FAREWELL TO AFFINITY AND THE CALCULUS OF KINSHIP

by
H. A. FINLAY*

'Let me not to the marriage of true minds
Admit impediments.'

Shakespeare: *Sonnet CXVI.*

I. *Introduction*

However else historians may one day judge the recent Australian government, it must be acknowledged to have inaugurated changes in the law on a scale not previously attained. This legislative activity was probably calculated less to bring about a radical transformation of Australian society than simply to face up to social changes that had already taken place or were in the process of taking place. A period of over twenty years of conservative government had failed to keep up with what amounted to a virtual revolution in Australian manners, morals and modes of thought since the end of the second World War. Nowhere else was this revolution more marked than in the sensitive field of human relationships. Marriage and divorce, abortion and illegitimacy are among the most important areas to have been affected, as the following tables, relating to the latter topic indicate:

EX-NUPTIAL LIVE BIRTHS

Annual averages —	
1921-1925	6,291
1926-1930	6,185
1931-1935	5,241
1936-1940	5,025
1941-1945	6,211
1946-1950	7,349
1951-1955	7,999
1956-1960	10,027
1961-1965	13,798
1966-1970	18,937
Annual totals —	
1969	19,585
1970	21,367
1971	25,629
1972	25,659
1973	24,198

* B.A. (*Lond.*), LL.B. (*Tas.*), of the Tasmanian and Victorian Bars. Associate Professor of Law, Monash University.

EX-NUPTIAL LIVE BIRTHS (per cent)

Average annual rates —	
1921-1925	4.63
1926-1930	4.69
1931-1935	4.67
1936-1940	4.15
1941-1945	4.23
1946-1950	4.04
1951-1955	3.97
1956-1960	4.51
1961-1965	5.92
1966-1970	7.88
Annual rates —	
1969	7.83
1970	8.30
1971	9.27
1972	9.68
1973	9.77

[1]

As far as the law of divorce is concerned, the social changes are not by any means confined to the area of what is called principal relief, where examples may be found, for instance, in the changing attitude to adultery and *de facto* relationships, culminating in the elimination of fault in the grounds of divorce,[2] but they reach right down into the area of consequential relief. Changes in the economic position of women have affected such matters as maintenance, property arrangements and legal costs in proceedings between spouses. Here the *Matrimonial Causes Act* 1959 introduced some new criteria, of which the arrangements regarding property settlements were among the most noteworthy.[3] Victoria alone among the States went some way in the same direction,[4] whereas the other States were content to remain virtually where the English *Married Women's Property Act* of 1882 had led them. In the law of maintenance likewise the Maintenance Acts of the various States authorised courts to ignore the earnings of a wife if these were earned 'solely or mainly because of the desertion or neglect of the defendant'.[5] In practice this was commonly applied to the case of a working wife

1 Australian Bureau of Statistics, Canberra, Births, 1973. — An example of the failure of official attitudes to keep pace with actual social conditions in this area was the practice under the Commonwealth Social Services legislation to pay 'special benefits' to unmarried mothers, which were quantified by reference to the scale of unemployment benefits. This had the bizarre effect that a girl under sixteen was entitled to no such benefits at all (see Sackville & Lanteri: 'The Disabilities of Illegitimate Children in Australia: A Preliminary Analysis' (1970) 44 *A.L.J.* 5, 51 at p. 57). This is no longer the case.

2 *Family Law Act* 1975, s. 48.

3 cf. *Matrimonial Causes Act* 1959, s. 86 and *Sanders* v. *Sanders* (1968) 116 C.L.R. 366.

4 cf. the amendments to s. 161 of the *Marriage Act* 1958 made in 1962.

5 e.g. *Maintenance Act* 1965 (Vic.) s. 5 (2).

since the desertion, — presumably on the assumption *post hoc, ergo propter hoc.*

Again, changes in sexual morality have had an impact on, among other things, custody and access. That legal decisions in these areas should be subject to change is hardly surprising, for if one of the guidelines in matters of custody was 'the dictates of conventional morality',[6] then as those dictates changed, so did the decisions by which the law was implemented. Unfortunately, however, that implementation all too often has been subject to the 'idiosyncratic conceptions and modes of thought'[7] of individual judges. Thus in 1968 an Australian judge was moved to transfer the custody of a girl of seven and a boy of five, which originally had been awarded to their mother, to the father, although the latter was less well able to look after them.[8] The main reason for this decision was the fact that the mother and her lover had engaged in such practices of 'sexual perversion' as *fellatio* and *cunnilingus.*[9] Yet, today, there are freely available in reputable bookshops, books by reputable authors[10] giving detailed instructions for a great variety of techniques of sexual practices, including the above and other perversions, now simply called 'oral sex'. Presumably such practices have now become respectable, at least in the privacy of the bedrooms of the nation.

It is of the nature of law to hold a mirror up to life, and to reflect a view of society as it is. But like all things, society changes. Most of these changes occur gradually, imperceptibly. Social acceptance of change will depend on a preponderance of attitudes and may, in the final analysis, be little more than a mere matter of counting heads. George Orwell once said that 'to be insane is to be in a minority of one' — or words to that effect. The insanity of today's minority may become the normality of tomorrow's majority and if and when it does, the law changes accordingly. So in this sense legal reforms are seldom forward-looking in the sense of being 'way out' and designed to mould a Brave New World. They are rather by way of catching up, of bringing normative rules into line with actual practices. With little exaggeration it could be said that the law of today is made up of the practices of yesterday.

II. *The Marriage of Affines*

Among the less spectacular reforms introduced by the *Family Law Act* 1975 is the alteration in the law of nullity of marriage. The concept

---

6 *Chisholm* v. *Chisholm* [1966] 1 N.S.W.R. 125.

7 *Reg.* v. *Trade Practices Tribunal, ex parte Tasmanian Breweries Pty. Ltd.* (1970) 123 C.L.R. 361, at p. 376 per Kitto J.

8 *D.* v. *D. & H. & D.* [1968] W.A.R. 177.

9 The case was commented on in Finlay & Gold: 'The Paramount Interest of the Child in Law & Psychiatry' (1971) 45 *A.L.J.* 82. — I am happy to add that a recent application by the mother for a variation of the custody order was successful and resulted in the transfer of the children to her custody.

10 e.g. Alex Comfort: *The Joy of Sex* (1972); *More Joy* (1974).

of voidable marriages[11] which were valid until impugned, and which could be impugned only by one of the parties or by someone with a sufficient interest and in the lifetime of both parties, has been dropped altogether. Nullity now will extend only to marriages void *ab initio*.[12] The catalogue of situations giving rise to a void marriage is substantially the same as before[13] with one important exception. That exception relates to the prohibited relationships. The prohibited relationships of consanguinity have been reduced to those of direct descent[14] and of collaterality in the first degree, i.e. the relationship of brother and sister.[15] Thus ends, in effect, the traditional prohibition of the levitical degrees which are as old as the Bible at least.

The prohibited degrees, both of consanguinity and of affinity, have been the legal expression of the principle of exogamy, which is the 'custom of compelling man to marry outside his own tribe'.[16] Authorities on the history of marriage[17] shows that the prohibition of marriage between persons closely related to one another by consanguinity has in most societies been part of the accepted order of things, with some notable, but quite rare exceptions. On the other hand, the prohibition of affinity has been subject to a marked degree of variation, so much so that it is doubtful whether it can be said to be the expression of any universal and deeply rooted principle. It is, after all, little more than an analogical extension of the prohibition against marriage within the prohibited degrees of consanguinity. In comparatively recent times and in our own society, the effect of the marriage of affines has fluctuated between being void and being voidable. The original canonical bar of affinity was only one of voidability, annullable by sentence of nullity passed during the lifetime of the parties. By the 1835 *Marriage Act*, called Lord Lyndhurst's Act[18] it was made void *ipso jure*.[19] That Act was not adopted in New South Wales, Victoria or Queensland.[20] Consequently in those three States, even as recently as immediately prior to the coming into force of the *Matrimonial Causes Act* 1959[21] marriages

---

11 *Matrimonial Causes Act*, s. 21.

12 *Family Law Act*, s. 51.

13 cf. *Matrimonial Causes Act*, s. 18 (1): *Family Law Act*, s. 51 (2).

14 Ancestor or descendant: *Family Law Act*, s. 51 (3) (a).

15 *Family Law Act*, s. 51 (3) (b).

16 Concise Oxford English Dictionary.

17 cf. Westermarck: *History of Human Marriage*, (5th ed., 1922), Vol. 1, 368, at p. 444; Howard: *A History of Matrimonial Institutions*, (1904), Vol. 1, at pp. 129, 352; Freisen: *Geschichte des kanonischen Eherechts*, (2nd ed., 1893), at p. 496 *et seq.*

18 5 & 6 Will. 4, c. 54.

19 Eversley, *Domestic Relations* (6th ed.) at p. 40 *et seq.*, Jackson: *The Formation and Annulment of Marriage*, (2nd ed.), at p. 23.

20 Joske: *Laws of Marriage and Divorce* (3rd ed.), at p. 77; *Svanosio* v. *Svanosio* [1918] V.L.R. 267; *Miller* v. *Major* (1906) 4 C.L.R. 219, *Liddell* v. *Moss* [1920] St. R. Qd. 104.

21 1st February, 1961.

within the prohibited degrees, both of consanguinity and of affinity, were valid unless impeached within the lifetime of the parties.

How variable have been the laws and social customs concerning the marriage of persons within the prohibited degrees is shown by standard works of reference. While the prohibition of marriage between mother and son or father and daughter, and of brother and sister has been fairly universal, as soon as we move to more remote relationships we see a relaxation of the rule. Thus marriage with a half sister was not infrequently permitted, not only among uncivilised people but among such ancient cultures as the Jews, Athenians and Semitic peoples.[22] For example, Abraham married his half sister Sarah.[23] Also among the Jews the marriage of uncle and niece was permitted, though marriage between aunt and nephew was not.[24] The reason for the distinction has been said to lie in the need for upholding the principle of authority between different generations within the family. Thus the authority of an uncle over his niece would not be detrimentally affected, but on the contrary enhanced by his becoming her husband, while the marriage of an aunt to her nephew on the contrary would set up two conflicting relationships of authority. Uncle-niece and aunt-nephew marriages, according to Westermarck, were also permitted in modern countries[25] such as Germany, the State of New York, Peru and Hungary or could become permissible in France, Italy, Belgium, Holland and Sweden. Again, it is fairly well known that there existed in Jewish society an obligation for a man to marry his deceased brother's wife on the basis of providing for her future.

The attitude of the Christian Church too has been varied. Simon, P. in *Cheni* v. *Cheni*[26] traces the development concisely as follows:

> In Christianity up to the schism between the Eastern and Western Catholic Churches marriage was prohibited up to the relationship of first cousins, so that the relationship of uncle and niece, which was closer, invalidated a marriage. After 1064 the Western Church maintained its prohibition of marriages between uncle and niece and first cousins, but the impediment was capable under special circumstances of dispensation by the Pope. The uncle-niece impediment would be dispensed with only to avoid some greater evil, generally of a political nature. This is still much the situation in the Roman Catholic Church: the Revised Codex of 1918 shows that close consanguinous relationship in marriage is discouraged, though dispensable up to the first degree collaterally, i.e., the brother-sister relationship. The Reformation involved a general

22 Westermarck, *op. cit.*

23 *Ibid.*

24 *Ibid.*

25 For a recent example of a marriage between uncle and niece which would have been valid by the law of Czechoslovakia coming to the attention of an Australian Court see *Ungar* v. *Ungar* (1967), 10 F.L.R. 467, *Ungar* v. *Ungar* (No. 2) (1968) 11 F.L.R. 301.

26 [1965] p. 85.

reaction against the papal system of dispensation. Luther dismissed the whole process and returned to the Levitical Code as the expression of God's will. The uncle-niece relationship is therefore permitted in many Lutheran churches, and the aunt-nephew relationship prohibited; though some Lutheran churches, such as those in this country and the United States, follow, as they are bound to, the law of the land. Calvin, on the other hand, did not accept the Levitical Code literally, but applied it by parity of reasoning. Uncle-niece and aunt-nephew stand in the same degree of blood relationship; the Levitical prohibition of aunt-nephew marriages was therefore applied to uncle-niece marriages. The Anglican communion in this respect followed the Calvinist line.

Not only have the substantive rules of the law relating to consanguinity and affinity undergone changes, but also the methods by which those relationships were established or computed. Thus while a rule might outlaw a marriage between persons within the fourth degree, different ways of ascertaining those degrees would result in different persons being affected. The Roman method of computation would have the effect of outlawing marriage with a first cousin, but with no one more distantly related, each link in the chain of relationship constituting a degree, thus:

Grandfather

2. ↑ *Father*	↓ 3. *Uncle*
1. ↑ *X*	↓ 4. *Cousin*

But another method would look at the matter from the point of view of a common ancestor, all of whose children would be in the first degree of relationship to him (and to one another), whose children would be in the second degree to him (and to one another) and so forth. Viewed in this way, marriages between first cousins are marriages between persons within the second instead of the fourth degree thus:

Great grandfather

1. ↓ *Grandfather*	↓ 1. *Granduncle*
2. ↓ *Father*	↓ 2. *Father's 1st cousin* (1st cousin once removed)
3. ↓ *Son*	↓ 3. *Son's second cousin*

Yet a third method existed among the ancient Germans where first cousins were reckoned to be within the first degree, second cousins within the second degree and so on.[27]

27 Pollock and Maitland: *History of English Law*, Vol. 2, Ch. VII.

It was the second of the above methods of computation that came to be adopted by the Roman Catholic Church when by the Lateran Council of 1215 the fourth degree of consanguinity came to be settled upon as the border between what was prohibited and what was allowed. The method of establishing kinship has been referred to as 'canonical computation'. Before 1215 the cut-off point was the seventh degree, but later that more remote degree of kinship was regarded merely as *impedimentum impediens* rendering a marriage sinful, but not as *impedimentum dirimens*, rendering it void.

According to Pollock and Maitland, no more cogent reason for the earlier choice of the seventh degree existed than that seven was a holy number, that it corresponds to the number of days in the week, to the seven ages of the world and to the seven deadly sins. 'Ultimately, the allegorical mind of the ecclesiastical lawyer had to be content with the reflection that... there were but four elements and but four humours.'[28] Pollock and Maitland further show that the prohibitions attaching to affinity followed by analogy those of consanguinity. They were based on the well-known doctrine of the law that husband and wife were one person. But beyond that, affinity could be constituted by baptism, thus bringing in relationships between godparents and godchildren, as it could also be constituted by espousal by *verba de futuro*, or betrothal.[29] And of course affinity also came into being merely through sexual intercourse.[30]

The following passage from *Pollock and Maitland* shows clearly how affinity was traced, encompassing relationships which in contemporary society would tend to be regarded as almost total strangers:

> Then with relentless logic the church had been pressing home the axiom that the sexual union makes man and woman one flesh. All my wife's or my mistress's blood kinswomen are connected with me by way of affinity. I am related to her sister in the first degree, to her first cousin in the second, to her second cousin in the third, and the doctrine of the twelfth century is that I may not marry in the seventh degree of this affinity. This is affinity of the first genus. But if I and my wife are really one, it follows that I must be related by way of affinity to the wives of her kinsmen. This is the second genus of affinity. To the wife of my wife's brother I am related in the first degree of this second genus of affinity; to the wife of my wife's first cousin in the second degree of this second genus, and so forth. But we can not stop here; for we can apply our axiom over and over again. My wife's blood relations are *affines* to me in the first genus; my wife's *affines* of the first genus are *affines* to me in the second genus; my wife's *affines*

28 *op. cit.*, at p. 388.

29 Pre-contract.

30 It was said that the sentence of nullity of his marriage to Anne Boleyn obtained by Henry VIII rested on his prior cohabitation with her sister Mary. The legal effect of such a relationship would clearly have been that of nullity under canon law; the only doubt in the case was whether sexual intercourse had in fact occurred.

> of the second genus are my *affines* of the third. I may not marry my wife's sister's husband's wife, for we stand to each other in the first degree of this third genus of affinity. The general opinion of the twelfth century seems to have been that while the prohibition of marriage extended to the seventh degree of the first genus, it extended only to the fourth degree of the second genus, and only to the second degree of the third genus. But the law was often a dead letter. The council of 1215, which confined the impediment of consanguinity within the first four degrees, put the same boundary to the impediment of affinity of the first genus, while it decreed that affinity of the second or third genus might for the future be disregarded. Even when confined within this compass, the doctrine of affinity could do a great deal of harm, for we have to remember that the efficient cause of affinity is not marriage but sexual intercourse. Then a 'quasi affinity' was established by a mere espousal *per verba de futuro*, and another and a very secret cause for the dissolution of *de facto* marriages was thus invented. Then again, regard must be had to spiritual kinship, to 'godsib'. Baptism is a new birth; the godson may marry neither his godmother nor his godmother's daughter. Behind these intricate rules there is no deep policy, there is no strong religious feeling; they are the idle ingenuities of men who are amusing themselves by inventing a game of skill which is to be played with neatly drawn tables of affinity and doggerel hexameters. The men and women who are the pawns in this game may, if they be rich enough, evade some of the forfeits by obtaining papal dispensations; but then there must be another set of rules marking off the dispensable from the indispensable impediments. When we weigh the merits of the medieval church and have remembered all her good deeds, we have to put into the other scale as a weighty counterpoise the incalculable harm done by a marriage law which was a maze of flighty fancies and misapplied logic.[31]

The abiding impression then that is left by the history of nullity through affinity (unlike that of consanguinity) is that it is not based on any instinctive repugnance similar, for example, to that which attaches to marriage between a parent and child or between brother and sister. Indeed in our own history the fluctuations that have occurred in the particular relationships that were subject to the prohibition of affinity were due, at least in part, to ecclesiastical rules, whose applicability was dictated by the changing political fortunes of the chief protagonists of the protestant reformation. As Jackson sums it up, 'The law of affinity was extremely complex: it was a mixture of mathematics and mysticism'.[32]

Time was to bring a gradual liberalisation of these taboos. Steps in the liberalisation effected in England were the *Deceased Wife's Sister's Marriage Act* 1907[33] and the *Deceased Brother's Widow's Marriage Act* 1921.[34] These were carried to their logical conclusion by the *Marriage*

31 Pollock & Maitland, *op. cit.*, at p. 388-9.

32 Jackson, *op. cit.*, at p. 21.

33 7 Edw. VII c. 47.

34 11 & 12 Geo. V, c. 24.

(Prohibited Degrees of Relationship) Act 1931[35] which permitted the marriage of a person with his or her deceased spouse's nephew, niece, uncle or aunt, or with his or her deceased nephew's, niece's, uncle's or aunt's widow or widower. In Australia the liberalisation effected by these enactments was brought about, in part at least in certain States, at earlier dates.[36]

In his comprehensive examination of the subject, Crockett J. pointed out that less than half the States of the United States have any statutory prohibition against the marriage of affines: *Re an Application by P. & P.*[37] He adds a comment as to

> the steady erosion of the integrity of the concept of marriage prohibition between affines... in English-speaking countries in the space of the last hundred years. The attrition of the view of the Christian Church, which had raised relationships by affinity to equal importance with that of consanguinity as an impediment to marriage on the basis of man and wife being 'one flesh', was given a powerful impetus by the dispossession of the ecclesiastical courts in England of jurisdiction in matrimonial causes.

The judgment goes on to say:

> When such a lofty view of marriage finds acceptance with increasingly fewer people the ground for the retention of the prohibition becomes correspondingly less justifiable. Undeniably the past 50 to 100 years have seen a greater rejection of religious belief — or at all events credence in the tenets of formal or organised religion — than ever before. At the same time many of the community have come in the past few generations to treat marriage simply as a mere terminable contract. How could it be otherwise when not only does a statute passed by the elected legislature allow divorce but also the fact is that a significant number of marriages contracted do end with curial dissolution ?
>
> The stage of social evolution would seem to be near when even the theoretical justification for prohibition of marriage of affines will no longer be acceptable...[38]

---

35 21 & 22 Geo. V, c. 31.

36 E.g. marriage with a deceased or divorced wife's sister or a deceased or widowed husband's brother was validated in New South Wales, see *Marriage Act* 1899, s. 18, *Marriage Amendment Act* 1925, s. 2, *Matrimonial causes Act* 1899, s. 28, in Queensland, see *Deceased Wife's Sister's Marriage Act* 1877, *Deceased Husband's Brother's Marriage Act* 1931, *Matrimonial Causes Jurisdiction Act* 1864, s. 52, the A.C.T., see *Marriage Ordinance* 1929, s. 17, No. 22 of 1932, s. 3, *Matrimonial Causes Ordinance* 1932, s. 3 (2), *Matrimonial Causes Act* 1899 (N.S.W.), s. 28, and Western Australia, see *Marriage Act* 1894-1948, s. 32; *Matrimonial Causes and Personal Status Code*, s. 58.

37 [1973] V.R. 533.

38 *Ibid.*, at p. 540.

III. *Exceptions by Statute and Discretion*

The *Matrimonial Causes Act* 1959 provided for dispensations from the prohibition of affinity to be granted in certain cases by a Supreme Court judge.[39] Persons within the prohibited degrees of affinity were enabled to apply to a Supreme Court judge of a State or Territory for permission to marry in spite of the prohibition[40] and a marriage entered into pursuant to permission thus obtained was valid.[41] The power to grant permission was within the discretion of the judge, and no guidelines for the exercise of that discretion were laid down.[42] But before the discretion could operate at all, the judge had to be 'satisfied that the circumstances of the particular case are so exceptional as to justify the granting of the permission sought'.[43]

The terms of s. 20 of the *Matrimonial Causes Act* 1959 appear to have been a genuine innovation — there seems to be no counterpart in English law. The only Australasian precedents prior to 1959 are to be found in the laws of Tasmania and of New Zealand. The Tasmanian *Marriage Act* 1942 contained a provision against the marriage of persons within the prohibited degrees of consanguinity or affinity,[44] but it provided for application to a Supreme Court judge, who could grant a dispensation 'upon being satisfied that it is desirable so to do'.[45] No guidelines were provided by the statute, and there do not appear to have been any reported decisions to indicate what kind of circumstances might have been regarded as making such a marriage desirable.

The New Zealand provision set up different criteria. The Supreme Court was empowered to grant a dispensation to persons within the prohibited degrees of affinity, 'if it is satisfied that neither party to the intended marriage has by his or her conduct caused or contributed to the cause of the termination of any previous marriage of the other party'.[46] This was purely a criterion of policy, and one would have thought that a judge, once he was satisfied that the defeating provision did not apply, would *prima facie* be disposed to grant the application.

---

39 *Matrimonial Causes Act* 1959, s. 20. — The grant of this power was not a conferral of federal jurisdiction under the Act, but a matter involving an administrative inquiry, conducted by a judge as a *persona designata* under the Act — so held by Crockett J. in *Re an Application by P. & P., supra*, following the reasoning of Crisp J. in *Re Hampton* (1965) 7 F.L.R. 353 in the analogous case of s. 17 of the *Marriage Act* 1961. The reasoning as to the role of the judge was followed by the Supreme Court of the A.C.T. (three judges) in *Re an Application for Consent to Marry* (1973) 22 F.L.R. 153, although that Court specifically refrained from expressing an opinion on the question whether the function was judicial or administrative.

40 *Matrimonial Causes Act* 1959 s. 20 (1).

41 *Ibid.*, s. 20 (3).

42 *Ibid.*, s. 20 (2).

43 *Ibid.* — A similar provision existed in s. 24 of the *Marriage Act* 1961 in respect of persons within the prohibited degrees of consanguinity, if, but only if, that relationship was constituted by adoption, and provided that the relationship thus brought into being was not that of brother and sister.

44 s. 19 (1), 4th Schedule.

45 s. 19 (2).

46 *Marriage Act* 1955 (N.Z.) s. 15 (2).

This provision therefore escapes the difficulties of interpretation arising from the requirement of exceptionality in the Australian Act. No guidelines are provided. Thus in its second branch, the New Zealand enactment is similar to s. 20 of the *Matrimonial Causes Act* 1959. The difference in the first branch, however, is that whereas in New Zealand the question can be resolved as an ascertainable fact upon proof of the surrounding circumstances, the Australian section calls for a value judgment to be made, which will in itself depend to a considerable extent upon purely discretionary considerations.

The enactment of the first branch of the New Zealand section is similar to and possibly based upon a private member's bill introduced into the House of Lords by Lord Mancroft in 1949 but which was not accepted by the British Government. That Bill sought to remove the prohibition on marriage during the lifetime of a divorced spouse with certain relations by affinity. In England the relaxation first effected by the *Deceased Wife's Sister's Marriage Act* 1907, the *Deceased Brother's Widow's Marriage Act* 1921 and the *Marriage (Prohibited Degrees of Relationship) Act* 1931 related only to relationships of affinity after the *decease* but not the *divorce* of the spouse through whom the relationship was derived. These two were finally assimilated in 1960.[47] The proposal for such assimilation was discussed in the report of the Morton Commission[48] and Lord Mancroft's Bill was there referred to. That Bill had contained a proviso that a marriage of the kind that was to be otherwise permitted should be prohibited if the applicant had been divorced for adultery with the affine whom he was now making application to marry.

The only two reported decisions under the New Zealand Act are of no great assistance. The first was *In Re Woodcock & Woodcock.*[49] The discussion was concerned with the condition precedent to the exercise of the court's discretion, i.e. whether the court was satisfied that neither party had contributed to the termination of any previous marriage of the other party. The case was referred to the Court of Appeal. In the course of the judgments, reference was made to the fact that

> the unity and integrity of the family is the basis of our civilisation and both its unity and its harmony cannot but be disturbed if either spouse has reason to see in his or her child a possible successor in the affections, in a matrimonial sense, of the other. Ancient wisdom and contemporary good sense alike dictate, therefore, that a marriage between a spouse and the child of a deceased spouse should not be regarded as other than a grave proceeding fraught with implications of serious social consequences.[50]

This in fact is what might well be called the modern rationalisation of the old ecclesiastical rule. The same judgment, however, then goes on to

47 By the *Marriage (Enabling) Act* 1960.
48 Cmd. 9678, Part XV.
49 [1957] N.Z.L.R. 960.
50 *Ibid.*, per Finlay A.C.J., at p. 963.

indicate at once the dilemma that this rule may lead to in present day conditions, and that in such a case it may be better to bow to the inevitable:

> If the parties are known to be publicly living together and there is no hope of change, the Court, like the Church, might well take the view that it is better for their own sakes that they should be married: better for their friends and the public that it should be known that they are properly married: better, indeed, for the law itself that they should live under it and not outside it. If there are children, then it is better that they should be legitimized.[51]

The Court of Appeal which remitted the matter to the primary judge, after considering the way in which that judge should determine the question of the proviso, was careful not to say anything to tie his hands in the exercise of his discretion, if he came to the conclusion that he had a discretion to grant the application. Nevertheless, North J. came close to indicating the way in which he thought the case should be disposed of when he said, '... I see no particular circumstances which should cause the court to refuse an order of dispensation, provided always that the express condition contained in the statute is met by satisfactory evidence'.[52] Such a decision would indeed be in accordance with what was previously said by his distinguished predecessor, Salmond J. on the exercise of a discretion conferred on the court by a statute.[53] The judges were clearly not happy with the unguided discretion with which they had been invested by this 'new and novel' provision.[54]

In the other case, *In Re Hoskin & Pearson*,[55] also a case of a stepfather and stepdaughter, Shorland J. enumerated some of the considerations that weighed with him in deciding the case. Crockett J. in *Re P. & P.*[56] included them among those considerations which might result in an emotional reaction against a proposed marriage between affines in our society — as opposed to 'a reasoned understanding of any principles that govern and are associated with the issue'.[57] These factors were:

1. Disparity in ages.
2. Closeness of the relationship between the applicants.
3. Whether either applicant has children, and if so, their ages.
4. Relationship of the other parent of any such children to the other applicant.
5. Attitude of such parent to the proposed marriage.

---

51 *Ibid.*

52 *Ibid.* at p. 972.

53 *Lodder* v. *Lodder* [1921] N.Z.L.R. 876; *Mason* v. *Mason* [1921] N.Z.L.R. 955.

54 *In Re Woodcock and Woodcock, supra,* at p. 963. 'The jurisdiction is grave and fraught with possibilities of far-reaching consequences' said Finlay, A.C.J.

55 [1958] N.Z.L.R. 604.

56 *Supra,* n. 37.

57 *Ibid.,* at p. 541.

6. The competition for the affection of such children that may be created by the marriage taking place.
7. Whether either applicant has by his conduct caused or contributed to the termination of the other party's previous marriage.
8. Whether the intended marriage is desired for unworthy reasons, e.g. a predatory motive.
9. Whether the applicants have begotten children who may be legitimated by the proposed marriage.
10. Circumstances of past relationship between the parties, e.g. whether they are or have been in the relationship of guardian and ward.

None of these criteria were, of course, in terms directly determinative of the only relevant consideration in the *Matrimonial Causes Act* 1959, namely that of exceptionality. In order to complete the chain in his reasoning, the judge considered that the above matters should be considered, 'in order to judge whether the circumstances associated with any one or more of them are such as are likely to arouse in a substantial number of those with knowledge of the marriage, were it to take place, feelings of indignation or revulsion or abhorrence'.[58]

Lest the reader, after undertaking this examination and asking this final question, be still left in doubt as to whether he had now arrived at an answer to his initial question, namely, whether the circumstances were 'so exceptional as to justify the granting of the permission sought', the judgment in *Re P. & P.* adds: 'If the conclusion reached is that the circumstances are not such as probably to promote a sense of outrage or give offence or invoke substantial opposition in the way that I have mentioned then it would be open to find them so exceptional as to justify the grant of permission to marry. No doubt the postulation of such an approach is to produce the seeming paradox that it is the case devoid of unusual or complicating features that will be the very exceptional one. I doubt whether in this context such a proposition does involve any self-contradiction. At all events if such a test is not adopted *what other guide can be used to determine the matter?*'[59]

What other guide indeed? The case rather suggests that the test of exceptionality is not a satisfactory one. Certainly *Re P. & P.* suggests that the test used there was the various considerations spelt out by Crockett J. The real test, it is submitted, was whether the parties were living together or were likely to do so even if permission was refused, and the detriment or otherwise to the institution of marriage if as a result of a prohibition set up by law, and preserved by the decision of a judge persons were forced (if they did not wish to part from one another) to cohabit and possibly to procreate without the benefit of a legal marriage.

58 *Ibid.*
59 *Ibid.*, emphasis added.

So long as our society remains based on the assumption that marriage is a desirable and socially important institution, — an assumption, one might add, that is being increasingly questioned, — then any legal impediment to marriage may be regarded as *prima facie* contrary to the interests of society. The justification of such an impediment must then be looked for in the existence of very strong countervailing considerations.

The criterion of exceptionality has not, in fact, proved a satisfactory test, either in s. 20 or in s. 43[60] of the *Matrimonial Causes Act* 1959. A similar provision appeared also in s. 12 of the *Marriage Act* 1961, making it possible to permit a person below marriageable age to marry. Section 43, in particular, attracted some decisions which could not possibly be justified under the terms of the section.[61] But as I have previously suggested[62] it is difficult to escape the conclusion that in these cases, as also in some of the cases under s. 12 of the *Marriage Act*, the real, if unspoken criterion was rather to look at the circumstances and if those circumstances appeared to be favourable to a dispensation, to grant it.[63] The decision in *Re P. & P.* similarly seems to have been based on the various considerations adumbrated by Crockett J., rather than exceptionality.

IV. *The Swing of the Pendulum*

It is apparent, as has been suggested, that a marriage between affines does not evoke any considerable feelings of revulsion among the greater part of our society. The degree of unseemliness required to justify a legislative prohibition is arguably lacking. Of course it is a matter of opinion, and no doubt some members of the public will still be affronted. But even *Re P. & P.*, where the prohibition was upheld, must have been close to the watershed, for as Crockett J. said, referring to the judgment of North J. *In Re Woodcock & Woodcock*, 'The stage of social evolution would seem to be near when even the theoretical justification for a prohibition of marriage of affines will no longer be acceptable'.[64] Crockett J. added his opinion that 'our society is not yet possessed of the degree of spiritual sterility as is necessary to permit it to accept completely the abolition of such an impediment'.[65] But Crockett J. was also well aware of the fact that views upon the subject in *Woodcock's* Case were finely

60 Allowing proceedings for divorce to be instituted within the first three years of marriage.

61 Cf. *Drzola* v. *Drzola* [1968] A.L.R. 71, *Cooke* v. *Cooke* [1971] A.L.R. 597. They were not followed in *Warford* v. *Warford* (1969) 15 F.L.R. 123, *Szagmeister* v. *Szagmeister* (1969) 15 F.L.R. 240, and have been criticised on several occasions since, for example by Crockett J. himself in *Re P. & P.*, at p. 538. See also, Finlay 'The Unexceptional Exception' (1970) 1 A.C.L.R. 81.

62 'The Unexceptional Exception' *supra.*

63 *Ibid.* at 88-89.

64 *Re P. & P., supra,* at p. 540.

65 *Ibid.*

balanced, for as he pointed out, a number of the members of the New Zealand Court of Appeal 'seem to have thought the marriage perfectly permissible, whilst Gresson J. found it "altogether repugnant".'[66]

The history of the impediments of consanguinity and affinity in fact is characterized by a contrast of attitudes. There never has been any serious attempt to question consanguinity. Tradition, based on the ecclesiastical rules, eugenics and a desire to uphold the accepted family structure were the main component parts in that attitude. One of the central elements in the last mentioned ground was the preservation of the lines of authority within the family, as was the case with the aunt-nephew relationship mentioned above.[67]

The case for affinity has been much weaker. Firstly, being an analogical extension of the prohibition on consanguinity it is correspondingly less compelling. Secondly, the eugenic argument has no application to it. Thirdly, with the increasing secularisation of society, and the lessening importance attached to tradition, what feeling in favour of affinity as an impediment there was has declined. Fourthly, with the nuclear family taking the place of the extended family, the marriage of affines no longer presented a threat to family life as it was lived. This attitude has been with us for some time. As an example of a mid-nineteenth century view the following passage from Shelford[68] illustrates this fact:

> ... if a concourse between brothers and sisters might be allowed, or their marriages be tolerated, the necessity there is that they should be educated together, and the frequent opportunities they have with each other, would fill every family with lewdness, and create heart-burnings and unextinguishable jealousies between brothers and sisters, where the family was numerous; and it would confine every family to itself, and hinder the propagating common love and charity among mankind, because there would be a danger of taking a wife out of any family, if women were liable to be corrupted by such vicious freedoms. This prohibition is likewise carried to uncles and aunts, nephews and nieces; because, upon the death of a father and mother, they come into the education of the children *loco parentum*; and by consequence it was necessary to propagate the same reverence of blood in such near degrees, that the uncle might have the same regard and command as a father, and a niece the same duty as a daughter. It was also necessary, in order to perfect the union of marriage, that the husband should take the wife's relations, in the same degree, to be the same as his own, without distinction, and so *vice versa*; for if they are to be the same person, as was intended by the law of God, they can have no difference in relations, and, by consequence, the prohibition touching affinity must be carried as far as the prohibition touching consanguinity.[69]

---

66 *Ibid.*

67 At p. 20, *supra.*

68 *A Practical Treatise of the Law of Marriage and Divorce,* (1841).

69 *Ibid.,* at p. 159.

Shelford goes on to indicate, quoting Paley[70] that 'restrictions which extend to remoter degrees of kindred than what this reason makes it necessary to prohibit from intermarriage, are founded in the authority of the positive law which ordains them, and can only be justified by their tendency to diffuse wealth, to connect families, or to promote some political advantage'.[71] None of these reasons are of course appropriate today, but it is significant that even a traditional apologist manages to convey a certain lack of conviction in his statement of the law and its supposed rationale.

The analogical view has been described, by the Law Commission as being

> unlikely to appeal today, and one must ask whether there exist social or moral reasons against such views. As in the case of consanguinity, there are undoubtedly people who feel that such unions are morally wrong and should not be permitted. On the other hand, there are others who feel that such unions are no more objectionable than those permitted by the Marriage (Prohibited Degrees of Relationship) Acts 1907 to 1931, and the Marriage (Enabling) Act 1960.[72]

The Law Commission goes on to refer to the recommendations of the Morton Commission which resulted in the passing of the *Marriage (Enabling) Act* 1960. That Commission had also recommended — in spite of the proposals of 'a few witnesses' that all prohibitions against affinity should be abolished, — that there should be no further changes, and with this view the Law Commission agreed.[73]

On the other hand, the abolition of affinity excited very little real controversy in the recent Australian Parliamentary Debates. In the Senate, there was no debate on the relevant clause at all.[74] In the House of Representatives, Mr. W. C. Wentworth moved an amendment designed to restore to the Bill provisions identical with those on the prohibited relationships in the *Matrimonial Causes Act* 1969.[75] Mr. Wentworth, although he did indicate that he was opposed to abolition, used as his main argument the fact that no adequate consideration had been given to the implications of the new law by members of the House and that he wanted members to have an opportunity for further consideration. The amendment was defeated by 62 to 47. The Attorney-General (Mr. Enderby) speaking against the amendment, referred principally to the absence of eugenic considerations.[76] However, the debate on this amend-

70 *Moral and Political Philosophy*, Book 3, Part 3, Ch. 5.

71 Shelford, *op. cit.*, 160.

72 Law Comm. 33, 1970, at p. 24.

73 *Ibid.*, at p. 25.

74 Hansard, Senate, 27 November, 1974, at p. 2869.

75 Hansard, H. Rep. 2509.

76 The Attorney-General also referred—at pp. 2511 and 2512—to views against affinity expressed by Professor Nygh and by the present author. The latter reference is to views expressed in correspondence between the author and the Attorney-General's Department.

ment only occupied five pages in Hansard.[77] Neither do the debates in 1959 shed any light on the question at that time, as there was very little discussion, and what little there was, related only to consanguinity, not to affinity.[78]

The Senate Standing Committee on Constitutional and Legal Affairs considered void and voidable marriages in 1972, but while there is some discussion of all the other grounds on which marriages were to be void, there is no discussion of the prohibited degrees, merely a statement that the grounds on which a marriage should be void should be 'marriage within prohibited degrees'.[79]

Perhaps the last word should be with the statistician. The figures show that in thirteen of the fourteen years of operation of the *Matrimonial Causes Act* 1959[80] a total of 22 degrees of nullity were made on the ground of 'invalid marriage',[81] an average of 1.69 per annum. This figure does not discriminate as between consanguinity and affinity, nor those marriages which fail to conform with the *lex loci celebrationis*, though as between consanguinity and affinity one would guess that there would be more of the former than of the latter. These figures, in any case, must be viewed against a total number of divorce decrees ranging from 10,000 to over 15,000 per annum during the period in question. The conclusion is inescapable that judging by the probable use made of affinity as a ground for impeachment of marriage, the abandonment of that ground will not be missed by the Australian public. It is unlikely, therefore, that the farewell to affinity and the calculus of kinship, under the *Family Law Act* 1975 will be the occasion for the shedding of a single tear.

77 At pp. 2509-2513.

78 H. Rep., Vol. 25, at pp. 2817-2818.

79 Hansard Report, Standing Committee on Constitutional and Legal Affairs, 1972, at p. 47.

80 1961-1975; the figures for 1974 and 1975 are not yet available.

81 Commonwealth Year Books 1963-1973.