The Law Commission

(LAW COM. No. 42)

FAMILY LAW
REPORT ON POLYGAMOUS MARRIAGES

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

Ordered by The House of Commons *to be printed 2nd February 1971*

LONDON
HER MAJESTY'S STATIONERY OFFICE

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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—

The Honourable Mr. Justice Scarman, O.B.E., *Chairman.*

Mr. Claud Bicknell, O.B.E.

Mr. L. C. B. Gower.

Mr. Neil Lawson, Q.C.

Mr. N. S. Marsh, Q.C.

The Secretary of the Commission is Mr. J. M. Cartwright Sharp, and its offices are at Conquest House, 37–38 John Street, Theobald's Road, London, WC1N 2BQ.

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THE LAW COMMISSION

Item XIX of the Second Programme

POLYGAMOUS MARRIAGES

To the Right Honourable the Lord Hailsham of Saint Marylebone, Lord High Chancellor of Great Britain

1. INTRODUCTION

1. Under Item XIX of our *Second Programme of Law Reform,*[1] which has as its aim the eventual codification of family law, we have made an examination of the question of polygamous marriages on which, in 1968, we circulated our Working Paper No. 21.[2] This elicited comments which have been most helpful to us in reaching the conclusions which are set out in this Report. Our study has been limited to the question of recognition of polygamous marriages for the purposes of family law and social security legislation. We do not deal, save incidentally, with the criminal law, or with the law of tort, nationality, immigration or taxation.

2. For the purposes of this Report a polygamous marriage can be defined as a marriage under a system of law which permits one of the parties to the marriage to take another spouse at a later date even though the marriage still subsists. The term " polygamous marriage "[3] includes:

(*a*) a potentially polygamous marriage, in which neither party has, at the relevant time, any other spouse, but in which one party is capable of taking another spouse ; and

(*b*) an actually polygamous marriage, in which one party has, at the relevant time, another spouse or other spouses in addition to the other party.

Both these types of marriage are in law polygamous marriages. The terms " potentially polygamous " and " actually polygamous " will be used to distinguish them where necessary.

3. It should perhaps be pointed out that there are still to be found types of so-called marriages which differ so fundamentally from the concept of marriage as we understand it that it is doubtful whether they can properly be classified as marriages as understood by English law. Examples are the so-called " ghost marriages " in which a living man takes a wife in the name of a dead friend who is deemed to be the husband (and the father of any

[1] Law Com. No. 14, 1968.

[2] We are deeply indebted to Dr. J. H. C. Morris, Fellow of Magdalen College, Oxford and University Reader in Conflict of Laws, for preparing at our request a preliminary study which we have found immensely valuable at all stages of our work.

[3] We include within the expression marriages in which the husband is allowed to have more than one wife (polygyny) and those in which the wife is allowed to have more than one husband (polyandry). This latter is, however, most uncommon, and the examples given in this Report are based on the polygynous situation.

children begotten), and those in which a woman is treated as the " husband " of another woman and the legal father of any children of that other woman begotten on her behalf by a man. Here the question whether there is a marriage (and if so between whom) which English law could recognise has nothing to do with the question whether or not the union is polygamous or monogamous, and this Report is not concerned with the former question. It is one which has not yet arisen in England and appears unlikely to do so.

4. The law relating to polygamous marriages is a field where reform is clearly needed, for the present position regarding financial provision is particularly disturbing. It should be emphasised, however, that this need for reform is not caused by the presence in this country of any significant number of husbands with several wives here. Such cases are rare.[4] There are, however, a number of cases where, because the marriage was celebrated abroad in Islamic or customary law form, it is potentially polygamous though the husband has in fact only one wife. There are also cases of actual polygamy where the husband has one wife in England and one or more wives in his country of origin.

2. THE RULE IN *HYDE* v. *HYDE*

5. The basic principle of English law concerning polygamous marriages is that neither party to such a marriage is entitled to matrimonial relief.[5] The leading case is *Hyde* v. *Hyde and Woodmansee*[6] which was a husband's undefended petition for divorce on the ground of his wife's adultery. The petitioner had an English domicil of origin. In 1847, when he was about 16 years old, he joined a congregation of Mormons in London, and was soon afterwards ordained a priest of that faith. In London he met the respondent and her family, all of whom were Mormons, and became engaged to her. In 1850 the respondent and her mother emigrated to Utah. In 1853 the petitioner joined them there, and was married to the respondent, the marriage being celebrated by Brigham Young, the president of the Mormon church, and the governor of the territory. They lived together in Utah until 1856, when the petitioner went on a mission to the Sandwich Islands, leaving the respondent in Utah. On his arrival in the Sandwich Islands he renounced the Mormon faith and preached against it. A sentence of excommunication was pronounced against him in Utah in 1856 and his wife was declared free to marry again, which she did in 1859 or 1860. Meanwhile in 1857 the petitioner resumed his domicil in England and petitioned for divorce.

6. Lord Penzance refused to adjudicate on the petition on the ground that " marriage, as understood in Christendom, may . . . be defined as the voluntary union for life of one man and one woman, to the exclusion of all others ",[7] and that this Mormon marriage was no marriage which the English Divorce Court could recognise, because there was evidence that

4 " [T]he number is very small . . . there is no known incident of a man arriving with two wives and very few cases in which a second wife has joined a husband ": *Hansard*, 4 July 1968, Vol. 767, Col. 1663 (Mr. David Ennals, then Under-Secretary of State for the Home Department).

5 For the extent of this rule, see para. 20 below.

6 (1866) L.R. 1 P. & D. 130.

7 At 133.

polygamy was a part of the Mormon doctrine, and was the common custom in Utah. "Now, it is obvious", he said, "that the matrimonial law of this country is adapted to the Christian marriage, and it is wholly inapplicable to polygamy."[8] He pointed out that to divorce a husband at the suit of his first wife on the ground of his adultery and bigamy with the second, or to annul the second marriage on the ground that it was bigamous, would be "creating conjugal duties, not enforcing them, and furnishing remedies when there was no offence".[8] He refused to draw any distinction between the first of a series of polygamous unions and the later ones, or between a marriage which was potentially polygamous and one which was actually polygamous.

7. At the end of his judgment Lord Penzance said:[9]

> "This Court does not profess to decide upon the rights of succession or legitimacy which it might be proper to accord to the issue of the polygamous unions, nor upon the rights or obligations in relation to third persons which people living under the sanction of such unions may have created for themselves. All that is intended to be here decided is that as between each other they are not entitled to the remedies, the adjudication, or the relief of the matrimonial law of England."

As will be seen later in this Report, polygamous marriages have, since *Hyde* v. *Hyde,* been recognised under English law for certain purposes other than matrimonial relief.[10]

8. The underlying reason for the rule in *Hyde* v. *Hyde* is the view that our matrimonial law is designed to deal only with monogamous marriages and that polygamous marriages cannot fit into our existing matrimonial system. This view has been followed consistently.[11] It has even been said that to apply our matrimonial law to a polygamous marriage, even though there was in fact only one wife, would "be attended by many obvious incongruities and difficulties."[12]

3. PRESENT RULES RELATING TO POLYGAMOUS MARRIAGES

9. The two basic principles of the present law concerning polygamy are:

   (*a*) Neither party to a polygamous marrage is entitled to any matrimonial relief in England whether the marriage is potentially or actually polygamous.[13]

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[8] At 135.

[9] At 138.

[10] Para. 111 ff. below.

[11] *Baindail* v. *Baindail* [1946] p. 122 (C.A.) per Lord Greene M.R. at 125: "the powers conferred on the courts for enforcing or dissolving a marriage tie are not adapted to any form of union between a man and a woman save a monogamous union"; *Sowa* v. *Sowa* [1961] p. 70 (C.A.) per Pearce L.J. at 83: "[Lord Penzance in *Hyde* v. *Hyde*] deals with the various remedies and shows that they are inapplicable to polygamous marriage . . . I find the reasoning of *Hyde* v. *Hyde* inescapable"; Pearce L.J., at 84, adopts Lord Greene's statement quoted above. See also Simon P. in *Cheni* v. *Cheni* [1965] p. 85, 91.

[12] *Sowa* v. *Sowa* [1961] p. 70 (C.A.) per Pearce L.J. at 85.

[13] *Hyde* v. *Hyde* (1866) L.R. 1 P. & D. 130.

(*b*) However, a polygamous marriage which is valid by the law of the place of celebration and by each party's personal law is generally recognised as valid in England, except for purposes of matrimonial relief.[14]

10. The application of these basic principles has resulted in the development of a substantial body of law concerning polygamous marriages. The main rules are as follows:

(*a*) The nature and incidents of the marriage according to the law of the place of celebration, and not the law of either party's domicil, determine whether a marriage is monogamous or polygamous.[15] Hence, if a domiciled Englishman[16] or Englishwoman[17] goes through a ceremony of marriage in polygamous form in a country where polygamy is lawful, he or she contracts a polygamous marriage, though the marriage will not be treated as valid in England.[18] Conversely, if a Moslem domiciled in India or Pakistan goes through a ceremony of marriage in an English register office, he contracts a monogamous marriage.[19] This latter result is to be welcomed on practical grounds because it renders English matrimonial relief available to the parties to a marriage celebrated in England.

(*b*) The legal systems of some monogamous countries draw a distinction, in relation to the recognition of foreign polygamous marriages, between the first, or potentially polygamous, marriage and later, actually polygamous, marriages entered into by the same husband; the first marriage may be recognised for purposes of matrimonial relief, whereas the later ones are not so recognised.[20] English law makes no such distinction. Neither a potentially polygamous marriage nor an actually polygamous marriage is recognised for the purpose of matrimonial relief. It is immaterial that the husband never took another wife and never intended to do so.[21]

(*c*) It was at one time thought that the monogamous or polygamous character of the marriage had to be determined once and for all as at the date of its inception.[22] But now it is clear that a poten-

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14 See para. 111 ff. below.

15 *Lee* v. *Lau* [1967] p. 14, 20: the English court decides whether a marriage is monogamous or polygamous by having regard to the nature and incidents of the marriage according to the law of the place of celebration.

16 *Re Bethell* (1888) 38 Ch. D. 220; cf. *Hyde* v. *Hyde* (1866) L.R. 1 P. & D. 130, where, however, the husband had probably acquired a domicil of choice in Utah before the ceremony.

17 *Risk* v. *Risk* [1951] p. 50.

18 See para. 18 below: under present law a person domiciled in England has no capacity to enter into a polygamous marriage.

19 *Chetti* v. *Chetti* [1909] p. 67; *R.* v. *Hammersmith Superintendent Registrar* [1917] 1 K.B. 634 (C.A.); *Srini Vasan* v. *Srini Vasan* [1946] p. 67; *Baindail* v. *Baindail* [1946] p. 122 (C.A.); *Maher* v. *Maher* [1951] p. 342; *Ohochuku* v. *Ohochuku* [1960] 1 W.L.R. 183; *Russ* v. *Russ* [1964] p. 315 (C.A.); *Qureshi* v. *Qureshi, The Times*, 31 October 1970, p. 23. See also para. 17 below. The law in Scotland is the same: *MacDougall* v. *Chitnavis*, 1937 S.C. 390. The arguments in favour of applying the law of the domicil to determine the nature of the marriage are considered in Cheshire, *Private International Law* (8th ed. 1970) pp. 294–295.

20 This approach has been followed in Australia and New Zealand, see paras. 71 and 92 below.

21 *Hyde* v. *Hyde* (1866) L.R. 1 P. & D. 130; *Sowa* v. *Sowa* [1961] p. 70 (C.A.); *Cheni* v. *Cheni* [1965] p. 85, 88–89. The law in Scotland is the same: *Muhammad* v. *Suna* 1956 S.C. 366.

22 *Mehta* v. *Mehta* [1945] 2 All E.R. 690.

tially polygamous marriage (i.e. where there is only one wife in fact) may become a monogamous marriage by reason of subsequent events, and that, therefore, English matrimonial relief may subsequently become available to the parties.[23] This may happen if, for instance, the parties (being domiciled in an eastern country where the personal law is a religious law) change their religion from one which permits polygamy to one which does not;[24] or if the husband changes his domicil from a country whose law permits polygamy to a country whose law does not;[25] or if the law under which the marriage was celebrated subsequently prohibits polygamy;[26] or if the parties, having gone through a polygamous ceremony in a country where the law permits polygamy, subsequently go through a valid monogamous ceremony;[27] or (under some systems of law) if a child is born.[28] The parties may not, however, rely on any facts which occurred while the marriage was potentially polygamous in support of the petition for matrimonial relief in England.[29]

(*d*) If the husband's personal law does not permit him to take more than one "wife", but does permit him to take concubines with a recognised status in law, a marriage celebrated under such a law is polygamous.[30]

(*e*) On the other hand, in spite of the distinction drawn in *Warrender* v. *Warrender*[31] and *Hyde* v. *Hyde*[32] between "Christian" and "infidel" marriages, a marriage may be monogamous although neither party is a Christian. The crucial question is whether the law under which the marriage is celebrated permits polygamy: if it does not, the marriage is monogamous.[33]

(*f*) A marriage may be monogamous although under the law of the place of celebration it can be dissolved by mutual consent or at the will of either party, with merely formal conditions of official registration.[34]

11. The proposition laid down in *Ali* v. *Ali*[35] that a potentially polygamous marriage may become a monogamous marriage in English law if the parties acquire an English domicil is a far-reaching one. It means that all those

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23 See Webb, "Mutation of Polygamous Marriages" (1967) 16 I.C.L.Q. 1152; Tolstoy, "The Conversion of a Polygamous Union into a Monogamous Marriage" (1968) 17 I.C.L.Q. 721.

24 *The Sinha Peerage Claim* (1939) 171 Lords' Journals 350, [1946] 1 All E.R. 348 n. as explained in *Cheni* v. *Cheni* [1965] p. 85, 90–91, and in *Parkasho* v. *Singh* [1968] p. 233, 243, 253 (D.C.).

25 *Ali* v. *Ali* [1968] p. 564; *Mirza* v. *Mirza* (1966) 110 Sol. Jo. 708.

26 *Parkasho* v. *Singh* [1968] p. 233; see also *Sara* v. *Sara* (1962) 31 D.L.R. (2d) 566, affirmed on other grounds in (1962) 36 D.L.R. (2d) 499.

27 *Ohochuku* v. *Ohochuku* [1960] 1 W.L.R. 183.

28 *Cheni* v. *Cheni* [1965] p. 85. This is the leading case on the conversion of a potentially polygamous marriage into a monogamous one.

29 *Ali* v. *Ali* [1968] p. 564, 580; see para. 14 below.

30 *Lee* v. *Lau* [1967] p. 14.

31 (1835) 2 Cl. & F. 488, 532 (H.L.).

32 (1866) L.R. 1 P. & D. 130.

33 *Spivack* v. *Spivack* (1930) 46 T.L.R. 243 (D.C.) (Jewish marriage); *Brinkley* v. *Att.-Gen.* (1890) 15 P.D. 76 (Japanese marriage); *Isaac Penhas* v. *Tan Soo Eng* [1953] A.C. 304 (P.C.).

34 *Nachimson* v. *Nachimson* [1930] p. 217 (C.A.).

35 [1968] p. 564.

now in England who have entered into potentially polygamous marriages abroad will find themselves entitled to English matrimonial relief as soon as they have formed an intention to remain here permanently.

12. However, the decision is open to the comment that it is difficult to reconcile with prior authority[36] including *Hyde* v. *Hyde*[37] itself. For if the petitioner's acquisition of an English domicil in *Ali* v. *Ali* converted the marriage into a monogamous one, why did it not have this effect in *Hyde* v. *Hyde*? The judge disposed of this point as follows:[38]

> " In 1866 the importance of domicile as affecting capacity to marry was still only dimly appreciated and it has been during the succeeding century that jurisprudence has developed the doctrine to the full degree which it has now attained in English law. The point argued by Mr. Temple [counsel for the husband] was never argued before the judge ordinary " [Lord Penzance].

The first of these comments must be accepted with some reserve because five years before *Hyde* v. *Hyde* the House of Lords had decided, in what is still the leading case on the matter,[39] that capacity to marry is governed by the law of the domicil.

13. In *Ali* v. *Ali* the husband had never married more than one wife. His marriage had at no time been actually polygamous. Presumably the result would have been the same if the husband had in fact married two or more wives while domiciled in India, and the number of his wives had been reduced to one by death or divorce before his change of domicil. If the husband had two wives when he acquired an English domicil, and one wife subsequently died, presumably his remaining marriage would also become monogamous.

14. The change in nature of a marriage from polygamous to monogamous involves some practical difficulties. The judge in *Ali* v. *Ali* held that he had no jurisdiction to dissolve the marriage on any ground which arose before the marriage became monogamous by the acquisition of an English domicil, which happened in the middle of 1961.[40] Because of this, the husband's petition for divorce on the ground of desertion was dismissed, since the desertion had commenced at a time when the marriage was potentially polygamous and less than three years had elapsed between the date of conversion of the polygamous marriage into a monogamous marriage and the date when the petition was presented ; the wife's cross-petition for divorce for cruelty was dismissed, because the cruelty occurred before the date of conversion ; but the wife's cross-petition for divorce for adultery was granted, because the adultery took place after the marriage had become monogamous by virtue of the change of domicil. It is obvious that a court is not in a position to do justice to married persons if it has to shut its eyes to a substantial part of their married history.[41] The position will be equally anomalous under

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36 e.g. *Muhammad* v. *Suna* 1956 S.C. 366; *Cheni* v. *Cheni* [1965] p. 85.
37 (1866) L.R. 1 P. & D. 130, para. 5 ff. above.
38 [1968] p. 564, 579.
39 *Brook* v. *Brook* (1861) 9 H.L.C. 193.
40 [1968] p. at 580.
41 For detailed criticism of this aspect of the decision see Davis and Webb (1966) 15 I.C.L.Q. 1185; Tolstoy (1968) 17 I.C.L.Q. 721; and Morris (1968) 17 I.C.L.Q. 1014.

the Divorce Reform Act 1969: even if the marriage has in fact broken down irretrievably presumably the court will not be able to grant a decree on this ground if the facts which must be proved by the petitioner under section 2(1) occurred at a time when the marriage was potentially polygamous.

4. THE VALIDITY OF POLYGAMOUS MARRIAGES

15. For purposes other than matrimonial relief it may be of importance to establish whether a polygamous marriage is valid or invalid. Under English rules of conflict of laws the formal validity of the marriage is governed by the law of the place of celebration and the essential validity, including the capacity of the parties, by the law of their domicil. These questions will be further considered in connection with nullity proceedings.[42] Two special matters affecting the validity of polygamous marriages should, however, be considered at this stage.

(a) Polygamous marriages celebrated in England

16. It is stated in *Dicey and Morris on the Conflict of Laws* that " a marriage celebrated in England in accordance with polygamous forms and without any civil ceremony as required by English law is invalid, whatever the domicile of the parties ".[43] The formal validity of marriages celebrated in England is entirely a matter of statute law. There is no longer any room for the principles of the common law to operate. There is no provision in the Marriage Act 1949 which could conceivably validate a " marriage " celebrated in England in accordance with polygamous forms.

17. If a civil ceremony in an English register office is followed by a religious ceremony in an unregistered building, the religious ceremony does not supersede or invalidate the civil ceremony and is not registered as a marriage in any marriage register book.[44] Even if the husband's religion and personal law permit polygamy, the religious ceremony is a nullity so far as English law is concerned and the civil (monogamous) ceremony is the only marriage which English law can recognise. If there is a religious ceremony in a registered building (for example, a mosque which has been registered under the Marriage Act 1949, section 41) conducted in accordance with the essential requirements of the Act,[45] the civil marriage is recognised as a monogamous marriage, even if the religion permitted polygamy.

(b) Capacity of persons domiciled in England to enter into polygamous marriages

18. Capacity to marry is, in general, governed by the law of the domicil of each of the parties.[46] Hence, it is stated in *Dicey and Morris* that " a man

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42 Para. 88 ff. below.

43 (8th ed. 1967) Rule 34, p. 280; *R.* v. *Bham* [1966] 1 Q.B. 159 (C.C.A.), overruling *R.* v. *Rahman* [1949] 2 All E.R. 165. See also *Abdul Majid Belshah* (*The Times*, 16 and 18 Dec. 1926, 14 and 18 Jan. 1927); Beckett, " The recognition of polygamous marriages under English law " (1932) 48 L.Q.R. 341, 348; Jackson, *The Formation and Annulment of Marriage* (2nd ed. 1969) p. 141.

44 Marriage Act 1949, s. 46(2); *Qureshi* v. *Qureshi*, per Simon P. (not yet reported in full; see *The Times*, 31 October 1970, p. 23).

45 s. 44.

46 *Dicey and Morris, op. cit.*, Rule 31, p. 254.

or woman whose personal law does not permit polygamy has no capacity to contract a valid polygamous marriage."[47] Thus, if a person domiciled in England goes through a polygamous form of marriage abroad, that marriage will, under English law, be void, even if it was only potentially polygamous. However, although the marriage is void, because it is polygamous in form, the English courts will not grant nullity to either party. The authorities which support this proposition[48] have been confirmed by *Ali* v. *Ali*.[49]

19. In our Working Paper we considered whether it might be acceptable to test the validity of a polygamous marriage solely by reference to the law of the place of celebration, and without any reference to the law of either party's domicil.[50] But we concluded that there was no justification, nor indeed reason, for changing the present law by making the law of the place of celebration the sole test of validity; regard must still be had to the law of the country where each party is domiciled.[51] Our consultations have confirmed us in this view. Accordingly, we do not recommend any change in the test of validity of polygamous marriages.

5. THE CASE FOR REFORM

20. The rule in *Hyde* v. *Hyde* which denies matrimonial relief to either party to a polygamous marriage, applies to the following proceedings:

(*a*) divorce,[52] nullity[53] and judicial separation;[54]

(*b*) proceedings for maintenance in magistrates' courts[55] and (presumably) under section 6 of the Matrimonial Proceedings and Property Act 1970, on the ground of wilful neglect to maintain;

(*c*) presumably, proceedings under sections 13 to 15 of the Matrimonial Proceedings and Property Act 1970, relating to the variation of maintenance agreements;

(*d*) petitions under section 39 of the Matrimonial Causes Act 1965 for a declaration that a marriage is valid;[56]

(*e*) presumably, petitions for a declaration of legitimacy[57] or legitimation under the same section; and

(*f*) presumably, petitions under section 14 of the Matrimonial Causes Act 1965 for a decree of presumption of death and dissolution of marriage.

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47 *Op. cit.*, Rule 35, p. 283. This is stated in terms of "personal law" and not in terms of "domicil" because in many eastern countries the personal law is a religious law. Hence an Englishman or Englishwoman who acquired a domicil of choice in, e.g., India, Pakistan or Ceylon could not contract a valid polygamous marriage without a change of religion to Islam.

48 *Re Bethell* (1888) 38 Ch. D. 220; *Risk* v. *Risk* [1951] p. 50 (C.A.); for a contrary view see comments of Denning L.J. in *Kenward* v. *Kenward* [1951] p. 124, 144–145 (C.A.).

49 [1968] p. 564, 576–577.

50 Working Paper No. 21, paras. 16–20.

51 We shall deal with the validity and recognition of English and foreign marriages in a later study.

52 *Hyde* v. *Hyde* (1866) L.R. 1 P. & D. 130. The law in Scotland is the same: *Muhammad* v. *Suna*, 1956 S.C. 366.

53 *Risk* v. *Risk* [1951] p. 50 (C.A.).

54 *Nachimson* v. *Nachimson* [1930] p. 217 (C.A.).

55 *Sowa* v. *Sowa* [1961] p. 70 (C.A.).

56 *Brinkley* v. *Att.-Gen.* (1890) 15 P.D. 76.

57 Unless, possibly, the declaration can be made without pronouncing directly on the validity of a polygamous marriage: cf. *Lee* v. *Lau* [1967] p. 14.

21. It does not apply to petitions for a declaration as to status under Order 15, rule 16 of the Rules of the Supreme Court, at any rate if the declaration can be granted without determining whether the marriage is valid.[58] Nor does it apply to a wife's claim against her husband for "deferred dower" under a marriage contract governed by Islamic law, since the wife is asserting a contractual claim and not seeking matrimonial relief.[59]

22. The authority of *Hyde* v. *Hyde* has been recognised on two occasions by the Court of Appeal[60] and applied and extended on a third occasion[61] to a form of matrimonial relief which did not exist when *Hyde* v. *Hyde* was decided. A change in the law can therefore be effected only by the House of Lords or by legislation.

23. For many years the rule in *Hyde* v. *Hyde* was tolerable only because (*a*) marriages celebrated in England can take effect only as monogamous marriages,[62] and (*b*) marriages entered into abroad in polygamous form by persons domiciled in England were regarded as void for lack of capacity.[63] Although the English courts refuse to exercise nullity jurisdiction in respect of polygamous marriages entered into abroad by persons domiciled in England, the parties are regarded as not married, and are therefore free under English law to remarry. The residual hardship lies in the impossibility of obtaining any form of financial provision. Reform of the law has become more urgent in recent years due to immigration which has brought into permanent residence in this country large numbers of people from countries where polygamy is one of the normal forms of marriage.

24. If people marry in England the question of polygamy does not arise since a marriage celebrated in England, if valid, can take effect only as a monogamous marriage.[64] The real problem concerns the position of persons who have married abroad in polygamous form, and who now reside in England. They may be immigrants or they may be persons of English origin who have married according to the locally recognised form while domiciled abroad. In either case their position can be summarised as follows:

(*a*) If they acquire, or revert to, an English domicil then, provided there is only one wife, the marriage is converted into a monogamous marriage.[65] The full range of matrimonial relief is then available.

(*b*) If they do not acquire an English domicil their marriage remains polygamous, even if there is only one wife. No matrimonial relief is available to either party.

(*c*) If there is more than one wife, then, whether or not the parties acquire an English domicil, the marriage remains polygamous, and no matrimonial relief is available to either party.

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58 *Lee* v. *Lau* [1967] p. 14.

59 *Shahnaz* v. *Rizwan* [1965] 1 Q.B. 390; see also *Qureshi* v. *Qureshi, The Times*, 31 October 1970, p. 23.

60 *Nachimson* v. *Nachimson* [1930] p. 217 (C.A.); *Baindail* v. *Baindail* [1946] p. 122 (C.A.).

61 *Sowa* v. *Sowa* [1961] p. 70 (C.A.).

62 Paras. 16–17 above.

63 Para. 18 above.

64 Above, paras. 16–17. If one spouse is a party to a prior subsisting marriage in polygamous form at the time of the English marriage, the court will exercise nullity jurisdiction in respect of the English marriage on the ground that it is bigamous: *Srini Vasan* v. *Srini Vasan* [1946] p. 67; *Baindail* v. *Baindail* [1946] p. 122 (C.A.).

65 *Ali* v. *Ali* [1968] p. 564; para. 11 above.

25. To close the doors of all matrimonial courts in England to either party to a polygamous marriage gives rise to hardship and to the risk of a social problem which, in our view, the law should not ignore. As Lord Walker pointed out in *Muhammad* v. *Suna*:[66]

> "It is perhaps not altogether satisfactory that a man who enters into a polygamous union while domiciled abroad should, on acquiring a domicile in this country,[67] be unable to sue in the Court of his domicile for divorce (*Hyde's* case) and yet be regarded by the Court of his domicile as not free to marry."[68]

The hardship is perhaps most acute when the wife is seeking maintenance from the husband. This is vividly illustrated by two cases, one decided by the Supreme Court of British Columbia, the other by the English Court of Appeal.

26. The first of these cases is *Lim* v. *Lim*.[69] The husband, a Chinese domiciled in China, married two wives there, one in 1912 and the other in 1919. Chinese law at all material times permitted polygamy. In 1919 the husband and his second wife emigrated to British Columbia, where they acquired a domicil of choice. The second wife was admitted by the Canadian immigration authorities on the ground that she was the wife of a permitted immigrant. Nearly thirty years later (when the first wife was still living in China) the husband deserted the second wife, whose claim for maintenance was dismissed, with obvious reluctance, on the authority of *Hyde* v. *Hyde*. Coady J. said:[70]

> "It does not seem to me consistent with common sense that this plaintiff who was admitted into this country under our immigration laws as the wife of the defendant and who, in China prior to her coming to this country, enjoyed the full civil status of wife, should be denied that status under our law, when, after a residence here of almost 30 years with the defendant as her husband, and after acquiring a domicile in this country she seeks against her husband the remedy which our law provides to a wife to claim alimony . . . I express the hope that this case will go to a higher Court so that this matter which, I have no doubt, affects perhaps many other Chinese men and women residing in this Province, may be authoritatively decided. The implications arising from refusal to recognise the plaintiff's status for the purpose in question are so many and so repellent to one's sense of justice that it is with regret that I come to the conclusion which I am on the authorities as I read them forced to arrive at."

27. The second case is *Sowa* v. *Sowa*.[71] The parties, who were domiciled in Ghana, married there in accordance with African law and custom. These permitted polygamy, but the husband never took a second wife. He promised

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66 1956 S.C. 366, 370.

67 Lord Walker used these words before it was decided that the acquisition of a domicil in this country converts the marriage into a monogamous one. See above, para. 11.

68 For this proposition Lord Walker cited *Baindail* v. *Baindail* [1946] p. 122 (C.A.); see para. 112 below.

69 [1948] 2 D.L.R. 353.

70 At 357–358.

71 [1961] p. 70 (C.A.).

solemnly on the Bible to convert the marriage into a Christian one,[72] but failed to do so. The parties came to England in search of employment. The wife had a baby. Her application to a magistrates' court for an affiliation order was adjourned when the defence was put forward that she was not a single woman. Her subsequent application for maintenance under what is now the Matrimonial Proceedings (Magistrates' Courts) Act 1960 was granted. But the decision of the magistrate was reversed by the Divisional Court and the Court of Appeal because the marriage was potentially polygamous. The judges in the Divisional Court reached their decision " with deep regret ".[73] In the Court of Appeal Pearce L.J. said:[74]

> " The husband has behaved so badly that I fully share the regrets expressed by the Divisional Court at finding itself unable to uphold the magistrate's order. One is inclined to echo the words of Crew C.J. in the case of the Earldom of Oxford when he said that there was none but would ' take hold of a twig or twine-thread to uphold it '."

Something is gravely wrong when learned and humane judges are compelled by ancient authority to come to a conclusion which manifestly shocks their sense of justice.

28. The result of these decisions was not, of course, that the unfortunate Mrs. Lim and Mrs. Sowa had to starve No doubt they received social security benefits at the expense of the Canadian and United Kingdom taxpayer respectively. Some relief to the taxpayer was afforded by the recent case of *Imam Din* v. *National Assistance Board.*[75] The husband married his second wife in Pakistan in 1948 while both were Moslems domiciled there. The first wife was still alive but she died in the following year. In 1961 the husband and his second wife came to Engand, where the husband abandoned the wife and four of their children, leaving them destitute. The wife obtained assistance from the Board which preferred a complaint against the husband under the National Assistance Act 1948, section 43, alleging that he was liable to maintain the wife under section 42(1)(*a*), which provided that " a man shall be liable to maintain his wife and children ". The justices made an order for the husband to pay £6 a week, and this was affirmed without hesitation by the Divisional Court on the ground that common sense and justice required that the " wife " in section 42(1)(*a*) should include the wife of a polygamous marriage. Apparently it was not argued that the husband had acquired an English domicil ; if he had done so the marriage would have become monogamous.[76]

29. Thus the somewhat odd result is that, although the wife cannot obtain maintenance in direct proceedings against her husband, even if the marriage is only potentially polygamous, the husband can, indirectly, be made liable to pay for her maintenance if she has been in receipt of national assistance (now supplementary benefits), even if the marriage was at one time actually polygamous, and even if she is the second wife.

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[72] Conversion was provided for under the law of Ghana: [1961] p. 70, 72 (C.A.).
[73] At 77.
[74] At 82.
[75] [1967] 2 Q.B. 213 (D.C.).
[76] *Ali* v. *Ali* [1968] p. 564.

30. The denial of matrimonial relief is not the only problem arising from the presence in England of persons who have married abroad in polygamous form. It has to be borne in mind that Islamic law, as well as permitting polygamy, allows the husband to divorce his wife unilaterally and extra-judicially by a declaration known as talaq.[77] Similar types of divorce are recognised under some customary laws.

31. Despite an earlier decision to the contrary,[78] it is now established that English courts will recognise divorces by talaq and other extra-judicial divorces, provided it can be proved that the divorce is effective according to the law of the country of domicil. It has, for example, been held that talaq pronounced in the country of domicil may validly dissolve a marriage originally celebrated in monogamous form in England, where the parties had later remarried each other in polygamous form.[79] Recognition has been accorded to a divorce valid by the law of the domicil, even though it was not pronounced by any court,[80] and even though it took place in England,[81] It has also been held that a husband domiciled abroad may pronounce in England a talaq which would be recognised by the English courts as dissolving a monogamous marriage celebrated in England, provided that it is established that the procedural requirements of the law of the domicil had been complied with and that the courts of the domicil would recognise the talaq as effective.[82]

32. It has been suggested that it would be useless to give a wife the right to bring matrimonial proceedings against her husband if he can, by his unilateral act, end the marriage before she can obtain a decree or order. We do not agree. In the first place, under present law talaq will not be recognised by the English courts if the husband was domiciled in England. Secondly, some Islamic countries restrict the husband's freedom to administer talaq[83] and, even if they do not, if there was a marriage contract providing for deferred dower, it might be very expensive for the husband to exercise his right of talaq.[84] Finally, we think that the suggested difficulty is part of a wider problem involved in the recognition of foreign divorces generally, and that it is not peculiar to extra-judicial divorces or to polygamous

77 The right to divorce by talaq is not entirely unfettered. It may be restricted by the marriage contract, by procedural requirements, or by rules concerning maintenance: para. 32 below.

78 *R.* v. *Hammersmith Superintendent Registrar* [1917] 1 K.B. 634 (C.A.).

79 *Russ* v. *Russ* [1964] p. 315 (C.A.).

80 *Ratanachi* v. *Ratanachi, The Times*, 4 June 1960 (divorce by mutual consent valid by Thai law).

81 *Har-Shefi* v. *Har-Shefi* [1953] p. 161.

82 *Qureshi* v. *Qureshi* (not yet reported in full; see *The Times*, 31 October 1970, p. 23). In that case the marriage was celebrated in England and was therefore monogamous. The husband, who was domiciled in Pakistan, wrote a letter to his wife while both were in England, in which he stated " I divorce thee " three times. In recognising the divorce, Simon P. said that it was irrelevant that there was no judicial pronouncement, provided the divorce could be shown to be effective in Pakistan. Certain Pakistan procedural requirements concerning reconciliation had been complied with. The wife was awarded dower.

83 The procedural requirements of Pakistan law are described in *Qureshi* v. *Qureshi* (not yet reported in full; see *The Times*, 31 October 1970, p. 23), per Simon P. See also J. N. D. Anderson " Reforms in the Law of Divorce in the Muslim World " (1970) XXXI *Studia Islamica* 41.

84 See *Shahnaz* v. *Rizwan* [1965] 1 Q.B. 390; *Ali* v. *Ali* [1968] p. 564, 581; *Qureshi* v. *Qureshi, The Times*, 31 October 1970, p. 23.

marriages. English law recognises the right of a monogamously married husband to obtain a divorce by changing his domicil to a country where divorce is easy and judicial control is reduced to a shadow, and where the wife has not the means to follow. If he divorces her there he will effectively deprive her of the safeguards provided by English law, including her right to financial provision, provided it has not crystallised in a court order before the divorce.[85] The position of the divorced spouse arising from recognition of the foreign divorce, including talaq, may well be unsatisfactory, but its unsatisfactory character has nothing to do with the nature of the marriage.[86]

33. Looking at the matter from another point of view, we think that the very existence of talaq is an additional argument in favour of conferring matrimonial jurisdiction on the English courts in respect of polygamous marriages. Despite reforms in some Muslim countries which restrict the husband's right to divorce by talaq, and which enable the wife to obtain a judicial divorce, there remain countries where the spouses are not equal;[87] the husband's right to unilateral divorce by talaq is not matched by an equivalent right on the part of the wife. For parties who reside in England it seems intolerable that the husband can obtain a divorce in England (provided he complies with the law of his domicil) while the wife is debarred from seeking a divorce and from any other matrimonial relief before the English courts.

34. For these reasons we reject the argument that the husband's right of talaq is a good ground for denying matrimonial relief in respect of a polygamous marriage.

35. The case in favour of abolishing the rule in *Hyde* v. *Hyde* and extending English matrimonial relief to polygamous marriages can be summarised as follows:

(*a*) Family relationships validly created under a foreign system of law should be recognised here, unless there are compelling reasons of English public policy to the contrary.[88]

(*b*) In the absence of compelling reasons, it is undesirable that people should be regarded as married for some purposes and not for others. It is equally undesirable that where a marriage is recognised for some purposes there should be no means of dissolving it when it has broken down irretrievably. For example, a person who has contracted a valid polygamous marriage abroad and who then returns

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[85] *Wood* v. *Wood* [1957] p. 254 (C.A.); *Turczak* v. *Turczak* [1970] p. 198.

[86] We shall shortly be circulating a Working Paper which will discuss these matters; the position arising from the decision in *Qureshi* v. *Qureshi, The Times*, 31 October 1970, p. 23, is also being considered.

[87] Some recent developments are described in J. N. D. Anderson, " Reforms in the Law of Divorce in the Muslim World " (1970) XXXI *Studia Islamica* 41. The U.N. International Covenant on Civil and Political Rights, 1966 (Cmnd. 3220) Article 23(4) provides that " states parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution ". The Covenant will come into force when ratified by 35 countries.

[88] T. C. Hartley, " Polygamy and Social Policy " (1969) 32 M.L.R. 155, 161–2 suggests that polygamous " marriages serve the same social function in the countries where they are permitted as monogamous ones do in England ".

to or settles in England cannot, while the marriage is potentially or actually polygamous, get a divorce in England though his marriage has broken down. Yet he is not free to marry again; any marriage entered into in England would be void for bigamy.

(*c*) When people have settled in this country they and their children should receive the protection of English law. A spouse whose partner has committed any grave breach of the matrimonial obligation should have the same redress through the courts as is available to parties married here.

(*d*) The interests of the taxpayer should not be lost sight of. A man who has several "wives" and who can afford to maintain them should not be allowed to leave them as a charge on the Supplementary Benefits Commission.

36. There are, of course, arguments to the contrary. Chief of these is the argument that English matrimonial law is devised for monogamous marriages, and cannot be applied to polygamous marriages.[89] This, as we have seen,[90] is a contention which has frequently been put forward and which cannot be ignored. The following parts of this Report will examine this argument in detail and suggest to what extent English law could be applied to potentially or actually polygamous marriages.

37. Another argument, which is sometimes said to support the contrary view, is that a change in the law ought not to be such as to encourage polygamy, particularly at a time when the trend in countries recognising polygamy is to place restrictions on its practice.[91] However, so long as English law refuses to allow a polygamous marriage to be celebrated in England, and so long as a person domiciled in England cannot contract a valid polygamous marriage anywhere, English law cannot be regarded as "encouraging" polygamy. The only polygamous marriages with which we are concerned are those celebrated in countries where polygamy is permitted, between parties whose domicil or personal law permits polygamy. To dissolve or annul such polygamous marriages could hardly be said to encourage polygamy; it would, in fact, reduce the incidence of polygamy among those in England.

38. Finally, it is rightly argued that immigrants to England are not in a privileged position and are expected to conform to English standards of behaviour. However, it seems to us that parties to polygamous marriages are more likely to conform to English standards if English law imposes on them, so far as is practicable, the same family rights and obligations as are imposed on other married people. The denial of all relief cannot achieve any change in the standards of behaviour of people who have made their home in England. On the contrary, denial of relief not only permits parties to escape from their obligations, lawfully entered into under another legal system, but tends to perpetuate the polygamous situation because the marriage cannot be ended.

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[89] *Hyde* v. *Hyde* [1866] L.R. 1 P. & D. 130, 135; *Baindail* v. *Baindail* [1946] p. 122, 125 (C.A.); *Sowa* v. *Sowa* [1961] p. 70, 83, 85 (C.A.).

[90] Para. 8 above.

[91] Anderson, *Islamic Law in the Modern World* (1959) p. 38 ff. refers to some of these restrictions. Cf. the U.N. Covenant on Civil and Political Rights, 1966, n. 87 above.

39. In Australia the problem is smaller and the courts have seldom been called upon to consider *Hyde* v. *Hyde*.[92] Nevertheless two provisions affecting polygamous marriages have been enacted in recent years. The Uniform Maintenance Act, which has been adopted in most States, applies to polygamous as well as to monogamous marriages.[93] Under that Act, provided that a polygamous marriage is valid according to the law of the place of celebration, either party may apply for relief on the ground that the applicant has been left without adequate support.[94]

40. The other Australian provision is section 6A of the Matrimonial Causes Act 1959–65[95] under which, for the purpose of matrimonial relief, including divorce, marriages which are potentially polygamous *at their inception* are recognised, whether or not they subsequently become actually polygamous by reason of the fact that the husband takes a further wife. In other words, a polygamous marriage will be recognised so long as neither party was married to another spouse at the date of the marriage in question ; a distinction is drawn between the marriage with the first wife and marriages with subsequent wives.[96] The section appears to have evoked no opposition in the Australian Parliament. It was welcomed as a piece of non-controversial law reform. The Australian experience shows that it is possible within a monogamous society to find a legal solution to the problem of polygamous marriages.

41. Taking all these factors into account it is our view that there is no longer any justification for denying all forms of matrimonial relief to polygamously married persons resident in this country. But while we favour the general principle that such persons should be entitled to relief, we cannot ignore the contention that grave practical difficulties would be experienced if this principle were implemented. We therefore propose to examine in detail the application of the various types of English matrimonial relief to potentially and actually polygamous marriages.

6. DIVORCE

(a) Application of English law

42. Under present rules the English courts will exercise jurisdiction to dissolve a marriage if the parties are domiciled in England ;[97] a wife may also petition if her husband has deserted her or been deported and was domiciled in England immediately before the desertion or deportation,[98] or

92 *Khan* v. *Khan* [1963] V.R. 203.

93 The N.S.W. Maintenance Act 1964, s. 7(3) is quoted below, para. 92.

94 ss. 7(3), 11 and 14.

95 s. 6A was introduced by the Act of 1965, s. 3; the text is set out in Appendix C to this Report.

96 For a criticism of the drafting of s. 6A, see Jackson, (1966) 40 Aust. L.J. 148. New Zealand has adopted a similar formula in the Domestic Proceedings Act 1968, s. 3(1), in respect of maintenance proceedings in Magistrates' Courts: see Appendix C, and Orchard, "The Domestic Proceedings Bill and Polygamy" (1968) N.Z. L.J. 447. See also Jackson, *The Formation and Annulment of Marriage* (2nd ed. 1969) p. 130; *Crowe* v. *Kader* [1968] W.A.R. 122; para. 71 ff. below.

97 The present rules are considered, and proposals for reform made, in our Working Paper No. 28, Jurisdiction in Matrimonial Causes (other than Nullity), 1970.

98 Matrimonial Causes Act 1965, s. 40(1)(*a*).

if she has been ordinarily resident in England for a period of three years and her husband is not domiciled in the United Kingdom or in the Channel Islands or the Isle of Man.[99]

43. Provided there is jurisdiction in the above sense, English courts always apply English law when dissolving marriages, irrespective of the domicil, the nationality or the religion of the parties at the time of the marriage or at any other time. Thus, if those who were Roman Catholics domiciled in the Republic of Ireland (where there is no divorce) marry there and then acquire an English domicil, either of them may obtain a divorce in accordance with English law. Moreover, when a wife who has been ordinarily resident in England for three years invokes the English court's jurisdiction under section 40(1)(*b*) of the Matrimonial Causes Act 1965, English law is applied even if her husband is domiciled, for example, in Ireland at the time of the proceedings.[1] It would be no defence to a petition based on irretrievable breakdown to show that by Irish law this is not a ground of divorce, for the remedy available depends solely upon English law if the petition is being heard here. Thus the existence or absence of a remedy under the law of the parties' domicil or religion at the time of the marriage or at any other time is irrelevant in English divorce proceedings.

44. The arguments for applying English law in English divorce proceedings despite the foreign domicil or nationality of one or both of the parties are fully rehearsed in our Working Paper on Jurisdiction in Matrimonial Causes,[2] and need not be repeated here in detail. It would be impracticable and undesirable to require English courts to apply unfamiliar alien concepts of law in dissolving marriages. In this respect there is no reason why a foreign polygamous marriage should be treated differently from a foreign monogamous marriage. The application of two systems of divorce law in England hardly seems likely to facilitate the integration of immigrants into English society.

45. For these reasons we are of the opinion that if English courts are given power to dissolve polygamous marriages then, not only must there be jurisdiction in the sense described in paragraph 42 above, but the court must apply English internal law to such marriages. This raises the question how far it is practicable to apply the English law of divorce to polygamous marriages.

46. The application of English divorce law to all marriages wherever celebrated, is founded on the assumption that the mutual rights and duties of the parties are basically the same as those of spouses married according to English law. But it does not necessarily follow that a divorce law framed for monogamous marriages can be applied without qualification to polygamous marriages if justice is to be done between the parties.

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[99] Matrimonial Causes Act 1965, s. 40(1)(*b*).

[1] Matrimonial Causes Act 1965, s. 40(2); *Tursi* v. *Tursi* [1958] p. 54. cf. *Zanelli* v. *Zanelli* (1948) 64 T.L.R. 556 (C.A.), where the Court of Appeal assumed that this was the law before what is now s. 40(2) was first enacted.

[2] No. 28, 1970, paras. 81–84; see also the Scottish Law Commission, Memorandum No. 13, Jurisdiction in Divorce.

(b) The grounds on which breakdown of marriage is inferred

47. Under section 1 of the Divorce Reform Act 1969,[3] the sole ground of divorce is that the marriage has broken down irretrievably; under section 2(1) irretrievable breakdown will be inferred (in the absence of evidence to the contrary) if, and only if, the petitioner satisfies the court of one or more of the following facts:

> "(*a*) that the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent;
>
> (*b*) that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent;
>
> (*c*) that the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition;
>
> (*d*) that the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition and the respondent consents to a decree being granted;
>
> (*e*) that the parties to the marriage have lived apart for a continuous period of at least five years immediately preceding the presentation of the petition."

Section 4 of the Act provides that the court must dismiss the petition where it is based on five years' separation if the respondent opposes the grant of a decree and satisfies the court that the dissolution of the marriage would result in grave financial or other hardship to him and that it would be wrong to dissolve the marriage. There are other provisions designed to give financial protection to the respondent when breakdown is inferred from separation, whether for two years or five.

48. The fact that the sole ground of divorce will be that the marriage has broken down irretrievably would seem to lessen the difficulty of applying our law of divorce to polygamous marriages. Whether the marriage has broken down irretrievably would seem equally ascertainable whatever the nature of the marriage and, if it has broken down, to be an equally valid ground for dissolving it. Nevertheless we still have to consider each of the situations which are the prima facie indicators of irretrievable breakdown and the essentials without proof of which a divorce cannot be granted. In doing so it is necessary to remember the types of polygamous marriage with which the court may be concerned:

(1) Where the marriage has at all times been potentially polygamous (that is, there has never been more than one wife though more are legally permitted).[4]

(2) Where the marriage was at one time actually polygamous, but has become potentially polygamous in the above sense at the time of the presentation of the petition,[5] in other words there was at one time more than one wife, but there is now only one.

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[3] The Act comes into force on 1 January 1971.

[4] e.g. *Sowa* v. *Sowa* [1961] p. 70 (C.A.); para. 27 above.

[5] e.g. *Imam Din* v. *National Assistance Board* [1967] 2 Q.B. 213 (D.C.); para. 28 above.

(3) Where the marriage is at the relevant time actually polygamous because the husband has two or more wives. As already pointed out, the number of cases where there is more than one wife in England is very small.

(i) **Adultery**

49. Under the Divorce Reform Act 1969 one of the facts from which irretrievable breakdown can be inferred is adultery plus the fact that the petitioner finds it intolerable to live with the respondent.[6] In the context of a monogamous marriage it is easy to accept the proposition that if one spouse commits adultery and the other spouse finds it intolerable to live with him or her, this is sufficient to show that the marriage has broken down and that it should be dissolved. A monogamous marriage is the union of one man with one woman to the exclusion of all others, and whether or not the adultery is regarded as a " matrimonial offence " in legal terms, it is certainly recognised in moral and social terms as a breach of the matrimonial relationship.

50. In a potentially polygamous marriage, where there was at the relevant time only one wife, there would be no difficulty in applying section 2(1)(*a*). There are, however, two possible difficulties in applying to an actually polygamous marriage the principle that breakdown can be inferred from the fact that one party has committed adultery and the other party finds it intolerable to continue the married life. First, considering the situation of a man who has two or more wives, there is the problem of whether either wife could rely on the husband's intercourse with the other wife as adultery. If a Moslem domiciled in Pakistan marries two wives there in valid polygamous form, both marriages are recognised as valid in English law, and both women are wives, at least for many purposes.[7] Obviously, one wife should not be entitled to rely upon her husband's intercourse with the other wife (or with a concubine whose status is legally recognised[8]) as adultery.[9] However, such intercourse could not be adultery, since it is an essential element of adultery that intercourse has taken place outside the marriage relationship, i.e., between persons not married to each other.[10] This being so, intercourse with a wife could not be adultery.[11]

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[6] It appears from the wording of s. 2(1)(*a*) that this need not be because of the adultery: cf. s. 3(3)(*a*).

[7] See below, para. 111 ff.

[8] Cf. *Lee* v. *Lau* [1967] p. 14. It seems to us that a concubine whose status is legally recognised is in effect a " wife ", albeit a second class one, at any rate to the extent that sexual intercourse with her is not illicit. In any event legally recognised concubinage seems to be a dying institution. It has, for example, long since been abolished in China: see H. McAleavy, " Some Aspects of Marriage and Divorce in Communist China ", in J. N. D. Anderson, ed., *Family Law in Asia and Africa* (1968) pp. 76–77; Derrett, *An Introduction to Legal Systems*, " China ", pp. 112–114. Proposals have been made to alter the status of concubines in Hong Kong: (1969) *Bulletin of Legal Developments* 151 (British Institute of International and Comparative Law).

[9] In *Hyde* v. *Hyde* (1866) L.R. 1 P. & D. 130, 136–137, Lord Penzance said that this would be " creating conjugal duties, not enforcing them, and furnishing remedies when there was no offence ".

[10] *Rayden on Divorce* (11th ed. 1971) p. 178.

[11] Provided that the marriage was valid. A marriage celebrated in England cannot be a valid polygamous marriage, nor can a person domiciled in England enter into a valid polygamous marriage. In many countries where polygamy is practised, the marriage contract may preclude a second marriage; legislation sometimes prohibits a second marriage without the first wife's consent.

51. The second problem is whether adultery ought to be considered as a breach of matrimonial duty in a polygamous marriage. Under the law of the country where the polygamous marriage was celebrated, intercourse outside the marriage or marriages (if there is more than one wife) may or may not be a ground for divorce. However, the fact that adultery by one or other of the parties to such a marriage may not give the other party the right to bring divorce proceedings is clearly not conclusive. There are monogamous societies in which a similar view prevails. However, even if adultery does not afford grounds for divorce in the country where the monogamous marriage was celebrated, and even if the adultery took place in that country, it can be relied on in a petition for divorce in England once the parties have acquired the necessary jurisdictional connection with England. In our view there is no reason why the same rule should not apply to a polygamous marriage, and why adultery should not give rise to proceedings for divorce whenever and wherever it occurred.

52. Under section 2(1)(*a*) of the Divorce Reform Act 1969, in addition to adultery it is necessary for the petitioner to establish that he finds it intolerable to live with the respondent. This involves a subjective test, and we do not think that it would give rise to any more difficulty in its application to a polygamous marriage than to a monogamous one. The court will be concerned only with the petitioner's state of mind, and not with the application of any objective standards of behaviour.

(ii) "Behaviour" under section 2(1)(*b*)

53. Under section 2(1)(*b*) of the Divorce Reform Act 1969, irretrievable breakdown is to be inferred if the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with him. This formula apparently preserves the law as declared by the House of Lords in *Gollins* v. *Gollins*[12] and *Williams* v. *Williams*[13] but without the requirement of actual or apprehended injury to the petitioner's health and without using the emotive word cruelty. Section 2(1)(*b*) appears wide enough to cover not only acts which would amount to cruelty under present law but also acts of an expulsive nature which could give rise to constructive desertion. In general, we can see little reason why this ground for inferring breakdown should not be appropriate to a polygamous marriage. Behaviour on the part of one spouse which makes it unreasonable to expect the other to live with him (or her) is equally unjustifiable whether the marriage is monogamous or polygamous.

54. Where the behaviour consisted of physical ill-treatment the court would have little difficulty in deciding the issue. There might, however, be problems where non-violent "behaviour" is involved. Under the present law "the question is whether *this* conduct by *this* man to *this* woman, or vice versa, is cruelty",[14] and the court can and does take into account "[t]he particular circumstances of the home, the temperaments and emotions of both the parties and their status and their way of life, their past relationship

12 [1964] A.C. 644 (H.L.).

13 [1964] A.C. 698 (H.L.).

14 *Lauder* v. *Lauder* [1949] p. 277, 308, per Pearce J.; approved in *Gollins* v. *Gollins* [1964] A.C. 644, 672 (H.L.) per Lord Evershed.

and almost every circumstance that attends the act or conduct complained of ".[15] The same test would *a fortiori* be applicable where a petitioner relies on the Divorce Reform Act 1969, section 2(1)(*b*). In the context of a polygamous marriage, it might be a little more difficult, applying this test, to decide whether a petitioner could reasonably be expected to live with a respondent who had behaved in a way which the court might normally deplore but which parties accustomed to a polygamous society might not.

55. On the other hand, the difficulties should not be exaggerated. Where the marriage is potentially polygamous, or where there is only one wife in England, there should be little more difficulty than in a monogamous marriage in deciding whether particular behaviour was unjustifiable. Even in the unlikely event of there being more than one wife in England it does not follow that more than one wife would be involved, for example, where the issue concerned physical ill treatment. Nevertheless, there may, from time to time, be difficult questions to resolve ; difficulties are, however, almost inevitable in any " cruelty " case, other than the most straightforward one, and the courts are well used to dealing with them.

(iii) **Desertion**

56. Under the Divorce Reform Act 1969, section 2(1)(*c*), irretrievable breakdown may be inferred from the fact that the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition. There would appear to be no problem in applying straightforward desertion to a marriage which was actually or potentially polygamous. However, if the issue is one of constructive desertion, problems similar to those considered in the previous section could arise. As we have pointed out, the court would rarely have any difficulty in reaching a decision.

(iv) **Separation for two years or five years**

57. If the parties have lived apart for two years and the respondent consents to a decree, the court is entitled to infer irretrievable breakdown.[16] If the parties have lived apart for five years the court may infer irretrievable breakdown whether or not the respondent consents.[17] The court is concerned only with the fact that the parties have lived apart, not with the reasons for the separation. There would be no difficulty in deciding this fact in a polygamous situation. The safeguards, in the case of grave financial or other hardship and in respect of financial provision, would, of course, apply.[18]

Conclusions concerning divorce

58. From this review of the breakdown ground of divorce and of the factual situations from which it is to be inferred the majority of us conclude that there would be no insuperable difficulties in applying them to potentially or actually polygamous marriages. For the reasons set out below it is our view that parties to such marriages should be entitled to petition for divorce in reliance on any of those facts, and that the rule in *Hyde* v. *Hyde* should be abolished in its application to divorce.

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15 *Gollins* v. *Gollins* [1964] A.C. 644, 696 (H.L.) per Lord Pearce.
16 Divorce Reform Act 1969, s. 2(1)(*d*).
17 Divorce Reform Act 1969, s. 2(1)(*e*).
18 Divorce Reform Act 1969, ss. 4 and 6.

59. One of us[19] dissents on this point; while agreeing with the majority that the rule in *Hyde* v. *Hyde* should no longer apply in its present form to divorce, he would limit the right to petition to cases where the marriage is actually monogamous. A Memorandum of Dissent setting out his views appears at the end of this Report.

Reasons of the majority

60. We realise that there may be an instinctive recoil from going so far at present as to apply English law and procedure to the resolution of questions of matrimonial obligations and marriage breakdown in relation to a type of marriage different from that for which the law and procedure were devised. Nevertheless, if cases of hardship to polygamously married persons who have settled in this country are to be avoided, we think the reform of the law should go that far. The weight of opinion of those we consulted was heavily on the side of the reform going the whole way.

61. In support of this view we would emphasise that our recommendation to extend matrimonial relief to parties to a polygamous marriage would not result in the legalisation or recognition of something which has hitherto been forbidden or totally unrecognised in this country. Polygamous marriages are already recognised for most purposes except matrimonial relief. Nor would our recommendation permit anyone to enter into a polygamous marriage in this country. The only marriages in respect of which relief would be granted are those validly entered into abroad; no marriage entered into in England can take effect as a polygamous marriage. Nor would our recommendation enable or encourage any person domiciled in England to enter into a polygamous marriage abroad: such a marriage would be void. Nor would it allow the English court to exercise jurisdiction over a polygamous marriage in circumstances where it would have no jurisdiction over an English or any other foreign marriage; parties to polygamous marriages would be subject to the same jurisdictional requirements as any other married persons.[20] Our recommendation would mean that where parties have lawfully entered into a polygamous marriage abroad before they settle in England, the English court would recognise and enforce their matrimonial rights and obligations as husband and wife.

62. The present law, by continuing to refuse relief in respect of the marriage, grants the husband a privilege which he may not have enjoyed in his own country: that of escaping altogether his obligation to maintain his wife whom he has lawfully married.[21] It deprives both the wife and the husband of any opportunity to obtain here dissolution of a marriage which has irretrievably broken down, or any protection through the court, however badly the other party may have behaved.[22] At the same time, it recognises that there is a marriage, and that the parties have the status of husband and wife. It therefore denies them any opportunity of entering into a later monogamous marriage.

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19 Mr. Neil Lawson, Q.C.
20 See para. 42 above.
21 Unless he can be made liable as in the case of *Imam Din* v. *National Assistance Board* [1967] 2 Q.B. 213 (D.C.); para. 28 above.
22 As to the husband's rights of talaq, see para. 30 ff. above.

63. In our view the recognition of polygamous marriages as marriages should be carried to its logical and just conclusion. The parties to such marriages should be encouraged to conform to English standards of behaviour by having, so far as is practicable, the same rights and obligations in marriage as other married people living in England. They should be allowed to petition for the dissolution of a marriage which has broken down irretrievably, whether that marriage is potentially or actually polygamous, provided, of course that the English court has jurisdiction.

Recommendation concerning divorce

64. The majority of us therefore recommend that, provided the English court has jurisdiction over the marriage, a party to a polygamous marriage should be entitled to petition for a decree of divorce in England.

(c) **Alternative solutions concerning divorce**

65. Although the majority of us are convinced that the legal problems of applying the English grounds of divorce to a potentially or actually polygamous marriage can be overcome, the matter goes beyond purely legal considerations. There are emotional, religious and moral issues involving the attitudes of a monogamous society towards polygamy, which ought not to be ignored. The function of this Report is not to resolve such issues, but to point out in what respects the present law gives rise to hardship and to recommend what changes are practicable.

66. There are alternative solutions which fall short of our majority recommendation. While the majority of us do not resile from that recommendation, we recognise that these alternatives would go some way to relieve the present hardships and might be more readily acceptable to some.

(i) **The potentially polygamous marriage**

67. The solution which is favoured by one of us[23] is to limit divorce proceedings to marriages where there is in fact only one husband and one wife, even if the marriage is potentially polygamous in the sense that the husband has capacity to take one or more further wives. This solution must be distinguished from the rule applied in *Ali* v. *Ali*.[24] In that case there was only one husband and one wife, but the marriage was held to be no longer potentially polygamous because the husband had become domiciled in England. The court was, therefore, dealing with a marriage which was monogamous *in fact* and *in law*. The solution put forward here is that divorce jurisdiction should be exercisable wherever mogonamy exists *in fact*.

68. There are several arguments in favour of this solution:

(*a*) The court would never have to consider an actually polygamous situation.

[23] Mr. Neil Lawson, Q.C. See the Memorandum of Dissent at the end of this Report (p. 46).

[24] [1968] p. 564; paras. 11 and 12 above.

(*b*) The English court would have no difficulty in applying English grounds of divorce in respect of a marriage in which there was in fact only one wife and one husband.

(*c*) In contrast with the present rule in *Ali* v. *Ali*, it would be unnecessary for the court to decide at what date the husband had acquired an English domicil.[25] It would be irrelevant whether the marriage had been " converted " from a polygamous to a monogamous union *in law*, so long as there was *in fact* only one husband and one wife.

(*d*) Some cases where a remedy would hitherto have been denied would be covered by this solution, including *Hyde* v. *Hyde*.[26]

69. On the other hand certain arguments tend to show that this solution does not go far enough:

(*a*) The effect of *Ali* v. *Ali* is that whenever the husband has become domiciled in England the potentially polygamous marriage becomes converted into a monogamous marriage, and the parties become entitled to English matrimonial relief. Because of this, the proposed solution would affect only two categories: those cases where the court's territorial jurisdiction was founded on some ground other than the husband's domicil;[27] and those cases where a potential ground for relief had arisen wholly or partly before the acquisition of an English domicil.

(*b*) The right of the parties to matrimonial relief would not remain constant, but would depend on whether the husband at any point of time, had another wife. For example, the parties may have been married for some years, there being only one wife. They may then have come to England to settle. Provided the jurisdictional requirements were satisfied the parties would be entitled to apply to the English court for matrimonial relief. Suppose the husband then deserted his wife, returned to his country of origin permanently, and there married a second wife. The wife in England would no longer have any right to bring proceedings, unless the husband's second marriage ended in death or divorce. It seems unsatisfactory that the rights of the parties in English law should fluctuate in this way and, in particular, that the wife's position should be dependent on the husband's unilateral action.

70. If this solution were to be implemented, it would have to be decided whether the right to petition should be limited to those whose marriages had never been actually polygamous (i.e., there had never been more than one wife)[28] or whether it should be extended to all whose marriages were potentially polygamous at the time of presentation of the petition, even though at some previous time the marriage had been actually polygamous.

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25 Except in so far as this was relevant to jurisdiction.

26 The following cases would also be covered: *Sowa* v. *Sowa* [1961] p. 70 (C.A.); and possibly *Imam Din* v. *National Assistance Board* [1967] 2 Q.B. 213 (D.C.).

27 Under present rules the only alternative bases of jurisdiction are where the wife's petition has been brought under s. 40(1) of the Matrimonial Causes Act 1965, para. 42 above.

28 Cf. the National Insurance Act 1965, s. 113(1) (para. 126 below) under which a potentially polygamous marriage will be recognised only if it has *at all times* been monogamous in fact.

There seems to us little justification in denying matrimonial relief to the parties merely because at some stage of the marriage the husband had had another wife, even though that wife had long since died or been divorced. Where there is only one husband and one wife at the time of the petition, the court should be able to entertain divorce proceedings, whatever the previous history of the marriage. Further, a party should be able to rely on any fact in support of the petition, whether it occurred at a time when the marriage was actually polygamous, or at a time when it was potentially polygamous. These would be the views of all of us if this alternative solution were adopted.

(ii) **The first marriage**

71. Another solution which requires consideration is that which has been adopted in Australia in respect of divorce, and in New Zealand in respect of maintenance proceedings.[29] Briefly, the solution adopted is that relief will be granted in respect of a polygamous marriage provided that neither party was, at the date of the marriage, already a party to a polygamous marriage. In other words relief is available between the husband and a wife whom he married at a time when he had no other wife. If the husband took a second wife (while he was still married) the right to relief would not be lost by the parties to the first marriage, but neither the second wife nor the husband would ever be entitled to any relief in respect of the second marriage, even if the first wife later died or was divorced.

72. The legislation referred to was introduced in Australia as the result of a case concerning an Australian woman who had become domiciled in Pakistan and had married a Pakistani in Muslim form. The parties returned to Australia, but when the husband committed adultery the wife could get no matrimonial relief.[30] When the Bill was introduced, the Attorney General stated that the provision would cover only those polygamous marriages entered into abroad between parties permitted by the law of their domicil to enter into such a marriage ; it would not alter the rule that Australian marriages are monogamous and would not encourage domiciled Australians to enter into such marriages while abroad.[31] In Parliament, the Bill was criticised only on the grounds that it did not apply to domiciled Australians who had entered into potentially polygamous marriages abroad[32] and that it did not allow relief to a wife who had entered into a polygamous marriage in the mistaken belief that she was the only wife.[33] Apart from the criticism that it did not go far enough, the clause was unopposed.

73. The argument in favour of this solution (which we will refer to as the Australian solution) is that the position of the first wife remains the same throughout the marriage, whether or not the husband takes one or more additional wives. The situation is one of certainty: relief is always available

29 The relevant legislation appears in Appendix C to this Report.

30 *Khan* v. *Khan* [1963] V.R. 203; see also Parliamentary Debates, H. of R.(N.S.) Vol. 48, pp. 2414 ff. and Vol. 49, pp. 3010 ff.

31 Parliamentary Debates, H. of R.(N.S.) Vol. 48, p. 2415 (2nd reading debate).

32 One of the first reported cases on this section concerned such a marriage. The petition was dismissed as there was no valid marriage: *Crowe* v. *Kader* [1968] W.A.R. 122. This result could be avoided in England by our recommendation to extend nullity jurisdiction to such cases, while not recognising the marriage as valid, para. 89 below.

33 Parliamentary Debates, H. of R.(N.S.) Vol. 49, p. 3012.

between the husband and his first wife, and never between the husband and his second wife. This is in contrast to the first alternative solution considered above, under which the husband and the first wife would lose the right to relief if a second wife were taken, and the husband and the second wife would acquire the right to relief if the first marriage ended. The Australian solution would probably lead to relief being available in more cases than under the first alternative solution. While there was only one wife, relief would be available under either solution. If the husband took a second wife no relief would be available under the first solution in respect of either marriage until one marriage had come to an end. Under the Australian solution relief would continue to be available between the husband and his first wife.

74. On the other hand, the inevitable consequence of preserving the spouses' rights in respect of the first marriage is that the court may be called upon to dissolve a marriage which has become actually polygamous. Another consequence of this solution is that it makes a distinction between the right to matrimonial relief in respect of the first marriage and the right to relief in respect of the second marriage. Such a distinction would almost certainly be entirely contrary to the rules governing polygamous marriages in the country of celebration.

Summary of possible alternative solutions

75. If our majority recommendation concerning polygamous marriages is not accepted, we put forward these alternative solutions for consideration. The majority of us would, however, stress that, in contrast to our recommendation,[34] neither of these solutions covers all the situations where relief should, in our view, be available. As we have indicated, either would lead to anomalies.

Alternative (i) Assuming that the English court has jurisdiction, a party to a potentially polygamous marriage should be entitled to petition for divorce in England, provided that there is only one husband and one wife at the time when proceedings are commenced, even if the marriage has at some stage been actually polygamous, and whether or not the wife is the first or a later wife. A party should be able to rely on any fact in support of the petition, whether it occurred during a time when the marriage was potentially polygamous, or when it was actually polygamous.[35]

Alternative (ii) Assuming that the English court has jurisdiction, a party to a polygamous marriage should be entitled to petition for divorce in England provided that at the time of the marriage neither party was a party to a subsisting polygamous marriage, whether or not the marriage subsequently became actually polygamous.

7. PRESUMPTION OF DEATH AND DISSOLUTION OF MARRIAGE

76. The Matrimonial Causes Act 1965, section 14, provides that:

> "(1) Any married person who alleges that reasonable grounds exist for supposing that the other party to the marriage is dead may . . . present

[34] Para. 64 above.

[35] This is the solution favoured by Mr. Neil Lawson, Q.C.; see the Memorandum of Dissent at the end of this Report (p. 46).

a petition to the court to have it presumed that the other party is dead and to have the marriage disolved, and the court may, if satisfied that such reasonable grounds exist, make a decree of presumption of death and dissolution of the marriage."

It has been held that where a decree has been made under this section presuming a spouse to be dead, that spouse may later apply for maintenance, as the decree of dissolution is the equivalent of a decree of divorce.[36]

77. Since a decree under section 14 is based on the court's finding of certain objective facts, there appears to be no reason why parties to a potentially or an actually polygamous marriage should not be entitled to petition on this ground whether or not they are given the right to petition for divorce. For example, if a polygamously married wife has lost all trace of her husband for several years the court will be concerned only with the issue whether there were reasonable grounds to presume him dead. The existence or non-existence of another wife would be totally irrelevant, and there seems no reason to deny relief merely because the husband had another wife at the time of his disappearance, and that other wife is still living. Similarly, if the husband has lost trace of one wife, why should the existence of another wife be a bar to relief?

78. On the other hand, it could be argued that if the right to petition for divorce is not extended to the parties to an actually polygamous marriage, it might be anomalous to allow the same parties matrimonial relief, including financial provision, on the ground of disappearance of the other spouse. But the question of financial provision could arise only if the party presumed dead subsequently reappeared. In other cases the successful petitioner would be left with the right to apply for maintenance from the estate as a former spouse.[37]

79. For these reasons, we recommend unanimously that a party to a polygamous marriage should be entitled to petition for a decree of presumption of death and dissolution of marriage under section 14 of the Matrimonial Causes Act 1965.

8. JUDICIAL SEPARATION

80. Under the Divorce Reform Act 1969, section 8, the grounds for judicial separation are the same as the facts from which irretrievable breakdown of marriage is to be inferred in divorce proceedings. It is not, however, necessary for the court to consider whether the marriage has broken down irretrievably. The problems concerning the application of the grounds to an actually or potentially polygamous marriage are exactly the same as those arising in divorce proceedings, which were considered in detail above. The court's powers to award financial provision in proceedings for judicial separation are the same as its powers in divorce proceedings.

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[36] *Deacock* v. *Deacock* [1958] p. 230 (C.A.). In that case the wife, who had been presumed dead, successfully applied for maintenance.

[37] Under s. 26 of the Matrimonial Causes Act 1965.

81. The majority of us would make the same recommendation for judicial separation as for divorce:

> Assuming that the English court has jurisdiction, a party to a polygamous marriage should be entitled to petition for a decree of judicial separation on any ground laid down by section 8 of the Divorce Reform Act 1969.

82. One of us[38] dissents from this recommendation but would accept an alternative solution under which parties to potentially polygamous marriages would be entitled to petition for judical separation.[39] If the majority recommendation is not accepted we put forward for consideration the same alternative solutions as in the case of divorce.[40]

9. NULLITY

(a) The right to petition

83. Proceedings for nullity are less important than proceedings for divorce because the number of cases is very much smaller.[41] In contrast to proceedings for divorce, English courts sometimes apply foreign law in annulling a marriage, at any rate if it is alleged to be void and not voidable. Thus they will apply the law of the place of celebration if it is alleged that the marriage is formally void, or the law of a party's domicil at the time of the marriage if it is alleged that he or she had no capacity to contract the marriage. The rules regulating the jurisdiction of the court to annul a marriage are complicated. They are summarised in *Dicey and Morris on the Conflict of Laws*[42] and need not be repeated here. They will be reviewed with a view to their reform and clarification in a later Working Paper. Parties to polygamous marriages would, of course, be subject to the same jurisdictional requirements as parties to any other marriage.

84. Since *Hyde* v. *Hyde* it has been assumed that the same considerations as prevent the grant of a divorce apply to nullity. But it is not immediately obvious why they should. As Barnard J. said in *Risk* v. *Risk*:[43]

> "If English law regards such a polygamous marriage as the one now before me as no marriage, it might seem at first sight that there could be no objection to the court's saying so, for the decree would be declaratory."

However, he went on to point out that the objection to granting a decree of nullity is that it "would mean that a successful petitioner would have the right to apply for maintenance and for custody".[44] We assume that his Lordship meant, not that it is wrong ever to grant ancillary relief in respect of a polygamous marriage, but merely that it would be anomalous to deny a divorce (and ancillary relief) in respect of such a marriage but to grant a decree of nullity (and ancillary relief).[45]

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[38] Mr. Neil Lawson, Q.C. See the Memorandum of Dissent at the end of this Report (p. 46).
[39] See para. 67 ff. for the application of this alternative to divorce petitions.
[40] Para. 75 above.
[41] An average of 800 decrees per annum compared with over 50,000 divorces.
[42] (8th ed. 1967) Rule 44, pp. 344–345.
[43] [1951] p. 50, 53.
[44] *Ibid.*
[45] See his comments in *Mehta* v. *Mehta* [1945] 2 All E.R. 690, 693.

85. If our recommendation concerning divorce is implemented, parties to potentially and actually polygamous marriages will be able to petition for divorce. In those circumstances there would no longer be any objection to granting nullity decrees in respect of such marriages. The majority of us therefore recommend that a party to a polygamous marriage should be entitled to petition for a decree of nullity.

86. If our recommendation concerning divorce is not accepted, and one of the alternative solutions is implemented, the right to petition for divorce may be limited to potentially polygamous marriages or other limited categories. The problems to which we have referred, which arise when applying English divorce law to polygamous marriages, do not necessarily arise in the case of nullity. At first sight, therefore, it would appear that the right to petition for nullity need not be restricted because of any restriction on the right to petition for divorce. Nevertheless, in our view, for reasons similar to those given by Barnard J., it would be anomalous to allow the relief of nullity in circumstances where the parties would not be entitled to petition for divorce. On a decree of nullity the court may exercise the same powers as on a decree of divorce to award financial provision to either spouse, including the power to transfer and settle property. These powers go far beyond those which may be exercised in an application for maintenance in the High Court, the county court or the magistrates' court. Parties to a polygamous marriage should not be entitled to petition for nullity and then apply for the exercise of these powers in circumstances where they would not, if the marriage were valid, be entitled to petition for divorce.

87. The one of us who dissents from our majority recommendation concerning divorce and judicial separation[46] takes the view that the right to petition for nullity should also be limited to those cases where the marriage is in fact monogamous. However, he agrees in principle with the majority that the same rule should apply to nullity as to divorce. In those cases where a spouse was not entitled to petition for nullity, there would be the right to apply for a declaration of validity or non-validity of marriage under a later recommendation.[47] In such proceedings the court would not be able to award financial provision.

(b) The law to be applied

88. Since a marriage celebrated in England cannot take effect as a polygamous marriage,[48] the court will be concerned only with marriages celebrated abroad. The law of the place of celebration determines the nature and incidents of the marriage ;[49] these are relevant to the decision whether the marriage is monogamous or polygamous.[50] The law of the place of celebration is also applied to determine whether the marriage is void for

[46] Mr. Neil Lawson, Q.C. See the Memorandum of Dissent at the end of this Report (p. 46).
[47] Para. 102 below.
[48] Para. 16 above. If a person who is already married (whether monogamously or polygamously) marries again in England, either party may petition for a decree of nullity on the ground of bigamy (para. 112 below).
[49] *Warrender* v. *Warrender* (1835) 2 Cl. & F. 488, 531; *Hyde* v. *Hyde* (1866) L.R. 1 P. & D. 130, 134; *Sowa* v. *Sowa* [1961] p. 70, 84 (C.A.); *Cheni* v. *Cheni* [1965] p. 85, 90.
[50] *Lee* v. *Lau* [1967] p. 14, 20.

failure to comply with the formal requirements concerning the ceremony,[51] or possibly because either party has no capacity to marry according to that law.[52]

89. The marriage is also regarded as void if either party lacks capacity to marry under the law of the domicil of that party.[53] A person who is domiciled in England has no capacity to enter into a valid polygamous marriage; the effect of marrying in a polygamous form would render the marriage void.[54] Our proposals do not alter these rules, except to allow the parties to marriages which are void on any of these grounds to petition the English court for a decree of nullity. If there is no ground on which the marriage could be considered void under the law of the place of celebration or the law of the domicil of either party, it might be voidable under the law of the matrimonial domicil.[55]

10. MAGISTRATES' COURTS AND MAINTENANCE

90. Under the Matrimonial Proceedings (Magistrates' Courts) Act 1960,[56] a married man or a married woman may apply by way of complaint to the magistrates' court for a separation, maintenance or custody order if one of a number of alternative grounds is established. It has already been pointed out that these orders are not available to the parties to a polygamous marriage.[57] In our view this is unjustified.

91. In our Working Paper[58] we said that we did not think that public opinion in this country now favoured the denial of maintenance to the wife or wives of a polygamous marriage. Our consultations confirm, with almost complete unanimity, the view we expressed. The man in the street does not readily understand why a polygamously married wife (unlike every other wife resident in this country) should be without a remedy when she is left destitute and should become a charge on our welfare services. Nor will it increase his respect for the law to be told that, while the wife cannot get maintenance by direct proceedings against the husband, the husband can, indirectly, be made liable to pay for her maintenance if she had been in receipt of supplementary benefit.[59] It is equally difficult to understand why the parties to a polygamous marriage should not be entitled to apply for separation and custody orders. The protection of an innocent spouse and the welfare of the children of the family are matters which cannot be ignored on the ground that the marriage is actually or potentially polygamous.

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[51] *Brook* v. *Brook* [1861] 9 H.L.C. 193; *Sottomayor* v. *De Barros* (1877) 3 P.D. 1, 5 (C.A.); *Starkowski* v. *A.G.* [1954] A.C. 155 (H.L.).

[52] *Breen* v. *Breen* [1964] p. 144; but see *Reed* v. *Reed* (1969) 6 D.L.R. (3d) 617, 620, 621; see also *Berthiaume* v. *Dastous* [1930] A.C. 79, 83 (P.C.); *Harvey* v. *Farnie* (1882) 8 App. Cas. 43, 50 (H.L.).

[53] *Brook* v. *Brook* (1861) 9 H.L.C. 193, 234. There is another line of authority which has been interpretated as implying that it is the law of the matrimonial domicil which is decisive.

[54] See above, para. 18.

[55] *De Reneville* v. *De Reneville* [1948] p. 100 (C.A.); *Way* v. *Way* [1950] p. 71, 80; *Ramsay-Fairfax* v. *Ramsay-Fairfax* [1956] p. 115, 125 (C.A.).

[56] s. 1(1).

[57] *Sowa* v. *Sowa* [1961] p. 70 (C.A.); see above, para. 27.

[58] Para. 33.

[59] *Imam Din* v. *National Assistance Board* [1967] 2 Q.B. 213 (D.C.); see above, para. 28.

92. In both Australia and New Zealand polygamous marriages are recognised for the purpose of maintenance proceedings. For example, in New South Wales, the Maintenance Act 1964, section 7(3) provides that:

> "For the purposes of this Act a man and a woman married by a subsisting marriage, whether monogamous or polygamous, shall if the marriage is lawful and binding in the place where it was solemnized be regarded as husband and wife."

Similar legislation has been passed in the other States. Both potentially and actually polygamous marriages are recognised under the above provision. The ground of relief is that the spouse has been left without adequate support. In New Zealand the first polygamous marriage is recognised under the Domestic Proceedings Act 1968, section 3.[60]

93. Dealing first with the ground of wilful neglect to maintain, this is a ground on which an application for maintenance can be made in the High Court or county court;[61] it is also a ground for separation, maintenance and custody orders in the magistrates' court.[62] Once it is accepted that there is an obligation to maintain in the context of a polygamous marriage then it follows that the parties should be entitled to apply for relief on this ground whether the marirage is potentially or actually polygamous.

94. There can be no reason, in our view, why a party to a polygamous marriage should not be entitled to apply in the magistrates' court on the ground of persistent cruelty by the defendant to an infant child of the complainant or to an infant child of the defendant who, at the time of the cruelty, was a child of the family.[63] In addition, there are certain grounds which require only proof of objective facts concerning the defendant and which do not involve an enquiry into customs or standards of behaviour. These are that the defendant has been found guilty of certain offences,[64] has had sexual intercourse with the complainant while knowingly suffering from a venereal disease,[65] is a habitual drunkard,[66] or, being the husband, has compelled the wife to submit to prostitution.[67] It is our unanimous view that parties to actually or potentially polygamous marriages should be entitled to apply for maintenance or custody orders[68] in the magistrates' court on any of the above grounds, as well as to the High Court, county court or magistrates' court on the ground of wilful neglect to maintain.

95. There are certain grounds on which we are unable to reach a unanimous view. These are the grounds of desertion,[69] persistent cruelty[70] and

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[60] The text of s. 3 appears in Appendix C to this Report; see Orchard, "The Domestic Proceedings Bill and Polygamy" (1968) N.Z. L.J. 447. T. C. Hartley, "Polygamy and Social Policy" (1969) 32 M.L.R. 155, 161 and 164 n. 58, draws attention to a French decision in which maintenance was awarded to one of two wives.

[61] Matrimonial Proceedings and Property Act 1970, s. 6.

[62] Matrimonial Proceedings (Magistrates' Courts) Act 1960, s. 1(1)(*h*) and (*i*); the husband's right to apply is limited.

[63] s. 1(1)(*b*)(ii) and (iii).

[64] s. 1(1)(*c*).

[65] s. 1(1)(*e*).

[66] s. 1(1)(*f*).

[67] s. 1(1)(*g*).

[68] As to separation orders, see below.

[69] s. 1(1)(*a*).

[70] s. 1(1)(*b*)(i).

adultery.[71] If our majority recommendation concerning divorce is implemented parties to actually or potentially polygamous marriages will be able to petition for divorce under the Divorce Reform Act 1969 relying on "facts" which are very similar to these grounds. Since the issue, whether it be of adultery, cruelty or desertion, would be essentially the same, there would clearly be no objection to allowing these grounds to be relied on if, as the majority of us have recommended, the courts were given divorce jurisdiction over all polygamous marriages and these issues could be adjudicated upon in divorce proceedings.

96. On the other hand, if the majority recommendation is rejected because it is thought that there would be insuperable difficulties in deciding, in an actually polygamous situation, the issues of adultery, cruelty or desertion, it would follow that the same objection would apply to allowing these grounds to be relied on in magistrates' court proceedings. The one of us who dissents from our majority recommendation to allow the English court to exercise divorce jurisdiction in respect of actually polygamous marriages,[72] has the same reservation about allowing these three grounds to be relied on in magistrates' court proceedings, because he recoils from the idea that English courts should have to investigate these matters in an actually polygamous situation. Whilst agreeing that parties to actually or potentially polygamous marriages should be able to apply to the High Court, county court or magistrates' court on the grounds set out in paragraphs 93 and 94, his view is that if the marriage is actually polygamous neither spouse should be entitled to apply to the magistrates' court on the ground of adultery, cruelty or desertion. He also takes the view that where the marriage is actually polygamous the court should not be entitled to insert a "non-cohabitation clause" in its order since such an order has the effect, for most purposes, of a judicial separation.[73] While the rest of us see the logic of his position, we would regard the result as most unfortunate. Non-cohabitation clauses should be inserted where it is thought that they are needed for the wife's protection, and we fail to see why she should be denied protection merely because her marriage is polygamous.

97. The minority view regarding the grounds of adultery, cruelty and desertion has even wider repercussions. Under existing law when a spouse applies to the court for maintenance the defendant is entitled to put forward the defence that the applicant has been guilty of adultery, cruelty or desertion. This applies whether the case is commenced in the High Court, county court or magistrates' court.[74] The majority of us are of the opinion that the court must be able to decide these issues when raised by way of defence if it is to adjudicate sensibly between the spouses on the question of maintenance. The one of us who dissents[75] agrees that the magistrates must be entitled to have regard to the whole of the circumstances, including the conduct of the parties when deciding what order, if any, to make. But

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[71] s. 1(1)(*d*).

[72] Mr. Neil Lawson, Q.C. See the Memorandum of Dissent at the end of this Report (p. 46).

[73] Matrimonial Proceedings (Magistrates' Courts) Act 1960, s. 2(1)(*a*); cf. Matrimonial Proceedings and Property Act 1970, s. 40(2).

[74] Matrimonial Proceedings (Magistrates' Courts) Act 1960, s. 2(3)(*b*). *Naylor* v. *Naylor* [1962] P. 253 (D.C.); *Young* v. *Young* [1964] p. 152, 160 (D.C.).

[75] Mr. Neil Lawson, Q.C. See Memorandum of Dissent at the end of this Report (p. 74).

since he takes the view that where the marriage is actually polygamous no English court should be called upon to adjudicate upon any issue of adultery, cruelty or desertion, he maintains that the parties to such a marriage should be barred from pleading these issues either as a ground for relief or by way of defence.

98. The majority of us, however, are of the view that it would lead to unjust results if, for example, when a wife applied for maintenance on the ground of wilful neglect to maintain, her husband was debarred from putting forward the defence that she had been cruel to him, had deserted him, or had been committing adultery. If, as is conceded, conduct is to be relevant, it must include conduct which would or might amount to adultery, cruelty or desertion. If issues of fact relating to these matters have to be decided for the purpose of considering conduct, there seems no reason why, if proved, adultery, cruelty and desertion should not be regarded as defences in the usual way. It was considerations of this kind which led the majority of us to the view that, as a practical matter, the choice is between excluding actually polygamous marriages from all forms of matrimonial relief, on the one hand, and treating them in exactly the same way as potentially polygamous marriages on the other. Any intermediate stage of partial recognition would lead to anomalies and would in our view be unworkable.

99. All that has been said concerning maintenance has been based on the assumption that the court has jurisdiction over the parties. The circumstances in which jurisdiction may be exercised by the High Court and county court,[76] and by the magistrates' court[77] should, of course, be the same for polygamous marriages as for other marriages.

Recommendation concerning maintenance

100. The majority of us therefore recommend[78] that a party to a polygamous marriage should be entitled to apply for maintenance in the High Court or county court on the ground of wilful neglect to maintain and to apply for a maintenance, separation or custody order in the magistrates' court on any ground set out in the Matrimonial Proceedings (Magistrates' Courts) Act 1960, section 1.

11. MAINTENANCE AGREEMENTS

101. Under sections 13, 14 and 15 of the Matrimonial Proceedings and Property Act 1970 the court has power to vary maintenance agreements for the benefit of a party or of a child of the family where there has been a change of circumstances. This power may also be used to insert financial arrangements in an agreement for the benefit of a child of the family where the original agreement contains no proper arrangements for such child. Magistrates' courts may exercise this jurisdiction, but are limited to making orders inserting or varying provision for periodical payments.[79] In exercising

[76] Matrimonial Proceedings and Property Act 1970, s. 6(2).
[77] Matrimonial Proceedings (Magistrates' Courts) Act 1960, s. 1(2) and (3).
[78] See the Memorandum of Dissent by Mr. Neil Lawson, Q.C. at the end of this Report (p. 46). He agrees with this recommendation in relation to marriages which are in fact monogamous.
[79] s. 14(3).

jurisdiction under these provisions the court is not required to make any decision or order affecting the matrimonial status of the parties. Moreover, the jurisdiction arises only when the parties have already made an agreement regarding their financial arrangements. The court's attention is directed to whether or not the financial circumstances of the parties have changed; any question concerning conduct would arise only incidentally to this main issue. We see no reason why parties to actually or potentially polygamous marriages should not be able to submit their agreements to the court's jurisdiction, whether during joint lives, or on the death of one spouse.[80] We so recommend.

12. DECLARATIONS OF VALIDITY OF MARRIAGE AND LEGITIMACY

102. Whether or not polygamous marriages are to be recognised in English law for the purpose of matrimonial relief, it is clear that they are already recognised for many purposes. A person who is polygamously married is not capable of contracting a valid marriage in England; the authorities suggest that the issue of a potentially or actually polygamous marriage will be regarded as legitimate, and that the widow and children will be entitled to rights of succession. All these matters are quite independent of the question of matrimonial relief, but they often depend on whether a polygamous marriage is valid. At present no application can be made under section 39 of the Matrimonial Causes Act 1965 for a declaration that a polygamous marriage is valid.[81] It is uncertain whether a petition for a declaration of legitimacy can be made under the same section if a polygamous marriage is in question, or whether a declaration of validity of marriage can be made under the Rules of the Supreme Court, Order 15, rule 16.[82] It is obviously desirable that persons within the jurisdiction of the English courts should be able to have a judicial determination as to their status.[83] In order that such questions may be conveniently resolved, we therefore recommend that the fact that the marriage is polygamous should not be a bar to proceedings under section 39 of the Matrimonial Causes Act 1965 or under the Rules of the Supreme Court, Order 15, rule 16.

13. ANCILLARY QUESTIONS

(a) Conversion of polygamous marriages

103. *Ali* v. *Ali*[84] decided that if the parties to a potentially polygamous marriage become domiciled in England the marriage will be converted into a monogamous marriage and the parties will become entitled to matrimonial relief. This rule was held to follow from the proposition that a person domiciled in England has no capacity to enter into a polygamous marriage.

[80] s. 15. The right to apply arises only if the agreement provides for the continuation of payments after the death of one spouse.
[81] *Brinkley* v. *Att.-Gen.* (1890) 15 P.D. 76.
[82] Paras. 20–21 above.
[83] See the remarks of Cairns J. in *Lee* v. *Lau* [1967] p. 14, 24.
[84] [1968] p. 564; see paras. 11–14 above.

Because the English courts have no matrimonial jurisdiction in respect of a polygamous marriage it was also held in that case that the court could consider only those grounds for relief which arose after the date on which the marriage was converted into a monogamous one. The anomalies to which this rule gives rise have already been considered ;[85] they would disappear if the courts were given jurisdiction in respect of all polygamous marriages.[86] It would then be irrelevant whether any fact had occurred before or after the date of conversion of the marriage.

104. It could be argued that if the English courts were given matrimonial jurisdiction in respect of polygamous marriages there would no longer be any need to preserve the "conversion" rule in *Ali* v. *Ali* as a basis for jurisdiction. Nevertheless, it seems to us desirable that a potentially polygamous marriage celebrated abroad should be impressed with an English, and therefore monogamous, character once the parties have settled permanently in England. The rule in *Ali* v. *Ali* is not limited to matrimonial relief, and there may be advantages in other fields (for example, taxation) in being a party to a monogamous rather than a polygamous marriage. For these reasons we are of the opinion that the rule in *Ali* v. *Ali* should continue to operate.

105. There is another aspect of conversion of polygamous marriages into monogamous marriages to which attention should be drawn. In *Ohochuku* v. *Ohochuku*[87] parties to a potentially polygamous marriage celebrated in Nigeria had remarried each other in an English register office. Although some doubt was cast on this practice in *Ali* v. *Ali*[88] there seems to us to be both common sense and justice in allowing parties to a potentially polygamous marriage voluntarily to convert their marriage into a monogamous one by a ceremony performed in England.[89] The fact that the implementation of our recommendations would allow the court matrimonial jurisdiction in respect of potentially polygamous marriages[90] ought not, in our view, to create any obstacle to conversion by going through a marriage ceremony in England. The potentially polygamous marriage would, from that date, be absorbed into the English marriage, and would cease to have any separate existence. If an English court subsequently granted a decree of divorce in respect of such a marriage, the decree would operate on the marital status of the parties, and not on any particular ceremony.[91]

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85 Para. 14 above.

86 If jurisdiction were limited to potentially polygamous marriages, we have proposed that the court should be allowed to consider facts occuring during any time when the marriage had been actually polygamous (para. 75(i) above).

87 [1960] 1 W.L.R. 183.

88 [1968] p. 564, 578 per Cumming-Bruce J.: "As by English law the parties were validly married, I find it a little difficult to see how the registrar succeeded in marrying them again."

89 In *Cheni* v. *Cheni* [1965] p. 85, 91, Simon P. seems to have accepted that there was a conversion in *Ohochuku* v. *Ohochuku*. In countries where polygamous marriage is permitted, there is sometimes a special provision allowing conversion by going through a monogamous ceremony.

90 Either under the majority recommendation (para. 64) or under the limited alternative solution (para. 75(i)) favoured by one of us.

91 *Thynne* v. *Thynne* [1955] p. 272, 297–298 (C.A.); *Merker* v. *Merker* [1963] p. 283, 300. In this connection it is interesting to note that in *Ohochuku* v. *Ohochuku* [1960] 1 W.L.R. 183 the Judge expressly limited the decree to the English marriage holding that he had no jurisdiction over the earlier Nigerian marriage. In *Ali* v. *Ali* [1968] p. 564, where the polygamous marriage had been converted by the acquisition of an English domicil, the decree expressly dissolved the marriage celebrated in an Indian Mosque.

(b) Parties to matrimonial proceedings

106. Who should be the parties to matrimonial proceedings concerning a polygamous marriage? Where there is, in fact, only one wife at the time of the proceedings there is no problem. Where there is more than one wife the proceedings will be between the husband and one of the wives. In the case of divorce, only the marriage between the husband and that wife will be dissolved by the decree. Nevertheless, in proceedings between a husband and one wife it is possible that another wife, or other wives, may be affected by decisions concerning the status of the parties, ancillary relief or the children of the family. We recommend that in matrimonial proceedings concerning an actually polygamous marriage the court should have power in appropriate cases to direct service on any spouse of either party who is not already a party to the proceedings and that the other spouse should be entitled to apply for leave to intervene.

(c) Financial provision and other ancillary relief

107. When the court grants a decree of divorce, judicial separation or nullity it may order financial provision for either spouse or for the children of the family. The court's powers have been extended by the Matrimonial Proceedings and Property Act 1970, sections 2–5. Either spouse, whether the husband or wife, petitioner or respondent, may apply for periodical payments, a lump sum order, a transfer or a settlement of property or a variation of ante- or post-nuptial settlements. The court in exercising its powers must have regard to certain criteria laid down in section 5. A divorced spouse or one whose marriage has been annulled has the right to apply for maintenance from the estate of the other spouse under the Matrimonial Causes Act 1965, section 26. The magistrates' court's powers in matrimonial proceedings are limited to ordering periodical payments.

108. There would be no difficulty in applying any of these provisions to a potentially polygamous situation. Nor, in our view, would there be any difficulty in applying the criteria laid down by section 5 of the Matrimonial Proceedings and Property Act 1970 to an actually polygamous marriage. If the applicant for an order were the wife, the court would, in assessing the husband's ability to pay, take into account his financial obligations and responsibilities. These would include his obligations and responsibilities towards another wife and children in the same way as they now include a husband's responsibilities towards a former wife, a later wife whom he married after the divorce, or any dependent member of his family. The court is well used and well able to cope with the competing claims of the first and the second wife in maintenance proceedings.

(d) Children of the Family

109. In the exercise of its matrimonial jurisdiction the court has certain powers and duties in respect of the children of the family. It may make orders for their custody, and for financial provision, and may not make absolute a decree of divorce or of nullity, or make a decree of judicial separation unless it declares that it is satisfied as to the arrangements for the welfare (including custody, education and financial provision) of every

child of the family.[92] The magistrates' court may also make orders for the custody and maintenance of children of the family in matrimonial proceedings.

110. " Child of the family " means, in relation to the parties to a marriage:

" (*a*) a child of both of those parties ; and

(*b*) any other child . . . who has been treated by both of those parties as a child of their family ; ".[93]

In a polygamous marriage it could happen that the children of the family included not only the children of the spouses whose marriage was before the court, but also the children of the husband and another wife. This would not arise where the wife and children of each marriage had been living as separate families ; but the circumstances could vary greatly from case to case. For example, the other wife might be abroad, or might herself have left the husband leaving her children with him or with the wife who is the other party to the divorce. If the court were concerned with the arrangements for children of another wife or former wife of the husband, any order for custody made in respect of such a child would not be binding on the other wife, unless she had become a party to the proceedings.[94] However, there would be no greater problems than may arise already when children of the family include children other than those of both parties: for example, the wife's children by a divorced husband.

14. RECOGNITION OF POLYGAMOUS MARRIAGES FOR PURPOSES OTHER THAN MATRIMONIAL RELIEF

111. In spite of Lord Penzance's emphatic statement in *Hyde* v. *Hyde*[95] that his decision was limited to the question of matrimonial relief, there was for many years a tendency to assume that all polygamous marriages were wholly unrecognised by English law.[96] However, since 1939[97] it has become clear that they are recognised for many purposes. There is growing support for the statement in *Dicey and Morris*[98] that:

> " A marriage which is polygamous . . . and not invalid . . . will be recognised in England as a valid marriage unless there is some strong reason to the contrary."

Irrespective of whether our recommendation to extend the full range of matrimonial relief to parties to polygamous marriages is implemented, cases

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92 Matrimonial Proceedings and Property Act 1970, s. 17.

93 Matrimonial Proceedings and Property Act 1970, s. 27(1). Where a child of the family is not a child of a party, the court has to take into account certain special factors: s. 5(3). The Matrimonial Proceedings (Magistrates' Courts) Act 1960, s. 16(1), has a slightly different definition of " child of the family ".

94 Matrimonial Proceedings and Property Act 1970, s. 18(2).

95 (1866) L.R. 1 P. & D. 130, 138; quoted above, para. 7.

96 See *Harvey* v. *Farnie* (1881) 6 P.D. 35, 53 (C.A.); *Re Bethell* (1888) 38 Ch.D. 220; *R.* v. *Hammersmith Superintendent Registrar of Marriages* [1917] 1 K.B. 634, 647 (C.A.); *R.* v. *Naguib* [1917] 1 K.B. 359, 360 (C.C.A.).

97 *The Sinha Peerage Claim* (1939) 171 Lords' Journals 350, [1946] 1 All E.R. 348 n., is usually considered to mark the turning point.

98 (8th ed. 1967) Rule 36, p. 285; approved by Winn J. in *Shahnaz* v. *Rizwan* [1965] 1 Q.B. 390, 397, and by Lord Parker C.J. in *Alhaji Mohamed* v. *Knott* [1969] Q.B. 1, 13–14 (D.C.). In that case a potentially polygamous marriage celebrated in Nigeria was recognised, even though the wife was only 14.

will arise in which the courts will have to decide whether a marriage is recognised for other purposes. We proceed to consider some situations in which polygamous marriages, valid by the law of the place of celebration and by the personal law of the parties, have been or may be considered by the courts.

(a) As a bar to a subsequent monogamous marriage

112. It has been established that a valid polygamous marriage is recognised as constituting a bar to a subsequent monogamous marriage in England. The second " wife " is entitled to a decree of nullity on the ground of bigamy.[99] Otherwise the husband would be validly married to his first wife in the country where he married her and to his second wife in England, a state of affairs which would encourage rather than discourage polygamy.

(b) Legitimacy of and succession by children

113. " [I]t cannot, I think ", said Lord Maugham, L.C., delivering the opinion of the Committee for Privileges of the House of Lords in *The Sinha Peerage Claim,*[1] " be doubted now (notwithstanding some earlier *dicta* by eminent judges)[2] that a Hindu marriage between persons domiciled in India[3] is recognised in our court, that the issue are regarded as legitimate, and that such issue can succeed to property in this country with a possible exception which will be referred to later."[4]

Provided the marriage is valid by the law of the place of celebration and by the personal law of the parties at the time of the marriage, it seems to be immaterial that the succession is governed by English law. Thus, in *Bamgbose* v. *Daniel,*[5] a man's children, by no less than nine wives whom he had married in Nigeria where the parties were domiciled, were held entitled to succeed to their father's property on his death intestate, although by a Nigerian Marriage Ordinance the property was distributed " in accordance with the provisions of the law of England relating to the distribution of the personal estates of intestates, any native law or custom to the contrary notwithstanding ". On the basis of the authorities it now seems clear that the word " children " in the English Statute of Distribution 1670 (and presumably the word " issue " in the Administration of Estates Act 1925) is wide enough to cover the children of a valid polygamous marriage.[6] If this is so, it follows that the decision in *Bamgbose* v. *Daniel* would have been the same if the father had acquired an English domicil after the celebration of his marriages and before his death, and if the case had come before the Chancery

[99] *Srini Vasan* v. *Srini Vasan* [1946] p. 67; *Baindail* v. *Baindail* [1946] p. 122 (C.A.). The husband's domicil at the date of the second ceremony is irrelevant. See T. C. Hartley, " Bigamy in the Conflict of Laws " (1967) 16 I.C.L.Q. 680, 691 ff. On the other hand, a polygamous marriage is not a sufficient first marriage to support an indictment for bigamy: *R.* v. *Sarwan Singh* [1962] 3 All E.R. 612.

[1] (1939) 171 Lords' Journals 350, [1946] 1 All E.R. 348 n. Cf. *Baindail* v. *Baindail* [1946] p. 122, 127 (C.A.) per Lord Greene M.R.

[2] The reference is apparently to the decision of Stirling J. in *Re Bethell* (1888) 38 Ch. D. 220.

[3] The Hindu Marriage Act 1955 has now abolished polygamy between Hindus in India; but the principle stated by Lord Maugham is no doubt applicable to Moslem marriages celebrated in India or elsewhere, or to marriages celebrated under customary law.

[4] For this exception, see para. 114 below.

[5] [1955] A.C. 107 (P.C.).

[6] [1955] A.C. 107, 119 (P.C.).

or Probate Division and not (as it did) before the Privy Council. In any event, once the rule in *Hyde* v. *Hyde* is abolished, the only obstacle to recognising as legitimate the issue of a polygamous marriage will be removed.

114. The "possible exception" referred to by Lord Maugham in *The Sinha Peerage Claim* is the right to succeed as heir to real estate in England (which after 1925 is restricted to succession to entailed property and one or two other exceptional cases); and no doubt, to a title of honour and property limited to devolve therewith.[7] This exception was considered necessary because it was thought that difficulties would arise if there was a contest between the first-born son of the second wife and the later-born son of the first wife, each claiming to be the heir. We do not consider that this matter is sufficiently important or likely to arise to merit alteration by legislation.

115. Under section 2(1) of the Legitimacy Act 1959, the child of a void marriage is treated as the legitimate child of his parents if at the time of the act of intercourse resulting in the birth (or at the time of the celebration of the marriage if later) both or either of the parents reasonably believed that the marriage was valid. Under section 2(2) the section applies, and applies only, where the father of the child was domiciled in England at the time of the birth, or, if he died before the birth, was so domiciled immediately before his death. Under section 2(5) a "void marriage" means a marriage in respect of which the High Court has or had jurisdiction to grant a decree of nullity, or would have had such jurisdiction if the parties were domiciled in England. The apparent effect (presumably unintended) of this definition is that at present the section may be inapplicable if the marriage was celebrated in polygamous form. Thus if H domiciled in England goes through a ceremony of marriage with W in Muslim form while on a temporary visit to Pakistan, and a child C is born, C is illegitimate. He is not born in lawful wedlock, since H being domiciled in England, had no capacity to contract a polygamous marriage.[8] He is not rendered legitimate by section 2 of the Legitimacy Act 1959, even if W reasonably believed that the marriage was valid, because owing to the rule in *Hyde* v. *Hyde* the High Court would not have jurisdiction to annul a potentially polygamous marriage.

117. This unfortunate result would, of course, disappear if our majority recommendation to abolish the rule in *Hyde* v. *Hyde* were implemented since the High Court would have jurisdiction to grant a decree of nullity on the ground of the husband's lack of capacity to enter into a polygamous marriage. Children of such a marriage would therefore be entitled to be treated as legitimate if the other conditions were fulfilled.

(c) Succession by wives

118. It seems that the surviving wife of a valid polygamous marriage has succession rights as a widow on the husband's death intestate, at any rate if the marriage was only potentially polygamous. In *Coleman* v. *Shang*[9] the widow

[7] See *Doe d. Birtwhistle* v. *Vardill* (1840) 7 Cl. & F. 895 (H.L.); Legitimacy Act 1926, ss. 3(1) and (3) and 10(1).

[8] *Re Bethell* (1888) 38 Ch. D. 220; *Ali* v. *Ali* [1968] p. 564; see also the cases referred to in para. 18 above.

[9] [1961] A.C. 481 (P.C.).

of a potentially polygamous marriage celebrated in Ghana between parties domiciled there was held entitled to a grant of letters of administration to the husband's estate on his death intestate, although by the Ghana Marriage Ordinance, section 48(1), two-thirds of the property was distributable "in accordance with the provisions of the law of England relating to the distribution of the personal estates of intestates in force on the 19th day of November, 1884, any native law or customs to the contrary notwithstanding". It seems, therefore, that the word "wife" in the English Statute of Distribution 1670 (and presumably the word "spouse" in the Administration of Estates Act 1925) is wide enough to cover the wife of a polygamous marriage, at any rate if there is only one surviving wife. Once again it would appear that the decision in *Coleman* v. *Shang* would have been the same if the husband had acquired an English domicil[10] after the celebration of the marriage, and if the case had come before the Chancery or Probate Division and not (as it did) before the Privy Council.

119. There does not appear to be a reported case in which the courts have had to decide whether several surviving wives of a polygamously married man could claim to share as his widows if the succession were governed by English law. It is difficult to see, consistently with the ratio in *Coleman* v. *Shang*,[11] how they could be denied this right. The Privy Council said:[12]

> "Difficulties may no doubt arise in the application of this decision in cases where there are more than one widow, both in dealing with applications for the grant of letters of administration and in the distribution of the estate, but they can be dealt with as and when they arise."

In fact the Privy Council has, without difficulty, adopted the practice, in dealing with the estates of deceased Chinese who died domiciled in Malaya, of assigning the one-third share of the widow under the Statute of Distribution equally between the several widows.[13] And there is Canadian and Rhodesian authority for the proposition that gifts by will to a surviving wife attract succession duty at the lower rate applicable to a spouse, even if there is more than one wife.[14]

120. In our view the English courts would now have little difficulty in deciding that the several wives of a polygamously married man should share equally between them the widow's share on his death intestate.[15] Although the amount considered appropriate for one widow might not be enough if there were two widows to provide for, we do not propose that any special rule should be introduced for polygamous marriages. If one widow should

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[10] The effect of *Ali* v. *Ali* [1968] p. 564 would, in any case, be to convert the marriage into a monogamous one if there were only one wife.

[11] [1961] A.C. 481 (P.C.). cf. *Bamgbose* v. *Daniel* [1955] A.C. 107, 119, 120 (P.C.).

[12] [1961] A.C. at 495.

[13] *Cheang Thye Phin* v. *Tan Ah Loy* [1920] A.C. 369 (P.C.); cf. *The Six Widows' Case* (1908) 12 Straits Settlements L.R. 120. In the Californian case of *Re Dalip Singh Bir's Estate* 83 Cal. App. 2d 256, 188 P. 2d 499 (1948) it was held that a Hindu's two widows could share his estate equally.

[14] *Yew* v. *Att.-Gen. B.C.* [1924] 1 D.L.R. 1166 (British Columbia Court of Appeal); *Estate Mehta* v. *Acting Master* 1958 (4) S.A. 252 (Supreme Court of the Federation of Rhodesia and Nyasaland). In this latter case there was only one wife, but reliance on this fact was expressly disclaimed (at 262).

[15] Including the right to require an appropriation of the home under the Intestates' Estates Act 1952, Second Schedule.

suffer hardship through having to share her succession rights with another there would, we suggest below, be a right to apply under the Inheritance (Family Provision) Act 1938.

121. Although there has as yet been no decision on this question, we think that the courts would hold that a party to a polygamous marriage is entitled to apply for maintenance from the estate of the other party under the Inheritance (Family Provision) Act 1938 as amended. The fact that, rarely, a husband may be survived by more than one wife should not cause excessive complication, since under the present law a spouse may be survived not only by the other spouse, but by one or more former spouses, all of whom may be entitled to apply for maintenance from the estate. The court then has to consider the competing claims of each spouse or former spouse in deciding what award to make. No problem arises in relation to the right of a former spouse to apply for maintenance under section 26 of the Matrimonial Causes Act 1965 ; once the court is given jurisdiction to dissolve or annul a polygamous marriage it will be able to exercise jurisdiction under this section.[16] Equally, we see no good reason why the surviving wife of a polygamous marriage should be held not to be a widow for the purpose of transmission of a statutory tenancy under the Rent Act 1968, section 3 and Schedule 1.

(d) The Matrimonial Homes Act 1967

122. The Matrimonial Homes Act 1967 protects a spouse's rights of occupation in the matrimonial home. It applies between " one spouse " and " the other spouse ". In our view these terms are capable of application to a husband and a wife whose marriage is polygamous. Certainly they should apply, since a polygamously married wife needs a roof over her head just as much as a monogamously married wife. The Act does not confer any right of exclusive occupation (if it did it would admittedly present difficulties in the very rare cases where there was more than one wife in this country). It merely protects the wife from eviction from the matrimonial home of which the husband is the owner or tenant if she is already there, and entitles her to apply to the court for an order restoring her to occupation if she is not. The court in either case can regulate the nature and extent of the occupation.[17] In practice it is unlikely that any other wives would be in the matrimonial home because, as already pointed out, it is extremely rare for more than one wife to be brought to England. In the unlikely event of the matrimonial home being shared with other wives, then each wife would have the right not to be evicted or excluded by the husband without the leave of the court.

(e) The Married Women's Property Act 1882, section 17

123. Section 17 affords a summary remedy for resolving disputes between husband and wife regarding the ownership or possession of their property. In the Working Paper we said that we saw no reason in principle why this summary procedure should not be available if the marriage is polygamous. In an actually polygamous marriage with several wives in this country (rare

16 Under section 26(6) a former spouse is one whose marriage with the deceased was dissolved or annulled by a decree made under that Act.
17 Matrimonial Homes Act 1967, s. 1(3).

though that is likely to be) any such dispute might involve the other wife or wives as well as the husband. However, the fact that the dispute between husband and wife might in some cases involve a third party ought not to debar them from using the procedure in other cases. Even now, third parties can be involved, for example, where the parent or former spouse of one party has or claims an interest in the property in dispute. In such a case the section 17 procedure may be inappropriate. Nevertheless, since the section is merely procedural and does not affect the substantive rights of the parties, there is no reason to deny the summary remedy simply on the ground that sometimes it may not be appropriate or that there may be difficult questions to resolve. Of course, if the dispute was between two or more wives (unlikely as that may be) and not the husband, the summary remedy would not be available. The abolition of *Hyde* v. *Hyde* should remove any doubt as to whether section 17 applies to polygamous marriages.

(f) Miscellaneous

124. There are other areas in which the question might arise whether a polygamous marriage should be regarded as having the same consequences as a monogamous marriage. We have not discovered any in which there would seem to be any serious doubt that polygamous marriages would be so regarded. For example, the Married Women's Property Act 1964, under which the savings from the housekeeping allowance are to be shared between husband and wife would seem to apply to polygamously married spouses. Similarly there seems little doubt that parties to a polygamous marriage would be regarded as parents for the purposes of the Guardianship of Infants Acts (now being consolidated by the Guardianship of Minors Bill). We have not thought it necessary to ransack the statute book for references to the words " wife ", " husband ", or " spouse ", nor to deal with questions outside the family law field. In the light of the recognition which has already been extended to polygamous marriages for most purposes we do not think that these are likely to lead to serious doubt. For example, we think that the wives of a polygamous union would be entitled to claim under the Fatal Accidents Acts to the extent of their dependence on the deceased husband.[18]

15. SOCIAL SECURITY LEGISLATION

125. We have thought it necessary to deal with social security in this Report because this field has been the subject first of decisions and later of legislation affecting polygamous marriages. Any change in the social security position of parties to polygamous marriages will require further legislation. The Commissioners under the National Insurance Acts held, in a number of decisions, that the polygamously married wife of a contributor was not entitled in right of his contributions to benefits under those Acts.[19] The reason given was that " the question whether the words ' marriage ', ' husband ', ' wife ' and ' widow ', when used in an Act of Parliament or statutory instrument are intended to include polygamous marriages and the parties thereto must be

[18] This does not impose any hardship on the tortfeasor since there would normally be no increase in the total dependency or of the damages payable for its loss, but at the most, merely a sharing of the damages among a greater number of dependants. In the United States in *Royal* v. *Cudahy Packing Co.* 195 Iowa 759, 190 N.W. 427 (1922) workmen's compensation was awarded to the widow of a potentially polygamous union.

[19] Decisions Nos. C.G. 116/51, R(G) 18/52, 11/53, 3/55, 7/55.

decided in the light of the language of the Act or instrument in question taken as a whole, and of its manifest scope and purpose", and that for National Insurance purposes the claimant had never been the wife of the contributor. It was thought that it obviously could not have been the intention to allow several wives of one contributor each to claim benefits under the Acts.

126. This interpretation was thought to cause injustice in the case of the one and only wife of a man who was compelled to pay contributions because of his employment in this country. Parliament went some way to meet this injustice by enacting section 3 of the Family Allowances and National Insurance Act 1956. This is now replaced by the National Insurance Act 1965, section 113(1), the National Insurance (Industrial Injuries) Act 1965, section 86(5) and the Family Allowances Act 1965, section 17(9), which provide that

> "a marriage performed outside the United Kingdom under a law which permits polygamy shall be treated for any purpose of [those Acts] as being and having at all times been a valid marriage if and so long as the authority by whom any question or claim arising in connection with that purpose falls to be determined is satisfied that the marriage has in fact at all times been monogamous."

127. These enactments are significant as being the only occasion on which the Parliament of the United Kingdom has legislated on the subject of polygamous marriages. They undoubtedly effect an improvement in the law as previously administered. But we question whether the sections go far enough. They do not cover cases where the marriage was once actually polygamous, but is so no longer, for example, because the first wife died or was divorced before the parties came to England. Nor do they cover cases where the marriage is in fact polygamous at the time when the social security benefits are sought although only one wife is in this country. The problems involved in these two situations are quite different. They will therefore be discussed separately.

128. We deal first with marriages which were once actually polygamous but in which there is now only one wife. As we have seen, the second Mrs. Imam Din[20] obtained assistance from the National Assistance Board, and the Board was held entitled to recover part of it from the husband. But she would not have been entitled to any social security benefits payable to a wife or widow,[21] because her marriage was at one time actually polygamous. We regard this as both unfortunate and anomalous because the second wife, having been admitted into this country as the wife of a permitted immigrant, should be treated just like any English wife if she was in fact her husband's only wife throughout the period of their residence in England while the husband was paying contributions in England. It cannot, surely, be right to compel the husband to suffer deductions from his wages because of his employment in England, and then deny social security benefits to the woman who, throughout the period of those compulsory deductions, was his one and only wife, merely because at some earlier time before coming to England he had another wife. Suppose that three workmen are killed in the same

[20] See *Imam Din* v. *National Assistance Board* [1967] 2 Q.B. 213 (D.C.); above, para. 28.
[21] i.e., allowances payable under the legislation referred to in para. 126.

industrial accident. All three are married; all three have for many years contributed to the social security funds. One is an Englishman born and bred; the second is a Pakistani whose marriage, celebrated in Pakistan before he came to this country, has in fact at all times been monogamous though potentially polygamous; the third is a Pakistani who divorced his first wife in Pakistan before he came to England, but after he married his second wife there. Before 1956, only the wife of the first workman would have been entitled to benefits under the National Insurance (Industrial Injuries) Act; under the present law, so also would the wife of the second; in our opinion, so also should the wife of the third.

129. This situation does not appear to be relieved by the rule in *Ali* v. *Ali*[22] that when parties to a potentially polygamous marriage become domiciled in England the marriage becomes monogamous in law. It has been held that on the construction of the enactments referred to in paragraph 126 above, parties to marriages entered into in polygamous form qualify for benefits only if the conditions laid down in those enactments are complied with;[23] in other words, only if the marriage has been at all times monogamous in fact. There are, in addition, practical reasons why *Ali* v. *Ali* should not apply for the purposes of social security. In claims for insurance benefit the detailed investigation of all the facts necessary to establish domicil should be avoided if possible. We think the present law is too restrictive in denying all benefits unless there has never been more than one wife.

130. Turning to the second situation, difficult problems may be involved if the marriage is in fact polygamous at the time when the benefits are sought, but to deny social security benefits in such a case may involve hardship and injustice. In our Working Paper we considered numerous proposals for coping with the actually polygamous situation, but we were not able to discover a solution which we were sure would be both administratively workable and acceptable to public opinion.

131. From a consideration of the views expressed by those we consulted it is apparent that the various benefits under the three schemes—those embodied in the National Insurance Act 1965, the National Insurance (Industrial Injuries) Act 1965 and the Family Allowances Act 1965—are so different in their characteristics and in the practical problems of their administration that no single test applying to them all is practicable. Having regard to these detailed and practical problems we do not feel that we are the proper body to produce the varied solutions to them. In our view it is rather within the sphere of the Secretary of State for Social Services, with the help of specialist advice to examine each benefit separately and to determine as a matter of policy the circumstances in which each particular benefit should be made available in a polygamous situation, taking into account all the problems relating to it. This was the approach adopted in the National Superannnuation and Social Insurance Bill.[24] Clause 126(3)(*a*) provided for regulations to be made specifying the circumstances in which

22 [1968] p. 564; above, para. 11.

23 Decision No. C.G. 4/68 (unreported), where it was held that the fact that the marriage may later be converted to a monogamous marriage does not alter the fact that it was (in the words of the Act) "a marriage performed . . . under a law which permits polygamy."

24 The Bill lapsed on the dissolution of Parliament in May 1970 after completing the Committee Stage in the House of Commons.

a marriage celebrated under a law which permits polygamy would be treated as a marriage celebrated under a law which does not. This clause would have replaced section 113(1) of the National Insurance Act 1965 and section 86(5) of the National Insurance (Industrial Injuries) Act 1965.

132. A provision on the lines of the above clause would achieve what we have in mind once the appropriate regulations had been made. But unless and until they were made, it would preserve the present position under which polygamous marriages are not treated as marriages for the purposes of the legislation. In our view it ought to be made clear in the legislation that a polygamous marriage is not excluded from being a marriage for those purposes, although the extent to which the parties may qualify for benefits must necessarily depend upon fulfilment of conditions laid down in regulations. We recognise that those regulations may have to limit the right to benefits in some polygamous situations. For example, it may prove impossible to grant benefits (even by splitting) to two or more wives actually present in this country. A solution of this nature has a twofold advantage. First, there would be no question of giving offence to persons regarding themselves as married by declaring that the marriage was not recognised.[25] We are informed by the Chief National Insurance Commissioner that such declarations cause offence by implying that such persons are not validly married. Secondly, regulations could provide appropriate conditions, determined in the light of policy considerations for each of the different benefits.

133. Accordingly, we recommend that section 113(1) of the National Insurance Act 1965, section 86(5) of the National Insurance (Industrial Injuries) Act 1965 and section 17(9) of the Family Allowances Act 1965 should be replaced in each case by a provision that any person claiming a benefit in reliance upon a marriage celebrated outside the United Kingdom under a law which permits polygamy should qualify for the benefit except where regulations otherwise provide.

134. Draft legislation to implement this recommendation is not included in the draft Bill attached to this Report, which is expressly limited to matrimonial relief and allied questions. However, in view of the great practical importance of social security, we have attached a draft clause dealing with this matter in Appendix B.

16. SUMMARY OF RECOMMENDATIONS

135. The recommendations concerning matrimonial proceedings are all limited to those cases in which the English court is entitled to exercise jurisdiction over the marriage and parties in question. Except where it is indicated to the contrary, the recommendations are unanimous.

Divorce (Majority recommendation)*

(i) A party to a polygamous marriage should be entitled to petition for a decree of divorce in England. (para. 64)

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[25] We are informed that a new form of insurance officer's decision has been introduced, which says "For National Insurance purposes X cannot be accepted as the claimant's husband . . . on the ground that their marriage has not at all times been monogamous."

* See the Memorandum of Dissent by Mr. Neil Lawson, Q.C. at the end of this Report (p. 46). He agrees with this recommendation in relation to marriages which are in fact monogamous.

Presumption of death and dissolution of marriage

(ii) A party to a polygamous marriage should be entitled to petition for a decree of presumption of death and dissolution of marriage under section 14 of the Matrimonial Causes Act 1965. (para. 79)

Judicial separation (Majority recommendation)*

(iii) A party to a polygamous marriage should be entitled to petition for a decree of judicial separation in England on any ground laid down by section 8 of the Divorce Reform Act 1969. (para. 81)

Nullity (Majority recommendation)*

(iv) A party to a polygamous marriage should be entitled to petition for a decree of nullity in England. (para. 85)

Maintenance (Majority recommendation)**

(v) A party to a polygamous marriage should be entitled to apply for maintenance in the High Court or county court on the ground of wilful neglect to maintain and to apply for a maintenance, separation or custody order in the magistrates' court on any ground set out in the Matrimonial Proceedings (Magistrates' Courts) Act 1960, section 1. (para. 100)

Maintenance agreements

(vi) A party to a polygamous marriage should be entitled to apply to the court for an order for the variation of a maintenance agreement, under sections 13 to 15 of the Matrimonial Proceedings and Property Act 1970. (para. 101)

Declarations of validity of marriage and legitimacy

(vii) The fact that a marriage is polygamous should not be a bar to proceedings under the Matrimonial Causes Act 1965, section 39 or under the Rules of the Supreme Court, Order 15, rule 16. (para. 102)

Parties to matrimonial proceedings

(viii) In matrimonial proceedings concerning an actually polygamous marriage the court should have power in appropriate cases to direct service on any spouse of either party who is not already a party to the proceedings ; that other spouse should be entitled to apply for leave to intervene. (para. 106)

Social security

(ix) Section 113(1) of the National Insurance Act 1965, section 86(5) of the National Insurance (Industrial Injuries) Act 1965

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* See the Memorandum of Dissent by Mr. Neil Lawson, Q.C. at the end of this Report (p. 46). He agrees with this recommendation in relation to marriages which are in fact monogamous.

** See the Memorandum of Dissent by Mr. Neil Lawson, Q.C. at the end of this Report (p. 46). He agrees with this recommendation except in relation to certain grounds where the marriage is actually polygamous.

and section 17(9) of the Family Allowances Act 1965 should be replaced in each case by a provision that any person claiming a benefit in reliance upon a marriage celebrated outside the United Kingdom under a law which permits polygamy should qualify for the benefit except where regulations otherwise provide. **(para. 133)**

We would again emphasise that the main effect of these recommendations is merely to overcome the present anomalies resulting from the fact that polygamous marriages celebrated abroad between persons domiciled abroad are recognised here for most purposes but are at present treated as creating an indissoluble union without enforceable obligations of mutual support.

136. All our recommendations will require legislation. Draft clauses are attached covering matrimonial proceedings in Appendix A and covering social security in Appendix B.

(*Signed*) LESLIE SCARMAN, *Chairman.*
CLAUD BICKNELL.
L. C. B. GOWER.
NEIL LAWSON.*
NORMAN S. MARSH.

J. M. CARTWRIGHT SHARP, *Secretary.*

21st December 1970.

Memorandum of Dissent

I dissent from the recommendation of my colleagues that either party to a polygamous marriage should be able to petition for a decree of divorce or judicial separation in England notwithstanding that, at the relevant time, that marriage is actually polygamous. This recommendation to my mind, not only represents a departure from the basic principles of English law concerning the marriage relationship, in its many aspects, but its adoption would face the courts with problems with which they are not designed or equipped to deal. I am unconvinced that substantial hardship is caused to individuals, who have knowingly contracted polygamous marriages, by the present state of the law, so far as divorce and judicial separation are concerned ; I am also not satisfied that, were the other recommendations contained in the Report adopted (including the recommendation to which I refer below), any appreciable hardship would remain.

I favour the recommendation that either party to a potentially polygamous marriage should be entitled to petition for divorce, judicial separation or nullity in England, provided that there is only one husband and one wife at the time when proceedings are commenced, even if the marriage has, at some stage been actually polygamous whether or not the wife is a first or later wife.

* See the Memorandum of Dissent (this page) which affects Recommendations Nos. (i), (iii), (iv) and (v).

I concur with the remaining recommendations in the Report subject to a reservation concerning magistrates' court proceedings and proceedings for wilful neglect to maintain in the High Court or county court. In my view, where the marriage is actually polygamous neither party ought to be entitled to rely on the ground of adultery, cruelty or desertion either in support of, or as a defence to, an application for maintenance, although the magistrates should be entitled to have regard to the whole of the circumstances including the conduct of the parties when deciding what, if any order, they will make. Nor should the magistrates' court be entitled to insert a non-cohabitation clause in its order if the marriage is actually polygamous.

(*Signed*) NEIL LAWSON.

21st December 1970.

APPENDIX A

Matrimonial Proceedings (Polygamous Marriages) Bill

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Enable matrimonial relief to be granted, and declarations concerning the validity of a marriage to be made, notwithstanding that the marriage in question was entered into under a law which permits polygamy.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Matrimonial relief and declarations of validity in respect of polygamous marriages.

1.—(1) A court shall not be precluded from granting matrimonial relief or making a declaration concerning the validity of a marriage by reason only that the marriage in question was entered into under a law which permits polygamy.

(2) In this section "matrimonial relief" means—

(*a*) a decree of divorce, nullity of marriage or judicial separation;

1965 c. 72.

(*b*) a decree under section 14 of the Matrimonial Causes Act 1965 (presumption of death and dissolution of marriage);

1970 c. 45.

(*c*) an order under section 6 of the Matrimonial Proceedings and Property Act 1970 (wilful neglect to maintain);

(*d*) an order under section 14 of the said Act of 1970 (alteration of maintenance agreements);

(*e*) an order under any provision of the said Acts of 1965 and 1970 which confers a power exercisable in connection with, or in connection with proceedings for, any such decree or order as is mentioned in the foregoing paragraphs;

1960 c. 48.

(*f*) an order under the Matrimonial Proceedings (Magistrates' Courts) Act 1960.

(3) In this section "a declaration concerning the validity of a marriage" means—

(*a*) a declaration that a marriage is valid or invalid; and

(*b*) any other declaration involving a determination as to the validity of a marriage,

EXPLANATORY NOTES

Clause 1

1. This clause abolishes the rule in *Hyde* v. *Hyde* (1866) L.R. 1 P. & D. 130, under which a party to a polygamous marriage is not entitled to matrimonial relief or to a declaration as to the validity of marriage in the English courts. The scope of the rule in *Hyde* v. *Hyde* is explained in paragraphs 5, 6 and 20 of the Report. No distinction is drawn between polygamous marriages under systems allowing a husband to have more than one wife and those under systems allowing a wife to have more than one husband. The latter are extremely rare (see paragraph 2, n. 3 of the Report).

2. There is nothing in the Bill which affects the validity or invalidity of any particular polygamous marriage. This question would, as now, fall to be determined in accordance with the ordinary rules of law concerning the recognition and validity of foreign marriages. A marriage celebrated in England can never be a valid polygamous marriage, nor can a person domiciled in England enter into a polygamous marriage which would be recognised as valid in England.

3. The Bill does not confer on parties to polygamous marriages any greater right to matrimonial relief than that enjoyed by parties to monogamous marriages, whether celebrated in England or abroad. A party applying for relief will have to satisfy all the other conditions which apply; for example, requirements as to domicil or residence.

4. Under *subsection* (1) the fact that a marriage is polygamous will no longer preclude a party to such a marriage from applying for any type of matrimonial relief referred to in *subsection* (2) or for a declaration concerning the validity of a marriage as defined in *subsection* (3). It applies whether or not the marriage is potentially polygamous or actually polygamous, i.e., whether or not the husband has one wife or more than one wife (see *subsection* (4)).

5. *Subsection* (2) sets out the categories of matrimonial relief in respect of which the rule in *Hyde* v. *Hyde* is abolished. *Paragraph* (*a*) relates to divorce and judicial separation (implementing the majority recommendations in paragraphs 64 and 81 of the Report) and to nullity (implementing the recommendation in paragraph 85 of the Report). *Paragraph* (*b*), relating to section 14 of the Matrimonial Causes Act 1965, implements the recommendation in paragraph 79 of the Report. *Paragraph* (*c*), relating to section 6 of the Matrimonial Proceedings and Property Act 1970, implements part of the majority recommendation in paragraph 100 of the Report. Under section 6 a party to a marriage may in certain circumstances apply to the High Court or to a county court for an order for financial provision on the ground that the other party has wilfully neglected to maintain the applicant or a child of the family. *Paragraph* (*d*), relating to proceedings under section 14 of the Matrimonial Proceedings and Property Act 1970, implements the recommendation in paragraph 101 of the Report. Under section 14 the court has power to vary the terms of a maintenance agreement between parties to a marriage in certain cases, for example, where there has been a change in circumstances. Where one party to a maintenance agreement dies, section 15 provides that the survivor may apply for an order under section 14. *Paragraph* (*e*) implements paragraphs 107 and 108 of the Report and relates to any order that can be made under the Matrimonial Causes Act 1965 or the Matrimonial Proceedings and Property Act 1970 which now provides for the types of order that the court can make in relation to the decrees and orders specified in paragraphs (*a*) and (*b*). These include orders for financial provision for the parties to the marriage and the children of the family under sections 1 to 4 of the 1970 Act, and orders for the variation, discharge and enforcement of such orders or those made under sections 6 or 14 of that Act. It also includes orders for custody of and access to children under section 18 of that Act. The words "exercisable in connection with, or in connection with proceedings for, any such decree or order" ensure that the paragraph covers not only ancillary orders made after a decree but also orders

being a declaration in a decree granted under section 39 of the said Act of 1965 or a declaration made in proceedings brought by virtue of rules of court relating to declaratory judgments.

(4) This section has effect whether or not either party to the marriage in question has for the time being any spouse additional to the other party ; and provision may be made by rules of court—

(*a*) for requiring notice of proceedings for matrimonial relief brought by virtue of this section to be served on any such other spouse ; and

(*b*) for conferring on any such other spouse the right to be heard in any such proceedings,

in such cases as may be specified in the rules.

that can be made before the decree is granted, for example, maintenance pending suit under section 1 of the 1970 Act or an interim order made on an application under section 6 of that Act. *Paragraph* (*f*) implements that part of the recommendation in paragraph 100 of the Report not dealt with by *paragraph* (*c*). Under the Matrimonial Proceedings (Magistrates' Courts) Act 1960 a married woman or man may apply to the magistrates' court on certain grounds for an order for periodical payments for the applicant or for a child of the family, for custody of a child, etc. The jurisdiction is described in paragraphs 93 and 94 of the Report.

6. *Subsection* (3) (on which see paragraph 102 of the Report) specifies what is meant by " a declaration concerning the validity of a marriage " for the purposes of subsection (1). It has been thought better to distinguish declarations from " matrimonial relief " dealt with in subsection (2) since not all declarations relating to the validity or invalidity of a marriage can properly be subsumed under the latter expression. The subsection says that the expression " a declaration concerning the validity of a marriage " includes both a declaration that the marriage is valid or invalid (*paragraph* (*a*)) or any " other declaration " which involves a determination as to the validity of a marriage (*paragraph* (*b*)). An example of the latter would be a declaration that a child had been legitimated by the subsequent marriage of his parents.

7. The subsection expressly covers both declarations under section 39 of the Matrimonial Causes Act 1965 and declarations under the Rules of the Supreme Court. As a result of the decision in *Brinkley* v. *Attorney General* (1890) 15 P.D. 76 it appears that the rule in *Hyde* v. *Hyde* at present prevents the court from making a declaration under section 39, if the marriage concerned was polygamous, at any rate if the declaration is one specifically relating to the validity of the marriage under paragraph (a). This subsection, coupled with subsection (1) overrules this. Under section 39, a person may in certain circumstances apply to the court for a decree declaring that he is legitimate, that he or his parent became or has become legitimate, that the marriage of his parents was valid or that his own marriage is valid. In future the fact that the issue before the court involves a marriage which is actually or potentially polygamous will no longer prevent the court from making a declaration.

8. Under Order 15, rule 16 of the Rules of the Supreme Court, the court has power to make declaratory judgments, irrespective of whether any consequential relief could be claimed. It has never been decided whether or not the court may pronounce directly on the validity or invalidity of a polygamous marriage. To prevent future doubt, *subsection* (3) removes any obstacle to the court's power to make a declaration under Order 15, rule 16 on the ground that the marriage in question is polygamous.

9. *Subsection* (4) provides first that the abolition of the rule in *Hyde* v. *Hyde* for the purposes set out in subsections (2) and (3) is to be effective whether the marriage in question is potentially polygamous (i.e. where there is only one husband and one wife at the relevant time) or actually polygamous (i.e. where one party to the marriage has more than one spouse): see paragraph 2 of the Report. Secondly it provides that rules of court may be made specifying that where there is another spouse notice of the proceedings shall be served on any such other spouse in such cases as may be provided in the rules. The rules may also provide that the other spouse should in certain circumstances have the right to intervene and to be heard. This part of subsection (4) implements the recommendation in paragraph 106 of the Report.

Short title, interpretation and extent.

2.—(1) This Act may be cited as the Matrimonial Proceedings (Polygamous Marriages) Act 1971.

(2) References in this Act to any enactment shall be construed as references to that enactment as amended, and as including references thereto as extended or applied by any subsequent enactment.

(3) This Act does not extend to Scotland or Northern Ireland.

Clause 2

This clause contains the usual formal provisions relating to the short title, interpretation and the territorial extent of the Bill. It will apply only to England and Wales.

APPENDIX B

Draft Clause relating to social security and polygamous marriages: the National Insurance Acts 1965 to 1970, the National Insurance (Industrial Injuries) Acts 1965 to 1969, and the Family Allowances Acts 1965 to 1969.

(1) Subject to subsection (2) of this section, a marriage shall not be disregarded for the purposes of—

(*a*) the National Insurance Acts 1965 to 1970 ;

(*b*) the National Insurance (Industrial Injuries) Acts 1965 to 1969 ; or

(*c*) the Family Allowances Acts 1965 to 1969,

by reason only that it was entered into under a law which permits polygamy whether or not either party to the marriage has for the time being any spouse or spouses additional to the other party.

(2) Regulations under the National Insurance Act 1965, the National Insurance (Industrial Injuries) Act 1965 or the Family Allowances Act 1965 may provide for excluding the application of subsection (1) of this section in relation to any purpose of the enactments mentioned in paragraph (*a*), (*b*) or (*c*) of that subsection respectively or for its application in relation to any such purpose only to such extent or in such manner as may be prescribed by the regulations.

(3) The following enactments are hereby repealed, that is to say—

(*a*) section 113(1) of the National Insurance Act 1965 ;

(*b*) section 86(5) of the National Insurance (Industrial Injuries) Act 1965 ; and

(*c*) section 17(9) of the Family Allowances Act 1965,

(which treat as valid for the purposes of those Acts respectively a marriage performed outside the United Kingdom under a law which permits polygamy if it has in fact at all times been monogamous).

EXPLANATORY NOTES

1. This clause implements the recommendation in paragraph 133 of the Report. The reasons for the recommendation are set out in paragraphs 125 to 132 of the Report. The clause could be enacted as part of a Bill dealing generally with social security, or independently.

2. *Subsection* (1) provides that marriages which are actually or potentially polygamous are not to be disregarded for the purposes of the social security enactments specified. It gives effect to the general principle that polygamous marriages should be recognised (paragraph 132 of the Report).

3. *Subsection* (2) provides for regulations to be made under the Acts mentioned specifying the circumstances in which the various provisions of each Act will apply in respect of persons who are parties to polygamous marriages. Paragraph 131 of the Report explains why it is necessary to consider each benefit separately, for example, where two wives of one husband claim an allowance. This clause should not come into effective operation until these regulations have been made.

4. Regulations made under each of the Acts specified must comply with certain provisions laid down by the Act. For example, the regulations made under the National Insurance Act 1965 will be subject to the consultation procedure laid down by section 108, and to Parliamentary control under section 107(4). (See also the National Insurance (Industrial Injuries) Act 1965, section 85(5) and the Family Allowances Act 1965, section 13(2)).

5. *Subsection* (3) repeals the enactments listed. These repealed provisions give limited recognition to polygamous marriages for social security purposes where there has never been more than one husband and one wife. They will no longer be necessary when the wider principle of recognition of polygamous marriages embodied in subsections (1) and (2) is in force.

6. This clause will apply to England and Wales and Scotland. The three Acts referred to apply to England and Wales and Scotland ; it would not be practicable in these circumstances to limit the operation of the clause to England and Wales.

APPENDIX C

Australian Matrimonial Causes Act 1959 (No. 104) (as amended by Matrimonial Causes Act 1965 (No. 99) s. 3)

6A. (1) Subject to this section, a union in the nature of marriage entered into outside Australia or under Division 3 of Part IV of the *Marriage Act* 1961 that was, when entered into, potentially polygamous is a marriage for the purposes of proceedings under Part VI of this Act in respect of the union, and for the purposes of proceedings in relation to any such proceedings, where it would have been a marriage for those purposes but for the fact that it was potentially polygamous.

(2) This section does not apply to a union unless the law applicable to local marriages that was in force in the country, or each of the countries, of domicil of the parties at the time the union took place permitted polygamy on the part of the male party.

(3) This section does not apply to a union where, at the time the union took place, either of the parties was a party to a subsisting polygamous or potentially polygamous union, but this section does apply to a union notwithstanding that the male party has, during the subsistence of the union, contracted, or purported to contract, a further union in the nature of marriage, whether or not the further union still subsists.

New Zealand Domestic Proceedings Act 1968

3. *Meaning of "marriage"*—(1) For the purposes of this Act, the term "marriage" includes a potentially polygamous union in the nature of marriage entered into outside New Zealand, if—

(*a*) The law of the country in which each of the parties was domiciled at the time of the union then permitted polygamy ; and

(*b*) Neither party was at the time of the union a party to a subsisting polygamous or potentially polygamous union ;—

and the terms "husband", "wife", and "married" have corresponding meanings.

(2) This section shall apply to a union in the nature of marriage, notwithstanding that either party has, during the subsistence of the union, entered into a further union in the nature of marriage, whether or not the further union still subsists.

Cf. Matrimonial Causes Act 1965, s.3 (Aust.).

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