

THE ASTONISHING FATE OF *SCOTT v SCOTT* (1911-1913)

Secrecy in family cases from the Court for Divorce and Matrimonial Causes (1858) to the Financial Remedies Court (2024)

PREFACE

This is a detailed investigation of what is on any view one of the most consequential, if now all too frequently disregarded, cases in family law. It is a much expanded account of some of the matters which I first explored in *Some Sunlight Seeps In* [2022] FRJ 79. It falls into five parts.

Part A, *Scott v Scott* and the Royal Commission, is a historical and analytical account of *Scott v Scott* and of the *Royal Commission on Divorce and Matrimonial Causes* chaired by Lord Gorell whose work overlapped and was intertwined with it. The story starts in 1858 and ends in 1935. It is followed in Part B by an analysis of precisely what it was that *Scott v Scott* decided.

Parts C-E, are an attempt to explore and explain why the teaching of *Scott v Scott* has been largely forgotten and ignored by the family courts over the last half-century. It is organised conceptually around a historical and analytical examination of what, adapting Lord Sumption, I refer to as the desert island syndrome which continues to afflict the family courts – a syndrome Nicholas Mostyn has usefully analysed with characteristic brio as embracing The Family Law Silo, The Cult of Secrecy and The Cult of Anonymity. Part C deals with desert island syndrome, family court exceptionalism and the family law silo. Part D contains a historical and analytical exploration of the cult of secrecy in financial cases. Part E describes from both a historical and contemporary viewpoint the cult of anonymity in financial cases and the currently pressing problem of the use and misuse of the rubric. The tone here is increasingly polemical. Part F contains some parting thoughts.

The reader is entitled to know where, as it were, I am coming from.

For much of my professional career I was not a family lawyer. My first introduction to what we would now call transparency came in 1988, when I was briefed by the Official Solicitor as amicus curiae in *Re W and Others (Wards) (Publication of Information)* [1989] 1 FLR 246. From 1988 until 2000 I was involved as counsel in many of the most important reported transparency cases in the family courts: acting sometimes on behalf of a child, sometimes as amicus curiae but frequently on behalf of newspapers, as, for example, in *In re M and N (Minors) (Wardship: Publication of Information)* [1990] Fam 211. Only later did I first start dabbling in family law – mostly in the Court of Appeal and House of Lords – and only when appointed a judge in 2000 did I really become what most people would think of as a family lawyer.

The importance of these autobiographical details is that my introduction to transparency as practised in the family courts involved me starting from the principle of open justice and looking into the family justice system, whereas I found that most family lawyers took (and

continue to take) the family justice system as their starting point and look out when thinking about transparency.

Re W was important for three reasons. First, it introduced me to the complexities surrounding section 12 of the Administration of Justice Act 1960: matters which I was later to explore as a judge in *Re B (A Child) (Disclosure)* [2004] EWHC 411 (Fam), [2004] 2 FLR 142, and in *A v Ward* [2010] EWHC 16, [2010] 1 FLR 1497. Secondly, it introduced me to *Scott v Scott*, which I was later to explore as a judge in a number of cases, in particular in *Clibbery v Allan and another* [2001] 2 FLR 819 and in *Re Webster (A Child), Norfolk County Council v Webster* [2006] EWHC 2733 (Fam), [2007] 1 FLR 1146. Thirdly, and more fundamentally, it alerted me to the fact that the assumptions and beliefs in relation to transparency commonly accepted by family lawyers are not necessarily a sound guide to what the law really is: matters which I was later to explore judicially in *Kelly v British Broadcasting Corp*n [2001] Fam 59 and in *In re A Ward of Court (Wardship: Interview)* [2017] EWHC 1022 (Fam), [2017] Fam 369.

In re M and N was likewise important for three reasons. First, it deepened my understanding of the significance of *Scott v Scott*. Secondly, it introduced me to that great American judge Brandeis J, whose writings I was later to cite in so many judgments. Thirdly, it established that in matters of transparency the interests of the child are not paramount, and that conflicting interests are to be reconciled by a balancing exercise, albeit not articulated at that stage, in the days before the Human Rights Act 1998, by the various Convention rights with which we are now so familiar and which I was subsequently to explore judicially in *Re Roddy (A Child) (Identification: Restriction on Publication)* [2003] EWHC 2927 (Fam), [2004] 2 FLR 949, and in many other subsequent judgments.

In *In re M and N* I had the temerity to argue that “The present practice of the courts has been to grant such injunctions routinely and without consideration of the relevant principles ... The width of prohibition is also greater than can be necessary, and there is rarely any expressed time limit. The current practice militates against the policy of the legislation and shifts the emphasis against freedom of speech.” Lord Donaldson of Lymington MR was not unsympathetic: “In the absence of statistical information, which is not available to anyone, I am not convinced that this is true, but I recognise and understand the concern of the media.” *Plus ça change*.

During the ensuing 35 years I have spent much time thinking and writing (both judicially and non-judicially) about transparency and, especially more recently, about the need for reform – pressing – and about the experience – mixed at best – of reform, that is, both reform unsuccessfully attempted and reform often only partially achieved. But although my thinking has developed and, I hope, matured down the years, it has maintained an essential consistency. Looking back, it can be seen that in many ways the key building blocks were put in place for me by *Re W* and *In re M and N*. One major subsequent development, dating from the late 1990s, must however be mentioned: the introduction of the rubric, the use of which in financial remedies case has now become so controversial; something whose purpose, meaning and effect I sought to analyse in *Re RB (Adult) (No 4)* [2011] EWHC 3017 (Fam), [2012] 1 FLR 466, and *Re X (A Child) (No 2)* [2016] EWHC 1668 (Fam), [2017] 2 FLR 70.

I must acknowledge many debts I owe to that distinguished lawyer and eminent judicial colleague, my friend Nicholas Mostyn. His arguments in *Spencer v Spencer* [2009] EWHC 1529 (Fam), [2009] 2 FLR 1416, though unsuccessful, made me think more deeply about the reforms of 2009. Without the spur provided by his great series of judgments starting with *BT v CU* [2021] EWFC 87, [2022] 1 WLR 1349, and ending with *Augousti v Matharu* [2023] EWHC 1900 (Fam), I doubt that I would ever have embarked upon this investigation. My indebtedness to his desert island taxonomy I have already acknowledged. And finally I must acknowledge the great assistance he has given me in commenting on successive drafts, which has much improved what I now present though not of course exposing him to responsibility for any remaining deficiencies.

Table of Contents

Part A : <i>Scott v Scott</i> and the Royal Commission	5
Introduction	5
<i>Scott v Scott</i> and the Royal Commission.....	6
The context : the problem of publicity in the Divorce Court.....	8
Bargrave Deane.....	9
Law and practice 1857 to 1910.....	12
Understandings of the legal position in 1910 : Rayden	24
Understandings of the legal position in 1910 : Dr Tristram's evidence to the Royal Commission...	25
Understandings of the legal position in 1910 : the Report of the Royal Commission (1912)	27
Comment	28
The Royal Commission takes evidence	29
The Royal Commission deliberates	40
Interlude : <i>Scott v Scott</i> at first instance.....	40
Interlude : <i>Scott v Scott</i> in the Court of Appeal	42
The Royal Commission reports	46
<i>Scott v Scott</i> in the House of Lords	49
The aftermath to the Royal Commission	52
Part B : The legacy of <i>Scott v Scott</i>	55
The importance of <i>Scott v Scott</i>	55
<i>Scott v Scott</i> a century on	59
Part C : The Desert Island.....	60
Family Court exceptionalism.....	60
The Family Law Silo	63
Part D : The Cult of Secrecy in financial cases.....	65
The Cult of Secrecy.....	65
The Cult of Secrecy : history.....	66
The Cult of Secrecy : analysis	77
Part E : The Cult of Anonymity in financial cases.....	78
The Cult of Anonymity	78
The Cult of Anonymity : the rubric.....	85
The Cult of Anonymity : concluding thoughts	88
Part F : Parting thoughts	89
<i>Scott v Scott</i> in retrospect.....	89
<i>Scott v Scott</i> : the ultimate irony	91
A final thought	91
Envoi.....	91

Part A : *Scott v Scott* and the Royal Commission

Introduction

In a familiar line of cases of which the first was *BT v CU* [2021] EWFC 87, [2022] 1 WLR 1349, and the last *In re PP (A Child: Anonymisation)* [2023] EWHC 330 (Fam), [2023] 4 WLR 48, and *Augousti v Matharu* [2023] EWHC 1900 (Fam), Mostyn J explosively ignited a most necessary debate about the anonymisation of judgments in financial remedy cases. An important part of his analysis focussed on the great case of *Scott (Otherwise Morgan) v Scott* [1912] P 4, [1912] P 241, [1913] AC 417, and, in particular, on the dissenting judgment of Fletcher Moulton LJ in the Court of Appeal, later to be so triumphantly vindicated when the decision of the Court of Appeal upholding the judgment at first instance of Bagnall J was reversed by a unanimous House of Lords: see, in particular, what Mostyn said in *Xanthopoulos v Rakshina* [2022] EWFC 30, [2023] 1 FLR 388, [89], and *Gallagher v Gallagher* [2022] EWFC 52, [2022] 1 WLR 4370, [2023] 1 FLR 120, [33].

For present purposes, the Mostyn thesis, as I shall refer to it, can be summarised in the form of two propositions:

Proposition (A): *Scott v Scott* [1913] AC 417 and the subsequent case-law establishes that, subject to any statutory provision to the contrary:

- (1) It is not, as such, a contempt of court (a) to publish an account of what has gone on at a hearing of a family case in private or (b) to publish a judgment in a family case delivered in private or (c) to identify the parties in an anonymised family judgment.
- (2) Litigants, even in a family case heard in private, have the right to talk about the case; and a judge has no power to prevent them doing so.

Proposition (B): Restrictions on publication not otherwise imposed by law can be imposed only following a judicial ‘balancing exercise’ which has regard to and balances the interests of the parties and the public as protected by Articles 6, 8 and 10 of the Convention, *considered in the particular circumstances of the case*: *In re S (A Child) (Identification: Restrictions on Publication)* [2004] UKHL 47, [2005] 1 AC 593.

I have on various occasions indicated my emphatic support for the Mostyn thesis as correctly setting out the law. For present purposes I refer to *Some Sunlight Seeps In* [2022] FRJ 79, which contains much historical information, including about *Scott v Scott*; to *Family Justice: Ostiis Apertis? Or a mantle of inviolable secrecy? A challenge to those who would keep the doors closed* (12 January 2023); to *Groundhog Day: a Response to the Report of the Financial Remedies Sub-Group of the Transparency Implementation Group* (2 July 2023); and to *Groundhog Day Again: A Response to The Transparency Reporting Pilot for Financial Remedy Proceedings* [2024] FRJ 33.

Scott v Scott and the Royal Commission

The passage of *Scott v Scott* through the courts from 1911 to 1913 was intertwined, both chronologically and as to the substance, with the work between 1910 and 1912 of the Royal Commission on Divorce and Matrimonial Causes chaired by Lord Gorell. An examination of these parallel processes is both timely and illuminating.

As Sir Gorell Barnes, Gorell had been a judge of the Probate, Divorce and Admiralty Division from 1892-1905, and then the President until he resigned on 10 February 1909; he was created Lord Gorell on 16 February 1909 (as a hereditary peer, it may be noted, *not* as a Lord of Appeal in Ordinary). No doubt his Chairmanship of the Royal Commission was not unconnected with his famous judgment in *Dodd v Dodd* [1906] P 189, in which he had excoriated the state of divorce law. His influence was more directly involved as his younger son explains in his Introduction to his father's biography, J E G de Montmorency, *John Gorell Barnes, First Lord Gorell (1848-1913), A Memoir* (John Murray, 1920), p 11:

"It was not until 1906 that of set intent and after most anxious deliberation he delivered the noted judgment in *Dodd v. Dodd* which revealed his grave sense of the deficiencies of the law he was called upon to administer. This was the first blow, which did all that he had intended it to do by arousing attention and focussing discussion. He followed this up on July 15, 1909 – as soon, that is, as he was no longer a Judge and free therefore to act – by a motion in the House of Lords to give jurisdiction in divorce to the County Courts, which he withdrew on receiving a practical promise from the Government of the day to concede the real objective he had in his mind, namely, the appointment of a Royal Commission to inquire into the whole subject."

At a time when, if only as a result of Mostyn J's labours, *Scott v Scott* is properly back in the spotlight, a more detailed examination of what is still arguably the most consequential case on family law which has ever been decided is timely.

To those who are unable to look beyond the desert island (to adopt Lord Sumption's famous metaphor), my claim may appear extravagant. What, they may ask, to take two obvious contenders, of the decisions of the House of Lords in *Ward v Laverly* [1925] AC 101, enshrining the paramountcy of the child's welfare as a fundamental principle of family law, and in *White v White* [2000] 1 AC 596, establishing the concept of spousal equality as an equally fundamental principle of the law of ancillary relief? My response is stark. Those cases deal merely with what happens on the desert island itself. *Scott v Scott* established, definitively and for all time, the proper relationship between the desert island and the rest of the legal world – a much more fundamental and, indeed, a profoundly important issue.

The Royal Commission on Divorce and Matrimonial Causes chaired by Lord Gorell was created by Royal Warrant dated 10 November 1909. It examined 246 witnesses in public, the first on 25 February 1910 and the last on 21 December 1910. Its Report (Cd 6478) was dated 2 November 1912. Amongst the eight questions which it considered (Report, para 35), and the one with which I am here concerned, the eighth was *Should any, and, if any, what provisions be made for preventing or limiting the publication of reports of divorce and other matrimonial cases?* The answer was provided in Part XVII (Report, paras 471-520).

At the same time the great case of *Scott v Scott* was winding its way through the courts. The wife had filed her nullity petition on 13 January 1911. On 14 February 1911 the Registrar had made the order in common form directing a hearing in camera that was to generate the great controversy. The suit was heard in camera by Sir Samuel Evans P on 13 June 1911. On 4 December 1911 Bargrave Deane J made the famous ruling that the petitioner and her solicitor had committed a contempt of court by sending copies of the official transcript of the hearing before the President to her father, her sister and a friend “for the purpose of vindicating her character and position”: *Scott (otherwise Morgan) v Scott* [1912] P 4. On 6 July 1912 the full Court of Appeal (Cozens-Hardy MR, Farwell, Buckley and Kennedy LJJ, Vaughan Williams and Fletcher Moulton LJJ dissenting) dismissed her appeal: *Scott (otherwise Morgan) v Scott* [1912] P 241. On 26 July 1912 the Court of Appeal (The Master of the Rolls and Farwell LJ) gave her leave to appeal. On 5 May 1913 she was triumphantly vindicated when a unanimous House of Lords (Viscount Haldane LC, Earl of Halsbury, Earl Loreburn, Lord Atkinson and Lord Shaw of Dunfermline) allowed her appeal: *Scott (otherwise Morgan) and Another v Scott* [1913] AC 417.

Lord Gorell had died just a few days before on 22 April 1913. He was succeeded as the second Lord Gorell by his eldest son who, as the Hon Henry Gorell Barnes, had been the Secretary to the Royal Commission; he was to be killed at Ypres in January 1917.

As can be seen, the Royal Commission had finished taking evidence very shortly before the litigation began. It reported after the Court of Appeal had given judgment and while the appeal to the House of Lords was pending.

There is a most interesting discussion of the Royal Commission by Cretney in his magnum opus, *Family Law in the Twentieth Century: A History* (OUP, 2003), pp 209-214, but he says very little about its work in relation to the reporting of divorce cases. Indeed, it is a most striking fact that, so far as one can see, Cretney makes no reference at all anywhere in his great book to *Scott v Scott* and only very brief references (pp 176, 298) to the Judicial Proceedings (Regulation of Reports) Act 1926. (The note of qualification reflects the fact that we know the Table of Cases in his book, like the Table of Statutes, is not complete: if proof of that serious claim is required, I need only point out that he refers (p 171) to the important case of *Robinson v Robinson and Lane* (1858) 1 Sw&Tr 362, which is not included in the Table of Cases, and that although he refers (pp 176, 298) to the 1926 Act, the only reference in the Table of Statutes is to p 298.) For Cretney’s analysis of the Royal Commission’s work in relation to this, one has to go to his important essay, ‘*Disgusted, Buckingham Palace ...*’: *Divorce, Indecency and the Press, 1926*, in Chapter 4 of *Law, Law Reform and the Family*, (OUP, 1998), pp 94-98, originally published as ‘*Disgusted, Buckingham Palace ...*’ *The Judicial Proceedings (Regulation of Reports) Act 1926* [1997] CFLQ 43. This, as one might expect, is deadly accurate so far as it goes (and includes brief reference to *Scott v Scott*) but there is more to tell than Cretney has shared with us.

Four other sources, important in relation to what follows, must be mentioned.

Serendipitously, 1910 saw the publication both of the first edition of Rayden and of the memoirs of a newspaper reporter who had been a fixture in the divorce court for decades,

including 30 years reporting for the *Daily Telegraph*: Henry Edwin Fenn, *Thirty-Five Years in the Divorce Court* (T Werner Laurie, 1910).

1920 saw the publication of de Montmorency's biography of Lord Gorell; he had been the Assistant Secretary to the Royal Commission. It contains, as we have seen, an introduction by Gorell's younger son, the third Lord Gorell, who had succeeded to the title on his elder brother's death.

Much more recently, there is Janice Hubbard Harris, *Edwardian Stories of Divorce* (Rutgers University Press, 1996), an interesting scholarly account of the 'Edwardian story on divorce' seen through the prisms of the newspaper reporting of Edwardian divorce cases, the work of the Royal Commission, and Edwardian novels.

The context : the problem of publicity in the Divorce Court

What was the problem with which both the Royal Commission and the courts in *Scott v Scott* were grappling? I can most conveniently identify it by referring to what I said in *Rapisarda v Colladon* [2014] EWFC 1406, [2015] 1 FLR 584, [7]-[10]:

"7 As Cretney points out, the 1926 Act was the solution to a problem coeval with the creation of the Court for Divorce and Matrimonial Causes by the Matrimonial Causes Act 1857. The practice of the Ecclesiastical Courts was to take evidence in private. Section 46 of the 1857 Act, however, required witnesses in the Divorce Court to be examined orally in open court, a provision still in force in the form of FPR 2010 rules 7.16(1) and 22.2(1)(a) and reinforced by the decision of the House of Lords in *Scott v Scott* [1913] AC 417 that the Probate Divorce and Admiralty Division had no power to hear a nullity suit in camera in the interests of public decency. The consequence, inevitable if unintended (for many affected to believe that the shame and humiliation of having to endure a hearing in public would deter the bringing of divorce suits, and some even to be astonished by what the evidence in such cases revealed of behaviour in the bedroom), was a torrent of salacious newspaper reporting.

8 Kate Summerscale, in her recent retelling in *Mrs Robinson's Disgrace: The Private Diary of a Victorian Lady* (Bloomsbury, 2012) of the remarkable case of *Robinson v Robinson and Lane* (1859) 1 Sw & Tr 362, notes (at page 187) what one can only think of as the delicious irony that in the summer session of 1857 "Lord Palmerston's government had pushed through the Matrimonial Causes Act, which established the Divorce Court, and the Obscene Publications Act, which made the sale of obscene material a statutory offence." Both, she opines, had identified sexual behaviour as a cause of social disorder. But, she continues:

"A year on ... they seemed to have come into conflict: police officers were seizing and destroying dirty stories under the Obscenity Act, while barristers and reporters were disseminating them under the Divorce Act. 'The great law which regulates supply and demand seems to prevail in matters of public decency as well as in other things of commerce,' noted the Saturday Review in

1859.” – The author, she suggests, was James Fitzjames Stephen, later Stephen J – ““Block up one channel, and the stream will force another outlet; and so it is that the current dammed up in Holywell Street flings itself out in the Divorce Court.””

9 Deborah Cohen, *Family Secrets: Living with Shame from the Victorians to the Present Day* (Viking, 2013), comments (at page 45), that:

“Born at the same moment, the Divorce Court and the mass-circulation press were made for each other. The Divorce Court got the publicity to humiliate moral reprobates. The newspapers got the fodder they needed to power a gigantic leap into the mass market.”

10 As Thorpe LJ put it in *Clibbery v Allan and Another* [2002] EWCA Civ 45, [2002] Fam 261, [87], “the tension between the principle of open justice and the consequent revulsion of respectable opinion at the salacious details of trials in the divorce court appearing in the popular press surfaced almost immediately.””

Bargrave Deane

Before proceeding further, it is worthwhile identifying a significant common link between the Royal Commission and *Scott v Scott*: Bargrave Deane J. He gave evidence to the Royal Commission and then went on to give judgment in *Scott v Scott*.

Henry Bargrave Finnelly Deane (1846-1919) had been ‘born to the purple’, for his father was the great Dr Deane QC – Sir James Parker Deane (1812-1902) – the distinguished civilian, who had been admitted to Doctors’ Commons in 1839. Bargrave Deane J had been called to the Bar by the Inner Temple in 1870, had specialised in divorce since 1885, took silk in 1896 and was appointed to the PDA on 1 February 1905, in succession to Gorell Barnes J on the latter’s appointment as President in succession to Sir Francis Jeune P. As the Commission observed in its Report (Cd 6478, para 51), he “has had more experience of the Divorce Court than any other witness, having been in practice in that court at the bar as junior and leader for over 25 years, and a judge of the court for the last seven years.”

Bargrave Deane was a compassionate and humane judge. But it has to be appreciated that, in one important respect, he was most unusual as a judge of the PDA. It is, at least in retrospect, an astonishing fact that, prior to the appointment of Hodson J in 1937, Bargrave Deane was the *only* judge ever appointed to the Court for Divorce and Matrimonial Causes created in 1858, or to its successor the PDA, whose practice had been largely as a matrimonial and divorce lawyer. Bargrave Deane was also unusual, perhaps unfortunate, in another respect. Previously the incumbent puisne had always been promoted upon the retirement or death of the President. But when Sir Gorell Barnes P resigned in 1909 Bargrave Deane was passed over in favour of Bigham J from the King’s Bench Division. Bigham (later Lord Mersey) was not a success as President. All in all we can only wonder whether Bargrave Deane would not have been a much better appointment as President than Bigham and regret that the claims of Admiralty were unhappily preferred to those of Divorce.

I have described Bargrave Deane as compassionate and humane. In the light of everything that was to follow it is worth elaborating the point.

Bargrave Deane had had decades of experience in the Divorce Court before becoming a judge. As a judge he comes over as not merely humane and compassionate but worldly-wise. By way of example one can see his approach when called upon to exercise discretion under section 31 of the 1857 Act in favour of a petitioner also guilty of adultery.

In *Northover v Northover* (1910) 26 TLR 224, he exercised discretion under section 31 in favour of the petitioner, who had committed both adultery and bigamy. Her husband had forced her into simulating her availability as a prostitute and then blackmailed her would-be clients. The case was extensively reported in the *News of the World* on 16 January 1910 with the arresting three-decker headline *WIFE AS DECOY / TERRIBLE REVELATIONS IN DIVORCE CASE / BIGAMY TO GAIN HAPPINESS*.

Later the same year he decided *Pretty v Pretty (The King's Proctor Shewing Cause)* [1911] P 83. The question was whether he should exercise discretion in favour of a petitioner who had committed adultery and then aggravated her misconduct by perjury. In a remarkable judgment which ought to be read in full, he was explicit (p 87) as to his approach:

"Some people think that, in such matters, you must treat men and women on the same footing. But this Court has not taken, and, I hope, never will take, that view. I trust that, in dealing with these cases, it will ever be remembered that the woman is the weaker vessel: that her habits of thought and feminine weaknesses are different from those of the man: and that what may perhaps be excusable in the case of the woman would not be excusable in the case of the man. Where you find that the woman has been guilty of adultery and that her adultery has resulted from her husband's conduct towards her, this Court does, and I hope always will, make allowances and treat her error with leniency."

He then explained how (pp 88-89):

"she met the man who seduced her and whose wife she became, whose conduct towards her and vile treatment of her has made life with him an impossibility, and to whom, if this decree is rescinded, she will be bound for the rest of her life. With what result? It can only result in absolute ruin to her. It has been said that I ought not to trouble myself about that. But I think that, the Legislature having imposed upon me the responsibility of exercising my discretion, I ought to look at every conceivable aspect and circumstance of the case, not only in the present but in regard to the future; and I feel bound to save this petitioner from the absolute ruin which I am certain must ensue if I were to rescind this decree and dismiss this petition ... I must put aside the feelings of indignation with which I naturally regard the petitioner owing to her having committed perjury ... In the present case, notwithstanding all that has occurred, I am prepared, after mature consideration, to give effect to the feelings of humanity which I believe the Legislature had in mind when the particular section of the Act of 1857 was passed."

Two further judgments on the question of discretion were delivered by Bargrave Deane on the same day in March 1914. In the first, *Habra v Habra and Habal* [1914] P 100, he observed during the course of argument that:

“I think I have never exercised my discretion in favour of a husband guilty of adultery. I have always distinguished between the weakness of women and the weakness of men in such cases.”

In the event, he exercised discretion in favour of the husband petitioner. In the second case, *Hampson v Hampson (The King’s Proctor Shewing Cause)* [1914] P 104, the petitioner wife had suffered appalling cruelty at the hands of her husband, a career criminal, who had forced her into prostitution. Sir Samuel Evans P granted her a decree. The King’s Proctor then intervened, proving at the hearing before Bargrave Deane that she had perjured herself before the President in concealing the fact that she was living, adulterously, with a man named Wymark. Bargrave Deane exercised discretion in her favour:

“I am bound to say that every instinct tells me that I ought not to exercise my discretion in favour of this petitioner.

But on the other hand there is another consideration which I cannot divest myself of, and that is this woman’s future. Whether it is any use for me to give her a chance I do not know, but, if I do not, I suppose no one can doubt that she will become a prostitute. If I do, and it is on the understanding that Wymark has said he will marry her, she will have another chance.

... against every feeling I have except one I am going to allow this woman to have her decree.”

Bargrave Deane’s reference to the woman as “the weaker vessel” – a biblical expression; it comes from 1 Peter 3:7 – reads painfully today. Indeed, the contrast with the views expressed by Oliver J (as he then was) as long ago as 1978 in *Midland Bank Trust Co Ltd v Green (No 3)* [1979] Ch 496, 527, is striking. Yet, although we probably have to assume that Bargrave Deane really did believe what he was saying, we cannot overlook the fact that he seems to have been motivated by a sensitive, understanding and humane desire to release the victims of appalling domestic abuse from being tied to their monstrous husbands. Not all were so sensitive. Henry Lopes (later Lopes J and, in due course Lopes LJ), the reactionary Conservative MP for Launceston and one of the leading opponents in the House of Commons of what became the Married Women’s Property Act 1870, had been blunt in his recourse to the trope (see Lee Holcombe *Wives and Property: Reform of the Married Women’s Property Law in Nineteenth-Century England* (Martin Robertson, 1983), p 149):

“The law recognised the fact that the wife was the weaker vessel, that there ought to be only one head of the house, and that the husband was the proper head.”

Bargrave Deane was not the only judge in the pre-War era to adopt a sensible attitude in ‘discretion’ cases. Consider, for example, *Burdon v Burdon (The Queen’s Proctor Shewing Cause)* [1901] P 52, another case where a wife had been driven into prostitution by her

husband and then lied to the trial judge. Gorell Barnes J, having heard submissions from her counsel, Bargrave Deane QC, exercised discretion in her favour, commenting:

“It is most difficult, to say the least of it, for a woman who has been sent down on the downward path to retrieve herself.”

Another example relates to Bargrave Deane’s approach to cruelty, which compared favourably with that of Bigham.

Fenn, in his chapter on Bigham, which is subtitled “A Brief but Breezy Career”, is interesting if unsympathetic. Bigham’s appointment, he says, was “a great surprise” and his retirement “unexpected.” He concludes that Bigham was “a disappointment.” Fenn complains (*Thirty-Five Years*, pp 43-44) that in the view he took of what constituted cruelty on the part of a husband Bigham was an old-fashioned reactionary:

“Frequently [he] has remarked, when the wife has been giving evidence of what she considered cruelty on the part of her husband, “I don’t think much of that; that is not cruelty.” He apparently was rather in favour of the strict old-fashioned cruelty, tending to the really physical character. He once or twice stated that there is “too great a tendency to magnify incidents.””

His account of Bargrave Deane’s view on cruelty (*Thirty-Five Years*, pp 58, 156, 177, 190) makes for an interesting contrast.

Law and practice 1857 to 1910

To understand the context, both for the Royal Commission and for *Scott v Scott*, I need first to explore what had been happening since the creation by the Matrimonial Causes Act 1857 of the new Court for Divorce and Matrimonial Causes, the ancestor of both the PDA and today’s Family Division.

Section 22 of the 1857 Act provided that:

“In all Suits and Proceedings, other than Proceedings to dissolve any Marriage, the said Court shall proceed and act and give Relief on Principles and Rules which in the Opinion of the said Court shall be as nearly as may be conformable to the Principles and Rules on which the Ecclesiastical Courts have heretofore acted and given Relief, but subject to the Provisions herein contained and to the Rules and Orders under this Act.”

The specific exclusion from the ambit of section 22 of proceedings for dissolution of marriage (in other words divorce cases) reflected the fact that the ecclesiastical courts had had no jurisdiction to grant a divorce. So, section 22 applied to proceedings for nullity, judicial separation and restitution of conjugal rights, all of which had been within their jurisdiction.

Section 46 provided that:

“Subject to such Rules and Regulations as may be established as herein provided, the Witnesses in all Proceedings before the Court where their Attendance can be had shall be sworn and examined orally in open Court: Provided that Parties, except as herein-

before provided, shall be at liberty to verify their respective Cases in whole or in part by Affidavit, but so that the Deponent in every such Affidavit shall, on the Application of the opposite Party or by Direction of the Court, be subject to be cross-examined by or on behalf of the opposite Party orally in open Court, and after such Cross-examination may be re-examined orally in open Court as aforesaid by or on behalf of the Party by whom such Affidavit was filed.”

Section 53 provided that:

“The Court shall make such Rules and Regulations concerning the Practice and Procedure under this Act as it may from Time to Time consider expedient, and shall have full Power from Time to Time to revoke or alter the same.”

The Royal Commission tells us (Report, para 478) that during the passage of the Bill through Parliament it was proposed to amend what became section 53 by adding the words “including any rules and regulations for enabling the said Court to hear any proceedings under this Act in private”, but that the amendment was rejected.

I add that section 48 of the Act provided that:

“The Rules of Evidence observed in the Superior Courts of Common Law at Westminster shall be applicable to and observed in the Trial of all Questions of Fact in the Court.”

This emphasis upon the applicability of common law practice was reinforced by rule 33 of the Rules and Regulations made pursuant to section 53:

“The hearing of the cause shall be conducted in court, and the counsel shall address the Court, subject to the same rules and regulations as now obtain in the Courts of Common Law.”

The opening of the new court saw the publication in 1858 of two new practitioner’s books: John Fraser Macqueen, *Practical Treatise on Divorce and Matrimonial Jurisdiction Under the Act of 1857 and New Orders*, and William Brandt, *A Treatise on the Law, Practice and Procedure of Divorce and Matrimonial Causes Under the Act [of 1857]*. Both are available in modern facsimile editions. Neither, so far as I can see, had anything to say about hearings in camera or about the adoption by the new court of the previous mode of trying nullity proceedings in the ecclesiastical courts. On the contrary, Macqueen, in a chapter entitled *Mode of Taking Evidence*, emphasised (p 89) the terms of section 46. And in a rather Delphic passage referring to the practice of the ecclesiastical courts in nullity suits based on incapacity, he said (p 76): “It has been thought that the mode of investigation is unsatisfactory and deceptive ... The new court will take order in this matter.”

Section 1 of the Matrimonial Causes Act 1858 empowered the Judge Ordinary “to sit in Chambers for the despatch of such part of the business of the ... Court as can in the opinion of the ... Judge Ordinary, with advantage to the suitors, be heard in Chambers.” Section 3 provided that “The ... Judge Ordinary when so sitting in Chambers shall have and exercise the same powers and jurisdiction in respect of the business to be brought before him as if sitting

in open Court.” Both sections, it may be noted, were repealed by the Statute Law Revision Act 1892.

During the passage of what became the Matrimonial Causes Act 1859, as the Royal Commission records (Report, para 478):

“On July 28th, 1859 ... an effort was again made by the Lord Chancellor to give the court power to sit with closed doors, and the result of the discussion in the House of Lords was that power to sit with closed doors at the discretion of the judge was conferred by clause 1, which was carried by 26 votes to 9 ... This clause became clause 5 of the Bill, which passed to the House of Commons, where it was discussed at length on August 11th, 1859, and was struck out of the Bill, without a division.”

The clause, which was proposed at the request of Sir Cresswell Cresswell JO, provided that “The Court, when for the sake of public decency it shall so think fit, may hold its sittings with closed doors”: see *Barnett v Barnett* (1859) 29 LJ (P&M) 28. The Commission records that during the debates the Attorney-General, Sir Richard Bethell, later Lord Westbury LC, said:

“the court was a place of resort – according to the accounts that were given to him – of characters of the worst description. Crowds congregated there for the purpose of hearing details which could only give gratification to depraved and diseased minds.”

Having pointed out, as the Commission put it, “the effects of publicity in embarrassing witnesses and deterring parties from applying to the court, and the lifelong injury which might be inflicted not only on the parties to the suit, but also their innocent and unhappy children”, he went on:

“He thought, therefore, the interests of humanity, the interests of justice, the interests of public decency, all required that in a tribunal of this kind there should be an exception to the general rule, such as that embodied in this clause.”

On 4 November 1859, *Barnett v Barnett* (1859) 29 LJ (P&M) 28 came before Sir Cresswell Cresswell JO. It was a wife’s suit for judicial separation on the ground of cruelty. Counsel for the petitioner, Dr Phillimore, asked that the case might be heard in camera “on the ground that the evidence as to the cruelty would be of a character utterly unfit for the public ear.” Sir Cresswell responded:

“I should have been glad to hear the case with closed doors; but you will remember that in the course of last session a bill was brought into parliament to make further provision for the conduct of business in this court. Into that bill, at my request, a clause was inserted giving the Court a discretion as to hearing cases with closed doors. The legislature, in their wisdom, rejected that clause, and refused to vest that discretion in the Court. I think I am bound to take that rejection as a prohibition as to my exercising any discretion.”

The husband’s counsel added his plea that the case be heard in camera. Sir Cresswell continued:

“I was anxious to have my powers clearly defined, and as there was a fair opportunity of asking the opinion of the legislature, I suggested that the clause might be introduced. It met with the approbation of the Lord Chancellor, and after a good deal of objection passed the House of Lords. It was supported by the Attorney General in the House of Commons, but was rejected. I think that rejection is tantamount to a prohibition as to my exercising any discretion in the matter. I shall, however, as is frequently done by other Courts, order women and children to leave the Court. I regret very much that I cannot grant the application, but I must be bound by the decision of the legislature. I am aware that the Full Court has, when presided over by the present Lord Chancellor (Lord Campbell), heard two cases in private, but I thought the matter might be questioned, and that it would, therefore, be better to get the power of the Court clearly defined.”

In the upshot, we are told, “The hearing of the cause was accordingly proceeded with in open court; but before the case of the petitioner had been concluded, the petition was withdrawn.”

Three days later, on 7 November 1859, the same issue came before the full court (Sir Cresswell Cresswell JO, Williams J and Bramwell B) in a wife’s suit for nullity on the ground of the husband’s impotence: *H(C) v C* (1859) 1 Sw&Tr 605 (fuller report on this point (1859) 29 LJ (P&M) 29). When the cause came on for hearing on oral evidence, Dr Deane, for the petitioner (there was no appearance by the respondent), asked that the evidence be heard in camera. The report in 1 Sw&Tr 605 says nothing further as to his submissions; the report in 29 LJ (P&M) 29 has him saying “in accordance with the practice of the Ecclesiastical Courts in similar cases.” His application was refused, the court holding unanimously that it had no power to exclude the public during the hearing of a cause.

Sir Cresswell said: “I adhere to the opinion I have already given in *Barnett v Barnett*, that the Court has not power to grant the application.” Williams J agreed: “I am of opinion that we have no power to hear the case, except in open court.” Bramwell B, whose judgment was later to underpin the decision in *Scott v Scott*, said:

“If this had been the first application of the kind, I also should have thought it perfectly clear that this being a new Court was constituted with the ordinary incidents of other English Courts of justice, and, therefore, that its proceedings should be conducted in public. Upon that question I should not have felt the slightest doubt; and the only doubt I now entertain is in consequence of this Court having since it was established, on two occasions, sat in private. But in those cases I understand that that course was adopted with the consent of both parties, and that no discussion took place. In my opinion the Court possesses no such power.”

I note in passing that, although in both reports the case was reported anonymously (as was the substantive hearing reported at (1859) 29 LJ (P&M) 81), in the joint judgment of Sir Cresswell and Williams J dismissing the petition as reported in (1859) 1 Sw&Tr 605 the husband was named as George Castleden. Indeed, when the case went to the House of Lords it was reported as *Fanny Castleden v George Castleden* (1861) 9 HLC 186.

It might have been thought that the judgment of the Full Court was clear enough. Not a bit of it.

On 25 June 1864 Sir J P Wilde JO began the hearing in *M(H) v H* (1864) 3 Sw&Tr 517, a wife's petition for nullity on the ground of the husband's impotence. The various reports are all silent on the present point: see *M(H) v H* (1864) 3 Sw&Tr 517, (1864) 3 Sw&Tr 592, (1864) 13 WR 108 and (1864) 11 LT 317. As Rayden subsequently explained (p 6, para 8, fn (a)), one has to consult the note in *A v A* (1875) LR 3 P&D 230, 232:

"In fact, from February, 1860, when the case of *H v C* was decided, until July, 1864, nullity cases were always *heard in open Court*. In the case of *Marshall v Hamilton* (3 Sw&Tr 517) the evidence was of such an offensive character that Sir J Wilde signified a desire that for the future they should be tried in camera, and with the consent of counsel ordered that they should be so."

We can see from the reports of *M(H) v H* that the wife was represented by Dr Spinks and Searle and the husband by Dr Deane QC and Dr Middleton. It may be noted that the "offensive" evidence was in fact set out in great detail in the report at (1864) 3 Sw&Tr 517.

On 16 March 1869, Sir J P Wilde JO (he was to become Lord Penzance three weeks later on 6 April 1869) gave judgment on a preliminary point in *C v C* (1869) LR 1 P&D 640. It was a case where the wife was petitioning for divorce by reason that her husband had been "guilty of sodomy with two young men in his service." Searle for the respondent asked that the case be heard in camera. Dr Tristram for the petitioner consented (his reasons, if any were expressed, are not included in the report). In a short reserved judgment, Wilde refused the application:

"I have considered the matter, and I think I have no power to hear the cause in camera. The only causes which have been heard in private are suits for nullity of marriage, and in doing so, the Court has followed the practice of the ecclesiastical courts, which it is expressly empowered to do by [section 22 of the 1857 Act]. There is, however, nothing at all in that statute which gives such a power to the Court in suits for dissolution of marriage, and in one of the amendment acts a clause which had been introduced for the purpose of giving such a power, was rejected by the legislature; I therefore think that I am bound to hear the case in open Court."

Pausing at this point, Sir Cresswell Cresswell, with the trenchant support of the Full Court in *H(C) v C* (1859) 29 LJ (P&M) 29, had been clear that *all* cases had to be heard in open court. Wilde, his successor as Judge Ordinary, agreed that *divorce* cases had to be heard in open court, but (and, it has to be said, in defiance of the ruling of the Full Court) had established the practice of hearing nullity cases – at least where the ground was sexual incapacity – in camera. He justified this by reference to section 22 of the 1857 Act and what he asserted had been the practice of the ecclesiastical courts before 1858. He seems to have ignored the imperative language of section 46.

Wilde's successor, Sir James Hannen JO, considered the matter on 19 January 1875 in his reserved judgment in *A v A* (1875) LR 3 P&D 230. This was a wife's suit for restitution of conjugal rights where her husband claimed a judicial separation, alleging that she had been

guilty of cruelty in accusing him of “unnatural practices.” Dr Tristram for the respondent husband sought a hearing in *camerâ* (again, his reasons, if any were expressed, are not included in the report); Bayford for the petitioner wife sought a trial in open court.

Having referred to *H(C) v C* (textual analysis shows that he was using the report in (1859) 1 Sw&Tr 605 and not the much fuller report in (1859) 29 LJ (P&M) 29), Hannen continued:

“It would seem, however, that that rule has not been acted upon. On the contrary, such cases have been heard in *camerâ* both by my predecessor and myself, and I therefore think it must be taken that the impression which was entertained by Sir C Cresswell was afterwards abandoned. The practice must now be considered as settled, and all cases which could have come before the old Ecclesiastical Courts, and might have been heard by those Courts in *camerâ*, this Court has power to investigate in private. In cases however of dissolution of marriage which arise under the Acts constituting this Court, this course of investigation cannot be pursued, but this Court must proceed in the way usual in other Courts. That was decided in *C v C*.”

It is interesting to note that the word “impression” which Hannen uses to characterise what Cresswell had said in *H(C) v C* is the word quoted in the report in (1859) 1 Sw&Tr 605. As we have seen, the report in (1859) 29 LJ (P&M) 29 quotes Cresswell as having used the word “opinion.” Crucially, moreover, the report in (1859) 1 Sw&Tr 605 does not set out Bramwell B’s judgment. So, fatefully, Hannen focused on what he characterised as Cresswell’s “impression” rather than on Bramwell’s judgment.

Having set out Wilde’s judgment in *C v C* in full, Hannen continued:

“I have here a distinct expression of opinion that suits which the Ecclesiastical Courts would have heard in *camerâ* I still have power to hear privately. It does not appear, however, that the Ecclesiastical Courts did, in fact, hear cases in private merely because the investigation might involve an inquiry into charges of unnatural practices. At any rate, I do not find any report of an application to hear such cases in *camerâ*. It does not follow that when such charges are made the investigation of them will necessarily be of such a character as to require the exclusion of the public, for in Courts of justice we cannot be over fastidious in such matters, and disagreeable as it may be to inquire into the truth of such charges, it must be done if circumstances require it, whether few or many persons are present. But I am opinion that there may be cases in which it would be desirable for the sake of public decency that the investigation should take place in private, and as the Ecclesiastical Courts always exercised such a power in nullity suits, I conceive they must have had the same power in other cases where it was desirable from respect to public decency or morality that they should exercise it. In cases, therefore, in which it is not advisable to carry on the suit in open court, I shall order it to be heard in private.”

Turning to the exercise of discretion, he said:

“I think *prima facie* it appears from the affidavits before me that it is highly probable that the facts in this suit ought not to be investigated in public. I shall therefore order

that the inquiry shall commence with closed doors, but if it turns out that the circumstances are not offensive to public decency, I shall order them to be opened.”

The continuing ‘creep’ in practice is very evident. Cresswell had been clear that *all* cases had to be heard in public. Wilde had made an exception for nullity cases. Hannen now expanded the exception to *any* suit, other than one for divorce, in which “public decency or morality” made it “desirable” – it might be thought a pretty low hurdle in comparison to the modern concept of “necessity.” Under Sir Francis Jeune P this ‘creep’ was to extend even further.

In 1887, 1888 and 1889 there were, as the Royal Commission explained (Report, para 478) unsuccessful attempts to legislate, but all failed.

Lawrence v Ambery (1891) 91 LT Jo 230 was a nullity case heard in *camerâ* in which on 18 June 1891 Sir Charles Butt P had granted the petitioner husband a decree on the basis of impotence. Motions for attachment made by the respondent in respect of reports in two newspapers came before Jeune J on 21 July 1891. Bargrave Deane appeared on behalf of the newspapers. Jeune dismissed both motions:

“The Court (Jeune J) said that, while it was perhaps desirable that the result of such cases should be announced in the public prints, yet that should be done in the barest possible way. What had been done in the two cases before him was to give the result of the suit, amplified by full names, residences, &c. That might be a matter of good or bad taste on the part of the writers and publishers of such paragraphs; but motions of this kind were not to be dealt with upon points of good or bad taste, but upon the law applicable to such cases. After the decree was made, it was public property, and nobody could be blamed for publishing a mere announcement of a decree of this court. It could not be said that what had been published in the present instance was any part of what transpired while the court was sitting *in camerâ*. The motion for attachment in each of these cases must therefore be dismissed.”

The implication was that publishing “what transpired while the court was sitting *in camerâ*” was a contempt.

In 1896 the Publication of Indecent Evidence Bill was introduced in the House of Lords. The first clause provided that:

“Where a judge of the High Court is of opinion that any evidence given at any trial before that judge is of such an indecent character that the publication thereof is likely to be prejudicial to public morality, the judge may order that such of the evidence as is specified in the order shall not be published, and any person who publishes or is a party to the publishing of such evidence in any newspaper, periodical, book, or any other public manner, in contravention of such order, shall be guilty of contempt of court and punishable accordingly.”

Opposed by such legal luminaries as Lord Coleridge, Lord Russell of Killowen and Lord Herschell, it never became law. It is interesting to note, as the Royal Commission did (Report, para 498) something said by Lord Halsbury LC in the course of debate on the Bill:

“It had been held that the Lord Chancellor or the judges having jurisdiction in lunacy, had power to sit with closed doors in lunacy, and it had also been held that the Court of Chancery had power, when dealing with its wards, to hold its inquiries with closed doors. These cases were not exceptions to the general rule, because, in the ordinary sense, the administration of justice was not concerned. The only other case he was aware of, of power to try a case with closed doors, was that where the object of the action might be absolutely destroyed by the hearing in public. He was not aware of the right of the Divorce Court to sit *in camera*.”

The Royal Commission added that “Lord Halsbury did not consider that a case could be heard *in camera* by the consent of the parties.”

The Royal Commission, of course, was not to know this, but these views remarkably foreshadowed what Lord Halsbury, speaking judicially, was to say 17 years later: see *Scott v Scott* [1913] AC 417, 441-443.

Fenn (*Thirty-five Years*, pp 296-302) spent a number of pages describing and denouncing what he called this “ill-considered legislation”, “objectionable Bill”, “meddlesome Bill, [which] was wisely dropped.” Of particular interest for present purposes, he refers (p 298) to Lord Russell of Killowen, the Lord Chief Justice, saying that:

“The judge who presided over the Probate and Divorce Court [Sir Francis Jeune P] was most emphatic in his opinion that the Bill was not called for, and that the existing law was sufficient to meet existing difficulties.”

Cohen v Cohen (1897) 13 TLR 255 was a divorce case before Sir Francis Jeune P on 3 March 1897. The report is very short and can be quoted in full:

“When this case was called on counsel applied that it should be heard *in camera*, on the ground there would have to be an investigation of charges of an abominable character.

THE PRESIDENT – I cannot order the case to be heard *in camera*, but as counsel has made this statement I shall follow the rule laid down in *Purdey v Purdey* (a case of a similar nature), and ask all persons not interested in the case to leave the Court, as I am sure that no one would wish to listen to a case which is quite unfit for decent people to hear. These remarks apply equally to the public gallery and the body of the Court.

The case then proceeded with closed doors.”

On 1 April 1903, in *D v D, D v D and G* [1903] P 144, Jeune was faced with a curious forensic conundrum. He had before him two suits which had been consolidated by previous order of the court. One was a wife’s suit for judicial separation on the ground of cruelty, the wife’s allegations against her husband including what were described as “certain filthy practices”, which however did *not* include sodomy or bestiality. The other was the husband’s suit against the wife for divorce on the ground of adultery. It may be noted that, according to the co-respondent’s counsel, there was “nothing involved in the cross-suit of the husband against

the wife which could possibly preclude the ordinary course of a public hearing.” Fenn discusses what is obviously the same case at some length (*Thirty-five years*, pp 278-284), though curiously attributing it to December 1897. He tells us that Sir Edward Clarke KC, appearing for the husband, remarked in the course of his submissions that the allegations “were of a character such as he never expected to live long enough to hear discussed in the Divorce or any other Courts.”

The problem, of course, to put it in the context of the previous case-law, was that section 22 of the 1857 Act though it applied to the wife’s suit for judicial separation did *not* apply to the husband’s suit for divorce.

The law report summarises what occurred on the first day of the hearing: *D v D, D v D and G* [1903] P 144, 144-145. A more detailed account is given by Fenn (*Thirty-five years*, pp 278-280), whose accuracy there is no reason to doubt if one compares his text with what appears in the law report. I add in [...] text which he omits but which is in the law report.

At the opening of the case, Jeune said:

“I have had an opportunity of looking at the record and the particulars in this case, and it is quite clear, I think, that if it is gone into, as I presume it may be, it is a case in which the details are not such as any self-respecting people ought to care to hear.

[The suits being consolidated, and involving, therefore, on the husband’s petition, a claim for dissolution of marriage, I have no power to clear the Court.] Therefore, although I have no power to compel any person to leave this Court, still, I think it is a case that every right-minded person would desire to be absent from.

I would ask, therefore, in their own interests, and the interests of decency, that every person not immediately connected with the case and not properly engaged in it, should not stay to hear details which will only give pain and disgust to hear.”

Fenn tells us that “Several people in the body of the Court and the representatives of the Press then left.” The President continued:

“My observations apply to the gallery, as well as the body of the Court. I am sorry to see, however, that a number of persons, who cannot in any way be connected with the case, still remain.

I hope they will leave the Court, I really hope that every decent-minded person will leave the Court. I have never yet made such an appeal in vain, and I can only regret that so many persons remain in Court.”

Fenn’s account continues:

“Taking the unmistakable hint, the occupants of the public gallery filed out and thronged the corridors during the petitioner’s recital of details.”

More prosaically, the law report tells us that, several more persons having then left the court, the case was opened and proceeded. Later in the day, it tells us, “when the objectionable

parts of the case had been dealt with, so far as the wife's evidence thereon was concerned", the newspaper reporters and the public were readmitted.

On the second day, at the sitting of the court, Sir Edward Clarke applied that the rest of the case should be heard in *camerâ*. His submissions, which included reference to *C v C*, are set out in some detail in the law report (pp 145-146) but need not be repeated here. Fenn summarised their essence as being (p 281) that the Court had:

"the inherent right to hear cases *in camerâ* if the Court considered that the administration of justice would be rendered more accurate, useful, and forcible by that course; or if a public hearing would defeat the ends of justice."

Bargrave Deane KC, appearing for the wife, supported Sir Edward's application, submitting (p 147) that "Cases ought to be tried in the best possible way that is conducive to the attainment of the ends of justice."

The President's extempore judgment began thus:

"I am very glad that this application had been made to me, partly because the point raised is one which has pressed upon my mind in similar cases more than once, and over and over again I have felt the great difficulty there is in hearing these cases in public, not because the publication of the matters involved might be prejudicial to the morals of the public [Fenn adds "(although he was bound to say they would have that effect)"], because one may rely on the discretion of the press not to publish matters which would have that effect, but because one cannot try cases of this kind before the public.

I never felt so vividly as yesterday in this case the difficulty of dealing with a witness by handing up pieces of paper and not being able to press questions to the extent that they might be pressed because of details which no right-minded person would wish to press before a mixed audience of men and women.

What one has always felt is not the desirability or justice – of which I have had no doubt – but the mere legal difficulty of whether it can be done."

He continued:

"On the whole, giving to the matter what consideration I can, I come to the conclusion that this Court has power to do what is now asked."

Jeune then explained that the application had proceeded on two grounds "which run very closely into one another": one applying "especially to this Court", the other applying to "all the Courts of justice in this realm."

In exploring the first ground, Jeune followed Hannen's analysis in *A v A* up to a point but in the event went further. He said:

"In my view, [the Ecclesiastical Courts] might have heard any suits in private; and I believe, having investigated this matter and inquired about it from persons of much greater experience and age than myself [Jeune was 60], I feel some confidence in

saying that that the Ecclesiastical Courts would have had power to hear in camera any case which, for reasons of decency, ought to be so heard.

If that is so, then this Court inherited those general powers.”

Who those “persons of much greater experience and age” were we do not know. Following Dr Deane’s death in 1902, there were by 1903 only two living survivors of Doctors’ Commons: Herbert Jenner-Fust (born 1806; admitted in 1835), who was to die aged 98 in 1904, and Dr Tristram (born 1825; admitted in 1855), the last survivor, who was to die in 1912. Tristram was, with Dr Swabey, editor of the eponymous reports (including those of *H(C) v H* and *M(H) v H*) and had himself appeared in *C v C* and *A v A*. He was an obvious person for Jeune to consult. On 14 December 1910 he was to give evidence to the Royal Commission (see below). Another possibility is Frederick Inderwick KC, in his day the acknowledged leader of the Divorce Court (he had been called to the Bar by the Inner Temple in January 1858, had taken Silk in 1874 and was to die in 1904).

Continuing, Jeune concluded:

“In the present case I am prepared to ... hold that this Court has power in suits for dissolution to hear the evidence in camera. If justice cannot properly be done by hearing a suit in public, the Court is justified and has power to hear it in camera.”

In relation to the second ground, he said:

“Wherever it is reasonably clear that justice cannot be done unless the case is heard in camera – it may be a patent case or a matter in Chancery relating to a ward of court, or for the very reason that the investigation is practically impossible if the case is heard in public – then the Court, by reason of its inherent jurisdiction, has power to order that it be heard in private.”

“The present case” – he said – “comes under both heads.”

De Lisle v De Lisle (1904) Times 15 March was a wife’s petition for divorce on the grounds of cruelty and adultery. Rufus Isaacs KC, appearing for the wife, submitted by reference to *D v D*, *D v D* and *G* that:

“Having regard to the nature of a large body of the evidence ... the suit should be heard *in camera*, or, if that were impossible, that the Court should be cleared of all persons not engaged in the suit while the petitioner gave her evidence. He was anxious that the Court should clearly understand the nature of the present application. The lady’s evidence was not on the same footing as the medical evidence frequently given in Court, which in the interests of public morality was in his Lordship’s hands. The point was that the petitioner would be “embarrassed” if she had to give her evidence in open Court, and that the ends of justice would therefore best be served if she were examined *in camera*.”

Shee KC for the husband did not oppose the application that the wife’s evidence be heard *in camera*.

Sir Francis Jeune P said that:

“in his opinion it would be impossible that justice could be done, if the petitioner were examined on the points that had been opened, unless such examination took place *in camera*; he was therefore prepared to say that her evidence should be so heard, and all persons who were not engaged in the suit must leave the Court.”

Note the further ‘creep’ in practice under Jeune. Cresswell had been clear that *all* cases had to be heard in public. Wilde had made an exception for nullity cases. Hannen had expanded the exception to *any* suit, other than one for divorce, in which “public decency or morality” made it “desirable”. Jeune now expanded the exception to include all suits, including those for divorce, where “justice cannot properly be done by hearing a suit in public”, finally going so far as to justify a hearing in camera if needed for no more compelling reason than to save a witness from feeling “embarrassed.”

I refer to one final development. In 1906, Sir Gorell Barnes P took steps to prevent sketching in court. I can do no better than quote what the Royal Commission said (Report, para 515):

“On August 9th, 1906, Lord Gorell, then President of the Divorce Division, in order to put a stop to a practice which had grown up, directed that sketching in court would no longer be permitted, on the grounds (which he publicly stated) that he was convinced that many persons who have to give evidence in cases in the court were embarrassed and rendered more self-conscious and nervous than they otherwise would be to an extent which affected the proper giving of their evidence, and that this acted to their prejudice, and might thus interfere with the due administration of justice. He said, further, that pictorial illustrations, which may draw attention to divorce cases, are not necessary, nor can they be said to be really desirable in the public interest, but the action he proposed to take was on the grounds already stated ; that he did not suppose that it had been realised how the taking of these sketches might affect the witnesses in the course of the cases, and that he expected that he had only to intimate how the practice might affect trials there, and those who have hitherto followed it would realise the effect which he and his brother Judge thought it had, and would cease from the practice. (*The Times*, 10th August, 1906.)

The rule only applied, in terms, to sketching in court, but intimation was afterwards, on 12th March, 1907, given to the effect that the President and his brother Judge entertained a strong opinion as to the undesirability of directing special attention to cases in the Divorce Court, by illustrations taken, either in or out of court, principally on the ground of the effect which they have on the proper trial of cases in the court, and also on the ground that it is not in the public interest that such illustrations should be published. The President further stated that it had been a source of gratification to him that his views on the subject had met with acceptance and been acted on, and that he was satisfied that a very distinct and noticeable benefit to the administration of justice in the court had resulted, that he had been informed that since last August in only one or two instances had any such illustrations appeared, and he had some ground for supposing that these may have been due either to inadvertence or to

misappreciation of what he had intended to convey, and hoped that after this statement it would not be necessary to refer to the matter again. (*The Times*, 13th March, 1907.)

Since that time we understand that not only has the rule laid down been generally observed by the Press, but that they have themselves voluntarily accepted and acted upon the suggestion made, so that illustrations even from sources obtainable outside the court have practically ceased.”

Understandings of the legal position in 1910 : Rayden

The first edition of *Rayden* was published in 1910, stating the “practice and law” as of “the first day of the Easter Sittings, 1910.” It gives us (p 6, paras 8-11, citations omitted) this interesting summary of the relevant practice:

“8 Power to sit *in camera* is inherited from the Ecclesiastical Courts which, however, so far as reported, appear to have only so acted in cases of nullity of marriage, for incapacity.

9 In cases where the ends of justice might be defeated, owing to the difficulty of obtaining the necessary evidence from witnesses in open Court, the Judges sometimes exercise their inherent jurisdiction, and exclude the public from the Court during the whole, or part, of the hearing.

10 Occasionally, when the details of the case are very unpleasant, the Judge clears the Court of women and children.

11 It is the practice to hear motions in Court [footnote: “usually at 11 o’clock on Mondays”]: Judges’ summonses are heard, with the same powers as if in open Court, in the Judge’s private room [footnote: “usually at 10.30 on Saturdays”] the Registrars also sit [footnote: “at Somerset House in the Strand”] during term time to hear summonses, and to dispose of other matters [footnote: “Registrars hear summonses on Tuesdays and Fridays at 11.30, and other matters by special appointment”].”

Rayden also printed (p 364; see also p 155) the standard form (Form No 75) of Registrar’s order used in nullity cases for the appointment of medical inspectors, which concluded with the words “And I do further order that this cause be heard *in camera*.”

As can be seen from examples of such orders contained in court files preserved in The National Archives – see, for example, the order dated 14 February 1911 in the court file for *Scott v Scott* (TNA J77/1029/1186) – these orders were drawn on pre-printed forms requiring only the insertion of the names and other details relevant to the particular case. Years after the decision in *Scott v Scott*, the court was still using these pre-printed forms including the words “And I do further order that this cause be heard in Camera.” Thus we can see from the court file in *C (otherwise H) v C* [1921] P 399, actually *Colman (or se Hankey) v Colman* (TNA J77/1691/2620), that the order for the appointment of medical inspectors made by the Registrar on 26 October 1920 was drawn on the pre-printed form but with the offending words “And I do further order that this cause be heard in Camera” struck through. The court

obviously had a stock of old forms, for this order was drawn on a form showing the pre-printed date as 189-.

Understandings of the legal position in 1910 : Dr Tristram's evidence to the Royal Commission

Dr Tristram, as we have seen, had appeared in both *C v C* and *A v A*, in the first case consenting to and in the second seeking a hearing in camera. Neither report contains any details of such submissions as he may have made. On 14 December 1910 he gave evidence to the Royal Commission.

The opening interchanges set the scene:

“42.245 (Chairman.) You are also one of His Majesty's Counsel? — Yes, I am a King's Counsel.

42.246 May I also assume I am right in believing you are the sole survivor of the original body of The Doctors Commons Bar? — I am.

42.247 You are really the only person who can tell us what the practice was in those days? — Yes.

42.248 Except so far as we could get it from books? — Yes.

42.249 You have prepared a short memorandum as to the practice in old Ecclesiastical Courts. May I read it and see whether there is any questions that should be asked you upon it? — Yes.”

A little later there was this very important and most illuminating interchange:

“42.254 You go on to say: — “Upon the pleadings in the case being filed in the Registry of the Court, witnesses were examined by one of the Doctors Commons Proctors, as Commissioner, either in London, or in any other place where the parties or witnesses were resident. The evidence was taken in private, and the depositions of the witnesses were filed in the Registry of the Court, copies of which were supplied to the Proctors of the parties to the suit.” That evidence was taken entirely by the Proctor, who was deputed to take it without the presence of any advocates or solicitors, or anybody but the witnesses? — Yes, but I should state during the preparation of the pleadings they were laid before counsel and they put interrogatories, the petitioner would put interrogatories, and the respondent would put interrogatories on the different cases, which the examiner would put to the witnesses.

42.255 The result was that he took their answers from questions he framed, and from the interrogatories? —Yes.

42.256 The ultimate record of that was sent to the judge, who never saw the witnesses? — No.

42.257 I do not know whether, looking back over it from this point of time, you think that was a satisfactory means of getting at the truth? — No, but it was considered to be a very fair mode of obtaining the evidence at that time.

42.258 Perhaps it would not be thought so now? — If the witnesses lived out of London the examiner was able to examine them out of London.

42.259 Then you go on: That was a practical way of excluding from publication anything that was at all of an offensive character? — Yes.”

For present purposes there are two things about this which are immediately apparent:

First, that the practice described by Dr Tristram had nothing whatever to do with the particular nature of nullity suits, nothing to do with what Hannen was later to call “public decency or morality”, and nothing to do with what, in the sense in which he was using the expression, Jeune was later to call cases where “justice cannot properly be done by hearing a suit in public”. It was simply the practice adopted by the ecclesiastical courts generally in all matrimonial suits. Indeed, as Fletcher Moulton LJ was later to point out in *Scott (otherwise Morgan) v Scott* [1912] P 241, 278, this was the practice in both matrimonial and testamentary cases: “The procedure was common to all.” It was, moreover, a practice under which “the judge ... never saw the witnesses” and where, if, during the hearing before the judge, a problem arose in relation to evidence “unfit to be published”, the remedy was not to clear the court but to avoid reading the “objectionable details” aloud.

Second, that the practice described by Tristram had been entirely swept away by the legislation governing the new court. Section 48 and Rule 33 mandated application of the practice of the common law courts and section 46 required witnesses to be “examined orally in open Court”, in other words before the judge.

Tristram's evidence then turned to what had happened in 1858:

"42.260 Then you state: "On the Divorce Act coming into operation in January 1858, it was mentioned to the judges of the Divorce Court that if the evidence in all divorce cases was taken in open court it might lead to the publication in the Press of objectionable matter, which was precluded by the practice of the Ecclesiastical Courts. The judges, however, held that it was desirable to adhere in that court to the rules relating to evidence that prevailed in the common law courts." I believe they did so because, if I recollect rightly, the Act of 1857 provided that the hearing should be in open court? — Yes. With regard to that I should add that a few days before the Act came into operation I met Mr Delane, the editor of the "Times," and he told me that he had consulted the sub-editors, and they decided that the only statement they would make in future would be to give the names of the advocates, the names of the parties, and what the charge was.

42.261 And the result? — Yes. He asked me what I thought of that. I said I thought it would be all that was necessary. Then I met Mr Delane a few days after the court was established, and he said he regretted very much to say that his suggestion had failed to take effect. He said he found that the other newspapers gave full reports of each case, and that in self-defence he was obliged to do it in the “Times.” I told Dr Phillimore, who was leader of the Bar, what had passed between the editor of the “Times” and myself, and he said he would put a question to the court on a motion day,

and he put a question. He asked Sir Cresswell Cresswell what would be the course with regard to publication of evidence, who said, "In nullity suits we have always the cases heard in camera." Then Dr Phillimore asked with regard to the other cases. Sir Cresswell Cresswell said, "I will speak to the judges, and mention it on next court day," and he spoke to the Common Law judges, and they said they thought the evidence should be given in open court, just as in other cases in the courts.

42.262 This is the section I had in mind, Section 46 of the old Act of 1857: "Subject to such Rules and Regulations as may be established as herein provided, the witnesses in all proceedings before the Court where their attendance can be had shall be sworn and examined orally in open Court." However, the result was, except in nullity cases and, I think, in children's cases with regard to custody of children, it was decided that the cases should be heard in open Court? — Yes.

42.263 I gather from what you have said that you think, and it was thought at the time, to be undesirable that details should appear in the papers? — Yes."

It will be recalled that Dr Phillimore had appeared in *Barnett v Barnett*.

Understandings of the legal position in 1910 : the Report of the Royal Commission (1912)

In relation to the question of what the law was (rather than what it should be) the Royal Commission expressed various views, some of them surprisingly tentative, which can usefully be compared with Rayden's statement of the practice. I can summarise what the Commission said as follows:

(1) It referred (Report, para 484) to "the very limited powers which exist in England of hearing cases in camera in the Divorce Court."

(2) It said (Report, para 497) that:

"It is the practice to take certain exceptional cases in camera, for instance, nullity cases on the ground of impotence. This practice has always existed in the Ecclesiastical Courts, which Courts seem to have acted on the principle that they had power to hear any case in private, if they chose to do so."

(3) It referred, without disapproval, to the decision of Sir Francis Jeune P in *D v D* [1903] P 144,

"in which, as we understand, he considered that, in the interests of decency, or in the interests of justice, where the case could only be properly tried *in camera*, he had power to close the court."

It quoted the President's view that:

"If justice cannot properly be done by hearing a suit in public, the court is justified and has power to hear it *in camera*."

(4) It went on (Report, para 498):

"It seems probable that, although there is no statutory power to close the court, if a trial cannot be properly conducted with decency and justice, the judge has inherent power to order the court to be closed, a power, however, which he would feel some difficulty in exercising unless he felt himself backed by express statutory enactment."

(5) It assumed (Report, para 502) that where there is a hearing *in camera*, this “necessarily involves the prohibition of publication.”

(6) It expressed, amongst its conclusions (Report, paras 508-9):

“It seems possible that a judge hearing a case or any proceeding has power to close the court for the whole or part of a case, if the interests of decency, morality, humanity, or justice so require. This power at present remains in a somewhat vague condition, and judges feel difficulty in acting upon it without express statutory provision ... A power of this character was exercised, as already stated, by the Ecclesiastical Courts, and is still exercised in nullity cases on the ground of impotence, which are not suitable to be heard in public.”

Dr Tristram’s evidence is referred to by the Royal Commission only briefly in its Report, where the position was summarised as follows (Report, para 472):

“In cases in the Ecclesiastical Courts, the evidence was taken in private before an examiner, and the notes of the evidence were placed before the judge at the hearing. Proceedings so conducted are usually too uninteresting to attract public attention, though the same cannot be said of the occasional actions of crim. con. which were brought in the Common Law Courts. We may refer here to the evidence of the late Dr Tristram.”

But Lord Gorell was too good a lawyer not to have been able to appreciate its significance in evaluating how, and the legitimacy of the process by which, the practice had developed under Wilde, Hannen and Jeune. May it be that Tristram’s evidence had been responsible, if only in part, for the note of hesitancy in the Report when it came to discussing *D v D*?

Comment

Pausing to take stock of all this, there are three very striking features of these developments between 1859 and 1904.

First, there was the abandonment, without, it might be thought, any satisfactory attempt to justify what was being done, of the very clear rule laid down by the Full Court in *H(C) v C* (1859) 29 LJ (P&M) 29). The gradual whittling away of that rule between 1864 and 1904, successively by Wilde and then more particularly by Hannen and later again and yet further by Jeune, led eventually to its complete emasculation. In the 45 years from 1859 to 1904 the court, as we have seen, had travelled from the rule that all cases must be heard in open court to acceptance that it might sit in camera in every kind of suit, including those for divorce, where “justice cannot properly be done by hearing a suit in public”, finally going so far as to justify a hearing in camera if needed for no more compelling reason than to save a witness from feeling “embarrassed.” And all this, it may be noted, against the background of a consistent Parliamentary refusal to legislate for privacy.

It is unsurprising that, when, for the first time, this development was exposed to close examination and rigorous analysis in *Scott v Scott*, one finds the striking language used by the Earl of Halsbury and Lord Shaw of Dunfermline which I quote below.

Secondly, this whittling away of the rule in *H(C) v C* was made without the slightest reference to either section 46 of the 1857 Act or the vital judgment of Bramwell B. Moreover, it was based in large part upon bare assertions or assumptions as to what the practice of the ecclesiastical courts had been, arrived at, so far as one can see from the reports, without any real attempt to explore the history and the authorities or to analyse their effect.

The extraordinary poverty of the entire forensic process is strikingly encapsulated in Bargrave Deane's despairing observation (*D v D, D v D and G* [1903] P 144, 147) that "There is nothing to shew on what grounds the old Ecclesiastical Courts heard suits for nullity of marriage in camera." And if he did not know, it is unlikely that anyone else (Dr Tristram apart) was much better informed, for he was the son of the great Dr Deane, who had appeared in *H(C) v C* and in *M(H) v H*, and he himself had specialised in divorce since 1885.

Moreover, it might be thought, the careful account Tristram had given the Royal Commission of the practice of the ecclesiastical courts did not begin to justify the later views and understandings of that practice expressed in particular by Hannen and Jeune.

It is utterly unsurprising that when for the first time these matters, including the practice of the ecclesiastical courts, were exposed to critical historical examination and proper analysis in *Scott v Scott*, initially by Fletcher Moulton LJ in the Court of Appeal and then in the House of Lords, the entire edifice created by all this judicial endeavour between 1864 and 1904 was found to be built on sand and wholly devoid of substance, and that it was in consequence all swept away. I must return to this below.

Thirdly, and despite all this judicial activity, it is striking how very little attention had been paid to what was to be the central issue in *Scott v Scott*: did the fact that a hearing took place in camera mean that publication of what had gone on was a contempt of court? There seems to have been only one reference in the authorities to this crucially important question (*Lawrence v Ambery*); and the answer – that it was a contempt – was mere unreasoned, dogmatic, assumption and assertion.

The Royal Commission takes evidence

His biographer tells us Gorell's overall approach to the work of the Royal Commission (de Montmorency, 165-166):

"It was part of Lord Gorell's scheme to secure once and for all exhaustive evidence with respect to the various fields of inquiry: religious, medical, social questions, and questions of the dangers and difficulties of practice were all to be investigated with the thoroughness only possible if the principal experts of the day were available for examination ... Lord Gorell felt that such an inquiry, conducted on an adequate scale, might affect permanently the outlook of the whole world in its attitude towards the status of marriage. In view of such a large issue Lord Gorell and the other commissioners felt it desirable that the evidence should be heard in public, and that the witnesses should be without exception of the first rank."

The analytical list provided by the Royal Commission (Report, para 6) of all the 246 witnesses it called more than bears this out. From the Press it called 12 witnesses including such distinguished figures as C Moberly Bell (*The Times*), H A Gwynne (*The Standard*), Sidney Low (*St James' Gazette*), C P Scott (*Manchester Guardian*), W T Stead (*Review of Reviews*) and J St Loe Strachey (*The Spectator*). It is also important to note that J A Spender, editor of *The Westminster Gazette* 1896-1922, was a member of the Royal Commission.

In relation to the question of publication of reports of divorce proceedings, the Royal Commission's care and attention to detail is exemplified by its thorough analysis of the legislation since 1857 (Report, para 478); by its analysis (Report, para 479) of the law and practice in Scotland and (Report, paras 480-483) of the law in no fewer than 17 foreign countries and colonies (Austria, Belgium, Denmark, France, Germany, Greece, Italy, The Netherlands, Norway, Portugal, Russia, Spain, Sweden, Switzerland and the United States; in the colonies, Queensland and New Zealand); and perhaps most strikingly of all by its remarkable tabular statistical analysis (Report, para 475) of newspaper reporting term by term from Hilary 1909 to Easter 1910.

This shows the number of columns of reports of divorce and matrimonial cases (the figures I quote are in each case for the entire period) divided between London Morning Papers: *Times* (105), *Daily Telegraph* (165), *Standard* (114½), *Morning Post* (39¾), *Daily Mail* (152½), *Daily Chronicle* (78) and *Daily News* (53¾); London Evening Papers: *Pall Mall* (4½), *Westminster Gazette* (13½), *Evening Standard* (39), *Globe* (24), *Star* (19¾), and *Evening News* (12¾); Provincial Papers: *Yorkshire Post* (60¾), *Bradford Daily Telegraph* (81), *Manchester Guardian* (33), *Liverpool Daily Post* (55¾), *Western Morning News* (21¼), and *Notts Daily Guardian* (57½); and Sunday Papers: *Dispatch* (84¾), *Umpire* (311), *Sunday Chronicle* (33¾), *News of the World* (174¼), *Lloyd's* (102¼) and *People* (188).

The domination of this market by the Sunday Papers, especially the *Umpire*, *People* and *News of the World*, will be noted; also, amongst all the others, the commanding position of the *Daily Telegraph* and *Daily Mail*. *Plus ça change*.

In the light of these statistics, it is interesting to read the evidence given by representatives of the Press as summarised by the Royal Commission (Report, para 493, citations omitted):

"The first witness was Mr A H Jeans, managing director of "The Liverpool Daily Post" and other Liverpool papers, who suggested that the newspapers should not be permitted to give the evidence in divorce cases, but simply the summing-up or judgment of the judge. This witness among other matters stated that which appears to be in accordance with the evidence of most of the witnesses who spoke on this subject, viz: that, on the whole, the reports have been given as inoffensively as possible by the more reputable journals, but that there is a class of paper – chiefly weekly penny papers which have mainly a working-class circulation — which gives great prominence to and pretty full details of such reports.

Mr Russell Allen, proprietor of "The Manchester Evening News", had no hesitation in saying that the proprietors of newspapers, who have a proper sense of their responsibilities, would welcome regulations, which would keep the reports of divorce cases within such limits as to be harmless to the public, without shielding the guilty parties from the publicity they deserved. He suggested that there should be an official reporter connected with the court, who would know what was proper to give, and to whom others might apply, and thus competition would be avoided.

Mr John Thomas Smith, Chairman of the Central London Branch of the National Union of Journalists, did not suggest direct interference with reporting, but thought that, if societies of newspaper owners and the various kindred organisations throughout the country are appealed to, they could do something to stop the publication of extremely offensive details.

Mr Charles Moberly Bell, the late managing director of "The Times", suggested that it would be possible for the Divorce Court to exercise an indirect but effective control over reports, if the publication of any such report were forbidden, unless signed by one of a corps of reporters licensed by the Divorce Court to report, and whose licence could be revoked.

Mr H A Gwynne, editor of "The Standard", thought that the greater number of journalists do not approve of legislation in matters which concern the conduct of their papers, and that the difficulties in the way of legislation will be so enormous as to render it almost impossible; would see no objection to the court closing its doors in any case of an offence of a sexual character; found, from inquiry among his colleagues and friends on the press as to what rules govern their conduct, that they are practically unanimous in keeping out anything of a sordid and filthy nature; thought that the restriction of publication to the judgment or summing-up would meet the case; thought it was on the lines of education that progress towards the elimination of obscene, filthy, and suggestive matter in the press will be best and most thoroughly attained; and said that, as far as he was concerned, he should be delighted to see all reports of these cases cleared away by law.

Mr Harold Hodge, editor of "The Saturday Review", proposed three alternatives, either no report, or a report of results, or a report supervised in some way, and he preferred no report.

Mr J S R Phillips, managing editor and editor-in-chief of "The Yorkshire Post" and its other papers, was generally against legislative restraint on publication, but was opposed to the publication of any matter which is obscene or indecent, and thought there may be an excess in the amount of publication of reports, and he would not deny that there is in some cases; he did not see how to limit it, without going further than he would think desirable, that is, how to limit it by legal means; it can be limited by editorial discretion; that is one way. He thought there ought to be a somewhat stricter rule in regard to the checking of the publication of indecent matter, and would support

any change in the law or any additional strictness of administration, which would deal with that all round.

Mr John St Loe Strachey, editor of "The Spectator", suggested that it should be the practice of the judge, whenever he is of opinion that the reporting of evidence or of statements by counsel would be injurious to the public interest and contrary to good morals, to indicate to the reporters and to all persons present in court that such-and-such testimony by witnesses or statements by counsel ought not to be published in the press or elsewhere, and that he would treat the publication of the passages as contempt of court.

Mr Sidney Low, formerly editor of "The St. James' Gazette", mentioned several alternatives, but ... said, "I suggest that the way out of the difficulty is to prohibit full publication by the newspapers and to substitute a brief official report. I think that is the way out."

Mr W T Stead, late editor of the "Review of Reviews", had no objection to the prosecution before a jury of any book, magazine, or newspaper which publishes obscenity, even in a privileged law report, unless it can be proved that without such obscenity the law could not be intelligently reported, but would otherwise rely on the force of public opinion and moral suasion and the discretion of the editor.

Mr C P Scott, editor of "The Manchester Guardian", while admitting that a very great deal is published which is to be extremely regretted and is extremely reprehensible, appeared to attach primary importance to the freedom of the Press, and thought that on the whole the disadvantage of any restriction would outweigh the advantage, and that all the suggestions made to the Commission seemed to him either undesirable or impracticable, but that the law against obscenity should be enforced.

Mr David Edwards, managing director of the Nottingham Daily Express Company, Ltd., and formerly general manager and editor of "The Daily News", favoured reports of divorce cases being published, giving anything that is of value from a legal point of view, or which might be of value in the case as governing certain aspects for reference in similar cases, and would have no personal objection to go the length of abolishing any report of any kind whatever of a divorce case, but does not advocate it."

It is interesting to contrast the view from the editorial chair with that of the seasoned journalist on the court press bench. Fenn's view – he finished his book *after* Sir John Bigham P and Bargrave Deane J had given their evidence to the Royal Commission (*Thirty-five Years*, pp 47-48, 289-290) – comes over as smugly complacent. He quoted with evident satisfaction (*Thirty-five Years*, p 287) what Sir Francis Jeune had said in the course of a published interview:

"so far as the reporting of the proceedings in the Divorce Division was concerned, instead of incurring his censure, the British Press deserved his praise for its presentation of the often sensational and unsavoury stories which are unfolded before

him. "I am perfectly satisfied with the Press," he said. "Their discretion is admirable, and I have never felt disposed to disapprove of a newspaper for over-reporting." He went further and gave reasons for his statement: "The Press is the voice of the country. Justice is a public thing, and the administration of justice should be given all publicity. If this were not done, how would the public ever know that litigants were getting their rights?"

Fenn was unenthusiastic about reform (*Thirty-five Years*, pp 290-292):

"Judges know how much the reporters give to the public, and also how much they let drop into discreet oblivion, without suppressing anything that can be reasonably held to be essential or desirable that the public should know. Now, this discretion is especially important, and requires to be exercised under a strong sense of responsibility, as well as self-respect, and with a large consideration.

The public should know that what is published in the leading newspapers regarding unsavoury matter is the merest bagatelle compared with the details which are eliminated. When they are printed it is, as a rule, because they are essential, because their omission, or even their material alteration, would entail, or imply, misrepresentation of facts. Every case is and has to be subedited at the fountain source before leaving the hands of skilled reporters.

No doubt, publicity is the great Court of Appeal. If it were unduly restricted, many a sinner would go unpunished. The policy of suppression gives rise to all sorts of conjectures, and it is not a policy to be commended in the interest of morality alone. Publicity is the great deterrent influence in regard to wrongdoing, and the "fierce light" of the newspaper report is dreaded by those whose deeds are evil.

At present the English Courts possess the confidence of every class of Englishmen, this to a great extent being due to the fact that justice is administered in the full glare of publicity. This is an inestimable advantage, and should not be lightly tampered with for the sake of a problematic good."

In relation to what he called "the suppression of names in divorce cases", Fenn was pointed in his criticism (*Thirty-five Years*, pp 304-305):

"Publicity is part and parcel of the system of English law. It is one of the chief deterrents to evil-doing; and one of the severest punishments that evil-doers have to face ...

Nowadays we seem to be getting away rapidly from the principle, or, worse still, modifying the principle in the most invidious way by using alphabetical letters to conceal the identity of witnesses. The motives which govern the Courts in allowing names to be suppressed are always sympathetic. But sympathy requires to be exercised with great circumspection when the interests of justice are at stake.

The custom is a direct incentive to the evildoer to embrace temptation and let severity take the consequences.

There are instances in which the Court grants an indulgence in regard to suppression of names, but there is no reason why it should degenerate into a common practice, especially in the Divorce Court where one might not like it to take root. The practice, if extended, tends to deprive testimony of the great incentive to truth — publicity, and if one shamefaced witness may remain anonymous to the world, why not all?”

This early critical reference to the “invidious” practice of derogating from the principle of publicity by anonymisation is noteworthy.

In the light of the stance that the judge was later to take in *Scott v Scott*, it is intriguing to read Fenn’s account (*Thirty-five Years*, pp 294-295) of what Farwell LJ had said at the last Lord Mayor’s Banquet in 1909:

“we do our work in public, in the fierce light that beats upon the Bench ... in the presence of reporters that sit to record all that we say ... To my mind, the great secret is that we stand for freedom and security, and that we act in public.

It will be an ill day for England if any of that freedom, or any of those rights of property, are handed over to any individual, or body of men, to be dealt with in secret, without appeal to any law, or any responsibility to any court of law. Star chambers are detestable and odious to the English race. It matters not who are the members of a Star Chamber. I would not trust the whole bench of bishops or judges with the powers of the Star Chamber, to act in secret and do as they thought fit.”

Yet Farwell was, seemingly, content to allow Bargrave Deane such powers.

It is interesting to contrast all this contemporary opinion with more modern understanding of what was going on. Janice Hubbard Harris in *Edwardian Stories of Divorce*, her interesting account of the ‘Edwardian story on divorce’, has an insightful analysis of the newspaper reporting – particularly by the Sunday papers – of Edwardian divorce cases, from which she draws three conclusions (*Edwardian Stories*, pp 44, 45, 61, 63, 64).

- First, that while “this kind of extended, intimate court report has great potential to demystify the routine practice of justice”, at the very same time it “theatricalise[s] beyond all human recognition every person and issue it touches.”
- Secondly, that what she calls “the reigning narrative on Edwardian divorce” was “primarily constructed and maintained through the peculiar English conjunction of imposing trial and widespread publicity.” What she calls “the mesh between the trial’s narrative dynamics and the long tabloid report” served, she says, two functions: (i) it “educate[d] Edwardian readers in the ways of the law” and (ii) it was “designed to maintain the reigning narrative on marriage and divorce ... [and its] two ideals, lifelong fidelity for England’s married citizens and open, even-handed justice for England’s courts.” She continues, “According to the reigning narrative, the Edwardian way of

conducting and publicizing divorce trials served the community's interests in obvious ways ... Because so much community good rides on conjugal stability, the state will try hard to prevent any marriage from being dissolved. With trials and tabloids as the means, it will make that dissolution frightening, expensive, public and humiliating."

- Moreover, and following on from the previous point, "the publicizing of divorce is crucial to the punishing of the guilty and the vindicating of the innocent."

She points out (*Edwardian Stories*, pp 89, 113), how, encouraged by Gorell – "this is so valuable, we ought to have it all" – the hearings "drew forth counterstories designed to undermine the reigning narrative." Although she does not go on to make the point in so many words, this "reigning narrative" was surely what Lord Gorell wanted to challenge and to dethrone.

The Commission recorded (Report, para 487) that "the views of 98 Chief Constables in England ... were, with one exception, unanimous in stating the deleterious effects, especially upon young persons of both sexes of the poorer classes, of the publication of the details of these cases."

I turn to the evidence given by the two judges of the PDA, Sir John Bigham P and Bargrave Deane J, and by the Lord Chief Justice, Lord Alverstone, formerly Sir Richard Webster QC (with only short gaps while the Liberals were in power, he had been Attorney-General from 1885 to 1900).

On 26 February 1910 Bigham gave evidence. He had succeeded Gorell as President on 10 February 1909 and was to resign, only days after giving his evidence, on 4 March 1910. In relation to publication of reports he said this (QQ 613-616):

"613 The next head to which you refer is the publication of reports. We should be glad to have your views? — Well, as I say, I never see the papers which offend in this connection. My newspapers are what I call the respectable newspapers. But there are newspapers, especially Sunday newspapers, which do offend, at least, so I am told, and I was told by the proprietor of one very well known Sunday newspaper that if his newspaper does not publish what he calls the spicy details he has complaints from his agents all over the country that the rival newspapers have got it all in, and that consequently they cannot sell his newspaper. I am not going to name the newspaper; it is not necessary to do that; but I have no doubt that it is true that these indecent and improper details are put into the newspapers in order to sell the newspapers. They are put in for the most sordid motives, not because it is necessary in reporting a case that they should be there at all, and those are the details I would have suppressed.

614 I do not know whether you were present yesterday when we had letters put in from various countries the laws of which either exclude all publication or give the court power to hear cases privately? — I think I did hear that matter referred to. I have a very strong opinion that it would be undesirable to suppress the reports, and I say so because of the anxiety that I know exists amongst the litigants themselves to keep the

cases out of the paper. That very anxiety convinces me that the fear of publicity helps to keep people straight, and I would not take the fear of publicity away from them.

615 Do you think that would be in the interests of the children of the marriage? — I think so. It is in the interests of the public generally. Of course, it is always a shocking and painful thing that these cases should come into court at all when there are children.

616 I am now asking about something which is in proofs which have not yet been circulated, I think. Have you any suggestion as to, or experience of, the improper use of the fact that there is publicity? — No, I have never heard of it.”

Later the same day Bargrave Deane gave evidence on the point (QQ 834-843):

“834 Then passing to the next matter, I should like to ask your views about the question of publicity. That is the question of reporting. It is not suggested, I think, that the trial should take place entirely with closed doors? — I think it is essential we should keep that which I think is a certain protection, namely, the publicity of the fact that two people are having their case tried, and that there is a decree at the suit of one, but I think any reports should be excluded.

835 Whether decent or indecent? — Whether decent or indecent. I do not think it is necessary to go into any details, except to say who was in the wrong, and who got relief, I think to that extent we must alter the law of privilege with regard to reporting.

836 Would you suggest power to hear in camera? — You have got that now, I think. If there is any evidence which is going to be given that the judge is informed is of such a character that it is not advisable that the general public should hear it — I have known it done all the time I have been at the bar — the judge has said: “Well, I think it advisable, and I must clear the court until this evidence is given.” That has been done with advantage, but I should go beyond that in the question of reporting divorce cases. I should not allow any details at all to be reported.

837 Do you think it is any real check upon immorality — that there is a fear of publicity? — I think there is a certain amount of check in it. I think a certain number of people would say: I am not going to do anything that will get me into the divorce court. I do not mean actually immorality, but conduct between the sexes, getting themselves into questionable places, and doing things that are doubtful. I think a lot of people hesitate and say: so and so will put such a construction on it. I think it is a protection. They do not like the idea of getting into the divorce court.

838 Then what is the advantage you would expect from not allowing any details? — I think that is a great protection against immorality. One knows perfectly well if you get a crime committed, and advertise it by publication, you will find somebody imitates it. There is nothing so bad as reading about immorality and crime for leading somebody else to do it.

839 With regard to children, do you think it right that they should be able to read reports of their parents' cases afterwards? — Certainly not. It is most fatal.

840 I see your note states "the well-conducted newspapers do not publish indecent details." Have you anything further to add? — No, beyond this. I know some newspaper proprietors, and I got that information from them — that it is working against the honest newspapers. A decent, respectable paper loses circulation because a less respectable paper gets the circulation instead of the good one by reason of publishing these improper details, and I think it is very difficult, unless you alter the law, to stop it, because these gentlemen have to earn what they can, and get the biggest circulation they can get, and what is the result? Well a certain class of the public will rush after these indecent reports, and a good newspaper suffers. You are not only doing good to the public, but to the good papers, by preventing the others from publishing details.

841 But, apart from the indecent details, you think it is not an advantage on the balance to publish any details of divorce cases? — I should do no more except to protect the innocent, and I will not say brand the guilty, but let the world know who is the innocent one.

842 That is the French system, of publishing the decree, and not the evidence? — I should go a little beyond decrees. I should like the papers to publish this sort of statement: Petition by A.B., defended or not by O.D., allegation of misconduct with B.F., result.

843 But no evidence? — No evidence at all. You must publish the result, or the public will be in ignorance as to A.B.'s or C.D.'s position, whether they were married or unmarried, or divorced or anything else."

Bigham was re-called to give further evidence on 28 February 1910, when this question was posed by the Archbishop of York:

"1382 On the question of publication. Before you leave us I should like to know whether you think the restriction of publication, even of some details, would have any bearing on the detection of perjury or collusion? — I do not think so."

Lord Alverstone CJ gave evidence on 1 June 1910 (QQ 15,535-15,557). The Royal Commission (Report, para 487) printed the most important passages in extenso:

"15,535 May I pass on to a very important matter, on which your experience will be of the utmost value; that is the question of the publication of divorce cases? — I have the strongest opinion about this. I have worked in a small way upon it for many years in connection with other people who have done more. We deal with this question from the wrong standpoint, I think. I consider there ought to be the fullest publication of the names of the people who have got into the Divorce Court, to use a popular expression, against whom a decree has been made; whether or not the names of people who have been found not guilty should be published is a difficult question.

It depends largely on the wish of the person. In many cases it would be a hardship to say a case had been brought against a man and he had been acquitted, because many people will not notice the acquittal, but will think where there was some smoke there was some fire. I am dealing with the guilty people. The right course is to publish as publicly as you like the names where they have been found guilty either as co-respondents, or as respondents. The other things that ought to be published are the opinions, the judgments of the court, in important questions of practice, and those will be absolutely free from any objection. They are for the guidance of the profession.

15,536 Those are allowed now? — They, of course, should be published. I only mention that because the question has come before us in connection with criminal law, as to how far there should be reports of such proceedings in the criminal courts, and the judges have resolved that the results of cases should be published, and that the opinion of the judge for the guidance of other people should be published. Once you have done that you do not want anything more from the point of view of publication. Now I come to the evil of it. I have had for years brought to my attention the mischief done by the reports in certain low-class papers of the details of divorce cases. You cannot touch them for indecency in the ordinary sense of the word, or for obscenity. There may be gross cases in which you might be able to, but I am speaking of those which do as much evil, I mean the accounts which are put in head-lines, ‘the ladysmaid’s evidence,’ and ‘the housemaid’s evidence,’ which is followed up in these papers by a detailed account of question and answer; of the servant going to the room and saying what she sees, and incidents which the prurient mind fastens on, which could do infinite harm to young people. It has been said in evidence before this Commission that cases have been known where absolute evil has been done by these stories being read by young people, and I cannot see the slightest ground for the publication.

15,537 The only ground suggested is that it is a deterrent to people? — I do not believe it for one moment. I am afraid there are people who do not mind their name appearing in the court. If it be a deterrent, it is not as much so as the fact of a person appearing in the black-list as being guilty under circumstances which attract nobody. I cannot understand how that publication can be a deterrent.

15,538 Your view is that the greater evil by far is the detailed accounts? — Yes. I do not agree about it being a deterrent to the person who has come to the court as a guilty person. It is not a deterrent. The mischief done to the young is incalculable, particularly to boys and girls between the ages of 14 and 18. This Commission has had accounts, I believe true accounts, of the terrible extent to which immorality does exist between people of that age. It is largely promoted by this sort of publication. Ideas are put into their minds, and there is nothing to be gained by it. I want to remind you of what happens. They do not report every case with all these details, but in some of the papers, I am sorry to say frequently the Sunday papers, those that come out on Sunday, you will find extraordinary disclosures, and then there will be one case which will be taken, and all these suggestive details — I do not use the word ‘indecent’ because the

mischievous is not done by the indecency of them, but by the suggestion. They are not obscene or indecent; very few of them are within the case of *Regina v. Hicklin* and those sort of cases, but the mischief is done by the suggestions that are made: I have not been able to understand what public use could be obtained by boys and girls or anybody, servants particularly, being allowed to read the details of some adulterous intercourse which has taken place at an hotel, or at some place which has to be proved for the purpose of the court. I have watched this, and I have never seen any advantage, and the best of the Press entirely agree with this view. They do not publish those things; it is only the papers that are cheap and do harm that publish the detail. Therefore it is not necessary in the administration of justice it should be done. We have never grappled with this evil with half the courage we ought to have."

One notes his Lordship's solicitude for the moral welfare of servants. The modern reader is inevitably reminded of the famous question posed to the jury by Mervyn Griffith-Jones opening for the prosecution in *R v Penguin Books Ltd*, the Lady Chatterley trial, in 1960 (see H Montgomery Hyde, *The Lady Chatterley's Lover Trial* (The Bodley Head, 1990), p 62):

"Would you approve of your young sons, young daughters – because girls can read as well as boys – reading this book? Is it a book you would have lying around your own house? Is it a book that you would even wish your wife or your servants to read?"

This long-lived thought tells us so much about one aspect of the legal mind.

I have quoted this evidence in some detail, to bring out the stark divergence of judicial opinion on the topic even between the two judges of the PDA. The President strongly believed that the reporting of such cases acted as a deterrent to private immorality – "the anxiety that I know exists amongst the litigants themselves to keep the cases out of the paper ... convinces me that the fear of publicity helps to keep people straight, and I would not take the fear of publicity away from them" – and, indeed, thought that this approach was in the interests of the children of the marriage! Bargrave Deane was less persuaded of the deterrent argument and, on the contrary, thought that *not* publishing the details, as he recommended, was "a great protection against immorality" on the ground that there is "nothing so bad as reading about immorality and crime for leading somebody else to do it." He was emphatic that it was "most fatal" that children should be able to read reports of their parents' cases.

The Lord Chief Justice was vehemently in favour of publication of the names of the guilty and of "the judgments of the court, in important questions of practice." He was equally vehement in opposition to any greater reporting. He ridiculed the idea that it acted as a deterrent to private immorality and waxed eloquent on the dangers to the young of such reporting for, in his mind, it promoted immorality in boys and girls between the ages of 14 and 18.

In the light of modern approaches to the problem it is important to understand the way in which this debate was framed. A primary concern was the perceived need to protect *public morals*, by shielding the vulnerable and impressionable – servants and children and what Bargrave Deane delicately referred to as "a certain class of the public" – from the publication

of salacious detail. On this issue there was a clear difference of opinion between the judges – all of whom favoured at least some degree of prohibition – and a significant body of newspaper representatives who were opposed in principle to restrictions on the publication of the details of what went on in court. There was equal focus, although as we have seen judicial opinion on the point was much divided, as to the effect of publication on *private morality*, the deterrent effect of potential publicity on those who might otherwise be tempted to stray from the moral path.

But apart from the impact, one way or another, of publicity on *morality*, public or private, the impact of reporting on the parties and their children seems to have been of peripheral concern to the judges. There was general agreement that, to use a modern expression, the guilty should be ‘named and shamed’ and there is the interesting view of the Lord Chief Justice about the possible unfairness of publicity to the innocent, but there is no reference to publicity as the cause of personal or private embarrassment. And only Bargrave Deane expressed strong views as to the damaging effect – “most fatal” – of publicity on the parties’ children. (The President, as we have seen, had expressed precisely the opposite view.)

The Royal Commission deliberates

As we have seen, the Royal Commission heard its last witness on 21 December 1910. Gorell then applied himself to completing the *Notes as to the Principles upon which Divorce Legislation should proceed* which he presented to his fellow Commissioners on 17 May 1911 and which his biographer reprints (de Montmorency, pp 191-291), and to drafting the Report of the Royal Commission which, we are told (de Montmorency, p 146), he finished and got ready for circulation in December 1911, just about the time Bargrave Deane was hearing *Scott v Scott*. On 30 January 1912, the draft report was approved by a majority of the Commission (in the event there was to be a minority report by the Archbishop of York, Sir William Anson, the distinguished legal academic and, since 1881, Warden of All Souls College Oxford, and Sir Lewis Dibdin, Dean of Arches) and on 1 July 1912 Gorell’s revised draft was approved. The work, we are told, was completed on 8 July 1912 (de Montmorency, pp 147, 149). Although by then the Court of Appeal on 6 July 1912 had given judgment in *Scott v Scott*, it was, as J A Spender observed in his Note (Report, p 170), “delivered too late for its consideration by the Commissioners as a whole.”

Interlude : *Scott v Scott* at first instance

In the meantime, as we have seen, the petition in *Scott v Scott* had been filed on 13 January 1911; on 14 February 1911 the Registrar had made the order in common form directing a hearing in camera; on 13 June 1911 the suit was heard in camera by Sir Samuel Evans P; and on 4 December 1911 the notice of motion dated 23 November 1911 alleging contempt came on for hearing by Bargrave Deane J: *Scott v Scott* [1912] P 4, (1911) 28 TLR 127, (1911) 81 LJ(P) 14, (1911) 105 LT 192.

It is apparent from the reports, in particular the report in 28 TLR 127 (which has the most detailed report of the argument), that Bargrave Deane was never in any doubt that the petitioner and her solicitor had been guilty of contempt of court by circulating copies of the official transcript of the hearing before the President, even though circulation was limited to

only three people and for private purposes. From the very outset, her counsel, Barnard KC, had an uphill struggle. The report in 28 TLR 127 says it all:

“Mr BAYFORD having moved the Court,

MR JUSTICE BARGRAVE DEANE – What is the petitioner’s excuse, Mr. Barnard?”

When Barnard made the key point that the order directing a hearing *in camera* had said nothing about her not informing others of what had happened during the hearing, the judge’s retort was sharp and, in effect, indicated the answer to his own question: “What is the object of trying cases *in camera*?”

“Mr BARNARD – To prevent unpleasant details being published.

MR JUSTICE BARGRAVE DEANE – But this lady has divulged details to various people when she told them what had happened ... The publication is the sending of the details to some one other than the parties themselves.

Mr BARNARD. – It is not publication for a party to say to a friend “the truth was so-and-so, and the evidence given was so-and-so.” It is different to publication in a newspaper. Why should not a party to a suit be permitted to explain matters to his friends and relations?”

Barnard struggled on, but got nowhere:

“MR JUSTICE BARGRAVE DEANE – ... I do not suggest that the petitioner committed it intentionally, but I have no doubt that there has been contempt.

Mr BARNARD – Then on behalf of the petitioner I apologize to the Court for her contempt, committed unwittingly.”

Giving a short extempore judgment, Bargrave Deane said (I take this from the report in [1912] P 4; in the House of Lords Lord Atkinson gave a slightly different version: [1913] AC 417, 466-467):

“It is manifest that the reason for trying such unhappy cases as this *in camera* is the protection of both parties, inasmuch as the details of evidence are of a very delicate and private character. The medical evidence and the evidence of the petitioner in particular is of such a nature that it ought to be kept absolutely private and not disclosed to any one ...

One of the main objects of trying these unhappy cases *in camera* is that the evidence should be kept secret: the result may be made known, but none of the details may be published.

It is gross contempt of Court for people to go spreading about the country particulars of that which is done *in camera*. It is gross contempt of Court to report anything heard *in camera*. It is the same even in regard to reporting summonses heard in chambers, or in Court as in chambers, which is, in effect, the same thing, unless by special leave of the judge.

... every one must clearly understand, from this time forward, that what is done in camera is not to be reported or published.”

No authorities seem to have been referred to, indeed the judgment began with Bargrave Deane remarking that “I am not sure that there has ever been a similar application.” Perhaps he had forgotten his own appearance in 1891 in *Lawrence v Ambery*.

Interlude : *Scott v Scott* in the Court of Appeal

We are all familiar with the ringing statements of the high constitutional importance of open justice which are to be found in *Scott v Scott*; in particular, in the dissenting judgment of Fletcher Moulton LJ in the Court of Appeal (vitaly important as foreshadowing so much of what was later to be said in the House of Lords) and in the famous speech of Lord Shaw of Dunfermline in the House of Lords. These are two great judicial declarations which ring down the ages. But for present purposes a narrower focus is necessary.

On appeal by the wife to the Court of Appeal (the notice of appeal was dated 15 December 1911) and further appeal to the House of Lords, there were three issues: (1) Did the court have jurisdiction to make the order that the case be heard in camera? (2) If so, did the order made by the Registrar prevent the subsequent publication of the proceedings? (3) Was the order made by Bargrave Deane J in a ‘criminal cause or matter’ so as to preclude any appeal to the Court of Appeal?

The full Court of Appeal by a majority (Cozens-Hardy MR, Farwell, Buckley and Kennedy LJJ, Vaughan-Williams and Fletcher Moulton LJJ dissenting) answered all three questions in the affirmative and dismissed the appeal. The House of Lords (Viscount Haldane LC, the Earl of Halsbury, Earl Loreburn, Lord Atkinson and Lord Shaw of Dunfermline) unanimously allowed the appeal, answering all three questions in the negative.

I need not consider the third question any further, interesting though it may be to the black letter lawyer mired in the technicalities of the law of contempt. For present purposes it is the first two questions which are important.

The law reporter tells us ([1913] AC 417, 419) that the appeal was initially argued before Cozens-Hardy MR, Fletcher Moulton and Buckley LJJ but was “ultimately ordered to be re-argued before the Full Court of Appeal.” Fletcher Moulton’s son, in his biography of his father, H Fletcher Moulton, *The Life of Lord Moulton* (Nisbet and Co Ltd, 1922), p 65, reveals what happened:

“The case came to the Court of Appeal, and the appeal would have been dismissed without even calling on counsel for the respondents, but for Lord Justice Fletcher Moulton expressing his desire to hear the case in full (a course which by an unwritten law is always followed unless the court are unanimous), and he finally convinced his colleagues that the points raised were of such importance that the hearing should be taken before the full court of six judges.”

The rest is history. We have so much to be grateful for to Fletcher Moulton: had it not been for his pertinacity his monumental judgment would not have been written and this truly landmark case would never have reached the House of Lords.

The appeal was argued on 4 and 6 May 1912. Judgment was given on 6 July 1912.

As reported in [1912] P 241, the judgments fill 49 pages of the law report, the vast bulk of which, no fewer than 39 pages, are taken up with the dissenting judgments of Vaughan Williams LJ (14 pages) and Fletcher Moulton LJ (25 pages). The three judgments of the Master of the Rolls, Farwell LJ and Buckley LJ (Kennedy LJ merely agreed with the majority) between them take up only 10 pages, much of that, in the nature of things, relating to the issue with which we are not concerned.

The majority's treatment of the other two issues was fairly brief, almost perfunctory. On the first issue (jurisdiction to order that the case be heard in camera) they treated the law as having been correctly laid down in *A v A* and *D v D*: see in particular the Master of the Rolls at p 246 and Farwell LJ at p 288. On the second issue (did the order prevent publication) they took the same view as Bargrave Deane, though the only authority they referred to in support of the proposition was the decision of North J in *In re Martindale* [1894] 3 Ch 193, a wardship case: see in particular the Master of the Rolls at p 247 and Farwell LJ at p 289.

Much of Vaughan Williams LJ's dissenting judgment was taken up with a remorseless demolition of the majority's view on the third issue ('criminal cause or matter'). But in relation to the matters which are our present concern he was clear and emphatic (p 259):

"In re Martindale is only an authority in respect of the jurisdiction of the King as paterfamilias in respect of wards, and *D v D* is based entirely on an assumed general right of all Courts and judges to hear any case in their discretion in private, a proposition for which there is, as far as I know, no authority."

He went on to observe that Jeune had not quoted section 46 of the 1857 Act.

Without in any way disparaging Vaughan Williams LJ's important judgment, it is, however, to the great dissenting judgment of Fletcher Moulton LJ, later to be so handsomely vindicated in the House of Lords, that we must direct our primary focus. In common with Vaughan Williams, he engaged in remorseless demolition (pp 266-270, 284-286) of the majority's view on the issue of 'criminal cause or matter'. As to that, I say no more.

For present purposes I can start with his preliminary point (pp 265-266) that the practice in relation to "the wholly different jurisdiction" in respect of wards and lunatics was irrelevant to the present case:

"There is no analogy between matters coming within such a quasi-parental jurisdiction and actions or suits in the High Court. The parties here stand in no such relation to the Court. They are persons who are sui juris and who are merely asserting or defending their rights and are capable of doing so."

The core issue in *Scott v Scott* was what the words directing that the suit be heard in camera actually meant, and it was to this that he directed particular attention (pp 270-275). It was Fletcher Moulton who articulated the key insight that, as he put it (pp 271, 272):

“The language of the order provides for privacy at the hearing. It has nothing to do with secrecy as to the facts of the case ... the order that the case should be heard in camera has always been intended to relate and has in fact related to the mode of conducting the hearing and to nothing more.”

In other words, such proceedings were private, they were not secret; an order for a hearing in camera went to the mode of trial, not the reportability of what had happened during the hearing. The same of course applied to a hearing in chambers or, to use modern terminology, in private. A hearing in private is just a mode of dealing with judicial business and does not impute secrecy to the proceedings.

Fletcher Moulton LJ was pitiless in his demolition of Bargrave Deane J’s intellectually lazy and simplistic decision (pp 271–272):

“The language of the order provides for privacy at the hearing. It has nothing to do with secrecy as to the facts of the case. The learned judge interprets it as enjoining such secrecy. He realizes that having done so he is logically compelled to put all hearings in chambers on the same footing, and he therefore declares that under the procedure of our Courts there is an absolute obligation to perpetual secrecy as to what passes at the hearing of all summonses in chambers. No one has ventured to say before us a single word in defence of this part of the judgment. It is not too much to say that it is ludicrously at variance with the actual practice. Many thousands of summonses in actions are heard in chambers in the course of each year, and during all my experience at the Bar and on the Bench I have never heard it suggested that there is the slightest obligation of secrecy as to what passes in chambers. Everything which there transpires is and always has been spoken of with precisely the same freedom as that which passes in Court. Yet, as the judge acknowledges, the phrases “in camera” and “in chambers” are synonymous. We start, therefore, from the datum line that the judgment which we are asked to declare unappealable is confessedly based on reasoning which makes the whole lives of those who are professionally engaged in litigation one long series of criminal contempts of Court.”

He went on (p 275):

“conclusive proof that the order cannot bear the interpretation contended for by the respondent is derived from an examination of the origin of such orders and the jurisdiction under which they are made. The result of such an examination is in my opinion to establish beyond doubt that the order that the case should be heard in camera has always been intended to relate and has in fact related to the mode of conducting the hearing and to nothing more.”

To that examination he next turned, considering, first (pp 275-277), the jurisdiction of the Court for Divorce and Matrimonial Causes and the associated case law and, secondly (pp 277-

282) the way in which the predecessor ecclesiastical courts had exercised their jurisdiction. After a detailed and most interesting historical examination of that he concluded (p 281):

“There is nowhere the slightest suggestion or trace of any attempt on the part of the Court to enforce secrecy either on the parties to the suit or on anybody else as to the matters discussed at the hearing. On the contrary it is abundantly evident that neither in the judgments of the judges nor in the reports published by the various reporters is there any difference whatever in the treatment of cases tried in camera and of those which were not so tried.”

He concluded (p 282) that:

“the only conclusion to which one can come is that the order that the hearing should be in camera was recognized as relating only to the mode of conducting the hearing and had no reference to subsequent publication.”

He then turned to section 46 of the 1857 Act, noting (p 282) that it had not been referred to in any of the cases and saying that “I entirely fail to see how this is reconcilable with the power to order that the hearing shall be in camera.”

Finally, for present purposes, he turned (p 282) to consider the contention that “all branches of the Supreme Court have jurisdiction to hear cases in camera if they think fit to do so,” a contention which he dismissed as being “against the weight of authority and ... to my mind a most dangerous one.” He referred approvingly to the judgment of Bramwell B in *H(C) v C*, adding (p 283) that “in such a matter it would be hard to find a judge whose opinion is entitled to greater weight.” Of *D v D* he said that it “does not support the contention that the Court has a general power to hear cases in camera.” He proceeded (p 284) with this withering observation:

“The order in the present case was not made by the judge and was not based on any consideration of the facts of the case. It was made in chambers by the registrar as a matter of course ... There is therefore no pretence for saying that it was or purported to be an exercise of any such inherent power in the Court depending on the special facts of the case.”

Be that as it may, he went on, referring to the practice of the ecclesiastical courts:

“there is no trace either in reports or books of practice that it affected anything but the mode of conducting the hearing.”

His conclusion, praying in aid “principle ... precedent, and ... legal history,” was that:

“Under such an order the public are excluded from the hearing ... and the order is then entirely complied with and is exhausted ... But the Court has nothing to do with the action of the individual parties when the suit is over.”

The proceedings for contempt, he said (p 286), had been “misconceived from the beginning.”

Earlier in his judgment, Fletcher Moulton had dealt at some length, and in strikingly powerful language, with the petitioner’s right to disseminate the materials she had circulated and the

constitutional impropriety of any judicial attempt to prevent her doing so. The passage (pp 272-274) deserves to be read as a whole, but I content myself with two extracts:

“in my opinion it is often not merely a solace but a duty which a man owes to himself and to those about him to inform them fully of all that has passed in these inexpressibly painful cases. It may be vital to him to clear away misconception in the minds of those who are dear to him or whose good opinion he values, and to obtain from them the sympathy and support that he needs. And I own that, not only as an individual but as a member of the Judicial Bench, I rebel against the suggestion that according to English law he may do this only so far as it may accord with the notions of some judge who, as such, has no more authority to act towards him as a moral director in his behaviour in life after the suit is over than has the man in the street.

... The same considerations apply to a defendant who is unsuccessful. The Court has the right and the duty to decree the proper relief against him, but it can do no more. It cannot add to that relief directions or commands as to his future conduct. If they are not part of the relief itself they are pronounced without authority.”

The Royal Commission reports

It is time to return to the work of the Royal Commission.

As it recorded (Report, para 486), the Commission was faced with a diversity of opinion:

“Two views were brought before us. One that the publication of reports of divorce and matrimonial cases is unnecessary and undesirable, and bad for the country. Several important witnesses, however, suggest that the anticipation of publication has little, if any, deterrent effect upon the commission of acts of immorality, though it may have an effect upon the course of the proceedings in court. The other that publication is in the general interest, and that the fear of public exposure is a deterrent to the commission of acts of immorality.”

Expressing its own view, the Commission said (Report, para 494):

“With the evidence before us, we take it as established that the evils of excessive publication are real and serious. When we come, however, to consider the remedies, we are confronted with a great variety of opinions. On the one hand, it is admitted that the liberty of the Press should be exercised for the public benefit, and is not so exercised when it is used to disseminate among the masses of the people literature of a demoralising tendency ; on the other hand, there is a genuine anxiety lest, in seeking to cure this abuse, we should obstruct the free play of a healthy public opinion.”

It rejected (Report, paras 500-501), as being neither practicable nor desirable, proposals for “(1) The exercise of discretion by the judge as to what should be reported, which would involve revision by him of the reports; (2) revision of the reports by an official appointed for the purpose; (3) reporting by official reporters; (4) reporting by licensed reporters.” It went on (Report, para 502) to list the following as “the only practicable alternatives, which can profitably be considered”:

- “(1) Hearing in camera, which necessarily involves the prohibition of publication.
- (2) Hearing in open court, with prohibition of publication.
- (3) Hearing in open court, with prohibition of all reports, except a record of the names of the parties, the charges made, and the result.
- (4) Hearing in open court, without prohibition of publication, but with restraint of such publication as is beyond all necessity in the public interest and is deleterious to public morals.”

It then explained (Report, paras 503-505) why it did not recommend any of the first three. Its reasoning in relation to the first (Report, para 503) is interesting:

“we think that it is opposed to general English sentiment, and we do not recommend its adoption, except in cases which are at present heard in camera, and in other cases which, if our recommendations be adopted, ought to be heard in camera, e.g., nullity on the ground of non-disclosed disease.”

It then came to its conclusion (Report, para 506):

“The fourth method suggested would, however, in our opinion, meet the difficulties of the matter, and the only question then would be in what manner and to what extent should restraint be imposed.”

In answering that question, it then proceeded to make four suggestions:

The first (Report, paras 508-510) was that “power to close the court for the whole or part of a case, if the interests of decency, morality, humanity, or justice so require” should be expressly conferred by Statute.

The second (Report, paras 511-513) was that in relation to “cases in which portions of the evidence, correspondence, documents, or speeches may be unsuitable for publication in the interests of decency or morality ... statutory power should be given to a judge to order in court during the conduct of a case or proceeding, or at its conclusion, that the portions of the evidence, &c., of the character referred to must not be reported or published.” In relation to both this and the previous suggestion, the Commission added (Report, para 513) that “The ground for closing a court, or of making such an order as aforesaid, should be stated by the judge at the time” and that “The judge in exercising those powers should have regard to the possible effect on the character of individuals who may be brought into the proceedings.”

The third suggestion (Report, para 514) was that “there should be no publication of the report of a case or proceeding until after it is finished.”

The fourth suggestion (Report, para 515) was that “publication of pictorial representations, whether produced from photographs, drawings, or otherwise, of parties, witnesses, or others concerned in divorce and matrimonial cases should not be permitted.” This, as it pointed out, reflected the President’s pronouncements in 1906 and 1907 and “therefore, will only declare what is now commonly acted on, but will prevent the publication of these illustrations by anyone who chooses to depart from the course adopted by the Press generally.”

Breach, it recommended (Report, para 516), should be punishable as contempt of court. The Commission ended on this somewhat plaintive note (Report, para 519):

“If it should be found that the provisions we have proposed have not the effect which we anticipate, it may be necessary for the Legislature to strengthen the law further in the direction of prohibiting reports which are deleterious to public morals.”

Given the modern ‘cult of anonymity’, as I shall refer to it, it is of interest to note that, from beginning to end, there was no suggestion by the Commission that anonymisation was a solution to the problems it had identified. On the contrary, the focus of the Commission’s thinking was to restrict publicity “in the interests of decency or morality” and to close the court “if the interests of decency, morality, humanity, or justice so require.”

It may be noted that on this topic, the Minority (Report, p 191) concurred in the recommendations of the Majority Report.

Gorell’s biographer tells us (de Montmorency, pp 179-180) how:

“The need for the change in the law was strongly felt by Lord Gorell. He knew well the terrible harm of such publications, and he argued with all his well-known power for this change in the law. Could he have foreseen the regrettable lengths to which publication has gone in the numerous and unhappy divorce suits which have followed the war, it is probable that he would have urged that the matter should be made the subject of special and separate legislation.”

That, it may be noted, was written in 1920, before the excesses culminating in the lurid reporting of the *Russell* divorce case in 1922.

In a Note (Report, p 170) J A Spender made some important additional points:

“In assenting to the proposal that the “inherent jurisdiction,” which the Courts now claim, of hearing cases in camera should be made statutory, I attach the utmost importance to the definition and limitation of this jurisdiction by Statute, that the Courts should not slip into the practice of using it for the convenience of parties who desire to avoid publicity in cases presenting no exceptional features. The recommendation that the Judge should be required to state his ground for closing the Court is, in my view, an essential safeguard, and if the grounds are so defined by Statute that the parties will not desire to have recourse to them unnecessarily, I do not think that any unforeseen extension of this power need be apprehended. In any case, since the doctrine of an “inherent jurisdiction” to close the Court has been set up, and is implied in the present practice of the Court in nullity cases, it is desirable that it should be defined by Statute.”

He added:

“As regards publicity in general, I rely on the recommendation that there should be no reports in the public press, until a case is concluded, to correct the chief part of the abuses alleged against reporting, as at present practised. This, I hope, will discourage long and detailed reports running, like a serial story, from day to day, with the

accompanying bills, headlines, and sensational incidents. On the other hand, all that is valuable in publicity will remain unimpaired, and the public supervision of the Courts which will be more and not less important if the recommendations made by the majority of the Commissioners are adopted, will continue as hitherto.”

The Commissioner’s Report made no explicit reference to *Scott v Scott*, though one can only assume that the assertion (Report, para 502(1)) that a hearing in camera “necessarily involves the prohibition of publication” was at least in part based on Bagnall Deane’s judgment at first instance. Spender, in contrast wrote powerfully about the decision in the Court of Appeal assumption (Report, p 170):

“I wish to add, however, that in any dealing with this subject it will be incumbent on the Legislature to take careful steps to guard the interests of the parties, which seem to me to be seriously threatened by the decision given in the Court of Appeal (July 6, 1912) in the case of *Morgan v. Scott*. In that case it was decided by a majority of four Judges to two that a lady who had obtained a transcript of the shorthand-writer’s notes of a case heard in camera and forwarded it to members of her family was guilty of contempt of Court. In dissenting from this judgment, Lord Justice Fletcher Moulton described it as “a serious encroachment upon personal liberty,” and energetically protested against the claim of the Court to “control the personal acts of litigants after the conclusion of the suit, except to enforce the relief granted.” Apart from the important legal principle here at issue, it seems to me clear that, as the Lord Justice contends, the most serious injustice may be done to the parties, if at the conclusion of a case heard in camera they are to be denied access to the records of the Court or prevented from communicating them to friends, relations, and others, whose good opinion may be of importance to them. It is, therefore, in my view, of the highest importance that the Legislature should take care that restrictions on publicity, which may be deemed necessary in the interests of public decency, are not liable to be interpreted as a rule of secrecy which may be imposed on the parties by the Court, when the proceedings are over.

The Judgment in this case was delivered too late for its consideration by the Commissioners as a whole, and it may yet be reversed on appeal to the House of Lords; but it raises a question of such obvious relevance to a portion of our report that I feel it necessary to add this note, in case the assumption holds that the law is what the Court of Appeal has decided it to be.”

Spender’s observations were prescient.

Scott v Scott in the House of Lords

When *Scott v Scott* reached the House of Lords, their Lordships unanimously reversed the decision of the Court of Appeal and, in substance adopting the approach of Vaughan Williams LJ and Fletcher Moulton LJ, held that (and I summarise the headnote) the Probate, Divorce and Admiralty Division had no power, either with or without the consent of the parties, to hear a nullity suit or other matrimonial suit in camera in the interest of public decency, that the order to hear in camera had been made without jurisdiction and that the order, assuming

that there was jurisdiction to make it, did not prevent the subsequent publication of the proceedings: [1913] AC 417.

It is noticeable that much more attention was paid in the House of Lords than had been paid by the majority in the Court of Appeal to two fundamental issues: the form of procedure before 1858 in the ecclesiastical courts and the case-law between 1859 and 1904 (see in particular Viscount Haldane LC (pp 432-436) and Lord Shaw of Dunfermline (pp 469-475, 478-480). The outcome was the complete vindication of Fletcher Moulton LJ.

The House of Lords unanimously endorsed the correctness of the views expressed by Bramwell B in *H (C) v C* (1859) 29 LJ (P&M) 29. The House also asserted, again unanimously, that so far as concerned its powers to sit in camera or in private, and this whether in nullity cases or in any other type of case before it, the Probate, Divorce and Admiralty Division stood in principle in no different position than the Queen's Bench and Chancery Divisions: see Viscount Haldane LC (pp 434, 436), Earl of Halsbury (p 443), Earl Loreburn (pp 446-447), Lord Atkinson (pp 462-463) and Lord Shaw of Dunfermline (pp 469, 475 and 478-480). There is no need to quote length everything said by their Lordships on the point. Three short passages will suffice for present purposes. Viscount Haldane LC said (p 436):

"As to the proposition that the Divorce Court has inherited the power to hear in camera of the Ecclesiastical Courts, I am of opinion that, since the Divorce Act of 1857, it has been untrue of every class of case, and not merely of suits for divorce strictly so called. I am in accord with the reasoning of Bramwell B, in the case I have already referred to, which led him to the conclusion that the Court which the statute constituted is a new Court governed by the same principles, so far as publicity is concerned, as govern other Courts."

Earl Loreburn said (p 447):

"... the Divorce Court is bound by the general rule of publicity applicable to the High Court and subject to the same exception."

To the same effect, Lord Shaw of Dunfermline said (p 475):

"... in my humble opinion these sections of the Act of 1857 were declaratory in another sense. They brought the matrimonial and divorce procedure exactly up to the level of the common law of England. I cannot bring myself to believe that they prescribed a standard of open justice for these cases either higher or lower than that for all other causes whatsoever. And it is to this point accordingly that the discussion must come. The historical examination clears the ground. So that the tests of whether we are in the region of constitutional right or of judicial discretion – of openness or of optional secrecy in justice – are general tests ... The old private examination of witnesses is abolished; the new system is an open system."

The House of Lords identified three categories of case recognised as 'exceptions', even if not all properly so called, to the general rule that all hearings must take place in public: see Viscount Haldane LC (pp 437, 440), Earl of Halsbury (pp 441, 443), Earl Loreburn (pp 445, 447-448), Lord Atkinson (pp 450-451, 462) and Lord Shaw of Dunfermline (pp 481-484). The first

category was cases involving children and the second cases involving lunatics. These were not true exceptions to the rule because the court was exercising a paternalistic, quasi-domestic and essentially administrative jurisdiction. The third category was cases involving secret processes or confidential information, where the effect of publicity would be to destroy the very subject-matter of the litigation.

They were clear, however, that the court was not justified in sitting in camera merely out of feelings of delicacy, or because hearing the case in public might be painful, humiliating or deterrent either to parties or witnesses, or because the evidence was of an unsavoury character: see Viscount Haldane LC (pp 438-439), Earl of Halsbury (p 442), Earl Loreburn (p 447), Lord Atkinson (p 463) and Lord Shaw of Dunfermline (pp 484-485).

They also took the same view as had Fletcher Moulton about the constitutional impropriety of restraining the petitioner's right to speak out. The same views as those expressed by Fletcher Moulton are to be found also in the speeches in the House of Lords of Earl Loreburn (who at p 449 expressly associated himself with the Lord Justice) and Lord Shaw of Dunfermline. Earl Loreburn said (p 444):

"... even assuming Bargrave Deane J had full power to direct a hearing in camera and to treat it as an order for perpetual silence, he was wrong in treating as a contempt of court the publication by Mrs Scott in good faith of the true evidence in justifiable defence of her own reputation and happiness."

And he went on (pp 448-449) to comment:

"The right of this lady to tell the truth and to furnish the best evidence of the truth in defence of her own character and reputation is inalienable, and cannot lawfully be taken away by any judge. It is but an elementary right, though if the claim of right be merely put forward as a pretext to cover some malicious communication it could not prevail. There is no more difficulty in deciding whether a particular case comes within this line or lies outside it than in deciding whether there has been express malice in uttering defamatory matter on an occasion of privilege. If the communication be made in good faith and in fulfilment of any social or moral duty to oneself or any one else, it cannot be either prohibited or punished."

Lord Shaw of Dunfermline said much the same (p 484):

"... the judgment of Bargrave Deane J cannot be sustained. It was, in my opinion, an exercise of judicial power violating the freedom of Mrs Scott in the exercise of those elementary and constitutional rights which she possessed, and in suppression of the security which by our Constitution has been found to be best guaranteed by the open administration of justice. I think, further, that the order to hear the case in camera was not only a mistake, but was beyond the judge's power; while, on the other hand, the extension of the restrictive operation of any ruling – that a case should be heard in camera – to the actions of parties, witnesses, counsel, or solicitors, in a case, after that case has come to an end, seems to me to have really nothing to do with the administration of justice. Justice has been done and its task is ended; and I know of no

warrant for such an extension beyond the time when that result has been achieved. It is no longer possible to interfere with it, to impede it, to render its proceedings nugatory. To extend the powers of a judge so as to restrain or forbid a narrative of the proceedings either by speech or by writing, seems to me to be an unwarrantable stretch of judicial authority.”

The aftermath to the Royal Commission

The depressing aftermath to the Report of the Royal Commission has been described by Cretney (*History*, pp 213-229). Suffice it to say that not until 1937 were its major proposed reforms of the divorce law implemented by the Matrimonial Causes Act 1937.

In relation to publication of reports, the Royal Commission’s proposals, despite being unanimous, fared no better: see Cretney (*Disgusted*, pp 96-98). The decision of the House of Lords in *Scott v Scott* was, to put it mildly, unhelpful. And when Lord Buckmaster in 1920 introduced a Bill in the House of Lords including a provision (clause 32) to give effect to the Commission’s proposals there was, as Cretney says, “strong opposition to measures such as those proposed by the Royal Commission which would restrict the freedom of the press in divorce cases.”

As is well known, what turned the tide was the lurid reporting of the *Russell* divorce case in 1922 (see *Russell v Russell* [1924] AC 687) and of the scandalous case of *Dennistoun v Dennistoun* (1925) 69 Sol Jo 476 tried before McCardie J in 1925, where it was alleged that Lieutenant Colonel Dennistoun had corruptly connived in his wife becoming the mistress of General Sir John Cowans in return for his own preferment in the Army: see the detailed account in William Cross *The Dustbin Case: An Account of Dennistoun v Dennistoun* (2012). It is ironical, given what was to happen, that McCardie began his final judgment (Cross, p 253) by quoting Lord Shaw’s observation in *Scott v Scott* that “publicity is the soul of justice” and saying that “The question of publicity is not for the Court ... The extent to which a case should be reported is for others – not the Court.” And Cretney was later to note the curious paradox (*Disgusted*, p 107) that the Judicial Proceedings (Regulation of Reports) Act 1926 would not have applied to *Dennistoun*; it was not a matrimonial case (it was an action for damages in the King’s Bench Division) and although shocking and scandalous it did not involve anything obscene.

Cretney discusses in delicious detail and with mordant wit (*Disgusted*, pp 91-94, 98-110) how the King, who described himself as “disgusted”, pressed for reform and how, eventually, this and other pressure led to the enactment of the Judicial Proceedings (Regulation of Reports) Act 1926.

The 1926 Act bore scant resemblance to the Royal Commission’s proposals. There was no enactment of the court’s right to sit in camera (that, as we shall see, was not to follow until 1935) and statutory regulation of photography and sketching in court had already been dealt with by section 41 of the Criminal Justice Act 1925, making it a criminal offence (section 41(1)(a)) to “take or attempt to take in any court any photograph, or with a view to publication make or attempt to make in any court any portrait or sketch, of any person, being a judge of

the court or a juror or a witness in or a party to any proceedings before the court, whether civil or criminal.”

The 1926 Act, which was described in the long title as “An Act to regulate the publication of reports of judicial proceedings in such manner as to prevent injury to public morals,” did two things. Section 1(1)(a) provided that:

“It shall not be lawful to print or publish, or cause or procure to be printed or published ... in relation to any judicial proceedings any indecent matter or indecent medical, surgical or physiological details being matter or details the publication of which would be calculated to injure public morals.”

Section 1(1)(b) provided that:

“It shall not be lawful to print or publish, or cause or procure to be printed or published ... in relation to any judicial proceedings for dissolution of marriage, for nullity of marriage, or for judicial separation, or for restitution of conjugal rights, any particulars other than the following, that is to say:—

- (i) the names, addresses and occupations of the parties and witnesses;
- (ii) a concise statement of the charges, defences and countercharges in support of which evidence has been given;
- (iii) submissions on any point of law arising in the course of the proceedings, and the decision of the court thereon;
- (iv) the summing-up of the judge and the finding of the jury (if any) and the judgment of the court and observations made by the judge in giving judgment:

Provided that nothing in this part of this subsection shall be held to permit the publication of anything contrary to the provisions of paragraph (a) of this subsection.”

Section 1(2) provided that “no person, other than a proprietor, editor, master printer or publisher, shall be liable to be convicted under this Act.”

Again, it is interesting to note that anonymisation was not seen as the solution; on the contrary, note the width of what 1(1)(b) expressly permitted to be published.

More importantly, and as the long title had spelt out, the purpose of the 1926 Act was explicitly “to prevent injury to public morals.” Lord Rodger of Earlsferry JSC put the point definitively in *In re Guardian News and Media Ltd and others* [2010] UKSC 1, [2010] 2 AC 697, [24]:

“The purpose of the legislation was ... not the protection of the parties’ privacy but the prevention of injury to public morals throughout Great Britain.”

He had earlier, as the Lord Justice-General, used much the same language in *Friel v Scott* 2000 JC 86, a case in Scotland where a prosecution under the 1926 Act failed.

As Thorpe LJ had put it in *Clibbery v Allan and Another* [2002] EWCA Civ 45, [2002] Fam 261, [88], “No doubt the aim of the statute was to strike a balance between the principle of open

justice and the need to curb reports from the divorce court for the protection of public morality.”

For views of the 1926 Act in retrospect one can consult Cretney (*Disgusted*, pp 110-114) and, for a more recent judicial analysis, *Rapisarda v Colladon* [2014] EWFC 1406, [2015] 1 FLR 584. As Cretney points out, though the Act limited what could be reported of a divorce case while the trial was proceeding, the effect of section 1(1)(b)(iv) was to give the judge a wide freedom to include whatever he thought fit in his judgment. As I remarked in *Rapisarda*, [39]:

“section 1(1)(b)(iv) plainly leaves the judge free to include in or exclude from his judgment whatever material he thinks fit. In that sense the judge has a discretion – and, in my judgment, a discretion which is fettered only by the dictates of the judicial conscience.”

Thus, albeit indirectly, the Act gave partial effect to the Royal Commission’s third suggestion (Report, para 514) that “there should be no publication of the report of a case or proceeding until after it is finished.” The Law Commission, in its 1966 Report on the *Powers of Appeal Courts to Sit in Private and The Restrictions upon Publicity in Domestic Proceedings* (Law Com No 6), para 17, identifying what it called “the protection of public decency” as the rationale of the 1926 Act, noted that:

“The prohibition on publishing the evidence in divorce and similar cases ... protects the public from being titillated by morning and evening accounts of the salacious details brought out in evidence.”

That had been a concern at the time of the Royal Commission.

To round off this part of the story, the Supreme Court of Judicature (Amendment) Act 1935 provided for the insertion of a new section 198A in the Supreme Court of Judicature (Consolidation) Act 1925:

“In any proceedings for nullity of marriage, evidence on the question of sexual incapacity shall be heard in camera unless in any case the judge is satisfied that in the interests of justice any such evidence ought to be heard in open court.”

This, as will be appreciated, had a much narrower application than the more general provision which the Royal Commission had recommended.

Given the importance which had been attached to the issue by the Gorell Royal Commission, it is curious to note that the report dated 20 December 1955 of the Royal Commission on Marriage and Divorce, 1951-1955, chaired by Lord Morton of Henryton, Cmd 9678, was completely silent on the point although it was plainly *not* excluded from consideration by the Commission’s terms of reference. One can only assume that the current law and practice in relation to the reporting of divorce and ancillary relief cases gave no cause for concern either to the Commissioners or to those who gave evidence.

Part B : The legacy of *Scott v Scott*

The importance of *Scott v Scott*

In relation to what is now the Family Division, *Scott v Scott* is of importance – very great, and continuing, importance – for three reasons.

The first point to be derived from *Scott v Scott* is the definitive statement that it is not, as such, a contempt of court to publish an account of what has gone on in camera or in chambers or to publish a judgment delivered in chambers (or, as we would now call it, in private).

Ever since then, the law has been quite clear, and it applies as much to the Family Division as to any other part of the High Court. In the absence of any relevant restriction imposed by statute it is not a contempt of court to publish or report a judgment, whether in whole or in part, merely because it was given or handed down in private – in chambers – and not in open court: for the classic modern authorities see *Forbes v Smith* [1998] 1 All ER 973 and *Hodgson and Others v Imperial Tobacco Ltd and Others* [1998] 1 WLR 1056. A hearing in private is just a mode of dealing with judicial business and does not impute secrecy to the proceedings. As Mostyn J has put it, referring to the current rule, “FPR 27.10 ... does no more than to provide for partial privacy at the hearing. It has nothing to do with secrecy as to the facts of the case:” *Gallagher v Gallagher*, [33].

It may be convenient at this point to note what Lord Woolf MR said in *Hodgson and Others v Imperial Tobacco Ltd and Others* [1998] 1 WLR 1056, 1072:

“In relation to hearings in chambers the position may be summarised as follows. (1) The public has no right to attend hearings in chambers because of the nature of the work transacted in chambers and because of the physical restrictions on the room available but, if requested, permission should be granted to attend when and to the extent that this is practical. (2) What happens during the proceedings in chambers is not confidential or secret and information about what occurs in chambers and the judgment or order pronounced can, and in the case of any judgment or order should, be made available to the public when requested. (3) If members of the public who seek to attend cannot be accommodated, the judge should consider adjourning the proceedings in whole or in part into open court to the extent that this is practical or allowing one or more representatives of the press to attend the hearing in chambers. (4) To disclose what occurs in chambers does not constitute a breach of confidence or amount to contempt as long as any comment which is made does not substantially prejudice the administration of justice. (5) The position summarised above does not apply to the exceptional situations identified in section 12(1) of the Act of 1960 or where the court, with the power to do so, orders otherwise.”

Secondly, *Scott v Scott* articulated the constitutional impropriety of restraining a litigant’s right to speak out. Fletcher Moulton LJ’s ringing declaration of principle as to the litigant’s right to speak is now to be found in the jurisprudence of the Convention, particularly in Article 10’s

protection of the “right ... to ... impart information.” As the Court of Appeal has recently explained (*Tickle v Griffiths* [2021] EWCA Civ 1882, [2022] EMLR 11, [27]-[28]):

“27 The right to freedom of expression, protected by Article 10 of the Convention, encompasses a right to speak to others, including the public at large, about the events and experiences of one’s private and family life. As Munby J (as he then was) pointed out in *Re Angela Roddy* [2003] EWHC 2927 (Fam), [2004] EMLR 8 [35–36] this is also a facet of the right to respect for private and family life:

“amongst the rights protected by Article 8 ... is the right, as a human being, to share with others – and, if one so chooses, with the world at large – one’s own story ...”.

28 Corresponding to the right of an individual to impart information about his or her private and family life, without interference by a public authority, is the fundamental right of others to receive such information, without such interference. That is a right enjoyed by the media parties here, as well as the general public.”

Of course, as the Court of Appeal went on to explain, this is not an absolute right, for both Article 8 and Article 10 are qualified by ‘the need to protect the rights of others who are participants in the “story”’. To this extent the principle enunciated by Fletcher Moulton LJ is now modified, because section 6 of the Human Rights Act 1998 imposes on the court, as a public authority, the duty “[not] to act in a way which is incompatible with a Convention right”.

But – and for present purposes this is the vital point – the law requires that, before coming to the conclusion that a party to litigation is to be barred from speaking out (and, if that is what they wish, speaking out using their own name) the court must first undertake the well-known ‘balancing exercise’ mandated by the decision of the House of Lords in *In re S (A Child) (Identification: Restrictions on Publication)* [2004] UKHL 47, [2005] 1 AC 593: see, for a well-known example, *Re P (Enforced Caesarean: Reporting Restrictions)* [2013] EWHC 4048 (Fam), [2014] 2 FLR 410.

Moreover, as the Court of Appeal went on to observe in *Tickle v Griffiths*, [30], referring to *O (A Child) v Rhodes* [2014] EWHC 2468 (QB), [2014] EWCA Civ 1277, [2015] EMLR 4, [2015] UKSC 32, [2016] AC 219, “the right to tell one’s own story is likely to carry considerable weight”.

There is clear authority as to how the balancing exercise is to be applied where what is sought is the anonymisation of the litigants. As Lord Neuberger MR said in *H v News Group Newspapers Ltd* [2011] EWCA Civ 42, [2011] 1 WLR 1645, [21]:

“(1) The general rule is that the names of the parties to an action are included in orders and judgments of the court.

(2) There is no general exception for cases where private matters are in issue.

(3) An order for anonymity or any other order restraining the publication of the normally reportable details of a case is a derogation from the principle of open justice and an interference with the Article 10 rights of the public at large.

(4) Accordingly, where the court is asked to make any such order, it should only do so after closely scrutinising the application, and considering whether a degree of restraint on publication is necessary, and, if it is, whether there is any less restrictive or more acceptable alternative than that which is sought.

(5) Where the court is asked to restrain the publication of the names of the parties and/or the subject matter of the claim, on the ground that such restraint is necessary under Article 8, the question is whether there is sufficient general, public interest in publishing a report of the proceedings which identifies a party and/or the normally reportable details to justify any resulting curtailment of his right and his family's right to respect for their private and family life.

(6) On any such application, no special treatment should be accorded to public figures or celebrities: in principle, they are entitled to the same protection as others, no more and no less.

(7) An order for anonymity or for reporting restrictions should not be made simply because the parties consent: parties cannot waive the rights of the public."

In this connection one needs also to consider Lord Neuberger's subsequent *Practice Guidance (Interim Non-disclosure Orders)* [2012] 1 WLR 1003. I quote the key parts:

"4 Applications which seek to restrain publication of information engage article 10 of the Convention and section 12 of the Human Rights Act 1998 ... In some, but not all, cases they will also engage article 8 of the Convention. Articles 8 and 10 of the Convention have equal status and, when both have to be considered, neither has automatic precedence over the other. The court's approach is set out in *In re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593, para 17 ...

9 Open justice is a fundamental principle. The general rule is that hearings are carried out in, and judgments and orders are, public ...

10 Derogations from the general principle can only be justified in exceptional circumstances, when they are strictly necessary as measures to secure the proper administration of justice. They are wholly exceptional ... Derogations should, where justified, be no more than strictly necessary to achieve their purpose.

11 The grant of derogations is not a question of discretion. It is a matter of obligation and the court is under a duty to either grant the derogation or refuse it when it has applied the relevant test ...

12 There is no general exception to open justice where privacy or confidentiality is in issue. Applications will only be heard in private if and to the extent that the court is satisfied that by nothing short of the exclusion of the public can justice be done. Exclusions must be no more than the minimum strictly necessary to ensure justice is done and parties are expected to consider before applying for such an exclusion whether something short of exclusion can meet their concerns, as will normally be the

case ... Anonymity will only be granted where it is strictly necessary, and then only to that extent.

13 The burden of establishing any derogation from the general principle lies on the person seeking it. It must be established by clear and cogent evidence ...

14 When considering the imposition of any derogation from open justice, the court will have regard to the respective and sometimes competing Convention rights of the parties as well as the general public interest in open justice and in the public reporting of court proceedings ... On the other hand, the principle of open justice requires that any restrictions are the least that can be imposed consistent with the protection to which the party relying on their article 8 Convention right is entitled.”

In the guidelines on clause 14 of the model order the Guidance adds:

“Private hearings can be reported without fear of contempt unless the material comes within the protection of the Administration of Justice Act 1960 s.12. A specific order is required to prevent reporting under the Contempt of Court Act 1981 s.11: *Clibbery v Allan* [2002] 2 WLR 151; *McKennitt v Ash* [2008] QB 73. Section 11 orders should only be made when strictly necessary.”

For those who may be thinking, ‘What is that to do with us? That was a civil case, not a family case, and things are different in the Family Court and the Financial Remedies Court’ my response is simple. This is simply another revival of the desert island heresy. There is nothing in Lord Neuberger’s Guidance to suggest that it does not apply to financial remedy cases heard in private. Moreover, the Court of Appeal has now three times applied Lord Neuberger’s approach in financial remedy cases: *K v L* [2011] EWCA Civ 550, [2012] 1 WLR 306, *Norman v Norman* [2017] EWCA Civ 49, [2017] 1 WLR 2523, [2018] 1 FLR 426, and *XW v XH* [2019] EWCA Civ 549, [2019] 1 WLR 3757.

Thirdly, and of much wider and more fundamental significance, *Scott v Scott* established definitively and for all time that, as Viscount Haldane LC put it (p 436), referring to the Court for Divorce and Matrimonial Causes established by the Matrimonial Causes Act 1857:

“the Court which the statute constituted is a new Court governed by the same principles, so far as publicity is concerned, as govern other Courts.”

Earl Loreburn was equally pithy (p 447):

“the Divorce Court is bound by the general rule of publicity applicable to the High Court.”

Specifically, it followed that, specific statutory provisions apart, the Divorce Court and its successors could, and can, sit in camera only in the very limited circumstances permissible in the other Divisions.

As I put it in *Re Webster, Norfolk County Council v Webster* [2006] EWHC 2733 (Fam), [2007] 1 FLR 1146, [39]:

“Scott v Scott established once and for all that there is in principle no difference for these purposes between the Family Division and the other two Divisions. It is impossible to argue that the Family Division as such has any greater powers to sit in secret or to enforce the confidentiality of its proceedings than any other part of the High Court. If it is to be argued that the Family Division has some such power, either generally or in some particular class or classes of case, that power is not to be derived from the fact that the Family Division is the Family Division or from any “practice” of the Family Division however inveterate; it has to be founded in specific statutory authority or, since the coming into force of the Human Rights Act 1998, justified by reference to the Convention.”

I had made the same point some years previously in *Clibbery v Allan and another* [2001] 2 FLR 819, [52]-[55].

Scott v Scott demonstrated the astonishing fact that, as we have seen, in a succession of cases between 1869 and 1904 the practice exemplified by the Registrar’s order had grown up in disregard – one is tempted to say defiance – not merely of section 46 of the 1857 Act but also of the definitive judgment of Bramwell B sitting in the Full Court in *H (C) v C* (1859) 29 LJ(P&M) 29.

The Earl of Halsbury ([1913] AC 417, 443) confessed himself “amazed to find three such learned judges as Sir Cresswell Cresswell, Williams J and Bramwell B ... overruled by any single judge.”

Lord Shaw of Dunfermline was scathing in his indictment of what had been allowed to happen (pp 478–479):

“I think it would have been better had those attempts to evade the publicity commanded by the statute then ceased and the judgment of Bramwell B been accepted as law.”

He went on to castigate what Sir James Hannen had said in *A v A* (1875) LR 3 P&M 230 as being “a confession of a progressive departure from the law ... an illustration of ... the liability, unless the most rigorous vigilance is practised, to have constitutional rights, and even the imperative of Parliament, whittled away by the practice of the judiciary.”

Scott v Scott a century on

It might be thought that these magisterial pronouncements (and there is much else in *Scott v Scott* to similar effect) would have put an end, once and for all, to the idea that in some mysterious and unexplained fashion the Divorce Court and its successors the Probate Divorce and Admiralty Division and the Family Division are not bound by the same principles as the rest of the High Court. Not a bit of it. One hundred years on and the heresy, as we shall see, is with us still.

Astonishingly, and a century and more after *Scott v Scott*, the exceptionalism of the family court still retains its vigour, and there remain, even today, far too many family practitioners, and, dare one say it, far too many family judges, who, whatever they may or may not say

openly, still complacently prefer the accustomed comfort of the desert island to the harsh rigorous world of principle and proper legal analysis.

Part C : The Desert Island

Family Court exceptionalism

Some years ago, I addressed the problem of family court exceptionalism in a trio of ancillary relief cases also involving other areas of law: *A v A (St George Trustees Ltd, interveners)* [2007] EWHC 99 (Fam), [2007] 2 FLR 467 (sham); *Whig v Whig* [2007] EWHC 1856 (Fam), [2008] 1 FLR 453 (bankruptcy); and *Ben Hashem v Shayif* [2008] EWHC 2380, [2009] 1 FLR 115 (trusts and piercing the veil of incorporation). It suffices to quote from just one.

In *Whig v Whig* [2007] EWHC 1856 (Fam), [2008] 1 FLR 453, [57]-[60], the question arose in the context of an application to annul a husband's bankruptcy pursuant to section 282(1)(a) of the Insolvency Act 1986 in a case where ancillary relief and bankruptcy proceedings were being heard together. I was rather sharp with counsel:

"57 [Counsel] referred to these authorities as displaying what he was pleased to call "the strict approach advocated by Chancery judges." I do not understand the observation. The High Court of Chancery and the Court for Divorce and Matrimonial Causes were both abolished by the Judicature Acts. Ever since then, as Vaisey J once observed (see *In re Hastings (No 3)* [1959] Ch 368 at page 377-378), there has been only the one court – the High Court of Justice – and all the judges of that court are simply judges of the High Court. He said:

"It is a curious thing, and I think very notable and encountered in many connections, how hardly this idea of the separate courts dies ... The expression "The Court of Chancery" is constantly heard, yet it is three generations since it existed as a court. "The Court of Queen's Bench" is referred to in the same way: but there is now only one court – the High Court of Justice ... [A] good deal of colour is lent to the suggestion of separate courts by various expressions which are used, "a Chancery judge," "a Queen's Bench judge," which mean, respectively, a judge assigned to do the work which is commonly denominated Chancery work, and a judge assigned to do that work which was commonly done in the old court of Queen's Bench. Section 2 of the Supreme Court of Judicature (Consolidation) Act, 1925, obliges us to be appointed under the description of "judges of the High Court" ... That has to be remembered. If it is thought that there is some kind of emanation of the Chancery spirit which can overrule the decisions of the Queen's Bench, or some special inspiration of common sense which allows a judge of the Queen's Bench to say that the decisions in the Chancery Division are wrong, that is complete illusion."

58 Nigh on fifty years have passed since those words were uttered, yet the illusion that there is some special inspiration of common sense infusing the Family judges and which is lacking in our brethren in the Chancery Division – an illusion no doubt fostered by our inveterate practice of sitting in private – seems to be as prevalent today as ever. It cannot be stressed too much that there is simply no basis for this illusion.

59 As I recently had occasion to observe (*A v A (St George Trustees Ltd, interveners)* [2007] EWHC 99 (Fam) at para [19]), the Family Division cannot simply ride roughshod over established principle, least of all where there are, or appear to be, third party interests involved. I continued (para [21]):

“it is important to appreciate (and too often, I fear, is not appreciated at least in this Division) ... that the relevant legal principles which have to be applied are precisely the same in this Division as in the other two Divisions. There is not one law of ‘sham’ in the Chancery Division and another law of ‘sham’ in the Family Division. There is only one law of ‘sham’, to be applied equally in all three Divisions of the High Court, just as there is but one set of principles, again equally applicable in all three Divisions, determining whether or not it is appropriate to ‘pierce the corporate veil’.”

And the same I might add – one really ought not to have to emphasise the point – goes for the law and practice relating to the annulment of bankruptcy orders.

60 The Family Division applies *precisely* the same principles, and in *precisely* the same way, as the Chancery Division, or for that matter the Queen’s Bench Division. A creditor is not to be prejudiced because a wife’s application to annul the bankruptcy order on which he depends is heard by a Family Division judge (more properly, as Vaisey J explained, a judge of the High Court who is assigned for the time being to the Family Division) any more than a wife is to be prejudiced because her application is heard by a Chancery judge.”

In *Richardson v Richardson* [2011] EWCA Civ 79, [2011] 2 FLR 244, [53], the context was the application of the principle which in some circumstances attributes the knowledge of an agent to his principal. I said:

“The Family Division is part of the High Court. It is not some legal Alsatia where the common law and equity do not apply. The rules of agency apply there as much as elsewhere. But in applying those rules one must have regard to the context.”

I returned to these themes in the Chancery Bar Association Annual Lecture 2011 which I gave on 14 March 2011: *An Unconscionable Time A-Dying: Reports from a Traveller in a Foreign Country* – the foreign country being, of course, a reference to the Family Division.

In *Imerman v Tchenguiz and others, Imerman v Imerman* [2010] EWCA Civ 908, [2011] Fam 116, the Court of Appeal had to consider the so-called *Hildebrand* rules in ancillary relief cases. Holding that there was no legal basis for them, the Court (which it may be noted consisted of judges from all three Divisions) was emphatic in what it said ([118], [137]-[139]):

“118 So far as concerns the special role of the court in ancillary relief cases, we accept that the jurisdiction is inquisitorial and not purely adversarial ... But this cannot be a justification for riding roughshod over established legal rights nor for permitting a litigant without sanction to evade by lawless recourse to self-help the safeguards of the *Anton Piller* (search order) jurisprudence ...

137 The objection of those practising in the Family Division relies on the licence to cheat which the *Hildebrand* rules seek to prevent. But there is no basis for any special rules. Many litigants in all jurisdictions are driven by their greed or other unworthy motives to lie and cheat. The rules, and the judges’ application of the rules, must be robust to prevent such conduct. But what surely cannot be allowed is a system of self-help outwith the law so as to circumvent the rules, and this, after all, is the hypothesis upon which the *Hildebrand* rules have to be justified, for otherwise the remedy would be to invoke the assistance of the court. How can the law – how can the judges – countenance recourse to self-help in circumstances where the court itself declines to act, and when to do so would be not merely unprincipled but an unjustifiable invasion of someone's rights? ...

138 The forensic reality is that these problems are not unique to the Family Division ...

139 What was done here cannot be justified under the so-called *Hildebrand* rules. There are no such rules. There are no rules which dispense with the requirement that a spouse obeys the law.”

The definitive expression of the principle followed shortly after in the Supreme Court in *Prest v Petrodel Resources Ltd and others* [2013] UKSC 34, [2013] 2 AC 415. In the course of an authoritative analysis of the doctrine of piercing the veil of incorporation, and its misapplication in too many family cases, Lord Sumption JSC, having referred, seemingly with approval ([24]-[25]), to what I had said in *A v A* and in *Ben Hashem v Shayif*, observed ([37]) that:

“Courts exercising family jurisdiction do not occupy a desert island in which general legal concepts are suspended or mean something different. If a right of property exists, it exists in every division of the High Court and in every jurisdiction of the county courts. If it does not exist, it does not exist anywhere.”

That, it might be thought, ought finally to have relegated to history any idea of family court exceptionalism, at least in the context of *substantive law*. But one has to wonder.

Consider, for example, the views more recently expressed in the Court of Appeal in *In re J (Children)* [2023] EWCA Civ 465, [2023] 1 WLR 3348, [49]: what might be thought a very strong, and, dare one say it, an all too characteristic, example of desert island syndrome. The great and universally applicable decision of the House of Lords in *Phosphate Sewage Co Ltd v Molleson* (1879) 4 App Cas 801 was dismissed as relating to “a claim in bankruptcy”, a characterisation which, as I have previously suggested ([2023] FRJ 77, 87), would have puzzled

Lord Diplock: contrast his use of it in *Hunter v Chief Constable of the West Midlands Police and Others* [1982] AC 529.

Now that, it may be argued, was said in the context of proceedings relating to a child. Yes, up to a point, but the underlying approach – mentalité – is all too characteristic and it remains deeply concerning.

In relation to *practice and procedure*, however, family court exceptionalism continues astonishingly to thrive, despite my lament as recently as 2018 in *Kerman v Akhmedova* [2018] EWCA Civ 307, [2018] 2 FLR 354, [20]-[22]:

“20 [Counsel] was ... on much firmer ground when he asked rhetorically, “Whether the Family Court is to be permitted to adopt different trial and post trial procedures to those permitted by other divisions of the High Court.” As a matter of generality, the answer to this is, and must be, an emphatic NO!

21 It is the best part of sixty years since Vaisey J explained in *In re Hastings (No 3)* [1959] Ch 368 that “there is now only one court – the High Court of Justice.” It is now eleven years since I observed in *A v A* [2007] EWHC 99 (Fam), [2007] 2 FLR 467, paras 19, 21 (though, of course, at the time I was a mere puisne), that “the [Family Division cannot] simply ride roughshod over established principle” and that “the relevant legal principles which have to be applied are precisely the same in this division as in the other two divisions.” In *Richardson v Richardson* [2011] EWCA Civ 79, [2011] 2 FLR 244, para 53, we said that, “The Family Division is part of the High Court. It is not some legal Alsatia where the common law and equity do not apply.” And in *Prest v Petrodel Resources Ltd and others* [2013] UKSC 34, [2013] 2 AC 415, para 37, Lord Sumption JSC observed that “Courts exercising family jurisdiction do not occupy a desert island in which general legal concepts are suspended or mean something different.”

22 It is time to give this canard its final quietus. Let it be said and understood, once and for all: the legal principles – whether principles of the common law or principles of equity – which have to be applied in the Family Division (and, for that matter, also, of course, in the Family Court) are precisely the same as in the Chancery Division, the Queen’s Bench Division and the County Court.”

The Family Law Silo

Alexander Chandler KC, an always thoughtful commentator on practice in financial remedies (what used to be referred to as ancillary relief) cases, wrote amusingly but pointedly on the problem in his November 2022 blog, *Have We Been Getting It Wrong for the Past 75 Years? Privacy, Secrecy and the Financial Remedies Court*:

“*The Go-Between* by L.P. Hartley starts with one of the most celebrated opening lines in literature: ‘The past is a foreign country; they do things differently there.’ Historically, the same could be said of the Family Division, where a husband or wife could obtain a *Mareva* injunction, or pierce the corporate veil, in circumstances which would surprise commercial litigants. ‘The matrimonial field calls for a different approach’, held Lincoln J in *Shipman* [1991] 1 FLR 250 ... Family law was effectively a

foreign country ('a desert island', even an 'Alsatia'); the judges did things differently there.

Over the past 15 years, the concept of family law exceptionalism – or, to quote Mr Justice Mostyn, 'the cult of the silo' – has been in steady retreat."

But, he went on:

"One notable hold out in the retreat of family law exceptionalism has been the tradition of secrecy in the family court."

Mostyn's judgments, he said:

"taken as a whole, involve a radical review of the practices of the family court, and the conclusion that we as family lawyers have been misapplying the law, in relation to the secrecy of financial remedy proceedings, since the Second World War.

A key theme in these authorities is the distinction between **privacy** (e.g., a court sitting *in camera* or in chambers) and the proceedings being shrouded in **secrecy**."

He concluded in arresting fashion:

"Will these reset the family court's traditional approach and deliver a mortal blow to what remains of the family law silo? The jury is still out, as to whether (to close with another quotation from L.P. Hartley):

'With the opening of the door, and the installation of electric light in the cupboard, the skeletons [what remains of family law exceptionalism] had crumbled into dust.'"

In relation to the family law silo, it is interesting to compare the views expressed by Lord Sumption and by Sir Mathew Thorpe in recent interviews. Interviewed by Alexander Chandler ([2022] FRJ 167, 168), and asked his impression of family lawyers, Lord Sumption answered:

"As lawyers? I thought that they were too bound up with their own way of doing things and with a series of principles and practises grown up unique to their area of law, which is always a bad thing."

Earlier he had observed that:

"family lawyers were particularly inclined to feel that their field was governed by certain imperatives which made other legal principles irrelevant."

Interviewed by HHJ Edward Hess and Nicholas Allen KC the following year ([2023] FRJ 68, 71), Sir Mathew Thorpe neatly illustrated Lord Sumption's point. Pressed with Mostyn's views about *Clibbery v Allan* [2002] EWCA Civ 45, [2002] Fam 261, and *Lykiardopulo v Lykiardopulo* [2010] EWCA Civ 1315, [2011] 1 FLR 1427, his answer is most revealing:

"I quite understand all the arguments. I just know that I was starting in Mitre Court in the early 60s [he was called to the Bar in 1961] and there were senior juniors in chambers doing the sort of Charles Russell work. The big clients in those days were the

English landed class and occasionally English tycoons. The pop culture was going to come 15 years later. The English landed gentry were terrified of the papers and one thing that we always said was you needn't worry, absolutely not a word will come out. That's what I was brought up with: that these were private proceedings. And so when I was pontificating in those cases in the Court of Appeal I was really only expressing what I believed to be orthodox and an important orthodoxy that people are entitled to privacy. But of course the world has completely changed."

He continued:

"Do I think all these people known as celebrities are deserving of privacy? Why should they be? They court publicity all the time in their lives. That is their meat and drink, their source of revenue. Why should they suddenly think that they're entitled to privacy?"

But the omens are not good. Obdurate exceptionalism, I fear, remains the order of the day.

Part D : The Cult of Secrecy in financial cases

The Cult of Secrecy

This continuing obduracy, what he denounces as 'the cult of secrecy', itself a manifestation of what he also denounces as 'the cult of the silo', is, of course, the subject of Mostyn J's great sequence of judgments which I referred to above. As I have written more than once, I am convinced that he is correct, and no one has yet risen to the challenge of demonstrating that he is not.

The nearest anyone has come to furnishing any basis in law for the almost ubiquitous practice of enforcing secrecy and anonymity in financial remedy cases is the statement by Peel J in *Tsvetkov v Khayrova* [2023] EWFC 130, [114], where he suggested that the decisions of the Court of Appeal about publicity in financial remedy cases in *Clibbery v Allan* [2002] EWCA Civ 45, [2002] Fam 261, and *Lykiardopulo v Lykiardopulo* [2010] EWCA Civ 1315, [2011] 1 FLR 1427, provided that basis and that, while the former was obiter, the latter was not.

With the last observation I cannot, with respect, agree. In *Some Sunlight Seeps In* [2022] FRJ 79, 93, I commented on the irony that:

"In both *Clibbery v Allan* and *Lykiardopulo v Lykiardopulo*, the decisions of the Court of Appeal most frequently cited in support of the conventional pieties, the actual ratio was that proposed prohibition of publication or anonymisation is to be resolved having regard to and balancing the interests of the parties and the public as protected by Articles 6, 8 and 10 of the Convention, considered in the particular circumstances of the case."

Moreover, *Clibbery v Allan* was not even a financial remedies case; it was a claim under Part IV of the Family Law Act 1996. I may add the further irony that in neither case were the parties

anonymised. It is also highly relevant to note that *Clibbery v Allan* long preceded the fundamentally important change in the Rules which came into effect on 27 April 2009 (see below) and that *Lykiardopulo v Lykiardopulo* was an appeal from a decision of Baron J on 13 February 2009 which likewise preceded that change.

Be that as it may, in neither case is the reasoning in support of what I have called the conventional pieties remotely convincing, though the history behind it is intriguing.

The Cult of Secrecy : history

I traced the emergence of the present practice in financial remedy cases in *Some Sunlight Seeps In* [2022] FRJ 79, 87-89, focusing in particular on the period which began with the first publication of the Family Law Reports (FLR) in 1980. But we need to go further back, looking also at what was going on in the 1960s and 1970s.

It will be convenient first to give a historical account of the general landscape in relation to the reporting of family and, in particular, ancillary relief cases, taking the key developments in chronological sequence.

The report dated 20 December 1955 of the Royal Commission had been completely silent on the point. Moreover, in that era the anonymisation of financial remedy cases was very infrequent. As I commented in *Some Sunlight*, the 1958 edition of Tolstoy's *The Law and Practice of Divorce and Matrimonial Causes* provides a useful snapshot. Of the scores of cases on financial provision cited, only five were anonymised of which, moreover, only one dated from the post-War era.

Section 12 of the Administration of Justice Act 1960 marked a milestone, but section 12(1)(a) as originally enacted applied only to proceedings relating "to the wardship or adoption of an infant or wholly or mainly to the guardianship, custody, maintenance or upbringing of an infant, or rights of access to an infant," so, then as now, its application to ancillary relief cases was more theoretical than real: see *Spencer v Spencer* [2009] EWHC 1529 (Fam), [2009] 2 FLR 1416, [10]-[15].

In 1972, that most learned and vastly experienced family law practitioner, Joseph Jackson QC, published the first edition of his *Matrimonial Finance and Taxation* (Butterworths). It is striking to note that it contained not a single reference to *Scott v Scott*, though, as Jackson was at pains to make clear, his book did not deal with procedure, for which his readers were directed to consult *Rayden on Divorce* (then in its 11th edition).

Readers who consulted *Rayden* would on this point have been left none the wiser. Looking at the 15th edition published in 1988 (the last edited by Jackson) we find references to *Scott v Scott* on pp 26, 27, 29 explaining the circumstances in which the court may sit in camera (though not the consequences in terms of secrecy and reporting if it does) and, on pp 1334, 1488, relating to wardship. The only other reference to *Scott v Scott*, in a footnote on p 1202, does relate to publication, but in terms so Delphic as to leave the reader baffled. The Index has no entries for, eg, 'Publishing', 'Reporting' or 'Disclosure.' A reader encouraged by the heading 'Reports of proceedings' on p 29 would have been disappointed, for the accompanying text is confined to a discussion of the 1926 Act.

The decision in May 1988 in *Re W and Others (Wards) (Publication of Information)* [1989] 1 FLR 246 drew attention to the fact that neither section 12 of the 1960 Act nor section 97 of the Children Act (which as originally enacted applied only to proceedings before a magistrates' court) prevented the identification of children involved in wardship or other proceedings in the High Court. The result was the progressive elaboration and refinement from 1988 to 2001, as described in *Harris v Harris, Attorney-General v Harris* [2001] 2 FLR 895, [345]-[353], of what became the familiar standard reporting restriction order in children cases.

The 1993 LCD *Review* made three assumptions as to current law and practice:

- First, it said it was “clear” that a court sitting in chambers “has an absolute discretion as to whom it allows to be present:” para 2.15, citing *Re G (A Minor)* (1991) Court of Appeal (Civil Division) Transcript No 679 of 1991 and *R v Leicester City Justices ex p Barrow* [1991] 2 QB 260.
- Second, it opined that, because of the rule restricting access to documents on the court file, “Unless a case is tried in open court ... access to most of the evidence and information held at court is effectively in the control of the court or the parties:” para 2.17. But what, one might ask rhetorically, about *Scott v Scott*?
- Third, it recognised that, except in relation to children, “the extent of the court’s power to prohibit publication is unclear:” para 2.41. This was because, as I explained in *Spencer v Spencer* [2009] EWHC 1529 (Fam), [2009] 2 FLR 1416, [24], and then in *Some Sunlight Seeps In* [2022] FRJ 79, 85-86, the undoubted power of the court to restrain the publication of information about a *child* was at that time understood to be found in the inherent *parens patriae* jurisdiction in relation to *children*. Only after 2000 was it recognised that the court’s power was derived from the Human Rights Act 1998 (with the important corollary that the court’s power was not limited to children but extended also to adults).

In relation to this last point, the *Review* commented:

“Distinctions are not infrequently drawn between wardship and other proceedings, because of the parental and administrative nature of the former.”

This was elaborated (para 2.55) by reference to the “exception to the general rule of open justice” identified in *Scott v Scott*. So far so good. But what followed was more problematic:

“Yet it would be odd if the court could punish a person for publishing documents on the court’s file [fn, at least where leave is required for inspection] but not for publishing an account of oral evidence given in a private hearing. There must be two main objects of holding a hearing in private: first, to promote the proper trial of the case, for example by encouraging witnesses to speak freely; and secondly, to preserve the privacy of the information revealed. Subsequent reporting would not necessarily impede the first, but it might frustrate the second.”

This, to speak plainly, was entirely inconsistent with *Scott v Scott*, where the House of Lords had entirely repudiated Bargrave Deane’s analysis derived from the proposition that, as he

had put it, “One of the main objects of trying these unhappy cases in camera is that the evidence should be kept secret.”

All in all, the LCD Review is most revealing in showing how in this context the true significance of *Scott v Scott* was no longer understood.

In explaining its preliminary thinking, the Review drew, seemingly for the first time, an important distinction (para 4.53):

“It may be argued that there are two alternative methods of providing some respect for people’s private lives where a case is to be reported. The law may either allow the persons to be identified, in which case respect for their privacy would demand some limits on the details to be reported; or the law may prohibit identification, in which case there might be less or no need to limit the details to be published.”

It went on to ask whether this was a valid approach and, if so, which of the two alternatives was preferable; or whether there were circumstances where there might be a need, in the interests of personal privacy “to prevent identification and limit the particulars to be published.”

This all remained academic, because the results of the Consultation were never published and, at least so far as the public was concerned, the project and the work on it of the interdepartmental working party, the Family Law and Administration Working Party (Review, para 1.2), did not progress any further.

Two cases in 1997, the decisions of Wilson J, as he then was, in *S v S (Inland Revenue: Tax Evasion)* [1997] 2 FLR 774 and *R v R (Disclosure to Revenue)* [1998] 1 FLR 922, are very revealing. To set them in context it is necessary to recall the material provisions of Rules 10(15) and 10(20) of the Family Proceedings Rules 1991 as then in force.

Rule 10(15) provided in relevant part that:

“(5) Any party ... shall be entitled to require from the shorthand writer a transcript of the shorthand note, and the shorthand writer shall, at the request of any person so entitled, supply that person with a transcript of the whole or any part of the note ...

(6) Except as aforesaid, the shorthand writer shall not, without the permission of the court, furnish the shorthand note or a transcript of the whole or any part thereof to anyone.”

Headed “Inspection etc of documents retained in court”, Rule 10.20 provided in substance that:

“(1) ... a party to any family proceedings or his solicitor ... may have a search made for, and may inspect and bespeak a copy of, any document filed or lodged in the court office in those proceedings.

...

(3) Except as provided by ... paragraph (1) ..., no document filed or lodged in the court office other than a decree or order made in open court shall be open to inspection by any person without the leave of the district judge, and no copy of any such document, or of an extract from any such document, shall be taken by, or issued to, any person without such leave.”

S v S (Inland Revenue: Tax Evasion) [1997] 2 FLR 774 followed ancillary relief proceedings in which Wilson J had found the husband to have wrongfully evaded payment of UK income and capital taxes. By an administrative error in the court office the wife’s brother was supplied with a transcript of the judgment even though he was not a party to the proceedings and was therefore not entitled to a transcript without the permission of the court. He in turn supplied the Inland Revenue with a copy. The Inland Revenue accepted that its possession was “irregular”. It was right to do so, for the document had been improperly supplied to the brother in breach of Rule 10.15(6). It sought permission under Rule 10.15(6) to keep the transcript, permission under Rule 10.20(3) to inspect certain affidavits and documents on the court file and permission under Rule 10.15(6) to obtain a transcript of certain oral evidence. Neither the husband nor the wife was willing to co-operate, indeed, the wife joined her husband in active opposition to the application. It was therefore necessary for the Inland Revenue to seek permission from the court, for there was no one lawfully in possession of the material who was willing to supply it voluntarily. The question which Wilson J accordingly had to consider was simply how to exercise his discretion under Rules 10.15(6) and 10.20(3) to permit access by a non-party to the court file. He did not have to consider any wider question and, so far as I can see, did not do so. There is nothing whatever to suggest that his decision was otherwise than entirely correct.

Correctly understood, *R v R (Disclosure to Revenue)* [1998] 1 FLR 922 raised very different issues. The wife in ancillary relief proceedings had provided the Inland Revenue with a copy of a transcript of the judgment supplied to her by the judge. Wilson J said:

“ ... as [the solicitor for the Inland Revenue] has to concede, the disclosure to the Inland Revenue of part of a transcript of a judgment delivered in chambers is irregular, if it is not preceded by the grant of leave; that is to be collected from rr 10.20(3) and 10.15(6) of the Family Proceedings Rules 1991 and the case *S v S* to which I have referred.

I consider that, where somebody has communicated part of a transcript irregularly, very potent considerations may need to be placed against the general principle in favour of anonymity to which I have referred.

I asked [counsel for the husband] whether whoever sent the parts of the transcript to the Inland Revenue had committed a contempt of court. His response was that it was at least arguably a common-law contempt of this court for my judgment, which is this court’s property and was delivered in chambers and disseminated just to the parties and to their advisers, to have been sent to a third party. I am of the view, quite apart from any duty cast upon me under the Matrimonial Causes Act 1973, that I should explore how it came about, and at whose hand, that court property was irregularly released to the Inland Revenue.”

Wilson J accordingly considered himself obliged to embark upon the same exercise of discretion as he had in *S v S*.

Now with all respect to Wilson J his statement of principle was far too wide, in truth simply wrong. The disclosure to the Inland Revenue by the wife of part of a transcript of a judgment delivered in chambers was not irregular, just because it was not preceded by the grant of leave. That was not the effect of either Rule 10.20(3) or Rule 10.15(6); nor was it to be collected from *S v S*, a case which on the facts was crucially different. Put bluntly, his reliance on these Rules was wrong, for they were, with respect, completely irrelevant to the question whether Mrs R had committed a contempt by furnishing the Inland Revenue with a copy of the transcript of judgment which had been provided to her by the court.

Nor was there any basis, whether in authority or in principle, for the assertion that a judgment given in chambers is the court's "property", particularly if by that it was intended to be meant that any dissemination of it without the court's leave was, as Wilson J put it, "irregular".

I note that Wilson J was not referred either to *Scott v Scott* or to section 12 of the 1960 Act; that he did not have addressed to him any argument disputing the correctness of the Inland Revenue's concession (a concession which the erring husband obviously had no reason to challenge); and that his decision preceded, if only by a few weeks, both the judgment of Jacob J in *Forbes v Smith and others* [1998] 1 FLR 835 and that of Lord Woolf in *Hodgson and Others v Imperial Tobacco Ltd and Others* [1998] 1 WLR 1056.

Wilson J was a great master of ancillary relief law and practice who was to crown an immensely distinguished career as a justice of the Supreme Court. Called to the Bar in 1967 he had 30 years of experience of the world of which he spoke in *R v R*, so his views and approach are of great and very revealing interest. In a sense the real significance of what he said was that he was authentically articulating, albeit with an attempt at justification, what was at the time a widespread, indeed, I suspect, the common, assumption.

But his reasoning, and what it discloses of the underlying mentalité, is uncomfortably close to Bargrave Deane's analysis exploded by the House of Lords in *Scott v Scott*. The notion that Mrs R was playing fast and loose with the Court's property [sic] and therefore in contempt was as misconceived as was Mr Scott's case against Mrs Scott. Mrs R's position was in substance identical to that of Mrs Scott – and we know what Fletcher Moulton and the House of Lords thought of Bargrave Deane's view that Mrs Scott was in contempt by providing a copy of her transcript to her father and her sister.

Finally, one may ask, why were these two cases anonymised?

These decisions of Wilson J were soon followed by the fundamentally important decisions in *Forbes v Smith and others* [1998] 1 FLR 835 and *Hodgson and Others v Imperial Tobacco Ltd and Others* [1998] 1 WLR 1056.

There was an elegant attempt to argue the inapplicability of *Hodgson* in the Family Division by Andrew Moylan QC, as he then was, which I summarised in *Clibbery v Allan and another* [2001] 2 FLR 819, [74]. He had more success in the Court of Appeal, where Thorpe LJ airily observed (*Clibbery v Allan* [2002] EWCA Civ 45, [2002] Fam 261, [110]):

“Of course Mr Price QC in his submissions made much of the decision in this court in *Hodgson v Imperial Tobacco Limited* [1998] 1 WLR 1056. In his judgment the Master of the Rolls nowhere refers to the Family Proceedings Rules or the practice in family proceedings or to any of the relevant authorities in the Family Division. Clearly the Master of the Rolls is delivering an important judgment clearly presaged one aspect of the wholesale reform of procedure in civil justice on which he was then engaged. He was well aware that at that time sweeping reforms of the practice in ancillary relief proceedings were well advanced. There is in my mind the clearest inference that the application of the judgment of this court was limited to civil proceedings.”

Really?

In *Hodgson* Lord Woolf had referred with approval to the judgment of Jacob J in *Forbes v Smith and another* [1998] 1 All ER 973. Referring to *Scott v Scott*, Jacob J had commented (p 975):

“I can find nothing in the speech of Lord Loreburn in *Scott v Scott* (a speech, and indeed decision, which is wholly and almost emotionally in favour of the notion that the administration of justice is a matter of public concern) which suggests that a judgment itself can be a secret document, save where the judge specifically so directs.”

Lord Woolf in *Hodgson* (p 1070) said this:

“A distinction has to be clearly drawn between the normal situation where a court sits in chambers and when a court sits in camera in the exceptional situations recognised in *Scott v Scott* [1913] AC 417 or the court sits in chambers and the case falls in the categories specified in section 12(1) of the 1960 Act (which include issues involving children, national security, secret processes and the like). Section 12(1) also refers to the court having prohibited publication. *Such proceedings are appropriately described as secret; proceedings in chambers otherwise are not appropriately so described* (emphasis added).”

Evidently, Lord Woolf was here including family – children – cases in his analysis. And, critically, the distinction he was drawing was not between family and civil cases but between those cases properly described as secret – either because held in camera or because subject to section 12 of the 1960 Act – and the generality of proceedings held in chambers “not appropriately so described.”

In *Clibbery v Allan*, where the Court of Appeal was directly confronted with *Scott v Scott*, critical reliance was placed on the implied undertaking whereby the recipient of financial disclosure made under compulsion is prohibited from making ulterior (i.e. additional) use of it. But the undertaking implied applies in all civil proceedings – it is not unique to financial remedy proceedings. Thorpe LJ rather let the cat out of the bag [100]:

“... family proceedings are easily distinguishable from civil proceedings in the other Divisions of the High Court. Speaking of ancillary relief proceedings in the case of *Kelly v Corston* [1998] QB 686, my lady the President referred to ‘the more inquisitorial atmosphere of family proceedings’. I believe that this means that in family proceedings the relationship between the court and the litigants is clearly distinguishable from the

relationship between the litigants and the court in civil proceedings. In the latter the parties bring into the arena such material as they choose to bring together with such material as they may be ordered to bring during the development of the case. At the completion of that process the judge determines outcome applying the law to such facts as have been admitted or have been found proved. The determination of an ancillary relief application proceeds on a very different basis. First it is to be noted that litigants may not bring into the proceedings such material as they think fit. All parties are under a duty of full and frank disclosure, clearly recognised well before the advent of the statutory powers for equitable redistribution of assets on divorce.”

With great respect to a master of ancillary relief law and practice, this was not and is not correct. In civil proceedings the obligation to give standard disclosure (what used to be called discovery) of all documents adverse to your case or supportive of your opponent’s was and is just as onerous as the obligation of full and frank disclosure in financial remedy cases. But this led Thorpe LJ to conclude ([106]):

“Accordingly I have no difficulty in concluding that in the important area of ancillary relief ... all the evidence (whether written, oral or disclosed documents) and all the pronouncements of the court are prohibited from reporting and from ulterior use unless derived from any part of the proceedings conducted in open court or otherwise released by the judge.”

How can this be reconciled with *Scott v Scott*? It is in fact all too eerily reminiscent of what Bargarve Deane had said in the judgment condemned by the House of Lords:

“It is gross contempt of Court for people to go spreading about the country particulars of that which is done in camera. It is gross contempt of Court to report anything heard in camera. It is the same even in regard to reporting summonses heard in chambers, or in Court as in chambers ... unless by special leave of the judge.

... every one must clearly understand, from this time forward, that what is done in camera is not to be reported or published.”

It is, with respect, very difficult to accept Thorpe LJ’s analysis, and his observations on the point – as some might think, a classic example of desert island syndrome – were, after all, obiter. But the consequence was that the family law world was reinforced and became even more entrenched in its collective mind-set that where an ancillary relief case was heard in private the press and the public did not have the right (even as qualified by *Hodgson*) to attend or to report and, indeed, that what went on was unreportable even by the parties unless the court gave leave.

Much the same was said some years later In *Lykiardopulo v Lykiardopulo*, where Stanley Burnton LJ said ([79]):

“I start from the premise that, as Article 6 requires, justice should be seen to be done, and in general the judgment of the court should be public unless there is good reason for it not to be published or for the identities of the parties not to be disclosed. Litigants have a right to respect for their private life under Article 8, but that right is

qualified and in many, indeed most, cases the interests of justice, and of justice being seen to be done, require facts that would otherwise remain private to be made public in a judgment. The general practice of the Family Division is for judgments in ancillary relief cases not to be published, or if published to be anonymised. That is done out of respect for the private life of the litigants and in order to promote full and frank disclosure, and because the information in question has been provided under compulsion.”

Again, this reasoning is, with respect, utterly unconvincing. The House of Lords has spoken, and no-one has ever sought (how could they?) to challenge what it said in *Scott v Scott*. Parliament has passed two provisions – section 46 of the Matrimonial Causes Act 1857 and section 12 of the Administration of Justice Act 1960 – recognising that the private life of family litigants in non-children cases is no different to the private life of any other civil litigant. That the disclosure is made under compulsion is a requirement across the board and provides no distinguishing feature for family cases.

Since the turn of the Millenium there has been much activity in relation to transparency, as it is now called. But for present purposes only four developments call for notice:

- First, with effect from 27 September 1999, the amendment of section 97 of the 1989 Act to extend to proceedings in the High Court.
- Second, the recognition that the court’s power to restrain reporting is derived from the Human Rights Act 1998, with the important corollaries (1) that the court’s power is not limited to children but extends also to adults and (2) that the court in exercising this power must first undertake the well-known ‘balancing exercise’ mandated by the decision of the House of Lords in *In re S (A Child) (Identification: Restrictions on Publication)* [2004] UKHL 47, [2005] 1 AC 593.
- Third, the introduction of the rubric, seemingly first used in a financial remedies case in 2003: see *Some Sunlight Seeps In* [2022] FRJ 79, 95 (fn 8).
- Fourth, and of transformative importance, the change in the Rules which, with effect from 27 April 2009, and subject only to narrowly defined exceptions, give journalists (and the same now applies to authorised legal bloggers) the *right* to attend proceedings in chambers: see, in the context of ancillary relief, *Spencer v Spencer* [2009] EWHC 1529 (Fam), [2009] 2 FLR 1416.

It is important to consider the potentially vital impact of this last change in two different contexts: first, in relation to section 12 of the 1960 Act and, secondly, in relation to *Clibbery v Allan*.

Section 12 applies only to “proceedings before [a] court sitting in private.” Is a hearing attended by a journalist “in private”? Astonishingly, even 15 years on there seems to be no definitive answer to this very obvious and indeed critically important question.

In 2006, before the rule change, I had ordered that the media, but not the general public, should be entitled to attend certain hearings in a care case: *Re Webster, Norfolk County Council v Webster* [2006] EWHC 2733 (Fam), [2007] 1 FLR 1146. I explained the effect of that order [121]:

“The general public will not be able to attend the hearing. But since the media will be entitled to be present, the hearing will not, as it seems to me, be “in private” within the meaning of section 12 of the Administration of Justice Act 1960. Section 12 will therefore not apply in relation to that hearing. But this does not mean that section 12 ceases to apply altogether to the Care Proceedings. Save in relation to any particular hearing which has been opened to the media, section 12 will continue to apply.”

It is implicit in this view that a hearing which is not open to the public may nonetheless *not* be a hearing “in private” for the purposes of section 12; in other words that it is not the case that there is a simple dichotomy where a hearing is necessarily either “in public” or “in private”.

Both the rule as introduced in 2009 (rule 10.28 of the Family Proceedings Rules 1991) and the corresponding rule currently in force rule 27.11(2) of the Family Procedure Rules 2010) are framed in terms of entitling the media to attend what are variously described as certain “private hearings” and “proceedings ... held in private.” It has been said that the wording of the rule demonstrates that whatever I may have said in *Webster* can no longer apply. As Mostyn J said in *DL v SL* [2015] EWHC 2621 (Fam), [2016] 2 FLR 552, [11]:

“Parliament has in FPR 27.10 specifically provided that the proceedings shall be heard in private. The fact that the media may attend the hearing pursuant to FPR 27.11 and PD27B does not alter the fact that the hearing is in private.”

He elaborated this in *Appleton & Anor v News Group Newspapers Ltd & Anor* [2015] EWHC 2689 (Fam), [2016] 2 FLR 1, [18]:

“In *Norfolk County Council v Webster & Ors* [2006] EWHC 2733 (Fam), a case decided in the old era, Munby J, as he then was, at para 121 held that a case where journalists were permitted to enter court and observe the proceedings under an ad hoc arrangement was not one held “in private” for the purposes of section 12 of the 1960 Act. That view cannot, so it seems to me, survive the opening words of FPR 27.11, which expressly state that the right granted to journalists is to attend a hearing held in private. A hearing cannot be in private and not in private at the same time.”

Perhaps, but with all respect perhaps not. There are two problems. First, it is not explained how a statutory instrument made in 2009 can affect the proper interpretation of a statute enacted in 1960. Secondly, it is not, with respect, at all obvious that this is what the words of the rule mean. The rule permits a journalist to attend a hearing which, were the journalist not present, would indubitably be “in private”. But it does not follow that, having allowed the journalist to enter, the hearing *continues to be* “in private”, let alone “in private” within the meaning of and for the purposes of section 12.

More recently, Mostyn J has had second thoughts. In *Gallagher v Gallagher (No.1) (Reporting Restrictions)* [2022] EWFC 52, [2022] 1 WLR 4370, [33], he said that what he had said in *DL v SL* “may be literally true”, but he immediately qualified that with this intriguing footnote:

“I say “may be” because a natural construction of rules 27.10 and 27.11 is that once the media have exercised the right to be present at a hearing, that hearing is no longer

“in private”: see *Norfolk County Council v Webster & Ors* [2006] EWHC 2733 (Fam) at [121] per Munby J. So far as I am aware no-one has since grappled with the point except by assuming that the language of the rules has an effect which arguably it does not.”

Six weeks later, in what was his final judicial comment on the point in *In re EM* [2022] EWCOP 31, [2022] 4 WLR 101, [45]-[46], he said this:

“I recognise, however, that in *Webster* ... Munby J ... at [121] ... considered that an order which permitted the press to attend the hearing would mean that the proceedings were not “in private” ... I leave it to others to determine if those views are correct.”

The other, and in the present context much more important, question is as to the impact of the rule change on the obiter dicta in *Clibbery v Allan*. Given that a fundamental underpinning of those dicta was a settled practice and expressed principle of privacy for the proceedings – that no-one other than the parties, their legal representatives and any witnesses was ever present in chambers – it is surely obvious that the removal of the underpinning must have been severely detrimental to the survival of the superimposed structure.

It would be tedious in the extreme to analyse the tergiversations of the LCD’s successors, the Department for Constitutional Affairs and the Ministry of Justice, in their successive consultation papers *Confidence and confidentiality: Improving transparency and privacy in family courts*, Cm 6886, published by DCA in July 2006, *Confidence & confidentiality: Openness in family courts – a new approach*, Cm 7131, published by MoJ in June 2007, and *Family Justice in View*, Cm 7502, published by MoJ in December 2008, or of the eventual outcomes: the rule change in 2009 and the ill-fated, unimplemented and unlamented Part 2 of the Children, Schools and Families Act 2010, repealed in 2013. My views can be found in *Spencer v Spencer* [2009] EWHC 1529 (Fam), [2009] 2 FLR 1416, [51]-[58], and, in even more caustic terms, in *Lost Opportunities: law reform and transparency in the family courts*, [2010] 22 CFLQ 273-289 (the 2010 Hershman-Levy Memorial Lecture).

In the present context, the analyses presented by DCA and MoJ were no more satisfactory than that previously presented by LCD, and by now with even less excuse, for they post-dated the important decisions in *Hodgson and Others v Imperial Tobacco Ltd and Others* [1998] 1 WLR 1056 and *Clibbery v Allan* [2001] 2 FLR 819, [2002] EWCA Civ 45, [2002] Fam 261. Neither the DCA nor the MoJ consultations mention those cases, nor, amazingly, do they mention *Scott v Scott*. Their focus is on children cases – ancillary relief cases receiving little mention – and only the most assiduous and well-informed reader would appreciate the vitally important differences between the two types of case in this context and the different impact on them of section 12 of the 1960 Act.

The failure, even at this late stage, to appreciate the significance of *Scott v Scott* is illustrated by two quotations which characterise much of the analysis. In *Confidence and confidentiality: Improving transparency and privacy in family courts*, p 14, DCA says:

“Most family proceedings are heard in private. This means that in many (but not all) cases, only those involved in the proceedings (the parties), their legal advisers and those giving evidence are allowed into the courtroom. The decisions that are taken, and the reasons for them, will be known only to those involved, unless the court decides to issue an anonymised judgment of those decisions.”

In *Family Justice in View*, p 24, MoJ says:

“The fact that family proceedings are and will remain private retains the context and framework of the expectation of privacy.”

A similar failure to appreciate the significance of *Scott v Scott* is also all too apparent in the *President's guidance in relation to applications consequent upon the attendance of the media in Family Proceedings* issued on 22 April 2009. Having identified (para 8) authorities which it was suggested provided useful summaries of the position relating to the publication of matters relating to proceedings in private, it noted (para 9) that those decisions all concerned the interests and welfare of children and that:

“the approach in ancillary relief proceedings (which are also likely to be productive of media applications) has not been the subject of similar judicial consideration and guidance.”

As I commented in *Spencer v Spencer* [9], that was not altogether accurate, for there was such authority, albeit that, so far as I was aware, the only authority which in modern times bore upon the question of access to, or reporting of, ancillary relief proceedings was *Clibbery v Allan*. So far as concerned ancillary relief proceedings, the only further assistance to be derived from the Guidance was this (para 18):

“So far as ancillary relief proceedings are concerned, policy, privacy and Convention issues may also arise for decision, albeit the interests of children may not be engaged.”

But it did not refer to the key principle established by *Scott v Scott* that family proceedings (other than those protected by section 12) which are heard in chambers, such as ancillary relief, give rise to no entitlement to privacy. Nor did it explain that if a restraint of publication of such proceedings were to be sought then the court would be required to undertake a highly focussed balancing of the competing convention rights.

Moreover, the Note failed to explain what “policy” issues could be at large on an application to restrain publication of the proceedings by an attending journalist or how they might be dealt with.

It is as if *Scott v Scott* and *Hodgson* had never been decided. Again and again one sees the endemic failure to understand that a private hearing does not impose secrecy as to the facts of the case.

So much for the bare history, but we need to try and understand what lay behind it.

The Cult of Secrecy : analysis

Mostyn J has explained in *Xanthopoulos v Rakshina* [2022] EWFC 30, [86], how in the 1960s almost all financial remedy cases were heard by the Registrars, sitting at Somerset House in chambers. Neither the law reporters, nor journalists nor members of the public were entitled to be present in chambers, and any request for permission would, I suspect, have been greeted with incredulity and refusal. Sir Mathew Thorpe's account in his interview is very clear and the views expressed by the LCD *Review* (as by the Booth Committee), as indeed subsequently by both DCA and MoJ, are revealing of professional opinion and of its failure to engage with what for present purposes was the most important part of the learning in *Scott v Scott*. And it must be remembered that Lord Woolf's more accommodating approach as expounded by him in *Hodgson and Others v Imperial Tobacco Ltd and Others* [1998] 1 WLR 1056 still lay in the future, even assuming, that is, that any family practitioner, policy maker or judge would have thought it of the slightest relevance to life on the desert island – and, as we have seen, Thorpe LJ, DCA and MoJ seem to have thought not.

But how had practice in financial remedy cases got to this extraordinary position?

It is clear that well before the end of the 20th century practitioners and judges had, as it were, lost their moorings.

Section 3 of the 1858 Act was long repealed and long forgotten. The significance of *Scott v Scott* was no longer appreciated – in the context with which we are concerned it had largely disappeared from view. If it was thought of at all it was probably as authority on trial in camera, not as an authority relevant to the secrecy or otherwise of hearings in chambers.

The crucial importance of section 12 of the 1960 Act, which in substance mirrored the learning in *Scott v Scott*, was not understood, any more than the significance of what it did and, more importantly, what it did not say. The problems about transparency which have beset the family justice system for decades are all traceable back to section 12 and more particularly in the present context to the elision in professional understanding and practice of those types of case which are covered by section 12 (and/or section 97(2) of the Children Act 1989) with those types of case which are not. Cases in the former category – children cases – are subjected to strict statutory secrecy. Cases in the latter category – including almost all financial remedies cases – are subject to no such restrictions. Yet the practice has been to treat them as if they were. Hence the currency, then and now, of the trope that parties to financial remedy proceedings have an 'entitlement to privacy'.

The clarity which Lord Woolf was to bring to the whole subject in *Hodgson* lay in the future. And such rules as there were threw little light on the subject. By way of example, it was not until 2009 that the Family Proceedings Rules 1991 were amended by The Family Proceedings (Amendment) (No 2) Rules 2009 to include a new rule 10.28 specifying who was entitled to be present at a hearing in proceedings held "in private", rather unhelpfully defined in rule 10.28(2) as meaning "proceedings at which the general public have no right to be present."

The reality is that the prevailing mentalité was that so compellingly described by Sir Mathew Thorpe.

The rest is largely speculation. But what I have called the prevailing mentalité may have been at least in part the consequence of three further factors. Most judgments were given by Registrars, which would have been treated axiomatically as not worthy of report by law reporters. And most judgments by High Court judges, unless delivered in open court, would likely have suffered the same fate. The law reporters seem to have focused attention on cases in the Court of Appeal, where the hearing was always in public. So what went on in chambers by and large was not reported. A second factor may have been the revolution in the law of ancillary relief effected by the Matrimonial Proceedings and Property Act 1970, which gave the court vastly increased powers and correspondingly much extended the reach of the court in exploring both the nature and extent of the matrimonial assets and, when considering the needs of the parties, the details of their private lives. This will scarcely have served as a spur to transparency (to use the later expression); probably quite the reverse. The third factor was hinted at by Jackson when he wrote in justification of his new book (*Matrimonial Finance*, v):

“Divorce has become less about divorce and more about money. The process by which a divorce is obtained has become increasingly less significant. The parties now wage their warfare on the battlefield of finance. The present writer has long thought that, as a general comment, too little attention has been given to matrimonial financial matters. All too often the processes by which financial orders and agreements are reached are hit-and-miss, haphazard affairs.”

Be that as it may, in *Clibbery v Allan*, as we have seen, Thorpe LJ opined at [106] that:

“in the important area of ancillary relief ... all the evidence (whether written, oral or disclosed documents) and all the pronouncements of the court are prohibited from reporting and from ulterior use unless derived from any part of the proceedings conducted in open court or otherwise released by the judge.”

How, to repeat the point, can either this or what was subsequently said by Stanley Burnton LJ in *Lykiardopulo v Lykiardopulo*, be reconciled with *Scott v Scott*?

Part E : The Cult of Anonymity in financial cases

The Cult of Anonymity

It is a striking if paradoxical aspect of the history of all this that, well after the cult of secrecy in financial remedy cases had become dominant, the cult of anonymity had *not yet* taken hold. For it is important to note how very infrequent was the anonymisation of financial remedies cases throughout an era that lasted until long after the Second World War. Moreover, there is reason to suspect that, during that long period, anonymisation, when it occurred, was as much due to the practice of law reporters as to action by the judges.

As we have seen, the 1958 edition of Tolstoy's *The Law and Practice of Divorce and Matrimonial Causes* indicates the extreme rarity of anonymisation in the post-War era. The Table of Cases in Jackson's 1972 *Matrimonial Finance and Taxation* runs to some 15 pages;

only a small number – by my count only 25 – are anonymised. In the overwhelming bulk of cases there was no anonymisation. A similar picture emerges from the first edition of *At a Glance* published in 1992. Its Table of ‘Leading Cases’ lists 20 cases from the period 1960-1979. Only 3 – curiously, in the light of modern practice, all decisions of the Court of Appeal – were anonymised. Starting in the 1980s a very different picture begins to emerge.

My analysis in *Some Sunlight Seeps In* [2022] FRJ 79, 87-89, of first instance ancillary relief cases reported in the Family Law Reports (FLR) showed that from 1980-1989 84 cases were reported of which 21.4% were anonymised, whereas from 1990-1999 70 cases were reported of which 72.9% were anonymised (and for the entire period from 1990-2021 470 cases of which 73.6% were anonymised). Plainly, in relation to anonymisation as well as in relation to the sheer volume of reporting, something dramatic occurred, starting in the 1980s and accelerating in the 1990s. What that was we shall probably never know. As I observed:

“Unfortunately, so far as concerns first instance judgments, we are never likely to be able to get to the bottom of what was going on in the 1980s and 1990s before the arrival of BAILII [at the turn of the Millenium]. We cannot tell whether the anonymisation of any particular case was determined by the judge or by the law reporter.”

Why was there so much more anonymisation? What were the drivers? Was it a consequence of the ancillary relief revolution and/or of the dramatic increase in the numbers of cases being reported? Who were the drivers? Was it the judges, or the practitioners or the FLR editors and reporters? In our present state of knowledge we simply do not know.

I went on:

“With the advent of BAILII it is now possible to see in much more detail exactly what is going on [for] what BAILII publishes is, in the case of a written judgment, the judgment as prepared by the judge; in the case of an extempore judgment, the official transcript as approved by the judge ...

Examination of anonymised financial remedies cases published on BAILII reveals that there are many such cases ... where, although the judge has determined that there should be anonymisation, there is nonetheless no rubric. In other words, although the judge has decided not to supply the names of the parties, there is no judicial prohibition on the naming of the parties. The inevitable corollary of this is that one cannot assume, just because a judgment has been anonymised (even judicially anonymised), that there is any judicial prohibition on the naming of the parties.”

This hardly suggests that the practice of routine anonymisation is accompanied by much careful thought, or even by much understanding of what is (or ought to be) going on. And this, depressing though it is to report, seems to have been largely unaffected by all Mostyn’s endeavours.

In January 2023, in *Family Justice: Ostiis Apertis? Or a mantle of inviolable secrecy? A challenge to those who would keep the doors closed*, and casting myself in the role of the weary cynic, I complained about “the continuing vigour of ‘desert island syndrome’ compounded by

egregious examples of the inveterate misunderstandings which still bedevil this whole topic.” I referred again “to the enduring currency of the trope, fostered by certain judges, that parties to financial remedy proceedings have an ‘entitlement to privacy’” despite what I said were the “irrefutable arguments of *Mostyn J* that there is no such entitlement.”

What prompted these thoughts were the following remarkable facts:

“Claims under the Inheritance (Provision for Family and Dependants) Act 1975 are triable in both the Chancery Division and the Family Division and, it is important to note, under the same procedures, for in both Divisions the relevant rules are the Civil Procedure Rules.

One might expect therefore that, in matters relating to anonymity and other aspects of transparency, practice would be the same in both Divisions.

Not a bit of it!

Study of the judgments in 1975 Act cases published on BAILII reveals 44 such judgments in the Chancery Division and 14 in the Family Division. As one might expect, none of the 44 cases in the Chancery Division was anonymised (with one exception where the claimants were children and an anonymity order was made under section 39 of the Children and Young Persons Act 1933) and none was subject to a rubric. Of the 14 judgments from the Family Division, 4 were wholly or partly anonymised and 6 were subject to a rubric.”

As I commented, “this hardly shows the Family Division in a good light. It merely demonstrates the continuing vigour of ‘desert island syndrome’.” For what other explanation, I add rhetorically, can there be for such a remarkable discrepancy?

But there are hopeful signs, for subsequently in *Kaur v Estate of Karnail Singh & Ors* [2023] EWHC 304 (Fam), [2023] 2 FLR 901, [4], [6], Peel J said:

“The CPR rather than the FPR apply to an Inheritance Act claim, even if it is issued in the Family Division or transferred there: CPR 57.15(2) ... By CPR 39.2(1) “The general rule is that a hearing is to be in public”, that is to say in open court. This, of course, applies to an Inheritance Act claim even if issued in, or transferred to, the Family Division. It follows that ordinarily any judgment will be unanonymised.”

That, if I may say so, was an impeccable statement of principle. It will be interesting to see whether his approach now becomes the norm.

This prompts a further reflection. TOLATA proceedings under the Trusts of Land and Appointment of Trustees Act 1996 are usually tried in the Chancery Division, where the parties cannot expect and are only rarely granted anonymity. Sometimes, however, such proceedings are transferred to the Family Division to be heard together with financial remedy proceedings. What are family judges who still cleave to the view that parties to financial remedy proceedings have an ‘entitlement to privacy’ supposed to do when they come to give judgment? Name the parties or anonymise them? A recent example can be found in the two judgments in *Aldoukhi v Abdullah* [2021] EWHC 3086 (Fam) and *Aldoukhi v Abdullah* [2023]

EWHC 3438 (Fam), a case where TOLATA proceedings commenced in the Chancery Division were transferred to the Family Division and tried with proceedings under Part III of the Matrimonial and Family Proceedings Act 1984. Neither judgment tells us why the judge proceeded, as he did, to name the parties. We are left puzzled, baffled and confused.

On 28 October 2021 the President had published the outcome of his *Transparency Review: Confidence and Confidentiality: Transparency in the Family Courts*. What he said was very welcome, in particular the views expressed in para 22:

“It is no longer possible to rely upon the factors against more openness to prevail so that the Family Court continues to be an exception from the ordinary imperative for open justice ... it is necessary for the court to regard openness as the new norm ... there needs to be a major shift in culture and process to increase the transparency of the system in a number of respects.”

This was plain recognition that there is no longer room for exceptionalism in the Family Court. We do not inhabit some desert island free from “the ordinary imperative for open justice”. The President went on to call (Review, para 63) for “a period of accelerated change”.

In April 2023, but published in May 2023, the Financial Remedies Sub-Group of The Transparency Implementation Group, chaired by HHJ Farquhar, produced its long-awaited Final Report, *Transparency in the Financial Remedies Court*. As I said in July 2023 in *Groundhog Day: a Response to the Report of the Financial Remedies Sub-Group of the Transparency Implementation Group* it was a long, detailed and in many ways impressive report but though there was much to support there was unhappily, I said, much to criticise.

Here I need to focus on two points.

In relation to anonymity, and having referred to Mostyn J, it commented (Report, para 2.13) that:

“Most other High Court Judges that regularly deal with FRC work appear to us to remain of the view that parties should retain their anonymity, although they do not set out the legal basis for so doing.”

The Report recorded (p 70), question 22 it had posed in consultation: “Do you consider the default position should be that judgments are anonymised?” The answers were recorded as being Yes 451, No 98, Maybe 37.

Disappointingly, in response to the President’s call for “the court to regard openness as the new norm” the Report in effect rejected it, proposing routine anonymisation in every case, in other words, standardised derogation from the open justice principle and the perpetuation of family law exceptionalism. As I commented in *Groundhog Day*:

“a cynic might describe the passages in the Report on the key question of anonymity as no more than another manifestation of family law’s unbreakable time-loop encapsulated in the irresistible and immutable principle: ‘we have always done it this way’.”

It is interesting, if hardly surprising, to note how the consultation revealed widespread ignorance about transparency. Thus, the Report recorded (para 9.7) that whereas 503 responses were to the effect that only the parties and their representatives should be able to attend a hearing, only 275 thought that the media should be able to attend and only 19 legal bloggers. It continued (para 9.8.1) to note the 'stand out feature' that:

"only 275 responders consider that the accredited press should be able to attend hearings, when this has been permitted for many years now. This is indicative that press attendance is rare and that perhaps the legal community is still wary of the press and unaware of the fact that the press is already permitted to be present at such hearings. The numbers supporting legal bloggers attendance (which is also permitted) are even lower, but that may be down to ignorance of the position as that is a more recent change. The lack of knowledge of the position is highlighted by the following quote from one responder, which was not an isolated view: "members of the press should have to meet the judge first and be approved, avoid twitter chancers and fake news bloggers". This highlights the need for education."

The Report concluded on this point (para 9.16):

"There is a significant lack of knowledge amongst the professionals / judges as to the ability of reporters to attend hearings. This is indicative of how infrequently the press ever attend FRC cases, causing practitioners and most judges to be unaware of the relevant rules. This should be addressed by training and awareness."

It is, as I observed in *Groundhog Day*:

"a depressing commentary on the inveterate failure of those professionally involved in the family justice system to concern themselves either with fundamental principles or with proper practice that this astonishing ignorance should still be so widespread more than fourteen years after the law was changed in April 2009 to entitle representatives of the media to attend almost all hearings in family cases, including those in what is now the FRC."

More recently, in *Groundhog Day Again: A Response to The Transparency Reporting Pilot for Financial Remedy Proceedings* [2024] FRJ 33, I wrote critically about *The Transparency Reporting Pilot for Financial Remedy Proceedings* dated 11 December 2023, published by the President on 14 December 2023, which includes *Guidance From the President of the Family Division* (the Guidance):

"I end by asking, as I must, why the Guidance – so admirable in other ways – seemingly embraces what I worry will in reality prove to be wholesale, routine, near-automatic anonymity.

I fear that the outsider, viewing matters from a perspective away from the desert island, will respond with the searing observation that it simply reflects an inveterate practice which, however unprincipled and despite Mostyn J's fulminations, shows no sign of abating, and is founded on nothing more substantial than the weary trope: 'we believe we are different and we have always done it this way'."

What is now formalised by the Guidance as the norm – an anonymised judgment with an injunction preventing identification of the parties – is conceptually indistinguishable from hearing the case behind closed doors and having a secret judgment. It must never be forgotten that the second great ratio decidendi of *Scott v Scott* was that, even if the in camera order was lawful, it could not prevent Mrs Scott from discussing – publishing – whatever she wanted to reveal about what had happened in court. Yet that is exactly what the standard pilot transparency order seeks to do.

That norm was reinforced on 19 June 2024 when the President issued *Practice Guidance: Transparency in the Family Courts – Publication of Judgments*. According to Para 6.1:

“The law in respect of the reporting of financial remedies cases, including the appropriate approach to anonymisation in light of the open justice principle, is the subject of some controversy, with judicial and extra-judicial views split. As noted by the TIG FRC subgroup, decisions of High Court level conflict, decisions are not binding on judges of the same level, and there is no definitive view from a binding appellate court. Clarification must come from the Court of Appeal as and when an appropriate case reaches it. At the moment, those decisions in the Court of Appeal which deal with issues of reporting, such as *Clibbery v Allen*, remain good law binding at first instance. See also the consideration of the issues by Peel J in *Tsvetkov v Khayrova* [2023] EWFC 130 (4 August 2023) endorsing that point.”

And para 6.6 advises:

“On the basis that the decision has been taken in a particular case to anonymise the judgment, the general process set out below (Table 2) is intended to represent a reasonable starting point for the approach to the anonymisation of financial remedies judgments for the purposes of publication. It is not intended to be a fixed or rigid default position, but in many cases this general approach or something close to it will represent good practice. It is the responsibility of the court to consider in each case (a) whether to anonymise, and (b) whether the general approach set out is appropriate or if some adjustment is required.”

The Table prescribes as a “reasonable starting point” anonymisation of the parties and witnesses (other than expert witnesses) and redaction of much financial information.

In relation to the assertion that judicial views are “split”, it must be emphasised that no reasoned argument demonstrating why Mostyn J is wrong has ever been advanced. Asserting that *Clibbery v Allen* remains “good law binding at first instance” is surprising where it was not even a financial remedy case; where the decision on this point was entirely obiter dicta; where it has since been completely overtaken by the rule change in 2009 allowing the attendance of journalists; and where it is in any event irreconcilable with *Scott v Scott*. The truth is, as Lucy Reed tweeted on 6 June 2024 when referring to Mostyn’s blog *Multiplied Propagation* (see below):

“Multiplied Propagation. The gauntlet remains where it was thrown down... he’s still right isn’t he? However much you wish he wasn’t”

Reliance in this context on *Clibbery v Allan* recalls to mind Lord Buckmaster's biting words in *Donoghue v Stevenson* [1932] AC 562, 573, 576. Referring to similarly fragile authority which "has been used as a tabula in naufragio for many litigants struggling in the seas of adverse authority", he said "better that they should be buried so securely that their perturbed spirits shall no longer vex the law." (Tabula in naufragio, literally 'a plank in a shipwreck', meaning metaphorically 'when all else has failed, the argument you hope will stop you from drowning and keep you afloat'.)

It is, unhappily, necessary yet again to go back to basics. It is clear law, established by the House of Lords in *In re S (A Child) (Identification: Restrictions on Publication)* [2004] UKHL 47, [2005] 1 AC 593, that restrictions on publication not otherwise imposed by law can be imposed only following a judicial 'balancing exercise' which has regard to and balances the interests of the parties and the public as protected by Arts 6, 8 and 10 of the Convention, *considered in the particular circumstances of the case*. This last point is vital, reflecting what Lord Steyn said in *In re S*, [17]:

"an *intense focus* on the comparative importance of the specific rights being claimed in the *individual case* is *necessary* (emphases added)."

It is rightly common ground that, as Peel J said with pellucid clarity in *Tsvetkov v Khayrova* [2023] EWFC 130, [116]:

"whether the starting point is as per the long established practice (i.e. non reportability unless the judge orders otherwise) or as per the thesis of Mostyn J (ability to report unless prohibited by the court), if the court is considering whether to permit or prohibit (as the case may be) reporting, it will need to carry out the *Re S* balancing exercise."

In *What's In a Name?' Anonymising Financial Remedy Judgments* [2024] FRJ 38, Alexander Chandler KC has analysed the 38 published first instance financial remedies decisions at High Court level between 1 November 2021 (when Mostyn fired the opening shot) and 29 September 2023. The results are striking: 25½ cases (67.1%) were anonymised, 12½ cases, including 5 from Mostyn, (32.9%) were not. The explanation for there being 'half a case' itself demonstrates the confusion in practice: the same case was at different stages anonymised and then, for reasons never explained, not anonymised! But what is even more striking is Chandler's analysis of the rationale (if any) given for anonymisation. Of the 25½ anonymised cases, explanations for the anonymisation were given in only 6 cases, no explanation being given in the other 19½. His comment is biting:

"This statistic speaks for itself: in the overwhelming number of anonymised judgments, the point of anonymisation is not addressed *at all* in the judgment. It is unclear if the point was argued out and dealt with separately 'off piste' (i.e. outside the published judgment) or was not addressed at all, and the judgment was anonymised by reflex action."

One does not have to be unduly cynical to imagine that the latter is overwhelmingly the more likely.

More recently Sir Nicholas Mostyn in his interesting April 2024 blog, *Multiplied Propagation*, has published a similar analysis, covering the period from 30 September 2023 to 1 April 2024, in which he identifies 11 published first instance financial remedies decisions at High Court level. Again the results are striking: 10 cases were anonymised, only 1 (and that a case where previous judgments had not been anonymised) was not. Again what is even more striking is his analysis of the rationale (if any) given for anonymisation. In none of these 10 cases was any explanation given for the anonymisation. His analysis also included a further 13 first instance financial remedies decisions at below High Court level. All were anonymised. An explanation for anonymisation was provided in only 2 of these 13 cases. None of these 24 cases, so far as I am aware, was governed by The Transparency Reporting Pilot for Financial Remedy Proceedings.

The Cult of Anonymity : the rubric

At this point I need to mention the problems in relation to the Rubric routinely attached to financial remedies judgments which I addressed in January 2024 in *The Use and Misuse of the Rubric in the Family Courts*. I said that the current problems in relation to the rubric – to speak plainly, its all too frequent misuse – are the consequence of the combination of three factors: (1) The purpose and effect of the rubric are, even after all these years, still not as well understood as they should be. (2) This is exacerbated by the inveterate elision in professional understanding and practice of those types of case which are covered by s 12 of the 1960 Act 1960 (and/or s 97(2) of the 1989 Act) with those types of case which are not. (3) The problem is further exacerbated by the unhelpfully misleading form of the template.

To elaborate the last point, the template provided for family court judgments generates a single form of rubric, making no distinction between children cases and financial remedy cases or between proceedings heard or judgments delivered in private or in public. The unwary can all too easily be lulled into believing that the one form of rubric is appropriate for all family cases when it is not. The template (with its automatic inclusion of a rubric in a single standard and often inappropriate form) is, in truth, a snare and delusion for the unwary. For family cases the rubric can of course be adapted by the judge to fit the circumstances, but as the still endemic misuse of the rubric all too obviously demonstrates this is not a task that can confidently be left any longer to individual judicial initiative.

I should add that the rubric includes the words:

“in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media and legal bloggers, must ensure that this condition is strictly complied with. Failure to do so may be a contempt of court.”

This prohibition, it is important to appreciate, is not confined to newspaper reports or legal blogs or, more generally to publications to the public or a section of the public. It extends, as Sir Nicholas has pointed out in *Multiplied Propagation*, to any written or oral revelation to a third party of the contents of the judgment which reveals the identity of any member of the family in question: cf *Re B (A Child) (Disclosure)* [2004] EWHC 411 (Fam), [2004] 2 FLR 142,

[68]-[72], and note the use of the word “including”. Nor is it limited in time; the prohibition lasts in perpetuity.

The rubric has no proper role to play in a financial remedy case where there is, in contrast to a case involving a child, no statutory prohibition on the publication of a judgment handed down in chambers, and, absent any reporting restriction order, nothing to prevent anyone doing so. In financial remedy cases heard in private (except those under Schedule 1 of the 1989 Act) the standard rubric is completely ineffective to prevent full reporting of the proceedings or of the judgment. It is not worth the paper it is written on. Its continued use in such cases – which is still endemic – is a legal oxymoron. The existing rubric should be abolished in financial remedy cases at the earliest opportunity. It is a *brutum fulmen*, is thoroughly misleading and is almost certainly unlawful.

The Report of the Financial Remedies Sub-Group of The Transparency Implementation Group was clear (para 11.63) in acknowledging Mostyn J's criticisms of the standard rubric “and accepts that this should be changed.” Yet its recommendations were inadequate to meet the point as was the subsequent Guidance in relation to The Transparency Reporting Pilot for Financial Remedy Proceedings. The new form of rubric for the pilot provides that:

“In no report of, or commentary on, the proceedings or this judgment may the parties or their children or their addresses be identified ... All persons, including representatives of the media and legal bloggers must ensure that the terms of this rubric ... are strictly observed. Failure to do so may be a contempt of court.”

This does not meet the objections mentioned above including those in relation to the rubric's width of application and perpetual nature.

Para 8.1 of the *Practice Guidance* issued on 19 June 2024 reads as follows (emphasis added):

“8.1. An appropriate rubric *in either a children case or a FR case* might read as follows:

“This judgment was given in private [and a reporting restrictions order OR transparency order is in force.]. The judge gives permission for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of this judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media and legal bloggers, must ensure that this condition is strictly complied with. Failure to do so may be a contempt of court.””

Error is perpetuated. Further comment is really superfluous but at the risk of repetition I must add this. It is remarkable that, despite all that has been written on the point, this latest Guidance leaves up in the air the core question of what the status of such a rubric is. The seemingly optional inclusion of the words in square brackets appears to suggest that the rubric could be issued omitting those words and without the court having made a concomitant reporting restriction order. In that event the Guidance appears to permit the making of a form of indefinite reporting restriction order without any of the procedural requirements for the

making or form of such an order having been observed. The question of the status of such a rubric has been at large for a long time, and it is, with respect, remarkable that the ambiguity is seemingly deliberately perpetuated.

What is the outside observer to make of all this? Why do practitioners and judges seemingly find it so difficult to understand and honour the learning in *Scott v Scott* and the imperative demands of *In re S*? What is the explanation for this unprincipled adherence to the cult of anonymity? How, to speak plainly, can one be expected to have any respect for a legal system which obstinately continues to behave in such a confused and erratic way?

Some scant comfort may perhaps be derived by family practitioners from the thought that there are, in this respect, similar difficulties elsewhere in the Royal Courts of Justice. Consider, for example, the very revealing and similarly depressing blog by Paul Magrath, *Anonymisation of civil judgments: a routine failure to follow open justice rules*, published on its website on 10 March 2024 by the Courts and Tribunals Observers' Network.

Consider, also, this remarkable rubric which was attached to the judgment of the Court of Appeal (Criminal Division) in *R v Auriol Grey* [2024] EWCA Crim 487, a manslaughter case involving neither sex nor children:

“WARNING: reporting restrictions may apply to the contents transcribed in this document, particularly if the case concerned a sexual offence or involved a child. Reporting restrictions prohibit the publication of the applicable information to the public or any section of the public, in writing, in a broadcast or by means of the internet, including social media. Anyone who receives a copy of this transcript is responsible in law for making sure that applicable restrictions are not breached. A person who breaches a reporting restriction is liable to a fine and/or imprisonment. For guidance on whether reporting restrictions apply, and to what information, ask at the court office or take legal advice.”

It will be noted that the possibility of there being reporting restrictions was *not* confined to cases involving either a sexual offence or a child, so the rubric held out the possibility that there were indeed reporting restrictions in the instant case. Yet, astonishingly, it does not even state whether or not there were any reporting restrictions, let alone what they were: “reporting restrictions [unspecified] may apply.”

Who drafted this remarkable document? Who authorised its use? How, as a matter of law, can the recipient of a judgment handed down in open court be held “responsible in law for making sure that applicable restrictions [if any; and not specified] are not breached.”? Which “court office” is one supposed to ask? And how is taking legal advice going to throw much useful light on whether or not there are in fact reporting restrictions?

Use of such a rubric can only have a seriously chilling effect, at least for those minded to take it seriously. It demonstrates, as if such demonstration is required, just how far we have become removed from *Scott v Scott* and, dare one say it, from what would once have been thought elementary principles of law and justice.

The Cult of Anonymity : concluding thoughts

It will be interesting to see whether the judgments which emerge from the pilot continue to display the defects so revealingly exposed by Chandler and Mostyn. I hope to be proved wrong, but I am not optimistic. I look forward to the further analysis which I very much hope to be able to read, if Chandler can be persuaded to return to the issue, in *What's In a Name?* *Anonymising Financial Remedy Judgments: An Update*.

No-one disputes that Parliament could enact a stringent secrecy regime for financial remedy cases. But, if there is to be such a regime, it has to be democratically approved after full and proper debate, not quietly slipped through by Presidential edict. There are, however, in my opinion very good reasons why Parliament should not do so.

The reportability of all forms of private law civil litigation, including the names of the parties, is a key aspect of the open justice principle, which in turn is one of the pillars on which the rule of law and thus our constitutional democracy stands. Financial remedy proceedings are not uniquely intrusive as some have claimed. They are invariably an argument about money, just as a partnership dispute, a contested probate action, a claim under TOLATA, or a claim under the Inheritance Act 1975, is a claim about money. Yet all those cases are heard publicly and are fully reportable.

Names need to be named to ensure that journalists, who have the responsibility of ensuring that the judiciary maintain the highest standards of probity, are sufficiently interested to observe and report such a case. They also need to be named in order to keep actual and potential litigants straight. In 1910 Sir John Bigham P, as we have seen, stated “the fear of publicity helps to keep people straight, and I would not take the fear of publicity away from them”. That principle applies as forcefully now as it did then.

These views do not, of course, remain unchallenged. In his Nicholas Wall Memorial Lecture, *Is Family Law law?* delivered in May 2023, a distinguished family judge, Lord Justice Peter Jackson, offers a different view:

“The argument that family law should conform to ‘the general law’ tends to enlist geographical metaphors. Family law must not be allowed to become ‘a desert island’, with its castaways and palm tree justice. It is not ‘some legal Alsatia’ ... These analogies are entertaining, but they are tilting at windmills. No one is suggesting that family law should not respect proper principles. What is in issue is whether rules derived and applied in some areas of the law should be imposed everywhere, regardless of the consequences. A better geographical metaphor is not a mainland of civil law with an offshore island of family law, but a continent on which all areas of law co-exist.”

We shall, I fear, have to agree to differ. The idea that Lord Sumption is some latter-day Don Quixote is arresting but unconvincing. And I would hope that the ideas which he and I expound are less crude and more convincing than a bare attempt to argue that the general principles of the civil law must be imposed in family cases “regardless of the consequences.”

In an episode, released on 23 March 2024, of the new podcast *Law and Disorder* which he presents alongside Lord Falconer and Baroness Kennedy of the Shaws KC, Sir Nicholas Mostyn was unrepentant:

“We have been transported back to 1912 immediately before the House of Lords erupted in *Scott*. Back then, family law occupied its own silo where the cult of total secrecy prevailed. And we know what the Lords said about that.

It is incredible that the Family Judiciary has succeeded in reinstating the cult of secrecy that prevailed before the Lords abolished it.”

Mostyn’s belated conversion to the path of principle may be seen perhaps as the exception that proves the rule.

Part F : Parting thoughts

Scott v Scott in retrospect

What has been going on?

In 1859 the Full Court established a clear and simple rule, securely founded in statute and general principle. Over the next 45 years, and culminating in the decision of Sir Francis Jeune P in *De Lisle v De Lisle* in 1904, that rule was steadily eroded, emasculated and eventually for all practical purposes abandoned. The culmination of that process was the judgment of Bargaive Deane J in 1911 in *Scott v Scott*. In 1913 the House of Lords in effect restored the position to that laid down by the Full Court in 1859. But in recent decades there has been considerable and almost engrained retreat. In 2013 the Supreme Court marked the centenary of *Scott v Scott*, albeit without referring to it, by demanding not merely a halt but a return to proper principle, there being, it may be noted, no dissent to Lord Sumption’s clarion call from either of the two family judges, Lady Hale and Lord Wilson.

Yet even now the learning of *Scott v Scott* continues to be forgotten and ignored.

How is this to be explained?

An American realist would say look at the judges. There is an attractive argument to be made which might go like this. Cresswell, Williams and Bramwell were all common lawyers. Jeune and Bargaive Deane were not. Before his appointment as a judge in 1891, Jeune had not been a matrimonial lawyer, but by 1904 he had had over a dozen years’ experience as a judge of the PDA. Bargaive Deane had been a matrimonial lawyer in the PDA for the greater part of his professional life. Unsurprisingly, it might be thought, theirs was a rather different approach, based on a very different experience of a very different type of litigation. Jeune, as we have seen was explicit in basing his decision in *D v D*, *D v D and G* [1903] P 144 on two grounds, the first of which, as he put it, applied “especially to this Court”, though the other, he said, applied to “all the Courts of justice in this realm.” His misfortune was that his assertion of what we now think of as family court exceptionalism turned out to be bad history, while the rest was

bad law. No-one in the House of Lords in *Scott v Scott* was a matrimonial lawyer or had ever sat in the PDA. Perhaps the recognition and proper application of legal principle came more easily to those who had not been exposed for so long, as had both Jeune and Bargrave Deane, to the particular atmosphere of the PDA.

What was that particular atmosphere?

It is a commonplace of thinking about the modern family court to draw an important distinction between civil law, where the court looks primarily to the past in order to provide typically financial compensation for past wrongdoing, and family law, where the court looks to the past primarily to decide what is to happen to family members, children and parents, for the future. And that, typically involves, at least in cases involving the future of a child, some kind of problem-solving and the granting of non-financial relief.

But in fact, if one thinks about it, this was very much what the PDA was doing a century ago when exercising its matrimonial jurisdiction. Of course it dealt to an extent (though much more limited than today) with financial matters: questions, for example, of alimony, maintenance, variation of settlements and damages for adultery. But fundamentally it was dealing with questions as to matrimonial status and deciding what was to happen for the future to the parties; and its remedies were decrees of nullity, divorce, judicial separation, restitution of conjugal rights and, very occasionally, jactitation of marriage – all very different from what was going on in either the King's Bench or Chancery Divisions.

In this context the question of the exercise of discretion under section 31 of the 1857 Act has a very modern resonance, especially as articulated by Bargrave Deane in *Pretty v Pretty (The King's Proctor Shewing Cause)* [1911] P 83. There, as we have seen, he said that "I ought to look at every conceivable aspect and circumstance of the case, not only in the present but in *regard to the future* (emphasis added)" and "to give effect to the feelings of humanity which I believe the Legislature had in mind." In that frame of mind, he was powerfully motivated, as I have said, by a sensitive, understanding and humane desire to release the victims of appalling domestic abuse from being tied to their monstrous husbands; in particular to give women who had been driven into prostitution by their husbands the chance of escaping from a life of degradation – which necessitated their being released from the matrimonial bond. As he put it in the passage I have already cited:

"I feel bound to save this petitioner from the absolute ruin which I am certain must ensue if I were to rescind this decree and dismiss this petition."

That was far removed indeed from the work of the civil courts and must, one imagines, have exercised a powerful influence on sensitive judges like Jeune and Bargrave Deane, affecting their approach in cases of the type exemplified by *D v D*, *D v D and G* and *Scott v Scott*.

Bargrave Deane, it should be noted, seems never to have anonymised his judgments, with the consequence, as we have seen, that the appalling degradations suffered by Mrs Northover, Mrs Pretty and Mrs Hampson are preserved for all time in the law reports alongside their names. Anonymisation was to be achieved by sitting in camera where, as in nullity cases, that was possible and by assuming that the corollary was perpetual secrecy.

The House of Lords determined, as we have seen, that this was bad history and bad law. But the particular atmosphere of the PDA and its successors means that, over a century later, his judicial successors continue to adopt an approach which would, no doubt, be approved by Bargrave Deane.

Be that as it may, it is no answer to our present concerns. Such an attitude is perhaps at least partly understandable when it comes to children – it is reflected in Peter Jackson’s lecture – though not, in my opinion, justified as a matter of law. But in relation to financial remedy claims it is an attitude which is neither understandable nor justifiable. It is simply wrong.

Scott v Scott: the ultimate irony

Finally, there is this bitter irony. *Scott v Scott* was first and foremost what we would now call a family law case. Its principles are almost sacred in the world of civil law. In *Millicom Services UK Ltd and others v Clifford* [2023] EWCA Civ 50, [2023] ICR 663, [31], Warby LJ describes it as “the foundational common law authority”. He repeated that description in *R (Marandi) v Westminster Magistrates’ Court* [2023] EWHC 587 (Admin), [2023] 2 Cr App R 15, [29]. Yet in the family law world, where the decision is directly applicable and binding, it has been and continues to be studiously ignored by everyone – by practitioners, by the judges and by the policy makers.

A final thought

In *Scott v Scott* Bargrave Deane held that it was contempt of court for Mrs Scott to send the official transcript of the hearing before the President to her father, her sister and a friend “for the purpose of vindicating her character and position”. The House of Lords, following Fletcher Moulton LJ, was forthright in reversing Bargrave Deane and fierce in denouncing his imposition on Mrs Scott of perpetual secrecy.

But where are we 111 years later? Seemingly in exactly the same place as if the House of Lords had never spoken.

A financial remedies judgment is handed down anonymised and with the rubric (either the standard rubric or the pilot rubric or the latest suggested rubric, it matters not which). We must assume that the judge understands and intends the words of the rubric to mean what they say. What if (say) the wife 30 years later and talking to her grandson about their family history shows him the anonymised judgment and explains that it was about her and her ex-husband? As Sir Nicholas has pointed out in *Multiplied Propagation*, she would be in breach of the rubric, and, on the judge’s view, in contempt of court. I agree with Sir Nicholas. Such an impairment of her right to talk about her own case to her own family is no more tolerable now than it was 111 years ago. And, one has to ask, is it really what the judge intended?

Envoi

I end with this. One day someone with a sufficiently uncluttered mind and an interest in what French historians would call ‘histoire des mentalités’ will study this interesting phenomenon of Family Court exceptionalism in its origins and its tenacious longevity. This History of the War of the Desert Islands will I fear be illustrated with all too many choice examples of

egregious Family Court exceptionalism. And I venture to assert that, one day, this whole idea of Family Court exceptionalism will come to be seen and be accepted as the unhistorical and unprincipled dogma it is.