survey marriages took place) the proportion of women marrying in their teens rose from 20% between 1947 and 1951 to 41% in 1960/61 for the brides of unskilled manual workers; from 19% to 32% for the brides of skilled manual workers; and remained unchanged at 4% for the brides of self-employed professional workers.⁽¹⁾ Thirty-one per cent of the survey wives married in their teens compared with 29% of the brides of unskilled manual workers in the population at large in 1956. The strikingly low age at marriage of the survey brides and grooms reinforces the conclusion derived from the occupational and financial data that the population bringing its matrimonial troubles to magistrates' courts is drawn from the lowest stratum of the working class.

The young age at marriage of the survey wives helps to explain why nearly three-quarters of all the orders were made before the wife had reached the age of forty.

Statistics relating to the pattern of divorce in this country have been reasonably well provided over the years by the Registrar General and the Lord Chancellor's Department. The only directly relevant information provided for matrimonial cases coming before justices are the number of applications and consequent maintenance orders made each year. Evidence suggests "that such published figures as there are provide no reliable guide for any further studies."⁽²⁾ Adequate annual official statistics are urgently needed for the matrimonial jurisdiction of the summary courts. It is unrealistic when legislating new matrimonial laws, to consider only the known social facts about the divorcing population without consideration of what is happening in the magistrates' court.

When discussing the social and legal characteristics of matrimonial breakdowns coming before the courts; the Committee on Statutory Maintenance Limits observed that there remain " a number of uncertainties ... the greatest uncertainty is the extent of the overlap between the jurisdiction of the magistrates and the High Court."⁽³⁾ The reason why such uncertainty is undesirable is clearly shown by the editor in his Introduction to the Civil Judicial Statistics for 1968; "It is not possible to draw reliable

(1) The Registrar General's Statistical Review... for 1965
Part III:Commentary, Table C17.

(2) Report of the Committee on Civil Judicial Statistics,
Cmd. 3546, 1968, p.60. Miss Graham-Hall, Chairman of the Committee
on Statutory Maintenance Limits, in a letter to Chief Master Adams,
Chairman of the Committee on Civil Judicial Statistics.

(3) Cmd. 3587, 1968, p.36, pars. 115-116.

conclusions from the statistics about the rate at which marriages are breaking down. In the first place, it is not known what proportion of de facto broken marriages leave a record in court proceedings. Secondly, there is no knowledge of the relationship between the jurisdictions of the High Court and of Magistrates' Courts. For some complaints, a Magistrates' Court is a staging post on the way to the High Court; for other complainants it is a terminus at which marital journeys will end."⁽¹⁾ The purpose of the remaining section of this chapter is to analyse the 'overlap' and 'relationship' between these two matrimonial jurisdictions.

(1) Cmd 4112, 1969, p.17.

Changing resort to the courts

Since the early years of this century, divorce petitions have increased sixtyfold; in the same period, application to magistrates' courts for matrimonial orders have trebled. Table 19 shows that in the period 1901-1905 almost fourteen times as many applications were made to the magistrates' courts than petitions to the divorce courts. By 1968 almost twice as many petitions were filed in the divorce courts than applications by wives for maintenance in the summary courts. The proportion of spouses resorting to the divorce court rather than to the magistrates' courts has continuously increased in the last generation. In 1935 for every 100 petitions for divorce filed by husbands and wives there were 268 applications for maintenance by wives to magistrates; by 1966 for every 100 petitions there were only 60 applications.⁽¹⁾

As applications are invariably made by wives, it is more accurate to compare wife-petitioners with applicants for maintenance. On this basis, there were 595 applications for maintenance for every 100 wife-petitions in 1935; thirty years later, the ratio was 99 applications to every 100 petitions.

Though there was a twofold increase between 1935 and 1966 in the number of wives applying for maintenance orders, Table 20 shows that the number of wife petitioners had risen by 1966 to nearly ten times the 1935 number. Less than one-fifth of wives going to court in 1935 with matrimonial complaints sought divorce; by 1966 this proportion had increased to half.

Rising wages⁽²⁾ and the introduction of legal aid has made divorce something that working class couples can afford. Poverty had been the main factor barring most working class people from access to the divorce court, but it hindered wives more than husbands. Over the fifteen years from 1951 to 1965, 69% (191,733) of all wife petitioners (277,602 : 100%) had received some financial assistance under the Legal Aid Scheme. The availability of legal aid has allowed far more working class wives to turn to the High Court for divorce when their marriage breaks down.

(1) Before the Matrimonial Proceedings (Magistrates' Courts) Act of 1960, it was common practice for an application under the Guardianship of Infants Act to accompany a complaint made under the then operative Summary Jurisdiction (Maintenance and Separation) Acts. If the wife failed to obtain an order for herself she could still depend on the Guardianship application to obtain maintenance for the children. Since 1961, magistrates are bound to consider the welfare and maintenance of the children at the same time as the maintenance of the wife. This has resulted in the wife with children, ^{often} usually making a complaint for maintenance under the 1960 Act alone, regardless of whether her own matrimonial conduct might disqualify her. The result is that ^{with} in the 27,586 Married Women applications for maintenance in 1966, there are a proportion of complaints which prior to 1961 would have been shown as Guardianship complaints because of the wife's probable failure to prove 'guilt' against the husband. Thus the figure of 60 must be seen as the maximum resultant proportion.

(2) See G. Routh, op.cit., p.104, table 47. The average earnings of manual male workers in 1955/6 had increased over three times the 1935/6 level; in 1955 skilled workers earned £622, semi-skilled £469 and unskilled £435.

Table 19

Ratio of maintenance applications made by wives in the magistrates' court to every 100 petitions filed by husbands or wives for dissolution or nullity: 1896-1968

Period	Ratio	Period	Ratio	Period	Ratio
1896-1900	1,250	1921-1925	456	1951-1955	77
1901-1905	1,369	1926-1930	370	1956-1960	91
1906-1910	1,329	1931-1935	292	1961-1965	69
				1968	55

Source: calculated from annual Criminal Statistics and Civil Judicial Statistics.

Figures are not available for maintenance order applications between the years 1911-1920 and 1936-1950. A resultant ratio of '100' means that petitions filed for dissolution and nullity were the same number as married women maintenance order applications in the magistrates' courts.

Table 20

Matrimonial complaints made in 1935 and 1966 by wives.

Type of Complaint	Year					
	Number	<u>1935</u> %	Ratio	Number	<u>1966</u> %	Ratio
Dissolution: Wives petitions filed	2,790	17	100	27,833	50	100
Ration		100		998		
Maintenance Orders: Applications	13,806	83	595	27,586	50	99
Ration		100		200		
Total	16,596	100		55,419	100	
Ration		100		334		

Source: ibid.

Many well-informed observers agree with the explanation of the continued use of the matrimonial jurisdiction of magistrates' courts which Mr. G.S. Green, Clerk to the City of Manchester Justices, put forward in a letter to The Times. "What enables a divorce to be granted speedily is that in most cases a previous hearing in a Magistrates' Court has already taken place - a hearing which in these days is all too often a prelude to divorce."⁽¹⁾ On this view, the magistrates' court is a staging post at which wives quickly obtain maintenance orders at the beginning of their journeys to the High Court.

The Survey

The direct method of obtaining the relevant data for this purpose would have been to determine the proportion of orders in our survey which subsequently resulted in petitions to the High Court. This proved impossible because investigation showed that, in a significant number of instances, the magistrates' court records contained no indication of the fact that the marriage had been subsequently dissolved although it was known from other sources that a decree had been made absolute. Accordingly, the Bedford College researchers were driven to rely exclusively upon the very full information in divorce petitions. The rules relating to petitions prescribe that any previous court proceedings between the parties in respect of their matrimonial affairs shall be disclosed. Hence the petitions filed in the Divorce Registries contain full details of any prior maintenance proceedings. The petitions selected for study were petitions for dissolution which were filed in 1955 and 1961. There does not seem to be any reason for thinking that, if any other two years in the recent past had been chosen, the findings would have been significantly different. By 1955, the increase in the number of petitions which followed the introduction of legal aid had subsided. Although 1961 saw the further increase in petitioning which followed the more generous legal aid provisions of 1960, that year gave the overwhelming advantage of comparison with new census data. A one in twenty sample of all divorce petitions filed at Somerset House and in the 95 District Registries throughout the country was taken. This sampling fraction was adequate to provide valid statistical conclusions for the two years under review.

(1) 10th December 1965.

Table 21 shows the proportion of successful divorce petitions having a previous history of proceedings before magistrates. The two years show a strikingly similar pattern. In nearly 28% and 29% respectively of the petitions filed in the two years, the wife had earlier obtained a maintenance order for herself, together with her dependent children, or for her children alone.

Table 21

Percentage distribution of divorce petitions heard in London and the provinces in which there were prior proceedings before magistrates' courts, 1955 and 1961

Location of court	Divorce petitions showing						Total 1955 1961 Numbers (100%)	
	*Prior hearing before magistrates but no order		Maintenance Order made by magistrates		No prior hearing before magistrates			
	1955	1961	1955	1961	1955	1961	1955	1961
Provinces %	8	6	32	34	60	60	862	1,015
London %	5	5	22	20	73	75	516	563
Total %	7	6	28	29	65	65	1,378	1,578

*Includes complaints dismissed and withdrawn before hearing, and applications for interim orders of maintenance, and for custody orders.

Regrettably, it is impossible to work back from the national figure of 35% of divorce petitions shown by Table 21 to have a history of prior complaints before magistrates to calculate the proportion of magistrates' court orders which end up as petitions in the High Court. For example, the 5% sample of divorce petitions for 1955 contained 482 petitions with an earlier history of complaint before magistrates. On a national basis (allowing for the destruction by fire of 401 petitions in the Portsmouth Registry) this represents 9,780 petitions which can be compared with the 22,727 applications to magistrates' courts for maintenance orders in 1955. Similarly, for 1961, 10,900 petitions can be compared with 25,471 maintenance applications.

The proportion of petitions to applications on this basis is 43% for both years, 1955 and 1961. On the other hand, if the petitions are compared with maintenance⁽¹⁾ orders, the proportion increases to 47% for 1955 and to 48% for 1961. This sort of juggling is unsatisfactory for many reasons, not least because the figures for application for magistrates' orders have been shown to be unreliable.⁽²⁾ The best estimate that can be drawn from these figures suggests that about one-half of all wives in receipt of magistrates' maintenance orders find themselves in the divorce court subsequently, either as petitioners or respondents.⁽³⁾

TABLE 22

Social class of husband, for petitions originating in a magistrates' court compared to those proceeding directly to the divorce court.

Petition	Social class by husband's occupation at divorce					Total Number (100%)
	I & II	III Non manual	III Manual	IV	V	
From a summary court	9	14	45	16	16	223
Proceeding directly to the divorce court	22	22	32	16	8	376
All petitions	17	19	37	16	11	599

Source: 2nd 1961 divorce survey (see chapter 12). The variation in totals shown here compared to Table 21 is due to these differing samples.

It has already been noted that the magistrates' court matrimonial jurisdiction is almost exclusively used by working class wives. It is not therefore, surprising that Table 22 shows that of those petitions filed in 1961 disclosing previous proceedings in the summary courts, over three-quarters (77%) relate to working class people compared to 56% who proceed

- (1) Married Women and Guardianship of Infants orders combined for each year, (a 15% reduction for the latter allowing for wives with joint orders).
- (2) Separated Spouses, ch.2.
- (3) The average length of time between the making of the maintenance order and the consequent filing of the 454 survey petitions in 1961 averaged four years and eleven months. This meant that 1956 was the most suitable year for comparing the number of maintenance orders made in a year with petitions filed in 1961 that had originated from a magistrate's court. The conclusion drawn from these figures is that 54% of all magistrate's court orders proceed to the High Court.

directly to the divorce courts. Petitions filed in 1961 compared to 1955 show a drop in the proportion of petitioners coming from the bottom two classes and a corresponding increase in the other social class groupings.

TABLE 23

Geographical distribution within England and Wales of marriage breakdown compared with still married women.

Area in which hearing took place: by the Registrar General's Standard Regions	Divorce Petitions: 1966		Maintenance orders being enforced in 1966	1961 Census: England and Wales	
	With previous complaint	All petitions		Working Class married women	All married women
	(a) %	(b) %	(c) %	(d) %	(e) %
A. Northern and Midland Counties (1-5)	54	41	56	51	49
B. Eastern and Southern Counties (6-9) including London and Wales	46	59	44	49	51
Total	100	100	100	100	100
Number	545	1,578	165,000	8,681,000	11,860,000

Source

- (a) and (b) Legal Research Unit Divorce Court survey of 1,578 petitions filed in 1961.
- (c) Legal Research Unit magistrate's court survey of orders.
- (d) Census 1961; Occupation Tables, Table 27, p.188+, column 'f', "Married Women enumerated with husband by husband's social class". (10% sample). 'Working class' is defined as occupations falling within the Registrar General's social classes III, IV, and V.

Section (d) of Table 23 shows that the distribution of all working class marriages within the two regions of England and Wales was very similar, with 51% in area A containing the five Registrar General's Standard Regions of Northern, East and West Riding, North Western, North Midland and Midlands; and 49% in area B consisting of the remaining four English regions of Eastern, South Eastern (containing the Greater London conurbation), Southern and South-Western, together with the tenth region of Wales. It has been estimated that there were some 165,000 maintenance orders being enforced in England and Wales in 1966 of which 56% were held in area A and 44% in area B (Table 23 (c)). The distribution of petitions

in 1961 that had a previous history of complaint to a magistrate's court, show that 54% were in area A and 46% in area B. These results show a very similar geographical distribution pattern, with the slightly larger proportion in the northern area being a direct resultant of the significantly higher number of maintenance orders being enforced there compared with the southern area.

A significantly higher proportion of those divorce petitions filed in registries in the Midlands and the North (45%), and Wales (also 45%) were preceded by hearings before magistrates' courts than was the case with those filed in either London (25%) or in the Eastern and Southern counties of England (28%). The marked regional differences clearly reflect the familiar higher socio-economic level of the population in London and the South-East. It seems that in Northern England the magistrate's court is used as a stepping stone to a far greater extent by those proceeding to the divorce court than in Southern England.

In 1961, a quarter of the petitions recording previous summary court proceedings were filed by husbands and three-quarters by wives. To the extent that the wives with maintenance orders are divorce petitioners, there is an irresistible inference that the magistrates' court is a first step towards divorce, even though this statement must be qualified if the grounds for divorce were different from the grounds for a maintenance order. If wives with maintenance orders are respondents to their husband's petitions, with or without cross-petitioning, the conclusion that the magistrates' court is a prelude to divorce cannot be so readily drawn. We proceed, therefore, to examine the intentions of the one-third of divorce petitioners who had previously appeared before the justices. Were they then contemplating divorce?

Prior to the introduction in 1971 of the Divorce Reform Act of 1969, the most commonly used matrimonial offences in the divorce courts were adultery, cruelty and desertion, these three grounds featuring in 99% of petitions filed in 1961. The same three offences were - and still are - acceptable grounds of complaint in the magistrates' court, the only substantial difference in practice being that desertion had to exist for at least three years (two years since 1971) for a divorce to be allowed, whilst in the magistrates' court there is no such minimum period. The magistrates' court can make a maintenance order upon proof of the husband's wilful neglect to maintain either his wife, or his children, or both. Such a failure has never been allowed as a ground for divorce. Section 3(2) of the Matrimonial Causes Act 1965 provides that, on a petition for divorce, the court may treat the magistrates' order as sufficient proof of the adultery, cruelty, desertion or other ground on which the order was granted.

A finding by a magistrates' court constitutes prima facie evidence or corroboration of what was then, in 1961, a matrimonial offence (and is now evidence in support of irretrievable breakdown) but it does not absolve the divorce court from examining all the evidence at the divorce hearing.

If the magistrates' court is a staging post to the divorce court, it might seem reasonable to assume that in cases where the wife had previously obtained a maintenance order she would be petitioning on the same grounds as those successfully proved before the magistrates. But the research results tabulated in Table 24 provide no evidence for such an assumption.

TABLE 24

The distribution of successful petitioners in cases where the wife had previously obtained a maintenance order in 1955 and 1961

Petitions showing	Number	%
Wife with maintenance order for benefit of herself or children only	846	100
Decree nisi obtained by		
1) Husband	188	22
2) Wife: i) on grounds other than shown on maintenance order	297	35
ii) on grounds shown on maintenance order	361	43

Fifty-seven per cent of the 846 petitions did not have the same ground for divorce as had previously been shown on the original magistrates' court order. In 22% of the cases the husband was granted the decree nisi.⁽¹⁾ The remaining 35% were petitions where the wife obtained a divorce upon grounds other than that shown on the maintenance order. In 19% of the cases the order had been either based upon wilful neglect to maintain or an application under the Guardianship of Infants Act, though neither provided a basis for divorce. Whatever the ground for divorce, if these wives had intended to employ the jurisdiction of the magistrates' court as a first step on the road to the divorce court, they would have established an appropriate matrimonial offence at their first appearance in court.

(1) In 509 cases out of the 849⁶ orders, the wife obtained an order for herself on the grounds that contained either adultery, cruelty or desertion. The husband in 49 cases (9.6% of 509) eventually obtained the decree nisi though the maintenance order, based on a ground acceptable in the divorce court, had not been revoked.

Further findings showed 21% of the wives with maintenance orders based on adultery, cruelty or desertion alone or in combination did not proceed to the divorce court on that basis. Altogether 47% of the wives that successfully petitioned for divorce did not use as their grounds the matrimonial offence upon which they had obtained their maintenance order.

The next stage in the analysis is to compare the occasions upon which a wife petitioning the divorce court on the ground of adultery, cruelty or desertion used the same ground in the divorce proceedings as that upon which she had obtained her maintenance order.

TABLE 25

A comparison of the grounds upon the wife's successful petition with those of the original maintenance order

Successful ground in magistrates' court	Each ground as percentage of total	Percentage of wives using the same ground as appeared on the magistrates' order
Adultery	10	83
Cruelty	28	83
Desertion	62	66
Total	100	72
Number	406	292

Table 25 shows that in 83% of the maintenance orders obtained upon the ground either of adultery or of cruelty, the same ground was the basis of the subsequent divorce petition. This figure dropped to 66% in the case of desertion. The difference between the percentages for adultery and cruelty on the one hand and for desertion on the other is explicable on the ground that desertion in the magistrates' court is not dependent upon a time element. That desertion, prior to 1971, had to run for three years before a petition for divorce could be presented, necessarily required some wives to proceed on a different ground when petitioning for divorce. The comparable percentage in adultery and cruelty cases strongly suggests that the ground upon which the maintenance order is made will largely predetermine the ground for divorce. (1)

(1) $\chi^2 = 11.9$; 2d.f.; $P < 0.01$.

Table 26 records the period of delay between obtaining the maintenance order and petitioning for divorce. If an order were obtained by a wife in a magistrates' court, partly with the intention of proceeding on to the divorce court, it could be expected that the divorce proceedings would follow hard on the heels of the maintenance order. A lengthy delay would tend to suggest that the separated wife when applying to the magistrates' court did not at that time contemplate divorce proceedings.

TABLE 26

Delay between the maintenance order and the divorce petition
by ground of maintenance order

Successful ground in magistrates' court	Percentage distribution of orders by the a period of time from making of maintenance order to filing of petition			Total number	Average * period of time	
	Under 3 years %	3 years but under 9 years %	9 years and over %		Years	Months
Adultery	62	21	17	29	4	
Cruelty	59	31	10	59	4	
Adultery and cruelty combined	60	27	13	88	4	
Desertion	31	53	16	134	5	8
Number (100%)	95	95	32	222**	5	
% Distribution	43	43	14	100		

* Averages are derived from a more detailed 12-point breakdown.

** The total is less than 406 because the necessary information was not available in 184 cases.

It is reasonable to suppose that when a wife obtains a maintenance order as a preliminary step to divorce, she will petition within three years. In fact only 60% of the adultery and cruelty cases proceeded to divorce within three years, and 74% within five years. In the case of desertion, the proportion of wives proceeding to divorce within three years was only 31%. The average period of time between the magistrates and divorce hearings for all orders was 5 years, adultery and cruelty as summary grounds both being 4 years whilst desertion extended to 5 years and 8 months.

Any study of the relationship between the two jurisdictions must include the comparative periods of time that elapse before the spouses resort to the magistrates' courts and/or to the divorce court. Table 27 records the number of years from marriage until a maintenance order is obtained for those wives resorting solely to the magistrates' court (Group A) and for those cases where there is a divorce after a prior hearing before the magistrates (Group B).

Table 27 shows that where the parties ultimately went on to the divorce court, their marriages endured for a shorter period before maintenance was obtained than in those cases where there were no divorce proceedings after the maintenance order. Just over a quarter (28%) of the non-divorcing population obtained a maintenance order within five years of the marriage, compared to 44% of those spouses who went on to the divorce court. It seems that if a maintenance order was obtained within five years of the marriage, dissolution of the marriage was more likely to occur than when the maintenance order was made more than five years after the marriage.

The average duration of undissolved marriages until the maintenance order was 10.6 years. In the case of those who petitioned for divorce, the duration of marriage until the maintenance order averaged 7.6 years. This significant difference might be accounted for by the type of maintenance order sought. This possibility is examined in Table 28.

Marriages were of shorter duration for both groups of wives who did not establish a matrimonial offence against their husband, but obtained maintenance for their dependant children. Where the maintenance order was for the wife, the average duration of the marriage in the cases with no subsequent divorce proceeding was 11.1 years compared with 7.8 years in the cases where divorce followed. Where the maintenance order was for the child only, the difference in the duration of marriages which did or did not go on to the divorce court was much less marked - 8.3 years compared with 7.0 years. Very similar proportions of wives going on within five years to seek divorce were found for those who had orders for themselves and those who did not, and the average duration of marriage until the order differed only slightly. It appears that the magistrates' decision does not seem to be a relevant factor in deciding how soon to seek divorce.

A comparison of petitions coming via the magistrates' courts in the two years 1955 and 1961 showed that ^{petitioners} ~~marriages~~ for the latter year were seeking divorce within a shorter period of time of marriage. In 1961, 45% of such marriages petitioned within nine years of marriage compared with 35% in 1955. The average length of marriage was reduced by half a year over the six year period. The petitions that were filed in 1961 were

TABLE 27

A comparison of the duration of marriage up to the obtaining of a maintenance order for divorcing and non-divorcing wives

Duration of marriage up to magistrates' court order	<u>Group A</u>		<u>Group B</u>	
	Only maintenance orders made		Divorce after maintenance order	
	Cumulative		Cumulative	
	%	%	%	%
Under 3 years	16	16	29	29
3 years but under 5 years	12	28	15	44
5 years but under 9 years	22	50	23	67
9 years but under 15 years	23	73	20	87
15 years but under 20 years	13	86	9	96
20 years and over	14	100	4	100
Number (100%)	834		281	

Source: Bedford College survey of:

- (A) Maintenance orders in summary courts.
- (B) Petitions filed in Divorce Registries during 1961.

TABLE 28

Length of marriage to magistrates' court hearing by type of order

Duration of marriage up to magistrates' court order	<u>Type of maintenance order made</u>						
	(1) for wife		(2) for children only		Total		
	Group*	A %	B %	A %	B %	A %	B %
Under 5 years		26	43	35	45	28	44
5 years but under 15 years		44	43	51	47	45	43
15 years and over		30	14	14	8	27	13
Total		100	100	100	100	100	100
Number		659	206	175	75	834	281

*Group as Table 27. A.Maintenance order only;

B. Maintenance order proceeding to divorce court, petitions filed in 1961.

then examined to see whether duration of marriage was affected by social class. The data are set out in Table 29 below.

TABLE 29

Duration of marriage by social class for petitions showing previous proceedings in magistrates' courts, and continuing married population in England and Wales in 1961

Duration of marriage to filing of petition	<u>Social class</u>				Total
	Professional Intermediate	Skilled	Partly skilled	Unskilled	
	I & II	III	IV	V	
	- - - cumulative percentage - - -				
Under 5 years	13	15	21	25	17
5 years but under 9 years	36	45	40	58	45
9 years but under 15 years	66	69	69	77	70
15 years but under 20 years	89	80	87	86	83
20 years and over	100	100	100	100	100
Total numbers (100%)	30	221	77	57	385

This table demonstrates that there is a strongly marked social class differential in marriage breakdown. Nearly twice as many divorcing couples in social class V ended their marriages within five years as did those in social classes I and II. In social class III and IV 8½% more marriages existed for 15 years or more than among those in social class V. Of marriages lasting for 9 or more years, 57% were from social classes III and IV but only 42% from social class V. As the duration of marriage shortened, the proportion of lower social class husbands increased. This was more marked among the 1961 population than among the 1955 population where there was greater similarity between the three working class groups.

A later study of 1961 petitions compared length of time from marriage until the decree absolute to see whether those marriages which had passed through the magistrates' court were of shorter duration than those that proceeded straight to the divorce court. A positive finding might have suggested that an application to the magistrates' court, with its first taste of matrimonial court proceedings for the wife, hastened the spouses on their way to divorce. The results in Table 30, however, provides no such evidence. The de jure length of marriage for those coming from the summary court and those proceeding directly to the divorce court are very similar with almost two thirds of both groups having their marriages dissolved after 9 years of marriage. These figures do not suggest a speedy resort to the divorce court for the majority of marriages covered by the survey.

TABLE 30

Length of marriage to decree absolute for petitions filed in 1961, originating in a magistrates' court compared to those proceeding directly to the divorce court

Length of marriage to decree absolute	Petition		Total	All * petitions
	From a \mathcal{F} summary court	Proceeding directly to divorce court		
	- - - - cumulative percentages - - - - -			
Under 5 years	12	9	10	11
5 years but under 9 years	36	36	36	36
9 years but under 15 years	64	62	63	64
15 years and over	100	100	100	100
Total number	263	460	723	25,394

\mathcal{F} This is a later study, and so the totals are not similar to those shown for previous tables.

The percentage distribution differs due to the length of time recording decree absolute.

* Source: Registrar General's Statistical Review ... for 1961, Pt.II, Table P.4, p.82.

It has already been observed that wives turning to the magistrates' courts for an order had an earlier marriage age than was found among the general population. This partly explains why in Table 31 the age of the wife at marriage was under twenty in 40% of petitions recording earlier resort to a summary court compared to 29% for wives who had not sought a maintenance order.

TABLE 31

Age of wife at marriage for petitions originating in a magistrates' court compared with those proceeding directly to the divorce court, and filed in 1961

Age of wife at marriage	Petition +		Total	All * petitions
	From a summary court	Proceeding directly to divorce court		
	- = - - - cumulative percentages - - -			
Under 20	40	29	33	30
20 but under 25	83	74	77	77
25 and over	100	99	99	99
Not known		100	100	100
Total number	263	460	723	25,054

*Source: Registrar General's Statistical Review ... for 1961, Pt.II, Table P.3, + Bedford College 2nd divorce survey.

One-third of all divorcing wives were aged under twenty at marriage. Two out of five (42%) of these wives had previously sought help from the summary court compared to 30% found amongst wives marrying at the age of twenty or more. It was also found that wives who had married young and had come from the summary court had marriages of shorter duration than wives of the same age group who had proceeded directly to the divorce court. For instance, 46% of the former group had marriages of less than 9 years duration compared to 38% in the latter group. But both these groups had shorter marriage duration than wives with a marriage age of twenty or more. Amongst the twenty and over marriage age group the duration of marriage was far more similar between wives who had been through the summary court and those who had not, as the Table 32 shows.

TABLE 32

The proportional distribution of marriage duration by age of wife at marriage, for petitions proceeding from the summary court compared to those proceeding directly to divorce.

Duration of marriage to decree absolute	Petition						Total		
	From a summary court			proceeding directly to divorce					
	under 9 years	9 years and over	Total	under 9 years	9 years and over	Total	under 9 years	9 years and over	Total
Age of wife at marriage	percentages			percentages			percentages		
under 20	46	54	100	38	62	100	41	59	100
20 and over	32	68	100	35	65	100	34	66	100
Total	37	63	100	36	64	100	37	63	100

Bedford College 2nd divorce survey.

Wives who had previously resorted to the summary court were more likely to have children than wives who proceeded directly to the divorce court. Only 18% of the former group of marriages were childless compared to almost half (47%) of the latter marriages.

TABLE 33

Number of children of marriage for petitions originating in a magistrates' court compared with those proceeding directly to the divorce court, and filed in 1961.

Number of children of marriage	<u>Petition</u>		Total %
	From a summary court %	Proceeding directly to divorce %	
No children	18	47	37
1	41	24	30
2	22	20	21
3 or more	19	9	12
Total %	100	100	100
Number	227	446	673

Source: 2nd 1961 Survey.

Petitions recording previous summary court matrimonial proceedings had 19% of the couples with families of three or more children compared to 9% for marriages that had not come before the magistrates. The greater fertility of former marriages is associated with the younger age at marriage of such wives. Ninety-five per cent of wives marrying before twenty and proceeding from a summary court had children compared to 61% for wives of the same marriage age group who had not turned to the summary court.

The distribution of successful grounds for divorce is examined in Table 34 in order to disclose any significant factors. For purposes of simplification only petitioners showing only one ground were analysed.

TABLE 34

Distribution of successful grounds for decree nisi, for petitions originating in magistrates' courts, and filed in years 1955 and 1961.

Ground of petition	<u>Petitioner</u>				Total	
	Wife 1955	Wife 1961	Husband 1955	Husband 1961	1955	1961
	p e r c e n t a g e s					
Adultery	27	37	60	59	36	42
Desertion	47	34	36	36	44	35
Cruelty	26	28	4	5	20	23
Total	100	100	100	100	100	100
Sample size	266	328	86	97	352	425

Source: 1st 1961 Survey.

The most popular ground for divorce in 1961 for those petitioners who had previously gone through the magistrates' courts was adultery. Of all such petitions 42% were for adultery, 35% for desertion and 23% for cruelty. In 1955,

desertion was the most popular ground with 44%, adultery followed with 36% and cruelty with 20%. These differences are largely accounted for by changes in the grounds used by wife-petitioners. Between 1955 and 1961 wives showed a marked shift from desertion to adultery. Husband petitioners showed little change in their choice of grounds. It seems unlikely that there could have been a marked increase in husbands' readiness to commit adultery between 1955 and 1961. The explanation may be the growing awareness by wives that there is no time bar to divorce on the grounds of adultery as there is with desertion.

The increasing use of adultery as ground for divorce by working class wife-petitioners occurred mainly among social classes III and IV. Between 1955 and 1961 these two classes, combined, showed an increase of 8% in adultery petitions and 5% in cruelty petitions but a decrease of 10% in petitions on the ground of desertion.

TABLE 35

Successful grounds for divorce as a percentage of all working class petitioners, for petitions originating in a magistrates' court.

Grounds for divorce	<u>1955</u>		<u>1961</u>		Percentage difference (1961-1955)	
	<u>Social Class</u>		<u>Social class</u>		<u>Social class</u>	
	3 & 4	5	3 & 4	5	3 & 4	5
	combined		combined		combined	
	%	%	%	%	%	%
Adultery	33	5	41	4	+ 8	(0.5)
Desertion	35	7	25	5	-10	-2
Cruelty	13	7	18	7	+ 5	
Total %	81	19	84	16	+ 3	-3
Sample size (100%)	269		328			

In 1961, 23,369 decrees absolute were made. Adultery was the ground in half of them, desertion the ground in one-third and cruelty in 15%. A similar proportion of petitioners in social classes III and IV in our sample, as in the whole divorcing population, used adultery as their ground. On the other hand, the unskilled working class in our sample used adultery in only one-quarter of their petitions. But even here there is a trend towards greater use of adultery and less reliance upon desertion. This may reasonably be interpreted as a slow adoption of middle class habits by working class petitioners.

THE ASSOCIATION BETWEEN DIVORCE AND SOCIAL CLASS

Easier access to the divorce court has been one of the main factors leading to an increasing rate of divorce over the last sixty years. This rate, defined as the number of petitions for dissolution and annulment filed in a year for every 10,000 still married women aged under fifty years, has risen from 2 petitions in 1911 successively through the following decades to 8 in 1931, 38 in 1955, 42 in 1961 and 71 in 1968.⁽¹⁾ Historical and statistical study of divorce in England and Wales indicates that it is only since the end of the last World War that working class broken marriages have turned to the divorce courts for dissolution. As the Report of the Committee on Statutory Maintenance Limits (the Graham Hall Committee) observed in 1968, "the democratic influences which established equality as the ideal and proper basis of marital relationships have also given all citizens easy access to the courts for litigating their matrimonial disputes".⁽²⁾

Writing in 1955, Barbara Wootton found that nothing precise could be said about the distribution of divorces among different social classes although she thought it "not unreasonable to suppose that there has been a change in ... the penetration of divorce proceedings to the lower social classes".⁽³⁾ In 1958, Miss Rowntree and Mr Carrier published their study of The Resort to Divorce in England and Wales which was based on statistics extracted from all petitions filed in 1871 and a sample of those in 1951. This provided the first information available about the occupational structure of the divorcing population since the Registrar General discontinued providing such data in 1921.⁽⁴⁾ The results of the survey of 1951 petitioners showed a remarkable similarity in the occupational structure distribution of the divorcing and the still married populations, with 70% of both groups being classified as 'manual worker'.⁽⁵⁾ The authors urged that their finding should be treated with caution because the number of manual workers' petitions must have been inflated by the backlog of cases brought to the divorce court in the first full year after the Legal Aid and Advice Act of 1949 came into force in the autumn of 1950.

(1) Rates for years 1911, 1931 and 1955 modified from Rowntree and Carrier, op.cit., table 2; 1961 and 1968 calculated from official statistics.

(2) Cand. 3587, 1968, p.10, par.36.

(3) "Holiness or Happiness", The Twentieth Century, November 1955, p.41.

(4) The Registrar General has since provided such data for the year 1966 in his Statistical Review ... of England and Wales for 1967, Part III (Commentary), pp.31-32.

(5) Op.cit., table 12, p.223

The sample of 1961 petitions

It was around this discussion that the Legal Research Unit, Bedford College, undertook a new survey which, this time, encompassed all divorce petitions filed in 1961 that resulted in dissolution of the marriage. A one in forty sample of all divorce petitions filed in Somerset House and in the 95 District Registries throughout the country was taken. (1)

We found that within our national sample of 723 divorcing couples, 90% of the wives and 84% of the husbands married before the age of thirty. The total divorcing population of 25,394 husbands or wives who obtained decrees absolute in 1961 showed the same proportion of marriages occurring before the age of thirty. Further confirmation of the representativeness of the sample is provided by Table 36 which shows that 37% of the wives in the sample had two or more children compared with 38% in the national divorcing population. It is reasonable to conclude that the cases randomly drawn for the survey were an extremely accurate sample of the divorcing population for that year.

The court rules require that the husband's current (or last known) occupation is shown on the petition. The attached marriage certificate provided occupations of the bride and groom at marriage. These two documents allowed the husband's occupation to be coded into one of the five social classes provided by the Registrar General in his Classification of Occupations (1966 edition) manual. ^{Our} The researchers, ~~however,~~ made one ~~innovation to the classification by~~ ^{breaking} down social class III (skilled worker) into two groupings according to the non-manual/manual occupational classification; the former consisting of mainly white-collar workers, the latter comprising skilled manual workers. (2)

Information in 83% of the 724 petitions in the sample allowed a social class to be assigned. Of the remaining 17% (125 petitions), the husband in 7% (54 petitions) of the cases was classified as 'other', being either (a) retired, in prison, a student, unemployed or disabled (3%); or (b) a serviceman (4%). The occupation was inadequately described for coding purposes in 1% (6 petitions) of the petitions, and was not known in the remaining 9% (65 petitions). Three-quarters of the 125 petitions that were not codable into social classes I - V were filed by wives. (3)

- (1) Our own research staff extracted the data from the petitions filed at Somerset House. The County Courts Branch of the Lord Chancellor's Department very kindly arranged for officials in the District Registries to extract data on our behalf.
- (2) A similar coding process has now been undertaken by the Registrar General in his 1971 edition of the Classification of Occupations manual
- (3) This finding suggests working class husbands, but analysis of other variables neither confirmed or refuted this belief.

TABLE 36

Family size of divorcing couples in the Bedford College sample compared with the total divorcing population in 1961

Number of children	Bedford College sample	Total divorcing population (*)
	%	%
0	32	32
1	31	30
2	22	22
3	9	9
4 or more	6	7
Total %	100	100
Total number	720	25,394

(*) Source: The Registrar General's Statistical Review ... for 1961, Part III, p.85, table P.5 ("Dissolutions and annulments of marriage made absolute in 1961, ...". Annulments formed 1.8% of the 25,394 decrees absolute. Though the great majority of annulled marriages are childless, their inclusion does not affect the above distribution by more than 1%.)

The children included in the table are those alive at the date of the petition, irrespective of age, including children legitimated by the marriage and adopted children.

The Survey Findings

The purpose of the remaining section of this chapter is to examine the nature of the association between divorce and social class in England and Wales. Ideally, we would have liked to compare the social class of the divorcing couples in the sample with the social class of the cohorts of the continuing married population to which the divorcing population belonged. This was not possible and so we had to do the next best thing and compare the divorcing population for 1961 to the still married population for that year, as recorded in the 1961 Census. A breakdown into non-manual and manual classification by occupation at divorce shows that the former group formed 36% of the divorcing population, and 34% of the still married population. In other words the non-manual group were slightly more prone to divorce than the manual population. This conclusion hides important variations within the individual social classes. For instance, Table 37 records that the two social classes that showed a greater propensity to divorce were firstly the white-collar workers of social class III - who formed 19% of the divorcing population but only 13% of the still married population; and secondly, the unskilled worker, with 11% of divorcing but 8% of the still married population.

TABLE 37

Social class by occupational structure of the divorcing and continuing married populations in England and Wales in 1961

Couples	Husband's social class by present occupation						Total		
	Professional (I)	Intermediate (II)	Skilled Non Manual (III N.M.) Manual (III M)		Partly Skilled (IV)	Unskilled (V)			
	p e r c e n t a g e s							%	No.
Divorcing	3	14	19	(56) 37	16	11	100	599	
Continuing * married	4	17	13	(51) 38(+)	20	8	100	10,967,060	

* Census 1961, Occupation Tables, Table 20, p.125, "Married Women enumerated with husband by Husband's Social Class".

(+) Note:

The Registrar General does not provide a breakdown of social class III into non-manual and manual groupings. Comparison of social class and socio-economic groupings shows that social class III can best be identified with the sum of socio-economic group (s.e.g.) 8 (foreman and supervisors - manual), s.e.g.9 (skilled manual worker), s.e.g.12 (own account worker), s.e.g.7 (personal service worker) and s.e.g.6 (junior non-manual worker). Socio-economic groups 8 and 9 (ie. manual workers) formed 68% of the group total, and s.e.g.12 and 7 (ie. manual and non-manual) contained 9% of the group total. If we assume that 7% of the latter 9% was formed by a manual working population, then 75% (68% + 7%) of these five socio-economic groups (s.e.g. 6 to 9 and 12) were manually occupied. Three-quarters (i.e. 75%) of social class III's 51% results in 38%

The divorce rate

A more refined presentation of the propensity to divorce within the different social classes is to construct a divorce rate. This is done by comparing the numbers of divorces within each social class to the still married population in that social class. Such a divorce rate was constructed by calculating the number of dissolutions granted in 1961 for every 10,000 married women aged under fifty-five years of age.⁽¹⁾ We assumed that the social class distribution of divorcing couples in the national population was similar to the distribution found in our sample. The number of divorces in each social class was calculated upon a national basis, and compared to the 1961 Census figures providing the number of married women enumerated with their husbands, by the husband's social class at the time of the census.⁽²⁾ Table 38 shows that the overall result was 30 divorces for every 10,000 still married women aged under fifty-five.

TABLE 38

Divorces per 10,000 married women aged under fifty-five by social class, in England and Wales in 1961

Divorce rate	Social Class					All divorces
	I	II	III	IV	V	
	22	25	32	25	51	30

Social class I with 22 had the lowest divorce rate; followed by social classes II and IV, both with a rate of 25. Social class V had double this latter rate, with ⁵¹51. However, a direct association between high social class and low rate of divorce is not obtained because social class III has a higher rate of divorce than that found in social class IV. This latter result is explained by the propensity to divorce found in the white-collar worker sub-group contained within the Registrar General's social class III. But what is clear is that marriages in which the husband is in an unskilled occupation have a greater risk of divorce than do the four other social classes. Overall, the findings suggest that the manual classes have already acquired the practice of the middle and upper classes to turn to

(1) The age of fifty-five was taken to allow comparison with the Registrar General's national data (fn.2, *infra*). The Civil Judicial Statistics for 1961 shows that 89% of the divorcing wives, whose age at the time of the decree absolute were known (25,054), were under fifty, and 98% under sixty. It is reasonable to assume that 95% of all wives were aged under fifty five at divorce.

(2) Occupation Tables, Table 20, p.125.

the divorce court when a marriage breaks down. The Registrar General's recently published analysis by social class of spinster/bachelor marriages that were dissolved in 1966, suggests that this working class trend will become more marked.⁽¹⁾ Calculations based on the latter source show that classes I and II together formed 12% of the divorcing population in 1966, class III 55%, and classes IV and V together 33%.

One very tentative explanation might be that manual workers have little or no autonomy in their work situation, which together with low wages, leads to job dissatisfaction. The home and family become the outlet for the husband's frustration with his work.⁽²⁾ Marital tension results if the wife is unable to cope with the resultant domestic stress. Another partial factor might be that the economic disparity between a low wage earning husband and his wife is far less than that existing between a professional worker and his wife. As the latter wife has far more to lose financially through loss of security and provision, she might be less willing to see her marriage end in divorce. Or it could be the resultant ~~of~~ higher income in itself, with its consequent ability to buy those items that make marriage and family life less of a potential strain upon the spouses. First in such an inventory is the greater capability of middle class couples to acquire suitable accommodation at an earlier stage of their marriage. For instance, the Population Investigation Committee survey of couples marrying in the decade 1950-1959 found housing to be the informants' main marital problem. But the proportion complaining about housing rose from an overall average of 21% to 32% in cases where the bride had married before twenty, and 46% where the teenage bride (defined as under the age of twenty) was also pregnant at marriage. Only a third of the latter brides had obtained accommodation (regardless of standard) of their own at marriage compared to two-thirds for all couples.⁽³⁾ But these are only theories that have not been validated.

(1) The Registrar General's Statistical Review of England and Wales for 1966, 1967, table C.14, p.32.

Bachelor/spinster marriages formed 89% of the 39,067 dissolutions and annulments made absolute in 1966.

(2) See D G McKinley, Social Class & Family Life, (New York - The Free Press of Glencoe), 1964, pp.130-148.

(3) Rachel M Pierce, "Marriage in the Fifties", Sociological Review, 1963, Vol.II, pp.215-240, at pp.231-33.

Age at marriage

The probability that a woman will have been married by the time she reaches the age of forty-five has increased since the early years of this century. In 1911, 832 out of every 1,000 women aged between 40 and 44 were, or had been, married. By 1961 this rate was 903, rising to 920 for 1968. Not only is there a greater propensity to marry than in earlier decades, but men and women now tend to marry at an earlier age than hitherto. Whereas in the period 1911-15 the average age of spinsters marrying bachelors was 25.3, in 1968 it had fallen by four years to 21.3. In the earlier period less than one in ten (7.6%) of all spinsters marrying did so under the age of twenty, by 1968 three out of ten (28.8%) were teenage brides. No satisfactory reason has yet been given to explain this fall in the age at marriage. For instance, the researchers of the Population Investigation Committee were unable to find any conclusive association between social and economic changes in our society and earlier age at marriage. (1)

Though there has been a lowering of the age of marriage for all social classes (as represented by the socio-economic grouping of the husband at the time of the 1961 Census), this trend has been most noticeable for the manual groupings. (2) Approximately four out of five brides who married before the age of twenty during the one year period 1960/61 had husbands in manual occupations. (3) In other words, the trend towards a drop in the age of marriage is mainly due to the increasing propensity of working class brides to marry before the age of twenty.

Differing educational patterns is one possible factor helping to explain the widening variation in age at marriage between the social classes. An increasing number of men are pursuing academic courses after leaving school. (4) Whilst still studying they usually postpone marriage. When eventually marrying, they choose (as is the usual pattern) a bride relatively close to them in age. In such cases the groom is probably in an occupation classified as social class I or II, whilst his bride is likely to be aged at least twenty.

- (1) E. Grebenik and Griselda Rowntree, "Factors associated with the age at marriage in Britain", Proceedings of the Royal Society, Series 'B', Vol.159 (1963), pp.178-198 at p.194.
- (2) See p.164.
- (3) Calculation based upon 1961 Census, Fertility Tables, table 14.
- (4) For example, professional work employees' marriages that occurred within five years of the 1961 Census showed a rise of 65% on the 1935-40 numbers; but unskilled manual worker marriages only rose by 1% in number.

Teenage marriages

The 1961 Census indicates that 29% of all 'manual' husbands' wives who had married in the five years prior to the census, had been under twenty.⁽¹⁾ It appears likely that the 1971 Census will show that somewhere approaching half of all working class girls currently become wives before reaching the age of twenty-one. Earlier age at marriage for working class couples is consistent with differing class patterns of life in modern society. The majority of boys and girls from 'manual' homes leave school at the earliest possible age.⁽²⁾ School streaming from primary classroom days has marked many working-class children as failures. Unsuccessful in a society which applauds the virtue of higher education, working class girls graduate to the one role that is acclaimed by the gramophone records they hear, the magazines they read and the television they view. For them marriage and motherhood is a clear expression of success in a role and function which, however much feminists may regret, is still seen by most young women as their ultimate goal.⁽³⁾ In most working class communities of today, the wedding ring, pram and double-bed are the ascribed symbols of primary accomplishment over their middle-class sisters.

One factor associated with marriages where the bride was under 20 is the greater incidence of pre-maritally conceived pregnancies than is found amongst older brides. The Population Investigation Committee, in its national survey of 739 marriages taking place between 1950 and 1959, found that 32% of brides under 20 were pregnant at the time of marriage - defined as giving birth within $8\frac{1}{2}$ months of marriage - compared to 13% for the brides in the 20-24 age group. In England and Wales during 1969, 36% (35,256) of all spinster brides (98,446) under 20, were pregnant at the time of marriage. Comparison between the earlier Population Investigation Committee's

- (1) Fertility Tables, table 14. 'Manual' as used in the above text consists of four socio-economic groupings based upon the husband's work; these being 'skilled', 'semi-skilled', 'unskilled' and 'agricultural workers'.
- (2) Statistics of the Ministry of Education for England in 1961 show that only 7 per cent of school-girls at Local Education Authority secondary schools went on to higher education, compared to 37 per cent at Local Education Authority grammar schools and 68 per cent at independent schools. (See D. Marsh, the Changing Social Structure of England and Wales, 1871-1961; 1965, p.215.)
- (3) See Eva Fices, Patriarchal Attitudes, 1970, pp.169-171; and Gillian Tindall, 'Housewives-to-Be', New Society, 30th May 1968, pp.194-95. See also The Daily Telegraph of 5th August 1970, which notes that some male M.Ps. replying to a questionnaire sent to them by Dame Joan Vickers, Chairman of the Status of Women Committee, observed that 'in the North of England particularly, girls in the 15-18 age groups saw themselves merely as potential mothers and didn't give serious thought to a job they could return to'.

survey and the recent findings of the Registrar General suggests that teenage marriages form an increasing proportion of all precipitated marriages. The former study showed that of the brides who were pregnant at the time of marriage in the 1950's, 39% were under 20.⁽¹⁾ By 1969, half (35,256 : 49%) of all births in England and Wales occurring within 8 months of marriage (72,595 : 100%) were to wives aged under 20 at their child's birth.⁽²⁾ Thus, today, half of all pre-maritally conceived legitimate maternities are to teenage brides.

The increase in young brides who were pregnant at marriage is partly explained by the trend to earlier marriage. In 1948, 38 out of every 1,000 woman aged 15 but under 20 were married; by 1968 this proportion had doubled to 77 married for every 1,000 such women.⁽³⁾ Also associated with young marriages is the greater likelihood of divorce. Figures produced by the Registrar General show that the divorce rate for marriages where both spouses were under 20 at the time of marriage is approximately three times the rate of divorce of all marriages. Where, however, the husband is over 20 and the wife under 20 at marriage, the divorce rate is approximately twice the rate of divorce of all marriages.⁽⁴⁾

The Bedford College survey of 1961 divorce petitioners shows that wives whose husbands were in manual occupations at marriage were more likely to have married at a younger age than wives marrying non-manually employed husbands. Thus, only a fifth of wives in social class I and II were married before the age of twenty, whereas in social class V 45% of the wives were married before twenty.⁽⁵⁾ There is an inverse relationship between the divorcing wife's age at which she married and social class, as classified by the husband's occupation at marriage. But it has to be remembered that this is partly a reflection of the differing national age at marriage patterns for each of these classes.

- (1) R. Pierce, op.cit., calculations based on tables 3 and 5.
- (2) The Registrar General's Statistical Review ... for 1969, Part II, Tables II(a) and (b).
- (3) Ibid. for 1968, Table A.3(b).
- (4) Report of the Committee on the Age of Majority, Cmnd.3342 1967, appendix 8, p.198.
- (5) Very similar results are obtained if the husband's social class at divorce is replaced by social class at marriage.

Not only are marriages more prone to divorce where the bride is under twenty, but such failures occur within a shorter period of marriage than is found in older age groups. This trend is increasing. For instance, in 1961, 10.1 wives out of every 1,000 wives who had married before 20 and whose marriages had existed for five years, had their marriages either dissolved or annulled in that year. By 1969, the rate of breakdown for a similar age/duration cohort had risen to 20.8 per 1,000 marriages.⁽¹⁾ Marriages of similar duration in 1961, in which the wife was aged 20-24 at marriage showed a ratio of 4.5 dissolutions and annulments for every 1,000 comparable marriages; by 1969 the rate had risen to 9.8 per 1,000 marriages. Our sample of divorcing wives reflected the propensity within the national divorcing population for shorter marriages to be associated with young brides. For instance, 30% of divorcing wives who were married before twenty had marriages lasting less than 7 years compared with 17% for wives who were aged at least twenty-five at marriage.

Couples in which the husband was manually employed had a higher proportion of marriages lasting under 7 years than in cases where the husband was in a non-manual occupation at the time of divorce. Twenty-eight per cent of manual marriages had lasted less than 7 years compared to 19% for non-manual marriages. The highest proportion of couples divorcing under 7 years was found to be in social class V with 33%. These findings might lead one to expect an association between longer length of marriage (i.e. 15 years and over) and higher social class. Such an expectation was not supported by the evidence of our survey. For example, in social class I and II 57% of the marriages had lasted 15 years or more compared to 28% for white-collar workers. The combination of these two groups resulted in 54% of non-manual marriages lasting 12 or more years compared to 50% for manual marriages. But this latter finding hides the real differences between the classes, notably the longer duration of marriages in the professional and intermediate groupings. The length of marriage distribution for the white-collar group was much more similar to the manual social classes than to social class I and II.

(1) The Registrar General's Statistical Review ... for 1969, Part II, Table F4.

Table 39

Length of marriage by age of wife at marriage by social class of husband at divorce

Length of marriage	Social Class of husband at divorce														
	I & II Wife's		III Non-manual Age		III Manual		IV at		V marriage						
	Under 20 -24	25 & over	Under 20 -24	25 & over	Under 20 -24	25 & over	Under 20 -24	25 & over	Under 20 -24	25 & over					
Under 7 years	14	10	15	30	27	16	31	23	26	29	36	6	34	37	20*
7 but under 15 years	34	33	23	44	43	56	38	38	44	39	28	50	28	34	40*
15 years and over	52	57	62	26	30	28	31	39	30	32	36	44	38	29	40*
Total	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100
Number	21	48	34	27	56	25	80	99	39	38	39	18	32	24	10

*percentages based on very small total number

It has been shown that (a) divorcing couples in the manual groups marry at a younger age than do couples in the non-manual groups, (b) manual marriages are of shorter duration than non-manual marriages, and (c) that, within the national divorcing population, earlier marriage age is also associated with shorter marriage duration. Table 39 tabulates the association between these three facts.

Table 39 shows the social class of divorcing husbands by the wife's age at marriage and the length of marriage. Within the individual social classes a shorter duration of marriage is not always associated with younger age at marriage. In both classes IV and V, for instance, a higher proportion of wives in the 20 to 24 marriage age group divorced under 7 years than in the under 20 marriage age group. Also, in social class I and II the proportion of wives whose marriages ended within 7 years were similar for wives who married under twenty and those who married at the age of twenty-five or over.

Younger age at marriage in social class I and II has far less effect on reducing the length of marriage; this class being the group in which each of the three age groups had at least half of the wives with ~~at~~ marriages lasting fifteen years or more. In all the social classes the proportion of wives under 20 at marriage who divorced within fifteen years is between 4% and 9% higher than for wives married between 20 and 24. Wives of white-collar workers (i.e. social class III; non-manual) had the highest proportion of cases in which the marriage had lasted under ^{fifteen}~~twelve~~ years; reflecting a shorter length of marriage for both the under 20 and 20-24 marriage age groups than ^{is} found in other classes. The broad conclusion to be drawn from this section of the analysis is that divorcing couples marry younger in the lower social classes, and younger age at marriage within the divorcing population is associat^{ed}~~ion~~ with a shorter duration of marriage.

Age at divorce

Official statistics show that for marriages dissolved by the courts in 1961, 72% of the husbands and 80% of divorcing wives were under 45 years of age.⁽¹⁾ The trend to earlier divorce since 1961 has resulted in nearly eight out of ten (79%) of all divorcing men and women in 1969 (102,620 : 100%) being under 45.⁽²⁾ In other words, if a marriage is to end in divorce it will occur for the majority of such couples before the age of 45. But age at divorce is affected by the social class grouping of the husband at divorce, as our survey findings show in Table 40. For instance, class I and II has a much older age at divorce distribution than the other classes. A third of the divorcing wives in the former grouping were aged at least forty-five compared with a fifth in the manual classes. This finding is associated with wives in class I and II, older age at marriage; and longer duration of marriage, in comparison to divorcing wives of manual workers. There is a very similar age at divorce distribution for both wives and husbands in the three manual classes. Class III non-manual had the lowest age at divorce distribution, with 59% of the wives aged under 35, and 78% of the husbands aged under 45. These white-collar divorces showed far greater similarity to the manual classes age at divorce distribution than to class I and II.

The overall conclusion from these findings is that husbands and wives who divorce in the manual classes do so at an earlier age than the higher income groups represented by class I and II. Related to earlier divorce is the greater chance of entering a second marriage.

The Registrar General has observed that: "the marriage rates of divorced persons ... demonstrate the pattern of marriage rates declining with increased age".⁽³⁾ The number of divorced men who entered a second marriage in 1964 aged 25-29 when compared to all divorced men in the same group produced a rate of 511 for every 1,000 such men. This rate, the

- (1) The Registrar General's Statistical Review ... for 1961, Part II, Table P2, p.79.
The Bedford College sample shows a very similar age distribution, with 85% of husbands and 79% of wives within the above age groups.
- (2) Ibid, 1969, Table P2.
~~79% out of the 102,620 were under the age of 45.~~
- (3) Statistical Review for ... 1964, Part III, p.27.

TABLE 40

Age of husbands and wives at divorce by social class of husband at divorce in the Bedford College survey of 1961 petitions.

Age at divorce	Social class of husband					Total
	I & II	III N.M.	III M	IV	V	
a) <u>Wife</u>	p e r c e n t a g e s					
Under 35	38	59	56	56	54	53
35 but under 45	28	27	25	24	25	26
45 and over	34	14	19	20	21	21
b) <u>Husband</u>						
Under 35	28	46	42	43	45	41
35 but under 45	35	32	32	31	27	32
45 and over	37	22	26	26	28	27
Total number (100%) in (a) and (b)	103	110	219	96	66	593

TABLE 41

Rates of second marriage in each age group, for every 1,000 divorced men and women in the same age group

Year	Age group at remarriage					ALL ages
	25-29	30-34	35-44	45-54	55 and over	
<u>Men</u> 1961	474	348	197	112	58	162
1964	511	364	210	110	56	172
1968	552	375	224	118	53	187
1969	529	346	214	115	54	183
<u>Women</u> 1961	405	249	111	52	17	96
1964	398	253	121	53	16	104
1968	391	230	131	60	16	112
1969	368	216	118	58	15	108

Source: Registrar General's Statistical Review ... for 1969, Part II Table H2, p.56.

Registrar General notes, "indicates an average interval between divorce and re-marriage of less than a year".⁽¹⁾ He goes on to comment on the 1964 rates shown in Table 41: "the rates of 364 per 1,000 for men aged 30-34 and 398 per 1,000 for women aged 25-29 both imply an average interval between divorce and remarriage of well under 2 years". These high rates point to an average interval of under four years between the time of divorce and entering a second marriage for divorced men under the age of 45 and divorced women under the age of 35. The rates of remarriage decline rapidly up to the age of 35, and then move more slowly. The fact that within each age group the remarriage rates for men are consistently higher than for women suggests that the former enter a second marriage within a considerably shorter interval than do their ex-wives. Table 42 records that for some three-quarters of all divorcing couples,⁽²⁾ divorce is a temporary condition between the dissolution of an unhappy first marriage and the formation of a more hopeful second marriage.⁽³⁾

(1) Statistical Review ... for 1964, Part III, p.28

(2) For the last fifteen years the yearly number of divorces has been increasing. Remembering the time-lag factor whereby persons re-marry some 3-5 years after divorce, it is probable that 71% in Table 42 is a minimum proportion.

(3) A similar finding is recorded by Jessie Bernard (Remarriage, 1956, [The Dryden Press, New York], pp. 65-66) in the U.S.A.; three-quarters of all divorced persons remarrying within 5 years.

Professor Bernard reports that the divorced wife remained unmarried for an average of 4.6 years, and the divorced husband 2.5 years (ibid, pp. 11-12).

William J Goode's^{*} study of 425 divorced mothers aged 20 to 38 at divorce, found one half (54%) of these mothers, who had divorced 26 months before, had already remarried. In the younger age group (20-24 years) 80% had remarried within this period of 26 months, compared to 46% for mothers aged 35 years and over. (After Divorce, 1956, The Free Press, Glencoe, U.S.A., 1965 ed., p.207).

TABLE 42

Proportion of divorced persons who entered a second marriage in the decade 1957-1966

<u>In period 1957-1966</u>		
Decrees Absolute: Dissolution	287,039	100%
Divorced men remarrying	207,630	72.3%
Divorced women remarrying	199,468	69.5%
ALL divorced persons remarrying	407,098	70.9%

Calculations based upon the Registrar General's Statistical Review of England and Wales, Part II, Table G. (for 1957-1966) and Table K (for 1966).

Second marriages of divorced persons now take place at ^{an} earlier age than occurred previously. This is reflected in the mean re-marriage age for men dropping from 40.8 in 1959 to 38.6 in 1969, and 37.4 in 1959 to 35.4 in 1969 for women. The proportion of the divorced women entering second marriage under the age of 45 has remained fairly constant at around four-fifths, it is the increase in the proportion remarrying under 35 (from 46% in 1956-60 to 58% in 1969) that is significant. This trend is shown in Table 43 below.

TABLE 43

Age at second marriage by date of new marriage for period 1956-1966

Age at second marriage	Date of second marriage				
	1956-60	1961-65	1966	1968	1969
cumulative percentages					
<u>Men</u>					
Under 35	33	37	41	44	45
45	69	71	73	74	75
50	83	82	83	85	86
Mean age (years)	40.6	40.0	39.2	38.7	38.6
<u>Women</u>					
Under 35	46	50	52	55	58
45	80	80	80	81	82
50	90	89	90	90	91
Mean age (years)	37.1	36.8	36.2	35.7	35.4

Calculations based upon Statistical Review, Part II, (for 1969, Tables K and L, pp.60-61).

Because the manual classes divorce at a younger age their chances of establishing a second marriage are higher than for couples in social classes I and II.

Maintenance provision for the younger wife, therefore, becomes in many cases a temporary financial remedy until a new husband takes on the responsibilities of her (and, in some cases, her children's) support. The other side of the coin is that the younger divorcing husband by marrying again acquires additional family responsibility. If the husband's former wife is still single, then his liability to support extends to both the ex-wife and family and to the new wife and their own existing (or potential) family.⁽¹⁾ Yet the survey findings show that such a husband is likely to only have a manual worker's wage to undertake his dual role. In starting afresh upon a new marriage, the previously divorced husband may already have the burden of maintenance upon him. This must considerably reduce the possibility of happiness in the second attempt.⁽²⁾ Because the middle class wife divorces at an older age, she has less statistical chance of entering a new marriage. Maintenance and property provisions decided at divorce are of far greater importance in affecting her long term financial security.

- (1) In 1967, 20,614 (73%) of divorced men who remarried (28,234 : 100%) were under the age of 45. Of the 20,614 (100%) under 45, 6,287 (30%) married divorced women and 1,115 (5%) married widows; in both groups the great majority of their new wives would be under 45 (6,670 divorced women and widows under the age of 40 married divorced men in 1967). (Statistical Review, for 1967, Part II, Table G, pp.51-54). In other words, in a significant minority of cases the husband takes on at second marriage the responsibility of supporting an already existing family and ex-wife, a wife, plus their own potential family. In addition, the husband and wife may have been cohabitating before marriage, with resultant children of the liaison, who would be legitimated by their parents' marriage (see The Field of Choice, Cmnd.3123, 1966, par.36).
- (2) This might be one explanation why men who had previously married, had, in 1967, a rate of 4.5 divorces for every 1,000 second marriages; compared to 3.2 for bachelor grooms. (Statistical Review for 1967, Part II, table P.7(b), p.76).

FAMILY PATTERNS WITHIN A DIVORCING POPULATION

We know that wives of manual workers marry at an earlier age than wives of non-manual husbands. Young wives begin their family building within an earlier period than do older wives. For instance, the 1961 Census showed that 59% of all brides aged under twenty, whose marriages had lasted one year, had already had a child, compared to 41% for brides aged over twenty but under twenty-five. Fertility patterns within individual age groups are also affected by social class, as Table 44 shows.

TABLE 44

Percentages of wives married once only, with one or more children after 1 and 4 years of marriage by socio-economic group of husbands, in England and Wales, 1961

Wife's age at marriage	Wives of:*				All wives*	
	Professional employees		Unskilled manual workers			
	Marriage duration (completed years)					
	1 %	4 %	1 %	4 %	1 %	4 %
Under 20	44	83	69	90	59	84
20 but under 25	31	72	60	83	41	74
25 but under 30	33	70	57	75	42	71
16 but under 29	33	73	63	84	46	76

Source: 1961 Census: +Fertility Tables, Table 14, pp.118-19 and 132-33;

* Ibid, Table 10(i), pp.47-48.

Wives of unskilled workers who married within the most popular age at marriage grouping of 20-24 ^{are} were twice as likely to have had a child within one year of marriage than ^{are} were wives of professional employees marrying in the same age groupings. The fact that a similar pattern appeared within each age group indicates that postponements of a family for the first few years of marriage is associated with the higher social classes. Couples who postpone a family for the purpose of saving will be in a more economically advantageous position than those who begin a family within a short time of marriage.

Working-class marriages are at an economic disadvantage in three ways when compared to middle-class marriages. Birth of the first child stops the wife financially contributing to the marriage. At the same time there is the additional expenditure required to meet the new baby's needs. Secondly, parenthood also enforces the couple's need to have independent self-contained accommodation. The Population Investigation Committee survey has shown that about half of young wives will have to wait for at least a year after marriage before they can acquire any degree of independent accommodation away from their parent's or in-laws' homes.⁽¹⁾ This means that in many cases the husband and wife would not have their own accommodation before their child's birth. The third disadvantage is the already existing income differential between manual and non-manual work.

If one is going to find a single factor that might explain the association between social class and divorce, then the financial condition of the marriage would appear the most important. Available money allows suitable housing, household and family needs to be purchased. For those less fortunate, the problems of overcrowding and budgeting can lead to marital disharmony. The newly married working-class couples problem of finding accommodation is, of course, an artefact of their own financial position. Surveys in this country have shown that young middle-class couples often get financial assistance from their parents at the start of the marriage, when money is most in need.⁽²⁾ Thus, middle-class couples are usually in a more advantageous position to acquire accommodation at an earlier stage of their marriage than are their working class counterparts.

(1) Griselda Rowntree, "Teenage Marriage in Britain", p. 6 (a paper read at the Sociology Section of the British Association Conference, on the 31st August 1962).

(2) See Colin R. Bell, Middle Class Families: Social and Geographical Mobility, 1968; and, Raymond Frith, Jane Hubert and Anthony Forge, Families and Their Relatives, 1970.

Pre-marital conception

One of the factors associated with divorce is the increased possibility that the divorcing wife was pregnant at marriage. The Registrar General has recently shown that within a sample of couples who were both single at the time of marriage and who divorced in 1966, 32% of ~~the~~^{fertile} wives had a first child either before marriage or less than 8 months after marriage.⁽¹⁾ Within this divorcing population, marriages in which the husband had an unskilled occupation at divorce (i.e. social class V) had the largest proportion of pre-nuptial conceptions with 41%, and social class I had the lowest proportion with 16%. Similarly, the Bedford College survey of 1961 divorcing couples found that social class and pre-marital conceptions were inversely correlated with 36% of all wives marrying husbands in unskilled occupations being pregnant at marriage compared to 10% for wives marrying husbands in social class I and II. These results are shown, by the age of the wife at marriage and husband's social class at marriage, in Table 40, which also collates these divorce findings to those produced by the Population Investigation Committee for couples marrying in the period 1950-59.

TABLE 405

Incidence of pre-maritally conceived legitimate maternities for: (I) wives marrying in the period 1950-1959 compared to: (II) wives divorcing in 1961: by husband's occupation at marriage.

Age of wife at marriage	Husband's occupation at marriage			All
	Non-manual	Skilled manual	Other manual	
<u>Under 20</u>	p e r c e n t a g e s			
(I) Marrying 1950-59	28	28	36	32
(II) Divorcing 1961	29	36	44	38
<u>20 but under 25</u>				
(I) Marrying 1950-59	4	15	17	13
(II) Divorcing 1961	17	15	19	17

Sources: (I) Rachel M. Pierce, 'Marriage in the Fifties', Sociological Review, 1963, Vol.11, table 5, p.221. Pre-maritally conceived births were taken as those within 8½ months of marriage. The original percentages have been rounded.
 (II) Bedford College survey took births within 9 months of marriage.

(1) Statistical Review ... for 1967, Part III, Table C.14, p.32.

Table 40 indicates that within the divorcing population, the high proportion (44%) of young (i.e. under twenty) pregnant brides who married 'other' (social classes IV and V) manually occupied grooms is partly a resultant of the overall national marriage pattern, in which over a third (36%) of this group of wives were pregnant at marriage. But precipitated marriages are much more common across all social classes for marriages involving young brides than for those wives who married between the ages of 20 and 24 years. Within this latter marriage group, divorcing wives of non-manual grooms were far more likely to have been pregnant at marriage (17%) than would be expected from the national distribution for all marriages shown by the Population Investigation Committee survey (4%). This suggests differing cultural patterns and norms in cases where the bride is pregnant; whereby amongst the non-manual classes there is a greater tendency to have a "shot-gun" marriage in such circumstances, rather than, as amongst the working classes, to see pregnancy as precipitating an already intending marriage. Miss Pierce's explanation for the high rate of pre-marital pregnancy amongst young middle class brides is that, "... not only the pregnancy but also the early marriage may contravene convention and such an 'indiscretion' may be more damaging in these circumstances than when it occurs in working class circles".⁽¹⁾

It has been earlier argued that the relationship between social class and pre-marital conception amongst divorcing wives is "partly a resultant of the national marriage pattern". But it has to be conceded to those moralists who see divorce as the judgment upon pre-marital conception, that such marriages do appear more prone to divorce. Further confirmation of this greater chance of divorce is indicated by comparing the overall Bedford College survey rate of 22% pre-marital conceptions amongst all divorcing wives with the pre-marital conception rate of 15% for all marriages occurring in England and Wales in the period 1955-59. So far, this section of the chapter has argued that,

- (1) Marriages where the bride was under 20 have a far greater number of pre-maritally conceived maternities.
- (2) The rate of such pregnancies is increasing, and so is the proportion of these pregnancies formed by young brides.
- (3) Marriages are taking place at a younger age.
- (4) Wives who are under 20 have a greater chance of divorce.

(1) Op.cit., p.221.

- (5) Divorcing wives have a greater propensity to be pregnant at marriage than is found in the still married population.⁽¹⁾ This tendency increases amongst divorcing wives who married before 20. These young divorcing wives were predominantly married to husbands in manual occupations. The Bedford College survey also showed that half of all precipitated marriages within the divorcing population occurred to young brides of manually employed grooms. This latter group of brides formed 11% of the total divorcing population. Pre-marital conception is therefore linked with young brides and divorce, but clearly the causality is from young women to pre-marital conception to young brides. Precipitated marriage is one facet associated with brides of under 20.

But it still remains that if there was a strong association between pre-marital conception and divorce in 1961, and that this association still exists today; then the increase in the national pre-marital conception rate from 15% in 1961 to 21% in 1969 could well be a significant guide to future divorce rates. It is not the effect of amending the law through the 1969 Divorce Reform Act, but demographic, social and normative changes that suggest a long term increase in the numbers seeking divorce.⁽²⁾

- (1) One American localised study of marriage occurring between 1919 and 1952 found, after controlling other variables, such as age differences, that marriages in which pre-marital conception occurred had double the rate of divorce than post-marital conceptions. Harold T. Christensen and Hanna H Meissner, 'Premarital Pregnancy as a Factor in Divorce', American Sociological Review, Vol.18(1953), pp.641-44.
- (2) The Abortion Act of 1967 may have consequences for the divorce rate by reducing the number of "shot-gun" marriages, though it does not appear to have made any impression yet. Thus, in 1965 there were 4,415 wives under 20 at the time of birth of their child in that year, the wife being married for less than three months. Five years later the number of such births had risen to 4,892 in 1969; these young mothers forming 54% of all (9,049) the six months or more pregnant brides.

Fertility, family patterns and Divorce.

Shorter time between marriage and the birth of the first child has been shown to be directly associated with low social class. It is therefore not surprising to find within the Bedford College survey's divorcing population that the lower social classes started a family at an earlier period of the marriage. Table 46 records that over twice as many divorcing wives in the social class V (38%) had a child within one year of marriage than was found in social class I and II (19%).

TABLE 46

Duration of marriage to birth of first child by social class of husband at divorce.

Duration of marriage to first child	<u>Social class of husband at divorce</u>					Total
	I & II	III N.M.	III M.	IV	V	
	cumulative percentages					
under 1 year	19	18	27	33	45	27
1 year but under 2 years	34	37	48	48	63	45
2 years and over	60	53	64	63	73	62
No children (%)	40	47	36	37	27	38
Number (100%)	94	104	207	89	62	556

The Age at marriage seems to be the factor most likely to suggest early start to a family. Table 47 shows that twice as many wives marrying before twenty had a child within a year of marriage compared to the remaining wives. This pattern extended to all social classes. Divorcing wives who married early, had in all classes a significantly higher rate of fertility. Yet early families in a divorcing population was not a typical pattern. Only half of the young wives in the 'other' manual grouping had had a child within one year of marriage.

TABLE 47

Duration of marriage to birth of first child by social class of husband at divorce, by age of wife at marriage.

Age of wife	Under 20				20 and over			
	<u>Social class of husband at divorce</u>							
Duration of marriage to first child	Non Manual	III Manual	Other Manual	Total	Non Manual	III Manual	Other Manual	Total
		cumulative percentages						
Under 1 year	33	38	50	41	14	20	28	20
1 year but under 2 years	52	62	64	60	30	40	47	38
2 years and over	74	76	76	75	51	57	60	55
No children (%)	26	24	24	25	49	43	40	45
Number (100%)	46	78	66	190	152	129	85	366

TABLE 48

The effect of duration of marriage to the birth of the first child upon length of marriage to petitioning for a divorcing population.

(A) Fertile Marriages

Length of marriage to divorce	Marriage duration to birth of 1st child					
	Months			(d)	(e)	(f=d+e)
	(a)	(b)	(c=a+b)	9 months - 2 years	2 years and over	9 months and over
	Under 6	6 - 8	Under 9			
	c u m u l a t i v e p e r c e n t a g e s					
Under 7 years	34	36	35	16	4	11
7 years but under 12 years	53	61	56	41	21	35
12 years but under 15 years	70	80	74	55	38	48
15 years but under 20 years	78	88	82	80	64	73
20 years and over	100	100	100	100	100	100
Total number	85	52	137	169	116	285

(B) All marriages

Length of marriage to divorce	(g=c+f) fertile marriages	(h) infertile marriages	(i=g+h) All marriages
	cumulative percentages		
Under 7 years	19	35	25
7 years but under 12 years	40	68	51
12 years but under 15 years	57	79	65
15 years but under 20 years	76	86	80
20 years and over	100	100	100
Total number	422	257	679*

* Information not available in 44 cases.

Commentators have noticed that childless marriages appear in greater proportion within the divorcing population than is found in the still married population. (1) Two out of ten (19%) marriages existing in England and Wales in 1961 were infertile. (2) Four out of ten (37%) wives in the 1961 divorcing population did not have a surviving child of the marriage. The numbers of such wives who had given birth to a child which had subsequently died must have been extremely small, and so marriages without children at the time of divorce can be accurately described as infertile. We would expect, if the 'economic' argument is a plausible explanation of varying divorce rates, that within a divorcing population, infertile marriages would at least have a longer duration than couples with families started within two years of marriage. This was not found to be so, as Table 48(B) shows. A comparison of fertile and infertile marriages show that just over one-third (35%) of the childless couples had marriages lasting less than 7 years, compared to 16% for wives bearing ^{their first child between} ~~a child within~~ 9 months and 2 years of marriage. Double the proportion of divorcing wives with children of the marriage had marriages lasting twelve or more years (60%), compared to childless wives (32%). Such findings indicate that, within a divorcing population, the absence of children and shorter marriage duration are associated.

- (1) See Rowntree and Carrier, op.cit., p.229; Thomas P. Monahan, "Is Childlessness Related to Family Stability?", American Sociological Review, Vol.20 (1955), pp.444-456.
- (2) 1961 Census, Fertility Tables, Table 10(1), p.47, (Women married only once and enumerated with their husbands - for wives marrying under 45). Standardising for length of marriages, 34% of divorcing wives with duration of marriage 9-14 years were childless: This can be compared to the much smaller proportion of 15% in the still-married population, with marriage duration 10-14 years - though this proportion of 15% fell to 5% for wives marrying before 20, and 10% for wives marrying between 20 and 24 years of age (ibid), table 10(1)). Four out of five divorcing wives were married before their 25th birthday, 45% between the ages of 20 and 24. Clearly, the de facto marriage duration (marked by the end of cohabitation) is shorter than this de jure duration of 10-14 years. But even if we reduce marriage duration, for all wives marrying in the 20-24 age groups, to 5 years; the population of childless wives only increases to 20%. This is still significantly different from the proportion of infertility in the divorcing population, and suggests that there is an association between the two that cannot be explained away by considering the de facto length of marriage in a divorcing population.

Table 48(A) indicates that within fertile divorcing marriages, there appear significant difference between times of first birth and length of marriage. Three-quarters (74%) of those wives who were pregnant at marriage divorced within 15 years of marriage, compared to half (48%) for wives who conceived in wedlock. The most vulnerable group were wives 6 months but under 9 months pregnant at their wedding. It is this group who are most likely to be correctly classified as 'shot-gun' marriages, in contrast to brides under 6 months pregnant. The latter group, by precipitating marriage have probably brought the wedding date forward; but they are not, as are the former couples, marrying against their own volition. The length of marriage distribution for 'shot-gun' marriages parallels very closely that found for childless marriages. Thirty-six per cent of the former category of divorces lasted under 7 years compared to 35% for childless marriages. In a divorcing population, social class is the factor linking shorter length of marriage with both pre-marital conception and childless marriages. (1)

Dependent children

Mr Justice Scarman, Chairman of the Law Commission, in an address on family law to a conference of magistrates in 1967 observed that only the rich can afford polygamy. Thus sums up rather drily the predicament facing legislators in any debate concerning the casualties of broken marriages. Upon entering a second marriage the previously divorced husband takes on the legal responsibility of providing for his new wife and children, whilst in many cases still having maintenance commitments to an ex-wife and family. This is the problem highlighted by Mr Justice Scarman's observation.

The Registrar General's Statistical Review for 1969 shows nearly three-quarters (33,494 : 73.1%) of all divorced wives were mothers, who had between then 72,790 children. The Review does not record how many of these children were still dependent upon their parents. It is mothers with children still at school who are most likely to be in the greatest financial need upon divorce. The Bedford College survey shows that 68% of all divorcing wives in 1961 had at least one child though this was reduced to 53% for those with a child (or children) still under fifteen and therefore at school.

(1) The association between shorter length of marriage and childless marriages was found for wives resorting to the magistrates' court for maintenance orders. See Separated Spouses, Table 31, p.77.

Upon divorce the higher social groups are much more likely to be able to arrange matters of maintenance provision on a sound basis than are the lower incomes groups. Further analysis showed that the wives with children still at school had in 69 per cent of the cases husbands who were in manual occupations; 16 per cent of the husbands were non-manual white-collar workers; whilst the remaining 15 per cent of the husbands were in professional and intermediate occupations (social class I and II). Another way of presenting these results is to say that 36 per cent of all divorcing wives had at least one child still at school, whilst the husband was in a manual occupation.

Table 49 shows, ~~as one would expect,~~ that the younger divorcing wife was less likely to have ~~children~~ ^{children} dependant, than a wife aged thirty ~~or more~~ ^{to forty} at divorce. Wives aged thirty but under forty at divorce had in 69% of all cases one or more children under the age of fifteen, compared to a third of the wives aged forty or over.

We know that just over half of all divorcing couples had at least one child still at school. It is the age of the youngest child of the family that is best seen as an indicator to some of the social problems associated with broken marriages. The presence of infant children place a restriction on the wife's ability to work, or, if not working, to get out of the house and make social contact.

TABLE 49

Proportion of wives with dependent children by age of wife at divorce

Age of wife at divorce	Divorcing couples				Total % No.	
	(i) Without children	(ii) All children aged 15 or more	(iii)=(i + ii) No dependent children	(iv) All or some children under 15		
	p e r c e n t a g e					
Under 30	44	-	44	56	100	229
30 but under 40	26	5	31	69	100	242
40 and over	28	39	67	33	100	241
All wives	32	15	47	53	100	712

Table 50

The proportion of divorcing couples with child(ren) under fifteen, by age of youngest child at divorce, by social class of husband at divorce.

Age of youngest child at divorce	Social class at divorce					Total
	I & II	N.M.	III M.	IV	V	
Under	cumulative percentages					
5 years	11	12	21	18	30	18
11 years	29	40	41	43	45	39
15 years	48	51	50	56	59	52
Number (100%)	104	109	220	96	66	595

Table 51

Distribution of wives who have children under 15, by wife's age at divorce, by husband's occupation at divorce.

Wives with child(ren) under 15: wife's age at divorce	Husband's occupation		ALL
	Non-manual	Manual	
	p e r c e n t a g e s		
Under 30	11	22	18
30 - 39	24	22	23
40 and over	15	9	11
Sub-total	50	53	52
Couples with all children over 15 or no children	50	47	48
Total %	100	100	100
No.	213	382	595

Our findings show that nearly one-fifth (18%) of all divorcing couples had at least one child under the age of five, and two-fifths (39%) had at least one child under the age of eleven. But, as Table 50 indicates, 30 $\frac{1}{2}$ % of divorcing couples in social class V had one or more children under five, compared to only 11% of couples in Class I and II. The spouse of the unskilled labourer is the wife least able to support herself because of the need to look after her very young children. But it is the same wife's husband who, evidence suggests, will be unable to pay maintenance regularly, if at all.

When considering the number of dependent children involved in divorce proceedings, it is useful to look at the age of the mother at divorce. This is because available information strongly suggests that the younger the wife is at divorce the greater the probability of a second marriage for her. Such chances of re-marriage must be considered when discussing the social and psychological effect of divorce upon the children and the economic position of the mother. Thirty-five per cent of all divorcing wives with children under fifteen (310 : 100%) were aged under thirty, and nearly two-thirds (62%) were under thirty-five. If the age distribution was similar in 1968 to our findings for 1961 (the Registrar General's figures show an increasing proportion of divorcing wives are mothers) then some 6,000 wives in 1968 had at least one child still under the age of five. Our findings showed that three-quarters (77%) of wives with children under five had husbands in manual occupations. We know the majority of these mothers are in the younger age group and are therefore more likely to enter a second marriage within five years of divorce. It therefore seems probable that there are between 20,000 and 30,000 divorced women with a child (or children) under school age. Many of these mothers would like the opportunity to work outside the home and to earn a wage, and at the same time make social contact with other people. But nursery places are seriously below the number of children under five; Holman calculating the proportion to be 6%, "a proportion that has hardly changed since the 1930's".⁽¹⁾

(1) Robert Holman, Unsupported Mothers, 1970 (published by 'Mothers in Action'), p.20.

There are significant social class differences in the age at divorce of these mothers. Half of all wives with dependent children in class V were under 30 at divorce compared to 12% in class I and II. The variation within non-manual and manual groupings is shown in Table 2251 as a proportion of all divorcing wives. Wives classified into non-manual groupings who had children under fifteen at the time of the divorce formed half of all wives within this grouping; the wives in the manual groupings showed a similar proportion. However, the manual grouping had double the proportion of wives who divorced before thirty and had dependent child(ren) than those in the non-manual occupations.

In a tenth of all divorces the wife was aged forty or over with child(ren) still at school. Within this age grouping there were an almost equal number of non-manual (48%) and manual wives (52%). It is these older wives who have less chance of entering a new marriage following divorce.

MARRIAGE BREAKDOWN IN THE 1970s

The Divorce Reform Act of 1969 requires the petitioner to show that the marriage has irretrievably broken down instead of, as prior to 1971, proving the respondent's committal of a matrimonial offence. Under the 1969 Act, the divorce courts cannot find that irretrievable breakdown has occurred unless they are satisfied that there exists at least one of five "facts". But the old theory of fault has not been removed from the divorce courts, for three of these facts - adultery, intolerable behaviour (cruelty) and desertion - make use of matrimonial misconduct to prove the existence of breakdown. The two other facts for presuming that the marriage has broken down are new. Under section 2(1)(d) of the 1969 Act the petitioner has to satisfy the court that the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the filing of the petition and the respondent agrees to a divorce. Section 2(1)(e) requires that the parties to the marriage have lived apart for a continuous period of at least five years immediately preceding the presentation of the petition. It was this last "fact" that brought most hostility from critics who held that the Act contained inadequate financial protection for the "innocent" wife divorced against her will. The new proposals were, according to Lady Summerskill, sexual licence for working men: "Most men cannot afford two wives. That, shortly, is why I said that this is 'a Casanova's charter'. None of the arguments that I am giving now applies to the rich man".⁽¹⁾ Many supporters of the Divorce Reform Act were concerned that wives defending "five year" clause petitions on the grounds of grave financial or other hardship would receive judicial support. For instance, Mr. Abse, M.P., in a letter to The Times, observed that "this clause could mean a wealthier man would have an advantage over a poorer one, but there is no novelty in that".⁽²⁾

If Mr. Abse's fear had become reality, then our divorce laws would have been providing a severe financial handicap against lower income husbands. But judges⁽³⁾ have sympathised with the Law Commission's belief that the objective of a good divorce law was:

(1) Hansard, H. of L. Deb., Vol. 303, col. 310.

(2) 7th February, 1968.

(3) See Ash v Ash [1972] 1 ALL E.R. 582.

- (1) To buttress, rather than to undermine, the stability of marriage; and
- (2) When, regrettably, a marriage has irretrievably broken down, to enable the empty legal shell to be destroyed with the maximum fairness and the minimum bitterness, distress and humiliation.(1)

If the marriage was dead then "... the object of the law should be to afford it a decent burial".(2)

Maintenance, need and ability to pay

The safeguards ensuring financial provision for the divorced wife and dependent children are underpinned by the Matrimonial Proceedings and Property Act of 1970. But however well intentioned the 1969 and 1970 Acts' provisions for the protection of wives and children, the reality is that few men can support two families. This harsh truth is described by the Law Commission:

The bed-rock of difficulty is simply that most men have neither the capital nor the income resources to provide adequately for the wife (or wives) they have deserted as well as for themselves and their new commitments. No amount of ingenuity by actuaries, lawyers or legislators can alter the facts, which may be summarised as follows:-

- (a) wealthy men present the law with no problems;
- (b) poor men present problems which can be solved only within the framework of national insurance, and Supplementary Benefit legislation;
- (c) the man who is neither rich nor poor generally has available an earned income, a pension expectancy and a capital asset - a house which may be encumbered with a mortgage. He rarely has much else.(3)

The Law Commission's belief is reinforced by the experience of a District Registrar:

Over the last twenty years about 10,000 divorces have passed through my offices and in about ninety per cent of them I have dealt with alimony and maintenance orders. In the vast majority of cases the parties are working-class people and the only income is the husband's wage, £14-£16 a week. They have no

- (1) Reform of the Grounds of Divorce: The Field of Choice, Cmnd. 3123, 1966, p.10, par.15.
- (2) Ibid., p.11, par. 17.
- (3) 'Matrimonial and Related Proceedings - Financial Relief', par. 210; Law Commission Working Paper No. 9 (April 1967), reprinted in their Report on Financial Provision in Matrimonial Proceedings, (No. 25), July 1969 (H.M.S.O.), p.154.

savings, insurance or pension rights. In fact all they have are the clothes they stand up in, heavy mortgage commitments and H.P. liabilities and other debts. By the time the parties reach me the husband has often assumed responsibility for another woman It is dishonest to talk about fair arrangements for the first wife and children No reasonable arrangements can be made in these cases.(1)

In many broken marriages there is not even a mortgaged matrimonial home to be considered in the distribution of family assets, and so, in Dr. Stone's words "the husband's theoretical liability to maintain his wife or former wife is in most cases a blatant piece of humbug, and should be exposed as such".(2) For such cases it is the State that undertakes support of the wife and family.

The truth facing many "innocent" wives contemplating use of section 4 as a defence against husbands petitioning under section 2(1)(e) is, as the Scottish Law Commission explain, that her financial "hardship would not be greatly increased, if at all, by the legislation of the marriage which is to be substituted for concubinage Apart from financial loss, however, the only injustice consists in her loss of status and the blow to her personal pride. It is arguable, however, that here the real blow fell when her husband left her".(3) The High Court has held that the claims of a mistress and an illegitimate family are not to be disregarded in assessing the husband's ability to pay.(4) In the majority of cases it is questionable whether the wife would be financially better off by denying her husband the right to contract a legal second union rather than having a continuing illicit union. A Home Office study of almost all summary court orders made during the months of September and October 1966, showed how seldom magistrates awarded amounts approaching the then maximum limits of £7 10s for a wife and £2 10s for each child. Seven per cent of all wives in the Home Office sample were ordered £5 10s or more.(5) The Committee on Statutory Maintenance Limits concluded

(1) Reported in The Law Guardian, No. 49 (June 1969), p.4.

(2) Olive Stone, "Who owns the family assts?", New Society, 23rd January, 1969.

(3) Divorce: The Grounds Considered, Cmnd. 3256, 1967, par.24, pp.7-8.

(4) It is not the practice of the Family Division in assessing maintenance to "draw a rigid line between legally enforceable obligations and "moral" obligations or to insist on shutting their eyes to the latter ...". Roberts v Roberts [1970] Pl.

(5) Report of the Committee on Statutory Maintenance Limits, Cmnd. 3587, 1968, Table 26(a), p.112.

from this study that "less than one in five of the orders were for amounts which would maintain a family at subsistence level by supplementary benefits standards. The witnesses who gave oral evidence were in agreement that the limiting factor was the defendant's resources and there seems no reason to doubt this".⁽¹⁾ The same study revealed how in the High Court, only 13% of orders for the benefit of wives and 13% of the orders for children exceeded the maximum amounts that could then be ordered by magistrates.⁽²⁾ This suggests that the financial background of those who seek maintenance from the divorce courts are not significantly different from those who resort to the summary courts to resolve their maintenance disputes.

The result is that many wives depending on maintenance have to resort to the Supplementary Benefits Commission to provide them with the financial means for a basic standard of living. In 1965, 125,000 separated or divorced wives received assistance from the National Assistance Board (now the Supplementary Benefits Commission). Less than half^(48%) of the 104,000^(48%) separated wives had either a court order or a voluntary maintenance arrangement with their husbands.⁽³⁾ Allowing for these court or voluntary payments, husbands in 1965 contributed only some 16% of their wives' financial needs as assessed by the Board.⁽⁴⁾ It is not simply that husbands do not pay regularly or at all, for further calculations showed that even if all wives being assisted had received regular payments under their maintenance orders, they would still have needed substantial financial help.⁽⁵⁾ As the Joint Under-Secretary of State for the Home Department (Mr. C.M. Woodhouse) explained to Parliament in 1964:

if the State were to underwrite a husband's maintenance obligations it would still in many cases be found that additional payment was needed for relief of the wife's hardship. In other words, the extent of the husband's maintenance obligation does not provide an appropriate yardstick for determining the extent to which the State should assist⁽⁶⁾

- (1) Ibid., par.125, p.40.
- (2) Calculations based on Tables 30 and 31 (pp.120-21), ibid.
- (3) Cmnd. 3587, op.cit., Table 17a, p.92.
- (4) The basis of these calculations is provided in Separated Spouses, Table 105 and pp.158-159.
- (5) Ibid., p.162.
- (6) Hansard, H. of C. Deb., Vol. 693 (1964), cols. 736-8.

The inability of many husbands to pay is highlighted by the Supplementary Benefits Commission's Report for 1968 which shows that about 37,000 husbands were receiving supplementary benefit who were themselves married ^{but} ~~by~~ living apart from their wives. ⁽¹⁾ Husbands of wives resorting to the summary court are in the lowest wage earning groups. ⁽²⁾ They do not have the means to maintain two families, though evidence suggests that many of them have formed financial commitments to both ^a legal family and an extra-marital family or paramour. For instance, the Law Commission estimated in 1966 that a change in our then existing divorce law would result in some 180,000 illegitimate children of stable but illicit unions being legitimated. ⁽³⁾ The divorced husband incurs a new liability by entering a second marriage, for the law now requires that he maintain his ex-wife and family as well as his new wife and their children. Many maintenance defaulters simply do not have the means to meet their legal commitments.

The ultimate deterrent against non-payment of maintenance is the threat of imprisonment. Justices can commit a defaulter for a period of up to six weeks, but they have to be certain that non-payment has resulted from his wilful refusal or culpable neglect to pay. Half the members of the Committee on the Enforcement of Judgement Debts (The Payne Committee) found "some evidence" that the power of committal was used more diligently by the High Court in England and the Scottish courts than occurred in the summary courts. ⁽⁴⁾ The persistence of imprisoning maintenance defaulters in the magistrates' courts is an indefensible survival which discriminates sharply between the very poor and the rest of the community.

(1) Cmnd. 4100, 1969, p.248.

About 150,000 separated wives and divorced women were receiving supplementary benefit in 1968 (p.250). Applying the 1965 proportions to this figure, some 132,000 of these wives would be separated. If all the 37,000 husbands referred to were married to wives obtaining benefit, then 28% $(37/132)$ ^{$\times 100$} of all these 132,000 wives would be married to husbands also obtaining benefit.

(2) See p.163.

(3) The Field of Choice, Cmnd. 3123, p.19, par.36.

(4) Cmnd. 3909, 1969, p.282, par.1093.

Imprisonment of a short stay civil prisoner is expensive to the State and wasteful of limited prison space and staff, whilst at the same time reducing the already poor earning power of the defaulter and increasing the likelihood that he will be drawing unemployment benefit on release from prison. A divorced wife describes the consequences of sending her second husband to prison for default on his first wife's maintenance: "this country is only losing by it; the N.A.B. did not have me and my family to keep while he was helping us. Now they have two families to help."⁽¹⁾

Inequality of economic opportunity

Motherhood deprives the wife of the freedom to earn during the early years of marriage, and also makes her the economically weaker spouse. However, the concept of a completely dependent wife is changing, and more married women are returning to work after their families have been reared. This trend has resulted in married women now constituting half of our female labour force. Many of these women are employed in unskilled work; such female work constituting the lowest paid of all occupational groups. For instance, the Government's New Earnings Survey showed that in April 1971, 87% of full-time women manual workers earned less than £20 a week, 87% of male manual workers earned £20 or more. Acknowledgement of women's right to better training, greater chances of promotion and a fair wage together with greater opportunity for part-time work would help to change the attitude that maintenance is an inalienable right of deserted wives. But such a proposal would not solve the innumerable problems facing the divorced or separated wage earning wife with young children to support. In addition to carrying out everyday household duties on top of her paid work, she has to find suitable private care or a nursery place for her children whilst she is away from home.

A disproportionately large number of unsupported mothers have to go out to work. Douglas and Bloomfield have shown that even amongst mothers of children under five, 36% of divorced, separated or widowed wives were in paid employment.⁽²⁾ Such women are far more likely to be in either social class IV or V than is found amongst working wives who have their marriages intact.⁽³⁾ The Report of the Seeborn Committee on Local Authority and Allied Personal Social Services emphasized that the special needs of such mothers are not yet being met by the social services.

There are at present 450,000 working mothers with young children under 5, about half of whom work part-time. Some can choose whether to go out to work or not: others, who are unsupported by a husband or who have to

(1) A letter to the writer.

(2) J.W.B. Douglas & J.M. Bloomfield, Children Under Five, 1958, p.114.

(3) S. Yudkin and A. Holme, Working Mothers and Their Children, 1969 (Sphere Ed.), pp.78-79, and p.41, Table III.

augment a very low family income, have little alternative. We are particularly concerned about these latter, as we believe that no mother who would prefer to look after her young children at home should be obliged to work for lack of reasonable minimum income. This is an issue which must be faced in the context of the arrangements for social security benefits.(1)

Justice and the settlement of maintenance

At the beginning of 1970 the introduction of the Divorce Reform Act of 1969 emphasized the double standard providing one jurisdiction for the very poor and another for the rest of the community. ~~But~~ A wife's right to maintenance is still decided in the magistrates' court by the complainant proving to the satisfaction of the court that her husband has committed a matrimonial offence. Thus, it depends on which tier of court is approached by the wife as to whether proof of a matrimonial offence will be necessary before a maintenance order can be made.(2) Misconduct by the wife after the making of a maintenance order, but during the subsistence of the marriage, results in a mandatory revocation of the maintenance order in the summary court, whilst an order in the divorce court is only subject to a discretionary revocation. Our two tier system of matrimonial law further discriminates between type of court by requiring enforcement of a maintenance order registered in the High Court to be commenced within twelve months from the date the arrears became due, unless special exemption is granted by that court.(3) No such restraining period exists in the summary court. These, and other anomalies, are being examined by the Law Commission's Working Party studying matrimonial law in magistrates' courts. The presence of this Working Party, and the formation of a similar Committee on Family Courts, is a reflection of the concern shown by both judiciary and legal profession over the aptness of our present legal process for settling problems of family life.(4) It is to be hoped that any proposals the Working Party formulate for legislation will recognise that our matrimonial laws should be dispensed within a unified system of family law.

When deciding questions of maintenance, divorce court judges now place far less stress on the rights and wrongs of the parties' conduct and more on the practical details resulting from the breakdown.(5) If maintenance is regarded as dependent on need and not, as in the past, on liability, then the function and role of courts dealing with such matters has to be re-examined. Justices are not

(1) Cmnd. 3703, 1968, p.59.

(2) An exception is wilful neglect to maintain.

(3) S.10, Matrimonial Proceedings and Property Act, 1970.

(4) See Judge Jean Graham Hall's, Proposal for a Family Court, 1970.

(5) For instance, see Sachs L.J., in Porter v Porter [1969], 3 ALL.E.R.640, C.A.

trained to measure need, nor are they, because of the social realities discussed in Chapter II, able to ensure either adequate or regularly paid maintenance for deserted wives.

The Magistrates' Association, in a memorandum to the Law Commission in 1969, observed that the existence of the matrimonial offence in summary courts

results in unnecessary complications and may result in substantial injustice because the grounds, or at least some of them, are matters of quite different interpretation. The whole process tends to obscure what should be the basis of the jurisdiction, namely, that ordinarily it is an application for maintenance and not primarily the determination of whether a specific matrimonial offence has been committed. We think that the law should be completely recast on the principle that a husband is prima facie liable to maintain his wife. If he has not maintained her, he may be ordered to do so unless he can show that it is unreasonable in all the circumstances that he should be so ordered.(1)

Clearly, the Magistrates' Association are in favour of the abolition of the matrimonial offence in their courts, and so bring their jurisdiction into line with the divorce courts (apart from the justices' inability to provide a licence to enter a new marriage). But implementation of the Associations proposals would mean that they would be primarily engaged in assessing the wife and family's need and the husband's ability to meet that need. This is precisely the role that the Supplementary Benefit Commission's officials are trained to carry out and consequently do every day of the week. The Magistrates' Association is recognising the already existing reality that summary courts are duplicating work which the Commission is better equipped to undertake.

In practice the separated or divorced working class wife depends on the law and provision of social security and not on the law and enforcement of maintenance. Either the Supplementary Benefits Commission, and not the summary court procedure, is providing the separated wife and family with a minimum standard of living, or the wife, ignorant of her rights, is existing in poverty.

Mrs. Lena Jeger, after studying the National Assistance Board payments in 1965 (see supra, p.211), observed to the House of Commons during a debate on deserted wives in 1968:

The situation is that, whether the Ministry of Social Security want to take on any extra work or not, in fact they are already doing a very large proportion of the maintenance work ... the Ministry's funds are being used to keep these families These figures (1965) suggest that the whole system is breaking down and that we are continuing an illusion in maintaining the machinery of court orders and attempting the disengagement of the Ministry of Social Security from the heart of the matter.(2)

(1) Quoted by Judge Graham Hall, op.cit., p.23, par.28.(2).

(2) Hansard, H. of C., Vol.746 (1968), col. 98.
It is estimated that in 1970 about £53 million was paid to some 129,000 separated wives by the Supplementary Benefit Commission. (Parliamentary Written Answers: Hansard, 21st December 1971, cols. 276-277.)

Progress to a Family Court

From the 1st October 1970, responsibility for family law was assumed at High Court level by the new Family Division. But below, the debt enforcing and criminal courts continue to administer the law relating to domestic matters. Their existence has led to an unjustifiable complexity of different courts exercising jurisdiction in family problems. It is fitting that ninety four years after justices were first given power to award maintenance, that an ex-Lord Chancellor, Lord Gardiner, should have asked Lord Chancellor Hogg "whether it had not always been anomalous that disputes between husband and wife as to separation and maintenance, and so on, should be decided in the local criminal court".⁽¹⁾

One area of criticism of the summary court jurisdiction has been the procedure for dealing with appeals. Sir Jocelyn Simon, when President of the Probate, Divorce and Admiralty Division, believed that the greatest defect existing in 1970 in our system of matrimonial jurisdiction

is the want of a satisfactory avenue of appeal from the matrimonial decisions of magistrates ... speaking generally, a Divisional Court can only correct errors of law; and most matrimonial litigation turns on matters of fact. The decision of the magistrates is of great importance to the parties: it often leads to a divorce; and a matrimonial maintenance order of only £7 a week will amount to no less than £1,820 in only five years.⁽²⁾

Judges may well spend a day examining affidavits, exhibits and business ledgers to obtain a true picture of the parties' needs and income. Magistrates have no power to call for certificates of earnings from employers; the best they can do is to obtain a probation officer's report. The fact that summary courts have severe administrative problems in handling the increasing amount of petty criminal cases coming before them means that only a minority of courts are able to set aside a special time for hearing domestic matters, let alone provide a separate court room.⁽³⁾ A bitter letter to the writer describes the experiences of one husband: "How, in ten minutes, a group of people can decide that one person out of two before them is just no good ... is beyond all reasonable

(1) Hansard, H. of L., Vol. 320 (1971), col. 979.

(2) "Recent Developments in the Matrimonial Law" (the 1970 Riddle Lecture), reported in Rayden (11th ed.), p. 3239.

(3) This is one cause for the increasing delay experienced by complainants in the matrimonial courts. For instance, James Morton ('Delay in Magistrates' Courts', The New Law Journal, 24th April 1969) reports that in Tottenham magistrates' court, the daily list regularly contains 150 cases. "There, with the best will in the world, a matrimonial summons taken out in April will not be heard much before July, and if the husband does not appear on that occasion, or appears and asks for legal aid, the case will be adjourned to September or October".

thinking. Without even retiring the Bench decided in favour of my wife, perhaps the quickness of the case was due to the Clerk reminding the court that they had a very busy day ahead, and that lunch was to be called soon". The authors of Separated Spouses (p.208) "found compelling the weight of evidence that the working class couples who go to the magistrates with their matrimonial troubles feel that they are treated like criminals in a court which is predominantly concerned with petty crime. Most significant was the fact that many wives who obtained orders felt dissatisfied with the manner in which the court found in their favour". A letter from one such wife describes the attitude of many wives experiencing the problems and anguish resulting from a broken marriage. "British justice is only for wives with money, or wives who turn to crime. They can get wigs and gowns fluttering around them ready to help in 24 hours Please help the respectable poverty-stricken wife to get immediate help. Not the Police Court immediate help, where one can get a pittance because they have not got the money or the time to await for a higher court." This letter is a reflection of the fact that the magistrates' courts deal with the broken marriages of the poorest members of the community who are least able to cope with their economic difficulties.

The present matrimonial jurisdiction of magistrates was established in the days when there was one law for the well-to-do and another for the poor. It unhappily retains many of the characteristics of its Police Court paternity. As the authors of Separated Spouses concluded from their study of this jurisdiction "Family law should be uniformly designed to regulate the behaviour of every family in Britain and not to perpetuate social class difference. The simplest way of erasing this inherited distinction is to establish a single jurisdiction in the form of a family court".⁽¹⁾

Ignorance and anxiety of the law

There is no evidence to suggest that poverty itself still bars access to the divorce courts. But this does not imply that such correlates of poverty as poor education and ignorance of legal rights do not serve as bars. A Committee of Conservative Lawyers noted in 1968: "the problem that remains is caused by the failure of many people who need legal assistance ever to get to a solicitor's office For some people solicitors represent a wholly unknown middle-class realm of life, to be avoided at all costs; and for others the idea of consulting a solicitor simply does not occur to them".⁽²⁾ The Society of Labour Lawyers held a similar view. "Little is known precisely of the reasons why people manifestly in need of it fail to seek the assistance of lawyers One (explanation) is undoubtedly ignorance of the existence and scope of the legal aid and advice scheme Another reason in the view of those who have seen it operate is a vague fear of lawyers, or of looking foolish in the

(1) p.216.

(2) Rough Justice, 1968 (The Conservative Political Centre), p.19.

sourroundings of a professional man's office, especially in working clothes."⁽¹⁾ Solicitors are unwilling to work in areas where much of the work would be uneconomical and therefore unattractive.⁽²⁾ The problem today is as much one of less accessibility as of less eligibility. It is an amazing reflection on the machinery of justice in this country that four newspapers - The Daily Mirror, Sunday Mirror, The People and The News of the World - receive between them something like 280,000 letters a year on legal or quasi legal problems.⁽³⁾

A general weakness of our legal structure has always been the difficulty that most ordinary people have in knowing the extent of their legal rights and how to utilize them. This was recognised by the Rushcliffe Committee who recommended in 1945 that "there should be facilities for legal advice available all over the country".⁽⁴⁾ The limitations of the eventual Statutory Legal Advice Scheme of 1959, whereby legal advice was to be provided by practising solicitors, soon became obvious. Due to the low income and capital limits on eligibility for the Scheme it is only available to those who are virtually on the poverty line, whilst ignorance of the Scheme's existence by the very people it was meant to help has led to its under-utilization.⁽⁵⁾

Following proposals made in 1970 by the Lord Chancellor's Advisory Committee on Legal Aid,⁽⁶⁾ the Government have recently introduced new legislation in the form of the Legal Advice and Assistance Bill of 1972. The Bill extends facilities for the provision of legal advice and assistance to the same people who now qualify for legal aid - those with a disposable income of less than £950 a year. However well-intentioned are the proposals contained within the Act it will do little to help the submerged portion of the working class population who do not recognise or are indifferent to the need for legal advice when it arises. This problem of ignorance is common to the other social services. In April 1970 the Government launched a £340,000 publicity campaign to overcome lack of knowledge of welfare benefits to which the poor were

- (1) Justice for All, 1968 (Fabian Research Series No.273), p.22.
- (2) In 1966 the average ratio of solicitors in private practice per person was one to 2,650; in predominantly working class areas, such as Batley, Leyton and Salford, there was less than one solicitor for over 6,000 people. See Rosalind Brooke, "Why Not More Legal Help?", New Society, 31st March 1966.
- (3) Justice for All, p.17.
- (4) Cmnd. 6641, par.176.
- (5) A history and working of the Scheme is provided by E.J.T. Matthews and A.D.M. Oulton, Legal Aid and Advice Under The Legal Aid Acts 1949 to 1964, 1971, pp.18-37.
- (6) The Better Provision of Legal Advice and Assistance, 1970, Cmnd. 4249, par. 5.

entitled; one example being that only 2,000 out of the estimated 190,000 children eligible for welfare milk and food were claiming it. The urgent need for the Government to increase publicity for the legal aid and advice schemes through the mass media is shown by the fact that the Law Society reported a considerable rise in requests for leaflets - up to 90% in one week in some areas - following a five minute explanation of the Scheme on the regional Thames Television.

In 1970, 42% of the 79,857 wives seeking legal remedy for their matrimonial difficulties proceeded to the summary court.⁽¹⁾ The longevity of the latter court's matrimonial jurisdiction must still be partly ascribed to the working classes' long lasting association with the magistrates' court as a court of first resort when a marriage breaks down.

A wife's complaint to the magistrates indicates her immediate financial need rather than diligent legal forethought, for evidence shows that half of all orders never proceed to the divorce courts. Many of those dead marriages that remain as maintenance orders are only eventually removed from the magistrates' courts' files by the undertaker.⁽²⁾ The reasons why so many wives still never attempt to legally terminate their marriages may be due to such factors as cultural tradition or ignorance of divorce formality rather than legal cost. There is no reason to suppose that the findings of an American survey on the attitudes of working class housewives in four American cities is different from what would be found in this country. The women were found to "... express a certain internal immobility and a reliance upon the outer world coming to them in terms that are specific, clearly defined, and readily understood They do not know how to go about taking suitable action in unfamiliar areas".⁽³⁾

- (1) Calculations based on the Civil Judicial Statistics for 1970, Tables L and 10(A)(ii). In the summary courts, Married Women (27,905) and Guardianship of Infants (6,090) applications totalled 33,995; whilst 45,862 wives petitioned to the divorce court for dissolution (45,032) or other available remedies.
- (2) The Bedford College follow up survey of maintenance orders existing in January 1966 showed that a third of the orders that had either been revoked or lapsed (for reasons other than a child reaching 16 years of age) by July 1971 were due to death of one or other spouse.
- (3) Lee Rainwater, Richard P. Coleman and Gerald Handel, Workingman's Wife: Her Personality, World and Life Style; 1959, p.45.

Because of their conviction that "private and public morality alike require a development in our matrimonial proceedings whereby all marriages which have ceased to exist in social reality should be legally interred", the authors of Separated Spouses have proposed that the magistrates' courts' jurisdiction should be converted into a stepping stone of short duration to the divorce courts.⁽¹⁾ Thus, if a wife wished to continue receiving maintenance she should be required to seek either a divorce or a judicial separation from the higher court within two years of the making of the maintenance order. The effect of such a proposal would be to raise the divorce rate to the point where divorce was most nearly an accurate index of broken marriages.

Marriage breakdown and divorce

The availability of divorce has been far more important in affecting the resort to divorce than changes in the acceptable grounds for petitioning. The introduction of legal aid in 1950 has been, in the words of Lord Denning, "one of the greatest revolutions in the law in our time".⁽²⁾ Evidence provided in chapter 10 indicates that, until the last World War, petitioning for divorce was very largely the prerogative of the middle class. The great majority of broken marriages that resorted to the courts, turned to the matrimonial jurisdiction exercised by the magistrates' court, rather than to that of the High Court. Since then, higher wages and the availability of legal aid have helped, but not caused, an increasing proportion of all working class broken marriages to resort to the divorce court instead of the magistrates' court. Recognition by couples of the disadvantages of the indeterminate status conferred by the summary jurisdiction has also been hastened by the wider acceptance of divorce as a socially respectable method of ending marriages that have become empty shells. The only systematic study so far attempted of the change in public opinion from absolute disapproval to the point where divorce has ceased to be an obstacle even to a politician's chances of becoming prime minister is that contained in the article of Mr. Carrier and Miss Rowntree. they conclude that "many would now subscribe to the view, boldly advanced by a metropolitan magistrate in his evidence to the 1912 (Gorrell) Commission that 'marriage cannot hope to be a working success unless divorce is in the background as a reserve. With divorce as a protection against unforeseen calamities ... marriage becomes a wise investment Without divorce I look on marriage as a dangerous, mad gamble'".⁽³⁾ This attitude represents the view of most middle

(1) O.R. McGregor et. al., op.cit., p.212.

(2) Hansard, H. of L., Vol.248, col.51.

(3) Op.cit., p.199.

class people today. But there is no data showing the extent to which knowledge or acceptance of divorce as a means of ending broken marriages has spread among the working class. The fact that nine out of ten wives seeking maintenance orders and half of the defendant husbands are now being legally represented in the summary court suggests that availability of divorce is increasingly being made known to a wider proportion of working class separated spouses. This belief is confirmed by a study conducted in Birmingham that showed women with matrimonial problems made up two-thirds of those seeking legal advice under The Legal Advice Scheme in Birmingham during 1970.⁽¹⁾

It might be argued that the working class resort to divorce provides evidence to uphold the theory of embourgeoisement and its belief that the working classes are being assimilated into the middle class. Such a belief is supported by the fact that manual workers have achieved income parity with members of the lower middle class, as best represented by white-collar workers such as clerks.⁽²⁾ The possibility of convergence of the middle and working classes in this country has been criticised by some sociologists for its narrowness of perspective. For example, John Goldthorpe and David Lockwood have argued that as well as the economic aspect, the normative and relational aspects of class also have to be considered.⁽³⁾ They conclude that there is no positive evidence that the working class have taken on middle class values. For instance, the Committee on Higher Education (The Robbins Report) showed that for children within the top ability group (I.Q. of 130 and over) only 18% of manual workers' children reached university compared with 37% of non-manual workers' children. Rejection of the relational aspect is observed in the refusal of middle class workers to treat as equal those manual workers with whom they come into regular contact.

Study of marriage breakdown in this country neither upholds or falsifies the theory of embourgeoisement. Firstly, there had never been available data providing the number of couples living together as man and wife outside the legal ties of marriage. It is not known whether a greater number of illicit

- (1) B.E. Sufrin and L.T. Bridges, "Statutory Legal Advice in Birmingham", The New Law Journal, 30th September 1971, p.870.
- (2) The Department of Employment's Family Expenditure Survey for 1970, (H.M.S.O., 1971) shows that in the United Kingdom the weekly earnings of manual workers and clerks both averaged £26.70 (table 28, p.90).
- (3) 'Affluence and the British Class Structure', The Sociological Review (New Series), 1963, Vol. II, pp.133-163.

relationships are formed today than in the past; not whether such associations have a higher rate of breakdown than is found in the marriage population. But it can be said with certainty that marriage has never been more commonly accepted in our society than it is today. The Registrar General, after making allowance for likely mortality, has calculated that ^{96%} of all women and 95% of all men aged between 45 and 49 in 1960 would have experienced marriage.⁽¹⁾ It has already been noted that somewhere in the region of half the marriages which leave a record of their collapse in the files of the magistrates' courts remain broken but never end in divorce. As well as these de facto broken but de jure united working class marriages, there were in 1965 some 61,000 separated wives who did not have a maintenance order but because of need were getting financial assistance from the old National Assistance Board.⁽²⁾ These separations represent working class broken marriages. Regrettably, there is little knowledge of the arrangements made by the parties to broken marriages which are not brought before the courts. It could be that breakdowns in the lower social classes that are recorded in the magistrates' courts and the Department of Health and Social Security Offices are balanced by couples in the higher classes who are far more likely to make their own private financial arrangements or turn to solicitors. Neither have we any idea of the number of social class distribution of marriages in which the spouses still live together though by their own subjective understanding the marriage has long since been dead. In theory, the incidence of recorded breakdown in England and Wales might be the same throughout all social strata. What we can say is that survey findings suggest that marriages in which the husband is an unskilled worker have the highest rate of divorce.⁽³⁾

(1) Statistical Review ... for 1961, Commentary, 1962, p.23.

(2) Cmnd. 3587, op.cit., p.92, table 17a.

(3) A similar conclusion is arrived at by American studies of the incidence of divorce amongst different occupational groups: see William J. Goode 'Marital Satisfaction and Instability: A Cross-Cultural Analysis of Divorce'; International Social Science Journal, No. XIV, No. 3, 1962.

Appendix 1

The Concept of Social Class

The framework of this study is based upon a concept that probably more than any other causes argument and disagreement among sociologists. Social science journals are seldom without an article discussing the interpretation and validity of social class. It has been defined, measured and recorded in objective and subjective terms. Social class classification has been undertaken by such criteria as income, occupation and style of life. Probably the most widely accepted conceptual tool to record class or class situation is the Weberian belief that, in an objective assessment, class or class situation refers to a person's economic or market position, with classes stratified according to their relations to the production and acquisition of goods. To this end, occupation serves as the primary index of social class. As Stephan Thernstrom records: "Occupation may be only one variable in a comprehensive theory of class, but it is the variable which includes more, which sets more limits on the other variables than any other criterion of status".⁽¹⁾ Yet a timely word of warning comes from the late Professor Cole when he noted: "The plain truth is that the social structure of Great Britain and of other developed industrial countries is much too complicated for easy breaking up into stratified social classes".⁽²⁾ But Professor Cole gives more encouragement to those attempting to ~~measure~~^{measure} social class, when he later observes that:

It is undoubtedly possible to assign to definite positions in terms of class status the vast majority of those who belong to a large number of occupational groups, though not to all; and there is no good reason for refusing to do this because it cannot be done for every group. It is no doubt true that even within such groups as dock labourers or mule-spinners or chartered accountants or doctors of medicine there are substantial differences of class status, related in part to differences of income and in part to the prestige of particular types of job. But that does not prevent the great majority of persons in each of these groups from being assignable, with sufficient precision, to a single class.⁽³⁾

In America, J.A.Kahl and J.A.Davis, in their article 'A Comparison of Indexes of Socio-Economic Status'⁽⁴⁾, record that their work showed, by factor analysis, that occupation was the most useful variable to predict a wide range of social behaviour.

- (1) Poverty and Progress, 1964, p.84.
- (2) G.D.H.Cole, Studies in Class Structure, 1955, p.48.
- (3) Ibid., p.187.
- (4) American Sociological Review, 1955, pp.317-25.

In this country, the Registrar General has, since 1911, categorised occupations of heads of household into five separate social classes, according to the character and responsibility of the work. As far as possible, each of the five classes within the Registrar General's Classification of Occupations manual:

is homogenous in relation to the basic criterion of the general standing within the community of the occupations concerned. This criterion is naturally correlated with, and the application of the criterion conditioned by, other factors such as education and economic environment, but it has no direct relationship to the average level of remuneration of particular occupations. Each occupational unit group has been assigned as a whole to a social class, and it is not a specific assignment of individuals based on the merits of a particular case.⁽¹⁾

This method of classification has been the basis for the Registrar General's presentation of demographic data concerning social class in England and Wales. Use of the Registrar General's social class classification allows the researcher to compare and verify his own sample findings with that known about the total population. It also provides an objective tool of analysis whose validity is widely understood, and accepted.⁽²⁾ The classification allows maximum comparability with past and on-going research; and, with modification, permits division into manual and non-manual categories. As Frank Bechhofer argues: "If the researcher's interest is mainly in the class situation, then classifying the elementary family domestic group on the basis of the husband's occupation will generally be justified".⁽³⁾ For such reasons, our analysis of social class was based upon the Classification of Occupations (1966 edition) manual.

- (1) Classification of Occupations, 1966 ed., pp.X-XI.
The Registrar General does not give any details of the procedure adopted to assess "general standing in the community".
- (2) This is not to argue that the Registrar General's classification is an ideal indicator of social class groupings. For instance, no allowance is made for the person's subjective placement of their own social class, nor does it allow for a person or populations subjective ranking of occupations and grades of employment within that occupation. What is argued, however, is that this classification (with all its defects) still remains, on practical and theoretical considerations, the most satisfactory indicator of social class when only occupation is available from the source of information.~~inquiry.~~
- (3) Comparability in Social Research, ed. Margaret Stacey, ch.4, "Occupations", p.103.

With the previously mentioned criteria in mind, the only practical way of describing the social class of spouses, either in historical terms or those of the survey of court cases, is by reported occupation of the husband. The mergence and overlapping of the different social classes in so many aspects of work and leisure inevitably leads to unavoidable descriptive confusion in the terms 'middle' and 'working class'. This work equates the working class as persons (and families) who earn their living by manual labour. (1)

(1) As W.G.Runciman writes of this distinction (Relative Deprivation and Social Justice, 1966, p.43); "This procedure is neither very elegant nor wholly unambiguous, but it is the best that can be done". John H. Goldthorpe and David Lockwood in "Affluence and the British Class Structure", (The Sociological Review, New series Vol.II (1963), p.159. fn.4), refer to the working class and middle class as " ... collectivities within the total society, the members of which have basically similar class positions". They regard " ... the rough dividing line between the working and middle classes as being that - equally rough - between manual and non-manual workers and their families". The authors go on to note that "... manual and non-manual employments tend to be differentiated in a variety of ways which will significantly affect the life-chances of their occupants. We also suggest that there are broadly correlated differences in belief and value systems and in behavioural patterns. Furthermore, it would appear from the available evidence that at the level of the local community, the manual/non-manual division tends commonly to be also a line of status group demarcation There is, then, we feel, an adequate basis for speaking of 'working class' and 'middle class' in the way in which we have chosen to understand these terms".

Social class groupings used by:			
Registrar General		Bedford College	
Classification of Occupations 1966 ed.	Magistrates' courts survey 1966.	1964 Divorce surveys; and maintenance orders surveys 1972.	Examples of occupational groups.
I (Professional)	1	1	Doctors, chemists, solicitors.
II (Managerial intermediate)	2	2	Managers of various kinds, nurses civil service executive officers.
(Skilled non-manual)		3(IIIM.M.)	Secretaries, draughtsmen, commercial travellers.
III (Skilled manual)	3	4(III M.)	Coalmine face workers, electricians, fitters, engine&bus drivers
IV(Semi-skilled)	4	5	Agricultural workers, spinners, storekeepers, barmen*.
V (Unskilled)	5	6	Labourers, railway porters, office cleaners.
	6	7**	In prison
		8**	Retired/student.
		9**	Unemployed/disabled.
		10(o)	Servicemen.
		11(x)	Occupation inadequately described.
		12(y)	Unknown.

* Social class IV does contain a minority of non-manual occupations such as barmen and telephone operators, but for reasons of simplicity and comparison this class is equated with manual occupations.

** Allocated to this category if this was the only information and the former occupation was not provided. The latter was taken for purposes of coding if available.

Coding of Occupations

All the Bedford College surveys previously mentioned (apart from the study of Private Act divorces, which had its own schedule) used the Registrar General's Classification of Occupations manual(1) as the basis for coding social class by the husband's reported occupation. Use of the manual requires allowance to be made for the status of the worker within his or her occupational grouping. [The 1966 magistrates' court survey used the Registrar General's standard fivefold classification of occupations, together with a sixth category to cover those instances where husbands had retired or were unemployed or in prison. Servicemen were classified to social class III.

Limitations in the manual led us to expand it into a twelve-fold classification for use in later surveys. The additional categories are not occupational (apart from servicemen and subdivision of social class III), but they do allow a more realistic social grouping. Those in social class III (skilled workers) were coded into non-manual and manual groups, thereby allowing division of the sample into realistic overall non-manual and manual categories.(2)

Variations between the Registrar General's classification and the Bedford College modifications are shown opposite.

(1) The 1966 magistrates' courts survey of maintenance orders, affiliation orders and attachment of earnings orders used the 1961 edition; the two studies of divorce petitions filed in 1961 used the 1966 edition; the 1971 follow up study of maintenance orders existing in 1966, and new maintenance orders made in 1971, used the 1970 edition.

(2) This has since been done by the Registrar General in his 1970 Classification of Occupations.

Appendix 2.

Questionnaires used in Bedford College Matrimonial Surveys

- 1) Divorce questionnaire and coding schedule for petitions filed in 1961, recording that a wife had previously made a complaint to a magistrates' court; pp. 228-9 attached. (1st divorce survey).
- 2) Divorce questionnaire for all petitions filed in 1961; pp. 230-3 attached. (2nd divorce survey).
- 3) Matrimonial, affiliation and attachment of earnings questionnaires: see Separated Spouses, appendix B, pp.227-247.
- 4) News of the World sample of husbands' and wives' attitudes about and experiences of summary courts, separation and divorce. Postal and interview questionnaires: see ibid, appendix E, pp.257-272.

DIVORCE PETITION QUESTIONNAIRE SCALE SHEET

1. TYPE OF MAGISTRATES' ORDER (Qu.4, Col.9(a))

- 1 Guardianship Order, i.e. maintenance children only 1
- 2 Married Women only, i.e. no children 2
- 3 Married Women plus separation order 3
- *4 Married Women with children. 4*
- 5 Married Women with children plus separation order. 5
- 6 Children only (i.e. since 1961). 6
- 7 Custody of children (without maintenance). 7
- 8 Separation order only (i.e. non-cohabitation). 8
- 9 Dismissed the complaint. 9
- 0 The Court Hearing was adjourned s/d. 0
- X Husband awarded maintenance or separation order (but not just X
custody of children)

* 4 includes orders where separate order made for wife under Married Women's Act and order for children (including custody) under Guardianship of Infants' Acts.

2. LENGTH OF TIME (Qu.5b, Col.12, Qu.5d, Col.14, Qu.7, Col.19)

- 1 Under 3 months 1
- 2 3 months but under 6 months. 2
- 3 6 months but under 1 year. 3
- 4 1 year but under 2 years 4
- 5 2 years but under 3 years. 5
- 6 3 years but under 5 years. 6
- 7 5 years but under 7 years. 7
- 8 7 years but under 9 years. 8
- 9 9 years but under 12 years 9
- 0 12 years but under 15 years. 0
- X 15 years but under 20 years. X
- Y 20 years and over. Y

3. GROUNDS FOR MAINTENANCE ORDER BEING MADE (Qu.4, Col.13)

- 1 Desertion 1
- 2 Husband guilty of wilful neglect. 2
- 3 Adultery. 3
- 4 Persistent cruelty to wife. 4
- 5 Other grounds (please name below) 5
- 6 Guardianship (or children only) . 6
- 7 Not known 7
- 8 Desertion + wilful neglect. 8
- 9 Desertion + adultery. 9
- 0 Desertion + cruelty 0
- X Adultery + wilful neglect X
- Y Adultery + cruelty. Y

N.B. Wilful neglect + cruelty should be taken as 4

4. MAGISTRATES' REASON FOR REVOKING ORDER (Qu.5, Col.15)

- 3 Wife's refusal of husband's bona fide offer 3
- 4 Wife's adultery 4
- 5 Reconciliation of parties (resume cohabitation) 5
- 6 Children reached maximum age for maintenance order. 6
- 7 Custody of children taken away from the mother. 7
- 8 Any other reason (please name below). 8
- 9 Not known 9

5. AGE OF PARTIES (Qu.8, Cols.20-23)

- 1 Under 20 years 1
- 2 20 years but under 25 years. 2
- 3 25 years but under 30 years. 3
- 4 30 years but under 35 years. 4
- 5 35 years but under 40 years. 5
- 6 40 years but under 45 years. 6
- 7 45 years but under 50 years. 7
- 8 50 years but under 60 years. 8
- 9 60 years but under 70 years. 9
- 0 Over 70 years of age 0
- X Not known. X

6. ON WHAT GROUNDS WAS THE DECREE NISI GRANTED? (Qu.11, Col.35)

- 1 Adultery 1
- 2 Desertion. 2
- 3 Cruelty. 3
- 4 Adultery & Desertion 4
- 5 Adultery & Cruelty 5
- 6 Desertion & Cruelty. 6
- 7 Any other (please name below). 7

ENQUIRY INTO DIVORCE PETITIONS WHICH SHOW A PREVIOUS COMPLAINT FOR MAINTENANCE TO A MAGISTRATES' COURT BY THE WIFE AGAINST HER HUSBAND

1. Petition case number	Serial number	1 - 4
2. Name of District Registry Office (Coded: 1-96 for District Registry Offices; } { X for Principal Registry Office.)		5 - 6
3. Date the petition was filed		7 - 8
4. If section 5 of the petition shows that there have been previous proceedings in a Magistrates' Court concerning maintenance either for the wife or children of the marriage, please give details (i.e. type of order, grounds for order, etc.) (a) Type of Court Order. Scale 1. (b) Year above hearing took place (10-11); Length of marriage to time of Maintenance Order being made (12). Scale 2. (c) Grounds for making Maintenance Order. Scale 3. (d) Length of time between Maintenance Order being made and divorce petition being filed. Scale 2.		9 10-12 13 14
5. Has the above Maintenance Order been revoked before the petition was filed, without again being remade by the Magistrates' Court? (RING) If 'yes', why was the order revoked? Scale 4. (Insert Scale code number and ring.)	No 1 Yes 2	15
6. Has there been any resumption of cohabitation by the petitioner and the respondent since the making of the order? (The last one, if more than one has been made.) (Ring)	No 0 Yes 1	16
7. Date of marriage (i.e. year, 17-18) Length of time between marriage and divorce petition being filed. Scale 2. (19)		17-19
8. Age of parties at marriage Husband <input type="text"/> Wife <input type="text"/> Scale Age 5. Marriage <input type="text"/> Divorce <input type="text"/>	H W	20-21 22-23
9. Number of children of the marriage at the time of the petition, and their respective dates of birth (a) Number of children (24) (b) Was wife more than 8 weeks' pregnant at marriage? (25) No 1 Yes 2 Children of previous marriage or illegitimate 3 If 'Yes', then (c) How many months' pregnant? (26) (X: fathered by husband and born before marriage) (d) Number of children of marriage, under 15 years of age at time of petition. (27) (e) Ages of children of marriage at time of petition. (28-33) (Ages of first two and last one born, if more than three.)		24-26 27 28-29 30-31 32-33
10. Who was petitioning for divorce? (Ring) Wife 0 Husband 1 Was the suit defended by the other party? (Ring) Yes 2 No 3		34
11. On what grounds was the decree nisi granted to respondent		35
12. Husband's occupation at the time the petition was filed		

ENQUIRY INTO DIVORCE PETITIONS FILED IN THE
DIVORCE REGISTRY OFFICES DURING THE YEAR 1961

- Dissolution
- Judicial Separation
- Nullity
- Restitution of Conjugal Rights
- Tick relevant petition

	Column
1. Petition Case Number	1-4
2. Name of District Registry Office	5
.....	6
(QUESTIONS 3-7 TO BE ANSWERED FROM COURT MINUTES)	
3. DATE:	7
a) petition was filed	8
b) of the Court hearing (i.e. decree nisi)	9
c) of the decree absolute	10
.....	11
4. Who obtained the DECREE NISI?	12
Petitioner - Husband 1	
- Wife 2	
Respondent - Husband 3	
- Wife 4	
Granted to both parties 5	
Not applicable: a) case dismissed 6	
b) Separation or Restitution 7	
5. Was the PETITION DEFENDED?	13
Yes 1	
No 2	
6. Was there a DISCRETION STATEMENT?	14
No 1	
Yes: by petitioner husband 2	
Yes: by petitioner wife 3	
.....	15-17
(QUESTIONS 7-9 RELATE TO INFORMATION CONCERNING PARTIES AT TIME OF MARRIAGE AND SHOULD BE ANSWERED FROM MARRIAGE CERTIFICATE.)	
7. Date of marriage:	18-19
.....	20
8. Age of parties at marriage:	
Husband	21-22
Wife	23-24

9. What were the occupations at the time of the above marriage of:

Husband

Wife

X X 25-26

N-DES 27

E 28

E 29

H 30

W 31

E 32

R.G. area 33

(QUESTIONS 10-15 FROM PETITION)

10. Give the last-known address of the Petitioner and Respondent (i.e. place of cohabitation (district only, e.g. S.E.18, London; Dover, Kent.))

..... 34

11. CHILDREN

A. Show number of surviving children:

- i of the present marriage 35
- ii of the family, other than above 36
 - i.e. a) from a previous marriage
 - b) legitimated children
 - c) adopted children
 - d) other
- iii of disputed paternity 37

B. Give their respective dates of birth. (If Part A. ii or iii applies, tick in column marked \emptyset .) (Give day for 1st child only.)

Children	Date of Birth		\emptyset
	Month	Year	
1st Child			
2nd Child			
3rd Child			
4th Child			

(If more than 4 children, record dates below)

Children	Ages
1st Child	41-43
2nd Child	44
3rd Child	45
4th Child	

12. What was the Husband's occupation at the time of the divorce?

EMPTY	46-49
M/NM	50
E	51
S.C.	52
S.E.G.	53-54

(If current information not available, record last-known occupation and date to which it relates. Note if retired.)

13. Have there been any previous Court proceedings with reference to the marriage or the children of the marriage?

- 1 No
- 2 Yes - Magistrates' Court
- 3 - High Court
- 4 - County Court
- 5 - Magistrates' to High Court
- 6 - High Court to Magistrates'

If 'yes, what type of order was made, or was the case dismissed? (e.g. Maintenance Order for children only, under Guardianship of Infants Acts.)

N.O.	56
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14. What were the grounds shown on:

Petition	Decree Nisi

- a) Dissolution
- b) Annulment
- c) Judicial separation

(Ring a, b, or c, as appropriate)

P	57
a)	
D	58
P	59
b)	
D	60

15. DESERTION

In cases where desertion is given as a ground on the decree nisi for either party, please show:

A. which spouse left the matrimonial home before the petition was filed, so as to cause desertion (including constructive desertion - but if this applies, tick here)

- 1 No
- 2 Yes; Wife: Petitioner
- 3 Respondent
- 4 Yes; Husband: Petitioner
- 5 Respondent

(If Wife is Petitioner, but Husband obtains decree nisi on grounds of Wife's desertion, ring '3'. If vice versa, ring '5'.)

B. If A. is 'yes', note the date taken as the cause of desertion

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D-P 62

X 63

16. Was LEGAL AID received either by the Petitioner or by the Respondent?

- 1 No: neither party
- 2 Yes: Petitioner only
- 3 Yes: both Petitioner & Respondent
- 4 Yes: Respondent only

64

EMPTY 65-79

E 80

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