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FAMILY COURT OF AUSTRALIA — FULL COURT at MELBOURNE

In the Marriage of WRIGHT

Evatt CJ, Asche and Watson JJ

29 April 1977 — (1977) 29 FLR 10; 14 ALR 561; 3 Fam LR 11,150; [1977] FLC 76,145 (¶90-221)

FAMILY LAW – PROCEDURE AND REQUIREMENTS OF APPROVAL OF MAINTENANCE AGREEMENTS – APPLICATION BY WIFE FOR MAINTENANCE AND FOR ½ SHARE OF MATRIMONIAL HOME: *FAMILY LAW ACT* 1975, S87.

At hearing both parties were represented by counsel and a deed was prepared in settlement. The Judge merely inquired of both parties who had been legally advised and if they understood the nature of the deed. He then approved the document under s87. On appeal it was argued that the judge failed to comply with s87 in that he did not satisfy himself that the financial provisions were proper.

HELD:
1. In relation to the operation of s87, regulation 109(2) makes it clear that the approval of an agreement is not to be treated as a consent order. In determining whether the provisions of the agreement with respect to financial matters are proper, the principles to be applied are as follows:

2. The Court should have a general view of the means and needs of each party and of the factors relevant under sections 72, 75 and 79, Having regard to those matters and to the provisions of s81 the Court must be satisfied as to the propriety of the agreement. A lengthy investigation is not envisaged; In most cases the statement of financial circumstances, with any necessary supplementary information about both parties should suffice. The court should be sure that the marriage has broken down and that there is no prospect of reconciliation. The parties and their legal advisers have a duty to disclose all relevant circumstances to the Court.

3. In the present case it does not appear that a sufficient enquiry was conducted by His Honour. Accordingly, this lack of enquiry and the absence of a specific finding that the provisions of the agreement were proper amounted to an error in the exercise of discretion.

EVATT CJ: The Court will not usually approve a maintenance agreement under s87 unless both parties join the application. If they both ask the Court to exercise its discretion to approve the agreement then at first sight it may appear that they cannot be aggrieved if the Court does approve the agreement. The better view is that the parties are asking the Court to exercise its discretion in a particular way and to make a positive finding that the provisions of the agreement with respect to financial provision are proper. This finding is a condition precedent to approval of the agreement and to the effective operation of the agreement. It is a matter of substance not a matter of form as in the case of s86.

In the present case His Honour omitted to make the finding that the agreement made proper provision with respect to financial matters. This failure to exercise discretion in the manner provided was an error which in my view could be relied on by the appellant as a person aggrieved.

Turning to the operation of s87, I note that regulation 109(2) makes it clear that the approval of an agreement is not to be treated as a consent order. In determining whether the provisions of the agreement with respect to financial matters are proper, the principles to be applied are as follows:

> The Court should have a general view of the means and needs of each party and of the factors relevant under sections 72, 75 and 79.
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The parties and their legal advisers have a duty to disclose all relevant circumstances to the Court.

In the present case it does not appear that a sufficient enquiry was conducted by His Honour. In my view this lack of enquiry and the absence of a specific finding that the provisions of the agreement were proper amounted to an error in the exercise of discretion.

ASCHE J: It is not enough to present the Court with a Deed and expect it to be automatically approved because the parties have come to an agreement. It is not even sufficient to urge on the Court that the parties, having had competent legal advice, must necessarily have come to an agreement proper to be approved. Although this latter factor will obviously weigh with the Court it cannot absolve the Court from that clear duty which is cast not on the parties or their lawyers but on the Court under section 87(4) to approve if it is satisfied the agreement is proper and to refuse approval if not so satisfied. Such duties have at time been placed on Courts in other jurisdictions e.g. approval of an infants compromise or of a consent order under Worker's Compensation legislation.

When such specific duties have been placed on Courts the rationale is clearly that the legislature has seen fit to provide an additional safeguard over and above the voluntary agreement of the parties; and that safeguard is the overall view of the Court that in all the circumstances the agreement is proper. Parties who enter into an agreement to be approved under section 87, agree, 'to accept the agreed benefits in lieu of rights under an existing order ... or if there is no such, order in lieu of the right to seek an order' (per Barwick CJ in *Shaw v Shaw* [1965] HCA 39; (1965) 113 CLR 545; [1966] ALR 631; 39 ALJR 139). In such a case public policy, it seems, through section 87(4) requires that so distinct a repudiation are justified. 'No doubt, a Court asked to sanction such an agreement will consider closely its provisions realizing not merely that the parties are foregoing rights to the Court's immediate intervention but that they must thereafter rely upon the contractual rights which the agreement gives'. (per Barwick CJ *supra*).

This is not to say that the Court must embark upon a detailed and precise examination of the financial position of both parties and approve only when the agreement agrees with what the Court would consider a proper order had the matter been contested and judicially resolved. I comprehend that the Court's duty under section 87(4) is to satisfy itself that the agreement comes within a broad area of what might be considered a just and equitable settlement between the parties bearing in mind that future rights or possible future rights are being sacrificed for a present consideration spelled out in the agreement. Provided that the agreement comes within that broad area, it may be approved although it might not be precisely the terms which the Court might have imposed by way of an order.

It is to be noted that no such duty is cast on the Court under section 86 where an agreement may be registered and by such registration the terms of the agreement may be enforced as if they were orders of the Court (section 88). Many such agreements may be perfectly reasonable in their terms as between the parties; yet fail to pass the necessary test of the Court's approval within the meaning of section 87. Undoubtedly such agreements registered under section 86 will frequently satisfy the parties and resolve all differences between them. In such circumstances it would not normally be the Court's function to examine the agreement any further than ordering that it be registered. Indeed there is nothing inconsistent in a Court refusing to approve an agreement under section 86 but permitting registration of a similar agreement under section 86. In the former case, the Court would not be satisfied that that proper provision had been made bearing in mind the sacrifices of future tights; yet the agreement may well be a perfectly reasonable one so far as the immediate claims of the parties are concerned provided it left open at least the possibility of one or both parties making further applications in the future.

WATSON J: *[whose reasons received the general concurrence of Evatt CJ and Asche J]* ... "To ascertain

the duty of the court in deciding whether to approve a deed in accordance with the provisions of section 87(4) it is useful to look at the historical background which led to the enactment of this provision. An examination will first be made of English authorities.

Consideration naturally begins with *Hyman v Hyman* [1929] AC 601; [1929] All ER 245; [1929] P 1. In that case the House of Lords held that the statutory power conferred upon the court to make provision for a wife on the dissolution of her marriage is a necessary incident of the power to decree such a dissolution, conferred not merely in the interests of the wife, but also of the public: therefore a wife could not by deed preclude herself from involving the jurisdiction of the court nor could she preclude the court from the exercise of that jurisdiction. The statutory authority then operative was section 190 of the English *Supreme Court of Judicature (Consolidation) Act* 1925 which was itself a repetition of s32 of the *Matrimonial Causes Act* 1857 – the original English legislation permitting curial divorce.

Viscount Hailsham LC said at the end of his judgment:

> 'However this may be, it is sufficient for the decision of the present case to hold, as I do, that the power of the court to make provision for a wife on the dissolution of her marriage is a necessary incident of the power to decree such a dissolution, conferred not merely in the interests of the wife, but also of the public, and that the wife cannot by her own covenant preclude herself from invoking the jurisdiction of the court or preclude the court from the exercise of that jurisdiction.'

Lord Shaw reflected more closely the language of his day when he said at the conclusion of his judgment:

> 'The true principle is that whenever the aid of a court is involved to grant a judicial allowance, and there is present to it an agreement as in bar of the exercise of the right or the discharge of the duty under statute, then the court is bound to look at such an agreement and to decline to be turned from the performance of its judicial duty or the exercise of its judicial rights when the agreement so tabled is of a nature repugnant to and defiant of those obligations which are inherent in the sanctity of marriage itself. To hold otherwise would bring the law into confusion and courts into contempt, for, as already indicated, it would be using courts of law for purposes essentially subversive of society. It will be seen that the principle, so put, applies all round, that is to say, not only to applications for alimony in case of divorce, but in those also of judicial separation.'

An extract from the judgment of Lord Atkin is perhaps more in point:

> When the marriage is dissolved the duty to maintain arising out of the marriage tie disappears. In the absence of any statutory enactment the former wife would be left without any provision for her maintenance other than recourse to the poor law authorities. In my opinion, the statutory powers of the court to which I have referred were granted partly in the public interest to provide a substitute for the husband's duty of maintenance and to prevent the wife from being thrown upon the public for support. If this be true, the powers of the court in this respect cannot be restricted by the private agreement of the parties ... In my view, no agreement between the spouses can prevent the court from considering the question whether in the circumstances of the particular case it shall think fit to order the husband to make some reasonable payment to the wife, having regard to her fortune, if any, to the liability of her husband and to the conduct of the parties. The wife's right to future maintenance is a matter of public concern which she cannot barter away.

By 1952, the relevant provisions had become s19(2) and (3) of the *Matrimonial Causes Act* 1950. In *Bennett v Bennett* (1952) 1 All ER 413 the spouses in anticipation of a divorce entered into a deed whereby *inter alia* the wife agreed to accept an annuity from the husband in full satisfaction of her rights to seek maintenance. Her application for maintenance was by consent dismissed by a registrar in divorce. The husband defaulted on instalments of the annuity. The wife sued. The Court of Appeal held that the whole or the main consideration moving from the wife for the payment by the husband of the annuity was her promise not to invoke the statutory jurisdiction, such a promise was contrary to public policy, and therefore the deed was unenforceable against the husband. In his judgment Denning LJ after dealing with separation agreements had this to say concerning agreements for permanent maintenance on a divorce:

> An award of permanent maintenance on a divorce is peculiarly a matter for the Divorce Court, and the jurisdiction of that court in regard to it cannot be ousted by the private agreement of the parties. The reason lies in public policy. First, it is in the public interest that the wife and children

of a divorced husband should not be left dependent on public assistance or on charity when he has the means to support them. They should, therefore, be able to come to the Divorce Court for maintenance, notwithstanding any agreement to the contrary: *Hyman v Hyman* (1929) P 1; affd. HL (1929) AC 601; 98 LJR 81; 141 LT 329; 93 JP 209; Digest Supp.

Secondly, when maintenance is awarded by the Divorce Court, it is not fixed irrevocably at a named figure. It can be varied thereafter, upwards or downwards, according to the circumstances prevailing at the time, and, if the husband is unable to pay and arrears accumulate it is in the discretion of the Divorce Court whether to enforce payment of the arrears or not. These beneficent controls would be lost if the parties could by agreement, without the intervention of the court, fix maintenance permanently at an unalterable figure. Any private agreement, of the parties which purports to make maintenance a debt enforceable at law must of necessity impliedly oust the jurisdiction of the Divorce Court to fix it, vary it or discharge it, and it is, by reason of that implication, invalid, for the ouster goes to the whole consideration. There is no consideration moving from the wife except an implied promise to accept the named figure and not to ask for more, and that is invalid, because it impliedly takes away the jurisdiction of the court to give her more. If her promise does not bind her, then his should not bind him: *Gaisberg v Storr* (1949) 2 All ER 411; (1950) 1 KB 107; 2nd Digest Supp; *Combe v Combe* [1952] EWCA Civ 7; [1951] 2 KB 215; [1951] 1 All ER 767; [1951] 1 TLR 811. Sometimes there may be an implied promise by her to prosecute the divorce proceedings, but that would be worse, for it would be collusion. In the present case, however, the ouster is not merely by implication. It is expressed in c1.10 of the deed. That clause is invalid. It forms the whole, or substantially the whole, consideration for the husband's promise to pay the annuities. His promise is therefore invalid.

Then he went on to deal with 'the sanction of the court' in the following terms:

If the parties do not oust the jurisdiction of the Divorce Court, but preserve it by making their agreement subject to the sanction of the court, then, once it is sanctioned, it is valid. The court, however, cannot, and will not, give its sanction before decree nisi. It has itself no jurisdiction before decree nisi to deal with permanent maintenance. Its jurisdiction only arises 'on' the decree. Its sanction should, I think, be obtained in this way. If the parties agree on the figure for maintenance, the court should be asked to make an order for that figure. If they agree on a lump sum in composition of maintenance, the court should be asked to dismiss an application for maintenance or to discharge the existing order, as the case may be: *Mills v Mills* (1940) 2 All ER 254; (1940) P 124; 109 LJP 86; 163 LT 272; 2nd Digest Supp, but they made the mistake that they sought to apply it before decree nisi. That was quite wrong because the court had no jurisdiction before decree nisi to sanction the agreement and did not in fact do so. The agreement was recited in the consent order made by the registrar, and it was, no doubt, mentioned to the Judge who heard the petition. Those circumstances go far to negative any collusion, but they do not validate the deed. They do not amount to that sanction by the court which is required to validate it. The proper way of doing it would be to ask the judge to approve the deed as a secured provision for the wife, on the ground that it secures to her an annual sum of money by way of covenant under seal.

That was never done. This does not mean that the wife will go destitute. She can still apply to the Divorce Court for maintenance. The consent order dismissing her previous application is no bar, because it was made before the case came on for hearing and there was no adjudication on the merits. At that stage it was no more than an amendment of the petition striking out her claim for maintenance. No adjudication could take place until the decree. Once the consent order is seen to be no obstacle the case is one in which the Divorce Court would, I think, readily grant her leave to apply for maintenance notwithstanding that three years have elapsed since the making of the decree. She has a reasonable excuse for not applying earlier because she was relying on an agreement which has turned out to be invalid.

In *Addison v Brown* (1954) 2 All ER 213, Streatfield J declined to extend the public policy bar in *Bennett v Bennett* to dissolution by a foreign court. A maintenance agreement entered into in England between parties married there, the husband being an American citizen, had been approved by a Californian court during divorce proceedings. In an action by the wife for arrears under the agreement, His Honour held that although the agreement would have been contrary to public policy and, therefore, void, if it had purported to oust the jurisdiction of the English courts, it was not contrary to public policy to allow the wife to sue on it merely because it purported to oust the jurisdiction of a foreign court.

In *Russell v Russell* (1956) 1 All ER 466 the husband had given the court an undertaking that he would not apply for a variation of a maintenance order except in certain specified circumstances. The Court of Appeal held that his undertaking was not contrary to public policy. The distinction was based on the protection of the wife as is shown by the following extract from

the judgment of Jenkins LJ (at pages 469-470):

> The next point taken by counsel for the husband (which to some extent overlaps the first) is to the effect that this undertaking offends against the doctrine of *Hyman v Hyman* (1929) AC 601; [1929] All ER 245; [1929] P 1. In that case the House of Lords held that a wife could not bind herself by agreement with her husband to forgo her right of applying to the court for maintenance in matrimonial proceedings between them. The principle has been shortly expressed by saying that a wife cannot contract herself out of her statutory right to maintenance. It is said that the same principle applies in a case like the present, where the wife has not bound herself by any agreement to forgo maintenance or to accept some fixed periodical sum once and for all as the maintenance payable to her. The effect of the present undertaking is not to curtail the wife's rights in the least degree. The effect of it is to assure that the husband undertakes that the wife shall receive by way of maintenance at least the sums now payable under the Justices' order. It is argued by counsel for the husband that what is sauce for the goose is sauce for the gander, and that if the wife cannot bind herself once and for all to accept maintenance at a specified rate, by parity of reasoning a husband cannot validly bind himself to his wife to pay her at least a certain fixed minimum sum by way of maintenance. It is said that precisely the same considerations apply to both sides of the bargain. I cannot agree. I think the position of the husband in this matter is very different from that of the wife. It may be that in some circumstances the obligations undertaken by a husband in some form of agreement relating to maintenance in matrimonial proceedings might be so framed or attended with such consequences that it would be proper to hold them contrary to public policy. But I am by no means satisfied that, as a general proposition, the considerations applicable to a wife in this matter apply also to a husband, however the matter may stand as regards agreements out of court, the present case is concerned, not with an agreement *inter partes*, but with an undertaking given to the court, and I am clearly of opinion that it is open to a husband to give an undertaking to the court such as the undertaking in the present case, and that there is no rule of public policy preventing him from doing so. The principle in *Hyman v Hyman* be it remembered does not apply to any bargain which is brought before and approved by the court. By parity of reasoning, it seems to me that that principle is inapplicable where terms are embodied in an undertaking to the court, tendered to the court by the husband, and accepted by the court and incorporated in its order.

In *L v L* (1961) 3 All ER 834 the Court of Appeal applying *Bennett v Bennett* and *Russell v Russell* held that where an agreement disposing of a wife's claim for maintenance is brought before the court and sanctioned, the principle that the court's jurisdiction to award maintenance cannot be ousted by agreement no longer applies and, in the absence of fraud, the wife will be held to the sanctioned agreement.

In *Nash v Nash et al.* (1965) 1 All ER 480 Scarman J had ten agreements to consider. Section 4(2) of the English *Matrimonial Causes Act* 1950 had provided collusion was a discretionary bar to divorce. Section 4(3) of the English *Matrimonial Causes Act* 1963 specified that provision might be made by rules of court for enabling the court, upon application made either before or after the presentation of a petition, for divorce, to take into consideration for the purposes of section 4 of the earlier Act any agreement or arrangement made or proposed to be made between the parties, and to give such directions in the matter as the court thinks fit. Rules were made. After considering the question of collusion Scarman J said (at page 483):

> On the application, the court will require to be satisfied under two heads: (i) that the agreement makes reasonable provision for maintenance, custody, access, damages, or costs, according to its subject-matter; (ii) that there is nothing in the agreement or its surrounding circumstances likely to endanger the true course of justice. Unless the court is satisfied under both heads, it will not approve the agreement or arrangement.
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> As to the first, it can be said with confidence that the court will seldom, if ever, approve an agreement under which the wife abandons her claim for all time for maintenance unless, as in *Mills v Mills* (1940) 2 All ER 254; (1940) P 124, some effective provision be made for her by agreement; see per Sir Jocelyn Simon P, In *Mulhouse v Mulhouse* (1964) 2 All ER 6 at pp54, 55. Furthermore, such an agreement binds neither the wife nor the court; *Hyman v Hyman*. The better course, where a wife does not at the time need maintenance and the *Mills v Mills* procedure is inappropriate, is to make a nominal order or to allow her claim to stand adjourned generally.
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> As to the second, the court must be satisfied by evidence that the justice of the case will be met. This necessarily involves informing the court sufficiently of the nature of the suit, the charges, counter charges and defences, to enable it to reach a view as to the requirements of justice. If the court is unable to express approval, any one of a number of courses may be taken, as I indicated when enumerating some of the powers of the court on such an application. Only in a grave case will

> the court dismiss the petition. When justice permits, it will accept an undertaking to discharge, or not to implement, the agreement; or it may be satisfied by evidence that the agreement has been discharged and no longer operates: in such cases, the court will allow the suit to proceed to trial. If on the evidence adduced in support of the application the court expresses approval, it may, and very often will, give directions for the conduct of the suit e.g. staying further proceedings on the prayer of the petition or striking out the answer.
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> Finally it is desirable whenever possible, that the judge who deals with the application should take the trial of the suit. A word of caution, however; if the parties fail in their endeavour to persuade the court that their arrangement will meet the justice of the case, it may well be that the judge, who has heard the application and has been allowed both to hear counsel's opinion on the merits of his case and to see all or some of the evidence available, will think it better that he himself should not take the trial.

After dealing individually with each of the agreements, Scarman J concluded (at pages 486-7):

> It will be apparent from the foregoing that, since the enactment of the *Matrimonial Causes Act* 1963, it is no longer appropriate to treat all collusion as mischievous or all who negotiate collusive bargains as mischief-makers. A collusive bargain, which in the ordinary meaning of the word is corrupt, remains an offence legally and morally, e.g. the procurement of a decree on a false case or improper pressure by financial bribes or threats on a spouse to bring a suit or abandon a defence; but a collusive bargain, which represents an honest negotiation between the parties, which is not intended to deceive the court either by putting forward false evidence or suppressing or withdrawing a good defence and which takes its place in an agreement which is intended to make a reasonable provision for its parties according to its subject-matter is a perfectly reputable transaction. There is no objection to solicitors and counsel negotiating such a bargain: their duty, in this context as in every other, is to apply their honest skill to the task in hand. If they do so and then place the results of their labour before the court in a spirit of unreserved candour, they will have lived up to the honourable tradition of their profession in a changing world, and will have discharged their duty to their clients, the court and the public – the public whose over-riding interest is that the institution of marriage should not be undermined by an unworthy and disreputable market in its dissolution.

By 1966 section 5 of the *Matrimonial Causes Act* 1965 had re-enacted verbatim section 4 of the *Matrimonial Causes Act* 1963. Simon P thought it advisable to add some comments to what had been said by Scarman J in *M v M (No.1) et al.* (1967) 1 All ER 870 he also handed down some general observations involved in the approving of agreements by the Court. He said (at pages 872-3):

Before I come to deal with the individual cases, there are six general observations which I wish to make.

> First, as to the use of s5(2). In 1966 there were 310 summonses under it in London alone, in the overwhelming majority of which the agreement or arrangement was allowed to go forward without substantial amendment. But this did not exhaust the usefulness of s5(2); under it judges were on occasion able to assist parties actually involved in a contest before the court to come to a reasonable accommodation of their various disputes.
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> Secondly, when an agreement or arrangement under s5(2) comes before me in chambers or court, I invariably ask the counsel or solicitors appearing before me whether, in their view, the decree which the court will be asked, or is likely, to make in consequence of the agreement or arrangement is what would be the likely result of the case were it to be fought out on the pleadings as they might be constituted by the actual instructions to the legal representatives of the respective parties. The resulting duty placed on the legal representative is not always one easy of performance; it involves a critical, a judicial, attitude towards one's own case. It is a characteristic example of the way in which the administration of justice is a co-operative proceeding and how the court has to a substantial extent to rely on the legal representatives of the parties in its performance of the duty laid on it by Parliament.
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> Thirdly, as to provisions for a wife's maintenance. Where the result of the agreement or arrangement is likely to be the grant of a decree to a wife, I do not in other than quite exceptional circumstances, sanction a term providing for the dismissal for all time of a wife's claim to maintenance. When I do dismiss a wife's claim for maintenance it is intended as an indication to a judge dealing subsequently with an application by the wife for leave to make a claim for maintenance that I have been satisfied either that the wife's conduct has been such that it would be unjust that her husband should he

ordered to provide maintenance for her or that her support has been adequately and reasonably provided for in some other way. Even so, the tribunal dealing with the matter subsequently is not concluded by my order; it is intended as no more than an indication of the view to which I have come on the material before me. Again with the aim of giving some guidance to the registrar, where I have sufficient material before me to indicate that the wife would be entitled to a substantial maintenance were it not for her own actual or potential income at the time, I make a nominal order in her favour. Where I have insufficient evidence before me, whether going to conduct or means, to be able to form any view as to what extent the wife should be maintained by the husband my order is silent as to maintenance; this, once more, is intended as no more than an indication to the registrar that I have not had sufficient material to come to a concluded view on the matter, and it does not preclude the wife from subsequently claiming maintenance.

Fourthly, the discretion given by Parliament is finally the responsibility of the trial judge: and the machinery provided by the rules is intended as no more than a convenience to the parties. If the agreement or arrangement presents any difficulty on its investigation in chambers, I make it my practice to reserve the trial of the suit to myself, in order to avoid the expense of time involved in a double investigation and possible embarrassment arising out of any difference of view between the chambers and the trial judge.

Fifthly, it is not infrequent that arrangements or agreements are negotiated and submitted for the consideration of the court under s5(2) because a wife wishes to be assured of her financial security before starting divorce proceedings. In many cases this is entirely reasonable – where, for example a divorce will entail the loss of financial rights on widowhood. Other cases will require close scrutiny by the court to ensure that its procedures are not being used as an instrument for extortion. The issue in each such case will be whether the provision proposed to be made for the wife is a reasonable one in all the circumstances. Particularly in such cases, but also generally in adjudication under s5(2), the court will need to be apprised of the respective means of the parties.

Sixthly, in *Head (formerly Cox v Cox (Smith cited)* (1964) 1 All ER 776 at p777, Wrangham J emphasised as a consideration which the court will weigh together with the primary – and overriding – (see *Mulhouse v Mulhouse* (1964) 2 All ER at p55) consideration that the result of the agreement or arrangement should not be a decree contrary to the justice of the case, the welfare of any children of the marriage, infants in particular. In this connexion I have had, on occasion, to weigh the desirability of sparing children of a marriage the bitterness and publicity liable to be attendant on contested proceedings. Moreover particularly when there has been a history of mental instability, I have also on occasion taken into consideration the advantage of sparing the parties themselves the strain of contested proceedings even though they may themselves be said to have voluntarily invoked the jurisdiction of the court.

In *Gosling v Gosling* (1967) 2 All ER 510 the special commissioner sitting in divorce had refused to approve an agreement. The Court of Appeal held that although the crucial question was whether, if the agreement were implemented, a decree would be granted contrary to the justice of the case, the test was to make a realistic assessment of the probable result, namely whether the defence that was to be abandoned was likely to succeed, not whether the defence would not by any possibility succeed. The Court of Appeal affirmed the approach in *Nash v Nash* and *M v M* (No.1).

In *Wilkins v Wilkins* (1969) 2 All ER 463 the wife sought to have a maintenance order made by the registrar rescinded. Although the case deals with consent orders the following remarks of Baker J (at pages 467-8) are of some relevance:

In *L v L* (1961) 3 All ER 834; (1962) P 101 a wife who was independently advised had consented through her solicitors to an order dismissing her application for maintenance on terms which included the payment to her of a lump sum, Willmer LJ said (1961) 3 All ER at p840; (1962) P at 119, 120:

'I am not impressed by the argument of counsel for the wife that the sanction of the court for such an agreement is not properly obtained unless there is a full investigation by the court of all the circumstances, with affidavits of means filed on both sides. We are dealing here with a case in which both parties were competently advised by solicitors, one of whom was present on the hearing of the summons. The summons was heard by an experienced registrar, and it is to be presumed that he did not make the order giving effect to the terms of the agreement without satisfying himself that it was proper to all the circumstances to do so. I do not think that it is right, therefore, to dismiss the making of the consent order as a mere formality equivalent (to use counsel for the wife's phrase) to no more than putting a rubber stamp on the agreement of the parties. It seems to me that everything necessary to be done to give binding effect to the agreement

> was done in this case. The wife, therefore, is, in my judgment, precluded by the agreement from making this second attempt to obtain an order for maintenance against her husband'.

Davies LJ said (1961) 3 All ER at p842; (1962) at P at 123:

> 'It is, as I think, quite impossible to accept counsel for the wife's argument that that order was a mere rubber stamp nullity. It would be quite wrong and quite improper to disregard the order of the court or to embark in any particular case on an inquiry whether the consent order (in the absence, of course, of fraud) was or was not properly made'.

The decision of Stirling J in *Re Minter (decd.); Visco v Minter* (1967) 3 All ER 412 that a consent order discharging a previous maintenance order by which the wife undertook to make no further claim for maintenance or payment of a lump sum, did not bar an application by her after the husband's death for provision out of his estate, does not assist the husband in the present case.

In *Wright v Wright* (1970) 3 All ER 209 the court had approved an agreement whereby the wife would, on being permitted to get an uncontested decree, not seek maintenance unless she found it impossible to work or otherwise to maintain herself. The wife applied for maintenance on the grounds that her living expenses had increased. In the Court of Appeal Willmer J returned to *Hyman v Hyman*:

> There is, of course, no doubt that no agreement made *inter partes* can ever deprive the court of its right to review the question of maintenance for a wife, as was decided by the House of Lords in *Hyman v Hyman*. I do not think that anything contained in the new provisions of the *Matrimonial Causes Act* 1965, giving the court the power to approve reasonable arrangements between the parties, is such as to cast any doubt at all on the continuance in force of the doctrine enunciated by the House of Lords in *Hyman v Hyman*. There is, therefore scope for two diametrically opposite views. On the one hand it may be said that the court has an absolute right to go behind an agreement between the parties so far as the question of maintenance for a wife is concerned. On the other hand, there is the learned judge's approach to the problem, i.e. that where there is an agreement between the parties approved by the court effect must be given to it. Under the one view, the right to award maintenance would be completely uninhibited, whereas under the other it would be strictly curtailed by the arrangement made between the parties and approved by the court at the time of the trial.

Later he said (at page 214):

> I think for my part, approaching it *de novo* and in the absence of authorities, that the proper view is to say that this was an agreement entered into with full knowledge of all the circumstances and with the advice of both parties' legal advisers. It is therefore, something to which considerable attention must be paid. I accept that it would not be right to say that it has to be construed like a statute or that it absolutely forbids any possible award of maintenance, except on the strictest proof of the existence of the circumstances mentioned. If and insofar as the learned judge so decided I would not agree wholly with his conclusion; but I do not think that he did go so far as that I think that he was thinking along the same lines as I myself think, namely, that the existence of this agreement, having regard to the circumstances in which it was arrived at, at least makes it necessary for the wife, if she wants to justify an award of maintenance, to offer *prima facie* proof that there have been unforeseen circumstances, in the true sense, which make it impossible for her to work or otherwise maintain herself. If that be right, then I think that it is quite plain that the wife here did not ever give such *prima facie* proof.

In *Smallman v Smallman* (1971) 3 All ER 717 the wife had taken out a summons under s17 of the English *Married Women's Property Act* 1882 to determine the property in the former matrimonial home and the furniture. An agreement was reached between the spouses 'subject to the approval in due course of the court'. After certain action under the agreement had been taken by the wife the husband sought to resile from it. He contended that the agreement was not binding on him since it had not received the court's approval. The Court of Appeal held that the parties having reached agreement on all essential matters, it was no longer open to either of them to refuse to carry out the obligations assumed thereunder. The clause 'subject to the approval of the Court' did not mean there was no agreement at all — it meant that its operation was suspended until the court approved it. It was the duty of one party or the other to bring the agreement before the court for approval. If the court approved, the agreement was binding on the parties: if the court did not approve it was not binding: but pending the application to the court

it remained a binding agreement which neither party could disavow.

The difficulties encountered by spouses in Australia who sought to enter into a binding agreement, whereby their financial obligations to each other was fixed for all time are well illustrated by *Brooks v Burns Philp Trustee Company Limited* [1969] HCA 4; (1969) 121 CLR 432; [1969] ALR 321; (1969) 43 ALJR 131. In a deed made between husband and wife on the eve of the divorce hearing under the New South Wales *Matrimonial Causes Act* 1899 the husband covenanted to pay the wife specified weekly amounts. The wife accepted this covenant in 'full settlement of all claims against the husband for alimony and maintenance of any description'. The deed was approved by the court at the hearing of the divorce. No order for permanent maintenance was ever sought or made. After the husband's death the executor sought a decretal order whether the estate was bound to pay periodic maintenance in accordance with the deed. The High Court held that the wife's acceptance was devoid of legal effect and the husband's covenant to pay weekly was unenforceable.

Kitto J held that the court's approval implied a decision by the trial judge to make no order as to alimony and maintenance. He held on the authority of *Hyman v Hyman* and *Bennett v Bennett* that the Divorce Court could refuse to treat the wife's covenant as binding and any other court would refuse to enforce it on the ground of public policy.

Taylor J was of the opinion that the deed was not subject to the approval of the court and was void as being contrary to public policy seeking, as it did, to oust the court's jurisdiction He was further of the opinion that the court's approval did not render effective a covenant that was otherwise enforceable. He said (at p133):

> Again it is a matter of some difficulty to see how the validity of the appellant's covenant could have been saved, either by a clause suspending the operation of the deed until it was approved by the Court, or, by the approval which according to the decree nisi was in fact given to it. At that time the Court had no power to sanction or approve agreements of the character under consideration so as to clothe them with a validity which they did not otherwise possess. The statement is made by Denning LJ (as he then was) in *Bennett v Bennett* (1952) 1 KB 249 at 262, 263 that:
>
> > "If the parties do not oust the jurisdiction of the Divorce Court, but preserve it by making their agreement subject to the sanction of the court, then, once it is sanctioned, it is valid'.
>
> But from his suggestion as to the method by which the sanction of the court might be obtained to an agreement to pay, it clearly enough appears that what his Lordship had in mind in such a case was, not a procedure by which the validity and effectiveness of an agreement might be preserved or reinstated, but one by which obligations under an order of the court might be substituted for contractual obligations.
>
> However observations in *Shaw v Shaw* (1965) 66 SR (NSW) 30; [1965] NSWR 3 make it clear that the practice of placing agreements of the kind now in question before the court grew out of a proper desire to make a frank disclosure of all relevant dealings between the parties in matrimonial causes and to allay or dispel any suggestion of collusion. There is no reason to suppose that the deed in this case was placed before the court for any other purpose and the approval which the decree nisi evidenced must be understood in this context. That is to say, it is impossible to regard the approval of the court was purporting to render effective a covenant which was otherwise unenforceable. Particularly is this so when it is borne in mind that it was trite law that the court had no such power.

Windeyer J (who with Menzies J dissented) considered the historical background which had led to *Hyman v Hyman* and *Bennett v Bennett*. In analysing *Hyman* he pointed out that the wife therein argued *inter alia* (a) that a deed operative after a divorce was against public policy and therefore void, and (b) the wife's covenant could not deprive her of her statutory right to apply for maintenance. As to these two propositions Windeyer J said (at pp139-140):

> In the second and third propositions which were put for the wife in *Hyman v Hyman* the words 'public policy' were used. When invoked in relation to one of these propositions, public policy was a rule of the common law which, it, was urged, would of its own force invalidate the wife's covenant in the deed. However, in relation to what was as I read their Lordships' judgments, the main and decisive consideration the public interest was simply an element in the determination of the nature of statutory rights. The decision that Mrs Hyman could, notwithstanding her covenant, approach the Court was founded on rights given her by statute.

When a statute creates and confers rights and imposes corresponding duties, persons for whose benefit this was done may by contract waive or renounce their rights, unless to do so would be contrary to the statute.

It may be seen that it would be so, because of an express prohibition against contracting, or because the provisions of the statute, read as a whole, are inconsistent with a power to forego its benefits: or the policy and purpose of the statute may show that the rights which it confers on individuals are given not for their benefit alone, but also in the public interest, and are therefore not capable of being renounced. This has been long recognised: see *Graham v Ingleby* [1848] EngR 92; 154 ER 277; (1848) 1 Exch 651 at p656.

In *Davies v Davies* (1919) 26 CLR 348, at p362 Higgins J expressed the general rule when he said:

> "Anyone is at liberty to renounce a right conferred by law for his own sole benefit; but he cannot renounce a right conferred for the benefit of society".

That was the doctrine on which the final decision in *Hyman v Hyman* stands. Lord Hailsham said (at p614) that

> "... the power of the court to make provision for a wife on the dissolution of her marriage is a necessary incident of the power to decree such a dissolution, conferred not merely in the interests of the wife, but of the public, and ... the wife cannot by her own covenant preclude herself from invoking the jurisdiction of the court or preclude the court from the exercise of that jurisdiction".

Lord Shaw and Lord Buckmaster with whom Lord Dunedin agreed took much the same view, So did Lord Atkin: 'The wife's right to future maintenance is a matter of public concern, which she cannot barter away".

I have no doubt that these considerations apply to the provisions for maintenance in the present case and also to Pt VIII of the *Matrimonial Causes Act* 1959-1966 and to other Australian statutes: *Fishwick v Fishwick* [1950] VicLawRp 8; [1950] VLR 30. Their provisions must be read in the light shed by the maxim *privatorum conventio juri publico non derogat*. This phrase, derived from the Digest and quoted by Isaacs J in *Davies v Davies supra*, at p355, and by Lord Atkin in *Hyman v Hyman* has been said by Asprey J, and in my view rightly, to be 'the principle of the decisions in the line of authority exemplified by *Hyman v Hyman*: *Shaw v Shaw* (1965) 66 SR (NSW) 30 at p43; [1965] NSWR 3. Those who look for the law in Latin sentences may like to be reminded also of Coke's version: *pacta privata juri publico derogare non possunt*. Public policy, it is said changes with the times. When considerations of public policy are a determinant of the scope of common law rights courts can, and, perhaps slowly, do keep abreast of the times. But when considerations of the public interest are invoked for determining whether a right given by Parliament can be renounced the case is different. That is because the nature and effect of rights created by statute are, speaking generally, to be determined at the date when the statute comes into force, They are not to be thereafter diminished or enlarged by changing views of what the public interest may be thought by judges to require. That is for Parliament to consider. It is for it, not the courts, to keep the law it has made abreast of the times. I appreciate the remarks of Selby J made in his judgment in *Whittle v Whittle* (1965) 82 WN (Pt 1) (NSW) 31 about a changed attitude to the proprietary rights and interests of spouses now reflected in the *Matrimonial Causes Act* 1959 (Cth), although for reasons I shall give later, I agree with the decision of the Full Court which reversed his Honour's decision in that case: see *Whittle v Whittle* (1965) 66 SR (NSW) 141. I shall assume that *Alderdice v Alderdice* (1963) 64 SR (NSW) 467; [1964] NSWR 787, correctly states the effect of the Commonwealth Act. I have no reason to think that it does not. It then follows, in this case, that if any proceedings could have been taken, and had been taken, by either spouse in respect of the wife's maintenance, they would, after 1st February 1961 have been governed by the Commonwealth Act. But no such proceedings were taken; and the husband being dead, no such proceedings can now be taken: see the remarks of Kitto J in *Johnston v Krakowski* [1965] HCA 57; (1965) 113 CLR 552 at p562; [1966] ALR 357; 39 ALJR 268. Moreover, the Commonwealth Act did not diminish the right of a wife to seek an order for maintenance: nor did it alter the effect of the deed the appellant and her husband had executed.

Windeyer J then proceeded to consider the relevance of such terms as 'void','invalid' and 'unenforceable'. Turning to *Bennett v Bennett* he thought the judgments therein did not turn on consideration in the contractual sense but on a theory of dependent covenants. Windeyer J gave close and detailed consideration to what was involved in the 'Divorce Court's approval of the deed'. He pointed out that it was important to keep distinct and not to confuse 'sanction' to remove the effect of a collusive arrangement and 'approval' to prevent an agreement being or remaining invalid.

Part VIII of the Commonwealth *Matrimonial Causes Act* 1959 dealt with questions of maintenance, custody and settlements. Section 87(1)(k) of that Act provided that that the courts in exercising its powers under Part VIII could sanction an agreement for a lump sum or periodic sums or other made in respect of sections 84, 85 or 86 settlement, or any right to seek such an order. Section 84 empowered the court to make such order for the maintenance of a husband, wife or child as it thought proper having regard to means, earning capacity, conduct and all other relevant circumstances. Section 85 referred to the powers of the court in custody proceedings. Section 86 empowered the court to make orders covering the settlement of property – the test being what was just and equitable in the circumstances of the case.

All these sections at least in their statutory provision applied even-handedly to both wives and husbands. The principle of the wife as the 'weaker economic partner' in marriage did not receive statutory recognition although it clearly continued to affect many decisions relating both to maintenance and settlement of property.

A substantial body of case law was built up around s87(1)(k), particularly as agreements capable of sanctioning under that paragraph became increasingly numerous across Australia. Early in the life of the Act Macfarlan J in *Gribow v Gribow* (1963) 5 FLR 51 held that the court was not obliged to sanction an agreement merely because the parties so wished. He refused to sanction a deed which provided for the payment of one shilling in full discharge of the wife's rights under Part VIII.

In *Shaw v Shaw* (1965) 6 FLR 455 the New South Wales Full Court closely reviewed the meaning and purpose of s87(1)(k). Brereton J pointed out that agreements had been submitted to divorce courts for approval (a) to dispel any suggestion of collusion (b) to provide security for maintenance, or (c) to provide for payment of a lump sum in redemption of future periodic payments of maintenance. He pointed out that the act of approval (or 'sanction') was no mere formality – the court would not give effect to the terms of the agreement without satisfying itself that it was proper in all the circumstances to do so. He mentioned *Bennett v Bennett*, *L v L*, *Nash v Nash* and *Kitchin v Kitchen* [1952] VicLawRp 23; [1952] VLR 143; [1952] ALR 387. He went on to indicate that once an agreement was sanctioned, the situation was wholly controlled by the agreement.

Asprey J reviewed historically the relevance of s87(1)(k) previous law and precedent. He said (at pp470-471):

> The principle of the decisions in the line of authority exemplified by *Hyman v Hyman* is *privatorum conventio juri publico non derogat*. An agreement to pay maintenance entered into by a person who is subject to statutory obligations under this type of legislation cannot, if the agreement is renounced by the other party to it, operate as a bar to the making of an order compelling him to fulfil such obligations (see *Davies v Davies* [1919] HCA 17; (1919) 26 CLR 348; 25 ALR 170; [1918] P 132; *Cooper v Cooper* [1941] HCA 17; (1941) 65 CLR 162 per Williams J at p182). A covenant to pay maintenance, pure and simple, is not void but voidable. It may be enforced, until avoided, by the party in whose favour it operates; and the taking of benefits under it does not affect the right of such a party to avoid it at some future time. However, an agreement not to invoke jurisdiction of the court at some future time to enforce the other party's statutory obligations for maintenance is void and if such an agreement were not subsidiary to and severable from the covenant to pay maintenance, such covenant would be tainted by illegality, would be void and could not be sued upon (see *Bennett v Bennett*) and, if the only consideration for the covenant to pay maintenance is one which by inference is an undertaking not to apply to the court, the court will infer that the agreement is void (see *Gaisberg v Storr* (1950) 1 KB 107; [1949] 2 All ER 411). When a court in these circumstances is called upon to make an order for maintenance, the court is not compelled to exercise its jurisdiction by remoulding an already existing agreement by way of variation of its terms but can make such order for maintenance as it thinks appropriate to the then particular circumstances. However, the sanctioning of an agreement pursuant to s87 statutory obligation of maintenance imposed upon one of the parties to the marriage and it operates to prevent any reliance upon the principle above referred to by the other party and thus, the statutory obligation having been complied with, the court has no jurisdiction in the future to make an order for maintenance. Accordingly, the agreement as sanctioned, would be subject to the application of the ordinary law of contract so that, unless it contained within its own terms a provision enabling it to be varied it could not (subject to the rights of the children and to the possible operation of s87(1)(1) be varied without the assent of both the parties; and, since, although the court has power to vary an order for maintenance, there is no power in s87(1)(k) to enable the court to make an order varying such an agreement, the agreement would, so far at any rate as the wife herself

> is concerned (cf. *Pisani v Attorney-General for Gibraltar* (1874) LR 5 PC 516, at p521; 30 LT 729), operate *inter partes* until its discharge in one of the modes in which a contract may be discharged under the general law. Where such an agreement is subsequently varied by mutual consent it would appear possible that the agreement of variation itself may need the benefit of an order under s87(1)(k) to avoid the possibility of being struck at in the future by the principle of *Hyman v Hyman*, at least in a case where the agreement as sanctioned does not contain as one of its terms a provision for variation by mutual consent.

Finally dealing with court's duty, Asprey J said:

> The present case should not be parted with without stressing that agreements presented to the court under s87(1)(k) should not be sanctioned as of course and the court's approval should be withheld unless the court is upon the appropriate evidence, affirmatively satisfied that the provisions of the agreement are, in the particular circumstances and having regard to the principles applied by the court in matters of maintenance, equitable. If s87(1)(k) is to have the operation of ousting the principles contained in *Hyman v Hyman*, it should be recalled that 'the Court cannot forgo its duties, and it cannot be bound by an estoppel between the parties; for the jurisdiction in matters of divorce is not affected by consent' (see per Lord Hanworth in *Hyman v Hyman*). A heavy responsibility is placed upon the court under this statutory provision and the court should not be asked to exercise its jurisdiction thereunder without the fullest disclosure to it of all the relevant facts to enable it to decide whether or not to make the order asked of it. In particular the court should be wary of exercising its powers under s87(1)(k) when the interests of children are involved.

An application to the High Court for special leave was refused (113 CLR 545). Barwick CJ shortly stated the effect of s87(1)(k) as follows (at page 549):

> The agreement which s87(1)(k) contemplates is an agreement to accept the agreed benefits in lieu of rights under an existing order (which presumably will thereupon be discharged if it would otherwise have any further operation), or if there is no such order, in lieu of the right to seek an order under Pt.VIII. The court is given power to sanction such an agreement so that it will be binding on the parties according to its terms so far as they relate to matters within that part of the Act. No doubt, a Court asked to sanction such an agreement will consider closely its provisions realizing not merely that the parties are foregoing rights to the Court's immediate intervention but that they must thereafter rely upon the contractual rights which the agreement gives.

Shaw's case was followed by the NSW Full Court in *Whittle v Whittle* (1965) 83 WN (Part 2) (NSW) 286. It was also applied in other cases: see e.g. *Carthew v Carthew* (1966) 8 FLR 301; *Sherwood v Sherwood* (1966) 9 FLR 282; *Berry v Berry* (1968) 11 FLR 290; *Browne v Cox* (1968) 12 FLR 474; *Scifleet v Scifleet* [1971] ALR 134; 14 FLR 449; [1970] 1 NSWR 143; *Sparks v Sparks* (1971) 19 FLR 54; *Dowd v Dowd* 4 ALR 242; 23 FLR 437; [1974] 2 NSWLR 5; *Donald v Donald* (1975) 5 ALR 428; 26 FLR 95.

The meaning and purpose of s87(1)(k) was further considered by the High Court in *Felton v Mulligan* [1971] HCA 39; (1971) 124 CLR 367; [1972] ALR 33; 45 ALJR 525. Barwick CJ said:

> In my opinion, it is appropriate to examine what is further involved in the defence said to be founded on considerations of public policy. Those considerations are not themselves the foundation of a cause of action. They involve principles developed by the common law on which courts have acted sometimes in determining matters of statutory construction and sometimes in deciding the meaning and the validity of agreements or of parts of agreement. Historically they were developed when the jurisdiction of the courts with respect to which they were applied was derived from the royal prerogative and the common law.
>
> In relation to such courts the matter of the validity of an agreement said to be an attempt to prevent the exercise of a court's jurisdiction arose under the common law. But we are not here concerned with a court of that kind or with a right to invoke its aid derived from the common law. Here the jurisdiction of the court which it is said was sought to be 'ousted' is wholly derived from the Acts of the Parliament – the *Matrimonial Causes Act* and the *Judiciary Act*. In Australia the exclusive source of such a wife's right to such an order is that Act. It is, in my opinion, nothing to the point that there is a history of the provision of alimony or maintenance which precedes and may in a sense have prompted the statutory provisions now obtaining. The right to an order for permanent maintenance whether as an initial or as a varying order is in Australia essentially and exclusively derived from the *Matrimonial Causes Act*. The question which the defence raises is whether a party to a matrimonial proceeding may validly agree not to seek the court's aid to obtain maintenance by the other party to such proceedings.

It is not the law, as I understand it, that a person who has a right under a statute to seek the aid of a court cannot in any case agree not to exercise that right: cf. *Admiralty Commissioners v Valverda (Owners)* (1938) AC 173, per Lord Wright at p185. But it is true that some statutory rights may not be so foregone. Whether or not the right in question is a right which may not be validly bargained away must depend on the subject matter to which it relates and the terms of the statute from which it is derived. The construction of the statute will be influenced by the principles as to public policy which have been developed by the courts. No doubt it may readily be decided that a statute creating a right to an order of a court for maintenance, upon its proper construction does not intend to allow the right it creates to be foregone. But whether the wife in such a case can validly agree not to enforce the right the statute gives here must be answered by a consideration of the statute itself. Here, as I have said, the right of a party to a matrimonial cause to an order for maintenance is given by the *Matrimonial Causes Act*.

To assert that the agreement of a party to a matrimonial cause not to seek such an order is against public policy is in reality and in substance to assert that the agreement offends the statute which is in truth the relevant expression of public policy. Such an assertion in my opinion does not merely involve the construction of the statute: it necessarily involves, in my opinion, a matter arising under the statute. The assertion is that the statute according to its proper construction, avoids the agreement.

However in this case the statute is not silent on the question. In its enactment, the Parliament has concerned itself with the public policy relating to the capacity of a person entitled to seek an order for maintenance, including a varying order, to agree to forego that right. It has expressed itself in s87(1)(k) quite clearly. By implication it has said that without the sanction of a court under that provision the right to such an order may not be foregone. Thus, the defence in this case necessarily involved, in my opinion, the assertion that the implied promise offended the provisions of the *Matrimonial Causes Act*. Indeed it could be said that there was in reality only one point in the defence, namely that the deed had not been sanctioned by the court. But however expressed, the defence in my opinion necessarily involved a matter arising under a law made by the Parliament.

Windeyer J took a somewhat different approach. He said (at pp531-2; ALR at 42-3):

There is no doubt a common law principle expressed by the aphorism that an agreement to oust the jurisdiction of the courts – or, as it was put in the earlier cases, to oust the courts of their jurisdiction – is unlawful and void as being, contrary to public policy: that, said Pollock CB in *Horton v Sayer* [1859] EngR 686; (1859) 4 H & N 643 at p649; 157 ER 993; 9 Eq 345, was 'the rule which has been acted on for above a century'. The earliest enunciations of it were, so far as I have noticed, in *Kill v Hollister* (1746) 1 Wils KB 129; *Wellington v Mackintosh* [1743] EngR 59; 2 Atk 569; 26 ER 741; and *Thompson v Charmock* [1799] EngR 612; 8 TR 139; 101 ER 1310. These were all cases upon agreements to refer disputes to arbitration a disputable topic until the law was settled in *Scott v Avery* [1856] EngR 810; 5 HLCas 811; 10 ER 1121. But the grandiloquent phrases of the eighteenth century condemning ousting of the jurisdiction of courts cannot be accepted in this second half of the twentieth century as pronouncements of a universal rule. It is simply not correct to say that all agreements foregoing a right to have the adjudication of a court are void or unenforceable. Claims for redress for breach of contract or for a remedy for tortious damage can be settled out of court; and actions and suits of many kinds can be compromised by agreement, after they have been commenced, provided that each of the parties is *sui juris*. As Latham CJ said in *Lieberman v Morris* [1944] HCA 13; (1944) 69 CLR 69 at p80; [1944] ALR 150: 'It certainly cannot be said generally that covenants not to take particular legal proceedings are necessarily void – the case of the ordinary covenant not to sue provides a sufficient answer to any such suggestion'. The policy of the law that prevents a woman making binding agreement not to invoke the jurisdiction to make such orders. It is the policy and purpose of this jurisdiction that produces the rule that agreements purporting to oust a court from the exercise of it can be ignored. It is a mistake to speak of the ouster of a statutory jurisdiction as being against public policy regardless of the nature of the statutory rights involved. Lord Wright's statement has often been quoted: 'Whenever there is a question whether there can be contracting out or waiver of statutory provisions, the problem must be solved on a consideration of the scope and policy of the particular statute': *Admiralty Commissioners v Valverda (Owners)* (1938) AC 173 at p185. I venture to repeat what on this aspect I said in *Brooks v Burns Philp Trustee Co Ltd supra*, at p140, and, without naming them here, to refer to the supporting authority that I cited for the proposition that: 'When a statute creates and confers rights and imposes corresponding duties, persons for whose benefit this was done may by contract waive or renounce their rights, unless to do so would be contrary to the statute. It may be seen that it would be so, because of an express prohibition against 'contracting out', or because the provisions of the statute, read as a whole, are inconsistent with a power to forego its benefits: or the policy and purpose of the statute may show that the rights which it confers on individuals are given not for their benefit alone, but also in the public interest, and are therefore not capable of being renounced'. If the question that *Helsham J* had to consider had been whether the applicant was precluded from enforcing the covenant of her

former husband on the ground that her doing so would be a contravention of the *Matrimonial Causes Act* 1959, I would have no doubt that his Honour was concerned with a matter arising under a law made by the Commonwealth Parliament. But, as will appear, I do not think the question for us is so simply answered.

Later he said (at p544; ALR at 45):

> The jurisdiction of the Divorce Court to make orders for maintenance when dissolving a marriage is historically distinct from the power to make orders for permanent alimony on a decree for judicial separation; for the latter, although now governed by statute, is derived from ancient practice in the ecclesiastical courts: see *Lush on Husband and Wife* 4th ed p454. But that does not make any difference here. The inability of a wife to forego her right to seek an order for maintenance accords with early concepts in the law commonly stated as that a man has a duty to support his wife. This expression reflects the common law rule making a husband liable upon contracts made by his wife for her necessaries. This liability was not abrogated by the husband making his wife an allowance if it was not adequate, even if she had acquiesced in it: *Hodgkinson v Fletcher* [1781] EngR 110; (1814) 4 Camp 70. The whole doctrine of the husband's obligation has been sometimes seen as a by-product of the *Act for the relief of the Poor* 1601 (43 Eliz. 1 c2). That Act did not expressly include wives among the relatives for whose support a man was chargeable. But it seems to have been thought that to throw a wife's maintenance upon the parish was against the policy of the law: see the references in the article *Criminal Omissions* by Mr Glazebrook, 76 Law Quarterly Review, pp395-396. This is significant because the whole basis of the public policy which precludes a woman from contractually releasing her husband from his obligation to maintain her has been constantly said to be to prevent putting on the public a burden that a husband should bear: see *National Assistance Board v Parkes* (1955) 2 QB 506, at pp517, 523. In the result I do not regard the invalidity of a wife's promise not to seek maintenance when her marriage is dissolved as a consequence of the provisions of the *Matrimonial Causes Act*. I am not able to see s87(1)(k) of the Act as, by implication, the source of the rule that an agreement that is not sanctioned, is unenforceable. Rather, I think that rule arises from the common law. I appreciate that another view is open and that others take it and are able to see statutory provisions in the foreground. It is I suppose partly a conceptual partly a terminological problem to determine in a case like this whether or not a proposition of law arising under a particular statute or by the combined impact of statutory provisions and common law principle.

It seems unnecessary for present purposes to explore further the judgments in *Felton v Mulligan* wherein four judges considered that proceedings relating to a maintenance deed arose directly under a Commonwealth law, namely the *Matrimonial Causes Act* 1959, and three did not.

It is useful to mention only two further decisions under the repealed Act. In *George v de Georgio* (1968) 12 FLR 445; [1968] 3 NSWR 593 the spouses had executed a deed in anticipation of having it approved under s87(1)(k). Before the hearing transactions under the deed were completed. The husband died before the hearing. The widow sued the husband's executors to recover transferred property. Helsham J held that no fiduciary relationship arose from the transactions between the husband and wife prior to the sanction of the deed. The relationships between and the rights of the parties fell to be determined according to the law of contract. The contract was not void as offending public policy. The provision in the deed relating to its sanction by the court operated as a condition precedent, not to preclude a contract existing at all but to preclude an existing contract from operating as an effective settlement.

In *Gipps v Gipps* (1974) 1 NSWLR 259 the New South Wales Court of Appeal held that except in cases where the interests of children were involved, the powers of the court sanctioning an agreement pursuant to s87(1)(k) were not inquisitive but adjudicatory. The court did not have the power, of its own motion, to investigate issues not raised between husband and wife. Hutley JA: said at pp266-267:

> When the *Matrimonial Causes Act* gave express power to sanction a deed, the draftsman was no doubt conscious both of the fact that in matrimonial causes deeds had been sanctioned and that what was the basis for such a sanctioning procedure had been agitated in the courts. The history of the process of sanctioning in New South Wales is set out in the judgments of Brereton and Asprey JJ in *Shaw v Shaw* (1965) 66 SR (NSW) 30; 83 WN (Pt.2) 1; [1965] NSWR 3; special leave to appeal refused, (1965) 113 CLR 545. Though Windeyer J in *Brooks v Burns Philp Trustee Co Ltd* [1969] HCA 4; (1969) 121 CLR 432 at p476; [1969] ALR 321; 43 ALJR 131 expressed doubts as to whether a statutory basis for sanctioning was necessary, this historical question does not touch the problem which now arises. There is no procedure laid down as to how the court will proceed when it is asked to sanction a deed under s87(1)(k). Except in cases where the interests of infants are involved and

> the court exercises its special powers under s71, the powers of the court are not inquisitive but adjudicatory: *Moore v Moore* (Court of Appeal, 11th October 1973). The court does not have the power to investigate issues not raised between husband and wife of its own motion. Though in *Shaw v Shaw* (1965) 66 SR (NSW) 30 at p47; 83 WN (Pt 2) 1, at p17; [1965] NSWR 3. Asprey J said 'A heavy responsibility is placed upon the court under this statutory provision and the court should not be asked to exercise its jurisdiction thereunder without the fullest disclosure to it of all the relevant facts to enable it to decide whether or not to make the order asked of it. In particular, the court should be wary of exercising its powers under s87(1)(k) when the interests of children are involved, this is an injunction addressed to the judge who has to deal with the matter; it does not create a power in the judge to raise issues as between husband and wife or direct inquiries to be made on issues, that they have not brought to his attention. Judges have, of course, in *Gribow v Gribow* (1963) 81 WN (Pt 1) (NSW) 101; M*cCarthy v McCarthy* [1968] SASR 137; (1968) 14 FLR 142, but it does not appear that the judges have ever taken upon themselves to conduct independent inquiries. The description given by Watson QC counsel for the plaintiff of the process of sanctioning carried out in the Family Law Division of this Court, based upon his experience, would indicate that nothing like this is ever done. Inevitably, the judge relies upon the legal advisers of the parties to protect them against deception, imposition of improvidence. He has, besides the instrument he is asked to approve, the pleadings, which should disclose their respective statements of their respective assets, oral evidence and statements from the bar table. In other words sanctioning does not, except in the rarest cases, involve the judge investigating anything.

Glass JA said (at p269):

> The court on an application to sanction is concerned only to consider whether the settlement contained in the deed seems on the fact of things to be a fair bargain.

The *Family Law Act* 1975 is based upon different concepts of marital duty and support to those in the cases reviewed. Marriage is no longer seen as an institution upon which the wife remains economically dependent *per se*. The policy of social security developed in Australia accepts that upon marriage breakdown the separated wife or separated mother may look to the public purse for financial assistance in the appropriate case. Fault having been abolished as a ground for divorce, collusion in the old sense is no longer relevant.

The right of either spouse to seek maintenance from the other is now based on need (s72). The catalogue of matters to be taken into consideration in deciding whether there is a need, and if there is, its assessment is set out in section 75(2). The right to maintenance during marriage and upon its dissolution is to be found in the Act and only in the Act. On the other hand the Act does not contain specific provision for rights and duties as to property. It leaves the spouses to make their own agreements but empowers the court when there is a pending, concurrent or completed application for principal relief to alter property interests according to principles of justice and equity having regard to contribution (including homemaking and parental performance) and maintenance needs (section 79).

Each spouse is obliged to support the minor children of the marriage according to their respective financial resources as far as practicable (section 81). The court may make maintenance and property orders of consent.(s80) In performing its tasks concerning Part VIII which relates to maintenance and property the court has to have regard to section 43 which reads:

> The Family Court shall, in the exercise of its jurisdiction under this Act or any other Act, and any other court exercising jurisdiction under this Act shall, in the exercise of that jurisdiction, have regard to —
> (a) the need to preserve and protect the institution of marriage as the union of a man and a woman to exclusion of all others voluntarily entered into for life:
>
> (b) the need to give the widest possible protection and assistance to the family as the natural and fundamental group unit of society, particularly while it is responsible for the care and education of dependent children:
>
> (c) the need to protect the rights of children and to promote their welfare; and
>
> (d) the means available for assisting parties to a marriage to consider reconciliation or the improvement of their relationship to each other and to the children of the marriage.

Paragraphs (b) and (c) of section 43 are frequently of particular relevance. The Act envisages two types of maintenance agreements. Those which do not operate in substitution of

rights under the Act (section 86), and those which do. The former may be registered in a court having jurisdiction under the Act by filing with a supporting affidavit (regulation 169). It is then enforceable as a court order (section 88). A maintenance agreement is defined in section 4(1) as meaning:

An agreement in writing made, whether before or after the commencement of the Act, between the parties to a marriage, being an agreement that makes provision with respect to financial matters, whether or not there are other parties to the agreement and whether or not it also makes provision with respect to other matters, and includes such an agreement that varies an earlier maintenance agreement.

The same sub-section defines 'financial matters' in relation to the parties to a marriage as meaning matters with respect to the maintenance of spouses or children or with respect to the property of the husband or wife or either of them. Where the parties enter into a maintenance agreement which contains provisions in substitution for rights under Part VIII, the Act contains a special provision. That is section 87 which reads:

> (1) Subject to this section, a maintenance agreement may make provision to the effect that the agreement shall operate, in relation to the financial matters dealt with in the agreement, in substitution for any rights of the parties to the agreement under this Part.
>
> (2) A maintenance agreement that makes provision as mentioned in sub-section (1) does not have any effect unless it has been approved by the court.
>
> (3) If—
> (a) a maintenance agreement makes provision as mentioned in sub-section (1); and
>
> (b) the agreement has been approved by the court and the approval has not been revoked, any order having effect under this Part or any order made under Part VIII of the repealed Act and continued in effect by virtue of paragraph 3(2)(e) ceases to have effect in so far as it relates to the financial matters dealt with in the agreement and, subject to sub-section (9), no court having jurisdiction under this Act may make an order with respect to those financial matters.
>
> (4) In proceedings for the approval of a maintenance agreement, if the court is satisfied that the provisions of the agreement with respect to financial matters are proper, the court shall approve the agreement, but, if the court is not so satisfied, it shall refuse to approve the agreement.
>
> (5) A maintenance agreement that has been approved by a court ceases to be in force upon the death of a party to the agreement unless the agreement otherwise provides.
>
> (6) A court may revoke its approval of a maintenance agreement if, and only if, it is satisfied that the approval of the court was obtained by fraud, that the parties to the agreement desire the renovation of the approval and, where an approval is so revoked, the agreement ceases to be in force.
>
> (7) Where a court has approved a maintenance agreement the agreement shall be deemed to be registered in that court.
>
> (8) An agreement that is by virtue of sub-section (7) deemed to be registered in a court may be registered as prescribed, in another court having jurisdiction under this act.
>
> (9) Where the court is satisfied that a maintenance agreement that has been approved by the court relating to a child of the attained the age of 18 years are no longer proper, it may make an order under this Part.
>
> (10) Nothing in this Act affects the operation of an agreement sanctioned under paragraph 87(1)(k) of the repealed Act or the rights and obligations of a person under such an agreement.
>
> (11) Subject to section 89, this section does not apply to overseas maintenance agreements.

Once approved the agreement is deemed registered and by virtue of section 88 is enforceable as if it were a court order. What is the purpose of section 87? Why did the Parliament act with what appears considerable paternalism by insisting that agreements between spouses which contain provisions in substitution of rights granted under Part VIII should be subject to court approval before being legally effective; It seems to me there are clearly several reasons. Among those are:

(a) the circumstances surrounding marriage breakdown do not always enhance evenness of bargaining power, particularly where emotional stress impairs judgment;

(b) the financial resources of one spouse are not always known to the other;

(c) the interests of the children, particularly their housing is a matter of prime importance;

(d) as the agreement is to be enforceable by the court it should be an agreement appropriate for the court to enforce — e.g. not an agreement arising from an unconscionable bargain, or an agreement the terms of which are fictional or meaningless.

What then are the duties of the legal profession and the court when an agreement under section 87 is before the court for approval? It seems to me that the following elements require consideration:

(a) has there been sufficient and adequate disclosure of relevant financial resources?

(b) does the agreement appear to be a fair adjustment between the parties?

(c) is the agreement one which it is proper that the court should enforce?

(d) do the parties have the capacity to perform their obligations under the agreement?

(e) are the interests of any minor children properly protected?

(f) do the parties fully understand their rights and duties under the agreement and that it is in substitution of rights under Part VIII?

Without referring again to specific passages in the judgments I have dealt with previously, I consider that, notwithstanding the changed concepts expressed by the *Family Law Act*, the above principles should prevail. As to the nature of the enquiry to be conducted by the court I respectfully adopt what Hutley JA said in *Gipps v Gipps* (*supra*). In the present case there is insufficient evidence before us to guidelines had been laid down up to this time to assist the courts or the legal profession in approaching section 87.

I would allow the appeal. I would discharge His Honour's order approving the deed. I would make no order as to costs. I would send the matter back for re-hearing.
