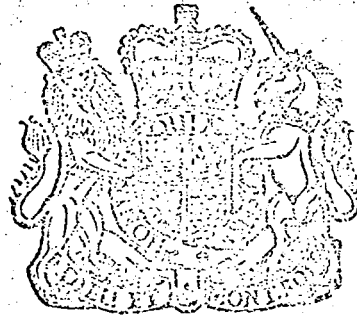


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# THE LAW COMMISSION

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Second Programme . Item XIX

Family Law

Restitution of Conjugal Rights

17th February 1969

The Law Commission will be  
grateful if comments can be  
sent in by 2nd June 1969.  
All correspondence should be  
addressed to:-

DIMITRY TOLSTOY, Q.C.  
Law Commission,  
Lacon House,  
Theobalds Road,  
London, W.C.1.

(Tel: 01-405 8700, Extension 233)

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Family Law

Restitution of Conjugal Rights

1. In this Paper, in accordance with the terms of Item XIX of our Second Law Reform Programme (which has as its aim the eventual codification of family law), we have made an examination of the matrimonial remedy of restitution of conjugal rights. We have set out shortly the historical background to the remedy and the arguments for and against its retention in the hope that this will be of assistance to the bodies and persons we are consulting.

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

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

decree in order to obtain a divorce. The Matrimonial Causes Act 1884 was repealed by the Supreme Court of Judicature (Consolidation) Act 1925 and, while reenacting that failure to comply with the decree was to be a ground for judicial separation (section 185), the provision in the 1884 Act that such failure was deemed to constitute desertion, was not reenacted.

3. The law has since remained unaltered.<sup>(2)</sup> The present position is that where the respondent has failed to comply with a decree of restitution of conjugal rights -

- (a) the petitioner may at once present a petition for judicial separation;<sup>(3)</sup>
- (b) a wife petitioner may obtain by way of financial provision for herself either permanent alimony or periodical payments, which latter payments can be secured;<sup>(4)</sup>
- (c) a husband petitioner can obtain for himself and the children of the marriage an order for periodical payments out of the profits of a trade or earnings of the wife and, if she has property, a settlement of that property or a part of it;<sup>(5)</sup>
- (d) the court may make orders for the custody, maintenance and education of any children of the family;<sup>(6)</sup>

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(2) See Matrimonial Causes Act 1937, s.5; Matrimonial Causes Act 1950, ss. 14, 15; Matrimonial Causes Act 1965, ss. 12, 13. Compare Matrimonial Causes Act 1959-66 (Aus.), s.60 and Matrimonial Proceedings Act 1963 (New Zealand), s.16 where the remedy is retained.

(3) Matrimonial Causes Act 1965, s.12. The Divorce Reform Bill now before Parliament proposes to abolish this ground for a judicial separation: cl.8.

(4) Ibid s. 21(1), (2).

(5) Ibid s. 21(3).

(6) Ibid s.34; the section calls them "relevant children".

(e) though failure to comply with a restitution decree does not automatically put the respondent into desertion, it is treated as prima facie evidence of desertion. (7)

4. The remedy of restitution of conjugal rights is today seldom used: in the three years 1965-1967 there were 105 petitions (60 by husbands and 45 by wives) and 31 decrees made (11 granted to husbands and 20 to wives) making an annual average of 35 petitions filed and 10 decrees made. We are, therefore, considering whether this remedy is of any real value today, whether it should be retained or whether it should be abolished as no longer serving any useful purpose. To assist us the Senior Registrar extracted for us the information which we needed concerning 64 of the 68 petitions filed in London during the three years 1965-1967 (the files of the remaining 4 cases were not available) and which we set out below:-

Result of proceedings

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

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(7) Nanda v. Nanda [1968] P.351, 353.

Financial provisions

No husband applied for a financial provision.

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

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

(a) Though the decree has the effect of establishing desertion and of enabling a spouse to obtain financial relief, these consequences are only incidental. The real purpose of the proceedings is to persuade the deserting spouse to return and they are, as it were, the last resort left to a spouse who has tried without success all other methods to preserve the marriage.

The fact that out of 29 petitions brought by wives in 12 cases only did wives seek and obtain an order for their own financial support tends to indicate that the majority of petitions are not brought for financial ends. One petition was dismissed at the hearing at the petitioner's request, suggesting the possibility that that case at least achieved its object in persuading the husband to return; the 8 cases in which nothing happened after the filing of the petition and the petition was dismissed by consent also suggest the possibility that reconciliations took place. If recourse to legal proceedings results in some marriages - however few - being saved, such proceedings should not be abolished.

(b) It was argued before the Morton Commission<sup>(9)</sup>

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(9) Report of Royal Commission on Marriage and Divorce, 1956, Cmd. 9678, paras. 320-324.

that there might be circumstances where a wife could not obtain a maintenance order on the ground of the husband's wilful neglect to maintain and yet would be able to obtain a decree for restitution of conjugal rights<sup>(10)</sup> and an ancillary order for financial provision; that husbands would lose the right to apply for financial provision for themselves and the children; and that a decree was useful in putting on record the circumstances of the separation if these are not altogether clear. The Morton Commission's conclusion was that since there were members of the legal profession in favour of retention and since there were arguments "of some weight" in support of their view the remedy should be retained.

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

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

6. We think that the answers to these arguments are:

- (a) Insofar as the restitution proceedings are brought to establish desertion, this can be effected less artificially, more expeditiously and more cheaply by obtaining an order on the ground of desertion in the magistrates' court, a remedy available to either spouse.
- (b) If the real purpose of restitution proceedings is to obtain financial support, the proper remedy for this should be section 22 of the Matrimonial Causes Act 1965. This section (and a like provision in the magistrates' court) enables a wife whose husband wilfully neglects to maintain her or the children to obtain proper financial provision without resort to the cumbersome proceedings for restitution of conjugal rights.<sup>(11)</sup> The main weakness of section 22 at present is that alimony pending suit cannot be obtained unless there is a finding of wilful neglect, whereas alimony pending suit can be obtained in restitution proceedings as soon as the petition is filed. We shall, in a forthcoming Report on Financial Provisions, be recommending that this defect be remedied. It is thought that the financial provisions open to a husband who obtains a restitution decree are rarely, if ever, used.<sup>(12)</sup>

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

(12) They were not used at all during the three years 1965-1967: see paragraph 4. In the forthcoming Report on Financial Provisions referred to in paragraph 6(b) above, we shall be putting forward proposals to enable husbands to obtain financial support in appropriate circumstances.

- (c) The fact that in some cases no steps are taken after the petition is filed of itself establishes nothing: the reason for no further steps being taken may be due to the petitioner's realising that to continue the proceedings would not bring the respondent back. No doubt a reconciliation does take place in some cases after a restitution petition is filed, but so it does in the case of any matrimonial proceedings and practitioners will be aware of reconciliation taking place even in the case of divorce proceedings. Moreover, before accepting the effective use of particular proceedings in bringing about a reconciliation, one would need to know whether the reconciliation, if it takes place, is real or illusory: for instance, in one case in 1966 the petition was dismissed at the petitioner's request, suggesting the possibility of a reconciliation, but one month later the respondent's solicitors wrote enquiring for the name of the petitioner's solicitors, which suggests that the reconciliation (if there was one) had broken down.
- (d) It is an intolerable interference with the freedom of individuals for the court to order adults to live together and is hardly an appropriate method of attempting to effect a reconciliation.
- (e) The "order" has in fact no teeth and only brings the law into disrepute; it is suspected that few, if any, decrees are obeyed and the futility of the decree is well illustrated by Nanda v. Nanda [1968] P.351, where a wife, having obtained a restitution decree, went to the husband's flat and the court was prepared to grant an injunction to restrain her from molesting him and entering on his premises.



7. Proceeding on the assumption that our forthcoming recommendations for removal of existing defects in section 22 of the Matrimonial Causes Act 1965 (see paragraph 6(b)) will be adopted, our conclusion is that the remedy of restitution of conjugal rights is today inappropriate and ineffective and should be abolished. This conclusion is provisional only and will be reconsidered in the light of any comments and views received in reply to this Paper.