

The Law Commission

(LAW COM. No. 23)

PROPOSAL FOR THE ABOLITION OF THE MATRIMONIAL REMEDY OF RESTITUTION OF CONJUGAL RIGHTS

*Laid before Parliament by the Lord High Chancellor
pursuant to section 3(2) of the Law Commissions Act 1965*

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The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law. The Commissioners are—

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THE LAW COMMISSION

Item XIX of the Second Programme

**PROPOSALS FOR THE ABOLITION OF THE MATRIMONIAL
REMEDY OF RESTITUTION OF CONJUGAL RIGHTS**

*To the Right Honourable the Lord Gardiner,
the Lord High Chancellor of Great Britain.*

INTRODUCTION

1. Under Item XIX of our Second Law Reform Programme, which has as its aim the eventual codification of family law, the Law Commission has made an examination of the matrimonial remedy of restitution of conjugal rights. As a result of a preliminary examination we came to the provisional conclusion that the remedy should be abolished and in February 1969 we issued our Working Paper No. 22 which was circulated to the Bar Council, The Law Society and many other bodies and individuals. In this Working Paper we set out shortly the historical background to the remedy and the arguments for and against its retention and we invited comments from those whom we consulted. We have taken careful account of the comments which we have received and would like to record our appreciation of the help we have derived from them in reaching our final conclusions.

HISTORY

2. In the Ecclesiastical Courts desertion was not a matrimonial offence and the only remedy available to a deserted spouse was to obtain a decree of restitution of conjugal rights which ordered the deserter to return and to render conjugal rights. Disobedience to the decree was punished by excommunication until the Ecclesiastical Courts Act 1813, which substituted imprisonment not exceeding six months for the sentence of excommunication. By the Matrimonial Causes Act 1884 failure to comply with a restitution decree ceased to be punishable by imprisonment; instead, such failure to comply was deemed to be desertion (known as "statutory desertion"), entitling either spouse to an immediate decree of judicial separation and, if coupled with the husband's adultery,¹ entitling the wife to an immediate divorce. The Matrimonial Causes Act 1923 gave the wife the right to divorce the husband for adultery alone, so that it thereafter became unnecessary for her to rely on his failure to comply with a restitution decree in order to obtain a divorce. The Matrimonial Causes Act 1884 was repealed by the Supreme Court of Judicature (Consolidation) Act 1925 and, while re-enacting that failure to comply with the decree was to be a ground for judicial separation (section 185), the provision in the 1884 Act that such failure was deemed to constitute desertion, was not re-enacted.

¹ Under the Matrimonial Causes Act 1857 the husband could divorce the wife for adultery, but the wife could not divorce the husband for adultery unless she established, in addition to the adultery, incest, bigamy, cruelty or two years' desertion; the wife could also divorce the husband for rape, sodomy and bestiality: s. 27.

PRESENT POSITION

3. The law has remained unaltered since 1925.² The present position is that where the respondent has failed to comply with a decree of restitution of conjugal rights—

- (a) the petitioner may at once present a petition for judicial separation ;³
- (b) a wife petitioner may obtain by way of financial provision for herself either permanent alimony or periodical payments, which latter payments can be secured ;⁴
- (c) a husband petitioner can obtain for himself and the children of the marriage an order for periodical payments out of the profits of a trade or earnings of the wife and, if she has property, a settlement of that property or a part of it ;⁵
- (d) the Court may make orders for the custody, maintenance and education of any children of the family ;⁶
- (e) though failure to comply with a restitution decree does not automatically put the respondent into desertion, it is treated as *prima facie* evidence of desertion.⁷

4. The remedy of restitution of conjugal rights is to-day seldom used: in the three years 1965–1967 there were 105 petitions (60 by husbands and 45 by wives) and 31 decrees made (11 granted to husbands and 20 to wives) making an annual average of 35 petitions filed and 10 decrees made. A detailed examination⁸ of the files of 64 of the 68 petitions filed in London during the three years 1965–1967 (the remaining 4 files were not available) gave the following result—

Result of proceedings

Petitions resulting in decrees of restitution (4 to husbands, 7 to wives)	11
Petitions which led to proceedings for divorce or judicial separation, including petitions dismissed by consent or at petitioner's request to make way for such further proceedings	21
Petitions to which answers (alleging just cause, cruelty, etc.) were filed but the petitions were either dismissed by consent or nothing further happened	4
Petitions dismissed for want of prosecution	1
Petitions filed but nothing further happened	19
Petitions dismissed by consent but nothing further happened	8
Total: 35 petitions by husbands, 29 by wives	64

² See Matrimonial Causes Act 1937, s. 5; Matrimonial Causes Act 1950, ss. 14, 15; Matrimonial Causes Act 1965, ss. 12, 13. Both Australia (Matrimonial Causes Act (Aus.) 1959–66, s. 60) and New Zealand (Matrimonial Proceedings Act (N.Z.) 1963, as amended by Matrimonial Proceedings Amendment Acts 1966 and 1968, s. 16) have retained the right to claim restitution of conjugal rights.

³ Matrimonial Causes Act 1965, s. 12.

⁴ *Ibid.*, s. 21(1), (2).

⁵ *Ibid.*, s. 21(3).

⁶ *Ibid.*, s. 34; the section calls them "relevant children".

⁷ *Nanda v. Nanda* [1968] P. 351, 353.

⁸ This examination was carried out with the permission of the Senior Registrar on the understanding that its purpose was to obtain statistical information only and that any other information disclosed by the files was to be treated confidentially.

Financial Provisions

No husband applied for a financial provision.

Of the 29 wives who petitioned, 12 applied for alimony pending suit or, where they obtained a decree, for permanent alimony or periodical payments, and 17 (including 2 who obtained a decree) did not apply for any financial provision.

ARGUMENTS FOR RETENTION OF REMEDY

5. The arguments for retention of the remedy of restitution of conjugal rights may be summarised as follows—

- (a) Though the decree may have the effect of establishing desertion and of enabling a spouse to obtain financial relief, these consequences are only incidental. The real purpose of the proceedings is to persuade the deserting spouse to return and they are, as it were, the last resort left to a spouse who has tried without success all other methods to preserve the marriage.⁹ The fact that out of 29 petitions brought by wives in 12 cases only did wives seek and obtain an order for their own financial support tends to indicate that the majority of petitions are not brought for financial ends. One petition was dismissed at the hearing at the petitioner's request, suggesting the possibility that that case at least achieved its object in persuading the husband to return; the 8 cases in which nothing happened after the filing of the petition and the petition was dismissed by consent also suggest the possibility that reconciliations took place. If recourse to legal proceedings results in some marriages—however few—being saved, such proceedings should not be abolished.
- (b) It was argued before the Morton Commission¹⁰ that there might be circumstances where a wife could not obtain a maintenance order on the ground of the husband's wilful neglect to maintain and yet would be able to obtain a decree for restitution of conjugal rights¹¹ and an ancillary order for financial provision; that husbands would lose the right to apply for financial provision for themselves and the children; and that a decree was useful in putting on record the circumstances of the separation if these were not altogether clear. The Morton Commission's conclusion was that since there were members of the legal profession in favour of retention and since there were arguments "of some weight" in support of their view the remedy should be retained.

⁹ Several commentators made this point, but, except for one who wanted the remedy retained, they nevertheless favoured its abolition.

¹⁰ Report of Royal Commission on Marriage and Divorce, 1956, Cmd. 9678, paras. 320–324.

¹¹ This is because the question whether the husband is providing reasonable maintenance for the wife and children must be considered with reference to the husband's common law liability to maintain his wife and children and the word "reasonable" must be interpreted against the background of the standard of life which he had previously maintained; the fact that the amount paid is less than the court might order on a divorce or judicial separation (and *semble* restitution of conjugal rights) does not of itself establish wilful neglect to maintain: *Scott v. Scott* [1951] P. 245; *Bradley v. Bradley* [1956] P. 326. For instance, in *Scott v. Scott*, *supra* there was no wilful neglect to maintain where the husband, who had £40,000 capital, paid the wife and two children £10 per week.

- (c) If one spouse wants the other back (and a decree will be granted only if the court is satisfied that the petitioner is sincere in wanting the respondent back and is willing to render him conjugal rights), he or she can obtain a restitution decree which merely orders the respondent to return; thus, the petitioner may feel that the position is not exacerbated by a finding that the respondent has committed the matrimonial offence of desertion or wilful neglect to maintain, as the case may be.

ARGUMENTS FOR ABOLITION OF REMEDY

6. We think that the answers to the foregoing arguments are—
- (a) In so far as restitution proceedings are used to demonstrate a spouse's endeavour to save the marriage by showing his or her willingness to resume married life together, this can be demonstrated equally clearly by other more appropriate approaches. If these fail to bring about the desired result, it is unlikely that bringing legal proceedings will have greater effect.
- (b) In so far as restitution proceedings are brought to establish desertion, this can be effected equally well, and more suitably, by obtaining an order on the ground of desertion in the magistrates' court,¹² a remedy available to either spouse.
- (c) If the real purpose of restitution proceedings is to obtain financial support the proper remedy for this should be section 22 of the Matrimonial Causes Act 1965.¹³ This section (and a like provision in the magistrates' court) enables a wife whose husband wilfully neglects to maintain her or the children to obtain proper financial provision without resorting to the proceedings for restitution of conjugal rights.¹⁴ It can be argued that section 22 is not as comprehensive as the financial remedies available in restitution proceedings.¹⁵ Nevertheless, the statistics we have quoted in paragraph 4 show that only an insignificant number of spouses make use of the financial remedies available in restitution proceedings.¹⁶

¹² The order is made under the Matrimonial Proceedings (Magistrates' Courts) Act 1960, s. 2. It is doubtful if there is power to make an order under this section unless the order contains at least one of the provisions (set out in the section) dealing with maintenance, custody, etc., so that a spouse who establishes desertion (or some other offence such as adultery or cruelty) but does not seek any immediate relief may need to have inserted in the order a provision for nominal maintenance, e.g., one penny a week.

¹³ Or proceedings in the magistrates' court.

¹⁴ Proceedings for wilful neglect are on the same footing as proceedings for restitution of conjugal rights, so that the wife's right to maintenance depends in either case on her ability to justify her living apart from the husband: *Price v. Price* [1951] P. 413; *Marjoram v. Marjoram* [1955] 1 W.L.R. 520, 527-528.

¹⁵ In section 22 proceedings, alimony pending suit cannot be obtained until there is a finding of wilful neglect to maintain and the section is not available at all to husbands. In our forthcoming Report on Financial Provision in Matrimonial Proceedings we are recommending that in proceedings under section 22 there should be available alimony pending suit and, on the making of an order, unsecured and secured maintenance and a lump sum, a husband being able to apply in the like circumstances as he can now under the corresponding provision in the magistrates' court.

¹⁶ In the 64 cases examined for the years 1965-1967 (out of a total of 105 cases for the whole of England and Wales) there were applications for financial provision by 12 wives only and no applications at all by husbands.

- (d) The fact that in some cases no steps are taken in restitution proceedings after the petition is filed of itself establishes nothing: the reason for no further steps being taken may be due to the petitioner's realising that to continue the proceedings would not bring the respondent back. Nor does the fact that in some cases a reconciliation takes place after a restitution petition is filed establish that such proceedings tend to bring about a reconciliation, for reconciliation can and does occur in all types of proceedings and, even in divorce proceedings, reconciliation sometimes occurs outside the very doors of the court, or even after the decree was granted.
- (e) A court order directing adults to live together is hardly an appropriate method of attempting to effect a reconciliation.
- (f) The "order" has in fact no teeth and only brings the law into disrepute; it is suspected that few, if any, decrees are obeyed and the futility of the decree is well illustrated by *Nanda v. Nanda* [1968] P. 351 where a wife, having obtained a restitution decree, went to the husband's flat and the Court was prepared to grant an injunction to restrain her from molesting him and entering on the premises.
- (g) The mere fact that the remedy of restitution of conjugal rights is so rarely used of itself indicates that the remedy is not an effective one.

CONCLUSION

7. The comments we have received in reply to our Working Paper have shown an overwhelming support for the abolition of the remedy of restitution of conjugal rights. We recommend, therefore, that this remedy should be abolished. A draft Clause effecting this purpose and making consequential amendments to the Matrimonial Causes Act 1965 is set out in the Appendix.

(Signed) LESLIE SCARMAN, *Chairman.*

L. C. B. GOWER.

NEIL LAWSON.

NORMAN S. MARSH.

ANDREW MARTIN.

J. M. CARTWRIGHT SHARP, *Secretary.*

9th July 1969.

APPENDIX

DRAFT CLAUSE

Abolition of
right to claim
restitution of
conjugal
rights.

No person shall after the commencement of this Act be entitled to petition the High Court or any county court for restitution of conjugal rights ; and accordingly section 13 (power to grant decree) and section 21 (ancillary provisions) of the Matrimonial Causes Act 1965 shall cease to have effect except in their application to proceedings on or arising out of a petition for restitution of conjugal rights presented before the commencement of this Act.

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