MARRIAGE OF MINORS

Notwithstanding the opinions of modern observers on teenage behaviour that children are maturing earlier, many more difficulties are placed in the way of their marrying than in more robust ages.

The Commonwealth Marriage Act 1961[1] is in some ways more liberal in its provisions relating to age than other modern legislation, in that it gives the court dispensing powers. There are now several accessibly reported cases on these provisions, and it is proposed to examine these decisions to see whether general principles can be deduced to guide practitioners advising young persons who are considering making application to the court. Further, as at least one judge has been embarrassed by the jurisdiction bestowed on him by the Act,[2] it is proposed to examine the wisdom of the provisions in the light of history and the legislation of other jurisdictions.

I. RESTRICTIONS ON MARRIAGE OF MINORS AT COMMON LAW

A. AGE OF MARRIAGE

From an early date, marriage was within the exclusive jurisdiction of ecclesiastical tribunals, whose judgments were generally accepted by the common law courts. The canon law adopted the rule of the civil law of late Rome, "*Justas nuptias contrahunt masculi quidem puberes, feminae vero viripotentes*",[3] puberty being adjusted not by the number of a person's years, but according to his or her competence to procreate. But the presumption of civil law that puberty began for a man at fourteen, and for a woman at twelve, was accepted by the canon law. It has been suggested that these early ages were adapted to the southern climate of Italy, whence the law was derived![4]

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1 Act No. 12 of 1961.

2 Pape J. in Re an Application under s. 17 of the Marriage Act 1961 (Com.), [1964] V.R. 135, 142: "I dislike having to exercise the jurisdiction the Act has conferred on me."

3 Instit. tit. de Nupt.

4 Lancelot Instit. When Napoleon increased the canon law ages (below, p. 357), he argued that the Roman and canon laws were ill suited to "our northern climate" and that the standard of the Prussian code should be adopted. 1 Toullier, Le Droit Civil Français, 421.

An entertaining example of an enquiry into sexual proclivity is the unsuccessful attempt by Katherine to establish that at the time of her marriage to Arthur, Henry VIII's brother, he was under age and thus not able to consent.[5] This allegation was vigorously contradicted by some bawdy testimony of the remarks made by the Prince on the morning after his wedding-night, strongly suggesting consummation and full satisfaction. That capacity and not age was the test is shown in an early French case where a girl married and became pregnant before the age of twelve: it was held that she had given proof of puberty, so that the marriage was valid.[6] In any event, a marriage contracted when either party was below the age of puberty was not void, but "imperfect"—the party under age might ratify the marriage on reaching puberty;[7] until then, either party could treat the marriage as void.[8] By canon law, *sponsalia* were wholly void if either party were below the age of seven, at which age rational consent was deemed to be possible.[9]

The extent to which the common law courts were bound by the findings of ecclesiastical tribunals was discussed in *Kenn's* case,[10] where in order to determine title to a manor held by knight service it was necessary to establish whether or not a certain marriage between minors was valid. *A,* who was seised of the manor, had married *B,* by whom he had had issue, *C.* Thereafter, he petitioned the ecclesiastical Court of Audience, and having obtained a sentence that the marriage was void, married *D,* who died, and then married *E,* by

5 I State Trials 299 (1809 edition). It will be recalled that Pope Julius had granted Henry VIII a Dispensation to marry Katherine, notwithstanding his otherwise fatal relationship by affinity; Henry VIII now alleged that the Pope had no jurisdiction to allow such dispensation as would permit incest. Katherine now sought to prove that she had never been married at all to Arthur.

6 Cited in Pothier, Traité du Contrat de Marriage, VI Oeuvres, 3° Part, Ch. 2, Art. 2. *Accord* is a decision of Pope Alexander III:—"Si ita fuerint aetati proximi, quod potuerint copula carnali conjungi, minoris aetatis intuitu separati non debent, quum in eis aetatem supplevisse malitia videtur." (Caut. de Illis, 9 Extr. de Desp. imp.)

7 See I Phillimore, Ecclesiastical Law 713. The canon law was contained in the Decretal "Ubi non consensus utriusque . . .", which was made a portion of English law by the Council of Westminster 1175.

8 Thus Decretum (n. 7.). But *aliter* Maitland: "In case only one of the parties was below that age [of puberty], the marriage could be avoided by that party but was binding on the other." II POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW 390.

9 II POLLOCK AND MAITLAND, *op. cit.,* n. 8, at 390.

10 (1607) 7 Co. Rep. 42b [77 E.R. 474.].

whom he had issue, *F*. *C* took out a bill of revivor in the common law Court of Wards,[11] but died before the case was determined. *C*'s issue then took out a further bill of revivor, alleging that *A* and *B* were lawfully married, being above the age of consent, so that they (*C*'s issue) had seisin of the manor. They argued (a) that the sentence of the Court of Audience was not res judicata, but that the matter could be re-tried in the common law courts, as it concerned inheritance, and sought to present evidence that the parties were of the age of consent; (b) that even admitting that the marriage took place before the age of consent, yet if the parties had assented or cohabited after reaching that age, the marriage would be valid: again, the "divorce"[12] would be only evidence, and should not estop the parties at common law. It was resolved by Fleming and Coke C.JJ., Tanfield C.B., Yelverton and Williams JJ., and Smith and Altham, BB. that the sentence of the ecclesiastical court should conclude the matter for two reasons: (i) although the parties were above the age of consent (presumably, that is, at the time of the sentence of the Court of Audience), yet the judge had sentenced that the contract was *void,* so that there was cause of divorce; (ii) if the marriage had been *infra annos nubiles,* the ecclesiastical judge was also judge of what constituted assent to the marriage; presumably, lack of consent was the reason for his declaring the marriage void, rather than voidable, though this is not expressly stated in the report. The court also held that a second bill of revivor was not maintainable.

The Court in *Kenn*'s case emphasized that it 'ought to give credit to the sentences of the ecclesiastical court, as they give to the judgment in our court'.[13] *Corbet*'s case[14] was cited with approval. That case drew a distinction between instances where there had been a divorce, which was res judicata, and those where one of the spouses had "put away" the other, in which case the issue could be tried by the common law courts.

Kenn's case is an interesting commentary on what was then a matter of some delicacy—the relationship between the common law and other courts. While, however, appearing to pay excessive courtesy to the ecclesiastical tribunals, the court categorically rejected the notion

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11 One of the numerous special courts of the sixteenth and seventeenth centuries that were formally abolished at the Restoration. (12 Car. II, c. 24).

12 i.e. of course, in modern terminology, decree of nullity.

13 7 Co. Rep. 43b.

14 22 E. 4. tit. Consultat. 5. (cited in 7 Co. Rep. 44a).

that the comomn law courts were obliged to *submit* questions of marriage to the ecclesiastical courts.[15]

The common law courts were unwilling to make an enquiry into the sexual maturity of boys and girls, and the canon law presumptions hardened into irrebuttable age limits, fourteen for a boy, twelve for a girl. By 1758,[16] there was no doubt that fourteen for boys and twelve for girls were 'the ages at which by law they are capable of marriage, unless it appeared they had not capacity to understand the act they did'.[17]

But the common law did not accept these canon laws for all purposes. There were occasions when a betrothal of children under the age of seven was not regarded as void.[18] Moreover, it was well settled that at the age of nine, a girl was capable of entering a "marriage de facto",[19] entitling her to dower on the death of her husband, 'albeit he were but four years old'.[20] Coke justified this as the fruit of an 'inchoate and imperfect' marriage, although if the spouses afterwards were "divorced" by the ecclesiastical courts in the lifetime of the husband, dower would not be obtainable. Coke also remarked that copulation was not necessary to establish such a marriage.[21]

Perhaps the earliest statutory reference to age in connexion with marriage is that of the Statute of Merton 1235-1236,[22] which treats of a characteristically feudal evil—*"de dominis qui maritaverint illos quos habent in custodia sua"*. The statute provided that if the lord married an heir of under fourteen years 'and of such an age that she could not consent to marriage', then, if the parents objected, the lord lost the custody and all its feudal advantages; if, however, the heir was of fourteen or more, no such penalty followed.[23]

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15 For an account of the uneasy relationship between the ecclesiastical and common law, see MAITLAND, CANON LAW IN THE CHURCH OF ENGLAND. Maitland came to the conclusion that canon law of Western Europe had had the profoundest authority in the ecclesiastical courts of England: indeed, there was little or no "separate" English ecclesiastical law until after the Reformation.

16 Arnold v. Earle, (1758) 2 Lee 529 [161 E.R. 428].

17 Id. at 531, per Sir George Lee.

18 Cf. II POLLOCK AND MAITLAND, op. cit., n. 8, at 391.

19 Co. Litt. 33a.

20 Ibid.

21 Ibid.

22 30 Hen. III, c. 6.

23 "De dominis qui maritaverint illos quos habent in custodia sua, villanis, vel aliis sicut burgensibus, ubi disparagentur, si talis haeres fuerit infra 14 annos, et talis aetatis quod matrimonio consentire non possit, tunc si parenties illi conquerantur, dominus amittat custodiam illam usque ad

Coke lists "seven ages of woman", among which were: (a) seven years for the lord to have *aid pur file marier;* (b) nine years to deserve dower; (c) twelve years to consent to marriage; (d) fourteen years to be in ward.[24]

A plaintive attempt to raise the age was rejected by Lawrence J. in *R. v. Gordon*:[25] the prisoner was indicted on a charge of bigamy under 1 Jac. I, c. 11;[26] at the time of his first marriage, he was twenty. He argued that the statute did not extend to persons who had contracted a marriage "within" (that is, before) the age of consent, which, although fourteen/twelve at the time of the passing of the Act, had been raised in 1753 by Lord Hardwicke's Act[27] to twenty-one. Lawrence J. had no apparent hesitation in finding the prisoner guilty; the report discloses no reasons. Lord Hardwicke's Act, of course, nowhere refers to the age at which marriage is possible. It is not revealed, however, in the inadequate report whether the prisoner had had the consent to his first marriage of his parents or guardians; if he had not, his plea would have been substantial for at the time marriages without parental consent were void.[28] It may be, however, that the prisoner was suggesting that Lord Hardwicke's Act had rendered necessary the consent of parents or guardians *in lieu* of the consent of the party, which was no longer possible because of infancy. If this argument had been accepted, it would, of course, have been a reversal of the cardinal rule of canon law that *consensus facit matrimonium.* As will be noticed,[29] Lord Hardwicke's progressive statute produced a number of difficulties of construction which necessitated amending legislation, but it is doubtful that even that

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aetatem haeredis, et omne commodum quod inde receptum fuerit convertatur ad commodum haeredis infra aetatem existentis, secundum dispositionem parentum, propter dedecus ei impositum. Si autem fuerit 14 annos, et ultra, quod consentire possit et tali matrimonio consenserit, nulla sequatur poena."

24 Co. Litt. 78b. The other three are:—

(i) fourteen years to be out of ward if she attained thereunto in the life of her ancestor.

(ii) fifteen years to tender her marriage if she were under the age of fourteen at the death of her ancestor.

(iii) twenty-one years to alienate her lands, goods and chattels.

Coke similarly lists divers ages of man. Perhaps this delineation was the inspiration of the famous speech of Jacques (As You Like It, II, vii, 139.).

25 (1803) Russ. & Ry. 48. [168 E.R. 677.].

26 (1604).

27 26 Geo. II, c. 33. (1753). See below, pp. 330 et seq.

28 Below, p. 331.

29 Below, p. 334.

rather carelessly drafted Act could be construed to abolish the need for consent of the minors themselves.

In England, the common law minimum ages of marriage remained until 1929, when the Age of Marriage Act[30] changed the age to sixteen for both male and female. Marriage by an English domiciliary below that age is void, even though the marriage may be valid by the *lex loci contractus* and the other party's domicile.[31]

In the U.S.A., however, legislatures sought to amend the common law at an early period. Apparently, the raising of ages was much resented at first, so that a New York statute raising the ages to seventeen/fourteen had to be repealed four months after its enactment.[32] The statutes of most American states prescribe ages higher than those of common law, but there is great variety amongst them, although the majority of states have opted for eighteen/sixteen.[33] Surprisingly, the one state that still has the common law ages is not in the Deep South, which has tended to retain "common-law" marriage (generally *"per verba de futuro cum copula"*), but the ultra-respectable Massachusetts.[34] While in California[35] and Wisconsin[36] "non-age" renders a marriage void, in most other states a marriage under age is voidable, at the instance of the person under age, provided it takes place when both parties are above the common law ages. What amounts to ratification varies, but in Georgia, for example, copulation after attaining the minimum age (seventeen/fourteen) suffices.[37] In New York, the court has a discretion whether or not to affirm a marriage where one of the parties was under age (sixteen/fourteen) at the time of the marriage, and in exercising its discretion must take into account the interest of any child born to the parties,

30 The minimum age is now governed by the Marriage Age 1949 (Eng.), which repealed the 1929 Act.

31 Pugh v. Pugh, [1951] P. 482.

32 2 Kent. Com. on the Laws of the United States, 79.

33 See JACOBS AND GOEBEL, CASES AND MATERIALS ON DOMESTIC RELATIONS (4th ed., 1961), STATUTORY SUPPLEMENT.

34 Mass. Gen. Laws Ann. c. 207, s. 9.

35 See West v. West, 62 Cal. App. 541, 217. P. 567 (1923)—even though the wife had had two children before the husband reached the statutory age of eighteen. In some states, the marriage is classified as void, in others voidable, and yet others do not specify by statute whether non-age renders the marriage void or voidable. *Cf.* Moore, *Defences Available in Annulment Actions,* 7 J. FAMILY LAW 239, 245 (1967).

36 See Swenson v. Swenson, 179 Wis. 536, 192 N.W. 70 (1923).

37 Smith v. Smith, 84 Ga. 440, 11 S.E. 496.
Cf. Annot., Ratification of marriage by one under age, upon attaining marriageable age, 159 A.L.R. 104 (1945).

or *en ventre sa mére.*[38] Many American states provide a procedure whereby a marriage under age may be permitted in certain circumstances. Thus in Colorado, both parties must be sixteen unless the judge shall have approved the marriage and shall have authorized the issuance of a marriage licence; it would seem that the judge has a complete discretion.[39]

The diversity of the provisions of various states has led to border-hopping; young persons have moved across state lines to a neighbouring state where they came within the age limits, and returned home immediately after the marriage. Since the preliminary formalities (banns, licences, etc.) are, in most cases, negligible, and there are few residential time limits, elopement is a simple affair, and has none of the romance of a Gretna Green chase.[40]

Many states are rightly concerned about this flagrant evasion of their laws, but the principle, *locus regit actum,* has been more rigidly applied to marriage in the U.S.A. than in England or Australia.[41] Only in a very few decisions has it been held that age of marriage is a matter of essential validity, to be tested by the *lex domicilii.*[42] Other courts have held that although a marriage between its underage domiciliaries is valid in the *lex loci contractus,* yet the vigour of the *lex fori's* policy is such that it would be contrary to public policy to hold the marriage valid.[43] About fifteen states have adopted the Uniform Marriage Evasion Act,[44] which provides:

> 1. If any person residing and intending to continue to reside in this state who is disabled or prohibited from contracting mar-

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38 Foley v. Foley, 122 Misc. 663, 203 N.Y. Supp. 674 (1924).

39 Col. Rev. Stat. Ann. § 90-1-4. Cf. Conn. General Statutes, s. 46-5 (d):
> No certificate shall be issued . . . to parties either of whom is sixteen years unless the judge of probate for the district wherein such minor resides endorses on such certificate his written consent.

40 In some parts of U.S.A., it involves no more than a journey to another part of the same town. Thus the border between the states of Kansas and Missouri is the river Missouri which runs through the heart of Kansas City. Young persons in Omaha, Nebraska, regularly travel a few miles across the same river to Council Bluffs, Iowa, whose marriage formalities are less stringent than those in Nebraska.

41 See Annot., Conflict of Laws as to Validity of Marriage attacked because of Nonage, 71 A.L.R. 2d. 687. In the absence of statute, the fact that the extra-state marriage was contracted for the specific purpose of evading the age requirements of lex domicilii does not render the marriage void: e.g. Needam v. Needam, 183 Va. 681, 33 S.E. 2d. 288 (1945).

42 E.g. Wilkins v. Zelichowski, 126 N.J. 370, 140 A. 2d. 65 (1958).

43 Cf. Annot., n. 41, above.

44 9 Uniform Laws Ann. 479 (1942). The Act is, of course, a model, drafted by the National Commissioners.

> riage under the laws of this state shall go into another state or country and there contract a marriage prohibited and declared void by the laws of this state, such marriage shall be null and void for all purposes in this state with the same effect as though such prohibited marriage had been entered into in this state.
> 2. No marriage shall be contracted in this state by a party residing and intending to continue to reside in another state or jurisdiction and every marriage celebrated in this state in violation of this provision shall be null and void.

Apart from the limitation that this Act renders the marriage void only in the *lex domicilii,* and not in the rest of America, its constitutionality seems on the face of it dubious, for it appears to conflict with the requirement of the full faith and credit clause of the United States Constitution.[45] The Supreme Court of the United States has more than once held valid divorce decrees of states to which persons have fled in order to evade rigorous substantive or residential requirements of their home state, provided that jurisdiction was properly obtained over the respondent;[46] if the respondent contested, or had the opportunity to contest, the jurisdiction of the court (over the subject-matter) then the decree is free from either direct or collateral attack in any other jurisdiction, even though it has been clearly obtained by a false asumption of acquisition of domicile.[47] *A fortiori,* one would hope, a marriage valid in the state where it was contracted, ought as a matter of public policy to be recognized. As yet, the Act's constitutionality has not been challenged, and it must be confessed that American commentators do not seem to see a constitutional difficulty.

In Canada, the minimum age varies from province to province; in some, the common law ages have not been altered. But in Ontario, the minimum age of marriage is fourteen for both males and females.[48] In Alberta it is sixteen,[49] but an exception is made when the girl is pregnant.[50] It has been held that Provincial provisions altering the common law ages are matters of form, and thus constitutionally valid, since the Dominion Parliament's power to legislate on marriage and

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45 U.S. Constitution, Art. IV, sec. 1.

46 Williams v. North Carolina (No. 1), 317 U.S. 287 (1942); Sherrer v. Sherrer, below; Coe v. Coe, below; Vanderbilt v. Vanderbilt, 354 U.S. 416 (1957).

47 Sherrer v. Sherrer, 334 U.S. 343 (1948); Johnson v. Muelberger, 340 U.S. 581 (1951); Coe v. Coe, 334 U.S. 378 (1948).

48 Marriage Act 1960, s. 8. (Ont.).

49 Solemnization of Marriage Act 1942, s. 24(1) (Alta.).

50 Ibid., s. 24(2).

divorce relates only to matters of essential validity of marriage.[51] Yet they are mandatory.[52]

In New Zealand, surprisingly for a jurisdiction that has led the field in many matrimonial matters, the common law has not been directly altered by statute, although it is provided by the Marriage Act 1955[53] that no celebrant must celebrate a marriage of a person without a marriage licence, and no marriage licence may be issued to a person under the age of sixteen.

An English commentator has remarked that it was somewhat surprising that the common law ages remained in English law until 1929.[54] What might he have said about the Australian position? No attempt was made to amend the common law until 1942, when Tasmania raised the age to eighteen (male) and sixteen (female).[55] In 1956 Western Australia, by particularly well conceived legislation,[56] and in 1957 South Australia,[57] followed suit.

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51 In Ross v. McQueen, [1948] 2 D.L.R. 536 (Alta.) a fifteen year old girl obtained a certificate that she was pregnant, but the doctor intimated that he was in some doubt. In fact, she was not pregnant. It was held that the provisions of s. 24 (2) of the Alberta Act (above, n. 50) had not been complied with, and the marriage was declared void. See also below p. 369 for a discussion of the constitutionality of Canadian marriage legislation.

52 Ross v. McQueen, above. But this case was distinguished in Hobson v. Gray, (1958) 13 D.L.R. 2d. 404 (Alta.), on the very specious ground that in Ross v. McQueen, the party responsible for the fraud brought the action; in Hobson v. Gray, Egbert J. held that a marriage contracted when the girl was fifteen could not be annulled, i.e. that the provisions were directory only.

53 Section 21 declares that a marriage *knowingly* celebrated without a licence is void. If the parties misrepresented their age, however, the common law would apply.

54 BROMLEY, FAMILY LAW 33 (3rd ed. 1966).

55 Marriage Act 1942, s. 18 (Tas.).

56 Marriage Act Amendment Act 1956 (W.A.) s. 3 provided, *inter alia*:—

> (2) After the coming into operation of the Marriage Act Amendment Act, 1956, a person authorised by this Act to celebrate marriages shall not celebrate an intended marriage,
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> (a) if the intended husband has not attained the age of eighteen years; or
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> (b) if the intended wife has not attained the age of sixteen years;
>
> except by authority of an order made and issued under this section by a Magistrate.
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> (3) On application being made to a Magistrate for the making and issuing of such an order authorising the celebration of an intended marriage, the Magistrate may make and issue the order in, or substantially in, the form in the Twelfth Schedule to this Act, but only if the Magistrate is satisfied by enquiry on oath or affirmation,
>
> (a) that the intended wife is pregnant;
>
> (b) that consent to celebration of the intended marriage is given as required by section nine of this Act; and

But in the other states, the common law ages remained until 1961, when the Commonwealth Marriage Act provided uniform age limits.

B. PARENTAL CONSENT TO MARRIAGE OF MINOR

It took the Church a long time to make up its mind about parental consent. The early councils of the Church[58] upheld the axiom of civil law: *"Nuptiae consistere non possunt nisi consentiunt omnes, id est qui coeunt, quorumque in potestate sunt"*.[59] But in England, the Church soon came to the conclusion that the necessity for parental consent encouraged forced marriages and marriages of convenience, and waged war with the lay powers who tended to look upon consent of parents as a privilege designed to prevent undesirables from entering the family. Perhaps it was the decisive rejection of civil law, expressed most forcibly, of course, at Merton[60] in the Barons' *Nolumus,* that enabled ecclesiastical doctrine to be accepted by the common law. On the Continent the lay powers strongly resisted any weakening of the *patria potestas.*

Parental consent became an issue at the Reformation. The *Reformatio Legis*[61] advocated that marriage of minors without parental consent should be null and void, but the Council of Trent anathematized such a view.[62]

Pothier suggested that the Council of Trent did not express its abhorrence of a parental consent required by a positive law, but condemned the Protestant sentiment that by natural law parents had the power of annulling their children's marriages.[63] The canonists

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(c) that the order should be made in the interests of the parties to the intended marriage, and of the unborn child.

(4) The Magistrate

(a) may hear the application in camera; and

(b) may accept as evidence of pregnancy, a certificate purporting to have been signed by a medical practitioner, certifying that the person named in the certificate is in his opinion pregnant if the Magistrate is satisfied that the person named in the certificate is the intended wife.

(5) In the event of a marriage being celebrated in breach of this section, the marriage is not, by reason only of the breach, void.

57 Marriage Act Amendment Act 1957, s. 4 (S.A.).

58 Cf. Decretum:—"Matrimonia facta sine consensu parentum" were regarded as "adulteria, contubernia, stupra, et fornicationes".

59 Dig. lib. 23, tit. 2 § 2.

60 The rejection of the Civil Law principle of *Legitimatio per subsequens matrimonium* in 1235-6 is well described by Windeyer J. in Attorney-General for Victoria v. The Commonwealth, (1961-1962) 107 C.L.R. 529, 592.

61 Art. 4. De Matrimonio.

62 Sess. 24, cap. 1. De Reformatio Matrimonii.

63 VI. Oeuvres, Traité du Contrat de Marriage, IV° Part, Ch. 1, s. 2.

disagree.[64] The Tridentine Fathers were concerned to vindicate the natural, independent right of all persons, even minors, to dispose of themselves in marriage, a right which had been admitted since the twelfth century, chiefly as a result of the influence of Peter Lombard.[65] Occasional local acquiescence of the *patria potestas* should not be permitted to obscure this right that the Church Universal had always upheld. The Council rejected the postulates of the King of France introducing a new diriment impediment for *filiifamilias* of a certain age from defect of parental consent. And even though the Council exhorted children to seek their parents' consent, by reason of piety, the Council allowed the addition of a clause which permitted minors to obtain licence of the Bishop when the parents did object. *"Et leges clare significantes aliter matrimonium esse irritum, sunt abrogatae per ius canonicum."*[66]

In England, ecclesiastical law frowned on clandestine marriages. Before 1753, there appear to have been no formal requirements for parental consent, and it was certainly unnecessary if the marriage was preceded by banns, but it seems to have been the practice for celebrants otherwise to have required an oath that the parties were of age or, if under age, that they had the consent of parents or guardians. This requirement was, however, a duty of imperfect obligation, and failure to comply with it, or indeed a false oath itself, in no way invalidated the marriage—it was, in fact, *impedimentum impediens,* not *impedimentum dirimens.*

The quite frequent requirement of parental or third-party consent to marriage as a condition precedent to a gift or devise was considered valid, not constituting a restraint on marriage,[67] though when a doubt arose whether a third party's consent had been obtained, the courts accepted the most tenuous evidence of consent.[68]

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64 See Wernz, Ius Canonicum: Book V, Ius Matrimoniale (Rome, 1928); Gasparri, De Matrimonio, nn. 188 *et seq*; Sanchez, De Matrimonio, infra; Ojetti, Synopsis Rerum Moralium et Juris Pontifici, 2703; *et alios.*

65 V. Sanchez, De Matrimonio, Book IV, disp. 22; Book III, disp. 47.

66 Ibid., Book IV, disp. 22.

67 Dashwood v. Bulkeley, (1804) 10 Ves. 230 [32 E.R. 832]; O'Callaghan v. Cooper, (1799) 5 Ves. 117 [31 E.R. 501)]; Pollock v. Croft, (1816) 1 Merrivale 181 [35 E.R. 642]; Garret v. Pritty, (1893) 2 Vern, 293 [23 E.R. 790]; Scott v. Tyler, (1788) 2 Bro. C.C. 432 [29 E.R. 241]; Clarke v. Parker, (1827) 19 Ves. 1. [34 E.R. 419]. Cf. Chinham v. Preston, (1759) 1 Wm. Black. 192 [96 E.R. 104], per Lord Mansfield C.J. and Foster J.

68 See D'Aguilar v. Drinkwater, (1812) 2 V. & B. 226 [35 E.R. 305]; Pollock v. Croft, above; Garret v. Pritty, above. But see Yonge v. Furse, (1857) 26 L.J. Ch. 352, reversing Romilly M.R., (1856) 26 L.J. Ch. 117.

The law was radically tightened in the mid-eighteenth century. Lord Hardwicke's great Marriage Act,[69] which came into operation on 25th March 1754, was designed primarily to remedy the evil of clandestine marriage, of which those celebrated by the Fleet parsons were the most notorious. The provisions relating to parental consent seem not to have been actuated in any way by continental doctrines of *puissance paternelle* but to have been conceived as an expedient whereby to render clandestine marriages less likely.

The Act provides that all marriages solemnized by licence where either of the parties should be under twenty-one (not being a widower or widow) should be "absolutely null and void to all intents and purposes whatsoever" unless the consent of specified persons be first had.[70] The Act also provided that a parson, minister, vicar or curate would be liable to ecclesiastical censure if he solemnized a marriage after having received notice of dissent of the parents or guardians or one of them on or after publication of banns.[71] The Act gave an absolute right to the father to grant or refuse consent; if he were dead, the consent of the guardian or guardians lawfully appointed, or if there were none such, that of the mother provided she was unmarried, was required; if there were no mother living and unmarried, then the consent of the guardian or guardians appointed by the Court of Chancery must be obtained.[72] Neither the guardian nor the mother had the father's absolute right to dissent: for the Act provided that where the guardian or mother was *non compos mentis,* or in parts beyond the seas, or might be induced unreasonably and by undue motives to abuse the trust reposed in him or in her by refusing or withholding consent to a proper marriage, then the infant might apply by petition to the Lord Chancellor, Lord Keeper or Lords Commissioners of the Great Seal, and their order should be deemed to be as good and effectual as if the consent of the mother or guardian had been obtained.[73]

These provisions were, of course, ancillary to the main purpose of the Act, which was to abolish marriages *per verba,* and establish as necessary stringent formalities.

The Act was construed in a number of cases both in the common law and in the ecclesiastical courts. A lacuna gave rise to a conflict

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69 26 Geo. II, c. 33.
70 Ibid., XI.
71 Ibid., III.
72 Ibid., XI.
73 Ibid., XII.

of judicial opinion. The Act had not dealt expressly with illegitimate children. In *R. v. Inhabitants of Edmonton,*[74] it was held that the marriage of an illegitimate minor with the consent of the putative father was valid. In *The King v. Inhabitants of Hodnett,*[75] a strong criminal court held that someone's consent was necessary for the marriage of a bastard, for (per Lord Mansfield C.J.) 'there is no reason to except illegitimate children, for they are within the mischiefs intended to be remedied by the Act'.[76] Buller J. rejected the argument that a bastard was *nullius filius,* as applying only to the case of inheritances. The law was finally settled in the ecclesiastical case of *Horner v. Horner,*[77] where the illegitimate minor had obtained her mother's consent. It was held that the only person whom the law has armed with *patria potestas* was that parent *quem nuptiae demonstrant,* and yet it was emphasized that consent of someone was required for the protection of the bastard—the Court of Chancery should have been petitioned to appoint a guardian. This quite unrealistic suggestion was approved in the common law case of *Priestly v. Hughes.*[78] In these two cases, subsequently followed in a number of decisions of the early nineteenth century,[79] the marriages were declared null and void.

An elegant judgment resolved a point of some importance on which the Act was silent, whether consent once given could be retracted. In *Hodgkinson v. Wilkie,*[80] the minor was seventeen days short of twenty-one at the time of her marriage. The husband's courtship of the wife had been thoroughly approved by the wife's mother, but she swore at the hearing that she had not consented to the marriage. Sir William Scott, as he then was, pronouncing the marriage valid, said that consent could be retracted, since the parental authority continued up to the time of the marriage. This dictum appears to be the law today.[81] But, said Sir William Scott, this principle must be taken with reasonable limitation. Where consent had actually been given, it would be necessary that dissent afterwards should be distinctly expressed, for 'it would be a most alarming circumstance if, from

74 (1784) 2 Bott. 85.
75 (1786) 1 T.R. 96. [99 E.R. 993].
76 1 T.R. 100.
77 (1799) 1 Hag. Con. 337 [161 E.R. 573].
78 (1800) 11 East 1 [103 E.R. 903].
79 e.g., Droney v. Archer, (1815) 2 Phill. Ecc. 327 [161 E.R. 1159]; Clarke v. Hankin, (1814) 2 Phill. Ecc. 328n. [161 E.R. 1160].
80 (1795) 1 Hag. Con. 262 [161 E.R. 546].
81 See In Re Brown, [1904] 1 Ch. 120, below, p. 336.

mere brooding dissatisfaction in the mind, not expressed, the validity of a marriage to which consent had once been given could be attacked'.[82]

The same point was made in *Smith v. Huson*[83] by Sir John Nicholl, who applied the maxim, *semper presumitur pro matrimonio,* where, although no express consent had been given, the courtship had not been discouraged. It was said that the courts had gone almost to the length of requiring proof of dissent where the person whose consent was necessary had any knowledge of the courtship.

The obvious hardship caused by annulling marriages, often at the instance of a guilty party, and sometimes after several years of marriage, was noted on several occasions, particularly by Lord Stowell. In *Diddear v. Faucit,*[84] where the wife sought a decree though she was privy to the fraud, he remarked, 'This case certainly comes before the Court at a time and under circumstances which do not induce what may be called legal favour'.[85] And in *Cresswell v. Cosins*[86] he was even more tart: 'Cases of nullity are properly described as cases in which the court gives a reluctant obedience to the provisions of the law'.[87]

It was thus hardly surprising that the courts went out of their way to uphold marriages. In *Osborn v. Goldham,*[88] for example, a marriage was not annulled where the mother of the infant bride did not become aware of the marriage until some months after it had taken place, whereupon she 'expressed surprise, but not dissatisfaction':[89] it was held that this was sufficient consent. Likewise in *Cresswell v. Cosins,*[90] it was held that consent might be given without personal acquaintance of the proposed spouse. The presumption of legitimacy was relied on by the court in *Fielder v. Smith*[91] where the court refused to annul a marriage celebrated twenty-one years earlier with the consent of the infant's mother, it being alleged that the infant was illegitimate and so a guardian appointed by the Court of Chancery should have given consent.[92]

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82 1 Hag. Con. 265 [161 E.R. 547].
83 (1811) 1 Phill. Ecc. 287 [161 E.R. 987].
84 (1821) 3 Phill. Ecc. 580 [161 E.R. 1421].
85 3 Phill. Ecc. 581 [161 E.R. 1421].
86 (1815) 2 Phill. Ecc. 281 [161 E.R. 1145].
87 2 Phill. Ecc. 283 [161 E.R. 1146].
88 (1808) 1 Phill. Ecc. 298n. [161 E.R. 990].
89 Ibid., [161 E.R. 991].
90 Above.
91 (1816) 2 Hag. Con. 193 [161 E.R. 712].
92 26 Geo. II, c. 33, XI. Above, n. 72.

Nevertheless, cases came before the courts in which the lack of consent was proved, and, as the principle, *malitia supplet aetatem,* had no application,[93] the court had to pronounce the marriage void even on the application of a "guilty" party. In *Balfour v. Carpenter,*[94] a marriage had been celebated without the father's knowledge. On hearing of the marriage the father was 'so incensed that he would not see his son for four years afterwards'. In spite of the 'perfectly desperate'[95] arguments of counsel, Sir John Nicholl felt obliged to annul the marriage, remarking that the presumption of consent was rebutted by the clear proof of dissent. And in *Days v. Jarvis,*[96] an infant wife, accomplice to two false representations that she was over age, was nevertheless granted a decree by a reluctant Lord Stowell.

The judicial outcries had their effect. In 1822, an Act[97] was passed candidly admitting the 'great evils and injustice'[98] that had arisen from Lord Hardwicke's Act, and repealing the greater part of it. The Act also provided that marriages celebrated without the necessary consent before its coming into operation should be valid, unless they had previously been declared invalid;[99] and introduced more stringent formalities[100] (consent must be in writing and attested by two or more witnesses, one of whom must make oath) as prerequisites to a grant of a marriage licence. The Act provided a penalty of transportation and forfeiture for false oaths and representations,[101] but enacted that non-compliance would not render the marriage void.[102]

This Act had almost as short a life as any public Act of Parliament before or since. It was repealed in toto on 26th March 1823 by 4 Geo. IV, c. 17, on the ground that 'inconveniences have been found to arise',[103] and the forms prescribed by Lord Hardwicke's Act were reinstated,[104] although a marriage without consent of parent or guardian

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93 Cf. Sir John Nicholl in Balfour v. Carpenter, (1811) 1 Phill. Ecc. 221, [161 E.R. 966] below. And see Jones v. Robinson, (1815) 2 Phill. Ecc. 285 [161 E.R. 1146]; Clarke v. Hankin, (1814) 2 Phill. Ecc. 328n. [161 E.R. 1160].
94 (1811) 1 Phill. Ecc. 221 [161 E.R. 966].
95 Ibid., per Sir John Nicholl.
96 (1814) 2 Hag. Con. 172 [161 E.R. 705].
97 3 Geo. IV, c. 75.
98 Preamble to 3 Geo. IV, c. 75.
99 Ibid., II, III.
100 Ibid., IX, VIII.
101 Ibid., X.
102 Ibid., XV.
103 Preamble to 4 Geo. IV, c. 17.
104 Ibid., I.

celebrated in accordance with the provisions of either the 1753 or the 1822 Act should nevertheless be valid.[105]

After this equivocation, Parliament finally made up its mind later in the session, and 4 Geo. IV, c. 76,[106] passed on 18th July 1823, has remained substantially the law in England ever since. The Act provided elaborate direction on the manner in which banns were to be published. Section VIII provided that no parson, minister, vicar or curate solemnizing marriages between persons one or both of whom should be under twenty-one should be punishable by ecclesiastical censure, where banns had been published and no notice of dissent of such parents or guardians has been received: if, however, parents or guardians or one of them should openly and publicly declare in the Church or Chapel where the banns should be published his, her or their dissent, the publication of banns would be absolutely void. Section XVI set out the persons who were to give consent to the marriage of a minor before a licence could be obtained, and was in similar terms to section XI of Lord Hardwicke's Act.[107] Section XVII provided that an application to the Lord Chancellor, Lord Keeper or Lord Commissioners of the Great Seal, Master of the Rolls or Vice-Chancellor might be made if consent were withheld, in the circumstances similar to those prescribed in Lard Harwicke's Act.[108]. Section XXIII provided penalties for false representations of persons under twenty-one who married—in effect the punishment was forfeiture of all benefits received as a result of the marriage. The 1823 Act incredibly did not specify whether a marriage of an infant without necessary consent was void, voidable or valid,[109] but the matter was judicially considered in a case which can be said to be the leading English authority on consents to infants' marriages, *R. v. Inhabitants of Birmingham*.[110] It was argued that it would have been absurd for the legislature to have required consent and yet have made the marriage good without it, 'for that would have it entirely in the opinion of the party to obey the statue or violate it'. Nevertheless, Lord

105 Ibid., II.

106 Sometimes known as the Marriage Act, 1823.

107 Above, p. 330.

108 Above, p. 330. Section XVII caused some difficulty and is dealt with more fully later.

109 The Committee of the House of Lords had suggested that the marriage should be voidable for twelve months after the celebration but the clause was rejected.

110 (1828) 8 B. & C. 29 [108 E.R. 954].

Tenterden pronounced the marriage valid, though such property accruing from it had to be forfeited.

Thus did the legislature wash its hand of the issue, and left it to the courts to settle this vital question in a way which has satisfied most common law jurisdictions.

The Act contained a number of anomalies.[111] In the first place, it enabled *either* parent to dissent to the publication of banns, yet left intact the *father's* right to give or refuse consent to a licence. But this was as nothing compared to the issue that was raised in *Ex parte Colegrave,*[112] which produced an incident unusual in the history of the English judiciary. It will be recalled that the 1823 Act provided that 'in case the father or fathers of the parties to be married or one of them, so under age as aforesaid, shall be *non compos mentis,* or the guardian or guardians, mother or mothers, or any of them whose consent is necessary . . . shall be *non compos mentis,* or in parts beyond the sea, or shall unreasonably or from undue motives refuse or withhold his, her or their consent to a proper marriage . . .',[113] then an application could be made to, *inter alias,* the Lord Chancellor or Vice-Chancellor, whose declaration should have the same effect as parental consent.[114] In *Ex parte Colegrave,* a girl of eighteen presented a petition to Lord Cottenham L.C., stating that she had received eligible proposals of marriage, but that her father had unreasonably, or from undue motives, refused her consent, and praying that the Lord Chancellor would make a judicial declaration. It was argued for the girl that the Lord Chancellor had jurisdiction, for it would be absurd to say that the Act did not intend to apply a remedy to cases in which there might be an improper refusal on the part of the father. Furthermore, counsel drew the Lord Chancellor's attention to *Ex parte Cooper,*[115] in which the Vice-Chancellor[116] had entertained jurisdiction when the father of the minor had been abroad. The Lord Chancellor, however, gave his opinion that the power of consent vested in the Court applied exclusively to the case of a *guardian or mother* beyond the seas or unreasonably refusing consent; the first sentence of the section being complete in itself. As, however, the Vice-Chancellor had construed the section differently, Lord Cottenham

111 It was described by plaintiff's counsel in Ex p. Colegrave, below, as "an ill-worded statute".

112 (1838) 7 L.J. Ch. 236, sub. nom. Ex p. I.C., 3 My. & Cr. 471 [40 E.R. 1008].

113 4 Geo. IV, c. 76, s. 17.

114 See above for the other persons to whom application might be made.

115 19th August 1834, unreported.

116 Shadwell V-C.

decided to defer his decision until he had conferred with him. Two days later, Lord Cottenham said that he and the Vice-Chancellor had looked over the Act, and they entertained no doubt that the Lord Chancellor's construction was the correct one; there could be no doubt that the order in *Ex parte Cooper* would not have been made if the Act had been properly brought to the Vice-Chancellor's attention at the time: 'The date of the order being the 19th of August afforded a very sufficient explanation of the circumstance under which that order was obtained.'[117]

In *Ex parte Reibey*,[118] Lord Lyndhurst L.C. had no difficulty in declaring his consent in a similar application when a minor's guardians lived in Van Diemen's Land, and were unacquainted with the minor's proposed wife.

An interesting point arose in *Harrison v. Southampton Corporation*.[119] Beneficiaries sought a declaration that a marriage celebrated fifty years previously was void for lack of parental consent. Relying on the principle, *omnia rita praesumuntur acta esse*, the court held the marriage valid, notwithstanding a sentence of an ecclesiastical court to the contrary. One supposes that the same obsequiousness that Coke C.J. and his brethren thought expedient in 1607[120] was not deemed necessary four years before the abolition of the jurisdiction of the ecclesiastical courts. In any case, though the point appears not to have been argued, the marriage was probably validated by section II of 4 Geo. IV, c. 17.[121]

In *In Re Brown, Ingall v. Brown*[122] the court was asked to determine whether the consent of the mother, once given, could be retracted, so as to prevent the testator's daughter from taking a legacy. Byrne J. held that a parent did not have an absolute power to revoke consent. Disapproving a dictum of Lord Henley in *Merry v. Ryves*,[123] he said that 'it must be justifiable for persons *in loco parentis* to change their minds if circumstances come to their knowledge in respect

117 This remark is reported only by Mylne and Craig: 3 My. & Cr. 474. Apparently, Shadwell was a keen sportsman; Campbell tells a story of his being so fond of water that he once issued an injunction "while immersed in that element". By August 19th, he would already have missed seven days' shooting! (See CAMPBELL, LIVES OF LORDS CHANCELLORS.)

118 (1843) 12 L.J. Ch. 436.

119 (1853) 4 De G., M. & De G. 137 [43 E.R. 459].

120 Kenn's Case, above, p. 320.

121 Above, p. 333.

122 [1904] 1 Ch. 120.

123 (1757) 1 Eden 1, 5 [28 E.R. 584].

of the proposed husband which, if they had been within their knowledge at the time the consent was given, would fairly and properly have operated to induce them not to give their consent'.[124]

And so the law stood in England until 1925, when the famous Guardianship of Infants Act[125] pronounced for the first time the doctrine of equality of parents.[126] Thenceforth, consent to an infant's marriage by licence had to be obtained from both parents if living together; and the schedule to that Act set out the consents required in all circumstances. They now appear in the Schedule to the Marriage Act 1949 (Eng.), and are almost identical with those of the Australian Act.[127] The position in England, then, is that no consents are required (save, of course, that of the parties themselves) to the marriage of an infant or infants that takes place in an Anglican Church after publication of banns, although dissent can be declared at the time of the publication and the banns will thereby be void.[128] (This, incidentally, is fortunately not widely known in England, where it is popularly supposed that consent of parents or guardians is always required.) In the case of marriage by common licence or under a Superintendent Registrar's certificate, the consent of the specified persons is required, unless it is impossible to obtain or is unreasonably withheld.[129] An application for consent of the court to be granted in lieu of consent of parents or guardians may be made to the High Court, a county court or a magistrates' court sitting a domestic court;[130] most unfortunately, there is no right of appeal,[131] so that

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124 [1904] 1 Ch. 129.

125 15 & 16 Geo. V, c. 45.

126 Ibid., s. 1.

> . . . [A] court . . . shall not take into consideration whether from any other point of view the claim of the father, or any right at common law possessed by the father, in respect of such custody, upbringing, administration or application is superior to that of the mother, or the claim of the mother is superior to that of the father.

127 See below, p. 345.

128 Marriage Act 1949, s. 3 (3). Strangely, no mention is made in this Act of the consents required by a minor when the marriage is solemnized on the authority of a "special licence" (ibid., s. 5).

129 Ibid., ss. 3 (1), 16 (1) (c).

130 Ibid., ss. 3 (1) (b), 3 (5).

131 Re Queskey, [1946] Ch. 250. The Guardianship of Infants Act 1925, s. 7 (3), did allow a right of appeal. It was held in Re Queskey that the section applied only to those matters that were formerly dealt with in the Guardianship of Infants Act 1886, i.e. guardianship and custody. The 1925 Act consolidated this Act and the Marriage Act 1823, which did not provide a right of appeal. Cf. the position in New Zealand, below, p. 366.

there are virtually no accessibly reported modern cases on either the procedure or the principles of applications to the courts.[132] [133]

II. THE COMMONWEALTH MARRIAGE ACT, 1961

The Commonwealth Matrimonial Causes Act, 1959, and the Commonwealth Marriage Act, 1961, have made uniform the law on marriage and divorce in Australia.[134] No-one acquainted with the American difficulties will gainsay the wisdom and foresight of the framers of the Australian Constitution, when they reserved the right to legislate on marriage,[135] nor can it be doubted that the legislation as a whole was a wise exercise of power.

The provisions as to minimum age and parental consent are contained in Part II and the Schedule of the Marriage Act 1961. Section 18(1) of the Matrimonial Causes Act 1959, provides that a marriage that takes place after the Act's commencement is *void* where either of the parties is not of marriageable age. The principle, *Quod fieri non debet, factum valet,* applies, however, to marriages that take place without parental consent.[136]

A. AGE OF MARRIAGE

Section 11 of the Marriage Act provides that, subject to section 12, a male person is of marriageable age if he has attained the age of eighteen years, and a female if she has attained the age of sixteen years. Section 12(1), however, gives a boy aged sixteen or seventeen and a girl aged fourteen or fifteen, the right to apply to court for an order permitting that person to marry 'a particular person of marrageable age'. On the face of it, this would seem to mean that a girl of fourteen or fifteen may apply to marry only a male person who is eighteen or over, and a boy of sixteen or seventeen may apply to marry only a female person who is sixteen or over. The wisdom of these restrictions is not immediately apparent. One supposes that the legislature has argued, "We're not prepared to let two immature per-

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132 That the provisions have given rise to procedural difficulties is clear from the practice points discussed in: 117 J.P.N. 819 (1953), 109 J.P.N. 315 (1945), 110 J.P.N. 402 (1946), 114 J.P.N. 121 (1950).

133 The provisions of other common law countries on parental consents are treated below, pp. 365-370.

134 In accordance with the power reserved to the Commonwealth Parliament in the Australian Constitution, s. 51 (xxi).

135 Cf. Currie, *Suitcase Divorce in the Conflict of Laws,* 34 U. OF CHICAGO L. REV. 26 (1966): "The Australians are dead right: divorce ought to be a federal question."

136 Marriage Act 1961, s. 48(2).

sons marry, but we'll make a concession if only one of them is immature." In effect, the application of a girl of fourteen to marry a man of eighty must be entertained, but the application of a girl of fifteen to marry a boy of seventeen will not![137]

It may be, however, that the statute is to be interpreted differently. "Marriageable age" is not defined in the definition section. The only section in which the words appear is section 11, in which in any case they are used predicatively, and so not necessarily definitively. Section 11 is expressly made subject to section 12, so that it is arguable that in construing section 12, one should read the words "marriageable age" as if section 11 had not been enacted, i.e., simply as "an age at which one is capable of being married". This may be the sounder, albeit the more strained interpretation—even though it appears not to have been in the draftsman's mind.[138] Perhaps this is yet another occasion when a strict, analytical construction of a statute produces a more just result than an appeal to the nebulous intention of the legislature.[139]

If the draftsmanship of section 12(1) is clumsy, that of section 12(2) is pleonastic. The section requires a judge or magistrate to 'hold an inquiry into the relevant facts and circumstances, and if he is satisfied that

> (a) the applicant has attained the age of sixteen years or fourteen years, as the case may be; and
> (b) the circumstances of the case are so exceptional and unusual as to justify the making or the order,

he may, in his discretion, make the order sought, but otherwise he shall refuse the application'.[140]

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137 The absurdity of this was pointed out by Mr. Bandidt (Wide Bay) in the Debates on the Marriage Bill in the House of Representatives: Vol. H. of R. 28, p. 134.

138 This construction was certainly not in the mind of the promoter of the Act, Sir Garfield Barwick (as he then was): see Barwick, *The Commonwealth Marriage Act 1961,* 3 MELB. U.L.R. 277, 288 (1962).

Quaere, would this article be admissible as an aid to the construction of the Act? Surely a statement of legislative policy after the coming into operation of an Act is as potent, or dangerous, as the debates on the Act, whose inadmissibility is well established. But see Barwick, *Courts, Lawyers and the Attainment of Justice,* 1 TASM. U.L.R. 1 (1958), for a plea that memoranda of explanation be admitted.

139 Cf. Frankfurter, *Some Reflections on the Reading of Statutes,* 47 COL. L. REV. 527 (1947).

140 This sub-section is expressly subject to sub-section (4), which merely permits a magistrate or judge to transfer an application to a place nearer the place where the applicant ordinarily resides. The English Act has been criticized for the lack of such a provision: 100 L.J. 131 (1950).

It requires no acuteness to deduce that if the judge or magistrate does not exercise his discretion in the applicant's favour and make an order, he must necessarily refuse the application! Pleonasm in statutes not merely offends the reader's intelligence, but also excites his suspicions. Do the additional words have subtle jurisdictional purport that completely escapes this reader of them?

The words, "in his discretion", are also, presumably, inserted *ex abundanti cautela.* The corresponding section that empowers a magistrate to give his consent to a marriage *in lieu* of that of a parent, or guardian[141] does not include the words. Is there something sinister, too, in this inconsistency? As the section reads, the court clearly has *power* to refuse consent even though it is satisfied that the circumstances are such as to justify the making of the order.

But the drafting is still more unsatisfactory in the use of the words "exceptional and unusual".[142] Is the phrase one of those tautological legal catchphrases like "null and void"?[143] Selby J. in *Re K (An Infant)*[144] appears to have treated the phrase as not severable. But if two words are used in a statute, then one ought to ask why. Are the words "exceptional" and "unusual" synonyms? or are there circumstances which may be exceptional but not unusual, or vice versa? Literally an "exceptional" event is one that happens less often than not, whereas an "unusual" event is one that happens rarely. It could thus be argued that the pregnancy of a girl under sixteen is exceptional, since most girls of that age manage not to become pregnant, but not unusual, since it happens with lamentable frequency, as Selby J. lugubriously pointed out in *Re K.*[145]

In *Re K* the applicant girl, aged fifteen, wished to marry a man aged twenty-one, by whom she was pregnant. Selby J. said,

> I do not consider that the fact that a fifteen year old girl is pregnant can be regarded as coming within the specified category. Any judge who has sat in the Matrimonial Causes Jurisdiction of this Court or in Equity for the purpose of considering

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141 Section 16 (2), below: "The magistrate . . . if he is satisfied . . . may give his consent."

142 Section 12 (2) (b), above.

143 Cf. MELLINKOFF, THE LANGUAGE OF THE LAW (1963), *passim,* for a collection of these familiar "doubled words", e.g., "had and received", "fit and proper", "force and effect", "cease and desist". The author suggests that "A loathing for the redundant is not a generally respected lawyerly quality."! id. at 346.

144 (1963) 5 F.L.R. 38; 81 W.N. (pt. 1) (N.S.W.) 33, [1964] A.L.R. 363, discussed, below.

145 See below.

> applications for orders of adoption must be well aware of the unfortunate fact that it cannot be regarded as exceptional or unusual to find that a fifteen years old girl has become pregnant.[146]

He then considered further circumstances and came to the conclusion that 'the circumstances of this case may be regarded as so exceptional and unusual as to justify the making of the order sought'.[147] He considered the following factors, which in combination he regarded as 'suffciently exceptional and unusual':

(a) The parents of the applicant had given their consent.

(b) The parents were anxious that the marriage should take place.

(c) The girl, according to her father, was unusually mature for a girl of her age.

(d) The father was convinced that the parties were suited to each other and in no way incompatible.

(e) To give birth to an illegitimate child was 'a deep and abiding disgrace' in the part of Holland in which the applicant lived.

(f) The Dutch authorities were prepared to permit the marriage provided only that the marriage was sanctioned in Australia.

One is left to wonder which of these circumstances of itself would have been considered both exceptional and unusual. It is doubtful that any of the first four is unusual, except in the sense that it is unusual for a fifteen year old girl to seek to marry in the first place. Certainly, all four circumstances appear to be predicated on the fact of the girl's pregnancy. It would, surely, be more "exceptional and unusual" if parents whose daughter was pregnant opposed the marriage which would restore their daughter's good name: the natural reaction of a father is rather to insist on the marriage.

With respect, it is suggested that factors (a) and (d) were irrelevant to an application under section 12, being matters exclusive to an application under section 16.[148] It would seem that the only exceptional or unusual aspect of this girl's application related to her living in Holland. Selby J. pointed out that not merely would the girl have been ostracized, but the child would have been handicapped throughout his life. Of course, giving birth to an illegitimate child is regarded in most parts of the world to a greater or less extent as disgraceful, but Selby J. seemed to imply that this part of Holland was unusually condemnatory towards an unmarried mother.

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146 5 F.L.R. 38, 39.
147 Id. at 40.
148 Below, p. 352.

The remarks of Selby J. with regard to pregnancy have been approved by all judges who have subsequently had to deal with an application, either under section 12 or under section 17, where the girl was pregnant.[149]

In *Re P.*[150] the late Bridge J. was confronted with a situation that appears to be not uncommon in the Northern Territory. The applicant, a half-aboriginal girl of fourteen, wished to marry a Chinese man. The parties had had sexual relations on two occasions, one of which had resulted in the applicant's pregnancy. The parents of both the applicant and the man she wished to marry had given their consent. Bridge J. considered with great care the meaning of the words "exceptional and unusual". Pointing out that the variations of circumstances were too wide to permit any statutory, or judicial, definition, he considered that the 'text and spirit of section 12 bear certain obvious connotations'. First, section 12 presupposes that persons within the specified ages are generally unfit by reason of immaturity for marriage; secondly, the legislation is designed to protect such persons against themselves; thirdly, the words "exceptional and unusual" are emphatic words, calling for judicial caution; and finally, the onus of showing that the circumstances are sufficiently unusual lies clearly on the applicant.

As in *Re K.* the consent of parents was thought to be a circumstance to be taken into account, together with the fact that the applicant and her proposed husband had been constant to each other for two years. But, in contrast with the severe local intolerance of unmarried motherhood and illegitimacy that was felt to be the decisive factor in *Re K.*, was the 'notorious, if regrettable, complacency about such matters in the Northern Territory'.[151] Nevertheless, Bridge J. granted the application. The principal reason he advanced appears to be that the welfare of the child to be born demanded it. After pointing out that even if the marriage did not take place until after the applicant had reached sixteen, the child could be legitimated,

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149 Re P, below, per Bridge J.; In the Matter of C, [1965] S.A.S.R. 388, per Travers J. But cf. Wilson C.S.M. in Ex p. P, [1967] S.A. L. Soc. Jdmt. Sch. R. 505: "I think this observation as to the effect of the pregnancy must be taken to be implicitly qualified . . . by some such phrase as 'standing alone' or 'in itself'."

150 Unreported, 8th March 1965 (Supreme Court of Northern Territory of Australia). For this case and Re D, below, I am indebted to Mr B. H. Leader, a former Associate of Bridge J. and graduate of the University of Adelaide.

151 Re P, above.

Bridge J. nevertheless felt that, 'the parental care and devotion which I believe both parents to be able and keen to give to the child in early infancy would be impaired if not given where best given, namely in the family home which the father has the means and wish to provide'.[152]

This approach seems incompatible with Bridge J.'s own interpretation of the statute. Nowhere in the relevant sections of the Act, or indeed in Bridge J.'s analysis, is the welfare of the child stated to be material. If this decision is correct, one is tempted to say that the judiciary has assumed a complete discretion in deciding whether or not the marriage ought to be permitted.[153]

Yet is not Bridge J.'s approach a wiser one than that which the legislature has enjoined? Surely, the existence or impending arrival of a child puts a wholly different complexion on an application under section 12. Indeed, the only obvious occasion when the stringency of minimum age requirements ought to be relaxed is when an illegitimate child would otherwise be born. Selby J., it is submitted correctly, regards this of itself as not "exceptional and unusual". The legislature is to be blamed if, as it may, hardship results, for not having given the judges carte blanche whenever the applicant, or his intended wife, is pregnant.[154]

An application of rather a different order came before Bridge J. in *Re D.*[155] In this case, the applicant and her proposed husband were both Greek immigrants. The applicant, aged fifteen, had initially obtained her father's consent to the marriage with a man aged thirty-six, but her father vacillated, occasionally made unfounded accusations against the applicant of prostitution and immorality, and made brutal attacks on her. Later, the applicant, her father and her intended husband consulted a Greek Orthodox priest, who favoured the marriage; then all of them instructed a solicitor to seek the necessary judicial approval. The father having again withdrawn his consent, the applicant left him, and was later committed to the care of the Director

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152 Ibid.

153 Cf. the South African cases dealt with below, p. 365 and In re A.B., [1944] N.Z.L.R. 674, below p. 366.

154 Cf. the Western Australian legislation, discussed above, p. 327. It is perhaps unfortunate that the provisions of section 3 of the W.A. Marriage Act Amendment Act, 1956 (above n. 56) were not inserted in toto into the Commonwealth Marriage Act.

155 Unreported, 25th March 1965 (Supreme Court of Northern Territory of Australia).

of Welfare. The Director was obliged reluctantly to place the applicant in an institution in the Northern Territory for non-delinquent boys and girls. The Director consented to the proposed marriage. Bridge J. gave his consent to the marriage, on the grounds that both the applicant and her intended husband were of sound character, that she was mature and responsible, that the intended husband had sufficient economic security and that their probable compatibility was indicated by their mutual steadfast devotion in difficult circumstances. Bridge J. further took into account the customary Greek acceptance of marriage of girls at an early age, the fact that responsible authorities had approved the marriage, and the desirability of removing the applicant from the environment of the delinquent home.[156]

It would seem that none of the circumstances save the fact of the girl's being in a delinquent home, and perhaps that the applicant and her husband were Greek, could be considered of itself to be exceptional or unusual. Yet again the decision is surely unimpeachable as a matter of sound policy. Bridge J. in this case seemed to treat the enquiry as being as to whether the marriage would be satisfactory—he said that 'the proposed marriage would offer a vast improvement in this respect'[157]—and seems to have done no more than pay lip-service to the "exceptional and unusual" provisions of section 12.

It is interesting that in two of the three cases mentioned, the applicant has been a foreigner, or at least of foreign origin—and in both these cases this fact appears on its face to have been of critical importance to the decision. Does this mean that foreign applicants are to be "most favoured citizens" in these applications? It would be unfortunate, particularly in the case of immigrants, whose best interest would seem to demand that they be assimilated into the Australian way of life, if the courts tended to look too readily to the foreign environment and upbringing as a criterion of suitability. But, for reasons stated above, it appears that the court made much of these factors only in order to be able to point to something "exceptional and unusual" so as to justify making an order. And in *Re H.*,[157a] Isaacs J. paid only cursory lip-service to the words, clearly deciding to grant permission on the basis of the maturity of the applicant and his intended spouse.[157b]

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156 Ibid.

157 Ibid.

157a [1964/5] N.S.W.R. 2004.

157b Occasionally a magistrate will do more than pay lip-service to the words "exceptional and unusual". An example is the recent South Australian

B. CONSENT OF PARENT OR GUARDIAN TO MARRIAGE OF MINOR

(i) *Whose Consent is Required?*

The provisions relating to consents required by a minor are contained in sections 13-17 of the Marriage Act 1961,[158] and the Schedule to the Act, which contains a detailed list of the persons whose consent is required in a variety of circumstances. The Schedule is almost a copy of the Second Schedule of the English Marriage Act 1949.[159]

Section 13(1) restricts the operation of that Part of the Act to minors who have never been previously married (though it is arguable that an infant who has had one unsuccessful marriage is a greater prima facie marriage risk than the infant who has not previously been married[160]). The requisite consent or consents must be given within three months of the marriage,[161] but may be effectively withdrawn any time before the proposed ceremony.[162] The consent, however,

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case, Ex p. P, [1967] S.A. L. Soc. Jdgm. Sch. R. 505, where Milson C.S.M. refused to sanction the marriage between a pregnant 17 year old girl and a 16 year old boy. This must have shaken the parties and their parents, for they had fixed the wedding for the following day! Notable dicta in that case are:

1. A marriage, in which the female is already pregnant, is very often a forced marriage, built on a much more shaky foundation than one which is contracted voluntarily, and is therefore much more likely to founder.
2. It does not follow that [the fact that parents have consented] carries weight in every case; and in the present case it seems to me that the 'chorus hymeneal' is:
   'But an empty vaunt—
   A thing wherein we feel there is some hidden want'.
3. In presenting [an application under s. 12.] to the court the assistance of a solicitor is highly desirable—and indeed well-nigh essential.

In a letter to the writer, Mr Wilson pointed out that in not more than 20% of all applications to the Adelaide Magistrates' Court, under s. 12 or s. 16, has either side been represented by counsel.

The writer is indebted to Mr Wilson for permission to quote his observation.

158 Sections 18-21 apply both to marriageable age and to parental consents.

159 Above, p. 337. A notable distinction is that adopted children are not specially dealt with in the Second Schedule to the English Act. And see below, n. 169.

160 This restriction appeared in Lord Hardwicke's Act, and seems not to have been since questioned. In civil law jurisdictions, the *puissance paternelle* is lost on emancipation, which usually occurs on marriage and does not revive if that marriage is dissolved. See below, p. 362.

161 Marriage Act, s. 13 (1) (a) (i).

162 Ibid., s. 21 (2). It would appear that the caveat placed on parents' right to withdraw consent in In Re Brown, [1904] 1 Ch. 120, (above, p. 336) has not been incorporated into the Australian Act, which is phrased in absolute terms.

of any person whose consent it would be impracticable, or impracticable without unreasonable delay, to obtain, may be dispensed with by a "prescribed authority",[163] which unattractive creature turns out to be no-one but 'an authorized celebrant or Justice of the Peace appointed by the Attorney-General to be a prescribed authority'.[164] The "prescribed authority" may dispense with the consent of a person only if he has no reason to believe that the consent of that person would not be refused,[165] and if he has no reason to believe that 'facts may exist by reason of which it could reasonably be considered improper that the consent should be dispensed with'.[166]

The Schedule is divided into three Parts. Part I prescribes that where both parents are alive and living together, their consent is required to the marriage of their legitimate child, save where they have been deprived of the custody of the child by court order, in which case the consent of the custodian or custodians is required. Where only one parent is living then if the parent acts with an appointed guardian, the consent of both the parent and the guardian is required; if a guardian alone is acting, only his consent is required; if there is no guardian, then of course, the surviving parent's consent is required. Where both parents are dead, then again the guardian's consent is required if there is one, otherwise the consent of a "prescribed authority". Part II deals with the position where the minor is illegitimate: the mother who has not been deprived of custody by order of court has the sole power of consent; if she has been deprived of custody, the person to whom custody has been ordered; if she is dead, the guardian or, if none, the "prescribed authority" must consent. Part III deals with adopted children, providing in effect, that their position be equated with that of children born naturally in lawful wedlock.

These provisions are, of course, straightforward and clear. But the Schedule also provides for two occasions when the family unit has been split: (i) where the parents are divorced or separated by order of a court or by agreement,[167] and (ii) where one parent has been deserted by another.[168] In the first case, the consent of both parents is required only where the minor lives with one parent for part of a

163 Ibid., s. 15 (1) (a).
164 Ibid., s. 5.
165 Ibid., s. 15 (1) (b).
166 Ibid., s. 15 (1) (c).
167 Ibid., The Schedule, Part I, 1 (b).
168 Ibid., Part I, 1 (c).

year, and with the other for the remainder of the year.[169] This means, of course, that if a court orders custody of a child to one parent, subject to the other parent's having the child with him for a week during the summer holiday, consent of the latter parent is required, but *aliter* if the other parent is granted only access, albeit for one day each week. This seems anomalous.

In practice, courts in most cases grant custody to the wife, unless she is adjudged the "guilty" party, though even then the court will often grant her custody, especially of very young children.[170] It is doubtful whether on the whole the child's best interests are served by allowing the mother rather than the father the sole adjudication of the wisdom of marrying under age. Indeed, if these provisions become widely known, husbands may be less willing to concede custody, and this most unseemly of court battles will become more frequent.

"Divorced or separated by order of court or by agreement" appears to preclude a "maintenance" order, for these orders, as is well known, unlike separation orders, do not justify one party's leaving the other, but merely determine what shall be paid to the other spouse and the children if he does, or has done, so. The phrase "by agreement" would seem not to require a formal, written document.

The other exception is that where one parent has been deserted by the other, the consent of only the one who has been so deserted is required.[171] This provision, again copied from the English Act, was severely criticized by Pape J. in *Re an Application under s. 17 of the Marriage Act 1961*,[172] on the ground that it makes it necessary to turn the inquiry into an investigation as to which of the parents deserted the other. Pape J. regarded this as 'a very undesirable state of affairs'.[173] It is difficult not to agree; particularly as the judge 'is not bound by the rules of evidence',[174] it is patent that the court hearing an application under section 17 of the Marriage Act is an inappropriate tribunal to determine questions of marital right and wrong.

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169 Contrast the English Marriage Act 1949, Second Schedule, where the consent of both parents is required only if *custody* is given to each for part of the year.

170 Allen v. Allen, [1948] 2 All E.R. 413 (C.A.); Willoughby v. Willoughby, [1951] P. 104 (C.A.). The English cases in which "custody" and "care and control" have been awarded to separate parents have not found favour in Australia.

171 The Schedule, Part I, 1 (c).

172 [1964] V.R. 135.

173 Ibid.

174 Marriage Act, s. 18 (1) (a).

Pape J. pointed out a further difficulty in applying this provision, namely whether "desertion", not defined in the Marriage Act, includes the "constructive desertion" referred to in section 29 of the Matrimonial Causes Act 1959. He decided that as this section was applicable only to proceedings for divorce or judicial separation, it was not intended to be applied to proceedings under this Part of the Marriage Act. Therefore, he said, 'the desertion referred to in the Schedule is desertion at common law'.[175] He included in this constructive desertion according to the superseded doctine of *Lang v. Lang*,[176] though it is doubtful whether *stricto sensu* constructive desertion of any kind can be said to be "desertion at common law", the term being applied for the first time in England[177] long after the passing the first Divorce Act.[178] Nevertheless, it is submitted that Pape J. was correct, as section 29 of the Matrimonial Causes Act 1959 uses the words "shall be deemed", which clearly introduce a new conception and are by nature not definitive.[179] Thus, if one spouse's conduct is such that it constitutes just cause for leaving, that spouse's consent will still be required, whereas if he intentionally drives his spouse out or, according to Pape J., if his conduct is such that an irrebuttable presumption of intention to drive out arises,[180] his consent will not be required. To add to the difficulties, the full implications of the effect, if any, in

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175 [1964] V.R. 138.

176 [1955] A.C. 402 (P.C.).

177 The term appears to have been used for the first time judicially by Scrutton L.J. (using inverted commas) in Bowron v. Bowron, [1925] P. 187, 194. The doctrine that the person who remains may be in desertion was, however, certainly enunciated as early as 1864. (Graves v. Graves, 3 Sw. & Tr. 350). As late as 1947 Lord Jowitt was able to say in the House of Lords, "On some future occasion it may be necessary that this House should consider . . . whether there is sufficient warrant for the doctrine of 'constructive desertion' which from time to time seems to have found favour.": Weatherley v. Weatherley, [1947] A.C. 628, 631.

178 Matrimonial Causes Act 1857. The term "common law" is, of course, comprehensible only in context. Cf. its use in Matrimonial Causes Act 1959, ss. 25 (3), 95 (5); see COWEN & DA COSTA, MATRIMONIAL CAUSES JURISDICTION (1961) 57-59, 93-97.

179 For the effect of Matrimonial Causes Act 1959, s. 29, see Manning v. Manning, (1961) 2 F.L.R. 257, per Burbury C.J.; Costello v. Costello, (1961) 2 F.L.R. 353, per Hudson J.; A v. A, [1962] V.R. 619 per Barry J.; Simes v. Simes, (1961) 2 F.L.R. 311, per Barry J.; Fronten v. Fronten, [1963] S.A.S.R. 179, per Hogarth J.; Meek v. Meek, [1963] W.A.R. 155 per Hale J.;Wood v. Wood, [1966] S.A. Law Society Judgment Scheme Reports 339, per Mitchell J.; and Busby v. Busby, [1966] 2 N.S.W.R. 202.

180 Lang v. Lang, [1955] A.C. 402 (P.C.).

Australia of *Gollins v. Gollins*[181] and *Williams v. Williams*[182] on the matrimonial offence of desertion have not yet been realized. If it be that the principle of those two cases applies as well to desertion as to cruelty, then conduct which is not intended to drive the spouse out of the matrimonial home, and which is, subjectively, excusable, will amount to desertion (at common law?) if in fact a reasonable spouse would have left.[183] Actually, in *Re an Application under s. 17 of the Marriage Act 1961*[184] Pape J., after assessing the evidence, came to the conclusion that he was quite unable to say whether either party deserted the other, and so considered the case on the basis that the consent of both father and mother was required. As it was, he held the father's consent was unreasonably refused.

It is submitted that Pape J.'s criticism of the Schedule was entirely justified. Surely, where parents are not living together, the judge or magistrate ought to have been entrusted with the discretion to determine whether in the circumstances, and particularly having regard to the conduct of the particular parent to the child, it be just that the minor should be required to await that parent's consent before marrying.

(ii) *The Nature of Proceedings under Section 17*

Section 17 provides that either the minor or the parent or parents who were unsuccessful before the magistrate in an application under section 16 may apply to a judge, who may 'rehear the application accordingly'. The exact nature of this "re-hearing" has been the subject of some judicial opinion.

Pape J., in what may be said to be the "leading case" on this subject,[185] considered that the hearing under section 17 was an enquiry

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181 [1964] A.C. 644 (H.L.). This case has been followed in Walker v. Walker, [1964] W.A.R. 96 (Hale J.), Patton v. Patton, [1964] A.L.R. 240 (Selby J., N.S.W.) and Clayton v. Clayton, [1963] S.A. Law Society Judgment Scheme Reports 110 (Napier C.J.).

182 [1964] A.C. 698 (H.L.). This case appears to be having a less ready acceptance in Australia than the companion case of Gollins v. Gollins. See, e.g., Riba v. Riba, [1966] Qd. R. 511; Driscoll v. Driscoll, (1963) 80 W.N. (N.S.W.) (Pt. 1) 722.

183 Williams v. Williams might equally well be rejected, Gollins v. Gollins accepted, with regard to desertion. Indeed, it is arguable that section 29 of the Matrimonial Causes Act 1959 is a codification of the principle of Gollins v. Gollins applied to constructive desertion. But Busby v. Busby, above, suggests that it is a codification of Williams v. Williams too!

184 [1964] V.R. 135.

185 Re an Application under s. 17 of the Marriage Act 1961 (Com.), [1964] V.R. 135.

de novo—the judge not being bound in any way by the magistrate's decision or his reasons for it.[186] This opinion has been followed in several of the accessibly reported decisions.[187]

Bridge J., however, in *Re a Minor*[188] considered that the words of the statute did not require that the judge conduct a complete hearing *de novo,* but thought that they at least authorized it: the language being wide enough to allow the judge to receive at his enquiry

> (a) any document tendered, whether previously in evidence before the magistrate or not; (b) either an oral repetition or an official written record of the evidence already given by any witness before the magistrate; (c) further evidence from any such witness whether extending, qualifying, varying or otherwise affecting his previous evidence or not; and (d) evidence from any fresh witness.[189]

In the South Australian case of *Re V.*,[190] Bright J., though approving Pape J.'s observations in *Re an Application under s. 17 of the Marriage Act 1961,* expressed the view that the rehearing is 'by trial over again, using the evidence given before the magistrate and *pronouncing such decision as the magistrate ought to have given*'.[191] (Italics supplied). He drew a parallel with *Victorian Stevedoring & General Contracting Co. Pty. Ltd. v. Dignan*[192] and *Ex parte Australian Sporting Club Ltd.*[193] Nevertheless, he allowed fresh evidence to be introduced.

The question becomes one of some importance in the unusual circumstances of *Re Hampton,*[194] where Crisp J., of the Supreme Court of Tasmania, delivered what has so far been the most searching analysis of the type of enquiry that section 17 envisages. In that case the applicant was a boy of nineteen, whose parents were at first divided on the wisdom of his intended marriage—his mother refused, his father consented. The boy accordingly applied under section 16 for the consent of the police magistrate, which was refused. Between the time of this refusal and the date of the hearing before Crisp J.

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186 Id. at 136.
187 See Mansfield C.J. in Re an Application under s. 17 of the Marriage Act 1961 (Com.), [1964] Qd. R. 399, 401.
188 (1964) 6 F.L.R. 129. (Supreme Court of Northern Territory of Australia).
189 Id. at 135.
190 (1964) 6 F.L.R. 266; sub. nom In the Matter of V, [1964] S.A.S.R. 189.
191 6 F.L.R. 267.
192 (1931) 46 C.L.R. 73.
193 (1947) 47 S.R. (N.S.W.) 283; 64 W.N. 63.
194 (1965) 7 F.L.R. 353.

under section 17, the boy's father changed his mind. Could he be heard by the court? If the enquiry was in effect an appeal from the magistrate, clearly he could not, for he was not a party to that application. Crisp J., however, fortified by the provision of section 18(1)(b) that a judge should 'give to the applicant and, so far as is reasonably practicable, any person whose consent to the marriage of the applicant is required by this Act an opportunity of being heard', considered that he was indeed obliged to give the father a hearing; otherwise, the father might still refuse to give consent, and the minor would have to begin proceedings again, for the court's consent would be in substitution only for that of the mother.[195]

Though approving Pape J.'s observations, Crisp J. felt that they did not go quite far enough. His interpretation of section 17 was that it envisaged an administrative proceeding,[196] and he was reinforced in this view by the provision of section 18 that the judge was not bound by the rules of evidence.

> Subject to the duty to act quasi-judicially, that is to observe the rules of natural justice, and to the statutory duty to hear the applicant and the parties whose consent are necessary upon such a matter, I think the judge may inform his mind as he thinks fit and for that purpose he may regulate his own procedure.[197]

He thought that the judge was not bound to adopt 'the trappings and formalities of a trial',[198] and that, although the magistrate's notes might be used, viva voce evidence was to be preferred. It is submitted that this interpretation is sound, though some may think that the surreptitious establishment of yet another administrative tribunal is to be regretted rather than applauded.

A further important point arose in *In re Hampton,* which again illustrates the reluctance of the judiciary to be bound by what they regard as faulty draftsmanship. In an application, the magistrate[199] or judge[200] is enjoined to consider whether the person who has refused to consent has (sic) refused his consent unreasonably. Crisp J. considered that a strict interpretation of this mandate would require a judge to consider the unreasonableness of the refusal only at the time and in the circumstances when it was made; but 'such a narrow

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195 Id. at 355.
196 Id. at 356.
197 Ibid.
198 Ibid.
199 S. 16(2)(a).
200 S. 17(2).

view of the court's function would not . . . fulfil the purpose of the statute',[201] and the court must treat the refusal as a persistent and continuing one, and consider the circumstances as they exist at the time of the enquiry.[202] The same result could probably have been achieved by a less dubious method of construction. The words "has consented", being in the present perfect tense, must import a continuing refusal. If the legislature had intended the situation only as it existed at the time of the first refusal it would surely have used the preterite tense.

(iii) *When will Consent be Given?*

Both the few reported cases that reached Supreme Courts, and the South Australian statistics set out in Appendix I suggest that, notwithstanding the stringency of the provisions, a great proportion of applications is successful.[203] But, perhaps more significant is the number of applications withdrawn, one can only surmise, because the parents have relented.[204]

It will be recalled that section 16(2) prescribes that if he is satisfied that the person who has refused to consent has refused his consent unreasonably, then the magistrate (or judge[205]) may give his consent to the marriage in lieu. The matters to be considered in determining whether the consent is unreasonable are not specified in the statute,

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201 7 F.L.R. 353, 357.

202 Ibid.

203 In the following appellate cases, the minors were ultimately successful: In re Hampton, (1965) 7 F.L.R. 353 (Tas.), above; In the Matter of C, [1965] S.A.S.R. 388, below; Re an Application under s. 17 of the Marriage Act 1961 (Com.), [1964] V.R. 135, above; Re V., (1964) 6 F.L.R. 266 (S.A.) above.

The parents "won" in Re A Minor, (1964) 6 F.L.R. 129 (N.T.), above, and Re an Application under s. 17 of the Marriage Act 1961 (Com.), [1964] Qd. R. 399.

204 The writer is indebted to the Prothonotary, Supreme Court of New South Wales, the Prothonotary, Supreme Court of Victoria, the Master of the Supreme Court of Western Australia, the Registrar of the Supreme Court of the Australian Capital Territory and the Registrar of the Supreme Court of Queensland for kindly furnishing information as to applications dealt with by Supreme Court judges in their respective Courts. The number of these applications is too few to enable one to draw any but the superficial conclusion—that in two-thirds to three-quarters of applications the minor is successful.

The writer is also greatly indebted to Mr D. F. Wilson C.S.M. of the Adelaide Magistrates' Court for the statistics that he supplied [Appendix II], and for permission to quote his letter.

205 s. 17(2).

but certain criteria can be deduced from the cases, although, of course, each case is to be considered on its own facts, and stare decisis is not readily applicable to this kind of process.

What promises to be the *locus classicus* is another dictum of Pape J. in *Re an Application under s. 17 of the Marriage Act 1961*.

> The question is not whether in all the circumstances the judge thinks it would be reasonable to allow the minor to marry; his function is to say whether the parent's refusal is unreasonable. If in all the circumstances the judge concludes that a reasonable parent, acting reasonably, might regard himself as justified in refusing his consent, the judge cannot overrule the parent's decision simply because he himself would have adopted another course; he can only substitute his own view for that of the parent if he is able positively to say that the refusal of consent was unreasonable.[206]

Most significant is Pape J.'s observation that a reason personal to the parent and in no way connected with parties to the proposed marriage and the desirability of their union would be prima facie unreasonable.[207] In the case itself, one of the reasons advanced by the father (another immigrant) as a ground for refusal was that his consent had not been asked in the normal and proper manner. Apparently, it was the custom in the father's youth for children to ask their father in three separate stages for consent (i) to "bring the boy or girl in the family"; (ii) to "go engaged"; (iii) to be married. But this father's daughter approached him for the first time to request consent to the marriage as if it were a fait accompli.

Pape J. said that the father's objection was personal to the parent and should not be held to be reasonable. But, with respect, may it not be that the daughter's covert attitude demonstrated a lack of maturity which might well be a very valid reason for refusing consent? Certainly, though the customs of today do not generally demand the sort of inquisition that Algernon (or Ernest?) was subjected to by Lady Bracknell, yet it could be argued that some significance ought perhaps to be attached to the manner in which the prospective parents-in-law are approached. Some sympathy may be felt for this father—after all, if the applicant had taken a similarly cavalier attitude with the court, she would have been unlikely to curry much favour! Pape J. has, however, been approved on this point in *In re*

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206 [1964] V.R. 136.
207 Id. at 139.

Hampton,[208] and in *Re an Application under s. 17 of the Marriage Act 1961*.[209]

Other objections vary from assertions that the minor was immature,[210] to allegations that the prospective spouse was of bad moral character, having interfered with two young sisters of the minor.[211] Decisions on these objections are wholly decisions on facts, inferences and observations of witnesses, but one or two general deductions can be made from the cases:

(1) Disparity of age has *not* been upheld as a valid objection: *Re V.*[212] (girl applicant nineteen—proposed husband thirty-four); *Re an Application under s. 17 of the Marriage Act 1961*[213] (girl applicant seventeen—proposed husband thirty-three).

(2) The very devotion of the young persons to their cause has been regarded by the court as likely to mature their personalities and to intensify the bonds between them: *In Re Hampton;*[214] *In the Matter of C.*[215]

(3) Hostility towards parents—and particularly an application brought from "spite"—is likely to tell against a minor: *Re an Application under s. 17 of the Marriage Act 1961*[216] where the applicant appears to have lost her case through her performance in court.

(4) Notwithstanding Pape J.'s dictum that 'if a parent simply says, "I think my child is too young to marry" and there are no circumstances to be taken into account—the parent's decision should be upheld',[217] the courts have not automatically regarded the youth of the applicant as a bar to marriage; the individual maturity of the applicant will be considered. This is clear not only from the perceptive judgment of Travers J. who refers particularly to this point in the South Australian case of *In the Matter of C.*,[218] but also from the other reported cases, in all of which individual appraisal of the applicant's maturity—and that of his or her prospective spouse—is made.

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208 7 F.L.R. 353, 358.
209 [1964] Qd. R. 399.
210 Re an Application under s. 17 of the Marriage Act 1961 (Com.), [1964] Qd. R. 399. Re A Minor, (1964) 6 F.L.R. 129.
211 Re V., (1964) 6 F.L.R. 266.
212 Ibid.
213 [1964] Qd. R. 399.
214 (1965) 7 F.L.R. 353.
215 [1965] S.A.S.R. 388.
216 [1964] Qd. R. 399.
217 [1964] V.R. 140.
218 [1965] S.A.S.R. 388.

(5) There is a conflict of judicial opinion on the extent to which, if at all, pregnancy, or birth of a child, should affect the court's judgment. On the one hand Travers J. in *In the Matter of C.* felt that if consent was not given, either the applicant and her prospective husband would set up home in an irregular union or he would drift away from the applicant and their child;[219] on the other hand Bridge J. in *In Re A Minor*[220] considered that in allowing this factor to influence the issue the court would be approving or condoning the immoral behaviour—and, in any case, the child could be legitimated *per subsequens matrimonium* when the applicant reached twenty-one. For reasons advanced above, the writer feels that the views of Travers J. are more realistic and sounder, *a fortiori* with regard to parental consent.

III. MARRIAGE OF MINORS—A SOCIAL PROBLEM

A. AGE OF MARRIAGE

The right age to marry has been debated in many civilizations.[221] Nor has the answer seemed to everyone quite so straightforward as to Bacon: 'A young man not yet, an elder man not at all.'[222] Today there exists a considerable diversity in mature legal systems.

Modern observers conflict. Although the United Nations has passed a Convention condemning marriage at an early age,[223] it has been asserted by some social scientists that age at which persons marry appears not to have any bearing on the success or failure of marriage except where the marriage is undesirable on other grounds.[224] But this seemingly irresponsible view appears to be neither supported by statistics, nor acceptable to the public.[225]

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219 [1965] S.A.S.R. 391.

220 (1964) 6 F.L.R. 129.

221 An interesting, though dated, comparative study of oriental, ancient and modern laws is Swindlehurst, *Some Phases of the Law of Marriage,* 30 HARV. L. REV. 124 (1916).

222 Essays 8, Of Marriage and Single Life.

223 United Nations Convention of Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, General Assembly Resolution 1763A (XVII), November 1962. For the text and commentary on this resolution, see Schwelb, *Marriage and Human Rights,* 12 AM. J. COMP. L. 336 (1963). See also n. 226, below.

224 E.g. Monahan, *Does Age at Marriage Matter in Divorce?,* 32 Social Forces 81 (Oct. 1953). See also Day, *Divorce in Australia,* 35 Australian Quarterly 57 (1963). A recent report of the British Medical Association, which has been attended with much publicity, has made the issue topical.

225 See COHEN, ROBSON AND BATES, PARENTAL AUTHORITY (1958), discussed below.

The two principal issues which arise in considering the wisdom of provisions relating to minimum age are: (i) the minimum age (or ages) at which the marriage should be possible; (ii) whether any dispensation ought to be available, and, if so, in what circumstances.

(i) *What should be the minimum age or ages?*

Modern provisions vary so greatly that a comparative analysis might be thought futile. In 1961, the United Nations Commission on the Status of Women recommended that the minimum age ought to be fifteen.[226] Much was made of this report, which had not then been ratified, in the Debates on the Commonwealth Marriage Bill. In a non-party debate, several Labour representatives tended to oppose the proposed legislation raising the ages to eighteen/sixteen on the ground that to ignore the United Nations' recommendation would be contrary to Australia's obligation as a member State. The supporters of the Bill maintained, however, that to comply with the Resolution would be a derogation from the sovereignty that a mature nation possessed. Some members expressed themselves rather less temperately.

> We are dealing with an Australian problem in an Australian climate. I suppose a rough analogy would be that simply because in some parts of the world people travel on camels there is no need for us to adopt that means of transport. I do not like travelling on a camel, and I am sure that the honourable member for Parkes would not like that mode of travel. What people elsewhere do is no concern of ours when we are dealing with our marriage laws.[227]

Applaud this attitude as a welcome refusal to surrender national identity, or condemn it as unworthy chauvinism, the fact remains that a substantial part of the provisions relating to minors' marriages is a copy of rather an ill-considered English statute.

Those who opposed the raising of the age agreeably, though somewhat fancifully, prayed literature in aid. "How old was Juliet when she stood on the balcony?", interjected one member.[228]

The tendency from the French Revolution on has been to raise

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226 Those legislators who considered that to adopt the recommendation would be too hasty, as the Commission had, at the time of the debates in the Australian Parliament, made no firm recommendation, will be comforted in the knowledge that the final Convention (above, n. 223) omitted such recommendation. In fact, the Convention now merely incorporates an injunction to States to take legislative action specifying a minimum age for marriage.

227 Mr Killen (Moreton): HANSARD, 30 H. of R. 492.

228 Mr Chaney: HANSARD, 30 H. of R. 495.

minimum ages—and this tendency is readily apparent in legislation passed since the publication of the United Nations' Report.

In France, the ages remained eighteen (boy) and fifteen (girl) since their introduction by the Code Napoléon.[229] In Switzerland they have in this century been raised to twenty/eighteen,[230] in Germany to twenty-one/sixteen,[231] in Denmark to eighteen/seventeen.[232] Soviet law varies from republic to republic—in most republics the age is eighteen for both male and female, in other eighteen/sixteen.[233] In very recent years, Tunisia (twenty/seventeen),[234] Guinea (eighteen/seventeen),[235] Algeria (eighteen/sixteen),[236] Poland (twenty-one/eighteen),[237] Ivory Coast (twenty/eighteen)[238] and Mali (eighteen/fifteen)[239] have raised the minimum ages. (The new legislation of the African countries has emphasized the need for consent of the parties themselves, and to that extent is revolutionary.)

Australia belongs to the majority of States that have adopted different age limits for boys and girls. This difference reflects the earlier maturity of girls, albeit it might be thought contrary to the Article in the Declaration of Human Rights by which the equality of sexes in marriage is enjoined.[240]

(ii) *Should there be a dispensing power?*

A more fruitful enquiry, perhaps, is, should there be any power in the court (or some other body) to permit marriages under age, and, if so, in what circumstances?

The Australian Act differs from the English,[241] which permits of no exception to the age of sixteen. Many other jurisdictions provide exceptions. Legislation is of two kinds:

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229 Code Civil (France), Art. 144.
230 Code Civil (Switzerland), Art. 96, al. 1.
231 Ehe G. § 1. But see below, p. 358.
232 Marriage and Divorce Act, 1923.
233 Code of Laws on Marriage, Family and Guardianship, section 5. See II Gsovski, Soviet Civil Law, 241.
234 Décret-loi No. 64, Art. 5, 20th February 1964.
235 Loi. No. 54 A.N. 162, art. 1., 14th April 1962.
236 Loi. No. 63. 224, 29th June 1963.
237 Family and Guardianship Code, Art. 10. (Until 1964, the age was eighteen for both male and female.)
238 Loi. No. 64-376 (1964).
239 Loi. No. 62-17, art. 11., 3rd February 1962.
240 Art. 16. "Men and women . . . are entitled to equal rights as to marriage, during marriage and at its dissolution." It is, however, possible to construe this Resolution as applying only to those of full age.
241 Marriage Act 1949 (England).

(a) The marriage under age is not void, but either voidable or even valid. In Germany, for example, a marriage in infraction of section 1 of the EheGesetz[242] is nevertheless a valid marriage.[243] More usual is the French law that the marriage is voidable until after six months' cohabitation after attaining marriageable age.[244] The law in most American states is similar, following common law.[245]

(b) A procedure is available whereby a person or persons might be granted permission to marry notwithstanding that he, she or they have not reached the minimum age. The pattern for this type of legislation is that of the French Code Civil, which has been followed almost verbatim in the many jurisdictions that have adopted or adapted that code. Article 145 provides that the Head of the State may grant a decree of dispensation for *"motif grave"*. This admirable phrase, whose nuances are not quite reproduced in literal translation, certainly covers the pregnancy of a girl under the minimum age.

Most modern legislation accords the power to authorize such marriage to a judicial officer, but a few jurisdictions that have adopted the Code Civil vest the power in the President of the Republic.[246] The Australian legislation is rare in that the court is accorded the power only in "exceptional and unusual" circumstances, though Soviet Russia is a parallel.[247] Some American jurisdictions simply permit a pregnant girl to marry.[248]

(iii) *Comment on the wisdom of the Australian provisions*

It would be futile to analyse the different opinions[249] on whether early marriage is desirable. Statistics are not needed to demonstrate that a marriage that takes place when either party is not fully mature,

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242 Ehe G. § 31 provides that a man should ("soll") be twenty-one, a woman sixteen, subject to permission by the "Vormundschaftsgericht" (Guardianship Court).

243 See II Erman, Handkommentar zum Bürgerlichen Gesetzbuch (1962) 1784 (n. 4). The marriage would, however, be void if either of the parties were "eheunfähig", defined in s. 104 B.G.B. to include persons under seven, and persons mentally affected.

244 Code Civil (France), art. 185 (1).

245 See above pp. 324-6.

246 E.g. Ivory Coast: Loi No. 64-375, 7th Oct. 1964; Guinea: Loi No. 54 A.N. 162, 14th April 1962: the dispensation is only available to the girl. Some Australian states also accorded to a ministerial officer the discretionary power before 1961: below, pp. 371-2.

247 Code of Laws on Marriage, Family and Guardianship, s. 5.

248 See, e.g., West's Ann. Cal. Civ. Code, s. 56; McKinney's N.Y. Dom. Rel. Law, s. 15.

249 See above, nn. 224, 225.

and particularly where the husband is unable comfortably to support his wife, is likely to be strained. Nor could Australian mores accept a practice quite normal in U.S.A.,—that of wives supporting their husbands' education,[250] let alone the idea of marrying while at high school.[251] On the other hand, people do of course fall in love in their teens, and some may be embittered if they are prevented from marrying the person whom in retrospect they feel to be their "right partner". The sexual difficulties that postponement of marriage entails are too obvious to need elaboration.

All in all, the ages contained in the Commonwealth Marriage Act are a very reasonable compromise. Certainly, one feels relieved that the maturer opinion of legislators was not seduced by the fictional Juliet, or the legendary Helen (a somewhat dubious exemplar)![252]

Whether or not the provisions relating to dispensations are satisfactory is more doubtful. It might be argued that to permit of exceptions to the minimum ages of marriage is to encourage young people to immorality, in the hope that pregnancy will enhance their chances of obtaining dispensation. It was for this reason, presumably, that the proposer of the Marriage Bill emphasized that pregnancy would not be sufficient of itself to justify dispensation,[253] and that the unfortunate "exceptional and unusual circumstances" was made a requirement. These fears were probably unfounded. It is unlikely that young persons who otherwise would not have had extra-marital intercourse would do so simply for tactical reasons. And even if this were sometimes so, these occasions would be outnumbered by instances when pregnancy results from "non-tactical" sexual intercourse.

It is suggested that to give the court a power of dispensation was wise. The strange restriction of section 12, discussed above,[254] might well have been omitted. The words "exceptional and unusual circumstances" insection 12(2)(b) might have been replaced by "for serious reasons", or even "if the minor or the minor's proposed spouse is

250 The writer recalls that in his classes at the Universities of Michigan and Nebraska, at least three-quarters of his male students were married; most of them either had part-time jobs or were wholly dependent on their wives' incomes; many had families.

251 See Cochrane v. Mesick Bd. of Education, 360 Mich. 390, 103 N.W. 2d 569 (1960); State v. Gans, 168 Ohio St. 174, 151 N.E. 2d 709 (1958), cert. den. 359 U.S. 945 (1959); In re Rogers, 36 Misc. 2d 680, 234 N.Y. S. 2d 172 (1962).

252 Mr Haylen: HANSARD, 30 H. of R. 498.

253 Sir Garfield Barwick: HANSARD, 30 H. of R. 501.

254 Above, p. 340 *et seq.*

pregnant or has given birth to a child"; the first phrase was probably to be preferred, for it accords to the court a measure of discretion.

Some of the suggestions made in connexion with the dispensing of consent of parents or guardians[255] might well have been thought applicable to minimum age too.

B. SHOULD THE CONSENT OF ANYONE BE NECESSARY FOR THE MARRIAGE OF MINORS? SHOULD SUCH CONSENT BE THAT OF PARENTS OR GUARDIANS? IF SO, SHOULD THE COURT HAVE A DISPENSING POWER, AND UNDER WHAT CIRCUMSTANCES?

This enquiry is more demanding. First, opinions are more diverse; secondly, there is a greater disparity of provisions amongst different jurisdictions; and, thirdly, the cases reveal almost doctrinal contentions.

It has been seen that parental consent came into English law without any apparent influence from the civil law. But the conception must surely have been inspired by the *patria potestas* of Rome.[256]

The almost unlimited powers of the *paterfamilias* included, of course, the right to object to the marriage of one who was in his *potestas*. This power was exercisable not merely over sons and, generally, daughters, but also over the more distant relatives who belonged to the *familia*. In the later period of the Empire, the *potestas* became more modified. Thus a father might be obliged to assent to a suitable marriage for his daughter if he had no other to propose;[257] if the father was absent, and it was not known whether he was alive or where he was, the child could marry, after the expiration of three years.[258] Marriage, however, did not emancipate the son or daughter, and it has been suggested that the *paterfamilias* could even dissolve a marriage that had been contracted with his consent.[259] A more moderate power is also found in Germanic law and in other ancient systems.[260]

(i) *Parental consent in civil law jurisdictions*

The proprietary interest of parents in children was characteristic of feudal systems, but in the Middle Ages became so attenuated that

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255 Below, pp. 365-372.

256 Cf. Hodgkinson v. Wilkie, (1795) 1 Hag. Con. 262, [161 E.R. 546], per Sir William Scott.

257 See BUCKLAND, TEXT-BOOK OF ROMAN LAW, (3rd Ed) 113.

258 Dig. 23. 2.11.

259 See SCHULZ, CLASSICAL ROMAN LAW 134.

260 E.g. the Germanic *Munt*, not quite so unlimited as the *patria potestas*.

even in France, the bulwark of feudalism, it seems to have been possible at one stage to marry without parental consent.[261] It has already been noted that the Church set its face against parental control,[262] but after the Reformation, the French kings revivified the power by a series of confiscatory edicts. At first, children who married without parental consent simply lost the right to inherit and their parents could revoke all previous gifts,[263] but later it was decreed that priests who celebrated such marriages should be guilty of rape![264] It followed from the "rape" that the marriage was no more than a seduction, *ergo* without consent of both parties, *ergo* void for diriment impediment! The only occasions when parental consent seems to have been dispensable was where the parent had left the realm, had been condemned to a penalty, was in a religious profession or had suffered civil death (loss of "l'état civil"[265]). After the French Revolution, the *puissance paternelle,* previously extending well into majority, was limited in its exercise to minors. But for the purpose of consent to marriage, majority began at twenty-five for a man, twenty-two for a woman. Not merely the father and mother, but other members of the family could intervene, at least where the child was under twenty-one.[266] Moreover, even after attaining majority, a man of less than thirty and a woman of less than twenty-five were "expected" to obtain parental consent ("l'acte respecteuse"): if the parties married against their wishes, the marriage was nevertheless valid, but if consent had not been requested at all, then the parties were subject to penalties, including "exhérédation".[267] This law was not repealed until 1933.[268] Now, consent is necessary in France only where the children are under twenty-one. Many former French colonies have even lowered this age.[269]

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261 The preamble to an edict of Henry II, 1556, suggests that there was no law at the time in force against the marriage of infants, without consent: Pothier, *op. cit.,* IVe Part, ch. 1., s. 2.

262 Above, p. 328.

263 Edict of Henry II, 1556, (above, n. 261).

264 Ordinance of Henry III (Ordonnance de Blois), art. 41, confirmed by Declaration of Louis XIII, 1639.

265 Pothier, *op. cit.,* IVe Part, ch. 1.

266 Code Napoléon, art. 151.

267 See Pothier, *op. cit.,* IVe Part, ch. 1, s. II.

268 Loi du 2e Février 1933.

269 E.g. Madagaskar—eighteen (Ordinance of 1st October 1962, art. 5); Tunisia—twenty (Décret-Loi of 13th August 1950, art. 6); Mali—eighteen for girls (Loi, 3rd February 1962, art. 11). Guinea appears not to require parental consent at all.

The history of the *patria potestas* in France is typical of the Continental developments, but a few examples will show that the *puissance paternelle* devolves on different persons in different civil law jurisdictions. The modern law is still evolving to suit changing customs.

(a) *Where the child is legitimate, and both parents are alive*

Originally the *puissance paternelle* was universally exercisable solely by the father, when alive. In modern France, a legitimate child is under the authority of both the mother and the father, though such authority is normally exercised by the father as head of the family.[270] Disagreement between them amounts to consent to marriage.[271] Switzerland requires the consent of both father and mother in most matters, the mother's opinion generally being purely "consultative";[272] but the full consent of both is required before the minor can enter into marriage, for marriage emancipates the child according to Swiss law, so that the very existence of the *puissance paternelle* is in issue.[273] Formerly, in the event of disagreement, the will of the father prevailed in Germany;[274] but the effect of the "equality of rights" legislation of 1957 was to render this provision of the B.G.B. void, and now the parents must try to reach a decision—if not, the Guardianship Court will decide.[275] In Brazil, the *puissance paternelle,* which formerly belonged to the father, now is exercisable by both father and mother; in the case of disagreement, recourse may be had to judicial authority.[276] Recent legislation of Israel concerning the equality of women has been interpreted as meaning that both mother and father must consent.[277] In Italy, however, the father maintains absolute *puissance paternelle.*[278]

Few civil law jurisdictions provide expressly for the abandonment by conduct of powers of control. The conception that the parent with whom a child is not living may lose the *puissance paternelle* is generally foreign to civil law. Certain exceptions, however, may be noted:

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270 Code Civil (France), arts. 372, 373.

271 Ibid., art. 148.

272 Code Civil (Switz.), art. 160, al. 1., art. 274, al. 2.

273 Ibid., art. 98, al. 1.

274 B.G.B., 1628. Cf. Marriage Law of 1946, s. 3. Cf. §§ 1303-1308.

275 s. 1628 (n. 274) of B.G.B. was declared null by the Federal Court ("Bundesverfassungsgericht") on 29th July 1959, as being inconsistent with the Equality of Rights legislation. For the provisions relating to the Guardianship Court ("Vormundschaftsgericht") see B.G.B., §§ 1666 *et seq.*

276 Law no. 4.121 of 1964.

277 Marriage Law, 1951, Art. 3 (a).

278 Civil Code (Italy), arts. 317-327.

(1) In French law, where one of the parents "cannot manifest his will"[279] only the other parent need be consulted.
(2) In some circumstances, the *puissance paternelle* may be vested in new persons when a father or mother re-marries.[280]
(3) Sometimes, on divorce, the innocent mother may obtain the *puissance*.[281]
(4) In some jurisdictions, where the parent or parents give a "bad reason", the court may dispense with his, her or their consent.[282]
(5) In some jurisdictions, where it is impossible to obtain consent of the parents, a court or administrative officer may give consent.[283]

(b) *Where the child is legitimate and the mother is dead*

Invariably, when the mother dies, the *puissance paternelle* passes to the father.

(c) *Where the child is legitimate and the father is dead*

If the father dies before the minor is emancipated, the *puissance paternelle devolves* on the mother of a legitimate child in most jurisdictions, sometimes unconditionally, as in France,[284] sometimes in conjunction with a guardian, or assistant, as in Germany in certain circumstances ("ein Beistand").[285]

(d) *Where the child is legitimate and both parents are dead*

An orphan child must, in civil law, be subject to somebody's *puissance*. Normally, a guardian is appointed, whose consent to marriage will be necessary. In France, however, the right does not devolve on the *tutelle,* but on the grandparents,[286] and if there are none, on the, Balzacian, family council ("Conseil de Famille").[287]

(e) *Where the child is illegitimate*

As has been noted, the *patria potestas* was an incident of marriage. Formerly, therefore, neither the natural mother nor the natural father obtained *puissance paternelle,* and this is still the law in some jurisdictions: normally someone's consent is required—usually that of a "tutelle" or "curateur".[288] In Germany, the mother normally has no

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279 Code Civil (France), art. 149.
280 E.g. Code Civil (Switz.), art. 286, al. 1. Code Civil (France), arts. 395, 396.
281 E.g. Code Civil (Switz.), art. 156,—the innocent party to the divorce *ipso facto* has the *puissance*.
282 See below, p. 364.
283 E.g. South Africa—Marriage Act 1961, s. 25.
284 Code Civil (France), art. 149.
285 See B.G.B. s. 1685.
286 Code Civil (France), art. 150. The consent of any one grandparent is sufficient.
287 Ibid., Art. 159.
288 E.g. Austria, Code Civil, ss. 166 *et seq.*, Code Civil (France), art. 159.

puissance paternelle, but a public guardian ("Jugendamt") must be appointed, though the mother retains the care for the person of the child, assisted by the Jugendamt.[289] In France, however, the consent of whichever parent or parents "recognize" the child is necessary; if the child is not recognized, then the consent of the "Conseil de Famille" is required.[290] In Israel, it has been held that the putative father is automatically vested with power of consent on the death of the illegitimate child's mother.[291]

(f) *Where the child is adopted*

Usually the consent of the adoptive parents only is required. But in certain circumstances, that of the blood family is needed.[292]

(ii) *Is intervention possible?*

To the continental European, for whom human relations are expressible in absolute terms, the *puissance paternelle,* and indeed the *"puissance maritale",* are natural rights. So that the question whether recourse to a tribunal ought to be available to minors is one of the deepest doctrinal significance. After all, if the *puissance paternelle* means what it says, the right of the family is absolute.

In France, accordingly, the courts have confirmed that the parents are vested with a complete discretion.[293] Not even the best interest of the child justifies a recourse to the courts. It has been accurately stated that the family has a "veto"[294] on whom it will permit to join it.

But the character of the *puissance paternelle* has so changed as to permit a modern commentator to remark, 'En droit moderne, la puissance paternelle est un devoir que tous les parents sont tenus de remplir pour le bien de l'enfant'.[295] The emphasis on the welfare of the child has led some continental jurists to recommend that in certain cases of conflict, intervention of the court ought to be available.[296] But such suggestions have met with the retort: 'Eh bien! non, ce ménage à trois, du père, de la mère et du juge de paix, c'est la néga-

289 B.G.B., s. 1707.

290 Code Civil (France), arts. 158, 159, 389.

291 Alzafaddy v. Att.-Gen., (C.A. 86/63, 17 Piskei Din 1419).

292 See Code Civil (France), art. 361:—in case of death, "interdiction" or disappearance of both adoptive parents, the power of authorization may return to the blood family.

293 Pothier, however, gives two instances, in 1663 and 1772, where the court intervened when the advantage of the marriage would be great and the refusal manifestly unjust. In neither case was the refusal that of the father.

294 David, II Le Droit Français 21 (Paris, 1960).

295 Planiol, I Traité elémentaire de Droit Civil 637 (2nd ed., Paris, 1936).

296 Defreyn-D'or, II Travaux de l'Association Henri Capitant 464 (Paris, 1947).

tion de la famille'.[297] (It will be recalled that Pape J. expressed disquiet at the jurisdiction accorded to him, not, of course, on doctrinal grounds, but because, he felt that:

> A judge is no more competent than a parent to decide whether a minor should be permitted to marry. . . . Indeed . . . he is in most cases in a much worse position, for it is impossible by evidence to place any tribunal in full and accurate possession of all the facts.[298])

Nevertheless, a few civil law jurisdictions permit recourse to a judicial authority. The law of Brazil has already been noted.[299] Perhaps most interesting to Australians are the provisions of recent South African legislation.[300] Section 2 of the South African Marriage Act 1961 provides that where the consent of the parents or guardian cannot be obtained (but not where it is refused) the Commissioner of Child Welfare can give consent to a marriage of a minor. Section 25 enacts that where one of the parents or the guardian has refused consent, a judge of the Supreme Court can grant consent in lieu. The section has been judicially considered in *Ex parte F.*[301] and in *Coetzee v. Van Tonder.*[302] In the former case it was held by Milne J.P. that the court had to be satisfied on a balance of probabilities that the parents had no adequate reason for thinking that it would be contrary to the minor's interests to consent to the proposed marriage—a similar conclusion to that reached by Pape J. in *Re an Application under s. 17 of the Marriage Act 1961.*[303] But in *Coetzee v. Van Tonder,* the court considered that the legislation gave it a complete discretion—the test to be applied being whether the refusal of consent would unreasonably prejudice the minor, and not whether it was mala fide, trivial or highly unreasonable: in other words, the test was objective, not subjective. Significantly, a pregnant girl was given leave to marry.

(iii) *Parental consent in common law jurisdictions*[304]

Among common law jurisdictions, little guidance can be gleaned from the English decisions,[305] but the New Zealand case-law is not

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297 Savatier, II Travaux de l'Association Henri Capitant 44 (Paris, 1947).
298 [1964] V.R. 142.
299 Above, p. 362.
300 Marriage Act 1961 (South Africa).
301 (1963) (1) P.H. 139.
302 (1965) 2 S.A. 239 (0).
303 [1964] V.R. 135, above.
304 And see above, pp. 345-355.
305 There are no reported cases in which the principles are discussed. (See above, p. 337).

insignificant—although the latest Marriage Act[306] has abolished the right of appeal, apparently through inadvertence.[307] The New Zealand provisions, contained in the Marriage Act 1955, are in similar terms to those of Australia and England, with some interesting exceptions, most notable of which is the unnecessarily sweeping one that the consent of any person (whatever his status) living outside New Zealand is not required.[308]

Section 19 of the Act provides for an application to a magistrate where consent is refused by parent or guardian. In *In re A.B.*,[309] a father refused consent to the marriage of his pregnant daughter with a half-caste Maori. The learned Magistrate who first heard the application said that ordinarily he would have questioned the girl and the young man in detail, but that his first question to the applicant was, "Has your father given any reason for refusing his consent?" and that the answer was, "Yes, he objects to my fiancé on account of his dark blood". The learned Magistrate said that he did not deem it necessary to pursue his inquiries further, the objection being reasonable, adding that in his sixteen years' experience on the bench he had not known of one mixed marriage that had not ended disastrously in the Maintenance or Divorce Court! On appeal, Myers C.J. said that although a court should not lightly overrule a parent's refusal where that parent's conduct is not unreasonable or capricious, he did not think the refusal was conclusive. In this case the applicant's mother consented to the marriage, and he thought that the mother's views might well be wiser than those of the father. 'In my opinion, the principal factors to be considered in an application of this kind are the welfare of the girl and the interests of the unborn child.'[310] Although he felt that mixtures of race, colour or religion were factors militating against success of a marriage, Myers C.J. noted that in this case the applicant's fiancé was a half-caste whose parents had conducted their household on English lines. He also considered the possibility of abortion and the availability of divorce as factors tending to support a grant of consent to marriage of minors.

The New Zealand court is granted a complete discretion, which

306 Marriage Act 1955 (N.Z.).

307 Wong v. Hatton, [1958] N.Z.L.R. 955.

308 Marriage Act 1955, s. 18(5), (N.Z.). Similar provisions were contained in some of the Australian state statutes: below, pp. 370-372.

309 [1944] N.Z.L.R. 674.

310 Id. at 676.

Myers C.J. would not allow to be fettered by merely examining the parent's subjective views. Indeed it has been held in New Zealand that a father was being unreasonable when he objected to the marriage of his daughter to a man of a different religion, to which she had changed, for 'this would be to allow a father to penalise a child for her exercise of her freedom to change her religion'.[311] In that case, however, the religions were both Christian, and the case might have been differently decided if the daughter had changed her religion to, say, Islam.

All the States of the U.S.A., except, apparently, Tennessee, require parental consents. The provisions vary widely in detail,[312] but all but fifteen states differ from British Commonwealth and civil law jurisdiction in prescribing different ages for males and females.[313] In Michigan it appears that the male does not require consent at all.[314] In almost every American jurisdiction a marriage entered into without the consent is valid, provided the parties are above the minimum age for marriage.[315] Exceptionally, California makes the marriage void,[316] and in one well-known case, a New York court even annulled a marriage that took place in California between one of its domiciliaries and a Californian minor.[317] Although most American jurisdictions provide that a requirement that a party be of a certain age might be waived where the girl is pregnant, there seem to be few such provisions with respect to parental consent. As with minimum age, border-hopping to avoid the necessity for parental consent is quite frequent, but the similarity of legislation makes it less serious a problem.

Canada is unusual in that several provinces have flirted with mandatory parental consents. In Alberta, consent of parents or guardians was required only when an infant was under sixteen,[318] and similar provisions applied to infants under eighteen in Ontario.[319] A spate of cases about the time of the first World War established that the

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311 Per Stout C.J. in In re A.B., (1915) 34 N.Z.L.R. 384.

312 See JACOBS & GOEBEL, *op. cit.*, STATUTORY SUPPLEMENT.

313 Twenty-one/eighteen save for New Hampshire (twenty/eighteen).

314 See Mich. Comp. Laws, §§ 551, 103.

315 See PLOSCOWE AND FREED, *op. cit.*, 76.

316 West's Ann. Cal. Civ. Code s. 36.

317 Cruikshank v. Cruikshank, 193 Misc. 366, 82 N.Y.S. 2d 522 (1948); cf. Kingsley, *The Law of Infants' Marriages*, 9 VANDERBILT L.R. 593 (1956).

318 Marriage Act 1922, c. 213, s. 11. (Alta.).

319 Marriage Act 1914, c. 148, s. 36. (Ont.).

requirements were directory.[320] In *Le Arrowsmith v. Le Arrowsmith*[321] a parent had given oral consent before the ceremony, but did not file formal consent until after it; it was held that even though the marriage had not been consummated, neither party being impotent, the marriage was valid. The criticism to which these cases were subjected[322] no doubt prompted some provinces to enact legislation rendering marriages celebrated without parental consent void. The constitutional validity of such Ontario legislation[323] was considered by the Supreme Court of Canada in *Kerr v. Kerr and Attorney-General for Ontario.*[324] The rather remarkable provisions of this Act purported to lay down as an essential element the consent of parents to the marriage of persons under eighteen,[325] but provided that the court should have power to declare a marriage celebrated without this consent void only (i) at the instance of the person who was under eighteen, (ii) if the action were brought before that person had attained the age of nineteen, (iii) if the marriage had not been consummated and the parties had not cohabited since the ceremony *and* (iv) if the parties had not had carnal intercourse before the marriage.[326] In *Kerr v. Kerr* the girl had married without parental consent after swearing a false affidavit that she was eighteen; but, as intercourse had taken place before the marriage—she was, in fact, pregnant—the court had no jurisdiction unless, as she submitted, section 34 of the Marriage Act was ultra vires of the Ontario legislature. This argument was accepted by the trial judge,[327] but the Ontario Court of Appeal[328] reversed. The Supreme Court of Canada held, with one dissentient, that the provisions of the statute were constitutional, principally because the Provincial legislatures had power to regulate conditions as to the form of solemnization of marriage, which on the authority of *Sottomayor v. De Barros*[329] included provisions relating to parental consent; the conditions of section 34 being a bestowal of jurisdiction to determine the *fact* whether or not a valid marriage had been celebrated, and thus within the competence of the Provincial legislature

320 Burns v. Hills, (1915) 22 D.L.R. 74 (Alta.); Peppiatt v. Peppiatt, (1916) 30 D.L.R. 1 (Ont.); Breen v. Breen, [1923] 3 D.L.R. 600 (Alta.).
321 [1931] 2 D.L.R. 608 (Alta.).
322 E.g. per Stuart J. in Burns v. Hills, (1915) 22 D.L.R. 74.
323 n. 319, above.
324 [1934] 2 D.L.R. 369 (Can.).
325 Marriage Act 1927, s. 17 (Ont.).
326 Ibid., s. 34 (1), (2).
327 [1932] 2 D.L.R. 349.
328 [1932] 4 D.L.R. 288.
329 (1877) 3 P.D. 1.

as a matter of practice and procedure.[330] On the authority of *Kerr v. Kerr* Saskatchewan legislation requiring parental consent as a condition precedent to marriage of persons under twenty-one[331] was held constitutional by the Saskatchewan Court of Appeal,[332] as was similar legislation of Alberta, by the Supreme Court of Canada.[333]

Following *Kerr v. Kerr,* the Ontario legislature once again changed its mind, and repealed sections 24 and 35 of the 1927 Act, and amended section 17;[334] the provisions now relating to parental consent are directory in Ontario,[335] in Nova Scotia,[336] and British Columbia.[337]

The present Alberta legislation is unique in many respects. In the first place, where a minor is under eighteen the consent of both parents is required but if he or she is between eighteen and twenty-one, only that of one parent is needed.[338] Such consent is a condition precedent unless the marriage has been consummated or the parties have cohabited as man and wife.[339] Yet the court shall not declare a marriage void where carnal intercourse has taken place between the parties before the ceremony.[340]

The British Columbia legislation is more orthodox.[341] Having provided that no marriage is to be celebrated by any person under twenty-one unless parental consent is first given,[342] the Act grants the infant a right to apply to a judge for a declaration that the marriage appears to be proper in case the consent is refused 'unreasonably or

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330 It will be recalled that the Canadian Dominion Parliament has the power to legislate over marriage and divorce, save where express power is given to the provinces. It has been held that matters relating to the formalities of marriage are properly the subject of provincial legislation: Kerr v. Kerr, above. A full discussion of these constitutional matters, which formed a large part of the judgments in Kerr v. Kerr, is obviously outside the scope of this article.

331 Marriage Act 1933, c. 59, ss. 52a, b, c, d. (Sask.).

332 Graham v. Graham, [1939] 1 D.L.R. 728 (Sask.).

333 Nielson v. Underwood, [1934] 4 D.L.R. 167 (Can.).

334 Statute Law Amendment Act 1932, s. 17 [Marriage Act, 1932, c. 53, s. 17.] See now Marriage Act 1950, s. 7 (Ont.).

335 Clause v. Clause, (1956) 5 D.L.R. (2d) 286; cf. Alspector v. Alspector, (1957) 9 D.L.R. (2d) 679.

336 See Harris v. Meyers, (1916) 30 D.L.R. 26 (N.S.).

337 See R. v. Moraes, (1907) 5 W.L.R. 285, 22 Can. Abr. 127.

338 Solemnization of Marriage Act 1942, s. 21 (2) (Alta.).

339 Ibid., s. 21 (3). S. 25 (1) appears to duplicate s. 21 (1) with regard to minors under eighteen.

340 Ibid., s. 25 (2).

341 Marriage Act 1936, s. 25. (B.C.).

342 Ibid., s. 25 (1).

from undue motives'.[343] In *Re Horne*,[344] a minor aged seventeen petitioned the Court for leave to marry a twenty-four year old gunner, by whom she was pregnant. Both her parents objected, and the judge at first instance refused the petition, without giving reasons. The girl's father gave as reasons for the parents' refusal: (i) the girl was too young to know her own mind; (ii) the parties were of different religions; (iii) the girl was a diabetic, and her proposed husband could not afford to supply her with insulin; (iv) the proposed fiancé could not afford to support the girl. It was held by a majority that the appeal ought to be dismissed. Sidney Smith J.A. simply felt that he should not interfere with the decision of the judge who saw the parties and their witnesses.[345] Robertson J.A., however, felt that it was not unreasonable of the parents to think first of the safety of their daughter rather than the fact that her child would be illegitimate if the marriage did not take place.[346] O'Halloran J.A., dissenting, thought that the objections ought to be examined in the light of the facts and (a) the girl was pregnant, (b) the fiancé desired to marry her, and (c) they both swore they were in love with each other. He thought the court had been placed in the position of *parens patriae*, and that the girl's pregnancy was the dominating consideration, illegitimate unions and illegitimate births being contrary to public policy.[347]

The history of parental consents in Australia is less chequered. Although it was suggested by Bonney J. in *Cutler v. White*[348] that the English Marriage Act 1823 became part of the law of New South Wales until varied by local legislation, this appears doubtful, for, as was pointed out by Herring C.J. in the Victorian case of *Quick v. Quick*[349] the Act contained an express provision that it should extend only to 'that part of the United Kingdom called England'.[350]

Tasmania was quickly off the mark. In 1838, an Act for regulating Marriages in Van Diemen's Land and its Dependencies[351] contained a section that such person or persons whom consent to the marriage of

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343 Ibid., s. 25 (2).
344 [1944] 3 D.L.R. 665 (B.C.).
345 Id. at 669.
346 Ibid.
347 Id. at 667, 668.
348 (1947) 48 S.R. (N.S.W.) 167, 170.
349 [1953] V.L.R. 224, 228. And see Catterall v. Sweetman, (1845) 1 Rob. Ecc. 304 [163 E.R. 1047].
350 4 Geo. IV, c. 76, s. 33. Lord Hardwicke's Act, specified that it should not extend "beyond the Seas": 26 Geo. II, c. 33, s. XVIII.
351 2 Vict. No. 7 (Tas.).

an infant would have been required in England immediately before the passing of that Act should be obtained.[352] A similar provision was introduced in 1842 in South Australia.[353]

The early legislation of N.S.W., 6 & 7 Will. IV, c. 86, was adopted in a slightly amended form by the first Victorian Act that regulated marriage and divorce, Marriage and Matrimonial Causes Statute 1864.[354] Section 16 of the Act provided that the father's consent was required unless he was 'not within Victoria'—in which case the consent of the guardian, or mother if no guardian, was required. The Act cured the anomaly highlighted in *Ex. p. Colegrave*[355] by providing that if either the parent or the guardian were incapable of consenting, by reason of absence, mental incapacity or other substantial cause, the written consent of a justice, appointed for that purpose, who was to conduct an inquiry into the facts and circumstances of the case was necessary.[356]

These provisions were considered in *R. v. Griffin,*[357] *Gullifer v. Gullifer*[358] and *R. v. Adams.*[359] In the first case, a prisoner indicted for bigamy pleaded that his first marriage was void, his "wife", being under twenty-one, not having obtained parental consent: he argued that the words 'the marriage shall not take place' rendered the provisions mandatory. His argument was peremptorily rejected by Stawell C.J. and Fellows J., availing themselves of different Latin maxims, *omnia rite* and *quod fieri non debet, factum valet.* The matter was raised three years later in *Gullifer v. Gullifer,* where the Victorian Supreme Court entertained jurisdiction over a petition for dissolution of a marriage that took place without knowledge or consent of the infant wife's father, and again in *R. v. Adams,* a trial for bigamy when the prisoner was convicted notwithstanding that he believed the first marriage to be invalid for lack of parental consent.

The N.S.W. legislation[360] was interpreted in the same way by Bonney J. in *Cutler v. White.*[361]

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352 Ibid., s. XXIII.
353 5 Vict. No. 12 (S.A.).
354 27 Vict. No. 268 (Vic.).
355 (1838) 7 L.J. Ch. 236, above, p. 335.
356 27 Vict. No. 268, s. 14 (Vic.).
357 (1877) 3 V.L.R. (L.) 278.
358 (1880) 6 V.L.R. (1 P. & M.) 109.
359 (1892) 18 V.L.R. 566.
360 Marriage Act 1899, s. 9 (1) (N.S.W.).
361 (1948) 48 S.R. (N.S.W.) 167, app. dismissed 48 S.R. (N.S.W.) 177.

The Queensland and Western Australian requirements appear to have been introduced in 1864[362] and 1894[363] respectively.

The provisions in force immediately before the enactment of the Commonwealth Act are contained in Marriage Act 1958 (Vic.),[364] Marriage Act 1899 (N.S.W.),[365] Marriage Act 1936 (S.A.),[366] Marriage Act 1894-1959 (W.A.),[367] Marriage Act 1864 and the Guardianship and Custody of Infants Act and Marriage of Minors Amendment Act 1929 (Qd.)[368] and Marriage Act 1942 (Tas.).[369] The Tasmanian and South Australian legislation contained unusual provisions relating to the effect of failure to consent. Section 31 of the Tasmanian Marriage Act provided that:

> It shall not be necessary to give any proof of the consent of any person thereto whose consent is by law required, and no evidence shall be given to prove the contrary in any proceedings touching the validity of the marriage.

This clause was, indeed, introduced by the 1838 Act.

The other states gave discretion to a judge or justice to dispense with consent, but South Australia and Tasmania vested discretion in a Minister.[370]

Apart from *Watson v. Kane*[371] which concerned a refusal of trustees —held by the court to be reasonable—to consent to the marriage of a conditional legatee with a man who had a history of insanity, the only instance prior to 1961 when the principles that the courts ought to apply in entertaining applications for dispensation were enunciated is the Queensland case of *Re Vonhoff (No. 2)*.[372] The trial judge had given "conditional consent" to a marriage, expressing his view that the parent's refusal was unreasonable but ordering that the marriage take place no earlier than six months thereafter. On appeal, the Full Court of the Supreme Court of Qeensland held that the trial judge had no power accorded by relevant Queensland legislation to postpone

362 Marriage Act 1864 (Qd.).
363 Marriage Act 1894 (W.A.).
364 Div. 4, ss. 43-46, 63.
365 s. 9.
366 ss. 26, 58, Third Schedule, Fourth Schedule.
367 ss. 9, 10, Third Schedule, Fourth Schedule.
368 Marriage Act, s. 20; Guardianship etc. Act, s. 9, Schedule.
369 ss. 15, 31, Third Schedule.
370 "Minister" was not defined in the Tasmanian Act; in the South Australian Act it is defined to mean "the Minister of the Crown to whom the administration of this Act is for the time being committed by the Governor."
371 (1890) 16 V.L.R. 766.
372 [1959] Q.W.N. 12.

the operation of his order. His consent had been rightly given, and the order was varied so as to operate immediately. *Re Vonhoff* also contained important remarks on the jurisdiction of the Supreme Court to entertain appeals.

C. PARENTAL CONSENT—A WISE SAFEGUARD OR AN UNNECESSARY RESTRICTION?

Commentators have expressed themselves with some warmth on the wisdom of laws requiring parental consent to marriage. Behavioural observers are divided.[373] There is no greater agreement amongst jurists. René David, the French jurist, has said that the strict French provisions do not accord with modern "moralité".[374] The American scholar Wharton, justifying the refusal of common law courts to treat parental consent as a matter of essential validity, remarked that 'the power given to parents in continental codes to interfere with their children's marriage cannot be tolerated in England or the United States.'[375]

But the authors of a modern American case-book have advocated that the law be amended so as to render marriages without such consent void, submitting that the present position leaves parents with little control over 'the marriage of their minor children' and is 'socially unsound'.[376] In accord is Rabel,[377] who forcibly criticizes the refusal of England (and, he might have added, Australia) to characterize the requirement of parental consent as an intrinsic, mandatory requirement.[378]

There are three possible alternatives to the present Australian law, which accords parents an initial right to refuse or assent but provides machinery whereby the state can sanction a marriage over their heads:

(a) That minors above the minimum marriage age should be wholly free to marry.

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373 See n. 224, above.

374 II Le Droit Français 21 (Paris, 1960).

375 1 Wharton, Treatise on the Conflict of Laws or Private International Law (3rd Ed., Rochester, 1905) § 253 at 573.

376 PLOSCOWE AND FREED, *op. cit.*, 74.

377 RABEL, I THE CONFLICT OF LAWS: A COMPARATIVE STUDY 289 (2nd Ed. 1948). He refers to the "misleading habit of English courts and writers of contrasting mandatory requirements with formal instead of with directory requirements."

378 Ogden v. Ogden, [1908] P. 46. Rabel refers to this decision as a "very much discredited authority": *op. cit.*, 289.

(b) That consent of parents should have a complete veto.

(c) That consent, not of parents, but of the State should be required.

(a) In a study conducted among residents of Nebraska, U.S.A., it appears that there was a very strong consensus in favour of the diminishing of parental control generally over children.[379] But in one matter alone, the opinion went the other way—that the law requiring consent of parents to the marriage of their minor child was a wise one.[380]

Most parents, one supposes, are a little apprehensive when their child wants to marry in his or her teens. The natural reaction of parents, whose son or daughter only two or three years before was indeed a child, is to recall their own inexperience at that age and contrast it with the tremendous responsibilities and tribulations that their own marriages have entailed. Even the most understanding of parents sees the advantage of delaying marriage, and perhaps overlooks more emotional factors. And there is a, probably correct, assumption that many teen-age marriages end in divorce.

Australian law at present presumes a wise exercise of power by parents—but provides a means by which an unwise, or unsound, judgment may be reversed. To grant young persons complete freedom of choice would be to attenuate still further the familial bonds, which this writer would regard as a tragic rejection of the wisdom of past experience.

(b) The suggestion that parents be given an absolute right to veto marriage of their children can readily be discounted. No-one reading *Re V.*[381] and *Re D.*[382] can doubt that there are unwise and selfish parents whose decisions are not made in the best interests of their children. It would be intolerable if the consent of such parents were

379 COHEN, ROBSON AND BATES, PARENTAL AUTHORITY (1958). This work tends to support those who question the techniques of social scientists. Although the authors are at pains to rebut such suggestions, nevertheless the tenor of the questions is such that one cannot classify them as other than leading. The fact that the results coincide with the clear bias of the authors towards a dissatisfaction with the existing law, arouses one's suspicions. These criticisms apart, do such surveys serve any useful purpose? After all, that which may be gleaned from this project is that several residents of Nebraska, skilled neither in jurisprudence nor in any social science, hastily gave it as their unimformed opinion that parental authority ought to be reduced.

380 Ibid., 69 (Table 9).

381 (1964) 6 F.L.R. 266, above.

382 Unreported, 25th March 1965 (N.T.), above.

a prerequisite. Moreover, history has shown that their children's determination would not stop at fraud and elopement.

(c) The last suggestion has been adopted in some Communist countries. It is by no means anathema to Western thought.

Several American commentators have argued for an extension of State intervention in preventing undesirable marriages. In the U.S.A., many states have gone a long way to ensure physical well-being of married persons by requiring pre-marital tests for venereal disease and preventing marriages with mental defectives and epileptics.[383] The next step, logically, might be felt to be the prevention of marriage between emotionally unsuitable persons.

Yet there is something rather distasteful about state interference in marriage. It has not always been used humanely.[384] And Australian culture resists infraction of the fundamental freedom to marry whom one pleases, perhaps fearing that such a step would ultimately lead to "marriage selection boards" or some such horror. Further, the replacement of parental consent by state intervention would weaken the familial bonds just as effectively as would its abolition.

Nevertheless, it is submitted that the state intervention that already exists—i.e. where parental consent is refused and an application is made to the courts—might have been supplemented with advantage by requiring pre-marital advice as a condition subsequent to the court's consent. The legislature in 1959 warmly encouraged Marriage Guidance organizations.[385] These bodies are agreed that their counselling is much more effective before the marriage takes place than after it breaks down.

IV. CONCLUSION

It is suggested that it would have been a great step forward to require persons applying under either section 12 or section 16 of the Marriage Act 1961 attend a Marriage Guidance Council for pre-marital counselling.

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383 Cf. *Premarital Tests for Venereal Disease,* 53 HARV. L. REV. 309 (1939).

384 E.g. Connecticut introduced legislation providing for three years' imprisonment of a man or woman either of whom was epileptic, who might marry or live as husband and wife when the woman was under 45: Conn. Pub. Acts (1895), c. 325. The many miscegenation statutes, that still appear to be valid in U.S.A., are another example of inhumane interference. The United States' Supreme Court has recently declared these statutes unconstitutional.

385 See Matrimonial Causes Act 1959, s. 9.

It is also submitted that the welfare of children, either born or *en ventre sa mère,* might have been expressly made a significant factor in considering whether to permit marriage of minors. It would not, perhaps, have been inappropriate to introduce into this type of proceeding a concept available in Matrimonial Causes[386]—the representation of such children by a guardian *ad litem.* Australia ought to be more ready than at present it is to acknowledge that children have rights vis-a-vis their parents and society, which can be adequately protected only by separate representation.[387]

J. NEVILLE TURNER*

386 Matrimonial Causes Rules 115A [inserted by Rule 18 of Matrimonial Causes Rules 1967].

387 The findings of the very lively Report of the U.K. Committee on the Age of Majority, (1967) [Cmd. 3342] [The Latey Commission], are set out in Appendix I. This report contains an excellent statement of the arguments for and against lowering the ages for "free marriage".

APPENDIX I

The Report of the (U.K.) Committee on the Age of Majority [*Cmd. 3342*] *(1967)* [*The Latey Commission*].

SUMMARY OF RELEVANT RECOMMENDATIONS

(1) We recommend that the need for parental or Court consent to marry should cease at the age of 18.

(2) We are of opinion that the . . . minimum age for marriage should remain at 17 for both sexes.

[p. 58]

APPENDIX II

ADELAIDE MAGISTRATES' COURT. APPLICATIONS FOR CONSENT TO MARRY

Analysis of Cases brought before Court from 1/7/63.

	GRANTED				REFUSED				WITHDRAWN		
	SECTION 12		SECTION 16		SECTION 12		SECTION 16		SECS. 12 & 16		TOTALS
	M	F	M	F	M	F	M	F	M	F	
1/7/63 to 30/6/64	8	—	1	10	—	1	1	—	2	10	33
1/7/64 to 30/6/65	7	6	5	12	1	1	4	3	2	12	53
1/7/65 to 30/6/66	3	2	6	13	8	1	2	2	4	11	52
1/7/66 to 30/6/67	9	1	7	12	4	3	2	2	1	12	53
TOTAL	27	9	19	47	13	6	9	7	9	45	191