

FOOTNOTES

1. See W. H. Hurlburt, Q.C., A Working Paper on The Courts and Family Law, submitted to The Institute of Law Research and Reform (Alberta) in January, 1971.
2. Domestic Relations Act, R.S.A., 1970, ch. 113, section 3.
As to jurisdiction, see ibid, section 8:
"8. The Court has jurisdiction to hear an action for judicial separation or restitution of conjugal rights, or an application for alimony, when both parties thereto,
 - (a) are domiciled in Alberta at the time of the commencement of the action, or
 - (b) had a matrimonial home in Alberta, when their cohabitation ceased, or the events occurred on which the claim for separation is based, or
 - (c) are resident in Alberta at the time of the commencement of the action."
3. Domestic Relations Act, R.S.A., 1970, ch. 113, section 4.
4. Ibid, sections 5 and 7(c)(ii).
5. Ibid, section 16.
6. Ibid, section 17.
7. Ibid, section 18(2).
8. Ibid, section 25.
9. Law Commission (England), Proposal for the Abolition of the Matrimonial Remedy of Restitution of Conjugal Rights (Law

- ... Com. No. 23) (July 24, 1969). See also Working Paper No. 22, Restitution of Conjugal Rights (February 17, 1969).
10. Law Com. No. 23, supra, para. 6.
 11. Compare Domestic Relations Act, R.S.A., 1970, ch. 113, section 27.
 12. See, e.g., Matrimonial Proceedings and Property Act (England), 1970, section 6, whereby an order may be obtained for financial relief on the ground of wilful neglect to maintain family dependants.
 13. See Nanda v. Nanda [1968] P. 315, [1968] 2 W.L.R. 404, [1967] 3 All E.R. 401, wherein the court granted the husband an injunction to restrain the wife from molesting him, notwithstanding that the wife had previously obtained a judgment for restitution of conjugal rights.
 14. See Matrimonial Proceedings and Property Act (England), 1970, section 20.
 15. The present grounds for judicial separation are defined in section 7(1) of the Domestic Relations Act, R.S.A., 1970, ch. 113, which provides:

"7. (1) A judgment of judicial separation may be obtained from the Court either by a husband or by a wife, if his wife or her husband, as the case may be, has since the celebration of marriage been guilty of

(a) adultery, or

- (b) cruelty, or
- (c) desertion
 - (i) for two years or upwards without reasonable cause, or
 - (ii) constituted by the fact of the wife or husband, as the case may be, having failed to comply with a judgment for restitution of conjugal rights,
- or
- (d) sodomy or bestiality, or an attempt to commit either of these offences."

As to jurisdiction, see ibid, section 8, supra, footnote 2.

16. Compare sections 52 and 28(a)-(l) of the Matrimonial Causes Act (Australia), 1959-1966.
17. Compare Domestic Proceedings Act (New Zealand), 1968, section 19:

"19.(1) The Court may, in its discretion, on the application of any married person, make a separation order on any of the following grounds:

- (a) That there is a state of serious disharmony between the parties to the marriage of such a nature that it is unreasonable to require the applicant to continue, or, as the case may be, to resume, cohabitation with the defendant, and that the parties are unlikely to be reconciled; or
- (b) That within the period of six months immediately preceding the making of the application the defendant has been convicted of -
 - (i) Any assault or other offence of violence against the applicant or a child of the family; or

"9. No judgment of judicial separation shall be granted when it is made to appear at the hearing of the case that the plaintiff has

- (a) in any case where judicial separation is sought on the ground of adultery, been accessory to or connived at the adultery of the other party, or
- (b) condoned the matrimonial offence complained of, or
- (c) presented or prosecuted the claim in collusion with the respondent, or
- (d) during the existence of the marriage committed adultery that has not been condoned.

10. A judgment of judicial separation may be refused when the claim has been presented on the grounds of adultery, and it is made to appear at the hearing that the plaintiff has been guilty of conduct conducing to the adultery."

19. Compare Domestic Proceedings Act (New Zealand), 1968, section 21:

"21.(1) Subject to section 26 of the Matrimonial Proceedings Act, 1963 (which relates to the effect of a resumption of cohabitation with a view to reconciliation), a separation order shall cease to have any force or effect if —

- (a) The husband and the wife, with the free consent of both parties, have resumed cohabitation as man and wife; or
- (b) The order is discharged by the Court under section 22 of this Act.

(2) Without limiting the provisions of paragraph (a) of subsection (1) of this section, the wife or the husband may apply to the Court for the discharge of the separation order on the ground that it has ceased to have effect pursuant to that paragraph, and, on proof that the order has ceased to have effect as aforesaid, the Court shall discharge the order."

See also Matrimonial Proceedings Act (New Zealand), 1963-1968,

- ... section 15 (discharge of decree of judicial separation on resumption of cohabitation).
20. See Wens v. Wens [1939] 3 W.W.R. 606, at 610 (Man.), wherein it was held that the granting of a petition for divorce is a complete answer to a cross-petition for judicial separation. See Divorce Act, S.C., 1967-68, ch. 24, section 4(1)(e)(i), text supra.
21. See Domestic Proceedings Act (New Zealand), 1968, section 22:
- "22. The Court may at any time, on the application of either party, discharge any separation order if the Court is satisfied that the circumstances have so changed since the making of the order that it is reasonable that the order should be discharged:
- Provided that the Court shall not discharge the order if a petition for divorce has been filed by either party, whether based on the separation order or not, and is pending."
22. Section 11 of the Domestic Relations Act, R.S.A., 1970, ch. 113 provides as follows:
- "11. After a judgment of judicial separation has been granted
- (a) neither the husband nor wife is under any duty of cohabitation, and
- (b) the wife shall, during the continuance of the separation, be considered as a feme sole for the purposes of contracts and wrongs and injuries and suing and being sued in a civil proceeding, and for all other purposes, and shall be reckoned as sui juris and as an independent person for all purposes, including the acquisition of a new domicile distinct from that

... of her husband."

23. Section 13 of the Domestic Relations Act, R.S.A., 1970, ch. 113 provides as follows:

"13.(1) After a judgment of judicial separation and during the continuance of the separation, the husband is not liable in respect of any engagement or contract his wife has entered or enters into, or for a wrongful act or omission by her, or for any costs she incurs in any action.

(2) Notwithstanding subsection (1), where in or after a judgment of judicial separation, alimony has been decreed or ordered to be paid to the wife, and it is not duly paid by the husband, he is liable for necessaries supplied for her use."

Quaere, however, whether any useful purpose is achieved by retention of the agency of necessity defined in section 13(2) of the Domestic Relations Act, supra. Compare Matrimonial Proceedings and Property Act (England), 1970, section 41, whereby the wife's agency of necessity is abolished. See text infra, sub-heading "The husband's liability for necessaries procured by his wife as an agent of necessity".

24. Section 12 of the Domestic Relations Act, R.S.A., 1970, ch. 113 provides as follows:

"12. After a judgment of judicial separation, the property of the wife in the event of her dying intestate during the continuance of the separation devolves as the property would have done if her husband had been then dead."

Compare Matrimonial Proceedings and Property Act (England), 1970, section 40; Domestic Proceedings Act (New Zealand),

... 1968, section 24(2); Matrimonial Proceedings Act (New Zealand), 1963-1968, section 12(2).

25. See Domestic Proceedings Act (New Zealand), 1968, section 23:

"23.(1) Where the Court makes a separation order, it may at the same time or at any time thereafter while the separation order remains in force, on the application of either party, if it is satisfied that the making of the order is necessary for the protection of the applicant or of any child of the family, make a non-molestation order.

(2) Where a husband and wife are living apart (whether under a separation agreement or not), either party may apply to the Court for a non-molestation order, and the Court, if it is satisfied that the making of the order is necessary for the protection of the applicant or of any child of the family, may make a non-molestation order.

(3) Where a non-molestation order is in force, the person against whom it was made —

- (a) Shall not enter or remain on any land or building which is in the occupation of the applicant or in which the applicant or any child of the family in the custody of the applicant dwells or is present, in circumstances which constitute a trespass:
- (b) Shall not molest the applicant by watching or besetting her or his dwellinghouse or place of business, employment or residence, or by following or waylaying the applicant in any public place within the meaning of section 2 of the Police Offences Act 1927, or by making persistent telephone calls to the applicant at her or his dwellinghouse or place of business, employment, or residence:
- (c) Shall not molest any child of the family in the custody of the applicant by watching or besetting his place of residence or education, or by following or waylaying him in any such public place, or by making persistent telephone calls to him at his place of residence or any other place.

... (4) Every person who does any act in contravention of any non-molestation order under this section commits an offence, and is liable on summary conviction to imprisonment for a term not exceeding three months, or to a fine not exceeding four hundred dollars, or to both.

(5) A non-molestation order shall cease to have any force or effect if any separation order or separation agreement in respect of which it was made ceases to be in force or, as the case may be, the husband and the wife, with the free consent of both parties, have resumed cohabitation as man and wife, or if the Court, on the application of either party, orders that it be discharged."

Quaere whether a non-molestation order should be available as independent relief rather than by way of corollary relief in proceedings for judicial separation.

Compare Matrimonial Proceedings Act (New Zealand), 1963-68, section 11(3):

"11.(3) If the person against whom a decree of separation is in force -

- (a) Enters or remains upon or in any land or building which is in the occupation of the person in whose favour the decree was made or in which that person dwells or is present, in circumstances which constitute a trespass; or
- (b) Attempts or threatens to do any such act; or
- (c) Molests the person in whose favour the decree was made by watching or besetting his dwellinghouse or place of business, employment, or residence, or by following or waylaying him in any public place within the meaning of section 2 of the Police Offences Act 1927, -

he commits an offence, and is liable on summary

- ... conviction to imprisonment for a term not exceeding three months, or to a fine not exceeding fifty pounds, or to both."
26. Domestic Relations Act, R.S.A., 1970, ch. 113, section 15.
27. Compare Wener v. Davidson, otherwise Sedore (1970) 75 W.W.R. 693, (1971) 15 D.L.R. (3d) 631 (Alta.), wherein the court refused to strike out the wife's statement of claim in enticement, notwithstanding that sections 32-35 of the Domestic Relations Act [R.S.A., 1970, ch. 113] confer a statutory right to damages for loss of consortium only upon the husband. Although the court concluded that the aforementioned sections do not constitute an exclusive codification so as to exclude a wife from reliance upon a common law right of action, there would appear no basis upon which to infer that a wife has a residual common law action for criminal conversation as distinct from enticement or harbouring.
28. For recommendations to similar effect, see Ontario Law Reform Commission, Report on Family Law, Part I, Torts, (1969) pp.86-101; Report of the Torts and General Law Reform Committee of New Zealand, Miscellaneous Actions (February, 1968); Law Commission (England), Working Paper No. 19, The Actions for Loss of Services, Loss of Consortium, Seduction and Enticement (June 14, 1968). See Law Reform (Miscellaneous Provisions) Act (England), 1970, section 4, whereby the right of action to claim damages

- ... for adultery is abolished.
29. See text infra, sub-heading "Loss of consortium".
30. Compare Matrimonial Proceedings Act (New Zealand), 1963-68, section 36, Matrimonial Causes Act (Australia) 1959-1966, section 44, whereby either spouse may claim damages for adultery in proceedings for the dissolution of the marriage.
31. See Power on Divorce (2nd ed., 1964) pp.600-605. See also Matrimonial Proceedings Act (New Zealand), 1963-68, section 38; Report of the Royal Commission on Marriage and Divorce 1951-1955 (England), (1956) Cmd. 9678, paras. 461-464; Law Commission (England), Working Paper No. 9, Matrimonial and Related Proceedings - Financial Relief (April 25, 1967), paras 121-127.
32. Domestic Relations Act, R.S.A., 1970, ch. 113, section 34.
33. Ibid, section 35(1). See Martens v. Briliz and Thew (1964) 46 W.W.R. 250, 44 D.L.R. (2d) 13 (Alta.).
34. Ibid, section 35(2).
35. Wener v. Davidson, otherwise Sedore, supra, footnote 27.
36. See Law Reform Committee (England), Eleventh Report, Loss of Services, (1963) Cmd. 2017; Law Commission (England), Working Paper No. 19, The Actions for Loss of Services, Loss of Consortium, Seduction and Enticement (June 14, 1968);

- ... Law Commission (England), Working Paper No. 9, Matrimonial and Related Proceedings - Financial Relief (April 25, 1967), paras. 128-142; Law Commission (England), Report on Financial Provision in Matrimonial Proceedings (Law Com. No. 25) (July 24, 1969), paras. 99-102; Ontario Law Reform Commission, Report on Family Law, Part I, Torts, (1969), pp.86-113; Report of the Torts and General Law Reform Committee of New Zealand, Miscellaneous Actions (February, 1968).
37. Law Reform (Miscellaneous Provisions) Act (England), 1970, section 1. As to the statutory regulation of property rights and gifts between engaged couples, see ibid, sections 2 and 3, infra, footnote 42. For the protection of a person who has in good faith entered into a void marriage, section 6 expressly empowers the court to order maintenance for the surviving party to a void marriage out of the estate of the deceased: compare Shaw v. Shaw [1954] 2 Q.B. 429, [1954] 3 W.L.R. 265, [1954] 2 All E.R. 638 (Eng.C.A.) (action for breach of promise of marriage).

See S. Cretney, "Law Reform (Miscellaneous Provisions) Act 1970" (1970) 33 M.L.R. 534.

See also Law Commission (England), Breach of Promise of Marriage, (Law Com. No. 26) (October 14, 1969); Ontario Law Reform Commission, Report on Family Law, Part II, Marriage, (1970), pp.7-16.

38. Law Reform (Miscellaneous Provisions) Act (England), 1970, section 4.
39. Ibid, section 5.
40. See Seduction Act, R.S.O., 1960, ch. 365. Compare Seduction Act, R.S.A., 1970, ch. 334.
41. Compare Law Reform (Miscellaneous Provisions) Act (England), 1970, section 1.

Such legislation should not foreclose further inquiry into the advisability of introducing statutory provisions conferring rights to maintenance on the basis of de facto cohabitation: compare Law Reform (Miscellaneous Provisions) Act (England), 1970, section 6, supra, footnote 37. See Wives' and Children's Maintenance Act, R.S.M., 1970, ch. W 170, section 6:

"6. Where

(a) a woman has lived and cohabited with a man for a period of one year or more; and

(b) he is the father of any child born to her;

she, or any person on her behalf, may, within one year from her ceasing to live and cohabit with him, make an application under sections 4 and 5 in respect to herself and her child for an order under sections 13 and 17, and this Act, mutatis mutandis, applies in such a case."

42. Compare Law Reform (Miscellaneous Provisions) Act (England), 1970, section 3:

... "3.—(1) A party to an agreement to marry who makes a gift of property to the other party to the agreement on the condition (express or implied) that it shall be returned if the agreement is terminated shall not be prevented from recovering the property by reason only of his having terminated the agreement.

(2) The gift of an engagement ring shall be presumed to be an absolute gift; this presumption may be rebutted by proving that the ring was given on the condition, express or implied, that it should be returned if the marriage did not take place for any reason."

See also ibid, section 2.

"2.—(1) Where an agreement to marry is terminated, any rule of law relating to the rights of husbands and wives in relation to property in which either or both has a beneficial interest, including any such rule as explained by section 37 of the Matrimonial Proceedings and Property Act, 1970, shall apply, in relation to any property in which either or both of the parties to the agreement had a beneficial interest while the agreement was in force, as it applies in relation to property in which a husband or wife has a beneficial interest."

(2) Where an agreement to marry is terminated, section 17 of the Married Women's Property Act, 1882 and section 7 of the Matrimonial Causes (Property and Maintenance) Act 1958 (which sections confer power on a judge of the High Court or a county court to settle disputes between husband and wife about property) shall apply, as if the parties were married, to any dispute between, or claim by, one of them in relation to property in which either or both had a beneficial interest while the agreement was in force; but an application made by virtue of this section to the judge under the said section 17, as originally enacted or as extended by the said section 7, shall be made within three years of the termination of the agreement."

See S. Cretney, loc. cit, supra, footnote 37.

43. Smith v. Smith [1955] O.R. 695, [1955] 3 D.L.R. 808
(Ont. C.A.); Rystrom v. Rystrom and Burt (1954) 12 W.W.R.

- ... 521, affd. (1955) 14 W.W.R. 118, [1955] 2 D.L.R. 345 (Sask. C.A.); Carnegie v. Carnegie and Young [1953] O.W.N. 681, [1953] 3 D.L.R. 782; MacDonald v. MacDonald [1952] O.R. 754, [1952] 4 D.L.R. 457 (Ont.C.A.); Thompson v. Crawford (falsely called Thompson) [1932] O.R. 281, at 284, [1932] 2 D.L.R. 466, affd. (1932) 41 O.W.N. 231, [1932] 4 D.L.R. 206 (Ont. C.A.); Pastre v. Pastre [1930] P. 80, 99 L.J.P. 20 (Eng.); McNair v. McNair [1923] 2 W.W.R. 46, 19 Alta. L.R. 479, [1923] 2 D.L.R. 465 (Alta. S.C.) (App. Div.).
44. [1932] 1 W.W.R. 86, at 91-92, 16 Sask. L.R. 390, at 395, [1923] 1 D.L.R. 294, at 299 (Sask. C.A.).
45. See also Cependa v. Cependa [1945] O.W.N. 102, [1945] 2 D.L.R. 339, at 340, affd. [1945] O.W.N. 731, [1945] 4 D.L.R. 806 (Ont.C.A.).
46. See Domestic Relations Act, R.S.A., 1970, ch. 113, section 16. See also Queen's Bench Act, R.S.S., 1965, ch. 73, section 29.
47. Holmes v. Holmes [1923] 1 W.W.R. 86, 16 Sask. L.R. 390, [1923] 1 D.L.R. 294 (Sask. C.A.); Brown v. Brown [1920] 3 W.W.R. 1072, 16 Alta. L.R. 88, 55 D.L.R. 656 (Alta. S.C.) (App. Div.); Rousseau v. Rousseau [1920] 3 W.W.R. 384 (B.C.C.A.); McDougal v. Campbell (1877) 41 U.C.Q.B. 332, at pp. 337 and 341 (Ont.). See also Royal Bank of Canada

- ... v. Diamond [1929] 2 W.W.R. 267, 38 Man. R. 301, [1929] 3 D.L.R. 390, at p. 396. Compare Chisholm, J., dubitante in McLeod v. McLeod, 2 M.P.R. 559, [1931] 2 D.L.R. 364 (N.S.C.A.).
48. See Papp v. Papp [1970] 1 O.R. 331, (1970) 8 D.L.R. (3d) 389 (Ont.C.A.); Galbraith v. Galbraith (1969) 70 W.W.R. 744, (1970) 8 D.L.R. (3d) 24 (Man.); Evans v. Evans and Robinson (1969) 70 W.W.R. 153, sub nom. Evans v. Evans (1970) 7 D.L.R. (3d) 651 (applying Divorce and Matrimonial Causes Act, R.S.B.C., 1960, ch. 118, section 20); Cherewick v. Cherewick (1969) 69 W.W.R. 235, at 237-238 (Man.).
49. See Papp v. Papp, supra; Niccolls v. Niccolls and Buckley (1969) 68 W.W.R. 307, at 308, sub nom. Niccolls v. Niccolls (1969) 4 D.L.R. (3d) 209, at 210-211 (B.C.); Whyte v. Whyte (1969) 69 W.W.R. 536, at 541, (1970) 7 D.L.R. (3d) 7 (Man. C.A.). See also Todd v. Todd (1969) 68 W.W.R. 315, (1969) 5 D.L.R. (3d) 92, at 93 (B.C.), wherein Tyrwhitt-Drake, L.J.S.C. stated: "The enactment of ... section 11 is within the powers of parliament, the maintenance mentioned therein being relief consequential upon the granting of a decree nisi of divorce."
50. See Tapson v. Tapson [1970] 1 O.R. 521, (1970) 8 D.L.R. (3d) 727 (Ont.C.A.).

51. See Domestic Relations Act, R.S.A., 1970, ch. 113, sections 22 and 24; Divorce and Matrimonial Causes Act, R.S.B.C., 1960, ch. 118, section 34; Supreme Court Act, R.S.B.C., 1960, ch. 374, am. 1962, ch. 61, section 3; Matrimonial Causes Act, R.S.O., 1960, ch. 232, sections 3 and 4; Queen's Bench Act, R.S.S., 1965, ch. 73, sections 34 and 35.
52. Domestic Relations Act, R.S.A., 1970, ch. 113, section 2.
53. Compare Queen's Bench Act, R.S.M., 1970, ch. C280, section 52; Judicature Ordinance, R.O.N.W.T., 1956, ch. 54, section 7; Alimony Act, R.S.N.S., 1967, ch. 7, section 1; Judicature Act, R.S.O., 1897, ch. 51, section 34; Queen's Bench Act, R.S.S., 1965, ch. 73, section 29; Judicature Ordinance, R.O.Y.T., 1958, ch. 60, section 7. See Hounsell v. Hounsell, 23 M.P.R. 59, [1949] 3 D.L.R. 38 (Nfld.).
54. Domestic Relations Act, R.S.A., 1970, ch. 113, section 16. See also Thompson v. Crawford (falsely called Thompson), infra, footnote 55; Burchell v. Burchell, 58 O.L.R. 515, at 519-520, [1926] 2 D.L.R. 595.
55. Thompson v. Crawford (falsely called Thompson) [1932] O.R. 281, at p. 284, [1932] 2 D.L.R. 466, *affd.* 41 O.W.N. 231, [1932] 4 D.L.R. 206 (Ont. C.A.), leave to appeal to Privy Council granted (unreported), November 18, 1932.

- ... See also Guest v. Guest (1884) 3 O.R. 344.
56. Section 7 of the Domestic Relations Act, R.S.A., 1970, ch. 113 defines the grounds for judicial separation; see supra, footnote 15.
57. Section 3 of the Domestic Relations Act, R.S.A., 1970, ch. 113 defines the jurisdiction of the court to grant a judgment for restitution of conjugal rights; see text to footnote 2, supra.
58. In O'Leary v. O'Leary [1923] 1 W.W.R. 501, 19 Alta. L.R. 224, [1923] 1 D.L.R. 949 (Alta. S.C.) (App.Div.), which was decided before a statutory discretion was conferred in respect of proceedings for restitution of conjugal rights, Beck, J.A. expressed the opinion that the Supreme Court of Alberta is not restricted in the exercise of its jurisdiction to decree restitution of conjugal rights but may give or refuse relief upon wide principles of justice and equity, having regard to the matrimonial state and its obligations and the relationship and conduct of the parties.

As to the effect of section 3 of the Domestic Relations Act, R.S.A., 1970, ch. 113, see Power on Divorce (2nd ed., 1964) 247.

59. Fumerton v. Fumerton (1970) 75 W.W.R. 425 (B.C.);
Macleod v. Macleod (1954-55) 13 W.W.R. 269, [1955] 1 D.L.R.

... 374 (B.C.); Ginter v. Ginter [1953] O.R. 688, [1953] O.W.N. 575, affd. [1953] O.W.N. 917 (Ont.C.A.); Cuthbertson v. Cuthbertson; Anglo-Canadian Associates v. Cuthbertson [1952] O.R. 762, [1952] 4 D.L.R. 814; Morrison v. Morrison [1948] O.W.N. 446 (Ont.C.A.); Gardner v. Gardner [1937] O.W.N. 500; Bell v. Bell [1939] 1 W.W.R. 106, [1939] 1 D.L.R. 793 (Alta.). See Reid v. Reid, [1970] 2 O.R. 132, (1970) 10 D.L.R. (3d) 118 (Osler, J.: "In my view, it is not necessary for a plaintiff to maintain a steady, fixed desire for the resumption of cohabitation at the risk of being deprived of the right to support if she does not. Provided a desire for cohabitation had originally been present, it would be monstrous to hold that subsequent blameworthy conduct on the part of the defendant bringing about revulsion on the part of the plaintiff would relieve the defendant from his obligation to maintain her").

If a wife can prove desertion for two years or upwards, she is entitled to alimony and need not establish her right to a decree for the restitution of conjugal rights: see Domestic Relations Act, R.S.A., 1970, ch. 113, sections 16 and 7 (1)(c)(i); Mainwaring v. Mainwaring (No. 2) [1942] 1 W.W.R. 728, 57 B.C.R. 390, [1942] 2 D.L.R. 377 (B.C.C.A.); Ancelle v. Ancelle [1919] 1 W.W.R. 620 (Alta.).

60. For a similar statutory definition in Saskatchewan, see Queen's Bench Act, R.S.S., 1965, ch. 73, section 25. See Lovett v. Lovett [1944] 3 W.W.R. 17, affd. [1944] 3 W.W.R. 607 (Alta. S.C.) (App.Div.); Bell v. Bell [1945] 2 W.W.R. 614 (Alta.); Davies v. Davies [1946] 1 W.W.R. 528 (Alta.); Olsen v. Olsen [1946] 3 W.W.R. 389 (Alta.); Chernoff v. Chernoff (1954) 12 W.W.R. 291, [1954] 3 D.L.R. 509 (Sask. C.A.); Herring v. Herring (1963) 41 W.W.R. 400 (Sask.); Bateman v. Bateman (1964) 47 W.W.R. 641, 45 D.L.R. (2d) 266, affd. (1965) 51 W.W.R. 633 (Alta. S.C.) (App.Div.); Reves v. Reves (1965) 52 W.W.R. 321, 52 D.L.R. (2d) 543 (Sask.).

In provinces other than Alberta and Saskatchewan, "cruelty" requires proof of danger to life, limb or health, bodily or mental, or a reasonable apprehension thereof: see Power on Divorce (2nd ed., 1964) 270.

61. See Payne, Digest of Cases and Materials on the Divorce Act, 1968 (Revised edition, 1970) 22-46.
62. See text to footnote 53, supra.
63. Domestic Relations Act, R.S.A., 1970, ch. 113, sections 16 and 9.
64. Domestic Relations Act, R.S.A., 1970, ch. 113, sections 16 and 10.

65. See Aldrich v. Aldrich (1891) 21 O.R. 447 (where adultery was committed after the wife left, and Boyd, C. held that where no distinct matrimonial offence is proved against the wife the husband cannot refuse to receive her back, but he, having committed adultery, cannot insist on her return if she is disposed to live apart).
66. See Gould v. Gould (1921) 50 O.L.R. 622, 64 D.L.R. 621. See also Crowder v. Crowder [1938] O.W.N. 154 (Ont. C.A.); McKay v. McKay (1857) 6 Gr. 380, at 382 (Ont.).
67. Fitchett v. Fitchett (1913) 24 O.W.R. 109, 4 O.W.N. 844, 10 D.L.R. 367 (wherein the wife was lessee of the house). See also cases cited in footnotes 65 and 66, supra.
68. Barrett v. Barrett (1928) 34 O.W.N. 300.
69. See Whimbey v. Whimbey (1918) 14 O.W.N. 128 (Ont. C.A.); Lofthouse v. Lofthouse (1908) 12 O.W.R. 140. See also Williams v. Williams [1964] A.C. 698, [1963] 3 W.L.R. 215, [1963] 2 All E.R. 994 (wherein the House of Lords held that the respondent's insanity does not necessarily constitute a defence to a charge of matrimonial cruelty in divorce proceedings); Gollins v. Gollins [1964] A.C. 644, [1963] 3 W.L.R. 176, [1963] 2 All E.R. 966 (H.L.) (divorce); Novak v. Novak (1969) 68 W.W.R. 524, sub nom. N. v. N. (1969) 4 D.L.R. (3d) 639 (B.C.) (divorce); Hills v. Hills (1970) 1 N.S.R. (2d) 405, sub nom H. v. H. (1970)

- ... 9 D.L.R. (3d) 722 (divorce); White v. White (1968)
69 D.L.R. (2d) 60 (N.S.) (divorce). And see Priday v. Priday [1970] 3 All E.R. 554.
70. Domestic Relations Act, R.S.A., 1970, ch. 113, sections 16 and 9(d).
71. Mainwaring v. Mainwaring (No. 2) [1942] 1 W.W.R. 728, 57 B.C.R. 390, [1942] 2 D.L.R. 377 (B.C.C.A.).
72. Usher v. Usher (1922) 128 L.T. 26 (Eng.); Cargill v. Cargill (1858) 1 Sw. & Tr. 235, 27 L.J.P.69, 164 E.R. 708 (Eng.).
73. See text to footnote 53, supra. Compare Brunton v. Brunton [1946] O.W.N. 616.
74. See Payne, Digest of Cases and Materials on the Divorce Act, 1968 (Revised edition, 1970) 177-179.
75. Domestic Relations Act, R.S.A., 1970, ch. 113, sections 16 and 9(d). See Plumb v. Royal Trust Co. [1943] 3 W.W.R. 513, affd. sub nom. Plumb v. Snow and Royal Trust Co. [1950] 2 W.W.R. 334 (Alta. S.C.) (App.Div.).
76. Nelligan v. Nelligan (1894) 26 O.R. 8.
77. Davis v. Davis [1959] O.W.N. 318; Ginter v. Ginter [1953] O.R. 688, [1953]O.W.N. 575, affd. [1953] O.W.N. 917 (Ont. C.A.); H. (Hawn) v. H. (Hawn) [1944] O.R. 438 (Ont.C.A.);

... Johnston v. Johnston [1942] O.W.N. 47. Compare Clarke v. Clarke [1927] 3 W.W.R. 728, [1928] 1 D.L.R. 249 (Alta.) (wherein the wife's outbursts of temper were held not to disentitle her to alimony).

In view of the decision in Russell v. Russell [1895] P.315, 64 L.J.P. 105 (Eng. C.A.), affd. on another point [1897] A.C.395, 66 L.J.P. 122 (H.L.), the earlier Canadian cases holding that the only defences to a suit for alimony based on the claim that the wife was entitled to a decree of restitution of conjugal rights were the adultery or cruelty of the wife can no longer be considered sound: see Power on Divorce (2nd ed., 1964) at pp.245-246 and 275; Reid v. Reid [1970] 2 O.R. 132, (1970) 10 D.L.R. (3d) 118.

78. Diehl v. Diehl (1922) 22 O.W.N. 550, affd. (1923) 23 O.W.N.91
79. Elliott v. Elliott (1959) 17 D.L.R. (2d) 446 (Ont.); Batt v. Batt (1916) 9 W.W.R. 1040, 33 W.L.R. 550, 27 D.L.R. 718 (Alta.); Forster v. Forster (1909) 14 O.W.R. 796, 1 O.W.N. 93, affd. 1 O.W.N. 419 (Ont.C.A.); Harris v. Harris (1896) 3 Terr.L.R. 416.
80. See text and contents of footnote 59, supra. See also Marshall v. Marshall [1968] 2 O.R. 757, 70 D.L.R. (2d) 555; Johnston v. Johnston [1942] O.W.N. 47; Mainwaring v. Mainwaring (No.2) [1942] 1 W.W.R. 728, 57 B.C.R. 390, [1942] 2 D.L.R. 377 (B.C.C.A.); McNair v. McNair [1923]

- ... 1 W.W.R. 1022, [1923] 1 W.W.R. 1022, [1923] 1 D.L.R. 1144 (Alta.).
81. B. v. B. [1950] O.R. 721; Stephens v. Stephens [1948] O.R. 807, at p. 809, [1948] 4 D.L.R. 525; Spillett v. Spillett [1943] 3 W.W.R. 110 (Man.); Gardner v. Gardner [1937] O.W.N. 500; Lee v. Lee (1927) 59 O.L.R. 561, [1927] 1 D.L.R. 94 (Ont.C.A.) (offer not bona fide); Gould v. Gould (1921) 50 O.L.R. 622, 64 D.L.R. 621; Bailey v. Bailey (1919) 45 O.L.R. 59, 48 D.L.R. 750 (Ont.C.A.).
82. See McNair v. McNair [1923] 1 W.W.R. 1022, [1923] 1 D.L.R. 1144, and cases cited in footnote 81, supra.
83. Weatherall v. Weatherall [1937] O.R. 572, [1937] 3 D.L.R. 468 (Ont.C.A.); Ferris v. Ferris (1883) 7 O.R. 496.
84. Smith v. Smith [1955] O.R. 695, [1955] 3 D.L.R. 808 (Ont. C.A.), distinguishing Hyman v. Hyman [1929] A.C. 601, 98 L.J.P. 81 (Eng.) (H.L.) (maintenance on divorce). See also Campbell v. Campbell (1954) 13 W.W.R. 252, [1955] 1 D.L.R. 304 (B.C.).
- Compare Spillett v. Spillett [1943] 3 W.W.R. 110 (Man.), wherein it was held that the statutory power of the court to award alimony cannot be ousted by inter-spousal agreement and a covenant whereby the wife purports to restrict or abandon her statutory right to alimony is void as contrary

... to public policy.

A contract made during cohabitation providing for future maintenance is invalid and a covenant therein not to sue for alimony does not bar the wife from instituting proceedings for alimony: Woods v. Woods 60 O.L.R. 438, [1927] 3 D.L.R. 321.

See generally, Payne, "Proposals for Reform of the Law Relating to Separation and Maintenance Agreements" (1968) 33 Sask. L. Rev. 1.

85. Moir v. Moir [1945] O.W.N. 491; Re Carey [1940] O.R. 171, [1940] 1 D.L.R. 362 (Ont. C.A.).
86. Jasper v. Jasper [1936] O.R. 57, [1936] 1 D.L.R. 193; Christofferson v. Christofferson [1924] 3 W.W.R. 545, 21 Alta. L.R. 13, [1924] 4 D.L.R. 967 (Alta. S.C.) (App. Div.); Day v. Day (1923) 23 O.W.N. 566; Fremont v. Fremont (1912) 26 O.L.R. 6, 6 D.L.R. 465 (Ont. C.A.); Lafrance v. Lafrance (1898) 18 P.R. 62 (Ont.); Henderson v. Henderson (1872) 19 Gr. 464 (Ont.).
87. MacKinnon v. MacKinnon (1966) 54 D.L.R. (2d) 41 (P.E.I. C.A.); Hall v. Hall [1947] O.R. 6, [1947] O.W.N. 42, affd., subject to variation in the formal order for alimony, [1947] O.W.N. 503, [1947] 3 D.L.R. 453 (Ont.C.A.); M. v. M. [1947] O.W.N. 474, [1947] 3 D.L.R. 74; Carroll v. Carroll (1931) 40 O.W.N. 55; Malcolm v. Malcolm (1919) 46 O.L.R. 198, affd. ibid, 609.

88. Bennett v. Canada Trust Co. (1960) 31 W.W.R. 311, (1960) 23 D.L.R. (2d) 492 (B.C.C.A.); B. v. B. [1950] O.R. 721; M. v. M. [1947] O.W.N. 474, [1947] 3 D.L.R. 74; Martin v. Martin [1939] 3 W.W.R. 537, 54 B.C.R. 434; Goodfriend v. Goodfriend (1912) 21 W.W.R. 637, 3 O.W.N. 784, 1 D.L.R. 368.
89. Johnstone v. Johnstone [1967] 1 O.R. 211, 60 D.L.R. (2d) 26 (Ont.C.A.); Kershaw v. Kershaw [1964] 3 W.L.R. 1143, [1964] 3 All E.R. 635. See also MacKinnon v. MacKinnon (1966) 54 D.L.R. (2d) 41, at 46; Newton v. Newton (No.2) [1927] 1 W.W.R. 106, [1927] 1 D.L.R. 756 (Man.) (wife awarded one-half of the joint incomes, less the amount of her salary); Atcheson v. Atcheson [1959] O.W.N. 175 (wherein the court made an order on an application for variation which had the effect of turning over to the wife one-half of the husband's net income, the husband, however, having the security and potential benefits of substantial capital assets).
90. Morgan v. Morgan (1912) 22 O.W.R. 25, 3 O.W.N. 1220, 3 D.L.R. 802. See also Cuthbertson v. Cuthbertson; Anglo-Canadian Associates Ltd. v. Cuthbertson [1952] O.R. 762, [1952] 4 D.L.R. 814 (wherein the court considered the following factors: the total value of the husband's assets; his gross income as disclosed in his income tax returns for the previous five years; his total obligations arising out of his previous marriages, amounting

- ... to \$5,700 per annum, which obligations were known to the plaintiff at the time of her marriage to the defendant).
91. Atcheson v. Atcheson [1959] O.W.N. 175; Nurse v. Nurse (1914) 20 D.L.R. 863 (B.C.).
92. Wilson v. Wilson (1920) 17 O.W.N. 426; Malcolm v. Malcolm (1919) 46 O.L.R. 198, affd. ibid, 609; Karch v. Karch (1912) 22 O.W.R. 534, 3 O.W.N. 1446, 4 D.L.R. 250.
93. Donaldson v. Donaldson [1958] 1 W.L.R. 827, [1958] 2 All E.R. 660; Cuthbertson v. Cuthbertson; Anglo-Canadian Associates Ltd. v. Cuthbertson, supra, footnote 90; Clarke v. Clarke [1927] 3 W.W.R. 728, [1928] 1 D.L.R. 249 (Alta.).
94. See Cipperly v. Cipperly (1959-60) 30 W.W.R. 226. (Alta.); Newton v. Newton (No.2) [1927] 1 W.W.R. 106, [1927] 1 D.L.R. 756 (Man.).
95. Goodfriend v. Goodfriend (1912) 21 O.W.R. 637, 3 O.W.N. 784, 1 D.L.R. 368. See also Attwood v. Attwood [1968] 3 W.L.R. 338, [1968] 3 All E.R. 385 (maintenance).
96. Goodfriend v. Goodfriend, supra; but see Hudson v. Hudson, infra, footnote 97, wherein the same judge presided. See also Dixon v. Dixon [1950] 2 W.W.R. 49, at 52, 58 Man. R. 48.

97. Hall v. Hall [1947] O.W.N. 997; M. v. M. [1947] O.W.N. 474, at 476, [1947] 3 D.L.R. 74; Newton v. Newton (No.2) [1927] 1 W.W.R. 106, [1927] 1 D.L.R. 756 (Man.); Keweluk v. Keweluk [1923] 2 W.W.R. 78, 17 Sask. L.R. 18, [1923] 2 D.L.R. 979 (Sask. C.A.); Hudson v. Hudson (1914) 26 O.W.R. 688, 6 O.W.N. 503.
98. Day v. Day (1923) 23 O.W.N. 566; Pickell v. Pickell (1922) 21 O.W.N. 313. See also B. v. B. [1950] O.R. 721, at 733.
99. Wedley v. Wedley [1925] 3 W.W.R. 46 (Man.).
100. Hogg v. Hogg (1914) 6 W.W.R. 1201, 28 W.L.R. 635, 20 D.L.R. 85 (Man.).
101. Roberts v. Roberts [1968] 3 W.L.R. 1181, [1968] 3 All E.R. 479. Conversely, the court may take into consideration financial benefits received by the husband from his mistress: Ette v. Ette [1964] 1 W.L.R. 1433, [1965] 1 All E.R. 341 (maintenance).
102. Cuthbertson v. Cuthbertson; Anglo-Canadian Associates Ltd. v. Cuthbertson [1942] O.R. 762, at pp.780-781, [1952] 4 D.L.R. 814; Gilbert v. Gilbert (1914) 29 W.L.R. 714 (Alta.).
103. Maynard v. Maynard [1950] O.R. 44, [1950] 2 D.L.R. 121, affd. [1951] S.C.R. 346, [1951] 1 D.L.R. 241; Martin v. Martin [1939] 3 W.W.R. 537, 54 B.C.R. 434.

104. Olynyk v. Olynyk [1932] 1 W.W.R. 825, 26 Alta. L.R. 485, [1932] 2 D.L.R. 785 (Alta. C.A.).
105. Goodfriend v. Goodfriend (1912) 21 O.W.R. 637, 3 O.W.N. 874, 1 D.L.R. 368. Compare Holmes v. Holmes [1923] 1 W.W.R. 86, 16 Sask. L.R. 390, [1923] 1 D.L.R. 294 (Sask. C.A.), wherein it was held that the fact that no income is derived from the husband's land, even where it is his only asset, should not prevent the awarding of alimony unless he is so unwell or advanced in years that he may never be able to cultivate the land so as to derive any income from it. See also Wright v. Wright (1968) 62 W.W.R. 579, at 580-581, (1968) 65 D.L.R. (2d) 631, at 632 (Sask.) (MacPherson, J.: "In the majority of cases a man's ability to pay alimony to his wife is determined by his income. It is wrong, in my view, to apply this approach when the husband is elderly and retired. His earning days are over. It seems to me that some of what he has saved for his old age should be available also to maintain his wife. ..In these circumstances a judge awarding alimony need not be unreasonably concerned about depleting the husband's capital.").
106. See cases cited in footnotes 107 and 108 infra, but compare Bertlet v. Bertlet (1914) 26 O.W.R. 817, 7 O.W.N. 67.

As to the jurisdiction of the court to award a lump

- ... sum where maintenance is sought by way of corollary relief in divorce proceedings, see Divorce Act, S.C., 1967-68, ch. 24, section 11(1); Strachan v. Strachan (1971) 14 D.L.R. (3d) 125 (B.C.); Wener v. Wener (1970) 75 W.W.R. 721 (Alta.); Feldman v. Feldman (1970) 75 W.W.R. 715 (Alta. S.C.) (App.Div.); Kumpas v. Kumpas (1970) 71 W.W.R. 317 (Man. C.A.), leave to appeal to Supreme Court of Canada denied [1970] S.C.R. 438; Ceicko v. Ceicko (1969) 69 W.W.R. 52, (1969) 5 D.L.R. (3d) 360 (Man.). Compare Johnstone v. Johnstone [1969] 2 O.R. 765, (1970) 7 D.L.R. (3d) 14. See also G. Miller, "Maintenance and Property" (1971) 87 L.Q.R. 66.
107. Keweluk v. Keweluk [1923] 2 W.W.R. 78, 17 Sask. L.R. 18, [1923] 2 D.L.R. 979 (Sask.C.A.); Derby v. Derby (1916) 26 Man. R. 320, 31 D.L.R. 248.
108. Conway v. Conway (1918) 15 O.W.N. 106; Hagarty v. Hagarty (1865) 11 Gr. 562 (Ont.). See also Maynard v. Maynard [1950] O.R. 44, [1950] 2 D.L.R. 121, affd. [1951] S.C.R. 346, [1951] 1 D.L.R. 241.
109. Conway v. Conway, supra.
110. See Domestic Relations Act, R.S.A., 1970, ch. 113, section 26, which reads as follows:
- "26.(1) In a case in which an order has been made for the payment of alimony, or for the payment of maintenance in an action for alimony, divorce, judicial separation, a declaration of nullity, or restitution of conjugal rights,

... upon it being made to appear

- (a) that the means of either the husband or the wife have increased or decreased, or
- (b) that the wife has been guilty of misconduct or, being divorced, has married again,

the Court may from time to time vary or modify the order either by altering the times of payment or by increasing or decreasing the amount, or may temporarily suspend the order as to the whole or any part of the money so ordered to be paid and may again revive the order wholly or in part, as the Court thinks fit.

(2) No order made before the first day of July, 1927, shall be varied or modified by reason of any misconduct on the part of the wife, or if divorced, by reason of her marriage again, unless the order expressly provided to the effect that the alimony or maintenance thereby made payable was to continue only so long as she led a chaste life and did not marry again."

See Fowler v. Fowler [1950] 1 W.W.R. 406 (Alta.); Green v. Hammond [1941] 3 W.W.R. 161, [1941] 4 D.L.R. 335 (Alta.). See also Yates v. Yates [1967] 1 O.R. 260, (1967) 60 D.L.R. (2d) 202 (Ont.C.A.); Johnstone v. Johnstone [1967] 1 O.R. 211, (1967) 10 D.L.R. (2d) 26 (Ont.C.A.); Atcheson v. Atcheson [1959] O.W.N. 175; Benard v. Benard [1957] O.W.N. 361, 567 (Ont.C.A.); Anderson v. Anderson (1957) 21 W.W.R. 363 (B.C.); Lamphier v. Lamphier [1933] O.W.N. 591; Mackinnon v. Mackinnon (1924) 58 N.S.R. 220 (N.S.C.A.).

A consent judgment awarding alimony is reviewable and the power to increase the award exists even if the judgment makes no provision for increase: Benard v. Benard, supra.

As to the jurisdiction of the Master to vary an order for interim alimony see Carvell v. Carvell [1969] 2 O.R. 513, (1969) 6 D.L.R. (3d) 26 (Ont.C.A.), overruling Zubrzycki v. Zubrzycki [1950] O.W.N. 262.

111. See text to and contents of footnotes 116 and 117, infra.
112. Fowler v. Fowler [1950] 1 W.W.R. 406 (Alta.).
113. Johnstone v. Johnstone [1967] 1 O.R. 211, (1967) 60 D.L.R. (2d) 26 (Ont.C.A.); Sansom v. Sansom [1966] P.52, [1966] 2 W.L.R. 1125, [1966] 2 All E.R. 396; Dean v. Dean [1923] P. 172, 92 L.J.P. 109.
114. Yates v. Yates, footnote 110, supra; Johnstone v. Johnstone, footnote 113, supra.
115. See Domestic Relations Act, R.S.A., 1970, ch. 113, section 26(1); Green v. Hammond [1941] 3 W.W.R. 161, [1941] 4 D.L.R. 335 (Alta.) (divorce and remarriage of wife). Quaere whether divorce of itself warrants discharge of the order for alimony: Green v. Hammond, supra. See also Smith v. Smith [1955] O.R. 695, [1955] 3 D.L.R. 808 (Ont. C.A.); Carnegie v. Carnegie and Young [1953] O.W.N. 681; Mezger v. Mezger [1937] P.19, [1936] 3 All E.R. 130; Pastre v. Pastre [1930] P. 80, 99 L.J.P. 20 (Eng.); Hyman v. Hyman [1929] A.C. 601, 98 L.J.P. 81 (Eng.) (H.L.). And see Nunn v. Nunn [1965] 1 O.R. 143, 47 D.L.R. (2d) 128 (Ont.C.A.).

116. Kergan v. Kergan (1964) 50 W.W.R. 172 (Alta.); Fiarchuk v. Fiarchuk (1952-53) 7 W.W.R. 568, 61 Man. R. 75; Murray v. Murray (1952) 5 W.W.R. 704 (B.C.) (the court will not ordinarily enforce payment of arrears for a greater period than one year); McMillan v. McMillan and Weisgarber [1949] 1 W.W.R. 769, [1949] 2 D.L.R. 762 (Sask.); Head-Patrick v. Patrick [1922] 1 W.W.R. 825, 15 Sask. L.R. 304, 63 D.L.R. 158 (Sask. C.A.).
117. See Carnegie v. Carnegie and Young [1953] O.W.N.681 and Knox v. Knox [1942] O.W.N. 462, following the unreported decision of the Court of Appeal of Ontario in Alabaster v. Alabaster, February 7th, 1936, wherein it was held that the courts of Ontario have no jurisdiction to make an order discharging arrears of alimony. See contra: MacDonald v. MacDonald and Howard [1957] O.W.N. 419, (1957) 10 D.L.R. (2d) 309; Perry v. Perry (1923) 54 O.L.R. 613; Maguire v. Maguire (1921) 50 O.L.R. 100.

See also Smith v. Smith (1954) 13 W.W.R. 207, at 215, [1955] 1 D.L.R. 229, at 237 (B.C.) (Clyne, J.: "I do not think I can assume that the Maguire and Perry cases which were not mentioned in either the Knox or Carnegie cases, have been overruled by [Alabaster] which was unreported and in which no reasons were given...").

Compare Eveleigh v. Eveleigh [1969] 2 O.R. 664, 666, (1969) 6 D.L.R. (3d) 380, at 382 (action for arrears under

... separation agreement) (Stewart, J.: "It seems abundantly clear that the law is settled in Ontario that arrears of alimony or maintenance cannot be affected and that any application to vary an order for alimony must speak for the present and future — not the past.").

118. See MacDonald v. MacDonald and Howard, *supra*; Head-Patrick v. Patrick, *supra*.

Arrears of alimony are not provable in bankruptcy: Re Freedman (1924) 55 O.L.R. 206, [1924] 3 D.L.R. 517.

An order for alimony granted on the ground of cruelty is not discharged by the husband's promise of amendment: Cronk v. Cronk (1872) 19 Gr. 283, at 286-287 (Ont.); nor when granted on the ground of desertion is it terminated by the wife's refusal to accept the husband's offer of conjugal rights: McLeod v. McLeod 2 M.P.R. 559, [1931] 2 D.L.R. 364 (N.S.C.A.).

119. MacDonald v. MacDonald and Howard [1957] O.W.N. 419, (1957) 10 D.L.R. (2d) 309; Wright v. Wright [1955] O.W.N. 405; McCart v. McCart and Adams [1946] O.R. 729, [1946] 4 D.L.R. 568; Lamphier v. Lamphier [1933] O.W.N. 591.

120. See also Land Registry Act, R.S.B.C., 1960, ch. 208, sections 2(1), 174-181; Execution Act, R.S.B.C., 1960, ch.135, section 34; Judgments Act, R.S.M., 1970, ch. J10, section 9;

... Re Judgments Act; Leslie v. Leslie (1959-60) 30 W.W.R. 414 (Man.); Judicature Act, R.S.O., 1960, ch. 197, section 78; Abbott v. Abbott (1912) 21 O.W.R. 281, 3 O.W.N. 683, 1 D.L.R. 697.

The word "alimony" in section 78 of the Judicature Act, R.S.O., 1960, ch. 197, does not include permanent maintenance awarded to a former wife on the dissolution of her marriage, and a judgment for permanent maintenance is consequently not registrable under that section:

MacDonald v. MacDonald [1952] O.R. 754, [1952] 4 D.L.R. 457 (Ont.C.A.), disproving Puddy v. Puddy [1948] O.W.N. 354, [1949] 1 D.L.R. 284.

There would appear to be no substantial reason for differentiation between orders for alimony and orders for maintenance by way of corollary relief in divorce or other matrimonial proceedings. It is accordingly submitted that section 21 of the Domestic Relations Act, R.S.A. 1970, ch.113 should be amended to include orders or judgments for maintenance.

121. Klischies v. Klischies (1959-60) 30 W.W.R. 115 (Man.).

122. Domestic Relations Act, R.S.A., 1970, ch. 113, section 20. Compare Queen's Bench Act, R.S.S., 1965, ch. 73, section 38.

123. Washik v. Washik [1944] 3 W.W.R. 484 (Sask.C.A.).

124. Alimony Orders Enforcement Act, R.S.A., 1970, ch. 17, section 8. See also Queen's Bench Act, R.S.S., 1965, ch. 73, section 39; Grigoreshenko v. Grigoreshenko [1947] 2 W.W.R. 570 (Sask.).
125. Auld v. Auld [1960] O.W.N. 62 (Ont.C.A.); Roswell v. Roswell and Schmuir [1950] 4 D.L.R. 801. But see Moyer v. Moyer [1945] O.W.N. 463; Wright v. Wright and Broughton [1947] O.W.N. 50 (application for interim alimony).
126. Clydesdale v. Clydesdale (1959) 17 D.L.R. (2d) 429 (B.C.).
127. Johnson v. Johnson [1935] 2 W.W.R. 672 (Sask.). Compare Bouveau v. Bouveau [1941] 1 W.W.R. 245, [1941] 2 D.L.R. 348 (Sask.).
128. Amson v. Amson (1955-56) 17 W.W.R. 40, (1956) 2 D.L.R. (2d) 517 (Sask.). See also Chernoff v. Chernoff (1954) 12 W.W.R. 291, [1954] 3 D.L.R. 509 (Sask.C.A.).
129. Rex v. Cantelo (1951) 2 W.W.R. 344 (Sask.).
130. For recommendations proposing a community of property regime for the Province of Ontario, see Report of the Ontario Family Law Project, Vol. III, pp. 521-586 (revised submission). This writer does not subscribe to the above recommendations being of the opinion that social justice and inter-spousal equality can be achieved by statutory amendments which fall far short of a total rejection of the doctrine of separate property in favour

- ... of a community of property regime.
131. See text to and contents of footnote 153, infra. See also H. H. Foster, Jr. and D. J. Freed, "Unequal Protection: Poverty and Family Law" (1967) 42 Indiana L.J. 192, at 204.
132. C.G. Peele, "Social and Psychological Effects of the Availability and the Granting of Alimony on the Spouses" (1939) 6 Law & Contemp. Probs. 283, at 291.
133. Domestic Relations Act, R.S.A., 1970, ch. 113, section 2.
134. See Domestic Relations Act, R.S.A., 1970, ch. 113, sections 27-31; Family Court Act, R.S.A., 1970, ch. 133, section 4. See Payne, "The Deserted Wives' and Children's Maintenance Act, R.S.O., 1960, Ch.105; Proposals for Reform" (1969) 8 West. Ont. L. Rev. 67.
135. See W. H. Hurlburt, Q.C., Working Paper on The Courts and Family Law (Institute of Law Research and Reform, Alberta) (1971); Ontario Family Law Project, Vol. X, pp.236-265. See also Doyle v. Doyle, text infra, sub-heading "The offence concept"; R. W. Kelso, "The Changing Social Setting of Alimony Law" (1939) 6 Law & Contemp. Probs. 186, at 196.
136. See Law Commission (England), Report on Financial Provision in Matrimonial Proceedings (Law Com. No. 25) (July 24, 1969), para. 7, wherein a recommendation is submitted in favour of replacing the different forms of financial relief available

... in the High Court by a single form of financial relief. For implementation of this recommendation, see Matrimonial Proceedings and Property Act (England), 1970, section 2.

A comprehensive code regulating support obligations both during marriage and after dissolution may be precluded in Canada by reason of the constitutional limitations upon the jurisdiction of the Federal Parliament and the provincial legislatures: see text, supra, sub-heading "Legislative jurisdiction".

137. See supra, sub-heading: "Magistrate's Court and Juvenile and Family Court orders; effect of, or on, alimony proceedings".

138. See Law Commission (England), Working Paper No. 9: Matrimonial and Related Proceedings - Financial Relief (April 25, 1967), para. 3:

"Procedure in magistrate courts is summary; the issues must be readily ascertainable and clear cut so that cases can be disposed of rapidly. It would be quite inappropriate to require magistrates' courts to try complex issues which cannot be isolated without preliminary pleadings or to exercise far wider discretions than they do now."

See also Report of The Special Joint Committee of the Senate and House of Commons on Divorce (Canada, 1967) at p. 150,

... wherein the following conclusion is expressed:

"The Family Court, at first glance, would seem the obvious place to deal with divorce and other matrimonial causes. ..The basic argument against vesting jurisdiction in the Family Courts is a practical one. ...Some Family Courts may be competent, but your Committee believes that, at present, such courts are in a minority."

139. The writer endorses the following conclusions expressed by the Canadian Welfare Council in its Report on Family Desertion, (1961), at p.8:

"While ... the deterrent provisions in law should be retained, ... increased emphasis should be placed on eliminating or ameliorating the conditions that contribute to family break-up, rather than on punishment of the deserter. Constructive action should include practical measures of strengthening family life such as:

(a) Education of young people

(i) for their role and responsibilities in bringing up their children;

(2) for marriage, including sex relations and family living.

(b) Marital counselling where needed to help couples deal with their current problems.

- ... (c) Reduction of social and economic pressures through provision of
- (i) subsidized and low rental housing;
 - (ii) realistic minimum wage levels;
 - (iii) educational courses on buying, budgeting, etc.;
 - (iv) a more realistic family allowances program;
 - (v) the provision of opportunities for recreation in which the family may participate as a group."

140. Compare Divorce Act, S.C., 1967-68, ch. 24, sections 7 and 8, whereby duties are imposed on counsel and the court to promote reconciliation between the parties to divorce proceedings. As to the inadmissibility of communications made in the course of reconciliation proceedings, see ibid, section 21; Cronkwright v. Cronkwright [1970] 3 O.R. 784; Robson v. Robson [1969] 2 O.R. 857, 864-866, (1970) 7 D.L.R. (3d) 289; compare Payne, "The Divorce Act (Canada), 1968" (1969) 17 Chitty's L.J. 321, 328-329.

See also Divorce Reform Act (England), 1969, section 3; Matrimonial Causes Act (Australia), 1959-1966, sections 14-17; Matrimonial Proceedings Act (New Zealand), 1963-1968, sections 4 and 5; Domestic Proceedings Act (New Zealand), 1968, sections 13-18. See Payne, "Statutory

- ... Reconciliation Provisions in Australia and New Zealand" (1968) 11 Can. Bar J. 226.
141. See Divorce Act, S.C., 1967-68, ch. 24, section 10, Matrimonial Proceedings (Magistrates' Courts) Act (England), 1960, section 6.
142. See Ontario Welfare Council, Brief To The Ontario Law Reform Commission, at p. 6, wherein it is suggested that provision might be made for the purchase of service from qualified family agencies.
143. See text supra, sub-heading "Grounds for alimony".
144. See H. H. Foster, Jr. and D. J. Freed, "Unequal Protection: Poverty and Family Law" (1967) 42 Indiana L.J. 192, at 204-206; A. Milner, "The Place of Fault in Economic Litigation between Husband and Wife" (1959) 109 L.J. 215; M. Paulsen, "Support Rights and Duties between Husband and Wife" (1955) 9 Vanderbilt L. Rev. 709.

Compare L. Rosen, Matrimonial Offences With Particular Reference To The Magistrates' Courts (2nd ed., 1965), at p.2:

"However cogent the arguments may be for abandoning the concept of the matrimonial offence in divorce proceedings, it is difficult to see what other basis can be applied for imposing the obligation to pay maintenance, without dissolving the

... marriage."

145. Compare Divorce Act, S.C., 1967-68, ch. 24, section 11, whereby a discretion is conferred on the court to order maintenance as corollary relief upon granting a decree nisi of divorce. The grounds upon which a decree of divorce may issue now include not only designated matrimonial offences but also other designated circumstances resulting in the permanent breakdown of the marriage: see Payne, "The Divorce Act (Canada), 1968" (1969) 7 Alta. L. Rev. 1.

146. 158 N.Y.S. 2d 909, at 911-913 (1957).

147. It is submitted that the misconduct of the claimant should be relevant but not conclusive in determining whether alimony is appropriate in the particular circumstances of the case.

As to the present law, see text supra, sub-heading "Bars and defences".

148. Considerations corresponding to those advocated by Hofstadter, J. would appear to be reflected in section 11(1) of the Divorce Act, S.C., 1967-68, ch. 24. See also Matrimonial Proceedings and Property Act (England), 1970, sections 2, 4 and 5.

149. Report of The Governor's Commission on The Family (California, December, 1966), at pp. 47-48. See also Law

- ... Commission (England), Working Paper No. 9, Matrimonial and Related Proceedings - Financial Relief (April 25, 1967), at pp.3, 5 and 11-17; Law Commission (England), Report on Financial Provision in Matrimonial Proceedings (Law Com. No. 25) (July 24, 1969), para. 21.
150. See Stats. Calif., 1969, ch. 1608, § 8, operative Jan. 1, 1970.
151. For policy considerations underlying this provision, see Report of The Governor's Commission on The Family (California, December, 1966), at pp.48-49, wherein it is stated:
- "To permit full retroactive modification of arrearages would mean that the decree setting the award would not be a final decree, and hence could be denied full faith and credit in the Courts of sister states. Furthermore, modifiability would raise great questions in other contexts — for example, as to the state of a claim against the obligor's estate upon his death".

But see text infra, sub-headings, "Variation of alimony judgments; recovery and remission of arrears"; "Recovery and remission of arrears; effect of death of either spouse". See also Law Commission (England), Report on Financial Provision in Matrimonial Proceedings (Law Com. No. 25) (July 24, 1969), paras. 85-93.

152. See text infra, sub-heading "Duration of orders; orders to secure".
153. As to the jurisdiction of the court to order an equal division of community or quasi-community property on dissolution of the marriage or legal separation of the parties, see California Civil Code, § 4800, Stats. Calif., 1969, ch. 1608, § 8.

The Report of The Governor's Commission on The Family further concluded that "no little confusion has been engendered by the fact that the present statute law provides for alimony and child support in the same section" and recommended that these matters be provided for by independent statutory provisions. Separate provisions defining parental obligations to support children are now set out in the California Civil Code, supra, § 4700-4703. See also ibid, § 4807 which provides that "[the] community property, the quasi-community property and the separate property may be subjected to the support, maintenance and education of the children in such proportions as the court deems just."

154. See also Matrimonial Proceedings and Property Act (England), 1970, section 5(1):

"5.—(1) It shall be the duty of the court in deciding whether to exercise its powers under section 2 or 4 of this Act in relation to a party to the marriage and, if so, in what manner, to have regard to all the circumstances of the case including the following matters, that

... is to say —

- (a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future;
- (b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;
- (c) the standard of living enjoyed by the family before the breakdown of the marriage;
- (d) the age of each party to the marriage and the duration of the marriage;
- (e) any physical or mental disability of either of the parties to the marriage;
- (f) the contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family;
- (g) in the case of proceedings for divorce or nullity of marriage, the value to either of the parties to the marriage of any benefit (for example, a pension) which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring;

and so to exercise those powers as to place the parties, so far as it is practicable and, having regard to their conduct, just to do so, in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other".

As to relevant criteria with respect to orders in relation to children of the marriage, see ibid, section 5(2) and (3).

155. See Power on Divorce (2nd ed., 1964), chs. XV and XXIII.

156. Compare Divorce Act, S.C., 1967-68, ch. 24, section 11, whereby the court may order maintenance in favour of either spouse on granting a decree nisi of divorce. See Cohen v. Cohen [1970] 2 O.R. 474, (1970) 11 D.L.R. (3d) 264, varied [1971] 1 O.R. 619 (Ont. C.A.). See also Matrimonial Proceedings and Property Act (England), 1970, section 2:

"2.—(1) On granting a decree of divorce, a decree of nullity of marriage or a decree of judicial separation or at any time thereafter (whether, in the case of a decree of divorce or of nullity of marriage, before or after the decree is made absolute), the court may, subject to the provisions of section 24(1) of this Act, make any one or more of the following orders, that is to say —

- (a) an order that either party to the marriage shall make to the other such periodical payments and for such term as may be specified in the order;
- (b) an order that either party to the marriage shall secure to the other to the satisfaction of the court, such periodical payments and for such term as may be so specified;
- (c) an order that either party to the marriage shall pay to the other such lump sum or sums as may be so specified.

(2) Without prejudice to the generality of subsection (1)(c) above, an order under this section that a party to a marriage shall pay a lump sum to the other party—

- (a) may be made for the purpose of enabling that other party to meet any liabilities or expenses reasonably incurred by him or her in maintaining himself or herself or any child of the family before making an application for an order under this section;

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

Compare ibid, section 6(1)(b) (neglect to maintain).

157. See Matrimonial Proceedings and Property Act (England), 1970, section 6(1)(b); Matrimonial Proceedings (Magistrates' Courts) Act (England), 1960, section 2. See also Vernier, *American Family Law* (1935), Vol. 3, § 161.
158. See Law Commission (England), Working Paper No. 21, *Polygamous Marriages* (July 26, 1968); Law Commission (England), Report on Polygamous Marriages (Law Com. No. 42) (February 2, 1971).
159. See Power on Divorce (2nd ed., 1964) at pp.338-339.
160. See Law Commission (England), Working Paper No. 9, *Matrimonial and Related Proceedings - Financial Relief* (April 25, 1967), paras. 214-222, wherein the arguments in favour of such legislation are set out in detail. See also Law Commission (England), Working Paper No. 21, *Polygamous Marriages* (July 26, 1968), para. 68.
161. Compare Matrimonial Causes Act (Australia), 1959, section 6, as amended by Matrimonial Causes Act (Australia), 1965, section 3; and see D. Jackson, "Monogamous Polygamy" (1966) 40 Aust. L.J. 148.
162. MacDonald v. MacDonald [1952] O.R. 754, [1952] 4 D.L.R. 457 (Ont. C.A.).

163. Compare Divorce Act, S.C., 1967-68, ch. 24, section 11(1); Matrimonial Proceedings and Property Act (England), 1970, section 7(2)(b).

See text infra, sub-heading "Recovery and remission of arrears; effect of death of either spouse".

164. Todd v. Todd [1942] 2 W.W.R. 225, [1942] 3 D.L.R. 210, affd. [1942] 3 W.W.R. 653, [1942] 4 D.L.R. 698 (Sask.C.A.).
165. Conway v. Conway (1918) 15 O.W.N. 106; McMillan v. McMillan and Weisgarber [1949] 1 W.W.R. 769, [1949] 2 D.L.R. 762 (Sask. C.A.).
166. See text to and contents of footnotes 106-109, supra.
167. See footnote 106, supra.

In England, the High Court, on or after granting a decree of divorce, nullity or judicial separation, may award a lump sum in addition to or in lieu of periodic payments: Matrimonial Proceedings and Property Act (England), 1970, section 2(1)(c) and 2(2). Jurisdiction is also vested in the High Court to award a lump sum where an application for maintenance simpliciter is made on the ground that the respondent spouse has wilfully neglected to provide reasonable maintenance: Matrimonial Proceedings and Property Act (England), 1970, section 6(6)(c) and 6(7).

168. Law Com. No. 25 (July 24, 1969), paras. 9 and 10.
169. See Davis v. Davis [1967] P. 185, [1966] 3 W.L.R. 1157, [1967] 1 All E.R. 123 (Eng. C.A.); Hakluytt v. Hakluytt [1968] 1 W.L.R. 1145, [1968] 2 All E.R. 868 (Eng.C.A.).
170. See Curtis v. Curtis [1969] 1 W.L.R. 742, [1969] 2 All E.R. 207 (Eng. C.A.).
171. Brett v. Brett [1969] 1 W.L.R. 487, [1969] 1 All E.R. 1007 (Eng.C.A.); Curtis v. Curtis, supra.
172. In Brett v. Brett, supra, and Curtis v. Curtis, supra, periodical maintenance was ordered in addition to substantial lump sums.
173. Law Commission (England), Working Paper No. 9, Matrimonial and Related Proceedings - Financial Relief (April 25, 1967), para. 37.
174. See Matrimonial Proceedings and Property Act (England), 1970, sections 2(2)(a), 6(7)(a).
175. See Matrimonial Proceedings and Property Act (England), 1970, sections 2(2)(b), 6(7)(b).
176. See Divorce Act, S.C., 1967-68, ch. 24, section 11(1); Switzer v. Switzer (1969) 70 W.W.R. 161, (1970) 7 D.L.R. (3d) 638 (Alta. S.C.) (App.Div.); Laur v. Laur and Gott, Unreported, March 24, 1969 (Ont. S.C.). Compare Johnstone

... v. Johnstone [1969] 2 O.R. 765, (1970) 7 D.L.R. (3d) 14.

Although the court may order the husband to secure to a divorced wife the amount of maintenance ordered to be paid, the court has no authority, without the consent of the husband, to deprive him of his property and to order it transferred to the wife: Switzer v. Switzer, *supra*; J. v. J. (1970) 8 D.L.R. (3d) 760 (Sask.); Olynyk v. Olynyk [1923] 1 W.W.R. 825, 26 Alta. L.R. 485, [1932] 2 D.L.R. 785 (Alta. S.C.) (App. Div.). But see Wagner v. Wagner (1970) 73 W.W.R. 474 (Alta.). Compare Matrimonial Proceedings and Property Act (England), 1970, section 4(a), whereby the High Court, on or after granting a decree of divorce, nullity or judicial separation, may order either spouse to transfer to the other spouse or to any child of the family such property in possession or reversion as may be specified by the court.

177. See, e.g., Domestic Relations Act, R.S.A., 1970, ch. 113, section 23 (order to secure annual sum); Matrimonial Causes Act, R.S.O., 1960, ch. 232, section 1 (order to secure gross or annual sum); Queen's Bench Act, R.S.S., 1965, ch. 73, section 33 (order to secure annual sum). See also Matrimonial Proceedings and Property Act (England), 1970, section 2(1)(b).

178. See MacDonald v. MacDonald [1952] O.R. 754, at 758, [1952] 4 D.L.R. 457, at 462 (Ont.C.A.), wherein Hope J.A. stated:

"There are certain fundamental differences in the quality of 'alimony' and 'maintenance'. The former cannot be ordered to be secured; the latter may be secured. The former may be withdrawn, increased or decreased at the discretion of the Court; the latter, so far as security is concerned, is an irrevocable provision and cannot be varied by the Court."

For recommendation respecting the jurisdiction of the court to vary orders, whether secured or unsecured, see footnote 230, infra.

Compare Matrimonial Proceedings and Property Act (England), 1970, section 7(2)(b), whereby maintenance awarded in independent proceedings may be ordered to be secured for the life of the beneficiary.

179. Section 2 defines the jurisdiction of the court to order maintenance by way of lump sum or periodical payments on or after granting a decree of divorce, nullity or judicial separation.
180. Section 4 defines the jurisdiction of the court to transfer or settle property or to vary settlements on or after granting a decree of divorce, nullity or judicial separation.

181. As to the factors relevant to orders in favour of children of the marriage, see ibid, section 5(2) and (3).
182. See text supra, sub-heading "Family counselling and conciliation procedures"; text to and contents of footnote 142, supra.
183. 158 N.Y.S. 2d 909, at 911(1957). See also S.H. Hofstadter and S. R. Levittan, "Alimony — A Reformulation" (1967) 7 J.L. of Fam. Law 51. In an appendix to the aforementioned article, the authors propose that verified information should be submitted by husband and wife on a standard form questionnaire detailing information relating to such matters as earnings, assets, expenses and debts. Compare the requirements of current Divorce Rules operating in the Canadian provinces.
184. Goodfriend v. Goodfriend (1912) 21 O.W.R. 637, 3 O.W.N. 784. See cases cited in footnote 185, infra.
185. Dixon v. Dixon [1950] 2 W.W.R. 49, at 52, 58 Man. R. 48. See Goodfriend v. Goodfriend, supra; Hudson v. Hudson (1914) 26 O.W.R. 688, 6 O.W.N. 503; Keweluk v. Keweluk [1932] 2 W.W.R. 78, 17 Sask. L.R. 18, [1923] 2 D.L.R. 979 (Sask. C.A.); Newton v. Newton (No. 2) [1927] 1 W.W.R. 106, [1927] 1 D.L.R. 756 (Man.); M. v. M. [1947] O.W.N. 474, at 476, [1947] 3 D.L.R. 74; Hall v. Hall [1947] O.W.N. 997; Rose v. Rose [1951] P.29, [1950] 2 All

- ... E.R. 311 (Eng.C.A.); Le Roy-Lewis v. Le Roy-Lewis [1955] P. 1, [1954] 3 W.L.R. 549, [1954] 3 All E.R. 57; J.-P.C. v. J.-A.F. [1955] 2 W.L.R. 973, [1955] 2 All E.R. 85, affirmed with variation [1955] P. 215, [1955] 3 W.L.R. 72, [1955] 2 All E.R. 617 (Eng.C.A.); Levett-Yeats v. Levett-Yeats (1967) 111 S.J. 475; Attwood v. Attwood [1968] P. 591, [1968] 3 W.L.R. 338, [1968] 3 All E.R. 385. See also Phillips v. Phillips, 1 App. Div. 2d 393, 150 N.Y.S. 2d 646 (1956), affd. 2 N.Y. 2d 742, 138 N.E. 2d 738 (1956); Doyle v. Doyle, text to footnote 148, supra. Compare Matrimonial Proceedings and Property Act (England), 1970, section 5(1)(a), text supra.
186. [1951] P. 29, at 31-32, 66 T.L.R. (Pt.2) 440, at 443; [1950] 2 All E.R. 311, at 313.
187. Compare Le Roy-Lewis v. Le Roy-Lewis, supra, wherein a wife who had been deserted by her husband and who had been employed before the marriage was held to be under no obligation "to go back to earning in order to reduce the husband's liability to maintain her", even though she was still a young woman and had no children dependent on her.
188. Cmd. 9678 (1956), paras. 493-495.
189. See Matrimonial Proceedings and Property Act (England), 1970, section 5(1), text supra.

190. See text to and contents of footnotes 84-86, supra.
191. See e.g. Jenny v. Jenny, 178 Cal. 604, 174 Pac.652 (1918).
192. See e.g. Benjamin v. Benjamin, 283 App. Div. 455, 128 N.Y.S. 2d 401 (1st Dept. 1954).
193. See e.g. Munger v. Munger, 21 N.J. Super. 49, 90 A. 2d 539 (1952); Commonwealth v. Myerson, 160 Pa. Super. 432, 51 A. 2d 350 (1947). See generally M. Paulsen, "Support Rights and Duties between Husband and Wife" (1955-56) 9 Vanderbilt L. Rev. 709, at 719.
194. Compare Deserted Wives' and Children's Maintenance Act, R.S.S., 1965, ch. 341, section 10.
195. Ibid.
196. See supra, sub-heading "Magistrate's Court and Family Court orders; effect of, or on, alimony proceedings".
197. See Matrimonial Proceedings (Magistrates' Courts) Act (England), 1960, section 5.
198. See Matrimonial Proceedings (Magistrates' Courts) Act (England), 1960, section 6. See also Report of The Royal Commission on Marriage and Divorce (England) 1951-55: Cmd. 9678 (1956), paras. 1059-1061 and 1142-1145; Final Report on Procedure in Matrimonial Causes (England), Cmd. 7024 (1947), para. 45.

199. See Matrimonial Proceedings (Magistrates' Courts) Act, (England), 1960, section 7(3), amended Matrimonial Proceedings and Property Act (England), 1970, section 33.
200. It is submitted that there is no justification for imposing the present statutory requirement whereby desertion must continue for two years in order to constitute a ground for alimony. The offence of desertion should not be proscribed by any designated time factor and the above recommendation should be applicable without further qualification.

See Matrimonial Causes Act (England), 1965, section 3, which provides as follows:

"3.(1) A person shall not be prevented from presenting a petition for divorce, or the court from granting a decree of divorce, by reason only that the petitioner has at any time, on the same facts or substantially the same facts as those proved in support of the petition, been granted a decree of judicial separation or an order under, or having effect as if made under, the Matrimonial Proceedings (Magistrates' Courts) Act, 1960 ...

(2) On any such petition for divorce, the court may treat the decree of judicial separation or the said order as sufficient proof of the adultery, desertion or other ground on which it was granted, but the court shall not pronounce a decree of divorce without receiving evidence from the petitioner."

Although section 3, supra, applies only where divorce proceedings are instituted in the High Court, it could be readily adopted with minor amendments so as to implement the recommendation set out in paragraph 4 of the text.

... Compare Domestic Relations Act, R.S.A., 1970, ch. 113, section 29(3), which provides as follows:

"29(3) A finding by a magistrate that adultery has been committed or that adultery has been condoned is not evidence of the adultery or the condonation, as the case may be, for any purpose except for the purpose of proceedings under this Part."

201. Family Court Act, R.S.A., 1970, ch. 133, section 6:

"6.(1) A person entitled to alimony or maintenance under a judgment or order of the Supreme Court of Alberta may file a copy of the judgment or order in the Family Court and when so filed it is enforceable in the same manner as an order made by a magistrate under Part 4 of The Domestic Relations Act.

(2) A person entitled to maintenance under a judgment or order of the Supreme Court within the meaning of subsection (1) includes a child entitled to maintenance under any such judgment or order.

(3) The judge of the Family Court may not vary the amount of any alimony or maintenance ordered to be paid by a judgment or order of the Supreme Court filed in the Family Court under this section".

In England, the magistrates' court may entertain an application to vary a maintenance order granted in the High Court or County Court and subsequently registered in the magistrates' court to facilitate enforcement: Maintenance Orders Act (England), 1958, section 4, as amended by Administration of Justice Act (England), 1970, section 48.

202. See Report of Council of State Governments (U.S.A., 1963) entitled "Locating Persons Liable for Support of Dependents".

203. See Report of Canadian Welfare Council on Family Desertion (1961) at p. 11, para. 13.
204. See Report of Canada Welfare Council on Family Desertion (1961), at p.11.
205. Compare the opinion expressed by The Royal Commission on Marriage and Divorce, (England), 1951-55, Cmd. 9678 (1956), para. 1148:

"We are satisfied that it would be wrong to require Government Departments to disclose the husband's address, whether to an officer of the court or the wife. Against the right of a wife to maintenance must be balanced the right of the husband to have his privacy respected; in our view, the latter must prevail."

But see Scarman, J. "Family Law And Law Reform" (Public Lecture - Univ. of Bristol, March 18th, 1966), at pp.17-19:

"A determined defaulter will cause his wife and children endless misery, and more often than not imposes a great burden, through National Assistance, upon the community as a whole. It was hoped that the enactment of provisions enabling part of a man's earnings to be earmarked by means of an attachment order for the support of his wife and

... children would go some way to meet this problem. Unfortunately it has not proved a very effective weapon. ... If a central register of addresses and places of work were kept and its information made available under proper safeguards to those who had rights to enforce, the difficulties of enforcing matrimonial orders would be largely met. There is much to commend the suggestion made by Miss Margaret Wynn in her book, that the Inland Revenue might be charged through the P.A.Y.E. system with the task of collecting what was due from a man for the support of his family, while the State assumed vis-a-vis the wife and children direct responsibility for their financial support. The exposed family would not then be bothered with problems of enforcement, and one of the great interests of society in family law would be on the way to being met, namely, the effective provision of support for mother and children."

206. In the special case where it can be shown to the satisfaction of the court that the facts are such that the missing spouse may be presumed to be dead, the wife may be able to get at the funds but the necessary proof may not always be available until some time has elapsed. During the interval the wife may suffer considerable

... hardship if she has no private means and is unable to support herself by her own earnings: Cmd. 9678 (1956), para. 526.

As to the jurisdiction of the court to order provision to be made for the future maintenance of family dependants out of the estate of a deceased spouse, see Family Relief Act, R.S.A., 1970, ch. 134.

207. Such a recommendation was endorsed in the Report of The Royal Commission on Marriage and Divorce, (England), 1951-1955: Cmd. 9678 (1956), para. 529.

208. Ibid.

209. Ibid.

210. See Cmd. 9678 (1956), para. 528.

211. See text infra, PROTECTION ORDERS, sub-heading "Payment through and enforcement by officer of the court".

212. See Family Court Act, R.S.A., 1970, ch. 133, section 6, text supra, sub-heading "Family Court orders; effect of, or on, alimony proceedings."

As to the power of the court to order alimony to be paid to a trustee, see Divorce and Matrimonial Causes Act (England), 1857, section 24. Corresponding jurisdiction is conferred with respect to interim alimony and

- ... permanent maintenance granted in divorce proceedings in Canada: Divorce Act, S.C., 1967-68, ch. 24, section 12.
213. This approach reflects the opinion expressed by Professor McGregor at a Colloquium on the Economic Aspects of Family Law which was held at the London School of Economics on March 26th and 27th, 1965. The report of the proceedings of the colloquium is published in (1965) 8 S.P.T.L. J1. 166-208. For the views of Professor McGregor, see p. 207. See also Scarman, J., "Family Law And Law Reform", footnote 205, supra.
214. See text supra, sub-heading "Determining the amount of alimony".
215. It would appear that the Department of Social Development, like the National Assistance Board in England, presently, and perhaps inevitably, places a far greater emphasis upon discharging its obligation to provide maintenance for the deserted family than upon the provision of adequate counselling services which would facilitate reconciliation between the spouses. It may be of some relevance to refer to the following opinion expressed by Lord Morton of Henryton in the Minutes of Evidence of The Royal Commission on Marriage and Divorce, (England), 1951-1955, at page 791, para. 7511, concerning the services provided by the National Assistance Board in England:

... "I should have said that, formerly, in the days of the relieving officer, there was more likelihood of that kind of service [involving full examination of circumstances to determine inter alia the prospects of reconciliation] being made available than there is today. A great deal of it now is an over-the-counter transaction, and there is not what there used to be in the old days, the weekly visit, compulsory by statute, of the relieving officer to the home, who then had first hand knowledge of it."

216. See Report of Canadian Welfare Council on Family Desertion (1961), at p. 7:

"And while there is little prospect of recovering money from certain classes of deserting parents such as alcoholics, drifters, etc., court action is effective in securing support from regularly employed persons and in preventing fraud."

217. See (1965) 8 S.P.T.L. J1. at pp. 207-208. See also Minutes of Evidence of The Royal Commission on Marriage and Divorce (England), 1951-55, at p. 334, para. 3; p. 796, para. 7567; p. 850, paras. 8242-8244; p. 875, paras. 8377-8381; p. 877, para. 8416; p. 916, paras. 8909-8920.

218. See Report of Canadian Welfare Council on Family Desertion (1961), especially at p. 7:

"Most important of all perhaps, it would be unwise

... to remove legislative provisions that emphasise the responsibility and obligations of the husband to support his wife and family."

See also views expressed by Dr. Winefred Cavenagh, J.P. in (1965) 8 S.P.T.L. Jl. at p. 207.

219. See supra, sub-headings "Family counselling and conciliation procedures"; "Determining the amount of alimony".

220. See text to and contents of footnotes 116 and 117, supra.

221. Ibid.

222. See infra, footnote 230.

223. It may be advisable for such statutory limitation to be subject to the discretion of the court. See Matrimonial Proceedings and Property Act (England), 1970, section 10, which provides as follows:

"10.— (1) A person shall not be entitled to enforce through the High Court or any county court the payment of any arrears due under an order made by virtue of section 1, 2(1), 3(2), 6(5) or 6(6) of this Act without the leave of that court if those arrears became due more than twelve months before proceedings to enforce the payment of them are begun.

(2) The court hearing an application for the grant of leave under this section may refuse leave, or may grant leave subject to such restrictions and conditions (including conditions as to the allowing of time for payment or the making of payment by instalments) as the court thinks proper, or may remit the payment of such arrears or of any part thereof.

...

(3) An application for the grant of leave under this section shall be made in such manner as may be prescribed by rules of court."

224. Young v. Young (No.2) [1962] P. 218, [1961] 3 W.L.R. 1041, [1961] 3 All E.R. 793. See also Brett v. Brett [1969] 1 All E.R. 1007, 1015, wherein Phillimore, J. stated: "It must be remembered that once a capital sum has been awarded and paid, the order cannot be varied and the money cannot be recalled."

225. See California Civil Code, section 4801(d), text supra, sub-heading "The offence concept". See also Matrimonial Proceedings and Property Act (England), 1970, section 11, which provides:

"11.--(1) Where on an application made under this section in relation to an order to which this section applies it appears to the court that by reason of —

(a) a change in the circumstances of the person entitled to, or liable to make, payments under the order since the order was made, or

(b) the changed circumstances resulting from the death of the person so liable,

the amount received by the person entitled to payments under the order in respect of a period after those circumstances changed or after the death of the person liable to make payments under the order, as the case may be, exceeds the amount which the person so liable or his or her personal representatives should have been required to pay, the court may order the respondent to the application to pay to the applicant such sum, not exceeding the amount of the excess, as the court thinks just.

...

This section applies to an order made by virtue of section 1, 2 (1)(a) or (b), 3(2)(a) or (b), 6(5) or 6(6)(a),(b), (d) or(e) of this Act.

(2) An application under this section may be made by the person liable to make payments under an order to which this section applies or his or her personal representatives and may be made against the person entitled to payments under the order or her or his personal representatives.

(3) An application under this section may be made in proceedings in the High Court or a county court for—

- (a) the variation or discharge of the order to which this section applies, or
- (b) leave to enforce, or the enforcement of, the payment of arrears under that order;

but except as aforesaid such an application shall be made to a county court, and accordingly references in this section to the court are references to the High Court or a county court, as the circumstances require.

(4) An order under this section for the payment of any sum may provide for the payment of that sum by instalments of such amount as may be specified in the order."

See also ibid, section 22. The Law Commission envisaged that the power of the court to order repayment of money received would be exercised sparingly, and not at all where payments were received in good faith: Law Commission (England), Report on Financial Provision in Matrimonial Proceedings (Law Com. No. 25) (July 24, 1969), para. 92.

See Payne, "Corollary Financial Relief in Nullity

- ... and Divorce Proceedings" (1969) 3 Ottawa L. Rev. 373, at 403.
226. Jachowicz v. Bate (1958) 24 W.W.R. 658, 66 Man. R. 175, (1958) 14 D.L.R. (2d) 99.
227. McLeod v. Security Trust Co. [1940] 1 W.W.R. 423, [1940] 2 D.L.R. 697 (Alta.).
228. Sugden v. Sugden [1957] P. 120, [1957] 2 W.L.R. 210, [1957] 1 All E.R. 300 (Eng. C.A.), applying Hinde v. Hinde [1953] 1 W.L.R. 175, [1953] 1 All E.R. 171 (Eng. C.A.), and explaining Dipple v. Dipple [1942] P.65, 111 L.J.P. 18 (Eng.). Compare In re Woolgar; Woolgar v. Hopkin [1942] Ch. 318, 111 L.J. Ch.209 (Eng.). See also Re Hudson [1966] Ch. 207, [1966] 2 W.L.R. 398, [1966] 1 All E.R. 110; W. v. W. [1961] P. 113, [1961] 2 W.L.R. 878, [1961] 1 All E.R. 751, affd. [1961] P. at p.129, [1961] 2 W.L.R. at p. 893, [1961] 2 All E.R. 56 (Eng.C. A.). See text supra, sub-heading "Duration of orders; orders to secure".
229. O'Halloran, J.A. in Barker v. Westminster Trust Co. [1941] 3 W.W.R. 473, 614, 57 B.C.R. 21, [1941] 4 D.L.R. 514. See also Stonehouse v. Att.-Gen. for B.C. (1960-61) 33 W.W.R. 66, at 69, (1961) 25 D.L.R. 301, on appeal (1960-61) 33 W.W.R. 625, (1961) 26 D.L.R. (2d) 391 (B.C.C.A.), affd. (1962) 37 W.W.R. 62 (S.C.C.).

230. See Report of The Royal Commission on Marriage and Divorce, (England), 1951-1955, Cmd. 9678 (1956), paras. 593-594; Law Commission (England), Working Paper No. 9, Matrimonial and Related Proceedings - Financial Relief (April 25, 1967), para. 52(b), paras. 88-97, paras. 143-152, and pp.99-100.

See also Law Commission (England), Report On Financial Provision In Matrimonial Proceedings (Law Com. No. 25) (July 24, 1969), para. 93, wherein it is recommended:

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

- (i) a lump sum should not be variable,
- (ii) on an application to vary an order for periodical payments it should not be possible to award a lump sum, settlement, transfer, or variation of settlements,
- (iii) secured provision should not be variable after the death of the payer unless application is made [within six months of probate or letters of administration unless the court allows an extension.]

It should continue to be possible to back-date a variation of an order for periodical cash provision, thus remitting arrears, and to remit arrears on

... enforcement proceedings. ...

[The] court should be empowered to order the repayment of sums paid in excess of the amount actually due whether the over-payment was because the payer was kept in ignorance that an event ... had occurred which brought the order to an end or because a variation was backdated."

For legislative implementation of the above recommendations, see Matrimonial Proceedings and Property Act (England), section 9. See also ibid, sections 10 and 11, supra, footnotes 223 and 225.

231. Ibid.

232. Compare Queen's Bench Act, R.S.S., 1965, ch. 73, section 38, which provides as follows:

"38. The court may, after action brought, issue an order restraining the defendant in any action for alimony or upon the covenant for payment contained in a separation agreement from disposing of or encumbering his property, whether real or personal, pending the final disposition of such action save subject to any interest that the wife may subsequently acquire in the property under any judgment of the court."

See Washik v. Washik [1944] 3 W.W.R. 484 (Sask. C.A.).

See text supra, sub-heading "Disposal of property".

233. For corresponding legislation in Saskatchewan, see Queen's Bench Act, R.S.S., 1965, ch. 73, section 39.

- ... See Grigoreshenko v. Grigoreshenko [1947] 2 W.W.R. 570 (Sask.).
234. For application to proceedings commenced or orders made under the Matrimonial Causes Act (England), 1965, see Schedule 1, para. 9(1) and (2).
- Compare Fraudulent Conveyances Act, R.S.O., 1960, ch. 154; MacDonald v. MacDonald and Howard [1957] O.W.N. 419, (1957) 10 D.L.R. (2d) 309.
235. For corresponding legislation in other provinces, see Land Registry Act, R.S.B.C., 1960, ch. 208, section 2(1), 174-181; Execution Act, R.S.B.C., 1960, ch. 135, section 34, Judgments Act, R.S.M., 1970, ch. J10, section 9; Judicature Act, R.S.O., 1960, ch. 197, section 78.
- For recommendation that section 21 of the Domestic Relations Act, R.S.A., 1970, ch. 113 be amended to include orders for maintenance by way of corollary relief in divorce or other matrimonial proceedings, see footnote 120, supra.
236. Judicature Act, R.S.O., 1960, ch. 197, section 78(3).
237. As to the need for such amending legislation, see Klischies v. Klischies (1959-60) 30 W.W.R. 115 (Man.). See Judgments Act, R.S.M., 1970, ch. J10, section 21; Kumpas v. Kumpas [1971] 2 W.W.R. 652 (Man.).

238. Compare Maintenance Orders Act (England), 1958, sections 6 - 15, as amended by Administration of Justice Act (England), 1970, sections 11-30.

See J. C. Wood, "Attachment of Wages" (1963) 26 M.L.R. 51; P.R.H. Webb, "An Outline of the English Law of Maintenance of Spouses During the Subsistence of the Marriage" (1966) B.I.I.C.L. Comparative Law Series 13 - Parental Custody and Matrimonial Maintenance: A Symposium, at pp. 143-144. See also Scarman, J. "Family Law And Law Reform", footnote 205, supra.

239. See Abraham v. Abraham (1890) 19 O.R. 256, affd. (1892) 18 O.A.R. 436 (Ont.C.A.) (wherein it was held that the precedence given to an assignment for the benefit of creditors by The Assignment and Preferences Act [now R.S.O., 1960, ch. 293, section 13] does not extend to a judgment for alimony registered under the Judicature Act [now R.S.O., 1960, ch. 197, section 78].)

Compare Francis v. Wilkerson [1917] 3 W.W.R. 920, 25 B.C.R. 132, affd. [1918] 2 W.W.R. 956 (B.C.C.A.), applied in Mackey v. Mackey [1930] 1 W.W.R. 604, 42 B.C.R. 440, [1930] 3 D.L.R. 497.

"I think that the only privilege a wife can obtain, by judicial proceedings, over other creditors of her husband, is by an order

- ... securing payment of [maintenance]. ... She may also, by [due registration of the judgment in the Land Registry Office] obtain additional protection or preference, but it is not necessary to form a decided opinion on this point... " : per MacDonald, J. in Francis v. Wilkerson [1917] 3 W.W.R. 920, at p. 924.
240. Re Freedman (1923-24) 55 O.L.R. 206, [1924] 3 D.L.R. 517; Jachowicz v. Bate (1958) 24 W.W.R. 658, at 666, 66 Man. R. 175, (1958) 14 D.L.R. (2d) 99.
241. See also Law Commission (England), Report on Financial Provision in Matrimonial Proceedings (Law Com. No. 25) (July 24, 1969), para. 78.
242. See Slemin v. Slemin (1903) 7 O.L.R. 67, at 69.
243. See footnote 230, supra.
244. See Report of The Royal Commission on Marriage and Divorce (England), 1951-1955, Cmd. 9678 (1956), para. 580. See also Administration of Justice Act (England), 1970, sections 11, 12 and 30.
245. Cmd. 9678 (1956), para. 590.
246. See Minutes of Evidence of The Royal Commission on Marriage and Divorce, (England), 1951-1955, at p. 240, para. 69, wherein it is suggested that the State should

... provide workplaces to which the court could commit a defaulting spouse, that a person so committed should be paid the recognized trade union rate for his particular job and that a proportion should be payable to the wife for current maintenance and arrears. See also Statutes of State of Michigan, 1948, § 552-201, as amended by 1954, Act 6, which provides as follows:

"Whenever either party to a proceeding for divorce or separate maintenance has been ordered or decreed to pay money for the support and maintenance of minor children and fails or refuses to obey and perform such order, and has been found guilty of contempt of court for such failure or refusal, the court making such order in contempt proceedings may forthwith upon the filing of a sworn affidavit of complaint establishing such fact of non-payment, issue a bench warrant requiring said party to be brought forthwith before said court to answer and plead to such neglect or refusal; whenever the court shall be satisfied that the said party is of sufficient ability to comply with said order, and has neglected or refused to do so, said court may forthwith punish such person for contempt of said court by making an order placing such person on probation or may commit him to the county jail or commit him to the county jail with the liberty of jail limits which shall be co-extensive with the limits of the county, during such hours as the court shall determine, for the purpose of allowing said party to go to and return from his place of employment under such supervision as the court shall deem necessary, or to any state prison or any penal institution in the state of Michigan for such period as said party shall continue to be in contempt, not to exceed one year, however; the court may further direct that any portion or all of the earnings of such person in said institution shall be paid to and applied for the support of the minor children of such person until the order or decree of the court has been complied with or until the further order of the court; and if it appears that a state, county, city or township welfare

- ... agency has contributed towards the support of said minor child or children during the period of non-compliance with the order of the court, the court may order all or part of any lump sum payment to the friend of the court or county clerk in said contempt proceedings to be paid to such welfare agency not to exceed the amount of the contribution made by the welfare agency: Provided, that the court may in its discretion order said money paid to the person or persons entitled thereto in weekly or monthly installments by the friend of the court or county clerk to the extent that the court may consider necessary for the support, maintenance and education of the minor children."
247. A similar conclusion is presented by The Royal Commission on Marriage and Divorce, (England), 1951-55, and is supported by the preponderance of evidence submitted to the Commission: see Cmd. 9678 (1956), para. 1108, and Minutes of Evidence, p. 242, para. 72; p.762, paper 87; p. 794, para. 14.
248. See Cmd. 9678 (1956), para. 1108, wherein a similar opinion is expressed. See also Alimony Orders Enforcement Act, R.S.A., 1970, ch. 17, section 14(a).
249. See Alimony Orders Enforcement Act, R.S.A., 1970, ch. 17, section 14(a). Compare Cmd. 9678 (1956), paras. 1092 and 1109:
1092. No arrears of maintenance accrue while the husband is in prison unless the court makes a specific order to this effect.
1109. We do not suggest that there should be any change in the present rule whereby no arrears of maintenance accrue in respect of current payments while the husband is in prison for default

... unless the court otherwise orders."

Compare also Magistrates' Courts Act (England), 1952, section 75.

250. See Cmd. 9678 (1956), para. 1108. See also text supra, sub-heading "Variation of alimony judgments; recovery and remission of arrears". See Alimony Orders Enforcement Act, R.S.A., 1970, ch. 17, section 12(a).
251. See McKenzie v. McKenzie (1965) 51 W.W.R. 182 (Alta. S.C.) (App. Div.).
252. Compare Divorce Act, S.C., 1967-68, ch. 24, section 10(a):
- "10. Where a petition for divorce has been presented, the court having jurisdiction to grant relief in respect thereof may make such interim orders as it thinks fit and just
- (a) for the payment of alimony or an alimentary pension by either spouse for the maintenance of the other pending the hearing and determination of the petition, accordingly as the court thinks reasonable having regard to the means and needs of each of them....".
253. See footnote 252, supra.
254. See text supra, PERMANENT ALIMONY, sub-heading "Legislative jurisdiction". See Tapson v. Tapson [1970] 1 O.R. 521, (1970) 8 D.L.R. (3d) 727 (Ont. C.A.).
255. See footnote 252, supra.
256. See text supra, PERMANENT ALIMONY, sub-heading "Legislative jurisdiction".

For strict interpretation of the phrase "upon granting a decree nisi of divorce" in section 11(1) of the Divorce Act, S.C., 1967-68, ch. 24, see Daudrich v. Daudrich [1971] 1 W.W.R. 81, (1971) 14 D.L.R. (3d) 245

- ... (Man); Payne, Digest of Cases and Materials on the Divorce Act, 1968 (Revised Edition, 1970) 153-162. Compare Power on Divorce (2nd ed., 1964) 535; and see Payne, "Corollary Financial Relief in Nullity and Divorce Proceedings" (1969) 3 Ottawa L. Rev. 386-389.
257. See text supra, PERMANENT ALIMONY, sub-heading "Legislative jurisdiction".
- Compare Divorce Act, S.C., 1967-68, ch. 24, section 11(2) (variation of maintenance orders), infra, footnote 262.
258. See e.g. Bill C-181 (First Reading, January 23, 1970) (Mr. McCleave), whereby amendment of section 11(1) of the Divorce Act, S.C., 1967-68, ch. 24 is proposed so as to empower the court to award permanent maintenance after a decree nisi of divorce has been granted.
259. See text supra, RESTITUTION OF CONJUGAL RIGHTS.
260. See text supra, CONCLUSIONS AND RECOMMENDATIONS FOR REFORM OF THE LAW OF ALIMONY.
261. It may be observed that section 26 of the Domestic Relations Act, R.S.A., 1970, ch. 113 does not specifically authorize the discharge or rescission of an order for alimony or maintenance. Compare Divorce Act, S.C., 1967-68, ch. 24, section 11(2), infra, footnote 262.

262. Section 11(2) of the Divorce Act, S.C., 1967-68, ch. 24 provides as follows:

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

263. See text to and contents of footnotes 256-259, supra.

See also Divorce Act, S.C., 1967-68, ch. 24, section 11(2), supra, footnote 262.

264. Curwen v. Maguire (1833) 1 Law Rec. N.S. 54 (Ire.);

Moylan v. Nolan (1864) 17 I.C.L.R. 427, at 462 (Ire. C.A.);

Debenham v. Mellon (1880) 6 App. Cas. 24 (Eng.) (H.L.);

Thompson and Kerr v. Findlay [1939] O.R. 22.

265. Moylan v. Nolan, supra, at p. 443.

266. Watson v. Threlkeld (1798) 2 Esp. 637 (Eng.).

267. Groves v. Whitestone (1847) Bl.D. & O. 169 (Ire.).

268. Moylan v. Nolan (1864) 17 I.C.L.R. 427, at 454 (Ire. C.A.).

269. (1870) L.R. 6 C.P. 38, at 42 (Eng.).

270. Chappell v. Nunn (1879) 4 L.R. (Ire.) 316.

271. Russell v. Mulcahy, 31 I.L.T. 215 (Ire.).

272. Moylan v. Nolan (1864) 17 I.C.L.R. 427, at 449 (Ire. C.A.).

See also Miss Gray Ltd. v. Earl Cathcart (1922) 38 T.L.R.

562 (Eng.); Robert Simpson Co. v. Ruggles (1929) 65 O.L.R. 186.

273. Etherington v. Parrot (1703) Holt K.B. 102 (Eng.);
Weaver v. Lawrence (1839) 2 Ont. Case Law Dig. 3053.
274. Montague v. Benedict (1825) 3 B. & C. 631 (Eng.);
Archibald v. Flynn (1872) 32 U.C.Q.B. 523.
275. Switzer v. Kennan, 64 I.L.T.R. 226 (Ire.); Miss Gray Ltd. v. Earl Cathcart, supra, footnote 272.
276. Switzer v. Kennan, supra; Callott v. Nash (1923) 39 T.L.R. 29 (Eng.); Owen Sound G. and M. Hospital v. Mann [1953] O.R. 643, [1953] 3 D.L.R. 417. Compare Biberfeld v. Berens [1952] 2 Q.B. 770, at 782, [1952] 2 T.L.R. 39, [1952] 2 All E.R. 237 (Eng. C.A.), wherein Denning L.J. stated:
- "[At] the present day, when a wife is in nearly all respects equal to her husband, she has to bear the responsibilities which attach to her freedom. If she is a rich woman, I see no reason why her own means should not come into the family pool, just as his do."
277. Russell v. Mulcahy, supra, footnote 271; Robert Simpson Co. v. Ruggles, supra, footnote 272.
278. Jolly v. Rees (1864) 15 C.B. (N.S.) 628 (Eng.); Debenham v. Mellon, supra, footnote 264.
279. (1864) 17 I.C.L.R. 427 (Ire. C.A.).

280. Ibid, at p. 462.
281. Day v. Spread, Ir. Cir. Rep. 141, at 144.
282. Johnstone v. Manning, 12 I.C.L.R. 148 (Ire.); Curwen v. Maguire, supra, footnote 264; Hawthorne Bros. v. Reilly [1949] A.L.R. 552.
283. Day v. Spread, supra, footnote 281.
284. (1868) L.R. 3 Q.B. 559 (Eng.).
285. At p. 564.
286. This criterion has been challenged in (1953) 16 M.L.R. 221, wherein it is suggested that the same principle applies in both contexts.
287. See Domestic Relations Act, R.S.A., 1970, ch. 113, section 19:
"19. Where an interim or other order for alimony is subsisting, and the payment of alimony is not in arrears under that order, the husband is not liable for necessaries supplied to his wife."
288. See Domestic Relations Act, R.S.A., 1970, ch. 113, section 31(2):
"31.(2) Nothing in this Part shall be construed to prejudice, abridge, curtail, defeat or otherwise affect a civil or other remedy at law of a married woman against her husband that she would otherwise have but for this Part."
- See also Sandilands v. Carus [1945] 1 K.B. 270 (Eng.);

- ... Hatfield Hall v. Walters and MacDonald [1955] O.W.N. 66.
And see E. J. Cohn, "Maintenance Order and Agency of Necessity" (1945) 8 M.L.R. 250.
289. Curwen v. Maguire, supra, footnote 264.
290. Ibid; Day v. Spread, supra, footnote 281; Biberfeld v. Berens, supra, footnote 276.
291. Day v. Spread, supra, at pp.144-145.
292. Wilson v. Glossop (1888) 20 Q.B.D. 354 (Eng.); quaere conduct conducting.
293. Harris v. Morris (1801) 4 Esp. 41 (Eng.).
294. Emery v. Emery (1827) 1 Y. & J. 501 (Eng.).
295. Blades v. Free (1829) 9 B. & C. 167 (Eng.).
296. Johnston v. Manning, 12 I.C.L.R. 148 (Ire.); Deare v. Soutten (1869) L. R. 9 Eq. 151 (Eng.); Weingarten v. Engel [1947] 1 All E.R. 425.
297. Ontario Family Law Project, Vol. III, pp. 538-540.
298. Law Com. No. 25 (July 24, 1969).
299. See Law Commission (England), Working Paper No. 9, Matrimonial and Related Proceedings - Financial Relief (April 25, 1967), paras. 41-52 and 108.

300. Report of the Special Joint Committee of the Senate and House of Commons on Divorce (Canada, 1967), pp. 29 and 163.
301. Proceedings of the Standing Committee on Banking and Committee, No. 23, p. 224 (February 1, 1968).

See also Report of the Special Joint Committee of the Senate and House of Commons on Divorce (Canada, 1967), at p. 59, wherein it is suggested that the Federal Parliament may lack jurisdiction to enact legislation relating to the disposition of property in divorce proceedings:

"The division of property between divorced persons (apart from the question of support or maintenance), as well as such matters as marriage settlements, dower, homestead rights.... may well stand on a different footing. These matters do not involve rights and obligations between husband and wife, but they seem.... to relate more to the property and civil rights of the parties to the marriage than to their legal status as married persons. They could vary from time to time and from jurisdiction to jurisdiction and a particular rule is not necessary or essential to constitute a marriage."

Quaere, however, whether the above opinion does not ignore the fundamental basis of all forms of corollary

- ... relief in divorce proceedings, which is the provision of an equitable distribution of the economic assets, both actual and prospective, of the spouses on dissolution of the marriage.
302. House of Commons Debates, December 5, 1967, V, p. 5089.
303. F. J. E. Jordan, "The Federal Divorce Act (1968) and the Constitution" (1968) 14 McGill L.J. 209, 261-262.
304. See text supra, PERMANENT ALIMONY, sub-heading "Legislative jurisdiction".
305. See supra, footnote 106.
306. See text infra, sub-headings "Settlement of wife's property", "Variation of marriage settlements".
307. See, e.g., Ontario Family Law Project, Vols. I-III.

The jurisdiction of the court to order an adjustment of property rights (see text, infra) would not be rendered obsolete by the statutory adoption of a community of property regime. The jurisdiction to review property rights would still be necessary, the only difference being that the court would deal with rights held in common instead of rights under the present system of individual ownership: see Law Commission (England), Report on Financial Provision in Matrimonial Proceedings (Law Com. No. 25) (July 24, 1969), para. 67.

308. See Morasch v. Morasch (1960) 40 W.W.R. 50 (Alta.).
309. See Divorce and Matrimonial Causes Act, R.S.B.C., 1960, ch. 118, section 34; Matrimonial Causes Act, R.S.O., 1960, ch. 232, section 3; Queen's Bench Act, R.S.S., 1965, ch. 73, section 35.

As to the power of the court to order a settlement of the wife's property for a term exceeding her life, see Compton v. Compton and Hussey [1960] P. 201, [1960] 3 W.L.R. 476, [1960] 2 All E.R. 70; Style v. Style and Keiller [1953] 3 W.L.R. 613, [1953] 2 All E.R. 836, varied [1954] P. 209, [1954] 2 W.L.R. 306, [1954] 1 All E.R. 442; Midwinter v. Midwinter [1895] P. 93, 62 L.J.P. 77 (Eng.).

As to the jurisdiction of the court to ante-date the settlement of a wife's property, see Style v. Style and Keiller, supra.

310. Compare Matrimonial Proceedings and Property Act (England), 1970, section 4.
311. Moy v. Moy and White [1961] 1 W.L.R. 552, 105 S.J. 179, [1961] 2 All E.R. 204; Lorriman v. Lorriman and Clair [1900] P. 282, 77 L.J.P. 108 (Eng.); March v. March and Palumbo (1867) L.R. 1 P. & D. 440, 36 L.J.P. 108 (Eng.). See also Hughes v. Hughes [1947] O.W.N. 170, [1947] 1 D.L.R. 744.

312. Moy v. Moy and White, *supra*; Hughes v. Hughes, *supra*; Matheson v. Matheson and Hartley [1935] P. 171, 104 L.J.P. 59 (Eng.).
313. Compare Matrimonial Proceedings and Property Act (England), 1970, section 4, which applies irrespective of the ground upon which the decree is based.
314. For criticism of the corresponding situation formerly applying in England, see Law Commission (England), Working Paper No. 9, Matrimonial and Related Proceedings - Financial Relief (April 25, 1967), paras. 79 and 84; Law Commission (England), Report on Financial Provision in Matrimonial Proceedings (Law Com. No. 25) (July 24, 1969), paras. 50 and 66. See now Matrimonial Proceedings and Property Act (England), 1970, section 4.
315. See Divorce Act, S.C., 1967-68, ch. 24, sections 3 and 4 (grounds for divorce) and sections 10 and 11 (corollary relief).

If a husband seeks a divorce pursuant to section 4(1)(e) of the Divorce Act, S.C., 1967-68, ch. 24, the court might refuse to grant a decree by reason of section 9(1)(f) unless the husband executed a settlement of property. Such indirect persuasion could not operate, however, in respect of divorce proceedings instituted pursuant to section 3 or section 4, paragraphs (a) to

... (d) inclusive. The restricted application of section 9(1)(f) to petitions instituted pursuant to section 4(1)(e) would appear anomalous. Compare section 11(1) of the Divorce Act, S.C., 1967-68, ch. 24, whereby the court is empowered to order the payment of a lump sum on dissolution of marriage irrespective of the ground for relief.

316. There would appear no justification for denying the courts a statutory power to order a settlement of property in nullity proceedings: see Law Commission (England), Working Paper No. 9, Matrimonial and Related Proceedings - Financial Relief (April 25, 1967), para. 82; Law Commission (England), Report on Financial Provision in Matrimonial Proceedings, (Law Com. No. 25) (July 24, 1969), paras. 50 and 66. See now Matrimonial Proceedings and Property Act (England), 1970, section 4. See also Matrimonial Causes Act (Australia), 1959-66, section 86.

See Law Com. No. 25, supra, para. 65, wherein it is stated:

"Clearly if there has been a decree of divorce or nullity, the marriage has broken down permanently. So, normally, has it when there is a decree of judicial separation. Admittedly there may be, and sometimes is, a reconciliation after

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

Compare O. Kahn-Freund, "Recent Legislation on Matrimonial

... Property" (1970) 33 M.L.R. 601, 623.

317. Quaere whether the phrase "children of the family" should be statutorily defined to correspond with the definitions of "child" and "children of the marriage" set out in section 2, paragraphs (a) and (b), of the Divorce Act, S.C., 1967-68, ch. 24. See Law Commission (England), Report on Financial Provision in Matrimonial Proceedings (Law Com. No. 25) (July 24, 1969), paras. 71-73, wherein it is recommended that the power to order a settlement should extend to children in respect of whom the parties stand in loco parentis and that no limitation should be imposed on the court's jurisdiction to order a settlement in favour of a child who has attained his majority. See Matrimonial Proceedings and Property Act (England), 1970, section 27.

318. See Law Commission (England), Working Paper No. 9, Matrimonial and Related Proceedings - Financial Relief (April 25, 1967), para. 88:

"Anomalously, although there is power to vary an order for settlement of a wife's property made on a decree for restitution [of conjugal rights] there is no such power in the case of a similar order made ... [on divorce] or ... on a judicial separation."

Compare Law Commission (England), Report on Financial

... Provision in Matrimonial Proceedings (Law Com. No. 25) (July 24, 1969), para. 75:

"An order for out-and-out transfer, like one for payment of a lump sum, should not be variable after it has been executed. Nor should a settlement or variation made on the dissolution or annulment of the marriage. On the other hand, a settlement or variation made on a judicial separation should be variable on a subsequent divorce or rescission of the judicial separation."

For legislative implementation of these latter recommendations, see Matrimonial Proceedings and Property Act (England), 1970, section 9.

319. See supra, footnote 317.

320. Similar statutory provisions have been enacted in other jurisdictions: see Supreme Court Act, R.S.B.C., 1960, ch. 374, section 14; Matrimonial Causes Act, R.S.O., 1960, ch. 232, section 4; Queen's Bench Act, R.S.S., 1965, ch. 73, section 34.

See Redgrove v. Unruh (1961) 35 W.W.R. 682, (1961-62) 30 D.L.R. (2d) 555, *affd.* (1962) 39 W.W.R. 317, (1962) 35 D.L.R. (2d) 688 (Alta. S.C.) (App. Div.); Painter v. Painter (1956-57) 20 W.W.R. 300 (B.C.);

... Burkmar v. Burlmar and Hurst (1953) 8 W.W.R. 397, [1953] 2 D.L.R. 329 (B.C.); Duncan v. Duncan (No. 2) [1950] 1 W.W.R. 1003 (B.C.); Burns v. Burns [1924] 1 W.W.R. 498, [1924] 1 D.L.R. 462 (Alta.); Church v. Church (1888) 20 N.S.R. 468, 9 C.L.T. 254 (application under S.N.S., 1885, ch. 15).

Compare Matrimonial Proceedings and Property Act (England), 1970, section 4, whereby the court may order the variation of a marriage settlement (including a settlement made by will or codicil) on or after a decree of divorce, nullity or judicial separation.

See Ulrich v. Ulrich and Felton [1968] 1 W.L.R. 180, [1968] 1 All E.R. 67 (Eng. C.A.); Radziej (or se Sierkowska) v. Radziej [1967] 1 W.L.R. 659, [1967] 1 All E.R. 944, affd. [1968] 1 W.L.R. 1928, [1968] 3 All E.R. 624 (Eng. C.A.); Cook v. Cook [1962] 3 W.L.R. 441, [1962] 2 All E.R. 811 (Eng. C.A.); Young v. Young [1962] P. 27, [1961] 3 W.L.R. 1109, [1961] 3 All E.R. 695; Compton v. Compton and Hussey [1960] P. 201, [1960] 3 W.L.R. 476, [1960] 2 All E.R. 70; Prescott (otherwise Fellowes) v. Fellowes [1958] P. 260, [1958] 3 W.L.R. 288, [1958] 3 All E.R. 55; Jeffrey v. Jeffrey (No.2) [1952] P. 122, [1952] 1 T.L.R. 825, [1952] 1 All E.R. 790; Lort-Williams v. Lort-Williams [1951] P. 395;

... [1951] 2 T.L.R. 200, [1951] 2 All E.R. 241, Bown v. Bown and Weston [1949] P. 91, [1948] L.J.R. 1912, [1948] 2 All E.R. 778; Joss v. Joss [1943] P. 18, 112 L.J.P. 19 (Eng.); Bowles v. Bowles [1937] P. 127, 106 L.J.P. 68 (Eng.).

321. See Law Commission (England), Report on Financial Provision in Matrimonial Proceedings (Law Com. No. 25) (July 24, 1969), para. 50 (b), wherein it was further observed that this produces the rather odd result that if the husband and wife acquire a home in their joint names there is apparently a settlement which can be varied, while if the house is owned by one alone, even though as a result of a gift from the other, there is not: see Brown v. Brown [1959] P. 86, [1959] 2 W.L.R. 776, [1959] 2 All E.R. 266 (Eng. C.A.); Cook v. Cook, *supra*, footnote 320; compare Redgrove v. Unruh, *supra*, footnote 320; see also Prescott (otherwise Fellowes) v. Fellowes, *supra*, footnote 320. See Power on Divorce (2nd ed., 1964), pp. 545-546.

322. [1929] P. 225, at 232, 98 L.J.P. 105, at 108 (Eng.).

323. See also Smith v. Smith, 114 L.J.P. 30, [1945] 1 All E.R. 584, at 586; Worsley v. Worsley and Wignall (1869) L.R. 1 P. & D. 648, at 651, 20 L.T. 546 (Eng.).

An absolute assignment of property is not a settlement

- ... and the court has no jurisdiction to vary its provisions:
Redgrove v. Unruh (1961) 35 W.W.R. 682, (1961-62) 30
 D.L.R. (2d) 555, affd. (1962) 39 W.W.R. 317, (1962) 35
 D.L.R. (2d) 688 (Alta. S.C.) (App. Div.); Prescott
otherwise Fellowes) v. Fellowes [1958] P. 260, [1958] 3
 W.L.R. 288, [1958] 3 All E.R. 55.
324. Princep v. Princep [1929] P. 225, 98 L.J.P. 105 (Eng.);
 and see cases cited in footnote 325, infra.
325. Redgrove v. Unruh, supra; Best v. Best [1956] P. 76,
 [1955] 3 W.L.R. 334, [1955] 2 All E.R. 839; Egerton v.
Egerton [1949] W.N. 301, [1949] L.J.R. 1683, [1949]
 2 All E.R. 238; Colclough v. Colclough and Fisher [1933]
 P. 143, 102 L.J.P. 87 (Eng.); Alston v. Alston [1929]
 P. 311, 98 L.J.P. 155 (Eng.); Princep v. Princep, supra.
326. Ulrich v. Ulrich and Fenton, supra; Redgrove v. Unruh,
supra; Best v. Best, supra; Tomkins v. Tomkins (No. 2)
 [1948] P. 170, 117 L.J.R. 1028, [1948] 1 All E.R. 237.
327. Lort-Williams v. Lort-Williams, supra; Constantinidi v.
Constantinidi and Lance [1905] P. 253, 74 L.J.P. 122 (Eng.);
Chetwynd v. Chetwynd (1865) L.R. 1 P.D. 39, 35 L.J.P. 21
 (Eng.).

"[The power to vary a settlement] is said to be
 exercisable on precisely the same principles as the power
 to order a settlement [Ulrich v. Ulrich and Fenton [1968]

- ... 1 W.L.R. 180, [1968] 1 All E.R. 67 (Eng.C.A.)] - yet
the proceedings in which it can be exercised are
 not the same and it arises only if there is settled
 property (so that the property of the husband outside
 any settlement cannot be touched)": Law Commission
 (England), Report on Financial Provision in Matrimonial
 Proceedings (Law Com. No. 25) (July 24, 1969), para. 50(b).
328. Benyon v. Benyon and O'Callaghan (1890) 15 P.D. 29, 54,
 59 L.J.P. 39 (Eng.); Gladstone v. Gladstone (1876) L.R.
 1 P.D. 442, 45 L.J.P. 82 (Eng.). See also Newte v.
Newte and Keen [1933] P. 117, 102 L.J.P. 44(Eng.); Taylor
v. Taylor (1926) 16 L.T. Jo. 236 (Eng.).
329. See text supra, sub-heading "Variation of Marriage
 settlements".
330. Re Wombwell's Settlement; Clerke v. Menzies [1922] 2 Ch. 298,
 92 L.J. Ch. 18 (Eng.); Re Garnett (1905) 74 L.J. Ch. 570,
 93 L.T. 117 (Eng.); Dormer (otherwise Ward) v. Ward [1901]
 P. 20, 69 L.J.P. 144 (Eng.). Compare Newbould v. A.-G.
 [1931] P. 75, 100 L.J.P. 54 (Eng.). See also Re Ames'
Settlement; Dinwiddy v. Ames [1946] Ch. 217, [1946] 1 All
 E.R. 689.
331. See Re Eaves; Eaves v. Eaves [1940] Ch. 109, at 121, [1939]
 4 All E.R. 260.
332. See Dormer (otherwise Ward) v. Ward, supra; Re Ames'

... Settlement; Dinwiddy v. Ames, supra. See also Sharpe (otherwise Morgan) v. Sharpe [1909] P. 20, 78 L.J.P. 21 (Eng.); Attwood (otherwise Pomeroy) v. Attwood [1903] P. 7, 71 L.J.P. 129 (Eng.).

333. See supra, footnote 316.

334. See O. Kahn Freund, loc. cit., supra, footnote 316.

335. See Law Commission (England), Report on Financial Provision in Matrimonial Proceedings (Law Com. No. 25) (July 24, 1969), para. 66.

As to the desirability of re-defining "children of the marriage", see supra, footnote 317.

336. Ibid. See now Matrimonial Proceedings and Property Act (England), 1970, section 4(c). As to the former portion, see Garratt v. Garratt and Garratt [1922] P. 230, 91 L.J.P. 207 (Eng.).

337. See Smith v. Smith [1970] 1 W.L.R. 155 (Eng.). See also Law Com. No. 25, supra, para. 74:

"74. There is one further point that arises in relation to variation of settlements. Not infrequently the variation takes the form of deleting the interests of the guilty party. Yet it is not clear how this can always be legally justified if all that the court can

... do is vary for the benefit of the spouses and the children. Suppose, for example, that the settlement is on W for life, then for H for life, then for the children, and then for W's next of kin. And suppose that there are no children and that W divorces H because of his adultery. It seems clear that the court should have power to vary the settlement by deleting H's life interest (indeed it always seems to be assumed that it already has power to do so). Yet this cannot conceivably confer any financial benefit on W herself, or on children because there are no children. We therefore recommend that any legislative [amendment] should expressly state that the court, in addition to its power to vary for the benefit of the spouses and children, always has power to extinguish the interest of either."

For legislative implementation of the above recommendation, see Matrimonial Proceedings and Property Act (England), 1970, section 4(d).

338. See Law Com. No. 25, supra, footnote 318.

339. Matrimonial Proceedings and Property Act (England), 1970, section 9(2)(d) and 9(4).

340. See Thompson v. Thompson [1961] S.C.R. 3, (1961) 26 D.L.R. (2d) 1. Compare Trueman v. Trueman, [1971] 2 W.W.R. 688 (Alta. S.C.) (App. Div.).
341. A corresponding power should also be statutorily conferred in proceedings for alimony as an independent remedy: see O. Kahn-Freund, "Recent Legislation on Matrimonial Property" (1970) 33 M.L.R. 601, 623.
342. Law Commission (England), Report on Financial Provision in Matrimonial Proceedings (Law Com. No. 25) (July 24, 1969), paras. 68-70, text infra.
343. Matrimonial Proceedings and Property Act (England), 1970, section 4(a).
344. O. Kahn Freund, loc. cit., supra, footnote 341, at pp.627-628.
345. Family Court Act, R.S.A., 1970, ch. 133, sections 3 and 4.
346. Domestic Relations Act, R.S.A., 1970, ch. 113, section 27(2), (3) and (4).
347. Domestic Relations Act, R.S.A., 1970, ch. 113, section 27(1). The significance of this circular definition is somewhat elusive but it is presumably intended to include the husband who terminates the matrimonial cohabitation without just cause.

348. Ibid.
349. Domestic Relations Act, R.S.A., 1970, ch. 113, section 7(2).
350. J.B. v. A.W.B. [1958] O.R. 281, [1958] O.W.N. 104, (1958) 13 D.L.R. (2d) 218 (Ont.C.A.). Compare Divorce Act, S.C., 1967-68, ch. 24, section 4(1)(e); Pybus v. Pybus (1970) 72 W.W.R. 315 (B.C.); Seminuk v. Seminuk (1970) 72 W.W.R. 304, (1970) 10 D.L.R. (3d) 590 (Sask.C.A.); Reid v. Reid (1969) 71 W.W.R. 375, (1970) 9 D.L.R. (3d) 306 (B.C.); Rousell v. Rousell (1969) 69 W.W.R. 568, (1969) 6 D.L.R. (3d) 639 (Sask.); Galbraith v. Galbraith (1969) 69 W.W.R. 390, (1969) 5 D.L.R. (3d) 543 (Man. C.A.).
351. Domestic Relations Act, R.S.A., 1970, ch. 113, section 29(1).
352. Ibid, section 29(2).
353. Family Court Act, R.S.A., 1970, ch. 133, section 7.
354. Ibid, section 8(1).
355. Ibid, section 8(2).
356. See Domestic Relations Act, R.S.A., 1970, ch. 113, Part 4. See also Wakshinsky v. Wakshinsky [1924] 2 W.W.R. 1174, [1924] 4 D.L.R. 231 (Man.).
357. Domestic Relations Act, R.S.A., 1970, ch. 113, section 27(2) (3) and (4).

As to interim orders, see text to and contents of footnotes 354 and 355, supra.

As to application by welfare worker in cases where the province or municipality has provided economic assistance to family dependants, see text to and contents of footnote 353, supra.

358. Domestic Relations Act, R.S.A., 1970, ch. 113, section 27(6).
359. Ibid, section 27(5).
360. Family Court Act, R.S.A., 1970, ch. 133, section 10(1).
361. See Re Ross (A Bankrupt) (1960-61) 33 W.W.R. 73, 67 Man. R. 131. Compare Divorce Act, S.C., 1967-68, ch. 24, section 11(1), text infra.
362. Domestic Relations Act, R.S.A., 1970, ch. 113, section 27(7).
363. See Divorce Act, S.C., 1967-68, ch. 24, section 2(a) and (b). See also Payne, "The Divorce Act (Canada), 1968" (1969) 17 Chitty L.J. 249, at 250 and 325.
364. Domestic Relations Act, R.S.A., 1970, ch. 113, section 28(1), (2) and (3).
365. See Domestic Relations Act, R.S.A., 1970, ch. 113, section 28(4); Criminal Code, section 694(2).

As to the power of the court to order payment of

- arrears by instalments, see Criminal Code, section 694(3) - (10).
366. Domestic Relations Act, R.S.A., 1970, ch. 113, section 28(5).
367. See Criminal Code, sections 733-742.
368. Domestic Relations Act, R.S.A., 1970, ch. 113, section 27(8). As to the relevant procedure and powers of the appellate court, see ibid, section 27(9) - (16).
369. See W. H. Hurlburt, Q.C., A Working Paper on The Courts and Family Law (Institute of Law Research and Reform, Alberta), (January, 1971).
370. See text supra, CONCLUSIONS AND RECOMMENDATIONS FOR REFORM OF THE LAW OF ALIMONY, sub-heading "Family Counselling and Conciliation Procedures".
371. Compare Divorce Act, S.C., 1967-68, ch. 24, sections 7, 8, and 21.
372. Compare Family Court Act, R.S.A., 1970, ch. 133, sections 8 and 10(5). See also Matrimonial Proceedings (Magistrates' Courts) Act (England), 1960, section 6.
373. See Report of Canadian Welfare Council on Family Desertion (1961), at p. 14, para. 22.
374. Ibid.

375. See Report of The Joint Committee on Legal Aid (Province of Ontario), March 1965, at pp.62-65, 88-89. See also Report of Canadian Welfare Council on Family Desertion (1961), at pp.11 and 12, and Draft Statute of Canadian Welfare Council, section 40.
376. See text supra, PROTECTION ORDERS, sub-heading "Application by wife".
377. The Law Commission (England), Report on Financial Provision in Matrimonial Proceedings (Law Com. No. 25) (July 24, 1969), para. 21.
378. Pursuant to sections 31-34 of the Domestic Proceedings Act (New Zealand), 1968, the wife has a duty to maintain her husband if he is unable to provide necessaries for himself.
379. See text supra, CONCLUSIONS AND RECOMMENDATIONS FOR REFORM OF THE LAW OF ALIMONY, sub-heading "The offence concept ".
380. See text supra, PROTECTION ORDERS, sub-heading "Application by wife".
381. Compare J.B. v. A.W.B. and other cases cited in footnote 350, supra. See Domestic Proceedings Act (New Zealand), 1968, section 30, text supra. Compare Matrimonial Proceedings (Magistrates' Courts) Act (England), 1960,

... section 7.

382. See Domestic Proceedings Act (New Zealand), 1968, text supra. See Report of The Royal Commission on Marriage and Divorce (England), 1951-1955, Cmd. 9678 (1956), paras. 1042-1050. See also Draft Statute proposed by Canadian Welfare Council in its Report on Family Desertion (1961):

"5. Upon complaint in writing that any husband who has property or is in receipt of any wages, salary or other remuneration is by habit of drunkenness or irresponsibility, destroying, dissipating, or wasting the property, wages, salary or remuneration so as to expose his wife or their children to the danger of destitution or hardship, the court shall issue a summons requiring the husband to appear at the time and place mentioned in the summons and show cause why he should not be ordered to pay a sum sufficient for the maintenance of the wife and children."

383. See Cmd. 9678 (1956), para. 1049.

384. See text to and contents of footnote 349, supra.

385. Cmd. 9678 (1956), para. 1024.

386. See text to and contents of footnotes 346 and 361, supra.
387. See Schlesinger, "Women With Two Careers":
"In 1963, 1,858,000 women were in the [Canadian] labour force, comprising 28 per cent of our total labour force. Of these women, roughly half were married, 40 per cent single, and 10 per cent were widowed, separated and divorced."
388. It is probable that such revision of the law would not result in any significant demand for maintenance by husbands but such relief should nevertheless be available in appropriate cases. See footnote 156, supra.
389. See Matrimonial Proceedings (Magistrates' Courts) Act (England), 1960, section 2(1)(h), as amended by Maintenance Orders Act (England), 1968, section 1. Compare Domestic Proceedings Act (New Zealand), 1968, section 35(2).
390. Matrimonial Proceedings (Magistrates' Courts) Act (England), 1960, section 2(1)(c) and 2(2)(b), as amended by Maintenance Orders Act (England), 1968, section 1. Compare Domestic Proceedings Act (New Zealand), 1968, section 31, whereby the court may order maintenance in favour of a husband "if it is satisfied that having regard to his health, his duty of care to any child

- ... of the family in his custody, or to other circumstances he is unable to provide the necessities of life for himself."
391. See Vernier, American Family Law (1935), Vol. 3 §161.
392. As between husband and wife the family expense statutes do not operate to shift the primary liability for support from the husband nor to apportion the burden between the spouses: see Taylor v. Taylor, 54 Ore. 560, 103 Pac.524 (1909) and compare Truax v. Ellett, 234 Iowa 1217, 15 N.W. 2d 36 (1944). See also Paulsen, "Support Rights and Duties Between Husband and Wife" (1955-56) 9 Vanderbilt L. Rev. 709, at 712.
393. See text supra, CONCLUSIONS AND RECOMMENDATIONS FOR REFORM OF THE LAW OF ALIMONY, sub-heading "Determining the amount of alimony".
394. See Draft Statute, section 6, proposed in the Report of the Canadian Welfare Council on Family Desertion (1961):
- "6. ...Before making a decision on the amount of an order for payment, the court may require that a complete report on the financial circumstances and needs of the deserted wife and children and on the husband, be prepared by the family court worker, or, where there is no family court, by a competent welfare authority. Where

- ... the welfare department has an interest in the case it may also prepare a report on the circumstances of the aggrieved party."
395. See text infra, sub-heading "Adultery of complainant spouse".
396. See text supra, sub-heading "The offence concept".
397. See text to and contents of footnote 396, supra.
398. Compare Divorce Act, S.C., 1967-68, ch. 24, section 11(1), whereby maintenance may be awarded in favour of a spouse notwithstanding the commission of adultery. See Payne, Digest of Cases and Materials on The Divorce Act, 1968 (Revised Edition, 1970) pp.177-179. Compare also Domestic Proceedings Act (New Zealand), 1968, section 28, text supra.
399. See Williams v. Williams (1958) 13 D.L.R. (2d) 139, 120 C.C.C. 262 (Ont. Co. Ct.). Compare Tremaine v. Tremaine (1970) 10 D.L.R. (3d) 358 (N.S. Co. Ct.).
400. See text supra, CONCLUSIONS AND RECOMMENDATIONS FOR REFORM OF THE LAW OF ALIMONY, sub-heading "Separation agreements.
401. Domestic Relations Act, R.S.A., 1970, ch. 113, section 27(4).

402. See also Domestic Proceedings Act (New Zealand), 1968, section 31 (order in favour of husband), and section 39 (order in favour of child).
403. Matrimonial Proceedings (Magistrates' Courts) Act (England), 1960, section 2(1)(a).

Such a non-cohabitation provision while in force has the effect in all respects of a decree of judicial separation: ibid.

The magistrates' court has an absolute discretion whether to include a non-cohabitation provision in a matrimonial order, and there is no presumption in favour of including it even in a case of persistent cruelty. In exercising the discretion the three leading considerations which the court ought to bear in mind are (i) whether the provision is necessary for the protection of the complainant; (ii) whether the case is a more than ordinarily serious case; and (iii) whether there is a reasonable prospect of a reconciliation." Corton v. Corton [1965] P. 1, [1962] 3 All E.R. 1025. See also Squires v. Squires (1946) 62 T.L.R. 631, 44 L.G.R. 274 (Eng.).

404. Report of The Royal Commission on Divorce and Matrimonial Causes (England), 1909-1912, Cmd. 6478 (1912), para. 145.
405. Ibid, paras. 161, 162.

406. Ibid, para. 160.
407. Report of The Royal Commission on Marriage and Divorce (England), 1951-1955, Cmd. 9678 (1956), para. 1036.
408. Four members dissented from this recommendation except in so far as it applies to a separation order made on the ground of a spouse's conviction for a sexual offence against a child: Cmd. 9678 (1956), para. 1037, footnote 15.
409. Ibid, para. 1037.
410. Ibid, para. 1038.
411. Ibid, para. 1065.
412. Compare Wives' and Children's Maintenance Act, R.S.M., 1970, ch. W170, sections 13(a) and (f), 14, 18(a) and (d), and 19, infra, footnote 416. Compare also Domestic Proceedings Act (New Zealand), 1968, section 23, text supra, JUDICIAL SEPARATION.
413. See Cmd. 9678 (1956), paras. 687-698 and pp. 319-320, paras. 78-81. See now Matrimonial Homes Act (England), 1967, as amended by Matrimonial Proceedings and Property Act (England), 1970, section 38. See also Matrimonial Proceedings and Property Act (England), 1970, section 4. And see Kahn-Freund, "Recent Legislation on Matrimonial Property" (1970) 33 M.L.R. 601. Compare the more limited

... protection extended by the Dower Act, R.S.A., 1970,
ch. 114.

414. Cmd. 9678 (1956), paras. 657-658.

415. See text supra, sub-heading "Separation orders".

416. See Wives' and Children's Maintenance Act, R.S.M., 1970,
ch. W170, sections 13(a) and (f) and 14, which provide
as follows:

"13. The judge or magistrate.... may make an
order or orders containing any or all of the
following provisions:

(a) That the wife be no longer bound to
cohabit with her husband....

(f) That the husband shall not enter upon
any premises where the wife is living
apart from her husband.

14.(1) Where the order made contains a prov-
ision under clause (f) of section 13, the
husband shall not thereafter enter upon the
premises.

(2) A husband who violates this section is
guilty of an offence and is liable, on summary
conviction, to a fine of not more than one
hundred dollars."

For corresponding statutory provisions operating for
the protection of the husband, see ibid, sections 18(a)
and (d) and 19(1) and (2).

417. Compare Maintenance Order Act, R.S.A., 1970, ch. 222.

418. See Ross v. Polak [1971] 2 W.W.R. 241, at 254 (Alta. S.C.)

- ... (App. Div.); McKenzie v. McKenzie (1970) 73 W.W.R. 206 (B.C.C.A.). Compare Wives' and Children's Maintenance Act, R.S.M., 1970, ch. W170, section 3(1); Vickell v. Vickell [1971] 1 W.W.R. 552 (Man. C.A.). Compare Maintenance and Recovery Act, R.S.A., 1970, ch. 223, section 20.
419. See also Domestic Proceedings Act (New Zealand), 1968, sections 35-59. See P.H.R. Webb, "Maintenance of Children under the Domestic Proceedings Act 1968" [1970] N.Z.L.J. 85.
420. Matrimonial Proceedings (Magistrates' Courts) Act (England), 1960, section 16.
421. Ibid, section 2(1)(d).
422. Ibid, section 2(1)(e) and (f).
423. Ibid, section 2(1)(h), as amended by Maintenance Orders Act (England), 1968, section 1.
424. Ibid. See Roberts v. Roberts [1962] P. 212, [1962] 3 W.L.R. 448, [1962] 2 All E.R. 967.
425. Matrimonial Proceedings (Magistrates' Courts) Act (England), 1960, section 4(1)(a). A similar duty is imposed on the court in respect of any application to revoke a matrimonial order containing provisions relating to custody,

... care or supervision, or to vary an order by the addition or alteration of provisions relating to custody: ibid, section 4(1) (b) and (c).

426. Ibid, section 4(2).

427. See Family Court Act, R.S.A., 1970, ch. 133, section 10; Wensley v. Orchard, Unreported, July 24, 1970 (Alta. Fam. Ct.) (Judge Hewitt: "... I hold that the Family Court does not have jurisdiction to entertain [an] application [for custody by the father of an illegitimate child].").

Compare Divorce Act, S.C., 1967-68, section 11(1) and section 2(a) and (b).

See Report of The Committee on the Age of Majority (England), Cmnd. 3342 (1967), pp.69-71, wherein it is concluded that the question of maintenance should not be affected by the age of majority and that the courts should retain the discretionary power to make maintenance orders for education or otherwise in respect of children who have attained majority. See also Institute of Law Research and Reform (Alberta), Report on Age of Majority (1970), Part IV. Compare Guardianship of Minors Act (England), 1971, section 12.

428. The Royal Commission on Marriage and Divorce (England), 1951-1955 opposed the imposition of such a duty upon the magistrates' courts in England on the ground that

... it would introduce the possibility of delay and thus reduce the efficacy of the summary procedure available in such courts: Cmd. 9678 (1956), para. 409. This opinion, however, was not shared by The Departmental Committee on Matrimonial Proceedings in Magistrates' Courts (England), Cmd. 638 (1959), at pp. 12-13 and 34. See also Matrimonial Proceedings (Magistrates' Courts) Act (England), 1960, section 4. It is submitted that any delay ensuing from the imposition of such a statutory duty is but a reasonable price to pay for the protection and welfare of children and that difficulties encountered by reason of delay should be met by enactment of a statutory provision empowering the court to make interim orders for relief. Such provision has been included in the Matrimonial Proceedings (Magistrates' Courts) Act (England), 1960, section 6.

429. See text supra, CONCLUSIONS AND RECOMMENDATIONS FOR REFORM OF THE LAW OF ALIMONY, sub-heading "Family Court orders; effect of, or on, alimony proceedings".

430. See Armich v. Armich [1971] 1 W.W.R. 207, at 211 (B.C.C.A.), wherein McFarlane, J.A. stated:

"I am accordingly of the opinion that
 an order made by a Family Court on application made by a woman when she had the status of a married woman continues in effect after her

... marriage is dissolved, and that the powers of the Provincial Court of British Columbia, Family Division, to vary or rescind such an order and to cancel arrears also remain in effect unless and until the Supreme Court or a judge thereof has made or refused an order for alimony or maintenance of any kind. It should be noted that I do not deal with the rights of a child under the statute; no such question arises in this appeal."

See contra, Hitsman v. Hitsman [1970] 2 O.R. 573, wherein Wright, J. held that an order made in favour of the wife under the Deserted Wives' and Childrens' Maintenance Act, R.S.O., 1960, ch. 105 ceases to have effect upon the subsequent dissolution of the marriage.

431. See Domestic Proceedings Act (New Zealand), 1968, section 81.
432. Magistrates' Courts Act (England), 1952, section 52(2). See also Matrimonial Proceedings (Magistrates' Courts) Act (England), 1960, section 13(2).
433. Magistrates' Courts Act (England), 1952, section 52(4).
434. Ibid, section 52(3).
435. Ibid.

436. See text supra, sub-heading "Legal aid". See contents of footnote 438, infra.
437. See text supra, CONCLUSIONS AND RECOMMENDATIONS FOR REFORM OF THE LAW OF ALIMONY, sub-heading "Payment of maintenance and enforcement of support obligations through Department of Social Development".
438. Compare Ontario Family Law Project, Vol. XII, pp.591-609, wherein it is recommended that an assessment branch should be established in the Family Courts of Ontario to determine the quantum of maintenance and assume the primary obligation for the payment thereof with a right of recourse against the deserting spouse or parent.
- See text to footnote 436, supra.
439. See Family Court Act, R.S.A., 1970, ch. 133, section 7.
440. Compare Domestic Relations Act, R.S.A., 1970, ch. 113, section 28(5).
441. See Report of The Royal Commission on Marriage and Divorce (England), 1951-1955, Cmd. 9678 (1956), paras. 594, 1111.
442. See e.g. Wives' and Children's Maintenance Act, R.S.B.C., 1960, ch. 409, section 6 (bond in sum not exceeding \$500 with or without sureties or deposit not exceeding \$250); Wives' and Children's Maintenance Act, R.S.M., 1970,

- ... ch. W 170, section 26 (as in B.C., supra); Deserted Wives' and Children's Maintenance Act, R.S.S., 1965, ch. 341, sections 12, 13 (bond in sum not exceeding \$1,000 with sufficient sureties approved by the court or deposit not exceeding \$1,000).
443. Ibid.
444. Ibid.
445. Such statutory powers are not intended to preclude maintenance being awarded by way of a lump sum in addition to or in lieu of periodical payments: see text supra, sub-heading "Lump sum".
446. See text supra, CONCLUSIONS AND RECOMMENDATIONS FOR REFORM OF THE LAW OF ALIMONY, sub-heading "Duration of orders; orders to secure".
447. See text supra, CONCLUSIONS AND RECOMMENDATIONS FOR REFORM OF THE LAW OF ALIMONY, sub-heading "Disposition of property by spouse".
448. See e.g. Wives' and Children's Maintenance Act, R.S.B.C., 1960, ch. 409, section 12; Wives' and Children's Maintenance Act, R.S.M., 1970, ch. W170, section 28(7) and (8); Deserted Wives' and Children's Maintenance Act, R.S.S., 1965, ch. 341, section 16.

449. Ibid.
450. Compare Domestic Relations Act, R.S.A., 1970, ch. 113, section 21, text supra, CONCLUSIONS AND RECOMMENDATIONS FOR REFORM OF THE LAW OF ALIMONY, sub-heading "Registration of alimony judgments against land". There would appear to be no justification for distinguishing between alimony judgments and protection orders in this context.
451. Bombardier v. Bombardier (1952) 6 W.W.R. 431 (Alta. Dist. Ct.). Compare Deserted Wives' and Children's Maintenance Act, R.S.O., 1960, ch. 105, section 16, whereby an order for maintenance may be filed with the clerk of any Division Court and enforced by garnishee proceedings, by execution and by judgment summons as in the case of a judgment in the Division Court.
452. See text supra, CONCLUSIONS AND RECOMMENDATIONS FOR REFORM OF THE LAW OF ALIMONY, sub-heading "Priority of alimony order over other debts; effect of bankruptcy or insolvency".

See also section 37 of the Draft Statute proposed by the Canadian Welfare Council in its Report on Family Desertion (1961) which provides as follows:

"37.(1) The fact that a husband or parent is in debt or has paid debts shall not be a

... defence to proceedings to obtain or to enforce a maintenance order.

(2) Amounts paid as family maintenance under court order shall not be considered as part of a man's income for garnishee or attachment proceedings."

As to the privileged position of alimony and maintenance orders with respect to enforcement by seizure of the debtor's property, see Exemptions Act, R.S.A., 1970, ch. 129, section 9(b).

453. See text supra, PROTECTION ORDERS, sub-heading "Enforcement and variation of orders".

454. Compare Magistrates' Courts Act (England), 1952, section 75:

"75. Where a person is committed to custody under this part of this Act for failure to pay a sum due under an affiliation order or order enforceable as an affiliation order, then, unless the court that commits him otherwise directs, no arrears shall accrue under the order while he is in custody."

455. See e.g. Minutes of Evidence of The Royal Commission on Marriage and Divorce (England), 1951-55, at p. 240, para. 69.

456. A similar conclusion is presented by The Royal Commission on Marriage and Divorce (England), 1951-55:

- ... see Cmd. 9678 (1956), para. 1108, and Minutes of Evidence, p. 242, para. 72; p. 762, paper 87; p.794, para. 14.
457. See text supra, sub-heading "Recovery and remission of arrears".
458. See text supra, sub-heading "Payment through and enforcement by an officer of the court".
459. See Minutes of Evidence of The Royal Commission on Marriage and Divorce 1951-55, at p. 240, para. 69; p. 332, para. 37; and p. 335, para. 2632. See also Statutes of State of Michigan, 1948, § 552-201, as amended by 1954, Act 6, supra, footnote 246.
460. "'Officer' means a probation officer appointed under The Probation Act or The Juvenile and Family Courts Act or a local director of a children's aid society, and includes any official of the Department of Public Welfare or of any municipality who is designated by the Minister of Public Welfare as an officer": Deserted Wives' and Children's Maintenance Act, R.S.O., 1960, ch. 105, section 4(1). See also ibid, section 4(3).
461. Ibid, section 4(2).
462. Ibid, section 4(4).

463. Section 36 of the Domestic Relations Act, R.S.A., 1970, ch. 113 provides as follows:

"36.(1) If a person persistently and falsely alleges that he is married to another person, that other person in an action of jactitation of marriage may obtain a judgment forbidding the making of the allegations.

(2) No such judgment shall be granted in favour of a person who has at any time acquiesced in the making of the allegations."

464. See Report of The Royal Commission on Marriage and Divorce (England), 1951-1955, Cmd. 9678 (1956), para. 326.

465. See Judicature Act, R.S.A., 1970, ch. 193, section 15; Ancelle v. Ancelle [1919] 1 W.W.R. 620 (Alta.).

~~It is submitted that more specific statutory~~
 authority should be enacted in the Province of Alberta. Consideration might well be given to introducing a statutory provision corresponding to section 15(2) of the Judicature Act, R.S.O., 1960, ch. 197, which provides:

"15.(2) No action or proceeding is open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right, whether or not any consequential ~~relief is or could be claimed.~~

See generally, Ontario Family Law Project, Vol. VII, pp.291-306 and 354-364. See also Matrimonial

... Proceedings Act (New Zealand), 1963-68, section 17.

466. Compare Report of The Royal Commission on Marriage and Divorce (England), 1951-1955, Cmd. 9678 (1956), para. 326:

"It was, therefore, suggested to us that if the court has power to make declaratory judgments as to status ..., it is unnecessary to retain the remedy of jactitation of marriage. We think, however, that it may on occasion still be useful and that it should remain."